

No. 45146-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
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In re the Marriage of:
BRETT CLYDE BIRCH,
Appellant,
and
VICKEY ANN BIRCH,
Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE VICKI L. HOGAN

BRIEF OF RESPONDENT

SMITH GOODFRIEND, P.S.

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I. INTRODUCTION

After a 35-year marriage, the wife, now age 55, and always marginally employed because of her responsibilities raising the parties' now-adult children, earned a third of the husband's income by working one full-time and two part-time jobs. The trial court awarded the wife sixty percent of the community property, spousal maintenance until the husband, also age 55, reaches age 62 or retires, whichever is sooner, and attorney fees of \$7,500.

On appeal, the husband does not challenge any of the trial court's findings of fact and concedes that "the important facts in this case are not subject to serious dispute." (App. Br. 4) Instead, he baldly argues that the trial court's thoughtful, discretionary, and fact-based decision was "unfair." (*See* App. Br. 11) In light of the trial court's broad discretion in dividing the marital estate and providing for the future of both of the spouses at the end of their long-term marriage, this court should affirm and award the wife her attorney fees on appeal.

II. RESTATEMENT OF FACTS

A. After a 35-year marriage, the wife, who had been the primary caregiver of their now adult children, earned a third the income of the husband.

Appellant Brett Birch and respondent Vickey Birch married on March 11, 1978, and separated on October 13, 2011. (RP 12; CP 9) The parties, both now age 55, have two adult children, born in 1978 and 1981. (CP 1; RP 13)

Vickey graduated from high school and attended community college for nine months. (RP 61) When they married, she was 19 years old and working at a potato warehouse earning \$4.50 per hour. (RP 75) Vickey stopped working at the warehouse when she was six months pregnant with the parties' oldest child. (RP 75)

Although Vickey was the primary caregiver for the parties' children during the marriage she continued to work outside the home in low-paying jobs, with the exception of a few breaks before and after each child's birth. (RP 76-80) Vickey at one point looked into becoming a teacher, but the parties agreed that it was not feasible for her to pursue her degree with two small children. (RP 76-77) Instead, Vickey began working as a special education assistant or paraeducator. (RP 78-79) By agreement of the parties, Vickey's work was structured around her responsibility for the

children. (RP 80) Brett was, and always had been, the primary wage earner for the family. (RP 80)

At the time of trial, Vickey was working as a paraeducator for the Peninsula School District, where she works 6.5 hours per day during the school year, earning \$17 per hour. (RP 62-63, 84; Ex. 7) In addition to her job with the school district, Vickey also works at a group home, where she assists clients by bathing, feeding, housekeeping, and transporting them to activities. (RP 63) Vickey works 8 to 12 hours a week for the group home, earning \$11.06 per hour. (RP 82) During the summers, Vickey also occasionally works as a “field supervisor” for the school district’s soccer fields, earning \$13 per hour. (RP 84)

Vickey’s average total monthly net income from all of these jobs is \$1,728. (Finding of Fact (FF) 2.12, CP 11, *unchallenged*; see also RP 91-92; Ex. 21) Vickey testified that she anticipated that her monthly expenses after trial would be over \$3,000. (Ex. 21)

Vickey testified that she did not foresee any circumstance where she will have the opportunity to earn any more income than what she was presently earning. (RP 93) Vickey is eligible to retire from the school district in 10 years, when she is age 65. (RP 93) She believes her total monthly retirement benefit from her

employment will be approximately \$1,600. (RP 94-95; *see also* Exs. 17, 18)

Brett is a high school graduate. (RP 13) He is a member of the Glazer's Union, working largely on glass and frame installation for high-rise buildings. (RP 13-14) Brett works 40 hours per week, earning \$37.55 per hour, plus overtime whenever it is available. (RP 40) Brett's average monthly net income is \$4,933. (FF 2.12, CP 11, *unchallenged*; *see also* RP 43) Brett testified that his monthly expenses were approximately \$2,600. (RP 43-44; Ex. 9)

Brett, who was age 54 at trial, is eligible for "early" retirement at age 55. (RP 16; Ex. 16) If he retires early at age 55, he will receive a monthly retirement benefit of \$1,901.40. (Ex. 16) If he retires at the "normal" date, when he is age 62, Brett will receive \$2,716.28 per month. (Ex. 16) Brett acknowledged that if he retired early, he would likely need to work part-time to meet his expenses. (RP 37-39)

Brett testified that he wished to retire early at age 55, so that he could focus his "full-time" attention on developing unimproved real property next to the family residence in Gig Harbor. (RP 15-16) Vickey testified that the parties considered this land, which could be divided into eight smaller lots, to be their "retirement." (RP 34, 98)

Unimproved, the real property was worth \$124,000. (FF 2.8, CP 9, *unchallenged*) However, Brett believed that once the property is developed, it could be worth \$800,000. (RP 34) Vickey believed it could be worth closer to \$1 million. (RP 99)

Brett had already performed a “bunch of work on getting [the property] ready” for development during the marriage. (RP 99) But it was undisputed that more needed to be done before the property could be developed. (RP 34-36, 99)

B. The trial court awarded the wife a slightly disproportionate award of property, spousal maintenance, and attorney fees.

Brett filed a petition for legal separation on December 6, 2011. (CP 1) Vickey responded to the petition and asked that the marriage be dissolved. (CP 6)

When they separated, Brett remained in the family residence and Vickey moved out. (*See* RP 11, 85-87; CP 9) Initially, Vickey moved into a friend’s home for three months. (RP 87) She eventually moved into her own apartment, but then moved out to housesit for friends to save money. (RP 88) Vickey testified that the friends would be returning soon after trial, then Vickey would need to find another place to live. (RP 90) Vickey hoped to buy a small home from whatever property she was awarded. (RP 90, 106)

Brett was ordered to pay temporary monthly spousal maintenance of \$650 to Vicky, based on his claim that he was unemployed and receiving only unemployment compensation. (RP 47-49; Ex. 10) In fact, by the time the temporary order was entered, he was employed and earning his average monthly net income of \$4,933, but failed to disclose this fact to the court or Vicky. (RP 49-50) As a result, even after receiving temporary spousal maintenance, Vicky had approximately half the income that Brett continued to enjoy. (RP 47, 49) The trial court acknowledged that Vicky's standard of living had "significantly dropped since separation," while Brett's "standard of living had not changed as dramatically." (RP 153)

The parties appeared for a two-day trial before Pierce County Superior Court Judge Vicki Hogan. The parties had already agreed that the property should be divided 60/40 in favor of the wife, and that the husband should be awarded the family residence and the undeveloped real property, with a combined net value of \$251,000. (RP 8-9, 10; CP 9-10) The issue before the trial court was whether spousal maintenance should also be awarded to the wife in light of the agreed disproportionate award of property. (*See* RP 10)

The trial court adopted the parties' proposed 60/40 property division, including the agreement to award the husband all of the parties' real property. (RP 148-49) The trial court found that regardless of the parties' agreement, it would have found that this was a "fair and equitable" division. (RP 149) The wife was awarded property worth \$232,043.34, exclusive of unvalued pension assets. (RP 149; CP 9-10, 16-17) The bulk of the wife's award was the defined contribution component of her retirement, valued at \$104,030, which was not available to her until she turned 65, and a judgment in the amount of \$122,804. (CP 16-17) In total, the husband was awarded \$154,696 in property, exclusive of unvalued pension assets, and taking into account the judgment he was ordered to pay the wife. (RP 149; CP 9-10, 15-16)

The trial court also found that the wife was still in need of spousal maintenance. (RP 152) In a series of unchallenged findings supporting its maintenance award, the trial court found the parties had a "long term marriage" - 33 years at the time of separation, and 35 years by the time of trial. (FF 2.12, CP 11, *unchallenged*) The trial court also found that "by the parties' joint decision, the family relied primarily upon husband's earnings during their marriage, while the wife's employment was typically structured around her

primary responsibility for the parties' children and the home." (FF 2.12, CP 11, *unchallenged*) The trial court found "that as a result of the parties' joint choices during marriage, there is significant disparity in their respective abilities to earn a self-supporting income. The wife is economically disadvantaged as a result of marital decisions." (FF 2.12, CP 11, *unchallenged*)

The trial court found that "the wife did not further her formal education after marriage. Her income has historically been significantly less than the husband's earnings." (FF 2.12, CP 11, *unchallenged*) In particular, the trial court found that although the wife works more than 40 hours per week, she still earns an average monthly net income of only \$1,728, whereas the husband earn an average monthly net income of \$4,933. (FF 2.12, CP 11, *unchallenged*) The trial court found that "given [the wife's] current age, as well as the time and cost involved, it is not reasonable to expect the wife to obtain education and training and then build a new career with greater earnings prior to her normal retirement age." (FF 2.12, CP 11, *unchallenged*) The trial court found that the "wife has demonstrated need of financial support from the husband. The husband has the ability to pay spousal maintenance while meeting his own needs." (FF 2.12, CP 11, *unchallenged*) In

particular, the trial court noted that despite working three jobs, the wife was still unable to meet her current expenses. (RP 152) Meanwhile, the trial court found that the husband could meet his expenses even after paying spousal maintenance to the wife. (RP 152)

The trial court awarded the wife monthly spousal maintenance of \$1,500 until the husband reaches age 62 or retires, whichever is sooner. (CP 18)

The trial court also found that the wife has the need and the husband has the ability to pay her attorney fees. (FF 2.15, CP 11-12, *unchallenged*) The trial court found that while the wife incurred reasonable attorney fees and costs of \$23,000 (FF 2.15, CP 12, *unchallenged*), it was only ordering the husband to pay \$7,500 of those fees. (CP 18) In addition, the husband was ordered to pay an additional \$500 for requiring the wife to file a pre-trial motion to compel discovery. (CP 18)

On June 20, 2013, the trial court denied the husband's motion for reconsideration. (CP 35)

The husband appeals. (CP 36)

III. ARGUMENT

A. The trial court's decision awarding the economically disadvantaged spouse more property and spousal maintenance after a long term marriage was well within the trial court's broad discretion.

Trial courts are given "broad discretion" in the division of property "because it is in the best position to determine what is fair, just, and equitable." *Marriage of Wallace*, 111 Wn. App. 697, 707, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn.2d 1011 (2003). The trial courts also have "wide" discretion in awarding spousal maintenance, and its decisions will not be disturbed on appeal, absent a showing that the trial court abused its discretion. *Marriage of Luckey*, 73 Wn. App. 201, 209-10, 868 P.2d 189 (1994).

Here, the husband's challenge on appeal is not that the trial court abused its discretion in awarding the wife more of the marital estate, or even that the trial court abused its discretion in awarding the wife maintenance. Instead, he claims that the trial court could not order both. (App. Br. 5) Division One recently rejected a similar argument in *Marriage of Wright*, ___ Wn. App. ___, ¶47, 319 P.3d 45, 48-49 (Dec. 16, 2013), *reconsideration denied* (Feb. 3, 2014), *rev. pending*. There, the husband argued, as does the

husband here, that because of the disproportionate division of property to the wife, she was no longer in need of spousal maintenance.¹ The *Wright* court held that regardless of the property award, “financial need is not a prerequisite to a maintenance award.” *Wright*, 319 P.3d at 52, ¶ 22. “The only limitation on the amount and duration of maintenance under RCW 26.09.090 is that the award must be ‘just.’ Maintenance is ‘a flexible tool’ for equalizing the parties’ standard of living for an ‘appropriate period of time.’” *Wright*, 319 P.3d at 52, ¶ 23.

The *Wright* court therefore affirmed a trial court’s decision awarding more property and spousal maintenance to the economically disadvantaged spouse, holding that in a “long-term marriage of 25 years or more, the court’s objective is to place the parties in roughly equal financial positions for the rest of their lives.” 319 P.3d 45, 48-49, ¶47. In this case, the trial court attempted to meet that objective by awarding the wife both a disproportionate share of the property and spousal maintenance in light of the fact that the wife earns a third of the income of the husband, while working three jobs and more than 40 hours a week.

¹ In *Wright*, this argument made more sense, because there, the wife was awarded over \$3 million more than the husband, who was set to retire in 2 ½ years, plus \$1 million in maintenance over three years.

Our courts have long recognized that when considering maintenance and property awards, the trial court's "paramount concern" is the parties' standard of living during the marriage and their post dissolution "economic condition." *Marriage of Sheffer*, 60 Wn. App. 51, 57, 802 P.2d 817 (1990); RCW 26.09.090; RCW 26.09.080. In *Sheffer*, the parties, as here, were married for 30 years, and at the end of the marriage the wife had significantly less income than the husband because her role during the marriage was not as wage earner but as "provide[r] [of] the services needed by the community to function as a family." 60 Wn. App. 52, 57. The trial court in *Sheffer* awarded the wife 60% of the community property and three years of maintenance. The appellate court reversed the maintenance award, unconvinced that the trial court adequately considered the standard of living during the marriage and the post-dissolution economic circumstances of the parties, and directed the trial court on remand to *increase* the maintenance award. *Sheffer*, 60 Wn. App. at 57-58.

In this case, the trial court made detailed, unchallenged findings of fact in support of its maintenance award, which focused on the disparate economic situations that the parties find

themselves at the end of their 33-year marriage.² (See FF 2.12, CP 11) The trial court also explained in its oral ruling that a “fair and equitable” property division required that the wife be awarded more property than the husband after looking at the position of the parties at the end of their marriage as a result of the decisions made by the parties during the marriage. (RP 146)

The wife was left in a worse financial situation than the husband, as she makes significantly less income because of the parties’ decision that she be primarily responsible for raising their children and caring for their home while the husband would be the primary wage earner. While the wife was awarded more of the value of the property at the time of the dissolution, the husband was awarded the land that was intended to be the parties’ “retirement.” (RP 98) And although the land was worth only \$124,000 at the time of the dissolution, it is undisputed by the parties that it had the potential to be worth 7-8 times that value if developed, which was the husband’s plan. (RP 34, 99)

Further, the only significant asset awarded to the wife, other than the money judgment, was the defined contribution portion of

² Unchallenged findings are verities on appeal. *Marriage of Petrie*, 105 Wn. App. 268, 275, 19 P.3d 443 (2001).

her retirement, which she could not access until age 65, without incurring substantial tax liabilities. Finally, the trial court recognized that the husband will likely accrue greater retirement benefits post-dissolution than the wife as a result of his higher income. Therefore he will be better situated at retirement than the wife even if she is awarded more property at the time of the dissolution. (See RP 152-53) In light of this property division, which only superficially awards more property to the wife, the trial court properly awarded the wife maintenance.

As a result of the disparate “economic condition” of the parties at the end of the marriage, it was well within the trial court’s “broad” and “wide” discretion to award the wife both a disparate property division *and* spousal maintenance. This court should affirm.

B. The trial court’s award to the wife of a third of the fees she incurred was well within its discretion.

“An award of attorney fees is within the trial court's discretion. The party challenging the award must show that the court used its discretion in an untenable or manifestly unreasonable manner. Under RCW 26.09.140, the trial court can order a party in domestic relation actions to pay reasonable attorney fees, but

generally the court must balance the needs of the party requesting the fees against the ability of the opposing party to pay the fees.” *Mattson v. Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999) (*citations omitted*).

Here, the trial court properly awarded the wife a small portion of the attorney fees that she incurred based on its finding that she “has the need for payment of fees and costs and the other spouse has the ability to pay these fees and costs.” (FF 2.15, CP 11-12, *unchallenged*) The husband has not assigned error to this finding, therefore it is a verity on appeal. *Marriage of Petrie*, 105 Wn. App. 268, 275, 19 P.3d 443 (2001).

An award of attorney fees was also warranted in this case because the husband had greater income available to him during the dissolution from which to pay his attorney fees than the wife. For more than a year before trial, the husband paid only \$650 in spousal maintenance even though he was earning nearly \$5,000 net per month, and the wife was only earning \$1,700. (RP 47-50; Ex. 10) Under these circumstances, it was well within the trial court’s discretion to award the wife a portion of her fees. This court should affirm.

C. This court should award attorney fees to the wife for having to respond to this appeal.

The wife asks this court for her attorney fees and costs for this appeal after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). The wife should not be forced to use the limited resources that she was awarded in the dissolution to respond to the husband's challenge to the trial court's wholly discretionary and fact-based decision. She has the need for her attorney fees to be paid, and the husband has the ability to pay. The wife will comply with RAP 18.1(c).

IV. CONCLUSION

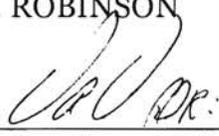
This court should affirm the trial court's decision awarding the wife more of the community assets, spousal maintenance, and attorney fees as within the trial court's broad discretion. This court should also award attorney fees to the wife for having to respond to this appeal.

Dated this 2nd day of April, 2014.

SMITH GOODFRIEND, P.S.

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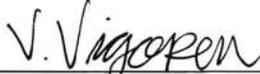
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 2, 2014, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 2nd day of April, 2014.



Victoria K. Vigoren