

No. 44250-7-II

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COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

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MARGARET BYERLEY,

Respondent,

v.

JAMES HOWARD CAIL,

Appellant.

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BRIEF OF APPELLANT

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## A. INTRODUCTION

After a 10-year relationship, James Cail and Margaret Byerley<sup>1</sup> got married. They divorced less than five years later with few assets and little debt. They have no dependent children. Although Jim retired in 2009 and relies exclusively on his various pensions for income, Meg continues to work, earn additional income, and contribute to her retirement.

The crux of this dispute is the trial court's division of the couple's property, which leaves them in patent economic disparity and is neither just nor equitable. During their relationship, they participated in identical retirement plans administered by the same employer. Because they accrued retirement benefits during their time together, portions of their retirement pensions are community property. But the trial court incorrectly calculated each party's interest in the community property portions of the other's pensions. It also mischaracterized Jim's home as community property when it calculated the property division.

This Court should reverse and remand with instructions to the trial court to correct its mathematical errors and to recalculate the property distribution in a just and equitable manner. The Court should also award Jim his attorney fees and costs on appeal.

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<sup>1</sup> The parties will be referred to by their first names for clarity and ease of reading; no disrespect is intended.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error<sup>2</sup>

1. The trial court erred by entering finding of fact no. 2.8(a).
2. The trial court erred by entering finding of fact no. 2.8(c), including its subparts.
3. The trial court erred by entering finding of fact no. 2.9(b) as to both Jim and Meg, which addresses the couple's retirement pensions.
4. The trial court erred by entering finding of fact no. 2.10.
5. The trial court erred by entering conclusion of law no. 3.4.
6. The trial court erred by entering a decree of dissolution on November 16, 2012.
7. The trial court erred by entering a Qualified Domestic Relations Order on November 16, 2012.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court abuse its discretion when it characterized as community property a home purchased by the husband while he was still married to his first wife and before his committed intimate relationship with his second wife began and it then considered the existence of that home when evaluating and distributing the community and separate property of the husband and his second wife during their dissolution proceedings? (Assignments of Error Nos. 1, 4-6)

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<sup>2</sup> Copies of the trial court's findings of fact, conclusions of law, and decree of dissolution are in the Appendix. The Qualified Domestic Relations Order ("QDRO") is not in the Appendix because it was filed in the trial court under seal.

2. Did the trial court abuse its discretion when it failed to properly calculate the community and separate property portions of the spouses' respective retirement accounts, which results in a patent economic disparity that is neither just nor equitable and leaves the husband, who is already retired, with little monthly income to support himself? (Assignments of Error Nos. 2-3, 5-6)

3. Did the trial court abuse its discretion when it entered a Qualified Domestic Relations Order that is inconsistent with the decree of dissolution and that improperly expands the wife's rights in her husband's pension while diminishing his? (Assignments of Error Nos. 6-7)

#### C. STATEMENT OF THE CASE

Jim and Meg met in April 1995, when Jim was still married to his first wife. RP 77, 167, 278. Jim and Meg dated for about five months, but later separated. RP 77, 302.

Jim signed a purchase and sale agreement for his house on July 18, 1996, several months before his divorce from his first wife was finalized. CP 36; RP 47, 285, 295-96. The house is titled in his name only. RP 47, 61.

Jim and Meg eventually renewed their friendship. RP 303, 319. She moved in with him at the end of September, after his divorce from his first wife was finalized. RP 78. Although Jim refinanced his home three times during his relationship with Meg, he never quit claimed any interest in it to her. CP 36; RP 171, 297.

Jim and Meg married in October 2006 and separated in June 2011. CP 6, 10. Meg petitioned to dissolve the couple's marriage a month later.

CP 5-8. She did not request maintenance. CP 6. Neither party has any dependent children. CP 5.

At the time of trial, Meg was 59-years old and had been employed as a payroll specialist with the Tacoma School District for approximately eight years. CP 12; RP 73. She was working full-time and earned approximately \$4,950 gross income per month. CP 61. She also received medical and dental insurance, retirement benefits, and vacation leave. CP 61; RP 73. She continues to work and to contribute to her various retirement plans. RP 73, 333. By contrast, Jim was 58-years old at the time of trial and had already retired from the State of Washington as a union laborer. CP 36; RP 277. He collects approximately \$4,193 per month in retirement benefits, which are his only source of income. CP 61, 62.

Jim and Meg acquired little in the way of assets during their relationship apart from their respective retirement accounts and three vehicles.<sup>3</sup> CP 17; RP 157. Jim contributed to a pension with the Western Washington Laborer's Union ("union pension") and also earned School Employees Retirement System ("SERS") pension benefits. RP 159, 160, 377-78; Exs. 18-19. His SERS plan consisted of two parts: a defined

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<sup>3</sup> The couple already owned or purchased: a 2002 Honda CRV, a 2004 Dodge Dakota, and a 1956 Ford Thunderbird. RP 155, 157. They later agreed that Meg would receive the Honda and that Jim would receive the Dodge and the Thunderbird. CP 31, 44.

benefit component and a defined contribution component. Exs. 18-19. Meg also earned SERS benefits during their relationship, which likewise consisted of defined benefit and defined contribution components. RP 160, 379; Ex. 20.

The couple had little debt when they separated. CP 138. Jim's home was appraised for \$184,500, but carried a \$122,675 mortgage as of October 2011. CP 138; RP 155.

The trial court, the Honorable Susan K. Serko, conducted a two day bench trial on August 21 and 22, 2012 and heard testimony from fourteen witnesses, most of who testified about the nature of the couple's relationship.<sup>4</sup> CP 55, 59; RP 2-3. In a memorandum decision issued on September 18, 2012, the court found that the parties were involved in a committed intimate relationship for 10-years before their marriage and that they were married for nearly five years.<sup>5</sup> CP 60. Based on those findings, the court then identified and distributed the parties separate and community property (both real and personal) and their minimal liabilities. CP 61, 62.

Relevant to this appeal, the trial court found that there were both separate and community property interests in the couple's various

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<sup>4</sup> Although Jim contested the nature and characterization of his relationship with Meg before their marriage at trial, he does not do so for purposes of this appeal.

<sup>5</sup> A copy of the trial court's memorandum decision is in the Appendix.

retirement plans. CP 62. For example, it calculated that 38% of Jim's monthly benefits were community property and should be distributed to Meg based on their 15-year relationship. *Id.* But it did not perform the same calculations with respect to Meg's future retirement benefits or award Jim any interest them. *Id.* The trial court further found that an equal division of the parties' assets was equitable without resort to spousal maintenance or an award of attorney fees given the ages of the parties, the length of their relationship, and their financial and employment status. CP 61. Nonetheless, the court ordered Jim to pay Meg a lump sum equalization payment of \$23,113 because the property award was "slightly skewed" in his favor. CP 61. This payment was later reduced by Meg's proportionate share of the mediation fee to \$22,363. CP 133.

Meg presented proposed findings of fact and conclusions of law to which Jim objected. CP 63-65. The trial court continued the hearing to November 16, 2012, at which time it entered findings of fact, conclusions of law, and a decree dissolving the marriage. CP 128-41. The court ordered Meg's interest in Jim's union pension transferred to her via a QDRO.<sup>6</sup> CP 2-4, 131.

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<sup>6</sup> A QDRO is a specific type of order that awards a portion of a retirement benefit to the employee's divorced spouse, who is called an "alternate payee." *See generally*, Kenneth W. Weber, 20 Washington Law and Practice: Family and Community Property Law, § 32.37 (1997); *In re Marriage of Anderson*, 134 Wn. App. 111, 138 P.3d 1118 (2006); *In re Marriage of Knutson*, 114 Wn. App. 866, 60 P.3d 681 (2003).

Jim filed a motion for reconsideration, which the trial court denied. CP 69-86, 104-111. This timely appeal followed.

D. SUMMARY OF ARGUMENT

A trial court has broad discretion in evaluating and distributing property in a dissolution proceeding. An appellate court will not interfere with a trial court's disposition of property in such a case unless the trial court abuses its discretion. An abuse of discretion occurs when the decree results in a patent disparity in the parties' economic circumstances.

Where the trial court has weighed the evidence, this Court's role is to determine whether substantial evidence supports the findings of fact, and if so, whether the findings support the trial court's conclusions of law.

Here, the abuse of discretion lies in the trial court's overall property distribution scheme. The trial court made numerous errors when evaluating and dividing the couple's property, which result in a patent economic disparity that is neither just nor equitable as required by RCW 26.09.080. By miscalculating the pension distributions, the trial court is permitting Meg to walk away from the marriage with the bulk of Jim's monthly income. This is a windfall for Meg, is financially devastating to Jim, and is not supported by the facts or the law. This Court should reverse and remand for an equitable distribution of the parties' assets.

The trial court compounded its distribution errors by entering a QDRO that does not conform to the underlying dissolution decree and impermissibly alters Jim's rights to his pension.

A careful assessment of Jim's financial need, balanced against Meg's ability to pay, firmly supports the conclusion that he should recover his fees and costs on appeal.

E. ARGUMENT

(1) Standard of Review

The trial court's distribution of property in a dissolution action is guided by statute, which requires it to consider multiple factors in reaching an equitable conclusion. RCW 26.09.080. In weighing these factors, the court must make a "just and equitable" distribution of the marital property. RCW 26.09.080; *Stachofsky v. Stachofsky*, 90 Wn. App. 135, 147, 951 P.2d 346 (1998), *review denied*, 136 Wn.2d 1010 (1998). In doing so, the trial court has broad discretion -- its decision will be reversed only if there is a manifest abuse of discretion. *In re Marriage of MacDonald*, 104 Wn.2d 745, 751, 709 P.2d 1196 (1985). A trial court abuses its discretion if its decision is manifestly unreasonable, meaning that its decision is outside the range of acceptable choices, or if its decision is based upon untenable grounds. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997); *State ex rel. Carroll v.*

*Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). If the decree results in a patent disparity in the parties' economic circumstances, then a manifest abuse of discretion has occurred. *In re Marriage of Pea*, 17 Wn. App. 728, 731, 566 P.2d 212 (1977).

Where the trial court has weighed the evidence, this Court's role is to determine whether substantial evidence supports the findings of fact, and if so, whether the findings support the trial court's conclusions of law. *In re Marriage of Greene*, 97 Wn. App. 708, 986 P.2d 144 (1999).

(2) The Distribution of Property in a Dissolution Action 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). The trial court must distribute the marital property in a manner that is "just and equitable" after considering all relevant factors, which include:

- (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.

RCW 26.09.080. 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).

Separate property is not generally subject to division between the parties. RCW 26.16.010. Separate property will remain separate property through changes and transitions, if the separate property remains traceable and identifiable *In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). Although the character of property is a relevant factor to its distribution, it is not determinative. *Konzen*, 103 Wn.2d at 478.

(3) The Trial Court Erred By Failing to Make a Just and Equitable Division of the Parties' Assets

The trial court made numerous errors when dividing the couple's property. This results in a patent economic disparity that is neither just nor equitable (CL 3.4) as required by RCW 26.09.080. The trial court has allowed Meg to profit enormously at Jim's expense, leaving him with little monthly income to support himself in retirement.

- a. Substantial evidence does not support the trial court's characterization of the home as community property or the findings that it entered to support the mischaracterization

The trial court characterized Jim's house as community property in finding of fact number 2.8(a) and entered several findings to support that characterization. CP 135 (FF 2.8(a)(i-iv)). Substantial evidence does not

support the characterization or the findings. The home was Jim's separate property and the trial court erred by considering its existence when evaluating and then distributing the couple's property. CP 61, 131.

A court must determine property's character as of the date it was acquired. *In re Estate of Borghi*, 167 Wn.2d 480, 484, 219 P.3d 932 (2009). Income and property acquired during a committed intimate relationship is characterized in a similar manner as income and property acquired during marriage. *Connell v. Francisco*, 127 Wn.2d 339, 351, 898 P.2d 831 (1995). All property acquired during a committed intimate relationship is thus presumed to be owned by both parties. *Id.* But property purchased by one of the parties *prior* to a committed intimate relationship is not before the court for distribution. *Id.*; *In re Marriage of Lindemann*, 92 Wn. App. 64, 69, 960 P.2d 966 (1998).

Here, Jim purchased his home in July of 1996 *while he was still married to his first wife* and *before* he and Meg renewed their committed intimate relationship.<sup>7</sup> CP 36; RP 285, 295-96. The home is therefore presumptively his separate property. *Connell*, 127 Wn.2d at 351. Further, he made the earnest money deposit with proceeds from his life insurance

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<sup>7</sup> Contrary to finding of fact number 2.8(a)(i), Jim and Meg did not begin their committed intimate relationship until September of 1996, months *after* Jim purchased the home. Moreover, the couple did not move into the home simultaneously as the trial court found. CP 136 (FF 2.8(a)(v)). Meg moved in with Jim at the end of September, *after* his first divorce was finalized.

policy. RP 284-85, 301, 317-18. Meg did not contribute financially toward the purchase price. RP 301. At the very least, the trial court should have reduced the net equity in the home by the amount of Jim's down-payment.

The trial court's findings that Meg's name may have appeared on an initial title document (FF 2.8(a)(iii)) or that Jim's real estate agent, Sharon Benson ("Benson"), testified that the "buyers" were "Jim and Meg" (FF 2.8(a)(ii)) are outweighed by substantial evidence showing that Meg did not contribute financially toward, nor was she a party to, the purchase. RP 301. Her name does not appear on the purchase and sale agreement or on the statutory warranty deed. RP 39, 61, 295-96, 300. Although she claims to have signed the purchase and sale agreement on July 24, 1996, neither Jim nor the Seller ever acknowledged the addition in writing and the sale was placed in escrow in his name only on July 22, 1996. RP 55, 61, 648-49.

Similarly, that the purchase and sale agreement was written with "Jim Cail and/or Assigns" (FF 2.8(a)(ii)) as the buyer does not support the trial court's community property characterization. Benson never verified to whom the assignment would have been made and just assumed that Jim intended to assign an interest in the house to Meg, which would explain why she would have written a thank you letter to both Jim and Meg.

CP 135 (FF 2.8(a)(vi); RP 64. Her assumption was incorrect and the trial court's reliance on her testimony was thus misplaced. Jim repeatedly testified that he would never run the risk of getting run out of his own home as occurred following his first divorce, which is why he would not have assigned an interest in it to Meg. RP 286, 291, 297, 301. More to the point, the assigns language in the purchase and sale agreement upon which the trial court relied would have applied, if at all, to Jim's first wife given that he was still married to her when he purchased the house.

The record does not support the trial court's characterization of the house as community property. Jim purchased it before his committed intimate relationship with Meg began; accordingly, the court should not have considered its existence when evaluating and then distributing the couple's assets. It erred by factoring the house into its calculations.

b. Substantial evidence does not support the trial court's distribution of the couple's pensions

The trial court found that Meg had an interest in a portion of Jim's pensions and assigned specific community and separate property values to each before distributing them. CP 61, 136 (FF 2.8(c)), 137 (FF 2.9). The trial court miscalculated the community and separate property portions of Jim's pensions. Further, it did not perform the same calculations with respect to Meg's retirement benefits and failed to award Jim any interest in

them. The trial court's calculations are incorrect; consequently, the resulting distribution is not supported by substantial evidence.

Under Washington community property law, all property acquired during the marriage by either spouse is presumed to be community property. *Arnold v. Dep't of Ret. Sys.*, 128 Wn.2d 765, 777-78, 912 P.2d 463 (1996). Retirement income is generally considered to be deferred compensation. *Id* at 778. The portion of retirement income earned during the marriage may be divided as community property. *Id*.

The typical formula used to determine the total community share of a pension is the months of service during marriage divided by the total months of service at retirement multiplied by the monthly benefit at retirement. *In re Marriage of Greene*, 97 Wn. App. 708, 713, 986 P.2d 144 (1999) (citing *In re Marriage of Chavez*, 80 Wn. App. 432, 436, 909 P.2d 314 (1996)). The community share of a pension may include increased benefits attributable to salary increases following dissolution but not increases due to additional years of service. *Chavez*, 80 Wn. App. at 437-38.

As an initial matter, the trial court incorrectly established the community and separate property percentages of Jim's pensions. Jim retired in 2009 after 12.75 years of employment and stopped making contributions to all of his pensions at that time. CP 80. Yet the trial court

credited Meg with 15-years of contributions into those pensions based on the length of their relationship. CP 61; Exs. 18, 19. In mathematical terms, the trial court fixed the community property portion of Jim's pensions at 38% (15 years of 40). Exs. 18, 19. This is incorrect. The actual community property portion should have been 32% based on Jim's retirement after only 12.75 years of employment rather than 15 years. Moreover, the trial court failed to adjustment Meg's pension values to reflect the length of the couple's committed intimate relationship. CP 61; Ex. 40. Instead, Meg's values were based only on the length of the couple's marriage. The trial court's miscalculations created a windfall for Meg.

The trial court made a number of other errors when it calculated and distributed Jim's pensions. For example, it found that the community property portion of his union pension had a present value of \$170,823. CP 62, 136 (FF 2.8(c); FF 2.9). It further found that his full monthly benefit was \$3,084 and that of that amount, \$2,501 was separate property and \$1,166 was community property. CP 61, 131, 136 (FF 2.8(c)). It then awarded Meg the community property portion of that pension. CP 62, 131. These findings are mathematically incorrect and result in an improper distribution of Jim's union pension.

The trial court's first mistake was to find that Jim's separate property (\$2,501) and Meg's community property (\$1,166) portions of the pension totaled a monthly benefit of \$3,084. CP 61. In fact, \$2,501 plus \$1,166 equals \$3,667 and not \$3,084. Meg conceded this error below and urged the trial court to correct it. CP 90-91. The trial court refused to recalculate the pension awards using the correct monthly benefit, CP 110-11, creating another financial windfall for Meg.

The trial court's second mistake flows from the first. Despite the fact that Jim's actual monthly benefit is only \$3,084, the trial court determined its present cash value of \$170,823 based on a monthly benefit of \$3,667. But that is not the correct amount of Jim's monthly benefit. CP 80. The trial court erred by failing to adjust the present cash value of Jim's union pension to reflect his actual monthly benefit of only \$3,084.

The trial court's third mistake was to award Meg the full value of the community property share of the pension. If the community property share of Jim's union pension is \$1,166, then Meg is entitled to receive only one-half of that amount, or \$583, based on the court's decision to divide the couple's assets equally. She acknowledged the trial court's mathematical error below and agreed that she should receive only one-half of the \$1,166 community property portion of the pension. CP 90-91; RP 163. The trial court declined to make the change.

The trial court also erred when it set the amount of the equalization payment that Jim must make to Meg. Although the trial court did not specifically award Meg a portion of all of his retirement benefits, it did the functional equivalent by considering the increases in value in those pensions when setting the amount of the equalization payment. The trial court did so without direct or positive evidence of an increase in value attributable to community-like labor and despite the fact that a substantial portion of Jim's retirement benefits accrued before the couple's relationship began and were his separate property. Accordingly, Meg was only entitled to the increase in plan values during the marriage and not before. *Lindemann*, 92 Wn. App. at 69 (any increase in the value of separate property during a committed intimate relationship is separate in nature).

The trial court also found that the total community property portion of Jim's SERS defined contribution pension was \$125,325, or \$641 per month. CP 61. This too was error. Jim had \$40,894.95 in his defined contribution pension when he and Meg began their committed intimate relationship in September 1996. CP 84. The \$40,894.95 balance in the pension was his separate property and he was entitled to benefit from the gains and interest that accrued on that amount. When Meg and Jim separated in June 2011, the balance in the pension was \$223,004.56. *Id.*

From that balance, the trial court should have removed the contributions/interest and gains and losses on what was earned prior to the committed intimate relationship, or \$64,810.80. CP 85. Then it should have removed the bonus amount (\$79,775.08) and the gainshare amounts (although incomplete, calculated at \$2,058.84) that accrued. *Id.* This calculation leaves a balance of \$76,356.84 in Jim's SERS defined contribution pension. That is the amount that should have been subject to the equal distribution ordered by the court.

The trial court has allowed Meg to profit enormously at Jim's expense. Meg and Jim are of similar age and have similar incomes. The critical distinction that the trial court failed to make is that Jim is retired and earns no other income while Meg continues to work and to accrue additional retirement benefits. By miscalculating the pension distributions, the trial court is permitting Meg to walk away from the marriage with the bulk of Jim's monthly income. This is a windfall for Meg, is financially devastating to Jim, and is not supported by the facts or the law. The trial court's findings of fact do nothing to shed light on how this inequity came about. Where they should provide clarity and guide the parties in the equitable distribution of their marital assets, they provide an inequitable distribution. No judgment is enforceable under the terms of the findings and decree as written. They are, in short, based on untenable

grounds. This Court should reverse and remand for an equitable distribution of the parties' assets.

(4) The Trial Court Erred by Entering a QDRO that Does Not Conform to the Decree

The trial court compounded its errors by entering a QDRO that does not conform to the underlying dissolution decree. CP 2-3. The QDRO should be reversed because it impermissibly alters Jim's rights to his pension.

A QDRO is a device used to enforce or facilitate the acquisition of a right or interest awarded in a dissolution decree. It is not substantive in its own right, but merely tracks the underlying decree. Brett R. Turner, *The Mechanics of Dividing Retirement Benefits: Recent Case Law on Preparation of Qualified Domestic Relations Orders*, 10 No. 6 DIVORCE LITIG. 105 (June 1998). A QDRO enables the Plan Administrator to determine whether the order is qualified to transfer one party's interest in the other's pension. It is not the final order of the trial court definitely and finally determining each party's interest in the pension; instead, the final order of the trial court is the decree. *See Byrne v. Ackerlund*, 108 Wn.2d 445, 739 P.2d 1138 (1987) (the decree is sufficiently final and definite where it informs the parties of what will happen to each asset and upon what operative events).

Here, the dissolution decree established Meg's rights in Jim's union pension and required Meg's counsel to prepare a QDRO to divide it. CP 131. According to the decree, Meg is to receive \$1,166 per month in pension benefits. *Id.* Despite this unequivocal language, the trial court entered a QDRO awarding Meg that interest *plus* any increases or adjustments (*e.g.*, cost of living adjustments) applied to that amount. CP 3. But the decree does not dictate that Jim share any increases or adjustments in his benefits with Meg. CP 66, 131.

The QDRO also establishes Meg as the irrevocable beneficiary of the survivor benefit associated with the pension. CP 3. But that award is not reflected anywhere in the court's decision. CP 66, 131. By including that provision in the QDRO, the trial court has impermissibly reduced Jim's rights to his pension. The trial court has also essentially prevented him from remarrying and attempting to provide financially for his future wife if he predeceases her because Meg has been given that benefit.

The QDRO does not implement the decree; instead, the QDRO improperly alters the decree by expanding Meg's rights and diminishing Jim's. This is reversible error.

(5) Jim Is Entitled to His Attorney Fees and Costs on Appeal

RAP 18.1(a) permits an award of attorney fees and costs on appeal if granted by applicable law. Washington courts have consistently

followed the American Rule regarding attorney fees, which provides that attorney fees are not recoverable as costs of litigation unless such fees are specifically provided by contract, statute, or some recognized ground of equity. See, e.g., *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 143, 930 P.2d 288 (1997); *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941).

RCW 26.09.140 provides for an award of reasonable attorney fees for maintaining or defending any proceeding under RCW Chapter 26.09. *In re Marriage of Bocanegra*, 58 Wn. App. 271, 282, 792 P.2d 1263 (1990), *review denied*, 116 Wn.2d 1008 (1991). On appeal, the Court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs. RCW 26.09.140. In making the award, the Court must consider the financial resources of both spouses, the need of the party requesting fees and the ability of the other party to pay. *In re Marriage of Moody*, 137 Wn.2d 979, 994, 976 P.2d 1240 (1999); *In re Marriage of Shellenberger*, 80 Wn. App. 71, 87, 906 P.2d 968 (1995).

Jim is entitled to his reasonable attorney fees and costs on appeal. RAP 18.1(b); RCW 26.09.140. RAP 18.1(c) requires that where fees are based on need, the party requesting fees must file an affidavit of financial need no later than 10 days before oral argument. Jim will file his financial

affidavit within the time limits established in RAP 18.1(c). A careful assessment of his financial need, balanced against Meg's ability to pay, firmly supports the conclusion that he should recover his fees and costs on appeal. RCW 26.09.140.

F. CONCLUSION

The trial court's property distribution is not factually supported and is inequitable. It should be reversed. On remand, the Court should direct the trial court to reconsider its determinations with the objective of arriving at a distribution that is just and equitable. The Court should award Jim his attorney fees and costs on appeal.

DATED this 7<sup>th</sup> day of May, 2013.

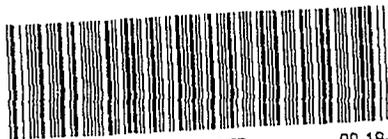
Respectfully submitted,



Emmelyn Hart, WSBA #28820  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188  
(206) 574-6661

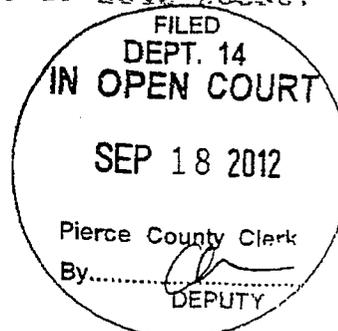
Jeffrey S. Floyd, WSBA #14730  
Jeffrey S. Floyd & Associates, PLLC  
The Curran Law Firm Building  
555 West Smith Street, Suite 106  
Kent, WA 98032  
(206) 575-7562  
Attorneys for Appellant James Cail

# APPENDIX



11-3-02558-5 39210236 CTD 09-19-12

SUPERIOR COURT  
OF THE  
STATE OF WASHINGTON  
FOR PIERCE COUNTY



SUSAN K. SERKO, JUDGE  
Candice Augustin, Judicial Assistant  
Department 14  
(253) 798-3646

334 COUNTY-CITY BUILDING  
930 TACOMA AVENUE SOUTH  
TACOMA, WA 98402-2108

September 18, 2012

Daniel N Cook  
ATTORNEY AT LAW  
5920 100th St SW Ste 25  
LAKEWOOD, WA 98499-2751

Heather Colleen Ramirez  
ATTORNEY AT LAW  
10009 59th Ave SW  
LAKEWOOD, WA 98499-2775

RE: MARGARET BYERLEY vs. JAMES HOWARD CAIL  
Pierce County Cause No. 11-3-02558-5

Dear Counsel:

This case came on for trial on August 21, 2012, concluding on August 22, 2012. Fourteen witnesses gave testimony; 41 exhibits were marked and all except Exhibits 16, 24 and 41 were admitted and reviewed by the Court. After careful consideration of the testimony, the Court's trial notes, admitted exhibits and the lawyers' briefs and arguments, the Court makes the following findings.

The parties to this marriage, Meg Byerley and Jim Cail, began cohabiting in September 1996, married on October 20, 2006, and separated in June 2011, and have lived separate and apart since then. Their relationship began with a meeting in April 1995 when Mr. Cail responded to Ms. Byerley's singles ad. After a five month dating and intimate physical relationship, Ms. Byerley discovered that Mr. Cail was married and she discontinued the relationship. They had no contact for three months until Mr. Cail advised that he and his wife were divorcing, at which point the dating relationship between Byerley and Cail resumed. Mr. Cail's marriage ended in a dissolution decree on September 13, 1996.

In the summer of 1996, the parties looked at homes to purchase together. Their realtor, Sharon Benson, testified at trial that the "buyers" were Jim Cail and Margaret Byerley. As ultimately consummated, the purchase and sale document read "James Cail and Assigns" as buyer. Ms. Benson testified that this designation usually means there is intent to assign to another buyer. The Court is satisfied that the parties' intent was to purchase the home together, but that Ms. Byerley's poor credit history prevented securing a loan in both names and therefore, Mr. Cail purchased the house in his name alone. The parties moved into the home at 2108 N. Shirley and in all ways, conducted

themselves as joint owners, improving the property with joint labor and money, and paying the mortgage and utilities with joint funds. Even the realtor sent a thank you note to "Jim and Margaret" to congratulate them on their purchase and express appreciation for their business.

Whether this relationship was a committed intimate relationship for the first ten years is the primary issue for resolution by the Court. Both sides concede the need for a just and equitable division of assets acquired during the marriage, between 2006 and 2011 (primarily retirement funds). However, Petitioner Margaret Byerley argues that a committed intimate relationship existed from 1996 to 2006, which adds ten years to the acquisition of community assets and that the home was purchased together.

Resort to the law on "meretricious" or committed intimate relationships is helpful to define the factors for the Court's consideration.

Under *Connell*, [committed intimate] relationships are defined as stable relationships evidenced by such factors as continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for mutual benefit, and the intent of the parties. *Connell*, 127 Wash.2d at 346, 898 P.2d 831.

*In Re Pennington*, 142 Wn.2d 592, 603, 14 P.2d 752 (2000).

The Court concludes that a committed intimate relationship existed throughout the parties' relationship from September 1996 through the date of marriage in October 2006, based on the following facts:

- 15 year continuous relationship:  
9/1996 through 6/2011, 10 years unmarried, 5 years married
- Relationship included intimate sexual relationship, living together for 15 years, sharing a bedroom, integration within each other's extended families, sharing and attending weddings, showers, family vacations, pooled resources.
- Wife's grandchildren referred to her and husband in a familial way: Grandma and "Papa."
- Obituaries for their respective parents included reference to the other as if a spouse (even though not married at the time).
- Purchase of a home together, albeit in Husband's name due to Wife's poor credit; payment of mortgage with joint and community funds.
- Romantic proposal of marriage by Husband in 2006, including expensive wedding rings, a Vegas wedding and a Leavenworth honeymoon.
- Joint Christmas cards sent each year from "Jim and Meg."
- Joint house bills including utilities and vet expenses.

- Husband's witness (a neighbor) testified that Husband told him that he and Meg were "splitting the sheets."

When dealing with property distribution between partners in a committed intimate relationship, Washington common law has evolved to look beyond how property is titled, requiring equitable distribution of property that would have been community property had the partners been married. But equity is limited; only jointly acquired property, but not separate property, can be equitably distributed.

*Oliver v. Fowler*, 161 Wn.2d 655, 669, 168 P.3d 348 (2007); also see *Parentage of G.W.F. and A.W.F.*, *Finch v. Wieder*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, (Div. I, 9/17/2012).

Based on the foregoing analysis, the Court finds that the home, the retirement accounts (acquired after 9/1996), and the items of personal property identified at trial and on the attached spreadsheet, are all community in nature. The wife, Margaret Byerley, age 59, is still employed full-time with the Tacoma School District. She started work with the Tacoma School District in October 2003, and enjoys medical/dental insurance, retirement benefits and vacation leave. She earns approximately \$4,965 gross per month. The husband, James Cail, is 58 years old, is retired after long-term union employment with the Tacoma School District. He currently enjoys retirement benefits as noted on the attached spreadsheet. A portion of these monthly payments are community and should be distributed to wife. Given the ages of the parties, the length of the relationship and their financial and employment status, an equal division of the assets is equitable in this case without reliance on spousal maintenance or an award of attorney's fees. Because the division is slightly skewed in favor of husband, he should pay a lump sum to wife in the amount of \$23,113.00 to equalize the distribution. If paid within six (6) months of the date of this letter, no interest shall accrue. If not paid within six (6) months, interest at the rate of 5% shall be assessed on the amount due from the date of this letter until fully paid.

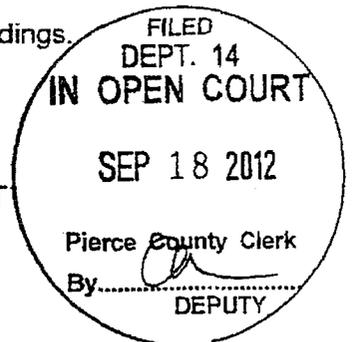
All items of personal property have been equitably, if not equally divided. Each party shall retain all personal property in his/her possession. Wife shall return to husband "Lucy's" remains and the two Christmas brass reindeer.

Mr. Cook is charged with the responsibility of preparing the final pleadings. Presentation is set for October 26, 2012 at 9:00 a.m.

Sincerely,

PIERCE COUNTY SUPERIOR COURT

*Susan K. Serko*  
 Susan K. Serko  
 Judge



SKS:cpa  
 Enc.

cc: Pierce County Clerk for filing

**BYERLEY v. CAIL**  
Cause No. 11-3-02558-5

**PROPERTY DIVISION**

2009 9/19/2012 2:00:00

<b>ASSETS:</b>	<b>Present Value</b>	<b>Liens/Debt</b>	<b>Community Share</b>	<b>Net to Husband</b>	<b>Net to Wife</b>
<b>Real Estate:</b>					
Family residence at 2108 North Shirley, Tacoma, WA	\$184,500	[\$122,675]	\$ 61,825	\$ 61,825	
<b>Vehicles:</b>					
1956 T-Bird	\$ 15,000		\$ 15,000	\$ 15,000	
2004 Dodge Dakota	\$ 10,900	[\$ 4,600]	\$ 6,300	\$ 6,300	
2002 Honda CRV	\$ 10,425				\$ 10,425
<b>Personal Property:</b>	\$ 10,000			One-half	One-half
<b>Financial Accounts:</b>					
Husband's TAPCO Checking				Separate Prop.	
Wife's Columbia Bank Checking					Separate Prop
<b>Pensions/Retirement:</b>					
Husband's Western Washington Laborer's Union Pension Full monthly benefit \$3,084.00	\$170,823 (comm. portion only)		\$170,823 (\$1,166 per month)	\$2,501.00 per month (sep. property share)	\$1,166 per month (\$170,823)
Husband's SERS defined contribution	\$125,325 (\$641 per month)		\$125,325	\$125,325	
Husband's SERS defined benefit	\$ 74,256		\$ 74,256	\$74,256	
Wife's SERS defined contribution	\$ 19,771		\$ 19,771		\$ 19,771
Wife's SERS defined benefit	\$ 35,461		\$ 35,461		\$ 35,461
<b>Total</b>				\$282,706	\$236,480
<b>TOTAL COMMUNITY</b>			\$519,186 50% = \$259,593		
<b>Net due to Wife from Husband:</b>				[\$23,113]	\$ 23,113
<b>NET TOTALS TO EACH</b>				\$259,593	\$259,593

*Community portion*  
↓  
*46,081 plus TC*

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

in re the Marriage of <b>MARGARET BYERLEY,</b> and <b>JAMES HOWARD CAIL,</b>	Petitioner,  Respondent	No. 11-3-02558-5  Decree of Dissolution (DCD)  <input type="checkbox"/> Clerk's action required
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I. Judgment Summaries

1.1 Real Property Judgment Summary

Real Property Judgment Summary is set forth below:

Name of Grantor: Margaret Byerley	Name of Grantee: James Cail
Assessor's property tax parcel or account number. 9490200210	
Or	
Legal description of the property awarded (including lot, block, plat, or section, township, range, county and state).	
LOT 9 IN BLOCK 2 OF WESTGATE SECOND ADDITION TO THE CITY OF TACOMA, according to Plat recorded in Book 16 of Plats at Page(s) 21 and 22, in Tacoma, Pierce County, Washington	
SUBJECT TO COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS, RECORDED UNDER AUDITOR'S NO 1635853 RIGHT OF THE PUBLIC TO MAKE NECESSARY SLOPES FOR CUT OF FILLS UPON SAID PREMISES AS DEDICATED IN THE PLAT	

Decree (DCD) (DCLGSP) (DCINMG) - Page 1 of 6  
WPF DR 04.0400 Mandatory (06/2012) - RCW 26.09.030, 040, 070 (3)  
Byerley v Cail  
Macintosh HD Users Dan Dropbox Byerley, Margaret A Drafts Pleadings Final Decree doc

FAUBION, REEDER,  
FRALEY & COOK, P.S.  
5920-100<sup>TH</sup> Street SW, Ste 25  
Lakewood, WA 98499  
253-581-0650

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**1.2 Money Judgment Summary:**

Does not apply.

*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 marriage of the parties is dissolved

**3.2 Property to be Awarded the Husband**

The husband is awarded as his separate property the following property:

- a. The real property located at 2108 North Shirley, Tacoma, Washington, legally described as follows.

Name of Grantor Byerley	Margaret	Name of Grantee. James Cail
Assessor's property tax parcel or account number: 9490200210		

Legal description of the property awarded (including lot, block, plat, or section, township, range, county and state): LOT 9 IN BLOCK 2 OF WESTGATE SECOND ADDITION TO THE CITY OF TACOMA, according to Plat recorded in Book 16 of Plats at Page(s) 21 and 22, in Tacoma, Pierce County, Washington. SUBJECT TO COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS, RECORDED UNDER AUDITOR'S NO. 1635853. RIGHT OF THE PUBLIC TO MAKE NECESSARY SLOPES FOR CUT OF FILLS UPON SAID PREMISES AS DEDICATED IN THE PLAT.
--

- b Any and all personal property, furniture, furnishing and effects in the husband's possession at the time of the entry of this order, including but not limited to:
  - i 1956 T-Bird
  - ii 2004 Dakota
  - iii "Lucy's ashes" The wife has returned this item to the husband
  - iv. Two Christmas brass reindeer. The wife has returned these items to the husband.

- a Any and all interest in any bank accounts, whether checking or savings, credit union accounts, stocks, bonds, certificates of deposit, retirement funds, pension funds, profit sharing funds, and all Social Security benefits in the name of the Husband, including, but not limited to
  - i. Husband's Tapco Bank account.
- b. Except as provided in 3 3(e) below, any pension, IRA, Keogh, profit sharing, stock option, retirement, medical insurance, life insurance, voluntary investment plan, financial security plan, bonds, sick leave, vacation allowance, bonuses, Social Security or any other type of employment benefit in Husband's name, including, but not limited to:
  - i. The Western Washington Laborer's Union Pension except for the award to the wife as otherwise provided herein
  - ii Husband's SERS defined contribution
  - iii Husband's SERS defined benefit
- c. Any income tax refund resulting from Husband's employment
- d. All benefits, rights and property acquired by the community in connection with the employment of either party to this decree shall be the sole and separate property of the party whose employment resulted in the acquisition of such rights, benefits and property. Including any and all whole or partial interest in any business enterprise, venture or self-employment regardless of form (e.g. any sole proprietorship, partnership, or corporation) in the name of the Husband

**3.3 Property to be Awarded to the Wife**

The wife is awarded as her separate property the following property:

- a. Any and all personal property, furniture, furnishing and effects in the wife's possession at the time of entry of this order , including, but not limited to:
  - i 2002 Honda CRV
- b. Any and all interest in any bank accounts, whether checking or savings, credit union accounts, stocks, bonds, certificates of deposit, retirement funds, pension funds, profit sharing funds, and all Social Security benefits in the name of the Wife, including, but not limited to.
  - ii Wife's Columbia Bank account
- b Any pension, IRA, Keogh, profit sharing, stock option, retirement, medical insurance, life insurance, voluntary investment plan, financial security plan, bonds, sick leave, vacation allowance, bonuses, Social Security or any other type of employment benefit in Wife's name

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- c. The wife shall receive \$1,166 per month from the husband's Western Washington Laborer's Pension. Attorney for the wife shall prepare a qualified domestic relations order to divide this pension
- d. Any income tax refund resulting from Wife's employment,
- e. All benefits, rights and property acquired by the community in connection with the employment of either party to this decree shall be the sole and separate property of the party whose employment resulted in the acquisition of such rights, benefits and property. Including any and all whole or partial interest in any business enterprise, venture or self-employment regardless of form (e.g. any sole proprietorship, partnership, or corporation) in the name of the Wife, including, but not limited to:
  - i. Wife's PERS defined contribution
  - ii. Wife's PERS defined benefit
- f. The Wife is awarded and the Husband shall pay \$22,363 to achieve the fair and equitable division of assets and liabilities set forth herein. This payment is due and payable in full on or before March 17, 2013. Should the husband fail to timely pay this obligation then interest shall accrue on the amount due at the rate of 5% per annum commencing and retroactive to September 18, 2012. A money judgment for the unpaid principal amount and prejudgment interest shall be entered on the Commissioner's Calendar against James Cail and in favor of Margaret Byerley if this obligation is not paid on or before March 17, 2013

**3.4 Liabilities to be Paid by the Husband**

**The husband shall assume and pay and shall hold the wife harmless there from the following community or separate liabilities:**

- a. The mortgage on the property located at 2108 North Shirley, Tacoma, which has been awarded to him (\$122,675 balance of mortgage).
- b. The debt on the 2004 Dodge Dakota, which has been awarded to him (\$4,600 balance of auto loan)
- c. Any and all debt incurred by the husband in his name since the date of separation
- d. Any and all debt in the sole name of the husband
- e. Any and all debt associated with the property awarded to the husband.

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f Undisclosed obligations incurred prior to the date of separation, where existence is known only to one party, shall be the sole responsibility of that party.

Unless otherwise provided herein, the husband shall pay all liabilities incurred by him since the date of separation

**3.5 Liabilities to be Paid by the Wife**

The wife shall assume and pay and shall hold the wife harmless there from the following community or separate liabilities:

- a Any and all debt incurred by the wife in her name since the date of separation.
- b Any and all debt in the sole name of the wife
- c Any and all debt associated with the property awarded to the wife
- d Undisclosed obligations incurred prior to the date of separation, where existence is known only to one party, shall be the sole responsibility of that party.

Unless otherwise provided herein, the wife shall pay all liabilities incurred by her since the date of separation.

**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 Maintenance**

Does not apply

**3.8 Restraining Order**

Does not apply

**3.9 Protection Order**

Does not apply

**3.10 Jurisdiction Over the Children**

Decree (DCD) (DCLGSP) (DCINMG) - Page 5 of 6  
WPF DR 04 0400 Mandatory (06/2012) - RCW 26 09 030, .040, 070 (3)  
Byerley v Cail  
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FAUBION, REEDER,  
FRALEY & COOK, P.S.  
5920-100<sup>TH</sup> Street SW, Ste 25  
Lakewood, WA 98499  
253-581-0660

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Does not apply because there are no dependent children.

3.11 Parenting Plan

Does not apply.

3.12 Child Support

Does not apply

3.13 Attorney Fees, Other Professional Fees and Costs

The equalizing payment has been reduced by \$750 to represent the wife's share of the mediation fee paid to Mike Turner.

3.14 Name Changes

Does not apply

3.15 Other

Does not apply

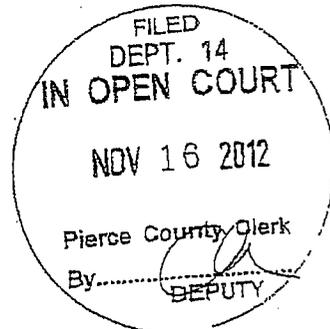
Dated: 11/16/2012 *Susan J. Clark*  
Judge/Commissioner

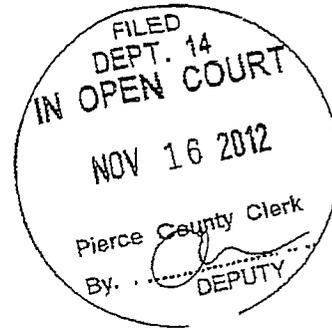
Presented by  
FAUBION, REEDER, FRALEY & COOK, P.S

*[Signature]*  
Daniel N. Cook, WSBA #34866  
Attorney for Petitioner

Approved by  
Notice of presentation waived:

*[Signature]*  
Heather Ramirez, WSBA 38816  
Attorney for Respondent





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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

In re the Marriage of.	No. 11-3-02558-5
<b>MARGARET BYERLEY,</b>	Findings of Fact and Conclusions of Law (Marriage) (FNFCL)
and Petitioner,	
<b>JAMES HOWARD CAIL,</b>	
Respondent	

**I. Basis for Findings**

The findings are based on trial.

- The following people attended:
- Petitioner.
- Petitioner's Lawyer.
- Respondent
- Respondent's Lawyer.

**II. Findings of Fact**

Upon the basis of the court records, 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 appeared, responded or joined in the petition

Findngs of Fact and Concl of Law (FNFCL) – Page 1 of 8  
 WPF DR 04 0300 Mandatory (06/2012) – CR 52; RCW 26 09 030, 070(3)  
 Byerley v Cail  
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 A Drafts Pleadings Final Findings docx

FAUBION, REEDER,  
 FRALEY & COOK, P.S.  
 5920-100<sup>TH</sup> Street SW, Ste 25  
 Lakewood, WA 98499  
 253-581-0660

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**2.3 Basis of Personal Jurisdiction Over the Respondent**

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The facts below establish personal jurisdiction over the respondent.

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The respondent is currently residing in Washington.

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**2.4 Date and Place of Marriage**

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The parties were married on October 20, 2006, in Las Vegas, Nevada

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**2.5 Status of the Parties**

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Husband and wife separated on June 30, 2011

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**2.6 Status of Marriage**

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The marriage is irretrievably broken and at least 90 days have elapsed since the date the petition was filed and since the date the summons was served on the respondent joined.

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**2.7 Separation Contract or Prenuptial Agreement**

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There is no written separation contract or prenuptial agreement.

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**2.8 Community Property**

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The parties have the following real or personal community property:

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a. The real property located at 2108 North Shirley, Tacoma, WA (present value \$184,500). The court finds this to be community property even though it is titled solely in the name of the husband based upon the following facts:

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i. In the summer of 1996 while still dating the parties looked at homes to purchase together

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ii. Sharon Benson, the parties' realtor, testified that the "buyers" were Jim Cail and Margaret Byerley. The Purchase and Sale Agreement as originally written named the Buyer as "James Cail and Assigns". Sharon Benson testified this designation usually means there is intent to assign another buyer

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iii. Early in the sale process initial title insurance documents named both Jim Cail and Margaret Byerley as Buyers

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iv. The court is satisfied that Margaret Byerley's poor credit history prevented the parties from securing a loan in both names and

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therefore the property was ultimately purchased in Mr. Cail's name alone

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- v. The court is satisfied that the parties moved into the home at 2108 N. Shirley Street simultaneously and in all ways conducted themselves as joint owners, improving the property with joint labor and money and paying the mortgage utilities with joint funds
  - vi. Sharon Benson, the Realtor, sent a Thank You note to "Jim and Margaret" to congratulate them on their joint purchase and express appreciation.
- b. Any bank accounts, whether checking or savings, credit union accounts, stocks, bonds, certificates of deposit, retirement funds, pension funds, profit sharing funds, and all Social Security benefits in the name of either party earned subsequent to the marriage and prior to the date of separation
  - c. Any pension IRA, Keogh, profit sharing, stock option, retirement, medical insurance, life insurance, voluntary investment plan, financial security plan, bonds, sick leave, vacation allowance, bonuses, Social Security or any other type of employment benefit in the name of either party earned subsequent to the marriage and prior to the date of separation, including, but not limited to:
    - i. Husband's Western Washington Laborer's Union Pension (present day community value is \$170,823)
    - ii. Husband's SERS defined contribution (present day community value is \$125,325)
    - iii. Husband's SERS defined benefit (present day community value is \$74,256)
    - iv. Wife's PERS defined contribution (present day community value is \$19,771)
    - v. Wife's PERS defined benefit (present day community value is \$35,461)
  - d. Any personal property acquired by either party subsequent to the marriage and prior to the date of separation, including, but not limited to:
    - i. 1956 T-Bird (value \$15,000)
    - ii. 2004 Dodge Dakota (value \$10,900)
    - iii. 2002 Honda CRV (value \$10,425)
    - iv. "Lucy's" remains (sentimental value only)
    - v. Two brass reindeer (sentimental value only)
  - e. Any whole or partial interests in any business enterprise, venture or self-employment regardless of form (e.g. any sole proprietorship, partnership, or corporation) in the name of either party acquired subsequent to the marriage and prior to the date of separation.

## 2.9 Separate Property

The husband has the following real or personal separate property:

Findings of Fact and Concl of Law (FNFL) – Page 3 of 8  
 WPF DR 04 0300 Mandatory (06/2012) – CR 52, RCW 26 09 030, 070(3)  
 Byerley v Cail  
 Macintosh HD Users Dan Dropbox Byerley, Margaret  
 A Drafts Pleadings Final Findings.docx

FAUBION, REEDER,  
 FRALEY & COOK, P.S.  
 5920-100<sup>TH</sup> Street SW, Ste 25  
 Lakewood, WA 98499  
 253-581-0660

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- 2 a Any bank accounts, whether checking or savings, credit union accounts,
- 3 stocks, bonds, certificates of deposit, retirement funds, pension funds,
- 4 profit sharing funds, and all Social Security benefits acquired by the
- 5 husband prior to the date of marriage and subsequent to the date of
- 6 separation, including, but not limited to:
- 7 i. Husband's TAPCO Checking
- 8 b. Any pension, IRA, Keogh, profit sharing, stock option, retirement, medical
- 9 insurance, life insurance, voluntary investment plan, financial security
- 10 plan, bonds, sick leave, vacation allowance, bonuses, Social Security or
- 11 any other type of employment benefit acquired by the husband prior to the
- 12 date of marriage and subsequent to the date of separation.
- 13 i. Husband's Western Washington Laborer's Union Pension (separate
- 14 property component not specifically valued)
- 15 ii. Husband's SERS defined contribution (separate property component is
- 16 \$107,743)
- 17 iii. Husband's SERS defined benefit (separate property component not
- 18 specifically valued)
- 19 c Any property in the possession of the husband's, as well as any and all
- 20 property, whether real or personal, acquired by the husband prior to the
- 21 date of marriage and subsequent to the date of separation.
- 22 d. Any income tax refund resulting from husband's employment earned by
- 23 the husband prior to the date of marriage and subsequent to the date of
- 24 separation.
- 25 e. Any whole or partial interest in any business enterprise, venture or self-
- employment regardless of form (e.g. any sole proprietorship, partnership,
- or corporation) in the name of the husband acquired by the husband prior
- to the date of marriage and subsequent to the date of separation.

**The wife has the following real or personal separate property:**

- 26 a Any bank accounts, whether checking or savings, credit union accounts,
- 27 stocks, bonds, certificates of deposit, retirement funds, pension funds,
- 28 profit sharing funds, and all Social Security benefits in the name of the
- 29 wife acquired by the wife prior to the date of marriage and subsequent to
- 30 the date of separation, including, but not limited to
- 31 i. Wife's Columbia Bank Checking
- 32 b. Any pension, IRA, Keogh, profit sharing, stock option, retirement, medical
- 33 insurance, life insurance, voluntary investment plan, financial security
- 34 plan, bonds, sick leave, vacation allowance, bonuses, Social Security or
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any other type of employment benefit in wife's name acquired by the wife prior to the date of marriage and subsequent to the date of separation.

c Any property in the possession of the wife's, as well as any and all property, whether real or personal, acquired by the wife prior to the date of marriage and subsequent to the date of separation

d Any income tax refund resulting from wife's employment earned acquired by the wife prior to the date of marriage and subsequent to the date of separation.

e Any whole or partial interest in any business enterprise, venture or self-employment regardless of form (e.g. any sole proprietorship, partnership, or corporation) in the name of the wife acquired by the wife prior to the date of marriage and subsequent to the date of separation.

**2.10 Community Liabilities**

The parties have incurred the following community liabilities:

<u>Creditor</u>	<u>Amount</u>
QualStar Credit Union for Mortgage on residence located at 2108 North Shirley, Tacoma, WA	\$122,675 (as of 10/11)
Debt on 2004 Dakota	\$4,600

**2.11 Separate Liabilities**

The husband has incurred the following separate liabilities:

- a Any and all debt incurred by the husband in his name since the date of separation.
- b. Any and all debt in the sole name of the husband.
- c Undisclosed obligations incurred prior to the date of separation, where existence is known only to husband

The wife has incurred the following separate liabilities:

- a. Any and all debt incurred by the wife in her name since the date of separation.
- b Any and all debt in the sole name of the wife.

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c. Undisclosed obligations incurred prior to the date of separation, where existence is known only to wife

**2.12 Maintenance**

Maintenance was not requested

**2.13 Continuing Restraining Order**

Does not apply

**2.14 Protection Order**

Does not apply.

**2.15 Fees and Costs**

There is no award of fees or costs

**2.16 Pregnancy**

The wife is not pregnant.

**2.17 Dependent Children**

The parties have no dependent children of this marriage.

**2.18 Jurisdiction Over the Children**

Does not apply because there are no dependent children.

**2.19 Parenting Plan**

Does not apply

**2.20 Child Support**

Does not apply

**2.21 Other**

The parties engaged in a "committed intimate relationship" from September 1996 through the date of marriage in October 2006 based on the following facts.

- 15 year continuous relationship with no breaks in cohabitation 9/1996 through 6/2011, 10 years unmarried, 5 years married

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- Relationship included intimate sexual relationship, living together for 15 years, sharing a bedroom, integration within each other's extended families, sharing and attending weddings, showers, family vacations, pooled resources
- Wife's grandchildren referred to her and Husband in familial way. Grandma and "Papa."
- Obituaries for their respective parents included reference to the other as if a spouse even though not married at the time
- Purchase of a home together, albeit in Husband's name due to Wife's poor credit; payment of mortgage with joint and community funds See also, Findings set forth in Paragraph 2.8(a) above
- Romantic proposal of marriage by Husband in 2006, including expensive wedding rings, a Vegas wedding and a Leavenworth honeymoon.
- Joint Christmas cards sent each year from "Jim and Meg."
- House bills in the joint name of both parties including utilities and vet expenses directed to Jim and Meg.
- Husband's witness (a neighbor) testified that Husband told her that he and Meg were "splitting the sheets."

### 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 a Decree

The parties should be granted a decree

#### 3.3 Pregnancy

Does not apply

#### 3.4 Disposition

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The court should determine the marital status of the parties, make provision for a parenting plan for any minor children of the marriage, make provision for the support of any minor child of the marriage entitled to support, consider or approve provision for maintenance of either spouse, make provision for the disposition of property and liabilities of the parties, make provision for the allocation of the children as federal tax exemptions, make provision for any necessary continuing restraining orders, and make provision for the change of name of any party. 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 Fees and Costs

The parties agreed to equally split the \$1,500 fee paid to Mike Turner for mediation in this case prior to trial.

3.8 Other

Property acquired during the parties committed intimate relationship from September 1996 through the date of marriage in October 2006 should also be divided applying community principles.

Dated: 11/16/2012

[Signature]  
Judge/Commissioner

Presented by:  
FAUBION, REEDER, FRALEY & COOK, P.S.

Approved by:  
Notice of presentation waived.

[Signature]  
Daniel N. Cook, WSBA #34866  
Attorney for Petitioner

[Signature]  
Heather Ramirez, WSBA 38816  
Attorney for Respondent

FILED  
DEPT. 11  
IN OPEN COURT  
NOV 16 2012  
Pierce County Clerk  
By... [Signature]

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 Brief of Appellant in Court of Appeals Cause No. 44250-7-II to the following parties:

Jeffrey S. Floyd  
Jeffrey S. Floyd & Associates, PLLC  
555 West Smith Street, Suite 106  
Kent, WA 98032

Daniel Cook  
Faubion Reeder Fraley & Cook PS  
5920 100<sup>th</sup> Street SW, Suite 25  
Lakewood, WA 98499-2751

Original efiled 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: May 7, 2013, at Tukwila, Washington.

A handwritten signature in cursive script, appearing to read "Paula Chapler", written over a horizontal line.

Paula Chapler, Legal Assistant  
Talmadge/Fitzpatrick

# TALMADGE FITZPATRICK LAW

**May 07, 2013 - 2:16 PM**

## Transmittal Letter

Document Uploaded: 442507-Appellant's Brief.pdf

Case Name: Margaret Byerley v. James Howard Cail

Court of Appeals Case Number: 44250-7

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Paula Chapler - Email: [paula@tal-fitzlaw.com](mailto:paula@tal-fitzlaw.com)