No. 76306-7-I

96172-7

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

In re the Marriage of:

HEIDI K. KAPLAN,

Petitioner,

and

DONALD C. KAPLAN,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Heidi Kaplan[1] asks this Court to grant review of the Court of Appeals decision set forth in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its published decision on July 23, 2018 in which it concluded that in a dissolution when a trial court addresses the allocation of marital resources under RCW 26.09.080/.090 in a long-term marriage, the placement of the spouses in roughly equivalent positions post-dissolution is only an aspirational goal.

A copy of the opinion is in the appendix at pages A-1 through A-20.

C. ISSUE PRESENTED FOR REVIEW

> There is an overarching principle set forth in numerous cases construing RCW 26.09.080/.090 that in a long-term marriage, the courts must endeavor to place the parties in roughly the equivalent financial position post-dissolution they had before the dissolution. Did the Court of Appeals err in affirming trial court decisions on property division and spousal maintenance that failed to effectuate that overarching principle, concluding that principle was only aspirational?

D. STATEMENT OF THE CASE

[1] Heidi has since changed her name to Heidi Kasselman Sky. CP 621. This petition refers to the parties by their first names hereafter for the sake of clarity. No disrespect is intended.

The Court of Appeals opinion is largely correct in recitation of the facts, op. at 1-4, but a number of facts bear emphasis and further development.

This was a long-term marriage. The parties were married for twenty-six years. CP 595. The parties' estate was worth nearly $5.2 million. CP 596. Donald Kaplan was 53 years old at the time of trial and a top executive with the Phillips 66 Oil Company. CP 1.[2] His career resulted in four moves within the same company from shortly after their marriage in 1990 in Connecticut, to Seattle; back to Connecticut; then to Arizona for four years and ultimately back to Seattle in 2001. RP 41-42, 45-47. His last career advancement during the marriage occurred when he transferred to Houston, Texas in 2014, for a promotion to a strategic planning development role, one that made him more visible to senior Phillips 66 executives. RP 48. He earned upwards of $500,000 per year in the retail marketing division of the company; his compensation consisted of a salary, an annual bonus which he received every year for the last twenty-six years,[3] restricted stock units, and benefits including a pension, a 401K, to which

[2] Phillips 66 is one of America's largest independent oil refiners. http://www.phillips66.com. It is ranked #28 on the 2018 Fortune 500 ranking of profitable U.S. companies, http://fortune.com/fortune500/phillips/, and #150 on Fortune 500's global list, https://www.forbes.com/companies/phillips-66/.

[3] Donald's 2015 bonus was $141,746.

Phillips matched contributions by the employee, and executive term life, disability, and comprehensive health insurance. CP 603-17; RP 414-26. He received 8 weeks of annual paid vacations. RP 475.

At the time of trial, Heidi was 52 years of age. CP 1. She began the marriage with a potential of a promising career in the retail clothing industry and public relations, RP 42, but the birth of their two children and the moves to promote Donald's career advancement precluded the development of her own career. CP 599, 600. At the time of trial, she had long been out of the job market, although she was planning what mode of re-education would best suit enhancement of her future career opportunities. *Id.*; RP 42-44.[4] She and Donald had a division of labor that was very traditional – he worked outside the home and she was the homemaker/full-time parent. RP 52. Now, however, given her age and her depression, as her expert, David Goodenough, noted, she was not currently employable except at a "low end" job, RP 179-82, and the better analysis of her employable skills was as a "displaced homemaker," a status the trial court obtusely disregarded. CP

[4] Heidi gave up her own business. RP 42-44. At the time of the dissolution, Heidi had not been in the paid workforce in a highly demanding, evolving field—public relations/communications—for *twenty years*. When Heidi left the workforce in 1996, for example, the internet was just beginning to develop, and social media and smart phones did not even exist. *See, e.g.*, RP 182. The trial court's sense that Heidi had kept up public relations/communications skills by doing occasional volunteer work, CP 599 (FF 13), defies logic.

599 (FF 13).[5] She required retraining to secure marketable skills, a process that would require time. RP 182-84, 188-89, 192-94.[6] Even if she realized her retraining goals, her ability to earn in the future would be significantly less than what Donald would earn.

Heidi and Donald had two children. CP 601. Jillian was 20 years old and about to attend her third year of college at Scripps College in California. CP 69. Sophie was 17 years old in August 2016, and was to begin her senior year of high school at The Bush School in Seattle. CP 69, 601, 631. Sophie had a number of learning challenges resulting from a diagnosed Attention Deficit Hyperactivity Disorder ("ADHD") for which she explored treatment options and learning therapies. Ex. 20; CP 69. The combination of that condition and her reaction to the break-up of the family resulted in psychological and academic challenges that required Heidi's

[5] *See generally*, Ann Laquer Estin, *Maintenance, Alimony, and the Rehabitation of Family Care*, 71 N.C. L. Rev. 721, 749-57 (1993) (maintenance as appropriate compensation for homemaker's return to competitive labor market; recognizing need to value family care in dissolution decisionmaking); Cynthia Stames, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation under No-Fault*, 60 U. Chi. L. Rev. 67, 70 (1993) (need for equal treatment of homemakers in dissolution decisionmaking: "Seriously at risk are the heroines of the Betty Crocker culture, women who have already devoted their most career-productive years to homemaking and who, if forced into the labor market after divorce, suddenly will be viewed as modern dinosaurs.").

[6] The trial court, however, gave short shrift to his testimony. CP 599.

active support, a therapist, and academic aids involving more than merely preparing Sophie to take the SAT for college entrance. RP 281-83.

Although the parties' marital home was in Seattle and one of the children was in school in Seattle, Donald filed a dissolution action on July 6, 2015 in Harris County, Texas. CP 4.[7] Heidi filed her petition for dissolution of the parties' marriage in the King County Superior Court on July 15, 2015, CP 1-6, specifically alleging Washington jurisdiction. CP 2. Donald answered that petition, CP 7-9, denying that the court had jurisdiction over the parties' marriage. CP 8. Ultimately, after considerable expense to Heidi, at least $12,000 in fees, RP 56-57, the Texas courts concluded that Washington had jurisdiction over the parties. Ex. 140; CP 595. The trial court here expressly found that Washington had jurisdiction over the marriage and Donald. *Id*.

After a trial, the trial court, the Honorable Elizabeth Berns, entered a series of orders on the dissolution of the parties' marriage. The court entered findings of fact and conclusions of law and a decree on October 26,

[7] Donald tried to evoke jurisdiction in Texas, a state antagonistic to spousal maintenance, br. of appellant at 4 n.4, even though the parties' marriage was based in Washington where the family home was located and where their daughter attended high school. CP 601-02 (Sophie lived with a parent in Washington and had no other "home state"). Heidi never lived in Texas. RP 53. Donald later apologized to Heidi for having filed the action in Texas, evidencing the baseless nature of the filing, although he never reimbursed her for those obviously needless expenses. RP 440-43. The trial court correctly concluded that Seattle was the primary residence of the parties during the marriage. CP 596.

2016. CP 594-627. The court entered a qualified domestic relations order as to Donald's 401(k) plan, allocating roughly 55% to Heidi. CP 587-92. Overall, in those rulings, the court found the marriage irretrievably broken, CP 595, 621, and allocated the parties' assets and made maintenance decisions that largely preserved Donald's pre-dissolution economic status, but failed to do so for Heidi. The trial court also granted clarification of its orders on December 9, 2016 and January 12, 2017, addressing the duration of maintenance, life insurance as to Donald, and health insurance. CP 719-20, 787-88.

The court then entered a child support order. CP 628-40.[8] The court compounded its failure to afford Heidi an economic situation roughly comparable to her pre-dissolution economic status by penalizing her for purposes of child support because she had been a full-time parent over the course of the parties' marriage; the court found that Heidi was "voluntarily unemployed." CP 628-30.

Heidi incurred substantial legal expenses, RP 88-89, but the trial court denied an award of attorney fees to Heidi, notwithstanding Donald's effort to have the Texas courts decide the parties' dissolution action. CP 600-01.

[8] The parties agreed to a parenting plan, CP 80-88.

In a published opinion, Division I affirmed the trial court's disposition of the parties' assets and the trial court's fee decision, but reversed the trial court's imputation of income to Heidi as a stay-at-home parent, mischaracterizing her as voluntarily unemployed or underemployed under RCW 26.19.071(6) for child support purposes.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED[9]

This case involves the dissolution of a long-term marriage between a husband employed outside the home as a key oil company executive and a wife who supported her husband's career and remained at home to raise the parties' children. The trial court, however, penalized Heidi by failing to apportion the parties' overall economic status post-dissolution to reflect their long-term marriage, and to allow Heidi to maintain her pre-dissolution economic status.

This Court should take review 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.[10]

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[9] This Court is fully familiar with the criteria for review in RAP 13.4(b). In this case, there is an obvious split among the decisions of the Court of Appeals, RAP 13.4(b)(2), and Division I's published opinion presents a significant issue of public import that this Court should address. RAP 13.4(b)(4).

[10] While financial decisions in dissolutions are usually reviewed for an abuse of discretion by the trial court, the trial court's decisions here were based on a core legal error – the failure to properly apply the principle of rough parity for the parties' pre- and post-dissolution economic status. That error of law pervaded the trial court's exercise of its discretion, constituting an abuse of discretion, and is reviewed *de novo*. *State v. Corona*,

(1) Washington Courts Recognize that Parties in a Long-Term Marriage Should Be Placed in Roughly the Same Financial Position They Had Pre-Dissolution by the Court's Disposition of Marital Assets

The trial court here, and then the Court of Appeals, failed to honor the principle established by the Court in numerous cases that in a long-term marriage, courts must endeavor to place the parties' post-dissolution in roughly the equivalent position they enjoyed pre-dissolution. The trial court treated the parties' long-term marriage as a mere factor in its decision, rather than an overarching rule: "While this is a lengthy marriage, that is only one factor that the Court considers." CP 600. Backtracking on its own decisional law, Division I agreed, concluding that the rule was essentially only aspirational in nature. Op. at 7-9. This was error.

RCW 26.09.080 governs the division of the parties' property; RCW 26.09.090 addresses awards of maintenance. *See* Appendix.

(a) Property Division

RCW 26.09.080 sets forth four distinct factors to guide a trial court's allocation of the marital assets. One of those factors is the economic circumstances of the parties. In addition to the statutory criteria of a fair, just and equitable distribution, the case law supplements the four statutory

164 Wn. App. 76, 79, 261 P.3d 680 (2011) ("When we review whether a trial court applied an incorrect legal standard, we review de novo the choice of law and its application to the facts in the case.").

factors *Nat'l Bank of Commerce of Seattle v. Green*, 1 Wn. App. 713, 717, 463 P.2d 187 (1969). For example, courts look to the parties' relative health, age, education, and employability. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242-43, 170 P.3d 572 (2007), *review denied*, 163 Wn.2d 1055 (2008). *See generally*, Kenneth W. Weber, 20 *Wash. Practice, Family and Community Property Law* § 32.15 (2d ed. 2000) (Washington courts have historically considered a variety of relevant factors involving the spouses when allocating marital property).

Since the enactment of Washington's Dissolution Act in 1973, the statutory standard in RCW 26.09.080(1-2) specifically provides that *all* property, community and separate, is before a court for distribution in a dissolution action. *In re Marriage of Kraft*, 119 Wn.2d 438, 447-48, 832 P.2d 871 (1992).[11] In *In re Marriage of Konzen*, 103 Wn.2d 470, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985), this Court stated that a court in a dissolution action may award the separate property of one spouse to the other to achieve the statutorily required "fair, just and equitable" division of property. 103 Wn.2d at 478. This Court *rejected* the concept that the separate property of one spouse could be awarded to the other only in

[11] This principle also applied under pre-Act law. *Friedlander v. Friedlander*, 80 Wn.2d 293, 305, 494 P.2d 208 (1972); *Morris v. Morris*, 69 Wn.2d 506, 509, 419 P.2d 129 (1966).

"exceptional circumstances." RCW 26.09.080 requires a trial court to make a just and equitable distribution of both community and separate property based upon the circumstances of the case. *See also*, *In re Marriage of Larson and Calhoun*, 178 Wn. App. 133, 313 P.3d 1228 (2013), *review denied*, 180 Wn.2d 1011 (2014). In roughly equalizing the parties' pre-dissolution economic status, courts may allocate what is characterized as separate property to achieve rough parity in the parties' status pre-dissolution that they have post-dissolution.[12] The trial court here did not award *any* of Donald's separate property to Heidi.

However, as noted *infra*, any trial court discretion in allocating marital property is tempered by a special principle for long-term marriages.

(b) Maintenance

RCW 26.09.090 addresses spousal maintenance, establishing

[12] *In Marriage of Larson and Calhoun*, *supra*. In a case involving a long-term marriage, the trial court awarded the husband $327 million in net assets, all separate property through Microsoft stock benefits, and awarded the wife 100% of the community assets worth $139 million, and $40 million in his separate assets, "… citing its 'broad equitable powers' to 'make a lopsided division of community assets and also invade a separate estate to the extent necessary to achieve a just result.'" 178 Wn. App. at 136. The award of the husband's separate property, notwithstanding the wife's receipt of $138 million in community assets, was in part justified by the observation that the wife had not been employed during the marriage, and that the husband had "…obtained significant employment and investment experience during the marriage…and…was in a better position to acquire and manage future wealth." *Id.* at 145. In other words, the court considered the disparity in their abilities to financially provide for themselves as they faced the future.

various factors to be addressed in making such an award.[13] An award of maintenance is appropriate even in circumstances in which the spouse seeking maintenance is self-supporting, as a "…flexible tool by which the parties' standard of living may be equalized for an appropriate period of time." *In re Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984).

Necessarily, in long-term marriages, maintenance is considered in conjunction with the allocation of marital property to achieve the appropriate rough parity in pre- and post-dissolution economic situations. Maintenance may be long-term. For example, Division III affirmed the award of maintenance for 20 years to a wife where the evidence was clear that her future ability to earn would not be sufficient to maintain the standard of living the parties established during the marriage. The amount, but not the duration, of the award was reversed in light of the remand in her favor as to the property division. "... we are reluctant to reverse the court's award of spousal maintenance ... But we conclude remand is required in light of our decision regarding the division of property. The trial court necessarily considered the division of property when determining

[13] Spousal maintenance in Washington has long been a vehicle to effectuate a fair and just allocation of marital resources between spouses upon dissolution of a marriage. *In re Cave*, 26 Wash. 213, 216-20, 66 Pac. 425 (1901).

maintenance." *In re Marriage of Marzetta*, 129 Wn. App. 607, 625-26, 120 P.3d 75 (2005), *rev'd on other grounds, In re Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007).

As with allocation of marital property, the general principles on maintenance give way to a more particular rule for long-term marriages.

(c) The Overarching Principle for Long-Term Marriages

In dividing the property of parties in long-term marriages, the trial court must equalize the financial position of the parties. This principle was recognized nearly thirty years ago.[14] The very same concern over economic parity for older spouses, usually women, whose earnings are significantly less than their spouses, resulted in permanent maintenance being awarded. *In re Marriage of Brossman,* 32 Wn. App. 851, 650 P.2d 246 (1982), *review denied*, 98 Wn.2d 1017 (1983);[15] *In re the Marriage of Bulicek,* 59 Wn.

[14] In his often quoted article in the Washington State *Bar News*, the late Judge Robert Winsor observed:

> Long Marriage: Those lasting approximately twenty-five years or more ... In the case of a long marriage, the goal should be to look forward and to seek to place the spouses in the same economic position where, if they both work to the reasonable limits of their respective earning capacities and manage the properties awarded to them reasonably so that they can be expected to be in roughly equal financial positions for the rest of their lives.

Robert Winsor, *Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions*, *Washington State Bar News*, 16 (1982); *Washington Family Law Deskbook*, §32.3(3) at 17 (2d ed. 2000) ("… the trial court must put the parties in roughly equal financial positions for the rest of their lives.").

[15] In *Brossman*, the parties had a long-term marriage and the wife was a stay-at-

App. 630, 800 P.2d 394 (1990);[16] *In re Marriage of Williams,* 84 Wn. App. 263, 927 P.2d 679 (1996), *review denied*, 131 Wn.2d 1025 (1997).[17]

Division I *explicitly* adopted the interpretive principle that spouses in a long-term marriage must be placed in roughly comparable financial circumstances post-dissolution that they enjoyed pre-dissolution was more explicitly adopted in *In re Marriage of Rockwell, supra*. "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." 141 Wn.

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home parent of the parties' four children. Division I upheld a maintenance award to the wife for the rest of her life or until she re-married. 32 Wn. App. at 856.

[16] In *Bulicek*, the parties were married for 26 years. The husband continued to work after the divorce and to earn retirement benefits. 59 Wn. App. at 631. The trial court used the time rule method to divide his pension. On appeal, the husband argued that the trial court should have valued and apportioned his pension at the time of trial so that the wife would not receive a portion of his post-separation retirement pension contributions. *Id.* at 636. Division I upheld the trial court's decision to award the wife maintenance until the husband's pension benefits commenced, entitling her to a share in the husband's post-separation pension increases. The court noted the length of the couple's marriage before separation; the husband's "advancements and pay raises during that time came as a direct result of community effort and performance … [T]he prospective increase in retirement benefits due to increased pay after separation is founded on those 22 years of community effort." *Id.* at 638-39. The court affirmed the pension award to recognize the wife's community contribution to the increase in the pension's value. *Id.* at 639.

[17] In *Williams,* the couple separated after 27 years of marriage. 84 Wn. App. at 265. The husband's pension vested and matured one month before trial, but he decided to continue working. *Id.* at 266. The trial court awarded the wife maintenance equal to one-half of the community share of the husband's retirement benefit, including four years of military service retirement he accrued before the marriage. *Id.* Division I affirmed, reiterating that the paramount concern in determining the appropriateness of maintenance is the post-dissolution economic position of the parties. *Id.* at 268. Like the *Bulicek* court, the court considered the wife's level of education and potential earnings as compared to her husband's financial circumstances when addressing the appropriateness of the trial court's maintenance award.

App. at 243.[18] In subsequent decisions, Division I re-affirmed the *Rockwell* principle.[19] Division II has also followed the *Rockwell* principle.[20] Prior to this case, only Division III has expressed any reticence about doing anything more than making a fair allocation of marital property.[21] Division

[18] The court cited to the WSBA *Washington Family Law Deskbook* referenced *supra*.

[19] *In re Marriage of Wright*, 179 Wn. App. 257, 319 P.3d 45, *review denied*, 180 Wn.2d 1016 (2014) (court indicated that to achieve the rough economic parity envisioned in *Rockwell*, a court could account for each spouse's likely post-dissolution earnings in making the allocation of spousal property). There, Division I affirmed a trial court decision that involved an equalizing payment and spousal maintenance award to secure economic parity where the husband, a doctor, had significantly greater earning capacity, *id*. at 262-63, and also rejected the husband's argument that a maintenance award was "unjust" in a high income spouse case, concluding that a court could make an unequal property division and a maintenance award in favor of the same spouse. *Id*. at 269. *See also*, *VonAllmen v. VonAllmen*, 198 Wn. App. 1042, 2017 WL 1397147 (2017) at *2 ("In a long-term marriage, the court's objective is to place the parties in roughly equal financial positions for the rest of their lives. Similarly, in awarding maintenance, the court must make a just award to equalize the parties' standard of living for an appropriate period of time.").

[20] In dissolving a marriage of 26 years, Division II upheld an award to the wife of twelve years of maintenance in gradually decreasing amounts every four years. *In re Marriage of Wilson,* 165 Wn. App. 333, 339, 267 P.3d 485 (2011). The facts in *Wilson* are strikingly similar to this case. The wife put off her career plans to raise the children until about three years before the separation, five years before the divorce. *Id*. at 336. The decision in *Wilson* is consistent not only with *Rockwell*, but with the standards contained in the spousal maintenance statute, RCW 26.09.090, and principles established in prior case law that construe that statute. *See also, Faber v. Faber*, 192 Wn. App. 1022, 2016 WL 236468 (2016) at *3 ("In a long-term marriage, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives."). *See also, In re Marriage of Burks,* __ Wn. App. 2d ___, 2018 WL 2946178 (2018) (Division II reaffirms application of *Rockwell* to distribution of property in a long-term marriage to put parties in positions roughly similar to those that they had pre-dissolution and affirms trial court decision to allocate proceeds of wife's separate property account to husband as matter of equity); *In re Marriage of Tablazon*, ___ Wn. App. 2d ___, 2018 WL 3641740 (2018) (Court cites *Rockwell* principle regarding long-term marriages in reversing trial court decision to give 100% of interest in house, the primary asset of the parties in a long-term marriage, to the wife).

[21] *E.g., In re Marriage of Doneen*, 197 Wn. App. 941, 950, 391 P.3d 594 (2017), *review denied,* 188 Wn.2d 1018 (2017) (*Rockwell's* policy in long-term marriages was

I's opinion here ignores its own decisions in *Wright*, *VonAllmen*, or Division II precedent applying *Rockwell* and instead relies on *Doneen*. Op. at 6-7.

There is now a clear split of authority on the *Rockwell* principle, a principle that better implements the overall policy articulated in RCW 26.09.080/.090 in making a just apportionment of spousal property, and treating wives, in particular, in long term marriages fairly.[22] The trial court failed to honor the *Rockwell* principle for treatment of marital assets in the dissolution of long-term marriages; Division I's opinion equivocated on the validity of that principle. This Court should grant review to definitively articulate the applicable policy for the distribution of marital assets in long-term marriages.

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permissive, not mandatory); *In re Marriage of Willson*, 199 Wn. App. 1019, 2017 WL 2445536 (2017).

[22] The failure to adhere to the *Rockwell* policy for long-term marriages implicates Washington's Equal Rights Amendment, article 31, § 1: "Equality of rights and responsibilities shall not be denied or abridged on account of sex." The ERA flatly prohibits discrimination based on sex. *Darrin v. Gould*, 85 Wn.2d 859, 871, 540 P.2d 882 (1975) (state ERA does more than repeat what is already contained in other state and federal constitutional provisions); *Marchioro v. Chaney*, 90 Wn.2d 298, 305, 582 P.2d 487 (1978), *aff'd*, 442 U.S. 191, 99 S. Ct. 2243, 60 L. Ed. 2d 816 (1979); *Guard v. Jackson*, 132 Wn.2d 660, 663-64, 940 P.2d 642 (1997). The impact of a policy that does not provide for rough parity falls more heavily on women, who, historically, were more likely to be stay-at-home parents. *See* Milton C. Regan, Jr., *Divorce Reform and the Legacy of Gender*, 90 Mich. L. Rev. 1453, 1458 (1992) ("Despite significant changes in social attitudes in the past three decades, and notwithstanding the elimination of much formal sex discrimination in the law, women remain far more economically vulnerable than men in American society.").

(2) The Trial Court Failed to Put the Parties in a Roughly Comparable Financial Position Post-Dissolution to Their Pre-Dissolution Financial Position

The trial court here failed to place Heidi in a roughly comparable position to Donald and instead overemphasized the separate property status of some of the parties' assets.

To put the case in appropriate financial context, there is little legitimate dispute that the trial court's decisions on the division of the parties marital property, maintenance, child support,[23] and fees reflected this failure to honor the rough parity principle as to the economic status, post-dissolution, of spouses in a long-term marriage. The trial court's decision allocated the marital property overall on roughly a 55/45 basis in Heidi's favor but largely gave Donald liquid assets while giving her non-liquid assets like the marital home. That home, a 90-year-old English Tudor-style home, CP 597, had a substantial mortgage that Heidi was fully responsible to satisfy. CP 623. The house was also in need of substantial upgrades to remain livable, to which Heidi testified.[24]

[23] The court penalized Heidi because she was a full-time parent and homemaker, attributing income to her for child support purposes because she allegedly was "voluntarily underemployed," Division I's opinion properly remedied the injustice of treating Heidi as voluntarily unemployed.

[24] Notwithstanding that testimony regarding the need for repairs and the effect of Sound Transit construction on it, ex. 8; RP 106-19, the trial court characterized the work as "elective and not necessary." CP 597. The court acknowledged that the home had cracks in it. CP 597. Heidi's characterization of the home's general state was corroborated by Darcy Simmons, the parties' joint appraiser, RP 226-27, as the trial court acknowledged.

The trial court noted that the income of the parties is "significantly disproportionate." CP 600. From the allocation of marital property, Donald had the benefit of his very substantial corporate income, subject only to payments of spousal maintenance to Heidi of $10,000 per month for a period of six years; the trial court found that he made $387,000 per year, CP 600, leaving him very substantial monthly income, and few debts. CP 624. After the dissolution, Donald retains his lucrative position, with its expansive salary, bonuses, and generous fringe benefits. Although he must pay Heidi maintenance for a period of six years, pay a portion of his 401(k) account to her, and bear part of the child support for their daughters, he is essentially free of debt. He retains all of his Phillips 66 stock[25] and his future pension. He has a lavish lifestyle for himself and Melanie Wallace with luxury cars, travel, dining at fine restaurants and the like. RP 407-13.

The court also accepted Donald's contention that his lucrative oil company position might be at some peril due to changes in the market place, CP 598-99, and that he would retire within a few years. CP 598. Both

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CP 597. Simmons may not have seen the full extent of the cracks in the house and driveway, however. RP 230-31. Her appraisal assumed no major structural repairs for the house or yard. RP 232-34.

[25] None of Donald's separate property, principally his Phillips stock, was awarded to Heidi, CP 750, 757; it was worth hundreds of thousands of dollars. CP 759-71. Donald continues to accrue such stock options in the course of his continued Phillips employment.

determinations were entirely speculative.[26] The trial court made no effort to fine-tune its ruling so that if Donald continued to work in his highly compensated executive position, the financial rulings would be altered.

By contrast, the trial court evidenced significant less regard for Heidi's actual financial situation post-dissolution. Heidi was not immediately employable and required retraining to enter the job market. CP 599.[27] From the spousal maintenance, she is expected to pay for the mortgage on the house and any repairs to it, taxes, retraining expenses, child support, and postsecondary education expenses for Jillian and Sophie. CP 620-40. She has incurred health care costs after 2017, as the trial court ended Donald's obligation to provide such insurance to Heidi at that time. CP 787.[28] Patently, she will need to invade the liquid assets transferred to her from Donald's 401(k) account to remain afloat, harming her future

[26] Donald has continued his Phillips 66 employment. During the marriage, his retirement desire was never "a plan." RP 284-85. His proposed retirement date would have him retire at 58, RP 414, walking away from his significant executive compensation and benefits package, a counterintuitive proposition, given his quite lavish style of life. RP 407-13. In any event, even were Donald to lose his employment, he had marketable skills coupled with 30 years of executive experience, making him an attractive candidate for employment. RP 426-27. On retirement from Phillips, he himself stated that he would be employable "in a heartbeat." RP 426-27.

[27] The trial court's finding on this point is oddly equivocal; the court asserted that Heidi had kept her "basic skills relative current," but then stated "it was communicated that unless Ms. Kaplan sought to advance her education in an area of interest to her, she would be capable of securing only minimum wage positions." CP 599. In fact, Goodenough testified that Heidi was not ready for full-time employment. RP 179-82.

[28] Donald even terminated their membership in the Washington Athletic Club. RP 71-72, 348-50.

circumstances on retirement, as she does not have either a pension or a 401(k). She will be compelled to consider the sale of the Seattle home and other steps that will result in a lifestyle unlike that which she enjoyed pre-dissolution. RP 72-73.

The trial court in this case largely preserved Donald's pre-dissolution economic status in the disposition of marital property. It did not do so for Heidi. Donald retained a substantial income from a high-paying executive position with limited debts or other obligations. Heidi received the Seattle house, but it is burdened with a *substantial* mortgage and major repair needs. Heidi received maintenance for six years, but she is also saddled with heavy expenses to retrain for the work force and to pay child support and post-secondary education expenses for her daughters. Heidi's post-dissolution economic status in no way reflects her economic situation pre-dissolution. *See, e.g.,* Ex. 2; RP 72-73 (WAC membership). *Compare* RP 407-13.

This Court should grant review. RAP 13.4(b).

(3) Heidi Is Entitled to Her Fees on Appeal

RCW 26.09.140 authorizes an award of fees on appeal. RAP 18.1(a). This Court should award Heidi her fees on appeal.

F. CONCLUSION

This Court should grant review of Division I's published opinion and reverse the trial court's decisions on maintenance/property division and remand the case to the trial court for a new trial in which the trial court properly undertakes the disposition of marital assets in a long-term marriage. The Court should award Heidi her costs, including reasonable attorney fees, on appeal.

DATED this 7th day of August, 2018.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of HEIDI K. KAPLAN, Appellant, and DONALD C. KAPLAN, Respondent.	No. 76306-7-I DIVISION ONE PUBLISHED OPINION FILED: July 23, 2018

MANN, A.C.J. — Heidi Kaplan appeals the division of property, award of maintenance, and child support calculation. She argues that the trial court failed to recognize the long-term marriage and to allow her to maintain her predissolution economic status, improperly imputed income to her for child support, and failed to award her attorney fees. We reverse the trial court's decision to impute income for child support. We affirm on all other issues.

FACTS

Donald Kaplan and Heidi Kaplan married on October 7, 1990.[1] After a marriage of 25 years, Donald and Heidi separated on July 20, 2015. Donald filed a dissolution

[1] We refer to the parties by their first names in order to avoid confusion. No disrespect is intended.

action on July 6, 2015, in Harris County, Texas. Heidi filed her petition for dissolution in the King County Superior Court on July 15, 2015. After concluding that Washington had jurisdiction over the dissolution, the Texas court dismissed Donald's petition without an award of costs to either party. A five-day bench trial in King County Superior Court began on June 20, 2016.

At the time of the dissolution, Donald was a business development manager at Phillips 66. Donald had worked for Phillips 66, or its predecessor company, since 1990. Donald's career required the family to move four times for different positions. The family had lived in Seattle since 2001. Donald accepted a promotion in 2014 and transferred to Houston. Heidi and their two children remained in Seattle. At the time of trial, Donald's gross monthly salary was $19,802 monthly and $237,624 annually. Including his average annual bonus, Donald's annual salary was approximately $387,000 per year.

In 2014, Donald and Heidi discussed Donald's desire to retire after their youngest daughter, Sophie, graduated from high school. During trial, Donald testified that he intended to retire in roughly four years. Donald also testified he had concerns about his continued employment at Phillips 66. Brent Longnecker, a consultant who advises energy companies in strategy, governance, and executive pay testified on behalf of Donald. Longnecker testified that Donald's position in business development and acquisitions was at risk because oil companies are less inclined to make capital expenditures and expand their business.

Heidi graduated from Syracuse University in 1985 with a Bachelor of Science degree in speech communications and rhetorical studies. After graduating, Heidi

pursued a career in product development and merchandising until their older daughter, Jillian, was born in 1996. The Kaplan's second daughter, Sophie, was born in 1999. Heidi remained at home to take care of Jillian and Sophie from 1996 until the time of trial in June 2016. At the time of the trial, Jillian was 20 years old and in college in California; Sophie was 17 and a high school senior in Seattle. Over the years, Heidi volunteered at Jillian and Sophie's schools, including acting as president of the parent teacher association. In doing so, she organized fundraisers and events, engaged in community outreach, and managed volunteers. Heidi also attended workshops and courses, such as a grant writing course and an art history course.

At trial, Heidi argued that she was at the time unemployable. David Goodenough, a vocational counselor, testified in support of this contention. Goodenough assessed both Heidi's immediate employability and her long-term career capabilities as of May 2016. Goodenough offered his expert opinion that Heidi was not currently employable except at a "low end" job. Goodenough testified that Heidi required retraining to secure marketable skills, a process that would require time.

The trial court entered findings of fact, conclusions of law, and a final dissolution decree on October 25, 2016. As for the distribution of property, the court found, and the parties do not dispute, that the overall value of the estate was $5.2 million. Donald asked the court to effectively award him 50 percent of the community property. Heidi asked the court to effectively award her 60 percent of the community property. The trial court concluded that "[w]hen 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 assets to Ms. Kaplan and 45% to Mr. Kaplan."

The trial court next addressed maintenance for Heidi. The trial court found that Donald's salary was likely to stay flat or experience only small increases and that future bonuses were unlikely. The trial court also found that Donald hoped to retire in 2020. Heidi requested maintenance in the amount of $18,850 per month for 12 years, until Donald was 66 years old in 2028. Donald agreed that Heidi should receive maintenance, but asked the court to order maintenance for 5 years at $9,500 per month. After finding that Donald would continue working for roughly four more years, that Heidi was healthy, well educated, and had maintained a basic skill set, and that both parties' monthly expenses were approximately $10,000, the trial court awarded maintenance to Heidi at $10,000 per month for 6 years, until August 2022. The court also noted that Heidi may "choose to enroll in an education program," but stated the court "is not specifically awarding maintenance in consideration of any such possible program."

The parties agreed to a parenting plan. The court entered a child support order imputing a monthly income of $2,714 after finding Heidi was "voluntarily underemployed" under RCW 26.19.071(6). The trial court declined to award fees.

Heidi appeals.

ANALYSIS

Distribution and Maintenance

1. Effect of Long-Term Marriage

Heidi's primary argument is that the trial court erred, as a matter of law, in failing to place the parties in roughly the equivalent financial position they had before the dissolution. We disagree.

Heidi's argument appears based on two incorrect premises. First, Heidi repeatedly asserts that the trial court "must endeavor to place the parties in roughly the equivalent financial position they had before the dissolution after the dissolution." Heidi offers no legal authority for this assertion. Upon dissolution, the trial court must provide for a just and equitable distribution of the parties' assets, liabilities, and income. The predissolution economic circumstances of the parties is just one factor that the trial court must consider. RCW 26.09.080(4) (disposition of property); RCW 26.09.090(1)(c) (maintenance). Heidi is not "entitled to maintain her former standard of living as a matter of right." Cleaver v. Cleaver, 10 Wn. App. 14, 20, 516 P.2d 508 (1973).

Heidi also asserts that in distributing assets and awarding maintenance, the trial court must follow the "overarching premise" that because of their long-term marriage, the parties must be placed in roughly equivalent financial positions for the rest of their lives. Heidi's argument is based on an overly narrow reading of the statement made by this court in Marriage of Rockwell, 141 Wn. App. 235, 243, 170 P.3d 572 (2007), that in long-term marriages of over 25 years "the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives."

Rockwell, affirmed the trial court's unequal distribution of community property after a long-term marriage. The trial court did not, however, limit its consideration to the length of the marriage or conduct a mathematical analysis to ensure equal financial positions for the rest of the parties' lives. Instead, the trial court examined a variety of factors in reaching its decision to award an unequal distribution. As this court explained,

> This requires considering the combination of the division of property and the expected income and earnings of the parties. And, 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. Peter was younger, in good health and employable at a substantial wage. Moreover, substantial evidence showed that Carmen was retired, older and in poor health. Accordingly, the trial court did not abuse its discretion when it compared Peter's age, health and employability (and thereby, future earning capacity) against Carmen's as a basis for its 60/40 split of the community property.

Rockwell, 141 Wn. App. at 249.

In a recent case, Division Three of this court considered and rejected an argument similar to Heidi's. In Marriage of Doneen, 197 Wn. App. 941, 950, 391 P.3d 594, 599 (2017), review denied, 188 Wn.2d 1018, 396 P.3d 337 (2017), the wife appealed the trial court's property division that left her with less than 50 percent of the marital assets. She argued that under Rockwell, the court was required to equalize the financial circumstances of the parties because they had a long-term marriage. Doneen, 197 Wn. App. at 945. The court rejected this argument, holding that the objective established in Rockwell "was permissive in nature, not mandatory, in nature." Doneen, 197 Wn. App. at 950. In affirming, the court noted that the trial court properly "declined to utilize an inflexible rule, but rather properly considered all of the circumstances of the

marriage and exercised its discretion to attain a result in accordance with RCW 26.09.080." Doneen, 197 Wn. App. at 951.

We agree with the analysis in Doneen. 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)(c) and reach a just and equitable distribution. We decline Heidi's request to hold that failure to place the parties in roughly the equivalent financial position for the rest of their lives constitutes an error of law. The objective stated in Rockwell, is just that, an objective, which is to be considered as the trial court determines the "fair, just, and equitable division of the property."

Accordingly, we review the trial court's distribution of property and award of maintenance.

2. Distribution of Property

"The trial court's distribution of property in a dissolution action is guided by statute." Rockwell, 141 Wn. App. at 242. The court must consider: "(1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and (4) the economic circumstances of each spouse at the time the division of the property is to become effective." RCW 26.09.080. In considering these factors, the court must make a "just and equitable" distribution of the parties' property and liabilities, whether community or separate. RCW 26.09.080. All property is brought before the court for distribution. Farmer v. Farmer, 172 Wn.2d 616,

625, 259 P.3d 256 (2011). The trial court is in the best position to decide issues of fairness. Brewer v. Brewer, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). Accordingly, the court has "broad discretion" to determine what is just and equitable based on the circumstances of each case. Rockwell, 141 Wn. App. at 242.

The trial court is not, however, required to divide community property equally. "The longer the marriage, the more likely a court will make a disproportionate distribution of the community property." Rockwell, 141 Wn. App. at 343. "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." Rockwell, 141 Wn. App. at 242 (citing 2 WASH. STATE BAR ASS'N, WASHINGTON FAMILY LAW DESKBOOK § 32.3(3), at 32-17 (2d ed. 2000)). But "[f]airness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules." Marriage of Tower, 55 Wn. App. 697, 700, 780 P.2d 863 (1989). As our Supreme Court explained in Marriage of Konzen,

> This court will not single out a particular factor, such as the character of the property, and require as a matter of law that it be given greater weight than other relevant factors. The statute directs the trial court to weigh all of the factors, within the context of the particular circumstances of the parties, to come to a fair, just and equitable division of property. The character of the property is a relevant factor which must be considered, but is not controlling.

103 Wn.2d 470, 478, 693 P.2d 97 (1985)

"A property division made during the dissolution of a marriage will be reversed on appeal only if there is a manifest abuse of discretion." Marriage of Muhammad, 153 Wn.2d 795, 803, 108 P.3d 779 (2005). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons."

Marriage of Larson, 178 Wn. App. 133, 138 313 P.3d 128 (2013). "If the decree results in a patent disparity in the parties' economic circumstances, a manifest abuse of discretion has occurred." Rockwell, 141 Wn. App. at 243.

The net value of the Kaplans' predissolution assets was calculated at $5.2 million, with the overall community property being valued at $4.77 million. The high value community property items included: (1) the parties' house in the Montlake area of Seattle, appraised at $1.3 million, with an existing mortgage of $370,057, for a net value of $944,943; (2) Donald's Vanguard 401(k) savings account, with a net value of $1.8 million; and (3) a commonwealth account with a net value of $1.19 million. The parties also split several lower value accounts. The trial court distributed the full value of the Seattle house to Heidi; making Heidi also responsible for the mortgage. The trial court unevenly divided the Vanguard 401(k) account, with over $1 million being distributed to Heidi, and $768,225 being distributed to Donald. The trial court split the commonwealth financial network account 50/50. In the end, Heidi received a net value of $2,627,298 in community property and Donald received $2,149,434. It is undisputed that Heidi received slightly over 55 percent of the community property.

Heidi acknowledges the trial court distributed the community property on a 55/45 basis in Heidi's favor, but argues the trial court erred by largely giving "Donald liquid assets while giving her nonliquid assets like the marital home." Heidi argues that Donald was left with his income and limited debts, whereas, she received the Seattle house, which is "burdened with a substantial mortgage and major repair needs."

We hold the trial court did not abuse its discretion in its distribution. At trial, Heidi specifically requested that she be awarded the house in Montlake, maintaining she did

not wish to put it up for sale and divide the proceeds. Heidi testified that she intended to live in the house then sell it after Sophie left home. Heidi does not contest the stipulated net value of the house was $944,943, which took into account the mortgage that encumbered the house. Heidi also received a larger share of the 401(k), totaling more than a million dollars. The combined value of the house and the 401(k) account established nearly half of the parties overall assets.

Because the house and the 401(k) each have such a high net value, they necessarily would affect the other assets that Heidi would receive. The trial court had no other way of accommodating these requests without also allocating other assets to Donald "in order to make the division just and equitable." See Wright, 179 Wn. App. at 263. Some of which may have been more liquid. Heidi cannot now complain that she received what she requested.

At trial, and on appeal, Heidi contends the house was less valuable because the house was in need of substantial upgrades to remain livable, and argues the trial court erred in finding the house did not need any immediate repairs. We review a trial court's findings to determine whether they are supported by substantial evidence in the record. Wilson, 165 Wn. App. at 340. This court will not "substitute its judgment for the trial court's, weigh the evidence, or adjudge witness credibility." Rockwell, 141 Wn. App. at 242. "In determining whether substantial evidence exists to support a finding of fact, the record is reviewed in the light most favorable to the party in whose favor the findings were entered." Marriage of Gillespie, 89 Wn. App. 390, 404, 948 P.2d 1338 (1997).

At trial, Heidi testified that the house had cracks in the walls and the driveway required repair. The trial court acknowledged these cracks; however, the trial court

found the testimony "was consistent that any work to be done is elective and not necessary." The trial court reasoned, "[Heidi] did not present the Court with any documentation from third party contractors about the work she indicated was necessary, and what the cost would be to make repairs or improvements." We hold substantial evidence supports this finding.

At trial, the parties agreed on a joint appraiser, Darcy Simmons. When Simmons was performing her appraisal of the home, Heidi was present and pointed to issues with the house, including the cracks in the plaster and the concrete. Simmons testified that she took those cracks, and the overall condition of the property, into consideration for her appraisal. When the appraisal was finalized, it was not conditioned on the repair of the cracks.[2] Because Heidi did not present evidence to support her claim that upgrades or repairs would be necessary, or that the house was not structurally sound, the trial court did not err in accepting the appraised value.

Heidi also argues that the trial court erred when it "overemphasized the separate property status of some of the parties' assets." In this case, the trial court did preserve the parties' various separate property—and the value of Donald's separate property far exceeded Heidi's separate property.

Donald had several high value items that were identified as separate property: (1) Donald's unvested stock award, valued at $90,176, (2) Donald's unvested restricted stock units accrued after the date of separation with the net value of $150,908, (3) Donald's Bank of America checking account with the net value of $46,122, and (4)

[2] At trial, the parties admitted an engineering report, exhibit 7, which apparently stated, "the cracks were cosmetic." However, this exhibit was not provided on appeal. The appraisal was conditioned on the property not having structural damages. No structural damages were shown.

Donald's personal share of the Vanguard 401(k) accruing after the separation with the net value of $50,666. Heidi had two assets identified as separate property: (1) the Michigan condominium Heidi co-owns with her brothers with the net value of $35,417 and (2) her Bank of America checking account with the net value of $16,227. Donald's personal property was worth $373,642 and Heidi's was worth $51,644. Adding the separate property to the community property each party received, Donald received $2,523,076 and Heidi received $2,678,942. With the separate property considered, the distribution percentage shifts slightly, with Heidi receiving 52 percent of the assets.

Heidi is correct that Washington courts no longer abide by a strict rule that protects separate property from distribution. "Under appropriate circumstances," the trial court "need not divide community property equally, it need not award separate property to its owner." White v. White, 105 Wn. App. 545, 549, 20 P.3d 481 (2001). The court need only "make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors." White, 105 Wn. App. at 549; RCW 26.09.080.

However, Heidi has not presented evidence or argument that the trial court abused its discretion in not distributing Donald's personal property. With the separate property considered, Heidi still received 52 percent of the assets, as well as maintenance. The trial court did not abuse its discretion in preserving the parties' personal property.

3. Maintenance

An award of maintenance is "a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time." Marriage of Washburn, 101 Wn.2d

168, 179, 677 P.2d 152 (1984). "The only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of the relevant factors, the award must be just." Marriage of Bulicek, 59 Wn. App. 630, 633, 800 P.2d 394 (1990). The factors to be considered include, but are not limited to, "(1) the financial resources of the party seeking maintenance, (2) the time needed to acquire education necessary to obtain employment, (3) the standard of living during the marriage, (4) the duration of the marriage, (5) the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance, and (6) the ability of the spouse from whom maintenance is sought to meet his or her needs and obligations while providing the other spouse with maintenance." Marriage of Valente, 179 Wn. App. 817, 821-22, 320 P.3d 115 (2014); RCW 26.09.090. We review a trial court's award of maintenance for abuse of discretion. Valente, 179 Wn. App. at 822.

The trial court awarded Heidi maintenance of $10,000 per month for 6 years, ending in August 2022. Heidi argues on appeal that this maintenance award was an abuse of discretion because "she is also saddled with heavy expenses to retrain for the work force and to pay child support and post-secondary education expenses for her daughters."

In this case, the trial court entered substantial findings explaining the factors it considered in determining the amount and duration of the maintenance award. The trial court's determination of $10,000 a month was based on evidence presented by Heidi that she needed $10,000 a month to meet her expenses. Heidi did not dispute this finding or provide any evidence that more was required. In determining the length of time for maintenance, the trial court considered that Donald's income was substantially

higher than Heidi's, and the evidence, provided by both parties, that Donald planned to retire in roughly four years. The trial court also stated, "due to substantial assets available to each party, it is clear that [Heidi] has a demonstrated capacity of self-support."

Heidi first assigns error to the trial court's finding that Donald's "position might be at some peril due to changes in the market place, . . . and that he would retire within a few years." Asserting, "[b]oth determinations were entirely speculative." While there is no guarantee when Donald will retire, both parties testified that Donald had stated he wanted to retire in a few years. The trial court found this testimony to be credible, and the appellate court will not substitute its "judgment for the trial court's, weigh the evidence, or adjudge witness credibility." Rockwell, 141 Wn. App. at 242.

Heidi next argues that the trial court failed to properly consider her expert's testimony that she was currently unemployable, and argues the trial court erroneously determined Heidi was healthy, well educated, and had maintained a basic skill set.

Contrary to Heidi's assertion, the trial court did recognize that Heidi was not immediately employable in anything other than a minimum wage position in the ruling. The trial court did, however, discount Heidi's expert testimony, finding

> Mr. Goodenough didn't start work until May 2016. His testimony, in particular the vocabulary he used such as "displaced homemaker" and "trying on the dress" and his indication that he believed that Ms. Kaplan needed to stay home to parent her children, certainly communicated that Mr. Goodenough is operating within an expired and outdated framework. That, and his limited time to evaluate Ms. Kaplan, certainly led this Court to consider his testimony in a very limited manner.

Again, we reserve the determination of witness credibility for the trial court. Rockwell, 141 Wn. App. at 242. Even considering Heidi's employability, the trial court determined,

"based on the parties' asset base, [Heidi] does not have an imminent need to secure employment." This was not an abuse of discretion.

Heidi argues, however, that the trial court erred in relying on her "asset base" because she should not be required to sell her house or to use the amount given to her in the 401(k). This argument is not supported by law. To the contrary, "[t]he trial court may properly consider the property division when determining maintenance, and may consider maintenance in making an equitable division of the property." Marriage of Estes, 84 Wn. App. 586, 593, 929 P.2d 500 (1997). Heidi was awarded the family home and other assets for her to use to maintain her standard of living. The trial court did not err in considering the assets in awarding maintenance.

Moreover, even if Heidi decided not to use the assets to support her standard of living, there is evidence in the record that six years of maintenance should provide sufficient time to obtain any further education necessary to reenter the job market. Heidi has not demonstrated this maintenance award was unjust or a manifest abuse of discretion.

Child Support and Imputed Income

Heidi next argues that the trial court erred in its child support calculation by finding she was voluntarily unemployed and imputing income to her because she was a full-time stay at home mother. We agree.

We review child support orders for a manifest abuse of discretion. Marriage of Griffin, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). In calculating child support, the trial court must consider all income and resources of each parent's household. RCW 26.91.071(1). This includes income such as salaries, wages, interest and dividends,

along with other sources of income including maintenance actually received. RCW 26.19.017(3)(q). The trial court is required to impute income to a parent when the parent is "voluntarily unemployed or voluntarily underemployed." RCW 26.19.017(6). The determination of whether a parent is voluntarily unemployed or underemployed is "based upon that parent's work history, education, health, and age, or any other relevant factors." RCW 26.19.017(6). "A court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation." RCW 26.19.017(6).

The trial court found that based on her work history, education, health, and age, Heidi was able to work and was therefore voluntarily unemployed. Based on its finding that she was voluntarily unemployed, the court imputed income of $2,714 per month to Heidi over and above the $10,000 per month in maintenance awarded to Heidi. The trial court erred.

First, the trial court erred in failing to consider that it had already determined that an award of $10,000 per month to Heidi for maintenance was appropriate based on the statutory factors for awarding maintenance. Because RCW 26.19.071(3)(q) requires the court consider maintenance as income during the time that Heidi is receiving maintenance, the court erred in finding Heidi was voluntarily unemployed. Finding Heidi was voluntarily unemployed is contrary to the purpose of awarding maintenance and the child support statute. Moreover, the court failed to consider its own finding that "Ms. Kaplan put her employment advancement on hold in support of the community; specifically, so that she could care for the children as well as support Mr. Kaplan's

career goals that took him out of town extensively." Care for the community and children are "other relevant factors" that the trial court must consider in determining whether Heidi was voluntarily unemployed. RCW 26.19.017(6).

Donald relies on three older cases from Divisions Two and Three of this court in support of his argument that it would have been reversible error had the trial court failed to impute income to Heidi. Marriage of Jonas, 57 Wn. App. 339, 788 P.2d 12 (1990); Marriage of Wright, 78 Wn. App. 230, 896 P.2d 735 (1995); Marriage of Pollard, 99 Wn. App. 48, 991 P.2d 1201 (2000).

Jonas was a modification proceeding involving parents that were both voluntarily unemployed postdissolution. The father was attending school and the mother chose to stay at home to care for their children. Division Two concluded that because both parties elected to remain unemployed for personal reasons, the trial court erred in failing to determine and consider the mother's earning capacity. Jonas, 57 Wn. App. at 340-41.

Similarly, in Wright, Division Two affirmed the trial court's decision declining to award maintenance to the mother after concluding maintenance was not appropriate under the statutory criteria and because an unequal distribution of property substantially improved the mother's financial position. Wright, 78 Wn. App. at 237-38. Then, based on the holding in Jonas, Division Two affirmed the trial court's imputation of $300 per month income to the mother because she was working only half time at a hospital while raising her five children.

In Pollard, Division Three reviewed the trial court's decision failing to impute income in a modification proceeding. Under the terms of the initial dissolution, the

mother was required to pay the father, the primary residential parent, $217 per month for child support. After the mother remarried, she sought modification of the child support because she had left full time employment and was instead staying home to work "full time as a mother and homemaker." Pollard, 99 Wn. App. at 50-51. The trial court agreed to the modification request and reduced the mother's obligation to $85 per month. Pollard, 99 Wn. App. at 51. Division Three reversed after concluding that the mother's choice to give up her previous salary was voluntary and motivated by the decision to stay home and raise the two children from her new marriage.

The facts in this case are distinguishable from Jonas, Wright, and Pollard. Moreover, to the extent Jonas, Wright, and Pollard stand for the proposition that a trial court must impute income anytime a spouse voluntarily stays home in support of the community to raise children, we decline to follow those cases. We hold that where, as here, 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 court erred in finding at the time of dissolution that Heidi was voluntarily unemployed and voluntarily underemployed.[3]

Under the facts in this case, the trial court's decision to impute income to Heidi for child support was a manifest abuse of discretion.[4]

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[3] The record established that Heidi had not been employed since the birth of their first child in 1996.

[4] Heidi argues that the trial court was biased and requests reassignment to a new judge on remand. The remedy of reassignment has limited availability: "even where a trial judge has expressed a strong opinion as to the matter appealed, reassignment is generally not available as an appellate remedy if the appellate court's decision effectively limits the trial court's discretion on remand." State v. McEnroe, 181 Wn.2d 375, 387, 333 P.3d 402 (2014). Only "where review of facts in the record shows the judge's impartiality might reasonably be questioned," will the appellate court remand the matter to another judge. State v. Solis-Diaz, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). After reviewing the record in this case, we

Attorney Fees

Heidi argues the trial court erred in not awarding her attorney fees due to Donald's intransigence because he filed his original proceeding in Texas. Heidi also argues that this court should award fees under RCW 26.09.140. We affirm the trial court's ruling denying fees and deny fees on appeal.

At trial, the court denied the request for fees, stating "each party should pay his/her own fees or costs." The court noted that "the parties have accessed community funds to pay for their respective attorney's fees" and held,

> [t]here is no evidence of intransigence. To the contrary, the parties have been able to proceed through the course of their dissolution without the need for Temporary Orders of any kind. They entered an Agreed Parenting Plan at the time of trial. There is no evidence to suggest that either party has acted in bad faith or with any intention to unnecessarily increase the cost of litigation to the other, whether financially or emotionally.

At trial, both parties acknowledged that Heidi had used community funds to pay her attorney fees. Heidi later effectively withdrew her request for fees, stating, "I didn't argue fees, because I'm not asking for fees. I had that section in the brief because I felt that if Dr. Smith were forced to testify, it should be unnecessary, I was going to ask compensation for that. But since it ultimately became unnecessary, I didn't pursue the issue of fees."

We review attorney fee awards based on intransigence for an abuse of discretion. Marriage of Bobbitt, 135 Wn. App. 8, 29-30, 144 P.3d 306 (2006). "Discretion is abused when the court's decision is outside the range of acceptable

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hold the trial court's impartiality cannot "reasonably be questioned," and decline to order reassignment on remand.

choices or based on untenable grounds or untenable reasons." Wixom v. Wixom, 190 Wn. App. 719, 725, 360 P.3d 960 (2015). We hold the trial court did not abuse its discretion. The only claim of intransigence is that Donald originally filed for divorce in Texas. That proceeding was quickly dismissed and no further issues were raised. A finding that Donald was not intransigent was not "outside the range of acceptable choices."

Heidi also requests fees on appeal. This court may award costs and attorney fees on appeal after considering the financial resources of both parties under RCW 26.09.140. Marriage of Wilson, 117 Wn. App. 40, 51, 68 P.3d 1121 (2003). In considering the financial resources of both parties, the appellate court balances the needs of the requesting party against the other party's ability to pay. Marriage of Trichak, 72 Wn. App. 21, 26, 863 P.2d 585 (1993). Both parties argue they should be awarded fees. After considering the record, we deny both parties' request for fees on appeal. Each party is financially able to pay his or her attorney fees and neither would be under a critical hardship to do so.

We reverse the trial court's decision imputing income to Heidi for child support and remand for a recalculation of child support. We affirm on all other issues.

Mann, ACJ

WE CONCUR:

Leach, J.

Schindler, J.

RCW 26.09.080:

In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering 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 or domestic partnership; and

(4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

RCW 26.09.090:

(1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which

a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals Cause No. 76306-7-I to the following parties:

Alan Funk, WSBA #25702
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Original E-Filed with:
Court of Appeals, Division I
Clerk's Office
One Union Square
600 University Street
Seattle, WA 98101-1176

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

DATED: August 7, 2018, at Seattle, Washington.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

August 07, 2018 - 4:08 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76306-7
Appellate Court Case Title:	Heidi K. Kaplan, Appellant vs. Donald C. Kaplan, Respondent
Superior Court Case Number:	15-3-04474-9

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Comments:

Petition for Review (filing fee to be sent to Supreme Court)

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