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ORIGINAL

COURT OF APPEALS DIVISION I OF THE STATE OF
WASHINGTON

In re the Marriage of:

SYLVIA FLYNN,

**Respondent/Cross-
Appellant,**

vs.

DENNIS FLYNN,

**Appellant/Cross-
Respondent.**

COA No. 64429-7

KCSC No. 07-3-03533-3 KNT

APPELLANT'S REPLY BRIEF

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ARGUMENT IN REPLY

1. Respondent Mis-states Facts of the Case

As in the trial below, Respondent spends considerable time and effort smearing Dennis with allegations of possession of child pornography. This issue was covered in some depth in the trial, and in Appellant's Opening Brief, at pg. 5-6. Appellant will not belabor the issue here, but it should be noted that the compact disc that Respondent alleged she found at Appellant's home was established by forensic evidence to have been created during a time when Dennis was out of the country, and Respondent herself was seen at Dennis's residence by a neighbor on the same date, where the neighbor could not have known what the forensics would later show. RP 774-775. Charges against Dennis were eventually dismissed for lack of evidence. RP 308, 700, 710.

Respondent asserts that Dennis "admitted use of adult pornography in the presence of the [parties'] son." Brief of Respondent ("Response"), at pg. 2. This assertion is not supported by the record. Dennis actually stated that he was not aware of any time that KF might have been exposed to pornography in Dennis's presence. RP 753-754. With respect to the possibility that KF might have been exposed to adult pornography without Dennis's knowledge, the only expert testimony in the case was that KF

suffered no psychological harm. RP 696. Dennis testified that he had no intention of allowing KF to be exposed to pornography of any kind. RP 754.

In an apparent effort to portray Dennis as a man who refused to support his children, Respondent asserts that “with the exception of two payments, Dennis provided no other support for the parties’ children during the separation.” This is a cynically misleading statement, and contradicts Respondent’s own testimony: during trial, Sylvia testified that her position was that the payments she received due to Dennis’s disability “satisfied his child support obligation from [her] perspective.” RP 215.

In an ongoing attempt to smear Dennis as a man who does not care about his children, Respondent asserts that Dennis could have seen his children at any time but he did not act to do so. Response, at 34. This assertion is patently false. Respondent cites Sylvia Flynn’s testimony for this assertion, at RP 209. While Sylvia testified that temporary orders in the present family law case contained provisions for Dennis to seek contact with his children, she also admitted that she was aware of other orders in the criminal case that prohibited him from having contact with any minors. RP 209. These orders, independently of the family law orders, prevented Dennis from having any contact with his children until December 2008, when the charges were finally dismissed. RP 751-753.

Immediately thereafter, Dennis contacted the parenting evaluator in the case to facilitate contact with his children. RP 753.

Respondent claims that “there was evidence that the husband claimed to transfer real property in Maple Valley to a friend... when in fact the husband retained title to the property in his name.” Response, at 24. In fact, the record shows that Sylvia specifically testified at trial that the title to this property was *not* in Dennis’s name. RP 102. Dennis’s uncontradicted testimony was that the property is owned by Doug Watson, and that Dennis had agreed to manage the property for Mr. Watson because Mr. Watson lives in Leavenworth, Washington, over 100 miles from the property. RP 459, 608-609.

Respondent implies that Dennis mismanaged community funds by transferring “two separate deeds of trust” to Jane Ninh. Response, at 9. This assertion mis-states the testimony, which related solely to a single note, the “Custodio/Sawyer” note. RP 54-60. Dennis explained that the transfer of this note was due to the fact that Ms. Ninh had bought the Flynns out of the note. RP 920-922.

Respondent misleadingly claims that Dennis wired money to Thailand for “reasons he can’t remember.” Response, at 8. It is unclear why Respondent emphasizes this point, but in fact, Dennis testified that he

wired \$1,000.00 to Thailand because he had sold a motorcycle for him, and was wiring the money to the friend's wife. RP 770-771.

Because the Respondent's factual assertions lack merit as described above, Appellant requests that this court disregard them.

2. Respondent's Calculations of Estate Shares Awarded to the Parties is Misleading; the Court Abused its Discretion in Awarding a Highly Disproportionate Share to the Wife

Respondent's description of the court's division of assets is highly misleading. See Response, at 11-12. Respondent omits several facts entirely from the calculation; including the court's allocation of debts to Dennis in the amount of \$25,418.78. Response, at 12. Respondent also ignores the fact that Sylvia seized community assets in the amount of \$53,006.00 immediately after filing for dissolution. RP 756. These funds should be assessed as part of Sylvia's share of the estate.

Respondent next argues that the court was entitled to ignore Dennis's testimony about the value of promissory notes, and adopts the court's face-value approach to the notes. Response, at 12. As was stated in Appellant's Opening Brief, this valuation is an abuse of discretion. The uncontradicted evidence was that all of the notes had no value due to borrower default and *offered to stipulate that they could be awarded to Sylvia* if the court disagreed. It is certainly also highly suspicious that the

court awarded to Sylvia all of the notes that Dennis testified had value, and awarded to Dennis all of the notes that he testified had no value. There is no reason to doubt Dennis's veracity (why would he lie about the value of the notes to the benefit of *Sylvia*), and under these circumstances, it was abuse of discretion to apply face value to the notes awarded to Dennis.

Respondent's calculation of the split of the marital estate was also based on the trial court's valuation of the Kent family home at \$679,000.00, which was an abuse of discretion as described in Appellant's opening brief. Respondent attempts to defend this abuse of discretion by arguing that a property owner can testify as to the value of property (citing Worthington v. Worthington, 73 Wn.2d 759, 763, 440 P.2d 478 (1968)) and that the court has the discretion to decide at what point value is determined (citing Lucker v. Lucker, 71 Wn.2d 165, 167-168, 426 P.2d 981 (1967)).

Respondent's caselaw citations are inapposite. It must first be noted that Respondent's citation to Lucker is completely mystifying. The cited passage of the Lucker opinion related to personal property rather than real property and the crux of the issue was that "if the [personal] property is to be valued as of the date of trial rather than the date of separation, appreciation as well as depreciation should be considered in

making an equitable division.” Lucker, 71 Wn.2d at 168. To the extent that Lucker is in any way applicable to this case, it suggests that if the trial court decided without explanation to value the family home as of the date of separation as Respondent suggests, the court would be obligated to consider appreciation in value – i.e. the court would have had to consider the valuation testimony offered at trial establishing the value of the home to be, at a *minimum*, \$750,000.00.¹

In Worthington, the court valued property at \$27,000 based on the property owner’s interrogatory answers, in spite of an appraiser’s testimony that the property was worth \$27,400.00. Worthington, 73 Wn.2d at 762-763. This is a difference of 1.45%, and in that case the record showed “that, even though the home was well kept, it was very old, it was too large for the average family, upkeep was expensive, and it would be difficult to sell in an area such as Quilcene.” Worthington, 73 Wn.2d at 762-763. Here, by contrast, Sylvia made no effort whatsoever to explain the reasoning for her proposed valuation. RP 125. Also, the difference between the court’s eventual valuation and the lowest value offered by expert testimony in this case is dramatically greater than in

¹ Appellant further asserts that it would have still been abuse of discretion to rely on the valuation of Sylvia’s appraiser for the family home, in light of the appraiser’s failure to take into account the substantial improvements to the family home that were discussed in testimony. RP 470-479. Appellant requests that the trial court be instructed to assign the value testified to by Appellant’s appraiser on remand.

Worthington. It is telling that Respondent found no case more recent than 1968 to support her position, nor any case whatsoever holding that an owner's *entirely arbitrary* assessment of value constitutes substantial evidence. The trial court's valuation of the family home was abuse of discretion, and the net value awarded to Sylvia in the form of the family home was at a *minimum* -\$31,270.73.

Finally, as was argued in Appellant's Opening Brief at pg. 11-12, the trial court both failed to make a finding of value, and to the extent that \$237,000 represents a finding of value, abused its discretion. Respondent attempts to defend this abuse of discretion by arguing, without any citation to authority for the proposition that an offer to sell is substantial evidence of value, that the fact that Dennis once offered to sell the house for that amount constitutes substantial evidence for that value. This argument is not only patently illogical but, lacking citation to applicable authority, should be ignored. Conway v. Washington State Dep't of Soc. & Health Servs., 131 Wash.App. 406, 421 n. 16, 120 P.3d 130 (2005) ("Reviewing courts are not required to address issues raised in passing or unsupported by authority or persuasive argument.") Where the uncontradicted expert testimony in the case was that the property was worth \$180,000.00 (RP 667). Thus, the net value of the Olalla property (\$17,000 per Respondent – See Response, at 12), should be -\$40,000.

The uncontradicted expert valuation of the Olalla property is well supported in the record: the house had no running water, no septic service, RP 678, 779. Respondent herself testified that the house had negative value. RP 128. In sum, the court's valuation of the Olalla property was not supported by any evidence and constituted a clear abuse of discretion.

The following more accurately represents the split of the marital assets that is based on fair valuation of the family home and promissory notes, and includes debts imposed on Dennis:

Asset	Wife	Husband
Family residence	(\$31,270.73)	
Kent rental	(\$30,048.74)	
Tacoma rental	\$167,000.00	
Olalla residence		(\$40,000)
Commercial building	\$29,255.75	
Deeds of trust	\$31,000.00	\$0
Bank accounts	\$35,702.00	
Vehicles/trailers	\$56,850.00	\$12,100.00
Personal property	\$23,900.00	\$2,000.00
Community debt		\$25,418.78
Community funds	\$53,006.00	

seized by Sylvia		
TOTAL	\$335,394.28	(\$481.22)

When the marital assets are valued in light of the evidence of the case, and the debt imposed on Dennis is considered, it is clear that Sylvia was awarded *literally everything of value* from the marital estate, and Dennis was given, again literally, *less than nothing*. As argued in Appellant's Opening Brief, this is a clear abuse of discretion.

3. The Court Erred in Finding that Maintenance was Appropriate in this Case

As described in Appellant's Opening Brief, the trial court erred in failing to consider the statutory factors in deciding that maintenance should be awarded to Sylvia despite its explicit finding that Dennis did not have ability to pay, thereby abusing its discretion. Respondent defends this error by citation to Donovan v. Donovan, 25 Wash. App. 691, 697, 612 P.2d 387 (1980). Respondent argues that this case is similar to Donovan, but the argument fails because in Donovan, the court made an explicit finding that the husband was likely to return to work following medical leave, whereas here the court made no such finding.

Respondent further argues, based on Marriage of Crosetto, 82 Wn. App. 545, 559, 918 P.2d 954 (1996), that having decided to award maintenance, the court had the discretion to award a disproportionate share of the property division in lieu of maintenance. This argument fails because the award of maintenance in Crosetto followed after “the trial court considered the relevant factors regarding maintenance and property division.” Crosetto, 82 Wn. App. At 559. The same cannot be said here; having failed to properly consider Dennis’s acknowledged disability, the court cannot use an improper award of maintenance to justify a disproportionate share of the property.

4. The Court Erred in Imposing Parenting Plan Restrictions Against Dennis

Respondent attempts to distinguish Marriage of Watson, 132 Wash.App. 222, 232, 130 P.3d 915 (2006) on the basis of her specious assertions that Dennis could have sought contact with his children sooner. As discussed above, Sylvia’s own testimony makes clear that Dennis did not have the ability to contact his children prior to December 2008, and his undisputed testimony clarifies that he began pursuing contact with his children as soon as he could. RP 209, 751-753. It should also be noted that the uncontradicted testimony by Dr. Wendy Hutchins-Cook was that KF still loved Dennis and wanted to see Dennis, and thus the finding of

absence or substantial impairment of emotional ties is not supported by substantial evidence. RP 704.

Because Dennis, like the father in Watson, did as much as he could to see his children when he was able to do so, the court's finding under RCW 26.09.191(3) cannot stand, and the requirement of a sexual deviancy evaluation ordered under the asserted authority of the RCW 26.09.191(3) finding likewise must fail.²

5. The Court Erred in Ordering Dennis to Pay Sylvia's Legal Fees

As was argued in Appellant's Opening Brief, the trial court's award to Sylvia of attorney's fees from Dennis is incoherent, contradictory, and unsupported by appropriate findings or substantial evidence for the findings that would have been necessary. Respondent first attempts to defend the order by asserting that the court "apparently... intended" to award \$50,000.00. Response, at 31. This bald assertion is supported by no citation to the record or to authority, and should be ignored by this court. Conway, 131 Wash.App. at 421 n. 16. In fact, the order is irredeemably internally inconsistent and remand is necessary.

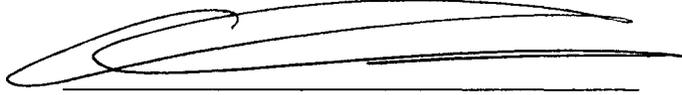
² Though this court need not reach Respondent's argument that the trial court may ignore the testimony of Dr. Hutchins-Cook, it should be noted that both cases cited by Respondent (Response, at 36-37) involve weighing the testimony of one guardian ad litem against the testimony of other experts in the case. See Fernando v. Nieswandt, 87 Wn. App. 103, 107, 940 P.2d 1380 (1997); Marriage of Swanson, 88 Wn. App. 128, 138, 944 P.2d 6 (1997). Respondent cites no cases upholding a trial court's decision to entirely disregard the uncontradicted testimony of the only expert in the case.

Respondent next argues that the trial court's unsupported award of attorney's fees should evade review because, while it was not supported by and findings of fact, it should nonetheless be treated as though it were a finding of fact. Respondent attempts to support this piece of mental gymnastics by citation to State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce, 65 Wn. App. 614, 624, 829 P.2d 217 (1992). Again, this citation cannot be described as anything other than mystifying: the case cited simply says nothing whatsoever that supports Respondent's point. Appellant has properly challenged the award of fees, and the award should be reversed.

CONCLUSION

The trial court's property division in this case is so obviously inequitable, and the restrictions on Mr. Flynn's parenting of his son so unsupported, that it is impossible to ignore the conclusion that the trial court was seeking to punish Mr. Flynn for what it saw as marital fault. The trial court's orders should be reversed, with instructions to enter a fair and equitable division of property and to remove parenting plan restrictions.

CARNEY GILLESPIE ISITT, PLLP

A handwritten signature in black ink, consisting of several overlapping, fluid strokes that form a cursive name.

Christopher Carney, WSBA No. 30325
Attorney for Dennis Flynn

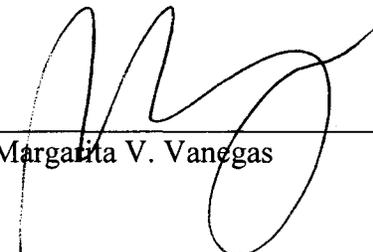
DECLARATION OF SERVICE

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

That on September 30, 2010, I arranged for service of Appellant's Reply Brief to the parties to this action as follows:

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DATED at Seattle, Washington this 30th day of September, 2010.



Margarita V. Vanegas