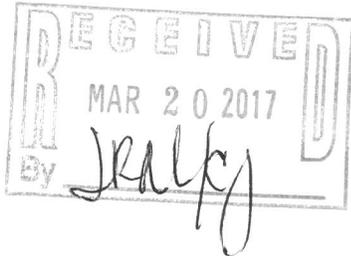


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COURT OF APPEALS
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STATE OF WASHINGTON
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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III
344185-III



JULIE ANN CLARK

Petitioner

AND

DARRYL G. CLARK

Appellant

RESPONSIVE BRIEF OF PETITIONER

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I. STATEMENT OF THE CASE

The termination of Mr. Clark's employment as office manager, by Dr. Clark, was the direct result of Mr. Clark's engaging in a romantic affair with a fellow employee, another veterinarian in the office. Dr. Clark consulted with an employment law attorney about potential liability as a consequence of this workplace relationship, and terminated both Mr. Clark and the other veterinarian (**RP 716, line 25; RP 717 lines 1-12**).

Mr. Clark testified that he could most likely obtain reemployment as an office manager (**RP 607, lines 5-10**).

During separation, he submitted one application for an office manager's position (**RP 611, lines 7-10**).

II. STANDARDS OF REVIEW

A party who challenges a decision in a dissolution proceeding must demonstrate that the trial court manifestly abused its discretion. In re Marriage of Griffin, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). "A manifest abuse of discretion is a decision manifestly unreasonable or exercised on untenable grounds or for untenable reasons." In re Marriage of Thomas, 63 Wn.App. 658, 660, 821 P.2d 1227 (1991) (quoting In re

Marriage of Tower, 55 Wn.App. 697, 700, 780 P.2d 863 (1989) review denied. 114 Wn.2d 1002 (1990)).

As long as the Findings of Fact are supported by substantial evidence, they will not be disturbed on appeal. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

Where the trial court has weighed the evidence, the reviewing court's role is to simply determine whether substantial evidence supports the Findings of Fact and, if so, whether the Findings in turn support the trial court's Conclusions of Law. In re Marriage of Greene, 97 Wn.App. 708, 986 P.2d 144 (1999).

III. ARGUMENT

The trial court's calculation of child support is correct

The trial court carefully enunciated the court's findings regarding Mr. Clark's child support obligation. (**RP 740, lines 20-25; RP 741, lines 1-25; RP 742, lines 1-22**).

The trial court found that Mr. Clark's average monthly income for 2012 and 2013 was \$7,035 per month from the veterinary clinic alone. (**RP 741, lines 19-22**). Dr. Clark's evidence through Mr. Todd Carlson, her valuation expert, was that Mr. Clark could earn, as an office manager

in a veterinary clinic, between \$48,000 to \$60,000 per year. (**RP 741, lines 23-25; RP 742 lines 1-8**).

The court's imputation of income to Mr. Clark in the amount of \$50,000 per year, with the imputation to increase to \$60,000 per year if Mr. Clark had not found full time employment within six months, was well within the evidence. (**RP 742, lines 1-10**).

The court relied on both Mr. Clark's past earnings as well as the testimony of Mr. Carlson. Mr. Clark does not allege error in the decision to impute income and he acknowledges that the trial court considered his work history, education, health, age, and relevant factors. (**Appellant's Brief, pg. 22**).

RCW 26.19.070 (6) (a-e), per its terms, is to be utilized in the absence of records of a parent's actual earnings. Here, we have a record of Mr. Clark's actual earnings, as well as evidence of an income range available to Mr. Clark should he accept a job which replicated his previous employment.

The trial court's reference to RCW 26.19.071 (6) placed in the context of the entirety of his comments on the topic of child support, clearly indicates that the trial court's application of RCW 26.19.071 (6),

was appropriate application, based on the established facts that Mr. Clark was voluntarily unemployed, established facts of historical earnings, as well as the testimony of Mr. Carlson relative to prospects for prospective employment. At DewBerry v. George, 115 Wn.App.351, 62 P.3d 525 (2003), the fact picture was very similar. In DewBerry, the father was imputed to have income of \$48,000 per year for the purposes of child support. The DewBerry court found that the father was a healthy, 47 year old college graduate and, prior to losing his job, he was earning \$55,000 per year. The trial court found that the father was voluntarily underemployed and imputed income at a level of \$48,000 per year for the purposes of child support. In DewBerry, the court affirmed the trial court's imputation of the father's income at the level that he was earning prior to being discharged.

Thus, the determination by both experts that Mr. Clark had been overpaid in the clinic was moot, in that the trial judge in this matter imputed income to Mr. Clark in an amount less than Mr. Clark had been earning in the past as office manager. The trial court considered Mr. Clark's previous income as manager of the clinic, but ultimately used a lower number.

An award of child support is reviewed for an abuse of discretion. In re Marriage of Curran, 26 Wn.App. 108, 110, 611 P.2d 1350 (1980). Under RCW 26.19.071 (6), the trial court must impute income to a parent who is voluntarily underemployed. The court first determines whether or not a parent is voluntarily underemployed based upon the parent's work history, education, health, age and other relevant factors. In re Marriage of Peterson, 80 Wn.App. 148, 153, 906 P.2d 1009 (1995).

The trial court appropriately applied the statutory criteria, and the court's Findings of Fact are supported by substantial evidence.

**The trial court's determination of post-secondary
educational support is correct**

Mr. Clark concedes that the trial court had the authority to order post-secondary educational support for the parties' son, Carson, pursuant to RCW 26.19.090 (Appellant's Brief at page 24).

Mr. Clark argues that Dr. Clark is left with no obligation to contribute toward Carson's post-secondary educational support. Mr. Clark also argues that his proportionate share to be paid on Carson's post-secondary educational support should be consistent with the

determination of his proportionate share of the combined net incomes of the parties.

The assignment of the cost of Carson's college education at 32% to Mr. Clark and 33% to Carson, certainly, by implication, results in the remaining 35% being assigned to Dr. Clark. A fair reading of the order should result in that analysis.

However, it is correct to state that Mr. Clark's monthly net income represented 25.8% of the combined monthly net incomes of the parties and, under In re Marriage of Daubert, 125 Wn.App. 483, 99 P.3d 401 (2004), his contribution should be limited to that proportion.

**The trial court's order denying Mr. Clark's
request for spousal maintenance is correct**

The trial court has broad discretion in determining whether maintenance is appropriate and, if so, how much to award. In re Marriage of Crosetto 82 Wn.App. 545, 918 P.2d 954 (1996).

The only statutory limitation of amount and duration is that, in light of the relevant factors, the award must be just. In re Marriage of Foley, 84 Wn.App. 839, 930 P.2d 929 (1997).

The trial judge made a specific finding on each and every maintenance factor set forth in RCW 26.09.090. (RP 734, lines 20-25; RP 735, lines 1-25; RP 736, lines 1-25; RP 737, lines 1-25; RP 738, lines 1-12).

The court also found that Mr. Clark had received \$4,000 per month in spousal maintenance since September of 2014 and that, as of January 8, 2016, he had been paid \$62,000 (RP 734, line 12).

The trial court found that, given Mr. Clark's background and experience as a manager of a veterinary practice, he could make between \$48,000 and \$60,000 per year. (RP 735, lines 1-12).

The court also found that the Mr. Clark had chosen not to work since separation and that he "simply needs to decide what direction he will take." (RP 736, lines 7-8). The trial court also found that Mr. Clark was capable, through employment, to replicate the community standard of living. (RP 736, lines 19-23).

Mr. Clark cites In re Marriage of Stenshoel, 72 Wn.App. 800, 866 P.2 635 (1993), for the proposition that the trial court erred in considering his property equalization payment order in evaluating any spousal maintenance award. Stenshoel, in fact, is limited to a determination as to

whether or not a property equalization payment is appropriately considered in a child support calculation. The court's consideration of the equalization payment to be made by Dr. Clark to Mr. Clark is certainly a valid consideration in considering maintenance and the economic circumstances in which Mr. Clark was left. In re Marriage of Washburn, 101 Wn.2d 168, 181, 677 P.2d 152 (1984).

The trial court did not consider fault

The sole purpose of Dr. Clark's evidence that Mr. Clark was involved in an intimate relationship with another veterinarian in the professional practice was explained by Dr. Clark's counsel at the outset of trial (**RP 56, lines 24-45; RP 57, lines 1-13**).

The trial judge clearly enunciated that he would consider the evidence solely for the purpose of resolving issues where the existence of the relationship might be relevant, without consideration of fault. (**RP 58, lines 6-13**).

In the trial court's decision, the court does include references to the extramarital affair, but only in the context of determinations, which excluded any consideration of fault (**RP 716, line 25; RP 717, lines 1-10**).

Dr. Clark was concerned about potential employment law liability that might result from the relationship between her husband, who was the practice manager, and an employee in the practice. She was allowed to testify that she consulted a lawyer and, upon the advice of her attorney, terminated the veterinarian with whom Mr. Clark was having an affair (**RP 717, lines 6-10**).

In order to support her request for indemnification, the testimony was allowed in.

As a result of this firing of Dr. Gese, Dr. Clark assumed increased responsibilities and workload. (**RP 717, lines 22-25; RP 718, lines 1-4**).

Judge Clary ordered that Mr. Clark indemnify Dr. Clark from any potential liability regarding a contingent civil suit by Dr. Gese. (**RP 731, lines 11-25**). The basis of this relief was pursuant to the establishment of the relationship between Mr. Clark and Dr. Gese, which may have exposed Dr. Clark and the practice to a claim for damages.

Each example cited by Mr. Clark in his Brief was, in fact, evidence offered to establish “negatively productive conduct.” In re: Marriage of Clark, 13 Wn .App. 805, 538 P.2d 145 (1975).

The fact that Mr. Clark may have had defenses to these claims or viewed these claims as de minimis does not preclude the introduction of evidence establishing the relationship.

In order to explain the request for indemnification and to explain the request for reimbursement of certain funds paid to Dr. Gese, Dr. Clark was required to make known the fact of their relationship in support of her position that these payments were gratuitous and that indemnification was necessary.

The relationship, thus, was not introduced into evidence to establish fault, but to seek to establish that Mr. Clark's conduct had damaged, and had the potential to further damage Dr. Clark and that she was, therefore, entitled to redress.

Clearly, the trial judge's comments on the record indicate that the evidence was allowed in only to allow Dr. Clark to pursue her theory of the case. (RP 619, lines 6-11; RP 633, lines 4-8).

**The trial court's exclusion of a putative offer
to purchase is appropriate**

On Friday preceding the commencement of trial on Monday, counsel for Dr. Clark was provided through Mr. Clark's counsel, "a letter

that purports to be a proposed offer to purchase this practice.” (RP 264, lines 17-18). The putative offer was identified on the record as having been made by a veterinarian who employed a Dr. Gese, a veterinarian who was intimately involved with Mr. Clark. (RP 264, lines 14, 18-21).

At the time the offer was delivered to Dr. Clark’s counsel, this proceeding had been pending for a year, valuations of the business had been generated by both parties’ experts, depositions of the experts had been completed, written discovery had been exchanged, and Mr. Clark had already been granted one trial continuance. (RP 268, lines 18-25).

Mr. Clark acknowledges that the proffered evidence was not timely and in violation of the court’s Scheduling Order. (Appellant’s Brief, page 39). Neither the putative offer, nor any witness who could authenticate the offer, had been provided in a timely manner.

Counsel for Mr. Clark explained, “we can’t control when the offer comes in.” (RP 265, line 16). No explanation was given as to why this offer could not have been secured and provided in a timely fashion.

Only Mr. Clark or the putative prospective purchaser knew the answer as to why the putative offer had not been provided in a timely

fashion, and Mr. Clark attempted to offer no evidence or explanation. Mr. Clark also did not request a trial continuance.

The trial court certainly may have had justified concerns about the timing and the bona fides of the putative offer, given the relationship between Dr. Gese, the prospective purchaser, and Mr. Clark. (**RP 266, lines 15-18; RP 269, lines 1-2**).

Judge Clary's ruling was made during the course of cross examination of Dr. Clark's valuation expert, Mr. Todd Carlson. (**RP 264, lines 12-13**). Mr. Clark was wrongfully attempting to inquire about the offer during the cross examination of Dr. Clark's valuation expert. The putative offer had not been admitted into evidence, it was unauthenticated, and it was hearsay. (**ER 802, ER 902, ER 904**).

Mr. Clark could have sought the admission of the offer during his case in chief through his own testimony, and he could have attempted to explain the untimely production. He did neither. No further effort to introduce the putative offer was made. No request for a trial continuance was ever made.

The Court of Appeals has upheld a trial court's decision to exclude testimony when it could not be explained why discovery was not timely

provided or where the proffered witness was named only 13 days before trial. Allied Fin. Servs. v. Mangum, 72 Wn.App. 164, 168, 864 P.2d 1, (1993); Dempere v. Nelson, 76 Wn.App. 403, 405, 886 P.2d 219 (1994), review denied. 126 Wn.2d 1015, 894 P.2d 565 (1995).

In Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997), the Court of Appeals noted that although the experts were not disclosed in a timely manner, a significant amount of time yet remained before trial. Burnet at 131 Wn.2d 484. The sanction imposed was “too severe in light of the length of time to trial.” Id at 497-98.

Mr. Clark’s failure to ask for a trial continuance was also a failure to effectively preserve any alleged error for appellate review. See e.g. State v. Jackman, 113 Wn.2d 772, 779-82, 783 P.2d 580 (1989). (Defendant could not move for a new trial under Cr.R. 7.6(a)(3), where witness did not appear at trial and defendant failed to move for a trial continuance.)

The putative offer of purchase would not have changed Mr. Clark’s business valuation expert’s testimony. Mr. Scott Martin, Mr. Clark’s valuation expert, provided lengthy testimony regarding his valuation of the professional practice. However, Mr. Martin testified that although he would have looked at the putative offer, he would not have given it any

weight. (**RP 408, lines 6-7**). Thus, any error in excluding the evidence is harmless error in that it would have been cumulative and would not have changed Mr. Martin's value. Jones v. City of Seattle, 179 Wn.2d 322, 314 P.3d 380 (2013).

Judge Clary's refusal to allow Mr. Clark's counsel to cross examine Dr. Clark's expert regarding a putative offer, which had not been introduced into evidence, along with Mr. Clark's failure to provide any explanation for the untimely submission on the Friday preceding trial, and Mr. Clark's failure to ask for a trial continuance under the circumstances, is not error. If there was error, it was harmless in that the evidence was cumulative.

The purpose of seeking admission of the putative offer could only be to challenge the valuation of the practice ultimately assigned by the trial court. Mr. Clark has failed to assign error to the trial court's valuation of the practice and, therefore, the trial court's valuation of the practice is a verity on appeal. Fuller v. Employment Sec. Dept. of State of Washington, 52 Wn. App. 603, 762 P.2d 367 (1988). In that the trial court's valuation of the practice is a verity on appeal, the failure to allow the admission of

the putative offer is harmless error in that the putative offer becomes irrelevant. Jones v. City of Seattle, 179 Wn.2d 322, 314 P.3d 380 (2013).

It is reversible error for the trial court not to exclude testimony when the other party would be prejudiced by a willful violation of court order. Allied Fin. Servs., 72 Wn.App. 164, 864 P.2d 1 (1993), citing Hampson v. Ramer, 47 Wn.App. 806, 737 P.2d 298 (1987). A violation of a court order without reasonable excuse will be deemed willful. Allied Fin. Servs., 72 Wn.App. at 168, citing Lampard v. Roth, 38 Wn.App. 198, 202, 684 P.2d 1353 (1984).

The property division is just and equitable

The trial court found that Dr. Clark was awarded assets, less debts, resulting in a net worth to her of \$237,511. The value of assets awarded to Mr. Clark was \$29,802. This resulted in a difference of \$207,709. The trial court then ordered an equalization payment of \$103,854.50, resulting in an equal division of community net worth (**RP 732, lines 1-16**).

Mr. Clark does not allege any error regarding the court's findings as to the value of assets, the balance on debts, or the characterization of property or debts. In fact, he does not quarrel with the trial court's mathematical computations regarding the equalization payment.

The sole basis of alleged error is that the veterinary practice and coffee shop were awarded to Dr. Clark, rather than Mr. Clark.

Judge Clary enunciated his rationale for awarding these assets to Dr. Clark. (**RP 716, lines 3-25; RP 717, lines 1-25; RP 718, line 1-28-5; RP 719, lines 1-6**).

Mr. Clark's argument seems to be that because he was willing to "pay" more for the practice than Dr. Clark's value for the practice, that the court should have used "maximum value for the one significant asset of the parties." (Appellant's Brief at page 43). Mr. Clark does not, however, assign error to the trial court's determination of value of the veterinary practice, i.e. he is not arguing that because he was willing "pay" more, that it was worth more.

Dr. Clark was awarded the practice at a value that Mr. Clark does not assign error to. As stated previously, he was ultimately awarded one-half of the net worth of the community property, including one-half of the value of the practice.

The trial court has broad discretion in distributing the marital property of divorcing spouses under RCW 26.09.080. A trial court's distribution of property in a marriage dissolution proceeding will not be

disturbed on appeal absent a manifest abuse of discretion. A manifest abuse of discretion occurs when the court's discretion is exercised on untenable grounds. A manifest abuse of discretion can also occur if the dissolution decree results in a patent disparity in the parties' economic circumstances. In re Marriage of Rockwell, 141 Wn.App. 235, 170 P.3d 572 (2007).

Awarding the veterinary practice to the veterinarian certainly does not constitute an abuse of discretion. The veterinary practice, the coffee shop, and Carica, LLC were an integrated business. (**RP 718, lines 11-16**).

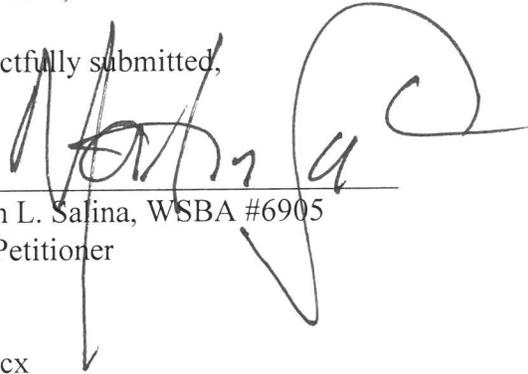
IV. CONCLUSION

The trial court did not abuse its discretion in this matter. The imputation of income to Mr. Clark is supported by the evidence and is not contrary to existing law. The determination that Mr. Clark pay his proportionate share of post-secondary educational support is supported by the facts and the law. The facts in this case do not support an award of spousal maintenance to Mr. Clark. There was no admission of testimony regarding marital misconduct for the purposes of establishing fault. The relationship was discussed in the context of appropriate resolution of valid issues. The trial court's ruling relative to the exclusion of testimony

concerning a putative offer of purchase was appropriate in that the evidence was untimely, the evidence was cumulative and irrelevant and, if there was error, it was harmless error. The division of property was just and equitable. Dr. Clark requests that the appellate court affirm the trial court's decision and award to her her fees and costs on appeal.

DATED this 20th day of March, 2017.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'M. Salina', is written over a horizontal line. The signature is highly cursive and extends above and below the line.

Martin L. Salina, WSBA #6905
Attorney for Petitioner

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