

FILED

MAY 27 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

COA No. 29422-6-III

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STATE OF WASHINGTON

In re the Marriage of

ELIZABETH G. NEBERGALL,

Respondent,

v.

ROBERT EARL NEBERGALL,

Appellant.

Brief of Respondent

Erika Balazs
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(509)999-6985
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I. RESTATEMENT OF ISSUES ON APPEAL

- A. Did the trial court properly exercise its discretion by awarding lifetime maintenance to Ms. Evans when the evidence showed she was 73 years old and unable to work due to health conditions?
- B. Did the trial court properly exercise its discretion when it declined to allow an offset for the sale of personal property and instead decided the parties should retain the personal property in their possession?
- C. Did the trial court properly exercise its discretion by awarding Mr. Nebergall \$3,000 for home maintenance expenses and offsetting any additional contribution against the contributions made by Ms. Evans?
- D. Did the trial court properly exercise its discretion in ordering Mr. Nebergall to pay a portion of the fees owed to Ms. Evans attorney?

II. STATEMENT OF THE CASE

This case involves the dissolution of a 24 year marriage. (CP 241). Both parties are over 70 years old. (CP 3). The parties had a home in Deer Park and a few other items of personal property.

Mr. Nebergall moved out of the family home in September 2009; Ms. Evans¹ left in December of the same year. (RP 9-10). A real estate agent suggested certain improvements to make the home more marketable. (RP 11). In January, 2010, the parties entered into a stipulated order that provided that Mr. Nebergall was to pay “utilities and other expenses to maintain the home.” (CP 24, ¶3.2). He was to be reimbursed for these expenses from the proceeds of the sale. (CP 25). When Mr. Nebergall was not able to complete some of the work on the house, Ms. Evans did so. (RP 8). Thus, as the evidence showed, both parties made efforts to improve the home’s condition.

Mr. Nebergall testified that he contracted with his son-in-law to make improvements to the bathroom. (RP 102). The bill for that work totaled about \$4,800. (RP 108). At the time of trial, Mr. Nebergall had paid \$1,800,

¹ The Decree provided that Mrs. Nebergall would change her surname to Evans. (CP 254).

with a balance of about \$3,000 owing. (RP 106). He asked to be reimbursed for the entire \$4,800.

Ms. Evans testified she and family and friends spent many hours improving the property too. They did some painting, took several trips to the dump, did yard work, and cleaned several times. (RP 12 and 14). They performed many incidental repairs, such as fixing the shutters and replacing towel bars and shower heads. (RP 15). She estimated the value of her contribution at over \$6,000. (RP 15). Ms. Evans felt her work more than offset the amounts claimed by Mr. Nebergall. (RP 15).

While the dissolution was pending, Ms. Evans sold some of the assets, including a concession trailer and household items. (RP 53, 54). The proceeds from the sale of the trailer were evenly divided. (CP 25, ¶3.3). Ms. Evans sold items at a garage sale but could not recall the amount she netted from those sales. (RP 52-53). Mr. Nebergall estimated the value to be around \$20,000,

but he did not provide any itemization for this claim in his testimony. (RP 124).

Ms. Evans requested a property division and award of maintenance to allow her to remain on an “equal footing” with Mr. Nebergall. (RP 39). Although she had worked as an LPN when younger, she was 73 years old, had titanium rods in her back and had several heart stents. (*Id.* and RP 61). She was unable to stand for any length of time. (RP 62). She did not feel she could engage in any significant work. (RP 40).

The trial court made a property division, awarded Ms. Evans maintenance for life and ordered Mr. Nebergall to pay 40% of Ms. Evan’s attorney’s fees. Mr. Nebergall has raised issues regarding almost every aspect of the decree.

III. SUMMARY OF ARGUMENT

This is an appeal of dissolution proceedings. Maintenance, property division and fee awards rest with

the sound discretion of the trial court. In this case, the trial court properly considered the facts and applied the statutory factors to make an equitable division of the property, award lifetime maintenance to provide relatively similar standards of living and award a limited amount of fees. The award was well within the trial court's discretion and should not be reversed on appeal.

IV. ARGUMENT

A. The trial court properly considered the relevant factors and awarded lifetime maintenance.

The trial court divided the income producing assets evenly and then ordered Mr. Nebergall to pay Ms. Evans an amount of maintenance that would further equalize their expected monthly income. (CP 257, 259, 263). The court ordered maintenance for life. (CP 263). This Court should affirm that decision.

In general, decisions concerning maintenance rest with the sound discretion of the trial court. *In re*

Marriage of Zahm, 138 Wn.2d 213, 226-227, 978 P.2d 498 (1999). While lifetime awards are not favored, the award of lifetime maintenance in a reasonable amount is proper "when it is clear the party seeking maintenance will not be able to contribute significantly to . . . her own livelihood." *In re Marriage of Mathews*, 70 Wn. App. 116, 124, 853 P.2d 462 *rev. denied* 122 Wn.2d 1021 (1993). In this case, the facts warranted lifetime maintenance to equalize the parties' economic circumstances and to avoid leaving Ms. Evans destitute.

As Mr. Nebergall's own brief admits, the award of lifetime maintenance has the effect of leaving the parties with similar monthly income: Ms. Evans receives roughly \$2,005 per month after including \$375 maintenance and Mr. Nebergall retains \$2,279². (CP 257, 263). Nevertheless, Mr. Nebergall claims income

² Mr. Nebergall also received some small amounts for the sale of grain and some mineral rights on a separate property inheritance. (RP 113-114). Those amounts are not included in this comparison.

equalization was appropriate only until the sale of the family home. Appellant's Brief, p. 7. He argues at that point, the parties' assets "were sufficient to equalize their post-dissolution economic positions through property division alone." *Id.* There are both legal and factual fallacies with this argument.

First, the argument is flawed legally. The test for property division and maintenance is not that it be equal but that it be equitable. *In re Marriage of Mathews*, 70 Wn. App. 116,121, 853 P.2d 462, 466 (1993) *rev. denied* 122 Wn.2d 1021 (1993). "The paramount concern is the economic condition in which the decree will leave the parties." *Id.* When awarding maintenance, the trial court must consider all the statutory factors, including the financial resources of both parties, the standard of living established during marriage, the age and physical condition of the party seeking maintenance and the ability of the spouse asked to pay maintenance to meet

his or her own needs. *Id. at* 122, 123. It would be error for the trial court to focus only on the property awarded in the decree when awarding maintenance. Thus, the fact Ms. Evans was awarded half the proceeds from the sale of the family home in no way limits the power of the trial court to award lifetime maintenance if justified by the other statutory factors.

Second, the argument is flawed factually. While the equal division of the proceeds from the house would provide an identical measure of security to both parties, it does not resolve the continuing disparity in income. Without the maintenance award, Ms. Evans monthly income drops to \$1,630 and Mr. Nebergall would receive \$2,654. Moreover, part of the income is from the proceeds of a real estate contract. (CP 259). As Mr. Nebergall admitted in his own testimony, the contract was going to expire soon. (RP 113, lls. 1-10). That contract provides \$944 per month, or \$472 to each

party. *Id.* When that contract expires, Ms. Evans will receive \$1,533 per month and Mr. Nebergall \$1,807. Take away the maintenance award, and those figures change to \$1,158 and \$2,182, respectively. Thus, Mr. Nebergall wants to force Ms. Evans to live on less than \$20,000 per year and eventually less than \$14,000 per year, while he would receive almost \$32,000 and then \$26,000 per year. Such a result is unconscionable. Given the parties' ages, health conditions, the length of the marriage, the standard of living both had enjoyed, and the limited resources, the trial court quite properly awarded lifetime maintenance to Ms. Evans. This Court should affirm that award.

B. The trial court properly exercised its discretion in the property division, including the court's decision to not try to unravel the asset sales that occurred before the trial.

Mr. Nebergall claims that the trial court failed to make an adequate adjustment for amounts received by

Ms. Evans from the sale of items at garage sales. In its oral ruling, the trial court indicated that it was going to “observe the status quo” with regard to personal property because it was an impossible task to try to sort it out. (RP of Decision 3). As the court said, both parties had had access to the property and it would be like throwing a dart at a dart board to come up with a value. *Id.* The court’s decision was a valid exercise of discretion, given the disputed testimony.

Although Mr. Nebergall claims that this issue involves \$9,000 worth of property, there is no finding to support this contention. (CP 240-250). Moreover, it is not supported by the record³. Nothing at the pages cited by Mr. Nebergall (RP 51-53) supports the amounts claimed; Ms. Evans admitted selling items but could not recall the amounts received. (RP 51-53). Mr. Nebergall

³ It should be noted that appellate counsel is not responsible for the state of the record; Mr. Nebergall retained new counsel for the appeal.

estimated the value of the property sold was around \$20,000 but made no effort to itemize it. (RP 123). This Court is faced with the same difficulty the trial court faced, trying to equalize a division of unknown property of uncertain value.

Mr. Nebergall notes that Ms. Evans admits giving funds to a friend. (RP 65-68). But the exact amount and source of such funds is not clear. For example, it is undisputed that Ms. Evans received half the cash from the sale of the concession trailer for \$13,000. (RP 53, 138). It would therefore be unfair to assume the money paid to the friend came from garage sales. Thus, the absence of clear evidence alone justifies leaving the parties in the status quo.

But two other factors should also be considered. First, Ms. Evans testified that Mr. Nebergall also took personal items from the house needed for staging. (RP 59). Although she too failed to specify items and values,

this was not seriously contradicted. She also testified Mr. Nebergall had not been consistent in support until after the contempt proceedings and as a result, the proceeds from the garage sales had been used for living expenses. (RP 27, 28, and 33). Mr. Nebergall controlled most of the family income; if he refused to provide temporary support during the dissolution, he should not be allowed to complain when Ms. Evans had no choice but to live off the family assets.

In summary, the trial court was faced with limited proof as to the amount at issue and conflicting claims as to who took how much. Given the failure of evidence, the trial court cannot be faulted for refusing to guess at the value of the items sold. The trial court's decision to maintain the status quo in the division of personal property was within its discretion and should be affirmed.

C. The trial court properly limited Mr. Nebergall to \$3,000 for improvements to the property.

Mr. Nebergall was awarded \$3,000 toward his expenses to improve the family home. (CP 257).

Mr. Nebergall complains it should have been \$4,800. In making its decision, the trial court considered the funds and effort expended by Ms. Evans and decided the value of those efforts cancelled out part of Mr. Nebergall's contributions. (CP 234). Thus, rather than the full \$4,800 claimed, the trial court awarded Mr. Nebergall \$3,000. This was well within the trial court's discretion.

Mr. Nebergall entered into a stipulated order that said he was responsible for payment of expenses to maintain the family home. (CP 24). But when he was not there and failed to adequately maintain the property, Ms. Evans stepped in. (RP 12-15). It is only reasonable that the court could take that into consideration. The fact the Order *required* Mr. Nebergall to pay for

improvements and maintenance in no way precludes the trial court from considering payments and improvements made voluntarily by Ms. Evans when Mr. Nebergall failed in his duty to maintain. To ignore Ms. Evan's contributions would be inequitable and unfair. The trial court properly exercised its discretion and allowed an offset.

D. The trial court properly considered the relative economic positions when it ordered Mr. Nebergall to pay 40% of Ms. Evan's attorney's fees, or \$5,832.00.

The trial court ordered Mr. Nebergall to pay 40% of Ms. Evan's attorney's fees. Mr. Nebergall argues this was error. The trial court may award fees pursuant to RCW 26.09.140. When doing so, the trial court must consider the financial resources of both parties. *Id.* The decision to award fees rests with the sound discretion of the trial court. *In re Marriage of Foley*, 84 Wn. App. 839, 846, 930 P.2d 929 (1997).

In reaching its decision, the trial court stated it was considering both need and ability to pay.⁴ (RP of Decision 6). The court held that looking at “the big picture” Mr. Nebergall should pay 40% of Ms. Evans fees. *Id.* Mr. Nebergall argues that this was an abuse of discretion because Ms. Evans had the ability to pay and the parties had roughly the same assets. But this argument ignores the fact Ms. Evans had been forced to incur significantly more fees than Mr. Nebergall. At the time of trial she owed almost \$20,000 compared to Mr. Nebergall’s attorney bill of about \$4,300. (CP 258). She had incurred fees to commence the dissolution Mr. Nebergall requested (RP 75), to obtain temporary orders (CP 1-5), to maintain contempt proceedings to enforce the temporary orders for support (RP 75), and for trial (RP 80). Mr. Nebergall did not hire counsel until well into the proceedings. By ordering Mr. Nebergall to

⁴ The trial court could also have considered that Mr. Nebergall had agreed to pay fees in the stipulated order entered. (CP 25, ¶ 3.12).

pay a portion of Ms. Evan's fees, the court equalized the relative fee burden. Thus, the trial court fully complied with the statute by considering the resources available to both parties. This was legally proper and well within the trial court's discretion. It should not be reversed.

E. Ms. Evans Requests Fees on Appeal

Ms. Evans asks for fees on appeal pursuant to RAP 18.1 and RCW 26.09.140. When considering a fee request, the Court of Appeals should examine the arguable merit of the issues on appeal and the financial resources of the respective parties. *In re Marriage of Griffin*, 114 Wn.2d 772, 791 P.2nd 519 (1990). These factors support an award of fees to Ms. Evans.

First, the issues raised in this case all involve discretionary rulings and thus require proof of an abuse of discretion, a very difficult standard on appeal.

Moreover, except for the maintenance issue, the total amount at issue was less than \$20,000. While it would

be difficult to classify this appeal as frivolous, the Appellate Court should consider the fact that an award of fees in such a case would force parties to think twice before filing an appeal that involves discretionary rulings and minimal assets. Mr. Nebergall has put Ms. Evans to significant expense on a very thin appeal.

Second, given the relative resources, Mr. Nebergall should pay Ms. Evans fees. Mr. Nebergall made the decision to appeal and in effect forced Ms. Evans to incur an expense, reducing her available assets through no fault of her own. She should not have to bear the full brunt of his dissatisfaction with the trial court ruling. Ms. Evans asks this Court to award her fees so that Mr. Nebergall bears the consequences of his choice to seek review.

V. CONCLUSION

The trial court court's decision left the parties in relatively equal positions for the rest of their lives. This

decision was well within the trial court's broad discretion. The trial court should be affirmed and this Court should award Ms. Evans fees on appeal.

Respectfully submitted this 26th of May, 2011.

A handwritten signature in black ink, appearing to read "Erika Balazs", written over a horizontal line.

Erika Balazs WSBA # 12952
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May, 2011, I caused to be served a true and correct copy of the Brief of Respondent by the method indicated below, and addressed to the following:

- | | | |
|-------------------------------------|------------------|----------------------|
| <input type="checkbox"/> | Hand-delivered | Kenneth.H. Kato |
| <input checked="" type="checkbox"/> | First-Class Mail | Attorney at Law |
| <input type="checkbox"/> | Overnight Mail | 1020 N Washington St |
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Erika Balazs.