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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 338789

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SHARON TAYLOR (now Ms. Radovich),

vs.

FRANK TAYLOR.

APPEAL FROM THE SUPERIOR COURT
FOR OKANOGAN COUNTY
THE HONORABLE CHRISTOPHER CULP

BRIEF OF RESPONDENT

OVERCAST LAW OFFICES, P.S.
By: Rani K. Sampson, WSBA No. 37486
23 S. Wenatchee Ave., Ste. 320
Wenatchee, WA 98801
(509) 663-5588

HERTOG & COSTER, PLLC
By: Ellen E. Barton, WSBA No. 16209
200 W. Mercer Street, Ste. 310
Seattle, WA 98119
(206) 587-6556

Attorneys for Mr. Taylor

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I. INTRODUCTION

This appeal presents the issue of the interpretation of the division of a pension contained in a marital dissolution decree prepared by the parties and entered by the court in 1985 to dissolve their 22-year marriage.

II. RESTATEMENT OF ISSUES

- A. Whether the trial court correctly found that contributions made to Mr. Taylor's pension after separation due to additional years worked were his separate property? (Appellant's Assignment of Error 1).
- B. Whether the trial court properly concluded that Ms. Radovich was entitled to one-half the value of the pension accrued during the parties' marriage? (Appellant's Assignments of Error 1, 2 and 3).
- C. Whether the trial court properly found that the intent of the parties as expressed in their decree of dissolution was to divide only the contributions made to the pension during the parties' marriage? (Appellant's Assignments of Error 1, 2 and 3).
- D. Whether the trial court correctly found that the language of the decree is unambiguous when considered in light of surrounding circumstances? (Appellant's Assignment of Error 4).¹
- E. Whether the trial court properly considered the reasonableness of the parties' respective interpretations of the decree language when determining the parties' intent? (Appellant's Assignment of Error 5).¹

¹ Appellant failed to state any issues relating to her Assignments of Error 4 and 5.

III. RESTATEMENT OF THE CASE

When Frank Taylor (herein, "Mr. Taylor") separated from his wife on November 1, 1983, he had worked for Douglas County P.U.D. for the last 13 years of the couple's 22-year marriage. *CP 57*. Sharon Taylor (herein, "Ms. Radovich") petitioned for dissolution of their marriage on July 3, 1984. *CP 1*. She alleged that Mr. Taylor agreed to pay for all the community's debts, to give her half the community's assets and to give her half his future benefits, writing: "[h]alf to [Ms. Radovich] for 13 years after [Mr. Taylor] retires." *CP 3*. Mr. Taylor denied those allegations. *CP 6*.

The final decree of dissolution divided the couple's property differently than the division proposed in Ms. Radovich's petition. *CP 13*. For example, she was awarded less equity in the home than she petitioned for. *CP 13*. Further, the decree did not incorporate the petition language when dividing Mr. Taylor's pension. *CP 13*. Instead, Ms. Radovich was awarded "[o]ne half of Respondents [sic] retirement benefits for 13 years." *CP 13*. Mr. Taylor was awarded "[h]alf of retirement benefits for 13 years [sic] and full amount after that period of time." *CP 13*.

Mr. Taylor continued to work for Douglas County P.U.D. for the rest of his career. *CP 58*. As he neared retirement, Mr. Taylor asked

Washington State's Department of Retirement Systems (herein, "DRS"), to calculate Ms. Radovich's portion of the retirement account in accordance with the decree of dissolution. *CP 58*. DRS reported that the value of the marital contributions to the retirement account was \$22,364.57 as of the date the parties separated, November 1, 1983. *CP 70*. Ms. Radovich's half interest, \$11,192.29, had increased in value to \$60,807.74 by the time Mr. Taylor retired on December 31, 2014. *CP 49*. According to DRS, Ms. Radovich's half, \$60,807.74, yields a monthly payout to her of \$394.20. *CP 75*.

Ms. Radovich seeks a different outcome. *CP 46*. Instead of accepting the monthly payments calculated by DRS of \$394.20, Ms. Radovich demands payment of \$4,081.98² per month for 13 years or until either party dies. *CP 24*. Payments in this higher amount would necessarily include a portion of Mr. Taylor's separate property, i.e. a portion of the contributions made by Mr. Taylor to his pension after their separation. *CP 18*.

Mr. Taylor moved the trial court for clarification of the decree language awarding a portion of the pension benefits. *CP 47*. According to Mr. Taylor's and the DRS's interpretation, Ms. Radovich is entitled to

² Note that the actual figure is \$3,371.71 because Ms. Radovich cited a number that is too high. *See CP 50*.

receive her share of the community portion of the pension, or \$394.20 per month. *CP 59.*

Mr. Taylor produced a chart showing the difference between Ms. Radovich's claim and the interpretation shared by Mr. Taylor and the DRS. *CP 59.* According to Mr. Taylor's and DRS' interpretation, Ms. Radovich is entitled to \$4,730.40 per year which is \$61,495.20 paid over the course of 13 years. *CP 59.* In contrast, Ms. Radovich claims \$40,460.52 per year, or one-half of Mr. Taylor's payout for each of 13 years. *CP 59.* At the end of 13 years, Ms. Radovich would receive a total of \$525,986.76. *CP 59.*

The trial court agreed with Mr. Taylor's analysis, finding:

FF-15. Both parties made a conscious decision that the award would be based on Mr. Taylor's contributions of community property, his income, for 13 years that he was working and they further decided that, after they were divorced, any of his contributions to the retirement would be his. The [decree's] references to 13 years are based on those contributions of community property.

...

FF-17. To base the retirement to be awarded on an additional 31 years that Mr. Taylor worked is not fair and the parties understood that.

FF-18. Contributions to the retirement account made after the parties separated were the separate property of Mr. Taylor, not Ms. Radovich.

...

FF-20. The Department of Retirement Systems determined the value of the retirement account as of the date the parties separated and also at the date Mr. Taylor retired. The value of Ms. Radovich's portion of Mr. Taylor's account increased from the date of separation to the date of Mr. Taylor's retirement and such increase sufficiently compensated her for the payments delayed for 31 years.

CP 201-02.

The court concluded:

CL-7. The sums Mr. Taylor contributed to the retirement account from the time of separation to the time of Mr. Taylor's retirement are the separate property of Mr. Taylor, and Ms. Radovich has no interest in those sums.

...

CL-9B. The basis of Ms. Radovich's property right to part of Mr. Taylor's retirement account is: her separate property and all of the interest that accrued on her separate property interest in Mr. Taylor's retirement account. This comports with the ruling in In re the Marriage of Moore, 99 Wn.App. 144, 993 P.2d 271 (Div. 3, 1999).

CP 203.

Accordingly, the trial court ordered that Ms. Radovich was awarded the sum of \$394.20 per month from Mr. Taylor's pension. *CP*

187. Ms. Radovich appealed. *CP 189-90.*

IV. SUMMARY OF ARGUMENT

This appeal is about the interpretation of the language used in a dissolution decree dividing the husband's pension accrued during the parties' marriage. The husband maintains that the intent of the parties at the time was to split the pension *accrued* during marriage 50-50. In contrast, wife asserts that the intent instead was to award to wife one-half of the amount that husband would *receive* for a period of 13 years.

The trial court concluded that the language used was not ambiguous, since there was only one reasonable interpretation, and that was that the parties intended to divide the pension accrued during marriage equally between them. The trial court's decision is supported by the facts and the law and should be affirmed.

V. ARGUMENT

A. Standard of Review.

1. Findings of fact are reviewed for abuse of discretion.

If the trial court's findings of fact are supported with substantial evidence, they will be upheld on appeal. *Miles v. Miles*, 128 Wn.App. 64, 69, 114 P.3d 671 (2005). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth." *Miles*, 128 Wn.App. at 69 (citation omitted). In evaluating the "sufficiency of

evidence, an appellate court need only consider evidence favorable to the prevailing party.” *In re Marriage of Akon*, 160 Wn.App. 48, 57, 248 P.3d 94 (2011) (citation omitted).

When the trial court reviews extrinsic evidence and weighs its credibility or chooses among reasonable inferences to be drawn from extrinsic evidence to interpret a contract, the trial court’s decision is entitled to deference on appeal. *See Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990), quoting *Restatement (Second) of Contracts*, §212, 214(c) (1981). This is so even where the evidence is solely documentary, because a trial judge is in a better position than an appellate judge to make factual determinations. *In re Parentage of Jannot*, 149 Wn.2d 123, 126, 149 P.3d 664 (2003), (adopting Division Three’s reasoning that the trial court was in a better position to decide whether submitted affidavits established adequate cause to modify a parenting plan.)

In *Jannot*, the Washington Supreme Court stated that,

First, many local trial judges decide factual domestic relations questions on a regular basis, and the adequate cause determinations at issue here often involve facts that are very much in dispute.

...

[Further], [b]ecause adequate cause determinations are fact intensive, we recognize that a trial judge generally evaluates fact based domestic relations issues more

frequently than an appellate judge and a trial judge's day-to-day experience warrants deference upon review.

...

The very nature of a trial court makes it better suited than an appellate court to weigh these varied factors on a case-by-case basis.

In re Jannot, 149 Wn.2d at 127. While this is a narrow exception it applies where competing documentary evidence must be weighed and conflicts resolved. *In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003). In *Rideout*, the Court held that,

The procedural safeguards of our court system strongly support the application of the substantial evidence standard of review. As noted, trial courts are better equipped than multijudge appellate courts to resolve conflicts and draw inferences from the evidence.

Rideout, 150 Wn.2d at 352.

Here, the trial court was required to review evidence from the parties, weigh that evidence and resolve their conflicting interpretations of the decree language. Mr. Taylor stated that they intended to divide the pension *contributions* at the time of the dissolution. Ms. Radovich claimed that they intended to divide the *disbursements* at the time of Mr. Taylor's retirement. Mr. Taylor submitted a declaration and information from DRS on the value of the pension at the time of the parties' separation and at the time of his retirement. Ms. Radovich produced additional evidence in support of her claim. The trial court was required to review

and weigh the evidence in light of the language used by the parties in their decree, consider the surrounding circumstances and make its findings.

The trial court's findings are entitled to deference on appeal.

2. The appellant failed to assign error to any findings of fact.

RAP 10.3 (g) provides in part:

A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

The failure to assign error to the findings of fact means that they become "verities on appeal." *Gormley v. Robertson*, 120 Wn.App. 31, 36, 83 P.3d 1042 (2004). However, the failure to assign error to the trial court's findings of fact does not prevent appellate review as long as "the nature of the challenge is clear and the challenged findings are set forth in the appellant's brief." *In re Welfare of Young*, 24 Wn.App. 392, 394, 600 P.2d 1312 (1979).

The issue before the trial court was the correct interpretation of language contained in a 30 year-old dissolution decree. The issue came before the court on cross-motions filed by Ms. Radovich and Mr. Taylor. Both sides submitted extrinsic evidence for the court to consider, including declarations in support of their respective positions.

The trial court entered findings of fact and conclusions of law that were approved by the parties' counsel prior to entry. *CP 205*. The trial court's Findings of Fact and Conclusions of Law were not appealed, and counsel for Ms. Radovich did not assign any errors to the court's findings. While the court on appeal may consider challenges to findings without the necessity of assigning error, Ms. Radovich must make it clear which findings she objects to and present argument in support of her objections.

In her brief, Ms. Radovich discussed several of the court's Findings of Fact, specifically numbers 9, 10, 13, 15, 16, 17, 18, 20 and 21. However, it is not always clear from the context whether Ms. Radovich is challenging those findings or using them in support of her argument.

B. The Trial Court Properly Concluded that the Parties' Decree Was Unambiguous.

In Finding of Fact No. 22, the trial court held:

There is no ambiguity with regard to what the language in the decree indicates. There is room for interpretation, but there is no ambiguity.

CP 202.

The Appellant did not object to this finding and did not address it in her brief. Accordingly, it is a verity on appeal.

C. The Trial Court Properly Considered Extrinsic Evidence When it Interpreted the Decree.

The court need not find that ambiguity exists prior to considering extrinsic evidence. *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990). The Washington Supreme Court held that “extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties’ intent.” *Berg*, 115 Wn.2d at 667.

In *Berg*, the Washington Supreme Court set out the proper standard for courts to use in contract interpretation. Citing *Corbin on Contracts*, the Court stated that contract interpretation “is the process whereby one person gives a meaning to the symbols of expression used by another person.” *Berg*, 115 Wn.2d at 663. Referring to the *Restatement (Second) of Contracts*, the Court defined interpretation as “the ascertainment of its meaning.” *Berg*, 115 Wn.2d at 663. “The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties.” *Berg*, 115 Wn.2d at 663; citing, Corbin, *The Interpretation of Words and the Parol Evidence Rule.*, 50 Cornell L. Quar. 161, 162 (1965) (citations omitted). The Court went on to say that “the various principles of interpretation should not be applied as absolutes ...”

but should “be taken as suggestive working rules only.” *Berg*, 115 Wn.2d at 664, (citations omitted).

The court in *Berg* held that extrinsic evidence was admissible to establish the circumstances under which the contract was made, “as an aid in ascertaining the parties’ intent.” *Berg v. Hudesman*, 115 Wn.2d at 667. Extrinsic evidence may not be considered for the purpose of contradicting or changing the terms of the written contract, but solely to aid the court in determining the parties’ intention. *Berg v. Hudesman*, 115 Wn.2d at 669-670, (citations omitted).

Subsequently, the Supreme Court clarified and explained its decision in *Hearst Communications v. Seattle Times*, 154 Wn.2d 493, 115 P.3d 262 (2005). In *Hearst*, the Court said that in *Berg* it adopted the “context rule,” recognizing that “the intent of the contracting parties cannot be interpreted without examining the context surrounding an instrument’s execution.” *Hearst*, 154 Wn.2d at 502.

In *Hearst*, the Court held that relevant information “may include (1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) the subsequent acts and conduct of the parties, and (4) the reasonableness of respective interpretations urged by the parties.” *Hearst*, 154 Wn.2d at 502. Extrinsic evidence may be used “to determine the meaning of *specific*

words and terms used and not to show an intention independent of the instrument or to vary, contradict or modify the written word.” *Hearst*, 154 Wn.2d at 503, (citations omitted, emphasis in original).

The trial court here considered the factors set out by the Court in *Hearst*. It considered the objective of the contract – to equally divide community property of the parties. It considered the circumstances surrounding the entry of the decree – the length of the parties’ marriage, other property acquired during the marriage, the parties’ otherwise equal distribution of their community property, and the period of time that Mr. Taylor worked for the state during the parties’ marriage. It considered the subsequent acts of the parties – the additional 31 years of contributions made through the efforts of Mr. Taylor after the parties separated as well as the increase in value of Ms. Radovich’s portion of the pension. Finally, the trial court considered the reasonableness of the interpretations presented by the parties and the windfall that would result to Ms. Radovich if her interpretation were adopted.

1. Findings of Fact Nos. 9 and 10.

FF-9. In order for Petitioner to receive monthly payments from Mr. Taylor’s retirement account, the Department of Retirement Systems requires specific language to appear in an order from this court. The Court is not concerned with what the Department of Retirement Systems does with the court’s decision. The Court is to determine what the parties

meant and what the court meant 30 years ago when the decree was entered.

CP 200.

FF-10. The motions question the interpretation of a decree, specifically, the meaning of the words written in the decree that award a portion of Mr. Taylor's retirement to Ms. Radovich. This is a property award which can't be modified. The original decree's award of retirement benefits is a property award which can't be modified.

CP 200.

Although Ms. Radovich argues that later findings made by the court are inconsistent with Findings of Fact Nos. 9 and 10 she does not challenge these findings. *Appellant's Brief*, p. 34. Accordingly, these findings are verities on appeal.

2. Finding of Fact No. 13.

Ms. Radovich challenges Finding of Fact No. 13 on the basis that the court could not have made it without considering extrinsic evidence. *Appellant's Brief*, pp. 28-29. The finding pertains to the two references in the decree to the 13 years that Mr. Taylor contributed to the pension during the parties' 22-year marriage. *CP 201.*

In its Finding Fact No. 13, the trial court found that,

The number "13" is used twice in the decree. The number "13" and the reference to it twice in the decree is important because it gives the Court a context, a basis for saying that there is no ambiguity. The number "13" and the reference to it twice is really helpful and a reason why the Court can say that the Decree is unambiguous on its face. The

number reflects that Mr. Taylor worked for a state entity and contributed to the state retirement system for a period of 13 years while married to Ms. Radovich and before they separated.

CP 201.

Ms. Radovich argues that it was not possible for the trial court to have determined the intent of the 13-year references in the decree without considering extrinsic evidence. *Appellant's Brief*, pp. 32-33. Ms. Radovich also asserts that it was the trial court's duty to consider the circumstances under which the contract was made. *Appellant's Brief*, p. 33.³

Appellant is correct. In its Finding of Fact No. 14B, the trial court states as follows:

The court is considering the four corners of the decree and is interpreting the same with consideration of parol or extrinsic evidence.

CP 201.

Thus, the trial court properly considered the surrounding circumstances when it interpreted the parties' decree. The trial court's Finding of Fact No. 13 should be affirmed.

³ In support of this assertion, Ms. Radovich cites to an unpublished decision of the court of appeals, *Joint Venture Fourplay v. Loistl*, No. 64038-1-I (May 3, 2011), stating that it is directly on point. "A party may not cite as an authority an unpublished opinion of the Court of Appeals." *GR 14.1(a)*.

D. The Trial Court Properly Concluded that Pension Contributions Made After Separation Were Mr. Taylor's Separate Property.

1. Finding of Fact No. 18.

Contributions to the retirement account made after the parties separated were the separate property of Mr. Taylor and not Ms. Radovich.

CP 201.

While acknowledging that this finding is both consistent with the language in the decree and with RCW 26.16.140⁴, Ms. Radovich argues, on page 15 of her brief, that this finding is incorrect. Ms. Radovich bases her argument upon decisions in other cases in which the court awarded more than one-half of the pension to one or the other spouse. However, Ms. Radovich's reliance on these cases is misplaced. These cases are not helpful in determining whether the trial court's finding here is supported by substantial evidence. Rather, the cases cited by Ms. Radovich stand for the proposition that a trial court has wide discretion in determining an equitable division of the parties' separate and community property upon dissolution of their marriage.

For example, in *In re Marriage of Bulicek*, 59 Wn.App. 630, 800 P.2d 394 (1990), the Court of Appeals upheld the trial court's decision to

⁴ "When spouses or domestic partners are living separate and apart, their respective earnings and accumulations shall be the separate property of each." *RCW 26.16.140.*

make an unequal award of the husband's pension, stating, "[i]n Washington, the trial court has wide discretion in awarding property in a dissolution." *Bulicek*, 59 Wn.App. at 639. The court held that it was within the discretion of the trial court to value the pension as a percentage rather than attempt to determine its present value especially since the expert testimony "varied widely at to the value of the pension." *Bulicek*, 59 Wn.App. at 639.

Similarly, in *Farver v. Dep't of Ret. Sys.*, 97 Wn.2d 344, 644 P.2d 1149 (1982), the Washington Supreme Court held that it was not an abuse of discretion for the trial court to award a specific percentage of the retirement benefits to the non-employee spouse. In that case, the trial court divided the retirement rights as follows:

[T]hree-fourths of the income from the contingent pension to John and one-fourth to Phyllis, with the unchallenged proviso that any additional benefits accruing in the event John decided to work past his earliest permissible retirement date in 1977 would be shared equally.

Farver, 97 Wn.2d at 345. The parties married in 1944, divorced in 1974 and the pension was the most valuable marital asset at the time of the parties' divorce. *Farver*, 97 Wn.2d at 345.

Since the original award made by the trial court had not been appealed, the issue before the appellate court was whether Phyllis' right in the pension plan was inheritable. *Farver*, 97 Wn.2d at 346-347. The

Washington Supreme Court concluded that it was, stating that her portion of the pension became Phyllis Berling's separate property and distributable to her heirs. *Farver*, 97 Wn.2d at 348.

Finally, Ms. Radovich cited a California case in support of her claim that she is entitled to a greater amount of Mr. Taylor's pension than was awarded in the decree. *Appellant's Brief*, at 15. In that case, the parties married in 1947 and an interlocutory judgment of dissolution was entered in 1972. One of the issues reserved was the distribution of husband's pension until his retirement in 1974. *In re Marriage of Adams*, 64 Cal.App. 3d 181, 183, 134 Cal.Rptr. 298 (1976). At that time, the trial court calculated the community property interest in the pension at 89.13 percent and the husband's separate property interest at 10.87 percent. *Adams*, 64 Cal.App. at 183. The court awarded the wife one-half of the community portion of the pension. *Adams*, 64 Cal.App. at 183.

On appeal, the husband argued that the trial court should have valued the pension on the date of the parties' dissolution and not on the date of his retirement. *Adams*, 64 Cal.App. at 184. The appellate court held that the trial court did not abuse its discretion when it divided the *community portion* of the pension as it did. *Adams*, 64 Cal.App. at 187. In a footnote, the court of appeals noted that if an increase in the value of a pension was caused solely by the ex-spouse's earnings, "it would be an

abuse of discretion to give a portion of the increase to the community.” *Adams*, 64 Cal.App. at 187, n. 8. The court noted, “[s]uch a situation is not, however, the case here.” *Adams*, 64 Cal.App. at 187, n. 8.

In contrast, that situation is presented here. Mr. Taylor accrued pension benefits for 13 years during the marriage. Those benefits were divided 50-50 in the decree. Each party’s one-half interest in the accrued pension became his or her separate property. Mr. Taylor went on to accrue another 31 years of pension benefits *as his separate property* while Ms. Radovich accrued interest on her share also *as her separate property*.

Although, as pointed out in the case law, a court *may* make an unequal property distribution as part of a decree of dissolution; that did not happen here. The parties intended and did make an *equal* distribution of the property acquired during marriage, including Mr. Taylor’s accrued pension benefits. The contributions made subsequent to the parties’ separation were Mr. Taylor’s separate property; just as earnings on her share were her separate property. There is nothing in the case law cited by Ms. Radovich that changes that basic proposition. As stated by the court of appeals in *Adams* an award of subsequent earnings to the non-employee-spouse would be an abuse of discretion.

Further, the trial court’s decision is supported by the Washington Supreme Court’s decision in *In re Estate of Borghi*, 167 Wn.2d 480, 219

P.3d 932 (2009). In *Borgi* the court was presented with whether a deceased spouse had intended to convert separate property into community property prior to her death. *Borgi*, 167 Wn.2d at 483. The Court stated that the characterization of property is determined on the date of its acquisition. *Borgi*, 167 at 484. The right of spouses to their separate property “is as sacred as is the right in their community property, and ... it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear.” *Borgi*, 167 at 484 (citations omitted). There must be some positive evidence showing “the intent of the spouse owning the separate property to change its character from separate to community property.” *Borgi*, 167 at 485 (citations omitted).

In *Borgi* the Court held that the inclusion of both spouses names on a deed did not change the character of the property from separate to community, stating, that in the absence of clear and convincing evidence of an intent to create a community interest in the property, the presumption that it remains separate property controls. *Borgi*, 167 at 490 (citations omitted).

Similarly, there is insufficient evidence of Mr. Taylor’s intent to transfer ownership of his separate property, the contributions made after separation, into a community asset. Ms. Radovich’s bare assertion that

was indeed the parties' intent, does not overcome the presumption that those contributions were his separate property. The trial court's finding that was not the parties' intent is consistent with the Court's ruling in *Borghi* and should be affirmed.

E. The Trial Court Properly Found that Ms. Radovich was Entitled to One-Half the Value of the Pension as of the Date of Separation.

1. Finding of Fact No. 17.

To base the retirement to be awarded on an additional 31 years that Mr. Taylor worked is not fair *and the parties understood that*.

CP 201, (emphasis supplied).

This was an appropriate finding per the Supreme Court's holding in *Berg*, refined by its holding in *Hearst*. The trial court considered the parties' circumstances in 1985 when the decree was entered, including the length of time the Mr. Taylor had worked at his job and that the parties equally divided all of their other assets. The court also considered the reasonableness of the parties' interpretations in light of the contested language and the entire decree. The court's conclusion that the parties intended to split, 50-50, the portion of the pension that had been accrued during marriage and that the additional pension contributions from earnings after marriage were Mr. Taylor's separate property, is the only reasonable interpretation.

For example, if Ms. Radovich's interpretation were adopted, instead of receiving one-half of the pension which accrued during marriage (plus interest), or \$394.20 per month for the remainder of her life, she would receive nearly \$3,371.71 per month for 13 years or approximately \$464,491.76 of Mr. Taylor's separate property. *CP 59*.

The pension contributions by Mr. Taylor after the parties' separation is indisputably separate property. *RCW 26.16.140*, (earnings accrued after separation are the separate property of each); *Lee v. Kennard*, 176 Wn.App. 678, 688, 310 P.3d 845 (2013), (pension benefits are characterized the same as income).

In *Lee v. Kennard*, the court stated that a spouse is not entitled to share in post-dissolution increases to a pension due solely to additional years of service. *Lee*, 176 Wn.App. at 688. The court held that the trial court's decision to divide the pension as of the date of separation, rather than eleven years later, was consistent with Washington law. *Lee*, 176 Wn.App. at 689.

To award Ms. Radovich any portion of the amount accrued subsequent to the parties' marriage is inconsistent with the parties' intent, inconsistent with statute and case law and would impermissibly modify the parties' property settlement agreement.

F. The Trial Court Properly Found that the Parties Intended to Equally Divide the Community Property.

1. Findings of Fact Nos. 15 and 16.

In Findings of Fact Nos. 15 and 16, the trial court found that the contributions made to the pension fund for the 13 years during the parties' marriage was community property and that they intended to make an equal division of the community property. *CP 201.*

In its Finding of Fact 15, the court stated:

Both parties made a conscious decision that the award would be based on Mr. Taylor's contributions of community property, his income, for 13 years that he was working and they further decided that, after they were divorced, any of his contributions to the retirement would be his. The references to 13 years are based on those contributions of marital income to Mr. Taylor's retirement account.

CP 201.

And in Finding of Fact 16, the court held:

The parties recognized that Mr. Taylor had worked for the public entity for 13 years, made contributions of community property, and she would be entitled to half of those contributions of community property.

CP 201.

Ms. Radovich objects to these findings, arguing that the decree is ambiguous because the Department of Retirement Systems directed the parties to seek an order from the court when presented with two very

different distribution requests. *Appellant's Brief*, p. 29-30. However, Ms. Radovich did not object to the court's Finding of Fact No. 22 in which the trial court held that the decree was not ambiguous. *See* §B, *infra*, at 10. Therefore, Ms. Radovich's argument that DRS's request established ambiguity should be disregarded.

Even if the court considers Ms. Radovich's argument, the fact that DRS requested an order from the court directing it how to distribute the pension, does not create an ambiguity. It merely shows DRS's position when it was presented two separate, very different requests regarding disbursement of the pension. Mr. Taylor asked DRS to calculate his and Ms. Radovich's payments based on the decree of dissolution. *CP 58*. In contrast, Ms. Radovich proposed language consistent with language in the Washington Administrative Code but in variance with the parties' decree. *CP 22*.

Further, Ms. Radovich's argument that the trial court must consider extrinsic evidence to interpret the decree, is not well-grounded, since the trial court did exactly that. *Appellant's Brief*, pp.31-34.

2. Finding of Fact No. 20.

The Department of Retirement Systems determined the value of the retirement account as of the date the parties separated and also at the date Mr. Taylor retired. The value of Ms. Radovich's portion of Mr. Taylor's account increased from the date of separation to the date of Mr.

Taylor's retirement and such increase sufficiently compensated her for the payments delayed for 31 years.

CP 202.

Appellant challenged this finding, arguing that the trial court did not have the authority to determine what was fair and equitable 30 years after entry of the decree. *Appellant's Brief*, pp.35-37. Appellant is incorrect.

The trial court appropriately considered the subsequent acts and conduct of the parties, including Mr. Taylor's continued employment during which he accumulated 31 more years towards his pension as well as the increased value of the Ms. Radovich's portion of the pension during that same period.

This finding is in line with *In re Marriage of Moore*, 99 Wn.App. 144, 993 P.2d 271 (1999), cited by Ms. Radovich in her brief. In that case, the trial court awarded one-half of the community interest in the husband's pension to be disbursed at his retirement. *Moore*, 99 Wn.App. at 145-6. Thirteen years later, husband offered wife one-half the value of the pension as of the date of the dissolution. *Moore*, 99 Wn.App. at 146. The wife sought relief from the court. The court ordered that wife should receive "43.5 percent of the total pension funds, or one-half the 1998 value of the 1985 community interest." *Moore*, 99 Wn.App. at 146.

Husband appealed. The court of appeals affirmed the trial court, holding that upon entry of the decree the wife's interest in the retirement benefits became her separate property and she was entitled to any increase in value of her separate property until the date of its disbursement. *Moore*, 99 Wn.App. at 147. Wife was, therefore, entitled to the 1998 value of her share of the pension benefits. *Moore*, 99 Wn.App. at 148.

The court's decision in *Moore* supports the trial court's decision here. The trial court concluded that the parties intended to award Ms. Radovich one-half of the pension contributions made during the parties' marriage. When the decree was entered, Ms. Radovich's share became her separate property and she was entitled to all increases in value to that share until the date of distribution. The trial court so concluded. The trial court's Finding of Fact No. 20 is supported by the facts and the law and should be affirmed.

3. Finding of Fact No. 21.

To distribute one-half of the total monthly benefits at the time of retirement to Ms. Radovich would result in a significantly disproportionate distribution, which would not be a fair and equitable distribution of assets.

CP 202.

Again the trial court properly considered the subsequent acts of the parties and the inequity that would result if Ms. Radovich's proffered

interpretation of the decree language were adopted. The court is allowed to consider the reasonableness of each party's proffered interpretation. *Berg*, 115 Wn.2d at 668.

A court may determine the intent of the contracting parties "not only from the actual language of the agreement, but also from 'viewing the contract as a whole, the subject matter and objective of the contract, all circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.'" *Scott Galvanizing v. Northwest Enviroservices*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993), (citations omitted).

G. The Trial Court's Conclusions of Law are Supported by its Findings of Fact, by Statute and Case Law.

Ms. Radovich challenged the trial court's conclusions of law nos. 5, 6, 7 and 11 for the same reasons that she challenged the findings of fact that support these conclusions of law. Conclusions of law are reviewed to determine whether they are supported by the findings of fact. *In re Marriage of Akon*, 160 Wn.App. 48, 57, 248 P.3d 94 (2011). These conclusions are all supported by the trial court's findings of fact, by case law and statute. The trial court's conclusions should be upheld on appeal.

1. Conclusion of Law No. 5.

The intent of the parties was that they made a conscious decision to base Ms. Radovich's award on Mr. Taylor's contributions of community property, his income for the 13 years that he was working and married to Ms. Taylor (now Radovich).

CP 203.

The court concluded that the parties intended to split the value of the 13 years of contributions made to the pension during their marriage. This is based upon the trial court's findings of fact numbers 4, 13, 15 and 16.

Further, the trial court's conclusion is supported by the Washington Supreme Court's decision in *Estate of Borghi*, 167 Wn.2d 480, 219 P.3d 932 (2009), discussed above.

Here there is no clear statement that Mr. Taylor intended to convert the separate property into community. The evidence is to the contrary. As the trial court found, the parties' inclusion of the number 13, representing the 13 years during the marriage that Mr. Taylor contributed to the pension, is compelling evidence that they intended to divide only the community portion of that pension. The trial court's conclusion that was the parties' intent is consistent with the court's ruling in *Borghi* and should be affirmed.

2. Conclusions of Law Nos. 6 and 7.

Conclusion of Law No. 6:

The parties decided that any contributions Mr. Taylor made after they were separated would be his separate property and the court so concludes.

CP 203.

Conclusion of Law No. 7:

The sums Mr. Taylor contributed to the retirement account from the time of separation to the time of Mr. Taylor's retirement are the separate property of Mr. Taylor, and Ms. Radovich has no interest in those sums.

CP 203.

The trial court's conclusions are supported by its findings of fact numbers, 1, 2, 3, 4, 7, 11, 15 and 18, the case law cited above, and by statute.

3. Conclusion of Law. No. 11.

Conclusion of Law No. 11:

The distribution of retirement funds is fair and equitable.

CP 204.

The trial court's conclusion is supported by the trial court's findings of fact numbers 17, 20, and 21 and by the case law cited above

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H. The Mr. Taylor is Entitled to an Award of Attorneys' Fees and Costs on Appeal.

The appellate court may award fees on appeal pursuant to RCW 26.09.140. *In re Marriage of Knight*, 75 Wn.App. 721, 732, 880 P.2d 71 (1994). That statute states:

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 attorneys' fees in addition to statutory costs.

RCW 26.09.140.

The primary considerations in a fee award in dissolution actions are need and ability to pay as well as the "general equity of the fee given the disposition of the marital property." *In re Marriage of Davison*, 112 Wn.App. 251, 259, 48 P.3d 358 (2002). In *Davison*, the court held that it could also "consider the merit of the issues raised on appeal." 112 Wn.App. at 259. Intransigence of one party on appeal is also a ground to award fees under the statute. *MacKenzie v. Barthol*, 142 Wn.App. 235, 242, 173 P.3d 980 (2007). The court defined intransigence as "the quality or state of being uncompromising." *MacKenzie v. Barthol*, 142 Wn.App. at 242.

Mr. Taylor is entitled to an award of attorneys' fees and costs on appeal pursuant to RCW 26.09.140 for the following reasons:

1. The difficulty in responding due to Ms. Radovich's failure to assign error to any of the trial court's findings in violation of RAP 10.3(g) and her failure to state the issues pertaining to each assignment of error in violation of RAP 10.3(a)(4)⁵;

2. Her incorrect citation to authority, misquotations and citation to an unpublished opinion in violation of GR 14.1(a); and

3. Her reliance on case law that did not support her position but instead supported the trial court's decision.

VI. CONCLUSION

The trial court's findings of fact are supported by substantial evidence, support its conclusions of law and its order should be affirmed. The trial court properly found that there was just one reasonable interpretation of the language used in the parties' 1985 dissolution decree and properly divided only the community portion of Mr. Taylor's pension in accordance with the parties' intent at the time.

⁵ "A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." *RAP 10.3(a)(4)*.

DATED this 8th day of September, 2016.

OVERCAST LAW OFFICES, P.S.

A handwritten signature in black ink, appearing to read "Rani K. Sampson", written over a horizontal line.

Rani K. Sampson, WSBA No. 37486
Attorneys for Mr. Taylor

23 S. Wenatchee Ave., Ste. 320
Wenatchee, WA 98801
(509) 663-5588

DATED this 8th day of September, 2016.

HERTOG & COSTER, PLLC

A handwritten signature in cursive script, appearing to read "Ellen E. Barton", written over a horizontal line.

Ellen E. Barton, WSBA No. #16209

Attorneys for Mr. Taylor

200 W. Mercer Street, Ste. 310

Seattle, WA 98119

(206) 587-6556