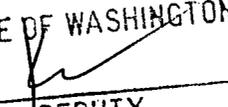


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

No. 46464-1-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

MARY JO FABER, Respondent

v.

KENNETH L. FABER, Appellant.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

ARGUMENT..... 1

I. THE TRIAL COURT MANIFESTLY ABUSED ITS DISCRETION IN
DISTRIBUTING THE MARITAL PROPERTY..... 1

II. MR. FABER HAS NOT AND WILL NOT ARGUE ANY ISSUES BEYOND
THOSE RAISED IN HIS ASSIGNMENTS OF ERROR..... 2

III. THE TRIAL COURT IMPROPERLY TREATED SOCIAL SECURITY
BENEFITS MR. FABER WAS NOT YET COLLECTING AS CURRENT
INCOME..... 3

IV. CREDITING MS. FABER WITH \$45,124.00 WAS NOT HARMLESS ERROR
..... 4

V. THE TRIAL COURT’S AWARD OF ATTORNEY’S FEES TO MS. FABER
WAS AN ABUSE OF DISCRETION..... 6

VI. MS. FABER’S REQUEST FOR ATTORNEY’S FEES ON APPEAL SHOULD BE
DENIED..... 7

CONCLUSION..... 8

TABLE OF AUTHORITIES

CASES

<i>Chapman v. Perera</i> , 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985)	8
<i>In re Marriage of Horner</i> , 151 Wn.2d 884, 894, 93 P.3d 124 (2004)	2
<i>In re Marriage of Kraft</i> , 119 Wn.2d 438, 450, 832 P.2d 871 (1992)	1
<i>In re Marriage of Landry</i> , 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985)	1
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)	2
<i>In re Marriage of Olivares</i> , 69 Wn. App. 324, 328, 848 P.2d 1281, <i>review denied</i> , 122 Wash.2d 1009, 863 P.2d 72 (1993)	1
<i>In re Marriage of Pearson-Maines</i> , 70 Wn. App. 860, 864, 855 P.2d 1210 (1993)	1
<i>In re Marriage of Rockwell</i> , 141 Wn. App. 235, 248, 170 P.3d 572 (2007)	3
<i>In re Marriage of Terry</i> , 79 Wn. App. 866, 871, 905 P.2d 935 (1995)	6
<i>Marriage of Rideout</i> , 150 Wn.2d 337, 357, 77 P.3d 1174 (2003)	6
<i>Moore v. Moore</i> , 619 N.W. 2d 723, 242 Mich. App. 652 (2000)	4

STATUTES

RCW 26.09.080(4)	3
RCW 26.09.140	7

RULES

RAP 1.2(a)	2
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ARGUMENT

I. THE TRIAL COURT MANIFESTLY ABUSED ITS DISCRETION IN DISTRIBUTING THE MARITAL PROPERTY.

A trial court is indeed vested by RCW 26.09.080 with discretion in awarding property to the parties in a dissolution proceeding. *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 864, 855 P.2d 1210 (1993). The trial court's exercise of discretion in making a property division will not be reversed on appeal "absent a showing of manifest abuse of discretion." *In re Marriage of Kraft*, 119 Wn.2d 438, 450, 832 P.2d 871 (1992); *In re Marriage of Olivares*, 69 Wn. App. 324, 328, 848 P.2d 1281, *review denied*, 122 Wash.2d 1009, 863 P.2d 72 (1993).

An abuse of discretion is manifest when the trial court exercises its discretion on untenable grounds. *In re Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985); *Olivares*, 69 Wn. App. at 328, 848 P.2d 1281.

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Horner, 151 Wn.2d 884, 894, 93 P.3d 124 (2004)
(quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362
(1997)).

In this case, the Court included property in the distribution that did not exist at the time of trial. CP 1, 38, 190-91, 231, 712-13.

It counted Mr. Faber's *potential* social security benefits as current income in order to "equalize" the parties' incomes. CP 25, 30-31, 40.

To value Mr. Faber's inheritance at \$220,000 and to include it in the property division was also an abuse of discretion. Mrs. Faber presented nothing at trial to contradict Mr. Faber's testimony that shows where these funds have gone. CP 192-93, 196, 199, 401, 403, 405, 406.

This allocation absolutely created "a patent disparity in the parties' economic circumstances." *Pea*, 17 Wn. App. at 731. This is a manifest abuse of discretion. This distribution also contravenes RCW 26.09.080, and is an error of law.

II. MR. FABER HAS NOT AND WILL NOT ARGUE ANY ISSUES BEYOND THOSE RAISED IN HIS ASSIGNMENTS OF ERROR

RAP 1.2(a) provides, "Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except

in compelling circumstances where justice demands, where justice, subject to the restrictions in rule 18.8(b).”

Just as he did in his opening brief, Mr. Faber is confining his argument in this reply brief to those issues related to his assignments of errors as set forth in his opening brief.

III. THE TRIAL COURT IMPROPERLY TREATED SOCIAL SECURITY BENEFITS MR. FABER WAS NOT YET COLLECTING AS CURRENT INCOME

“[F]uture earning potential is a substantial factor to be considered by the trial court in making a just and equitable property distribution;” however, a trial court is also required to consider “[t]he **economic circumstances** of each spouse or domestic partner **at the time the division of property is to become effective[.]**” RCW

26.09.080(4) (emphasis added); *In re Marriage of Rockwell*, 141 Wn. App. 235, 248, 170 P.3d 572 (2007).

RCW 26.09.080 begins as follows:

In a proceeding for dissolution of the marriage . . . the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors[.]

The trial court treating Social Security benefits Mr. Faber was not yet collecting as actual, current income ignored Mr. Faber's actual economic circumstances at the time the property division was to be effective. CP 25, 30-31, 40. RCW 26.09.080. This was not equitable; it was error.

In addition, Mrs. Faber has two IRAs that will produce additional, *future*, income for her, but that was not included in the trial court's equalization of income. CP 25, 30-31, 40.

Just as the Michigan Court of appeals did, this court should hold that imputing *potential* retirement benefits as income depends upon whether making an early election results in a reduced benefit. *Moore v. Moore*, 619 N.W. 2d 723, 725, 242 Mich. App. 652 (2000). Collecting Social Security much earlier than he had planned would result in a greatly reduced Social Security benefit for Mr. Faber. CP 304-05. This ruling was a manifest abuse of discretion.

IV. CREDITING MS. FABER WITH \$45,124.00 WAS NOT HARMLESS ERROR

The trial court awarded Mrs. Faber \$77,863.85 less than it awarded to Mr. Faber – on paper. Br. of Respondent at 23.

It is undisputed that the \$45,124 at issue, regardless of its characterization, did not exist at the time of trial. Mrs. Faber acknowledged that these funds were used to purchase a \$70,000 CD in August of 2010. Br. of Respondent at 24; CP 190-91, 712-13. This was long before the Fabers separated on May 8, 2012. CP 1, 38, 231.

The CDs the Fabers subsequently purchased (including the \$70,000 CD discussed above) were used to open an account at American West Bank with an opening balance of approximately \$171,000. CP 193.

Those funds were later distributed to Mr. Faber's children. CP 196, 199, 401, 403, 405, 406.

The record clearly shows that the \$45,124 CD did not exist at the time of trial, and had not existed since 2010, two years prior to the parties' separation. CP 1, 38, 190-91, 231, 712-13.

When announcing her ruling, the trial judge specifically stated "I always think that we should try to value things as close to the date of trial as possible unless everything is being valued as of the date of separation." CP 24-25.

Testimony at trial gave the value of this CD *as of the date of its acquisition in 2009*. CP 58. That CD no longer existed at the time of

trial. CP 1, 38, 190-91, 231, 712-13. This added to the artificial inflation of Mr. Faber's property distribution and income. This was not harmless error.

V. THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES TO MS. FABER WAS AN ABUSE OF DISCRETION

There are several well-established, different bases upon which a trial court may award attorney's fees in matters related to domestic law, one of which is often referred to as consideration of "need versus ability to pay."

RCW 26.09.140 provides that a trial court *may* order one party to pay the other party's attorney's fees after considering the relative financial resources of both parties. However, a party is not entitled to an award of attorney fees as a matter of right. *In re Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1995).

This statute does vest an appellate court with the discretion to award fees and costs to an opposing party, but it must be read "in light of the fact that the statute ties the award of fees to a consideration of financial circumstances." *Marriage of Rideout*, 150 Wn.2d 337, 357, 77 P.3d 1174 (2003).

In this case, the trial court ruled it was distributing the marital property equally (CP 23-29, 38-39, 44), despite the fact that there

was no evidence presented at trial that Mr. Faber still had the entire inheritance from his father available to him. CP 187-88, 189, 190-91, 193, 196, 199, 339, 349, 390, 391-92, 400, 401, 403, 406, 505. The \$45,124 CD "awarded" to Mr. Faber had not existed since 2010. CP 1, 38, 190-91, 231, 712-13.

The trial court also allocated the parties' income streams including Social Security income to Mr. Faber that he was not yet drawing. CP 304-05.

Therefore, Mr. Faber does not have a greater ability to pay Mrs. Faber's attorney fees than she has to pay them herself. The trial court's property division renders Mrs. Faber's need for an award of attorney's fees no greater than Mr. Faber's. In reality, it renders Mrs. Faber's need far less than Mr. Faber's.

The trial court abused its discretion in making this award; it should be reversed.

VI. MS. FABER'S REQUEST FOR ATTORNEY'S FEES ON APPEAL SHOULD BE DENIED

Mrs. Faber claims an entitlement to attorney's fees on appeal pursuant to RCW 26.09.140, and she makes the passing argument that Mr. Faber's appeal is also frivolous. Br. of Respondent at 27-28.

As argued previously, in light of the trial court's distribution of assets, and attribution of artificially high income to Mr. Faber, he has no greater ability to pay Mrs. Faber's attorney's fees than she has to pay them herself. CP 187-88, 189, 190-91, 193, 196, 199, 204-05, 339, 349, 390, 391-92, 400, 401, 403, 406, 505.

"An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists." *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985) (citations omitted).

This case presents several debatable issues on which reasonable minds do differ. These issues go to Mr. Faber's very ability to financially survive his retirement. These issues deserve review and are by no means frivolous. This request should be denied.

CONCLUSION

The record shows Kenneth Faber spent his entire adult life carefully planning for his retirement. The trial court's division of property and its allocation of income streams make it impossible for Mr. Faber to meet his most basic needs.

This matter should be remanded to the trial court in order to fashion a property division and allocation of income streams that is truly just and equitable.

DATED this 14th day of May, 2015.

RESPECTFULLY SUBMITTED,



Barbara McInville, WSBA #32386
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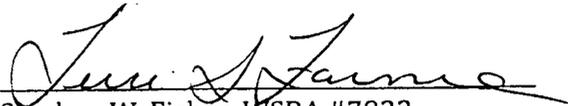
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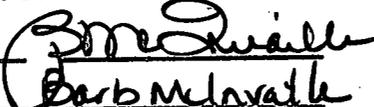
RESPECTFULLY SUBMITTED,

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FACSIMILE TRANSMISSION CERTIFICATION

I CERTIFY UNDER PENALTY OF WA, PERJURY LAWS I HAVE RECEIVED AND EXAMINED THE ATTACHED DOCUMENT, WHICH IS INCORPORATED HEREIN BY THIS REFERENCE THERETO, AND HAVE DETERMINED SAME TO BE COMPLETE AND LEGIBLE.

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Declaration of Transmittal

Under penalty of perjury under the laws of the State of BY _____
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Washington I affirm the following to be true:

On this date I transmitted the original document to the
Washington State Court of Appeals, Division II by personal service,
and delivered a copy of this document via legal messenger, to the
following:

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Law Office of Jennifer A. Wing PLLC
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Signed at Tacoma, Washington on this 14th day of May, 2015.



Barbara McInville