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Court of Appeals No. 79819-7-I

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

Marriage of:

PHILIPPE CHAINIER,

Respondent,

and

KELLIE ANN CHAINIER,

Petitioner.

PETITION FOR REVIEW

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INTRODUCTION

The principal issue here is the trial court's broad discretion to value an asset before it for distribution in a dissolution, when it finds that the asset's owner has failed to provide a credible valuation. Husband owns a substantial interest in his family's business, SARL Financiere Chainier ("Financiere"), a holding company for wineries, vineyards, and related assets. His expert, Steven Kessler, used what he called "fair value" to value Financiere, accounting only for an asset's acquisition price, not its current worth or fair market value. Expert Kevin Grambush opined that this approach was flawed, where establishing fair market value was necessary to properly value the businesses. The trial court found Kessler not credible, and Grambush credible, in large part because Kessler's valuation appeared extremely low in comparison to current land values. Left without a credible valuation, the trial court made an adverse evidentiary inference based on

the record before it to assign a value to Financiere, enabling it to distribute the parties' assets.

In direct conflict with scores of controlling cases, the appellate court reweighed the evidence and reviewed the trial court's determination that Kessler was not credible. The result is a remand to determine the "proper value" of husband's interest in Financiere, without information in the record to determine its fair market value. ***Marriage of Chainier***, No. 79819-7-I, slip op. at 29 (March 29, 2021).

The appellate court erred again in labeling the trial court's adverse evidentiary inference a "sanction" subject to ***Burnet v. Spokane Ambulance***. This creates more conflicts and raises a question of substantial public interest this Court should determine. And raising another issue of substantial public interest, the appellate court held that unchallenged domestic violence findings were insufficient to order parenting classes and DV treatment.

This Court should accept review and reverse.

ISSUES PRESENTED FOR REVIEW

1. Where it is well established that the appellate courts will not review credibility determinations or reweigh the evidence, does the appellate decision conflict with numerous controlling cases where it: (a) considers and effectively reverses the trial court's decision that Kessler's business valuation was not credible; (b) ignores the trial court's determination that Grambush testified credibly in refuting Kessler's valuation; and (c) ignores the trial court's determination that husband also was evasive and not credible regarding the family businesses?

2. Does the appellate decision conflict with controlling precedent and raise a question of substantial public interest this Court should determine, where it treats the adverse evidentiary inference as a sanction requiring a ***Burnet*** analysis?

3. Does the appellate decision raise another question of substantial public interest this Court should determine in holding that numerous detailed findings establishing a history of acts of domestic violence are insufficient to order DV treatment and parenting classes under RCW 26.09.191 because the court did not further explain its order?

FACTS RELEVANT TO PETITION FOR REVIEW

A. Ruling that husband's business valuation was lacking, the trial court applied an adverse evidentiary inference to value the business.

Kellie Anne and Phillipe Chainer separated in June 2017 after an 11-year marriage. CP 267. Their children were ages 3 and 6 when their dissolution was finalized in March 2019. CP 268, 339. The primary issues at trial and on appeal included the valuation of the husband's business interest and RCW 26.09.191 limitations on his parenting due to his history of acts of domestic violence. Op. at 1-3.

Along with his father and two brothers, husband owns Financiere a holding company located in France. CP 268. Financiere owns SAS Pierre Chainier, a wine-making company whose annual revenues approximate €15 Million. *Id.* Directly and through other companies, Financiere owns 250 hectares of vineyards, among other assets. CP 269. Husband owns a 7.5% direct share of Financiere, and

another 25.89% share in remainder interest he will receive upon the death of his father, who is 79 years-old. *Id.*

The trial court found that “Husband’s testimony regarding the value of SAS Pierre Chainier was evasive and not credible” CP 269. His expert, Steven Kessler, agreed that the value of the company lies in the value of the vineyards and inventory, and that the vineyards would have to be properly appraised to determine their fair market value. *Id.*; RP 343-45, 930. But husband did not provide appraisals of the vineyards. CP 269; RP 334, 890, 899-900, 930-31, 1368.

Kessler used an “asset approach,” but lacking appraisals, he based his opinion on the vineyards’ original acquisition price or “book value” taken from the company’s financial statements. CP 269; RP 345, 934-36, 1308; Ex 154; Op. at 6-7. For assets subject to depreciation for tax purposes, Kessler excluded accumulated depreciation to return the assets to the undepreciated original cost – what

he called “fair value.” CP 269; 934-36, 1308; Ex 154; Op. at 6-7. As a result, “book value” and “fair value” are the same figure – the assets have not been adjusted to what they are currently worth, but returned to their acquisition cost. CP 269-70; RP 934-36, 1306-09. Kessler valued Financiere at €8,455,422, and valued husband’s total interest at €1,365,500. RP 348; Op. at 6-7. While he admitted this approach was subject to criticism and that appraisals would be nice, he believed obtaining them would be prohibitively expensive. CP 269; RP 334-36, 950.

Wife’s expert Kevin Grambush agreed that using an “asset approach” was appropriate, but opined that to accurately value the businesses, one had to determine the fair market value of each asset or group of assets. CP 269; RP 1303-05. Appraisals were necessary to determine the fair market value of the vineyards, one of the principal components of the businesses’ total value. RP 343, 1305-06. Kessler’s approach was flawed because he merely

used “what was originally paid for” all the assets, not their current worth. RP 1307-09. This is particularly problematic with real estate, whose purchase price is not an indicator of current worth. CP 269-70; RP 1307-09.

The trial court found Grambush’s testimony “credible.” CP 270. The court found Kessler’s valuation “not credible” and that there “is evidence to support an adverse inference that the fair market value is greater than Kessler opined.” *Id.* The court inferred the value as follows (*id.*):

- The Chainier family owns 250 hectares.
- There is evidence allowing the court to infer that around 2017, they purchased two hectares for €42,664 per hectare.
- If that price per hectare reflected the fair market value of the 250 hectares, then then the vineyards would be valued at about €10,625,000, more than five times Kessler’s valuation of the vineyards.
- The court ruled, “This evidence is strong impeachment of Mr. Kessler’s valuation and the court finds his opinion not credible.”
- Using this price-per-hectare approach, reducing husband’s remainder interest to reflect its present value, and converting to U.S. dollars, the court assigned a value of \$4.954 million to husband’s ownership interest.

B. The trial court ordered RCW 26.09.191 limitations on husband's parenting, finding a history of acts of domestic violence that husband conceded on appeal.

The trial court found a history of acts of domestic violence giving rise to limitations on husband's parenting. CP 129-31. The court's findings document physical altercations, including punching wife's car window, choking her, bruising her, and kicking-in her door. CP 129-30. They also document a pattern of "coercive control," including threatening wife, limiting her access to others, requiring her to obtain permission before making purchases, cutting off her access to finances, and inspecting her body after travel. *Id.* The court found that wife was "the more credible witness," testifying consistently with other witness and the records produced. CP 130. The court found that husband's testimony "was often evasive and sometimes strained credulity" and that it "contradicted several" of "his prior statements, other witness testimony, and records" *Id.*

C. The appellate court reversed without argument, holding that the trial court erred in failing to apply the three-part *Burnet* inquiry to the adverse evidentiary inference, and in failing to enter findings supporting the .191 limitations.

The appellate court held that the trial court's valuation "is not financially sound," questioning its "explanation of why it did not find Kessler credible": (1) it mischaracterized Kessler as presenting only book value, when he started with book value to determine "fair value"; (2) it asserted "that Kessler's estimates were not credible as fair market values, despite the fact that Kessler was estimating fair values, not fair market values"; (3) its price-per-hectare approach failed to take into account hectares purchased at a far lower price. Op. at 6-9. The court rejected wife's argument that the trial court need not use an accepted valuation technique because it was using an adverse evidentiary inference, holding that wife did not file a motion to compel discovery and that the court did not

comply with ***Burnet v. Spokane Ambulance***, 131 Wn.2d 484, 495-96, 933 P.2d 1036 (1997). *Id.* at 9.

As to parenting, husband did not challenge the trial court's domestic violence findings, but challenged the .191 limitations that he abstain from drugs and alcohol and complete a "step parenting" class, a Washington DV prevention program, and "DV Dads." Op. at 17, 18. The court held that these limitations are "overly restrictive because they are not supported by the court's findings." *Id.*

REASONS THIS COURT SHOULD ACCEPT REVIEW

A. The appellate decision conflicts with numerous decisions from this Court and the appellate courts holding that appellate courts do not review credibility determinations or reweigh the evidence. RAP 13.4(b)(1) & (2).

It is well established that appellate courts will not review credibility determinations or reweigh competing testimony. Here, the appellate court did both. The court reviewed – or ignored – the trial court's three credibility determinations: (1) husband undervalued his assets

repeatedly and his testimony regarding the company's value was "evasive and not credible ..."; (2) Kessler's valuation was so low it was not credible; and (3) Grambush's testimony is credible. CP 228, 229, 440; Op. at 9-10. In doing so, the court also reweighed the expert testimony regarding the Financiere valuation. Op. at 6-10. In both regards, its decision conflicts with scores of cases.

As this Court has repeatedly held, "Credibility determinations are for the trier of fact and are not subject to review. ... This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." **State v. Thomas**, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing **State v. Camarillo**, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) and **State v. Cord**, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)); see also **Marriage of Rideout**, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003); **Marriage of Wright**, 179 Wn. App. 257, 262 n.7, 319 P.3d 45 (2013); **Marriage of**

Eklund, 143 Wn. App. 207, 212, 177 P.3d 189 (2008). This is due in large part to the fact that trial courts hear and see witnesses, providing an opportunity to assess credibility that the appellate court does not share. See **Bale v. Allison**, 173 Wn. App. 435, 459, 294 P.3d 789 (2013); **Garofalo v. Commellini**, 169 Wash. 704, 705, 13 P.2d 497 (1932). It is also due to the fact that “trial judges and court commissioners routinely hear family law matters.” **Rideout**, 150 Wn.2d at 352.

In a related but distinct area, appellate courts “do not reweigh or rebalance competing testimony and inferences even if [they] may have resolved the factual dispute differently.” **Bale**, 173 Wn. App. at 458 (citing **Brown v. Superior Underwriters**, 30 Wn. App. 303, 305-06, 632 P.2d 887 (1980)). “This is especially true when the trial court finds the evidence unpersuasive.” 173 Wn. App. at 458 (citing **Quinn v. Cherry Lane Auto Plaza, Inc.**, 153 Wn. App. 710, 717, 225 P.3d 266 (2009)). Put another way,

“where a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding.” *Quinn*, 153 Wn. App. at 717.

Directly contradicting each of these cases (and many more), the appellate court erred in reviewing – and impugning – the trial court’s three credibility determinations, effectively preferring Kessler’s valuation to Grambush’s critique. Op. at 9-10. It gave three incorrect reasons for undermining the trial court’s “explanation of why it did not find Kessler credible” (Op. at 8):

(1) its mischaracterization of Kessler as presenting the court with only the book value of the company, (2) its assertion that Kessler’s estimates were not credible as fair market values, despite the fact that Kessler was estimating fair values, not fair market values, and (3) its identification that the court’s estimate, which we have noted was mathematically inconsistent, was significantly higher than Kessler’s estimate.

As to the first reason, the court apparently believed that the trial court mischaracterized Kessler as presenting only

book value, when he in fact started with book value to determine “fair value,” the value of the interest to the holder. Op. at 6-8. But this misunderstands that with Kessler’s approach, the “fair value” calculation merely used the vineyards acquisition price and returned buildings and equipment to their undepreciated book value. RP 345, 1307-09; Ex 154. Under Kessler’s approach, there is no difference between book value and fair value – both capture only the acquisition price, not their current worth. *Id.* Kessler admitted “fair value” is not reflective of the asset’s fair *market* value, nor could it be unless the vineyards never appreciated. CP 269-70; RP 934, 1307-09. The appellate court simply reweighed evidence that it misunderstood.

As to the second reason, the trial court never ruled “that Kessler’s estimates were not credible as fair market values.” Op. at 9. It ruled that Kessler did not adjust book values to fair *market* values (as Grambush testified was

necessary) and that there “was no expert testimony of the fair market value of husband’s separate property interest in the family winery business.” CP 270; RP 1306-08. It knew Kessler was using fair value, not fair *market* value. *Id.* Its credibility determination is based not on a misunderstanding, but on the fact that evidence in the record strongly suggested that Kessler grossly undervalued the vineyards. *Id.*

Relatedly, the appellate court erred in criticizing the trial court for focusing on fair market value when “fair value is an appropriate alternative” “*when the fair market value of an asset cannot be determined.*” Op. at 7 (emphasis added). Nothing prevented husband from providing fair market value aside from his refusal to pay for appraisals. CP 269; RP 334, 890, 899-900, 930-31, 1368. The trial court’s “focus on fair market value” was not an error – it was well within the trial court’s broad discretion to determine the weight and persuasiveness of the evidence.

As to the third reason, it is irrelevant that the trial court's price-per-hectare approach failed to account for hectares purchased at a far lower price. Op. at 7-8. The trial court was not attempting to value the vineyards. It was attempting to *assign* a value so that it could distribute the assets. This was necessary because Kessler's valuation was not credible, and it was reasonable to infer from the evidence before the court that it was far lower than fair market value. CP 269-70.

The treatment of the Kessler credibility determination must be understood in context of the others. The trial court found too that husband was not credible regarding Financiere. CP 269. Grambush testified credibly that a proper evaluation required appraisals to determine fair market value, where book value or fair value fail to account for appreciation. CP 270; RP 1305-09. Kessler lacked credibility not just because his valuation was far too low,

but because his approach was flawed due to husband's refusal to provide appraisals. CP 269-70; RP 1305-09.

In sum, the appellate court improperly reviewed the trial court's determination that Kessler was not credible, and ignored its determinations that husband also was not credible and that Grambush was. It reweighed the evidence, effectively accepting testimony the trial court had rejected. Conflicts abound. This Court should accept review and reverse.

B. The appellate decision conflicts with numerous decisions governing a trial court's duties and discretion in distributing assets in a dissolution, conflicts with *Burnet* and its progeny, and raises a question of substantial public interest this Court should review. RAP 13.4(b)(1), (2) & (4).

As addressed above, the trial court was faced with Kessler's valuation that it found not credible, and with Grambush's credible testimony that he could not value husband's interest in *Financiere* without appraisals. CP 269-70. Without any way to properly value to that asset, but constrained to do so, the court inferred that the interest

was worth more than Kessler opined and assigned it a value based on a price-per-hectare approach. *Id.* This was not a sanction, but an evidentiary ruling. *Id.* The appellate decision that this required a motion to compel discovery or a ***Burnet*** analysis comes out of left field. Op. 9.

Forcing the adverse evidentiary ruling into a sanctions construct conflicts with numerous decisions requiring a trial court to value the assets before it in a dissolution, and giving it broad discretion to do so. The trial court has a duty to value and distribute all assets before it in a dissolution and abuses its discretion if it fails to do so. See ***Marriage of Sedlock***, 69 Wn. App. 484, 498, 849 P.2d 1243 (1993); ***Marriage of Thomas***, 63 Wn. App. 658, 664, 821 P.2d 1227 (1991); see also ***Marriage of Hadley***, 88 Wn.2d 649, 657, 565 P.2d 790 (1977); ***Marriage of Greene***, 97 Wn. App. 708, 712, 986 P.2d 144 (1999). It has broad discretion in valuing an asset and “wide latitude” in weighing related expert testimony. ***Marriage of Gillespie***,

89 Wn. App. 390, 403, 948 P.2d 1338 (1997); **Sedlock**, 69 Wn. App. at 491. The valuation need only be “within the range of the credible evidence.” 69 Wn. App. at 491-92. When a party to the divorce fails to account for an asset within his control, “any uncertainties” must be “resolved against him.” **Thomas**, 63 Wn. App. at 664.

The trial court’s decision is entirely consistent with each of these cases. It had to value Financiere to distribute the parties’ assets. **Sedlock**, *supra*. It found credible (and more persuasive) Grambush’s testimony that the only way to properly value that asset was to have appraisals for the vineyards. **Gillespie**, *supra*; CP 269-70. It rejected as not credible Kessler’s valuation of the vineyards based on their book value. *Id.* Finding that Kessler had grossly undervalued the vineyards in comparison to a recent purchase, the court inferred their value was far greater. **Thomas**, *supra*. It then assigned a value within the range of that evidence. **Sedlock**, *supra*.

The trial court did not mention CR 37, **Burnet**, or sanctions. CP 269-70. It discussed husband's production only in awarding wife \$90,000 in attorney fees for intransigence. CP 282.

The appellate court invoked CR 37 and **Burnet** in response to wife's assertion that husband's "resistance to discovery left the court no choice but to draw an adverse inference." Op. at 9. Her point was that "[l]eft with no credible evidence of the actual value of his interests, [the court] drew an adverse inference from the evidence available to it." BR 44. That is not a sanction. Since: (a) Kessler failed to provide a credible valuation; and (b) Grambush could not do so without appraisals; then (c) the court inferred, based on the 2017 purchase price of two hectares, that the fair market value of the vineyards was considerably more than Kessler opined. CP 229-70; BR 47-48. This has nothing to do with CR 37 or **Burnet**, which apply to sanctions for discovery violations, or court-rule

violations. See **Keck v. Collins**, 184 Wn.2d 358, 368-69, 357 P.3d 1080 (2015).

The appellate decision fundamentally disrupts a trial court's discretion to provide a just and equitable distribution of assets necessary to achieving finality for divorcing parties. Thus, its invocation of CR 37 and **Burnet** also merits this Court's review and correction that an adverse evidentiary inference *is not a sanction*. Op. 9.; RAP 13.4(b)(4). A line of cases addressing adverse inferences in the Fifth Amendment context is instructive.

In **Diaz v. Wash. State Migrant Council**, the appellate court distinguished adverse-inference instructions given as discovery sanctions from adverse-inference instructions warranted when a witness invokes the 5th Amendment. 165 Wn. App. 59, 85-87, 265 P.3d 956 (2011). There, several board members of the Washington State Migrant Counsel asserted their 5th Amendment privilege in response to deposition questions about their

immigration status. **Diaz**, 165 Wn. App. at 68-69. In addressing the trial court's decision to give an adverse inference instruction as a discovery sanction, the appellate court held that "a request that the court give an adverse inference instruction in a civil case may be made anytime a witness with the necessary relation to a party invokes the Fifth Amendment; it need not be raised by a motion to compel discovery and is not, fundamentally, a sanction." 165 Wn. App. at 86.

Rather, invoking the 5th Amendment in the civil context "does not protect the invoking party from adverse inferences that may logically be drawn from its exercise" *Id.* at 85-86 (citing **Baxter v. Palmigiano**, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976); **King v. Olympic Pipe Line Co.**, 104 Wn. App. 338, 355-56, 16 P.3d 45 (2000) (citing **Ikeda v. Curtis**, 43 Wn.2d 449, 458, 261 P.2d 684 (1953)), *rev. denied*, 143 Wn.2d 1012 (2001)). In that context, the adverse inference is "not as a

sanction or remedy for any unfairness created by exercise of the privilege but simply because the inference is relevant and outside the scope of the privilege.” *Diaz*, 165 Wn. App. at 86 (citing *Steiner v. Minn. Life Ins. Co.*, 85 P.3d 135, 143 (Colo. 2004) (Coats, J., concurring)).

While the 5th Amendment cases are distinguishable, they illustrate the proper use of an adverse inference when relevant evidence is kept from the factfinder. This Court should accept review and clarify that an adverse evidentiary inference is not a sanction, but is a useful tool available to the trial court, just as it is a useful tool available to a jury.

C. The appellate decision to require exacting domestic violence findings not required by RCW 26.09.191 creates an issue of substantial public interest this Court should determine. RAP 13.4(b)(4).

Where, as here, the trial court finds “a history of acts of domestic violence,” it must limit the parent’s residential time with the child. RCW 26.09.191(2)(a)(iii); *Marriage of*

Watson, 132 Wn. App. 222, 231-32, 130 P.3d 915 (2006). Such limitations may range from supervised visits only, to completing relevant counseling and treatment. RCW 26.09.191(m)(i). Here, the trial court found a history of domestic violence, documented in pages of findings uncontested on appeal, and ordered husband to abstain from alcohol and to take parenting and DV classes. CP 128-32. The appellate court effectively held that the trial court abused its discretion in failing to explain these limitations in its findings. Op. 17-21.

The only finding required is that there is a history of domestic violence. See RCW 26.09.191(2)(a)(iii). There is no basis for requiring more exacting specificity. When a court finds numerous acts of domestic violence, it should not be reversed on appeal because it fails to explain why parenting and DV classes are appropriate.

Moreover, the record amply supports that these limitations were reasonably calculated to protect the

children. See RCW 26.09.191(m)(i). As just one example, when husband became frustrated with the parties' daughter C., he would "drag her by the ear or arm" or spank her. RP 1044. This reaction could be provoked by something as simple as spilling food. RP 1054-55.

Husband made scenes while transferring the children for visitation and disparaged wife in the children's presence. RP 1058-62, 1816-17. He directly involved C. in the parties' dispute about repeating kindergarten. RP 1813-17, 1846. When asked whether he considered the emotional impact on C., who had to be moved back from first grade to kindergarten, husband answered "I don't know." RP 1236.

Simply stated, children who are exposed to DV are damaged by that exposure. Ex 5 at 12. And husband's DV history puts the children at significant risk in the future. *Id.* That is exactly why DV group therapy and DV Dads was recommended. See RP 1136-38; Ex 5 at 12-13. Given the

obvious effect of the DV on the children, the court need not have explained why it ordered therapy.

This Court should accept review and reverse.

CONCLUSION

The appellate decision conflicts with numerous decisions from this Court and the appellate courts, and raises two questions of substantial public interest this Court should determine. This Court should accept review and reverse.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to RAP 18.17(b), this Petition for Review was produced using word processing software and the number of words contained in the document, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, and exhibits) is 4,973.

RESPECTFULLY SUBMITTED this 7th day of September 2021.

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I certify that I caused to be filed and served a copy of the foregoing **PETITION FOR REVIEW** on the 7th day of September 2021 as follows:

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