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(Spokane County Superior Court No. 08-03-01728-0)

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

In re the Marriage of:

IOULIA A. FRAZIER,

Petitioner/Respondent,

v.

DEAN JACOB FRAZIER,

Respondent/Appellant.

BRIEF OF RESPONDENT, IOULIA A. FRAZIER

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I. INTRODUCTION

Appellant, Dean Frazier, and Respondent, Ioulia Frazier, were married on February 19, 2005 in Kootenai County, Idaho. This was the parties' second marriage to each other. Ms. Frazier filed for dissolution in Spokane County Superior Court on July 25, 2008 under Cause No. 08-3-01728-0. The parties were divorced on September 15, 2009. The appeal before this Court was brought by Mr. Frazier due to alleged errors made by the Superior Court of Spokane County at the non-jury trial held on August 28, 2009 and in the entering of the Decree of Dissolution on September 15, 2009. Ms. Frazier denies that any errors were made by the Superior Court of Spokane County, requests that Mr. Frazier's appeal be dismissed, that this Court uphold the trial court's ruling and that she be awarded her reasonable attorney's fees accrued in having to respond to this Appeal.

II. STATEMENT OF THE CASE

Ms. Frazier agrees in part with Mr. Frazier's statement of the case. This matter does in fact concern a marriage dissolution proceeding which did involve issues of property distribution. However, Mr. Frazier has failed to state many relevant facts regarding the progression of this case. Mr. Frazier and Ms. Frazier were married on February 19, 2005 in Kootenai County, Idaho. [CP 3-4]. This was the parties second marriage

to each other. [CP 12]. During their first marriage, the parties conceived one child, a daughter named Jessica [CP 12]. Ms. Frazier filed for divorce on July 25, 2008 in Spokane County Superior Court stating that the marriage was irretrievably broken. [CP 1-3]. On August 28, 2009, the parties proceeded to a non-jury trial where the trial court analyzed many contested issues. [CP 89-99].

On July 25, 2008, the same day that Ms. Frazier filed for divorce, Mr. Frazier left the home he shared with Ms. Frazier taking their daughter, Jessica, with him. [CP12]. The issue of residential placement of Jessica was hotly disputed between the parties. [CP 7-14 and 60-64]. Mr. Frazier made various allegations of verbal, physical, and sexual abuse of Jessica by Ms. Frazier or Ms. Frazier's family members and claimed that he needed to receive full custody of Jessica for her safety. [CP 7-14; 01/23/2009 RP 7]. Throughout the litigation vast amounts of the parties' resources were devoted towards ascertaining the truth of Mr. Frazier's claims. [CP 60-64, 72-73, and 93]. Mr. Frazier made reports of his allegations to Child Protective Services ("CPS") and CPS reported the allegations to the Spokane Police Dept.. [01/23/2009 RP 7]. Ms. Frazier was investigated by CPS, by the police, and participated in a polygraph. [05/07/2009 RP 5 and 15]. Both CPS and the police filed reports as a result of Mr. Frazier's allegations of abuse. [05/07/2009 RP 5 and 15].

Prior to trial, it was determined through the examination of a police report, CPS report and documentation, and Ms. Frazier's polygraph that Mr. Frazier's allegations against Ms. Frazier were unfounded and untrue. [05/07/2009 RP 15]. At trial, the court recognized that the case had been difficult with "various accusations about nefarious things..." [CP 90]. The trial court informed that parties that it had "to make a decision based on solid evidence and not upon speculation or accusations." [CP 90]. In the end, the trial court did not rely on Mr. Frazier's allegations and Mr. Frazier did not receive full custody of the parties' daughter. [CP 137].

As part of pre-trial motion practice, Mr. Frazier requested spousal maintenance. [CP 76]. During the pre-trial hearing, Commissioner Triplet (now Judge Triplet) denied Mr. Frazier's request for spousal maintenance on the merits. [CP 83; 04/16/2009 RP 11-12]. Specifically, Commissioner Triplet identified that Mr. Frazier had not provided any "medical evidence showing that he's not able to be employed...", that Mr. Frazier had stated that he "was employed in the past and could go back to work", and that Ms. Frazier did not have the ability to pay. [04/16/2009 RP 11-12].

At trial, Mr. Frazier once again requested spousal maintenance. [CP 90-91]. The trial court likewise did not find that Mr. Frazier had a need sufficient nor did the parties have finances adequate to warrant the award

of spousal maintenance. [CP 90-91]. Further, the trial court found that Mr. Frazier's statement that he would be returning to work in the near future further negated the need for maintenance. [CP 91]. Based upon the evidence before it, the trial court denied spousal maintenance to Mr. Frazier. [CP 90-91]

During the pendency of the lawsuit, Mr. Frazier did not provide proof of his income, tax records, bank statements and credit card statements to support his claim for spousal maintenance, attorney's fees, division of debt, and allocation of the parties' minimal assets. [CP 132]. Ms. Frazier, however, provided evidence of finances and the value of assets for both herself and Mr. Fraizer. [CP 102-104, 106-122, and 132]. This evidence allowed the trial court to determine that the parties were substantially equal in their financial positions. [CP 90-91]. Based upon the evidence before the trial court, the court, as stated above, did not find sufficient need to award Mr. Frazier spousal maintenance. [CP 90-91]. Further, this evidence also established that there was not sufficient disparity in wealth to warrant one party paying the other's attorney fees. [CP 90-91].

The trial court further analyzed the parties assets and debts, both community and separate. [CP 89-99]. During marriage, the parties acquired few assets and there was relatively little by way of property for division by the trial court. [CP 89-99]. In fact, the trial court determined

that Mr. and Ms. Frazier were of “fairly modest means.” [CP 92.] The parties had a home with some equity, three vehicles, basic garden tools and equipment, and basic household furnishings. [CP 89-99]. These items were given their fair market value as estimated by the trial court reviewing the evidence provided at trial. [CP 89-99]. The trial court divided property such that Mr. Frazier received assets valued at approximately \$5,400 plus half of the equity from the sale of the parties’ residence as his separate property. [CP 92-97]. This award does not include the motorcycle that Mr. Frazier purchased with cash during separation for \$2,299. [CP 86, 89-99]. Ms. Frazier received assets valued at approximately \$8,305 as her separate property plus half of the equity from the sale of the parties’ residence as her separate property. [CP 92-97]. Both parties received their own retirement accounts. [CP 90].

Mr. Frazier received “credit” for the down payment of approximately \$8,600 which he made on the residence with his separate property funds. [CP 92-93]. Ms. Frazier also received “credit” for the payments on the home that she made after separation, a \$5,000 payment made on the second mortgage, and the large appliances and curtains that stayed with the home when it was sold, totaling approximately \$17,000. [CP 92-93 and 132-134]. Although Ms. Frazier’s payments on the residence were approximately \$8,400 *more* than Mr. Frazier’s, the trial court divided the

proceeds from the sale of the residence “fifty-fifty.” [CP 93]. Similarly, in conclusion of trial, Ms. Frazier was ordered to pay 55% of the *Guardian ad Litem’s* \$8,000 bill, or \$4,400. [CP 93]. Mr. Frazier was ordered to pay 45% of the same bill, or \$3,600. [CP 93].

The trial court made specific findings regarding property allegedly owned by Mr. Frazier and cash held in a bank account by Ms. Frazier. [CP 95-96]. At trial, it was alleged that Mr. Frazier co-owned a parcel of real property with his mother. [CP 95]. However, the trial court did not find evidence sufficient to bring that alleged interest into the property division between the parties. [CP 95].

It was proven to the trial court that the cash held in a bank account by Ms. Frazier was not a marital asset. [CP 95-96]. It was money belonging to her parents and loaned to her in 2003. [CP 95-96 and 135-137]. Since she had held the money for her parents since 2003, Ms. Frazier was able to draw chunks of money as needed for emergency purposes as a loan she was required to repay to her parents. [CP 135-137]. At all times, Ms. Frazier kept this money separate from the parties’ community funds. [CP 135-137]. The funds were loaned to Ms. Frazier by her parents on an as-needed basis and were never commingled with her pay checks or any other potential community property asset. [CP 135-137].

At trial, Ms. Frazier testified as to how the availability of her parent's life savings was important to Ms. Frazier and her family because, after the parties' first separation in May 2002 and divorce in March 2003, Ms. Frazier was left in a terrible situation. [CP 136]. She had no legal immigration status; Ms. Frazier was unable to legally work or purchase a vehicle. [CP 136]. She was a single mother, with no means and a one-year-old daughter to support. [CP 12 and 136]. Her parents loaned her their life savings to assist her. [CP 136]. Bank statements provided at trial show that large deposits were made into Ms. Frazier's separate bank account. [CP 116-117]. Neither party earned enough money to make deposits in the amounts Ms. Frazier was able to deposit. [CP 136-137]. Mr. Frazier offered no explanation or evidence of the source of the money. [CP 136-137]. Ms. Frazier provided her own testimony, her mother's sworn testimony, and bank records upon which the trial court was able to rely and reach its conclusions that the funds deposited were not from community sources. [CP 95-96, 105, 116-117 and 136-137].

Further, if necessary and permitted by this Court, Ms. Frazier's parents have additional proof which is available in the form of a proof of purchase showing her parent's purchase of those funds in U.S. money from the Federal Russian Bank prior to bringing those funds to the U.S. to Ms. Frazier. [CP 136].

On September 25, 2009, on the tenth day after the Decree of Dissolution was filed, Mr. Frazier filed a Motion for Reconsideration. [CP 139]. The trial court denied the Motion for Reconsideration citing that under Washington law a “division of assets and liabilities is governed by an *equitable* division, rather than a 50-50 division.” [CP 139-140]. It was the trial court’s position that its disposition would “put the parties in a position to put this matter behind them, get to work and get on with their lives.” [CP 140]. On November 10, 2009, Mr. Frazier filed his Notice of Appeal with the Superior Court of Spokane County informing Ms. Frazier that he was appealing the Order on Reconsideration entered on October 12, 2009, the Findings of Fact and Conclusions of Law and Decree of Dissolution, both entered on September 14, 2009, to the Court of Appeals, Division III, in the State of Washington. [CP 56]. Further facts may be discussed below where applicable.

III. STANDARD OF REVIEW

“[A]ppellate courts apply the substantial evidence standard of review to findings of facts made by a trial judge.” *In re the Marriage of Rockwell*, 141 Wn.App. 235, 242, 170 P.3d 572 (2007) (citing *Washington Family Law Deskbook*, 2nd Ed. § 65.4(1) at 65-9). “A trial court’s findings will be upheld if supported by substantial evidence.” *In re the Marriage of Obadi*, 154 Wn.App. 609, 614, 226 P.3d 787 (2010)(citing *Sunnyside Valley*

Irrigation Dist. v. Dickie, 149 Wash.2d 873, 879, 73 P.3d 369 (2003)).

Substantial evidence is found to exist when “the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Rockwell*, 141 Wn.App. at 242, 170 P.3d 572 (quoting *In re Marriage of Griswold*, 112 Wash. App. 333, 339, 48 P.3d 1018 (2002)).

If the trial court properly weighed the evidence, it is not the appellate court’s responsibility to substitute its judgment for that of the trial courts. *Id.* Rather, the appellate court should “simply determine whether substantial evidence supports the findings of facts, and if so, whether the findings in turn support the trial court’s conclusions of law.” *Id.* (citing *In re Marriage of Greene*, 97 Wash.App. 708, 986 P.2d 144 (1999)). Here, Mr. Frazier has the burden of proving that the “trial court abused its discretion.” *Obadi*, at 614, 226 P.3d 787 (citing *In re Marriage of Griffin*, 114 Wash.2d 772, 776, 791 P.2d 519 (1990)). Based upon the record, Mr. Frazier cannot show that the trial court’s exercise of its discretion was “manifestly unreasonable, based on untenable grounds, or based untenable reasons.” *Urbana v. Urbana*, 147 Wn.App. 1, 9-10, 195 P.3d 959 (2008)(citing *Qwest Corp v. City of Bellevue*, 161 Wash.2d 353, 369, 166 P.3d 667 (2007)). Therefore, Ms. Frazier requests that the trial court’s rulings be upheld.

IV. ARGUMENT

A. The Trial Court Properly Valued the Personal Property of the Parties.

The “property division made during the dissolution of a marriage will be reversed on appeal only if there is a manifest abuse of discretion.” *Urbana*, 147 Wn.App. at 9 (quoting *In re Marriage of Muhammad*, 153 Wash.2d 795, 803, 108 P.3d 779 (2005)). Mr. Frazier argues that the trial court “grossly over-valued” the property awarded to him. In his argument, he cites specifically to the valuation of a jet ski and trailer estimated by the trial court at a value of \$1,000; a pellet stove with an estimated value of \$1,000 and the contents of the parties’ garage, including all of the parties’ “tools, equipment, gardening stuff, lawn mower” valued at \$3,000. [CP 94; CP 96] Mr. Frazier further argues that the trial court “grossly under-valued” the property awarded to Ms. Frazier, specifically, the 2004 Honda vehicle. In addition, Mr. Frazier argues that the trial court miscalculated the division of property and debt in this matter constituting an inequitable distribution. Mr. Frazier is incorrect in all three of these alleged points of error.

In distribution of a couple’s property, it is common practice for the trial court “to set forth the valuation placed upon the items of property awarded in divorce cases.” *Wold v. Wold*, 7 Wn.App. 872, 875, 503 P.2d

118 (1972). The purpose of this is to allow for review so that a court of appeals may be able to “discover whether there has been an abuse of discretion in over evaluating the property awarded to one party and under evaluating the property awarded to the other.” *Id.* at 875-876 (citing *Mayo v. Mayo*, 75 Wash.2d 36, 448 P.2d 926 (1968)). If the trial court fails to value the property, or a piece of property, “the appellate court may look to the record to determine the value of the assets.” *In re the Marriage of Greene*, 97 Wn.App. 708, 712, 986 P.2d 144 (1999) (citing *In re Marriage of Hadley*, 88 Wash.2d 649, 657, 565 P.2d 790 (1977)). However, it is not the position of the appellate court to substitute “its valuation of property for that made by the trial court and should only do so when inequity and injustice are apparent and an abuse of judicial discretion is manifest.” *Wold*, 7 Wn.App. at 876. An appeals court should not substitute its valuation of property when there is quite “simply an honest difference of opinion.” *Id.* at 876 (citing *Rogstad v. Rogstad*, 74 Wash.2d 736, 446 P.2d 340).

In determining the value of the parties’ personal property to be divided, the trial court found that the “trailer, in and of itself, has some value...” [CP 94] Mr. Frazier was awarded the Jet Ski trailer, a Jet Ski and a utility trailer. [CP 94]. The Jet Ski trailer is worth \$400 alone, the utility trailer, \$200. [CP 94; CP 103] For the trial court to include those two

items with a Jet Ski and value the group at \$1,000 is manifestly reasonable to the side of favoring Mr. Frazier. Further, despite having the property for the entirety of the pendency of the dissolution action, Mr. Frazier did not submit any evidence at trial regarding the value or condition of the property so he did not provide the trial court with any basis to lower the value of the property below \$1,000. Mr. Frazier had opportunity to have the property inspected and submit contrary evidence and failed to do so.

Similarly, the pellet stove, which had been initially purchased for \$2,000 at Falcos, was valued by the trial court at \$1,000. The stove may have obtained its value from its usefulness, its purchase price and/or Mr. Frazier's refurbishment of the stove. In any event, the trial court considered the evidence regarding the value of the pellet stove and reached the reasonable conclusion that it should be valued at \$1,000. Again, Mr. Frazier failed to submit any contradictory evidence at trial, indicating that the pellet stove was not useful or valuable.

Likewise, Mr. Frazier submitted no evidence to the trial court that he had acquired the tools, equipment, gardening materials and lawn mower prior to marriage. There was no evidence submitted by Mr. Frazier regarding the value of the property or supporting Mr. Frazier's contention of the separate-nature of that property.

The trial court's valuation of \$3,000 for the property remaining in the garage was reasonable, based upon the evidence provided at trial especially because Mr. Frazier took the opportunity to repeatedly remove property from the family home throughout the pendency of the dissolution. [CP 137; 04/16/09 RP 8-9] Therefore, not all property taken by Mr. Frazier could be evaluated by the trial court. Mr. Frazier received much more property than that valued and counted by the trial court.

Ms. Frazier did submit substantial evidence to the court that certain household items were her separate property. [CP 102-104] Pictures were taken and submitted showing that Ms. Frazier owned all of the furniture prior to marriage. [CP 106-107] Ms. Frazier proved that the living room set was purchased with her separate money from her bank account existing prior to marriage. [CP 116] Therefore, the trial court properly valued the household furnishings awarded to Ms. Frazier at \$305.

Mr. Frazier's argument regarding the under valuation of the 2004 Honda motor vehicle awarded to Ms. Frazier is likewise unfounded and not based upon the evidence presented at trial. The vehicle had relatively high-mileage, with 70,500 miles on the engine at the time of valuation by the trial court. Ms. Frazier submitted evidence of the vehicle's value based upon Kelley Blue Book ("KBB") [CP 108-109] Ms. Frazier also submitted evidence of issues with the vehicle which decreased its value from its

KBB value. For instance, after separation, Ms. Frazier was required to pay \$600 for new tires and maintenance to the vehicle. [CP 112-113] Ms. Frazier also paid \$910 towards the loan on the vehicle after separation. [CP 111] Ms. Frazier provided picture evidence at trial that the vehicle had severe damage to the body. [CP 114-115] The windshield was cracked when the vehicle was purchased and the large dent in the front passenger bumper and the fender area occurred before separation. [CP 114-115; CP 134] A deduction of approximately \$1,000 from the KBB value of the vehicle due to the required maintenance, new tires, body damage, and windshield damage was reasonable and, if anything, an overvaluation of the vehicle in its condition as it was at trial.

With regard the alleged miscalculation by the trial court in entering paragraph 3.15 of the Decree, the Decree is unclear on its face as to the precise point of miscalculation now asserted by Mr. Frazier. It is well settled law that ““a fair and equitable division by a trial court ‘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 the future needs of the parties.’”” *Urbana*, 147 Wn.App. at 11 (quoting *In re Marriage of Zahm*, 138 Wash.2d 213, 218-19, 978 P.2d 498 (1999)). Even if a miscalculation were made, if the final valuation and division is the result of valuation within the range of

evidence offered at trial, the trial court's calculations are appropriate. See, *Marriage of Rockwell*, 141 Wn.App. at 250.

The trial court upheld its calculations and division in ruling on Mr. Frazier's Motion for Reconsideration, thus eliminating the possibility of an inadvertent choice or mere mathematical error in favor of the trial court's conscious choice of a value within the range of evidence. *Id.* at 250-251; CP 139-140. Upon reconsideration of its findings and order, the trial court determined that the division was "equitable" "rather than a 50-50 division." [CP 140] The trial court upheld its Decree, finding that it "put the parties in a position to put this matter behind them, get to work and get on with their lives." [CP 140]

There was no abuse of discretion by the trial court and Mr. Frazier cannot prove that the trial court's decision was unreasonable, based upon untenable grounds, or based upon untenable reasons, therefore, the trial court's valuation should be upheld. *Urbana*, 147 Wn.App. at 9-10.

Alternatively, if this Court does determine that the trial court's valuations should not be upheld and the distribution of the parties' property should be changed, Ms. Frazier requests that her overpayment toward the mortgage and second mortgage on the family home, her purchase of the major appliances that contributed to the value of the home

upon resale, her payments to the guardian ad litem, and the fact that she does not receive child support, be considered.

B. The Court Did not Mischaracterize the Money Held by Ms. Frazier for Her Parents.

Whether the trial court's mischaracterization of property requires remand is a difficult issue. *In re the Marriage of Shannon*, 55 Wn.App. 137, 141, 77 P.2d 8 (1989). In fact, "a dissolution court's mischaracterization of property is rarely a proper basis to reverse the court's property distribution." *In re Marriage of Zier*, 136 Wn.App. 40, 46, 147 P.3d 624 (2006). This is because the "dispositive inquiry of the court's property distribution is that the court's decision "is just and equitable under all the circumstances."" *Id.* (quoting *In re Marriage of Kraft*, 119 Wash.2d 438, 450, 832 P.2d 871 (1991)). Remand is only required due to mischaracterization of property when "(1) the trial court's reasoning indicates that its division was significantly influenced by its characterization of the property, and (2) it is not clear that had the court properly characterized the property, it would have divided it in the same way." *Shannon*, 55 Wn.App. at 142.

Here, the trial court determined that the approximately \$11,000 which had been held in Ms. Frazier's bank account was not property owned by either Ms. Frazier or Mr. Frazier, or the marital community

thereof. [CP 95-96] The evidence presented at trial through documentary evidence and Ms. Frazier's testimony was sufficient for the trial court to conclude that the \$11,000 was a loan made to Ms. Frazier by her parents during the parties' first divorce in 2003. [CP 135; CP 105] Ms. Frazier's parents loaned her their life savings so that she would have it in case of an emergency. [CP 135-137] After the parties' first separation, Ms. Frazier's hopeless situation with her lack of immigration status (and the resultant inability to work or purchase a vehicle) while having an infant and being in a foreign country warranted her parent's decision to put their life savings in her hands to be repaid when Ms. Frazier was safe and secure. [CP 136]

Ms. Frazier made it clear that she kept the cash in the safe deposit box from 2003 until 2006 when she deposited it into her separate bank account in order to gain interest on the money for her parents. [CP 135; CP 105] All distributions from her parents' money for emergencies were placed into Ms. Frazier's separate bank account. [CP 135-136; CP 117] This money was never commingled with the parties' community property. [CP 136] Ms. Frazier repaid the \$11,000 to her parents for the loan they gave her after her first divorce from Mr. Frazier. [CP 135; CP 105] Mr. Frazier offered no alternate explanation for the source of the funds and

was able to present no evidence that the funds were possibly a marital asset.

The trial court did not mischaracterize the \$11,000. The separate character of property will remain “through all of its changes and transitions so long as it can be traced and identified, and its rents, issues and profits likewise are and continue to be separate property.” *Burche v. Rice*, 37 Wn.2d 185, 222 P.2d 847 (1950) as cited by *Baker v. Baker*, 498 P.2d 315, 498 P.2d 315 (1972). Therefore, this money held by Ms. Frazier to be ultimately returned to her parents and which had been kept separate from all other property was never commingled and is clearly money rightfully belonging to Ms. Frazier’s parents.

If this Court disagrees with the trial court’s finding that the money was not the property of Ms. Frazier, Mr. Frazier, or the marital community thereof; Ms. Frazier asserts that the money was accompanied by a debt in the same amount to be repaid to her parents. Even if viewed as an \$11,000.00 asset and an equal \$11,000 debt to be allocated between the parties, the fact that the trial court may have mischaracterized the property as not being property of the marriage is not reason to remand the trial court’s decision on distribution of the marital assets. “Even if the trial court mischaracterizes the property, the allocation will be upheld as long as it is fair and equitable.” *In re the Marriage of Williams*, 84 Wn.App.

263, 269, 927 P.2d 679 (1996). In the present case, the mischaracterization would amount to harmless error that does not affect the equitable distribution of the assets because Ms. Frazier was always required to return the money to her parents. Although the money, at one point in time, existed in Ms. Frazier's bank account, it was not, in reality, a tangible asset of the marriage.

C. The Court Properly & Equitably Distributed the Parties' Property.

RCW 26.09.080 provides a trial court with "broad discretion when distributing property in a dissolution case." *In re the Marriage of White*, 105 Wn.App. 545, 549, 20 P.3d 481 (2001)(citing RCW 26.09.080). "In a marriage dissolution, all property, both community and separate, is before the court for distribution." *Zier*, 136 Wn.App. at 45(citing *Friedlander v. Friedlander*, 80 Wash.2d 293, 305, 494 P.2d 208 (1972)). There is no mandate that trial courts "divide community property equally" or "award separate property to its owner." *White*, at 549. The main requirement is that the trial "make such disposition of the property and liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors." *Id.* (quoting RCW 26.09.080); see also, *Rockwell*, 141 Wn.App. at 242. An appellate court will only reverse an award of property "upon the appellant's showing of manifest abuse of

discretion.” *Zier*, 136 Wn. App. at 45 (citing *In re Marriage of Kraft*, 119 Wash.2d 438, 450, 832 P.2d 871 (1991)). A manifest abuse of discretion will be found only if the trial court’s “decision is manifestly unreasonable, based on untenable grounds, or based untenable reasons.” *Urbana*, 147 Wn.App. at 9-10 (citing *Qwest Corp v. City of Bellevue*, 161 Wash.2d 353, 369, 166 P.3d 667 (2007)).

RCW 26.09.080 guides the distribution of property in dissolution by requiring the trial court to “consider multiple factors in reaching an equitable conclusion.” *Id.* These 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, and
- (4) the economic circumstances of each spouse at the time of the division of the property is to become effective.”

Rockwell, 141 Wn.App. at 242 (citing RCW 26.09.080).

The factors listed in RCW 26.09.080 are not limiting. A “trial court may consider other factors such as “the health and ages of the parties, their prospects for future earnings, their education and employment histories, their necessities and financial abilities”” and so on. *Urbana*, 147 Wn.App. at 11 (quoting *In re Marriage of Olivares*, 69 Wash.App.324, 239, 848 P.2d 1281 (1993)).

In considering all of the possible factors, ““a fair and equitable division by a trial court ‘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 the future needs of the parties.’”” *Id.* (quoting *In re Marriage of Zahm*, 138 Wash.2d 213, 218-19, 978 P.2d 498 (1999), quoting *In re Marriage of Crosetto*, 82 Wash.App. 545, 556, 918 P.2d 954 (1996)). This does not require that the court divide community property equally amongst the parties. *Rockwell*, 141 Wn.App. at 243. Nor does a just and equitable division limit the trial court to only community property. *White*, 105 Wn.App. at 549.

In the case before this Court, it is evident from the record that the trial court recognized that both Ms. Frazier and Mr. Frazier had modest means. [CP 139; CP 92] The trial court did not find that one party had significantly more financial ability than the other, nor did the trial court find that either had a significantly larger future earning capacity. [04/16/09 RP 10; CP 76] Instead the court looked at the relative community and separate property assets and found that the primary asset was the family home owned by the marital community. [CP 92] The trial court divided the marital assets equitably (and not equally) between the parties in splitting the proceeds from the sale of the home fifty-fifty despite the fact that Ms. Frazier had paid in more to the equity in the home. [CP 92; CP

132-134; CP 118-122] Ms. Frazier was also ordered to pay a larger percentage of the parties' debt to the Guardian ad Litem. [CP 93] Mr. Frazier has failed to establish that there was any manifest abuse of discretion on part of the trial court. This is not a situation where one party is in a position where they are significantly financially better off than the other party. [CP 92] Neither Ms. Frazier nor Mr. Frazier has significant financial assets or earning capacity. [CP 139; CP 92] The trial court considered the community and separate property allocated to Mr. Frazier, and found that it was equitable. [CP 140]

D. The Court Did Not Err in its Decision Not to Award Spousal Maintenance to Mr. Frazier.

"In making an equitable property division or awarding maintenance, the trial court exercises broad discretionary powers. Its disposition will not be overturned on appeal absent a showing of manifest abuse of discretion." See *Baker v. Baker*, 80 Wash.2d 736, 747, 498 P.2d 315 (1972); *In re Marriage of Glorfield*, 27 Wash.App. 358, 360, 617 P.2d 1051, review denied, 94 Wash.2d 1025 (1980); *In re Marriage of Nicholson*, 17 Wash.App. 110, 116, 561 P.2d 116 (1977) as cited by *In re Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984). 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 court's decision is manifestly unreasonable if it is based on an incorrect legal standard. *Littlefield*, 133 Wash.2d at 47. The trial court in this case reasonably based its decision upon the facts as presented at trial and on the correct legal standard, as it considered the evidence subject to the relevant statutory provisions.

While the trial court did, in *dicta*, express that spousal maintenance is disfavored in these "modern times," it was correct in its brief summary of the law. It has been long-held that "[a]limony is not a matter of right." *Berg v. Berg*, 72 Wn. 2d 532, 533, 434 P.2d 1 (1967). When the requesting spouse "has the ability to earn a living, it is not the policy of the law of this state to give [that spouse] a perpetual lien" on the other spouse's future income." *Id.*

Here, the trial court considered all appropriate factors in reaching its decision and addressed these in its opinion, finding no factual basis for Mr. Frazier to request spousal maintenance. [CP 90-92] The trial court determined that Mr. Frazier is able to work, has no need and that Ms. Frazier has no ability to pay pursuant to RCW 26.09.090. [04/16/09 RP 10-12; CP 83; CP 90-92] Throughout the dissolution proceeding, Mr. Frazier's request for spousal maintenance was denied. First, by Commissioner Triplet on April 16, 2009 and, again at trial, by Judge

Cozza on September 15, 2009. [CP 83; CP 53] Mr. Frazier's request for reconsideration was also denied on October 12, 2009. [CP 139-140]

RCW 26.09.090 sets forth the factors for consideration in an award of spousal maintenance. These factors include the following, which were repeatedly, properly considered by the trial court in this case:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently...

Here, the trial court found that the parties were of modest means. [CP 139; CP 92] The record indicates that Ms. Frazier only earned \$2,463 net per month. [04/16/09 RP 10] Mr. Frazier earned \$1,993 (by his own estimation) per month. [CP 76] Mr. Frazier was employed in the past and could go back to work. [04/16/09 RP 11; CP 14] The record indicates that Mr. Frazier had access to resources which provided his housing [04/16/09 RP 12] and was permitted the ability to purchase frivolous items on his own, such as a motorcycle, for which Mr. Frazier paid \$2,299 cash. [CP 86] The court found that Mr. Frazier was without need sufficient to warrant spousal maintenance. Commissioner Triplet also specifically found that Ms. Frazier did not have the ability to pay. [04/16/09 RP 12] In addition, the trial court properly considered the community and separate

property allocated to Mr. Frazier, and found that it was equitable. [CP 140]

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life and other attendant circumstances;

Here, the trial court relied upon Mr. Frazier's own indications that he intended to return to work in the near future. [CP 91] Further, Commissioner Triplet found no medical evidence showing that Mr. Frazier was unable to work. [April 16, 2009, RP 10-12] Mr. Frazier was employed in the past and could go back to work. [*Id.*; CP 14] Mr. Frazier presented evidence early on that he was able to work. [CP 14] Therefore, his refusal to do so, constitutes voluntary unemployment. Mr. Frazier never presented medical evidence to the court supporting his inability to work and testified that he was soon to go back to work. [CP 91]

(c) The standard of living established during the marriage or domestic partnership

Again, the trial court noted that these were parties of modest means. [CP 92] Mr. Frazier was voluntarily unemployed and the parties struggled financially during marriage on Ms. Frazier's income of \$2,463 net per month. [RP 10] The parties did not have a high standard of living and acquired minimal personal property during their marriage as a result of their tight financial circumstances. [CP 137] The parties could not

afford and did not live an extravagant lifestyle. *Id.* Rather, the parties were unable to afford much in the way of frivolities during their marriage. *Id.*

(d) The duration of the marriage...

A short term marriage does not support an award of spousal support. RCW 26.09.090. The duration of the parties' marriage was short by any standard. The parties were married in February 19, 2005 and Ms. Frazier filed for dissolution of marriage just over three years later on July 25, 2008. [CP 3-4; CP 1-3] A marriage of such a short duration does not justify an award of spousal maintenance, particularly in a circumstance where the wage-earning spouse does not earn a significant wage and is charged with full responsibility for the parties' child. RCW 26.09.090.

(e) The age, physical or emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance;

Here, Mr. Frazier indicated to the trial court, and the trial court appropriately relied upon Mr. Frazier's indications that he intended to return to work in the near future. [CP 91; CP 14] Again, no medical evidence was presented showing that Mr. Frazier was unable to work. [04/16/09 RP 10-12; CP 91] Mr. Frazier was employed in the past and could go back to work. [04/16/09 RP 10-12; CP 14] Mr. Frazier had remained voluntarily unemployed since at least July 2008. [CP 14]

Relying upon Mr. Frazier's own testimony, the trial court determined Mr. Frazier was able and willing to return to the workforce.

Mr. Frazier indicated to the trial court that he was able and willing to return to the workforce in the near future. [CP 91] Evidence exists in the record that shows Mr. Frazier earned \$1,993 per month when he was gainfully employed. [CP 76] In addition, there were other relevant factors before the trial court. For instance, while stating to the court on April 14, 2009 that he "had nothing and could afford nothing," [CP 75], Mr. Frazier purchased a 2009 Kymco scooter for \$2,299 cash on April 10, 2009. [CP 86] The scooter could not be considered a necessity by any means. Mr. Frazier had two other vehicles. Additionally, Mr. Frazier could not legally transport the parties' young daughter on the scooter.

Mr. Frazier did not submit bank statements, credit card statements or other statements of income to the trial court to indicate need or to show how he was able to afford expensive toys with no apparent means of support. Therefore, it was appropriate for the trial court to determine that Mr. Frazier was capable of self-support and that he was returning to work in the near future. [CP 91; CP 14].

The appellant's reliance on *In re Marriage of Washburn* is misplaced. Unlike *Washburn*, Mr. Frazier did not support Ms. Frazier through advanced schooling. Mr. Frazier did not forgo his opportunities in the

workforce to raise the parties' child. No medical evidence was ever presented that Mr. Frazier suffered from an alleged short-term disability. [CP 91; CP 14] Unlike *Washburn*, the Frazier's were not married for 10 years; but rather, were married for a short, three years.

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

The trial court, based upon solid evidence and thorough consideration of all relevant factors determined that Ms. Frazier had no ability to pay maintenance. [4/16/09 RP 4-12; CP 90-92] Ms. Frazier paid all household bills after separation including the mortgage, home maintenance and credit card bills. Ms. Frazier was forced to stay in the family home by GAL recommendation, despite the existence of less expensive options. [CP 57-58] Ms. Frazier provided full support for the parties' young daughter, including health insurance premiums, co-pays, school expenses, school activities, food and clothing. [CP 59-68] Ms. Frazier incurred additional debts and attorney fees through the duration of the dissolution. [CP 60] She has no ability to meet her needs and financial obligations and pay spousal maintenance to Mr. Frazier. [RP April 16, 2009, p. 4-12]

Mr. Frazier deliberately involved Ms. Frazier in a long dissolution and custody battle by making false accusations of sexual abuse against Ms.

Frazier, increasing her attorney fees, GAL fees, and leading Ms. Frazier into substantial debt. With this debt load, Ms. Frazier is now a single mother, with full custody of the parties' young daughter, without financial assistance from Mr. Frazier for the child's care or medical support. Mr. Frazier's continued requests for spousal maintenance are baseless and maintained for the primary purpose to cause harm to Ms. Frazier.

In addition, the trial court is required to consider, among other statutory factors, the division of property between the parties. RCW 26.09.090; *In re Marriage of Crosetto*, 82 Wn. App. 545, 558, 918 P.2d 954 (1996); *In re Marriage of Rink*, 18 Wn. App. 549, 552-53, 571 P.2d 210 (1977). Thus, a significant maintenance award is less likely to be necessary when the parties have received an equal share of the parties' assets. *See In re Marriage of Washburn*, 101 Wn.2d 168, 182, 677 P.2d 152 (1984) (maintenance necessary to compensate for unequal property division). Here, the parties received *equitable* distributions of the community property as determined by the trial court. [CP 140] In fact, Mr. Frazier received more of the parties' community assets than Ms. Frazier when all payments on the home are taken into consideration as well as the division of the Guardian ad Litem fees. Ms. Frazier did not leave the marriage with substantial financial advantages. Ms. Frazier is not a high wage earner and is the primary care giver of the parties' young daughter.

The parties did not have many assets for division, therefore, Ms. Frazier relies solely upon her wages to support herself and the parties' child. Further, Ms. Frazier left the marriage with more of the parties' debt to the GAL, despite having already paid \$1,000 GAL near the beginning of the dissolution proceedings. [CP 53; CP 132; CP 133].

"In determining spousal maintenance, the court is governed strongly by the need of one party and the ability of the other party to pay an award." *In re Marriage of Foley*, 84 WnApp. 839 930 P.2d 929 (1997); *Endres v. Endres*, 62 Wash.2d 55, 56, 380 P.2d 873 (1963); *Cleaver v. Cleaver*, 10 Wash.App. 14, 20, 516 P.2d 508 (1973). In this case, as in *Foley*, the trial court denied Mr. Frazier's request for maintenance based on the tenable basis that Mr. Frazier was going back to work and was capable of self-support [CP 91] while Ms. Frazier was not a high wage earner, was of modest means and unable to pay. [CP 91; 04/16/09 RP 11-12]

Mr. Frazier has not shown that the trial court manifestly abused its discretion. In light of the factors set forth in RCW 26.09.090 and the facts presented throughout the Frazier's dissolution, the trial court appropriately determined that in this case, with these parties of modest means, coming out of a short marriage, with substantially similar earning capacity, spousal maintenance was not necessitated.

E. The Court Did Not Err in its Decision Not to Award Attorney Fees to Mr. Frazier.

Whether an award of attorney fees and costs should be allowed in a dissolution proceeding, and the amount thereof, is also a matter within the sound discretion of the trial court. *In re Marriage of Thomas*, 63 Wn. App. 658, 671, 821 P.2d 1227 (1991). Here, there was no case made for other than each side maintaining their own attorney fees. [CP 92]

Pursuant to RCW 26.09.140, the trial court has discretion to award attorney fees and other costs of litigation when one party has a financial need for an award and when the other party has the ability to pay. *Id.*; RCW 26.09.140. That statute provides:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney[] fees

The purpose of the statutory authority is to ensure that a person is not deprived of his or her day in court by reason of financial disadvantage. *Malfait v. Malfait*, 54 Wn.2d 413, 418, 341 P.2d 154 (1959).

In determining whether a requesting party has a need for fees, the trial court may consider such factors as the employment and health of that party, *Bennett v. Bennett*, 63 Wn.2d 404, 414-15, 387 P.2d 517 (1963), and the division of property between the parties. *In re Marriage of Stenshoel*, 72 Wn. App. 800, 813-14, 866 P.2d 635, 643 (1993).

Here, the trial court articulated tenable reasons for denying an award of attorney fees to Mr. Frazier, finding that the parties are in the same position to pay their own attorney fees. [CP 92] This finding is supported by substantial evidence in the record as outlined in response to Mr. Frazier's request for spousal maintenance. The trial court made an effort to distribute the value of the parties' assets equally between them, including the liquid asset of the equity in the parties' home, which was sold, thereby leaving each with an equitable division of property. [CP 140]

The trial court did not abuse its discretion by denying Mr. Frazier's request for an award of attorney fees.

V. MS. FRAZIER IS ENTITLED TO AN AWARD OF ATTORNEY FEES ON APPEAL

Ms. Frazier requests reasonable attorney's fees under RCW 26.09.140 and as allowed by RAP 18.1. Under RCW 26.09.140,

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

RCW 26.09.140 further provides, "Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs."

Ms. Frazier should be awarded her attorney fees because Mr. Frazier's appeal lacks merit, Ms. Frazier has need and Mr. Frazier has ability to pay. *In re Marriage of King*, 66 Wn. App. 134, 139, 831 p.2d 1094 (1992). As required by RAP 18.1, Ms. Frazier will timely submit an affidavit of financial need based in part on her legal debt compounded by Mr. Frazier's repeated baseless allegations and requests along with the expense of raising the parties' child without financial support from Mr. Frazier.

VI. CONCLUSION

Based upon the foregoing facts and authorities, Ms. Frazier respectfully urges this court to uphold the trial court's decision and to award her attorney fees on appeal.

RESPECTFULLY SUBMITTED this 3rd day of July, 2012:



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VI. CERTIFICATE OF SERVICE

I, Kelsey Kittleson, being first duly sworn on oath, depose and state as follows: That on the 23rd day of July, 2012, I caused to be served a copy of Respondent, Ulia Frazier's Response Brief to the below-listed attorney of record in the above-captioned matter, as follows:

Robert Cossey 902 N Monroe Spokane, WA 99201 Attorney for Appellant Dean Frazier	Via Hand-Delivery <input checked="" type="checkbox"/>
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Kelsey Kittleson