

FILED
Court of Appeals
Division II
State of Washington
3/5/2018 11:51 AM

NO. 50494-4-11

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

JOSEPH ANTHONY
Petitioner/Appellant

v.

PENNY ANTHONY
Respondent/Appellee

Appeal from the Superior Court of Washington
In and for the County of Kitsap

RESPONDENT'S OPENING BRIEF

Jan Yvonne Rinker
Law Office
Attorney for Petitioner/ Appellant
5800 Soundview Dr., D-102
Gig Harbor, WA 98335

Laura E. Baier
Newbry Law Office PLLC
Attorney for Respondent
623 Dwight St.
Port Orchard, WA 98366

TABLE OF CONTENTS

- I. Response to Assignment of Error
- II. Issues Presented
- III. Statement of the Case
- IV. Summary of Arguments
- V. Argument
- VI. Request for Attorney Fees
- VII. Conclusion

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bryant v. Joseph Tree</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992).....	29
<i>Donovan v. Donovan</i> , 25 Wash.App. 691, 612 P.2d 387 (1980).....	27
<i>Hilsenberg v. Hilsenberg</i> , 54 Wash. 2d 650, 344 P.2d 214 (1959).	27
<i>In re Detention of Ambers</i> , 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007).....	25
<i>In re Marriage of Akan</i> , 160 Wn. App. 48, 57, 248 P.3d 94 (2011).....	13
<i>In re Marriage of Booth</i> , 114 Wn.2d 772, 779, 791 P.2d 519 (1990).....	31
<i>In re Marriage of Chua</i> , 149 Wn. App. 147,154, 202 P.3d 367 (2009).....	13
<i>In re Marriage of Davison</i> , 112 Wash.App. 251, 48 P.3d 358 (2002).....	18
<i>In re Marriage of Doneen</i> , 197 Wash.App. 941, 391 P.3d 594, review denied 188 Wash.2d 1018, 396 P.3d 337 (2017).....	18
<i>In re Marriage of Estes</i> , 84 Wash.App. 586, 929 P.2d 500 (1997).....	26
<i>In re Marriage of Fiorito</i> , 112 Wash. App. 657, 664, 50 P.3d 298 (2002).....	14
<i>In re Marriage of Gillespie</i> , 89 Wash.App. 390, 948 P.2d 1338 (1997).....	20

<i>In re Marriage of Greene</i> , 97 Wash.App. 708, 986 P.2d 144 (1999).....	14
<i>In re Marriage of Khan</i> , 182 Wash.App. 795, 332 P.3d 1016 (2014).....	22
<i>In re Marriage of Kile and Kendall</i> , 186 Wn. App 864,887,347 P.3d 894 (2015).	16
<i>In re Marriage of Kim</i> , 179 Wash.App. 232, 317 P.3d 555, review denied 180 Wash.2d 1012, 325 P.3d 914 (2014).....	18
<i>In re Marriage of Kraft</i> , 119 Wash.2d 438, 450, 832 P.2d 871 (1992).....	15
<i>In re Marriage of Larson and Calhoun</i> , 178 Wash.App. at 138, 313 P.3d 1228 (2013).....	15
<i>In re Marriage of Littlefield</i> , 133 Wash.2d 39, 46–47, 940 P.2d 1362 (1997).....	15
<i>In re Marriage of Mueller</i> , 140 Wash.App. 498, 167 P.3d 568, review denied 163 Wash.2d 1043, 187 P.3d 270 (2007).....	22
<i>In re Marriage of Parsons</i> , 182 Wash. App. 1013 (2014).....	16
<i>In re Marriage of Rich</i> , 80 Wash.App. 252, 259, 907 P.2d 1234 (1996)).....	14
<i>In re Marriage of Roark</i> , 34 Wash.App. 252, 659 P.2d 1133 (1983).....	27
<i>In re Marriage of Rockwell</i> , 141 Wash. App. 235, 242, 170 P.3d 572, 576 (2007).	7, 12, 14, 16, 17, 22, 23
<i>In re Marriage of Sheffer</i> , 60 Wash.App. 51, 56, 802 P.2d 817 (1990).....	17

<i>In re Marriage of Steadman</i> , 63 Wash.App. 523, 821 P.2d 59. (1991).....	18
<i>In re Marriage of Terry</i> , 79 Wash.App. 866 at 869, 905 P.2d 935(1995)).....	23
<i>In re Marriage of Williams</i> , 84 Wash.App. 263, 927 P.2d 679, review denied 131 Wash.2d 1025, 937 P.2d 1102 (1996).	23, 26
<i>In re Marriage of Wright</i> , 179 Wash.App. 257, 262, 319 P.3d 45 (2013).....	15
<i>In re Marriage of Zier</i> 136 Wash.App. 40, 147 P.3d 624, review denied 162 Wash.2d 1008, 175 P.3d 1095 (2006).....	15
<i>In re Parentage of Jannot</i> , 149 Wash.2d 123, 126 65 P.3d 664 (2003).....	14
<i>Int’l Ass’n of Fire Fighters</i> , <i>Local 46 v. City of Everett</i> , 146 Wn.2d 29, 37, 42 P.3d 1265 (2002).....	25
<i>Keever & Assocs., Inc. v. Randall</i> , 129 Wash. App. 733, 737, 119 P.3d 926 (2005).....	13
<i>Mid Mountain Contractors, Inc. v.</i> <i>Dept. of Labor & Industries</i> , 136 Wn. App. 1, 8, 146 P.3d 1212 (2006).....	25
<i>Perkins v. Perkins</i> , 107 Wash.App. 313, 26 P.3d 989 (2001).....	27
<i>Puget Sound Plywood, Inc. v. Master</i> , 86 Wn.2d 135, 542 P.2d 756 (1975).....	29
<i>Rhinehart v. Seattle Times</i> , 59 Wn. App. 332, 798 P.2d 1155 (1990).....	30

<i>Rich v. Starczewski</i> , 29 Wn. App. 244, 628 P.2d 831, rev. denied, 96 Wn.2d 1002 (1981).....	30
<i>Seattle School Dist. No. I v. State</i> , 90 Wn.2d 476 585 P.2d 71 (1978).....	28
<i>Smith v. Shannon</i> , 100 Wn.2d 26, 37, 666 P.2d 351 (1983).....	25
<i>Western Stud Welding, Inc. v. Omark Indus., Inc.</i> , 43 Wn. App. 293,716 P.2d 959 (1986).	29

State Statute

RCW 26.09.060.....	7, 8, 22, 26
RCW 26.09.080.....	12, 15, 16, 17
RCW 26.09.090.....	8, 9, 12, 13, 16, 22-24,26, 28
RCW 26.09.140.....	29, 30-31

Court Rules

CR 11.....	29
RAP 18.1	30
RAP 18.9.....	29- 31
RAP 18.14.....	30

I. Response to Appellant's Assignment of Error

The Kitsap County trial court properly divided property, awarded maintenance, and entered orders consistent with the court's trial decision. The Kitsap County trial court properly denied Mr. Anthony's request for relief in the post-trial Motion to Clarify and the Motion for New Trial.

First, the trial court properly interpreted *In re Marriage of Rockwell*, 141 Wash. App. 235, 242, 170 P.3d 572, 576 (2007) as requiring the trial court place the parties in "roughly equal positions post dissolution." Contrary to Mr. Anthony's assertion, there is *no* reference to maintenance in Conclusion 2, nor was there a reference to maintenance when the court made its oral ruling.

Second, the trial court did *not* need to calculate the income of the parties to determine the division of property. The court provided a hypothetical to explain the economic condition of the parties after the division of property per RCW 26.09.060. Contrary to Mr. Anthony's assertion, the 10-year projected income figures were provided solely for demonstrative purposes to illustrate the economic circumstances of the parties at the time the division of property was to become effective, not maintenance. Mr. Anthony deliberately conflates the hypothetical provided for illustrative purposes to explain the distribution of property pursuant to

RCW 26.09.060 with the amount and duration of spousal support awarded to Mrs. Anthony pursuant to RCW 26.09.090.

Third, the award of spousal support was just and equitable based on the circumstances of this case. The trial court properly exercised its discretion and did not act in an untenable or manifestly unreasonable way when awarding support to Mrs. Anthony using the statutory factors in RCW 26.09.090.

In preparing and reviewing documents for appeal, it became clear that the Qualified Domestic Relations Order currently on file with the court, specifically pertaining to the Lynden Pension Equity Plan, contained an error, resulting in an unintended distribution of assets to the parties that does not accurately reflect the ruling of the court. The current Qualified Domestic Relations Order would result in an overpayment of the LTI account to Ms. Anthony, by approximately \$12,750 and would void Mr. Anthony a portion of his court ordered equity in the house. The correct distribution of the LTI account occurs when the total LTI account (\$66,033.08) is divided by two (50% of the marital portion of the participant's account), less the Participant's share (\$25,500) of the agreed upon equity in the home. This results in Ms. Anthony receiving \$7,516.54 of the LTI retirement, leaving Mr. Anthony with his 50% share of the equity in the home (\$25,500) and

his 50% share of the LTI retirement account (\$33,016.54). These figures total \$66,033.08.

A 2004 Opinion issued by the Department of Labor of makes clear that where there is an error in a Qualified Domestic Relations Order such that it frustrates the distribution of assets intended by the court, an Amended Order is appropriate and will supersede a previously filed QDRO. Mrs. Anthony has included a Motion to be filed in the Superior Court in Kitsap County to amend the QDRO.

II. Issues Presented

- A. WHETHER A MANIFEST ABUSE OF DISCRETION EXISTS WHEN THE TRIAL COURT PROPERLY INTREPRETED *ROCKWELL* AS “ROUGHLY EQUALIZING” THE POST DISSOLUTION FINANCIAL CONDITION OF THE PARTIES RELATED TO DIVISION OF PROPERTY.

- B. WHETHER A MANIFEST ABUSE OF DISCRETION EXISTS WHEN THE TRIAL COURT PROPERLY RELIED UPON THE STATUTORY FACTORS DELINEATED IN RCW 26.09.090 TO DETERMINE SPOUSAL SUPORT.

III. Statement of the Case

The parties met in 1985 when Mr. Anthony was 23 and Mrs. Anthony was 21. 1 RP p. 199 ln. 23-24.¹ They married in June of 1987. Id.

¹ The brief refers to the verbatim reports as follows: 1RP – Trial Transcript dated November 3, 2016 and 2RP- Post Trial Motions Transcripts dated March 31, 2017 and May 26, 2017.

The parties have four adult children, the oldest is 34 and the youngest is 26. Id. The parties separated in 2012, after 25 years of marriage. Mrs. Anthony remained in the marital residence. Mr. Anthony moved into another residence, where he resides with his girlfriend.

Mr. Anthony is currently 53 years old. He served in the Marine Corps from March 27, 1984 until July 31, 2006. CP 19 ln 24-25. He began serving when he was 21 and retired at age 43. Following his military retirement, Mr. Anthony began working at Lynden Trucking (hereinafter LTI) in August of 2007, where he remains working to date. Id at 20 ln 5. Mr. Anthony has historically worked 55-60 hours per week. Id ln 6. With his current employment income, retirement pay, and disability pay, he grosses over \$7,500 per month. Id at 10.

Mrs. Anthony is currently 51 years old. Mrs. Anthony left school at age 15 to marry (not to Mr. Anthony) and has an 8th grade education and does not have a GED. 1 RP 141 ln. 8. Mrs. Anthony had her first child at the age of 16 and another shortly thereafter with her first husband. Id at ln 12. It was an abusive relationship, and she divorced him after 3 years. Id. Mrs. Anthony remarried and had a third child with her second husband. Her second husband was an alcoholic, and she divorced him. Id at ln 15-23.

Then, she met Mr. Anthony in 1985, at the age of 21. They married, Mr. Anthony adopted her three older children, and they had a fourth child together.

By agreement of the parties, Mrs. Anthony was a homemaker, raising their children and keeping their home(s) during Mr. Anthony's various stations and deployments. Id. Mrs. Anthony has never held a job outside the family home. 1 RP 190 ln 21-22. Mrs. Anthony's only current income is the maintenance paid by Mr. Anthony and \$500 rent paid to her by her adult son. 1 RP 172 ln. 19.

This matter went to trial in Kitsap County Superior Court on November 3, 2016. The court made the following ruling after trial:

Mrs. Anthony was awarded the family home. The Court found, based on evidence presented, that the family home had equity of \$51,000, which was to be shared equally between the parties. Mr. Anthony's community retirement is to be shared equally between the parties. Mr. Anthony's equity in the home is to be offset against Mrs. Anthony's share of the LTI retirement. The court divided personal property between the parties and ordered Mr. Anthony to pay the USAA and Citibank Credit Cards. Mr. Anthony was ordered to retain his life insurance policies and Mrs. Anthony was ordered to pay the monthly premium on the policies. Mrs. Anthony was awarded 20 years of maintenance, starting at \$2,500 per month for the first five years and

decreasing by \$500 every five years thereafter. Id.

Mr. Anthony filed a post-trial motion for clarification of the court's ruling. In that Motion, Mr. Anthony requested clarification of the division of the LTI Pension, clarification of the basis for the division of property, and clarification of the maintenance award. CP 200-215. The Court heard argument from both parties on March 31, 2017 and requested proposed orders from both parties. CP 233-235. The Court entered Final Orders on April 18, 2017, that were consistent with Mrs. Anthony's position at the hearing, reiterating the trial findings. CP 178-188 and 236-242.

Mr. Anthony filed a second post-trial motion for reconsideration or new trial after Final Orders were entered. CP 200-215. In the motion, Mr. Anthony requested that the court reconsider or vacate the maintenance award based on the contention that the trial court improperly relied upon *Rockwell* in making the award of maintenance. Id. The Court requested briefing and heard argument from both parties on May 26, 2017. Id. The Court entered an order on Reconsideration on May 31, 2017 denying the request to reconsider maintenance, making a specific finding that the Court applied the statutory factors for both property under RCW 26.09.080 and maintenance under RCW 26.09.090. CP 233-235. Mr. Anthony filed the instant appeal upon the denial of his Motion for Reconsideration.

IV. Summary of Argument

- A. The trial court properly interpreted Rockwell as “roughly equalizing” the post dissolution financial condition of the parties related to division of property and properly considered the statutory factors delineated, including providing an illustrative example using 10-year income projections.
- B. The trial court properly relied upon the statutory factors delineated in RCW 26.09.090 to determine maintenance because the trial court properly considered the relevant factors to determine maintenance.

V. Argument

On appeal, the court should uphold a trial court’s findings of fact in a dissolution proceeding if the findings are supported by substantial evidence, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *See In re Marriage of Chua*, 149 Wn. App. 147,154,202 P.3d 367 (2009); *see also In re Marriage of Akan*, 160 Wn. App. 48, 57,248 P.3d 94 (2011). That means that the court will look at the evidence and make reasonable inferences therefrom in the light most favorable to the respondent. *Keever & Assocs., Inc. v. Randall*, 129 Wash. App. 733, 737, 119 P.3d 926 (2005).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; [and] it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of

the correct standard. *In re Marriage of Fiorito*, 112 Wash. App. 657, 664, 50 P.3d 298 (2002).

This court has determined that 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)).

“Local trial judges decide factual domestic relations questions on a regular basis” and consequently stand in a better position than an appellate judge to decide whether submitted affidavits establish adequate cause for a full hearing on a petition to modify a parenting plan. *In re Parentage of Jannot*, 149 Wash.2d 123, 126 65 P.3d 664 (2003). Arguably, the same would hold true for a Trial Court deciding issues related to property distribution and maintenance.

The trial court has broad discretion to determine what is just and equitable based on the circumstances of each case. *Rockwell*, 141 Wash.App. at 242, 170 P.3d 572. Because the trial court is in

the best position to determine what is fair, this court will reverse its decision only if there has been a manifest abuse of discretion. *In re Marriage of Larson and Calhoun*, 178 Wash.App. at 138, 313 P.3d 1228. This discretion applies to determinations regarding division of property. *In re Marriage of Wright*, 179 Wash.App. 257, 262, 319 P.3d 45 (2013).

A. THE TRIAL COURT PROPERLY INTREPRETED *ROCKWELL* AS “ROUGHLY EQUALIZING” THE POST DISSOLUTION FINANCIAL CONDITION OF THE PARTIES RELATED TO DIVISION OF PROPERTY.

The trial court has broad discretion in awarding property pursuant to equitable distribution in a marriage dissolution action. *In re Marriage of Zier* 136 Wash.App. 40, 147 P.3d 624, review denied 162 Wash.2d 1008, 175 P.3d 1095 (2006). A property division made during the dissolution of a marriage will be reversed on appeal only if there is a manifest abuse of discretion. *In re Marriage of Kraft*, 119 Wash.2d 438, 450, 832 P.2d 871 (1992). “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.” *In re Marriage of Littlefield*, 133 Wash.2d 39, 46–47, 940 P.2d 1362 (1997).

The Court turns to RCW 26.09.080 when making a determination of property and liabilities. RCW 26.09.080 requires the trial court to consider

the following non-exhaustive factors in making a determination as to the disposition of property and liabilities in a dissolution proceeding:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership; and
- (4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

Mr. Anthony is correct that *Rockwell* does not mandate that trial courts place parties in a 25-year or longer marriage in "roughly equal financial positions for the rest of their lives" by awarding maintenance in perpetuity. First, *Rockwell* concerns the just and equitable division and distribution of property under RCW 26.09.080, not maintenance under RCW 26.09.090. Second, the holding in *Rockwell* was permissive in nature, not mandatory. *Rockwell* does not support the contention that a trial court must use maintenance to roughly equalize income in perpetuity. See *In re Marriage of Parsons*, 182 Wash. App. 1013 (2014); see also *In re Marriage of Kile and Kendall*, 186 Wn. App 864,887,347 P.3d 894 (2015).

To that end, the court's objective in *Rockwell* is to place the parties in roughly equal financial positions for the rest of their lives.

Although the property division must be “just and equitable,” it does not need to be equal, nor does it need to be mathematically precise. *Larson*, 178 Wash.App. at 138, 313 P.3d 1228. Rather, it simply needs to be fair, which the trial court attains by considering all circumstances of the marriage and by exercising its discretion—not by utilizing inflexible rules. *Id.* For example, “where, as here, the disparity in earning power and potential is great, this court must closely examine the maintenance award to see whether it is equitable in light of the post dissolution economic situations of the parties.” *In re Marriage of Sheffer*, 60 Wash.App. 51, 56, 802 P.2d 817 (1990).

The trial court properly interpreted *Rockwell* as “roughly equalizing” the post-dissolution financial conditions of the parties through the division of property. There is no manifest abuse of discretion because the trial court properly considered the holding in *Rockwell* as permissive and relied on RCW 26.09.080 in making a just and equitable division and distribution of property and liabilities. 1 RP p. 201 ln. 9-11. The trial properly considered the non-exhaustive factors in RCW 26.09.080 in making its determination of the distribution of property and liabilities.

1. The trial court properly considered the nature and extent of the community property and the nature and extent of the separate property.

When distributing property during dissolution of marriage, the court is required to make an equitable distribution, not an equal one. *In re Marriage of Davison*, 112 Wash.App. 251, 48 P.3d 358 (2002); *see also In re Marriage of Doneen*, 197 Wash.App. 941, 391 P.3d 594, review denied 188 Wash.2d 1018, 396 P.3d 337 (2017). The court has specifically held that inequality that results from divorce court's apportioning of liabilities is not an abuse of discretion when there exists inequality in the parties' incomes. *In re Marriage of Steadman*, 63 Wash.App. 523, 821 P.2d 59. (1991).

In a long-term marriage of 25 years or more, the trial court's objective in property division is to place the parties in roughly equal financial positions for the rest of their lives. *In re Marriage of Kim*, 179 Wash.App. 232, 317 P.3d 555, review denied 180 Wash.2d 1012, 325 P.3d 914 (2014).

In the case at bar, the trial court considered evidence presented at trial as it related to the nature and extent of the community property and separate property. The trial court made a specific finding that “there isn’t... much separate property... here.” 1 RP p. 204 ln 21-23. The trial court ultimately awarded the marital home to Mrs. Anthony, along with the

Honda 4 wheeler, 2002 Chevy Silverado, lawnmower, all furnishings and appliances in the family home, 50% of the LTI retirement, 50% of the equity in the marital home, 50% of the community portion of Mr. Anthony's military retired pay, and 50% of the 401(k) retirement accrued from June 1987 until August 2012. Mrs. Anthony was ordered to assume the debt associated with the mortgage on the marital home, amounting to \$267,000. CP 193.

The trial court awarded to Mr. Anthony a miter saw, wood stove, motorcycle, Haulmark trailer, and a Taurus 9mm. 1 RP 207 ln. 4-17; CP 178-188 Ex. B. Mr. Anthony was also ordered to assume the following debts: Citi bank Credit Card in the amount of \$15,500, USAA credit card in the amount of \$3,900, Sound Credit Union (Truck payment) in the amount of \$22,000, HAPO Credit (Harley payment) in the amount of \$20,000, and Navy Federal Credit Union Credit (motorcycle) in the amount of \$400, amounting to \$61,800. CP 192.

2. The trial court properly considered the duration of the marriage or domestic partnership; and

In the case at bar, the trial court considered evidence presented at trial as it related to the duration of the marriage and made a specific finding that the duration of marriage was “a long term marriage” and there was “no argument about that.” 1 RP 204 ln 24-25.

3. The trial court properly considered the economic circumstances of each spouse at the time the division of property was to become effective.

The Trial Court's paramount concern when distributing property in a dissolution action is the economic condition in which decree leaves parties. *In re Marriage of Gillespie*, 89 Wash.App. 390, 948 P.2d 1338 (1997).

In the case at bar, the trial court considered evidence presented at trial related to the economic circumstances of each spouse at the time of the division of property. The trial court made a finding that the parties have “a situation where one party has been and can and will continue to earn far more income than the other party.” 1 RP p. 206 ln 2-4. In fact, the court provided an in-depth analysis of the parties’ respective economic circumstances by way of a hypothetical example using numbers provided in trial.

The trial court’s analysis of the parties’ economic circumstances by indicating that Mr. Anthony is not obligated to work 60 hours per week.

The court then provided the following hypothetical:

For example, if over the next ten years instead of grossing \$115,000 a year, Mr. Anthony were to gross \$85,000 a year, so \$30,000 less per year because he decided to work less, that is still a total gross income of \$850,000 over the next ten years. That would

take him to 63, at which point he may be contemplating retirement or whatnot.

If Ms. Anthony—and we will talk about her employment situation—but if she were to work a minimum wage job – at \$10 an hour, full-time, over the next ten years that would be \$200,000 gross income.

So we're talking about even if Ms. Anthony were to work for ten years at a minimum wage job and Mr. Anthony were to decrease \$30,000 a year, we're still talking about over the next ten years a difference of \$650,000 of income.

There's no doubt, there's no question that Mr. Anthony is in a far better position to generate income than Ms. Anthony. 1 RP p. 204 ln. 4-24.

Assuming arguendo, that Mr. Anthony's income figures contained in his brief are accurate and Mr. Anthony's 10-year projected income is \$679,800 and Mrs. Anthony's 10-year projected income is \$363,680, there is still no doubt, no question that Mr. Anthony is in a far better economic circumstance and in a far better position to generate income than Mrs. Anthony.

Contrary to Mr. Anthony's assertion, the 10-year projected income figures were provided solely for demonstrative purposes to illustrate the economic circumstances of the parties at the time the division of property was to become effective. Mr. Anthony deliberately conflates the hypothetical provided for illustrative purposes to explain the distribution of

property pursuant to RCW 26.09.060 with the amount and duration of spousal support awarded to Mrs. Anthony pursuant to RCW 26.09.090.

Therefore, there is no manifest abuse of discretion because there is substantial evidence that the trial court properly considered the economic circumstances of each spouse at the time the division of property was to become effective.

B. THE TRIAL COURT PROPERLY RELIED UPON THE STATUTORY FACTORS DELINEATED IN RCW 26.09.090 TO DETERMINE SPOUSAL SUPORT.

Spousal support is not a matter of right, but is within the sound discretion of the trial court. *In re Marriage of Mueller*, 140 Wash.App. 498, 167 P.3d 568, review denied 163 Wash.2d 1043, 187 P.3d 270 (2007). The trial court must consider the statutory factors delineated in RCW 26.09.060 to determine a spousal maintenance award in marriage dissolution proceeding. These factors are not exclusive. *In re Marriage of Khan*, 182 Wash.App. 795, 332 P.3d 1016 (2014).

In the instant case, the trial court did *not* rely upon *Rockwell* when making a determination on spousal support. Rather, the trial court considered the statutory factors delineated in RCW 26.09.090 to determine spousal support. 1 RP 211 -217. The court reiterated the position that *Rockwell* is a property distribution case and clarified that the award of

spousal support was made after careful consideration of considered the statutory factors delineated in RCW 26.09.090:

Not only did I outline all the factors related to property distribution -- which is a *Rockwell* -
- *Rockwell* is a property case, not a maintenance case. We all agree on that. But I outlined all the factors that one has to look at for distributing property. I also outlined factors that one has to look at in determining maintenance. 2 RP 36 ln. 18-24.

(1) The Trial Court properly the relevant factors to determine maintenance.

Some of the factors the court must consider include: the post-dissolution financial resources of the parties; their abilities to meet their needs independently; the duration of the marriage; the standard of living they established during their marriage; and the ages, health and financial obligations of the parties. *In re Marriage of Williams* 84 Wash.App. 263, 927 P.2d 679, review denied 131 Wash.2d 1025, 937 P.2d 1102 (1996) (citing RCW 26.09.090(1); *In re marriage of Terry*, 79 Wash.App. 866 at 869, 905 P.2d 935(1995)).

Mr. Anthony did not argue these factors on appeal. However, the trial court made the following findings:

- Mrs. Anthony did not have the present ability to be employed and did not have prolonged periods of time of employment and would not have the ability to meet her needs if support was not ordered. 1 RP 211 ln. 18-24.

- Although Mrs. Anthony has the ability to gain some employment without a GED, or the ability to obtain her GED and gain employment, it does not alleviate the need for “significant spousal support”. 1 RP 212 ln. 22-23.
- The significant income Mr. Anthony makes that had previously been shared in the home is no longer being shared to support one home. “Just by the very nature of the relationship dissolving, that invariably is going to reduce the standard of living likely for both parties.” Id at 213 ln. 4-11.
- The duration of marriage was “a long term marriage” and there was “no argument about that.” Id at 204 ln 24-25.
- The parties have appear to have been responsible with their finances. There’s some consumer debt, but there’s equity in the home. Id at 214 ln 1-4.
- Mrs. Anthony’s age and limited work experience will make finding gainful employment difficult. Id at 215 ln 2-6.
- Mrs. Anthony made relevant and significant contributions to the community during the marriage. Id at 215 ln 7-9.

Therefore, there is no manifest abuse of discretion because there is substantial evidence that the trial court properly considered RCW 26.09.090(a)-(e) when the trial court awarded spousal support to Mrs. Anthony.

(2) The trial court properly considered Mrs. Anthony’s need for support and Mr. Anthony’s ability to pay.

It is well settled law that a party may not generally raise a new argument on appeal that the party did not present to the trial court. *In*

re Detention of Ambers, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007); *see also Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). This court may decline to consider an issue inadequately argued below. *Int'l. Ass'n. of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 37, 42 P.3d 1265 (2002); *Mid Mountain Contractors, Inc. v. Department of Labor & Industries*, 136 Wn. App. 1, 8, 146 P.3d 1212 (2006).

Mr. Anthony stipulated to Mrs. Anthony's need for spousal support in the amount of \$2,500 per month during trial. 1 RP 187 ln. 10-11. The court made a finding on the basis of the stipulation, that Mrs. Anthony has the need for spousal support. *Id* at 211 ln. 25 and at 184. The court reiterated this point during argument on the Motion:

The Court: The Court may do something, but in trial, you conceded this was a maintenance case. I mean, I think you indicated you thought that there was maintenance that was going to be awarded. That wasn't really the fight. The fight was over for how long and how much.

Ms. Rinker: That's right. Okay. 2 RP 39 ln. 8-14.

Therefore, there is no manifest abuse of discretion because there is substantial evidence that the trial court properly considered the stipulation of Mrs. Anthony's need for support in the amount of \$2,500 and made a finding of fact based on this stipulation. Additionally, Mr. Anthony should

be barred from raising a new argument on appeal that he did not present to the trial court.

The court made a finding that Mr. Anthony has the ability to pay spousal support. This finding was based on evidence presented during trial, including testimony about Mr. Anthony's income, expenses, and retirement. The evidence presented by Mr. Anthony at trial indicated an ability to pay a minimum of \$1,500 monthly in spousal support to Mrs. Anthony.

Therefore, there is no manifest abuse of discretion because there is substantial evidence that the trial court properly considered RCW 26.09.090(a)-(e) when the trial court awarded Mrs. Anthony 20 years of spousal support, setting the amount of support at \$2,500 for the first 5 years and decreasing the amount of support by \$500 every 5 years thereafter.

(3) The amount and duration of maintenance is just in light of relevant factors delineated in RW 26.09.060.

The award of maintenance must be just in light of RCW 26.09.060. *In re Marriage of Estes*, 84 Wash.App. 586, 929 P.2d 500 (1997). It is within the trial court's discretion to grant maintenance in an amount and for a period of time the court deems just. *In re Marriage of Williams*, 84 Wash.App. 263, 927 P.2d 679, review denied 131 Wash.2d 1025, 937 P.2d 1102 (1996).

The courts have held that there is no abuse of discretion by awarding a wife spousal maintenance where the award was based on careful consideration of statutory factors for determining a maintenance award. *In re Marriage of Roark*, 34 Wash.App. 252, 659 P.2d 1133 (1983); *see also Donovan v. Donovan*, 25 Wash.App. 691, 612 P.2d 387 (1980). Additionally, the court may consider a spouse's entitlement to an undivided veteran's disability pension as one factor relevant to a just and equitable distribution of property, and as one factor relevant to an award of maintenance, provided of course that it follows the usual state-law rules for applying those statutes. *Perkins v. Perkins*, 107 Wash.App. 313, 26 P.3d 989 (2001).

Even if the obligor's current annual income would not be sufficient to meet all the obligor's obligations for two years immediately following divorce, and payment of those obligations out of current income would leave little or nothing for personal living expenses, there was no abuse of judicial discretion in either division of property or awarding spousal support when the obligor was also awarded property and would have an additional \$4,438 annually to spend as he saw fit after the first two years of support payments. *Hilsenberg v. Hilsenberg*, 54 Wash. 2d 650, 344 P.2d 214 (1959).

The case at bar is factually similar to that in *Hilsenberg*. The evidence presented by Mr. Anthony at trial provided his net monthly income

at \$4,558.11 and his monthly expenses at \$3,995.00. CP Financial decl. Mr. Anthony further testified to his ability to pay a minimum of \$1,500 monthly in spousal support, which was included in his monthly expenses.

Assuming Mr. Anthony would reduce his historical hours from 60 hours per week to 40 hours per week, and accounting only for the income figures and not any property distribution, this results in Mr. Anthony's monthly support payment exceeding his income by \$463.89 for the first 5 years. Thereafter, Mr. Anthony will have an additional \$757.32 annually to spend as he sees fit during years 6-10, \$6,757.32 annually to spend as he sees fit during years 11-15, and \$12,757.32 annually to spend as he sees fit during years 16-20. Mr. Anthony was also awarded property.

Therefore, there is no manifest abuse of discretion because there is substantial evidence that the trial court properly considered RCW 26.09.090(f) when the trial court justly awarded Mrs. Anthony 20 years of spousal support and justly set the amount of support at \$2,500 for the first 5 years and decreasing the amount of support by \$500 every 5 years thereafter.

VI. Request for Attorney Fees

In general, attorney fees are available on review on the same grounds on which they are available in the trial court. The general rule is that each party bears its own attorney fees. *Seattle School Dist. No. I v. State*,

90 Wn.2d 476 585 P.2d 71 (1978). Reasonable attorney fees may be claimed, however, where provided for by contract, statute, or recognized ground in equity. *Western Stud Welding, Inc. v. Omark Indus., Inc.*, 43 Wn. App. 293, 716 P.2d 959 (1986).

Attorney fees may also be available as a sanction against a party pursuing a frivolous appeal or abusing the court rules and procedures. RAP 18.9; CR 11; *see Rich v. Starczewski*, 29 Wn. App. 244, 628 P.2d 831, rev. denied, 96 Wn.2d 1002 (1981); *see also Bryant v. Joseph Tree*, 119 Wn.2d 210, 829 P.2d 1099 (1992).

Where a statute allows for the award of attorney fees to the prevailing party at trial it is interpreted to allow for the award of attorney fees to the prevailing party on review as well. *See, e.g., Puget Sound Plywood, Inc. v. Master*, 86 Wn.2d 135, 542 P.2d 756 (1975). For example, RCW 26.09.140 provides: “upon any appeal, the, appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney fees in addition to statutory costs.”

RAP 18.9 provides the appellate court with broad authority to impose attorney fees as a sanction against the pursuit of frivolous claims and defenses or the abuse of court rules and procedures.

RAP 18.9 has provided authority to the appellate courts to sanction frivolous appeals, although, where an appeal presents one arguably

meritorious issue, the appeal will not be considered frivolous. *Rhinehart v. Seattle Times*, 59 Wn. App. 332, 798 P.2d 1155 (1990).

However, RAP 18.9(a) allows an appellate court to impose sanctions against a party who “uses these rules for the purpose of delay or who fails to comply with these rules” as well as for frivolous appeals. The Court of Appeals has invoked this section of the rule to impose sanctions on a party whose appeal was not frivolous, but who had repeatedly used the appellate rules and procedures for delay and harassment. *Rich v. Starczewski*, 29 Wn. App. 244, 628 P.2d 831, rev. denied, 96 Wn.2d 1002 (1981). In *Starczewski*, the court found that although one of the issues raised on appeal was not frivolous, the court required Starczewski to pay \$1,000 in compensatory damages and \$4,000 in attorney fees. *Id.*

RAP 18.1 (c) provides: In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit not later than 10 days prior to the time set for oral argument; however, in a motion on the merits pursuant to RAP 18.14, each party must serve and file a financial affidavit along with its motion or response. This requirement is understandable in light of the statutory mandate of RCW 26.09.140 that an award of fees in a dissolution case be based upon the need of one spouse and the ability to pay of the other spouse.

Fees awarded under RCW 26.09.140 are not based on which party prevails. The appellate court examines the arguable merit of the issues on appeal as well as the financial resources of the parties. *In re Marriage of Booth*, 114 Wn.2d 772, 779, 791 P.2d 519 (1990).

In the instant matter, Mrs. Anthony is not likely to recover attorney fees under RAP 18.9. Although the majority of the issues presented by Mr. Anthony on appeal are frivolous, Mr. Anthony does raise one arguably meritorious issue- the need to revise the QDRO. Therefore, although Mr. Anthony did not seek the appropriate remedy, filing a Motion to Amend the QDRO, the appeal is not likely to be considered frivolous.

However, Mrs. Anthony is entitled to recover damages and attorney fees under RAP 18.9(a) based on Mr. Anthony's failure to comply with the Rules of Appellate Procedure and/or uses the Rules of Appellate Procedure to delay enforcement of maintenance provisions and to cause Mrs. Anthony to incur significant attorney fees in two post-trial motions and the instant appeal.

Mrs. Anthony has provided a financial affidavit as required under RAP 18.1(c) and RCW 26.090.60 and 26.090.80. CP 9-14. This Court may consider Mrs. Anthony's financial need and the ability of Mr. Anthony to pay Mrs. Anthony's attorney fees pursuant to RCW 26.09.140.

VII. Conclusion

For the aforementioned reasons, Mrs. Anthony respectfully requests that this court remand the issue of the QDRO to the trial court so the parties may enter a QDRO consistent with the stipulated language and ruling of the court and deny Mr. Anthony's appeal and affirm the Kitsap County Trial Court's decision in this matter as it relates to the division of property and spousal support, and award attorney fees and costs.

Dated the 5th day of March 2018.

RESPECTFULLY SUBMITTED



Laura E. Baier, WSBA #48127
Attorney for Penny Anthony

NEWBRY LAW OFFICE

March 05, 2018 - 11:51 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50494-4
Appellate Court Case Title: In re the Marriage of: Joseph C. Anthony, Appellant v. Penny L. Anthony, Respondent
Superior Court Case Number: 15-3-00791-8

The following documents have been uploaded:

- 504944_Briefs_20180305114742D2700302_3435.pdf
This File Contains:
Briefs - Respondents - Modifier: Amended
The Original File Name was Anthony Appeal Brief Amended.pdf

A copy of the uploaded files will be sent to:

- diane@newbrylaw.com
- janrinker@aol.com
- laura@newbrylaw.com
- leyna@newbrylaw.com

Comments:

Sender Name: Christiine Newbry - Email: christine@newbrylaw.com
Address:
623 DWIGHT ST
PORT ORCHARD, WA, 98366-4619
Phone: 360-876-5567

Note: The Filing Id is 20180305114742D2700302