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STATE OF WASHINGTON
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No. 96172-7

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

HEIDI K. KAPLAN,

Petitioner,

v.

DONALD C. KAPLAN,

Respondent.

ANSWER TO PETITION FOR REVIEW AND CONDITIONAL CROSS-PETITION FOR REVIEW

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A. Relief Requested by Respondent.

Donald Kaplan, respondent in both this Court and the Court of Appeals, asks this Court to deny Heidi Kaplan's petition for review of Division One's July 23, 2018 decision affirming the trial court's disproportionate division of the marital estate in her favor and its award to her of $10,000/month spousal maintenance for six years. Her petition is premised on an argument repeatedly rejected by Washington courts, that in exercising its discretion to award spousal maintenance and make a just and equitable division of the marital estate, the trial court must give a single factor greater weight than the other factors in RCW 26.09.090 and RCW 26.09.080. Upon divorce, each spouse will necessarily have less income, and less property, in their new separate households, than they had pre-dissolution. Petitioner's argument that "in a long term marriage, courts must endeavor to place the parties' post-dissolution in roughly the equivalent financial positions they enjoyed pre-dissolution" is not only unsupported by statute and common law, but defies common sense.

The parties separated over three years ago, and this litigation should end. If this Court accepts review of the issues raised in wife's petition, it should also review Division One's decision reversing the

trial court's imputation of income to the wife, which fails to follow the mandate of RCW 26.19.071(6) and conflicts with decisional law, requiring the court to impute income to a parent who is voluntarily unemployed when calculating child support.

B. Restatement of the Case.

Respondent Donald C. Kaplan ("Don"), now age 56, and petitioner Heidi K. Kaplan ("Heidi"), now age 54, married on October 7, 1990. (RP 41; CP 1) Their marriage was dissolved on October 25, 2016, after a 6-day trial. (CP 594, 620) The parties have two adult daughters, born in February 1996 and August 1999. (RP 45) At the time of trial in June 2016, the older daughter was completing her second year of college and the younger daughter was a rising high school senior. (*See* CP 69) Although petitioner describes the younger daughter as having "psychological and academic challenges" (Petition 4), she had a 3.65 GPA at the Bush School and achieved a 1300 on her SATs at the time of trial. (RP 353, 477) The parties agreed to a parenting plan for the younger daughter; the only issue at trial was child support for her remaining year in high school and postsecondary support. (*See* RP 10, 16-17)

The trial court found that the parties had amassed a marital estate of approximately $5.2 million. (Finding of Fact (FF) 9, CP

596) "When the court considers the nature and extent of all the property, the duration of the marriage and the financial position of each party, it finds that a fair and equitable division is the allocation of 55% of the [community] assets to Ms. Kaplan and 45% to Mr. Kaplan." (FF 9, CP 598) Including separate property awarded to her, Heidi received approximately $2.7 million, including the family home, which she requested, half of a $1.2 million investment account, and over $1 million from the parties' 401(k). (CP 604-05)

In deciding spousal maintenance, the trial court considered that Heidi, a college graduate, had not worked outside the home since the older daughter was born. (FF 13, CP 598-600) Heidi however testified that she kept "current" and "intellectually engaged in stimulating programs" by volunteering and attending workshops. (RP 81) The trial court found that Heidi, who was well-educated and healthy, had the capacity to pursue employment because "through her continued volunteer work, Ms. Kaplan has been able to keep basic skills relatively current." (FF 13, CP 599) The trial court however noted it was clear from Heidi's testimony that she "is not currently seeking employment. She has not updated her resume recently, applied for jobs, contacted any temporary agencies, or initiated any job-seeking networking." (FF 13, CP 600)

The trial court found that "due to substantial assets" awarded to Heidi, totaling approximately $2.7 million, "it is clear that Ms. Kaplan has a demonstrated capacity of self-support." (FF 13, 600) The trial court found spousal maintenance was nevertheless warranted because "the income of the parties is significantly disproportionate." (FF 13, CP 600)

At the time of trial, Don's gross monthly salary (working for oil company Phillips 66 scouting locations for gas stations) was $19,802, or $237,624 annually. (RP 337) Including Don's award of restricted stock units and bonuses, the trial court found Don had an average annual income of $387,000 per year. (FF 13, CP 600) However, the trial court also found that Don's "salary would stay flat or experience only very small increases; that his future bonuses would be unlikely, and long-term incentives would be reduced or removed." (FF 13, CP 599) Further, there was "uncertainty about Mr. Kaplan's continued employment; namely, that upper management positions are very competitive while the industry is shifting to keep costs flat. A likely strategy to accomplish that goal is to cut positions. Mr. Kaplan testified that he has not been provided with any assurances that his position is immune from

elimination."[1] (FF 13, CP 598-99) The trial court also considered that Don was towards the end of his career, as "he has worked in the oil industry approximately 28 years [and] in his current position, he works on average between 45 and 60 hours a week," and would retire in "roughly four years," in 2020, which was a few years later than the parties planned prior to separation. (FF 13, CP 598, 600)

"After careful consideration of the statutory factors, and the evidence presented at trial," the trial court awarded Heidi monthly maintenance of $10,000 for six years, commencing on September 1, 2016 and ending after August 1, 2022, five years after the younger daughter graduates from high school in 2017. (FF 13, CP 600; CP 625) The amount of maintenance awarded was sufficient to meet Heidi's monthly expenses, as found by the trial court (FF 13, CP 600), and the amount that Heidi told her vocational counselor she needed to meet her living expenses. (RP 273)

To calculate child support, the trial court found Don's gross monthly income was $27,689, including his salary, bonus, and $460 in investment and dividend income. (CP 636) The trial court

[1] Contrary to Heidi's assertions that the trial court's findings were "entirely speculative" (Petition 18) Don was in fact laid off from Philips 66 shortly after she filed her petition. https://www.krmg.com/news/local/layoffs-announced-conoco-phillips-energy/HJETnx3ZiJUQ1SDHoDxEyN/

imputed income to Heidi because "based on her work history, education, health, [and] age," she "is able to work, but is voluntarily unemployed." (CP 630) Because Heidi had "no recent wage history," the trial court imputed income to her based on the "median net monthly income of year-round full-time workers as derived by the Bureau of Census," at $2,714 per month. (CP 630) In addition to imputed income, the trial court found that Heidi had monthly rental income from her separate condominium of $421, interest and dividend income of $460, and maintenance of $10,000. (CP 636)

The trial court ordered Don to pay child support of $965.05 until the younger daughter begins college in the fall of 2017. (CP 630-31) If the daughter's education savings of more than $200,000 is exhausted, the court ordered the parties to pay their proportionate share of postsecondary support. (CP 631-32)

Heidi appealed, challenging every decision by the trial court, even complaining that the trial court had not awarded her attorney fees when she had withdrawn her request for fees at trial. Division One affirmed on every issue except child support, holding that the trial court should not have imputed income to Heidi for purposes of calculating the parent's relative responsibilities.

C. This Court Should Deny Review of Division One's Decision Affirming the Trial Court's Discretionary Fact-Based Property and Maintenance Awards.

This Court should deny review. Petitioner makes absolutely no effort to address any of the grounds that would justify this Court taking review of Division One's decision affirming the trial court's fact-based and discretionary decisions on property and spousal maintenance. Undoubtedly, "this Court is fully familiar with the criteria for review in RAP 13.4(b)" (Petition 7, fn. 9), but that is no excuse for not discussing the rule in the context of this case. The reason for this deficiency is clear – there are no grounds under RAP 13.4 for this Court to take review. Division One's decision affirming the trial court's discretionary property and spousal maintenance decisions does not conflict with any decision of this Court or the Court of Appeals. RAP 13.4(b)(1), (2) Nor does Division One's decision affirming a disproportionate award to petitioner wife of $2.7 million from a $5.2 million marital estate, plus 6 years of spousal maintenance totaling $720,000, violate her constitutional rights or "involve an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(3), (4). This Court should therefore deny review.

1. On dissolution of a long-term marriage, the trial court cannot, nor is required to, place the parties "in roughly the same financial position they had pre-dissolution."

This Court should decline petitioner's invitation to "reaffirm that a long-term marriage *requires* courts in making a division of marital assets to place the parties in roughly the same position after the dissolution they experienced before it." (Petition 7; emphasis added) This Court cannot "reaffirm" a premise that has never been the law of Washington. When parties divorce, the income and property that once maintained one household, must now sustain two separate households. With the income and property now divided, neither party can be in the same, or "roughly" the same, position they were in pre-dissolution when they had access to the parties' combined property and income.

Petitioner misplaces her reliance on Division One's decision in *Marriage of Rockwell,* 141 Wn. App. 235, 170 P.3d 572 (2007), *rev. denied,* 163 Wn.2d 1055 (2008) as support for this "requirement." Nowhere in that decision, or any other, does it purport to hold that after a long-term marriage the trial court must place the parties "in roughly comparable financial circumstances post-dissolution that they enjoyed pre-dissolution." (Petition 13) In fact, the property division that Division One affirmed in *Rockwell*

did not provide the parties the same standard of living "post-dissolution that they enjoyed pre-dissolution." The husband in *Rockwell,* who was the appellant, had at age 48 stopped working five years before the parties separated, and the wife followed suit three years later when she retired from federal civil service at age 60. Accordingly, during the final two years before separating, neither party worked and instead enjoyed the wife's "substantial pension." *Rockwell,* 141 Wn. App. at 240-41, ¶¶ 2, 3.

In dissolving the parties' 28-year marriage, the trial court directed the husband, then age 54.5, to return to work, with the expectation that he continue working for another 7 years. The trial court then divided the community property 60/40 in favor of the wife, and awarded each party their separate property. Included in that division was the wife's pension, which had a separate property component because 16 of her approximately 40 years of federal employment was pre-marriage.

Division One affirmed the property distribution, which left the wife with significantly more property and effectively required the husband to go back to work. It is unlikely that the husband/appellant in *Rockwell,* who had been enjoying an early retirement pre-dissolution that was afforded to him because he

could equally share in the wife's pension, would agree with petitioner here that the "*Rockwell* principle" purportedly adopted by Division One left him in the same financial circumstance that he enjoyed before the parties separated. (Petition 14)

Nor were the parties in *Marriage of Wright,* 179 Wn. App. 257, 319 P.3d 45 (2013) (Petition 14), *rev. denied,* 186 Wn.2d 1017 (2014), the only published decision that petitioner claims "re-affirmed the *Rockwell* principle," left in their same pre-dissolution economic circumstances. Prior to separating, the parties in *Wright* had amassed an estate of over $18.1 million, nearly $1 million of which was the separate property of the husband, who earned a "minimum of $4 million annually." 179 Wn. App. at 261, ¶ 3. The trial court awarded the wife 56% of the marital estate and a three-year spousal maintenance award worth $1 million. Thus, while the wife received more assets, she shared in only a fraction of the income she enjoyed pre-dissolution. In affirming, Division One acknowledged that while the wife left the marriage with over $3 million more property than the husband, he would "ultimately end up with nearly $2.7 million" more than her due to his anticipated future income. *Wright,* 179 Wn. App. at 263, ¶ 8.

No authority supports petitioner's claim that trial courts must endeavor to return the parties to their pre-dissolution standard of living. Notably, RCW 26.09.080, which petitioner acknowledges "governs the division of the parties' property" (Petition 8) does not include the parties' "pre-dissolution" economic circumstances as a factor that courts must consider in dividing the marital estate. Instead, more appropriately, the court is required to consider, among other things, "the economic circumstances of each spouse or domestic partner *at the time the division of property is to become effective.*" RCW 26.09.080(4) (emphasis added).

While the "standard of living established during the marriage" is a factor to be considered under RCW 26.09.090 in deciding spousal maintenance, Division One properly noted that "the predissolution economic circumstances of the parties is just one factor that the trial court must consider." (Op. 5) As Division Two has held, "the trial court must consider *all* of the statutory factors" in RCW 26.09.090 before awarding maintenance. *Marriage of Khan*, 182 Wn. App. 795, 800, ¶ 9, 332 P.3d 1016 (2014) (emphasis added) (*citing Marriage of Washburn*, 101 Wn.2d 168, 179–80, 677 P.2d 152 (1984)).

In rejecting petitioner's argument here, Division One properly held that a party is "not entitled to maintain her standard of living as a matter of right." (Op. 5, *quoting Cleaver v. Cleaver*, 10 Wn. App. 14, 516 P.2d 508 (1973)) This is wholly consistent with this Court's decisions holding that a trial court is not required to guarantee the parties their pre-dissolution standard of living. *See Friedlander v. Friedlander*, 80 Wn.2d 293, 297, 494 P.2d 208 (1972) ("the maintenance of a lifestyle to which one has become accustomed" is not a "proper basis" to award spousal maintenance); *Morgan v. Morgan*, 59 Wn.2d 639, 644, 369 P.2d 516 (1962) ("If the trial court awarded alimony because of its impression [that wife needed a certain amount each month] to continue the standard of living which she had enjoyed as appellant's wife, this was not a proper legal basis for making the award.").

There is no statutory, common law, or economic support for the petitioner's assertion "that a long-term marriage requires courts in making a division of marital assets to place the parties in roughly the same position after their dissolution they experienced before it." (Petition 7) This Court should deny review, and petitioner's invitation "to take review to reaffirm" such a proposition.

2. The length of the marriage does not control the trial court's discretion to divide the marital estate or award spousal maintenance.

This Court should also reject petitioner's invitation to "definitively articulate the applicable policy for the distribution of marital assets in long-term marriages." (Petition 15) Contrary to petitioner's claim, Washington has no "special principle for long-term marriages." (Petition 10) Instead, the discretion of trial courts is controlled by statute, RCW 26.09.080 governing property and RCW 26.09.090 addressing spousal maintenance, which the courts must abide, whether it is dissolving a long-term or a short-term marriage.

The "duration of the marriage" is a relevant consideration as *one* of a number of factors the trial court must consider in deciding how to divide the marital estate and whether to award spousal maintenance. RCW 26.09.080(3); RCW 26.09.090 (1)(d). But as this Court held in *Marriage of Konzen,* 103 Wn.2d 470, 693 P.2d 97, *cert. denied,* 473 U.S. 906 (1985) in addressing RCW 26.09.080, it will not "single out" one of the statutory factors for special consideration, "and require as a matter of law that it be given greater weight than other relevant factors." 103 Wn.2d at 478; *see also Washburn,* 101 Wn.2d at 177 ("all relevant factors [under RCW

26.09.080] must be considered by the trial court in its attempt to achieve an equitable distribution").

Petitioner's claim that there is some "overarching principle for long term marriages" (Petition 12) outside of that established by the Legislature is based on what Division One accurately described as an "overly narrow reading" of *Marriage of Rockwell,* 141 Wn. App. 235 (2007) (*supra*), which contains the statement: "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." (Op. 5, quoting 141 Wn. App. at 243, ¶ 12).

As a preliminary matter, this "objective" has no support in case law or statute. Instead, the Court in *Rockwell* cites only the WSBA Family Law Deskbook for this objective. 141 Wn. App. at 243, ¶ 12. The Deskbook, in turn, relies on a 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). WSBA Family Law Deskbook, § 32.3(3) at 32-17 (2nd ed. 2000). Neither the Deskbook nor the Winsor article is the law of our state. Further, as made clear by Division One in this decision, the "objective" in *Rockwell* was not intended to usurp the statute to establish different

controlling authority for long marriages. (Op. 7) In fact, preceding the statement seized upon by petitioner (and countless others before her), the Court in *Rockwell* specifically held that "the trial court's distribution of property in a dissolution action is guided by statute, which requires it to consider multiple factors in reaching an equitable conclusion." 141 Wn. App. at 242, ¶ 11.

Rather than the "overly narrow reading" of *Rockwell* by petitioner, Division One agreed that Division Three in *Marriage of Doneen,* 197 Wn. App. 941, 391 P.3d 594, *rev. denied,* 188 Wn.2d 1018 (2017) more accurately interpreted what was intended by the statement in *Rockwell.* (Op. 6-7) In *Doneen,* Division Three held that because trial courts are not bound by "inflexible rules," and are instead guided by the RCW 26.09.080 factors to make a "just and equitable" decision, "considering all circumstances of the marriage and by exercising its discretion, the "objective" described in *Rockwell* is "not mandatory." 197 Wn. App. at 949, 950, ¶¶ 28, 32. Division One's decision in this case wholeheartedly, and correctly, adopts this reasoning, holding that "an objective of placing the parties to a long-term marriage in 'roughly equal' financial positions, is not a mandate for trial courts to predict the future, divide assets with mathematical precision, or guarantee future equality. The trial court must still

exercise its discretion to consider all of the statutory factors set out in RCW 26.09.080 and RCW 26.09.090(1) and reach a just and equitable distribution." (Op. 7)

This Court should deny review and petitioner's invitation to "definitively articulate the applicable policy for the distribution of marital assets in long-term marriages." (Petition 15) Such a "definitive policy" would be inconsistent with decisions from this Court and all three divisions of the Court of Appeals, including Division One in this case and Division Three in *Doneen*, favoring flexibility over "inflexible rules" or "precise formulas," when fairness and RCW 26.09.080 and RCW 26.09.090 should be the guides. *See e.g. Marriage of Zahm*, 138 Wn.2d 213, 218–19, 978 P.2d 498 (1999) ("a fair and equitable division by a trial court 'does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of parties'"); *Marriage of Wright*, 147 Wn.2d 184, 196, 52 P.3d 512 (2002) (declining to hold that a trial court must value a pension a certain way because it "would unwisely limit the broad discretion of the trial court in dividing property"); *Marriage of Rink*, 18 Wn. App. 549, 553, 571 P.2d 210 (Div. II, 1977) ("Fairness is decided by the exercise

of wise and sound discretion not by set or inflexible rules.") (quoted source omitted).

D. If This Court Grants Review, It Should Also Consider Division One's Decision Holding That Parents Who Stayed Home During the Marriage Cannot Be Imputed Income As Required By RCW 26.19.071.

If this Court accepts review of the wife's petition, it should also review Division One's decision reversing the trial court's imputation of income to the wife after the trial court found her voluntarily unemployed because she is "able to work," is "healthy, well-educated, and has maintained a basic skill set," but "is not currently seeking employment." (FF 13, CP 599, 600; CP 630)

This Court should take review because Division One's holding that when a "spouse in a long-term marriage stays home to care for the children and manage the household while the other spouse works outside the home," the trial court errs in finding that the spouse is voluntarily unemployed at the time of dissolution for purposes of child support (Op. 18), is an issue of public import as it is inconsistent with both the statute, RCW 26.19.071, which plainly requires the trial court to impute income to a parent who is voluntarily unemployed, and legislative policy requiring that child support "be equitably apportioned between the parents." RCW 26.19.001. RAP 13.4(b)(4). The governing statute provides:

> The court *shall* impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court *shall* determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors."

RCW 26.19.071(6) (emphasis added).

The statute does not carve out an exception for voluntarily unemployed parents who stayed home with the children during the marriage. Instead, the statute requires the trial court to make a factual finding on the bases for imputing income. That a parent stayed home during the marriage to care for the children may be relevant to the "parent's work history," but it is not the sole consideration. Instead, the trial court must determine, based on a consideration of the parent's "education, health, and age, or any other relevant factors," whether the parent is employable but chooses to remain unemployed. RCW 26.19.071(6). If the answer, as a factual matter, is yes (as the trial court found here), the statute mandates the trial court to impute income to that parent.

As Division One itself previously held, "a parent should not be allowed to avoid obligations to his or her children by voluntarily remaining in a low paying job or by refusing to work at all." *Curran v. Curran*, 26 Wn. App. 108, 110–11, 611 P.2d 1350 (1980). To not

impute income to a parent, who is capable of working but chooses not to, undermines the Legislature's intent that child support be "equitably apportioned between the parents" RCW 26.19.001, placing a disproportionate burden on the other parent.

This Court should also take review of this issue under RAP 13.4(b)(2) because Division One's child support decision in this published opinion is inconsistent with decisions of Division Two and Division Three holding that a parent's decision to stay home and care for children rather than pursue employment, when able, will not shield them from a child support obligation or imputation of income. *See Marriage of Jonas*, 57 Wn. App. 339, 788 P.2d 12 (Div. II, 1990) (reversing trial court's decision to not impute income to the mother, who chose to stay home to care for the children); *Marriage of Pollard*, 99 Wn. App. 48, 991 P.2d 1201 (Div. III, 2000) (reversing trial court's decision to not impute income to a mother who reduced her full-time hours to stay home and care for her children); *see also Marriage of Wright*, 78 Wn. App. 230, 234, 896 P.2d 735 (Div. II, 1995) (affirming trial court's decision to impute income to a mother who worked only half-time because she was the primary caretaker of five children ranging in age from 9 to 12).

E. This Court Should Deny Attorney Fees to Petitioner.

Heidi is not entitled to attorney fees. RAP 18.1(j) provides that only a party awarded attorney fees by the Court of Appeals may seek an award in *responding* to a petition for review. Heidi is the petitioner in this Court, and the Court of Appeals denied her request for fees "after considering the financial resources of both parties," and concluded that "each party is financially able to pay his or her attorney fees and neither would be under a critical hardship to do so." (Op. 20) This Court too should deny her attorney fees.

F. Conclusion.

This Court should deny review. However, if this Court accepts review, it should also review the Court of Appeals decision reversing the trial court's calculation of child support, which included imputed income to the wife.

Dated this 6th day of September, 2018.

SMITH GOODFRIEND, P.S.

By: 

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Attorneys for Respondent

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 September 6, 2018, I arranged for service of the foregoing Answer to Petition for Review and Conditional Cross-Petition for Review, to the Court and to the parties to this action as follows:

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DATED at Seattle, Washington this 6th day of September, 2018.

Andrienne E. Pilapil

SMITH GOODFRIEND, PS

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