

FILED

OCT 11 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 315975

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

IN RE THE MARRIAGE OF:

DEBRA M. ALDRIDGE

Respondent,

and

WILLARD D. ALDRIDGE, JR.

Appellant.

Chelan County No. 09-3-00572-7

APPELLANT'S OPENING BRIEF

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**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

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I. ASSIGNMENTS OF ERROR

Appellant, Willard Aldridge (“Will”) assigns error to the following rulings in the trial court’s *Temporary Order*, filed on December 28, 2009:

- A. Determining that Will should return \$14,500 of joint funds that had already been spent on community obligations;
- B. Determining that Will should be responsible for all obligations related to the parties’ residence.

(CP 37-41.)

Will assigns error to the following rulings in the trial court’s *Order to Enforce Temporary Order*, filed on December 15, 2010:

- A. Denying Will’s Motion for Reconsideration;
- B. Refusing to reconsider the order that Will should return \$14,500 of joint funds that had already been spent on community obligations;
- C. Determining that Will had the past and present ability to comply with the order and had intentionally failed to do so;

D. Refusing to reconsider whether Will should be responsible for all obligations related to the parties' residence.

(CP 64-67.)

Will assigns error to the following portions of the trial court's *Findings of Fact and Conclusions of Law*, filed on December 12, 2012:

- A. Determining that the wife, Debra Aldridge ("Debra") quit her job as a nurse to devote her efforts to the parties' real estate projects.
- B. Determining that the Poolside Apartments are a community asset;
- C. Determining that the parties' residence on Satterlee Road is a community asset;
- D. Awarding the Poolside Apartments to Debra;
- E. Awarding 11% of Will's Civil Service Retirement to Debra;
- F. Failing to account for the use of funds during separation;
- G. Forcing the sale of the parties' residence and awarding 58% of the proceeds to Debra and 42% of the proceeds to Will;

- H. Awarding the right to market and sell the home to Debra;
- I. Awarding the right to reside in the home prior to sale to Debra;
- J. Awarding 44% of the total assets and 68% of the community assets to Debra and awarding 56% of the total assets and 32% of the community assets to Will;
- K. Awarding \$10,000 in attorney's fees to Debra;
- L. Awarding an heirloom china cabinet inherited by Will (belonging to his children's grandmother) to Debra.

(CP 276-300.)

The trial court erred by making the following rulings in the *Order Granting in Part and Denying in Part Respondent's Motion for Reconsideration* (entered on March 28, 2013):

- A. Awarding \$5,000 in attorney's fees to Debra;
- B. Refusing to change the characterization or distribution of the Poolside Apartments;
- C. Refusing to account for Debra's surplus cash flow during separation;
- D. Refusing to reconsider Will's request to remain in the parties' residence until sale or to grant reimbursement

for window installation and other labor, etc. (Number 4, CP 374)

- E. Refusing to change its award of the china cabinet to Debra.

(CP 372-374.)

Will assigns error to the following ruling in the *Order on Motion to Amend/Clarify/Enforce Decree of Dissolution of December 12, 2012*:

- A. Refusing to allow him to continue to reside in the Satterlee home.

(CP 376.)

Will assigns error to the following portions of the *Order on Petitioner's Motion Regarding Post Dissolution Issues Related to Adjustment to House Sale Price, Payment of Attorney's Fees and Attorney's Fees on Appeal* (filed on June 26, 2013)¹:

- A. Awarding anticipatory attorney's fees to Debra (Section 3, page 2).

¹ This document was filed after the Designation of Record was submitted and will be included in the Clerk's Papers through a Supplementary Designation of Record filed simultaneously with this brief; therefore, the exact citation to the record on

II. ISSUES PRESENTED

- A. Did the trial court improperly characterize the Poolside Apartments when it determined that the property had been purchased with separate funds, but chose to rely on events subsequent to acquisition and the names listed on the title to characterize the Poolside Apartments as a community asset?
- B. Did the trial court improperly characterize the parties' residence when it determined that the property had been acquired with separate funds, but determined it to be a community asset?
- C. Did the trial court improperly award attorney's fees when it awarded \$10,000 to Debra without a finding of financial need or intransigence? Did the trial court err when it failed to indicate on the record the method by which it calculated the fee award?
- D. Did the trial court err when it awarded anticipatory attorney's fees on appeal to Debra?
- E. Did the trial court abuse its discretion when it distributed property in this case?
- F. Did the trial court demonstrate partiality sufficient to require remand to a different judge?

III. STATEMENT OF THE CASE

Willard and Debra Aldridge were married for the second time on March 7, 2001 in Mount Vernon, Washington. (CP 4, 16.) The parties had previously been married in 1986 and divorced in 1994. (CP 8, 27.) They have no children together. (CP 3, 16.)

Will, 64 years-old, is an architect. (CP 282-83.) He began working for the federal government in about 1982 and retired in 2004 (approximately 22 years). (CP 283.) Additionally, he spent a great deal of his own time and resources on developing real estate. (CP 283.)

Debra, 55 years-old, was a nurse until she decided to retire in 2004. (CP 283.)

After divorcing in 1986, the parties resumed a relationship over time until they entered a committed intimate relationship in 1999. (CP 283.) At the time they remarried, both parties owned property. (CP 285.)

Will owned four properties when he and Debra remarried. The "Yokeko" property that he had purchased in 1995 and sold in 2003 for net proceeds of about \$76,907.63. (CP 285; RP 23, 306, 310, 439, 447, 491, 530-32, 674.) The "8th Street" property, which he sold in 2001, resulting in a net proceeds of \$32,068.48. (CP 284; RP 306, 436, 491, 530-32.) The "408 Commercial" property, which he purchased in 1977 and sold for a net proceeds of \$535,796. (RP 306,436, 439, 489, 530-32.) Lastly, Will also owned the "commercial side" of the "Deaconess" property, which has not been sold but has been valued at approximately

\$1,007,000. (CP 295.) Prior to remarriage, Will owned approximately \$1,651,772 in assets.

Debra owned a residence located on Peters Lane that she had received as her separate property in her first divorce with Will. (CP 285; RP 490.) She sold it in 2002 for \$305,000 and net proceeds of \$91,857.42. (RP 309.) Prior to remarriage, Debra owned approximately \$91,857.42 in assets.

After remarriage, the parties acquired several properties. The only properties at issue on appeal are the "Poolside" property (a 22-unit studio apartment complex located on N. Mission St. in Wenatchee, WA) and the parties' residence (located on Satterlee Road in Anacortes, WA).

The parties separated in September of 2009, after approximately 8 years of marriage. (CP 4, 8, 17.) Debra left the parties' residence and began living at the Poolside Apartments. (CP 290.). On November 4, 2009, she filed for dissolution and simultaneously moved for temporary orders. (CP 6-9.)

TEMPORARY ORDERS: In her motion, Debra complained that Will had removed \$11,500 from a joint account associated with Poolside. (CP 8-9.) She also alleged that Will had removed \$4,500 from "her" savings account, though she admitted the

account was joint prior to the court's ruling. (CP 9.) Debra asked the trial court to order Will to return the money to her. (CP 8-9.) She also requested that the court award her the use of and income from Poolside, and that Will be awarded the use of and income from Deaconess. (CP 6-9.) Debra stated that she intended to remain at Poolside, so Will should pay the mortgage, taxes, and all other expenses on the parties' residence. (CP 6-9.)

Will responded, stating that he removed the money from joint accounts after Debra had taken \$21,000 from a joint account and emptied out another. (CP 30.) He then stated that he used the money he removed to pay community obligations that were supposed to have been paid with the money that Debra had removed from their joint account. (CP 30.) He listed those expenses in a declaration signed under oath. (CP 30-31.) He also argued that the Deaconess property had been purchased with his separate funds in 1998, prior to his second marriage to Debra, and it was therefore his separate property. (CP 27.)

Debra responded, admitting that money had been set aside for construction on the parties' residence, but arguing that the money was really her separate property despite the joint nature of the account. (CP 33-34.)

The trial court entered minutes after the motion hearing on temporary orders. (CP 36.) The record states that the court did not review Will's financial declaration due to its length. (CP 36.) The court awarded the use of Poolside (and its income) to Debra. (CP 36, 38.) Will was awarded the use of Deaconess (and its income) as well as the use of the parties' residence. (CP 36, 38-39.) Will was ordered to pay the mortgage, insurance, and taxes on the parties' residence. (CP 39.) The court also ordered that Will would be responsible for the cost of any work done on the parties' residence unless the parties agreed otherwise. (CP 36, 39.) In addition to having been ordered to pay all of the aforementioned community obligations, Will was also ordered to return \$14,500 of joint funds to Debra, while Debra was allowed to keep the \$21,000 she had withdrawn, though she was ordered not to spend it. (CP 36, 40.)

Will filed a motion for reconsideration. (CP 42.) Will objected to the treatment of the Deaconess property as a community asset, arguing that he was deprived of any benefit from Poolside (a community asset) while simultaneously saddled with the community liabilities to maintain the parties' residence, complete its construction, and to pay other community

obligations. (CP 47.) With equal income and no obligations, Debra was unfairly enriched at his expense. (CP 29, 47.) Will also requested that the court reconsider its order that he repay the money he had previously withdrawn. (CP 47.) He submitted declarations stating that he did not have the ability to repay the money as it had already been spent on community obligations. (CP 47.)

Debra then made a motion to enforce the temporary order. (CP 49.) She complained that Will had not yet repaid her the \$14,500 in compliance with the temporary order. (CP 50.) Will filed a declaration stating that the funds had been expended to pay for tax preparation and for real estate taxes and construction invoices related to the parties' residence. (CP 55.)

At hearing, Debra argued that Will had not filed a declaration stating how the funds he had withdrawn were spent even though Will had, in fact, filed two such declarations on November 20, 2009 (CP 26) and February 5, 2010 (CP 54). (CP 62.) The court, ignoring Will's declarations, accepted Debra's argument and stated that it was troubled there was no documentation as to where Will spent the money. (CP 62.) The trial court denied the motion

for reconsideration, granted Debra's motion for enforcement, and awarded \$500 to Debra for attorney's fees. (CP 63-67.)

TRIAL: The trial in this matter lasted for five days. The main issues identified at trial were: 1) the nature of the parties' relationship when they resumed seeing each other after their first divorce (whether the parties immediately engaged in a "committed intimate relationship" prior to remarriage, or whether a "committed intimate relationship" evolved over time); 2) the characterization, value, and distribution of property; 3) accounting for community funds during separation; and 4) Debra's request for attorney's fees. (CP 276-300.)

a) Committed Intimate Relationship

The trial court determined that the parties engaged in a committed intimate relationship after March 1, 1999. (CP 283.) Will does not assign error to this finding on appeal.

b) Characterization, Value & Distribution of Property

On appeal, Will assigns error to the court's findings and conclusions with respect to:

- i. The Poolside property;
- ii. The parties' residence;
- iii. Retirement funds; and

iv. An heirloom china cabinet.

The Poolside Property: The following facts are undisputed: The parties purchased Poolside as a foreclosure in May of 2002. (CP 284; RP 45, 69.) The property was extremely distressed, and Debra was not in favor of the investment. (RP 69, 363, 508.) Poolside was acquired through a down payment of approximately \$32,000, which was obtained through a 1031 Tax Exchange from one of Will's separate properties. (CP 284; RP 362-63, 406, 419, 424-25, 491, 509, 536, Exhibit 12A.) The parties obtained a loan (in both their names) from Will's friend, Tryg Fortun, for the balance of the purchase price. (CP 284; RP 69, 362-63, 424-25, 510, 536.) The property was titled in both parties' names. (CP 284.) Debra did not contribute any funds to the purchase of the property or to remodeling the property. (RP 69, 503, 509, 687.) The property (which was characterized as a "cigarette butt project") required intensive remodeling and modernization that required approximately a year and a half to complete. (RP 69, 72, 508.) Many units were totally gutted and refurbished. (RP 69, 72, 508.) Both parties worked on the project. (CP 284; RP 72, 509.)

Both parties requested that they be awarded Poolside. The court determined that Poolside was a wholly community asset and awarded it to Debra. (CP 284, 292.)

The Parties' Residence: The parties decided they wanted to find a residence on waterfront property and discovered property that suited them at 13407 Satterlee Road. (RP 29.) The parties borrowed approximately \$445,000 from Will's friend, Tryg Fortun, to acquire the real estate. (RP 29, 314.)

The property had a small cabin on it, which the parties lived in for approximately a year and then decided to tear it down. (RP 30, 314-15.) The parties decided to build a new home on the property, and Will personally designed it and served as general contractor on the project. (CP 284-85; RP 30, 316, 450.)

Will contributed funds from his 1031 exchange of his separate property (the 408 Commercial building) in an amount that equaled approximately \$250,000-\$275,000 to build the new Satterlee residence. (CP 285; RP 490, 645, 674, 688.) Debra testified that Will also used funds he received from Deaconess (most recently, \$12,000) to help pay for the expenses of building their residence. (RP 411-12.)

Both parties requested that the court award them the residence. (RP 36, 458.) The court determined that the home was a wholly community asset, and ordered that the house be sold and 58% of the proceeds distributed to Debra and 42% distributed to Will (CP 286, 293.)

Retirement Funds: At trial, Will testified that his federal pension made him ineligible for social security, but that his wife was able to collect social security. (RP 629.) Will testified that he contributed to social security before going to work for the government (22 years previously), but other than small portions for short-term jobs, he had not contributed to social security since becoming a government employee in 1982. (RP 629; Exhibit 9A.) Will also testified that if he were forced to maintain a survivor's benefit on his pension, the benefit he receives would be reduced by 15%. (RP 630.) This testimony was undisputed.

The trial court refused to consider that a portion of Will's pension was partially in lieu of social security. Nor did the court consider that by giving Debra a percentage of Will's pension (rather than some other method of accounting for the community value in the pension) it was penalizing Will an additional 15% of

his retirement support. Debra was awarded 11 % of Will's pension (approximately \$297/month). (CP 293.)

Heirloom China Cabinet: One of the items of personal property to be distributed was an antique china cabinet. At trial, Will requested that he be awarded the china cabinet because it was an heirloom from his first wife's grandmother and had sentimental value to his children. (RP 610.). Debra made no special request.

Nevertheless, the trial court awarded the china cabinet to Debra. (CP 295-300.)

c) Accounting for Community Funds During Separation

At trial, Debra testified that she had moved into the Poolside's manager apartment in September of 2009. (CP 14.) At trial, Debra submitted all of the accounting worksheets that she had kept (pursuant to the court's temporary order) that showed the profit she received from Poolside every month. (Exhibits 5A1-5A9, 5 B1-B12, and 5C1-C5). They show an average income of \$3,896.78/month in 2010, \$3,740.79/month in 2011, and \$4,364.05/month in 2012. Overall, Poolside provided Debra with approximately \$168,022.68 of income in community funds since separation of the parties in September of 2009.

Debra's Financial Declarations (which experiment with various methods of presenting her income and expenses) often use the depreciated version of her income from her tax returns, though as she herself states in a declaration she filed a few days after filing for divorce: "[t]he court is aware that the amount of income reported on a tax return for rental properties is not necessarily the amount of money that is available from the rental stream due to depreciation expenses that are paper transactions." (CP 33.)

d) Attorney's Fees

At trial, Debra testified that she had been able to pay for her attorney's fees in this case. (RP 209-10, 297.) She also testified that she had been paying her bills (including attorney's fees, as previously stated) and being able to put aside savings. (RP 378-79.) She testified that she had a personal checking account and a savings accounts that together totaled to approximately \$11,000, in addition to a CD account containing \$20,000. (RP 202-03.) At the conclusion of trial, the trial court awarded Debra 44% of the total assets and 68% of the community assets, totaling to well over \$805,046. (CP 293, 300.)

At trial, Debra requested attorney's fees based on financial need and Will's alleged intransigence. (CP 198.) She provided

no support for her argument based on financial need. In support of her argument for intransigence she referenced two events for which the Court already awarded attorney's fees. (CP 198.) She referenced a motion for reconsideration that was not granted. (CP 64, 109, 198.) She also referenced discovery requests that she had made and did not feel were answered to her satisfaction, even though she never made any motion to compel, nor could she demonstrate that she was prejudiced as a result. (CP 198-200.) Finally, she argued that "Mr. Aldridge's trial testimony was also vague and often times confusing" (a statement that rings slightly hypocritical in light of the fact that the record is replete with complaints from witnesses (including Debra herself) who had difficulty clearly articulating details related to the 1031 tax exchanges or to the Section 42 tax credit partnerships.) (CP 200.) The trial court awarded Debra \$10,000 in attorney's fees "[b]ased on the overall property distribution and some of the events of litigation." (CP 294.)

MOTION FOR RECONSIDERATION: Will made a motion for reconsideration, arguing that a) an award of attorney's fees was inappropriate; b) that the court should reconsider its treatment of Poolside in light of Will's \$32,000 down payment from

separate property; that the court should reconsider the appraised value of the property; and the court should account for his wife's excess cash flow during separation; c) a request that Will be allowed to continue residence in the Satterlee home until that property was sold, and d) another request that the antique china cabinet (which had been passed down through a number of generations) and should be his separate property be awarded to him.

With respect to attorney's fees, the court noted that it had not made any finding of intransigence, and as Will had previously been penalized for removal of funds, he ought not to be penalized twice. (CP 370, 373.) The court also noted that it did not make a finding that Debra was unable to pay her fees. (CP 370, 373.) The court then lessened the award of attorney's fees from \$10,000 to \$5,000. (CP 370, 373.)

With respect to the Poolside issues, the trial court acknowledged that the \$32,000 down payment made on Poolside was the separate property of the husband, but refused to alter its ruling. (CP 373.)

With respect to Will's request to remain in the home, the court found that Will ought not to be allowed to reside in the Satterlee

home, because “the Respondent had been in the house for over 3 years and had made no effort to complete the repairs necessary for sale.” (CP 370, 374.)

The court also refused to change its award of the china cabinet to the wife. (CP 370-374.)

MOTION POST-DISSOLUTION:

Shortly after trial, Mr. Aldridge’s attorney withdrew, and, Will conducted all ongoing litigation *pro se*. On June 26, 2013, the trial court awarded anticipatory attorney’s fees to Debra on appeal.² In the hearing minutes entered by the trial court, it “expressed its concern with how petitioner claimed her business expenses and income, but noted that even though it was a little muddled, the Court understood how she calculated her business income and expenses.”³ There is no evidence in the record to explain Debra’s financial declaration, which appears to suggest that she makes no income whatsoever.

² This document was filed after the original designation of record and is therefore being designated simultaneously with the filing of this brief, so a citation to the Clerk’s Papers is not possible; however, the document is entitled: *Motion Hearing*, filed on June 11, 2013.

³ *Id.*

IV. SUMMARY OF ARGUMENT

The record in this case shows that the trial court abused its discretion in finding facts for which there was no substantial evidence in the record and that it erred in its conclusions as a matter of law. Further, the trial court demonstrated consistent prejudice against Will in its inequitable distribution of property and unfair management of the case. Therefore, the Appellant respectfully requests this Court to remand the matter for proper characterization and distribution of property to a different trial judge.

V. ARGUMENT

- A. The trial court erred as matter of law when it concluded that the Poolside and Satterlee properties were entirely community property.**

POOLSIDE

The trial court made several findings of fact prior to its conclusion that the Poolside was community property.

- a) Poolside was purchased with a down payment of \$32,000 in cash that was obtained through a 1031 tax exchange of a duplex that was Will's separate property. (CP 284)
- b) Poolside was "acquired in both parties' names." (CP 284)

- c) The remainder of the purchase price for Poolside came from loans obtained by the parties in both their names. (CP 284) The trial court failed to make a finding as to what the purchase price of the property actually was.
- d) “Both parties worked extensively on the project. In addition, for periods of time, petitioner managed the operations of the building.” (CP 284)

STANDARD OF REVIEW: “The trial court’s classification of property as separate or community is a question of law.” *In re Skarbek*, 100 Wn.App. 444, 447, 997 P.2d 447 (2000), citing *In re Marriage of Martin*, 32 Wash.App. 92, 94, 645 P.2d 1148 (1982). Questions of law are reviewed *de novo*. *State v. Kaiser*, 161 Wn.App. 705, 724, 254 P.3d 850 (2011).

ANALYSIS: The trial court has the duty to characterize the property as either community or separate. *Blood v. Blood*, 69 Wash. 2d 680, 682, 419 P.2d 1006 (1966). Property acquired during the marriage has the same character as the funds used to buy it. *In re Borghi*, 167 Wn.2d 480, 488, 219 P.3d 932 (2009). The character of property as separate or community is established at the date of acquisition. *Borghi* at 484; *In re Zahm*, 138 Wn.2d 213, 978 P.2d 498 (1999).

There is a rebuttable presumption that property acquired during marriage is community property. *Skarbek* at 449. The party asserting otherwise has the burden of proving that property was acquired with separate funds. *Id.* Here, the trial court found that, with respect to the \$32,000 “down payment,” the property was acquired with funds that were Will’s separate property. (CP 284) Therefore, the portion of the property that was purchased with Will’s separate funds is Will’s separate property.

If property is determined to be separate, it remains separate unless clear and convincing evidence is presented that a party intended to transmute the property from separate to community property. *Borghi* at 484. An asset is characterized as of the date of its acquisition and its character does not change thereafter regardless of whether the asset is improved or its value enhanced by property of a different character. *In re White*, 105 Wn.App. 545, 550, 20 P.3d 481 (2001). Here, the trial court made no finding that the presumption in favor of separate property had been rebutted or that Will intended to transmute the property from separate to community property. The absence of a finding in favor of the party with the burden of proof as to a disputed issue is

the equivalent of a finding against that party on that issue. *George v. Helliard*, 62 Wash.App. 378, 384, 814 P.2d 238 (1991).

“Where the buyer acquires legal title at the outset in exchange for a cash payment and an obligation to pay the remainder of the purchase price, the fractional share of the ownership represented by the cash payment will be owned as the cash was owned, and the character of the ownership of the balance will be determined by the character of the credit pledged to secure the funds to pay the seller or to secure payment to the seller.” Harry M. Cross, *The Community Property Law in Washington (Revised 1985)*, 61 WALR 13, 40 (1986).

In addition to the above-described errors, the trial court appeared to consider information that was irrelevant to the determination of the Poolside’s character. The trial court considered events subsequent to the date of purchase and assigned significance to the fact that the title of the property was in both the parties’ names. (CP 284) As previously stated, the character of property is determined at the date of acquisition, so consideration of the parties’ subsequent involvement in the improvement of the property is irrelevant to its characterization. Assigning significance to the names listed on the title is similarly

irrelevant. The Washington Supreme Court has held that “[w]e have consistently refused to recognize any presumption arising from placing legal title in both spouses’ names and instead adhered to the principle that the name on a deed or title does not determine the separate or community character of the property or even provide much evidence.” *Borgi* at 488. Including a spouse’s name on a deed or title “does not evidence an intent to transmute separate property into community property, but merely an intent to put both spouses’ names on the deed or title.” *Id* at 489. “There are many reasons it may make good business sense for spouses to create joint title that have nothing to do with any intent to create community property.” *Id*.

On reconsideration, the trial court stated:

“The source of the \$32,000 down payment that was made on the Poolside was from the separate property of the former husband. In light of the subsequent transactions relating to the Poolside Property, including but not limited to taking title as husband and wife, working on the projects as husband and wife as well as borrowing money as husband and wife using the Poolside as collateral, the Court confirms that it is not going to reimburse Mr. Aldridge for the \$32,000 invested or characterize the property as his separate property.”

(CP 373.)

As it had done previously in the *Findings of Fact and Conclusions of Law*, the trial court relies entirely on irrelevant

evidence to support its conclusion. The majority of the grounds the court cited were events that took place subsequent to the purchase of the property (“working on projects as husband and wife” and “borrowing money as husband and wife using the Poolside as collateral”). Aside from subsequent events, the only other basis the trial court provides is the fact that the title to the property was in both parties’ names. This basis has been specifically identified as insufficient to support a determination of property’s character by the Washington Supreme Court. *Borg* at 488.

Therefore, the trial court mischaracterized the Poolside property and erred as a matter of law. Mischaracterization does not always require remand, however. “Remand is required where (1) the trial court’s reasoning indicates that its division was significantly influenced by its characterization of the property, and (2) it is not clear that had the court properly characterized the property, it would have divided it in the same way.” *In re the Marriage of Shannon*, 55 Wn.App. 137, 142, 777 P.2d 8 (1989). On reconsideration, the trial court made no distinction between categorizing the property as separate property and reimbursing Will for his separate property – it denied both outcomes

simultaneously and on identical grounds (within the same sentence in fact). (CP 373.) It made no suggestion that it relied on other reasoning for its refusal to reconsider the property characterization and distribution. Therefore, it can be concluded that had the trial court properly characterized Will's separate property, it would likely have changed the distribution of property in his favor. Therefore, the Appellant respectfully requests that this Court remand the matter for proper characterization and distribution.

SATTERLEE

The analysis for the Satterlee property is conducted in much the same way as the analysis for Poolside. The trial court found that the Satterlee house was purchased in part by funds that were the separate property of Will. (CP 285.) Yet the trial court did not determine the amount of separate funds contributed by Will. (CP 276-300.) After making this finding of fact, the trial court subsequently ignored it. As in the analysis of Poolside, because property obtained during the marriage has the same character as the funds used to obtain it, the portion of the Satterlee house purchased with Will's separate property is and remains Will's separate property.

For the same reasons cited above, the Appellant respectfully requests this Court to remand this matter for a determination of the amount of Will's separate property that was invested into the Satterlee home and for proper characterization and distribution.

B. The trial court erred when it awarded Debra attorney's fees at trial, on reconsideration, and on appeal.

FEES AT TRIAL AND ON RECONSIDERATION: The trial court awarded attorney's fees to Debra, saying, "[b]ased on the overall property distribution and some of the events of litigation, respondent is also ordered to contribute \$10,000 to petitioner's attorney's fees." (CP 294)

On reconsideration, the trial court made the following ruling:

"The Court has reviewed the previously entered Findings of Fact and Conclusions of Law and Decree and has determined that *the Court did not enter a specific finding of fact that the former husband had been intransigent*, but the Court noted that the former husband had delayed in providing pertinent information to the Court up to and including the time of trial. The parties had agreed to several delays of the trial and the last delay came about as the result of the illness of the former wife's father. *The Court did not make a finding that the former wife was unable to pay her attorney's fees.* In light of the overall financial circumstances of the parties and the Court's award of the community and separate property to each party, the Court will reduce the \$10,000 in fees awarded to Ms. Aldridge to the sum of \$5,000 in fees. The judgment for attorney fees in the December 12, 2012, Decree Judgment #10-9-01565-5 shall be amended accordingly. The interest rate of 12% on said judgment shall be

effective 12/12/12 and shall continue until such time as the judgment is satisfied by Mr. Aldridge.”

(CP 373.)(*Emphasis added.*)

ANALYSIS: RCW 26.09.140 allows a court to award reasonable attorney fees after considering the financial resources of both parties. “Using its discretion, the court balances the requesting party’s need for a fee award against the other party’s ability to pay.” *In re Marriage of Ayyad*, 110 Wn. App. 462, 473, 38 P.3d 1033 (2002). “If the court makes an award, it must state on the record the method it used to calculate the award.” *Id.* An award can be vacated even when it is reasonable if there is no indication in the record of how the court arrived at the figure. *In re Sanborn*, 55 Wn.App. 124, 130, 777 P.2d 4, (1989).

In this case, the trial court itself recognized that it did not properly find that Debra was unable to pay her attorney’s fees. (CP 373.) The trial court also properly recognized that it did not find Will intransigent. (CP 373.) Then, rather than changing its findings to support an award of attorney’s fees or withdrawing the award of attorney’s fees, the trial court cut the award in half, but again did not make the proper findings required to support such an award nor did it state the method it used to calculate the award.

(CP 373.) This is error, and the Appellant respectfully requests that this Court vacate the award.

FEES ON APPEAL:

“The court has examined the financial circumstances of Debra Aldridge as set forth in her updated financial declaration and has reviewed her 2012 income tax return and has determined that *Debra Aldridge has the financial need for assistance with payment of temporary attorney fees to assist her in the defense of the appeal filed by Willard Aldridge, Jr.* The court was not provided with a financial declaration by Mr. Aldridge, and he did not file declarations or affidavits which disclosed his income and resources. Mr. Aldridge included in his notebook some bank statements and credit card statements as well as alleged accounts payable for the Deaconess Commercial and Deaconess Apartments. He did not provide documentation under oath of his monthly income and expenses. The court has determined based on the information submitted by Mr. Aldridge and his sworn testimony taken on June 11, 2013, that Mr. Aldridge has the ability to provide the information to set forth his current income and resources and failed to do so. Based on the information provided and the testimony of Mr. Aldridge, *the court has determined that Mr. Aldridge has the financial ability to assist Debra Aldridge with her temporary attorney fees and costs on appeal and will order him to pay \$5,000 towards such fees which shall be reduced to a judgment.* The temporary fees shall be paid on or before July 10, 2013. If the sum is paid by the due date statutory interest shall not accrue.”⁴

(Emphasis added.)

⁴ This order was entered after the original designation of record and is therefore being designated simultaneously with the filing of this brief, so a citation to the Clerk's Papers is not possible; however, the document is entitled: *Order On Petitioner's Motion Regarding Post Dissolution Issues Related To Adjustment to House Sale Price, Payment of Attorney's Fees, And Attorney's Fees on Appeal*, filed on June 26, 2013.

STANDARD OF REVIEW: “A party challenging the award has the burden to prove that the trial court abused its discretion by making a decision that is clearly untenable or manifestly unreasonable.” *Ayyad* at 473.

ANALYSIS: The trial court awarded fees on the basis of financial need pursuant to RCW 26.09.140, which provides that one party may be ordered to pay a reasonable attorney’s fees for “the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney’s fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.” This language clearly states that attorney’s fees can be awarded *temporarily* (i.e., prior to the final resolution of the matter before the court), but it does not allow for fees to be awarded *anticipatorily*. The clear language of the statute states that a reasonable amount can be awarded for legal services *rendered* and costs *incurred*. Costs must be incurred and services rendered before the court can make an award. There is no authority to support the contention that the trial court is entitled to project an amount that a party might spend

on future attorney's fees and base an award on that amount. The trial court must review the fees charged and the time expended to determine whether the fees are reasonable. *In re Estes*, 84 Wn. App. 536, 929 P.2d 500 (1997); *In re Knight*, 75 Wn. App. 721, 880 P.2d 71 (1994); *In re Sanborn*, 55 Wn. App. 124, 130, 777 P.2d 4 (1989). As Debra argued in her own trial brief, "Proof of fees incurred is necessary to support an award." (CP 156.) No proof of fees can be provided for fees that have not yet been incurred.

Second, the trial court failed to state its method for calculating its award of fees on the record, which is required. *Ayyad* at 473; at 729; *Sanborn* at 130.

Third, the trial court appears to penalize Will for "failing" to provide information in a particular format.⁵ The trial court acknowledged that Will appeared *pro se* and submitted bank statements and credit card statements as well accounts payable for the Deaconess Commercial and Deaconess Apartments.⁶ He was also subjected to questioning under oath.⁷ Then, however, the

⁵ *Order On Petitioner's Motion Regarding Post Dissolution Issues Related To Adjustment to House Sale Price, Payment of Attorney's Fees, And Attorney's Fees on Appeal*, filed on June 26, 2013.

⁶ *Id.*

⁷ *Id.*

trial court concluded that “Mr. Aldridge has the ability to provide the information to set forth his current income and resources and failed to do so.”⁸ This seems particularly heavy-handed in light of the fact that this particular hearing was hard on the heels of a five day trial five months earlier wherein Will’s income and resources were discussed at considerable length (and being retired, neither was likely to change considerably). The implication that there is a law or court rule that obligates Will to provide a sworn financial declaration whenever his wife moves the court for anticipatory attorney fees (which are themselves unsupported by authority) is puzzling. Even more troubling is the continuing pattern of rulings by the trial court that insinuate that some kind of intransigence has taken place without any specific finding or basis for the suggestion.

Fourth, in addition to the absence of legal authority for awarding anticipatory attorney’s fees in general, there is no basis to conclude that the trial court has authority to award attorney’s fees on behalf of the appellate court. Debra provided no such authority in her request. Further, the Rules of Appellate Procedure related to fees on appeal require that certain

⁸ *Id.*

requirements be met prior to the mere *consideration* of a request for fees. An affidavit of financial need must be submitted 10 days before oral argument as required by RAP 18.1(c). An appellate court will not consider an award of attorney fees on appeal under RAP 18.1 and RCW 26.09.140 when a party seeking fees fails to comply with RAP 18.1(c). The party seeking fees must also devote a section of the brief to the topic of attorney's fees. RAP 18.1(a)&(b); *In re Foley*, 84 Wn.App. 839, 847, 930 P.2d 929 (1997). Because an appellate court will not even decide whether a request for fees will be considered (much less awarded) until a brief is filed and an affidavit is submitted to the appellate court 10 days prior to oral argument, it clearly confounds proper procedure for the trial court to thwart the entire process by awarding fees on appeal before the first appellate brief is filed.

Finally, there is no substantial evidence in the record to support a finding that Debra has a financial need for an award of attorney's fees. The test for attorney's fees on appeal is the same as at trial: using its discretion, the court balances the requesting party's need for a fee award against the other party's ability to pay. *Ayyad*, at 473. In *Ayyad*, the court found that the husband earned a net income of \$6,164.48 per month in 1998 and

\$7,408.79 in 1999. *Ayyad* at 467. In contrast, the wife earned a net income of \$1,016.97 in 1998 and \$1,568.53 in 1999. *Id.* The court noted that because the trial court had awarded the wife half of the husband's stock options (equaling approximately \$82,383.85), "it seems virtually certain that Ayyad will have substantial ability to pay her attorney fees and costs on appeal. We deny her request." *Ayyad* at 474. Further, in cases where property distribution is "roughly equal," the parties should be equally able to pay their own attorney's fees. *In re Stenshoel*, 72 Wn.App. 800, 814, 866 P.2d 635 (1993).

In this case, Debra was awarded over \$800,000 in property mere months prior (over \$30,000 of which was liquid) and testified to making several thousand dollars a month from the rents of that property such that she was able to put away quite a bit of savings while paying her attorney's fees. The suggestion that she is unable to pay her legal fees (when in fact she has already successfully done so) lacks credibility.

The trial court's award of anticipatory attorney fees on appeal was error. The Appellant respectfully requests that this Court vacate the order.

C. Did the trial court abuse its discretion when it distributed property in this case?

STANDARD OF REVIEW: “A trial court’s division of marital property will not be reversed absent a showing of manifest abuse of discretion.” *In re Crosetto*, 82 Wn.App. 545, 556, 918 P.2d 954 (1996). Appellate review is limited to whether the trial court’s distribution of property was fair and equitable. *Id.*

ANALYSIS: RCW 26.09.080 requires that the trial court make a “just and equitable” distribution of the parties’ property and liabilities. *Id.* The statute sets forth a non-exclusive list of factors to be considered by the trial court, including the nature and extent of the community property, the nature and extent of the separate property, duration of the marriage, and the resulting economic circumstances of each spouse when the property is divided. *Id.*

“An equitable division of property does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of the parties.” *Id.*

“The court may consider the health and ages of the parties, their prospects for future earnings, their education and employment histories, their necessities and financial abilities, their foreseeable future acquisitions and obligations, and whether the property to be divided should be attributed to the inheritance or efforts of one party. *Friedlander v. Friedlander*, 80 Wash.2d 293, 305, 494 P.2d 208 (1972). Washington courts recognize that consideration of each party’s responsibility for creating or dissipating assets is relevant to the just and equitable distribution of property.” *In re Williams*, 84 Wn.App. 263, 270, 927 P.2d 679 (1996).

In long-term marriages of 25 years or more, the trial court’s objective is to place the parties in roughly equal financial positions for the rest of their lives. *In re Rockwell*, 141 Wn.App. 235, 243, 170 P.3d 572 (2007). In the case of a short marriage, the emphasis should be to look *backward* to determine what the economic positions of the parties were at the inception of the marriage and then seek to place them back in that position.” *Winsor*, “Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions,” *Washington State Bar News*, vol. 14, page 16 (Jan. 1982).

Where one spouse is older and retired and the other spouse is employable, the court does not abuse its discretion in ordering an unequal division of community property.” *Rockwell* at 243.

In this case, the trial court was presented with a relatively short marriage in which Will brought 95.8 % of the real estate assets into the marriage and Debra brought 4.2% of the assets.⁹ Will (who is almost 10 years older than Debra) is in his mid-sixties and the record is replete with testimony about his concern that he financially prepare for retirement. (RP 80-81, 183, 724.) Debra specifically testified that Will told her that “he wanted to do investments for a while and that his retirement from the Navy base would not be enough for retirement...” (RP 403.) Despite Debra’s enthusiastic descriptions of her involvement, there is no question that Will is the primary party responsible for creating the parties’ assets. Debra has certainly contributed to the maintenance, management, and even improvement of such assets, but she was minimally involved with their creation. It is undisputed that Will has a unique skill set that enables him to successfully undertake unattractive development projects. Prior

⁹ Appellant’s trial brief was not filed with the court prior to the designation of the record on appeal. It will be supplemented simultaneously with the filing of this brief. The document citation is *Letter, Scott Volyn to Judge Allan, Docket #188*.

to her involvement with Will, Debra had no experience or interest in property development. All testimony at trial showed that Debra had little interest in any of Will's development projects at their inception (and little interest in property development generally). (RP 117, 359-60, 386, 403, 446, 508.) Debra herself made few (if any) investments on behalf of herself or the marital community. (RP 69, 74-75, 674, 687.) She kept her assets in bank accounts and did not generally invest them.

While there is no question that Debra should be compensated for her efforts, given the duration of the marriage, the age of the parties, and the parties' comparative responsibility for creating the community's assets, the distribution made by the trial court was fundamentally unfair.

Parties' Residence (Satterlee property):

More than any other asset, the Satterlee property was Will's special project. In addition to the incredible amount of separate property he invested in the home, Will invested vast quantities of time and energy, as well. He designed the entire home, served as general contractor, and handled all aspects of the project. Tim Wallace, a friend and neighbor was Will's primary assistant building the house. (CP 69.) He described the kinds of work he

and Will did, included unloading two large forty-foot semi-trucks full of materials in extremely cold weather, constructing the home out of 425-475 tons of concrete; cutting, bending and hauling steel; and digging drainage. (CP 69-70.) He commented that designing and building a house out of concrete and glass is extremely challenging. (CP 69.) Tim commented that he had worked on many jobs with many people, and he didn't think he had ever worked on a more demanding project. (CP 70.) Roger Rohrich, another friend and neighbor, stated that he watched Will build the house for two years. (CP 72.) Will worked all day long, as long as there was daylight, year-round, even in terrible weather. (CP 72.) Roger stated that Will put in "an unbelievable amount of time and work into his home. I know he thought he was doing this so he and his wife could have a beautiful place to live the rest of their life. I would hate to see him have to sell his home after all his hard work." (CP 72.) Another neighbor, Janne Peterson said, "I constantly found it amazing that a person who is my age, middle age, could devote so many hours per day and so many days for two years, to the strenuous physical labor and mental challenges of house construction. Will worked alongside anyone he hired to assist him and often worked alone. I witnessed

him doing all sorts of tasks, no matter how menial or complicated, and no matter how extreme the weather was.” (CP 74.) Lark Kerlee put it this way: “I was remodeling my own home when Will was building his and witnessed the many hours and days that he spent. He worked 8-12 hour days, 6-7 days a week for almost a year and a half.” (CP 80.)

In addition to the money, time, and energy that Will invested into the property, the trial court ordered him to pay the mortgage, real estate taxes, and insurance on the Satterlee home for over three years.

Will spent hundreds of thousands of dollars of his separate funds on the Satterlee home as well as thousands of hours of work. The trial court’s ruling that the house had to be sold and 58% of the proceeds awarded to Debra was fundamentally unfair.

Originally, Will was entitled to continue living in the home until it was sold. (CP 304.) Then, pursuant to one of Debra’s post-judgment motions, the trial Court ordered Will to move out within one month “in order to permit the immediate construction and repair of all interior work needed in the house to ready it for sale.” (CP 376.) The court denied Will’s motion to reconsider saying, “[t]he former husband has been in residence in the home

for three years while the court case has been pending and he has made no effort to complete the repairs necessary for the sale of the home.” (CP 374.) This was a clear abuse of discretion. Will was in fact under no obligation to prepare the home for sale as he had been awarded the use of the home in the temporary orders, he had requested the award of the home at trial, and no court ruling with respect to sale had been made. Further, the trial court *did* rule that Will would be solely financially responsible for any work done on the home unless Debra agreed to the work. (CP 37-41.) The court’s ruling left Will with one month to locate new housing, which was unjustly burdensome. Debra had a place to live, and the parties had sufficient property and income such that there was no need for urgency. The trial court had no reasonable basis for ruling that Will should be abruptly turned out of his residence to prepare the home for sale.

Retirement Funds:

In cases where one spouse is a federal employee and is not entitled to receive Social Security benefits but instead receives a federal pension, it is fair and equitable to compensate the federal employee spouse for this amount since the other spouse will receive Social Security benefits. *Rockwell* at 243-44. A trial

court does not properly evaluate the economic circumstances of the spouses unless it considers the amount of social security benefits received. *Rockwell* at 244.

Will testified that he would not receive social security benefits because of the nature of his federal pension. Debra would receive social security benefits. The trial court erred in refusing to consider this information when it awarded a small portion of Will's pension to Debra.

Further, Will testified at trial that if he were required to maintain a survivorship policy for Debra on his pension, he would lose 15% of the pension payment he would otherwise receive. The trial court ignored this and awarded 11% of his pension to Debra. The actual result, however, was to deprive Will of 26% of the pension he would otherwise receive. Given the small amount of the pension owed to Debra, the existence of a social security benefit receivable by Debra to which Will is not similarly entitled, and the large quantity of property available for distribution in this case,¹⁰ the trial court abused its discretion and unnecessarily

¹⁰ A pension may be divided by awarding 100% of the pension to one party and a compensating asset or marital lien to the other party *In re Wright*, 78 Wn. App. 230, 896 P.2d 735 (1995).

burdened/penalized Will when it awarded Debra 11% of his pension.

Heirloom China Cabinet:

The trial court failed to characterize the china cabinet. It is a family heirloom and was inherited or gifted to Will. Therefore it is his separate property.

The trial court may consider sentimental value in fashioning a just and equitable property distribution. Washington State Bar Association, *Family Law Deskbook 2nd Ed.*, 31.2(3) at 31-4 (2000).

The court provided no explanation as to why it twice refused to give Will the one piece of personal property he was particularly concerned about. This decision is perplexing as Debra made no special request. Given the amount of property available in this case, it is truly inscrutable why the trial court would choose to deprive Will (and his family) of property to which it would appear he is obviously entitled.

The trial court abused its discretion in repeatedly awarding Will's family heirloom to Debra.

Community Funds During Separation:

The trial court erred when it unfairly forced Will to return \$14,500 of community funds to Debra (which had already been spend on community debts), but it simultaneously allowed Debra to retain \$21,000 of community funds. Will was forced to obtain a loan in order to comply with the court order. (RP 677.)

The trial court erred when it unfairly awarded all the community income (over \$150,000 in Poolside rents) to Debra during separation and all the community liabilities to Will (Satterlee mortgage, real estate taxes, and insurance). This court-ordered continued for three years despite Will's repeated requests for reconsideration or even permission to sell property in order to obtain relief.

D. The clear partiality of Judge Allan requires disqualification on remand in order to satisfy the appearance of impartiality.

ANALYSIS: The law requires not only an impartial judge, but that "the judge appear to be impartial." *In re Custody of R.*, 88 Wn.App. 746, 762, 947 P.2d 745 (1997). "The test is whether a reasonably prudent and disinterested observe would conclude that a party obtained a fair, impartial, and neutral trial." *In re Dominguez*, 81 Wn.App. 325, 330, 914 P.2d 141 (1996).

Justice must satisfy the appearance of impartiality. *R.* at 762. In the opinion for *In re Custody of R.*, the appellate court remanded the matter to a different judge after a party asked the trial court, “Are you made at me, your honor?” and the trial court responded, “I don’t like what you did... We don’t like that as judges.” *R.* at 763. The appellate court found that based on that dialogue and the trial court’s denial of the party’s requested continuance, the matter was remanded to a different judge. *Id.*

The following events are just a few of many that demonstrate an ongoing prejudice by the trial judge against Will:

The trial court refused to consider evidence submitted for its review related to the motion for temporary orders. (CP 36.)

The trial court ruled against Will based relying on the absence of evidence that was in fact present. (CP 62.)

Despite the expert testimony of a tax credit attorney, the trial court accused Will of engaging in a “scam” or a “shell game” when it felt the nature of a Section 42 Tax Credit Partnership was too complex to be easily understood. (RP 696-97.)

The court repeatedly penalized Will for not doing things he was not obligated to do. (“[T]he Respondent has been in the house for over 3 years and has made no effort tot complete the

repairs necessary for sale.” CP 370, 374.) (“Mr. Aldridge has the ability to provide the information to set forth his current income and resources and failed to do so.” *Order on Petitioner’s Motion Regarding Post Dissolution Issues*, filed June 26, 2013.)

Throughout trial, the court repeatedly assisted Debra’s attorney and hindered Will’s attorney:

MR. VOLYN: Is there an objection?

MS. SCHMIDT: Well, I think this is unnecessary.

THE COURT: Cumulative.

MS. SCHMIDT: The document speaks for itself.

THE COURT: It does speak for itself.

MR. VOLYN: I wasn’t going to go through every document.

THE COURT: Okay. I’m happy to hear that because I actually am fully able to read these myself so I don’t need them read to me, but if there’s some point you’re going to –

MR. VOLYN: There is.

(RP 377.)

Finally, the consistency with which the trial court’s orders adhered to the proposed orders submitted by Debra, even in the

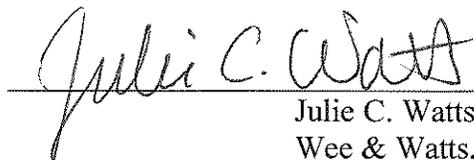
absence of supporting legal authority, results in a strong inference of partiality in Debra's favor.

Therefore, the Appellant respectfully requests that the case be assigned to a different judge on remand.

VI. CONCLUSION

The record in this case shows that the trial court abused its discretion in the finding of facts for which there was no substantial evidence in the record and it repeatedly erred in its conclusions as a matter of law to the significant detriment of Will. Further, the trial court demonstrated consistent prejudice against Will in its inequitable distribution of property and unfair management of the case. Therefore, the Appellant respectfully requests this Court to remand the matter for proper characterization and distribution of property to a different trial judge.

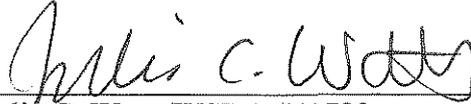
RESPECTFULLY SUBMITTED this 11th day of October, 2013



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CERTIFICATE OF ATTORNEY

I certify that I mailed a copy of the foregoing Appellant's Opening Brief to Kathleen Schmidt, Respondent's attorney, at 427 Douglas Street, Wenatchee, WA, 98801, postage prepaid, on October 11, 2013. A digital copy of the same was emailed to Ms. Schmidt on October 11, 2013 at 8:49 AM.



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