

NO. 44449-6-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

In Re The Marriage of:

SAMIR AWWAD

Appellant

v.

ALICE AWWAD

Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

The Honorable Judge JOHN NICHOLS

OPENING BRIEF OF APPELLANT

Josephine C. Townsend, WSBA 31965
Attorney for Appellant
211E. 11th Street Suite 104
Vancouver WA 98660
360-694-7601
Facsimile: 360-694-7602
jctownsend@aol.com

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- A. Assignment of Error No. 1 The court erred when it found that that the date of separation was November 22, 2010 instead of September 1, 2006. (FOF 2.5)
- B. Assignment of Error No. 2. The trial court erred when it found that the ring the wife purchased for \$15,000.00 was not an asset to the wife that should be calculated in the final distribution of property. (FOF 2.5, 2.10)
- C. Assignment of Error No 3. The trial court erred when it awarded the debt associated with the purchase of the \$15,000.00 right to the husband. (FOF 2.10)
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- H. Assignment of Error No. 8. The trial court erred when it found that the wife sold a property in Washington and did not receive the \$70,000.00 equity derived from the sale (FOF 2.8, 2.10)
- I. Assignment of Error No. 9. The trial court erred when it awarded 100% of the husband's retirement accounts to the wife in the distribution of property. (FOF 2.8, 2.10)

2. Issues Pertaining to Assignments of Error

Does the court commit and abuse of discretion when it found that that the date of separation was November 22, 2010 instead of September 1, 2006?
(assignment of error No.1)

Did the court commit and abuse of discretion when it found that the ring the wife purchased for \$15,000.00 was not an asset to the wife that should

be calculated in the final distribution of property and instead order the debt to the husband? (Assignment of Error 2).

Does the court commit an abuse of discretion when it failed to reduce the amount of support owed by the husband at trial for the months that the husband had no employment ? (Assignment of Error No. 4)

Does the court commit an abuse of discretion when it summarily determined that the wife could not work full time despite her education and qualifications? (Assignment of Error No.5).

Does the court commit an abuse of discretion when it awarded a vehicle belonging to the couple's adult son, to the father as part of the distribution of property? (Assignment of Error No. 6)

Does the court commit an abuse of discretion when there is insufficient evidence of debt, yet awards the debt to a wife to offset her large property award ? (Assignment of Error No. 7)

Does the court commit an abuse of discretion when the evidence shows that the wife sold a property and received the proceeds of the sale, yet her claims that she gave it away to her brother are upheld by the court in its division of property? (Assignment of Error No. 8)

Does the court commit an abuse of discretion when it awards 100% of one spouse's retirement assets to the other spouse, in spite of the fact that the wife has a longer work expectancy than the husband, the husband is ill and unemployed and his prospects for re-earning retirement benefits are minimal? (Assignment of Error No. 9)

C. **Statement of the Case**

Samir "George" Awwad and Alice Awwad were married in Lebanon on 1/1/1983. They came to the United States in June of 1986. During the marriage the couple had four children: George, Joey, Andy and Christopher. Christopher is 16 now and lived with his mother at the time of trial. The other children were adults and not under the jurisdiction of the court. (RP 32, 33) The couple was living in a single family home in Pennsylvania when the couple physically separated. (RP 66) Wife moved to Camas, Washington and husband went to Melbourne, Florida, (3200

Miles apart). (RP 66-67) The couple placed their home in Pennsylvania on the market on September 1, 2006 and the couple never cohabitated after that date. (RP 257) At trial the husband argued that this was the true date of separation. (RP 323) The wife argued that the court should use the date she actually filed her petition for dissolution on November 22, 2010.(RP 48) The Court used December 1, 2010 as the date of separation. CP 382. There was testimony during the trial that the couple used though to gather with the children on some holidays, which was the wife argued during the trial to state that she thought that the marriage was going strong. (RP 50-56) Wife filed for divorce on Nov 22nd 2010. CP1. The judge set separation date at the time the wife filed for divorce stating that separation had to be mutual, as the wife claimed that the marriage was going strong in spite of the separation the later date would be used. CP 373. This created a large distribution of the husband's assets to go to the wife. CP 373-394. Three weeks before wife filed for divorce, she purchased a diamond ring for \$15,000 charged to her husband's American Express Credit Card. (RP 299), Wife claimed that that ring was a 50th anniversary gift to her mother which was disputed by the husband. During temporary orders, the judge ordered the husband to pay \$4000 per month in maintenance and child support effective Nov 1, 2011. CP 211-

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Josephine C. Townsend
Attorney at Law, WSBA 31965
211 E. 11th Street Suite 104
Vancouver WA 98660

213. Husband's employer reduced his working hours from 40 to 25 and reduced husband's salary accordingly from \$165,000 to \$103,000 per year effective Nov 28, 2011. CP 214. RP 276. The husband went to court as soon as the original orders were entered in Feb 2012. CP 217. The judge reduced the \$4000 to \$3250. Husband lost his job on July 18, 2012 and he again went to court for relief requesting a reduction in his support obligations but the judge said that he will rule on that at the trial. CP 285. During all this period, arrearages added \$12,000 for the period of Nov 1, 2011 till Feb 1, 2012 against the husband and kept adding \$3250 per month from Feb 1, 2012 till day of trial. (CP 373-394). A total of \$47,750 in support was assessed against the husband. (CP 373-394) The court determined that the husband owed \$30,000 in arrears at time of trial CP 373. Before judge set the separation date, husband had \$51,000 in his bank account. The court considered this as community property and was awarded to husband as part of his share of the couple's property even though it had been expended for expenses pending trial. The judge, in spite the fact that husband was unemployed, imputed a \$60,000 per year salary for him, yet ruled that wife could work only part time (30 hours per week.) CP 373.

The judge awarded the husband three cars although the husband testified that one was purchased eight years prior to the marriage and the other the wife gave him a power of attorney for and hence the husband gave to their adult son. (RP 332). At the trial wife produced promissory notes stating that she borrowed money from her brothers. (RP 218-220) The judge awarded husband \$50,000 for that debt although husband testified that the documents were forgery and she had not borrowed the money. (RP 299-302). The husband argued that the documents were written by the same person and the same pen for dates that were years apart. (RP 258-263). The documents were alleged to have signed by Alice, although she was married to the husband and the couple resided together during the same time period. (RP 262-269). The husband testified he would have known if the wife borrowed any funds and that there was no need to borrow funds as he provided full financial support to his wife while they resided together. (RP 339) The purchased property without her husband's knowledge and then sold the property in Washington. (RP 257) The capitol gain on the sale was \$70,000 and the court disregarded her windfall in the distribution of marital property. CP373- 395). The court also awarded 100% of the husband's retirement accounts to the wife, with the exception of an account which opened post separation. (CP 373 -395).

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Josephine C. Townsend
Attorney at Law, WSBA 31965
211 E. 11th Street Suite 104
Vancouver WA 98660

The court did this despite the fact the husband testified he was in poor health, was unemployed and had no job prospects. (RP 347). The wife was in good health, had completed dental assistant school, and was capable of working full time. (RP 197-209). The court gave a disproportionate share of the assets to the wife, and left the husband destitute. CP 367, 373- 395).

D. Argument

In the area of domestic relations, the appellate courts have historically been loath to overturn trial court decisions. *In re Parentage of Jannot*, 149 Wn.2d 123, 126-28,65 P.3d 664 (2003). Appellate Courts will overturn the trial court decision when it finds that an abuse of discretion has occurred. An abuse of discretion is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997) It is a decision based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. Id. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re the Marriage of Littlefield*, 133 Wn.2d 39,46-7,940 P.2d 1362 (1997). 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; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. Robinson v. PEMCO Ins. Co., 71 Wn. App. 746,753, 862 P.2d 614 (1993). The trial court erred in the distribution of property and assets to such a degree as to authorize a reversal by the Court of Appeals.

1. The court erred when it found that that the date of separation was November 22, 2010 instead of September 1, 2006. The burden of proving the separation date lies with the “deserting party” (i.e. moving party). The threshold of shifting the burden is low. Harry M. Cross, *The Community Property Law in Washington* (Revised 1985), 61 WALR 13, 35 n. 114 (1986); Seizer v. Sessions, 132 Wn.2d 642, 657, 940 P.2d 261 (1996). In this case, there was no dispute that the couple physically separated in September of 2006. The contact by the couple was sporadic and neither testified that the couple was intimate after the separation. The wife testified that the couple only saw each other on special occasions after she

moved to Washington. They visited in December of 2006, (RP 44), at Easter in 2007, (RP47), in Hawaii in 2008 (RP 45), and attended their son's graduation in Florida in 2007 (RP 48) and in 2010 attended their son's graduation in Hershey PA, (RP 54). The couple filed separate taxes starting in 2010. RP 238. The husband testified that they did not act as a married couple since their separation in 2006. RP 323. Mr. Awwad testified that his wife was not invited to see him on the Hawaii trip and just showed up. RP 325. Mr. Awwad stated they had no intention of being together. RP 330. Mr. Awwad more than presented enough evidence to support his contention that the proper date of separation was September 1, 2006. The court erred when it used the wife's date of filing her petition as a reasonable date of separation. For a marriage to be defunct, it is not necessary that a dissolution action be final or even pending. *Seizer v. Sessions*, 132 Wn2d. 642, 657, 940 P.2d 261 (1996); *Aetna Life Ins. Co. v. Bunt*, 110 Wn.2d 368, 372, 754 P.2d 993 (1988).

2. The trial court erred when it found that the ring the wife purchased for \$15,000.00 was not an asset to the wife that should be calculated to her in the final distribution of property. (FOF 2.5,

2.10) It was undisputed that she made the purchase of a diamond ring and earrings right before she filed for divorce. RP 299. The court also failed to take into account an additional \$100,000.00 in gold and pearl jewelry that the couple acquired in their marriage. RP 299-303. The court gave no value to the dental goods which cost \$16,000.00 and which the wife sent to her sister in Kuwait in four separate shipments. RP 305. The timing of the purchase of the ring which coincided with the wife's filing made it obvious that she purchased the ring and earrings as a set for herself which she intended to keep when she filed for divorce. The court should have seen this purchase as an obvious self serving action on the part of the wife. Wasting or dissipating assets may be a factor for consideration. *In re Marriage of Kaseburg*, 126 Wn. App. 546, 556, 108 P.3d 1278 (2001). In this case, the wife's spiteful purchase right before divorce wasted community assets and forced a debt upon the community. The court should have awarded the debt associated with this purchase to the wife.

3. The trial court erred when it awarded the debt associated with the purchase of the \$15,000.00 right to the husband. (FOF2.10). The wife testified that post separation and right before trial, she

purchased a \$15,000.00 ring. RP 143-44. Other than her statement that the ring was for her mother, no other evidence was provided to the court to prove who had possession of it. It was undisputed that the wife purchased the ring and earrings from Costco, using her husband's credit card a mere three weeks before she filed for divorce. RP 227, 299. The debt was on a joint credit card. While the wife received the benefit of the purchase, the husband was unfairly ordered to pay the debt. To compound matters, the court failed to even count the ring and earrings as an asset which the wife received. A spouse is required to act in good faith when managing community property and a disposition of community funds is within the scope of a spouse's authority to act alone only if he or she acts "in the community interest." *Schweitzer v. Schweitzer*, 81 Wn. App. 589, 597, 915 P.2d 575 (1996); The wife's actions were obviously self serving and this debt should have been awarded to the wife.

4. The trial court erred when it failed to reduce the amount of support owed by the husband at trial for the months that the husband had no employment. (FOF 2.12) The husband testified that he lost his job in July of 2012. RP 293. He had sent out over

200 resumes and no one would hire him because of his age. RP 278. The husband's only income between July 2012 and the time of trial was \$610.00 per week. RP 292. "[I]n considering a party's future earnings capacity, a trial court may consider the age, health, vocational training and work history of the party." *In re Marriage of Rockwell*, 141 Wn. App. 235, 248, 170 P.3d 572 (2007). Health and age may be factors for consideration. *In re Marriage of Schweitzer*, 81 Wn. App. 589, 915 P.2d 575 (1996), remanded, 132 Wn.2d 318 (1997). In this case, it was undisputed that the husband was in poor health. He had been out of work for months and had no prospects of a new employer. He was 62 years old and had undoubtedly been attempting to gain new employment without success. The wife on the other hand, was licensed to work in four states, and made approximately \$35-\$40.00 per hour. While the court reserved the husband's request to lower his child support obligation, the court failed to apportion his back child support in conjunction with his actual earnings. The court left his back support judgment in place and used this data to increase the transfer of assets to the wife. Despite testimony to the contrary,

the court imputed the husband's salary at \$60,000 a year, at a time when his actual income was approximately \$2400 gross per month.

5. The trial court erred when it imputed only part time work income to the wife despite her certification and education. (FOF 2.12) The wife testified that she completed dental hygienist school in May of 2005. RP 22. She graduated with a certificate and began working in September of 2005. RP 22. She became licensed in Oregon and Washington in July of 2007. RP 42. The wife worked at least three days per week. RP 78. She had temped regularly for three to four years. RP 78. In 2009, she grossed \$29,248.00 RP 83. The wife testified she was still employed by the temp agency in Washington. RP 91. Her net income was \$1600.00 per month. RP 96. The husband paid for his wife to get her certification. RP. 197. The wife was licensed to practice in Oregon, Washington, Florida and Pennsylvania. RP 198. She admitted that she earned between \$35.00 and \$40.00 per hour. RP 199. She had been free to work since 2005. RP 200. She agreed that she was fully able to work full time RP 209. By the wife's testimony she was licensed and available to work full time since 2005. Despite this, the court only imputed the wife at minimum wage for purposes of calculating the

child support. Voluntary unemployment has been defined as “unemployment that is brought about by one’s own free choice and is intentional rather than accidental...” *In re Marriage of Brockopp*, 78 Wn. App. 441, 446 n. 5, 898 P.2d 849 (1995). The wife was fully capable of working and refused to work in order to exact as much financial support from her husband as possible and this factor was not fully considered by the court in making its award of property, assets and debts.

6. The trial court erred when it awarded to the husband a vehicle which had been gifted to the couple’s son and therefore had no value as well as a vehicle no one had seen in years (FOF 2.10). It was uncontested that the 2009 Ford had been driven by the son, and that he had been given the car by his parents and in fact had traded it in, at the time of the trial. RP 216-27. The wife testified that a Pontiac was in Lebanon and had been refurbished in 1998. RP 248. She had no proof that the car even existed anymore but valued it at \$12,000.00 RP 250. The wife voluntarily signed off the Ford in January of 2011 so that her son could use it as a trade in. RP 332. Both parents agreed that they no longer owned the asset. RP 332-334. Gifts of community property to a third party

are valid when they include a power of attorney being signed which occurred in this case. *In re Marriage of Bryant*, 125 Wn.2d 113, 117, 882 P.2d 169 (1994). Therefore the Ford should not have been considered an asset by the court as both parents agreed the vehicle was driven by the son and used by him as a trade in, and there was no evidence that the Pontiac was even in existence. The value placed on the vehicles awarded to the husband was arbitrary and capricious.

7. The trial court erred when it found that the wife had borrowed \$50,000.00 from family members when the evidence did not support such a finding. (FOF 2.10) The wife testified that she paid her son's debt to the State of Washington for unemployment benefits which he received but had not earned. RP127. The court failed to take this into consideration when the wife testified the payments from her son were loans from her son to her. The actual purpose of the checks was mostly likely to reimburse his mother for the payments she had made on his behalf. The wife admitted under oath that she alone received the entire proceeds of the couple's home in Pennsylvania. RP 183. The wife provided no evidence that anyone other than she, received the benefit of these

funds. RP 178. Despite the amount of money she received, she claimed that at the same time, she began to borrow heavily from her family members. RP177-188. This was at the same time that her husband deposited all of his paycheck into the couple's joint account. RP 339. The court agreed that both parties had credibility issues. RP 502-507. The husband argued that the wife hid assets she obtained during separation. The court, using its equitable powers, should have allocated more of the marital property to the husband based upon the wife's conduct. *In re Marriage of Angelo*, 142 Wn. App. 622, 646, 175 P.3d 1096 (2008).

8. The trial court erred when it found that the wife sold a property in Washington and did not receive the \$70,000.00 equity derived from the sale (FOF 2.8, 2.10). Wife testified that when she moved to Vancouver, the purchase of a house, was placed in her separate name. RP 34, 35, 211, 232. She claimed that she sold the house, and while the capital gain notice was in her name, she gave the money to her brother. RP 39. She kept both the purchase and the sale of the home from her husband. RP 258. Concealment of assets (even unsuccessfully) may be a factor for consideration in dividing property. *In re Marriage of Wallace*, 111 Wn. App. 697, 708, 45

P.3d 1131 (2002), review denied, 148 Wn.2d 1011 (2003); The wife hid the fact that she purchased a home, in her separate name, and then sold it. She proffered that she had given the proceeds to her brother, but she was the only person listed on the capital gains form. The court erred when it failed to consider this asset as a distribution to the wife.

9. The trial court erred when it awarded 100% of the husband's retirement accounts to the wife in the distribution of property. (FOF 2.8, 2.10). The husband testified and it was undisputed that he was not working at the time of trial. RP 278. He was insulin dependent and had no health insurance. RP 288. His health was described as fair, with a leaky heart valve, shortness of breath, and sleep apnea. RP 289. The husband takes several medications for his various conditions. RP 347. He had no work, and had not been employed despite sending out resumes every day. RP 291. A party's reduced probability of enjoying pension benefits due to poor health should be a factor in valuing a pension, *In re Marriage of Pilant*, 42 Wn. App. 173, 180, 709 P.2d 1241 (1985) Husband was age 62 at the time he was laid off from work. RP 276. Since July of 2012 the husband was only receiving \$610.00 per week on unemployment. RP 292. "[T]he economic

circumstances of each spouse upon dissolution [are] of paramount concern.” *In re Marriage of Gillespie*, 89 Wn. App. 390, 399, 948 P.2d 1338 (1997); *In re Marriage of Chavez*, 80 Wn. App. 432, 439, 909 P.2d 314, review denied, 129 Wn.2d 1016 (1996) *In re Marriage of Olivares*, 69 Wn. App. 324, 330, 848 P.2d 1281 (1993). “Future earning potential ‘is a substantial factor to be considered by the trial court in making a just and equitable property distribution.’ *In re Marriage of Rockwell*, 141 Wn. App. 235, 248, 170 P.3d 572 (2007). Unjustifiably disproportionate awards are subject to reversal. *In re Marriage of Tower*, 55 Wn. App. 697, 780 P.2d 863 (1989), review denied, 114 Wn.2d 1002 (1990); *In re Marriage of Pea*, 17 Wn. App. 728, 566 P.2d 212 (1977); *Wills v. Wills*, 50 Wn.2d 439, 312 P.2d 661 (1957), When property is to be valued at the time of trial instead of the time of separation, the trial court should have considered each parties separate contributions to and depletion of the community property during the period of separation. *Lucker v. Lucker*, 71 Wn.2d 165, 167-68, 426 P.2d 981 (1967). By awarding virtually all of the husband’s retirement benefits to the wife, the court failed to consider the factors outlined above. In this case, the court gave every positive reference to the wife, and every negative reference to the husband in

terms of valuing their testimony. While it was undisputed that the husband was the primary breadwinner for the family and worked doggedly to support his family. He had earned considerable retirement benefits at the time of dissolution and was close to retirement age. However, when the court finalized the disposition, it left the husband with the majority of the debt and a disproportionately small amount of the couple's assets. The husband was left with little opportunity to replenish his retirement benefits while the wife was well trained and had significant opportunities for employment in her future. The wife was in good health, and the husband was in poor health. The husband was able to articulate the location and value of each of the assets he had access to. The wife, refused to divulge details of her financial status, made secret purchases and sales of real property and incurred a significant debt so that she could gift herself \$15,000 worth of diamond jewelry right before filing the Petition for Dissolution. Despite this, the court refused to allocate a reasonable distribution to the husband and abused its authority in making its final awards.

E. **Conclusion**

Samir George Awwad moves this court to:

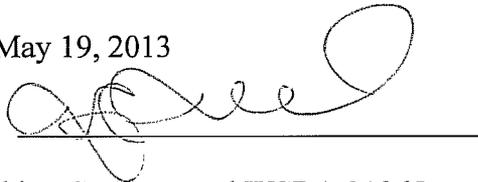
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Josephine C. Townsend
Attorney at Law, WSBA 31965
211 E. 11th Street Suite 104
Vancouver WA 98660

1. Vacate the findings of fact and conclusions of law and final decree;
2. Remand the case for a new trial with a new judge and/or reverse the decision of the trial court and award him an equitable percentage of the couple's assets and debts in accordance with the evidence presented and
3. Award Samir Awwad attorney fees for having to bring this appeal. Upon a request for fees and costs, this court will consider the parties' relative ability to pay and the arguable merit of the issues raised on appeal. *In re Marriage of Leslie*, 90 Wn. App. 796, 807,954 P.2d 330 (1998). This Court should award attorney fees to Appellant pursuant to RCW 26.09.140 and RAP 18.1.

Respectfully submitted this May 19, 2013



Josephine C. Townsend WSBA 31965
Attorney for Appellant Samir George Awwad
211 E. 11th Street, Suite 104
Vancouver WA 98660
360-694-7601
Facsimile: 360-694-7602
JCTownsend@aol.com

1 CERTIFICATE OF SERVICE

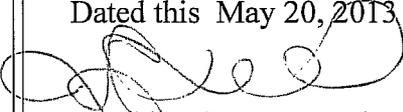
2 I hereby certify , that on this date, I served the Appellant's Opening Brief

3
4 VIA U.S. Mail and/or courier /Electronically onto

5 Court Of Appeals
6 Division II
7 950 Broadway, Suite 300
8 Tacoma WA 98402

9 Lori Ferguson
10 Attorney At Law
11 415 E. 17th Street
12 Vancouver WA 98663

13
14 Dated this May 20, 2013

15 
16 Josephine C. Townsend
17 Attorney at law
18 211 E. 11th Street Suite 104
19 Vancouver WA 98660

TOWNSEND LAW

May 20, 2013 - 12:55 PM

Transmittal Letter

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Case Name: Samir G Awward and Alice Awwad

Court of Appeals Case Number: 44449-6

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: Josephine Townsend - Email: **jctownsend@aol.com**

A copy of this document has been emailed to the following addresses:

lori@lfplawfirm.com
sga96@att.net