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APR 10 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 320227

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

Yakima Co. Superior Court No. 09-3-00322-2

ZALE WOOD, Appellant.

v.

DIANE WOOD, Respondent

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii-iii
I. Introduction	1
II. Summary of August 9, 2013 Hearing	3
III. Appellant’s Arguments Are Devoid of Merit	7
IV. It Was Not An Abuse of Discretion for the Court to Leave These Parties to a 49-Year Marriage in Roughly Equal Financial Condition.....	9
V. The Court Did Not Abuse Its Discretion in Denying a Continuance	13
VI. Attorney Fees on Appeal	17

TABLE OF AUTHORITIES

Table of Cases

<u>Washington Cases</u>	<u>Page</u>
In re Marriage of Rockwell, 141 Wn.App. 235, 242-3, 170 P.3d 572 (2007).....	2, 12
In re Marriage of Mansour, 126 Wn.App 1, 16, 106 P.3d 768 (2004).....	11
City of Tacoma v. Fiberchem, Inc., 44 Wn.App 538, 541, 722 P.2d 1357.....	11
In re Marriage of Crosetto, 82 Wn.App 545.556, 918 P.2d 954 (1996).....	12
In re Marriage of Tower, 55 Wn.App 697,700, 780 P.2d 863 (1989), review denied,114 Wn.2d 1002 (1990).....	12
In re Marriage of Buchanan, 150 Wn.App 730, 735, 207 P.3d 478 (2009)	12
In re Marriage of Williams, 84 Wn.App 263, 267, 927 P.2d 679 (1996), review denied 131 Wn.2d 1025 (1997).....	12-13
In re Marriage of Landry, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985).....	13
In re Marriage of Muhammad, 153 Wn.2d 795, 803, 108 P.3d 779 (2005).....	13
In re Marriage of Konzen, 103 Wn.2d 470, 478, 693 P.2d 97, review denied, 473 U.S. 906 (1985)	13
State v. Herzog 69 Wn.App 521, 524, 849 P.2d 1235, review denied, 122 Wn.2d 1021 (1993).....	16

Statutes

	<u>Page</u>
RCW 51.32.060	7, 11
RCW 26.09.080	9-10, 12
RCW 26.16.140	10, 17
RCW 26.09.090	11, 12

Court Rules

	<u>Page</u>
Civil Rule 11	17

Publications

	<u>Page</u>
Washington Family Law Deskbook, § 32.3(3), at 17(2d. Ed. 2000)..2	

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ZALE WOOD,)	
Appellant,)	Appeal No. 320227-III
)	
DIANE WOOD,)	SUPPLEMENTAL
Respondent.))	BRIEF OF
)	RESPONDENT

COMES NOW the Respondent, Diane Wood, by and through her attorney, Blaine T. Connaughton, of Connaughton Law Office, and responds as follows:

I. INTRODUCTION

In Brief of Appellant at Page 1, the Appellant claims:

“The gravamen of Mr. Wood’s appeal is twofold: (1) Mr. Wood’s dissolution matter was not decided by the judge as required under the Washington Constitution, Article 4, § 20 and RCW 2.08.240, and (2) the trial court erroneously applied RCW 26.09.080 and .090 and, resulting in an unfair distribution of the marital estate and an unfair spousal maintenance amount.”

The first assertion was premised on counsel's misunderstanding of the complete trial court proceedings and lack of awareness that there was a hearing on August 9, 2013, wherein the court further explained its decision and instructed counsel to comply with this decision through updated income information.

The second component of Appellant's "gravamen" argument is premised on the trial court dividing all income of the parties to this 49-year marriage. The court put the parties in roughly equal financial positions, as the facts and the law clearly mandate in a 49-year marriage:

"In a long-term marriage of 25 years or more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives." *Washington Family Law Deskbook*, § 32.3(3), at 17 (2d. Ed. 2000), Marriage of Rockwell, 141 Wn.App. 235, 243, 170 P.3d 572 (2007).

The Appellant fails to provide any legal authority that would support an abuse of discretion by the trial judge in leaving the parties to this 49-year marriage in essentially identical financial positions for the rest of their lives.

II. SUMMARY OF AUGUST 9, 2013 HEARING¹

One issue that was raised post-trial was a claim by Mr. Wood that Ms. Wood might be able to receive a higher amount of Social Security due to the dissolution of the marriage. At some point, Ms. Wood agreed to investigate that, and she went to the Social Security Administration to see if there would be additional funds available to her after dissolution. This was referenced at the August 9, 2013 hearing, at Page 3, Lines 19-20. The court ultimately agreed that there was no evidence to support the claim by Mr. Wood that Ms. Wood would receive additional funds after the divorce. However, the court left that issue open and instructed Mr. Wood's attorney to investigate it and return to court if his investigation revealed something to the contrary (*Page 5*). The response of Mr. Wood's attorney was, "fair enough" (*Page 5*). Mr. Velikanje, who was Mr. Wood's attorney, never returned to the court with contrary evidence,

nor have we ever received any evidence that Ms. Wood would receive increased Social Security benefits after the divorce. Additionally, the court indicated if there was an increase in benefits based upon her ex-husband's Social Security, then that would be a cause for adjustment of the maintenance *(Page 6, Lines 5-7)*.

At this hearing, the judge referenced that he was sure that he had decided everything, but hadn't fully determined the exact maintenance transfer because he didn't have full disclosure with regard to the relative incomes of the parties *(Page 7)*. As to division of any personal property items, the court indicated he thought he had divided all these. However, he agreed that if there was disagreement on that, then "somebody needs to get a transcript" *(Page 8)*:

"THE COURT: Then we need to continue this hearing and you need to get a transcript and you need to figure out what I said, at what it was I said *[sic]*. I don't know what else I can do.

MR. VELIKANJE: I think we know what you said. All I'm asking is those be added,

¹ Unless otherwise cited, all page cites are to the August 9, 2013 transcript

acknowledged in their notes that those were awarded to him but they're not in the decree.

THE COURT: Okay. Any problem with that, Mr. Connaughton?

MR. CONNAUGHTON: No.”

At the August 8, 2013 hearing, the issue was again raised about income from Mr. Wood's L&I benefits being considered with regard to maintenance. At the hearing, Mr. Wood's attorney indicated he understood the court's decision that it was not specifically dividing L&I benefits, but rather total income:

“MR. VELIKANJE: I understand the argument that this is going to be paid as maintenance. It's not an actual division of his L&I benefits, so we put it in the bank and then it becomes his money and it gets divided.

THE COURT: Yeah. I don't care where the money comes from.

...

THE COURT: . . . I don't know that the money that he's required to pay her necessarily comes from L&I.

MR. VELIKANJE: Right. . . .”

Page 9, Lines 7-13.

Mr. Wood's attorney went on to explain to the court that he was having difficulty getting his client to understand the court's decision:

“And I've tried to explain is that in the domestic law, it's not the L&I we're benefit or dividing, it's the depositing into your account that's being dividing.” *[sic]*

Page 10, Lines 8-10.

It was further represented that there was going to be some change in Mr. Wood's income due to attorney fees being taken out of his pension benefits (Page 10). The court agreed that if, in fact, this occurred, then the transfer payment would need to be adjusted due to Mr. Wood's reduction in income (*Page 11*).

The court repeatedly instructed counsel that its decision was to figure out total income of the parties, from whatever source, and to order a maintenance figure that left them with essentially equal income:

“THE COURT: Well I need to have the two of you sit down and walk through these numbers. Again, my intent was you figure out what the total income of the two people together, you divide it in half and then you subtract her income from that.

That leaves you how much he owes her a month.
It's not complicated.”

Page 19, Lines 1-4.

As was repeatedly pointed out, this was simple arithmetic. The court indicated that it did not think that it needed to “do the math” since it properly assumed the attorneys were competent in simple arithmetic.

III. APPELLANT’S ARGUMENTS ARE DEVOID OF MERIT

In his argument in Appellant’s Supplemental Brief, the Appellant claims at Page 2 that Mr. Wood was now receiving \$480 less in L&I benefits and that his benefits were converted to “some kind of temporary pension” and that the court didn’t reconsider whether these new facts impacted Mr. Wood’s current economic condition, his age, his poor health, his ability to meet his financial needs, etc.

As an initial matter, there is no such thing as a “temporary pension.” The representation was that Mr. Wood had been pensioned out with the Department of Labor & Industries. As a result, his time loss benefits were now

pension benefits, which he would received for the remainder of his life as replacement of his income. *(See RCW 51.32.060)* However, due to this change in status, his attorney was collecting a fee off this amount. Again, the court specifically instructed if there was any change to Mr. Wood's income, then the transfer payment should be adjusted accordingly. This was done. It was also incorporated into the Decree.

At no time during the proceedings on August 9, 2013 did Mr. Wood or his attorney claim that payment of attorney fees on his L&I pension impacted his "current economic condition, his age, his poor health, his ability to meet his financial needs, etc." In fact, as was disclosed at trial, Mr. Wood lived with his girlfriend, with whom he shared expenses. His girlfriend owned a home that they lived at. *RP 04/09/13, Page 91.*

In her argument at Page 3, counsel goes on to misstate that counsel for Ms. Wood admitted he did not know what type of benefit Mr. Wood was receiving and that even Mr. Wood's attorney was uncertain. In fact, Mr. Wood disclosed

at the hearing that he had received his first pension check and that “they stopped the L&I last month” (*Page 26*). What was disclosed was that Mr. Wood’s attorney had not bothered to provide documentation that Mr. Wood’s claim had been closed and he had been awarded a pension. As was pointed out at the hearing, if someone is on a pension, “there is an order generated that you’re pensioned out, so it would be easily available. If he doesn’t have copies, his attorney certainly would” (*Page 26*). Right after that, Mr. Wood admitted that he was, in fact, on a pension.

IV. IT WAS NOT AN ABUSE OF DISCRETION FOR THE COURT TO LEAVE THESE PARTIES TO A 49-YEAR MARRIAGE IN ROUGHLY EQUAL FINANCIAL CONDITION.

Counsel for Mr. Wood next claims that the court’s decision to leave the parties in similar financial situations as to income was a “legal error” as the court refused to address the statutory factors in RCW 26.09.080. It is unclear what analysis the court missed. This was a 49-year marriage with parties who were in their 70s, both of whom had health issues.

RCW 26.09.080 provides, in pertinent part:

“The court shall, without regard to misconduct, make such disposition of the property and liabilities of the parties, either community or separate, as shall appear just and equitable after considering all the relevant factors including, but 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 or domestic partnership; and
- (4) the economic circumstances of each spouse or domestic partner at the time of the division of property is to become effective. . .”

In the instant case, the court clearly considered the nature and extent of the community property, of which there was little other than about \$8,000 of home equity proceeds, pension benefits, and personal property. The court also considered the nature and extent of any separate property. The only claimed separate property was the income that Mr. Wood received from his Labor & Industries pension, which the court properly characterized as income to him. It should be reiterated that all income earned post-separation is considered

separate property. (RCW 26.16.140). Under Appellant's theory, the court would presumably never be able to award maintenance, as post-separation earnings are separate property.

“Nothing in RCW 26.09.090 requires the trial court to make specific factual findings on the given factors.” *In Re Marriage of Mansour*, 126 Wn.App. 1, 16, 106 P.3d 768 (2004) (finding no basis for reversal of the maintenance award when the trial court failed to list the influence of each factor in its findings). Generally, “a trial court is not obligated to make findings of fact on every contention of the parties. Rather, it is required to find only the material facts of the case, that is, findings sufficient to inform us, on material issues, what questions the trial court decided and the manner in which it did so.” *City of Tacoma v. Fiberchem, Inc.*, 44 Wn.App 538, 541, 722 P.2d 1357. In the present case, the court made it clear that this was a 49-year marriage and it was attempting to leave both parties in similar financial conditions for the remainder of the lives, as case law clearly mandated.

Pension benefits are replacement for earnings. (*See RCW 51.32.060*). The court certainly considered that this was a 49-year marriage, and that neither party would be working in the future. The court followed the defining case law, as well as RCW 26.09.080 and RCW 26.09.090, in leaving these people who shared 49 years together in essentially the same financial condition post-dissolution.

The trial court has broad discretion to determine what is just and equitable. *In re Marriage of Rockwell*, 141 Wn.App. 235, 242, 170 P.3d 572 (2007). A just and equitable distribution requires fairness over mathematical precision. *In re Marriage of Crosetto*, 82 Wn.App. 545, 556, 918 P.2d 954 (1996). ‘Fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules.’ *In re Marriage of Tower*, 55 Wn.App. 697, 700, 780 P.2d 863 (1989), *review denied*, 114 Wn.2d 1002 (1990).

A trial court’s decision in a dissolution will rarely be changed on appeal. *In re Marriage of Buchanan*, 150

Wn.App. 730, 735, 207 P.3d 478 (2009) (quoting *In re Marriage of Williams*, 84 Wn.App. 263, 267, 927 P.2d 679 (1996), *review denied*, 131 Wn.2d 1025 (1997)). “Appellate courts should not encourage appeals by tinkering with [dissolution decisions]” because the interests of the parties are best served by the finality of the trial court’s decision. *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). Accordingly, a trial court’s property distribution in a dissolution will be reversed “only if there is a manifest abuse of discretion.” *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005). A spouse challenging a trial court’s decision in a dissolution bears “the heavy burden of showing a manifest abuse of discretion on the part of the trial court.” *Landry*, 103 Wn.2d at 809 (citing *In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97, *review denied*, 473 U.S. 906 (1985)). “The trial court’s decision will be affirmed unless no reasonable judge would have reached the same conclusion.” *Landry*, 103 Wn.2d at 809-10. In the present case, there was no abuse of discretion by the trial court.

V. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING A CONTINUANCE

In her Supplemental Brief, counsel, at Page 5, again claims that somehow the court abused its discretion in not granting a continuance on September 18, 2013 when Mr. Wood showed up in court and requested one. What counsel fails to point out is that she filed a motion for reconsideration, where she basically made the same claims that she currently makes.

At the hearing on October 8, 2013, counsel indicated she had just received the transcript of the trial and needed additional time to properly prepare her motion for reconsideration. Interestingly, the court agreed to give her additional time to brief the issues:

“THE COURT: I’m going to give you your two weeks – well, it might have to be actually – that would give us, that would run us to the first which is a day that I am not available. So, it would have to be noted for some day other than the first. However, if he’s not able to show that in fact there were some issues that either weren’t resolved because I just didn’t rule on them or something like that, I will be granting an award of attorney’s

fees against him, so he needs to make sure he's right about this."

Verbatim Transcript of October 18, 2013, at Page 8.

Mr. Wood and his counsel never followed through with this offer from the court to show what issues he claimed were unresolved or weren't ruled on. Mr. Wood had the opportunity to raise this issue but abandoned it. There has been no abuse of discretion by the trial court. Importantly, there were two additional hearings after the September 18, 2103 hearing. One was on November 4, 2013. This was brought by Ms. Wood and was a contempt motion for Mr. Wood's failure to comply with the Decree of Dissolution. There was another hearing on November 22, 2013. Again, this hearing was brought by Ms. Wood for clarification of the Decree of Dissolution. At neither of these hearings did Mr. Wood's attorney pursue his motion for reconsideration or follow up on the offer made by the court at the September 18, 2013 hearing to raise any issues with regard to matters that he thought had not been decided by the court and which the court needed to consider.

The denial of a continuance is reversible error upon a showing of both an abuse of discretion and resulting prejudice. *State v. Herzog*, 69 Wn.App, 521, 524, 849 P.2d 1235, *review denied*, 122 Wn.2d 1021 (1993). Mr. Wood seems to argue that, had the trial court granted his continuance, his counsel would have been able to raise the same issue he now raises on appeal. Mr. Wood was given this opportunity when his new attorney filed a motion for reconsideration. However, Mr. Wood and his attorney then abandoned this opportunity that was offered by the court. This failure on Appellant's part eliminates his current argument.

In his Supplemental Brief, Mr. Wood again claims the court committed legal error and violated Mr. Wood's constitutional rights by failing to resolve the parties' dispute. Again, the record from the hearing on August 9, 2013 obviates this argument. Additionally, Mr. Wood had an opportunity granted to him at the October 18, 2013 hearing to point out to the court what had not been resolved or what the

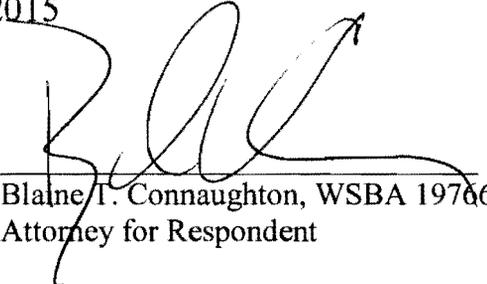
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court failed to rule on. Mr. Wood chose to not take advantage of the opportunity he requested and which the court granted.

VI. ATTORNEY FEES ON APPEAL

Respondent again requests an award of attorney fees and costs pursuant to RCW 26.09.140, based upon intransigence and now based upon CR 11, as the latest filing was not well-grounded in fact, is not warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law. Further, most if not all of Appellant's arguments are effectively eliminated with production of the August 9, 2013 Verbatim Transcript of Proceedings.

DATED: April 8, 2015



Blaine T. Connaughton, WSBA 19766
Attorney for Respondent