

NO. 68933-9-1

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

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In re the Marriage of:

MICHELLE HUGHES,

Respondent

v.

ROBERT HUGHES,

Appellant.

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**REPLY BRIEF**

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON



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## INTRODUCTION

Michelle Evans paints a rose-colored picture of Robert Hughes' financial future, but in reality the maintenance and property awards left Hughes with little cash, a \$654,000 debt to Michelle due within 12 months, and a \$1.217 million, 18-year maintenance obligation. To satisfy the maintenance obligation, Hughes will have to perform hard physical labor on his family farm until he is nearly 70-years old. To satisfy the "equalizing" payment, he will have to sell or encumber rental properties, losing the use of their income.

By contrast, the maintenance award will provide 48-year-old Evans with a six-figure income until she is 66 years old. And she will have \$654,000 up front. Evans, who acknowledges her disinterest in trying to increase her earning capacity, will not have to. She will enjoy much the same standard of living she had during the marriage, regardless of whether she chooses to work.

The maintenance award is based in large part on rental income from real property Hughes must sell or encumber to pay the \$654,000 equalizing payment, and on Hughes' farm shares and the income they produce, even though their only real value *is* the income they produce. These and other errors make the total award unjust. This Court should reverse.

## REPLY STATEMENT OF THE CASE

Hughes addresses most factual discrepancies in the Argument Section, but one bears correcting here. A repeated theme in Evans' brief is that the trial court awarded Hughes his Hughes Farm shares "off the top." BR 1, 12, 15, 16, 28, 29, 30. The trial court assigned a \$900,000 value to Hughes' farm shares, but correctly held that their primary value is that they produced income for Hughes that far exceeds the market rate. CP 61-62, FF 2.14. Specifically, Hughes makes between \$350,000 to \$400,000 per year, and a "fairly generous" estimate of the market value of his services is about \$85,000. BR 9; 03/13 RP 101, 136-37; 03/22 RP 9-10; CP 61-62, FF 2.14-2.16. Evans agrees:

The trial court found that "rather uniquely," the Farm's "primary value is its ability to generate compensation for the officers above what the market would pay for those services in the real world." . . . The trial court also found that the "primary value" to Robert was that he "can work for it and make maybe four times what he would be making doing the same work for, say, Sakuma Brothers or for some other farm in the community."

BR 10 (citations omitted). Since the "primary value" of the farm shares is their ability to produce 4.5 times market income, and since the farm shares were Hughes' separate property and were plainly intended to remain his separate property, the trial court did

not include their assigned value in the asset distribution. CP 61, FF 2.11-2.14.

The trial court repeatedly states that it divided the assets “60/40” in Evans’ favor. *Id.* Evans, at times, agrees. BR 19, 30, 31. Yet Evans also inserts a table into her fact section showing a 66/34 distribution in Hughes’ favor, stating “In total, Michelle was awarded slightly less than \$800,000, and Robert was awarded more than \$1.554 million, for an overall 34/66 division in favor of Robert.” BR 15-16. Evans arrives at this conclusion by adding the \$900,000 into the distribution, even though the trial court specifically declined to do so. *Compare* CP 61, FF 2.11-2.14 *with* BR 15-16. Again, the farm share’s real value is Hughes’ salary, which is accounted for in the maintenance award. CP 61-62, FF 2.14; CP 62, FF 2.16; CP 64, FF 2.23. Evans’ chart and references to it are misleading and inconsistent with the trial court’s findings. *Id.*

## ARGUMENT

- A. **The maintenance award is unjust and unreasonable, where it would require Hughes to work long, hard hours until he is nearly 70-years old, to support Evans who chooses to work part-time.**
1. **Evans benefited substantially from Hughes' higher earnings during their 25-year marriage – another 18 years of support is unfair and unjust.**

The 18-year \$1.27 million maintenance award is untenable, where Evans is young, healthy, and capable of gainful employment, and Hughes will have to work long, hard hours until he is nearly 70 years-old to pay the award. Evans enjoyed the benefits of Hughes' higher earning capacity for at least 20 years. CP 62, FF 2.15. An additional 18 years of support is unreasonable. This Court should reverse.

As this Court is aware, *In re Marriage of Washburn* is the seminal case addressing if and how to compensate one spouse who supports the other spouse through school, where the parties divorce before the higher education produced the income increase the parties anticipated. 101 Wn.2d 168, 173-74, 677 P.2d 152 (1984). The assumptions underlying *Washburn* are (1) that “[t]he educational years will be lean”; (2) that “the supporting spouse” will likely postpone or forgo career opportunities; (3) that the parties expect that the family will enjoy a higher standard of living once the

degree is obtained; and (4) that the marriage is dissolved before the parties fully realize the financial benefit of the advanced education. **Washburn**, 101 Wn.2d at 173-74. The result is that the student spouse leaves the marriage with significantly higher earning-potential than the supporting spouse. *Id.*

But the **Washburn** Court anticipated a different result when the parties realize the financial benefits of the advanced education for a significant time before divorcing. *Id.* at 181. When the marriage endures long enough, “the supporting spouse may already have benefited financially from the student spouse’s increased earning capacity to an extent that would make extra compensation inappropriate.” *Id.*

**Washburn** is analogous. The trial court found that like the wife in **Washburn**, Evans “contributed to [Hughes’] ability” to “earn[] a lot of money,” and gave up the opportunity to “improve[] her skills or working ability” to support Hughes. Compare CP 64, FF 2.28 with CP 65, FF 2.29. Thus, the basic underlying premise is the same: one spouse sacrifices earning potential, while the other spouse’s earning potential improves dramatically.

But here, Evans left the marriage with significant job skills she obtained by working for Hughes Farms. CP 64, FF 2.28; 03/12

RP 54; 03/13 RP 5. She was working part time in a similar position to the one she held at Hughes Farms, is entirely capable of working full time, and is a “valuable employee” with “a lot of skills.” *Id.* This bodes against any “extra compensation” for Evans. **Washburn**, 101 Wn.2d at 180-81.

And while each party's earning capacity supports some maintenance, 18 years and \$1.217 million is too long and too high. 101 Wn.2d at 180-81. Hughes agrees that he earns far more than Evans, but while his income is stagnant, Evans' income will improve and she “has a lot of good working years ahead of her.” CP 64-65, FF 2.28-2.29. And Evans enjoyed the benefit of Hughes' higher income for at least 20 years. CP 62, FF 2.15.

Evans argues that **Washburn** is incomparable, claiming that the maintenance award is not “based on a theory of ‘compensation,’” but on what is just under RCW 26.09.090. BR 23. This reads too much into the term “compensation” used in **Washburn**, 101 Wn.2d at 181. **Washburn** does not propose some alternate “theory of ‘compensation’” for calculating maintenance, but applies the RCW 26.09.090 factors, holding that one consideration is whether the supporting spouse has received enough of a benefit from the higher-earning spouse's income

during the marriage, that more is not necessary. *Compare* 101 Wn.2d at 181 *with* BR 23. Hughes does not assert that Evans should not have any maintenance, but 18 years is too long.

**2. This matter is unlike typical long-term maintenance cases, where Evans is healthy and capable of gainful employment, and Hughes will have to work long, hard hours until he is nearly 70 years-old to pay maintenance.**

As discussed at length in the opening brief, 10-plus-year maintenance awards typically involve a party receiving maintenance who requires medical care and cannot work due to disability, and a party paying maintenance who (a) committed economic waste, converted community property, or otherwise depleted community assets; (b) has substantial separate property from which to pay maintenance; and/or (c) received a disproportionate community property award. BA 25-28 (discussing *In re Marriage of Hadley*, 88 Wn.2d 649, 651, 565 P.2d 790 (1977); *In re Marriage of Bulicek*, 59 Wn. App. 630, 631, 800 P.2d 394 (1990); *In re Marriage of Morrow*, 53 Wn. App. 579, 581, 586-88, 770 P.2d 197 (1989); and *In re Marriage of Tower*, 55 Wn. App. 697, 780 P.2d 863 (1989)). This matter is nothing like these representative cases.

Evans is young, healthy, and “has a lot of good working years ahead of her.” CP 65, FF 2.29. She is a “valuable employee,” who possess “a lot of skills,” and will earn more over time. CP 64, FF 2.28.

Hughes did not waste, convert, or deplete community assets. **Morrow**, 53 Wn. App. at 581, 586-88. Evans received 60% of the community assets and 60% of two of Hughes’ separate property parcels, worth \$197,100. **Hadley**, 88 Wn.2d at 652; **Tower**, 55 Wn. App. at 698-99. And while Hughes received his separate property farm shares off the top, their real value is the income they produce. *Supra*, Statement of the Case; *Infra*, Argument § B 1. Thus, the trial court correctly declined to include their value in the asset distribution. CP 61-62, FF 2.11-2.14.

Evans does not address these cases except to say that they “prove” that this Court will affirm the trial court’s decision “[u]nless the trial court fails to properly consider the parties’ economic circumstances at the end of the marriage.” BR 22. While a trial court’s discretion in a dissolution is undeniably broad, it is not limitless. A maintenance award must be just in light of the statutory factors – it is not and cannot be the law that appellate courts will affirm so long as the trial court considered the statutory factors.

Evans does not disagree that she is unlike any of the spouses receiving long-term maintenance in these representative cases. BR 6-7. Evans is healthy and fully capable of working full-time. CP 64-65, FF 2.28-2/29. She acknowledges that she has no desire to obtain further education. BR 7. She claims that she would not earn more with a degree, but paradoxically claims that she is not qualified for the jobs she applied for and that without a degree, she cannot get a better job. BR 6-7.

The reality of this maintenance award is that for the next 18 years, Evans' income will be very close to Hughes' income even if she chooses to continue working part-time, while Hughes must work full-time driving a tractor, plowing fields, clearing ditches, and harvesting crops. This is in large part because in addition to paying Evans maintenance, Hughes had to pay Evans \$654,590 within one year after the dissolution. CP 59, FF 2.6.<sup>1</sup> But Hughes left the marriage with only \$102,000 in cash. 03/13 RP 15.

The trial court anticipated that Hughes would have to borrow against the farm parcels to make the equalizing payments to Evans. CP 67-68, FF 20; CP 70, CL 3.16. The court ordered

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<sup>1</sup> The value totaled \$662,815 but the court subtracted \$8,325 for separate expense incurred by Evans but awarded to Hughes, thus the total award to Evans is \$654,590. *Id.*

Hughes to provide Evans with promissory notes and deeds of trust on the farm parcels to secure the equalizing payment, but ruled that Hughes “should be able to borrow against said real properties in order to satisfy the equalizing award . . . .” *Id.* Hughes’ rental income from the farm parcels is about \$54,000 per year – 12 times less than the \$654,590 equalizing payment. With interest, it could easily take Hughes 15 years or more to pay off the loans with the rental income on those properties.<sup>2</sup>

Hughes cannot use much, if anything, of his Hughes Farms income to pay off the loans necessary to make the equalizing payment, where a significant portion of his income goes to maintenance. The trial court found that Hughes’ gross monthly income is \$30,747, likely putting him in a 33% tax bracket.<sup>3</sup> From that he must pay Evans \$12,000 per month for seven years, and \$10,000 per month for 11 more years. CP 76, FF 3.12. Thus, after taxes, Hughes would have about \$12,561 left over after paying maintenance (for the first seven years). CP 64, FF 2.27.

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<sup>2</sup> Of course, it is entirely possible that Hughes will have to sell assets to pay Evans, losing the rental income entirely. 03/14 RP 76-77; CP 69, 97-98

<sup>3</sup> <http://www.irs.gov/pub/irs-pdf/n1036.pdf>.

Evans' after-tax income and maintenance will total about \$9,880 per month. CP 64, FF 2.27.<sup>4</sup> Evans estimates that her investments would produce about \$2,250, bringing her income to \$12,130 per month, just a few hundred dollars less than Hughes will have left after paying Evans and paying down the debt he incurred to pay Evans. BR 24-25 (citing 3/13 RP 37). And again, Evans will also have \$654,590 in cash, while Hughes is left with considerable debt and little or no cash.

In short, to satisfy the current maintenance award, Hughes will have to work long hard hours until he is almost 70-years old. Evans will have very nearly as much income as Hughes working part-time at a farm stand, and her income will improve over time, and if she chooses to work more. While Evans will start out her new life with \$654,000 in cash, Hughes is left with a mountain of debt. This is not just or equitable.

**3. The trial court placed undue emphasis on the duration of the parties' marriage.**

The trial court unequivocally states that the "primary" basis for the duration and amount of maintenance is the duration of the marriage:

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<sup>4</sup> Evans would likely be in a 28% tax bracket. <http://www.irs.gov/pub/irs-pdf/n1036.pdf>.

This is a long period of maintenance for Mr. Hughes, a long time, a lot of money. And the reason for it is primarily because he's been married for more than 25 years. Mr. Hughes earns a lot of money. His wife has contributed to your ability to do that. And in the meantime she hasn't improved her skills or working ability.

CP 65, FF 2.29. The parties thoroughly addressed this issue at trial, Hughes arguing that *Rockwell* does not compel the trial court to use the duration of the marriage as the ultimate trump card. CP 765-67 (discussing *In re Marriage of Rockwell*, 141 Wn. App. 235, 170 P.2d 572 (2007)). Indeed, doing so would plainly contradict numerous cases stating that the "paramount concern" is not the duration of the marriage, but the parties' relative post-dissolution economic positions. *In re Marriage of Vander Veen*, 62 Wn. App. 861, 867, 815 P.2d 843 (1991); *In re Marriage of Stenshoel*, 72 Wn. App. 800, 812-13, 866 P.2d 635 (1993).

Evans' response ignores the trial court's ruling on this point. Compare BR 26 with CP 65, FF 2.29. Evans argues that Hughes is "simply wrong" is asserting that the primary reason for the maintenance award is the duration of the parties' marriage. BR 25. But again, the trial court specifically stated that "the reason" for the exceptionally long maintenance award "is primarily" the duration of the marriage. CP 65, FF 2.29.

Evans insists that the court did not equalize the parties' post-dissolution economic positions, but left Hughes in a superior position. BR 26-27. Evans can arrive at that conclusion only by ignoring the \$654,000 equalizing payment the court ordered Hughes to pay within a year after the dissolution. As discussed above, Hughes leaves the marriage with little or no cash and a mountain of debt to satisfy the \$654,000 equalizing payment, and his income will be just a few hundred dollars more than Evans' income, even though he undeniably works far more. *Supra*, Argument §A 2. Again, this is unjust.

In short, Evans was generously compensated for her contributions to the community during the marriage. At 48 years-old, she "has a lot of good working years ahead of her." CP 65, FF 2.29. The maintenance award is simply too long and too high. This Court should reverse.

**B. The trial court erroneously devalued Hughes' separate property interest in Hughes farms, making the overall asset distribution unjust.**

**1. The maintenance award is exactly what the trial court correctly intended to avoid – an inequitable double-dip.**

The trial court intended to avoid "double dipping," correctly recognizing that it would be inequitable to divide the value of the

farm shares, and to also use the income they produce to calculate maintenance, where the primary value of the farm shares is the income they produce. CP 61-62, FF 2.14. But the trial unintentionally double-dipped in a slightly different way, using the award of the farm shares to Hughes to justify the 18-year maintenance term, and using the income the farm shares produce to calculate the maintenance amount. CP 61-62, FF 2.14-2.16. This Court should reverse.

Evans agrees that the farm shares are rather unique in that their primary value is that they provide Hughes with an income that is 4.5 times the market rate. BR 9-10; 03/13 RP 101, 136-37; 03/22 RP 9-10; CP 61-62, FF 2.14-2.16. Thus, while the trial court placed a monetary value on the farm shares, the court intended to award them to Hughes “without any credit” to Evans. CP 61-62, FF 2.14, 2.15; CP 64, FF 2.23-2.24. The court awarded Hughes the farm shares “off the top,” excluding their value from the 60/40 asset distribution, and intending to use maintenance to account for the farm shares’ real value – the income they produce. *Id.*

But the court nonetheless double-dipped. The maintenance award is based on the value of the farm shares themselves and the income they produce, even though the trial court correctly found

that the only real value of the farm shares is the income they produce. CP 62, FF 2.16, 64, FF 2.29, 65 FF 11; 03/22 RP 11, 17. This is much like the impermissible double-dip the court sought to avoid. *Id.*

Evans' response misunderstands Hughes' argument. BR 27-30. Hughes does not suggest that the trial court erroneously based maintenance on his farm income. BR 27. His argument is that the trial court impermissibly considered his farm shares *and* his income to justify the maintenance award, when the only real value in the farm shares is the income they produce. BA 33-34. That is a double-dip.

Evans attempts to distinguish this matter from *In re Marriage of Barnett*, in which the trial court awarded the wife a \$100,000 lien for half of the value of the parties' salvage business, and maintenance in the amount of \$500 per month for life. 63 Wn. App. 385, 388, 818 P.2d 1382 (1991). There, the appellate court held that "the maintenance award was an attempt to distribute [the wife's] share of the business." *Barnett*, 63 Wn. App. at 388. That of course was an impermissible double dip, as the court already given the wife a lien for half the value of the business. 63 Wn. App. at 388.

Hughes never raised **Barnett** because it is inapposite – the trial court successfully avoided the precise double-dip at issue there – awarding the wife a lien on the asset and using maintenance to “distribute” the asset again. Again, however, the trial court impermissibly double-dipped by effectively counting the arm shares twice to justify the massive maintenance award. And in any event, the 18-year maintenance award is very much a lien on Hughes’ post-dissolution earnings.

**2. The court erroneously included two separate property parcels in the pool of distributed assets, further skewing the distribution.**

The trial court incorrectly included Hughes’ separate property Mann Road (valued at \$122,100) and Maupin Road (valued at \$75,000) in the 60/40 asset distribution, effectively awarding Evans 60% of the value of these assets. CP 60, FF 2.9. The court’s first reason for doing so is inherently flawed. The court found that “Hughes testified . . . that the real estate that was owned by the parties, was essentially their retirement plan, and that the income from those rental parcels was intended to provide retirement income to the parties.” CP 60, FF 2.9. But Mann Road and Maupin Road, Hughes’ pre-marital separate property, are not “owned by the parties.” *Compare* CP 60, FF 2.9 *with* 03/13 RP

170-72; Exs 104, 105. And Hughes never told Evans that rental income from his separate property would “provide retirement income to the parties.” *Compare* 03/14 RP 76 with CP 60, FF 2.9.

Evans argues that there is “substantial evidence” that the income from Mann Road and Maupin Road was supposed to be the parties’ “retirement plan.” BR 11, 31; 3/12 RP 56-57, 62-64; 3/13 RP 13-14. But the testimony Evans cites refers generally to “land rent” and statements like “we invested in rental property.” 3/12 RP 62-63; 3/15 RP 13-14. There is no specific evidence contradicting Hughes’ testimony that he did not intend for his separate property parcels to provide for the parties’ retirement. 03/14 RP 76. And again, the parties did not “invest” in Mann and Maupin, Hughes did.

The trial court also distributed the value of Mann Road and Maupin Road to offset the exclusion of the farm shares from the property distribution. CP 60-61, FF 2.9, 2.10. The 18-year, \$1.217 million maintenance award is more than enough to compensate for Hughes’ superior earning capacity – it was unjust to also distribute the value of this separate property.

Finally, as discussed above and below, the trial court distributed the value of these parcels despite anticipating that Hughes would have to sell or encumber them pay the \$654,000

equalizing judgment. CP 67-68, FF 20. This too makes the distribution of these assets particularly unjust.

**3. The disparate asset distribution is unjust, where the court included separate property in the distribution and awarded extraordinarily high maintenance.**

Hughes agrees that the disparity in the parties' income justifies a disproportionate asset distribution with some maintenance. But it is not just to award Evans 60% of the community *and separate* assets, plus an 18-year \$1.27 million maintenance award. To satisfy the property distribution, Hughes will have to give up much if not all of the income his rental properties produce for many years to come. *Supra*, Argument § A 2. Yet it was in significant part this rental income that compelled the massive maintenance award. CP 65, FF 2.29. To pay maintenance, Hughes will have to work for the farm, plowing, harvesting, and the like, until he is nearly 70-years old. Evans will enjoy nearly the same income working part-time at a farm stand.

Evans criticizes Hughes' statement that he will not get paid when he can no longer work, arguing that "there was no evidence that the amount of compensation that he receives was dependent on the type or amount of hours he worked at the Farm." BR 10. Those are two separate points. It is true that as a full-time Hughes

Farm employee and shareholder, Hughes' income has not fluctuated based on his hours or labor provided. *Id.* His point, however, is simply that when he is no longer able to work, he will not get paid. 03/14 RP 76-77.

Evans argues that the property award is just, where Hughes was awarded the income-producing assets and had significant control over his financial "destiny." BR 30. But again, Hughes' "destiny" includes selling or encumbering the income-producing assets to pay the \$654,000 equalizing judgment. *Supra*, Argument A 2. He will lose the rental income from any parcels he has to sell, and the income from those parcels he can keep will go to paying off the attached debt for many years. *Id.* Under the circumstances, awarding Hughes those assets does not justify the 60/40 distribution and 18-year maintenance award.

**C. Evans does not "need" her fees paid.**

Evans' fee request overreaches. As discussed above, Hughes left the marriage with just \$102,000 in cash, but facing a \$654,000 transfer payment. CP 67-68, FF 20. The decree even anticipates that Hughes will have to take considerable loans to satisfy the \$654,000 payment. CP 80. In addition to this massive cash payment, Hughes is also paying Evans \$12,000 maintenance

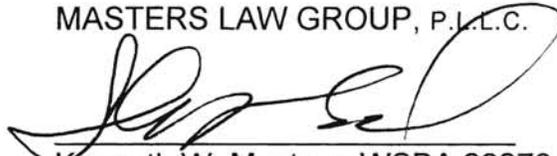
each month. Thus, Evans has significantly more cash than Hughes. She does not establish her need, much less Hughes' ability to pay. RCW 26.09.140.

### **CONCLUSION**

The maintenance and property award leaves Hughes working in his physically demanding occupation until he is nearly 70-years old, to provide Evans a six-figure income while she works part-time, if at all. And Hughes will likely exhaust his rental income, one of the primary bases of the maintenance award, on loans taken to make the \$654,490 equalizing payment. This is not just or equitable. This Court should reverse.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of April, 2013.

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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 29<sup>th</sup> day of April 2013, to the following counsel of record at the following addresses:

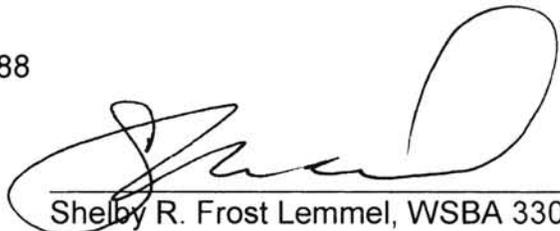
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