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DIVISION II

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STATE OF WASHINGTON

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No. 44449-6-II

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

SAMIR AWWAD,
Appellant

v.

ALICE AWWAD,
Respondent

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

Date of separation is September 1, 2006 1

Jewelry awarded to respondent should be assigned a value 4

Husband's income is improperly imputed at $5,000 per month 7

Respondent's income is improperly imputed at $1,500 per month 8

Vehicles awarded to husband are improperly valued 9

Respondent's family loans are not a community debt 11

Division of property was not fair and equitable 12

Respondent should not be awarded attorney fees on appeal 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases Cited

Aetna Life Ins. Co. v. Bunt, 110 Wn.2d 368, 372, 754 P.2d 993 (1988).....1

Groff v. Dept. of Labor & Ind., 65 Wn.2d 35, 40, 395 P.2d 633 (1964).....12

Hanley v. Most, 9 Wn.2d 429, 458, 115 P.2d 933 (1941).....4

In re Marriage of Griffin, 114 Wn.2d 772, 779, 791 P.2d 519 (1990).....16

In re Marriage of Hall, 103 Wn.2d 236, 248, 692 P.2d 175 (1984).....14

In re Marriage of Mueller, 140 Wn. App. 498, 505, 167 P.3d 568 (2007).....5

In re Marriage of Rockwell, 141 Wn. App. 235, 248, 170 P.3d 572 (2007).....7

In re Marriage of Schellenberger, 80 Wn.App. 71, 87, 906 P.2d 968 (1995).....16

In re Marriage of White, 105 Wn. App. 545, 549, 20 P.3d 481 (2001).....10

Johnson v. Dar Denne, 161 Wash. 496, 497, 296 P. 1105 (1931).....6

Rustad v. Rustad, 61 Wn.2d 176, 180, 377 P.2d 414 (1963).....2

Seizer v. Sessions, 132 Wn.2d 642, 657, 940 P.2d 261 (1997).....2

In re Marriage of Shoemaker, 128 Wn.2d 116, 123, 904 P.2d 1150 (1995).....7

Togliatti v. Robertson, 29 Wn.2d 844, 190 P.2d 575 (1948).....2

Statutes

RCW 26.09.080.....6, 7, 13

RCW 26.09.090.....7

RCW 26.09.140.....15, 16

RCW 26.16.030(2).....4

RCW 26.16.140.....1, 2

RCW 26.19.071.....9

Other Sources

Harry M. Cross, *The Community Property Law in Washington*, 61 Wash. L. Rev. 13, 34.....1

RAP 18.1.....1

RAP 18.9(a).....16

CR 52(a)(2)(B).....12

I. ARGUMENT

A. THE TRIAL COURT ERRED IN FAILING TO DETERMINE THAT THE PROPER DATE OF SEPERATION IS SEPTEMBER 1, 2006.

Separate property also includes the earnings and accumulations of a husband or a wife while living separate and apart. "When a husband and wife are living separate and apart, their respective earnings and accumulations shall be the separate property of each." RCW 26.16.140; *Aetna Life Ins. Co. v. Bunt,* 110 Wn.2d 368, 372, 754 P.2d 993 (1988). In the case at hand it is undisputed that the parties have lived separately since 2006.

The "living separate and apart" statute contemplates a permanent separation, a "defunct" marriage. *Bunt,* 110 Wn.2d at 372; Cross, 61 Wash. L. Rev. at 34. A marriage is considered "defunct" when both parties to the marriage no longer have the will to continue the marital relationship. Harry M. Cross, *The Community Property Law in Washington*, 61 Wash. L. Rev. 13, 34 (emphasis added). The parties in the present case did not have a marital community since 2006.

The absence of a marital community is seen through the respondent's own actions. The respondent engaged in activities such as purchasing real estate, obtaining loans, and making purchase and sale

determinations as if she were a single person (RP 177-188, 34-35, 39). The mere act of the parties being physically together at five family events in approximately four years does not support the finding a marital community (RP 44-45, 47-48, 54). The parties' actions were for their sole separate benefit and were not for the benefit of the marital community nor was there even any testimony regarding an intimate relationship presented.

Under RCW 26.16.140, a dissolution action need not be final or even pending. *Togliatti v. Robertson*, 29 Wn.2d 844, 190 P.2d 575 (1948). Rather, this statute applies to those marriages that are for all practical purposes "defunct". *Rustad v. Rustad*, 61 Wn.2d 176, 180, 377 P.2d 414 (1963). Reviewing courts have found a marriage defunct under RCW 26.16.140 only when the facts involved situations where both parties demonstrated the marriage was over. *Seizer v. Sessions*, 132 Wn.2d 642, 657 (1997). The test for whether the statute applies requires, at the least, an <u>acquiescence</u> in the separation. *Seizer*, at 658 (emphasis added).

The trial court erred by overlooking the substantial evidence that the parties' marriage was defunct at the time that the parties physically separated in 2006. RP 323. It is clear from the record that the respondent acquiesced in the separation by engaging in activities as would be expected of a single person. RP 66, 115, 218, 257, 299. The respondent

asserts that her unilateral insistence that the parties' marriage was not defunct is sufficient for the court to find that 2010 as the actual date of separation for purposes of dividing the marital community's assets and liabilities.

The trial court focused on the concept of the date of separation needing to be a "mutual" event. RP 424, 433-434. The trial court seems to confuse the concept of an agreed separation date as compared the defunct marriage. The date of separation is often contested and therefore not a "mutual" event. Here the evidence presented clearly indicates that both parties acquiesced that the marriage was defunct and engaged in activities indicating same.

The respondent has now been able to reap the financial benefit of the later date of separation while at the same time reaping the benefits of conducting her activities like that of a single person during this same time period. The respondent testified throughout trial that she was short on funds due to her husband not providing her with money. The respondent testified that in 2008 the appellant stopped putting his paycheck into a joint account. RP 115. There is no testimony that respondent placed her paychecks into a joint account. The husband even met with an attorney during his time in Florida to discuss divorce but did not file due to his understanding of jurisdictional issues. RP 327-329. This court should

reverse the trial court and hold that September 1, 2006 is the proper date of separation.

B. THE TRIAL COURT ERRED BY ASSIGNING NO VALUE TO THE JEWELRY AWARDED TO WIFE

It is undisputed that during this long-term marriage the parties purchased considerable jewelry, including a purchase by the respondent of a diamond ring just three weeks prior to the dissolution action being filed that this jewelry was ultimately sent to the respondent's mother in Lebanon. RP 227, 299. RCW 26.16.030(2) prohibits a spouse from gifting community property without the express or implied consent of the other spouse. Here there was no testimony at time of trial to overcome the presumption that most of the jewelry (with the exception of the diamond ring purchased just before filing for dissolution) was purchased with community funds and therefore was a community asset.

A spouse has a duty to manage community property for the interest of the marital community. *Hanley v. Most*, 9 Wn.2d 429, 458 (1941). Here there is no possible explanation as to how purchasing and disposing of a considerable asset mere weeks before the respondent files for dissolution is managing property in the best interest of the marital community nor was there any showing how the material community benefited from this transaction.

The respondent simply alleged that the husband consented to the purchase. RP 227. In a spousal agreement case, such as this, the evidentiary standard is clear and convincing proof and the reviewing court will uphold the trial court's findings of fact if they are supported by "highly probable" substantial evidence. *In re Marriage of Mueller*, 140 Wn. App. 498, 505 (2007). Here, the husband contends that this purchase should not be viewed as a community debt due to it occurring after September 1, 2006. But should the court be inclined to view it as a community debt instead, the record does not support the finding that husband consented to the purchase and gifting of the property. The respondent's only offer of proof regarding the purchase and subsequent gifting of the property was her self-serving unsubstantiated testimony.

Here, there is no evidence to support the trial court's findings. The respondent testified that twice she returned jewelry purchased during the marriage as the couple did not have the funds for it and at approximately the same time the respondent testified that she was borrowing money to survive. RP 110-111, 227-228. The respondent herself testified that she purchased the ring after learning from her parents that her husband was going to be filing for divorce. RP 143, 60. Clearly purchasing an asset immediately after learning that a spouse is contemplating divorce and

immediately before actually filing for divorce is a deliberate attempt to waste community assets.

The respondent's own testimony provided that the parties maintained separate bank accounts established in 2008 and that the respondent did not have access to the husband's earnings. RP 115. Clearly this purchase should be viewed as a purchase made after separation and the court should award all the associated debt on the purchase to the respondent.

The respondent had over $100,000 in jewelry concealed in a safe deposit box. RP 302. The trial court incorrectly held that the jewelry had no value due to the "speculative" nature of the value and that any jewelry was a gift between spouses. RP 492-493. Although the trial court has the ability to award gifts of personal adornment as the separate property of either spouse, the court does have an obligation to ensure that the overall division of property is just and equitable. *Johnson v. Dar Denne*, 161 Wash. 496, 497 (1931); RCW 26.09.080.

The husband testified that throughout their marriage jewelry was purchased during his trips to the Middle East; the respondent testified that husband purchased jewelry for her on occasion. RP 110, 301-303. There is no evidence in the record, other than the respondent's self serving testimony, to support the finding that the jewelry held by the respondent

has no value; therefore, the court of appeals should remand to the trial court to determine the proper value of the jewelry to be considered in the division of assets.

C. THE TRIAL COURT ERRED IN IMPUTING HUSBAND'S INCOME AT $5,000 PER A MONTH

The husband's only income at time of trial was $610.00 per week. RP 292. In 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 (2007). There is no dispute that the husband did hold considerable training in the field of engineering. However, husband presented significant evidence that his health is failing and that he was 62 years of age at the time of trial and had no promising job prospects. RP 290-291.

The trial court has a duty to determine that the division of assets and liabilities is fair and equitable and to examine the financial position of both spouses when awarding spousal maintenance. RCW 26.09.090; RCW 26.09.080. The trial court disregarded the husband's available financial resources, age and health when imputing income for the basis of child support and spousal maintenance.

In Washington, courts are allowed in some contexts to apply traditionally recognized equitable principles to mitigate the harshness of claims for

back support. *In re Marriage of Shoemaker*, 128 Wn.2d 116, 123, 904 P.2d 1150 (1995). The trial court further disregarded husband's current earning capacity when entering judgment for back unpaid support owed. Husband clearly no longer had the earning capacity to satisfy the back support obligations and the trial court should have used its equitable power to reduce his obligation.

There is fundamental disconnect between the trial court's determination that the husband was earning substantial income and at the same time the respondent had the need to borrow a substantial amount of money.

D. THE TRIAL COURT ERRED IN IMPUTING RESPONDENT'S INCOME AT $1,500 PER A MONTH

The trial court incorrectly determined that respondent's net month income for spousal maintenance and child support purposes was $1,500 per month. CP 377, 396. Although the respondent did not work extensively during the marriage, since the time of separation she had placed herself in a significantly better position to obtain lucrative continuous employment. At the time of trial the respondent had already completed dental hygienist training and was licensed to practice in four states. RP 198. When the respondent did work she earned between $35-40 an hour. RP 199. The parties' children were all either adults or

teenagers not in the need of around the clock care and there was no reason that respondent could not be employed full time. RP 209.

A trial court is required to impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. RCW 26.19.071. The court is also required to determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors. RCW 26.19.071(6). In the present case there is nothing in the record to show that the respondent cannot be employed full-time. Respondent's historical earnings are not an accurate reflection of respondent's earning potential and therefore the court should have imputed income to wife based upon full time employment at her historical rate of pay.

E. THE TRIAL COURT ERRED IN VALUING THE VEHICLE'S AWARDED TO HUSBAND AT $2,000

The husband is not requesting that the reviewing court re-weigh the evidence presented at trial; rather, the husband contends that the trial court's findings were an abuse of discretion and untenable, unreasonable, and not supported by substantial evidence.

The parties agree that the marital community no longer owned the 2009 expedition at the time of trial. RP 216-227; 332-334. The respondent

voluntarily signed the vehicle over to their son in January 2011 for use as a trade in on a new vehicle. RP 332. There is no prohibition on allowing a gift of community property to be made to a 3rd party as long as both spouses consent. *In re Marriage of Schweitzer*, 132 Wn.2d 318, 331 (1997). Here there is testimony that the respondent unilaterally signed off on allowing the vehicle to be used as a trade in for the parties' son. RP 332.

A trial court focuses on the assets then before it--i.e., on the parties' assets at the time of trial. *In re Marriage of White*, 105 Wn. App. 545, 549 (2001). If one or both parties disposed of a marital asset before trial, the court simply has no ability to distribute that asset at trial. *White*, at 549. The respondent presented no evidence at trial that the Pontiac, last known to be in Lebanon, was still in existence at the time of trial. RP 250. Likewise, testimony was presented at trial that the Mercury was a high mileage vehicle at the end of its usable life at the time of trial. RP 306. There was no evidence presented at trial to support the finding that the three vehicles should be assigned a value of $2,000. This was an abuse of discretion.

F. THE TRIAL COURT ERRED IN FINDING THAT RESPONDENT'S LOAN FROM HER FAMILY IS A COMMUNITY DEBT

The evidence presented at time of trial does not support the finding that the debts (loans) acquired during marriage from the respondent's family were a community debt. The respondent placed into evidence a number of promissory notes purporting to start in approximately 2004. There was no evidence presented as to whether there may be collection problems associated with some or all of these alleged community debts, such as statute of limitations.

Husband presented testimony that he was unaware of any such loans and that there was no reason for them. RP 335-338. Husband testified that the notes appeared to be forgeries and that the funds were not deposited into a joint account. RP 337. The parties agree that during the time period in question husband was earning over $100,000 a year and that the respondent collected all of the proceeds from the sale of the family home in Pennsylvania. RP 183. There is a fundamental disconnect between the trial court's determination that the husband was earning substantial income and at the same time the respondent had the need to borrow a substantial amount of money. Thus there was no need for the respondent to obtain loans and any loans that may have been obtained should be a separate debt of the respondent.

George Awwad testified that he wrote multiple checks to his mother on the same day in 2011 for her to cash (after the date of separation). RP

254. The trial court found that the total alleged loans from family (excluding rent) totaled $98,000. RP 488. The court reduced this figure to $50,000 but also stated that "...I'm suspicious about these loans." RP 489. Yet the court made no finding as which loans were valid, and simply valued the community debt at $50,000. RP 488-489. Here the respondent has presented little evidence to support her claim that any loans obtained by the respondent from her family were nothing more then an attempt to lessen the value of marital assets. The improper characterization of the loan as a community debt impacted the overall property distribution. CP 380-381.

A trial court must make findings of fact in dissolutions. CR 52(a)(2)(B). The findings must be sufficient to support its conclusions. *Groff v. Dept. of Labor & Ind.*, 65 Wn.2d 35, 40, 395 P.2d 633 (1964). In the present case the findings regarding the alleged loans are not based on substantial evidence; this is insufficient to support the conclusions that the loans were community debt.

G. THE DIVISION OF PROPERTY WAS NOT FAIR AND EQUITIBLE

RCW 26.09.080 provides in part:

> "...The court shall, without regard to misconduct, make such disposition of the

> property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:
> (1) The nature and extent of the community property;
> (2) The nature and extent of the separate property;
> (3) The duration of the marriage or domestic partnership; and
> (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time."

In the present case the court abused its discretion in making a fair and equitable division of assets and liabilities. As set forth in husband's brief the court failed to adequately weigh all the statutory factors and evidence presented in determining a just and equitable division of the marital assets.

The trial court erred in awarding the respondent 100% of husband's retirement benefits. The husband has a diminished work capacity and was unemployed at the time of trial despite providing evidence of diligently pursuing employment. RP 278, 289, 347. Due to husband's age it is unlikely that he will ever be able to reestablish any type of significant pension / retirement account. The court improperly included the Falcon

401K as community property even though it was started in 2011, after the court's date of separation. RP 505. The respondent did not address the issue of husband's retirement benefits in their response.

The respondent has had significant assets available to her since the couple separated in 2006; these assets include the equity in the Pennsylvania family home (sold in 2008 and funds withdrawn by the respondent and deposited into her separate account five days after deposit into the joint account), the sale proceeds of the Vancouver, WA property, and access to husband's earnings. CP 259, 262. The respondent argues that despite these benefits it is fair and equitable to set the date of separation as December 1, 2010 and to affirm the division of assets and liabilities as set forth in the decree of dissolution. Brief of Resp. 22-23.

Both party's future earning potential is a substantial factor to be considered in determining what is equitable. *In re Marriage of Hall*, 103 Wash.2d 236, 248, 692 P.2d 175 (1984). In the present case the husband presented significant evidence that his earning potential is greatly reduced, while at the same time the respondent has the ability to earn significantly more than what the trial court found to be her earning potential.

Furthermore, the court erred by including in the decree a Wachovia bank account that was depleted prior to the date of separation established by the court. CP 380. Although the respondent acknowledged, during the trial, that that account was depleted and completely spent before the set separation date, and despite the fact that the judge decided that he is canceling this account and despite the judge's decision that this account will not be entered into the ledger, this account appeared in the ledger and was counted as money awarded to the husband out of the community property. RP 220, 488, 494; CP 380. This is not a fair and equitable division of assets.

H. RESPONDENT SHOULD NOT BE AWARDED ATTORNEY'S FEES ON APPEAL

The respondent requests an award of attorney's fees pursuant to RCW 26.09.140:

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

The husband does not have the financial resources to contribute to the respondent's attorney fees. Although the respondent once had a high earning job, the evidence presented at time of trial showed that he no longer had that employment and factors such as age and diminishing health further impeded his likelihood of being able to earn wages at his historical level, despite actively seeking employment.

"The court should examine the arguable merit of the issues on appeal and the financial resources of the respective parties." *In re Marriage of Booth*, 114 Wn.2d 772, 779, 791 P.2d 519 (1990). "[a]t both the trial and appellate levels in a dissolution or post dissolution proceeding, a court asked to apportion attorney fees must consider the parties' relative need and ability to pay." *In re Marriage of Schellenberger*, 80 Wash.App. 71, 87, 906 P.2d 968 (1995).

In the present case the trial court awarded a disproportionate share of assets to the respondent. CP 380-381. The husband does not have the available assets to pay for attorney fees for the respondent. The trial court denied the respondent's request for additional fees at the time of trial on such a basis. CP 379.

The respondent also asserts that fees are appropriate under RAP 18.9(a). The appellate court's function is to insure that the division of assets and liabilities is fair and equitable and that the trial court did not

abuse its discretion. The appellant raises genuine legal issues and therefore respondent's request for fees should be denied.

The appellant has also requested an award of attorney fees for pursuant to RCW 26.09.140 and RAP 18.1. The respondent has not addressed these issues in their response. Due to inequitable distribution or property and the husband need for attorney's fees and the respondent's ability to pay, husband should be awarded fees on appeal.

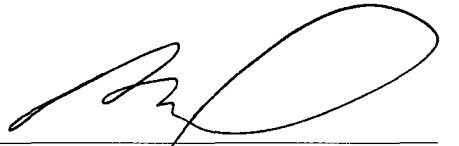
CONCLUSION

When examining the totality of the circumstances the division of assets and liabilities was not fair and equitable. The trial court abused its discretion in awarding all the parties' major assets, such as all of husband's retirement benefits, to the respondent while leaving the husband with considerable debt. Furthermore, the trial court's finding of a separation date of December 2010 is not supported by substantial evidence.

The husband respectfully requests that this court vacate the findings of fact and conclusions of law as well as the final decree and remand this matter for further proceedings.

DATED the 26 day of August, 2013.

RESPECTFULLY SUBMITTED,



Andrew Helland, WSBA # 43181
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Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington I affirm the following to be true:

On this date I transmitted the original document to the Washington State Court of Appeals, Division II by personal service, and delivered a copy of this document via USPS 1st Class Mail, postage prepaid, to the following:

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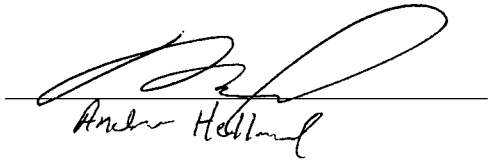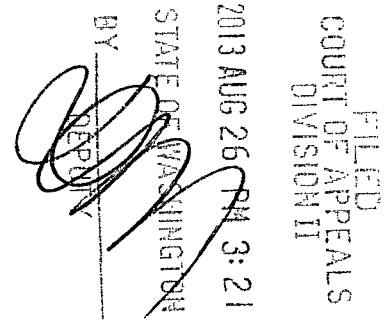
Signed at Tacoma, Washington on this 26th day of August, 2013.