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NO. 66704-1-I

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

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STATE OF WASHINGTON
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IN RE THE MARRIAGE OF:

PENNY L. SWEET,

RESPONDENT,

and

KENNETH W. SWEET,

APPELLANT.

BRIEF OF APPELLANT

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Assignment of Error No. 2: The trial court erred when it determined the value of the parties’ marital residence as of the date of trial, as opposed to the date of the parties’ separation, where Ms. Sweet had exclusive control of the residence, Ms. Sweet ignored court orders requiring her to sell the home, and the condition and value of the home deteriorated substantially under her care.

Assignment of Error No. 3: The trial court erred when it valued two promissory notes awarded to Mr. Sweet at \$100,000.00 each, when Mr. Sweet testified the notes were worthless and Ms. Sweet conceded that was likely the case, or, at the very least, she didn’t know if the notes had value.

Assignment of Error No. 4: The trial court erred when it determined that Mr. Sweet had already received \$60,000.00 of his share of the marital estate as a result of mortgage payments Ms. Sweet made on the home Mr. Sweet owned prior to the marriage, where the home was sold during the

parties' marriage and the proceeds of that sale were used to purchase other community property.

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3. May the court assign a substantial value to an asset that both parties' agree is likely worth nothing or of unknown value? (Assignment of Error No. 3)
4. Should a party in a divorce case be granted an award at trial based on contributions that party made toward the mortgage on a home his or her spouse owned prior to the marriage, where that home was later sold during the marriage and the proceeds used to purchase other community property? (Assignment of Error No. 4)

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INTRODUCTION

Kenneth W. Sweet appeals the trial court's valuation of several assets awarded to him or his wife, Penny L. Sweet, in the parties' divorce case. First, the trial court erred when it valued the parties marital residence at \$950,000.00 based solely on Ms. Sweet's testimony that that was the price she "would like to sell it for," notwithstanding overwhelming evidence the home was worth more than that. Evidence that the home was worth significantly more than \$950,000.00 included testimony regarding the \$1,819,000.00 purchase price of the home, evidence of assessed values of the home (\$1,463,000.00 for tax year 2011, and \$1,690,000.00 for tax year 2010, and \$1,917,000.00 for tax year 2009), Mr. Sweet's testimony the home was worth over \$3,000,000.00, Mr. Sweet's testimony regarding the \$2,500,000.00 requested sale price of a neighboring house of lesser value, a certified market analysis obtained by Ms. Sweet stating the home was worth between \$1,300,000.00 and \$1,400,000.00, and a sworn statement signed by Ms. Sweet earlier in the case stating the home was worth \$1,690,000.00.

Second, the trial court erred when it valued two promissory notes awarded to Mr. Sweet at \$100,000.00 each, even though Mr. Sweet testified the notes had no value and Ms. Sweet conceded they likely were

worth nothing, or, at the very least, she didn't know if they had value.

Because the court ultimately divided the parties' net marital estate fifty-fifty, attributing \$200,000.00 in value to worthless assets and awarding them to Mr. Sweet substantially reduced the actual value of his award in the case.

Third, the trial court erred when it valued at \$60,000.00 something Ms. Sweet termed the "Key Bank Account, community property surplus." This "award" of property was apparently related to mortgage payments made on the Sweets' home while the parties were in bankruptcy (a home Mr. Sweet purchased prior to the marriage), which was later sold during the marriage and the proceeds from that sale used to purchase other community property. Since the court ultimately divided the parties' net marital estate fifty-fifty, this inappropriate award to Mr. Sweet substantially reduced the actual value of his award in the case.

Mr. Sweet also appeals the trial court's decision to value the parties' marital residence at the date of trial instead of the date of separation despite the fact that Ms. Sweet had exclusive control of the residence during that period, Ms. Sweet ignored several court orders to sell the home at an earlier date, and the condition and value of the marital residence deteriorated sharply under her care.

. Finally, Mr. Sweet appeals the trial court's failure to correct a mathematical error it made when it tallied the value of the assets awarded to each party in an effort to divide the marital estate equally between them.

ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred when it determined the value of the parties' marital residence to be \$950,000.00, when the only evidence supporting such determination was Ms. Sweet's testimony that \$950,000.00 was the price for which she wanted to sell the it, and a wide array of evidence demonstrating the home was worth substantially more than that was introduced, including a sworn statement signed by Ms. Sweet stating the home was worth \$1,690,000.00.

Assignment of Error No. 2: The trial court erred when it determined the value of the parties' marital residence as of the date of trial, as opposed to the date of the parties' separation, where Ms. Sweet had exclusive control of the home during that period, Ms. Sweet ignored several court orders regarding the sale of the property, and the condition and value of the home deteriorated substantially under her care.

Assignment of Error No. 3: The trial court erred when it valued two promissory notes awarded to Mr. Sweet at \$100,000.00 each, when Mr. Sweet testified the notes were worthless and Ms. Sweet conceded that was likely the case, or, at the very least, she didn't know if the notes had value.

Assignment of Error No. 4: The trial court erred when it determined that Mr. Sweet had already received \$60,000.00 of his share of the marital estate as a result of mortgage payments Ms. Sweet made on the home Mr. Sweet owned prior to the marriage, where the home was sold during the parties' marriage and the proceeds of that sale were used to purchase other community property.

Assignment of Error No. 5: The trial court erred when, in an effort to award each party to the divorce a 50 per cent share of the marital assets, it incorrectly added the amount of assets awarded to Mr. Sweet.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is a trial court permitted to ignore a wide array of evidence regarding an asset's value and instead value that asset at a substantially lower amount based solely on one party's unsupported testimony as to his or her desired sale price of the asset (Assignment of Error No. 1)

2. Should a marital residence be valued at the date of separation or the date of trial where one party to the divorce had exclusive control of the property during the intervening period, that party ignored court orders to market the home for sale during the divorce proceedings, and the condition and value of the residence deteriorated substantially under that party's care? (Assignment of Error No. 2)

3. May the court assign a substantial value to an asset that both parties agree is likely worth nothing or of unknown value? (Assignment of Error No. 3)

4. Should a party in a divorce case be granted an award at trial based on contributions that party made toward the mortgage on a home his or her spouse owned prior to the marriage, where that home was later sold and the proceeds used to purchase other community property? (Assignment of Error No. 4)

5. When the trial court endeavors to divide the parties' property fifty-fifty, and incorrectly tabulates the values of property awarded to one of the parties, should the mathematical error be corrected and the affected party's award adjusted accordingly? (Assignment of Error No. 5)

STATEMENT OF THE CASE

Marital background. Kenneth W. Sweet and Penny L. Sweet met in 1999 (RP 173). The parties married in March 2000 (RP 13 and RP 175). Mr. Sweet was a registered investment advisor at the time (RP 176 and RP 177) and Ms. Sweet was a registered nurse (RP 176). When the parties married, Ms. Sweet had three children from a prior marriage (RP 10). The Sweets later had two biological children of their own, and adopted another of Ms. Sweet's children from a third relationship (RP 10).

Following their marriage, the parties lived in Redmond, Washington, in a home Mr. Sweet owned prior to the marriage (RP 174). Mr. Sweet had owned the home for five years before Ms. Sweet moved into it with him (RP 175). Mr. Sweet had to borrow approximately \$359,000.00 to purchase the home (RP 175). The Sweets lived a fairly extravagant lifestyle at the time, incurring approximately \$20,000.00 in monthly living expenses (RP 181). Shortly thereafter, however, they began to experience financial difficulties (RP 180). Mr. Sweet eventually borrowed another \$150,000.00 against his home (RP 182). In July 2004, the Sweets filed for bankruptcy (RP 24-25, and RP 183).

While the Sweets were in bankruptcy, one of their children died after ingesting magnets from a small toy (RP 11-12). The Sweets sued the manufacturer of the toy, and eventually received a \$6,000,000.00 settlement, approximately \$4,100,000.00 of which they retained after attorney fees (RP 12). The proceeds of this lawsuit were deposited into the hedge fund Mr. Sweet was managing with another individual (RP 48-49).

The Sweets used a portion of the proceeds to pay off their creditors and emerge from bankruptcy (RP 45-46). They also purchased a luxury home in Carnation, Washington, for approximately \$1,819,000.00 (RP 105).

In September 2007, the Sweets sold Mr. Sweet's home in Redmond, netting \$358,402.00 from the sale (RP 46-47). The proceeds from the sale of Mr. Sweet's Redmond home were transferred to a KeyBank account Mr. Sweet maintained during the marriage (RP 46-47). Mr. Sweet then transferred the funds into the account of the hedge fund he was managing (RP 214). The Sweets used money from that account to purchase a piece of commercial property in Carnation for \$275,000.00 (RP 55 and RP 214-215). Title to the commercial property was held in Deer Haven Properties LLP, a limited liability partnership established by

the Sweets, in which Mr. and Ms. Sweet were equal partners. (RP 54-55).

Over the ensuing months, the Sweets spent over \$500,000.00 on home improvements and personal property for their new Carnation residence, while maintaining the remainder of the settlement proceeds in the aforementioned hedge fund (RP 48-49, RP 101, RP 195, RP 197-200, and Exhibit 61). The Sweets resumed living an extravagant lifestyle, once again incurring \$18,000.00 to \$20,000.00 a month in living expenses (RP 226 and RP 345).

Mr. Sweet's hedge fund made money in 2006 and 2007 (RP 200), but lost over \$350,000.00 in 2008 due to the decline in the stock market (RP 200-201). By February 2009, the Sweets' liquid assets were reduced to \$50,000.00 in cash and \$139,000.00 to \$150,000.00 in the hedge fund (RP 199 and RP 207).

On or about February 8, 2011, Mr. Sweet was accused of raping one of Ms. Sweet's daughters from her prior marriage (RP 2). Mr. Sweet was removed from the marital residence on February 9, 2011 (RP 205 and RP 222). On March 9, 2009, an order was entered in King County Superior Court granting Ms. Sweet exclusive control of the marital residence and prohibiting Mr. Sweet from entering on the grounds of the property or having any contact with Ms. Sweet and the parties' children

(Ex. 262). Mr. Sweet had no access to the marital residence from that date forward (RP 216 and RP 218-219).

The Sweets divorce trial. Trial of the parties' divorce action was held December 6, 7, 8, 9, and 16, 2010 (CP 65-74). At the time of trial, Mr. Sweet was incarcerated in the King County Jail, having been found guilty of raping his stepdaughter (RP 7 and RP 164-165). Mr. Sweet participated in a portion of the trial by way of telephone (CP 63-64).

At trial, the parties testified regarding the issues raised in this appeal:

Value of the marital residence. In a "Complete Asset and Debt" table adopted by the court and attached to the Decree of Dissolution (and a subsequent Amended Decree of Dissolution), the trial court valued the parties' marital residence at \$950,000.00 (CP 108 and CP 204). The sole evidence supporting this valuation was Ms. Sweet's testimony at trial, in which she responded, "Yes," to her attorney's question of whether \$950,000.00 was what she would like to sell it for (RP 81). Ms. Sweet did testify regarding repairs she wanted to make to the residence (RP 64-72), and introduced exhibits noting \$33,200.00 worth of repairs she felt the home needed (Ex. 20, Ex 31, and Ex. 251), but she offered no evidence as to how much more the home would be worth if these repairs were made other than to say that she "would prefer to have the

maintenance and the repairs and sell it for much higher than (\$950,000.00)” (RP 82). She also testified that she believed she could “get more money” for the home if these repairs were made, but again did not say how much (RP 83).

Ms. Sweet admitted on cross-examination that she obtained a Certified Market Analysis of the residence regarding its value in January 2010 that stated the value of the home was between \$1,300,000.00 and \$1,400,000.00 (RP 380-381). One of Ms. Sweet’s exhibits regarding repairs that allegedly needed to be made on the property noted that buyers expected a home to be fully functional when they spent over \$1,000,000.00 on a home, implying the Sweets’ home would be sold for at least that much (Ex. 31).

In countering Ms. Sweet’s limited evidence the home should be sold for \$950,000.00, Mr. Sweet introduced overwhelming evidence that the home was worth significantly more than that. This evidence included testimony that the home was purchased several years earlier for “\$1,819,000.00 plus” (RP 105), that the parties put \$500,000.00 into improving the residence by way of landscaping and the addition of a pool (RP 197-198) and a volleyball court (RP 191), installation of cherry wood bookshelves, school desks, library, billiard room and office (RP 192), installation of a water filtration system (RP 192-193), installation

of a 25-seat home theater system with 106" high-definition screen and a 12-person hot tub and sauna (RP 196).

Mr. Sweet also introduced a declaration filed by Ms. Sweet earlier in the case in which she stated, "Our home is assessed at \$1,690,000.00 by the King County Assessor. The assessments are correct *and true to the value of the home*" (RP 379 and Ex. 246). Mr. Sweet introduced additional assessments of the home, showing the residence was assessed at \$1,463,000.00 for tax year 2011 and \$1,690,000.00 for tax year 2010, and \$1,917,000.00 for tax year 2009 (Ex. 264).

Mr. Sweet testified that the home next door to the Sweets' marital residence was being listed for sale at a price of \$2,500,000.00, and the Sweets' property was more desirable than that of this particular neighbors' (RP 229-230). Mr. Sweet testified he believed the marital residence was worth more than \$3,000,000.00 at the time of the parties' separation due to the improvements the parties had made on the property (RP 227-228).

Date of valuation of the marital residence. By way of background, on October 15, 2009, an agreed Order was entered in King County Superior Court requiring Ms. Sweet to list the marital residence for sale within 45 days (Ex. 212). Ms. Sweet had exclusive control of

the residence at the time (Ex. 262). On May 4, 2010, another Order requiring the home to be sold was entered in the Sweets' divorce case (Ex. 214). This time the Order contained provisions to address anticipated problems if the parties did not cooperate (Ex. 214, pages 3 and 4). The order stated that any improvements to the property recommended by the realtor should be made, but limited the amount of those improvements to \$4,000.00 held in Ms. Sweet's attorney's trust account (Ex. 214, pages 3 and 4). On July 6, 2010, the lower court entered a third Order requiring Ms. Sweet's cooperation in the sale of the home and specifically directing her to show the property to interested parties (Ex. 216).

Ms. Sweet never showed the home to the interested buyers, testifying at trial that she would not permit the buyers to view the property until they were pre qualified to purchase it and gave her two weeks notice (RP 385-387). When asked at trial what her plan was to keep the marital residence from being foreclosed on pursuant to a deed of trust that encumbered the property, Ms. Sweet replied, "I wish I had one. It's really unfortunate" (RP 402). After a break in proceedings (RP 413), Ms. Sweet's attorney followed up on her testimony that she wished she had a plan to keep the home out of foreclosure, and asked her if she "ever (had) a plan for sale of the home (RP 433). Ms. Sweet testified she

was waiting for the commercial property to sell so she could use the proceeds of that sale to make improvements to the home and get it into marketable condition (RP 433). She admitted, however, that as of the date of trial, she had only used \$5,000.00 to make repairs on the home of the then-\$14,000.00 she had been allotted by the court for such purpose. (RP 448-451, and Ex. 217).

Mr. Sweet testified that when he was forced to vacate the parties' home, the marital residence was in "pristine condition" (RP 216). Photographs of the marital residence were introduced at trial verifying the excellent condition of the home at the time (Ex. 268, RP 440, and RP 442).

Subsequent to Mr. Sweet's removal from the residence, the condition of the property deteriorated so badly that the company insuring the Sweet's home canceled their insurance due to the home's poor condition and debris-littered yard (RP 74 and RP 397). Photographs of the property verifying its poor condition were introduced at trial (Ex. 209, RP 397-398). A neighbor of the Sweets testified that after Mr. Sweet was removed from the property, the home looked like it had not been taken care of (RP 418). Another neighbor testified that in the summer following Mr. Sweet's removal from the home, the property had not been taken care of, and that it was overgrown with weeds (RP 421).

At trial, Mr. Sweet asked that the court value the marital residence as of the date of separation as opposed to the date of trial (RP 468-472). Mr. Sweet argued that valuing the property as of the date of separation was appropriate given that Ms. Sweet was in exclusive control of the residence following the parties' separation, she failed to take steps to sell the property as ordered by the court, and the condition of the home deteriorated sharply under her care (RP 469-471). Mr. Sweet also argued that the home had to be valued as of the date of separation because his wife had offered no substantial evidence of what the home was worth, and all meaningful evidence regarding the property's value related to its value at earlier dates (RP 471-472).

“Community property surplus” awarded to Mr. Sweet at the request of Ms. Sweet. At trial, Ms. Sweet proposed that something she termed a “community property surplus” be credited toward Mr. Sweet's share of the property (RP 94). In furtherance of this request, Ms. Sweet testified the sale of a home in Redmond Mr. Sweet purchased prior to the parties' marriage netted \$358,000.00 (RP 94). Ms. Sweet requested that the sale proceeds be deemed a community property asset based on the fact that the marital community made payments toward the property when it was “underwater” (RP 94). Ms. Sweet's attorney then asked Ms.

Sweet to explain why she was calling the Redmond home a community property surplus:

Q: And that --- you're claiming it was community surplus because of the payments you made based on your previous testimony and the \$222,000 from the funds from the products liability case?

A: Yes, uh huh. That were used to pay off the bankruptcy, yes. Uh huh.

(RP 94)

The "previous testimony" referred to by Ms. Sweet apparently was her testimony that the value of Mr. Sweet's home was listed as \$685,000.00 in the bankruptcy petition (RP 26), there was a \$573,000.00 mortgage on the residence at the time of the bankruptcy (RP 41-42), there were \$108,951.00 in late payments and penalties due on the mortgage existed at the time of bankruptcy (RP 42), Ms. Sweet's paid \$3,000.00 per month toward the parties' debts under the Sweets' bankruptcy plan (RP 43), the Redmond home eventually sold for \$875,000.00 (RP 45), the parties eventually netted \$358,402.00 from the proceeds of that sale (RP 45), and a \$222,000.00 payment was made from the Sweet's lawsuit to "pay off the bankruptcy" (RP 45).

Ms. Sweet also testified that the proceeds of the sale of the Redmond home were transferred to a KeyBank account maintained by Mr. Sweet (RP 46-47). She also testified that the approximate

\$4,100,000.00 from the parties' product liability lawsuit was deposited into the hedge fund Mr. Sweet was managing with another individual (RP 48-49). Ms. Sweet testified she had no access to this account (RP 48). She stated title to the commercial property was held in Deer Haven Properties LLP, a limited liability partnership established by the Sweets, in which Mr. and Ms. Sweet were equal partners. (RP 54-55).

Mr. Sweet testified that the proceeds of the sale of his Redmond home were placed in his bank account (RP 214), and that he later transferred the funds into the account of the hedge fund he was managing (RP 214). From that account, the Sweets paid for the commercial property they purchased in Carnation (RP 214).

Based on the above testimony, the court "awarded" a \$60,000.00 "community property surplus" to Mr. Sweet, and counted that amount toward his fifty percent share of the parties' net assets (CP 205, item 16).

Two promissory notes awarded to Mr. Sweet. At trial, Ms. Sweet testified that, after Mr. Sweet was removed from the home, she found two promissory notes in favor of the Sweets representing loans they had made to two acquaintances, Michael Callahan and Greg Erickson, in the amount of \$75,000.00 and \$85,000.00 (RP 94-95). The only notes she produced at trial, however, were an \$80,000.00 note from Mr. Callahan and a \$10,000.00 note from Mr. Erickson (Ex. 39). Ms. Sweet testified

she was unable to say whether the “permissionary” (sic) notes, or the account that held them, had any value (RP 98). She testified that she had a “hunch” the notes had never been paid (RP 99).

Mr. Sweet testified the notes from Mr. Callahan and Mr. Erickson would be worth over \$100,000.00 each given the interest that had accumulated on them by the date of trial (RP 204). He testified that the loan to Michael Callahan was secured by a third position on his home (RP 205 and RP 295). He further testified that he repeatedly tried to collect on the notes, but that the owners of the “first lien” on Mr. Callahan’s home took that home away from him (RP 206 and RP 294-295). Mr. Sweet testified that he no reason to believe the Deed of Trust on Mr. Callahan’s property was worth anything (RP 207). Ms. Sweet herself later conceded she had “very little idea” whether the notes had any value (RP 325). In closing comments to the trial court, Ms. Sweet’s attorney was asked by the trial judge whether he really believed Ms. Sweet could collect on the notes, to which he replied, “No, but we certainly want to try (RP 466-467). Referring to the \$100,000.00 value he attributed to each note, Ms. Sweet’s attorney told the court, “... there’s fictional or unsure numbers in her column, too, with number 19. *If you recall, there was testimony about these ill-conceived loans to partners in the Geneva Fund after he said it was a bad idea, after my*

client said don't do it, and he did it. And now they're not valuable, according to him. We want the notes, just in case they are valuable ... So when I put that number there, that's one of those unreal numbers that according to his testimony, is more fictitious than in --- in my opinion, your honor, than the \$924,000 in line 17" (emphasis added, RP 466-467).

Following trial, the court entered Findings of Fact/Conclusions of Law and a Decree of Dissolution (CP 93-102 and CP 103-112). The Findings of Fact used for both the original Decree of Dissolution and Amended Decree of Dissolution were general in nature, and did not include specific findings on such issues as why the court chose to value the home as of the date of trial as opposed to the date of separation or why the court chose to give value to promissory notes both parties testified were likely worthless or of unknown value (CP 93-102). The Findings did mention that Mr. Sweet had "real or personal separate property as set forth in Exhibit A," however, the only exhibit attached to the Findings make no reference to any real or personal separate property (CP 94 and CP 98-102).

Attached to the Decree of Dissolution and the Amended Decree of Dissolution was a table titled "Complete Assets and Debts" (CP 108-112 and CP 204-208). The Complete Assets and Debts Table listed the

value of the marital residence as \$950,000.00 and awarded it to Ms. Sweet (CP 108 and CP 204). The Table listed the value of the Carnation commercial property as \$22,461.00 and awarded it to Mr. Sweet (CP 108 and CP 204). The last page of the "Complete Assets and Debts" table consisted of a tabulation of the assets and debts awarded to each party (CP 112 and CP 208). As part of that tabulation, the court totaled the net award to each party (\$599,177.50 to Ms. Sweet and \$798,831.50 to Mr. Sweet), divided the difference between the two awards by two, and awarded Ms. Sweet a judgment against Mr. Sweet for that amount. This judgment amount, \$99,827.00, ostensibly resulted in each party receiving precisely 50 percent of the marital assets (CP 112 and CP 208).

After the initial Decree of Dissolution was filed, Mr. Sweet filed a Motion for Reconsideration noting, among other things, the trial court had made a mistake in addition when it tabulated the assets and debts awarded to each party (CP 115-155). The motion pointed out that had the court correctly added the assets awarded to Mr. Sweet, the net amount of the court's award to him would be \$779,172.50, not \$798,831.50 (CP 115-116). The motion requested a corresponding correction to Ms. Sweet's judgment against Mr. Sweet to \$89,997.50, as opposed to the \$99,827.00 stated in the Decree (CP 116).

Ms. Sweet objected to a lowering of the judgment amount, but did not cite any reason why the mathematical error should not be corrected (CP 177). The trial court denied the Motion for Reconsideration without comment (CP 182-183).

For reasons not relevant to any issue raised in this appeal, the trial court subsequently entered the Amended Decree of Dissolution. This Amended Decree had attached the same “Complete Asset and Debt” table as was attached to the initial Decree (CP 199-208).

ARGUMENT

“No man is above the law, and no man is below it...”

- Theodore Roosevelt

Regardless of the crimes for which Mr. Sweet has been convicted, he is entitled to have his case determined fairly and on the facts.

1. The trial court erred when it valued the marital residence at \$950,000.00 based solely on Ms. Sweet’s testimony that that was the price for which she would like to sell it, and ignored a wide array of evidence the home was worth substantially more than that, including a declaration signed by Ms. Sweet stating the home was worth \$1,690,000.00.

The only evidence Ms. Sweet put before the trial court regarding the value of the marital residence was her answer of, “Yes,” to a question from her attorney about whether she would like to sell the home for \$950,000.00. Ms. Sweet didn’t even state what the basis was for believing \$950,000.00 was an appropriate sale price.

Mr. Sweet, on the other hand, produced the following evidence regarding the value of the residence: the purchase price of the home several years earlier (\$1,819,000.00-plus), the fact that over \$500,000.00 in improvements had been made on it home, the assessed values of the home since the date of separation (\$1,463,000.00 for tax year 2011, \$1,690,000.00 for tax year 2010, and \$1,917,000.00 for tax year 2009), a certified market analysis (\$1,300,000.00 to \$1,400,000.00), and the asking

price related to a less-desirable neighboring property (\$2,500,000.00). Mr. Sweet even produced a declaration signed by Ms. Sweet earlier in the case in which she stated the marital residence was worth \$1,690,000.00.

In light of the wide array of evidence produced by Mr. Sweet regarding the value of the marital residence, there was simply no justification for valuing the home at \$950,000.00, especially when the only basis for valuing it at that amount was Ms. Sweet's statement concerning the amount for which she would like to sell the home.

A trial court's valuation of property subject to division in a marriage dissolution proceeding is a question of fact. *IN RE MARRIAGE OF GILLESPIE*, 89 Wn.App. 390, 948 P.2d 1338 (1997). A trial court's valuation of property subject to division in a marriage dissolution proceeding is reviewed for an abuse of discretion. *IN RE MARRIAGE OF GILLESPIE*, *supra*. A trial court's findings of fact will be upheld on review if they are supported by substantial evidence in the record. *IN RE MARRIAGE OF LINDEMANN*, 92 Wn.App. 64, 960 P.2d 966 (1998); *IN RE MARRIAGE OF CROSETTO*, 82 Wn.App. 545, 918 P.2d 954 (1996). The value a court assigns to property in a dissolution action need not conform precisely with the evidence presented by either party so long as the value is supported by substantial evidence. *IN RE MARRIAGE OF SORIANO*, 31 Wn.App. 423, 643 P.2d 450 (1982). Substantial evidence

exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. IN RE MARRIAGE OF GRISWOLD, 112 Wn.App. 333, 48 P.3d 1018 (2002); IN RE MARRIAGE OF CROSETTO, supra. A trial court abuses its discretion when it exercises that discretion on untenable grounds. IN RE MARRIAGE OF HARRINGTON, 85 Wn.App. 613, 929 P.2d 1159 (1997); IN RE MARRIAGE OF OLIVARES, 69 Wn.App. 324, 848 P.2d 1281 (1993). While a trial court has broad discretion in valuing property subject to division in a dissolution proceeding, its discretion does not extend to completely overlooking factors material to the determination. IN RE MARRIAGE OF LANDAUER, 95 Wn.App. 579, 975 P.2d 577 (1999).

In the case at bar, the only evidence supporting the court's valuation of the residence was Ms. Sweet's statement regarding the amount for which she would like to sell the home. Technically, Ms. Sweet's testimony didn't even concern the value of the home; it only concerned the amount for which she wanted to sell it. But even if it is assumed that Ms. Sweet wanted to sell the home for what it was worth, her meager testimony was overwhelmed by the vast array of evidence produced by Mr. Sweet that showed the home was worth far more than \$950,000.00. It is simply not possible to consider Ms. Sweet's testimony

to be of a sufficient quantity to persuade a fair-minded, rational person that the marital residence was worth \$950,000.00, especially in light of Ms. Sweet's own sworn declaration submitted earlier in the case stating the home was worth \$1,690,000.00.

2. The trial court erred when it valued the marital residence as of the date of the parties' trial as opposed to the date of separation, where Ms. Sweet had exclusive control of the residence during the parties' separation, Ms. Sweet refused to comply with court orders to market the home for sale, and the condition and value of the home deteriorated substantially under her care.

In general, if property is to be valued as of the date of trial rather than the date of separation, appreciation as well as depreciation in value should be considered in making an equitable division. LUCKER V. LUCKER, 71 Wn.2d 165, 426 P.2d 981 (1967). This general rule is particularly applicable where the conduct of one of the spouses results in a reduction in value of an asset after married parties have separated. In IN RE MARRIAGE OF GRISWOLD, 112 Wn.App. 333, 48 P.3d 1018 (2002), the appellate court approved valuing the marital residence at the time of separation instead of the date of trial where the wife had failed to maintain the home subsequent to separation, thereby causing its value to decrease.

This Court should apply the rule of LUCKER and the logic of GRISWOLD in the case at bar. Mr. Sweet produced substantial evidence at trial that the condition of the home had deteriorated under his wife's care. He produced photographs of the residence taken at the same approximate time he was forced to vacate the home that showed the residence to be in pristine condition. He produced photographs taken nearly a year later when the company insuring the home canceled the Sweet's homeowner's insurance policy due to his wife's neglect of the property. Two neighbors also testified regarding Ms. Sweet's neglect of the property while it was under her care.

Beyond that, the case at bar presents a compelling scenario for valuing the home as of the date of separation. Here, Ms. Sweet was ordered three times by the court to market the home for sale. As of the date of trial, over a year later, she still had not done so. Ms. Sweet even refused to show the home to a prospective buyer, insisting that the buyers be pre-qualified to purchase the property before she would even show it to them. It is simply unfair to punish Mr. Sweet for his wife's intransigence, where her failure to sell the home, coupled with her neglect of the property while it was in her exclusive care, resulted in a decreased value of the property by the date of trial.

A final, practical reason exists for valuing the home at a date earlier than the date of trial: all the meaningful evidence produced at trial regarding the property's value related to dates preceding the date of trial. In this case, the trial court really had no choice but to value the home at an earlier date.

3. The trial court erred when it valued two promissory notes at \$100,000.00 each and awarded them to Mr. Sweet as part of his 50 per cent share of the marital estate when both Mr. and Ms. Sweet agreed the notes were either worthless or of unknown value. Indeed, Ms. Sweet's attorney called the purported \$100,000.00 value of the notes "fictitious."

Mr. Sweet testified he tried to collect on the promissory notes from his business partners and could not. He testified the security for one of the notes was worthless since a priority lien holder had already taken away his business partner's home. There was no testimony or exhibit showing the other loan was secured. Overall, Mr. Sweet testified, the notes were worthless.

Ms. Sweet was hard pressed to disagree. She testified she could not say whether the notes had any value. In closing arguments, the court pressed Ms. Sweet's attorney regarding whether his client really thought she could collect on the notes. Ms. Sweet's attorney answered, "Probably

not, but we would like to try.” Ms. Sweet’s attorney later described the \$100,000.00 value attributed to of each of the notes as “fictitious.”

The trial court erred when it valued these two promissory notes at \$200,000.00 and awarded them to Mr. Sweet as part of his 50 per cent share of the marital estate. The only notes produced at trial were a \$75,000.00 note and a \$10,000.00 note. Both parties questioned whether the notes were worth anything. To value the notes at \$200,000.00 in light of this was an abuse of discretion.

A trial court’s findings of fact will be upheld on review if they are supported by substantial evidence in the record. IN RE MARRIAGE OF LINDEMANN, 92 Wn.App. 64, 960 P.2d 966 (1998); IN RE MARRIAGE OF CROSETTO, 82 Wn.App. 545, 918 P.2d 954 (1996). The value a court assigns to property in a dissolution action need not conform precisely with the evidence presented by either party so long as the value is supported by substantial evidence. IN RE MARRIAGE OF SORIANO, 31 Wn.App. 423, 643 P.2d 450 (1982). Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. IN RE MARRIAGE OF GRISWOLD, 112 Wn.App. 333, 48 P.3d 1018 (2002); IN RE MARRIAGE OF CROSETTO, *supra*. A trial court abuses its discretion when it exercises that discretion on untenable grounds. IN RE

MARRIAGE OF HARRINGTON, 85 Wn.App. 613, 929 P.2d 1159 (1997); IN RE MARRIAGE OF OLIVARES, 69 Wn.App. 324, 848 P.2d 1281 (1993).

4. The trial court erred when it “awarded” Mr. Sweet a non-existent “community property surplus” of \$60,000.00, thereby reducing Mr. Sweet’s fifty percent share of the net value of the marital estate.

It is difficult to determine from the record the basis for a “community property surplus” award. It appears Ms. Sweet argued she should receive compensation for contributions made by the marital community toward the mortgage on Mr. Sweet’s home while the parties were in bankruptcy. Unless the home was awarded to Mr. Sweet as his separate property, however, there would not appear to be a basis for any such an award.

It is hornbook law that a husband or wife is not entitled to compensation at the time of divorce for routine payments he or she made during the marriage to community property. Nor is a husband or wife entitled to compensation for payments he or she made during the marriage toward an asset that no longer exists. If a husband or wife makes contributions toward the separate property of his or her spouse, it is possible the contributing party is entitled to receive some sort of compensation from the spouse who owned the separate property,

especially if the contributing party's payments enhanced the value of the separate property. This latter scenario is not the case here, however.

Here, Ms. Sweet's payments were toward Mr. Sweet's Redmond home, a home that was sold several years before the parties' divorce. Mr. Sweet's Redmond home was no longer a marital asset at the time of trial. There was no surplus because the asset did not exist.

Beyond that, the proceeds of the sale of his Redmond home were used by the marital community to purchase the commercial property in Carnation. Before the commercial property was purchased, the proceeds of the Redmond home sale were commingled with community funds, first in the Key Bank account Mr. Sweet maintained during the marriage, and later in the hedge fund Mr. Sweet managed that also contained the proceeds of the Sweets' lawsuit settlement. Further, Ms. Sweet testified the commercial property was titled in Deer Haven Properties LLP, a limited liability partnership in which both she and Mr. Sweet were fifty percent partners. From any perspective, the commercial property was community property, and spouses are not entitled to contributions they made during the marriage to community property. It would be a strange interpretation of the law that permitted Ms. Sweet to receive both her share of the community property in the marriage and compensation for payments she made that helped purchase it.

It is true that Mr. Sweet requested the commercial property be awarded to him in the divorce on a separate property theory. There is no indication, however, that the Court granted this request. While the trial court's Findings of Fact do refer to Mr. Sweet owning some unspecified separate property, the Findings don't state what that property was. It is unlikely the trial court was referring to the parties' commercial property, since that property was titled in an LLP of which both Mr. and Ms. Sweet were equal partners. Further, all property acquired during a marriage is presumed to be community property. IN RE MARRIAGE OF HARRINGTON, 85 Wn.App. 613, 929 P.2d 1159 (1997). Property purchased with commingled funds, i.e., funds composed of untraceable and unidentifiable separate and community funds, is community property. IN RE MARRIAGE OF HURD, 69 Wn.App. 38, 848 P.2d 185 (1993). Absent any other explanation, a spouse's use of separate funds to purchase property in the names of both spouses gives rise to a presumption that the purchase was intended to be a gift to the community. It takes clear and convincing proof to overcome the presumption. IN RE MARRIAGE OF HURD, supra. Even if the commercial property were the separate property of Mr. Sweet, it would make no sense to grant Ms. Sweet \$60,000.00 for contributions she made toward an asset the trial court ultimately valued at \$22,461.00.

Even more perplexing than the basis for the “community property surplus” award was how the \$60,000.00 figure was derived. There was no testimony regarding how the sum was calculated, nor testimony regarding any fact that readily makes apparent the basis for the \$60,000.00 figure. It appears that this number was a figure proposed by Ms. Sweet that she did not adequately explain to the court. Even if she had explained it more thoroughly, however, there was simply no basis for this award.

A trial court’s findings of fact will be upheld on review if they are supported by substantial evidence in the record. IN RE MARRIAGE OF LINDEMANN, 92 Wn.App. 64, 960 P.2d 966 (1998); IN RE MARRIAGE OF CROSETTO, 82 Wn.App 545, 918 P.2d 954 (1996). Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. IN RE MARRIAGE OF GRISWOLD, 112 Wn.App 333, 48 P.3d 1018 (2002); IN RE MARRIAGE OF CROSETTO, *supra*. A trial court abuses its discretion when it exercises that discretion on untenable grounds. IN RE MARRIAGE OF HARRINGTON, 85 Wn.App. 613, 929 P.2d 1159 (1997); IN RE MARRIAGE OF OLIVARES, 69 Wn.App. 324, 848 P.2d 1281 (1993).

Here, there was nothing educed at trial that would persuade a fair-minded, rational person that Ms. Sweet was entitled to \$60,000.00

compensation for payments the marital community made toward the parties' home while the parties were in bankruptcy (a home that was sold several years before the parties divorced, and proceeds from the sale of which were used to purchase additional community property). To the extent the court awarded Ms. Sweet compensation for specific payments made during the marriage, payments that ultimately benefited her as much as Mr. Sweet, the trial court's decision is untenable under Washington community property law.

5. The trial court erred when it failed to correct a simple error of arithmetic after incorrectly adding the value of the assets awarded to each party in dividing the marital estate equally between them.

Following trial, the court awarded property to each party, added up the net value of the property awarded to each, and then divided the difference between those two awards by two. The resulting sum was then entered as a judgment in favor of the spouse receiving the lesser valued assets, in this case Ms. Sweet. The purpose of this mathematical exercise was to award each party 50 percent of the marital estate. In this respect, the trial court's reasoning was fine; the court simply made a mistake in addition which resulted in a judgment being entered against Mr. Sweet that was \$9,829.50 higher than it should have been.

It is a fairly simple to ascertain the cause of the mathematical error. The Court found that the total value of the assets awarded to Mr. Sweet equaled \$809,902.50 (CP 110 and CP 112, and CP 206 and 208). In fact, the value of the assets listed on the Complete Assets and Debts table awarded to Mr. Sweet totals \$790,243.50 (CP 108-110, and CP 204-206). The difference between these two figures is \$19,659.00, the precise value attributed to a Toyota Tundra in the Assets and Debts Table (CP 108 and CP 204). In the initial typed version of the Table, the Toyota Tundra is listed in the husband's column (CP 108 and CP 204). The trial court crossed out the typewritten award, and hand-wrote in half of the value of the asset (\$9829.50) in Mr. Sweet's column and half (\$9,829.50) in Ms. Sweet's (CP 108 and CP 204). Apparently the trial court failed to adjust the initial tally of the assets awarded to each party to compensate for this change in the Tundra's status.

This mathematical error was pointed out to the trial court in a Motion for Reconsideration following entry of the Decree of Dissolution. The court denied the motion without explanation. The trial court's failure to correct this error in addition, or at least explain why it was not changing it, is inexplicable. A trial court abuses its discretion when it exercises that discretion on untenable grounds. IN RE MARRIAGE OF

HARRINGTON, 85 Wn.App. 613, 929 P.2d 1159 (1997); IN RE MARRIAGE OF OLIVARES, 69 Wn.App. 324, 848 P.2d 1281 (1993).

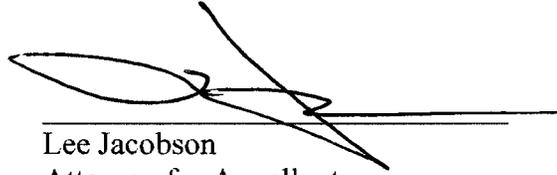
CONCLUSION

Regardless of crimes for which Mr. Sweet has been convicted, he is entitled to fair treatment under the law, and to have his case determined based on the facts. To make adverse determinations against him based on meager evidence or dubious legal theories, simply because it leads to a desired result, calls into question the principal the law metes out justice based on facts and not on passion. In this case, the trial court attributed substantial value to a number of assets awarded to Mr. Sweet that in fact had no value. On the other hand, the court substantially undervalued the principal asset awarded to Ms. Sweet. This process served little purpose other than to make the final property division appear fair on its face.

The appellate court should either make the appropriate adjustments to the final property division given the facts produced at trial, or, in the alternative, remand the case to the trial court for revision of the parties' property division consistent with the issues raised in this appeal.

Dated: August 7, 2011

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line and a diagonal stroke extending to the right.

Lee Jacobson
Attorney for Appellant
WSBA# 20752

PROOF OF SERVICE

I certify that I served a copy of this Brief of Appellant on respondent Penny L. Sweet by emailing a copy of it to the office of her attorney of record, Bart Anderson, at bart@bartanderson.com on August 8, 2011. Mr. Anderson accepts service of court documents by email in this case.

On this date I also deposited a copy of this Brief in the U.S. mail, first-class, postage pre-paid, addressed to Bart Anderson, 2122 112th Avenue NE, Suite A-300, Bellevue, WA 98004

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Dated this 8th day of August, 2011, at Seattle, Washington.



Lee Jacobson, WSBA# 20752
Attorney for Appellant