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Division III
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COA No. 35317-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

DAYRA R. SALCEDO,

Appellant,

v.

JORGE SALCEDO,

Respondent.

BRIEF OF RESPONDENT

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I. COUNTER-STATEMENT OF ASSIGNMENTS OF ERROR

A. Jorge Salcedo, M.D., accepts the appellant's assignments of error and issues pertaining to them.

II. COUNTER-STATEMENT OF THE CASE

Dr. Salcedo accepts the appellant's statement of the case with the following additions.

Ms. Salcedo attended Saint Thomas University in Bogota, Colombia, for five years and graduated with a degree in psychology. (RP 282). After getting her degree, she worked in Colombia for two years as a psychologist in a drug addiction program. (RP 283). Ms. Salcedo later came to the U.S. to go to school and work. (RP 283-84). She also testified, however, that she did not further her education to prepare for future U.S. employment. (RP 284-85). She lived in Baltimore, Maryland, where she took English classes at Arundel Community College for two semesters to increase her language skills. (RP 284).

Around July 1998, Dr. and Ms. Salcedo moved to Chicago where he would do his residency in radiology at Cook County Hospital. (RP 226). She continued her studies at the University of Illinois – Chicago so she could keep her student visa and study English. (RP 226). She testified she took English as a second

language classes and had no intention of working. (RP 285). Ms. Salcedo then attended National University to get her master's in arts and psychology, with an emphasis in organizational psychology. (RP 286-87). Her stated purpose for obtaining her master's was to prepare for future employment. (RP 287). Ms. Salcedo completed her course work except for the thesis. (RP 288). She worked for a private company in Chicago teaching Spanish to English speakers about 2 hours/week. (RP 290).

Upon completion of Dr. Salcedo's residency in 2002, they moved to McAllen, Texas. (RP 228). Ms. Salcedo went to school to keep her student visa. (RP 229). They moved to El Paso, Texas, in 2003. (*Id*.). She attended the University of Texas – El Paso while there. (RP 230). Dr. Salcedo's OCD management was very good in McAllen and El Paso. (RP 231).

After El Paso, they moved to Dallas, Texas, where they lived for about eight months. (RP 232). Dr. Salcedo lost his job at the hospital two weeks after the move and subsequently worked in Houston for four months. (RP 233). The Salcedos moved to Eagle Pass, Texas, in October 2007. (RP 234). Dr. Salcedo lost his job about six months later in January 2008. (*Id*.). After a year in Eagle

Pass, they moved to Spokane in August 2008 where Dr. Salcedo got a job with the VA. (RP 239-40).

In January 2015, Dr. Salcedo was suspended by the VA. (RP 429-30). His attorneys were working through an administrative process relating to the VA suspension. (RP 429-30). Dr. Salcedo did not know whether his pay and benefits would continue until the process was resolved. (RP 430). After settlement was reached, he resigned his privileges at the VA. (RP 69).

Dr. Salcedo was receiving $10,000/month from a disability insurance policy with payments ending March 2017 because coverage was limited to 24 months when due to a mental disability. (RP 85, 328). Ms. Salcedo's counsel told the trial court he understood the doctor's current disability payments were ending in March/April 2017. (RP 7).

Dr. Salcedo got his Texas medical license on August 16, 2002. (RP 435). He testified his license actually expired on November 30, 2016, and he renewed it on December 6, 2016. (RP 441). Even though he was licensed, Dr. Salcedo still had to take a competency examination in order for the Texas medical board to find he was competent and able to return to work as a physician. (RP 397-99). For whatever reason, Texas became aware of the

problems Dr. Salcedo had at the VA, which had agreed to limit public disclosure of the reasons for his separation from service. (RP 443-44). Just because he had paid the license fee did not mean he was able to practice. (RP 454-55, 457).

Further facts will be discussed as discussion of the issues necessitates.

III. ARGUMENT

A. The court did not abuse its discretion by denying the trial continuances requested by Ms. Salcedo.

The standard of review is whether the court abused its discretion by denying a continuance. *Bonneville v. Pierce County*, 148 Wn. App. 500, 508, 202 P.3d 309 (2008), *review denied*, 166 Wn.2d 1020 (2009); *In re Custody of C.D.*, 188 Wn. App. 817, 828, 356 P.3d 211 (2015). An abuse of discretion occurs when the decision is manifestly unreasonable or based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Stated another way, an abuse occurs when no reasonable person would take the view adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Here, the court gave tenable reasons for denying the continuances and therefore did not abuse its discretion.

The October 2016 continuance request was based on Ms. Salcedo's claim that additional time was needed to secure an expert to explore Dr. Salcedo's lifelong obsessive compulsive disorder (OCD). (RP 6-7). Among the factors to be considered in deciding whether a continuance should be granted are the needs of and possible prejudice to the moving party. *In re Dependency of V.R.R.*, 134 Wn. App. 573, 581, 141 P.3d 85 (2006).

Ms. Salcedo was well aware of Dr. Salcedo's OCD and was involved in managing his stability over the years. (RP 230-31). She attended some counseling sessions with his Spokane psychiatrist, Dr. Mark Chalem, who first met with Dr. Salcedo on June 8, 2009, and had dealt with his OCD since. (RP 154-55, 179). Dr. Chalem noted Ms. Salcedo was a psychologist and tried to help her husband behaviorally. (RP 180). Dr. Chalem had seen Dr. Salcedo 40 times and Ms. Salcedo was present for 10 sessions. (RP 179). It was undisputed Dr. Salcedo had OCD. Dr. Chalem opined he was incapable of working at the time of trial, but felt he would get his Texas license back at some point. (RP 172, 174, 193). In light of this background, Ms. Salcedo showed no need for continuing the trial so she could seek an expert to testify on Dr. Salcedo's OCD. The court did not abuse its discretion by denying

the continuance for her counsel's stated purpose. *Castellanos*, 132 Wn.2d at 97.

But Ms. Salcedo now claims the court abused its discretion because it improperly relied on the timing of the motion, noting the case had been pending for over a year. The court said:

> The issue is this case has been pending for over a year. It's had several different judicial officers on it. It needs to resolve, and I understand, but all these issues are the same thing from I read all the way back to the first filing. The mental health issues, the counselor issues, all these have been on the table since last December. So these are not new issues.
>
> I understand you just came on in August, that there's been other attorneys on both sides of this case. This case needs to end.
>
> Whether he gets a job, whether he gets long-term disability, the Court isn't going to carry them out. They set time standards for divorces for reasons because there has to be an end.
>
> You're set to go December 5th. I'm leaving it for December 5th. At this point, there's been two mediations set up. It hasn't worked. We need to go to trial with the issues. I understand you just came on, but we did continue it to allow you time to prepare. Whether or not a doctor gets hired or not, isn't going to make that big of a difference in this case.
>
> So at this point, I'm going to deny the Motion for Continuance. I'm not going to give out anymore money. There's a lot of money already been given out for attorney fees, for costs, for expenses. Both

> of these people are very well-educated, and at this point, until the case is done, that's going to stay in trust at this point.
>
> I'm going to deny the Motion for Continuance. (RP 16-17).

The court misspoke when it said the case had been pending for over a year. But it had been pending for 11 months, nearly a year. (CP 1). The court did not find the case was beyond the time standards for divorces. (RP 17). It noted a continuance had already been granted for Ms. Salcedo's new counsel to prepare for trial. (*Id*.). The case needed to be resolved. The issues were not new and substantial amounts of money for Ms. Salcedo's attorney fees, costs, and expenses had already been ordered. (RP 16-17). The court has inherent power to manage its docket. *Swan v. Lundgren*, 6 Wn. App. 713, 715, 495 P.2d 1044 (1972). The record as a whole shows it properly balanced Ms. Salcedo's interests and the need to control its own docket. The court did not abuse its discretion by denying the October 2016 request for a continuance. *Junker*, 79 Wn.2d at 26.

A week before trial, Ms. Salcedo again requested a continuance for Dr. Salcedo's failure to furnish discovery. (RP 19-20). Her counsel was aware the court was not inclined to grant the

motion, but argued he needed more information. (RP 20). Dr. Salcedo did provide discovery as best he could, but Ms. Salcedo's counsel insisted he needed to see more documents relating to finances and the status of payment and coverage on the private disability insurance. (RP 20-27).

Dr. Salcedo's lawyer countered the finances had been disclosed and were in opposing counsel's possession as evidenced by his massive exhibit book. (RP 28-29). He further represented to the court Dr. Salcedo had no employment contracts or business and Ms. Salcedo had the Thrift Savings Plan statements along with information about medical insurance payments. (RP 29-30). Counsel said he was ready to go and there were no secrets. (RP 30). Ms. Salcedo was aware of the private disability process, the Social Security disability, and the nature of the disability. (RP 31). Her counsel insisted he needed updated information. (RP 32-34).

In light of these circumstances, the court denied the motion for continuance:

> I can understand your issue of trying to get ready for trial without having all the information. My problem is this case has been pending over a year. It's been through I know other lawyers, and now you are both ready for trial or at least as ready as you can be.

> At this point, [counsel]. I don't want to sit here through discovery and you go through it, but if you can't back up some of the things that he's testifying to, then the Court's not going to speculate to it.
>
> I'll take a break for an hour, and I'm going to ask that you give him all those bank statements from June until November so that he can at least have an opportunity to review those, and if nothing else, take them home tonight and get prepared.
>
> If you need to ask a little bit more questions than normal in order of trying to get this off the docket before the end of the year and get his divorce completed, at this point, the Court's going to take the time and effort and get it done because it is way past time standards at this point. (RP 34-35).

The court did misspeak about the case being far past time standards. On the other hand, it weighed the needs of Ms. Salcedo's counsel to review the recent bank statements and fashioned a remedy for him to have time to do so. The court's reasons for denying this continuance are based on tenable grounds and reasons. Ms. Salcedo's alleged lack of information is belied by her own exhibit book and her counsel's skillful examination of Dr. Salcedo on all issues, including his economic condition. The court did not abuse its discretion by denying the continuance. *Junker*, 79 Wn.2d at 26.

B. Distributing the property fairly and equitably, the court did not abuse its discretion in dividing the property.

The court's decision on property division in a dissolution is reviewed for an abuse of discretion. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). Only if no reasonable person would take the view adopted by the trial court will its decision be reversed on appeal. *Castellanos*, 132 Wn.2d at 97.

The court takes into consideration the statutory factors in RCW 26.09.080, *i.e.*, the nature and extent of the community and separate property, marriage duration, and economic circumstances of each spouse; and can also consider others such as the health and ages of the parties, their prospects for future earnings, their education and employment histories, their necessities and financial abilities, and their foreseeable future acquisitions and obligations. *In re Marriage of Urbana*, 147 Wn. App. 1, 9, 195 P.3d 959 (2008).

The division of property does not have to be equal or be done with mathematical precision as long as fairness is achieved. *In re Marriage of Crosetto*, 82 Wn. App. 545, 556, 918 P.2d 954 (1996). Nonetheless, Ms. Salcedo claims the court's property division resulted in a disparity in the parties' economic circumstances and should be reversed. *In re Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572 (2007), *review denied*, 163 Wn.2d 1055 (2008). She points out Dr. Salcedo is a physician with

a higher earning capacity. But she ignores the evidence showing Dr. Salcedo was disabled and unable to perform his medical specialty because of OCD. (RP 172, 174). His psychiatrist opined his patient was presently incapable of work, although he thought at some point he would be able to get back to practicing in Texas. (RP 193).

The record reflects Ms. Salcedo had $7000/month income and Dr. Salcedo had a nearly equal monthly income at the time of trial. (RP 313, 392). Their economic circumstances were the same.

In its written opinion, the court detailed the reasons for its property division in a section entitled "Equitable Division of Assets." Ms. Salcedo received $405,958 in assets, while Dr. Salcedo received $355,553 in assets. (CP 476). She got $187,360 in liabilities and he got $218, 347 in liabilities. (*Id*.). The court found:

> The Court heard testimony from Dr. Salcedo that he "may" not be able to practice his trade as a doctor any longer based on his lost job at the VA. However, it was established that Dr. Salcedo is still licensed as a doctor in the State of Texas and has not been suspended from practicing. Dr. Salcedo did not present any proof that he could not practice in the State of Texas until such time as Mrs. Salcedo pointed out in cross examination Dr. Salcedo renewed his Texas medical license on line during the week of trial. The very next day in trial, Dr. Salcedo provided a copy of

> the Agreement between the Medical Board in Texas and himself on the parameters in which he can practice Radiology. . . This agreement shows that Dr. Salcedo must complete a competency assessment for Radiology and follow up on any recommendations. This agreement was signed by Dr. Salcedo in October 2016 and finalized in December 2016.
>
> Based on Dr. Salcedo's ability to earn a substantial living as a Radiologist, the Court finds that he should take a little higher of the debt incurred. The Court recognizes that the assets and liabilities should be divided evenly but the Court must also consider the surrounding circumstances of both parties. Since Mrs. Salcedo hasn't worked in some time, the Court finds it equitable that Dr. Salcedo be responsible for more of the personal debt. Dr. Salcedo will, also, be getting his government disability check of $2124/month and, therefore, has more ability to pay. (CP 476-77).

The court's findings were reflected in the findings and conclusions about a marriage. (CP 525). These findings, as shown by the evidence in the record, were supported by substantial evidence and cannot be disturbed on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992).

Ms. Salcedo argues he had the potential to earn more and she would never be able to make that much so she should get a larger distribution of property. But she did get more in assets and less in liabilities. Moreover, Dr. Salcedo was ordered to pay her maintenance. (CP 474, 527). The trial court made a reasoned

decision in light of its findings that were verities on appeal as they were supported by substantial evidence. *Cowiche Canyon Conservancy*, 118 Wn.2d at 819. Accordingly, the court did not abuse its discretion in making its property division. *Junker*, 79 Wn.2d at 26.

Ms. Salcedo also argues the court's findings as to her ability to find work immediately were not supported by the evidence. In its written opinion, the court noted she had the ability to find work right away:

> Mrs. Salcedo is entitled to some maintenance payments due to the fact that she is currently unemployed and has been unemployed off and on throughout the marriage. The Court recognizes that Mrs. Salcedo is extremely educated just short of her Master's Degree. She is fluent in Spanish and has even worked in the past as a translator. She has the ability to find employment right away (*See resume of Mrs. Salcedo – Exhibit R116*). (CP 473).

In its findings and conclusions about a marriage, the court found in relevant part:

> 26. Mrs. Salcedo is entitled to some maintenance payments due to the fact that she is currently unemployed and has been off and on throughout the marriage.
>
> 27. The Court recognizes that Mrs. Salcedo is extremely educated just short of her Master's Degree. She is fluent in Spanish and has even

worked as a translator. She has the ability to find employment right away. . .

34. There was no evidence presented during the trial that Mrs. Salcedo has made any real efforts to find employment other than testimony that she would need to go back to school and wished for a longer period of maintenance. This dissolution has been pending for over a year and she has been receiving support from Dr. Salcedo. With additional six months of maintenance, the Court finds that sufficient based on their circumstances. Mrs. Salcedo also received a larger amount of the trust money to use to pay expenses and attorney fees.

35. Mrs. Salcedo is capable of finding a job. She will also be receiving half of all assets from the marriage, including any profit from the sale of the house. Mrs. Salcedo claimed that the reason for her unemployment was because Mr. Salcedo refused to have her green card status renewed. Even if Mrs. Salcedo was incapable of working once they had children, she seems capable of working now as both children are reaching full school age. . .

37. Based on Dr. Salcedo's ability to earn a substantial living as a Radiologist, the Court finds that he should take a little higher of the debt incurred. Dr. Salcedo should update any changes in his disability status or payment under the private policy.

38. The Court recognizes that the assets and liabilities should be divided evenly but the Court must also consider the surrounding circumstances of both parties. Since Mrs. Salcedo hasn't worked in some time the Court finds it equitable that Dr. Salcedo be responsible for more of the personal debt. Dr. Salcedo will also be getting a disability

> check each month and therefore has the ability to pay. (RP 531-32).

The court took into account Ms. Salcedo's current unemployment against the fact she was highly educated, just short a thesis for her master's degree in the U.S., and had taken college classes during the marriage. She had worked as a psychologist, a trainer, and a teacher of English as a second language where she could use her excellent Spanish and English speaking skills. Ms. Salcedo said her looking for a job was in limbo. (RP 265). She did think about applying to School District 81, but she had not applied. (RP 330-31). Ms. Salcedo could work, but chose not to. These facts are substantial evidence supporting the court's findings she could find work quickly in light of her education and abilities. *Cowiche Canyon Conservancy*, 118 Wn.2d at 819.

The record thus supports each of the court's findings by substantial evidence and the court made its credibility determinations, which cannot be disturbed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). Ms. Salcedo has failed to argue how or why they were not supported by substantial evidence. She merely argues the court was wrong. Without citation to the record and argument why the findings were

not adequately supported, this court need not consider the issue. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986). In any event, the court's findings in turn support its conclusions. *McIntyre v. Fort Vancouver Plywood Co.*, 24 Wn. App. 120, 123, 600 P.2d 619 (1979).

C. The court did not abuse its discretion by awarding Ms. Salcedo maintenance.

Ms. Salcedo claims she was entitled to maintenance under RCW 26.09.090. But the court did award her maintenance. (RP 533). By finding Ms. Salcedo was entitled to some maintenance payments, it took into account the factors in RCW 26.09.090 in its written opinion:

> Dr. Salcedo testified that his current disability payments will end in March 2017, because they are paid out due to a mental condition and not a medical condition. Should the insurance company deem his disability a medical condition, his payments would continue until May 2031. During the trial, Dr. Salcedo presented nothing to support his conclusion that payments end shortly. The letter provided in *Exhibit P29* claim that payments would only last for 24 months if it was for an emotional or mental condition, but will pay longer if it is a medical condition. The letter does not give a define [*sic*] answer either way. Even if it was for only 24 months, the payment should continue until May 2017 based on the Court's calculation of 24 months since starting.

This would allow Dr. Salcedo to continue to pay Mrs. Salcedo $5000.00 per month for 6 months of maintenance allowing her to find employment. The Court does not see any need for maintenance longer than 6 months based on her education, experience and her portion of the assets which will be awarded to her. . .

Since Mrs. Salcedo does not currently work, the Court is ordering that for the next 6 months, Dr. Salcedo continues to payout half of his disability payment. This $5,000 will allow Mrs. Salcedo to continue to make the payments on the home while it is on the market and while she looks for full time employment. Mrs. Salcedo will have to find some type of employment immediately and work toward reducing her monthly expenses. For example, since Mrs. Salcedo was not currently employed the Court saw no need for daycare expense for their younger child. Obviously once she is employed full time the Court understands this need for child care. . .

If the home is not sold in the next 6 months, Mrs. Salcedo will have to continue to make the payments on her own. Mrs. Salcedo will continue to get the disability payments for the children from Social Security as her child support. Once she has employment and receives her portion of the trust payout, as well as the other assets, she should be able to make the monthly payment even without the maintenance.

While it is necessary to consider the standard of living Mrs. Salcedo was accustomed to during the marriage for a short amount of time, Dr. Salcedo stated in his affidavit that he had told his wife that their current lifestyle needed to change before the divorce was initiated. . . There was no evidence presented during the trial that Mrs. Salcedo has made any real efforts to find employment other than testimony that she would need to go back to school and wished for a longer period of maintenance. However, since the dissolution

> has been pending for over a year, she has been receiving support from Dr. Salcedo. With the additional 6 months of maintenance, the Court finds that sufficient based on their circumstances. She also received a larger amount of the trust money to use to pay expenses and attorney fees.
>
> Ms. Salcedo is capable of obtaining a job. She will, also, be receiving half of all assets from the marriage, including any profit from the sale of the house. Mrs. Salcedo claimed that the reason or her unemployment was because Mr. Salcedo refused to have her green card status renewed. *See Petitioner's Motion and Declaration for Supplemental Temporary Orders p. 6.* This is the only reference she made to her work abilities, and there was very little information that supported her reason for not working. Even if Mrs. Salcedo was incapable of working once they had children, she seems capable of working now as both children are reaching full school age. (CP 473-76).

The court's findings and conclusions about a marriage comport with the findings in its written opinion. (Other Findings 14, 26, 33, 34, 35; CP 530-32). The exception related to the amount of maintenance, where the court found:

> * The court finds a need and ability to pay. Dr. Salcedo will have funds to pay $5,000 through and including May 2017, and will have ability to pay $425 for June 2017 and July 2017. (CP 533).

The opinion and findings show the trial court carefully considered the factors for maintenance in RCW 26.09.090 and gave tenable reasons for its decision. These findings are supported by

substantial evidence and Ms. Salcedo has not shown otherwise. *McIntyre*, 24 Wn. App. at 123. The findings in turn support the conclusion that Ms. Salcedo should receive maintenance for several months pending employment. *Id*. The court did not abuse its discretion in making its award of maintenance. *In re Marriage of Zahm*, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999).

D. Ms. Salcedo is not entitled to attorney fees at trial or on appeal.

Noting Ms. Salcedo had already received approximately $19,000 from the trust to pay for her attorney, the trial court decided that would be the only award for attorney fees with the parties paying their respective fees through their own assets. (CP 477, 527). But she had already received $5000 from Dr. Salcedo for attorney fees before the $19,000 trust payment. (*See* RP 386).

As found by the trial court, Ms. Salcedo had no more need for attorney fees than Dr. Salcedo and both had the same ability to pay as their monthly incomes were equal at the time of trial. The court's findings on the attorney fee issue with the parties bearing their own fees were supported by substantial evidence. *Shelcon Constr. Grp., LLC v. Haymond*, 187 Wn. App. 878, 890-91, 351 P.3d 895 (2015). Again, Ms. Salcedo merely concludes, but fails to

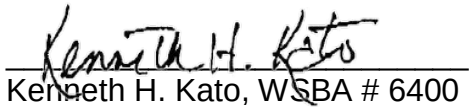
show, why the findings were not so supported. The court did not abuse its discretion by ordering the parties to bear their own attorney fees. *In re Marriage of Crosetto*, 82 Wn. App. at 563.

Seeking fees on appeal, Ms. Salcedo once more argues she has the need and Dr. Salcedo has the ability to pay. RCW 26.09.140; *In re Marriage of King*, 66 Wn. App. 134, 139, 831 P.2d 1094 (1992). But there is nothing of record showing things have changed since trial. The parties are in the same financial condition as before with neither able to pay the fees of the other. Accordingly, Ms. Salcedo is not entitled to an award of fees on appeal as Dr. Salcedo does not have the ability to pay any more than she does. *In re Marriage of King*, 66 Wn. App. at 139.

IV. CONCLUSION

Based on the foregoing facts and authorities, Dr. Salcedo respectfully urges this court to affirm the decision of the trial court.

DATED this 22nd day of May, 2018.



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CERTIFICATE OF SERVICE

I certify that I served the Brief of Respondent on May 22, 2018, through the eFiling portal on Dena Allen at her email address.

Kenneth H. Kato

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