No. 89862-6

SUPREME COURT
OF THE STATE OF WASHINGTON

CHRISTOPHER R. LARSON,

Petitioner,

v.

JULIA CALHOUN,

Respondent.

ANSWER TO LAWYERS' AMICUS MEMORANDUM

Janet A. George, WSBA #5990
Janet A. George Inc. P.S.
701 5th Ave., Suite 4550
Seattle, WA 98104-7088
(206) 447-0717

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

Attorneys for Respondent Julia Calhoun

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. INTRODUCTION

A group of family law lawyers ("lawyers"), solicited by counsel for Christopher Larson, signed onto a memorandum prepared by Larson's counsel. *See* declaration of Janet A. George Regarding Requests for Amici. The lawyers' "amicus" memorandum offers nothing new in this case precisely because it parrots the position advanced by Larson in his petition for review.

This Court should disregard the lawyers' amicus memorandum and deny review. RAP 13.4(b).

B. ARGUMENT WHY REVIEW SHOULD BE DENIED

The essence of the "amicus" memorandum drafted by the Larson's counsel and signed by the lawyers in that this Court should grant review "to provide clear guidance to the lower courts, attorneys, and litigants on the increasingly troublesome issue of when separate property may be invaded[1] in a marital dissolution." Memo at 1.

The plain flaw in the lawyers' memorandum, written by Larson's counsel, however, is that it does not articulate precisely how the issue of the treatment of separate property has become "increasingly troublesome," nor does it specifically articulate how any of the criteria of RAP 13.4(b)

[1] The use of the pejorative verb "invaded" betrays the actual intent of Larson and the lawyers here. The trial court allocated or awarded a small portion of Larson's separate property to ensure a fair property division pursuant to RCW 26.09.080. The Court of Appeals agreed.

are met. In fact, the ultimate result of the lawyers' argument seemingly would be a new rule that would only interject a significant element of uncertainty into property divisions in dissolutions when the law governing such division is already clear.

RCW 26.09.080 articulates the factors for property divisions in the dissolution setting in Washington. Decisions of this Court and the Court of Appeals have made clear that trial courts, like the experienced trial court here, have *broad discretion* in making property division decisions that are, in the words of RCW 26.09.080, "just and equitable." This Court in *In re Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985) stated:

> 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. *In re Marriage of Konzen*, 103 Wash.2d 470, 478, 693 P.2d 97 (1985). *Baker v. Baker*, 80 Wn.2d 736, 747, 498 P.2d 315 (1972). The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.

More to the point, this Court has long held, again in the language of the statute, that *all* property, community or separate, is before a

dissolution court for a just and equitable division. *In re Marriage of Kraft*, 119 Wn.2d 438, 447-48, 832 P.2d 871 (1992).[2]

Far from requiring "clarification," Washington courts have historically considered numerous factors in exercising their broad discretion in tailoring property divisions in dissolutions to the spouses' particular circumstances and needs. As Kenneth W. Weber, an experienced family law practitioner, wrote in 20 *Wash. Practice, Family and Community Property Law* § 32:15:

> The statutory factors are not exclusive, and the court should consider all relevant factors when determining how to distribute the property and debts of the parties. The court, for example, may consider the age and health of the parties; the existence and validity of any agreements between the parties that might affect the characterization or division of assets; the sources and dates of acquisition of property; the extent to which any of the property was acquired by one or both spouses during their cohabitation relationship before marriage; the extent to which the services of one spouse aided in acquiring and improving community assets; the extent to which a right of reimbursement might be owed by one spouse to the other, or to the community estate; the extent to which a spouse is required to support a child of a prior marriage; the employment and/or business experience of the spouses, together with their education, training, and future earning prospects; the amount of temporary maintenance paid by one spouse to the other during the

[2] This fact indicates that the lawyers/Larson's contention that separate property is "sacred" is a significant overstatement of the fact that property is separate in character. A trial court must properly characterize property to be divided, as a first step. *E.g., Baker v. Baker*, 80 Wn.2d 736, 745, 498 P.2d 315 (1972). But if separate property is "sacred" and that somehow militates against its award in a "just and equitable" property division, *where is the language in RCW 26.09.080 that restricts the award of separate property in any way*? The lawyers/Larson cannot cite such language because it does not exist.

> pendency of the proceeding; the fact that a spouse will have custody of the children, and the demands and needs placed upon that spouse by having custody; the extent to which one spouse has peculiar need for an asset or the involvement of one spouse in an asset with third persons; and the effect of appreciation or depreciation of property since separation of the parties. Additional factors will undoubtedly be relevant as well.

Mathematical precision or inflexible rules, as the lawyers and Larson advocate, are not required in property divisions in dissolutions. *In re Marriage Konzen*, 103 Wn.2d 470, 477-48, 693 P.2d 97, *cert. denied*, 473 U.S. 905 (1985). Indeed, "new guidance" on property divisions will only create unnecessary uncertainty as to the division of property in the dissolution setting, a result no one cherishes.

With regard to the allocation of separate property specifically, such property is before a dissolution court for distribution. RCW 26.09.080. That fact alone certainly indicates that the Legislature did not intend any special rule limiting its award as part of a "just and equitable" division of marital property. But that is *precisely* what Larson advocates in his petition for review and impliedly what the lawyers seek.

Washington rejects any formulaic approach to divisions of marital property. A trial court need not divide community property equally, nor need it award separate property to its owner. *In re Marriage of Hadley*, 88 Wn.2d 649, 656, 565 P.2d 790 (1977) (community property is not required

to be divided equally but equitably); *Blood v. Blood*, 69 Wn.2d 680, 682, 419 P.2d 1006 (1966) (noting the trial court is not bound to award separate property to the party acquiring it); *Oestreich v. Oestreich*, 2 Wn.2d 72, 75, 97 P.2d 655 (1939) (court can award all property, community or separate, to wife regardless of her financial condition).

In *Konzen*, this Court *rejected* an inhibition on the ability of a trial court to award the separate property of one spouse to another, rejecting the notion that separate property could not be awarded unless "exceptional circumstances" were present (*Bodine v. Bodine*, 34 Wn.2d 33, 207 P.2d 1213 (1949)). Larson's formulation that separate property of one spouse to another may not be awarded to another if the community can make "ample provision" for the spouse is nothing but a re-casting of *Bodine's* exceptional circumstances principle to benefit Larson.[3]

Konzen's holding is clear. It has been followed in cases like *In re Marriage of Griswold*, 112 Wn. App. 333, 48 P.3d 1018 (2002), *review denied*, 148 Wn.2d 1023 (2003) (a case the lawyers/Larson neglect to cite in their memorandum) and faithfully applied by the Court of Appeals below.

[3] The uncertainty interjected by the concept of "ample provision" will require years of litigation to unravel just how "ample" is "ample" to justify an award separate property.

Most pointedly, *Konzen* has been the law in Washington for nearly 30 years and yet the Legislature has not sought to amend RCW 26.09.080 to in any way restrict the awarding by dissolution court of spousal separate property.

In sum, the Court of Appeals decision is entirely consistent with this Court's *Konzen* decision. Review is not warranted under RAP 13.4(b)(1).

The decision is similarly consistent with decisions of the court of Appeals like *Griswold* and *In re Marriage of Wright*, ___ Wn. App. ___, 319 P.3d 45 (2013)[4] so that review is unavailable under RAP 13.4(b)(2).

---

[4] One of the concerns raised by the lawyers/Larson is language in the *Wright* decision referencing *In re Marriage of Rockwell*, 141 Wn.2d 235, 170 P.3d 572 (2007), in which Division I indicated that the objective of an overall RCW 26.09.080 property division in a "long-term" marriage is to secure a roughly equal division of spousal property. *Id.* at 243; *Wright*, 319 P.3d at 48-49. As noted by Calhoun her answer to the petition for review at 8 n.8, the trial court here did not rely *Rockwell*. Larson received 65% of the marital property.

The *Wright* court did rely on the Court of Appeals opinion here to reject virtually the identical argument on awards of separate property made by Larson throughout this case. The *Wright* court stated:

> The *Konzen* court made clear that "[t]he character of property is a relevant factor which must be considered, but it is not controlling." As the *Larson* court correctly observed, *Konzen* controls as to this issue. As in *Larson*, the trial court's decision here was within the range of acceptable choices, given the facts and the appropriate legal standard.

319 P.3d at 49.

In *Wright*, as here, a husband with substantial assets, contested a trial court's allocation of part of the husband's separate property to the wife. Larson's counsel was also counsel on appeal for the appellant husband in *Wright*.

The principal contention advance by the lawyers/Larson is that there should be a "protocol" for when a court, in the exercise of its discretion, may award separate property as a part of a "just and equitable" property division under RCW 26.08.090. Memo at 5-6. A "protocol" is but another word for a formula like "ample provision." As noted, *supra*, Larson's "ample provision" standard is unworkable.

The lawyers/Larson's plea for an unspecified "protocol" is equally unworkable. First, of course, they decline to specify it. But second, and most critically, any such "protocol" cannot anticipate the wide array of individual circumstances involving 2 spouses that might govern such a "protocol". Dissolutions will involve spouses with differing life styles, numbers of children, financial demands, health, age, education, and employability, just to name some of the potential factors. The lawyers/Larson ask this Court to grant review to overturn 35 years of settled law to interject a whole new level of uncertainty into dissolution courts' sensitive decision making on spousal property divisions; such a new public policy is contrary to the language of RCW 26.09.080 requiring all property, properly characterized, before the dissolution court for allocation. Review is inappropriate under RAP 13.4(b)(4).

C. CONCLUSION

The lawyers' amicus memorandum, written by Larson's counsel, parrots Larson's arguments. The Court of Appeals below correctly applied this Court's teaching in *Konzen*. Review should be denied. RAP 13.4(b).

DATED this 9th day of April, 2014.

Respectfully submitted,

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

Janet A. George, WSBA #5990
Janet A. George Inc. P.S.
701 5th Ave., Suite 4550
Seattle, WA 98104-7088
(206) 447-0717
Attorneys for Respondent Julia Calhoun

AMENDED DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited with the U.S. Postal Service for service a true and accurate copy of the Answer to Lawyers' Amicus Memorandum in the Supreme Court Cause No. 89862-6 to the following parties:

Catherine W. Smith Valerie A. Villacin Smith Goodfriend, P.S. 1619 8th Avenue N. Seattle, WA 98109-3007	David B. Zuckerman Attorney for Amicus Curiae 705 Second Avenue, Suite 1300 Seattle, WA 98104
Thomas G. Hamerlinck Thomas G. Hamerlinck PS 10900 NE 4th Street, Suite 2300 Bellevue, WA 98004-5882	Ms. Alexis Squier Strata Law Group, PLLC Email: asquier@stratalawgroup.com
Janet A. George Janet A. George, Inc. P.S. 701 5th Avenue, Suite 4550 Seattle, WA 98104	

Original Emailed for filing with:

Washington Supreme Court
Clerk's Office
415 12th Street West
Olympia, WA 98504

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated: April 9, 2014, at Tukwila, Washington.

Irelis Colon, Paralegal
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Irelis Colon
Subject: RE: Larson v. Calhoun - Supreme Court No. 89862-6 - Answer to Lawyers' Amicus Memorandum

Received 4-9-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Irelis Colon [mailto:irelis@tal-fitzlaw.com]
Sent: Wednesday, April 09, 2014 3:46 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Larson v. Calhoun - Supreme Court No. 89862-6 - Answer to Lawyers' Amicus Memorandum

Dear Clerk:

Attached please find an Answer to Lawyers' Amicus Memorandum for the following case:

Case Name: *Larson v. Calhoun*

Supreme Court Cause No.: 89862-6

Attorney for Respondent: Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick PLLC
18010 Southcenter Parkway
Tukwila, WA 98188
Tel: 206-574-6661
Email: Phil@tal-fitzlaw.com

Sincerely,

IRELIS COLON (IRIS)
Paralegal
Talmadge/Fitzpatrick, PLLC

206-574-6661 (w)
206-575-1397 (f)
Irelis@tal-fitzlaw.com