FILED
Court of Appeals
Division III
State of Washington
9/13/2018 10:33 AM

No. 358321

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOHN ARTHUR LODWIG,

Respondent,

vs.

MELANIE ISHA SUMMERS F/K/A MELANIE LODWIG,

Appellant.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

This appeal is not a literary exercise. The appellant appreciates the respondent's reference to great American literature, and as an English Literature major many decades ago, her counsel shares the same appreciation. The appellant is not caught between "…the primeval old and the impossibly new, between an abiding sense of certitude and the dissembling future."[1] Rather, the appellant asks this Court to review the decision of the trial court in a dissolution matter, on the issues of asset division, property valuation, and spousal maintenance.

This is a straightforward appeal, supported by relevant legal authority, and brought before this Court in good faith and with serious intention. This is not an epic quest, no matter how respondent characterizes his fourth ex-spouse. Finally, it is assumed this Court may make its own literary analogies without the direction of counsel.

B. SUMMARY OF ARGUMENT

In this matter, failure to divide with finality the single most important and valuable asset of this marriage led directly to this appeal. Leaving the parties as tenants in common of an active closely held business entity does not award property with the requisite completeness. Failure to

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1 Philip Hoare, *What "Moby Dick" Means to* Me, November 3, 2011, The New Yorker, https://www.newyorker.com/books/page-turner/what-moby-dick-means-to-me.

divide valuable property will lead inevitably to future forced sale or partition actions, something our highest Court has indicated is to be avoided when awarding property in dissolution actions, as cited by appellant in earlier briefing. The trial court had a duty to dispose of all the property of the parties before it, and the parties continue to enjoy a right to have their property interests definitely and finally determined.

Also, the trial court's valuation of the construction business was unsupported by any competent evidence. The Court provided no support for its valuation, which is distinct in value from that proposed by the jointly hired valuation expert. The trial court was not presented with differing, credible valuations, but rather a single valuation proffered by one jointly retained expert.

Lastly, while the Court maintains wide latitude in awarding spousal maintenance, the financial resources of the appellant, as well as the ability to meet her needs independently, in contrast to the respondent, in addition to the length of the marriage, supports a maintenance award larger in amount and longer in duration than that awarded by the trial court.

C. ARGUMENT

(1) <u>The trial court erred in failing to award the primary asset of the marriage with finality; rather, the court placed the parties in an untenable position, ordering equal ownership, while depriving one party of the ability to operate the business, make decisions appropriate for the business, or to</u>

make strategic choices regarding the future of the jointly owned asset.

Our trial courts have a duty to not award property to parties as tenants in common.[2] If the court does so, it risks failing to definitively and finally determine the property interests before the court at dissolution.

Respondent relies upon *Zier* as supportive of his position. However, *Zier* is not applicable authority in the present matter, for *Zier* did not speak to the issue before the court on appeal. In *Zier* the primary issue was the trial court's having divided shares in a closely held family corporation equally between the divorcing spouses, the characterization of separate and community property, and the applicability of the stock purchase transfer restriction.[3]

In contrast, the present matter involves the ongoing operation of a business awarded to the parties as undivided equals, and yet where the trial court vested management of the business solely in the hands of the respondent. In so doing, the trial court is depriving the other party of the ability to manage and operate the jointly owned business. The appellant is stripped by the trial court of management, strategic decision making, and operation, and the net result is that while the trial court may have awarded her an equal share in the business, she is powerless to chart the course of

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2 *Bernier v. Bernier*, 44 Wn.2d 447, 449-50, 267 P.2d 1066 (1954).
3 *In re Marriage of Zier*, 136 Wn. App. 40, 47, 147 P.3d 624 (2006), *review denied*, 162 Wn.2d. 1008 (2007).

the business she owns. The trial court has reduced her to the role of passive investor, and the result is inequitable on its face.

It is per se inequitable for the trial court to have failed to award the storage business property to one party and, in conjunction therewith, to make economic adjustments in favor of the other party, thus allowing one party to move forward following dissolution as the sole owner of the subject property. Such a decision is within the purview of the trial court, and would result in the stated goal of definitively and finally determining the property interests of the parties before the court at dissolution.

Baker Flats/Cinco are company entities which own the land upon which the storage business stands and operate the storage business entity. Respondent argues that "Cinco owns the real property underlying the Baker Flats/Cinco storage business."[4] While that is accurate formalistically, it is the parties to the dissolution that own the business and the real property. The net effect of the trial court's decision remains the same: While the appellant owns an equal share in the real property and storage business, her equal share remains undivided.

(2) <u>The valuation of respondent's construction company by the trial court is without support, and the only competent evidence regarding valuation presented at trial is significantly higher than the value independently chosen by the trial court.</u>

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4 Resp Brief, pg. 14.

The jointly retained valuation expert provided the only competent evidence at trial on the value of the construction business. The respondent did not so much place an unsupported value on the business as he testified he would accept somewhere between $50,000 and $100,000 to sell it to a hypothetical third party.[5]

Rather than accept the valuation range of the sole expert, or the unsupported value statement provided at trial by the respondent, the trial court chose a value, providing no support for the decision. There is no credible evidence found in either the respondent's announcement he would accept somewhere between $50,000 and $100,000 for the business or the trial court's determination of value at $77,000. As previously stated, valuation findings must be within the range of credible evidence.[6] The record before this Court on appeal does not contain any credible evidence other than the valuation expert's analysis and opinion, and in the absence of substantial evidence supporting the trial court's valuation, it is error for the court to have so ordered.

(3) <u>The length of the parties' marriage and pre-marital cohabitation makes inequitable the short period of spousal support ordered by the trial court.</u>

Counsel for appellant inadequately described the parties' marriage

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5 RP at 59:16-17.
6 *In re Marriage of Sedlock*, 69 Wn. App. 484, 490, 849 P.2d 1243 (1993).

in earlier briefing as one of 17 years' duration. More accurately, the relationship between the parties was approximately 17 years in length at the time of the dissolution.[7] As stated by the appellant in her declaration in support of the motion for reconsideration, the parties formed their personal intimate relationship in 2000.[8] The parties were married in 2002, and while married for approximately 15 years the parties were in relationship for 17 years.

The appellant has not worked outside of the relational/marital home for more than 17 years. While she testified at trial she has the desire to start a new business to support herself and her children, at the time of trial such a business had not yet been established (and it still has not been established).[9]

It is argued a two-year maintenance period is inequitable in light of the duration of the relationship, as well as the time necessary for the appellant to find employment appropriate to her skill, interests, lifestyle and other attendant circumstances. If a hypothetical spousal maintenance award following a 25-year marriage is intended to place the parties in roughly equal financial positions for the balance of their lives, then surely a two-year maintenance provision, in light of the property and debt division

7 CP 056-068.
8 *Id.*
9 CP 046-055.

ordered by the trial court in the case of an approximately 17-year relationship (pre-marriage and marriage) is insufficient as an award of spousal maintenance. The decision of the trial court does not equalize the parties' standard of living for an appropriate period of time.

D. CONCLUSION

The appellant respectfully requests this Court reverse the trial court's decision and remand this matter to the Chelan County Superior Court for final division of the storage business asset, proper valuation of the construction business awarded to respondent, and a lengthening of the spousal maintenance period, in light of the statutory factor supporting an adjustment therein.

DATED this 13th day of September, 2018.

Respectfully submitted,

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APPENDIX

For years, “Moby-Dick” defeated me. I think I was put off the book when, as a child, I watched the 1956 John Huston film on our tiny black-and-white television, at home in suburban Southampton, England. Seeing it on the ghostly cathode-ray tube, which was housed in a veneered cabinet, was more like viewing some Victorian apparatus for contacting the departed spirits, forever imprisoned behind its glass.

Huston’s film promised so much—the rearing white whale, a monster of my deepest imaginings—but it delivered a wordy worthiness, quite remote from what I wanted from the story. Later, I’d look at the book itself and fail to find any way into its prose, as impermeable as that TV screen. I didn’t know then what I do now: that “Moby-Dick” can be whatever you want it to be. It took me thirty years to discover what the book was—or what it was not.

Now along comes Nathaniel Philbrick’s brilliant and provocative new work, “Why Read Moby-Dick“—a collection of elegant essays, an eclecticism that it shares with its subject. Philbrick seeks to make us look again at the paradoxes of what he, like many others before him, acclaims as “the greatest American novel ever written.”

But “Moby-Dick” is not a novel. It’s barely a book at all. It’s more an act of transference, of ideas and evocations hung around the vast and unknowable shape of the whale, an extended musing on the strange meeting of human history and natural history. It is, above all, a sui-generis creation, one that came into the world as an unnatural, immaculate conception.

To my mind, there are only two other works with which it bears comparison: Mary Shelley’s “Frankenstein” (1818), and Emily Brontë’s “Wuthering Heights” (1847). The former, in its own witness to one man’s obsessive interference with nature, was a direct influence on Melville, who acquired a copy on a visit to London in 1849, even as the whalish shades were beginning to swirl about in his imagination.

We don’t know if Melville read Brontë’s rural, gothic creation, but its uncontained spirit—in which the wild Yorkshire moors themselves become the monster—would seem to me to be an apt fellow-traveller for the author who launched the Pequod into the mid-nineteenth century. All three books are caught between the primeval old and the impossibly new, between an abiding sense of certitude and the dissembling future.

In an age of uncertain faith, then as now, “Moby-Dick” resembles a religious tract, an alternative testament. Little wonder that one of its early set-pieces is Father Mapple’s fire-and-brimstone sermon from the prow-shaped pulpit in the Seamen’s Bethel, New Bedford, or that Philbrick takes the title for his own first chapter, “The Gospels in This Century,” from Melville’s wry and rather Wildean remark on the unsalability of his work: “Though I wrote the Gospels in this century, I should die in the gutter.” As he told Nathaniel Hawthorne, “I have written a wicked book, and I feel as spotless as the lamb.”

When I finally began reading “Moby-Dick” (had I wasted my time before then?), I found I couldn’t put it down. I’d carry about with me a tiny, Oxford World Classics edition, anonymously bound in blue cloth, to be studied chapter by chapter, like the Bible or the Koran, as I sat on the Tube or on an airplane, or in the early hours of the morning. As Philbrick exhorts his readers, ” ‘Moby-Dick’ is a long book, and time is short. Even a sentence, a mere phrase will do.”

Much of the impact of Melville’s book on any fierce new convert is implicit in that sense of time travel. Sometimes I read it and I feel like I’m going backward, fast. It reads like something that was written before books were invented, yet it is utterly modern—pre-postmodern, perhaps. It is part of its own prediction, as if it and its characters had been there all along, and had only been waiting to be written. Just as in the real New Bedford’s Bethel a pulpit-prow had to be built, in the nineteen-sixties, because so many visitors expected to find one there; and, just as Melville wrote vividly of Nantucket, an island that he had yet to visit, much of “Moby-Dick” is conjured out of the air and the sea.

That’s why the book appeals so much to modern artists, like Frank Stella and Matthew Barney. Its oceanic reach and perverse digression provide endless sources of inspiration and interpretation. In chapters such as the famously sublime “The Whiteness of the Whale”—almost hallucinatory in its associative suspension of normality and subtle obscenity—Melville takes up his theme, then takes it apart, teasing it out to impossibly filigreed tendrils, until you wonder how you, or he, got there in the first place.

While reading “Moby-Dick” is a bit like being stoned, it also evokes an Asperger’s air. Ishmael will tell you everything you wanted to know about the whale, and much that he has made up. (Few books are so filled with neologisms; it’s as if Melville were frustrated by language itself, and strove

to burst out of its confines.) At the same time, “Moby-Dick” stands both as a historical reference for the great age of Yankee whaling and as a work of imagination in which whales become avatars as much as they are real animals. Melville would never have finished his book today—he’d be constantly Googling “whale.” “God keep me from ever completing anything,” his existential alter ego complains. “This whole book is but a draught—nay, but the draught of a draught. Oh, Time, Strength, Cash, and Patience!”

It always astonishes me that, just as my schoolmates and I were made to wade through Shakespeare and Dickens at an inappropriate age, American high-school students are subjected to Melville’s madness, with its subversion and, to modern eyes, overtly homoerotic passages. Indeed, part of the power of “Moby-Dick” lies in its latency, its delayed, time-bomb quality. It was virtually ignored in the author’s lifetime—its first edition never sold out, and the remaining copies went up in flames in a fire in the publisher’s downtown Manhattan warehouse in 1853.

Like a protean seed awaiting germination, the book needed a new element to bring it to life. As a result, when it burst into the new century, it came invested with a terrific momentum of its own—as if the world had just caught up with its fiery power. In the nineteen-twenties, this lost book was rediscovered by the Lost Generation. And, just as it was stoked up by the dark streets of London on that 1849 visit, “Moby-Dick” owed more than a little of its rebirth to a foreign land and the British writers who led the way in its reappraisal.

In 1923, D. H. Lawrence published his idiosyncratic, if not faintly crazy, “Studies in Classic American Literature.” Lawrence proclaimed Melville to be “a futurist long before futurism found paint,” the author of “one of the strangest and most wonderful books in the world.” Lawrence’s paean was only the public eruption of a reputation already in revival. The year before, in 1922, T. E. Lawrence, of Arabia fame, reported that “Moby-Dick” took prime position on his “shelf of ‘Titanic’ books (those distinguished by greatness of spirit),” and two years after that, in 1924, noted, “Someone is working a Melville boom, & I’ve sold all my early editions profitably.”

In the summer of 1936, the aristocratic aesthete the Honourable Stephen Tennant was entertaining his friend Morgan Forster, at tea in a genteel hotel in the English Home Counties, talking avidly of Queequeg. Could Melville have ever imagined that his book would travel so far, and find such unlikely

readers?

In the alchemical process of critical and cultural assimilation, Melville's monstrous creation—like Shelley's Creature, like Brontë's Heathcliff and Cathy—took on, especially through its susceptible adaptations to other media, a modern typology of Manichean and cinematic proportions. A century and a half after it first played out, Ahab's wanton chase was evoked in the "war on terror," and the attempts to pursue an apparently uncatchable foe, even as it sourced an epic designed to reflect America's first imperial venture—the getting of the oil that lit and lubricated the Western world.

Yet it has an even timelier message, one that, like so many of Melville's literary grenades, seems to have been lying in wait for us. "Does the Whale's Magnitude Diminish?—Will He Perish?" the book asks. Although, having posed this question, Melville, a perennial contrarian, comes to a contrary conclusion, his summary is certainly predictive. Three hundred and sixty thousand blue whales died in the cetacean Armageddon of the twentieth century, reducing the world's largest animal to a population of just a few thousand.

Yet, in the wake of the moratorium on the hunting of great whales implemented by the International Whaling Commission, in 1986, whales appear to have recovered. Earlier this year, in the waters of the Indian Ocean off the tip of Sri Lanka, I saw dozens of blue whales, their thirty-foot blows as tall as houses. That vast biomass was an Edenic sight, a glimpse of the world before "Moby-Dick." Blue whales now swim up the Irish Sea, and last month Captain Mark Dalomba was astonished to see one from the wheelhouse of his Dolphin Fleet whale-watch boat off Provincetown, on Cape Cod.

This summer, in the deep waters of the Azores, I swam with sperm whales. In the silence of their world, listening to the rhythm of their sonar clicks, feeling the scale of their social cohesion, I was more aware than ever before of the history that has passed between us. Now, as I pick up "Moby-Dick" again, prompted by Philbrick's provocative book, I'm reminded of a salutary notion: that the whales that inspired Melville were around long before us, and may, with luck, outlive us, too.

"Wherefore … we account the whale immortal in his species, however perishable in individuality… . In Noah's flood he despised Noah's ark; and if ever the world is to be flooded again, like the Netherlands, to kill off its

rats, then the eternal whale will still survive, and rearing upon the topmost crest of the equatorial flood, spout his frothed defiance to the skies."

Philip Hoare is the author of "The Whale." He is currently Artist-in-Residence at the Marine Institute, Plymouth University, U.K., and is working on an audio edition of "Moby-Dick," read by Tilda Swinton, John Waters, Stephen Fry, Simon Callow, and others.
Photograph: Andrew Sutton.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the Brief of Appellant in Court of Appeals, Division III Cause No. 358321 to the following parties:

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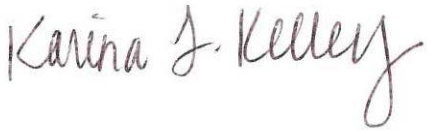
I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 13, 2018, at Wenatchee, Washington.



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September 13, 2018 - 10:33 AM

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Superior Court Case Number:	16-3-00294-1

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