

**NO. 49862-6-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

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**STATE OF WASHINGTON**

**Respondent,**

**vs.**

**JAMES HENRY MAGEE**

**Appellant.**

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**BRIEF OF APPELLANT**

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**1108 North 6<sup>th</sup> Street**  
**Tacoma, WA 98403**  
**(253) 383-1001**

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## I. Introduction

The trial court entered an amended Property Division on December 13, 2016. A slight change was made and a further amended Property Division was entered on December 16, 2016. CP 70-73.

The Law Offices of James H. MaGee had two and only two retirement plans. There was a 401k plan known as the provision.

The trial court correctly found that there was a 401k plan known as the Law Offices of James H. MaGee 401k Plan. MassMutual held the assets in this 401k plan and the trial court found this account to hold \$276,980, consisting of \$231,058 community and \$45,922 separate property, under MassMutual account #587, as exemplified by exhibit #48. (CP 71 – item #2)

The trial court also correctly found that there was a defined benefit plan known as the Law Offices of James H. MaGee Defined Benefit Plan. This was found to hold \$285,726, with MassMutual as the custodian holding the assets of \$285,726 in Mass Mutual account #076, as exemplified by exhibit #458. (CP 70 – item #10)

But the Amended Property Divisions of December 13 and December 16, 2017 both contained a substantial error. Allocated to Mr. MaGee is a second additional defined benefit pension account in the alleged amount of \$447,312.

Unlike the Law Offices of James H. MaGee Defined Benefit Plan and the Law Offices of James H. MaGee 401k Plan, no identifying exhibit number references or MassMutual account reference numbers are provided in the property division to link this alleged second defined benefit pension plan to any trial exhibit or MassMutual investment account. (CP71 – item #1)

There is a massive problem; there simply is no second additional defined benefit pension account as listed at CP 71 – item #1 by the trial court. This non-existent additional defined benefit pension plan account supposedly in the amount of \$447,312 was created out of thin air and does not exist. It never has existed. There is no #447,312 asset that can be allocated to either party.

The trial court thus erroneously found that there were two defined benefit pension plans, namely an account in the amount of \$447,312 (CP 71 – item #1) and another defined benefit pension plan in the amount of \$285,726 (\$212,088 community portion and \$73,638 separate portion) (CP 70 – item #10), when in reality there is only one defined benefit pension plan. The finding of two defined benefit pension plans is inaccurate; there is only one pension plan in the amount of \$285,726 as found at CP 70 – item #10. The \$447,312 account found at CP 71 – item #1 simply does not exist.

Mr. MaGee filed a motion for reconsideration on December 27, 2016, supporting the motion for reconsideration with the declarations of Nicole LaFerriere (aka Ms. Nicole LaFerriere) and also that of Mr. MaGee in an effort to bring the trial court's error to the attention of the trial court so that a repair could be made.

The trial court declined to hear any argument or discussion from either Mr. MaGee or Ms. MaGee regarding the motion for reconsideration. The trial court entered an order denying the motion for reconsideration.

This appeal ensued.

The amended property division of December 13, 2016 should be vacated and the decree of dissolution also vacated with a remand to provide for a re-distribution of assets. Mr. MaGee is entitled to receive \$223,656 in assets (one half of the \$447,312 error) from Ms. MaGee and remand should be made to direct this result. Respondent Ms. MaGee's has several 401k and retirement investments accounts which should be the source of this \$447,312 transfer to Mr. MaGee and the trial court should be directed to enter a qualified domestic relations order directing transfer of this sum to Appellant Mr. MaGee. Ms. MaGee's \$241,093 Washington State Deferred Compensation 457 plan could be an appropriate source for the \$223,656 distribution to Mr. MaGee. (CP 71 – item #13).

## II. Assignments of Error

No. 1 - The trial court erred in allocating to Mr. MaGee a \$447,312 asset that did not exist.

### Issues Pertaining to Assignments of Error

No. 1 - Did the trial court error in allocating to Appellant Mr. MaGee a \$447,312 defined benefit pension plan asset that never existed?

## III. Statement of the Case

The trial court entered an amended Property Division on December 13, 2016. (CP 70-73). A further amendment was made on December 16, 2016

The Amended Property Division contained a substantial error. It allocated to Mr. MaGee a second defined benefit pension account in the amount of \$447,312 that does not exist and which never did exist. The trial court erroneously found that there were two defined benefit pension plans, namely an account in the amount of \$447,312 (CP 71 – item #1) and another defined benefit pension plan in the amount of \$285,726 (\$212,088 community portion and \$73,638 separate portion) (CP 70 – item #10). This is inaccurate; there is only one pension plan in the amount of \$285,726 as found at CP 70 – item #10. There are not two defined

benefit pensions. The \$447,312 account found at CP 71 – item #1 does not exist and never has existed.

Trial witness Nicole LaFerriere, (aka Nicole Zeiler) is the administrator for all of the defined benefit pension; she provided testimony about the defined benefit pension plan at trial; at no point in her testimony did Ms. LaFerriere detail the existence of two defined benefit pension plans. (RP 1-30). In fact, Ms. LaFerriere referred to the defined benefit pension plan again and again in the singular:

*Q: Are you familiar with Mr. MaGee's defined benefit plan?*

*A: I am.*

*Q: What is a defined benefit plan?*

*A: It is a type of qualified retirement plan where you are funding for a retirement benefit; so the benefit that is defined is the benefits you're going to have at retirement, versus benefits today.*

*Q: Do you recall when Mr. MaGee started his defined benefit plan?*

*A: 2010.*

*Q: And is that plan called the James H. MaGee defined benefit plan? Well, I guess law offices?*

*A: Law offices of; yes, that's correct. (RP 5-6)*

-Trial testimony of Nicole LaFerriere at RP 5-6.

Several trial exhibits were admitted regarding the Law Offices of James H. MaGee Defined Benefit Pension Plan, including 462, 463, 465, 466 and 467.

A statement for the Law Offices of James H. MaGee 401k plan was admitted as exhibit #452; the 401k plan is separate and distinct and is not accounted for in error in the property division, as has been the defined benefit plan. Per exhibit #452, the 401k plan assets are held under MassMutual account #xxx587. The December 16, 2016 property division references both the MassMutual account number as #587 and also exhibit #48.

The one and only Law Offices of James H. MaGee defined benefit pension plan assets are held under Mass Mutual account #xxx076, per exhibit #458. The December 16, 2016 property division references MassMutual account #076 and exhibit #458.

Unlike the one-and-only defined benefit pension plan and the 401k plan, no exhibit nor account number is listed for the “additional” non-existent \$447,312 defined benefit account in the December 16, 2016 property division. (CP 71 – item #1) This is troubling – and telling.

Mr. MaGee filed a motion for reconsideration on December 27, 2016, supporting the motion for reconsideration with the declarations of Nicole LaFerrierer (aka Nicole Zeiler) and also that of Mr. MaGee in a

good faith effort to bring to the trial court's attention the error in allocating to Mr. MaGee a second additional defined benefit pension plan that did not exist. Ms. LaFerriere is the pension plan outside administrator. (CP 54-57; CP 48-49)

The trial court declined to hear any argument or discussion from either Mr. MaGee or Ms. MaGee regarding the motion for reconsideration.

The trial court entered an order denying the motion for reconsideration without allowing any oral argument. (CP 58)

This appeal ensued.

The amended property division of December 13, 2016 should be vacated and the decree of dissolution also vacated with a remand to provide for a re-distribution of assets. (CP 70-73) Mr. MaGee should be allocated an additional \$223,656.00.

This award of \$223,656 can be made by way of qualified domestic relations order directing transfer of this sum to Mr. MaGee from Ms. MaGee's 457 plan detailed at CP 71 – item #13.

#### IV. Summary of Argument

The decree of dissolution (CP 59-97) and the amended property division (CP 70-73) should be vacated, with a removal of the \$447, 312

non-existent erroneously duplicated defined benefit pension plan. The non-existent defined benefit plan is found at CP 71, item #1.

Consequently, \$223,656 should be allocated from Respondent Ms. MaGee's Washington State Deferred Compensation 457 plan to Appellant Mr. MaGee to adjust for the error. The balance of the 457 account was listed at \$241,093. (CP 71 – item #13)

Also, attorneys' fees for this appeal should not be awarded against the Appellant Mr. MaGee. Mr. MaGee should be awarded fees against the Respondent Ms. MaGee at the rate of \$200 per hour; the Respondent and her counsel were fully aware that the trial court made an error in duplicating the pension plan asset and have stood by while the trial court remained in error.

#### V. Argument

**A. – The Law Offices of James H. MaGee did not have two defined benefit pension plans; allocating a non-existent “additional” \$447,312 pension plan to Mr. MaGee is an error.**

The trial court has broad discretion when distributing property in a dissolution proceeding. The lack of substantial evidence can support a reversal of a property division.

No substantial evidence exists which supports the trial court's findings that there are two separate defined benefit pension plans.

Substantial evidence exists if “*the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.*” Thorndike v. Hesperian Orchards, Inc., 54 Wash.2d 570, 575, 343 P.2d 183 (1959).

As described above, Ms. LaFerriere’s trial testimony references only one defined benefit pension plan, the Law Offices of James H. MaGee Defined Benefit Pension Plan; and Ms. LaFerriere’s (aka Ms. Zeiler) December 27, 2016 declaration in support of the motion for reconsideration further emphasize this point, along with the declaration of Mr. MaGee. (CP 50-53 and CP 54-57)

The record does not contain evidence of sufficient quantity (or any quantity, for that matter) which supports that there exists a second defined benefit pension plan in addition to The Law Offices of James H. MaGee Defined Benefit Plan that is administered by Ms. LaFerriere’s firm, Farmers and Betts.

Additionally, the disposition of property made in this case should be disturbed on appeal upon Mr. MaGee’s showing of a manifest abuse of discretion. In re Marriage of Kraft, 119 Wn.2d 438,450, 832 P.2d 871 (1992). In re Marriage of Valente, 179 Wn.App. 817, 831, 320 P.2d 115 (1992).

The trial court is obliged to dispose of property and liability of the parties, either community or separate, in a manner that is “fair, just and equitable,” towards Mr. MaGee, considering all the relevant factors under RCW 26.09.080. *In re Marriage of Brady*, 50 Wn. App 728, 731, 750 P.2d 654 (1988).

The Washington Supreme Court explained “abuse of discretion”:

*A trial court abuses its discretion only if any of the following is true:*

- (1) *The Decision is “manifestly unreasonable,” that is, it falls “outside the range of acceptable choices, given the facts and the applicable legal standard”;*
- (2) *The decision is “based on untenable grounds,” that is, “the factual findings are unsupported by the record,”; or*
- (3) *The decision is “based on untenable reasons,” that is, it is “based on an incorrect standard or the facts do not meet the requirements of the correct standard.”*

*State v. Dye*, 178 Wn.2d 541, 548 309 P.3d 1192 (2013) quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

The testimony of Ms. LaFerriere (occasionally also referred to as Ms. Zeiler in this proceeding) provides that there is but one defined

benefit pension plan, the Law Offices of James H. MaGee Defined Benefit Pension Plan; the Court's finding of two defined benefit pension plans is an abuse of discretion and falls "outside the range of acceptable choices, given the facts and the applicable legal standard." *Dye at 548.*

Similarly, the factual findings of two defined benefit pension plans are not supported by the record, given the testimony of Ms. LaFerriere and the exhibits and testimony presented, and thus the facts do not meet the requirements of the correct standard.

Furthermore, the allocation to Mr. MaGee of an asset that the court found to have a value of \$447,312, when such asset does not exist, is not a fair, just and equitable allocation of assets to Mr. MaGee.

**B. - The trial court abused its discretion in failing to entertain presentation and argument on the motion for reconsideration and in denying such motion.**

Appellant Mr. MaGee made significant and timely efforts to assist the trial court to correct the erroneous finding of two defined benefit pension plans by filing a motion for reconsideration of the error. (CP 48-49).

Mr. MaGee's declarations are clear that there are not two defined benefit pension plans and never have there been two separate defined benefit pension plans. (CP 50-53 and CP 28-29).

The declaration of Ms. LaFerriere (aka Ms. Zeiler), the pension administrator filed in support of the motion to reconsider is likewise clear. There are not two pension plans for Ms. LaFerriere (aka Ms. Zeiler) refers to the defined benefit pension plan in the singular, which was consistent with her trial testimony. (CP 54-57) (RP 6-8) As mentioned earlier, Ms. LaFerriere never referred to two defined benefit pension plans in her testimony. (RP 1-31) She referred to only one defined benefit pension plan in her trial testimony (RP 5-6). No other pension administrator testified besides Ms. LaFerriere.

The grant or denial of a motion for reconsideration is reviewed for abuse of discretion. *Worden v. Smith*, 178 Wn. App. 309, 322-23, 314 P.2d 1125 (2013).

The trial court abused its discretion in refusing to hear and then denying the motion for reconsideration when presented with substantial evidence that the trial court had made an error by incorrectly finding the existence of two pension plans as set forth the in the post- trial declarations of Mr. MaGee (CP 50-53, 27-40) and Ms. LaFerriere (aka as Ms. Zeiler). (CP 54-57) The trial court's choice to deny reconsideration in

the face of overwhelming evidence of error was outside of the range of acceptable choices given the facts and the applicable legal standard. Creating and then allocating to Mr. MaGee an asset that did not exist, and then declining to hear Mr. MaGee's motion to repair the trial court's error was not within the acceptable choices given the facts and applicable legal standard.

Ms. Zeiler's declaration of December 27, 2016 recites: "*There are not actual funds of \$447,312. There are funds as of 3/31/16 of \$285,726.50, which needs to satisfy the benefits accrued for all employees first, then Mr. Magee would receive the remaining assets available. These are the only funds in the plan as of that date.*" (CP 55)

In support of the motion for reconsideration, a clear property division was presented to the trial court was included for the trial court's review by Mr. MaGee; there is no mention of two defined benefit pensions in this document, only one defined benefit pension. (CP 35-40)

**C. Attorneys' fees are appropriately awarded against Respondent**

**Ms. MaGee to Mr. MaGee**

RCW 26.09.140 provides that "*Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.*"

The Respondent Ms. MaGee is well aware that the trial court has made a serious error in finding that a second defined benefit pension plan exists in the amount of \$447,312, yet Respondent has continued to allow the court to remain in error.

The Appellant Mr. MaGee has certain financial need as his law office business is in significant decline given the robust economy (Mr. MaGee has practiced all but exclusively in consumer bankruptcy for the past 12 years), and can provide a declaration/affidavit to the Court to this effect. Mr. MaGee hopes and expects to substantially prevail on this appeal and thus would be entitled to fees. *In re Marriage of Chandola*, 180 Wn.2d 632, 237 P.3d 644 (2014).

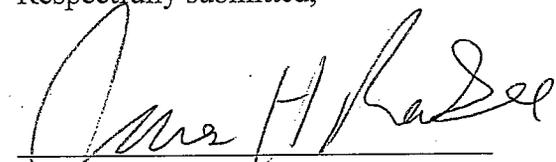
#### VI. Conclusion

The December 16, 2016 property division should be vacated to the extent that it awards a non-existent defined benefit pension plan in the amount of \$447,312 to Appellant Mr. MaGee. To compensate in reallocation, \$223,656 should be allocated to Mr. MaGee from Ms. MaGee's Washington State Deferred Compensation 457 plan, which is half of the supposed balance of the nonexistent additional defined benefit pension plan that was "awarded" to Mr. MaGee.

Remand should be had to effect this result. Attorneys' fees and costs should be awarded to Mr. MaGee at the rate of at least \$200 per hour; this is a lesser rate than what Mr. MaGee would seek for work in his practice area because the Respondent Mr. MaGee is inexpert at appellate work, so has reduced his hourly request.

Dated this 2<sup>nd</sup> day of October, 2017, at Tacoma Washington.

Respectfully submitted,



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James H. MaGee  
Appellant

**LAW OFFICE OF JAMES H MAGEE**

**October 02, 2017 - 4:34 PM**

**Transmittal Information**

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**Comments:**

Appellant's Opening Brief

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Sender Name: James MaGee - Email: staff1@washingtonbankruptcy.com  
Address:  
1108 N 6TH ST  
TACOMA, WA, 98403-1615  
Phone: 253-383-1001

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