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No. 362477-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

ERIC B. EDWARDS, Petitioner/Appellant

v.

**JUDITH L. EDWARDS
Respondent/Cross-Appellant**

REPLY BRIEF OF APPELLANT

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Comes now the Petitioner, Eric Edwards and submits the following Reply Brief and Response to Cross Appeal.

I. LEGAL ARGUMENT

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DID NOT CONSIDER THE IMPACTS OF THE MARTINEZ LITIGATION AT ALL.

The Respondent makes the unsupported argument at pages 14 and 20 of her brief that the Petitioner did not provide updated information about Frosty and the impact of the lawsuit on the minority interests citing RP 89-92. The letter ruling of the Court certainly does not support this claim because the Trial Court did not consider the impact of the shareholder freeze out litigation at all. It simply adopted the December 15, 2015 valuation.

On the contrary, Respondent was aware of the Frosty litigation and Mr. Edward's termination prior to trial. PE 1.16, PE 1.17. The lawsuit seeking the dissolution of Frosty was filed by the Martinez group on November 2, 2017 and Respondent was a

served party to that lawsuit which occurred three months before the trial. PE 1.17. Respondent and her expert did have copies of the Frosty Ridge and Frosty Packing operating agreements in discovery and could have presented an opinion on this effect of the litigation in his opinion. PE 1.18, 1.19. Her expert, Mr. Grambush, however, based his opinion solely on the state of the companies and control as of December 31, 2015. RP at 241. He did not consider any of the implications of this Martinez litigation on the marketability discounts or lack of marketability of the minority interests of Chief. RP at 292. The argument that the LLC agreement which contained a non-mandatory buy-sell option would have any bearing on the value is specious at best when it was clear that the Martinez group did not exercise any option to buy out Chief, but instead commenced the litigation to freeze out the Chief minority interest. PE 1.17. This demonstrated the obvious fact that these provisions had no bearing on price and were of no benefit to the Chief group or Edwards.

Neither did the Trial Court consider the impacts of this demonstrated lack of control. The Court's letter ruling simply adopts a three year old opinion on value and at one point the Trial Court mistakenly referred to the valuation as a 2017 valuation. RP at 91. The opinion letter is devoid of any consideration of that impact in its mechanical adoption of a three year old valuation. Contrary to the claims of Respondent that the Trial Court considered the issue at page 20 of her brief, it was clear that Mr. Granbush did not factor in the Martinez freeze out litigation at all. RP at 241.

The Trial Court abused its discretion in adopting a three year old 2015 valuation when it did not examine or factor in the current economic circumstances of the parties and their ownership interest as affected by the Martinez lawsuit. The Trial Court's paramount concern when distributing property in a dissolution action is the economic condition in which the Decree leaves the parties. RCW 26.09.080; In re Marriage of Gillespie, 89 Wash. App. 390, 399, 948 P.2d 1338, 1343 (1997). In making

its ruling the Trial Court failed to exercise its discretion because it failed to consider this impact on the single most valuable asset.

B. THE TRIAL COURT SHOULD HAVE DIVIDED THE INTERESTS IN CHIEF / FROSTY IN A MANNER THAT ALLOWED FOR THE RESOLUTION OF THE FROSTY LAWSUIT

Respondent takes issue with the idea that she should be awarded one half of the community interest in Chief which holds the Frosty ownership. However, the Trial Court could have ordered or structured a division of that asset in the manner suggested by 20 Wash. Prac., Fam and Community Prop. L section 32.6 and ordered Mr. Edwards to pay half of the value of the community derivative interest in Frosty or Chief when the ownership issues in Frosty are resolved. Mrs. Edwards is certainly in no more of a disadvantage with respect to Frosty than Mr. Edwards and the only realistic means of satisfying a judgment which incorporates any value of Frosty is for the Martinez litigation to be resolved in a manner in which Chief obtains some payment in exchange for its interest.

Respondent's discussion regarding the potential application of a stock division followed in Brewster v Brewster, 113 Wn. 551, 194 P. 542 (1920) is incorrect because like Brewster, the community ownership in both Chief and its derivative interest in Frosty is only a minority interest. Chief is not controlled and managed by Mr. Edwards. He only holds a minority interest. Mr. Edwards was clearly being outvoted by its other 2/3 ownership. RP at 32. Therefore, this case does present the same circumstances where divisions of stock are ordered.

The case of Marriage of Zier, 136 Wn. App. 40, 147 P. 3d 624 (2006) actually represents another case where the Trial Court properly exercised its discretion in dividing stock in a closely held corporation involving closely held stock. Similarly, Marriage of Estes, 84 Wn. App. 586, 929 P. 2d 500 (1997) demonstrates that when there are difficulties in valuation such as contingent fees, a division of the asset itself subject to the ultimate outcome is the preferred method to divide such an asset. Id at 590-91. Respondent incorrectly asserts this case was different than Estes

in that the valuation of Frosty was not difficult or impossible .
Rather, Respondent's expert presented no evidence either in his report or in response to questions on cross examination as to what the value of Frosty would be considering the current circumstances of the Martinez lawsuit and readily admitted that he did not "know specifically what was happening right now" and that "it was really a possibility" that Chief would have no involvement in management or control. RP at 292, 300, 301.

C. THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING MAINTENANCE IN THE AMOUNT AND MANNER WHICH FAILED TO CONSIDER THE CURRENT ECONOMIC CIRCUMSTANCES OF THE PARTIES.

1. Substantial Evidence Did Not Support Need Or Ability To Pay With Respect To The \$2500 In Spousal Support Ordered.

In addressing the earnings of Mrs. Edwards, Respondent is correct that the wage stub for January 2018 and April 2017 shows bi-weekly pay periods rather than a weekly pay period RE 2.4, PE

1.7. However, this paycheck also shows that the total gross wages for the same year-to-date pay period were \$4,019.84 which is substantially at variance with the claim that Mrs. Edwards only made \$4,550.00 gross per month in her financial declaration. PE 2.2. The year-to-date recorded pay would support the conclusion that the monthly gross was \$8,709 ($\$4019.84 \times 26 \div 12$). Respondent is only including paid hours and not paid time off which is actually money paid and available to her and should have been considered.

Similarly, the April 4/09/17 to 4/22/17 paycheck appears to represent a bi-weekly period. However, the year-to-date pay reflected at the bottom of that paycheck shows \$19,228.44 year-to-date pay for that time and represents four months' pay or approximately \$4,807.11 per month. PE 1.7. Under such circumstances an award of \$2,500.00 per month would have exceeded her stated need. RE 1.2.

In determining maintenance the Trial Court also abused its discretion in determining Mr. Edwards had the ability to pay. Mr.

Edwards had gross income of \$10,000.00 per month, however his expenses exceeded his net income after taxes. PE 1.11. Before consideration of any judgment payment obligations or spousal support Mr. Edwards did not have the ability to pay spousal support.

Respondent is incorrect in asserting at page 31 of her brief that the Trial Court found that Mr. Edwards has resources beyond his monthly draws from Chief. This is nowhere in the Court's findings and is not supported by any citation to the record. The Court made no such finding. Instead the Court found there was a "dire cash flow" circumstance and that Mr. Edwards' income had been reduced to a \$10,000 per month draw. CP at 90.

2. The Trial Court Abused Its Discretion In Failing To Account For The Impact Of The Property Payment Obligations And Imposing A Support Obligation Which Mr. Edwards Could Not Pay.

Again at page 31 of her brief, Respondent incorrectly argues that the Court found that Mr. Edwards had other resources other than his \$10,000.00 per month draw to cover his support

payment. Nowhere in the Court's findings is there a finding that Mr. Edwards has other resources to make the payment and it is certainly not supported at CP 42 as claimed by Respondent. At best the Court engaged in a discussion of prior tax refunds but made no finding of other resources which could be used to make the payment. Nowhere is there any support that Mr. Edwards had the ability to pay \$2,500.00 in spousal support unless the payment of the judgment at \$11,892.94 per month was completely ignored.

The fact that the judgment impact was completely ignored in setting spousal support was an abuse of discretion by the Trial Court. Under Marriage of Kile and Kendall, 186 Wn. App. 864, 877, 347 P.3d 894 (2015) and Marriage of Rink, 18, Wn. App. 549, 552-53, 571 P. 2d 210 (1977) the Trial Court was required to factor this into the question of ability to pay, but failed to do so. Respondent fails to address this error in her brief with any response other than unsupported argument that Mr. Edwards had "other resources". It is fundamentally an abuse of discretion to order maintenance that a spouse is not able to pay. 20 Wash. Prac.

Fam. And Community Prop. L. section 34-9. The Trial Court then compounded this abuse of discretion by including a “maintenance penalty” which increases the amount of support payable by \$1,000.00 for every month in which Mr. Edwards is unable to make an \$11,891.94 monthly judgment payment adding a greater inability to pay to one which is already demonstrated.

3. Placeholder Maintenance Is An Abuse Of Discretion.

Respondent does not actually directly address the error raised by Petitioner in his discussion of In re Marriage of Valente, 179 Wn. App 817, 827, 320 P. 3d 115 (2014) holding that placeholder maintenance was an abuse of discretion. The problem here is that the Trial Court could not use contingent alimony to insure against the future potential hardship associated with the non-payment on the judgment without a specific finding that it was certain that Mr. Edwards would not be able to pay the judgment. The Trial Court made no such findings and Respondent does not address the placeholder alimony problem associated with the “maintenance penalty” award.

4. The Double Dipping Problem Exists Because The Only Source Of Funds Used To Set Support Is A Draw Against The Income Of The Company Which Was Used To Value The Company.

There is no difference from the situation in Marriage of Barnett, 63 Wn. App 385, 388-89, 818 P. 2d 1382 (1991). In Barnett the value of the business declined when the inventory of scrap was sold just like the draws against the potential future income of Chief take away the same income stream that was used to value the companies in the first place. If you count that income once for the purpose of determining the value of the business and then again as a basis for spousal support you have just counted the same income twice. The concept of double dipping under Barnett is whether you are counting the same funds twice for valuation and second for alimony; not whether the company is in a wind down liquidation.

After using the estimated income of the companies to generate a value for the purpose of the property division, it was a

double dipping abuse of discretion to count that income a second time and use it to create a spousal support payment.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SETTING THE JUDGMENT INTEREST RATE AT 4% PER ANNUM.

In her cross-appeal, Respondent takes issue with the interest rate of 4% which the Trial Court applied to the outstanding judgment \$1,962,429.41 which it made payable over the next 20 years citing Marriage of Harrington, 85 Wn. App. 613, 630-32, 935 P. 2d 1357 (1977) in which the Court required “adequate reasons for the reduction” in the judgment rate. Id. at 631, 935 P.2d at 1368.

The Court in its findings determined that the judgment should be paid over a period of 20 years in connection with setting the judgment at \$1,962,429.41 and the 4% rate. CP at 107, 113. This would result in a monthly amortized payment over 20 years in the amount of \$11,891.94 which exceeded the gross income of Mr. Edwards which was \$10,000.00 per month. CP at 29. Mr.

Edwards was 57 years old at the time of trial. RP 29; CP 3-4. Under those calculations Mr. Edward would not be able to service the debt and even if he could it would not be paid until he was age 77 in any event. Even the Court recognized and found that he was likely unable to pay the judgment when it imposed the “maintenance penalty” of \$3,500.00 for every month that Mr. Edwards was unable to pay the monthly judgment payment. RP at 65. While the Court did not specifically ever say that Mr. Edwards would not be able to pay the judgment if the rate was set at 4% or any other rate higher than 4% the other findings and rulings make that obvious.

However, in the event that this is not obvious, if a rate of 12% was applied to a judgment of \$1,962,429.41 the resulting monthly payment would be \$21,608.04 to amortize the same judgment over 20 years. This is just the obvious math. It would be equally obvious that if Mr. Edwards could not make an \$11,891.94 per month payment he would not be able to make a much higher payment under the facts as determined by the Court.

Under the circumstances and the record as found by the Trial Court, there was no abuse of discretion in setting the judgment interest rate at 4% per annum.

E. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY'S FEES.

The Trial Court abused its discretion in awarding fees because it did not take into consideration the impact of the financial obligations under the property judgment and maintenance award which destroyed Mr. Edwards' ability to pay more. A party to a dissolution action is not entitled to attorney's fees as a matter of right. In re Marriage of Terry, 79 Wash.App. 866, 871, 905 P.2d 935, 938 (1995). In deciding whether to award attorney's fees, this court must balance the needs of one party against the other's ability to pay. Id. at 871. In doing so the Court must consider all of the financial circumstances.

Included in these financial circumstances the Court should have considered the significant impact of the property distribution

award and the alimony which placed a burden on Mr. Edwards which exceeded Mr. Edwards' ability to pay. In Marriage of Harrington, 85 Wn. App. 613, 636, 935 P. 2d 1357, 1371(1997) the Court determined that attorney's fees to the wife would be denied when considering the financial burdens placed upon him in the Decree:

Mr. Harrington has filed an affidavit showing an inability to pay, in light of his heavy financial obligations under the decree dissolving the marriage and his income at the time of oral argument for this appeal. Accordingly, we deny Ms. Harrington's request and direct that each party shall bear his and her respective attorney fees for this appeal and cross appeal.

Id. In a similar manner, because Mr. Edwards currently lacks the ability to pay attorney's fees, no fee should be awarded on appeal.

II. CONCLUSION

The Trial Court abused its discretion in determining the value of the companies without any findings as to the impact of the shareholder litigation. The preferred method of dealing with such an issue should have been followed to divide the ownership

interests rather than rely on a three year old value which did not address the economic circumstances the parties faced at the time the property division and spousal support was made.

The Trial Court abused its discretion in setting maintenance which was beyond Mr. Edwards' demonstrated ability to pay and without consideration of the impacts of the judgment obligation entered against him and in making the award punitive and contingent on a failure to pay an amount which cannot be paid because the shareholder litigation impacts were not considered.

Finally, the Trial Court abused its discretion when it awarded attorney's fees to Mrs. Edwards, when, again, there was no demonstrated need or ability to pay.

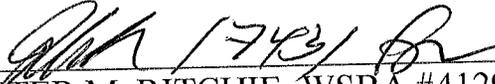
This Court should reverse the decisions of the Trial Court and remand to correct those errors.

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Respectively submitted this 30th day of July, 2019.



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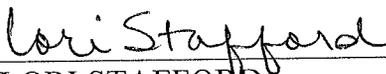
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I certify under penalty of perjury under the laws of the state of Washington that the undersigned caused a copy of this document to be sent to the attorney(s) of record listed below as follows:

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DATED this 30th day of July, 2019, at Yakima, Washington.



LORI STAFFORD

MEYER, FLUEGGE & TENNEY

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