

**FILED**

**FEB 02 2012**

**COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_**

NO. 300111

WASHINGTON STATE COURT OF APPEALS  
DIVISION III

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In Re the Marriage of

STEPHEN HARRISON

Appellant

v.

KAREN HARRISON

Respondent

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BRIEF OF APPELLANT

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W. JAMES KENNEDY  
WSBA NO: 4648  
Counsel for Stephen Harrison

THORNER, KENNEDY & GANO P.S.  
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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	i, ii, iii
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR/ISSUES ON APPEAL . .	3
A. Assignments of Error. ....	3
B. Issues on Appeal .....	6
III. STATEMENT OF THE CASE .....	7
IV. ARGUMENT .....	16
A. Standard of Review .....	16
B. Property Division Principles .....	19
C. Primary Custody of Hannah .....	31
V. CONCLUSION .....	36
APPENDIX A .....	44

**TABLE OF AUTHORITIES**

<b>Washington Cases</b>	<b><u>Page</u></b>
<i>Thorndike v. Hesperian Orchards, Inc.</i> , 54 Wn.2d 570, 575, 343, P.2d 183, 186 (1959) . . . . .	17
<i>In re the Marriage of Vander Veen</i> , 62 Wn. App. 861, 865, 815 P.2d 843 (1991) . . . . .	17
<i>Magnuson v. Magnuson</i> , 141 Wn. App. 347, 351, 353, 170 P. 3d 65 (Div. III, 2007) <i>rev. den</i> , 163 Wn. 2d 1050 (2008) . . . . .	17,19 31
<i>In re Marriage of Schweitzer</i> , 81 Wn. App. 589, 595-96, 915 P.2d 575, <i>affirmed</i> , 132 Wn.2d 318 (1997) . . . . .	17, 26
<i>In re Marriage of Marzetta</i> , 129 Wn. App. 607, 624, 120 P.3d 75 (Div. III, 2005) . . . . .	17
<i>In re Marriage of Mathews</i> , 70 Wn. App. 116, 123, 853 P. 2d 462, 467(Div. III, 1993) . . . . .	17,27
<i>In re Marriage of Sheffer</i> , 60 Wn. App. 51, 53, 57-58 & n.2, 802 P.2d 817 (1990) . . . . .	17
<i>Marriage of Kovacs</i> , 121 Wn. 2d 795, 801, 854, P.2d 629 (1993) . . . . .	18
<i>Coggle v. Snow</i> , 56 Wn. App. 499, 505-07, 784 P.2d. 554 (1990) . . . . .	18
<i>In re the Marriage of Littlefield</i> , 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) . . . . .	18,32
<i>In re Marriage of Wicklund</i> , 84 Wn. App. 763, 770 n. 1, 932 P.2d 652 (1996) . . . . .	19

<i>State v. Lord</i> , 161 Wn.2d 276, 284, 165 P. 3d 1251 (2007) .....	19
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn. 2d 677, 684, 132 P.3d 115 (2006) .....	19
<i>In re Marriage of Gillespie</i> , Wn. App. 390, 399, 948, P.2d 1338, 1343 (1997) .....	20
<i>In re the Marriage of Brewer</i> , 137 Wn.2d 756, 769, 976 P. 2d 102 (1999) .....	21
<i>In re the Marriage of Thomas</i> , 63 Wn.App. 658, 664, 821 P. 2d 1227 (1991) .....	21
<i>In re Thomas v. Wilfac, Inc.</i> , 65 Wash. App. 255, 262, 828 P.2d 597, 601 (1992) .....	23
<i>Ghaffari v. Department of Licensing</i> , 62 Wn. App. 970, 976, 816 P.2d 66, 70 (1991) .....	23
<i>Urbana v. Urbana</i> , 147 Wn. App. 1, 10, 195 P. 3d. 959 (2008) .....	25
<i>In re the Marriage of White</i> , 105 Wash.App. 545, 549, 20 P.3d 481 (2001) .....	25
<i>In re the Marriage of Rockwell</i> , 141 Wn. App. 235, 243, 170 P.3d. 572 576 (2007) .....	28,29 30
<i>In re the Marriage of Crosetto</i> , 82 Wn. App. 545, 558, 918 P.2d 954 (1996). .....	28
<i>In re the Marriage of Spreen</i> , 107 Wn. App. 341, 349-50 28 P. 3d 769 (2001) .....	28
<i>In re the Marriage of Lawrence</i> , 105 Wn. App. 683, 686 20 P. 3d 972 (2001). .....	32

<i>In re the Marriage of Grigsby</i> , 112 Wn. App. 1, 6-7, 57 P. 3d 1166 (2002) . . . . .	32
<i>In re the Marriage of Horner</i> , 151 Wn. 2d. 884, 896, 93 P. 3d 124 (2004) . . . . .	34
<i>Christopher v. Christopher</i> , 62 Wn. 2d 82, 90, 281 P.2d 115, 119 (1963) . . . . .	35
<i>Gross v. Gross</i> , 70 Wn. 2d. 614 424 P. 2d. 654 (1967) . . . .	40

<b>Constitutional Provisions, Statutes and Court Rules</b>	<b>Page</b>
RCW 26.09.080 . . . . .	3,4,17 19,40 41
RCW 26.09.090 . . . . .	6,7,17 26,39, 40
RCW 26.09.187 . . . . .	6, 32, 34,35, 38,39 40
RCW 26.09.004(3) . . . . .	31
RCW 26.09.405 . . . . .	32
RCW 26.19.090 . . . . .	37
RCW 26.09.210 . . . . .	34

## I. INTRODUCTION

The Appellant, hereafter referred to as “Steve” has filed this appeal seeking relief from the following: (1) property award; (2) postsecondary educational costs to be paid on a pro-rata basis based on sharing expenses equally with spouse; (3) failure to allow pleadings to be amended to request maintenance; (4) failure to find that Wife had in the bank at the time of filing the sum of \$147,800.00; (5) failure to allow cross-examination on documents reviewed by the Court after the Wife rested; and (6) awarding residential placement of the parties’ youngest child, Hannah, to her mother.

The parties were married on September 11, 1986 in King County, Washington. (CP at 2, 195). According to the Findings of Fact, the parties separated on November 13, 2006. (CP at 195). The trial was held on September 7<sup>th</sup> through the 10<sup>th</sup> of 2010. On February 9, 2011, more than five months later (159 days), the Court issued a Memorandum Decision. (CP at 207). The Decree of Dissolution was entered on May 16, 2011. (CP at 217). <sup>1</sup>

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<sup>1</sup> For the purposes of this brief “RP” refers to Report of Proceedings of trial held on September 7 through 10 of 2010. All other transcripts will be referred to by the title of the transcript.

At the time of the marriage, the Respondent, hereinafter referred to as "Karen" had completed approximately one year of medical school. (See CP at 208; RP at 55-56). Karen's internship and residencies were all accomplished while she was married to Steve (CP at 56). Karen's student loans were paid by community earnings. (See CP at 208; RP at 55-56). According to the Child Support Worksheets, the Court found her net income to be \$18,578.90 (CP at 188). Working as a nephrologist, Karen makes almost twice as much as Steve (CP at 188).

Prior to marriage Steve had received a doctorate of dental science from the University of Washington in 1984. (CP at 207; RP at 56, 201). He was found to have earned \$10,000.00 a month in net income. (CP at 188).

Steve is 60 years of age and Karen is approximately 50 years of age. (CP at 207-08; RP at 54, 201). The Trial Court's property division (CP at 229-237) is set forth in Appendix A, attached hereto and incorporated herein as if set forth fully herein.

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 pursuant to RCW 26.09.080 and/or Washington case law.

(a). The Trial Court erred when it did not value Karen's cash accounts in the sum of \$147,000.00. This asset was set forth in Karen's financial declaration at the commencement of the case (EX 5.75). After the conclusion of the case there was a document attached to a declaration filed by Karen that indicated the amount of the funds in the accounts were only \$108,000.00. (CP at 123). The Trial Court erred when it did not find that the account should have been listed in Wife's column in the sum of \$147,000.00. Based on the information that was filed by Karen after she rested, the Trial Court should have found at least that there was cash/bank accounts in Karen's control. Based on the evidence and Karen's declaration it would have had to have been either \$108,000.00 or \$147,000.00. If the affidavit was allowed, perhaps cross-examination would have revealed the actual amount of cash held by Karen at the commencement of this case.

(b). The Trial Court erred in not making findings pursuant to *RCW 26.09.080*, nor did the Court reference any case law in regards to the property division. The Court only stated “it is the Court’s opinion that if Steve transfers his efforts from these types of investments to his dental practice that he should be able to maintain his standard of living quite adequately.” (CP at 211). The Trial Court erred in adopting this basis for property division. No testimony was offered by Karen to support this theory, nor was any proof presented that the businesses impacted his dental income.

Based on the income discrepancy between the parties the Trial Court should have made an equitable division of the assets of the community.

(2). The Trial Court erred in awarding postsecondary education costs requiring that William be responsible for one-third of his educational expenses, through grants, scholarships and personal earnings, and each parent would be responsible for one-third of his expenses. (CP at 210). Postsecondary education requirements for Josiah and Hannah were deferred (CP at 210). The Trial Court ignored that Karen’s net monthly income is approximately \$18,000.00 and Steve’s is approximately

\$10,000.00. (See CP at 210). The Court erred in not requiring Karen to pay 65% of two-thirds of the expenses and require Steve to pay approximately 35% of two-thirds of the college expenses for William. The Trial Court made no findings or gave no basis for arriving at this opinion relating to post-secondary education. Karen has sufficient income to pay 65%

(3). The Trial Court erred in not allowing Steve to amend his Petition and request maintenance.

(a). The Trial Court erred in failing to amend Steve's Petition for Dissolution to provide for maintenance for and on his behalf given the discrepancy of income between the parties. Despite the fact that the Court denied the Motion to Reopen, the Trial Court stated "The court recognizes the disparity in income between husband and wife but is reluctant to award maintenance in favor of the husband" (CP at 211). Did the Court grant Steve's motion or did the Court simply find that if it had, this Court would still have been reluctant to award maintenance in favor of Steve? If the motion to amend maintenance was granted, the Trial Court erred in failing to set forth specific findings pursuant to *RCW*

26.09.090 as to factors to support its ruling that there is no award of maintenance from Karen to Steve.

4. The Trial Court erred in awarding residential placement of Hannah to Karen.

(a) The Trial Court erred in awarding primary residential placement of Hannah to her mother. The Trial Court erred in failing to note that prior to separation Steve had been the primary parent. The Trial Court further erred by relying entirely upon the report of the guardian ad item. Karen did not call her significant other (Ms. McNidar) as a witness. The Court did not have an opportunity to access Ms. McNidar's impact on Hannah. The Trial Court did not interview the children as to the residential placement. The Trial Court made no findings pursuant to *RCW 26.09.187*.

#### **B. ISSUES ON APPEAL**

1. The Trial Court failed to find that there was \$147,000.00 of cash in the bank according to Karen. (CP at 214). This was stated under oath by Karen. Karen's financial declaration revealed \$147,000.00 and at no time prior to trial did Karen come forward with any information that the amount in the bank accounts

at the time of separation was any different than what she presented under oath. (See, EX 5.75).

2. The Trial Court abused its discretion in failing to allow Steve to amend his pleadings to provide for maintenance. The Trial Court further abused its discretion by failing to make a finding pursuant to *RCW 26.09.090*, which serves as a basis for the award of maintenance.

3. The Trial Court abused its discretion in requiring Steve to pay 50% of two-thirds of William's college education.

4. The Trial Court erred in not making an equitable distribution of assets.

5. The Trial Court erred in the placement of Hannah.

6. The Trial Court erred in relying upon information not admitted at trial.

### **III. STATEMENT OF THE CASE**

This appeal seeks to vacate the property division and the trial court's denial of Appellant's request to amend the pleadings during the trial. This appeal seeks a result that leaves each of the parties in nearly equal financial circumstances.

The parties were married on September 11, 1986 in King County, Washington and separated on/or about October 31, 2007 (CP at 208). This was a marriage of approximately 20 to 21 years, making this marriage a long term marriage. (See CP at 188).

Four children were born as a result of the marriage: a daughter, Sarah, who has graduated from college; a son, William, who is 20 years of age and attends Northwest College; Josiah, age 17, resides with Steve; and Hannah, age 13, resides with Karen. (CP at 208; *see also* RP at 58).

Steve is 60 years of age and holds several degrees as follows: (1) BA in psychology from the University of North Dakota in 1975; (2) a BS in biology from Central Washington University in 1980; (3) an MS in biology from the University of North Dakota in 1980; and (4) a doctorate of dental science from the University of Washington in 1984. (CP at 207; *see also* RP at 201). All of Steve's education was obtained prior to the parties' marriage. (RP at 56; *see also* CP at 207).

Steve has been a licensed dentist since his graduation from the University of Washington. (CP at 207). He and the family moved to the Yakima area in approximately 1997 when Steve

purchased a dental practice in Zillah, Washington. (CP at 207). Steve continues to practice dentistry at this time. (CP at 207). The Trial Court found his health to be reasonably good. (CP at 207). The Trial Court also found that Steve has no thoughts of retirement at this time. (CP at 207). Steve testified that his ability to work can be affected as a result of physical changes as he ages, particularly as to the ability to work his hands and to stand over patients for a long period of time. (See RP at 271). Assuming normal retirement dates, Steve has somewhere between 5 and 10 years of future employment. (See RP at 201).

Karen is 50 years of age. (CP at 208; See RP at 54, 125). She attended medical school at the University of Washington and completed that course of study in 1987, after the parties' marriage. (CP at 208; RP at 55-56). Her internship was at the University of Washington in 1988. (CP at 208; RP at 56). Karen completed her residency in internal medicine at the University of Washington in 1990. (CP at 208; RP at 56). She completed a fellowship in transplantation services at the University of Washington in 1993. (CP at 208; RP at 56). Karen continued to practice after the completion of her education at the University of Washington

Medical School and Southern Illinois Medical School. (CP at 208; RP at 57). She purchased a medical practice in the sum of approximately \$60,000.00 from a Yakima physician by the name of Boyken in 1997. (RP at 61). She has practiced in Yakima since 1997. (RP at 61). She obtained her board certification in internal medicine in 1997 and in pathology in 2006. (CP at 208). Karen's student loans were paid by the marital community. (RP at 56, 57).

Karen has gone through periodic bouts of depression in the past 10 years, lasting for months off and on and has had periodic panic attacks. (CP at 208; RP at 76). Karen was diagnosed with bipolar variant mood disorder by a psychiatrist. (RP at 78). Karen strongly disagreed with that diagnosis. (RP at 78; CP at 208). The guardian ad litem requested an evaluation but advised Karen not to tell the psychiatrist that she had a previous diagnosis of bipolar disorder. (RP at 382). Karen continues to take prescribed Prozac and Lithium and has been in counseling at various periods of time. (CP at 208; *see also* RP at 74-77, 92).

At the commencement of this case the parties sought mediation and attempted to work out all issues. (See RP at 110, 111). Unfortunately they were unsuccessful.

At the commencement of custody proceedings William was placed with Steve and Josiah and Hannah were placed with Karen. (CP at 208). The guardian ad litem was asked to do a home study in regards to the issue of residential placement. The GAL received numerous contacts including emails from Karen and her partner Cindy McNidar. (RP at 132-133, 371, 380). Many of those emails involved Karen and Ms. McNidar complaining about Steve and making accusations about him. (RP at 380). The GAL only emailed Steve four times during the course of the case and would rarely contact him to allow him to respond to Karen's and Ms. McNidar's accusations. (RP at 380-81). Over the course of this four year divorce, the GAL never saw the children in Steve's home and only saw Steve interacting with the children on four different occasions. (RP at 379). Pursuant to a court order, residential placement of Josiah was changed and he was placed with Steve. (CP at 210).

The Trial Court found that the primary reason for the Harrisons' separation stemmed from the fact that the mother had entered into a lesbian relationship with a long time family friend. (CP at 209). Karen's perception of this relationship was that it

became permanent by the time of trial. (RP at 166; CP at 209). The Trial Court found that Steve had a difficult time accepting the relationship. (CP at 209). The issue before the Court here is not whether this is a homosexual relationship or not, it is the fact that this was a family friend who interrupted the marital relationship. The Trial Court went on to find that the children had been raised in and were members of churches that do not condone homosexuality. (CP at 209). The children had been raised by both parents with this religious philosophy. (CP at 209). It was Karen's choice to enter into this relationship that had a profound effect upon the children. (CP at 209).

The Trial Court found that during the majority of the marriage Steve had been the primary parent but that the guardian ad litem, Ms. Suko, had concerns of misconduct with the children during this long period of litigation. (CP at 210). Without comment, the Trial Court adopted the guardian ad litem's recommendations. (CP at 210). The Trial Court made no effort to interview the children between the trial date and the date of the Court's decision. (See, CP at 207-215). The Trial Court should have taken the opportunity

to interview the children and inquire as to their wishes and relationship with Ms. McNidar.

According to the child support worksheets, the Trial Court found Karen's gross income to be \$26,750.00 per month or \$321,000.00 on an annual basis. (CP at 188). The Court found Steve's gross income to be \$13,519.00 a month or \$162,228.00. (CP at 188). Karen's income almost doubles that of Steve's. (See CP at 188).

At the commencement of this case Karen filed a financial declaration stating that she had \$147,000.00 in bank accounts (See EX at 5.75). She presented no other evidence during the trial regarding these accounts. Following trial she presented a rough draft declaration from her previous lawyer's office that indicates she had \$108,000.00 in the bank. (CP at 116, 123). The Trial Court found no money in the bank at the time of separation and made no award of either \$147,000.00 or \$108,000.00. (CP at 214). In its Memorandum Decision, the Trial Court indicated that as to Karen's medical practice that the accounts receivable were based on a letter from Karen's accountant. (CP at 212). That letter was never introduced at the time of trial. Steve had no ability to cross-

examine or see the document in advance pursuant to the discovery rules. The Trial Court used it as a basis for finding \$77,879.00 in accounts receivables for Karen. (CP at 212). Steve testified at the time of trial that Karen's accounts receivable are approximately 90 days of billings. (RP at 236).

During the trial, Steve moved the Court to amend his pleadings and request maintenance. (RP at 483). At the time the Court denied that motion. (RP at 483). In its Memorandum Decision the Court, in discussing spousal maintenance, claims that he recognizes a disparity in income between the husband and wife, but was reluctant to award maintenance in favor of the husband. (CP at 211). The Trial Court based that on the fact that Steve's investment of community funds may not have reached a point where they were determined wasteful but that it was clear that they had been unwise and had produced very little, if any, return. (See CP at 211).

In its Memorandum Decision, the Trial Court failed to find that Karen received a substantial portion of her education after the parties were married. (CP at 207-215). The Trial Court did not note the age difference between the parties. (CP at 207-215).

Karen testified that she hoped to work until she is 80. (RP at 541). Testimony was solicited from her to indicate that being a nephrologist you really do not need to depend upon your physical skills.

The Court's Memorandum Opinion seems to indicate that Steve has been wasteful. (CP at 211). All investments were done while the parties were married and were presumed to be on behalf of the marital community. There was no testimony that Karen objected to these investments.

In regard to William's education each party was required to pay one-third of his education. (CP at 210). William is responsible to pay the other one-third. (CP at 210). William attends Northwest University, which is a small private school affiliated with the Assembly of God Church. (RP at 251, 260-261). This is where they wanted the child to go. There was no testimony that William had any ability to contribute towards his education. Any other costs and expenses should be divided not equally between Karen and Steve, but rather on a percentage of their incomes as to whatever portion each would owe.

During the trial Steve requested that the children, Josiah and Hannah, be interviewed by the Court. (RP at 441). The Trial Court indicated that if it had time it would do so. (RP at 442). However, because of the length of the testimony the Court found that there was not sufficient time. (RP at 546). The tragedy is that given the date of the ruling, there were five months in which the Trial Court could have interviewed the children prior to entry of the Trial Court's decision. (See CP at 188).

Steve believes that the Trial Court breached its statutory duty and abused its discretion when it ignored the undisputed future economic realities of the parties stated in its own findings and failed to use disproportionate property award and/or failed to use maintenance as a flexible tool to equalize the economic condition in which the Decree finds the parties after 20 years of marriage and Karen's education.

#### **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).<sup>2</sup> 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

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<sup>2</sup> "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."

acts unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard". *In re Marriage of 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 (Kulik, J., dissenting).

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

The Trial Court made no specific findings as to the statutory factors for property distributions and/or maintenance.

#### **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. The Trial Court should have added the money in Karen's bank account to her column.**

In a marriage dissolution if property is valued as of the date of trial rather than the date of separation, appreciation and depreciation as well as either party's waste of community assets must be considered. *In re Marriage of Brewer*, 137 Wn.2d 756,769, 976 P.2d 102 (1999). Any uncertainty as to values of assets or proceeds received from assets should be resolved against the spouse who maintains total control of records, but fails to provide them. *In re Marriage of Thomas*, 63 Wn.App. 658, 664, 821 P.2d 1227 (1991). (*emphasis added*)

In *Thomas*, the Court of Appeals found that the trial court abused its discretion when it failed to award a portion of the net rental proceeds received during separation to the wife. *Id.* at 663. In that case the husband had control of all accounts pertaining to the rental proceeds. *Id.* The husband did not provide an accounting of the rental properties nor did he provide testimony regarding the actual expenses of maintaining the rental properties at trial. *Id.* The Court of Appeals found that "[s]ince [the husband] had total control of the real estate income, he should have been

required to account for it; any uncertainties resulting from his failure to account should have been resolved against him." *Id.*

In this case, Karen had total control of the bank accounts containing \$147,800, as she stated in her financial declaration. (Exhibit 5.75). In trial, Karen provided no further evidence regarding the bank accounts. In fact she did not supply bank records. (RP at page 96 line 25). In the Trial Court's Memorandum Decision, which was issued five months after the close of trial, the Trial Court valued the account at zero simply because Karen did not include it on her asset spreadsheet. (CP at 214). The Trial Court's failure to value the bank accounts is an abuse of discretion because any uncertainties regarding the accounts should have been resolved against Karen. *See Thomas*, 63 Wn. App. at 664. This is especially true in light of the fact that Karen did not provide any other evidence of the accounts until after the Steve's Motion for Reconsideration. She provided a financial declaration that stated that she had between \$108,000 and \$109,000 in the accounts. (CP at 123).

The Trial Court should have placed the \$147,800 from the bank accounts in Karen's column. Steve would receive his 50%

payment from Karen. The Trial Court's failure to do so was an abuse of discretion.

**2. The Trial Court should not have allowed Karen's Declaration as evidence after she rested her case.**

Admission of evidence lies within the sound discretion of the trial court. *Thomas v. Wilfac, Inc.*, 65 Wash. App. 255, 262, 828 P.2d 597, 601 (1992). An abuse of discretion occurs if no reasonable person would take the position adopted by the trial court. *Id.* Additional evidence accepted post-trial is subject to the same rules of admissibility applicable at trial. *Ghaffari v. Department of Licensing*, 62 Wn. App. 870, 876, 816 P.2d 66, 70 (1991). Under ER 901, before a document can be admitted as evidence and considered by the trier of fact, it must first be authenticated.

In this case, the Trial Court allowed Karen to present, ex-parte, a declaration indicating that she had approximately \$108,000 in bank accounts that the Trial Court had valued at zero. (RP page 9, line 4-5). Steve was not given a chance to cross-examine Karen regarding this declaration. (RP at page 9, line 4-5). Steve should have been given a chance to cross-examine Karen on this

declaration because of the discrepancies between the declaration and Karen's first financial declaration.

The Trial Court admits that it probably abused its discretion in allowing Karen's declaration as evidence. (RP at page 9). The Trial Court should not have allowed Karen's declaration as evidence or in the alternative should have reopened the case to allow Steve to cross-examine Karen regarding the declaration.

**3. The Trial Court abused its discretion by considering the letter from Karen's accountant regarding Karen's account receivables.**

The Trial Court also erred by allowing and considering a letter from Karen's accountant regarding her account receivables after Karen rested her case. Once again, the Trial Court allowed for the letter to come in ex-parte without giving Steve a chance to cross-examine the accountant or to verify the authenticity of the document. The Trial Court should not have allowed the account's letter as evidence or in the alternative should have reopened the case to allow Steve to cross-examine the accountant regarding the letter.

**4. The Trial Court abused its discretion when it divided the assets equally not equitably.**

“While a trial court ‘is not required to divide community property equally,’ if its dissolution ‘decree results in a patent disparity in the parties’ economic circumstances,’” its decision will be reversed as a manifest abuse of discretion. *Urbana v. Urbana*, 147 Wn. App. 1, 10, 195 P.3d 959 (2008). “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 party.” *Id.* at 11. Although the trial court may not give a singular factor greater weight than another, “the economic circumstances of each spouse upon dissolution [are] of paramount concern.” *Id.*

However, “the court is not required to divide community property equally. *In re the Marriage of White*, 105 Wash.App. 545, 549, 20 P.3d 481 (2001).

The longer the marriage, the more likely a court will make a disproportionate distribution of the community property. Where one spouse is older, semi-retired and dealing with ill health, and the other spouse is employable, the court does not abuse its discretion

in order an unequal division of community property. *In re the Marriage of Schweitzer*, 81 Wash. App. 589, 915, P.2 575 (1996).

Here, the Trial Court's community property division was not equitable and just. It did not take into account Steve and Karen's respective financial circumstances when making the award of the community property.

As discussed above the Trial Court did not place the \$147,800 into Karen's column. (CP at 214). In effect this gave Karen \$147,800 more in assets on top of what the Trial Court had awarded her. This puts Steve in the position where there is a patent disparity between his and Karen's post-decree financial positions.

**5. *The Trial Court should have awarded maintenance to Steve***

The court may grant a maintenance order for either spouse in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors. RCW 26.09.090. RCW 26.09.090 then sets out the following nonexclusive list of factors that the court must consider:

- (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, 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 or her skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage or domestic partnership;
- (d) The duration of the marriage or domestic partnership;
- (e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and
- (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.

An award of maintenance that is not evidenced by a fair consideration of the statutory factors constitutes an abuse of discretion. *In re Marriage of Mathews*, 70 Wn. App. 116, 123, 853 P.2d 462, *review denied*, 122 Wn.2d 1021 (1993). An award does not evidence a fair consideration of the statutory factors when the award is substantively irreconcilable with fair consideration of the factors, *e.g.*, *Mathews*; when the record reveals unwarranted reliance on other, non-statutory factors, *e.g.*, *In re Marriage of*

*Spreen*, 107 Wn. App. 341, 349–50, 28 P.3d 769 (2001); and when the trial court substitutes a disproportionate property award for a duly-considered maintenance award, see *In re Marriage of Crosetto*, 82 Wn. App. 545, 558, 918 P.2d 954 (1996).

In a long term marriage of 25 years or more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives. *In re Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572, 576 (2007). In dividing the property and awarding maintenance, the court should consider the ages of the spouses, their health, and future earning capacity. *Id.* at 243, 170 P.3d at 576-577.

In this case, the Trial Court did not provide findings as to any of the statutory factors. (CP at 211). Reviewing the Trial Court's Memorandum decision it is impossible to determine whether the Trial Court even considered the statutory factors when it refused to award maintenance to Steve or allow Steve to amend his petition. (CP at 211). This is not the only factor. The Trial Court's sole concession to analyzing the statutory factors is a comment regarding the disparity between Steve and Karen's respective incomes. (CP at 211). It stated "The court recognizes the disparity

in income between husband and wife but is reluctant to award maintenance in favor of the husband.” (CP at 211). The trial Court based its decision on the fact that Steve’s investment of community funds may not have reached a point where they were determined wasteful but that it was clear that they had been unwise and had produced very little, if any, return. (See CP at 210). The Court’s decision to not award maintenance to Steve was not just under the circumstances and does not put the parties in “roughly equal financial positions.” See *In re Marriage of Rockwell*, 141 Wn. App at 243.

For the majority of the marriage, Karen has been the primary bread winner for the family. (CP at 209). Although both Steve and Karen are well educated, Karen’s income doubles Steve’s income. (CP at 188). Karen’s gross income is \$321,000.00 per year as compared to Steve’s income of \$162,228.00. (CP at 188). Further, Karen is younger than Steve and has longer to work. Karen was 50 years old at the time of trial and testified that she can work for another 15 to 20 years. (RP at 115, 541). Since separation she has been able to contribute \$78,000.00 to a 401(k) at the rate of \$4,000.00 per month, which reveals that she has excess income

(RP at 115). If Karen works until she is 65 years of age she will have earnings of \$4,815,000.00. If Steve works until he is 65 years of age he will have earnings of \$811,140.00. If Steve works until he is 70 years of age his earnings will total \$1,622,800.00.

Another factor that the Trial Court failed to note was that Karen received a substantial portion of her education after the parties were married. (CP at 207-215). The Trial Court makes no mention of that factor. (See CP at 207-215). Neither did it note the age difference between the parties. (CP at 207-215). At the time of trial Karen was 50 years old while Steve was 60. (RP at 54, 210). Karen testified that she hoped to work until she is 80. (RP at 541).

It was the opinion of the Trial Court that if Steve transferred his efforts from his non-dental businesses he should be able to maintain his standard of living adequately. (CP at 211). The Trial Court fails to note that the standard of living of the parties are supposed to be nearly equal at the entry of the Decree. (CP at 207-215); See *In re Marriage of Rockwell*, 141 Wn. App at 243. Steve does not have a retirement account and cannot afford to pay \$4,000.00 a month into a retirement account. The real issue before

the Court was that if it had allowed the amendment to the pleading, other evidence could have been offered by Steve. The Trial Court's reference to spousal maintenance is inconsistent with the ruling of the Court.

### **C. Primary Custody of Hannah**

#### **(1) Statutory Factors.**

Review a trial court's child placement decision for abuse of discretion. *Magnuson v. Magnuson*, 141 Wash. App. 347, 350-51, 170 P.3d 65, 67 (2007). Generally trial courts have broad discretion and are not bound by GAL recommendations. *Id.* A court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.*

When establishing the residential provisions in a permanent parenting plan, the court must consider the following statutory factors:

- (i) The relative strength, nature, and stability of the child's relationship with each parent;
- (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
- (iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;

(iv) The emotional needs and developmental level of the child;

(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

*RCW 26.09.187(3)(a)*. Factor (i) shall be given the greatest weight. *Id.* A trial court should make findings of fact and conclusions of law sufficient to suggest the factual basis for its ultimate conclusions. CR 52(a); *In re the Marriage of Lawrence*, 105 Wn. App. 683, 686, 20 P.3d 972 (2001). When ordering a parenting plan, the trial court must consider the factors listed in RCW 26.09.187. *In re the Marriage of Littlefield*, 133 Wash.2d 39, 51-52, 940 P.2d 1362 (1997), *superseded by statute on other grounds*, RCW 26.09.405 et seq., *as recognized in In re the Marriage of Grigsby*, 112 Wn. App. 1, 6-7, 57 P.3d 1166 (2002).

In this case, the Trial Court adopted the guardian ad litem's recommendations in awarding primary residential

placement of Hannah to Karen. (CP at 210). The Trial Court stated “[the guardian ad litem] is very experienced in this field and the court places great weight on her opinions.” (CP at 209). It then acknowledged that “during the majority of the marriage [Steve] has been the primary parent . . . (CP at 210). The GAL testified to the same. (RP at 389) as did the home school teacher who is the person who had the most contact with the children. (RP at 28-29, 32-33). The Trial Court did not award primary custody of Hannah to Steve because of the GAL’s concern about his conduct toward the children. (CP at 210).

The GAL’s opinion of Steve’s conduct appears to be biased toward Karen. (See RP at 379-381). The GAL testified that she had numerous emails with Karen and her partner Cindy McNider. (RP at 380). Many of those emails involved Karen and Ms. McNider complaining about Steve and making accusations about him. (RP at 380). The GAL then admitted that she only emailed Steve four times during the course of the case and would rarely contact him to allow him to respond to Karen’s and Ms. McNider’s accusations.

(RP at 380-81). The appearance of bias is also shown by the fact that she never saw the children in Steve's home and only saw Steve interacting with the children on four different occasions. (RP at 379).

The Trial Court made no findings as to the factors set forth in RCW 26.09.187. The record must not only reflect evidence on each of the statutory factors but also the court's consideration of this evidence. *In re Marriage of Horner*, 151 Wn.2d 884, 896, 93 P.3d 124 (2004). As stated above the Trial Court did not address all of the statutory factors, nor can it be inferred from the record that the Trial Court even considered all of the statutory factors. Based on this error, the Court should either remand for a new trial and allow for new evidence or to remand for specific findings as to each statutory factor.

(2) Interview Children

The court may interview the child in chambers to ascertain the child's wishes as to the child's residential schedule in a proceeding for dissolution of marriage or domestic partnership, legal separation, or declaration of invalidity. RCW 26.09.210. A

court's decision to interview a child is reviewed under an abuse of discretion standard. *Christopher v. Christopher*, 62 Wn.2d 82, 90, 381 P.2d 115, 119 (1963).

The Trial Court indicated that it would interview Hannah and Josiah. (RP at 442). There was not sufficient time in the scheduled trial time to facilitate that. (RP at 546). Steve was adamant in his desire to have the children interviewed. (RP at 441). It was his hope that the Trial Court could obtain from the children what the children's feelings and desires were. In the 159 day period of time from trial to opinion Steve believes the Court had the opportunity to interview the children.

Steve believes that there is an abuse of discretion. The children in question are very bright and mature. This was not a typical family. The Harrison children have always been a part of establishing family rules and lifestyles. (RP at 27). The Trial Court did not allow the children to express their preference as to their custodial parent and the Court hearing from the children as to the other statutory factors, such as Ms. McNidar.

## V. CONCLUSION

The Trial Court's ruling leaves the parties in the following positions:

Steve is a licensed dentist. Steve's annual income was found to be a gross of \$162,228.00. At the time of trial Steve was 60 years of age with a work expectancy of between five and ten years. Steve was also awarded the assets that the Court found to be on the verge of wasting which further drains Steve's economic position. If Steve works an additional five years he will have gross earnings of \$811,140.00. If he works 10 years he would have gross income of \$1,622,280.00. Steve is unable to make any contributions to retirement .

Karen is 50 years of age. For the purposes of this matter we will assume she is going to retire at age 65. She would have total income over that period of time in the amount of \$4,815,000.00. Her testimony was that she has been able to save \$4,000.00 per month during the parties' separation. During the pendency of this case she has contributed approximately \$79,000.00 to a retirement account. (RP at page 115 line 7).

The Trial Court failed to find that Karen had either \$108,000.00 in bank accounts at the time of the parties' separation or \$147,000.00. (RP at page 113 lines 7-8). The Court did not place either amount in Karen's column. Karen swore under the penalty of perjury that she had \$147,000.00. The dispute as to this amount should have been found in favor of Steve. All of the information as to these accounts were within Karen's control. She produced no documents.

Despite the fact that Karen makes \$321,000.00 and Steve makes \$162,228.00, the Trial Court found that each should pay the same amount of post-secondary education for their son, William. The Court offered no basis for its ruling. The Court issued no findings pursuant to RCW 26.19.090. There was no testimony that William had any ability to contribute towards his post-secondary education. Karen presented no testimony that she was unable to pay her proportionate share based on pro-rata income rather than equalization between the parties that the judge ruled. The Trial Court set forth no basis for its ruling.

The guardian ad litem recommended that the daughter, Hannah, stay with the mother and the son, Josiah, with the father.

This despite the fact that the guardian ignored Karen's history of difficulties. The guardian ad litem even advised Karen not to state that she had been found to be bipolar in a previous examination from a psychiatrist. The guardian ad litem ignored the unusual sleeping arrangements as Hannah at age 12 was continuing to sleep with her mother. According to the guardian ad litem, Karen stopped seeing counselors because she did not have the money to cover the counseling and other expenses. (See, RP 394 17-18). That certainly is contradicted by the fact that Karen was able to save \$4,000.00 a month. The guardian ad litem spent a great deal more time and effort with Karen than she did with Steve. The Trial Court made no mention of the factors set forth in *RCW 26.09.187(3)*. There are seven factors, none of which were discussed by the Court with the exception there was testimony that Steve was the primary parent prior to the parties' separation. (RP 389.4. See also RP 28-29, 32-33) Sub-section 1 states "the relative strength, nature and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily

needs of the child". This factor is required to be given the greatest weight. *RCW 26.09.187(3)*.

This case involved children that even prior to the separation were greatly involved in the dynamics of the family. These children were raised together with their older brother and sister to be much more involved in adult decision making than most children in most families. (See, RP at 168, line 22). (See, also RP 31 lines 2-5, page 27 lines 18-20). When Karen was asked "Do these children have expectation of their opinions being listened to?" Her reply was "Yes and obeyed". (See, RP 169 at 4-5). This was one of the reasons why Steve requested that the kids be interviewed, something the Trial Court indicated it would do. Time simply ran out during trial. However, the Court had, approximately five months to interview these children before its opinion.

The Court could have assessed what each child's position is, what the circumstances are and how they were relating to the situation with Ms. McNider. Ms. McNider did not testify and for whatever reason Karen believed it was not in her best interest to call Ms. McNider to the stand. The inference is that she would not help Karen's request for placement. The question arises, how can

the Court decide the best placement for the child when under *RCW 26.09.187(3)(a)(b)(V)*. Ms. McNider would certainly be considered another significant adult that could impact the residential placement of Hannah. The guardian ad litem became involved with Ms. McNider receiving and responding to her emails. The appearance of fairness and neutrality was compromised in this GAL report.

The Trial Court made no specific findings pursuant to *RCW 26.09.080* as to the disposition of property and liabilities. The Court did make findings as to the value of community assets but appears to have given no weight to the duration of the marriage and/or the economic circumstances of each spouse at the time the division has become effective.

The Trial Court made no specific findings as to *RCW 26.09.090*. In its opinion the Court did not present what each party's incomes were or how much they would earn in the future given their employment capabilities. The Court made no reference to the fact that the Wife is able to contribute \$4,000.00 per month to her IRA account and make twice as much as Steve. Future earning capacity is a factor to be considered yet the Court makes no mention of it. See, *Gross v. Gross*, 70 Wn. 2d. 614 424 P.2d. 654

(1967). The Trial Court made no findings as to the standard of living as to maintenance and property. The only finding the Court made was that some of the actions taken by Steve financially bordered on being wasteful. There is no cases in the State of Washington that adopt this approach. All of the investments were made while the parties were married and presumably were with both parties' consent.

If, for example, five years ago Steve had purchased a Washington Mutual stock it would have been considered a good investment. Had he bought that stock two years ago he would be holding a worthless certificate. If, in fact, the Court is going to adopt this approach then one must consider the fact that Steve has been saddled in the property division with these non-producing assets.

The Court stated on April 15, 2011, that the "the Court erred in denying Husband's motion to amend pleadings and provide for maintenance. I did". Despite that statement the Court went on to state "and the Court will not allow you to re-open". Transcript 4-15-2011 at page 4, line 24-25. The Court stated that he understood the disparity between what Mr. Harrison asks and what Mrs.

Harrison makes (though he gives no numbers). The Court also indicated that he did not believe it should make any difference. (RP 5, 3-9). The Court went on to state that Steve should spend more time in his dental practice instead of these other investments. However, there was no testimony that these other businesses took away from his dental practice.

It is Steve's position that the time from the date of trial to the date of the Court's Memorandum Decision worked to Steve's disadvantage. The most telling error is perhaps the \$147,000.00 or \$108,000.00. The Court found that neither number existed. The evidence was that it was either \$147,000.00 or \$108,000.00, but certainly not zero. This is further evidenced by the fact that the Trial Court allowed in and based part of his property division award on the letter from Karen's accountant which stated that she had \$77,879.00, Steve finds himself in a position where he makes one-half of what Karen makes. He has to buy a residence. Karen retained the family home and is able to put \$4,000.00 a month into a retirement account. Steve cannot. Steve is entitled to know why the property division is not equitable rather than equal. The Court issued no such findings other than its statement regarding his

business ventures. The Trial Court should have considered the business ventures as a detriment when awarded to Steve. Even the judge admits that he should have reopened on the issue of maintenance. Did the Court leave the parties in equal economic circumstances? Absolutely not.

Respectfully submitted this 2d of February, 2012.

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



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# **APPENDIX A**

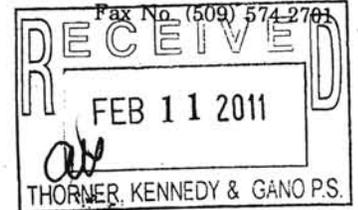


Superior Court of the State of Washington  
for the County of Yakima

Judge C. James Lust  
Department No. 8

COPY

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February 9, 2011

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Re: Marriage of Stephen Paul Harrison & Karen Leigh Harrison  
Yakima County Case # 06-03-01077-1

Letter Opinion

Dear Counsel:

The following is the letter opinion of the court.

**Background**

Petitioner, Stephen Harrison, is 60 years old. He holds several degrees: (1) a B.A. in Psychology from the University of North Dakota in 1975; (2) a B.S. in Biology from Central Washington University in 1980; (3) an M.S. in Biology from the University of North Dakota in 1980, and a Doctor of Dental Science from the University of Washington in 1984. He has practiced dentistry since his graduation from the University of Washington and in 1997 moved to Zillah, bought a dental practice there from a retiring dentist and has practiced dentistry in that city since that time. His health is reasonably good and he has no thoughts of retiring at this time.

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Respondent, Karen Harrison, celebrated her 50<sup>th</sup> birthday during this dissolution proceeding. After receiving her undergraduate degree, she attended medical school at the University of Washington in 1987. She completed her internship at the University in 1988 and then completed her residency in Internal Medicine at the University in 1990. She completed her Fellowship in the Division of Nephrology and Transplantation Services at the University in 1993. Following the completion of her education she continued in the field of nephrology at the University of Washington Medical School and the Southern Illinois University Medical School in Springfield, Illinois. She eventually purchased a medical practice from a Yakima physician in 1997 and has practiced in Yakima since that time. She obtained her board certification in Internal Medicine in 1997 and in Nephrology in 2006. Respondent has gone through periodic bouts of depression in the past ten years, lasting for months off and on, and has had periodic panic attacks. She was diagnosed with a bipolar variant mood disorder by a Bellevue physician, but strongly disagrees with that diagnosis and addressed a letter to her physician stating her disagreement. She has been prescribed Prozac and Lithium and has been in counseling during various periods of time. In spite of her periods of depression, she believes she is in good physical health.

As will be discussed later, both parties report a reduction in their professional incomes, for a variety of reasons, which include a poor economy and the introduction of other dentists and physicians in their respective fields into their geographical area over the recent past.

The Harrisons began living together in 1984 and were married September 11, 1986. They separated November 13, 2006. They have four children: Sarah, born September 14, 1986; William, born March 6, 1990; Josiah, born July 11, 1993; and Hannah, born March 1, 1998. The children were ages 20, 17, 13 and 9 respectively when their parents separated in 2006. Presently Sarah, who is now 24, is self supporting but lives with her mother; William is now 20 and is in college; Josiah, is now 17, and Hannah is 12. Initially the parties continued to live in the same home—one upstairs and one downstairs. An order maintaining the status quo was entered May 4, 2007. On October 9, 2007 an order was entered placing William with his father and Josiah and Hannah with their mother. After various motions for reconsideration and for revision Commissioner Swanhart, on remand from a motion for revision signed a temporary order entered January 13, 2008 placing Will with his father and Josiah and Hannah with their mother.

### Issues

The issues presented to the court involve residential placement of the children, child support, spousal maintenance and division of the property and indebtedness.

### Residential Placement:

The primary reason for the Harrison's separation stems from the fact that the mother entered into a lesbian relationship with a long time family friend. Her perception of this relationship is that it has become permanent. On the other hand the father, as expected, has had a most difficult time accepting the relationship, and this situation has affected the children and their relationship with both parents.

The parents have in the past attended and become members of churches that do not condone homosexuality. The children have been raised with this religious philosophy and the mother's choice to enter into this relationship has had a profound effect on them. The discord between the parents as a result of this relationship has been very detrimental to the children. For a period of time both parents were barred from discussing their mother's relationship with her partner Cindy McNider, and Ms. McNider was to have no contact with the children. These prohibitions have since been relaxed but the children have taken sides. William now has very little contact with his mother. Josiah, who was originally placed with his mother, has since moved in with his father. Hannah, who initially aligned herself with her mother and wanted very little contact with her father, has since appeared to have relaxed this attitude and is seeing more of her father.

This proceeding was filed in mid November 2006 and the children have been a focus of this proceeding now for almost four years. Marcia Suko was appointed as guardian ad litem May 4, 2007 and continues in that position. She is very experienced in this field and the court places great weight on her opinions. She has an M.S in Counseling and Guidance, is certified as a guardian ad litem and has been involved in over 50 cases. She has filed an initial report with recommendations and several supplemental reports. She believes and has testified that the father has demonstrated an inability to control his behavior around the children and has been manipulative and controlling in an effort to influence residential placement. It is apparent from Ms. Suko's testimony at trial and from the testimony of both parents that her opinion is essentially correct.

The children's relationship with both parents before the separation was a healthy one. They loved both parents and were comfortable in their presence and with one another. After the separation there has been no agreement between the parents with respect to residential placement. This has been one of their major disagreements. During the marriage the parents shared parenting functions. The mother has always been the primary breadwinner, which meant that she was not always available to the children. The father took care of many of the everyday tasks—getting the children to their activities, cooking the evening meals, doing the grocery shopping, and being primarily responsible for their schedules. Although the mother was away from the home as a result of her work, the time she spent with the children was productive. Since 1998 Bonnie Oliphant, who has a B.A. in elementary education, has worked for the Harrisons as a home school teacher and as a part-time nanny. She taught previously in Christian schools and was teaching at West Side Baptist when she met the Harrisons. She cooked for the kids, transported them to their functions, and went to their school activities. She is more closely aligned with the father and sees the father as being more

involved with the children than the mother. It is clear from her testimony that she sees the father as being the primary parent during the period she worked for the Harrisons.

All four of the children have had a difficult time with their parent's separation and have suffered emotionally. The two youngest remain in family therapy with their mother, and each is in individual counseling. Sarah, the oldest, is apparently coming to terms with what has happened to the family unit and is back with her mother. William's relationship with his mother has suffered to the point that he seldom sees her. Josiah is torn between his parents. Although he was initially placed with his mother he is now living with his father. Ms. Suko sees this change coming about primarily as a result of the father's favorable attention to Josiah. Hannah initially was left out of some of the activities with her father and continues living with her mother. She appears to be the child who has suffered the most from the impact of her parent's separation. She initially did not want to spend overnights with her father, but recently her attitude has changed and she is now spending more time with him.

During the majority of the marriage the father has been the primary parent but the guardian ad litem's concern over his conduct with regard to the children during this long period of litigation causes the court to give minimal effect to who was the primary residential parent. The court adopts the guardian ad litem's recommendations. The father will be designated as the primary residential parent for Josiah. Josiah will be free to visit his mother as he wishes—within reason of course. He will be required to give up his house keys to her home. The mother will be designated as the primary residential parent for Hannah. Hannah will have alternate weekends with her father Friday after school until Sunday evening at 6 P.M. and alternate Wednesday overnights during the weeks she doesn't have weekend visits. The parents will alternate the spring vacation period—father to have the Monday-Friday spring vacation period in alternate years. Thanksgiving Day will be alternated—father to have even years. Christmas Eve and Christmas day will be alternated—father to have Christmas Eve (9AM to 8PM) in alternate years and Christmas day, (9AM to 8 PM) in even years. Other major holidays will be alternated. Father will have a two-week period each summer for family vacations, the time to be agreed on by the parents. In spite of the acrimony between the parents during the period of litigation, they are encouraged to be flexible with the residential schedule if conflicts between family activities arise.

#### **Post Secondary Education:**

The parents are now sharing William's college expenses on a 50-50 basis pursuant to a court order dated October 9, 2009. The court orders that William be responsible for one-third of his educational expenses, through grants, scholarships and personal earnings. The parents shall each be responsible for one-third of his expenses. Post secondary education requirements for Josiah and Hannah will be deferred.

#### **Child Support:**

Wife's 2009 income totals roughly \$353,000, consisting of her compensation of \$216,000, and her S corporation's ordinary business income of \$105,000 for total gross income of 321.000. The deductions appearing on her individual and corporate tax returns appear reasonable. Husband's 2008 income (2009 income unavailable as result of filing an extension) shows officer's salary of \$108,000. Husband's corporate return shows gross receipts of \$741,846 with deduction totaling \$733,796 for net income of \$8,050. The court finds this unusual. A portion of the answer might be in the nature of his clientele, many of whom are on some type of welfare or are low income, but without some explanation for the disparity in the amount of income and the high amount of deductions over the years, including over \$170,673 in dental supplies the court can only assume that the husband has a good accountant. According to husband's testimony he has been paying the Harrison Family Trust rental expense of \$54,000 per year. Since the court anticipates awarding him the dental building and lot this amount will be added back in to his net income for purposes of calculating child support. Josiah's wages of \$6,230 are also added back in for total net income of \$162,230. Counsel will prepare worksheets and a split custody support order using these figures.

**Spousal Maintenance:**

The court recognizes the disparity in income between husband and wife but is reluctant to award maintenance in favor of the husband. Although his investment of community funds may not have reached the point where they can be determined wasteful, it is clear that these investments have been unwise and have produced very little, if any, return. This is true of his penny stock investments and especially true of his treatment of A-1 Custom Cabinets. He has allowed the present occupant to run this business rent free during the pendency of this dissolution, anticipating that the occupant might eventually purchase the asset. The result is that the building and assets have depreciated and the community has received no income for a substantial period of time. It is the court's opinion that if he transfers his effort from these types of investments to his dental practice that he should be able to maintain his standard of living quite adequately.

**Property Division:**

A. The property and indebtedness of the parties is valued and awarded as follows:

	Husband	Wife
1. Residence at 1019 Fellows Drive, Yakima: FMV \$600,000 S/T debt of \$326,000 for equity of \$274,000		\$274,000
2. Cherry Hill Golf Course (1/2 interest): FMV \$297,000, s/t debt of \$182,000 Equity valued at \$115,000	\$115,000	
3. A-1 Custom Cabinets and Remodel, Inc		



14. 2003 Ford Thunderbird \$24,950		\$24,950
15. 1984 Porsche \$4,000	\$4,000	
16. 2004 GMC Yukon \$17,000		\$17,000
17. 1994 Dodge Van \$500	\$500	
18. 1995 Plymouth Van \$500	\$500	
19. 1998 Buick Park Avenue \$1,500	\$1,500	
20. Harrison Family Trust; No value All the funds passing through this came in the form of rental income from the dental business and was used for the benefit of the marital community.	NV	
21. 2005 Tax Refund \$19,000	\$9,500	\$9,500
22. Steinway grand piano \$19,000		\$25,000
23. Yamaha grand piano \$19,000	\$19,000	
25. Coins--\$1,200 in wife's possession and \$9,700 in husband's possession	\$9,700	\$1,200
26. Books—split	½	½
27. Husky Tickets—split	½	½
28. Ameriprise IRA \$4,300		\$4,300
29. Artwork--CA 15 through 25 and CA 64-65 appearing on wife's spreadsheet will be awarded to husband. (Ex 19) with her values totaling \$3,925 CA 14, valued at \$400 will be awarded to the wife.	\$3,925	\$400
30. Rugs—CA 28 valued at \$5,000 will be split	\$2,500	\$2,500
31. Furniture—CA 29, 32, 33, 35 through 37,		

and CA 39 through 41 on wife's spreadsheet (Ex 19) with her values totaling \$14,250 will be awarded to the husband. CA 30 and 31 will be awarded to the wife at the values set forth totaling \$250. The leather couches CA 38 will be split.	\$14,250 split	\$250 split
32. Golf clubs—Each receives his/her clubs	his	hers
33. Music Systems: CA 43 and 45 through 48 valued at \$4,500 will be awarded to the husband. Wife receives CA 44 valued at \$1,500.	\$4,500	\$1,500
34. Quilt material will be awarded to the wife at a nominal value of \$250		\$250
35. Wife's account-date of separation—appears on husband's spreadsheet valued at \$147,000, but does not appear as an asset on the wife's spreadsheet. The court finds there is insufficient evidence as to the account amount and therefore does not include it as an asset		NV
36. Washington Mutual Line of Credit \$22,862	<u>\$22,862</u>	
Total Assets:	\$569,837	\$466,951
Less Debts:		
1. IRS unpaid personal taxes (\$24,000)	(\$24,000)	
2. Mariott VISA (\$9,300)	(\$9,300)	
3. IRS A-1 Cabinet penalty (\$11,000)	(\$11,000)	
4. Unpaid property taxes (\$4,800)	(\$4,800)	
5. A-1 Cabinet personal property taxes (\$600)	(600)	
6. Debt reduction A-1 Cabinet interest payments (\$43,000)	(\$43,000)	
7. Debt reduction Golf course interest payments. (\$11,651)	<u>(11,651)</u>	

Total Debts	<u>\$104,351</u>
Net Award	\$465,486 \$466,951

Wife's separate property consists of her 401-k valued at \$79,000, and her Palm Springs time share valued at \$10,000 and subject to indebtedness of \$18,000 all of which is awarded to her.

Each party shall pay his/her attorney fees.

Very truly yours,



C. James Lust  
Judge