

January 19, 2016

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

**DIVISION II**

MARY JO FABER,

Respondent,

v.

KENNETH L. FABER,

Appellant,

No. 46464-1-II

UNPUBLISHED OPINION

MAXA, J. — Kenneth Faber appeals the trial court’s property distribution in conjunction with the dissolution of his marriage with Mary Jo Faber.<sup>1</sup> We hold that (1) the trial court did not abuse its discretion by considering Kenneth’s potential social security income when dividing the parties’ retirement income, (2) substantial evidence supported the trial court’s valuation of Kenneth’s inheritance from his father, and (3) substantial evidence supported the trial court’s finding that the parties owned \$45,124 that was distributed to Kenneth. However, we hold that the trial court abused its discretion by awarding Mary Jo \$15,000 in attorney fees. Accordingly, we affirm the trial court’s property distribution, but reverse and vacate the trial court’s attorney fee award to Mary Jo.

**FACTS**

Kenneth and Mary Jo married in September 1993, and separated in May 2012 after nearly 19 years of marriage. When they separated, both Kenneth and Mary Jo were retired and had no

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<sup>1</sup> Because the parties share the same last name, we refer to them by their first names for clarity. We intend no disrespect.

No. 46464-1

dependent children. At the time of trial in September 2013, Kenneth was 62 years old and Mary Jo was 70.

The primary issue at trial was property and retirement income distribution. Neither party requested spousal maintenance. The trial court heard extensive evidence regarding the parties' community and separate property and their respective incomes. Following trial, the trial court made an oral ruling regarding the distribution of property and income. The trial court entered written findings of fact and conclusions of law and the dissolution decree in January 2014.

#### *Social Security Benefits*

Kenneth testified that he received pension benefits of \$3,056.37 per month, which included \$814 of separate property. Mary Jo testified that she received pension benefits of \$394 per month and social security of \$2,123.90 per month. The trial court awarded Kenneth the \$814 separate property portion of his pension and divided the remainder equally between the parties. The trial court awarded Mary Jo the full amount of her pension and her social security benefits. These rulings left Mary Jo with a monthly income stream of \$3,639.08 and Kenneth with a monthly income stream of \$1,935.18.

However, the trial court also considered Kenneth's available social security benefits. Kenneth testified that he currently was entitled to receive \$1,743 per month in social security benefits, but that he could receive a higher monthly benefit if he deferred collecting his benefits. Kenneth would receive \$2,237 per month in social security benefits if he began collecting at age 66 and approximately \$2,700 if he waited until age 68. On the other hand, Kenneth also suggested that he might start collecting social security soon. Without discussion, the trial court included Kenneth's available social security benefits in his monthly income.

No. 46464-1

After including \$1,743 in social security benefits in Kenneth's income, the trial court calculated Kenneth's monthly income at \$3,678.18 and Mary Jo's monthly income at \$3,639.08. The trial court stated that "while they're not exactly 50/50, they're pretty darned close and I'm leaving it at that." Clerk's Papers (CP) at 31.

### *Kenneth's Inheritance*

Kenneth's father died in 2009. Kenneth estimated that the total amount he inherited from his father was \$220,000. The trial court asked Kenneth to clarify what happened to the \$220,000 he received from his father. Kenneth responded:

Well, that's a good question, Your Honor. I'm not really sure where all that money went. I mean, I know where some of it went because I put it into some of the accounts, but a lot of that stayed in the Columbia Bank account, too . . . [M]y son and my daughter have some of that money because it was supposed to be passed on to them.

CP at 349.

The trial court included the full \$220,000 of inheritance in Kenneth's distribution. The trial court stated, "I didn't find, quite frankly, Mr. Faber's testimony credible that he has no idea what happened to that \$220,000." CP at 29.

### *Certificate of Deposit*

Kenneth and Mary Jo used \$70,000 to open a certificate of deposit (CD) at HomeStreet Bank on August 10, 2010. Mary Jo testified that \$45,124 of the \$70,000 was community property. Kenneth did not dispute Mary Jo's claim that community funds had contributed to the HomeStreet CD.

The trial court asked Kenneth about the \$45,124. Kenneth said, "I don't have that . . . I don't have the money she's talking about. I don't know – I don't know where she got that

figure.” CP at 350. But then he clarified, “[T]he money that was in the CDs went to my kids, as it was supposed to.” CP at 350.

The trial court included \$45,124 in Kenneth’s distribution. In the oral ruling, the trial court stated: “There was testimony that there were CDs; they were community property. This was disputed between Mr. and Mrs. Faber. I am adopting Mrs. Faber’s position in this regard and placing in Mr. Faber’s column \$45,124.” CP at 25.

#### *Attorney Fees*

Mary Jo testified at trial that she requested attorney fees in her domestic relations information form and had incurred \$14,278 in fees as of July 2013. She testified that she had paid \$8,303 to her attorney to date. Kenneth testified that he had borrowed \$10,000 from his daughter to help pay his legal fees. He also testified that he still owed attorney fees as of trial and had no funds available to pay them.

In its oral ruling, the trial court found that Mary Jo needed assistance and that Kenneth had the ability to pay. The trial court ultimately awarded Mary Jo \$15,000 in attorney fees.

#### *Final Property Distribution*

The trial court divided the parties’ community and separate property between them in its oral ruling, written findings of fact and conclusions of law, and the dissolution decree. The trial court awarded a total of \$745,258.40 to Kenneth and \$667,117.63 to Mary Jo. The trial court stated that it did not order an equalization payment because the significant portion of the difference was Kenneth’s inheritance.

During the trial court’s oral ruling, Kenneth questioned why the trial court attributed to him social security income he was not yet receiving. The trial court acknowledged that Kenneth

could choose not to draw social security, but stated that in that event, his \$220,000 inheritance gave him sufficient assets to support himself.

Kenneth filed a motion for reconsideration in which he disputed a number of the trial court's findings, including the issues he raises on appeal. The trial court modified two minor provisions of the decree not at issue here, but otherwise denied the motion.

Kenneth appeals the trial court's property distribution and award of attorney fees.

## ANALYSIS

### A. STANDARD OF REVIEW

We review the trial court's distribution of property for manifest abuse of discretion. *In re Marriage of Byerley & Cail*, 183 Wn. App. 677, 684-85, 334 P.3d 108 (2014). The trial court abuses its discretion by basing its decision on untenable grounds or reasons or if the decision is manifestly unreasonable. *Id.* at 685. The trial court also abuses its discretion by using an incorrect legal standard. *In re Marriage of Neumiller*, 183 Wn. App. 914, 920, 335 P.3d 1019 (2014). Finally, a manifest abuse of discretion occurs if the trial court's distribution results in a patent disparity in the parties' economic circumstances. *Byerley*, 183 Wn. App. at 685.

We review the trial court's findings of fact for substantial evidence. *In re Marriage of Wilson*, 165 Wn. App. 333, 340, 267 P.3d 485 (2011). Substantial evidence exists when there is sufficient evidence to persuade a fair-minded, rational person of the finding's truth. *Id.* We do not substitute our judgment for the trial court's judgment, weigh the evidence, or evaluate witness credibility. *Id.* When the trial court has weighed the evidence, we simply determine whether substantial evidence supports the findings of fact, and if so, whether the findings support the trial court's conclusions of law. *Id.*

B. ANTICIPATED SOCIAL SECURITY BENEFITS

Kenneth argues that the trial court abused its discretion by considering his anticipated social security benefits in dividing the parties' retirement income when he had not yet elected to collect social security. We disagree.

1. Legal Principles

In dissolution proceedings, RCW 26.09.080 requires the trial court to make a "just and equitable" distribution of both community and separate property. The trial court must consider "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, and (4) the economic circumstances of each spouse at the time the division of the property is to become effective. RCW 26.09.080. In a long-term marriage, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives. *See In re Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572 (2007) (discussing a 25 year marriage).

A just and equitable division does not require mathematical precision. *In re Marriage of Larson & Calhoun*, 178 Wn. App. 133, 138, 313 P.3d 1228 (2013), *review denied*, 180 Wn.2d 1011 (2014). The trial court should seek fairness based on all of the past and present circumstances of the marriage and the future needs of the parties. *Id.* The trial court attains fairness by considering all the circumstances and exercising its discretion, not by applying inflexible rules. *Id.* The trial court is in the best position to decide issues of fairness. *Id.*

Social security benefits require special treatment in the property distribution context. The Social Security Act forbids transfer or reassignment of benefits in a marital property distribution.

42 U.S.C. § 407(a); *In re Marriage of Zahm*, 138 Wn.2d 213, 219, 978 P.2d 498 (1999). Social security benefits are the separate, indivisible property of the spouse who earned them. *Zahm*, 138 Wn.2d at 220. As a result, the Supreme Court held in *Zahm* that “social security benefits themselves are not subject to division in a marital property distribution case.” *Id.* at 219.

However, the court in *Zahm* also held that although trial courts cannot directly divide social security benefits in a dissolution action, trial courts are not precluded from *considering* social security benefits in making a just and equitable property distribution. *Id.* at 223.

Consistent with RCW 26.09.080, a trial court can consider social security income “within the more elastic parameters of the court’s power to formulate a just and equitable division of the parties’ marital property.” *Id.* at 222. RCW 26.09.080(4) allows the trial court to consider the economic circumstances of the spouses, and the court could not properly evaluate those circumstances unless it could consider the social security benefits a party is receiving. *Id.* at 223.

## 2. Consideration of Available Social Security Income

Here, the trial court did not improperly divide social security benefits – it awarded each party their own benefits as separate property. And Kenneth does not argue that the trial court should not have considered social security benefits at all. He apparently agrees that the trial court properly considered Mary Jo’s social security income in calculating the parties’ income stream. Instead, Kenneth argues that the trial court erred in considering his *future* social security income that he was not yet receiving. He notes that when his uncollected social security income is removed from his income stream, there is patent disparity between the parties’ economic circumstances. Kenneth claims that this disparity indicates a manifest abuse of discretion.

Kenneth argues that the trial court's consideration of his future social security benefits is inconsistent with RCW 26.09.080(4), which requires consideration of the parties' economic circumstances "at the time the division of property is to become effective." Based on this language, the court in *Zahm* stated that the trial court could consider the amount of social security benefits " 'currently received.' " 138 Wn.2d at 223 (quoting *In re Marriage of Zahm*, 91 Wn. App. 78, 85, 955 P.2d 412 (1998)). Kenneth emphasizes that RCW 26.09.080(4) is inapplicable because he was not yet receiving social security benefits.

However, RCW 26.09.080 requires courts to consider "all relevant factors including, *but not limited to*" the four enumerated factors. (Emphasis added.) The four enumerated factors in RCW 26.09.080 are not exclusive. *Larson*, 178 Wn. App. at 138. The trial court's consideration of anticipated social security may not have been appropriate under RCW 26.09.080(4), but that did not preclude the trial court from considering anticipated benefits in order to develop a fair and equitable property distribution. In fact, Washington courts have stated that "the *possibility* that one or both parties may receive Social Security benefits is a factor the court may consider in making its distribution of property." *Rockwell*, 141 Wn. App. at 244-45 (emphasis added); *see also In re Marriage of Smith*, 158 Wn. App. 248, 260, 241 P.3d 449 (2010).

Here, both Kenneth and Mary Jo were retired and eligible to receive social security. Mary Jo was receiving social security, but Kenneth was not. In order to put the parties on comparable footing, the trial court decided to consider the amount of social security that Kenneth was *entitled* to receive at the time of the distribution. *Rockwell* supports such a consideration, and Kenneth provides no authority to the contrary.



In addition, Kenneth never testified that he definitely was going to defer his benefits until age 68. Kenneth implied that he had intended to wait until age 68 to collect his social security benefits. However, he also offered testimony providing a theoretical balanced income stream that was based on the assumption that he would begin collecting social security immediately. And Kenneth's counsel represented in his closing argument that Kenneth was willing to start his social security benefits at 62.

Kenneth argues that by considering his current social security entitlement, the trial court impermissibly disturbed his prudent strategy to defer benefits. He cites to two Michigan cases for the proposition that deferring benefits is a prudent strategy and should not be viewed as an unexercised ability to earn or a voluntary reduction in income. However, neither case deals with property distribution. The first case addresses whether deferred social security benefits could be imputed income for purposes of calculating a child support obligation. *Clarke v. Clarke*, 297 Mich. App. 172, 823 N.W.2d 318, 323 (2012). And the second case addresses whether potential pension benefits should be imputed to a spouse for purposes of calculating alimony. *Moore v. Moore*, 242 Mich. App. 652, 619 N.W.2d 723, 724 (2000).

These cases are inapposite, because a court may adjust child support and spousal maintenance if the parties' economic circumstances change, but a property distribution cannot subsequently be altered. Therefore, the Michigan cases offer no support to Kenneth's argument that the trial court must not disturb his strategy to defer social security.

Further, the trial court did consider Kenneth's strategy to defer benefits. It noted that its decision did not require Kenneth to take his social security benefit. "I believe with his \$220,000 inheritance that he has sufficient assets to support himself. . . . [H]e can choose not to withdraw

that Social Security. Absolutely. And I think he has sufficient assets to support himself if he doesn't." CP 34.

The trial court has broad discretion to make a just and equitable distribution. *In re Marriage of Wright*, 179 Wn. App. 257, 261, 319 P.3d 45 (2013), *review denied*, 180 Wn.2d 1016 (2014). If the trial court had balanced the income streams without considering Kenneth's social security, Kenneth could have begun collecting benefits immediately after the distribution decree and caused a significant disparity in his favor. In order to achieve an equitable distribution, the trial court determined that the parties should be on equal footing and therefore decided to consider Kenneth's future social security income. Accordingly, we hold that the trial court did not abuse its discretion by considering Kenneth's anticipated social security income.

C. INHERITANCE FROM FATHER

Kenneth argues that the trial court's finding that he had \$220,000 in separate property that he inherited from his father was not supported by substantial evidence. We disagree.

Kenneth repeatedly testified that he inherited \$220,000 from his father's estate. Kenneth provided details about the various assets that comprised the inheritance. But his testimony about what happened to the money was contradictory and confusing.

Kenneth initially stated that he was not sure where the money went in the four years between receiving it and testifying at trial. Later, he said he was not sure where \$20,000 of the inheritance had gone. He also testified that he had moved the money around between different accounts. During cross-examination Kenneth said he transferred \$171,939 from his inheritance to his two children, Jason and Katy. The transfers were made on May 7, 2012, the day before the parties separated.

But additional evidence showed that in December 2012 Jason and Katy had transferred the money they received into two Wells Fargo accounts that they shared with Kenneth. One account received a deposit for \$83,403.38 and the other received a deposit for \$83,126.40 (a total of \$166,529.78). This indicated that Kenneth regained control over the substantial portion of his inheritance that he claimed to have transferred to his children.

The trial court considered the evidence presented regarding the value of Kenneth's inheritance and said, "I didn't find, quite frankly, Mr. Faber's testimony credible that he has no idea what happened to that \$220,000." CP 29. Because there was uncontroverted evidence that Kenneth inherited \$220,000 in 2009, and Kenneth provided little evidence that he had spent or no longer had control of the money, a fair-minded, rational person would conclude that Kenneth still had \$220,000 at the time of trial.

Accordingly, we hold the trial court's valuation of Kenneth's inheritance at \$220,000 was supported by substantial evidence.

D. COMMUNITY PROPERTY CERTIFICATE OF DEPOSIT

Kenneth argues that the trial court abused its discretion because the \$45,124 in CD proceeds did not exist at the time of trial and the trial court's finding that the parties owned a CD in this amount was not supported by substantial evidence. We disagree.

The trial court found that the parties owned a CD in the amount of \$45,124, and awarded that amount to Kenneth. Kenneth correctly points out that this finding was mistaken – there was no CD in existence in the amount of \$45,124. However, we interpret the trial court's finding as referring to the amount of community funds that were placed in the \$70,000 HomeStreet CD.

No. 46464-1

The question here is whether the evidence allowed the trial court to trace these funds as they were transferred to other accounts.

The trial court's finding was based on Mary Jo's testimony that \$45,124 in community property was included in a \$70,000 HomeStreet CD. Kenneth did not dispute this testimony. Additional testimony from both Mary Jo and Kenneth created questions about what happened to the \$45,124. The evidence shows that the HomeStreet CD was liquidated and that the funds in that CD were transferred multiple times from account to account. And there was some indication that the \$45,124 may have ended up in accounts that were included in Kenneth's \$220,000 inheritance.

Attempting to trace those funds is difficult. The evidence is somewhat contradictory and confusing. However, the trial court heard the evidence and considered the exhibits in making its ruling, and the trial court was in the best position to figure out what happened to the \$45,124 in community funds. We do not substitute our judgment for the trial court's judgment. *Wilson*, 165 Wn. App. at 340.

We hold that substantial evidence supports the trial court's finding that the parties owned \$45,124 in community funds at the time of the dissolution, and that the trial court did not abuse its discretion in including that amount in Kenneth's property distribution.

E. ATTORNEY FEES IN TRIAL COURT

Kenneth argues that the trial court erred in awarding Mary Jo \$15,000 in reasonable attorney fees. We agree.

We review the trial court's award of attorney fees for manifest abuse of discretion. *Neumiller*, 183 Wn. App. at 920. The trial court abuses its discretion by using an incorrect legal standard or basing its decision on untenable grounds or reasons. *Id.*

RCW 26.09.140 allows the court to award attorney fees "after considering the financial resources of both parties." When the trial court entered the dissolution decree, Kenneth had not elected to start receiving Social Security benefits. Therefore, there was a significant disparity between the parties' monthly incomes. The trial court's rulings left Mary Jo with a monthly income stream of \$3,639 and Kenneth with a monthly income stream of \$1,935.18. The trial court awarded Kenneth approximately \$78,000 more in property than Mary Jo, but that amount included \$220,000 in inheritance and \$45,124 in community funds for which Kenneth could not account.

Under these circumstances, we hold that the trial court erred in ordering Kenneth to pay Mary Jo's attorney fees. Accordingly, we reverse and vacate the trial court's \$15,000 attorney fee award to Mary Jo.

F. ATTORNEY FEES ON APPEAL

Mary Jo argues that she is entitled to attorney fees for defending this appeal. We disagree.

RAP 18.1 permits an award of attorney fees on appeal if applicable law permits such award. RCW 26.09.140 grants this court discretion to award attorney fees on appeal after considering the financial resources of both parties. *In re Marriage of Kile & Kendall*, 186 Wn. App. 864, 888, 347 P.3d 894 (2015). In exercising our discretion, we may also consider the

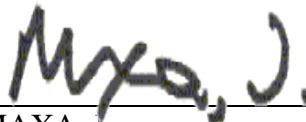
No. 46464-1

arguable merit of the issues on appeal. *In re Marriage of Raskob*, 183 Wn. App. 503, 520, 334 P.3d 30 (2014).

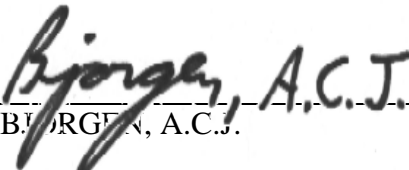
In her affidavit of financial need, Mary Jo asserts that she has accrued and paid \$31,232.58 in appellate attorney fees. Kenneth also filed an affidavit of financial need indicating that he has substantial attorney fees of his own and has not yet begun receiving social security benefits. Because the parties' circumstances are substantially the same as they were at trial, we hold that an award of appellate attorney fees to Mary Jo is not warranted.

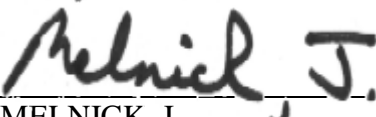
We affirm the trial court's property distribution, but reverse and vacate the trial court's \$15,000 attorney fee award to Mary Jo.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
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MAXA, J.

We concur:

  
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BJORGE, A.C.J.

  
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MELNICK, J.