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Division III
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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.

BRIEF OF APPELLANT

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A. INTRODUCTION

This appeal arises after a dissolution trial and a subsequent motion for reconsideration.

The subject marriage is one of intermediate length. The parties acquired substantial assets, most particularly a storage business providing an almost entirely passive income source. Also, while the mother raised the children and maintained the household throughout the marriage, the father built a successful commercial construction business. The issues on appeal focus upon the failure of the trial court to award the storage business asset, the failure to observe the joint valuation opinion offered by the parties, and the failure to award adequate maintenance given the applicable statutory factors and case authority.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error.

1. The trial court erred with respect to dividing the ownership interest in the parties' storage business, despite the broad discretion given to it in making a property division.

2. The trial court erred in determining the value of Respondent's commercial construction business.

3. The trial court erred in awarding maintenance as it

relates to need and ability to pay.

(2) Issues Pertaining to Assignments of Error

1. The decision of the trial court is a manifest abuse of discretion as it is obviously unreasonable. (Assignment of Error Number 1)

2. The parties filed, by exhibit, an agreed value significantly higher than that ordered by the Court. Furthermore, the parties' jointly-retained valuation expert provided a value far higher than that determined by the Court, and the Court arrived at a valuation unsupported by any admissible evidence. (Assignment of Error Number 2)

3. The drastic decline in revenue earned by the Respondent's commercial construction business, from approximately \$500,000 annually during the marriage to slightly more than \$200,000 during the separation year, demonstrates a deliberate attempt to minimize the value of the business for the purposes of reducing any maintenance obligation. Moreover, the Court erred in its' failure to accord sufficient weight to the length of the marriage. (Assignment of Error Number 3)

C. STATEMENT OF THE CASE

This is an intermediate length marriage of 17 years duration where the parties owned and operated multiple businesses in both Chelan and Douglas Counties. They have two children, sons aged 17 and 11, and in addition to raising their children, the Appellant also worked administratively to develop and grow both the parties' commercial construction company and storage business.

The Respondent worked as contractor of the commercial construction business throughout the marriage and the Appellant raised the children of the marriage. Given the length of the marriage, the community substantially benefited from the Respondent's career, facilitated by the Appellant caring for the home and family while forfeiting her own economic and educational opportunities. While she assisted in valuable ways in operating the construction company and the storage facility, the construction work itself was completed by the Respondent. The parties utilized the businesses and their accounts as community property throughout the marriage.

At trial, the parties conceded that while the Respondent may continue to operate the commercial construction business as he had for many years, the Appellant would not be in the position to enjoy the benefit of simply continuing a career arc long in the making. By contrast, the

Appellant would be required to launch a career, late in life as compared to recent college graduates, and the Appellant argued she would be at a true disadvantage post-dissolution.

At trial it was disclosed Respondent would imminently receive a considerable inheritance.

D. SUMMARY OF ARGUMENT

Failure to divide and award assets constitutes an error by the trial court. Parties in a dissolution case have the right to have their property interests definitively and finally determined in the decree. To effectuate this right, courts have a duty to not award property to parties as tenants in common.

The trial court errs when it makes a valuation finding which is not based upon credible evidence.

Finally, the trial court errors when it makes a maintenance award which does not provide a sufficient amount of time or money to allow the recipient to become self-supporting and fails to acknowledge the length of marriage.

E. ARGUMENT

(1) A Trial Court Abuses Its Discretion if Its Property Division is Manifestly Unreasonable or Based on Untenable Grounds or Untenable Reasons.

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. ¹

In a dissolution proceeding the trial court, without regard to misconduct, makes an equitable distribution of the parties' liabilities and property after considering: “(1) [t]he nature and extent of the community property; (2) [t]he nature and extent of the separate property; (3) [t]he duration of the marriage ...; and (4) [t]he economic circumstances of each spouse ... at the time the division of property is to become effective,” along with any other relevant factors. ²

Other relevant factors include “the health and ages of the parties, their prospects for future earnings, their education and employment histories, their necessities and financial abilities, their foreseeable future acquisitions and obligations, and whether the property to be divided should be attributed to the inheritance or effects of one or both spouses.” ³

¹ *In re Marriage of Larson*, 178 Wn.App. 133, 138, 313 P.3d 1228 (2013).

² RCW 26.09.080

³ *In re Marriage of Olivares*, 69 Wn. App. 324, 329, 848 P.2d 1281 (1993).

To achieve fairness, the trial court's division of property and liabilities requires a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of the parties.⁴ The division of property and liabilities does not need to be equal to be valid.⁵

When considering maintenance the trial court may properly consider the property division, and may consider maintenance in making an equitable division of the property.”⁶ The trial court may look to the parties' standard of living during the marriage and the resources and obligations of the spouse seeking maintenance when deciding whether to award maintenance.⁷ “The purpose of spousal maintenance is to support a spouse ... until [he or she] is able to earn [his or her] own living or otherwise become self-supporting.”⁸ But “a demonstrated capacity of self-support does not automatically preclude an award of maintenance.”⁹

(2) The Trial Court Erred By Not Fully Awarding Ownership.

The trial court erred with respect to not fully awarding the ownership

⁴ *In re Marriage of Zahm*, 138 Wn.2d 213, 218-19, 978 P.2d 498 (1999) (quoting *In re Marriage of Crosetto*, 82 Wn. App. 545, 556, 918 P.2d 954 (1996)).

⁵ *In re Marriage of White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001).

⁶ *In re Marriage of Estes*, 84 Wn. App. 586, 593, 929 P.2d 500 (1997).

⁷ *Id.*, at 593; see also *In re Marriage of Williams*, 84 Wn. App. 263, 268, 927 P.2d 679 (1996) (“The court's paramount concern is the economic condition in which the dissolution decree leaves the parties.”).

⁸ *In re Marriage of Irwin*, 64 Wn. App. 38, 55, 822 P.2d 797 (1992).

⁹ *Marriage of Washburn*, 101 Wn.2d 168, 178, 677 P.2d 152 (1984).

interest in the parties' storage business, and despite the broad discretion given to it in making a property division, the decision of the trial court is a manifest abuse of discretion as it is exercised on untenable grounds and is manifestly unreasonable.

Absent agreement of the parties, Washington law does not permit the court in a dissolution proceeding to leave the parties as tenants in common of the assets. The court performs its responsibility to resolve property disputes in dissolution actions "by a specific disposition of each asset which informs the parties of what is going to happen to the asset and upon what operative events, e.g., that a set sum or formula of money will be paid upon the sale of certain property."¹⁰ Parties in a dissolution case have the right to have their property interests definitively and finally determined in the decree.¹¹ To effectuate this right, "courts have a duty to not award property to parties as tenants in common."¹² When a trial court awards property as tenants in common at dissolution, the court has failed to exercise this statutory duty because this type of award does not dispose of the property in dispute.¹³ Instead, it leaves the parties in the same situation

¹⁰ *Byrne v. Ackerlund*, 108 Wn.2d 445, 451, 739 P.2d 1138 (1987).

¹¹ *Stokes v. Polley*, 145 Wn.2d 341, 347, 37 P.3d 1211 (2001) (citing *Shaffer v. Shaffer*, 43 Wn.2d 629, 631, 262 P.2d 763 (1953)).

¹² *Id.*, at 347 (citing *Bernier v. Bernier*, 44 Wn.2d 447, 449-50, 267 P.2d 1066 (1954)).

¹³ *Bernier*, 44 Wn.2d at 449.

they would be in if the property was not before the court for disposition.¹⁴ In order to avoid such a result, our State's highest court stated: "[t]o avoid this result and future forced sale and partition actions, courts should award the property itself to one spouse and an offsetting monetary award to the other spouse."¹⁵ While there have been subsequent decisions allowing trial courts to order joint ownership of property when supported by fairness and equity, these are rare in number.¹⁶

Here, the trial court stated in its Memorandum Decision denying Appellant's motion for reconsideration: "Who ultimately ends up with this business is yet to be determined. However, absent agreement of the parties, the court had to choose. It chose to allow Petitioner (here Respondent) to run the business, but divided ownership in half. The court stands by that decision." CP 076-080.

In the present matter the trial court forced the parties to become tenants in common, thus, it did not enter a lawful order that finally distributed the couple's assets. Further compounding the error, the trial court then summarily stripped a spouse of all management or participation in the jointly owned business, in perpetuity. This act, alone, deprives an

¹⁴ *Id.*, at 449-50 (citing *Shaffer*, 43 Wn.2d at 630).

¹⁵ *Stokes v. Polley*, 145 Wn.2d 341, 37 P.3d 1211 (2001).

¹⁶ *In re Marriage of Sedlock*, 69 Wn. App. 484, 500, 849 P.2d 1243 (1993); *In re Marriage of Irwin*, 64 Wn. App. 38, 53-54, 822 P.2d 797 (1992).

owner of her ability to seek to maximize the value of the asset through deliberate business operation and activity.

A proper distribution of the asset on remand may then operate to impact the duration and amount of maintenance, child support, and other property distribution. Therefore, while it may be premature and superfluous until the distribution of the couple's largest asset – the storage business - is resolved, for the purpose of appeal the additional assignments of error are addressed herein.

(3) The Trial Court Erred in Determining Value.

The trial court erred in determining the value of the parties' commercial construction business, as the parties filed by exhibit an agreed value significantly higher than that ordered by the Court. Furthermore, the parties' jointly retained valuation expert provided a value far higher than that determined by the Court, and the Court arrived at a valuation unsupported by any admissible evidence.

When valuing assets in a dissolution proceeding, the trial court is not generally controlled by fixed standards. It has wide discretion to consider all relevant facts and circumstances.¹⁷ Where there is conflicting evidence on the value of an asset, the court may adopt the value asserted by

¹⁷ *In re Marriage of Hay*, 80 Wn. App. 202, 204, 907 P.2d 334 (1995).

either party or the value demonstrated by other evidence.¹⁸ The factfinder has broad latitude in determining the weight to give expert opinion.¹⁹ Where the trial court's decision falls within the range of expert testimony given at trial, or is reasonable in light of the conflicting expert opinions, the decision is based upon substantial evidence and will be affirmed upon appeal.²⁰

While a court does not abuse its discretion by assigning values to property within the evidence range²¹ valuation findings must be within the range of credible evidence.²² While the appellate court does not substitute its judgment over the trial court's judgment on disputed property-value and witness-credibility fact issues²³, substantial evidence must still support the valuations.²⁴ Substantial evidence will be found to exist if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.²⁵

¹⁸ *In re Marriage of Soriano*, 31 Wn. App. 432, 435, 643 P.2d 450 (1982).

¹⁹ *In re Marriage of Harrington*, 85 Wn. App. 613, 637, 935 P.2d 1357 (1997).

²⁰ *Sedlock*, 69 Wn. App. 484, at 491-92.

²¹ *In re Marriage of Soriano*, 31 Wn. App. 432, 436-37, 643 P.2d 450 (1982); *In re Marriage of Rockwell*, 141 Wn. App. 235, 250-51, 170 P.3d 572 (2007).

²² *Sedlock*, 69 Wn. App. 484, at 490.

²³ *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999).

²⁴ *In re Marriage of Crosetto*, 101 Wn. App. 89, 96, 1 P.3d 1180 (2000) (quoting *Wold v. Wold*, 7 Wn. App. 872, 878, 503 P.2d 118 (1972)); *In re Marriage of Eklund*, 143 Wn. App. 207, 212, 177 P.3d 189 (2008); *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000).

²⁵ *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002) (quoting *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)).

In the present matter the trial court, as explained in its December 21, 2017, Memorandum Decision, claimed it could not find any written stipulation that the parties had agreed to a value for the commercial construction company. CP 076-080. The court made this claim despite the parties' having stipulated to a joint property matrix which placed the value of the business at \$127,000. Moreover, the parties jointly hired a single valuation expert, Wenatchee based certified public accountant Rick Linder, who valued the business at \$127,000.

Nevertheless, the trial court, without any explanation found in the record, unilaterally determined the value of the construction business to be \$77,000. The valuation provided by the court is inconsistent with the value provided by expert opinion as well as the minimal value claimed, without any supporting evidence, by the Respondent at trial. The trial court did not reach a valuation consistent with the expert testimony received at trial via stipulated exhibit, nor did it reach a value asserted by the Respondent. Nor did the trial court choose the value proposed by the Appellant, consistent with the value reported by the jointly retained expert. Rather, it chose its own value without supporting the valuation upon any evidence of any kind.

When faced with conflicting expert opinions on valuation, with either expert opinion within the range of acceptability, the trial court should be free to establish a value between the two amounts. When the parties offer

conflicting evidence in valuation, the court may adopt the value asserted by either party, or any value in between the two.²⁶

By contrast, a party who stipulates to value but then seeks to offer conflicting evidence without evidentiary support does not by so doing present the trial court with two values. Finally, the trial court is not permitted to strike out on its own with respect to determining value, but rather must anchor its' decision in admissible evidence. While the Court may reject the valuation proposed by parties, it must still determine value based upon substantial evidence. Here, the decision of the trial court, as represented in its written explanation, is not based upon substantial evidence and must be overturned.

(4) The Trial Court Erred in Awarding Maintenance.

The trial court erred in awarding maintenance as it relates to both need and ability to pay. With respect to the latter, the drastic decline in revenue earned by the Respondent's commercial construction business, from approximately \$500,000 annually during the marriage to slightly more than \$200,000 during the separation year, demonstrates a deliberate attempt to minimize the value of the business for the purposes of reducing any maintenance obligation.

²⁶ *In re Marriage of Rockwell*, 141 Wn. App. 235, 250, 170 P.3d 572 (2007); *Sedlock*, 69 Wn. App. at 491.

A request for maintenance is controlled by RCW 26.09.090. Its nonexclusive list of factors to be considered includes:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently.

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage... ;

(d) The duration of the marriage... ;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

The purpose of maintenance is to support a spouse until he or she is able to become self-supporting.²⁷ Maintenance is a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time.²⁸ The only limitation on the amount and duration of maintenance

²⁷ *In re Marriage of Luckey*, 73 Wn. App. 201, 209, 868 P.2d 189 (1994).

²⁸ *In re Marriage of Valente*, 179 Wn. App. 817, 320 P.3d 115 (2014) at 821 (quoting *In re Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984)).

under RCW 26.09.090 is that the award must be just. 29 At bottom, the court's main concern must be the parties' economic situations post dissolution.³⁰ While there is no right to spousal maintenance in Washington, the denial of maintenance is reviewed for abuse of discretion.³¹

It has long been recognized that the trial court sits in the best position to assess the assets and liabilities of the parties, and to determine what constitutes an equitable outcome³², and while a just and equitable division does not require mathematical precision, it does require fairness.³³

In our State, spousal maintenance sought in a long-term marriage receives a distinct consideration. Some decades ago, in an article published in the Washington State Bar News by former King County Superior Court Judge Robert W. Winsor, there was described by Judge Winsor three categories of marriage: (1) short-term, lasting five years or less; (2) long-term, lasting 25 years or more; and (3) intermediate term, encompassing all other marriages. In a long-term marriage of twenty-five years or more, the trial court's objective is to place the parties in roughly equal financial

29 *In re Marriage of Wright*, 179 Wn. App. 257, 269, 319 P.3d 45 (2013).

30 *In re Marriage of Williams*, 84 Wn. App. at 268 (1996).

31 *Friedlander v. Friedlander*, 80 Wn.2d 293, 297-298, 494 P.2d 208 (1972).

32 *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

33 *In re Marriage of Larson & Calhoun*, 178 Wn. App. 133, 138, 313 P.3d 1228 (2013), review denied sub nom., *In re Marriage of Larson*, 180 Wn.2d 1011, 325 P.3d 913 (2014); *In re Marriage of Crosetto*, 82 Wn. App. at 556 (1996).

positions for the rest of their lives. This roughly equal financial circumstance assumes both spouses each work to their capacity and reasonably manage their property.

Mid-range marriages will receive more or less of the long or short marriage considerations, depending upon the length of the marriage and the necessities. The term “rehabilitative maintenance” applies most generally to mid-range cases. In mid-range marriages, Washington courts have often held that the duration of maintenance award may be based upon the time necessary to further the recipient’s education and employability.³⁴

Some argue that distribution and maintenance are not only flawed mechanisms for compensating spousal contributions but also theoretically inapposite.³⁵ Because our courts utilize distribution or maintenance to solve the compensation problem the analysis of the non or low-earner's (stay at home parent) award is made within the realm of discretionary decision-making and judicial generosity.³⁶ Thus, traditionally, our courts have placed men's claims to family wealth in the nondiscretionary realm of entitlement, while women's and children's claims are relegated to the discretionary realm of family law - where the issue is one of whether courts

³⁴ *In re Marriage of Bulicek*, 59 Wn. App. 630, 636, 800 P.2d 394 (1990) (citing RCW 26.09.090(1)(b)).

³⁵ P Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 962 (1979).

³⁶ *Divorce Equality*, 90 Wash. L. Rev. 1245 (October 2015).

will redistribute the traditionally male wage earner income. Our case history concedes that it is women who have been disproportionately impacted by the maintenance analysis: “The purpose of spousal maintenance is to support a spouse, typically the wife, until she is able to earn her own living or otherwise becomes self-supporting.”³⁷

This artificial distinction between length of marriage is never more marked than in the marital length described as intermediate. While a 25-year marriage may result in a maintenance award placing the parties in equal economic positions for life, a 17-year marriage warrants no such consideration. Candidly, these arbitrary divisions cannot properly account for a qualitative difference between a 17 and 25-year marriage, not to mention the clearly indistinguishable line between years 24 and 25.

Practically speaking, a spousal support award profoundly fails to reflect the idea of marriage as an economic partnership in which two individuals share equally in successes and losses. Maintenance, in this way, fails to capture the “normative good” of the property framework, which is to “encourage people to invest, to labor, and to plan carefully” such that “people will work and trade and make everyone collectively better off.”³⁸

It is conceded that the instant appellate matter will not solve the

³⁷ *In re Marriage of Luckey*, 73 Wn. App. 201, 209, 868 P.2d 189 (1994).

³⁸ Carol M. Rose, *Rhetoric and Romance: A Comment on Spouses and Strangers*, 82 Geo. L.J. 2409, 2417 (1994).

discrepancy outlined above. Yet it is inequitable for the trial court in this matter to have awarded 24 months of maintenance following the expiration of a 17-year marriage. Especially where one party raised the children and maintained the home, allowing the other party to continue operating his commercial construction business unimpeded by the responsibilities of child rearing. This Court has treated a 21-year marriage as a long-term marriage.³⁹ In sum, without more, there is no material difference between a marriage of 17 years and a marriage of 25 years. Without specific additional findings of fact, the arbitrariness of such a maintenance decision is manifest.

F. CONCLUSION

Based upon the foregoing, the Appellant respectfully requests this Court remand this matter for additional consideration, specifically instructing the trial court to: (1) award the storage business to one party, adjusting all other economic issues accordingly; (2) properly value the commercial construction business at \$127,000 making appropriate adjustments thereafter to the award of assets, and (3) increase the maintenance award to a just amount, in order to allow Appellant sufficient

³⁹ *In re Marriage of Terry*, 79 Wn. App. 866, 905 P.2d 935 (1995).

time and resources to become self-sufficient following the termination of a
17-year marriage.

DATED this 16th day of July, 2018.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Scott A. Volyn", written over a horizontal line.

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APPENDIX

RCW 26.09.080

Disposition of property and liabilities—Factors.

In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all 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 the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

DECLARATION OF SERVICE

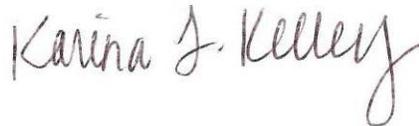
On said day below, I electronically served a true and accurate copy of the Brief of Appellant in Court of Appeals, Division III Cause No. 358321 to the following parties:

Jordan Miller
Via e-mail per stipulation to:
jordanm@jdsalaw.com
barbc@jdsalaw.com

Original E-filed with:
Court of Appeals, Division III
Clerk's Office
500 N. Cedar Street
Spokane, WA 99201

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: July 16, 2018, at Wenatchee, Washington.



Karina L. Kelley, Legal Assistant
Volyn Law Firm

DECLARATION

VOLYN LAW FIRM

July 16, 2018 - 8:50 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35832-1
Appellate Court Case Title: In re the Marriage of: John Arthur Ludwig and Melanie Isha Ludwig, nka Summers
Superior Court Case Number: 16-3-00294-1

The following documents have been uploaded:

- 358321_Briefs_20180716084854D3976735_3474.pdf
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