

Court of Appeals No. 74930-7-I
King County Superior Court No. 14-3-05767-2

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

In re the Marriage of:

STEPHANIE FERGUSON, f.k.a. VANDAL
Petitioner-Respondent,

v.

JOSEPH H. VANDAL,
Respondent-Appellant.

FILED
September 14, 2016
Court of Appeals
Division I
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Helen Halpert, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

1. The trial court erred in ruling that Mr. Vandal's business was community property. Specifically, Mr. Vandal challenges the following Findings of Fact: 2.8.2.3, 2.8.2.4, 2.8.2.5, 2.8.2.6, and 2.8.2.7. Further, Finding of Fact 2.8.2.7 is truly a conclusion of law. Mr. Vandal also assigns error to Conclusions of Law 3.4.5.1(f), 3.4.5.2(a), and 3.4.5.4(e), which effectively require Mr. Vandal to buy from Ms. Ferguson half of the value of the business.
2. The Court erred when it awarded Mr. Vandal the value of his business, and then also awarded him the value of the bank accounts included in the business valuation. This resulted in double-counting of the bank accounts.
3. The overall distribution of assets was inequitable. In particular, Mr. Vandal disputes Conclusion of Law 3.4.3, which states that Mr. Vandal has the ability to pay maintenance of \$9,000 per month for six years in addition to the 1.5 years of the same maintenance during temporary orders.

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Vandal opened his accounting practice long before his marriage to Ms. Ferguson, and never expressed an intent to convert the business to community property. Did the Court err in finding that the business became separate property?

2. It was undisputed that the value of the business bank accounts was included in the Court's valuation of the business. The issue did not arise until the Court issued its memorandum decision, in which it awarded him both the value of the business and the value of the bank accounts contained in it.
 - a. Was Mr. Vandal required to object to this double-counting prior to the issuance of the memorandum decision?

 - b. Was it an abuse of discretion to ignore the double-counting simply because the court generally (but not always) valued assets as of the date of separation, while the business valuation (which included the bank accounts) was made on a different date?

3. Was the overall distribution of property inequitable where Ms. Ferguson obtained most of the liquid assets, along with generous, long-term maintenance, while Mr. Vandal was left mostly with debt?

III. STATEMENT OF THE CASE

Mr. Vandal has declined to challenge the parenting plan and order on relocation to avoid disruption to his son L.V. This appeal focuses solely on three financial issues. The statement of the case will focus only on facts relevant to the appeal.

Joseph “Jay” Vandal and Stephanie Ferguson were married on August 4, 2000. 1 RP 19; CP 392 (F&C¹ 2.4). They separated on August 2, 2014. *Id.* Ms. Ferguson was permitted to relocate to Connecticut on August 15, 2014. CP 62-64 (Temporary Order); CP 117-123 (Final Order). She began receiving maintenance of \$9,000 per month on September 1, 2014. Supp. CP² ____; Dkt. 35 at p. 2 (Temporary Order). At the time of trial in 2015, Ms. Ferguson was 49 years old and Mr. Vandal was 51 years old.

Ms. Ferguson graduated from Merrimac College with a B.S. in marketing. 4 RP 534. Between 1989 and 1992 she worked for a radio station and a casino. 4 RP 535-36. She then attended a program in Lisbon, Connecticut to obtain an eligibility certificate for teaching. 4 RP 534. She

¹ F&C stands for Findings of Fact and Conclusions of Law.

² A Supplemental Designation of Clerk’s Papers will be filed today in King County Superior Court.

taught all ages for the Pequot Tribe with a salary of \$46,000. 4 RP 537. Ms. Ferguson stopped teaching once she moved with Mr. Vandal to Washington. She has not worked outside the home since then. F&C 2.12.3 (CP 398).

This was Ms. Ferguson's first marriage. Mr. Vandal had two children from a previous marriage with Hilary Johnson. That marriage was dissolved in April 2000. 1 RP 21 The children, Trygve and Synnove are now adults. But as discussed in section IV(D), below, Mr. Vandal is still responsible for their support and higher education. Ms. Ferguson and Mr. Vandal have one child together, L.V., who was born on June 25, 2002. 1 RP 19; CP 392 (F&C 2.4). L.V. was diagnosed to be on the autism spectrum. Because a standard school setting was difficult for him, the parties arranged for a private teacher with autism experience. They rented a room near Mr. Vandal's office and turned it into a classroom. This began around May 2011 and lasted for four years. 3 RP 352-55. L.V. was in the classroom from 9:00 AM to 2:00 PM, Monday through Thursday, year-round. 3 RP 355-36.

At the time of trial, Mr. Vandal had been a CPA for over 20 years. He opened his own business in 1989, long before he met Ms. Ferguson, and then incorporated it in 1991. 80% of his work is condominium HOA auditing, about 15% of it is condominium HOA tax preparation, and 5% is

individual tax preparation. 6 RP 854. His business thrived in part because he was willing to drive long distances to reach additional clients. 6 RP 863. He averaged a profit of over \$300,000 per year before taxes. CP 399 (F&C 2.12.9).

Mr. Vandal testified that all the profits from the business went to the marital community. 6 RP 866. Ms. Ferguson confirmed that the parties had no source of income other than the business. 5 RP 705.

The parties agreed on how community expenses were generally handled during the marriage. First, Ms. Ferguson would write out checks for expenses. Then Mr. Vandal would write a check from the business to the joint banking account to cover the total. 6 RP 866 (testimony of Vandal); 1 RP 66 (testimony of Ferguson).

As the trial court found,

[t]he parties enjoyed a high standard of living during the marriage, expending all the income earned by the Respondent, purchasing expensive clothing and jewelry and a share of a race horse. The family also spent generously on the child's education, with a private teacher and a separate classroom.

CP 399 (F&C 2.12.7). As the Court noted, the parties had little savings. CP 244.

As discussed in section IV(D) below, the trial court gave most of the liquid assets to Ms. Ferguson, along with over seven years of

maintenance at \$9,000 per month. Mr. Vandal was left with debts he will never be able to pay off even if he can continue his historic income. This outcome stemmed in part from the Court's finding that Mr. Vandal's business was community property, which effectively required him to buy back from Ms. Ferguson half the value of his business.

IV. ARGUMENT

A. STANDARD OF REVIEW

“A court's characterization of property as either separate or community is a question of law subject to de novo review.” *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018, 1021 (2002), *review denied*, 148 Wn.2d 1023, 66 P.3d 637 (2003); *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000).

The trial court's decisions regarding parenting, child support, and most financial issues are generally reviewed for abuse of discretion, which is defined as discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

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 standard or the facts do not meet the requirements of the

correct standard. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995) (citing Washington State Bar Ass'n, Washington Appellate Practice Deskbook § 18.5 (2d ed.1993)), *review denied*, 129 Wn.2d 1003, 914 P.2d 66 (1996).

In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

On appeal, a trial court's findings of fact will be upheld if supported by substantial evidence. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). "Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise." *In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984).

In re Marriage of Bernard, 165 Wn.2d 895, 903, 204 P.3d 907, 911 (2009).

B. MR. VANDAL'S BUSINESS, WHICH WAS ESTABLISHED BEFORE THE MARRIAGE, REMAINED HIS SEPARATE PROPERTY

1. Introduction

The trial Court acknowledged that Mr. Vandal began his business well before marriage. Therefore, it was his separate property at that time. CP 393 (F&C 2.8.2.2). "[W]here the status of real or personal property, fixed at the time of its acquisition, is shown to be that of separate property, the presumption is that it and its rents and profits continue such." *In re Binge's Estate*, 5 Wn.2d 446, 460-61, 105 P.2d 689, 695 (1940) (internal citation omitted). "Once the separate character of property is established, a presumption arises that it remained separate property in the absence of

sufficient evidence to show an intent to transmute the property from separate to community property.” *In re Estate of Borghi*, 167 Wn.2d 480, 484, 219 P.3d 932 (2009), as corrected (Mar. 3, 2010).

There is no suggestion in this case that Mr. Vandal ever intended to transmute his property. The business filed a separate tax return as an S-Corporation. *See, e.g.*, Ex. 72 (2010), Ex. 73 (2011), Ex. 74 (2012), Ex. 75 (2013), and Ex. 209 (2014). The business had separate bank accounts: U.S. bank account numbers 7334 (Ex. 25) and 0058 (Ex. 26), and 2823 (Ex. 24). No money was transferred from the joint bank account (U.S. Bank account number 3924) to the business.

The trial court found for several reasons, however, that the business became community property over time. Mr. Vandal will address each factor in turn.

2. Minimal Co-mingling was not a Basis for Changing the Characterization of the Business

Two of the trial court’s findings of fact relate to the issue of co-mingling:

2.8.2.3 Subsequent to and during the marriage, there was not a clear separation of the monies paid into or paid from the business. Community monies from lines of credit were paid into the business, although the amounts cannot be determined.

2.8.2.4 Many of the community and family expenses were paid through the business during the

marriage, including both the business and personal lease payments and expenses for use of vehicles for both spouses. The Respondent characterized these monies as loans and stated that the accounts were reconciled at the end of the year, but no financial records or other concrete evidence was offered to support this assertion and the Court does not find his testimony to be credible.

CP 393-94 (F&C 2.8.2.3, 2.8.2.4).

That the money was transferred from the business accounts to the joint account to cover community expenses does not detract from the separate nature of the business in any way. Mr. Vandal has never maintained that such transfers remained separate property. Like many people running a small business, he relied on his business income to support his family. In fact, if he had not adequately compensated the community, there could be an argument that some of the funds in the business were actually owing to the community. *See* Section B(4) below. Thus, that portion of F&C 2.8.2.3 is true but irrelevant.

The same finding of fact states that community funds were paid back into the business. CP 393 (F&C 2.8.2.3). This may have happened occasionally, but it was quite rare. That Mr. Vandal used accounts in his own name for business purposes, as well as accounts in the name of the business, does not suggest such co-mingling. Mr. Vandal explained that after the crash of 2008, he opened two extra accounts in his name because the FDIC would ensure any single account only up to a certain amount. 6

RP 871. While it might have been preferable to put those accounts in the name of the business, the name on an account does control whether funds are separate. “[D]epositing separate funds in a joint bank account is not an acquisition of property; therefore, no presumption [of community property] attaches.” *In re Marriage of Skarbek*, 100 Wn. App. at 446. It follows with greater force that placing funds in an account under his own name did not deprive Mr. Vandal of this separate property. There was no evidence that Mr. Vandal moved money from the joint account to any of the business accounts. The only clear testimony regarding use of community funds for the business involved Mr. Vandal’s admitted use of the home equity line of credit to cover shortfalls of the business on a few occasions. 7 RP 950-51.

In any event, even if Mr. Vandal had routinely moved money back and forth between the business and the community, there is no question about the end result: all of the profits ultimately were spent on the community. As discussed in the statement of the case, Mr. Vandal, Ms. Ferguson and L.V. led luxurious lives. Ms. Ferguson agreed that Mr. Vandal’s business was the only source of funds for the community. 5 RP 705. Under these circumstances, the money has effectively been traced.

Our Supreme Court addressed a similar issue in *In re Binge's Estate*, 5 Wn.2d at 461, citing *State ex rel. Van Moss v. Sailors*, 180 Wash. 269, 39 P.2d 397 (1934):

We further held there was no commingling of separate property with community property sufficient to destroy its identity where the business in which the separate property was invested is capable of identification and division, and any additions in the way of services by a member of the community have been offset by withdrawals for living expenses.

Here, Ms. Ferguson performed no work. But the same reasoning should apply to *money* provided to the business from the community. Clearly, in this case, any such transfers have been amply offset by the Niagra Falls of cash flowing from the business to the community. As Judge Halpert found,

The parties enjoyed a high standard of living during the marriage, *expending all of the income earned by the Respondent*, purchasing expensive clothing and jewelry and a share of a race horse. The family also spent generously on the child's education, with a private teacher and a separate classroom.

CP 399 (F&C 2.12.7) (emphasis added).

Further, even if there were some showing that the community made net contributions to the business, the community would be entitled only to reimbursement – not to ownership of the business.

Later community property contributions to the payment of obligations, improvements upon the property, or any subsequent mortgage of the property may in some instances

give rise to a community right of reimbursement protected by an equitable lien, but such later actions do not result in a transmutation of the property from separate to community.

In re Estate of Borghi, 167 Wn.2d at 491. The Court of Appeals recently addressed this issue in the context of ownership of a house.

Byerley testified that she contributed labor and funds to the house. Such contributions may entitle the community to reimbursement for a portion of the increase in value of the house during the relationship, *In re Marriage of Elam*, 97 Wn.2d 811, 816-17, 650 P.2d 213 (1982), but do not change the character of the house itself as separate property, *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 865, 855 P.2d 1210 (1993).

Byerley v. Cail, 183 Wn. App. 677, 689, 334 P.3d 108, 114 (2014).

Thus, F&C 2.8.2.3 and 2.8.2.4 (CP 393-94) are for the most part not supported by substantial evidence. Further, even if they were, they would not support the Court's conclusion because the Court did not follow the correct legal standards.

3. The Value of The Business was Not Based Primarily on Mr. Vandal's Labor

The trial court made the following finding:

The value of the business is almost entirely based on the goodwill generated by the Respondent. Both valuation experts, Steven J. Kessler for the Petitioner and Douglas S. McDaniel for the Respondent, as well as the Respondent himself, testified that the clientele of the business and thus its goodwill required constant renewal which was accomplished by the community labor of the Respondent.

CP 394 (F&C 2.8.2.5). The implication is that the value of the business is based primarily on Mr. Vandal's toil. If that were true, there would be little separate value because a party's toil is a community asset. But such a premise is directly at odds with the valuation of Mr. Kessler, the expert business appraiser for Ms. Ferguson. The Court accepted his report with only one exception.³

It is true that Mr. Vandal's clients had little loyalty to any particular CPA, which meant that he often had to find new clients. 6 RP 856. But that does not imply that the value of the business is due almost solely to his own toil. First, it is not as though Mr. Vandal lost all his clients every year and had to start from scratch. As Mr. Kessler explained,

[Mr. Vandal has] been in practice for a long time. He's grown. His practice is what I would call a mature practice. . . . So he's nurtured the client base and the goodwill.

2 RP 260. Mr. Vandal himself testified that he had to obtain new fee agreements with homeowner associations each year, but that does not mean that the clients were necessarily new. 6 RP 854-56.

Second, Mr. Kessler defined the meaning of goodwill in this context to be Mr. Vandal's ability to generate cash flows to himself that

³ The Court used Mr. McDaniel's capitalization factor because of concern that Mr. Vandal might not be able to perform as diligently as he had in the past. CP 230 (Memorandum Opinion at p. 4).

are *greater* than he would have if he were simply an employee performing the same services and receiving appropriate compensation. 2 RP 258-59. The goodwill is measured by the *excess* earnings. 2 RP 260. Mr. Kessler applied a hypothetical salary of \$200,000 per year as the reasonable value of Mr. Vandal's services if he were an employee. 2 RP 272. After some adjustments, Mr. Kessler came up with average excess cash flows of \$109,172 per year. He then determined the value of such flows over time. 2 RP 274-75. In other words, in view of the valuation method approved by the Court, *none* of the value of the business was based on Mr. Vandal's actual toil. Mr. Vandal's valuation expert, Douglas McDaniel, likewise applied the "excess earnings" approach.

The trial court's finding also ignored testimony that much of the hard work on the audits was done by Mr. Vandal's full-time employees. Mr. Kessler's report noted that Mr. Vandal had three employees. Ex. 76 at 4. Mr. Kessler also testified that the staff would do such work as reviewing checks and check registers. In particular, one woman Mr. Kessler met with at Mr. Vandal's office was "clearly a key person who does a lot of I guess that analysis for audit purposes." 2 RP 291-92.

That woman was likely Evelyn Stack, who testified at trial. She has worked for Mr. Vandal as a staff accountant since 2008. She described her duties as:

working with the clients, arranging to get the records for audits, getting those records for the audits, putting the files together, doing a working trial balance, and then putting them in a . . . financial format, doing the tax returns, [and] any follow-up that's necessary.

4 RP 461-62. Ms. Stack worked Monday through Friday and some weekends. 4 RP 462. She averaged about 40 hours per week, but with much longer hours during audit season.

Another employee, Lauren Lackey, worked for Mr. Vandal during the same time period as an audit associate. She often worked 12-hour days during audit season, which she described as January to May or June. After that it was "more of a 9 to 5 schedule." 6 RP 766-67. The amount of work that was done by employees further shows that the value of the business was not based primarily on Mr. Vandal's own labor.

Thus, F&C 2.8.2.5 was not supported by substantial evidence to the extent the Court suggested that the value of the business was based primarily on Mr. Vandal's own toil.

4. Mr. Vandal More Than Adequately Compensated the Community for his Own Toil

F&C 2.8.2.6 (CP 394) reads as follows:

The husband's salary of approximately \$70,000 per year, as he historically paid himself, was recognized by both experts and by the Respondent himself as inadequate to compensate the community for his labor.

This finding is true but misleading. Mr. Vandal agrees that his nominal salary was far below the reasonable value of his own toil. But throughout the marriage, Mr. Vandal provided far more compensation than that to the community. As discussed in section B(2), above, it is undisputed that *all* of the substantial funds used by the community came from the business. This amounted to an average of \$26,501.47 per month before taxes. CP 399 (F&C 2.12.9) or about \$318,000 per year. That is well above the \$200,000 figure that Mr. Kessler estimated as the value of Mr. Vandal's own toil.

Thus, Mr. Vandal's low, nominal salary does not affect the separate nature of his business.

5. The Business did Not Lose Its Separate Nature

F&C 2.8.2.7 reads as follows:

The Court concludes that over the 14 years of marriage, the business lost its characterization as the Respondent's separate property. It is not possible to trace what separate portion, if any, can be segregated from the overwhelming community ownership. Therefore, the Court concludes this is wholly community property.

CP 394 (F&C 2.8.2.7).

That the business lost its separate nature has been rebutted by the above argument in sections B(1-4). Similarly, Mr. Vandal has shown that the business owed little or nothing to the community. The final sentence of

F&C 2.8.2.7 is actually a legal conclusion, which is untenable in view of the erroneous findings and faulty legal standards. The same is true for Conclusions of Law 3.4.5.1(f), 3.4.5.2(a), and 3.4.5.4(e) (CP 402-03), which effectively require Mr. Vandal to buy from Ms. Ferguson half of the value of the business.

C. THE TRIAL COURT ERRED BY AWARDING MR. VANDAL THE SAME MONEY TWICE: FIRST DURING THE BUSINESS VALUATION, WHICH INCLUDED THE CASH IN BUSINESS ACCOUNTS, AND THEN AGAIN FROM THE SAME ACCOUNTS

During the valuation of Mr. Vandal's business, both sides included the cash in the business as a tangible asset. This was based on the three accounts in the name of the business: U.S. Bank accounts 0058, 2823, and 7334. *See* CP 384. Both experts agreed that the value of the cash was \$122,030 as of December 31, 2014. *See* Ex. 76, p. 36; Ex. 201, p. 20.

In her memorandum opinion, the Court found that the business was community property. CP 228-29. The Court then awarded the business itself to Mr. Vandal at its full value of \$446,000, and also awarded him the value of the three accounts used in the business. CP 241-42. The Court's value of the three accounts was \$198,657. CP 239. This differed somewhat from the expert's figure because it was based on a different valuation date.

Mr. Vandal objected to the double-counting. CP 318-19. This took place in the context of both sides requesting clarification of various portions of the Court's memorandum ruling. Ms. Ferguson did not deny that double-counting may have occurred. She maintained, however, that it was too late to fix the problem because Mr. Vandal did not raise it during trial. CP 348-49. But the issue did not arise until the Court mistakenly counted the money twice in her memorandum decision. Thus, to the extent the Court may have relied on that premise, the reasoning was untenable.

Ms. Ferguson also maintained that it was difficult to determine the precise amount of the double-counting because the business was valued as of December 31, 2014, while most of the other assets were valued as of August 2, 2014, the date of separation.

In her order on clarification, issued on February 11, 2015, the Court did not address this double-counting issue. CP 163-64.⁴

On February 12, 2016, Mr. Vandal objected again to the double-counting in response to Ms. Ferguson's proposed findings and conclusions. CP 380-82. Mr. Vandal also presented a declaration from his valuation expert, Douglas McDaniel. CP 383-90. Mr. McDaniel confirmed

⁴ The Court accepted the parties' agreement to correct a different and smaller problem regarding double counting of other accounts.

that both he and Mr. Kessler included the same value of cash in the business as part of their valuations. *See* Ex. 201, p. 20 (McDaniel Report); Ex. 76, p. 35 (Kessler Report). In Mr. McDaniel's professional opinion, "if the Court awarded U.S. Bank accounts ending in 0058, 2823, and 7334, to Mr. Vandal as a separate asset, it would be awarding an asset that had already been included in the value of his business that was expressed by Mr. Kessler and me." CP 384.

At a presentation hearing on March 2, 2016, the Court brought up the issue of double-counting.

When I read the affidavit of 2/23 from Mr. McDaniel, it did make some sense to me that there was perhaps double counting. I don't fancy myself an expert in accounting. I would like an affidavit from Mr. Kessler as to whether he agrees with Mr. McDaniel's analysis that I double counted the assets, or if you would like to just reply to that.

8 RP 1172.

Ms. Ferguson's attorney then reminded the Court that this had come up in the motion for clarification. *Id.* The Court said it would re-read that pleading. 8 RP 1173. A bit later in the same hearing the Court brought up the issue again.

Now going through the findings. And I thought a little bit about my concern about the value of the business and Mr. McDaniel's subsequent affidavit or declaration. I think it is in everybody's interest that we get this finished. I don't -- we can accept -- I can either treat Mr. McDaniel's affidavit as a motion for reconsideration and use the reply as that

which was filed back in the first motion. Or we can just -- or Mr. Vandal can move for reconsideration on that one issue and, if I change my mind, we'll have to deal with this. But I'm thinking we either get this done today or we don't, and I hadn't thought about the fact, or I hadn't remembered when I was reading it this morning, that we already had talked about this sort of double payment thing with the reply on that first motion.

So how do you all want to do this? I mean, I can either think about this more carefully and we can -- *it will permeate everything if I obviously reduce the value of the business. It will change a lot of things.* Or we can go through all of this and I will read, reread Mr. Kessler's explanation and determine whether I'm going to change my mind as to the value of the business. What's best for the parties?

8 RP 1186-87 (emphasis added). It is not clear why the Court believed that correcting the double-counting would change the value of the business. The remedy was simply to strike the stand-alone award of the accounts that were used in the business valuation.

Ms. Ferguson's attorney then convinced the Court that the issue had already been decided because the Court did not grant relief to Mr. Vandal on that issue in the motion for clarification. 8 RP 1187-88.

Ms. Moschetto: "So I would say let's just go ahead and enter the order. If Mr. Vandal wishes to appeal it, that's certainly his right." *Id.* The Court agreed. 8 RP 1188.

The Court abused its discretion because it was undisputed that double-counting occurred, yet the Court refused any remedy. Any

discrepancy between dates of valuation could have easily been avoided by simply using the date of December 31, 2014, for both the value of the business and the value of the cash included in the value of the business. That is what both expert appraisers did. Using that approach, it is obvious that the remedy is to strike the award of all cash in the business accounts.

While the Court generally valued assets as of the date of separation, August 2, 2014, it made several exceptions. For example, the Court obtained appraisals of several large diamonds based on the value on September 2, 2015, more than a year after separation. CP 91-102; CP 233-34. U.S. Bank Checking account 2823 was valued as of October 31, 2014. *See Ex. 24*, p. 1. And, of course, the Court had no objection to valuing the business based on December 31, 2014.

Thus, concerns about diverging valuation dates was no reason to count the business income twice. The failure to provide any remedy was based on untenable grounds and was therefore an abuse of discretion. Of course, this issue could become moot if this Court agrees that the business should be treated as separate property.

D. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SET CONTINUING FINANCIAL OBLIGATIONS BEYOND MR. VANDAL'S EARNINGS, AND PLACED MS. FERGUSON IN A SIGNIFICANTLY BETTER POSITION

The trial court imposed the following financial obligations on Mr.

Vandal:

- Maintenance of \$9,000 per month for six years beginning on January 1, 2016. CP 419-20, 427. Mr. Vandal was also ordered to pay maintenance of \$9,000 per month for a year and a half during temporary orders. *See* Statement of the Case.
- Child support for L.V. of \$1,034.48. CP 418. The Court declined to deviate from the standard calculation although Mr. Vandal was also required to pay for post-secondary education and other support for his two children from an earlier marriage. Although it appeared at the time of trial in this case that the cost would be higher (*see* Ex. 223), Mr. Vandal confirms that at the moment he is paying \$1,438 per month.
- Health insurance for L.V. CP 421-23 (Order of Child Support at 7-9). This will likely cost about \$200 per month.
- In addition, Mr. Vandal had over \$ 90,000 in debt on his business line of credit. *See* Ex. 76, p. 35 (long-term debt). This requires

monthly payments of about \$2,400 for principal and interest. Ex. 27, pp. 19-21.

These obligations add up to approximately \$14,000 per month. Mr. Vandal also has the following judgments against him:

- \$175,513.25 to Ms. Ferguson as an “equalizing award” CP 432 (Decree at 1).
- \$95,000 to Ms. Ferguson to reimburse her for withdrawals made on the home equity line of credit. CP 433 (Decree at 2).
- \$17,167.12 to Ms. Ferguson for delinquent mortgage payments. CP 433 (Decree at 2).
- \$101,691.39 to Ms. Ferguson as custodian for L.V. CP 415 (Order of Child Support at 1.1).

The judgments total \$389,371.76.

The Court determined that Mr. Vandal earned an average of \$26,501.47 per month before taxes. CP 399 (F&C 2.12.9). The amount after taxes is \$18,635.41. 7 RP 1117.⁵ This leaves Mr. Vandal with about \$12,500. Assuming that he can meet his own expenses for \$9,000 per

⁵ These numbers likely exaggerate Mr. Vandal’s earning capacity going forward. In 2014, the last year available at trial, he grossed only \$284,161. After reducing for 28% in taxes, the number is \$204,590, or \$17,050 per month. The trial judge acknowledged that Mr. Vandal might not be able to keep up his former earnings. *See* CP 230.

month, that leaves him with another \$3,500 per month or \$ 42,000 per year.

But that is not nearly enough to pay off the judgments. At a 12% rate, the yearly interest alone is \$46,725. That means that Mr. Vandal will come up short by several thousand dollars every year. He has been sentenced to lifetime indebtedness, despite his hard work over the years to provide a lavish life for his family.

In addition to the \$389,000 in judgments, the awards to Ms. Ferguson include the following:

- All proceeds from sale of the family home. CP 434 (Decree at 3.2.1.a). A value of \$104,219.63. CP 393 (F&C 2.8.1.7).
- All of her jewelry and designer handbags. *See* CP 434 (Decree at 3.2.1.b) and CP 439-40 (attachment A). This included a 3.57 karat round diamond,⁶ two matching 1.63 karat round diamonds, two Rolex Submariner watches,⁷ a Tiffany golden charm bracelet, a David Yurman necklace, a David Yurman ring, sapphire earrings,

⁶ Ms. Ferguson testified that the largest diamond was appraised at \$80,000. 5 RP 684. She later obtained a new appraisal finding that the largest diamond and two other smaller ones were together worth only about \$61,000. As the trial court acknowledged, Mr. Vandal had little ability to obtain his own appraisal because Ms. Ferguson and the diamonds were already in Connecticut by this time. CP 233-34.

⁷ Mr. Vandal also kept similar watches.

a sapphire necklace, a Hermes cuff dog collar in silver, pearl earrings, a pearl necklace, a Chanel handbag, two Prada handbags, and two items of Louis Vuitton dog luggage. All of these items were bought either through community funds or were a present from Mr. Vandal to Ms. Ferguson during the course of the marriage.

- \$22,400.00 in cash from U.S. Bank 3427 and 3443, personal accounts.

Thus, Ms. Ferguson obtained over \$100,000 in cash, nearly \$400,000 in judgments, and considerably more assets that could be readily sold for cash, in addition to over seven years of maintenance at \$9,000 per month. Mr. Vandal, on the other hand, obtained nothing but debt. Much of this was due to the high maintenance and the characterization of the business as community property.

Certainly it was appropriate to award maintenance to Ms. Ferguson during temporary orders. She could not be expected to return to work immediately. But she had a year and a half to make such plans.

Ms. Ferguson is in good health physically and mentally. F&C 2.12.2 (CP 398). She has a degree from a prestigious college. She was permitted shortly after separation to relocate to be near her parents, her brother, and his family in Connecticut. 3 RP 389-90. She and L.V. have

maintained a close connection with these relatives. 1 RP 27. That family support should make it easier to care for L.V., who is now a teenager. Under these circumstances, six additional years of generous maintenance is a windfall.

Thus, for all these reasons, the overall distribution is inequitable and amounts to an abuse of discretion.

**V.
CONCLUSION**

The Court should remand for a new division of property based on Mr. Vandal retaining his business, and its bank accounts, as separate property. This may moot the remaining issues. In the alternative, the Court should remand to eliminate the double-counting of bank accounts, and to craft a more equitable division of property.

DATED this 14th day of September, 2016.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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