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

Case No. 319181

COURT OF APPEALS OF THE  
STATE OF WASHINGTON, DIVISION III

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SANDRA LYNETTE GUNKEL, *Appellant*,

v.

DANIEL GEORGE GUNKEL, *Respondent*.

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Brief of Appellant

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## I. INTRODUCTION

Wife and Husband married in July of 1979, when she was 21 and he was 23. Wife was a teller at a bank in Goldendale, Washington, where she had worked since her senior year of high school. Husband was a real estate agent, with a high school diploma and a few years of community college. Neither made very much money or had any assets to speak of. A few years later they had their first child, and eventually two more. Wife left the bank to raise the children, run the family home, and to work alongside Husband to build what eventually became Gunkel Orchards, Inc.

As described further below, Gunkel Orchards, Inc. is the economic engine that Husband, Wife and Husband's brother Ron Gunkel built. While wife worked and sacrificed to help build Gunkel Orchards, Inc., only Husband and his brother had control of the business.

Throughout much of the marriage, Wife and Husband worked hard. They rarely relaxed together. They did not eat out at restaurants, take vacations, or see live entertainment. Husband spent his days managing Gunkel Orchards, or determining ways to increase its capital. He did not devote time to family life.

Husband was able to work more than most fathers because Wife bore the primary responsibilities for raising the children and managing the household, inside and out. Wife was the only parent that drove children to activities, attended parent-teacher conferences, and the like. In addition to her duties in the home, Wife also worked for the family businesses. At first for her in-laws George and Georgiana, and then for Gunkel Orchards, Inc..

Wife worked the Gunkel Orchards fruit stand for 17 years. For those 17 years, when the fruit stand was open, she was working at it. She and the children spent day after day at the stand with Wife doing whatever was needed of her. During the years before word processors, Wife was Husband's in-house typist for contracts and the like. Wife spent a couple of hours every evening preparing bank deposits from the various receipts. Wife also contributed to the establishment of the Peach Beach RV Park, even while it was still owned by her in-laws. She did not receive a paycheck for most of this work; her hours were recorded by Husband's mother who would then credit Wife's hours to Husband's paycheck. She has received no credit towards Social Security for any of the hours that were credited towards husband's income.

When her youngest child was in high school, in 2000, Wife started her current job as a teacher's assistant. She currently is employed in the same position. She enjoys the work and hopes to continue. Her hourly rate is \$13.33. Up until this time, Wife worked very hard, pinched every penny and did all that she could do to help the family accumulate land and better the family's holdings.

Eventually, this goal became a reality. Things were financially good for the Gunkel family. The standard of living had increased significantly. The couple remodeled a retreat like home on 120 acres. They no longer needed to pinch pennies and live frugally. Husband and Wife's half of Gunkel Orchards, Inc., together with the family's other business and financial assets were found to be worth more than 2 million dollars. This was the result of quintessentially a community effort over three decades of marriage.

About this time, Husband began to push Wife out. Husband was done with Wife. The parties separated in 2010. During the period of separation Wife was able to make ends meet living off of a meager \$1000 dollars a month in maintenance and some rental income in addition to her own salary. However, her living conditions were nowhere near what she had become accustomed to, nor were they at the standard of living the

Husband continued to live. Ms. Gunkel was again living the frugal lifestyle that she had come out of earlier in the parties' marriage. Wife drained her savings to pay her attorney fees.

The matter was tried before the Honorable Brian Altman on October 29-31, 2012, November 28, 2012, and February 5, 2013. The Court awarded Wife an equalizing Judgment of \$768,372.00, and Husband was awarded the land and business assets. The Court additionally awarded Wife the continued \$1,578.00 per month in maintenance until the equalizing judgment is one-half paid off. After that point, Wife will not receive any maintenance. The parties and the Court anticipate the entire judgment to be paid off within 7 years. The point at which one half the judgment will be paid is likely to be much sooner. Additionally the Court ordered that each party pay their own attorney fees.

Wife appeals the property distribution, the maintenance award, both the duration and the amount, as well as the order that each party pay his or her own attorney's fees at trial. Additionally, Wife's position is that the Court's oral findings on the record do not support the Court's orders with regard to property distribution, spousal maintenance or attorney's fees.

## **II. ASSIGNMENT OF ERRORS**

1. The trial court abused its discretion by not awarding indefinite maintenance to Wife where there is ample evidence supporting an award of indefinite spousal maintenance.
2. The trial court abused its discretion awarding Wife only \$1,000 in maintenance in addition to \$578 in rental income where there is ample evidence of Wife's limited income producing resources, Wife's inability to increase her own income through employment, the standard of living established during the marriage, the duration of the marriage, and the ability of Husband to afford substantially more maintenance.
3. The trial court abused its discretion in leaving Husband with all the income producing assets thus allowing him to support a lifestyle similar to or better than the lifestyle enjoyed during the marriage while Wife will be required to live in a manner far more frugal than she enjoyed during the marriage and will be required to spend down her cash equalizing judgment in doing so.

4. The trial court abused its discretion in not considering the maintenance award to wife, hand in hand with the property award to wife, and failing to either award wife with a larger indefinite spousal support award or a larger portion of the parties' assets.

5. The trial court abused its discretion in not awarding the Dry Creek home to Wife which will require her to use her cash award to purchase a home which will in turn diminish the income the court found she would derive from her cash award.

6. The trial court abused its discretion when it ordered that Husband's obligation to pay maintenance would end when Husband paid one half of the Judgment owing to wife, thus creating an illusory maintenance award not supported by the ample evidence on the record regarding Wife's inability to increase her own income through employment, the standard of living established during the marriage, the duration of the marriage, and the ability of Husband to afford substantially more maintenance.

7. The trial court abused its discretion when it failed to adequately compensate Wife for her years of unpaid contributions, living frugally, and hard work towards assisting Husband in increasing the value of his family's holdings that were determined to be separate property of Husband.

8. The trial court abused its discretion when it failed to consider Husband's separate income producing property and not awarding Wife a larger portion of the parties' community property, specifically the Dry Creek home.

9. The trial court abused its discretion in not compensating Wife for the years of unpaid wages not credited towards her social security when dividing the property and awarding maintenance and attorney's fees.

10. The trial court abused its discretion in its division of property and its award of maintenance and attorney's fees when it failed to consider that after three decades of marriage, Husband's ability to grow his income and continue to amass assets will only grow while

Wife's ability to grow her income and amass assets will come to an abrupt end upon the dissolution of this long term marriage.

11. The trial court abused its discretion in its division of property and its award of maintenance and attorney's fees when it failed to consider that Husband has the unique ability to determine the level of income and distributions to himself each year.

12. The trial court abused its discretion when in its division of property and its award of maintenance and attorney's fees it failed to consider all the additional expenses, beyond housing that Wife will be required to meet using the principal of her cash money judgment thereby limiting her income going forward to an amount that will afford her nowhere near the standard of living that husband will be able to afford.

### **III. ISSUES PRESENTED FOR REVIEW**

1. Whether the Court abused its discretion in failing to award indefinite maintenance to Wife.

2. Whether the Court abused its discretion in failing to award maintenance to Wife in the amount of \$3,500 per month.
3. Whether the Court abused its discretion in failing to award Wife a larger portion of the parties' community property, specifically the Dry Creek home.
4. Whether the Court abused its discretion in failing to award Wife reimbursement of her attorney's fees.

#### **IV. STATEMENT OF THE CASE**

The parties to this case have been married for 33 years. RP (Vol I) 15: 23-24. Wife worked at the same job she had during high school as a bank teller. RP (Vol I) 14: 1-8. Neither party brought any assets to speak of into the marriage with the exception of a small savings account of Wife's. RP (Vol I) 17: 15-21. The parties had three children during the marriage. RP (Vol I) 49: 5-8. Their ages were 25, 29 and 31 at the time of trial. *Id.* In 1981, when the parties first child was born, Wife left her job at the bank and remained at home to care for their first child. RP (Vol I) 14: 18-20; 16: 3. Either at that time, or shortly thereafter, Wife began working in the family business that eventually became Gunkel Orchards, Inc. RP (Vol I) 20: 14-20.

For seventeen years during the parties marriage, Wife worked hard, contributing significantly to the family business. RP (Vol I) 23: 2-5.

She did whatever was needed, including but not limited to cleaning fruit, sorting fruit, selling fruit, and cleaning restrooms in the fruit stand; whatever needed to be done, she did. RP (Vol I) 20: 25-21: 5. She took her children with her to the stand while she worked and simultaneously cared for them from seven in the morning until seven at night. RP (Vol I) 21: 10-13; 25: 23-25. She typically worked ten to twelve hour days. RP (Vol I) 26: 1. When Wife returned home after her 10-12 hour day of working in the fruit stand for Gunkel Orchards, Inc., she would then spend hours in the evening performing various typing duties and sending out accounts receivables. RP (Vol I) 29: 11-16. This continued on from May through October for the years 1981 until approximately 1998. RP (Vol I) 23: 2-5.

During the times of the year that the fruit stand was closed, Wife still performed her evening clerical duties and accounting duties for the business. RP (Vol I) 29: 11-16.

During these seventeen years, Wife was not paid for her work. RP (Vol I) 21-23: 5. Wife would keep track of her hours and provide the information to Husband's mother, Georgiana Gunkel. *Id.* Husband's mother would add an unknown amount to Husband's check. *Id.* Wife has no idea what hourly rate she was paid, whether it was at or below minimum wage, whether she ever was paid over time, or practically speaking what, if any amount of Husband's check included any amount

for Wife's long hours and contributions. RP (Vol I) 22: 3-20.

Almost none of the hours that Wife put in working at Gunkel Orchards were reported to Social Security. RP (Vol I) 22-26. There were a couple of instances where Wife wanted a check so that she herself could pay a bill with money that she earned. RP (Vol I) 25: 1-7; 26: 4-17. Once was in 1984 when she wanted to pay the medical bill associated with the birth of one of her children. RP (Vol I) 25: 1-7. Another was in 1995 when Wife wanted to receive orthodontia treatment and to get braces. RP (Vol I) 26: 4-17. There was one other amount in 1996 when \$457 in wages was reported to the Social Security administration. RP (Vol I) 27: 14-18. At the time of trial, Wife had no recollection of that report or why it was made. *Id.*

During the seventeen years spanning 1981-1998, Wife received no in kind compensation or benefits, such as a car allowance, health insurance, or a cell phone. RP (Vol I) 28: 4-13.

Eventually, in 1999, at Husband's urging that Wife "get a job," Wife went to work for the Goldendale School District. RP (Vol I) 9; 17-21; 71: 12-23. Wife still works full-time at Goldendale School District as a para educator where she earns \$13.33 per hour. RP (Vol I) 38: 4-16. She is at the top of the pay scale for her position and therefore is unlikely to get any increases beyond cost of living increases as state school funding allows each contract period. *Id.* Wife is 55 years old, she loves this job,

she loves working with the children and she is not planning to make any significant career changes at this point in her life. RP (Vol I) 37: 19-38: 4.

Wife's unpaid, unreported, uncompensated hours contributing towards the growth and operations did not end once she began working for Goldendale School District. From 1999-2010, for the next 11 years, Wife continued in the evenings and on her lunch hours, counting cash, making deposits, and accomplishing various clerical tasks that needed to be done for Gunkel Orchards, Inc. RP (Vol I) 31: 9-32: 18. The counting of cash was time consuming, as it involved counting amounts of cash that grew to total 30 to 40 thousand dollars per year annually. RP (Vol I) 65: 15-66: 18. She would spend many evenings after working all day, when everyone else in the home was sleeping performing these duties. RP (Vol I) 47: 11-17.

Wife was not appreciated for her contribution towards Gunkel Orchards Inc., instead she suffered years of physical and emotional abuse by Husband. RP (Vol I) 51-59: 6. As a result, Wife suffers from high blood pressure, anxiety, and fear that has negatively impacted her life and has landed her in the emergency room a couple of times. RP (Vol I) 10: 2-14. Wife desires to receive counseling services to assist her with these issues, however, under her current financial circumstances, counseling has been something she has been unable to afford. RP (Vol I) 82: 4-83: 8.

The parties lifestyle changed dramatically over time. During the

first part of the marriage, the parties worked endlessly, to create a family business that could support three families including the parties to this case, Husband's parents, and Husband's brother's family. RP (Vol I) 44: 1-15. In the early years of the marriage, the parties lived frugally, delayed purchases, went without health insurance, drove cars until they broke down on the road, all in an effort to reach their goal of building a successful sustainable business and achieve financial security. RP (Vol V) 1086: 1-1087:19.

During the last several years of the marriage, the parties were able to build a very nice - retreat like home on 120 acres. RP (Vol I) 88: 8-12. Wife loves that home and hiked there everyday. RP (Vol I) 91: 15-24. She was able to buy many customized accessories for the home including knobs, lighting, countertops and cupboards, all to match the peaceful retreat like environment of the home and it's surroundings. RP (Vol I) 89: 24-99: 2. Even the furniture was custom made using wood from the property, made especially to match and enhance the surroundings. RP (Vol I) 92: 14-25. Husband was receiving, and still is receiving income from six sources. RP (Vol I) 94: 25-96: 5. Gunkel Orchards, Inc., was able to operate without operating loans, and was additionally able to subsidize several other business that all exist without financial liabilities owing to anyone. RP (Vol I) 127: 2-128: 22. Wife was able to spend more on clothing, she could go to events, she could purchase gifts for her

children, and she could save money. RP (Vol II) 310: 15-311: 1; (Vol I) 150: 5-16. The parties have amassed an extraordinary business estate worth in excess of 2 million dollars. RP (Vol V) 1086: 2-5. Husband has always been able to and will be able to continue to determine the amount of annual dividends that he takes from Gunkel Orchards for his own personal use. RP (Vol III) 795: 20-796: 18.

Once the parties separated, Wife's standard of living decreased significantly. Wife now lives in a 33 year old home, built at a time in their lives when they had no money or assets to speak of. RP (Vol I) 17: 15-24. The house needs repairs that Wife has not been able to afford. RP (Vol I) 80: 14-81: 8. Her appliances are 33 years old, and practically speaking, in need of replacement. RP (Vol I) 82: 18-19. She is unable to purchase clothing to update her work wardrobe. RP (Vol I) 81: 18-23. She does not have a working computer and has to use the computer at her job. RP (Vol I) 82: 12-17. She cannot afford tickets to events or any kind of vacation. RP (Vol I) 84: 19-21; (Vol II) 310: 23-311: 1. Her home is partially filled with hand me down furniture that she received from her own parents during the marriage. RP (Vol I) 93: 12-22. She's given much of that furniture to her kids when they were in college so parts of her home are actually empty. RP (Vol I) 93: 7-11. She has been unable to afford counseling to meet her mental health and anxiety needs. RP (Vol I) 82: 20-83: 2.

During the period of separation, from 2010 - through judgment, Husband was ordered to pay \$1000 per month maintenance. RP (Vol II) 309: 23-25. Husband was also ordered to pay \$578 of rental income to Wife. RP (Vol II) 310: 1-4; (Vol V) 1102: 3. In addition to that, Wife receives her net pay of \$1,148.00 per month. RP (Vol I) 34: 15-21.

Once the parties are no longer married and the Decree is entered, Wife's expenses increase. She will then be required to pay for her own cell phone, her automobile insurance, and her internet service. RP (Vol I) 83: 17-84: 12; 82: 12-14.

The Court's oral findings included the following relevant statements:

1. Although the evidence showed at times that it was a deeply troubled marriage, both parties throughout the 33 years or so worked so hard to accumulate assets and improve their gains. RP (Vol V) 1086: 15-18.
2. And the Wife contributed equally in a quintessential rationale for why we have community property laws in this state. Early in the marriage she worked long hours in the fruit stand for no significant monetary compensation. Again, this was quintessentially a community effort over three decades of marriage. RP (Vol V) 1087.
3. One of the parties will have more cash, the other party will

have more real estate. RP (Vol V) 1092: 15-17.

4. Not only is Husband very intelligent, articulate, ambitious, supremely focused, relatively young, and relatively healthy, it's one of the strange ironies of a divorce court that those same self attributes that got him where he is and hold him in such good stead in society actually cost that same person money in a divorce action. RP (Vol V) 1093: 3-10.
5. The Husband in my view has great prospects. His history for the last three decades has been one of steady improvement of an ever increasing upward trajectory in terms of his various enterprises, and I expect that will continue. RP (Vol V) 1093: 15-19.
6. The Wife unfortunately has none of these attributes and none of these options. She'll have her cash. If she's prudent with that cash, that will enable her to live very, very comfortably for the rest of her life. She has her job, but it is unlikely with her health problems, and her prospects, that career improvement is in the [future]... She is basically where she's going to be now. She's also not an entrepreneur to the extent that Husband is. So...whatever I leave her with today, is what she will have for the rest of her life. RP (Vol V) 1093: 20-1094: 9.

The court went on to award Wife an equalizing cash judgment of \$768,372. RP (Vol V) 1097: 8. The court further ordered that the home Wife lives in now be sold and the profits be shared equally between husband and Wife. RP (Vol V) 1094: 15-17. The court then ordered that Wife continue to receive maintenance in the amount of \$1578 until one-half the equalizing Judgment is paid off. RP (Vol V) 1099: 1-2. Husband anticipates that he can pay off one-half the equalizing Judgment within six months. RP (Vol V) 1103: 14-17. The court went on to order all the other real and business property to go to Husband, including the Dry Creek Residence. RP (Vol V) 1097: 17-18.

## V. ARGUMENT

### **A. Wife should have been granted indefinite spousal maintenance in the amount of \$3500.**

RCW 26.09.090 sets forth factors to be considered when awarding spousal maintenance. The statute states as follows:

(1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

(a) The financial resources of the party seeking maintenance,

including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

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

“An 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 future needs of the parties.” *In re Marriage of Crosetto*, 82 Wn. App. 545, 556, 918 P.2d 954 (1996). The trial court is “entitled to consider the property division its determination of maintenance.” *Id.* at 559.

Here, Husband was awarded all of the income producing assets. He was also awarded the Dry Creek, paid in full, and desired by both parties. Wife was awarded a cash judgment, however she will be required to liquidate much of this award to purchase a home for her self.

Additionally, while Wife received half of the value of the parties' community assets, Husband was awarded as his separate property many additional income producing assets. In considering the property division ordered by the court, together with the length of the marriage and an evaluation of wife's future needs as compared to husband's, Wife should have been granted maintenance indefinitely. This is particularly true when Husband's ability to indefinitely continue to receive payment from his income producing assets is considered.

“The standard of living of the parties during the marriage and the parties' post dissolution economic condition are paramount concerns when considering maintenance and property awards in dissolution actions.” *In re Marriage of Estes*, 84 Wn. App. 586, 593, 929 P.2d 500 (1997).

“Maintenance may serve to equalize the parties' standard of living for an appropriate period of time.” *Id.*

Spousal maintenance for a variable period of time, left up to the obligated party, may not serve to equalize the parties' standard of living for an appropriate period of time. *Id.* In *Estes*, the appellate court remanded the issue of maintenance where the trial court ordered maintenance of \$1000 per month to be paid to wife, but only until Husband made a cash payment to wife as required as part of the property distribution. *Id.* at 594. In remanding the case, the Court stated, “Because

the award could be avoided by payment of an amount which Husband was legally obligated to pay, and which the evidence showed he was able to pay, the purported amount of maintenance award was illusory, and is not supported by the court's finding that Wife was in need of maintenance." *Id.* at 592.

When focusing on the post dissolution relative economic positions of the parties, and finding that one party will be in a better position to support a lifestyle more comparable to the lifestyle enjoyed by the parties during the marriage than the other party, given their relative earning power, a continuous stream of income may be appropriate. *In re Marriage of Bulicek*, 59 Wn. App. 630, 635, 800 P.2d 394 (1990).

Here we have a 33 year marriage, assets totaling more than 2 million dollars, and a maintenance award that is likely to end in six months, but theoretically could end immediately. This, when coupled with wife's sacrifices and contributions towards the parties accumulation of wealth, is not appropriate in the amount ordered or for the time ordered.

Here the court also failed to consider the standard of living of the parties during the marriage and the parties' post dissolution economic condition. During the marriage Wife was uncompensated for years of 10-12 hour days of hard work towards the accumulation of the parties' assets.

After the decree entered, Wife now lives in a half empty modest home with 33 year old appliances and hand me down furniture from her own parents. Her net income of \$1148 per month is unlikely to increase. Her maintenance award is illusory as far as its being paid for an appropriate period of time. As stated above, Wife will immediately have to begin liquidating her property award just to secure housing. Meanwhile, Husband will be in a position to support a lifestyle comparable to the lifestyle enjoyed by the parties during the marriage, and even better than the life style enjoyed by the parties as his empire continues to grow. Wife should have been granted indefinite maintenance.

The case at hand is similar to *Morrow*. In *Morrow*, “the parties were married for 23 years before separating, during which time Ms. Morrow sacrificed her earning potential by becoming a homemaker.” *In re Marriage of Morrow*, 53 Wn. App. 579, 587, 770 P.2d 197 (1989). Mr. Morrow was found to be capable of paying maintenance. *Id.* at 588. Additionally, “the court found that Mr. Morrow controlled the salary paid to him by his accounting practice, (and) the fees paid to his accounting practice by other entities” that he owned. *Id.* Mr. Morrow left the marriage with \$500,000 more in resources than did Ms. Morrow. *Id.* at 587. The court also found that Ms. Morrow was unlikely “to achieve, by pursuing additional education and training, the financial independence enjoyed by Mr. Morrow.” *Id.* Under these facts, Ms. Morrow was

awarded indefinite maintenance in the amount of \$2200 per month. *Id.* at 583.

The case at hand is analogous to *Morrow* with the exception of two issues. First, here, Wife did not give up her earning potential by becoming a homemaker, she gave her earning potential over to the family business, Gunkel Orchards, Inc., much of which was awarded to Husband as separate property. Second, in *Morrow*, Mr. Morrow converted community property for separate purposes. However, in the case at hand, Husband benefitted greatly from Wife's contributions to property that she had an expectation of future financial benefit to, which was awarded to Husband as separate property.

The case at hand is also similar to *Washburn*. In *Washburn*, the wife supported her husband through professional school with the mutual expectation that the community would enjoy the financial benefits flowing from the professional degree, but the marriage was dissolved before that benefit could be realized. *In re Marriage of Washburn*, 101 Wn.2d 168, 170-172, 677 P.2d 152 (1984). The question for the *Washburn* Court was whether wife should have been compensated, to which the court answered yes, she should have been. *Id.* at 170.

The court described the situation as follows:

“The cases at bar are representative of a situation which is so familiar as to be almost a cliché. A husband and wife make the mutual decision that one of them will support the other while he or she obtains a professional degree. The educational years will be lean ones for the family not only because of heavy educational expenses, but also because the student spouse will be able to earn little or nothing. Moreover, the supporting spouse may be called upon to postpone his or her own education or forgo promotions and other valuable career opportunities in order to find a job near the student spouse’s school. These sacrifices are made in the mutual expectation that the family will enjoy a higher standard of living once the degree is obtained. But dissolution of the marriage intervenes.” *Id.* at 173.

The court then went on to reason that:

“under the extremely flexible provisions of RCW 26.09.090, a demonstrated capacity of self-support does not automatically preclude an award of maintenance. Indeed, the ability of the spouse seeking maintenance to meet his or her needs independently is only one factor to be considered. RCW 26.09.090(1)(a). The duration of the marriage and the standard of living established during the marriage must also be considered, making it clear that maintenance is not just a means of providing bare necessities, but rather a flexible tool by which the parties’ standard of living may be equalized for an appropriate period of time. RCW 26.09.090(1)(c), RCW 26.09.090(1)(d). Moreover, the factors listed in the statute are not exclusive. The trial court may consider the supporting spouse’s contribution and exercise its broad discretion to grant maintenance, thereby in effect allowing the supporting spouse to share, temporarily, in the lifestyle which he or she helped the student spouse to attain.” *Id.* at 178-179.

Here, we have essentially the same scenario as the court addressed

in *Washburn*. Husband in this case did not obtain a professional degree, he instead amassed more than 2 million dollars in business and income producing assets. For 33 years, Wife worked tirelessly, for no pay, getting no credit towards social security for 17 of those years, with the mutual expectation of future financial benefit. Sacrifices were made. The parties' lifestyle for the first 28 years of the marriage was modest. Wife scrimped and saved and for the last 10 years of the marriage essentially worked two jobs, one for the school district and another at Gunkel Orchards, Inc., in an effort to realize the lifestyle that now only Husband will continue to live. She drove old cars. She lived with old hand-me-down furniture, she went without health insurance. She gave up all educational and career opportunities of her own. She even gave up receiving her own paycheck and credit towards Social Security for herself as her pay and those credits went to Husband.

Finally during the last five years of the marriage, the parties began to live the lifestyle that they both worked so hard to attain. But Husband was done with Wife and the marriage at that point. In 2010, after 31 years of working to benefit Husband's empire, Wife was back in the same situation she was in during the first 28 years of her marriage, and that is exactly where she is today, except she has a bit more cash.

As the court stated in *Washburn*, "marriage is a shared enterprise,

a joint undertaking ... in many ways it is akin to a partnership.’ But every joint undertaking has its bounds of fairness. Where a partner to marriage takes the benefits of his spouse's support in obtaining a professional degree or license with the understanding that future benefits will accrue and inure to both of them, and the marriage is then terminated without the supported spouse giving anything in return, an unfairness has occurred that calls for a remedy.” *Washburn*, 101 Wn.2d at 181-182.

Under the facts of the case at hand, an unfairness has occurred that calls for a remedy. Wife should be paid maintenance indefinitely in the amount of \$3500.

**B. Under the court’s decision regarding spousal support, Wife should have received a larger distribution of property, specifically the Dry Creek home.**

The trial court's distribution of property in a dissolution action is guided by statute, which requires it to consider multiple factors in reaching an equitable conclusion. These factors include (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and (4) the economic circumstances of each spouse at the time the division of the property is to become effective. RCW 26.09.080. In weighing these factors, the court must make a “just and equitable” distribution of the marital property. *In re Marriage of Rockwell*, 141 Wn. App. 235, ¶ 11, 170 P.3d 572 (2007).

RCW 26.09.080.

If the decree results in a patent disparity in the parties' economic circumstances, a manifest abuse of discretion has occurred. *Id.* “In a long term marriage of 25 years or more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives.” Washington Family Law Deskbook, § 32.3(3) at 17 (2d. ed.2000); *see also Sullivan v. Sullivan*, 52 Wash. 160, 164, 271 P. 268 (1928) (finding that for a marriage lasting over 25 years, “after [which] a husband and wife have toiled on together for upwards of a quarter of a century in accumulating property ... the ultimate duty of the court is to make a fair and equitable division under all the circumstances”). The longer the marriage, the more likely a court will make a disproportionate distribution of the community property. Where one spouse is older, semi-retired and dealing with ill health, and the other spouse is employable, the court does not abuse its discretion in ordering an unequal division of community property.” *Rockwell*, 141 Wn. App. at ¶ 12.

In the case at hand, under RCW 26.09.080, Wife should have been granted a larger proportion of the community property than Husband.

The nature of the community property that each party was awarded was unjust and an abuse of discretion. The property that Husband was awarded will continue to appreciate, will increase in value, and will increase Husband's income as it does so. Wife was awarded cash. With

each day that goes by, her money will be worth less. Wife's money will be significantly reduced when she is forced to purchase a residence for herself. Husband on the other hand received a beautiful home owned free and clear by the parties. Understandably the court wanted to keep the income generating properties operating as they do now, thus allowing Husband to keep operating and growing his business with his brother, leaving only the Dry Creek as property that could be awarded to Wife. These parties have "toiled on together for upwards of a quarter of a century in accumulating property." Under these circumstances Wife should have received the Dry Creek home.

Similarly, the court failed to consider that, even though each of these parties entered the marriage with nothing, Husband was awarded a substantial amount of property that was deemed to be separate by the Court. Wife received no separate property. This factor should have been taken into consideration and should have resulted in Wife receiving a larger portion of the community property.

Lastly, if the court had considered factors three and four, the result again would have resulted in a disproportionate property division in Wife's favor. After 33 years of marriage, Wife will leave the marriage with no home and a need to live a frugal life while Husband will enjoy the beautiful family home, all the income producing assets, and as stated by the court in the oral findings, "The Husband in my view has great

prospects. His history for the last three decades has been one of steady improvement of an ever increasing upward trajectory in terms of his various enterprises, and I expect that will continue.” Under these facts, a manifest abuse of discretion has occurred. Wife should be awarded the Dry Creek home.

**C. The Court’s findings in this case support a larger and longer maintenance award and larger distribution of the property, specifically, the Dry Creek home.**

The court made the following oral findings on the record:

1. Although the evidence showed at times that it was a deeply troubled marriage, both parties throughout the 33 years or so worked so hard to accumulate assets and improve their gains. RP (Vol V) 1086: 15-18.
2. And the Wife contributed equally in a quintessential rationale for why we have community property laws in this state. Early in the marriage she worked long hours in the fruit stand for no significant monetary compensation. Again, this was quintessentially a community effort over three decades of marriage. RP (Vol V) 1087: 2-7; 17-19 .
3. One of the parties will have more cash, the other party will have more real estate. RP (Vol V) 1092: 15-17.
4. Not only is Mr. Gunkel very intelligent, articulate,

ambitious, supremely focused, relatively young, and relatively healthy, it's one of the strange ironies of a divorce court that those same self attributes that got him where he is and hold him in such good stead in society actually cost that same person money in a divorce action. RP (Vol V) 1093: 3-10.

5. The Husband in my view has great prospects. His history for the last three decades has been one of steady improvement of an ever increasing upward trajectory in terms of his various enterprises, and I expect that will continue. RP (Vol V) 1093: 15-19.

6. The Wife unfortunately has none of these attributes and none of these options. She'll have her cash. If she's prudent with that cash, that will enable her to live very, very comfortably for the rest of her life. He has her job, but it is unlikely with her health problems, and her prospects, that career improvement is in the [future]... She is basically where she's going to be now. She's also not an entrepreneur to the extent that Mr. Gunkel is. So...whatever I leave her with today, is what she will have for the rest of her life. RP (Vol V) 1093: 20-1094: 8.

The court went on to award Wife an equalizing cash judgment of

\$768,372. RP (Vol V) 1097: 8. The court went on to further order that the home Wife lives in now be sold and the profits be shared equally between husband and Wife. RP (Vol V) 1094: 15-17. The court further ordered that Wife continue to receive maintenance in the amount of \$1578 until one-half of the equalizing Judgment is paid off. RP (Vol V) 1099: 1-2.

None of the court's statements above support the court's division of property or its award of maintenance. Furthermore, it is unclear which statutory factors, if any, under RCW 26.09.080 or RCW 26.09.090 the court considered, and how the court considered those factors in dividing the property and awarding maintenance.

“An award that does not evidence a fair consideration of the statutory factors results from an abuse of discretion.” *In re Marriage of Spreen*, 107 Wn. App. 341, 349, 28 P.3d 769 (2001). Additionally, “a trial court abuses its discretion when it makes a decision based on ‘untenable grounds or for untenable reasons, considering the purposes of the trial court’s discretion.’” *In re Marriage of Sheffer*, 60 Wn. App. 51, 53, 802 P.2d 817 (1990).

The court's decision in the case at hand did not evidence a fair consideration of the statutory factors, and did not evidence a fair consideration of its own oral findings. A fair consideration of the statutory factors under RCW 26.09.080, and 26.09.090, together with a

fair consideration of the court's oral findings should have resulted in Wife receiving indefinite maintenance in the amount of \$3500 and her being awarded the Dry Creek home.

**D. Wife should have been granted reimbursement for her attorney fees and costs at both the trial court level and on appeal.**

An award of attorney fees in a dissolution proceeding is discretionary with the trial court. RCW 26.09.140. "In making an award, the court must balance the needs of the spouse requesting them with the ability of the other spouse to pay." *In re Marriage of Tower*, 55 Wn. App. 697, 705, 780 P.2d 863 (1989).

Husband clearly has a better ability than Wife to pay attorney's fees. As the court stated, Wife will have to live "frugally." Husband on the other hand has "great prospects." Husband should have been ordered to pay Wife's attorney fees. Wife makes significantly less than Husband does. Wife will need to conserve all of the money she has in order to purchase a home for herself, afford the additional costs she will incur after the home she lives in now is sold, and to be able to support herself into the future.

Wife also requests reimbursement of her fees and costs for this appeal. Under RAP 18.1, Wife will submit her affidavit of financial need at the appropriate time.

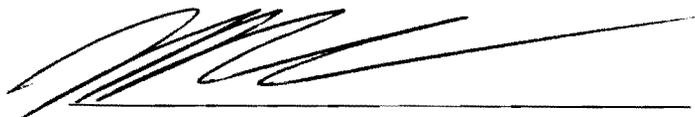
## VI. CONCLUSION

Based upon the evidence presented at trial, the laws and decisions of the State of Washington cited, and the abuse of judicial discretion by the trial court, Wife respectfully requests that the Findings of Fact, Conclusions of Law and the Decree of Dissolution be modified to award Wife indefinite maintenance in the amount of \$3500 per month and be modified to award Wife the Dry Creek home.

Dated this 28<sup>th</sup> day of March, 2014

Respectfully submitted,

**JAQUES, SHARP, SHERRERD, FITZSIMONS & OSTRYE**



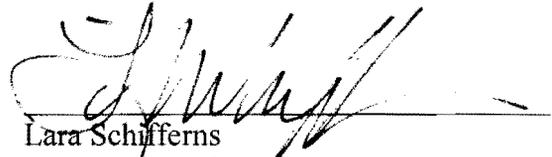
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