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No. 69133-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

MARY M. WRIGHT,

Respondent,

and

KIM B. WRIGHT,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE WILLIAM DOWNING

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Despite the trial court's claim that it was placing the parties in "roughly equal" financial positions, its property division and maintenance award leave the wife in a far superior position. The wife has over $10 million in mostly liquid assets – $3.5 million more than the husband – and will receive over $1 million in spousal maintenance in the three years after divorce. On the cusp of retirement, the husband is left with largely illiquid assets, limited retirement accounts, and an obligation to pay a significant money judgment and spousal maintenance to the wife. The only way for the husband to come even close to the wife's financial situation is to continue to labor 14- to 16-hour days at work that is both physically and mentally tasking. This court should reverse because this is far from the "roughly equal" financial circumstances that the trial court purportedly intended.

II. REPLY ARGUMENT

A. The Trial Court Erred In Ordering The Husband To Pay A $1.7 Million Judgment To The Wife From His Separate Earnings And Assets When She Could Be Amply Provided For From The Community Estate.

The trial court properly divided the substantial community estate nearly equally, but then erred by ordering the husband to pay a $1.7 million cash judgment to effect a disproportionate award to

the wife. Because the community property awarded the husband, including his unsalable goodwill, was largely illusory or illiquid, he will necessarily pay this judgment from separate income and assets. The wife claims that it is the husband's fault that he was left with largely illiquid community assets, and that he got "everything he asked for." (Resp. Br. 25-27) But while the husband asked to be awarded assets including real property, aircraft, and business investments, in Alaska, where he resides – assets that the wife would not have wanted – the husband did not ask that he also be ordered to pay the wife $1.7 million cash from his separate earnings and assets. The trial court erred in entering this judgment, which was not necessary to make a just and equitable division of the marital estate.

Contrary to the wife's assertions (Resp. Br. 26), the husband does not argue that a trial court can never order an equalizing judgment in making a just and equitable division of the parties' property. Instead, his argument is that when the community property alone is sufficient to "amply provide" for the wife – as it was here, where the wife was awarded more than $8.5 million in assets, including over $1.3 million in stocks, $1.227 million in retirement accounts, and $733,386 in cash and savings – it was

error for the trial court to also invade the husband's separate earnings and assets by imposing a $1.7 million "equalizing" judgment. (*See* App. Br. 31-33)

Marriage of Young, 18 Wn. App. 462, 569 P.2d 70 (1977) (Resp. Br. 26) does not support the wife's claim that the trial court acted within its discretion in entering its $1.7 million "equalizing" judgment. In *Young,* the parties had a community estate valued at $157,750, but 72% of its value was associated with the parties' interest in the husband's business. When the husband was awarded that business, the wife was left with only a small portion of the community estate. The court held that this was a "proper case" for an equalizing judgment to give the wife half the community estate, because it was not possible to otherwise "conveniently effectuate a 'present allocation' of property." *Young,* 18 Wn. App. at 465.

Here, however, the wife had already been awarded half of the community estate, including nearly all of the liquid assets and retirement accounts. An invasion of the husband's separate earnings and assets with a judgment intended not to equalize, but to make a disproportionate division to the wife, was not necessary to "effectuate a present allocation of property."

The wife also argues that the trial court was not required to preserve the husband's separate property because the character of property is not "controlling" in dividing the marital estate on divorce. (Resp. Br. 27-28, *citing Marriage of Konzen,* 103 Wn.2d 470, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985)). But the wife's reading of *Konzen* goes too far and ignores the plain language of RCW 26.09.080, which requires the court to consider both the "nature and extent of the community property" and the "nature and extent of the separate property" in dividing the marital estate. RCW 26.09.080(1), (2). If separate and community property were interchangeable in dividing the marital estate, the requirement of RCW 26.09.080 that the court consider the "nature and extent" of each asset's character would be superfluous. Because an award from the community estate amply provided for the wife, the trial court erred in also awarding the wife a money judgment that will necessarily be paid from the husband's separate earnings and assets to effect a disproportionate division of the marital estate.

B. The Husband's Financial Condition Is Even Worse Than The Trial Court Recognized Because Characterization And Valuation Errors Leave The Husband With Much Less Community Property Than The Trial Court Intended.

Making the award of a $1.7 million judgment to the wife even worse is the fact that while the trial court intended to award the husband 40% of the community property, its errors in valuing and characterizing assets left the husband with significantly less community property than was intended. The husband in fact was awarded less than a quarter of the community estate, instead of 40% as the trial court intended. (*See* App. Br., Appendix C)

First, the trial court erred by including $1.048 million in accounts receivables for services performed by the husband after the wife filed for dissolution as part of its 60/40 community property division. RCW 26.16.140 ("When a husband and wife are living separate and apart, their respective earnings and accumulations shall be the separate property of each."). Both experts valued the accounts receivables as of January 2012. (*See* RP 84-85, Ex. 202) The wife's expert testified that the receivables were for services performed two months earlier – seven months after the wife filed for dissolution – while the husband testified that the receivables were for services performed four or five months

earlier. (RP 194, 611) In either event, the services were indisputably performed after the wife filed for dissolution in April 2011. The wife does not deny that these accounts receivables were for services performed after she filed for dissolution, and that they were therefore the husband's separate property. No evidence supports the trial court's determination that the accounts receivables were community property.

Second, the trial court properly concluded that the husband's purported "goodwill" in his neurosurgery practice was "not a saleable asset," (Finding of Fact (FF) 9, CP 252), but then erred by awarding goodwill as an "asset" to the husband in its 60/40 property division. The wife does not dispute that the law of Alaska, where the husband practices neurosurgery, prohibits the distribution of goodwill that cannot be marketed or sold on divorce. (Resp. Br. 31) *Moffitt v. Moffitt,* 749 P.2d 343, 347 (Alaska 1988), *remanded on other grounds, Moffitt v. Moffitt,* 813 P.2d 674 (Alaska 1991); *see Miles v. Miles*, 816 P.2d 129, 131 (Alaska 1991); *Fortson v. Fortson*, 131 P.3d 451, 460 (Alaska 2006). Instead, the wife argues that because the parties lived in Washington during the majority of their marriage, she is entitled to the "protection" of

Washington law, which allows for the distribution of goodwill even if not "readily marketable." (Resp. Br. 34)

But the wife is not in need of "protection." The wife had no "financial expectation" that any goodwill in the husband's neurosurgery practice would be treated as an asset – even if, as the wife suggests, the parties planned for the husband to eventually partner in a medical practice before he relocated to work at Alaska Native Hospital. (Resp. Br. 33, *citing* RP 577) It was undisputed that the husband would retire in just a few years, and that his goodwill cannot be sold – indeed, it will have absolutely no value once the husband retires in 2 ½ years, as predicted by the trial court. The wife therefore could not "expect" goodwill to be awarded to the husband as an asset. Yet because the trial court awarded the husband this unsalable asset and accounts receivables that are properly characterized as separate property, he received $1.4 million less in community assets than the trial court intended.

In a related error, the wife benefitted immensely from the husband's neurosurgery practice during the marriage, and the trial court therefore erred by leaving the husband wholly responsible for any liability associated with the malpractice action that was pending at the time of the dissolution trial. *Dizard & Getty v.*

Damson, 63 Wn.2d 526, 530, 387 P.2d 964 (1964). (*See* App. Br. 40) To the extent there is any future liability associated with the practice based on actions taken during the marriage, the trial court should have ordered the wife to share in that liability.

The wife is wrong when she claims that the reason the husband's expert assigned a "very low" value to the husband's goodwill was because of the pending malpractice actions, and that these claims were thus "considered" by the trial court in its property distribution. (Resp. Br. 38) First, the value the trial court assigned to the husband's goodwill was only "very low" compared to the wife's expert's value, which the trial court rejected. (FF 13, CP 254-55) Second, while acknowledging the pending malpractice actions, neither expert included them in their calculations of goodwill. (*See* Exs. 1, 202) The trial court should have considered the pending medical malpractice actions when making its property division, and at a minimum made both parties responsible in the event of liability.

Finally, the trial court erred in characterizing assets the husband acquired after November 2010 as community property. By then, the husband had disclosed that his girlfriend in Alaska was pregnant. (RP 398-99, 400-01, 770-71) That neither party

immediately took "legal steps to end the marriage" is not evidence that the marriage was still intact. (Resp. Br. 36) A marriage is "for all practical purposes 'defunct,'" even though it has not been legally dissolved, when the parties have ceased to have a "community" relationship, and retain only a skeletal "marital" relationship. *Aetna Life Ins. Co. v. Bunt,* 110 Wn.2d 368, 372, 754 P.2d 993 (1988) (*citing* Harry Cross, *The Community Property Law in Washington* 61 Wash. L. Rev. 13, 33 (1985)). As the wife acknowledges, "the test is whether the parties by their conduct have exhibited a decision to renounce the community, with no intention of ever resuming the marital relationship." (Resp. Br. 35, *citing Marriage of Nuss,* 65 Wn. App. 334, 344, 828 P.2d 627 (1992)) Once the husband disclosed his girlfriend's pregnancy, the parties told the children about the end of the marriage, and thereafter the wife did not allow the husband to stay in the family home and started consulting divorce attorneys. (RP 401-02, 770-71) Because the marriage was defunct by the end of November 2010 at the latest, the trial court erred in including those assets acquired by the husband with his earnings after that time.

The husband in fact received only 38% of the existing community property, and it was not necessary to award the wife the

$1.7 million judgment to effect a disproportionate award in her favor. (*See* App. Br., Appendix C) By including separate assets in its 60/40 division of community property and then awarding the wife a $1.7 million judgment, the trial court awarded the husband almost $3.5 million less in community property than it intended.

C. The Trial Court Erred In Awarding The Wife Both A Disproportionate Share Of The Community Property And Spousal Maintenance Of Over $1 Million.

The $1.7 million "equalizing" judgment was also unnecessary because of the wife's $1 million spousal maintenance award. The basis for the trial court's award of both more property and spousal maintenance to the wife was the husband's higher earning capacity. (*See* FF 8, 12, CP 251-52, 254) Even though both parties are near retirement age, only the husband must continue to work at a high stress and physically demanding job – not only to satisfy the trial court's cash property and maintenance awards, but also to try to "catch up" financially so the parties might be in the "roughly equal" financial positions that the trial court intended. (*See* Conclusion of Law (CL) 4, CP 257) But the husband's earning capacity has an established end date – his retirement, which the trial court determined would occur 2 ½ years after the decree was entered. (FF 12, CP 254) The trial court erred in awarding the wife both a

disproportionate share of the community property and $1 million in spousal maintenance based on the husband's high earning capacity.

Premised on her assertion that the husband will "net" over $6 million if he continues to work until he is 62, the wife argues that the trial court's property distribution and spousal maintenance award were "entirely justified" because the husband will "surpass" her if he continues to work at the same pace he had in the past. (Resp. Br. 21-22) Even if this were true,[1] the husband must still pay the wife almost half of this claimed "net" income – $1.7 million as part of the property division, and over $1 million in spousal maintenance.[2] (CP 273-74, 275) Meanwhile, the husband must try to save for his own retirement (since the wife was awarded virtually the parties' retirement accounts), and pay his own ongoing expenses, including the support of his youngest son.

The husband will not "catch up," much less "surpass" to the wife, who will not need to work, even if he continues working far beyond the 2½ years the trial court predicted he would. The $1.4 million value of the husband's medical practice – 20% of the award

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[1] It indisputably is not, as Dr. Wright's RAP 18.1 declaration will demonstrate.

[2] He also pays $1,602 per month in child support for the parties' youngest child and 87% of the post-secondary support for the parties' two youngest children – the youngest of whom will not graduate from college until after the husband retires. (*See* CP 280, 281, 283-84)

to him – will vanish on his retirement. Three years after divorce, the husband's estate likely will be less than half that of the wife's.

The wife claims that an award of spousal maintenance of $30,000 per month was appropriate, even though it far exceeds her claimed monthly expenses, as a "flexible tool by which the parties' standard of living may be equalized for an appropriate period of time." (Resp. Br. 38-39, *citing Marriage of Washburn,* 101 Wn.2d 168, 677 P.2d 152 (1984)) But she also argues that the trial court awarded her more property, including a $1.7 million judgment, to accomplish the same result. (*See* Resp. Br. 20-23, *citing Marriage of Rockwell,* 141 Wn. App. 235, 170 P.3d 572 (2007), *rev. denied,* 163 Wn.2d 1055 (2008)) In doing so, the wife improperly conflates property and maintenance.

Contrary to the wife's arguments, an "unequal distribution of property obviate[s] the need for spousal maintenance as it substantially improve[s] [the wife]'s financial position." *Marriage of Wright*, 78 Wn. App. 230, 238, 896 P.2d 735 (1995), If the trial court wanted to "briefly lessen [the parties]' grossly disproportionate earning capacities," (Resp. Br. 46), it could do so with either a disproportionate share of the community property or with spousal maintenance, but not with both.

The cases on which the wife relies do not support both a disproportionate award of property *and* spousal maintenance. *Washburn* (Resp. Br. 38-39) particularly highlights the trial court's error. The *Washburn* Court held that a spouse who supports the other to reach higher earning potential should be compensated through an appropriate division of property. 101 Wn.2d at 178. If the marriage ends before the benefit can be realized and there are few or no assets to divide, "a supplemental award of maintenance is appropriate." *Washburn*, 101 Wn.2d at 178. But when the marriage, as here, is long, "the supporting spouse may already have benefitted financially from the student spouse's increased earning capacity to an extent that would make extra compensation inappropriate." *Washburn*, 101 Wn.2d at 181.

Here, unlike in *Washburn*, no "extra compensation" is required. When the parties married, the husband had already graduated from medical school. (RP 45) The parties amassed an estate of over $17 million during their marriage, and the wife enjoyed the full benefit of the husband's higher earning capacity. The wife was not entitled to a supplemental award of spousal maintenance for any support of the husband to reach his present earning potential.

Rockwell (Resp. Br. 20-22) also illustrates the trial court's error in awarding the wife both maintenance and more property to the wife. In *Rockwell*, this court affirmed a disproportionate division of the community property to the retired wife, who was nearly 9 years older than the husband. The husband, who the trial court found would retire in seven years, was not ordered to pay maintenance to the wife, in part to give him an opportunity during those years to "earn income and save for his retirement," which was necessary due to the disproportionate award of property to the wife. *Rockwell,* 141 Wn. App. at 254-55, ¶ 38. The disproportionate division of property was justified in part because the husband had no maintenance obligation.

The wife's reliance on *Marriage of Sheffer,* 60 Wn. App. 51, 802 P.2d 817 (1990) (App. Br. 41) for an award of both an outsized share of the property and maintenance also is unjustified. In *Sheffer*, the wife's award of 60% of the community property largely consisted of equity in the family residence. The wife, who had health problems and limited income, was also awarded three years of maintenance after 30 years of marriage. The appellate court remanded on maintenance after expressing concern that because the end of the wife's maintenance award coincided with when she

would be required to pay the husband for his lien on the family residence – something that could only be accomplished by refinancing or selling the residence – the wife's income would decrease at the same time that her housing costs would increase. *See Sheffer*, 60 Wn. App. at 56.

There are no such concerns here. The wife is healthy, the majority of her community property award, including nearly all of the parties' retirement accounts, is in liquid assets, and she has no future obligation to the husband. Further, when the wife's maintenance terminates, the youngest child will likely have moved out of the family home, and the wife could, if she chose to, sell the home, thus reducing what the trial court acknowledged was a "significant expense." (FF 15, 16, CP 255-56)

Finally, in *Marriage of Rink,* 18 Wn. App. 549, 571 P.2d 210 (1977) (Resp. Br. 23-24), the parties were still relatively young – both in their forties – when the trial court awarded the wife two-thirds of the property and maintenance of $200 per month for one year. In *Rink*, unlike here, both parties still had many years of employment ahead of them, during which the husband could "catch up" to the wife, who was expected to pursue employment to support herself. The husband here cannot similarly "save" for his own

retirement because his post-dissolution income must be used to satisfy the disproportionate award of property to the wife and pay her spousal maintenance.

The trial court's decision did not place the parties in "roughly equal" financial positions. Instead, the wife is in a far better position than the husband. She does not have to work and leaves the marriage with virtually all of the "nest egg" in cash and retirement accounts that the parties accumulated together during their marriage, and an income stream from the husband over the next three years of nearly $3 million. The husband, at age 59, is left with a largely illiquid property award and a large maintenance obligation that will force him to work beyond the time that even the trial court anticipated. The trial court erred by awarding the wife both a disproportionate award of community property *and* significant spousal maintenance based on the husband's earning capacity.

D. The Wife Should Pay The Husband's Fees.

This court should award the husband his attorney fees because he has the need and the wife has the ability to pay. RCW 26.09.140. The husband will file a RAP 18.1 declaration, which will show his income is substantially less than the trial court predicted.

The husband's lower income coupled with his court-ordered obligations leave him unable to meet his ongoing expenses and pay his attorney fees. The wife has the ability to pay both her attorney fees and the husband's attorney fees because she was awarded the majority of the liquid assets and substantial maintenance.

III. CONCLUSION

This court should reverse and remand, directing the trial court to reconsider its property division and maintenance award after a proper consideration of the parties' post-dissolution financial situations and the correct character of the property to be divided.

Dated this 24th day of May, 2013.

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DECLARATION OF SERVICE

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

That on May 24, 2013, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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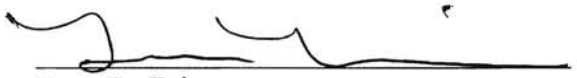
DATED at Seattle, Washington this 24th day of May, 2013.



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