

No. 44250-7-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

MARGARET BYERLEY,

Respondent,

v.

JAMES HOWARD CAIL,

Appellant.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Except for its rambling, three-page argumentative introduction¹ and equally argumentative statement of the case, Margaret “Meg” Byerley’s² response brief is largely unremarkable. This Court should not condone Meg’s blatant violations of the Rules of Appellate Procedure or be misled by her ill-conceived attempt to muddy the waters on appeal. It should, however, remain cognizant of one important point: Meg *admits* the trial court made a number of mathematical errors impacting Jim’s property rights when it calculated the property distribution after the couple’s dissolution trial.

Meg offers nothing to dissuade this Court from reversing the trial court’s property distribution and remanding the matter to the trial court to correct the errors it admitted making and to recalculate the property

¹ Meg’s introduction is far from “concise.” RAP 10.3(a)(3). An introduction should not take the place of the statement of the case and the argument section of a brief. It is meant to be a *concise* introduction to the issues presented. As stated in the *Washington Appellate Practice Deskbook* (WSBA 3d ed. 2005 & 2011 Supplement) at § 19.7(8):

The introduction should not exceed one or two pages. The introduction should give the reader or listener a high-level picture of the forest before plunging into the trees of the brief. The rule states that the introduction not need contain citations to the record or authority, but this is not a license to lard the introduction with facts that are outside the record. Every fact recited in the introduction should be supported later in the brief by a citation to the record.

² The parties will be referred to by their first names for clarity and ease of reading; no disrespect is intended.

distribution in a just and equitable manner. The Court should award James Cail his attorney fees and costs on appeal where he has demonstrated the need for such fees and his appeal is not frivolous.

B. JIM'S RESPONSE TO MEG'S INTRODUCTION AND STATEMENT OF THE CASE

Jim must begin his response to Meg's statement of the case by pointing out the obvious: the statement violates RAP 10.3(a)(5).³ Despite this rule, Meg's statement is hopelessly entangled with inappropriate argument, making it challenging for this Court and Jim to distinguish between the arguments and the facts. The arguments are a far cry from the "fair recitation" required by the rules and place an unacceptable burden on Jim and the Court. *See Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P.2d 545 (1990), *review denied*, 116 Wn.2d 1021 (1991). The Court should disregard them and impose sanctions. RAP 10.7.

Meg makes a number of misleading statements about the couple's individual incomes and earning potential. For example, she first states that Jim's earning capacity and retirement savings are substantially higher than hers because of his much longer work history and the higher income he earned while working. Br. of Resp't at 1, 3. Not so. Except for Meg's

³ RAP 10.3(b) dictates that a response brief conform to RAP 10.3(a). RAP 10.3(a)(5) requires a brief to contain a "fair statement of the facts and procedure relevant to the issues presented for review, without argument."

time at the Tacoma School District, her work history is longer than his. *See, e.g.*, RP 73, 95, 112, 164, 344. Moreover, Meg consistently earned wages comparable to his. There was only a 3% difference in their incomes and earning potentials during their relationship. Three percent is hardly “substantial.”

Meg also incorrectly states that “[p]rior to the court’s award of a portion of Jim’s retirement to Meg, he received more per month than Meg.” Br. of Resp’t 1. In actuality, Jim earns approximately 15% less per month than Meg. CP 61. Nearly lost in all of the hyperbole that Meg presents to this Court is her grudging acknowledgment that her monthly income is greater than Jim’s. Br. of Resp’t at 1, 46. At the time of trial, she was working full-time and earning approximately \$4,950 gross income per month. CP 61. She continues to work and to contribute to her various retirement plans. RP 333. Jim was collecting \$4,193 per month in retirement benefits, which remain his only source of income. CP 61, 62.

Meg’s commentary on Jim’s decision to retire is both uninformed and one-sided. *See, e.g.*, Br. of Resp’t at 1, 46. Meg neglects to mention her own choices and their negative impact on both her finances and her ability to retire. She *chose* not to pay into the identical pension plans and *chose* not to invest financially in her future. RP 263, 322-23. She *chose* to gamble. RP 311, 367-68. By contrast, Jim committed to 30plus years

of deliberate, disciplined work as a union laborer and heavily invested in his pensions. RP 333; CP 13. Contrary to Meg's insinuations, he would be unable to return to work in a substantially similar environment given his time away from the workforce and his health. Even if he did so, he would lose his service credit and forfeit his monthly benefits. RCW 41.40 *et seq.*

Meg next asserts that she and Jim began searching for a house to purchase together shortly before Jim's divorce from his first wife was finalized and that she was always an intended purchaser of that home. Br. of Resp't at 2, 4. She is mistaken. Jim was already searching for a home and had already been approved for a home loan by the time the couple's committed intimate relationship began in September 1996.⁴ RP 286-87.⁵ There is no evidence that Meg was an "intended purchaser" of the house where the couple eventually lived. Meg's name was not on the purchase and sale agreement nor was it on the statutory warranty deed. RP 39, 61, 295-96, 300; Exs. 7, 31. Although Meg claims to have signed the purchase and sale agreement, her signature on that agreement post-

⁴ Meg is highly critical of Jim's decision not to appeal the trial court's finding that the couple had been involved in a committed intimate relationship for 10-years prior to their marriage. Br. of Resp't at 2, 22, 26. But no court rule requires an appellant to appeal each and every error that a trial court committed.

⁵ "RP" refers to the verbatim report of proceedings from the bench trial. "RP II" will refer to the verbatim report of proceedings from the November 16, 2012 hearing on Jim's motion for reconsideration.

dated Jim's and neither Jim nor the Seller acknowledged her addition to that agreement. RP 55, 61, 291, 295; *compare* Ex. 5 with Ex. 7. Moreover, the sale was placed in escrow in only Jim's name on July 22, 1996, *months before* his first divorce was finalized and *months before* his relationship with Meg began. RP 55, 61, 648-49. Meg admits, as she must, that Jim began the process to purchase his home in July 1996, *before* their committed intimate relationship began. Br. of Resp't at 22-23. She also admits that, Jim never quitclaimed any interest in the home to her or included her in any of his refinancing efforts. RP 110, 171.

While Meg correctly notes that the "and Assigns" language in the purchase and sale agreement indicates the involvement of a third party, she wrongly states that person was her. Br. of Resp't at 4. The "and assigns" language in the agreement referred to Jim's first ex-wife, whom he was in the process of divorcing at the time of the purchase. RP 246; Ex. 7. The real estate agent, Sharon Benson, never verified to whom the assignment would have been made and wrongly assumed it was Meg. RP 47-48.

Meg claims that Jim attacks for the first time on appeal the expert pension valuations that she presented to the trial court. Br. of Resp't at 2. She conveniently forgets that Jim objected to her proposed final orders. CP 63-66. He also moved for reconsideration on this very issue, but the

trial court denied his motion. CP 69-86, 98-111. Absent a finding from the trial court that Jim and Meg had been involved in a committed intimate relationship, Jim could not have known in advance of trial where or when the court would establish the starting point for the community property presumption.

Meg's most egregious mischaracterizations of the record are found in her statements addressing the trial court's mathematical errors. For example, she claims without factual or legal authority that the court's "simple" math errors did not affect the couple's substantive rights. Br. of Resp't at 10-11, 35-36. But how could those mistakes, whether characterized as simple or complex, not have affected the couple's substantive rights when they contributed to the court's unjust and inequitable property award?

C. ARGUMENT IN SUPPORT OF THE REPLY

(1) A Trial Court's Discretion in Dividing the Marital Estate on Divorce Is Not Boundless

While trial courts have "broad discretion" in distributing marital assets in a dissolution action, *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999), the court cannot divide the marital estate without a proper consideration of the character of the individual assets according to

RCW 26.09.080 and expect to be affirmed.⁶ See, e.g., *In re Marriage of Pollock*, 7 Wn. App. 394, 404, 499 P.2d 231 (1972) (reversing when the trial court did not have the proper character of the property in mind); *In re Marriage of Holm*, 27 Wn.2d 456, 466, 178 P.2d 725 (1947) (reversing after considering “the division made by the trial court unjust and inequitable in so far as it awarded to the respondent a portion of what was appellant’s separate property”); see also, *In re Marriage of Bodine*, 34 Wn.2d 33, 35-36, 207 P.2d 1213 (1949) (reversing property division awarding the wife some of the husband’s separate property when the trial court had already found that wife was not entitled to half of the community property); *McNary v. McNary*, 8 Wn.2d 250, 253-54, 111 P.2d 760 (1941) (reversing property division when trial court divided the entire marital estate, community and separate, equally between the parties).

⁶ RCW 26.09.080 dictates that in a proceeding to dissolve a marriage, the trial court must dispose of the property and the liabilities of the parties, either community or separate, in a just and equitable manner after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership; and
- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

Jim and Meg have fundamentally divergent views concerning the trial court's characterization of the home as community property and the findings it entered to support that characterization. *Compare* Br. of Appellant at 10-13 *with* Br. of Resp't at 22-27. Meg takes the disagreement one step further, arguing that even if the trial court mischaracterized the home as community property, it had the authority to divide Jim's separate property. Br. of Resp't at 27-30. It did not.

Washington law prohibits the award of one spouse's separate property to the other when ample provision for the spouse can be made from the community estate alone. The "right of the spouses in their separate property is as sacred as is their right in their community property." *Estate of Borghi*, 167 Wn.2d 480, 484, 219 P.3d 932 (2009) (*quoting Guye v. Guye*, 63 Wash. 340, 352, 115 P. 731 (1911)). A party's "sacred right" to separate property requires greater care before invading it at the end of the parties' marriage. As a consequence, "Washington courts refrain from awarding separate property of one spouse to the other if a just and equitable division is possible without doing so." *Stokes v. Polley*, 145 Wn.2d 341, 347, 37 P.3d 1211 (2001); *Holm v. Holm*, 27 Wn.2d 456, 465, 178 P.2d 725 (1947).

This has long been the law in Washington. Our statutory scheme clearly distinguishes between community and separate property, and

requires the trial court to consider the character of property before distributing it. See RCW 26.16.010 (defining separate property); RCW 26.16.030 (defining community property); RCW 26.09.080 (among the “relevant” factors the court must consider is “(1) The nature and extent of the community property; [and] (2) The nature and extent of the separate property”). But the Supreme Court has reversed awards of one spouse’s separate property to the other that were not necessary to make adequate provision for the other spouse even before the enactment of RCW 26.09.080 in 1973, when the statutes governing the division of property on divorce did not require the court to “consider” as a factor the character of property before dividing it. *Former* RCW 26.08.110; Rem. Rev. Stat. § 989; Bal. Code § 5723; Code of 1881 § 2007.⁷

In *Holm*, for instance, the trial court valued the marital estate at \$342,000, including \$73,000 that was the husband’s separate property, and distributed the entire marital estate equally between the parties, including the husband’s separate property. The Supreme Court reversed,

⁷ “In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the conditions in which they will be left by such divorce, and to the party through whom the property was acquired.” *Folsom v. Folsom*, 106 Wash. 315, 318, 179 P. 847 (1919) (quoting Rem. Rev. Stat. § 989); *In re Cave*, 26 Wash. 213, 217, 66 P. 425 (1901) (quoting Bal. Code § 5723, which had language identical to Rem. Rev. Stat. § 989). “This statute was passed in 1863, prior to the passage of community property law, and has ever since been the law of the territory, and of the state.” *Webster v. Webster*, 2 Wash. 417, 419, 26 P. 864 (1891) (citing Code of 1881 § 2007, which had language identical to Rem. Rev. Stat. § 989 and Bal. Code § 5723).

holding that “[w]e consider the division made by the trial court unjust and inequitable in so far as it awarded to the respondent a portion of what was appellant’s separate property.” *Holm*, 27 Wn.2d at 466. The *Holm* court recognized that separate property *could* be awarded to the wife, but held that “[t]his is not a case where, in order to make adequate provision for the necessitous condition of the wife, the court is constrained to take from the husband his separate property.” *Id.* at 465. *See also, McNary*, 8 Wn.2d at 253-54) (reversing property division when trial court divided the entire marital estate, community and separate, equally between the parties); *Bodine*, 34 Wn.2d at 35 (reversing property division awarding the wife some of the husband’s separate property when the trial court had already found that wife was not entitled to even half of the community property).

The enactment of RCW 26.09.080, requiring the trial court to consider the “nature and extent” of both the community and separate property before dividing property in a dissolution, makes this factor even more important under the current statute than it was previously. A spouse’s separate property cannot be invaded when ample provision can be made from the community estate. The trial court’s findings do not support its invasion of Jim’s separate property here.

If separate property and community property were intended to be interchangeable in dividing the marital estate as Meg seems to suggest

they are, the requirement of RCW 26.09.080 that the trial court consider the “nature and extent” of each asset’s character would be superfluous. “It is well settled that statutes must not be construed in a manner that renders any portion thereof meaningless or superfluous.” *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 809, 16 P.3d 583 (2001). Further, there would be no point in requiring trial courts to “have in mind the correct character” of property if ultimately, as the trial court decided here, the character of the property has no impact on how the property is divided. *See Blood v. Blood*, 69 Wn.2d 680, 682, 419 P.2d 1006 (1966) (“the court must have in mind the correct character and status of the property as community or separate before any theory of division is ordered”). *See also, Pollock*, 7 Wn. App. at 404 (*citing Blood*).

The fact that separate property is available for distribution under RCW 26.09.080 does not mean that separate and community property are treated the same. This would be inconsistent with the rule that the “right of the spouses in their separate property is as sacred as is their right in their community property.” *Borghi*, 167 Wn.2d at 484.

As Jim noted in his opening brief, the trial court mischaracterized the house as community property and therefore erred by factoring the house into its calculations. Br. of Appellant at 10-13. At the very least, the trial court should have reduced the net equity in the home by the

amount attributable to Jim's down payment.⁸

Jim and Meg also have fundamentally divergent views concerning the trial court's pension calculations. *Compare* Br. of Appellant at 13-18 *with* Br. of Resp't at 31-38. Although Meg offers an alternate explanation for the court's miscalculations with respect to Jim's union pension, she conceded the patent mathematical error below and admits it on appeal. CP 90; Br. of Resp't at 11, 35-36. Even the trial court admitted the mistake, stating "I mean, I did go wrong when I did the spreadsheet with the mathematical error . . . My error was *in not doing the math correctly* and providing that the net to the husband was the separate portion." RP II:4 (emphasis added). The court acknowledged that the net to Jim based on its calculations should have been \$1,918 per month rather than \$2,501, but refused to amend the property division accordingly. RP II:4, 10; CP 111. Contrary to Meg's assertion in her response at 36, the financial harm to Jim flowing from this mistake is self-evident. *See, e.g.*, RP 278. The trial court's math was admittedly incorrect and resulted in an

⁸ Meg argues that the trial court properly declined to reimburse Jim for his down payment. Br. of Resp't at 30. Jim presented both documentary and testimonial evidence that he withdrew funds from his life insurance policy for the down payment. RP 284-85. Although the trial court acknowledged that evidence on reconsideration, it refused to modify its property distribution, stating the amount was "de minimis in my opinion given an estate that I valued total at 519,000.00 and divided equally." RP II:11. The court did not consider the down payment sufficient to undo what it did in the spreadsheet. RP II:12; CP 62. It is ironic that the trial court was so adamant about equally dividing the estate but then refused to consider the lopsided impact of its decision not to credit Jim with his contribution toward that estate.

improper distribution of Jim's union pension and a windfall for Meg.

No matter how the Court views the trial court's calculations and the impact of that court's mathematical mistakes, one thing remains clear: contrary to RCW 26.09.080(4), the trial court failed to consider the economic circumstances of each spouse at the time the division of property was to become effective. Despite Meg's attempt to muddy the waters, the undisputed fact remains that Jim lives on a fixed income limited to his retirement benefits. By contrast, Meg continues to work, earn additional income, and contribute to her retirement. Meg is also entitled to two survivor annuities, which means that if Jim dies, she will continue to receive benefits.⁹ RP 164. Finally, Meg admits that all of the retirement benefits she earned as of the date of the couple's separation were community property. Br. of Resp't at 9, 11. Yet the trial court did not award any portion of that community property benefit to Jim. CP 62. The harm to Jim flowing from the trial court's added refusal to grant him any interest in the community property portions of Meg's pensions is self-

⁹ Meg claims that the trial court entered a proper Qualified Domestic Relations Order ("QDRO") notwithstanding the undisputed fact that the court's letter ruling did not contain all language for every provision of the final orders. Br. of Resp't at 43-44. Even if true, that does not mean that Meg was free to invent self-serving findings of fact that the trial court clearly did not make. Her claim that there would be no need for a QDRO if every provision of that QDRO was already contained in the decree is simply false. As Jim explained in his opening brief, a QDRO is necessary to enforce or facilitate the acquisition of a right or interest awarded in a dissolution decree. Br. of Appellant at 19. The QDRO enables the Plan Administrator to determine whether the order is qualified to transfer one party's interest in the other party's pension. *Id.*

evident.

Meg argues that this Court should not consider Jim's arguments with respect to his pension because he relies on evidence that is not part of the trial court record. Br. of Resp't at 39. She is again mistaken. That the trial court refused to consider the evidence that Jim presented on reconsideration does not mean that the evidence is not part of the record.

Contrary to Meg's assertions, nothing in CR 59 prohibits the submission of new or additional materials on reconsideration. *Chen v. State*, 86 Wn. App. 183, 192, 937 P.2d 612, *review denied*, 133 Wn.2d 1020 (1997). *See also, Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 202-03, 810 P.2d 31 (1991) (declining to flatly prohibit the practice of basing a motion for reconsideration on evidence that was available earlier); *Ghaffari v. Dep't of Licensing*, 62 Wn. App. 870, 875-76, 816 P.2d 66 (1991), *review denied*, 118 Wn.2d 1019 (1992) (consideration of additional evidence at motion for reconsideration of bench trial within discretion of trial court).

By miscalculating the pension distributions, the trial court is permitting Meg to walk away from the marriage with the bulk of Jim's fixed monthly income. Neither Meg nor the trial court can adequately explain this patent inequity. The trial court's judgment is based on untenable grounds and should therefore be reversed.

(2) Meg is Not Entitled to Attorney Fees and Costs on Appeal

Meg *admits* that Jim's fixed monthly income is significantly less than hers, but nevertheless requests that she be awarded attorney fees and costs under RCW 26.09.090. Br. of Resp't at 47-48. Her request for attorney fees and costs on appeal should be denied.

Glaringly absent from Meg's fee request is any mention of the fact that she is still employed full-time and that she continues to accrue a variety of benefits. Br. of Resp't at 47-48; RP 73, 333. Moreover, she does not contend like Jim that her financial circumstances have changed post-trial. She has thus failed to provide a basis for fees under RCW 26.09.140. *See Schumacher v. Watson*, 100 Wn. App. 208, 216, 997 P.2d 399 (2000).

Meg also claims without citation to authority that Jim's appeal is frivolous. Br. of Resp't at 48. She seeks to attach some sort of emotional motive (*i.e.* revenge, retaliation) to Jim's appeal. *See id.* But there is nothing vengeful about raising issues that clearly need to be addressed, and that are financially significant to the appealing spouse. A spouse does not lose his or her property rights because of a divorce.

RAP 18.9(a) permits an award of attorney fees and costs for a frivolous appeal. An appeal is not frivolous if the issues presented are at least debatable. *Kirshenbaum v. Kirshenbaum*, 84 Wn. App. 798, 929

P.2d 1204 (1997). *See also, Advocates for Responsible Development v. Western Washington Growth Management*, 170 Wn.2d 577, 245 P.3d 764 (2010) (holding the intermediate appellate court abused its discretion by awarding attorney fees as a sanction where the action was not frivolous in its entirety). Any doubt should be resolved in favor of the appellant. *Pub. Employees Mut. Ins. Co. v. Rash*, 48 Wn. App. 701, 740 P.2d 370 (1987). An appeal that is affirmed simply because the arguments are rejected is not frivolous. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005); *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980).

Resolving all doubt in favor of Jim, this appeal raises debatable issues upon which reasonable minds could differ. Jim's brief contains legal authority to support his issues and meaningful analysis of those issues to permit the Court to reverse and require the trial court to correct the errors it admitted making and to recalculate the property distribution in a just and equitable manner. His appeal is therefore not frivolous and Meg's request for fees on appeal on this basis should be denied.

(3) Jim is Entitled to Attorney Fees and Costs on Appeal

Jim requested attorney fees and costs in his opening brief pursuant to RAP 18.1 and RCW 26.09.140. Br. of Appellant at 20-21. Meg responds, arguing that he is in a far better position to pay attorney fees and

costs than she is. Br. of Resp't at 47-48. Not so. A careful assessment of Jim's financial need, as will be described in his forthcoming RAP 18.1(c) affidavit, balanced against Meg's ability to pay, firmly supports the conclusion that Jim should recover his attorney fees and costs on appeal. RCW 26.09.140.

D. CONCLUSION

For the reasons outlined in Jim's opening brief and reiterated here, this Court should reverse the trial court's distribution of the marital estate and direct the trial court on remand to recalculate the property distribution in a just and equitable manner. The Court should deny Meg's request for attorney fees and costs, but award them to Jim.

DATED this 11th day of October, 2013.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Reply Brief of Appellant in Court of Appeals Cause No. 44250-7-II to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 11, 2013, at Tukwila, Washington.



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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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