

NO. 45767-9-II  
COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ANTONIO JOSE CARRASCO

Appellant

v.

ANNA MARIE CARRASCO

Respondent

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**REPLY BRIEF OF APPELLANT**

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Josephine C. Townsend  
Attorney for Appellant,  
WSBA 31965  
211 E. 11<sup>th</sup> Street, Suite 104  
Vancouver WA 98660  
Telephone: 360.694.7601  
Fax: 360.694.7602  
e-mail: [JCTownsend@aol.com](mailto:JCTownsend@aol.com)

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## **REPLY ARGUMENT**

### **I. AWARD OF "SUPPLEMENTAL" MAINTENANCE**

It was undisputed at trial, and Anna expressly concedes on appeal, that "Anna did not pay for Antonio's educational expenses because she had no independent income ...." [Respondent Brief, 11]. Instead, Antonio paid those expenses, and he supported the family while he attended school, with the proceeds of Antonio's student loans, grants, and stipends, and financial and other assistance provided by Antonio's parents. [RP 80, 176, 184, 245, 260]. The obligation to pay the loans, totaling \$192,000, was assigned entirely to Antonio. [CP 110]

The court found, and Antonio does not challenge the finding, that, since Antonio obtained his education during the marriage, "[Anna] should be afforded similar opportunity to at least obtain, at a minimum, a four year degree", and that "five years of spousal maintenance is appropriate". [CP 110, Findings of Fact and Conclusions of Law, ¶2.12]

The question is whether Anna is also entitled to an additional four years of maintenance as "compensat[ion] ... for the value of the medical

degree obtained by [Antonio] during the marriage." [CP 110, Findings of Fact and Conclusions of Law, ¶2.12] Antonio argues that she is not entitled to this additional award. Relying on *In re Marriage of Washburn* (1984) 101 Wn.2d 168, 677 P2d 152, Anna claims the court did not err. But *Washburn* is inapposite. It involved consolidated cases presenting "a situation which is so familiar as to be almost a cliché. A husband and wife make the mutual decision that one of them will support the other while he or she obtains a professional degree," *Washburn*, 101 Wn.2d, at 173.

That cliché certainly described the cases before the Court. In both, while the husband attended veterinary school and served his internship, the wife worked full time; and, one, the wife contributed to the husband's education and support of the family not only her employment earnings, but also money from a personal injury settlement, *Washburn*, 101 Wn.2d, at 171-172. And, throughout the opinion, the Court referred to the spouse entitled to compensation as "the supporting spouse", and stated repeatedly that the issue it was deciding was whether and how to compensate a spouse who contributed financially to the other spouse's education. Thus:

In reviewing how the courts of other states have responded to this "common situation", the Court observed that some have held "the supporting spouse is entitled to restitution of the money he or she spent toward the attainment of the degree", and one court granted

"'reimbursement alimony' equal to the amount spent by the supporting spouse toward the education," *Washburn*, 101 Wn.2d, at 174-175. The Court rejected "unjust enrichment" as the theory for an award of compensation because, while it achieved the objective of "requiring a person to make restitution to the extent he has been unjustly enriched", the "unjust" component would entail an inquiry into whose conduct led to dissolution of the marriage, and that conflicted with the "no fault" aspect of Washington's dissolution of marriage act; *Washburn*, 101 Wn.2d, at 176; In explaining how Washington's dissolution of marriage act supplied the mechanism for awarding compensation where compensation is due, the Court explained: "When a person supports a spouse through professional school," that is a fact a court may consider in making a fair and equitable division of property and liabilities pursuant to RCW 26.09.080, and in making a just award of maintenance under RCW 26.09.090, *Washburn*, 101 Wn.2d, at 178.

The Court said an award of maintenance as compensation is appropriate, even though the right to compensation arises only where the party to be compensated was capable of supporting his or her spouse through school, because "a demonstrated capacity of self-support does not automatically preclude an award of maintenance," *Washburn*, 101 Wn.2d, at 179. While the Court refused to encroach upon the trial courts'

discretion in dividing property and awarding maintenance by providing a precise formula for determining the amount of compensation to be awarded, it listed the factors a trial court must consider in making that calculation, and those factors included "[t]he amount of community funds expended for direct educational costs", and "[a]ny educational or career opportunities which the supporting spouse gave up in order to obtain sufficiently lucrative employment ...," *Washburn*, 101 Wn.2d, at 180.

The "cliche" that was before the Court in *Washburn* - a situation where one spouse obtains a job to support the other through professional school -- is simply not this case. Anna and Antonio did not make the mutual decision that Anna would support Antonio while he obtained his medical degree.<sup>1</sup>

Instead, during the entire time Antonio attended school, it was Antonio alone -- through loans, grants, stipends and contributions from his family - - who paid his education expenses and supported the family. (RP 260).

*Washburn* would not justify an award of compensation to Anna had Antonio's education and support of the family been paid from Antonio's

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<sup>1</sup> Certainly, Antonio did not concede he and Anna made such a mutual decision. He testified he and Anna agreed Anna would stay home with the children while they were young, but when the youngest child began attending school, he encouraged Anna to obtain employment to help support the family but she refused. [RP 31-32]

premarital savings; and payment of those expenses with the proceeds of loans assigned to Antonio is the functional equivalent of their payment with his premarital savings.

Anna also was working as the executive secretary to the head chef at the San Francisco Marriott (RP 33), and had both past and current work experience which she intended to return to after updating her computer skills. In fact, Anna left her job prior to trial, because she wanted to see what she would receive in maintenance. (RP 268). She was working for minimum wage until right before trial. (RP 258). Throughout the marriage, Anna was encouraged to work once the children attended school. (RP 35). Anna testified that her only plan for schooling was to update her computer skills because “twenty years ago, computers weren’t the same as they are today and I plan on getting a job.” (RP 269). Anna did not file a single job application between the date of separation and trial. (RP 269). She chose to instead volunteer at a hospital and hoped that if a job opened up that she liked, she would apply for it then. (RP 269-270).

She in fact, meets the criteria for someone who is voluntarily underemployed under the child support statute. RCW 26.19.017(6) which states: The court shall impute income to a parent who is voluntarily unemployed. In this case, the court did not impute any income to Anna

for purposes of child support and it failed to take into consideration that she quit her job prior to trial so as to increase her chances of the husband paying increased maintenance. Her choice to remain unemployed was purposeful. If the court had imputed her income, the equalization of income would have been less of a burden on Antonio. See Clarke v. Clarke (112 Wash App. 370 (2002)).

The additional four years of maintenance should not have been awarded and it was an abuse of discretion for the court to do so. It was an abuse of discretion for the court to award the additional four years of maintenance which was not supported by the record. The purpose of spousal maintenance is support a spouse, typically the wife, until she is able to earn her own living, or otherwise become self-supporting. In re Marriage of Luckey, 73 Wn. App 201( 1994). In this case, the court found specifically that Anna would be able to do so in five years. Based on the findings, there was insufficient evidence to support the court's rationale for an additional award. It was error for the court to make that finding.

## **II. ORDER REGARDING INSURANCE**

In his Opening Brief, Antonio argued that the trial court's order regarding life insurance was an abuse of discretion because it provides Anna with a windfall if Antonio dies before his obligation to pay

maintenance expires. Anna claims that Antonio "misapprehend[s]" the facts relating to the order. Antonio submits that the misapprehension is Anna's, not his. The decree requires Antonio to pay Anna maintenance of \$5,500 per month on the first day of each month until and including October 1, 2022 [i.e. for nine years, commencing November 1, 2013], or until Anna remarries or Antonio dies, whichever occurs first. The decree further provides that, to secure payment of his maintenance obligation, Antonio must maintain a policy of insurance on his life that designates Anna as beneficiary "in an amount not less than the remaining amount due for maintenance". Thus, at the outset, the order required Antonio to designate Anna as beneficiary of proceeds equal to \$594,000 [9 years x 12 months/year x \$5,500/month], and it allowed him to reduce her share of the proceeds by \$5,500 each month upon paying that month's installment. Thus, assuming Antonio pays each installment as it accrues, upon payment of the installment in October 2018, the order regarding insurance will require him to designate Anna as beneficiary of proceeds in the amount of \$264,000 [4 years x 12 months/year x \$5,500].

The order concerning insurance ignores the fact that Antonio's duty to pay maintenance *terminates* upon his death. If he dies during October 2018, Anna will receive insurance proceeds of \$264,000 for future maintenance payments Antonio is not obligated to pay. Anna fails to

acknowledge this fundamental flaw in the order in her response – because there is no argument she can proffer to overcome this flaw in the court’s decision. Antonio does not question the trial court's authority to order Antonio to maintain life insurance for Anna's benefit for maintenance payments he owes at the time of his death – if it were fashioned to say that any debt owed to her prior to his death were to be paid from the proceeds.

An example would be if Antonio lost his job due to poor health and fell behind in his support obligations. Whatever he owed at the time of his death could be satisfied, but going forward, his death terminates a future obligation.

Thus, he can only be required to maintain a life insurance policy for Anna's benefit only for those installments that accrued during Antonio's lifetime that remain unpaid at the time of his death. The provision in the decree ordering Antonio to maintain sufficient life insurance on his life naming Anna as irrevocable beneficiary "in an amount not less than the remaining amount due for maintenance" should be modified to state "in a amount not less than the amount of any accrued maintenance which was unpaid at the time of his death".

III. COURT SHOULD HAVE IMPUTED INCOME TO ANNA

Respondent mistakenly argues that Antonio did not argue for his wife to have income imputed to her for purposes of the child support calculation (which would also impact equalization of the maintenance award). In fact the court discussed at length the husband's proposed child support worksheets which included imputed minimum wage for the wife. (RP 303-317) and the court directed that the parties submit their proposed worksheets for his decision. (RP 312). When asked if allowed to make a closing argument summarizing the arguments, the court rejected Antonio's request to do so. (RP 312).

In fact neither attorney was allowed to give closing argument. (RP 322). The court did however acknowledge the argument in its rulings. (RP 328, 325, 326, 327, 338-339). The court recognized the husband's proposal for the wife to be imputed when it specifically rejected his argument to do so. (RP 337-339, 372). The court abused its discretion by not making a finding of income to Anna and then stating that – "she will have to work if she wants to afford the bills she put down in her declaration". (RP 373). The court admitted by its ruling, it placed both of the parties "in a hole". "There wasn't enough to pay all the bills." (RP 373). Anna admitted that she worked just prior to the divorce trial and while it was not full time, it did not need to be for the

court to impute some income to her. To do otherwise, is a violation of public policy. Schumacher v. Watson 100 Wash App. 208 (2000).

The court also thereby admits the ruling was faulty and placed the parties in an untenable situation. In this case, the court awarded virtually all of the community debt to the husband, and then left him in a position where he could not meet his bills, support and maintenance obligations while acknowledging the wife worked, and had the ability to work. This is clearly an abuse of discretion.

#### IV. Court Should Not Have Entered CR2A as to Adult Daughter

While it is true that the father agreed to pay for his adult daughter's medical treatment, the court conceded it did not have any jurisdiction over the adult daughter and could not consider the medical treatment in calculating costs to the father. Early on in trial, the father agreed that he would agree to pay for the adult daughter's treatment if she needed it.

Q: And do you know how much it's going to cost for her to go through the in-patient treatment program?

A: I imagine it will be a similar amount – fifteen to twenty thousand dollars.

Q: And you've already stipulated to the court that you're going to undertake this step?

A. Yes.

RP at 28.

However, the court also agreed that it had no jurisdiction over the adult daughter and money allocated to her would not be part of the final divorce calculations.

RP 328:

Judge: And there's always the legal question of where I fit Sara into this formula because legally she's 22 – she's not a party to the action any longer.

While Antonio was free to make agreements outside of the dissolution proceeding as to his adult daughter, he did not receive any discount for this expense in the child support worksheets, or in regards to how maintenance would be calculated because at time of trial, the court acknowledged it had no jurisdiction over what the parties did as it related to the adult daughter who was not part of the action. Therefore it was error and an abuse of discretion to enter the supplemental order.

The Addendum to the Decree directed that an order pursuant to that stipulation become a part of the Decree of Dissolution. [ CP 160, Addendum to Decree of Dissolution, ¶2]. The order set forth in the Addendum did not conform to the parties' agreement and it was outside the court's authority to enter this in the decree.

V. Attorney Fees

Antonio was forced to file this appeal of the court's erroneous ruling, or his estate should there be one, would be forced to pay Anna maintenance beyond his death, inapposite to our state statute. Anna has no bills other than her normal living expenses because the court awarded all of the debt to Antonio. Both parties were awarded their own fees at trial. Anna was not given additional funds because the court found that she was able to meet her obligation through gifts from her family, and the division of assets by the court at time of trial placed her in a position to meet that need. If the court does not award Antonio attorney fees, then at the minimum each party should pay their own.

Respectfully submitted this 2<sup>nd</sup> day of September 1, 2014

Josephine C. Townsend

WSBA 31965

**CERTIFICATE OF SERVICE**

I hereby certify , that on this date, I served the attached motion for extension of time via U.S. Mail, and e-mail to

Patricia AS. Novotny

Attorney At Law

3418 N.E. 65<sup>th</sup> Street Suite A

Seattle WA 98115-7397

novotnylaw@comcast.net

Signed this 2<sup>nd</sup> day of September 2014

S/Josephine C. Townsend

WSBA 31965

## TOWNSEND LAW

September 02, 2014 - 9:32 PM

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