

FILED

JAN 15 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 304591

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

DANEILLE DICKSON,
Plaintiff/Respondent

v.

CRAIG DICKSON,
Respondent/Appellant

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF THE CASE

Daneille Dickson and Craig Dickson were married on July 6, 1991. (RP 31). Craig Dickson received an inheritance from his mother's estate in 2002 that went to the purchase of the community home. (RP 56; CP 815). Other than the inheritance, all assets acquired by the Dicksons during the marriage were the result of the income generated by Dickson Iron & Metals, Inc. ("DI&M" or "Company").

Two children were born during the marriage – a son, Jordan P. Dickson born on May 7, 1992 and a daughter, Regan A. Dickson, born on November 10, 1994. (RP I, 63; RP II, 61, 66). Presently, Jordan is a sophomore attending Whitman University (RP 66). His annual tuition is approximately \$50,000 per year. (CP 703). Regan is a senior at St. George's School in Spokane, Washington.

Dickson Iron & Metals was started in 1986 (RP 15) and incorporated in 1989. (CP 706). The Company has operated in its current location since 1986. The operating business is structured inside of DI&M and the scrap yard and shop building were held in the names of Mr. and Mrs. Dickson. The business paid rents to Mr. and Mrs. Dickson for the yard and shop. (CP 708). The scrap metal is purchased from industrial manufacturers, construction demolition contractors and individuals. The Company had a core group of metal suppliers numbering approximately

25, along with a group of small fragmented suppliers that are in the junk hauling business.

The Company's primary customers, which account for approximately 100% of its scrap iron sales and 80% of its other recycled sales, are larger recycling companies with a regional or national scale. In that regard, Dickson operates very much like an accumulation site for these larger processors of scrap metals.

The primary factors that impact the value and profitability of metal recycling companies are (1) end demand for scrap and steel, (2) prices for scrap, and (3) ready supply of inflows of the scrap material. The prices paid for metals increased significantly beginning in 2005, peaked during 2008 and substantially declined starting at the end of 2008. The result is a cyclical industry and Company.

The parties separated on August 9, 2009. (RP 56). The trial commenced on July 29, 2010 and testimony was ended on August 18, 2010. (CP 701). Before the trial court issued its ruling, the Federal Bureau of Investigation ("F.B.I.") on August 31, 2010 raided the business premises of DI&M, the personal residence of Craig Dickson at E. 8922 Courtview Lane, Spokane, Washington, and the family residence occupied by Daneille Dickson at 5221 W. Ardea Lane, Spokane, Washington. (CP 701). The F.B.I. seized cash, checks payable to the order of DI&M, the

account balances in all DI&M bank accounts, personal vehicles and the business records of the Company. (CP 713-715).

Craig Dickson brought a Motion to Reopen Trial for Presentation of Additional Evidence on September 8, 2010 (CP 320-326), which motion was granted by the trial court (CP 360-361). Thereafter, the United States Attorney for the Eastern District of Washington filed an Information against Craig Dickson, CR-10-180-EFS on December 22, 2010, charging (1) Structuring Financial Transactions to Avoid Reporting Requirements, (2) Conspiracy to Commit Structuring and (3) Criminal Forfeiture Allegations based upon the business practices in the operation of DI&M from January 1, 2005 through April 30, 2008. (CP 713). A Plea Agreement was entered on December 29, 2010 by Craig Dickson. (CP 713). The Plea Agreement included the stipulation and agreement of Craig Dickson to the forfeiture of real property, vehicles, retirement accounts and a money judgment. (*See* Ex. P-76). The forfeited assets were held in the name of DI&M or Craig and Daneille Dickson. The Plea Agreement was accepted by the Federal District Court on March 29, 2011. The forfeited property is set forth in the Amended Judgment in a Criminal Case dated April 11, 2011.

Daneille Dickson retained criminal legal counsel and filed a Statement of Right, Title and Interest in Property Subject to Criminal

Forfeiture, Petition for Hearing to Adjudicate Interest in Property and Request for Production on May 5, 2011 to preserve her community property interest in the forfeited assets (hereinafter "Daneille Dickson Statement of Right"). (Ex. R-182). Later, upon advice of criminal legal counsel, Daneille Dickson entered into a Stipulation for Settlement of Third Party's Interest in Criminally Forfeited Property and Release of all Claims on July 6, 2011, in which she compromised her claims for \$15,000 cash and the title to ___ vehicles. (*See* Ex. P-108).

Thereafter, the trial resumed on July 13, 2011, and continued until July 20, 2011. The trial court refused to admit evidence bearing on the reduction in value of DI&M, resulting from the F.B.I. search and seizure and the Guilty Plea of Craig Dickson. The trial court entered Findings of Fact and Conclusions of Law, a Decree of Dissolution, Child Support Worksheets and a Child Support Order dated September 21, 2011. (CP 797-833). Respondent's Motions for Reconsiderations were denied as to the Assignments of Error set forth herein. (CP 854-865; 1054-1055; 1060-1063, 1068-1087, 1131, 1133). Respondent Craig Dickson timely appealed.

II. ASSIGNMENTS OF ERROR & STATEMENTS OF ISSUES

- A. The Trial Court Erred and Abused its Discretion by entering Finding of Fact 2.12 Maintenance and Exhibit A incorporated therein (CP 814) that Maintenance Should be Paid to the Wife.
- B. The Trial Court Erred and Abused its Discretion by entering Finding of Fact 2.15 Fees and Costs, Other and Exhibit A incorporated therein (CP 814), When it Awarded Fees and Costs to the Wife.
- C. The Trial Court Erred and Abused its Discretion by entering Finding of Fact 2.20 Child Support and Exhibit A incorporated therein (CP 815) that Incorporated an Order of Child Support (CP 802) and the Washington State Child Support Schedule Worksheets (CP 797); and by entering Finding of Fact 2.21 Other and Exhibit A incorporated therein (CP 815) at (6) Income of the Parties (CP 818) on account of refusal to use Mr. Dickson's actual income and impute income to Ms. Dickson by Considering Doug Zikan's Income; Regan's cost of attendance to be paid solely by Mr. Dickson; (7) Post Secondary Education; and (8) Retroactive child support/maintenance/credit for payment on debts. (CP 819) Mr. Dickson requested an offset.
- D. The Trial Court Erred and Abused its Discretion in the Order of Child Support and Worksheets 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.
- E. The Trial Court Erred and Abused its Discretion by entering Finding of Fact 2.21 Other, 1. Net Proceeds from the Sale of Residence at 5221 W. Ardea Lane and Exhibit A incorporated therein (CP 815), that \$200,000 of Separate Property Funds of Craig Dickson were Invested in the Ardea Home Residence had been Commingled and Became Community Property.
- F. The Trial Court Erred and Abused its Discretion by entering Finding of Fact 2.21 Other, 9. Retroactive Child Support/ Spousal Maintenance/Credit for payment on Debt and Exhibit A incorporated therein (CP 819).

- G. 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).
- H. 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 were Community Property Assets Separate from DI&M.
- 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 (CP 815) when Charging Craig Dickson with Receipt of 100% of the Value of the Forfeited Community Property Assets.
- J. The Trial Court Erred and Abused its Discretion by entering Finding of Fact 2.21 Other, 3. Residence at 8904 E. Vista Park Dr. and Exhibit A incorporated therein (CP 816), that a Gift to Tyson Dickson of \$255,000 had Been Made by Mr. Dickson and Charging That Gift as an Asset Received by Craig Dickson.

III. ARGUMENT

- A. **The Trial Court Erred and Abused its Discretion by entering Finding of Fact 2.12 Maintenance and Exhibit A incorporated therein (CP 814) that Maintenance Should be Paid to the Wife.**

Maintenance awards are 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 Marietta*, 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).

As in *Mathews*, the trial court in this matter abused its discretion by finding that Mr. Dickson is able to pay maintenance to Ms. Dickson maintenance in the amount of \$6,500. Ms. Dickson was awarded the proceeds from the sale of the home, all of the contents in the home, significant lump sum amounts from the court prior to completion of trial and \$5,169 in maintenance from August 2010 to August 2011 when the court increased the maintenance to \$6,500 without justification. During separation, Mr. Dickson was required to maintain the costs of the home, including the mortgage, taxes and insurance without credit from the court. In addition to the maintenance, Mr. Dickson is ordered to pay 100% private school tuition for their daughter 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.

1. *The court erred in awarding Ms. Dickson maintenance and an additional two years of maintenance in the amount of \$6,500.00.*

Statutorily the legislature has provided factors for the court to consider when awarding maintenance. RCW 26.09.090. The maintenance order shall be in such amounts and for such periods of time as the court deems just, **without regard to misconduct.**¹

- a. Duration of the marriage.

Division I has recognized a long term marriage to be one of 25 years or more. *In re Marriage of Rockwell*, 141 Wash. App. 235, 243, 170 P.3d 572, 576 (2007).

Here, Mr. and Mrs. Dickson did not have a long term marriage, but rather an 18 year marriage, marrying on July 6, 1991 (RP 31, 56) and separating August 10, 2009 (RP 56).

- b. Age, physical and emotional condition and financial obligations of the spouse seeking maintenance.

¹ The relevant statutory factors a court must consider include:

- (1) the financial resources of the party seeking maintenance, including separate or community property apportioned to him;
- (2) 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;
- (3) the standard of living established during the marriage;
- (4) the duration of the marriage;
- (5) the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and
- (6) the ability of the spouse from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse seeking maintenance.

RCW 26.09.090

At the time of trial in August 2010, Mr. Dickson was 45 years of age and Mrs. Dickson was 40 (RP 284). Ms. Dickson is in excellent health and shape playing tennis and working out at the Spokane Club. Ms. Dickson travels to participate in tennis competitions and has no physical or emotional conditions.

At the time of separation, there was no debt (RP 957) other than the parties' mortgage. At the end of the second trial, the trial court left Ms. Dickson with very little to no financial obligations.

- c. The financial resources of the party seeking maintenance including separate or community property apportioned to her.

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). Here, the trial court failed to consider this disproportionate division of property awarded to Ms. Dickson which will leave Ms. Dickson long term, pursuant to RCW 26.09.090(1)(a).

- (1) Assets.

The trial court is required to consider, among other statutory factors, the division of property between the parties. RCW 26.09.090; *In*

re Marriage of Crosetto, 82 Wn. App. 545, 548, 918 P.2d 954 (1996); *In re Marriage of Rink*, 18 Wn. App. 549, 552-53, 571 P.2d 210 (1977).²

In this matter, Ms. Dickson was awarded 100% of the proceeds from the sale of the community home along with a significant amount of liquid assets. (RP A-117). In fact, the court recognized that in combination with these assets, Ms. Dickson will be able to maintain herself and her children (RP 2088-2089). (Jordan was in college; at the time of the first trial, Regan lived with Mr. Dickson. At the time of the second trial, Regan lived with Ms. Dickson but with a shared schedule).

Ms. Dickson considers her asset request to be significant. (RP 7/14/11, p. 25). From the assets awarded, monies retained, credit card debt incurred and the lump sums awarded, Ms. Dickson had significant resources of monies.

Here, when the court considers the amount of assets apportioned to Ms. Dickson, her ability gain to employment based on her skills as CEO and President of Rogue Coffee, and the income from her paramour, Doug Zikan, compared to the income of Mr. Dickson (less child support, post-

² In *Mathews*, the trial court awarded most of the equity in the family home to the wife, and ordered the home sold in 1992. She therefore had money available to her and income from her part-time job to help meet her needs. When this amount is added to the amounts Mr. Mathews had been ordered to pay, Mrs. Mathews had over \$800 a month in excess of the available income remaining to Mr. Mathews. *In re Marriage of Mathews*, 70 Wash. App. 116, 123-24, 853 P.2d 462, 467 (1993).

secondary and equalization payment owed by Mr. Dickson), Ms. Dickson has a significant excess of assets and income available to her.

With regard to maintenance, the trial court in this matter 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. A significant maintenance award is less likely to be necessary when the parties have received an equal share of the parties' assets. *See Washburn*, at 182 (maintenance necessary to compensate for unequal property division); *Crosetto*, 82 Wn. App. 548. Ms. Dickson was allowed to double dip. Specifically, in addition to the disproportionate amount of community assets awarded to Ms. Dickson, she also received an equalization payment in the amount of \$1,916,120 and prior cash awards or distributions, while forcing Mr. Dickson to pay for all community property debt without credit. Ms. Dickson used the cash awards to establish historical spending for herself so she could get a maintenance award. (RP 550).

Thus, the trial court has failed to fairly and properly consider post-dissolution resources and assets of Ms. Dickson.

- (2) The trial court erred in its denial to consider Ms. Dickson's paramour's income as income when considering maintenance and child support.

As of July 13, 2011, Ms. Dickson had made plans to move in with her boyfriend Doug Zikan in Colorado. Ms. Dickson and Doug Zikan had been dating for a year and a half at the time of this second trial (RP 7/14/11, p. 27). Ms. Dickson moved to Colorado with no job and without looking for employment other than on Craig's List (RP 7/14/11, p. 22). She never interviewed for positions.

The 2010 income tax returns of Doug Zikan were put into evidence (RP 7/14/11, p. 1). Mr. Zikan is employed as a medical health care distributor (RP 437; RP 7/14/11, p. 18) and had business income in the amount of \$200,552 with an annual adjusted gross income of \$74,079 for the tax year 2010. (RP 7/14/11, p. 19).

In completing the rental agreement, Ms. Dickson indicated that she would be earning \$7,500 per month for gross income (RP 7/14/11, p. 23) which was in part based upon the possible assets she guessed the judge would award her (RP 7/14/11, p. 22, 24 and 27). She signed a 2-year lease agreement with Mr. Zikan (RP A-49-50). However, at the time Ms. Dickson and Mr. Zikan rented the home, she did not know that her daughter would be living with her (RP 7/14/11, p. 10).

The court, in the presentment hearing, refused to reconsider its prior ruling on imputing income to Ms. Dickson and refused to so impute. Further, it ordered that any income as to Mr. Zikan be addressed in a motion for reconsideration (Ex. P-73). The court subsequently denied reconsideration (CP 1131).

- d. 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.

The amount and time of the maintenance awarded is to Ms. Dickson is excessive. Mrs. Dickson has significant education, training and transferrable skills to be employable and meet her personal needs and maintain self-sufficiency. Ms. Dickson is a high school graduate who has also taken numerous college classes (RP 32). She was a waitress in 1986 for approximately 3 years (RP 30); as a loan collection officer as a debt collection agent (RP 31) a home loan mortgage officer (RP 32), and as an assistant for a dental coach to improve business environment, assist with seminars, schedule appointments and do paperwork (RP 35).

From the inception of the business, Ms. Dickson worked at Dickson Iron & Metal, Inc. (RP 1753) and ascertained numerous skills. (RP 62-63 and 356-357).

As time went on, Mr. Dickson taught her how to drive a forklift (RP 357). While at DI&M she received a paycheck. From 2000 to 2009 Ms. Dickson received a gross wage amount of \$400 bi-weekly/\$10,000 per year from DI&M (RP 79, 357-358). However, after the parties separated, and she was no longer employed at DI&M, she testified that "he didn't give me any more of those checks" (RP 1753) (emphasis added).

In November 2008, the couple opened Rogue Coffee. (RP 220). Ms. Dickson was designated as the CEO and President (RP 493) and testified that it was her ultimate responsibility to oversee the operations as the owner/manager (RP 375). Ms. Dickson and sister Sophia Rosenbaum, shared duties. Sophia was paid a salary of \$2,400 per month (RP 99).

In opening Rogue, Ms. Dickson had enough business savvy to know that she had to get a business license and name. She contacted an attorney and friend Vanessa Zink who helped her set up the business. (RP 359). Ms. Dickson assisted in setting up the banking and adding her sister as a signor (RP 363). She used the debit card through Bank of America in order to better track her spending. (RP 364).

Ms. Dickson received bids and was the ultimate decision maker and was in charge of working with the contractors. (RP 364). She also worked with electricians, purchased lighting, flooring, furniture and large

equipment (RP 219 and 365-366). She set up the signage and decorated the restaurant (RP 359).

Mrs. Dickson and her sister shopped for and ordered all of the equipment for the store (RP 362), including on-line shopping. (RP 366). She designed the way the refrigeration cases looked when patrons walked in the door (RP 368) and hired a private decorator (RP 360).

Mr. and Mrs. Dickson obtained a beer and wine license. (RP 361). Ms. Dickson met with the Health Board and obtained her food handler's card (RP 367). She worked to obtain the liquor license where she had to put in her own personal history, provide a layout of Rogue and show where the exits were and the capacity for the number of people the restaurant held (RP 368).

Ms. Dickson was trained with the credit cards, checks, cash and debit cards that were accepted (RP 369) and in which Ms. Dickson was trained. Ms. Dickson met with a payroll company and worked directly with them for payroll and credit cards. (RP 369). She also worked with Qwest to set up the big screen TV's and wireless internet (RP 369).

Mrs. Dickson and her sister each had their own responsibilities (RP 361). Mrs. Dickson was the banker, paid the bills and accounts payable, did bank runs, got grocery supplies, and provided customer service, set up

accounts with suppliers and ordered baked goods through Rocket Bakery and Europa for items she wasn't able to bake (RP 362-363).

For Rogue, Ms. Dickson ordered T-shirts, Avion Coffee with the Rogue Label on it which Ms. Dickson set up for Rogue. (RP 360). She and her sister also worked closely together reviewing cookbooks to see what would be favorable with the public (RP 366-367).

In addition to manager/owner/operator, Ms. Dickson was trained how to be a barista, making various coffees, and how to properly mix the drinks. Further, Ms. Dickson provided customer service and worked the cash register (RP 371). Ms. Dickson was responsible for hiring employees and advertising for employees (RP 371). In fact, they interviewed 15-20 people and narrowed it down to 8-10 employees (RP 372). She hired employees with culinary experience (RP 366). Ms. Dickson testifies that she has quite a knack of baking and trained employees on cooking (RP 372).

Ms. Dickson had many public relations skills. In fact, Ms. Dickson was interviewed as owner of Rogue and Rogue received a positive write-up in the newspaper (RP 373). She was directly responsible for the marketing (RP 373), reaching out to local businesses and Whitworth College (RP 374).

Ms. Dickson testified that she worked hard to try and make the business a success and worked until she was falling over. (RP 224).

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 and closed the doors without first mitigating the lease or talking to the suppliers (RP 938).

In following the Supreme Court, Ms. Dickson had had ample opportunity during the two years subsequent to the entry of the decree of divorce to adapt herself to her new status or environment. Manifestly, it was her duty to gain employment. *Endres v. Endres*, 62 Wash. 2d 55, 57, 380 P.2d 873, 874 (1963).

Despite building Rogue Coffee in 2008, Ms. Dickson quit Rogue and then refused to look for work. In fact, as she sat in trial in 2010 she had no job and had not looked for work since the date of separation (RP 479). She did not know whether she would look for work in the next 8 months, did not know whether she would go back to school nor if she even had a desire to go back to school (RP 479). She went on to state that if someone offered her to go back to school and take classes, she would decline the offer (RP 479). Ms. Dickson remained unemployed as she sat in trial a year later in August 2011.

Even the court found that it did not accept the argument that Ms. Dickson is merely at a minimum wage level (RP 2087). Rather, her work experience in the past included some positions that required financial savvy, as well as putting together the business plan of Rogue and being involved in the operation of that entity (RP 2087). The court was satisfied that Ms. Dickson walked away from Rogue with experience that will hold her in good stead as she moves forward in her career. (RP 2088). (This trial court erred in not imputing Ms. Dickson at the wage bracket for a healthy 40 year old, pursuant to the child support guidelines).

The court held that Ms. Dickson is relatively young and has a good many years of professional work ahead of her if she chooses to pursue that (RP 2088). The court seriously questioned and had personal reservations about Ms. Dickson's choice to become a life coach. (RP 2088).

The court then authorized maintenance of what Mr. Dickson argues is in error, stating: I am authorizing maintenance to only be available for one and a half, let's go two years." (RP 2088). The court recognizes that Ms. Dickson has enough background in other areas to pursue a traditional education at a later date (RP 2088). The trial court abused its discretion in awarding maintenance without factual substantiation and failed to consider the statutory factors.

e. The Standard of Living Established During the Marriage.

While the trial court must consider the standard of living established during the marriage, it is not required to maintain that standard post-dissolution. The maintenance of a lifestyle to which one has become accustomed is not a test of need. *Friedlander v. Friedlander*, 80 Wash. 2d 293, 297, 494 P.2d 208, 211 (1972).

Mr. Dickson's actions created the substantial assets and standard of living the Petitioner readily enjoyed. Here, Ms. Dickson continued to enjoy her share of her husband's earnings so long as he continued in his objectionable conduct.

There is no doubt that throughout this marriage, and particularly as a result of 2008 income and sales from DI&M, the parties lived a lifestyle that was better than most. However, after 2008, the financial situation of the parties began to change.

As a result in the decline in profits, Mr. Dickson asked Ms. Dickson to slow down on the spending; however, rather than do so, Ms. Dickson exponentially increased her spending (RP 870). Mr. Dickson was keenly aware of their financial situation and requested that Ms. Dickson stop spending as the community obviously could not sustain her current spending habits (RP 870).

Mr. and Ms. Dickson had conversations regarding their financial situation and Ms. Dickson was very well aware of their declining financial situation (RP 871-72).

After separation, Ms. Dickson traveled the United States with Mr. Zikan (Colorado, Utah, Montana, Oregon, Washington and Arizona). This clearly was not the lifestyle established during the marriage, but rather jet-setting with her paramour.

As a result of the spoils the parties enjoyed during their marriage, an F.B.I. investigation was conducted for transactions occurring January 1, 2005 thru April 30, 2008. Community and corporate assets were seized.

f. The Ability of the Spouse From Whom Maintenance is Sought to Meet His Needs and Financial Obligations While Meeting Those of the Spouse Seeking Maintenance.

The trial court in this matter abused its discretion in determining income to Ms. Dickson and finding Mr. Dickson has an ability to pay maintenance.

Pursuant to Mr. Dickson's testimony, his bi-weekly salary is \$4,400 (RP 956). Multiplied x 26 provides an annual salary for a total of \$10,000 per month gross and a yearly salary of approximately \$120,000 (RP 956, 980, 1014). It has been this amount for at least a couple of years (RP 1083). Ms. Dickson's expert, Doug Brajcich, testified that reasonable compensation for Mr. Dickson would be at \$110,000 per year (RP 2055).

However, the trial court averaged Mr. Dickson's income over the course of 4 years to "come up with a good monthly." (RP 2109). For purposes of computing child support and maintenance, the court found that Mr. Dickson's income is \$25,000 per month gross and \$12,283 per month net (Presentment Hearing, "PH") (PH 78).

Pursuant to the court's ruling, Mr. Dickson's net income from DI&M is \$23,714.00 per month. Mrs. Dickson was awarded a property equalization payment of \$1,953,012.50 with 12% interest per annum. Assuming that Mr. Dickson pays the minimum payment of interest associated with the equalization payment, Mr. Dickson is required to pay the following:

\$23,714.00	
(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
<u>(6,500.00)</u>	Maintenance per month
\$ (8,988.25)	

Even if no maintenance is ordered, Mr. Dickson's payments for child support, tuition, post-secondary and interest towards the equalization payment would leave Mr. Dickson negative \$2,488.86 each month, exceeding 45% of his net income. After maintenance is awarded, Mr. Dickson is negative \$8,988.25 each month.

The court authorized maintenance in error, stating: I am authorizing maintenance to only be available for one and a half, let's go two years." (RP 2088).

The court then ruled that maintenance would be for two years (vs. 1 ½) at \$6,000 per month which will be income to Ms. Dickson and deductible to Mr. Dickson (RP 2089). The court then increased the \$6,000 per month maintenance award to \$6,500.00 without sufficient basis.

The court abused its discretion regarding maintenance by not considering the factors for Mr. Dickson's ability pay and failing to provide specific reasons for the change from one and a half years to two years and then from raising the maintenance from \$5,169 per month to \$6,500, and ordering 100% of tuition and 100% post-secondary support.

2. *The trial court abused its discretion failing to characterize post-separation payments made on the mortgage, taxes and insurance as maintenance.*

On October 27, 2009, Ms. Dickson was awarded \$50,000. (CP 129) On July 19, 2010, Mr. Dickson was ordered to pay Ms. Dickson \$10,000 with characterization to be reserved. (CP 305; RP 1458)

In October, 2010, the court ordered Mr. Dickson to bring the mortgage arrearage up to date, reserving the right of giving Mr. Dickson credit for remedying the deficiencies (RP 1458; CP 420). Mr. Dickson

was ordered to bring the taxes that may be delinquent on the home and the community's 10-acre parcel current which will be accounted for and will become part of the overall distribution (RP 1459; CP 420). The court ordered that \$5,169.00 payable to Ms. Dickson would not be considered maintenance.

In final orders, the court considered payments to Ms. Dickson \$5,169 per month as a sufficient amount with no other child support or maintenance reasonable being reasonable on an ongoing basis (RP 1570-1571; CP 1085). The court ordered that Mr. Dickson again bring the mortgage and insurance payments up to date for September and October 2010 and keep payments current, reserving the right regarding a credit to Mr. Dickson as to the fair rental value of Ms. Dickson's utilization of the home. (RP 1571; CP 1086). Pursuant to precedence, Mr. Dickson's income from the date of separation is his separate property. In fact, counsel for Ms. Dickson stipulates that they are not claiming a one-half interest in Mr. Dickson's income (RP 7/14/11, 47-50) thus substantiating payments of the mortgage stemming from his separate property proceeds.

For the tax year 2009, Ms. Dickson not only claims Regan (RP 7/14/11, 40) but also claims the real property taxes on her taxes (RP 7/14/11, 53). She misrepresents that the judge ordered that the parties take the Ardea Lane taxes out of the safety deposit box and that they paid the

real property on Ardea Lane out of the safety deposit box funds (RP 7/14/11, 53). She claims the home mortgage interest in the amount of \$11,063 which is the whole amount of the mortgage interest even though Mr. Dickson paid the entire year's mortgage (RP 7/14/11, 53).

If Ms. Dickson received any tax documents in the mail at the family home she simply gave them to Mr. Amon (Omlin) but did not provide a copy of those to Mr. Dickson (RP 7/14/11, 55).

It was an abuse of discretion in failing to treat the payments made on Ardea Lane and the 10-acre parcel as part of the spousal maintenance and in failing to provide Mr. Dickson a credit as such. Mr. Dickson requests remand for proper characterization as maintenance and credit. Ms. Dickson, with the \$5,169 per month previously awarded and other cash sums had proper resources to pay towards the community debts.

B. The Trial Court Erred and Abused its Discretion by entering Finding of Fact 2.15 Fees and Costs, Other and Exhibit A incorporated therein (CP 814), When it Awarded Fees and Costs to the Wife. (Decree (CP 829))

On October 27, 2009, the court awarded Ms. Dickson \$25,000 in attorney fees payable from Mr. Dickson. (CP 129). Mr. Dickson was ordered to pay \$196,821.89 in fees and costs (CP 814) with 12% per

annum on judgment. (CP 829). The court provided a 30% reduction in the net equalization payment. (CP 829). Ms. Dickson has an ability to pay her fees. The court erred in awarding fees and costs to Ms. Dickson. This equates to a double dip (12% per annum on judgment, reduction from net equalization payment but yet 12% per annum on that equalization judgment).

C. The Trial Court Erred and Abused its Discretion by entering Finding of Fact 2.20 Child Support and Exhibit A incorporated therein (CP 815) that Incorporated an Order of Child Support (CP 802) and the Washington State Child Support Schedule Worksheets (CP 797); and by entering Finding of Fact 2.21 Other and Exhibit A incorporated therein (CP 815) at (6) Income of the Parties (CP 818) on account of refusal to use Mr. Dickson's actual income and impute income to Ms. Dickson by Considering Doug Zikan's Income; Regan's cost of attendance to be paid solely by Mr. Dickson; (7) Post Secondary Education; and (8) Retroactive child support/maintenance/credit for payment on debts. (CP 819) Mr. Dickson requested an offset.

Child support is set by statute. The purpose of support is to ensure the child's basic needs are provided for consistent with the parents' income, resources, and standards of living. RCW 26.19.001.

A parent's "*total* child support obligation" may not exceed 45 percent of his or her net income unless good cause is shown. RCW 26.19.065(1) (emphasis added). A parent's "total child support obligation" necessarily includes additional support payments made in excess of the "basic child support obligation." RCW 26.19.011(1), .065(1); *McCausland*

v. McCausland, 129 Wn. App. 390, 412, 118 P.3d 944; *In Re Marriage of Daubert and Johnson*, 124 Wn.. App. 483, 502, 99 P.3d 401.

1. *Income of the parties.*

The uniform child support schedule shall be applied ... [i]n all proceedings in which child support is determined or modified," RCW 26.19.020; RCW 26.19.035(1)(c); and "[a]ll income and resources of each parent's household shall be disclosed and considered by the court when the court determines the child support obligation of each parent," with tax returns and paystubs provided to verify income, RCW 26.19.071(1), .071(2). It shall include an imputation where a parent is voluntarily unemployed. RCW 26.19.071(6).

- a. The trial court erred in failing to use Mr. Dickson's actual income for calculations of child support and post-secondary support purposes.

For the same propositions as listed above Mr. Dickson's salary should be calculated using \$10,000 per month for the purpose of child support. This is in congruence of the evidence presented by both Mr. Dickson and by Mr. Brajcich (Ms. Dickson's own expert witness) (RP 956, 980, 1014, 1083; RP 2055, 2109; PH 78).

- b. The trial court erred in failing to impute income to Mrs. Dickson and for failing to consider her voluntarily unemployed.

For the same proposition as listed above regarding Mrs. Dickson's ability to work and her ability to earn income, Mrs. Dickson should have been imputed.³

Words in a statute such as RCW 26.19.071(6) are given their usual and ordinary meaning. *Marriage of Blickenstaff*, 71 Wn. App. 489, 493, 859 P.2d 646 (1993). In this regard, RCW 26.19.071(6)'s use of the term "shall" imposes a mandatory duty. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) "*The word "shall" in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent.*"): *Erection Co. v. Department of Labor & Industries*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993).

³ The Imputation of income is governed by RCW 26.19.071(6) and provides:

The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors. A court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation. Income shall not be imputed for an unemployable parent. Income shall not be imputed to a parent to the extent the parent is unemployed or significantly underemployed due to the parent's efforts to comply with court-ordered reunification efforts under chapter 13.34 RCW or under a voluntary placement agreement with an agency supervising the child. In the absence of information to the contrary, a parent's imputed income shall be based on the median income of year-round full-time workers as derived from the United States bureau of census, current populations reports, or such replacement report as published by the bureau of census.

While "voluntary unemployment" is not defined in the child support statute, precedence is that the usual and ordinary meaning of that term to be unemployment that is brought about by one's own free choice and is intentional rather than accidental, and that one who is unemployable cannot be "voluntarily unemployed". *In Re: Marriage of Blickenstaff*, 71 Wash. App. 489, 493, 859 P.2d 646 (1993).

In *Marriage of Brockopp*, 78 Wn. App. 441, 446, 898 P.2d 849 (1995), the trial court's failure to impute income to the former wife, a 38 year old woman in good health with a high school diploma and work experience, was reversed on appeal.

Here, it is undisputed that after returning to work for Rogue Coffee, Ms. Dickson voluntarily quit that employment. Ms. Dickson is therefore voluntarily unemployed for purposes of RCW 26.19.071(6) and shall be imputed.

- c. The trial court erred in failing to consider the income of Ms. Dickson's live in paramour's income for the calculation of child support and post-secondary support.

While RCW 26.19.071 provides an exclusion of Mr. Zikan's income from Ms. Dickson's gross monthly income, the court may take this income into consideration. In this instance, Ms. Dickson is unemployed. She and Mr. Zikan share the expenses in their new home. Ms. Dickson relies upon Mr. Zikan's income in caring for herself and Regan. Mr.

Zikan is a resource for Ms. Dickson and provides income to her household.

2. *Extraordinary Expenses/Tuition – Regan.*

RCW 26.19.080(1) requires the basic child support obligation derived from the economic table be allocated between the parents on each parent's share of the combined monthly net income. However, 26.19.080(3) provides that tuition is designated as a special child rearing cost which is not included in the economic table. Once, the court determined that the extraordinary expense of tuition is reasonable and necessary the court is required to allocate the expense in the same proportion as the basic child support obligation. *State ex rel. JVG vs. VanGuilder*, 137 Wash. App. 417, 427, 154 P.3d 243, 248 (2007); *In Re: Yeamans*, 117 Wn. App. 593, 600-02, 72 P.3d 775, 778-79 (2003) (no deviation from basic support obligation and thus allocation must be in proportion of parties' incomes).

During the first trial, Regan lived with Mr. Dickson and attended St. George's private school. The tuition for St. George's is \$16,990 for the base tuition. There is another \$400 for non-bus rider fee in addition to any books (RP 1413). Mr. Dickson requested the court order Ms. Dickson to assist in the costs of St. George's in addition to child support (RP 1413). Mr. Dickson chose to make payments on the 3 payment plan towards the

tuition for Regan at St. George's (RP B-154). However, Ms. Dickson objected to having these costs treated as a community debt (RP B-154).

At the time of the second trial, Regan was going back and forth between the parties' homes. For the 2009/2010 Mr. Dickson paid Regan's tuition for St. George's in Spokane. For the 2010/2011 school year, Regan moved to Colorado and attended Valor Christian. Regan's tuition is approximately \$14,000 per year and the court ruled that her father will be looked to continue supporting Regan in her private school through graduation. (RP 2050).

Between private school tuition and post-secondary tuition, Mr. Dickson pays an annualized monthly amount of \$5,500 per month in tuition (RP 1898).

In the case at bar, the court determined that the extraordinary expense of private school was reasonable and necessary; however, rather than allocate the cost proportionately as required, the court ordered Mr. Dickson pay 100% of Regan's private school tuition. A deviation was specifically denied. This is reversible error. Mr. Dickson requests this court remand the order to the trial court for proper allocation of private school costs and award Mr. Dickson a credit for his payment of the private school costs from the date of separation to present (denied on reconsideration).

3. *Post-Secondary Education – Jordan.*

Provisions for postsecondary education support are found under RCW 26.19.090(1). Additional support payments include extraordinary health care expenses, tuition, long distance transportation costs, and postsecondary education support. RCW 26.19.080(2), (3), .090; *Daubert*, 124 Wash. App. at 502, 505, 99 P.3d 401. **

In deciding whether to order support for postsecondary educational expenses, the court must first determine "whether the child is in fact dependent" and is relying on the parents for support. RCW 26.19.090(2). The court then exercises its discretion in deciding whether and for how long to award postsecondary educational support.⁴

The record must include what those costs are generally when a court orders a parent to pay expenses in excess of the basic child support obligation. *McCausland*, 129 Wash. App. at 412, 118 P.3d 944. And the court "must consider each parent's ability to share those expenses in light

⁴ RCW 26.19.090 (2) provides, in pertinent part:

(2) When considering whether to order support for postsecondary educational expenses, the court shall determine whether the child is in fact dependent and is relying upon the parents for the reasonable necessities of life. The court shall exercise its discretion when determining whether and for how long to award postsecondary educational support based upon consideration of factors that include but are not limited to the following: Age of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities or disabilities; the nature of the postsecondary education sought; and the parents' level of education, standard of living, and current and future resources. Also to be considered are the amount and type of support that the child would have been afforded if the parents had stayed together.

of their economic circumstances and in light of their total child support obligation." *Id.* (citing RCW 26.19.001, RCW 26.19.065(1)); *see Daubert*, 124 Wash. App. at 495, 99 P.3d 401.

Daubert requires both parties income be considered for purposes of tuition and post-secondary and the tuition allocated accordingly. Here, the trial court erred in failing to allocate the income proportionately for the payment of Jordan's postsecondary education and costs and erred in requiring Mr. Dickson to pay 100% of the tuition. In recognizing Mr. Dickson's additional support payments for tuition and post-secondary education, Mr. Dickson's transfer payment should be \$243.78 per month. Mr. Dickson's total support obligation, as indicated above, exceeds 45% of his net income, prevents him from providing for his own living expenses and, in fact, leaves him with a deficiency each month.

Jordan attends Whitman College and lives on campus. He does not reside with either parent. The cost for his attendance at Whitman College is \$49,496 per year (RP II, 253). The court was clear that in terms of post-secondary education, Jordan was beyond the period of time for traditional child support but satisfied his requirements for the first year of college. However, the trial court, after denial of reconsideration, ordered Jordan be added to the Child Support Order 3.1 Children for Whom Support is Owed (CP 803).

During her testimony, Ms. Dickson agreed that should spousal maintenance be awarded to her, she is willing to participate and have the court reflect that as income for purposes of any child support or post-secondary educational support for court orders (RP II, 70). After the assets are distributed and as a result of Jordan not having any scholarships, Ms. Dickson testified that she is willing to pay for half of Jordan's college (RP 471).

However, in this case, no allocation by the court was ordered; rather, Mr. Dickson was required to pay 100% of Jordan's post-secondary tuition for four years at Whitman College, stating: "It is appropriate for dad to continue supporting him in his tuition at \$50,000 per year." (RP 2089-2090).

The court stated that since Mr. Dickson supported Jordan and paid his tuition fees last year, he will be looked to in the future to support him through completion at Whitman for a period of four years (RP 2050).

In fact, for the 2010-2011 school year, Mr. Dickson was ordered to pay \$24,113.56 for Jordan's education at Whitman (RP 1697; RP 1840-1841); He had previously paid \$12,500 for the first semester Jordan's tuition (RP 1698; RP 1840-1841). No credit was given to Mr. Dickson for the payments he paid towards Jordan's tuition (RP 1698). Pursuant to

Daubert, the court must allocate Jordan's tuition and failure to do so was an abusive use of discretion.

D. The Trial Court Erred and Abused its Discretion in the Order of child Support and Worksheets 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 trial court determines the basic child support obligation from the economic table as set forth in RCW 26.19.020, based on the parents' combined monthly net income and the age and number of children for whom support is owed. The child Support Order in this matter states that the Children for Whom Support is Owed is both Regan and Jordan; however, the calculation is based only upon a one child standard, therefore, increasing the amount of support owed by Mr. Dickson.

There is no dispute that the parties' eldest child is attending college and is dependent on his parents for support. Nor is there any dispute that the parents agreed to contribute to their children's postsecondary educational expenses. Further, the court ordered and there can be no dispute that Mr. Dickson paid for Jordan's tuition from his separate property earnings post separation. In fact, counsel for Ms. Dickson stipulates that they are not claiming a one-half interest in Mr. Dickson's income (RP 7/14/11, 50).

Relying on *In re Marriage of Daubert*, 124 Wash. App. 483, 99 P.3d 401 (2004), overruled on other grounds by *In re Marriage of McCausland*, 159 Wash.2d 607, 152 P.3d 1013 (2007), Mr. Dickson contends that in calculating the basic support obligation for the younger child, Regan, the court must include a college-age dependent child in the calculation even though the college expenses are being paid from separate property earnings.

The *Daubert* court held that "when calculating support for the younger minor children, the schedule applies and requires consideration of the postsecondary child, because this child is still a child receiving support." *Daubert*, 124 Wash. App. at 503, 99 P.3d 401.

In a footnote, the *Daubert* court noted that the trial court calculated the child support for the youngest child under the economic table for a one child family even though the college-age child "was still receiving postsecondary child support." *Daubert*, 124 Wash. App. at 503, n. 3, 99 P.3d 401. This is the issue in the case at bar it is clear that both 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 tuition and postsecondary education.

Because the child support order indicates both Jordan and Regan for whom support is owed, Ms. Dickson calculated support on a one child

standard of \$1884 rather than the two child standard of \$1,440.00, thus increasing support owed by Mr. Dickson. As a result, Mr. Dickson requests the court remand the matter for proper calculation.

Mr. Dickson requests this court remand the matter for entry of an order consistent with the proper calculations and award an overpayment of child support from August 2011 to the present.

Mr. Dickson requests this court remand the matter for entry of an order consistent with the statute and case law by removing Jordan from the child support order and calculating the matter based on a one-child standard (order includes Jordan).

Mr. Dickson requests this court remand the matter for entry of an order providing an overpayment and credit to Mr. Dickson for private school tuition paid since the date of separation to the present for Jordan and Regan.

Mr. Dickson further requests that this court remand the matter of entry of an order consistent with the calculation based on percentages for post-secondary support, awarding an overpayment for post-secondary tuition of Jordan and entering an order requiring Ms. Dickson to refund Mr. Dickson for her appropriate percentage for the school years 2009, 2010 and 2011.

- E. The Trial Court Erred and Abused its Discretion by entering Finding of Fact 2.21 Other, 1. Net Proceeds from the Sale of Residence at 5221 W. Ardea Lane and Exhibit A incorporated therein (CP 815), that \$200,000 of Separate Property Funds of Craig Dickson were Invested in the Ardea Home Residence had been Commingled and Became Community Property.**

The trial court ruled \$200,000 of Craig Dickson's separate property was used to purchase and build the Arden home. No findings were entered nor evidence at trial to support a commingling of assets.

- F. The Trial Court Erred and Abused its Discretion by entering Finding of Fact 2.21 Other, 9. Retroactive Child Support/ Spousal Maintenance/Credit for payment on Debt and Exhibit A incorporated therein (CP 819).**

In dealing with issues of property, spousal maintenance and child support, the court has discretion in its decision so long as it is just. *Washburn vs. Washburn*, 101 Wn.2d 168, 667 P.2d 152 (1984).

The court was clear in its ruling that any court ordered allocations to Mrs. Dickson, in which Mr. Dickson did not receive the same amount, would be considered maintenance. Mrs. Dickson received court ordered funds in the amounts of \$20,000.00 on August 28, 2009, \$50,000.00 on October 27, 2009, \$10,000.00 on July 19, 2010, which was not properly credited to Mr. Dickson. Mr. Dickson requests a credit of this \$80,000.00 either against maintenance or as assigned as an asset which Mrs. Dickson received and was not accounted for. If these amounts are not accounted for, the community is short \$80,000.00 and Mr. Dickson is deprived of his

fair share of the \$80,000.00 credit. While the trial court shortened Ms. Dickson's maintenance based upon the \$10,000 distribution, Mr. Dickson asserts that maintenance was improper and requests remand.

This \$80,000.00 amount that Mrs. Dickson was awarded by court order, which was not allocated in the assets, is not the same amount that Mrs. Dickson unilaterally took from the bag without court approval. Nor is it part of the \$5,169.00 that Mr. Dickson paid each month in maintenance. Nor is it part of the \$39,000.00 that Mrs. Dickson benefitted from on the Alaska Airlines card which was exclusively used for shopping and other personal items.

Mr. Dickson was required to be responsible for the maintenance of payments on the debts existing on September 24, 2010. Additionally, while a ruling was made on the prior payments made by Mr. Dickson on the home, no credit or allocation was provided to Mr. Dickson for catching up the payments on the home which totaled \$15,000.00 pursuant to the October 2010 court order. Further, Mr. Dickson was not provided credit nor was an allocation made for the nine (9) additional months at \$3,500.00 per month that Mr. Dickson paid on the home totally \$31,500.00. In essence, Mr. Dickson was not provided credit for 46,500.00 for payments on the home pursuant to an October 2010 ruling by this court.

Overall, up to trial, Mrs. Dickson was "given" at least \$126,500 in assets/benefits which have not been accounted for or in which Mr. Dickson has not been given credit for, in addition to the \$1.9 million dollar transfer payment, \$60,000.00 worth of absconded funds, \$700,000.00 for the value of the value of the home plus the unaccounted for value for the contents in the community home which Mrs. Dickson unilaterally packed without prior court order.

If Mrs. Dickson is awarded these assets and maintenance without proper credit to Mr. Dickson, Mr. Dickson would be punished as this would be a double dip for Mrs. Dickson. Mrs. Dickson would be provided a transfer payment and also, from consideration of the same assets, be provided as maintenance. After considering the division of property in a disproportionate share of assets to Mrs. Dickson, along with the property received by Mrs. Dickson and payments by Mr. Dickson, both of which were not considered by the court in the ruling, is punitive to Mr. Dickson.

Given that Mrs. Dickson was awarded significant funds that were not distributed, that she received a disproportionate share of the assets and that her paramour provides a significant amount of financial assistance to the partnership's home, Mr. Dickson requests that Mr. Dickson receive a credit for prior payments on support and debt as incorporated in Exhibit A and that his matter be remanded for proper calculations.

G. 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 trial court has a duty to make a disposition of the property and liabilities of the parties as shall appear just and equitable after considering all relevant factors. RCW 26.09.080. The trial court has broad discretion and the standard for review is manifest abuse of discretion. *In re Marriage of Gillespie*, 89 Wn. App. 390, 398, 048 P.2d 1338 (1997). The trial court abused its discretion in setting the value of DI&M as set forth in the issues discussed below.

1. *Whether the trial court erred and abused its discretion in relying upon Method 3 from In re Marriage of Hall, 103 Wn.2d 236, 692 P.2d 174 (1984) to value DI&M, a highly cyclical business that purchases and sells recycled metals.*

DI&M operates a metal recycling business that purchases scrap metals within its geographical area, sorts and processes the metals, and then sells the scrap metal to regional or national metal recycling businesses, including Metro Metals Northwest and Schnitzer Steel Industries, Inc. (RP 1118, 1119, 1120; Exhibit R129, p. 2). The volume of sales and selling price are dependent upon the worldwide demand for metals, particularly ferrous metals. This is a highly cyclical market

dependent upon construction activity and overall economic growth. (RP 1131-1135; Exhibit R129, p. 17).

The trial court erred and abused its discretion to determine the value of DI&M because it adopted the Capitalized Excess Earnings Method as defined in *In re Marriage of Hall*, 103 Wn.2d 236, 692 P.2d 175 (1984) (hereinafter "Hall #3") to value DI&M. (CP 818). The Court in *Hall* stated:

These five methods are not the exclusive formulas available to trial courts in analyzing the evidence presented. Nor must only one method be used in isolation. One or more methods may be used in conjunction with the *Fleege* factors **to achieve a just and fair evaluation of the existence and value of any professional's goodwill.** (Emphasis added).

Hall #3 incorporates the excess earnings method as defined by the Internal Revenue Service in Revenue Ruling 68-609, 1968-2 C.B.327.

The *Hall* court described method #3 as follows:

The IRS variation of capitalized excess earnings method takes the **average net income** of the business for the **last 5 years** and **subtracts a reasonable rate of return based on the business' average net tangible assets.** From this amount a **comparable net salary is subtracted.** Finally, this remaining amount is capitalized at a definite rate. The resulting amount is goodwill. (Emphasis added).

See Hall, at 244.

The Respondent's expert, Daniel J. Harper, CPA, testified that Hall #3 was not applicable in this case because a metals processing and

recycling business was being valued, not a service business, professional or otherwise. (RP 1184 to 1190/Vol. VIII, pgs. 1184-1190). Mr. Harper also testified that the Hall #3 method has been heavily criticized by the American Society of Appraisers and the Internal Revenue Service that formulated the Excess Earnings Method. (RP 1184-1190 and Ex. R-173). The Internal Revenue Service created this formula to compensate breweries for the loss of goodwill during Prohibition. (Ex. R-173, page 3).

Mr. Harper testified that both the AICPA Statement of Standards for Valuation Services (Ex. R-130) and the Uniform Standards of Professional Appraisal Practice (Ex. R-131) published by the American Society of Appraisers were consulted and implemented by him in the preparation of his opinion of values. (RP 1105-1116). Mr. Harper selected the straight capitalization accounting method as the primary means to value the business. This method (hereinafter "Hall #1") is described by the Court in *Hall* as follows:

Under the straight capitalization accounting method the **average net profits** of the practitioner are determined and this figure is **capitalized at a definite rate**, as, for example, 20 percent. **This result is considered to be the total value of the business including both tangible and intangible assets.** To determine the value of goodwill the book value of the business' assets are subtracted from the total value figure. (Emphasis added).

See Hall, at 243 and 244.

Mr. Harper determined a value of \$1,441,674 for the Company using Hall #1. (Exhibit R129, p. 31).

The Court in *Hall* states the capitalization of the average net profits of the business results in the total value of the business, including both tangible and intangible assets. Since the Dickson's owned 100 percent of the outstanding stock of DI&M and held it as community property, there was no need to separately break out a value for the intangible asset goodwill when determining the value of the entire business. The adoption of Hall #3 to value DI&M served no purpose. However, as stated at pages 56 to 58 in Ex. R-173, its use creates a greatly increased risk of error in valuation due to not only computing average net profits of the business, but also allocating those profits to operating tangible assets and the remainder of net profits to goodwill for capitalization under a separately determined capitalization rate.

Therefore, the trial court erred and abused its discretion when it selected Hall #3 as the valuation method to value all of the outstanding stock in DI&M.

2. *Whether the trial court erred in determining the value of the Company under the Hall #3 method due to the failure to use five years of earnings of the Company as required by Hall #3.*

Mr. Brajcich's valuation which the trial court relied upon failed to satisfy the requirement of Hall #3 to used five years of the Company's earnings.

The court in *Hall* described the third method as follows:

The IRS variation of capitalized excess earnings method takes the **average net income of the business for the last 5 years** and subtracts a reasonable rate of return based on the business' average net tangible assets. From this amount a comparable net salary is subtracted. Finally, this remaining amount is capitalized at a definite rate. The resulting amount is goodwill. (Emphasis added).

See Hall, at 244.

DI&M filed its federal tax returns as a "C" corporation on a fiscal year ending June 30th of each calendar year for tax years ending June 30, 2005, June 30, 2006, June 30, 2007 and June 30, 2008. (Exhibits P-1, P-2, P-3, P-4). An "S" election for federal tax reporting was made for the Company effective July 1, 2008 and a tax return for the six-month period ending on December 31, 2008 was filed with the Internal Revenue Service. (Ex. P-5; RP August 5, 2010, pgs. 89 and 90). The "S" election was at the suggestion of accountant John Omlin, C.P.A., who had prepared the corporate tax returns for the Company. (RP 1802). Mr. Omlin

suggested the "S" election as a means to reduce the combined corporate and individual taxes being paid by the Dicksons on income earned by DI&M. (RP 1803). The tax effect of an "S" election is to cause the Company's earnings to be reported at the shareholder level and income taxes on the corporate earnings to be paid by the shareholder also.

Petitioner's expert, Mr. Brajcich, valued the Company using the Hall #3 method that is based upon Revenue Ruling 68-609. (Ex. R-162; RP 622). His final analysis and opinion of value for the Company is Exhibit P-34, and at trial he testified the value was reduced to \$3,000,000. (RP 622). Mr. Brajcich's value of \$3,000,000 was for the date December 31, 2008. (RP 631).

Mr. Brajcich did not use five years of earnings as required by the Hall #3 method, rather he used three years of income and additionally a second calculation allegedly on four years of income. (RP 644, 645). (Ex. P-34, pages 3 and 4). The net profit of the Company listed on pages 3 and 4 of Exhibit P-34 is based upon Mr. Brajcich's analysis of earnings at pages 7 and 8 of Exhibit P-34. While Mr. Brajcich's valuation determined the taxable income for the fiscal year ending in June 30, 2005 and a tax return for the fiscal year had been filed (Ex. P-1), he chose to not use that year. (RP August 5, 2010, p. 180) Mr. Brajcich looked at the two fiscal years ending before June 30, 2006, but did not put them into his

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calculations. (RP 645). The fiscal years ending June 30, 2005 and June 30, 2004 were left out because they have less credibility the farther back you go. (RP 645).

Mr. Brajcich intentionally used the three highest years of income for the Company. (RP 645). Mr. Brajcich stated the national economy was in a depression and unemployment was high during the end of 2008 and the beginning of 2009. (RP 638, 639).

The four-year earnings analysis for DI&M at page 4 of Mr. Brajcich's valuation (Ex. P-34) concludes the Company has a value of \$3,863,000 as compared to \$2,761,000 under the three-year earnings analysis at page 3. The four-year earnings analysis of Mr. Brajcich was made possible by annualizing the six-month period ending December 31, 2008. (RP August 5, 2010, p. 205). This was an extremely profitable period in the Company's history. (RP August 5, 2010, p. 206). The use of this annualized income based on the six-month period ending December 20, 2008 is the primary variable as compared to the Three Year Earning Analysis and results in an increase in value of the Company by over \$1,000,000.

The "reasonableness of any valuation depends upon the judgment and experience of the appraiser and the completeness of the information upon which his conclusions are based." *Suther v. Suther*, 28 Wn. App.

838, 843 (1981) (quoting Ernest J. Lawinger, *Appraising Closely-Held Stock – Valuation Methods and Concepts*, 110 *Trusts & Estates* 816 (October 1971)). Mr. Brajcich recognizes Shannon Pratt as a recognized expert in valuation, probably the number one guru in the country. (RP 657, 658). Mr. Harper included in Exhibit R 173 excerpts from Shannon Pratt's treatise discussing the Capitalized Excess Earnings Method and common errors. (Exhibit R173, pp. 60-64). Mr. Harper, respondent's expert, detailed the numerous errors committed by Mr. Brajcich. (RP, 1190,-1196). Mr. Harper prepared a valuation using the Capitalization of Excess Earnings Method and it is shown at page 73 on Exhibit R173. The values range from \$1,494,153 to \$1,642,675. (RP 1202-1207).

Mr. Brajcich failed to follow the Hall #3 method of valuation and purposely left out low income years and annualized the most profitable six-month period of the Company. As a result, the trial court failed to value DI&M in accord with its selected valuation method when it used the appraisal of Mr. Brajcich as the basis for its valuation.

4. Whether the trial court erred in refusing admit or to consider the evidence regarding the negative impact on the earnings and value of the Company caused by the loss of corporate assets and negative publicity.

The trial court refused to hear testimony that the value of the Company was diminished on account of the F.B.I. raid and the guilty plea

of Craig Dickson. This was a clear abuse of the court's discretion. (RP 1919).

H. 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.

1. *The checks payable to the order of DI&M that were seized by the F.B.I. belonged to the Company and were not a separate asset from the Company.*

It is undisputed that the checks were the property of DI&M. The Petitioner, in Case No. 10-CR-180-EFS, in the United States District Court, Eastern District of Washington, filed a petition titled Daneille Dickson Statement of Right, Title and Interest in Property Subject to Criminal Forfeiture, Petition for Hearing to Adjudicate Interest in Property and Request for Production (hereinafter "Daneille Dickson Statement of Right"). (Ex. R-182). Therein, Daneille Dickson admitted the checks seized from Craig Dickson on August 31, 2010 were revenue of DI&M and were acquired and accumulated during her marriage to Craig Dickson and she claimed a community property interest in the checks of DI&M. Craig Dickson testified the checks seized by the F.B.I. were the property of and payable to DI&M. (RP 1884 and 1885). The DI&M checks were in Craig's bag and seized by the F.B.I as he was leaving for work. (RP

194). Therefore, both parties agreed that the checks totaling \$448,470.47 were assets of DI&M and received in the ordinary course of business from purchasers of its inventory of recycled metals.

The trial court had no basis in evidence produced at the trial to rule that the \$448,470 of checks payable to DI&M was a separate community asset. The trial court may only divide assets that are in existence at the date it enters its ruling. *In re Marriage of White*, 105 Wash. App. 545, 20 P.3d 481 (2001). Therefore, the trial court abused its discretion when crediting Craig Dickson with receipt of \$448,470 of checks payable to DI&M.

2. *The \$448,470 of checks payable to DI&M were an asset of DI&M and included in the value assigned to DI&M by the trial court.*

The trial court erred and abused its discretion when it determined the \$448,470.47 of checks payable to DI&M were a separate community property asset of the Dicksons. The trial court correctly stated the need to avoid duplication and counting the same asset within the DI&M value and then again as a separate community asset. (RP, July 14, 2011, page 69). The trial court made no finding of fact that the checks payable to DI&M were not a corporate asset, nor did it enter a finding that their value was not included in the value of \$3,000,000 assigned to DI&M.

The Court ruled the forfeited assets should be assigned to Craig Dickson when determining net worth. (CP 815 and 816). Craig Dickson was already penalized because the value of the DI&M stock assigned to him was valued as of the July 26, 2010 trial date and without any diminution in value on account of the assets seized by the F.B.I. and forfeited to the United States. The result of treating the \$448,470.47 of checks as a separate asset is to penalize Mr. Dickson twice for the value of the checks forfeited. First, when DI&M had \$448,470.47 of sale proceeds seized by the F.B.I. without a correspondent reduction to its value. (CP 817 and 818). Secondly, when the trial court created a new community asset consisting of the forfeited checks and charged Mr. Dickson with its receipt. (CP 816). The trial court correctly treated cash seized from the Company's two bank accounts (\$106,004 and \$40,370) and later forfeited as a Company asset and not a separate community asset. (CP 816). The trial court abused its discretion by not granting the same treatment to the \$448,470.47 of checks payable to DI&M.

3. *The valuation assigned to DI&M by the trial court was based upon the Hall #3 valuation method and assumed a continuing business that included accounts receivable and payments on account.*

The trial court determined a value for DI&M using the Hall #3 valuation method as interpreted and applied in the valuation report of Mr.

Brajcich, Petitioner's expert. (CP 817 and 818). Mr. Brajcich stated DI&M was an active, going business. (RP 618 and 619). It was not a business that was to be liquidated and valued at its net asset value. This is reflected in Mr. Brajcich's valuation at Ex. P-34, pg. 4, where Mr. Brajcich determined the average earnings of DI&M in the prior 3½ years ending on December 31, 2008 and used that income stream to value all assets of DI&M, including the intangible asset of goodwill.

Mr. Brajcich understood DI&M used cash to make purchases of scrap metal from suppliers. Cash was a necessary asset in order to run its business and purchase inventory. (RP 619). The business model of DI&M required cash to purchase inventory, the inventory would be processed and sorted before being sold. The sale proceeds would be deposited in its bank account and the cycle would begin anew.

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). Mr. Brajcich increased the income reported on the DI&M tax returns by \$40,000 under the line item "Cash in Car" in his computation of Net Adjusted Excess Profit. (Ex. P-34, pgs. 3 and 4). The result of this increase to Net Adjusted Excess Profit was to increase the value of goodwill by \$160,000 (\$40,000 multiplied by a cap rate of 4). The trial court adopted Mr. Brajcich's report with the exception of the

amount determined to be the reasonable compensation for Mr. Dickson to operate DI&M. (CP 818). The trial court then found the value of DI&M to be \$2,500,000, not including the value of the real estate its business operates from at N. 907 Dyer Road and 6328 E. Dean Avenue.

The cash in corporate bank accounts and checks of DI&M seized by the federal government were generated in the ordinary course of business and were assets of DI&M. (RP ____). The cash and checks were an asset of DI&M and included in the \$2,500,000 value assigned by the trial court, and not a community property asset separate and apart from DI&M. The trial court abused its discretion by treating the checks as a separate asset of the community and charging Craig Dickson with its receipt.

4. *The checks payable to DI&M in the aggregate amount of \$448,470 were not listed as an asset on the Joint Trial Management Report of Petitioner during the 2010 trial.*

The last Joint Trial Management Report submitted by the Petitioner during the 2010 trial listed total assets of \$5,442,932. DI&M was valued at \$3,000,000 and no listing was made for DI&M' accounts receivable or payments on such accounts. The failure to list accounts receivable of DI&M as a separate asset was not an oversight by Petitioner.

Petitioner's expert, Mr. Brajcich, was fully aware of the existence of accounts receivable and he included their value in his valuation of

DI&M. (Ex. P-34). When the trial resumed in 2011, the Petitioner filed a revised Joint Trial Management Report that listed the checks totaling \$448,470 as a separate asset and did not reduce the value of DI&M. This claim was in direct contradiction to Daneille Dickson Statement of Right filed by Petitioner in the federal forfeiture proceeding under Cause No. 10-CR-180-EFS. (Ex. R-182). The assets of the community were reduced, not increased, in the wake of the forfeiture. It was an abuse of the trial court's discretion to accept the contradictory and unsupported position the Petitioner and treat the \$448,470 of checks payable to DI&M seized on August 31, 2010 as a separate asset following the forfeiture.

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 (CP 815) when Charging Craig Dickson with Receipt of 100% of the Value of the Forfeited Community Property Assets.

1. *Acts of Craig Dickson resulting in the forfeiture of community property assets occurred during the marriage, before the date of separation.*

Craig Dickson's management of DI&M created the income the community used to acquire the assets accumulated during the marriage and fund the family's lifestyle. Craig Dickson's business practice was to withdraw cash daily from DI&M' bank accounts and used the cash to purchase scrap metal from customers. Many days more than one withdrawal would be made due to the supply of scrap metal being sold to

DI&M. The business practice of withdrawing cash to purchase inventory was known to Daneille Dickson, who had made withdrawals herself. Petitioner's expert, Mr. Brajcich, was aware of the practice and understood it was the normal business practice of DI&M.

The cash withdrawals in the ordinary course of business at DI&M was the basis for the criminal structuring charges brought against Craig Dickson occurred during the time period of January 1, 2005 through April 30, 2008. (Ex. P-76, page 9). Thus, all management actions of Mr. Dickson that were the basis for the forfeiture of assets occurred during the marriage and before the date of separation in August of 2009.

The Petitioner repeatedly asserted during the trial the decision in *Griswold v Griswold*, 112 Wash. App. 333, 48 P.3d 1018 (2002) required the trial court to charge Craig Dickson with the value of the assets forfeited. In *Griswold*, the value of the family home depreciated after the date of separation and on account of the failure of Ms. Griswold to maintain the home. The actions of Craig Dickson occurred during the marriage and more than a year before the date of separation. Therefore, the *Griswold* case is not applicable and the forfeiture should be a community liability shared equally by husband and wife.

2. *Acts of Craig Dickson were undertaken while managing DI&M for the benefit of the marital community.*

The business management skills of Mr. Dickson were directly responsible for the growth and income generated by DI&M. The income from DI&M was the source of all the assets acquired during the marriage of Dicksons. (RP Volume III, page 357). As the Company grew, Daneille Dickson worked in the office less and would do bank runs on occasion. (RP Volume III, page 357).

Daneille Dickson testified that all assets forfeited in the Plea Agreement (Ex. P-76) were community property assets and purchased as a result of the earnings and revenues generated by DI&M. (RP 1641). Mr. Dickson worked six days a week building the business. (RP 1643). Mr. Dickson managed DI&M and his actions were for the benefit of the company. (RP 1644). The management of DI&M by Mr. Dickson allowed Daneille Dickson to stay at home, travel and play tennis. (RP 1644).

The acts of Mr. Dickson that led to his Guilty Plea and forfeiture of community property assets acquired during the 2005-2008 time period were committed in the management of DI&M and for the benefit of the community as admitted by Daneille Dickson. If a tortious act is committed in the management of community property and for the benefit

of the community, the community is rendered liable for the act. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 21 Wn. App. 886, 586 P.2d 1207 (1978). The decision in *Bergman v. State*, 187 Wash. 622, 60 P.2d 699 (1936) is distinguishable because Mr. Dickson's acts were for the financial benefit of the community. Whereas, in *Bergman*, the act of arson in burning down the store building housing the community furrier business was destructive of the community business.

3. *The criminal forfeiture was a community liability that should be shared equally.*

In Re Marriage of Clark, 13 Wn. App. 805, 811, 538 P.2d 145, 149 is cited as authority to charge dissipation of assets against Craig Dickson. The case is easily distinguished. Mr. Clark over a period of years spent substantial funds from his earnings purchasing alcoholic beverages and thereby depleting the community assets.

Craig Dickson's management of DI&M created the substantial assets and standard of living the Petitioner readily enjoyed. (RP 1641). There was no dissipation of assets by Mr. Dickson (RP 1645). Mr. Dickson worked six day per week operating DI&M. Those efforts created the income from DI&M that the community used to purchase the assets acquired from January 1, 2005 through April 30, 2008. The community should be liable for the forfeiture of assets.

4. *The acts of Craig Dickson did not constitute waste of community assets.*

See *Griswold* where Mr. Griswold's overall investment experience for the benefit of the community overcame one \$16,000 investment loss.

5. *Petitioner exercised her right to petition for the return of her community one-half interest in the assets forfeited, but voluntarily entered into a Stipulation for Settlement. Therefore, Ms. Dickson, on advice of criminal law counsel, gave up her community property interest in each asset forfeited.*

Phillip Wetzel served as counsel for Ms. Dickson. (RP 7/14/11, p. 74). Mr. Wetzel met with representatives of the U.S. Attorney's office and reviewed the files and records of case No. 10-CR-180-EFS. (RP 7/14/11, p. 74). With Mr. Wetzel's assistance, on May 5, 2011, the petitioner filed Daneille Dickson's Statement of Right stating each asset forfeited by Craig Dickson was community property, and claiming a 50% interest in each asset that was vested and superior to the federal governments. (RP 7/14/11, p. 85; Ex. R-182). Prior to trial commencing, Ms. Dickson entered into a Stipulation for Settlement dated July 6, 2011, and received \$15,000 cash and two vehicles, a 2006 Lexus GS430 and a 2008 BMW. (Ex. P-108). Pursuant to the Stipulation for Settlement, the Petitioner voluntarily relinquished, assigned and conveyed to the United States any and all interest she had in the forfeited assets. (Ex. P-108). Therefore, it was the voluntary act of the Petitioner, for her own benefit and upon

advice of her criminal counsel, that resulted in her loss in the forfeited assets. The trial court abused its discretion charging the husband with one hundred percent (100%) of the value of the forfeited assets.

6. *The assets forfeited under the terms of the Guilty Plea and released by the Stipulation for Settlement of Daneille Dickson were not before the trial court for allocation, neither at the commencement of the hearing on July 13, 2011, or when the trial court issued its ruling on August 11, 2011. The trial court erred in crediting the husband with assets that the Dicksons no longer had an ownership interest to allocate.*

The assets forfeited to the United States by the husband released by the July 6, 2011 Stipulation for Settlement of the wife were not before the trial court for distribution at trial which commenced on July 13, 2011. Both the husband and wife had previously conveyed their interests in the assets forfeited to the United States. "If one or both parties disposed of an asset before trial, the court simply has no ability to distribute that asset at trial." *In Re White v. White*, 105 Wn. App. 545 (2001). Therefore, the trial court erred when it credited these assets to the husband.

Attorney Fees

Appellant, pursuant to RAP 18.1(b) requests an award of attorney fees for his costs and fees incurred in this appeal. The necessary affidavit of fees and expenses will be filed in accordance with RAP 18.1(d).

V. CONCLUSION

The court clearly 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, to determine if there is a need for maintenance and Appellant's ability to pay; the duration of maintenance if a determination of need and ability to pay is established. Further a determination needs to be made if there is a need for the Respondent to pursue any further training.

There were no personal or real property accumulated by the parties in their marriage to be awarded to either party except for nominal items. Nevertheless the trial court imposed an ongoing maintenance obligation to be remanded and recalculated.

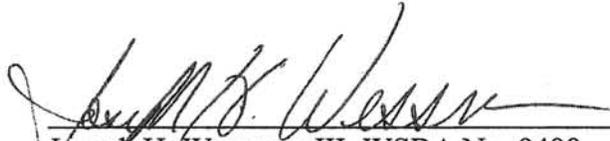
The court should reverse the award of attorney fees since the award was made without a finding of Appellant's ability to pay.

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.

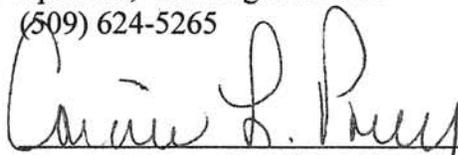
Because of the court's seemingly intent to impose fees as a penalty, rather than based on the statutory requirement, it is requested that upon remand that this court direct that all future matters be heard in a different department.

Finally, Appellant should receive an award of attorney fees.

Respectfully submitted this ~~1/4~~ day of January, 2013.



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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 14th day of January, 2013, the foregoing APPELLANT'S OPENING 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

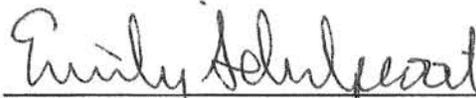
- By Hand Delivery
- By U.S. Mail
- By Overnight Mail
- By Facsimile Transmission
- By Email to

*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 14th day of January, 2013, the foregoing APPELLANT'S OPENING BRIEF was caused to be served to the following:

Martin L. Salina
824 U.S. Bank Building
W 422 Riverside Ave
Spokane, WA 99201

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



Emily Schilperoort