

FILED

AUG 17 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO 28489-1

WASHINGTON STATE COURT OF APPEALS
DIVISION III

In Re the Marriage of

MICHAEL KEVIN TRIGGS,

Appellant

v.

JUDITH KAY TRIGGS

Respondent

AMENDED RESPONDENT'S BRIEF

W. JAMES KENNEDY
WSBA NO: 4648
Counsel for Judith Kay Triggs

THORNER, KENNEDY & GANO P.S.
PO BOX 1410
YAKIMA, WA 98907
(509) 575-1400

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	i, ii, iii
INTRODUCTION	1
A. COUNTER-STATEMENT OF ISSUES	1
B. STATEMENT OF THE CASE	2
C. ARGUMENT ..	14
1. Summary	14
2. The Standard of Review	14
3. Appellant Asserts the trial court improperly relied upon the Exhibits 3 and 13, which were admitted solely for illustrative purposes	16
a. Retirement Plans	18
b. Loan to Emma	19
c. Valuations of Bank Accounts	20
4. The trial court's valuation of the parties' assets was within its sound discretion to achieve a fair and equitable distribution	21
5. Separate Interest in Residence	24

6. Did the trial court err in awarding maintenance to the wife?	29
7. The trial court did not award social Security.	35
8. Attorney's Fees	37
9. Attorney's Fees and Costs on Appeal . . .	39
CONCLUSION	40
APPENDIX:	
JUDGE'S RULING (CP 107)	A

TABLE OF AUTHORITIES

Washington Cases	<u>Page</u>
<i>In re the Marriage of Williams</i> , 84 Wn. App. 263, 267, 927 P.2d 679 (1996)	15, 33
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)	15
<i>Matter of Marriage of Crosetto</i> , 82 Wn. App. 545, 556, 918 P.2d 954 (1996).....	15, 22
<i>In re Marriage of Wright</i> , 78 Wn. App. 230, 237, 896 P.2d 735 (1995).....	16
<i>In re the Marriage of Nicholson</i> , 17 Wn. App. 110, 114, 561 P 2d 1116 (1977)	16
<i>In re the Marriage of Washburn</i> , 101 Wn.2d 168, 677 P.2d 152 (1984).	22
<i>In re the Marriage of Rockwell</i> , 141 Wn. App. 235, 170 P.3d 572 (2007).....	23, 32 35
<i>In re the Marriage of Martin</i> , 22 Wn. App. 295, 588 P.2d 1235 (1979).	23
<i>In re the Marriage of Pilant</i> , 42 Wn. App. 173, 181, 709 P.2d 1241 (1985).....	24
<i>In re the Marriage of Olivares</i> , 69 Wn. App. 324, 336, 848 P.2d 1281, and 122 Wn.2d. 1009 (1993).	25, 27, 28
<i>In re the Marriage of Pearson-Maines</i> , 70 Wn. App. 860, 855 P.2d. 1210 (1993)	25, 29

<i>In re the Marriage of Elam</i> , 97 Wn. 2d. 811, 650 P.2d. 213 (1982).....	25
<i>In re the Marriage of Miracle</i> , 101 Wn.2d. 137, 139, 675 P.2d. 1229 (1984)	26
<i>In re the Marriage of Borghi</i> , 167 Wn. 2d. 480, 219 P. 3d 932 (200)	27, 28 29
<i>In re the Marriage of Terry</i> , 79 Wa. App. 866, 869, 905 P.2d. 35 (1995).....	33
<i>In re the Marriage of Marcetta</i> , 129 Wn. App. 607, 120 P.3d. 75 (2005)	34
<i>In re the Marriage of Zahm</i> , 138 Wn. 2d. 213, 978 P.2d. 498 (1999).....	36, 37
<i>Fite v. Fite</i> , 3 Wn. App. 726, 479 P.2d. 560 (1970)	38
<i>In re the Marriage of Murrow</i> , 53 Wn. App. 579, 70 P.2d. 197 (1989) at page 591.....	38
<i>Koon v. Koon</i> , 50 Wn. 2d. 577, 581 (1957)	39
<i>In re the Marriage of Booth</i> , 114 Wn.2d. 772, 779-80, 791 P.2d. 519 (1990).....	39
<i>Rhinehart v. Seattle Times, Inc.</i> , 59 Wn. App. 332, 340, 798 P.2d. 1155 (1990).....	39
Constitutional Provisions, Statutes and Court Rules	Page
RCW 26.09.140	2, 37, 39, 41

RCW 26.09.090.....	2, 29, 30, 31 32
RCW 41.50	13
RCW 26.16.030	20
RCW 26.09.080	22, 37
RCW 4.84.185	39
RAP 18.1	39
RAP 18.9	39
Family Law Deskbook, section 29.3, at 29-4.	33
Washington Practice, Volume 20, at page 376.....	33

INTRODUCTION

This appeal arises from a challenge from Michael Triggs (Michael), of the court's rulings regarding the division of assets, award of spousal maintenance and attorney fees in granting the Wife's petition for dissolution of the parties' 33 year marriage.

The trial court acted and ruled within its discretion – both in dividing the parties' property, awarding maintenance and awarding attorney's fees to Judith Triggs (Judith). The rulings should be affirmed in all respects. Respondent, Judith, provides the following response to Michael's opening brief.

A. COUNTER-STATEMENT OF ISSUES

Judith acknowledges the assignments of errors presented but believes the issues can be more clearly stated as follows:

1. Did the court abuse its discretion by entering a ruling that was not supported by substantive evidence? The trial court did rely upon some exhibits for illustrative purposes? The valuations and the dates of the valuation were presented by way of testimony and/or exhibits. Exhibit 13 was admitted for illustrative purposes, but was supported by substantive evidence.

2. Did the trial court err in valuing retirement plans on different dates which unduly prejudiced Michael?

3. Did the trial court err in finding that Judith had a separate property interest in the family home?

4. Did the trial court fail to consider the statutory factors in RCW 26.09.090 in awarding maintenance to Judith?

5. Did the trial court err in awarding maintenance based on Michael's social security income?

6. Did the trial court abuse its discretion under Washington case law and RCW 26.09.140 in awarding attorney's fees to Judith?

B. STATEMENT OF THE CASE

The parties were married on January 25, 1975 (CP 18) and separated on/or about January 13, 2009 (CP 18). All children born of the marriage are emancipated. The parties lived in Yakima throughout their marriage.

At the time of the trial Michael was 57 years of age, having been born on July 27, 1951 (Exhibit 2.6). Judith was 63 years of age, having been born on January 11, 1946 (Exhibit 2.31) (RP line 1, page 72 and Line 20, page 71). At the time of trial Judith was

approximately three years away from the retirement age of 66 (Exhibit 2.31) and Michael was approximately nine years away from his social security age of 66 (Exhibit 2.6).

Both parties have worked hard during their marriage. Judith has worked for DSHS and People for People. She had a hiatus to raise the children from approximately 1973 through 1985 (Exhibit 2.31). Since 1986 she has worked fulltime (RP line 23, page 112). At age 66 Judith will receive approximately \$1383.00 from social security upon retirement (Exhibit 2.31). Judith's 2008 W2 showed income of \$39,846.00 (Exhibit 2.37). Judith also supplied at trial her W2s back to the year 2002 (Exhibit 2.4).

Michael's social security retirement benefits at his age of 66 will be approximately \$2,061.00 (Exhibit 2.6). The social security statement for Michael is dated April of 2006 and he did not supply a more current statement (Exhibit 2.27). The trial court did not have current information to set a specific amount. The last year shown on Exhibit 2.6 had Michael's income for 2005 at \$82,189.00 (see Exhibit 2.32 for Michael's W2 for the year 2008). For the past two years Michael has had a marked increase in his income.

Following separation Michael was earning a gross income of \$3,920.00 every two weeks or more than \$90,000.00 per year (see Exhibit 2.5). By his own admission, Michael is a hard worker and had obtained employment for the Hanford Reservation as an electrical maintenance planner (see RP 28).

Michael testified that he wished to retire when he turns 66 in the year 2017 (see RP 71). Comparing Michael and Judith's social security earnings you can see that Michael has generally made twice as much, or more, than Judith (see Exhibit 2.6 and 2.31). Michael's income was found by the court to be \$7,644.00 per month (see Exhibit 2.5 and RP 29). Judith's income was found to be \$3,600.00 per month (see RP 195). Michael's gross income is more than 100% greater than that of Judith's.

The parties had some significant assets. The parties separated in early 2008 and this case was tried in the summer of 2009. At the beginning of this dissolution case the retirement accounts were substantially greater than at the time of trial. There was no testimony that the parties did anything to affect the value of the stock, but rather the decrease was due to the general stock market conditions.

The trial court in reaching its conclusion prepared a one page document listing the values, debts, net values and who was to receive it. A copy of that document is attached as Appendix "A" (see CP 107).

The Appellant argues the court erred in the valuation of the retirement plans. Michael answered discovery and his answers were set forth in Exhibit 2.27. An interrogatory update letter was sent to Michael asking that the interrogatory answers be updated and reminding him that he had a continuing duty to update his answers to the interrogatories (Exhibit 2.22). This letter and his answers to discovery were admitted into evidence (see Exhibit 14) (see also Exhibit 2.27).

Michael had every opportunity to supply complete records of what had transpired in regards to his retirement accounts up to the date of trial. He did not. The court relied on some of the statements by Michael that was based on phone calls he made to the plan administrators during trial and set forth on Exhibit 13 for illustrative purposes (RP 165, 166).

Michael had three retirement plans, namely: Vanguard, which as of July 9, 2009 (date of trial) was valued at \$281,477.00

(see Appendix "A", CP 107); a Novation Retirement with BAC, which on July 9, 2009 was worth \$102,054.00; and a 401(k) (see Exhibit 2.13), which was fairly new and the community contributions at the time of separation were approximately \$4,800.00 (RP line 19-20, page 66). Michael's contributions from the date of separation to date of trial were approximately \$23,417.00.

Michael contributed after separation between \$1,666.00 and \$1,000.00 per month into his retirement account (RP, line 23, page 50). At the same time he was able to pay temporary maintenance of \$1,400.00 per month and still had \$800.00 after his monthly expenses (RP, line 8, page 51).

Judith has a difficult time understanding the complaint about the retirement accounts. First of all, the Vanguard account was split by way of a Qualified Domestic Relations Order (CP 22-25). Each party was to receive 50% of the value of the plan up to the date of division. Neither party benefited any more or less than the other party. On September 30, 2007, prior to separation the Vanguard account was worth \$328,000.00 (Exhibit 2.14). As of March 31, 2009 the plan was worth \$263,000.00 (Exhibit 2.14). This was due to the fluctuation of the market. Neither party removed funds or

contributed to this plan after separation. The Vanguard net amount was divided equally by a Qualified Domestic Relations Order.

There was \$138,000.00 in the Novation account in 2007 (see Exhibit 2.13). On/or about March 31, 2009 there was a balance of \$139,925.00 (see Exhibit 2.13). At the time of trial it was worth \$102,054.00 (see Exhibit 13 for illustrative purposes) (based on the statement of Appellant). If there were further documents relating to Michael's retirement, they were in Michael's possession. He could have produced them at any time. It was his duty to produce them.

Michael's statement also indicates that the 401(k) administered by Tradewinds was valued without specifying a date. The valuation of the plan was based on Michael's contribution of \$1,600.00 for three months prior to separation. The value of Tradewind at separation was \$4,800.00 (cite RP page 66).

Judith's retirements suffered the same ups, downs and back ups history as did Michael's. Judith had four different accounts. One was with the Catholic Credit Union with a value of \$2,191.00 (see Exhibit A, CP 107). She cashed out the Catholic Credit Union account to pay her attorney's fees. She had a People for People

TSA, which was valued by the court at \$9548.00 (see Appendix "A", CP 107 and also Exhibit 2.17, which is dated June 30, 2009 approximately eight days before trial). Judith produced her People for People 401(k) account statements for December 31, 2007, December 31, 2008 and June 30, 2009 (Exhibit 2.16).

Judith produced statements for her American Funds 403(b) account for December 31, 2007, August 11, 2008, December 31, 2008, March 31, 2009 and June 30, 2009 (Exhibit 2.19). As of June 8, 2009 the 403(b) account had a balance of approximately \$50,501.00.

Judith's 401(k) account (Exhibit 2.16) had a balance on March 31, 2009 of \$17,615.00. This account was actually valued by the court at \$30,117.00, less \$3,600.00 for separate contributions by Judith after the date of separation for a net value of \$26,517.00 (see Appendix "A", CP 107).

The trial court valued the accounts of Michael as of July 9, 2009 (date of trial). The trial court valued the 403(b) and 401(k) accounts of Judith as of June 8, 2009, the People of People TSA as of June 30, 2009 and the People for People 401(k) as of March 31, 2009 (see Exhibit 2.16, 2.17, 2.18, 2.19).

Michael sets forth in his Statement of Facts, "the court found the TSA account was worth \$9,548.00 without specifying the date of the valuation". Exhibit 2.17 specifically sets forth the balance as of June 30, 2009. With the exception of the separate property contributions all of the retirement accounts were found to be community property (see Appendix "A", CP 107).

The trial court did not charge Michael with spending the proceeds from an IRA (\$89,406.00) that Michael had received prior to separation. Michael presented testimony that accounted for the withdrawal of the funds (see Exhibit 8 and Exhibit 5). The items purchased with these funds were listed as assets. There was \$4,000.00 remaining and held by Michael but not considered by the trial court (Appendix "A", CP 107).

The next issue is the characterization of the residence. Prior to the parties' marriage, Judith and her previous husband owned a residence. Judith sold that property on/or about May 18, 1981 and received equity in the sum of \$30,497.50 (see Exhibit 2.25). On the same date the parties entered into a contract to purchase property located at 290 Beane Road, Moxee, Washington. 100% of the \$30,000.00 down payment came from Judith's separate property

(see Exhibit 2.25). At the time of the purchase the marital community had no equitable interest in this property by way of financial contribution. In 2010 the residence was appraised at \$165,000.00 (see Exhibit 2.36). The trial court, in its oral opinion, found that Judith paid \$30,000.00 of the \$65,000.00 purchase price with her separate property (see Appendix "A", CP 107). The court found that at the time of acquisition of the Beane Road residence Judith owned 46% of the interest of the house as her separate property. The trial court, in valuing the residence, retained that same percentage (46%) and determined that her separate property interest as of that date of trial equaled \$75,900.300 (see RP, line 16-22, page 189). The trial court went on to state that he wanted it to be clear on the record that his determination with regard to dividing the character and the amount of that separate property had been clear, cogent and convincing evidence (see RP, line 20-25, page 189 and lines 1-2, page 190).

Judith agrees that the marital community paid off the mortgage against the residence. The mortgage was paid from funds from a community IRA account that Michael removed prior to separation that were held at Charles Schwab (see Exhibit 5).

There was no testimony offered by Judith or Michael that any "improvements" of the residence increased its value. Any increase in the value of the residence would have been inflation.

Spousal maintenance is the next issue. Michael asserts that the trial court erred when it awarded maintenance in the amount of \$1,700.00 and for a length of time up to Michael's 66th birthday. Michael's gross income was \$7,700.00 per month (see, Exhibit 2.7). Michael's monthly expenses are \$2,710.00 a month (Exhibit 2.7). Michael's financial declaration also reveals that he had cash in the bank of \$17,000.00 at the time of signing his financial declaration (Exhibit 2.7). During the pendency of this action Michael had been able to pay additional funds into his retirement of \$1,666.00 per month (RP, line 23, page 50).

Judith had total monthly expenses of \$3,910.00 and a net income of \$2,490.00 (see Exhibit 2.8). Judith had a shortfall of approximately \$1,420.00 a month. During the pendency of the dissolution Michael was required to pay approximately \$1,400.00 per month.

Michael, based on his financial declaration, had a net income of \$6,666.00 before any deduction for pension plan

payments. Michael had excess earnings over and above his expenses in the sum of \$2,962.00 per month (RP, line 23, page 50 and line 8, page 51). The trial court concentrated on Michael's gross monthly income of approximately \$7,700.00 and Judith's gross monthly income of \$3,600.00 (see RP 195). The trial court ordered Michael to pay Judith maintenance in the sum of \$1,700.00 per month until he reaches the age of 66. The court stated that when Michael begins collecting social security he is to pay maintenance in the sum of one-half of the difference between the parties' social security (see CP 12-13). The court stated that if Michael started collecting social security before he retires (age 66), that he would have to pay both the maintenance and the additional maintenance based on social security income (CP 15).

Michael would have the court to believe that the trial court awarded a portion of Michael's social security directly to Judith. That is not the case. Pursuant to the Decree of Dissolution, which reads in pertinent parts as follows:

3.7 Maintenance

The husband shall pay \$1700.00 maintenance to Wife. Maintenance shall be paid monthly. The first maintenance payment shall be due on 09-01-2009.

The obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance unless otherwise specified below:

Payments shall be made directly to the other spouse. If a maintenance payment is more than 15 days past due and the total of such past due payments is equal to or greater than \$100, or if the obligor requests a withdrawal of accumulated contributions from the Department of Retirement Systems, the obligee may seek a mandatory benefits assignment order under Chapter 41.50 RCW without prior notice to the obligor.

Maintenance shall terminate upon Husband's 66th birthday, at which time Husband shall pay as maintenance one-half of the difference between his amount of social security and the amount that Wife is receiving of social security, if any. The amount of maintenance shall be reconsidered to take into account any changes in Wife's receipt of social security or its amount (CP 13-14).

Husband is required to pay maintenance, taking into account the social security income. Judith is not entitled to have a payment made directly from social security, nor was she awarded a property interest in Michael's social security (CP 12, 13, 16).

Based on the economic circumstances of the parties at the time of the entry of the Decree the trial court ordered that Michael pay to Judith \$6,000.00 in attorney's fees. Judith submitted a billing

for \$8,027.50 in fees and \$720.00 in costs (see Exhibit 2.30). In a previous declaration Judith indicated that she had paid fees in the sum of \$2,000.00 (Exhibit 2.8). Michael had paid \$9,000.00 in fees and did have \$3,000.00 refunded to him (RP page 44-45, 59-60). Throughout the trial process Michael was able to make payments to his counsel and Judith was not.

C. ARGUMENT

1. Summary.

Michael seeks to reverse the trial court's property division, the award of spousal maintenance and award of attorney's fees. The trial court properly considered the evidence presented as to all of the relevant factors and acted within its sound discretion to value and divide the parties' property in the manner in which it did and to award maintenance taking into consideration the relevant factor of the parties' income and the property distribution.

Michael's appeal is advanced without reasonable cause. Judith is entitled to her attorney's fees and costs.

2. The Standard of Review

"[T]rial court divisions in marital dissolution proceedings are rarely changed on appeal. The party who challenges a

maintenance award or a property distribution must demonstrate that the trial court manifestly abused its discretion". *In re the Marriage of Williams*, 84 Wn. App. 263, 267, 927 P.2d 679 (1996)(internal citation omitted).

"A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. 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 an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (internal citations omitted).

Appellate review of a trial court's division of marital property "is limited to whether the trial court's distribution of property was fair and equitable". *Matter of Marriage of Crosetto*, 82 Wn. App. 545, 556, 918 P.2d 954 (1996).

“The trial court abuses its discretion if it bases the award or denial of spousal maintenance on untenable grounds or for untenable reasons”. *In re Marriage of Wright*, 78 Wn. App. 230, 237, 896 P.2d 735 (1995).

“As to the trial court’s exercise of its discretion, more is required to establish an abuse of that discretion than disagreement with the trial court’s opinion”. *In re the Marriage of Nicholson*, 17 Wn. App. 110, 114, 561 P 2d 1116 (1977).

3. Appellant asserts the trial court improperly relied upon Exhibits 3 and 13, which were admitted solely for illustrative purposes.

The following sets forth a value the court found in regards to each asset. Judith has made reference to either the exhibit or the testimony that serves as a basis for those values.

Asset	Value	Debt	
290 Bean Road	165,000	75,900 *	Exhibit 2.36
95 Ford Contour	1,000	0	RP 61, line 14
			Exhibit 3.27
00 Nissan Maxima	6,595	0	RP 61, line 21
08 Mazda M6	19,000	0	RP 62, line 5
76 Chevrolet	250	0	RP 62, line 11
HH goods/furnish.	8,225	0	Exhibits 2.20 & 2.21
Antiques	3,850	0	Exhibit 2.20
Appliances	400	0	RP 132
Catholic CU IRA	2,191	0	RP 127, line 24
American Funds	50,501	0	Exhibits 2.18
402(b) **			

Asset	Value	Debt	
Wife's 401(k)	30,117	3,600	Exhibit 2.38
Wife's TSA	9,548	0	Exhibit 2.17
Vanguard	281,477	0	Exhibit 2.14
Novations	102,054	0	Exhibit 2.13
Husband's 401(k)	4,800	0	RP 66, lines 19-21
Catholic CU	12,771	0	Exhibit 2.35, RP 89
Yakima Valley CU	1,000	0	RP 139, line 20
Yakima Valley CU	1,000	0	RP 139, line 22
Key Bank	8,509	0	Exhibits 2.27 & 2.35

* Wife's separate property interest in home.

** This account was split equally as of date of division.

Debts

Capital One	30,000	RP 140, line 8
Macy's	2,100	RP 140, line 8
Roza Irrigation	333	RP 140, line 8
Property taxes	768	RP 140, line 9, 10
Sears	75	RP 140
Valencia Yard	350	RP 140
Catholic CU	1500	RP 162, 163

Other Assets

Nuvotec USA stock	20	
Emma loan	9000	RP 111, line 6
Community funds for attorney	3000	RP 163, line 6 Exhibit 2.35

Michael would have this court believe that the trial court simply utilized Exhibits 3 and 13 to form an opinion as to what the facts were in this case.

Upon review of the valuations Judith could argue that the court erred in finding the value of the Catholic Credit Union account in the sum of \$1,500.00 rather than \$1,000.00 (see Appendix "A", CP 107). Judith could argue that the trial court erred in failing to list the remaining \$4,000.00 Michael had at the time of separation that was left over from his withdrawal of \$89,000.00 IRA account (see Exhibit 5). On the day of trial Judith's retirement accounts were actually less than what was listed by the court (Appendix "A", CP 107).

The court did not rely on information contained in Exhibits 3 and 13. Judith has tried to be precise in regards to answering the basis for each and every item listed on Exhibit 13. Michael's issue has no merit.

(a). Retirement Plans. Michael alleges that the trial court misstated its rationale for choosing the valuation dates and the dates utilized by the court resulted in an inequitable result.

This matter was tried on July 8, 2009 and July 9, 2009. The first issue is the valuation date of the BAC: Novations account (husband's retirement). That number was based upon what Michael stated it was worth on the second day of trial. Michael also stated the valuation as of July 9, 2009 for his Vanguard account. The court valued that property at the time of trial as it did for Judith's pensions (see, Exhibits 2.16, 2.17, 2.18, 2.19 and 2.38). With the fluctuations of the stock market up and down the retirements should have been valued as close to trial as possible and they were (see Appendix "A", CP 107).

The trial court did not value Judith's retirement accounts as of March 31, 2009. Exhibit 2.38 is a valuation as of June 30, 2009. All of the retirement plans were valued within eight or nine days of each other. Michael's argument is without merit (see Appendix "A", CP 107).

(b). Loan to Emma. Michael argues that the court should not have considered the loan to Emma and placed the \$9,000.00 loan in his column.

Michael stated that Judith did not know that he was forgiving the loan to their daughter (RP line 6, page 111), nor is there any

evidence that Michael ever advised her prior to trial that he had forgiven the indebtedness RCW 26.16.030 states that a party can only gift their community interest. Since the trial court utilized its discretion in finding that the community money had been loaned without Judith's consent, the trial court charged Michael with the loan.

(c). Valuations of Bank Accounts. Michael alleges that there is no direct evidence of the balances of three bank accounts as of the date of separation. That information was available to Michael. Pursuant to the terms of Exhibit 14, he was required to produce certain bank records. Those accounts were in his name and available to him.

According to Michael's financial declaration dated March 6, 2008 (two months after separation) he stated under oath that he had \$17,000.00 in bank accounts (see Exhibit 2.7). The question is: if Michael had any different information than what the court found, Michael certainly could have presented it at trial.

The last account mentioned by Michael is the Key Bank account. The trial court had no other documents to rely on as to the Key Bank account of Michael's other than Exhibit 2.34. Michael

never came forward with the balance as of the date of separation. Michael was also sent requests to update discovery (Exhibit 2.22). Judith was asking for updated answers from Michael through her counsel. From the date of the letter to the date of trial no such information was forthcoming. The trial court used the best and only information available to it. This is a \$4,000.00 issue. The trial court did not consider the remaining \$4,000.00 left over from the cashing in on one IRA account by Michael prior to the parties' separation. Michael argues that there has been a net detrimental affect to him of more than \$30,000.00. Michael states "it appears that the trial court simply took the information, both the value of the assets and the dates of valuation, directly from Ms. Triggs' Exhibit 13". Exhibit 13, for illustrative purposes, utilized the valuation based on exhibits or testimony.

4. The trial court's valuation of the parties' assets was within its sound discretion to achieve a fair and equitable distribution.

Michael assigns error to the trial court's overall distribution of the community assets and the court's valuations as set forth on Appendix "A" (see CP 107).

The trial court had broad discretion in dividing the marital property pursuant to RCW 26.09.080. The non-exclusive factors as set forth in RCW 26.09.080 include the nature and extent of the community property, the nature and extent of the community property, the nature and extent of separate property, the duration of the marriage, and the economic circumstances of each spouse when the property division is to be effective. *In re the Marriage of Washburn*, 101 Wn.2d 168, 677 P.2d 152 (1984). *In re the Marriage of Crosetto*, 82 Wn. App. 545, 556, 918 P.2d 954 (1996). “An equitable division of property does not require mathematical precision, but rather fairness, based upon a consideration of all of the circumstances of the marriage, both past and present, and an evaluation of the future needs of [the] parties”. *Matter of Marriage of Crosetto*, 82 Wn. App. 545, 556, 918 P. 2d 954 (1996).

The trial court addressed the nature and extent of the parties' property, the duration of the marriage, their ages, health, education, business experience and employability. The final property division is just and equitable, based upon the court's consideration of relevant factors. The court acted within its

discretion in dividing the assets as set forth in Appendix “A” (see CP 107).

Judith relies on the case of *In re the Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007). In considering the spouse’s future earning capacity the trial court may consider the spouse’s age, health, vocational training and work history. In the case at bar, Judith was 63 years at the time of trial and intended to retire at 66 as of trial she had a work expectancy of three years. Michael had a work potential for another nine years. The trial court also has an obligation to review the incomes between the parties, including future pensions. Justice Applewick in writing the opinion *In re the Marriage of Rockwell, supra* at page 243, stated “in the dissolution of a long-term marriage of 25 years or more, the trial court’s objective in dividing marital property is “to place the parties in roughly equal financial positions for the rest of their lives”.

The trial court had a duty to value the property. *In re the Marriage of Martin*, 22 Wn. App. 295, 588 P.2d 1235 (1979). “[W]hen the parties offer conflicting evidence in valuation, the court may adopt the value asserted by either party, or any value in between the two”.

If a trial court incorrectly valued certain marital assets, the appellant court need not reverse on that basis if the distribution of the property on the whole is fair and equitable. *In re the Marriage of Pilant*, 42 Wn. App. 173, 181, 709 P.2d 1241 (1985).

The trial court's valuation of the assets is within the range of evidence offered by the parties' testimony or exhibits entered at trial. The overall distribution is both fair and equitable.

5. Separate Interest in Residence.

Michael's position as to the family residence is that the trial court should have characterized it as 100% community property. The trial court found that at the time of the purchase of the residence, Judith took the funds from the sale of the property she previously owned and on the same date made the entire down payment of \$30,000.00 on the residence at 290 Beane Road (see Exhibit 2.25). The total purchase price was \$65,000.00 (see Exhibit 2.26). The trial court found that at the time of the purchase that 46% of the property was separate property and 54% was community property. Appendix "A" (CP 107).

The title of real property is not necessarily dispositive of ownership characterization as separate or community. The court

can look beyond the title. The trial court could have found that there was no community property interest in the home. The residence should be entirely Judith's separate property.

Once separate property has been determined it is presumed to retain the character until there is direct and positive evidence to the contrary. In this case no such evidence was offered. See, *In re the Marriage of Olivares*, 69 Wn. App. 324, 336, 848 P.2d 1281, review denied, 122 Wn.2d. 1009 (1993). As a result, any increase in the value of separate property is presumed to be separate. The trial court found that because the marital community would be making the payments on the remainder of the contract that that percentage amount would be community property.

Michael could have come forward and convinced the court that he had a right to be reimbursed for any increase in value attributable to the community contributions. Michael did not. *In re the Marriage of Pearson-Maines*, 70 Wn. App. 860 at 869, 855 P.2d 1210 (1993). *Pearson* also stands for the proposition that any increase due to inflation shall be divided consistently with the portions of community and separate contributions. See, also *In re the Marriage of Elam*, 97 Wn.2d. 811, 650 P.2d. 213 (1982).

The marital community benefitted from the use of the separate residence. *In re the Marriage of Miracle*, 101 Wn.2d. 137, 139, 675 P.2d 1229 (1984). Judith has not been compensated for the use and benefit of her 46% separate property interest in the residence. If someone has the right to complain it is Judith for the court not having found that the house was her separate if, in fact, there had been improvements for which the community should have been compensated there would be an offset against the community's use and benefit of the property. The community had the use and benefit of not only the community aspect of the property, but wife's separate property. Michael argues that there were certain improvements made in 2007 and 2008 for storm windows, property taxes and yard work. The burden was on Michael to prove that those improvements increased the value of the property. There was no testimony to that. There is no proof that the community did anything towards improvements to the residence that have increased the community's percentage of interest in the property or in the value of the residence.

The second issue raised by Michael is that in obtaining a home equity loan to remodel the house and to pay certain

expenses (not related to the house) these improvements reduced Judith's separate interest in the residence. There was no testimony that Judith had any intention of changing the character of her separate interest of the residence and did nothing to do so.

The third issue is that the trial court did not utilize the presumption that "property acquired during marriage is presumed to be community property, unless the presumption is rebutted by clear and convincing evidence". *In re the Marriage of Olivares*, 69 Wn. App. 331, 848 P.2d. 1281.

Michael failed to cite the case *In re the Marriage of Borghi*, 167 Wn. 2d. 480, 219 P.3d 932 (2009). The Washington Supreme Court, in *Borghi*, stated "we have consistently refused to recognize any presumption arising from placing legal title in both spouse's name and instead adhered to the principal with the name on a deed or title does not determine the separate or community character of the property or even provide much evidence". *Borghi, supra*, at page 488. The Supreme Court stated that the document itself (deed) is not controlling in determining which of the spouses is the actual owner of the property. The Supreme Court set forth certain methods that a party with a separate interest could do to change

the characterization of his/her separate property. The separate property holder could transfer his or her separate property into the community property by either a quit claim deed, valid community property agreement or any other writing evidence of his or her intent (under *Borghi, supra*). Both names on the deed only means that there was an intent to put both names on the deed or title, not necessarily an intent to transfer separate property into community property. Judith paid the entire down payment from separate funds. The burden of proof by way of clear and convincing evidence is on the party asserting a community interest. The Washington Supreme Court stated “to the extent *Hurd* and *Olivares* suggested gift presumption arising when one spouse places the name of the other spouse on a title to separate property, we disapprove these cases”. *Borghi, supra*, at page 490.

Michael states that Judith had the burden of proving the extent of her separate interest in the appreciated value of the house and failed to meet her burden for proof. Judith has previously set forth in this reply brief case law in support of her position. There is no testimony that any appreciation accrued during the marriage was anything other than inflation. In light of the trial court’s finding

that there was a 46% separate interest of Wife in the house at the time it was purchased, she is entitled under the case law to 46% of its present value. Judith argues that in light of the *Borghini* case, *supra*, she would be entitled to be the sole owner of the residence.

Any increase in the value of the land that is due to inflation may be divided consistently with the proportion of community and separate contributions. *In re the Marriage of Pearson-Maines*, 70 Wn. App. 860, 855 P.2d. 1210 (1993).

6. Did the trial court err in awarding maintenance to the Wife?

The trial court did consider all the statutory factors of RCW 26.09.090. The true issue before the court is whether or not the trial court had substantial evidence as to each factor.

Michael believes the trial court failed to identify and/or consider each statutory factor when issuing its decision on maintenance and, as a result, error was committed.

The first factor for the court was: the financial resources of the party seeking maintenance. The trial court had before it each party's financial declaration (see Exhibits 2.7 and 2.8). The Wife's monthly living expenses were placed before the court in Exhibit 2.9. Judith testified that even with \$1,400.00 per month she was not

able to meet her monthly living expenses (RP line 19, page 117). The trial court was aware that Judith was unable to meet her expenses and the testimony from Husband was that he certainly had the ability to pay. The court made findings that he was earning \$7,700.00 a month and Judith was receiving \$3,600.00 per month gross. Evidence presented to the court indicated that the Husband was 57, going to be 58 a month after trial. He was approximately eight to nine years away from retirement while Judith was three years from retirement at which time she will then retire with her pension and one-half of her husband's Vanguard account. She will receive social security in the sum of approximately \$1300.00 (see Exhibit 2.6 and 2.31). The court found that Judith was not able to meet her needs independently.

A factor to be considered pursuant to RCW 26.09.090 is the time necessary to acquire sufficient education or training to enable a party seeking maintenance to find employment appropriate to her for her skills. Judith has been at People for People and there is no advancement available to her over the next three years (see, RP 120, line 20).

The third factor is the standard of living established during the parties' marriage. This was shown by the monthly expenses set forth in each party's financial declaration. If the parties have the same amount of income and assets it follows that they each would have similar standards of living.

The fourth statutory factor is the duration of the marriage. This is a 33 year marriage, a factor that weighs heavily in awarding maintenance under the Washington State case law. The trial court heard testimony as to the age, physical and emotional condition and financial obligations of both of the parties (RP line 8-16, page 113). Each of the parties has some health factors, but at this time neither are prevented from working because of health issues. The trial court heard testimony as to the ability of Michael to meet his expenses. During the pendency of this case Michael was able to pay \$1,400.00 a month to Judith for maintenance and \$1,000.00 to \$1,666.00 a month into his pension plan and have \$800.00 over and above his expenses (RP line 8, page 51. Michael's monthly expenses were presented in Exhibit 2.7.

The fifth factor of RCW 26.09.090 is the age, physical and emotional condition and financial obligation of the spouse seeking

maintenance. Wife had substantial indebtedness as shown on Appendix "A" (see CP 107), which lists debts greater than \$30,000.00 costing Judith about \$1,000.00 a month and affects her ability to meet her expenses.

The last remaining factor is: the ability of Michael to meet his needs and also meet the needs of his spouse seeking maintenance. It is apparent that he does have the ability to meet his needs and pay maintenance as previously set forth.

All of these factors under RCW 26.09.090, together with the holding *In re the Marriage of Rockwell*, 141 Wn. App. 235 170 P.3d 572 (2007) serve as a basis for the court's decision.

Judith is employed fulltime. The gap between the incomes will increase upon Judith's retirement and she no longer will be receiving a gross income of \$3,600.00 per month. Judith essentially has no disposable income. Michael, after paying maintenance and substantial amounts of money towards his retirement (see, Exhibit 2.7) and still has about \$800.00 a month positive cash flow.

The courts have repeatedly held that the paramount concern in determining the issue of maintenance is the economic condition

in which the dissolution decree leaves the parties. *In re the Marriage of Terry*, 79 Wa. App. 866, 869, 905 P.2d. 935 (1995).

Other factors the trial court considered are the following: availability of pension and retirement benefits, receipt of disability or termination, the timing of the dissolution in connection with the careers of the parties. See, Family Law Deskbook, section 29.3, at 29-4. The court's division of property and maintenance should leave the parties in equal financial positions. The testimony revealed that Judith was 63 years of age and Michael was 57. They had been married approximately 33 years. The court made specific mention of this in its oral opinion, RP 195.

According to Washington Practice, Volume 20, Paragraph 34.15, at page 376, the trial courts have considerable discretion as to both amount and duration of maintenance and will not be reversed except in a manifested abuse of discretion. As a result reversals are relatively rare.

In re the Marriage of Williams, 84 Wn. App. 263, 927 P.2d. 679 (1996), the court's paramount concern in setting maintenance is the economic positions in which the decree of dissolution will leave the parties. Judith received less than 50% of the community

assets. In addition, she received approximately \$75,900.00 of separate property based on her interest in the family residence. Michael did not present evidence or authority that these parties should not be left in equal economic circumstances and the difference in the parties' income is so significant to act as a basis for an award of maintenance. Michael wants to adopt a position that leaves Judith where she only receives funds for her basic needs. Judith should receive a substantial equitable distribution of the property in addition to the \$1,700.00 a month maintenance.

Michael states that maintenance should be reviewed based on the fact that he claims that the court placed a perpetual lien on his future earnings. The Court of Appeals, *In re the Marriage of Marcetta*, 129 Wn. App. 607, 120 P.3d. 75 (2005) a case wherein the husband was ordered to pay maintenance until the he was 82 years of age. In that case the husband's position was that the award of spousal maintenance was improper because the wife had failed to submit a budget. The appellate court pointed out that there was no case law cited, nor was there any case law citing when the maintenance must terminate. The court stated *Marcetta, supra*, at page 625-626 "we are reluctant to reverse the court's award of

spousal maintenance given the complexity of the financial circumstances here. Review of the record, and it's clear the trial court considered the statutory factors." The appellate court concluded that remand was required in light of the decision regarding the division of property. In the case at bar the record reveals the basis upon which maintenance was awarded.

Michael's position is that there was no pre-separation standard of living evidenced. Under the *Rockwell, supra*, Judith believes that that is unnecessary. The test is what position the parties will be left in. the parties should be left in equal positions as to property, income and standard of living.

7. The trial court did not award social security.

Michael claims that the trial court awarded a portion of his social security benefits. That is not correct. Pursuant to Exhibits 2.6 and 2.31 Michael is going to be receiving approximately \$700.00 more social security per month than is Judith once they each reach age 66.

Pursuant to paragraph 3.7 of the Decree of Dissolution it sets out maintenance payments. Pertinent part of Paragraph 3.7 reads as follows:

Maintenance shall terminate upon Husband's 66th birthday, at which time Husband shall pay as maintenance one-half of the difference between his amount of social security and the amount that Wife is receiving of social security, if any. The amount of maintenance shall be reconsidered to take into account any changes in Wife's receipt of social security or its amount (see CP 12, 13 and 16).

The trial court recognized that there would be additional income available by way of social security and other retirement that allows Michael to have the ability to pay one-half of the difference of the amount he receives from social security and wife receives for social security.

In support of his position Michael cites *In re the Marriage of Zahm*, 138 Wn. 2d. 213, 978 P.2d. 498 (1999). The holding by the Washington State Supreme Court in *Zahm* stands for the proposition that the trial court cannot calculate a specific formal valuation of the Petitioner's social security benefits and award the other party a precise property offset based on that valuation. The court can, however, consider those benefits when determining the parties' relevant economic circumstances in dissolutions. See, *Zahm, supra*, page 222.

The *Zahm* case dealt with RCW 26.09.080, the property distribution statute. Here social security was not valued for that purposes.

The Washington Supreme Court adopted the following: “a trial court could not properly evaluate the economic circumstances of the spouse unless it could also consider the amount of social security benefits currently received”. In re the Marriage of Zahm, 91 Wn. App. 85. “This resolution by the court of appeals is more consistent with the statutory goals of just and equitable distribution and we adopt it” (*Zahm, supra*, page 223)

The Decree of Dissolution paragraph relating to maintenance is not a division of Michael's social security benefits. It sets forth a formula to determine what he has to pay for additional maintenance, but does not require that it be paid from his social security benefits.

8. Attorney's Fees.

Michael's position is that the attorney's fees should not be awarded. The trial court awarded Judith attorney's fees in the sum of \$6,000.00 payable at the rate of \$500.00 per month with 5% interest. The court met the requirements of RCW 26.09.140 when

it found that the Wife has the need for fees and costs and the spouse had the ability to pay for those fees and costs.

The facts of the matter are that Michael was able to pay \$9,000.00 in attorney's fees during the pendency of this matter, \$3,000.00 of which was refunded. He was also able to keep his attorney's fees account current (RP 60). The evidence is clear that Michael paid \$4,000.00 of that from the community assets. Under the spreadsheet, Appendix "A" (CP 107), it was not listed as an asset even though the Wife's payment of \$3,000.00 was. Exhibit 2.30 sets forth the fees incurred up to trial.

According to the case of *Fite v. Fite*, 3 Wn. App. 726 479 P.2d. 560 (1970) the trial court stated that the issue as to attorney's fees must be viewed as it exists at the time the action has commenced. Using that as a standard Judith was essentially without funds at the commencement of this action. Michael had substantial funds available and \$17,000.00 in a bank account at that time (see, Exhibit 2.7). Further it was necessary to unravel an \$89,000.00 withdrawal from an IRA account, which serves as a basis for fees in addition to need and ability. See, *In re the Marriage of Murrow*, 53 Wn. App. 579, 770 P.2d. 197 (1989) at

page 591. In essence, the Court of Appeals noted in re the case of *Koon v. Koon*, 50 Wn. 2d. 577, 581 (1957) an award of attorney's fees should consider the financial needs of spouse and the other's ability to pay.

9. Attorney's fees and costs on appeal

"In awarding attorney's fees on appeal the court should examine the arguable merit of the issues on the appeal and the financial resources of the respective parties". *In re the Marriage of Booth*, 114 Wn.2d. 772, 779-80, 791 P.2d. 519 (1990).

Judith requests an award of her attorney's fees and costs in this appeal under RAP 18.1 and applicable law: "upon any appeal, the appellate court may in its discretion, order a party to pay for the cost to the other party in maintaining the appeal and the attorney's fees in addition to statutory costs". RCW 26.09.140. In the alternative, Judith should be awarded sanctions under RAP 18.9 and RCW 4.84.185 on the grounds that Michael's appeal is advanced without reasonable cause. A frivolous action is one that cannot be supported by any rational argument on the law of the facts. *Rhinehart v. Seattle Times, Inc.*, 59 Wn. App. 332, 340, 798 P.2d. 1155 (1990). There is no reasonable basis to argue the trial

court abused its discretion in this case. The main thrust of Michael's appeal relates to the fact that he claims that Exhibits 3 and 13 were relied upon by the court. Exhibit 13 was admitted for illustrative purposes only. Appendix "A", CP 107 sets the court's ruling based on the testimony and exhibits that were presented at trial.

CONCLUSION

Judith respectfully submits that there is no basis for appeal and the reasons are set forth as follows:

1. The court did not rely upon illustrative Exhibit 13 for its valuation of assets, the value of each asset was based upon testimony and exhibits and set forth on Appendix "A" (CP 107).

2. Valuation of assets. The court was within its discretion in valuing the assets. If there were any problems relating to the valuation of the assets on dissimilar dates it was because the Appellate failed to file any documents in support of his position of. Documents that he alone was in possession (i.e., his retirement account).

3. The award of maintenance for the wife was within the testimony and exhibits presented at trial.

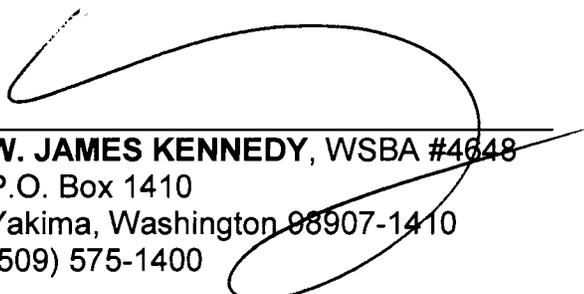
4. The trial court did not err in finding that 46% of the residence on Beane Road was wife's separate property. The trial court did not err by extrapolating the 46% to a present value based on an appraisal.

5. The trial court did not err in setting attorney's fees based on a need of the wife and the ability of the husband. Michael was able to pay his attorney's fees from a community account and payments to his attorney as the case went along. Judith had the need and the court's award was appropriate.

6. Attorney's fees on appeal. Judith requests attorney's fees as set forth herein based on the fact that this was a frivolous appeal and RCW 26.09.140.

Respectfully submitted this 16th day of August, 2010.

THORNER, KENNEDY & GANO, P.S.
Attorneys for Respondent



W. JAMES KENNEDY, WSBA #4648
P.O. Box 1410
Yakima, Washington 98907-1410
(509) 575-1400

APPENDIX “A”
CP 107

In re the Marriage of TRIGGS					
Yakima County cause no: 08-3-00133-7					
COURT'S DECISION					
	Value	Debt	Net	To Husband	To Wife
COMMUNITY ASSETS:					
REAL PROPERTY:					
290 Beane Rd., Moxee, WA	\$ 165,000.00	\$ 75,900.00	\$ 89,100.00		\$ 89,100.00
PERSONAL PROPERTY:					
1995 Ford Contour	\$ 1,000.00		\$ 1,000.00	\$ 1,000.00	
2000 Nissan Maxima	\$ 6,595.00		\$ 6,595.00	\$ -	\$ 6,595.00
2008 Mazda M-6	\$ 19,000.00		\$ 19,000.00	\$ 19,000.00	
1976 Chevrolet 1/2-ton pickup	\$ 250.00		\$ 250.00	\$ 250.00	
H.H. goods & furnishings (see Ex. A)	\$ 8,225.00		\$ 8,225.00	\$ 7,025.00	\$ 1,200.00
Antiques (See Ex. B)	\$ 3,850.00		\$ 3,850.00	\$ 500.00	\$ 3,350.00
Appliances	\$ 400.00		\$ 400.00	\$ -	\$ 400.00
Retirement Accounts:					
Wife:					
Catholic Cr. Union - IRA	\$ 2,191.00	\$ -	\$ 2,191.00		\$ 2,191.00
American funds - 403(b) as of 6/08/09	\$ 50,501.00	\$ -	\$ 50,501.00		\$ 50,501.00
People for People - 401-K as of 3/31/09	\$ 30,117.00	\$ 3,600.00	\$ 26,517.00		\$ 26,517.00
People for People - TSA	\$ 9,548.00	\$ -	\$ 9,548.00		\$ 9,548.00
Husband:					
Vanguard as of 7/09/09	\$ 281,477.00		\$ 281,477.00	\$ 140,738.50	\$ 140,738.50
Novations ret. w/BAC as of 7/09/09	\$ 102,054.00		\$ 102,054.00	\$ 102,054.00	
Tradewind 401-K (Comm. Contribution)	\$ 4,800.00		\$ 4,800.00	\$ 4,800.00	
IRA withdrawal - taxes & penalties			Cashed in during marriage - spent		
IRA withdrawal - remaining proceeds			Cashed in during marriage - spent		
IRA withdrawal - food & recreation			Cashed in during marriage - spent		
IRA withdrawal - husband's credit card			Cashed in during marriage - spent		
Other Assets:					
Yakima Fed. - husband (8/25/07)			Spent before separation		
Catholic Cr. Union - husband (3/31/09)	\$ 12,771.00		\$ 12,771.00	\$ 12,771.00	
YVCU - wife's checking	\$ 1,000.00		\$ 1,000.00	\$ -	\$ 1,000.00
YVCU - wife's savings	\$ 1,000.00		\$ 1,000.00	\$ -	\$ 1,000.00
Key Bank - husband (11/01/07)	\$ 8,509.00		\$ 8,509.00	\$ 8,509.00	
Nuvotec USA - stock	\$ 20.00		\$ 20.00	\$ 20.00	
Loan to Emma	\$ 9,000.00		\$ 9,000.00	\$ 9,000.00	
Lincoln Nat'l Life - husband - term ins.				XX	
Community funds for attorney	\$ 3,000.00		\$ 3,000.00		\$ 3,000.00
TOTAL COMMUNITY ASSETS:	\$ 720,308.00	\$ 79,500.00	\$ 640,808.00	\$ 305,667.50	\$ 335,140.50
COMMUNITY LIABILITIES:					
Capital One.	\$ 30,000.00				\$ (30,000.00)
Macy's	\$ 2,100.00				\$ (2,100.00)
Roza Irrigation	\$ 333.00				\$ (333.00)
Property taxes	\$ 768.00				\$ (768.00)
Sears	\$ 75.00				\$ (75.00)
Valencia Yard	\$ 350.00				\$ (350.00)
Catholic Credit Union	\$ 1,500.00			\$ (1,500.00)	
TOTAL LIABILITIES:	\$ 35,126.00			\$ (1,500.00)	\$ (33,626.00)
NET:				\$ 304,167.50	\$ 301,514.50
SEPARATE PROPERTY:					
Tradewind 401-K - sep. contributions	\$ 23,417.00	\$ -	\$ 23,417.00	\$ 23,417.00	
Down pmt. on 290 Beane Rd.	\$ 75,900.00		\$ 75,900.00		\$ 75,900.00
People for People 401-K -- sep. cont.	\$ 3,600.00		\$ 3,600.00		\$ 3,600.00

FILED

AUG 17 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

In re the Marriage of:

MICHAEL KEVIN TRIGGS,

Appellant/Petitioner,

and

JUDITH KAY TRIGGS,

Respondent.

Court of Appeals #284891
Yakima County #08-3-00133-7

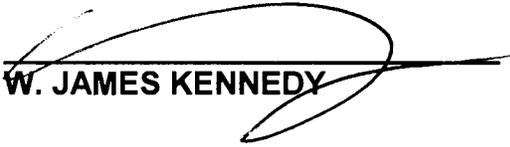
**DECLARATION OF PERSONAL
SERVICE**

14 I, W. JAMES KENNEDY, being first duly sworn on oath, depose and say:

15 I served a copy of the Respondent's Amended Reply Brief DAVID L.
16 TRICK, attorney for MICHAEL KEVIN TRIGGS, Appellant/Petitioner, by
17 personally delivering a copy of the Brief on Monday, August 16, 2010, addressed
18 to David L. Trick, attorney for Appellant/Petitioner at 6 S. 2nd Street, Suite 415,
19 Yakima, Washington.

20 DATED this 16th day of August, 2010.

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W. JAMES KENNEDY

DECLARATION OF SERVICE
Page 1

THORNER, KENNEDY & GANO, P.S.
ATTORNEYS AT LAW
THE CHESTNUT LEGAL BUILDING
101 SOUTH 12TH AVE. P.O. BOX 1410
YAKIMA, WASHINGTON 98907-1410
(509) 575-1400