

Thurston County Superior Court

No. 10-3-00984-2

COA No. 43168-8-II

2012 AUG 15 PM 3:49
STATE OF WASHINGTON
BY  DEPUTY

FILED
COURT OF APPEALS
DIVISION II

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

AMANDA STARR MOUNT,

Respondent

vs.

JOHN MERRITT MOUNT,

Appellant.

APPELLANT'S OPENING BRIEF

Bertha B. Fitzer, WSB #12184
Fitzer Law, LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905
bertha@fitzerlaw.com

Table of Contents

I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR	3
III. ISSUES RELATING TO ASSIGNMENTS OF ERROR	7
IV. STATEMENT OF THE CASE	8
A. Procedural Statement	8
B. Factual Statement & Trial Court’s Division of Property.....	10
1. The Parties.....	10
2. Decision to Award Maintenance.....	13
3. Finances & Other Assets	14
V. ARGUMENT SUMMARY	23
VI. ARGUMENT.....	25
A. Standard for Review	25
B. The Trial Court Abused Her Discretion in Awarding Maintenance to a Healthy, Well Educated, and Employed Wife Who Also Received a Disproportionate Share of the Community Assets.....	26
1. Legal Standards for Maintenance	26
2. The trial court incorrectly applied the statutory factors.....	28
3. The trial court improperly balanced the equities by determining that she had an obligation to place the wife in the same position as the husband.....	36

C. The Trial Court by Denying the Husband’s Request that the House be Either Awarded to the Wife or Sold.....	38
D. The Trial Court Abused Its Discretion in Ordering the Husband to Pay the Wife’s Attorney’s Fees and Student Loan.	40
E. The Trial Court Erred in Suggesting that the Husband Had No Authority to Use Community Funds for the Repayment of Community Debts and to Fund Their Daughter’s Education.	41
F. Attorney’s Fees	42
VII. CONCLUSION	42

Table of Authorities

Cases

<i>Friedlander v. Friedlander</i> 80 Wn. 2d 293, 297, 494 P. 2d 208 (1972).....	29
<i>In re Marriage of Bulicek</i> 59 Wn. App. 630, 800 P.2d 394 (1990).....	36
<i>n re Marriage of Dessauer</i> 97 Wn.2d 831, 650 P.2d 1099 (1982).....	37
<i>In re Marriage of Donovan</i> 25 Wn. App. 691, 612 P.2d 387 (1980).....	37
<i>In re Marriage of Estes</i> 84 Wn. App. 586, 593, 929 P.2d 500 (1997).....	31
<i>In re Marriage of Foley</i> 84 Wn. App. 839, 845-46, 930 P.2d 929 (1997).....	31
<i>In re Marriage of Griswold</i> 112 Wn. App, 333, 339, 48 P. 3 rd 1018 (2002).....	28
<i>In re Marriage of Kraft</i> 119 Wn. 2d 438, 450, 832 P.2d 871 (1992).....	29
<i>In re Marriage of Littlefield</i> 133 Wn. 2d 39, 47, 940 P.2d 136 (1997).....	29
<i>In re Marriage of Marzetta</i> 129 Wn. App. 607, 120 P.3d 75 (2005).....	36
<i>In re Marriage of Morrow</i> 53 Wn. App. 579, 770 P.2d 197 (1989).....	36

<i>In re Marriage of Muhammad</i> 153 Wn. 2d 795, 803, 108 P.3 rd 779 (2005).....	29
<i>In re Marriage of Nicholson</i> 17 Wn. App. 110, 116, 561 P.2d 1116 (1977).....	37
<i>In re Marriage of Rink</i> 18 Wn. App. 549, 571 P.2d 210 (1977).....	37
<i>In re Marriage of Schweitzer</i> 81 Wn. App. 589, 598, 915 P. 2d 575(1996).....	43
<i>In re Marriage of Sheffer</i> 60 Wn. 2d 51, 57, 802 P. 2d 817 (1990).....	39
<i>In re the Marriage of Mathews</i> 70 Wn. App. 116, 853 P. 2d 462 (1993).....	30
<i>Kelso v. Kelso</i> 75 Wn. 2d 24, 27, 448 P. 2d 499 (1968).....	29
<i>Marriage of Rockwell</i> 141 Wn. App. 235, 242, 170 P. 3 rd 572 (2007).....	28
<i>Marriage of Washburn</i> 101 Wn. 2d 168, 677 P. 2d 152 (1984).....	34
<i>Morgan v. Morgan</i> 59 Wn. 2d 639, 369 P. 2d 516(1962).....	30
<i>Stacy v. Stacy</i> 68 Wn.2d 573, 414 P.2d 791 (1966).....	36

Statutes

RCW 26.09.090 (1) (c)..... 38

RCW 26.09.090,..... 4, 23,27, 30

RCW 26.09.140..... 44

RCW 26.09.090(1)(e).....29

RCW 26.09.090(1)(b).....31

RCW 26.09.090(1)(a).....35

Other Authorities

Weber, Family & Community Property Law,
20 Wash. Practice, Sec. 34.638

Rules

RAP 10.3 (g) 6

RAP 18.1 28

I. INTRODUCTION

When a fully employed, well-educated, healthy spouse who has also received the majority of the community assets requests maintenance, does the desire to equalize income between the parties establish need? In this case, the trial court answered the above question affirmatively. Because no court has approved maintenance under facts similar to those presented here, Appellant Merritt Mount seeks review and reversal of the trial court's rulings regarding maintenance, disposition of the family home and allocation of liabilities.

The evidence before the court established that during their marriage, Merritt Mount and his wife, Respondent Amanda Mount, both worked outside the home. Both individuals obtained advanced degrees during the marriage. Nonetheless, citing the need to “put the two parties on a more equal footing as they leave the marriage”¹ the long term marriage and the husband's ability to pay, the trial court ordered that Merritt pay his ex-wife \$1500 a month until he retires or his prostate cancer makes him unable to work.

This award of long term maintenance to a woman well-equipped to provide for her own needs came in the context of a decision where the

¹ Sept. 26, 2011 VRP, p. 14.

court had already awarded the wife 75% of the community assets and assigned major debts to the husband.

The trial court's decision can only be viewed as punitive. While disavowing any finding that the husband acted improperly,² both the substance of the court's decision and her various comments throughout the proceedings established that the court believed the husband was intentionally withholding information and/or improperly managing accounts. Unfortunately that belief was based on the innuendo and argument of the wife's attorney, rather than evidence. The end result is a decision that unfairly punishes the husband for his generosity during the marriage and forces him to face serious medical issues without the certainty that he will be able to provide for his own financial needs³ if (or when) he can no longer work.

Nonetheless, the husband is not asking that the court reverse the disproportionate award of community property to the wife. While the court's one-sided resolution of the issues and the lack of factual foundation for certain findings constitute a manifest abuse of discretion which requires reversal, the husband seeks only a limited remedy.

² Sept. 26, 2011 VRP, p. 7.

³ To allow the husband to remain on the wife's medical insurance, the parties entered a legal separation rather than dissolution decree. CP 137.

Merritt Mount respectfully requests that the trial court's decision be modified as follows: (1) the award of maintenance should be struck; (2) The payment of "equity" should be reversed and the house ordered to be sold; (3) The award of attorney's fees should be struck; and (4) The husband should be repaid for satisfying the wife's outstanding student loan.

II. ASSIGNMENTS OF ERROR⁴

Because the court's factual findings are intrinsically interwoven within her ultimate determination of what was "equitable" following assignments of error are necessary:

1. The trial court erred in entering Finding of Fact 2.12⁵ and concluding that Amanda Mount had a "need" for maintenance when the uncontroverted evidence established that Ms. Mount was in good health and that she was fully employed in a long term position, with generous health and retirement benefits.

⁴ Appellant's counsel is aware of the requirement that specific assignments of error be detailed for each alleged factual error and finding of fact. RAP 10.3 (g). Because the trial court incorporated oral rulings and written decisions into her Findings of Fact, it is difficult to identify which statements are simply commentary and which are true Findings of Fact. Appellant intends by argument and specific findings to formally assign error to all statements contained in the oral and written decisions which may ultimately be construed as findings of fact associated with the court's rulings.

⁵ The entire Findings of Fact and Conclusions of Law appear as Appendix A to this brief.

2. The trial court erred in applying the factors in *RCW 26.09.090*.
3. The trial court erred in concluding that the husband should pay maintenance in the amount of \$1500 per month until he retired or was forced to quit work for medical reasons when the evidence established that he had prostate cancer, was four years older than his wife, had only modest pension benefits and had had substantial periods of unemployment throughout his career.⁶
4. The court erred in citing the husband's agreement to a 75/25 division of the property as justification for her decision when the testimony established that the husband's agreement to that division was conditional on the court's decision regarding maintenance and an otherwise equitable distribution of liabilities.⁷
5. The trial court erred in finding that Amanda Mount's testimony regarding the value of Mary Mount's estate was more credible than that of Merritt Mount when Amanda Mount offered no testimony on this topic and the only reference to the value the court placed on the estate was an unsupported statement by Ms. Mount's attorney in closing argument.⁸

⁶ FOF 2.12, Appendix A, p. 5.

⁷ FOF 2.21, Appendix A, p. 7.

⁸ Appendix B, p. 5, CP 134.

6. The trial court erred in finding that there was credible evidence that Mr. Mount did not provide information during discovery when documents submitted as part of the Motion for Reconsideration clearly established opposing counsel was in possession of the document in question six months before the trial.⁹
7. The trial court erred in finding that the husband had only offered evidence of the gross value not the net value of the Carson Estate.¹⁰
8. The trial court erred in valuing community and separate property including:
 - a. The value of the family home;¹¹
 - b. The value of the Carson Estate;¹²
 - c. The value of the Estate of Mary Mount.¹³
9. The trial court erred in not considering the actual value of the Carson Estate as established in testimony and documents filed in conjunction with the motion for reconsideration in determining what was just and equitable.

⁹ Court's Decision on Motion for Reconsideration. This document appears as Appendix B, p. 2, CP 131.

¹⁰ Appendix B, p. 5, CP 134.

¹¹ FOF 2.8, Appendix A, p. 3.

¹² FOF 2.9, Appendix A, p. 4.

¹³ Appendix B, p. 5, See also, Sept. 26, 2011 VRP 8.

10. The trial court erred in finding that neither party wanted the family home sold.¹⁴
11. The court erred in refusing the husband's request to either list the family house for sale or award the asset to the wife.¹⁵
12. The trial court erred in ordering the husband to pay 75% of the alleged equity in the home to his wife instead of ordering that the home be sold or awarded to the wife.¹⁶
13. The trial court erred in concluding that it was just and equitable to award 75% of the community property to the wife in addition to an award of attorney's fees and maintenance.¹⁷
14. The trial court erred in finding that the wife had a need for attorney's fees when the wife had the ability to pay given her income and her disproportionate award of community property.¹⁸
15. The trial court erred in finding that the husband was in a better position to pay the student loan and in imposing the obligation to pay on the husband given the disproportionate division of property awarded to Ms. Mount and the fact that the loan represented an

¹⁴ Appendix B, p. 4; CP 133.

¹⁵ Appendix B, p. 4; CP 133, Appendix A, FOF 2.8.

¹⁶ Appendix A, FOF 2.21;

¹⁷ Appendix A, FOF 2.21.

¹⁸ Appendix A, FOF 2.15; Sept. 26, 2011 VRP 13.

investment in her earning potential that benefited her not the community.¹⁹

16. The trial court erred in suggesting that the husband took improper unilateral actions without his wife's knowledge regarding certain accounts when the documentary evidence and testimony established that he attempted to keep his wife informed of his actions, the wife had access to the accounts and the expenditures were made for legitimate community purposes.²⁰

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Where the party requesting maintenance is well educated, fully employed and in good health, does the trial court abuse its discretion by concluding that that party "needs" maintenance in order to even out the monthly income of the parties?
2. Did the trial court abuse its discretion by failing to consider the long range impact on the husband when it concluded that he should pay his ex-wife maintenance until either his retirement or until his cancer prevented him from working?

¹⁹ Sept. 26, 2011 VRP 13, Decree 3.4; CP 142.

²⁰ Appendix B, p. 2; CP 131.

3. Did the trial court abuse her discretion by relying upon counsel's argument rather than testimony or documents in determining values for various assets of the parties?
4. Did the trial court abuse her discretion by denying the husband's motion to order the home sold or awarded to the wife when he established that he needed to focus on treatment for his cancer rather than the issues associated with maintaining the home?
5. Did the combination of the court's decision to award maintenance, 75% of the community assets, attorney's fees and payment of the outstanding student loan result in an inequitable distribution of assets and unfairly penalize the husband?
6. Did the trial court incorrectly conclude that the husband could not use community assets to fund the children's college accounts?

IV. STATEMENT OF THE CASE

A. Procedural Statement

Merritt Mount and Amanda Mount were married on July 3, 1988. VRP 14. They separated on June 1, 2010. *Id.* They had three children, only one of whom was a minor at the time of trial. VRP 14. The parents agreed to share residential care of the minor and entered into an agreed parenting plan. VRP 15.

The court heard a single day of evidence relating only to issues of property division and maintenance. CP 16-17. Only the parties testified.

The trial court took the matter under advisement and announced her oral decision on September 26, 2011.²¹ As described below, the court's initial decision included an award of maintenance to the wife, an award of 75% of the community assets to the wife, an award of attorney's fees to the wife and an order that the husband pay his wife's outstanding student loan. Sept. 16, 2011 VRP p. 13-14. Despite the husband's request that the house be awarded to the wife, the court awarded it to the husband, ruled that the house had equity, and ordered the husband to pay 75% of that equity to the wife. Sept. 26, 2011 VRP, p. 11.

The husband filed a timely motion for reconsideration and a motion requesting that family house either be awarded to the wife or sold. CP 76-82. To support the motion for reconsideration, the husband offered additional evidence establishing that the allegation that he had withheld documents during discovery was inaccurate. CP 132. The husband also provided a declaration from the attorney handling the Carson estate regarding the net value of this asset and supplied additional information regarding his cancer. CP 111-113; 115-116.

²¹ The trial proceedings are herein referred to as "VRP." Where references are made to other hearings, the date of the hearing will be included.

The motion for reconsideration argued that the trial court erred in characterizing one retirement account, erred in determining the value of assets and erred in awarding maintenance. CP 83-87; 122-129.

The trial court granted the motion for reconsideration only as to issue of the proper characterization of the single retirement account. Appendix B, p. 3. The court denied the motion to sell the residence and affirmed all other aspects of her original decision. Appendix B, p. 4-5.

Findings of Fact and Conclusions of Law were entered on February 9, 2012. CP 149-160 (Appendix A). The husband filed a timely notice of appeal. CP 166-167. Following entry of the judgment, the wife moved for reconsideration on the issue of the amount of attorney's fees she had been awarded. CP 194. This motion was ultimately denied. Following denial of the wife's Motion for Reconsideration, the wife filed a timely notice of cross-appeal.

B. Factual Statement & Trial Court's Division of Property.

1. The Parties

At the time of the trial, Amanda Mount was healthy and 55 years old. VRP 15.²² She had been employed with the Superintendent of Public

²² The only evidence pertaining to the wife's health were several questions to the husband regarding his wife's surgeries during the pendency of the action. VRP 153-54.

Instruction since 2004 and grossed \$3,894²³ a month in addition to her medical, vacation and retirement benefits. VRP 16; Ex #1; Ex. # 11. She had a Master's Degree which she obtained towards the end of the marriage. VRP 21. In order to obtain that degree she incurred student loans. VRP 21; Ex. #3. Approximately half of the student loans had been paid with community funds during the course of the marriage. VRP 65-66.

Amanda Mount's resume indicates that she has "extensive communications experience; strong public relations skills; and "proven management abilities providing leadership and motivation" as well as extensive work experience. Ex. #11 [Exhibit 11]

Merritt Mount, on the other hand, had been recently diagnosed with prostate cancer and was 59 at the time of trial. VRP 15; 75. He, like his wife, has a Master's degree obtained during the course of the marriage, however this degree was obtained much earlier in the marriage and the community benefited accordingly. VRP 21. Merritt's mother paid the tuition for his degree. VRP 57.

At the time of trial, Merritt Mount was employed with the Washington State Community Action Partnership at a salary of \$7,634.00 per month. VRP 16; Ex. 13. He began work in April 2010. Ex. 13. Prior

No documentation or testimony was offered to establish any continuing medical issue for the wife.

²³ This amount reflected a statewide 3% decrease in compensation imposed on all state workers.

to that position, he had had several long periods of unemployment. Ex. 13; VRP 31.

Merritt Mount has prostate cancer. VRP 22. The court, in rejecting the motion for reconsideration regarding the maintenance award, commented: “although Mr. Mount testified that he had been diagnosed with cancer, there was not testimony as to what his prognosis was or what he intended to do for treatment (if anything) other than focus on his diet. Mr. Mount had the ability to present evidence on this issue but chose not to.” CP 133.

The record belies this comment. Exhibit 17 contains Merritt’s medical records regarding his diagnosis. It outlines his possible treatment options, including the numerous side effects associated with each alternative.

Merritt also testified that he had the tumor biopsied with positive results in six of the eight samples. VRP 75. He had sought a second opinion. The Seattle Cancer Alliance affirmed the existence of cancer and suggested that it was in fact worse than was first thought. *Id.* Merritt testified that he understood that without treatment the cancer would likely be terminal within 10 years. *Id.* He testified further that he understood he had three treatment options: (1) surgery for removal of the prostate; (2) external beam radiation; or 3) seed implant radiation. VRP 76. He

testified that the potential complications included damage to the bowels, including loose stools; potential incontinence and impotence. VRP 76-77.

In the motion for reconsideration, Merritt revealed his Gleason score and the fact that his score was associated with a reduced life expectancy. CP 116. He outlined the adverse impacts of the three treatment options he faced: fatigue, incontinence, bowel issues and impotence. *Id.* He explained that he had elected to delay treatment until after the dissolution trial and that as a new employee, he had limited sick pay. *Id.*

2. Decision to Award Maintenance.

At trial, Ms. Mount requested that the court award maintenance so that she could have at her disposal “something similar to what he has.” VRP 22. Ms. Mount provided no testimony indicating that she was unable to meet her monthly obligations unless maintenance was ordered. She had no significant liabilities other than fees owed to her attorney and her student loan. Under the agreed parenting plan, both parties equally shared custody of the only minor child. VRP 14-15.

The court ruled that Mr. Mount was to pay his ex-wife \$1,500 per month in maintenance. Her reasoning was as follows:

I believe that given that at this point Mr. Mount earns about twice what Ms. Mount does, he is in a position to pay

maintenance to help get the two parties on a more equal footing as they leave the marriage. At this time, I'm going to order that Mr. Mount pay \$1,500 a month until he cannot work because of medical reasons or he retires in the normal course. At either or those points, then certainly maintenance should and will be modifiable.

September 26, 2011 VRP at 14.

3. Finances & Other Assets

During the marriage, the parties traveled extensively and lived beyond their means, a life style largely augmented by money Merritt brought into the marriage and the generous supplements of funds from Mary Mount, Merritt's mother. VRP 134. Mary Mount paid for the children's braces, provided funds for each of the grandchildren in order for them to go to college and helped the family out when Merritt was unemployed. VRP 31-32.

a. Mary Mount Estate

Mary Mount died in August 2009. VRP 35. Amanda did not attend her mother-in-law's funeral with her husband. *Id.* At the time of trial, Mary Mount's estate had not yet been distributed. VRP 24. The court faulted the husband for requesting that the funds not be distributed prior to trial.²⁴

²⁴ CP 134; Appendix B.

Nonetheless, the evidence established that the funds were held in a single account which had a value of \$540,340.76 and that each of the three siblings would inherit equal shares. VRP 128; Ex. 29. This amount divided by three would have produced an inheritance of \$180,000. Merritt Mount produced a statement of the investment account which the court apparently excluded.²⁵ VRP 131. While the wife's attorney questioned whether the statement represented the entire estate, the only evidence was that it was. VRP 129. Merritt also testified that he believed he would receive between \$180,000 and \$190,000. VRP 128.

The trial court found that Mr. Mount's share of the estate was \$200,000. CP 165. In reaching that conclusion, the court noted:

Ms. Mount testified that she had been made aware of that it (the inheritance) was closer to \$200,000. The Court found Ms. Mount's testimony on that issue more credible.

CP 165; Appendix B, p. 5. There was no such testimony. Ms. Mount did not offer testimony regarding the value of the estate or her husband's share in it. A word search of the transcript using the \$200,000 figure shows that the only reference to the \$200,000 value is contained in the argument of Ms. Mount's attorney, Mr. William Pope. See VRP 201. Like his suggestion that the estate consisted of more than the single account, Mr.

²⁵ In fairness to the court, trial counsel did not provide a rationale for its admittance. His equivocal statement at page 120 can be taken as agreement that the document is inadmissible.

Pope had no factual foundation for his argument. He argued simply: "I don't know. I used \$200,000 and put it in his column. . . .He said 190. I used \$200,000." VRP 201.

b. Carson Estate

Merritt Mount's separate property also included an inheritance from the estate of Edward Carson. Merritt testified that he understood from the estate lawyer that his share was approximately \$160,000 and that he had not received any of the money as of the date of the trial. VRP 115; 136.

Using documentation associated with the gross estate, the wife's attorney tried to establish that the husband would receive \$325,000 from the Carson Estate in addition to a distribution of \$52,142.80 he had already received. He produced a certified copy of the initial pleadings in the estate matter which showed a gross estate in excess of 3 million dollars. VRP 24; Ex. 7.

The husband produced exhibit 40 which apparently contained recently obtained documents pertaining to the distributions made from the Carson Estate. VRP 116. After first objecting, Mr. Pope withdrew that objection when he spotted what he believed to be a cash distribution to Mr. Mount in the amount of \$52,142.00. VRP 124.

Also during this discussion, Mr. Pope represented to the court that Mr. Mount had just provided him with a document that Mr. Mount had had in his possession of since March. VRP 121.

The trial court valued Merritt's interest in the Carson estate at \$325,000. September 26, 2011 VRP at 8. On the motion for reconsideration, the husband produced a sworn declaration from the estate attorney. Appendix C; CP 111-113. The estate attorney's declaration established unequivocally the following:

1. Mr. Mount had not received any money from the estate.²⁶
2. The figures contained on the certified pleadings offered by Mr. Pope (Ex. 7) did not include reductions for assets that would not be recovered, anticipated costs for administration, attorney's fees or taxes.²⁷
3. The estimated value of Mr. Mount's 10% share of the Estate was \$173,000.²⁸
4. The Mounts had borrowed \$132,000 from Mr. Carson and secured that note with a mortgage.²⁹
5. Interest only payments had been made on that note.³⁰

²⁶ Appendix C, p. 2.

²⁷ Appendix C, p. 1, attachment.

²⁸ Appendix C, p. 1.

²⁹ Appendix C, p.2.

³⁰ Appendix C, p. 2.

6. The \$52,142.00 referred to in Exhibit 40 was offset against the outstanding debt.³¹

This evidence conclusively established that after the community debt was satisfied; Mr. Mount would net approximately \$41,000 from his share of this estate.³²

Also produced in the motion for reconsideration was documentation establishing that Mr. Pope had been provided with an email for the attorney for the estate containing this same information on March 24, 2011, six months before the trial. CP 34.

c. Family Home

Neither party could agree on a value for the family home. Cf. VRP 30 (wife's testimony that house worth \$350 -360,000 with VRP 69 (husband's testimony that house was worth \$250,000.) The husband testified that he was willing to list the house sale. VRP 70. Alternatively Merritt suggested that the house be awarded to his wife. VRP 70. The wife also testified that she was willing for the house to be sold. VRP 30.

The court determined that the house had equity of \$34,925.00. Sept. 26, 2011 VRP p. 11. Rather than giving Ms. Mount the home, the

³¹ Appendix C, p. 2.

³² The original motion for reconsideration relied upon a letter from the estate attorney explaining the issues. CP 37-39. In her response, the wife argued that this evidence was inadmissible because it had not been authenticated. CP 105-106. Appellate counsel contacted the estate attorney and arranged for a formal declaration which was submitted to the court along with the reply memorandum. CP 111-13.

trial court decided that Ms. Mount should receive cash representing seventy-five percent of the equity. Sept. 26, 2011 VRP, p. 11; CP 138. Consequently, Mr. Mount was ordered to pay his wife an additional \$26,193.75. CP 115.

Once the wife heard the court's valuation and the additional information that she would receive cash for her interest, the wife opposed sale of the house. She alleged that it would be too traumatic for her to deal with her husband on the details of a sale. CP 98-102

d. Investment Accounts

The parties had the following community investment/retirement accounts:

Item	Ex. No.	Value³³	Wife	Husband
Wife's Deferred Compensation	20	\$2518.86	75%	25%
Wife's Defined Benefit Acct.	21	\$10,721.13	75%	25%
Wife's DWS Scudder IRA	22	\$16,160.26	75%	25%
Husband's PERS	23	\$1738.77	75%	25%
T.Rowe Price	24	\$80,288.08	75%	25%
Columbia Acorn	25	\$9,284.94	75%	25%
Janus	26	\$99,657.15	75%	25%
Totals:		\$220,369.19	\$165,276.89	\$55,092.29

³³ The values of these accounts fluctuated with market values. Because they were divided based on percentage of ownership, these fluctuations do not significantly impact the division. The values contained herein are taken from the exhibits.

Issues arose during the proceedings regarding the husband's use of the investment accounts during the separation period. This issue was complicated by the fact that the parties continued using a common account to pool their paychecks and pay bills after the separation. VRP 27. Both parties made payments to their lawyers from this joint account and paid expenses. VRP 27; 165; 185-86; CP 42-63.

Further complicating matters was the fact that the husband was the one who managed the accounts. VRP 32. When the wife requested information, she admitted that "most of the time" she got it. VRP 39. Her name was also on at least some of the accounts. VRP 186-87.

During the separation period, the husband liquidated funds in order to pay expenses of both parties, to make up back payments on the mortgage to the Ed Carson estate, to reimburse the son's account for sums that had been previously borrowed to meet family expenses and to fund the daughter's college education fund. VRP 139; VRP 140-142; 184-85; CP 65-70.

The husband testified that during the marriage the son's funds were used for family purposes and that the son was owed money to reimburse his account. VRP 175-76. He also testified that he sent his wife an email that outlined what the son was owed and informed her that he was going to redeem funds to pay that back. VRP 143.

The wife testified that she was not involved in the accounts. VRP 180-81. She knew, however, that if the family did not have enough money, her husband would transfer funds from the various accounts. VRP 179. She testified that she “happy” that her daughter had the additional money and she was not opposed to reimbursing their son. VRP 181; 188. Nonetheless, the court concluded that it was not appropriate for the husband to make these decisions unilaterally. Sept. 26, 2011 VRP 8-9.

On the motion for reconsideration the husband produced some of the emails which notified his wife of the transfers and a spread sheet³⁴ he had previously provided to his wife showing why the funds were due. CP 28-30; 64-70.

e. Liabilities

The family residence had two mortgages. The first mortgage, through Chase, was for \$115,000. Appendix A, FOF 2.10. The second mortgage was owed to the Carson estate in the amount of \$132,000. *Id.* The husband was ordered to pay these sums. CP 172,173.

The final awards involved attorney’s fees and responsibility for the wife’s remaining student loan. The trial court found, based on need and

³⁴ Ironically, much of the confusion involved the fact that the husband provided too much information. It appears he was constantly updating values associated with assets and providing the information in spreadsheet form. At one point the wife testified that she had seen so many spreadsheets with so many numbers, it “got overwhelming.” VRP 183.

the ability to pay, that the husband should assume these obligations. Sept. 26, 2011 VRP p. 13. The court ordered Mr. Mount to pay \$7,000 of his wife's attorney's fees and ordered him to pay his wife's student loan of \$12,452.00. Sept. 26, 2011 VRP at 13.

f. Final Division

The trial court's division of property resulted in the wife taking 75% of the community investment accounts (\$165,276.89)³⁵ and an additional \$26,193.75 as equity in the house. The wife thus received a cash award of approximately \$191,470.

The husband took 25% of the community assets or approximately \$63,823.54. Because the husband was ordered to pay the student loan and \$7,000.00 in attorney's fees, his total cash from the community assets was reduced to \$44,371.54 or just 17% of the total community property. This total assumes, of course, that the court's valuation of the house was correct. If the market value of the house was significantly less, the husband's share would be reduced accordingly.

The court awarded the husband his separate property consisting of his inheritance from Mary Mount, his inheritance from Ed Carson, a separate property IRA and a separate property SEP. Appendix B, p. 4,

³⁵ The amount of money the parties actually received depends on the market value on the day the parties separated the accounts. For argument purposes, the brief refers to the values of the accounts as documented in the exhibits.

FOF 2.9. Using the values the court placed on the inheritances suggests that the husband was awarded in excess of \$525,000 for these assets plus a substantial IRA as his separate property. In fact, the value of both inheritances was \$231,000 or less than ½ the value set by the court. CP 111-113; VRP 128.

V. ARGUMENT SUMMARY

Trial courts are granted substantial discretion in dissolution cases to determine just and equitable results. A trial court abuses its discretion, however, when its decision is based on unsupported facts. *Tatham v. Rogers*, (Slip opinion, August 14, 2012, Division III). Here, the trial court's decision is not supported by the evidence. Statements of values for the husband's separate property were taken not from the exhibits or testimony but from argument of counsel. To compound the error, the court made a "credibility" finding based on non-existent testimony. CP 165.

Moreover, the trial court abused her discretion by combining a disproportionate distribution of the community assets to the younger, healthier party, with an award of maintenance, attorney's fees and payment of the student loan to that same party. While the court acknowledged her obligation to consider the statutory factors contained in

RCW 26.09.090, her decision was based on inaccurate understanding of the facts and misapplication of the statutory factors.

The court's decision elevates income parity between the parties to a level of importance not recognized by any court. Even a long-term marriage does not impose a continuing obligation on one party to support someone fully capable of self-support. But the court's strong desire to place the wife on an equal financial footing with the husband resulted in her shifting the economic balance starkly in favor of the wife. It stripped the husband of virtually all his interest in the community assets while simultaneously saddling him with the obligation to provide additional financial support to a healthy, fully employed, highly educated woman for the remainder of his work life. The trial court's decision is a manifest abuse of discretion. The award of maintenance should be reversed, the award of attorney fees struck, the student loan assigned to the wife and the house ordered sold with the equity, if any, split in the same ratio as the other assets. This division leaves the wife with 75% of the community assets and allows the husband to get on with his life. Finally, the husband requests that he be awarded attorney's fees to offset the cost of pursuing this appeal pursuant to RAP 18.1.

VI. ARGUMENT

A. Standard for Review

Appellate courts apply the substantial evidence standard of review to findings made by the trial judge. *Marriage of Rockwell*, 141 Wn. App. 235, 242, 170 P. 3rd 572 (2007). 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).

A trial judge has broad discretion and the court's decision will be reversed only if there is a manifest abuse of discretion. *In re Marriage of Kraft*, 119 Wn. 2d 438, 450, 832 P.2d 871 (1992). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Muhammad*, 153 Wn. 2d 795, 803, 108 P.3rd 779 (2005). More specifically, "the court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Marriage of Littlefield*, 133 Wn. 2d 39, 47, 940 P.2d 136 (1997).

B. The Trial Court Abused Her Discretion in Awarding Maintenance to a Healthy, Well Educated, and Employed Wife Who Also Received a Disproportionate Share of the Community Assets.

1. Legal Standards for Maintenance

Maintenance (formerly alimony) is not a matter of right.

Friedlander v. Friedlander, 80 Wn. 2d 293, 297, 494 P. 2d 208 (1972);

Kelso v. Kelso, 75 Wn. 2d 24, 27, 448 P. 2d 499 (1968). Courts have

consistently rejected maintenance where the requesting party is healthy,

employed, educated and capable of self-support. *Morgan v. Morgan*, 59

Wn. 2d 639, 369 P. 2d 516(1962); *Friedlander, supra; In re the*

Marriage of Mathews, 70 Wn. App. 116, 853 P. 2d 462 (1993).

RCW 26.09.090 sets out the specific factors that the trial court must consider in awarding maintenance. That statute provides:

26.09.090. Maintenance orders for either spouse or either domestic partner -- Factors

(1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant

factors including but not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

An award of maintenance must be just in light of the relevant facts, including the financial resources of each party, the duration of the marriage, the standard of living during the marriage, and the resources and obligations of the spouse seeking maintenance, including that spouse's ability for self-support. *In re Marriage of Estes*, 84 Wn. App. 586, 593,

929 P.2d 500 (1997). When determining spousal maintenance, the court is governed strongly by the need of one party and the ability of the other party to pay. *In re Marriage of Foley*, 84 Wn. App. 839, 845-46, 930 P.2d 929 (1997).

2. The trial court incorrectly applied the statutory factors.

In ruling on the motion for reconsideration, the trial court insisted that she had considered all the statutory factors. She then clarified the factors she considered particularly significant:

First, Mr. Mount currently earns approximately twice the monthly income as does Ms. Mount. Second, this is a long term marriage (preceded by a committed intimate relationship of some years) and the goal of this Court is to allow, to the extent practicable, both parties to be on similar financial footing as they leave the marriage. Third, 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. Mr. Mount had the ability to present evidence on this issue and chose not to. Further, the Court specifically ordered maintenance was modifiable if Mr. Mount was no longer able, for medical reasons, to work, or if her retired in the normal course. Fourth, Mr. Mount will be receiving a significant amount of separate property, while there is no evidence showing that Ms. Mount has any separate property interests other than her (fairly nominal) retirement. Fifth, both parties are in their mid to late fifties and there was no evidence that they are currently unable to work. These are the most significant factors in the Court's mind on the issues of maintenance,

although all factors were considered. Maintenance is appropriate under the circumstances of this case and the Court will not reconsider this part of its ruling.

CP 133. With due respect to the trial judge, her decision rests upon incorrect factual premises and incorrect application of the legal standards.

To begin with, the court's reliance on the disparity in monthly income fails to account for a number of important facts. First, even assuming Mr. Mount's cancer does not disable him, Ms. Mount has an estimated work life four years longer than Mr. Mount. Multiplying each party's current salary over their remaining work life substantially narrows the disparity of income. During the husband's remaining work life, he would earn \$641,256.00.³⁶ Ms. Mount, on the other hand, with a four year longer work life, would earn \$514,008.³⁷ Consequently, even if Ms. Mount does not receive a promotion based on her improved educational credentials, Ms. Mount's income for the rest of her working life will be 80%, not 50% of that which her husband would earn if he is able to work till retirement age.

RCW 26.09.090(1)(e) requires that the judge consider the "age" of the party requesting maintenance. The trial court neglected to adjust the

³⁶ \$91,608 annual salary multiplied by seven years remaining work life.

³⁷ \$46,728 annual salary multiplied by eleven years remaining work life. The trial court used a figure of \$55,000 for her comparison. CP 131. The \$46,728 figure is based on the wife's actual testimony concerning her monthly gross. **VRP 16.**

wife's earning potential based on her longer work life. The court therefore erred.

Second, the trial court refused to consider the impact of Mr. Mount's cancer, dismissing it with the inaccurate statement that he had offered no evidence about its potential impact on his life. In fact, Mr. Mount established that the cancer jeopardized his life expectancy, that he would eventually need treatments and that those treatments had substantial negative side effects. **VRP 76-78**. He provided his medical records which established the existence of the cancer, that his doctors recommended several alternative treatments and that each of those treatments had extensive debilitating side effects. **Ex. 17**. Nowhere in its multiple decisions does the trial court indicate that it considered any of this evidence or even that it read the medical records that had been submitted.

The court's refusal to appreciate the husband's health issues violated the mandate of RCW 26.09.090(1)(f) that the judge consider the ability of the spouse from whom maintenance is sought to meet his own needs. The trial court's decision does not recognize that Merritt's ability to provide for himself will be substantially impaired by the combination of his need to obtain treatment for the cancer and very limited sick leave benefits to accommodate that treatment. Instead, the trial court simply ignored both the existence and the implications of Merritt's prostate

cancer and suggested that he could seek modification when he became disabled.

Third, the trial court's decision neglects to factor in the fact that the wife, like her husband, has now has a master's degree that will more than likely translate into increased future earnings. And, unlike Merritt's degree, the marital community has received no benefit from that degree. *See, Marriage of Washburn*, 101 Wn. 2d 168, 677 P. 2d 152 (1984) (Time after receipt of professional degrees can be considered in determining whether extra compensation appropriate.)

In failing to weigh the wife's educational advantages, the court improperly applied *RCW 26.09.090(1)(b)*. That section requires the court to consider the amount of time necessary for the requesting party to obtain sufficient education and training or to find employment. Here, the party seeking maintenance has the same level of education, has a long work history and is employed in a good job with retirement and health benefits. By failing to give full weight to this factor, the court erred.

Fourth, the trial court's decision was based on a wholly inaccurate valuation of the husband's separate property. The trial court valued the inheritances the husband would get at \$325,000³⁸ for the Carson Estate

³⁸ The court also concluded that the husband had already received \$50,000. VRP Sept. 26, 2011, p. 8. This finding also was incorrect. The distribution was applied to the outstanding loan balance. CP 112.

and \$200,000 from the estate of his mother. Sept. 26, 2011 VRP, p. 8.

These findings had two errors. First, it was based on the gross value of the Carson estate, not the net. Compare Ex. 7 to CP 37-39; 111-112.

The evidence established that the Carson estate inheritance had a value of \$173,000. CP 112-114. A large portion of that was required to repay the community mortgage on the family home. **Id.** Thus the total amount of the inheritance from the Carson estate was \$41,000---not \$325,000. CP 118.

Second, the court overvalued the Mary Mount estate by at least \$10,000. The evidence established that the husband's share of this inheritance was \$180,000 to \$190,000. VRP 128. Relying upon argument of counsel, not testimony, the court found the value of the inheritance to be \$200,000³⁹. [Compare CP 165 (Court's finding that wife's testimony on value more credible with closing argument of wife's attorney at VRP 201.)]

As a result of these mistakes the court put \$525,000 from the two estates as separate property awarded to the husband when she determined what was just and equitable. The evidence, however, established the value of these two inheritances was \$231,000--less than one half the values

³⁹ As noted previously, an electronic word search of the transcript reveals that the only the mention of \$200,000 occurs in closing argument of counsel.

placed on them by the court.⁴⁰ When presented with the documents establishing the lower values the court refused to reconsider her decision.

Finally, the trial court's decision does not reflect the fact that the award of maintenance actually shifts \$126,000 of the husband's income over to the wife. As a result, the wife has more income during her work life than her ill husband. As noted above, the husband, assuming he can continue to work, will earn \$641,256.00. However, the husband's earnings will be reduced by the maintenance payments he must make each month to his wife. Thus, his net wages for the remainder of his work life will be \$515,256.00.

The wife, on the other hand, will increase her share of the couple's earnings by the same \$126,000 in maintenance payments. As a result, the wife's income will substantially exceed that of her ill husband. Between her wages and her award of maintenance, she will earn an additional \$640,000 in the years remaining in her expected work life.

No court has upheld such a skewed result. Maintenance is designed to help transition a spouse to a place where they can be self-supporting. The following cases illustrate the correct use of maintenance

⁴⁰ The impact of this disparity was somewhat mitigated by the court's decision on the motion for reconsideration that she had incorrectly characterized the Scudder IRA as community property. **CP 163**. The impact of this ruling was to add approximately \$83,000 to the husband's separate property total. **CP 35;152**. With this figure added back to the total, the husband took \$355,000 in separate property.

to assist a needy spouse: *In re Marriage of Marzetta*, 129 Wn. App. 607, 120 P.3d 75 (2005) (20 years of maintenance after 13-year marriage; wife had multiple sclerosis and wealthy husband had ability to pay); *In re Marriage of Bulicek*, 59 Wn. App. 630, 800 P.2d 394 (1990) (26-year marriage; maintenance awarded until wife died or husband retired; wife had "numerous" health problems); *Stacy v. Stacy*, 68 Wn.2d 573, 414 P.2d 791 (1966) (22-year marriage; five years of maintenance plus 75 of assets; wife had no degree or work experience and husband was only 43 and had considerable, long-term earning potential); *In re Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989) (23-year marriage; lifetime maintenance; wife was in ill-health and court was unable to make equitable property division because husband had transferred community assets to third parties); *In re Marriage of Nicholson*, 17 Wn. App. 110, 116, 561 P.2d 1116 (1977) (ten years of maintenance following long term marriage; wife had only high school education and virtually no employment history; husband had steady job as plant supervisor, a good salary, and "excellent" long term earning potential); *In re Marriage of Dessauer*, 97 Wn.2d 831, 650 P.2d 1099 (1982) (25-year marriage; wife received 75 of assets but no maintenance; wife was seven years older than husband, had no vocational training or education, and had eye problem that prevented her from driving; husband had pension, earth moving

business, and property rentals); *In re Marriage of Donovan*, 25 Wn. App. 691, 612 P.2d 387 (1980) (14-year marriage; wife received 66 of assets; wife had three young children at home, little earning potential, and received only two years of maintenance; husband was an airline pilot with a "substantial salary" and a "secure" future); *In re Marriage of Rink*, 18 Wn. App. 549, 571 P.2d 210 (1977) (24-year marriage; wife received 66 of assets; wife received only one year of maintenance, had only high school education and no vocational training or skills; husband was in good health and had steady employment).

None of the equitable factors present in the above cases apply to Amanda Mount. She is healthy and four years younger than Merritt. Merritt, on the other hand, has prostate cancer and must undergo treatment even though he has a job that gives him limited sick pay.

The wife has the same level of education and has a significant employment history. [See Exhibit 11]. Finally, she has received cash assets of close to \$200,000. By failing to consider that the wife's needs had already been accommodated by the disproportionate award of community property, the trial court ignored the terms of *RCW 26.09.090(1)(a)* which requires the court to consider the financial resources of the party seeking maintenance including community property

apportioned to her. Here, correct application of the statutory factors establishes that the court erred in granting maintenance.

3. The trial court improperly balanced the equities by determining that she had an obligation to place the wife in the same position as the husband.

In reaching ordering maintenance, the court stated that she believed, in a long term marriage, she was required “to pay particular attention to trying to place the parties in roughly equal financial positions for the test of their lives. . . .” Sept. 26, 2011 VRP at 10. This court’s decision thus raises the issue of what is the proper weight to assign *RCW 26.09.090 (1) (c)*. That section states that the court should consider “the standard of living established during the marriage or domestic partnership.”

As noted by commentators, the inclusion of this statutory factor may have made a fundamental change in Washington law. Weber, Family & Community Property Law, **20 Wash. Practice, Sec. 34.6**. But this factor is just one to be considered. *RCW 26.09.090 (1)*. It does not apply if the parties were living beyond their means or if the parties were living at a standard that only could be maintained if they resided in one residence. **20 Wash. Prac. Sec. 34.6, pp. 357-58.**

In addition, the underlying justification for the rule does not apply here. Consideration of the standard of living is particularly important as a matter of fundamental fairness in long term marriages where one spouse was the bread winner and the other spouse was the “home maker.” *See, e.g., In re Marriage of Sheffer*, 60 Wn. 2d 51, 57, 802 P. 2d 817 (1990). Here, both parties worked during the marriage. Ms. Mount did not totally sacrifice herself or her career to be a homemaker. During the course of the marriage she worked frequently and reached a level of education comparable to her husband’s. Fundamental fairness dictates that she accept the same obligation to support herself as the court imposed upon Merritt.

Merritt Mount should be entitled to enjoy the benefits of his hard work for his remaining work life. Ms. Mount has skill, education and work experience and cash assets to ensure that her own needs are met. The trial court’s concerns for Ms. Mount’s financial welfare were already addressed by the disproportionate award of the community property to her. Consequently, in making this award, the trial court manifestly abused her discretion. Appellant respectfully requests that the trial court’s decision granting maintenance be reversed.

C. The Trial Court by Denying the Husband's Request that the House be Awarded to the Wife or Sold.

The trial judge initially ruled that though she was not inclined to order the house sold, she would listen to argument concerning that issue. Sept. 26, 2011 VRP at 11. Following the court's decision, the husband made a timely motion to have the house sold. CP 76. In support of that motion, Merritt Mount explained that he had put off cancer treatment until after the trial and that some of the anticipated side effects could render him incapable of taking care of a house. CP 86.

Ms. Mount replied with a declaration stating her reluctance to continue any economic partnership with her ex-husband. CP 98-99. She also inaccurately contended that her husband had testified that he had paid the debt owed to the Carson estate with community money and that there was even more equity in the house.⁴¹ CP 101. In his responsive declaration, Merritt Mount offered a second alternative, that the court award the house to Amanda Mount and that she pay him 25% of the equity. CP 117.

⁴¹ The evidence produced both during and after trial established that in fact the only payments made to the Carson Estate were applied to outstanding interest payments. CP 112; VRP 73.

Disregarding the evidence of Mr. Mount's health concerns, the court rejected both solutions finding that there was "credible testimony that Mr. Mount was in a better position to maintain the home than was Ms. Mount." CP 133. She also stated: "As testified to at trial, neither party wanted the Court to order the home to be sold and the Court remains of the view that it is unreasonable to require that to occur given the strikingly different approaches the parties have to financial matters, in addition to current market conditions." CP 133.

Again the court's findings conflict with the evidence. Repeatedly Merritt Mount and his attorney both asked that the court order the house to be sold or awarded to Amanda. VRP 11;70; 205; 227. Up until the time she learned that she would receive an additional \$26,000, the wife agreed that the house could be sold. VRP 30.

It is fairly clear that the reason the wife chose not to take the house or agree that it should be sold was that the court's decision provided her with cash without any of the risk associated with a potential sale below the value of the outstanding mortgages. Selling the house in the current market, as recognized by the trial court, was a risky proposition. In fact, the wife's own documentation established that, consistent with what has occurred throughout the country, the value of the house had dramatically declined each year from 2008 through 2011. CP 103.

The court's ruling placed all the risk of loss associated with this asset on the party least able to handle it, the one whose health was impaired. The husband identified a legitimate need to focus on his treatment, not maintenance of the house. Nonetheless the court rejected both his request that the house be sold and his request that the wife take the house and pay him his share of the equity. Instead she entered a judgment in favor of the wife for the "equity." CP 138.⁴² Because the court's ruling disregarded the evidence and placed an unfair burden on the husband, the trial court abused its discretion. The husband respectfully requests that this ruling be reversed and this portion of the case remanded to the trial judge for an order reversing the payment of equity. The house should be listed for sale and all costs of that sale (as well as any intervening improvements made by the husband) deducted from the sale price. At that time, if there is equity, it may be split between the parties.

D. The Trial Court Abused Its Discretion in Ordering the Husband to Pay the Wife's Attorney's Fees and Student Loan.

The trial court ordered the husband to pay \$7,000 in the wife's attorney's fees and the wife's student loan. As argued above, the trial

⁴² The actual judgment is less than the total equity awarded to Ms. Mount because of offsets associated with her retention of certain community assets. Ms. Mount actually was awarded \$26,193.75 as her share of the equity allegedly in the house. CP 161.

judge vastly overvalued the assets she awarded the husband. Moreover, where the wife takes 75% of the community assets, the trial court abused its discretion when it also further reduced the husband's share by forcing him to pay outstanding debt. As a result, after this long marriage, Merritt Mount leaves it with just 17% of the community assets. Amanda Mount leaves with no debts except her remaining attorney's fees, substantial cash assets and the yet to be realized value of her Master's degree. Equity requires that at this point she be responsible for these debts rather than further reducing the meager portion of the community awarded to her former husband.

E. The Trial Court Erred in Suggesting that the Husband Had No Authority to Use Community Funds for the Repayment of Community Debts and to Fund Their Daughter's Education.

The trial court faulted the husband for using community funds to reimburse their son for funds previously used by the community and to fund their daughter's college fund. Sept. 26, 2011 VRP p. 8. It is unclear what impact this comment had on the court's decision. However, either spouse is clearly authorized to pay community debts and to fund college educations for the children. See, *In re Marriage of Schweitzer*, 81 Wn. App. 589, 598, 915 P. 2d 575(1996). Absent evidence to the contrary the

expenditures are presumed to be for the benefit of the community. *In re Marriage of Schweitzer*, 81 Wn. App. at 598.

F. Attorney's Fees

As argued above, the court's ruling awarded substantial assets to the wife at a significant cost to the husband. While Merritt Mount received significant separate property as a result of his inheritances from his mother and his good friend, those funds are necessary to ensure that he is able to tend to his medical and financial needs. Appellant respectfully requests that the court award attorney fees pursuant to RAP 18.1(b) and *RCW 26.09.140*.

VII. CONCLUSION

Throughout his marriage to Amanda Mount and the separation and divorce process, Merritt Mount has attempted to do the honorable thing. During the marriage he generously shared his separate property. Following his wife's decision to separate, he continued to pool his resources with his wife's in a common checking account, even though his pay was twice that of hers. At trial he agreed that because he had separate property, his wife should receive twice the community property he received so that she would have additional monies available. Not

satisfied, Amanda Mount, younger, healthier and fully capable of supporting herself, wanted maintenance, attorney's fees and her debts paid off.

Near the end of his working career, Merritt now faces an uncertain future. As long as he is able to work, he must surrender nearly a fifth of his monthly income to support his ex-wife. His only recourse is to either retire or go through the expense of a modification proceeding if he becomes physically incapable of working.

The trial court's decision failed to balance all the statutory factors contained in *RCW 26.09.090* and ignored Merritt's evidence relating to his cancer, its impact on him emotionally and physically and his lack of sick time to accommodate treatments. Because the trial judge ignored the evidence and punished the husband for failings real or imaginary, she abused her discretion. Appellant respectfully requests that this court reverse the trial court's decisions regarding maintenance, disposition of the house and allocation of the student loan and attorney's fees.

Respectfully submitted this 15th day of August, 2012.

By: 
Bertha B. Fitzer, WSB #12184
Attorney for Appellant
bertha@fitzerlaw.com

DECLARATION OF SERVICE

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

Electronically and via USPS

DATED at Tacoma, Washington this 15th day of August, 2012.



Bertha B. Fitzer

RECEIVED
AUG 15 2012

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

APPENDIX A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

M

<input type="checkbox"/> EXPEDITE <input type="checkbox"/> Hearing is set: <input type="checkbox"/> None Date: _____ Time: _____ Judge/Calendar: _____
--

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
12 FEB -9 PM 4: 04
BETTY J. GOULD, CLERK
BY _____ DEPUTY

**SUPERIOR COURT OF WASHINGTON
COUNTY OF THURSTON
FAMILY & JUVENILE COURT**

<p>In re the Marriage of:</p> <p>AMANDA STARR MOUNT,</p> <p style="text-align: right;">Petitioner,</p> <p>and</p> <p>JOHN MERRITT MOUNT,</p> <p style="text-align: right;">Respondent.</p>	<p>NO. 10-3-00984-2</p> <p>FINDINGS OF FACT AND CONCLUSIONS OF LAW (FNFCL)</p>
--	--

I. BASIS FOR FINDINGS

The Findings are based on the results of a trial before the Honorable Judge Anne Hirsch that took place on September 12 and 13, 2011, and the Respondent's Motion for Reconsideration or New Trial.

The Petitioner, AMANDA STARR MOUNT, appeared in person and with her attorney, WILLIAM B. POPE of William B. Pope & Associates, P.C. The Respondent, JOHN MERRITT MOUNT, appeared in person and with his attorney, CHARLES SZURZEWSKI of Connolly Tacon & Meserve. The court having heard the testimony of the parties and the statements of counsel at the time of trial. The court having further reviewed and fully considered the Respondent's Motion for Reconsideration or New Trial, Respondent's Certified Statement in support of his motion, the Petitioner's Responsive Declaration, the Petitioner's Memorandum Re: Motions, the Declaration of Jerome Feldman, the Respondent's Supplemental Declaration Re: Reconsideration, the Respondent's Reply Re: Motion for Reconsideration, and the Respondent's Memorandum in Support of Motions. The court having further reviewed and fully considered the Statement of Counsel re:

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FNFCL)

WBS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Proposed Changes in Final Papers submitted by the Respondent, together with oral argument of Respondent's new associated counsel, Ms. Bertha Fitzer of Fitzer Law, LLC on the January 12, 2012, hearing on presentation and the oral argument of the Petitioner's attorney, and in all things being fully advised, now makes and enters the following:

II. FINDINGS OF FACT

Upon the basis of the court record, the court FINDS:

2.1 RESIDENCY OF PETITIONER.

The Petitioner is a resident of the state of Washington.

2.2 NOTICE TO THE RESPONDENT.

The Respondent originally appeared pro se and then appeared by and through his attorney, Charles Szurszewski of Connolly Tacon & Meserve.

2.3 BASIS OF JURISDICTION.

At all times material to this action, both the Petitioner and the Respondent have been residents of Thurston County, Washington.

2.4 DATE AND PLACE OF MARRIAGE.

The parties were married on July 3, 1988, in Poulsbo, Kitsap County, Washington.

2.5 STATUS OF THE PARTIES.

Husband and wife separated on June 1, 2010.

2.6 STATUS OF THE MARRIAGE.

The marriage is irretrievably broken and at least 90 days have elapsed since the date the petition was filed and the Respondent accepted service.

2.7 SEPARATION CONTRACT OR PRENUPTIAL AGREEMENT.

There is no written separation contract or prenuptial agreement.

//

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2.8 COMMUNITY PROPERTY.

The parties have real and personal community property which consists of the following:

The home and real property commonly described as 4411 Green Cove Street NW, Olympia, Thurston County Washington, which is more specifically described below. The home is subject to an indebtedness due and owing Chase in the approximate amount of One Hundred Fifteen Thousand Dollars (\$115,000.00) and an indebtedness due and owing the Estate of Edward R. Carson in the approximate amount of One Hundred Thirty-Two Thousand Dollars (\$132,000.00). The value of the property is hard to establish in this market, but the court finds that the equity available to divide (75/25) between the parties is \$34,925. That figure was arrived at by averaging the opinion of value offered by each party.

Section 33 Township 19 Range 2W Plat COUNTRY CLUB PARK
BLA-0744 TR B Document 3353985 LT 20 & PTN 19 & PT
COMMON AREA TO THE NORTH

Records of the Thurston County Auditor, Olympia, Thurston County,
Washington

Tax Parcel No. 42520002000

- The Janus Global Select Fund D account ending 90798;
- The Janus Overseas Fund D account ending 90798;
- The Columbia Acorn Fund Z account ending 1610;
- The Columbia Acorn International Fund Z account ending 8429;
- The T. Rowe Price IRA (Int'l Stock) ending 5311-4;
- The DWS Latin America Equity Fund account ending 1652;
- The Petitioner's PERS Plan 2;
- The Petitioner's Deferred Compensation;
- The Respondent's PERS Plan 2;
- The WSECU Roth IRA standing in the Petitioner's name;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

The WSECU Money Mover and Joint Savings Account;
The Bank of America Checking and Savings Account;
The 2000 Volvo, Thule & Bike Rack;
The 2000 Infiniti Q45;
Household furniture, furnishings, and other personal property items;
The Tumwater Valley Family Membership; and
The Petitioner and Respondent's Social Security rights and interests available to each of them pursuant to federal law.

The court originally found the DWS Scudder IRA ending 0595 to be community in nature, but reconsidered that and finds that it is the separate property of the Respondent, John Merritt Mount, and should be awarded to him accordingly consistent with the letter opinion dated October 28, 2011.

2.9 SEPARATE PROPERTY.

The American Funds SEP IRA standing in the Respondent's name shall be his separate property and awarded to him accordingly, together with any and all proceeds he may enjoy from the estate of his mother and the estate of his friend, Edward R. Carson. The court also finds that the DWS Scudder IRA ending 0595 to be the separate property of the Respondent and should also be awarded to him accordingly.

Any and all property acquired by either party from and after the date of separation should be that person's sole and separate property and awarded to him or her free of any interest in the other party, excluding the parties' separate incomes which continued to be deposited into a joint account.

2.10 COMMUNITY LIABILITIES.

The parties have the following community liabilities:

The mortgage obligation due and owing Chase in the approximate amount of One Hundred Fifteen Thousand Dollars (\$115,000.00);

The indebtedness due and owing the estate of Edward R. Carson in the approximate amount of One Hundred Thirty-Two Thousand Dollars (\$132,000.00); and

The Petitioner's FFEL student loan.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2.11 SEPARATE LIABILITIES.

Any and all indebtedness incurred by either party from and after the date of separation should be the sole and separate obligation of the party who incurred the indebtedness and that individual should be required to assume and satisfy those obligations and hold the other party harmless therefrom and indemnify the other party from any responsibility arising from the debt. This, however, is not an invitation for the parties to go back and try to readjust or account for debts they incurred during the pendency of this action, which have been satisfied with their pooled earnings and will continue to be satisfied through the month of September 2011.

2.12 MAINTENANCE.

The Petitioner, Amanda S. Mount, has a financial need and the Respondent, John M. Mount, has the ability to pay maintenance. In establishing maintenance, the court has looked to the long duration of this marriage and even longer duration of the parties' relationship, and the respective earnings of the parties, together with the statutory criteria set forth in RCW 26.09.090 and case law.

The Respondent, John Merritt Mount, should be required to tender maintenance to Amanda Starr Mount, in the amount of One Thousand Five Hundred Dollars (\$1,500.00) per month, payable on or before the fifth (5th) day of each month, commencing with October 5, 2011. Maintenance should continue each month thereafter at that rate until the Respondent, John M. Mount, can no longer work due to medical reasons or retires, at which time maintenance may be reviewed and modified. Maintenance may also be reviewed and modified, if appropriate, upon a substantial change in circumstances, as provided by statute.

2.13 CONTINUING RESTRAINING ORDER.

Does not apply.

2.14 PROTECTION ORDER

Does not apply.

2.15 ATTORNEY'S FEES AND COSTS.

The Respondent, John Merritt Mount, should be required to pay Seven Thousand Dollars (\$7,000.00) of Amanda Starr Mount's attorney's fees and costs. Each party should be required to assume and satisfy the balance of his or her own attorney's fees

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

and costs incurred in this action, with the exception of those funds that have already been paid and with the exception of the \$7,000.00 to be paid by the Respondent to the Petitioner.

2.16 PREGNANCY.

The wife is not pregnant.

2.17 DEPENDENT CHILD.

The child listed below are dependent upon either or both spouses.

Name of Child: Victoria "Torie" Estelle Mount
Age: 13
Mother's Name: Amanda Starr Mount
Father's Name: John Merritt Mount

2.18 JURISDICTION OVER THE CHILD.

This court has jurisdiction over the parties' minor daughter, Victoria, because Washington is her home state and she has lived here with her parents for at least six consecutive months immediately preceding the commencement of this case.

2.19 PARENTING PLAN.

The final parenting plan signed by the court on September 12, 2011, is approved and incorporated as part of these findings.

2.20 CHILD SUPPORT.

There is a child in need of support and child support should be set pursuant to the Washington State Child Support Schedule. The Order of Child Support signed by the court and the Child Support Worksheets which have been approved by the court are incorporated by reference in these findings.

2.21 OTHER:

Tax Liabilities

Each party should be required to file separate federal income tax returns for the calendar year of 2011. Each party should report their respective incomes for that year and assume the tax liability, if any, due and owing arising from their respective incomes and hold the other party harmless therefrom.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Joint Accounts

The parties' joint checking and savings account at Bank of America and the joint checking and savings account at WSECU should be divided as follows: 75% to the Petitioner, Amanda Starr Mount, and 25% to the Respondent, John Merritt Mount, following the payment of their September bills. Both parties should continue to deposit their incomes into those joint accounts for the month of September 2011. Starting with October 1, 2011, each party should deposit their respective incomes into their own accounts and be responsible for their own bills and expenses.

Division of Investment Accounts

The investment accounts of the parties should be divided in such a manner as to provide Seventy-Five Percent (75%) of the account balances to the Petitioner, Amanda Starr Mount, and the remaining Twenty-Five Percent (25%) to the Respondent, John Merritt Mount. Each brokerage account or fund custodian should be directed to divide the funds as soon as possible based on the 75/25 division of each stock held within the account. It is the intent of the court, consistent with the recommendation of the Respondent, John Merritt Mount, that the community assets be essentially divided with Seventy-Five Percent (75%) going to the Petitioner and Twenty-Five Percent (25%) going to the Respondent. The court has not valued the personal property in the parties' possessions, nor has it valued the household furniture, appliances, utensils, and furnishings in each parties' possession, nor is the court including the parties' respective vehicles. The court will include in this division, in addition to the investment accounts, the Petitioner's retirement account and Deferred Compensation Account with the State of Washington, the Roth IRA at WSECU, the Respondent's retirement account with State of Washington (PERS II Retirement Plan), and the DWS Latin America Equity Fund (ending 1652). To adjust for a 75/25 division of those retirement components, would require a payment from the Petitioner to the Respondent of \$4,175.00. The \$26,193.75 judgment the Petitioner should receive against the Respondent for Seventy-Five Percent (75%) of the home equity should be reduced by \$4,175.00. That adjustment results in a judgment amount of \$22,018.75.

Division of Retirement Accounts

The retirement accounts of the parties should also be divided on a 25/75 basis. The Petitioner's PERS 2 account had a balance of \$13,334, her Deferred Compensation account had a balance of \$2,519, and her Roth IRA had a balance of \$100. The Respondent's PERS 2 account had a balance of \$4,177. The DWS Latin America Equity Fund (ending 1652) had a balance of \$13,278. To provide a 75/25 division of these retirement accounts, would require the Petitioner to pay the Respondent \$4,175 from her accounts. In lieu of entered Property Division Orders or Qualified

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Domestic Relations Orders, the court will simply reduce the judgment it was going to award the Petitioner for Seventy-Five Percent (75%) of the home equity from \$26,193.75 to \$22,018.75.

Medical Insurance

The Petitioner, Amanda Starr Mount, should continue to provide healthcare coverage for the benefit of the Respondent, John Merritt Mount, for so long as such healthcare coverage is available for the Respondent commensurate with the Petitioner's employment, for so long as the parties remain legally separated, and conditioned on the Respondent assuming and satisfying the additional cost to the Petitioner of his healthcare coverage. The Respondent, John Merritt Mount, should also be responsible for his own co-pays and insurance deductibles and shall indemnify the Petitioner, Amanda Starr Mount, for any responsibility arising from those expenses.

Motion for Reconsideration

The court's letter opinion dated October 28, 2011, which is attached hereto and incorporated by this reference, should be considered Supplemental Findings of Fact and should be incorporated into the Decree of Legal Separation as if fully set forth.

Continuing Jurisdiction

In the event it is reasonable, desirable, or necessary to execute any other documents or papers to transfer title or otherwise effectuate the terms of the Decree of Legal Separation, each party should sign the same in a timely and cooperative manner. The court should retain jurisdiction over the parties and over the subject matter of this action for the purposes of enforcing the decree.

III. CONCLUSIONS OF LAW

The court makes the following Conclusions of Law from the foregoing Findings of Fact:

3.1 JURISDICTION.

The court has jurisdiction to enter a decree in this matter.

3.2 GRANTING OF A DECREE.

The parties should be granted a Decree of Legal Separation dissolving the marital bonds and marital community existing between the parties and restoring to each his or her status as a single adult.

//

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

3.3 PREGNANCY

Does not apply.

3.4 DISPOSITION.

The court should determine the marital status of the parties, make provision for a parenting plan for the minor child of the marriage, make provision for the support of the minor child, approve the provision for the maintenance of the Petitioner, make provision for the disposition of property and liabilities of the parties, and make provision for the allocation of the child as a federal tax exemption. The distribution of property and liabilities as set forth in the decree is fair and equitable.

3.5 CONTINUING RESTRAINING ORDER.

Does not apply.

3.6 PROTECTION ORDER

Does not apply.

3.7 ATTORNEY'S FEES AND COSTS.

John Merritt Mount should pay Seven Thousand Dollars (\$7,000.00) of Amanda Starr Mount's attorney's fees and costs. Each party should be required to assume and satisfy the balance of his or her own attorney's fees and costs incurred in this action, with the exception of those funds that have already been paid and with the exception of the \$7,000.00 to be paid by the Respondent to the Petitioner.

3.8 OTHER:

Tax Liabilities

Each party should be required to file separate federal income tax returns for the calendar year of 2011. Each party should report their respective incomes for that year and assume the tax liability, if any, due and owing arising from their respective incomes and hold the other party harmless therefrom.

Joint Accounts

The parties' joint checking and savings account at Bank of America and the joint checking and savings account at WSECU should be divided as follows: 75% to the Petitioner, Amanda Starr Mount, and 25% to the Respondent, John Merritt Mount,

1 following the payment of their September bills. Both parties should continue to
2 deposit their incomes into those joint accounts for the month of September 2011.
3 Starting with October 1, 2011, each party should deposit their respective incomes
4 into their own accounts and be responsible for their own bills and expenses.

5 **Division of Investment Accounts**

6 The investment accounts of the parties should be divided in such a manner as to
7 provide Seventy-Five Percent (75%) of the account balances to the Petitioner,
8 Amanda Starr Mount, and the remaining Twenty-Five Percent (25%) to the
9 Respondent, John Merritt Mount. Each brokerage account or fund custodian should
10 be directed to divide the funds as soon as possible based on the 75/25 division of
11 each stock held within the account. It is the intent of the court, consistent with the
12 recommendation of the Respondent, John Merritt Mount, that the community assets
13 be essentially divided with Seventy-Five Percent (75%) going to the Petitioner and
14 Twenty-Five Percent (25%) going to the Respondent. The court has not valued the
15 personal property in the parties' possessions, nor has it valued the household
16 furniture, appliances, utensils, and furnishings in each parties' possession, nor is the
17 court including the parties' respective vehicles. The court will include in this
18 division, in addition to the investment accounts, the Petitioner's retirement account
19 and Deferred Compensation Account with the State of Washington, the Roth IRA
20 at WSECU, the Respondent's retirement account with State of Washington (PERS
21 II Retirement Plan), and the DWS Latin America Equity Fund (ending 1652). To
22 adjust for a 75/25 division of those retirement components, would require a payment
23 from the Petitioner to the Respondent of \$4,175.00. The \$26,193.75 judgment the
24 Petitioner should receive against the Respondent for Seventy-Five Percent (75%) of
25 the home equity should be reduced by \$4,175.00. That adjustment results in a
26 judgment amount of \$22,018.75.

19 **Division of Retirement Accounts**

20 The community retirement accounts of the parties should also be divided on a 25/75
21 basis as set forth above.

22 **Medical Insurance**

23 The Petitioner, Amanda Starr Mount, should continue to provide healthcare coverage
24 for the benefit of the Respondent, John Merritt Mount, for so long as such healthcare
25 coverage is available for the Respondent commensurate with the Petitioner's
26 employment, for so long as the parties remain legally separated, and conditioned on
27 the Respondent assuming and satisfying the additional cost to the Petitioner of his
28 healthcare coverage. The Respondent, John Merritt Mount, should also be
responsible for his own co-pays and insurance deductibles and shall indemnify the
Petitioner, Amanda Starr Mount, for any responsibility arising from those expenses.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Motion for Reconsideration

The court's letter opinion dated October 28, 2011, which is attached hereto and incorporated by this reference, should be considered Supplemental Conclusions of Law and should be incorporated into the Decree of Legal Separation as if fully set forth.

Continuing Jurisdiction

In the event it is reasonable, desirable, or necessary to execute any other documents or papers to transfer title or otherwise effectuate the terms of the Decree of Legal Separation, each party should sign the same in a timely and cooperative manner. The court should retain jurisdiction over the parties and over the subject matter of this action for the purposes of enforcing the decree.

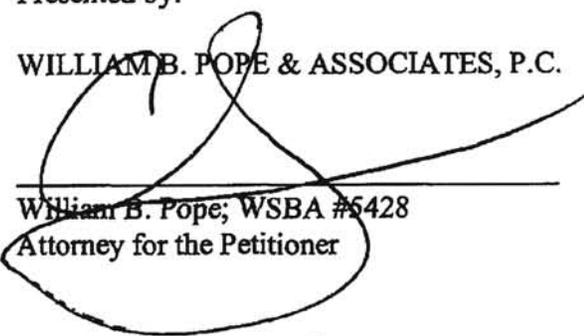
DONE IN OPEN COURT this 9th day of February, 2012.



Judge Anne Hirsch

Presented by:

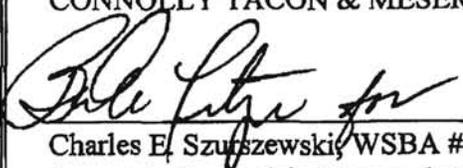
WILLIAM B. POPE & ASSOCIATES, P.C.



William B. Pope; WSBA #5428
Attorney for the Petitioner

Approved as to form and content;
Notice of Presentation waived:

CONNOLLY TACON & MESERVE



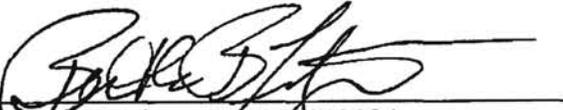
Charles E. Szurszewski, WSBA #8300
Associate Counsel for Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FNFL)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Approved as to form and content;
Notice of presentation waived:

FITZER LAW, LLC


Bertha B. Fitzer, WSBA #12184
Associate Counsel for Respondent

APPENDIX B

5

Superior Court of the State of Washington
For Thurston County
Family and Juvenile Court

Paula Casey, Judge
Department No. 1
Thomas McPhee, Judge
Department No. 2
Christine A. Pomeroy, Judge
Department No. 3
Gary R. Tabor, Judge
Department No. 4
Chris Wickham, Judge
Department No. 5
Anne Hirsch, Judge
Department No. 6
Carol Murphy, Judge
Department No. 7
Lisa L. Sutton, Judge
Department No. 8



2801 32nd Avenue SW, Tumwater, WA 98512
Mailing Address: 2000 Lakeridge Drive SW, Olympia, WA 98502
Telephone: (360) 709-3201 Fax: (360) 709-3256
www.co.thurston.wa.us/fjc

Christine Schaller,
Court Commissioner
Indu Thomas,
Court Commissioner

Marti Maxwell,
Court Administrator
(360) 786-5560

October 28, 2011

Clerk's Action Required

William B. Pope, Jr.
Attorney at Law
1605 Cooper Point Rd. NW
Olympia, WA 9852-8325

Charles E. Szurszewski
Attorney at Law
201 5th Avenue SW, Suite 301
Olympia, WA 98501-1063

LETTER OPINION

RE: *In Re the Marriage of Amanda S. Mount and John M. Mount*
Thurston County Cause No. 10-3-00984-2

Dear Counsel:

Mr. Mount filed a Motion for Reconsideration or New Trial, along with a Motion regarding Sale of House, with the Court on October 13, 2011, asserting that the Court made various errors of law, and abused its discretion in its oral ruling. Mr. Mount asserts, among other things, that the Court either was moved by passion or prejudice in arriving at its rulings, and that there is no evidence or reasonable inference that could be drawn from the evidence at trial that could support the rulings of the Court. The Court has once again carefully reviewed the file, the newly filed documents, (including the declarations submitted by Mr. Mount that contain information not introduced at trial), the transcript of the proceedings and the applicable case law. This letter contains the Court's ruling on Mr. Mount's requests.

To begin, the Court will say that there were many reasons that gave rise to the rulings

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
11 NOV -1 PM 4:29
BETTY J. GOULD, CLERK
BY _____ DEPUTY

0-000000130

issued in this case; some were articulated in the Court's oral comments, some, however, were not. This letter hopefully contains sufficient information to supplement the comments and findings made by the Court in its oral ruling on September 26, 2011.

Background:

The evidence produced at trial proved that Mr. Mount and Ms. Mount had a long term marriage (preceded by a committed intimate relationship of some years), and that they enjoyed a life together that included a great deal of travel financed in part by the generosity of Mr. Mount's family. Both parties worked at times during the marriage. Mr. Mount earned an advanced degree during the marriage. Mr. Mount is 59 years of age and has recently been diagnosed with prostate cancer. He did not submit any evidence at trial (though apparently had it available as indicated in the declaration he filed post trial) as to his prognosis or intended course of treatment, other than that he preferred to treat the cancer with diet. Mr. Mount did testify, however, that at this time there is no impact on his work from the cancer. Ms. Mount is 55 years of age and also received an advanced degree during the marriage. That degree was financed with student loans and is not yet paid off. Mr. Mount believes that Ms. Mount should be responsible for payment of that loan since he did not receive any benefit from it. At this time Mr. Mount earns approximately twice the amount per month as does Ms. Mount, grossing approximately \$90,000 per year, compared to approximately \$55,000 for Ms. Mount. Ms. Mount received a three percent pay cut last year; Mr. Mount received a \$10,000 raise.

Mr. Mount maintained at trial that his separate property estate is valued at approximately \$400,000 and that the parties' community property totaled approximately \$200,000. He asserts that he should receive the entirety of his separate property and that the community property should be divided disproportionately, with Ms. Mount receiving 75% of it.

Mr. Mount and Ms. Mount both testified, credibly, that Mr. Mount was essentially "in charge" of the finances during the marriage. There was also credible testimony that Mr. Mount unilaterally made decisions to spend community assets after the separation without the consent or knowledge of Ms. Mount (specifically including, in part, money "owed" to their son Austin and also repayment of some of his student loans). There was also credible testimony that Mr. Mount did not provide, despite the discovery request, information regarding the Carson inheritance to Ms. Mount's counsel. Further there was credible and unrefuted evidence at trial that Mr. Mount intentionally delayed, with his brother, distribution of his share of his mother's estate until after his dissolution was complete. Mr. Mount testified that he expects to receive \$180,000 to \$190,000 from his mother's estate.

The Scudder IRA:

The Court has reviewed the transcript of the proceedings and specifically reviewed the testimony of Mr. Mount regarding the Scudder IRA. Mr. Mount is correct in asserting that the testimony was unrefuted that that account was initially funded by him and/or his family prior to the relationship of the parties, that a significant amount of the funds deposited during the marriage were specified by the donor (his mother) as intended for his retirement, and that he never intended this account to be community.

The case of *In Re the Estate of Borghi*, 167 Wn. 2d 480, 219 P. 3d 932 (2009) guides the Court's analysis of this issue.

“We begin with basic principles of Washington community property law. First, presumptions play a significant role in determining the character of property as separate or community property. 19 Kenneth W. Weber, *Washington Practice: Family and Community Property Law* § 10.1, at 133 (1997) (“Possibly more than in any other area of law, presumptions play an important role in determining ownership of assets and responsibility for debt in community property law.”). The presumptions are *true* presumptions, and in the absence of evidence sufficient to rebut an applicable presumption, the Court must determine the character of property according to the weight of the presumption. *Id.*...

Second, the character of property as separate or community property is determined at the date of acquisition. Harry M. Cross, *The Community Property Law*, 61 *Wash. L.Rev.* 13, 39 (1986)...

Moreover, the right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear... Significantly, the evidence must show the intent of the spouse owning the separate property to change its character from separate to community property...

Borghi at 484-485 (citing other cases).

Under the reasoning of *Borghi* (and cases cited in *Borghi*) therefore, the funds in the Scudder IRA are Mr. Mount's separate property and in its oral ruling the Court incorrectly characterized those based on its review of the record at that time. It should be noted however, that this case is distinguishable in the Court's mind from *Borghi*, where there was no testimony from the interested parties (who were deceased) as to their intent.

Maintenance:

The Court did, in arriving at its decision regarding maintenance, consider all of the factors outlined in RCW 26.09.090 although the Court did not specifically mention each of the factors in its oral ruling. To be clear, what was and remains particularly significant to the Court on the issue of maintenance are the following: First, Mr. Mount currently earns approximately twice the monthly income as does Ms. Mount. Second, this is a long term marriage (preceded by a committed intimate relationship of some years) and the goal of this Court is to allow, to the extent practicable, both parties to be on similar financial footing as they leave the marriage. Third, 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. Mr. Mount had the ability to present evidence on this issue and chose not to. Further, the Court specifically ordered maintenance was modifiable if Mr. Mount was no longer able, for medical reasons, to work, or if he retired in the normal course. Fourth, Mr. Mount will be receiving a significant amount of separate property, while there was no evidence showing that Ms. Mount has any separate property interests other than her (fairly nominal) retirement. Fifth, both parties are in their mid to late fifties and there was no evidence presented that they are currently unable to work. These were the most significant factors in the Court's mind on the issue of maintenance, although all factors were considered. Maintenance is appropriate under the circumstances of this case and the Court will not reconsider this part of its ruling.

The House:

There was credible testimony that Mr. Mount was in a better position to maintain the home than was Ms. Mount. As testified to at trial, neither party wanted the Court to order the home to be sold and the Court remains of the view that it is unreasonable to require that to occur given the strikingly different approaches the parties have to financial matters, in addition to current market conditions. The Court will not reconsider its ruling on the home, however if the parties decide that they are able to work together cooperatively, with the shared goal of minimizing conflict over the sale of the home, the Court would encourage them to make an agreement to that effect.

The Inheritances:

The Court found the testimony at trial on the issue of inheritances to be troubling. Mr. Mount was in control of all of the information regarding both matters, and the Court (and Ms. Mount) was provided little information on either estate. The exhibit regarding Ed

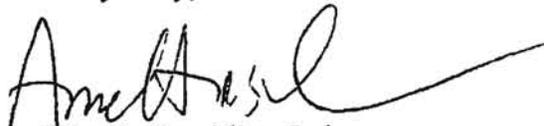
Carson's estate initially offered by Mr. Mount was incomplete; the exhibit ultimately admitted was more detailed, yet contained only the gross, not net, value of the estate. Regarding the estate of Mr. Mount's mother, the Court found the testimony (which was not specifically refuted) credible that Mr. Mount and his brother have delayed the closing of the estate so that evidence was not available at this trial (or the trial of Mr. Mount's brother). The Court therefore had incomplete information about that as well. Mr. Mount testified that his share of the estate was somewhere between \$180,000 to \$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. However, the Court did not rely solely on that one piece of testimony in reaching its overall distribution of property in this case.

Conclusion:

At the end of the day it remains this Court's ruling that a disproportionate division of the community property is warranted after consideration of all of the factors the Court must consider under RCW 26.09.080. The Court is not reconsidering the award other than to remove the Scudder IRA from the community assets. In all other respects the Court reaffirms its earlier ruling. To be clear, the award is that Mr. Mount will receive (as he requested) 25% of the community assets and Ms. Mount will receive 75% of the community assets. Each party will retain their separate assets. The Court is not reconsidering any other part of its initial ruling other than specifically noted in this letter opinion.

Please schedule a date for presentation of orders or, if you are able to agree to the wording of the final documents, the Court will sign them ex parte.

Yours very truly,


Anne Hirsch, Presiding Judge
Family and Juvenile Court

cc: Court File

0-000000134

APPENDIX C

4

IN THE SUPERIOR COURT OF AND FOR THE
COUNTY OF THURSTON
FAMILY & JUVENILE COURT

In re the Marriage of:

No. 10-3-00984-2

~~Amanda Starr~~ Mount,

Declaration of Jerome I. Feldman

Petitioner,

and

John Merritt Mount,

Respondent.

FILED
SUPERIOR COURT
THURSTON COUNTY, WA
2011 OCT 21 PM 1:39
BETTY J. GOULD, CLERK

Jerome I. Feldman, declares under penalty of perjury pursuant to the laws of the State of Maryland, that the following is true and correct:

I am over the age of 18 and have personal knowledge of statements contained herein. I am the attorney handling the Estate of Edward R. Carson (the "Estate"). Mr. Mount is one of the beneficiaries of this Estate.

On March 24, 2011, I received an e-mail from Mr. Mount inquiring about the status of the Estate. It is my understanding that attorneys for Amanda Mount had taken the gross value of the Estate listed on initial documents as the value of the Estate. The initial figures listed on those court documents did not reflect any reduction for assets that might not be recovered. Those figures did not reflect anticipated costs for administration, attorney's fees or taxes.

In response to Mr. Mount's inquiry, I sent an e-mail to him dated the same date. Attached hereto is a true and correct copy of that e-mail indicating an estimate of what Mr. Mount's share of the Estate would most likely be (in the range of \$173,000).

DECLARATION OF
JEROME I. FELDMAN



ORIGINAL

FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

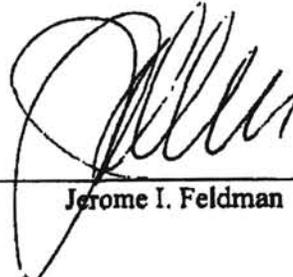
0-000000111

1 The Mounts borrowed \$132,000 from Mr. Carson and secured that loan as a mortgage
2 on their property. That loan provided for monthly payments of interest only with a maturity
3 date of 2013. To my knowledge, no payments on the principal had been made prior to Mr.
4 Carson's death.

5 A partial distribution from the Estate was made to the beneficiaries from the Estate. Mr.
6 Mount's share of that partial distribution was \$52,142.80. That sum was applied to the
7 outstanding balance on the loan. Mr. Mount has received no cash distribution from the Estate.

8 Prior payments received from Mr. Mount to the Estate have been applied to outstanding
9 interest payments.

10 Dated this 21 day of October 2011.



11
12 Jerome I. Feldman

13 STATE OF MARYLAND, COUNTY OF ANNE ARUNDEL, to wit:

14 I HEREBY CERTIFY that on this 21 day of October, 2011, before me, a Notary
15 Public in and for the State and County aforesaid, personally appeared Jerome I. Feldman,
16 known to me (or satisfactorily proven) to be the person whose name is contained on the within
17 instrument and in my presence signed and sealed the same for the purposes therein.

18 Witness the hands and seals this 21 day of October, 2011.

19
20 
21 Notary Public
22 My Commission Expires: 9-13-13

23 Debra L. Coale
24 Notary Public
Anne Arundel County
Maryland

23 DECLARATION OF
24 JEROME I. FELDMAN

Jerome I. Feldman

From: Merritt Mount <mmount@wapartnership.org>
Sent: Monday, March 28, 2011 3:34 PM
To: Jerome I. Feldman
Subject: Re: Estimated share of estate

CERTIFIED TRUE COPY

Jerry,

Thanks for the info. Also, do you have an estimated timeframe of when Ed's estate may be settled?

Thanks,
Merritt Mount
Executive Director
Washington State Community Action Partnership
www.wapartnership.org
mmount@wapartnership.org
360 888-8033

Helping People. Changing Lives

On Mar 24, 2011, at 6:24 AM, Jerome I. Feldman wrote:

Merritt,

I am very sorry to hear about the prostate cancer. I hope that they can zap it and that it is just a bump in an otherwise (relatively) smooth road.

As for the Estate, you are a 10% beneficiary. The gross estate, as it now stands (a few of the assets are valued at numbers that appear higher than what we will recover e.g. Pittsboro property looks like will bring in 25% less than appraised, Horan mortgage looks like at least a 25% haircut) is \$3,060,520.

Then you must subtract deductions (est. \$195,482), taxes (est. \$983,563) and expenses (est. \$150,000). The net, is today estimated to be \$1,731,475. That would put you at \$173,147.50. Please note that these numbers are not final. However, this should give you a better idea than the \$3 million guess.

Jerry

Jerome I. Feldman, Esquire
Bernstein & Feldman, P.A.
900 Bestgate Road, Suite 200
Annapolis, Maryland 21401
Phone: (410) 573-0017
Fax: (410) 573-0049
Website: <http://www.bflaw.com>

This communication may be subject to the attorney-client privilege or the attorney work product privilege or may be otherwise confidential. Any dissemination, copying or use of this communication by or to anyone other than the designated and intended recipient(s) is unauthorized. If you are not the intended recipient, please delete or destroy this communication immediately.

To ensure compliance with requirements imposed by the IRS under Circular 230, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any transaction or matter addressed herein.

From: Merritt Mount [mailto:mmount@wapartnership.org]
Sent: Thursday, March 24, 2011 1:54 AM

To: jerry@bflaw.com
Cc: Bruce Northam
Subject: Estimated share of estate
Importance: High

Hi Jerry,

I hope you are doing great! I am doing well, even with a recent diagnosis of prostate cancer - can you believe it, never a health care in the past!

Reason for my email to you ... I was just informed by my wife that her lawyer has valued my portion of Eddie's inheritance at \$300k+.

Is this accurate. I had understood that it was more in the neighborhood of \$200k

Please advise at your earliest convenience as I am in court on Monday.

Thanks,

Merritt Mount
Executive Director
Washington State Community Action Partnership
www.wapartnership.org
mmount@wapartnership.org
360 888-8033

Helping People. Changing Lives