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NO. 62611-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In re the Marriage of:

DAVID VAN ZILE,

Respondent,

and

VICTORIA VAN ZILE,

Appellant

2009 AUG 27 AM 11:05

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I


REPLY BRIEF

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INTRODUCTION

The down economy was the pervasive factor in the trial court's treatment of David. Due to the economy, the court concluded that David would earn 30-50% less than he has earned in ten years, and intentionally fashioned a maintenance award that allows David to keep his \$1 million in investments and his \$785,000 condo.

Yet the court failed to consider the effect the down economy has on Vicki. The court assumed that Vicki can (1) net \$1.2 million by selling her real property; (2) purchase a house for herself and the children for \$400,000; (3) invest the remainder at a 5-8% rate of return, yielding \$45,000 each year; and (4) find a job in one year paying \$40,000 without any re-education. Houses are not selling and businesses are not hiring – due to the economy.

The trial court's maintenance scheme is based on too many variables that Vicki cannot control. She cannot make her house sell. And until her house sells, she cannot invest to produce income to live on. And she cannot make someone hire her. In short, Vicki left a 19.5-year marriage with almost no cash and no guaranteed income – only the potential of an income and the potential of maintenance. This Court should reverse.

REPLY STATEMENT OF THE CASE

The “disproportionate” property division David repeatedly refers to is the parties’ agreement that Vicki would receive about \$180,000 more than David. BR 1, 3, 19, 24; CP 35-38. David can make up the difference in a year or two. BA 25-26. The real value of Vicki’s assets will decrease – Vicki must sell her assets to live off any income she gets from investing the proceeds. CP 60, FF 2.12(i). David’s assets will appreciate while he earns hundreds of thousands of dollars more than Vicki annually. CP 61, FF 2.12(vi).

David complains that his assets – \$1 million in investments – are “less desirable” than the real property Vicki received, where David cannot access his investments without paying a penalty.¹ BR 11; CP 36-37; 4/23 RP 34-35, 45-47. David has worked in the financial sector for 25 years – he cannot seriously complain about the nature of the investments he agreed to keep as his property distribution. 4/23 RP 50. And it is not as if Vicki’s assets are penalty free – assuming that Vicki can sell her properties, she will incur substantial commissions, sales costs, and taxes.

¹ David neglects to mention that he can borrow from his largest investment account, valued at over \$560,000. 4/23 RP 43-44.

David omits that Vicki objected to the \$785,000 waterfront condo purchase, claiming that the parties “jointly” purchased David’s condo. *Compare* BR 9 with BA 11. Vicki did not even know that David was buying the condo until he told her to come sign the papers. BA 11. Vicki protested the exorbitant mortgage payment and homeowners dues, reluctantly signing the papers under pressure from David and his brother-in-law/realtor. *Id.*

Although Vicki has not worked in over 16 years, David characterizes her “work history” as “significant.”² BR 6-7; 4/23 RP 152-53. Vicki last worked at Boeing, where she was “highly specialized.” BA 6-8; 4/23 RP 167-68. Vicki does not think Boeing would hire her now. *Id.* Without re-education, Vicki is “stuck.” *Id.*

Finally, some of David’s figures need correcting. David states that Vicki last earned \$29,000, but she never earned more than \$22,000 to \$25,000. *Compare* BR 6 with 4/23 RP 150-51. David also claims that he pays private school “tuition” of \$18,000-\$19,000 each year, but his own testimony is that tuition is \$15,000. *Compare* BR 13 with 4/23 RP 10. Finally, David claims that his fixed child-related expenses are \$3,200 each month, but they are

² David incorrectly states that Vicki is 46. BR 2. Vicki will be 48 on September 16, 2009. CP 23.

actually \$2,850 each month (\$12,000 child support + \$7,200 college savings contribution + \$15,000 private school tuition = \$34,200/ 12 = \$2,850). BR 13.

REPLY ARGUMENT

A. This Court should closely examine the maintenance award.

David has historically earned 10 times more than the trial court imputed to Vicki. 4/24 RP 3; CP 60, FF 2.12(i) & (iii). As such, “this court must closely examine the maintenance award to see whether it is equitable in light of the postdissolution economic situations of the parties.” *In re Marriage of Sheffer*, 60 Wn. App. 51, 56, 802 P.2d 817 (1990).

B. This Court should reverse the trial court’s grossly one-sided maintenance award. (BA 17-29, BR 17-28).

1. David’s post-dissolution standard of living is far-superior to Vicki’s. (BA 17-21, BR 25-26).

The trial court abused its discretion, where the maintenance award utterly fails to balance the parties’ postdissolution standards of living. *Sheffer*, 60 Wn. App. at 56. While the court correctly ruled that Vicki needs \$45,000 maintenance per year for five years (CP 60-61, FF 2.12(i) &(iv)), it guaranteed her maintenance for only one year. CP 55-56, 60-61. Maintenance in the remaining four years is contingent on David earning more than \$280,000, which

David claimed he must earn before he can “afford” to pay maintenance. *Id.* Requiring Vicki to give up 100% of the maintenance she “needs” while David keeps 100% of the income he “needs” (to pay for his exorbitant condo) is not the balancing this Court requires. 60 Wn. App. at 56.

David’s attempt to distinguish ***Sheffer*** is unpersuasive. BR 25-26. There, this Court reversed and remanded to revise the three-year maintenance award, where the wife would have had only \$844 per month – compared to the husband’s \$4,000 per month – when maintenance terminated.³ 60 Wn. App. at 56-57. The wife’s housing costs would also increase at the same time that her maintenance expired. *Id.* Vicki’s picture is far bleaker.

Vicki does not get three years of maintenance – she gets only one year of maintenance with the possibility of more. *Compare* CP 63-64 *with* 60 Wn. App. at 56. David’s income is 7 times Vicki’s imputed income. CP 60, FF 2.12(i); 4/23 RP 55-56, 93-94. In ***Sheffer***, the husband’s income was 4.7 times the wife’s post-maintenance income. 60 Wn. App. at 56. And Vicki has no

³ The Court did not seem concerned by the amount of maintenance, which was \$1,200 each month. 60 Wn. App. at 56. The wife’s house payment was only \$159 each month, so with her income, she had \$1,885 after housing expenses. *Id.*

actual income, while the wife in **Sheffer** was employed and had at least some income each month. 60 Wn. App. at 56-57. The exact same rationale that led this Court to reverse and remand in **Sheffer** applies here (*id.* at 57):

[Vicki] facilitated [David's career by] caring for the home and family while forfeiting her own economic opportunities. . . . Through her efforts, [Vicki] provided the services needed by the community to function as a family. She did so at a sacrifice of her economic opportunities in the marketplace. That trade-off, clearly agreed to by [David], now leaves [Vicki] economically disadvantaged as compared to [David].

2. Vicki should not have to cannibalize her only assets to live off of the proceeds. (BA 21-23, BR 19-21).

As discussed at length in the opening brief, the trial court justified its inadequate maintenance award with an elaborate scheme that requires Vicki to cannibalize her assets and live off the investment proceeds. BA 21-23, 29-32. For the trial court's scheme to work, Vicki would have to:

- ◆ Sell two pieces of real property for top dollar in one of the worst housing markets our state has ever seen.
- ◆ Spend not more than \$400,000 on a new home for herself and the children, while David lives in his \$785,000 condo;
- ◆ Invest the remainder at a rate of return that would produce \$40,000-\$50,000 each year; and
- ◆ Get a job that pays \$40,000 annually, even though she has not worked in over 16 years, has no contacts at Boeing (her last employer – who is laying people off in any event), and the economy is still in a recession.

Id. Two fatal inequities form the basis of this decision. First, Vicki must sell her assets to produce income to live on while David keeps his exorbitant condo and preserves \$1 million in investments. Second, while the court found that the current economy would drive down the sale price on David's condo and cut his income by 50%,⁴ it failed to apply the same rationale to Vicki, finding that she could sell her home for top dollar and find a job paying more than she has ever earned. Much of what the Court expects Vicki to do is outside of her control – she would still “need” maintenance for five years. CP 60-61, FF 2.12(i) & (iv).

David compares this case to ***Marriage of Irwin***, stating that maintenance terminated upon the award of “certain property” to the wife. BR 24; ***Marriage of Irwin***, 64 Wn. App. 38, 822 P.2d 797, *rev. denied*, 119 Wn.2d 1009 (1992). He omits that this “certain property” was \$2.5⁵ million cash. ***Irwin***, 64 Wn. App. at 43. This case is nothing like ***Irwin***.

In ***Irwin***, the trial court divided the assets 50/50, awarding the wife \$2.6 million in assets and a \$2.5 million equalization

⁴ The Court attributed \$200,000 to David to calculate child support, 50% less than his average income over the last 10 years. CP 101; 4/24 RP 3. \$280,000 is 30% less than his average income.

⁵ This includes installment payments and interest, deemed “equalization payments.” 64 Wn. App. at 43.

payment. *Id.* at 42, 43. The court ordered the husband to pay the wife \$12,000 maintenance each month until he started making the equalization payments eight months after trial. *Id.* at 44. This Court rejected the wife's argument that the trial court erroneously failed to award "permanent maintenance," holding that there was no need for maintenance "[g]iven the extent of the property awarded to [the wife], some of which [was] income producing." *Id.* at 55.

Unlike the wife in *Irwin*, Vicki received very little cash. CP 36. And Vicki's assets are not "income producing" (BR 19) – almost her entire award is the house she and the children live in and land in Wenatchee. CP 60, FF 2.12(i). The court anticipated that Vicki could live off of investment income from the proceeds of selling her real property, but despite reasonable efforts, Vicki has not been able to sell her home, due to the down economy.⁶

Marriage of Wright is also inapposite. BR 20-21 (citing ***Marriage of Wright***, 78 Wn. App. 230, 896 P.2d 735 (1995)). In ***Wright***, the husband earned \$4,950 per month and the wife earned \$1,700. 78 Wn. App. at 233-34. The trial court ordered the husband to pay \$1,839 per month child support and a \$487

⁶ <http://sea.themlsonline.com/search/29024979.html>.

equalization payment, leaving the husband with \$2,624 each month, and leaving the wife with \$4,026 each month. *Id.* As such, the wife had \$1,400 each month more than the husband. *Id.*

The trial court denied the wife's maintenance request. *Id.* at 238. This Court affirmed, holding that maintenance was unnecessary given the unequal asset distribution, the parties' earnings, and the wife's training and education, which enabled her to provide for herself. *Id.*

Unlike the wife in ***Wright***, Vicki's income is a fiction – she has no actual income. Compare CP 60, FF 2.12(i) with ***Wright***, 78 Wn. App. at 233-34. And Vicki has far less than David each month, compared to the wife in ***Wright*** who had 35% more than the husband each month. 78 Wn. App. at 233-34.

Finally, David takes issue with Vicki's statement that the trial court effectively required her to sell her assets. BR 20. Vicki does not "challenge" the parties' agreement to sell the family home. *Id.* The trial court erred in finding that Vicki could sell the home in a time-frame and price-range that would net her enough money to buy a new house and support herself and the children. CP 60, FF 2.12(i). And the trial court found that Vicki would almost certainly have to sell the Wenatchee property to produce investment income.

CP 60, FF 2.12 (i) & (iii). Selling the Wenatchee property is not “entirely within [Vicki’s] control” (BR 20) – if David is not going to pay maintenance, she has to have something to live on.

3. Vicki should get maintenance while she obtains re-education and finds employment. (BA 23-25, BR 21-22).

The trial court refused to guarantee rehabilitative maintenance, finding that re-education had no “significant financial benefit.”⁷ CP 60, FF 2.12(ii). The trial court ignored that Vicki sacrificed her career and economic opportunities so that the community could “function as a family” to David’s great benefit. BA 24-25 (quoting *Sheffer*, 60 Wn. App. at 57).

David again erroneously compares this case to *Wright*, in which the wife had two part-time jobs and had the opportunity to work full-time, but elected not to. BR 21; 78 Wn. App. at 234. Vicki has not worked in over 16 years, was in a “highly specialized” field when she stopped working, and has no business contacts. 4/23 RP 167-68; 4/24 RP 28.

⁷ Vicki testified that she would earn as much teaching as she would earn at Boeing if Boeing were to hire her, which she doubted. 4/23 RP 167-68; 4/24 RP 29. She never said her teaching salary would match her old Boeing salary. BR 7.

4. David should not get to keep the first \$280,000 he earns before paying maintenance. (BA 25-27, BR 26-28)).

The trial court decided to allow David to keep \$280,000 before paying maintenance for three reasons:

- ◆ David pays most of the children's expenses;
- ◆ David should get to keep a \$785,000 waterfront condo that costs \$6,000 each month;
- ◆ David should get to preserve his \$1 million in investments.

CP 60-61, FF 2.12; 4/23 RP 90-91. David suggests that the sole basis of the court's maintenance scheme is to allow him to continue supporting the children (BR 23), even going so far as to claim that he has relieved Vicki of any financial obligation to the children. BR 12, 26 (citing CP 85, FF 2.12 (v) and (vi)). But David does not need \$280,000 to support the children – he calculates that he spends \$40,000 each year on the children (\$5,800 more than he actually spends⁸). BR 13; *supra*, Reply Statement of the Case. David asked the trial court to make maintenance contingent on his earning \$280,000 annually, so that he could support the children *while paying for his waterfront condo and preserving his \$1 million in investments*. 4/23 RP 90-92. That is exactly what the court did. CP 61, FF 2.12(vi).

⁸ This is discussed in more detail below. *Infra*, Argument § B 5 (a).

And Vicki certainly bears expenses for the children. The parties' two minor children live with Vicki a majority of the time. CP 23, 66. In addition to basics like food, clothing, transportation, and housing, Vicki pays 50% of the children's activities and 33% of their uninsured medical costs. CP 26-27. In any event, paying most of the children's expenses does not entitle David to have three-and-one-half to seven times more than Vicki each month.⁹ BA 26.

David's (repeated) complaint that Vicki's "entire appeal is premised on what she believes she 'needs' or is 'entitled' to" highlights the trial court's error – ignoring Vicki's "need" for maintenance for five years, while focusing exclusively on David's *need* to keep \$280,000 before paying Vicki a dime. BR 26. David's ability to pay is a factor – not the only factor. BR 26-27; RCW 26.09.090.

The possibility that David might lose a few thousand dollars selling his condo does not justify the trial court's grossly inequitable maintenance scheme. BR 28; 4/23 RP 43. David's claim that it "would not be helpful" to sell his condo ignores that he could pay

⁹ At \$280,000 David has seven times more than Vicki's imputed income and three-and-one-half times her imputed income and predicted investment income. BA 26.

maintenance from the money saved on a reasonable mortgage. That would be “helpful.” And David should not be heard to complain that he would need to “find a new home,” which would put him in the same situation that Vicki is in, except that Vicki provides the home that the children live in most of the time. BR 28.

David’s (repeated) complaint that his \$1 million in investments is not liquid is essentially a complaint that he has \$1 million in investments appreciating, while Vicki has to sell her assets, decreasing their real value. BR 28; *supra* Reply Statement of the Case. David is preserving his retirement while Vicki is forced to live off of hers.

Finally, David’s reliance on ***Marriage of Foley*** is misplaced. BR 27 (citing ***Marriage of Foley***, 84 Wn. App. 839, 846, 930 P.2d 929 (1997)). David omits that the court denied maintenance in ***Foley*** in part because the party seeking maintenance “did not demonstrate need.” 84 Wn. App. at 846. Here, however, the trial court found that Vicki needs maintenance for five years. CP 55, 60-61 ¶¶ 2.12(i) & (iv). ***Foley*** is inapposite.

5. RCW 26.09.090 factors David argues that Vicki did not raise. (BR 22-23, 23-25, 25-26).

David discusses RCW 26.09.090 factors (c), (d), and (e)¹⁰ none of which Vicki argues. As such, Vicki responds only briefly.

a. Factor 3 – the standard of living during the marriage.

As discussed above, David's own calculations belie his assertion that the maintenance award was not designed to allow him to "protect his assets and affluent lifestyle," but to insure that he could continue supporting the parties' children. BR 23. David calculates that he pays \$3,200¹¹ each month for the children's fixed expenses and must also provide medical insurance and car insurance for one child. BR 13. Assuming David spends \$1,500 each month on insurance (which is likely very high given that his employer pays for part of the health insurance), his total expenses for the children would be \$4,700 each month. 4/23 RP 13.

At a 33% tax rate, David would net \$187,600 on \$280,000 gross – \$15,633 each month. After all child-related expenses,

¹⁰ David refers to the RCW 26.09.090 factors by number rather than letter. His argument on factor e ("5") – Vicki's age, physical and emotional condition, and financial obligations – is an effort to distinguish *Sheffer, supra*. *Sheffer* is discussed in full above. *Supra*, Argument § B 1.

¹¹ David actually spends \$2,850 on the children. *Supra*, Reply Statement of the Case. Vicki nonetheless uses David's calculation to illustrate that his child-related expenses do not justify the maintenance scheme.

David would have nearly \$10,000 each month to live on before paying Vicki a dime. David would have \$4,000 left each month after paying for his waterfront condo. The maintenance scheme is plainly designed to allow David to keep his waterfront condo and preserve his \$1 million in the bank. This is grossly inequitable where Vicki is required to cannibalize her assets.

b. Factor 4: the duration of the marriage.

David inaccurately argues that he already supported Vicki for 13 months before the divorce, during which Vicki “made no effort to prepare for her future or to limit her spending.” BR 23-24. Vicki made plans to obtain her teaching certificate during that time, but the trial court refused to award her maintenance for a sufficient time to obtain re-education. 4/23 RP 170-71, 174. In any event, having supported Vicki while the dissolution was pending does not detract from trial court’s correct statement that Vicki needs maintenance for five more years. CP 55, 60-61 FF 2.12 (i) & (iv). Nor does David challenge that finding.¹²

¹² Vicki waives her argument that the trial court erroneously refused to reduce child support on her motion for reconsideration. Counsel was unaware that Rourke had returned to private school.

C. The trial court imputed too much income to Vicki, whose out-dated and specialized experience will not help her get a job in the worst economy since the Depression. (BA 29-32).

No evidence supports the trial court's finding that Vicki can earn \$40,000 annually and can find a job paying that much within a year. CP 60, FF 2.12(i); *Johnson v. Horizon Fisheries, LLC*, 148 Wn. App. 628, 640, 201 P.3d 346 (2009) (findings of fact must be supported by substantial evidence). Three key factors undermine the trial court's imputation of income:

- ◆ Vicki has no significant job experience: Vicki has not worked in over 16 years. She last worked on-and-off for Boeing, where she was "highly specialized." She has no contacts at Boeing, who announced probable lay-offs and hiring freezes, in any event. BA 14-15, 29-31.
- ◆ Vicki is looking for work in a horrible market: David testified at length about market conditions that would drastically reduce his salary. The trial court found that the market would wreak havoc on David's job, calculating David's income at 50% of his income for the last ten years. CP 61, FF 2.12(vi), CP 101; 4/24 RP 3.
- ◆ The trial court denied Vicki a chance to obtain re-education: Vicki sought maintenance so that she could return to school and obtain her teaching certificate. BA 14-15. The trial court found that re-education was not financially beneficial. CP 60, FF 2.12 (ii). Without re-education, Vicki is "stuck." 4/23 RP 168.

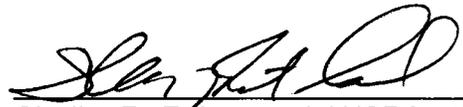
David does not respond to this argument. This Court should reverse.

CONCLUSION

The trial court utterly failed to balance the parties' postdissolution standards of living. Vicki must cannibalize her assets to produce money to live on, while David keeps his \$785,000 waterfront condo and \$1 million in investments. David will have \$10,000 a month after child-related expenses. Vicki cannot even approach that much. This Court should reverse and remand for a maintenance revision.

RESPECTFULLY SUBMITTED this 26 day of August 2009.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 26 day of August 2009, to the following counsel of record at the following addresses:

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