

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of:

No. 27728-3-III

**MONA LISA KELLER, n/k/a
MONA LISA MEADOWS,**

Respondent,

and

DALE C. KELLER,

Appellant.

Division Three

UNPUBLISHED OPINION

Brown, J.—Dale C. Keller appeals a marriage dissolution decree, assigning error to the trial court’s (1) maintenance award, (2) division of property, and (3) attorney fee award to Mona Lisa Meadows.¹ We find no abuse of the trial court’s broad discretion, affirm, and award Ms. Meadows attorney fees on appeal.

FACTS

Dale Keller and Mona Lisa Meadows married March 31, 1985 and separated

¹ In the dissolution decree, the trial court changed Mona Lisa Keller’s name to Mona Lisa Meadows.

January 11, 2006 when Mr. Keller was 48 and Ms. Meadows was 45. Except for a few weeks of elder care in 1996, Ms. Meadows worked as a homemaker and raised the couple's two daughters. Both daughters were in college by trial.

After separation, Ms. Meadows started basic work skills classes at a community college and was expected to finish them by December 2008. She stated that going back to school was extremely difficult for her and that she might need additional courses to secure a clerical position. Ms. Meadows undisputedly suffers from long-standing emotional issues requiring periodic counseling.

Mr. Keller financially supported the family during the marriage. At trial, he had worked for the federal government with U.S. Customs and Border Patrol for 16 years. In 2002, this position became full time. He testified that his annual income for the three years prior to trial had been over \$83,000.

During the separation, Ms. Meadows moved into a \$550 a month apartment with the couple's youngest daughter. Mr. Keller remained in the paid-for family home.

Following trial, the court divided the parties' community property and awarded Ms. Meadows \$2,000 per month in maintenance for five years, then \$1,000 per month until the parties' split pensions were payable. Mr. Keller received the family home, valued at \$165,500; Ms. Meadows received an equalization of \$89,925. By a Qualified Domestic Relations Order (QDRO),² Ms. Meadows received a one-half interest in Mr.

² A Qualified Domestic Relations Order is a specific type of court order that awards a portion of a retirement benefit to the employee's divorced spouse, who is called an "alternate payee." See Kenneth W. Weber, 20 Washington Law and

Keller's Washington National Guard retirement plan and his Federal Employees Retirement System (FERS) pension. She was awarded \$4,556 in a LPL stock portfolio, 55 percent of a Thrift Savings Plan, and a large portion of the couple's income tax refunds from 2006 and 2007. The court did not order Mr. Keller to pay post secondary child support for either of the college-age daughters but presumed he would contribute to these expenses.

In support of the maintenance award, the trial court found:

The wife has the need for spousal maintenance and the husband has the ability to pay. This is a long term marriage where the wife has been a homemaker throughout, has no education and no work experience. The wife is emotionally fragile and it will be very difficult for her to take care of herself and she has limitations on her work and earning capability. The wife will likely never be able to reach the same earning level as the husband and he will be in a far better financial position after this divorce. The husband has had the entire duration of the marriage which the wife has not had to learn job skills and gain job experience. The wife is at danger of ending up in poverty if the Court does not address the issues and award spousal maintenance.

Clerk's Papers (CP) at 112.

Before he appealed, Mr. Keller moved for reconsideration of all adverse rulings. He attached several documents to his motion, including a printout from a federal government personnel internet page indicating a \$95,000 base salary for GS-15 employees, a federal statute pertaining to limitations on premium pay, a statement from LPL financial, and a letter purportedly from Ms. Meadows. The court denied Mr.

Practice: Family and Community Property Law, § 32.37 (1997).

Keller's motion on all issues relevant to this appeal and refused to consider the documents Mr. Keller provided after trial. The court awarded Ms. Meadows \$1,000 attorney fees as costs for responding to Mr. Keller's reconsideration motion.

ANALYSIS

A. Income Calculation

The issue is whether the court improperly calculated Mr. Keller's annual income for maintenance purposes. Mr. Keller contends the court erred in using a 2008 pay stub, uncertain pay raises, and in finding his 2008 net (\$82,549.92) and gross (\$112,598.20) incomes. Mr. Keller contends the court abused its discretion in not considering documents he attached to his reconsideration motion; he argues one document establishes his annual income is capped at \$95,000 a year.

Considering the range of evidence, the court did not speculate in calculating Mr. Keller's annual salary. The court properly extrapolated from the year-to-date figures on a 2008 pay stub submitted by Mr. Keller as his sole salary documentation. Without considering any raises, the court calculated Mr. Keller's annual gross income at \$112,598.20. Mr. Keller testified the 2008 pay stub accurately reflected his annual salary. According to the pay stub, Mr. Keller earned \$43,307 in 20 weeks.

Next, the court did not err in refusing to consider the documents Mr. Keller submitted after trial. CR 59 sets forth the grounds for a motion for reconsideration of a trial court's decision or order. "[E]vidence presented for the first time in a motion for

reconsideration without a showing that the party could not have obtained the evidence earlier does not qualify as newly discovered evidence.” *In re Marriage of Tomsovic*, 118 Wn. App. 96, 109, 74 P.3d 692 (2003). In *Tomsovic*, the court held that the trial court did not abuse its discretion by denying the appellant’s motion for reconsideration where the additional evidence presented to the court in his motion for reconsideration was available at an earlier stage in the case, and the appellant failed to explain why he neglected to bring the arguments to the court’s attention earlier. *Id.*

Here, the trial court explained it was refusing to consider Mr. Keller’s supplemental evidence because he failed to show why these documents that were available before trial could not have been presented at trial. It noted, “[w]hile the federal statute is certainly law and not evidence, it is not possible to interpret it without reference to other evidence, such as the improperly and tardily submitted personnel pay scale information.” CP at 161.

The court partly found:

It is unclear even from the attachments to the motion that Mr. Keller’s income as found by the court is not accurate. . . . However, it is true that the exhibits suggest that respondent’s income premium pay would be capped at about \$95,000 per year. But even if the information is now considered, or had been considered at trial, the maintenance order is something that the respondent can still afford, and that the petitioner certainly needs.

CP at 156-57.

In sum, the court properly refused to consider the new evidence. Mr. Keller did

not explain why he could not have provided the additional information to the court earlier. Moreover, as next discussed, the court's maintenance award was equitable.

B. Maintenance

The issue is whether the trial court abused its discretion in its maintenance award. A maintenance award is often utilized to equalize the parties' standard of living for an appropriate period of time. *In re Marriage of Estes*, 84 Wn. App. 586, 593, 929 P.2d 500 (1997) (citing *Washburn v. Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984)). Appellate courts are generally reluctant to interfere with the trial court's decisions in a dissolution action because the emotional and financial interests affected by such decisions are best served by finality. *In re Marriage of Landry*, 103 Wn.2d 807, 8, 9, 10, 699 P.2d 214 (1985). The spouse who challenges such decisions bears the heavy burden of showing an abuse of discretion on the part of the trial court. *In re Marriage of Zahm*, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999).

The trial court may award maintenance in such amounts and for such time as it deems just, without regard to misconduct, considering the following non-exclusive factors: (1) the post-dissolution financial resources of the parties, including the apportionment of separate or community property, (2) the ability of the spouse seeking maintenance to meet his or her needs independently, (3) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find

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employment, (4) the standard of living established during the marriage, (5) the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance, (6) the ability of the spouse from whom maintenance is sought to meet his or her needs and financial obligations, and (7) the duration of the marriage. RCW 26.09.090(1)(a)-(f). The only limitation on an award of maintenance is that the amount and duration, in light of all these factors, must be just. *Washburn*, 101 Wn.2d at 178.

The court's paramount concern is the "economic condition in which the dissolution decree leaves the parties." *In re Marriage of Williams*, 84 Wn. App. 263, 268, 927 P.2d 679 (1996). The earning capacity of the parties is one of the most important concerns and an award is not just if one party is left with a low and uncertain standard of living while the other party retains a much higher standard. *Stacy v. Stacy*, 68 Wn.2d 573, 576, 414 P.2d 791 (1966).

A trial court abuses its discretion when it makes a decision on untenable grounds or for untenable reasons. *In re Marriage of Sheffer*, 60 Wn. App. 51, 53, 802 P.2d 817 (1990). We review a trial court's findings of fact under a substantial evidence standard. *Johnson v. Horizon Fisheries, LLC*, 148 Wn. App. 628, 640, 201 P.3d 346 (2009). Evidence is substantial if it is sufficient to persuade a fair-minded person of the truth of the asserted premise. *Mowat Constr. Co. v. Dep't of Labor & Indus.*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009).

Here, the trial court's award of maintenance to Ms. Meadows was based on the

following findings: (1) Ms. Meadows' status as a full-time homemaker for many years results in a high risk of impoverishment, (2) Ms. Meadows lacks education, work experience, and job skills, (3) Ms. Meadows presents as emotionally fragile, and this condition limits her from all but low paying employment, (4) Ms. Meadows will never be able to reach Mr. Keller's earning level, whereas Mr. Keller will be in a better financial position after the dissolution, (5) Ms. Meadows cannot meet her monthly living expenses, (6) Mr. Keller's annual net income is \$82,549.92; therefore, Mr. Keller has the ability to pay the ordered maintenance, and (7) the parties' marriage was long term.

Mr. Keller challenges these findings of fact and contends the amount and duration of the maintenance award is unjust under RCW 26.09.090. Mr. Keller contends one or two years of maintenance was sufficient, especially considering he was paying his daughter's college expenses. Mr. Keller argues that due to Ms. Meadows' emotional fragility, the court should have ordered her to investigate social security disability or engage in treatment or psychological counseling as a condition of maintenance. He argues the court should consider the non-statutory factor "that the party receiving maintenance has chosen not to avail themselves of possible financial aid or assistance when that person claims to suffer limitations in terms of her ability to maintain gainful employment." Br. of Resp't at 32.

Mr. Keller's arguments lack merit. First, the court did consider Mr. Keller was paying about \$1,200 a month for the college expenses, but concluded his monthly

income was enough for him pay both college and maintenance expenses. Next, the record supports the court's findings of fact. Mr. Keller concedes Ms. Meadows is emotionally fragile. Further, the court observed Ms. Meadows' demeanor during trial and made relevant findings of her coping ability.

Mr. Keller provides no authority, and we can find none, requiring Ms. Meadows to engage in psychological counseling or treatment as a condition of maintenance. And, similarly, Mr. Keller offers no authority requiring Ms. Meadows to apply for social security disability benefits in lieu of maintenance.

The court's primary concern is the economic condition of the parties after divorce. In view of this concern and the statutory factors, Mr. Keller fails to persuade us that the maintenance award was unjust. The marriage was long term. Ms. Meadows' lack of training for gainful employment combined with her emotional condition makes it unlikely she will ever be able to earn enough to maintain an adequate standard of living for herself. In contrast, Mr. Keller developed work skills during the marriage and was earning a significant income working for U.S. Customs. As the court pointed out, "[t]he maintenance awarded was only \$2,000 per month, leaving [Mr. Keller] with \$71,000 per year adjusted gross income." CP at 161. The trial court could find it unjust to leave Ms. Meadows with a low and uncertain standard of living while Mr. Keller retained a significantly higher one. *Stacy*, 68 Wn.2d at 576.

C. Property Division

The issue is whether the court made a just and equitable distribution of the parties' property.

The trial court's distribution of property in a dissolution action is guided by statute, which requires it to consider (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 of the property is to become effective. RCW 26.09.080.

In evaluating these factors, the court must make a "just and equitable" distribution of the marital property. RCW 26.09.080. In doing so, the trial court has broad discretion in distributing the marital property, and its decision will be reversed only if there is a manifest abuse of discretion. *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002). The court is not required to equally divide the community property. *White v. White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001). "Future earning potential is a factor that may be considered in making a just and equitable property division." *In re Marriage of Crosetto*, 82 Wn. App. 545, 557, 918 P.2d 954 (1996). And "[t]he longer the marriage, the more likely a court will make a disproportionate distribution of the community property." *In re Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572 (2007).

Mr. Keller's contention that the property division is inequitable because he has been assigned all the community debt is not persuasive. The record shows the trial

court ordered Mr. Keller to pay two debts: \$4,100 in student loans for one of the daughters and any capital gains tax on the sale of the LPL portfolio. In view of Mr. Keller's annual income and Ms. Meadows' total inability to pay off any debt, the court did not abuse its discretion in ordering Mr. Keller to pay these debts.

Further, in dividing the property, the trial court properly considered the length of the marriage and the future earning potential and economic situation of each spouse. The court found Ms. Meadows was totally unable to support herself or amass any property in the foreseeable future and risked impoverishment unless she received a greater share of the parties' property. As already discussed, the record amply supports the court's finding that Ms. Meadows's future earning ability is severely compromised by her lack of job skills and her emotional frailty. In contrast, Mr. Keller will be able to financially rebound after the divorce. Mr. Keller fails to demonstrate how the trial court abused its discretion in its property division.

D. FERS Pension

The issue is whether the trial court erred in valuing and dividing the FERS retirement account. Mr. Keller argues that while he started full time federal employment in 1992, he did not begin accruing retirement benefits until 1997 and Ms. Meadows' interest ratio should be calculated from the latter date.

A retirement pension earned by a spouse during marriage is community property subject to equitable division by the court. *In re Marriage of Harris*, 107 Wn. App. 597,

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27 P.3d 656 (2001). Even if a trial court erroneously values or mischaracterizes property, including a retirement plan, the allocation will be upheld if as long as it is fair and equitable. *In re Marriage of Pilant*, 42 Wn. App. 173, 181, 709 P.2d 1241 (1985); *In re Marriage of Williams*, 84 Wn. App. at 269.

In the dissolution decree, the trial court stated,

The wife's interest in the [FERS] plan shall be set forth by way of separate QDRO and the formula for the calculation shall be based on a ratio of the marital interest in the plan being 249.3 months of the total months of service at the time of retirement. The wife shall receive 50% of said interest in the plan.

CP at 119.

The trial court declined to modify the FERS QDRO, rejecting Mr. Keller's argument that the community interest in the FERS plan should start in 1997. The court noted Mr. Keller's argument "ignores the fact that he would not have had a vesting date in the absence of those previous years of qualifying employment, all of which were during the course of the marriage." CP at 163.

Notably, Mr. Keller cites no authority for his proposition that the vesting date of the FERS retirement plan should be used in calculating the community interest in the plan rather than the date of hire. He ignores the fact, emphasized by the court, that he would not have begun accruing benefits in 1997 unless he had spent the previous five years, during which he was married, in federal employment. The years of community efforts during Mr. Keller's federal employment contributed to his 1997 vesting date.

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See *In re Marriage of Wright*, 147 Wn.2d 184, 192, 52 P.3d 512 (2002) (court must take into account the community's contribution to a pension plan). The record supports the trial court's reasoning and exercise of discretion. Given all, the trial court did not err in calculating the community interest in the FERS plan based on Mr. Keller's date of federal employment.

E. LPL Stock

The issue is whether the court erred when valuing and dividing the LPL financial stock. Mr. Keller, seeking an equal division, contends the court improperly granted Ms. Meadows 60 percent of the stock value based on its erroneous finding that Mr. Keller unilaterally sold the stock. Mr. Keller argues the court should have valued the stock at its pre-liquidation value of \$7,594.31 not the \$6,574.52 he received upon its sale.

When the court entered the dissolution decree, the sole documentation before it indicated the stock value was \$7,594.31. The court awarded Ms. Meadows 55 percent of that sum (\$4,556). The court noted Mr. Keller provided no documentation supporting his claim that he received approximately \$6,500 for the stock until after trial. And, post trial, Mr. Keller submitted a letter he claims shows Ms. Meadows had discussed the stock sale with a paralegal, although the court noted Mr. Keller did not seek permission before selling the stock. But the trial court properly declined to consider these documents because both the document and the letter were available before trial. Mr. Keller failed to explain why they were not presented at that time. Further, the court

found that even if it used the lower stock value of \$6,554.52, a 60 percent award of the stock to Ms. Meadows was not inappropriate given her financial need.

In sum, the record and CR 59(a)(4) support the trial court. Even if we accepted Mr. Keller's argument that the stock should have been valued at its sale price, he fails to explain how the court abused its discretion in awarding 60 percent of the stock's value to Ms. Meadows given her financial need. See *Pilant*, 42 Wn. App. at 181 (even if court erroneously values property, its distribution will be upheld if equitable).

F. College Expense Offset

The issue is whether the court erred by abusing its discretion when denying Mr. Keller's request to offset a daughter's college expenses against spousal maintenance. He contends the court erroneously concluded "the priority of keeping petitioner out of poverty was a more important one than financing the daughters' college education."

CP at 164. However, the court merely recognized:

No post secondary child support is ordered for the adult dependent children, however, it is presumed that the father will be contributing to those expenses and the Court has factored that into its calculations with regard to the spousal maintenance award.

CP at 113.

Given Ms. Meadows' dire financial need, the trial court did not abuse its discretion in denying a college expense offset. The primary maintenance concern is the economic condition of the parties after dissolution. *Williams*, 84 Wn. App. at 268. In sum, the trial court did not abuse its discretion in denying a college expense offset.

G. Tax Refunds

The issue is whether the trial court erred by abusing its discretion when characterizing and dividing the parties' 2006 and 2007 tax returns and an Internal Revenue Service stimulus check. The combined value of the tax returns was \$7,648 and the value of the stimulus check was \$1,200. Mr. Keller contends the tax refunds should have been characterized as separate property notwithstanding the fact that the parties filed joint tax returns in 2006 and 2007. He argues that his earnings alone generated the refunds and Ms. Meadows, not he, received the benefit of the joint filings. Finally, Mr. Keller contends that, at most, Ms. Meadows is entitled to an equal division of the stimulus check.

Both parties agreed to file joint tax returns in 2006 and 2007. The trial court characterized the tax returns as community property based on this joint filing and found that both parties thereby benefitted. It awarded Ms. Meadows \$8,000 of the \$8,848 total so that she would be able to pay attorney fees, which were not awarded, and a \$5,500 loan from her parents for a car. The court refused to reconsider the award because Mr. Keller stipulated to the joint filings and showed no prejudice.

Because both parties agreed to file joint tax returns, the court did not err in characterizing the returns as community property. Moreover, the disproportionate division in favor of Ms. Meadows was not unjust. Considering that the court did not award Ms. Meadows attorney fees and she assumed a \$5,500 debt, the trial court

acted within its discretion in awarding the bulk of the tax refunds to Ms. Meadows.

H. Attorney Fees

Mr. Keller contends the trial court abused its discretion by awarding Ms. Meadows \$1,000 attorney fees for responding to his reconsideration motion. He asserts the trial court erred in finding that Ms. Meadows was unable to pay the fees and argues the reconsideration motion was not frivolous.

The decision to award attorney fees under RCW 26.09.140 is within the trial court's discretion. *In re Marriage of Knight*, 75 Wn. App. 721, 729, 800 P.2d 71 (1994). "The party challenging this award bears the burden of proving that the trial court exercised [its] discretion in a way that was clearly untenable or manifestly unreasonable." *Id.*

RCW 26.09.140 states in pertinent part:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

When determining an attorney fee award, the trial court should consider the factual and legal questions involved and the time necessary to prepare the case. *Knight*, 75 Wn. App. at 730. It must also balance the needs of the spouse seeking them against the ability of the other spouse to pay. *Id.* at 729.

Regarding the attorney fee award, the court found:

The sum of \$1,000 is a more than reasonable sum given the length of the motion, the time one would obviously expect to be involved reviewing and responding to it, and the fact that counsel indeed had to travel from Spokane to Newport and back to argue the motion. Additionally, the parties' financial situation has not changed since the entry of the Decree, and the petitioner's ongoing ability to pay for her attorney remains severely limited.

CP at 160.

Considering all, Mr. Keller fails to persuade us that the court abused its discretion. Mr. Keller's motion was lengthy and he challenged all of the trial court's decisions – yet Mr. Keller solely prevailed on limiting life insurance payments to the maximum term. Overall, the record establishes Mr. Keller has the ability to pay the award and Ms. Meadows lacks the financial ability to do so.

Ms. Meadows requests attorney fees on appeal, but cites no supporting legal authority. Therefore her request would ordinarily be denied under RAP 10.3(a)(6). To receive an attorney fees award on appeal, a party must devote a section of the brief to the request. RAP 18.1(b). A bald request for attorney fees on appeal is inadequate. *Thweatt v. Hommel*, 67 Wn. App. 135, 148, 834 P.2d 1058 (1992). Argument and citation to authority are required under the rule. *Austin v. U.S. Bank of Wash.*, 73 Wn. App. 293, 313, 869 P.2d 404 (1994). However, Ms. Meadows adequately discussed attorney fees when responding to the reconsideration contentions and further briefing would not assist us. Therefore, we waive strict compliance with RAP 18.1. RAP 1.2(a)

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(authorizing waiver of strict compliance, to do otherwise would cause a hardship not warranted by the infraction).

Under RCW 26.09.140, we have discretion to “order a party to pay for the cost to the other party of maintaining the appeal and attorney’s fees in addition to statutory costs.” This statute allows fees on appeal based on the parties’ ability to pay and the merit of the issues raised on appeal. *In the Matter of the Marriage of Muhammad*, 153 Wn.2d 795, 807, 108 P.3d 779 (2005). Here, Mr. Keller is in a much better financial position than Ms. Meadows, and she presents meritorious arguments on appeal. Given this disparity in income, and Mr. Keller’s ability to pay, we grant reasonable costs and fees for this appeal to Ms. Keller, provided she complies with RAP 18.1(d).

Affirmed.

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.

Brown, A.C.J.

WE CONCUR:

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Sweeney, J.

Korsmo, J.