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COURT OF APPEALS
 DIVISION I
 OF THE STATE OF WASHINGTON

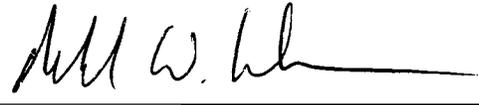
ZACHARY B. HARJO,
 Petitioner,

v.

GELSEY HANSON,
 Respondent.

RESPONSIVE BRIEF OF RESPONDENT

WECHSLER, BECKER, LLP



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I. ASSIGNMENTS OF ERROR

The respondent does not assign error to the decision of the trial court. The trial court considered the property and liabilities of the parties and the factors under RCW 26.09.080, and fairly and equitably distributed the community-like property and liabilities.

II. STATEMENT OF THE CASE

Zachary Harjo and Gelsey Hanson engaged in a 8-year, marital-like, equity relationship.¹ CP 36.

During their relationship, they acquired a home, towards which Hanson put \$52,392 in separate property. CP 37, 56. The home had a value of \$332,500, less a mortgage of \$174,000, for net equity of \$158,500.² CP 39, 56. Deducting Hanson's separate property investment in the home left a community-like interest of \$106,108.

Harjo worked on the home, generating sweat-equity, from which the court calculated a "home lien" of \$10,000, based on 1,000 hours at

¹ Washington courts have variously described such relationships as "meretricious," "quasi-marital," "marital-like," "committed intimate relationships," and most recently, "equity relationships." *In re Long and Fregeau*, 158 Wn. App. 919, 244 P.3d 26 (2010).

² CP 39 contains a mathematical error, finding \$131,000 in net equity. This was corrected when the court entered its amended Decree.

\$10/hour. CP 38.

Also using Hanson's separate property, the parties were able to secure funds to begin a restaurant, "Ocho." CP 38. The business was immediately successful, and generated enough income to pay off a \$79,000 line of credit in a single year. CP 41. The parties initially ran the business together, but when Harjo obtained a no contact order against Hanson, he then ran the business on his own. CP 42. The business was valued at \$222,000 at the time of trial. CP 42.

Hanson and Harjo also purchased a condominium unit, which at the time of trial was worth less than its mortgage. CP 40. Harjo paid homeowner's dues for the condo after the parties separated in the amount of \$4,483. CP 41. Harjo also collected rents on the condo after separation, which he did not share with Hanson. CP 41. The court determined that the parties should share equally in the rents and homeowner's dues, and allowed offsets for each.

Following a trial before Judge Julie Spector, the court divided the assets of the parties and made findings. CP 35-49. Harjo was awarded the business and the condo. Hanson was awarded the home. To create an equitable distribution, Harjo was to make a cash payment to Hanson of \$45,250. On Harjo's motion for reconsideration, the court corrected its

Decree, adopting slightly different numbers as a basis of its final, \$52,205 judgment in Hanson's favor. CP 61-6.

Specifically, on reconsideration, the court adopted the numbers presented in Hanson's response to the motion for reconsideration at CP 56, i.e.:

Harjo owes Hanson for Ocho	\$111,000
Hanson owes Harjo for ½ community-like interest in home	-53,054
Harjo owes Hanson for rents collected on condo after separation	6,500
Hanson owes Harjo for homeowner's dues paid after separation	-2,241
Hanson owes Harjo for home lien	-10,000
Total Harjo owes Hanson	\$52,205

The business was essentially divided in half, with Harjo receiving this substantial asset. After deducting the separate interest in the home, the

community interest was divided between the parties. Harjo had collected rents for the condo, which the court divided between the parties; likewise, Harjo was entitled to a credit for homeowner's dues he had paid. Finally, the court found that there was a right of reimbursement in the form of a "home lien" representing the work Harjo had put into the house. CP 37. While the court was cognizant of the condo (CP 40-41, 52), it found that no offset was appropriate.

Harjo brought a motion for reconsideration, re-arguing the case he had made at trial. On reconsideration, the court corrected its calculation of the amounts owed to Hanson as set forth above. CP 56, 70.

III. ARGUMENT

1. The Relevant Standard of Review is Abuse of Discretion

The trial court's conclusions of law are reviewed de novo. *Gormley v. Robertson*, 120 Wn. App. 31, 36, 83 P.3d 1042 (2004). However, the distribution of property at the end of an equity relationship is reviewed for abuse of discretion. *Long v. Fregau*, 158 Wn. App. 919, 928, 244 P.3d 26 (2010); *Soltero v. Wimer*, 159 Wn.2d 428, 150 P.3d 552 (2007).

Here, the record on review is limited and incomplete. No exhibits are provided; nor is any testimony. "In such a situation, our ability to fairly

evaluate the findings in light of the record before the trial court is compromised. Thus, we treat the findings as verities. [Citations omitted.] This approach to appellate review of trial court factual determinations is one of long standing. [Citations omitted.]” *Parentage and Custody of A.F.J.*, 161 Wn. App. 803, 806 (fn. 2), 251 P.3d 276 (2011).

While the court’s findings may have been corrected in its amended decree, the basis for the calculation of its ultimate judgment is still apparent from the record. “We require findings and conclusions in part to allow appellate scrutiny of the trial court’s decision in uncontested cases. CR 55(b)(2). This protects the integrity of the justice system because it allows the reviewing court (and others) to evaluate the factual and legal basis for the trial court’s decision. ‘Judges and commissioners must not be mere passive bystanders, blindly accepting a default judgment presented to it. Our rules contemplate an active role for the trial court when the amount of a default judgment is uncertain.’ [*Lenzi v. Redland Ins. Co.*, 140 Wash.2d 267, 281, 996 P.2d 603 (2000)].” *Little v. King*, 160 Wn.2d 696, 706, 161 P.3d 345 (2007). Implied findings can be sufficient to allow for appellate review. *Id.*

Here, the court’s initial findings did indeed contain a factual, mathematical error, when the court concluded the deduction of a \$174,000

mortgage from property worth \$332,500 yielded \$131,000 in equity. CP 36. However, this calculation was corrected as the court adopted the revised figures presented in Hanson's response to Harjo's motion for reconsideration, to the dollar. Thus, the basis for the court's ultimate award is clear from the record, and sufficient to allow for appellate review of the decision.

2. The court did not err in its mathematical calculation of the amount owed to Hanson (assignment of error number one).

The court's calculated division of property is adequately described in its findings and conclusions, as corrected in the amended decree. The figures are correctly calculated to the dollar, as set forth in the chart above. There is no mathematical error.

3. The court did not err in its calculation of the amount to be distributed from the home (assignment of error number one).

Harjo's revised calculation for determining the *equity in the home* was not adopted by the court. However, the court has discretion to determine value of an asset using any reasonable method. *In re Marriage of Farmer*, 83960-3 (September 8, 2011, WASC). Harjo points to no

finding that contradicts the court's figures or calculations. The home was worth \$332,500. CP 39. It was subject to an encumbrance of \$174,000. *Id.* The gross value encompassed a separate interest of \$52,392 that Hanson invested. CP 37. This left a net, community-like equity of $\$332,500 - \$174,000 - \$52,392 = \$106,108$. Only the community-like property of the parties is subject to distribution at the end of a marital-like relationship. *Fenn v. Lockwood*, 162 Wn.2d 1006, 175 P.3d 1093 (2007); *In re Long and Fregeau*, *supra*. Thus, Harjo was entitled to reimbursement of half this amount, or \$53,054, from Hanson, which is exactly the figure the court used.

4. The court's error in calculating reimbursement to Harjo for work on the home and mortgage payments on the home operated in Harjo's favor (assignment of error number one).

The court did, in fact, err in determining Harjo's right of reimbursement for labor, but this error worked in Harjo's favor, and therefore is not a basis for reversal. The court found that Harjo had put in \$10,000 in labor on the home. CP 37. This created a right of reimbursement in *the community*. *Connell v. Francisco*, 127 Wn. 2d 339, 351-52, 898 P.2d 831 (1995). However, Judge Spector granted *Harjo* a lien for \$10,000. Given that it was community-like labor that he invested, he

should have been entitled to reimbursement for half this amount, whereas Judge Spector gave him a right to the entire amount. Thus, he was unjustly enriched by Judge Spector's error, and there is no basis for reversal.

While the court did not include in its calculation the \$7,000 in excess of what would have been Harjo's "half" of the mortgage, Harjo cites not authority for the assertion he should be entitled to reimbursement for voluntarily-paid excess rents during the course of a marital-like relationship. Therefore, the court may not consider the argument. *See* RAP 10.3(a)(5); *In re Marriage of Fiorito*, 122 Wn. App. 657, 669, 50 P.3d 298 (2002); *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992).

The decision made by the parties as to management of their incomes does not give rise to a right of reimbursement. *In re Marriage of Mueller*, 140 Wn. App. 498, 506, 167 P.3d 568 (2007); *In re Marriage of Schweitzer*, 81 Wn. App. 589, 597-98, 915 P.2d 575 (1996). Absent waste, the court does not allow offset based on a the parties' decisions in managing their incomes and paying bills. *Cf. In re Marriage of Kaseburg*, 126 Wn. App. 546, 556, 108 P.3d 1278 (2005).

Second, he would only have been entitled, at most, to reimbursement for half this amount, or \$3,500. Where his maximum reimbursement should

have been \$8,500 (the \$5,000 for work performed plus half the \$7,000 for excess rents), he was still granted a right to \$10,000 from Hanson, and therefore still improved his position beyond what the law allows.

Third, Harjo should not be entitled to reimbursement for excess “rent” or “mortgage” payments, as he was enjoying the benefit of living in the home. *In re Marriage of Miracle*, 101 Wn.2d 137, 139, 675 P.2d 1229 (1984). The funds he paid while there represented the reasonable value of occupancy, and therefore no right of reimbursement accrues at all.

5. The court did not err in declining to include the value and mortgage on the condo in its calculation (assignment of error number one).
 - a. The debt may be ignored.

The parties did acquire a condo that was worth less than the amount owed on it at the time of trial. However, like many homeowners who are significantly under water on their homes, Harjo has the option of simply walking away from the condo and its debt. Where a party has only an expectancy of some future benefit, this is not “property” for purposes of dissolution actions. *In re Marriage of Harrington*, 85 Wn. App. 613, 624, 935 P.2d 1357 (1997). Likewise, a debt which Harjo can simply walk away

from may be eliminated from consideration by the trial court.

For example, if parties are deeply under water on their home, then it would be unfair to award one party the home, mortgage, and a large, asset offsetting the negative home equity, only to have that party walk away from the mortgage without penalty, while keeping the offsetting asset.

- b. The court has discretion to award the condo and mortgage to one party, without an equalizing offset.

Without citation, Harjo argues, “For the court not to divide the negative equity is an abuse of discretion that leads to an unfair and unjust distribution of the property.” *Brief of Appellant*, at 17. However, the court was clearly aware of the asset and liability, as described in its findings, and simply chose *not* to apportion it between the parties. CP 40.

An equal division of property is not required, either in a dissolution of marriage or at the end of a marital-like relationship. *Koher v. Morgan*, 93 Wn.App. 398, 968 P.2d 920 (1998); *White v. White*, 105 Wn.App. 545, 20 P.3d 481 (2001); *Ovens, v. Ovens*, 61 Wn.2d 6, 376 P.2d 839 (1962); *Webster v. Webster*, 2 Wash. 417, 26 P. 864 (1891). The court has broad discretion in distributing property, including debt. *Gormley v. Robertson*, 120 Wn.App 31, 83 P.3d 1042 (2004), citing *In re Marriage of Thomas*,

63 Wn.App. 658, 660, 821 P.2d 1227 (1991).

“Future earning potential ‘is a substantial factor to be considered by the trial court in making a just and equitable property distribution.’” *In re Marriage of Rockwell*, 141 Wn. App. 235, 248, 170 P.3d 572 (2007), citing *In re Marriage of Hall*, 103 Wn.2d 236, 248, 692 P. 2d 175 (1984). Here, Harjo was given a business that generated enough income to pay off a \$79,000 line of credit in one year (CP 41), while also paying for the basic needs of the family. Hanson, on the other hand, was given no means of earning a living at the end of the relationship, and had a new baby at home to support. From this, it is reasonable for the court to conclude that a fair division of the property leaves Harjo with some additional debt. The business should be able to quickly pay off that additional debt, while Hanson has no means of doing so (particularly given her outstanding tax obligations). CP 44.

6. The court’s allocation of the business does not constitute an abuse of discretion.

The court utilized an agreed value of the business; there was no dispute as to the community-like nature of the business; therefore, the allocation of the business 50-50 to each party is not an abuse of discretion.

The court made extensive findings on the value of work each party put into the business through the concluding months of the relationship and the course of the litigation. However, these values were incorporated into the value of the business. The parties agreed on a value for the business to present to the trial court as of the date of trial. CP 42. Therefore, the draws were already included in the business valuation and no further adjustment is appropriate. Had a smaller value been used for Harjo's compensation from the business than \$75,000, the business would have had a proportionally higher value, as it would have had that much additional net income. This higher value should then have been distributed between the parties. However, the court incorporated Harjo's anticipated compensation in the valuation used.

Furthermore, it is not an abuse of discretion to decline to allocate the value of that labor through offset. The court's findings show that the court did consider the various draws each party received from the business, and allocated those draws in its overall distribution. While it made detailed findings about the exact amount each party received, this does not necessarily entitle the parties to a dollar-for-dollar offset or credit against amounts received by the other. The court specifically found that "an *equitable* division, taking into consideration the contributions of each and

allocating *the remainder* to result in a 50/50 division of property, is appropriate.” CP 39 [Emphasis supplied]. Again, the court has wide discretion in valuing and distributing the property of parties at the end of their relationship.

Harjo has argued that he should receive additional compensation from the business above and beyond his draws. However, the business generated a substantial income in 2008 – enough to pay off a \$79,000 line of credit and also pay for all the parties’ living expenses in one year. As soon as Harjo took over sole control of the business, including control of its operations, books, and finances, the business income (at least on paper) dropped from a gush to a trickle. The court can easily conclude that additional profits and draws are available, offsetting any right of reimbursement he might have.

As in *Koher v. Morgan*, one party put more work into a business than he was compensated for. (In *Koher*, the court determined that the amount of undercompensation was \$196,700). However, as in *Koher*, this does not generate an automatic right of reimbursement from the other party. Instead, the work goes to the ultimate value of the business at issue. Where the community and separate nature of an asset cannot be segregated, the asset should be considered a community asset, created during the

relationship, and subject to distribution within the trial court's discretion. "In our community property system, there is no basis for allocating one party's labor to a separate property account." *In re Marriage of Lindemann*, 92 Wn. App. 64, 73, 960 P.2d 966 (1998).

As with the condo, the court has discretion to allocate property fairly, even if not equally. *Koher v. Morgan, supra*. Just as no dollar-for-dollar offset for each item was granted to Harjo, the court also did not offset Hanson's additional tax liability for her business draws against the assets awarded to her, even though these tax obligations were generated during the relationship and known to the court. Again, mathematical precision is not required in dividing assets; the fundamental inquiry is whether the division is fair and equitable.

7. The court should ignore statements and allegations not supported by the record.

In Section 6(1)(3)(C), page 26 of Appellant's brief, Harjo makes statements in regard to profit for 2010. No reference to the record is provided for these factual allegations. RAP 10.3(a)(5). Evidence was not submitted at the trial regarding these issues and is not before this court.

8. The court should not address the assignments of error which are not addressed in Appellant's brief.

Harjo's Assignments of Error 2 through 7 are not separately addressed in his brief. Harjo does not cite authority supporting his claimed errors. Where a party assigns error to a finding by the trial court, but does not address that error in his opening brief on the claimed assignment, the claimed error is waived. RAP 10.3(a)(4); *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992); *First American Title Ins. Co. v. Liberty Capital Starpoint Equity for Fund, LLC*, 161 Wn. App. 474, 254 P.3d 835 (2011).

9. The court did not err in excluding eleven "adjustments" argued by Harjo (assignment of error number two).

Harjo fails to describe the eleven "adjustments" the court allegedly did not include. Again, his failure to address the alleged error in his opening brief constitutes a waiver of the allegations. *Id.*

As to particular "adjustments" regarding the home, condo, and business, these have already been addressed above.

As to other "adjustments," these are not addressed in the assignments of error, issues pertaining to assignments of error, or the brief.

In any event, where a court has made a full distribution of the property and liabilities, it is unnecessary to particularly list and separately account for every asset and alleged asset. “In that community property is not required to be divided equally but rather equitably, we find that the strict particularity in listing each asset urged by the appellant to be unnecessary.” *In re Marriage of Hadley*, 88 Wn.2d 649, 656, 565 P.2d 790 (1977).

10. The court did not err in its allocation of business tax obligations for 2010.

The court ordered that Hanson was entitled to her share of business income in 2010, “pro rata in accordance with the income/distributions that the respective parties received from the enterprise in 2010.” CP 64. Hanson had received no benefit from the business since shortly after the parties’ split in May, 2009. CP 65. Her tax liability in 2010 was therefore limited to what benefit she would receive from the business in 2010, which could not be known at the time of trial.

Harjo does not address why this is unfair or inappropriate, or cite any authority in support of his argument. Hanson had no control over the business, its operations, accountings, or books in 2010. It is fair and

equitable to limit her tax liability only to the tax on whatever benefit she ultimately receives.

11. The final, overall distribution is fair and equitable.

At the end of a relationship – marital or otherwise -- the ultimate obligation of the trial court is to arrive at a fair, just and equitable distribution of assets and liabilities regardless of their characterization as separate or community. RCW 26.09.080; *In re Marriage of Konzen*, 103 Wash.2d 470, 478, 693 P.2d 97 (1985). *Worthington v. Worthington*, 73 Wash.2d 759, 768, 440 P.2d 478 (1968); *In re Marriage of Brady*, 50 Wn.App. 728, 731, 750 P.2d 654 (1988).

While the court did indicate at one point that it intended to create a 50-50 division of “all property” (CP 39, line 18), it obviously did not do this; nor is an equal split allowed or appropriate. It is not allowed because only marital-like property may be divided at the end of a marital-like relationship, not separate property. *Soltero v. Wimer*, 159 Wn.2d 428, 150 P.3d 552 (2007); *Fenn v. Lockwood*, *supra*. It is not necessarily appropriate because what is required is justice and equity, not equality.

And while the court did not distribute the estate equally, it did distribute the estate equitably. Hanson was, for example, awarded tax

liabilities accrued during the relationship with no right of offset. CP 43-44. Her total tax liabilities were \$31,510, not counting interest and penalties accruing since that time (given that Harjo has not paid the judgment, allowing her to pay off the tax liability). Harjo was awarded the condo, and the liability thereon. CP 40.

The court considered the factors under RCW 26.09.080, including the age, health, and incomes of the parties, including the fact that Hanson had a new baby at home at the time of trial. CP 48. Based on these factors, the court made a fair distribution of property.

VI. CONCLUSION

Harjo misunderstands the law of equitable division of property following a marital-like relationship. He may be correct that “there is only one version of exact.” However, exactitude is not the standard – equity is. Within its broad discretion, the trial court made a fair and equitable decision in resolving this property dispute.

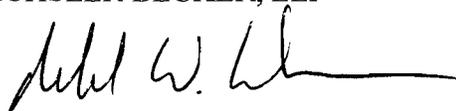
We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality.... The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.

In re Marriage of Landry, 103 Wash.2d 807, 809-10, 699 P.2d 214 (1985).

The decision should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of September, 2011

WECHSLER BECKER, LLP

A handwritten signature in black ink, appearing to read "Michael W. Louden", written over a horizontal line.

MICHAEL W. LOUDEN, WSBA #24452
Attorney for Respondent Gelsey Hanson

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THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I, SEATTLE

ZACHARY HARJO,

Petitioner,

No. 66749-I

v.

PROOF OF SERVICE OF
RESPONDENT'S BRIEF

GELSEY HANSON,

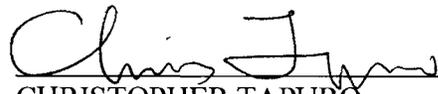
Respondent.

On this date, I personally deposited a copy of the Respondent's Responsive Brief, along with this Proof of Service into the mails of the United States, first class postage prepaid, addressed to the following:

Mr. Zachary Harjo
5440 Leary Avenue NW #414
Seattle, WA 98107

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

DATED this 28th day of September, 2011.


CHRISTOPHER TAPURO