

**FILED**

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 30662-3-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION NO. III

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LIUBOV A. SCHMIDT,

Appellant,

vs.

KENNETH R. SCHMIDT,

Respondent.

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**RESPONDENT'S BRIEF ON THE MERITS**

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## II. INTRODUCTION

In brief response and correction of the production of facts submitted by the Petitioner, the following is submitted for consideration.

The Respondent is an 80 year old retired engineer who met the Petitioner, a 50 year old music teacher and travel agent on-line in August, 2004. Contrary to the Appellant's statement, the tax returns of record demonstrates that his average monthly income was just slightly over four thousand dollars (\$4,000.00) a month rather than almost seven thousand dollars (\$7,000.00).

Although the Appellant alleged that the Respondent attempted to isolate and control her escalating to physical abuse none of those findings were given any credibility or accepted by the trial court.

The evidence presented at trial and accepted by the trial court was that Mr. Schmidt earned additional funds by a private lending business that was mostly financed through his friend, Ed Anders. The evidence showed that Respondent was given very little time to make decisions regarding these loans and most of them were negotiated and resolved through the internet or over the telephone within a span of two to three days. Once in place the Respondent simply monitored the loans for payment and did very little if anything else to manage them.

The evidence of record showed that the Appellant came in to the relationship with substantial dental problems. The Respondent paid thousands of dollars not only for dental care but also for other medical problems the Appellant had throughout the relationship. Although the Appellant claimed she was limited in her ability to be gainfully employed evidence showed that the year before the dissolution trial she was capable of earning eighteen thousand dollars (\$18,000.00). It should be noted this is a woman with three different degrees so she is certainly resourceful and capable of obtaining and sustaining gainful employment. The trial court awarded the Appellant twenty-five thousand dollars (\$25,000.00) in cash with a fair and equitable consideration of whatever community interest she may have in the assets that were obtained during the four year marriage, as well as two thousand dollars (\$2,000.00) a months for two years of separate maintenance in consideration of the psychological evaluation performed by Dr. Ronald Page who would find that once the dissolution was over many if not all of the Appellant's medical problems would subside.

### III. LEGAL ARGUMENT

Respondent shall address all allegations raised by the Appellant in this Motion; the issues questioned were factual in nature, were discretionary acts of the trial court, or are matters founded in well settled law.

The trial court prepared a very detailed five page letter opinion following a four-day trial. This opinion is contained in the record at CP 84-88. Thereafter, Findings of Fact and Conclusions of Law were filed which accurately reflect the letter opinion prepared by the trial court.

The actions of the trial court were based on facts, well grounded on well settled case law, and were discretionary in nature. Those acts should not be overturned by this Court unless there is a finding that the trial court acted arbitrarily. *State v. Downing*, 151 Wn.2d 265, 272-3 (2004). The court there stated:

“We will not disturb the trial court’s decision unless the appellant or petitioner makes ‘a clear showing . . . (that the trial court’s) discretion (is) manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’”

*State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citing *MacKay v. MacKay*, 55 Wn.2d 344, 347, P.2d 1062 (1959)).

Further considering the trial court’s exercise of discretion, more is required to establish an abuse of that discretion than simply a disagreement with the trial court’s opinion or an honest difference of opinion. *Rehak v. Rehak*, 1 Wn.App. 963, 965, 465 P.2d 687 (1970). As often discussed, in order to conclude that a trial court manifestly abused its discretion, an Appellate Court is required to find that no reasonable person

would have ruled as the trial judge did. *Richards v. Richards*, 5 Wn.App. 609, 613, 489 P.2d 928 (1971).

The Court of Appeals should grant the Respondent's Motion on the Merits and affirm the actions of the trial court.

**(1) That the trial court erred in finding that Mr. Schmidt's lending enterprise was entirely his separate property without considering whether, under *Pollack v. Pollack, supra*, the marital community had an interest in the enterprise as the result of Mr. Schmidt co-mingling his community labor with his separate capital investment.**

Contrary to the Appellant's claim that the trial court failed to consider whether the marital community had an interest in Mr. Schmidt's lending efforts in *Pollack v. Pollack, supra*. The court made a very specific finding in that regard (CP 86, 95). The court noted:

"The court also finds respondent's testimony regarding the amount of time he devoted to his business interest to be minimal or insubstantial. The court also rejects the 'all or nothing' rule of the case of *Pollack v. Pollack*, 7 Wn. App. 394 (1972), when characterizing assets as community or separate property. The court has considered the nature of the contracts herein and the profits therefrom as to whether they are separate, community or mixed."

The trial court has broad discretion in distributing marital property and its decision will be reversed only if there is a manifest abuse of that discretion. *In re Marriage of Rockwell*, 141 Wn.App. 235, 239-41, 170

P.3d 572 (2007). Further, the Appellate Court should not substitute its judgment for the trial court's, weigh the evidence, or judge its credibility. *In re Marriage of Greene*, 97 Wn.App. 708, 714, 986 P.2d 144 (1999). The relevant factors in determining a just and equitable distribution of property are provided in RCW 26.09.080, which factors include, but are 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, and (4) the economic circumstances of each spouse at the time the division of the property is to become affected.

The Appellant alleges that "only Mr. Schmidt's self-serving testimony that he spent very little time managing the account supports a conclusion that the inherent qualities of the lending enterprise contributed to its growth."

However, the trial court specifically found that the testimony of Mr. Ed Anderson regarding the business relationship with the Respondent, how it evolved and worked, and the division of labor was most credible. CP 86. Mr. Anderson testified that when he first contacted the Respondent with a loan proposal until the loan was closed, normally took a total of about two hours of actual time. RP 465. Mr. Anderson further testified that once the loan was closed, the lender (in this case the Respondent, Mr.

Schmidt) would simply manage the accounts by watching the payments come in. RP 465.

It is important to note further that the trial court found that, based on the evidence and testimony, there were only two to four contracts that Respondent generated on his own during the marriage that could be considered community property. The trial court found it credible from the testimony submitted that none of the contracts generated a profit, and actually resulted in a loss, and at best there was no community value (CP 86).

Despite Appellant's allegations that Mr. Schmidt spent a deal of time working on his business matters, Appellant acknowledged in her testimony that she was often doing other things around the house when the Respondent was in his office (RP 399), and she further acknowledged that for at least an hour each day she went to the gym to work out (RP 400). So her familiarity with what the Respondent did while in his office was based primarily on conjecture.

The Appellant claims that the trial court failed to properly apply existing law to the dispute at hand per *Pollack v. Pollack, supra*. However, the trial court specifically weighed all of the evidence, considered the legal basis of *Pollack v. Pollack, supra*, and rejected it. (CP 86 and CP 95).

The key element to this portion of the Appellant's argument is whether Respondent, Mr. Schmidt, actively managed his contracts he entered into before marriage, as well as the hand full of contracts that he executed afterwards. In *Pollack v. Pollack, supra*, and *Marriage of Lindemann*, 92 Wn.App. 64, 72, 960 P.2d 966 (1998), two primary cases cited by the Appellant to support her position that the separate property of the owner-spouse had been co-mingled and became community property is drastically different than the instant case because, in both of those situations (*Pollack* and *Lindemann*) the owner-spouse continued to work actively in the business. However, in the instant case, the trial court, after having heard the testimony of all of the parties, specifically found that the Respondent's testimony about the amount of time he devoted to his business was minimal or insubstantial (CP 91). As previously mentioned, it is not the role of the Appellate Court to substitute its judgment for the trial court's, weigh evidence, or judge witness credibility, *In re Marriage of Greene, supra*.

**(2) and (3) That the trial court abused its discretion in dividing the parties' property in a manner that resulted in gross disparity between them, and in awarding maintenance in a manner that failed to adequately weigh the needs of the parties with Mr. Schmidt's ability to pay.**

As noted by the Appellant in her Brief, the trial court is obligated to consider all of the factors in RCW 26.09.080 in making a fair and equitable division of property. The Appellant alleges that the trial court's property division left the parties with a grossly disparate award of assets and income.

However, the trial court did factor in that from the date of trial the Respondent had paid for financial obligations or maintenance of the Appellant in excess of \$55,000 (CP 84).

The relevant factors under RCW 26.09.080 are as follows:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage;
- (4) The economic circumstances of each spouse at the time of the division of the property is to become effective.

The trial court heard substantial testimony from various parties and considered all of the exhibits. The court made a determination as to what assets were deemed to be community and separate property (CP 90). The Appellant received a majority of the furnishings and furniture in the residence (CP 84). The court also considered the length of the parties' marriage, which was four and one-half years (CP 93). The Appellant alleges that she possesses limited skills with which to support herself, which is clearly contrary to the evidence. For example, the Appellant herself testified that she has three different degrees, two in music and one in health

education (RP 381 and 382). The Appellant further taught music lessons, and even up to the time of trial, had an active website that was advertising private tutoring (RP 383). The court also considered the fact that the year prior to the trial (2011), the Appellant had shown on her tax return that she had been able to generate over \$18,000 in income (CP 92).

The Appellant goes on to allege that the maintenance awarded by the court did nothing to provide with Mrs. Schmidt with job training or further education to increase her ability to earn more income. However, the court specifically addressed all of the factors in determining maintenance under RCW 26.09.090 (CP 92). The court made a very specific finding (CP 93) that the Appellant had employment skills and experience such that additional schooling or training was not necessary.

In reviewing the allocation of assets and liabilities and making a maintenance award, the trial court's decision following a bench trial is reviewed to determine whether the findings are supported by substantial evidence and whether those findings support the conclusions of law. *Dorsey v. King County*, 51 Wn.App. 664, 668-669, 754 P.2d 1255 (1988). Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). In determining the sufficiency of evidence the Appellate Court need only

consider evidence favorable to the prevailing party. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963).

In addressing the Appellant's arguments, valuation of the persuasiveness of the evidence and the credibility of witnesses, the Appellate Court defers to the trier of fact. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994). Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

The trial court considered substantial evidence at the time of trial regarding a determination of credibility of the Appellant. For example, the trial court found that allegations that the Appellant suffered emotional domestic violence were not credible (CP 92). Further, a psychological evaluation completed by Dr. Ronald Page (CP 110) was found by the trial court to be credible (CP 92). Dr. Page specifically noted that:

“. . . Ms. Schmidt has demonstrated herself to be creative, persuasively skilled, organizationally creative, musically competitive, and self-developmental to the point of naturalizing in this country, earning her real estate certification, and completing other college course work. Her interpersonal presentation is that of relative sophistication and optimization of her appearance through dress and grooming.”

Further, although Dr. Page did not find the Appellant to actually be a malingerer, he did find that she was expressing herself in somatization and autonomic symptomatology (CP 120). A key element of Dr. Page's

findings was that the Appellant is “. . . very likely to rebound in short order to levels of greater comfort and productivity, once she is situationally beyond the process of contested divorce.” (CP 120). Dr. Page also determined, that based on his observation of the Appellant, he could “. . . see no reason to believe that she could not return to her pre-morbid level of functioning, which included gainful employment and creative outlets for her musical attributes.” (CP 121).

The Appellant claims that the trial court failed to consider the factors that govern an appropriate maintenance award. However, the trial court specifically went through each and every one of the factors outlined in RCW 26.09.090 (CP 92). Overall, an award of maintenance is within the broad discretion of the trial court. *In re Marriage of Matthews*, 70 Wn.App. 116, 123, 853 P.2d 462 (1993). Abuse of discretion can be found only if said award or denial of maintenance is on untenable grounds or for untenable reasons. *In re Marriage of Wright*, 78 Wn.App. 230, 237-38, 896 P.2d 735 (1995). Here the trial court awarded the Appellant \$25,000 as a cash award for her portion of the community property, plus ordered the Respondent to pay maintenance to the Appellant in the sum of \$2,000 a month for twenty-four (24) months (CP 88).

The Appellant further makes allegations regarding failure by the trial court without any substantiating authority. For example, the Appel-

lant claims that no value was attributable to the Appellant's domestic work she provided to the Respondent. There is no legal authority tendered to substantiate that domestic services are afforded any consideration as it relates to property distribution or maintenance award. The Appellant goes on to allege that the trial court failed to consider her circumstances as an immigrant with limited employment opportunities. To the contrary, the trial court made a very specific finding (CP 92) regarding the Appellant's health, but that she was capable of generating a moderate annual income, and that the report of Dr. Ronald Page was credible in regard to the Appellant's situation (CP 92).

#### IV. REQUEST FOR ATTORNEY FEES

Pursuant to RAP 18.1(b) the Respondent herein requests an award of attorney fees pursuant to RAP 18.1. More specifically, the trial court, after having heard four days of testimony, opined that “. . . this case should have been resolved through mediation and, not only did the Petitioner incur substantial attorney fees, but also had three attorneys through these proceedings. The court (finds) that this case and resulting trial were unnecessarily protracted as a result of Petitioner's actions, claims and largely irrelevant, unsupported allegations.”

This proceeding took far longer than it should have and, to a great extent, the court determined this was a specific result of exaggerated posi-

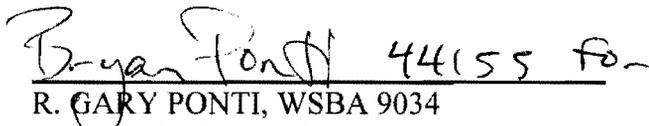
tions of the Appellant (CP 94). Consequently, on appeal Respondent, Mr. Schmidt, is requesting that the Court award him reasonable attorney fees, estimated at \$3,000, for the necessity of responding to and addressing this appeal.

V. CONCLUSION

The determination of the trial court should be upheld, and the Respondent's Motion on the Merits granted and this appeal should be dismissed.

The trial court judge reviewed all of the same case law submitted by the Appellant at the time of trial; considered his personal observations of the testimony of the parties, and the voluminous exhibits submitted for consideration. The trial court then issued a letter opinion, which was followed by Findings and Conclusions. The Appellant has not met her substantial burden to show that the trial court failed to consider the applicable law or that the trial court abused its discretion in making a property and maintenance award and, as a result, this appeal should be dismissed.

Respectfully submitted this 6th day of September, 2012.

  
R. GARY PONTI, WSBA 9034  
Attorney for Respondent

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on the 6<sup>th</sup> day of September, 2012, I mailed by regular mail, with postage thereon prepaid, a copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS to:

Andrea Burkhart  
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Signed at Walla Walla, Washington this 6<sup>th</sup> day of September, 2012.

  
\_\_\_\_\_  
Stacey U. Berg