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

In re the Marriage of:	)	No. 30029-3-III
MELISSA McCARTHY,	)	
Respondent,	)	
and	)	UNPUBLISHED OPINION
SEAN McCARTHY,	)	
Appellant.	)	

Sweeney, J. — Sean McCarthy and Melissa McCarthy married in 2002, filed for legal separation in 2010, and divorced in 2011. As part of their dissolution proceedings, the court considered whether the parties had a committed intimate relationship prior to their marriage. The court concluded they did. And the court then proceeded to characterize and divide the parties' assets and award spousal maintenance and child support. The court's decisions are supported by this record and we therefore affirm the court's judgment.

FACTS

Sean McCarthy and Melissa Williams (now McCarthy) began cohabitating in 1992 in Lafayette, Louisiana. Their son was born in 1993. Mr. McCarthy maintained a separate residence while attending college from 1995 or 1996 to 1999. According to Ms. McCarthy, he used the separate residence as a quiet place to study and continued to sleep at their shared home. According to Mr. McCarthy, he moved out of their home in 1995 because Ms. McCarthy's children from prior relationships strained their relationship. Ms. McCarthy testified that the two never separated; Mr. McCarthy testified that they separated for about six months after Ms. McCarthy was unfaithful.

In 2002, Mr. McCarthy accepted a job in Silverdale, Washington. He moved to Washington alone in March 2002. Ms. McCarthy remained in Louisiana because her children were in school and she was handling her mother's estate. When Mr. and Ms. McCarthy parted, Mr. McCarthy commented that he had accepted the job in Washington "for her" and that he would "be back to get her." Report of Proceedings (RP) (Mar. 1, 2011) at 7. In April 2002, Mr. McCarthy moved to Spokane because of his job. Ms. McCarthy flew to Washington that same month to look for a house in Spokane. They chose a house together, but the house was deeded to Mr. McCarthy alone. Ms. McCarthy and the children moved from Louisiana to the Spokane house in July 2002. Mr. and Ms.

McCarthy married on October 14, 2002.

They filed for legal separation on April 23, 2010, and eventually filed for divorce. They agreed that the home would be awarded to Mr. McCarthy and that their son would live with Mr. McCarthy. After a three-day trial, the court concluded that they had a committed intimate relationship before they married and divided property and awarded support accordingly. The court ordered that Mr. McCarthy make a $15,000 equalization payment to Ms. McCarthy for equity in the house. It also awarded Ms. McCarthy $1,200 monthly maintenance for two years and ordered that Ms. McCarthy pay $50 per month in child support. Mr. McCarthy appeals these orders and the court's division of community property and debt.

DISCUSSION

Committed Intimate Relationship

Mr. McCarthy first contends that the court incorrectly concluded that the parties had what he calls a meretricious relationship. He argues that they had not lived together for seven years before moving to Washington. And, when Mr. McCarthy moved to Washington and purchased the Spokane house, he did so alone. He argues that they could not have lived together and continued a relationship while Ms. McCarthy was over 3,000 miles away. And therefore the house should have been awarded to him as his

separate property.

Ms. McCarthy responds that Mr. McCarthy failed to assign error to any of the court's findings and they are now verities on appeal. She argues that the court considered the appropriate factors to decide whether or not there was a committed intimate relationship. And the court's findings clearly support its conclusion that a committed intimate relationship existed. The Spokane house was acquired during that relationship and was therefore subject to a just and equitable division.

We will defer to the court's findings in these matters. *In re Pennington*, 142 Wn.2d 592, 602-03, 14 P.3d 764 (2000). Those findings are verities on appeal if a party does not assign error to them. *Gormley v. Robertson*, 120 Wn. App. 31, 36, 83 P.3d 1042 (2004). Whether a committed intimate relationship exists and whether that conclusion of law flows from the court's findings are questions of law that we review de novo. *Pennington*, 142 Wn.2d at 602-03; *Soltero v. Wimer*, 159 Wn.2d 428, 433, 150 P.3d 552 (2007).

"A meretricious relationship is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). We will refer to the relationship by the more recent description—a committed intimate relationship. Whether

a particular relationship is the necessary committed intimate relationship depends on the facts of each case. *Id.* Five factors are relevant: (1) continuous cohabitation, (2) duration of the relationship, (3) purpose of the relationship, (4) pooling resources and services for joint projects, and (5) the intent of the parties. *Id.* These factors are not "hypertechnical"; they are merely a tool to help the court reach all helpful evidence. *Id.*

Mr. McCarthy lists a variety of reasons for his contention that there was no committed intimate relationship. Br. of Appellant at 19-20. The majority of these center on the court's findings; findings to which Mr. McCarthy did not assign error. *See Gormley*, 120 Wn. App. at 36. Mr. McCarthy asserts that he and Ms. McCarthy were not in a relationship when he moved to Washington and that the two had not resided together for years. The court found otherwise, specifically that he and Ms. McCarthy cohabitated consistently but for a six-month break up. Mr. McCarthy also argues that they could not have had a committed intimate relationship in 2002 while he lived in Washington and Ms. McCarthy lived in Louisiana. However the facts suggest that the parties were in a continuing relationship despite their separation. Almost immediately after Mr. McCarthy moved to Washington, Ms. McCarthy flew there, they chose a house together, and Ms. McCarthy moved the children into that house at the end of the school year.

Here all of the *Connell* factors suggest that the parties had a committed intimate

relationship.

Continuous Cohabitation. The court noted that the parties cohabitated from 1993 to August 1995 and during 2000. They argued over whether they lived together from 1995 to 2000, but the court ultimately found that they did live together because Mr. McCarthy did not move his possessions out of the family home, used the home, and received important mail at the home, the parties never sought a parenting plan for their child, and Ms. McCarthy never sought child support.

Duration of Relationship. The court found that the parties' relationship spanned from 1992 to 2010. After a one-night stand, the parties did separate for six months. Aside from the one-night stand, the parties' relationship was monogamous.

Purpose of Relationship. The court found that the parties maintained a "marriage-like" relationship where they "shared a residence, provided each other mutual love, care, support, sex, friendship, and companionship," referred to each other as husband and wife, and blended their families from prior relationships. RP (Mar. 1, 2011) at 10.

Pooling of Resources. The court found that the parties did not have joint bank accounts prior to marriage. However it also noted that they never got joint accounts after marriage. Rather, they would transfer money between their accounts to share living expenses. When Mr. McCarthy found stable employment in Washington, they pooled

resources by living a traditional marital relationship. Mr. McCarthy was the "breadwinner" and Ms. McCarthy "cared for the home and children." RP (Mar. 1, 2011) at 11.

Intent. The court found that they held each other out to be husband and wife, were monogamous, and were co-parenting their son. The court also found it significant that "these parties eventually did marry as husband and wife, it's pretty clear that they had some sort of a significant relationship leading to that marriage." RP (Mar. 1, 2011) at 11. Lastly, the court noted that, although Mr. McCarthy moved to Washington alone, Ms. McCarthy, their children, and all of their possessions followed and moved into a home with Mr. McCarthy.

In *Pennington*, the Supreme Court applied the five *Connell* factors to relationships and concluded that they were not a committed intimate relationship. In two of them the parties broke up repeatedly, dated other people, and were at times married to other people during the purported twelve- and six-year committed initimate relationships. 142 Wn.2d at 605-07. In one case, there was no evidence that the parties ever pooled their resources or their efforts and both had different perceptions about the seriousness of their relationship. *Id.* at 604-05. In another case, the parties did share bank accounts and expenses, but the trial court failed to make any findings regarding the intent of the parties

and the evidence was "too equivocal" to determine what the purpose of the relationship was. *Id.* at 606-07. In those cases, there was not the committed intimate relationship predominantly because the relationship and cohabitation was sporadic and each had different ideas about what their relationships meant.

The relationship here is distinguishable from the relationships addressed in *Pennington* for several reasons. First, the relationship was not sporadic. But for a six-month period, the relationship was consistent. Second, the relationship was largely monogamous. The only incident of infidelity was a one-night stand. Third, they seemed to have mutual intent regarding their relationship because it was a monogamous relationship that continued for 10 years until the parties eventually married. Fourth, the court found that the relationship had a marriage-like purpose and that the parties both pooled their efforts and resources to live as a family. The five *Connell* factors support the trial court's conclusion that the parties here had a committed intimate relationship.

Once the court concludes that a committed intimate relationship existed, it must then evaluate the parties' interest in property acquired during the relationship and make a "just and equitable distribution of the property." *Connell*, 127 Wn.2d at 349. We review the court's division of property for abuse of discretion. *Soltero*, 159 Wn.2d at 433; *In re Marriage of Kraft*, 119 Wn.2d 438, 450, 832 P.2d 871 (1992). A court abuses its

discretion when it bases its decision on untenable grounds or reasons. *Soltero*, 159 Wn.2d at 433.

There is a rebuttable presumption that all property acquired during the relationship is owned by both parties. *Connell*, 127 Wn.2d at 351. If the presumption is not rebutted, then the property is subject to a just and equitable division. *Id.* at 349-50. Mr. McCarthy argues that the court improperly concluded that the Spokane house was joint property because the house is deeded to Mr. McCarthy and he moved there alone. But the house was acquired during the committed intimate relationship. The court did not abuse its discretion in dividing the house's equity and ordering Mr. McCarthy to make a $15,000 transfer payment to Ms. McCarthy.

Just and Equitable Division of Community Property and Debts

Mr. McCarthy next argues that the court erred in classifying, distributing, and valuing certain assets and liabilities. He argues that the court erred by classifying a 1996 Mercury Cougar and his retirement accounts as community property. He argues that it was unfair to subject his retirement accounts to equitable division without giving Ms. McCarthy's interest in a trust similar treatment. And he argues that the court also erred by concluding that a Capital One credit card balance was community debt and by over valuing a Sony Playstation console and Playstation games.

Ms. McCarthy responds that the court did not abuse its discretion in equally dividing the property acquired during their relationship and marriage. She urges that Mr. McCarthy's retirement account was an asset acquired entirely during the parties' marriage. She also argues that the court correctly refused to consider Ms. McCarthy's separate trust account because the record contained insufficient evidence to value that asset.

In a dissolution action, a court's characterization of property as separate or community is an issue of law and accordingly our review is de novo. *In re Marriage of Mueller*, 140 Wn. App. 498, 503-04, 167 P.3d 568 (2007). The court's division of property is reviewed for abuse of discretion. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005).

When dividing property in a dissolution action, all separate and community property is before the court for division. *In re Marriage of Stachofsky*, 90 Wn. App. 135, 142, 951 P.2d 346 (1998). All property acquired during marriage is presumed to be community property. *In re Marriage of Short*, 125 Wn.2d 865, 870, 890 P.2d 12 (1995). The court should make a just and equitable division of that property by considering four factors: (1) the nature and extent of community property, (2) the nature and extent of separate property, (3) the duration of the marriage, and (4) the economic circumstances of

each spouse at the time the division will be effective. *In re Marriage of Brewer*, 137 Wn.2d 756, 769 n.62, 976 P.2d 102 (1999) (quoting *In re Marriage of Konzen*, 103 Wn.2d 470, 477-78, 693 P.2d 97 (1985)).

Mr. McCarthy contends that the trial court incorrectly classified his retirement account and a Mercury Cougar as community property. Br. of Appellant at 3, 21. At trial, Mr. McCarthy testified that he began contributing to a Thrift Savings Plan account in 2003 and that, as of April 23, 2010, the account contained $63,104.26. Ms. McCarthy testified that they had a 1994 or 1996 Mercury Cougar. Neither party testified about whether the Cougar was acquired before or during their marriage.

On appeal, Mr. McCarthy contends that portions of his retirement accounts were his separate property because the accounts are "considered to have started in 1999 because of prior military credits." Br. of Appellant at 21. He also contends he used his separate assets to buy the Cougar in 1999. These facts, however, are not in this record. We are led to conclude then that the court appropriately characterized the retirement accounts and Cougar as community property.

Mr. McCarthy also contends that the trial court erred by characterizing a $10,000 Capital One credit card balance as community debt. Br. of Appellant at 3. Ms. McCarthy testified that she is the authorized user of a Capital One credit card account

that belongs to her stepfather. She testified that her stepfather does not use the credit card, but that she used the credit card to pay family expenses. On April 12, 2010, the card's balance was $10,038.14. Mr. McCarthy argues that the debt is not community debt because the credit card belongs to Ms. McCarthy's stepfather and it includes debts incurred before and after separation. Br. of Appellant at 3. However Ms. McCarthy's testimony suggested that the debt was acquired during the marriage to cover community expenses. The court then correctly concluded that this was a community debt.

Mr. McCarthy next contends that the trial court abused its discretion in valuing, or failing to value, certain assets. We review a trial court's ruling on valuation for abuse of discretion. *In re Marriage of Mathews*, 70 Wn. App. 116, 122, 853 P.2d 462 (1993). First, Mr. McCarthy argues that the court improperly valued a Playstation console and Playstation games at $2,000. Br. of Appellant at 3. Ms. McCarthy testified that the parties owned a Playstation console and between 200 and 250 Playstation games. According to her testimony, Mr. McCarthy bought the games for between $70 and $90 each. She estimated that those items were now worth $3,000. Assuming that the game console has no value and that the parties only had 200 games, the court's valuation gives each game a value of $10. This is not an abuse of discretion.

Finally, Mr. McCarthy suggests that the trial court abused its discretion by

dividing his retirement accounts but failing to consider Ms. McCarthy's interest in the corpus of an irrevocable trust. Br. of Appellant at 21-22. Mr. McCarthy testified that he did not begin contributing to his retirement account until 2003. By his testimony, the account contained only community property.

Ms. McCarthy testified that she is the beneficiary of an irrevocable trust. She explained that her stepfather has use of the trust assets until his death and that any remaining assets would be divided equally between Ms. McCarthy and her two siblings. She reported that her stepfather is in good health and that the trust assets' value is "supposed to be at some point close to" $1 million. RP at 184. Mr. McCarthy assumes that the value of her interest in the trust is "over $330,000." Br. of Appellant at 21, 31. The court noted that it had little information regarding the trust and declined to value it because the court "cannot just guess at a value." RP (Mar. 1, 2011) at 24. Absent some reliable calculation of the value, the court's treatment of the trust was not an abuse of discretion.

Spousal Maintenance

Mr. McCarthy contends that the trial court's order that Mr. McCarthy pay $1,250 in maintenance and $454 for Ms. McCarthy's health insurance every month is unfair. Mr. McCarthy argues that he supports their son and pays his college tuition while Ms.

McCarthy is living rent free in her stepfather's house and chooses to be unemployed. Br. of Appellant at 23-24. He argues that the court also erred by awarding maintenance to allow Ms. McCarthy time to pursue a bachelor's degree because Ms. McCarthy already has a bachelor's degree. Br. of Appellant at 26.

We review a maintenance award for abuse of discretion. *In re Marriage of Zahm*, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999).

The court has discretion to order maintenance "in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors." RCW 26.09.090(1). A 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.

Ms. McCarthy's income at the time of trial was from oil royalties. In 2010, she received about $8,000. During the parties' relationship, she received about $12,000 annually. The court estimated that Ms. McCarthy's monthly income from the royalties was about $750.

Mr. McCarthy argues that the court's award of maintenance is unfair because Ms. McCarthy was voluntarily unemployed and living in a house rent free. The court considered Ms. McCarthy's unemployment and lack of housing costs when weighing the RCW 26.09.090's factors. Regarding Ms. McCarthy's living expenses, the court considered that Ms. McCarthy did not pay rent and that she was splitting living expenses with a live-in boyfriend. Regarding Ms. McCarthy's employment, the court observed that Ms. McCarthy had been a homemaker for many years, but that she would "need to become self-sufficient." RP (Mar. 1, 2011) at 31. The court ordered maintenance for two years to give Ms. McCarthy time to finish her bachelor's degree or find a job. While Ms. McCarthy already has a bachelor's degree, two years is a reasonable amount of time for her to find a job and become self-sufficient. The court's maintenance order was not an abuse of discretion.

Child Support

Mr. McCarthy next contends that the court abused its discretion by deviating from the child support schedule and failing to impute income to Ms. McCarthy. Br. of Appellant at 24-25. Again, we review child support orders for abuse of discretion. *See In re Marriage of Bell*, 101 Wn. App. 366, 370-71, 4 P.3d 849 (2000).

RCW 26.19.020 governs standard calculation of child support. *In re Marriage of*

Holmes, 128 Wn. App. 727, 737, 117 P.3d 370 (2005). The court can deviate from the standard calculation if it makes appropriate findings. *Id.* RCW 26.19.075 provides a nonexclusive list of reasons to deviate from the standard calculation.

The court imputed $850 in monthly income in addition to $750 in oil royalties. Based on her monthly income of $1,600 and Mr. McCarthy's monthly net income of $6,949, the standard calculation for child support would require Ms. McCarthy to pay $543 per month in support. The court deviated from that figure based on "tax planning and maintenance." RP (Mar. 1, 2011) at 30. It ordered Ms. McCarthy to pay $50 per month in child support. The court's order was not an abuse of discretion considering the $1,200 maintenance award and the parties' tax liabilities. An order for Ms. McCarthy to pay $543 per month in child support would wipe away nearly half of maintenance that the court ordered. Moreover the court suggested that Mr. McCarthy would receive the benefit of claiming their son as a dependent on his federal income tax return because Ms. McCarthy likely would not owe any taxes. The court did not abuse its discretion in adjusting Ms. McCarthy's child support obligation downward.

Reconsideration

Mr. McCarthy next contends that the trial court improperly denied his motion for reconsideration. "Motions for reconsideration are addressed to the sound discretion of

the court; a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of that discretion." *Wagner Dev., Inc. v. Fid. & Deposit Co. of Md.*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999). A motion for reconsideration may be granted if a party establishes any one of the grounds listed in CR 56(a), including "[n]ewly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at trial." CR 59(a)(4).

Mr. McCarthy's motion for reconsideration essentially reargued every issue at trial. It also explained that his retirement account included pre-marriage assets and that he bought the Cougar prior to the marriage. Mr. McCarthy's motion was not supported by any of the grounds listed in CR 59(a). Although the evidence Mr. McCarthy presented in the motion did suggest that some of the property characterized as community property was in fact separate property, the evidence was certainly not "newly discovered." The trial court properly denied Mr. McCarthy's motion for reconsideration.

Other Issues

Mr. McCarthy assigns error to the trial court's pretrial order giving Ms. McCarthy four months to move out of the parties' home. He also argues that he is entitled to postsecondary educational support for their son. Br. of Appellant at 4-5. The order providing Ms. McCarthy four months to move out is moot and need not be considered.

Citizens for Financially Responsible Gov't v. City of Spokane, 99 Wn.2d 339, 350, 662 P.2d 845 (1983). And Mr. McCarthy's motion for postsecondary educational support cannot be addressed here because the motion was pending at the time this appeal was filed.

Attorney Fees

Ms. McCarthy moves for attorney fees pursuant to RCW 26.09.140. In a dissolution proceeding, the court may award attorney fees to a party defending any proceeding after considering the parties' financial resources. RCW 26.09.140. The evidence at trial suggests that Mr. McCarthy has the ability to pay attorney fees and Ms. McCarthy has a need for attorney fees. In considering a motion for attorney fees, this court also considers "the arguable merit of the issues on appeal." *In re Marriage of King*, 66 Wn. App. 134, 139, 831 P.2d 1094 (1992). Mr. McCarthy's appeal was not meritorious. An award of attorney fees is appropriate.

We affirm the decision of the court and award fees.

A majority of the panel has determined that 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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Sweeney, J.

WE CONCUR:

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Korsmo, C.J.

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Brown, J.