

63523-9

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No. 63523-9-I

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION I

KATHLEEN JEAN JANES
Plaintiff/Appellant

v.

STEVEN CRAIG JANES
Respondent

APPELLANT'S OPENING BRIEF

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I. ISSUES ON REVIEW

A. In a dissolution action involving two spouses married for 35 years, both age 61, owning an accrued community estate of \$4.8 million and a business generating net monthly income of \$23,000 a month, does a trial court abuse its discretion in making a property, debt and income award that leaves the medically ill wife with \$635 a month of income, and the working husband \$23,000 a month of net income?

II. STATEMENT OF THE CASE

Appellant, Kathleen Janes (“Kathy”), age 61 at the time of trial, and her Respondent husband, Steven Janes (“Steve”), also age 61, were married for 35 years. *CP 129, para. 2.5; and see CP 480, ln. 16, and CP 180.* Kathy married Steve on March 25, 1969. *CP 129, ln. 10.* Steve had not finished high school. *RP 237, lns. 19-20.* For ten years following the marriage, Steve would work “off and on.” *RP 237-238.* The parties had two children, ages 36 and 28 at the time of trial. *RP 239.*

Steve first began a flooring type business in 1972 at the same time the parties’ first child was born. *RP 240, lns. 6-17.* That business was sold, and the parties’ business known as “The Janes Company” began. *RP 241.* During the marriage, Kathy’s role was to be “mother and father to the children the majority of the time,” because Steve worked substantial

hours. *RP 249*. Kathy also assisted the business doing home shows. *RP 249-250*. The success of the business led to an exceptional standard of living. Kathy and Steve traveled extensively, and “first class.” *RP 409*. They vacationed in Hawaii, Mexico, Arizona, Reno and Las Vegas. *RP 409*. Kathy became a certified diver, and she and Steve vacationed in Micronesia, Cozumel and Grand Cayman. *RP 588*. They skied in Steamboat Springs, reserved private sleeper cars in trains, flew first class, and stayed in the best hotels. *RP 409-410*.

Steve had “no limits” on anything to do with clothing or food. *RP 410*. Steve was a “big spender.” *RP 590*. If he wanted to go fishing, he would “charter the whole boat for himself.” *RP 590*. Kathy and Steve drove Mercedes and Audi cars, and traded for newer vehicles within one to two years. *RP 409*. Steve would buy three or four pairs of shoes “for a couple hundred dollars apiece.” *RP 410*. The family would often go to Seattle to shop overnight and “catch a plane out the next day.” *RP 410*. They dined out frequently with “no limits.” *RP 411*. Kathy testified, “We’re not Bill Gates, but we definitely, you know, spent money and traveled nicely, and went to a lot of nice places and never thought much about ordering anything or buying things and spending money.” *RP 411-412*.

The couple’s standing in town was respected. “People used to joke

and call it ‘Janesville,’” because the couple owned so many buildings there. *RP 412*. By the time of trial, the parties owned community assets of approximately \$4,282,000. *RP 134, para. 29*.

Steve and Kathy separated on November 1, 2003. *CP 129, para. 2.5*.

The Husband’s Economic Circumstance Post-Separation.

The trial court found that by 2007, “The Janes Company” business had produced an after tax net available income to Steve of \$23,052.78 per month. *CP 166*. In fact, during the five years of the pendency of the divorce, Steve’s checking account reflected deposits into his account of net cash averaging \$26,343 per month in 2004; \$26,659 per month in 2005, \$46,642 per month in 2006, and \$38,391 per month in 2007. *Wife’s Exhibit P-31*.

Steve’s financial declaration identified his continued enjoyment of the marital standard of living. Steve itemized his monthly living expenses at \$15,749 a month, including expense for his residence in the community home, his utilities, and food of \$8,560 per month. *CP 182-184*. His personal expenses were listed at \$2,889 per month, including clubs and recreation, gifts, and clothing. *CP 184*. Steve listed other miscellaneous expenses of \$2,500 per month, including such things as his house maintenance and upkeep. *CP 184 at para. 5.8*. Steve included his transportation expense of \$950 per month, but he was reimbursed for such

expense through the business. *CP 183; RP 177.* The business paid for Steve's vehicle payments, insurance, and gas. *RP 177.* It paid for his health insurance. *RP 177.* Steve used the business credit card for business lunches and meals, as well as "business" travel. *RP 177-178.* Steve could characterize his vacation travel as business travel if he met a client in that location. *RP 178, Ins. 5-9.* The business paid for part of his health club membership, and contributed to his IRA. *RP 178.*

In 2006, Steve had \$571,000 of compensation paid to him. *RP 161-162.* But notwithstanding that level of compensation, by the end of the year, the company also retained earnings of \$231,000. *RP 163, Ins. 16-23.* Steve took money from the business in "\$10,000 chunks." *RP 148, Ins. 6-7.* He would look at the balance in the business checking account, and take what he needed. *RP 152, Ins. 8-12; RP 150, Ins. 14-20.*

While paying a temporary maintenance order to Kathy, Steve continued to gamble in Las Vegas. He could take with him in excess of \$30,000 cash with which to gamble. *RP 176, Ins. 9-19.* He vacationed in Mexico, Hawaii, Las Vegas, and Arizona. *RP 176-177.* And in spite of the maintenance order and his spending, Steve paid off his credit cards monthly. *RP 187, Ins. 12-25; RP 188-189.* In some months, Steve could make a discretionary credit card payment for himself that was over three times the amount of money he provided Kathy as maintenance for her total

living expense. *RP 120, lns. 2-11 (where Steve paid \$26,000 on his credit card, versus the highest maintenance order to Kathy of \$7,400. CP 713).*

By September 2008, Steve had paid his three dissolution attorneys over \$108,000. *CP 185, § 6.1 (Arndt & Walker, Goykham & Theune).* He had also paid the wife's counsel approximately \$80,000, and his wife's former counsel, Jessie Valentine, \$12,000. *Id.* During trial, Steve had two lawyers representing him. *See RP cover sheets.* They were apparently paid in full. *RP 187-189.* He was debt-free, other than his home mortgage, taxes and insurance of \$4,740 a month. *Id.* The court's decision would identify \$220,000 of separate debt assigned to Steve, but Steve testified that his "attorney" had listed that debt—in actuality, he paid off his debt monthly. *See CP 36 versus RP 187-189.*

The Wife's Economic Circumstances Post-Separation.

Kathy left the family home in 2003, taking \$3,000 of furnishings, pictures, and personal items. *CP 133, para. 22.* She took \$3,000 of cash. *RP 258, lns. 16-24.* She also took with her bills of \$28,805. *CP 133, para. 27.* Kathy took a company vehicle—a 2000 Durango with over 125,000 miles on it, which the Court found to be worth \$4,500. *CP 131, para. 2; RP 259, lns. 22-25; RP 422, lns. 19-21.* The shocks were gone, and the brakes were worn. *RP 422.* Kathy's medical condition rendered her unable to work. *CP 134, para. 40.* Her medical expenditures ran approximately

\$1,300 per month, including \$1,000 of uninsured expenses. *CP 483, lns. 23-26.*

Kathy ultimately arrived in Spokane, Washington and began leasing a \$172,000 home she wanted to purchase. This home totaled 800 square feet, and it had to be made livable. *RP 412-413, lns. 21-25.* Kathy charged furnishings on her credit card. *RP 601.* A friend also loaned her some money to help purchase other furnishings. *RP 269, lns. 20-23, RP 601.*

The only income Kathy had during the 5-year pendency of the divorce action was her monthly spousal maintenance. *RP 263-264.* Two months after the separation, Kathy received her first order for maintenance—a gross amount of \$4,400 a month, from which she would be required to pay income tax. *CP 898, lns. 1-2.* Six months later, her maintenance increased to \$7,400 gross per month. *CP 713, lns. 1-4.* But on September 29, 2005, her maintenance was decreased to \$5,800 gross per month, plus \$225 a month (given to her for her car expenses). *CP 584-586, this document is missing from Petitioner's Clerks Papers, but is discussed at RP 558-559.* Kathy's maintenance would continue at \$6,025 a month gross for the next 3½ years. *CP 116-127.*

Kathy was unable to participate in any marital standard of living. *RP 412, lns. 14-16.* When her granddaughter was born, Kathy was unable

to go to Mexico to see the child. She did not have the money to do so. *RP 584, lns. 9-12.* Steve had been there every year since parties' separation. *RP 584, lns. 13-14.*

Over the 5-year pendency of the dissolution, Kathy accrued a substantial amount of credit debt for her living expense, along with IRS tax debt and penalties on her monthly maintenance (\$50,753). This all remained owing at the time of trial. *CP 47-48; CP 35-36.* Kathy had \$3.95 in her savings account. *RP 423, ln. 20.* The financial stress was impacting her health. *RP 583, lns. 18-24.*

By trial, Kathy was continuing to suffer from medical problems including anemia. Her medical care consisted, in part, of blood transfusions. *RP 440, lns. 8-11.* Kathy wanted a home with proper weather-proofing and adequate heat. *RP 584, lns. 1-7.*

The trial court found its earlier maintenance orders to be a 'disparate' maintenance order. *CP 134, Finding 35.* But by the time of trial five years later, Kathy's credit card and loan debt had risen to \$80,000. *CP 484, para. 5.11.* This amount did not include the additional debt Kathy owed for attorney fees. *CP 485.* By the end of trial, Kathy's fee bill was \$134,466 in arrears to her trial counsel, and she still owed a former attorney \$16,685. *CP 93, lns. 9-15.* She owed the IRS \$50,753. *CP 47, lns. 18-20.*

The Husband's Award.

Following trial, the trial court awarded Steve the family home in Langley, Washington, valued at \$1,750,000, and The Janes Co. business, valued at \$1.145 million, along with all of its income. *CP 131, Ins. 18-19, 23-24.* He was awarded notes receivable of \$30,037, all of the community pension and stock accounts valued collectively at approximately \$136,000, and a separate property IRA worth \$28,920. *CP 131, Ins. 20-22; and CP 132, paras. 15 & 16, and CP 134, para. 30.*

The court found Steve's 2007 net income from the community business to be \$23,052 per month. Its findings as to his income in 2009 were only that Steve took a "\$20,000 draw" each month from his business, and that his income tax return reflected his likely income. *CP 134, para. 37.* The last income tax return Steve produced was his 2007 return, showing \$485,650 in W-2 income, or \$38,221 a month in gross income. *CP 166.*

The Wife's Award.

The court awarded Kathy a 55% share of the community property. *CP 134, paras. 34-35.* But as its property distribution, it awarded her the three commercial buildings in Langley, Washington, across the state from where she lived. *CP 132, paras. 9-11.¹* The properties operated at a

¹ These buildings were valued at \$700,000, \$900,000, and \$750,000 respectively.

monthly debit of approximately \$2,700 a month.² On reconsideration, Kathy testified that the commercial properties were eating up her funds, and could not be sold in the existing real estate market in February 2009. *CP 48, para. 14.*

The trial court also awarded Kathy a property equalization payment to Kathy of \$560,000. *Id.* It then assigned her \$162,087 of debt, both separate and community. *CP 164-165.* Her debt turned out to be around \$316,500.³ *CP 47-48*

The trial court then terminated Kathy's maintenance. *CP 130, para. 2.12.* It refused Kathy's request for attorney fee assistance, notwithstanding that all earlier awards had been exhausted long before trial commenced. *CP 136, ins. 6-10, RP 93, para. 5.* The court left Kathy with only \$635 a month

² Steve testified that after the mortgages, taxes and incidentals were paid, the buildings produced no cash flow to speak of other than \$200 a month coming out of all commercial properties combined. *RP 701, ins.25—RP 702, ln. 25.* Steve was required to make repairs on the commercial properties either by pulling money from credit lines, or by taking the funds out of his own income. *RP 870, ins. 20-22.* In Steve's financial declaration, he identified using \$1,450 a month on average just for upkeep and maintenance of those properties. *CP 184, para. 5.8.* This amount did not address the property taxes or insurance on these properties. *Id.*

When Kathy took over the commercial properties, she discovered that even with the infusion of \$1,450 a month of Steve's monthly income into the properties, the property tax payments on all of the properties were delinquent to the level of some \$15,000, or another \$1,250 of debt per month. *CP 92, ins. 26-28; CP 93, ins. 1-6.*

In other words, the commercial properties ran at a monthly debit of \$2,700 a month.

³ Following trial, Kathy was required to pay her attorney fees, IRS tax debt, delinquent property taxes on the commercial buildings, the upcoming property taxes and insurance, personal loans, medical debt, medical bills turned over to collection, and the purchase of a new vehicle for \$20,000 to replace a vehicle that was barely functioning. *CP 47-48.*

of social security income. *CP 49, ln. 14*. It ordered Kathy to pay for her own health insurance of \$465 a month, and her own living expense. *CP 134, para. 41; CP 49, lns. 14-15*. Kathy was already spending \$4,833 a month on her basic living expenses for her lease, and including utilities, food, car repairs, gas, and oil. *CP 482-484*. In addition, she continued to incur uninsured health expenses of \$1,000 a month. *CP 483, ln. 25*.

Kathy moved to reconsider the resultant income and debt problem created by the court's decree. *CP113-115, 89-91*. Kathy advised the court that, upon receipt of her \$560,000 equalization payment, she paid the debt she had to pay. Only a month after her Decree was entered, she had only "\$125,000" left. *CP 45-49; CP 47*. She would be without cash by the end of 2009. *CP 49, para. 15*. Unless the commercial buildings sold somehow, by January 2010, Kathy would thereafter receive only \$635 a month in Social Security income. Her health insurance cost \$465 of that. *CP 49*. She would necessarily continue to have \$2,700 monthly expense for the commercial properties, \$1,000 a month of uninsured health care expenses, and living expense of \$4,833 a month in her leased home. *CP 482-485*.

Kathy's economic future is now confined to living on social security income, and going into debt at the monthly rate of approximately \$8,998 a month until her commercial buildings sell. This is even before any credit

card debt is considered. *CP 49, Ins. 14-15.*⁴

The court's Decree of Dissolution was entered on January 13, 2009. *CP 116-127.* Kathy moved for reconsideration. *CP 113-115 (initial motion); CP 45-88 (declaration); CP 89-91 (supplemental motion); CP 92-112 (declaration).* The court struck her motion without granting relief. *CP 42-44.*

III. ASSIGNMENTS OF ERROR

Kathy assigns error to the following Findings of Fact and Conclusions of Law entered January 13, 2009. *CP 128-136, with its attachments at 162-166:*

1. That the court's property division will allow the wife the ability to support herself. *CP 130, Finding 2.12.*
2. That the equalization payment provided for by the trial court would give Kathy the "ability to purchase an annuity which will provide a stable income for her." *CP 135, Finding 43.*
3. That the trial court's award of commercial properties to Kathy to provide the ability to have stable rental income that keeps pace with

⁴ Commercial Property - 1450 upkeep
1250 Tax & Insurance
Uninsured Health - 1000
Health Insurance - 465
Living Expenses - Basic - 3283
Personal Expenses - 1050; *CP 482-484.*

the cost of living. *CP 135, Finding 42.*

The wife assigns error to the following conclusions made by the Island County Court as to the equity of its result:

1. That maintenance should terminate upon the husband's paying the property equalization payment of \$560,000. *CP 130, para. 2.12.*

2. That the court's distribution of property and liabilities is fair and equitable. *CP 135, para. 3.4.*

3. That the wife should be required to pay for her fees in the proceeding from her property. *CP 136, para. 3.7, and CP 130, para. 2.15*

The wife assigns error to the trial court's refusal to grant reconsideration of its decree upon being advised of the financial reality in which that decree had placed the wife. *CP 113-115; CP 45-88; CP 89-91, 92-112.*

IV. SUMMARY OF ARGUMENT

The marital dissolution entered by this Island County trial is unequalled in Washington precedent. After 35 years of marriage, a trial court has divided the parties' \$4.8 million of property, debt, and income to result in a medically ill wife receiving \$635 a month of social security income while obligated to \$8,900 a month of debt, while awarding a healthy working husband \$23,000 a month of net income, with only his mortgage to pay.

This result does not arise from just one trial court ruling, i.e., the specific percentage of property accorded either party, the distribution of debt, the nature of property awarded, the termination of maintenance, or the refusal of the court to require assistance to Kathy for her attorney fees. Instead, the entire economic package visited upon this wife imposes not simply gross disparity in the economic circumstances of the parties for the remainder of their lives, but it renders the wife literally unable to support herself, going into thousands of dollars of debt monthly. This ruling is abuse of discretion, and must be corrected.

V. ARGUMENT

A. Standard of Review.

A trial court has broad discretion in achieving an equitable distribution of marital property and debt, awarding maintenance, and awarding attorney fees. Its decision will be reversed only if there is a manifest abuse of discretion. *Washburn v. Washburn*, 101 Wash. 2d 168, 179, 677 P.2d 152 (1984). A manifest abuse of discretion occurs when discretion is exercised on untenable grounds or for untenable reasons. *In re Marriage of Muhammad*, 153 Wash. 2d 795, 803, 108 P.3d 779 (2005).

A trial court's distribution of property in a dissolution action is guided by RCW 26.09.080, which requires a court 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 26.09.080.⁵

The economic condition in which a dissolution decree leaves the parties is the paramount concern in determining issues of property division and maintenance. *Washburn*, 101 Wash. 2d at 181, referencing *DeRuwe v. DeRuwe*, 72 Wash. 2d 404, 408, 433 P.2d 209 (1967); *In re Marriage of Dessauer*, 97 Wash. 2d 831, 839, 650 P.2d 1099 (1982).

If a dissolution decree results in a patent disparity in either an award, or in the economic circumstances in which the parties are left by the decree, a manifest abuse of discretion has occurred. *In re Marriage of Pea*, 17 Wash. App. 728, 731, 566 P.2d 212 (Wash. Ct. App. 1977), citing

⁵ Specifically:

The disposition of property “shall appear just and equitable after considering all relevant factors including, but not limited to:

- (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 property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse with whom the children reside the majority of the time.”

RCW 26.09.080

Edwards v. Edwards, 74 Wash. 2d 286, 444 P.2d 703 (1968).

In this instance, this court's award of property, debt, and income creates a gross disparity in the economic circumstances in which the parties are left by its decree. Abuse of discretion has occurred.

B. The wife was entitled to be placed in economic parity with her husband following 35 years of marriage. The court's failure to ensure such a result is abuse of discretion.

The duration of the marriage is a requisite and significant factor of RCW 26.09.080. Equities attendant to long term marriages differ from those of shorter term marriages. *In re Marriage of Terry*, 79 Wash. App. 866, 871, 905 P.2d 935, 937 (Wash. Ct. App. 1995) (reversing a trial court distribution for abuse of discretion when the trial court failed to recognize the duration of the marriage). While the concept is not stated directly in case law, the *Washington Family Law Deskbook*, § 32.3(3) at 17 (2d. ed. 2000) notes that in a long term marriage of 25 years or more, the objective is to place the parties in roughly equal financial positions for the rest of their lives. Case precedent in Washington consistently implements the concept.

Often, after a long-term marriage where parties must necessarily leave a marriage on economically disparate terms, disproportionate

distributions of community property are used to achieve equity. Awards of twice the property to one party are approved as being just and equitable if the party receiving less property earns a substantial salary, with a financial future that is “reasonably secure.” *Donovan v. Donovan*, 25 Wash. App. 691, 696-697, 612 P.2d 387 (Wash. Ct. App. 1980).

Where one spouse is older, semi-retired and dealing with ill health, and the other spouse is employable, unequal divisions of community property are proper. *Schweitzer v. Schweitzer*, 81 Wash. App. 589, 596, 915 P.2d 575 (Wash. Ct. App. 1996)(upholding a 55% distribution of community property to a husband with greater need). Even an award of 75% of the community property to an older wife with limited job skills, after 25 years of marriage, is proper where the husband is found to be “fairly well fixed” due to outside income from a pension, a business, and real property rentals. *In re Marriage of Dessauer*, 97 Wn.2d at 835; and see *In re Marriage of Davison*, 112 Wash. App. 251, 258, 48 P.3d 358 (Wash. Ct. App. 2002)(wherein an award of 75 percent of the community property was properly awarded to a wife where a husband was better off economically than such appeared through his award of separate assets).

But importantly, even property awards that place parties in relatively equal positions are *not* just and equitable where such awards still create disparity in the economic conditions of the parties. *Edwards*, 74

Wash. 2d at 287-288. In *Edwards*, the property division was equal, but the income left to the parties by the court's decree was significantly unequal. The 67 year old husband received only his social security payments and a pension payment, while the 53 year old wife received social security, part of the husband's pension, and social security payments for children, *and* she was also capable of work. The end result was the wife's receiving almost three times what the husband received in monthly income. The Supreme Court concluded that such an unequal division of income caused "too great a disparity in the condition in which these parties are left for this to be a just and equitable disposition of the property of the parties..." *Edwards*, 74 Wash. 2d at 288.

Consistently, in *In re Marriage of Pea*, 17 Wash. App. 728, the appellate court reversed as "grossly unequal" a result whereby the husband was left with "more than four times" the earning power of the wife's. *Id.* at 731. Such result created a patent disparity, not only in the property award itself, but in the economic circumstances in which the parties were left by the decree. *Id.*

This court's distribution of property, debt, and income is grossly unequal. It leaves the husband with \$23,000 a month of net business income, and the wife \$635 a month of Social Security income. This "disproportionate distribution of property in favor of the wife" was form

over substance. The nature of property awarded only made a bad situation worse. The commercial properties awarded the wife produced monthly debt of \$2,700 a month, and required management of tenants. The court then also obligated the wife to \$150,000 of additional community and separate debt, credit loan, IRS and attorney fee debt, which was soon identified as \$316,500 of debt, including another \$64,000 in trial fees that were not accounted for in the court's workup. *CP 36*.

Whatever theory drove this court's ruling, the ruling became more inexplicable when the court then cut off maintenance to the wife entirely. This prevented her from managing the very property and debt assigned her. The inevitable result would deplete the wife of every dollar she was awarded, until it left her with no more than \$635 a month of Social Security income.

Meanwhile, the husband's 45% award of the property included a business generating \$23,000 a month of net income to him. Using the husband's own Financial Declaration as indicative of his living expense, the husband was left to enjoy \$7,000 a month net cash over and above his already enhanced \$15,749 of living expenses. The latter number already included \$3,550 a month to him for just discretionary and miscellaneous personal expenses. In sum, the husband's net income of \$23,000 a month will be 36 times that of the wife's \$635 a month, moving forward.

Such a result is a grossly unequal result under *Edwards* and *Pea*, *supra*. *Edwards*, 74 Wash. 2d at 288, and *In re Marriage of Pea*, 17 Wash. App. at 731.

Moreover, discretion was exercised on untenable grounds or for untenable reasons. *In re Marriage of Muhammad*, 153 Wash. 2d at 803. The trial court failed to make any findings under RCW 26.09.080 as to how its distribution achieved equity, much less how it achieved the concept of placing these parties in parity of financial positions. To the contrary, the court's only findings regarding the post-dissolution economic status of the parties focus on how the wife should have the "ability to support herself." *CP 130, Finding 2.12; CP 135, Findings 42 & 43*. But even were those findings supported by evidence, the issue after a long-term marriage of 35 years is not whether one party merely has the "ability to support herself" or "stable rental income." To the contrary, the directive following a long term marriage is for parity of economic circumstance post-dissolution. *RCW 26.09.080; Edwards*, 74 Wash. 2d at 287-288; *In re Marriage of Pea*, 17 Wash. App. at 731. Kathy Janes has not received the benefit of this law since her separation from Steve in 2003.

The trial court's decision implementing gross economic disparity between spouses of 35 years as a permanent economic condition is based

on untenable reasons. It constitutes abuse of discretion, and should be reversed and ordered to be corrected.

C. **The court's findings that the wife could support herself from the court's property award are not supported by substantial evidence.**

Even under its erroneous theory that the wife should be entitled only to “the ability to support herself,” the trial court’s findings that the wife could do so under the court’s distribution is unsupported by evidence.

A trial court's factual findings are reviewed to determine whether substantial evidence supports the findings. *Scott v. Trans-Sys., Inc.*, 148 Wash. 2d 701, 707-08, 64 P.3d 1 (2003). Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash. 2d 169, 176, 4 P.3d 123 (2000).

Here, the trial court found that the “commercial properties will provide the wife the ability to have stable rental income that keeps pace with the cost of living.” *CP 135, para. 42*. But no evidence exists of these properties producing any “stable rental income” over debt. Nor did the trial court itself make any findings as to such income, or even opine or theorize as to exactly what income might allegedly produced by the properties.

The court also found that its property division “will allow the wife the ability to support herself.” *CP 130, Finding 2.12*. But no findings are made of what the wife might require to support herself, or what her income might be to fulfill those needs. This finding is not supported by evidence either.

The trial court found that its equalization payment would give the wife the “ability to purchase an annuity which will provide a stable income for her.” *CP 135, para. 43*. But no findings or consideration are made of what the wife would have left of this equalization payment after paying the debt assigned her, and her trial fees. Moreover, there is no evidence of, nor testimony as to, nor findings as to, what “annuity” income could produce.

In sum, even the findings made by this court as to the wife’s “ability to support herself” are without evidentiary support in the record. The findings are thus made upon “untenable grounds.”

This decree leaves the parties in grossly disparate economic circumstances, and must be considered clear and reversible error. *In re Marriage of Pea*, 17 Wn. App., 731, (citing *Edwards*, 74 Wash. 2d 286).

D. Failure to award the wife maintenance when the husband receives \$23,000 a month of net income, and the wife \$635 of income, is abuse of discretion.

The court also terminated the wife’s maintenance, while imposing

substantial debt on her. This is also abuse of discretion.

RCW 26.09.090 directs the court to consider a maintenance order in such amounts and for such periods of time as the court deems just after considering such factors as:

- (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....;
-
- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, physical and emotional condition, and financial obligations of the spouse; 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.

RCW 26.09.090.

Awards of maintenance are an important tool following a long term marriage where economic earning power is and will remain unequal. *In re Marriage of Sheffer*, 60 Wash. App. 51, 54, 802 P.2d 817 (Wash. Ct. App. 1990), citing *Stacy v. Stacy*, 68 Wash. 2d 573, 596, 414 P.2d 791 (1966). Maintenance is a means of providing for not only “bare necessities” of day-to-day life, but to equalize the parties' standard of living for an appropriate period of time. *In re Marriage of Sheffer*, 60 Wash. App. at 55, citing *Washburn*, 101 Wash. 2d at 179, and also

discussing DeRuwe, 72 Wash. 2d at 409.

The *Sheffer* court emphasizes the equalization of standard of living through the use of maintenance. In *In re Marriage of Morrow*, 53 Wash. App. 579, 587-588, 770 P.2d 197 (Wash. Ct. App. 1989), lifetime maintenance was properly awarded to a wife who was unable to work due to vision problems after a 22 year marriage. In *In re Marriage of Tower*, 55 Wash. App. 697, 699, 780 P.2d 863 (Wash. Ct. App. 1989), a permanent award of maintenance was properly granted to a wife of 19 years who had multiple sclerosis. *Scheffer* at 55-56, citing *Washburn*, 101 Wash. 2d at 183-184.

A record which fails to support a trial court's adequate consideration of the two paramount concerns—the parties' standard of living during marriage, and the post-dissolution economic condition—in considering maintenance and a property award, is reversible error. *In re Marriage of Sheffer*, 60 Wash. App. at 57-58. Here, the record reflects no reference to either paramount concern. It reflects no reference to the specific RCW 26.09.090 factors related to a maintenance order. *CP 130, para. 2.12*. All that can be found in this trial court's ruling is the implied concept that this wife is entitled to no more than "the ability to support herself," or "the ability to have stable rental income that keeps pace with the cost of living." *CP 135, para. 4.2*.

An award which leaves one party with over \$4,000 per month income, and the other receiving \$844 per month, is reversible error. *Scheffer* at 56-57. “It would be manifestly unjust to leave the wife (and children) with a low and uncertain standard of living while the husband retains a much higher one.” *In re Marriage of Sheffer*, 60 Wash. App. at 54, quoting *Stacy*, 68 Wash. 2d at 576. This trial court award leaves the husband with \$23,000 a month net income, and the wife \$635 a month. This result is manifestly unjust, and should be reversed.

E. Failure to award fee assistance to the wife after placing her in grossly disparate economic circumstances is abuse of discretion.

The trial court also refused to award the wife attorney fee assistance. A court asked to apportion attorney fees must consider the parties' relative need and ability to pay. *In re Marriage of Shellenberger*, 80 Wash. App. 71, 87, 906 P.2d 968 (Wash. Ct. App. 1995), citing *Matter of Marriage of Booth*, 114 Wash. 2d 772, 779-80, 791 P.2d 519 (1990).

It is obvious that this wife has no ability to pay attorney fees by anything other than substantial depletion of the property payment awarded her of \$560,000. But these are the very funds the court allegedly made available to the wife to prospectively purchase an “annuity” on which the wife could support herself. Moreover, this trial court did not consider the

extent to which the wife was left with attorney fees following a lengthy trial. When the court assigned the wife “70,000” of fees as separate debt, it was fully aware that this was the debt owed *before* trial. *CP 36*. In fact, the wife’s fees following trial were “134,466.17,” or some additional \$64,000 of debt. This is not considered in the wife’s debt obligation. *CP 93, ln. 9-15*.

Comparatively, having paid over \$200,000 in fees for both parties prior to trial, the husband’s two counsel were paid in full monthly. *RP 187-189*. The husband now receives \$23,000 of net monthly income in the court’s award, plus access to company retained earnings and credit, with no further obligation.

The court’s failure to award fee assistance under RCW 26.09.140 was based on untenable reasons. The trial court made no finding that Kathy’s fees were unreasonable. *CP 130, para. 2.15; CP 136*. The court not only did know the wife’s total fee exposure when it denied her assistance the first time in its decision after trial, but it then again denied her assistance on her reconsideration motion when she identified some combined \$150,000 of fees owing. *CP 93, lns. 7-15*. Moreover, it required the wife to pay all such fees from the property distribution it found she must live on for income post decree. *CP 93, lns. 14-15, and see CP 47-48 for additional debt*. This fee determination further exacerbated

the disparity in the post-dissolution economic circumstances of the parties, and should be reversed.

F. CONCLUSION

This trial court's division left a medically disabled wife of 35 years living in a leased 800 square foot home with less than \$635 a month of income and \$8,900 a month of debt. It left a working, healthy husband living in a \$1.7 million dollar waterfront home, enjoying \$23,000 a month net income as of the year 2007, with only his mortgage to pay. The husband's income of \$23,000 a month net is 36 times greater than the wife's Social Security income of \$635 per month. This decision is manifestly unreasonable under any standard of equity, and constitutes abuse of discretion. The trial court's failure to reconsider its decision after being presented with the economic reality of its property division to the wife was further abuse of discretion, as the result implemented by this court is clearly contrary to law.

This court should reverse this result and remand to the trial court. The trial court should be directed to enter an equitable distribution of all property, debt and income. It should be directed to consider that this wife's separate debt accrued through its own disparate maintenance orders, while allowing the husband to spend freely. The trial court should be directed to implement economic parity in both property and income

between these spouses of 35 years for the post dissolution remainder of each's life.

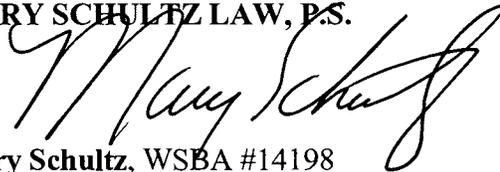
G. RAP 18.1 – FEES

The wife requests fees and costs for this appeal under RAP 18.1, and per directive of RCW 26.09.140, and *In re Marriage of Sheffer*, 60 Wash. App. at 59. Such an award is proper given the gross economic disparity between these spouses.

DATED this 9 day of Dec., 2009.

Respectfully Submitted,

MARY SCHULTZ LAW, P.S.



Mary Schultz, WSBA #14198
Attorney for Appellant

CERTIFICATE OF SERVICE

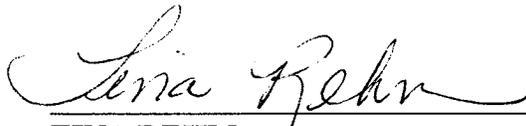
The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers.

That on the 9th day of Dec, 2009, she served a copy of the **Opening Brief of Appellant** to the persons hereinafter named at the place of address stated below which is the last known address via regular U.S. mail.

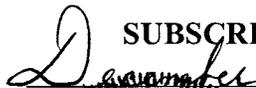
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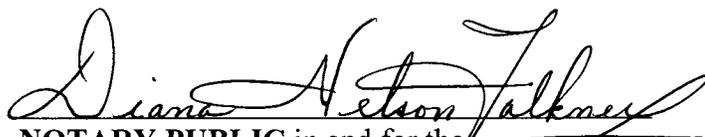
**Karen D. Moore
Brewer Layman, P.S.
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Everett, WA 98206-0488**



TINA REHM

 SUBSCRIBED AND SWORN to before me this 9th day of December, 2009.





NOTARY PUBLIC in and for the
State of Washington, residing in
Spokane. Commission Expires: 04/01/12