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No. 35635-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

GORDON FRIEND RENNIE,

Respondent,

and

CYNTHIA ANN RENNIE,

Appellant.

STAT. BY: *mm*
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COURT OF APPEALS

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE CHRISTINE A. POMEROY

REPLY BRIEF OF APPELLANT

LAW OFFICES OF JANICE M. SUTTER

By: Edward J. Hirsch
WSBA No. 35807

80 South Jackson, Suite 301
Seattle, WA 98104
(206) 464-4149

Attorney for Appellant

ORIGINAL

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A. Issues in Reply

1. Did the trial court properly decide that Cindy was underemployed, when it based its decision on information outside of the courtroom and not presented at trial?
2. Is it sufficient for a trial court, in determining maintenance, to merely consider the relevant statutory factors?
3. Is a maintenance award proper as long as the party seeking maintenance receives a disproportionate share of the property divided at trial?
4. Is an appeal of a ruling as to maintenance that leaves the parties in disparate economic situations post-dissolution necessarily frivolous?

B. Counterstatement of Facts

Introduction

Deciding Cindy was underemployed, the court fashioned a maintenance award that creates for Gordon and Cindy starkly different economic futures. Gordon will continue to earn a handsome salary, while preserving and growing his assets for retirement. Cindy will go increasingly into debt each month as she struggles to get certified in her profession and to find an entry level

position at a time when most women would be facing retirement. She also will have to spend her assets in order to make ends meet. The trial court accepted Cindy's facts, except as to employment.

The trial court largely accepted Cindy's telling of the facts, except it believed that Cindy was "underemployed." The court limited the maintenance award based on this belief. Otherwise, the findings of fact reflect the evidence that Cindy presented at trial. Gordon's facts, on appeal, differ from unchallenged findings of fact.

Gordon, in his response, tells a story of the facts that differs significantly from the undisputed findings of fact. His story also differs significantly from his testimony at trial.

At trial, Gordon testified that maintenance was not necessary. He said that if Cindy received "a significant fraction" of their assets, she ought to be able to go ahead with her own life. RP 29-30. He did not testify that she was able to get an appropriate job, but refused to do so in order to live off of maintenance, as he does now.

Gordon testified that Cindy really only worked about 20 years ago. RP 21-22; FF 2.12. He said that she stopped working as a cardiac technologist when they moved to West Virginia in the early 1980s. RP 20-21; FF 2.12. He said that she did not resume

her work in that field. RP 21; FF 2.12. He said that after they moved to Olympia in 1984 she “worked briefly as a vocational counselor, but mostly she has been a homemaker.” RP 22; FF 2.12. He said that she “took care of the three children, who were very active in sports programs, music and the like and kept house. She’s always been active with her church musical activities, that sort of thing outside the house.” RP 23; FF 2.12. He did not refer to those activities as “self-indulgent hobbies”, as he depicts in his response.

The decision that Cindy was “underemployed” was not based on evidence submitted at trial.

The trial court formed its opinion of Cindy’s employment situation based on information it obtained outside of the courtroom. Its opinion was not based on evidence submitted by either party at trial. The court believed that full time jobs with benefits existed, that Cindy was qualified for these jobs, and that she chose not to look into them. No such evidence was presented at trial.

Cindy testified that she wanted to work full time as a vocational rehabilitation counselor. RP 155. She testified about the difficulties she faced in finding a job in her field. RP 159-160. The court itself challenged Cindy’s job search. The court was

convinced that jobs for Cindy currently existed in other state agencies, such as Juvenile Rehabilitation:

THE COURT: But why not juvenile rehabilitation? They hire voc rehabs all the time. All the prisons, they have all these voc reps.

THE WITNESS: I've applied for those positions.

THE COURT: And you haven't heard from them?

THE WITNESS: No.

THE COURT: So you've applied for everything you can think of?

THE WITNESS: Yes.

RP 160-161.

Dissatisfied, the court further asked her how many times she applied and if she was currently on the state register of employment. RP 161.

The trial court itself tried to discredit the career counselor.

The court also conducted its own examination of the career counselor, Janice Reha. Ms. Reha testified about Cindy's persistent efforts to find an appropriate job. She said that even though Cindy has the relevant master's degree, she does not qualify for jobs in her field because she lacks the proper certification. Interrupting, the court asserted that she would get these jobs if she "got her certification, which doesn't take too long."

RP 176.

When Ms. Reha said that jobs for people with Cindy's degree are hard to come by, the court asked her about other jobs at specific locations for people with Cindy's degree:

THE COURT: What I'm asking you is, are there other positions when you have a master's in counseling, and have you explored juvenile rehabilitation, the Department of Corrections, being a cottage counselor for all of Maple Lane, Green Hill, you know, those? Have you gone and expanded it beyond vocational rehabilitation?

RP 177.

Ms. Reha explained that Cindy's degree places her in a specialized area of "working with people who have disabilities; usually physical but emotional as well." RP 177-178. The court continued to ask about openings, this time in specific cities, such as in Olympia, Shelton, and Grays Harbor. RP 177.

When Ms. Reha said Cindy's age made it difficult for her to find an appropriate job, because, among other things, companies "are less inclined to hire older people." RP 180. The court dismissed the counselor's opinion, repeatedly asserting that they "can't ask those kinds of questions" because they will "be setting themselves up for a lawsuit." RP 180-181.

Ms. Reha explained the importance of developing a network of contacts in obtaining employment. The court interrupted her,

revealing its opinion that Cindy did not want to ever be self-sufficient. RP 182. Ms. Reha disagreed. She said that in her 30 years as a career counselor she has seen very few older women who “are putting out the effort Cindy does.” RP 182-183.

When Ms. Reha was questioned about her exploration of jobs in the non-profit sector with Cindy, the court asserted that there were current job openings with benefits at specific non-profit agencies in the area:

THE COURT: -- there are jobs in counseling down here in nonprofits, very much so; BHR and South Sound. Have you looked into those?

THE WITNESS: I haven't looked at those, no.

THE COURT: Okay.

THE WITNESS: I would not -- if I were to look at those, I would look at those to see if they were full-time jobs or if they're contract again.

THE COURT: No, they're mostly full-time jobs with that agency.

THE WITNESS: Okay.

THE COURT: But you haven't looked down here for any of those types of jobs? Nonprofit: BHR, South Sound Mental Health?

THE WITNESS: I haven't. No, I haven't the ability.

THE COURT: But they're not contract jobs, and that's what I want to ask you --

THE WITNESS: Okay.

THE COURT: -- the difference. They have employees with benefits.

THE WITNESS: Yes. Now, again, you're going to have to compete with people who have been in the system, networked into the system and have work experience that fit whatever not-for-profit or mental health center that you're looking at. And usually in the mental health center, which I

have familiarity with because I did my internship there, they're going to look at people who – internships are the other way to get a job.

THE COURT: Okay.

RP 187-188.

The court, in its oral ruling, decided that this “is a long-term marriage” and that Cindy “is underemployed.” RP 273. Based on these decisions, the court awarded eight years of progressively decreasing maintenance, even though the court had “no doubt” that Gordon “will make substantially more income than her for his lifetime.” RP 273. The court also ruled that there “should be a disproportionate share of property” along with the maintenance.

RP 274-275.

C. Argument

1. Standard of review is de novo.

This court should conduct an independent review of the trial court's ruling that Cindy was “underemployed.” As the term “underemployed” carries legal implications, it is a conclusion of law, even though it is labeled as a finding of fact. “The label applied to the finding or conclusion is not determinative; the court will treat it for what it really is.” Para-Medical Leasing, Inc. v. Hangen, 48 Wn. App. 389, 397, 739 P.2d 717 (1987). The appellate court reviews

erroneously labeled findings of fact that are conclusions of law de novo. Keever & Associates, Inc. v. Randall, 129 Wn. App. 733, 738, 119 P.3d 926 (2005).

Even if the term “underemployed” was a finding of fact, this court, on review, must take a hard look at the trial court’s exercise of discretion in a case such as this one, as instructed by the court in In re Marriage of Sheffer, 60 Wn. App. 51, 57, 802 P.2d 817 (1990)(emphasis added):

Broad discretion is given the trial court. However, where, as here, the disparity in earning power and potential is great, this court must closely examine the maintenance award to see when it is equitable in light of the post-dissolution economic situation of the parties.

A review of the record as a whole reflects that the trial court’s ruling of “underemployed” is not supported by substantial evidence in the record. Such a review instead reflects that the trial court had its own opinion from the outset that Cindy was “underemployed.”

2. Ruling of “underemployed” is not supported by evidence in record.

The record contains only two instances where evidence presented at trial pertained to the issue of underemployment.

Neither of these instances are sufficient to support the conclusion that Cindy was “underemployed.”

The first involves Cindy’s reading of the career goal in the career counselor’s report. Gordon, at trial and in his response, tries to make the goal of part time work and long term maintenance seem like a goal that Cindy set for herself. It was not. It was the counselor’s goal for Cindy. The counselor herself recommended, in her report, that Cindy cut back on her 40+ hour work schedule, complete the classes required to obtain recertification, and find part time work in her field, supplemented by long range maintenance. Exhibit 21, page 10. Cindy requested maintenance, but she testified that she wanted to work full time as a vocational rehabilitation counselor. RP 155. And her desire to work full time was supported by the fact that she was working four jobs—more than full time—as of the time of trial.

The second instance involved Gordon’s counsel’s submission of an advertisement for a job for Cindy from April 2006, which she did in an effort to imply that Cindy did not apply for any jobs between that date and September 2006. RP 166. But Cindy and the career counselor both testified about Cindy’s extensive job

search. RP 109-110, 121-124, 150-152, 157-160, 164-166, 178, Exhibits 18-19.

These instances of evidence—the career counselor’s goal for Cindy and the isolated advertisement for a position—do not constitute substantial evidence to support the conclusion of “underemployed.”

3. Ruling of “underemployed” was based on information outside of courtroom; not on evidence submitted at trial.

The trial court had an opinion or information of its own regarding possible employment opportunities for Cindy in government agencies and in non-profit organizations. The court asked Cindy how many times she applied for jobs in Juvenile Rehabilitation. RP 161. The court extensively examined the career counselor, asserting that it does not take long to become certified as a vocational rehabilitation counselor, that jobs are available in related areas in other state agencies and in other cities, that employers cannot deny Cindy work on the basis of her age, and that Cindy did not want to become self-sufficient. RP 176-183.

The trial court’s opinions about specific full time job openings in certain cities do not constitute evidence that was submitted by the parties at trial. The decision that Cindy was “underemployed”

was based on this opinion—and possible information—from outside the courtroom. It was not based on substantial evidence in the record, as presented at trial. It is a decision based on untenable grounds and for untenable reasons. Accordingly, it is an abuse of discretion.

4. Maintenance must be just and based on statutory factors.

Gordon contends that the trial court has a broader discretion than it actually does. He claims that the court need only consider certain “general factors”, as if this talismanically renders the court’s decision proper. For this claim, he relies on two cases from the 1960s, Groves v. Groves, 70 Wn.2d 614, 424 P.2d 654 (1967) and Stacy v. Stacy, 68 Wn.2d 563, 567, 414 P.2d 791 (1966). These cases were issued 22 years before the enactment of the current statute regarding maintenance.

According to these cases, the courts “should, when awarding alimony at the divorce of a long marriage, consider and weigh the future earning capabilities of both parties and allow the wife such sums for whatever period of time seems right under all of circumstances.” Groves, 70 Wn.2d at 617, quoting Stacy, 68 Wn.2d at 567. In both Groves and Stacy, the courts say that in the “final distribution of property between the spouses, the amount of

child support and alimony, if any, all derive from a compound of many ingredients”—the “general factors” referred to by Gordon—and not “to be ignored is the question of fault.” Groves, 70 Wn.2d at 617; Stacy, 68 Wn.2d at 567.

This is not the current state of the law. Now, under the relevant statute, courts have a more circumscribed discretion in awarding maintenance. The court is directed to award maintenance in duration and in amount as it “deems just, without regard to marital misconduct,” after considering all of the listed factors. RCW 26.09.090. It is insufficient to just list the statutory factors. The court must consider the factors, in light of the evidence before the court.

5. A larger share of property does not make a maintenance award proper.

Gordon contends that the maintenance award was proper, because Cindy was awarded a disproportionate share of their property. But the trial court did not fashion the maintenance award based on its decision as to the division of property. It did so based on its decision that Cindy was “underemployed.” Gordon, in essence, is contending that a maintenance award is always proper,

if the recipient of maintenance is awarded a greater share of the marital assets. This is not true.

Gordon relies on two cases, Marriage of Estes, 84 Wn. App. 586, 929 P.2d 500, 502 (1997) and Marriage of Crosetto, 82 Wn. App. 545, 918 P.2d 954 (1996).

In Estes, the trial court specifically awarded the wife a disproportionate share of property instead of maintenance. Ronald and Yong Estes filed for marital dissolution after a 10 year marriage without children. Ronald, an attorney, was earning a gross annual income of about \$61,400. At the time of trial, he had several personal injury cases on a contingency fee basis. Yong had been trained as a travel agent, but during the marriage worked as a bank teller earning \$7.50 an hour. The Estes had community assets valued at about \$390,000.

At trial, the court awarded Ronald about \$178,000 in assets, as well as the rights to the contingency fee cases, which it considered as without value. The court awarded Yong about \$210,000 in assets, including a payment of \$60,000 from Ronald. The court also awarded her maintenance of \$1,000 per month, to terminate upon her receipt of about \$74,000 from Ronald and "noted the purpose of the unequal property division was to provide

for her needs in lieu of additional maintenance.” Estes, 84 Wn. App. at 589-590. The court said that it “chooses a disproportionate division of the property in lieu thereof to equalize for a period of time the parties’ standard of living, as respondent will have a more difficult time adjusting her lifestyle than will petitioner.” Estes, 84 Wn. App. at 593. Ronald made the required payment on the day the decree was entered, so Yong did not receive any maintenance.

On appeal, Yong successfully challenged the maintenance award as “illusory” because the award “could be avoided by payment of an amount which Mr. Estes was legally obligated to pay, and which the evidence showed he was able to pay”. Estes, 84 Wn. App. at 592.

The court reaffirmed the policy that the standard of living of the parties during the marriage and the parties’ post dissolution economic condition “are paramount concerns when considering maintenance and property awards in dissolution actions.” Estes, 84 Wn. App. at 593, quoting Marriage of Sheffer, 60 Wn. App. 51, 57, 802 P.2d 817 (1990)(emphasis added).

The court contrasted Ronald’s considerable earning power, based on his law degree and experience with Yong’s inability to earn more than \$7.50 an hour, even with further training or

education. The court said it “is apparent Ms. Estes’s income is not sufficient to meet her monthly expenses, even when her earnings are supplemented with income from property awarded to her.” Estes, 84 Wn. App. at 594. Accordingly, the court remanded—without reversing—for “entry of an express finding as to whether 16 months is an appropriate length of time for maintenance in view of the disparate earning capacities of the parties.” Estes, 84 Wn. App. at 594.

Estes does not say that an award of maintenance is proper as long as the person receiving maintenance also receives a disproportionate share of the assets. Estes also does not say that an award of maintenance is proper as long as the person receiving maintenance also receives sufficient assets to liquidate and live off from the rest of her life. In Estes, the wife received a disproportionate share of the assets and the court still remanded for a decision as to the appropriateness of the maintenance award due to the disparities in the parties’ incomes.

In Crosetto, the trial court decided that the wife needed maintenance, but chose instead to award her a disproportionate share of the assets. Laurel and James Crosetto were married for 21 years. Laurel had a teaching certificate and at the time of trial

was working part time as a substitute teacher. She earned a monthly net income of about \$1,700, which would increase when she got a full time position. James had a business and earned about \$75,000 per year. At trial, Laurel asked for \$1,500 per month in maintenance. The trial court assessed various factors and awarded her 60 percent of the marital assets but no maintenance.

On appeal, the court affirmed, concluding that under the relevant statute the trial court “was entitled to consider the property division in its determination of maintenance, and to consider maintenance in its property division.” Crosetto, 82 Wn. App. at 559.

The trial court “was entitled” to consider the property division in determining maintenance. But the court in this case did no such thing. The court expressly limited maintenance based on its decision that Cindy was “underemployed”; not on its decision as to the property division.

6. Maintenance award is unjust.

The trial court failed to properly consider the post-dissolution economic circumstances of Cindy and Gordon—and instead punished her for its opinion that she was “underemployed.” The economic condition in which a dissolution decree “leaves the parties is a paramount concern in determining issues of property

division and maintenance.” Sheffer, 60 Wn. App. at 55. The consideration of the duration of the marriage and the standard of living during the marriage make “it clear that maintenance is not just a means of providing bare necessities, but rather a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time.” Sheffer, 60 Wn. App. at 55, quoting , Marriage of Washburn, 101 Wn.2d 168, 179, 677 P.2d 152, 158 (1984).

The facts of this case are remarkably similar to those in Sheffer, as Cindy demonstrated in her opening brief. They are also similar to those in a number of cases, which rest on the policies enunciated in Sheffer. These cases take particular note of the circumstances pertaining here: where the marriage is long; one spouse has been a “breadwinner” and the other a “homemaker;” the marriage ends in middle age, when employment opportunities are limited; and the parties have disparate earning potentials, leading to a stark difference in the standard of living they will be able to maintain post-dissolution.

For example, in 1966, our Supreme Court reversed as inequitable and doubled an award of maintenance of \$100 monthly for five years where the 41 year old wife had no work experience,

had stayed home during the 22 year marriage to care for the children, and the husband earned \$1000 a month, and despite that the wife received 75% of the net assets. Stacy v. Stacy, 68 Wn.2d at 577. Again, the court focused on the relative earning potential of the parties and how that affected their future economic conditions. Stacy, 68 Wn.2d at 576.

Likewise, the court has upheld awards that properly take “economic reality” into account. For example, Division Three upheld an award of maintenance that roughly equalized the parties’ income streams, reducing husband’s to \$2,300 and raising wife’s to \$1900, assuming she worked only one full-time job. Marriage of Williams, 84 Wn. App. 263, 269, 927 P.2d 679 (1996).

Similarly, Division One upheld an award requiring a 52 year old husband to pay maintenance until his retirement to a 46 year old wife with limited job skills where the husband’s income was nearly three times the wife’s. Marriage of Bulicek, 59 Wn. App. 630, 634, 800 P.2d 394 (1990).

As the court there observed, the proper focus of the court’s analysis is “the post-dissolution relative economic positions of the parties.” Bulicek, 59 Wn. App. at 635. See, also, Marriage of Vander Veen, 62 Wn. App. 861, 815 P.2d 843 (1991) (maintenance

award upheld after 17 year marriage where the wife had not worked for 13 years outside the family farm and would need to go to school to obtain suitable employment); Marriage of Morrow, 53 Wn. App. 579, 587-588, 770 P.2d 197 (1989) (lifetime maintenance to middle-aged wife after 23 year marriage, during which wife sacrificed her earning potential by becoming a homemaker while husband capitalized on his earning opportunities); Marriage of Nicholson, 17 Wn. App. 110, 116-117, 561 P.2d 1116 (1977) (award to 49 year old wife of maintenance for ten years where wife had few job skills or experience and husband earned good salary and had good earning potential).

These cases paint a picture of what is "just" as a maintenance award on facts such as presented in this case. Considering the 20 year duration of the marriage, the disparate earning capacities of the parties, and the unsupported conclusion that Cindy was "underemployed", the maintenance award was unjust. Accordingly, the court should reverse and enter an award of maintenance that is just or remand for determination of maintenance without a conclusion that Cindy was "underemployed."

7. Cindy should be awarded attorney fees.

The court should reject Gordon's request for attorney fees on appeal. Cindy's appeal was not frivolous. The issues she raises are similar to those in important cases such as Sheffer, Estes, and Stacy. These issues regarding maintenance awards never have been regarded as frivolous in an opinion from our appellate courts.

The court instead should award Cindy her attorney fees and costs on appeal, based on Gordon's ability to pay and her need for payment, as set out in her opening brief.

D. Conclusion

For the foregoing reason, Cindy respectfully asks this court to reverse the trial court's decision regarding maintenance and award her attorney fees on appeal.

Dated this 19th day of September 2007.

Respectfully submitted,

Law Offices of Janice M. Sutter



Edward Hirsch

WSBA #35807

Attorney for Appellant

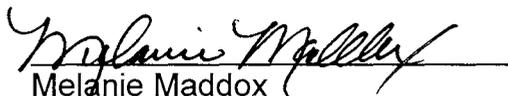
Declaration of Service

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

That on September 19, 2007, I arranged for service of the foregoing Reply Brief of Appellant, to the court and the parties to this action as follows:

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Margaret Brost Attorney at Law 1800 Cooper Point Rd SW, Suite 18 Olympia, WA 98502-1179	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivered
Cynthia Rennie P.O. Box 2850 Olympia, WA 98507-2850	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivered

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Melanie Maddox

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