

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TAMRA K. ROBINSON,)	No. 64382-7-I
)	
Appellant,)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
TERRY LEV ROBINSON,)	
)	
<u>Respondent.</u>)	FILED: May 9, 2011

Schindler, J. — Tamra Robinson appeals entry of the decree of dissolution, findings of fact and conclusions of law, and the child support order. Tamra argues the court erred (1) in characterizing and valuing assets and liabilities, (2) in dividing the property, (3) in not awarding additional maintenance, (4) in not using the current child support schedule, and (5) in refusing to award attorney fees.¹ Because the trial court did not use the current child support schedule and worksheets in effect at the time of entry of the child support order, erred in calculating gross income, and did not use the correct figure in calculating the buy-in amount for the business, we reverse and remand to correct those errors. In all other respects, we affirm.

FACTS

Terry and Tamra Robinson were married for 14 years. Their children were 13,

¹ We refer to the parties by their first names for clarity. No disrespect is intended.

11, 9, and 4 at the time of the dissolution trial in July 2009.

Terry is part owner of Attorneys' Messenger and Process Services Inc., LMI Office Supply, Spino Bonding Service, and LMI Notary Service (collectively AMS). AMS provides bonding and notary services, as well as supplies to law offices. Terry and Tamra purchased a 45 percent share of the company from Victor Spino for approximately \$105,000. Terry pays \$900 each month to Spino's estate on the amount owed. Terry's uncle Morris Sharon is the majority owner of the business. Terry earns a salary of approximately \$8,800 per month, together with 45 percent of the net profits of AMS, which averages approximately \$5,450 per month.

After the parties separated in August 2008, Tamra and the four children remained in the family home. Terry continued to pay the community expenses, including the mortgage, the home equity line of credit, preschool fees, and the minimum monthly amount due on community credit card debt. Terry also paid \$1,990 each month in support. Tamra said that after separation, she incurred over \$60,000 in debt, not including attorney fees.

Tamra returned to school to obtain a degree in nursing. At the time of the trial in 2009, Tamra was attending school full time, working one twelve-hour shift each week as a nurse technician, and twelve hours per month as a childbirth and lactation educator. Tamra testified that after graduating in June 2011, she expected to earn \$43,000 a year as a registered nurse. However, Tamra expressed concern that back pain could limit her nursing career.

In June 2009, the parties agreed to a parenting plan designating Tamra as the

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primary residential parent. Tamra and Terry also agreed to sell the family home and one of the cars. Tamra and Terry could not agree on the characterization and valuation

of assets and liabilities, the amount of maintenance, and child support.

A four day trial took place in July 2009. In addition to Tamra and Terry, real estate appraisers and accountants also testified at trial. The court found that the total fair market value of AMS was \$187,084 and, at the time of separation, the parties owed \$39,648 as the buy-in amount for the business, resulting in a net value of \$147,436. The court also found that the parties owed \$20,000 to AMS for unauthorized personal expenses. The court awarded AMS, the \$20,000 debt, and the remaining amount owed for the buy-in to Terry.

The court found that the fair market value of the home as of June 2009 was \$675,000. With a mortgage balance of \$292,000 and a home equity line of credit, balance owing was \$110,300. Until the family home sold, the court ordered Tamra to pay the mortgage of \$2,142 per month, and Terry to make payments on the home equity line of credit and the Chase Visa account. The court ruled that after the home sold and the equity line of credit and Chase Visa amount was paid off, the remaining proceeds would be divided “such that each party receives 50% of the net community property.”

The court awarded the Suburban to Tamra.² By agreement after the separation, Tamra sold the Volvo for \$11,000. The court found that Tamra paid \$1,000 on the credit card balance owed to Chase Visa and kept \$10,000 as a predistribution of community property.

² In her reply brief, Tamra concedes that the court found that Terry owed \$40,000 to his parents to pay his attorneys and that his attorney fees totaled \$64,375, of which \$18,800 owed. Tamra concedes that the court did not intend to charge her rent for the community home after it is sold. There is nothing in the record that suggests she would be required to pay rent. Tamra acknowledges that the court credited her with \$1,000 from the sale of the Volvo, which she used to pay the Chase Visa credit card.

The court ordered Terry to pay Tamra \$3,000 per month in maintenance for two years beginning October 1, 2009, and ordered Terry to pay \$1,499 per month in child support. The court did not award attorney fees to either Tamra or Terry.³

ANALYSIS

Characterization And Valuation Of Property

We review the court's findings of fact for substantial evidence. In re Marriage of Skarbek, 100 Wn. App. 444, 447, 997 P.2d 447 (2000). The court's "classification of property as separate or community is a question of law." Skarbek, 100 Wn. App. at 447. "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." Bering v. SHARE, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). Where the trial court has weighed the evidence, the reviewing court's role is simply to determine whether substantial evidence supports the findings of fact, and if so, whether the findings in turn support the trial court's conclusions of law. In re Marriage of Greene, 97 Wn. App. 708, 714, 986 P.2d 144 (1999). A court should "not substitute [its] judgment for the trial court's, weigh the evidence, or adjudge witness credibility." Greene, 97 Wn. App. at 714.

A court has broad discretion in valuing property in a dissolution action, and its valuation will not be reversed on appeal absent a manifest abuse of discretion. In re Marriage of Gillespie, 89 Wn. App. 390, 403, 948 P.2d 1338 (1997). A manifest abuse of discretion occurs when the discretion was exercised on untenable grounds. In re

³ Tamra does not challenge the division of personal property and funds from various bank accounts and life insurance policies equally.

Marriage of Muhammad, 153 Wn.2d 795, 803, 108 P.3d 779 (2005). A trial court does not abuse its discretion by assigning values to property within the scope of evidence.

In re Marriage of Soriano, 31 Wn. App. 432, 435, 643 P.2d 450 (1982). Findings of fact supported by substantial evidence will not be disturbed on appeal. Thorndike v.

Hesperian Orchards, Inc., 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

Characterization Of The Volvo As Community Property

Tamra contends the court erred in finding that the Volvo was community property. Assets acquired during a marriage are presumed to be community property.

In re Marriage of Short, 125 Wn.2d 865, 870, 890 P.2d 12 (1995). A party can rebut this presumption by showing by clear, cogent and convincing evidence that the asset was acquired as separate property. In re Marriage of Zahm, 91 Wn. App. 78, 86, 955 P.2d 412 (1998).

Tamra testified that the Volvo was a gift because Terry purchased the car near her birthday and Hanukkah, and did not give her any other gifts on those occasions. Terry testified that the car was not a gift but was purchased as the family car, and that the title was in his name. Because the record shows that the Volvo was purchased with community funds, and the court found Terry's testimony more credible than Tamra's, we conclude the court did not err in determining the Volvo was a community asset.

Valuation Of The Suburban

Tamra argues that the trial court abused its discretion by valuing the 2001 Suburban at \$9,535. Tamra relies on her testimony at trial that she believed the Suburban was in "poor" condition and worth only \$4,000. Terry testified that he

believed the car was worth between \$5,000 and \$10,000. In determining the value of the Suburban, the court relied on Tamra's answers to interrogatories. In the answers to interrogatories, Tamra states that the Suburban is worth \$9,535 based on the Kelley Blue Book value for a 2001 in "fair" condition. The court did not abuse its discretion in determining the value of the Suburban based on Tamra's answers to interrogatories.

Post-separation Community Expenses

Tamra argues the court abused its discretion by declining to consider the post-separation debt that she incurred for community expenses. However, because the record shows that Terry also incurred \$47,529 in community expenses after the parties separated that the court did not take into account, the court did not abuse its discretion by declining to credit either party with post-separation debt.

Tamra also argues that the court erred in failing to credit Terry with \$611 for a dividend check from a community investment that Tamra delivered to him "after separation." Because there was no evidence that the funds still existed at the time of trial, the court did not abuse its discretion in failing to credit the \$611. In re Marriage of White, 105 Wn. App. 545, 549, 20 P.3d 481 (2001).

Valuation Of The Business

The court found the business had a gross fair market value of \$187,084 as of November 7, 2008 based on the valuation report prepared by Terry's expert. The court also found that "[t]he parties owed \$39,648 on the 'buy in' contract at the time of separation, for a net . . . value of \$147,436."

Tamra challenges the trial court's decision to use the date of separation in

determining the buy-in amount owed for the business, while using the November 2008 valuation of the business. Tamra asserts that relying on the November 7, 2008 valuation date of the business included a decrease in value due to the economic downturn.

The court has broad discretion in determining the valuation date for an asset. Koher v. Morgan, 93 Wn. App. 398, 404, 968 P.2d 920 (1998). While some states require a particular valuation date for an asset, Washington courts have discretion to determine which date to use for each asset. Lucker v. Lucker, 71 Wn. 2d 165, 167-68, 426 P.2d 981 (1967).

The valuation of the business and the amount owed on the buy-in contract are separate. Any change in the value of the business did not change the amount owed under the buy-in agreement. The court's decision to use different valuation dates was not an abuse of discretion.

Tamra also argues that the amortization schedule does not support the court's determination of the amount owed for the buy-in. Terry concedes that the number used by the court is not correct but argues that because the difference between the correct amount owed of \$40,197 and the court's calculation of \$39,648 is insignificant, it is not reversible error. On remand, the court should correct the amount used for the buy-in calculation.

Community Expenses Paid By The Business

Tamra argues substantial evidence does not support the trial court's finding that the community owed "\$20,000 for personal expenses that were paid by the business in

2007 and 2008.” We disagree.

For the first time on appeal, Tamra argues that the court should have used only the unauthorized expenditures testified to by accountant Rodger Mulholland and the debt should be considered income to Terry. Mulholland testified that AMS made unauthorized expenditures for medical and other personal expenses totaling \$11,369. Mulholland testified that AMS considered the expenditures as a loan to the community. Tamra’s forensic accountant Linda Saunders testified that there were additional unauthorized expenditures totaling over \$10,000. Substantial evidence supports the court’s finding that the community owed \$20,000 to the business.

Cash Retained By Business

Tamra contends the trial court erred in failing to award her 45 percent of the cash retained by the business to cover the day to day business operations. AMS annually retains between \$40,000 and \$47,000 in an account to cover the “cash flow” of the business. Because the valuation of the business took into account gross receipts, expenses, profit and loss, owner benefits, and net profit and loss, the trial court did not abuse its discretion in declining to separately award the amount in the cash-flow account.

Division Of Property

Tamra asserts that the distribution of property was not just and equitable. Tamra argues that because the community home had not sold when the decree was entered, the court could not divide the community assets and liabilities equally.

The trial court's division of property in a dissolution action is guided by statute.

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RCW 26.09.080 requires the court to consider a number of factors in making a “just and equitable” distribution of the marital property, including (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 each spouse at the time the division of the property is to become effective.

All of the property, both community and separate, is before the court for

distribution. In re Marriage of Olivares, 69 Wn. App. 324, 328, 848 P.2d 1281 (1993). The trial court has broad discretion in distributing marital property, and its decision will be reversed only if there is a manifest abuse of discretion. In re Marriage of Griswold, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002). The trial court is in the best position to determine under the circumstances what is “fair, just and equitable.” In re Marriage of Brewer, 137 Wn.2d 756, 769, 976 P.2d 102 (1999) (quoting In re Marriage of Hadley, 88 Wn.2d 649, 656, 565 P.2d 790 (1977)).

The trial court’s stated goal was to achieve an equal division of the community property. The draft final decree stated that Terry should receive 48 percent of the net proceeds from the sale of the home and Tamra would receive 52 percent. At the October 2 hearing on entry of the decree, Tamra’s attorney argued that because the court did not know the actual value of the home, the court could not know whether the amount awarded would result in an equal division of community property. In response to Tamra’s concerns, the court changed the wording of the decree to clarify that regardless of the value of the home, the net proceeds “shall be divided such that each party receives 50% of the net community property.”

Tamra argues that the division of community property was not equitable because the court did not take into account the separate debt Tamra incurred after the parties separated. Tamra also asserts that the court did not take into account whether she would be able to support herself and her children or whether the overall award was equitable. However, contrary to Tamra’s arguments, the record shows that the court considered the community and separate property and the economic circumstances of

each party, including Tamra's earning potential as a nurse. The main assets owned by the parties were the business and the family home. As described, the court ruled that the net proceeds from the house should be distributed to achieve an equal division. The court also awarded Tamra two years of maintenance. We conclude the trial court did not abuse its discretion in determining a just and equitable distribution of the parties' assets and liabilities.

Maintenance

Tamra challenges the trial court's decision to award only two years of maintenance. An award of spousal maintenance is within the broad discretion of the trial court. In re Marriage of Bulicek, 59 Wn. App. 630, 633, 800 P.2d 394 (1990). The only limitation on the amount and duration of maintenance under RCW 26.09.090 is that the award must be just. In re Marriage of Luckey, 73 Wn. App. 201, 209, 868 P.2d 189 (1994). The relevant statutory factors the court must consider include the financial resources of each party; the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; the standard of living during the marriage; the duration of the marriage; and the time needed to acquire education necessary to obtain employment. RCW 26.09.090; In re Marriage of Vander Veen, 62 Wn. App. 861, 867, 815 P.2d 843 (1991).

The trial court awarded Tamra \$3,000 per month in maintenance for two years based on Terry's ability to pay, the length of the marriage, the time line for completing her nursing degree, and "the disparity in incomes which would otherwise result if maintenance in this amount were not awarded." Tamra argues that the court erred in

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not awarding a higher amount of maintenance per month for an additional year and a half. She also contends that her monthly expenses were \$6,443 but the combined

award of maintenance and child support totaled only \$4,499.

Even though Tamra testified that she has back problems that could limit her nursing career, she does not challenge the court's finding that she will be able to work full time as a nurse when she completes her degree.⁴ And at trial, Tamra testified that "she anticipates becoming fully employed upon graduation" and estimates that "she can attract a salary of approximately \$43,000 gross per year." Tamra's argument on appeal that the court abused its discretion in not awarding her more maintenance focuses primarily on Terry's ability to pay. Because the record reflects the trial court addressed all of the statutory factors, including Terry's ability to pay, we conclude the decision to award maintenance for only two years was not an abuse of discretion.

The three cases Tamra cites in support of her argument that the court's award of \$3,000 per month for two years was an abuse of discretion are distinguishable. In In re Marriage of Morrow, 53 Wn. App. 579, 580-81, 770 P.2d 197 (1989), the court awarded the spouse lifetime maintenance of \$2,200 per month because she suffered from diabetic retinopathy, which occasionally rendered her legally blind and limited her ability to work. In In re Marriage of Tower, 55 Wn. App. 697, 698-99, 780 P.2d 863 (1989), the spouse suffered from multiple sclerosis. The court awarded her maintenance of \$100 per month until the children were emancipated, at which time maintenance would increase to \$700 per month. In In re Marriage of Hurd, 69 Wn. App. 38, 43-44, 848 P.2d 185 (1993), the spouse also suffered from multiple sclerosis. The court awarded her \$500 per month in maintenance and the cost of medical insurance.

⁴ Tamra graduated in 2010.

Child Support

Tamra challenges the trial court's calculation of Terry's gross income in the child support order, the decision not to exceed the economic table, and the award of the tax exemptions. We review the child support order for abuse of discretion. In re Marriage of Bell, 101 Wn. App. 366, 371-72, 4 P.3d 849 (2000). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A court's decision is manifestly unreasonable if it is based on an incorrect legal standard. Littlefield, 133 Wn.2d at 47.

The court entered the child support order on October 2, 2009. New economic schedules and worksheets for calculating child support went into effect on October 1, Laws of 2009, ch. 84, § 6. Nonetheless, the court did not use the new schedule in calculating child support. The trial court must use the current child support schedule and worksheets in effect when the child support order is entered. RCW 26.19.035; see Vander Veen, 62 Wn. App. at 864. Accordingly, we remand to recalculate child support using the child support schedule and worksheets currently in effect. However, because we anticipate that Tamra may raise the same arguments she makes on appeal, we address whether the court erred in calculating Terry's gross income, the decision not to exceed the economic table, and the award of tax exemptions.

Tamra argues that the court should have added \$10,800 to Terry's gross income because the evidence shows that the business, not Terry, made the \$900 monthly payments to Spino's estate on the buy-in contract. But because the court expressly

found Terry's testimony that the business did not make the monthly payment credible, the court did not err in refusing to include the buy-in amount in his gross income.

Tamra also argues that in calculating Terry's gross income, the trial court should not have deducted \$19,494 in medical insurance premiums. In calculating gross income, the court must include all income and wages from any source, including "[c]ontract-related benefits" such as health insurance premiums. RCW 26.19.071(3). The trial court found that the premiums should be deducted because "[h]ealth insurance premiums should not be included as income for purposes of calculating child support or maintenance." But because health insurance premiums are not among the permitted deductions under RCW 26.19.071(3), we conclude the court erred in deducting the premiums from its calculation of Terry's gross income.

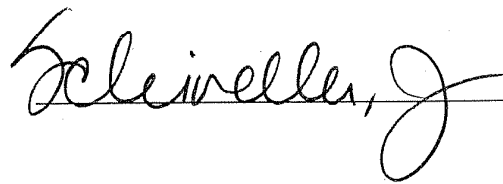
Tamra asserts that the court should have exercised its discretion to exceed the economic table amount in determining child support. Because the trial court has discretion to decide whether to set the basic child support obligation at an amount that exceeds the economic table, the trial court's decision was not an abuse of discretion. In re Marriage of McCausland, 159 Wn.2d 607, 620-21, 152 P.3d 1013 (2007).

Tamra also asserts the court should have awarded two tax exemptions to each parent, rather than three to Terry and one to Tamra. Tamra claims that because she will have to pay taxes on the maintenance, she is entitled to an additional exemption. Under RCW 26.19.100, "[t]he court may divide the [tax] exemptions . . . , alternate the exemptions between the parties, or both." The court acted within its discretion in awarding tax exemptions.

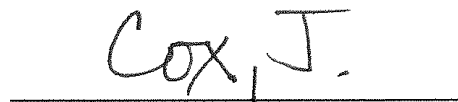
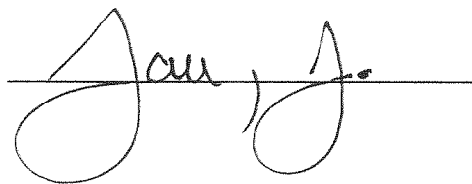
Attorney Fees

Finally, Tamra contends the trial court abused its discretion in refusing to order Terry to pay a portion of her attorney fees. The award of attorney fees is within the discretion of the trial court and will not be reversed on appeal unless it is untenable or manifestly unreasonable. Dakin v. Dakin, 62 Wn.2d 687, 693, 384 P.2d 639 (1963). At the time of trial, Tamra incurred attorney fees of approximately \$36,000 and Terry incurred approximately \$65,000 in attorney fees. Both parties obtained loans to pay fees. The trial court found that Terry borrowed \$40,000 to pay his attorney fees and still owed \$18,800. The court concluded that “[w]hile each party has the need for assistance with their attorney fees and costs neither party has the ability to pay.” The trial court did not abuse its discretion in not awarding attorney fees to Tamra.

We remand to correct the buy-in amount, to recalculate Terry’s gross income and enter a child support order using the current schedule and worksheets. In all other respects, we affirm.⁵



WE CONCUR:



⁵ We deny Tamra’s request for fees on appeal.