

**FILED**

**SEP 22 2014**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 320227

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

Yakima Co. Superior Court No. 09-3-00322-2

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DIANE WOOD,

Respondent

v.

ZALE WOOD

Appellant.

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BRIEF OF RESPONDENT

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## I. STATEMENT OF CASE

Diane Wood was born on May 21, 1941, and she is 73 years old. She married Zale Wood on July 5, 1960, when she was 19 years old. *(RP 04/09/13, Page 13, Line 1)* The parties have two adult children from their marriage. *(RP 04/09/13, Page 13)* The parties lived in a small home on 17 acres which they purchased in 1980. *(RP 04/09/13, Page 14)* At the time of trial, Ms. Wood lived in the home and had nine goats and a llama that she cared for. *(RP 04/09/13, Page 14)* The home was 900 square feet. *(RP 04/09/13, Page 19)* There were two loans against the home at the time of trial. *(RP 04/09/13, Page 20)* One loan payment was for \$1,238 and a second mortgage payment was \$280. *(RP 04/09/13, Page 22)*

Ms. Wood had worked up until 1980 when they purchased the home. After the home purchase, she worked on the property, farming and raising her children. *(RP 04/09/13, Page 14)*

At trial, Ms. Wood reported health problems, which included congestive heart failure, which resulted in a hospitalization in 2009. *(RP 04/09/13, Page 48)*

At the time of trial, Mr. Wood lived with a female friend, with whom he shared living expenses. *(RP 04/09/13, Page 91)* His female companion owned the home where he resided.

## II. LEGAL ARGUMENT

### A. The Trial Court Properly Exercised its Discretion in its Maintenance Award.

This is a 49-year marriage. Both parties were in their 70s at the time of trial. Both were unemployed and relied upon income from pensions, Social Security, and L&I benefits received by Mr. Wood to live on.

At the time of trial, the parties to this action had little in the way of assets and a rather significant amount of debt mostly owed on their home. As a result, this was essentially a maintenance case.

RCW 26.09.090 provides that in a proceeding for dissolution of marriage, the court may grant a maintenance order for either spouse:

The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage or domestic partnership;

- (d) The duration of the marriage or domestic partnership;
- (e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and
- (f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

Mr. Wood cites In re Marriage of Rockwell, 141 Wn.App. 235, 170 P.3d 572 (2007), in support of his contention that he should pay no maintenance to his wife of 49 years. Mr. Wood claims the court cannot “calculate a specific formal valuation of one spouse’s Soc. Sec. benefits and award the other spouse a precise property offset based on that valuation.” (*Appellant Brief, Page 16*) The court did not do that in the case of Mr. and Mrs. Wood. No testimony was offered as to the value of Mr. Wood’s Social Security benefits. Rather, both parties testified as to what they received each month in benefits. As stated in Rockwell, *supra*:

“A trial court could not properly evaluate the economic circumstances of the spouses unless it could also consider the amount of social security benefits currently received.”

quoting, In re Marriage of Zahm, 138 Wn.2d 213, 223, 978 P.2d 498 (1999); Rockwell, *supra*, at 245.

In the present case, the court sought to “equalize the income” of the parties. (*RP 04/10/13, Page 169*) Other than personal property and approximately \$8,000 equity in the family home, there was little to divide but debt. Essentially, the court added up the total income of the

parties and ordered Mr. Wood to pay maintenance to his former wife of 49 years based on his far superior income. Mr. Wood's income included his income from various pensions, Social Security benefits received, as well as L&I benefits received through an L&I pension.

In Rockwell, supra, repeatedly cited by Mr. Wood, there is a clear mandate to leave the parties of a long-term marriage in roughly equal financial positions:

“In a long term marriage of 25 years or more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives. Washington Family Law Deskbook, § 32.3(3) at 17 (2d. ed. 2000); see also, Sullivan v. Sullivan, 52 Wash. 160, 164, 100 P. 321 (1909) (finding that for a marriage lasting over 25 years, ‘after [which] a husband and wife have toiled on together for upwards of a quarter of a century in accumulating property . . . the ultimate duty of the court is to make a fair and equitable division under all the circumstances’).

Rockwell, supra, at 243.

In the present case, there was no property with which to make a disproportionate division. The only way the court could leave the parties in roughly equal positions for the rest of their lives was through a maintenance award, which is precisely what the court did. (*RP 04/10/13, Page 169*)

Appellant cites In re Marriage of Zahm, 138 Wn.2d 213, 978 P.2d 498 (1999), in support of his challenge to the trial court's equitable decision. In Zahm, the trial court had categorized one spouse's Social Security benefits as community property, something that did not occur in

this case. However, in Zahm, both the Court of Appeals and the Washington Supreme Court found that this error was harmless. In Zahm, the Supreme Court referenced that although the trial court did erroneously characterize the Social Security benefits as community property, “it did not order an actual distribution of those benefits” Zahm, supra, at 501, and it affirmed the trial court.

In the Wood case, the judge did not reassign Mr. Wood’s Social Security benefits to Ms. Wood, nor did he order an actual distribution to Ms. Wood of those benefits. Rather, he included the Social Security income in Mr. Wood’s total income to determine an award of maintenance that was fair and equitable based upon this 49-year marriage. The court’s decision did not violate Zahm, Rockwell, or any other defining case law.

B. Mr. Wood’s L&I Income was a Proper Consideration to an Award of Maintenance.

At the time of trial, Mr. Wood was receiving time loss benefits through the Department of Labor & Industries with the State of Washington. This was a result of his on-the-job injury. Pursuant to RCW 51.36.060, when an industrial injury prevents a worker from returning to gainful employment, time loss payment is to be made.

Before entry of the Decree of Dissolution, it was determined that Mr. Wood would receive an L&I pension for the remainder of his life.

This income for life was properly considered by the court in making its maintenance award.

As Appellant correctly points out, his L&I benefits are intended to “restore the injured worker as nearly as possible to the condition of self-support as an able-bodied worker.” RCW 51.32.055. Certainly, this permanent monthly income, de facto wages for life, was properly before the court for purposes of determining maintenance.

The trial court agreed these benefits were Mr. Wood’s separate property. (*RP 04/10/13, Page 150*) In fact, by statute, post-separation earnings are separate property, RCW 26.16.140. Under Appellant’s theory as to separate property, the court could presumably never award maintenance, as all post-separation earnings are separate property. This is clearly not the law.

As with the Social Security income, the court did not assign any of these benefits to Ms. Wood, nor did the court “calculate a specific formal valuation” of these benefits. Rather, the court “merely considered these benefits when determining the parties’ relative economic circumstances at dissolution.” In re Marriage of Zahm, 138 Wn.2d 213, 217, supra.

C. The Court Properly Denied Respondent’s Untimely Motion to Continue.

Appellant alleges an abuse of discretion, because the trial court did not grant Mr. Wood a continuance of the hearing on the presentation of final orders. Appellant concedes the presentation was timely and properly before the court.

As was pointed out at the 09/18/13 presentation, copies of the proposed orders and calculations were sent to Mr. Wood's then attorney on 08/21/13 to determine if he had any objection. *(RP 09/18/13, Page 1)* Having received no response, a Notice of Presentation was filed on 08/28/13 setting the matter for hearing. No response was filed by Mr. Wood or his attorney. Mr. Wood's attorney did file a Notice of Intent to Withdraw, which was effective immediately on 09/03/13. *(CP, Page 96)*

Mr. Wood then filed a "Motion to Continue" on the day of the hearing. *(CP, Page 99; RP 09/18/13, Page 1)* At the 09/18/13 hearing, the judge asked Mr. Wood if the proposed final orders reflected the court's ruling:

**“THE COURT:** Mr. Wood, I know you were present at the trial and when I made my decision and the central question is does this document, the decree of dissolution and the findings of fact, do they accurately reflect what I decided, not necessarily what you agree with but do they accurately reflect what it was I decided?

**MR. WOOD:** Well, that's what I'm trying to say. I never had any input in that, so how can we agree to this. It's between you and him and I never – Velikanje never got into the agreement so he said, so I don't know.

**THE COURT:** Okay, but again, you were present when I made my decision –

MR. WOOD: Yes.

THE COURT: -- so are you saying that the documents prepared by Mr. Connaughton have different numbers in them from what I said in my decision?

MR. WOOD: I don't know. I don't remember that and I (inaudible) get the paperwork from it, so I have no idea."

*(RP 09/18/13, Page 3, Lines 7-19)*

The assertion that denying this untimely and meritless motion to continue was an abuse of discretion is a frivolous argument. The only basis that Mr. Wood could provide for continuing the presentation was that he was unhappy with his attorney and more likely, unhappy with the court's decision. It would have been an abuse of discretion to grant the motion as there were no facts whatsoever to support it. Further, the court advised Mr. Wood he could file a motion for reconsideration, which his new attorney did, obviating any claimed prejudice to Mr. Wood.

The granting or denying of a motion for continuance is discretionary:

"The granting or denying of a motion for continuance of the trial of a case, whether criminal or civil, rests within the sound discretion of the trial court, and this court will not disturb the trial court's ruling absent a showing that the trial court, in ruling upon the motion, either failed to exercise its discretion or manifestly abused its discretion." State v. Bailey, 71 Wn.2d 191, 426 P.2d 998 (1967); State v. Miles, 77 Wn.2d 593, 464 P.2d 723, 725, 464 P.2d 724, 726 (1970).

The balance of the argument made by Appellant under "Issue #2" provides either no supporting facts or statements that are blatantly

inaccurate. For example, at Page 24, Appellant claims, “Mr. Wood was forced to pay the entire monthly amount owed against the house for April, May, and June, 2013 when in fact, in its oral decision April 10, 2010, the court ruled the parties would split these payments.”

What counsel apparently fails to understand is that Mr. Wood received a credit against his maintenance obligation for the payments he made on the house for 100 percent of those payments. If, in fact, Mr. Wood were responsible for one-half of the house payments, in addition to the maintenance payments, as claimed, then he actually would owe Ms. Wood one-half of the house payment for those three months.

D. The Court Timely Rendered its Decision.

Counsel next asserts that the court failed to render its final decision within 90 days. As an initial matter, the court outlined its decision after the second day of trial. It then suggested that the house should be sold, since no competent evidence was produced as to the value of the home. (*RP 04/10/13, Pages 165-166*) The home was then unilaterally listed for sale by Mr. Wood and promptly sold.

The parties understood the decision the court provided. The house was sold and the proceeds preserved and divided equally. The final papers were prepared by Ms. Wood’s counsel and forwarded to Mr. Wood’s attorney. The presentation was noted for 09/18/13. No

objection was ever provided or filed by Mr. Wood or his attorney after the matter was noted for 09/18/13. There was no indication by Mr. Wood's attorney that the orders were inconsistent with the court's decision.

It is noteworthy that there was a court hearing on 05/31/13, wherein Mr. Wood was found in contempt for violation of a pretrial order. (*CP, Page 86*) It was requested that he also be found in contempt for violation of the court's oral decision, which the court denied. (*RP 05/31/13, Page 6*) At the same hearing, there was further discussion and clarification of the court's decision. It was represented by Mr. Wood's attorney that he had a cash offer on the home. (*RP 05/31/13, Page 17*)

In that hearing, the only issue that was not resolved was whether Ms. Wood would receive an increase to her Social Security benefit as a result of the divorce. (*RP 05/31/13, Page 17*) At that hearing, the court stated that the parties could come back to court after July 9, when the house would have been sold and the Social Security issue resolved. At that point, final papers could be entered. (*RP 05/31/13, Pages 17-18*) Ms. Wood filed a statement regarding these benefits on 07/02/13. (*CP, Page 89*)

The court's decision was made and entirely clear to all concerned well within the 90-day timeframe referenced by Appellant.

E. The Court Properly Considered the Law in Dividing Assets and Awarding Maintenance.

Appellant next claims that the court failed to apply the statutory factors in dividing the limited marital estate and awarding maintenance. In this 49-year marriage, the court indicated it was going to equalize the income of the parties. (*RP 04/10/13, Page 169*) The court mentioned, “when I’m considering maintenance, I’m conserving what’s the financial – relative financial condition of the parties and so on.” (*RP 04/10/13, Page 169*)

Appellant claims that the court did not determine the net value of the marital estate. As the court pointed out, no competent evidence was provided as to marital assets. The only asset of significant value was the house, which was sold and the equity divided equally. The marital debts were addressed, and the court divided those debts.

Appellant fails to explain how the court’s division of assets and debts equally, in this 49-year marriage, was an abuse of discretion.

Under Appellant’s argument, his failure to provide the court with a value for the house and items of personal property is a basis to reverse the trial court. Mr. Wood is responsible for this failure. Under invited error, the court is to consider “Whether the petitioner” affirmatively assented to the error materially contributed to it, or benefited from it. State v. Momah, 167 Wash.2d 140, 154, 217 P.3d 321 (2009). In the present case, to the extent there was any error, Mr. Wood materially

contributed to it by failing to get a home appraisal or offering testimony on personal property values.

Importantly, however, the primary asset was sold at Appellant's request, which provided the court with a value. The court then divided the proceeds.

The court awarded Mr. Wood the property items he requested. He also awarded Ms. Wood "the stuff in the house. He didn't want it." *RP 04/10/13, Page 167*) Under Appellant's theory, the court was required to value every item owned, including utensils, toasters, dishes, etc. If Mr. Wood wanted these property items valued, he should have provided evidence and testimony on the values.

F. The Court Properly Focused on the Present Financial Resources of the Parties, Rather Than Permitting Testimony on 49 Years of Competing "Contributions" and Alleged Dissipation of Assets

Appellant next claims that the court abused its discretion by excluding testimony regarding each party's contributions during the marriage and each party's conduct relative to preserving or dissipating community assets.

Ms. Wood testified, without objection, that Mr. Wood had a habit of spending money on scams. (*RP 04/09/13, Pages 34-35*) As an example, she mentioned a particular scam wherein a fraudulent check for

\$4,900 was sent to Mr. Wood. He then sent a check back to the scammer for \$2,900, losing the marital community \$2,900.

Mr. Wood was also a gambler and admitted to spending money on horse races throughout the marriage. (*RP 04/09/13, Page 89*) He also admitted to being involved in "Lotto Magic" at a cost of \$53 per month. Again, Mr. Wood's testimony was without objection. It would appear that Mr. Wood was engaged in a substantial amount of "waste" of marital assets.

In this 49-year marriage, Mr. Wood attempted to raise issues about Ms. Wood's claimed mismanagement of community funds during the course of the marriage. This was objected to as irrelevant and sustained.

A review of the transcript cited by Appellant (*RP 04/10/13, Pages 134-135*) indicates that Mr. Wood testified that he worked in Alaska from 1975 to 1991, and he claimed his Alaska Teamsters pension should have been larger. It is then referenced that the Appellant made an offer of proof (*Appellant Brief, Page 44*) and references *RP 04/10/13, Page 142*. That offer of proof provides as follows:

"MR. VELIKANJE: Your Honor, I was trying to address that inartfully [*sic*] but the point of 20 years of work in Alaska, he only gets 659. Regardless of fault is because they had to take a big draw to pay off a (*inaudible*) --

(*RP 04/10/13, Page 142*)

No timeframe is provided and the offer of proof is incomplete. It provides no indication of any waste of marital assets by Ms. Wood. Presumably, this was something that was paid off back in the 1980s or 1990s. How that would be relevant in this 49-year marriage to the court's determination of maintenance is unclear.

### III. ATTORNEY FEES ON APPEAL

RCW 26.09.140 provides authority for an award of attorney fees and costs and Ms. Wood requests fees. An additional basis for fees is Mr. Wood's continued intransigence during the dissolution action, along with the filing of this appeal. In re; Marriage of Wallace, 111 Wn.App. 697, 710 45 P.3d 1131 (2002).

DATED: September 17, 2014.



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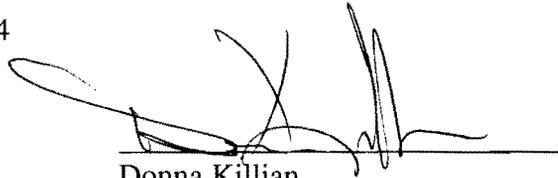
Blaine T. Connaughton, WSBA 19766  
Attorney for Petitioner

DECLARATION OF MAILING

I DECLARE under penalty of perjury under the laws of the state of Washington that the following is true and correct:

1. I am the legal assistant of Blaine T. Connaughton, over the age of 18, and competent to testify herein.
2. On 9/18/14, I sent a copy of Brief of Respondent, which includes this declaration, to Appellant's attorney, Ellen McLaughlin, by Attorney Messenger Service and by email to Ellen@emcloughlinlaw.com.

DATED: September 18, 2014

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

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