

62702-3

62702-3

NO. 62702-3-1

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

DIVISION ONE

CRAIG SCOTT AMAN,

Appellant,

vs.

GRACE LOUISE AMAN,

Respondent

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING
COUNTY

The Honorable James Cayce, Judge

RESPONDENT'S BRIEF

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I. INTRODUCTION

The Washington State legislature vests considerable discretion in its judges in determining the terms of dissolution decrees, including provisions for children, awards of maintenance and divisions of property. This discretion is given great deference because judges are in a unique position to hear actual evidence and assess witness credibility. Absent abuse of discretion, the decision of a trial judge should be upheld on appeal.

The appellant raises a number of claims in his brief. The vast majority of these claims are raised for the first time on appeal. Claims raised for the first time on appeal should be rejected.

The other claims by appellant do not raise issues of an abuse of discretion. They only seek to have the Court of Appeals substitute its judgment for that of the trial judge. This is not the appropriate standard for appeal and should be rejected.

II. COUNTER STATEMENT OF FACTS

Grace Aman was 51 at the time of trial. RP, June 24, 2008, p. 28. Grace had limited education: high school and one year of community college in the mid 1970s. RP, June 24, 2008, p. 29-30. She had a variety of low paying jobs over the next few years. RP, June 24, 2008, p. 29-33. Grace and Craig began living

together in February of 1992 and married July 24, 1992. RP, June 24, 2008, p. 34-5. They adopted a child, Lauren, in July of 1998. RP, June 24, 2008, p. 36.

Craig Aman worked at the Seattle Fire Department when the parties married and also owned and operated a business, Life Safe. RP, June 24, 2008, p. 37. In 1998, he sold Life Safe and began working at Philips Health Care as his second job. RP, June 24, 2008, p. 37-8.

Grace had various medical problems throughout the marriage. She had two ectopic pregnancies and a miscarriage. RP, June 24, 2008, p. 37. She suffered a serious back injury in 2000 or 2001. RP, June 24, 2008, p. 39. She underwent spinal fusion surgery in 2002. RP, June 24, 2008, p. 40. Due to a post-surgical complication, the surgery was unsuccessful and it has been recommended that at some point she undergo more extensive spinal fusion surgery. RP, June 24, 2008, p. 41. As recommended by her physician, she has postponed that surgery to await less disabling procedures to be developed. RP, June 24, 2008, p. 41, 131-132. She has serious physical limitations due to her back injury. RP, June 24, 2008, p. 42, 48-49. She had a bleeding ulcer that required a lengthy hospitalization and

transfusions. RP, June 24, 2008, p. 46. She became addicted to her prescribed back pain medication and underwent treatment. RP, June 24, 2008, p. 45-6. She had endometriosis and ovarian cysts which ultimately required a hysterectomy. RP, June 24, 2008, p. 49-50. Grace requires ongoing medication and medical treatment for her back condition. RP, June 24, 2008, p. 50-53, 127-8, 132. This treatment was temporarily interrupted while she recovered from her hysterectomy. RP, June 24, 2008, p. 50-1 and RP, June 25, 2008, p. 14-6.

Grace was the primary parent for Lauren and solely involved in getting Lauren up and off to school each day. RP, June 24, 2008, p. 52-3. She was heavily involved in volunteering at Lauren's school, a Catholic school requirement. RP, June 24, 2008, p. 53-55. Lauren had many extracurricular activities and Grace was solely responsible for transportation to and from those activities as well as assisting in many of them. RP, June 24, 2008, p. 56-57, 71-73. Lauren attended private Catholic school, a decision made by both parents. RP, June 24, 2008, p. 57-8.

Grace and Lauren planned to move to Arizona after trial. RP, June 24, 2008, p. 20. Lauren would still be attending private Catholic school in Arizona and her school would also have

requirements for parental involvement. RP, June 24, 2008, p. 58-61, 103-4. Lauren would continue in extracurricular activities. RP, June 24, 2008, p. 61, 72-3.

Grace anticipated that her expenses in Arizona would be comparable to her expenses in Seattle. RP, June 24, 2008, p. 90. She expected moving expenses of \$5-7,000. RP, June 24, 2008, p. 100. She anticipated a need for a deposit for first and last month's rent of \$5-6,000. RP, June 24, 2008, p. 101. She did research on Arizona expenses on the internet. RP, June 24, 2008, p. 102, 145-6, 164-5 and RP, June 25, 2008, p. 22. She did research on costs through the newspaper. RP, June 24, 2008, p. 166. She spoke to realtors in Arizona. RP, June 25, 2008, p.22.

The child, Lauren, had her own medical problems; she suffered from scoliosis which required ongoing medical treatment. RP, June 24, 2008, p. 67-71. The treatment is in California. RP, June 24, 2008, p. 70-71, 149-50.

The parties owned a home in north Seattle. RP, June 24, 2008, p. 75. Grace estimated the home's value at \$575,000-\$600,000 at the time of trial. RP, June 24, 2008, p. 76. Craig estimated the value at \$575,000 at trial. CP 170. He estimated the wife would receive \$120,900 in house proceeds. CP 170. After a

two month delay in the trial before its conclusion, Grace testified that in August of 2008, real estate agents expected it to sell for \$555,000. RP, August 26, 2008, p. 31-33. The home actually sold for much less, \$515,000. EX A, Appellant's Brief. The reduced sales price would have resulted in little or no proceeds to the wife under the Decree of Dissolution, CP 150.

The home had been refinanced 2-3 years before trial with Craig receiving \$64,000, funds he used exclusively for his own use (payment of debts in his name, but not the debts in Grace's name). RP, June 24, 2008, p. 78, 108. The debts, even though in Grace's name, were all incurred after marriage. RP, June 24, 2008, p. 78. Those unpaid debts were still due at the time of trial. RP, June 24, 2008, p. 79. In fact, another debt that was unknown at the time of trial was discovered when the house was sold and further reduced the proceeds available for division.

Grace had no ability to return to employment she had held in the past. Her prior job as a telephone operator had been replaced by technology with which she was not familiar. RP, June 24, 2008, p. 104-5. Her prior job in sales was not physically doable due to her back injury. RP, June 24, 2008, p. 105. In addition, its hours were not compatible with full-time parenting. RP, June 24, 2008, p.

105-6. Similarly, she would not be physically able to return to being a flight attendant and the travel required would not be compatible with full-time parenting. RP, June 24, 2008, p. 106. Her prior work with her husband's business, Life Save, was not possible since the business had been sold. RP, June 24, 2008, p. 106. She was not physically able to perform similar tasks. RP, June 24, 2008, p. 106-7.

Grace can't lift more than 15 pounds. RP, June 24, 2008, p. 42. She has pain from the middle of her back down to her hips, her neck gets stiff, her shoulders get stiff and she can't stand for any longer length of time. RP, June 24, 2008, p. 48-9. Her left leg and sometimes her right leg get numb if she stands. RP, June 24, 2008, p. 49. Sitting also results in pain. RP, June 25, 2008, p. 12-3.

Grace needed education in order to return to the work force. Exhibit 35, page 5. She had been unable to pursue any education prior to trial due to her medical problems. RP, June 25, 2008, p. 4-5. She also had no funds for educational expenses. RP, June 25, 2008, p. 21.

Craig had considerable education, including a master's degree. RP, June 25, 2008, p. 25-6. He was a veteran fire fighter

with 18 years experience at the time of trial. RP, June 25, 2008, p. 27. He had, until just before trial, been employed in a second full-time job with Philips Health Care. RP, June 25, 2008, p. 32-3. Craig resigned voluntarily to take a different second full-time job. RP, June 25, 2008, p. 36. His second job at the time of trial was for Medic First Aid. RP, June 25, 2008, p. 40-1.

Craig's expenses were much lower than those he listed on his financial declaration. RP, June 25, 2008, p. 52-68.

While working for the Seattle Fire Department, Craig suffered a minor injury to his shoulder. RP, June 25, 2008, p. 158. He had suffered similar minor injuries during the marriage with no permanent consequences. RP, August 26, 2008, p. 24-5. The injury was treated by chiropractic treatment and physical therapy. RP, June 25, 2008, p. 159. Craig was off work for awhile but received pay during that time. RP, June 25, 2008, p. 164-5. The City of Seattle and State of Washington are closing his claim. RP, June 25, 2008, p. 165. Craig returned to his prior job without restriction. RP, June 25, 2008, p. 166. He has since changed positions to one that requires less strain on his shoulder. RP, August 26, 2008, p. 24. He showed no sign of limitations due to this prior shoulder injury. RP, August 26, 2008, p. 25-267. Craig's

work with the Seattle Fire Department had no adverse impact on his work with Medic First Aid. RP, July 8, 2008, p. 21.

Craig claimed he took medication for a heart arrhythmia. RP, July 8, 2008, p. 52. He provided no medical evidence to support this claim and did not allege that any doctor claimed it affected his ability to work. RP, July 8, 2008, p. 77-8. He admitted he did not claim it prevented him from working. RP, July 8, 2008, p. 78. Grace testified that he had this condition prior to their marriage. RP, August 26, 2008, p. 23. Craig did not even disclose any claimed disability in discovery. RP, August 26, 2008, p. 15.

Craig expressed an interest in not continuing his employment with the Seattle Fire Department but continued it because he didn't feel one income was sufficient for his financial needs. RP, July 8, 2008, p. 53-55.

For trial in June of 2008, Craig submitted a spreadsheet for court using the value of \$106,301.56 for the Philips 401(k) plan. CP 170. The husband proposed that the wife receive \$50,000 from this plan. CP 170. As stated above, the trial was delayed for two months and testimony resumed in late August of 2008. RP, August 26, 2008. At that time, the wife provided updated information on the house listing price. RP, August 26, 2008, p. 31-32. Craig did

not take this opportunity to update the court on the value at that time of the Philips 401(k) plan. RP, August 26, 2008, p. 7-23. Ultimately, the court specifically determined that the wife should receive \$50,000 from the Philips 401(k) plan with “the balance” awarded to the husband. CP 107 and 108. The husband did not propose at trial that this asset be divided by percentage. The husband did not oppose the wording of this provision at the time of presentation. The husband took no action whatsoever to transfer this \$50,000 to the wife after the trial.

III. SUMMARY OF ARGUMENT.

In a dissolution action, the trial court’s division of property and award of maintenance shall be upheld on appeal absent a manifest abuse of discretion. *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991).

The trial court in this matter appropriately found by a preponderance of evidence that the wife should be awarded a disproportionate award of property and an award of maintenance. The trial court’s decision was supported by lengthy and clear findings and should be upheld.

The wife should be awarded attorney fees for this appeal pursuant to RCW 26.09.140.¹

IV. ARGUMENT

The Appellant challenges on appeal, in effect, a number of the court's findings. The law is well established that factual issues will not be retried on appeal. The court's findings of fact will be accepted as verities on appeal as long as they are supported by substantial evidence in the record. *In Re Marriage of Thomas*, 63 Wn.App. 658, 827 P.2d 1227 (1991) (citing *In Re Marriage of Nicholson*, 17 Wn.App. 110, 114, 561 P.2d 1116 (1977)). In this case, all challenged findings by the court were supported by substantial evidence. As such, they should not be disturbed on appeal. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). Significantly, appellant did not even submit evidence at trial contrary to the substantial evidence presented by the wife on each challenged issue.

A. The court properly considered the statutory factors of RCW 26.09.090 in awarding maintenance to the wife. As such, the court's award was not an abuse of discretion and must be upheld.

RCW 26.09.090 provides that in a proceeding for dissolution of marriage the court may grant a maintenance order for either

¹ The wife's financial declaration will be timely filed.

spouse in such amounts and for such periods of time as the court deems just after considering all relevant factors including but not limited to:

- (a) *The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;*
- (b) *The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;*
- (c) *The standard of living established during the marriage or domestic partnership;*
- (d) *The duration of the marriage or domestic partnership;*
- (e) *The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and*
- (f) *The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.*

An award of maintenance is within the discretion of the trial court and will be upheld as long as it is not based on untenable grounds or for untenable reasons. *In Re Marriage of Thomas*, 63

Wn. App. 658, 821 P.2d 1227 (1991); In Re Marriage of Wright, 78 Wn.App. 230, 896 P.2d 735 (1995).

1. The wife presented credible evidence to establish her anticipated financial need.

The trial court must consider the financial needs of the spouse in determining a reasonable award of maintenance. The court had sufficient evidence of the anticipated financial obligations of the wife. The wife presented evidence of her monthly expenses in Seattle as well as her investigation into certain expenses in Arizona. She anticipated her moving expenses, the child's likely school expenses and the cost to rent a home. She testified that the remainder of her expenses was similar to those incurred in Seattle. Although appellant argues that this was insufficient, he provided no evidence whatsoever at trial that any of the wife's estimates were inaccurate. The court had a right to rely on the wife's representations, particularly in the absence of contrary evidence by the husband. Complaints raised for the first time on appeal are not adequately preserved for appeal.

2. The court properly considered the child's special needs and its effect on the wife's time in determining maintenance.

The child had unusual medical needs which required medical appointments, including travel out of state for the most modern treatment. The child's school required parental contributions of time that could only be performed by the wife. Not only was the wife the only parent who resided close enough to make these contributions of time but, historically, the wife had performed all of these tasks. The wife established that all of these commitments would require significant contributions of her time and energy.

The wife presented evidence of the child's long diagnosed scoliosis, her treatment with a doctor in California, and the daily activities to maintain and improve her condition. The husband did not contradict the wife's descriptions of the child's condition, treatment or needs. He presented no evidence contrary to the wife's testimony. Complaints raised for the first time on appeal are not adequately preserved for appeal. RAP 2.5(a).

The wife presented evidence of the child's many extracurricular activities. The husband did not deny the child's involvement in such activities.

3. The court was sufficiently informed as to the property that would be awarded to each party when it made its maintenance determination.

The court had evidence as to the likely value of the parties' real property at the time of trial. While the house had not been sold, each party testified as to its likely value. The court divided the parties' property leaving only minor adjustments to be later made when the exact sale proceeds were known. The husband's argument on appeal is that, in effect, the court should have known the exact amount of proceeds available to the wife before awarding maintenance. The court actually awarded the wife ten years of maintenance while believing the wife would receive over \$100,000 in house proceeds. The sale actually generated fewer funds to the wife. It challenges logic to claim that the court would have awarded the wife less maintenance if it had known she would receive far less in proceeds. In fact, it would be far more logical to assume the court would have awarded her more maintenance if it had known of the actual sale proceeds she would receive.

As previously discussed, the court did have an opportunity to make adjustments in the Decree of Dissolution in post trial motions once the actual sale price of the home was known. Appellant failed to make this argument in his post-trial motion. CP 154-155. By not raising this issue at the trial court level, at trial or in post-trial motions, appellant is precluded from raising such issue for the first time on appeal. RAP 2.5(a).

4. The length of maintenance was reasonable and should be upheld.

Appellant argues the ten years of maintenance is inherently unreasonable. He complains, in particular, of the award in light of the length of the parties' marriage. First of all, the duration of the marriage is only one factor for the court to consider in determining maintenance. RCW 26.09.090. Awards of maintenance of ten years as well as permanent maintenance are routinely upheld. *In re Nicholson*, 17 Wn.App. 110, 561 P.2d 1116 (1977).

In his opening brief, appellant misstates the report of Kathryn Reid, the vocational expert who evaluated the wife. Ms. Reid testified via her report that Grace was physically capable of only part-time work. Exhibit 35, page 5. Ms. Reid testified that Grace would be unlikely to earn one-half of the median earnings of an

office manager since such positions are generally full-time. Exhibit 35, page 5. She also testified that Grace would be unlikely to earn benefits with her part-time employment. Exhibit 35, page 5. Reid recommended that Grace obtain an AA degree to improve her employability. Exhibit 35, page 6. The court did not award Grace the funds she requested for such education and did not require her to pursue this education. CP 287. Reid testified that Grace was qualified to earn \$10-\$15,000 per year but faced severely limited access to jobs due to physical limitations, lack of transferable skills or recent experience or current references. Exhibit 35, page 6. Reid further testified that after two to four years of education, Grace could earn up to \$25,000 per year but still not receive full benefits. Exhibit 35, page 6.

Appellant argues, in effect, that it is certain that the wife will be fully employable and self sufficient in two years. This is far from the truth and without any support in the trial record. He did not even so testify at trial. The wife established that she currently cannot work due to her physical limitations, lack of current skills and education and her responsibilities as the mother of a child with special needs. Kathryn Reid found that she would need education to even try to return to work and verified that even upon a return to

work she would have physical limitations. The court made detailed findings as to Grace's injuries, limitations and disability. CP 274. The child's needs for additional time from her mother further restrict her mother's available time to work.

The wife originally proposed a five year review of maintenance but it was in conjunction with a higher award of maintenance and no reduction in amount over time. The court rejected this approach by its cross-out of those terms in the Decree of Dissolution. CP 280. Instead the court awarded maintenance for ten years but provided that the amount would be reduced twice during that ten year period. CP 275. The court merely neglected to cross out the review provision in the attached Findings after doing so in the Decree of Dissolution. CP 287. The Decree is the final word on the court's position on this subject.

5. The court properly considered the husband's ability to pay maintenance.

The husband had worked two full-time jobs throughout the parties' marriage. He was able to do so since the position with the Seattle Fire Department had him working only a few days each month. RP, June 25, 2008, p. 153. The husband was working two jobs at the time of trial. The appellant claims in his brief that it

would be increasingly burdensome for him to do so as he got older. He presented no evidence in support of this claim at trial. The issue of when or whether the husband will retire from the Seattle Fire Department is speculative. RP, August 26, 2008, p. 19.

6. The husband's financial responsibilities were not burdensome.

The husband's obligations were not burdensome even if they included, for a short time, a payment of the family home mortgage. It is not an abuse of discretion to leave the husband with little funds for a two year period. Hilsenberg v. Hilsenberg, 54 Wn.2d 650, 344 P.2d 214 (1959). Here, there was no evidence at trial that husband would have little funds even after paying mortgage on family home, child support and maintenance. Significantly, the obligation to pay the mortgage on the family home was limited in time since it terminated at the sale of the home only a few months after trial. Furthermore, the husband had the right to live there during the sale process after the wife moved to Arizona and would get the mortgage payments reimbursed to him. CP 253.

The husband's financial declaration over-stated his expenses. It did not include anticipated bonuses from Medic First Aid. For all these reasons, the husband failed to establish his

burden that he did not have the ability to pay maintenance as ordered.

B. The court properly considered the statutory factors of RCW 26.09.080 in its division of property.

The court's only obligation is to make a just and equitable disposition of the parties' property and liabilities. "*Wide discretion and latitude rests with the trial court in making the determination that a particular division of property meets and 'just and equitable' standard found in RCW 26.09.080.*" Davis v. Davis, 13 Wn.App.812, 813, 537 P.2d 1048 (1975) (citations omitted). The appellate court is not to substitute its judgment for that of the trial court merely because reasonable persons could differ on the reasonableness of the division of property. Rehak v. Rehak, 1 Wn.App. 963, 965, 465 P.2d 687 (1970).

Disparate awards of property, even two-thirds of the property to the wife, are routine when the wife has a lower earning capacity than the husband. In Re Marriage of Rink, 18 Wn. App. 549, 571 P.2d 210 (1977), In Re Marriage of Croseto, 82 Wn. App. 545, 918 P.2d 954 (1996). Although appellant points to the 15 year marriage of these parties, these parties lived together and were married over fifteen years. The court awarded 60% of the community property to

the wife and 40% to the husband. This fell well within the two-thirds/one-third division approved after a 14 year marriage in In Re Marriage of Donovan, 25 Wn.App. 691, 612 P.2d 387 (1980). In fact, it is unlikely that any appellate court will reverse any division of property that is within a two-thirds/one third standard; this is true even if the court made an error in some portion of the valuation or characterization of the property. In Re Marriage of Griswold, 112 Wn.App. 333, 346, 48 P.3d 1018 (2002), review denied, 148 Wn.2d 1023 (2003). In Re Marriage of Brady, 50 Wn. App. 728, 732, 750 P.2d 654 (1988).

1. The court had sufficient information on the value of the parties' home to make its decision on maintenance and a fair and equitable division of property.

The court acted properly in confirming the parties' decision to sell the house and divide the proceeds. Just as argued in Paragraph A.3 above, the trial court had sufficient information to make its award of property prior to knowing the exact amount of the sales proceeds from the home.

2. The court properly valued the Philips Vanguard Powersaver 401(k) plan at the time of trial.

The Phillips plan was worth one amount at the time of trial and a smaller amount at the time of a post trial motion. It is within the court's discretion to determine what date to use in valuing and then dividing an asset. *In Re Marriage of Curtis*, 106 Wn. App. 191, 197-8, 23 P.3d 13 (2001), review denied, 145 Wn. 2d 1008 (2001). At trial, the husband did not seek to divide the account at some later date. Nor did the husband seek to immediately transfer the asset to the wife post-trial. By doing so, the husband assumed the risk that the value would go down. *In Re Marriage of Knutson*, 114 Wn. App. 866, 873, 60 P.3d 681 (2003). Since, in the interim, the husband had sole control of those funds and did not provide any portion of the funds to the wife, the court properly used the trial value.

The court was not "valuing" the parties' assets at the time of the post trial motion. The court was merely enforcing its trial determinations.

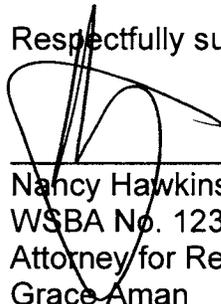
VI. CONCLUSION.

The trial court findings and order of maintenance and division of property were fair and equitable and took into account

the required statutory factors and the evidence presented in this case. Grace, the petitioner below, proved by a preponderance of the evidence that the award of property and maintenance was fair and equitable. The court acted properly within its discretion. The trial court's determinations should be upheld.

Dated: January 29, 2010.

Respectfully submitted,



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COURT OF APPEALS OF THE
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vs.

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No. 62702-3-1

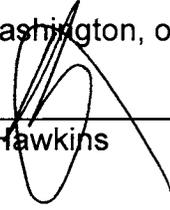
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The undersigned certifies that on January 29, 2010, a copy
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William Buchanan
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DATED at Seattle, Washington, on January 29, 2010.



Nancy Hawkins

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TRANSMITTAL LETTER

62702-3

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RE: Aman Dissolution

ENCLOSURES: **Respondent's Brief and Certificate of Service.**

TRANSMITTED FOR: Your Information Your Signature and Return

REMARKS:

IF YOU SHOULD HAVE ANY QUESTIONS, PLEASE CALL MY OFFICE.

NANCY HAWKINS

By: Janet
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