No. 90043-4

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 69133-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

KIM B. WRIGHT,

Petitioner,

vs.

MARY M. WRIGHT,

Respondent.

PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

By: Catherine W. Smith, WSBA No. 9542
Valerie A. Villacin, WSBA No. 34515

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

A. Identity of Petitioner.

Appellant Kim Wright asks this Court to accept review of the Court of Appeals' published decision designated in Part B of this Petition.

B. Decision Below.

In a decision filed December 16, 2013, Division One affirmed the trial court's award to respondent Mary Wright of both 60% of the community estate, including the vast majority of the parties' investment and retirement accounts and a $1.7 million "equalizing" judgment, and of a distributive maintenance award exceeding $1 million, both payable over three years before the appellant Kim Wright's anticipated retirement. (Appendix A)

Division One published its decision and denied petitioner's motion for reconsideration and RAP 9.11 motion on February 3, 2014. (Appendix B) Petitioner asks that this petition be considered in conjunction with his RAP 13.5(b) motion for discretionary review and motion to supplement the record.

C. Issues Presented for Review.

1. RCW 26.09.080 requires consideration of four non-exclusive factors, including the nature and extent of the community and separate property, the duration of the marriage, and the parties'

current economic circumstances, in making a "just and equitable" division of the marital estate on dissolution. "This court will not single out a particular factor . . . and require as a matter of law that it be given greater weight than other relevant factors." *Konzen v. Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985). Is the court nevertheless required to place the parties "in roughly equal financial positions for the rest of their lives" when the parties have been married at least 25 years?

2. When, in order to place the parties in "roughly equal financial positions for the rest of their lives," the court makes a disproportionate property award to one spouse based on the other spouse's predicted greater postdissolution earnings, does the court err in also awarding distributive spousal maintenance to the spouse receiving the disproportionate award on the same grounds, particularly when the maintenance can only be paid from the same postdissolution earnings that the trial court found warranted the disproportionate division of property?

3. When a court purports to "look forward" to base awards of an "equalizing" judgment and distributive spousal maintenance on the predicted future earnings of one spouse, is post-dissolution proof that the spouse's actual income was significantly

lower than predicted relevant to whether the court's decision was proper?

D. Statement of the Case.

Petitioner Kim Wright and respondent Mary Wright, both now age 61, were married on June 14, 1980. (CP 3-4; RP 44, 46) Kim[1] was a neurosurgeon who earned a substantial income for the family; Mary stayed home with the parties' eight children, all of whom are now adults.

The trial court valued the community property at $17.84 million after finding the parties had legally separated on April 26, 2011, when Mary filed this dissolution petition, rather than nearly four years earlier when the parties physically separated and Kim moved to Alaska to practice medicine (CP 260-64; Finding of Fact (FF) 2, CP 249) The trial court awarded Mary a Mercer Island waterfront residence and the vast majority of the parties' cash, retirement, and stock accounts, totalling more than $8.5 million, and an additional $1.7 million "equalizing" judgment, payable over three years, to provide her with what the trial court calculated as 59.5% of the community estate ($10.226 million). (*See* Opening Br.

[1] Because the parties share a last name this petition refers to them by their given names. No disrespect is intended.

23) The disproportionate division left Kim with less than $500,000 in community cash, retirement and stock accounts. Over 20% of Kim's award was the $1.4 million value placed on his Alaska medical practice, which the trial court conceded would have no ongoing value when Kim retired, in less than three years. (*See* FF 9, CP 252) While the trial court acknowledged that the goodwill of Kim's medical practice was not a "saleable asset," it nevertheless awarded it to him as an asset, noting that it did so to "protect" Mary's "financial expectations" in the practice. (FF 10, CP 253)

In addition to its disproportionate award of property, the trial court awarded Mary spousal maintenance of $30,000 a month for three years – total maintenance of $1.08 million. (CP 258) The basis for both the disproportionate award of property and the distributive spousal maintenance award was the trial court's prediction that Kim would earn gross annual income of $4 million ($10 million total) for the next 2 ½ years, until he retired. (FF 4, CP 250; FF 12, CP 254)

Kim appealed, challenging the disproportionate property division and the distributive spousal maintenance award. In affirming the disproportionate property award, Division One held that "if the spouses were in a long-term marriage of 25 years or

more, the court's objective is to place the parties in roughly equal financial positions for the rest of their lives," and that "to reach this objective, the court may account for each spouse's anticipated postdissolution earnings in its property distribution by looking forward." (Appendix A, ¶ 7) Division One concluded that, using the trial court's prediction of his future income, "Dr. Wright would ultimately end up with nearly $2.7 million more than Ms. Wright in the long run." [2] (Appendix A, ¶ 8) Division One's own reasoning depends entirely on Kim earning $10 million ($4 million annually) in the 2 1/2 years after divorce, from which he would pay both the $1.7 million "equalizing" judgment and $1 million-plus distributive spousal maintenance award.

---

[2] This conclusion is not only mathematically flawed but depends entirely on the husband earning $10 million ($4 million annually) in the 2 1/2 years after divorce, from which he would have to pay both the wife's $1.7 million "equalizing" judgment and $1 million-plus spousal maintenance award. It appears to be based on the wife's claim that the husband would "surpass" her by nearly $2.7 million based on the following calculation: $10,000,000 x .396 (tax bracket) = $6,040,000-$3,369,196 = $2,670,804. (Resp. Br. 21-22) But the wife actually received $3,532,642 more in property than the husband, plus $1,080,000 in spousal maintenance. (*See* App. Br. 23-24) Thus, the "immediate imbalance" in the wife's favor was $4,612,642, not $3,369,196. (Appendix A, ¶ 8) Assuming the husband could earn $10 million over the 2.5 years after the divorce (which would require that he earn $6 million in the next 13 months), and that the rules governing subtraction are not discretionary, the husband would be "ahead" only $1,427,358. Ironically, that is about the value placed on his surgical practice by the trial court – a value that, as noted in the text, will evaporate when he retires. (*See* FF 9, CP 252)

Division One rejected Kim's argument that the trial court's $1.7 million "equalizing" judgment improperly invaded his separate property because the way in which the marital estate had been divided meant the award would necessarily be paid from his postdissolution income. (Appendix A, ¶ 10) Division One held that the character of property is not controlling in a property division, and that the trial court is free to award one spouse's separate property to the other, relying on its recent decision in *Marriage of Larson and Calhoun* ___ Wn. App. ___, 313 P.3d 1228 (2013), (Appendix A, ¶ 10), *pet. rev. pending* in Cause No. 89862-6.

Division One also affirmed the distributive spousal maintenance award, on the same grounds. Holding that "financial need is not a prerequisite to a maintenance award," Division One reasoned that Kim would continue to earn significant postdissolution income, averaging $4 million a year in the 2-1/2 years after divorce ($10 million), that "will leave him ahead by nearly $2.7 million, even considering the maintenance award" (Appendix A, ¶ 25), again basing its discretionary "math" on the postdissolution income predicted by the trial court.

Kim moved for reconsideration and asked Division One in reconsidering its decision to consider evidence of his *actual*

postdissolution income under RAP 9.11. Although both the trial and appellate court's decisions had been premised on him earning $4 million annually, his earnings in the 18 months since divorce had been little over half that. Given Division One's holding that the courts' "objective" in long-term marriages must be to place the parties in "roughly equal financial positions for the rest of their lives," the courts' reliance on an inaccurate prediction of the amount Kim would earn postdissolution meant that goal could not be achieved with the disproportionate property division and distributive maintenance award.

Division One denied the motion for reconsideration and the motion to take additional evidence and published its decision. Kim petitions for review.

E. Why This Court Should Accept Review.

1. Division One's published decision creates a new rule for long-term marriages that ignores RCW 26.09.080, conflicts with this Court's decision in *Konzen*, and raises an issue of substantial public interest that this Court should decide.

RCW 26.09.080 requires the trial court to make a "just and equitable" distribution after consideration of all relevant factors, including but not limited to:

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. Instead of making a "just and equitable" distribution based on *all* these factors, Division One's decision in this case directs the courts to place the parties to a long-term marriage lasting more than 25 years in "roughly equal financial positions for the rest of their lives." (Appendix A, ¶ 7) This new rule improperly gives greater weight to the "duration of the marriage" than to the other factors the court is required to consider under the statute.

"This court will not single out a particular factor . . . and require as a matter of law that it be given greater weight than other relevant factors." *Konzen v. Konzen*, 103 Wn.2d 470, 478, 693 P.2d

97 (1985).[3] Division One's decision in this case conflicts with *Konzen,* making the duration of the marriage the only relevant factor in the division of property at the end of long-term marriages.

Division One's decision in this case goes far beyond confirming a trial court's discretion in making a property division. Instead, it creates a new rule that ignores all the factors of RCW

---

[3] Division One's opinion in this case cites *Konzen* for the proposition that the character of property is not controlling – a proposition with which petitioner does not argue. (Appendix A ¶ 10) But *Konzen* does not support the factorless exercise of discretion in the division of property in the manner in which it is cited in both this case and in *Marriage of Larson and Calhoun,* ___ Wn. App. ___, 313 P.3d 1228 (2013), *pet. rev. pending* in Cause No. 89862-6. The correct standard of review is whether "the decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *Marriage of Littlefield,* 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). This standard of review properly focuses on whether the trial court's decision is based on the correct legal standard and whether the facts as found by the trial court meet the requirements of the correct legal standard. (*See* App. Br. 20; Reply Br. 3-4) Importantly, this standard of review also recognizes that the appellate courts have a role in establishing the factors relevant to the trial court's exercise of its discretion.

Nothing in *Konzen,* or elsewhere in the statutory or case law governing the division of property, supports the new rule for division of property at the end of a long-term marriage announced in this case. In *Konzen,* this Court affirmed the trial court's decision awarding the wife 30% of the husband's separate property military pension, after dividing the community estate equally between the parties. Most of the *Konzen* opinion addresses the impact of federal laws on the state court's authority to consider and divide a spouse's military retired pay. *See* 103 Wn.2d at 473-77. *Konzen* was one of a series of cases decided in the mid-1980s dealing with the much-criticized consequences of the U.S. Supreme Court's characterization of federal benefits in *McCarty* and other cases. *See also, e.g., Marriage of MacDonald,* 104 Wn.2d 745, 709 P.2d 1196 (1985); *Marriage of Landry,* 103 Wn.2d 807, 699 P.2d 214 (1985).

26.09.080 except the duration of the marriage, dictating that the trial court's "objective" in long term marriages must be to "place the parties in roughly equal financial positions for the rest of their lives" – regardless of the parties' economic circumstances at the time of the dissolution, and without consideration of the character of the property before the court for distribution.

RCW 26.09.080 does not support Division One's new rule. A "fair and equitable" division is not necessarily one that places the parties in "roughly equal financial positions for the rest of their lives," as dictated by Division One. As this Court held over a century ago, even when a "husband and wife have toiled on together for upwards of a quarter of a century in accumulating property," the "ultimate duty of the court is to make a *fair and equitable* division under all the circumstances" – not a "roughly equal" one. *Sullivan v. Sullivan*, 52 Wash. 160, 164, 100 P. 321, 323 (1909) (emphasis added). In *Sullivan,* for instance, this Court affirmed a property division (with no maintenance) that awarded the husband all of the property that the trial court found was his separate property and 55% of the community property.

Division One's decision also disregards the century-long distinctions made by the Legislature and the courts between

separate and community property, and directly contravenes the requirement in RCW 26.09.080 that the dissolution court in dividing the marital estate consider the character of the property before it, by holding that "to reach this objective [of roughly equal financial positions], the court may account for each spouse's anticipated postdissolution earnings in its property distribution by looking forward." (Appendix A, ¶ 7) Post-separation (and certainly postdissolution) earnings are separate property. RCW 26.16.140. As this Court has held, a spouse's right to their separate property is "sacred." *Estate of Borghi*, 167 Wn.2d 480, 484, ¶ 8, 219 P.3d 932 (2009), *quoting Guye v. Guye*, 63 Wash. 340, 352, 115 P. 731 (1911). That "sacred" right does not evaporate simply because the parties' marriage lasted 25 years or more.

Division One's pronouncement that trial courts are "required" to "look forward" at the postdissolution earnings of each party when dividing the marital estate of a long-term marriage also ignores RCW 26.09.080's dictate that the trial court consider "the economic circumstances each spouse *at the time the division of property is to become effective.*" RCW 26.09.080(4) (emphasis added). "Looking forward" to predicted earnings and assets that do not exist when the trial court is dividing the property conflicts with

Division Two's decision in *White v. White*, 105 Wn. App. 545, 549, 20 P.3d 481, 484 (2001), which holds that "when exercising this broad discretion, a trial court focuses on the assets then before it-i.e., on the parties' assets at the time of trial." It is also inconsistent with this Court's decision in *Marriage of Hall,* 103 Wn.2d 236, 248, 692 P.2d 175 (1984), that while "future earning potential" is a "consideration" in making a just and equitable division of property, it is not an "asset" that can be used to offset other assets.

The reason for restricting reliance on predicted postdissolution income is obvious – it requires a level of speculation that is an untenable grounds for the court's division of property. Here, for instance, the trial court based both its disproportionate property division and distributive spousal maintenance award on the prediction that petitioner would have a future $10 million asset (annual income of $4 million over 2 ½ years). The Court of Appeals affirmed on the same basis. (Appendix A, ¶ 8) If this is the rule – that trial courts can speculate as to one spouse's future income, and treat it as an asset to be awarded – then a reviewing court should take additional evidence to determine whether in fact the trial court's property division

either makes a "just and equitable" division or "places the parties in roughly equal financial positions for the rest of their lives."

The only support Division One cites for its holding in this case that "if the spouses were in a long-term marriage of 25 years or more, the court's objective is to place the parties in roughly equal financial positions for the rest of their lives" (Appendix A, ¶ 7) is dicta from its earlier decision in *Marriage of Rockwell (I)*, 141 Wn. App. 235, 243, ¶ 12, 170 P.3d 572 (2007), *rev. denied*, 163 Wn.2d 1055 (2008), *on remand*, *Rockwell (II)* 157 Wn. App. 449, 238 P.3d 1184 (2010). Division One's decision also misapplies *Rockwell* in a manner this Court should accept review to correct.

Rockwell (I) affirmed an award to each party of their separate property and a disproportionate award of the community property (but no maintenance) to the older wife, who was retired and in ill health, on the grounds the younger husband would have an opportunity to "make up" the smaller property division with his

predicted employment income after divorce.[4] In dicta, both published opinions in *Rockwell* state:

> In a long term marriage of 25 years or more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives. The longer the marriage, the more likely a court will make a disproportionate distribution of the community property. Where one spouse is older, semi-retired and dealing with ill health, and the other spouse is employable, the court does not abuse its discretion in ordering an unequal division of community property.

Rockwell (I), 141 Wn. App. at 243, ¶ 12; *Rockwell (II)*, 157 Wn. App. at 452, ¶4.

Rockwell (II) cites only *Rockwell (I)* for this "roughly equal" proposition. 157 Wn. App. at 452, ¶ 4) The only support *Rockwell*

---

[4] The holdings of *Rockwell* have become lost in the misguided use of its dicta. The disproportionate property division was affirmed, and the case was remanded on the wife's cross-appeal because the trial court mischaracterized a portion of the wife's separate property pension as community property by using the "subtraction method" rather than the "time rule method" in *Rockwell (I)*, 141 Wn. App. 235, 254, ¶ 36, 170 P.3d 572 (2007). On remand, the trial court re-characterized the pension and once again divided the community property 60/40 in the wife's favor and awarded each party their separate property. *Marriage of Rockwell (II)*, 157 Wn. App. 449, 238 P.3d 1184 (2010). On remand from the second appeal, the trial court was able to test its original prediction that the husband could earn $70,000 annually with the actual facts and confirmed that it intended to make the same property division. *Marriage of Rockwell (III)*, 168 Wn. App. 1047, 2012 WL 2369519 (2012).

Petitioner does not rely on the unpublished decision in *Rockwell (III)* as authority, but to provide context for the Court of Appeals' decision in *Rockwell (I)* and to demonstrate why later courts' misapplication of its dicta supports acceptance of review to determine the issues of substantial public interest raised by this petition. RAP 13.4(b)(4).

(I) cites for this "objective" is the WSBA, Family Law Deskbook, § 32.3(3) at 17 (2d. ed. 2000). The Deskbook, in turn, relies on a 32-year old Washington Bar News article by then-King County Superior Court Judge Robert Winsor. Winsor, Robert, *"Guidelines for the Exercise of Judicial Discretion,"* Washington State Bar News at 16 (January 1982). The Winsor article is not available online, and has never been cited in a published decision of the Washington appellate courts. For the Court's convenience, a copy of the Winsor article is attached as Appendix C.

Neither the Deskbook nor the Winsor article is the law of our state,[5] and in the six years since *Rockwell I* was decided, its holding has been lost in misguided reliance on its dicta. *Rockwell* is typically cited for the proposition that trial courts have "broad discretion to determine what is just and equitable based on the circumstances of each case." *See, e.g., Marriage of Larson and Calhoun* ___ Wn. App. ___, ¶ 10, 313 P.3d 1228, 1230 (2013);

---

[5] In *Marriage of Bracken,* 157 Wn. App. 1070, 2010 WL 373405 (2010), Judge Dwyer of Division One pointed out that Judge Winsor's Bar Review article was not controlling, and that RCW 26.09.080 itself does not purport to categorize the length of marriages. Petitioner does not rely on the unpublished decision in *Bracken* as authority, but to demonstrate the conflict developing over reliance on the Winsor article in the lower courts, and why later courts' misapplication of the dicta in *Rockwell* supports acceptance of review to determine the issues of substantial public interest raised by this petition. RAP 13.4(b)(4).

Marriage of Kim, ___ Wn. App. ___, ¶ 55, 317 P.3d 555, 566 (2014). This Court should accept review to correct the lower court's misapplication of *Rockwell*.

Courts are poor predictors of future earnings – that is why maintenance can be modified. But a property distribution is permanent and non-modifiable. *Marriage of Thompson*, 97 Wn. App. 873, 880, 988 P.2d 499 (1999). Division One's published decision creates a rule for the division of property at the end of long-term marriages that ignores the factors of RCW 26.09.080, makes the character of property irrelevant (and the duration of marriage the only relevant factor), and allows the trial court to award assets that do not exist at the time the division is made. This Court should accept review under RAP 13.4(b)(1), (2), and (4).

2. Division One's published decision holding that financial need is not a prerequisite to an award of maintenance is inconsistent with RCW 26.09.090 and conflicts with *Friedlander* and *Wright*.

This Court also should accept review of Division One's decision affirming an award of distributive maintenance to the wife because the flawed basis for that award – the husband's postdissolution income, and the requirement that the parties be placed in "roughly equal financial positions" – is the same as that

justifying the disproportionate division of the marital estate. The Court of Appeals' published decision is inconsistent with RCW 26.09.090 and conflicts with decisions of this Court and Division Two.

Division One's decision affirming the trial court's distributive maintenance award, based solely on the husband's predicted postdissolution earnings and regardless of the wife's actual need given the disproportionate property award to her (Appendix A, ¶¶ 7, 24), is inconsistent with both RCW 26.09.080 and RCW 26.09.090. RCW 26.09.090(1)(a) (in awarding maintenance the trial court must consider the financial resources of the parties, including the property apportioned to them); RCW 26.09.080(4) (in dividing property the court must consider the economic circumstances of the parties). Instead, the six factors RCW 26.09.090 directs the court to consider in awarding spousal maintenance are premised on the need of the spouse seeking an award.

Division One's holding that "financial need is not a prerequisite to a maintenance award" (Appendix A, ¶ 22) is inconsistent with the statute and conflicts this Court's decision in *Friedlander v. Friedlander*, 80 Wn.2d 293, 297, 494 P.2d 208, 211 (1972), which held that maintenance "is based upon two factors: (1)

the necessities of the wife and (2) the financial ability of the husband to pay." *See also Marriage of Foley,* 84 Wn. App. 839, 845-46, 930 P.2d 929 (1997) (court's discretion in making an award of maintenance is "governed strongly by the need of one party and the ability of the other party to pay an award.").

Division One's decision also conflicts with Division Two's decision in *Marriage of Wright*, 78 Wn. App. 230, 238, 896 P.2d 735 (1995), holding that "[a]n unequal distribution of property obviate[s] the need for spousal maintenance as it substantially improve[s] [the wife]'s financial position." *See also Marriage of Estes,* 84 Wn. App. 586, 593, 929 P.2d 500 (1997) (in making its maintenance award, the trial court must consider the property awarded to each spouse)*; Marriage of Irwin*, 64 Wn. App. 38, 55, 822 P.2d 797 (no maintenance award in light of property awarded the wife), *rev. denied*, 119 Wn.2d 1009 (1992).

In support of the trial court's decision, Division One reasoned that, regardless of the wife's "need," maintenance can be used as a "flexible tool to equalize the parties' standard of living for an appropriate period of time." (Appendix A, ¶ 23, *citing Marriage of Washburn,* 101 Wn.2d 168, 677 P.2d 152 (1984))) *Washburn* does not support both a disproportionate award of property *and*

spousal maintenance under the circumstances of this case.

This Court held that "maintenance is not just a means of providing bare necessities, but rather a flexible tool, by which the parties' standard of living may be equalized for an appropriate period of time" in *Washburn*, 101 Wn.2d at 179. But *Washburn* also held that where, as here, "a marriage endures for some time after the professional degree is obtained, the supporting spouse may already have benefitted financially from the spouse's increased earning capacity to an extent that would make extra compensation [in the form of spousal maintenance] inappropriate. For example, he or she may have enjoyed a high standard of living for several years. Or perhaps the professional degree made possible the accumulation of substantial community assets, which may be equitably divided." *Washburn,* 101 Wn.2d at 181. That is precisely the situation here.

"It is not a policy of the law to give a wife a perpetual lien upon her divorced husband's future earnings, which arise from his personal efforts." *Morgan v. Morgan,* 59 Wn.2d 639, 642, 369 P.2d 516 (1962). Division One's published decision ignores the factors of RCW 26.09.090 and wrongly addresses maintenance and property awards in a factorless vacuum. This Court should accept

review under RAP 13.4(b)(1), (2), and (4).

F. Conclusion.

This Court should accept review of the Court of Appeals' published decision under RAP 13.4(b)(1), (2), and (4) to decide 1) whether the duration of the marriage is entitled to greater weight than the other factors of RCW 26.09.080, requiring the court place the parties to a long-term marriage in "roughly equal financial positions for the rest of their lives," and 2) whether the trial court can use a prediction of one spouse's postdissolution income to justify both an award of that income as an asset in a disproportionate property distribution and a distributive maintenance award, regardless of the other spouse's need for additional support.

Dated this 5th day of March, 2014.

SMITH GOODFRIEND, P.S.

By: _____
Catherine W. Smith, WSBA No. 9542
Valerie Villacin, WSBA No. 34515

Attorneys for Petitioner

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 5, 2014, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile X Messenger ___ U.S. Mail ___ E-Mail
Janet A. George Janet A. George, Inc. P.S. 701 Fifth Avenue, Suite 4550 Seattle, WA 98104-7088	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
Thomas G. Hamerlinck Thomas G. Hamerlinck PS 10900 NE 4th Street, Suite 2300 Bellevue, WA 98004-5882	___ Facsimile ___ Messenger X U.S. Mail X E-Mail
Kenneth W. Masters Shelby Frost Lemmel Masters Law Group PLLC 241 Madison Ave N Bainbridge Island, WA 98110-1811	___ Facsimile ___ Messenger X U.S. Mail X E-Mail

DATED at Seattle, Washington this 5th day of March, 2014.

V. Vigoren

Victoria K. Vigoren

--- P.3d ----, 2013 WL 7137154 (Wash.App. Div. 1)
(Cite as: 2013 WL 7137154 (Wash.App. Div. 1))

H

Only the Westlaw citation is currently available.

Court of Appeals of Washington,
Division 1.
IN THE MATTER of the MARRIAGE of Mary M. **WRIGHT**, Respondent,
and
Kim B. **Wright**, Appellant.

No. 69133-3-I.
Dec. 16, 2013.
Publication Ordered Feb. 3, 2014.

Background: In proceedings on wife's petition for dissolution of marriage, the Superior Court, King County, William L. Dowling, J., entered decree of dissolution, distributing marital assets, awarding child custody and support, and establishing spousal maintenance. Husband appealed.

Holdings: The Court of Appeals, Verellen, J. held that:
(1) distribution of marital property leaving immediate imbalance of $3,369,196 in favor of wife was not abuse of discretion;
(2) trial court did not abuse its discretion in awarding more tangible and liquid assets to wife than to husband;
(3) trial court's award to wife of equalizing payment including husband's future earnings was within its discretion;
(4) trial court did not abuse its discretion in calculating value of goodwill of husband's Alaska surgery practice;
(5) evidence was sufficient to support determination that marital community was intact until date wife filed for dissolution; and
(6) husband's unsupported and conclusory assertions were insufficient to establish that award of maintenance to wife was abuse of trial court's discretion.

Affirmed.

West Headnotes

[1] Divorce 134 ⚿653

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)1 In General
134k653 k. Discretion of Court in General. Most Cited Cases

Divorce 134 ⚿726

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)3 Proportion or Share Given on Division
134k726 k. Factors and Considerations in General. Most Cited Cases

Trial court in dissolution proceedings has broad discretion to make a just and equitable distribution of property based on statutory factors, including but not limited to: (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. West's RCWA 26.09.080.

[2] Divorce 134 ⚿810

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)5 Valuation, Division or Distribution of Particular Property or Interests
134k810 k. Community Property in General. Most Cited Cases

App. A

Trial court in a divorce action may distribute all property, whether categorized as community or separate.

[3] Divorce 134 ⚿1283(1)

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(I) Appeal
134k1277 Discretion
134k1283 Disposition of Property
134k1283(1) k. In General. Most Cited Cases

Appellate court will affirm the distribution of marital property in dissolution proceedings unless an appellant demonstrates that the trial court manifestly abused its discretion.

[4] Divorce 134 ⚿1283(1)

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(I) Appeal
134k1277 Discretion
134k1283 Disposition of Property
134k1283(1) k. In General. Most Cited Cases

Trial court abuses its discretion in the distribution of marital property in a dissolution action if its decision is manifestly unreasonable, or based on untenable grounds or reasons.

[5] Divorce 134 ⚿1290(1)

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(I) Appeal
134k1286 Questions of Fact, Verdicts and Findings
134k1290 Disposition of Property
134k1290(1) k. In General. Most Cited Cases

Trial court's factual findings in support of a distribution of marital property in a dissolution action are accepted if supported by substantial evidence.

[6] Divorce 134 ⚿728

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)3 Proportion or Share Given on Division
134k728 k. Equality. Most Cited Cases

Divorce 134 ⚿740

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)3 Proportion or Share Given on Division
134k731 Particular Factors and Considerations
134k740 k. Length of Marriage, Living Standard and Lifestyle. Most Cited Cases

Trial court is not required to place the parties in precisely equal financial positions at the moment of dissolution of a marriage; rather, if the spouses were in a long-term marriage of 25 years or more, the court's objective is to place the parties in roughly equal financial positions for the rest of their lives.

[7] Divorce 134 ⚿738

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)3 Proportion or Share Given on Division
134k731 Particular Factors and

Considerations
134k738 k. Income and Earning Capacity; Employment. Most Cited Cases

Divorce 134 ⚿740

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)3 Proportion or Share Given on Division
134k731 Particular Factors and Considerations
134k740 k. Length of Marriage, Living Standard and Lifestyle. Most Cited Cases
In order to place the parties to a long-term marriage in roughly equal financial positions for the rest of their lives, the court may account for each spouse's anticipated post–dissolution earnings in its property distribution by looking forward.

|8| Divorce 134 ⚿738

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)3 Proportion or Share Given on Division
134k731 Particular Factors and Considerations
134k738 k. Income and Earning Capacity; Employment. Most Cited Cases

Divorce 134 ⚿740

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)3 Proportion or Share Given on Division
134k731 Particular Factors and Considerations
134k740 k. Length of Marriage, Living Standard and Lifestyle. Most Cited Cases
Trial court's distribution of marital property in dissolution proceedings, leaving immediate imbalance of $3,369,196 in favor of wife, was not an abuse of discretion, where marriage was long-term, permitting trial court to look forward in property distribution, and trial court determined that husband would earn at least $10 million in two and a half years after dissolution, resulting in imbalance of nearly $2.7 million in his favor.

|9| Divorce 134 ⚿781

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)5 Valuation, Division or Distribution of Particular Property or Interests
134k781 k. Nature of Property or Interest in General. Most Cited Cases

Divorce 134 ⚿786

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)5 Valuation, Division or Distribution of Particular Property or Interests
134k786 k. Vehicles, Vessels, and Other Forms of Transport. Most Cited Cases

Divorce 134 ⚿794

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)5 Valuation, Division or

Distribution of Particular Property or Interests
134k794 k. Businesses and Associated Assets in General. Most Cited Cases
Trial court did not abuse its discretion, in dividing marital property upon dissolution of long-term marriage, in awarding more tangible and liquid assets to wife than to husband, where property division accommodated husband's requests for certain specific high-value items with combined net value of $7.75 million, including four airplanes, husband's surgical practice, and investment and real property acquired by husband after he moved to Alaska.

[10] Divorce 134 ⚿826

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)6 Methods of Distribution
134k826 k. Credits, Offsets and Compensating Payments. Most Cited Cases
Trial court's award to wife of equalizing payment including husband's future earnings was within its discretion, in proceedings for dissolution of marriage; character of property from which award was drawn was relevant factor, but was not controlling.

[11] Divorce 134 ⚿875

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)9 Proceedings for Division or Assignment
134k875 k. Pleadings. Most Cited
Trial court's duty to characterize a particular asset as community or separate property in a dissolution of marriage proceeding only arises where the issue is presented at trial. West's RCWA 26.09.080.

[12] Divorce 134 ⚿1263(2)

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(I) Appeal
134k1259 Review
134k1263 Parties Entitled to Allege Error
134k1263(2) k. Estoppel. Most Cited Cases
Husband waived claim that trial court erred in distributing separate property consisting of accounts receivable of his surgical practice for services provided after wife filed for dissolution, by failing to claim such assets as his separate property at trial, even when trial court directly asked his counsel to list his separate property.

[13] Divorce 134 ⚿797

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)5 Valuation, Division or Distribution of Particular Property or Interests
134k797 k. Good Will. Most Cited Cases
Under Alaska law, goodwill that cannot be marketed or sold is not considered in the property distribution at the dissolution of a marriage.

[14] Action 13 ⚿17

13 Action
13II Nature and Form
13k17 k. What Law Governs. Most Cited Cases
Where there is a conflict of laws, the court determines which state's law to apply by evaluating which jurisdiction has the most significant relationship to a given issue.

[15] Divorce 134 ⚿505

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(A) In General
134k502 What Law Governs
134k505 k. Property Distribution. Most Cited Cases

In determining law to apply, trial court's findings of fact in dissolution proceedings concerning long-term nature of parties' marriage and parties' financial expectations strongly supported conclusion that Washington's contacts with issue of whether goodwill of husband's Alaska surgical practice, which goodwill could not be marketed or sold, was subject to distribution upon dissolution of marriage were more significant than Alaska's.

[16] Divorce 134 ⚿765

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)4 Valuation of Property or Interest in General
134k762 Evidence in General
134k765 k. Weight and Sufficiency. Most Cited Cases

Evidence 157 ⚿571(7)

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(7) k. Value. Most Cited Cases

Evidence 157 ⚿574

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k574 k. Conflict with Other Evidence. Most Cited Cases

Trial court did not abuse its discretion, in proceedings for dissolution of marriage, in calculating value of goodwill of husband's Alaska surgery practice in determining distribution of marital property, where trial court heard testimony from husband's and wife's experts, and accepted value placed on goodwill by husband's expert.

[17] Husband and Wife 205 ⚿272(4)

205 Husband and Wife
205VII Community Property
205k272 Dissolution of Community
205k272(4) k. Actions for Dissolution or Partition. Most Cited Cases

Evidence in dissolution proceedings was sufficient to support trial court's determination that marital community was intact until date wife filed for dissolution, for purposes of application of the separate and apart statute; evidence established that neither party intended for family to accompany husband when he moved out of state, that parties continued to travel together and socialize with friends together after that date, that neither party expressly renounced marriage after husband announced that he had a pregnant girlfriend out of state, and that parties discussed family's future as "family partnership" as recently as four months prior to wife's filing for divorce. West's RCWA 26.16.140.

[18] Husband and Wife 205 ⚿249(5)

205 Husband and Wife
205VII Community Property
205k249 Property Acquired During Marriage in General
205k249(5) k. Time When Character Determined; Continuance of Character. Most Cited Cases

Husband and Wife 205 ⚿272(1)

205 Husband and Wife
205VII Community Property
205k272 Dissolution of Community
205k272(1) k. Effect of Abandonment, Separation, or Divorce. Most Cited Cases

In Washington, when married individuals live separate and apart from one another, their respective earnings and accumulations while apart are regarded as the separate property of each; however, the separate and apart statute provides that a married person's assets are separate property only when a community no longer exists. West's RCWA 26.16.140.

[19] Husband and Wife 205 ⚿272(1)

205 Husband and Wife
205VII Community Property
205k272 Dissolution of Community
205k272(1) k. Effect of Abandonment, Separation, or Divorce. Most Cited Cases

For purposes of application of the separate and apart statute, mere physical separation does not dissolve the marital community. West's RCWA 26.16.140.

[20] Husband and Wife 205 ⚿249(5)

205 Husband and Wife
205VII Community Property
205k249 Property Acquired During Marriage in General
205k249(5) k. Time When Character Determined; Continuance of Character. Most Cited Cases

Husband and Wife 205 ⚿272(1)

205 Husband and Wife
205VII Community Property
205k272 Dissolution of Community
205k272(1) k. Effect of Abandonment, Separation, or Divorce. Most Cited Cases

For purposes of application of the separate and apart statute, the determination of whether a husband and wife are living separate and apart turns on the peculiar facts of each case. West's RCWA 26.16.140.

[21] Divorce 134 ⚿843

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)7 Debts and Liabilities in General
134k834 Particular Debts and Liabilities
134k843 k. Other Particular and Multiple Debts. Most Cited Cases

Trial court did not abuse its discretion, in calculating property award upon dissolution of marriage, in declining to include in marital debts purely hypothetical liability faced by husband in pending medical malpractice action.

[22] Divorce 134 ⚿598(1)

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(C) Spousal Support
134k598 Award in General; Calculation
134k598(1) k. In General. Most Cited Cases

Divorce 134 ⚿606

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(C) Spousal Support
134k605 Extent of Time of Payments
134k606 k. In General. Most Cited Cases

Only limitation on the amount and duration of maintenance in a dissolution proceeding is that the award must be just. West's RCWA 26.09.090.

[23] Divorce 134 ⚿573

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(C) Spousal Support
134k567 Grounds and Defenses in Determining Existence and Amount of Obligation
134k573 k. Standard of Living and Station in Life. Most Cited Cases
Spousal maintenance is a flexible tool for equalizing the parties' standard of living for an appropriate period of time. West's RCWA 26.09.090.

[24] Divorce 134 ⚿1251

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(I) Appeal
134k1251 k. Briefs. Most Cited Cases
Husband's unsupported and conclusory assertion, in action for dissolution of marriage, that trial court gave undue weight to fact that wife supported husband for period of time while husband earned professional degree was insufficient to establish that award of spousal maintenance to wife was abuse of trial court's discretion, especially where ultimate property division left husband nearly $2.7 million ahead of wife, taking maintenance award into consideration. West's RCWA 26.09.090.

[25] Divorce 134 ⚿1147

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(H) Counsel Fees, Costs, and Expenses
134k1142 Need and Ability to Pay
134k1147 k. Effect of Divorce Recoveries. Most Cited Cases

Divorce 134 ⚿1163

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(H) Counsel Fees, Costs, and Expenses
134k1159 Stage or Condition of Cause
134k1163 k. Appeal or Review. Most Cited Cases
Husband was not entitled to award of attorney fees on appeal, in action for dissolution of marriage, where husband was awarded substantial property in dissolution and was able to carry his own attorney fees on appeal. West's RCWA 26.09.140.

Valerie a Villacin, Catherine Wright Smith, Smith Goodfriend PS, Janet A. George, Janet A. George Inc P.S, Seattle, WA, for Appellant.

Janet A. George, Janet A. GeorgeInc P.S, Seattle, WA, Thomas Gerard Hamerlinck, Thomas G. Hamerlinck PS, Bellevue, WA, Kenneth Wendell Masters, Masters Law Group PLLC, Shelby R. Frost Lemmel, Masters Law Group PLLC, Bainbridge Island, WA, for Respondent.

VERELLEN, J.

***1** ¶ 1 Dr. Kim Wright appeals the property distribution and maintenance order in the dissolution of his 30–plus year marriage to Mary Wright. We conclude that (1) The property distribution was within the trial court's discretion; (2) ample evidence supports the trial court's determination of the date the Wrights separated; (3) the trial court correctly applied Washington law in valuing the surgical practice's goodwill, and soundly exercised its discretion in distributing the Wright's community interest in the practice; (4) Dr. Wright waived the issue of whether certain assets were his separate property; and (5) the award of spousal maintenance was an appropriate exercise of the trial court's discretion. We affirm the trial court's property distribution and provision of maintenance, and deny Dr. Wright's request for attorney fees on appeal.

FACTS

¶ 2 Ms. Wright petitioned for dissolution in

April 2011. The issues before the trial court were child support, spousal maintenance, and the distribution of assets.[FN1] The Wrights agreed to the terms of a parenting plan and the values of most assets.[FN2] Following trial, the court entered a decree of dissolution and distributed the property.

¶ 3 The court awarded Ms. Wright $8,526,834 in community property, a $1.7 million equalizing payment, and $1 million in spousal maintenance spread over three years. The court awarded Dr. Wright $8,657,042 in community property and $979,966 in separate property, less the $1.7 million equalizing payment. The court determined that Dr. Wright would work for a minimum of 2.5 years after the dissolution, and earn a minimum of $4 million annually.

¶ 4 Dr. Wright appeals.

ANALYSIS

[1][2][3][4][5] ¶ 5 A trial court in dissolution proceedings has broad discretion to make a just and equitable distribution of property based on the factors enumerated in RCW 26.09.080.[FN3] The court may distribute all property, whether categorized as community or separate.[FN4] This court will affirm unless an appellant demonstrates that the trial court manifestly abused its discretion.[FN5] This occurs if the trial court's decision is manifestly unreasonable, or based on untenable grounds or reasons.[FN6] A trial court's factual findings are accepted if supported by substantial evidence.[FN7]

Property Distribution: Roughly Equal Positions

¶ 6 Dr. Wright first contends that the trial court abused its discretion because its property distribution did not leave the parties in "roughly equal" positions. This is so, Dr. Wright argues, because Ms. Wright received more tangible and liquid assets, on the basis that Dr. Wright would earn at least $10 million post–dissolution. Dr. Wright fails to demonstrate that the trial court abused its discretion.

[6][7] ¶ 7 A trial court is not required to place the parties in precisely equal financial positions at the moment of dissolution.[FN8] Rather, if the spouses were in a long-term marriage of 25 years or more, the court's objective is to place the parties in roughly equal financial positions for the rest of their lives.[FN9] To reach this objective, the court may account for each spouse's anticipated postdissolution earnings in its property distribution by looking forward. In *In re Marriage of Rockwell,* this court approved a property award that provided more amply for the wife, who was six years older than her husband and in ill health, where the court determined that the husband would make up the difference through at least seven years of anticipated postdissolution employment earnings.[FN10]

***2** [8] ¶ 8 *Rockwell* supports the trial court's property division in this case. Dr. Wright argues the court awarded property valued at $8,657,042 to Dr. Wright and $8,526,834 to Ms. Wright, then applied an equalizing payment and three years of spousal maintenance to Ms. Wright, leaving an immediate imbalance of $3,369,196 in her favor. But, looking forward as is required in a long-term marriage, the trial court also determined that Dr. Wright would earn at least $10 million in 2.5 years after dissolution. On this basis, Dr. Wright would ultimately end up with nearly $2.7 million more than Ms. Wright in the long run. The trial court's determinations are amply supported by the evidence adduced at trial. Dr. Wright fails to demonstrate that the property division left him in an inferior position to Ms. Wright for the rest of their lives, much less that the trial court abused its discretion.

[9] ¶ 9 Dr. Wright's assertion that the property division was unfair because Ms. Wright received more of the "tangible" and "liquid" assets than he did is not persuasive. Dr. Wright expressly requested certain high-value items with a combined net value of $7.75 million, including four airplanes, the surgical practice, and investment and real property acquired after he moved to Alaska. The

trial court's property division accommodated his requests. It was entirely reasonable for the trial court to award Ms. Wright the assets it did in order to make the division just and equitable. Dr. Wright fails to persuasively demonstrate that this was an abuse of discretion.

Separate Property

[10] ¶ 10 Dr. Wright contends that the trial court improperly invaded his separate property in awarding the $1.7 million equalizing payment because the award necessarily included his future earnings. To support this contention, he cites to *Marriage of Holm,* a case decided under Remington's Revised Statutes § 989.[FN11] This court rejected the nearly identical argument in a recent published opinion, *In re Marriage of Larson and Calhoun,* [FN12] relying in part on our Supreme Court having rejected the *Holm* approach in *Konzen v. Konzen.* [FN13] The *Konzen* court made clear that "[t]he character of the property is a relevant factor which must be considered, but is not controlling." [FN14] As the *Larson* court correctly observed, *Konzen* controls as to this issue.[FN15] As in *Larson,* the trial court's decision here was within the range of acceptable choices, given the facts and the applicable legal standard.

[11][12] ¶ 11 Dr. Wright also asserts that the trial court erred in distributing separate property consisting of the practice's accounts receivable for services provided after Ms. Wright filed for dissolution. However, Dr. Wright failed to claim these assets as his separate property at trial, even when the trial court directly asked Dr. Wright's counsel to list his separate property. The trial court's duty to characterize a particular asset as community or separate property only arises where the issue is presented at trial.[FN16] Dr. Wright waived the issue as to these assets.[FN17]

Distribution of Alaska Surgical Practice

***3** [13] ¶ 12 Dr. Wright argues that the trial court erred in distributing the goodwill of his Alaska surgical practice. He contends that the practice had no value because it was not "saleable" under Alaska law. Under Alaska law, goodwill that cannot be marketed or sold is not considered in the property distribution at the dissolution of a marriage.[FN18]

[14] ¶ 13 Where there is a conflict of laws, the court determines which state's law to apply by evaluating which jurisdiction has the "most significant relationship" to a given issue.[FN19] This is determined under the principles stated in *Restatement (Second) Conflicts of Law* § 6 (1971), [FN20] which include:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

[15] ¶ 14 Here, the trial court considered those factors and determined that Washington law should apply. The trial court explained that "Washington's policy interests in consistency and in protecting the financial expectations of these parties are substantial and outweigh the speculative interest of Alaska in not restricting [Dr. Wright's] economic liberty ... in these unusual circumstances." [FN21] The trial court's findings of fact concerning the long-term nature of the marriage and the parties' financial expectations strongly support the conclusion that Washington's contacts were more significant than Alaska's.

[16] ¶ 15 Dr. Wright fails to persuasively demonstrate that the trial court abused its discretion in considering the surgery practice's goodwill as an asset in calculating Dr. Wright's award. The trial court's determination of the goodwill value was supported at trial by the testimony of financial experts. Ms. Wright's expert, certified public accountant Kevin Grambush, testified that Dr. Wright's neurosurgery practice was worth $8.4 million and, of that, "[t]he tangible assets are $1,105,042, and the goodwill value is $7,294,958." [FN22] Dr. Wright's expert, certified public accountant Neil Beaton, testified that the goodwill value was $366,000. The trial court ultimately accepted Beaton's goodwill value of $366,000, and awarded Ms. Wright a $219,600 share. Because this award was based directly on evidence provided by Dr. Wright's own expert, there was no abuse of discretion in the trial court's determination that this number was correct.

¶ 16 Dr. Wright argues that Ms. Wright had no financial expectation that the goodwill would be treated as an asset because she should have assumed that Alaska law would apply. But it was entirely reasonable for the trial court to conclude that Ms. Wright had a legitimate expectation to receive her community property share of the goodwill based on a correct application of Washington law and on the trial court's factual findings supported by the evidence.

***4** ¶ 17 Dr. Wright also contends the trial court erred by concluding that the marriage was irretrievably broken in April 2011, when Ms. Wright filed for divorce. He argues that his business investments, comprised of money he earned before that date but while the couple were living separate and apart, are his separate property. Neither argument is persuasive.

[17] ¶ 18 The trial court's finding that the marital community was intact until April 2011 is supported by sufficient evidence. The record demonstrates that (1) Dr. Wright moved to Alaska in November 2007, when the parties' youngest children were still in middle school or high school, and it "really was never the plan" for the family to move with him; [FN23] (2) Dr. Wright regularly travelled between the family home and Alaska, and the parties travelled together regularly and continued to socialize with friends together; (3) even after Dr. Wright announced in October 2010 that he had a pregnant girlfriend in Alaska, neither party expressly renounced the marriage; (4) in January 2011, the parties discussed the family's future as a family partnership, not a divorce; and (5) Ms. Wright, a Roman Catholic, was not eager to divorce, and filed for divorce only after concluding the marriage was irretrievably broken in April 2011.

[18][19][20] ¶ 19 In Washington, when married individuals live separate and apart from one another, their respective earnings and accumulations while apart are regarded as "the separate property of each." [FN24] However, the separate and apart statute provides that a married person's assets are separate property only when a "community" no longer exists. Mere physical separation does not dissolve the community.[FN25] The determination of whether a husband and wife are living separate and apart "turns on the peculiar facts of each case." [FN26] The evidence supports the trial court's finding that the marital community was intact until April 2011. This finding, in turn, supports the trial court's determination that Ms. Wright was entitled to her community property share of these assets. Accordingly, Dr. Wright fails to demonstrate that the trial court erred in dividing these assets as community property.[FN27]

[21] ¶ 20 Dr. Wright also argues that the trial court erred in making him solely responsible for liability from a pending medical malpractice action, citing *Dizard & Getty v. Damson.* [FN28] But Dr. Wright does not identify any portion of the record that demonstrates any existing or pending liability from such a suit. The trial court was not required to make provision for a hypothetical future lawsuit in its property award. Because the trial court's

findings regarding the values of assets and liabilities were amply supported by evidence at trial, Dr. Wright fails to demonstrate any abuse of discretion in its assessment of this purely hypothetical liability.

¶ 21 The trial court's distribution of these assets was reasonable, supported both by correct conclusions of applicable law and findings of fact supported by the evidentiary record.

Maintenance

***5** ¶ 22 Dr. Wright contends that the trial court abused its discretion by awarding maintenance because Ms. Wright did not demonstrate financial need in light of the other provisions included in her award. Because financial need is not a prerequisite to a maintenance award, Dr. Wright's argument is unpersuasive.

[22][23] ¶ 23 The only limitation on the amount and duration of maintenance under RCW 26.09.090 is that the award must be "just." [FN29] Maintenance is "a flexible tool" for equalizing the parties' standard of living for an "appropriate period of time." [FN30]

¶ 24 Citing *In re Marriage of Rink,*[FN31] Dr. Wright argues that in high-asset cases, neither spouse has financial "need" and thus, an award of both maintenance and a disproportionate property division is not appropriate. Dr. Wright's reliance on *Rink* is misplaced because *Rink* is distinguishable from the facts here. In *Rink*, both parties had several working years ahead of them after their 24–year marriage ended. Here, by contrast, the trial court determined Ms. Wright would not work and Dr. Wright would retire in 2.5 years at the soonest. *Rink* does not support Dr. Wright's argument that Ms. Wright is required to work before an award of maintenance is appropriate. *Rink* supports the conclusion that the trial court has discretion to award both an unequal property division and maintenance in favor of the same spouse. The *Rink* court affirmed an award to the wife of two-thirds of the marital estate and maintenance.[FN32]

[24] ¶ 25 Dr. Wright argues that in ordering maintenance, the trial court gave too much weight to the fact that Ms. Wright supported him for a time while he earned his degree. His argument, premised upon the analysis in *Washburn,* is not persuasive. The *Washburn* court held that when a marriage endures for some time after one spouse obtains a professional degree while supported by the other spouse, an award of maintenance may be inappropriate because "the supporting spouse may already have benefited financially from the student spouse's increased earning capacity." [FN33] Dr. Wright fails to demonstrate that the *Washburn* analysis applies here, given that the ultimate property division will leave him ahead by nearly $2.7 million, even considering the maintenance award. He also fails to provide any details allowing any insight into how the trial court analyzed the extent of Ms. Wright's support while Dr. Wright earned his degree.

¶ 26 Dr. Wright does not demonstrate that the maintenance award was an abuse of the trial court's discretion.

Attorney Fees

[25] ¶ 27 Dr. Wright seeks attorney fees and costs under RCW 26.09.140. This court may award attorney fees after considering the relative resources of the parties and the merits of the appeal. [FN34] Here, Dr. Wright was awarded substantial property in the dissolution, and is able to carry his own attorney fees on appeal. We deny his motion.

***6** ¶ 28 Affirmed.

WE CONCUR: LINDA LAU, and SCHINDLER, JJ.

FN1. The Wrights had eight children together, seven of whom were emancipated adults by the time of the May 2012 trial.

FN2. Dr. Wright does not appeal from the value the court assigned to the family home, the only asset value the parties did

not stipulate to before trial.

FN3. Under RCW 26.09.080, the trial court is to make a distribution of property that is just and equitable after consideration of all relevant factors, including but not limited to, (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.

FN4. *In re Marriage of Konzen,* 103 Wash.2d 470, 477–78, 693 P.2d 97 (1985); *In re Marriage of Irwin,* 64 Wash.App. 38, 48, 822 P.2d 797 (1992).

FN5. *In re Marriage of Brewer,* 137 Wash.2d 756, 769, 976 P.2d 102 (1999) (trial court is in the best position to determine what is fair under the circumstances); *In re Marriage of Buchanan,* 150 Wash.App. 730, 735, 207 P.3d 478 (2009).

FN6. *In re Marriage of Littlefield,* 133 Wash.2d 39, 46–47, 940 P.2d 1362 (1997).

FN7. *In re Marriage of Thomas,* 63 Wash.App. 658, 660, 821 P.2d 1227 (1991). An appellate court should "not substitute [its] judgment for the trial court's, weigh the evidence, or adjudge witness credibility." *In re Marriage of Greene,* 97 Wash.App. 708, 714, 986 P.2d 144 (1999).

FN8. *In re Marriage of White,* 105 Wash.App. 545, 549, 20 P.3d 481 (2001).

FN9. *In re Marriage of Rockwell,* 141 Wash.App. 235, 243, 170 P.3d 572 (2007).

FN10. 141 Wash.App. 235, 248–49, 170 P.3d 572 (2007).

FN11. 27 Wash.2d 456, 465, 178 P.2d 725 (1947).

FN12. —— Wash.App. ——, 313 P.3d 1228 (2013).

FN13. 103 Wash.2d 470, 693 P.2d 97 (1985).

FN14. *Id.* at 478, 693 P.2d 97.

FN15. *Larson,* —— Wash.App. at ——, 313 P.3d 1228.

FN16. RCW 26.09.080; 20 KENNETH W. WEBER, WASHINGTON PRACTICE, FAMILY AND COMMUNITY PROPERTY LAW, § 32.9, at 175 (1997).

FN17. *See* RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court."); *see also In re Marriage of Griswold,* 112 Wash.App. 333, 349 n. 7, 48 P.3d 1018 (2002).

FN18. *Moffitt v. Moffitt,* 749 P.2d 343, 347 (Alaska 1988) ("If the trial court determines either that no good will exists or that the good will is unmarketable, then no value for good will should be considered in dividing the marital assets."); *see also Miles v. Miles,* 816 P.2d 129, 131 (Alaska 1991); *Fortson v. Fortson,* 131 P.3d 451, 460 (Alaska 2006) (wife's dermatology "clinic's unmarketability made it unnecessary to determine the value of the clinic's goodwill").

FN19. *Seizer v. Sessions,* 132 Wash.2d 642, 650, 940 P.2d 261 (1997).

FN20. In *Seizer,* our Supreme Court adopted *Restatement (Second) Conflicts of Law* § 258 (1971), which explains that the most significant relationship is determined

under the principles stated in § 6. Section 258 further clarifies the relative weight given to these factors: "In the absence of an effective choice of law by the spouses, greater weight will usually be given to the state where the spouses were domiciled at the time the [property] was acquired than to any other contact in determining the state of the applicable law." Comment a to § 258 states that "[t]he rule applies to chattels, to rights embodied in a document and to rights that are not embodied in a document." In *In re Marriage of Landry,* 103 Wash.2d 807, 810, 699 P.2d 214 (1985), this rule was applied to a spouse's military pension. Dr. Wright does not dispute the applicability of *Restatement (Second) Conflicts of Law* § 258 to the goodwill of his Alaska business, but challenges the trial court's analysis of those factors.

FN21. Clerk's Papers at 253.

FN22. Report of Proceedings (RP) (May 29, 2012) at 71. Grambush also addressed and criticized the approach undertaken by Dr. Wright's expert's valuation of the practice.

FN23. RP (May 31, 2012) at 590.

FN24. RCW 26.16.140.

FN25. *Kerr v. Cochran,* 65 Wash.2d 211, 224, 396 P.2d 642 (1964).

FN26. *Nuss v. Nuss,* 65 Wash.App. 334, 344, 828 P.2d 627 (1992).

FN27. *See Seizer,* 132 Wash.2d at 654, 940 P.2d 261 ("If the [separate and apart] statute does not apply because the marriage is not defunct, [the wife] would then be entitled to her community property share of the [asset].").

FN28. 63 Wash.2d 526, 387 P.2d 964 (1964). In *Dizard,* the husband was responsible for the community business while the dissolution was pending. The community accumulated debts for which creditors sought payment after the marriage was dissolved. The wife sought to avoid liability, claiming that the marriage was defunct when the liabilities accrued. The Supreme Court held that "it is inconceivable that respondent may authorize the husband to carry on the community business, create a potential source of assets, ultimately share in these assets, and yet be immune from the claims of creditors who contribute to the accumulations, if any." *Dizard,* 63 Wash.2d at 530, 387 P.2d 964.

FN29. *In re Marriage of Bulicek,* 59 Wash.App. 630, 633, 800 P.2d 394 (1990).

FN30. *In re Marriage of Washburn,* 101 Wash.2d 168, 179, 677 P.2d 152 (1984).

FN31. 18 Wash.App. 549, 571 P.2d 210 (1977).

FN32. *Id.* at 551, 571 P.2d 210.

FN33. *Washburn,* 101 Wash.2d at 181, 677 P.2d 152.

FN34. RCW 26.09.140; *Leslie v. Verhey,* 90 Wash.App. 796, 807, 954 P.2d 330 (1998).

Wash.App. Div. 1,2013.
In re Marriage of Wright
--- P.3d ----, 2013 WL 7137154 (Wash.App. Div. 1)

END OF DOCUMENT

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

In the Matter of the Marriage of MARY M. WRIGHT, Respondent, and KIM B. WRIGHT, Appellant.	)	No. 69133-3-I ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO TAKE ADDITIONAL EVIDENCE AND GRANTING MOTION TO PUBLISH OPINION

Appellant filed a motion for reconsideration of the court's opinion filed December 16, 2013 along with a motion to take additional evidence or, in the alternative, to publish the court's opinion. Respondent filed a response to the motions. After consideration of the motions and response, the panel has determined that the motion for reconsideration and to take additional evidence should be denied and the motion to publish should be granted.

Now therefore, it is hereby

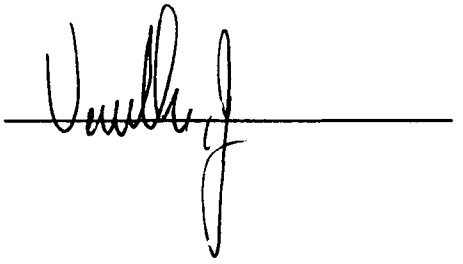
ORDERED that appellant's motion for reconsideration is denied; it is further

ORDERED that appellant's motion to take additional evidence is denied; it is further

ORDERED that appellant's motion to publish is granted.

Done this 3rd day of February, 2014.

FOR THE PANEL:



Volume 36, Number 1
January 1982

WASHINGTON STATE BAR NEWS

DISILLUSION, DISSOLUTION & SOLUTION

App. C

This is different from the mandatory Family Law Department settlement conference, as required in King County, where, prior to trial, the parties meet with a Superior Court judge in a formal attempt to resolve issues. The mandatory King County settlement conference concept can be utilized outside King County. Ask your local Superior Court judge to allocate forty-five minutes for a late afternoon conference in his or her chambers or jury room. At the conference, everyone is given an opportunity to look at the case objectively. The judge acts as an advisor and each side, including the parties themselves, presents its point of view, sets forth contested issues, and presents an argument on how the issues could be resolved. Legal points at issue are also discussed and evaluated, and detailed information is given regarding community assets and obligations.

After hearing both presentations, the judge weighs the issues and evidence and gives an advisory opinion on what might be a likely result at trial. This opinion is often persuasive and may encourage a settlement.

To encourage frank and candid discussion in the conference, the parties should stipulate that the settlement judge cannot hear the matter if trial is necessary. Such is the case by local rule in King County.

Conclusion

One of the most valuable assets of a lawyer who recognizes the importance of counseling in domestic relations law is the ability to recognize when and to whom the client should be referred for other professional help. The lawyer should be sufficiently aware of the mental health resources available in the community to advise the client on how to select a counselor to avoid the uncertain outcome associated with sending a client to the yellow pages.[11]

The attorney should realize the dynamics of the client's problem and a lawyer's own limitations in the counseling role. While these limits are debatable, it can be argued that the lawyer's objective should be to play a more active counseling role. The question has often been raised whether an interested lawyer who is untrained in the mental health field should even attempt counseling. The very nature of a lawyer's activities forces the lawyer into the role. The family law attorney has an obligation to learn and improve counseling skills. Law schools and CLE programs need to offer more clinical training to further that end.

A lawyer who has an intellectual interest in understanding human behavior, who is sensitive to human problems, and who is willing to analyze his or her own actions in the attorney-client relationship, can and should perform this valuable counseling role. It is sheer fiction that a lawyer plays a neutral role, merely implementing the wishes of one of the parties. Efforts are expended by every conscientious attorney to ensure that the decision to obtain a divorce is an appropriate one. A lawyer needs a special temperament to be a competent practitioner of family law. A client's needs must be acknowledged, understood, and supported. The goal I advocate is to reach a fair and equitable settlement.[12]

[11]The Seattle-King County Bar Association Family Law Section has published a list of mental health professionals who are interested and experienced in marital counseling.

[12]I give thanks to Ruth Nelson, Marywave Van Deren, and John Gadon for research help and to those lawyers and associates who took valuable time to review this article and offer constructive comments that improved its content and overall quality.

Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions

by Robert W. Winsor

[Prefatory Note: In September 1980, the King County Superior Court created a Family Law Department. Five judges (Gerard Shellan, presiding, Nancy Ann Holman,

Norman Quinn, Anthony Wartnik, and I) were the first assigned to that Department. We all served until June 1981 when we began, one every two months, to be replaced by successor judges. The Family Law Department is assigned all marital dissolution matters. The judges have alternated their time between settlement conferences (mandated prior to assignment of trial date) and trials. In an effort to become better informed and more predictable the judges have held weekly breakfast meetings, primarily devoted to discussion of a concluded case, to compare ideas about what each of the others might have done with the same facts. This article has developed out of those experiences. I first submitted it to the other judges for comment. It is my perception that there was substantial agreement with the views here expressed.]

Under the law in Washington the trial judge has a wider discretion in making decisions in dissolutions of marriage than in any other area of his or her work. That this rule applies most obviously in a case of child custody is well known and is not the topic of this memorandum. Rather, this paper will deal with the problem presented by the fact that this very broad discretion applies also in matters of division of properties, setting of maintenance and child support, as well as attorneys' fees.

The unguided burden that falls upon the trial judge is stated as well in the case of *Baker v. Baker,* 80 Wn.2d 736 (1972) as in any other case. One of the issues concerning the Court in that case was whether certain properties were separate or community, and it was argued that the answer to that question is determinative of the distribution of the properties by the judge. The Court stated:

> "The court in a divorce action must have in mind the correct character and status of the property as community or separate before any theory of division is ordered . . . Characterization of the property, *however,* is not necessarily controlling; the ultimate question being whether the final division of the property is *fair, just and equitable* under all the circumstances." (page 745) (emphasis added)

Likewise, in the same case, the Court enunciated the trial judge's discretion in the case of maintenance:

> "The court should, when awarding alimony at the divorce of a long marriage, consider and weigh the future earning capabilities of both parties and allow the wife such sums for whatever period of time *seems right* under all the circumstances." (page 744) (emphasis added).

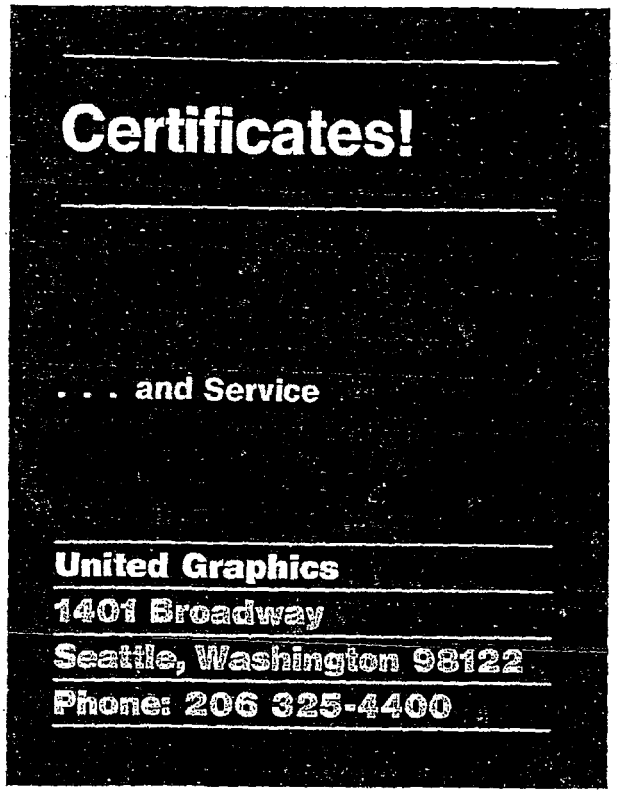
The Marriage and Dissolution Act of 1973, RCW 26.09, specifies factors that must be considered by the trial judge in making property divisions (26.09.080) and maintenance (26.09.090) but does not change the prior law, leaving to the discretion of the trial judge the problem of what resulting award is appropriate after considering all of the required factors. *Marriage of Nicholson,* 17 Wn. App. 110 (1977); *see also* "Property Dispositions in Dissolution Proceedings: The Criteria in Washington", 12 Gonzaga Law Review 492 (1977).

It is perhaps flattering and maybe even comforting sometimes to a trial judge to know that so much trust is placed in her or him. On the other hand, it is almost always a dilemma to know what direction to take with all that discretion. It is this dilemma that has led me to believe that it may be useful to try to lay down some general principles that seem applicable in broad categories of cases. That is to say, in what general direction lies "fairness" or, how are we to know what should "seem right"?

General Considerations Affecting Property Division and Maintenance

I have found it helpful to establish three categories of

Judge Winsor was in general law practice in Seattle for 18 years and has served on the King County Superior Court bench for 9 years. He has taught in the Washington Judicial Education program for five years and has been, since 1978, a faculty member of the National Judicial College.



cases, based upon the duration of the marriage:

1. Short Marriage: Those lasting approximately 5 years or less.
2. Long Marriage: Those lasting approximately 25 years or more.
3. Mid-range: All the others.

In the case of a short marriage, the marriage has in fact not been the significant event that normally is presumed. Particularly, there has not been a long reliance on the marital partnership. Therefore, the emphasis should be to look *backward* to determine what the economic positions of the parties were at the inception of the marriage and then seek to place them back in that position, including provision for interest or inflation, if feasible. After doing that, if there are properties left over they presumably would be divided about equally. Presumably in a short marriage maintenance would not be paid, except in extraordinary circumstances or perhaps for a very brief adjustment where necessary, *e.g.*, if one of the parties gave up a job to relocate or otherwise accommodate to the marriage, that would be an extraordinary reason to either adjust the decision regarding property or allow brief maintenance during a relocation period.

In the case of a long marriage, the goal should be to look *forward*[1] and to seek to place the spouses in an economic position where, if they both work to the reasonable limits of their respective earning capacities, and manage the properties awarded to them reasonably, they can be expected to be in roughly equal financial positions for the rest of their lives. Long term maintenance, sometimes permanent, is presumably likely to be used unless the properties accumulated are quite substantial, so that a lopsided award of property would permit a balancing of the positions without (much) maintenance. *In re Marriage of Rink*, 18 Wn.App. 549 (1977) (In a 24-year marriage 2/3 of the property was awarded to the wife, along with maintenance for a brief time.)

In the traditional marriage relationship where one spouse devotes prime energies outside of the home earning money for the family and the other devotes prime energies raising children and maintaining a nurturing household, there is in a sense a contractual relationship entered into at the time of the marriage where the parties understand their respective primary obligations and undertake them willingly in the understanding that they both expect that the marriage is a long term (presumably life-time) commitment and that each will be protected and provided for by the other. When a traditional long marriage fails, however, one of the spouses usually is stranded in a situation where she (sometimes he) is very much behind the other in earning capacity. The judge should redress the balance.

For example, in a long marriage where H has an annual income of $50,000 and W probably will be

unable to earn more than $10,000 annually, W should either have substantial permanent maintenance (perhaps $15,000 annually) in addition to an equal division of property, or (if there is very substantial property) a disproportionate share of the property. It is often argued by H's lawyer in such a case that since W can earn $10,000 annually there is no "need" to justify maintenance. "Need" is a relative term and must be judged in the context of the circumstances of the particular parties.

Mid-range marriages will partake more or less of the long or short marriage considerations and goals as set forth above, depending primarily upon the length of the marriage and the necessities. Maintenance, where appropriate, is likely to be used only for fixed terms of months or years in these settlements. The term "rehabilitative maintenance" applies most generally to mid-range cases.

Where child support must be assessed, regardless of the length of the marriage, there should be a two-step process in the decision making. First, the considerations set forth above should be applied to achieve a preliminary decision about division of property, maintenance and related items. Then, as hereafter discussed, the needs of the respective households to provide for the children should be overlaid and adjustments made, if necessary, in light of the child support that seems feasible.

Lawyers Fees

The law of course permits the judge to order that one party pay the lawyer fees of the other party if there is a "need" on the one hand and an "ability to pay" on the other. RCW 26.09.140. However, it is ordinarily a desirable goal to avoid doing so for several reasons.

1. It is often a bitter pill—one that can make an otherwise acceptable decision unacceptable—to force the one party to pay the (very often disliked) other lawyer.
2. It interferes with the natural control (check and balance) on lawyer fees that exists in the normal lawyer-client relationship, *e.g.*, no way for the payor to blow a whistle or take his business elsewhere if it begins to appear from monthly or other periodic billings that fees are getting out of hand; no control that inheres in the normal situation where the lawyer may decide to reduce extraordinary fees in the hope that the client will leave on a happy basis and return with other cases or refer friends to the lawyer.
3. If one party is left by the judge's decision substantially more "in need" of help to pay a lawyer than the other party it is presumably evidence that the judge's decision regarding property and maintenance is ill advised. At least in all long marriages, and in most mid-range marriages, the parties should be equally able (or, more often, unable) to pay lawyer fees and court costs.

The obvious exception is the modification action where it may appear that one party is the more stubborn and has long delayed an obvious need for adjustment of child support and thereby necessitated the other party's having to hire a lawyer.

Child Support and Maintenance Levels

Human nature being what it is, we all have, or can easily develop, legitimate needs and uses for all the income available to us. For this reason, detailed itemizations of living expenses, now routinely required by our local rules, are not very helpful to the judge in deciding what support is appropriate, and they are a time-consuming and costly burden for the parties and lawyers. In the rare situations where the total of the detailed expenses adds up to less than the actual income of the party, it usually means that he or she has not taken enough time to carefully compile the list. It would probably be more helpful if we made such a listing

optional but required that the parties respond to a statement such as the following:

> "If you believe that certain of your expenses of living are extraordinary, such as daycare for a child, orthodontia, psychiatric care, extraordinarily large housing expenses, or the like, give the details thereof."

Child support for more than one child should never be stated in terms of a multiple of one amount "per child." For example, if there are four children, the needs of the custodial spouse for child support are not reduced by 25% when the first child is emancipated. As hereafter suggested, child support schedules have their considerable limitations, but the King County support schedule has an important positive feature in that it posits that the level of support for four children (termed as a percentage of the income of the noncustodial parent) reduces from 48% for four to 42% for three children; 34% for two; and 24% for one. Those differentiations between the various levels are probably pretty close to the mark. Accordingly, if there are four children a total sum should be stated for the four and then provision made for reduction by about 12% (6/48) when the first is emancipated, thereafter a further reduction of 20% (8/42) when the second is emancipated, and a third reduction of 30% (10/34) when the third is emancipated.

There seems to be a consensus that in the normal case some form of escalation clause should be built into the support award in the hopes that it will obviate the expense and trauma of the parties' having to return to court for adjustments for inflation or normally-anticipated income appreciation of the noncustodial parent. Some judges use the Consumer Price Index. Others prefer a percentage of income. Some use a combination.

Child support schedules, particularly those that do not relate to the income of both parents, are of only limited value. Rather, the most important test of the propriety of support is a comparison of the spendable dollars in the two households affected, together with consideration of the number of people to be supported in each household.

For example, assume that H has a gross wage of $2,000 per month and a net (after income tax and social security) of $1,500, and then assume that W is given custody of two children in three different situations:

(a) The children are ages 1 and 3. W is needed at home and not employed. It might be appropriate that undifferentiated maintenance and child support be set at $1,000 with the assumption (estimated) that thereby H's income taxes will be reduced leaving a revised net of $1750 and therefore leaving him with $750 to support

himself alone and an estimated $900 for W to support herself and the two children, after she deducts the (estimated) $100 income tax she must pay on the $1000.

(b) If the children are ages 6 and 8 and W is employed part-time earning a net of $400, there would be perhaps no maintenance but there might be child support at $650, as that would give W a total of $1,050 to support herself and the two children and leave $850 for H alone.

(c) Finally, if the children are ages 12 and 14 and W is employed fully and earns a net of $1250, child support might be set at $400, as that would provide $1650 in the home where W and two children live and allow $1200 in the home where H resides alone.

Conclusion

Washington case law and statutes lay down many factors that the trial judge must consider in exercising her or his discretion in marital dissolutions, but I know of no comprehensive statement of the goals that are to be achieved. There will doubtless be considerable disagreement with the specific examples and perhaps the goals as I have stated them, but at least it is a beginning that may be helpful in searching for a consensus.

[1]In re Marriage of Clark, 13 Wn. App. 805 (1975) which involved a 34-year marriage, the court said: "The key to an equitable distribution of property is not mathematical preciseness, but fairness. This is attained by considering all of the circumstances of the marriage, past and present, with an eye to the *future* needs of the person involved. Fairness is decided by the exercise of wise and sound discretion, not by set or flexible rules." (emphasis added) (page 810)

Family Law: Strategy and Tactics

by Maryalice Norman

Conventional wisdom among lawyers holds that family law practice doesn't amount to much, that anyone with the stomach for it can do it.

Wrong. There may be more bad domestic relations law practiced than any other kind, largely because of the widespread belief that there's nothing to it.

Conventional wisdom is right about one thing, though. You need to have a taste for family law. If you do not have it, you have to develop it. If you only handle a family law case once in a while, you will need to work at it hard, or face the fact that you will do a poor job for your client.

Strategy

1. Your client is where your overall strategy begins. What does your client want? Is it reasonable; is it too much or too little? Some spouses (male and female) are so stricken by the break-up of a marriage that they withdraw from the battle. If your client wants to give away the farm, is that reasonable for the long haul? Sometimes it is, but usually it hurts everyone to allow a one-sided settlement.

On the other hand, if your client wants revenge, do you go along with that? A settlement based on revenge will cause widening circles of damage, often engulfing your client along with the other spouse and children.

So your first step is to decide what is to be achieved and whether you can handle your client. If you cannot or do not want to, then withdraw and let the client find another more simpatico lawyer.

2. The goals to be achieved should be specified, in writing, so both you and your client know where you are headed. These goals should be realistic, that is, founded

Seattle attorney Maryalice Norman is a family lawyer in the firm of Norman & Loreen. She is chairperson of the Editorial Advisory Board.