IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of DAVID VAN ZILE, Respondent, and VICTORIA VAN ZILE, Appellant.	)	No. 62611-6-I DIVISION ONE UNPUBLISHED OPINION FILED: November 23, 2009

Grosse, J. — A trial court does not properly apply the statutory factors for determining a maintenance award when it finds the receiving spouse has a need for maintenance but reserves $280,000 in income to the paying spouse before maintenance must be paid. We therefore remand.

FACTS

David and Victoria Van Zile were married in August 1987 and separated in March 2007 when David was 53 and Victoria was 45. They have four children, who were 18, 17, 14 and 9 at the time of separation. The parties agreed on a property division and parenting plan, and went to trial in April 2008 solely on the issue of maintenance.

David has a Master of Business Administration (MBA) degree and has worked in the financial industry for 25 years. At the time of trial, he was engaged in making institutional equity sales for Oppenheimer & Company, which had recently acquired David's former employer, Canadian Imperial Bank of

Commerce (CIBC). David's annual compensation includes a base salary of $150,000 and the opportunity for a bonus based on company profitability and David's revenue generation, an arrangement under which David has worked for many years. Typically, half to two-thirds of David's income is a bonus, paid in a lump sum in December. In the four years before trial, David's earnings ranged from a low of $398,350 to a high of $458,412. David testified that Oppenheimer's recent acquisition of CIBC and the current state of the economy would probably negatively affect his future bonus payments.

Vicki earned a Bachelor's degree in kinesiology in 1984. She worked periodically during the marriage but the most she ever earned was $29,000 in 1988 while working for Boeing. When the parties' third child was born in 1993, Vicki and David agreed that she would spend her time taking care of the children and she has not worked outside the home since then. At the time of the separation, one of the parties' four children was away at college and the other three remained at home. The agreed parenting plan placed the children with Vicki during the school year. Between the separation in March 2007 and trial in April 2008, Vicki did not make significant efforts to seek employment. She testified at trial that she desired to pursue a teaching certificate. She estimated that obtaining the certificate would cost $12,000 to $13,000 and that she would likely have a starting salary of $35,000.

The community estate was valued at over $2,000,000. The parties agreed to a 54/46 percent property division in Vicki's favor. Vicki was awarded a

recreation property in Wenatchee valued at $500,000. The parties agreed that the family home would be sold and that Vicki would be awarded an amount from the sale sufficient to satisfy the agreed upon property division. David was awarded a retirement account valued at $562,000, an equity fund valued at $200,000, and a joint investment account valued at approximately $100,000. The assets that the parties agreed should go to David could not be converted to cash as readily as the assets awarded to Vicki. In order to access the retirement account, David would incur an early withdrawal penalty. The equity fund was structured as a partnership, could not be sold, and did not generate current income. The joint investment account held primarily "penny stocks" that were not easily liquidated.

The parties agreed that Vicki would be the primary residential parent, that David would pay child support of $1,000 per month, allocated equally to each of the three dependent children, and that this amount would continue even after the second child graduated from high school. The parties agreed that David would fund a college account for each of the two youngest children by paying $300 per month per child until these children graduated from high school. The parties agreed that David would continue to pay private school tuition for the two youngest children, a total of approximately $18,000 to $19,000 a year. The parties agreed that David would pay for automobile insurance for one child at a time and for health insurance for all four children. David's obligations for expenses related to the children, including child support, totaled roughly

$40,000 to $45,000 per year.

During the parties' separation, David purchased a condominium on the Kirkland waterfront for $785,000, with Vicki's assent. The purchase was made with a 5 percent down payment and David's monthly mortgage payments were $5,500 per month. He also had homeowner dues of $450 a month, and his yearly expenses for housing were thus more than $70,000. Vicki was concerned about the size of the obligation and the amount of the monthly payments, but agreed to the purchase. By the time of trial, the value of the condominium had declined and it would probably have sold at a loss if put on the market. The property agreement awarded the condominium to David.

The parties agreed that Vicki would continue to live in the family home after the separation but that it would be sold and the proceeds split to achieve the agreed upon property division. By the time of trial, the family home had a net value of $600,000 to $700,000. Vicki planned to use $400,000 to $500,000 of the proceeds to purchase a new home for herself and the children so she would not have a mortgage payment.

In addressing the maintenance issue, the trial court found that the marriage was long term and that maintenance should be awarded for five years beginning in April 2008. It found that Vicki needed maintenance of $45,000 per year. The trial court found that the property division agreed to by the parties left Vicki in a better financial position in terms of resources and liquidity. It reasoned she could sell the family home and the Wenatchee property to raise

approximately $1,200,000 in cash, purchase a home for $400,000, invest the remaining $800,000 to earn $40,000 to $45,000 per year, and earn $40,000 per year from employment based on her prior education and experience. It found that Vicki's need for maintenance was greatest in the first year because she was unemployed and needed time to liquidate property and invest in income producing assets. The court did not anticipate requiring David to make any of his assets productive and did not consider whether his position would improve if he were required to find less costly housing. The court's calculations appear to anticipate that Vicki would have income of $125,000 to $130,000 per year, in addition to the amount she received in child support.

The court found that Vicki had not pursued developing skills that would allow her to increase her earning capacity to maintain a $12,000 per month lifestyle. It found her stated plan of developing a teaching credential of no significant financial benefit. It found she left the marriage with no financial obligations other than her own living expenses, even though she was still paying the mortgage on the family home, based on her stated desire to sell the home and downsize to a smaller, less expensive residence.

The court found that the Wenatchee property, used throughout the marriage for family recreation, was a $500,000 luxury the parties could no longer afford. It found that Vicki would probably have to sell this property to invest in income producing assets.

The court found that there was a reasonable basis for concern as to

David's ability to maintain the level of earning he has generated over the past ten years. It found that he needed $280,000 per year to meet his own needs and fulfill his financial obligations for private school tuition, college funding and child support. It found he had the ability to pay maintenance only if he earned more than $280,000 per year.

The court ordered David to pay maintenance of $45,000 in year one based on its determination that Vicki's need for maintenance was greatest in the first year. It ordered no maintenance in years two through five unless David made more than $280,000 per year. If David earned more than that amount he was required to pay everything over that amount to Vicki until he had paid $45,000. Anything above $325,000 per year was not subject to maintenance. Vicki appeals.

ANALYSIS

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:

> (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
> (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
> (c) The standard of living established during the marriage or domestic partnership;
> (d) The duration of the marriage or domestic partnership;
> (e) The age, physical and emotional condition, and financial

> obligations of the spouse or domestic partner seeking maintenance; and
> (f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.[1]

"The court's paramount concern is the economic condition in which the dissolution decree leaves the parties."[2] The court may consider the property division in deciding whether and how much maintenance to award.[3] 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.[4]

Maintenance is not a matter of right but within the court's discretion.[5] We therefore review a trial court's maintenance award under an abuse of discretion standard.[6] A trial court abuses its discretion when it makes a decision on untenable grounds or for untenable reasons.[7] We review a trial court's findings of fact under a substantial evidence standard.[8] Evidence is substantial if it is sufficient to persuade a fair-minded person of the truth of the asserted premise.[9]

We also bear in mind that the appellate courts are generally reluctant to

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[1] RCW 26.09.090.
[2] In re Marriage of Williams, 84 Wn. App. 263, 268, 927 P.2d 679 (1996).
[3] In re Marriage of Estes, 84 Wn. App. 586, 593, 929 P.2d 500 (1997).
[4] Stacy v. Stacy, 68 Wn.2d 573, 576, 414 P.2d 791 (1966).
[5] In re Marriage of Mueller, 140 Wn. App. 498, 510, 167 P.3d 568 (2007).
[6] In re Marriage of Zahm, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999).
[7] In re Marriage of Sheffer, 60 Wn. App. 51, 53, 802 P.2d 817 (1990).
[8] Johnson v. Horizon Fisheries, LLC, 148 Wn. App. 628, 640, 201 P.3d 346 (2009).
[9] Mowat Constr. Co. v. Dep't of Labor & Indus., 148 Wn. App. 920, 925, 201 P.3d 407 (2009).

interfere with the trial court's exercise of its equitable powers in dissolution cases.

> We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. . . . The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.[10]

Vicki contends she cannot earn $40,000 because she has no contacts at Boeing and has been a full time stay-at-home mother, by mutual agreement, since 1993. But she last earned $22,000 to $25,000 a year working only three days a week. While the trial court's finding that she could now earn $40,000 a year may be optimistic, it is consistent with the evidence. Vicki also contends that she should not be forced to sell the Wenatchee property. But the trial court did not require that it be sold. It only considered whether it could produce income if sold and then took that possibility into account in determining the maintenance award. Vicki argues that the sale of the Wenatchee property and the family home is not likely to produce $1,200,000. But the parties agreed to the property values and the trial court's determination that sales would produce this amount is consistent with the property valuations. The finding that Vicki could earn $40,000 to $45,000 per year by investing the funds remaining after

[10] In re Marriage of Landry, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985) (internal citations omitted).

purchasing another home is also consistent with the evidence. The trial court's calculations show that it anticipated Vicki would realize income of $125,000 to $130,000 per year, not including child support and the other expenses the parties agreed David would pay. This determination is generally consistent with the expenses Vicki claimed in her financial declaration. We do not find an abuse of discretion in the trial court's determination of what Vicki could generate in income and what she needs in maintenance.

However, the finding that David needs $280,000 per year to meet his own expenses is not supported by the record.

David submitted a financial declaration in which he claimed deductions from his monthly income of $5,284. This amount includes pension plan payments of $1,874 per month and a business expense for an assistant's bonus of $840 per month. Although the trial court did not make any findings as to specific expense items, it allowed David more than he claimed in his declaration. We conclude that expenses such as these should be carefully examined before the trial court determines that David cannot pay maintenance. We do not agree that it treats the parties equitably to allow David to put aside over $22,000 a year for his own retirement without paying maintenance that the trial court found appropriate, when Vicki is not permitted to do the same. Nor is it apparent why David should be allowed to deduct over $10,000 a year to pay a bonus to an assistant when he claims his own ability to pay maintenance is impaired by new corporate ownership that jeopardizes the corporate bonus structure.

David also claimed personal expenses of $13,924 per month. This amount includes all child support and education funding. It also includes housing and association fees of $5,950 per month. We do not agree that it treats the parties equitably to allow David over $70,000 per year in housing expenses without paying maintenance that the trial court found appropriate, while calculating Vicki's needs based on the assumption she will liquidate the community assets awarded her so that she will have no housing expenses. There is no apparent reason to base David's ability to pay on this figure. If a $400,000 house is adequate for Vicki, a less expensive housing arrangement should be adequate for David.

Finally, even assuming that all of David's claimed expenses are justifiable, an assumption we question, they total only slightly more than $230,000 per year, far less than the $280,000 per year the trial court exempted from any maintenance obligation.

We also question the treatment of the assets awarded to David as they relate to his ability to pay. There is adequate support in the record for the trial court's determination that David's assets are not as easily liquidated as Vicki's. But they are still assets, with values agreed to by the parties. The retirement account, for example, presumably continues to earn income which inures solely to David's benefit when he draws from it. We do not agree that it treats the parties equitably when Vicki's need is calculated on the assumption that she will liquidate assets to earn a return dedicated to her living expenses, while all the

assets awarded to David are assumed to generate nothing, or, if they generate future benefits, that those benefits do not enhance David's postdissolution economic condition. If it is fair to assume Vicki can earn a given amount from changing the character of her assets, it is fair to impute the same rate of return to David's assets. We conclude that the trial court erred in finding that David's ability to pay maintenance should be limited to income over $280,000.

Vicki also contends the trial court erred in denying her motion for reconsideration, in which she argued that David's private school expenses would be less because one of the children had decided to attend public school. The record does not show that this was a permanent change. But, in any event, as we have determined that David has the ability to pay the maintenance amount computed by the trial court, we need not further address this issue.

Vicki also challenges the child support order. But the parties agreed to this figure and Vicki did not raise the issue in the trial court. We therefore decline to address it.

We affirm the determinations as to Vicki's need for maintenance. We reverse the determination that David has the ability to pay maintenance in years two through five only if he makes more than $280,000 per year. We remand for the entry of an unrestricted maintenance award of $45,000 per year for five years.

Grosse, J.

WE CONCUR:

Schindler, C.J. Becker, J.