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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 300111

WASHINGTON STATE COURT OF APPEALS
DIVISION III

In Re the Marriage of

STEPHEN HARRISON

Appellant

v.

KAREN HARRISON

Respondent

REPLY BRIEF OF APPELLANT

W. JAMES KENNEDY
WSBA NO: 4648
Counsel for Stephen Harrison

THORNER, KENNEDY & GANO P.S.
PO BOX 1410
YAKIMA, WA 98907
(509) 575-1400

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I. ARGUMENT

A. *The Trial Court should have added the money in Karen's bank account to her column.*

"Washington courts recognize that consideration of each party's responsibility for creating or dissipating marital assets is relevant to the just and equitable distribution of property." *White v. White*, 105 Wn. App. 545, 551, 20 P.3d 481, 485 (2001). In cases where an asset is valued at trial rather than at separation, the Trial Court must consider any dissipating or marital assets in its distribution. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

Karen argues that the Trial Court was correct in not placing the $147,800 in her column for two reasons: (1) Karen's testimony that she couldn't remember the accounts is enough to show that the accounts did not exist; (2) even if the accounts did exist, the Trial Court could not distribute them because Karen had spent the money prior to trial. (Resp. Br. at 18-21). As discussed below these arguments are without merit.

1. Substantial evidence exists to prove that the funds existed at the time of Separation.

Karen filed a financial declaration in 2007 indicating that at the time of separation she had $147,800 in the bank. (Ex. P.E. 5.75). After Steve, filed his Motion for Reconsideration Karen improperly filed a declaration indicating that at the time of separation she had $109,000 in those same accounts. (CP at 123). It was only at trial that she couldn't remember the accounts. (RP at 116). At trial she did not deny that the accounts existed at separation she only stated that she didn't know if the 2007 declaration "included at the time of separation the checking and savings which have since been spent." (RP at pg. 113, lines 6-8).

Karen does not deny that the accounts existed at the time of separation nor does she deny that she used the money in the account. (RP at 116). Despite this, the Trial Court valued the accounts at zero. In so doing, the Trial Court abused its discretion by valuing an asset outside the range of the evidence presented. *See In re Marriage of Soriano,* 31 Wn. App. 432, 435, 643 P.2d 450 (1982).

2. ***The Trial Court can value an asset that is in existence at the time of separation even though it has been dissipated prior to trial***

Karen argues that the Trial Court could not assign her the value of the accounts because she had spent the monies prior to trial. (Resp. Br. at 20-21). In support of her argument she cites *In re Marriage of White*, 105 Wn. App. 545, 20 P.3d 481 (2001), which held that the trial court erred in awarding the wife $30,511 that had been her separate property but was used to pay off the mortgage of the family residence four years before the parties' separation. The Court of Appeals reasoned that these funds could not be distributed to the wife because they had been spent on the family residence four years earlier. *Id.*

White is distinguishable because, here, there is uncontroverted evidence that the accounts existed at the time of the parties' separation. (Ex. PE 5.75; RP at 113). It was within the court's discretion to value these assets at the time of separation as opposed to the date of trial for purposes of distribution. *See In re Marriage of Griswold,* 112 Wn. App. 333, 351, 48 P.3d 1018

(2002) (affirming trial court's decision to value the family home at the time of separation).

The only question is how much money was in the account at the time of separation. As Steve argued in his opening brief, any uncertainty as to values of assets or proceeds received from assets should be resolved against the spouse who maintains total control of records, but fails to provide them. *In re Marriage of Thomas*, 63 Wn. App. 658, 664, 821 P.2d 1227 (1991).

Karen had control of the bank accounts containing $147,800, as she stated in her financial declaration. (Exhibit 5.75). She was the one who spent the money in those accounts. (RP at 116). Due to her inability to provide documentation of those accounts, the Trial Court should have valued the accounts in the amount that they contained at the time of separation. *See Thomas*, 63 Wn. App. 658, 664, 821 P.2d 1227.

B. The Trial Court should not have allowed either Karen's Declaration and/or the letter from her attorney as evidence after she rested her case.

As stated in Steve's opening brief, additional evidence accepted post-trial is subject to the same rules of admissibility applicable at trial. *Ghaffari v. Department of Licensing*, 62 Wn.

App. 870, 876, 816 P.2d 66, 70 (1991). Under ER 901, before a document can be admitted as evidence and considered by the trier of fact, it must first be authenticated.

Karen misconstrues Steve's argument by saying that his argument is "solely to the timing of the court's acceptance of this evidence." (Resp. Br. at 25). Steve's argument is simply that the Trial Court is required to follow the same rules of admissibility whether it accepts evidence during or after trial. *Ghaffari*, 62 Wn. App. at 876, 816 P.2d at 70. The Trial Court accepted and considered both Karen's declaration and the letter from her accountant without following the rules for admitting evidence.

In the case of the accountant's letter, the Trial Court accepted it as evidence without requiring that it be authenticated or providing Steve with the opportunity to cross examine Karen's accountant on the contents of the letter. The Trial Court admitted that it was wrong in allowing the letter into evidence, nevertheless it refused to change its decision. (4/14/2011 RP at pg. 17, lines 6-12).

As for Karen's declaration, the same argument applies. The Trial Court should have allowed Steve to at the very least have the

opportunity to cross-examine Karen regarding the discrepancies between her two declarations. The Trial Court admitted that it probably abused its discretion in allowing Karen's declaration as evidence. (4/14/2011 RP at page 9). It stated: "and I'll give you this, the Court may have erred in allowing this information to come in after the trial in an ex parte way." (4/14/2011 RP at pg. 9, lines 5-6). The Trial Court should not have allowed Karen's declaration as evidence or in the alternative should have reopened the case to allow Steve to cross-examine Karen regarding the declaration.

Karen also argues that the Trial Court did not take Karen's declaration into account and therefore admitting the declaration was harmless. (Resp. Br. at 23). However, it is apparent from the Trial Court's statement that it did consider the declaration but did not change its decision. (4/14/2011 RP at pg. 9, lines 1-9).

C. Steve did not waive his argument of post-secondary support.

Karen argues that Steve waived his challenge to the Trial Court's post-secondary support award for two reasons: first, because it was not included in the argument section of his appeal brief; and second that he did not adequately raise the issue at the

Trial Court level. (Resp. Br. at 43-45). However, Steve did not waive his argument on appeal and if he did, the Court may still consider it.

1. The Court may consider Steve's post-secondary education argument even though it was not raised in the argument section of his opening brief.

Although, Steve did not argue post-secondary support in the argument section of his brief, the Court may still consider the argument on appeal. *See First American Title Ins. Co. v. Liberty Capital Starpoint Equity for Fund, LLC*, 161 Wn. App. 474, 254 P.3d 835 (2011).

In *First American*, The Appellants challenged one of the trial court's findings in a one sentence footnote of its opening brief. *Id.* at 496-497. Even though the Court of Appeals recognized that the Appellants had waived the argument on appeal because it was not supported by authority, it still considered the argument. *Id.*

Here, Steve raised the argument of post-secondary support in the conclusion section of his opening brief. (App. Br. at 37). Unlike in *First American*, he dedicated substantially more space than a one line footnote. Further, Steve did cite to RCW 26.19.090 as authority for the argument that the Trial Court should have made

findings pursuant to statute and based the post-secondary education award on the parents' pro-rata income. (App. Br. at 37).

The Court should consider Steve's argument that the Trial Court erred in requiring each parent to pay one-third of William's post-secondary education.

2. Steve did not waive his right to argue post-secondary education awards because he did assert the argument to the Trial Court.

Karen argues that because Steve did not cite a specific case to the Trial Court which supported his argument that the post-secondary support should be awarded based on the parent's pro-rata incomes that he waived his right to assert that argument on appeal. (Resp. Br. at 43-44). Karen's argument is based on a statement by Karen's attorney that he had not received any case or statute in support of Steve's argument. (Resp. Br. at 43; *see also* 4/14 RP at 8).

However, Karen's argument fails to recognize that Steve had made this argument from the beginning of the trial. (*See* 9/07/10 RP at 8 9/07/10 RP at pg. 22 lines 2-8). The Trial Court did in fact

take Steve's argument into account when issuing its decision. (04/14/2011 RP at pg. 9, lines 10-22).

Karen cites *In re Marriage of Studebaker*, 36 Wn. App. 815, 677 P.2d 789 (1984) and *Lindblad v. Boeing* Co., 108 Wn. App. 198, 31 P.3d 1 (2001) in support of her argument. (Resp. Br. at 43-44). However, these cases are distinguishable by the fact that in both cases there was nothing in the record indicating that they had asserted the "new arguments" to the trial court. *Studebaker*, 36 Wn. App. at 818, 677 P.2d 789; *Lindblad*, 108 Wn. App. at 207, 31 P.3d .1. Steve consistently argued that the post-secondary support award should be based on a pro-rata basis throughout the trial and the subsequent Motions for Reconsideration. The Trial Court recognized Steve's argument but decided to assign each parent a one third responsibility for the support.

3. The Trial Court should have apportioned post-secondary support based on the net incomes of the parents.

Postsecondary support must be apportioned according to the net income of the parents. *In re Marriage of Daubert & Johnson*, 124 Wn. App. 483, 505, 99 P.3d 401, 411 (2004) *abrogated by*

McCausland v. McCausland, 159 Wn. 2d 607, 152 P.3d 1013 (2007). Further, the court should consider the adult child's ability to contribute to their own education through work, grants, scholarships, and student loans. *In re Marriage Shellenberger*, 80 Wn. App. 71, 84, 906 P.2d 968 (1995).

Despite the fact that Karen makes $321,000.00 and Steve makes $162,228.00, the Trial Court found that each should pay the same amount of post-secondary education for their son, William. (CP at 210, 211). The Court offered no basis for its ruling. (CP at 210). It simply stated:

> "The parents are now sharing William's college expenses on a 50-50 basis pursuant to a court order dated October 9, 2009. The court orders that William be responsible for one third of his educational expenses, through grants, scholarships, and personal earnings. The parents shall each be responsible for one-third of his expenses."
>
> (CP at 210).

Karen offered no testimony or evidence that she could not pay her proportionate share of the post-secondary support. The Court issued no findings pursuant to RCW 26.19.090. The Trial Court

abused its discretion by ordering Steve to pay the same amount of post-secondary support as Karen when Karen makes twice as much money as Steve. *Daubert & Johnson*, 124 Wn. App. at 505, 99 P.3d 401.

The Trial Court also abused its discretion by ordering William to pay for his own educational expenses without any evidence of his ability to do so. *Shellenberger*, 80 Wn. App. at 84, 906 P.2d 968 There was no testimony that William had any ability to contribute towards his post-secondary education. The testimony was that both Karen and Steve were each paying half of William's educational expenses. (09/07/10 RP at pg. 252, lines 6-8). Despite this the Trial Court allocated a third of the cost of William's education to William. The Trial Court abused its discretion by not making any findings as to William's ability to provide any portion of his own educational expenses. *Shellenberger*, 80 Wn. App. at 84, 906 P.2d 968.

D. The Trial Court should have awarded maintenance to Steve

Karen's argument is essentially that Steve should not be awarded maintenance because he makes over $160,000 a year. (Resp. Br. at 30). However, this argument ignores the fact that in long term marriage the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives. *In re Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572, 576 (2007). In order to put the parties in "roughly equal financial positions, the court must consider among other things, the standard of living during the marriage, the duration of the marriage, the financial obligations of the party seeking maintenance and the ability of the party against whom maintenance is being sought to pay support. RCW 26.09.090.

In *Washburn v. Washburn*, 101 Wn.2d 168, 677 P.2d 152 (1984), the Supreme Court stated:

". . . under the extremely flexible provisions of RCW 26.09.090, a demonstrated capacity of self-support does not automatically preclude an award of maintenance. Indeed, the ability of the spouse seeking maintenance to meet his or her needs independently is only *one* factor to be considered. RCW 26.09.090(1)(a). The duration of the marriage and the standard of living established during the marriage must also be considered, making it clear that maintenance is not just a means of providing bare necessities, but rather a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time. RCW 26.09.090(1)(c), RCW 26.09.090(1)(d).

Washburn, 101 Wn.2d at 178-79, 677 P.2d 152.

Here the Trial Court refused to provide for maintenance even though it recognized the disparity between Steve and Karen's respective incomes and Karen's ability to pay maintenance. (CP at 211). Karen's gross income is $321,000.00 per year as compared to Steve's income of $162,228.00. (CP at 188). There is a substantial difference between Steve and Karen's incomes that leaves Karen in a much better financial position than Steve. The Trial Court made no effort to equalize the disparity by awarding more property to Steve or awarding maintenance. The Trial Court awarded an "equal distribution" of all assets. The result was a net award to Steve of $465,486 and $466,951 to Karen. (CP at 237). However, even in this Karen was awarded more property than Steve once again increasing the post-dissolution economic disparity between them.

This decision was based on what appears to be a wasting of assets argument even though the Trial Court found that there was not any wasting of community assets by Steve. (*See* CP at 210). However, it appears that the Trial Court wanted to punish Steve for economic decisions he made while the parties were married. (CP

at 210). Failure to award maintenance based on fault or marital misconduct is an abuse of discretion. *See* RCW 26.09.090 (noting that an award of maintenance must be made without regard to marital misconduct).

As mentioned in Steve's opening brief, the Trial Court did not consider the fact that Steve supported Karen for a majority of her schooling. Although Karen contends that Steve only supported her for one year of school after they were married, that assertion is incorrect. (Resp. Br. at 32). The parties began living together in 1984 and were married in 1986. (CP at 208). Karen testified that after the parties were married, she attended three years of medical school[1]. (09/07/10 RP at pg. 56). She then had a two year internal medicine residency and two years of a nephrology fellowship which were paid for by loans. (09/07/10 RP at 56). In all, she received at five years of medical education and training during the parties' marriage not just one year as Karen claims. (Resp. Br. at 32). During the entirety of her education, Steve supported her through

[1] Karen also testified that she received her undergraduate degree in 1983 and that she started medical school the next year which would have had her graduating in 1987. (09/07/10 RP at 55). Based on that testimony it is unclear whether the 3 years of medical school she attended after the parties were married included her time in her residency. Regardless, she received more than 1 year of education after the parties were married.

his dental practice. (09/07/10 RP at 59). A spouse's support of another spouse while they are earning a professional degree is a factor that needs to be considered when making a maintenance award. *Washburn*, 101 Wn.2d at 178-79, 677 P.2d 152. The Trial Court abused its discretion by not considering this factor. *Id.*

The Court's decision to not award maintenance to Steve was not just under the circumstances and does not put the parties in "roughly equal financial positions." *See In re Marriage of Rockwell*, 141 Wn. App at 243.

E. Primary Custody of Hannah could not be decided without interviewing her due to the conflicting testimony

The Trial Court is required to consider the relative strength, nature, and stability of the children's relationship with each person. RCW 26.09.187(3)(a)(i). The statute also allows for the court to interview the child in order to help it make a decision regarding the child's relationship to the parents as well as to ascertain the child's wishes with regard to the parenting plan. RCW 26.09.187(3)(a)(vi). In cases where there is conflicting testimony with regard to who has the better relationship with the child, the Trial Court's decision will only be upheld if it is supported by substantial evidence. *See In re*

Marriage of Kovacs, 121 Wn. 2d 795, 810, 854 P.2d 629, 637 (1993).

In this case, the Trial Court adopted the guardian ad litem's recommendations in awarding primary residential placement of Hannah to Karen. (CP at 210). The Trial Court heard testimony from several sources regarding Hannah's relationship with each parent. These included the GAL, Bonnie Oliphant, the children's home school teacher, Steve's sister who had close contact with the children, and Renee Woods who is close friend of Steve's and lives with the children in the family home. (09/07/10 RP at 25, 172, 176, 188, 315). Of all the witnesses, only the GAL testified that Hannah had a better relationship with her Karen than with Steve. The other four witnesses testified that Hannah was a "daddy's girl" and had a more stable relationship with Steve. (09/07/10 RP at pgs 33-34, pg. 182, lines 10-15, pg. 192, lines 20-24). Steve moved for the Trial Court to interview the children, for among other reasons, to help the court clarify conflicting testimony.

Steve felt that this was needed especially with the GAL's opinion appearing to be biased toward Karen. (*See* 09/07/10 RP at

379-381). As Steve pointed out previously, the GAL testified that she had numerous contacts with Karen and her partner Cindy McNider but had very few with Steve, (09/07/10 RP at 380-381). Steve was also concerned by the fact that the GAL never saw the children in Steve's home and only saw Steve interacting with the children on four different occasions. (09/07/10 RP at 379).

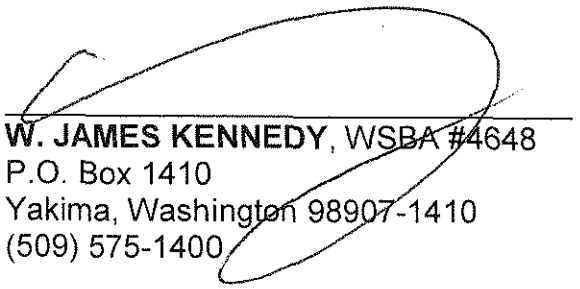
Despite the conflicting testimony and Steve's desire to have the children interviewed, the Trial Court did not interview Hannah. Substantial evidence does not support the Trial Court's unwillingness to interview Hannah. In fact there is substantial evidence to support an interview of Hannah as it would have been the only way for the Trial Court to ascertain the strength of Hannah's relationship with each of her parents amid the conflicting testimony.

II. CONCLUSION

For the above stated reasons, Steve respectfully requests that the Court reverse the Trial Court's award and remand for further proceedings.

Respectfully submitted this 23 of May, 2012.

THORNER, KENNEDY & GANO, P.S.
Attorneys for Appellant



W. JAMES KENNEDY, WSBA #4648
P.O. Box 1410
Yakima, Washington 98907-1410
(509) 575-1400