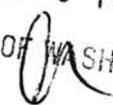


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DIVISION II
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STATE OF WASHINGTON
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Thurston County Superior Court

No. 10-3-00984-2

COA No. 43168-8-II

**In the Court of Appeals for
the State of Washington
Division II**

AMANDA STARR MOUNT,

Respondent/Cross-Appellant

vs.

JOHN MERRITT MOUNT,

Appellant/Cross-Respondent.

MERRITT MOUNT'S REPLY BRIEF

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 ORIGINAL

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I. INTRODUCTION

Amanda and Merritt present a starkly different view of the facts supporting the trial court's decision. Deciding which side has accurately stated the facts will require attention to the precise nature of the evidence admitted below. To this end, the Respondent will prepare a CD Rom with corresponding briefs and hyperlinks pursuant to *RAP 10.9*. Only by viewing the links between the actual evidence and the court's factual findings can the validity of counsel's arguments truly be evaluated and the magnitude of the court's errors truly appreciated.

II. ACKNOWLEDGEMENT OF ERRORS

The opening brief erroneously and improperly cited to exhibits 11, 13, and 17, exhibits that were not, inexplicably, offered into evidence. For these errors, the writer sincerely apologizes. It was truly inadvertent, caused by confusion generated by the documents provided in the file from which counsel worked, a dual numbering system used at the trial level and a transcript which is very difficult to follow. And, although it is clear from the exhibit list that the medical records were not admitted, it did not occur to appellate counsel that such an obviously critical document had not been offered.

In fairness, however, where those exhibits were cited, the brief also generally cited to testimony and clerk's papers which established the same facts. For instance, the facts contained in the medical records, Exhibit 17, are also contained in Merritt's trial testimony at 74-76 and in his declaration filed in the motion for reconsideration. CP 116.

The references to exhibit 11 established that Amanda Mount had the same educational level as Merritt and that Ms. Mount had certain skills.¹ The summary of Amanda's skills and credentials appears in the record at CP 120.

Finally, the reference to Ms. Mount's employment and skills stated the obvious. As noted in the original petition for dissolution, Petitioner herself acknowledged that she is "fully employed and may not need maintenance. CP 7, §1.10.

III. REPLY TO COUNTERSTATEMENT OF THE CASE

A. Merritt's Factual Statement Complies with the Applicable Rules of Appellate Procedure.

Amanda asserts that "Merritt's statement of the case violates *RAP 10.3 (a) (5)* because it is hopelessly entangled with inappropriate argument, which makes it challenging to distinguish between what is fact and what is not." Combined Respondent's Brief at 3. The writer then

¹ See Combined Brief of Respondent/Cross-Appellant at 4.

cites the court to *Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P. 2d 545 (1990) *review denied*, 116 Wn. 2d 1021 (1991).

Respondent offered no examples of inappropriate intermingling of argument and facts. Review of the factual statement presents no obvious examples of facts “hopelessly entangled with inappropriate argument.” *Lawson v. Boeing*, does not clarify Respondent’s argument. *Lawson, supra*, involved a failure to cite to pertinent portions of the record. If that is the point being made, it is without merit. Appellant’s Opening Brief contains over 175 citations to the record supporting each of the factual contentions made therein.

B. Amanda Merritt’s Combined Brief Contains the Same Deficiencies to Which She Attributes to Appellant.

There are several errors, significant and otherwise, in the Combined Brief of Respondent/Cross-Appellant which violate *RAP 10.4(f)*, *RAP 10.3 (a) (5)* and *RAP 10.7*.

First, although this is a minor point, Respondent/Cross-Appellant incorrectly identifies RP II as the court’s oral decision of September 13, 2011. Combined Brief at 5, n. 5. The court announced her oral decision on September 26, 2011. RP September 26, 2011 at 1.

Next, on page 5 of the combined brief, citing CP 7, Respondent states: “following a six year intimate relationship, Amanda and Merritt

married on July 1988.” CP 7 is the Petition for Dissolution. There is no reference on page that to a “six-year intimate relationship.”

On page 6, and again on page 23, Respondent states Merritt received a \$10,000 “bonus.” This is incorrect. RP 16 merely refers to each party’s monthly gross wages. CP 131 is to the court’s written decision which states that the husband received a \$10,000 raise².

As discussed more fully below, while referring to “evidence” before the trial court, the Respondent’s brief in multiple places relies solely upon citations to the record which are simply her attorney’s briefing or settlement materials. See, e.g., Combined Brief at 8; 10,³ 11.⁴ Additional errors will be discussed as they relate to specific arguments.

IV. SUMMARY OF REPLY/RESPONSE ARGUMENT

A trial judge abuses her discretion when the decision is based on unsupported facts; the decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Wilson*, 165

² Merritt started his current job in April 2010. RP 97. Before that, he had been unemployed for almost two years. RP 31. It is thus likely that the large bump in salary was associated with him successfully completing his first full year of employment, rather than any indicator that he will have routine raises of this magnitude. Like Amanda, because of budget issues, Merritt fears losing his position. RP 22.

³ Citation to CP 211 (Petitioner’s Brief at 4); Citation to Ex. 6 (Petitioner’s Proposed Property Division).

⁴ Citation to CP 233 to support statement that Merritt left marriage with 53% of couple’s combined income is actually last page of Petitioner’s Response Memorandum to Motion for Reconsideration.

Wn. App. 333, 340, 267 P. 3d 485 (2011). The trial court abused her discretion in three ways.

First, the trial court's factual findings regarding the factors she considered in ordering maintenance and valuing the assets are not supported by the evidence presented at trial or in the motion for reconsideration.

Next, the trial court applied the incorrect legal standard to the issue of maintenance. While giving lip service to the "statutory factors" an examination of the evidence establishes that she elevated a single factor, the desire to have the parties leave the marriage on equal footing, above the other statutory factors such as age, health of the parties, education and work history.

Finally, the trial court abused her discretion because no reasonable judge would both award a disproportionate share of community assets and conclude that a healthy, well-educated, fully employed 55 year old professional woman "needed" maintenance from a former husband, four years her senior, who faces the serious medical challenges of prostate cancer. For these reasons and those set out below, Merritt Mount respectfully requests that the trial court's rulings regarding maintenance, attorney's fees, repayment of the wife's student loan and disposition of the

house⁵ be reversed and that his wife's demand for additional attorney's fees be denied.

V. REPLY ARGUMENT

A. The Trial Judge Abused Her Discretion by Relying on Non-existent Evidence/Testimony to Support Her Finding Regarding the Value of Mary Mount's Estate.

The husband's opening brief identified a serious flaw in the court's reasoning supporting her decision. The judge opined:

Mr. Mount testified that his share of the estate was somewhere between \$180,000 and \$190,000. Ms. Mount testified that she had been made aware that it was closer to \$200,000. The Court found Ms. Mount's testimony on that issue more credible.

CP 165. [Emphasis added].

Merritt's opening brief argued that Amanda presented no testimony about the value of Mary Mount's estate and therefore the trial court abused her discretion by entering a finding without a factual basis. See Appellant's Opening Brief at 15 and 32.

Amanda's brief does not contest the lack of testimony. Instead, the brief offers a long discussion of a trial court's right to make credibility determinations. Combined Brief at 15-17. Merritt does not dispute that trial courts are charged with resolving credibility issues. That deference

⁵ Amanda's brief does not present argument or authority on this issue in violation of *RAP 10.3(a)(6)* and *Cowiche Canyon Conservatory v. Bosley*, 118 Wn. 2d 801, 809, 828 P. 2d 549 (1992).

presupposes, however, the *existence* of competing testimony. *See, e.g., In re Marriage of Meredith*, 148 Wn. App. 887, 201 P. 3d 1056 *review denied*, 167 Wn. 2d 1002, 220 P. 3d 207 (2009), [Parties accused the other of abuse.] *In re Sego*, 82 Wn. 2d 736, 743, 513 P.2d 831 (1973) [Appellate court invaded the province of the trial court by weighing the competing testimony of experts]; *In re Rich*, 80 Wn. App. 252, 259, 907 P. 2d 1234 (1996) [proper weight to be given lay and expert testimony]

Here, the husband does not ask the reviewing court to “weigh” testimony or evaluate credibility. The husband simply requested that the review court find that the trial court abused her discretion by relying upon testimony that did not exist.

The wife’s brief ignores the lack of testimony but seeks to remedy the trial court’s mistake by substituting the word “evidence” for testimony. Cross-Appellant’s Brief at pages 8;10;17. The wife argues, “By contrast, Amanda presented evidence that Merritt was likely to inherit approximately \$200,000 from his mother’s estate. Combined Brief at 8. Respondent/Cross-Appellant cites to CP 211 and Ex. 6 to support this statement. CP 211, however, is simply page 4 of the wife’s trial brief. Exhibit 6 is Petitioner’s Proposed Property Award and Debt Allocation. Argument of counsel is not evidence. See WPI 6th 1.02; *Tacoma v. Wetherby*, 57 Wash. 295, 299, 106 P. 903 (1910); *Jones v. Hogan*, 56

Wn. 2d 23, 32, 351, P. 2d 153 (1960). Because, no evidence supports the \$200,000 figure, the court abused her discretion.

B. The Trial Judge Abused Her Discretion by Awarding Maintenance Based on Unsupported Factual Findings.

Amanda's brief fails to address the global argument presented in Merritt's opening brief. The undisputed fact is that no Washington case has approved maintenance to a healthy fully employed, well-educated spouse who has also been awarded a disproportionate share of the community assets. Instead, Respondent seeks to insulate the court's decision by cloaking it in discretion and issues of credibility. As argued below, this court owes no deference to a decision that is without proper factual support or legal justification.

1. The doctrine of invited error does not apply.

Asserting "Merritt essentially got what he asked for" Amanda argues that the doctrine of invited error precludes Merritt from seeking relief. Combined Brief at 20. This argument is without merit. The doctrine of invited error prevents a party from setting up an error at trial and then complaining of it on appeal. *In re K.R.*, 128 Wn. App. 147, 904 P. 2d 1132 (1995). An error is deemed waived if the party asserting such error materially contributed thereto. *Casper v. Esteb Enters., Inc.*

119 Wn. App. 759, 771, 82 P.3d 1223 (2004). The doctrine applies when a party takes affirmative and voluntary action that induces the trial court to take an action that party later challenges on appeal. *Error! Bookmark not defined.Lavigne v. Chase*, 112 Wn. App. 677, 681, 50 P. 3d 306 (2002).

As noted in Merritt's opening brief, Merritt's offers of maintenance and/or a disproportionate award of community assets were dependent on the total financial package, not a fixed agreement to any one proposition. For example, in Exhibit 42⁶, Merritt offered a 70/30 split of assets with 56 months of maintenance at \$500 per month. Ex. 42, p. 2. CP 7-8, relied upon at page 19 of the Combined Brief is actually a citation to the wife's Petition for Dissolution which states that both parties are "fully employed" and raises "the possibility of maintenance becoming an issue." (CP 7). Page 8 goes on to state that the amount and duration should be based on the statutory factors. CP 158 is page 10 of the Findings of Fact, findings to which the Appellant assigned error. Appellant's Opening Brief at 4, Assignment of Error #4.

At no time did Merritt endorse a combined property split of 75/25 combined with \$1,500 per month in maintenance. The conditional

⁶ Citing Ex. 42, Amanda argues "contrary to the assertion in his brief, at no time did he condition his proposed maintenance award on an equitable or equal distribution." Combined Brief at 19-20. Amanda does not discuss the statement contained on page 132 of the transcript wherein Merritt qualifies his testimony regarding proposed split by prefacing it with the phrase "Depending on what maintenance might be, there is what I don't, don't know. . . ."

settlement proposals he did make were not the type of “affirmative voluntary action that induces the trial court to take an action that party later challenges on appeal.” *See, Lavigne*, 112 Wn. App. at 681 (concession that summary judgment should be entered when court excludes evidence not invited error). Amanda’s arguments in favor of finding invited error are neither supported by the record or the cases she cites.

First, the three citations to the record do not support Amanda’s argument. CP 41 is a page which only contains the heading “ATTACHMENT #3.” It is the attachment page for page 42 which is simply a list of credit card payments. CP 70 is an email dated October 27, 2010 discussing a tuition bill for the couple’s child. CP 71 is a page which contains only the heading “ATTACHMENT #5.” Attachment 5, on page CP 72, is a post-trial spread sheet dated October 3, 2011, which summarizes the impact of the court’s September 26, 2011 oral decision. RP 1232, 2195 do not exist. The report of proceedings ends at page 247.

The cases Amanda cites do not support her conclusion. *In re K.R.*, 128 Wn. 2d at 147 involved a stipulated agreement to the admission of polygraph testimony. In *Casper*, 119 Wn. App. at 771, the trial court accepted a party’s explicit invitation for the judge to answer a question for

him in front of the jury. Both cases involved clear, intentional, voluntary affirmative acts, not conditional agreements.

Finally, the trial court did not divide the property 75/25 as Merritt proposed. As established in the opening brief, the assignment of Amanda's liabilities to Merritt resulted in Merritt receiving just 17% of the community property. Opening Brief at 22. The court should reject Amanda's suggestion that review is precluded by the invited error doctrine.

2. The trial court's conclusion that Merritt Mount had offered no testimony or evidence regarding the impact of his prostate cancer on his life conflicts with the record.

Both the court and opposing counsel fault Merritt Mount for an alleged failure to offer testimony at trial regarding his condition. The trial court commented that "although Mr. Mount testified that he has been diagnosed with cancer, there was no testimony as to what his prognosis was or what he intended to do for treatment (if anything) other than focus on his diet." CP 164 (page 4 of Court's Written Opinion).

The response brief parrots this proposition, focusing on Merritt's testimony regarding his decision to delay treatment. Combined Brief at 8. Both positions ignore the actual trial transcript which contains detailed information about Merritt's prognosis without treatment and the significant side effects he will face when treatment begins.

Merritt testified that his cancer was terminal without eventual treatment. He told the judge he had been informed that a PSA such as his at his age “this will do you in if we don’t address it.” VRP 74, lines 23-24; [Emphasis added]. “Six of the eight samples were cancerous, which he indicated was unfortunate. . .” VRP 75, lines 1-2. The option of doing nothing, “[t]hat’s not a medical option. . . .” VRP 75, lines 17-18. [Emphasis added.] If he did nothing “they said probably at the ten-year mark or so, you’ll be done.” VRP 75, lines 24-25.

Merritt provided detail information regarding his treatment options. He had three medical recommendations: 1) surgical removal of the prostate; 2) external beam radiation; or 3) seed implant radiation. VRP 76, lines 6-11. He testified about the side effects of each treatment: VRP 76, lines 16-25; 77, lines 1-3. He explained that in the short term he would see if he could slow the cancer, but if his PSA hit ten “then I gotta (sic) do radiation or surgery.” VRP 78, lines 4-5. He explained he had to go to the restroom more often. VRP 78. He testified that the appointments he had to go to were affecting his work. VRP 78, lines 15-16.⁷

⁷ Respondent incorrectly states that Merritt testified that the cancer had not impacted his work. His answer to this question was “No, except for appointments and so forth that I’ve been going to. VRP 78; lines 15-16.

Ignoring the testimony about missed time for medical appointments, the court stated incorrectly that “at this time there was no impact on his work from the cancer.” CP 162. The trial judge then dismissed the entire prostate cancer issue with the comment that Merritt could seek modification if he “was no longer able, for medical reasons, to work” CP 133.

Merritt’s ability to seek modification does not relieve the court of its duty to consider the evidence presented to it. The remedy of modification when he “was no longer able, for medical reasons, to work” is not only harsh, but also woefully inadequate. It fails to consider the two most likely scenarios, a substantial reduction in income from unpaid sick leave associated with cancer treatments and/or reduction for income available if he is forced to retire prematurely.

Modification also only addresses future payments, not the funds already lost to maintenance payments. *RCW 26.09.170(1) (a)*. As Merritt explained “as a new employee, I have limited sick pay. My only retirement income and or money to live on should I become incapacitated is the money contained in the IRA’s, my deferred compensation, 6 months service credit as the state retirement system, and the money anticipated to be distributed as part of my inheritance from my mother and my close personal friend, Edward Carson.” CP 116, lines 10-14.

A trial court abuses its discretion if it relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Tatham v. Rogers*, 170 Wn. App. 76, 89, 283 P. 3d 583 (2012); *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). Because the trial court based her conclusions regarding Merritt's medical condition on the faulty conclusion he had not offered the appropriate testimony regarding his medical condition, the trial court abused her discretion.

3. The trial court abused her discretion because no reasonable person would conclude that, given the husband's health issues and the ability of the wife to meet her own needs based on her age, health, education, long term employment, future pension rights and significant award of community assets, long term maintenance was appropriate.

Citing CP 233, Amanda argues Merritt was left with 53% of the couple's combined income to her 47%. Combined Brief at 11. Again, Respondent improperly cites to argument in her attorney's briefing, rather than the evidence.⁸ The argument is also factually inaccurate. Multiplying the actual earnings of the parties through their actual expected work life reveals Amanda's income is 80% of the amount that

⁸ This citation is to Petitioner's Memorandum of Authorities in Opposition to Reconsideration which, while part of the record, is not evidence. WPI 1.02; *Jones v. Hogan*, 56 Wn. 2d 23, 32, 351 P. 2d 153 (1960).

Merritt earns without the maintenance award. [RP 16 (Wife \$3,894.00 per month; husband \$7, 634.00 per month multiplied by years to retirement).⁹

The trial court erred by not looking at the total picture of Amanda's ability to meet her needs. Future earning potential is a "substantial factor to be considered by the trial court in making a just and equitable property distribution. *In re Marriage of Rockwell*, 141 Wn. App. 235, 248, 170 P. 3d 572 (2007); *In re Marriage of Hall*, 103 Wn. 2d 236, 248, 692 P. 2d 175 (1984).

No reasonable person, looking at the relative position of the parties, would conclude that the wife "needed" maintenance for the time and in the amount ordered.¹⁰ At the outset of these proceedings, the wife acknowledged she was "fully-employed" and there was only a "possibility" of maintenance becoming an issue. CP 7 (Petition for Dissolution). No court has authorized maintenance under facts such as these. The trial court therefore abused her discretion.

⁹ The wife's longer work life results in Amanda earning a projected \$514,008.00 in wages without raises or promotions. Merritt would earn in wages \$641,256.00 if he is able to work until retirement.

¹⁰ Before the trial court imposed the student loan, attorney's fees and reduced his share of the community to 17% of the assets, Merritt had offered to pay maintenance for two years at \$500 per month. RP 242. The court tripled the length of time and the monthly payments.

4. The trial court abused her discretion in awarding maintenance because her decision is based on factually unsupportable conclusions regarding the assets she awarded to Merritt Mount.

Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *In re Marriage of Griswold*, 112 Wn. App, 333, 339, 48 P. 3rd 1018 (2002). The court's decision regarding maintenance was based on the factual finding Merritt Mount would inherit over \$575,000. Sept. 26, 2011 RP at 8. Merritt's combined inheritances were worth only 40% of that amount, or \$231,000.

The trial court erred by ignoring the testimony of the one person with knowledge of the net value of the estate, the probate attorney, Jerome Feldman. Mr. Feldman, through the initial email and then the sworn declaration, provided specific factual information regarding why the gross estate of 3.2 million had to be reduced to a realistic net. CP 37-39; CP 111-114. He noted that some assets previously identified would be recovered at 25% of the original estimate. CP 39. He explained that the gross estate had to be reduced by 1) deductions of estimated \$195,482.00; 2) taxes estimated at \$983,563.00 and 3) expenses of \$150,000.

The attorney provided a specific figure, as of March 24, 2011. CP 37-39. His testimony and correspondence provided the court with an

accurate estimate¹¹ which remained consistent throughout the proceedings. CP 37-39; CP 111-114. [Net at \$1,731,475 with 10% of that (173,147.50) going to Merritt. CP 39.]

Even when presented with a sworn declaration of this attorney, the trial court refused to reconsider her ruling. The trial court instead relied on “certified”¹² documents concerning the gross value. Assuming *arguendo*, that the trial court was entitled to exclude the original information regarding the net estate, that does not explain why it chose to totally ignore the more detailed information submitted as sworn testimony directly from the estate attorney. His declaration established that 1) Merritt’s total share of this estate was only \$173,000; 2) that Merritt’s distribution of \$173,000 would be reduced by \$132,000 for the outstanding mortgage; and 3) the first distribution of \$52,142.80 contained in Exhibit 40 had been applied to the outstanding community mortgage, not paid to Merritt.¹³

¹¹ Both the trial and appellate attorneys for the wife refer to the figures provided by the probate attorney as a “guesstimate.” See, e.g., Combined Brief at 9, n. 10 (citing CP 39; 105; 226).

¹² Although the court and the parties refer to Exhibit 7 as “certified” records, there is in fact no certification stamp on the exhibit that counsel inspected as part of the exhibits forwarded from Thurston County. The only validation of the documents is the signatures of the witnesses to the will itself contained on page 3 of the four page document.

¹³ The attorney stated unequivocally: “Mr. Mount has received no cash distribution from the Estate.” CP 112.

Merritt's inheritance was only \$41,000 from this estate, not \$375,000¹⁴ as valued by the trial judge. Sept. 26, 2011 RP 8. The trial court ignored this reduction in value in her ruling on reconsideration. Instead, she again repeated her incorrect statements that Merritt had withheld¹⁵ information regarding the value of the estate and that the only information provided concerned the gross value,¹⁶ not the net value. CP 133-34.

Merritt Mount does not have the huge inheritances which the trial court stated justified, in part, the award of maintenance. CP 133. Facing a life threatening medical condition, the trial court's refusal to reconsider her decision left Merritt without the financial resources necessary to ensure he can tend to his own needs for the remainder of his life. CP 120-21.

B. Attorney Fees and Allocation of Debt

¹⁴ The court valued the estate at \$325,000 plus \$50,000 that she believed had already been distributed. Sept. 26, 2011 RP at 8.

¹⁵ This was an accusation which first surfaced when Mr. Pope stated that the trial attorney had just given him a document which "that he has had since March. . ." RP 121. The document referred to was the original email from Attorney Jerome Feldman which contained the \$173,000 figure. CP 113. That Mr. Pope received this document in March was established post trial by the excerpt from Mr. Pope's settlement letter dated March 24, 2011 which refers to the email and the \$173,500 figure (CP 32) and by the fact that Petitioner's Proposed Property Allocation also included this figure. Ex. 6.

¹⁶ In settling on the gross value, rather than the net, the trial court apparently concluded that the estate could be distributed without paying taxes, cost of administration or the attorney who was handling the probate.

Arguing Merritt failed to support his argument with authority, Amanda asserts this court should not review the allocation of debt and the award of attorney's fees. Amanda's position ignores the standards of review set out at page 25 and the discussion of the abuse of discretion standards contained throughout the brief. These two awards are part and parcel of the total allocation of assets and are subject to the same legal standards. Amanda acknowledges as much when she argues "[t]he record here indicates that the trial court considered Amanda's need and Merritt's ability to pay when making every discretionary determination it was required to make in this case." Combined Brief at 27.

As argued throughout the opening and reply briefs, the trial court's discretionary rulings were based on unsupported factual conclusions. If this premise is accepted, then this allocation of liabilities also falls. Under **RCW 26.09.140**, the trial court failed to consider the impact of Merritt's health and the true value of his assets when making these awards. Given Amanda's good health, age, full employment and award of substantial cash assets, the court abused its discretion in making these awards.

The case Amanda cites does not support her position. *In re Hadley*, 88 Wn. 2d 649, 659, 565 P. 2d 790 (1977) involved awards to the wife who was at the time of trial "totally disabled, requiring full-time nursing care and other medical attention." *Hadley*, 88 Wn. 2d at 652. The

parties had assets of 9.4 million dollars. The trial judge awarded the wife \$4,000 per month in maintenance for 10 years and \$545,000 in community property.¹⁷ The Supreme Court affirmed the decision, noting the wife's disability required the long term maintenance and attorney fee award.

Here, the party charged with paying attorney fees has the health issues. And, unlike Mrs. Hadley, Amanda Mount is able to provide for her own needs. Because these two awards reduce Merritt Mount's share of the community property to just 17% after a long term marriage where he generously shared his separate property with the community, the trial court abused its discretion.

VI. RESPONSE TO CROSS-APPEAL

Asserting Merritt committed misconduct by filing his motion for reconsideration, that the trial court abused her discretion by denying her motion to reconsider, and that the present appeal is frivolous, Amanda cross-appeals seeking an additional award of fees. Combined brief at 29.

An appeal is frivolous under *RAP 18.9(a)* "if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so

¹⁷ It's interesting to compare the two decisions. In *Hadley*, the totally disabled wife received less than 6% of the total assets. With maintenance, her total increased to about 11%. Here, in contrast, the healthy, fully employed spouse received the disproportionate share of the community property in addition to a maintenance award against the spouse with the medical condition.

devoid of merit that there is no possibility of reversal. *Advocates for Responsible Development v. Western WA Growth Mgmt. Bd.*, 170 Wn. 2d 577, 580, 245 P. 3d 1764 (2010). An appeal that raises clearly debatable issues is not frivolous. *Biggs v. Vail*, 119 Wn. 2d 129, 138, 830 P. 2d 350 (1992). All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005).

Amanda's position that her additional fees resulted from Merritt's "misconduct" is without merit. Under *CR 59*, Merritt had a right to ask the court to reconsider its ruling. Furthermore, he prevailed in part on that motion, successfully convincing the trial judge she had improperly characterized the DWS Scudder IRA as community property. CP 163.

Next, while Amanda's trial attorney attempted to blame the delay in filing paperwork on Merritt's attorneys, the delay was caused by errors her attorney, Mr. Pope, made in drafting the paperwork. Although much of the material that supports proposition is not in the current record, several important pieces are.

First, Amanda's trial attorney advocated a judgment which incorrectly determined the amount of money that was to be paid to his client. On January 25, 2012, Mr. Pope filed documents indicating that

Amanda was entitled to judgment in the amount of \$25,338.25. CP 136.
The correct judgment amount was \$22,018.75. CP 239.

Next, Mr. Pope's final Findings of Fact and Conclusions of Law required further corrections and court appearances. The Decree of Legal Separation appears at CP 137-146. It was drafted by Mr. Pope as is evident from the fact it appears on his pleading paper. At least two changes, the result of clarifications made by the trial court at the hearing, are interlineated on that document at pages 138 and 142.

Finally, Amanda's trial attorney first moved for attorney's fees on January 25, 2012, before the final decree had even been entered. Compare CP 234 with CP 137. The Notice of Appeal was filed one month later, on March 8, 2012. CP 166. The court did not abuse her discretion by refusing to decide the issue. Instead, she denied the motion. This was not error, particularly given the additional information submitted by Merritt regarding his medical condition. CP 116. The trial court's ruling should be affirmed on this issue.

VII. REQUESTS FOR ATTORNEYS FEES

Amanda argues "given the thinness of the merits appeal, and the continuing disparity of income between the couple, this Court should award Amanda fees on appeal." Combined Brief at 33. Merritt's brief is

not “thin.” Merritt did not commit “misconduct.” He simply asked that the trial court base her decision on evidence, not argument.

Finally, as the younger, healthier spouse with substantial assets, Amanda is in a far better position to pay attorney’s fees. Had she taken responsibility for her own support, this appeal would never have been necessary.

VIII. CONCLUSION

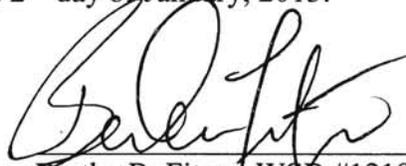
Amanda’s combined brief appeal accuses Merritt Mount of misconduct for asserting his rights and accuses him of being unwilling to meet his post-separation obligations. Combined Brief at 1.

Neither charge is true. Merritt’s appeal is not frivolous, he is not unwilling to meeting his post-separation obligations. Merritt simply wants the trial court to base her decision on the evidence, not the argument of counsel. He wants and deserves a decision that reflects—accurately—the value of his assets and the significant personal and physical challenges he faces in battling prostate cancer.

Because the trial judge abused her discretion in awarding maintenance, valuing the assets, and dividing property, Merritt Mount asks this court to reverse three of its decisions. The award of maintenance should be struck. Amanda should pay for her own student loan and her

own attorney's fees. The court's ruling regarding the house should be reversed and it ordered sold with equity, if any, split after the costs of sale and improvements are deducted.

Respectfully submitted this 2nd day of January, 2013.



Bertha B. Fitzer, WSB #12184
Attorney for Merritt Mount

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DECLARATION OF SERVICE

STATE OF WASHINGTON

BY _____

I, Bertha B. Fitzer, state and declare under penalty of perjury under the laws of the state of Washington that I caused to be served in the manner noted below a copy of this document, entitled "APPELLANT'S OPENING BRIEF" on the attorney of record as follows:

Attorney for Respondent:

Ms. Emmelyn Hart
Talmadge & Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630

Via USPS

DATED at Tacoma, Washington this 2nd day of January 2013.



Bertha B. Fitzer