

COA No. 29422-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

ELIZABETH G. NEBERGALL,

Respondent,

v.

ROBERT EARL NEBERGALL,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR

A: The court erred by ordering lifetime maintenance for Elizabeth G. Nebergall based on challenged finding 2.12:.....1

B. The court erred by not taking into account in dividing the property some \$9,000 in proceeds received by Ms. Nebergall from the sale of community property.....1

C. The court erred by awarding only \$3000 to Robert Earl Nebergall for home maintenance expenses when the evidence showed he paid more and, by stipulated order, he was responsible for such expenses and was to be reimbursed for them.....1

D. The court erred by ordering Mr. Nebergall to pay 40% of Ms. Nebergall's attorney fees based on challenged finding 2.15.....1

Issues Pertaining to Assignments of Error

1. Did the court err by ordering lifetime maintenance for Ms. Nebergall when the facts did not support it? (Assignment of Error A).....2

2. Did the court err by not taking into account in the division of property some \$9,000 from the sale of community personal property by Ms. Nebergall when she was, by order, not to dispose of such property and nevertheless received the proceeds? (Assignment of Error B).....2

3. Did the court err by awarding only \$3000 to Mr. Nebergall for home maintenance expense when the evidence showed he paid more and, by stipulated order, he was responsible for such

expenses and was to be reimbursed for them? (Assignment of Error C).....	2
4. Did the court err by ordering Mr. Nebergall to pay 40% of Ms. Nebergall's attorney fees when she did not have the need and he did not have the ability to pay? (Assignment of Error D).....	2
II. STATEMENT OF THE CASE.....	2
III. ARGUMENT.....	5
A. The court erred by ordering lifetime maintenance for Ms. Nebergall.....	5
B. The court erred by not taking into account in the division of property some \$9000 in proceeds from the sale of community property by Ms. Nebergall.....	8
C. The court erred by awarding only \$3000 to Mr. Nebergall for home maintenance expense when the evidence showed he paid more and, by stipulated order, he was responsible for such expenses and was to be reimbursed for them.....	9
D. The court erred by ordering Mr. Nebergall to pay 40% of Ms. Nebergall's attorney fees because she did not have the need.....	10
E. Mr. Nebergall is entitled to an award of fees under RCW 26.09.140 and RAP 18.1.....	11
IV. CONCLUSION.....	12

TABLE OF AUTHORITIES

Table of Cases

<i>In re Marriage of Barnett</i> , 63 Wn. App. 385, 818 P.2d 1382 (1991).....	7
--	---

<i>In re Marriage of Coyle</i> , 61 Wn. App. 653, 811 P.2d 244, <i>rev. denied</i> , 117 Wn.2d 1017 (1991).....	7
<i>In re Marriage of Foley</i> , 84 Wn. App. 839, 930 P.2d 929 (1997).....	5, 6, 11
<i>In re Marriage of Hulscher</i> , 143 Wn. App. 708, 180 P.3d 199 (2008).....	8
<i>In re Marriage of King</i> , 66 Wn. App. 134, 831 P.2d 1094 (1992).....	11
<i>Kirshenbaum v. Kirshenbaum</i> , 84 Wn. App. 798, 929 P.2d 1204 (1997).....	11
<i>In re Marriage of Kraft</i> , 119 Wn.2d 438, 832 P.2d 871 (1992).....	9
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997).....	9, 10
<i>In re Marriage of Rink</i> , 18 Wn. App. 549, 571 P.2d 210 (1977).....	7
<i>In re Marriage of Tower</i> , 55 Wn. App. 697, 780 P.3d 863 (1989), <i>rev. denied</i> , 114 Wn.2d 1002 (1990).....	8
<i>In re Marriage of Washburn</i> , 101 Wn.2d 168, 677 P.2d 152 (1984).....	6, 7
<i>In re Marriage of Zahm</i> , 138 Wn.2d 213, 978 P.2d 498 (1999).....	5

Statutes

RCW 26.09.080.....	8
RCW 26.09.140.....	10, 11

Rules

RAP 18.1.....11
RAP 18.1(c).....11

I. ASSIGNMENTS OF ERROR

A. The court erred by ordering lifetime maintenance for Elizabeth G. Nebergall based on challenged finding 2.12:

Spousal maintenance should be ordered because the wife has the financial need for spousal maintenance and the husband has the financial ability to pay spousal maintenance as ordered.

B. The court erred by not taking into account in dividing the property some \$9,000 in proceeds received by Ms. Nebergall from the sale of community property.

C. The court erred by awarding only \$3000 to Robert Earl Nebergall for home maintenance expense when the evidence showed he paid more and, by stipulated order, he was responsible for such expenses and was to be reimbursed for them.

D. The court erred by ordering Mr. Nebergall to pay 40% of Ms. Nebergall's attorney fees based on challenged finding 2.15:

The wife has the need for contribution by the husband toward payment of fees and costs and the husband has the ability to pay these fees and costs. The outstanding balance on reasonable attorney's fees and costs incurred by the wife in these proceedings is \$14,580.00.

Issues Pertaining to Assignments of Error

1. Did the court err by ordering lifetime maintenance for Ms. Nebergall when the facts did not support it? (Assignment of Error A).

2. Did the court err by not taking into account in the division of property some \$9,000 from the sale of community personal property by Ms. Nebergall when she was, by order, not to dispose of such property and nevertheless received the proceeds? (Assignment of Error B).

3. Did the court err by awarding only \$3000 to Mr. Nebergall for home maintenance expense when the evidence showed he paid more and, by stipulated order, he was responsible for such expenses and was to be reimbursed for them? (Assignment of Error C).

4. Did the court err by ordering Mr. Nebergall to pay 40% of Ms. Nebergall's attorney fees when she did not have the need and he did not have the ability to pay? (Assignment of Error D).

II. STATEMENT OF THE CASE

Mr. Nebergall and Ms. Nebergall married on February 16, 1986. (CP 241). They started living separate and apart on September 3, 2009. (*Id.*). A petition for dissolution was filed on

September 9, 2009. (CP 3). Both parties are over 70 years old.

(*Id.*). Mr. Nebergall was pro se until he was eventually represented by counsel for trial. (CP 15; CP 213).

After trial on July 21, 2010, the court entered findings and conclusions and a decree of dissolution. (CP 240-250, CP 251-263). With respect to spousal maintenance, the court found:

Spousal maintenance should be ordered because the wife has the financial need for spousal maintenance and the husband has the financial ability to pay spousal maintenance as ordered. (CP 242).

In the decree of dissolution, the court ordered spousal maintenance in Exhibit K:

The husband shall pay lifetime spousal maintenance in the amount of \$375.00 per month to the wife. Spousal maintenance shall be paid monthly on or before the first day of each month commencing September 1, 2010.

Spousal maintenance payments shall be made directly to the wife.

The obligation to pay future maintenance is terminated upon the death of either party or the wife's remarriage.

Spousal maintenance is non-modifiable. (CP 263)

As for fees and costs, the court found:

The wife has the need for contribution by the husband toward the payment of fees and costs and the husband has the ability to pay these fees and costs. The outstanding balance on reasonable attorney's fees and costs incurred by the wife in these proceedings is \$14,580.00. (CP 242).

In the decree, the court ordered attorney fees as follows:

The husband shall pay \$5,832.00, which is 40% of the outstanding balance on attorney's fees and costs incurred by the wife in this proceeding after credit to him for \$500 previously paid, to [attorney.]

Payment of this contribution shall be made from the husband's portion of proceeds from the sale of the family home. Judgment for attorney's fees ordered herein shall not accrue interest until the time of closing on the sale of the home. (CP 254).

In the decree, Mr. Nebergall was awarded \$3000 for home maintenance expenses:

The first \$3000 shall be paid to Robert Nebergall as reimbursement for expenses advanced for repairs, maintenance and other costs while the home was marketed; . . . (CP 254).

The court further awarded \$1349 to Ms. Nebergall "as equitable transfer payment for differential in automobile valuations for the vehicles respectively awarded to the parties." (CP 258). In making this transfer payment, it did not take into account some \$9,000 in proceeds from garage sales received by Ms. Nebergall. (CP 232-34). Both parties "were restrained from transferring, removing, encumbering, concealing, damaging, or in any way disposing of any property except in the usual course of business or for the necessities of life or as agreed in writing by the parties."

(CP 9). Ms. Nebergall nonetheless held the garage sales of community personal property and received all the proceeds. (7/21/10 RP 51-53, 83, 89-91).

Mr. Nebergall appeals. (CP 269).

III. ARGUMENT

A. The court erred by ordering lifetime maintenance for Ms. Nebergall.

The court found in finding 2.12 that spousal maintenance should be ordered because the wife had the financial need for it and the husband had the financial ability to pay. (CP 242). Mr. Nebergall assigns error to this finding as the facts do not support it.

The trial court's decision on spousal maintenance is reviewed for an abuse of discretion. *In re Marriage of Zahm*, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999). An abuse of discretion occurs when the court bases its decision on untenable grounds or for untenable reasons. *In re Marriage of Foley*, 84 Wn. App. 839, 845, 930 P.2d 929 (1997).

Some factors that the court must consider are the post-dissolution financial resources of the parties; their abilities to independently meet their needs; the time necessary for the party seeking maintenance to find employment; duration of the marriage;

the standard of living during the marriage; the age, physical, and emotional condition, and financial obligations of the spouse seeking maintenance; and the ability of the spouse from whom maintenance is sought to meet his needs and financial obligations. RCW 26.09.090(a)-(f). The only limitation on the maintenance award is that the amount and duration be just in light of all the relevant factors. *In re Marriage of Washburn*, 101 Wn.2d 168, 178, 677 P.2d 152 (1984).

The parties' economic positions following the dissolution are of utmost importance. *Washburn*, 101 W.2d at 181. Maintenance may serve to equalize the parties' standard of living for an appropriate period of time. *Id.* at 179. The court's decision on maintenance "is governed strongly by the need of one party and the ability of the other party to pay an award." *Foley*, 84 Wn. App. at 845-46.

Here, half of Mr. Nebergall's State Farm disability pension was awarded to Ms. Nebergall (\$614/month) as well as half of the monthly payment from a commercial real estate escrow contract (\$472/month), for a total of \$1086. (CP 257). Ms. Nebergall also received \$544 in Social Security. (CP 259). The court awarded lifetime spousal maintenance of \$375/month. (CP 263). Ms.

Nebergall's monthly income was then \$2005. Mr. Nebergall's monthly income was \$2279. (CP 257, 263).

The parties are over 70 years old and will not be going back into the workforce. The \$375 monthly maintenance for Ms. Nebergall was to equalize the standard of living for an appropriate period of time. *Washburn*, 101 Wn.2d at 179. But that period of time was only appropriate until the sale of the family home, which did take place, with the parties splitting the net proceeds. At presentment, the court was aware the house had indeed sold. (9/9/10 RP 5). The parties were then on an equal footing. The trial court must consider the division of property when determining maintenance. *In re Marriage of Rink*, 18 Wn. App. 549, 552-53, 571 P.2d 210 (1977). The parties' assets were sufficient to equalize their post-dissolution economic positions through the property division alone. *Cf. In re Marriage of Barnett*, 63 Wn. App. 385, 388, 818 P.2d 1382 (1991). In these circumstances, the court abused its discretion by awarding lifetime maintenance as Ms. Nebergall did not have the need.

It is not the policy of this State to place permanent responsibility for spousal maintenance on a former spouse. *In re Marriage of Coyle*, 61 Wn. App. 653, 657, 811 P.2d 244, *rev.*

denied, 117 Wn.2d 1017 (1991). Although the court provided the spousal maintenance was non-modifiable, the provision cannot be enforced because the court may not sua sponte enter a non-modifiable provision, absent an express agreement by the parties. *In re Marriage of Hulscher*, 143 Wn. App. 708, 714-15, 180 P.3d 199 (2008). There was no such agreement here as all issues were contested at trial. The award of lifetime spousal maintenance should be reversed.

B. The court erred by not taking into account in the division of property some \$9000 in proceeds from the sale of community property by Ms. Nebergall.

The court should strive to make an equitable division of property. RCW 26.09.080; *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989), *rev. denied*, 114 Wn.2d 1002 (1990). In its oral decision, the court stated it was going to leave the status quo on the personal property. (CP 232-33). At presentment, it was confirmed that everyone kept what they got in that respect. (9/9/10 RP 4). But even though the court awarded \$1349 to Ms. Nebergall as an equitable transfer payment due to the difference in the value of vehicles the parties each received, it inexplicably did not take into account the \$9000 in proceeds from

her garage sales of community property. (7/21/10 RP 51-53). She was not to dispose of the property. (CP 9). But she did and further acknowledged giving that money to her very close friend. (7/21/10 RP 65-68). The court abused its discretion by failing to consider this \$9000 kept by Ms. Nebergall in dividing the property between the parties. *In re Marriage of Kraft*, 119 Wn.2d 438, 450, 832 P.2d 871 (1992). Its decision was thus based on untenable grounds and for untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). The case should be remanded for further proceedings regarding the property distribution.

C. The court erred by awarding only \$3000 to Mr. Nebergall for home maintenance expense when the evidence showed he paid more and, by stipulated order, he was responsible for such expenses and was to be reimbursed for them.

In the parties' January 11, 2010 stipulated order, Mr. Nebergall was "responsible for payment of utilities and other expenses to maintain the home and for those expenses incurred. His payment for expenses incurred during the times that he is not occupying the home shall be reimbursed from the gross proceeds from the sale of the house." (CP 24-25). Mr. Nebergall testified his son-in-law, a contractor, worked on the home and billed \$4800.

(7/21/10 RP 105-106). He paid \$1800 of it from his own pocket.

(*Id.*). Various other maintenance was done by Mr. Nebergall along with similar maintenance by Ms. Nebergall. (*Id.* at 101-103).

The court determined the work done by both sides “probably cancel each other out in terms of ordinary kinds of things.” (CP 234). But there is nothing in the stipulated order requiring Ms. Nebergall to pay for maintenance or allowing reimbursement for such expenses. Even so, it is undisputed Mr. Nebergall incurred \$4800 in costs for maintenance work done by his son-in-law. The court, however, awarded only \$3000 to Mr. Nebergall. He was to pay maintenance costs and get reimbursed for them. (CP 9). The court abused its discretion by not awarding him \$4800 as the \$3000 amount was contrary to the evidence and thus based its decision on untenable grounds and for untenable reasons. *Littlefield*, 133 Wn.2d at 46-47. The \$3000 award should be reversed and Mr. Nebergall awarded \$4800.

D. The court erred by ordering Mr. Nebergall to pay 40% of Ms. Nebergall’s attorney fees because she did not have the need.

Under RCW 26.09.140, attorney fees may be awarded from one party to the other after consideration of their resources. Here, the court erroneously found Ms. Nebergall had the need and he

had the ability to pay. *Kirshenbaum v. Kirshenbaum*, 84 Wn. App. 798, 808, 929 P.2d 1204 (1997).

The house was sold; the parties were on equal footing. The parties should thus have been responsible for their own attorney fees. Their resources were approximately the same. Ms. Nebergall failed to show the need for Mr. Nebergall to pay her attorney fees. She had the ability to pay. The court thus abused its discretion by awarding her fees. *Foley*, 84 Wn. App. at 846. Moreover, the court must indicate on the record the method used to calculate attorney fees. *Id.* The court did not do so here. The award of attorney fees must be reversed.

E. Mr. Nebergall is entitled to an award of fees under RCW 26.09.140 and RAP 18.1.

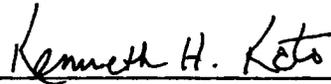
Mr. Nebergall should be awarded his fees for maintaining this appeal because the issues he raises have merit, he has the need, and she has the ability to pay. *In re Marriage of King*, 66 Wn. App. 134, 139, 831 P.2d 1094 (1992). As required by RAP 18.1, Mr. Nebergall will timely submit an affidavit of financial need based in part on the extraordinary expense of his narcolepsy medication. RAP 18.1(c).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Nebergall respectfully urges this Court to reverse the trial court, remand for further proceedings, and to award him attorney fees on appeal.

DATED this 27th day of April, 2011.

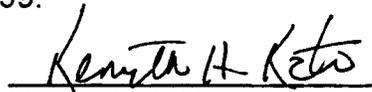
Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on April 27, 2011, I served a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, on Erika Balazs, Attorney at Law, 3206 W. Connaught Dr., Spokane, WA 99208-8459.


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