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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

BRIEF OF APPELLANT

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I. INTRODUCTION

Petitioner Eric Edwards appeals the trial court's rulings (1) valuing the community's interest in Chief Orchards Packing & Storage Co., LLC ("Chief") at \$4,007,000 and allocating the interest to Mr. Edwards, (2) awarding Judith Edwards spousal maintenance, and (3) awarding attorney's fees to Mrs. Edwards.

The Court should reverse the trial court's decision. The trial court abused its discretion in overvaluing the interest in Chief and allocating the entire interest to Mr. Edwards. What the trial court should have done, to promote fairness, was simply divide the entity shares among the parties in that the valuation testimony the trial court relied on was three years old at the time of trial and failed to consider significant litigation and control issues in the companies that existed at the time of trial.

The trial court also abused its discretion in its award of spousal support to Mrs. Edwards. The trial court failed to properly consider the lack of need of Mrs. Edwards and the lack of ability

to pay of Mr. Edwards when it set maintenance at \$2,500 per month.

Moreover, the trial court compounded that error by imposing an improper penalty on Mr. Edwards, when it allowed for an increase of Mr. Edwards' maintenance up to \$3,500 per month in the event he could not make the \$11,891 per month property judgment payment scheduled over a 20 year amortization period. This improperly set the maintenance above Mr. Edwards' ability to pay.

Finally, the trial court abused its discretion in awarding Mrs. Edwards attorney's fees, when the evidence showed that Mr. Edwards lacked the ability to pay, and Mrs. Edwards lacked the need for fees. The Court should reverse the trial court's decision.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the value of the community ownership in Chief was worth \$2,007,000.

ISSUE NO. 1: Did the trial court properly determine the value of the community interest in Chief at \$2,007,000?

ANSWER: No.

2. The trial court erred in applying only a five percent minority lack of control discount for Frosty Ridge Orchards, LLC and Frosty Packing Co., LLC (“Frosty”) and zero for Chief.

ISSUE NO. 1: Where Chief owned only a 33.33% interest in Frosty, was it proper to limit the minority discount to only five percent where the majority shareholder had demonstrated the lack of control by Chief at the time of trial by filing an action for dissolution and locking Chief and its owners out of management and control and where the operating agreement of Frosty could be amended at will by the majority owners?

ANSWER: No.

ISSUE NO. 2: Where the community owned only a 33.33% interest in Chief and could be outvoted by the other two 33.33% owners, was it proper to apply a zero minority shareholder discount in the evaluation of Chief?

ANSWER: No.

3. The trial court erred in failing to apply any lack of marketability discounts in its evaluation of Frosty and Chief.

ISSUE NO. 1: When there was no evidence presented of any available market for or willing buyer for the minority membership interest in Frosty and the LLC operating agreements prohibited sales to third parties without consent of the majority and under provisions where there was no mandatory buy/sell agreement, was it proper to fail to apply

any lack of marketability discount to the Chief interest in Frosty?

ANSWER: No.

ISSUE NO. 2: When there was no evidence presented of any available market for or willing buyer for the minority membership interest in Chief and the Operating Agreements prohibited the transfer of interests without the consent of the other members, was it proper to fail to apply any lack of marketability discount to the interest in Chief?

ANSWER: No.

4. The trial court erred in applying a 109.54% enhancement factor to adjust for income received throughout the year in its evaluation of Frosty and Chief.

ISSUE NO. 1: Was it proper to apply a factor to enhance the value of the income for the purposes of valuation based on an assumption that income was received equally throughout the year when the facts showed the majority of the entity operations were orchard operations where the income was actually received several months after the close of the year.

ANSWER: No.

5. The trial court erred in failing to consider any impact of Frosty litigation initiated by the Martinez majority owners in the evaluation of Frosty.

ISSUE NO. 1: In determining the value of Frosty, was it proper to completely ignore in the valuation determination the impact of the dissolution litigation and the lockout of the minority interest in Frosty on the value of the minority interest in Frosty?

ANSWER: No.

6. The trial court erred in using a December 31, 2015 valuation date for Frosty and Chief, which was over three years old at the time of trial.

ISSUE NO. 1: Is it proper to use a date of separation valuation from December 31, 2015 to evaluate the minority interest of Chief in Frosty when substantial changes in circumstances concerning the ownership, control and dissolution of Frosty by the majority shareholders has occurred?

ANSWER: No.

7. The trial court erred in awarding the entire community interest in Chief to Mr. Edwards in lieu of dividing ownership and denying the motion for reconsideration.

ISSUE NO. 1: When the determination of the value of a community interest in an asset is subject to substantial changing circumstances and variables that have not been resolved, was it proper to place a three year old value on the asset which completely ignores the unresolved changes in circumstances rather than dividing the membership interest between the parties?

ANSWER: No.

8. The trial court erred in awarding spousal support to Mrs. Edwards.

ISSUE NO. 1: Did the trial court properly consider the factors in awarding maintenance and the economic circumstances of the parties at the time of trial?

ANSWER: No.

9. The trial court erred in finding that Mrs. Edwards had a need for spousal support.

ISSUE NO. 1: Did the trial court properly rely on testimony that Mrs. Edwards could only work 24 hours per week when her most recent paycheck stub showed that she was working over 40 hours per week and earning substantially more income than her stated needs and where the testimony showed no actual restrictions on her ability to perform work?

ANSWER: No.

10. The trial court erred in finding that Mr. Edwards had the ability to pay spousal support.

ISSUE NO. 1: Did the trial court properly determine Mr. Edwards had the ability to pay spousal support when it obligated him to a monthly judgment payment that exceeded his gross income for the next 20 years and under circumstances where it would be impossible for him to perform?

ANSWER: No.

11. The trial court erred in imposing a \$1,000 per month additional maintenance penalty if Mr. Edwards was not able to make his property judgment transfer payments.

ISSUE NO. 1: Can a court impose an additional \$1,000 per month spousal support penalty amount to increase the amount of spousal support if Mr. Edwards cannot make the monthly property judgment payment amount when the determined that Mr. Edwards ability to pay was limited to \$2,500 and the obligation to make monthly payments on the judgment amount exceed both his gross and net income?

ANSWER: No.

12. The trial court erred in failing to consider the economic circumstances of the parties at the time of trial in fashioning the division of property and determining spousal support.

ISSUE: Did the trial court fail to consider the impact of the property judgment payment obligation as an economic circumstance when making the award of spousal maintenance?

ANSWER: Yes.

13. The trial court erred in awarding attorneys' fees and costs to Mrs. Edwards.

ISSUE NO. 1: Did the trial court properly consider the economic circumstances of the parties, the needs of Mrs. Edwards and the lack of ability to pay of Mr. Edwards in awarding fees and costs of \$25,000?

ANSWER: No.

14. The trial court erred in finding that Mrs. Edwards has a need for attorney's fees and costs.

ISSUE NO. 1: Was it proper to award Mrs. Edwards \$25,000 in fees and costs when her net income, spousal supports, and property payments exceeded her stated need?

ANSWER: No.

15. The trial court erred in finding that Mr. Edwards had the financial ability to pay fees or costs.

ISSUE NO. 1: In addition to imposing on Mr. Edwards a spousal support payment and judgment payments which he could not make given his income, was it proper to find that Mr. Edwards had the ability to additionally pay \$25,000 in attorney's fees.

ANSWER: No.

III. STATEMENT OF THE CASE

A. GENERAL FACTS

The parties were married in 1983. RP at 29. They separated in 2015. RP at 30. At that time, they had no minor children, RP at 30, and were both 56 years old. RP at 29, 339.

Mr. Edwards is an orchardist. RP at 32. During the marriage, the community owned a 33 1/3% interest in Chief

Orchards Packing & Storage Co., LLC (hereinafter "Chief"). RP at 120. Mr. Edwards' two brothers also each own a 33 1/3% interest in Chief. RP at 32.

Chief in turn owns a 33 1/3 percent interest in two limited liability companies, Frosty Ridge Orchards, LLC and Frosty Packing Co., LLC (hereinafter jointly "Frosty"). RP at 33, 120.

Another limited liability company, Martinez Fruit, LLC (hereinafter "Martinez") owns the remaining 66 2/3 percent of Frosty, and is the majority shareholder. RP at 33, 115-116. Mr. Edwards does not own any direct interest in Frosty. RP at 33, 116. His interest in Frosty is purely derivative through Chief. RP at 33.

Mr. Edwards previously worked for Frosty and Chief, managing its orchards. RP at 32, 35. Prior to November, 2017, Mr. Edwards earned a combined \$14,833.33 gross income per month from both entities. RP at 36.

In November, 2017, however, Martinez terminated Mr. Edwards' employment and management role with Frosty, eliminating his salary. PE 1.16, RP 104-105. Martinez also sued

Chief and its shareholders, including Mr. Edwards, for judicial dissolution. RP at 106-107, PE 1.17.

At the time of the trial, that litigation was still pending, and Mr. Edwards was locked out of the management and control of Frosty. RP at 125.

Martinez has total control over Frosty. RP at 117, 128-129. Mr. Edwards and this brothers have no power to set policy or the business direction for Frosty. RP at 123. They have no power to acquire or liquate assets. RP at 123. They have no power to determine compensation. RP at 123. Martinez alone determines whether to make distributions to shareholders. RP at 129.

Mrs. Edwards is a Registered Nurse. The trial court relied upon a finding that at the time of separation Mrs. Edwards was working 24 hours per week and earning \$45.68 per hour. CP at 41-42.

In fact, the testimony and evidence at trial showed that Mrs. Edwards as of December 31, 2017 was working 40.75 hours per

month or at least a full-time schedule of 40 hours at a rate of \$45.68 per hour. RE 2.4, PE 1.7.

This translates into gross monthly income of \$7,917.86 per month (45.68 times 40 times 52 divided by 12), or a net of \$5,869.15 per month (weekly net of \$1,354.42 times 52 divided by 12). RE 2.4, PE 1.7. That is \$2,500 per month more in income than Mrs. Edwards testified to at trial. RE 2.2.

At the time of trial, Mr. Edwards was taking a draw from Chief in the amount of \$10,000 per month gross. CP at 42, RP at 135. That translates into \$7,900 per month net. PE 1.11, RP at 135. Mr. Edwards, however, testified he was not sure if he would continue to be able to take a draw of \$10,000 in the future:

Q. Okay. So right now are you going to be able to continue to draw \$10,000 a month?

A. We don't know.

Q. What does that mean?

A. Because we still haven't packed all our fruit to the point where we know where we are at and see how far we can pay down the operating line. And if we get to the point where we can't, or we run out, then obviously there's no money to pay. We don't have a pile of money anywhere. We're just running on that operating line.

Q. Okay. So do you know if you're going to have a net profit at the end of this year?

A. I don't know that for sure.

Q. Okay. And if you don't have a net profit at the end of this year, then what happens with this \$10,000? How do you account for that?

A. It wouldn't be available because at that point we're going to -- we use up our operating line.

RP 135-136.

B. PROCEDURAL FACTS AND TRIAL

The trial occurred from February 5 to February 7, 2018.

See RP at 1. At trial, Mr. Edwards testified that his interest in Chief was worth \$313,174.67. RP at 118. He also testified the community interest in Frosty was \$750,000 due to the pending dissolution litigation, market conditions, and the fact that Martinez, as the majority shareholder, has exclusive control over Frosty. RP at 120. This was the only evidence presented as to the value of the community interest in Chief and Frosty as of the date of trial.

Mrs. Edwards, via her CPA expert Kevin Grambush, testified that the community's interest in Chief (which included

Chief's 1/3 interest in Frosty) was \$4,006,714. RP at 263. Mr. Grambush based his valuation solely on the state of the companies and control as of December 31, 2015, which was three years before the trial. RP at 241, lines 2-3. In his testimony, he did not consider any of the implications of the Martinez litigation and its impact on minority discounts or lack of marketability of the minority shareholder interests. RP at 292. In fact, Mr. Grambush admitted on cross examination that:

A: I don't know specifically what is happening right now. But it looks to me that there is – well, the lawsuit indicates that there has been a break between the Martinez and Edwards. And I would be surprised if the Edwards were actively involved in that-

Q: Okay. You would assume based on the lawsuit that the Edwards would have little or no involvement at this time in the actual management or control on a day-to-day basis of the Frosty entities, correct?

A: That's really going to be a possibility, yeah.

RP at 292, lines 18-22.

Mr. Grambush further admitted that his opinion was based solely on a three-year-old December 31, 2015 valuation date that did not take into consideration the current freeze out

circumstances of Frosty. RP at 300, line 16; RP at 301, line 16. In essence Mr. Grambush only presented an opinion of the value of Chief and Frosty as of December 31, 2015, and did not express any opinion on the current value in light of the Martinez dissolution litigation.

Mr. Grambush also improperly enhanced the income of the entities by 109.5 percent based on an assumption that the income should be received equally throughout the year. RP at 288, line 12-16. But the facts showed the operations to be at least 62 percent orchard operations, which not only did not receive income at equal times of the year, but rather several months after the end of the year. RP at 281, 283, 287.

On February 8, 2018, the trial court issued a letter opinion. CP at 57-66. The trial court valued Chief's interest in Frosty at \$8,910,419 and essentially adopted the dated, inaccurate evaluation of Mr. Grambush without factoring in any of the current economic circumstances presented by the Martinez dissolution litigation and lockout into the valuation. CP at 59. The

trial court then valued the community's 33 1/3 percent interest in Chief at \$4,006,714, and awarded the entire interest to Mr. Edwards. CP at 60, 64.

The trial court entered Findings of Fact and Conclusions on June 15, 2018, which incorporated the February 8, 2018 letter opinion. CP at 39.

The same day, the trial court entered a Final Divorce Order. CP at 51. The trial court granted Mrs. Edwards property judgments totaling \$2,022,429.41, and bearing interest at four percent per annum and amortized over 20 years at \$11,891.94 per month. CP at 52-53.

The trial court also ordered that Mr. Edwards pay maintenance of \$2,500 per month, but added a penalty if Mr. Edwards is unable to make the required property payments. In that event, the trial court ordered that maintenance be increased to \$3,500 per month. CP at 54, 59.

Following the trial and judgment, Mr. Edwards moved for reconsideration, arguing that the trial court's award of

maintenance and its valuation of Chief/Frosty was improper. CP at 73-79. Mr. Edwards requested that the trial court divide the member interest in Chief equally between the parties in lieu of allocating it entirely to Mr. Edwards, because he would never be able to satisfy the \$2,022,429.41 judgment. CP at 78.

The trial court denied the motion. CP at 80. This appeal followed. CP at 81.

IV. LEGAL ARGUMENT

A. STANDARD OF REVIEW

The review of trial court decisions in dissolution actions is generally governed by the abuse of discretion standard. In Re Marriage of Stenshoel, 72 Wn. App. 800, 803, 866 P.2d 635 (1993). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In Re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

The trial court's findings of fact are reviewed to determine whether they are supported by substantial evidence. In Re

Marriage of Stachofsky, 90 Wn. App. 135, 144, 951 P.2d 346 (1998). Substantial evidence is evidence of sufficient quantity to persuade a reasonable fact finder of the truth of the declared premise. Holland v. Boeing Co., 90 Wn.2d 384, 390–91, 583 P.2d 621 (1978).

RCW 26.09.080 requires that the trial court make a “just and equitable” distribution of the parties' property and liabilities. “An equitable division of property does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of the parties.” In Re Marriage of Crosetto, 82 Wn. App. 545, 556, 918 P.2d 954 (1996).

“In a dissolution action, the trial court's award of attorney's fees will not be reversed on appeal unless it is untenable or manifestly unreasonable.” Fernau v. Fernau, 39 Wn. App. 695, 708, 694 P.2d 1092 (1984).

B. THE TRIAL COURT ABUSED ITS DISCRETION IN CALCULATING THE VALUE OF THE COMMUNITY'S INTEREST IN FROSTY AND CHIEF

The trial court determined that the value of Chief's one-third interest in Frosty was \$8,465,000 based on the dated assessment of Mrs. Edwards' expert Mr. Grambush, despite Mr. Edwards' undisputed testimony that the actual, current interest was only valued at \$750,000. CP at 59. The trial court then calculated the value of the community's interest in Frosty at \$4,006,714. CP at 60. The trial court then allocated the entire interest to Mr. Edwards. CP at 64. This was an abuse of discretion.

1. The Trial Court Failed to Account for the Pending Litigation with Frosty in Its Valuation of Frosty and Chief

Instead of dividing the community's interest in Chief among the parties, the trial court allocated the entire interest to Mr. Edwards, offset by a substantial property judgment in Mrs. Edwards' favor of over \$2,000,000. CP at 48, 52-53. The trial court also adopted Mrs. Edwards' disputed valuation of the

component value of Chief's interest in Frosty at \$8,465,000. CP at 43.

This decision is highly problematic—and an abuse of discretion—because it failed to consider (1) Mr. Edwards' termination by Martinez/Frosty, and (2) the ongoing, pending litigation by Martinez/Frosty for judicial dissolution that effectively locked out Mr. Edwards as well as the other members of Chief.

The trial court and Mr. Grambush seem to have ignored that the Martinez/Frosty litigation adversely impacts over 50 percent of the value of Mr. Edwards' interest in Chief. Of the net tangible assets of Chief before Mr. Edwards' 1/3 is determined, over 8/12 of that value is represented by Frosty. As to the value of \$4,006,712 attributed to Mr. Edwards' interest in Chief, over 8/12 of that value (over \$2,671,142) is subject to virtually no discounts or consideration of the Frosty litigation. PE 1.16, 1.17.

That the trial court did not fully consider the impact of this litigation is clear from the discount applied and the adoption of

Mr. Grambush's valuation and its methodology that was over three years old at the time of trial and that failed to adjust for any impacts of the pending shareholder litigation. The trial court simply adopted, without question, Mr. Grambush's minimal five percent discount for lack of control of Frosty and zero discount for any lack of control in Chief. CP at 43. This was adopted even after it was clear that Mr. Grambush had no opinion on the current value of Frosty or Chief at the time of trial. RP at 241, 300-301.

The trial court's decision makes no sense here where the undisputed testimony was that neither Mr. Edwards nor Chief had any role in or control over Frosty at the time of trial. As to Chief, it was clear that Mr. Edwards could be outvoted by the other who shareholders making a zero minority control discount untenable.

It was also an abuse of discretion to fail to apply any lack of marketability discounts to either Frosty or Chief. The Frosty Operating Agreement prohibited Chief from selling its interest without the majority consent. PE 1.18, 1.19. The Operating

Agreement also contained a non-mandatory buy/sell agreement which offered no relief. PE 1.18, 1.19 § 8, 8.6.1.

Even Mrs. Edwards' expert agreed on cross-examination that the Martinez majority owners could sit on their 66.67 percent interest and freeze out Chief and the Edwards minority without any right of the minority to dispose of their interests. RP at 297 line 12-21. The Court should determine that it was an abuse of discretion not to apply any lack of control discounts or marketability discounts to the valuation of Chief and Frosty. Mr. Edwards testified that the lack of control discount should be a lot higher than 5 percent because Chief has no control. RP at 132-133.

At the time of trial, the pending Martinez litigation was a reality and not just hypothetical. RP at 133. As to lack of marketability even the non-mandatory buy/sell provisions contained at least a 10 percent discount applicable to the membership interest which would have been binding on Chief had Frosty decided to purchase the shares. PE 1.18, 1.19 § 8.6.3.

Under the circumstances of this case known at the time of trial it was an abuse of discretion not to apply any marketability discounts.

The trial court is not required to adopt an expert simply because it is made. Hedlund v. White, 67 Wn. App. 409, 413, 836 P.2d 250 (1992). The trial court's adoption of Mr. Grambush's extremely dated and incomplete conclusions, which did not even consider the impact of the Frosty litigation, was an abuse of discretion. Because a substantial amount of Mr. Edwards' interest in Chief is tied up in litigation, the trial court should have rejected the valuation of Mr. Grambush because it was untenable not to apply greater discounts where the evidence showed that neither Chief nor Mr. Edwards has the ability to control the litigation or access any of the determined value.

Instead, the trial court should have adopted an approach which would be more consistent with that used in a Qualified Domestic Relations Order division of a retirement plan which has ongoing changes in values. Under that approach the trial court

should have either awarded the ownership in Chief to both parties, as noted in Part 2, *infra*, or provided a mechanism to adjust the ultimate value of the Frosty interest when the litigation is concluded or to re-examine that valuation based on what occurs in the Frosty litigation.

Otherwise the trial court entered a ruling based on a property value of \$4,006,714 of which over \$2,671,142 (66 percent of the total value) is subject to litigation over whether Mr. Edwards will have any rights or control or ever recognize any interest from that Frosty ownership. Under the circumstances the trial court should have divided the shares in Chief to both parties instead of stacking a large number on Mr. Edwards' side of the worksheets.

The problems associated with valuation of a property interests that are subject to litigation is addressed in the Washington Practice Series:

Another example of an asset that may be valued based on its possible future value is a legal claim, or potential legal claim. While the range of value for certain types of legal

claims can be determined with a reasonable degree of confidence, many legal claims are impossible to value until they have been resolved. For such claims, the court will either award each spouse a 50% interest in the claim, or distribute the claim to one spouse with the duty to pay 50% of any recovery to the other spouse, after deducting the costs of prosecuting the claim.

20 Wash. Prac., *Fam. And Community Prop. L.* § 32:6.

2. The Trial Court Should Have Divided the Shares Among the Parties

The paramount concern of the trial court in the division of assets and liabilities should be the economic circumstance of the parties in which the court leaves the parties at the time the decree is entered. In re Marriage of Gillespie, 89 Wn. App. 390, 948 P.2d 1338 (1997).

A trial court may appropriately handle division of stock in a dissolution is by dividing the community shares equally. In re Marriage of Zier, 136 Wn. App. 40, 46, 147 P.3d 624 (2006). This is especially true when the interest to be divided has a value that is contingent on the outcome of litigation.

This is precisely what this Court did in In re Marriage of Estes, 84 Wn. App. 586, 929 P.2d 500 (1997), when this Court was faced with the question of how to value and divide pending contingency fee cases. This Court held that proceeds of any contingency fee agreements obtained during marriage in conduct of community's business should be awarded to both parties and divided between them, when received, based upon percentage of number of hours worked during marriage bears to total number of hours worked in earning the fees:

The difficulty of valuation, without more, does not preclude the court from awarding contingent fees; the proceeds of a contract obtained during the marriage in the conduct of the community's business may be awarded to both parties and divided between them when received. This is the approach followed in the majority of jurisdictions that have considered the matter.

Id. at 590–91.

In this case, consistent with the approach in Zier and Estes, the equitable way to achieve this paramount concern, given the substantial issues that affect Frosty and which comprise 66

percent of the ultimate value of Chief, was to re-allocate the award of the interests in Chief so that each of the parties was awarded a 50 percent in-kind interest in Chief.

Under that scenario, Mrs. Edwards would be awarded 50 percent of the distributions and 50 percent of the Chief interest in the outcome of the Frosty dissolution litigation. Since Mr. Edwards is already outvoted by the other two shareholders the community position on control is the same.

This appropriately and equitably links the potential success or failure of the enterprise to the actual ongoing course of business rather than a judgment which may or may not be collectable based on the success or failure of the business. *See Brewster v. Brewster*, 113 Wash. 551, 555, 194 P. 542 (1920).

C. THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING MAINTENANCE

Spousal maintenance is not a matter of right. *In re Marriage of Sheffer*, 60 Wn. App. 51, 54, 802 P.2d 817 (1990). In

determining whether to award maintenance, courts consider: (1) the financial resources of the party seeking maintenance; (2) the time necessary for the party seeking maintenance to acquire education and training to find employment; (3) the standard of living during the marriage; (4) the duration of the marriage; (5) the age, physical and emotional condition, and the financial obligations of the party seeking maintenance; and (6) the ability of the party against whom maintenance is being sought to pay support. RCW 26.09.090.

The primary consideration for the courts is the ability to pay and the financial need of the party receiving maintenance. In determining spousal maintenance, the trial court is governed strongly by the need of one party and the ability of the other party to pay an award. Endres v. Endres, 62 Wn.2d 55, 56, 380 P.2d 873 (1963); Cleaver v. Cleaver, 10 Wn. App. 14, 20, 516 P.2d 508 (1973).

The trial court awarded Mrs. Edwards \$2,500 per month in maintenance. CP at 54. This was error and an abuse of discretion for several reasons.

1. The Trial Court's Award of \$2,500 per Month Spousal Maintenance Failed to Consider the Economic Situations of the Parties

First, the award failed to consider one of the two primary factors: need. In making the award, the trial court relied upon a finding that at the time of separation Mrs. Edwards was only working 24 hours per week and earning \$45.68 per hour. CP at 41-42.

The testimony and evidence at trial, however, showed that Mrs. Edwards (as per her paycheck stub from December 31, 2017) was working 40.75 hours per week or at least a full-time schedule of 40 hours at a rate of \$45.68 per hour. RE 2.4, PE 1.7. This translates into gross monthly income of \$7,917.86 per month (45.68 times 40 times 52 divided by 12), or a net of \$5,869.15 per month (weekly net of \$1,354.42 times 52 divided by 12). RE 2.4, PE 1.7. That is \$2,500 per month more in income than Mrs.

Edwards claimed at trial, RE 2.2, a substantial increase in income the trial court failed to take into account when determining need.

If the trial court had considered Mrs. Edwards' actual income as of the date of trial, this would have shown that Mrs. Edwards (at \$7,917.86 gross per month) did not have a financial need when compared to Mr. Edwards' limited ability to pay, which was based on his \$10,000 gross per month draw. If the trial court had made the relevant inquiry and assessed those two factors, it should have reduced the maintenance obligations, if not eliminated any maintenance obligation.

Even looking at Mrs. Edwards' stated needs in her financial declaration, this income actually exceeded her stated needs. PE 2.2. In fact, examining Mrs. Edwards's post-maintenance income of \$8,369.15 (\$5,869.15 plus \$2,500) as compared to Mr. Edwards' post-maintenance income \$5,400 (\$7,900 minus \$2,500), shows there was no justification at all for an award of maintenance even before considering the additional unpaid judgment obligation placed on Mr. Edwards.

2. The Trial Court Failed to Consider the Impact of the Property Division on Mr. Edwards' Inability to Pay

Second, the trial court's award completely failed to consider the economic impact on Mr. Edwards of including judgments totaling \$2,022,429.41. Those judgments included a property equalization money judgment of \$1,962,429.41 for which the payments amortized at four percent over 20 years requires a monthly payment of \$11,891.94 per month which Mr. Edwards clearly cannot make under his current economic circumstances. CP at 52-53.

Taking this into consideration and that Mr. Edwards was only receiving his \$10,000 gross per month draw as income, CP at 42, RP at 135, it is apparent Mr. Edwards lacked the ability to pay not only the property transfer payments ordered but also the spousal maintenance ordered.

A trial court is not only permitted to consider the division of property when deciding whether to award maintenance, it is required to do so. In re Marriage of Kile and Kendall, 186 Wn.

App. 864, 877,347 P. 3d 894 (2015); In re Marriage of Rink, 18 Wn. App. 549, 552-53, 571 P.2d 210 (1977). When considering the division of “property,” courts must also consider the debts or obligations which are part of that property division award. In this case, the trial court erred in failing to do so.

What is more, the trial court seems to have conceded in its ruling that Mr. Edwards’ economic circumstances were such that he likely could not pay. CP at 54. Instead of not ordering maintenance, however, the trial court compounded its error by ordering an increase in maintenance from \$2,500 to \$3,500 per month if Mr. Edwards failed to make the \$11,891.94 per month property judgment payment. CP at 54.

There was no reason for the trial court to make such a specific ruling unless it truly believed that Mr. Edwards was unable to make these payments. Having failed to account for all of Mr. Edwards’ obligations to pay the substantial judgments, which he could clearly not pay given his available income, the trial court entered a maintenance award that he is unable to pay

under the current economic circumstances the trial court placed him in under the Decree.

A trial court abuses its discretion by ordering maintenance that a spouse is not able to pay:

If the obligor spouse has no ability to pay maintenance, it is error to order its payment. If there is limited ability to pay maintenance, it is error to order maintenance in excess of the ability to pay. This is not only a matter of fairness to the obligor spouse, but it is also a matter of judicial economy because if the decreed maintenance is not paid, the court will be burdened with repeated attempts to coerce the performance of an act that cannot be performed.

20 Wash. Prac., Fam. And Community Prop. L. § 34:9; Bowers v Bowers, 192 Wash. 676, 678, 74 P. 2d 229 (1937) (citing Bungay v Bungay, 179 Wash. 219, 223-24, 36 P. 2d (1934))

3. The Trial Court's Decision Improperly Includes A Maintenance Penalty

The trial court awarded Mrs. Edwards \$2,500 per month in maintenance based on an erroneous finding that Mr. Edwards' had the ability to pay that amount, but then went further and

ordered that such maintenance was to be increased to \$3,500 in the event that Mr. Edwards fails to make a property payment:

Spousal maintenance is due on the first of each month through October, 2016. For any month that the Petitioner does not make payment on the judgment amount listed herein, he shall be required to pay the Respondent \$3,500 a month.

CP at 54.

This ruling was an abuse of discretion because the trial court essentially imposed additional maintenance as a penalty on Mr. Edwards beyond his already demonstrated inability to pay. We know of no authority that permits increased maintenance as a penalty and it is obviously not included as an allowed factor under RCW 26.09.090. In making its findings, CP at 54, the trial court actually only found that Mr. Edwards had the ability to pay \$2,500 after considering the factors of RCW 26.09.090 as required by the law. *See Endres*, 62 Wn.2d at 56.

Because the trial court determined that Mr. Edwards only had the ability to pay \$2,500, any amount the trial court awarded above that amount (\$1,000 per month) would be clearly be

beyond Mr. Edwards' ability to pay, which the trial court had already specifically found to be \$2,500.

4. The Trial Court's Maintenance Award Should Be Viewed as an Improper Placeholder Award

While the trial court's ruling did not overtly reference the possibility of future modifications in the context of "placeholder" maintenance, the economic circumstances would not have supported any alimony award or an additional maintenance penalty where the recipient was also receiving \$11,891.94 per month in property settlement payments on top of her already substantial earned income. What the trial court attempted to do was to fashion a "placeholder" award with the contemplation that the payments on the judgments of over \$2,000,000 were virtually impossible under the current economic circumstances.

Maintenance cannot be used as an insurance policy against potential hardship in the absence of specific findings regarding the certainty of those hardships to occur. In re Marriage of

Valente, 179 Wn. App 817, 827, 320 P. 3d 115 (2014)
(placeholder maintenance is an abuse of discretion).

The trial court, however, did not make any findings that Mr. Edwards could not make the judgment payments in support of such an award, and if it had done so it would have created the double dilemma of calling into question both the appropriateness of any alimony and the fairness of the property award itself and the underlying value of Chief and Frosty.

**5. The Award of Maintenance Was An Improper
“Double Dipping” Award**

In In re Marriage of Barnett, 63 Wn. App. 385, 388-89, 818 P. 2d 1382 (1991), this Court determined that it was error to award one-half of a business value and on top of that also to award maintenance based on the income from the business. This error is referred to as “double dipping.” See In Re Marriage of Valente 179 Wn. App. 817, 829, 320 P. 2d 115 (2014).

It was established at trial that Mr. Edwards’ sole source of income was his draw against the future profits of Chief. RP at

135-136. He was no longer receiving any salary from Frosty because the majority shareholder had terminated his employment, PE 1.16, and commenced litigation locking Mr. Edwards and Chief out of control or management of Frosty and seeking its dissolution. PE 1.17.

In the same manner as in the Marriage of Barnett, *supra*, whatever money Mr. Edwards might derive from the Frosty entities at the conclusion of the dissolution litigation or otherwise would not be from operations but from its liquidation. While Mr. Edwards still had some ability to obtain draws from continued operations of Chief, the majority of the value of the property award is accounted for by the value of Chief's troubled 1/3 shareholder investment in Frosty.

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

The trial court also abused its discretion in awarding Mrs. Edwards \$25,000 in attorney's fees. CP at 54. Under RCW 26.09.140, the trial court may only award fees "after considering

the financial resources of both parties.” This involves assessing (1) the need for attorney’s fees, and (2) the other part’s ability to pay. In re Marriage of Schnurman, 178 Wn. App. 634, 644, 316 P.3d 514 (2013); In re Marriage of Wright, 107 Wn. App. 485, 489, 27 P.3d 263 (2001), aff’d, 147 Wn.2d 184, 52 P.3d 512 (2002). Even if one party has a demonstrated need, an award of fees is improper if the other party lacks an ability to pay. Id.

Further, attorney’s fees may not be allowed when the wife has ability to pay since she is not entitled to free litigation. Mason v. Mason, 40 Wn. App. 450, 457–58, 698 P.2d 1104 (1985).

In Schnurman, the Court of Appeals held that the wife was not entitled to fees under RCW 26.09.140. Even though she had a need for attorney’s fees, the husband had no further ability to pay. Id.

Here, the trial court abused its discretion in awarding fees. Based on the testimony and evidence at trial, it is apparent that Mr. Edwards lacks the ability to pay attorney fees. As noted, the trial court actually conceded below that Mr. Edwards would not

be able to even pay the property payments when it allowed for an increase in maintenance when Mr. Edwards is unable to make the payments. CP at 54. If the trial court recognized that he cannot make those payments, he certainly lacks the ability to pay fees.

Moreover, there is no finding that once Mrs. Edwards began receiving the property payments that she would be unable to pay her attorney's fees. *See* Mason v. Mason, 40 Wn. App. 450, 458, 698 P.2d 1104 (1985). In that case, the Court of Appeals found error when there was no specific finding as to need when considering the property award:

At the time the findings were entered Joseph had not paid the \$17,300. Since that time, however, he has paid that debt. There are no findings that once Sarah received the \$17,300 she would be unable to pay her attorney fees. Nor is there a finding that Joseph had the ability to pay Sarah's attorney fees. Additionally, based on affidavits filed in support of his motion for reconsideration, it is apparent that Joseph lacks the ability to pay Sarah's attorney fees. Therefore, the award of attorney fees is vacated.

Id. at 458.

In the case at bar, the property transfer payments are scheduled to be paid monthly at over \$11,000 per month. The trial court failed to make any finding considering the impact of those payments on the need for fees whatsoever. The award of attorney's fees should be vacated.

V. CONCLUSION

The trial court abused its discretion in awarding maintenance. The evidence showed that Mrs. Edwards did not have a need, and Mr. Edwards lacked the ability to pay. Based on those two relevant factors, an award of maintenance is untenable.

The trial court abused its discretion when it allocated the entire interest in Chief to Mr. Edwards. Alternatively, the trial court should have divided the membership interests between the parties equally. The trial court compounded this error by relying exclusively on a three-year-old valuation opinion from December 31, 2015, which failed to apply any reasonable discounts for lack of control or lack of marketability when it was clear that substantial and unresolved litigation was pending which directly

and adversely impacted the value of Chief at the time of trial. This impact was completely and inappropriately ignored by the trial court in its valuation decision.

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.

Respectively submitted this 13th day of March, 2019.



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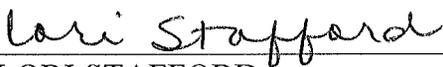
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I certify under penalty of perjury under the laws of the state of Washington that the undersigned caused a copy of this document to be sent to the attorney(s) of record listed below as follows:

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DATED this 13th day of March, 2019, at Yakima, Washington.



LORI STAFFORD

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