

No. 32594-6-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FILED

SHEILA CLAIRE JEWETT,
Petitioner/Appellant,

APR 16 2015

vs.

ROBERT HENRY JEWETT,
Respondent/Respondent.

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

APPEAL FROM THE WHITMAN COUNTY SUPERIOR COURT
Honorable David Frazier, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. **Substantial evidence does not support Finding of Fact 2.8 that the property set forth in Exhibit A to the Findings of Fact and Conclusions of Law is all the community property of the parties.**

The court awarded Mr. Jewett all assets in his possession and control: “I’m essentially going to award anything that he has that’s an asset in his custody or control right now to him.” RP at 481. As such, Mr. Jewett was awarded more assets than what is listed in Exhibit A to the

Findings of Fact and Conclusions of Law because Mr. Jewett admits he did not suggest any additions to Ms. Wilson's incomplete list of assets and the court did not find Mr. Jewett credible about what property he possessed. Br. of Resp't at 2 (par. 1). In fact, Ms. Wilson testified, and Mr. Jewett did not deny, that he possessed many more assets that she was able to list in Exhibit 36. It is not clear how much Mr. Jewett actually possessed because Mr. Jewett would not be candid with the court about what he possessed and he was in the best position to inventory the assets in his possession. Ms. Wilson did not know where Mr. Jewett hid some of the assets and could not afford to travel to North Dakota to inventory the assets he kept there.

The erroneous finding of fact 2.8 is not harmless. If the trial court fails to list all of the parties' assets, it will not be able to classify, value, or divide them properly. Thus, if the finding remains as is, it negatively affects this Court's ability to review whether the trial court's division of property and debts was just and equitable. The finding should, therefore, be set aside.

- 2. The trial court erred by finding and concluding at Finding of Fact 2.9 that Respondent has a separate property interest in Jewett Crushing, LLC.**

Mr. Jewett's reference to RCW 26.16.010 is irrelevant to whether Finding of Fact 2.9 is erroneous. RCW 26.16.010 protects a spouse's separate property from the debts of his spouse and permits a spouse to sell his separate property without his spouse's joinder. Finding of Fact 2.9 does not address protecting one spouse's separate property interest from the other spouse's debts or one spouse's privilege to sell the interest. Finding of Fact 2.9 did not concern the 90 percent interest Mr. Jewett's father owned because that portion of the partnership was not before the trial court. The fact that the remaining 90 percent of Jewett Crushing would ultimately become Mr. Jewett's separate property inheritance does not mean Mr. Jewett's existing 10 percent interest in the partnership must also be his separate property. If the trial court was considering Mr. Jewett's inheritance, then the trial court also should have considered Ms. Wilson's separate property contributions (i.e., her L&I settlement and advance on her inheritance) to the partnership.

Finding of Fact 2.9 concerns only the court's finding that Mr. Jewett's 10 percent interest in the Jewett Crushing partnership is his separate property. Ms. Wilson does not dispute that Mr. Jewett owned 10 percent of the partnership. She contends that Mr. Jewett's 10 percent ownership interest was community property.

Jewett Crushing partnership did not exist at the time of the dissolution trial in this case. As a result, the trial court found, “the value of this business is only in whatever value you can obtain from selling this [equipment].” RP at 479. The date the equipment was purchased and the source of the money used to purchase that equipment, not the date the partnership began, controls whether the equipment is separate or community property. See *In re Marriage of Martin*, 32 Wn. App. 92, 94, 645 P.2d 1148 (1982); Kenneth W. Weber, 19 WASHINGTON PRACTICE, FAMILY AND COMMUNITY PROPERTY LAW, §11.6 (1997) (Property is characterized as of the date of acquisition). The trial court did not address acquisition dates or the source of the money used to purchase the equipment. Regardless, Mr. Jewett and Ms. Wilson were in a committed intimate relationship when Jewett Crushing began. And property acquired during a committed intimate relationship or commingled during a marriage is presumed to be owned by both parties. *Connell v. Francisco*, 127 Wn.2d 339, 351, 898 P.2d 831 (1995); Weber, 19 WASHINGTON PRACTICE, FAMILY AND COMMUNITY PROPERTY LAW, §11.13.3 (1997) (commingling creates a community property presumption if substantial amounts of both types of property are intermixed to the extent it is no longer possible to identify whether the remainder is one or the other).

Presumptions play a significant role in determining the character of property as separate or community property. Weber, 19 WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW § 10.1, at 133 (1997) (“Possibly more than in any other area of law, presumptions play an important role in determining ownership of assets”). “The presumptions are *true* presumptions, and in the absence of evidence sufficient to rebut an applicable presumption, the court must determine the character of property according to the weight of the presumption.” *In re Estate of Borghi*, 167 Wn.2d 480, 483-84, 219 P.3d 932, 934-35 (2009), *as corrected* (Mar. 3, 2010) (emphasis original).

The partnership’s remaining equipment was purchased either while the parties were in a committed intimate relationship or while they were married. The parties commingled everything they had. Indeed, Mr. Jewett and Ms. Wilson each contributed money to the partnership that was not reflected in the partnership’s tax returns. And Mr. Jewett produced no evidence of the source of the money used to purchase the equipment. When the partnership ended, Mr. Jewett’s father left all the partnership’s equipment with Mr. Jewett and Ms. Wilson for their use. Based on the court’s findings about the equipment, it could not have concluded that Mr. Jewett’s 10 percent interest in the remaining partnership assets was his separate property. Mr. Jewett did not produce enough evidence to

overcome the presumption that the partnership equipment was community property. Finding 2.9 should be set aside.

3. Substantial evidence does not support Finding of Fact 2.10 that the parties have community liabilities as stated in Exhibit A when no evidence shows a deficiency judgment was entered against the parties and the evidence shows the tax warrants had been paid.

Dissolution of marriage is a statutory proceeding. *In re Marriage of McKean*, 110 Wn. App. 191, 194-95, 38 P.3d 1053 (2002). So the jurisdiction of the court is limited by the applicable statutes, e.g., Chapter 26.09 RCW. That chapter requires the trial court to divide “*the liabilities of the parties.*” RCW 26.09.050, .080 (emphasis added). A liability is not “of the parties” unless the parties are obligated to pay it. Indeed, a debt has been defined as “that which is due from one person to another; it is an obligation which one person is bound to pay to another; ‘that of which payment is liable to be extracted; due, obligation, liability.’” *Almond v. Gilmer*, 188 Va. 1, 49 S.E.2d 431, 442 (1948) (quoting Webster’s New International Dictionary, Second Edition). Thus, when exercising discretion under RCW 26.09.050 and .080, a trial court focuses on only those debts which are due from the parties to another at the time of trial. *Cf., e.g., White v. White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001) (noting that the trial court focuses on the parties’ assets at the time of trial when exercising its discretion to dispose of property and liabilities under

RCW 26.09.080); *see also Pickering v. Pickering*, 314 S.W.3d 822, 833 (Mo. Ct. App. W.D. 2010) (“Marital debts, like marital assets, may only be divided when they exist at the time of trial”). When a debt is not due from the parties, then it is not before the court for disposition.

As stated in Appellant’s opening brief, Mr. Jewett testified that the tax warrants referred to in Exhibit A to Finding of Fact 2.10 had been repaid. Contrary to Mr. Jewett’s argument, Ms. Wilson referred to the record to support this argument. Br. of Appellant at 11 states, “Mr. Jewett was ordered to pay tax warrants that had already been paid in full. (RP 361, 505)[.]” Mr. Jewett testified at RP 361, ll. 13-23 that tax warrants had been paid in full. However, after further review of Exhibit A to Finding of Fact 2.10, Appellant concedes that the court ordered Mr. Jewett to pay only an L&I obligation, not tax warrants, and withdraws her assignment of error regarding tax warrants only.

Ms. Wilson continues to assert her assignment of error regarding the deficiency judgment. Exhibit A to Finding of Fact 2.10 erroneously assigns Mr. Jewett a non-existent deficiency judgment in the amount of \$184,139.75 based on Exhibit 127 – an exhibit the court excluded from evidence as inadmissible hearsay. This finding should be set aside for insufficient evidence for several reasons.

First, the finding should be set aside because it is erroneously based upon excluded evidence. It is error for a fact finder to consider evidence that has not been admitted at trial. *E.g., State v. Pete*, 152 Wn.2d 546, 553–55, 98 P.3d 803 (2004). Because Exhibit 127 was excluded, the trial court could not consider or rely on it when determining the facts of the case. It was not substantial evidence that a deficiency judgment existed.

Second, Mr. Jewett cites no authority for his argument that “a deficiency judgment” is not required to create a community liability.” Br. of Resp’t at 9. While not all community liabilities are deficiency judgments, all deficiency judgments are liabilities. “[A] deficiency judgment requires a money judgment against the debtor.” *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 663, 303 P.3d 1065 (2013). To show that a deficiency judgment exists, Mr. Jewett must produce a money judgment against him and/or Ms. Wilson. He has not.

Third, Mr. Jewett produced insufficient circumstantial evidence that a deficiency judgment exists. He produced the Amended Judgment and Decree of Foreclosure at Exhibit 126 and cites the Total Judgment Amount listed in Exhibit 126 and the amount Mr. Howell paid the Judgment Creditor for the foreclosed property, claiming that this evidence is substantial evidence that a deficiency judgment exists. This Court

should reject Mr. Jewett's claim. Exhibit 126's Judgment Summary does not list Mr. Jewett or Ms. Wilson as judgment debtors:

Judgment Creditor: Eugene Gross and Eileen Gross and
Farrel F. and Sylvia Uhling Family
Trust

Total Judgment Amount: \$480,715.88

Judgment Interest Rate: 14.000%

Judgment Creditor's

Attorney: Valerie Holder
Routh Crabtree Olsen, P.S.
13555 SE 36th Street, Suite 300
Bellevue, WA 98006
425-457-7874

Judgment Debtors: In Rem Judgment

Judgment Debtor's

Attorney: None.

Assessor's Property

Tax parcel No: 1049000410011

Abbreviated Legal

Description: PRN SW ¼ of Section 5, T10N,
R46EWM, Situated in Asotin
County, State of WA

Property Address: 1823 Critchfield Road, Clarkston,
WA 99403.

Exhibit 126 at 1-2. It lists "In Rem Judgment" as the Judgment Debtors.

Id. An in rem judgment is a judgment against a thing (in this case, real property) as opposed to a person. *Webster's New Universal Unabridged Dictionary* 947 (2nd ed. 1983) (defining "in rem"). Exhibit 126 is a judgment against the Critchfield Road property that Mr. Jewett and Ms. Wilson once owned. The exhibit provides that the Judgment Creditors

reserved the right to pursue a deficiency judgment against Mr. Jewett and Ms. Wilson personally:

ORDERED, ADJUDGED AND DECREED that if any deficiency remains after the application of the Sheriff's foreclosure sale proceeds, Plaintiff hereby reserves the right to pursue a deficiency judgment and that a deficiency judgment shall be entered against Bob Jewett a/k/a Robert Jewett and Sheila Jewett.

Exhibit 126 at 5. But Exhibit 126 is not *the* deficiency judgment against Mr. Jewett and Ms. Wilson. Mr. Jewett produced no evidence showing the Judgment Creditor in fact exercised its right and obtained a deficiency judgment.

Moreover, this Court cannot be certain on the record before it that the difference between the Total Judgment Amount and the amount Mr. Howell paid for the property is or would be the deficiency amount. The deficiency is the difference between Exhibit 126's Total Judgment Amount and the net proceeds from the foreclosure sale. *See Gardner*, 175 Wn. App. at 6 (quoting *Boeing Employees' Credit Union v. Burns*, 167 Wn. App. 265, 272 P.3d 908 (2012) (defining a "deficiency judgment" as "a money judgment against a debtor for a recovery of the secured debt measured by the difference between the debt and the net proceeds received from the foreclosure sale")). No evidence in the record provides the value of the Critchfield property at the foreclosure sale. According to the record,

Mr. Howell did not purchase the property at the foreclosure sale, the Judgment Creditor purchased it, and he purchased the property for a negotiated price from the Judgment Creditor:

Q: Okay. And do you know if there are any debts still owing on that property?

A: *When I paid it off I had the lawyers check it out and negotiated the price and the - - the business with the people that had it financed and we got a clear deed to it when I paid for it so there was nothing still owed that I know of on it at all.*

Q. Do you know if there's still any outstanding judgment for the debt?

A: Not that I know of because there was three pages of stuff that they [the Jewetts] owed but none of them could be traced back to the property because *the first lienholder had a [sheriff's] sale and ended up the judge giving it back to them [the first lienholder]* and so that eliminates the rest of the lienholders that even filed judgment against them [the Jewetts] as far as I know.

RP 200-01 (emphasis and alterations added). Thus, the price Mr. Howell paid alone, is not sufficient to determine the deficiency, if any. The record does not show what the Judgment Creditor bid at the Sheriff's sale. That figure would be necessary to determine the deficiency. Therefore, on the record before the trial court, the amount of a deficiency, if any, could not be determined.

Without proof of a deficiency judgment and without sufficient proof of the deficiency amount, if any, Finding of Fact 2.10's inclusion of a deficiency judgment for \$184,139.75 should be set aside for insufficient

evidence. This result is consistent Exhibits 38 and 39 and with *In re the Marriage of Thomas*, where the trial court erroneously assigned the wife liability for a debt because the amount of and liability for that debt was still being litigated in a separate action. 63 Wn. App. 658, 664-65, 821 P.2d 1227 (1991).

The Thomases, who were getting divorced, owned Thomas Orchards. *Id.* at 665, n.12. Their daughter leased the orchard and sued her parents for an accounting of Thomas Orchard's earnings and finances during the lease period. *Id.* The daughter was appointed custodian of the Thomas Orchards account and 1985 crop proceeds, and the Thomases were permitted to borrow \$37,332.52 from the account and proceeds to bring in the 1986 crop. *Id.* at 665. Because the community's liability for and the residual amount (less 1986 crop proceeds) of the \$37,332.52 loan had not yet been determined in the daughter's pending lawsuit, this Court concluded that the dissolution court abused its direction by assigning the loan liability to the wife. *Id.* Like in *Thomas*, there is no evidence here of the amount of or liability for a deficiency judgment. Because no evidence of the deficiency amount or liability exists, the trial court erred by assigning a deficiency judgment of \$184,139.75 to Mr. Jewett. Finding of Fact 2.10 regarding the deficiency judgment should be set aside.

4. Substantial evidence does not support Finding of Fact 2.12 that Respondent was awarded all of the community liabilities and the Petitioner has the ability to support herself.

Mr. Jewett argues that Finding of Fact 2.12 is supported by substantial evidence because the deficiency judgment exists, because Ms. Wilson's 2011 and 2012 tax liability is a "very small fraction" of the parties' liabilities, and because Ms. Wilson worked in the past, had an Idaho real estate license, and could renew her Washington real estate license for \$500-\$600.

Finding of Fact 2.12, which denies Ms. Wilson's request for maintenance, is based, in part, on the trial court's division of liabilities. Finding of Fact 2.12 states, "Maintenance . . . should not be ordered because the Respondent was awarded all of the community liabilities[.]" Clerk's Papers (CP) at 95. The "community liabilities" to which this finding refers are the liabilities listed in Exhibit A to Finding of Fact 2.10, including the non-existent deficiency judgment. These "community liabilities" total \$294,624.02. As Section 3, above, shows, the court's finding regarding the \$184,139.75 deficiency judgment is based on excluded evidence, is not supported by substantial evidence, and should be set aside. With that finding set aside, the finding that Mr. Jewett was assigned "all of the community liabilities," as listed in Exhibit A, is not supported by the evidence. He was not, in fact, assigned community

liabilities totaling \$294,624.02. He was assigned community liabilities totaling \$110,484.27, or about one-third of the total amount listed in Exhibit A.

With regard to the tax liabilities assigned to Ms. Wilson, Ms. Wilson is not arguing that she should not have been assigned the tax liabilities on her income from 2011 and 2012. She is arguing that the trial court's failure to include these liabilities in Exhibit A to Finding of Fact 2.10 further undermines Finding of Fact 2.12 to the extent it finds that Mr. Jewett was awarded all of the community's liabilities. Mr. Jewett's suggestion that these tax liabilities are not community liabilities is not well-grounded in fact or law. The parties were married in 2011 and 2012, and the general rule is that all debts incurred by a married person are presumed to be community debts. *E.g., Oil Heat Co. v. Sweeney*, 26 Wn. App. 351, 353, 613 P.2d 169 (1980). No evidence was presented to rebut this presumption, so Ms. Wilson's tax liability is presumed to be a community liability.

This Court cannot be certain that the trial court would have denied maintenance had it not considered the so-called "deficiency judgment." In other words, it is possible the trial court would have awarded some maintenance had it considered the fact that the liabilities it assigned to Mr. Jewett totaled \$110,484.27 rather than \$294,624.02. Finding of Fact 2.12

should be set aside and remanded to the trial court for reconsideration of its maintenance decision in light of the corrected and significantly lower liability amount assigned to Mr. Jewett.

Had the court acknowledged that it, in fact, assigned Ms. Jewett some of the parties' liabilities, it is possible that its ultimate decision on the maintenance award would have been different. We do not know. The issue of maintenance should be reversed and remanded to the trial court for reconsideration in light of the liabilities assigned to Ms. Wilson and in the absence of the deficiency judgment liability.

Finding of Fact 2.12 also provides, "Maintenance . . . should not be ordered because . . . the Petitioner has the ability to support herself." CP at 95. Mr. Jewett argues that Ms. Wilson was able to support herself despite the fact she was unemployed at the time of trial because she worked in the past, had an Idaho real estate license, and could have obtained her Washington real estate license for \$500-\$600. This argument is fallacious. Ms. Wilson's work history and a real estate license provided her no income at the time of trial.

It is undisputed that Ms. Wilson was unemployed at the time of trial, had been disabled from working on any concrete floors, and could not work in grocery stores. RP 46. It is undisputed that she would have been homeless but for the charity of Leroy Howell, who allowed her to

continue living in the Critchfield property until the dissolution case was over. RP 206. She had to sell community property to pay for living expenses during the divorce. E.g., RP 83 Ms. Wilson was looking for work, but finding work would take time. RP 162. Meanwhile, her sole income at the time of trial was \$400 monthly payments on the sale of the Pony Espresso – an annual income of \$4,800. CP 77. Based on this undisputed evidence, it is unrealistic to expect Ms. Wilson to save more than one month's income to pay \$500 to \$600 for a Washington real estate license.

The 2013 Federal Poverty Guidelines for a one-person household was an annual income of \$11,490. 78 FR 5182. Ms. Wilson's income was less than half the poverty guideline for a one-person household. She easily qualified for public assistance, but she should not have had to seek State assistance when her spouse of 17 years had income with which to pay her maintenance at least until she could gain employment. Ms. Wilson's work history and real estate license are not substantial evidence that Ms. Wilson was able to support herself at the time of trial. The trial court's finding to the contrary should be reversed and maintenance awarded.

- 5. The Court's division of the parties' assets was disproportionately unfair and not based on the necessary statutory factors for disposition.**

Mr. Jewett argues that the trial court's division of assets was proper because the parties presented conflicting evidence about who possessed what property and the court, as fact finder, had the right to believe Mr. Jewett's testimony about the property in his possession. This argument misses the point. It is not a credibility issue. If it was, the trial court did not find Mr. Jewett's testimony about the parties' property credible. *See* RP 474. It is a legal issue. The trial court is required to consider the nature and extent of the parties' community property. RCW 26.09.080. The trial court failed to consider the nature and extent of a significant portion of the parties' property and simply awarded whatever property each party possessed to that party. *See* RP 475-76. It considered Jewett Crushing equipment, the Pony Espresso contract, vehicles, a pension, a gun safe and guns. RP 477, 483, 485-86. But it failed to consider the remainder of the parties' personal property.

Mr. Jewett suggests that his millwright tools are somehow exempt from consideration under RCW 26.09.080 because the tools were Mr. Jewett's separate property. Separate property is not entitled to special treatment. *In re Marriage of Larson and Calhoun*, 178 Wn. App. 133, 140, 313 P.3d 1228 (2013). RCW 26.09.080 applies the statutory criteria to separate and community property alike. *Id.* at 141. The court is

required to weigh all the factors in the context of the parties' circumstances to come to a fair, just, and equitable division of property. *Id.*

Mr. Jewett argues that the trial court's division of assets was fair because each party was awarded those assets that allow them to "ply their trade" and because Mr. Jewett was assigned all the parties' liabilities. First, Mr. Jewett continues to ignore the fact that no deficiency judgment exists. The lack of deficiency judgment alone warrants remanding the trial court's division of assets and debts for reconsideration. Second, the fact that Mr. Jewett was assigned a majority of the parties' debts also resulted in Mr. Jewett receiving most of the parties' assets.

Typically, when a trial court allocates a larger amount of debts and assets to one spouse, it will award maintenance to the other spouse. But the trial court did not award maintenance here. Instead, Ms. Wilson was awarded mostly household goods, antiquated office equipment, property held in third parties' names, and encumbered personal property that she could keep as long as Mr. Jewett paid the debt attached to it. Meanwhile, at the time the property division was to become effective, Ms. Wilson was unemployed with no current real estate clients or job prospects, receiving \$400 per month and no maintenance, and soon-to-be homeless, while Mr. Jewett was awarded a slide-out camper he lived in, had a job he could

return to in North Dakota, had a \$4,000 monthly income, and had equipment he could lease or use for income, and.

There is too great a patent disparity in the condition in which the parties were left for the trial court's award to be equitable under RCW 26.09.080. Most property of any value awarded to Ms. Wilson was encumbered and/or difficult, if not impossible, to liquidate. Her \$400 monthly income, as the Federal Poverty Guidelines cited above confirm, furnished a below-poverty level of existence. Ms. Wilson would have to rely on this income to pay for housing, food, basic living expenses, and the typing classes she needed. During the same time, Mr. Jewett's income was ten times Ms. Wilson's income, the equipment offered additional income potential, and his living expenses in North Dakota were minimal.

Based on the parties' post-dissolution economic circumstances, which the trial court declined to meaningfully consider because it believed the parties were voluntarily unemployed, the trial court's division of their assets was inequitable. Ms. Wilson should have been awarded an offset or a greater share of the parties' property.

- 6. The trial court erroneously denied Petitioner's request for maintenance by failing to properly consider the statutory maintenance factors.**

Ms. Wilson contends the trial court failed to properly consider each of RCW 26.09.090's maintenance factors and erroneously denied her request for 12 to 18 months of maintenance.

Mr. Jewett cites several portions of the record out of context, claiming the citations represent the trial court's consideration of the RCW 26.09.090 factors. Mr. Jewett's citations to RP 474, 475, 476, 477, 482, 483-84, 485, and 486 are citations to the court's division of the parties' assets and debts under RCW 26.09.080. Br. of Resp't at 20-22, 23-26. They are not part of the court's decision on maintenance. The trial court's maintenance decision is limited to RP 488, ll. 20, to RP 489, ll. 23.

The trial court's finding on maintenance provides, "Maintenance was requested, but should not be ordered because the Respondent was awarded all of the community liabilities and the Petitioner has the ability to support herself." CP 95 (Finding of Fact 2.12). This finding does not show the court's consideration of each RCW 26.09.090 factor, so the trial court's oral ruling on maintenance should be reviewed to determine whether it properly considered the statutory factors.

In summary, the trial court orally found that Ms. Wilson does not have need without explaining why, Mr. Jewett would have debts to pay, both were unemployed, Ms. Wilson's injury did not keep her from getting a decent job, Mr. Jewett was not too depressed to work, and he was relying

on others to pay his expenses. RP 488-89. By summarily concluding Ms. Wilson had no need, it is unclear upon what financial resources the trial court relied. The trial court did not address how Ms. Wilson would be able to support herself independently when she had \$400 monthly income and no job upon entry of the decree.

The trial court's oral ruling on maintenance further shows the trial court did not consider the parties' standard of living, the duration of their marriage, or Ms. Wilson's age and financial obligations. And it did not consider Mr. Jewett's ability to pay maintenance in addition to the obligations assigned to him. To the extent the court found Mr. Jewett had many debts to pay and relied on others to pay his expenses, it is not clear how the court concluded that Mr. Jewett did not have the ability to pay maintenance. Because the findings are insufficient for this court to determine whether the RCW 26.09.090 factors were considered and, if they were, upon what facts they were based, the issue should be remanded to the trial court for clarification. *In re the Matter of Marriage of Monkowski*, 17 Wn. App. 816, 819, 565 P.2d 1210 (1977).

Mr. Jewett also argues that Ms. Wilson "was left without significant financial obligations of any sort" because he was assigned the parties' debts. Br. of Resp't at 25. Mr. Jewett's argument ignores the fact

that Ms. Wilson had *basic* living expenses she could not afford to pay on the \$400 monthly income she was awarded.

Mr. Jewett argues that the trial court was not required to consider the time it would take Ms. Wilson to find employment. “RCW 26.09.090 requires the trial court to consider, but not limit itself to the . . . factors” listed therein. *Mansour v. Mansour*, 126 Wn. App. 1, 15, 106 P.3d 768 (2004). Because the trial court acknowledged that Ms. Wilson was unemployed at the time of trial, it was necessary for the trial court to consider the time it would take her to find employment. It failed to do so.

Mr. Jewett suggests that the trial court properly considered the time Ms. Wilson would need to gain skills to become employed by finding that Ms. Wilson was voluntarily unemployed. RCW 26.09.090 expressly prohibits a trial court from considering a party’s misconduct when determining whether to award maintenance:

- (1) In a proceeding for dissolution of marriage . . . , 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[.]

(Emphasis added). While ruling on Ms. Wilson’s maintenance request, the trial court reprimanded the parties for remaining voluntarily unemployed during the dissolution matter. It is clear that the trial court

considered Ms. Wilson's unemployment to be the result of her wrongdoing. The trial court erred by considering any misconduct by Ms. Wilson when deciding her maintenance request and by denying maintenance because Ms. Wilson was "voluntarily underemployed." RP at 489.

In sum, the trial court abused its discretion by failing to follow RCW 26.09.090 when deciding Ms. Wilson's maintenance request. Moreover, the court's decision was based, in large part, on the non-existent deficiency judgment. The issue of maintenance should be reversed and remanded for entry of an award of maintenance or reconsideration of all factors set forth in RCW 26.090 and without regard to misconduct or a deficiency judgment.

B. CONCLUSION

For the reasons stated above, Ms. Wilson respectfully requests that the trial court's division of property and denial of maintenance be reversed and be remanded for determination of an offset and short-term maintenance. She also renews her request for attorney fees and costs as set forth in her opening brief.

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Respectfully submitted on April 16, 2015.

STAMPER RUBENS, P.S.

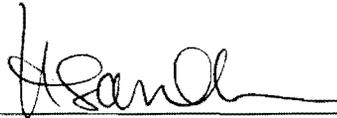
A handwritten signature in black ink, appearing to read "Hailey L. Landrus", written over a horizontal line.

Hailey L. Landrus, WSBA #39432
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, Hailey L. Landrus, do hereby certify under penalty of perjury that on April 16, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Reply Brief of Appellant:

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