No. 90043-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

KIM B. WRIGHT,

Petitioner,

v.

MARY M. WRIGHT,

Respondent.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Relying largely on new evidence that is the subject of his failed RAP 9.11 motion, Dr. Kim Wright asks this Court to take review to address issues that are not presented in this matter, or to revert to decades-old law. This Court should deny review.

The Honorable William Downing did not adopt a "new rule" for long-term marriages, but made a just and equitable property distribution and maintenance award under the controlling statutes. Judge Downing felt no obligation to divide the asset roughly equally, nor did he. He did not feel constrained by ***Marriage of Rockwell***, a six-year-old case that is the real subject of Dr. Wright's ire.

Judge Downing properly considered each party's future earning capacity, as he is required to do under this Court's holding in ***Marriage of Hall***, *infra*. There is no conflict and no reason to overrule ***Hall***, which Dr. Wright largely ignores.

The holding that "financial need" is not a necessary prerequisite to a maintenance award is consistent with RCW 26.09.090 and scores or cases following it, including this Court's decision in ***Marriage of Washburn***. Dr. Wright's professed conflict is an invitation to abandon ***Washburn*** and its progeny and revert to outdated and unwise law from 1972. This Court should deny review.

RESPONSE TO FACTS RELATED TO MOTION FOR DISCRETIONARY REVIEW

A. After a 30-plus-year marriage, the parties divorced following the birth of Dr. Wright's child with his younger girlfriend.

The parties met in 1977, and married in 1980. CP 227, FF 2.[1] Soon after, Mary Wright left her employment as a nurse to raise the parties' children. *Id.* Dr. Kim Wright focused on his neurosurgery practice. *Id.*

In 2007, Dr. Wright moved his medical practice to Alaska, where he could increase his income five or six times, while working less. RP 666, 789-90, 972-73. The youngest three of the parties' eight children were still in middle or high-school, and the parties agreed that Dr. Wright would travel back and forth often, until the children were off to college and Mary could join Dr. Wright in Alaska. RP 64-65, 375-76, 590-92.

After moving to Alaska, Dr. Wright cut back his neurosurgical practice by about one-third, but "quadrupled his income," averaging about $5 million annually. CP 230, FF 8. This increase was due to the higher medical reimbursement rates in Alaska. *Id.*

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[1] Dr. Wright filed both a Petition for Review and a Motion for Discretionary Review. Mary's responses to both use the same statement of facts.

As planned, Dr. Wright traveled home regularly, and the family visited him in Alaska as well. BR 6-11. But in October 2010, Dr. Wright told Mary that he had a pregnant girlfriend, a younger pilot he had helped to obtain her license. RP 398-99. "[D]evastated," "shock[ed]," and "overwhelmed," Mary made no immediate decision, but filed for dissolution after the child was born. RP 399-400, 404, 1025; CP 3.

B. Judge Downing divided the community assets 60/40, awarding Mary three years of maintenance totaling approximately $1 million before taxes.

The total martial estate was approximately $18.2 million, $17,184,506 of which was community property. CP 260-64, 268, 269; Exs 332, 333. The Honorable William Downing divided the community assets 60/40, awarding Mary $10,226,834: $8,526,834 in community property, and a $1.7 million equalizing payment; and awarding Dr. Wright $6,957,672: $8,657,672 in community property less the $1.7 million equalizing payment. CP 235, FF 4; CP 238-43; Exs 36, 332, 333. Judge Downing also awarded Dr. Wright $979,766 in separate property, bringing the net value of Dr. Wright's property award to $7,937,438. *Id.*; CP 198-99. Thus, Mary received about 56% of the total marital estate and Dr. Wright received about 44%.

Judge Downing found that Dr. Wright will continue to work for at least two and one-half more years, earning not less than $4 million annually, totaling at least $10 million. CP 228, FF 5; CP 232, FF 12. He ordered Dr. Wright to pay Mary $1 million in maintenance (taxable to Mary) over three years, less than Dr. Wright's separate property award on an after-tax basis, and only one-tenth of his anticipated post-dissolution earnings. CP 232, FF 12; 236-37, CL 6, 9; CP 240, 268-69. The appellate court affirmed in an unpublished decision.

Dr. Wright moved for reconsideration, moved to publish, and moved the court to order the taking of additional evidence under RAP 9.11. Eleven days later, Dr. Wright also moved to modify maintenance in the King County Superior Court, just as his counsel had predicted in oral argument. The appellate court granted the motion to publish, but denied Dr. Wright's motions for reconsideration and under RAP 9.11. Dr. Wright asks this Court to take discretionary review of the order denying his RAP 9.11 motion while filing a Petition for Review premised largely on the rejected RAP 9.11 evidence.

C. The "new evidence" Dr. Wright offers under RAP 9.11 is a completely one-sided account of his post-dissolution income.

The new evidence Dr. Wright offers is his declaration and tax records, purporting to demonstrate that his post-decree income is less than the trial court anticipated. Mary has had no opportunity to test Dr. Wright's allegations through discovery. But the picture Dr. Wright paints is not a fair depiction of reality.

As just one example, Dr. Wright's RAP 9.11 declaration – which incorporates his earlier RAP 18.1 declaration – omits a significant increase in this his income from rental properties. App. A (Dr. Wright's RAP 18.1 declaration, dated September 4, 2013). Dr. Wright's RAP 9.11 declaration, filed in January 2014, does not discuss rental income. His RAP 18.1 declaration, dated September 4, 2013, included a $31,500 / month debt on one of his Alaska rental properties. But Dr. Wright leased that building 7 months earlier (on February 14, 2013) for $45,060 / month, increasing 3% per year, over a 10-year term, to $58,793 / month. App. B (Dr. Wright's Supplemental Interrogatory Answers, dated March 4, 2014). In claiming that his earned income has declined, Dr. Wright neglects to mention this rental-income increase.

REASONS THIS COURT SHOULD DENY REVIEW

A. The trial court was not "required" to roughly equalize the parties' post-dissolution economic circumstances.

The first issue Dr. Wright asks this Court to review is whether the trial court dissolving a long-term marriage is "required" to roughly equalize the parties' post-dissolution economic circumstances. PR 2. The short answer is "no," trial courts have broad discretion to fashion maintenance and property awards, limited only by equity and justice. The Honorable William Downing plainly understood his broad discretion, awarding assets and maintenance that did not "roughly equal[ize]" the parties' post-dissolution financial circumstances, but left Dr. Wright about $2.7 million ahead based on what Judge Downing found Dr. Wright would likely earn post-trial.

Judge Downing rejected the assertion that "roughly equal[izing]" the parties' post-dissolution financial circumstances is an "imperative," accurately characterizing it instead as a "suggestion." CP 235, CL 4. Discussing this issue, Judge Downing stated, "this Court views itself as having discretion and as having exercised it." *Id.* Judge Downing did not feel required to do anything other than divide the property in a manner he "deem[ed] just and equitable in light of the RCW 26.09.080 factors. *Id.*

Dr. Wright's argument here is in stark contrast with the one he raised in the Court of Appeals. There, Dr. Wright argued "that the trial court abused its discretion because its property distribution did not leave the parties in 'roughly equal' positions." ***In re Marriage of Wright***, No. 69133-3-I, 2013 Wash. App. LEXIS 2823, *4 (December 16, 2013). The appellate court saw no abuse of discretion, where the property distribution and maintenance awards were projected to leave Dr. Wright about $2.7 million ahead just 2.5 years after the dissolution. ***Wright***, 2013 Wash. App. LEXIS 2823, at *4-6.

But now, Dr. Wright contends that the trial court was so focused on "roughly equal[izing]" the parties' post-dissolution financial circumstances following their long-term marriage, that he ignored the other factors relevant to the property distribution under RCW 26.09.080, including the nature and extent of the community and separate property, and each party's economic circumstances. PR 8. This, Dr. Wright claims, conflicts with the statute itself, and with ***Konzen***, requiring courts to consider all of the statutory factors without prioritizing any individual factor. PR 9-11; ***In re Marriage of Konzen***, 103 Wn.2d 470, 472, 478, 693 P.2d 97 (1985) *cert. denied*, 473 U.S. 906 (1985). The obvious problem with this argument is that

there is no indication Judge Downing placed too much emphasis on the duration of the parties' marriage.

Judge Downing is well known to this Court. He plainly stated that he considered each RCW 26.09.080 factor, he set forth detailed findings valuing and dividing the assets in dispute, and he appended a six-page asset-distribution sheet identifying and valuing the parties' assets. CP 235, CL 4; CP 238-43. While Judge Downing once mentioned the duration of the parties' marriage, he spent considerable time identifying and valuing the only two assets in dispute, the interest in Alaska Neurosurgery Associates and the family home. CP 229, FF 7; CP 232-33, FF 13-14; CP 235; RCW 26.09.080(1) & (3).

But perhaps the most compelling evidence that Judge Downing amply considered the character of the assets before the court is that he awarded Dr. Wright $979,766 in separate property – cash earned after the parties separated. CP 64-65, 198-99, 238-43; Exs 36, 332, 333; RCW 26.09.080(2). Dr. Wright fails to mention this sizable award in complaining that Judge Downing ignored the character of the assets. PR 9-11.

Judge Downing also carefully considered the parties' "economic circumstances . . . at the time the division of property

[was] to become effective." RCW 26.09.080(4); CP 228-29, FF 4-6; CP 229-30, FF 8; CP 232, FF 12; CP 234, FF 16. As discussed fully below, this included properly considering each party's work history and earning capacity. *Infra*, Argument § B.

In short, Judge Downing plainly considered each RCW 26.09.080 factor. He did not "roughly equal[ize]" the parties' post-dissolution financial circumstances, but left Dr. Wright millions ahead. And Judge Downing even articulated that he did not feel "required" to roughly equalize.[2] Thus, the issue Dr. Wright takes with ***Rockwell*** simply is not presented in this case. This Court should deny review.

B. The trial court property considered the parties' future earning capacity in distributing the parties' assets and awarding maintenance.

The second issue Dr. Wright asks this Court to review is whether a trial court making a disproportionate property award based on the parties' grossly disparate earning capacity – or what he calls "future income" – can also award maintenance based on the same. PR 2. The short answer is "yes" – the court can and must consider what both parties will earn in the future as one of many factors

[2] Referring to ***Marriage of Rockwell***, 141 Wn. App. 235, 170 P.3d 572 (2007) *rev. denied*, 163 Wn.2d 1055 (2008).

relevant to both an equitable distribution of property and a maintenance award. This Court need not take review to restate this rule announced in at least three of this Court's decisions, and countless appellate decisions. *See e.g.,* ***DeRuwe v. DeRuwe***, ***In re Marriage of Washburn***, and ***In re Marriage of Hall***, *infra.*

The first flaw in Dr. Wright's argument is that he treats property distributions and maintenance awards as if they are independent of one another, suggesting that trial courts must consider only RCW 26.09.080 in dividing property, and only RCW 26.09.090 in awarding maintenance. PR 10-11. This false construct sets up Dr. Wright's argument that a court dividing property must look only at the "economic circumstances of each spouse . . . at the time the division of property is to become effective" – RCW 26.09.080(4) – so cannot consider each party's ability to meet their financial needs in the future – RCW 26.09.090(a) & (f). *Id.* This is not the law, nor would it be workable in practice: the "trial court may properly consider the property division when determining maintenance, and may consider maintenance in making an equitable division of the property." ***In re Marriage of Estes***, 84 Wn. App. 586, 593, 929 P.2d 500 (1997).

The second flaw in Dr. Wright's argument is that it ignores this Court's opinion in ***In re Marriage of Hall***, rejecting the argument Dr. Wright raises here. 103 Wn.2d 236, 248, 692 P.2d 175 (1984). There, this Court plainly stated that not only *may* a trial court consider future income when distributing property under RCW 26.09.080, but that the trial court "should" also consider, amongst other things, the parties' "future earning prospects," a "substantial factor . . . in a just and equitable property distribution":

> In addition to the four subsections in RCW 26.09.080, which include "[t]he economic circumstances of each spouse at the time the division of property is to become effective," the court should also consider the age, health, education and employment history of the parties and their children, and the future earning prospects of all of them in determining a just and equitable division. ***DeRuwe v. DeRuwe***, 72 Wn.2d 404, 408, 433 P.2d 209 (1967); ***In re Marriage of Rink***, 18 Wn. App. 549, 551, 571 P.2d 210 (1977). In ***Washburn*** we also emphasized the importance of the future earnings potential of each spouse by setting it out as one of four factors to be considered in determining the proper amount of compensation for the supporting spouse.
>
> Once again we emphasize the importance of consideration of future earning potential. . . . we hold that it is a substantial factor to be considered by the trial court in making a just and equitable property distribution.

Marriage of Hall, 103 Wn.2d at 248 (citing ***In re Marriage of Washburn***, 101 Wn.2d 168, 179, 677 P.2d 152 (1984)). ***Hall*** directly rejects the second argument Dr. Wright raises. This Court should deny review.

Dr. Wright argues that ***Hall*** holds that future earning potential is not an "'asset' that can be used to offset other assets." PR 12. This is correct, but irrelevant. Relying on this Court's then-recent decision in ***Washburn***, ***Hall*** held that like the increased earning potential conferred by a professional degree, the "future earning potential" at issue in ***Hall*** was not an asset that could offset the award of goodwill to the husband, but was a "substantial factor" in the property distribution. ***Hall***, 103 Wn.2d at 247-48 (citing ***Washburn***, 101 Wn.2d at 174-75, holding that "future earning prospects" are relevant to both the maintenance award under RCW 26.09.090 and the property distribution under RCW 26.09.080). In other words, ***Hall*** *and* ***Washburn*** directly contradict Dr. Wright's assertion that a trial court distributing assets under RCW 26.09.080 may not consider the parties' future earning potential.

The court's property division and maintenance award, taken together, are more than fair to Dr. Wright. Dr. Wright neglects to mention that the maintenance award ($1,080,000 before taxes, spread out over three years) has an after-tax value that is hundreds of thousands of dollars less than the $979,766 in after-tax separate property Judge Downing awarded Dr. Wright independent of the 60/40 asset distribution. CP 64-65, 198-99, 238-43; Exs 36, 332,

333. The maintenance award is also just one-tenth of the income Judge Downing found Dr. Wright would earn in 2.5 years after the dissolution. CP 232, FF 12; CP 236-37, CL 6, 9.

In short, our courts have long held that trial courts not only may, but should consider the parties' future earning prospects when distributing assets and awarding maintenance. This Court should deny review.

C. This Court should not order the taking of new evidence.

The third issue Dr. Wright asks this Court to consider is whether this Court should order the taking of additional evidence under RAP 9.11, since the trial court considered, as it must, the parties' future earning potential. PR 2-3. Dr. Wright's sole argument on this point is that considering post-dissolution income invites trial courts to speculate, such that this Court should order the taking of additional evidence under RAP 9.11 to ascertain whether the trial court's necessary predictions were correct. PR 12-13. The short answer to this issue is "no," this Court should not adopt this unprecedented expansion of RAP 9.11. This Court should deny review.

Mary Wright's Answer to Dr. Wright's Motion for Discretionary Review addresses this issue in great detail. In brief, under ***Hall***,

Washburn, ***DeRuwe***, ***Rink***, and countless other cases, trial courts are directed to consider the parties' post-dissolution economic circumstances – including their future earning potential – when dividing property and awarding maintenance, if any. *Supra*, Argument § B. This sound principle should not operate to open the floodgates to RAP 9.11 motions used to second-guess the trial courts.

D. This Court has long held that "financial need" is not a prerequisite to maintenance – it should not take review to restate this correct and fair rule.

Dr. Wright asks this Court to revert to pre-1973 law and order that trial courts cannot award maintenance unless it is based on the wife's "financial need," a term Dr. Wright never defines. PR 16-17. This request plainly contradicts this Court's oft-cited holding in ***Washburn***: "maintenance is not just a means of providing bare necessities, but rather a flexible tool, by which the parties' standard of living may be equalized for an appropriate period of time." 101 Wn.2d at 179. Indeed, "the *only* limitation placed upon the trial court's ability to award maintenance," is not a finding of financial need, but "that the amount and duration, considering all relevant factors, be just." *Id.* at 178 (emphasis added). This Court should

reject Dr. Wright's invitation to reverse ***Washburn*** and its progeny and revert to outdated and unwise law.

First enacted in 1973, RCW 26.09.090 provides that the court may order maintenance "in such amounts and for such periods of time as the court deems just" after consideration of "all relevant factors," including:

> (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
>
> (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
>
> (c) The standard of living established during the marriage or domestic partnership;
>
> (d) The duration of the marriage or domestic partnership;
>
> (e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and
>
> (f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

Under prior law, "alimony" was based solely on one spouse's need and the other spouse's ability to pay:

> The criterion adopted by this court for the allowance of alimony includes two factors: (1) the necessities of the wife, and (2) the financial ability of the husband.

Morgan v. Morgan, 59 Wn.2d 639, 643, 369 P.2d 516 (1962); ***Friedlander v. Friedlander***, 80 Wn.2d 293, 297, 494 P.2d 208 (1972) (citing ***Morgan***). Dr. Wright asserts a conflict with ***Friedlander***, asking this Court to revivify the 1972 "alimony" test and hold that "financial need" is a prerequisite to a maintenance award. PR 17-18 (citing 80 Wn.2d at 297).

There is no conflict here – this Court has already made very clear that maintenance is not about "providing bare necessities." ***Washburn***, 101 Wn.2d at 179. The point, rather, is to "equalize[]" the parties' post dissolution standard of living for an appropriate period. 101 Wn.2d at 179. This laudable goal, followed in countless cases, should not be replaced by a 40-plus-year-old rule that the wife gets only as much as she "needs" to get by.

Indeed, the only supposed "conflict" is the one Dr. Wright invents by invoking an outdated and discarded rule. Maintenance awards are now governed by the six-part inquiry under RCW 26.09.090, not the two-part inquiry under decades-old law. The current statue appropriately requires trial courts to consider the "financial resources of the party seeking maintenance," but nowhere suggests that maintenance cannot be awarded absent a showing of financial necessity. RCW 26.09.090(a).

Dr. Wright falsely states that the maintenance award is "based solely on the husband's predicted postdissolution earnings." PR 17. The trial court plainly based its maintenance award on the six factors enumerated in RCW 26.09.090(1):

- (a): the court considered Mary's financial needs, including most importantly her ability to keep the family home the parties agreed she should have (CP 255-56, FF 14-16);
- (b): the court considered that where Mary, age 60, had not worked outside of the family home for over 25 years, she was unlikely to seek future employment (CP 250, FF 4);
- (c): the court considered the high standard of living during the marriage, particularly the last few years, when Dr. Wright's income more than quadrupled (CP 250-51, FF 6; CP 251-52, FF 8)
- (d): the court considered the duration of the parties' marriage (CP 249, FF 2);
- (e): the court considered Mary's age, health and financial obligations (CP 250, FF 4; CP 255-56, FF 14-16); and
- (f): the court considered Dr. Wright's ability to meet his own financial needs (CP 251-52, FF 8; CP 254, FF 12; CP 256, FF 18).

Dr. Wright also asserts a conflict with cases in which the trial courts elected not to award maintenance due to the unequal asset distribution. PR 18. But he omits the many decisions affirming significantly longer and higher maintenance awards. *See e.g.,* ***In re Marriage of Hadley***, 88 Wn.2d 649, 651, 565 P.2d 790 (1977); ***In re Marriage of Bulicek***, 59 Wn. App. 630, 632, 635, 800 P.2d 394

(1990); ***In re Marriage of Morrow***, 53 Wn. App. 579, 580, 586-88, 770 P.2d 197 (1989); ***In re Marriage of Tower***, 55 Wn. App. 697, 780 P.2d 863 (1989), *rev. denied*, 114 Wn.2d 1002 (1990). None of this establishes a conflict or an abuse of discretion.

Trial courts have "broad discretion" to fashion just and fair awards, using both the property distribution and maintenance. ***Washburn***, 101 Wn.2d at 179; ***Estes***, 84 Wn. App. at 593. There are likely many cases in which a disproportionate property award or a maintenance award is alone sufficient to accomplish equity. There are equally as many cases where both tools are properly used. Forcing trial courts to elect one tool or the other would arbitrarily limit their broad discretion.

Finally, Dr. Wright attempts to co-opt ***Washburn***, asserting that his medical degree created such significant community wealth, and such a high standard of living during the marriage, that maintenance is inappropriate. PR 19. He then falls back on the old rule that maintenance is not intended to provide the wife "a perpetual lien upon her divorced husband's future earnings." PR 19 (quoting ***Morgan***, 59 Wn.2d at 642). A three-year maintenance term is not a "perpetual" (a permanent or unending) lien.

In any event, the parties' situation is not at all like the one this Court imagined in ***Washburn*** – that some parties might enjoy the financial benefit conferred by one spouse's advanced degree for so long during the marriage that the supporting spouse had been sufficiently compensated and "extra compensation" is inappropriate. ***Washburn***, 101 Wn.2d at 181. Dr. Wright's income increased four to five times in the last few years of the parties' marriage. CP 251-52, FF 8. There is no abuse of discretion in allowing Mary to share in that gain for three years.

In short, this Court should decline Dr. Wright's invitation to revert to pre-1973 law that prohibited trial courts from awarding maintenance unless it was based on the wife's "financial need." This Court should deny review.

CONCLUSION

For the reasons stated above, this Court should deny review.

RESPECTFULLY SUBMITTED this 3rd day of April, 2014.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **ANSWER TO PETITION FOR REVIEW**, postage prepaid, via U.S. mail on the 3rd day of April 2014, to the following counsel of record at the following addresses:

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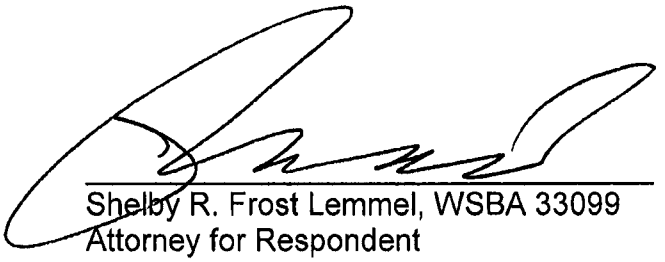

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ANSWER TO PETITION FOR REVIEW

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THANK YOU.

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