

No. 43168-8-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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AMANDA STARR MOUNT,

Respondent/Cross-Appellant,

v.

JOHN MERRITT MOUNT,

Appellant/Cross-Respondent.

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COMBINED BRIEF OF RESPONDENT/CROSS-APPELLANT  
AMANDA STARR MOUNT

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Emmelyn Hart, WSBA #28820  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188-4630  
(206) 574-6661  
Attorneys for Respondent/Cross-Appellant  
Amanda Starr Mount

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A. INTRODUCTION

This case involves an unremarkable action to grant a legal separation to Amanda Starr Mount and John Merritt Mount.<sup>1</sup> The only distinguishing features are the value of Merritt's separate property, which was more than double the value of the community property, and his unwillingness to meet his financial obligations post-separation.

This appeal follows a dissolution action converted to a legal separation and the trial court's award of maintenance to Amanda in addition to a disproportionate community property award. Merritt appeals the award and principally contends that the trial court failed to consider all six factors established in RCW 26.09.090 before awarding maintenance. His complaints are magnified by his mistaken belief that there was a conscious effort or conspiracy to show him at fault.

It is well-established that this Court will not reverse a trial court's decisions in a family law proceeding absent a manifest abuse of discretion and that the Court cannot substitute its judgment for that of the trial court unless the trial court's decisions rest on untenable grounds. The trial court carefully exercised its discretion when dividing the couple's assets and liabilities and awarding maintenance. Its findings of fact are supported by

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<sup>1</sup> The parties will be referred to by their familiar names to avoid confusion; no disrespect is intended.

substantial evidence. Merritt simply wants a “re-do” of the trial to maximize his share of the marital assets. The Court should reject his self-serving exercise and award Amanda her attorney fees and costs on appeal.

Amanda cross-appeals the trial court’s attorney fee award, arguing that the trial court categorically refused to exercise its discretion when it refused to reconsider that award. The trial court abused its discretion by refusing to pass upon a matter entirely within its discretion, thereby improperly shifting the responsibility for that decision to this Court. Consequently, this Court should reverse and order the trial court to increase Amanda’s fee award based on the evidence she submitted of Merritt’s post-trial motions and misconduct and the fees she incurred in defending against them.

**B. RESPONSE TO MERRITT’S ASSIGNMENTS OF ERROR**

Amanda acknowledges Merritt’s 16 assignments of error, but believes that the issues pertaining to those assignments are more appropriately and simply expressed as follows:

(1) Did the trial court appropriately exercise its discretion by awarding maintenance to the wife after it considered all of the factors established in RCW 26.09.090, substantial evidence supports the court’s findings of fact on the issue, and the error, if any, was invited by the husband?

(2) Did the trial court appropriately exercise its discretion by awarding the wife 75% of the community property and by awarding the husband only 25% when the husband proposed the disparate award and he retained significant separate assets post-separation?

(3) Did the trial court appropriately exercise its discretion by awarding attorney fees and costs to the wife after balancing her financial need against the husband's ability to pay?

C. COUNTERSTATEMENT OF THE CASE<sup>2</sup>

(1) Merritt's Statement of the Case Violates the Rules of Appellate Procedure

Amanda must begin her counterstatement of the case by pointing out the obvious: Merritt's statement of the case violates RAP 10.3(a)(5)<sup>3</sup> because it is hopelessly entangled with inappropriate argument, which makes it challenging to distinguish between what is fact and what is not. Merritt's statement is a far cry from the "fair recitation" required by the rules and places an unacceptable burden on Amanda and the Court. *See Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P.2d 545 (1990), *review denied*, 116 Wn.2d 1021 (1991).

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<sup>2</sup> Copies of the trial court's findings of fact and conclusions of law, decree, and order denying reconsideration of Amanda's fee request are in the Appendix.

<sup>3</sup> RAP 10.3(a)(5) requires a brief to contain a "fair statement of the facts and procedure relevant to the issues presented for review, without argument."

Additionally, Merritt improperly relies on evidence not before the trial court. As this Court is well-aware, the record on appeal consists only of those pleadings and exhibits before the trial court and considered by it in connection with the decision from which the appeal is taken. RAP 9.1.<sup>4</sup>

Here, Merritt asked the trial court to “transmit all exhibits admitted at trial to the Court of Appeals” when he designated the record on appeal. CP 3. But he cites to exhibits that were neither offered nor admitted into evidence during trial. For example, he refers to exhibit 11 to argue that Amanda has the same level of education that he does and that she has a significant employment history. Br. of Appellant/Cross-Resp’t at 11, 35. Similarly, he refers to exhibit 13 to provide evidence of his professional background. *Id.* at 11, 12. And he refers to exhibit 17 to argue that he provided his medical records to the trial court and that those records outline his treatment options for prostate cancer, including the side effects associated with each. *Id.* at 12-13, 30. While exhibits 11, 13, and 17 may have been marked as exhibits before the trial began, they were never offered or admitted into evidence, even for illustrative purposes. CP 16-

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<sup>4</sup> RAP 9.1(a) states: The “record on review” may consist of (1) a “report of proceedings”, (2) “clerk’s papers”, (3) exhibits, and (4) a certified record of administrative adjudicative proceedings.

17, 19-20; RP I:4.<sup>5</sup> Accordingly, they should not be considered by this Court on appeal.

Under RAP 10.7, this Court may strike portions of a brief and sanction a party who files a brief that fails to comply with these rules. *Sheikh v. Choe*, 156 Wn.2d 441, 446-47, 128 P.3d 574 (2006). Likewise, the Court may impose sanctions under RAP 18.9(a) when a party fails to comply with the rules. Insofar as Merritt has submitted an improper brief and attempted to circumvent the rules concerning the record on appeal, Amanda respectfully requests that the Court impose sanctions against him pursuant to RAP 10.7 and RAP 18.9(a).

(2) Response to Merritt's Factual Contentions

Regardless of the irregularities in Merritt's brief, the Court should keep the following facts in mind when deciding this appeal:

Following a six year intimate relationship, Amanda and Merritt married in July 1988. CP 7. They had three children together. CP 7-8. They separated in June 2010 after nearly 22 years of marriage. CP 7.

Amanda and Merritt both had periods of employment and unemployment throughout the marriage and both earned advanced degrees during the marriage. RP I-9, 41, 58. Amanda originally stayed home to

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<sup>5</sup> "RP I" refers to the verbatim report of proceedings from the single day of trial, which was held on September 12, 2011. "RP II" will refer to the court's oral ruling, which it issued on September 13, 2011.

raise the children. RP I:9. She is now employed with the Superintendent of Public Instruction. RP I:16. Merritt serves as the Executive Director of the Washington State Community Action Partnership. RP I:50. He earns approximately twice as much as Amanda. RP I:16, 23. He received a \$10,000 bonus in 2011; Amanda experienced a 3% pay cut. RP I:16; CP 131. His separate property was worth twice as much as the community property. RP I:23-24; CP 197.

Amanda petitioned to dissolve the couple's marriage in July 2010.<sup>6</sup> CP 6-11. Merritt responded in October 2010, admitting all of the allegations in the petition. CP 12-14. The couple had relatively few debts when they separated, which included two mortgages/loans on their family home and some credit card debt. CP 7, 13, 32. They had various assets, including the family home, investment and retirement accounts, vehicles, and other personal property. CP 210-11. Merritt also expected to receive two significant inheritances as his separate property: one from his friend, Ed Carson, and one from his mother, Mary Mount. CP 24-30.

The trial court, the Honorable Anne Hirsch, heard testimony from the couple during a one day bench trial limited to the property division,

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<sup>6</sup> The dissolution petition was later converted to a petition for legal separation to allow Merritt to remain covered by Amanda's medical insurance. CP 137, 144; RP I:16-17.

asset tracing, and the award of maintenance.<sup>7</sup> CP 16-18. Merritt proposed a disproportionate division of the community property, with 75% going to Amanda and 25% going to him. RP I:132-33; CP 134, 158; Ex. 42. He also proposed that they retain their separate assets and agreed that maintenance for Amanda in some amount was appropriate. Ex. 42; CP 7-8, 13; RP I:242. Amanda proposed an equal division of the community estate, but asked that Merritt be responsible for paying her attorney fees and student loan. CP 224. Like Merritt, she proposed that the couple retain their separate assets. CP 224. She requested a maintenance award of \$1,500 per month based on the substantial discrepancy in the couple's incomes, the long duration of the marriage, and the other factors listed in RCW 26.09.090. CP 212, 214-17; RP I:21-22.

During the trial, Amanda and Merritt disagreed on the amount of money Merritt was expected to inherit from Carson and from his mother. CP 24-30. RP I:117. Merritt testified that he was to inherit 10% of Carson's estate. RP I:115. Amanda presented evidence that the gross value of that estate was approximately \$3.2 million. RP I:24, 117; Ex. 7. Merritt suggested the value was closer to a net of \$2.2 million. RP I:117.

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<sup>7</sup> At the time of trial, only one child remained dependent on Amanda and Merritt for support. CP 18. The couple agreed to share residential placement of the child and entered into an agreed parenting plan on the day of trial. CP 18; RP I:15.

By the time of trial, he had already received a \$52,142.80 distribution from Carson's estate. CP 112; RP I:121, 124, 136; Ex. 40.

Merritt also testified that he was to inherit one-third of his mother's estate. RP I:128. But he did not produce any evidence documenting the value of that estate. RP I:129-30. Instead, he and his brother had agreed to delay closing their mother's estate so that the evidence of its value would not be available until after both of their divorce proceedings concluded. RP I:25, 128. When the trial court excluded evidence of the accounts that Merritt's mother had left when she died, he had nothing to prove the value of her estate. RP I:127, 129-31. By contrast, Amanda presented evidence that Merritt was likely to inherit approximately \$200,000 from his mother's estate. CP 211; Ex. 6.

Merritt was diagnosed with prostate cancer before trial. RP I:74-78. He testified that he made a conscious choice to delay a treatment decision until after the trial, but that he preferred to treat his cancer with diet and alternative medicine. CP 116; RP I:77-78. He also testified that the cancer was not impacting his ability to work. RP I:78. He did not submit any medical records documenting his condition or his prognosis until he requested reconsideration post-trial. CP 116; RP I:77.

The trial court issued an oral ruling on September 26, 2011, identifying the couple's assets and liabilities, characterizing their property,

both community and separate, and directing a division that was just and equitable. CP 23; RP II:3-14. The trial court divided the community assets as Merritt suggested, awarding 75% to Amanda and 25% to him, and awarded them their separate property.<sup>8</sup> RP I:132-33; RP II:13. The court awarded the family home to Merritt, but ordered him to pay 75% of its equity to Amanda.<sup>9</sup> RP II:11.

The trial court found the testimony at trial on the issue of Merritt's inheritances troubling. CP 133; RP II: 7. Merritt was in control of all of the information about those estates, but provided little information to the trial court or to Amanda about them. CP 133. The trial court determined that the evidence he produced about Carson's estate was incomplete and that the best evidence of the estate's value was the certified document that Amanda produced showing its gross value.<sup>10</sup> CP 134; RP I:117, 120. The evidence that Merritt submitted concerning his mother's estate was

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<sup>8</sup> The trial court did not value the couple's personal property, vehicles, or other possessions because they mutually resolved those distributions. CP 155.

<sup>9</sup> The trial court found that Amanda and Merritt maintained unrealistic positions about the value of the family home. RP II:11. The court determined the equity in the house by averaging the values proposed by the parties and then subtracting both mortgages. That left the court with equity of \$34,925, which it divided in the same proportion as the rest of the community property. RP II:11.

<sup>10</sup> Merritt submitted new evidence *post-trial* that estimated he would only inherit about \$173,000 from Carson's estate. CP 39. But that email was not a certified statement or a formal accounting, *nor was it admitted at trial*. It was merely a "guesstimate" by the estate's probate counsel. CP 39, 105, 226.

likewise incomplete. CP 134. The trial court determined that Amanda's evidence about the value was more credible. CP 211, 134.

The court also found that Amanda had a limited ability to meet her financial needs, that Merritt had significant financial resources available to him, and that the parties had been in a long-term marriage and enjoyed a comfortable lifestyle.<sup>11</sup> RP II:5, 13-14. Based on these findings, the court awarded Amanda \$1,500 per month in maintenance and \$7,000 in attorney fees. RP II:13-14. For the same reasons, the court also placed the responsibility for repayment of Amanda's student loan on Merritt. RP II:13. The court noted that even with the disproportionate award to Amanda, she was still going to receive significantly less than Merritt because of the value of his separate property. RP II:16-17.

Merritt moved for reconsideration, asserting that the trial court made various errors of law and abused its discretion. CP 24-30, 77-85, 115-29. He also moved the trial court for an order listing the family home for sale. CP 76, 85-87. Amanda objected. CP 98-102, 104-110, 225-233.

The trial court issued a memorandum decision on October 28, 2011 denying Merritt's motions in part and granting them in

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<sup>11</sup> Merritt refers only to the trial court's oral ruling on maintenance, seeming to suggest that the court's reasoning was inadequate to support the award. Br. of Appellant/Cross-Resp't at 14. In doing so, he overlooks the trial court's detailed findings of fact. CP 153.

part. CP 130-134. In doing so, the court recognized that Merritt was improperly relying on new evidence to support his motions that had not been submitted to the court. CP 130. The court granted Merritt's request to recharacterize one of his retirement accounts as his separate property, but denied the remainder of his requests. CP 132-34. Recharacterizing the account as separate property reduced Amanda's community property award anywhere from \$60,000 to \$63,000. CP 263.

The trial court entered extensive findings of fact and conclusions of law and a decree of legal separation on February 9, 2012, incorporating by reference its October 28th letter opinion. CP 149-66, 159. The trial court divided the marital estate roughly 75% to Amanda and 25% to Merritt. CP 135. The trial court also awarded Amanda \$7,000 in attorney fees and costs and monthly maintenance of \$1,500. CP 138, 142. Taking into consideration the value of Merritt's separate property and the maintenance award, Merritt left the marriage with 53% of the couple's combined income while Amanda left it with 47%. CP 233.

Amanda moved for reconsideration of the trial court's attorney fee award based on a substantial change of circumstances brought about by Merritt's post-trial motions and misconduct. CP 194-98, 234-237, 261-69. The trial court denied the motion. CP 275-78.

Merritt appealed. CP 166-93. Although he initially contends in his opening brief that his appeal is limited, his assignments of error and the issues relating to those assignments belie his claim.<sup>12</sup> Br. of Appellant/Cross-Resp't at 2-8, 42-43. Amanda cross-appealed the trial court's order denying her request for reconsideration of the attorney fee award, which was entered on May 31, 2012. CP 274-80.

D. ARGUMENT IN SUPPORT OF RESPONSE

(1) Standards of Review

In the area of domestic relations, the appellate courts have historically been loath to overturn trial court decisions. “[T]rial court decisions in marital dissolution proceedings are rarely changed on appeal.” *In re Marriage of Williams*, 84 Wn. App. 263, 267, 927 P.2d 679 (1996), *review denied*, 131 Wn.2d 1025 (1997). Such decisions are difficult at best. As our Supreme Court observed in *In re Marriage of Landry*, 103 Wn.2d 807, 699 P.2d 214 (1985):

Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. *The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court.* The trial court's decision will be affirmed

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<sup>12</sup> Responding to Merritt's arguments is difficult because he argues on the one hand that he seeks only a limited remedy. Br. of Appellant/Cross-Resp't at 2-3. But then he argues on the other that the trial court's resolution of the case and the lack of a factual foundation for certain findings constitute a manifest abuse of discretion requiring reversal. *Id.* at 2, 3-8.

unless no reasonable judge would have reached the same conclusion.

*Id.* at 809-10 (citations omitted) (emphasis added). See also, *In re Marriage of Zahm*, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999) (noting that a trial court's award of maintenance is reviewed for an abuse of discretion).

A trial court manifestly abuses its discretion if it makes an untenable or unreasonable decision. See *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989), review denied, 114 Wn.2d 1002 (1990). A 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. See *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citation omitted). When there is no abuse of discretion, this Court will uphold the trial court. See *Landry*, 103 Wn.2d at 810-11.

This Court reviews findings of fact entered after a bench trial to determine whether they are supported by substantial evidence and, if so, whether those findings support the trial court's conclusions of law. See, e.g., *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Substantial evidence is evidence that would persuade a

reasonable fact finder of the truth of the declared premise. *See, e.g., Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). This Court reviews questions of law and conclusions of law de novo. *See Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

(2) The Distribution of Property in Dissolution Actions Generally

All property, both community and separate, is before the court for distribution in a dissolution action. *Friedlander v. Friedlander*, 80 Wn.2d 293, 305, 494 P.2d 208 (1972). In a dissolution proceeding, the trial court must distribute the marital property in a manner that is “just and equitable after considering all relevant factors.” RCW 26.09.080. The list of non-exclusive factors the court should consider includes:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage; and
- (4) The economic circumstances of each spouse at the time the division of property is to become effective.

*Id.*

These statutory factors are not limiting and the trial court may consider other factors such as the age, health, education, and employability of the couple. *See In re Marriage of Tower*, 55 Wn. App.

697, 699, 780 P.2d 863 (1989), *review denied*, 114 Wn.2d 1002 (1990). No single factor is conclusive or given greater weight than the others. *See In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985), *cert. denied*, 473 U.S. 906, 105 S. Ct. 3530, 87 L.Ed.2d 654 (1985); *DeRuwe v. DeRuwe*, 72 Wn.2d 404, 408, 433 P.2d 209 (1967).

A fair and equitable property division does not require mathematical precision. *See In re Marriage of Crosetto*, 82 Wn. App. 545, 557, 918 P.2d 954 (1996). *See also, In re Marriage of Clark*, 13 Wn. App. 805, 810, 538 P.2d 145, *review denied*, 86 Wn.2d 1001 (1975) (noting the key to an equitable distribution is fairness). Nor does it require the court to divide the property equally. *See In re Marriage of Rockwell*, 141 Wn. App. 235, 255, 170 P.3d 572 (2007), *review denied*, 163 Wn.2d 1055 (2008) (affirming 60/40 property distribution). Instead, fairness is obtained by considering all the circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules. *See Tower*, 55 Wn. App. at 700.

(3) The Trial Court Was in the Best Position to Judge the Credibility of the Witnesses and the Persuasiveness of the Evidence

Many of Merritt's challenges are best characterized as arguments about the trial court's credibility determinations and the weight that it placed on the evidence. Br. of Appellant/Cross-Resp't at 4-5, 7, 23. The

Court should decline to consider those arguments because they are nothing more than a thinly veiled attempt to usurp the trial court's authority.

It is well-established that this Court does not review credibility determinations or weigh the evidence on appeal even though it may disagree with the trial court in either regard. *See, e.g., In re Marriage of Meredith*, 148 Wn. App. 887, 891 n.1, 201 P.3d 1056, *review denied*, 167 Wn.2d 1002, 220 P.3d 207 (2009). Nor does the Court substitute its judgment for that of the trial court. *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996). The trial court has the witnesses before it and is able to observe them and their demeanor upon the witness stand. *In re Sego*, 82 Wn.2d 736, 740, 513 P.2d 831 (1973). Accordingly, the trial court is more capable of resolving questions touching upon both weight and credibility than this Court. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). This Court thus defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The Court's duty, on review, is to determine whether there exists the necessary quantum of proof to support the trial court's findings of fact and, if so, whether the findings support the conclusions of law. *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999).

Here, the trial court saw, heard, and evaluated both Amanda and Merritt, their testimony, their demeanors, and their evidence. This Court should not, and cannot, second guess those determinations. *In re Pawling*, 101 Wn.2d 392, 401, 679 916 (1984).

(4) The Trial Court Considered the Additional Evidence that Merritt Submitted for the First Time on Reconsideration

After trial, Merritt moved for reconsideration and for an order listing the family home for sale. CP 24-30, 77-85, 115-29. He submitted new declarations and attached additional evidence relating to his health and to his inheritances not introduced during trial. CP 86, 111-13, 115-16. The trial court declined to reconsider the property award, except to recharacterize one of Merritt's retirement accounts as his separate property. CP 132-34. Merritt appears to argue on appeal that the trial court erred by refusing to consider his new evidence. Br. of Appellant/Resp't at 5, 9, 30, 32-33, 38-39. He is mistaken. The trial court considered the additional evidence, but found it unpersuasive and declined to change its mind.

For example, Merritt contends that the trial court refused to appreciate his health issues and that "nowhere in its multiple decisions does the trial court indicate that it considered any of this evidence or that it read the medical records that had been submitted." Br. of

Appellant/Cross-Resp't at 30. The trial court could not have considered Merritt's medical records at the outset *because they were never offered or admitted into evidence during trial. Supra* at 5. But more importantly, the trial court clearly stated in its reconsideration decision that it: "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." CP 130 (emphasis added). That Merritt does not like the outcome following reconsideration does not mean that the trial court refused to consider his new evidence. The trial court articulated the evidence it reviewed on reconsideration, which included Merritt's new evidence, but was simply unpersuaded to change its mind. That is not error.

More than likely, Merritt's real argument is with how the trial court viewed his new evidence and not with its failure to consider it at all. The discussion below resolves that question. Thus, the Court need not further address the merits of this argument.

(5) The Trial Court's Maintenance Award Was a Proper Exercise of Discretion

(a) Merritt invited the error about which he complains

The trial court did not abuse its discretion here, if for no other reason than because it gave Merritt essentially what he requested. But

even if this Court determines that the trial court erred by awarding maintenance to Amanda in addition to a disproportionate share of the community property, Merritt invited the error. He seems to forget that he proposed the disproportionate property award and that he *agreed* some amount of maintenance was reasonable. Ex. 42; CP 7-8, 13.

Under the doctrine of “invited error,” a party may not set up an error by adopting a position that induces the trial court to take an action and then complain of the trial court’s action on appeal. *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (“This court will deem an error waived if the party asserting such error materially contributed thereto.”); *Casper v. Esteb Enters., Inc.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004).

Here, Merritt encouraged the trial court’s decision to divide the marital estate the way that it did. Merritt himself proposed a disproportionate division of the community property, with 75% going to Amanda and 25% going to him. RP I:132-33; CP 134, 158; Ex. 42. He also proposed that they retain their separate assets and agreed that maintenance for Amanda in some amount was appropriate given his separate assets. Ex. 42; CP 7-8, 13. Contrary to the assertion in his brief,

at no time did he condition his proposed maintenance award on an equitable or equal distribution.<sup>13</sup> Ex. 42.

Merritt's complaint that the trial court's award was not "fundamentally fair," br. of appellant/cross-resp't at 37, should fall on deaf ears. Merritt essentially got what he asked for. CP 41, 70-71; RP 1232, 2195. Any alleged error was invited.

(b) The trial court properly awarded maintenance

Even if the Court does not consider the error to be invited, the trial court's maintenance award was a proper exercise of discretion.

Merritt contends that the maintenance award is excessive and an abuse of discretion. Br. of Appellant/Cross-Resp't at 28-37. Specifically, he argues that the court erred by failing to consider his medical needs and the couple's needs and abilities to pay where Amanda had the financial resources at the time of the divorce to allow her to meet her needs independently. *Id.* But Amanda's alleged capacity for self-support does not automatically preclude the court's maintenance award as Merritt

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<sup>13</sup> The trial court skewed the overall property division even more in Merritt's favor post-trial because it recharacterized one of his retirement accounts as his separate property. CP 132-34. Recharacterizing that account as separate property reduced Amanda's community property award anywhere from \$60,000 to \$63,000 and increased Merritt's separate property award by more than \$83,000. Br. of Appellant/Cross-Resp't at 33 n.40.

claims. On the contrary, her ability to independently meet her needs is only *one* factor to be considered. RCW 26.09.090(1).<sup>14</sup>

It is within the trial court's discretion to grant maintenance in an amount and for a period of time the court deems just. RCW 26.09.090(1); *In re Marriage of Bulicek*, 59 Wn. App. 630, 800 P.2d 394 (1990). That discretion is limited only by the requirement that the amount and duration of the award be just in light of the six non-exclusive statutory factors. *In re Marriage of Washburn*, 101 Wn.2d 168, 178, 677 P.2d 152 (1984).

RCW 26.09.090(1) states the factors that the trial court should consider when granting maintenance, including: (a) the financial resources of the parties; (b) the time necessary to acquire sufficient education or training to enable the spouse seeking maintenance to find employment appropriate to his or her skill; (c) the standard of living established during the marriage; (d) the duration of the marriage; (e) the age, physical and emotional condition, and financial obligations of the spouse seeking support; and (f) the ability of the spouse from whom support is sought to meet his or her needs and financial obligations while meeting those of the

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<sup>14</sup> RCW 26.09.090(1) provides, in part:

In a proceeding for dissolution of marriage, . . . , the court may grant a maintenance order for either spouse or domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct, after considering all relevant factors[.]

other spouse. The standard of living during the marriage and the couple's post-dissolution economic conditions are paramount concerns. *See In re Marriage of Sheffer*, 60 Wn. App. 51, 57, 802 P.2d 817 (1990); *In re Marriage of Morrow*, 53 Wn. App. 579, 586, 770 P.2d 197 (1989). Maintenance may serve to equalize the parties' standard of living for an appropriate period of time. *Washburn*, 101 Wn.2d at 178-79 (noting maintenance is a flexible tool by which the parties' standard of living may be equalized for an appropriate time).

Like the *Washburn* court, the trial court here utilized maintenance as a flexible tool to more nearly equalize the parties' post-dissolution standard of living. CP 133, 153 (FF 2.12). The trial court's reasoned consideration of the non-exclusive factors listed in RCW 26.09.090 supports its maintenance award of \$1,500 per month until Merritt can no longer work due to medical reasons or his retirement.

The testimony reflects that Amanda and Merritt enjoyed a comfortable standard of living during their 22-year marriage. RP I:134. They traveled the world and pursued things that were meaningful to them. RP I:30, 56, 134. They lived in several different countries. RP I:57. At times, they did not have to work. RP I:134. They were both able to obtain graduate degrees. RP I:28, 41, 154. But today, Amanda does not live on an income close to the income that supported the couple's standard of

living during the marriage. She makes approximately two times less than Merritt. RP I:16. She is not likely to achieve the financial independence that he enjoys, especially considering that she experienced a 3% pay cut and he received a \$10,000 bonus. *See* RCW 26.09.090(1)(a). She does not have separate assets as valuable as Merritt's separate assets. RP I:23-24.

By contrast, the testimony reflects that Merritt is capable of paying the maintenance award without sacrificing his own needs. Neither his cancer nor his alternative treatment is impacting his ability to work. RP I:78. He will inherit a significant sum of money from the estates of Carson and his mother once the estates are settled. Under the statute, the trial court was only required to consider his ability to meet his needs and his financial obligations while meeting those of Amanda and nothing more. The court did so.

As the court stated in its memorandum decision on reconsideration, which was later incorporated by reference into its formal findings and conclusions:

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.

CP 133. The trial court later found in Finding of Fact 2.12:

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.

CP 153.

Merritt weighs these same factors and urges that proper consideration militates against an award of maintenance because the trial court did not consider all the factors listed in RCW 26.09.090. Br. of

Appellant/Cross-Resp't at 28-37. The trial court is not required to enter a specific factual finding on each of the statutory factors; rather it must only consider the listed factors. RCW 26.09.090(1). "Ideally, trial courts will enter findings of fact on each factor." *In re Marriage of Horner*, 151 Wn.2d 884, 895, 93 P.3d 124 (2004). A court does not err by failing to enter such findings if substantial evidence was presented on each factor and the court's oral opinion and written findings reflect it considered each. *Id.* at 896. More importantly, it is the trial court's prerogative and duty to weigh these factors, not this Court's. *In re Marriage of Zahm*, 138 Wn.2d 213, 227, 978 P.2d 498 (1999); *In re Marriage of Brossman*, 32 Wn. App. 851, 854, 650 P.2d 246 (1982).

The trial court here went through each statutory factor individually in reaching its conclusion to grant maintenance. Its memorandum opinion and findings show that it considered the relevant factors. Both the memorandum opinion and findings as a whole reflect that the court considered the income and financial obligation of both parties, the standard of living during the marriage, the duration of the marriage, and the parties' educations. Where the trial court thoughtfully considered the relevant statutory factors in RCW 26.09.090 and thus acted within its discretion when setting maintenance, this Court should affirm. *Zahm*, 138 Wn.2d at 226-27. *See also, In re Marriage of Mathews*, 70 Wn. App.

116, 123, 853 P.2d 462, *review denied*, 122 Wn.2d 1021 (1993) (holding that a maintenance award that does not evidence a fair consideration of the statutory factors constitutes an abuse of discretion requiring reversal).

(6) The Trial Court's Award of Attorney Fees to Amanda and Payment by Merritt of Her Student Loan Was a Proper Exercise of Discretion

Merritt contends that the trial court erred by ordering him to pay a portion of Amanda's attorneys fees and costs and her student loan. Br. of Appellant/Cross-Resp't at 40-41. But he provides no legal authority for this argument; consequently, the Court should not consider it. RAP 10.3(a)(6).<sup>15</sup> *See also, Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (noting the Court need not consider arguments not supported by any citation of authority); *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

Even if the Court decides to consider the argument despite the lack of legal authority to support it, the trial court did not error in making this

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<sup>15</sup> RAP 10.3(a)(6) states: "An appellant must provide argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record."

award. In family law actions, RCW 26.09.140<sup>16</sup> permits a fee award as a matter of discretion. The award will not be disturbed absent proof that the discretion exercised was clearly untenable or manifestly unreasonable. *See Tower*, 55 Wn. App. at 697.

In making a fee award, the trial court must balance the needs of the spouse requesting the fees with the ability of the other spouse to pay. RCW 26.09.140. A spouse's receipt of substantial property or maintenance does not preclude that spouse from also receiving an award of attorney fees and costs when the other spouse remains in a much better position to pay. *See In re Marriage of Hadley*, 88 Wn.2d 649, 659, 565 P.2d 790 (1977); *Suther v. Suther*, 28 Wn. App. 838, 627 P.2d 110 (1981).

The record here indicates that the trial court considered Amanda's need and Merritt's ability to pay when making every discretionary determination it was required to make in this case. The record clearly reflects Amanda's need for fees, which was highlighted in her financial declaration and again in her trial testimony. Ex. 2; RP I:16, 23; CP 107.

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<sup>16</sup> RCW 26.09.140 provides:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after the entry of judgment.

Likewise, Merritt seems to forget that he suggested that he take responsibility for Amanda's loan. Ex. 42. The trial court did not abuse its discretion by awarding attorney fees and costs to Amanda under RCW 26.09.140 and by requiring Merritt to pay her student loan.

(7) Merritt Is Not Entitled to Attorney Fees and Costs on Appeal

Merritt *admits* that he received significant separate property as a result of his inheritances, but nevertheless requests that he be awarded attorney fees and costs under RCW 26.0.090 and RAP 18.1(b). Br. of Appellant/Cross-Resp't at 24, 42. His request should be denied.

Merritt requests an award of attorney fees "to offset the cost of pursuing his appeal," but offers no further argument supporting this request as required by RAP 18.1(b). RAP 18.1 "requires more than a bald request for attorney fees on appeal." *Thweatt v. Hommel*, 67 Wn. App. 135, 148, 834 P.2d 1058 (1992). He also has not demonstrated his need and Amanda's ability to pay as required by RCW 26.09.140 to warrant such an award. Consequently, his request for attorney fees should be denied.

E. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

(1) Assignments of Error

1. The trial court erred by entering finding of fact number 2.15.

2. The trial court erred by entering conclusion of law number 3.7.

3. The trial court erred by entering an order on May 31, 2012 denying Amanda's request for reconsideration of the attorney fee award.

(2) Issue Pertaining to Assignments of Error

Did the trial court abuse its discretion when it categorically refused on reconsideration to pass upon a matter entirely within its discretion, thereby improperly shifting the responsibility for the award of attorney fees and costs at trial to this Court? (Assignments of Error Nos. 1-3)

F. SUMMARY OF ARGUMENT IN SUPPORT OF AMANDA'S CROSS-APPEAL

The trial court refused to reconsider the amount of attorney fees and costs awarded to Amanda because the parties had already appealed. The trial court erred by refusing to pass upon a matter entirely within its discretion, thereby improperly shifting the responsibility for that decision to this Court. The trial court's failure to exercise discretion is an abuse of discretion.

The Court should reverse the award of attorney fees to Amanda and order the trial court to increase that fee award based on the evidence she submitted of Merritt's post-trial motions and misconduct and the fees she incurred in defending against them.

The Court should also award Amanda her reasonable attorney fees and costs on appeal based on her need and Merritt's ability to pay, and on the frivolous nature of Merritt's appeal.

G. ARGUMENT IN SUPPORT OF AMANDA'S CROSS-APPEAL

(1) Standard of Review

This Court reviews a trial court's denial of a motion for reconsideration for abuse of discretion. *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 203-04, 810 P.2d 31, *review denied*, 117 Wn.2d 1017 (1991). Abuse of discretion occurs when the trial court's decision rests on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

(2) The Trial Court Abused Its Discretion By Refusing to Reconsider the Amount of Fees Awarded to Amanda

After balancing Amanda's need for fees against Merritt's ability to pay them under RCW 26.09.140, the trial court awarded Amanda \$7,000 in attorney fees and costs. RP II:13-14. Amanda moved for reconsideration, arguing a substantial change in circumstances caused by Merritt's post-trial motions and misconduct warranted an increase in her fee award. CP 194-98, 234-237, 261-69. The trial court denied the motion. CP 275-78. The trial court abused its discretion by failing to

exercise discretion. *See State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Although Amanda asked the trial court to exercise its discretion on reconsideration, it refused to do so. Instead, the trial court stated:

. . . it is the opinion of the undersigned that *regardless of what action this court takes, or does not take, the matter will be addressed at the Court of Appeals*. If it chooses to address the issue of attorney fees, the Court of Appeals will do so.

All of the above is provided by way of background and for the purpose of underscoring this court's belief that it is time for the trial court level proceedings to be at an end, and the parties pursue their respective positions at the Court of Appeals. It is for this reason that the court is declining at this time to further reconsider its ruling in any respect.

CP 278. The trial court categorically refused to exercise its discretion because the parties had already appealed. The parties' appeals do not permit the trial court to shirk its responsibilities. Under RAP 7.2(e), the trial court retains the authority to decide a post-trial motion for reconsideration.

The trial court erred by refusing to pass upon a matter entirely within its discretion, thereby improperly shifting the responsibility for that decision to this Court. Where the trial court refused to exercise its discretion, this Court should reverse and order the trial court to increase

Amanda's award of attorney fees and costs at trial based on the evidence of Merritt's post-trial motions and misconduct.

H. AMANDA IS ENTITLED TO HER ATTORNEY FEES AND COSTS ON APPEAL

Attorney fees are recoverable in proceedings for a legal separation upon a showing of financial need and ability to pay. RCW 26.09.140. Pursuant to RAP 18.1(b), a party seeking attorney fees on appeal must devote a section of the opening brief to a request for such fees. A party who fails to comply with this procedure is not entitled to an award of attorney fees. *See, e.g., Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 772 n.17, 162 P.3d 1153 (2007).

Amanda is entitled to her reasonable attorney fees on appeal. RAP 18.1; RCW 26.09.140. This Court may award fees on appeal after considering the financial resources of the parties and balancing Amanda's need against Merritt's ability to pay. *In re Marriage of Wilson*, 117 Wn. App. 40, 51, 68 P.3d 1121 (2003). A careful assessment of Amanda's financial need, as will be described in her forthcoming RAP 18.1(c) affidavit, balanced against Merritt's ability to pay, firmly supports the conclusion that Amanda should recover her fees on appeal.

In deciding attorney fees on appeal under RCW 26.09.140, this Court also examines the arguable merit of the issues on appeal and the

financial resources of the respective parties. *In re Marriage of Booth*, 114 Wn.2d 772, 779, 791 P.2d 519 (1990). Given the thinness of the merits of Merritt's appeal, and the continuing disparity of income between the couple, this Court should award Amanda fees on appeal. Her receipt of substantial property or maintenance does not preclude her from also receiving an award of attorney fees and costs when Merritt remains in a much better position to pay. *Hadley*, 88 Wn.2d at 659.

The Court may also award terms and compensatory damages for a frivolous appeal or for a party's failure to comply with the rules of appellate procedure. RAP 18.9(a); RAP 18.1. *See also, In re Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114, *review denied*, 100 Wn.2d 1023 (1983) (noting an appeal may be so devoid of merit as to warrant the imposition of sanctions and an award of attorney fees). The concept of a frivolous appeal has been established for more than 30-years. *Streater v. White*, 26 Wn. App. 430, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980). An appeal is frivolous when it presents no debatable issues and is so devoid of merit that there is no possibility of reversal. *Id.* at 434. *See also, Miller Cas. Ins. Co. of Texas v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983) (adopting the same standard). "A lawsuit is frivolous when it cannot be supported by an[y] rational argument on the law or facts." *Forster v. Pierce County*, 99 Wn. App. 168, 183, 991 P.2d 687, *review*

*denied*, 141 Wn.2d 1010 (2000). In the instance of a frivolous appeal, an award of attorney fees under RAP 18.9(a) is appropriate. See *Mahoney v. Shinpoch*, 107 Wn.2d 679, 692, 732 P.2d 510 (1987); *Watson v. Maier*, 64 Wn. App. 889, 901, 27 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992).

In this case, there was no need for this appeal. Merritt's sole purpose in pursuing it was simply to overturn the reasoned *discretionary* decisions of the trial court. He simply cannot stand to "lose" to his former wife. His appeal is frivolous. Even resolving all doubt in his favor, he raises no debatable issues upon which reasonable minds could differ.

This Court has the authority to sanction Merritt and his counsel by awarding Amanda her reasonable attorney fees and costs on appeal. The Court should do so.

#### I. CONCLUSION

Merritt's appeal is motivated by self-interest and spite. He merely wants the opportunity to "re-do" the trial court's just and equitable property division, which was based in large part on his own proposal.

The trial court did not abuse its discretion in dividing the marital estate, ordering maintenance, and entering findings of fact and conclusions of law supporting the decree of legal separation. It cannot be said that the court's decisions rest on unreasonable or untenable grounds, or that no reasonable judge would have reached the same conclusions. Merritt has

not met his heavy burden of showing that the trial court manifestly abused its discretion. The court's orders, with the exception of the decision to deny Amanda's motion for reconsideration, were a proper exercise of the trial court's discretion.

This Court should affirm the trial court, with the exception of the amount of attorney fees awarded to Amanda at trial. The Court should reverse that award and order the trial court to increase the amount awarded to Amanda to account for Merritt's post-trial conduct. Costs on appeal, including reasonable attorney fees, should be awarded to Amanda.

DATED this 25<sup>th</sup> day of October, 2012.

Respectfully submitted,



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Emmelyn Hart, WSBA #28820  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188-4630  
(206) 574-6661  
Attorneys for Respondent/Cross-Appellant  
Amanda Star Mount

# APPENDIX

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**FILED**  
FEB 9 - 2012  
SUPERIOR COURT  
BETTY J. GOULD  
THURSTON COUNTY CLERK

**SUPERIOR COURT OF WASHINGTON  
IN AND FOR THURSTON COUNTY  
FAMILY & JUVENILE COURT**

In re the Marriage of:  AMANDA STARR MOUNT,  Petitioner,  and  JOHN MERRITT MOUNT,  Respondent.	<b>NO. 10-3-00984-2</b>  <b>DECREE OF LEGAL SEPARATION  (DCLGSP)</b>  Clerk's action required
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**I. JUDGMENT/ORDER SUMMARIES**

**1.1 RESTRAINING ORDER SUMMARY:**

Does not apply.

**1.2 REAL PROPERTY JUDGMENT SUMMARY:**

Real Property Judgment Summary is set forth below:

Assessor's property tax parcel or account number: 42520002000	
	See Page 3 for full legal description

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**1.3 MONEY JUDGMENT SUMMARY:**

Judgment Summary is set forth below.

- A. Judgment creditor AMANDA STARR MOUNT
- B. Judgment debtor JOHN MERRITT MOUNT
- C. Principal judgment amount \$22,018.75
- D. Interest to date of judgment N/A
- E. Attorney's fees \$7,000.00
- F. Costs N/A
- G. Other recovery amount N/A
- H. Principal judgment shall bear interest at 12% per annum from ~~September 26, 2011~~ **FEB 9, 2012**\*
- I. Attorney's fees, costs and other recovery amounts shall bear interest at 12% per annum from September 26, 2011\*
- J. Attorney for judgment creditor WILLIAM B. POPE
- K. Attorney for judgment debtor CHARLES SZURSZEWSKI & BERTHA FITZER
- L. Other: \*Interest shall be waived if the judgments are satisfied in full on or before April 1, 2012.

*END OF SUMMARIES*

**II. BASIS**

Findings of Fact and Conclusions of Law have been entered in this case.

**III. DECREE**

IT IS DECREED that:

**3.1 STATUS OF THE MARRIAGE.**

The husband and wife are legally separated.

**3.2 PROPERTY TO BE AWARDED THE HUSBAND.**

The husband is awarded as his separate property 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, subject to the indebtedness due and owing Chase in the approximate amount of One Hundred Fifteen Thousand Dollars (\$115,000.00) and the indebtedness due and

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owing the Estate of Edward R. Carson in the approximate amount of One Hundred Thirty-Two Thousand Dollars (\$132,000.00).

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

Miscellaneous household furniture, appliances, utensils, linens, furnishings  
and other personal property currently in the Respondent's possession, with  
the exception of the items being awarded to the Petitioner as outlined in  
Exhibit A;

The 2000 Infiniti Q45 automobile;

Any life insurance policy currently insuring the life of the Respondent;

The Respondent's PERS Plan 2 retirement account;

The DWS Scudder IRA (account ending 0595) standing in the Respondent's  
name;

The American Funds SEP standing in the Respondent's name;

All proceeds from the Respondent's interest in the estate of his mother,  
Mary Mount;

All proceeds from the Respondent's interest in the Edward R. Carson estate;

Twenty-Five Percent (25%) of the funds remaining in the joint checking and  
savings account standing in the parties' names with Bank of America;

Twenty-Five Percent (25%) of the funds remaining in the parties' joint  
money mover and savings accounts with WSECU;

Twenty-Five Percent (25%) of the DWS Latin America Equity Fund (account  
ending 1652) standing in the Respondent's name;

Twenty-Five Percent (25%) of the T. Rowe Price IRA (Int'l Stock) (account  
ending 5311-4) standing in the Respondent's name;

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Twenty-Five Percent (25%) of the Columbia Acorn Fund Z (account ending 1610) standing in the Respondent's name;

Twenty-Five Percent (25%) of the Columbia Acorn International Fund Z (account ending 8429) standing in the parties' names;

Twenty-Five Percent (25%) of the Janus Global Select Fund D (account ending 90798) standing in the parties' names;

Twenty-Five Percent (25%) of the Janus Overseas Fund D (account ending 90798) standing in the parties' names;

The Respondent's personal effects and belongings; and

The Respondent's Social Security rights and interests available to him pursuant to federal law.

Any and all property acquired by the husband, JOHN MERRITT MOUNT, from or after the date of the parties' separation shall be the sole and separate property of the husband and is hereby awarded to him accordingly free of any interest in the wife.

**3.3 PROPERTY TO BE AWARDED TO THE WIFE.**

The wife is awarded as her separate property the following:

The sum of Twenty-Six Thousand One Hundred Ninety-Three Dollars and Seventy-Five Cents (\$26,193.75), representing Seventy-Five Percent (75%) of the equity in the parties' home (see paragraph 3.15 below regarding offsets being taken from the wife's 75% equity in the family home);

The miscellaneous household furniture, appliances, utensils, linens, furnishings, and other personal property currently in the Petitioner's possession, together with the items awarded to her as outlined in Exhibit A, which are currently in the Respondent's possession;

The 2000 Volvo automobile, together with the Thule Carrier and Bike Rack;

Any life insurance policy currently insuring the life of the Petitioner;

The Petitioner's PERS Plan 2 retirement account;

The Petitioner's Deferred Compensation account;

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The WSECU Roth IRA standing in the Petitioner's name;

Seventy-Five Percent (75%) of the funds remaining in the joint checking and savings account standing in the parties' names with Bank of America;

Seventy-Five Percent (75%) of the funds remaining in the parties' joint money mover and savings accounts with WSECU;

Seventy-Five Percent (75%) of the DWS Latin America Equity Fund (account ending 1652) standing in the Respondent's name;

Seventy-Five Percent (75%) of the T. Rowe Price IRA (Int'l Stock) (account ending 5311-4) standing in the Respondent's name;

Seventy-Five Percent (75%) of the Columbia Acorn Fund Z (account ending 1610) standing in the Respondent's name;

Seventy-Five Percent (75%) of the Columbia Acorn International Fund Z (account ending 8429) standing in the parties' names;

Seventy-Five Percent (75%) of the Janus Global Select Fund D (account ending 90798) standing in the parties' names;

Seventy-Five Percent (75%) of the Janus Overseas Fund D (account ending 90798) standing in the parties' names;

The Petitioner's personal effects and belongings; and

The Petitioner's Social Security rights and interests available to her pursuant to federal law.

Any and all property acquired by the wife, AMANDA STARR MOUNT, from or after the date of the parties' separation or held by her prior to the parties' marriage shall be the sole and separate property of the wife and is hereby awarded to her accordingly free of any interest in the husband.

**3.4 LIABILITIES TO BE PAID BY THE HUSBAND.**

The husband, JOHN MERRITT MOUNT, shall pay the following community or separate liabilities and hold the wife, AMANDA STARR MOUNT, harmless therefrom and indemnify her from the obligations:

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

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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 FFEL student loans *in the amount of \$12,452*

JOHN MERRITT MOUNT shall pay all liabilities incurred by him since the date of separation, which have not previously been satisfied.

**3.5 LIABILITIES TO BE PAID BY THE WIFE.**

The wife, AMANDA STARR MOUNT, shall pay the following community or separate liabilities and hold the husband, JOHN MERRITT MOUNT, harmless therefrom and indemnify him from the obligations:

The indebtedness due and owing WSECU for the Visa standing in the Petitioner's name.

AMANDA STARR MOUNT shall pay all liabilities incurred by her since the date of separation, which have not previously been satisfied.

**3.6 HOLD HARMLESS PROVISION.**

Each party shall hold the other party harmless from any collection action relating to separate or community liabilities set forth above, including reasonable attorney's fees and costs incurred in defending against any attempts to collect an obligation of the other party.

**3.7 SPOUSAL MAINTENANCE.**

The husband, JOHN MERRITT MOUNT, shall tender maintenance to the wife, AMANDA STARR MOUNT, in the amount of One Thousand Five Hundred Dollars (\$1,500.00) per month. Maintenance payments shall be made on or before the fifth (5th) day of each month, commencing with October 5, 2011. Maintenance shall continue each month thereafter at that rate (\$1,500.00) until the husband, JOHN MERRITT 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 upon a substantial change of circumstances as provided by statute.

**3.8 CONTINUING RESTRAINING ORDER.**

Does not apply.

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**3.9 PROTECTION ORDER**

Does not apply.

**3.10 JURISDICTION OVER THE CHILD.**

The court has jurisdiction over the parties' minor daughter as set forth in the Findings of Fact and Conclusions of Law.

**3.11 PARENTING PLAN.**

The parties shall comply with the Parenting Plan signed by the court on September 12, 2011. The Parenting Plan is approved and incorporated as part of this decree of legal separation.

**3.12 CHILD SUPPORT.**

Child support shall be paid in accordance with the Order of Child Support signed by the court. That order is incorporated as part of this decree.

**3.13 ATTORNEY'S FEES, OTHER PROFESSIONAL FEES AND COSTS.**

JOHN MERRITT MOUNT, shall pay Seven Thousand Dollars (\$7,000.00) of AMANDA STARR MOUNT's attorney's fees and costs. Each party shall assume and satisfy the balance fo 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 husband to the wife.

**3.14 NAME CHANGES.**

Does not apply.

**3.15 OTHER:**

**Tax Liabilities**

Each party shall be required to file separate federal income tax returns for the calendar year of 2011. Each party shall 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.

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**Joint Accounts**

The parties' joint checking and savings account at Bank of America and the joint checking and savings account at WSECU shall 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 shall deposit their incomes into those joint accounts for the month of September 2011. Starting with October 1, 2011, each party shall 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 shall 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 shall be and is hereby directed to divide the funds as soon as possible based on the 75/25 division of each stock, bond, or fund held within the account.

**Division of Retirement Accounts**

The community 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 assets, the Petitioner would owe the Respondent \$4,175 from her accounts. In lieu of entered Property Division Orders or Qualified 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**

Amanda Starr Mount shall continue to provide healthcare coverage for the benefit of 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. The coverage for the Respondent is conditioned on the Respondent assuming and satisfying the additional cost to the Petitioner of his healthcare coverage. John Merritt Mount shall also be responsible for his own co-pays and



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

FITZER LAW, LLC

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

## Mount Household Items division

oak desk and chair	merritt
tv armoire	Amanda
dining room table and chairs	merritt
1x queen bed	merritt
2x double bed	Amanda
futon	merritt
oak long desk	merritt
oak shelves	Amanda
oak filling cabinets x3	Divide
ikea chair	Amanda
barrel chair	Amanda
4x dressers	Divide
kiwi desk	Amanda
antique desk	merritt
leather relax chair	merritt
plant stands x2	merritt
dresser-kauri	Amanda
victorian dresser	merritt
2 bedside tables	Divide
round bedside table	Amanda
corner desk -Torie	Amanda
bench - front deck	Amanda
teak bench front deck	merritt
white table 2 chairs-back deck	merritt
round table 4 chairs-back deck	merritt
hot tub	part of house
hot tub supplies	merritt
computer x2	Already Divided
tv	Amanda
stereo	merritt
dish washer	part of house
washing machine	part of house
dryer	part of house
fridgeator	part of house
CD collection - 75	Divide
antique Japanese dessert dishes	Mount family item
3 sets of wine glasses	Some Mount family item
teapot	merritt
china teac cups and saucers	Mount family item
vases	Divide
serving dishes	Divide
waffle maker	Amanda
zip	Amanda
blender	merritt
bread maker	Amanda
quisinart	merritt

toaster	merritt
utensils	divide
fondue pot	Amanda
3x asian rugs	Merritt's pre marriage
crystal glass set	merritt
spices	Divide
cleansers	Divide
china tea cups and saucers	Amanda
weed whacker x2	Divide
blower	Each have one
power washer	Amanda
camping chairs	divide
tent x 2	Divide
cooler	Amanda
winter ski gear	Divide
car washing kit	Divide
tool chests x 3	Divide
power tools	Divide
lawn care supplies	Divide
scooters x4	divide
terra cotta planters - x4	Divide
bike pump x2	Divide
bike repair tools	Split
bike rack	Amanda
christmas ornaments	Already split
halloween ornaments	Split
weed whacker x2	Split
blower	divide
SW painting by famous painter	merritt
Alaska landscape	merritt
Alaska animals	Amanda
NZ street fair painting	Amanda
Ansel Adams	merritt
Guatemala car	Amanda
S American toucan	Amanda
Australian carvings - small x 3	divide
NZ flax	merritt
Childrens portrait	Divide
bathroom sea art x3	Divide
box of framed art prints in garage	Divide
family portraits x 5	Divide
australian mask	merritt
alaskan mask - garage	Amanda
2 people sculpture	merritt

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<input type="checkbox"/> EXPEDITE <input type="checkbox"/> Hearing is set: <input type="checkbox"/> None  Date: _____ Time: _____ Judge/Calendar: _____
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**FILED**  
**FEB 9 - 2012**  
SUPERIOR COURT  
BETTY J. GOULD  
THURSTON COUNTY CLERK

**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><b>NO. 10-3-00984-2</b></p> <p><b>FINDINGS OF FACT AND  CONCLUSIONS OF LAW  (FNFCL)</b></p>
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**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:

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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.

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**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;

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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.

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**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

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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.

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**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

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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.

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**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,

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

**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.

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**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.

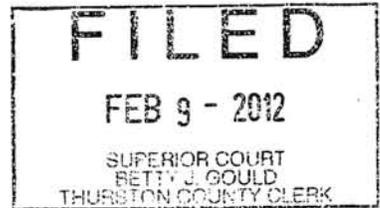
ANNE HIRSCH

\_\_\_\_\_  
Judge Anne Hirsch

Presented by:

WILLIAM B. POPE & ASSOCIATES, P.C.

WS  
\_\_\_\_\_  
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

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

FITZER LAW, LLC

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

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

Christine Schaller,  
Court Commissioner  
Indu Thomas,  
Court Commissioner

Marti Maxwell,  
Court Administrator  
(360) 786-5560



2801 32<sup>nd</sup> 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](http://www.co.thurston.wa.us/fjc)

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 5<sup>th</sup> 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

October 31, 2011  
Cause No. 10-3-00984-2  
Page Two.

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

October 31, 2011  
Cause No. 10-3-00984-2  
Page Five.

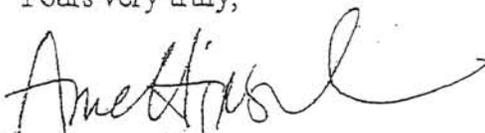
Carson's estate initially offered by Mr. Mount was incomplete; the exhibit ultimately admitted was more detailed, yet contained only the gross, not net, value of the estate. Regarding the estate of Mr. Mount's mother, the Court found the testimony (which was not specifically refuted) credible that Mr. 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

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**FILED**  
MAY 31 2012  
SUPERIOR COURT  
BETTY J. GOULD  
THURSTON COUNTY CLERK

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

In re the Marriage of  
  
Amanda Starr Mount,  
  
Petitioner,  
  
and  
  
John Merritt Mount,  
  
Respondent.

No. 10-3-00984-2  
  
ORDER ON PETITIONER'S MOTION FOR  
RECONSIDERATION OF ATTORNEYS'  
FEES AWARD

(No Mandatory Form)

This matter came before the Honorable Anne Hirsch pursuant to the Petitioner's Motion/Declaration for Reconsideration with Respect to Attorneys' Fees. The Petitioner appeared by and through her attorney William B. Pope of William B. Pope & Associates. The Respondent appeared through his attorney Bertha B. Fitzer of Fitzer Law, L.L.C. The court having reviewed the files and records herein, the declarations of the parties and in all things

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\ \ \

ORDER ON PETITIONER'S  
MOTION FOR RECONSIDERATION  
Page 1

**COPY**

FITZER LAW LLC  
950 Pacific Ave. Suite 400  
Tacoma, WA 98402  
(253) 327-1903

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being fully advised hereby Orders, Adjudges and Decrees that Petitioner's Motion for  
Reconsideration is denied. *for the reasons in the attached letter.*

*BSP*  
*WSP*

Dated this 31<sup>st</sup> day of May, 2012.

ANNE HIRSCH

Hon. Anne Hirsch

Presented by:

Fitzer Law LLC

*[Signature]*

Bertha B. Fitzer, WSBA #12184  
Attorney for Respondent

**FILED**  
MAY 31 2012  
SUPERIOR COURT  
BETTY J. GOULD  
THURSTON COUNTY CLERK

Approved as to Form:

William B. Pope & Associates, P.C.

*[Signature]*  
William B. Pope, WSBA #5428  
Attorney for Petitioner

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. Pamercy, Judge  
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Christina Schaller,  
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Marti Maxwell,  
Court Administrator  
(360) 786-5560



2501 62<sup>nd</sup> Avenue SW, Tumwater, WA 98512  
Mailing Address: 2000 Leelanidge Drive SW, Olympia, WA 98502  
Telephone: (360) 709-3201 Fax: (360) 709-3256  
www.co.thurston.wa.us/fjc

March 16, 2012

Bertha Fitzer  
Attorney at Law  
950 Pacific Ave. Suite 400  
Tacoma, WA 98402

William Pope  
Attorney at Law  
1605 Cooper Pt. Rd. NW  
Olympia, WA 98502

Re: Mounts Dissolution of Marriage, Amended Motion for Reconsideration, Thurston County  
Cause No. 10-3-00984-2

Dear Mr. Pope and Ms. Fitzer

This letter contains the Court's response to Ms. Mounts' recently filed Amended Motion for Reconsideration, where she is asking this court to award her additional attorney fees, citing, in essence, an excessive amount of time, post trial, that she has had to pay her attorney to spend on her case, resulting from the activities of Mr. Mount's attorneys. I will not review the standard the Court uses in addressing requests for reconsideration, as the court has already done so in this matter in earlier correspondence.

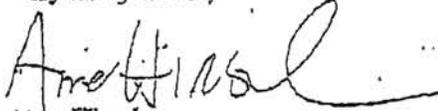
Trial in this case was completed last fall; it is now many months later and final orders were only entered on February 9, 2012; this is the third motion for reconsideration filed since trial. Additionally, Mr. Mounts filed a Notice for Discretionary Review with the Court of Appeals on March 8, 2012.

In reviewing the court file (on Liberty) it appears that although co-counsel Ms. Fitzer prepared a Supplemental Declaration of Merritt Mounts and a Response to Reconsider Attorneys Fee Award to Petitioner, and apparently provided it to counsel for Ms. Mounts, no such documents were filed with this court (and no bench copies were provided to the undersigned until this week after court administration made contact with counsel.)

In awarding fees at trial, the court considered the respective economic conditions of the parties and their respective ability to pay. Mr. Mount, in his most recent filings referenced above, asserts facts not asserted at trial and it is the opinion of the undersigned that regardless of what action this court takes, or does not take, the matter will be addressed at the Court of Appeals. If it chooses to address the issue of attorney fees, the Court of Appeals will do so.

All of the above is provided by way of background and for the purpose of underscoring this court's belief that it is time for the trial court level proceedings to be at an end, and the parties pursue their respective positions at the Court of Appeals. It is for this reason that the court is declining at this time to further reconsider its ruling in any respect,

Very Truly Yours;



Anne Hirsch  
Superior Court Judge

cc: Court File  
Chuck Szurzewski

DECLARATION OF SERVICE

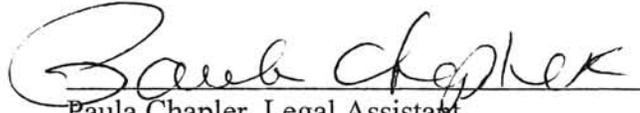
On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Combined Brief of Respondent/Cross-Appellant Amanda Starr Mount in Court of Appeals Cause No. 43168-8-II to the following parties:

Bertha B. Fitzer  
Fitzer Law LLC  
950 Pacific Avenue, Suite 400  
Tacoma, WA 98402

Original sent by ABC Legal Messengers for filing with:  
Court of Appeals, Division II  
Clerk's Office  
950 Broadway, Suite 300  
Tacoma, WA 98402-4427

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 25, 2012, at Tukwila, Washington.

  
Paula Chapler, Legal Assistant  
Talmadge/Fitzpatrick

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY