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Division I
State of Washington

No. 73468-7-I
(consolidated with 73860-7-I)

COURT OF APPEALS,
OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Marriage of:

AMBER HANSEN

Respondent/Cross Appellant,

v.

TROY EDWARD HANSEN

Appellant/Cross Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Monica J. Benton

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Amber fails to point to substantial evidence to support the finding that Troy wasted community assets. Although she knew that IRA funds would be used in acquiring C.J. Johnson Bail Bonds and had consulted counsel, she did not object to this plan, which her own expert called "brilliant" and which enhanced the community estate of which Amber was awarded 50%. Given her knowledge and opportunity to object, Amber waived any belated claim that Troy unilaterally chose an inappropriate funding mechanism. Moreover, Amber points to no evidence or finding that the parties could have instead borrowed against real estate equity (a notion she invents on appeal), let alone that they would have been better off doing so. The finding of waste should be vacated, and the division of property should be adjusted accordingly.

Amber does not dispute that the trial court included, in the valuation of the community business, a property found to be Troy's separate property and awarded to him as such. Nor does she dispute that, as a result, the trial court did not give effect to the decreed 50/50 division of community assets. Contrary to Amber's characterization, this is not a challenge to the 50/50 division or the characterization of any asset. Rather, the findings and decree are inconsistent, which is a legal error

requiring reversal. Reversal of the trial court's two errors in the property division warrants restitution of $145,068 plus interest to Troy.

Amber acknowledges that awarding child support in excess of the economic table requires written findings and, while she discusses the cursory findings made by the trial court here, she does not presume to argue explicitly that those findings are adequate under *Marriage of McCausland*, 159 Wn.2d 607, 620, 152 P.3d 1013 (2007). Remand is required to redetermine child support upon adequate findings. But there was no abuse of discretion in allocating post-secondary and extraordinary expenses equally rather than in proportion to the parties' incomes; Amber's cross-appeal ignores an exception to the general rule of proportionality.

This Court should reverse and remand with specific directions to (1) amend the findings and decree to cure the effects of the baseless finding of waste and the erroneous valuation of ACBB, including restitution of $145,068 plus interest and (2) redetermine child support with full restitution of overpayments.

II. ARGUMENT

A. Amber fails to point to substantial evidence to support the finding that Troy deliberately wasted community assets. That finding must be vacated and its effect on the property division undone.

Instead of pointing to substantial evidence to support the finding of deliberate waste, Amber misstates the facts of this and other pertinent cases. Primarily, she attempts to analogize to *Marriage of Steadman*, 63 Wn. App. 523, 821 P.2d 59 (1991), a case that is readily distinguishable.

For instance, without explanation, Amber asserts that there is no meaningful distinction between (1) failing to pay taxes when due, thus incurring delinquency penalties, which occurred in *Steadman*, and (2) incurring (and paying) taxes and early-withdrawal penalties to access IRA funds lawfully for a beneficial purpose, which occurred here. The distinction is clear: the conduct in *Steadman* was inherently wasteful and unjustifiable (not to mention unlawful), while it was undisputed here that the conduct was highly productive—even "brilliant." RP 341.

Amber "presum[es]" that the unpaid taxes in *Steadman* were incurred as "a result of income that the community business earned and benefitted from." Brief of Respondent/Cross-Appellant ("BR") at 26. This is incorrect; this Court noted that "[t]he company was not profitable for long, if at all." *Steadman*, 63 Wn. App. at 525. Regardless, Troy does not argue that conduct cannot be deemed wasteful if the community

derived some benefit. To be sure, like any transaction, using the IRA funds in acquiring C.J. Johnson Bail Bonds had both costs and benefits. Still, there was no basis here to find "gross fiscal improvidence" or "squandering of assets," *see id*. at 528, where Amber knew that the IRA funds would be used and did not object, RP 421, 766, 850-53, and where her own expert, Mr. Kessler, testified that using the IRA funds was "brilliant" notwithstanding the taxes and penalties incurred. RP 341.

That Amber knew of and failed to object to the use of the IRA funds is not "irrelevant," but was a waiver by acquiescence of any subsequent complaint about that funding mechanism. BR 24. *See Marriage of Williams*, 84 Wn. App. 263, 271, 927 P.2d 679 (1996). Contrary to Amber's characterization of *Williams*, the husband's knowledge of and failure to object to his wife's gambling were critical to the decision to affirm the denial of the husband's request to charge the wife with the resulting debts. *Id*. at 271 & n.3. Given the husband's knowledge and other factors, the appellate court held it was appropriate to balance the debts against the extra income the wife earned from working three jobs by including the debts in the community's liabilities. *Id*. at 271.

Amber attempts to neutralize the fact of her knowledge by analogizing to *Steadman*, but again misstates the facts of that case. Although Amber asserts that the wife in *Steadman* knew of the husband's

history of not paying taxes, there is no indication of such knowledge by the wife in *Steadman*: the trial court found that the wife did not "share[] in information…of the problem," and this Court observed that, although the wife worked in the family business, she "did not keep the books." 63 Wn. App. at 524-25.

Recognizing that she never objected specifically to the conduct at issue—the use of the IRA funds in acquiring C.J. Johnson Bail Bonds—Amber maintains she objected to the acquisition itself, through her attorney. BR 24-25. But there is no support in the record for such an objection. RP 419. Amber cites Trial Exhibit 35, a letter in which Troy's attorney stated that the acquisition was in abeyance (the closing was delayed about 6 weeks, Exh. 34, 247); the letter does not indicate that this was done in response to any objection.[1] Indeed, on the page of her brief following her claim that she objected, Amber concedes that she "did not question the decision to purchase CJ Johnson[.]" BR 26.

Even assuming Amber at some point objected to the acquisition generally, this would not support a finding of waste as she does not now dispute that the acquisition was a good idea. Such an objection would also

[1] The letter further stated that the acquisition would not go forward without Amber's approval, which was true—Amber approved of the acquisition, signed closing documents, and approved the allocation of payments toward the purchase. RP 851, 959-60; Exh. 247. The acts, not taken under protest, waived any subsequent objection.

be immaterial as there is no indication that it had anything to do with the use of IRA funds, the conduct the trial court found was deliberately wasteful.

Nor is there any support for the notion that Troy reconciled with Amber (and attended counseling) so that he could complete the transaction without interference—only insinuation by Amber's counsel on cross-examination of Troy and now on appeal. *See* RP 960. At RP 420-21, cited by Amber, she testified merely that (1) Troy accused her of having an affair and wanted a divorce in April 2013, (2) they reconciled in May 2013, and (3) the acquisition closed in June 2013; she did not presume to impugn Troy's motive for reconciling.[2] Amber always supported the acquisition of C.J. Bail Bonds. And, ultimately, it was her who wanted a divorce three months after closing, announcing her intention at a counseling appointment in September 2013 and filing papers in October 2013. RP 423.

Amber does not dispute that the build-up fund (BUF) was unavailable as an alternate funding source for the acquisition. She maintains instead that they could have borrowed against equity in real properties to get the money, rather than cash out the IRA. BR 26-27. But the trial court admitted no evidence regarding such borrowing, either on

[2] Troy testified that he reconciled because he loved Amber. RP 959-60.

the significant costs of borrowing more than $100,000 (*e.g.*, closing costs and interest) or the adverse effects of carrying additional debt; nor did the court presume to make a finding on the issue of alternate funding sources.[3] In the absence of a finding of fact on a material issue, the appellate court will imply a finding against the party having the burden of proof on that issue—here, Amber. *Marriage of Williams*, 156 Wn. App. 22, 29, 232 P.3d 573 (2010).

Contrary to Amber's suggestion on appeal, BR 14, borrowing money rather than cashing out the IRA would not have avoided taxes, as taxes would have been incurred on the money used to repay the loan, plus interest. The trial court's finding of waste cannot be sustained based on speculation that the parties could have borrowed money without costs, rather than use the IRA funds.

Finally, assuming that using the IRA funds in the C.J. Johnson acquisition left the parties with "minimal liquid assets" (but less debt), that circumstance did not work to Amber's detriment in the property division. She was nevertheless awarded 50% of the $9.9 million community estate—which was materially increased by the acquisition of C.J. Johnson

[3] Troy, who prefers not to carry debt, estimated at his deposition that the borrowing costs would have exceeded the IRA early-withdrawal penalties. Exh. 90 at 122-25.

Bail Bonds[4]—and her share included nearly $596,704 in fully liquidated cash (subject to partial restitution on remand). CP 46, 49, 466. She will also receive $1.2 million in maintenance, paid in installments of $20,000 per month for five years. CP 467. There is neither substantial evidence nor reasonable justification for the trial court's finding of waste. It should thus be vacated.

B. Amber does not dispute that the trial court included Troy's separate real property in the valuation of the community business and thus did not effect the decreed 50/50 division of community assets. This error requires reversal.

Amber does not dispute that trial court included in the valuation of a community asset, All City Bail Bonds, the $170,000 value of a parcel of real property found to be Troy's separate property *and awarded to him as such*. Nor does she dispute that this resulted in a disproportionate division of the community property, contrary to the trial court's finding that a 50/50 division was fair and equitable. CP 42 (FOF 2.20(2)). She argues essentially that it should not matter.

But Amber cites no authority for her assertion that "the trial court was not bound by a 'decreed 50/50 division of community assets.'" BR 30. A trial court's findings of fact must support its conclusions of law and

[4] *See* RP 240 (describing purchase of C.J. Johnson Bail Bonds in April 2013 for $1.2 million, comprised of $800,000 for the business and $400,000 for the real property); Trial Exhibit 1 at 5, Exhibit IX to same.

decree. *Marriage of Rockwell*, 141 Wn. App. 235, 242, 170 P.3d 572 (2007). Neither party challenges the 50/50 division or the finding that it is fair and equitable. Where the court so found but did not in fact effect a 50/50 division, this error of law requires reversal.[5]

The issue is not whether the trial court would have made the same distribution but for a characterization error. Neither party challenges the trial court's characterization of any asset. Rather, Troy challenges the valuation of All City Bail Bonds. Amber's reliance upon a misleading, partial quotation of finding 2.20(3) is misplaced. That finding states that the overall division "would still be fair, just and equitable" even if Troy had established that he retained a separate property interest in All City

[5] Troy was not required to assign error to the statement, "The property should be divided as set out in attached Exhibit A." CP 42 (FOF 2.20(2)). This is a conclusion of law, to which error need not be assigned. *See McClendon v. Callahan*, 46 Wn.2d 733, 740-41, 284 P.2d 323 (1955) (pre-rule case); *Noble v. Lubrin*, 114 Wn. App. 812, 817-18, 60 P.3d 1224 (2008). Moreover, Troy assigned error to the findings most closely related to the specific issue on review—the valuation of ACBB—and argued that issue. This was sufficient to raise the issue for review. *See Noble*, 114 Wn. App. at 818 (concluding that an issue was adequately raised, even where appellant did not assign error to all related findings, because the subject of his challenge was clear in the text of his brief). Amber recognized and addressed the issue fully in her Brief of Respondent/Cross-Appellant.

Bail Bonds. CP 42.[6] Again, the community character of All City Bail Bonds is unchallenged on appeal. Indeed, the fact of that community character is the reason it was error to include the value of a separate property asset awarded to Troy in the company's valuation.

Nothing pertinent can be inferred from the trial court's denial of Troy's motion for reconsideration on this issue. This is nothing like the situation in *Rockwell*, where the trial court divided the property disproportionately in favor of the wife, who was older than the husband and retired, in part because the husband could work an additional seven years until age 60. The trial court denied reconsideration after being shown that the husband was only 5.5 years from age 60, not seven. This Court inferred from the denial of reconsideration "that the seven year period was the intended duration as opposed to age 60 being the intended endpoint." 141 Wn. App. at 247.

In *Rockwell*, the trial court had discretion to resolve the discrepancy in its findings in either of two ways, and its choice became

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[6] FOF 2.20(3) states:

> Even if the husband had met his burden of proving the continued existence of a separate property interest in ACBB, the overall division of the separate and community property as set forth above would still be fair, just and equitable in light of the fledgling character of the business when the committed intimate relationship began, the tremendous growth of the business as a result of community efforts, the length of the relationship and marriage, the gross disparity in the parties[']earning capacities and their respective future economic prospects.

CP 42.

evident upon its denial of reconsideration. In contrast, the trial court here had no discretion to include the value of an asset it found was separate and awarded as such in its valuation of a community asset. Its denial of reconsideration as to this issue thus resolved nothing. The trial court simply refused to correct its error.

It is immaterial that the trial court's two errors in its property division resulted in a seemingly small percentage difference in the awards, due to the size of the marital estate. The difference is significant in cash terms, as the two errors combined to deprive Troy of $145,068.[7] *See* Appellant's Opening Brief ("OB") at 24. Resolution of these issues on remand will not involve reopening the property division for any exercise of discretion. The remand will be for the purpose of (1) vacating the finding of waste and (2) giving effect to the unchallenged 50/50 division by correcting the valuation of All City Bail Bonds to exclude the value of the separate asset, 607 Central Avenue N., and awarding restitution with interest.

[7] Even though Amber was awarded the same amount in the property division as Troy, she undoubtedly would have taken an appeal from the property division had errors deprived *her* of as much as $145,000.

C. The trial court's cursory findings are inadequate to support awarding child support in excess of the economic table. Remand is required.

Amber concedes that a trial court must make written findings to support awarding child support in excess of the economic table.[8] BR 33. While she repeats and discusses the cursory findings made by the trial court here, BR 33-34, she is unable to defend them as adequate under *Marriage of McCausland*, 159 Wn.2d 607, 620, 152 P.3d 1013 (2007), and even brings a cross-appeal premised in part on inadequacy of the findings. *See* BR 38. Where the parties' combined monthly net income exceeds $12,000, a court may exceed the presumptive support provided by the table based on findings demonstrating that the court considered (1) the parents' standard of living and (2) the children's special medical, educational, or financial needs. *McCausland*, 159 Wn.2d at 620.

Amber asserts that the trial court's finding of "wealth" indicates consideration of the first factor, standard of living. As discussed in Troy's Opening Brief, wealth is not the same as standard of living and is not alone a proper basis to order additional child support. OB at 30, citing *Marriage of Daubert*, 124 Wn. App. 483, 498, 99 P.3d 401 (2004),

[8] Amber does not dispute that the trial court incorrectly characterized its support award as a deviation from the standard calculation. "[E]xceeding the maximum amount of support provided by the economic table is not a deviation." *Marriage of Scanlon*, 109 Wn. App. 167, 176, 34 P.3d 877 (2001).

abrogated on other grounds by McCausland, 159 Wn.2d 607.[9] *McCausland* directs that "the amount of child support must be based on the correlation to the child's or children's needs." *McCausland*, 159 Wn.2d at 620 n.6.

Even assuming wealth could properly be equated with standard of living, the additional support should be necessary to "prevent[] a harmful reduction in a child's standard of living." *Marriage of Mattson*, 95 Wn. App. 592, 599, 976 P.2d 157 (1999). The trial court made no findings regarding the children's standard of living. Amber points to no evidence or finding that the children here would sustain any reduction in their standard of living at their mother's home—let alone a harmful reduction—absent the additional support. Indeed, in addition to Amber's significant post-trial assets, she has substantial income, as shown in the worksheets. CP 458.

As for need, Amber acknowledges that "the amount of child support must relate to the children's needs[.]" BR 32. Although the trial court found that deviation was appropriate based on the "children's needs and the family's historic child-related expenses," CP 56, it made no specific findings of needs or expenses, including any that would be unmet

[9] *Cf. Choate v. Choate*, 143 Wn. App. 235, 244, 177 P.3d 175 (2008) (holding that the mere recitation that the trial court considered or was aware of other household income was insufficient to justify child support deviation).

by the standard calculation. Amber only highlights this fact in postulating hypothetically that half of the household expenses are related to the children. BR 36.

Contrary to Amber's characterization, Troy looks to the trial court's oral ruling not to impeach its findings, but to find its rationale in the absence of adequate findings. Absent specific findings, the appellate court may look to the trial court's oral opinion to determine the basis for a deviation. *Marriage of Crosetto*, 82 Wn. App. 545, 560, 918 P.2d 954 (1996). Here, the trial court's oral comments not only fail to address the children's specific needs and expenses, but confirm that the trial court did not consider need a significant justification for its deviation. *See* RP 1279 ("I don't think this [support determination] has ever been about need.").

Lacking any genuine justification based on the children's needs, Amber ultimately resorts to comparing the parties' relative incomes and total household expenses (improperly omitting her imputed income, *see* BR 35 & n.8). In doing so, she misses the point. Similar to "wealth," this is not the standard for determining child support in excess of the economic table. *See McCausland*, 159 Wn.2d at 620. Moreover, post-hoc rhetoric and rationalizations cannot substitute for adequate findings of fact, which are required. *See id*.

Finally, Amber does not dispute that the trial court's finding of "tax planning" is unsupported by any evidence that the court or either party engaged in tax planning with respect to child support. The record includes no analysis of what was planned or how that would benefit the children. Amber does not dispute that the finding of "tax planning" provides no justification for the amount of support awarded.

Given the essentially undisputed inadequacy of the findings, this Court should vacate the child support order and remand for further proceedings, to include restitution as appropriate.

III. RESPONSE TO CROSS-APPEAL

For her cross-appeal, Amber argues that the trial court erred in allocating post-secondary support 50/50 rather than proportionally, based on the parties' incomes. She further argues as a conditional cross-appeal issue that, in the event of remand to reconsider the child support in excess of the economic table, the remand should include reconsideration of the 50/50 allocation of extraordinary expenses.

Amber's cross-appeal is without merit. She relies on *Daubert*, which held that postsecondary support must be apportioned according to the parents' net incomes, 124 Wn. App. at 505, and *In re Yeamans*, 117 Wn. App. 593, 600, 72 P.3d 775 (2003), which held that extraordinary expenses (*i.e.*, "special child rearing expenses") must be shared in the

same proportion as the basic support obligation. But these rules are subject to the exception that "a deviation from extraordinary expenses is permissible when the court deviates from the basic support obligation." *In re Yeamans*, 117 Wn. App. 593, 600, 72 P.3d 775 (2003), citing *Marriage of Casey*, 88 Wn. App. 662, 667, 967 P.2d 982 (1997).

The trial court had discretion here to allocate the postsecondary support and extraordinary expenses as it did. The court awarded support in excess of the economic table (albeit without adequate findings), and can thus deviate as to post-secondary support and extraordinary expenses. The equal allocation of post-secondary support reflects that Troy had already contributed over $100,000 to accounts in the children's names to help pay for college and other post-secondary expenses, RP 468-69; CP 46 ("Children's Property"), while the equal allocation of extraordinary expenses reflects that Troy pays for, among other things, 100% of health insurance and uninsured medical expenses. CP 453, 456. Only in the event that no support is ultimately awarded in excess of the economic table must the trial court revisit the allocation of postsecondary support or extraordinary expenses.

IV. ATTORNEY'S FEES.

Amber requests fees on appeal based on consideration of financial resources under RCW 26.09.140. Fees should not be awarded where

substantial assets are available to both parties. *See Marriage of Griswold*, 112 Wn. App. 333, 353, 48 P.3d 1018 (2002). In addition to the property and maintenance award, Amber's financial affidavit, if complete and accurate, will show that she has substantial income and resources.

In exercising its discretion under RCW 26.09.140, the appellate court considers the arguable merit of the issues raised on appeal, in addition to the parties' financial resources. *Marriage of C.M.C.*, 87 Wn. App. 84, 89, 940 P.2d 669 (1997). Troy's appeal raises multiple meritorious issues involving reversible legal errors, while Amber's cross-appeal ignores a clearly applicable exception. Even if this Court were to disagree with Troy's arguments, his issues cannot properly be characterized as "meritless." BR 40. Fees should be denied.

V. CONCLUSION

This Court should reverse and remand with specific directions as requested. The trial court's two errors in the property division require restitution of $145,068 to Troy, plus interest. Child support should be remanded for redetermination with full restitution of overpayments.

Respectfully submitted this 20th day of June, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorneys of record by the methods noted:

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