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65179-0

No. 65179-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Marriage of
LOIS MARGARET GELMAN
Appellant

and

ERIC NEAL FASSLER
Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves a long-term marriage between two doctors. Post-separation, each of the doctors experienced a career-changing medical condition. The wife (Gelman) lost her solo anesthesiology practice after suffering depression and the husband (Fassler) lost his practice after being diagnosed with cancer. At the time of trial, he was receiving disability insurance payments and the wife was employed in an anesthesiology practice, at less than half her former income, and disproportionately paying family expenses. *Without any explanation*, and after making errors in characterization, identification, and valuation, totaling well over several hundred thousand dollars, the court awarded the husband sixty-percent of the assets. Because this outcome is unreviewable for compliance with the law's requirements and also because the outcome is predicated on a number of obvious errors, the matter should be remanded for correction of those errors; for redistribution in light of the proper factors and the requirement that distribution of assets at dissolution of a marriage be just and equitable, with consideration of the future economic circumstances of the parties and without sympathy or prejudice; and, finally, for an explanation by the trial court of the reasons for its various rulings.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred when it failed, in any way or form, to explain its factual findings, its conclusions of law, or its distribution, which awarded to the husband a disproportionate share of the assets.
2. The trial court erred when it failed to enter complete findings of fact and conclusions of law.
3. The trial court erred when it distributed the property disproportionately, because the result is neither just nor equitable.
4. The trial court erred when it characterized Gelman's inheritance as community property, when the property was easily identifiable and traceable and when there was no evidence of an intent to donate the property.
5. The trial court erred when it awarded Gelman an accounts receivable asset that no longer existed.
6. The trial court erred when it assigned a value to Gelman's interest in an anesthesiology practice, absent any hallmarks of goodwill value.
7. The trial court erred when it failed to order an equitable lien or right of reimbursement to Gelman for the

substantial expense of maintaining the family residence, home to the parties' minor daughter, pending dissolution.

8. Gelman assigns error to the court's findings and conclusions because they are incomplete, but specifically assigns error to the following findings and conclusions.

2.8 Community Property

7. [inclusion of inheritance in Charles Schwab Joint Investment Account ****2286]

...

21. Wife's medical practice including accounts receivable as of December 2007.

2.9 Separate Property

[failure to include \$157,504, Gelman's inheritance]

CP 88-89.

Issues Pertaining to Assignments of Error

1. Is the court required to explain the reasoning behind its distribution, including by making complete findings of fact and conclusions of law, so that the parties and this Court can assess whether the requirements of the law are met?

2. Is the disproportionate distribution of assets just and equitable in light of all the facts and circumstances, including the

wife's disproportionate contribution to the marital estate and her inability to obtain disability insurance?

3. Is an inheritance, which is easily identifiable and traceable, properly characterized as separate property?

4. Can the court award an asset, in this case, an accounts receivable, that no longer exists?

5. When an anesthesiologist works in a practice where the doctors rotate and develop no relationship with patients and where, overall, the practice lacks any of the hallmarks of goodwill, did the trial court err when it assigned the practice a value of \$112,000 and awarded this value to the anesthesiologist spouse?

6. When, post-separation, one spouse remains in the marital residence with the parties' minor child, and pays overwhelmingly the expense of maintaining that residence, is she entitled to a right of reimbursement or an equitable lien against the community?

III. STATEMENT OF THE CASE

A. THE PARTIES WERE MARRIED FOR 23 YEARS.

Eric Fassler and Lois Gelman married in early 1986 and separated at the end of 2007. CP 88. Fassler is 53 years old and Gelman is 57. RP 10, 159. They have three daughters, all of

whom are now adults, though the youngest was finishing high school at the time of trial. CP 90; RP 15-19. Gelman petitioned for divorced after learning of Fassler's extramarital relationship with the family doctor, a partner in his practice, and when she realized there would be no reconciliation. CP 49-50.

Both Fassler and Gelman are medical doctors, Fassler a gynecologist/obstetrician and Gelman an anesthesiologist. RP 10, 15. Both enjoyed considerable professional success. Gelman had her own anesthesiology practice until April 2009, which CPA Steven Kessler described as "a phenomenal practice." RP 247-248. She provided anesthesia services for a big orthopedic group, Valley Orthopedic, by exclusive contract. RP 13-14. After the marital separation and resulting emotional trauma, she suffered depression, for which condition she was medicated. RP 41, 48. As a consequence of her illness, and its effects, she was forced to close her practice. RP 40-43. She rejoined a practice she had left ten years before, at a substantial loss in income, what Kessler described as a big change in value and not "a positive relationship." RP 240-241, 247-248.

Fassler was an OB/GYN partner in a practice called Women's and Family Health Specialists, and has also been

successful in business. RP 121, 160. He also managed the parties' finances and formerly had a medical consulting business. RP 21-22, 199, 285-286. His professional life also changed when, in 2009, with the dissolution pending, he was diagnosed with bone cancer in his upper left arm. RP 161. At the time of trial, he had undergone surgery and had just finished his final cycle of chemotherapy. CP 11; RP 161-165. His prognosis was uncertain. CP 29. His oncologist said his chance of survival was 45-55%, meaning half the people with his disease would die and half would not. RP 161; CP 24, 33. The vast majority of people who do die from the disease do so in the first couple years following diagnosis. CP 12, 33. His oncologist thought it too early to tell how well Fassler would be able to work in the future. CP 29. But Fassler was convinced he would never be able to practice the physically demanding type of medicine he had chosen. CP 29; RP 161-163.

B. THE PARTIES' EARNINGS, THEIR MEDICAL PRACTICES AND ACCOUNTS RECEIVABLE.

At the time of trial, Fassler was receiving social security disability and private insurance disability, in an amount totaling approximately \$11,700 monthly, or \$140,400 annually, tax-free. RP 138, 165. He acquired the insurance policy during the marriage. RP 129. An additional social security benefit satisfies his child

support obligation. RP 289. By age 65, Fassler will have received \$1.4 million in today's dollars, not counting social security. RP 139.

Fassler claimed at trial that the private insurance benefit ended at 65, but the policy itself was ambiguous, as read by Gelman's counsel and by the trial court. RP 129, 286-288. Fassler was unable at trial to produce a "determination letter," which would have shed light on this subject. RP 287. This mattered because benefits received post-dissolution but before age 65 would be separate property, but any benefits received after age 65 would be community property. RP 288. Post-trial, Fassler submitted evidence to the effect that the benefit continues past age 65, when it becomes a retirement benefit. Exhibit 158. Accordingly, the court awarded Gelman 50% of any such payments. CP 85-86.

Though he remained on the lease and remained an officer and stockholder in the medical practice corporation, Fassler was no longer working and planned to extricate himself from the practice, though he remained "on leave" according to the website. RP 121-125, 135.

CPA Kessler testified Fassler's goodwill interest in the medical practice was no longer worth anything, because he was unable to practice that type of medicine. RP 135, 242. If he

returned to work, he would lose a percentage of his disability benefits, based on what income he earned. RP 132. If able, he could work for free without jeopardizing his benefits. RP 134.

The parties disagreed over the value of Gelman's practice. Gelman lost her solo practice following separation when she was suffering from depression. RP 40-42. She was essentially forced out. RP 40. She took employment as one of 18 doctors in an anesthesiology practice, where she had formerly practiced. RP 42. The practice provides anesthesiology services to Valley Medical Center by exclusive contract. RP 15, 111. Her employment is subject to termination by either side at will. RP 44. If terminated, Gelman would take nothing with her. RP 255. And her success now is dependent on the success of the group. RP 248-249. The doctors work by rotation, over which Gelman has no control. RP 249. Accordingly, Gelman's hours vary, and, so, does her income. RP 32, 42-44. She makes about half what she did in her own practice, about \$31,000 monthly gross, from which she pays business expenses and taxes. RP 111, 248-249; Exhibit 37.

Although anesthesiology practices are generally acknowledged to lack "good will," CPA Steven Kessler decided to value Gelman's interest in the practice at \$112,000, which the court

accepted. CP 156 (amended spreadsheet); RP 249. Kessler initially called this value “good will,” but acknowledged that “more appropriately you may term it a contract value” (RP 238-239) or “potential value” (RP 252) or “earnings potential” (RP 250). Fassler called it “an expectancy of income.” RP 311-312. The court called it an “economic benefit expectancy.”¹ CP 86. Kessler admitted, “I think you could almost walk through the entire list of goodwill attributes and find that none of them technically apply.” RP 250. Certainly, for example, Gelman could not leave the practice and take any of the business, or even a single client, with her. RP 250.

Nevertheless, Kessler discerned this “intangible asset” in the practice group’s contract with the hospital, which resulted in Gelman’s income being “in my opinion, ... slightly above what I would term the replacement compensation or benchmark compensation, and – and so that’s what creates the value, whether you call it a goodwill or a contract value or an intangible value.” RP 240. In other words, Gelman had a job and the practice where she had the job had a contract with a hospital and that is an asset. RP 252. Despite that this “asset” had no hallmarks of goodwill, Kessler

¹ The court appears to have adopted this phrase from another trial court, as referenced in *In re Marriage of Freedman*, 35 Wn. App. 49, 51, 665 P.2d 902 (1983). See discussion at § IV.B below.

assigned it a value of \$112,000 by using “a more traditional goodwill approach.” RP 250. The court awarded this “asset” to Gelman. CP 156.

The court opined at the outset and again at the end of trial that Mr. Kessler is “the best there is” and observed how disagreeing with him in a previous case had resulted in reversal. RP 5, 325.

In addition to losing her practice, Lois lost her disability insurance when Eric failed to make a payment. RP 47-48. She has been unable to replace the insurance because of her age and because of the antidepressants she has been taking. *Id.*

The court also awarded to Gelman an accounts receivable from 2007 in the amount of \$138,306. CP 156. As Kessler described, this amount does not indicate profit or loss, because it does not indicate the cost of doing business (business expenses) or what actual payments were received, in contrast to Fassler’s more straightforward compensation. RP 252-255. In any case, the accounts receivable had long been collected and no longer existed as an asset. RP 245; see, also RP 101-104, 113-115, 253-254; Exhibit 153.

C. THE PARTIES' OTHER ASSETS INCLUDED A MARITAL RESIDENCE, REAL ESTATE, AND INVESTMENTS.

The assets before the court included a marital residence, a residence in Arizona, where Fassler's parents lived, investment accounts, and miscellaneous other items. The total was over \$4 million, depending on what proceeds the parties would receive from sale of the family home. CP 156. Regarding the other investments, which Fassler had managed, he testified they were "non-correlating," or meant to perform differently in different markets and, thereby, to mediate investment risk. RP 263. They included both taxable and nontaxable assets. Id. Accordingly, because they varied by type, Fassler said the investments could not simply be divided. Id. Rather, in his testimony, he urged the court to take into account the investment mix. Id. What the court ultimately did was award to the parties the assets Fassler picked for each of them. CP 78-84, 87-92; Exhibit 157.

1) Gelman's Inheritance

Gelman inherited approximately \$90,000 from her father in 2002. RP 69-70, 104-106.² The inheritance arrived in the form of a

² Fassler said the inheritance was approximately \$83,000. RP 149. He agreed the value of the inheritance in 2007 was approximately \$157,000, which is the amount taxed by the IRS. RP 149-150; Exhibit 115.

“Rollover IRA” and was maintained as such until, in 2007, the year of the parties’ separation, Fassler arranged for it to be withdrawn, as required by tax law. RP 182, 213. By then, the inheritance had increased in value to approximately \$157,000. RP 149-150. Fassler placed the funds in a joint Schwab account, as their accountant, Steven Shimuzu, confirmed. RP 116, 183; Exhibit 5A.³ Because he did not pay taxes on the distribution in 2007, there was \$53,597 owing the IRS in taxes, not including penalties and interest, at the time of trial. RP 66, 179; Ex. 31. They will owe interest of 7% from April 15, 2008, and, potentially, a 20% penalty. RP 179. Gelman asked to be awarded the asset, as valued at separation in 2007, including the tax liability. RP 69. Without explanation, the court did not include the asset as Gelman’s separate property, but listed it as community property. CP 89. The account in which the inheritance had been placed was awarded to Fassler. CP 156 (“Charles Schwab 2286”).

2) The marital residence.

The parties owned a residence in Clyde Hill appraised at \$2,450,000, subject to a \$980,000 mortgage at the time of trial. Exhibits 103 and 104. The parties’ youngest daughter, who was

³ The joint Schwab account was valued at approximately \$420,000 at the time of trial. RP 116.

still attending high school, remained with her mother in the home. RP 54, 107. At trial, Fassler claimed he opposed Gelman remaining in the house until the daughter completed high school. RP 146-147. For that reason, he did not want to share in the expense of maintaining the house. Id. During the two years following separation and before trial, Gelman had maintained the residence, including by payment of the monthly mortgage and escrow payments (approximately \$11,000), as well as other expenses. Exhibit 104; RP 35. Though Gelman had approached Fassler about refinancing at a lower interest rate, he was unwilling to cooperate in doing so as a joint owner (i.e., he wanted her to assume all the liability). RP 51-54. Gelman, in the midst of losing her practice, was unwilling to take on that risk. RP 54, 108.

During the separation, Fassler was ordered to make some contribution to the house payment. RP 35-36 (\$3400, then reduced to \$2000; no payments made after September 2009). Gelman had to dip into savings to keep up with the expenses. RP 34-37, 60.

D. THE TRIAL COURT DISTRIBUTED THE ASSETS DISPROPORTIONATELY BUT MADE NO ORAL RULING AND INCLUDED IN ITS FINDINGS NO EXPLANATION FOR THE DISTRIBUTION.

The trial court had both sides submit proposed findings and conclusions. RP 325. Without oral ruling, or indicating in a

memorandum ruling or otherwise, the court signed the final orders proposed by Fassler, including by attaching Fassler's spreadsheet from trial. CP 78-84, 87-92; Exhibit 157. Gelman moved for reconsideration, which the court at first denied without reading Gelman's reply. CP 93-108, 172. Then the court made numerous changes, including addressing items Gelman had indicated were omitted from Fassler's final orders, but otherwise leaving the distribution unchanged. CP 152-156. Gelman timely appealed. CP 174-218.

IV. ARGUMENT

A. THE TRIAL COURT'S DISTRIBUTION IS UNREVIEWABLE BECAUSE IT IS UNEXPLAINED.

People bring their disputes to a civil court in the hope that a neutral and fair arbitrator will reach a just decision. Whatever the outcome, these litigants deserve to understand the basis for the decision, without which understanding, their faith in the process necessarily is undermined. This harms the litigants, the legal system, and society generally.

Certainly, too, a trial court must explain its decisions so that an appellate court may review them for error. This requirement is not only practical, but also constitutional, since it implicates a party's very right to appeal. Const. art. I, § 22; *see, City of Seattle*

v. Klein, 161 Wn.2d 554, 556, 166 P.3d 1149 (2007) (“The ‘right to appeal in all cases’ is expressly guaranteed by the Washington Constitution.”). Indeed, it is axiomatic that without adequate findings of fact and conclusions of law explaining the trial court’s decision, this Court cannot meaningfully review it. See, e.g., *HTK Management, L.L.C. v. Rokan Partners*, 139 Wn. App. 772, 783, 162 P.3d 1147 (2007) (attorney fee award); *Lawrence v. Lawrence*, 105 Wn. App. 683, 20 P.3d 972 (2001) (child custody determination); *State ex rel. J.V.G. v. Van Guilder*, 137 Wn. App. 417, 424, 154 P.3d 243 (2007) (requirement that court consider relevant facts enforced by requirement that court state reasons for denying a request for deviation from child support).

Here, as in *Lawrence*, this Court is “unable to determine on what theory the trial court made its decision.” 105 Wn. App. at 686. The trial court was required to make a just and equitable distribution of the property and liabilities guided by the statutory factors in RCW 26.09.080, as well all other “relevant factors.”⁴ In

⁴ The statute provides as follows:

In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the

respect of that goal, the court's paramount concern when distributing property is the economic condition in which the decree leaves the parties. *In re Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1995). If only by implication, the court's decision should reflect these concerns, not prejudice or sympathy. Yet, it is impossible here to know whether the trial court complied with these duties.

This is no mere technicality. In the absence of any explanation by the trial court, the appellate court has no means to review the exercise of discretion to determine whether it was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 684-685, 41 P.3d 1175 (2002). Here, as in other contexts, the trial court's reasons for its decision should be clearly stated on the record, to permit meaningful review

parties, either community or separate, as 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 or domestic partnership; and
- (4) The economic circumstances of each spouse or domestic partner 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 or domestic partner with whom the children reside the majority of the time.

on appeal. *In re Marriage of Horner*, 151 Wn.2d 884, 894-896, 93 P.3d 124 (2004). After all, “only when it clearly appears what questions were decided by the trial court, and the manner in which they were decided,” can meaningful review occur. *Id.*, at 896.

Here, for all the record reveals, the trial court picked a number out of a hat, which is how it must feel to at least one of the parties. In addition to the outright errors described below, there is lingering concern that sympathy for Fassler’s health problems may have determined the outcome. The sympathy itself is, of course, completely warranted, but is not, itself, a reason to award Fassler more of the property. There must a nexus between his medical condition and economic circumstances. For example, if Fassler is one of the 50% whose cancer recurs, his life expectancy is very short, and his financial needs necessarily limited. If his cancer does not recur, he is positioned to work again. He is four years younger than Gelman and possessed, obviously, of considerable intelligence and skill. In the meantime, thanks to the disability insurance the marital community purchased for him, he enjoys tax-free income of \$100,000 to \$140,000 annually for the rest of his life.

Moreover, Fassler is not the only sympathetic character in this story. Gelman lost her marriage and, in the aftermath of, and

as a consequence of, that loss, she lost her very successful business. Older than Fassler by four years, she has had to start over, to a degree, with a practice she left a decade ago. She has no disability insurance, because Fassler failed to make the payments, and has been unable to purchase any because of her age and her health issues arising from the termination of the marriage. Should she become disabled, she would face financial ruin. As both Fassler's and Gelman's cases prove, one's ability to work cannot be taken for granted. One way or another, Fassler is guaranteed an ongoing income stream, whereas Gelman simply is not. This result seems particularly unfair in light of the disproportionate contribution Gelman made to the community estate, estimated to be about 65%, a contribution that includes the purchase of Fassler's disability insurance. RP 39, 47-48.

Here the judge left us without a clue as to why it was "just and equitable" to award one of these parties 60% of the assets. Maybe what is "just and equitable" is in the trial court's discretion, but that discretion is structured by the law and does not include sympathy or prejudice, but does require the court to consider factors such as contribution and future economic security. There is good reason to think the court did not complete the analytical

exercise the law requires. As described below, the judge mischaracterized an inheritance; he adopted a value for a medical practice widely considered to have no goodwill; he awarded Gelman an accounts receivable that no longer exists, the funds from which went, largely, to maintain the marital residence pending divorce, a contribution for which the community should have reimbursed her. Moreover, in one of the more striking indicators of the court's abstention from analysis, the distribution was entirely structured by Fassler, since the court adopted his proposed spreadsheet in its entirety. See CP 84, 154; Exhibit 157. Notably, that spreadsheet distributes the assets, not as Fassler testified would be fair (i.e., not just dividing up the assets but respecting the investment mix of taxable and nontaxable assets), but with Fassler, who had managed all of the assets, cherry-picking the assets to his advantage. RP 263; Exhibit 157. As a consequence of these decisions, the court's distribution actually is not 60/40, but more like 65/35 or worse.

This is wrong. Gelman is left with a result that, to her, seems unjust and inequitable and undecipherable. She is left, furthermore, unable to evaluate the court's reasoning or to confirm the court even considered the relevant facts, and only the relevant

facts. Likewise, this Court is left in the same position. Did the trial court do its job? Certainly, if a trial court passes appellate review only by managing to pin the tail somewhere on the donkey, then trials become a mockery and litigants may as well simply flip a coin.

B. THE TRIAL COURT ERRONEOUSLY INCLUDED A VALUE FOR DR. GELMAN'S PRACTICE, THOUGH IT HAS NO VALUE.

The trial court early on expressed the view that the CPA Steven Kessler could do no wrong, having learned this lesson from *In re Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007), where this Court reversed the same trial judge's ruling. In fact, Kessler's decision to invent a value of \$112,000 for a practice widely acknowledged to have no goodwill lacks any basis in fact or law. While the court declared there is "no magic in terms," citing *In re Marriage of Freedman*, 35 Wn. App. 49, 51, 665 P.2d 902 (1983), there is also no value in an anesthesiology practice. Gelman has a job and the business employing her has a contract with a hospital. If she leaves the job, she takes nothing with her. Gelman had the same contractual relationship in her solo practice, providing anesthesiology services by exclusive contract with a large orthopedic group. This is not goodwill and it is not an asset

recognized anywhere under Washington law, or the principles therein.

The trial court's reliance on *Marriage of Freedman* is instructive, since that case actually concerned goodwill, though the trial court called it a "spouse's economic expectancy benefit." 35 Wn. App. at 51. The appellate court did not adopt this term; rather, the appellate court used the term goodwill and applied the indices of goodwill to the law practice at issue in that case. *See, also, In re Marriage of Hall*, 103 Wn. 2d 236, 240, 692 P.2d 175 (1984) (discussing *Freedman* as a goodwill case).

Today, the law regarding goodwill is considerably more settled and recognizes goodwill as "the expectation of continued public patronage." Weber, 19 *Wash. Pract.*, § 11.15, citing *In re Marriage of Monaghan*, 78 Wn. App. 918, 926, 899 P.2d 841, 845 (1995). Of particular importance here is the recognition that

Goodwill is a property or asset which usually supplements the earning capacity of another asset, a business or a profession. Goodwill is not the earning capacity itself. It is a distinct *asset* of a professional practice, not just a *factor* contributing to the value or earning capacity of the practice.

In re Marriage of Hall, 103 Wn. 2d 236, 241, 692 P.2d 175 (1984) (emphasis added). The court applied this distinction in *Hall*, which

involved two medical doctors, to conclude that the spouse employed in academia had no good will.

As has been specifically recognized in other cases, anesthesiologists do not have goodwill. See, e.g., *In re Marriage of Nordby*, 41 Wn. App. 531, 537, 705 P.2d 277 (1985) (expert opined anesthesiologist had no goodwill because no contact with patients and work received on rotational basis); see, also, *In re Marriage of Crosetto*, 82 Wn. App. 545, 918 P.2d 954 (1996) (remanding for court to apply factors to claim of goodwill in a real estate appraisal business). Gelman exercised no control over when or how much she worked; patients did not choose her services, nor did other doctors. Indeed, Kessler agreed her practice had none of the hallmarks of goodwill.

Additionally, a similar kind of circumstance as presented here by Gelman's practice was addressed directly in *In re Marriage of Zeigler*, 69 Wn. App. 602, 849 P.2d 695 (1993). There the husband worked for State Farm Insurance Company. The trial court evaluated the wife's goodwill argument according to the factors in *In re Marriage of Fleege*, 91 Wn.2d 324, 588 P.2d 1136 (1979), and concluded there was no goodwill because it was State Farm, and not the husband, who enjoyed any expectation of

continued patronage. Similarly, it is Gelman's group, not Gelman, that determines her ability to earn money, as Kessler conceded. RP 248-249. She is completely dependent on the group's success, not her own individual effort, reputation, relationship with patients, etc. *Id.*

This distinction between earning capacity and goodwill seems to have been lost on Mr. Kessler and the trial court. Gelman, like *Ziegler*, would take nothing with her from the practice if she or the practice terminated her employment. Indeed, she had even less expectation of patronage than *Ziegler*, since, at least in his case, he maintained an office and had personal contact with his clients. As in *Nordby*, an anesthesiologist rotating with others simply has no goodwill. Gelman has a job, but her job is not a distinct asset available for distribution. Indeed, Gelman received no value for the solo practice she lost. All she had was a capacity to work and to be paid for the work she does. The trial court erred by "awarding" her \$112,000 that does not exist.

C. THE COURT ERRONEOUSLY CHARACTERIZED GELMAN'S INHERITANCE.

Property acquires its character upon acquisition and the right of the spouses in their separate property is as sacred as is the right in their community property..." *In re Estate of Borghi*, 167 Wn.2d

480, 484, 219 P.3d 932 (2009). An inheritance is a spouse's separate property. RCW 26.16.010. It retains that character if traceable and identifiable. *In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003).⁵ The burden of proving a change in character is heavy, meaning that separate property retains its character "until some direct and positive evidence [i.e., clear and convincing evidence] to the contrary is made to appear." *Borghi*, 167 Wn.2d at 484.

Certainly, that standard was not satisfied here. Gelman did not even want to withdraw the funds from the IRA, but did so reluctantly on Fassler's representation that tax law required it. RP 65. She did not herself put those funds into the joint Schwab account and, certainly, the timing of the transaction strongly militates against any suggestion of donative intent (i.e., occurring the same year as Fassler's infidelity and the marital separation).

⁵ By contrast, commingling occurs when:

(1) a substantial amount of separate property is (2) intermixed with (3) a substantial amount of community property to the extent that (4) it is no longer possible to identify whether the remainder is the separate property portion or the community property portion. When commingling has occurred, all of the asset becomes community property, and any asset acquired from the commingled asset is community property.

In re Marriage of Shui and Rose, 132 Wn. App. 568, 125 P.3d 180 (2005), citing 19 Kenneth W. Weber, *Washington Practice: Family and Community Property Law* § 11.13, at 159-60.

The funds are easily traceable and identifiable, amounting to \$157,054 at the time they were withdrawn from the IRA and deposited into the joint account. In short, all the evidence supported characterization of the inheritance as Gelman's separate property. The court erred by characterizing it as community property.

D. THE COURT FAILED TO ACCOUNT FOR THE WIFE'S DISPROPORTIONATE EXPENSE IN MAINTAINING THE MARITAL RESIDENCE DURING SEPARATION.

During the two years between separation and trial, Gelman remained in the marital residence with the parties' youngest daughter, who was still attending high school. She contributed overwhelmingly to the cost of maintaining this community asset, which sometimes required her to dip into her savings. Yet the court took no account of this contribution, made from Gelman's post-separation income, in distributing the asset. Rather, Fassler received a straight 60% of the net proceeds of the house sale, with no offset to Gelman for her post-separation contribution. This was error.

Spouses' earnings and accumulations during a permanent separation are considered separate property. RCW 26.16.140.⁶ By the same token, spouses are equally obligated, jointly and separately, to pay for family expenses. RCW 26.16.205; *see, also, State v. Rasch*, 40 Wn. App. 241, 245, 698 P.2d 559 (1985) (child support); *Sunkidd Venture, Inc. v. Snyder-Entel*, 87 Wn. App. 211, 215, 941 P.2d 151 (1997) (debt incurred during marriage is presumptively a community debt). Fassler cannot evade this obligation because he would have liked Gelman to move after he moved out or because he wanted her to assume full liability for the family residence. On the contrary, the fact that the Gelman was also the primary residential caretaker of the parties' youngest daughter, and the child was having considerable difficulty in the aftermath of her father's departure, her choice to remain in the home had bearing also on the parties' parental obligations, which the court should have considered. *See*, RCW 26.09.080(4) (requiring court to consider which spouse has primary residential care of children in decision about award of family home).

⁶ By contrast to Gelman's post-separation earnings, disability insurance payments to Fassler were community property until dissolution, another characterization issue and asset the court failed to address. *Brewer v. Brewer*, 137 Wn. 2d 756, 771, 976 P.2D 102 (1999).

As the court left it, Gelman ended up contributing at least several hundred thousand dollars to the community, for which she received no reimbursement or lien. Yet the courts have clearly recognized her right to one or the other. Indeed, an equitable lien “should arise whenever property of one of the three characters (separate property of husband, separate property of wife, or community property) is used to improve property of either of the other two sorts.” *In re Trierweiler’s Estate*, 5 Wn. App. 17, 22, 486 P.2d 314 (1971). Just as when community property is contributed to the separate property of one of the spouses, a spouse who contributes separate property (in this instance Gelman’s separate property income) to improve or maintain community property has a right of reimbursement for that contribution. *In re Marriage of DeHollander*, 53 Wn. App. 605, 770 P.2d 638 (1989).

Clearly the marital community here benefitted from Gelman’s payment of family expenses, including the costs of maintaining the marital residence. Such a community benefit is entitled to be recognized and reimbursed or offset from community property, such as in *In re Marriage of Pearson-Maines*, 70 Wn. App 860, 855 P.2d 1210 (1993), where the court granted an offset for the community benefit from the use of a residence owned by one

spouse as separate property. Likewise, here, Gelman was entitled to some reimbursement from the net sale proceeds for the considerable investment she made in the family residence post-separation. Of course, here, it is not clear the court ever even considered these facts.

E. THE COURT ERRONEOUSLY DISTRIBUTED GELMAN'S ACCOUNTS RECEIVABLE, THOUGH THEY NO LONGER EXISTED.

The court also awarded to Gelman a value attributed to her accounts receivable from December 2007 in the amount of \$138,306. CP 156. However, as CPA Kessler testified, the accounts receivable no longer existed. RP 245; see, also RP 101-104, 113-115, 253-254; Exhibit 153.⁷ The court cannot distribute an asset that no longer exists. *In re Marriage of Kaseburg*, 126 Wn. App. 546, 561, 103 P.3d 1278 (2005). Indeed, the court did not list as an asset or distribute Fassler's 2007 accounts receivable. CP 89; see, also RP 254-255 (Kessler discussing).

Indeed, what is particularly troubling about this distribution is the fact that Gelman was using whatever income she earned to almost single handedly maintain the marital residence, a

⁷ All that appeared in the court's orders of Fassler's 2007 income was a bonus of \$62,463, for the final quarter of 2007, which was received in 2008, after separation, and which Fassler deposited it in his U.S. Bank account. RP 72-75, 127; Exhibit 137. Fassler agreed this was community property. RP 211.

contribution the court did not recognize at all, as discussed above. *Compare In re Marriage of White*, 105 Wn. App. 545, 551, 20 P.3d 481 (2001) (wife's inheritance went to pay off community debts and justified disproportionate award to her of those assets). When this phantom asset is added to the "economic expectancy" of her practice, Gelman is at least several hundred thousand dollars short of a fair distribution.

V. CONCLUSION

For the foregoing reasons, Loie Gelman respectfully asks this Court to vacate the Decree of Dissolution and remand for correction of the errors described above; for redistribution in light of the proper factors and the requirement that distribution of assets at dissolution of a marriage be just and equitable, with consideration of the future economic circumstances of the parties and without sympathy or prejudice; and, finally, for an explanation by the trial court of the reasons for its various rulings.

Dated this 24th day of January 2011.

RESPECTFULLY SUBMITTED,



PATRICIA NOVOTNY #13604
Attorney for Appellant

INDEX TO APPENDIX: APPELLANT'S OPENING BRIEF

In re Marriage of Gelman and Fassler
Court of Appeals, Division One, No. 65179-0-I

<u>Number</u>	<u>Description</u>
A	Final Distribution Spreadsheet
B	Findings of Fact and Conclusions of Law
C	Additional Findings of Fact
D	Order Denying Motion to Reconsider

APPENDIX A

ASSET AND LIABILITY SPREADSHEET - OPTION 1									
DOM = April 1, 1982 DOS = DECEMBER 14, 2007 In the Marriage of Gabriel and Pamela									
	DOS = December 14, 2007	Account		Statement	Value	To Husband	To Wife		
	Description	Name	Documentation	Date	(Obligation)	Community	Separate	Community	Separate
Real Estate:	9420 NE 14th Street	Clyde Hill Residence	Appraisal						
	ChlMortgage 1728		Statement			60% to Husband/40% to Wife			
	5004 E. Silver Street	Tucson Residence	Appraisal	12/23/08	\$255,000	255,000			
	National Citi Mortgage 3825		Statement	4/1/09	-\$77,455	(77,455)			
	Total Real Estate				\$177,545	177,545	0	0	0
Vehicles:	Acura MDX 2002					X			
	Audi A8 2003						X		
	Total Autos				\$0	0	0	0	0
Bank Accounts:	US Bank 4290	Eric's Separate Checking Account	Statement	10/18/09	\$59,758		59,758		
	US Bank 4551	Lois's Separate Checking Account	Statement	9/30/09	\$85,466				85,466
	US Bank 0487	Lois's Separate Business Account	Statement	10/8/09	\$89,970				89,970
	US Bank 1646	Joint Checking	Statement	10/31/09	\$11,455			11,455	
	Capital One Account	Lois's Separate Savings Account							X
	Total Bank Accounts				\$226,649	0	59,758	11,455	155,439
Investments:	OptionsXpress 1560	Eric's Separate Money Market Account	Statement	10/30/09	15,813		15,813		
	OptionsExpress 8487	Joint	Statement	10/30/09	\$14,021	14,021			
	Charles Schwab 2286	Joint Investment Account	Statement	11/14/09	\$420,916	\$420,916			
	Tilson	Joint Investment Account	Statement	10/31/09	\$619,859	\$371,786		247,864	
	IDC Medical Ex-1, LLC	ExAblate Business			X	X			
	PPC Partners LLC C/O Pacific Port	1.7% Interest			X				
	Screenlife, LLC	91,758 Shares	Certificate		X				
	Tully's Stock	8,000 Shares	Certificate		X				
	Total Investments				\$1,070,409	808,732	15,813	247,864	0
Retirement:	Charles Schwab 4111	Lois IRA	Statement	11/14/09	\$17,089			\$17,089	
	Charles Schwab 1191	Eric's IRA	Statement	11/14/09	\$22,007	\$22,007			
	Vanguard 6580	Eric's Retirement	Online	10/31/09	\$18,374	18,374			
	Charles Schwab 2682	Lois's 401(K)	Online	11/30/09	\$1,184,848	543,338		523,267	98,045
	Tilson	Eric's 401(K)	Statement	10/31/09	\$812,679	\$439,867	42,573	330,249	
	Medford Bonds				X				
	Tully's Stock				X				
	Door to Door	4,167 Shares	Certificate		X				
	Westberg Media				X				
	Total Retirement				\$2,034,777	1,023,574	42,573	870,585	98,045
Other Assets:	Eric's Practice	Good Will	Valuation	9/29/09	\$0				
	US Bank 4280 2007 Distribution				\$62,483	62,483			
	Lois's Practice	Contract Value	Valuation		\$112,000			112,000	
		Accounts Receivable (\$234,456 * .55)	Valuation	12/31/07	\$138,308			138,308	
	2008 Tax Refund				X				
	Total Assets				\$3,127,789	62,483	0	250,306	0
Debts:	Alaska Airlines Visa Signature 9415	Eric's Separate Visa	Statement	8/8/09	-\$640		(640)		
	American Express 1005	Eric's Separate AE	Statement	8/1/09	-\$3,373		(3,373)		
	Capital One 0105	Lois's Separate MasterCard	Statement	9/30/09	-\$27				(27)
	Alaska Airlines Visa 2893	Lois's Separate Visa	Statement	10/2/09	-\$1,643				(1,643)
	American Express 1007	Lois's Separate Business AE	Statement	9/24/09	-\$3,362				(3,362)
	2008 Tax Debt								
	Total Debts				-\$9,145	0	(4,219)	0	(4,632)
Total Property					\$3,118,644	2,070,314	118,931	1,380,210	249,548
Total Community Property					\$3,118,644	2,070,314		1,380,210	
Community Property						\$ 2,070,314		\$ 1,380,210	
Percentage						60%		40%	

APPENDIX B

APPENDIX B

THE HONORABLE JAMES DOERTY

FILED
KING COUNTY, WASHINGTON

JAN 04 2010

SUPERIOR COURT CLERK
BY Megan Gaudens
DEPUTY

Superior Court of Washington
County of King

In re the Marriage of:

LOIS MARGARET GELMAN,

Petitioner,

and

ERIC NEAL FASSLER,

Respondent.

No. 08-3-05219-6 SEA

Findings of Fact and

Conclusions of Law

(Marriage)

(FNFCL)

I. Basis for Findings

The findings are based on trial. The following people attended:

- Petitioner.
- Petitioner's Lawyer.
- Respondent.
- Respondent's Lawyer.

II. Findings of Fact

Upon the basis of the court records, the court *finds*:

2.1 Residency of Petitioner

The Petitioner is a resident of the state of Washington.

1 **2.2 Notice to the Respondent**

2 The respondent appeared, responded or joined in the petition.

3 **2.3 Basis of Personal Jurisdiction Over the Respondent**

4 The facts below establish personal jurisdiction over the respondent.

5 The respondent is currently residing in Washington.
6 The parties lived in Washington during their marriage and the petitioner continues
7 to reside, or be a member of the armed forces stationed, in this state.
8 The parties may have conceived a child while within Washington.

8 **2.4 Date and Place of Marriage**

9 The parties were married on April 5, 1986 in Tucson, Arizona.

10 **2.5 Status of the Parties**

11 Husband and wife separated on December 14, 2007.

12 **2.6 Status of Marriage**

13 The marriage is irretrievably broken and at least 90 days have elapsed since the date the petition
14 was filed and since the date the summons was served or the respondent joined.

15 **2.7 Separation Contract or Prenuptial Agreement**

16 There is no written separation contract or prenuptial agreement.

17 **2.8 Community Property**

18 The parties have the following real or personal community property:

- 19 1. Real property at 9420 NE 14th Street in Clyde Hill, Washington.
- 20 2. Real property at 5004 E Silver Street in Tucson, Arizona.
- 21 3. 2002 Acura MDX.
- 22 4. 2003 Audi A6.
- 23 5. U.S. Bank Account****1546.
- 24 6. OptionsExpress Account****8487.
- 25 7. Charles Schwab Joint Investment Account****2286.
- 26 8. Tilson Joint Investment Account.
- 27 9. An interest in IDC Medical Ex-1, LLC.
- 28 10. An interest in PPC Partners, LLC.
- 11. 4,167 Shares of Door-to-Door.
- 12. 91,758 Shares of Screenlife, LLC.

- 1 13. 8,000 Shares of Tully's Stock.
- 2 14. Wife's IRA with Charles Schwab****4111.
- 3 15. Husband's IRA with Charles Schwab****1161.
- 4 16. Husband's Vanguard Account****5580.
- 5 17. Wife's 401(k) with Charles Schwab****2662.
- 6 18. Husband's 401(k) with Tilson, except for that portion attributable to his contributions post-separation as set forth below.
- 7 19. Bonds, Tully's Stock, Westberg Media interest included in the parties' retirement portfolio.
- 8 20. Husband's medical practice.
- 9 21. Wife's medical practice including accounts receivable as of December 2007.
- 10 22. Income Tax Refund from 2008.

7 **2.9 Separate Property**

8 The husband has the following real or personal separate property:

- 9 1. \$42,573 of his Tilson 401(k) as of 10/31/09.
- 10 2. Husband's OptionsExpress account****1560.
- 11 3. U.S. Bank Account****4290.

12 The wife has the following real or personal separate property:

- 13 1. U.S. Bank Account****4651.
- 14 2. U.S. Bank Account****0487.

15 **2.10 Community Liabilities**

16 The parties have incurred the following community liabilities:

<u>Creditor</u>	<u>Amount</u>
17 1. CitiMortgage****1728 (Family Home)	\$981,780
18 2. National City Mortgage (Arizona)	\$77,455
19 3. 2006 Tax liability from Wife's Inheritance	approx \$50,000

20 **2.11 Separate Liabilities**

21 The husband has incurred the following separate liabilities:

<u>Creditor</u>	<u>Amount</u>
22 1. Alaska Airlines Visa****9416	\$840
23 2. American Express****1005	\$3,373

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The wife has incurred the following separate liabilities:

<u>Creditor</u>	<u>Amount</u>
1. Capital One MasterCard****0105	\$27
2. Alaska Airlines Visa****2893	\$1,543
3. American Express****1007	\$3,362

2.12 Maintenance

Maintenance was not requested.

2.13 Continuing Restraining Order

Does not apply.

2.14 Protection Order

Does not apply.

2.15 Fees and Costs

Wife shall pay the husband's attorney's fees in the amount of _____ due to her intransigence.

2.16 Pregnancy

The wife is not pregnant.

2.17 Dependent Children

The children listed below are dependent upon either or both spouses *for pool recording and other financial report.*

<u>Name of Child</u>	<u>Age</u>	<u>Mother's Name</u>	<u>Father's Name</u>
<i>mf</i> Molly Fassler	<i>18</i>	Lois Fassler	Eric Fassler

2.18 Jurisdiction Over the Children

This court has jurisdiction over the children for the reasons set forth below.

This court has exclusive continuing jurisdiction. The court has previously made a child custody, parenting plan, residential schedule or visitation determination in this matter and retains jurisdiction under RCW 26.27.211.

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This state is the home state of the children because:

the children lived in Washington with a parent or a person acting as a parent for at least six consecutive months immediately preceding the commencement of this proceeding.

The children and the parents or the children and at least one parent or person acting as a parent, have significant connection with the state other than mere physical presence; and substantial evidence is available in this state concerning the children's care, protection, training and personal relationships; and

the children have no home state elsewhere.

No other state has jurisdiction.

2.19 Parenting Plan

The parenting plan signed by the court on this date or dated January 4 2010, is approved and incorporated as part of these findings.

2.20 Child Support

There are children in need of support and child support should be set pursuant to the Washington State Child Support Schedule. The Order of Child Support signed by the court on this date or dated January 4 2010, and the child support worksheet, which has been approved by the court, are incorporated by reference in these findings.

2.21 Other

See Courts attachment here to the

Does not apply. Further: in addition to Exhibits admitted at trial, and video depositions the court received and considered DR Foster 12-18-07 declaration, response and reply.

III. Conclusions of Law

The court makes the following conclusions of law from the foregoing findings of fact:

3.1 Jurisdiction

The court has jurisdiction to enter a decree in this matter.

3.2 Granting a Decree

The parties should be granted a decree.

3.3 Pregnancy

1 Does not apply.

2 **3.4 Disposition**

3 The court should determine the marital status of the parties, make provision for a parenting plan
4 for any minor children of the marriage, make provision for the support of any minor child of the
5 marriage entitled to support, consider or approve provision for maintenance of either spouse,
6 make provision for the disposition of property and liabilities of the parties, make provision for the
7 allocation of the children as federal tax exemptions, make provision for any necessary continuing
restraining orders, and make provision for the change of name of any party. The distribution of
property and liabilities as set forth in the decree is fair and equitable.

8 **3.5 Continuing Restraining Order**

9 Does not apply.

10 **3.6 Protection Order**

11 Does not apply.

12 **3.7 Attorney Fees and Costs**

13 Attorney fees, other professional fees and costs should be paid by Wife to Husband in the amount of
14 _____ *no attorney fees are ordered: see supplemental findings attached* 

15 **3.8 Other**

16 Does not apply.

17
18 Dated: January 4 2010



Judge/Commissioner
JAMES A. DOERTY

21 Presented by:
22 STELLA L. PITTS & ASSOCIATES, PLLC

Approved for entry:

A. Kyle Johnson, WSBA #1531
Attorney for Petitioner

25 Stella L. Pitts, WSBA #16412
26 Benjamin A. Lilien, WSBA #37912
Attorneys for Respondent

**STELLA L. PITTS
& ASSOCIATES, PLLC**
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Fax (206) 447-7146

APPENDIX C

APPENDIX C

APPENDIX D

APPENDIX D

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THE HONORABLE JAMES DOERTY
WITHOUT ORAL ARGUMENT
FEBRUARY 5, 2010

FILED
KING COUNTY WASHINGTON

FEB 09 2010

SUPERIOR COURT CLERK
BY Megan Gaudette
DEPUTY

SUPERIOR COURT OF WASHINGTON
KING COUNTY

In re the Marriage of:

LOIS MARGARET GELMAN,

Petitioner,

and

ERIC NEAL FASSLER,

Respondent.

NO. 08-3-05219-6 SEA

ORDER DENYING MOTION FOR
RECONSIDERATION

Clerk's action required.

~~PROPOSED~~

THIS MATTER having come before the undersigned Judge on Petitioner's Motion for Reconsideration, and the Court being fully informed, and for good cause shown, now, therefore,

IT IS HEREBY ORDERED:

A. Except as specifically set forth below, Petitioner's motion for reconsideration is denied.

B. The Order of Child Support signed by the Court on 1/4/2010 Shall be Revised as follows:

1. Paragraph 3.15 shall be revised to include the following language:

Proposed Order on Reconsideration - Page 1 of 3

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Fax (206) 447-7746

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1 The Petitioner shall pay 65.4% and the Respondent 34.6% (each parent's proportional
2 share of income from the Child Support Schedule Worksheet, line 6) of the following
3 expenses incurred on behalf of the child listed in Paragraph 3.1:

4 Lakeside Tuition.

5 C. The Findings of Fact shall be revised as follows:

- 6 1. Paragraph 2.9 shall be revised to include the following language:

7 The wife has the following real or personal separate property:

8 \$98,045 of her Charles Schwab 401(k) as of November 30, 2009.
9 Her Capital One Savings account.

10 D. The Decree of Dissolution shall be revised as follows:

- 11 1. The dispute resolution provisions shall be revised to designate Cheryl Russell or Howard
12 Bartlett as arbitrator (based on who is first available).
13 2. The Capital One mileage points accrued during the marriage (balance as of 12/14/07) shall
14 be used solely for the benefit of the children.
15 3. Petitioner is awarded the liabilities and contingent liabilities associated with her medical
16 practice.
17 4. Respondent is awarded the liabilities and contingent liabilities associated with his medical
18 practice.
19 5. Except as otherwise set forth in the decree, the husband shall pay any and all debts associated
20 with the property awarded to him.
21 6. Except as otherwise set forth in the decree, the wife shall pay any and all debts associated with
22 the property awarded to her.

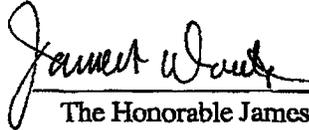
1 7. The liabilities and contingent liabilities associated with the parties' investment in IDC
2 Medical (ExAblate machine) are awarded to Respondent along with the asset.

3 8. The parties shall cooperate to refinance the mortgage debt secured by the family residence
4 to reduce the monthly mortgage payment as much as possible until the home is sold.

5 E. The Asset and Liabilities Chart shall be revised as follows:

6 1. The Assets and Liabilities Chart attached hereto as Exhibit A shall replace the Assets
7 and Liabilities Chart (Trial Exhibit #157) attached to and referenced in the Decree of
8 Dissolution and Findings of Fact.

9 DONE IN OPEN COURT this 8 day of February, 2010.

10
11 

12 The Honorable James Doerty

13 **JAMES A. DOERTY**

14 Presented by:

15 **STELLA L. PITTS & ASSOCIATES, PLLC**

16
17

Stella L. Pitts, WSBA #16412
18 Benjamin A. Lilien, WSBA #37962
Attorneys for Respondent

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23 Proposed Order on Reconsideration - Page 3 of 3

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Stella L. Pitts & Associates, PLLC

EXHIBIT A

ASSET AND LIABILITY SPREADSHEET - OPTION 1									
DOM # APRIL 1988 DOB # DECEMBER 14, 2007 In the Marriage of Gelman and Parise									
	DOS = December 14, 2007	Account Name	Documentation	Statement Date	Value (Obligation)	To Husband		To Wife	
						Community	Separate	Community	Separate
Real Estate:	9420 NE 14th Street	Clyde Hill Residence	Appraisal			60% to Husband/40% to Wife			
	5004 E. Silver Street	Tucson Residence	Appraisal	12/23/08	\$255,000	255,000			
	National Cit Mortgage 3825		Statement	4/1/09	-\$77,455	(77,455)			
	Total Real Estate				\$177,545	177,545	0	0	0
Vehicles:	Acura MDX 2002					X			
	Audi A8 2003						X		
	Total Autos				\$0	0	0	0	0
Bank Accounts:	US Bank 4290	Eric's Separate Checking Account	Statement	10/18/09	\$59,758		59,758		
	US Bank 4851	Lois's Separate Checking Account	Statement	9/30/09	\$85,466				65,466
	US Bank 0487	Lois's Separate Business Account	Statement	10/8/09	\$89,070				89,970
	US Bank 1646	Joint Checking	Statement	10/31/09	\$11,455			11,455	
	Capital One Account	Lois's Separate Savings Account							X
	Total Bank Accounts				\$226,649	0	59,758	11,455	155,438
Investments:	OptionsXpress 1560	Eric's Separate Money Market Account	Statement	10/30/09	15,813		15,813		
	OptionsExpress 8487	Joint	Statement	10/30/09	\$14,021	14,021			
	Charles Schwab 2288	Joint Investment Account	Statement	11/14/09	\$420,916	\$420,916			
	Tilson	Joint Investment Account	Statement	10/31/09	\$619,869	\$371,795			247,864
	IDC Medical Ex-1, LLC	ExAblate Business			X	X			
	PPG Partners LLC C/O Pacific Port	1.7% Interest			X				
	Screenlife, LLC	81,758 Shares	Certificate		X				
	Tully's Stock	8,000 Shares	Certificate		X				
	Total Investments				\$1,070,409	806,732	15,813	247,864	0
Retirement:	Charles Schwab 4111	Lois IRA	Statement	11/14/09	\$17,069			\$17,069	
	Charles Schwab 1181	Eric's IRA	Statement	11/14/09	\$22,007	\$22,007			
	Vanguard 5580	Eric's Retirement	Online	10/31/09	\$18,374	18,374			
	Charles Schwab 2882	Lois's 401(K)	Online	11/30/09	\$1,184,648	\$43,336		523,287	98,045
	Tilson	Eric's 401(K)	Statement	10/31/09	\$812,679	\$439,857	42,573	330,249	
	Morden Bonds				X				
	Tully's Stock				X				
	Door to Door	4,167 Shares	Certificate		X				
	Westberg Media				X				
	Total Retirement				\$2,034,777	1,023,674	42,573	870,585	98,045
Other Assets:	Eric's Practice	Good Will	Valuation	9/29/09	\$0				
	US Bank 4280 2007 Distribution				\$62,483	62,483			
	Lois's Practice	Contract Value	Valuation		\$112,000			112,000	
		Accounts Receivable (\$234,458 * .58)	Valuation	12/31/07	\$138,306			138,306	
	2008 Tax Refund				X				
	Total Assets				\$3,127,659	62,463	0	250,306	0
Debts:	Alaska Airlines Visa Signature 9416	Eric's Separate Visa	Statement	8/8/08	-\$940		(840)		
	American Express 1005	Eric's Separate AE	Statement	8/1/08	-\$3,373		(3,373)		
	Capital One 0106	Lois's Separate MasterCard	Statement	9/30/09	-\$27				(27)
	Alaska Airlines Visa 2883	Lois's Separate Visa	Statement	10/2/09	-\$1,543				(1,543)
	American Express 1007	Lois's Separate Business AE	Statement	9/24/08	-\$3,382				(3,382)
	2008 Tax Deb								
					-\$9,145	0	(4,213)	0	(4,832)
	Total Property				\$3,613,004	2,070,314	113,931	1,380,210	248,549
	Total Community Property				\$3,450,824	2,070,314		1,380,210	
	Community Property					\$ 2,070,314		\$ 1,380,210	
	Percentage					60%		40%	

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Marriage of)
)
LOIS MARGARET GELMAN,) No. 65179-0-1
Appellant,)
)
and) DECLARATION
) OF SERVICE
)
ERIC NEAL FASSLER,)
Respondent.)
_____)

Jayne Hibbing certifies as follows:

On January 24, 2011, I served upon the following true and correct copies of the Opening Brief of Appellant, Designation of Clerk's Papers Supplemental, and this Declaration, by:

- depositing same with the United States Postal Service, postage paid
 arranging for delivery by legal messenger.

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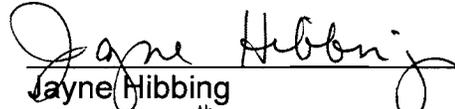
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2011 JAN 25 AM 10:05

I certify under penalty of perjury that the foregoing is true and correct.


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