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

In the Matter of the Marriage of:	No. 30011-1-III
STEPHEN P. HARRISON, Appellant, and KAREN L. HARRISON, Respondent.	UNPUBLISHED OPINION

Korsmo, C.J. — This case involves an appeal from various orders entered in a dissolution action. We remand the issue of college tuition to the trial court, but affirm in all other respects.

FACTS

Stephen Harrison DDS and Karen Harrison MD married in 1986 during her last year of medical school.[1] They separated 20 years later; the couple had four children. Both have their respective practices in the Yakima area. Stephen Harrison has a dental

practice in Zillah; he sees patients four days a week and works two hours a fifth day doing "office work."

Karen Harrison is a nephrologist with a practice in Yakima. She was the primary breadwinner during the marriage, while he had the primary after-school child care responsibilities. In addition to their practices, the couple had several outside business and investment ventures which did not provide profits for the couple. According to Karen's testimony, Stephen was responsible for pursuing the other ventures.

The dissolution trial lasted five days. The court determined that Karen's annual income was $321,000 and Stephen's income was $162,230. The community property was divided evenly between the parties—Stephen receiving assets valued at $465,486 and Karen assets valued at $466,951. Both were awarded their professional practices. The court declined to award maintenance to Stephen.

Primary custody of 17-year-old son, J.H., was awarded to Stephen, while primary custody of 13-year-old daughter, H.H., was given to Karen. The court ordered the parties to each pay one-third of the college tuition for their son, W.H. The court ordered that W.H. pay the remaining share of his college expenses.

[1] As both parties have the same title and had the same surname during trial proceedings, for convenience we will refer to them by their first names throughout this opinion. Karen Harrison is now Karen Mackichan.

Stephen timely appealed to this court.

ANALYSIS

This appeal challenges the property division and the associated accounting for family bank accounts and the value of Karen's practice. Stephen also challenges the court's decision not to award him maintenance, to grant primary custody of H.H. to Karen, and to assign him one-third of W.H.'s college expenses. We will address the issues in that order.

Property Division

Stephen argues that the court erred by dividing the community property evenly. There was no abuse of discretion.

RCW 26.09.080 requires consideration of four factors[2] in reaching a "just and equitable" property division. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242-43, 170 P.3d 572 (2007). The trial court has broad discretion in distributing the marital property and its decision will be reversed only when discretion was exercised on untenable grounds or for untenable reasons. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005). This deferential standard of review exists because the

[2] Those factors include the nature and extent of (1) the community property and (2) the separate property of the parties, (3) the duration of the marriage, and (4) the economic circumstances of the parties at the time of the property division. RCW 26.09.080.

trial court is "in the best position to assess the assets and liabilities of the parties" in order to determine what constitutes an equitable outcome. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

Stephen argues that an equal distribution of property was unfair because he makes only one-half of what Karen makes. His argument puts undue emphasis on one aspect of the fourth statutory factor—the economic circumstances of the parties at the time of the property division. RCW 26.09.080(4). While his income was one-half of his former spouse's, it was still quite substantial income. The trial court was also concerned that his actual income was not fairly reported. As noted in the court's letter opinion, Stephen's net corporate income was only $8,050 on receipts of $741,846 and included substantial deductions[3] over the years. Noting these facts, the trial judge "could only assume that the husband has a good accountant." CP at 211.

Skepticism that Stephen's actual income was accurately reported is only one part of this analysis. At a minimum, the meager profit margin (1.08 percent) suggested that there was room for improvement in the corporation's business practices. The court also noted that Stephen could also increase his income if he worked as much as Karen and/or stopped spending time on his other nonprofitable investments. Considering all the

[3] The opinion noted that $170,673 was deducted for "dental supplies." Clerk's Papers (CP) at 211. This deduction represents 23 percent of the gross receipts.

factors, the trial court determined that Stephen's acknowledged income did not reflect his true potential earning capacity. It was proper to consider these factors in the weighing of a proper division of the property.

Stephen also argues that he is 10 years older than Karen, meaning that he has less remaining time to practice his profession. He likens his situation to that in *In re Marriage of Schweitzer*, 81 Wn. App. 589, 915 P.2d 575 (1996), *aff'd in part on other grounds*, 132 Wn.2d 318, 937 P.2d 1062 (1997). There the husband was semi-retired, 12 years older than the wife, and had health problems. This court ruled that a 55/45 split of community property in favor of the husband was not an abuse of discretion. *Id.* at 596. *Schweitzer* does not aid Stephen here. First, his case is factually distinguishable as he is in good health and is still working with no plans to retire. Second, while *Schweitzer* affirmed the unequal distribution in light of the husband's condition, it did not *require* the unequal distribution. The question on review is whether the trial court abused its discretion, not whether the facts mandated a particular distribution.

In light of each party's high income and strong future earning potential, the trial court did not abuse its significant discretion in equally dividing the community property.

Asset Valuation

Stephen challenges the court's valuation of two assets on both substantive and

evidentiary grounds. We find no prejudicial error and no abuse of discretion.

Assets typically are valued at the time of trial. RCW 26.09.080; *Brewer*, 137 Wn.2d at 766. However, the court has discretion to value the assets as of the time of separation rather than the time of trial. *In re Marriage of Griswold*, 112 Wn. App. 333, 351, 48 P.3d 1018 (2002). The value of an asset is a question of fact. *Clark v. Clark*, 72 Wn.2d 487, 491, 433 P.2d 687 (1967). A factual determination is reviewed for substantial evidence. *Id*. at 492. "Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 262, 828 P.2d 597 (1992). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *Muhammad*, 153 Wn.2d at 803. In a bench trial, the judge has authority to accept additional evidence after trial and before rendering a decision. *Cerjance v. Kehres*, 26 Wn. App. 436, 441, 613 P.2d 192 (1980). However, the same rules for admission of evidence at trial apply to posttrial admission of evidence. *Ghaffari v. Dep't of Licensing*, 62 Wn. App. 870, 876, 816 P.2d 66 (1991).

These principles govern our consideration of both of Stephen's challenges. First,

he argues that the trial court erred in assigning a zero dollar value to bank accounts that had been valued at $147,800 in April 2007 by a declaration filed by Karen before the couple separated for good. He also argues that the trial court erred in accepting a posttrial declaration from Karen that the accounts actually were valued at $108,000 in April 2007, but stated the accounts no longer existed. Stephen had moved to strike the posttrial declaration, but the court admitted it. In issuing its letter opinion, the court indicated that it had not considered the new declaration and valued the accounts at zero based on Karen's trial testimony.

Stephen's evidentiary objection is without merit. The court had discretion to admit the document after trial testimony had concluded. *Cerjance*, 26 Wn. App. at 441. Even if there had been an abuse of discretion, the error would have been harmless as the court did not rely on the document.

Stephen's substantive objection is a closer call, but still without merit. The April 2007 declaration is evidence that bank accounts existed at that time, six months before Stephen moved out of the family home, but it is not evidence that the accounts still existed at the time of trial. At trial Karen testified that there were no accounts. Stephen had no contrary evidence. On the basis of Karen's testimony, the trial court had substantial evidence for finding that the former accounts had no value at the time of trial.

The finding is not erroneous.

The second challenge is to the court's valuation of Karen's medical practice. The court valued the respective practices by adding up the value of the equipment and accounts receivable; no evidence was offered of good will for either practice. At trial, Karen had testified on cross-examination that she did not know the value of her accounts receivable at the time of separation and offered to present evidence the following week. Prior to closing argument, Karen presented a letter from her accountant, Cathy Greninger, which set forth Karen's accounts receivable at $77,879 at the time of separation. The court admitted the letter over Stephen's objection and used it to assign a value of $82,879 to Karen's practice. Stephen's practice was valued at $58,800.

Stephen persuasively argues that the letter was unauthenticated and should not have been admitted. ER 901. However, error in the admission of evidence is harmless if "within reasonable probabilities" it did not affect the outcome of the trial. *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986). That is the case here. If the court had not admitted the evidence, the value of Karen's practice would have been only the $5,000 assigned for her equipment. CP at 234. It was to Stephen's benefit that the court considered and applied the evidence in the letter. Without that evidence, her practice would have been valued substantially below his practice instead of at the more accurate

higher value.

Stephen has not shown that he was prejudiced by the use of the unauthenticated letter from the accountant. The error provides him no basis for relief.

Maintenance

Stephen next argues that the court erred by not permitting him to amend his pleadings to request maintenance and by also declining to award maintenance. The trial court again did not abuse its discretion.

The decision to permit or deny an amendment to the pleadings is reviewed for abuse of discretion. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). The denial of a motion for leave to amend does not constitute an abuse of discretion where the proposed amendment was futile. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 729, 189 P.3d 168 (2008). Here, Stephen moved to amend his pleadings on the last day of trial. Believing that he had made an insufficient showing of need for maintenance, the trial judge denied the motion. Report of Proceedings (RP) at 483-84. Nonetheless, the court also stated its consideration of the issue in the letter opinion.

There is no right to spousal maintenance in Washington, but the denial of maintenance is reviewed for abuse of discretion. *Friedlander v. Friedlander*, 80 Wn.2d 293, 298, 494 P.2d 208 (1972). Trial courts must consider the statutory factors of RCW

26.09.090.[4] *In re Marriage of Williams*, 84 Wn. App. 263, 267-68, 927 P.2d 679 (1996). The purpose of maintenance is to support a spouse until he or she is able to become self-supporting. *In re Marriage of Luckey*, 73 Wn. App. 201, 209, 868 P.2d 189 (1994).

The trial court had tenable reasons for denying maintenance. Stephen did not need maintenance to allow him to become self-supporting. He had an established dental practice with a strong income along with significant assets. While the trial court must consider the standard of living established during the marriage, it is not required to maintain that standard postdissolution.[5] The fact that one spouse's income doubles the other spouse's does not necessarily mandate an award of maintenance. *See*, *e.g.*, *In re Marriage of Foley*, 84 Wn. App. 839, 930 P.2d 929 (1997) (denying maintenance to husband where wife earned $2,648 monthly and husband earned $1,350 monthly); *In re Marriage of Wright*, 78 Wn. App. 230, 896 P.2d 735 (1995) (denying spousal maintenance of wife where husband's monthly income was $4,950 and wife's was $1,400); *Luckey*, 73 Wn. App. at 204-05 (denying spousal maintenance to wife where

[4] Those factors include the parties' financial resources, their abilities to meet their needs independently, the length of the marriage, the time needed by the spouse seeking maintenance to acquire education necessary to obtain employment, the standard of living established during the marriage, the age, health, and financial obligations of the spouse seeking maintenance, and the ability of one spouse to pay maintenance to the other. RCW 26.09.090.

[5] "The maintenance of a lifestyle to which one has become accustomed is not a test of *need*." *Friedlander*, 80 Wn.2d at 297.

husband earned $85,000 annually and wife earned $18,000 annually).

Stephen was in good health with no plans to retire. His practice was not diminishing and there was no reason to believe he was in need of assistance to be self-supporting. The trial court had tenable reasons to decline the maintenance request.

The letter opinion focuses much of its discussion of the maintenance issue on Stephen's unprofitable investments. CP at 211. Stephen argues that this indicates the trial court denied maintenance because his investments were not successful and therefore was trying to punish him for "marital misconduct," a factor that the statute prohibits. RCW 26.09.090. We disagree. As discussed previously, the focus of this paragraph in the court's ruling was that Stephen could improve his income by focusing more on his dental practice and less on his investments. The last sentence sums up the trial court's thoughts:

> It is the court's opinion that if he transfers his effort from these types of investments to his dental practice that he should be able to maintain his standard of living quite adequately.

CP at 211. Far from punishing Stephen for "misconduct," this thought reflects simply the fact that the court believed Stephen had the capacity to earn more if needed to do so.

The trial court did not abuse its discretion in denying the belated request for maintenance.

Custody of H.H.

Stephen argues that the court erred in giving primary custody of the youngest child, daughter H.H., to Karen. The record reflects that the trial court carefully considered all of the evidence and the child's best interests in making its decision.

As with the other issues already discussed, we review custody placement for manifest abuse of discretion. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). The trial court's factual determinations are reviewed for substantial evidence. *Id*. at 810.

The trial court must consider seven factors when establishing the residential schedule:

> (i) The relative strength, nature, and stability of the child's relationship with each parent;
> (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
> (iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
> (iv) The emotional needs and developmental level of the child;
> (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
> (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
> (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

RCW 26.09.187(3)(a). The court must give the greatest weight to the first factor. *Id.* The trial court is not required to enter written findings as to each factor, but the court's ruling must demonstrate a consideration of all the factors. *In re Marriage of Jacobson*, 90 Wn. App. 738, 745, 954 P.2d 297 (1998).

Stephen alleges that the trial court abused its discretion by not making findings concerning the statutory factors and ignoring that he was the primary parent during the marriage, by siding with a "biased" guardian ad litem, and by not interviewing H.H. We will address each issue in turn.

As to Stephen's first argument, we note that the statute only requires that the court *consider* the seven factors; the court is not required to enter written findings addressing each factor. *Id.* The trial court's letter opinion did consider the seven factors, reciting the evidence relevant to each although not expressly tying the evidence to an enumerated subsection. CP at 209-10. For instance, the letter opinion noted that the parties did not agree on a custody plan, but did not reference RCW 26.09.187(3)(a)(ii) while so stating that fact. Nonetheless, this factor was "considered" by the trial court in its decision making. That is all that is required. The court's remaining discussion adequately established that it made its decision with the mandatory statutory factors in mind. CP at 209-10.

Stephen particularly argues that

because he was the primary parent before the marriage broke up, the court erred in discounting this factor in its placement decision. There was no error. The primary statutory factor is the child's current relationship with each parent rather than the parent's former role in the family. In its assessment of the current relationships, the court noted the comparative relationships and found that the relationship between H.H. and her mother was stronger than the child's relationship with her father. The trial court did not err in relying on that assessment.

Stephen also takes issue with the court relying upon the guardian ad litem's view that he was manipulating the children in an effort to influence the residential placement, arguing that the guardian was biased against him. CP at 210. He presents no evidence that suggests bias. The guardian was very experienced and observed the children interact with Stephen on several occasions. In the guardian's opinion, Stephen could not control his behavior around the children. The trial court credited that opinion, noting that it also was supported by the trial testimony of both parents. CP at 209.

The trial judge agreed with the guardian's recommendation that J.H. be placed with his father and H.H. with her mother. While not bound by a recommendation, the trial court is permitted to rely on and follow the guardian's recommendation after making its own assessment of the best interests of the child. *In re Marriage of Swanson*, 88 Wn.

App. 128, 138, 944 P.2d 6 (1997). Here, the trial court had the evidence of the parents' testimony to go along with the guardian's recommendation. There was no error in accepting that recommendation.

Finally, Stephen contends that the trial court erred by not personally interviewing H.H. since there was conflicting evidence in the record. The trial judge is statutorily authorized to interview a child in chambers concerning residential placement. RCW 26.09.210. The decision whether to interview a child is reviewed for abuse of discretion. *Christopher v. Christopher*, 62 Wn.2d 82, 88, 381 P.2d 115 (1963).

The guardian ad litem explained H.H.'s views to the judge—the youngest child would be happy to talk to the judge and was interested in seeing more of her father, but did not yet want to spend half her time with him. The judge asked the guardian if he needed to talk with H.H. and was assured that the child's desires had been faithfully reported to the court. Under these circumstances, the trial judge had tenable reasons not to personally interview the child.

The record reflects tenable reasons for the decision to make Karen the primary parent for H.H. There was no abuse of discretion.

Postsecondary Support for W.H.

The final issue is whether the trial court erred in assessing each parent one-third of

son W.H.'s college costs. Karen argues that Stephen did not preserve this issue and the trial court did not abuse its discretion, but agrees that payment in proportion to income is normally required. We conclude that Stephen did sufficiently preserve the issue and remand for the court to recalculate the payment of college expenses.

Stephen did present the issue to the trial court and very clearly did so during the motion to reconsider. On appeal, Stephen assigned error to the failure to require Karen to pay 65 percent of the college expenses. Other than the assignment of error, the opening brief only addresses the issue in one paragraph in its conclusion section. The brief does cite to the statute on postsecondary support, RCW 26.19.090. Because of the dearth of argument, Karen argues the issue is not properly before this court.

Karen correctly argues that this court need not address an issue that is not appropriately argued in the brief. RAP 10.3(a)(6).[6] *In re Guardianship of Atkins*, 57 Wn. App. 771, 775, 790 P.2d 210 (1990). However, our rules are to be "liberally interpreted" to "facilitate the decision of cases on the merits." RAP 1.2(a). To that end, a technical violation of the rules will not ordinarily bar appellate review where justice is to be served. *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 613, 1 P.3d 579

[6] The rule requires a brief to contain argument "in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6).

(2000).

Karen prudently addressed the issue in her briefing and Stephen responded more fully in the reply brief. We discern no prejudice to Karen from the manner in which the brief of appellant addressed the issue. Accordingly, we exercise our discretion to address the merits of the claim.

"A trial court has broad discretion to order a divorced parent to pay postsecondary education expenses." *In re Marriage of Newell*, 117 Wn. App. 711, 718, 72 P.3d 1130 (2003). In reviewing decisions setting child support, this court defers to the sound discretion of the trial court unless that discretion is exercised in an untenable or unreasonable way. *In re Marriage of Griffin*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990).

RCW 26.19.090(2) governs the trial court's determination of whether to order support for postsecondary education expenses. Under the statute, the court must determine whether the child is dependent upon the parents, and if so, then the court shall exercise its discretion whether to award support based upon consideration of the listed factors, including:

> Age of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities or disabilities; the nature of the postsecondary education sought; and the parents' level of education, standard of living, and current and future resources. Also to be considered are the amount and type of support that the child would have been afforded if the parents had stayed together.

RCW 26.19.090(2).

Karen testified at trial that she expected her children to pay an equal share of their own college expenses and recommended dividing college costs equally among the child and each parent. RP at 532. The trial judge, noting a concern that not all of the father's income had been accurately identified, ultimately accepted Karen's position on payment. CP at 211, 232. She argues that this was a tenable basis for the college support award.

However, both parties acknowledge that Division One of this court has held that "postsecondary support must be apportioned according to the net income of the parents as determined under the chapter." *In re Marriage of Daubert*, 124 Wn. App. 483, 505, 99 P.3d 401 (2004), *abrograted on other grounds by In re Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007). Although this holding seems at odds with the detailed factors that must be considered under RCW 26.19.090(2), which do not indicate support needs be proportional to income, the parties do not challenge the holding and we will not do so in the absence of briefing on the issue.

Nonetheless, the statute has numerous factors that should be considered by the trial judge in setting postsecondary support. The record does not reflect that was done here, probably because the issue was not squarely presented to the trial court in its initial consideration of the issue. In light of the *Daubert* holding and the lengthy statutory factors that need be considered, it is

appropriate to remand this issue to the trial court for consideration of *Daubert* and RCW 26.19.090(2).

We remand for reconsideration of college support and affirm in all other respects.

Affirmed and remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, C.J.

WE CONCUR:

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Sweeney, J.

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Siddoway, J.