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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 304591

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

DANEILLE DICKSON,
Petitioner/Respondent

v.

CRAIG DICKSON,
Respondent/Appellant

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. THE AWARD OF MAINTENANCE WAS IN ERROR AND THE TRIAL COURT ABUSED ITS DISCRETION.

Regarding maintenance, Respondent falls short of addressing the issues addressed under the statutory scheme of RCW 26.09.090, including, Mr. Dickson's ability to pay and Ms. Dickson's need. Mr. and Mrs. Dickson were married for 18 years (*In Re: Marriage of Rockwell*, 141 Wash. App. 235, 243, 170 P. 3d 572, 576 (2007) long-term marriage recognized to be one of 25-years or more) (RP 31, 56). In 1986, prior to the parties' marriage, Mr. Dickson began Dickson Iron & Metals (DI&M) (RP 15).

At the time of trial, Mr. Dickson testified that his consistent income was \$10,000 per month and that he had received this amount for at least two years (RP 956, 980, 1014, 1083). In fact, Ms. Dickson's own expert, Doug Brajich testified that reasonable compensation for Mr. Dickson would be \$110,000 per year (RP 2055). However, the trial court ruled that Mr. Dickson's monthly net income was \$23,714.00 per month. This was based on years 2005 through 2008 with the business substantially declining towards the end of 2008 to come up with a good monthly income estimate (RP 2109). These years represented an anomaly for the corporation. During these years, other than an inheritance, the community benefitted from the business actions of Mr. Dickson and all assets acquired by the

Dickson's during their marriage were the result of the income generated by DI&M.

As in *In re: Marriage of Matthews*, 70 Wn. App. 116, 123 (Div. III, 1993), the trial court in this matter abused its discretion by finding that Mr. Dickson's net income is \$23,714 per month and that he is able to pay maintenance to Ms. Dickson in the amount of \$6,500.00. Ms. Dickson was awarded a disproportionate distribution of assets, including the proceeds from the sale of the home, all of the contents in the home, numerous liquid assets, significant lump sum amounts prior to the completion of trial, maintenance of \$5,169 for the months August 2010 and August 2011 and an increase of maintenance to \$6,500.00 (RP 2088-2089) Accord, *In re: Marriage of Scheffer*, 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). Mr. Dickson was required to maintain the costs of the home, including mortgage, taxes, and insurance without credit from the court. Further, he was awarded the forfeited assets owned by the community. In addition, Mr. Dickson is ordered to pay 100% of private school tuition for Regan and 100% post-secondary support for their son, Jordan. This leaves Mr. Dickson without sufficient resources to meet his own needs and financial obligations and

the post-dissolution economic conditions for Mr. Dickson in a dire financial condition.

Contrary to Respondent's argument, the trial court's paramount concern must be the economic condition in which the dissolution decree leaves the parties. *In re: Marriage of Williams*, 84 Wash. App. 263, 268, 927 P.2d 679 (1996), *review denied*, 131 Wash.2d 1025, 937 P.2d 1102 (1997). The trial court is required to consider the division of property between the parties. RCW 26.09.090; *In re: Marriage of Crosetto*, 82 Wn. App. 545, 548, 918 P.2d 954 (1996); *In re: Rink*, 18 Wn. App. 549, 552-53, 571 P.2d 210 (1977). Here, the trial court awarded a disproportionate division of assets as well as allocating all forfeited assets to Mr. Dickson, which ultimately required an equalization payment due to Ms. Dickson in the amount of \$1,953,012 with 12% interest per annum. The trial court further distributed corporate funds to the community as if it was community assets rather than corporate assets. Mr. Dickson's financial information did not and could not have included a \$19,500 per month interest payment, 100% private educational fees, 100% college expenses and child support. Mr. Dickson does not have the financial ability to pay maintenance in the amount of \$6,500 per month. The trial court failed to consider this disproportionate division of property awarded to Ms. Dickson.

Mr. Dickson's long term finances are bleak, including:

\$ 23,714.00 Monthly income set by trial court
\$ (1,257.61) Child Support
\$ (4,165.00) Jordan's College Tuition
\$ (1,250.00) Regan's Tuition
\$(19,530.25) 12% interest towards equalization payment
\$ (6,500.00) Maintenance per month
\$ (8,988.25)

The statute requires Mr. Dickson to have the ability to meet his needs and financial obligations while paying maintenance. If Mr. Dickson has no ability to pay maintenance, it is error to order its payment; if there is limited ability to pay maintenance, it is error to order maintenance in excess of the ability to pay. *Bungay v. Bungay*, 179 Wash. 219, 36 P.2d 1058 (1934). This is not only a matter of fairness to Mr. Dickson as the obligor spouse, but it is also a matter of judicial economy because if the decreed maintenance is not paid, the court will be burdened with repeated attempts to coerce the performance of an act that cannot be performed. *See, e.g., Boyle v. Boyle*, 74 Wash. 529, 133 P. 1009 (1913).

In determining Mr. Dickson's ability, the court must look at his reasonable needs that must be fulfilled, despite the obligation to pay maintenance. The court must consider the needs and financial obligations of Mr., Dickson when determining maintenance. RCWA 26.09.090(1)(f). Here, payments for child support, tuition, post-secondary and interest would leave Mr. Dickson is negative \$2,488.86 each month, exceeding 45% of his net income. After maintenance is awarded, Mr. Dickson is negative \$8,988.25.

Respondent's argument falls short regarding payment of interest. While Mr. Dickson may not be subject to contempt as a consequence of his failure to pay judgment interest on a monthly basis, it is clear that foreclosure on assets awarded to Mr. Dickson is a consequence and, in fact, a reality for an inability to pay on the judgment. A payment on the amount of interest at 12% per annum equates to a minimum amount of \$19,530. Again, after considering the resources of Mr. Dickson, this creates an inability to make a maintenance payment.

The *needs* of Mr. Dickson, including the ability to meet his financial obligations, should be judged by the same standards that apply to the same subjects of the spouse seeking maintenance, Ms. Dickson. Certainly, Mr. Dickson should not be required to maintain a standard of living that is worse than Ms. Dickson.

Mr. Dickson's does not have an ability to pay maintenance. The trial court erred and abused its discretion in awarding spousal maintenance to Ms. Dickson and Mr. Dickson requests that the matter be remanded for determination of overpayment of maintenance and further requests any amounts of overpayment be credited towards the equalization payment.

The unequal distribution of property obviated the need for any spousal maintenance as it substantially improved Ms. Dickson's financial position. In light of the unequal property division, the trial court's decision regarding

maintenance was error. *In re Marriage of Wright*, 78 Wash. App. 230, 238, 896 P.2d 735, 739 (1995). Ms. Dickson has a significant excess of assets and income available to her. Regarding maintenance, the trial court ruled that the most appropriate mechanism for the property equalization payment is in the context of maintenance (RP 2087). However, as *Crosetto* and *In Re: Marriage of Washburn*, 101 Wn.2d 168, 182, 677 P.2d 152 (1984) reveal, a significant maintenance award is less likely to be necessary since Ms. Dickson received more than an equal share of the parties' assets. Here, Ms. Dickson is the person who received a disproportionate share of the community's assets and Mr. Dickson received the community's forfeited assets.

Ms. Dickson on advice of criminal legal counsel entered a Stipulation for Settlement and forfeited her one-half right to the community property interest in the forfeited assets. (Ex. P108).

Further, Ms. Dickson has significant education, training and transferrable skills to be employable and meet her personal needs and maintain self-sufficiency. As a high school graduate who has taken a number of college classes, Ms. Dickson has been employed in numerous positions (waitress, loan collection officer, debt collection officer, home loan mortgage office, assistant to a dental coach) (RP 30, 31, 32, 35). From the time Mr. Dickson opened DI&M, Ms. Dickson worked at the business and ascertained a number of transferrable skills

(RP 62-63 and 356-357). Ms. Dickson received a paycheck of \$10,000 per year through DI&M working part-time (RP 79, 357-358). In November 2008, the couple opened Rogue Coffee. (RP 220). Ms. Dickson was CEO and President and testified that she was the owner/manager responsible to see the business operations (RP 375).

Contrary to Respondent's allegations, the business was not opened primarily to employ Ms. Dickson's sister, Sophia Rosenbaum. However, they did employ Ms. Rosenbaum at \$2,400 per month and Ms. Dickson testified that she and her sister shared duties. (RP 99).

As owner/manager of Rogue Coffee, Ms. Dickson set up the business license, beer and wine license, arranged banking and used debt card tracking (RP 359, 361, 363, 364). Ms. Dickson obtained bids and was the ultimate decision maker working with the contractors during the complete remodel of Rogue (RP 364). Ms. Dickson purchased equipment, furnishings and lighting and was responsible for the decorating (RP 219 and 362, 365-366, 359). Ms. Dickson worked with the Health Board and obtained a liquor license where she herself put in her own personal history, provided a layout of Rogue (RP 368). Ms. Dickson was trained and provided the training with the credit cards, checks, cash and debit cards that were accepted (RP 369). Ms. Dickson worked with a payroll company and acted as the banker, accountant for accounts receivable and payable. Ms.

Dickson worked as customer service with patrons, set up accounts with suppliers and ordered baked goods through local bakers (RP 362-363). Ms. Dickson ordered T-shirts and coffee with the Rogue label (RP 360). As the manager/owner/operator, Ms. Dickson was trained and did training on how to be a barista and how to properly mix drinks. (RP 371). Ms. Dickson was responsible for hiring employees and advertising for employees (RP 371). Ms. Dickson interviewed 15-20 people and narrowed it down to 8-10 employees (RP 372). She hired employees with culinary experience and Ms. Dickson also had a knack of baking and training employees on baking (RP 372).

Ms. Dickson had public relations skills and was interviewed for a local newspaper. She was directly responsible for the marketing and reaching out to local businesses and Whitworth College (RP 373-374).

After filing for divorce, Ms. Dickson unilaterally quit Rogue and put an "out of business" sign on the door. She fired all of the employees, closed the doors without first mitigating the lease or talking to the suppliers (RP 938).

Ms. Dickson had ample opportunity during the two years of separation to adapt herself to her new status or environment. It was her duty to gain employment. *Endres vs. Endres*, 62 Wash. 2d 55, 57, 380 P.2d 873, 874 (1963). However, Ms. Dickson sat idly by and refused to look for work or return to school. In fact, she testified that even if someone offered her to go back to

school, she would decline the offer (RP 479). The trial court found that it did not accept the argument that Ms. Dickson is merely at a minimum wage level (RP 2087). Rather, the court recognized that Ms. Dickson's work experience required her to possess financial savvy and involve day-to-day operation of Rogue (2087).

Finally, Respondent obfuscates the issue of additional income and support available to her, including that of her paramour Doug Zikan. Ms. Dickson's financial resources are a paramount concern to the court in determining maintenance. One of Ms. Dickson's resources is Mr. Zikan's income. Mr. Zikan's 2010 income tax returns were put into evidence (RP 1). Ms. Dickson stated in a rental agreement where she is jointly signed with Mr. Zikan, that she would be earning \$7,500 per month (RP 23). The rental agreement was for a home in Colorado where she would be living with Mr. Zikan. The court erred by failing to consider Mr. Zikan's income as a support and resource available to Ms. Dickson when it considered maintenance.

The trial court abused its discretion in awarding maintenance without factual substantiation and failed to consider the statutory factors along with need and ability.

B. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ITS CHARACTERIZATION OF POST-SEPARATION PAYMENTS

As articulated throughout testimony, Mr. Dickson provided boxes of financial information to Ms. Dickson. This was done despite no formal discovery being requested. Several orders were entered throughout the pendency of the dissolution action awarding monies as well as requiring payments be made on the mortgage, taxes and insurance. Specifically, Ms. Dickson was awarded \$50,000 on October 27, 2009; \$10,000 on July 19, 2010 (with characterization reserved) (CP 129, 305; RP 1458).

In October 2010, the court ordered Mr. Dickson bring the mortgage arrearages up to date and reserved the right of credit (RP 1458; CP 420). Mr. Dickson was ordered to bring the taxes that may be delinquent on the family home current and to be accounted for in the overall distribution (CP 1459; CP 420). The court then ordered \$5,169 payments to Ms. Dickson which would not be considered maintenance. In October 2010, the court again ordered Mr. Dickson bring the mortgage and insurance payments current and reserved the right with regard to a credit to Mr. Dickson as to the fair rental value for Ms. Dickson's use of the home (RP 1571; CP 1086).

While the court stated that the funds came from community funds, presence dictates that Mr. Dickson's income for Mr. Dickson from the date of

separation is his separate property. In fact, Ms. Dickson's counsel made stipulated that Ms. Dickson was not claiming a one-half interest in Mr. Dickson's income (RP 47-50). Therefore, payments on the mortgage stemmed solely from Mr. Dickson's separate property proceedings.

Despite having complete financial information following the 2010 trial, Ms. Dickson inappropriately claimed Regan on her taxes along with the mortgage interest, taxes and insurance on her own tax returns even though Mr. Dickson paid for those full amounts (RP 53).

Ms. Dickson provides no case law or authority and should not be considered by this court as to why these payments and allocations should not be considered maintenance and it was an abuse of discretion in failing to treat these payments made on Ardea Lane and the 10-acre parcel as spousal maintenance and for failing to provide Mr. Dickson a credit. Mr. Dickson again requests remand for proper characterization as maintenance and credit. Ms. Dickson had proper resources to pay community debts with the \$5,169 per month awarded by the court.

C. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY AWARDING ATTORNEY'S FEES

Despite Ms. Dickson's contention that no error was made by the court, Ms. Dickson was allocated \$5,169 per month. Additionally, Ms. Dickson retained

\$60,000 in cash along with numerous distributions (as indicated above). Ms. Dickson had a duty to obtain employment as argued above. However, Ms. Dickson was not required to pay her own attorneys' fees. Rather, on October 27, 2009 Mr. Dickson was ordered to pay Ms. Dickson's attorney \$25,000 (CP 129) along with \$196,821.89 in fees and costs (CP 814) with 12% annum on judgment with a 30% reduction in the net equalization payment (CP 829).

Ms. Dickson received significant assets in the disproportionate distribution as well as monthly amounts of \$5,169 thus reducing if not alleviating any need.

A person must come into a court of equity with clean hands. *Pierce County vs. State*, 144 Wash. App. 783, 832, 185 P.3d 594 (2008).

Ms. Dickson and the community benefitted and profited from Mr. Dickson's business practices. In fact, Ms. Dickson benefitted from the bargain of entering into a settlement agreement and forfeiting assets and was then assigned a disproportionate distribution and further was awarded maintenance and attorneys' fees and costs. Ms. Dickson has received what is equivalent to a double dip (12% per annum on judgment, reduction from net equalization payment but yet 12% per annum on that equalization judgment).

The court erred in awarding fees and costs to Ms. Dickson.

D. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED IN ITS CALCULATION OF CHILD SUPPORT, CONTRIBUTIONS ON TUITION, AND POST-SECONDARY EDUCATIONAL SUPPORT.

Both parents have a duty support their children and the purpose of the statute is to ensure that the child's basic needs are provided for consistent with the parents' income, resources and standards of living RCW 26.19.001. Mr. and Mrs. Dickson are the parents of Regan and Jordan. Regan is a senior at St. George's. Jordan is at Whitman College. Tuition for Regan is \$16,990 for the base tuition along with non-bus rider fee and books (RP 1413). Jordan's tuition at Whitman is \$50,000 per year (RP 2089-90).

The trial court erred and abused its discretion in failing to impute income to Ms. Dickson, failing to require Ms. Dickson assist in the costs of St. George's in addition to child support, and failing to require Ms. Dickson share in the post-secondary costs for Jordan.

Mr. Dickson testified that his wages were \$10,000 per month at the time of trial (RP 980). Additionally, Ms. Dickson's expert, Doug Brajcich testified and agreed that a reasonable compensation for Mr. Dickson would be at \$110,000 per year (RP 2055). The trial court erred in calculating Mr. Dickson's income based on 4 years that were an anomaly to the corporation, DI&M.

The trial court erred in failing to impute income to Ms. Dickson. Otherwise, the findings made by the trial court are a dichotomy. Specifically, the

trial court found that it did not accept the argument that Ms. Dickson is merely at a minimum wage level (RP 2087). Rather, the court recognized that Ms. Dickson's work experience required her to possess financial savvy and involve day-to-day operation of Rogue (2087). However, the trial court refused to impute an income to Ms. Dickson based on her health, age, education and skills.

For the same proposition listed above regarding Mrs. Dickson's ability to work and ability to earn income, income should have been imputed to her for purposes of calculating child support. The trial court erred in failing to impute income to Ms. Dickson in calculating child support. *In re: Marriage of Brockopp*, 78 Wn. App. 441, 446, 898 P.2d 849 (1995) and is reversible on appeal.

Additionally, Ms. Dickson is intentionally "voluntarily unemployed" pursuant to the statute pursuant to her own free choice. Ms. Dickson is employable.

Ms. Dickson received a substantial amount of wealth from the disproportionate distribution of assets in her favor. This wealth is good cause to require Ms. Dickson to exceed 45% of her income for child support contribution as well as contribution to the children's educational needs.

No deviation was provided to Mr. Dickson for tuition. Rather, Mr. Dickson is required to pay 100% educational expenses for both Regan and Jordan. A deviation was not given to Ms. Dickson because no allocation was made to her.

Respondent's argument falls short as it relates to *In Re: Marriage of Daubert*, 124 Wash. App. 483, 99 P.3d 401 (2004). *Daubert* requires that both parties' income be considered for purposes of tuition and post-secondary support allocation. Ms. Dickson's income should have been imputed for purposes of determining child support, tuition and post-secondary expenses. However, this was not done by the trial court. Further, absolutely no deviation was ordered by the court and, in fact, the court ordered that it was appropriate for dad to continue supporting Jordan in his tuition at \$50,000 per year (RP 2089-90). He was further ordered to be 100% responsible for the private high school tuition for Regan without any contribution from Ms. Dickson. This constitutes reversible error.

Ms. Dickson testified and agreed that should she receive maintenance, she would assist with the educational expenses of the children. (RP II, 70). No evidence suggests that a deficiency would occur to Ms. Dickson.

No argument is made by Ms. Dickson to the contrary that Mr. Dickson should receive credit for payments he paid towards Jordan's tuition. Specifically, Mr. Dickson paid \$24,113.56 for the year 2010-2011 and \$12,500 for Jordan's first semester tuition (RP 1697; RP 1840-41; RP 1698).

E. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO FOLLOW WASHINGTON STATE LAW AND COMMON LAW WHEN CONSIDERING POST-SECONDARY EDUCATION AND WHEN CONSIDERING REGAN AND JORDAN UNDER A 2-CHILD SCHEDULE.

The child support order in this matter states that Regan and Jordan are the children for whom support is owed. However the calculation in the order is based only upon a one child standard and thus increasing the amount of support owed by Mr. Dickson for Regan.

The trial court was clear that Jordan is dependent on his parents for support. Both parents agreed to contribute to the children's post-secondary educational needs. Further, Mr. Dickson paid for Jordan's tuition from his separate property earnings post-separation. Counsel for Ms. Dickson stipulates that they are not claiming a one-half interest in Mr. Dickson's income (RP 50).

Daubert provides that the schedule applies and requires consideration of Jordan as the post-secondary child because he is still receiving support.

The issue previously not before the court in *Daubert* is one ripe for determination in the matter at bar. Specifically, Regan and Jordan are dependents with the court calculating support for Regan under a one-child standard while also ordering Mr. Dickson to pay 100% of both Regan's tuition and Jordan's post-secondary education. Because support for both Jordan and Regan is necessitated, Ms. Dickson calculated the support on a one-child standard at \$1884 rather than

the two child standard at \$1,440, thus increasing the support owed by Mr. Dickson.

Mr. Dickson asserts that this is reversible error and an abuse of discretion by the trial court. Mr. Dickson request the court remand the matter for a proper calculation based on the two child standard.

F. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ITS CHARACTERIZATION OF THE ARDEA LANE HOME RESIDENCE

Inheritance is separate property funds. RCW 26.16.010.

Title alone does not provide that the asset is community property.

Mr. Dickson testified that he received \$200,000 in an inheritance from his mother and that was the way he funded the purchase of the home on Ardea Lane (RP 777). Ms. Dickson was very clear in testimony that if Mr. Dickson indicated that he had received an inheritance from his mother and used it for the home, then she would have no reason to doubt him but that she just did not remember (RP 405-407). Therefore, no evidence to the contrary exists nor any findings entered that a commingling of Mr. Dickson's inheritance occurred.

G. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ITS DETERMINATIONS OF RETROACTIVE CHILD SUPPORT/SPOUSAL MAINTENANCE/CREDIT FOR PAYMENT OF DEBT ON EXHIBIT A

Ms. Dickson does not deny that the court ruled that any court ordered allocation to Ms. Dickson in which Mr. Dickson did not receive the same amount would be considered maintenance.

H. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ENTERING FINDING OF FACT 2.21 OTHER, 5. VALUATION OF DI&M AND EXHIBIT A INCORPORATED THEREIN (CP 817), IN THE VALUATION OF \$2,500,000 DETERMINED FOR DI&M.

The valuation of DI&M is a question of fact and under *Suther v. Suther*, 28 Wn. App. 838, 627 P.2d (110 (Wash.App. Div. 1 1981), the standard of review is whether the trial court's findings are supported by substantial evidence. Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *In re Marriage of Hall*, 103 Wash.2d 236,246 (1984). Substantial evidence does not exist to support the existence of goodwill, the method of valuation selected to value DI&M or the value assigned to the stock interest in DI&M.

First, the trial court made no finding as to the existence of goodwill or the facts supporting such a conclusion either as to DI&M or Craig Dickson in the Findings of Fact and Conclusions of Law (CP817 and 818). Likewise, the trial court made no finding as to the existence of goodwill or the facts supporting such

a conclusion when the Court's Ruling was given orally on August 11, 2011 (RP 2075-2077). The trial court must make a determination of the *Fleege* factors that support the existence of goodwill. *In re Marriage of Hall*. Therefore, no record was created to justify the trial court's adoption of the *Hall* #3 method of valuing the business with a separate determination of the value of goodwill. The factors relied upon and the person or entity found to possess goodwill are critical given Craig Dickson's guilty plea to criminal structuring charges related to the business operations of DI&M for the time period of January 1, 2005 thru April 30, 2008, and prior to the date of the trial court's ruling on August 11, 2011. (Ex. P-76). Without the basis for finding goodwill the trial court's selection and reliance upon the IRS variation of capitalized excess earnings ("*Hall* #3") to value DI&M cannot be reviewed based upon the record.

Secondly, the trial court failed to state why the use of the other methods of valuation of goodwill in *Hall* were not deemed relevant. The trial court relied upon Exhibit P-34 prepared by Petitioner's expert, Mr. Brajcich. The reasoning for ignoring the remaining four methods for valuing goodwill under *Hall* are not discussed. Mr. Brajcich was employed as tax counsel for the Petitioner before and during the trial. (RP Vol. V, 592).

The capitalized excess earnings method in *Hall* #3 for valuing goodwill specifically adopts the IRS variation as set forth in Revenue Ruling 68-609, 1968-

2 C.B. 327. (Ex. R-162). This method specifies a minimum of 5 years of earnings to be considered. Petitioner's expert, Mr. Brajcich, used 3 years and created a hypothetical 4th year using the income and expenses for the 6 month period ending December 31, 2008. (Ex. P-34). The trial court stated it would not consider income for periods after December 31, 2008 due to a lack of income tax return information for DI&M. The trial court gave no explanation for refusing to use the income tax return information for the fiscal years ending June 30, 2004 and 2005. The taxable income of DI&M for these years was \$49,758 and \$93,181, respectively, as reported on the federal tax returns prepared by John Omlin, CPA, the same accountant that prepared the tax returns relied upon by Mr. Brajcich and the trial court. (Ex. R 103 and Ex. P1). The use of these two complete fiscal years would have satisfied the *Hall #3* minimum requirement of five years and would have substantially reduced the average net income of the business and thereby the value of the goodwill.

The failure to use the net income of DI&M for fiscal years 2004 and 2005 caused the valuation to fail the 5 year requirement of *Hall #3* and more importantly to fail to capture the typical cycle of good and bad years in the industry. The metal recycling business of DI&M is a highly cyclical business dependent upon obtaining a supply of metals from the local geographical area and selling them to larger regional and/or national recycling businesses. The price and

demand are dependent upon the health of the economy and the worldwide demand for metals. (RP 1135-1137). The failure to follow *Hall #3* caused the trial court's valuation to fail to satisfy the valuation method selected by the court.

The second major deviation from the *Hall #3* valuation method was Mr. Brajcich's creation of a year of financial results that never happened. This mythical year is created under the heading of 12/30/08 on pages 7 and 8 of Petitioner's Exhibit P-34. The net income for this period is \$951,358. This net income is 3.7 times greater than the previous best year of 6/30/08. In fact it is the creation of Mr. Brajcich and not the actual results achieved by DI&M. (RP 713). Mr. Brajcich created this 12 month year by taking the 6 months reported on the 2008 corporate tax return of DI&M and doubling the net income. (RP 713). Mr. Brajcich testified this was an extremely profitable 6 months of the company. (August 5, 2010, p. 206). The world economy was heading into a major recession. The trial court adopted this position by relying upon Exhibit P-34.(CP 817 and 818). This is one more instance of failing to follow the very valuation method announced by the trial court. It dramatically increased the value of goodwill and thereby the company as a whole. The estimate of value at page 3 of Ex. P-34 for the 3 years ending on 6-30-08 is \$2,761,000 and the use of the mythical 4th year causes the estimate of value for the 4 years to jump to \$3,863,000, a 40 percent increase.

The manipulation of the earnings of DI&M did not end there. Before determining the average earnings for his 3 year analysis Mr. Brajcich weighted 2006 - 16.67%; 2007 - 33.33%; and 2008 - 50% resulting in a higher average income for the 3 years at page 3 of exhibit P-34. (RP 681-682). DI&M was a C corporation for each of these years and paid federal income tax at the corporate level. Mr. Brajcich and the trial court failed to use the after tax net income and instead averaged the before tax and after tax income of DI&M. The result was to increase the estimate of value from \$2,519,000 to \$2,761,000. (RP 34, p. 3). The same was done for the 4 years ending on 12-31-08.

Based upon the foregoing errors, the valuation of DI&M fails to satisfy the requirements for determining the existence of goodwill and then valuing the business entity. *In re Marriage of Hall*.

The trial court stated during the direct examination of Craig Dickson during the 2011 trial that DI&M would be valued as of the conclusion of the first trial in August of 2010. (RP Vol. XII, p. 1922). The trial court refused to hear testimony regarding the goodwill of DI&M resulting from the FBI raid on DI&M and the guilty plea entered by Craig Dickson. (RP Vol. XII, pp. 1919-1920). The trial court's valuation of DI&M was based upon the analysis of Petitioner's expert at Ex. P-34. This valuation fails to account for impact of the FBI raid on the premises of DI&M, the guilty plea of Craig Dickson to structuring charges related

to the operation of DI&M from January 1, 2005 through April 30, 2008, and the forfeiture of DI&M assets. The result is the trial court used the income of DI&M for the period of the structuring activities, but refused to consider the negative publicity and loss of DI&M assets that resulted from it as well. This constitutes an abuse of discretion that resulted in a drastic over valuation of DI&M. *Lucker v. Lucker*, 71 Wash.2d 165 (1967).

I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ENTERING FINDING OF FACT 2.21 OTHER, 2. FORFEITED ASSETS AND EXHIBIT A INCORPORATED THEREIN, WHEN IT DETERMINED THAT CHECKS PAYABLE TO DI&M FROM SALE OF RECYCLED METALS IN THE AGGREGATE AMOUNT OF \$448,470 WERE COMMUNITY PROPERTY ASSETS SEPARATE FROM DI&M.

The \$448,470 of checks payable to DI&M that were seized by the FBI on August 31, 2010, were assets of DM&I. The Respondent admits the same. Solely because the checks had not been deposited in the DI&M account the trial court found this to be a separate asset from the corporation. The Respondent attempts to explain the absence of this asset from the Petitioner's joint Trial Management report filed for the first trial in 2010 ("2010 JTMR") and justify the treatment of the \$448,470 of DI&M checks as a separate asset on its 2011 JTMR by claiming it was undisclosed at the 2010 trial. This claim is without merit given the valuation of DI&M as a going business.

Petitioner's expert, Doug Brajcich, used the assets listed on the December 31, 2008 corporate tax return of DI&M as the beginning point of his computation of the tangible assets of DI&M. (EX. P-34, page 1 and (RP 661)). Mr. Brajcich testified that accounts receivable existed on 12-31-08, but were not listed in his analysis. (RP 666-667). Therefore, the Petitioner and its expert were fully aware that DI&M would have multiple cycles of inventory purchases and sales to its customers between 12-31-08 and the trial in 2010, but made no claim the accounts receivable were a separate asset. Mr. Brajcich's valuation of Ex. P-34 was stated to be the value of the entire business operations of DI&M. (RP 209). No claim was made by Petitioner in the 2010 trial that payments from DI&M customers should be a separate asset on the 2010 JTMR and Mr. Brajcich offered no testimony that accounts receivable of DI&M at the date of the 2010 trial were a separate asset not included in his valuation of DI&M at Ex. P-34.

The Respondent claims only the cash in the DI&M bank account was considered by its expert, but not the checks representing accounts receivable. This is incorrect. Mr. Brajcich valued DI&M as of December 31, 2008, based upon the DI&M federal income tax return. (RP 661). Mr. Brajcich testified that he understood DI&M was a middle man in the metal recycling business that would purchase scrap metal, sort it and ship to larger recycling companies on the west coast. (RP 98-100). Mr. Brajcich was aware payments from the west coast

customers would be received as DI&M scrap metal was shipped and accounts receivable would exist. (RP 666-667).

Petitioner's expert did prepare a list of the tangible assets of DI&M as of the separation date of August 10, 2009. (R 128, 8). Mr. Harper testified that the inventory figure he utilized of \$286,000 as compared to Mr. Brajcich's of \$76,000 was meant to reflect inventory and Accounts receivable for inventory shipped to customers. Thus, Mr. Harper was aware of accounts receivable for inventory shipped, just as Mr. Brajcich was aware of their existence. This balance sheet is dated as of August 10, 2009, and did not reflect the balance of cash, accounts receivable or inventory at the trial in August of 2010 when Mr. Harper testified.

The trial court made a specific finding that Mr. Brajcich had used prior year's earnings of DI&M to determine a "total value of the operating entity." (CP 817). The trial court made a similar finding in its August 11, 2011, Court Ruling that the value placed on DI&M was as of the end of 2008 or the date of separation in 2009 and reflected the value of DI&M as a going concern including inventory, accounts receivable and cash. (RP 2121).

It is an abuse of discretion for the trial court to value DI&M as an operating entity and then carve out an undisputed corporate asset for treatment as a separate asset of the community, especially an asset that was created after the valuation date and the date of separation selected by the trial court. This finding

of the trial court should be reversed as an error that has created an inequity.

Lucker v. Lucker.

J. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ENTERING FINDING OF FACT 2.21 OTHER, 2. FORFEITED ASSETS AND EXHIBIT A INCORPORATED THEREIN, (CP 815) WHEN CHARGING CRAIG DICKSON WITH RECEIPT OF 100% OF THE VALUE OF THE FORFEITED COMMUNITY.

The actions of Mr. Dickson that led to his Plea Agreement (Ex. P-76) were in furtherance of the community business, DI&M. Ms. Dickson acknowledges that the conduct occurred during the marriage, specifically January 1, 2005 thru April 30, 2008. The trial court found the criminal activity was not in furtherance of a legitimate community purpose. (CP816). Based upon this determination the trial court assigned the value of the forfeited assets to Mr. Dickson. (CP816).

The assignment of the forfeited assets to Mr. Dickson is inequitable in light of the trial court's valuation of DI&M using the *Hall #3* method to value the business, including goodwill. The income of DI&M used to determine its value included the very time period when the criminal conduct was conducted in the operation of the company. The result is the trial court has valued DI&M as it was operated during the period of criminal conduct, but not reduced the value by the penalties incurred for operating the business in that manner. The Petitioner seeks to reap the benefit of the assets created by Mr. Dickson's conduct, but not suffer the liabilities that resulted. This assignment of liabilities fails to satisfy the

requirement of an equitable division of assets and liabilities under RCW 26.09.080.

The cases referenced by the Respondent are distinguishable. The facts of *In re Clark's Marriage*, 13 Wash. App. 805, 538 P.2d 145 (1975) are distinguishable because Mr. Clark dissipated assets on account of his drinking habits and produced no income, unlike the case of Mr. Dickson whose efforts created the community property being divided.

The case of *In re Marriage of Wallace*, 111 Wash.App. 697, 45 P.3d 1131 (2002) is easily distinguished because it involved actions of the husband post separation to transfer assets out of the community to his father. Mr. Dickson's actions were during the marriage and for the benefit of the community.

The facts of *In re Steadman*, 63 Wash. App. 523, 821 P.2d 59 (1991) are also distinguishable. Mr. Steadman operated a construction business and failed to pay business taxes, conduct he had long conducted. The construction business failed and loans from Mrs. Steadman's mother were not repaid. Mr. Steadman was allocated the outstanding tax liability. Mr. Dickson's operation of DI&M was profitable and increased the community wealth rather than dissipated the community assets. The allocation of the tax liability to Mr. Steadman still left Mrs. Steadman with \$2,400 of assets and \$18,710 of liabilities.

The Dickson case is substantially different. DI&M was the source of all assets acquired during the marriage. It is only equitable for the forfeited assets to be divided equally together with the assets obtained from the operation of DI&M by Mr. Dickson.

Mr. Dickson pursuant to the Plea Agreement assigned his interest in the Forfeited Assets. (CP815, 816). The trial record and exhibits referenced at page 57 of the Appellant's Brief set forth the testimony and exhibits establishing the community property interest of Mrs. Dickson as asserted by her legal counsel, Phillip Wetzel. Mr. Dickson did not have the legal right to transfer Mrs. Dickson's 50% community property interest. This was the position also of Mrs. Dickson. (RP 85; Ex. R 182). The decision of Mrs. Dickson to compromise her community property interest claims is documented by the Stipulation for Settlement she executed and which was admitted into evidence as Exhibit P 108. The Stipulation for Settlement is self-explanatory. The trial court erred in not charging Mrs. Dickson with one half of the forfeited assets.

III. CONCLUSION

The court failed to apply the mandatory standards and statutes relating to the entry of an order for child support and child support worksheets. The errors impose an undue financial burden on the Appellant, Mr. Dickson and the court's

ruling should be reversed and this matter remanded requiring compliance with the statutes and regulatory standards.

The court should remand the case to the trial court for a reconsideration of the award of maintenance and require compliance with the standards imposed by RCW 26.09.090.

The court should reverse the award of attorney fees since the award was made without a finding of Appellant's ability to pay.

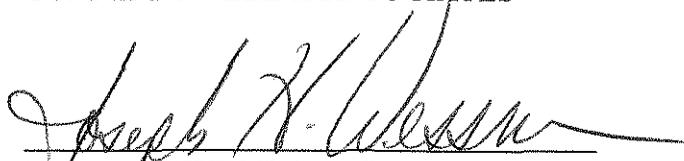
The court should remand the case to trial court for the determination of the value of DI&M and the treatment of the forfeited assets as a community liability.

Finally, Appellant should receive an award of attorney's fees.

RESPECTFULLY SUBMITTED, this 16th day of May, 2013.

WITHERSPOON • KELLEY

CONNIE POWELL & ASSOCIATES



JOSEPH H. WESSMAN, WSBA No. 9498

CONNIE POWELL, WSBA No. 34285

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 1st day of May, 2013, the foregoing APPELLANT'S REPLY BRIEF was caused to be filed with the following Court:

Court of Appeals of the
State of Washington,
Division III
500 N Cedar St
Spokane, WA 99201-1905

- By Hand Delivery
- By U.S. Mail
- By Overnight Mail
- By Facsimile Transmission
- By Email to

*1 Original, plus 1 Copy

Also, Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 1st day of May, 2013, the foregoing APPELLANT'S REPLY BRIEF was caused to be served to the following:

Counsel for Petitioner Martin L. Salina Attorney at Law 422 W. Riverside, Suite 824 Spokane, WA 99201	<input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Via Electronic Mail
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 Kim Kobasa