No. 97891-3

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

RICHARD DENNIS GROVES,

Petitioner,

and

MARY NOONAN GROVES,

Respondent.

ANSWER TO PETITION FOR REVIEW

HANSEN LAW GROUP

By: Craig Jonathan Hansen
WSBA No. 24060

12000 NE 8th Street, Suite 202
Bellevue, WA 98005
(425) 709-6762

SMITH GOODFRIEND, P.S.

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

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

Attorneys for Respondent

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I. STATEMENT OF THE CASE AND GROUNDS FOR DENYING REVIEW

The petition for review dispenses with the statement of the facts contemplated by RAP 13.4(c)(6). But a recital of the facts ignored or mischaracterized in the petition demonstrates why further review of the Court of Appeals' well-reasoned opinion remanding for a just and equitable division of the parties' property that reflects the proper character and consideration of the marital estate's most substantial asset is not justified. The law applied to those now indisputable facts demonstrates that the Court of Appeals opinion is wholly consistent with holdings from both this Court and the intermediate appellate courts, and raises no grounds for review under RAP 13.4(b):

A. The Court of Appeals opinion is wholly consistent with long-established law regarding the division and consideration of disability pensions, and conflicts with neither *Arnold* nor *Brewer*.

The Court of Appeals opinion recognizing that a disability pension that is now substitute for retirement income is divisible on dissolution is wholly consistent with long-established law and conflicts with neither *Brewer* nor *Arnold*. There is no reason for this Court to take review because it has not addressed this issue during

"this century." (Pet. 2)[1] The intermediate courts, and Division One in this case in particular, have this issue well in hand. Petitioner's argument otherwise is premised on ignoring certain unassailable facts recognized by the Court of Appeals in holding that the pension at issue here now "effectively supplanted the retirement benefits." (App. A-10)[2]

The parties married in 1991, which was also the last year the wife was employed, having earned a lifetime high of $28,757 in 1989. (RP 686, 736-37; Ex. 118) In 1993, the husband retired on a LEOFF I permanent disability pension that was never subject to review, because at age 50 he was already eligible to collect retirement pay. (App. A-6) During their 25-year marriage, until the husband filed for dissolution in October 2016, the parties lived off this tax-free pension, financial investments, and rental income. (App. A-3)

The husband's argument that after separation he alone is entitled to the benefit of his current tax-free disability income of

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[1] In particular, there is no reason for this Court to waste judicial resources *in* this century reviewing a dispute considering a LEOFF I Plan; the Court's decision would apply to very few other cases because any individual hired and eligible for LEOFF after September 30, 1977 is covered under LEOFF Plan 2 – a much less generous system with different rules and benefits. *See City of Pasco v. Dep't of Ret. Sys.*, 110 Wn. App. 582, 587, n. 6, 42 P.3d 992, *rev. denied,* 147 Wn.2d 1017 (2002).

[2] Citations to the Court of Appeals decision is to the slip opinion attached as Appendix A to the petition for review.

almost $6,000 a month, plus generous benefits, is premised on the claim accepted by the trial court: that he intended to work another 10 to 15 years but instead, at age 50, was "forced" to take a "poignant" retirement from his "family" in the Seattle Fire Department on a LEOFF I permanent disability pension. (Pet. 1, 10, 11) But over a quarter century after he retired, and at age 75 when the decree was entered, petitioner's tax-free pension and benefits indisputably replace retirement income, as the Court of Appeals correctly recognized. (App. A-10: "Dennis was eligible to retire when he became disabled. Moreover, by the time of trial Dennis was in his 70s and as such, it is reasonable to conclude that before dissolution Dennis would have retired.")

1. **The Court of Appeals opinion is consistent with decisions from this Court and intermediate appellate courts holding that when a disability pension has substantial elements of retirement it should be treated as a community asset.** (Answer to Petition 7-12)

This Court recognized that disability benefits may be "in fact deferred compensation" in *Arnold v. Dep't of Retirement Systems*, 128 Wn.2d 765, 778, 912 P.2d 463 (1996), as noted again by this Court in *Marriage of Brewer*, 137 Wn.2d 756, 768-69, 976 P.2d 102 (1999) – the two decisions with which petitioner claims the Court of Appeals opinion conflicts. Whether a disability pension has

"substantial elements of either deferred compensation or retirement" depends not on whether the retiree chose "to take disability 'in lieu of' a service pension'" (Pet. 7), but on whether "a party would be receiving retirement benefits but for a disability, so that disability benefits are effectively supplanting retirement benefits. . . [In that instance] the disability payments are a divisible asset to the extent they are replacing retirement benefits." *Marriage of Geigle*, 83 Wn. App. 23, 31, 920 P.2d 251 (1996).

In *Brewer*, this Court *rejected* the husband's argument that the disability policy proceeds at issue could not be a "divisible asset in marital dissolution proceedings." 137 Wn.2d at 768-69. Relying on *Arnold*, which "previously recognized disability payments which are in fact deferred compensation," this Court in *Brewer* held that payments under a disability insurance policy "which compensate for expenses incurred during the marriage, or earnings lost during the marriage or payments which are in fact deferred compensation, should be characterized as community property in proportion to the community's contribution." 137 Wn.2d at 770. In holding that the disability payments in *Brewer* were not deferred compensation, this Court relied on the trial court's conclusion that the disability policies

"were not intended for retirement purposes because they terminate when Petitioner reaches age 65." 137 Wn.2d 764.

The same is not true here. As the petitioner himself concedes, "the disability award is limited only by his life." (Pet. 9) Thus, as the Court of Appeals recognized (App. A-7), the disability payments here are more similar to those in *Marriage of Kollmer*, 73 Wn. App. 373, 377-78, 870 P.2d 978, *rev. denied*, 124 Wn.2d 1022 (1994), which held that a LEOFF I disability pension has a deferred compensation component and is "properly divisible" after the member turns 50. *See also* RCW 41.26.130. Because "any disability benefit Kollmer would be entitled to receive, up to the amount he would have received as retirement pay at that age, clearly will have characteristics of compensation for past services," the *Kollmer* court held a LEOFF I disability payment was community property and divisible. 73 Wn. App. at 378.

Similarly, Division One correctly recognized that in this case the husband was age 75 at the time of trial, "and likely would have been retired and would have been eligible for his LEOFF I pension." (App. A-6) "[B]ut for Dennis's disability, the marital community would have received Dennis's retirement benefits. The disability allowance effectively supplanted the retirement benefits." (App. A-

10) *See also Marriage of Kittleson,* 21 Wn. App. 344, 353, 585 P.2d 167 (1978) (App. A-8); *Marriage of Knies,* 96 Wn. App. 243, 979 P.2d 482 (1999) (App. A-6).

Division One properly interpreted *Kollmer* and related cases in holding that the disability pension at issue here has "substantial elements" of deferred compensation because the husband now receives it in place of his normal service retirement. RCW 41.26.090. 120, .130. The Court of Appeals opinion meets none of the criteria for further review under RAP 13.4(b).

2. The payments received by husband "supplant retirement benefits," and are not "post-dissolution wage replacement," which in any event would not be indivisible under RCW 26.16.140. (Answer to Petition 12-14)

Petitioner's reliance on Justice Guy's concurrence in *Brewer* as grounds for further review is misplaced because the payments here are not now "in the nature of earnings replacement." As Division One properly recognized, by the time the decree was entered, the disability pension "had the character of deferred compensation and not compensation for lost future income." (App. A-10) "Pension benefits constitute property rights in the nature of deferred compensation." *Marriage of Rockwell,* 141 Wn. App. 235, 251, ¶ 31, 170 P.3d 572 (2007), *rev. denied,* 163 Wn.2d 1055 (2008)

(quoting *Marriage of Bulicek*, 59 Wn. App. 630, 636-37, 800 P.2d 394 (1990)). These assets are subject to characterization and division on dissolution. *Marriage of Leland,* 69 Wn. App. 57, 72-73, 847 P.2d 518, *rev. denied,* 121 Wn.2d 1033 (1993) (App. A-10, n.3) (disability payments after retirement age divisible).

In arguing that the disability payments were not a divisible asset, petitioner makes much of the supposed failure of the wife to include the pension in the list of tangible assets subject to consideration and division. (Pet. 8) But at trial, *neither* party placed a lump sum value on the pension, and the wife sought distribution as the pension was paid out under RCW 41.26.053(3) (authorizing DRS "to pay benefits directly to an obligee under a dissolution order"); and as preferred by case law:

> An award of pension rights on a percentage, as-received basis is to be encouraged. Such a disposition avoids difficult valuation problems, shares the risks inherent in deferred receipt of the income, and provides a source of income to both spouses at a time when there will likely be greater need for it.

Bulicek, 59 Wn. App. at 638.

Indeed, contrary to the trial court's view that the husband's LEOFF I sinecure was "off limits" for consideration or division at dissolution, RCW 41.26.162 now contemplates that a LEOFF I disability pension can be a divisible asset even *after* a marriage ends,

allowing an ex-spouse to receive a "court-awarded portion of the member's benefit" after the member's death, and RCW 41.26.161 protects the former spouse's rights even in the "event of the nonduty connected death of any member . . . who is on disability leave or retired." RCW ch. 41.26, as amended in 2002 and 2005 (after this Court's decision in *Arnold*), now expressly protects an ex-spouse's right to disability benefits. RCW 41.26.053(3) requires DRS "to pay benefits directly to an obligee under a dissolution order." RCW 41.26.162 also contemplates that a LEOFF I disability pension can be a divisible asset even after a marriage ends, allowing an ex-spouse to receive a "court-awarded portion of the member's benefit" after the member's death. RCW 41.26.161 protects the former spouse's rights even in the "event of the nonduty connected death of any member . . . who is on disability leave or retired."

RCW 26.16.140, which provides that post-dissolution earnings are the separate property of the receiving spouse, has nothing to do with the division of the marital estate in this or any other case. Contrary to petitioner's assertion, the Court in *Brewer* upheld the trial court's award of the disability payments to the husband not because it was an indivisible "post-marital income stream" (Pet. 6), but because after a short-term, seven-year

marriage, the wife had received over $422,000 in other assets, and the husband only $55,000, plus the disability payments that would end when he reached age 65. 137 Wn.2d at 763. Petitioner's argument also ignores Justice Guy's own statement that "the trial court may consider such earnings when determining what constitutes a fair and equitable distribution of the assets." *Brewer,* 137 Wn.2d at 774 (citing RCW 26.09.080).

None of the equities that supported the award of disability insurance payments to the husband in *Brewer* exist here. The parties here lived off of the husband's disability pension as his retirement income for 25 years, when the wife otherwise could have been working for her own retirement. Although both parties are now at retirement age, the trial court awarded the husband 100% of the parties' most substantial asset; meanwhile the wife, who has no work experience over the last three decades, has no other income or separate property with which to support herself. The Court of Appeals opinion is wholly consistent with this Court's decisions in *Brewer* and *Arnold,* with the statutes governing LEOFF I disability pensions, and with well-established law governing the characterization and division of disability pensions. This Court should deny review.

B. The Court of Appeals decision conflicts with neither *Short* nor *Rockwell*. The time rule method does not apply because a 1998 community property agreement converted all of the parties' assets into community property. (Answer to Petition 15-17)

In *Brewer* the Court also did not consider the consequence of a community property agreement – an agreement that the trial court relied on in awarding to the husband half the wife's pre-marriage retirement assets as community property, and an agreement that petitioner does not even mention in his petition. Petitioner's argument relying on *Marriage of Short*, 125 Wn.2d 865, 890 P.2d 12 (1995) and *Rockwell*, 141 Wn. App. 235, to claim that the time-rule method should be used to characterize "the service-pension-like portion of Dennis' disability allowance" from the disability portion that "cannot be divided in a dissolution" (Pet. 15-16) ignores that any otherwise separate contributions to the pension were entirely community property as a result of the parties' unchallenged community property agreement.

The trial court found that the parties "clearly" "intended to make everything" and "all of their property community" (CP 16-17; *see* CP 30) when in 1998 they signed a three-prong community property agreement. (App. A-3) Petitioner voluntarily dismissed his cross-appeal of that issue (Resp. Br. 4), and these findings are

verities on appeal. Yet the husband's petition for review does not mention the community property agreement, or the Court of Appeals' analysis of its effect, at all.

Division One recognized (App. A-10) that the trial court here erred in concluding, without regard to the community property agreement and based on the "time rule" argument resurrected in the petition (Pet. 15), that "[a]ny service related pension/allowance is owned for the most part (97.5%) by Dennis as his separate interests" (CP 29) and was not available for division or for consideration in the division of the marital estate. Even if "[t]he settled rule for characterizing service pensions is the 'time rule' method, i.e., the community property portion of the pension is tied to the proportion of the pension that was earned during the marriage" (Pet. 15) that rule has little relevance here given the parties' community property agreement. Thus review of the Court of Appeals opinion in this case would not be a proper "vehicle clarifying how to address any such division" (Pet. 16) when as a result of the community property agreement the pension was entirely community property, and further review for that purposes is not warranted.

C. The Court of Appeals did not "overstep its role" in remanding for reconsideration of the property division and maintenance award when the trial court itself recognized that its decision left the parties in "greatly disparate" financial circumstances after their long-term marriage. (Answer to Petition 17-20)

The trial court made a legal error in concluding that the husband's pension and the monthly income from it was "off limits" and not subject to division or consideration.[3] As a consequence, the property division left the husband with the same tangible assets as the wife, nontaxable income of at least $6,000 a month, and "generous" benefits, including free medical coverage and assisted care for life (RP 265-66, 288-90, 305), while the wife, who the trial court recognized could not work in any "meaningful way" (CP 26, 235), was awarded only $1,600 per month in "limited" maintenance (the trial court's term) as a "bridge" to Medicare (the petitioner's term) in five years, and the prospect of less than a $1,000 a month in Social Security benefits thereafter. (RP 847; Ex. 118; App. Br. 10)

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[3] Petitioner now appears to concede that the trial court could have considered his receipt of this tax-free income and generous benefits in its division of property and award of maintenance. (Pet. 12) At trial, however, he argued, and the trial court accepted based on its misinterpretation of *Marriage of Anglin*, 52 Wn. App. 317, 759 P.2d 1224 (1988) (discussed App. A-9), that the disability pension was indivisible separate property and should not be considered in division of the marital estate. (CP 14, 29, 44, 223-25, 231; *see* App. Br. 20-25)

The Court of Appeals properly recognized that remand was required because it is clear that the trial court's property division was "significantly influenced"' by its mischaracterization of the pension, and it is not clear that the trial court would have divided it in the same way had it properly characterized it. *Marriage of Shannon,* 55 Wn. App. 137, 142, 777 P.2d 8 (1989) (cited App. A-4, App. A-11). While it (wrongly) thought its decision to be compelled by *Anglin,* the trial court itself recognized the "great disparity" in the parties' financial circumstances following their long-term marriage and its 50/50 split of the parties' tangible assets, including the wife's formerly-separate Roth IRA – the only retirement asset otherwise available to her, in part *because* of the husband's participation in the LEOFF I retirement system.

Because he is covered by LEOFF I, the husband receives only $25 per month in Social Security. (RP 231, 238) If the husband was not in LEOFF I and instead received comparable Social Security retirement benefits, the wife would have received half of the amount of his Social Security retirement payments as his former spouse at age 66-1/2.[4] Instead, she will only receive approximately $960 per

[4] Social Security Administration, "Benefits Planner: Retirement," *available at* https://www.ssa.gov/planners/retire/divspouse.html.

month, from her minimal Social Security work credits before the parties spent their 25 years of marriage enjoying life on the husband's "disability" pension. (RP 847; Ex. 118)

Although petitioner makes much of the award of other assets to the wife, he ignores that he received the same amounts, *plus* $6,000 and generous benefits, tax-free, a month. Leaving aside the husband's continued gross mischaracterization of predistributions to both parties and the division of tangible assets,[5] petitioner's unhelpful financial advice to his ex-wife of how she should take of advantage of the "terrific opportunity" offered by being left with the same tangible assets as he has and the prospect of less than a $1,000 in Social Security benefits (Pet. 19), is not grounds for further review.

II. CONCLUSION

This Court should deny review.

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[5] Petitioner's factual misstatements are most succinctly rebutted in respondent's October 4, 2019 Answer to Motion for Reconsideration in the Court of Appeals, and will not be further addressed here, as they are as irrelevant to acceptance of review as his unsolicited financial advice.

Dated this 8th day of January, 2020.

SMITH GOODFRIEND, P.S.

By: Catherine Smith

Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

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 January 8, 2020, I arranged for service of the foregoing Answer to Petition for Review, to the Court and to the parties to this action as follows:

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Craig Jonathan Hansen Hansen Law Group 12000 NE 8th St., Ste 202 Bellevue, WA 98005-3193 jhansen@hansenlaw.com	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
Kerry A. Richards Bradshaw & Richards 11300 Roosevelt Way NE, Ste. 300 Seattle, WA 98125 krichards@lawgate.net	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
Gregory M. Miller Carney Badley Spellman PS 701 5th Ave Ste 3600 Seattle WA 98104-7010 (206) 622-8020 miller@carneylaw.com	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail

DATED at Seattle, Washington this 8th day of January, 2020.

Sarah N. Eaton

SMITH GOODFRIEND, PS

January 08, 2020 - 4:13 PM

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