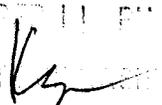


NO. 37100-6-II

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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THE COURT OF APPEALS
DIVISION II OF THE STATE OF WASHINGTON

MICHAEL L. SMITH,

Appellant,

vs.

KIMBERLY SJOLANDER formerly known as SMITH

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY

Cause No. 05-3-00821-0

BRIEF OF RESPONDENT

Donald N. Powell
WSBA #12055
818 S. Yakima, Suite 100
Tacoma, WA 98405
Phone: (253) 274-1001
Fax: (253) 383-6029
E-Mail: TacLaw@harboret.com

TABLE OF CONTENTS

	<u>Page</u>
I. Issues	1
II. Statement of the Case	1 - 4
III. Argument	4 - 21
A. The Court did not manifestly abuse its discretion in the division of the parties' respective retirement benefits.	4 - 20
1. Standard of review	5 - 7
2. Analysis of overall fairness	7 - 11
3. Analysis of the fairness of paying for the survivor's annuity "off the top"	11 - 13
4. Distribution of the state retirement	13 - 15
5. Social Security benefits	15 - 20
B. The appeal on the question of Federal preemption should be dismissed because Mr. Smith was not found in contempt of Court and because the order was within the Court's power to order Mr. Smith to act as his wife's representative.	20 - 21
IV. Attorneys fees.....	21 - 22
V. Conclusion.....	22

TABLE OF AUTHORITIES

Table of Cases

Page

Washington Cases

<i>In re Marriage of Bulicek</i> , 59 Wn.App.630, 800 P.2d 394 (1990).....	16
<i>In re Marriage of Brewer</i> , 137 Wn.2d 756, 976 P.2d 102 (1999).....	6,9-10
<i>In re Marriage of Greene</i> , 97 Wash.App. 708, 986 P.2d 144 (1999).....	8
<i>In re Marriage of Griswold</i> , 112 Wash.App. 333, 48 P.3d 1018 (2002).....	8-9
<i>In re Marriage of Kraft</i> , 119 Wash.2d 438, 832 P.2d 871 (1992).....	9
<i>In re Marriage of Muhammad</i> , 153 Wash.2d 795, 108 P.3d 779 (2005)....	9
<i>In re Marriage of Pea</i> , 17 Wash. App. 728, 566 P.2d 212 (1977).....	9
<i>In re Marriage of Rich</i> , 80 Wash.App. 252, 907 P.2d 1234 (1996).....	8
<i>In re Marriage of Rockwell</i> , 141 Wn.App. 235, 170 P.3d 572 (2007)....	5,8
<i>In re Marriage of Thomas</i> , 63 Wn. App. 658, 821 P.2d 1227 (1991).....	6
<i>In re Marriage of Wallace</i> , 111 Wn. App. 697, 45 P.3d 1131 (2002)....	5-6
<i>In re Marriage of Washburn</i> , 101 Wn.2d 168, 677 P.2d 152 (1984).....	6
<i>In re Marriage of White</i> , 105 Wash.App. 545, 20 P.3d 481 (2001).....	9
<i>In re Marriage of Yates</i> , 17 Wash.App. 772, 565 P.2d 825 (1977).....	5
<i>In re Marriage of Zahm</i> , 138 Wn.2d 213, 978 P.2d 498 (1999).....	18-19
<i>Shinn v. Thrust IV, Inc.</i> , 56 Wash.App. 827, 786 P.2d 285 (1990).....	5
<i>Sullivan v. Sullivan</i> , 52 Wash. 160, 100 P. 321 (1909).....	9,13
<i>Thorndike v. Hesperian Orchards, Inc.</i> , 54 Wash.2d 570, 343 P.2d 183 (1959).....	8

Cases from other jurisdictions

<i>In re Marriage of Brane</i> , 21 Kan. App.2d 778, 908 P.2d 625 (1995).....	18
<i>In re Marriage of Swan</i> , 301 Or. 167, 720 P.2d 747 (1986).....	19
<i>Mahoney v. Mahoney</i> , 425 Mass. 441, 446, 681 N.E.2d 852 (1997).....	18
<i>Olson v. Olson</i> , 445 N.W.2d 1 (N.D. 1989).....	19
<i>Pongonis v. Pongonis</i> , 606 A.2d 1055, 1058 (Me. 1992).....	18
<i>Rudden v. Rudden</i> , 765 S.W.2d 719, 720 (Mo. Ct. App. 1989).....	18
<i>Wolff v. Wolff</i> , 112 Nev. 1355, 929 P.2d 916 (1996).....	19

Statutes

RCW 4.84.185.....22
RCW 26.09.080.....6,9-10,18-19
RCW 26.09.140.....22
RCW 41.35.420.....14
RCW 2.28.010.....20-21

Other Authorities

Washington Family Law Deskbook, § 32.3(3).....9,13
Washington Family Law Deskbook, 2nd Ed. § 65.4(1) (2d. ed 2000).....8

APPENDIX

Transcript of Judge’s Oral Ruling

I. ISSUES

- A. Whether the Court manifestly abused its discretion in the division of the parties' respective retirement benefits?
- B. Whether the appeal on the question of Federal preemption should be dismissed because Mr. Smith was **not** found in contempt of Court or because the order was within the Court's power to order Mr. Smith to act as his wife's representative?

II. STATEMENT OF THE CASE

The parties married April 4, 1981. (CP 4) They separated March 1, 2005. (CP 4) Ms. Sjolander was almost 51 years old at the time of trial. (RP August 13, 2007 page 60) Mr. Smith was 58. (RP August 13, 2007 page 88) They had no minor or dependent children. (CP 6)

Mr. Smith is a Civil Service employee at Fort Lewis and has been employed full time since 1981. (RP August 13, 2007 page 34) He made a net income of approximately \$3,950.00. (RP August 13, 2007 pages 30-33 and 105) Ms. Sjolander's income, as a para-educator was such that she could not afford housing if she were not living with her father. (RP August 13, 2007 pages 54 and 60) Her income was a net \$1,022.50 per month. (Exhibit 2)

Both spouses have had issues with regard to their health. (RP August 13, 2007 pages 58 – 60 and 122 – 123) Ms. Sjolander did not work for ten years during the marriage due to her health and therefore did not contribute to the social security system during those years. (RP August 13, 2007 page 60)

The parties had a mediation before trial wherein they settled all of the property and debt issues except the division of the husband's civil service retirement pension and the wife's retirement as a result of her employment as a para-educator. (RP August 13, 2007 pages 7, 9 – 27 and 57) As a part of the mediation Mr. Smith was awarded the family home (with \$6,800 to Ms. Sjolander) and four motor vehicles. (CP 10) By the time the case went to trial Mr. Smith had borrowed heavily against the home. (Exhibit 20)

Ms. Sjolander had 53 months of service toward a state defined benefit retirement as of the date of separation. (Exhibit 8) Because this was less than the necessary 120 months of service in the State Employee's Retirement Systems Plan 3, she had not yet begun to accrue monthly retirement benefits (defined benefits). (Exhibit 8) As of the date of separation she had contributed \$10,230.53 in the defined contribution

portion of her state retirement account. (Exhibit 8) The Court awarded \$4,000 of that to Mr. Smith. (CP 10)

Because of the Federal Windfall Elimination law, Mr. Smith's social security benefits were reduced because of his participation in the Federal Civil Service Retirement System. (RP August 13, 2007 pages 115 - 116)

Mr. Smith wanted his wife to have a survivor's annuity to receive her share of the Civil Service Retirement System pension in the event he died before she died. (RP August 13, 2007 pages 34 -35 and 137) However his proposal was that the entire cost of the annuity should be taken from her share of the community property share of the pension. (RP August 13, 2007 page 46) Combining his arguments regarding the annuity and his "loss" of social security, Mr. Smith proposed his wife of 26 years should not get any payments until she reached age 70 or sooner only if he predeceased her. (RP August 13, 2007 page 46) The primary issue at trial was how the pension should be divided to obtain the survivor's annuity and the effect of obtaining it on the distribution of the remainder of that pension. (RP August 13, 2007 pages 7 - 27) Mr. Smith's proposal to the trial Court and to this Court results in Ms. Sjolander receiving nothing until she reaches age 70 or sooner if Mr. Smith predeceases her (RP August 13,

2007 pages 34 -35 and 137) and that he should receive all of his separate property share of the pension and a share equal to the “lost” social security benefits as measured by life expectancy tables. (RP August 13, 2007 pages 9 – 27) Mr. Smith did consider the survivor’s annuity to be community property. (RP August 13, 2007 page 137) The Court ordered that the survivor’s benefit annuity would be paid for “off of the top”. (CP 12) The balance of the pension was divided by giving Mr. Smith a percentage of each pension payment, characterized as his separate property, equal to the number of months he worked to earn the pension before the marriage and after **the separation** (not the date of entry of the decree). (CP 12) The balance of each monthly pension payment (the percentage equal to the number of months he worked to earn the pension during the marriage), characterized as community property, was awarded one half to the each of the parties. (CP 12)

The Court ordered Mr. Smith to do all acts necessary to ensure the Court’s award was honored by the Federal Government. (CP 12) Contrary to the assertion in his brief, Mr. Smith was **not** held in contempt of Court for his refusal to honor that Court order. (CP 16)

To the time of trial, Ms. Sjolander had incurred attorneys’ fees of

\$7,297.42 with her trial lawyer (Exhibit 3) plus fees for her prior lawyer, now Judge John Hickman. (RP August 13, 2007 page 58)

III. ARGUMENT

A. The Court did not manifestly abuse its discretion in the division of the parties' respective retirement benefits.

While the findings were not detailed, it is clear the trial judge considered all of the factors. A transcript of his oral ruling is submitted as an appendix to this brief. (RP August 17, 2007) In *In re Marriage of Rockwell*, 141 Wn.App. 235, 170 P.3d 572 (2007) the Court ruled at footnote 2:

Because the findings are not clear as to how the court arrived at its conclusions, we rely on the trial court's oral opinion. *In re Marriage of Yates*, 17 Wash.App. 772, 565 P.2d 825 (1977) (an appellate court may use a trial judge's oral opinion to clarify formal findings with which the oral opinion is consistent). *Cf. Shinn v. Thrust IV, Inc.*, 56 Wash.App. 827, 838, 786 P.2d 285 (1990) (an oral opinion is not itself the judgment, and cannot be used to impeach or contradict unambiguous written finding).

The oral ruling shows the trial judge considered all of the circumstances of the parties in making its property division.

1. Standard of Review

The standard for appellate review of this case is well settled. In *In re Marriage of Wallace*, 111 Wn. App. 697, 45 P.3d 1131 (2002):

The trial court has broad discretion to distribute property during a dissolution proceeding because it is in the best position to determine what is fair, just, and equitable. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). A party challenging a property distribution must demonstrate that the trial court manifestly abused its discretion. *In re Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or for untenable reasons. *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991).

This language, or language virtually identical to it, is repeated in almost every reported appellate decision regarding a property division in a dissolution of marriage action. Given all of the factors in this case, the trial Court did not manifestly abuse its discretion and had very logical and fair minded grounds and reasons to make the award.

Pursuant to RCW 26.09.080 (in pertinent part) the Court

. . . shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage . . . ; and
- (4) The economic circumstances of each spouse . . . at the time the division of property is to become effective . . .

The only assets of the marriage were

- a State Retirement contribution account of about \$10,000 earned by

Ms. Sjolander during the last few years of the marriage (Exhibit 8);

- a home awarded to Mr. Smith with \$6,800 to Ms. Sjolander (Exhibit 4); and
- the Civil Service Retirement pension earned by Mr. Smith for seventy-two months before the marriage and 287 months during the marriage together with whatever he would earn after the date of separation until he retired. (CP 9 - 12)

2. Analysis of overall fairness

By the time the case went to trial Mr. Smith had borrowed heavily against the home (Exhibit 20) and Ms. Sjolander only received merely \$6,800 of equity from it. (Exhibit 4) Therefore the only asset of any meaningful value was the Civil Service pension. The husband's separate property share of pension would never get smaller than 26%. This is because he had 72 months earned before the marriage, 30 months earned after separation until entry of the decree (102 months) and 287 months during the marriage. The combined earning months from the beginning of his eligible employment until entry of the decree was therefore 389 months.

His 102 combined months is 26% of that total. His separate property share of the pension would only grow in percentage as time passed from the date

of separation. Under the Court's division of assets Mr. Smith was awarded a minimum of 76% of the one significant asset of the parties (albeit both separate and community). Of course the law allows the Court to award a disproportionate share of community property or to award property to a spouse despite its character as separate or community property, so long as it is a fair and equitable division. In a case cited by Mr. Smith, *In re Marriage of Rockwell*, 141 Wn.App. 235, 170 P.3d 572 (2007) the Court said:

I. Standard of Review

Appellate courts apply the substantial evidence standard of review to findings of fact made by the trial judge. See Washington Family Law Deskbook, 2nd Ed. § 65.4(1) at 65-9. As long as the findings of fact are supported by substantial evidence, they will not be disturbed on appeal. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wash.2d 570, 575, 343 P.2d 183 (1959). "Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *In re Marriage of Griswold*, 112 Wash.App. 333, 339, 48 P.3d 1018 (2002). Where the trial court has weighed the evidence, the reviewing court's role is to simply determine whether substantial evidence supports the findings of fact, and if so, whether the findings in turn support the trial court's conclusions of law. *In re Marriage of Greene*, 97 Wash.App. 708, 986 P.2d 144 (1999). A court should "not substitute [its] judgment for the trial court's, weigh the evidence, or adjudge witness credibility." *Id.* at 714, 986 P.2d 144 (citing *In re Marriage of Rich*, 80 Wash.App. 252, 259, 907 P.2d 1234 (1996)).

The trial court's distribution of property in a dissolution

action is guided by statute, which requires it to consider multiple factors in reaching an equitable conclusion. These factors include (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and (4) the economic circumstances of each spouse at the time the division of the property is to become effective. RCW 26.09.080. In weighing these factors, the court must make a "just and equitable" distribution of the marital property. RCW 26.09.080. In doing so, the trial court has broad discretion in distributing the marital property, and its decision will be reversed only if there is a manifest abuse of discretion. *In re Griswold*, 112 Wash. App. at 339, 48 P.3d 1018 (citing *In re Marriage of Kraft*, 119 Wash.2d 438, 450, 832 P.2d 871 (1992)). A manifest abuse of discretion occurs when the discretion was exercised on untenable grounds. *In re Marriage of Muhammad*, 153 Wash.2d 795, 803, 108 P.3d 779 (2005). If the decree results in a patent disparity in the parties' economic circumstances, a manifest abuse of discretion has occurred. *In re Marriage of Pea*, 17 Wash. App. 728, 731, 566 P.2d 212 (1977).

However, the court is not required to divide community property equally. [emphasis added] *In re Marriage of White*, 105 Wash.App. 545, 549, 20 P.3d 481 (2001). In a long term marriage of 25 years or more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives. Washington Family Law Deskbook, § 32.3(3) at 17 (2d. ed.2000); see also *Sullivan v. Sullivan*, 52 Wash. 160, 164, 100 P. 321 (1909) (finding that for a marriage lasting over 25 years, "after [which] a husband and wife have toiled on together for upwards of a quarter of a century in accumulating property . . . the ultimate duty of the court is to make a fair and equitable division under all the circumstances"). The longer the marriage, the more likely a court will make a disproportionate distribution of the community property.

In accord with this ruling is the ruling in *In re the Marriage of Brewer*, 137

Wn.2d 756, 976 P.2d 102 (1999) where the Court said:

Although under RCW 26.09.080 the trial court in a dissolution proceeding must consider the character and status of property before distribution, the actual characterization of property as community or separate is not essential to the exercise of discretion by the trial court in distributing assets and liabilities. The trial court under the facts of this case, in the exercise of its discretion, could award future disability payments to Petitioner Michael A. Brewer, regardless whether those payments are characterized as community property or separate property. The fact the trial court characterized the disability policies as separate property even if in error, would not affect the discretionary disposition to Petitioner Michael A. Brewer. The trial court, under Brown, could properly characterize the monthly disability payments after the dissolution as the separate property of Petitioner Michael A. Brewer.

We therefore disagree with the Court of Appeals only in its determination that remand to the trial court was necessary. Any error committed by the trial court in concluding the disability insurance benefits were not assets subject to division was cured by the authority given courts under RCW 26.09.080 to divide both community property and separate property between the parties in a marriage dissolution, keeping in mind the correct character and status of the property and determining what is "fair, just and equitable under all the circumstances."

Mr. Smith and Ms. Sjolander were married for over 26 years. (CP 4) It took over two years for the dissolution action to be completed after their separation. (CP 9) Under the cited opinions (including one rendered almost a hundred years ago in 1909) by any standard this is a long term marriage. Both of the spouses were working and Mr. Smith was taking home an income of about three times that of his wife. He was guaranteed to get 76% of the only significant asset. Both parties had experienced

health problems. Both were in their 50's. Ms. Sjolander's income was dismally small, forcing her to live with her father in the home where she was raised in South Tacoma. (RP August 13, 2007 pages 54 – 60) The Court recognized the tragedy of the situation (RP August 17, 2007 page 8) but did reach a fair and equitable resolution given all of the factors it was required to consider under the statute and given the nature of the law as set forth above in the cases quoted. Keep in mind that Mr. Smith received about 40% of Ms. Sjolander's mere \$10,000 defined contribution retirement.

Mr. Smith's proposal is borne of resentment, fear and greed, not remotely connected to anything fair and equitable. Even the share awarded to her will not be sufficient income to meet her needs but it is at least half of the community property share. The facts would easily justify an award of a full half of the pension to Ms. Sjolander, even though 26% (at least to the date of the decree) of it was Mr. Smith's separate property.

3. Analysis of the fairness of paying for the survivor's annuity "off the top"

The Civil Service Retirement is clearly a community asset under Washington law. Mr. Smith does not contest that. He testified he believed even the survivor's annuity to be community property. (RP August 13,

2007 page 137) The asset exists and was created under Federal Law. The parties agreed they wanted a spousal annuity. (RP August 13, 2007 page 34-35 and 137) The nature of this asset, one of its inherent characteristics, is that to award a spouse a survivor's annuity, the pension benefits are reduced. There is a cost associated with dividing the asset in that fashion. This is analogous to the costs to sell real property if it must be sold to divide it. While paying the cost to divide this pension results in an income stream to Ms. Sjolander, it is nonetheless must more a cost than an asset. The survivor's annuity does not take effect until Mr. Smith dies so his complaint about her receiving an income stream after his death seems uniquely selfish.

Given the long duration of the marriage, Mr. Smith's own testimony about the nature of his health (RP August 13, 2007 pages 122 -123), the paltry income of Ms. Sjolander, Mr. Smith's income of three times that amount, the employment history of both of them and that the Civil Service Retirement Pension is the only meaningful asset after over a quarter century of marriage, it was imminently fair that the cost of the survivor's annuity would be paid by reducing the gross pension rather than making her 24% pay for all of the cost of the annuity. It would not be fair to allow Mr.

Smith to collect a pension owned almost one-fourth by his wife from his retirement to his death and force the wife to wait to age 70 or her former husband's death to begin collecting the pension. That proposition is on the other end of the spectrum from suggesting that the Court should try to equalize incomes for persons married four quarter of a century. *See*, Washington Family Law Deskbook, § 32.3(3) at 17 (2d. ed.2000); *see also Sullivan v. Sullivan*, 52 Wash. 160, 164, 100 P. 321 (1909) (finding that for a marriage lasting over 25 years, "after [which] a husband and wife have toiled on together for upwards of a quarter of a century in accumulating property . . . the ultimate duty of the court is to make a fair and equitable division under all the circumstances"). The longer the marriage, the more likely a court should make a disproportionate distribution of the community property. Here the Court only required the payment of the cost of insuring a pension to the non-civil servant spouse and divided the rest by giving each spouse half of the community property share and the separate property share to the spouse who owned it as separate property. Even if it is deemed a "disproportionate distribution" it is a minor disproportion that is only nominally fair and equitable under the totality of the circumstances.

4. Distribution of the state retirement

At the time of separation Ms. Sjolander had 53 months of service toward a state defined benefit retirement. (Exhibit 8) Under Exhibit 8, it was reported by the State of Washington Department of Retirement Systems that she was not vested in a defined benefit pension. The Court divided the Civil Service Retirement System award as of date of separation. Nothing more should need be argued on this topic. It would be neither fair nor equitable that one pension be divided as of the date of separation and another as of the date of the entry of the decree or trial. Such an award would be manifestly unjust and lacking any tenable basis.

As the Court can see from Exhibit 8 she was earning half of a month's of creditable service in one calendar month. (Exhibit 8, page two first two bullet points) In order to get the requisite 120 months (see the third bullet point) she would have had to work another 134 months from the date of separation ($120 \text{ months} - 53 \text{ months} = 67 \text{ months} \times 2 = 134 \text{ months}$). Mr. Smith had an opportunity to obtain updated information from the Department of Retirement Systems between April 26, 2005 (the date Exhibit 8 was created) and the time of trial in September, 2007. He chose to argue that Ms. Smith was vested under RCW 41.35.420. That statute in pertinent part provides:

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 . . . [emphasis added]

In order for Ms. Sjolander to vest under this statute she would have to be fifteen years older than she was at the time of trial and seventeen years older than she was at the time of separation. She would also need to have seven more months of creditable service than the evidence submitted to the trial judge proved she had. Mr. Smith's argument relies upon speculation about Ms. Sjolander reaching age 65 and is based on the theory that a husband should receive a share of property from his wife who obtains a vested right in property some seventeen years after her separation from him. The trial judge awarded Mr. Smith some nearly 40% of the rights she did have at the time of separation. Under the circumstances of this case that was very generous in favor of Mr. Smith. Mr. Smith's arguments about Ms. Sjolander's state retirement must fail as void of merit.

5. Social Security benefits

Mr. Smith's argument about the social security benefits must first and foremost be recognized as based on speculation. While his mathematical gyrations are based upon life expectancy tables there is no human who can foresee how these persons' lives will proceed. His

calculations are also all based upon a retirement age of 65 for him. This is also speculation but it is also totally within his control. If the Court were to rule based only upon the life expectancy tables using a retirement age of 65 for Mr. Smith he could easily upset the fairness and equitable nature of any property division by retiring at some different age. By the Court dividing the asset by an award of a percentage of each payment as it is received, all speculation or ability to manipulate the award are removed. This method is the most fair and equitable, as recognized in *In re Marriage of Bulicek*, 59 Wn.App.630, 800 P.2d 394 (1990):

We disagree with George's argument that this disposition of pension rights was unjust or inequitable. 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. We acknowledge that George's retirement fund may receive proportionately higher future contributions based upon his career longevity and anticipated increases in annual pay. We further acknowledge that the formula utilized for division of future retirement benefits could result in Janet's sharing in those increases. However, far from condemning this apportionment method, we specifically approve it as a means of recognizing the community contribution to such increases.

There is no doubt that Mr. Smith will receive a smaller amount of social security than if he had not been in the Civil Service Retirement

System. The Court must keep in mind however that it is because receiving both social security and a civil service retirement pension would be a windfall that the Federal Windfall Elimination law was passed. (RP August 13, 2007 pages 115 – 116) Aside from all of his numbers being potentially skewed by the date he actually retires and/or starts receiving social security benefits, Mr. Smith's calculations admittedly result in Ms. Sjolander receiving nothing until either Mr. Smith dies or Ms. Sjolander reaches age 70. Given these parties' circumstances this result cannot be judged by any reasonable or prudent person as "fair and equitable". The amount flowing from the government is the same amount under the Civil Service Pension as would be if those funds were social security benefits. That the wife who nets \$1,022 per month is sharing a percentage in a small percentage of what otherwise would have been not subject to division, does not render the Court's ruling a manifest abuse of discretion based on untenable grounds or for untenable reasons, particularly given the duration of the marriage, the age and earning abilities of the parties and the other circumstances in which they find themselves. Under the traditional analysis of such a long term marriage the Court could have equalized the incomes based upon the vested rights they owned. While he could not divide social security benefits he

could have considered them in the division of assets. *In re Marriage of Zahm*, 138 Wn.2d 213, 978 P.2d 498 (1999). The rule is stated in the opinion in that case beginning at 221:

In 1997, the Supreme Judicial Court of Massachusetts held, although social security old age benefits may not be characterized as part of the marital estate for the purpose of property characterization, a judge may consider a spouse's social security benefits as a factor coequal with others when determining an equitable division of any distributable marital assets. *Mahoney v. Mahoney*, 425 Mass. 441, 446, 681 N.E.2d 852 (1997). In *Mahoney*, the trial court had considered the husband's anticipated social security old age benefits when distributing the marital assets, ultimately awarding the wife a larger percentage of the marital estate " 'to equalize the standard of living both parties will enjoy in the present and future.' " *Mahoney*, 425 Mass. at 446. This approach was affirmed on appellate review.

Cases similar to *Mahoney* have emerged from other state courts. Some courts have held, while the anti-reassignment clause of the Social Security Act precludes a trial court from directly dividing social security income in a divorce action, a trial court may still properly consider a spouse's social security income within the more elastic parameters of the court's power to formulate a just and equitable division of the parties' marital property. *In re Marriage of Brane*, 21 Kan. App.2d 778, 783, 908 P.2d 625 (1995); *Pongonis v. Pongonis*, 606 A.2d 1055, 1058 (Me. 1992); *Rudden v. Rudden*, 765 S.W.2d 719, 720 (Mo. Ct. App. 1989). **This approach is consistent with the objectives of RCW 26.09.080.** [emphasis added]

While other cases are at odds with the approach taken by the Massachusetts, Kansas and Missouri state courts, these other holdings echo the reasoning in *Hisquierdo* and are, therefore, distinguishable from the subject case. For example, the Supreme Court of Oregon has held a trial court, in its division of marital property, may not properly consider the

formal valuation of a spouse's social security benefits. *In re Marriage of Swan*, 301 Or. 167, 171, 720 P.2d 747 (1986); *see also Wolff v. Wolff*, 112 Nev. 1355, 1363, 929 P.2d 916 (1996); *Olson v. Olson*, 445 N.W.2d 1 (N.D. 1989). **As noted above, the trial court here did not impermissibly calculate a specific formal valuation of petitioner's social security benefits and award respondent a precise property offset based on that valuation but, rather, merely considered those benefits when determining the parties' relative economic circumstances at dissolution. [emphasis added]**

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 . . .,"(fn1) **it is, therefore, permissible for a trial court to consider petitioner's social security benefits. [emphasis added]** "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 Marriage of 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. [emphasis added]**

Mr. Smith does not argue that the Windfall Prevention law restricts a state trial court from considering the "missed" social security benefits. Congress could have restricted the division of Civil Service Retirement benefits as it did social security benefits but that is not the law and Mr. Smith does not

argue that is the law.

At the risk of sounding like a broken record, this case law supports the trial judge in this case given all of the circumstances of the parties. The equal division of the community property portion of the pension, without deduction of any amounts for “missed” social security benefits, was fair and equitable and was clearly not a manifest abuse of discretion.

B. The appeal on the question of Federal preemption should be dismissed because Mr. Smith was **not** found in contempt of Court and because the order was within the Court’s power to order Mr. Smith to act as his wife’s representative.

Clerk’s Paper 16, page 3 of the Order on Show Cause Re: Contempt clearly indicated the Court declined to make a finding of contempt. Mr. Smith’s entire appeal and brief on the preemption issue rests on the incorrect assertion that Mr. Smith was found in contempt of Court. The appeal on this issue must fail due to this incorrect assertion.

Furthermore, under RCW 2.28.010 the Court had the authority to order Mr. Smith to undertake any act to fulfill its order. This statute provides in pertinent part:

Powers of courts in conduct of judicial proceedings. Every court of justice has power -- (1) To preserve and enforce order in its immediate presence. (2) To enforce order in the proceedings before it, or before a person or body empowered to

conduct a judicial investigation under its authority. (3) To provide for the orderly conduct of proceedings before it or its officers. (4) To compel obedience to its judgments, decrees, orders and process, and to the orders of a judge out of court, in an action, suit or proceeding pending therein.

Federal preemption is not even an issue because the law, as quoted in one of Mr. Smith's counsel's trial court briefs allows the former spouse to act through a representative. Quoting directly from that brief:

Title 5-CFR section 838.1005 specifically provides as follows in its relevant parts:

Section 838.1005 Applications by former spouse

- (a) **A former spouse (personally or through a representative) must apply in writing to be eligible for benefits under this subpart. No special form is required. [Emphasis was in Mr. Smith's lawyer's brief but not in the law]**

The Court was within its power to order, as an allocation of additional legal fees and to see that its order was fulfilled, that Mr. Smith should take the laboring oar to see that the pension was in effect.

Mr. Smith was not held in contempt of court and the Court's order was well within its authority without any real preemption issues. This portion of the appeal also lacks merit and should be affirmed.

IV. ATTORNEY'S FEES

Mr. Smith's income was almost three times Ms. Sjolander's. In a long term marriage his share of the only real asset is greater than 75% to

her 25%. Based upon this disparity of resources he should be required to pay Ms. Sjolander's fees for defending against this appeal. RCW 26.09.140 His appeal also lacks merit. Ms. Sjolander should be awarded fees pursuant to RCW 4.84.185.

V. CONCLUSION

Under the appropriate standard of review the division of assets in this case was fair and equitable and should not be disturbed by the Court. This Court should affirm the trial Court. Ms. Sjolander should be awarded her legal fees for the appeal.

Respectfully submitted this 11th day of September, 2008.



Donald N. Powell, WSBA #12055
Lawyer for Kimberly Sjolander/Respondent

APPENDIX

Transcript of Judge's Oral Ruling



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

Smith & Smith 8-18-07 Ruling

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PIERCE COUNTY, WASHINGTON
BY KEVIN STOCK, County Clerk
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,)
and)
MICHAEL L. SMITH,)
Respondent.)

No. 05-3-00821-0

ORIGINAL

VERBATIM REPORT OF PROCEEDINGS
AUGUST 17, 2007
COVER SHEET

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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 * * * * *

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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.

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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); *Sjolander*

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.

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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

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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

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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 were 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

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

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MR. POWELL: Thank you.

JUDGE CHRISTIANSON: Okay. Thank you.

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Smith & Smith 8-18-07 Ruling

1 REPORTER'S CERTIFICATE

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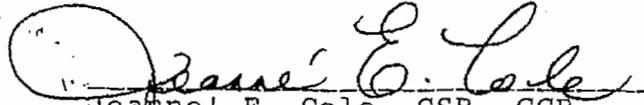
3 I, Jeanne' E. Cole, Official Pro Tem Court Reporter for
4 the Pierce County Superior Court, do hereby certify that
5 the foregoing transcript entitled "Verbatim Report of
6 Proceedings," was taken by me stenographically and
7 reduced to the foregoing typewritten transcript at my
8 direction and control,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

10 DATED at Auburn, Washington, this 24th day of August,
11 2007.

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

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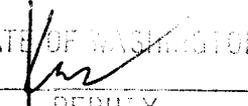
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Jeanne' E. Cole & Associates (253) 640-5974

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DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

**THE COURT OF APPEALS
DIVISION II OF THE STATE OF WASHINGTON**

MICHAEL L. SMITH,
Appellant,

NO. 37100-6-II

vs

DECLARATION OF SERVICE

KIMBERLY SJOLANDER,
formerly known as SMITH,
Respondent.

I DECLARE:

1. I am over the age of 18 years, and I am not a party to this action.
2. I served David B. Knodel with the following documents:

other: Brief of Respondent and copy of this declaration by leaving with ABC Legal Messenger on September 11, 2008 for regular delivery to

3419 Pacific Avenue
Tacoma, WA 98401
3. Service was made pursuant to Civil Rule 4(d): in paragraph 2 above.

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

Signed at Tacoma, Washington on September 11, 2008.


Carolyn D. Swanson

Dec. of Service

1 of 1

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