

FILED
Court of Appeals
Division III
State of Washington
NO. 368424
11/6/2019 4:16 PM

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

MARINA PALOMAREZ
(fka Wilcox)

Plaintiff / Appellant

v.

MATTHEW E. WILCOX

Defendant / Respondent

**BRIEF OF APPELLANT
MARINA PALOMAREZ**

Raymond G. Alexander , WSBA #14592
Halverson | Northwest Law Group P.C.
405 East Lincoln Avenue
Yakima, WA 98901
Telephone: (509) 248-6030
Facsimile: (509) 453-6880
ralexander@hnw.law

Table of Contents

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 1

III. STATEMENT OF THE CASE..... 5

IV. ARGUMENT 9

 1. The Trial Court Abused its Discretion in Awarding the Economically Disadvantaged Spouse in a Long-Term Marriage Substantially Less Assets When Husband Makes Seven Times the Income of Wife. 9

 2. It was an Abuse of Discretion for the Trial Court to Award Spousal Maintenance of Only \$1,000 Per Month for 47 Months With an Undefined Amount After That Beginning in December 2022, Given the Gross Disparity in Earning Power and the Court’s Inequitable Division of Property..... 16

 3. It was an Abuse of Discretion for the Trial Court to Find Husband’s Income (Earning Capacity) was Only \$40,000 Gross Per Year at the Time of Trial. 17

 4. It was an Abuse of Discretion for the Trial Court to Charge Wife \$42,000 Fair Rental Value for her Use of The Family Home While Their Divorce was Pending..... 25

 5. It was an Abuse of Discretion for the Trial Court to Use the Same US Bank Line of Credit Debt Twice in Dividing Assets.. 29

 6. It was also an Abuse of Discretion for the Trial Court to Find Husband is Only Capable of Making \$40,000 Gross Annually from the Business for Spousal Maintenance Purposes but Value the Parties’ Business Based on \$100,000 as Reasonable Compensation for Husband’s Work at the Business. 31

7. It was an Abuse of Discretion for the Trial Court to Find Husband Put Down \$20,000 of His Separate Money on the Purchase of the Family Home When There was No Testimony on the Record to that Effect. 32

8. It was an Abuse of Discretion for the Court to Find the Business Only Paid About \$4,000 of Personal Expenses Each Year and that There was Nothing Improper or Material Since Both Parties Had the Advantage of Running Those Expenses Through the Business Post-Separation. 33

9. It was Error for the Trial Court to Find the Mortgage Escrow Refund Check for \$986.13 was a Community Asset. 35

10. This Court Should Award Wife Attorney Fees for Having to Bring this Appeal Based on her Need for Attorney Fees and Husband's Ability to Pay..... 35

V. CONCLUSION..... 36

Table of Authorities

Cases

<i>Atkinson v. Atkinson</i> , 38 Wash. 2d 769, 231 P. 2d 641 (1951)	27, 33
<i>Dickison v. Dickison</i> , 65 Wn. (2d) 585, (1965)	15
<i>In re Marriage of Sheffer</i> , 60 Wn. App. 51, 802 P.2d 817 (1990).....	16
<i>In re Marriage of Tower</i> , 55 Wn. App. 697, 780 P.2d 863 (1989).....	16
<i>In re Marriage of Mueller</i> , 140 Wash. App. 498, 167 P.3d 568 (2007)	35
<i>In re Marriage of Neumiller</i> , 183 Wn.App. 914, 335 P.3d 1019 (2014).....	18
<i>In re Marriage of Olivares</i> , 69 Wn. App. 324, 848 P.2d 1281 (1993).....	9
<i>In re Marriage of Zahm</i> , 138 Wn. 2d 213, 978 P.2d 498 (1999)	9
<i>In re the Marriage of Urbana</i> , 147 Wn. App. 1, 195 P.3d 959 (2008).....	9, 13
<i>In re the Marriage of Washburn</i> , 101 Wn. 2d 168	17
<i>Jones v. Commissioner of Internal Revenue</i> , 99 T.C.M. (CCH) 1457 T.C. Memo. 2010-112 (2010).....	19
<i>Leslie v. Verhey</i> , 90 Wn. App. 796, 954 P.2d 330 (1998).....	36

<i>Marriage of Barnett</i> , 63 Wash. App. 385, 818 P.2d 1382 (1991)	14
<i>Marriage of Kaseberg</i> , 126 Wash. App. 546, 108 P.3d 1278 (2005)	33
<i>Marriage of Littlefield</i> , 133 Wn. 2d 39, 940 P.2d (1997)	9
<i>Marriage of Mathews</i> , 70 Wash. App. 116	16, 17, 32
<i>Marriage of Nuss</i> , 65 Wn. App. 334.....	27
<i>Marriage of Stenshoel</i> , 72 Wn. App. 800, 866 P.2d 635 (1993).....	24
<i>Marriage of Thomas</i> , 63 Wn. App. 658, 821 P.2d 1227 (1991).....	21
<i>PIER 67, Inc. v. King County</i> , 89 Wash. 2d 379, 573 P. 2d 2 (1977)	20, 22
<i>Powell v. Powell</i> , 66 Wash. 561, 119 P. 1119 (1912)	14
<i>Pugh v. Commissioner of Internal Revenue</i> , 213 F.3d 1324 (11th Cir.2000)	18
<i>Romak v. Commissioner of Internal Revenue</i> , 31 T.C.M. (CCH) 462 T.C. Memo. 1972-116 (1972).....	19
<i>United States v. Gilmore</i> , 372 U.S. 39 (1963)	20
<u>Statutes</u>	
26 USCA, Sec. 275	19
RCW 26.09.002.....	27
RCW 26.09.080.....	28
RCW 26.09.080(4)	9, 15
RCW 26.09.090.....	17

RCW 26.09.090(f).....	21
RCW 26.09.140.....	35, 36
RCW 26.09.197.....	28
RCW 26.16.140.....	35

I. INTRODUCTION

This case involves a long-term marriage where the parties should be put in roughly equal financial positions for the rest of their lives. Even though husband's gross income averaged over \$200,000 in the last three years and was seven times that of wife as shown on the tax returns, the trial court awarded husband substantially more property than wife, charged wife sua sponte \$42,000 of rental value for her use of the family home prior to trial, limited wife's spousal maintenance by finding husband was only capable of making \$40,000 gross per year while at the same time finding reasonable compensation for husband's work was \$100,000 for purposes of valuing the parties' business. These and other findings of the trial court resulted in a patent disparity in the parties' economic circumstances and constituted an abuse of discretion.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred in finding the division of community property and liabilities is "fair (just and equitable)."

Assignment of Error No. 2: The trial court erred in finding the division of separate personal property is “fair (just and equitable).”

Assignment of Error No. 3: The trial court erred in its spousal maintenance award to wife.

Assignment of Error No. 4: The trial court erred in finding the fair rental value of the family home was \$1,000 per month and then retroactively charging wife rent for 42 months of wife’s use of the home without such a claim ever being made by husband.

Assignment of Error No. 5: The trial court erred in offsetting \$35,000 of fair rental value against the underlying mortgage balance at separation.

Assignment of Error No. 6: The trial court erred in offsetting 50% of the remaining \$7,000 of fair rental value (\$3,500) found by the court against attorney’s fees awarded to wife.

Assignment of Error No. 7: The trial court erred in finding a \$20,000 down payment on the purchase of the family (community) home was made by husband as his separate property and then offsetting it against attorney’s fees awarded to wife.

Assignment of Error No. 8: The trial court erred in crediting the same US Bank debt of \$20,086.82 twice, once as a business debt in valuing the parties' business and then as a community debt of the parties.

Assignment of Error No. 9: The trial court erred in finding there was only \$4,000 per year on average of personal expenses that husband was paying through the business, and that both parties benefitted equally in personal expenses paid by the business after separation.

Assignment of Error No. 10: The trial court erred in finding husband was only capable of making \$40,000 gross per year at the time of trial for purposes of spousal maintenance.

Issues Related to Assignment of Error No. 10:

1. Did the trial court error in not including all of husband's income as income to him?
2. Did the trial court error in not including the business's Schedule K-1 distributions to husband as income to him?
3. Did the trial court error in finding husband's income lower than what husband himself declared it to be in a Financial

Declaration filed six months prior to trial (August 27, 2018)?

Assignment of Error No. 11: The trial court erred in finding husband was only capable of making \$40,000 gross per year from the business for spousal maintenance purposes, while at the same time valuing the parties' business based on finding \$100,000 was reasonable compensation for husband's work.

Assignment of Error No. 12: The trial court erred in finding wife had the ability to seek out new employment which should reasonably increase her income sufficient for her to be self-sufficient with the addition of future maintenance the court awarded.

Assignment of Error No. 13: The trial court erred in finding under the trial court's Final Divorce Order wife should be in a position to maintain or exceed the parties' prior standard of living for a reasonable period of time and become self-supporting.

Assignment of Error No. 14: The trial court erred in finding the mortgage escrow check which refunded the pre-paid taxes and insurance paid by wife on the family home in 2018 as a community asset.

Assignment of Error No. 15: The trial court erred in offsetting \$49,343 against wife's attorney's fees after the court specifically found that wife needed help in paying those fees and that husband had the ability to pay. (CP16, 32).

III. STATEMENT OF THE CASE

Appellant, Marina P. Palomarez, age 51, and respondent Matthew E. Wilcox, age 51, began living together in July/August of 1992 and then married on October 22, 1994. (RP 15, 18, 166, 174). The parties purchased a family home in 1996. (RP 197). In 2008, the parties purchased a power sports business known as Premier Power Sports, LLC. (RP 19). The parties separated on July 4, 2015 and Marina filed this divorce on August 8, 2015. (CP 17). Marina has one year of college at Heritage and no degrees. (RP 167). Matthew has a four-year Bachelor of Science Degree in Psychology with a minor in Business from WSU. (RP 15). The parties have one child Victoria who had one year of High School remaining at the time her parents separated. By court order dated September 3, 2015, Marina was to occupy the family home and was to receive "family support" of \$2,600 per month for both her and their minor daughter Victoria

who resided with her. (Ex. RE 1). This family support was reduced to \$1,800 per month on revision by order dated October 12, 2015 (Ex. RE 2). By order dated September 1, 2016, this court found Matt's gross income to be \$16,293.45 per month and Marina's to be \$2,727.97 per month based on the parties' 2015 Tax Return. From these findings, the court set spousal support for Marina at \$2,500 per month. Post-secondary support for their daughter's freshman year at EWU was set at \$1,056 per month for Matthew and \$172 per month for Marina. (Ex. RE 5). The parties' child switched colleges and came back home for her sophomore year of college at YVC. (RP 201). Victoria then went back to EWU for her Junior year of college. By Court order dated September 6, 2018, Father was ordered to pay college support of \$800 per month for her Junior year and Mother was ordered to pay 27% of \$19,680. (Ex. RE 10). At trial, the parties stipulated this order would remain in full force and effect post-trial and Yakima County Superior Court would retain jurisdiction to address whether any additional college support is warranted, and if so, how much. (RP 112, 117).

Prior to purchasing the business known as Premier Power Sports, Matthew was employed as the Production Manager of Graham Packaging earning an annual salary of approximately \$75,000 plus benefits and a modest bonus. (RP 17-18). Premier Power Sports was purchased in 2008 for \$400,000.00. (RP 19). The business was put into an S Corporation in 2014. (RP 43, Ex. RE 20). Gross sales of the business were approximately 2.5 million in 2014, 3 million in 2015, 3.9 million in 2016 and 4 million in 2017. (Ex. RE 20, 22, 24, 26). Matthew made gross incomes of \$195,522 in 2015, \$227,454 in 2016, and \$208,863 in 2017 as shown on his tax returns. (Ex. PE 53.7, 53.11, 53.14). Husband did not provide any evidence of how the business did in 2018, so 2017 is the last year evidencing his income. (RP 162). Nor did husband submit a Financial Declaration at trial. (RP 487). While this divorce was pending, the business paid Matthew's individual Federal Income taxes, all his divorce attorney's fees and all his divorce expert witness fees. (RP 43, 154-155, Ex. PE 53.57). At the time of trial, Matthew had no outstanding personal debt. (RP 30).

Matthew also paid for other personal expenses through the business. Even though the 2011 Dodge Ram pickup was the only

source of transportation for Mr. Wilcox up until 2017, business or personal, the business paid for 100% of its original cost (\$53,696), and all subsequent maintenance, insurance and gas. (Ex. PE-53.1, Schedule C, 53.39; RP 31). Matthew would also barter with other businesses he knew to pay for their services through the business as well. This included car accident repairs and dental work. (RP 36, 495). The business also paid for the gas, vehicle maintenance and repairs of the vehicles for the other family members as well as their cell phones. (RP 31-32; CP 28). Matthew plans to continue running this business for another 15 to 20 years. (CP 31).

Growing up, Marina worked in the fields, and then held primarily receptionist type jobs and/or data entry except for about five years when she stayed home by agreement to take care of their daughter. Marina is bilingual, but not certified. (RP 167-173; CP 19). Wife made \$32,735 in 2015, \$31,782 in 2016, \$21,744 in 2017, and \$26,228 in 2018 from employment (not including alimony). (Ex. PE 53.7, 53.10, 53.13). After entry of the Findings of Fact and Conclusions of Law, and Final Divorce Order, Marina brought a

Motion for Reconsideration which was summarily denied without comment. (CP 118, 127).

IV. ARGUMENT

1. **The Trial Court Abused its Discretion in Awarding the Economically Disadvantaged Spouse in a Long-Term Marriage Substantially Less Assets when Husband Makes Seven Times the Income of Wife.**

“A trial court abuses its discretion if its decision 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 legal standard or the facts do not meet the requirements of the correct standard.”

Marriage of Littlefield, 133 Wn. 2d 39, 47, 940 P.2d 136 (1997).

RCW 26.09.080(4) requires the court to consider the economic circumstances of each spouse at the time the division of property is to become effective. Our courts have repeatedly stated the paramount concern of the court is the economic condition each spouse will be left in at the time of divorce. *In re the Marriage of Urbana*, 147 Wn. App. 1, 11, 195 P.3d 959 (2008); *In re Marriage of Zahm*, 138 Wn. 2d 213, 218, 978 P.2d 498 (1999); *In re Marriage of Olivares*, 69 Wn. App.

324, 329, 848 P.2d 1281 (1993). As stated in the WASHINGTON FAMILY LAW DESKBOOK (Wash. St. Bar Assoc. 2d ed. 2000) Sec. 32-13: “The courts regularly award more property to the spouse with a lower income-earning capacity, especially where the marriage is of longer duration.”

This is a long-term marriage of over 20 years. (CP 17-18). The parties separated July 4, 2015. (CP 17). The trial court found the net marital estate to be valued at \$887,416 as outlined below. (CP 11, 15-16, 25-27, 29- 30, 32-33, 37, 39). Husband was always the primary bread winner for the family. Husband made gross incomes of \$195,522 in 2015, \$227,454 in 2016, and \$208,863 in 2017 as shown on his tax returns. (Ex. PE 53.7, 53.11 and 53.14). Husband did not provide any evidence of how the business did in 2018, so 2017 is the last year evidencing his income. (RP 162). Wife made \$32,735 in 2015, \$31,782 in 2016, \$21,744 in 2017, and \$26,228 in 2018 from employment (not including alimony). (Ex. PE 53.7, 53.10, 53.13). Thus, husband made a total of \$631,839 over the last three years of his reported income (2015-2017) compared to wife who only made a total of \$86,261 during that same time. Comparing these last three

years of income, husband made seven times as much as wife. (7.32 time as much to be exact). Without a significant unequal division of property in wife's favor and/or substantial alimony, there will be no legitimate comparison between the economic conditions of the parties at the time of divorce or after. Instead of providing wife with a significantly larger portion of the assets as is regularly done, the trial court awarded her \$125,000 less than husband declaring the nature of the assets did not allow it to make it more equal. (CP 32). Of the \$887,416 net marital estate the trial court found, husband was awarded \$506,250 and wife was awarded \$381,166 as follows:

Husband was awarded the following assets and debts:

Premier Power Sports, LLC	\$500,000
Bank Accts 1/2	\$15,800
US Bank LOC Debt	(\$20,086)
Marina's reimbursement for half of US Bank LOC Debt	\$10,043
Escrow Refund 1/2	<u>\$ 493</u>
	\$506,250

Wife was awarded the following assets and liabilities:

Family Home	\$225,000
Home Mortgage	(\$35,000)
Matthew's separate \$20,000 used in purchase of family home	(\$20,000)
Half of US Bank LOC Debt	(\$10,043)
Graham 401k	\$114,307

Fair Rental Value of Family Home	\$42,000
2013 Honda Accord	\$22,000
Morgan Stanley Acct.	\$17,424
Home Furnishings	\$6,000
WA. State Ret. Savings Plan	\$3,185
Bank Accts. 1/2	\$15,800
Escrow Refund 1/2	<u>\$ 493</u>
TOTAL:	\$381,166

Difference: \$506,250 - \$381,166 = \$125,084

Further, if this court finds that it was error for the trial court to assign \$42,000 of fair rental value to wife for her use of the family home (Argument No. 4 below), and that the US Bank LOC debt was improperly credited twice to husband's benefit (Argument No. 5 below), then wife would receive \$167,000 less of the marital estate. The division of assets and liabilities under this scenario would be as follows:

Husband would be awarded the following assets:

Premier Power Sports, LLC	\$500,000
Bank Accts 1/2	\$15,800
Escrow Refund 1/2	<u>\$ 493</u>
TOTAL:	\$516,293

Wife would be awarded the following assets and liabilities:

Family Home	\$225,000
Home Mortgage	(\$35,000)
Matthew's separate \$20,000 used in purchase of family home	(\$20,000)

Graham 401k	\$114,307
2013 Honda Accord	\$22,000
Morgan Stanley Acct.	\$17,424
Home Furnishings	\$6,000
WA. State Ret. Savings Plan	\$3,185
Bank Accts. 1/2	\$15,800
Escrow Refund 1/2	\$ 493
TOTAL:	\$349,209

Difference: \$516,293 - \$349,209 = \$167,084

The trial court found that "...while the division of community assets may not be exactly 50/50", the record did not allow it to do so, nor was it required to do so. (CP 16, 32). While a trial court is not required to divide community property equally, if its "decree results in a patent disparity in the parties' economic circumstances," its decision will be reversed because the trial court will have committed a manifest abuse of discretion. *In re the Marriage of Urbana*, 147 Wn. App. 1, 10, 195 P.3d 959 (2008). The trial court's division cannot be classified as anything close to 50/50, and the record clearly allowed the trial court several options to deal with the paramount concern of the economic condition each party will be left in. The trial court could have simply put the \$49,343 of offsets it found in wife's column instead of offsetting them against the attorney's fees it awarded her and for which it found she had the need for help to pay. (CP 16, 32).

Even under this scenario, the economically disadvantaged spouse would still be left with less than 50% of the net marital estate. It also made the trial court's award of attorney's fees it decided husband should pay illusory. How is wife to pay \$49,343 of fees with monies that do not exist. It is patently unfair when the court acknowledges wife needs help to pay her attorney's fees and husband has the ability to help pay, and then offset \$49,343 of attorney's fees awarded to wife with no money to pay while the business has husband's attorney's fees paid in full at the time of trial. The trial court could also have given wife an equalizing judgment which by all accounts could easily have been paid by husband where his income averaged over \$200,000 for the last three reported years while the business maintained over \$500,000 cash in its bank accounts. *See Marriage of Barnett*, 63 Wash. App. 385, 388, 818 P.2d 1382 (1991), citing *Powell v. Powell*, 66 Wash. 561, 564, 119 P. 1119 (1912). Or, the trial court could have awarded wife substantial alimony, or any combination of the above.

Instead, the trial court awarded wife \$125,000 less of the assets and reduced her maintenance from \$2,500 per month pre-trial to \$1,000 per month post-trial. And if this court decides the trial court

should not have charged wife \$42,000 of rental value for her use of the family home after separation, and/or that the trial court should not have given husband an additional credit for the same \$20,086 of US Bank debt, then wife, as the economically disadvantaged spouse in a long term marriage, was awarded up to \$167,000 less than husband. This results in a patent disparity in the parties' economic circumstances, especially when you consider husband makes seven times as much as wife. As found by the court in *Dickison v. Dickison*, 65 Wn. (2d) 585, 587, (1965):

“While...the law does not impel an equal or exact division of the community property, we agree with appellant that, under the evidence, it was a manifest abuse of discretion to award the respondent two-thirds of the community assets.”

Finally, as mentioned previously, RCW 26.09.080(4) specifically requires the court to consider the economic circumstances of each spouse at the time the division of property is to become effective. The court cannot consider the economic circumstances of each spouse at the time the division of property is to become effective if the court has erroneously determined husband's income. As discussed in Argument No. 3 below, the court erroneously determined

husband was only capable of making \$40,000 gross income at the time of trial. When you consider husband's tax returns for the last three years showed average taxable income seven times that of wife, the court did not give fair consideration to this legal requirement and therefore, it was an abuse of discretion. See *Marriage of Mathews*, 70 Wash. App. 116, 123, 853. P.2d 462 (1993).

2. It was an Abuse of Discretion for the Trial Court to Award Spousal Maintenance of Only \$1,000 per Month for 47 Months with an Undefined Amount After That Beginning in December 2022, Given the Gross Disparity in Earning Power and the Court's Inequitable Division of Property.

As stated in *Marriage of Sheffer*, 60 Wn. App. 51, 56, 802 P.2d 817 (1990): "When, as in the present case, the disparity in earning power is great and the property division is unequal, reviewing courts must closely examine a maintenance award "to see whether it is equitable in light of the post dissolution economic situations of the parties." As stated in *Marriage of Tower*, 55 Wn. App. 697, 701, 780 P.2d 863 (1989): "Such a disproportionate community property award in favor of the only spouse with any significant earning capacity would be an abuse of discretion were it not balanced by long-term

maintenance.” Citing *In re the Marriage of Washburn*, 101 Wn. 2d 168, 178 677, P.2d 152 (1984).

In this long-term marriage, husband makes seven times more than wife, and yet wife was awarded substantially less assets than husband. The trial court’s finding husband was only capable of making \$40,000 gross per year defies all factual evidence and legal standards as is addressed below. The trial court did not give a fair consideration to the statutory factors in RCW 26.09.090 and therefore it was an abuse of discretion. *Marriage of Mathews, Id.* at 123.

3. It was an Abuse of Discretion for the Trial Court to Find Husband’s Income (Earning Capacity) was Only \$40,000 Gross Per Year at the Time of Trial.

Income is income. Husband made gross income of \$195,522 in 2015; \$227,454 in 2016; and \$208,863 in 2017 as shown on his tax returns. (Ex. PE 53.7, 53.11 and 53.14). It is also important to keep in mind that husband did not argue or complain once at trial that he was struggling to pay or was not able to pay the spousal support or post-secondary support he had been paying prior to trial by court order. Nor could he, as husband testified at trial, he had no outstanding personal debt and all his attorney’s fees were paid in full. (RP 30, 154-

155, Ex.). Husband had attorney's fees of \$54,394 as of August 2018. (Ex. PE 53.57).

Further, distributions on Schedule K-1, line 16, of a U.S. Income Tax Return for an S Corporation (Form 1120S) constitute income to the shareholder by law. *Pugh v. Commissioner of Internal Revenue*, 213 F.3d 1324, 1330 (11th Cir.2000). An S Corporation does not make distributions to a shareholder to pay business expenses. All distributions shown on Schedule K-1 (1120S) line 16 decrease husband's basis in the business and constitute income to him on his personal income tax return. (Ex. PE 53.15, Schedule K-1, line 16; PE 53.14, line 17). Husband's Schedule K-1 (form 1120S) distributions in 2015 were \$45,613, in 2016 were \$59,449 and in 2017 were \$75,922. (Ex. PE 53.9, 53.12, 53.15). A trial court abuses its discretion if its decision is based on an incorrect legal standard. *In re Marriage of Neumiller*, 183 Wn.App. 914, 920, 335 P.3d 1019 (2014). The trial court refused to consider these distributions as income to husband contrary to law and is therefore an abuse of discretion. The Schedule K-1 distributions alone in each of those years were more than the \$40,000 gross the trial court found husband was capable of

earning. In fact, the 2017 business distributions to husband of \$75,922 were almost double what the trial court found husband was capable of making. Add in the W-2 wages the business paid husband of \$39,891 in 2017 (Ex. PE 53.14) and husband had income of at least \$115,813 which was not retained in the business. Even after payment of husband's W-2 wages and the Schedule K-1 Distributions, the business also paid back \$50,000 of the \$300,000 loan from husband's mother in 2017. (RP 352-353, Ex. PE 53.15, Schedule L, line 20). This was the first-time husband had paid back any of the \$300,000 principal loan amount from his mother since the loan was given in 2008 as is verified on the 2017 business tax return. (Ex. PE 53.15, Schedule L, line 20). Even with the above payments, the business still had \$531,126 of cash sitting in the business bank accounts on December 31, 2017. (Ex. PE 53.15, Schedule L, line 1).

Nor can the business pay the personal federal income taxes of husband, his divorce attorney's fees or his divorce expert witness fees as a business expense. 26 USCA, Sec. 275; *Romak v. Commissioner of Internal Revenue*, T.C. Memo. 1972-116, 31 T.C.M. (CCH) 462 (1972); *Jones v. Commissioner of Internal Revenue*, T.C. Memo.

2010-112, 99 T.C.M. (CCH) 1457 (2010). *United States v. Gilmore*, 372 U.S. 39,51 (1963). The business paid \$28,852.77 of husband's Federal income taxes in 2017 (RP 43); \$54,394 of his divorce attorney's fees as of August 2018 (RP 154-155); and \$6,600 of his divorce expert witness fees (RP 43). In *United States v. Gilmore*, 372 U.S. 39,51 (1963) our United States Supreme Court held legal fees incurred in a divorce were not deductible business expenses. None of these personal expenses could be paid by the business as a business expense. They are personal expenses of husband and by law constitute income to him.

Further, husband's failure to provide the court with any evidence at trial of how his business did for an entire calendar year (2018) prior to trial, should result in a finding that such evidence would be unfavorable to him. *PIER 67, Inc. v. King County*, 89 Wash. 2d 379, 385, 573 P. 2d 2 (1977). The 2018 business income information was completely in the control of husband and it was his obligation to provide it to this court which he did not do. His failure to provide it should result in any income issues being resolved against

him. *Marriage of Thomas*, 63 Wn. App. 658, 664, 821 P.2d 1227 (1991).

In addition, husband did not submit a Financial Declaration to the court at trial so the court could evaluate his income, available assets, expenses and liabilities. (RP 487). Nor did husband testify what cash he had available or what his monthly expenses were at the time of trial. This was husband's responsibility. RCW 26.09.090(f); Yakima County LSPR 94.04W (C)(2)(d)(iv). This information was completely in the control of husband and it was his obligation to provide it to this court. A trial court cannot fairly evaluate property division or spousal maintenance if husband's income and monthly expenses cannot be properly and accurately determined by the court.

His failure to provide a Financial Declaration or evidence of such financial information should result in these financial issues being resolved against him. *Marriage of Thomas, Id.*, at 664. Because wife learned at trial that husband did not prepare a Financial Declaration for purposes of trial, wife made the last Financial Declaration husband had filed for purposes of a temporary spousal maintenance motion in August 2018 an exhibit at trial. (Ex. PE 53.57). When questioned at

trial about how this Financial Declaration had been put together, husband testified:

“This was a last minute last ditch effort right before this—the proceedings before the Court at that time to try and provide some sort of a financial declaration because it’s always been an issue that I don’t provide one.”

(RP 162). This last Financial Declaration filed by husband in August of 2018 and signed under penalty of perjury showed a gross monthly income of \$15,901 and normal business expenses of \$2,920 for an adjusted gross income of \$12,981 per month or \$155,772 annually. (Ex. PE 53.57). Under no circumstances should his income be less than what he declared it to be. And his failure to provide this court with his annual income for 2018 or a Financial Declaration at trial should necessitate the court finding his taxable income as his income for all purposes. *PIER 67, Inc. v. King County, Id.* at 385. For some reason the trial court never commented on husband’s failure to provide a financial declaration at trial or provide any evidence of how the business did in all of 2018. Husband’s accounting practices gave him the ability to provide sales, and profit and loss type statements to this court, even if tax returns were not available. (RP 159-160, 489).

Husband testified he needed cash to help pay his obligations to the manufacturers until he received payment from the customer although husband did not testify about how much cash he believed needed to be on hand. Husband had over \$500,000 in cash in the business bank accounts at the end of 2015, 2016 and 2017. The business tax returns showed cash of \$547,881 at the end of 2015, cash of \$ 525,080 at the end of 2016, and cash of \$531,126 at the end of 2017. (Ex. PE 53.9, 53.12, 53.15, Schedule L, line 1). Generally, husband had seven days from the time a unit sold until he had to pay the manufacturer. (RP 485). In other words, he used his own money like a line of credit (stopgap) to pay his obligation to the manufacturer after a unit was sold until he was reimbursed when payment was received from the customer. But the cash is not used up, it is completely reimbursed to husband when he receives the customer's payment. So, when he has cash at the end of 2016 and 2017 at the same level of \$525,000 to \$550,000 as in 2015, it means he spent the money or his general cash reserves would continue going up since the business made an average of \$180,000 in each of those two years after 2015. (Ex. PE 53.12, 53.15).

The trial court appears to be considering the cash reserves as a business necessity to justify not using the retained earnings of the corporation in calculating his earning capacity. (*See Marriage of Stenshoel*, 72 Wn. App. 800, 866 P.2d 635 (1993)). But there was no business necessity since a line of credit would solve the husband's temporary need for cash, and he had existing lines of credit. (Ex. RE-39, 40). Even if the cash reserves were a business necessity, once the cash reserve was established, all profits of the business thereafter had no legitimate business necessity to stay within the business.

Also, it is factually impossible for husband to only be making \$40,000 gross at the time of trial. Husband paid \$38,448 in just spousal and post-secondary support alone in 2017 which is the last year of reported earnings. (Husband paid \$2,500 of spousal support per month for all of 2017 which amounts to \$30,000). Husband also paid \$1,056 per month for their daughter's college support from January through August 2017 which is another \$8,448 for a total of \$38,448. (Ex. RE-5). The truth is husband could not have paid for just his spousal support and post-secondary support alone if his gross income was only \$40,000 a year as found by the trial court.

Here is the reality of the situation. In 2017, husband paid his wife \$30,000 maintenance (Ex. PE-5), paid \$10,000 down on the purchase of a brand new 2017 Nissan Rogue (RP-30, 119), and paid \$8,455.52 towards his daughter's college support (Ex. PE-5) totaling \$48,455 in just those three areas. This doesn't include any of his own living expenses in 2017. During that same year, the business paid \$28,852.77 of his Federal income taxes (RP-43); \$15,000 of his divorce attorney's fees (RP-42); and \$6,600 of his divorce expert witness fees (RP-43) for another \$50,452.77 of personal expenses.

4. It was an Abuse of Discretion for the Trial Court to Charge Wife \$42,000 Fair Rental Value for Her Use of the Family Home While their Divorce was Pending.

Wife should not have been charged any rental value for her use of the family home after separation. To begin, the trial court on its own, without request from husband, decided wife should be retroactively charged rent for her use of the family home while this dissolution was pending even though wife paid all expenses associated with the home including the mortgage, taxes and insurance. (RP 247-249). If the court was going to unilaterally assign rent retroactively to wife for living in the family home, would it not also

be required in fairness to retroactively assign rent to husband for his use of the marital community's largest asset, the family business?

Further, there was no evidence on the record to make a finding that the fair rental value was \$1,000 per month as found by the trial court. The trial court itself acknowledged this when it found:

“While there was no direct evidence placed on the record regarding the value of Marina Wilcox's use of that community asset (typically couched in terms of a fair rental value) the Court is assigning the monthly principal payment of \$1,000...”

(CP 21). Even though there was no evidence of fair rental value, the trial court assigned wife \$42,000 of rent for the 42 months wife lived in the family home between separation and trial. Of this amount, the trial court offset \$35,000 of the fair rental value it assigned to wife against the \$35,000 home mortgage wife had paid after separation.

(CP 21). The balance of the home mortgage at the time of separation in July 2015 was \$35,916.10. (Ex. PE 53.47). Not only did the trial court offset the entire remaining mortgage against the rental value it assigned to wife for her use of the family home, it also found wife owed another \$7,000 of rent to the community after the home mortgage was paid off beginning in July 2018 through the month of

trial in January of 2019. (CP 22). Therefore, wife was retroactively assigned a total of \$42,000 of rent for her use of the family home while this divorce was pending. In *Atkinson v. Atkinson*, 38 Wash. 2d 769, 773, 231 P. 2d 641 (1951) our Supreme Court held it was an abuse of discretion for the trial court to assign a value to property that was not within the record.

In addition, as stated in relevant part in *Marriage of Nuss*, 65 Wn. App. 334, 338-339:

“It is highly unusual, however, to retroactively assign a rental charge to the spouse occupying the family community property home during the pendency of the case, and then reduce that spouse’s distributive share of community property accordingly...”

Nor should a court retroactively assign a rental value to one spouse living in the family home while a dissolution is pending, without at least putting that spouse on advance notice so that spouse can make intelligent residency decisions.

Finally, it should be against the public policy of this state to retroactively charge the custodial parent of a minor/dependent child rent for living in the family home while the divorce is pending. RCW

26.09.002 states in relevant part the policy of our State is to do what is in the best interest of dependent children and that:

“...The best interests of the child are served by a parenting arrangement that best maintains a child’s emotional growth, health and stability, and physical care.”

In carrying out this policy through issuance of a temporary parenting plan, RCW 26.09.197 requires the court in pertinent part to “...give particular consideration to: ...(2) Which parenting arrangements will cause the least disruption to the child’s emotional stability while the action is pending.” And RCW 26.09.080 on disposition of assets and liabilities requires the court to consider “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.” The parties’ child was 17 years old at the time the Petition for Dissolution was filed herein and about to enter her senior year of High School. The parties’ daughter resided with her mother and father was ordered to pay child support accordingly. (Ex. RE 2). She remained dependent on the parties through graduation from High School as well as her post-secondary

education through the time of trial as evidenced by the court's post-secondary support orders. (Ex. RE 5, 10).

A child's ability to stay in the family home is a definite source of stability for a child experiencing all the emotional distress and anxiety involved in the breakup of his/her parents' marriage. Therefore, it should be against public policy to retroactively charge the custodial parent rent for living in the family home while the divorce is pending. And where, as here, the custodial parent only makes one-seventh of the income of the other parent, to retroactively assign rent is patently unfair.

5. It was an Abuse of Discretion for the Trial Court to Use the Same US Bank Line of Credit Debt Twice in Dividing Assets.

The trial court first gave credit for the parties' US Bank Line of Credit debt of \$20,086.82 in the valuation of Premier Power Sports, LLC husband was awarded. The US Bank Line of Credit was listed as a business debt on the books of the business (rounded up to \$20,087 in the tax returns), was paid by the business and was taken into consideration by both parties' experts in valuing the business. (Ex. PE 53.6, 53.9, 53.12, 53.15, Schedule K, line 20; PE 53.41, 53.42, 53.45).

Husband himself viewed this debt as a debt of the business. (RP 442). Prior to the amended tax returns, the business debt on Schedule K, line 20 was \$170,087 made up of \$150,000 owed to Kathryn Hosack and \$20,087 borrowed from the US Bank line of credit. (RP 125, Ex. 53.36). Once the 2014 and 2015 business tax returns were amended in 2017 to add an additional \$150,000 of debt owed to husband's mother, line 20 shows business debt of \$320,087. (Ex. PE-53.6, 53.9, 53.12). This debt was now made up of \$300,000 owed to Kathryn Hosack and the same \$20,087 borrowed from the US Bank line of credit.

Husband was then given a second credit for this same US Bank debt when the trial court assigned this same debt for him to pay and receive a 50% credit of \$10,043 from wife. (CP 23). It was error for the trial court to credit the same debt twice to husband's benefit. Although the trial court viewed the loan from husband's mother (i.e. \$300,000) as a personal loan, because it was listed on the company books it was already taken into consideration in valuing the business. (CP 30). Even though the US Bank debt was a personal loan, it too was listed on the company books and was already taken into

consideration in valuing the business. Accordingly, it was error to give husband an additional 50% credit of \$10,043 for paying off this loan.

6. It was also an Abuse of Discretion for the Trial Court to Find Husband is only Capable of Making \$40,000 Gross Annually from the Business for Spousal Maintenance Purposes but Value the Parties' Business Based on \$100,000 as Reasonable Compensation for Husband's Work at the Business.

(CP 30, 31). The trial court found the value of the business on June 30, 2015 to be \$500,000 based on the analysis of wife's expert, Scott Martin. (CP 30). Scott Martin gave several values for the business depending on various factors. The value the court made its decision on was the fourth value Mr. Martin had listed (\$537,000) based on amended tax returns and \$100,000 of compensation as of December 31, 2015. (Ex. PE 53.44). The trial court reduced the \$537,000 to \$500,000 in its written decision to account for the June 30, 2015 valuation date. (CP 109). The \$100,000 of reasonable compensation is a significant valuation issue. When wife's expert did the exact same valuation calculation the trial court based its valuation decision on except using husband's W-2 wages the business value increased \$200,000 to \$737,000. (Ex. PE 53.44).

However, when the trial court looked at the spousal maintenance issue, it found husband was only capable of making \$40,000 gross per year which greatly limited wife's potential support after a long-term marriage. You cannot have it both ways. Either the business is capable of paying husband a \$100,000 salary, or it is only capable of paying husband a \$40,000 salary as found by the trial court. Husband's tax returns clearly show the business is not only capable of paying husband a \$100,000 salary, but the tax returns show average profits of \$172,970 for the last three reported years after payment of husband's W-2 wages. It was an abuse of discretion for the trial court to find husband's annual income at the time of trial to only be \$40,000 gross. That finding is not a fair consideration of the legal standards for what constitutes personal income. *Marriage of Mathews, Id.* at 123.

7. It was an Abuse of Discretion for the Trial Court to Find Husband Put Down \$20,000 of his Separate Money on the Purchase of the Family Home When There was No Testimony on the Record to that Effect.

Wife has searched the transcript and there does not appear to be any testimony at trial that husband paid \$20,000 of his own money

from the sale of a prior residence to purchase the family home. Wife was asked a couple of times if she knew \$20,000 of the down payment on the Summitview home (family home) came directly from the sale of a house in Duvall. Every time wife responded she did not know. (RP 222, 253). This is not evidence that husband paid \$20,000 of his separate money in a down payment on the family home. Without evidence in the record that \$20,000 was paid down, much less where it came from, it is an abuse of discretion to find that husband did so. See *Atkinson v. Atkinson*, 38 Wash. 2d 769, 773, 231 P. 2d 641 (1951). Even if there is evidence in the record, the \$20,000 would no longer be property before the court for division as it no longer exists contrary to what the trial court found. *Marriage of Kaseberg*, 126 Wash. App. 546, 556, 108 P.3d 1278 (2005).

8. It was an Abuse of Discretion for the Court to Find the Business only Paid About \$4,000 of Personal Expenses Each Year and that there was Nothing Improper or Material Since Both Parties had the Advantage of Running Those Expenses Through the Business Post-Separation.

Ex. PE 53-39 was husband's list of personal expenses paid by the business. On the bottom half of page 2 of said Exhibit, husband

lists post-separation expenses paid by the business. If you look at the last four entries beginning August 17, 2015, husband lists the business paying \$5,000 of his attorney's fees and \$5,200 of his court ordered spousal support through the business. (RP 42). Nor does husband's list of personal expenses paid by the business include his bartering for car repairs after accidents or his \$1,000 dental bills. (RP 36, 495). Further and more importantly, although some expenses benefited both parties' post-separation (i.e. cell phone, gas, etc.), the vast majority of personal expenses run through the business post-separation were significantly higher, solely for husband's benefit and could in no way be classified as proper or immaterial. As stated previously, the business paid thousands of dollars for husband's individual federal income taxes, his divorce attorney's fees and expert witness fees. (RP 42-43, 154-155). Husband's expert admitted her work was done solely for this divorce. (RP 306). None of these personal expenses could be paid by the business as a business expense. They are personal expenses of husband. Accordingly, it was error for the trial court to find the business had only paid about \$4,000 of personal expenses

each year post-separation, that it benefited both parties equally, or that such payments were proper or immaterial.

9. It was Error for the Trial Court to Find the Mortgage Escrow Refund Check for \$986.13 was a Community Asset.

The name under which property is titled is not controlling. *In re Marriage of Mueller*, 140 Wash. App. 498, 501, 167 P.3d 568 (2007). Further, when spouses are living separate and apart, as was the situation throughout all of 2016, 2017, and 2018, their respective earnings and accumulations are the separate property of each. RCW 26.16.140. The bottom line is that Petitioner had been making the mortgage payment which included prepayment of prorated taxes and insurance. The refund was of prorated real estate taxes and insurance wife was paying in her monthly mortgage payment during 2018 and for which wife was responsible to pay when it came due. (RP 247-249). This refund was her separate property.

10. This Court Should Award Wife Attorney Fees for Having to Bring this Appeal Based on her Need for Attorney Fees and Husband's Ability to Pay.

Wife does not have the ability to pay her own fees and husband does have the ability to pay them on her behalf. RCW 26.09.140. The

wife has already had to borrow against her limited property award to pay her attorney fees in the superior court. The wife does not have the ability to pay her attorney's fees on appeal. This court has discretion to award attorney fees after considering the relative resources of the parties and the arguable merits of the issues on appeal. *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev.denied*, 137 Wn. 2d 1003 (1999). Wife tried to avoid this appeal by filing a motion for reconsideration, but it was summarily denied without argument. Whether this court affirms or reverses the trial court, the wife's need relative to the husband's ability to pay warrants an award of fees on appeal under RCW 26.09.140. Wife will comply with RAP 18.1(c).

V. CONCLUSION

This court should reverse the trial court's decision and direct it on remand to 1) recalculate husband's income based on his taxable income as shown on his personal income tax returns for 2015-2017; 2) modify the property division to place the parties in a more equal financial position; 3) recalculate spousal maintenance to put the parties in a more equal financial position for an appropriate period of time; 4) not assign wife a fair rental value for her use of the family

home; 5) not give husband a credit of \$10,043 from wife for payment of the US Bank debt; 6) make no finding that husband paid \$20,000 of his separate property down on purchase of the family home; and 7) find the escrow refund check was the separate property of wife. Finally, this Court should award the wife attorney fees on appeal.

DATED this 6 day of November, 2019

HALVERSON | NORTHWEST Law Group P.C.
Attorneys for Appellant Marina Palomarez

By: 
Raymond G. Alexander, WSBA No. 14592

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

Chris Tait 403 West Chestnut Ave Yakima, WA 98902	<input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Email <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> AMS
Court of Appeals Division III 500 N. Cedar Street Spokane, WA 99201	<input checked="" type="checkbox"/> Filing Through Online Portal

DATED at Yakima, Washington, this 6th day of November, 2019.



Erin Schwabauer, Legal Assistant
Halverson | Northwest Law Group P.C.

HALVERSON NORTHWEST LAW GROUP PLLC

November 06, 2019 - 4:16 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36842-4
Appellate Court Case Title: In re Marriage of: Marina Palomarez (fka Wilcox) and Matthew E. Wilcox
Superior Court Case Number: 15-3-00807-5

The following documents have been uploaded:

- 368424_Briefs_20191106161508D3419256_5818.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Appeal Brief.pdf

A copy of the uploaded files will be sent to:

- eschwabauer@hnw.law
- taitlaw@taitlaw.net

Comments:

Sender Name: Raymond Alexander - Email: ralexander@halversonnw.com

Address:

405 E LINCOLN AVE

YAKIMA, WA, 98901-2469

Phone: 509-248-6030

Note: The Filing Id is 20191106161508D3419256