

FILED

DEC 30 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 298396

WASHINGTON STATE COURT OF APPEALS
DIVISION III

In Re the Marriage of

SUE SHAPIRO

Petitioner

v.

MARTIN SHAPIRO

Appellant

AMENDED OPENING BRIEF

W. JAMES KENNEDY
WSBA NO: 4648
Counsel for Martin Shapiro

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I. INTRODUCTION

The Appellant, hereafter referred to as "Marty" has filed this appeal seeking relief from an award of maintenance in favor of the Petitioner, hereinafter referred to as "Susan" in the amount of \$4500.00 a month payable until Marty either retires or reaches the age of 67, whichever occurs last and from property division award that mischaracterizes Marty's separate property as community property. Marty further seeks relief from a property division award that grants an equitable lien to Susan.

The parties were married approximately 27 years having separated in the year 2006. The Trial Court found that Susan, who has a master's degree in counseling, could only earn \$100.00 a day as a substitute teacher. The Trial Court made no finding as to why it did not consider the fact that during Marty and Susan's three year separation, Susan had taken no action to find employment other than to work occasionally as a substitute teacher. The Trial Court ignored that Susan had not attempted to find employment during the separation. It failed to find the amount of income that Susan was capable of making, and failed to review Susan's monthly expenses that averaged between \$2000.00 and \$3000.00 monthly.

Susan resides in a home on 28th Avenue that has no debt because Marty refinanced his residence and placed the mortgage against his family home. Having not made findings, it is impossible to determine how the Trial Court reached a decision based on the parties' economic conditions at the time of the entry of the Decree. See *In re Marriage of Washburn*, 101 Wn.2d 168, 181, 677 P.2d 152 (1984).

The Trial Court abused its discretion as it relates to the following issues.

II. ASSIGNMENTS OF ERROR/ISSUES ON APPEAL

A. ASSIGNMENTS OF ERROR.

1. The Trial Court erred in entering a property division which was not fair and equitable.

(a). The Trial Court erred when it mischaracterized the Dahl Road property as community property. The residential property was purchased prior to the parties' marriage. The property remained titled in Marty's name until approximately 2002 when the house was refinanced and Marty was required by the lender to quit claim the property to Martin and Sue Shapiro, husband and wife, in order to obtain financing. The deed of trust and the quit claim

deed from Marty to the marital community are one day apart. The Trial Court erred in finding this community property.

(b). The Trial Court erred in not making findings pursuant to RCW 26.09.080, nor did the Trial Court reference any case law in regard to the property division.

(c). The Trial Court erred in awarding the residence located at 912 South 23rd Avenue to Marty. Both parties agreed that the 23rd Avenue house should be valued at \$150,000 and awarded to Susan with the caveat that it would be given to their daughter. However, the Trial Court ignored the parties' agreement and valued the property at \$200,000.00 awarding the property to Marty.

(d). The Trial Court erred in valuing Marty's separate property (Chicago Junk) as of the date of trial.

2. The Trial Court erred in determining the award of maintenance as follows:

(a) The Trial Court erred in awarding 25% of Respondent's social security benefits to Susan.

(b). The Trial Court erred by failing to find that Susan had an interest in the social security earned by her other than the spousal annuity.

(c) The Trial Court erred when it failed to make findings, pursuant to RCW 26.09.090, regarding Susan's need for and Marty's ability to pay maintenance. In closing arguments, Susan's counsel only requested 12 months of additional maintenance. The Trial Court ignored that request without any findings.

(d) The Trial Court erred in establishing Marty's income, mischaracterizing draws against the company as income. The Trial Court found that Marty's salary from his place of employment was \$15,000.00 per month. (CP at 97). However, the Trial Court did not provide a basis for this finding other than the fact that in 2009 Marty had monthly draws against the company that reduced his equity in the business in that amount. (CP at 97). The Trial Court also found that Marty was receiving \$2,000.00 a month in rent from the corporation, and \$600.00 in rent from his property located in Naches (CP at 97). No tax returns were presented that indicated income of that amount. (See RE 2, 3, 4, 5).

(e) The Trial Court erred in awarding maintenance in an amount and for a length of time longer than was requested by Susan.

(f) The Trial Court erred in requiring Marty to pay maintenance that would require him to work past his retirement date.

(g) The Trial Court erred when it failed to reduce maintenance once Susan becomes eligible to receive social security benefits.

(h) The Trial Court erred in failing to review Susan's monthly expenses in order to establish her need for maintenance.

(i) The Trial Court made no comments or findings on the amount of money that was needed by Susan to meet her monthly expenses.

B. ISSUES ON APPEAL

1. The Trial Court found that a \$250,000.00 lien should be paid by Marty in favor of Susan. A review of Marty's cash flow indicates that he is unable to make the additional lien payment and/or maintenance payments. The facts are that one of the parties' daughters lives in the house at 912 S. 23rd Avenue and

Susan had previously been collecting \$500.00 a month rent from her. (CP at 96). Susan expected that the property would be deeded to the daughter, however, the property was awarded, not in halves to each party for gifting to the daughter, but the entire balance was awarded to the Marty, which resulted in a \$200,000.00 asset that has no actual value to him.

2. The Trial Court abused its discretion when it failed to make an equitable division of the property, including the business.

3. The Trial Court abused its discretion when it improperly valued the business known as Chicago Junk as of the date of separation and not the date of trial.

III. STATEMENT OF THE CASE

The parties were married on/or about March 23, 1979. (CP at 4). Susan and Marty separated on/or about August 7, 2006. (CP at 46). Both parties are graduates of Washington State University. (RP 180:81 at 15, 255). After graduation, Marty went to work at Chicago Junk. (RP at 255). Upon his father's death, he inherited his father's interest in Chicago Junk and one lot that the junk yard rents.

Susan has a master's degree in education with a guidance and counseling certification. (RP at 15). She worked at the Highland school district for approximately 3 years and has made little, if any, effort to find employment since the parties separated in August of 2006. (RP 118:16). While employed, Susan was the primary force in establishing an alternative school within the Highland school district. (RP at 16).

Both of the parties' children are grown and emancipated. (RP at 21). Marty continues to contribute to one of the children by paying her student loans.

Susan has acted as a babysitter for the grandchildren and has been doing so since about the time of the separation. (RP 118:24). No evidence was presented that Susan was not physically capable of working. In fact, Susan testified that she had earned approximately \$100.00 a day as a substitute teacher. (RP 26:3). Based on her testimony, the Trial Court found that she was capable of making \$1500.00 a month. (CP at 98).

However, there was no testimony from Susan that would indicate that she made any effort to find employment utilizing her master's degree in counseling. (RP 115:18) When asked whether

or not she had sought out the employment agency to assist her, she indicated that essentially she had no intention of finding employment and she indicated that her desire was to provide daycare for the grandkids. Her financial declaration indicated that her monthly expenses were \$2080.00 a month. (CP at 7). Susan has no monthly payment on her house. (CP at 9; RE 1).

The parties had previously borrowed money against Marty's Dahl Road residence to pay off the mortgages on the house on 28th Avenue (which was awarded to Susan) and on the house on 23rd Avenue in which their daughter and grandchildren reside. That was awarded to Marty. (CP at 51; RP at 57).

During the pendency of this case (2007 to 2010) Susan filed no motions to increase support. She had sufficient funds to meet her monthly expenses.

Marty's monthly expenses total approximately \$11,384.00, which the Trial Court does not reference. (RE 68). His expenses were actually more than \$11,384.00 a month because of additional expenses such as the IRS, irrigation assessments and farm expenses. (See RE 68). Marty's monthly living expenses at the time of trial included \$2,000.00 for spousal maintenance. (See RE

68). The Trial Court increased that number by \$2500.00, which makes Marty's monthly expenses \$13, 884.00. (See CP 51; RE 68). The Trial Court found that Marty's monthly expenses decreased by the sum of \$2479.00, which is the mortgage payment on the Hawaii house that was awarded to Susan. (CP at 95). This results in Marty's monthly expense being \$11,405.00. (See CP at 95; RE 68). Marty has expenses for payments on his daughter's student loan in the sum of \$6,000.00 and annual farm expenses including a water expense for 17 acres. (See RE 68).

During the trial Susan argued that Chicago Junk was financially in the hole at the time of the parties' marriage. Marty presented evidence from his father's estate's inventory and appraisal in 1985 that showed the inventory appraisal listing the value of Chicago Junk at \$125,000.00. (RE 18).

The Trial Court found that there was no community interest in Chicago Junk because it was Marty's inheritance. (CP at 93). The Trial Court valued the business at \$827,000.00 as of December 31, 2005. (CP at 93). The Trial Court found that Marty's comparable annual salary was \$62,000.00 (if that were to be the case the additional amounts of income from Chicago Junk would be

dividends). (See RP 148:20-24). When asked what his salary was Marty testified that he takes out of the business whatever he needs to pay his bills.

Marty continued to pay the indebtedness owed by the marital community, which includes the Dahl Road mortgage and the Hawaii property. (RP at 276). During the pendency of the divorce, Marty had to borrow more than \$125,000.00 from Chicago Junk in order to make those payments. This reduced his equity in the business.

Marty testified that his business was affected by the recession. The primary people that supplied scrap for his business were only producing 30% to 50% of what they did at the time of separation. (RP Vol II, 261:1-25). In the year the case was tried Chicago Junk lost \$123,000.00. (RP Vol II, 360:23-25)

In addition to his normal monthly expenses Marty now has to pay \$2651.00 per month for 10 years to Susan for the equitable lien awarded to her. (CP at 96). The Trial Court chose to award the lien and the 23rd Avenue property valued at \$200,000.00 to Marty rather than awarding it to Susan and reducing the lien to \$50,000.00. (CP at 96).

At the beginning of the case, Susan presented evidence that her monthly expenses were \$2080.00. (CP at 7) She now has a monthly expense for the Hawaii property that was awarded to her in the sum of \$2679.00. (CP at 95). Susan's total expenses are approximately \$4759.00. If she is employed at \$1500.00 a month she has excess funds available to her in the sum of approximately \$3892.00 per month after paying her expenses and taxes for Hawaii property and the normal withholdings. (See Appendix A1). The Trial Court made no such distinction or any findings setting forth the actual numbers as to income and expenses.

Despite the fact that the debt owed on the 28th Avenue property was paid with money from a mortgage on the Dahl's Road property, the Trial Court made no findings nor did it take into account that in essence Mr. Shapiro is paying for Susan's house.

The evidence before the Trial Court was that the income of the marital community in 2002 was \$37,178.00. (RE 6). In 2003 the marital community's income was \$55,305.00. (RE 5). The actual wage income was \$65,540.00 but there was a capital gain loss and losses on rentals. (RE 5). In 2004 wages from income were

approximately \$188,000.00. (RE 4). According to Exhibit 4 the adjusted gross income was \$182,807.00.

In 2008 income for the business was the sum of \$34,860.00. Marty is concerned that the Trial Court found that he had income of \$18,100.00 a month, including rent. (CP at 97-98). Especially troubling is that the Trial Court imputed \$500.00 a month for rent that Marty did not collect nor would have collected from his daughter. (See RP at 23-24). The only evidence as to income in 2009 was that the business lost \$123,000.00. (See RE 44).

The Trial Court made no finding that the funds were removed from the business by Marty. The Trial Court failed to recognize the loss suffered by Chicago Junk in 2009 in the sum of \$123,054.00 up to May 31, 2009. (See RE 58).

IV. ARGUMENT

A. Standard of Review

Review of a Trial Court's findings of fact is limited to determining whether the findings are supported by substantial evidence since "the constitution does not authorize the court to substitute its findings for that of the trial court". *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183, 186

(1959). Substantial evidence means “evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise”. *In re Marriage of Vander Veen*, 62 Wn. App. 861, 865, 815 P.2d 843 (1991). *Accord, Magnuson v. Magnuson*, 141 Wn. App. 347, 351, 353, 170 P.3d 65 (Div. III, 2007), *rev. den.*, 163 Wn.2d 1050 (2008).

Property divisions under *RCW 26.09.080* are reviewed for an abuse of discretion. *In re Marriage of Schweitzer*, 81 Wn. App. 589, 595-96, 915 P.2d 575, *affirmed*, 132 Wn.2d 318 (1997) (reversing property award). Maintenance awards are also reviewed for an abuse of discretion, which occurs, among other circumstances, when the Trial Court “does not base its award on a fair consideration of the statutory factors under *RCW 26.09.090*”. *In re Marriage of Marzetta*, 129 Wn. App. 607, 624, 120 P.3d 75 (Div. III, 2005)(reversing maintenance award); *In re Marriage of Mathews*, 70 Wn. App. 116, 123, 853 P. 2d 462 (Div. III, 1993)(vacating maintenance award). *Accord, In re Marriage of Sheffer*, 60 Wn. App. 51, 53, 57-58 & n.2, 802 P.2d 817 (1990)(reversing maintenance award for failure of Trial Court to adequately consider parties’ standard of living during the marriage

and the post-dissolution economic conditions that would result from the property division and maintenance award).

A Trial Court abuses its discretion when its decision is manifestly unreasonable; or is exercised or based on untenable grounds or reasons concerning the purposes of the Trial Court's discretion; or for no reason, since then there is no exercise of discretion. *Marriage of Kovacs*, 121 Wn.2d 795, 801, 854, P.2d 629 (1993)(reversing for abuse of discretion). *Accord, Coggle v. Snow*, 56 Wn. App. 499, 505-07, 784 P.2d. 554 (1990) (vacating discretionary decision); *In re the Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).¹ Abuse of discretion thus can be boiled down to the following: a "court acts on untenable grounds if its factual findings are unsupported by the record; the court acts for untenable reasons if it has used an incorrect standard or the facts do not meet the requirements of the correct standard; and the court acts unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard". *In re Marriage of*

¹ "A Court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard."

Wicklund, 84 Wn. App. 763, 770 n. 1, 932 P.2d 652 (1996)(reversing trial court). Justice Kulik recently re-emphasized that “an abuse of discretion is found if the Trial Court applies the wrong legal standard or bases its ruling on an erroneous view of the law. *State v. Lord*, 161 Wn.2d 276, 284, 165 P. 3d 1251 (2007) (citing *Mayer v. Sto Indus., Inc.*, 156 Wn. 2d 677, 684, 132 P.3d 115 (2006)).” *Magnuson v. Magnuson, supra*, 141 Wn. App. at 353 ¶15 (Kulik, J., dissenting).

In short, a Trial Court must exercise its discretion in a principled fashion based on the correct legal standard and supported by the record or admitted facts.

B. Property Division Principles

On a substantive level, the division of the parties’ property and liabilities is governed by RCW 26.09.080.

In a proceeding for dissolution of marriage . . . , the court shall, without regard to misconduct, 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 including, but not limited to:

- (1) nature and extent of the community property;
- (2) nature and extent of the separate property;
- (3) duration of the marriage or domestic partnership; and

(4) the economic circumstances of each spouse or domestic partner at the time of the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

“The trial court’s paramount concern when distributing property in a dissolution action is the economic condition in which the decree leaves the parties.” *In re Marriage of Gillespie*, Wn. App. 390, 948 P.2d 1338 (1997). The court may consider the health and ages of the parties, their prospects for future earnings, their education and employment histories, *their necessities and financial abilities*, their foreseeable future acquisitions and obligations, and *whether ownership of the property is attributable to the inheritance or efforts of one or both spouses*. *Gillespie*, 89 Wn. App. at 399, 948 P.2d at 1343 (*emphasis added*).

1. Dahl Road Property.

The Trial Court mischaracterized the family residence referred to as the Dahl Road property. In its opinion, the Trial Court found the Dahl Road property was community property. (CP at 93) However, the general rule is that the character of the asset is established at the time of the acquisition. See *In re Marriage of*

Zahm, 138 Wn.2d 213, 978 P.2d 498 (1999). The burden then shifts to the person who alleges that it is community property to bring the facts forward in support of their position. *Id.*

In this case, the Dahl Road property was purchased by Marty prior to the marriage for approximately \$14,000.00. Although, the residence has been remodeled a number of times during the marriage, Marty never intended to have the Dahl Road property become community property. The only evidence presented that the Dahl Road property was community property was a quit claim deed from Marty as a single person to Martin and Sue Shapiro, husband and wife. (See RE 38). The only reason Marty signed the quit claim deed was because the bank required that to refinance his home. (See CP at 93).

The presumption is that once property is separate it remains separate, unless the party seeking the change in character provides "direct and positive" evidence that the change in character occurred. *In re Estate of Borghi*, 141 Wn. App 294, 169 P.3d 847 (2007); *see also Gillespie*, 89 Wn. App. at 399, 948 P.2d 1338 ("The law will not convert property acquired before marriage into community property, absent a writing evidencing the mutual intent

of the parties.”). For a number of years the issue in dissolution proceedings has been whether real property found to be separate at the time of acquisition was converted to community property when the title company or lending agency required the property be placed in both names. See *id.* . This is due to the rule propagated in *Hurd v. Hurd*, 69 Wn. App 38 at 50, 848 P.2d. 195 (1993). The *Hurd* rule states that when both husband and wife’s names appear on a deed to real property, there is a presumption that the property is community property. See *id.* However this presumption can be overcome by proof that the property was titled in both names in order to accommodate a mortgagor. See *id.*

The Court in *Borgh* analyzed both the general rule and the *Hurd* Rule and determined that the general rule as stated in *In re Estate of Deschamps*, 77 Wn. 2d 514, 137 P.2d 1009 (1914), controlled in these situations. *Borgh*, 141 Wn. App. at 304, 169 P.3d 847. Relying on *Deschamps*, the Court of Appeals in *Borgh* found that a quit claim from one party to both did not result in community property. 141 Wn. App. at 304, 169 P.3d 847.

Under both *Borgh* and *Hurd*, the property should have remained Marty’s separate property. Marty bought the property

prior to his marriage to Susan with his separate assets. (CP at 93). The only reason why he deeded the property to the marital community was that the lender required it in order to mortgage the home. (CP at 93). The Dahl Road property should have been awarded to Marty as his separate property subject to any documentation or proof of a community lien. The burden should then shift to Susan to produce information and evidence in support of her claim of a community lien.

a. **Community Lien on the Dahl Road Property.**

The Trial Court erred by awarding Susan a community lien for the increase in the value of the Dahl Road Property without evidence to support such an award. One of the fundamental rules of community property law is that any increase in the value of the separate property is presumed to remain separate. See, *In re the Marriage of Elam*, 97 Wn.2d. 811, 650 P.2d. 213 (1982). This presumption can only be rebutted by direct and positive evidence that any increase is attributable to community funds or labors. *Id.* Marty does not argue that there were not contributions made by the community, but there has been no such evidence offered in this case. The only evidence offered was that the home had been

remodeled several times. (See CP at 94). However, this was generally done by Marty and Susan's friends when they had time on evenings and weekends. (RP 130:131 at 130-131). No evidence was presented as to how much the remodeling increased the value of the house.

The Trial Court's lack of findings illustrates this deficiency. The Trial Court made no findings as to how it arrived at the community or separate interest in the Dahl Road property other than to state that the Trial Court found the land value to be \$60,000.00. (CP at 94). The remaining portion of the house would relate to the improvements in the sum of \$385,000.00. (See CP at 94). However, without evidence relating to how much the value increased due to community contributions, the Trial Court's findings are guess work not based the facts or evidence.

b. Trial Court did not offset the community lien by the benefit the community received

Trial Courts may offset a right of reimbursement against any community benefit from the use of the separate property. *Miracle v. Miracle*, 101 Wn.2d. 137, 139, 675 P.2d. 1229 (1984). "A right to reimbursement may not arise if the contributing spouse received a

reciprocal benefit flowing from the use of the property.” *Id.* The fact that the community benefitted from living rent free in the residence offsets the right to reimbursement to the community of its contributions to the separate property. *See id.*

Although, the Dahl Road property was Marty’s separate property, Susan benefitted by living there rent free. However, the Trial Court did not take this into consideration when characterizing the property or awarding an equitable lien to Susan. (See CP at 94, 96). In fact, the Trial Court made no findings at all regarding how much the community contributed to an increase of the value of the property nor does the Trial Court comment on the presumption that any increase in the value of separate property is presumed to be separate, particularly when there is no findings to the contrary. *In re Marriage of Pearson v. Maines*, 70 Wn. App. 860 at 869, 855 P.2d 1210 (1993). This was in large part due to the fact that Susan did not provide any evidence to that effect. Because Susan did not meet her burden of proof in overcoming the presumption that the increase in the value of the Dahl Road property was separate, the Trial Court should not have awarded her an equitable lien in the property.

2. Miscellaneous Property Division Issues

The Trial Court awarded the house located at 913 S. 23rd Avenue to Marty with a value of \$200,000.00. (CP at 96). The Trial Court ignored both Marty and Susan's testimony regarding the value of the house. Susan testified that she was willing to take the residence for \$150,000.00 in her column and with strings attached on the daughter's right to have ownership of that property. (RP at 72-73). Susan also testified that if it was to go to the daughter, it should be awarded to Marty valued at \$150,000.00. (RP 72:73 at 72-73).

At the time of trial, there was no debt owing against the 23rd Avenue Property because all the debt was paid by the proceeds from a mortgage on the Dahl Road property. (RP at 319). When the Trial Court awarded the 23rd Avenue property to Marty, it left him paying the mortgage not only on the Dahl Road property but on the 28th Avenue house awarded to Susan² and 23rd Avenue property. The Trial Court did not take this into account when making its award of property divisions.

² The 28th Avenue and 23rd Avenue properties' mortgage was paid by a refinance on the Dahl Road property.

Marty's position at the time of the trial was for the parties to give to their daughter the 23rd Avenue residence. It should not have been awarded to one or the other of the parties as his intent was that it should become the daughter's. The Court never commented on that. It simply awarded the property based on the \$200,000.00 figure to Marty.

The Trial Court found that Marty was required to pay Susan an equitable lien in the sum of \$250,000.00. (CP at 96). This lien was to be amortized over 10 years at 5% interest. (CP at 96). This added payment reduced Marty's cash flow by \$2651.00 per month. The Trial Court either should have awarded the 23rd Avenue property to Susan at \$150,000.00 or Marty at \$150,000.00 or awarded to one or both of the parties on the condition that it be gifted to the daughter and neither party to be charged with the asset. It is unreasonable to expect Marty to be charged \$200,000.00 and then give the asset to the daughter. It should be a joint gifting.

The Trial Court awarded the property located on 23rd to the Husband. The Court stated "if he wants to give it to the daughter, he can do that. That's his property". (CP at 96). The testimony

was that he would give it to the daughter if awarded to him. (RP at At the very least he is entitled to a \$50,000.00 reduction on his side based on the testimony of Susan. The Trial Court never comments on Susan's testimony.

One final comment in regards to awarding the 23rd Avenue house if, in fact, Susan is correct and this property can be rented for \$1250.00,(RP at 23), if it is awarded to Susan not only does it reduce the equitable lien, but it increases her income \$1250.00 per month (assuming she does not give it to the daughter).

After hearing the reconsideration motion the Court stated "It seems to me that's something that the parties might be able to negotiate something between themselves because the practical matter here is, although in theory the house may be – may be a market value of \$200,000.00 it really doesn't have that value to either of these parties because neither one of them wants to sell it. You have the problem of the daughter living there, neither Susan nor Marty wants to evict the daughter and sell the house, so the practical matter is that it is not worth \$200,000.00 to either one of them, but I have to base my determinations on the fair market

value. It has a fair market value of \$200,000.00. I have to give it to one party or the other". (CP at 381).

The Court has the authority to order the 23rd Avenue house to be sold and the parties split the proceeds or to one party at no value if the other party agrees.

C. Maintenance Award

(i) Amount of Award was improper.

RCW 26.09.090(1) provides the court may grant a maintenance order for either spouse, in an amount and for a period of time the court deems just, after considering all relevant factors, including:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and

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

A trial court abuses its discretion in awarding spousal maintenance when the award does not evidence fair consideration of the statutory factors. *In re Marriage of Mathews*, 70 Wn. App. 116, 853 P.2d 462 (1993).

In *Mathews*, the Court reversed the trial court's maintenance award because it did not take into account that the husband could not meet his financial obligations while paying the maintenance award. *Id.* at 123. The Court also found that the maintenance award was excessive in light of the fact that the wife had more than enough money to take care of her needs once the property awarded to her was taken into account. *Id.* at 124.

In this case, according to the Trial Court, Marty has a monthly income in the amount of \$18,500. His living expenses are \$11,384.00. (See RE 68). This includes the house payment on the Dahl Road property in the sum of \$3409.00. Marty's basic expenses deducting out the Hawaii property and adding in an additional \$2470.00 for the judgment lien and \$2500 for the

additional maintenance total \$13,875.00 a month, after tax dollars. Attached as Appendix A1 is a breakdown of the Court's ruling and the impact taking into account tax consequences for the parties filing single.

Over and above those expenses Marty is paying a student loan for his daughter, property taxes on the Dahl Road property, farm expenses and water for the 17 acres (See RE 68). Despite the fact that Marty's expenses far exceed his income, the Trial Court ordered him to pay \$4,500 a month in maintenance until he is "67 or is retired whichever comes later." (CP at 122). The maintenance award is excessive not only because Marty cannot afford to pay it, but because it is in excess of Susan's financial needs and incorrectly states Marty's income.

RCW 26.09.090(1)(a) requires the court to consider "[t]he financial resources of the party seeking maintenance, including separate or community property apportioned to [her], and [her] ability to meet [her] needs independently ..." *Mathews*, 70 Wn. App. at 123, 853 P.2d at 467. There is ample evidence in the record showing that Susan has few monthly expenses and has the finances and ability to pay to those expenses.

Susan has a master's degree in counseling and by her own admission has not made any attempt to find employment that would utilize her degree. From the date of separation up to the time of trial she essentially had no employment she worked very little as a substitute teacher at \$100.00 per day. At the time of separation she had approximately 12-13 years of being able to be employed if she had only started by making an attempt to find employment. The Trial Court found that she was capable of being employed as a substitute teacher for 180 days a year. (CP at 98). Susan offered no evidence that she had applied to any jobs or that she had even contacted anyone for employment. The Court can infer that she has no intention of going to work. The fact remains that Susan has the skills and education to obtain employment.

The record shows that Susan had few monthly expenses. Her monthly expenses were approximately \$2080.00 per month. (CP at 7). This is corroborated by the fact that during the three years that Susan and Marty were separated Susan was able to live on \$2,000 a month that Marty voluntarily paid her. The only change in her expenses post dissolution decree has been the added mortgage of \$2,479 from the Hawaii house. Currently, Susan's

monthly expenses total \$4,559. However, this total does not take into account Susan's ability to either rent or sell the Hawaii house and have that money available to her. The Trial Court suggested sale.

Susan also has the monthly judgment lien payments in the amount of \$2,651 as income. Add that amount to the \$1,500 per month from substitute teaching and the \$4,500 she would receive in maintenance and she has a total monthly income of \$8,651, which gives her a \$2,973 positive cash flow. This scenario does not take into account the possibility of her selling or renting the Hawaii house. Susan has more than enough funds to meet her needs the maintenance award should be reduced. *See Mathews*, 70 Wn. App at 123-12, 853 P.2d at 467.

(ii) Duration of Award was improper.

Maintenance orders shall be in such amounts and for such periods of time as the court deems just . . . after considering all relevant factors. RCW 26.09.090(1). What is a reasonable length of time for a divorced spouse to become employed and provide for his or her own support so that maintenance can be terminated depends on the particular facts and circumstances of each case”.

Spreen v. Spreen, 107 Wn. App. 341, 28 P.3d 769 (2001), Under Washington law maintenance can be terminated or reduced upon the receiving spouse obtaining social security benefits. See, *In re Marriage of Sandborn*, 55 Wn. App. 124, 125, 777 P. 2d 4 (1989); *Hammond v. Hammond*, 26 Wn. App. at 129, 130, 611 P.2d 1352 (1980).

In this case, the Trial Court ordered Marty to pay maintenance until he is 67 years old or retires whichever is last. (CP at 122). Further the Trial Court ordered that Marty's obligation to make future maintenance payments terminates only upon the death of either party or marriage or cohabitation by Susan. (CP at 122). It does not terminate or reduce upon receipt of Social Security benefits. A maintenance award that does not terminate or reduce upon receipt of Social Security benefits is not only an abuse of discretion, but clear error. *Mathews*, 70 Wn. App. at 125, 853 P.2d at 468.

The Trial Court originally held Marty was awarded 75% of his social security in the May 3, 2011 reconsideration motion. (See CP at 98). The Trial Court stated in regard to the issue of social security that he wanted to make it clear that he would not say that

he was granting Susan an interest in Marty's social security. What the Trial Court said was the amount of maintenance he would be paying would be calculated based on the amount of his social security. (Verbatim Transcript of hearing held on May 3, 2010 at page 9). That solves a problem without violating federal law, but that has not been reduced to an order.

It is believed to be the intent of the Trial Court that at the time of Marty's retirement he would be responsible to pay to Susan one-half of the difference between the amount of funds that Susan is entitled to draw from social security as compared to what Marty could draw, i.e., Marty receives \$1000.00 and Sue receives \$500.00, then Marty would owe to Susan the sum of \$250.00. That needs to be placed under the maintenance portion of an amended decree. The Trial Court did not answer the question of how Susan's social security and a portion of Marty's social security affected the maintenance.

D. Valuation of Chicago Junk

The Trial Court erred in accepting Susan's valuation of Chicago Junk as of December 31, 2005.

When a court chooses a date to value an asset, it should consider several factors including which party has control of the asset and whether an asset has lost value due to a parties actions versus losing value due to market forces. See *In re Marriage of Griswald*, 112 Wn. App. 333, 350-351, 48 P.3d 1018, 1027-28 (2002). In *Griswald*, the wife contended that the trial court should have valued the family home at the time of trial and not the time of separation. *Id.* In upholding the trial court's decision to value the home at the time of separation, the Court of Appeals noted the wife had control of the home from the time of the separation and the record showed that much of the lost value of the home was due to her lack of maintenance and upkeep and not solely due to market forces. *Id.*

In this case, the court accepted the valuation of Chicago Junk by Susan's expert Matt Petersen, who valued the business at \$827,000 as of December 31, 2005, only because it mistakenly believed that this was the only testimony it had received. (CP at 93). This was simply not the case. The Trial Court also received evidence in the form of a report from Marty's expert M.J. Moriarty, CPA. (See RE 44). Mr. Moriarty valued the business at \$508, 389.

(RE 44). Yet the Trial Court made no mention of this report nor did it apparently take it into consideration when it made its ruling. (See CP at 93).

The Trial Court also had testimony from Dean Rasmussen who testified by deposition. (See RE 61). Mr. Rasmussen testified that based on current market forces the business would have a much lower value at the time of trial than it did in December of 2005. (RE 61). Although there Mr. Rasmussen provided ample testimony regarding the state of the scrap metal industry at the time of trial, the Trial Court never mentioned the circumstances relating to new competition in the area, the downturn in the market because of the recession, or any other factor. (See CP at 93). Based on Mr. Rasmussen's testimony, the business should have been valued as of trial in light of the recession and the fact that Marty has had to borrow \$140,000.00 to keep the business going. (See RE 44).

The Trial Court has the ability to value the business at the date of separation or, the date of the trial or any other date it believes is appropriate. The value of this business goes up and down in relationship to the commodities market. (RE 44 at page 9). It certainly should be valued at the time of trial. If neither party has

done anything to change the value of the company, positively or negatively, then the court should use the trial date or as close to the trial date as possible. See *Griswald*, 112 Wn App. at 351-52, 48 P.3d 1018.

In this case the land has been valued close to trial date; the only thing that wasn't was the business. In the trial court's initial ruling, the court made comments that the Court thinks the business will survive and it's unique in comparison to other businesses. (RP at 441) The court went on to make a general statement that the last businesses to fold have low overhead and high cash reserves, in hard times (in 2009) you take the money out. (RP at 442). That's correct but you reduce the value of the business for the capital reduction. Obtaining a valuation can be extremely important. Particularly where there has been a recession subsequent to the date of value.

According to the Family Law Deskbook, Volume 2, Section 31.2(4) assets can be valued as of the date of separation, day of settlement, day of trial or convenient or logical date between the date of separation and the date of trial or lastly the date on which an asset is distributed to a party (see, Valuation of Property

Section, 31.2(4) at Washington Family Law Deskbook. *In re the Marriage of Griswald*, 112, Wn. App. 333, 48 P.3d 1018 (2002), reviewed denied, 148 Wn. 2d 1023 (2003). Division III of the Court of Appeals upheld the Trial Court's award of a value valued on the date of separation. The value on that date was \$176,000.00. At the time of trial the house was worth \$149,000.00. The Court contributed the reduction in the valued for the failure to maintain the house.

The same kind of logic should apply here. There is no testimony that Mr. Shapiro did anything inappropriate in regards to the management of the business (his separate property). Susan has reaped the benefit of earnings from Marty's separate property throughout their marriage.

There was no testimony as to what business in the future is going to survive or who is not going to survive or under what terms and conditions. Mr. Moriarity, who is the business accountant for Chicago Junk and has been for a number of years, prepared and critiqued Mr. Petersen's report and brought it to a current date (See, RE 44). Mr. Moriarity talks about new competition such as Pacific Recycling. (RE 44) Mr. Petersen did not make any

comment as to this business. (RP at 168). As Mr. Petersen admitted, he was not an expert in regards to these kinds of issues relating to commodities nor did he rely on any comparable sales of businesses similar to Chicago Junk. (RP 180:81). Mr. Petersen could not find any comparable sales. (RP 180:81). Mr. Petersen did note that similar businesses were unable to be sold in the Yakima area. Mr. Moriarity's report talks about other issues such as competition, the world recession, and arrives at a value for this company of \$508,389. (RE 44). That being the book value as of December 31, 2005, but have it adjusted for what took place since that date. (RE 44). The Trial Court rejected that testimony.

In regard to the valuation of the business, Marty is concerned that there was no reference made to Dean Rasmussen's deposition, which was published and placed in the record (see, RE 61). Mr. Rasmussen is an employee of CALBAG metals to whom Marty sells some of his scrap. Mr. Rasmussen has been involved in the business as a nonferrous scrap metal buyer since 1978. (RE 61 at page 5).

As part of his employment, it is his job to form an opinion as to a value of scrap. (RE 61 at page 6). Mr. Rasmussen testified as

the economy gets stronger, so do the commodities and so does scrap. (RE 61 at page 9). Mr. Rasmussen pointed out in his deposition the correlation between the price of oil and the price of copper. (RE 61 at page 10). According to Mr. Rasmussen, the prices for nonferrous metal dropped dramatically beginning in the year 2008. (RE 61 at page 10). Mr. Rasmussen testified about the magazine "scrap" which is the treatise for the industry or as he referred to it "the bible." (RE 61 at pages 10-11). Mr. Rasmussen also testified about the additional competition in Yakima such as Pacific Recycling, Mayflower Recycling and Michelson's. (RE 61 at pages 13-14). Mr. Rasmussen described the new scrap metal business in Terrace Heights (Pacific Recycling); it's a brand new plant and opened within the last year and a half. (RE 61 at pages 14-15).

Mr. Rasmussen compared the size of Pacific with Chicago Junk. (RE 61 at page 16). According to Mr. Rasmussen, Pacific has had a very negative effect on smaller businesses. (RE 61 at page 16).

CALBAG's gross value of sales was down 45% 2009. (RE 61 at page 19). It's not just the volume that's down but the prices are down too; a double-edged sword. (RE 61 at page 19).

Mr. Rasmussen went on to state the last three years from 2005 through part of 2008 were record years for the industry. (RE 61 at page 20). The industry has not seen a decline like this in the 33 years that Mr. Rasmussen's been in the business. (Exhibit 61 at page 20).

Based on the testimony provided, the Trial Court erred in entering a valuation based solely on Susan's expert testimony. The Trial Court should have valued the business at the time of trial based on the fact that the market forces caused a decrease in the value of the business. In the alternative, the Trial Court should have valued the business at \$508, 389. (See RE 44).

V. CONCLUSION

The Trial Court abused its discretion in making both the property division award and the maintenance award. With respect to the maintenance award, the Trial Court did not take into account the financial hardship that such a large maintenance award would impose on Marty. The Trial Court's award of the additional

maintenance and the payments on the equitable lien has put Marty in the position of not being able to pay for his monthly expenses. It also gives Susan a large positive cash flow without requiring her to attempt to obtain employment. The maintenance award did not provide for a reduction or termination of the maintenance when eligibility for Social Security benefits was established.

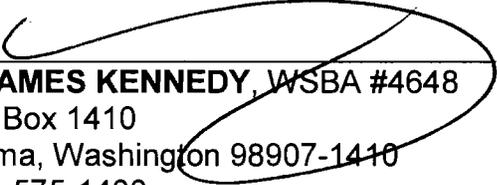
The property division award was improperly made as it gave an arbitrary amount of an equitable lien to Susan on the Dahl Road property. There was no evidence provided that would support the Trial Courts award of the amount of the equitable lien.

The Court mischaracterized the Dahl Road property as community property when the evidence and law support the fact that it was and should have remained Marty's separate property.

Each of the above mentioned errors were an abuse of discretion and should be reversed by this Court. Based upon these arguments and authorities, Marty respectfully requests that the maintenance and property division awards be reversed and the matter be remanded to the Trial Court.

Respectfully submitted this 29 of December, 2011.

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APPENDIX "A1"

	<u>SUSAN</u>	<u>MARTY</u>
<u>INCOME</u>		
Imputed	1,500.00	
Lien payment	2,651.00	
Maintenance	4,500.00	
Draws		15,000.00
Rents	<u> </u>	<u>3,100.00</u>
	8,651.00	18,100.00
<u>DEDUCTIONS</u>		
Maintenance		4,500.00
IRS		3,140.00
Social Security	63.00	
Lien payment	<u> </u>	<u>2,651.00</u>
	<1,119.00>	<10,291.00>
	<u> </u>	<u> </u>
	7532.00	7809.00
Monthly Expenses	<2,080.00>	<6,905.00>
Hawaii House	<2,479.00>	
	<u><4,589.00></u>	<u><6,905.00></u>
NET INCOME	2,973.00	904.00

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ⁱ Marty has additional debt for home, water payments, maintenance of family home, property taxes, and student loans for daughter.

Marty's house payment is \$3409.00 because his house was refinanced to pay off wife's house. See, Exhibit 68

FILED

DEC 30 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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7 **IN THE COURT OF APPEALS**
8 **OF THE STATE OF WASHINGTON**
9 **DIVISION III**

10 **In re the Marriage of:**

11 **SUE SHAPIRO**

12 **Petitioner,**

13 **and**

14 **MARTIN SHAPIRO**

15 **Appellant/Respondent.**

Court of Appeals: 298396
Yakima County: 07-3-00784-1

DECLARATION OF SERVICE

16 I, COREENA HOLDEN, being first duly sworn on oath, depose and say:

17 I served a copy of the Appellant's Amended Opening Brief to SUE SHAPIRO,
18 Petitioner, Pro Se, by placing a copy of the notice in the United States Mail, postage prepaid,
19 on December 29, 2011, addressed to Sue Shapiro, at 215 North 28th Avenue, Yakima, WA
20 98902.

21 DATED this 29th day of December, 2011.

22 

23 **COREENA HOLDEN**
24 **Legal Assistant**