

NO. 72518-1-I

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

KIRK E. BUHNE,

Appellant,

v.

MARJORIE A. WORTZ,

Respondent.

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

The Honorable Andrea Darvas

OPENING BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

The trial court committed legal error when it failed to apply RCW 19.40.041 to the wife's claim that the husband's parents' recent mortgage on husband's Canadian separate property home should be disregarded and the resulting equity in that home considered as part of husband's ability to pay maintenance and attorney's fees. The case should be remanded for application of RCW 19.40.041. Moreover, as the validity of the Canadian mortgage is currently being decided in Canadian court, this Court should order that if the Canadian court holds that the mortgage is valid, the case be remanded for recalculation of the husband's assets and ability to pay maintenance and attorney's fees.

Further, the trial court's entry of a judgment against the husband for \$44,550 was not supported by substantial evidence because the court failed to credit Mr. Buhne for \$22,500 that the wife admitted she had received between the time maintenance was ordered and trial.

In addition, the trial court erred when it ordered the husband to pay \$70,000 in attorney's fees, failing to segregate the amount incurred due to intransigence from that incurred for other reasons. The \$70,000 award itself was excessive and unreasonable, especially in light of the court's finding that Mr. Buhne has no liquid assets.

Finally, the trial court's 3 year maintenance award was

unsupported in the record because the wife's expert testified that she only needs 2 years to be able to return to work and the husband does not have the ability to pay either the amount or duration ordered. This Court should remand for further findings because the trial court found there was goodwill in Mr. Buhne's business, but failed to apply the Fleege¹ factors or set forth on the record the factors and value supporting its finding of goodwill.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to apply RCW 19.40.041 to the analysis of the parent mortgage on Mr. Buhne's Victoria, B.C. home.

2. The Judgment Summary and Order of September 16, 2014 ordering Mr. Buhne to pay unpaid back due amounts totalling \$44,550, contained in the Order vacating 9/12/2014 Judgment and Order, was entered in the absence of substantial evidence in the record and on unreasonable grounds because it failed to credit Mr. Buhne for \$22,500 actually received by Ms. Wortz during separation.

3. The trial court's Finding No. 2.8 that Mr. Buhne's former business Masonry Man is worth at least \$56,000 is unsupported by substantial evidence in the record.

¹ Matter of Marriage of Fleege, 588 P.2d 1136, 91 Wn.2d 324 (Wn. 1979).

4. The trial court's Finding No. 2.9 that Mr. Buhne has goodwill in the Masonry Man business is unsupported by substantial evidence in the record. The trial court failed to apply the Fleege factors or set forth on the record the factors and value supporting its finding of goodwill.

5. The trial court's Findings No. 2.12 are unsupported by substantial evidence in the record, specifically that:

5.1 the husband has the ability to pay the ordered maintenance;

5.2 Mr. Buhne has earning capacity via Masonry Man;

5.3 Mr. Buhne had historical annual earnings between \$57,000 and more than \$80,000;

5.4 Mr. Buhne's monthly earning capacity is \$8,300 to \$10,400 per month or more;

5.5 higher education costs for Mr. Buhne's two Canadian children do not need to be taken into account since University costs in Canada are "relatively modest as compared with costs of similar education the U.S.

5.6 the considerable financial support Mr. Buhne received from his parents was in the form of gifts, not loans.

5.7 an award of maintenance of \$3,500/month for two years followed by one year of \$2,500/month is appropriate (to the extent

this is a conclusion, it is erroneous). This is also found in the Decree No. 3.7, to which Mr. Buhne also hereby assigns error.

6. Finding 2.15, that Mr. Buhne has the ability to pay fees and costs of \$70,000, is unsupported in the record. This amount is ordered in the Decree Paragraph No. 3.13, to which Mr. Buhne also hereby assigns error.

7. The trial court erred as a matter of law in entering Finding 2.15, that Mr. Buhne's intransigence justifies an unsegregated, unspecified portion of the attorney fee award.

8. The trial court's Findings No. 2.21 OTHER are unsupported by substantial evidence in the record, specifically that Masonry Man generated considerably more income than \$28,000 annually;

9. The trial court erred in entering Conclusion of Law No. 3.4 that the maintenance award takes into account the insufficient assets of the parties.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 19.40.041 provides the statutory method by which a Washington court may determine that a conveyance is fraudulent. Here, the trial court failed to reference or apply RCW 19.40.041 when it concluded that the parent mortgage on Mr. Buhne's Canadian home should be disregarded and the resulting equity considered an asset to Mr. Buhne.

Should the case be remanded to trial court for application of RCW 19.40.041 and resulting reconsideration of the dissolution's financial orders? (Assignments of Error 1, 5.6.)

2. Where it is undisputed that Ms. Wortz actually received \$22,500 of Mr. Buhne's separate funds between the time the court ordered temporary maintenance and trial, did the trial court err in failing to account for that amount in its financial orders and failing to credit that amount against the total Judgment of \$44,550 Mr. Buhne owed in unpaid maintenance? (Assignment of Error 2.)

3. Crosetto² held that "[t]he trial court should also consider what attorney fees and costs were incurred as a result of Laurel Crosetto's intransigence. The fee award should be segregated, separating those fees incurred because of intransigence from those incurred by other reasons." Where the trial court enters an attorney fee award of \$70,000 referencing both a need/ability to pay analysis and intransigence, but fails to separate the amount incurred through intransigence from the amount ordered for other reasons, is remand for segregation appropriate? (Assignment of Error 7).

4. Fleege provides a framework for analyzing goodwill in

² In re Marriage of Crosetto, 82 Wn. App. 545, 918 P.2d 954 (1996).

businesses. Where the trial court fails to apply the Fleege factors or to set forth on the record the factors and value in support of its goodwill finding, should the case be remanded for analysis under Fleege? (Assignments of Error 3, 4, 5.1, 5.3, 5.4).

5. Where the trial court failed to include the monthly mortgage amounts Mr. Buhne must pay on his two houses in the court's calculation of income for maintenance purposes, did the trial court's error violate fundamental fairness? (Assignments of Error 5.1, 5.3, 5.4, 5.7, 6).

6. When the trial court finds that Mr. Buhne has no liquid assets, he is currently unemployed, and the trial court does not find that his intransigence permeated the proceedings, is an attorney's fee award of \$70,000 against Mr. Buhne unreasonable and an abuse of discretion? (Assignments of Error 5.3, 5.4, 6, 7).

7. Ms. Wertz's expert witness testified and the court found that she needed two years to be able to return to work. Given this fact, did the trial court abuse its discretion in ordering 3 years of maintenance after an 8 year marriage? (Assignment of Error 5.7).

8. Did the trial court violate fundamental fairness by failing to take into account higher education costs for Mr. Buhne's two Canadian children when calculating Mr. Buhne's income for maintenance purposes? (Assignment of Error 5.5).

9. Where there was extensive unchallenged testimony showing that Mr. Buhne had survived financially mainly on loans from his parents for the past two years, did the trial court abuse its discretion in calculating his income backwards from his expenditures and finding that Masonry Man generated considerably more income than \$28,000 annually? (Assignments of Error 5.1, 5.3, 5.4, 6, 8).

D. STATEMENT OF THE CASE

1. **Procedural History.** Ms. Wortz filed for dissolution in July, 2012. CP 86. Temporary orders setting \$3,500/month maintenance, other financial provisions, and a domestic violence protection order protecting Ms. Wortz were entered later in 2012. CP 87, 92. The matter went to trial from July 14-23, 2014, after which the court entered Findings of Fact and Conclusions of Law and a Decree of Dissolution on August 28, 2014 and an Order Vacating 9/12/14 Judgment and Order and Substituting This Amended Judgment And Order on September 16, 2014. CP 85, 96, 107. This appeal timely followed. CP 112.

2. **Relevant Facts.**

Facts related to each assignment of error are presented at the beginning of each argument section.

E. ARGUMENT

1. **THIS COURT SHOULD REMAND TO TRIAL COURT FOR APPLICATION OF RCW 19.40.041 TO THE PARENT MORTGAGE ON MR. BUHNE'S CANADIAN HOME. FURTHER, SINCE THE VALIDITY OF THE CANADIAN MORTGAGE IS CURRENTLY BEING LITIGATED IN CANADIAN COURT, THIS COURT SHOULD ORDER THAT IF THE CANADIAN COURT HOLDS THAT THE MORTGAGE IS VALID, THIS CASE WILL BE REMANDED FOR RECONSIDERATION OF MR. BUHNE'S ASSETS AND ABILITY TO PAY MAINTENANCE AND ATTORNEY'S FEES**

a. Relevant Facts. Mr. Buhne's parents have loaned him significant amounts of money over a period of many years. 5 RP 855, 5 RP 881.³ Mr. Buhne, his parents, and his ex-wife Juanita Berkhout all testified that his parents loaned him the down payment on his Victoria home, for renovations, and to buy a car (4 RP 598, 4 RP 610, 5 RP 856); many years they loaned him money for his property taxes and mortgage payments (4 RP 635, 5 RP 857). They utilized a line of credit with both their names on it to help keep track of the amounts they loaned him. 4 RP 641-2. His parents loaned him the money to fund a Canadian investment savings account called an "RRSP" account, worth approximately \$40,000. 4 RP 679. Mr. Buhne's parents loaned him \$27,000 to pay the settlement

³ The Clerk's Papers will be referred to as "CP" followed by their number. The Verbatim Report of Proceedings is numbered sequentially and will be referred to by volume number, then "RP" then the sequential page number.

in his first divorce. 4 RP 681. When Mr. Buhne had a serious fall off a high ladder in 2012 and could not work, his parents loaned him money for several mortgage payments. 4 RP 684. Mr. Buhne borrowed over \$10,000 for legal fees in the instant case from his parents. 4 RP 727, 5 RP 907-09, 6 RP 1132. His parents loaned him money to pay his property taxes this year, \$4,800. 4RP 731. Emil Buhne, Mr. Buhne's father, testified that he and his wife had loaned Mr. Buhne approximately \$315,000 over the years. 5 RP 864. The Buhnes plan to reduce Mr. Buhne's inheritance by the amount owed if he has not repaid it by the time of the deaths. 5 RP 867-8.

Mr. Buhne's parents testified that their plan is to move into the Victoria, B.C. house with him so that he can take care of them. 5 RP 858-59, 882. Mr. Buhne suffers from Parkinson's disease. 5 RP 859.

Shortly after Ms. Wortz filed for divorce, Mr. Buhne's parents registered a mortgage on Mr. Buhne's separate property Victoria, B.C. home in the amount of \$315,000. CP 89--. Ms. Wortz filed suit against Mr. Buhne in Canada to have the mortgage declared invalid. CP 89; 3 RP 398-400. The Canadian case has not yet been decided.

The trial court found that the elder Buhnes had given Mr. Buhne gifts, not loans. CP 89. Accordingly, Mr. Buhne was considered to have approximately \$315,000 equity in his separate property home.

b. Standard of Review. Whether and how RCW 19.40.041 applies to this case is a question of law that this Court should review *de novo*. Farmer v. Farmer, 259 P.3d 256, 172 Wn.2d 616 (Wash. 2011).

c. **RCW 19.40.041 provides the framework for analyzing transfers which may be fraudulent as to a present or future creditor.**

i. The language of RCW 19.40.041 contains a detailed analysis that is required in situations like Mr. Buhne's. That statute provides:

§ 19.40.041. Transfers fraudulent as to present and future creditors

- (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
 - (1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
 - (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
 - (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
 - (ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

- (b) In determining actual intent under subsection (a)(1) of this section, consideration may be given, among other factors, to whether:
- (1) The transfer or obligation was to an insider;
 - (2) The debtor retained possession or control of the property transferred after the transfer;
 - (3) The transfer or obligation was disclosed or concealed;
 - (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
 - (5) The transfer was of substantially all the debtor's assets;
 - (6) The debtor absconded;
 - (7) The debtor removed or concealed assets;
 - (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
 - (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
 - (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
 - (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Caselaw supports the use of this statute in situations like Mr. Buhne's. For many years it has been settled that "[e]very negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have

become a party thereto for value." Section 3415, Rem.Comp.Stat. (P.C. § 4095); Mell v. Winslow, 306 P.2d 751, 49 Wn.2d 738 (Wash. 1957), *citing* Lee v. Swanson, 69 P.2d 824, 190 Wash. 580, 587 (Wash. 1937).

The only way to overcome the presumption that the negotiable instrument between Mr. Buhne and his parents was issued for valuable consideration is to apply the test in RCW 19.40.041.

ii. The trial court did not explicitly or impliedly apply the RCW 19.40.041 analysis to this case. To find a fraudulent conveyance, the trial court would need to have either found actual intent to defraud Ms. Wortz, with reference to 11 statutory factors, or have found that the transfer had other deficiencies enumerated in the statute.

The trial court did not make the required finding in section (a)(1) that Mr. Buhne and his parents placed the mortgage on the Victoria home with actual intent to hinder, delay, or defraud Marjorie Wortz. Further, the trial court did not acknowledge, consider, or make findings relating to the 11 statutory factors related to actual intent to defraud. Instead, the trial court simply found that the funds received were a "gift." CP 89. This summary finding of a gift does not address RCW 19.40.041.

Similarly, the trial court did not analyze whether Mr. Buhne had received from his parents "a reasonably equivalent value in exchange for the transfer or obligation." The court did not make any finding on that

point. While value equivalency was not addressed in the trial court's findings, it is an important part of the fraudulent conveyance analysis.

iii. There is a reasonable likelihood that application of RCW 19.40.041 would change the outcome of the analysis of the parent mortgage, and the outcome of all the financial orders in the case, by eliminating the largest asset attributed to Mr. Buhne. It was undisputed at trial that the loans from Mr. Buhne's parents stretched back over more than 10 years, and many of them were documented. 5 RP 855, 881. This was not a case of a transfer of money for mortgage in the midst of a contentious divorce; instead, the loans had been ongoing for decades. Id.

Further, there was no challenge to the testimony of Mr. Buhne's parents that their health is declining and the family's plan has always been for them to move into the Victoria home where Mr. Buhne can take care of them. 5 RP 858-9. Mrs. Buhne's testimony demonstrated a wandering mind and general confusion, while the elder Mr. Buhne suffers from Parkinson's and needs an increasing amount of home care. 5 RP 859, 882. The elder Buhnes' plan to move into the home so that Mr. Buhne can care for them is a longstanding one and the testimony amply supported that their need for care is imminent. Id. Given that the elder Buhnes plan to spend their remaining years in the Victoria home, it is reasonable that they

should wish the extensive loans they have provided Mr. Buhne to be reflected in an equity share in the home where they will live.

Given these unchallenged facts, it is likely that neither the prongs of intent to defraud or lack of equivalency can be satisfied. In the absence of a specific determination that the mortgage is a fraudulent conveyance per RCW 19.40.041, the mortgage must be considered valid. Accordingly, remand to the trial court for analysis under RCW 19.40.041 is likely to make a significant difference in this case.

2. THIS COURT SHOULD REMAND FOR A \$22,500 REDUCTION OF THE \$44,550 JUDGMENT FOR BACK DUE MAINTENANCE, SO AS TO CREDIT MR. BUHNE FOR THE \$22,500 ACTUALLY RECEIVED BY MS. WORTZ POST-SEPARATION

a. Relevant facts. Ms. Wortz was supposed to receive \$44,550 in maintenance during the pendency of the dissolution, but Mr. Buhne was not able to make the ordered maintenance payments. CP 89 . The court found that Ms. Wortz received \$14,000 of Mr. Buhne's separate property funds from an insurance company, which money was intended for the repair of Mr. Buhne's separate property Tacoma home, and used it for living expenses during the pretrial maintenance period. CP 108. The court also found that Mr. Buhne's separate property work car was sold for \$6,500 (with an estimated higher book value) and the money was given to Ms. Wortz toward the unpaid maintenance obligation. CP 108, 2 RP 291.

Finally, it was undisputed that Mr. Buhne paid \$2,000 to Ms. Wortz's attorney, Molly B. Kenny, in September 2012. Mr Buhne furthermore provided two years of housing costs, for the Tacoma home, which should be deducted from the maintenance.

These payments were not credited toward Mr. Buhne's unpaid maintenance obligation, nor were they credited to him in the property distribution. Instead, the trial court entered judgment against Mr. Buhne for the full amount of unpaid maintenance, \$44,550. CP 107.

b. Standard of review. This Court reviews the trial court's Findings Of Fact in a dissolution for substantial evidence. In re Marriage of Wilson, 165 Wn.App. 333, 340, 267 P.3d 485 (2011). Substantial evidence is a sufficient quantity of evidence to persuade a fair-minded, rational person that the finding is true. In re Marriage of Rockwell, 141 Wn.App. 235, 242, 170 P.3d 572 (2007) (quoting In re Marriage of Griswold, 112 Wn.App. 333, 339, 48 P.3d 1018 (2002)). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

c. The judgment of \$44,550 for back due maintenance is not supported by substantial evidence. The funds received by Ms. Wortz were Mr. Buhne's separate property. In total, \$22,500 of Mr. Buhne's

separate property was provided to Ms. Wortz during pretrial separation.

"The key to an equitable distribution of property is not mathematical preciseness, but fairness." In re Marriage of Clark, 13 Wn.App. 805, 810, 538 P.2d 145(1975). Fairness requires that Mr. Buhne be credited for these amounts.

The judgment of \$44,550 was not based on tenable grounds because Ms. Wortz had already received \$22,500 of that amount. A rational, fair-minded person could only find that Mr. Buhne's back due maintenance obligation of \$44,550 should have been reduced by \$22,500. This court should remand for entry of an amended Judgment in the amount of \$22,050.

3. **THIS COURT SHOULD REMAND AND DIRECT THE TRIAL COURT TO SEPARATE THE ATTORNEY'S FEES INCURRED THROUGH INTRANSIGENCE FROM THOSE ORDERED FOR OTHER REASONS. THE \$70,000 ATTORNEY FEE AWARD AGAINST MR. BUHNE WAS EXCESSIVE AND UNREASONABLE BECAUSE THE TRIAL COURT DID NOT FIND HIS INTRANSIGENCE PERMEATED THE PROCEEDINGS, HIS INCOME IS INSUFFICIENT TO PAY IT, AND THE TRIAL COURT SPECIFICALLY FOUND HE HAS NO LIQUID ASSETS.**

a. **Relevant facts.** Ms. Kenny served Mr. Buhne with over 150 separate and sometimes multipart interrogatories as well as over 100 requests for production, in this case where there are no children,

claiming that the case is "inundated with complex financial issues in the United States and in Canada." Supp. CP. ___. When Mr. Buhne failed to timely provide full LFLR 10 financial responses to discovery requests, Ms. Wortz's attorney sent subpoenas to all of Mr. Buhne's known business suppliers. Supp. CP ___. She filed a motion to compel almost six months before trial. Supp. CP ___.

Mr. Buhne provided a 2013 W-2 and wage slips showing gross wages of \$34,926.39. for 7/14/2013 - 12/19/2013, net pay of \$27,405.15. This was Mr. Buhne's most recent employment, and he was let go because he could not concentrate and adequately perform the job due to the head injury from his accident. 4 RP 660-61, 664, 728, 752; 5 RP 887; 6 RP 1130, 1144. As a result of Ms. Wortz's motion to compel, on February 28, 2014, Mr. Buhne was assessed \$592.50 in attorney's fees by Judge Middaugh plus sanctions of \$50/day beginning February 6, 2014 until discovery is answered. Supp. CP ___.

The trial court found that Mr. Buhne did not supply complete LFLR 10 documentation. CP 89. He supplied records up to six months before trial, but failed to provide documentation for the six months prior to trial. *Id.* Mr. Buhne testified that he had not been aware of this obligation and was not asked to supply the missing documentation, and offered to produce the missing months of documentation during lunch time, to which

opposing counsel replied, "can you please be quiet, Mr. Buhne." 6 RP 1041-43, 1049, 1112, 1117. No motion to compel was filed regarding the missing documents. Mr. Buhne has not filed income tax returns since 2005. CP 89. Mr. Buhne was ordered to liquidate his Canadian "RRSP" retirement account (which was however fully encumbered) and pay the proceeds to Ms. Wortz for maintenance and attorney's fees, yet at the time of trial he had not yet done so. Id. During separation, Mr. Buhne was ordered to maintain Ms. Wortz's U.S. health insurance, yet he was unable to maintain insurance for either himself or Ms. Wortz due to unemployment. CP 92, 5 RP 911. The court additionally found some testimony by Mr. Buhne not credible. CP 92. Ordering payment of attorney's fees, the trial court found:

The petitioner has the need for the payment of fees and costs and the other spouse has the ability to pay these fees and costs. The petitioner testified at trial that she has incurred attorney fees and costs an [sic] amount in excess of \$100,000. The court finds that, due to the parties' respective earning capacities and financial status, as well as due to Mr. Buhne's intransigence in failing to provide complete and timely discovery, and in failing to obey court orders, it is reasonable to require Mr. Buhne to pay \$70,000 to Ms. Wortz's attorney for attorney fees and costs.

CP 90. The trial court also found that Mr. Buhne has no liquid assets. CP 89.

b. **Standard of review.** Awards of attorney fees based on **intransigence** are reviewed for an abuse of discretion. In re Marriage of Crosetto, 82 Wn. App. 545, 564, 918 P.2d 954 (1996). A court abuses its discretion if its decision is "clearly untenable or manifestly unreasonable." Crosetto, 82 Wn. App. at 564 (quoting In re Marriage of Knight, 75 Wn. App. 721, 729, 880 P.2d 71 (1994)).

c. **The fee award should be segregated, separating those fees incurred because of intransigence from those incurred by other reasons.** When awarding attorney fees on the basis of intransigence, a trial court must make findings sufficient to allow appellate review. In re Marriage of Greenlee, 65 Wn.App. 703, 708-09, 829 P.2d 1120 (1992). The Crosetto court held that "[t]he trial court should also consider what attorney fees and costs were incurred as a result of Laurel Crosetto's intransigence. The fee award should be segregated, separating those fees incurred because of intransigence from those incurred by other reasons." Crosetto, 82 Wn. App. at 555.

d. **Because the trial court did not segregate the amount that was incurred as a result of intransigence, remand is required.** Here, the trial court's Finding of Fact 2.15 merely stated "due to the parties' respective earning capacities and financial status, as well as due to Mr. Buhne's intransigence in failing to provide complete and timely discovery,

and in failing to obey court orders, it is reasonable to require Mr. Buhne to pay \$70,000 to Ms. Wortz's attorney for attorney fees and costs." CP 90.

The court's ruling shows that the award was of mixed character, both based on intransigence and a need/ability to pay basis. While the court finds that Mr. Buhne failed to provide complete and timely discovery and failed to "obey court orders," it is unspecified in what way or to what extent this intransigence caused Ms. Wortz to expend additional attorney's fees and costs beyond that already ordered by Judge Middaugh on February 6, 2014.

In reality, the evidence supporting additional fees and costs beyond February 6, 2014 associated with Mr. Buhne's shortcomings in providing discovery is scant. Therefore the trial court's award of further attorney's fees for failure to provide discovery and failure to obey court orders may be duplicative of the February 28, 2014 order. But because the trial court did not segregate its fee award as required by Crosetto, this is not possible to determine. The trial court did not acknowledge that Mr. Buhne had been previously ordered to pay attorney fees for failure to timely provide discovery.

Where a party's misconduct "permeate[s] the entire proceedings, the court need not segregate which fees were incurred as a result of intransigence and which were not." In re Marriage of Burrill, 113

Wn.App. 863, 873, 56 P.3d 993 (2002). Yet here, the trial did not make a finding that Mr. Buhne's misconduct permeated the entire proceedings. Therefore, the trial court should have segregated which fees were incurred as a result of intransigence and which were not. This court should remand so that the required finding can be made and the award adjusted accordingly.

e. Because the trial court found that Mr. Buhne has no liquid assets, the order to pay attorney's fees and costs not due to intransigence was unsupported in the record and should be reversed. The trial court found that "the other spouse has the ability to pay these fees and costs... due to the parties' respective earning capacities and financial status ... it is reasonable to require Mr. Buhne to pay \$70,000 ..." This finding is unsupported in the record. It is contradicted by the trial court's finding that Mr. Buhne has no liquid assets. As will be shown in the following section, Mr. Buhne does not have the ability to pay \$70,000 out of his earnings. This Court should remand for segregation of the portion of the award that was due to intransigence, and analysis of Mr. Buhne's ability to pay the remaining portion of the award in light of the argument in the following section.

4. THIS COURT SHOULD REDUCE THE TERM OF MAINTENANCE TO TWO YEARS AND REDUCE

**THE AMOUNT TO NO MORE THAN 50% OF
MR. BUHNE'S DOCUMENTED NET INCOME FOR
THE LAST TWO YEARS ON RECORD**

a. **Relevant facts.** The trial court found that Masonry Man, Mr. Buhne's former business, had generated \$28,000 annually over the two years that Mr. Buhne's financial expert testified about. CP 86. The court found that "much of the goodwill for the business has dissipated over the past 2 years, based on the limited evidence produced at trial, the court believes that the value of the business nevertheless is at least \$56,000." CP 86-7. The trial court also found that during the months when Mr. Buhne was employed by Sto Corp. and had received unemployment before starting that brief job, records show earnings of \$57,000. CP 87; 4 RP 674.

The court further found "evidence from bank records indicating average earned income in excess of \$80,000 annually." *Id.* Mr. Buhne and his parents testified that they made significant loans to Mr. Buhne during this time period. 5 RP 855-58, 881. The court then added in the rental income from the apartments located in Mr. Buhne's Victoria home and the Tacoma house and, without subtracting any amount for the monthly mortgage payments Mr. Buhne must make on those homes, added those amounts to the court's calculation of Mr. Buhne's monthly income. *Id.* In

this way, the court arrived at an estimated monthly earning capacity of \$8,300 to \$10,400 per month "or more." Id.

In addition, Mr. Buhne hit his head and back in his 16 foot fall from a ladder onto a hard floor in June, 2012 only a few days before Ms. Wortz filed for dissolution. 4 RP 660. This fall, which crushed his ankle and broke his leg, also left him with persistent vertigo from the head injury, inability to complete tasks, and inability to sleep normally. 4 RP 660-61. This testimony was unchallenged. While the leg and ankle injury prevented him from working for about a year, Mr. Buhne testified in detail regarding the persistent vertigo and concentration problems from his head injury, his subsequent falls due to vertigo, the debilitating effect on his ability to complete tasks at work, how he was let go from his job at Sto Corp. because of this, and the loss of professional earning capacity that has resulted. 4 RP 660-61, 664, 728, 752; 5 RP 887; 6 RP 1130, 1144. He obtained a job at Sto Corp. in 2013 but lost it after less than a year because he was not able to concentrate properly and complete the tasks expected of him. Id. He has not been able to find another job since then. Indeed, the trial court and opposing counsel commented on their own observations of Mr. Buhne's unusual inability to stay on track and remember instructions. 6 RP 1045.

A former boss of Mr. Buhne's, Gil Satter, lost his job at the Basalite company and Mr. Buhne agreed to allow Mr. Satter to funnel his own work through Masonry Man, to use the Masonry Man name and credit to obtain materials from suppliers. 5 RP 1010-1020. In return, Mr. Buhne received 2% of Gil Satter's profits. 5 RP 1010. Mr. Buhne could not remember exactly when this arrangement began, and his business files were in the Tacoma home he was not allowed to enter for 2 years. 5 RP 1101. But it began in approximately 2009. 5 RP 1017.

Gil Satter billed as Masonry Man. Mr. Satter had his own, separate contacts and sales. 5 RP 1013. When Mr. Satter and Mr. Buhne were both working through Masonry Man, they just divided up the income according to who had earned what. 5 RP 1013. It was a handshake agreement. 5 RP 1016. Mr. Buhne did not utilize the services of an accountant or any financial professional. 7 RP 1196. Mr. Satter had access to Masonry Man's email, and checks made out to Masonry Man for work that Mr. Satter performed were deposited into the Masonry Man bank account. 5 RP 1015. Mr. Satter would then take his earnings out of Masonry Man and put it into a different business account, for "Manark Products." Id. Mr. Satter continued working through Masonry Man into 2014. 5 RP 1014.

Mr. Buhne stopped working through Masonry Man when he had his accident in June 2012. 5 RP 887. When Ms. Wortz had him served with divorce papers a few days after his accident, he began withdrawing money he had been keeping in Masonry Man. 6 RP 1121-27. Mr. Buhne testified that this was money he had already earned from past jobs, a cushion he had kept in the Masonry Man account, and not current earnings. 6 RP 1115. He was unable to walk or work at this time. 4 RP 660.

Finding of Fact 2.9, footnote 1 indicates that the difference in value between the Canadian and American dollars was negligible at the time of trial. CP 87. Since then, the Canadian dollar has fallen 25% in value against the American dollar.

Mr. Buhne is legally responsible for half the cost of his 2 Canadian children's higher education expenses. 4 RP 606. His ex-wife Juanita Berkhout, the mother of his children, testified that currently, Mr. Buhne is responsible for \$2,000/year for his son's activities, plus his share of costs for his son's living expenses. 4 RP 602-04. Their son will go to college next year (in 2015) and his anticipated college cost is approximately \$15,000/year, of which Mr. Buhne is responsible for half. 54 RP 606. Their daughter has been in and out of university, due to lack of funds to

continue at one institution, but she is in university, Mr. Buhne is responsible for half her costs. 4 RP 602, 607.

Ms. Wortz's clinical therapist testified that it would take her "a year or two" to heal from her emotional wounds and be able to function in the world. 2 RP 235. The trial court found that Ms. Wortz required two years of psychotherapy and medication before she could work again. CP 88. Ms. Wortz's therapist assumed this time frame as "Mr. Buhne has made repeated breaches of the DVPO", yet this is false.

b. **Standard of review.** The trial court's decisions regarding maintenance are reviewed to determine whether they are manifestly unreasonable or based on untenable grounds. In re Marriage of Zahm, 138 Wn.2d 213, 226, 978 P.2d 498 (1999); Gillespie, 89 Wn.App. at 398-99. The reviewing court will not retry facts on appeal, and accepts findings of fact as verities on appeal if they are supported by substantial evidence. In re Marriage of Thomas, 63 Wn.App. 658, 660, 821 P.2d 1227(1991).

c. **This Court should remand, directing the trial court to determine Masonry Man's goodwill using the Fleege factors.**

Professional goodwill is determined by considering the Fleege factors which include, but are not limited to: the practitioner's age; health; past earning power; reputation in the community for judgment, skill, and

knowledge; and comparative professional success. Fleege, 91 Wn.2d at 326. The Fleege factors are applied in a two-step process, whereby the trial court first determines whether goodwill exists, then determines its value according to accepted accounting methods. In re Marriage of Luckey, 73 Wn App. 201, 206-07, 868 P.2d 189 (1994). Once the trial court finds goodwill, it must set forth on the record the factors and method used in reaching a finding of goodwill and its value. Id.

Here, the trial court failed to mention or apply Fleege. The court appeared to consider goodwill and value of the business to be the same thing. Instead of applying Fleege, the trial court simply doubled the amount of income Mr. Buhne's expert accounting witness told the court the business had earned for the last two years it was operational.

This Court should remand for application of Fleege because several factors will likely have a significant impact upon the outcome. Particularly important factors are Mr. Buhne's health, which has been poor for the last two years, and Masonry Man's reputation in the community, which has been damaged due to lack of business activity in the last two years and receipt of subpoenas by important suppliers, sent by Ms. Wertz's attorney. This Court should remand with directions that once the Fleege factors have been properly applied, the trial court should adjust the maintenance amount accordingly.

d. This trial court's finding that Mr. Buhne's monthly earning capacity is \$8,300 to \$10,400 per month and historical annual earnings of \$57,00 to \$80,000 or more is unsupported by substantial evidence in the record, thus remand is required.

i. The trial court included loans from Mr. Buhne's parents in its calculation of Mr. Buhne's income, contrary to testimony from Mr. Buhne, his mother, and his father substantiating these loans. The trial court reasoned backwards from Mr. Buhne's expenditures to arrive at Mr. Buhne's income. This method would have been sound had there been no source of funds for Mr. Buhne other than income; but in this case, there was a documented history of parental loans going back about 20 years. As a result, it was not reasonable to calculate income based on expenditures. This Court should remand for recalculation of Mr. Buhne's income excluding loans from his parents, with direction that the trial court should recalculate the amount of maintenance accordingly.

ii. The trial court incorrectly found that Mr. Buhne can make income from Masonry Man, a defunct company. Mr Buhne showed that Masonry Man no longer has a business license. Because Masonry Man was headquartered at the Tacoma home that Mr. Buhne could not go to for two years under the domestic violence protection order, he had no way to run the business. He had no access to any other

Washington State location he could use as a place of business, and had to pay for lodging, in Washington State when he visited here. In this two year period, Mr. Buhne testified that he had lost his good reputation in that industry because he had not been available to work for so long.

In light of Mr. Buhne's ongoing problems, the trial court was unrealistic to assume that he could rebuild the business after a two year absence and that he had the capacity to run Masonry Man as he had before the accident. Accordingly, it is unreasonable to impute income to Mr. Buhne at the level he earned when he was operating Masonry Man. This Court should remand to trial court with instructions to calculate Mr. Buhne's income based on his actual income for the past year, and adjust maintenance accordingly.

iii. The trial court incorrectly found that Masonry Man was still making money for Mr. Buhne. The court premised its finding largely on money that Mr. Buhne was withdrawing from Masonry Man and work being done by a business associate, Gil Satter, which was funneled through Masonry Man.

During 2012-14, and particularly in the second half of 2012, Mr. Buhne withdrew money from Masonry Man. This money was not income,

as it had already been earned before the accident which incapacitated Mr. Buhne. This money did not reflect current earning ability, but rather past savings. The trial court therefore erred in finding that the money Mr. Buhne withdrew represented current earnings from Masonry Man.

Further, Gil Satter used Masonry Man's name and credit to operate his own business deals. Mr. Buhne helped Mr. Satter with minor items like supplying refreshments for meetings and paying some minor expenses, in return for which Mr. Buhne received a 2% cut of Mr. Satter's profits. This arrangement brought in very little money for Mr. Buhne, and has since ended because Mr. Satter has obtained other full time employment and no longer operates through Masonry Man. For all these reasons, the trial court erred in finding that Masonry Man was still making money for Mr. Buhne. This Court should remand for recalculation of Mr. Buhne's income and maintenance.

iv. The trial court incorrectly included rental income in Mr. Buhne's income without deducting the mortgage payments he must make to maintain those homes. RCW 26.19.071(5) provides that net income shall not include:"(h) Normal business expenses and self-employment taxes for self-employed persons." For the purposes of being an independent landlord, Mr. Buhne is self-employed. Therefore his business expenses as a landlord, i.e., the mortgage payments he must make

as well as other expenditures, should be deducted from his overall income. This Court should remand the case for recalculation of Mr. Buhne's net income excluding business expenses such as mortgage and other landlord expenses, and concomitant adjustment of maintenance.

v. The Canadian-American currency exchange rate should be taken into account in determining Mr. Buhne's ability to pay maintenance and/or attorney's fees. Mr Buhne is not an American citizen and does not have a guaranteed right to work in the United States. His most realistic job prospects are in Canada, where he has a residence. The Canadian dollar is worth approximately 25% less than the American dollar. Should this court remand for recalculation of Mr. Buhne's income and ability to pay maintenance and attorney's fees, this Court should direct the trial court to take into account the fact that Mr. Buhne will be earning less valuable dollars.

e. This court should remand and direct the trial court to deduct the cost of his share of higher education for Mr. Buhne's two children from the calculation of Mr. Buhne's income. Mr. Buhne and his ex-wife, Juanita Berkhout both testified regarding costs and responsibility for higher education for their two children. Yet the trial court chose not to deduct Mr. Buhne's obligation from his income because higher education costs in Canada are "relatively modest as compared with costs of similar

education in the U.S." This reasoning lacks logic. Mr. Buhne is responsible for half of his son's higher education costs of \$15,000/year, plus his share of living expenses and activities, as well as for half of his daughter's education expenses. Higher education in Canada is not free; it bears a cost which should be included the expenses deducted from Mr. Buhne's total income. This Court should remand and instruct the trial court to recalculate Mr. Buhne's income accordingly, and adjust the maintenance amount correspondingly.

f. The 3 year duration of maintenance established by the trial court is unsupported in the record. Ms. Wortz's expert testified that she needed 2 years of maintenance to be able to re-enter the work force. No evidence was offered showing that Ms Wortz would need support beyond 2 years once she re-enters the work force. The award of a third year of maintenance lacked any support in the record. This two year time frame was erroneously based on Mr. Buhne's continued breaching of the DVPO requirements while no such breach occurred. They had already been separated for two years at the time of trial. Accordingly, this court should remand for entry of a 2 year maintenance award or less.

g. The trial court erred in entering Conclusion of Law No. 3.4 that the maintenance award takes into account the insufficient assets of the parties. The trial court stated that it was using maintenance to address

the insufficient assets available to permit a just and equitable division of property. Yet the maintenance award far exceeds that which is needed to accomplish the stated goal.

The court found there was \$56,000 of community property in the form of Masonry Man, and awarded it to Mr. Buhne. The court awarded \$40,000 of Mr. Buhne's separate property to Ms. Wortz. To equalize the awards, the court would need to award Ms Wortz another \$16,000. Instead, the court awarded Ms. Wortz "substantial" spousal support totaling \$114,000. This is excessive, especially considering that the trial court had already awarded Ms. Wortz Mr. Buhne's separate property, the only liquid asset available. This court should reduce the maintenance award.

F. CONCLUSION

Mr. Buhne respectfully requests this court remand to the trial court for (1) application of RCW 19.40.041 to the issue of the parents' mortgage on the Canadian home, (2) recalculation of Mr. Buhne's ability to pay maintenance and attorney's fees should the Canadian court find the parents' mortgage valid, (3) entry of amended Findings of Fact and Conclusions of Law, Decree and Judgment reflecting the \$22,500 Ms. Wortz has already received and reducing Mr. Buhne's back due maintenance by that amount, and (4) reduction of maintenance duration to

2 years and reduction of the amount commensurate with Mr. Buhne's ability to pay.

Mr. Buhne also respectfully requests this court remand to segregate the portion of the trial court's award of \$70,000 in attorney's fees and costs that was due to intransigence, make specific findings supporting the amount due to intransigence, and recalculate Mr. Buhne's ability to pay that portion of the fee award that is not due to his intransigence.

DATED this 13th day of March, 2015.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'Kirk E. Buhne', written over a horizontal line.

Kirk E. Buhne
pro se

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

IN RE: MARRIAGE OF:

KIRK E. BUHNE,

Appellant,

vs.

MARJORIE A. WORTZ,

Respondent.

No. 72518-1-I

AFFIDAVIT OF ABC

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 MAR 16 PM 12:00

Documents: **OPENING BRIEF OF APPELLANT**

The undersigned being first duly sworn on oath deposes and says: that he/she is now, and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of 18 years, not a party to or interested in the above entitled action, and competent to be a witness therein.

On March 13th, 2015, at approximately 3:45 p.m., ABC Legal Services duly delivered the above described document(s) to the Law Office of Molly Kenny, at the address of 9 Lake Bellevue Drive #204, Bellevue, WA 98005.

Affiant: _____

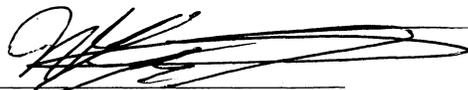


Edward M. Silveti Jr, Supervisor
Seattle Messengers, ABC Legal Services, Inc.

Subscribed and sworn before me, a notary public, in the state of Washington residing at Seattle, done this 16th day of March, 2015.



Notary: _____



Mark Lee Gockley