

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

In the Matter of the Marriage of:	)	
	)	DIVISION ONE
SANDRA BURLINGAME ESTEP,	)	
	)	No. 66814-5-1
Respondent,	)	
	)	UNPUBLISHED OPINION
and	)	
	)	
JAMES R. ESTEP IV,	)	
	)	
Appellant.	)	FILED: November 19, 2012
_____	)	

Dwyer, J. — James Estep appeals from the decree dissolving his 25-year marriage to Sandra Estep, now known as Sandra Burlingame. He claims that the trial court erred in compelling him to respond to discovery requests about his interest as a beneficiary in a trust and by considering that interest when the court distributed the parties' assets. James also challenges the trial court's distribution of property and award of maintenance following trial. We affirm.

Sandra Burlingame and James Estep were married in 1986 and dissolved their marriage in 2011. During the marriage, James was the primary wage earner and was employed in several different fields, including industrial engineering and information technology. At the time of trial, he had worked for Boeing for several years. For the

most part, Sandra did not work outside the home. After the parties separated in 2010, Sandra began working part time as a child care provider. The parties had four children, all adults by the time of trial. Sandra has significant medical issues. Two separate accidents caused her to undergo numerous surgeries and resulted in difficulty walking, standing, lifting, and sitting for long periods. She suffers from chronic pain and receives pain medication on a daily basis through a pump connected directly to her spinal cord.

The parties' community assets consisted primarily of a residence, two Boeing pension accounts, and several retirement accounts. Also, James and his brother, Robert Luckey, are co-trustees of the Estep Family Trust created by James's deceased father. The purpose of the trust is to finance four years of postsecondary education for each of the trustor's grandchildren, including James's four children. James and Luckey control different trust accounts and have distributed the benefits to their own children. The trust has assets in excess of the amount needed to pay the postsecondary education costs in accordance with the terms of the trust. There is only one remaining grandchild who will become eligible to receive trust benefits.<sup>1</sup> When the youngest grandchild, fourteen years old at the time of trial, graduates or completes four years of college, the trust will terminate. At that time, two-thirds of the remaining trust assets will be distributed to James. According to the testimony at trial, James will receive his portion of the remainder of the trust assets in or around 2019.

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<sup>1</sup> The trust excludes any children born after January 1, 2000 or adopted.

Through discovery, Sandra sought documents and information about trust assets. She also sought details about the transfer of funds between the trust and other accounts.<sup>2</sup> James partially responded, conceding that he had borrowed trust funds on behalf of the marital community.<sup>3</sup> He also disclosed that the trust had approximately \$500,000 in assets. He objected, however, to the requests for details about the trust's transactions. Sandra filed a motion to compel complete responses and production of documents.

James opposed the motion. He claimed the trust's assets were irrelevant to the dissolution because he had merely an "expectancy interest" in the trust and the possibility of future benefits was "remote" and "uncertain." He also claimed that because his co-trustee was not a party to the action, disclosure of the trust's finances would breach his fiduciary duties to the trust. The trial court granted the motion to compel, awarded \$600 in costs and attorney fees to Sandra, and denied James's motion to reconsider.

After a two-day trial, the trial court entered a decree of dissolution.<sup>4</sup> The court ordered James to pay maintenance to Sandra for a total of 13 years based on the duration of the parties' marriage, Sandra's "medical issues which impair her ability to work," and Sandra's limited work history and education. The court awarded the home

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<sup>2</sup> Account records for the trust checking account controlled by James revealed numerous transfers of funds between trust and personal accounts and personal expenditures.

<sup>3</sup> James initially disclosed \$17,500 in loans from the trust but later said the loans amounted to \$41,000. Until the time of the March 2011 trial, none of the loans were secured by promissory notes.

<sup>4</sup> King County Superior Court Judge Wesley Saint Clair ruled on the motion to compel, but the case was assigned to a different judge, Judge Carol Schapira for trial.

to James, but awarded between \$20,000 and \$100,000 in equity to Sandra, depending on the net proceeds if the home was sold.<sup>5</sup> With the exception of two retirement accounts that were divided 60 percent to Sandra and 40 percent to James, all other pensions and accounts were divided equally, or awarded solely to James. The court ordered that James would be responsible for all community liabilities.<sup>6</sup> James was also awarded several vehicles, a cemetery plot, and Dinars (Iraqi currency). The trial court awarded \$7,500 in attorney fees to Sandra due to James's "intransigent behavior," failure to comply with discovery, failure to timely respond to motions, and his late appearance at a settlement conference. James appeals.<sup>7</sup>

## II

James argues that the trial court erred in requiring him to produce financial documents of the trust. He contends that because the trust is a separate legal entity and was not a party to the dissolution, the trial court had no authority to adjudicate matters pertaining to the trust.

James relies on In re Marriage of McKean, 110 Wn. App. 191, 38 P.3d 1053 (2002). In that dissolution case, there were assets held in trust for the parties' children. The trial court found that the parties had both "manipulated" the trust property, treated

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<sup>5</sup> The decree provides for an initial payment to Sandra of \$20,000. If the house was not sold by December 21, 2011, she would receive an additional payment of \$80,000. If it was sold on or before that time, she would receive 80 percent of net proceeds in excess of \$20,000, but not to exceed \$100,000.

<sup>6</sup> Most of the community debt was related to the home and would be satisfied from the proceeds if the home was sold.

<sup>7</sup> Before the dissolution trial, James filed a notice for discretionary review, challenging the order granting the motion to compel. With leave from this court, James later filed an amended notice of appeal, appealing the decree and findings in addition to the order granting the motion to compel.

the trust property as their own, and would likely continue to do so. McKean, 110 Wn. App. at 194. Determining that it had a “responsibility to protect the financial assets of the children as well as their physical and emotional well-being,” the court ordered the trust assets to be transferred to a corporate trustee. McKean, 110 Wn. App. at 194.

On appeal, the court vacated the order transferring trust property. The court observed that in a dissolution action, while the court has the authority to distribute the assets of the parties, it has no authority to adjudicate the rights of parties not before the court. McKean, 110 Wn. App. at 194-95. Because neither party had initiated an action against the trust by suing a party in his or her representative capacity as trustee, the trial court lacked in personam jurisdiction over the trust and erred in adjudicating the designation of the trustee. McKean, 110 Wn. App. at 196.

James is correct that the trial court had no authority to adjudicate trust matters. It does not logically follow, however, that the trial court had no authority to compel him to comply with discovery requests to provide information about the trust. It is undisputed that James is the primary remainder beneficiary of the trust and that the community’s debt to the trust was before the court. Evidence before the court also indicated that, in addition to designated loans, the trust was a source of supplemental income to James. Information about the trust was clearly relevant to the dissolution. The trial court did not exceed its authority, because unlike the trial court in McKean, the court here did not “adjudicate” any trust matter.

III

Although not entirely clear, James also appears to contend that he has no present interest in the trust. Therefore, he claims the court erred by allocating his interest in the trust as separate property and taking that interest into consideration when it distributed the community property and awarded maintenance. James claims his interest in the Estep Trust is merely a “rank expectancy” because his receipt of future benefits is uncertain.

All property, community and separate, is before the court in a dissolution action. In re Marriage of Stachofsky, 90 Wn. App. 135, 142, 951 P.2d 346 (1998). James is a contingent remainder beneficiary in the trust and as such, he has a present interest in the trust. Nelsen v. Griffiths, 21 Wn. App. 489, 493, 585 P.2d 840 (1978). His beneficiary status is contingent because his survival until the termination of the trust is a condition precedent to the realization of his rights as a remainderman. Nelsen, 21 Wn. App. at 493. As this court observed in Nelsen, as to contingent remainder beneficiaries, “[a]ny uncertainty relates only to the amount they may receive, not to their right to receive it.” 21 Wn. App. at 493. Here also, the trial court aptly noted, although the exact timing and precise amount of trust assets that James will receive is unknown, the fact that, within ten years, he will receive substantial benefits is “likely.” The trial court did not err in considering and allocating James’s interest in the trust.

IV

James claims that the trial court's division of property is grossly disproportionate because the court awarded virtually all of the parties' community assets to Sandra.

In a dissolution action, the trial court must make a just and equitable distribution of the property and liabilities of the parties after considering all relevant factors, including the nature and extent of the separate and community property and the duration of the marriage. RCW 26.09.080. The parties' relative health, age, education, and employability are considered in property divisions as the trial court's paramount concern is the economic condition of the parties. In re Marriage of Crosetto, 82 Wn. App. 545, 556, 918 P.2d 954 (1996); In re Marriage of Williams, 84 Wn. App. 263, 270, 927 P.2d 679 (1996). The trial court is in the best position to determine what is fair and equitable and has broad discretion in distributing property in dissolution proceedings. In re Marriage of Brewer, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

James contends that the trial court awarded 98 percent of the community estate to Sandra, but it is not clear how he arrives at this figure. As explained, most of the accounts were divided equally, or nearly equally. Sandra presumably received a greater share of the home equity, but the amount of her equity award was dependent upon the future sale price of the home, assuming it would be sold. James cites several cases, including In re Marriage of Tower, 55 Wn. App. 697, 701, 780 P.2d 863 (upholding unequal property division in favor of husband because the husband was ordered to pay the wife long-term maintenance) and In re Marriage of Nicholson, 17 Wn. App. 110, 118, 561 P.2d 1116 (1977) (upholding an unequal property division

based on disparity in earning potential and in consideration of party's conduct in concealing assets), for the proposition that property may be unequally divided, but only if the ratio is a modest departure from a 50/50 division. But again, the touchstone is fairness and equity, rather than equality. See Tower, 55 Wn. App. at 700. And in fact, appellate courts frequently uphold disproportionate property awards, especially where, as here, more property is allocated to a spouse with limited employment prospects. See, e.g., In re Marriage of Donovan, 25 Wn. App. 691, 696-97, 612 P.2d 387 (1980) (awarding untrained wife approximately twice the amount of assets after 14-year marriage when husband could still work as commercial pilot); Stachofsky, 90 Wn. App. at 147-48 (rejecting argument that based on error in valuation, court awarded healthy spouse 100 percent of the community estate plus some separate assets). The record here reflects that the trial court considered the relevant factors under RCW 26.09.080 in distributing the property before it, including the circumstances of the marriage, the parties' relative health, and prospects for employment. The trial court did not abuse its discretion simply because it appears that the court awarded Sandra a greater share of the community property, especially considering James's separate interest in the trust.

V

Finally, James challenges the maintenance award. The court ordered maintenance of \$3,000 per month for three years and \$2,500 per month for the following ten years. James points out that the amount of maintenance in addition to the monthly house payment of \$4,069 exceeds his net monthly income of \$6,600. He



argues that this shows that the trial court failed to adequately consider his ability to pay the maintenance.

It is within the trial court's discretion to award maintenance based on the factors enumerated in RCW 26.09.090. The nonexclusive list of factors includes: (a) the financial resources of the party seeking maintenance; (b) the time necessary for the maintenance seeker to become employed; (c) the marital standard of living; (d) the marriage's duration; (e) the maintenance seeker's age, physical and mental condition, and financial obligations; and (f) the ability of the maintenance payer to meet his needs in addition to those of the maintenance seeker. RCW 26.09.090. As with property distribution, the primary consideration in awarding maintenance is the parties' economic positions following the dissolution. In re Marriage of Spreen, 107 Wn. App. 341, 349, 28 P.3d 769 (2001).

Maintenance awards are "flexible tool[s] by which the parties' standard of living may be equalized for an appropriate period of time." In re Marriage of Washburn, 101 Wn.2d 168, 179, 677 P.2d 152 (1984). "The only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of the relevant factors, the award must be just." In re Marriage of Bulicek, 59 Wn. App. 630, 633, 800 P.2d 394 (1990). The spouse who challenges the decision bears the heavy burden of showing an abuse of discretion by the trial court. In re Marriage of Zahm, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999).

The maintenance awarded amounts to 45 percent of James's current monthly net income and will decrease to 38 percent, assuming his salary remains the same. The fact that James cannot afford to pay maintenance and remain in the family residence does not, in and of itself, establish that he is unable to pay the maintenance awarded. Even if the court had imposed maintenance in the amount he proposed (starting at \$2,100 per month), James recognized that he would not be able to afford to pay maintenance without selling the home. This is primarily because the house is heavily encumbered. The trial court considered the fact that James's income is more than six times greater than Sandra's. The trial court also considered the disparity in the parties' education level, work experience, and their relative health. In sum, the trial court's award of maintenance reflects consideration of the appropriate statutory factors and James fails to establish an abuse of discretion.

Sandra requests attorney fees on appeal, citing RAP 18.9 and RCW 26.09.140. Although Sandra prevails, we cannot say that James's appeal was completely devoid of merit. See In re Marriage of Schumacher, 100 Wn. App. 208, 217, 997 P.2d 399 (2000) (appeal is frivolous if it presents no debatable issues upon which reasonable minds could differ and there is no possibility of reversal). We exercise our discretion and deny the request for attorney fees on appeal.

Affirmed.

Denz, J.

We concur:

Vandenberg

Cox, J.