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STATE OF WASHINGTON
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NO. 50494-4-11

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

JOSEPH ANTHONY
Petitioner/Appellant,

v.

PENNEY ANTHONY
Respondent/Respondent.

APPELLANT'S OPENING BRIEF

Appeal from the Superior Court of Kitsap County,
Cause No. 15-3-00791-8
The Honorable Kevin D. Hull, Presiding Judge

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I. INTRODUCTION

Appellant Joseph Anthony is a 53-year old veteran who is 50% disabled as the result of military service. Mr. Anthony earns $21.55 per hour as a truck driver. The trial court awarded Respondent Penney Anthony maintenance of $2,500 per month for five years, then $2,000 per month for five years, then $1,500 per month for five years, then $1,000 per month for five years, by which time Mr. Anthony will be 73 years old.

The maintenance award was based on the trial court's misinterpretation of *Rockwell,* incorrect figures used to project the parties' ten-year incomes, and the court's failure to consider Mr. Anthony's ability to pay the ordered maintenance while paying for his own needs and obligations. Neither the amount nor the duration of the maintenance award is "just" under the circumstances of this case.

The court's division of Mr. Anthony's retirement account and equity in the family home as ordered at trial is incorrectly described in the resulting QDRO, and does not reflect the trial court's decision.

II. ASSIGNMENTS OF ERROR

(1) Error is assigned to Finding of Fact Number 2, which states:

"Per *In re: the Marriage of Rockwell,* 163 Wn.2d 1055 (Wash

2008) the Court must put the parties in roughly equal positions post dissolution"[1] [through the maintenance award].

(2) Error is assigned to Finding of Fact No. 4, which states:

"The Court finds that upon examination of the above factors Mrs. Anthony should be awarded spousal support for 20 years, starting at $2,500 per month and decreasing by $500 every 5 years."[2]

(3) Error is assigned to Finding of Fact No. 5, which states:

"This award is fair and equitable under the circumstances of this case, Washington statutes and case law."[3]

(4) Error is assigned to the language of the QDRO directing payment to Ms. Anthony from the LTI retirement account.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(1) The trial court erroneously interpreted *Rockwell* as requiring the trial court to place the parties in a "roughly equal financial condition for the rest of their lives"[4] through the maintenance award. Assignment of Error No. 1.

(2) The trial court used incorrect figures to calculate the parties' projected income for ten years. Assignment of Error No. 2.

(3) The maintenance award is not just because it is based upon

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[1] CP 184.
[2] *Id.*
[3] *Id.*
[4] VRP 201, lines 9-15.

incorrect projections of the parties' income. Assignment of Error No. 3.

(4) The maintenance award is not just because the trial court failed to consider Mr. Anthony's ability to pay the maintenance ordered and still pay his own expenses and obligations. Assignment of Error No. 3.

(5) The language of the QDRO dividing the LTI retirement account does not correctly reflect the trial court's rulings on offsetting Ms. Anthony's share of the home equity against her share of the retirement account. Assignment of Error No. 4.

IV. STATEMENT OF THE CASE

The parties were married in July of 1987 and separated in August of 2012.[5] At trial on November 3, 2016, the court identified August 2012 as the separation date, noting that as of that date, "the relationship was not one that could be characterized as a marital relationship."[6] The trial court wrote, "[t]hat makes this a 25-year marriage."[7]

On July 6, 2015, Mr. Anthony filed a Summons and Petition for Dissolution of Marriage,[8] in which he requested the court to distribute separate and community property and debts, noting that "maintenance will be paid."[9]

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[5] CP 1.
[6] CP 44.
[7] VRP 200, line 13.
[8] CP 3.
[9] CP 4.

Mr. Anthony is a high school graduate and a Marine Corps veteran.[10] The parties were married for 19 of the 22 years that Mr. Anthony served in the military.[11] Mr. Anthony is 50% disabled from an injury sustained during his military service for which he receives disability benefits in addition to his military pension.[12] Nevertheless, between the date of the parties' separation in 2012 until the date of trial in 2016, Mr. Anthony worked 60+ hours per week in order to pay living expenses for both households.[13]

Except for part-time work in a school cafeteria for two or three years, Ms. Anthony did not work during the 25-year marriage.[14]

Maintenance

The court acknowledged that RCW 26.09.090 governs maintenance and noted that "[t]he court does have broad discretion as relates to spousal support."[15] The court then discussed the statutory factors to be considered when awarding maintenance.[16] The court noted that Mr. Anthony was then 53, and "as he continues to get older," the fact that driving a truck is "taxing both mentally and physically" and would

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[10] CP 19.
[11] *Id.*
[12] *Id.*
[13] CP 20. *See also* VRP 105, lines 21-25; 106, lines 1-8.
[14] VRP 34, lines 2-22.
[15] VRP 211, lines 6-8
[16] VRP 211, line 10 - VRP 216, line 1.

"become more and more of an issue." The court continued:

> He's certainly entitled to do things outside of work, and so the notion that he would continue to work 60 hours a week -- perhaps in the short term that could [be] but in the long term that's not particularly realistic. And I don't that think he's obligated be working 60 hours a week.
>
> Both parties, I think, have an obligation to the extent possible to mitigate the financial circumstances of the relationship. And so both parties have that obligation . . . but that doesn't mean that Mr. Anthony has to work 60 hours a week.[17]

Including overtime, Mr. Anthony's gross income from wages in 2015 was approximately $73,000.00.[18] Mr. Anthony receives a military retirement of approximately $2,500.00 gross a month for a total of approximately $30,000.00 a year.[19] Mr. Anthony also receives a medical disability benefit because of injuries sustained in the service which, prior to divorce, totaled approximately $11,000.00 per year.[20] For purposes of calculating the amount of maintenance, the trial court deducted the amount of overtime earned ($30,000) from his 2015 yearly income from all sources ($114,000) and set Mr. Anthony's annual income at $85,000 and a "total gross income of $850,000 over the next ten years.[21]

The court used "$10 an hour, minimum wage" for Ms. Anthony

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[17] CP 46-47.
[18] CP 201.
[19] *Id.*
[20] *Id.*
[21] CP 206; VRP 203, lines 4-10.

working "full time, over the next ten years" to set her total gross income for purposes of calculating the amount of maintenance at $200,000.[22]

The court concluded that even after deducting the overtime amount, "we're still talking about over the next ten years a difference of $650,000 of income."[23]

The court relied upon *In the Matter of the Marriage of Carmen P. Rockwell,*[24] and stated, "what *Rockwell* tells me is I have to do my best to put the parties in roughly equal financial positions for the rest of their lives."[25] The court then awarded Ms. Anthony maintenance for 20 years as follows:

- five years at $2500 per month
- five years at $2000 per month
- five years at $1500 per month
- five years at $1500 per month[26]

The court commented, "that totals over 20 years $420,000," and "that averages out to be 21,000 a year."[27] When Mr. Anthony's attorney asked whether these amounts "include[d] the 1100 she gets in military

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[22] VRP 203, lines 11-16.
[23] VRP 203, lines 17-22.
[24] 141 Wn.App. 235, 170 P.3d 572 (2007).
[25] VRP 216, lines 14-19.
[26] *Id.* at lines 21-24.
[27] VRP 217, lines 15-16.

retirement," the court replied, "no."[28]

Property Distribution

The court read into the record provisions of RCW 26.09.080, noting that it "governs the distribution of property and liabilities."[29] The court awarded the family home to Ms. Anthony, with one-half of the $51,000 equity awarded to each party, stating, "there's going to be a offset with regards retirement."[30] Ms. Anthony and her adult son testified that they had started the process of refinancing the house,[31] and that he would be paying one-half of the mortgage.[32] The court awarded a 2002 Chevy truck, the Honda four wheeler, a lawn mower, and all furnishings in the family home to Ms. Anthony.[33] The court awarded some tools, motorcycles, a Hallmark trailer, and a hand gun to Mr. Anthony, motor cycles, a trailer, some tools, and a wood stove to Mr. Anthony.[34]

The court awarded all credit card debt to Mr. Anthony.[35] The court awarded Ms. Anthony "half of the retirement accounts, both military and otherwise -- LTI, half the retirement that was accrued during the course of

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[28] *Id.* at lines 22-24.
[29] VRP 204, line 9 - VRP 205, lines 1-7.
[30] VRP 206, lines 11-19. This amount of equity is based upon an appraisal done in March of 2016. *See* Exhibit 10.
[31] VRP 11, lines 1-14; VRP 16, lines 16-23; VRP 17, lines 2-4; VRP 157, lines 7-11; VRP 205, lines 10-12; VRP 206, lines 8-10.
[32] VRP 16, lines 3-13; VRP 157, line 23 - VRP 158, line 13.
[33] VRP 206, line 25; VRP 201, lines 1-3.
[34] VRP 207, lines 4-25; VRP 208, lines 1-18.
[35] VRP 208, lines 20-23.

the marriage from June of 1987 to August of 2012."[36] The court ordered that Mr. Anthony's one-half of the equity in the family home would be "offset with Ms. Anthony's share of the retirement."[37] The court then stated that Mr. Anthony's LTI retirement account would be valued as of November 2016 instead of August 2012.[38] The other retirement accounts were to be valued as of August 2012.[39]

Motion for Clarification

On March 24, 2017, Mr. Anthony filed a Motion for Clarification, asking the court specific questions about the court's oral rulings at trial, including an explanation of the "offset" of Ms. Anthony's one-half of the pension account against Mr. Anthony's one-half share of the equity in the family home.[40] No clarification was given by the trial court on any of Petitioner's questions. The Clerk's Minute of the hearing on the Motion for Clarification states:

> Ms. Rinker argues Respondents' orders. Argues what should be in orders.
>
> Ms. Rinker needs to provide proposed orders to court & court will send finals out.[41]

The trial court subsequently adopted the Respondents' proposed

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[36] VRP 209, lines 8-13.
[37] VRP 209, lines 14-21.
[38] VRP 209, line 25; line 210, lines 1-11.
[39] *Id.* at lines 12-25.
[40] CP 97-111. See also CP 112-126.
[41] CP 159.

orders without any changes.[42]

The court entered written Findings of Fact and a Final Divorce Order on April 18, 2017.[43]

Motion for Reconsideration or New Trial

On April 21, 2017, Mr. Anthony filed a Motion for Reconsideration or New Trial,[44] asking the trial court to vacate and reconsider its maintenance award based on CR 59(a)(1) (irregularity in the proceedings of the court), CR 59(a)(7) (error of law), and CR 59(a)(9) (substantial justice has not been done).[45]

On May 31, 2017, the trial court entered an Order denying reconsideration of the maintenance award.[46]

On June 21, 2017, Mr. Anthony timely filed his Notice of Appeal.[47]

V. ARGUMENT

A. Standards of Review

A trial court's findings of fact in a domestic relations case are reviewed for substantial evidence.[48] A reviewing court must determine

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[42] *See* CP 178-197.
[43] CP 178 - 189.
[44] CP 200 - CP 215.
[45] CP 203.
[46] CP 234.
[47] CP 243-262.
[48] *In re Marriage of Stern,* 68 Wn. App. 922, 928–29, 846 P.2d 1387 (1993).

whether substantial evidence supports the findings of fact, and if so, whether the findings, in turn, support the trial court's conclusions of law.[49]

This court reviews de novo the language in a dissolution decree and a QDRO.[50]

This court reviews de novo whether a trial court's ruling rests on an erroneous understanding of the law.[51] This court reviews the application of law to facts de novo.[52]

B. This Court should vacate the maintenance award and remand for calculation of the maintenance amount and duration based on statutory factors, correct projected income, and consideration of Mr. Anthony's ability to pay the amount ordered while paying for his own expenses and obligations.

1. The trial court's understanding of *Rockwell* was erroneous.

The Court stated that it was "ordering 20 years of maintenance and that's because of what *Rockwell,* and that -- what *Rockwell* tells me is that I have to do my best to put the parties in roughly equal financial positions for the rest of their lives."[53] The court's understanding of Rockwell was erroneous, as explained in a recent case:

> Mr. Kendall argues on appeal that he should have been awarded spousal maintenance to place him in a

[49] *In re Marriage of Rockwell,* 141 Wn. App. 235, 242, 170 P.3d 572 (2007); *see also In re Marriage of Rideout,* 150 Wn.2d 337, 351, 77 P.3d 1174 (2003).
[50] *Gimlett v. Gimlett,* 95 Wn.2d 699, 704–05, 629 P.2d 450 (1981).
[51] *State v. Walker,* 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).
[52] *State v. Corey,* 181 Wn.App. 272, 276, 325 P.3d 250, *review denied,* 181 Wn.2d 1008, 335 P.3d 941 (2014).
[53] *Id.,* Ex. A, page 216, lines 20-24.

> financial position roughly equal to Ms. Kile's for the rest of his life, citing *In re Marriage of Rockwell,* 141 Wn.App. 235, 170 P.3d 572 (2007). **But *Rockwell* concerned the just and equitable division and distribution of property under RCW 26.09.080, <u>not</u> entitlement to spousal maintenance. And RCW 26.09.090 clearly makes an award of maintenance discretionary, <u>not</u> mandatory.**[54]

Rockwell does not mandate that trial courts place parties in "roughly equal financial positions for the rest of their lives" by awarding maintenance into the distant future. In fact, the word "maintenance" does not even appear in the *Rockwell* decision.

The *Rockwell* Court cited the Washington Family Law Deskbook, § 32.3(3) at 17 (2d. ed. 2000) as the authority for its statement that "[i]n a long term marriage of 25 years of more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives."[55] In the chapter on RCW 26.09.0<u>8</u>0 titled "Disposition of Property and Liabilities," the Washington Family Law Deskbook cites an article from a January 1982 Washington State Bar News Magazine article written by retired King County Superior Court Judge Robert W. Winsor. The author of the Deskbook wrote, "In a long marriage, Judge Winsor **<u>suggested</u>** that both spouses be placed in a roughly equal financial positions for the rest of their lives."[56] Former Superior Court Judge Winsor's "suggestion" made in a 1982 magazine article has no force of

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[54] *In re Marriage of Kile and Kendall,* 186 Wn. App 864, 887, 347 P.3d 894 (2015) (emphasis added).
[55] *See Rockwell,* 141 Wn. App. at 243, 170 P.3d 571.
[56] Washington Family Law Deskbook, § 32.3(3) at 32-17 (2000) (emphasis added).

law.

Six years after Division 1 of the Court of Appeals wrote the *Rockwell* opinion, it clarified application of that case:

> A trial court is not required to place the parties in precisely equal financial positions at the moment of dissolution. Rather, if the spouses were in a long-term marriage of 25 years or more, the court's **objective** is to place the parties in roughly equal financial positions for the rest of their lives.
>
> To reach this **objective**, **the court may account for each spouse's anticipated postdissolution earnings in its property distribution by looking forward.** In *In re Marriage of Rockwell,* this court approved a **property award** that provided more amply for the wife, who was six years older than her husband and in ill health, where the court determined that the husband would make up the difference through at least seven years of anticipated postdissolution employment earnings.[57]

An "objective" is "something aimed at or striven for."[58] An objective is not a mandate. The origin of the "objective" language was a suggestion made by a retired Superior Court judge in 1982 in the context of division of property, and does not apply to an award of maintenance, which is governed by the factors set out RCW 26.09.090 and case law interpreting that statute, not by *Rockwell.*

> In deciding whether to award maintenance, the court should consider factors that include the financial resources of **each** party; the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; the standard of living during the marriage; the duration of the marriage; and the time needed by the spouse seeking maintenance to acquire

[57] *In re Marriage of Wright,* 179 Wn. App. 257, 262, 319 P.3d 45 (2013).
[58] Webster's New College Dictionary (2005), page 994.

education necessary to obtain employment.[59]

Duration of a marriage is only one of several factors considered when determining whether maintenance should be awarded. *Rockwell* does not require or even suggest the imposition of long-term maintenance to "roughly equalize" the parties' financial condition simply because the parties' marriage was "long-term." In fact, *Rockwell* and the objective of "roughly equalizing" the post-dissolution financial condition of the parties is related to the division of property.

Because the trial court's decision on the amount and duration of the maintenance award was based on its misunderstanding of the Rockwell case, this Court should vacate the maintenance award and remand for recalculation of maintenance based on the factors set out in RCW 26.09.090.

2. The trial court utilized incorrect figures to calculate the parties projected income, upon which the maintenance award was based.

(a) Instead of $850,000, Mr. Anthony's 10-year projected income would be $679,800.

During trial, the Court explicitly stated that Mr. Anthony, now 53 years old and 50% disabled, is not obligated to work 60 hours a week, and acknowledged that Mr. Anthony's job is "taxing both mentally and

[59] RCW 26.09.090; *In re Marriage of Luckey,* 73 Wn.App. 201, 209, 868 P.2d 189 (1994).

physically."[60] The Court therefore deducted the $30,000 overtime pay amount from Mr. Anthony's annual income, finding that his gross yearly income for purposes of calculating maintenance was $85,000,[61] and that his total gross income over ten years would be $850,000.[62]

However, this $85,000 erroneously includes the entire annual amount of Mr. Anthony's military pension of $30,000,[63] which was divided between the parties,[64] with Ms. Anthony being awarded $1,100 per month[65] or $13,200 per year. Deducting the amount of the military pension awarded to Ms. Anthony leaves Mr. Anthony with an annual projected gross income of $71,800, not $85,000.

Mr. Anthony earns $21.55/hr. from Lynden Transfer. Working 40 hours per week instead of 60 hours per week, Mr. Anthony's gross income from Lynden Transfer will be:

40 x $21.55 = $862.00/week = $3,448/mo. x 12 = $41,376

Mr. Anthony's share of his military retirement will be $1,400 per month,[66] or $16,800 per year. Added to his gross wages of $41,376, the retirement would bring Mr. Anthony's income to $58,176.

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[60] VRP 202, lines 7-25.
[61] VRP 203, lines 4-7.
[62] *Id.,* lines 7-8.
[63] VRP 59, lines 8-18 (total monthly military retirement = $2,500 x 12 = $30,000 per year).
[64] CP 191, ¶ 8, Item No. 11; CP 192, ¶ 9, Item No. 8.
[65] VRP 59, lines 8-16; CP 197.
[66] VRP 59, lines 17-18.

Finally, Mr. Anthony will receive military disability benefits in the amount of $817 per month[67] or $9,804 per year. Added to his gross wages and military retirement, Mr. Anthony's total gross yearly income would be $67,980. Mr. Anthony's projected 10-year income would be $679,800, not $850,000.

(b) Instead of $200,000, Ms. Anthony' projected ten-year gross income would be $383,680.

For purposes of calculating maintenance, the Court assigned a ten-year gross income of $200,000 to Ms. Anthony on the assumption that she would work full time at "minimum wage" of $10.00 per hour for the next ten years, calculating that Ms. Anthony would earn $20,000 each year.[68]

However, the minimum wage in the state of Washington for 2017 is already set at $11.00 per hour, which will rise to $11.50 in 2018; $12.00 in 2019; $12.50 in 2020; and $13.50 in 2021.[69] After 2021, the minimum wage will rise each year "by the rate of inflation."[70]

Gross Income at $10.00/hour	**Actual Gross Income at Minimum Wage**
2017 - $20,800	2017 - $22,880
2018 - $20,800	2018 - $23,920
2019 - $20,800	2019 - $24,960
2020 - $20,800	2020 - $26,000
2021 - $20,800	2021 - $28,080
FIVE YEAR TOTAL = **$104,800**	FIVE YEAR TOTAL = **$125,840**

[67] VRP 59, lines 19-20.
[68] VRP 203, lines 11-16 ($200,000 earned in ten years = $20,00/year).
[69] RCW 49.46.020(1).
[70] RCW 49.46.020(2).

From these known figures, Ms. Anthony's projected average gross monthly income from full-time minimum wages for the next five years would be $1,907, and her average yearly income from wages for the next five years would be $25,168, not $20,000. Even if there were no increases in the minimum wage based on the rate of inflation in the five years between 2021 and 2027, Ms. Anthony's gross income from wages for ten years would be $251,680, not $200,000.

The trial court failed to add to Ms. Anthony's income her share of Mr. Anthony's military retirement,[71] which is $1,100 per month,[72] or $13,200 per year, and $132,000 over a period of 10 ten years. Adding the $132,000 for her share of military retirement to the correct amount of her projected wages would bring her ten-year income to $383,680.

(c) The Court's award of maintenance intended to "roughly equalize" the parties' income was based upon incorrect figures.

The Court's projections that Mr. Anthony's ten-year income would be $850,000 and that Ms. Anthony's ten-year income would be $200,000 were incorrect, as was the court's conclusion that Mr. Anthony would earn $650,000 more than Ms. Anthony would earn in ten years.

The court's error in crediting 100% of Mr. Anthony's military retirement to Mr. Anthony resulted in an error of $353,880 in the difference between the parties' comparative ten-year projected incomes.

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[71] VRP 217, lines 22-24.
[72] VRP 182, lines 7-13.

Instead of $650,000 difference in the parties' ten-year projected incomes, the actual difference between the parties' projected 10-year gross incomes is $296,120 ($679,800 - $383,680 = $296,120).

The trial court's attempt to "roughly equalize" the parties' incomes for the rest of their lives through the maintenance award was based upon a difference of $650,000 in the gross ten-year incomes between the parties.

The Court should vacate the maintenance award and remand for recalculation of maintenance based upon corrected figures.

(d) Ms. Anthony has no need for maintenance.

Although Ms. Anthony submitted Financial Declaration on November 5, 2015 indicating that her total monthly expenses were $3,566.49,[73] at trial she testified that after splitting the mortgage payment with her son and his shared payment for utilities, her monthly expenses would be approximately $2,500.[74]

If Ms. Anthony were earning minimum wage at a full time job, she would be earning an average of $25,168 per year for the next five years, or an average of $2097 per month. Ms. Anthony will also receive her share of Mr. Anthony's retirement in the amount of $1100 per month during that time, bringing her total income to approximately $3,197 per month. After paying her monthly expenses, Ms. Anthony will have almost $700 "excess' each month. Yet the trial court awarded Ms. Anthony

[73] CP 9-14.
[74] VRP 168, lines 12-14.

maintenance in the amount of $2,500 per month for the next five years, which would leave her with approximately $3,200 "excess" each month.

Because she did not work during the marriage, Ms. Anthony testified that she would have no Social Security benefits in the future.[75] However, if Ms. Anthony works full time for ten years, she will earn enough "credits" to be eligible for Social Security.[76]

(e) Mr. Anthony does not have the ability to pay the maintenance ordered by the trial court and pay his own living expenses and obligations.

Mr. Anthony's Financial Declaration indicates that his total gross income without overtime was $5,721,[77] and that his total monthly expenses (including the payments on community credit card debt) totaled $4,315,[78] leaving him with $1,406 "excess" each month. The court's maintenance order to pay Ms. Anthony $2,500 per month for the next five years is literally impossible for Mr. Anthony -- unless this 53 year-old-man who is 50% disabled is forced to work overtime in order to provide Ms. Anthony with $2,500 per month that she does not need.

(f) The trial court failed to consider Mr. Anthony's ability to pay the maintenance amount ordered.

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[75] VRP 156, lines 18-22.
[76] "Anyone born un 1929 or later needs 10 years of work (40 credits) to be eligible for retirement benefits." https://www.ssa.gov/pubs/EN-05-10072.pdf
[77] CP 33.
[78] CP 32-36

Under RCW 26.09.090(f), the Court is required to consider Mr. Anthony's ability to pay maintenance while paying his own expenses and obligations. Discussing this statutory factor, the trial court stated:

> Factor F, "the ability of the spouse or domestic partner from whom maintenance is sought," that's Mr. Anthony, "to meet his needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance."
>
> So, you know, Mr. Anthony is going to move on. As I've indicated, he earns a significant income. But I think that it's fair to say that maybe not in the short term but in the long term that's going to be reduced. I don't think it's fair to demand of Mr. Anthony that, you know, he continue to work 60 hour workweeks. So I'm kind of -- I'm keeping that in mind.
>
> I'm assuming that the income is going to be reduced as we go forward not necessarily increased.[79]

The trial court discussed only Mr. Anthony's "significant income" -- which was based on overtime pay -- and the fact that the significant income was "going to be reduced." The trial court utterly failed to consider Mr. Anthony's ability "to meet his needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance" as required under RCW 26.09.090(f).

The Court should vacate the maintenance award and remand for calculation with proper consideration of Mr. Anthony's ability to pay for

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[79] VRP 215, lines 10-25; 216, line 1.

his own needs and financial obligations while paying maintenance.

(g) The maintenance award is excessive in amount and duration, and is not "just."

The cumulative result of the trial court's projected $850,000 and $200,000 incomes and the ordered maintenance is clearly set out set out in documents submitted to the trial court during the clarification proceedings, which indicate that after the first five years, Ms. Anthony would receive "excess" income in the amount of $68,000 and and Mr. Anthony would suffer a deficit of $21,575.[80]

Even in long-term marriages, "[s]pousal maintenance is not a matter of right."[81] "Whether alimony should be awarded must be based on **two** factors -- the needs of the receiving spouse **and** the ability of the paying spouse to pay."[82] The maintenance award in this case shows no consideration of Mr. Anthony's ability to meet his to meet his needs and financial obligations while paying Ms. Anthony the maintenance amount ordered, as required under RCW 26.09.080(f). Although the Court stated that Mr. Anthony was not required to work 60 hours per week, the maintenance awarded to Ms. Anthony would **require** him to continue to work overtime at a job that the court characterized as "taxing both

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[80] CP 115 - CP 116; CP 126.

[81] *In re Marriage of Estes,* 84 Wn.App. 586, 593, 929 P.2d 500 (1997); *In re Marriage of Mueller,* 140 Wn. App. 498, 510, 167 P.3d 568 (2007); *In re Marriage of Luckey,* 73 Wn App. 201, 209, 868 P.2d 189 (1994) (citing *Friedlander v. Friedlander,* 80 Wn.2d 293, 297, 494 P.2d 208 (1972); *In re Marriage of Irwin,* 64 Wn.App. 38, 55, 822 P.2d 797, *review denied,* 119 Wn.2d 1009, 833 P.2d 387 (1992)).

[82] *In re Marriage of Irwin,* 64 Wn.App. 38, 55, 822 P.2d 797 (1992).

mentally and physically,"[83] for the next 15 years, until he is 68 years old.[84]

"When the wife has the ability to earn a living, it is not the policy of the law of this state to give her a perpetual lien on her divorced husband's future income."[85] While a more recent Court of Appeals case noted that "blind adherence" to this language is not required, that Court of Appeals also acknowledged that the valid goals of the policy of no "perpetual liens" on a divorced spouse's future income include "disentangling the divorcing spouses and setting each on a road to self-sufficiency."[86]

"The purpose of spousal maintenance is to support a spouse, typically the wife, until she is able to earn her own living or otherwise becomes self-supporting."[87] "What is a reasonable length of time for a divorced spouse to become employable and provide for his or her own support, so that maintenance can be terminated, depends on the particular facts and circumstances of each case."[88]

The Court's maintenance award in this case does not achieve the valid goal of "disentangling the divorcing spouses." To the contrary, it binds the parties together for 20 years into the future, and would force Mr.

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[83] CP 202, lines 12-13.
[84] CP 449.
[85] *Berg v. Berg,* 72 Wn.2d 532, 533, 434 P.2d 1 (1967).
[86] *Bulicek v. Bulicek,* 59 Wn. app. 630, 634, 800 P.2d (1990) (emphasis added).
[87] *In re Marriage of Luckey,* 73 Wn. Ap. 301, 209, 868 P.2d 189 (1994) (citing *In re Marriage of Irwin,* 64 Wn.App. 38, 55, 822 P.2d 797, *review denied,* 119 Wn.2d 1009, 833 P.2d 387 (1992)).
[88] *Spreen v. Spreen,* 107 Wn. App. 341, 348, 28 P.3d 769 (2001) (emphasis added).

Anthony continue to work overtime as a disabled senior citizen while Ms. Anthony enjoys a surplus of income while working a normal 40-hour week. This unfair situation is not the intended result of spousal maintenance, even in a "long-term" marriage, nor should it be the result of the maintenance award in this case. There is no precedent in Washington cases for such an outcome, even in "long-term marriage" cases.

The Court should vacate the maintenance award and remand for a new calculation because the current maintenance award is not just.

C. The Court should remand this case for the correction of the QDRO regarding the LTI retirement account to reflect the trial court's ruling on the "offset" between the parties' shares in the home equity and the retirement.

The trial court made very clear what its ruling was regarding division of Mr. Anthony's LTI retirement account and the equity in the family home:

> [T]here is $51,000 of equity in the home. And I am going -- there's going to be a[n] offset with regards retirement. **Each party will receive half of that equity. So I'm going to divide that equity up equally. <u>So that's 25,500 to Mr. Anthony as part of that equity</u>.**
>
> . . .
>
> As relates to the retirement, I **am awarding to Ms. Anthony half of the retirement accounts**, both military and otherwise -- LTI, half the retirement that was accrued during the course of the marriage from June of 1987 to August of 2012, half of that retirement -- those retirement and retirement accounts will go to Ms. Anthony.

> **So that will be split 50/50 with the exception of, so I don't forget, because I believe Mr. Anthony is entitled to half of the -- not entitled to, but <u>I'm awarding to Mr. Anthony half of the equity in the home</u>.** I'll let the lawyers figure that out as relates to the [QDROS], **but 25,500 that's half the equity of the home, <u>that will be offset with Ms. Anthony's share of the retirement.</u>**[89]

Thus, the trial court divided the LTI retirement account and the home equity as follows:

> (1) each party was awarded one half of the LTI retirement account, which was valued at $66,033.08[90] ($33,016.54 to each party);
>
> (2) each party was awarded one half of the home equity, valued at $51,000[91] ($25,500 to each party); and
>
> (3) instead of a lien against the home or a cash payment from Ms. Anthony[92] to Mr. Anthony for his share of the equity, the trial court ruled that Mr. Anthony would receive his share of the equity by means of an "offset with Ms. Anthony's share of the retirement."

This decision should have resulted in an order reflecting the following figures applied to the LTI retirement account:

Mr. Anthony		Ms. Anthony	
1/2 retirement =	$33,016.54	1/2 retirement =	$33,016.54
1/2 equity	+ $25,500.00	Offset with Mr. Anthony's 1/2 equity =	<$25,500>
TOTAL	**$ 58,516.54**	**TOTAL**	**$ 7,516.54**

[89] VRP 206, lines 15-19; VRP 209, lines 8-21 (emphasis added).
[90] SEALED CP 174, Part D, last paragraph. **Please note that this amount is incorrect. *See* fn 93.**
[91] VRP 206, line 13.
[92] Ms. Anthony was awarded the family home. VRP 206, lines 13-14.

However, the language of the QDRO that will govern how much Ms. Anthony receives from the retirement account sets out a different interpretation of the trial court's ruling. As set out above, the court ruled that each party should receive one half of the equity and one half of the retirement account, with Mr. Anthony's one half of the equity offset against Ms. Anthony's one half of the retirement account. The QDRO states:

> There is hereby assigned to the Alternate Payee, and as otherwise provided in this order and subject to the Plan Administrator's determination that this order is indeed a Qualified Domestic Relations Order, the Plan shall pay to the Alternate Payee, from the Participant's Plan account the following amount:
>
> $20,266.54
>
> The above amount is calculated using the participants account valuation as of November 1, 2016 ($66,033.08)[93] less the Participant's share ($25,500) of the agreed upon equity in the home, divided by two (50% of the marital portion of the participant's account).[94]

This interpretation of the trial court's ruling consists of **reducing the amount of the entire retirement account** by the amount of Mr. Anthony's one half of the equity rather than **reducing <u>Ms</u>. <u>Anthony's</u> one**

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[93] This amount is wrong according to the Details of Benefit Calculation prepared by LTI, which lists the value of the account on November 1, 2016 as **$66,933.98** (*see* SEALED CP 70). This error affects the amounts of each party's one-half share as well as the amount each party should receive from the retirement account. Instead of $33,016.54, each party's one-half share should be **$33,466.99.**

[94] SEALED CP 174.

half of the retirement account by the amount of Mr. Anthony's one half of the equity, as the trial court ordered. Under the QDRO as written, Ms. Anthony receives $12,750 more of Mr. Anthony's retirement account than the trial court ordered.

This Court should vacate the QDRO to LTI and remand for preparation of a new QDRO utilizing the correct the amount of the LTI retirement account on November 1, 2016, correcting the amount of the parties' one-half shares accordingly, and changing the instructions to LTI to pay Ms. Anthony according to the procedure set out on page 23 herein.

VI. CONCLUSION

This Court should vacate the maintenance award and the QDRO and remand this case for recalculation of the maintenance award and correction of the QDRO to reflect and comply with the trial court's ruling on division of the LTI retirement account.

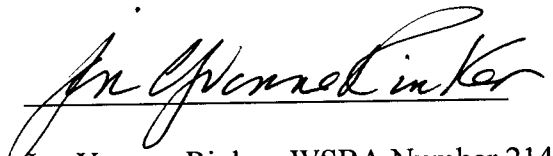
Mr. Anthony requests that this Court remand this case to the superior court tor proceedings before a different judge because Judge Hull would "exercise discretion on remand regarding the very issue that triggered the appeal and has already expressed an opinion as to the merits,"[95] refused to clarify any of his rulings, and denied reconsideration where Mr. Anthony showed that the maintenance award was based on

[95] *State v. McEnroe,* 181 Wash.2d 375, 386, 333 P.3d 402 (2014).

incorrect figures for the parties' projected 10-year incomes.

DATED this 16th day of October, 2017.

Respectfully submitted,



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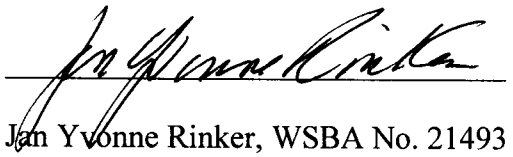
CERTIFICATE OF SERVICE

Jan Yvonne Rinker hereby certifies under penalty of perjury under the laws of the State of Washington that on the 16th day of October, 2017, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached and the report of proceedings to the following:

Christine Newbry
904 Dwight St.
Port Orchard, WA 98366

Signed at Gig Harbor, Washington this 16th day of October, 2017.



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