

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

In the Matter of the Marriage of	)	No. 63523-9-I
	)	
KATHLEEN JEAN JANES,	)	
	)	
Appellant,	)	
v.	)	
	)	
STEVEN CRAIG JANES,	)	UNPUBLISHED OPINION
	)	
Respondent.	)	FILED: November 8, 2010
	)	

Ellington, J. — In this dissolution matter, the trial court failed to make a just and equitable distribution of property. We remand for a revised decree of dissolution.

BACKGROUND

Kathleen Jean Janes (Kathy) and Steven Janes (Steve) were married 35 years. They lived on Whidbey Island, where Steve owned and operated a flooring business, The Janes Company. Kathy occasionally helped with the business, but mainly cared for the couple's two children. In addition to the business, the Janeses owned their family home and three commercial buildings.

Kathy and Steve separated in November 2003. Kathy is in poor health, and the parties stipulated that she is unable to work. The proceedings were highly adversarial, and Steve was found intransigent.

The court valued the couple's net community assets at approximately \$4.2

million.<sup>1</sup> In lieu of modifiable maintenance, Kathy requested a disproportionate 75/25 percent distribution of property. The court distributed the assets 55 percent to Kathy and 45 percent to Steve and awarded no maintenance. Kathy's distribution consists of the couple's three commercial buildings, valued at about \$1.72 million, and a \$560,000 equalization payment. Steve was awarded his business, valued at about \$1.145 million, and the family home, valued at about \$1.16 million.

The court found that Steve's tax returns accurately represent his income from his business. Those returns showed a monthly net income of between \$14,994 and \$29,278 for the four years before trial.

Pending trial, Kathy received temporary maintenance, which ended when she received the equalization payment. The court found that the three commercial properties distributed to Kathy will provide her with "stable rental income that keeps pace with the cost of living."<sup>2</sup> The court also found that the equalization payment, if invested in an annuity, would provide a stable income for her. The court declined to award attorney fees to Kathy.<sup>3</sup>

The court entered its decree, findings, and conclusions on January 13, 2009. On January 23, Kathy filed a motion for reconsideration. She noted the motion for hearing on April 27, 2009. The court subsequently struck the motion for untimeliness.

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<sup>1</sup> The only separate property was an individual retirement account Steve started after separation.

<sup>2</sup> Clerk's Papers at 135.

<sup>3</sup> Steve paid about \$92,000 in attorney fees for Kathy prior to trial.

Kathy filed her notice of appeal on May 22, 2009, seeking review of both the January 13, 2009 decree and findings and conclusions and the May 11, 2009 order striking Kathy's motion for reconsideration. A panel of judges ruled that both matters are properly before this court.

### DISCUSSION

Kathy's arguments arise from the fact that the court's distribution fails to provide her with any reliable source of income on which to live, whereas Steve continues to receive the same high income he had before. She challenges, as unsupported by substantial evidence, the court's findings that the division of property will allow her to support herself without continued spousal maintenance, that the three commercial properties will provide her with stable rental income that keeps pace with the cost of living, and that the \$560,000 property equalization payment will allow her to purchase an annuity, thereby generating stable income for her.

Kathy also challenges the court's conclusions that Steve should not be required to pay maintenance after making the \$560,000 equalization payment, that the distribution of property and liabilities is fair and equitable, and that Kathy should be required to pay her remaining attorney fees.

Kathy further assigns error to the court's refusal to consider her motion for reconsideration. She requests attorney fees and costs on appeal.

Steve responds that the court properly struck Kathy's motion for reconsideration as untimely, and that Kathy's appeal of the January 13, 2009 decision is untimely.<sup>4</sup> He

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<sup>4</sup> The court decided this issue in its order granting motion to modify filed September 8, 2009. The January 13, 2009 trial decisions are properly before this court.

also argues that any inequities in the property distribution were invited error, and requests attorney fees for a frivolous appeal.

*Motion for Reconsideration*

We first address Kathy's argument that the court erred by striking her motion for reconsideration.

"Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion. A trial court abuses discretion when its decision is based on untenable grounds or reasons."<sup>5</sup>

A motion for reconsideration must be filed within 10 days of the entry of the decision for which reconsideration is requested and must be noted for a hearing within 30 days of that decision.<sup>6</sup> Kathy timely filed her motion but did not note a hearing until April 27, 2009, more than two months past the deadline. The court did not abuse its discretion by striking the motion as untimely.

*Income-Producing Assets*

A trial court's findings will be sustained if supported by substantial evidence.<sup>7</sup> "Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise."<sup>8</sup>

The court found that "after the equalization payment is made, the wife will leave

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<sup>5</sup> Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 241, 122 P.3d 729 (2005) (citation omitted).

<sup>6</sup> CR 59(b).

<sup>7</sup> In re Marriage of Bernard, 165 Wn.2d 895, 903, 204 P.3d 907 (2009).

<sup>8</sup> Id. (quoting In re Marriage of Hall, 103 Wn.2d 236, 246, 692 P.2d 175 (1984)).

the marriage with a substantial amount of assets, including commercial rental properties, and will have the ability to support herself.”<sup>9</sup> The court awarded the commercial properties to Kathy so “she will have the ability to have stable rental income that keeps pace with the cost of living”<sup>10</sup> and found that “[b]y awarding the wife an equalization payment of \$560,000 the wife also has the ability to purchase an annuity which will provide a stable income for her.”<sup>11</sup>

These findings are not supported by substantial evidence.

(1) Rental Income From Commercial Properties. At trial, there was inconsistent testimony about whether the Janeses’ three commercial buildings produced rental income. Steve’s expert witness testified the buildings produced approximately \$5,500 in total rental income each month. But when asked how he formulated his conclusions, he admitted he had no documentation upon which to rely and was working from figures provided by Steve.

Steve, however, consistently contradicted his expert’s estimate of rental income from the commercial properties. He testified that the rental accounts do not produce cash flow adequate for major repairs, the rents from at least one of the buildings do not cover its mortgage, and very little remains after rental receipts are applied to operating expenses. Relying on his bookkeeper’s records, Steve testified that after all mortgages, taxes, and incidental expenses are paid for all three properties, there is “no cash flow to speak of other than \$100, \$200 a month coming out of there.”<sup>12</sup> He further

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<sup>9</sup> Clerk’s Papers at 130.

<sup>10</sup> Clerk’s Papers at 135.

<sup>11</sup> Id.

<sup>12</sup> Report of Proceedings (RP) (Sept. 24, 2008) at 702.

testified “[T]here is no gain from the rental properties. There’s only expenses in rental properties.”<sup>13</sup>

In its oral decision, the court observed that it had no evidence of the net income: “I don’t have the rental income; whether or not the rental income will cover the mortgage payments plus maintenance and vacancies.”<sup>14</sup>

The evidence the court did have was contradictory and unreliable, and was insufficient to persuade a fair-minded person of the premise that the commercial properties would produce a stable income for Kathy.

(2) Annuity Income From Property Equalization Payment. The court found that “[by] awarding the wife an equalization payment of \$560,000, the wife also has the ability to purchase an annuity which would provide a stable income for her.”<sup>15</sup> But the record contains no evidence whatsoever as to what annuity could be purchased with \$560,000 (or any other amount). The court’s finding constitutes the only mention of an annuity. Further, the court was aware that Kathy had over \$160,000 in separate debt at the time of trial, would cease to receive maintenance upon receipt of the equalization payment, and had negligible, if any, cash reserves. The court thus knew Kathy would need to pay debts and fees and living expenses before the equalization payment would be available for investment.

(3) Kathy’s Ability To Support Herself. The parties stipulated that Kathy cannot work because of ill health. The court made no finding as to Kathy’s living expenses,

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<sup>13</sup> RP (Sept. 25, 2008) at 921.

<sup>14</sup> RP (Nov. 5, 2008) at 25.

<sup>15</sup> RP (Nov. 19, 2008) at 52–53.

and made unsupported findings as to her likely future income. Therefore, the court had no basis upon which to find that she would have the ability to support herself.

### *Maintenance*

Kathy assigns error to the court's failure to award maintenance to her. We review a maintenance award under the abuse of discretion standard.<sup>16</sup> Where the disparity in earning power and potential is great, we must closely examine the maintenance award to see whether it is equitable in light of the postdissolution economic situations of the parties.<sup>17</sup>

Kathy requested a 75 percent distribution of property in preference to a modifiable award of maintenance. The court noted, "[Y]ou have made no proper request for spousal maintenance, but rather a request for a disproportionate award of the assets to the wife. . . . [s]o I am working under that assumption at least."<sup>18</sup> The court's attempt to honor Kathy's preference was not an abuse of discretion.<sup>19</sup>

The court also decided, however, that maintenance would be improper under In re Marriage of Barnett.<sup>20</sup> In Barnett, a couple separated after 44 years of marriage.<sup>21</sup> The court awarded Mrs. Barnett a \$100,000 lien against the couple's salvage business

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<sup>16</sup> In re Marriage of Mueller, 140 Wn. App. 498, 510, 167 P.3d 568 (2007).

<sup>17</sup> Mansour v. Mansour, 126 Wn. App. 1, 16, 106 P.3d 768 (2004) (quoting In re Marriage of Sheffer, 60 Wn. App. 51, 802 P.2d 817 (1990)).

<sup>18</sup> RP (Nov. 5, 2008) at 4–5.

<sup>19</sup> We note that the court has some tools available to protect against misuse of the modification procedure, including setting baseline requirements before modification may be requested. See 1 Wash. State Bar Ass'n, Family Law Desk Book § 27.7, at 27-15 (2d ed. 2000 & Supp. 2006)

<sup>20</sup> 63 Wn. App. 385, 818 P.2d 1382 (1991).

<sup>21</sup> Id. at 386.

as a means of distributing to her half its value.<sup>22</sup> The court also awarded her \$500 per month maintenance for the rest of her life, payable from the monthly proceeds of scrap metal sales.<sup>23</sup> The reviewing court found that the maintenance award was effectively a distribution of assets.<sup>24</sup> The award of both the lien and maintenance payments, therefore, was duplicative, and was held to be an abuse of discretion.

Relying on Barnett, the court below concluded that because it had distributed to Kathy her share of the marital assets, it would be error to “[also] distribute the value of the business through monthly maintenance amounts.”<sup>25</sup> But here, an award of maintenance would not function as a means of property distribution and would not be tied to any asset. Rather, it would be a means of curing the disparity in the parties’ economic circumstances. The court was not precluded from awarding maintenance to Kathy under Barnett.

Despite the court’s misapplication of Barnett, the court did not abuse its discretion by deciding to honor Kathy’s request for a disproportionate distribution of property in lieu of maintenance. The abuse of discretion lies in the overall distribution scheme.

#### *Economic Parity at Dissolution*

The court’s goal in arriving at a property division is to make a just and equitable distribution of marital property.<sup>26</sup> The court must consider the nature of the property,

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<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Id. at 388.

<sup>25</sup> Clerk’s Papers at 130.

<sup>26</sup> RCW 26.09.080.



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duration of the marriage, and the economic circumstances of each spouse upon dissolution.<sup>27</sup> The court has broad discretion in distributing marital property, and its decision will be reversed only if there is a manifest abuse of discretion.<sup>28</sup> If a decree results in a patent disparity in the parties' economic circumstances after a long-term marriage, a manifest abuse of discretion has occurred.<sup>29</sup>

Kathy argues the court's distribution of property leaves the parties in patent economic disparity after a 35-year marriage and is not just and equitable. We agree.

The court distributed the community property 55/45; awarding Kathy about \$2.3 million in assets and Steve about \$1.9 million in assets. But given the nature of the assets, this means Steve continues to enjoy a net income exceeding \$20,000 per month,<sup>30</sup> whereas Kathy has no source of income. According to her financial affidavit filed in this court, Kathy now receives \$683 monthly in social security income. Steve's financial affidavit says his current monthly net income is \$13,386. Steve argues that Kathy can sell the buildings and live on the proceeds. But there is no evidence of any market for the commercial properties, and Steve need not sell his share of the marital assets in order to live. The property distribution was inequitable.

The court gave Kathy the opportunity to reject the commercial properties. She did not. Steve argues Kathy thus waived any objection to that part of the award.<sup>31</sup>

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<sup>27</sup> Id.

<sup>28</sup> In re Marriage of Rockwell, 141 Wn. App. 235, 242–43, 170 P.3d 572 (2007).

<sup>29</sup> Id. at 243.

<sup>30</sup> This is the approximate average of his net monthly income from 2004 through 2007, before he made temporary maintenance payments to Kathy.

<sup>31</sup> Steve also argues this constituted invited error. We disagree. The error here is not in the specifics of the distribution, but in its inequitable result.

Steve cites no authority for this proposition. But, in any event, we fail to see how Kathy's acquiescence in one aspect of the distribution plan amounts to waiver of the right to an equitable property division.

#### *Attorney Fees*

The court must balance the needs of the spouse requesting attorney fees with the ability of the other spouse to pay.<sup>32</sup> The court declined to award fees to Kathy, apparently in the belief she had sufficient assets to bear her own. As discussed, Kathy received no liquid assets beyond the equalization payment, much of which was required to retire existing debt incurred for living expenses, taxes (including taxes due on the buildings at the time of transfer), and attorney fees. She is therefore without liquid assets. We doubt this was the court's intent.

A substantial award of property does not preclude an award of fees based on relative need and ability to pay.<sup>33</sup> On remand, the issue of fees should be considered in light of the revised distribution of property.

When considering whether to award fees on appeal in a dissolution, the court should examine the arguable merit of the issues on appeal and the financial resources of the respective parties.<sup>34</sup>

Steve requests attorney fees on appeal on grounds that Kathy's appeal has no merit.<sup>35</sup> As is obvious from the above discussion, we disagree.

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<sup>32</sup> See Mansour, 126 Wn. App. at 16–17; RCW 26.09.140.

<sup>33</sup> In re Marriage of Morrow, 53 Wn. App. 579, 590, 770 P.2d 197 (1989).

<sup>34</sup> In re Marriage of Booth, 114 Wn.2d 772, 779, 791 P.2d 519 (1990).

<sup>35</sup> Steve cites In re Marriage of Healy, 35 Wn. App. 402, 406, 667 P.2d 114 (1983).

According to Kathy's affidavit, she has no funds with which to pay her fees. On the basis of need and ability to pay, we award attorney fees to Kathy on appeal.

The court's property distribution is not factually supported and was inequitable, and is reversed. On remand, the court shall also reconsider its determinations regarding maintenance and attorney fees with the objective of arriving at a distribution that leaves the parties in approximate economic parity.

Reversed and remanded for further proceedings consistent with this opinion.

Edmonton, J

WE CONCUR:

Leach, a.c.j.

Grosse, J