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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON No. 47557-0-II

COURT OF APPEALS, 
DEPUTY

DIVISION II

OF THE STATE OF WASHINGTON

In re the Marriage of

Gregory Lackey, Appellant,

And

Carolynn Lackey, Respondent.

BRIEF OF RESPONDENT

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PM 12-10-15

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I. INTRODUCTION

This is a case in which the trial court deemed a 12% interest rate on a property equalizing judgment that was appropriate. This determination followed 4 days of testimony and a multitude of pre-trial hearings. The trial court heard substantial testimony that led to this decision.

II. ASSIGNMENTS OF ERROR

Appellant asks the following:

1. Did the trial court err in entering its Decree of Legal Separation to the extent of decreeing interest at 12% on the property equalization judgment awarded to the respondent as opposed to some significantly lower rate of interest (CP 67-69.)?
2. Did the trial court err in making its finding 2.8 (1) (at CP that interest should accrue at the rate of 12% per year, as opposed to some significantly lower rate of interest, on the property equalization judgment awarded to the respondent. (CP 60.)?
3. Did the trial court err in entering its Order on Motion for Reconsideration to the extent of denying the appellant's Motion for Reconsideration for some significantly lower rate of interest by

retaining the interest at 12% on the property equalization judgment awarded to the respondent.(CP 118.)?

III. Issues Pertaining to Assignment of Error

1. Issues Pertaining to Assignment of Error, No. 1

A. (1)The trial court possesses express statutory authority to establish a just and equitable distribution, including the interest rate payable by a debtor spouse to the creditor spouse; the first permitting the higher of 12% per annum or 4 basis points above the equivalent coupon rate, and the second, is the statutory default rate establishing a rate of interest on every loan or forbearance of money at 12%.

(2.)The trial court here considered relevant factors set forth in the equitable distribution statute, including: (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and (4) the economic circumstances of each spouse at the time the property distribution was to become effective.

B. (1) The relevant standard of review for an abuse of discretion; conferring great deference to the trial court as it is in a significantly superior position to make the subject determinations

having heard four days of trial testimony and the presentation of evidence on factors relevant to and bearing upon a just and equitable property distribution.

(2) The court's actions fell squarely within its equitable jurisdiction over the parties' dissolution proceeding

(3) The trial court has "broad discretion" to determine what is just and equitable based upon the facts and circumstances of each case.

2. Issues Pertaining to Assignment of Error, No. 2.

Same as those which apply to Assignment of Error No. 1.

3. Issues Pertaining to Assignment of Error, No. 3.

Same as those which apply to Assignment of Error No. 1.

IV. STATEMENT OF THE CASE

The husband (appellant) and wife (respondent) were married in 1998, the same year they began a private practice together (CP 628,875). Both are licensed as chiropractors. During their marriage, wife worked within the practice doing much of the office logistics, staffing, marketing, billing with some patient care.(CP 40, 632-633) This allowed her to have the time and flexibility to be the primary parent to their 3 children (2

together and I via previous marriage) while taking care of majority of household and child associated activities like doctor appointments, sports practices, class help etc.. (CP 40, 632-634) The marriage and practice was full of challenges (CP 628) but eventually resulted in a successful practice netting 6 figures.(CP 632) At the time of separation, husband took control of the money leaving the wife to essentially beg for funds from the husband (CP 656, 658, 659, 675). With no capital, comprised credit and an non cooperative spouse, wife struggled to start over in business (CP 669) Additionally with no finances, and having gone into debt for legal fees,(CP 715) she was forced to represent herself in the protracted and costly divorce proceeding. The trial court acknowledged the burden of wife's need to start over. The husband has enjoyed the income and control from their shared business (RP March 6, 2015 15) during the court process while the wife struggled to make basic ends meet; restart a practice and represent herself in court (RP of March 6, 2015 15). In its order, the trial court had husband pay an upfront amount to allow wife some start up capital that she had been in need of. (CP 877, RP of March 6,2015 15,20) It was not paid on time (RP of March 6, 2015 25) The average monthly accounts receivable is \$35,000+.(RP March 6, 2015 14,15) and historically there is the ability to borrow against accounts receivable in the short term when needed. (RP March 6, 2015 14)

The issue on appeal is the 12% interest rate. The trial court determined, following 4 days of testimony and numerous pre-trial and post-trial hearings that the collection of this debt may be difficult (RP of March 6, 2015 21). At one point, the trial court cited a feeling “of gamesmanship” (RP of March 6, 2015, 25) on behalf of the appellant. This was consistent with behavior described throughout the case (CP 679, 681,705,707,710,711). Since the order was entered the appellant has been late on the majority of the property equalizing payments including those prior to the motion for reconsideration (RP of March 6, 2015 11,14, 21,25). Appellant retained the successful business built by both parties. Wife continues to slowly rebuild her career but needs the money from the business she founded and built with her husband. (CP 674; RP of March 6, 2015 16, 20)

V. ARGUMENT

This first section (a.) is for the standard of review in Washington State Courts on equitable distribution judgments. The second section (b) is case law upholding various interest rates issued by lower court judges in Washington State Courts on judgments. In each section, I begin with Supreme Court Cases and then move to Court of Appeals cases.

a. Standard of Review for Equitable Distribution of property

In re Marriage of Kowalewski, 163 Wash. 2d 542, 553, 182 P.3d 959, 965 (2008)

When parties are dissatisfied with the substance of a dissolution decree, “[o]rdinarily, a review to reach an abuse of discretion is the proper remedy, rather than a challenge to the court's jurisdiction.” *Arneson*, 38 Wash.2d at 102, 227 P.2d 1016. A party may not raise a jurisdictional challenge in order to circumvent the relevant standard of review or time limit for review. *See Svatonsky v. Svatonsky*, 63 Wash.2d 902, 905, 389 P.2d 663 (1964) (former spouse estopped from challenging validity of divorce decree years later due to dissatisfaction with property distribution); *Ferry v. Ferry*, 9 Wash. 239, 37 P. 431 (1894); *Ghebregiorghis v. Dep't of Labor & Indus.*, 92 Wash.App. 567, 962 P.2d 829 (1998).

1. Farmer v. Farmer, 172 Wash. 2d 616, 624-25, 259 P.3d 256, 262 (2011)

Dissolution proceedings invoke the court's equitable jurisdiction. *Langham*, 153 Wash.2d at 560, 106 P.3d 212. Sitting in equity, a trial court enjoys broad discretion to grant relief to parties in a dissolution based on what it considers to be “just and equitable.” RCW 26.09.080. The court's actions fell squarely within its equitable jurisdiction over the parties' dissolution. Therefore, the court's standard of review, as here, was an abuse of discretion. *See *625 In re Marriage of Kraft*, 119 Wash.2d 438, 450, 832 P.2d 871 (1992) (citing *In re Marriage of Tower*, 55 Wash. App. 697, 700, 780 P.2d 863 (1989)).

A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons.” *Noble v. Safe Harbor Family Pres. Trust*, 167 Wash.2d 11, 17, 216 P.3d 1007 (2009). An error of law constitutes an untenable reason. *Id.*; *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wash.2d 299, 339, 858 P.2d 1054 (1993).

Court of Appeals Cases

The case above included the relevant statutory factors the courts shall apply and then states the proper standard of review and great deference to the trial court, as the trial judge is in a significantly superior position to make such a decision.

1. *In re Marriage of Larson & Calhoun*, 178 Wash. App. 133, 135, 313 P.3d 1228, 1229 (2013) review denied sub nom. *In re Marriage of Larson*, 180 Wash. 2d 1011, 325 P.3d 913 (2014)

Because the trial court properly exercised its discretion when it applied this rule to determine a fair and equitable property division, the appellate court affirmed.

In a dissolution action, the trial court must order a “just and equitable” distribution of the parties' property and liabilities, whether community or separate. RCW 26.09.080. All property is before the court for distribution. *Farmer v. Farmer*, 172 Wash.2d 616, 625, 259 P.3d 256 (2011). When fashioning just and equitable relief, the court must consider (1) the nature and extent of the community property, (2) the nature and extent of the

separate property, (3) the duration of the marriage, and (4) the economic circumstances of each spouse at the time the property distribution is to become effective. RCW 26.09.080. *138 These factors are not exclusive. The statute requires the court to consider all “relevant factors.” RCW 26.09.080.

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The court has “broad discretion” to determine what is just and equitable based on the circumstances of each case. *In re Marriage of Rockwell*, 141 Wash.App. 235, 242, 170 P.3d 572 (2007). A just and equitable division **“does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of parties.”** *In re Marriage of Crosetto*, 82 Wash.App. 545, 556, 918 P.2d 954 (1996) [emphasis added]. “Fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules.” *In re Marriage of Tower*, 55 Wash.App. 697, 700, 780 P.2d 863 (1989). “Just and equitable distribution does not mean that the court must make an equal distribution.” *In re Marriage of DewBerry*, 115 Wash.App. 351, 366, 62 P.3d 525 (2003). “Under appropriate circumstances ... [the trial court] need not award separate property to its owner.” *In re Marriage of White*, 105 Wash.App. 545, 549, 20 P.3d 481 (2001).

A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.

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. *139 *In re Marriage of Littlefield*, 133 Wash.2d 39, 46–47, 940 P.2d 1362 (1997) (citation omitted). “Trial court decisions in dissolution proceedings will seldom be changed on appeal.” *In re Marriage of Stenshoel*, 72 Wash.App. 800, 803, 866 P.2d 635 (1993). Finding no abuse of discretion, the appellate court affirmed the trial court's property distribution and its decree of dissolution.

The case above includes cites to *In re Marriage of Littlefield* and *In re Marriage of Stenshoel*. Both of which were cited to by the opposing counsel.

1. Wash. Rev. Code Ann. § 26.09.080 (West)

In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, 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 including, but not limited to:

(1) The nature and extent of the community property;

- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership; and
- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

The case below does little more, further reiterating that the court must consider all relevant factors.

- 2. In re Clark's Marriage, 13 Wash. App. 805, 808, 538 P.2d 145, 147 (1975)

Mrs. Clark responds by stating that the trial court's distribution of property should not be overturned in the absence of its manifest abuse of discretion;⁶ and that evidence of Mr. Clark's drinking was not admitted to show marital misconduct or 'fault,' but to show the effect his drinking and consequent expenditure of funds had on the community assets. We agree.

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RCW 26.09.080 requires the court to consider all relevant factors in arriving at a 'just and equitable' distribution of property without regard to 'marital misconduct.' The 'underlying purpose of the new Dissolution of Marriage Act is to replace the concept of 'fault' and substitute marriage failure or 'irretrievable breakdown' as the basis for a decree dissolving a marriage.⁷ However, the fact that 'fault' is no longer a relevant query does not preclude consideration of all factors relevant to the attainment of a just

and equitable distribution of marital property. The dissipation of marital property is as relevant to its disposition in a dissolution proceeding as would be the services of a spouse tending to increase as opposed to decrease those same assets.⁸ It is apparent from the record that the testimony relating to Mr. Clark's profligate life style was admitted and considered by the court not for the purpose of *809 establishing 'fault,' but for the purpose of determining whose labor or negatively productive conduct was responsible for creating or dissipating certain marital assets.⁹ This was not error.

The next two statutes relate to specific statutory interest rates the courts should adhere. Both state that the maximum allowed interest rate that is deemed reasonable is 12%. Therefore, the lower court's decision of 12% is within the statutory limit (although it is the absolute max). The first statute is a broader more general rule on interest. The first statute is cited by the opposition but the second statute is not. The second statute applies to interest on a loan or forbearance of money etc. and is what we (prefer) should apply here.

2. Wash. Rev. Code Ann. § 19.52.020 (West)

- (1) Any rate of interest shall be legal so long as the rate of interest does not exceed the higher of: **(a) Twelve percent per annum; or (b) four percentage points above the equivalent coupon issue yield** (as published by the Board of Governors of the Federal Reserve System) of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month

immediately preceding the later of (i) the establishment of the interest rate by written agreement of the parties to the contract, or (ii) any adjustment in the interest rate in the case of a written agreement permitting an adjustment in the interest rate. No person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater interest for the loan or forbearance of any money, goods, or things in action.

3. Wash. Rev. Code Ann. § 19.52.010 (West)

“(1) Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of **twelve percent per annum** where no different rate is agreed to in writing between the parties ...”

b. Upholding interest rates on judgments

This is the case law that includes decisions upholding interest rates on judgments. The first case is a case included by the opposing counsel in their brief (but claims not to have found any relevant Supreme Court decisions since 1964—pg.26 of their brief). This first case upholds interest rates of 1% that increases each year on a lien of \$25,000 and a flat rate 4 % on a lien of \$2,000.

Supreme Court Cases

1. Rogstad v. Rogstad, 74 Wash. 2d 736, 446 P.2d 340 (1968)

Wife brought action for divorce. The Lower Court, rendered judgment in favor of the wife, and the husband appealed. The Supreme Court, Rummel, J., held that division of property which, according to figures of wife, was 31% to husband and 69% to wife, was not a manifest abuse of discretion on part of Superior Court.

“...in making a division of the property the law does not impel an equal or exact division of the community property of the parties. The disposition only need be just and equitable, and wide latitude and discretionary powers are vested in the trial court in order to accomplish this division. Only a manifest abuse of that discretion justifies this court in substituting its judgment for that of the trial court.”

This court is most reluctant to substitute its evaluation and judgment for that of the trial judge, and will do so only when inequity and injustice are apparent beyond simply an honest difference of opinion, and it can be said that an abuse of judicial discretion is clearly manifest on the part of the trial judge

The court awarded three properties to the wife. The husband was given a lien of \$25,000 on the apartment, payable in 5 years and bearing 1 per cent interest the first year, but increasing 1 per cent each year thereafter. The appellant was further given a lien of \$2,000 on the Kirkland property payable in 5 years and bearing interest at 4 per cent per annum.

Considering the relative education and earning capacity of the parties, the future welfare of the children, the uncertainties connected with the retirement of the indebtedness, the substantial contribution of the mother of the respondent, both in selling at a reduced price and in risking her

property, the fault of the appellant and other factors suggested by the situation, this court cannot say there was a manifest abuse of discretion on the part of the trial court.

In the next case, the lower court awarded the wife \$50k in cash and \$15k over 3 yrs with 6% interest. The court not only upheld the lower court's decision, **but added on an award of \$100k with 6% interest to be deferred 10 yrs. This interest rate continued until the 100k was paid in full, similar to our case.**

2. DeRuwe v. DeRuwe, 72 Wash. 2d 404, 406-07, 433 P.2d 209, 211 (1967)

The decree awarded the wife \$50,000 in cash and an additional \$15,000 payable in 3 years with interest at 6 per cent annually, and order the plaintiff to pay the defendant \$5,000 per year alimony until the further order of the court, the alimony to be secured by a \$225,000 lien upon the husband's property.

Although this court will not substitute its judgment for that of the trial court in questions of child support, custody, alimony and division of property except where there has been a manifest abuse of discretion in one particular or another (*Root v. Root*, 64 Wash.2d 360, 391 P.2d 962 (1964)), we will, if shown some abuse of discretion, correct the decree to ameliorate or remove if possible the inequities fostered by it.

We are of the opinion, therefore, that, in addition to everything granted her in the decree, the wife should be awarded \$100,000 more from the

community property, but that delivery thereof be made in future so that, while the wife may be secured in her right to the additional amount, the husband's management and control of the property be left intact. Thus, delivery of the added \$100,000 in property division should, in our opinion, be deferred for 10 years, payable \$10,000 annually thereafter, the wife to be fully secured in the meanwhile and with interest at 6 per cent per annum beginning at the 10th year and continuing until the \$100,000 has been paid in full.

The trial court is given a wide discretion in matters relating to the division and disposition of property in divorce actions, and the appellate court will not, upon review, interfere with the decision of the trial court, unless it appears from the entire record that injustice has been done or that the trial court has abused its judicial discretion.

Appellant contends that the award made by the trial court should not have carried interest on the unpaid balances at 12%. The trial court did not agree with that contention. The record discloses there was ample evidence and testimony in four protracted days of trial for the trial court judge to determine legitimate bases for equitable distribution of property and the applicable cost to husband for the wife's money – particularly where the record demonstrates manifest abuse by husband over the jointly developed and owned business, retaining all profits and exclusively paying his personal expenses while withholding any profit sharing or distribution from its other 50% co-owner who upon distribution must restart professionally to build a new practice without sufficient cash or credit. Since he has the present use of the funds representing Wife's interest in the property, to the extent of the unpaid balances owed her, Husband

cannot in good conscience object to paying Wife a lesser rate than determined by the court, where all he has to do to avoid capitalized interest is either a) timely pay but slightly more principal each month and avoid cap interest altogether; or b) pay off the debt together with principal and interest, permitting Wife to reclaim her professional life and move forward.

The trial court in the next case awarded 6% interest and the Court of Appeals increased that rate to 8% for certain dates to encourage payment. The interest rate is to encourage payment not to allow them to make minimum payments over time.

1. Fite v. Fite, 3 Wash. App. 726, 728, 479 P.2d 560, 561-62 (1970)

The trial court awarded defendant the residence and contents (\$40,000) and a **562 cash sum of \$120,000--\$45,000 payable upon the entry of judgment and the balance in annual installments of \$15,000 with 6 per cent interest per annum on the unpaid balance.

The appellate court held that the \$45,000 which was payable at the entry of judgment shall be payable immediately upon the remittitur herein, together with interest at 8 per cent per annum from April 18, 1969 to the date of payment.

2. Fernau v. Fernau, 39 Wash. App. 695, 705, 694 P.2d 1092, 1099 (1984)

The award of maintenance under these circumstances is not unreasonable, nor does it constitute an abuse of discretion.

Walter next contends that the trial court's division of property was unfair and an abuse of discretion. Factors to be considered in dividing property are listed in RCW 26.09.080:

As part of the property division, the court awarded a balancing judgment to Walter in the amount of \$12,000, plus 10 percent interest per year, secured by the house.

The provisions of the amended decree establishing child support, providing for a percentage increase, awarding maintenance, and dividing the property of the parties were affirmed.

In this last case, the Court of Appeals upheld a 12 % interest rate penalty on trust. This is a slightly different property division between spouses, however, the asset divided here is similar – a business, specifically a healthcare practice.

3. In re Estate of Wimberley, 186 Wash. App. 475, 511, 349 P.3d 11, 29 review denied, 183 Wash. 2d 1023, 355 P.3d 1153 (2015)

The trial court correctly ordered James Wimberley pay twelve percent interest on the money he must reimburse the Trust. RCW 4.56.110(4) provides that judgments shall bear interest from the date of entry, at the maximum rate permissible under RCW 19.52.020. Under RCW 19.52.010, interest accrues on debts at twelve percent interest per annum when the

parties fail to reach an agreement as to the amount of interest. As here, Appellant provided no argument on appeal as to why twelve percent

VI. CONCLUSION

The cost of money was established at 12%, within the express authority of the trial court after 4 lengthy days of testimony - the trial court determined the wife's recounting of the facts and financial circumstances were credible, and the court's equitable distribution was set accordingly, including a cost of money for short and late payments; all squarely within the discretion of trial court judge. The appellate court should be want to substitute its judgment of the facts for that of the trial court who had the benefit of 4 days testimony and stated the following regarding this case. "Husband has shown already in this two or three month period that he's a substantial risk at payment on this." (RP of March 6, 2015 21) While the court conferred the business to the husband, the payment to wife includes a reasonable consequence for light or late payments. 12% is a statutorily authorized interest rate within the clear discretion of the judge hearing all the testimony and determining a distribution to the parties and an appropriate cost of money under the financial circumstances apprehended by the trial court at the time of trial. Additionally Husband retained the

successful business built by both parties over a decade and the wife has been in need of capital from this shared business to start over and become financially independent (RP of March 6, 2015 20) - only to be met with substantial resistance. During the time of this appeal, husband has been late with the majority of all property ordered payments, additionally, when asked if and when he will be making a payment, he will not respond. This is a pattern of behavior and at one point the court noted the following, "See, that's what I struggle with. It just seems like gamesmanship" (RP of March 6, 2015 25). The 12% interest rate is just and fair and supported by statute and common law.

Dated: December 10, 2015. (Corrected Brief)

Respectfully Submitted,



Carolynn Pavlock
Pro Se for Respondent
(previously k/a Carolyn Lackey)

FILED
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STATE OF WASHINGTON

BY E
DEPUTY

Court of Appeals, Division II
of the State of Washington

GREGORY LACKEY,

Appellant,

vs.

CAROLYNN LACKEY,

Respondent.

Case # 47557-0-II

AFFIDAVIT OF SERVICE

Affidavit of Service

I certify that on the 10th day of December 2015, I caused a true and correct, original plus one copy of the Brief of Respondent to be served by US First Class Mail on

Washington State Court of Appeals, Division II ✓
950 Broadway, Suite 300
Tacoma, WA 98402

And, I caused a true and correct copy of the Brief of Respondent to be served by US First Class Mail on

Jim Marston
Attorney at Law
3508 NE Third Avenue
Camas, WA 98607

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

By: Carolynn Pavlock
Carolynn Pavlock
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Date: 12/10/2015

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