No. 97891-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COA No. 78236-3-I

RICHARD DENNIS GROVES,

Petitioner,

v.

MARY NOONAN GROVES,

Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Suzanne Parisien

DENNIS GROVES' PETITION FOR REVIEW

Gregory M. Miller, WSBA No. 14459

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I. IDENTITY OF PETITIONER AND INTRODUCTION

Petitioner Dennis Groves ("Petitioner" or "Dennis"[1]) asks this Court to accept review of the decision or parts of the decision designated in Part II of this motion, *In re Marriage of Groves,* ___ Wn.App.2d ___, 447 P.3d 643 (2019) ("Decision" or "Slip Op."). Copies of the Decision and of the October 24, 2019, order denying reconsideration are in the Appendix.

The central issue is whether a LEOFF I total disability allowance is divisible property in a marital dissolution. Here the disability allowance is for a Seattle Firefighter who had 28 years of service before his back discs were injured in a fall while fighting a fire at night at Fisherman's Terminal (*see* RB pp. 10-11), after he had been married to Respondent Mary Groves ("Mary") for only one year. Dennis was disqualified from any future firefighting work, which he loved, by a Disability Board physician and forced to take disability – he had no option to take a pension, or to continue working for the Department for another ten to fifteen years or longer, as he had planned.

[1] The parties are referred to by their first names for clarity, as at the Court of Appeals.

The Court of Appeals mistakenly determined that Dennis' disability allowance – compensation for his permanently disabling personal injuries as well as for lost future income – was community property that could be divided and given in part or whole to Mary. Slip Op. p. 10. It ruled so even though it is an income stream that represents Dennis' future income that he receives after the date of separation and divorce, when the separate and apart statute provides that his post-marital earnings are his separate property and not subject to division. Instead, the Decision found that it was, in fact, a service pension and thus was not compensation for lost future income. Slip Op., p. 10. Necessarily, it also found that it was not compensation for his disabling personal injuries, though that consequence was not stated. *See id.*

This Court has not addressed disability pensions of any sort in the context of dissolutions this century. It most recently addressed disability allowance in *In re Marriage of Brewer*, 137 Wn.2d 756, 976 P.2d 756 (1999), when it held that disability pensions are the disabled spouse's separate property and not subject to division. In that case the disability payments were from private insurance the premiums for which were paid, at least in part, by community funds

during the marriage. Before *Brewer,* this Court addressed disability pensions in an unusual setting in *Arnold v. Dep't of Retirement Systems*, 128 Wn.2d 765, 912 P.2d 463 (1996) in which the ex-spouse challenged LEOFF as unconstitutional to try and obtain a share, after the divorce proceeding. In the course of rejecting the ex-spouse's claim, this Court relied on *In re Marriage of Kraft,* 119 Wn.2d 438, 832 P.2d 871 (1992), to implicitly rule that disability allowances which replace future income and compensate for injuries are not divisible in a dissolution, but that relief for a spouse can still be available by taking the income stream into account in the overall property division:

> The teaching of *Kraft* is that when a court is statutorily unable to award a portion of what might otherwise be a community asset to one spouse upon dissolution, the court may consider the economic circumstances of the parties to justify a disproportionate award of community property.

Arnold, 128 Wn.2d at 782.

As discussed *infra*, *Brewer* clarified the landscape of disability allowances and pensions in the dissolution context. But this case illustrates that, though correctly decided, *Brewer* is not being applied, perhaps because it is not a public service disability allowance, but was private insurance.

This case provides the Court the opportunity to clearly and unequivocally state what the rule is going forward in addressing disability allowances in the dissolution setting, consistent with the principles that drove *Brewer*: the then-recent decisions regarding the separate nature of payment for personal injuries in *Marriage of Brown,* 100 Wn.2d 729, 675 P.2d 1207 (1984); and the fact the payments constitute a replacement of future income, not deferred compensation for past service like a service pension.

This Court should take review not just because the Decision conflicts with *Brewer* and *Arnold,* but also because the range of Court of Appeals decisions to choose from as seen in the Decision shows there is no clear rule that is being followed.

II. COURT OF APPEALS DECISION

The Decision made a number of errors in reviewing and applying the record, in addition to the analytical errors in addressing Dennis' disability allowance. It held the trial court incorrectly characterized and failed to divide Dennis' future disability – which it mischaracterized as "the parties' most substantial asset" (Slip Op., p. 2, App. A-2) – thereby making the final property division "unfair,

unjust, and inequitable," *id.*, even though their house sale netted them $1,153,634. CP 1123.

Mary Groves, then 61, received half of all separate and community real and personal property that was before the court – precisely what she requested in her proposed property division submitted at the start of trial. *See* Ex. 101, App. A-17 hereto. As a result, Mary received nearly $1 Million in liquid assets, no debt, and five years of maintenance to bridge her to Medicare eligibility.

Division I vacated the property award on the basis that Dennis' disability allowance was divisible community property and that because it was not divided, the overall property division was not fair, just, and equitable. Dennis sought reconsideration, the panel called for an answer, allowed his reply, then let the initial decision stand.

III. ISSUES PRESENTED FOR REVIEW

1. Is a LEOFF I disability retirement allowance a "marital asset" that can be divided in a dissolution, or do this Court's decisions in *Brewer v. Brewer* and *Arnold v. Retirement Systems* still control such that the post-marital income stream cannot be "divided", even though it can be taken into account when determining maintenance or a disproportionate division of marital property?

2. Assuming a LEOFF I disability retirement allowance has attributes of a pension, is the non-LEOFF I spouse's potential share limited to the portion of that retirement allowance that was earned during the marriage and calculated under the time-rule principles of *In re Marriage of Short and In re Marriage of Rockwell* and associated cases?

3. Where the non-firefighter spouse received exactly half of the divisible community and separate property as requested, which is nearly $1 Million and no debt, plus five years' maintenance designed to bridge her to Medicare, and has the demonstrated ability to manage investments in real property and liquid assets, while the disabled firefighter spouse was 75 years at trial, did the Court of Appeals err by concluding the overall property division was not "fair, just, and equitable" when the appellate court never saw the parties or heard any of the testimony?

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Review should be granted per RAP 13.4(b)(1), (2), and (4) to address the conflict with this Court's decisions in *In re Marriage of Brewer, Arnold v. Retirement Systems,* and underlying Court of Appeals decisions on the treatment of disability allowances in marital dissolutions. This Court has not addressed the character of disability payments in a dissolution this century, not since *Brewer* in 1999, and, before then, in *Arnold* in 1996.

In re Marriage of Brewer, 137 Wn.2d 756, 976 P.2d 756 (1999), clarified the law, reaffirming the rule that disability payments are not community property, particularly where, as here, they compensate for the injury to the disabled worker and lost future compensation. *See Brewer*, 137 Wn.2d at 766-768, 770, and 137 Wn.2d at 772-774 (Guy, J, concurring). *Accord*, *In re Marriage of Anglin*, 52 Wn. App. 317, 759 P.2d 1224 (1988) (disability allowance was not a pension).

The pre-*Brewer* cases on which the Decision relied, which found a pension aspect to disability, involved a ***choice*** – the choice to take disability "***in lieu of***" a service pension, a situation not present here. For instance, in *Knies*, the state trooper's ***choice*** to take disability instead of a service pension was the difference:

> By **choosing to accept** the disability benefits **in lieu of** retirement, only six days before he was eligible to retire,

> albeit six years after entry of the dissolution decree, **Mr. Knies effectively altered the character of his disability to one of deferred compensation that can now be subject to property division.**

In re Marriage of Knies, 96 Wn.App. 243, 252, 979 P.2d 482 (1999) (emphasis added). Dennis did not have a choice to take the service pension. CP 223-225; see Dennis' Motion for Reconsideration at the Court of Appeals, pp. 13-19. He did not, like Trooper Knies, act "to alter" his disability allowance to deferred compensation. There was no element of personal choice by Dennis in his receipt of the disability allowance.

As to the disability allowance being an "asset" of the marriage, it is important to recall that at the outset of trial Mary did not list the disability allowance as an item of property to be divided on her exhibit 101 (Mary's "Asset and Debt Worksheet"), submitted to the trial court at the beginning of trial, and in the appendix at p. A-17, attached hereto. It was never valued by the parties or the Court. It always was an income stream of money to compensate Dennis for future work he could not do, and to also compensate him for his injuries which, under *Brown*, is his separate property. *Accord, Brewer* (disability insurance policy payments was separate property

of injured spouse, even though premiums were paid for with community funds, relying on *Brown* and other cases).

The appropriate analysis for characterization of the disability allowance is not the inconsistent, pre-*Brewer* Court of Appeals decisions which the Decision relied on. Rather, true to *Brewer* and *Arnold,* and to RCW 26.16.140, such disability payments are the separate property that, when deposited into community accounts as Dennis did throughout the marriage, converted those payments into community property. But once the parties separated and the payments were deposited into Dennis' separate account, they were separate and remain separate. RCW 26.16.140.[2] This is in accord with *Brewer*, and particularly with the analysis in the concurrence.

Dennis was granted a right under LEOFF I of an award for the injuries he sustained on the job as a first responder and for his future lost income after he could no longer serve. The disability award is limited only by his life.

It must be kept in mind that the disability allowance is a benefit granted by the legislature in its appreciation for the risks and

[2] RCW 26.16.140 states: "When spouses or domestic partners are living separate and apart, their respective earnings and accumulations shall be the separate property of each."

service of first responder firefighters like Dennis. It is particularly poignant here where Dennis was injured in a roof-top fall while fighting a fire at night at Seattle's Fisherman's Terminal in 1992. *See* RB 10-11, and record cites therein. This benefit was never altered. Its nature was never reconsidered until the novel Decision of the Court of Appeals. The Decision effectively alters that legislative grant of this specific benefit to Dennis in 1993 for his injuries and lost future pay. According to the logic of the Decision, sometime over the course of this marriage Dennis' statutory benefit was altered, unbeknownst to all involved, and "effectively supplanted the retirement benefits" he did not receive. *See* Decision, p. 10.

Tellingly, the Decision fails to specify any event that occurred which changed the statutory benefit granted to Dennis for his injuries and lost future income other than the passage of time. *See id.* Indeed, its analysis points to conflicting lines of authority in its footnotes 2 and 3 at page 10.

Nor does the Decision point to any part of the governing statutes which state that the statutory benefit granted Dennis – or other disabled firefighters – is a conditional grant which can be changed at some future time with no triggering event.

The Decision's reliance on Court of Appeals cases from the 1990's and earlier to assert a change to the nature of Dennis disability benefit due to the passage of time is also incorrect because those decisions: 1) did not have the benefit of *Brewer*; and 2) the notion of when a firefighter would retire has changed from the 1990's. The age discrimination laws have removed the earlier mandatory retirement requirements and many officers, particularly in leadership, continued to work into their seventies with service time of over 50 years. *See* RP 271-273 (Steve Brown testimony).[3] This undercuts the Decision's necessary predicate to transforming the disability allowance into a service pension that Dennis necessarily would have retired long before the dissolution. The only evidence in the record is that Dennis planned to work as long as he could because he loved the Department and his colleagues and that life – it was in a genuine sense his core family. He could well have been one of those Mr. Brown testified to who had 50 years of service when he finally retired. But he never got that chance.

[3] Steve Brown is the long-time executive secretary for the Seattle Firefighter's Pension Board. He testified at RP 249-310.

Dennis does not dispute that on dissolution the court can take that disability income stream into consideration in the property division and support orders and require support payments for a defined period, as could be done with post-marriage payments for child support. It just cannot "divide" it.

The Court should grant review because the Decision is in conflict with *Brewer* and its underlying principles.

B. Review should be granted per RAP 13.4(b)(4) to resolve the inconsistent treatment of disability allowances or pensions in marital dissolutions, which can be most simply resolved by embracing and applying the rationale of then-Chief Justice Guy's concurrence in *Brewer.*

Then-Chief Justice Guy stated that he "would clarify that post-dissolution wage-replacement benefits are not 'assets' that are before the trial court in a dissolution proceeding. [And that] courts and commentators alike have recognized the inconsistency in Washington's case law in this area." *In re Marriage of Brewer,* 137 Wn.2d at 772 (Guy, C.J., concurring, joined by Justices Alexander, Madsen and Durham). This case shows the kind of inconsistency that resulted from not adopting the clear rule suggested by Chief Justice Guy with his detailed analysis supported by the lions in this area of the law, including Professor Harry Cross of the University of

Washington, the recognized academic authority in the field; Kenneth Weber, the author of the WASHINGTON PRACTICE treatise on family law; and the authors of the two relevant WSBA practice guides, the FAMILY LAW DESKBOOK and the COMMUNITY PROPERTY LAW DESKBOOK. *See Brewer,* 137 Wn.2d at 772-774.

Chief Justice Guy laid out his proposed solution:

> In my view, we should clarify the law by overruling *Chase*[4] and hold: Disability payments which are in the nature of earnings replacement are treated the same as the earnings *774 of a healthy spouse. Therefore, when the parties are married and not separated, the replacement earnings would be community property; assets purchased with or generated by community funds are assets belonging to the community. RCW 26.16.030. When the parties are separated, their earnings—whether a result of wage replacement disability benefits or of personal labor—are separate property. RCW 26.16.140. Future, post-dissolution earnings, whether received from employment, business ventures, investment, or disability benefits, are not "assets" which are before the court for disposition in a dissolution action. *See Brown*, 100 Wn.2d at 738, 675 P.2d 1207; *In re Marriage of Hall*, 103 Wn.2d 236, 247, 692 P.2d 175 (1984) (future earning capacity is not a marital asset). However, the **113 trial court may consider such earnings when determining what constitutes a fair and equitable distribution of the assets and debts which are before the court. RCW 26.09.080 (economic circumstances of each spouse is a relevant factor in making a property disposition); *Hall*, 103 Wn.2d at 247, 692 P.2d 175; *In re Marriage of Leland*, 69 Wn.App. 57, 72, 847 P.2d 518 (1993). The trial court also

[4] *Chase v. Chase,* 74Wn.2d 253, 444 P.2d 145 (1968).

> may consider such earnings when determining the propriety and amount of any maintenance award. RCW 26.09.090.

Brewer, 137 Wn.2d at 773-774.

In effect, Dennis argued for the rule proposed in the concurrence, and which is consistent with RCW 26.16.140. He argued that the appropriate analysis for characterization of the disability allowance is that it is separate property that, when deposited into community accounts as Dennis did throughout the marriage, converted those payments into community property. And once the parties separated and the payments were deposited into Dennis' separate account, it was separate and remains separate.

What the dissolution court can do, and what Judge Parisien did here, was take that income stream into consideration in the property division and support orders and require support payments for a defined period, as could be done with post-marriage payments for child support.

C. Review Should Be Granted Per RAP 13.4(b)(1), (2), and (4) To Eliminate The Confusion And Insure Consistency In Cases In Which Disability Allowances Are Considered to Have Service Pension Aspects Or Be Substitutes For Service Pensions By Emphasizing Application of The Time Rule.

Assuming that a disability pension can, post-*Brewer*, have elements of a service pension, the Decision misapprehended the basic principle for characterizing a service pension, or the "service-pension-like portion" of Dennis' disability allowance. The settled rule for characterizing service pensions is the "time rule" method, i.e., the community property portion of the pension is tied to the proportion of the pension that was earned during the marriage.

> ¶ 31 "Pension benefits constitute property rights in the nature of deferred compensation, even if benefits are not presently available." *In re Marriage of Bulicek*, 59 Wn.App. [630] at 636–37, 800 P.2d 394 [(1990)]. If the pension was accumulated partly prior to marriage and partly after marriage, it is proportionately classified, with the portion acquired during marriage characterized as community property. *See In re Marriage of Landry*, 103 Wn.2d 807, 699 P.2d 214 (1985).

In re Marriage of Rockwell, 141 Wn.App. 235, 251, 170 P.3d 572 (2007). *See id* at 251-254 (collecting and reviewing cases). *Accord*, 20 Scott J. Horenstein, WASHINGTON PRACTICE, FAMILY AND COMMUNITY PROPERTY LAW § 32:16 (2nd ed., 2015) (hereafter "*Horenstein*") ("the favored method [for determining the community

share of a retirement benefit] is the 'time rule' method."). *See also In re Marriage of Short*, 125 Wn.2d 865, 890 P.2d 12 (1995) (applying time rule for division of vesting stock options earned during the marriage).

If this Court does ***not*** accept the rule proposed by Chief Justice Guy, underlying decisions, and authorities and commentators that disability allowances cannot be divided in a dissolution but can at times have service pension components which are subject to division, this case would be a vehicle clarifying how to address any such division.

The evidence is undisputed that Dennis' service time was 95 per cent ***before*** the marriage, so the only community portion would be the remaining five per cent, of which he is entitled to half. See Response Brief pp. 37-38. This was a factor the trial court addressed. See CP 1001, FOF 16. The evidence was also undisputed, and the trial court found, that under the circumstances Dennis did not have a ***choice*** between a service pension and the disability allowance. *See* Response Brief, pp. 11-14; CP 1000-1001, FOF 9, 10, 15. Under the settled law for characterizing pensions of the time rule and the facts of this case, the disability allowance cannot be considered entirely

community property. At most, it is five per cent community. Review should be granted per RAP 13.4(b)(1) and (2) because the Decision is inconsistent with settled decisions of this Court and the Court of Appeals and review in this case would give the Court the opportunity to clarify the rules.

D. Review should be granted per RAP 13.4(b)(1) and (4) because Division I overstepped its role in vacating a trial court property division which was within the accepted range of discretion for being fair, just, and equitable, by imposing its own determination of fair property division after taking into account the assets and debts awarded and the ages and positions of the parties.

Division I stepped outside of its role and replaced the trial court's assessment of the equities and parties with its own when there was no legal error and there was no proper basis to assume that role under the settled law of appeals. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). The overall property division was not unfair. Mary received over $900,000 in

cash and equivalents and no debt,[5] an asset base easily managed by her with the financial management skills she testified to at trial.

Most fundamentally, the overall property division and the positions in which the parties were left was not unfair, whatever is deemed the characterization of Dennis' disability allowance. This is inconsistent with a host of cases of this Court and the Court of Appeals, beginning with *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985), which affirmed property division, including vested future pension benefits, with the directive that "Appellate courts should not encourage appeals by tinkering with them…. The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion."[6] The appellate court can give an overall assessment whether the final result was fair just and equitable, but cannot substitute its judgment

[5] The parties got an equal division of the assets before the trial court, receiving $870,000 each, once their largest asset, the family home, was sold in spring of 2018. See CP 27-30, 36, 1123, and Response Brief, p. 1. Mary also received $35,000 during the pendency of the divorce to buy a new car, which she had not done by the finish of trial; by spring 2018, Mary thus had over $900,000 in cash and equivalents. *See* Response Brief, p. 1, fn. 2, pp. 17-18, p. 24; RP 608-609.

[6] *Accord, In re Marriage of Wright,* 179 Wn. App. 257, 261, 319 P.3d 45 (2013) (manifest abuse of discretion not shown, affirming property division); *In re Marriage of Kaplan*, 4 Wn.App.2d 466, 421 P.3d 1046 (2018) (affirming property division).

for trial court's. *Id;. Thorndike v. Hesperian Orchards, Inc., supra.*

With the funds she received and her capabilities, Mary would not need to "work" as an employee, but could manage the assets[7] and live off the income it generates while the capital increases by an investment strategy,[8] or by using some or most of the capital to buy rental properties and receive the income from them while the property value appreciates, an option she employed before and during the marriage to Dennis. The point is there are many attractive options for a person in the enviable position of having assets -- cash and equivalents -- of substantially more than three quarters of a

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[7] Though Mary's financial declaration in the Court of Appeals stated she is "unemployed", in fact by the time of argument she necessarily ***was*** "employed" – as a money and asset manager for one client, herself, with at least $800,000 of cash and equivalents to manage, if not more. She testified she managed their joint investment accounts well during the marriage (see RP 838-840), so the only evidence is that she would quickly invest the funds to generate income, if not increase the capital, to make productive use of the funds. The point is that Mary had a terrific opportunity with the property she received from the marriage and the wherewithal to make good use of it.

[8] For example, Mary could invest in high-yield mutual funds, which are not unreasonably risky. That sort of investment would yield more than enough to cover her listed expenses without infringing her capital, and without needing the $1,600/month of maintenance, which would be extra, and allow her to work on increasing the funds or invest in rental or appreciating real estate. Review of current disclosed yields for such funds shows that the annual returns for the first five funds reported by "U.S News & World Report" shows a range of what Mary could have gotten the past year for her funds: from 6.99% at Federated Institutional High Yield, to 7.48% at TIAA-CREF High Yield Fund, to 8.09% at Vanguard High Yield Corporate Fund, to 8.69% at Fidelity Focused High Income Fund. *See* U.S. News & World Report ranking for best high-yield bond mutual funds, available at https://money.usnews.com/funds/mutual-funds/rankings/high-yield-bond (last visited 9/15/19), screen shot and printout attached to Dennis' Motion For Reconsideration at pp. A-15-A-20 thereto. Other examples are set out in the reconsideration motion at pp. 3-8.

million dollars to invest and manage.

V. CONCLUSION

Dennis Groves asks the Court to accept review for the reasons stated above and schedule argument at the earliest opportunity.

Respectfully submitted this 25th day of November, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By _____
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APPENDIX

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 25th day of November, 2019.

Elizabeth C. Fuhrmann, PLS,
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APPENDIX A

FILED
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of RICHARD DENNIS GROVES, Respondent, and MARY NOONAN GROVES, Appellant.	No. 78236-3-I DIVISION ONE PUBLISHED OPINION FILED: August 26, 2019

MANN, A.C.J. — Mary Groves appeals the trial court's characterization and division of her former husband, Dennis Grove's, Law Enforcement Officer and Fire Fighter (LEOFF I) disability allowance.[1] The trial court characterized Dennis's disability allowance as separate property and awarded the entire monthly allowance to Dennis.

While a disability allowance that has the character of compensation for future lost wages is generally separate property and not divisible upon dissolution, a disability allowance that takes the place of a standard retirement pension is more akin to deferred compensation and therefore is divisible upon dissolution. Because Dennis was eligible to retire when he became disabled, and certainly would have retired prior to the parties'

[1] For clarity we refer to the parties by their first name. No disrespect is intended. Dennis's brief and the trial court orders refer to the respondent as "Dennis" despite his legal first name being Richard. We will follow suit.

dissolution, his disability allowance was more akin to deferred compensation and should have been characterized as community property. Further, the trial court's failure to divide Dennis's disability allowance—the parties' most substantial asset—indicates that the final division of property was unfair, unjust, and inequitable. Accordingly, we reverse and remand.

I.

Dennis joined the Seattle Fire Department on February 11, 1963, and became a lieutenant in 1979. Dennis and Mary married on November 18, 1991; they did not have any children together. In October of 1992, Dennis was injured in the line of duty while fighting a fire. After his injury, the Seattle Firefighters Pension Board doctor determined that Dennis was no longer able to physically handle the duties of a firefighter. Accordingly, on April 15, 1993, the Seattle Firefighters Pension Board approved Dennis's line of duty disability. That decision was subsequently affirmed by the State Department of Retirement Systems on May 5, 1993. Since then, Dennis has received a monthly disability allowance set at approximately 60 percent of the salary of a fire department lieutenant. At the time of trial Dennis was receiving $5,784 a month in disability.

The majority of the couple's assets were brought into the marriage by Dennis. Mary owned a small equity in a condominium and a small IRA deferred compensation account. The mortgage balance on Mary's condominium was fully paid using Dennis's separate liquid investments early in the marriage. The condominium was rented during the marriage and the community shared the revenue. Upon sale, the proceeds from the

sale of the condominium were placed in Dennis's investment accounts. During their marriage, the couple lived in a house that Dennis had separately purchased.

On November 12, 1998, the couple signed a community property agreement. The agreement provided that all of their separate property would be transferred to community property. On the agreement, Dennis hand wrote "Our intention is to now own all of our property together as community property." After signing and having the agreement notarized, the couple drove to three different counties to record the agreement and quit claim deeds that they made out to each other.

On October 21, 2016, after nearly 25 years of marriage, Dennis petitioned for dissolution. Both parties cross moved for summary judgment on the validity of the community property agreement and the characterization of Dennis's disability allowance. On the community property agreement, the trial court rejected Dennis's argument that he was coerced into signing the agreement or that he did not know what he was signing. The trial court found that the agreement was valid and that the parties' actions were "consistent with an intent to make all of their property community." The court reserved on the characterization of Dennis's disability allowance until trial.

After trial, the trial court awarded each party half of their collective assets except Dennis's disability allowance. The court awarded both parties 50 percent each of the net proceeds from the sale of the family home, 50 percent each of various savings bonds, and 50 percent each of Mary's IRA account, a money market account, and a joint account. But the trial court determined that Dennis's disability allowance was his separate property and was not "in any part community in character." Further, the court concluded that "any service related pension/allowance is owned for the most part

(97.5%) by Dennis as his separate interests as he worked for the [Seattle Fire Department] for 28.5 years before marriage."

The trial court also granted Mary a monthly maintenance of $1,600 for five years. The five-year time frame was intended to last until Mary qualified for Medicare and Social Security payments. At the time of trial, Dennis was 75 years old and Mary was 61.

II.

Mary argues that the trial court erred in characterizing Dennis's disability allowance as his separate property and then abused its discretion by awarding the full allowance to Dennis. We agree.

A.

"In performing its obligation to make a just and equitable distribution of properties and liabilities in a marriage dissolution action, the trial court must characterize the property before it as either community or separate." In re Marriage of Kile, 186 Wn. App. 864, 875, 347 P.3d 894 (2015). We review de novo a trial court's characterization of property as separate or community. In re Marriage of Mueller, 140 Wn. App. 498, 503-04, 167 P.3d 568 (2007).

The trial court's characterization, however, is not controlling. In re Marriage of Shannon, 55 Wn. App. 137, 141, 777 P.2d 8 (1989). "Rather, the trial court must ensure that the final division of the property is 'fair, just and equitable under all the circumstances[,]'" In re Marriage of Olivares, 69 Wn. App. 324, 329, 848 P.2d 1281 (1993) (quoting In re Marriage of Hadley, 88 Wn.2d 649, 656, 565 P.2d 790 (1977)),

because "all of the property of the parties, whether it be community or separate, is before the trial court for disposition." Shannon, 55 Wn. App. at 141.

In dividing property, the trial court must consider: (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and (4) the economic circumstances of each spouse at the time the division of property is to become effective. RCW 26.09.080. No factor is afforded greater weight than any other. In re Marriage of Kozen, 103 Wn.2d 470, 478, 693 P.2d 97 (1985).

The trial court has broad discretion in dissolution proceedings "to make a just and equitable distribution of property based on the factors enumerated in RCW 26.09.080." In re Marriage of Wright, 179 Wn. App. 257, 261, 319 P.3d 45 (2013). We review a trial court's division of property for a manifest abuse of discretion, Wright, 179 Wn. App. at 261, such as when the trial court exercises its discretion on untenable grounds or "[i]f the decree results in a patent disparity in the parties' economic circumstances." In re Marriage of Rockwell, 141 Wn. App. 235, 243, 170 P.3d 572. This is a highly deferential standard and "[t]he 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 Landry, 103 Wn.2d 807, 809, 699 P.2d 214 (1985).

B.

In reaching its characterization decision, the trial court found that Dennis "was not given the option of taking retirement or disability allowance" and instead that based on the medical evaluation at the time of his injury "the determination was made that he was to take a disability allowance." Based largely on this finding, the trial court

determined that "the disability allowance received by Dennis [was not] in any part community in character, but rather it is his separate personal property as described by the Court of Appeals in [In re Marriage of Anglin, 52 Wn. App. 317, 759 P.2d 1224 (1988)]."

The trial court's sole focus on whether Dennis elected to receive his disability allowance at the time of his injury was mistaken. It was undisputed that Dennis was eligible to retire and receive a pension before he became disabled at age 50. It is also undisputed at the time of trial Dennis was 75 years old and likely would have been retired and would have been eligible for his LOEFF I pension. Therefore, whether he elected to take disability instead of retirement at the time of his injury should not have been the sole focus of the trial court's analysis. Several cases are instructive.

In In Marriage of Knies, 96 Wn. App. 243, 244, 979 P.2d 482 (1999), the wife was awarded 50 percent of the husband's pension with the Washington State Patrol as part of a 1990 dissolution decree. In 1996, six days before the husband would have been eligible to retire, he became disabled and was awarded disability payments. Knies, 96 Wn. App. at 244. The wife moved for an order directing the husband to pay a portion of the disability payments to her and the trial court agreed. On appeal, the husband argued that the trial court erred in determining that the disability benefits may substitute for retirement pensions for the purposes of property division.

This court affirmed the trial court, noting that while generally "retirement benefits are considered deferred compensation. . . [and] [d]isability payments . . . are considered compensation for lost future wages . . . courts look carefully at the disability payment received to determine whether the payment has characteristics of an earned pension in

addition to disability." Knies, 96 Wn. App. at 251. "By choosing to accept the disability benefits in lieu of retirement, only six days before he was eligible to retire . . . [the husband] effectively altered the character of his disability to one of deferred compensation." Knies, 96 Wn. App. at 252.

Importantly, it was the nature of the benefits that was important in Knies and not the election of those benefits. This was evident in the court's rejection of the husband's argument—the same argument that Dennis made below—that he would not have retired but for the disability: "It was not untenable for the [trial] court to conclude, after hearing all the evidence, that [the husband] intended to remain on disability indefinitely. Therefore, we affirm." Knies, 96 Wn. App. at 252.

Similarly, in In re Marriage of Kollmer, 73 Wn. App. 373, 377-78, 870 P.2d 978 (1994), Division Two of this court affirmed in part the trial court's conclusion that the husband's LEOFF I disability allowance was divisible community property. The court reasoned that:

> [i]nsofar as the trial court determined that [the husband's] LEOFF I benefits were divisible after [he] was "over the age of 50", its determination was correct. At that age, any disability benefit [the husband] would be entitled to receive, up to the amount he would have received as retirement pay at that age, clearly will have the characteristics of compensation for past services. It was, therefore, properly divisible. On the other hand, any disability pay [the husband] has received or will receive prior to becoming eligible to collect retirement pay does not have characteristics of compensation for past services. It was, therefore, error for the trial court to divide it.

Kollmer, 73 Wn. App. at 378.

In contrast, in In re the Marriage of Huteson, 27 Wn. App. 539, 543, 619 P.2d 991 (1980), the husband began working as a Vancouver fireman, and thus became a member of the LEOFF retirement system in 1973. After a 10-year marriage, the parties

separated in 1977. A year later, in 1978, the husband suffered a heart attack and was placed on full disability. At the time he went on disability the husband had been employed less than five years and thus did not have any vested retirement benefits under LEOFF. Huteson, 27 Wn. App. at 540. The trial court determined that the husband's disability income was compensation for loss of future income and not a community asset.

Division Two of this court agreed with the trial court, explaining,

> [b]ut perhaps the most compelling argument favoring a separate property characterization is that disability payments acquired before the disabled spouse has earned a vested right to retirement benefits are designed to compensate solely for loss of future earnings. To treat such disability payments as a community asset would unfairly and permanently burden those future earnings to the same extent as would an award of permanent alimony. We believe such disability payments should not be considered a community asset subject to division in a dissolution proceeding.

Huteson, 27 Wn. App. at 543. The court, however, distinguished the facts before it, with a situation, such as here, where the disability serves as a form of deferred compensation.

> We acknowledge that if the disability pension serves as a form of deferred compensation for past services or is taken in lieu of a vested retirement benefit, circumstances may call for a different characterization. We agree with Kittleson that
>
> > [a]n inflexible rule that required a disability pension to be classified as separate property would ignore the fact that some "disability" pensions step into the place of a regular retirement pension . . . yet other awards are made for disability alone.
>
> Here there are no retirement elements involved in the disability award except for the possibility that respondent may, in the future, return to his firefighter's duty and vest a retirement benefit.

Huteson, 27 Wn. App. at 543 (quoting Marriage of Kittleson, 21 Wn. App. 344, 353, 585, P.2d 167 (1978)).

In Anglin, the case relied upon by the trial court here, the trial court's decree of dissolution characterized the husband's disability allowance as community property but awarded it entirely to the husband. 52 Wn. App. at 218. There, the husband was injured while working as a police officer and received a LEOFF I disability allowance, but the parties had executed a community property agreement prior to their dissolution. Anglin, 52 Wn. App. at 318-19. In distributing the parties' property, the trial court "determined that the disability award was community property (based on the community property agreement)." Anglin, 52 Wn. App. at 319 (parenthesis in original). The trial court nevertheless awarded all of the disability allowance to the husband "based on the age of each party, their respective incomes, and the distribution of other assets and obligations." Anglin, 52 Wn. App. at 319.

This court affirmed "because [the husband] was under 50 . . . the award to him was based solely on his disability, rather than being in the nature of a retirement benefit." Anglin, 52 Wn. App. at 324. Thus, as repayment for lost future wages, the disability award was "not a marital asset to be characterized and distributed by the trial court." Anglin, 52 Wn. App. at 324. Therefore, despite characterizing the disability award as community property, "[t]he trial court below did not abuse its discretion in awarding all of [it] to [the husband]." Anglin, 52 Wn. App. at 324-25.

Finally, in Marriage of Nuss, 65 Wn. App. 334, 343, 828 P.2d 627 (1992), this court upheld the trial court's characterization of a disability allowance as community property able to be distributed. The court reasoned that "[w]here a spouse has elected to receive disability in lieu of retirement benefits, for instance, only the amount of disability received over and above what would have been received as retirement

benefits is considered that spouse's separate property." Nuss, 65 Wn. App. at 343. This is so because "disability payments which are in the nature of compensation for lost future wages are not an asset for distribution upon dissolution" but, "retirement benefits are considered deferred compensation for past services, and thus the portion of those benefits accrued during marriage is community property." Nuss, 65 Wn. App. at 343.

From this line of cases we conclude that disability benefits that are intended to be compensation for lost future earnings are not distributable upon dissolution,[2] but disability benefits that replace compensation earned but deferred during marriage are potentially distributable.[3] Further, if "a party would be receiving retirement benefits but for a disability, so that disability benefits are effectively supplanting retirement benefits, the disability payments are a divisible asset to the extent they are replacing retirement benefits." Geigle, 83 Wn. App. at 31.

Here, trial court erred by determining that Dennis's disability allowance was his separate property and indivisible at dissolution. Dennis was eligible to retire when he became disabled. Moreover, by the time of trial Dennis was in his 70s and as such, it is reasonable to conclude that before dissolution Dennis would have retired. Thus, but for Dennis's disability, the marital community would have received Dennis's retirement benefits. The disability allowance effectively supplanted the retirement benefits.

The trial court erred by not characterizing Dennis's disability allowance as community property because it had the character of deferred compensation and not compensation for lost future income.

---

[2] See In re Marriage of Brewer, 137 Wn.2d 756, 767-69, 976 P.2d 102 (1999); In re Marriage of Geigle, 83 Wn. App. 23, 30, 920 P.2d 251 (1996); Nuss, 65 Wn. App. at 343; Anglin, 52 Wn. App. at 324.

[3] See Geigle, 83 Wn. App. at 31; Kollmer, 73 Wn. App. at 377; Nuss, 65 Wn. App. at 343; In re Marriage of Leland, 69 Wn. App. 57, 73, 847 P.2d 518 (1993).

C.

The trial court's mischaracterization of Dennis's disability allowance does not, alone, require reversal if the final division of property is otherwise fair. The characterization of property as separate or community is not controlling. Shannon, 55 Wn. App. at 140. "Rather, the trial court must ensure that the final division of the property is 'fair, just and equitable under all the circumstances.'" Olivares, 69 Wn. App. at 329 (quoting Hadley, 88 Wn.2d at 656).

Dennis argues that the trial court's division of property was fair and just under the circumstances. Dennis contends that he accumulated 95 percent of his retirement pension before his marriage to Mary and consequently at most only 5 percent of his retirement pension could be considered community property, of which Mary would only be entitled to half or 2.5 percent of his entire retirement account. The trial court agreed with this proposition when it found that "[a]ny service related pension/allowance is owned for the most part (97.5%) by Dennis as his separate interests as he worked for the [Seattle Fire Department] for 28.5 years before marriage."

But this argument ignores the presence of the community property agreement, which the trial court expressly found to be valid. The community property agreement states that it was Dennis and Mary's intention "to now own all of our property together as community property." There was no exception for retirement accounts that the parties earned prior to the marriage, as is evident by the trial court's equal division of Mary's previously earned IRA account.

Dennis's disability allowance was one of the most substantial assets that the parties had. At the time of trial, Dennis was collecting $5,784 a month in disability and

will continue to do so until his death. And while the trial court split virtually every other asset equally, it awarded Dennis the entirety of his disability allowance. Therefore, the trial court's mischaracterization of Dennis's disability allowance likely affected its distribution of property. While the trial court divided everything the parties owned evenly, it left Mary with a $1600 a month for five years maintenance while Dennis will receive nearly $6000 a month for life. This is not a fair, just, and equitable division of property under the circumstances.

Accordingly, this is one of the rare cases where the appellant has met their heavy burden to show that the trial court manifestly abused its discretion by exercising it on untenable grounds. Landry, 103 Wn.2d at 809-10. The final division appears to result in "a patent disparity in the parties' economic circumstances." Rockwell, 141 Wn. App. at 243. Remand is necessary.[4]

III.

Mary asks for an award of her attorney fees on appeal. RAP 18.1(a) allows us to do so "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses." RCW 26.09.140 allows the court "from time to time after considering the financial resources of both parties [to] order a party to pay a reasonable amount" of attorney fees and costs. Mary requests attorney fees based on the disparity in the parties' financial situations, her demonstrated need, and Dennis's ability to pay. App. at 45. But Mary declines to mention the fact that she recently received half of the net proceeds from the sale of the couple's marital home and other valuable property. The

[4] Mary also argues that the trial court erred in awarding her an insufficient maintenance. But because the trial court must reevaluate the division of property on remand, it will necessarily also have to reconsider its award of maintenance. See Marriage of Marzetta, 129 Wn. App. 607, 626, 120 P.3d 75 (2005).

trial court, below, concluded that Mary did not warrant an award of attorney fees and costs. We agree and decline Mary's request for her attorney fees on appeal.

We reverse and remand for the trial court to make a just and equitable distribution of property based on characterizing Dennis's LOEFF payments as community property.

Mann, A.C.J.

WE CONCUR:

Leach, J.

Dwyer, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of RICHARD DENNIS GROVES, Respondent, and MARY NOONAN GROVES, Appellant.	)	No. 78236-3-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Respondent Richard Groves filed a motion to reconsider the court's opinion filed on August 26, 2019. Appellant Mary Groves has filed an answer. The panel has determined that the motion for reconsideration should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Mann, A.C.J.

No. 78236-3-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

RICHARD DENNIS GROVES,

Respondent,

v.

MARY NOONAN GROVES,

Appellant

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Suzanne Parisien

RICHARD DENNIS GROVES' ORAL ARGUMENT EXHIBIT

Gregory M. Miller, WSBA No. 14459

CARNEY BADLEY SPELLMAN, P.S.
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Attorneys for Respondent Richard Dennis Groves

ORAL ARGUMENT EXHIBIT

Mary Groves' Asset & Debt Worksheet, Trial Exhibit 101

Groves v. Groves - Assets and Liabilities - W's

DOM: 11/18/1991; DOS: 10/24/2016; Length: 24 Years 11 Mos

Community Property

Ex. No.	Asset	Gross Value	Lien/Sep. Port	Net Value	To H	To W
	Real Estate:					
106	Home at 12221 8th Ave (Equity)	1,136,000	0	1,136,000	568,000	568,000
	Real Property	1,136,000	0	1,136,000	568,000	568,000
	Bank/Retirement Accounts					
107, 41	Discover Account No. 0609	498,653		498,653	249,327	249,327
108, 22	Vanguard Acct No. 5632/0036	131,771		131,771	65,886	65,886
109, 24	W's 2017 Vanguard IRA 4642	92,619		92,619	46,310	46,310
110, 60	Wells Fargo Chk (1924) (DOS)	80,396		80,396	40,198	40,198
111, 2	I-Bonds	142,564		142,564	71,282	71,282
	Total	946,003	0	946,003	473,002	473,002
	Misc. Property					
128	W's 1990 Camry	1,000		1,000	0	1,000
128	H's 2006 F150	7,432		7,432	7,432	0
128	1997 Fleetwood Motorhome	38,448		38,448	38,448	0
135	Furniture	23,332		23,332	23,332	
	Total Property	70,211	0	70,211	69,211	1,000
	Total Assets	2,152,214	0	2,152,214	1,110,213	1,042,002
	Division				51.58%	48.42%
	Equalizing Payment (From House)				-34,106	34,106
	Total Assets	2,152,214	0	2,152,214	1,076,107	1,076,107
	Division				50.00%	50.00%

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Attorneys for Appellant Mary N. Groves Catherine Wright-Smith Valerie A. Villacin SMITH GOODFRIEND, PS 1619 8th Ave N Seattle WA 98109-3007 cate@washingtonappeals.com; valerie@washingtonappeals.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☐ E-mail ☒ Other – Court's e-service system
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DATED this 7th day of June, 2019.

Elizabeth C. Fuhrmann, Legal Assistant/Paralegal to Gregory M. Miller

CARNEY BADLEY SPELLMAN

June 07, 2019 - 1:55 PM

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Appellate Court Case Number:	78236-3
Appellate Court Case Title:	Mary Noonan Groves, Appellantt v. Richard Dennis Groves, Respondent
Superior Court Case Number:	16-3-06450-1

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Filing Petition for Review

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