

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of)
SYLVIA FLYNN,) No. 64429-7-1
Respondent,) DIVISION ONE
and) UNPUBLISHED OPINION
DENNIS FLYNN,)
Appellant.) FILED: March 28, 2011

Grosse, J. — When, as here, the trial court properly considers the statutory factors in support of a property distribution award in a dissolution proceeding and the record supports the trial court’s findings, this amounts to a proper exercise of discretion and we will not disturb the court’s award. Accordingly, we affirm.

FACTS

Sylvia and Dennis Flynn were married in 1989.¹ They have two children, an 18-year-old daughter and a 12-year-old son.² Sylvia has a high school education and Dennis has a college degree in aeronautical science. Dennis served in the military, worked as a commercial airline pilot, and then worked in the real estate industry for approximately 20 years. In 1994, the couple purchased a mortgage company, United Mortgage, and operated it together. The company made loans to individuals that were

¹ For simplicity, the parties will be referred to by their first names.

² These were their ages at the time of trial. The parenting plan at issue addresses only the son.

secured by a promissory note and deed of trust on their homes. Dennis worked as a loan officer and Sylvia did the bookkeeping.

By 2007, the marriage began to deteriorate and Dennis admitted to having an affair with an employee of the company. In late June 2007, the couple agreed to separate and attend counseling. Dennis moved into the family's vacation home in Olalla, Washington, during this time.

During the separation, the children lived with Sylvia. In addition to caring for the children, Sylvia worked two jobs in order to meet the family's expenses, including the mortgages on the couple's real properties. She worked over 40 hours a week as a care-team coordinator for a home health-care company earning \$16.50 per hour and also worked a few hours a week at the mortgage company.

In October 2007, Sylvia discovered child pornography on Dennis's computer.³ Dennis was on a vacation in Thailand with a friend at the time. Sylvia eventually reported this to the police. The police obtained a search warrant and found pornography downloaded to Dennis's computer, including "preteen hardcore" pornography. Police also found several files on the computer containing child pornography, several videos of child pornography, and "trace evidence [of] child pornography-related search terms."

Dennis was arrested and charged with possession of child pornography. Dennis remained in custody for 24 days. During that time, Sylvia served him with divorce papers on November 9, 2007. The charges were ultimately dismissed, based on

³ There are conflicting accounts in the record about how she made this discovery, but the computer was located in the vacation home in which he was residing at the time.

evidence that someone else may have been downloading the child pornography while he was out of the country.

After Dennis was released from jail, he became depressed, and had suicidal thoughts. He sought medical help and was prescribed medication for anxiety and depression. He also sought help from the Veterans Administration to apply for disability benefits and in April 2008 was approved to receive Social Security disability benefits. The Social Security administration determined that he was disabled due to “mental devastation” and paid benefits to him dating back to December 2007. Additionally, Dennis received unemployment benefits because he was unable to work during this time.

Dennis also ceased assisting Sylvia in managing their finances and by the time of trial Sylvia had paid off \$200,000 in community debt. Some of those payments were made from community assets, but some were also made from her postseparation earning and loans from family. She also had to pay \$2,600 in unemployment taxes for the mortgage business due to Dennis’s receipt of unemployment compensation and disability benefits.

While the dissolution action was pending, Sylvia discovered that Dennis had diverted community assets to his girl friend and friends. In 2006, he conveyed a deed of trust to a friend against a rental property they owned in Maple Valley. According to Sylvia, the deed of trust had been paid off in 2007, but Dennis allowed his friend to record the deed against the property in 2008 and make a demand for payment against Sylvia. Sylvia also discovered that without her knowledge, Dennis had assigned two

separate deeds of trust they owned to the woman with whom he was having an affair.

The parties proceeded to trial on the dissolution. The trial court awarded Sylvia a disproportionate share of the property. Specifically, the court awarded to Sylvia the residential home (valued at \$679,000, but subject to mortgages totaling \$781,270.73), a rental home in Kent (valued at \$504,000, but subject to a mortgage of \$534,048.74), a rental property in Tacoma (valued at \$180,000 with no mortgage); a commercial building in Kent (valued at \$450,000, subject to mortgages totaling \$420,744.45); two promissory notes secured by deeds of trust (total value of \$31,000); \$35,000 from the sale of the couple's real property; and vehicles valued at approximately \$64,000 total. The court awarded to Dennis the Olalla home (valued at \$237,000, subject to two mortgages of \$220,000 and \$20,000); a rental property in Maple Valley (subject to a mortgage in undisclosed amount); 10 promissory notes secured by deeds of trust (total value of \$159,561.53); and vehicles valued at \$12,000. The court also ordered that Dennis be entirely responsible for the outstanding community debt of \$25,418.78. The court entered findings of fact and conclusions of law in support of its order.

The court further ordered Dennis to undergo a sexual deviancy evaluation and reserved issuing a residential schedule for visitation with the son pending receipt of the evaluation. The court also awarded attorney fees to Sylvia in the amount of \$50,000. Dennis appeals.

ANALYSIS

I. Consideration of the Parties' Economic Circumstances

Dennis contends that the trial court did not properly consider the factors under

RCW 26.09.080 because it failed to account for the fact that his disability limited his earning capacity and rendered him economically worse off than Sylvia. We disagree.

The trial court has broad discretion to determine distribution of property and liabilities in marriage dissolution proceedings.⁴ “The trial court is in the best position to assess the assets and liabilities of the parties and determine what is ‘fair, just and equitable under all the circumstances.’”⁵ We will not reverse a trial court’s property distribution determination on appeal absent a showing of manifest abuse of discretion.⁶

RCW 26.09.080 provides that in a proceeding for disposition of property following a dissolution:

the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership; and
- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

In support of its order of property distribution, the trial court made the following findings of fact:

The Respondent shall bear the disproportionate portion of community debt together with his own debt created after date of separation. The Court thereby awards the petitioner community property which is unencumbered and found in

⁴ Brewer v. Brewer, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

⁵ Brewer, 137 Wn.2d at 769.

⁶ Brewer, 137 Wn.2d at 769.

Tacoma at 5334 N 47th St. Tacoma, Washington, with equity amount of \$180,000, subject to taxes owed. This award is made because the record shows that the Respondent's [sic] intentionally squandered community assets with transfer of community property interest to third parties without Petitioner's consent. This type of economic misconduct is especially egregious given the respondent's peculiar knowledge of real estate and mortgage lending. Washington law simply put does not condone this kind of economic misconduct. In re Estate of Madden, 176 Wash. 51, [28 P.2d 280] (1934). As a matter of fairness Petitioner has a right to be reimbursed for the mismanaged community funds. In this estate those funds don't exist given the debts owed by the community. Accordingly, the legal title to all real properties listed in Section 2.8., however, shall be placed in the wife's name with the Petitioner to choose how to liquidate the assets.

Respondent's credibility was successfully attacked through his own testimony concerning his source of income. Not only is he claiming a disability for which he receives federal assistance, but also has been receiving unemployment compensation insurance. Additionally, Respondent's testimony was often confused and forgetful and thereby appearing evasive. His testimony was refuted on cross-examination when presented with documentary evidence that demonstrated he was in error in his handling of community assets, particularly with the myriad of loans he extended with community funds from the community owned business, United Mortgage.

. . . .

It is undisputed that Dennis Flynn has made no payments on the parties' community mortgage obligations, no payments on the parties' taxes, insurance, children's medical bills. Sylvia Flynn provided proof that during the pendency of this dissolution action she has made over \$200,000 in payments on community obligations, including mortgages, medical bills, insurance, and expenses for the children, including the cost of [the daughter's] trip to France, which both parties agreed to pay prior to separation, the cost of the Porsche automobile, which Sylvia was eventually able to sell at a substantial loss, and costs related to the parties' real properties, including rental repairs.

The court also stated in its in conclusions of law:

All community property listed in Section 2.8 is awarded to the Petitioner as reimbursement for the economic misconduct and Respondent's failure to perform the fiduciary role to preserve the community assets.

As Sylvia notes, Dennis does not assign error to the findings of fact and they are therefore verities on appeal.⁷ As the findings indicate, the court did consider the

parties' economic circumstances and Dennis's disability, but specifically found that Dennis lacked credibility and appeared evasive in his testimony about his income. Thus, as Sylvia contends, the trial court could have reasonably inferred that his disability was not permanent, particularly given his testimony that he planned to go back to work. This inference is further supported by his testimony that his condition was improving:

My stomach issues went away, my blood pressure is under control, normal, I still -- I take my anxiety pills as needed if I get worked up over something. And -- but not too often anymore. I've kind of weaned myself off the Prozac. I know you're supposed to take it every day, I don't. But I seem to be doing fine. So I'm not looking forward to staying on it forever.⁸

The court also recognized in its order of child support that his return to work was possible, noting that "[t]his amount shall be the child support amount, unless the Respondent obtains work and/or thereby loses eligibility for [Social Security Income] payments."

In any event, Dennis's disability was only one factor the court considered in support of its property distribution award. The trial court also considered the length of the marriage, one of 20 years, and the parties' education, work experience, and earning capacity, noting that Dennis had been the primary wage earner during the marriage and had a college degree while Sylvia had less work experience and a high school education. Additionally, the court considered Dennis's breaches of fiduciary duty and mismanagement of community funds, findings that were supported by the

⁷ Brewer, 137 Wn.2d at 766.

⁸ He further testified that he did not have any particular side effects from the medication, that he was able to grocery shop and drive, and that his disability did not interfere with his ability to function as a parent.

record, as discussed below.

II. Waste of Community Assets and Marital Fault

Dennis contends that the trial court improperly considered evidence that he “wasted” community assets by transferring their community property interest in the Maple Valley rental property without Sylvia’s consent. We disagree.

Dennis relies on In re Marriage of Kaseburg, which held that the trial court abused its discretion by allowing the wife to collaterally attack a foreclosure on community property that occurred before the dissolution trial and awarding her interest in that foreclosed property when it did not belong to the community at the time of trial.⁹ Dennis asserts that similarly here, the Maple Valley rental property was purchased by another party, was titled in that person’s name, and was therefore not a community asset properly before the court. Thus, he contends, the trial court erred by considering it in finding that he wasted community assets.

But unlike in Kaseburg, where it was undisputed that the property was disposed of in foreclosure before the dissolution proceedings, here ownership of the property was a disputed fact and a credibility issue to be resolved by the trial court as the trier of fact. Dennis testified that he and Sylvia decided to sell their interest in the property to Doug Watson, that they both sold their interests to Watson, and that he received \$18,000 from Watson. He also testified that he did not later purchase this property back from Watson and did not otherwise own it. He further testified that he managed the property for Watson because Watson lived a distance away, and offered evidence of rent checks made out to him and mortgage payments made from his bank account.

⁹ 126 Wn. App. 546, 559, 108 P.3d 1278 (2005).

Sylvia testified that she and Dennis agreed to sell the property to Watson and that they were both to receive \$26,000 from the sale. She testified that she received \$26,000 from Watson, but that Dennis did not sell the property or transfer title. According to Sylvia, Dennis “still owns [the] property” and it is still listed under United Mortgage.¹⁰

The trial court resolved this dispute by determining that the property remained a community interest.¹¹ This determination is within the province of the trial court and cannot be disturbed on appeal.¹²

Nor did the trial court improperly consider marital fault in awarding Sylvia a disproportionate share of the property, as Dennis contends. While he is correct that a court may not consider marital fault, such as “immoral or physically abusive conduct within the marital relationship,”¹³ the court did not consider such fault in its property distribution award. Rather, as discussed above, it was based on the appropriate statutory factors and Dennis does not cite any portion of the court’s order that indicates it was improperly based on marital fault.¹⁴

III. Valuation of Property

¹⁰ But she also testified that title did not transfer into Dennis’s name.

¹¹ The court’s findings of fact include the following as community property:

The Maple Valley property commonly known as: 26815 233rd Place SE Maple Valley, Washington 98038, on which the parties held a deed of trust (referred to as the McCluskey Deed), and which Mr. Flynn purchased in foreclosure, and which he has been renting and paying the mortgage. . . .

¹² Marriage of Woffinden, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982).

¹³ RCW 26.09.080; In re Marriage of Muhammad, 153 Wn.2d 795, 804, 108 P.3d 779 (quoting In re Marriage of Steadman, 63 Wn. App. 523, 527-28, 821 P.2d 59 (1991)).

¹⁴ He simply asserts: “Viewed as a whole, the court’s handling of this case strongly suggest[s] that the court sought to ‘punish’ Dennis for marital misconduct, awarding a hugely disproportionate property distribution in favor of Sylvia.”

Dennis further challenges the trial court's valuation of the parties' real properties and promissory notes as unsupported by the evidence. Trial courts have broad discretion to make property value determinations and will be reversed only for a manifest abuse of discretion.¹⁵ If substantial evidence supports the court's finding of value, it will be affirmed.¹⁶ To determine whether substantial evidence exists to support a court's finding of fact, we review the record in the light most favorable to the party in whose favor the findings are entered.¹⁷

Dennis first contends that the trial court's valuation of the Kent residence was error because it was outside the range of values presented by the parties. Sylvia offered expert testimony that the property had a value of \$750,000 and Dennis's expert testified that it was worth \$1,025,000. But Sylvia also testified that the value of the home at the time of the separation was \$679,000. The court valued the property at \$679,000.

We will not substitute our judgment for the trial court on a factual dispute over the valuation of property.¹⁸ "An owner may testify as to the value of his property and the weight to be given to it is left to the trier of fact."¹⁹ The trial court may also reject opinion testimony when valuing an asset and decide an issue "upon its own fair judgment."²⁰ In Worthington, the court held that substantial evidence supported the trial court's valuation of property in a dissolution action when the court's valuation was

¹⁵ In re Marriage of Gillespie, 89 Wn. App. 390, 403, 948 P.2d 1338 (1997).

¹⁶ Gillespie, 89 Wn. App. at 403.

¹⁷ Gillespie, 89 Wn. App. at 404.

¹⁸ Worthington v. Worthington, 73 Wn.2d 759, 762, 440 P.2d 478 (1968).

¹⁹ Worthington, 73 Wn.2d at 763.

²⁰ In re Marriage of Pilant, 42 Wn. App. 173, 178-79, 709 P.2d 1241 (1985).

lower than that testified to by both parties' experts but was the value testified to by the husband.²¹

Likewise here, the court's valuation of the Kent residence at \$679,000 was supported by the record: this value was offered by Sylvia, as the owner who currently resided in the home and paid the mortgage on it.

Dennis also challenges the court's valuation of the Olalla property as unsupported by the evidence. He offered an appraisal of the home that valued it at \$180,000. Sylvia offered evidence of a purchase and sale agreement signed by Dennis and a potential buyer that listed the selling price as \$237,600. In its findings, the court listed the property as:

The Ollala [sic] home on Hood Canal, 9164 SE Fragaria Road, Ollala [sic], where Dennis has been living, which Dennis apparently attempted to convey to Jane Ninh for \$237,600 (a price he obviously believes reflects its fair market value) subject to a first mortgage of \$220,000.

Dennis contends that this does not amount to a finding of value on the property and that even if it could be construed as assigning a value of \$237,600, this value is not supported by substantial evidence. While it could have been stated with more clarity, this finding is reasonably construed as determining the value of the property to be \$237,600, as indicated by the following parenthetical, "a price he obviously believes reflects its fair market value." And as Sylvia contends, this value is supported by substantial evidence. The record contains evidence that Dennis signed a purchase and sale agreement listing this value as the selling price of the property. As discussed above, the trier of fact is entitled to give weight to a property owner's opinion of the value of the property and we must defer to that factual determination.

²¹ Worthington, 73 Wn.2d at 763.

Dennis further challenges the court's valuation of the promissory notes, contending that they were "worthless" due to borrower default or foreclosure by another mortgage holder. But as Sylvia contends, this was a disputed issue of fact, resolved by the trial court in Sylvia's favor. Dennis contends that the evidence was "clear" that they had no value, but this evidence consisted solely of his testimony, which the court did not find credible. Thus, as the trier of fact, the court was free to reject his testimony and simply consider evidence of the face value of the notes themselves. We will not disturb this determination on appeal.²²

IV. Maintenance

Dennis also challenges the court's finding that maintenance should be awarded to Sylvia. He contends the court erred because it did so despite acknowledging that Dennis did not have the ability to pay. But while the court did make a finding that maintenance was appropriate, the court did not in fact award it to Sylvia, citing Dennis's inability to pay. Instead the court awarded her a disproportionate share of the property, making the following findings:

Maintenance should be ordered because: the parties have a 20 year relationship, during which the husband was the primary wage earner. The wife has a high school education and her work during the marriage was secondary to her obligations to care for the parties' children; the husband worked full time until the last year of the marriage. He is a college graduate, and a veteran, who is currently receiving disability benefits based upon a mental illness. The wife has the need for maintenance, based upon the financial obligations the parties' [sic] incurred against their properties prior to their separation. However, the husband is currently receiving disability, and does not have the ability to pay maintenance, and therefore the court awards the wife a disproportionate share of the community property.

²² In re Marriage of Rich, 80 Wn. App. 252, 259, 907 P.2d 1234, rev. denied, 129 Wn.2d 1030 (1996).

Thus, contrary to Dennis's contentions, the court did not fail to consider his ability to pay in considering a maintenance award. Indeed, this is precisely the reason the court did not award maintenance. Rather, the court considered this as a factor in support of a disproportionate property award, along with other factors. As discussed above, the court properly considered these factors in awarding Sylvia a disproportionate share of the property and appropriately exercised its discretion in making this determination.

V. Visitation Restrictions

The parenting plan restricted Dennis's residential time with his younger child on the following basis:

The respondent's involvement or conduct may have an adverse effect on the child's best interests because of the existence of the factors which follow: The absence or substantial impairment of emotional ties between the parent and child.

Additionally, the parenting plan stated:

There has been no contact between [the child] and his father since November 2007. [Dr.] Wendy Hutchins-Cook was an agreed court appointed expert who conducted a parenting evaluation in this matter, and who recommended that the father and the minor child go through reunification counseling before the father is permitted visitation with the child outside a therapeutic setting. The court is not satisfied that Dr. Hutchins-Cook's report addresses concerns related to Mr. Flynn's possession of child pornography and admitted use of adult pornography, including in the presence of [the child] while [the child] was sleeping in the same room where Mr. Flynn was viewing pornography, and therefore, the court requires that Mr. Flynn undergo a sexual deviancy evaluation by one of the following professionals. . . . Upon completion of the court ordered sexual deviancy evaluation by one of the evaluators identified above, the court will review the residential schedule. Mr. Flynn shall pay all costs associated with the sexual deviancy evaluation. There will be no visitation until the evaluation is completed.

The court further ordered that it “reserves issuing a residential schedule for visitation” and “retains jurisdiction over this matter to enter a residential schedule after completion of the sexual deviancy evaluation.”

Dennis contends that the trial court abused its discretion by imposing these restrictions because the reason he did not have contact with his children since November 2007 was that there was a no-contact order in effect stemming from the criminal charges that prevented him from doing so. While he is correct that loss of contact with a child due to court orders cannot supply substantial evidence in support of such a restriction,²³ his assertion that court orders prevented all contact with children during this entire time period is not supported by the record. While he testified at trial that there was a no-contact order related to the criminal charges that was in effect until December 2008 and prohibited contact with his children, this no-contact order is not part of the record.²⁴ Thus, there is no evidence establishing when it became effective and what its terms were, other than Dennis’s testimony, which the trial court was free to reject as not credible.

There was, however, evidence that Dennis had an opportunity to initiate contact with his children during this time period, but chose not to do so for almost a full year. According to the record, another restraining order was issued in connection with the dissolution in March 2008 and permitted him to contact a court-appointed psychologist to recommend a residential schedule. That order provides in part:

Wendy Hutchins-Cook is appointed for the limited purpose of investigating and

²³ See In re Marriage of Watson, 132 Wn. App. 222, 232, 130 P.3d 915 (2006).

²⁴ The court indicated that it was unclear about whether there was a no-contact order at that time and was informed that the no-contact order was not in the record and that counsel did not have a copy of a no-contact order.

making a recommendation as to the residential schedule for the children . . . with the husband paying Wendy Hutchison-Cook's fees and costs.

Hutchins-Cook also testified that Dennis did not contact her until February 2009. She further testified that when she asked him why he waited so long to contact her when he had the ability to do so in March 2008, he responded that "he wasn't going to start that process" until criminal charges were dismissed and he did not have funds to pay for the evaluation. She also testified that there was not a no-contact order in effect throughout this period and that he "certainly could have, through counsel" given the children Christmas presents or cards, but did not do so. Dennis also admitted that he did not contact Hutchins-Cook until 2009, explaining the reason for the delay as follows: "When my charge was dismissed, I -- just by the time I caught up with my divorce attorney and started asking how to see my kids now, it just took to about January." Hutchins-Cook further testified that this type of delay was not in the children's best interests, and noted that his failure to send presents and cards on Christmas and birthdays was "not real understandable." Thus, sufficient evidence supports the court's findings.

Dennis also contends that trial court abused its discretion by preventing visitation despite Hutchins-Cook's recommendation that he be allowed visitation if he went through reunification counseling. But again, as the fact finder, the trial court was free to reject her recommendation if there was other evidence to support its decision. As discussed above, expert testimony is offered to assist the trier of fact, but is not determinative. Here, as explained in its findings, the court declined to follow that recommendation in light of other evidence that Dennis possessed child pornography

and admitted viewing adult pornography in the presence of his son.

Dennis further challenges the trial court's requirement that he submit to a sexual deviancy evaluation before the court issues a residential schedule. He contends that there was insufficient evidence to warrant an order for a sexual deviancy evaluation. He acknowledges that this finding was based on the allegations that he possessed child pornography, but contends that forensic evidence "established conclusively" that he never intentionally possessed child pornography. But again, this was a factual dispute for the trial court to resolve. The court was presented with additional evidence that he viewed pornography in the presence of the children, a fact testified to by Hutchins-Cook. She testified that she learned from his daughter that she had seen child pornography and when she asked Dennis about it, he acknowledged that there was pornography in the house and admitted to viewing it in his son's presence.²⁵

VI. Attorney Fees

Both parties request fees on appeal. As the prevailing party, Sylvia contends she should be awarded fees under RCW 26.09.140, which provides this court with discretion to award fees after considering the parties' resources and merits of the appeal. Since it is difficult to discern from the record precisely what Dennis's earning capacity is and Sylvia has already been awarded her fees in the trial court, we remand to the trial court to make specific findings about Dennis's current ability to pay.²⁶

We affirm and remand on the issue of fees only.

²⁵ He stated, "I wouldn't knowingly let him see it, but he saw it from the couch."

²⁶ Sylvia has filed a motion to strike Dennis's financial declaration. Because the trial court will address the issue of fees on remand, we need not consider the motion.

Grosse, J.

WE CONCUR:

Cox, J.

Becker, J.