

**SAMPLE ACCEPTABLE
APPELLANT'S OPENING BRIEF
DOMESTIC RELATIONS CASE**

(updated January 1, 2011)

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[Note: this page (the "cover") must be blue paper
of at least 65 lb. weight]

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of)
)
DAVID DOE,)
)
Petitioner-Appellant,) Eden County Circuit
) Court No. 97C-0000
and)
) CA A000000
DIANE DOE,)
)
Respondent-Respondent.)

APPELLANT'S BRIEF AND EXCERPT OF RECORD

Appeal from the Judgment of Dissolution of Marriage
entered on February 2, 2003 in the Eden County Circuit Court

Honorable Adam Jurist, Judge

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INDEX

STATEMENT OF THE CASE

Nature of the Action.....1
Nature of the Judgment.....1
Basis of Appellate Jurisdiction.....1
Effective Date for Appeal.....1
Question Presented.....2

Whether the trial court properly recognized husband's claim
for a share in the enhanced earning capacity of wife?

Summary of Argument.....2
Statement of Facts
 ORAP 5.40(9) Summary.....2
 General Summary.....3

ASSIGNMENT OF ERROR.....8

The trial court erred by failing to properly value and consider the enhanced
earning capacity of wife, thus skewing the property division
in a manner that was inequitable under all the circumstances.

ARGUMENT.....8

CONCLUSION.....12

TABLE OF AUTHORITIES

Cases:

Denton and Denton, 326 Or 236, 951 P2d 693 (1998).....8, 9, 10, 11, 12

Statutes:

ORS 2.516.....	1
ORS 19.205.....	1
ORS 19.255.....	1
ORS 19.415(3).....	8

SAMPLE

APPELLANT'S BRIEF

STATEMENT OF THE CASE

Nature of the Action

This is a domestic relations case involving the singular issue of property division. Husband seeks modification of the judgment of dissolution to award him an equalizing judgment of approximately \$[dollar amount].

Nature of the Judgment

After a trial to the court, a Judgment of Dissolution of Marriage was entered. Such judgment forms the basis for this appeal.

Basis of Appellate Jurisdiction

This appeal is taken pursuant to ORS 2.516 and ORS 19.205.

Effective Date for Appeal

The Judgment of Dissolution of Marriage was entered on February 2, 2003, forming the effective date for appeal. The Notice of Appeal was filed on February 18, 2003. An Amended Notice of Appeal was filed on March 3, 2003. Both notices were within the 30 days provided by ORS 19.255.

Question Presented

Whether the trial court properly recognized husband's claim for a share in the enhanced earning capacity of wife.

Summary of Argument

Husband presented substantial evidence on the enhanced earning capacity of wife as a result of her completion of a degree in dental hygiene during the marriage. Despite such evidence, the trial court found that the present value of such enhanced earning capacity was impossible to determine with specificity and declined to attach any value to this asset, except to the extent that it effected a slightly uneven property division. Wife's enhanced earning capacity should have been recognized and valued based on the expert testimony that was provided.

Request for *De Novo* Review

[For cases in which the notice of appeal is filed on or after June 4, 2009, an appellant seeking *de novo* review must request it in the Statement of the Case and concisely state the reasons why the court should do so. *See* ORAP 5.40(8).]

Statement of Facts

ORAP 5.40(9) Summary

Date of Marriage:	[date]	
Age of the Parties:	Husband	46 (DOB [date])
	Wife	42 (DOB [date])
Ages of Minor Children:	Alvin Doe	8 (DOB [date])

Theodore Doe	13 (DOB [date])
Simon Doe	17 (DOB [date])

Custody Status of Minor Children: Husband has custody of Alvin;
wife has custody of Theodore and Simon.

Support: Husband is ordered to pay child support of
\$[dollar amount] per month in accordance
with the split custody provisions of Oregon's
child support guidelines.

General Summary

The parties were married in [month and year] when husband was 24 and wife 19. Husband had completed his education at that time, having received a bachelor's degree in 1976. He had financed at least part of his undergraduate education through loans, which had a balance of approximately \$[dollar amount] at the time of the marriage. Wife was still attending college when the parties were married and had a loan of about \$[dollar amount] relating to this schooling. Both of these loans were paid off during the marriage. (Testimony of husband, Tr at 53-54, 88; testimony of wife, Tr at 125.)

After the parties married, husband was the main source of income for the family. Wife left school after her second year and then had some medical problems that limited her work ability to some extent. These difficulties were resolved, and she was able to attend college in Portland to obtain additional college credits in preparation for her planned entry into dental hygiene school. She

enrolled in OHSU in the fall of [year]. She attended school full time for the two years that were necessary for her to complete her training. Although she worked in the summer between school, husband otherwise supplied the earnings for the family. The total cost of her schooling was \$[dollar amount] for tuition and \$[dollar amount] for books. These sums were paid from the family income and through some small loans,¹ which were paid off after she graduated. Husband, in addition to supplying the great bulk of the income during wife's schooling, also shared in the domestic chores. (Testimony of husband, Tr at 59-61, 68-69; testimony of wife, Tr at 124-25.)

After wife graduated from hygiene school in [year], the family moved to Salem where, after about nine months of unemployment, husband obtained a job with [name of employer], where he still works. Wife also obtained work as a hygienist, initially working for three different employers, which was essentially equivalent to full time. However, after the parties' first child was born in [year], she cut her work to half time and continued in that arrangement as the other children were born. The reduction in her work was by mutual agreement of the parties and allowed wife to spend more time with the children. It was also easier for her to work part time than husband. At the time of the hearing, wife was

¹ Wife testified that the loan in dental school was for furniture, not school expenses. (Testimony of wife, Tr at 263.)

working approximately 32 hours per week and making \$[dollar amount] per hour, for an average monthly gross income of \$[dollar amount]. Husband was making a gross monthly income of \$[dollar amount]. (Testimony of husband, Tr at 70-72; 90-91; testimony of wife, Tr at 105, 108-109; Petitioner's Ex 9.)

After receiving this basic historical evidence, the trial court divided the parties' assets and liabilities with no specific recognition of a value for wife's enhanced earning capacity. The division of property resulted in a net disparity in favor of husband of about \$[dollar amount]. The court stated:

"I find that this is a case calling for an award of something on account of the wife's enhanced earning capacity * * *. However, in consideration of the benefits already received by husband during this 20-year marriage, both financial and intangible, I don't believe that further litigation on that issue would really be cost effective. (Wife's enhanced ability to work flexible hours during the marriage benefitted both parents and their children.) It seems likely to me that the current disparity in the property award roughly approximates husband's equitable share of wife's enhanced earning capacity. Accordingly, while * * * (husband's counsel) * * * has reserved the right to present testimony on this issue, both parties may well be better off settling along the lines outlined above."

Letter Opinion of 8-25-98 (emphasis in original). ER-1.

Husband then did present expert testimony on the future value of wife's enhanced earning capacity. Robert Expert, a qualified expert on the subject, calculated the present value of wife's enhanced earning capacity, assuming that she would be working full time. He basically compared the earnings of wife as a four-year college graduate in dental hygiene to a person of her same age with some

college but no degree, her status at the time of the marriage. He projected expected work lives of these different categories, relying on available government statistics. He used a 3.9% annual wage growth and a discount rate of 5.4%, the yield on treasury notes. He then compared the future earnings of these two groups in three different ways. The first was using the current high wage in Oregon for a four-year college graduate in dental hygiene and comparing that to the current high wage in Oregon of a worker with some college but no degree. He then did the same analysis using the current mean wage in Oregon for both groups and finally performed such calculations based on a federal study that takes into account the fact that earnings fluctuate through certain age groups over five-year spans, rather than increasing at a constant rate.² He then reduced the difference in future income between these groups to present value, yielding amounts of \$[dollar amounts] respectively. (Testimony of Mr. Expert, Tr at 169-170, 175, 175-187, 190-198, 219-223; Exs 13-14.)³

However, in attaching a value to the enhanced earning capacity, at least for purposes of domestic proceedings, Mr. Expert discounted the figures by one-half, opining that wife's innate characteristics were responsible for that portion of the

² The study indicated that incomes of women go down between the ages of 42 and 48 and then rise again after age 60. (Testimony of Mr. Expert, Tr at 194-195.)

³ Exhibit 14 is contained in the excerpt of record.

enhanced earning capacity and that education was responsible for the rest.⁴ The range of values was thus between \$[dollar amount] and \$[dollar amount]. Husband asked the trial court to determine a reasonable value for the enhanced earning capacity of wife and then award an appropriate offsetting judgment in his favor. (Testimony of Mr. Expert, Tr at 197-200; testimony of husband, Tr at 242-249; Exs 14, 20.)

The court, after hearing such testimony, found as follows in the Judgment of Dissolution:

"16.1 The present value of Respondent's enhanced earning capacity as of December, 1998, is impossible to ascertain with specificity.

"16.2 In determining the appropriate value to place on Respondent's enhanced earning capacity, the factual issues considered by the court include Respondent's past, current and future income, Respondent's probable work life expectancy, and income information provided by Petitioner's expert. The court found the testimony of Dr. Expert to be credible, but rather speculative and of limited practical value in determining the ultimate issue.

"16.3 In arriving at a just and proper division of property, the factual issues considered by the court include but are not limited to the length of the marriage, each party's respective contribution to the other party's education and earning capacity, the extent to which the overall marital estate, both tangible and intangible, has benefitted from the parties' respective earning capacities, the parties' respective incomes, and the overall division of property. The court is of the opinion that whatever contributions Petitioner made to the enhanced

⁴ Counsel on appeal does not necessarily feel that this is an appropriate function of the expert, as opposed to merely calculating the differences in income and reducing them to present value.

earnings of Respondent were not of such a nature that there was any sacrifice to Petitioner's career or earning capacity."

The court's prior division of property was thus left undisturbed in light of the additional evidence submitted.

ASSIGNMENT OF ERROR

Preservation of Error

The trial court erred by failing to properly value and consider the enhanced earning capacity of wife, thus skewing the property division in a manner that was inequitable under all the circumstances. The pertinent portion of the record is the Judgment of Dissolution of Marriage. The particular portion of the judgment dealing with the treatment of enhanced earning capacity is set forth verbatim in the portion of the Summary of Facts immediately preceding this Assignment of Error.

Standard of Review

Review is *de novo*. *Denton and Denton*, 326 Or 236, 238, 951 P2d 693 (1998); ORS 19.415(3). [For cases in which the notice of appeal is filed on or after June 4, 2009, an appellant seeking *de novo* review must request it in the Statement of the Case and concisely state the reasons why the court should do so. See ORAP 5.40(8).]

ARGUMENT

This case may well be as much about the proper methodology to utilize in enhanced earning capacity as it is about the specifics of this particular litigation. Particularly, it involves the proper manner in which earning capacity should be determined and valued in a domestic sense and the clarity to be employed by the trial court.

In this case, the trial court found that the case was one "calling for an award of something on account of wife's enhanced earning capacity * * *," thus triggering a proper determination of the sum to be allocated to such award. The first logical step in such calculation is the recognition, preferably and probably necessarily through expert testimony, of the raw figures representing the enhanced earning capacity of the party in question. In this case, such calculations were performed by taking the future earning capacity of a person with some college but no degree (wife's premarital status) and comparing that to the earnings of a dental hygienist with a four-year degree (wife's education acquired during the marriage). The differences in income between these groups was then reduced to present value. This is exactly the approach that was used in *Denton*, above. (See Petition for Review at 6-7;⁵ see also *Denton and Denton*, 145 Or App 381, 930 P2d 239 (1996)

⁵ Indeed, this was the approach used in *Denton* by the same expert, before the same trial judge, who accepted such calculations.

(dissenting opinion of Riggs, J., at 421-22).) Not only is it the approach that was used, but it seems to be the only reasonable way to perform the necessary calculations. However, this method was rejected by the trial court as being speculative.⁶ It would seem that some rational approach to this issue should be available to bench and bar in an effort to determine an appropriate way to generate the figures necessary to a determination of value.

Generating fiscal data, however, is but the first step in determining a value for enhanced earning capacity to be utilized in a domestic case. Mr. Expert, in this case, reduced the raw figures by 50%, reflecting the intrinsic contribution of wife to her own enhanced earnings. The trial court also considered the extent to which husband and the family had profited from wife's enhanced earning capacity, both in a financial sense and in relation to her ability to have more flexibility to remain at home with the children. However, the trial court approached the problem with a broad brush, generally opining that a slight disparity in property division properly recognized wife's enhanced earning capacity while avoiding any specificity in valuing this asset. This seems contrary to the guidance that has been provided by the Supreme Court in *Denton* when it remanded the case because it was "impossible to discern * * * the factual basis" for the trial court's award. The same

⁶ It did not seem that the trial judge felt that the foundation for the opinion was speculative. There was certainly no challenge to the viability of the approach used, although Mr. Expert was cross-examined at length.

problem exists in this case to the extent that the trial court found that the value of wife's enhanced earning capacity was "impossible to ascertain with specificity," but essentially found that its value was offset by the \$20,000 disparity in the property award. Husband is not intending to be overly critical of the trial court. He acknowledges that determining a value for enhanced earning capacity that is just and equitable in a particular domestic case is much more difficult than conducting the mathematical computations that were performed by the expert. However, it is unclear whether the court's finding that the present value of the enhanced earning capacity was impossible to ascertain referenced the professional opinion of Mr. Expert or the court's ultimate responsibility to determine an equitable value. If it is the former, then such conclusion is contrary to the evidence. If the latter, then it is contrary to the responsibility of the court under *Denton*.

Husband contends that the court must make a determination of the mathematical value of enhanced earning capacity based on the evidence that is presented. The court may then examine a number of equitable factors to determine what portion of such value should be utilized in determining an equitable division of property. This process should be precise enough to afford the parties a reasonable change to analyze the methodology employed and also to provide this court with some basis for review. If the trial court can instead merely attach an

arbitrary value, relying on general rules of equity, then there are essentially no guidelines for bench and bar and no meaningful review.

In this instance, the court was presented with competent expert testimony on the enhanced earning capacity of wife. The figures, properly reduced to present value and reflecting **future** enhanced earning capacity, were in a range of \$[dollar amounts]. Mr. Expert suggested that these values be reduced by one-half to reflect the intrinsic contributions of wife. Husband suggests that a raw value of at least \$[dollar amount] be assigned to wife's enhanced capacity. The determination of the proper amount of this sum to be assigned to wife must then consider many factors, including the nature and extent of the contributions of the parties and the benefit accruing to husband as a result of wife's earning capacity. This latter consideration must be made in light of the fact that the calculations of the expert deal only with the enhanced earnings in the future (post-divorce), not the total enhanced earnings over wife's entire work life. The trial court **should not** base its decision on whether the supporting spouse gave up his or her own opportunities for career advancement, as was apparently done here. Such consideration is directly contrary to the Supreme Court's guidelines in *Denton*.⁷ Husband feels that an equitable value to be attached to this asset, and credited to wife, is \$[dollar

⁷ The court in *Denton* criticized this court so far as it "unduly emphasized what wife may or may not have 'given up' during husband's pursuit of his medical degree[.]" *Denton*, 326 Or at 243.

amount] and that he should thus receive an appropriate equalizing judgment of approximately \$[dollar amount].

CONCLUSION

The trial court failed to properly consider the expert testimony relating to wife's enhanced earning capacity or to otherwise value this asset. The Judgment of Dissolution should be modified.

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EXCERPT OF RECORD

INDEX

Petition for Dissolution of Marriage (TCF 1).....ER-2
Petitioner's Exhibit 14.....ER-3
Trial Court's Letter Opinion of August 25, 1998.....ER-4

SAMPLE

PETITION FOR DISSOLUTION OF MARRIAGE

[A copy of the petition for dissolution of marriage was included with this brief.

See ORAP 5.50.]

SAMPLE

PETITIONER'S EXHIBIT 14

[A copy of petitioner's exhibit 14 was included with this brief. *See* ORAP 5.50.]

SAMPLE

TRIAL COURT'S LETTER OPINION

[A copy of the trial court's letter opinion was included with this brief. *See* ORAP 5.50.]

SAMPLE

**CERTIFICATION OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 2,803 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

J. Michael Lawyer (OSB No. 000000)
Of Attorneys for Appellant

PROOF OF SERVICE

I, J. Michael Lawyer, hereby certify that I am one of the attorneys for appellant herein, that I served the within Appellant's Brief and Excerpt of Record on June 15, 1999, by placing two copies thereof in a sealed envelope plainly addressed to the following:

Russell Attorney
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Dated June 15, 1999

J. Michael Lawyer (OSB No. 000000)
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