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SEP 16 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

IN RE THE MARRIAGE OF:

**SELISA HUMPHREY
Appellant**

V.

**LLOYD HUMPHREY, SR.
Respondent**

NO. 31336-1

RESPONDENT'S BRIEF

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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- I. Did the Court err by finding default was not an available remedy for the Respondent's continued violations of discovery orders because there was no sum certain? Short Answer: No, the Court properly concluded that it was not practical.

- II. Did the Court err by finding that the money found in the Respondent's home on August 11, 2010 was the same as money withdrawn from the community bank accounts by the Respondent on August 2, 2010? Short Answer: No, the weight of evidence suggested no other source.

- III. Did the Court err by finding the community property guns had a value of only \$40,000.00? Short Answer: No, the weight of evidence supports that the majority of the guns were gifted to another and their value was established by commerce.

- IV. Did the Court err in awarding the Appellant \$800.00 per month in spousal maintenance? Short Answer: No, the Court properly

applied RCW 26.09.090 in making a just and equitable distribution of assets, including spousal maintenance.

- V. Did the Court err by reconsidering the agreed reimbursement to the Appellant contained in the Temporary Order entered June 30, 2011? Short Answer: No, application of the order would have resulted in an unintended windfall to the Appellant.

STATEMENT OF THE CASE

On August 9, 2010, the Petitioner/Appellant (hereinafter "Selisa") filed a Petition for Legal Separation (Marriage). CP at 1-4. Selisa deferred to the Court to determine property and debts/liabilities "at a later date." CP at 2. Over twenty-two (22) months later, Selisa amended her petition, again deferring to the Court to determine property and debts/liabilities "at a later date." CP at 335. At this time, Selisa introduced the notion of a meretricious relationship dating back to 15 years prior to the marriage. CP at 337. In between the two (2) petitions, numerous motions alleging discovery violations by the Respondent (hereinafter "Lloyd") were brought before the court. See Appellant's Brief at 6-14.

Trial in this matter occurred a little over a month after the amended petition. RP at 1-618. Selisa argued that the trial court should enter a default judgment based on the foregoing allegations, which the judge denied prior to trial. RP at 31, line 20. Near the conclusion of trial, the judge reiterated his prior ruling, stating that the remedy of default was not "available to [him] *as a practical matter*." RP at 593 (emphasis added). Written Findings of Fact clarified the ruling further, stating "[a] remedy of a default order is not possible given the lack of any reasonable sum certain." CP at 480, lines 1-2. The judge considered a mitigated remedy of

striking Lloyd's pleadings, but found it would "further limit available evidence." CP at 480, lines 2-3.

The trial court found that \$214, 998.00 recovered at the residence occupied by Lloyd is traceable from two (2) withdrawals made a short time prior to its discovery. CP at 486-487. Further, the trial court found that "no records have been located to support the existence of [other] concealed money, even though the financial records have been fully investigated." CP at 487.

The testimony and exhibits presented by both parties suggest that Lloyd attempted to conceal or secure money. RP at 252, line 13-15; RP at 613. However, neither Selisa nor her attorneys could point to an alternate source of this money, other than the previous withdrawal. CP at 487. By all accounts, this money was returned to the community coffers. CP at 486.

The Appellant misstates the trial court's ruling regarding the firearm collection. The Decree entered requires Lloyd to pay Selisa \$40,000.00 for her "*interest* in the firearm collection." CP at 475, line 21. The trial court's findings purport the same. CP at 486, lines 10-11. As such, the value of the gun collection is not specifically addressed. Of note,

only two pistols were confirmed in Lloyd's possession as of April, 2011.
CP at 486.

Lloyd testified that he gifted his guns to a relative, and while he wasn't a party to their subsequent sale, he believed they sold for \$40,000.00. RP at 260-261. There is debate about whether the sale involved all the guns, part of the guns, or any guns at all. See Appellant's Brief at 23-24.

The trial court's accounting of the parties respective incomes and monthly expenses indicate that Lloyd, after the deduction for spousal support, has a "disposable income" of \$29.00. Selisa, on the other hand, has a "disposable income" of \$17.00 after the spousal maintenance award. CP at 482-483.

The trial court ruled upon reconsideration that "if the pretrial agreement and order had been understood at the time of the oral ruling and entry of the decree, the division of property would have been adjusted for [sic] to reach the same overall division of property." CP at 626.

ARGUMENT

The trial court has broad discretion in distributing the marital property and its decision will be reversed only when discretion was exercised on untenable grounds or for untenable reasons. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)). This deferential standard of review exists because the trial court is "in the best position to assess the assets and liabilities of the parties" in order to determine what constitutes an equitable outcome. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102(1999).

The trial court's distribution of property should be disturbed only if there has been a manifest abuse of discretion. *Id.* Under the manifest abuse of discretion standard, the appellate court must affirm the trial court's decision unless no reasonable judge would have reached the same conclusion. *In re Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985).

RCW 26.09.080 instructs a trial court to make a "just and equitable" distribution of the parties' property. The statute's nonexclusive list of factors to be considered is; (1) the nature and extent of the

community property; (2) the nature and extent of the separate property; (3) the duration of the marriage; and (4) the economic circumstances of the parties. RCW 26.09.080. A just and equitable division by a trial court "does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of parties." *In re Marriage of Crosetto*, 82 Wn.App. 545, 556, 918 P.2d 954 (1996).

I. DID THE COURT ERR BY FINDING DEFAULT WAS NOT AN AVAILABLE REMEDY FOR THE RESPONDENT'S CONTINUED VIOLATIONS OF DISCOVERY ORDERS BECAUSE THERE WAS NO SUM CERTAIN?

Washington courts generally disfavor default judgments. Instead, "[w]e prefer to give parties their day in court and have controversies determined on their merits." *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007).

In entering a default judgment, the trial court may not grant relief in excess of or substantially different from that described in the complaint. *In re Marriage of Leslie*, 112 Wn.2d 612, 617, 772 P.2d 1013 (1989); *Sceva Steel Bldgs., Inc. v. Weitz*, 66 Wash.2d 260, 262, 401 P.2d 980

(1965); *Stablein v. Stablein*, 59 Wash.2d 465, 466, 368 P.2d 174 (1962);
In re Marriage of Campbell, 37 Wash.App. 840, 845, 683 P.2d 604
(1984); *In re Marriage of Thompson*, 32 Wash.App. 179, 183-84, 646
P.2d 163 (1982); *Columbia Vly. Credit Exch., Inc. v. Lampson*, 12
Wash.App. 952, 954, 533 P.2d 152 (1975). Further, the trial court has no
authority to grant relief beyond that sought in the complaint. To grant such
relief without notice and an opportunity to be heard denies procedural due
process. *Conner v. Universal Utils.*, 105 Wash.2d 168, 112 Wn.2d 618
172-73, 712 P.2d 849 (1986); *Watson v. Washington Preferred Life Ins.*
Co., 81 Wash.2d 403, 408, 502 P.2d 1016 (1972); *Ware v. Phillips*, 77
Wash.2d 879, 884, 468 P.2d 444 (1970).

In her pleadings most analogous to a complaint, Selisa deferred to
the trial court to determine property and debts/liabilities “at a later date.”
CP at 2; CP at 335. As such, no remedy was specified. To unilaterally
impose a default judgment under these circumstances, the trial court
would have granted relief not described in the petition and procedural due
process would have been violated.

Upon appeal, Selisa proposes that a default judgment should have
been entered and the provisions of CR 55 be employed to distribute the
property and liabilities. Appellant’s Brief at 17-18. In so doing, the trial

court would have conducted hearings comparable to what occurred anyway. CR 55(b)(2). Ultimately, the parties' property and liabilities must be divided and any award of maintenance be determined "without regard to misconduct." RCW 26.09.080, .090.

Given the inefficiency of the process described above, the trial court properly determined that a remedy of default was not practical. In her argument to the contrary, the Appellant relies almost exclusively on case law outside the family law arena, where lawsuits are initiated against a party, damages are specified, and a default disposition with some finality is possible. See Appellant's Brief at 16-20. The case at bar is distinguishable.

II. DID THE COURT ERR BY FINDING THAT THE MONEY FOUND IN THE RESPONDENT'S HOME ON AUGUST 11, 2010 WAS THE SAME AS MONEY WITHDRAWN FROM THE COMMUNITY BANK ACCOUNTS BY THE RESPONDENT ON AUGUST 2, 2010?

To determine whether substantial evidence exists to support a finding of fact, the appellate court must review the record in the light most

favorable to the party in whose favor the finding is entered. *In re Marriage of Gillespie*, 89 Wn.App. 390, 404, 948 P.2d 1338 (1997).

The trial court found that \$214, 998.00 recovered at the residence occupied by Lloyd is traceable from two (2) withdrawals made a short time prior to its discovery. CP at 486-487. Further, the trial court found that “no records have been located to support the existence of [other] concealed money, even though the financial records have been fully investigated.” CP at 487.

The testimony and exhibits presented by both parties suggest that Lloyd attempted to conceal or secure money. RP at 252, line 13-15; RP at 613. Neither Selisa nor her attorneys could point to an alternate source of this money, other than the previous withdrawal. CP at 487. By all accounts, this money was returned to the community coffers. CP at 486.¹

Based on the foregoing and in the light most favorable to Lloyd, the disputed finding should be affirmed. The oft repeated complaint about his behavior during the discovery process is not relevant to this particular finding.

¹ This Assignment of Error relates to a specific finding, while the Appellant’s Brief seemingly argues that the act of concealment warrants a form of punitive distribution of assets. Appellant’s Brief at 20-22. This is a different argument. As such, the portions not related to the Finding of Fact are not properly before this Court and should be disregarded.

III. DID THE COURT ERR BY FINDING THE COMMUNITY
PROPERTY GUNS HAD A VALUE OF ONLY \$40,000.00?

To determine whether substantial evidence exists to support a finding of fact, the appellate court must review the record in the light most favorable to the party in whose favor the finding is entered. *In re Marriage of Gillespie*, 89 Wn.App. 390, 404, 948 P.2d 1338 (1997).

Here, the Appellant misstates the trial court's ruling. The Decree entered requires Lloyd to pay Selisa \$40,000.00 for her "*interest* in the firearm collection." CP at 475, line 21. The trial court's findings purport the same. CP at 486, lines 10-11. As such, the value of the gun collection is not addressed. Of note, only two pistols were confirmed in Lloyd's possession as of April, 2011. CP at 486.

Lloyd testified that he gifted his guns to a relative, and while he wasn't a party to their subsequent sale, he believed they sold for \$40,000.00. RP at 260-261. There is debate about whether the sale involved all the guns, part of the guns, or any guns at all. See Appellant's Brief at 23-24.

If the collection was gifted and later sold for approximately \$40,000.00, assuming Selisa was opposed to the gift, she essentially

received the entire value as her separate award. This does not take into account whether portions of the collection were obtained prior to the meretricious relationship. On the other hand, if the collection is still possessed by Lloyd and valued at his estimate of \$100,000.00, she received 40 percent of their value, again not accounting for their designation as community or separate property. In either scenario, Selisa's award as it pertains to the gun collection was favorable in the extreme.

IV. DID THE COURT ERR IN AWARDING THE APPELLANT
\$800.00 PER MONTH IN SPOUSAL MAINTENANCE?

The trial court's decision on an award of maintenance is reviewed for an abuse of discretion. *In re Marriage of Zahm*, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999). An abuse of discretion occurs when the court bases its decision on untenable grounds or for untenable reasons. *In re Marriage of Foley*, 84 Wn.App. 839, 845, 930 P.2d 929 (1997). "An award of maintenance that is not based upon a fair consideration of the statutory factors constitutes an abuse of discretion." *Crosetto*, 82 Wn.App. at 558.

RCW 26.09.090 controls the awarding of maintenance. The court must consider (1) the post-dissolution financial resources of the parties;

(2) their abilities to independently meet their needs; (3) the time necessary for the party seeking maintenance to find employment; (4) duration of the marriage; (5) the standard of living during the marriage; (6) the age, physical, and emotional condition, and financial obligations of the spouse seeking maintenance; and (7) the ability of the spouse from whom maintenance is sought to meet his needs and financial obligations. RCW 26.09.090(a)-(f).

Maintenance awards are "flexible tool[s] by which the parties' standard of living may be equalized for an appropriate period of time." *In re Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984). The spouse who challenges the decision bears the heavy burden of showing an abuse of discretion by the trial court. *Zahm*, 138 Wn.2d at 226-27. "The only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of the relevant factors, the award must be just." *In re Marriage of Bulicek*, 59 Wn.App. 630, 633, 800 P.2d 394 (1990). The primary importance in the maintenance award is the parties' economic positions following the dissolution. *In re Marriage of Spreen*, 107 Wn.App. 341, 349, 28 P.3d 769 (2001). An award of maintenance that does not evidence a fair consideration of the statutory factors constitutes an abuse of discretion. *In re Marriage of Mathews*, 70 Wn.App. 116, 123,

853 P.2d 462 (1993). But nothing in RCW 26.09.090 requires the trial court to make explicit factual findings in its order on the given factors. *In re Marriage of Mansour*, 126 Wn.App. 1, 16, 106 P.3d 768 (2004).

The trial court's accounting of the parties' respective incomes and monthly expenses indicate that Lloyd, after the deduction for spousal support, has a "disposable income" of \$29.00. Selisa, on the other hand, has a "disposable income" of \$17.00 after the spousal maintenance award. CP at 482-483. This accounting was made after considering the factors enumerated by RCW 26.09.090(a)-(f). CP at 482-483. At no point in the Appellant's argument does she consider the disparity in living expenses, only the income disparity. See Appellant's Brief at 24-27.

The trial court's equalization through spousal maintenance could not be more precise using round numbers. In essence, Selisa is awarded all of Lloyd's Social Security benefits and a small portion of his VA disability pension. The trial court's ruling regarding spousal support is, therefore, just and equitable.

V. DID THE COURT ERR BY RECONSIDERING THE AGREED REIMBURSEMENT TO THE APPELLANT CONTAINED IN THE TEMPORARY ORDER ENTERED JUNE 30, 2011?

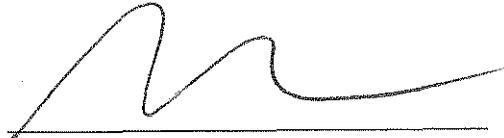
A valid stipulation is binding unless fraud, mistake, or misunderstanding is established. *De Lisle v. Fmc Corp.*, 41 Wn. App. 596, 597, 705 P.2d 283 (1985) (citing *Baird v. Baird*, 6 Wn. App. 587, 494 P.2d 1387 (1972)). In addition, the trial court is not bound by temporary orders preceding trial. *Lindsey v. Lindsey*, 54 Wn.App 843, 776 P.2d 172 (1989). Under RCW 26.09.060 “A temporary order...(b) May be revoked or modified; [and] (c) Terminates when the final decree is entered.” RCW 26.09.060(10).

In this case, the trial court ruled upon reconsideration that “if the pretrial agreement and order had been understood at the time of the oral ruling and entry of the decree, the division of property would have been adjusted for [sic] to reach the same overall division of property.” CP at 626. This statement illustrates the misunderstanding of the court, even assuming the temporary order was a “valid” stipulation. The court would have been within its authority to simply subtract \$49,300.00 from Selisa’s award of the liquid assets and require Lloyd to turn around and pay the same to her. Instead, the court cancelled the double recovery directly in accordance with *Lindsey* and *Baird*. CP at 627.

CONCLUSION

The Respondent respectfully requests that this Court affirm the lower court's rulings. In addition, the Respondent requests that this Court determine that the Respondent substantially prevails under RAP 14.2 and award reasonable attorney's fees and expenses under RAP 18.1.

Respectfully submitted this 12th day of September, 2013.

A handwritten signature in black ink, appearing to read 'Brett Billingsley', written over a horizontal line.

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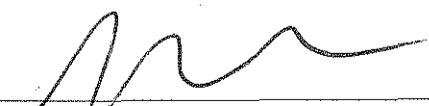
No: 31336-1

CERTIFICATE OF SERVICE

15 I certify that a copy of Respondent's Brief on this case has been and mailed to:

16 Christina Radzimska
17 WEBSTER LAW OFFICE, PLLC.
18 116 N. Main St.
19 Colville, WA 99114-2306

20 Dated this 12 day of Spk, 2013.

21 
22 _____
23 BRETT BILLINGSLEY, WSBA# 32084
24 Attorney for Respondent
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