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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 47643-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

ROBERT UNDERWOOD
Appellant

v.

KARA UNDERWOOD (nka CUTLER)
Respondent

REPLY BRIEF OF RESPONDENT

Appeal from Pierce County Superior Court
Judge James R. Orlando

No. 10-3-01083-1

Rebecca K. Reeder
Attorney for Respondent
Faubion, Reeder, Fraley & Cook, PS
5920 100TH Street SW #25
Lakewood, WA 98499

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STATEMENT OF THE CASE

They parties married in Condon, Montana on July 6, 1991. (CP 459.) The parties separated on February 12, 2010. (CP 459.) The dissolution case went to trial over the summer of 2012. (CP 458.) The parties' dissolution was finalized on September 4, 2012 when final orders were entered. (CP 469.) SUPPLEMENTAL FINDINGS ON REMAND TO FINDINGS OF FACT ENTERED ON SEPTEMBER 14, 2012 was signed and entered by the trial court on May 1, 2015. (CP 206-217.) An ORDER ON REMAND AMENDING DECREE OF DISSOLUTION ENTERED ON SEPTEMBER 14, 2012 were also entered by the trial court on May 1, 2015. (CP 218-220.) Robert Underwood filed his second Notice of Appeal in this matter on May 28, 2015 which is the issue before the court currently. (CP 440-455.) I have been counsel for Kara Underwood since the case was filed in March 2010. As a result, I have been involved in every portion of this case since its inception. Since that time, Mr. Underwood has been represented by attorneys Bruce Clements, followed by Andrea Donovan, Philip Thornton, Kenneth Levey and currently by Emily Tsai.

ARGUMENT

Trial court decisions in a dissolution action will seldom be changed upon appeal - the spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. In re Marriage of Landry, 103 Wash.2d 807, 809-10, 699 P.2d 214 (1985). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In re Marriage of Littlefield, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997). A 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." *Id* at 47.

ISSUE #1: CLAIMED ERROR BY ROBERT UNDERWOOD: "The trial court failed to follow the remand instructions of the Court of Appeals by failing to recalculate the community lien without consideration of lost profits from the failed Montana property transaction."

RESPONSE: The trial court did follow the remand instructions of the court of appeals and in fact the trial court specifically addressed and / or clarified their ruling in response to the court of appeals' ruling.

In regard to the lien, the Court of Appeals states:

The trial court implied that the lien included some amount for the parties' failed property transaction involving property owned by Robert's grandparents.

(Opinion of Court of Appeals, page 25.)

The trial court **may have considered** evidence of the failed property transaction in determining the amount of the lien. (Emphasis added.)

(Opinion of Court of Appeals, page 30.)

Because it is unclear what portion (if any) of the lien related to the failed property transaction and because the trial court also based its decision to award the lien on the community nature of the properties and the community efforts used to finance and maintain the properties, we remand to the trial court to recalculate the amount of Kara's lien without consideration of the projected lost profits from the failed Montana property deal. (Emphasis added.)

(Opinion of Court of Appeals, page 31.)

Based on the opinion issued by the Court of Appeals referenced above, the trial needed to address on the record the issue of whether or not the lost profits from the "failed property transaction" were considered when establishing a lien in the amount of \$112,000. If the trial court indicated on the record that no part of the "failed property transaction" was considered in their ruling, this would end the inquiry and the lien of \$112,000 would stand.

Additionally, according to the court of appeals opinion, if the trial court factored this “failed property transaction” into the decision, then the trial court was to then re-calculate the lien without such consideration.

On remand the trial court reviewed the ruling and directive from the court of appeals and incorporated said directive in his oral and written ruling. The transcript of the oral ruling can be found at CP 210-217 which provides on the topic in part as follows:

In terms of the lien on the property, I don't know how the Court of Appeals made a determination in some sense that I relied upon lost profits. That was a very, very small portion of my letter ruling. It referenced that Kara Underwood testified as to what she believed profits from that property would be. I didn't include that. I didn't make that my ruling. I didn't include that in my findings or decree. I think it's pure speculation that was the basis for my ruling. It was not. I attempted to draft a ruling that was fair and equitable considering the economic circumstances of the parties, his earning capacity and potential, his other separate property that he had, which is basically all of the property was separate subject to the community interest, and I came up with an amount that I thought accurately portrayed what she should be awarded. It was not based upon lost profits, and I will clarify that so the Court of Appeals can see that. I think the lien of \$112,000 is a fair and equitable division of the property, the community property interest, and award that to her.

(CP 212-13.)

The trial court has gone on the record and clarified their ruling for the Court of Appeals and indicated that “lost profits” were not considered in their ruling. The trial court indicated that no part of the ruling was based on lost profits. This “lost profits” argument

was never pled or argued at trial. Ms. Underwood never asked for additional funds as a result of the “failed property transaction”.

The testimony presented at trial regarding the return of the raw land to the trust was presented only to advise the court that the funds received from the trust were not all Mr. Underwood’s separate property. At no time did Ms. Underwood argue that there were lost profits or that she should be entitled to additional funds as a result. (See closing argument of Rebecca Reeder pages 746 through 751 contained in the clerk’s papers from appeal #1 as it relates to the division of assets.) Said argument ONLY discusses the value of the properties owned by the parties at the time of trial. No reference was made to lost profits as no such arguments were raised.

Additionally, there was ample evidence to demonstrate that the properties owned by the parties at the time of the dissolution had a large community interest. On that topic, the court of appeals stated in part as follows:

The trial court determined that Kara had a community interest in the Cheney and Montana properties because community resources had been used to purchase or improve them. The trial court stated that “[t]he community contributed funds, sweat equity and incurred liabilities for those properties. CP at 20. Robert argues that the two properties were his separate property because they were purchased using his separate funds from the dissolution of his family trust and there was no evidence that community efforts increased the value of the properties. Robert’s assertion

that the properties were his separate property is without merit. There was evidence that the two Cheney properties were purchased with not only the funds of the trust dissolution but also the funds received from the sale of the Steilacoom property, a community property asset. Further, there was evidence that the community funds were used to pay the mortgage on one of the properties and that community efforts and funds were used to improve both properties. Because community funds were used to purchase the properties and because community efforts were used to maintain the properties, we hold that Kara had a community interest in these properties.

Further, the proceeds from the Cheney property the parties sold were used to purchase the Montana property. Because Kara had a community interest in the Cheney property, she had a similar interest in the Montana property because it was purchased with proceeds from property in which she had a community interest. In addition, the parties paid the mortgage and made improvements to the Montana property with joint earnings. Accordingly we hold that the trial court did not abuse its discretion when it decided that Kara was entitled to a lien in some amount of property awarded to Robert to account for her community interest in properties that were purchased, maintained, and financed in part with community funds.

(Opinion of Court of Appeals, page 29-30.)

Therefore, Mr. Underwood's inquiry should end at this point and the decision of the trial court should stand.

It should also be noted that after the Court of Appeals decision was issued, but before Mr. Underwood requested a hearing on remand to the trial court, Mr. Underwood attempted to sell the Cheney property out from under Ms. Underwood. (CP 25-26.) Before attempting to close the sale, Mr. Underwood did nothing to get the matter back before the trial court on remand.

The act of selling the property would have further restricted the trial court's ability to award Ms. Underwood assets she is entitled to at the conclusion of this marriage. Mr. Underwood's attempt to sell the property was nothing short of bad faith and intransigence. Ms. Underwood was not even able to get a hearing on post-secondary educational support for their oldest daughter while the appeal is pending without posting an expensive bond, and Mr. Underwood tried to dispose of one of the parties' largest assets without proper permission from the court. (CP 169.)

Additionally, Mr. Underwood cites the Chumbley case which he states provides in part as follows: "Property that is purchased with both community funds and clearly traceable separate funds will be divided according to the contribution of each." In re Marriage of Chumbley, 150 Wn.2d 1, 8, 74 P.3d 129 (2003).

First of all, I do not believe that anyone here can state that the separate and community funds are clearly traceable as there were sales of property, and community funds and effort went into the properties on a monthly basis.

Additionally, Mr. Underwood is forgetting the long lines of cases requiring just and equitable distribution of all assets before the court. In fact, the Court of Appeals in their first opinion noted the following cases in their opinion:

In a marriage dissolution proceeding, the trial court must 'dispos[e] of the property and liabilities of the parties, either community or separate, as shall appear just and equitable after considering all factors.' In re Marriage of Muhammad, 153 Wn.2d 795, 803, 108 P.3d 779 (2005). Those factors 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 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. RCW 26.09.080. These factors are not exclusive. In re Marriage of Larson and Calhoun, 178 Wn. App. 233, 238, 313 P.3d 1228 (2013). All property is before the court for distribution. In re marriage of Farmer, 172 Wn.2d 616, 625, 259 P.3d 256 (2011).

The court has "broad discretion" to determine what is just and equitable based on the circumstances of each case. In re marriage of Rockwell, 141 Wn.App. 235, 242, 170 P.3d 572 (2007). ***A just and equitable division "does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of future needs of the parties."*** In re Marriage of Crosetto, 82 Wn.App. 545, 556, 918 P.2d 954 (1996). Fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules." In re Marriage of Tower, 55 Wn. App. 697, 700, 780 P.2d 863 (1989). "Just and equitable does not mean that the court must make an equal distribution. In re Marriage of DewBerry, 115 Wn.App. 351, 366. 62 P.3d 525 (2003). Under appropriate circumstances....***[the trial court] need not award separate property to its owner.*** In re Marriage of White, 105 Wn.App. 545, 549, 20 P.3d 481 (2001).

(Opinion of Court of Appeals, page 26-27.)

In this situation, the court certainly divided the property in a just and equitable way, and the requirement of fairness, based upon a consideration of all the circumstances of the marriage, both

past and present, and an evaluation of future needs of the parties was met.

Moreover, in this case, the trial court determined the characterization of the property as it is required to do. Once that occurs, the trial court is free to award said property in any way it sees fit as long as the award is just and equitable. The award of \$112,000 to Kara Underwood was and is still just and equitable after considering all relevant factors. Therefore, the amount of the award should stand.

ISSUE #2: CLAIMED ERROR BY ROBERT UNDERWOOD: “The trial court erred in finding that the Court of Appeals decision was based on “pure speculation” as to the court’s reliance on the failed property transaction and the trial court erred in stating that the lost profits from the failed property transaction were not a part of the court’s original findings.”

RESPONSE: The trial court fully explained that their prior ruling was not based on any failed property transaction in response to the ruling of the court of appeals.

Issue #1 in Mr. Underwood’s brief is very similar to Issue #2. (See response above.) Additionally, the trial court HAS clarified their ruling and affirmatively stated on the record as follows:

In terms of the lien on the property, I don’t know how the Court of Appeals made a determination in some sense that I relied upon lost profits. That was a very, very small portion of my letter ruling. It referenced that Kara Underwood testified as to what she believed profits from that property would be. I didn’t include that. I didn’t make that my ruling. I didn’t include that in my findings or decree. I

think it's pure speculation that was the basis for my ruling. It was not. I attempted to draft a ruling that was fair and equitable considering the economic circumstances of the parties, his earning capacity and potential, his other separate property that he had, which is basically all of the property was separate subject to the community interest, and I came up with an amount that I thought accurately portrayed what she should be awarded. It was not based upon lost profits, and I will clarify that so the Court of Appeals can see that. I think the lien of \$112,000 is a fair and equitable division of the property, the community property interest, and award that to her.

(CP 212-13.)

As stated above under Issue #1, this should end the inquiry.

But Mr. Underwood is not happy with the ruling and he is attempting to come up with any theory that he possibly can to overturn the ruling of the trial court. The same trial judge heard a number of dispositive and preliminary motions on this case, a four day trial, motion for presentation and later motions on remand. He is intimately familiar with the facts of this case, the parties and the controlling law.

I think it is pretty clear that Mr. Underwood is unhappy with the ruling of the trial judge and the court of appeals. Once the ruling of the trial court was issued, he filed an appeal. Despite rulings from the court of appeals, Mr. Underwood has failed to honor and follow the financial terms of the orders other than to pay child support and a portion of maintenance. No part of the

judgments have been satisfied, even the provisions that are not currently under appeal. (CP 25-27.)

After the court of appeals issued their ruling, rather than to promptly get this matter back before the Superior Court to determine if the \$112,000 lien was appropriate, again Mr. Underwood tried to sell the property out from under Ms. Underwood and the court. Mr. Underwood was under the impression that the lien had been automatically vacated and he tried to sell the property before the trial court could reattach the lien. He then backed out of the sale after we offered to deposit all sales proceeds into the court registry. (CP 26.)

There are also a number of messages that Mr. Underwood has sent to the children of this marriage that are directed to the judges on this case confirming his displeasure. The one I am most particularly fond of which I am conveying to this court at his request is as follows:

On Wednesday, April 30, 2014 4:27 PM, Robert Underwood <underwoodre@hotmail.com> wrote:

Mikaela and Bailey,
.....

NOTE TO THE NEXT JUDGE:

I believe this email will end you in the next court hearing so this is for the Judge - (don't leave it out Ms Reeder). I am forced to write like this because the legal system failed me.

Lawyers made a ton of money by keeping this going by toasting my rights out and knowing I am the type who will not put up with is in turn making you more money. WHAT A SORRY SYSTEM! I am father who will not give out and just follow the BS of the flawed family court system. Just to let you know, Mrs. Reeder told many lies on Ms Underwood's behalf to include telling the appeals court that I was taking with my daughter and we had an ongoing relationship, which was a complete lie. Ask ME about the lies and I will give you a list of them. Ask me about the letter she personally wrote to the Prosecuting Attorney defaming me and lying about me during the criminal trial.

(CP 31-32, 159.)

Mr. Underwood is clearly unhappy with the court system in the State of Washington. I presume that the judicial officers in the court of appeals would be part of this "sorry system" in his opinion.

The record on remand and this appeal is replete with colorful messages from Mr. Underwood indicating his displeasure with the courts and their rulings. (CP 25-163) I am particularly fond of the following statement from Mr. Underwood in another of his emails after the dissolution was finalized which provides in part as follows:

From: Robert Underwood <underwoodre@hotmail.com>
Date: July 31, 2013, 6:08:15 PM MST
To: "baileyu@yahoo.com" <baileyu@yahoo.com>
Subject: Please call me!

Bailey,

I would like to talk with you. I didn't do anything the people said I did and made lies up to destroy me! I have all the proof now and sent it to the media. **KIRO 7 is doing a story on what happened**

to me and will expose the lies and the people who made the lies against me.

I love you and have been waiting for 1 1/2 years for you to call like the sorry Judge ordered. You could if called text emailed me any time but I could not contact you until you contacted me first. **Well, that is a BS order from a BS Judge!**

I love you and always will love you. I have missed you more then (sic) my heart can bare! We have been wronged and it is time to fix these wrongs. Please talk to me!

Love,
Dad
R E Underwood

(CP 32, 162-163)

Mr. Underwood's never ending appeals and motions are a waste of judicial resources not to mention my client's time and money. They should be summarily dismissed and Ms.

Underwood's award at the trial court should be affirmed.

ISSUE #3: CLAIMED ERROR BY ROBERT UNDERWOOD: "The trial court erred in determining that a community lien could be imposed on separate property as a general property distribution – a community lien must be based on direct and positive community contribution."

RESPONSE: The trial court did not err in establishing the community lien and/or Ms. Underwood's share of the assets she was awarded.

It appears as though Mr. Underwood is suggesting that he be awarded both pieces of real property outright with no lien to Ms.

Underwood. This outcome would be to give Mr. Underwood basically all assets before the court with the exception of Ms.

Underwood's share of the military retirement, which she has yet to receive and may never receive. This result, giving virtually every asset to Mr. Underwood, would not be just and equitable given all relevant factors and should not be considered by the court.

Mr. Underwood wishes to ignore the cases that repeatedly state that the division must be just and equitable given all factors. Instead he wants to focus in on small details (the way the lien was calculated) which he believes support his position in order to convince the court that Ms. Underwood is entitled to nothing. He cites a 1954 case *Hamlin v. Merlino* which subscribes to the notion as follows:

Similarly, any increase in the value to separate property is presumed to be separate property, unless the spouse claiming the community property interest rebuts the presumption by producing direct and positive evidence that the increase is attributable to community funds or labors. *In re Marriage of Elam*, 97 Wn.2d 811, 816-17, 650 P.2d 213 (1982) (quoting *Hamlin v. Merlino*, **44 Wn.2d 851**, 857-58, **272 P.2d 125** (1954)). An equitable lien is a remedy designed to protect a party's right to reimbursement. *In re Marriage of Miracle v. Miracle*, 101 Wash.2d 137, 139, **675 P.2d 1229** (1984); H. Cross, *The Community Property Law in Washington*, 61 Wash.L.Rev. 13, 67 (1986).

They then cite the Marshall case, but omit the beginning portion of the quote which provides as follows:

Because a trial court is required to "do equity" in a dissolution proceeding, it must take into account all relevant circumstances in deciding whether a right to reimbursement has arisen. *Miracle*, 101 Wash.2d at 139, 675 P.2d 1229. (Emphasis added.) As Washington commentators have explained:

Equitable liens do not apply to property generally. They must attach to a specific property on a specifically documented theory. Equitable liens have principally been applied to favor the community, and not in favor of the separate property interest of either of the parties. **Most importantly, equitable liens are applied by Washington courts to assist a party in need of equity.** In re Marshall, 940 P.2d 283, 86 Wn.App. 878, 881-882 (1997) (Emphasis added.)

This court reviews a trial court's decision to grant or deny an equitable lien only for abuse of discretion. Miracle, 101 Wash.2d at 139, 675 P.2d 1229.

By the time of trial, we had numbers for all asset values.

The court then allocated all of the assets, community and separate, to the parties in a just and equitable manner as required by statute and case law. The court certainly has the power to award both community and separate property to either party. In fact, the trial court has broad discretion in distributing property in a dissolution action. In re Marriage of Gillespie, 89 Wash.App. 390, 398, 948 P.2d 1338 (1997). The statute controlling the disposition of assets and debts is RCW 26.09.080 which provides in part as follows:

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.

Additionally, failure to properly characterize property may be reversible error, but mischaracterization of property is not grounds for setting aside a trial court's property distribution if the division of the property is fair and equitable. *In re the Marriage of Gillespie*, 89 Wn.App. 390, 399, 948 P.2d 1338 (1997) (citing *In re the Marriage of Shannon*, 55 Wn.App. 137, 140, 777 P.2d 8 (1989)). Reversal is necessary only when the characterization of the property is crucial to the distribution. *In re the Marriage of Langham and Kolde*, 153 Wn.2d 553, 563-64 n.7, 106 P.3d 212 (2005) (citing *Shannon*, 55 Wn.App. at 142).

Again the trial court has gone on the record and indicated in part as follows:

I attempted to draft a ruling that was fair and equitable considering the economic circumstances of the parties, his earning capacity and potential, his other separate property that he had, which is basically all of the property was separate subject to the community interest, and I came up with an amount that I thought accurately portrayed what she should be awarded. It was not based upon lost profits, and I will clarify that so the Court of Appeals can see that. I think the lien of \$112,000 is a fair and equitable division of the property, the community property interest, and award that to her.

(CP 212-13.)

The court did what he thought was fair and equitable. He awarded Ms. Underwood a fair share of the assets payable as a lien on the only property in the State of Washington.

With regard to the issue of the lien, the court of appeals has already stated as follows:

The trial court determined that Kara had a community interest in the Cheney and Montana properties because community resources had been used to purchase or improve them. The trial court stated that “[t]he community contributed funds, sweat equity and incurred liabilities for those properties. CP at 20. Robert argues that the two properties were his separate property because they were purchased using his separate funds from the dissolution of his family trust and there was no evidence that community efforts increased the value of the properties. Robert’s assertion that the properties were his separate property is without merit. There was evidence that the two Cheney properties were purchased with not only the funds of the trust dissolution but also the funds received from the sale of the Steilacoom property, a community property asset. Further, there was evidence that the community funds were used to pay the mortgage on one of the properties and that community efforts and funds were used to improve both properties. Because community funds were used to purchase the properties and because community efforts were used to maintain the properties, we hold that Kara had a community interest in these properties.

Further, the proceeds from the Cheney property the parties sold were used to purchase the Montana property. Because Kara had a community interest in the Cheney property, she had a similar interest in the Montana property because it was purchased with proceeds from property in which she had a community interest. In addition, the parties paid the mortgage and made improvements to the Montana property with joint earnings. Accordingly we hold that the trial court did not abuse its discretion when it decided that Kara was entitled to a lien in some amount of property awarded to

Robert to account for her community interest in properties that were purchased, maintained, and financed in part with community funds.

(Opinion of Court of Appeals, page 29-30.)

I'm unsure why Mr. Underwood is asking to re-litigate that issue. The trial court found that there was a community interest in two pieces of real property. The court outlined all of the assets and debts of the marriage and divided them appropriately.

Additionally, property acquired by purchase during marriage is presumed to be community property. *Estate of Madsen v. Commissioner of Internal Revenue*, 97 Wash.2d 792, 796, 650 P.2d 196 (1982). The party asserting that an asset purchased during marriage is separate property can overcome this presumption only with clear and convincing proof. *Madsen* at 796. Evidence that a spouse had adequate separate funds available to purchase property is insufficient to overcome the presumption that an asset acquired during marriage is community property, unless separate assets are the only assets available. *In re Janovich*, 30 Wash.App. 169, 171, 632 P.2d 889, review den'd, 95 Wash.2d 1028 (1981) (quoting *Berol*, 37 Wash.2d 380, 382, 223 P.2d 1055); *Fite v. Fite*, 3 Wash.App. 726, 732, 479 P.2d 560 (1970), review den'd, 78 Wash.2d 997 (1971).

In this case, Robert's trust fund proceeds were not the only funds available to the parties to use to initially purchase the two parcels in Cheney. They had the proceeds from the sale of the Steilacoom home and the funds related to the return of the family trust real property in Montana along with some fees paid by the community.

On top of the community interest on the properties that the trial court and the court of appeals found exists, there may be a separate property interest on some of the assets. (Both parties acquired vehicles after the date of separation, etc.) The trial court can also divide to either party. All property before the court is capable of division to reach a just and equitable result, where there is mischaracterization, the trial court will not be affirmed unless the reasoning of the court clearly indicates that the court would have divided the property in the same way in the absence of the mischaracterization. In re Marriage of Shannon, 55 Wn.App. 137, 142, 777 P.2d 8 (1989). It is unlikely this court would have divided the property in any other way regardless of the characterization because the court can take a global view of the property evidence to reach an equitable distribution of assets and liabilities.

Robert wishes to spend much time arguing over the characterization of the property owned at the time of the dissolution. However, characterization of the property is not necessarily controlling; the ultimate question being whether the final division of the property is fair, just and equitable under all the circumstances. *Baker v. Baker*, 80 Wash.2d 736, 745, 498 P.2d at 321 (1972). The trial court has the duty to make final disposition of all of the property of the parties that is brought before the court. *DeRevere v. DeRevere*, 5 Wash.App. 741, 743, 491 P.2d 249 (1971). All property, both separate and community, is before the court. *Friedlander v. Friedlander*, 80 Wash.2d 293, 303, 494 P.2d 208 (1972).

Under appropriate circumstances, it need not divide community property equally. RCW 26.09.080; *20 Friedlander v. Friedlander*, 80 Wash.2d 293, 305, 494 P.2d 208 (1972); *In re Marriage of Hadley*, 88 Wash.2d 649, 656, 565 P.2d 790, (1977); *Worthington v. Worthington*, 73 Wash.2d 759, 768-69, 440 P.2d 478 (1968) (quoting *Webster v. Webster*, 2 Wash. 417, 419, 26 P. 864 (1891)); *In re Marriage of Leland*, 69 Wash.App. 57, 74 n. 14, 847 P.2d 518, *review denied*, 121 Wash.2d 1033, 856 P.2d 383 (1993). It need not award separate property to its owner. RCW 26.09.080; *Konzen v. Konzen*, 103 Wash.2d 470, 477-78, 693

P.2d 97 (1985); *Baker v. Baker*, 80 Wash.2d 736, 746-47, 498 P.2d 315 (1972); *Blood v. Blood*, 69 Wash.2d 680, 682, 419 P.2d 1006 (1966); see also *Brewer*, 137 Wash.2d 756, 766, 976 P.2d 102 (1999) ("Characterization of property as community separate is not controlling in division of property between the parties in a dissolution proceeding[.]"); *Stachofsky*, 90 Wash.App. 135, 147-48, 951 P.2d 346 (1998) (upholding a decision to award wife a portion of husband's separate property). According to RCW 26.09.080, the court need only "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."

In light of the circumstances, the award was just and equitable. Although in actuality, Kara has no ability to obtain most of the items the court awarded her. It will be difficult at best to collect on the lien in the amount of \$112,000, to obtain 50% of the accrued leave through the US Army, to obtain the retirement through the US Army if Robert elects to abandon that entitlement, to get Robert to pay the debts that he was awarded, and to obtain the return of all items of personal property. Kara has in her possession her vehicle acquired after the date of separation and that may likely be the only asset she will retain at the conclusion of

a marriage that spanned over 20 years. Unfortunately absent a foreclosure, Ms. Underwood has no way of collecting on her dissolution settlement. The court should have simply awarded Ms. Underwood the Cheney property outright to insure she received what was ordered by the court. Robert has already shown through his actions that he will not pay debts or attorney's fees that he is ordered to pay, he will not provide all of the personal property awarded to Kara, he will not pay all the maintenance that he is ordered to pay, which will be particularly hard to collect now that he has been released from the military.

ISSUE 4: CLAIMED ERROR BY ROBERT UNDERWOOD: "The court erred by failing to depreciate the value of community lien in its calculation in accordance with the depreciation in the value of the assets."

RESPONSE: The trial court did not err in the method they used in calculating Ms. Underwood's share of assets she was awarded.

When this case went to trial, the parties had three main assets, retirement through the military and two parcels of real property (one located in Eastern Washington and one located in Montana). I suspect the court can take judicial notice that real property is often subject to fluctuations in value. This case started in 2010. The court used the best information it had before it at trial in 2012 which included appraisals that Ms. Underwood obtained.

These figures were used in the court's ruling. Therefore, I am unsure why Mr. Underwood thinks inflated figures were in fact used by the court.

Mr. Underwood's brief also fails to take into consideration the payment of community funds that went into the properties to make the mortgage payments, capital improvements, payment of taxes, insurance, repairs, boundary line adjustments, advertising for renters, property management fees, and the like. The community also invested a lot of sweat equity.

Further, the court cannot ignore the property that Robert is being awarded. Robert was awarded appreciating assets to include the cabin and property in Cheney, both of which can either produce significant income or be sold. Robert was also expecting a \$57,000 settlement for legal malpractice concerning land purchases for his family in Montana.

ISSUE #5: CLAIMED ERROR BY ROBERT UNDERWOOD:

"Robert should not have to pay interest on the community lien from the date of divorce because the Court of Appeals specifically vacated the community lien and directed that the lien be removed from the property records."

RESPONSE: The trial court did not err in requiring Mr. Underwood to pay interest from the date of the decree forward.

Given that the trial court affirmed the lien of \$112,000, then I do not understand Mr. Underwood's position that he should not

have to pay any interest on the sum while the appeals have been pending.

It should also be noted that while the original Decree awarded Kara Underwood a lien of \$112,000 payable at 12% interest per annum, on Remand the trial court lowered the interest rate to 4%. (CP 469, CP 219) thereby lowering what Robert Underwood will ultimately have to pay to Kara Underwood after she has waited over 3 years for her payment. Therefore, Mr. Underwood already got the benefit of having to pay only negligible interest in this matter. The court also did not indicate a due date, at which time the statutory interest rate would commence. This was not fair to Ms. Underwood.

Further, Mr. Underwood should not be able to benefit from using the court system to stall his payment of the award. He could have done a number of things to eliminate the payment of interest going forward. That could have included paying the sums due into the registry of the court. Or he could have paid the sums due to his attorney's trust account, any one of the 5 attorneys that have represented him in the past. But he did not. Therefore interest should be assessed from the date of the original judgment going forward.

REQUEST FOR FEES ON APPEAL. Kara requests an award of attorney's fees under RAP 18.1(a) and RCW 26.09.140 for the necessity of defending this appeal.

Kara is requesting fees under RCW 26.09.140 cited above and RAP 18.1(a). In this case we believe that Robert's appeal is frivolous, particularly in light of his intransigence while the matter was pending in Superior Court. Robert had the funds available to hire experienced appellate counsel. Kara did not. She is requesting an award of fees.

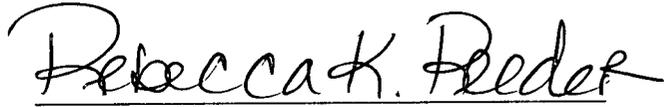
If attorney fees are allowable at trial, the prevailing party may recover fees on appeal. *Landberg v. Carlson*, 108 Wn.App. 749, 758, 33 P.3d 406 (2001) (citing RAP 18.1). RAP 18.1(a) authorizes the appellate court to order a party who files a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." Appropriate sanctions may include, as compensatory damages, an award of attorney fees and costs to the opposing party. *Yurtis v. Phipps*, 143 Wn.App. 680, 696, 181 P.3d 849 (2008).

Additionally, the award given at the conclusion of the four day trial was just and equitable.

CONCLUSION

The court should deny Robert Underwood's appeal in its entirety. The court should also award all fees and costs that Kara Underwood incurred for the necessity of defending this appeal.

RESPECTFULLY SUBMITTED this 15TH day of October, 2015



REBECCA K. REEDER, WSBA #25079
Of Attorneys for Respondent
Faubion, Reeder, Fraley & Cook, PS
5920 100TH Street SW #25
Lakewood, WA 98499

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DIVISION II

DECLARATION OF SERVICE

2015 OCT 19 PM 1:33

THE UNDERSIGNED, hereby declares:

STATE OF WASHINGTON

That I am a citizen of the United States, over the age of 18

BY C. [Signature]
DEPUTY

years, not a party to the above-entitled action, competent to be a witness therein and was at all times herein mentioned.

That on October 16, 2015, I arranged for service of the foregoing Reply Brief of Respondent to the court and to the parties of this action as follows:

Office of Clerk Court of Appeals – Division II 950 Broadway, Suite 300 M/S TB-06 Tacoma, WA 98402-4454	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> US Mail <input type="checkbox"/> Overnight mail
Emily J. Tsai Attorney for Appellant 2101 – 4 th Ave #2200 Seattle, WA 98121	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> US Mail <input type="checkbox"/> Overnight mail
James Cathcart PO Box 64697 University Place, WA 98464-0697	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> US Mail <input type="checkbox"/> Overnight mail

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

Signed at Lakewood, Washington this 16 day of October, 2015.

Paula J Ledbetter
PAULA J. LEDBETTER