DIVISION III COURT OF APPEALS
STATE OF WASHINGTON

No. **340643**

Whitman County Superior Court Case No. 14-3-00042-3
The Honorable Steve Dixon
Superior Court Judge

APPELLANT'S REPLY BRIEF

In Re:

ELLEN DONEEN, PETITIONER

V.

ESTATE OF JAMES DONEEN, RESPONDENT

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I. STATEMENT OF FACTS RELEVANT TO REPLY

Mr. and Mrs. Doneen were married approximately 45 years. RP 18. Mr. Doneen inherited several cash accounts and approximately 236 acres of prime Whitman county farm land. However, most if not all the accounts that the cash was deposited in were put in accounts under both their names. RP 260-269. Both parties helped each other work the "farm" lands in various capacities. RP 330-340. Upon separation Mrs. Doneen was allowed to stay in the family home and was allowed Temporary Maintenance. CP 058-061.

At trial, maintenance was clearly an issue, RP 295-314, however, it was argued in the alternative that if Mrs. Doneen was to receive half of the parties' property or "$500,000.00" (as an example), including land, maintenance would not be an issue. See RP 299 specifically. Even so, the court denied maintenance saying "Maintenance was not ordered." CP 121-124.

Regarding the farm land, the only expert at trial valued the Doneen farm land 210-236 acres was valued between $2,000 and $3,000, ostensibly placing the value between $420,000.00 and $708,000.00; with the court setting the value at $2,500 an acre equaling over $500,000 plus shop at $25,000 and home at $50,000, for a total of $575,000.00. RP 275-276, and CP 118. The judge did not even value this land in total in the findings or decree, simply saying that it was valued at $2,500 an acre and giving it in total to Mr. Doneen. See CP 118. Nor did the judge say in his findings why acreage was awarded to Mr. Doneen in the overall

distribution, other than to place it in the husband's separate property column. Id.

Mr. Doneen did testify at trial that he wanted the land to go to his grandchildren, but gave no testimony about any wills or trusts. See RP 193. Never the less, his estate appeals attorney indicated that it was clear that he wanted this land to go his grandchildren. Id. However, again, that never happened by any appropriate process such as a will since Mr. Doneen died just 4 days after the 1st Final Decree was entered, on June 6th, 2015. CP 098.

After Mr. Doneen died, and on the date of June 11th, 2015 the Respondent's former counsel filed a belated Motion for Reconsideration, which had been signed by Mr. Doneen before his death on the date of June 4th, 2015. CP 084-086. His attorney then, filed this without having a client to confirm the need for filing the motion. Id. The Petitioner has objected to that Motion being reconsidered given the fact that Mr. Gauper was divested of any authority to file such a motion. Mrs. Doneen also filed a motion for reconsideration on the date of June 12, 2015. CP 080-084. It should be noted that the Petitioner's motion was sent to the Adams County Clerk for filing but was somehow misplaced by the court, and later filed on July 30th nunc pro tunc as at June 12th, 2915, allowing it to be considered timely as of receipt by the court. CP 116 lines 20-22.

The court denied the reconsideration motion filed by Mrs. Doneen, and ostensibly granted the Motion of the deceased Petitioner, reducing Mrs. Doneen's property by almost $8,500.00. CP 116-124.

This appeal was filed and an opening brief was provided. The responsive brief by the Estate indicates that when the court gave Mr.

Doneen his land, that that distribution was discretionary and one of the many choices the court could make in this matter. The Estate's attorney indicates that since Mr. Doneen wanted his land to go to his grandchildren, that this was sufficient basis for this distribution. However, the Estate's counsel does not direct the court to any evidence at trial that the land would have gone to the grandchildren. No will was ever put into evidence and assuming that Mr. Doneen changed his will that was never cited, therefore, the Estate's attorney bases their entire argument on the speculation that Mr. Doneen would dispose of his "land" by giving it to his grandchildren and no other reason. In summary, there was absolutely no evidence in the record that Mr. Doneen would have given the land to his grandchildren since no testimony was ever elicited that corroborated that argument. Therefore, if in fact that was the reason for this distribution the judge had to go outside the record and speculate that that is what Mr. Doneen would have done if he received this marital property.

II. Law and Argument

A. Awarding the husband the land to bequeath to his "grandchildren" was clearly outside the appropriate basis' for awarding his separate property solely to him, given the length of the marriage and the *Rockwell* case at 157 Wn.App. 449, 238 P.3d 1184 (2010)

As indicated, there was no evidence at the time of trial that there was a will or other future transfer of the Doneen land to Mr. Doneen's grandchildren. The record only contains a few sentences which explain that that is what Mr. Doneen wanted to have happen, but no testimony was elicited that indicated that he had drafted a will which gave that land to his grandchildren. See RP generally & pp. 111 to 242 and to 271. Yet the Estate's attorney virtually bases his entire argument against this appeal on

that speculative conclusion. *See Responsive Brief*, page 9 line 1st paragraph; where the Estate attorney makes the following statement/argument:

> "Because Mr. Doneen inherited the farm, and has quite wholeheartedly, shown the farm to be entrenched in his family, the Trial Court correctly determined both the separate property character of the family farm to be entrenched in his family, the Trial Court correctly determined both the separate property character of the family farm and its distribution soley to Mr. Doneen (and his subsequent next of kin). The result was clearly within contemplation of an equitable distribution of property subject to the divorce." Id.

As indicated, there is only one place that Mr. Doneen talks about what he would like to have happen with his land. He said at RP 193, in answer to his attorney's question about the land and its distribution:

> *Q: Okay. What is -- Do you have any intent to sell this ground.*
> *A: Never.*
> *Q: Okay. Why?*
> *A: It's in the family.*
> *Q: Okay. What is your intent with this land?*
> *A: When the time comes, -- I want to pass it on to my grandsons.*

Nothing else was provided to the court on how he was going to give them the land, when he would do it, and which of the grandchildren would get the land. And there is no question that the distribution of the land to his grandchildren was the main and reason that the Estate somehow justifies this distribution.

This reasoning should be tested as to whether it justifies going outside the parameters of the *Rockwell* case instructions, as well as if it can be construed as an "acceptable choice" under the law. See *Larson & Calhoun* at 178 Wa. App.133, 145, 313 P.2d 1228 (2013).

First, the *Rockwell* case; this case was about two people who had been employed at a higher than normal rate of pay all their lives and had been married for more than 25 years, and had acquired retirements through their work. Like this case, children were not at issue. They had both retired by the time trial had begun. In the end, the court gave the wife 60% of the community, and the husband 40%. This was done rather than a 50/50 split because of the comparative future earning capacity of the parties and an attempt to equalize their lives financially. The primary difference in percentages was made up of retirement funds. There was some separate property involved that was taken into consideration as well.

The *Rockwell* case indicated that a judge presiding over a dissolution of marriage, of 25 years or more, has broad discretion in dividing the marital assets to equalize the parties' financial circumstances. The court used the term "marital assets" when talking about all of the property of the marriage, instead of focusing on community or separate property, since that term seemed to encompass both separate and community iteMrs. *Rockwell* clarified that a dissolution judge must treat a divorce between a marital couple of 25 years differently from a divorce of lessor years. It clearly stated that it is error for a court who presides over a "long term marital dissolution" to enter a decree that "results in a patent disparity in the parties' economic circumstances", and if they do it is a manifest abuse of discretion. Id.

In Washington State, a court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; if it is based on untenable reasons;

or if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *State v. Rundquist*, 79 Wash.App. 786, 793, 905 P.2d 922 (1995) (citing the WASHINGTON STATE BAR ASS'N, WASHINGTON APPELLATE PRACTICE DESKBOOK § 18.5 (2d ed.1993)), review denied, 129 Wash.2d 1003, 914 P.2d 66 (1996). See also *In re Marriage of Littlefield*, 133 Wn.2d 39, 940 P.2d 1362 (1997). Therefore, what can be said to be acceptable choices are governed by the current law on the specific issues at hand. It is insufficient then to simply say that a judge made a decision that was one of his "acceptable choice", without comparing it to the legal standard requirements of the case before the court.

A look at the *Larson/Calhoun* case as to the concept of "acceptable choices" would be helpful. In *Calhoun*, it was clear that that court did not simply use the terms "acceptable choices" without qualifying how that principle should be used. They said that the "acceptable choice" must also follow "the law" in this state. The "law" in this state, as to long term marital decisions, as outlined by *Rockwell* says then that it is not an "acceptable choice" when a judge's decision creates a substantial disparity in financial circumstances of the disadvantaged spouse such that it results in a patent disparity in the parties' economic circumstances . As the court in this case entertained (see RP 330-331), if one of the spouse had $5,000,000.00 in assets, that were separate property, would it be appropriate for the court to not give the disadvantaged long term spouse a proper portion of that "marital property", to help them maintain a similar lifestyle they enjoyed during the marriage. The answer per *Rockwell* is yes. To take this further, this would be especially true if this property were used to provide for the life

style they enjoyed. It is therefore, not an acceptable choice for one spouse to receive all the money-making property, regardless of whether it is separate property or not.

In this case, there is no doubt that this was a long-term marriage by anyone's calculation, 45 years. The Doneen's relied upon the marital farm land to supplement their income to the tune of at least $40,000 a year, not to mention the value of having a lot of valuable farm land to obtain a loan against. RP 297. In the end, Mr. Doneen ended up with all this land worth $575,000.00 with the structures and $229,531 in property and cash for a total distribution of $804,531.00 (versus Mrs. Doneen who received $314,676 in property and cash). CP 116-124. And this land, per the Whitman County Appraiser was highly valuable and resalable real estate, and was "going like gangbusters". RP 276. Even the judge remarked that the land's high value surprised him. RP 276-277.

Mr. Doneen left the marriage with over three quarters of a million dollars, some of which helped them live the life style they had lead for years. CP 121-124. Additionally, he also received their family home, albeit part of the farm, and Mrs. Doneen was ordered out of the only home she had known for years, in 60 days. Id. Mrs. Doneen then was left with a decreasing amount of cash to try and maintain the life style they enjoyed. In contrast, Mr. Doneen receive their family home, and all his inherited highly valuable land, as well as cash accounts and large property items. If the reason for the judge's decision was to insure this land stayed in the Doneen family, he the husband's children and grandchildren ahead of Mrs. Doneen, leaving her with a substantially lessor financial circumstance than he received. And in a situation where she would have to buy a new home

with her money and live off the remainder, and depending upon the cost of a new home her cash may have to suffer a severe blow. All because the judge apparently felt that Mr. Doneen's potential heirs should receive this land that the elder Doneen's farmed and lived off of their entire lives.

This decision resulted in a tremendous disparity in economic circumstances (28% for Mrs. Doneen and 72% for Mr. Doneen), but most importantly it left Mrs. Doneen with a much lessor financial circumstance than her husband. She went from the comfort of having many acres of prime farm land to depend on, bringing in approximately another $40,000 a year, along with her meager pension and social security amount, and free housing, to a choice between buying a house so she had no mortgage or having a large mortgage and a much lesser amount to live on than she had before. As compared to Mr. Doneen, who had all his farm land worth more than a half a million dollars, plus a lot of cash to live on and his larger social security. RP 336. By any standard this distribution was not within the range of acceptable choices for this older couple, and especially Mrs. Doneen.

This was an abuse of discretion to give Mr. Doneen the entirety of their farm land worth almost $600,000.00 and doing so based on the speculation that he would will all that land to his grandchildren, when no will was shown, nor was he ever asked if he would do that.

B. The husband's attorney had absolutely no authority to file the Motion for reconsideration since he was without a client to receive instructions from when it was filed.

The opening argument regarding the husband's attorneys filing of the belated Motion for Reconsideration stands as a clear basis for rejecting any changes in the original decree now authored by his former counsel. For all

the court knows Mr. Doneen could have had second thoughts about that reconsideration and called it off. We will never know what he preferred, and his dissolution attorney was in the same position as a dismissed or fired attorney at the time that motion was filed. He was without authority to do so. And, the difference is not de minimis since it took away $8,500 in cash from Mrs. Doneen.

III. Conclusion

This court should reject the estate's argument regarding this appeal and what the court ordered.

Respectfully submitted this 15th day of December 2016 by,

Gary R Stenzel, WSBA #16974

Declaration of Mailing

I, Gary R. Stenzel, declare under penalty of perjury pursuant to the laws of the state of Washington that I am now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of twenty-one years; that on December 15, 2016 affiant enclosed in an envelope a copy of the Petitioner's Reply Brief to: Mathew Purcell, Purcell Law, 2415 W Falls Ave, Kennewick, WA 99336.

Said address being the last known address of the above-named individual, and on said date deposited addressed envelope by regular mail with postage prepaid in the United States Post Office in City and County of Spokane, State of Washington.

Gary R. Stenzel, WSBA #16974