

FILED  
COURT OF APPEALS  
DIVISION II  
08 MAY 23 PM 3:19  
STATE OF WASHINGTON  
BY DEPUTY

NO. 37100-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

MICHAEL L. SMITH  
APPELLANT

VS.

KIMBERLY SMITH  
APPELLEE

---

**APPELLANT'S BRIEF**

---

DAVID B. KNODEL  
ATTORNEY  
3419 PACIFIC AVE.  
TACOMA, WA 98418  
(253) 471-8721

RECEIVED

MAY 21 2008

DONALD N. POWELL  
ATTORNEY AT LAW

NO. 37100-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

MICHAEL L. SMITH  
APPELLANT

VS.

KIMBERLY SMITH  
APPELLEE

---

APPELLANT'S BRIEF

---

DAVID B. KNODEL  
ATTORNEY  
3419 PACIFIC AVE.  
TACOMA, WA 98418  
(253) 471-8721

**TABLE OF CONTENTS**

ASSIGNMENT OF ERROR ..... 2

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR ..... 3

TABLE OF AUTHORITIES ..... 4 - 6

STATEMENT OF THE CASE ..... 7 - 11

ARGUMENT .....11 - 31

CONCLUSION ..... 31

APPENDIX:

    Court’s oral ruling of August 17, 2007 ..... Attach. A

    Findings of Fact and Conclusions of Law ..... Attach. B

    Decree ..... Attach. C

    5CFR Sec. 838.123 ..... Attach. D

### **ASSIGNMENT OF ERROR**

1. The Trial Court erred when it did not consider the value of the Wife's Survivor Annuity in arriving at a fair and equitable distribution of property.
2. The Trial Court erred when it did not consider that the Husband's social security benefits that accrued before marriage were reduced by \$310 per month by virtue of his participation in the Federal Civil Service Retirement System.
3. The Trial Court erred when it did not consider that the Husband forewent \$1,063 per month in social security benefits that he would have accrued but for his participation in the Federal Civil Service Retirement System.
4. The Trial Court erred by making an unfair and inequitable division of his pension.
5. The Trial Court erred when it found that the Wife's SERS 3 Defined Benefit Plan had not vested.
6. The Court Commissioner erred when it found that the Husband was in contempt of court for failing to send certified copies of the Findings and Decree to the Office of Personnel Management.

## ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Is a court required to recognize the mortality tables of the Washington State Insurance Commissioner when valuing the Wife's survivor annuity? .
2. Is it error for the Court to disregard the value of a spouse's survivor annuity when determining a fair and equitable division of property?
3. In determining whether to consider to offset for a \$310 per month reduction in accrued social security benefits due to the Husband's participation in the Federal Civil Service Retirement System does the Court focus on the social security benefits of the other non federal employee spouse or does the Court focus on the reduction in social security benefits of the federal employee spouse?
4. In determining whether to consider to offset for \$1,063 per month in foregone social security benefits due to the Husband's participation in the Federal Civil Service Retirement System does the Court focus on the social security benefits of the other non federal employee spouse or does the Court focus on the forgone social security benefits of the federal employee spouse?
5. Where the Court has provided that a fair and equitable division of community property between the parties is a 50 – 50 split, but due to not considering certain assets and offsets an actual division where the Wife is receiving virtually all of the community property occurs, is an inequitable and unfair division of property present?
6. Under Washington State's SERS 3 defined benefit plan are 60 months (5 years) of service required before vesting or is 120 months (10 years) of service required before vesting?
7. In the area of Federal Retirement Law does the Federal statutory scheme preempt the area thereby resulting in a setting where the State Court cannot shift responsibilities and duties placed on one spouse under the federal statutory scheme to the other spouse?

**TABLE OF AUTHORITIES**

A. Case Authority:

1. Layton v. Yakima, 170 Wn. 333 (1930) ..... 11

2. In re Marriage of Pilant, 42 Wn.App. 173 (1985) ..... 11

3. In re Marriage of Hurd, 69 Wn.App. 29 (1993) ..... 12

4. In re Marriage of Leland, 69 Wn. App. 57 (1993) ..... 13, 15

5. Irwin v. Irwin, 121 N.M. 266, 910 P.2d (1995) .....13, 14,15

6. In re Marriage of Zahm, 138 Wn.2d 213 (1999) ..... 15, 16, 18

7. In re Marriage of Crosby, 699 NW 2d 213 (1999)..... 14, 15, 16, 17, 18

8. In re Marriage of Kelly, 198 Ariz. 307, 9 P.2d 1046 (2000).....15, 16, 17, 19

9. Kimel v. Kimel, 913 A. 2d 289 (Pa. – 2006) .....16, 17, 19

10. In re Marriage of Rockwell, 140 Wn.App 1018 (2007) .....17, 18, 19

11. Willis v. Willis, 50 Wn.2d 439 (1957) .....20

12. Van Patten v. Jensen, 112 Wn.2d 552 (1989) ..... 27, 28, 29, 30, 31

13. Easton v Iowa, 188 US 220 (19030) ..... 29

14. Pioneer First Federal Saving & Loan v. Pioneer National Bank, 98 Wn. 2d 853 (1983) ..... 29, 30

15. Estate of Hanley v Andresen, 39 Wn.App. 377 (1984) .....30, 31

B.	Washington Statutes:	
1.	RCW 48.03.160 .....	11
2.	RCW 26.09.080 .....	15
3.	RCW 41.35.420 .....	26
C.	Federal Statutes:	
1.	512 USC Sec. 1561 et seq.....	27
2.	Federal Home Owner’s Act (HOLA) .....	27
3.	5 USC Sec. 8347 .....	28, 29, 31
4.	5 CFR Sec 838.123 .....	28, 30, 31
5.	5 CFR Sec. 870.901 (b) .....	30
6.	5 CFR Sec. 8700.901 .....	30
7.	5 USC Sec. 8701 – 8716 .....	30
8.	5 CFR Sec. 870 .....	30
D.	Other Authority:	
1.	Washington Pattern Instruction 34.04.....	11
2.	20 <u>Washington Practice</u> , Sec. 32.2 <i>Statutory Factors Governing Distribution of Property &amp; Debts</i> (1997) .....	12, 15
3.	20 <u>Washington Practice</u> , Sec. 32.16 <i>Retirement Benefits Generally</i> (1997)..	13,15
4.	20 <u>Washington Practice</u> , Sec. 32.25 <i>Future Interests &amp; Expectancies</i> (1997).	13,15

5. 20 Washington Practice, Sec. 32.10 *Nature and Extent of property- Equal Division not Required* (1997) ..... 20

6. Article 12 Section 12 of the Washington State Constitution .....27

## STATEMENT OF THE CASE

At time of trial the Husband- Appellant was 58 years old and the Wife-Appellee was 50 years old. The only major asset the parties have is the Respondent's pension. (CP 9-13 Decree). This is a long term marriage as the parties were married on April 4, 1981.

The Court recognized that the parties had a minor child in college. (Aug. 18, 2007 Oral Ruling – Page 9, Line 17). The daughter was then living with the Husband at the family home. (Exhibit 20). The Husband testified as to numerous physical ailments that were recognized by the Court. (Aug. 18, 2007 Oral Ruling – Page 9, Lines 11 -14). The Husband testified as to a failing financial condition entering into the record his financial statement. (Exhibit 20). Based on the testimony at trial the Court concluded “with the limitations it was going to be tough.” (Sept. 28, 2007 Hearing on Findings and Decree – Page 7, Lines 7 – 8).

The Husband testified that he expected to retire at the presumptive retirement age of 65. Based upon retirement at the presumptive retirement age of 65 the Court found that the expected gross monthly retirement would be \$3,876 per month. (Aug. 18, 2007 Oral Ruling – Page 5, lines 21- 25 – Exhibit 6). The Court acknowledged that an expected deduction of \$369 per month from the Husband's pension would occur if the Wife's Survivor Annuity was purchased. (Aug. 18, 2007 Oral Ruling – Page 5, lines 21- 25. (Note: As per Exhibit 6 and testimony in Court the exact amount of the deduction is expected to be \$365 per month). The Court went on to find that a net survivor annuity \$3,510 per month would result after the deduction of \$365 to pay for the survivor annuity was taken. The Court went on to find that the survivor annuity would be expected to be \$2,131 per month. (Aug. 18, 2007 Oral Ruling – Page 5, line 25 & Page 6, line 1). At

the end of the day the Court did not accept a fixed age of 65 when setting its retirement due to the “health conditions of the parties” which might cause an early retirement. (Aug. 18, 2007 Oral Ruling – Page 7, lines 5 – 13). The Court decided to go with a formula whereby the parties would share in accordance with percentages and based upon an actual future date of retirement. (Note: The Husband did retire as of January 31, 2008. This retirement is, however, in all likelihood will be a distinction without a difference in that the Husband is presently applying for Federal Workman’s Compensation through the Federal OWCP. If his disability is accepted, then for purposes of retirement he will be treated as though he did not retire early, but rather that he retired at the age of 66 with his retirement benefits calculated in accordance with his regular working pay. The Husband is presently considering supplementing the record when he receives further information that will make clear the status of his claim for Federal Workman’s Compensation benefits through OWCP). In the final Decree the Court the Court found that it would be fair to split the community’s interest in the pension on a 50 – 50 split. (Decree – CP 12). It gave the Husband credit for the 72 months of service under the Federal system prior to his marriage and he would also receive credit for his months of service after the date of separation. (Decree – CP 12).

While both parties testified as to having physical ailments neither party entered any expert testimony on the issue of whether these conditions would reduce their life expectancy. (August 13, 2007 Trial Transcript). The Husband testified in accordance with the Tables issued by the Washington State Insurance commissioner that he had a life expectancy of 19.23 years. (Exhibit 11). The Wife had a life expectancy of 30.45 years based on her being a 50 year old female. (Exhibit 11). Based on his life expectancy, the

husband is expected to draw \$3,510/mo. for 12 years and 8 months (Retirement date of March 1, 2014 until expected date of death on Nov.1, 2026). Conversely, based on the Petitioner's life expectancy she is expected to live another 11 years and 2 months (From husband's expected date of death, Nov. 1, 2026 to her expected date of death, Jan. 1, 2038). During this time the Wife will be drawing 100% of a projected \$2,131/mo. The Husband testified in accordance with Exhibit 5 (Attorney's Handbook on Federal Pensions) that a cost of living adjustment was built into the pension.

The Court found that the Wife could expect to receive a survivor annuity of \$2,131 per month. (Aug. 18, 2007 Oral Ruling – Page 5, line 25 & Page 6, line 1). The Court also decided that both the Husband and Wife would pay for the annuity by taking the \$365 cost of the annuity off the top of the Husband's pension. (Aug. 18, 2007 Oral Ruling – Page 8, lines 10 – 16). The Court did not then address the issue of why it did not consider the value in its August 18, 2008 oral ruling. It did, however, relate why it did not value the survivor annuity when responding to the Husband's Motion for Reconsideration argued on November 5, 2007. (Nov. 5, 2007 Reconsideration Hearing - Page 26, lines 19 – 24.). In somewhat contradictory language the Court first acknowledged that it was the law to use the tables, but then stated that it was not absolute. I quote the Court:

I think the arguments of Mr. Smith use statistical probabilities, as certainly. Whether it's the law or not, it's the law to use statistical life data, but it doesn't make it absolute. Otherwise, I suppose we could sue the state for not using the life expectancy tables.

The Husband testified and entered exhibits establishing that his \$587/mo. social security benefits that had accrued prior to marriage would be reduced by \$310 under

the Federal Windfall Profit Elimination Act. (Aug. 13, 2007 Trial Transcript – Page 114, line 5 – Page 117, line 11; Exhibits 10 and 15). The Husband also testified and entered exhibits showing that he forfeited an additional \$1,063 in social security benefits (\$1,650 total benefit less \$587 accrued = \$1,183), but for his participation in the Federal Civil Service Retirement System. (Aug. 13, 2007 Trial Transcript – Page 119, line 1 – 22; Exhibits 10, 15 and 16). The Court stated that it could not consider the reductions in social security benefits that the Husband had sustained because it did not have any testimony before it as to what the Wife's social security retirement would be. (Aug. 18, 2007 Oral Ruling – Page 8, line 18 – Page 9, line 6).

In addition to receiving social security the Wife is covered by a Defined Benefit Plan and Defined Contribution Plan through her employment through with Tacoma Public Schools. (Aug. 18, 2007 Oral Ruling – Page 9, lines 2 – 4). The Court specifically addressed the issue of vesting related to her Defined Benefit Plan on Page 9, lines 2 – 18 of its oral ruling. The Court related that an exhibit was entered by the Court which showed that as of April 2005 she had 53.5 months of accrued time. (Aug. 18, 2007 Oral Ruling, Page 6, lines 4 – 6). The testimony established that by the time of trial she had accrued about seven years of service. (Aug. 18, 2007 Oral Ruling, Page 6, lines 6 – 7). The Wife testified that she would need to work 120 months to vest and entered documentation to that effect. (Aug. 13, 2007 Oral Ruling, Page 6, lines 7 – 10). The Husband argued at closing that the Wife would vest after only five (5) years of service under statute. (Aug. 18, 2007 Oral Ruling, Page 6, line 10 – 13). The Court found insufficient proof to conclude that the Wife's pension had vested in accordance with the Husband's assertion so the Court found that the Pension did not rise to the level of

divisible asset and therefore did not consider it in its division of property. (Aug. 18, 2007 Oral Ruling, Page 6, lines 12 – 18).

The Decree also provided that the Husband was to “forthwith do all acts necessary to acquire the survivor’s benefit annuity naming Kimberly P. Sjolander as the sole beneficiary of that survivor’s benefit annuity.” (Decree – CP Page 12). The Wife brought a contempt Motion that was heard before the Court Commissioner on November 19, 2007 alleging that the Husband failed to do all acts necessary to obtain the survivor annuity. (CP 14 -18). On November 19, 2007 that the Husband was in contempt of Court for failing to forward to the Office of Personnel Management certified copies of the Findings and Decree. (CP 14 -18). The Husband asserted and continues to assert that under Federal Law that it is the Wife’s responsibility to provide the certified copies to the Office of Personnel Management and that Federal Law preempts the area therefore the State Court does not have the authority to shift responsibilities that are hers under federal law.

The Husband appealed both the Court’s original Decree and Findings of September 28, 2007 and Court Commissioner’s contempt ruling on December 5, 2008. (CP 19 – 44).

1. THE MORTALITY TABLES OF THE WASHINGTON STATE INSURANCE COMMISSIONER SHOULD BE UTILIZED BY THE COURT WHEN DETERMINING THE VALUE OF THE PENSIONS.

The Court admitted into evidence the mortality tables of the Washington State Insurance Commissioner for purposes of valuing the Husband’s pension. (Exhibit 11). Due to the Wife being 8 years younger and the fact that she is a female she has a life expectancy of 11 years and two months more than the than the Husband. The Court

found that the Wife could expect to receive a survivor annuity of \$2,131 per month. The Wife is expected to receive a survivor annuity benefit of \$285,554 (11 years and 2 months = 134 months X \$2,131/mo. = \$285,554) based upon her life expectancy. While both parties did testify as to some physical infirmities neither party entered any medical testimony establishing a reduced life expectancy. Notwithstanding admitting the tables of the Washington State Insurance Commissioner into evidence the Court declined to follow them for valuing the Wife's survivor annuity.

In Layton v Yakima, 170 Wn. 333 (1930) the Court stated "that the practice of admitting a standard mortality table in evidence whenever it becomes necessary to estimate the value of annuities, dower curtsy or damages from wrongful act has become too well established to admit of question." The use of mortality tables is mandatory under Washington Law when valuing pensions. In re Marriage of Pilant, 42 Wn. App. 173, 179 (1985). RCW 48.02.160 provides that the Insurance Commissioner is required to "obtain and publish for the use of the courts and appraisers throughout the state, tables showing the average expectancy of life and the values of annuities and of life and term estates." The tables of the Washington State Insurance Commissioner are so established as the standard by which life expectancies are determined that its tables are the ones that are adopted for use by the Courts pursuant Washington Pattern Instruction 34.04.

In conclusion, the Court properly admitted the tables of the Washington State Insurance Commissioner into evidence and should have utilized them to value the Wife's survivor annuity. Pilant, supra; Layton, supra.

2. THE TRIAL COURT SHOULD HAVE CONSIDERED THE WIFE'S SURVIVOR ANNUITY JUST LIKE ANY OTHER ASSET BEFORE IT FOR DIVISION.

Based on the Wife's age and her sex she is expected to live eleven years and two months longer than Mr. Smith. The Court found that the Wife could be expected to receive a survivor annuity of \$2,131 per month.

In making its decision as to the distribution of property the court must consider the nature and extent of the parties' community property and separate property. RCW 26.09.080; 20 Washington Practice, Sec. 32.2 *Statutory Factors Governing Distribution of Property and Debts* (1997). Before making a property division, it is the duty of this Court to determine the value of the community and separate property before it. In re Hurd, 69 Wn.App. 29 (1993).

The Trial Court stated that the reason that it did not consider the Wife's survivor Annuity was because it did not consider the tables to be absolute. Initially, Washington Law is well settled that when it comes to vested pensions that the Court is to consider, value and equitably divide the pensions between the parties. 20 Washington Practice Sec. 32.16, *Retirement Benefits Generally* (1997). Furthermore, a contingent future interest is property no matter how improbable the contingency. 20 Washington Practice Sec. 32.25, *Future Interests and Expectancies*, (1997) citing to In re Marriage of Leland, 69 Wn. App. 57, 847 P.2d 518 (1993). While the specific issue of whether a Court should consider a survivor annuity as an asset for distribution has not been directly addressed by the Washington Courts it has been specifically addressed by other community property states. Irwin v Irwin, 121 N. M. 266, 910 P.2d 342 (1995).

In Irwin v Irwin, 121 N. M. 266, 910 P.2d 342 (1995) the Court reviewed a trial court decision where the judge split the pension 50-50 between the husband and wife in a

survivor annuity setting. In that case the difference between the spouse's life expectancies was only 4 years, as opposed to the 11 years here. The Court reversed the trial Court's decision based on its failure to consider the value of the Wife's survivor's annuity. I quote from Irwin on pages 270-271:

Husband also argues that the trial court erred in denying his request to apportion the distribution of Husband's pension in consideration of the difference in the parties' respective life expectancies and the value of the survivor's benefit provision in the state educational retirement plan awarded to Wife...

Husband asserts that because his pension is fully vested and mature, and Wife, at the time of the divorce, had a greater life expectancy (twenty-one years) than his (seventeen years), the trial court erred in awarding each party one-half of the monthly distribution of such pension. He reasons that instead of giving each party one-half of the monthly pension payment, the amount awarded to the Wife should have been adjusted in order to take into consideration the fact that according to statistical probabilities, the Wife has a greater life expectancy than he, and because the trial court ordered him to give Wife the survivor's benefit option under the retirement plan, this will result in Wife receiving, during her lifetime, a greater portion of such pension benefits than Husband.

We note, however, that in dividing community assets, including a community pension, should award the non-employee spouse a lump sum of cash or another property equal to the value of the non-employee's interest in the plan, or in exceptional circumstances the court may order that the non-employee spouse be paid a monthly amount equal to his or her share of the pension as it is received.

As observed by the intervener Board, the effect of the trial court's Order directing Husband to name Wife as the person entitled to the Survivor's benefit option under the retirement plan will result in a lowering of the monthly retirement benefits which are payable during Husband's lifetime, but, assuming that Wife survives him, will result in her receiving a monthly pension payment during the remainder of her lifetime. ...

*A community interest in a pension plan containing a survivor's Benefit provision constitutes a valuable portion of the community Assets, and the survivor's benefit provisions should be considered*

in valuing and distributing the community interest in the retirement plan.

In sum, we hold that in situations such as those existing here where the community interest in the pension is fully vested and matured, the trial court should value the retirement benefits as a whole, including the value of the survivor's benefit provision of the retirement plan, in order to fully and fairly apportion each party's share of the retirement benefits. (*emphasis added*).

In conclusion, the trial court should have considered Wife's survivor annuity in determining a fair and equitable distribution of assets. RCW 26.09.080; 20 Washington Practice, Sec. 32.2 *Statutory Factors Governing Distribution of Property and Debts* (1997); 20 Washington Practice Sec. 32.16, *Retirement Benefits Generally* (1997); 20 Washington Practice Sec. 32.25, *Future Interests and Expectancies*, (1997); In re Marriage of Leland, 69 Wn. App. 57, 847 P.2d 518 (1993); Irwin v Irwin, 121 N. M. 266, 910 P.2d 342 (1995).

3. THE COURT SHOULD HAVE CONSIDERED THAT MR. SMITH'S SOCIAL SECURITY BENEFITS WERE REDUCED BY \$310.00 BECAUSE OF HIS PARTICIPATION IN THE FEDERAL CIVIL SERVICE RETIREMENT SYSTEM.

Mr. Smith accrued social security benefits prior to his marriage which were reduced by \$310 due to his participation in the Federal Civil Service Retirement System. The Court stated that the reason it did not consider Mr. SMITH'S reduction in benefits (or his loss of future social security benefits) because it did not have before it what social security Ms. SMITH had accrued.

Washington Courts follow the national trend on the subject and while classifying the property as separate property still consider social security benefits in determining a just and equitable distribution of property. In re Zahm, 138 Wn2d.213 (1999); In re Marriage of Crosby, 699 N.W.2d 255 (Iowa – 2006); In re Marriage of Kelly, 198 Ariz.

307; 9 p.2d 1046 (2000); Rimel v. Rimel, 913 A.2d 289 (Pa Super. 2006). In Zahm the trial court actually mischaracterized the parties' social security benefits earned during marriage as community property and made a distribution based on that characterization. Zahm, supra. The Court found that such a mischaracterization was harmless error. Id. I quote from Zahm at page 223:

In its review of this case, the Court of Appeals adopted the approach of the Massachusetts, Kansas, and Missouri state courts and held it proper that trial courts consider social security benefits in determining the parties' relative economic circumstances at dissolution. The Court of Appeals reasoned that since, under RCW 26.09.080, a trial court making a just and equitable distribution is allowed to consider such relevant and nonexhaustive factors as "(1) The nature and extent of the community property; (2) The nature and extent of the separate property; (3) The duration of the marriage; and (4) The economic circumstances of each spouse at the time the division of property is to become effective . . .," it is, therefore, permissible for a trial court to consider petitioner's social security benefits. "A trial court could not properly evaluate the economic circumstances of the spouses unless it could also consider the amount of social security benefits currently received." In re Zahm, 91 Wn. App. at 85. This resolution by the Court of Appeals is more consistent with the statutory goals of just and equitable distribution and we adopt it.

Until just recently Washington Courts had to look to other courts for how to properly address the setting of where you have one spouse who works for the federal government and therefore receives only the federal civil service pension while the spouse has works for another employer and receives her employer pension and social security. In re Marriage of Croby, 699 N.W.2d 255 (Iowa – 2006); In re Marriage of Kelly, 198 Ariz. 307; 9 p.2d 1046 (2000); Rimel v. Rimel, 913 A.2d 289 (Pa Super. 2006). In these other jurisdictions the emphasis of the Court was always placed on the social security

benefits foregone by the federal employee spouse as opposed to what social security benefits the other spouse received. In re Marriage of Crosby, 699 N.W.2d 255 (Iowa – 2006); In re Marriage of Kelly, 198 Ariz. 307; 9 p.2d 1046 (2000); Rimel v. Rimel, 913 A.2d 289 (Pa Super. 2006).

In re Marriage of Kelly, 198 Ariz. 307, 9 P.2d 1046 (2000) the Court stated as follows:

Relying on this “concept of fairness”, we agree that “to the extent individuals with Social Security benefits enjoy an exemption of that ‘asset’ from equitable distribution ... those individuals participating in the CSRA must, likewise, be so positioned. A portion of Corrine’s salary was community property. The resulting benefits, but for federal law, would be divisible as community property in Arizona. Under the present legal regime, however, they will be enjoyed only by her.

Viewed another way, it can be seen that in the absence of social security contributions, the community could have spent saved, or invested those funds as it saw fit. In each instance the resulting asset, if any, would have been divisible as community property. But, as matters presently stand, the community funds have been diverted to the separate benefit of one spouse. We believe this situation compels an equitable response.

The Kelly Court went on to determine what social security benefits the civil servant husband would have received had he worked and been able to participate in social security and credited him with that amount on his civil service pension when determining the parties’ eventual distribution. Kelly at 308.

The same issue was recently, however, addressed by our Courts In re Marriage of Rockwell, 140 Wn.App. 1018 (2007). In Rockwell the Court had a similar setting as here in that one spouse worked for the Federal government and therefore was excluded from

participation in social security while the other spouse was entitled to receive social security. In Rockwell the Husband objected to the Court's decision to reduce the Wife's federal pension by the amount of foregone social security benefits due to her participation in the federal system which prompted the following response by the Court:

Carmen's expert testified to the present value of the Social Security that Carmen would have received but is not entitled to draw due to the structure of her federal pension. The trial court "compensated" Carmen by reducing the community property portion of the pension by that amount and treating it as if it were social security. The fact that Peter would receive social security was confirmed, but its value was not considered. Neither the "in lieu of" portion of the pension nor Peter's social security were added to either parties' column for purposes of dividing the present assets. Once set aside, these amounts were excluded from the equation used by the court to determine a fair division of property, nor did it divide his social security benefit. That would have been error under *Zahm*. Rather, the trial court focused solely on Carmen's foregone, indivisible social security benefits and valued them for purposes of comparing her economic future against Peter's. But for the existence and structure of Carmen's federal pension there would be no question that this was appropriate- the trial court's adjustment method simply removed both parties' social security benefits from the equation in order to put them on comparable footing prior to dividing the remaining assets. We do not read *Zahm* to preclude this calculation as a fair and proper means of considering social security or achieving overall fairness. We conclude that the challenged finding is supported by substantial evidence and that the trial court properly considered compensated for the social security benefits that Carmen would have received, but for her federal pension.

In conclusion, the Trial Court should have considered the \$310 in reduced social security benefits that Mr. SMITH incurred in reduced social security benefits because of his participation in his Federal Civil Service Pension. In re Zahm, 138 Wn2d.213 (1999);

In re Marriage of Crosby, 699 N.W.2d 255 (Iowa – 2006); In re Marriage of Kelly, 198 Ariz. 307; 9 p.2d 1046 (2000); Rimel v. Rimel, 913 A.2d 289 (Pa Super. 2006); In re Marriage of Rockwell, 140 Wn.App. 1018 (2007).

4. THE COURT SHOULD HAVE CONSIDERED THE SOCIAL SECURITY BENEFITS THAT MR. SMITH GAVE UP IN LIEU OF HIS FEDERAL CIVIL SERVICE PENSION.

Mr. SMITH has assigned error (above) to the Court's failure to consider that he lost \$310 in social security benefits in social security benefits that he had accrued prior to marriage. In addition to actually losing benefits Mr. SMITH forewent the accrual of social security benefits. Mr. SMITH would have received a total of \$1,650 per month in social security benefits. Mr. SMITH would have received \$587 in social security benefits, which was reduced by approximately \$310 to \$268 because of his participation in the Federal system. Mr. SMITH gave up \$1,063.00 per month ( $\$1,650. - \$587 = \$1,063$ ) in social security benefits because of his participation in his Federal Civil Service pension. Mr. SMITH has assigned separate error to the \$1,063 in social security benefits based on the factual difference (i.e. the \$300.00 represents benefits he had already accrued but then lost) as well as the distinguishing legal differentiation (i.e. these were benefits accrued prior to marriage and are in every since his separate property).

In conclusion, it was additional error for the Court to not consider the loss of \$1,063 in social security benefits that Mr. SMITH would have earned, but for his participation in the Federal Civil Service Pension.

5. THE FAILURE OF THE COURT PROPERLY RECOGNIZE THE SURVIVOR ANNUITY AND PROVIDE SOME OFFSET FOR MR. SMITH'S REDUCTION IN SOCIAL SECURITY BENEFITS HAS RESULTED IN AN INEQUITABLE AND UNFAIR PROPERTY DIVISION.

*Division not Required* (1997) states as follows in its relevant parts:

Although a Decree that results in a patent disparity in the parties economic circumstances will be reversed, many decrees that have awarded one spouse considerably more assets in value than the other spouse have been upheld. In the absence of significant statutory factors or equity, a significantly disproportionate division of property is error. (citing to Willis v. Willis, 50 Wn. 2d 439, 312 p.2d 661 (1957).

In Willis the Court found that a 2/3 vs. 1/3 split was not fair and set the Trial Court's ruling aside. Willis at 441. In Willis the Court noted that where the Husband was without fault the community property should be distributed more equally. Willis at 441. On page 442 of Willis also went on to eliminate a maintenance award because the wife was in good health, college educated and seven years younger. The Court obviously found in Willis that the statutory factors that the Courts considered today were not present. Willis at 442. In our case the Court found both parties to have some health issues and that both were in a difficult financial situation. Therefore, the Court appropriately found a 50 – 50 split of the pension was appropriate and that the Husband should receive the amount of pension benefit attributable to his separate efforts.

The Husband vociferously emphasizes at the outset to this Court that his case is well distinguished from other cases in Washington where the Court may have provided a much greater share of property to one spouse over the other. In those cases the Court had a statutory basis of some sort for finding that a disproportionate share would be fair. (i.e. one spouse had physical disabilities, would be raising the children, substantial separate property, etc.). In our case the Court emphasized throughout its opinion that it had two

people before it who were in a difficult financial situation. It did not distinguish one from the other on any statutory consideration, but rather appropriately and properly found that a 50 -50 split of the community property was fair and the Husband should receive all of his separate property. In Willis we saw the Court over turn a 2/3 – 1/3 split and also overturned the award of maintenance because the statutory factors that justified maintenance were not present. The Husband asserts here that the Court specifically found that 50 – 50 was a fair split of the community property and the Court did not distinguish the Wife’s situation from that of the Husband’s. The Willis case is applicable as the Court in that case clearly rejected the basis for an inequitable distribution when it found that the Court had no basis for awarding maintenance. The Court here doesn’t need to reject any findings to find that an equal split of the property is fair, because the trial court made no such findings and concluded a 50 -50 split was a fair split.

The trial Court found that the Husband’s expected gross monthly retirement would be \$3,876 per month. The Court went on to properly find that the net survivor annuity after deducting for the \$365 cost for the annuity would be \$3,510 per month. The Court went on to find that the survivor annuity would be expected to be \$2,131 per month.

The Husband testified in accordance with the Washington State Insurance Commissioner mortality tables that he had a life expectancy of 19.23 years. The Wife had a life expectancy of 30.45 years. Based on his life expectancy, the husband is expected to draw \$3,510/mo. for 12 years and 8 months (Retirement date of March 1, 2014 until expected date of death on Nov.1, 2026). Conversely, based on the Petitioner’s life expectancy she is expected to live another 11 years and 2 months (From husband’s

expected date of death, Nov. 1, 2026 to her expected date of death, Jan. 1, 2038). During this time the Petitioner will be drawing 100% of a projected \$2,131/mo.

Assuming that the court would allow the Husband to have the full \$3,510/mo. for life, he would receive \$533,520 (12 years and 8 months = 152 months. X \$3,510/mo. = \$533,520). Conversely, the Wife is expected to live another 11 years and 2 months after the Husband dies, during which time, she is expected to receive \$2,131/mo. Therefore, she is then expected to receive \$285,554 (11 years and 2 months = 134 months X \$2,131/mo. = \$285,554). The total value of both the Husband's pension (\$533,520) and Wife's survivor annuity ((\$285,554) is \$819,074. Assuming the Court were to award the Husband an interest in the pension for life and then award to the wife survivor benefit based on the life expectancies, the Wife would receive 35% (\$285,554-wifes survivor benefit share divided by \$819,074-total pension value = 35%). The husband's share is 65% (\$533,520-husband's pension divided by \$819,074 = 65%).

Assuming a retirement pension benefit calculated on an age 65 the Husband would have a total of 467 months of service. Of the total 467 months 180 months of them would be his separate property contribution to the pension. Percentage wise his separate property contribution would be 38.5% (180 mos. div. 467 mos. = 38.5%). The total value of the pension is \$819,074 (His pension and his wife's survivor annuity). The remaining 61.5 % is the community interest in the pension. If you take the 38.5 % and multiply it by the value of the total pension you arrive at a dollar figure of \$315,343 of the pension being his separate property (38.5 % X \$819,074 = \$315,343). The Wife's community share is 30.75 % (1/2 of 61.5 % = 30.75 %). As per above the survivor annuity she is expected to be 35 % of the total pension value, while her total community

entitlement is 30.75 %. If the Court had considered the survivor benefit and awarded it to the Wife she would have received 4.25 % more ( $35 \% - 30.75 \% = 4.25 \%$ ) than her community entitlement leaving the Court in a position to award the Husband's pension to him in full.

By not considering the survivor annuity at all we ended up in a setting where effectively the Husband only received his separate property interest in the pension with the Wife receiving nearly all of the community interest. The Husband worked for 24 years during marriage (lost \$310 from his accrued social security benefit and forwent additional social security benefits) whereas and the Wife getting the full benefit of the Husband's 24 years of community work. This conclusion is arrived at when considering that the total Community interest in the pension \$819,074 pension is 61.5 %. When you multiply the total community property interest in the pension you arrive at a total community property interest in the pension of \$503,373 ( $61.5 \% \times \$819,074 = \$503,373$ ). The Husband's separate property interest based on a retirement benefit computed on a standard retirement age would be 38.5 % (arrived at by taking the months of service before marriage and months of service after separation). The total dollar amount of his separate property contribution to the pension is \$315,343 ( $38.5 \% \times \$819,074 = \$315,343$ ). Under the Court's approach (ignoring the survivor annuity in its entirety) the Husband is expected to get 38.5 % of his separate property. This equates to \$205,405 of his \$533,520 pension (12 years and 8 months = 152 months.  $\times \$3,510/\text{mo.} \times 38.5 \% = \$205,405$ ). He is then to receive a total of 30.75 % (1/2 the 61.5 % community interest) or \$164,057 ( $30.5 \% \times \$533,520 = \$164,057$ ). The total amount that he is to receive from the \$819,074 total pension is \$369,462 ( $\$205,405 \text{ separate} + \$164,057 =$

\$369,462). The Husband is getting 45 % ( $\$369,462 \div \$819,074 = 45\%$ ) of the entire pension (without regard to his separate contributions). Conversely the Wife is get the \$285,554 survivor annuity plus 30.75 % of his \$533,520 pension or \$164,057 ( $30.75\% \times \$533,530 = \$164,057$ ) for a total of 449,611 ( $\$285,554 + \$164,057 = \$449,611$ ). She will be getting 55 % ( $\$449,611 \div \$819,074 = 55\%$ ) of the entire pension.

When you look at the Court's division of the pension and allow for the Husband receiving his full separate property entitlement he is receiving 11 % of the community portion in the pension and the Wife is getting an 89 % community interest. This number is arrived at by first considering the Husband's separate property entitlement in his pension. The Husband's separate property interest in the \$819,074 pension (Husband's pension and Wife's survivor annuity) is \$315,343 ( $38.5\% \times \$819,074 = \$315,343$ ). The community interest in the \$819,074 pension is \$503,730 ( $61.5\% \times \$819,074 = \$503,730$ ). The Wife is getting 89 % of the community interest ( $\$449,611 \div \$503,730 = 89\%$ ). Conversely the Husband is getting his full separate property share and 11 % ( $100\% - 89\% \text{ to Wife} = 11\%$ ) of the community interest share.

The respective numbers get even more compelling if you consider the \$310.00 reduction in social security benefits (let alone the \$1,063 in foregone social security benefits). These were social security benefits that accrued to the Husband for service prior to marriage. The \$310.00 per month loss would total \$47,120 (12 yrs. 8 mos.  $\times$  \$310/mo = \$47,120) over the projected 12 year 8 month life expectancy after the Husband's retirement. If this amount were treated as a separate property offset (as appropriate when considering that it is a reduction in benefits he accrued prior to marriage) then the Husband's separate property contribution increases to \$362,463

$(\$315,343 + \$47,120 = \$362,463)$  while the community's contribution to the pension is reduced to  $\$456,660$  ( $\$503,730 - \$47,120 = \$456,600$ ). When the  $\$310.00$  loss of social security benefits accrued outside the marriage is considered and the failure to consider the Wife's annuity are combined the setting becomes one where the Wife is receiving 98% ( $\$449,611 \div \$456,600 = 98\%$ ) of the community interest in the pension and the Husband is effectively only receiving the remaining 2 % of the community interest in the pension.

The inequity to the Husband, however, does not stop here. The above numbers do not include the fact that after the Court gave to the  $\$285,554$  survivor annuity to the Wife it decided that the Husband should be the one to pay for it (or at least the most of it). In its ruling the Court decided that  $\$365$  per month cost of the annuity would be taken "off the top." This meant that the Husband's gross pension of  $\$3,875$  per month would be reduced by  $\$365$  to a net of  $\$3,510$ . Of this  $\$365$  amount 38.5 % is from the separate efforts of the Husband and the Husband has contributed another 30.75 % via his one-half (1/2) community interest for a total of 69.25 % ( $38.5\% + 30.75\% = 69.25\%$ ). Sixty-nine and a quarter percent (69.25%) of  $\$365$  survivor annuity cost is  $\$253$ . Based on the Husband's life expectancy after retirement he is expected to contribute this  $\$253.00$  for twelve years and eight months after his retirement (152 months) to fund the survivor annuity. Under the Court's ruling the Husband will be paying  $\$38,546$  ( $152 \text{ mos.} \times \$253/\text{mo.} = \$38,546$ ) in order give the Wife a  $\$285,554$  survivor annuity.

In conclusion, where the Court decides that a 50 – 50 split of the community property is appropriate an unfair and inequitable division occurs when the Court does not

properly consider the Wife's survivor annuity and reduction in social security.

Washington Practice, supra; Willis, supra.

6. UNDER WASHINGTON LAW THE WIFE WAS VESTED IN HER WASHINGTON STATE DEFINED BENEFIT PLAN.

The Wife has a Defined Benefit plan through her employment with the Tacoma Public Schools. As of April 2005 she had 53.5 months of accrued time. By the time of trial she had accrued about seven years of service. The Wife testified that she would need to work 120 months to vest and entered documentation to that effect. The Husband argued at closing that the Wife would vest after only five (5) years under statute. The Court found insufficient proof to conclude that the Wife's pension had vested in accordance with the Husband's assertion so the Court found that the Pension did not rise to the level of divisible asset and therefore did not consider it in its division of property.

RCW 41.35.420 provides for the vesting requirements for employees of the Washington State Schools. It states as follows in its relevant parts:

**41.35.420 Retirement Eligibility**

(1) NORMAL RETIREMENT. Any member with at least five service credit years who has attained at least age sixty-five shall be eligible to retire and to receive a retirement allowance computed according to the provisions of RCW 41.35.400.

In conclusion, the Wife was vested in the Defined Benefit Plan therefore the Court should have considered it in making its division of property. RCW 41.35.420.

7. THE COURT COMMISSIONER ERRED WHEN IT FOUND MR. SMITH IN CONTEMPT OF COURT FOR NOT TAKING ON RESPONSIBILITIES THAT ARE PLACED ON Ms. SMITH PURSUANT TO FEDERAL LAW.

The Decree provided that the Husband was to “forthwith do all acts necessary to acquire the survivor’s benefit annuity naming Kimberly P. Sjolander as the sole beneficiary of that survivor’s benefit annuity.” The Wife brought a contempt Motion that was heard before the Court Commissioner on November 19, 2007 alleging that the Husband failed to do all acts necessary to obtain the survivor annuity. On November 19, 2007 that the Husband was found in contempt of Court for failing to forward to the Office of Personnel Management certified copies of the Findings and Decree. The Husband asserts that under Federal Law that it is the Wife’s responsibility to provide the certified copies to the Office of Personnel Management and that since Federal Law preempts the area the State Court does not have the authority to shift responsibilities that are her duties under federal statute.

In Van Patten v Jensen, 112 Wn.2d 552, 773 P.2d 62 (1989) the Court found that Federal administrative regulations that are within the agency’s authority preempt state law, including a state Constitutional provision. Van Patten at 552. The Van Patten case dealt with a cause of action that was brought by a customer who deposited funds into a Federal Savings and Loan immediately before it was declared insolvent by the Federal Home Loan Bank Board. Van Patten at 553. The Bank was a federal institution created under 512 USC 1561 et seq., the Federal Home Owner’s Loan Act (HOLA) of 1933. Id. Our Supreme Court found no regulations under HOLA that forbid bank employees from taking deposits when a bank is “in failing circumstances.” Id. Conversely, in Van Patten the depositor brought a cause of action specifically permitted under Article 12, Section 12 the Washington State Constitution that provides that a bank employee may not accept deposits knowing that the institution is insolvent or “in failing circumstances”. Id.

Notwithstanding a cause of action was specifically permitted under our own State Constitution our Supreme Court found that the Federal HOLA pre-empted all state law and dismissed the depositor's cause of action. Van Patten, supra.

In Van Patten v Jensen, 112 Wn.2d 552, 773 P.2d 62 (1989) the Court found that Federal administrative regulations that are within the agency's authority preempt state law, including a state Constitutional provision. Van Patten at 552. 5 USC Sec. 8347 gives the Office of Personnel Management the right to promulgate regulations (inclusive of 5 CFR Sec. 838.123) applicable to federal employees insurance and annuities. I quote from the relevant parts of 5 USC Sec. 8347:

TITLE 5 GOVERNMENT ORGANIZATIONS AND  
EMPLOYEES  
Subpart G- Insurance and Annuities  
CHAPTER 83 – RETIREMENT  
SUBCHAPTER III- CIVIL SERVICE RETIREMENT

Section 8347. Administration; regulations

- (a) The Office of personnel Management shall administer this subchapter. Except as otherwise specifically provided herein, the Office shall perform, or cause to be performed, such acts and prescribe such regulations as are necessary and proper to carry out this subchapter.
- (b) Applications under this subchapter shall be in such form as the Office prescribes. Agencies shall support the applications by such certificates as the Office considers necessary to the determination of the rights of applicants. The office shall adjudicate all claims under this subchapter.

5 CFR838.123 requires the Wife to file a certified copy of the Court Orders with OPM. Since it was promulgated the Office of Personnel Management pursuant to 5 USC SEC

8347 that regulation preempts state law. Van Patten v Jensen, 112 Wn.2d 552, 773 P.2d 62 (1989).

In Van Patten when our Supreme Court determined that preemption exists when a clear federal intention to create a uniform banking system independent of state regulation is present. I quote from Van Patten v Jensen, 112 Wn.2d 552 (1989):

The analysis in EASTON v IOWA, 188 U.S. 220 (1903) supports our conclusion. There the Court found that federal law preempted applying a state criminal provision similar to section 12 to the president of a national bank. The Court stressed that Congress envisions a uniform banking system independent of state regulation, that the National Bank Act provided comprehensive organization of banks, that such banks were subject to regular examination by the comptroller, and that the comptroller determined insolvency and appointed a receiver.

When you review the CFRs promulgated by OPM there is a clear and pervasive effort to completely and fully regulate the laws and regulations that apply to federal employees. It is necessarily the Wife's position here that it was the intent of the United States Congress that all 50 states and the United States government are responsible for establishing the law as it applies to federal employees' pensions and entitlements. Such a proposition is absurd. The United States Congress obviously intended that it regulate the area of federal pensions. Van Patten, supra.

The Van Patten Court went on to make it clear why the Courts applied the preemption doctrine in the first instance. The Van Patten court stated that "the primary purpose of the preemption doctrine was to avoid a state court decision which overturns the authority of a federal administrative agency." Pioneer First Federal Savings and Loan v Pioneer National Bank, 98 Wn.2d 853, 861, 659 P.2d 481 (1983); Van Patten,

supra.

Our fact pattern is not nearly as compelling as Van Patten's. In our case we do not have a State Constitutional provision that provides that it is the Husband's responsibility to provide the Court's Order to OPM. In fact, we have no State Law of any sort that conflicts with the clear language 5 CFR sec. 838.123 that it is the Wife's responsibility to provide to OPM a certified copy of the divorce decree.

Furthermore, Washington Courts have already specifically found that in the area of federal employee benefits that the law is preempted by the federal regulations. Estate of Hanley v. Andresen, 39 Wn.App. 377, 693 P.2d 198 (1984). In Hanley the issue was whether a Washington divorce decree governs the disposition of proceeds from a federal employees group life insurance policy, the terms of which are controlled by 5 USC Sec. 8701-8716 and 5 CFR Sec. 870. Hanley at 379. The administrator of the Estate maintained that the divorce decree superceded a previously executed a designation of beneficiary in accordance with the applicable federal regulations. Id. The Court found that the Court Order Divorce decree must relinquish to federal law. Id. I quote from Hanley on 379:

Under the preemption doctrine, state law is not applied where it conflicts with federal law. ... Here, the statute and regulations issued pursuant to the statute both require that a change or cancellation of beneficiary must be witnessed and filed with the employer or the Office of Personnel Management. Further, such a change in a will or other document not so witnessed and filed is without force or effect, 5 CFR Sec. 870.901(b), and the right to change the beneficiary cannot be restricted. 5 CFR Sec. 870.901(e).

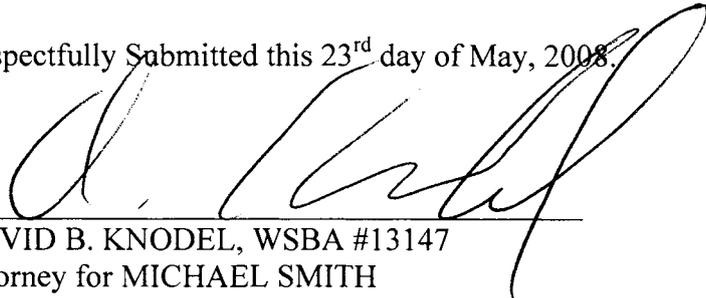
Our Supreme Court has already determined the Code of Federal Regulations that govern the benefits of federal employees preempts state law. Hanley, supra.

In conclusion, 5 CFR Sec 838.123 is a federal regulation promulgated by the Office of Personnel Management pursuant to 5 USC Sec. 8347. Federal administrative regulations that are within the agency's authority preempt state law. Van Patten v Jensen, 112 Wn.2d 552, 773 P.2d 62 (1989); Estate of Hanley v. Andresen, 39 Wn.App. 377, 693 P.2d 198 (1984).

### **CONCLUSION**

In getting his federal civil service retirement MICHAEL SMITH'S social security benefits were reduced and he could not accrue additional social security benefits. This has left MICHAEL SMITH with his federal pension as his only means for retirement. Conversely, the his 51 year old spouse is entitled to both a defined benefit plan and defined contribution plan through her employment in addition to her social security benefits. Beyond her own three (3) retirement plans she will also be receiving a full survivor annuity from him. It is MICHAEL SMITH'S prayer to this good and just Court that it will consider his prayers herein because its decision will have such a significant impact on the remainder of his life.

Respectfully Submitted this 23<sup>rd</sup> day of May, 2008.



---

DAVID B. KNODEL, WSBA #13147  
Attorney for MICHAEL SMITH

Attach A.

5293 8/24/2007 00135

1



05-3-00821-0 28126934 VRPTCF 08-24-07

Smith & Smith 8-18-07 Ruling

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

FILED  
IN COUNTY CLERK'S OFFICE  
A.M. AUG 24 2007 P.M.  
PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY                      DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

In re the Marriage of:            )  
  )  
KIMBERLY P. SMITH,                )  
                          Petitioner,    ) No. 05-3-00821-0  
  )  
and                                     )  
  )  
MICHAEL L. SMITH,                 )  
                          Respondent.    )

**ORIGINAL**

VERBATIM REPORT OF PROCEEDINGS  
AUGUST 17, 2007  
COVER SHEET



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

APPEARANCES

For the Petitioner:

MR. DONALD N. POWELL  
Attorney at Law  
818 South Yakima, 1st Floor  
Tacoma, Washington 98405  
(253) 274-1001

For the Respondent:

MR. DAVID B. KNODEL  
Attorney at Law  
3419 Pacific Avenue  
Tacoma, Washington 98418  
(253) 471-8721

Smith & Smith 8-18-07 Ruling

1 AUGUST 17, 3007

2 \* \* \* \* \*

3  
4 JUDGE CHRISTIANSON: Thank you. Please be  
5 seated. We are here this morning on the case of Smith  
6 versus Smith, Pierce County Superior Court Cause  
7 No. 05-3-00821-0.

8 First I would like to thank counsel and the  
9 parties for making the time to come here this morning.  
10 I know it's difficult to get off work, and I know the  
11 attorneys had to move some things, and I sincerely  
12 appreciate you making this effort so I could give you a  
13 decision. I know you want to move on from this case.

14 One of the matters we discussed  
15 preliminarily was to have an Order presented to me that  
16 would seal certain papers, and that will need to be  
17 presented to me or, if it's agreed to, then it certainly  
18 can be presented to the ex parte department.

19 MR. POWELL: On that topic, I had wanted to  
20 talk to the clerk about what specifically they wanted,  
21 whether we need to redact, and I have not had an  
22 opportunity to speak with the clerk yet on that. So,  
23 I'll do that. Thank you.

24 JUDGE CHRISTIANSON: Okay. I find the  
25 parties were married on April 4, 1981.

*Jeanne' E. Cole & Associates (253) 640-5974*

*Smith & Smith 8-18-07 Ruling*

1 I find that they were separated on March 1,  
2 2005.

3 I find that the Petitioner is 50 years of  
4 age and the Respondent is 58 years of age.

5 I find that the marriage is irretrievably  
6 broken.

7 I find that there are two adult children,  
8 the youngest of which is attending college.

9 There was no testimony the Petitioner is  
10 pregnant, and so I will find that she is not pregnant.

11 The wife will be restored to the last name  
12 of Schoelander (phonetic).

13 I will grant a decree of dissolution of  
14 marriage.

15 The issues I was presented with in this  
16 case, in no particular order, were attorney's fees,  
17 dividing up a civil service retirement annuity, what to  
18 do with the Petitioner's SERS Plan 3 benefits, and what  
19 to do about the survivor's benefit in the civil service  
20 retirement program.

21 Exhibit 9, as regards the civil service  
22 annuity, provides that there is a gross as of, I believe  
23 it was October 17, 2005, of \$3,876 per month deducting a  
24 benefit cost of \$369.09 would be \$3,510 pretax per  
25 month. The testimony was that the survivor benefit

Smith & Smith 8-18-07 Ruling

1 available to the \$2,131 per month.

2 As regards the wife's SERS Plan 3 benefits,  
3 there is a defined benefit and a defined contribution  
4 component. The defined benefit component, pursuant to  
5 an exhibit, indicated as of April of 2005 she had  
6 53-and-a-half months accrued. The testimony at trial  
7 was that she had about seven years accrued. The  
8 testimony provided and the documentary evidence provided  
9 that there was a 120 month vesting period which has not  
10 yet occurred. There was information offered after both  
11 parties rested and at the conclusion of the closing  
12 argument regarding some other statutory provision, but I  
13 find that there was insufficient proof to determine that  
14 there was some other period other than 120 days for the  
15 vesting of that defined benefit plan. I don't think it  
16 rises to the nature of a divisible asset. I will make  
17 no ruling on that. Whatever benefits will be received  
18 by the Petitioner.

19 As regards the defined contribution plan,  
20 there was testimony as of April 26, 2005, I believe it  
21 was documentary evidence, the balance in the account was  
22 \$10,230.50. There was testimony at trial that the  
23 current balance is somewhere around \$10,589.31. I will  
24 talk about what I'm going to do with that in just a  
25 minute.

Jeanne' E. Cole & Associates (253) 640-5974

*Smith & Smith 8-18-07 Ruling*

1           Substantial time and argument was devoted to  
2 what to do with the Civil Service Retirement Annuity. I  
3 think the matter was ably argued by both counsel, and I  
4 understand the difficulty, the predicament that poses  
5 for both parties. I do think that the Bullachek  
6 (phonetic) formula and using a formula is the fairest  
7 way of dividing such an interest, rather than  
8 determining it based upon fixed amounts, because of the  
9 health conditions of the parties, the uncertainty about  
10 their exact retirement date, whether there will be a  
11 medical retirement or some other event that may not  
12 cause the calculation assuming an age 65 retirement to  
13 come true. So, I think a formula is the fairest way to  
14 divide the pension that is fair to both parties.

15           So, I'm not going to determine the division  
16 based upon a fixed sum. What I am going to do is to  
17 determine the Petitioner shall receive 50 percent of the  
18 amount accrued from April 4, 1981 to March 1, 2005, and  
19 then that would be the numerator, then the denominator  
20 would be the total years of service. There was  
21 unrefuted testimony that there was accrued 48 months as  
22 a result of his military service, two years of civil  
23 service retirement benefits earned prior to marriage,  
24 24 months, and that after March 1, 2005 he had  
25 accumulated something around 100, for a total of

Smith & Smith 8-18-07 Ruling

1 180 months being his separate property.

2 I struggled mightily with the survivor  
3 benefit plan. I went back and forth. For every plus on  
4 one side there was a plus on the other side. There is  
5 just a host of factors that make this case extremely  
6 difficult, not the least of which is that as these  
7 parties approach the home stretch toward retirement  
8 there are just not sufficient assets to give either one  
9 of them a comfortable future, and that is tragic in many  
10 ways. I have come to the conclusion that I think the  
11 best way of dealing with it is to take the cost of the  
12 survivor benefit off the top and divide the pension  
13 after that, so that the Respondent would receive his  
14 separate portion and would receive his one-half of the  
15 community portion and the wife would receive her half of  
16 the community portion. Each of them will be required to  
17 pay income taxes on the shares they receive.

18 As regards Social Security benefits, there  
19 was testimony, it was undisputed, that the Respondent  
20 will have a deduction from what he would otherwise  
21 receive for Social Security and it would be down to  
22 about \$587 per month. I didn't really get a sufficient  
23 amount of information on the wife's pension. There were  
24 certain estimates provided by the Respondent which  
25 estimated income between 1972 and 1980. The testimony

Jeanne' E. Cole & Associates (253) 640-5974

Smith & Smith 8-18-07 Ruling

1 from the Petitioner was that there was a 10-year period  
2 where she was not employed, so I think there has been  
3 insufficient proof as to what her benefit would be, so  
4 really I'm unable to factor any changes or alterations  
5 in the division based upon a consideration of both  
6 parties' Social Security benefits.

7 As regards the wife's defined contribution  
8 plan, I think the numbers should be used as of the date  
9 of separation. I think that she has a lower earning  
10 capacity than does the Respondent. This is a 24-year  
11 marriage. I think the testimony about the husband's  
12 health conditions seem to me to be more in the nature of  
13 those which would affect his ability to continue working  
14 to age 65. I recognize there is a daughter in college.  
15 As regards what I'm going to do with respect to  
16 attorney's fees, I'm going to award the Respondent  
17 \$4,000 of that defined contribution plan and the  
18 Petitioner shall retain the remainder.

19 As regards attorney's fees, the testimony  
20 was that the Petitioner is unable to live alone on the  
21 income that she has. The husband testified that he has  
22 taken out a loan to pay off certain debts. There was  
23 testimony he might not have had to take out those debts  
24 at a certain time. The undisputed testimony is that  
25 both these persons are upside down financially. So, I

Jeanne' E. Cole & Associates (253) 640-5974

Smith & Smith 8-18-07 Ruling

1 think based upon need and ability to pay that each of  
2 them will need to pay their own attorney's fees and  
3 costs.

4           Regarding the matter related to the  
5 attorney's fees, there was discussion about a check for  
6 \$414 and a prior judgment of \$750. That judgment will  
7 remain in place. And a suggestion was made by  
8 Petitioner that the Respondent sign the \$414 check which  
9 would be credited against the \$750 judgment, and I think  
10 that is a good idea and I will order that.

11           MR. POWELL: I have some questions. On the  
12 \$4,000 of her contribution that you're awarding to him,  
13 when was that to take effect?

14           JUDGE CHRISTIANSON: Well, she's going to  
15 have to roll it out on a pretax basis to an account,  
16 then he can choose to take the money out or not. I'm  
17 not ordering that she has to cash that in and pay that  
18 in cash, because there will be a penalty.

19           MR. POWELL: The \$414 won't satisfy the  
20 \$750. Can we deduct the balance of that from the  
21 \$10,000?

22           JUDGE CHRISTIANSON: The judgment will  
23 remain. He'll just have to pay the judgment.

24           MR. POWELL: I could just garnish, and I  
25 don't know why we'd want to put him through the

Jeanne' E. Cole & Associates (253) 640-5974

*Smith & Smith 8-18-07 Ruling*

1 garnishment costs.

2 JUDGE CHRISTIANSON: I'm going to leave that  
3 to you to talk to Counsel.

4 MR. KNODEL: I think we can --

5 JUDGE CHRISTIANSON: I think for that amount  
6 of money you can work that out, would be my sense.

7 MR. POWELL: I hope so.

8 JUDGE CHRISTIANSON: Both these parties are  
9 bleeding pretty heavily financially, and nothing I can  
10 do can make it much better.

11 Mr. Knodel, any questions, sir?

12 MR. KNODEL: No. Thank you, your Honor.

13 JUDGE CHRISTIANSON: I know this is a tough  
14 case. I wish I could do it otherwise, but this is my  
15 best efforts with the facts that were presented. So, I  
16 wish you both the best of luck.

17 Mr. Knodel, I have your three-ring binder  
18 and I'll return that to you.

19 MR. POWELL: With regard to presentation, if  
20 we may, if we can't agree to --

21 JUDGE CHRISTIANSON: Arrange that with  
22 Jacky.

23 MR. POWELL: Jacky at the pro tem  
24 department?

25 JUDGE CHRISTIANSON: Yes.

*Smith & Smith 8-18-07 Ruling*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MR. POWELL: Thank you.

JUDGE CHRISTIANSON: Okay. Thank you.

\*\*oOo\*\*

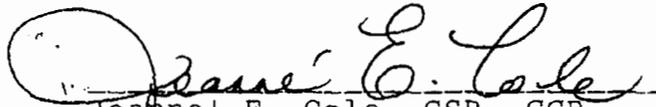
*Jeanne' E. Cole & Associates (253) 640-5974*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

REPORTER'S CERTIFICATE

I, Jeanne' E. Cole, Official Pro Tem Court Reporter for the Pierce County Superior Court, do hereby certify that the foregoing transcript entitled "Verbatim Report of Proceedings," was taken by me stenographically and reduced to the foregoing typewritten transcript at my direction and control, and that the same is true and correct as transcribed.

DATED at Auburn, Washington, this 24th day of August, 2007.



Jeanne' E. Cole, CSR, CCR  
WA CCR No. 02161  
CA CSR No. 08970



05-3-00821-0 28342473 FNFCL 10-01-07



4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**SUPERIOR COURT OF WASHINGTON  
COUNTY OF PIERCE**

In re: the Marriage of:

KIMBERLY P. SMITH,

Petitioner,

and

MICHAEL L. SMITH,

Respondent.

NO. 05-3-00821-0

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
(FNFCL)

**I. Basis for Findings**

The findings are based on:

trial. The following people attended:

Petitioner.

Petitioner's Lawyer.

Respondent.

Respondent's Lawyer.

**II. Findings of Fact**

Upon the basis of the court records, the court  *Finds*:

**2.1 Residency of Petitioner**

The Petitioner

is a resident of the state of Washington.

2.2 Notice to the Respondent

The respondent

[x] appeared, responded or joined in the petition.

2.3 Basis of Personal Jurisdiction Over the Respondent

[x] The facts below establish personal jurisdiction over the respondent.

[x] The respondent is presently residing in Washington.

[x] The parties lived in Washington during their marriage and the petitioner continues to reside, or be a member of the armed forces stationed, in this state.

[x] The parties may have conceived a child while within Washington.

2.4 Date and Place of Marriage

The parties were married on April 4, 1981 at Tacoma, WA.

2.5 Status of the Parties

[x] Husband and wife separated on March 1, 2005.

2.6 Status of Marriage

[x] The marriage is irretrievably broken and at least 90 days have elapsed since the date the petition was filed and since the date the summons was served or the respondent joined.

2.7 Separation Contract or Prenuptial Agreement

[x] There is no written separation contract or prenuptial agreement.

2.8 Community Property

[x] The parties have the following real or personal community property:

1. The family home located at 9002 East "F" St., Tacoma, WA 98445 and legally described as:

Section 33 Township 20 Range 03 Quarter 41 STERLING ADD: STERLING ADD NE OF SE 33-20-03E L 1 THRU 4 B 20 APPROX 12,000 SQ FT APPROVED SUBD BY CY OF TACOMA P/W 12/30/98 OUT OF 037-0 SEG K0471 MA 1/19/99 MA

2. ~~2003~~ [year] ~~Ford~~ [make] ~~Taurus~~ [model] [description of automobile]

3. ~~1997~~ [year] ~~Chev~~ [make] ~~S10~~ [model] [description of automobile]

4. Husband's Civil Service Pension ~~E. 1977 Chev Nova~~

5. Wife's SERS III Pension

6. Household goods and furnishings

~~20 1994 Ford Explorer~~

*PK*  
*OR*

*KPS*

*MR*

2.9 Separate Property

[x] The wife has the following real or personal separate property:

1997 Dodge Intrepid  
(x) The husband acquired vehicle as listed in Decree as his separate property before separation that was finalized

2.10 Community Liabilities

[x] There are no known community liabilities. The parties filed a joint bankruptcy after their date of separation.

2.11 Separate Liabilities

[x] The husband has incurred the following separate liabilities:

The husband shall pay any debt or lien against the home awarded to him under the property division above and any debts acquired by him since date of separation not discharged in bankruptcy.

Fieldstone Mtg, ALCU Home Equity, ALCU Car loan, ALCU Signature, Direct Loan (Educ. for Sm), AMERICAN GENERAL FINANCE, DAN LO KNOPEL

[x] The wife has incurred the following separate liabilities:

John Hickman	\$2,000.00
Visa	\$3,000.00
MasterCard	\$2,000.00
Visa	\$ 450.00
Visa	\$ 900.00
Visa	\$ 550.00
Franciscan Health	\$ 600.00

Fieldstone Mtg. 175,000  
 AM. LKE CC 30,000  
 ALCU - Car 7,800  
 ALCU Sig. Loan 2,700  
 Direct Loan 12,400  
 Am. Gen'l 3,000  
 D. Knobel, Atty 10,000

2.12 Maintenance

[x] Maintenance was not requested.

2.13 Continuing Restraining Order

[x] Does not apply.

2.14 Protection Order

[x] Does not apply.

2.15 Fees and Costs

[x] Other: The judgment previously entered by the Court Commissioner is hereby granted in favor of Kimberly Smith and against Michael Smith in the amount of \$750.00. Said judgment shall be offset by \$414.00 which the husband is ordered to endorse to the wife.

Each party shall pay their own attorney's fees and costs.

2.16 Pregnancy

DONALD N. POWELL  
Attorney and Counselor at Law  
818 S. Yakima, 1st Floor  
Tacoma, Washington 98405  
(253) 274-1001 (253) 383-6029 FAX

1 [x] The wife is not pregnant.

2 **2.17 Dependant Children**

3 [x] The parties have no dependent children of this marriage.

4 **2.18 Jurisdiction Over the Children**

5 [x] Does not apply because there are no dependent children.

6 **2.19 Parenting Plan**

7 [x] Does not apply.

8 **2.20 Child Support**

9 [x] Does not apply.

10 **2.21 Other:** The court finds the only fair method to divide the Civil Service Retirement in the name of  
11 the husband is to divide it as a percentage of each payment as it is received. The court order finds  
12 that a survivor's benefit annuity shall forthwith be purchased by the husband and he shall  
13 forthwith do all acts necessary to acquire the survivor's benefit annuity naming Kimberly P.  
14 Sjolander as the sole beneficiary of that survivor's benefit annuity. The husband shall receive the  
15 benefits of the annuity except for the portion of each benefit payment which is award to the wife.  
16 The portion of each benefit payment awarded to the wife is one-half of the amount that is  
17 determined after application of the formula set forth below. The parties were married for 298<sup>087</sup>  
18 months while the husband was earning a Civil Service Retirement pension. The husband has been  
19 earning the pension since 60 months prior to the date of marriage of April 4, 1981. The formula  
20 for determining the wife's share is  $\frac{298}{60 + 298}$  (number of months during the marriage) over the number  
21 of months that the husband earned the retirement pension until his date of retirement  
22 (Representing 60 months before marriage, 298 months and that number of months from March 1,  
23 2005 until the month of his retirement.) The court will preserve jurisdiction to ensure that the  
24 purpose and intent of this order is properly effectuated and enforced.

Handwritten notes: "RC WS" and "W" with arrows pointing to lines 12-15.

18 **III. Conclusions of Law**

19 The court makes the following conclusions of law from the foregoing findings of fact:

20 **3.1 Jurisdiction**

21 [x] The court has jurisdiction to enter a decree in this matter.

22 **3.2 Granting a Decree**

23 [x] The parties should be granted a decree.

24 **3.3 Pregnancy**

1 [x] Does not apply.

2  
3 **3.4 Disposition**

4 The court should determine the marital status of the parties, make provision for a parenting plan  
5 for any minor children of the marriage, make provision for the support of any minor child of the  
6 marriage entitled to support, consider or approve provision for maintenance of either spouse,  
7 make provision for the disposition of property and liabilities of the parties, make provision for  
8 the allocation of the children as federal tax exemptions, make provision for any necessary  
9 continuing restraining orders, and make provision for the change of name of any party. The  
10 distribution of property and liabilities as set forth in the decree is fair and equitable.

11 **3.5 Continuing Restraining Order**

12 [x] Does not apply.

13 **3.6 Protection Order**

14 [x] Does not apply.

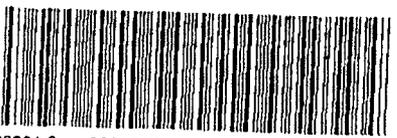
15 **3.7 Attorney Fees and Costs**

16 [x] Other: The judgment previously entered by the Court Commissioner is hereby granted in  
17 favor of Kimberly Smith and against Michael Smith in the amount of \$750.00. Said  
18 judgment shall be offset by \$414.00 which the husband is ordered to endorse to the wife.

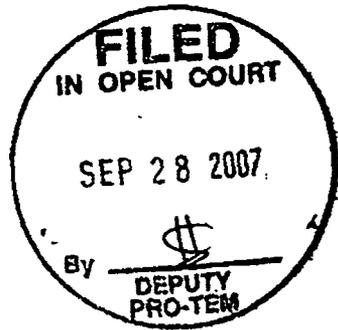
19 Each party shall pay their own attorney's fees and costs.

20 **3.8 Other:** The court finds the only fair method to divide the Civil Service Retirement in the name of  
21 the husband is to divide it as a percentage of each payment as it is received. The court order finds  
22 that a survivor's benefit annuity should be purchased, the husband shall be ordered to forthwith do  
23 all acts necessary to acquire the survivor's benefit annuity naming Kimberly P. Sjolander as the  
24 sole beneficiary of that survivor's benefit annuity. The husband shall receive the benefits of the  
25 annuity except for the portion of each benefit payment which is award to the wife. The portion of  
each benefit payment awarded to the wife is one-half of the amount that is determined after  
application of the formula set forth below. The parties were married for ~~298~~<sup>297</sup> months while the  
husband was earning a Civil Service Retirement pension. The husband has been earning the  
pension since ~~607~~<sup>297</sup> months prior to the date of marriage of April 4, 1981. The formula for  
determining the wife's share is ~~298~~<sup>297</sup> (number of months during the marriage) over the number of  
months that the husband earns the retirement pension until his date of retirement (Representing ~~60~~<sup>60</sup>  
months before marriage, ~~298~~<sup>297</sup> months and that number of months from March 1, 2005 until the  
month of his retirement.) The court will preserve jurisdiction to ensure that the purpose and intent  
of this order is properly effectuated and enforced.





05-3-00821-0 28342475 DCD 10-01-07



**SUPERIOR COURT OF WASHINGTON  
COUNTY OF PIERCE**

In re: the Marriage of:

KIMBERLY P. SMITH,

Petitioner,

and

MICHAEL L. SMITH,

Respondent.

NO. 05-3-00821-0

DECREE OF DISSOLUTION (DCD)  
 Clerk's action required

**I. Judgment/Order Summaries**

**1.1 Restraining Order Summary:**

Does not apply.

**1.2 Real Property Judgment Summary:**

Real Property Judgment Summary is set forth below:

*WPM DK*  
 Does not apply *MD*

~~Assessor's property tax parcel or account number: 7915000371~~

~~**1.3 Money Judgment Summary:**~~

~~Judgment Summary is set forth below.~~

- A. Judgment creditor Kimberly P. Smith
- B. Judgment debtor Michael Smith
- C. Principal judgment amount \$ \_\_\_\_\_
- D. Interest to date of judgment \$ \_\_\_\_\_
- E. Attorney fees \$ 750.00 (offset by \$414 = \$336)
- F. Costs \$ \_\_\_\_\_
- G. Other recovery amount \$ \_\_\_\_\_
- H. Principal judgment shall bear interest at 12% per annum

**DONALD N. POWELL**  
Attorney and Counselor at Law  
818 S. Yakima, 1st Floor  
Tacoma, Washington 98405  
(253) 274-1001 (253) 383-6029 FAX

1 I. ~~Attorney fees, costs and other recovery amounts shall bear interest at 12% per annum~~

J. Attorney for judgment creditor Donald N. Powell

2 K. Attorney for judgment debtor David Knodel

3 L. ~~Other:~~

*Handwritten initials: HQ, DK, MP, WPS*

*End of Summaries*

4 **II. Basis**

5 Findings of Fact and Conclusions of Law have been entered in this case.

6 **III. Decree**

7 *It Is Decreed that:*

8 **3.1 Status of the Marriage**

9  The marriage of the parties is dissolved.

10 **3.2 Property to be Awarded the Husband**

11  The husband is awarded as his separate property the following property (list real estate, furniture, vehicles, pensions, insurance, bank accounts, etc.):

12 1. The family home located at 9002 East "F" St., Tacoma, WA 98445 and legally described as:

13 Section 33 Township 20 Range 03 Quarter 41 STERLING ADD: STERLING ADD  
14 NE OF SE 33-20-03E L 1 THRU 4 B 20 APPROX 12,000 SQ FT APPROVED  
15 SUBD BY CY OF TACOMA P/W 12/30/98 OUT OF 037-0 SEG K0471 MA  
16 1/19/99 MA

17 2. \$4,000 from the wife's Defined Contribution Plan by way of a non-taxable rollover to a qualified retirement account in his name

18 3. That portion of his Civil Service Retirement Pension as set forth below.

19 4. 2003 [year] FORD [make] TAURUS [model]  
[description of automobile]

20 5. 1999 [year] Chev [make] S-10 [model]  
[description of automobile]

21 6. Household goods and furnishings in his possession

22 7. Bank accounts in his possession

23 8. Social Security benefits accrued by him

24 9. Any property acquired since date of separation

25 10. 1994 FORD EXPLORER 11. 1977 Chev. Nova

**3.3 Property to be Awarded to the Wife**

The wife is awarded as her separate property the following property (list real estate, furniture, vehicles, pensions, insurance, bank accounts, etc.):

1. Any benefits to her under her State Employment Retirement Systems III except for the \$4,000 rollover as set forth in the award to the husband

- 2. 1997 Dodge Intrepid (acquired after separation)
- 3. Household goods and furnishings in her possession
- 4. Bank accounts in her possession
- 5. Social Security benefits accrued by her
- 6. Any property acquired since date of separation

3.4 Liabilities to be Paid by the Husband

*before separation that was finalized*

[x] Other: The parties filed a joint bankruptcy after their date of separation. The husband shall pay any debt or lien against the home awarded to him under the property division above and any debts acquired by him since date of separation not discharged in bankruptcy.

*Fieldstone Home; ALCU home equity; ALCU Card loan; ALCU Signature Loan; Direct Loan (Edu. for sm); AMERICAN GENERAL FINANCE, DAVID KNODEL. In amount of \$1,000.00 for Div.*  
Unless otherwise provided herein, the husband shall pay all liabilities incurred by him since the date of separation.

3.5 Liabilities to be Paid by the Wife

*before separation that was finalized*

[x] Other: The parties filed a joint bankruptcy after their date of separation. The wife shall pay all debts acquired by her after date of separation as follows:

John Hickman	\$2,000.00
Visa	\$3,000.00
MasterCard	\$2,000.00
Visa	\$ 450.00
Visa	\$ 900.00
Visa	\$ 550.00
Franciscan Health	\$ 600.00
Donald Powell	

Unless otherwise provided herein, the wife shall pay all liabilities incurred by her since the date of separation.

3.6 Hold Harmless Provision

[x] Each party shall hold the other party harmless from any collection action relating to separate or community liabilities set forth above, including reasonable attorney's fees and costs incurred in defending against any attempts to collect an obligation of the other party.

3.7 Spousal Maintenance

[x] Does not apply.

3.8 Continuing Restraining Order

[x] Does not apply.

3.9 Protection Order

[x] Does not apply.

1 **3.10 Jurisdiction Over the Children**

2 [x] Does not apply because there are no dependent children.

3 **3.11 Parenting Plan**

4 [x] Does not apply.

5 **3.12 Child Support**

6 [x] Does not apply.

7 **3.13 Attorney Fees, Other Professional Fees and Costs**

8 [x] Attorney fees, other professional fees and costs shall be paid as follows:

9 ~~The judgment previously entered by the Court Commissioner is hereby granted in favor~~  
10 ~~of Kimberly Smith and against Michael Smith in the amount of \$750.00. Said judgment~~  
11 ~~shall be offset by \$414.00 which the husband is ordered to endorse to the wife.~~

11 Each party shall pay their own attorney's fees and costs.

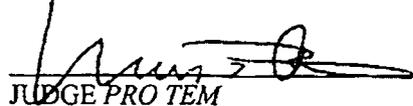
12 **3.14 Name Changes**

13 [x] The wife's name shall be changed to Kimberly P. Sjolander.

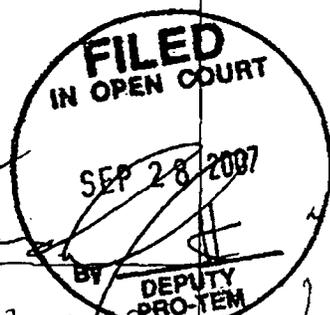
14 **3.15 Other:** The court finds the only fair method to divide the Civil Service Retirement in the name of  
15 the husband is to divide it as a percentage of each payment as it is received. A survivor's benefit  
16 annuity shall forthwith be purchased, the husband shall forthwith do all acts necessary to acquire  
17 the survivor's benefit annuity naming Kimberly P. Sjolander as the sole beneficiary of that  
18 survivor's benefit annuity. The husband shall receive the benefits of the annuity except for the  
19 portion of each benefit payment which is award to the wife. The portion of each benefit payment  
20 awarded to the wife is one-half of the amount that is determined after application of the formula  
21 set forth below. The parties were married for ~~298~~<sup>287</sup> months while the husband was earning a Civil  
22 Service Retirement pension. The husband has been earning the pension since ~~60~~<sup>67</sup> months prior to  
23 the date of marriage of April 4, 1981. The formula for determining the wife's share is ~~298~~<sup>287</sup>  
24 (number of months during the marriage) over the number of months that the husband earned the  
25 retirement pension until his date of retirement (Representing ~~60~~<sup>67</sup> months before marriage, ~~298~~<sup>287</sup>  
The court will preserve jurisdiction to ensure that the purpose and intent of this order is properly  
effectuated and enforced.

22 Dated: \_\_\_\_\_

9/28/07



JUDGE PRO TEM  
MARC CHRISTIANSON



1 Presented by:  
2   
3 DONALD N. POWELL, WSB #12055  
4 Attorney for Kimberly Smith

Approved for entry:  
Notice for presentation waived:  
5   
6 DAVID KNODEL, WSB  
7 Michael Smith

8 STATE OF WASHINGTON )  
9 COUNTY OF PIERCE ) ss.

COPY RECEIVED

10 Kimberly Smith, being both duly sworn on oath deposes and says:  
11 I am the Petitioner in this case and I have read the foregoing Decree of Dissolution and have  
12 also read the Findings of Fact & Conclusions of Law and related documents, if included herein, and  
13 they are true and accurate to the best of my knowledge. I am not seeking any relief beyond that  
14 specifically requested in the petition. I am not pregnant.

15 \_\_\_\_\_  
16 KIMBERLY P. SMITH  
17 Petitioner

18 SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

19 \_\_\_\_\_  
20 NOTARY PUBLIC, in and for the State of  
21 Washington, residing at: \_\_\_\_\_  
22 Commission expires: \_\_\_\_\_

23 STATE OF WASHINGTON )  
24 COUNTY OF PIERCE ) ss.

25 Michael Smith, being both duly sworn on oath deposes and says:  
I am the Respondent in this case and I have read the foregoing Decree of Dissolution and have  
also read the Findings of Fact and Conclusions of Law and related documents, if included herein, and  
they are true and accurate to the best of my knowledge. I am not seeking any relief beyond that  
specifically requested in the petition. The wife is not pregnant.

26 \_\_\_\_\_  
27 MICHAEL SMITH  
28 Respondent

29 SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

30 \_\_\_\_\_  
31 NOTARY PUBLIC, in and for the State of  
32 Washington, residing at: \_\_\_\_\_  
33 Commission expires: \_\_\_\_\_

Section 5CFR838.123

[Code of Federal Regulations]

[Title 5, Volume 2]

[Revised as of January 1, 2002]

From the U.S. Government Printing Office via GPO Access [CITE: 5CFR838.807]

**TITLE 5—ADMINISTRATIVE PERSONNEL**

**CHAPTER I—OFFICE OF PERSONNEL MANAGEMENT (Continued)**

**PART 838—COURT ORDERS AFFECTING RETIREMENT BENEFITS**

**Subpart A—Court Orders Generally**

**Sec. 838.123 Division Of Responsibilities—Claimants' responsibilities.**

Claimants' are responsible for—

(a) Filing a certified copy of court orders and all other required supporting information with OPM.

(b) Keeping OPM advised of their current mailing addresses.

(c) Notifying OPM of any changes in circumstances that could affect their entitlement to benefits; and

d. Submitting all disputes with employees or retirees to the appropriate State court for resolution.

09 JUN -5 PM 3:15

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

WASHINGTON STATE COURT OF APPEALS  
DIVISION II

No. 37100-6-II

**DECLARATION OF SERVICE OF  
APPELLANT BRIEF**

MICHAEL SMITH,

Appellant

Vs.

KIMBERLY SMITH,

Appellee

DAVID B. KNODEL certifies and states:

I am the Appellant's attorney, beyond the age of 18 and competent to testify as to the following.

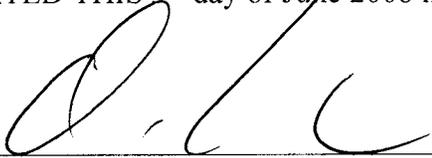
On May 21, 2008 I served upon the Paraprofessional for DONALD POWELL, Attorney for KIMBERLY SMITH, at 818 South Yakima, Suite 100, Tacoma, Washington a copy of MICHAEL SMITH'S Appellant Brief.

**DECLARATION OF SERVICE**

**DAVID B KNODEL, ATTORNEY**  
3419 Pacific Avenue  
Tacoma, Washington 98418  
Tel: (253) 471-8721  
Fax: (253) 471-8735

1 I HEREBY SWEAR UNDER PENALTY OF PERJURY THE ABOVE STATEMENT  
2 IS TRUE AND CORRECT.

3 DATED THIS 3<sup>rd</sup> day of June 2008 in Tacoma, Washington.

4 

5 \_\_\_\_\_  
6 DAVID B. KNODEL, WSBA #13147  
7 Attorney for MICHAEL SMITH