

APPELLANT'S OPENING BRIEF
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COURT OF APPEALS
Ca

No. 45146-8-II

THE COURT OF APPEALS, DIVISION II

State of Washington

IN RE THE MARRIAGE OF

BRETT CLYDE BIRCH,
Petitioner/Appellant,
and
VICKEY ANN BIRCH,
Respondent

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

The Superior Court erred by providing inadequate reasons for its division of property together with its award of maintenance and fees.

The Superior Court's award is, in total, not fair and equitable and therefore an abuse of discretion.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. If the trial court in a divorce has divided net assets 60% to wife and 40% to husband, including a substantial cash judgment such that there is a total distribution of \$154,696 to husband and \$232,043 to wife, plus monthly maintenance of \$1,500 a month to the wife, can the court also properly award \$7,500 in attorney fees based on "need and ability to pay" absent some other extraordinary finding?

2. In this particular case was it fair and equitable, considering the overall division of property to award fees in addition to the disproportionate property award?

3. If, in a long-term marriage, there is essential agreement that a 60%-40% property is appropriate in light of the parties' respective long-term earnings capacity, and if the court uses that agreement as a basis for making a division of property, is it fair and equitable for the court – in addition – to award substantial maintenance?

4. In this particular case is the award of maintenance fair and equitable, or even fairly explained by the court, in light of its property division?

5. In this particular case, is there any defensible reason advanced by the court to deviate from a 50%-50% split of the property other than as compensation for the parties' disparity in future earnings capacity, and is the disparate division of property fair and equitable if the court is nonetheless going to award long-term maintenance and attorney fees?

6. Has the trial court articulated sufficient reasons to justify its total award?

STATEMENT OF THE CASE

STANDARD OF REVIEW

This case calls upon the court to review a trial court's decisions on issues of property division, maintenance and attorney fees.

In awarding maintenance, the trial court exercises broad discretionary powers and appellate courts will not overturn the decision on appeal absent a showing of manifest abuse of discretion. *In re Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984); see also *In re Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985) (appellate courts are generally reluctant to interfere with the trial court's exercise of its equitable powers in dissolution cases). A trial court abuses its discretion when it makes a decision on untenable grounds for untenable reasons. *In re Marriage of Sheffer*, 60 Wn.App. 51, 53, 802 P.2d 817 (1990).

To succeed on appeal the appellant must show that the trial court's decision was manifestly unreasonable, or based on untenable grounds or reasons. *State ex. rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wash.2d 39, 47, 940 P.2d 1362 (1997).

The appellate court should not substitute its judgment for the trial court where the record shows that the trial court considered all relevant factors and the award is not unreasonable under the circumstances. *Id.* at 717, 789 P.2d 807.

IMPORTANT FACTS

The important facts in this case are not subject to serious dispute.

Everyone acknowledges that this was a long-term, thirty-three year marriage. Compare Finding No. 2.4 and 2.5. CP 8-9..

Mr. Birch worked for years, full time, with the Glazer's Union; Ms. Birch held a variety of jobs, culminating with work for a school district at not quite full time. TR 62-65. There is little doubt that Ms. Birch has an earnings capacity

that is inferior to that of Mr. Birch. The court concludes as much, and that's not challenged on appeal. See TR at top of page 152.

After considering all this, the court entered a decision splitting all the community property 60% to Ms. Birch and 40% to Mr. Birch, resulting in Ms. Birch getting \$232,043 and Mr. Birch getting \$154,696. But, then, in addition, the court awarded substantial maintenance and also attorney fees. There isn't really any justification offered by the court for why a 60%-40% split of the property is fair and equitable if the court is going to, in addition, award maintenance and attorney fees.

All of that was brought to the court's attention in a motion to reconsider. CP 20-27.

The motion to reconsider was denied in a one line order containing no explanation, issued by the court without any oral argument or further discussion. CP 35.

APPLICABLE LAW AND ARGUMENT

As described in Mr. Birch's motion for reconsideration, either an award of maintenance is appropriate, or a disparate award of property in lieu of maintenance, but **both** are not appropriate in this case. Or, at least, if there is a basis for an award of both maintenance

and a 60%/40% split of property, the court has not fairly articulated a reasonable basis for doing that – something it's required to do if the decision is not simply an abuse of discretion.

There is a similar problem with the award of attorney fees. Once the court has made such a substantially disproportionate award of property, and particularly inasmuch as very large sums of cash were awarded to the wife, there really is no showing of “need,” which is a prerequisite to any award of fees.

This is not to say that the trial court could *never* make both a disproportionate award of property and also award fees and maintenance. However, if that's going to be the award of the court, the trial court should at least explain its decision sufficiently for fair appellate review. In this case, the trial court recognized that both parties are approximately the same age, both in good health and physical condition. TR 151 at lines 17-21.

We know that both held jobs, albeit husband's earning capacity exceeded that of the wife.

The trial court explained that “In making [the property] distribution, the Court finds this to be fair and

equitable and recognizes that it was agreed only for Mr. Birch if the Court did not award maintenance to Mrs. Birch. But that isn't how the court operates." TR 149, lines 7-12.

And, of course, the court isn't duty bound to accept Mr. Birch's assessment of a "fair" property distribution. Still, if the basis for a decision that a 60%/40% split **is** fair rests on Mr. Birch's agreement that it's fair absent maintenance, then to accept that and then separately award maintenance isn't right ***without further explanation by the court.***

Again, that disproportionate award of assets is clearly **not** based on a difference in age or health. It's an award that compensates Ms. Birch for her more limited earning capacity.

The trial court indicated that "the analysis for whether or not Mrs. Birch is entitled to maintenance is a very different analysis than a fair and just division of the assets acquired and the distribution of debt." Fair enough. But the fact that the statutory rules are different doesn't mean that the court can make an award that, in its entirety, isn't "fair and equitable." And, in this case, there is no articulated reason – nor any factual basis in the record – for making a disproportionate award of property **except** as a substitute

for maintenance. And yet, a trial court must articulate on the record the reasons behind its determinations. *In re Parentage of Jannot*, 149 Wash.2d 123, 125, 65 P.3d 664 (2003) (affirmed *In re Parentage of Jannot*, 65 P.3d 664, 149 Wn.2d 123 (Wash. 2003); cited with approval in *In re Marriage of Horner*, 93 P.3d 124, 151 Wn.2d 884 (Wash. 2004).

A trial court need not enter written findings on every point, because its oral commentary supplements the written findings. Still, when an appellate court considers whether a trial court abused its discretion in deciding a case, the appellate court asks two questions. Did the trial court enter specific findings of fact on each applicable factor? If not, was substantial evidence presented on each factor, and do the trial court's findings of fact and oral articulations reflect that it considered each factor? Only with such written documentation or oral articulations can an appellate court be certain that the trial court properly considered. *In re Marriage of Horner*, 151 Wn.2d 884, 896, 93 P.3d 124, (Wash. 2004).

Here, the failure of the trial court to address why it was awarding both a 60%-40% split of property and also

maintenance and fees constitutes an abuse of discretion, notwithstanding the conclusions implied in the award itself. And, certainly a one-line denial of Mr. Birch's motion to reconsider does nothing to cure this defect.

To some extent, this is a method-of-practice problem. Some litigants approach trial by asking for everything – even unreasonable things – expecting the court to always compromise. Others go to trial trying to be fair from the start. But, if the courts, confronted with parties trying to be fair, accept the “give” and reject the “take” then there isn't going to be give and take; every litigant will learn that the only way to protect against real unfairness is to never compromise an inch.

The exact same problem exists with respect to fees. If a litigant goes in offering a disproportionate split of property, and the trial court starts accepting that as “fair,” but then **also** adds fees, then no litigant is going to ever offer a disproportionate split of assets. Here, of course, there is nothing wrong with the trial court awarding maintenance and fees, but if it does that, what's the basis for a disproportionate division of assets?

Given the division of net assets, there is just no fair reason articulated by the court for the award of fees and consequently, the trial court abused its discretion in making the award. See e.g. *Mahler v. Szucs*, 957 P.2d 632, 135 Wn.2d 398 (Wash. 1998) (“Fee decisions are entrusted to the discretion of the trial court, *Boeing Co. v. Sierracin Corp.*, 108 Wash.2d 38, 65, 738 P.2d 665 (1987), but we will exercise our supervisory role to ensure that discretion is exercised on articulable grounds. We remand the fee award to the trial court for the entry of proper findings of fact and conclusions of law consistent with this opinion.”)

In short, as to both maintenance and attorney fees, or alternatively, as to the property division, the trial court’s findings – limited as they are – do not support its conclusion that a fair and equitable division of the property should be 60%-40% if the court is also going to award maintenance and attorney fees.

Looked at differently, the trial court’s findings do not support its conclusion that maintenance and attorney fees are appropriate given the disproportionate division of property.

Either way, the award is an abuse of discretion until the court can articulate a rational basis for awarding **both** a disproportionate division of property and maintenance plus fees.

CONCLUSION

An award of maintenance and fees based on Mr. Birch's higher earnings capacity could be justified by the facts of this case.

Alternatively, a disproportionate award of net assets could be justified by the facts of this case.

But, the facts of this case do not suggest that it is "fair and equitable" to award both a disparity in assets and also maintenance and also attorney fees. Or, at the least, if there is justification for that, the court must provide some explanation. When called to account, the trial court cannot meet its responsibility by merely issuing a one-line decision denying reconsideration, because without any such explanation, the award itself becomes unreasoned and therefore an abuse of discretion.

Because there is no fair reasoning provided by the court justifying its decision in this case, the decision is

manifestly unreasonable and should be reversed and remanded for additional findings or an adjustment to the award.

DATED this 30th day of January, 2014.



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WASHINGTON STATE COURT OF APPEALS
Division Two

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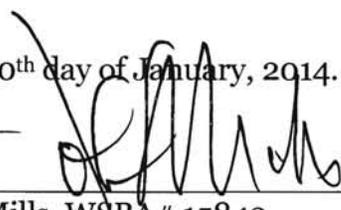
No. 45146-8-II

Declaration of Service of

OPENING BRIEF

JOHN MILLS, WSBA# 15842, declares under penalty of perjury of the State of Washington that a true and correct copy of the APPELLANT'S OPENING BRIEF (attached) was transmitted today in .pdf form to opposing counsel by email both to Ms. Cook at her regular email address: amanda@jrobinsonlaw.com, and also to Ms. Isaksen, co-counsel at her regular email address: victoria@washingtonappeals.com. Email is our customary form of communication, but if requested by opposing counsel, I will send a hard copy by ABC messenger

DATED at Tacoma, WA this 30th day of January, 2014.



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Service Declaration

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