

FILED
Court of Appeals
Division II
State of Washington
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NO. 53861-0

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

SHANNON ANDERSON, Appellee/Petitioner

vs.

MICHAEL ANDERSON, Appellant/Respondent

APPELLEE'S RESPONSIVE BRIEF

Clallam County Superior Court No. 17-3-00418-05

By:

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III. ASSIGNMENTS OF ERROR

Assignment of Error

1. A trial court's award of property and debts is reviewed for abuse of discretion. The trial court did not abuse its discretion by awarding community property and debts as outlined in the Decree of Dissolution of Marriage entered herein.

Issues Pertaining to Assignment of Error

1. Did the court abuse its discretion by making an unequal distribution of the parties' assets and debts? No.
2. Did the court's decision place the parties in unequal positions for the remainder of their lives? No

IV. STATEMENT OF THE CASE

This matter came before the trial court on June 24, 2019. The parties had previously agreed to a Parenting Plan and Child Support Order, which outlined a long-distance parenting plan wherein the childrens' contact with their father was limited by the fact that he chose to relocate to the state of California. As noted in the Court's Memorandum Opinion dated July 2, 2019, it was the court's obligation to determine the character of the property before it, the value of this property, and then divide it between the parties.

At trial, the parties stipulated to the value of the community residence at \$245,000.00.

Although the parties agreed that the appellant/respondent was to be the recipient of 3 separate pensions, both the value and distribution of these pensions was not stipulated to by the parties, and left to be determined by the court. After considering the testimony of the parties, the court valued the first pension at \$11,652.15 and awarded it to the appellant/respondent. After some discussion as to how the value of the second and third pensions was to be determined, the court valued the remaining two pensions at \$176,914.72. These two additional pensions were also awarded to the appellant/respondent, for a total award of the pensions at \$188,566.87.

The court went on to award the family residence to the respondent/petitioner and the pensions to the appellant/respondent. The court

noted that the respondent/petitioner would be residing in the family home with the parties' 3 young children, that the respondent/petitioner's monthly income was substantially less than that of the appellant/respondent and that, even with a child support payment of \$1,628.93, she would have a shortfall each month of \$156.78, without any allocation of debt. The respondent/petitioner's unrefuted testimony indicated that she could not qualify to refinance the home and thereby remain there with the children. The court went on to find that the respondent/petitioner's income was not likely to increase, as she was earning minimum wage with no skills to support a finding that she would earn more than minimum wage anytime soon. Any chances to receive additional training or more education was hindered by the fact that she was fully responsible for the care of the parties' 3 children, as the father lived in California. The court, therefore, determined that the stability of the children would be best served if the respondent/petitioner could remain in the family home with the children, where there was no mortgage payment due each month.

Based upon the appellant's own testimony, after expenses, he had an excess monthly income of \$2,303.07, or \$27,636.00 each year of funds available over and above his stated needs.

After considering the possibility of subjecting the various pensions to a Qualified Domestic Relations Order, and rejecting appellant's argument that his wife might someday marry a millionaire (RP page 144, lines 21-23) and thereby secure her financial future, the trial court made the equitable, but unequal,

distribution of assets and debts. Noting the appellant has 76% of the parties' total income, awarding the debts as outlined in the Memorandum Opinion was also equitable.

See Memorandum Opinion, attached hereto and incorporated by reference as Exhibit A.

V. ARGUMENT

1. The court did not abuse its discretion when it made an unequal distribution of community assets and debts.

Appellant argues before this court that the trial court abused its discretion when it divided the parties' community assets and debts, awarding the home to the respondent/petitioner and the pensions and debts to the appellant/respondent. A review of the trial record, and the court's Memorandum Opinion indicates otherwise.

A spouse who challenges such decisions must show the trial court manifestly abused its discretion. When there is no abuse of discretion, the courts have upheld the trial court. *In re Marriage of Griffin*, 791 P. 2d 519 (1990) ("this court will not substitute its judgment for trial court judgments if the record shows the court considered all relevant factors and the award is not unreasonable under the circumstances". *Griffin, supra*, at 776; *In re Marriage of Landry*, 103 Wn.2d 807, 699 P.2d 214 (1985); *State v. Burns*, 363 P. 3d 1(2015). 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; 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. *State v. Rundquist*, 79 Wash.App. 786, 793, 905 P.2d 922 (1995).

2. The court's decision did not put the parties in unequal positions for the rest of their lives.

The argument that the court's decision "put the parties in unequal positions for the rest of their lives" is not supported by either the testimony or evidence produced at trial. In fact, the trial court determined that, given the appellant's earnings and anticipated on-going future employment, "if he applied the extra amount he has available to him each month to erase the disparity in the property distribution in this case, it would take him just over three and a half years to do so." Court's Memorandum Opinion, pages 10, lines 21-2 and 11, line 1. There is absolutely no basis to support the appellant's contention that the trial court's opinion has put the respondent in a more advantageous financial position for the rest of the lives of the parties. In fact, based on the testimony produced at trial, it will be years before the respondent can consider bettering her job prospects, given that, prior to the separation of the parties, she was a stay-at-home parent and only went to work when her husband moved to California. She is responsible for raising 3 children, the youngest of which, at the time of trial, was 7 years old. Given the distance that the appellant chose to put between himself and his children, the respondent is responsible for all 3 children seven days a week,

every week, except for a brief period over Winter Break in December, and for several weeks in the summer. Hardly any time to advance her educational opportunities or attend vocational training.

Washington courts have long recognized the need to consider the post-dissolution financial condition of the parties when making property and awards of spousal maintenance. The Washington Supreme Court has noted the importance of the parties' postdissolution economic status. See, *In the Matter of Marriage of Sheffer*, 802 P. 2d 817(1990), which directly addresses the reasons why unequal distribution of marital assets and debts are fair and equitable.

In *Stacy v. Stacy*, 68 Wn.2d 573, 577, 414 P.2d 791 (1966), the trial court awarded the wife custody of three children, ordered child support and awarded her \$31,703 of the \$42,253 community property. The husband earned \$12,000 per year and the wife was never employed outside the family home during the 22-year marriage. The Supreme Court found an abuse of discretion which "fosters an inequity", then doubled the amount of maintenance and reduced by more than one-half a lien awarded to the husband against the family home. The Supreme Court noted:

The future earning capabilities of the wife, if she has no other means of support, represent one of the important concerns of the courts in divorce cases, and must be considered in comparison to those of her husband. It would be manifestly unjust to leave the wife and children with a low and uncertain standard of living while the husband retains a much higher one.

Stacy v. Stacy, 68 Wn.2d at 576.

Similarly, in *DeRuwe v. DeRuwe*, 72 Wn.2d 404, 408, 433 P.2d 209

(1967), the Supreme Court noted:

[I]t is the economic condition in which the decree will leave the parties that engenders the paramount concern in providing for child support and alimony and in making a property division.

In *DeRuwe*, the community property had grown approximately \$800,000 during the 22-year marriage. The trial court awarded custody of the children to the wife and ordered child support of \$100 per month for each child. The wife was also awarded less than \$90,000 in property plus \$5,000 per year alimony while the husband received over \$700,000 in property. Finding this award inequitable, the Supreme Court awarded the wife an additional \$100,000 in community property. *DeRuwe v. DeRuwe*, 72 Wn.2d at 409.

Several more recent cases have also emphasized that the economic condition in which a dissolution decree leaves the parties is a paramount concern in determining issues of property division and maintenance. In *In re Marriage of Washburn*, 101 Wn.2d 168, 181, 677 P.2d 152 (1984), the court pointed out that consideration of the duration of the marriage and the standard of living during the marriage as mandated by RCW 26.09.090 makes "it clear that maintenance is not just a means of providing bare necessities, but rather a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time." *Washburn*, 101 Wn.2d at 179.

In *Washburn*, the Supreme Court dealt with two cases, affirming in one case a monetary award to the wife who had worked during her husband's professional education, and reversing and remanding in the second case for the

trial court to consider compensation to the wife for her contribution toward the cost of her husband's professional education. *Washburn*, 101 Wn.2d at 183-84.

In *In re Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989), the appellate court upheld an award of lifetime maintenance of \$2,200 per month where the husband had converted large amounts of community property for his separate use and the wife was unable to work due to problems with her vision. The court noted the award properly reflected that the wife had forfeited economic opportunities during the 22-year marriage while her husband had capitalized on them. *Morrow*, 53 Wn. App. at 587-88.

See, also, *In re Marriage of Tower*, 55 Wn. App. 697, 780 P.2d 863 (1989), review denied, 114 Wn.2d 1002 (1990), where the appeals court upheld the amount and permanent duration of an award of maintenance in a 19-year marriage where the wife had multiple sclerosis that substantially limited her activities and the husband received 63 percent of the property. This court also modified the decree to eliminate the automatic termination of maintenance upon cohabitation. The maintenance started at \$100 per month and increased to \$350 upon emancipation of one child and to \$700 upon emancipation of the second child. *Tower*, 55 Wn. App. at 699. The court noted that the disproportionate division of property in favor of the only spouse with any significant earning capacity would be an abuse of discretion if it were not balanced by long-term maintenance. *Tower*, 55 Wn. App. at 701. See *In re Marriage of Bulicek*, 59 Wn. App. 630, 800 P.2d 394 (1990).

IV. CONCLUSION

It is clear, based upon the evidence produced at trial, the trial court's analysis of those facts, the situation of the parties as they presented themselves to the court, and the law regarding the distribution of marital assets and debts, that the trial court did not abuse its discretion when it made an unequal award of the parties' assets and debts. Based on the economic circumstances of the parties, the respondent/petitioner should be awarded the costs and attorney fees incurred in having to respond to this appeal.

Respectfully submitted this December 21, 2019.

KAREN L. UNGER, P.S.



KAREN L. UNGER # 11671
Attorney for Respondent/Petitioner

EXHIBIT

A

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1 SUPERIOR COURT OF WASHINGTON WIKKI BOTHEM
COUNTY OF CLALLAM

2 In re

NO. 17-3-00418-05

3 SHANNON ANDERSEN

MEMORANDUM OPINION

4 Petitioner,

5 vs.

6 MICHAEL ANDERSEN

7 Respondent.



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and was taken under the Clerk's direction and control.
9 Clallam County Clerk, by AB Deputy #pages: 11

10
11 This matter came before the court for trial regarding the issues in this dissolution of
12 marriage.

13 The parties presented a stipulated parenting plan and child support order. Those have
14 been signed by the court.

15 The parties have divided their personal property by agreement.

16 The following issues require determination by the court:

- 17
- 18 1. How should the residence, with a stipulated value of \$245,000, be awarded?
 - 19 2. What is the value of the three pensions, and how should they be awarded?
 - 20 3. How should the community debt be allocated?

21 The basic obligation of the court is to determine the character of the property, the value
22 of the property, and then divide the property between the parties.

A. House

The parties stipulate that the house value is \$245,000 and there is no amount owing on the house. Mr. Anderson does not wish to live in this residence and asks that it be sold and the equity divided. Mrs. Anderson wishes to reside in the residence and be awarded its equity in exchange for her share of the pension. To the degree that the pension is worth less than the house, she asks for an unequal division of the property so that the house and pension offset each other.

For the reasons set forth below, the court will award the residence to Mrs. Anderson and not require that it be sold, and not require that she obtain a loan to pay Mr. Anderson for any equity in the residence.

B. Pensions

Mr. Anderson owns three pensions.

1. Supplemental Pension

The first pension will be referred to as the supplemental pension. Exhibit 19 states that this is a 401K type plan, and has a balance on August 23, 2018 of \$11,652.15. As of the date of separation it had a balance of \$7,288.64. No testimony was presented regarding whether separate property contributions are being made to this account, or if the growth in the account is a result of normal investment expectations. The meaning of the language on Exhibit 19 showing \$424.25 for work "Jan through Jun 2018" is unclear. An updated statement is not provided.

The court values this account at \$11,652.15. On the one hand, the court does not believe that Mrs. Anderson should benefit from post separation contributions to this account.

1 On the other hand, she should not be deprived of its increasing value which is based upon
2 contributions made during the marriage. The court will reconcile these two competing interests
3 by assigning the value indicated above, and will award that value to Mr. Anderson for the
4 reasons set forth below.

5 2. SMART Local Pension & National Pension

6 The husband also has two pensions which will pay him an annuity, following
7 retirement, for the rest of his life. The parties agree that the value of these two pensions is all
8 community property, and the court will accept that stipulation.

9 The value of these two pensions is problematic at best. As a general principle, it is the
10 court's responsibility to value property within the "scope of the evidence." *In re Marriage of*
11 *Mathews*, 70 Wash.App. 116, 122 (1993). Both parties have provided values for these
12 pensions. They have utilized different methods and have utilized different assumptions in
13 doing so. The court concludes that the following assumptions should be utilized for purposes
14 of valuing the pensions.
15

16 First, the supplemental pension described above should not be included for purposes of
17 valuing the annuity pensions.

18 Second, the proper discount / investment rate is 3%. This rate is slightly higher than the
19 rate used by Mrs. Anderson, and slightly lower than the rate used by Mr. Anderson.

20 Third, the future payments that will be received from the National Pension is \$813 per
21 month and from the Local Pension is \$248.81 per month. The total expected payment is
22 \$1,061.81. The court notes that although some evidence exists that \$6.90 of the Local Pension
23 was earned before the marriage, the parties stipulated that the pensions were completely
24

1 community property. The testimony was that the parties lived together for a period of time
2 prior to their marriage, and so it is not unreasonable for the court to include this additional
3 \$6.90. It is not known is whether some of the National Pension and Local Pension amounts
4 have been excluded because they were earned prior to the official marriage date, even though
5 earned when the parties were living together. This fact potentially undervalues the community
6 interest in the pensions.

7 Fourth, the court will utilize eighteen years as the period during which the payments
8 will be made. Based upon Mr. Anderson's age of forty-nine, expected retirement date at age
9 sixty-five, and expected life expectancy of just over eighty-one years as shown in Exhibit 9, the
10 court is not quite sure how Mr. Anderson's expert arrived at the eighteen year figure.

11 However, his testimony was clear that eighteen years was the time period he was utilizing. The
12 court does not find any facts which would justify using the nineteen year figure utilized by Mrs.
13 Anderson.

14 Fifth, the court will find that the pension payments will start when Mr. Anderson turns
15 sixty-five, approximately sixteen years in the future.

16 Ms. Anderson utilized an online calculator to determine the value of the pension. That
17 calculator is found at financialmentor.com. She utilized the calculator that this online program
18 described as follows:
19

20 This annuity calculator computes the present value of a series of equal cash flows to be
21 received in the future. Use this calculator to figure out what a future income stream is
22 worth in today's dollars – whether it is from an annuity, business, real estate, or other
23 assets. <https://financialmentor.com/calculator/present-value-of-annuity-calculator#>
24
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1 If the court utilizes this calculator, with the assumptions set forth above, the present value of
2 the two pensions is \$176,914.92.

3 Mr. Anderson did not personally testify as to the value of the pension, but had
4 employed a CPA, to provide a value. In court the CPA used his phone to plug in numbers to
5 application to arrive at values. It is not clear to the court what program was used.

6 Mrs. Anderson argued that the parties had stipulated that the value of the pension was
7 \$225,000. Respondent claimed that there was a stipulation as to the present value of the
8 pension at that amount, but no stipulation as to the future value of the pension. It is unclear to
9 the court why Respondent would stipulate to a value that he did not believe was the value that
10 should be utilized by the court. It appears that when the parties were discussing stipulations,
11 they had not agreed as to what terms or phrases meant.

12 With no notice to Petitioner, Respondent called the CPA to provide testimony as to the
13 present value of this future income stream. Over Petitioner's objection, the court granted leave
14 for this expert to testify in the hope that it would provide some clarity on the value of the
15 pension.
16

17 The \$225,000 stipulation comes from the CPA determining that if Mr. Anderson
18 received \$1,039 per month from the day of his retirement at age sixty five for eighteen years
19 until he died, he would receive payments totaling \$224,424. What the CPA then did was to
20 determine how much money Mr. Anderson would need to have in the bank today in order to
21 pay him \$225,000 on the date of his retirement. Although the name of the program used by the
22 CPA was not provided to the court, the calculation is not overly complicated. If you take a
23 growth rate of 3% per year, and you want to have \$225,000 in the bank in sixteen years when
24

1 Mr. Anderson turns sixty five, then you would need about \$140,000 in the bank today. That is
2 consistent with the CPA's testimony, even though he used a different interest rate.

3 With no disrespect to the CPA, he is not qualified to testify as an expert at trial on the
4 present value of pensions. He testified that he has never valued a pension. He testified that he
5 is unfamiliar with standards in the industry for doing so, and testified that he was unfamiliar
6 with case law in the State of Washington relevant to these valuations. On the other hand, he is
7 probably no less qualified than Mrs. Anderson to perform these calculations.

8 The court finds, however, that the formula utilized by Mrs. Anderson is the more
9 accurate method of valuing these pension benefits. Accordingly, the court will value the
10 annuity pensions at a value of \$176,914.72. For the reasons set forth below, they will be
11 awarded to Mr. Anderson.

12 C. Property Award

13 The court will award the residence to Mrs. Anderson. The court will award the three
14 pensions to Mr. Anderson. Neither party will owe the other any offsetting amounts.

15 In dividing property in a dissolution, the court is to specifically consider "the economic
16 circumstances of each spouse at the time the division of the property is to become effective,
17 including the desirability of awarding the family home . . . to a spouse . . . with whom the
18 children reside the majority of the time." RCW 26.09.080. Additionally, trial courts may
19 divide a pension either by a "lump sum" distribution or a "pay as it comes in" method. *In re*
20 *Wright*, 147 Wash.2d 184, 190 (2002). Here the parties disagree as to which method should be
21 used. The court is to use its discretion in choosing which option to choose. *Wilder v. Wilder*,
22 85 Wash.2d 364, 369 (1974).
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1 Mrs. Anderson has a stipulated monthly income of \$1,847. She will be receiving child
2 support in the amount of \$1,628.93. Her total disposable monthly income is \$3,475.93. Her
3 monthly household expenses are \$3,632.71, leaving a monthly deficit, before allocation of the
4 community debt, of \$156.78. Her unrefuted testimony is that she would not qualify to
5 refinance and "cash out" Mr. Anderson for his share of the equity. She also testified that if she
6 sold the home and realized a portion of the equity, she still would not qualify to purchase
7 another home in Sequim even with that equity to use as a down payment. Under a scenario
8 where the house was sold, the equity in the house would be reduced by the costs of the sale and
9 further reduced by the cost of a purchase.

10 Given that her monthly expenses, which do not include a house rental payment, exceed
11 her monthly income, any equity she obtained from the sale of the residence would be
12 consumed, over time, by rental payments. This conclusion is bolstered by the fact that there is
13 little likelihood that Mrs. Anderson's income will increase. She may receive minimal wage
14 increases from her employer. She has no specialized training other than as a pastry chef. She
15 has been a stay at home mom during the marriage. Pursuing other educational opportunities in
16 an effort to improve her earning capacity is challenging given that Mr. Anderson has moved
17 from the area and she is therefore responsible for the total care of the children on a day to day
18 basis. The youngest child is seven years old. For the next eleven years she is likely forced to
19 live pay check to pay check to ensure stability for the children. The ability to do so is greatly
20 increased, and is a huge benefit for these children's stability, if she does not have a house
21 payment as well.
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1 It would be fundamentally unfair to put her in a position where her property award
 2 would be consumed by monthly rental payments.

3 The husband has a net monthly income of \$6,100. There is evidence that this amount
 4 will likely increase each year as a result of union contract negotiations. At trial he testified that
 5 his monthly expenses are \$1,000 for housing, \$85 for phone, \$400 for food and supplied, \$100
 6 for eating out, \$183 for transportation insurance, and \$400 for gas. This is a total of \$2,168.
 7 This amount is within a few hundred dollars of the amount stated in the financial declaration he
 8 provided early on in this litigation. His testimony is that the housing expense allows him to
 9 rent a room, but no testimony was provided as to what alternate housing arrangements might
 10 cost.

11 Accordingly, by his testimony, he has excess income of \$3,932 each month. From this
 12 he will pay \$1,628.93 in child support, leaving a monthly excess of \$2,303.07. Put into
 13 perspective, this amounts to \$27,636 each year in funds over his stated needs.

14 As a general premise, the court prefers a method of distribution of assets which allows
 15 each party to presently realize the economic benefits of what has been acquired up to the point
 16 of dissolution. This would typically favor the entry of a QDRO that divides the pension and
 17 allows each party to receive a portion at the time of retirement, and allows each party to receive
 18 some benefit from the equity in the family residence. This method is also preferred because it
 19 diversifies what each party has, and should an asset become more or less valuable, that risk /
 20 reward is spread equally between the parties. Finally, it is preferred because it can take some
 21 ambiguity out of the valuation process.
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 23
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1 Challenges with this approach, however, include the loss in value that accompanies the
2 sale of a home and resulting instability for the children. Additionally, it creates ambiguity for
3 Mrs. Anderson because she has no control over when Mr. Anderson will actually retire.
4 Finally, there was no testimony offered regarding aspects of this pension plan such as the cost
5 of survivorship benefits which Mrs. Anderson would be entitled to.

6 There was some argument by Mr. Anderson that there is uncertainty in the future, and
7 the court should somehow deal with this. As this argument relates to the pension, the
8 Respondent has indicated that he plans to continue to work in this field. That stated belief is
9 consistent with his actions of working in the field in Texas, Washington, and now California.
10 He is vested in his pension. The evidence supports the conclusion that, if anything, the
11 renegotiation of his union contracts will continue to add substantial value to his pension
12 benefits.

13
14 As this argument relates to Mrs. Anderson's economic circumstances, it is troubling to
15 hear that the court should take some different course because a woman may marry a millionaire
16 in the future, and her needs might change. . . .

17 This is a unique case where there are significant reasons to award the retirement wholly
18 to the husband and offset its value against the residence. First, his income places him in a far
19 better position than Mrs. Anderson to qualify to purchase a home. Second, these children need
20 stability. The wife's ability to maintain this house is a large part of that stability. The cost of
21 that stability, for her, is less security during her retirement years. The cost of that stability, for
22 the husband, is more uncertainty in housing at the present time, but far more stability in his
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1 retirement years. Additionally, he has the benefit of knowing that his children live in stable
2 circumstances at this time.

3 By awarding the residence to Mrs. Anderson at a value of \$245,000, and awarding the
4 pensions to Mr. Anderson at \$176,914.72 and \$11,652.15, Mrs. Anderson will receive
5 \$86,433.13 more in assets. The parties have total property valued at \$433,566.87. Under the
6 above distribution, Mrs. Anderson will receive 56% of the property, and Mr. Anderson will
7 receive 44% if the marital community property.

8 Additionally, other than the family residence and the husband's pension, the parties
9 agree that their other assets have been fairly divided. The parties further agree that there are
10 community debts in the amount of \$44,000 that need to be divided. Mr. Anderson has 76.8%
11 of the total income of the parties, and Mrs. Anderson has 23.2% of the total income. The court
12 will assign this debt to Mr. Anderson. Again, he is the only party who has the present financial
13 means to handle this debt.
14

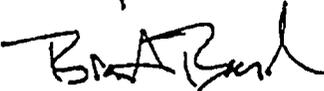
15 Conclusion

16 Mr. Anderson will receive property valued at \$188,566.87. He will assume debts of
17 \$44,000 leaving him a net award of \$144,556.87. Mrs. Anderson will receive assets of
18 \$245,000. Of the total net estate of \$389,566.67, Mr. Anderson will receive 37 percent, and
19 Mrs. Anderson will receive 63%.

20 Each month Mrs. Anderson will be short \$156.78. Each month Mr. Anderson will have
21 excess funds in the amount of \$2,303. If he applied the extra amount he has available to him
22 each month to erase the disparity in the property distribution in this case, it would take him just
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1 over three and a half years to do so. Because of this distribution, the court is not awarding
2 spousal maintenance or attorney fees to Mrs. Anderson.

3
4 DATED this 2 day of July, 2019.

5 
6 BRENT BASDEN
7 JUDGE

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KAREN L. UNGER, PS

December 21, 2019 - 3:06 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53861-0
Appellate Court Case Title: In re the Marriage of: Shannon Andersen, Respondent v. Michael Andersen,
Appellant
Superior Court Case Number: 17-3-00418-5

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