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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

BEVERLY SEVIGNY,

Respondent/Cross-Appellant,

v.

MICHAEL G. SEVIGNY,

Appellant/Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR YAKIMA COUNTY
THE HONORABLE GAYLE M. HARTHCOCK

CROSS-REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

SMITH GOODFRIEND, P.S.

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I. CROSS-REPLY ARGUMENT

The trial court arbitrarily reduced the interest rate without providing an adequate reason for doing so, removing any incentive for the husband to pay the equalizing judgment and denying the wife any benefit from the division of property. This was an abuse of discretion and should be reversed. *See Marriage of Harrington*, 85 Wn. App. 613, 631, 935 P.2d 1357 (1997) (“[T]he court abuses its discretion if it fixes an interest rate below the statutory rate [under RCW 19.52.020] without setting forth adequate reasons for the reduction.”). Particularly where, as here, it represents the spouse’s interest in a community business, an equalizing judgment should bear interest at “the rate . . . which judgments ordinarily bear.” *Berol v. Berol*, 37 Wn.2d 380, 382, 223 P.2d 1055 (1950).

In *Berol*, the Supreme Court held that the trial court had abused its discretion in refusing to allow the wife interest on deferred payments meant to compensate her for interests in the “complex” “Berol family business relationships.” 37 Wn.2d at 381. The Supreme Court reasoned that the husband could borrow money from another source to pay the wife if he could obtain it at a rate lower than the statutory rate:

We see no good reason why the husband should have the use of the wife's money in his business without the payment of interest thereon; and if he can secure the money from someone else at a lower rate, there is nothing in the decree to prevent his doing so and paying off the entire amount to which the wife is entitled.

Berol, 37 Wn.2d at 382. See also *Marriage of Stenshoel*, 72 Wn. App. 800, 812, 866 P.2d 635, 642 (1993) (an “ early payoff provision . . . encouraging [husband] to pay his obligation as soon as possible” without interest was proper, but it was an abuse of discretion for trial court to award 6% rather than statutory interest on deferred payments to wife from community business awarded to husband); *Marriage of Knight*, 75 Wn. App. 721, 731, 880 P.2d 71, 76 (1994) (trial court erred in setting interest at 6% on attorney fee award; remanding for imposition of interest at statutory rate), *rev. denied*, 126 Wn.2d 1011 (1995).

The husband points to the trial court’s statement that a 4 percent interest rate is “reasonable under the circumstances given the uneven distribution as well as the . . . maintenance” (RP 222) as sole justification for the reducing the interest rate to a third of the statutory rate. (Reply Br. at 12) But, tellingly, the husband cites no authority justifying a reduction to the statutory interest rate based solely on the distribution and maintenance award. To the contrary,

a trial court may not reduce the statutory interest rate by reciting circumstantial assurances about reasonableness – the reduction must have *some actual* support. *Marriage of Davison*, 112 Wn. App. 251, 259, 48 P.3d 358 (2002).

The trial court in *Davison* had reduced the interest rate on a judgment against the wife to 8 percent, stating the statutory interest rate was “very high,” and that “current interest rates were approximately 9.25 percent.” 112 Wn. App. at 259. The Court of Appeals reversed. *Davison*, 112 Wn. App. at 259 (the trial court’s reasoning “does not justify setting the rate at 8 percent. By not giving a reason to support this rate, the court abused its discretion”).

The facts here demand the same result. The husband made no attempt to support a reduced interest rate other than to claim, without evidence, that “3.5 [percent]” is “the kind of return people are getting on better investments right now,” and that the statutory rate is “not . . . workable.” (RP 221) Such baseless assertions cannot justify reducing the statutory interest rate. First, the husband presented no evidence that he would be able to borrow money at 3 or 3.5 percent – and, if so, *Berol* and *Stenshoel* teach that the trial court should have instead imposed both a statutory interest rate and a due

date for payment that would have encouraged the husband to pay off the wife, rather than use her as an involuntary “soft money” lender.

Further, the wife’s business valuation expert testified that the expected capitalization rate for the business awarded to the husband was 15%. (RP 58-59; *see also* Pet. Ex. 1.19) This is, essentially, the rate of return the husband can expect to earn on the business awarded to him. *See Marriage of Hall*, 103 Wn.2d 236, 243-44, 692 P.2d 175 (1984) (explaining that the capitalization rate is the estimated rate of expected return on a business). The trial court adopted the expert’s method for valuation and incorporated his report into its letter opinion (CP 50), yet reduced the wife’s “rate of return” to a third of the statutory rate – which was already less than the husband’s expected return on the business awarded to him.

The husband claims the reducing the interest rate was necessary to prevent “a windfall” to the wife (Reply Br. at 11), but the trial court’s arbitrary reduction worked the exact opposite, leaving the husband in possession of the wife’s property with no incentive to pay her for her share, as the judgment requires. The trial court’s decision upends the fundamental purpose for awarding interest, which is to incentivize a debtor “not to be delinquent . . . and, if delinquent, to abbreviate the period of interest by prompt payment.”

GTE Commc'n Sys. Corp. v. State of Wash., Dep't of Revenue, 49 Wn. App. 532, 536, 744 P.2d 638 (1987); *see also Marriage of Barnett*, 63 Wn. App. 385, 387, 818 P.2d 1382 (1991) (ordering interest as an “incentive to encourage” the husband to sell property and pay the wife’s judgment). This incentive is crucial in dissolution cases because “spouses are entitled to receive their share of the community property within a reasonable time.” *Marriage of Foley*, 84 Wn. App. 839, 844, 930 P.2d 929 (1997).

II. CONCLUSION

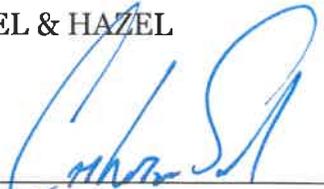
The interest rate reduction lacks any adequate reasoning and undercuts the important policy concerns underlying the statutory interest rate. For that reason, this Court should reverse and remand for imposition of interest at the statutory rate.

Dated this 6th day of November, 2019.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 6, 2019, I arranged for service of the foregoing Cross-Reply Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

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