73508-0

No. 73508-0-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

IN RE THE MARRIAGE OF:

TINA M. SHIBLEY, Respondent

v.

ERIC R. SHIBLEY, Appellant

REPLY BRIEF OF APPELLANT

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I. Statement of the Case

The response brief makes a number of references to the record which do not support its representations. It attributes a number of arguments to Eric Shibley that would be invalid that he has not made. These will all be pointed out in the argument sections that follow.

II. Argument

A. Property Division

1. The Factors of RCW 26.09.080 Not Considered By The Trial Court

The response brief argues that the factors listed in RCW 26.09.080 are not exclusive. However, it does not point out what other factors the court considered. Nothing in the record supports that it did so. Nor does the response brief deny that the trial court is required to weigh all of the factors under RCW 26.09.080 at a minimum.

The response brief relies on the trial court's oral decision. Analysis of its oral decision reveals that the trial court failed to consider "duration of the marriage" and "the economic circumstances of both parties at the time the division is to become effective..." as required by RCW 26.09.080(3) and (4).

This was a marriage of only 5 years. (CP 21). There is nothing to indicate that the court gave any consideration to its maintenance award as it impacts their financial circumstances going forward, nor the fact that Eric Shibley owes attorneys fees to his attorney after eight days of trial while she owes none, nor the significant differences in their housing costs. The court failed to consider these factors required under the statute.

2.The Court Abused Its Discretion By Failing to Adopt The Known Current Value Of The Assets

The response brief makes two contradictory misstatements of the record, as to the sale of the gold. One is at page 13 where it represents "Eric... at trial claimed to have liquidated the majority of them at a discounted rate of 42.9% of their market value." (Citing RP 1407). The other is at page 26 that there was no evidence of fair market value. These contradictory representations of the record are both inaccurate.

RP 1407 contains no testimony whatsoever. Nowhere did he testify that what he received was 42.9% of the market value. RP 1407 is the recitation to the trial court by the attorneys for both parties of "the settlement reached on this issue". They explained that the court was to characterize the gold sale proceeds not traceable to receipts in his name or her name under trial exhibit 135 (consistent with the prenuptial agreement

which the trial court deemed valid) as community property. As to the value of the community portion, they stated "...42.9 percent of its purchase price is the value for the court to distribute." RP 1407. Thus, the court's task, by the express terms of the settlement was to determine, based upon trial exhibit 135, what portion of the $75,000 he received was the community portion which the court was to divide, between the parties.

Thus the parties agreed that what Eric Shibley obtained for the gold was its market value as of trial. The argument in the response brief at page 26 that neither party presented testimony of fair market value is of no consequence because they agreed that what he received in sale proceeds was its value for purposes of the property division.

The trial court's response was not to say it would be take the property settlement under advisement, nor to reject it. The Court's response was "Okay". The court was then asked if it understood and acknowledged that it did. (RP 1407). In other words, the parties agreed that its current value is what he received when he sold it. What he received was 42.9% of what it cost to purchase, which is what the court found at CP 23, not 42.9% of its fair market value as represented by the response brief at page 13.

The response brief then argues that the trial court was not bound by the in-court property settlement of the parties citing *Munroe v. Munroe*, 27 Wa 2d 556 at 561 (1947). But *Munroe v. Munroe, supra* has not been good law since 1973.

Prior to the enactment of RCW 26.09.070 in 1973, trial courts had the discretion to accept or reject agreements as to property based upon what the court deemed to be fair. The legislature placed new limits on a court's discretion to not honor post separation agreements as to property when it enacted RCW 26.09.070.

Under the statute, the court is required to honor property settlement agreements unless a party opposes the agreement and can prove that the agreement was unfair in the circumstances that existed when it was signed. See RCW 26.09.070 (3). The fact that the statute changed the court's discretion as it had been under previous common law is fully explained in *Shaffer v. Shaffer*, 47 Wn. App. 189, 733 P.2d 1013 (1987).

> "Before the adoption of RCW 26.09.070 in 1973, the provisions of a separation agreement were to be adopted by the trial judge only if its terms were deemed "fair and equitable." (citation omitted.) Such agreements between spouses could be disregarded if the trial court was satisfied that the terms "do not constitute a proper division of the property." (citation omitted.) In essence, the trial court needed to pay only slight deference to the separation agreement of the parties because the trial court was bound

> in any case to make a "just and equitable" division of the property...
>
> Under the current statute, RCW 26.09.070(3), "amicable agreements are preferred **1016 to adversarial resolution of property ... questions, ...", and the separation contract is, therefore, binding on the parties unless the trial court finds it "unfair" at the time of execution. (citation omitted.)
>
> Because of this new freedom for marital partners to divide their property as they see fit, the old rule allowing the court to disregard the property division made by the parties in their agreement if the division does not conform to the trial court's view of an equitable property division, no longer is appropriate. Currently, the only question for a trial court reviewing a separation agreement is: was the agreement unfair when it was executed? If the agreement is not unfair, the parties will be held to have waived their right to have the court determine a "just and equitable" division of the property." *Shaffer v. Shaffer*, *supra* at 193-194 (1987).

Here, neither party contested the fairness of their property settlement as to the gold. Instead, the parties urged it upon the court. The court did not find it unfair because it had no evidence that what Eric Shibley got for the gold was less than what it was worth at the time of trial. The response brief does not deny that current fair market value is the measure trial courts must utilize in marital dissolution cases. Thus, the court abused its discretion by not following their property agreement on this issue. How then did the court do so?

3.The Court Punished Rather Than Compensated

It did so by punishing Eric Shibley for violating the restraining order, rather than compensating Tina Shibley for its value as stipulated by the parties.

At page 23 the response brief argues that Eric Shibley failed to assign error to the trial court considering the sold property divisible and that he in fact agreed to do so through the stipulation. Indeed, Eric Shibley did not assign error to that exercise of discretion because to do so is not error. He does not argue that there is no authority that allows the court to compensate her for property that no longer exists as did Mr. Wallace in *In re the Marriage of Wallace*, 111 Wn. App. 697, 45 P.3d 1131 (2002). The formulation of "the settlement of the issue" (RP 1407) is an endorsement by both parties that what they asked the court to do was to compensate her for her share of the community component of the gold sales proceeds.

The response brief also cites *In re the Marriage of Wallace*, *supra*, at 708 (2002) for the proposition that the misconduct that the court cannot consider, referenced in RCW 26.09.080, does not include the squandering of community assets. Eric Shibley acknowledges, as he must, that each party has a fiduciary responsibility to the marital community to manage

the property he or she controls for the benefit of the marital community. *Kolmorgan v. Schaller*, 51 Wash.2d 94, 316 P.2d 111 (1957). This duty extends during the period of legal separation. *Seals v. Seals*, 22 Wash.App. 652, 590 P.2d 1301 (1979). Eric Shibley has not argued otherwise.

But here, while there was proof that his selling of the gold was a violation of the order, there was no proof that in doing so he "squandered" these community assets because there was no evidence that he received less than fair market value. The court abused its discretion by failing to see that distinction and by failing to follow the stipulation of the parties.

The court's discretion is broad, but not unlimited. RCW 26.09.080 requires fairness to both parties, not merely to one. Our State Supreme Court reversed a trial court's division of property and debt because it was the trial court's way of punishing one spouse for her attempt to punish the other spouse in the property division through proof of her having obtained a permanent domestic violence protection order. *In re the Marriage of Muhammad*, 153 Wash.2d 795 at 784-785, 108 P.3d 779 (2005).[1]

[1] The response brief surmises in footnote 5, page 29 that another case was cited in error on this issue. The response brief is correct. Citation to *Muhammad, supra* was intended instead of *In re the Marriage of Ayyad*, 110 Wash.App. 462, 38 P.3d 1033 (1980).

The issue that Eric Shibley has raised on this appeal is not whether the award of compensation for the property sold was beyond the authority of the trial court to do. The position in his brief is that the amount imposed by the trial court was an abuse of discretion because it was not limited to compensation for its value, but rather to punish him for violating the order.

B. Attorney Fees

1. The Trial Court Failed To Consider All Factors Required Under RCW 26.09.140

The response brief does not deny the following: that there is nothing in the record to indicate that the court weighed all the factors required of it under RCW 26.09.140; that if it had, the award of maintenance (not challenged on this appeal), child support, and property that each party was awarded puts Tina Shibley in a better financial position than Eric Shibley, even if the property division and child support awards are reversed as requested on appeal.

Thus, the award of any fees was an abuse of the trial court's discretion.

2. Eric Shibley Has Not Challenged Whether A Trial Court Can Award Fees Even Though Tina's Fees Were Gratis

If this court should nevertheless determine that an award of fees is appropriate, the response brief argues that the lodestar method can be used in marital dissolution cases. Dr. Shibley did not challenge that proposition. He does not challenge the reasonableness of the hourly rates imputed by the court.

The response brief then goes on at some length to provide factual information about the Northwest Legal Foundation, how it operates, why it operates, the public service it provides to indigent clients who qualify for its services, and the contractual arrangement under which the attorneys representing Tina Shibley were compensated for their services on her behalf. While none of that information was provided as evidence at the trial, Eric Shibley will not dispute its accuracy, as factual information, because he presumes, she would have the right to present that information on remand, and her attorneys have an ethical obligation to be candid with this tribunal. He does not assume otherwise.

The response brief argues, the fact that Tina Shibley was not being charged anything by her attorneys does not, per se, preclude an award of attorney fees in her favor, citing *Tofte v. D.S.H.S.*, 85 Wa 2d 161, 531 P.2d 808 (1975). Eric Shibley did not argue that it does.

3. Failure To Consider What Her Attorneys Were Paid By Northwest Legal Foundation And What Each Party Owed Their Respective Attorneys Was An Abuse Of Discretion

The response brief concludes, relying upon *Tofte*, *supra*, that "What the attorneys were paid is irrelevant to the fact that she got free legal services." However, *Tofte v. D.S.H.S.*, *supra*, does not speak to the question of whether what the attorneys were paid is relevant to whether and how much the other party should pay in attorney fees.

The response brief has cited no authority to justify the conclusion that what her attorneys were paid by Northwest Legal Foundation on her behalf is irrelevant as to whether and how much Eric Shibley should have to pay them. Thus, failure to discount what they were paid by the Foundation is an abuse of trial court discretion for the following reasons.

The response brief argues that the court could have awarded fees based upon intransigence citing *In re Marriage of Babbitt*, 50 Wash.App. 190, 747 P.2d 507 (1987). But it does not deny that there was no finding that intransigence pervaded the proceeding, no finding as to what specific acts of intransigence were committed, if any, by Eric Shibley, and if so, what, under the lodestar formula, would be the cost of fees incurred in dealing with those specific intransigent acts, all of which is required under

Babbitt supra, for there to be an award based upon intransigence. That only leaves RCW 26.09.140 as a basis to award attorney fees and costs.

Only a party is entitled to an award of fees under RCW 26.09.140. The Northwest Legal Foundation is not a party to this action. It is not entitled to a recovery of what it paid the attorneys on Tina Shibley's behalf. That will be the net effect if the attorneys reimburse the Foundation for being paid what they were awarded against Eric Shibley.[2]

Nor does RCW 26.09.140 authorize the attorneys for the party to be compensated twice for the same services which will be the result if they do not reimburse Northwest Legal Foundation what they were already paid.

That is why failure to deduct what they were paid to determine how much Eric Shibley owes is an abuse of trial court discretion.

C. Child Support:

1. The Court Abused Its Discretion In Ordering A Transfer Payment In Excess Of The Standard Calculation In The Absence Of Evidence Of The Actual Costs Of The Child's Needs

[2] Their contract for services is not part of the record. Whether it requires reimbursement by the attorneys or not is unknown.

Deviations from the standard calculation are governed by RCW 26.19.075. Awards in excess of the standard calculation where combined incomes exceed the maximum advisory level call for different standards to be applied. The response brief argues that *Leslie v. Verhey*, 90 Wn. App. 796, 954 P.2d 330 (1998), is inapposite. However, the case is directly on point.

It holds that where, as here, combined incomes exceed the maximum advisory level, an award of a transfer payment can exceed the standard calculation from the economic table but if it does the award is not a deviation. *Leslie v. Verhey*, *supra* at 803 and 804. Here the court did so, and concluded the award to be a deviation at section 3.7 of the child support order noting special medical, educational, and psychological needs of the child. (CP 37-38).

At page 32 the response brief inaccurately argues that Eric Shibley has not cited authority for his argument that special child rearing expenses, uninsured medical expenses, and the standard calculation limit the court's authority to exceed the standard calculation. That is another mischaracterization of the argument he makes on this appeal.

His argument is that special expenses and uninsured health care expenses are paid for independently of the standard calculation. His

authority is RCW 26.19.080(2) and (3). In fact, the court in *In re the Marriage of Daubert*, 124 Wn. App. 483, 99 P.3d 401 (2004) expressly made that same observation at page 494.

The response brief argues that findings were not cursory quoting extensively from them at CP 887. The first thing those findings note is that the father's "...income allows for a higher standard of living for the child than... the standard calculation." How so? There was no evidence presented as to what actual costs would impact that standard of living. Thus, the finding as to standard of living is as cursory as can be.

The balance of "the finding" is instructive since it supports Eric Shibley's argument. Above and beyond a higher standard of living, the trial court found, "The child is 'also' in need of counseling and behavioral therapy and educational support." (CP 887). The word, "also" immediately follows on from its observation in regard to the standard of living. Thus, the finding reflects an acknowledgment by the trial court that the need for the mental health services and educational support is over and above the standard of living costs that the transfer payment is designed to cover.

The response brief completes its recitation of the finding: "A transfer payment in excess of the maximum advisory amount is necessary

to assist in receiving the behavior therapy and educational support." (CP 887). Thus the finding and the "reasons for deviation" are consistent. They make clear that the amount of the transfer payment in excess of the standard calculation was to provide additional money to cover those costs.

The only way its award of a transfer payment of $3,000 per month instead of $1,441 per month can be justified is for there to be evidence that Tina Shibley's payment of 3% of the costs of behavioral therapy, counseling, and educational support renders the standard calculation inadequate. To justify that conclusion, there had to be evidence of what the actual costs of counseling, behavior therapy, and educational support and if so, whether a transfer payment of more than double the standard calculation is warranted. But, there is no evidence that supports the conclusion that there are costs of counseling, behavior therapy, and educational support beyond the 3% that Tina must pay that will create such an additional economic burden to her to justify imposition of such a child support transfer payment. In fact, neither party is even ordered to obtain behavioral therapy or counseling or educational support for Ryan.

Alternatively, if her costs for those expenses had been added to the worksheet so that the transfer payment above the standard calculation would reimburse her for her payment of the 3% then, to that extent, a

transfer payment, above the standard calculation would be an appropriate exercise of trial court discretion. Section 11, page 2 of the worksheet provides for such expenses. However, in the child support worksheet as to those expenses is blank. (CP 56).

Thus the court's justification for a transfer payment of $3,000 per month plus 97% of those costs has him paying her each month for costs he funds, independently, or provides her a windfall for extra costs not being incurred at all. The costs of counseling, behavioral therapy, and educational support are not part of the standard of living that the transfer payment is designed to help cover.

It was the absence of evidence of those actual costs that caused the trial court to be reversed in *Daubert, supra.*

> "The fact that the children will benefit by the opportunities available to them from additional funds is not the test for additional support. It is not enough that the funds might be spent on allowable or beneficial opportunities... must be both necessary and reasonable...
>
> The record contains no evidence that Rusty was still in band and that the high school band had future travel plans before his graduation from high school or that any other travel, such as the trip he missed with friends, was contemplated.
>
> The record does not disclose whether SAT prep courses were still needed for Rusty or needed for Kara. Past events

> alone cannot provide a basis for future support. Without evidence of the future necessity of these expenditures...
>
> ...no finding of whether Rusty or Kara should have orthodontia...whether the children were in need of updated computer equipment... Without cost estimates, the court had no basis to determine an amount to award for the opportunities sought and had no basis to make findings about the reasonableness of that amount...
>
> The mere ability of either or both of the parents to pay more, whether based on consideration of income, resources or standard of living, is not enough to justify ordering more support... The test is the necessity for and reasonableness of the amount considering the totality of the circumstances." *In re Marriage of Daubert & Johnson*, 124 Wash. App. 483, 497-98, 99 P.3d 401, 407 (2004), as amended on reconsideration (Dec. 16, 2004) abrogated by *McCausland v. McCausland*, 159 Wash. 2d 607, 152 P.3d 1013 (2007).

Parents whose incomes exceed $12,000 per month, net of taxes, in some cases, do expose their children to such experiences: computer lessons, purchase of new computers, enriching excursions, or fun activities such as attending professional sporting events. These are just some examples of lifestyle enhancing endeavors that cost money, that are not included in the uninsured health care or special activities covered under RCW 26.19.080(2) and (3). What *MacCausland, supra*, in affirming the *Daubert* factors is telling trial courts is that for those families who don't simply wish to expose their children to those types of lifestyle enhancing experiences, but who actually do so, and where they are activities that are

both reasonable and necessary, and where the actual cost is proven the parent with whom the child does not live the majority of the time, shall not be free to expose the child to them, while the majority parent cannot do so due to the inadequacy of the amount that is the standard calculation. A higher transfer payment is appropriate in those circumstances to enable both parents to continue to expose their children to those lifestyle opportunities. But there was no evidence of that here. The award of the transfer payment of child support must be reversed and the standard calculation imposed.

2. The Trial Court Abused Its Discretion In Failing To Deduct Income Taxes Attributed To Eric Shibley's Pre-Tax Income

The response brief argues that a stipulation was reached as to Eric Shibley's monthly income. But that was a stipulation between he and the State of Washington reached several months before trial. (CP 894).

The trial court rendered a finding: "He testified that his gross income is $30,000 a month, of that he pays out about $11,000 to his staff and pays himself $200,000 a year, which gross would be about $16,500 per month. The rest remains as profit in the business or goes toward taxes and other expenses." (CP 5).

The worksheet signed by the court shows income after deduction of business expenses of $15,581.00 per month. However, that is his personal income net of business expenses **before** personal income taxes and state industrial insurance (section 2(c) of the child support worksheet). The mandatory deduction for personal income taxes, and state and industrial is left blank. (CP 55). That these deductions were not calculated and are mandatory under RCW 26.19.071 is an abuse of discretion.

Thus, the child support calculations as to transfer payment and the percentage of uninsured health care and special expenses must be reversed. The accuracy of those calculations contained in the brief submitted are not challenged in the response brief.

D. The Final Parenting Plan

1. Introduction

a. Attributing Arguments To Eric Shibley That He Does Not Make

The response brief argues that Eric Shibley has asked this court to review the findings and the record *de novo*; to substitute its judgment for that of the trial court, to weigh the evidence, including credibility determinations. It suggests that he has focused on evidence that contradicts other evidence that provided the basis for the trial court's

findings. Nowhere in the brief filed on his behalf has he asked this court to do any of those things. Those inaccuracies will be specifically addressed below.

b. What the Response Brief Either Admits or Does Not Deny

The response brief does not refute assignment of error #6 or the argument section D(2)(3)(c) page iii and pages 24-25 regarding the provision in the parenting plan order that Eric Ryan's conduct must be "supervised". It does not cite to anything in the record that supports that conclusion nor what form the supervision would take, nor what conduct it would prevent, about which the parenting plan order is completely silent. The response brief infers that the "finding" should be reversed and eliminated, as it serves no functional purpose given what was not ordered in the parenting plan.[3]

The response brief argues at pages 17 and 19 that the trial court did not enter a finding that Eric Shibley engaged in substantial non-performance of parenting functions. That is exactly what it found under section 2.2 of the final parenting plan order (CP 4). The response brief

[3] In reality, this is a conclusion of law which is reviewable "de novo" on appeal. See *Goodell v. Madison Real Estate*, 191 Wn. App. 88, 362 P.3d 302 (2015).

admits that there was no evidence that he did. (See assignment of error #7 and argument section D(2)(a), page iii.) This provision of the parenting plan should be reversed by this court and eliminated.

The response brief does not refute assignment of error #8 and under argument section D(2)(e), page iv and pages 28-32 that the trial court abused its discretion in failing to find that Tina Shibley engaged in abusive use of conflict that created the potential for psychological harm to Ryan. There was no evidence cited in the response brief that contradicted the array of behaviors that support that determination summarized in the original brief submitted on behalf of Eric Shibley. Indeed there isn't any.

Thus, on remand, the trial court should be directed to include that restriction under section 2.2 of the parenting plan order, with directions to formulate additional provisions that outline a protocol for the implementation of decisions and that circumscribe the conduct of both parties to spare Ryan the effects of him being exposed to conflict by both parents; not merely Eric Shibley.

The response brief admits that a trial court's discretion to award decision making authority is limited to health care, educational, and religious upbringing and that it cannot include other child care issues unless there is an agreement of the parties. (See page 23 of response brief).

The response brief concedes that the trial court abused its discretion by including several other decisions since there was no agreement of the parties. (See assignment of error #9 and under argument section D(3)(b), page iv and pages 33-34).

2. As to the Trial Court's Abuse of Discretion In Failing To Award Majority Residential Care of Ryan To Eric Shibley

The response brief quotes exhaustively from the record to show that Ryan Shibley has severe behavioral problems that resulted in him being kicked out of several day care facilities used by Tina Shibley during her residential times, and that she has not developed the ability to effectively deal with the serious challenges that typify Ryan's behavior to set appropriate limits to his behavior for his sake, if not her own. These are among the parenting functions as defined under RCW 26.09.004(2): (a) (maintaining a... stable consistent, and nurturing relationship with the child; and, (d) Assisting the child in developing and maintaining appropriate interpersonal relationships..."

That Tina Shibley has the desire and willingness to provide for Ryan's needs was not denied in this appeal. However, the uncontradicted evidence is that she does not have the ability to implement those parenting

functions on a consistent, sustained basis. He is an out-of-control child, when with her, but not when he is with Eric.

The response brief argues at page 20 that there is "extensive evidence" that Tina Shibley has that ability. It cites, in support of that contention, the testimony of Dustin Johnson at RP 789 and 796; Heidi Roy, RP 915 – 916 and the Guardian ad Litem at RP 198 – 199. Neither there, nor anywhere else in the testimony of those witnesses, do they state that she has the ability to set effective limits or correct any of Ryan's problematic behaviors. They all testified as to her willingness to learn and try. But not that she has demonstrated the ability to do so. Although the court found that she is capable of providing stability and necessary care (such as feeding and clothing) as demonstrated prior to separation and afterwards (CP 27) (past performance) there is no evidence that the court considered RCW 26.09.187 (3) (iii), as to each parent's future ability to perform those necessary functions. There is no evidence to contradict the fact that he can and does and that she cannot and does not. The decision that awarded her majority residential care should be reversed.

DATED this 21 day of March, 2016.

Respectfully submitted,

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