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No. 66138-8-I

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION ONE

In re Marriage of:
BARBARA CONGLETON,

Respondent / Cross-Appellant,

v.

JAY CONGLETON,

Appellant.

REPLY BRIEF OF CROSS-APPELLANT

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I. INTRODUCTION

Barbara's Cross-Appeal addresses one issue and one issue only: the trial court's order requiring that the parties each pay 50% of the outstanding tax liability (personal and corporate) for **2009**. CP 623 (Amended Decree ¶ 3.17.7). The Cross-Appeal does not challenge the order that the parties each pay 50% of the tax liability for **2008**. *Id.* Nor does it challenge the 60-40 property distribution in favor of Jay. Barbara accepts the trial court's discretion to set a property distribution lacking in mathematical precision. She wants only to get on with her life.

Jay put the question of just and equitable distribution of property under RCW 26.09.080 into issue by his appeal. Because Barbara is the Respondent on all issues aside from the one narrow issue of 2009 taxes, Jay's repeated technical arguments based on alleged failure to challenge specific findings or to make particular arguments are not well taken. Barbara challenged the only finding – FF #22 – pertinent to the 2009 taxes, and presented legal argument on that issue, so she has satisfied all technical requirements of the RAPs necessary for presenting her cross-appeal. *Brief of Respondent* at 2, 29-33. Barbara has no obligation to challenge any finding other than this one finding. Her other arguments about particular property valuations are properly before this Court because: (1) this Court has an obligation to affirm on any grounds

supported by the record, *e.g.*, *Gross v. City of Lynnwood*, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978); (2) erroneous valuations would be prejudicial if perpetuated on remand, RAP 2.4(a); and (3) proper valuation of the property distribution is required by the necessities of the case, RAP 2.4(a).

II. CROSS-APPEAL REPLY ARGUMENT

On cross-appeal, Barbara argued that the trial court's finding of a 2009 community tax obligation of \$25,000 was unsupported by the record, and that the trial court's attempt to allocate this supposed tax obligation with an order for "50-50" payment was an abuse of discretion because it went beyond the evidence of record and conflicted with IRS treatment of income of separating spouses. *Brief of Respondent* at 29-31.

Significantly, Jay concedes that there is no substantial evidence to support the finding of a \$25,000 community tax obligation in 2009. *Reply Brief* at 13. For this reason, there is no dispute that *the amount* to be divided in 2009 is unsupported, and should be stricken.

Nonetheless, Jay argues that "the amount in question is irrelevant" – what counts (according to Jay) is the order to pay the 2009 amount equally. *Id.* Jay is mistaken that the amount is irrelevant, for the simple reason that the trial court cannot make a just and equitable distribution of liabilities without knowing what amount it is dividing.

The trial court's unsupported ruling unnecessarily entangles the financial tax affairs of two parties who asked that they be kept separate. **BOTH** Barbara and Jay asked the trial court to allow them to file a **separate** tax return for 2009. VRP 563-64/22-2 (Jay); VRP 616/7-9 (Barbara). Indeed, by withdrawing his income from the community account beginning in July, 2009, VRP 94-95/10-15; 99/20-25, Jay made it clear that he wanted their financial affairs to be separate even two months before the date of separation. This record only supports an order that the parties be required to pay the amount due under their tax return in accordance with IRS regulations – not some other amount that the trial court ordered based on speculation about 2009 tax liabilities not of record.

The trial court's discretion to order spouses to make subsequent contributions to taxes cannot be exercised in a vacuum, absent evidence of the tax liabilities involved. Relevant evidence necessarily would include the actual amounts that Barbara and Jay each had to pay in 2009 after filing separately. It might also include "innocent spouse" filings with the IRS pertaining to the 2009 taxes.¹ Without knowing these matters, the trial court was simply shooting in the dark.

¹ Jay has subsequently sought to impose all liability for the deficiency on Barbara, with an "innocent spouse" status under IRS regulations. *See*, IRS Publication 971 at 5 (Sept. 2011). Actual evidence about 2009 taxes would be needed to explore the impact of this and other matters on the division of 2009 taxes.

Separate filing carries with it consequences as to what the income tax liability of each party will be under IRS regulations, and there is no basis to alter that without specific evidence as to the outcome for 2009, which was lacking. Absent such evidence, this narrow aspect of the trial court's ruling was speculative, unfounded, and could not carry out the mandate of "just and equitable distribution" under RCW 26.09.080.

Jay seeks in his Reply Brief to distance himself from his testimony that separate filing carries certain consequences under IRS regulations – namely, that the IRS assesses separately-filing spouses for one-half of the community income up to the date of separation, and then their sole income after separation. VRP 563/14-21; *see, Reply Brief* at 14. Whether he was or was not testifying as an expert (or even whether he was or was not correct) is not the point – the point is that this is how Jay explained what he meant when he asked the trial court to order separate filing, and this was the evidentiary record on which the trial court acted.

A trial court abuses its discretion if its decision is . . . based on untenable grounds or untenable reasons. A court's decision is . . . based on untenable grounds if the factual findings are unsupported by the record . . .

In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

In this case, both the amount of 2009 tax liability and the division of that liability ordered by the trial court were based on untenable grounds,

because they were unsupported by the record before the court. Therefore, the trial court abused its discretion with respect to the narrow, discreet issue of ordering a 50-50 split of a supposed “\$25,000” 2009 tax liability.

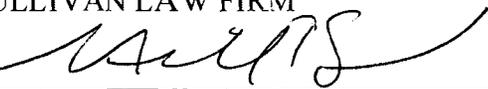
Jay asserts that “it is not even clear what Barbara would have this Court do in response to her cross-appeal.” *Reply Brief* at 14. We are happy to repeat it to be clear for Jay and the Court:

Barbara respectfully requests the following relief: (1) that the Amended Decree be modified to delete all language of the first subparagraph of ¶ 3.17.7, CP 623, so it retains only the part that states: “The parties shall file separately for the year 2009.” and then moves to the next sub-paragraph, “The parties are ordered to maintain in good order [etc.]”; (2) that the Amended Decree, so modified, be AFFIRMED; and (3) that Barbara be awarded her reasonable attorneys’ fees on appeal, plus costs.

Brief of Respondent at 39.

Dated at Seattle, WA, this 28th day of November, 2011.

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CERTIFICATE OF SERVICE

I, Michael T. Schein, attorney for Respondent / Cross-Appellant, hereby certify that on the date set forth below I served a true copy of the within REPLY BRIEF OF CROSS-APPELLANT, on all parties of record by delivering the same via U.S. Mail, first class postage prepaid, to:

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