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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 34064-3

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

**Whitman County Superior Court Case No. 14-3-00042-3
The Honorable Steve Dixon
Superior Court Judge**

IN RE MARRIAGE OF:

ELLEN DONEEN

Appellant/Petitioner,

and

JAMES DONEEN ESTATE,

CR 25 Respondent.

BRIEF OF RESPONDENT

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I. BRIEF RESPONSE TO ASSIGNMENTS OF ERROR

1. There is no statute or case law that *requires* a Trial Court to set aside its broad discretion to place parties in an equal financial situation at the end of a case. Further, the Court here disproportionately divided the community in favor Ms. Doneen in addition to awarding part of Mr. Doneen's separate property to Ms. Doneen. This was extensively reviewed during argument held for reconsideration. RP 318-347.

2. Mr. Doneen signed his declaration in support of his Motion for Reconsideration prior to his death. Any consideration of either party's Motion for Reconsideration is harmless error and supported by long history of judicial equity in domestic relations cases. CP 101-102.

3. Trial Courts have wide discretion in determining procedure and outcomes as related to domestic relations cases. Appellate Courts have supported such discretion as analogously argued herein via *In re Marriage of Morris*.

4. The disparate property division as a result of the consideration of competing Motions for Reconsideration was minuscule in light of the property divided as a whole; the end result was still a disproportionate division of community assets in favor of Ms. Doneen and part of Mr.

Doneen's separate property being awarded to Ms. Doneen. Compare CP 71-79 to CP 116-124.

5. The Court's ruling was outlined in written letter that was ultimately memorialized in the Findings of Fact and Conclusions of Law; said ruling (both the original and reconsideration) were substantially supported by the trial court record. RP and CP generally.

6. Again, as stated in number 5 above, the Findings were supported by the trial court record and letter ruling from the trial Court Judge. The Findings themselves are not deficient as drafted.

II. STATEMENT OF THE CASE

This case arises from the dissolution of Ellen (Appellant, herein after Ms. Doneen) and James (Respondent, herein after Mr. Doneen) Doneen. The parties were married on July 19th, 1969; they were married for approximately 45 years. RP 15, line 16. Mr. Doneen, was a lifelong farmer, and the community income generated by the parties during marriage never exceeded more than approximately \$40-45k in total in any given calendar year. RP 95, lines 18-25; RP 122, lines 1-5. Ms. Doneen, worked during the marriage for brief periods of time that resulted in a small JC Penneys Pension Account; both parties contributed their income to the benefit of the community estate. RP 95-96.

The majority of the significant assets held by the Doneen's upon this dissolution were inherited from Mr. Doneen's family members over the course of the marriage (Father and Aunt for example). The primary asset of significant value was the family farm inherited by Mr. Doneen through multiple generations of his family-CRP land, not production ground (approximately 200 acres). RP 8, lines 18-19; RP 174-177; RP 182-189 generally; RP 191. Mr. and Ms. Doneen did not pay for the farm and it was passed down to Mr. Doneen over time as his relatives passed away (Ms. Doneen acknowledges this via testimony-Mr. Doneen's Aunt purchased home they lived in, RP 82, lines 18-19; farm ground was not purchased but received via Mr. Doneen's Father, Mother or Aunt, RP 96, lines 12-22). Payments for taxes associated with the land were generated from CRP payments. RP 97, lines 16-23. No Mortgage was paid on the home during their marriage. RP 98, lines 9-10. Title on the farm property and home were in Mr. Doneen's name alone. RP 84, lines 1-10.

Throughout the marriage, the parties resided in the home located on the family farm rent/mortgage free, paying utilities and taxes associated with the property's use (in addition to some upkeep and remodeling over the course of the 45 year marriage). RP 51, lines 15-25; RP 98, lines 9-10.

Assets of the divorce also included inherited financial accounts (acknowledged by Ms. Doneen-RP 64, lines 12-13; RP 101-103) in Mr. Doneen's name in addition to the inherited separate property farm land; some of those separate property assets were awarded to Ms. Doneen as part of the Trial Court's decision. CP 68-70, 73, 78; Affirmed in reconsideration ruling-CP 116-124.

The parties both testified at Trial as to the value of various assets; Ms. Doneen's personal opinion of the separate property family farm was not considered as she was not on title and thus not an owner of the property (Extensive discussion is held RP 69-74). Mr. Doneen testified as to his belief of the value of the inherited separate property family farm. RP 166-167; RP 190. Conversely, Ms. Doneen elicited testimony from the Whitman County Assessor's Office as to the farm's value. RP 274-277 Both parties conducted discovery throughout the underlying case and neither appeared prejudiced in the presentment of their cases at Trial. RP in whole generally; CP 64-67; CP 90; CP 101-102. Additionally, there were no debts of the marriage. CP 69-79.

After an approximate two (2) day Trial, the Court, after taking the matter under advisement, issued a written letter opinion of the Court's decision. CP 68-70. That opinion was then memorialized in formal

findings of fact/conclusions of law and decree of dissolution that were then entered June 2, 2015. CP 71-79.

A summary of the history/procedure is as follows (See RP generally and CP 64-124):

- Trial held (RP generally): April 8/9/13, 2015
- Court's Written Letter Decision: April 28, 2015
- Findings/Decree entered: June 2, 2015
- Husband's Death: June 6, 2015
- Reconsideration Motion of Wife: June 11, 2015
- Reconsideration Motion of Husband (Husband's Declaration in support of Reconsideration signed June 4, 2015): June 11, 2015
- Court's Letter Addressing Husband's Death/Procedure: June 24, 2015
- Oral Hearing re: issue of Husband's Passing: June 28, 2015
- Motion for substituted party: July 31, 2015
- Order on substituted party: August 6, 2015
- Reconsideration Argument/Hearing: September 30, 2015
- Final Findings/Decree Entered: December 30, 2015

In sum, the Trial Court's decision was memorialized first in a written letter and then formal pleadings. Said decision awarded the following:

*rough percentages	Mr. Doneen	Ms. Doneen
Community Property Assets	30%	70%
Mr. Doneen's Separate Property Assets	80%	20%

III. ARGUMENT

A. Ms. Doneen's Reliance on *In re Marriage or Rockwell* is Misplaced as the Trial Court Did Not Abuse its Discretion Because it Made a Just and Equitable Distribution of Property that was Based on Justifiable Grounds.

In determining distribution in a marriage dissolution case, trial courts have “broad discretion in distributing marital property and [their] decision will be reversed only if there is a manifest abuse of discretion.” *In re Marriage of Griswold*, 112 Wn.App. 333, 339, 48 P.3d 1018 (2002) (citing *In re Marriage of Kraft*, 119 Wn.2d 438, 450, 832 P.2d 871 (1992)). Further, “As long as the findings of fact are supported by substantial evidence, they will not be disturbed on appeal.” *Thorndike v. Hesperian Orchards, Inc.*, 54 Wash. 2d 570, 575, 343 P.2d 183 (1959) ‘Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.’ ” *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002) (quoting *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)).

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 Wn. 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 (citing *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996)).

A manifest abuse of discretion only occurs when the trial court fails to provide tenable justifications for its awards such that they do not fall within "the range of acceptable choices, given the facts and the applicable legal standard." *In re Marriage of Larson and Calhoun*, 178 Wn.App. 133, 145, 313 P.3d 1228 (2013). Further, "trial court decisions in dissolution proceedings will seldom be changed on appeal." *In re Marriage of Stenshoel*, 72 Wn.App. 800, 803, 866 P.2d 635 (1993).

The trial court's decision awarded the following:

*rough percentages	Mr. Doneen	Ms. Doneen
Community Property	30%	70%
Mr. Doneen's Separate Property	80%	20%

The court's decision was not an abuse of discretion for the following reasons: (1) the farm was separate property intended to be passed down within Mr. Doneen's family; (2) *Konzen v. Konzen*, 103 Wn.2d 470, 472, 693 P.2d 97 (1985) provides guidance that while separate property is no longer entitled to special treatment it does not go so far as to throw out the nature and characterization of property regardless of length

of marriage; (3) Ms. Doneen's reliance on her case on point, *In re Marriage of Rockwell*, is misplaced because the facts are distinguishable from the immediate case; (4) the Trial Court considered the relevant factors and adequately supplied reasons for its decision, such that it was within the range of acceptable choices.

Further, Ms. Doneen was not prejudiced by the trial court's consideration of Mr. Doneen's Motion for Reconsideration because it reviewed the earlier decision as a whole in any case as a result of Ms. Doneen's pending Reconsideration Motion.

(1) The Farm was Separate Property Intended to be Passed Down Within Doneen's Family.

Property that is inherited or devised to a spouse remains that spouse's separate property. RCW 26.16.010. Further, "the status of the property is determined 'as of the date of its acquisition.'" *In re Marriage of Kile and Kendall*, 186 Wn.App. 864, 875, 347 P.3d 894 (2015) (citing *In re Marriage of Shannon*, 55 Wn.App. 137, 140, 777 P.2d 8 (1989)). From Mr. Doneen's grandparents to Mr. Doneen's Aunt Katherine to now Mr. Doneen (and his subsequent next of kin), Mr. Doneen's family homestead has remained in the family for multiple generations. RP 183, 191-192. Mr. Doneen's Aunt Katherine devised the family farm home to

Mr. Doneen, thus making it Mr. Doneen's separate property as of the date of its acquisition, conspicuously leaving out Ms. Doneen's name on the deed of transfer. RP 189. The home and the land are quite entrenched in Mr. Doneen's family, and it is a legacy he hoped to pass down himself as did his predecessors. RP 193-194. Because Mr. Doneen inherited the farm, and has, quite wholeheartedly, shown the farm to be entrenched in his family, the Trial Court correctly determined both the separate property character of the family farm and its distribution solely to Mr. Doneen (and his subsequent next of kin). This result was clearly within contemplation of an equitable distribution of property subject to the divorce.

(2) **Konzen v. Konzen, 103 Wn.2d 470, 472, 693 P.2d 97 (1985),**

Provides Guidance that While Separate Property is No

Longer Entitled to Special Treatment it Does Not Go So

Far as to Throw Out the Nature and Characterization of

Property Regardless of Length of Marriage.

In *Konzen*, Mr. Konzen and Ms. Konzen were awarded community property approximately equally. *Konzen v. Konzen*, 103 Wn.2d 470, 472, 693 P.2d 97 (1985). However, the trial court also awarded Ms. Konzen thirty percent (30%) of Mr. Konzen's military retired pay, his separate property, due to the economic circumstances of the parties. *Id.* at 472. The

court indicated that it preferred to allocate this separate property over the community property because the military retired pay was a more liquid asset. *Id.* The court held that whereas before the character of the property could be controlling, such that separate property could only be awarded under exceptional circumstances, now the character of the property was just a relevant factor. *Id.* at 477-78. The court found no abuse of discretion for the separate property allocation. *Id.* at 478. While separate property is no longer granted special treatment, Washington courts have not gone so far as to eliminate the distinction between separate and community property. *See id.* In fact, the courts must consider both the nature and extent of the community property, and the nature and extent of the separate property. *Id.*

In *Konzen*, the court only dipped into Mr. Konzen's separate property because it was more liquid and due to the economic circumstances of the parties. In regards to Mr. Doneen's separate property, the trial court provided Ms. Doneen with Mr. Doneen's more liquid American Equity annuity as opposed to splitting up Mr. Doneen's farm. CP 68-70.

Further, the *Konzen* court indicated that it only dipped into Mr. Konzen's separate property because of the liquidity, implying that had the

community property retained more liquid assets, the court would have awarded a disproportionate share of the community property rather than part of Mr. Konzen's separate property. This further implies that courts still consider separate property as less subject to distribution than community property. This is perfectly in line with the decision of the trial court in the instant case: the trial court distributed the community property heavily in favor of Ms. Doneen, and provided a substantial portion of Mr. Doneen's own separate property to Ms. Doneen. CP 68-70. Like the court in *Konzen* provided Ms. Konzen with separate property only as a matter of liquidity, the trial court here provided Ms. Doneen with a certain part of Mr. Doneen's separate property because of the American Equity annuity's liquidity.

Moreover, the court in *Konzen* awarded a portion of separate property due to Ms. Konzen's disadvantageous position, and Mr. Konzen still received more total property, yet the court found no abuse of discretion. Ms. Konzen in *Konzen* was not provided an equal amount of property in total despite being in a lesser economic position than Mr. Konzen because separate property is still distributed in favor of the separate property's owner as much as equity allows.

As such, the trial court properly considered the character of Mr. Doneen's separate property, and properly distributed Mr. Doneen's separate property in terms that it felt were most equitable given the totality of the property and the nature of the property, separate or community.

(3) Ms. Doneen's Reliance on her Case on Point, *In re Marriage of Rockwell*, is Misplaced Because the Facts are Distinguishable from the Instant Case.

Ms. Doneen contends that *In re Marriage of Rockwell* stands for the proposition that courts should put two parties in a long-term marriage of twenty-five (25) years or more in equal financial positions; this in contravention with trial court's broad discretionary powers.

In *Rockwell*, the court considered an appeal from Peter Rockwell (Mr. Rockwell) that contested the lower court's ruling dividing the community property portion of Carmen Rockwell's (Ms. Rockwell) pension sixty percent (60%) in her favor and forty percent (40%) in Mr. Rockwell's. *In re Marriage of Rockwell*, 141 Wn.App. 235, 241, 170 P.3d 572 (2007). Mr. and Ms. Rockwell were married for twenty-six (26) years. *Id.* at 239. Finding that Mr. Rockwell was eight (8) years younger and healthier than Ms. Rockwell, and had a future earning potential greater than Ms. Rockwell's, the court found no abuse of discretion awarding the

unequal division of community property in favor of Ms. Rockwell. *Id.* at 255. The court also decided to use the time rule method as opposed to the subtraction method in dividing the pension because Washington courts have only used the time rule method and it more fairly valued Ms. Rockwell's pre-marriage efforts. *Id.* at 254. This changed the pension to the following proportions (wherein a 60/40 split of the community portion in favor of Ms. Rockwell would occur):

	Before	After
Community Property	92%	62%
Separate Property	8%	38%

Id. at 253. The court decided Ms. Rockwell would continue to keep all her separate property, such that Mr. Rockwell was now only receiving twenty-four percent (24%) of the gross pension with the time rule method as opposed to thirty-seven percent (37%) with the original subtraction method. *Id.* at 241, 253.

Unlike how Mr. Rockwell was in a better financial position than Ms. Rockwell in *Rockwell*, Mr. Doneen and Ms. Doneen were both retired, living on relatively equal and limited gross monthly incomes of about \$1,900 and \$1,100 respectively, and the victims of multiple health problems. RP 21, 24-25, 230-231. In fact, the trial court in the instant case still distributed the community property unequally, favoring Ms. Doneen,

and even dipped into Mr. Doneen's separate property, despite their similar economic circumstances. CP 68-70.

Ms. Doneen's argument that she should receive even greater share of community or separate property despite their similar economic circumstances does not logically follow from *Rockwell*. Ms. Doneen uses *Rockwell*, a case where the wife was in a disadvantageous economic position in comparison to the husband, to establish her proposition that she, standing in a similar economic circumstance to her husband, should receive a more equal share of all property. The inconsistency that results is as follows in *Rockwell*: were Ms. Rockwell in a worse financial position, she would presumably receive more of the community property; however, were Ms. Rockwell in a more favorable financial position, she would still receive more community property. Ms. Doneen's reasoning would lead to a result whereby a disfavored spouse would always receive more property regardless of any other factors the Court is to consider. In short, Ms. Doneen relies on a case where the court ruled no abuse of discretion for an unequal distribution of community property in favor of a lesser economically sound spouse; she contends that *Rockwell* stands for the proposition that she, a wife of equal economic standing to her husband, should receive a more equal share of all of the property, despite her already receiving an unequal distribution of community property in her

favor and even part of Mr. Doneen's separate property (Note, characterization of any of the property is not at issue in the case at hand). Other than the distinguishable facts between *Rockwell* and the instant case, Mr. Doneen's erroneous reasoning further removes *Rockwell* from the instant case.

Moreover, Ms. Doneen's underlying contention that the court in *Rockwell* changed the property distribution to favor Ms. Rockwell is mistaken. The court indicated that the change in the division of property was due to a mistake in methodology that Mr. Rockwell advocated for the pension, not an abuse of discretion. The court did not change the trial court's sixty/forty (60/40) community property division, but rather changed the formula applied to the pension division itself, which ended up favoring Ms. Rockwell (and actually increasing her separate property position). Further, this change was also justified as a matter of placing more weight on Ms. Rockwell's pre-marriage efforts. Unlike how Ms. Rockwell had pre-marriage efforts to consider, there is no evidence regarding Ms. Doneen's prior efforts because there is no dispute regarding distribution of Ms. Doneen's pension and Mr. Doneen does not even have a pension plan.

Ms. Rockwell was already in a disadvantageous position, and was compensated through recognition of her pre-marriage efforts. In fact, this recognition of pre-marriage efforts was an attempt to ensure Ms. Rockwell kept more of her own separate property.

Here, Ms. Doneen's use of *Rockwell* is erroneous and is applied broadly in an attempt to find abuse of discretion whereby none exists. The trial court in the instant case adequately compensated for Ms. Doneen's lack of separate property by awarding Ms. Doneen the majority of the community property, and even a part of Mr. Doneen's separate property.

Ms. Doneen wants the Appellate Court to go further and force the Trial Court to reach further than it already did in awarding part of the separate property and the already unequal distribution of community property in favor of Ms. Doneen; *Rockwell* in and of itself does not support this reasoning and neither does any other case law.

Ms. Doneen was not in a disadvantageous position per se, and in any case, does not provide a tenable ground for finding an abuse of discretion other than she wants more of the separate property in addition to the substantially unequal division of community property in her favor. *Rockwell* does not stand for the proposition that a spouse that wants more separate property, despite equal economic positions, gets that extra

separate property just because the marriage was of significant length. Any finding along those lines would firmly remove trial court's broad discretionary power to consider equitable distribution in light of ALL statutory factors and case law.

(4) The Trial Court Considered the Relevant Factors and Adequately Supplied Reasons for its Decision, such that it was Within the Range of Acceptable Choices.

A trial court does not abuse its discretion when it ensures the financial security or comfortable lifestyle of both parties by considering (a) age and future earning potential, and (b) character of the properties. *In re Marriage of Kim*, 179 Wn.App. 232, 253-54, 317 P.3d 555 (2014); *In re Marriage of Larson and Calhoun*, 178 Wn.App. at 145. (c) Further, where an appellant fails to provide tenable grounds for modifying the distribution, there is no abuse of discretion. *See Stachofsky v. Stachofsky*, 90 Wn.App. 135, 147, 951 P.2d 346 (1998).

(a) Age and Future Earning Potential.

In considering age and future earning potential, courts look to how long each respective party can keep working and how much each can make during that time. *Kim* at 253-54. In *Kim*, the court found that Mr. Kim had over quadruple the earning capacity over Ms. Kim's, and that she

would have significantly fewer years in the paid work force than Mr. Kim. *Id.* Because the court considered the parties' financial circumstances, the court found no abuse of discretion when the trial court awarded a larger percentage of the community's property. *Id.* at 254.

Like the court in *Kim* considered the economic circumstances of each party, the trial court in the instant case considered both Mr. Doneen's and Ms. Doneen's current and future income, and retirement status. By noting that Mr. Doneen and Ms. Doneen had retired, retained future incomes amounting to about \$1,100 for Ms. Doneen and \$1,900 for Mr. Doneen, and were seventy-three (73) and seventy-four (74) years of age, the trial court employed its broad discretion to provide Ms. Doneen with a much larger percentage of the community's property, which is similar to the *Kim* court providing the larger percentage to Ms. Kim. Thus, similar to how the court in *Kim* found no abuse of discretion because the trial court considered the age and financial potential of each party to ensure financial stability post-marriage, the trial court here considered both factors as well to ensure both Mr. Doneen's and Ms. Doneen's financial stability, which points to no finding of an abuse of discretion by the trial court.

(b) *Character of the Properties.*

In considering the character of the properties, when the courts note a disparity between the parties, they will provide a larger share of the community property to the economically disadvantaged spouse, and sometimes dip into the separate property if necessary. *Larson*, 178 Wn.App. at 146. In *Larson*, the court sought to ensure Ms. Calhoun's financial security by providing the community asset in whole to Ms. Calhoun, assigning the community debt to Mr. Larson, and awarding a small portion of Mr. Larson's separate property to Ms. Calhoun. *Id.* at 136. The court held that the separate property was provided to ensure Ms. Calhoun had a liquid asset, and the community property to ensure Ms. Calhoun's long-term finances. *Id.* at 145. The *Larson* court found no abuse of discretion because the trial court considered the character of the properties to ensure each party's financial stability. *Id.*

Like the court in *Larson* considered the community or separate character of the parties' property, the court in the instant case specifically awarded property based on its character: an approximate thirty/seventy (30/70) ratio for community property in favor of Ms. Doneen, and an approximate twenty/eighty (20/80) ratio for separate property in favor of Mr. Doneen.

Like the court in *Larson* found no abuse of discretion because this consideration was purposed to ensure the financial stability of both parties, the court here should find no abuse of discretion because the trial court indicated that it provided the disproportionate community award and invasion of Mr. Doneen's separate property to ensure Ms. Doneen maintained a comfortable lifestyle.; it did so "[a]s a matter of equity". CP 70.

Because the trial court ensured a comfortable lifestyle for Ms. Doneen by considering the character of the properties, and the age and future earning potential of each party, there was no abuse of discretion by the trial court.

(c) *Untenable Grounds for Modification.*

Because the trial court considered the relevant factors, Ms. Doneen's argument essentially boils down to the following: because Ms. Doneen did not have equal separate property of her own, she should be awarded more of Mr. Doneen's separate property. Whatever muster this argument has when a trial court initially considers the distributions, it has no bearing on appeal or reconsideration when the trial court has already considered that exact situation in reviewing the record. *See Stachofsky*, 90

Wn.App. at 147. In *Stachofsky*, the court awarded the following to Mr. and Ms. Stachofsky:

	Community Property	Mr. Stachofsky's Separate Property
Mr. Stachofsky	42% at \$1,080,625	100% at \$752,892
Ms. Stachofsky	58% at \$1,493,442	0% at \$0

Id. at 141. The trial court considered Ms. Stachofsky's income, around \$10,000 to \$15,000 per year, and Mr. Stachofsky's income, around \$150,000 per year, in order to distribute a majority of the community property to Ms. Stachofsky. *Id.* at 147. The appellate court ruled that the trial court's community property distribution in favor of Ms. Stachofsky was not an abuse of discretion because Mr. Stachofsky's argument of a mischaracterization of the stock options was moot because the court would have awarded the same amounts in any case, and because the trial court properly based its decision on the parties' age, health, work history, length of marriage, and post-dissolution economic conditions of the parties. *Id.* The appellate court held that Mr. Stachofsky had not established an inequitable property division because it was essentially considering the same situation the trial court had considered, and Mr. Stachofsky provided no tenable grounds for modification. *See id.*

Like the court in *Stachofsky* found no abuse of discretion because it was both considering the same exact factors the trial court did and Mr. Stachofsky's lack of a tenable inequitable argument, the court here should find no abuse of discretion because the trial court has considered Mr. Doneen and Ms. Doneen's age, health, work history, length of marriage, and post-dissolution economic conditions. RP generally. In fact, in the instant case, the trial court actually considered the factors twice, and still came to substantially the same conclusions based on the same considerations. RP 318-347. Further, Ms. Doneen has not argued that the trial court has not, as a matter of fact, considered the relevant factors; she is arguing that in spite of considering the relevant factors, the trial court's decision was inequitable. However, the trial court's reviewing the facts of the instant case twice, reviewing case law as provided by both respective counsel and still arriving at substantially similar distributions indicates that it based its decision on tenable grounds and also did not find Ms. Doneen's argument tenable as a matter of an inequitable distribution that would substantiate reversal of the trial court's decision.

B. Ms. Doneen was not Prejudiced by the Trial Court's Consideration of Mr. Doneen's Motion for Reconsideration Because it

**Reviewed the Earlier Decision as a Whole in any Case as a Result of
Ms. Doneen's Motion for Reconsideration.**

Even if the trial court's review of Mr. Doneen's motion was an error, "an error is harmless if the outcome of the action was not affected." *Cox v. Lewiston Grain Growers, Inc.*, 86 Wn.App. 357, 370, 936 P.2d 1191 (1997).

Here, the Court specifically addressed that issue right at the start of argument in the reconsideration hearing with by counsel:

THE COURT: "On the record in Doneen v. Doneen, 14-3-00042-3. Gentlemen, -- each of you has on a motion for reconsideration. And as I've previously told you, I'm of a mind to consider both motions, and waive any requirement that they -- should have been filed within a certain time, because of the extraordinary circumstances of the respondent's death." RP 318, lines 4-11.

Counsel for both Mr. Doneen and Ms. Doneen stipulated to that and argument was held so as to not "waste the court's time" related to any procedural issues as stated by Ms. Doneen's counsel at the reconsideration hearing. RP 319, line 3.

Ms. Doneen's argument for prejudice is fundamentally stating that she should not have had any opposition against her reconsideration motion due to Mr. Doneen's untimely death. Even if it were the case that the trial

court should not have reviewed Mr. Doneen's motion, the trial court still reviewed the earlier decision as a whole with the discretion and authority to review the entirety of its ruling. Thus, Ms. Doneen's procedural argument is moot because the trial court would have reviewed the earlier decision regardless of whether it was considering just Ms. Doneen's motion, or both Ms. Doneen's and Mr. Doneen's motions.

C. The Trial Court's Consideration of Mr. Doneen's Reconsideration Motion was Harmless Error Because Trial Courts are Courts of Equity and Properly Addressed the Death of Mr. Doneen in Light of His Passing During the Pendency of the Action.

Ms. Doneen would like the Court to ignore its broad equitable and discretionary powers in determining cross motions for reconsideration as a procedural weapon to influence the outcome of the domestic case; that logic is not rooted in case law and contrary to long standing principals held in our Courts of equity.

As an example, others have tried such maneuvers and failed. *In re Marriage of Morris*, 176 Wn.App. 893, 309 P.3d 767 (2013), provides a clear example of such an abusive tactic. There, the Court was faced with the question of whether or not the Superior Court lacked authority to order postsecondary support and abused its discretion when it ordered

postsecondary support based upon the filing of a motion instead of following proper procedure and filing a petition to modify child support.

The *Morris* court stated [citing other case law], “Morris claims that the harmless error doctrine does not apply where a statute provides that the court “shall” do something. However, he cites no authority supporting that theory. Further, “[i]t is well established that errors in civil cases are rarely grounds for relief without a showing of prejudice to the losing party.” *Saleemi v. Doctor's Assocs.*, 176 Wn.2d 368, 380, 292 P.3d 108 (2013). Moreover, the court has broad equitable powers in family law matters. See, e.g., *Pippins v. Jankelson*, 110 Wn.2d 475, 478, 176 Wn.App. 904, 754 P.2d 105 (1988). *Id* at 903-904. The Court characterized such an argument as a “gotcha” defense; much like the argument proffered by Ms. Doneen here.

Further, when reviewing CP 90 and CP 101-102, the Court did exactly what would be equitable in light of the totality of the circumstances: it ensured neither party was prejudiced.

COURT: “Hadn’t received Stenzel’s to motion for reconsideration; unaware that he had even filed motion for reconsideration; jurisdictional issue; technically no client when Gauper filed the motion; **would like to achieve substantial justice; will be granting both motions for reconsideration;** Gauper to file another one after you have substituted in; time needs to be allowed so that each can respond to the other’s motion for reconsideration; Court strikes the July 30th setting at this time to allow for additional time;” CP 102 [*emphasis added*]

Additionally, the Court spent considerable time reviewing the argument of both parties and even additional case law submitted by Ms. Doneen (including cases *Rockwell* and *Griswold* for consideration). RP 318-347(generally).

Lastly, the Trial Court offered the following AFTER hearing the reconsideration arguments of both parties:

THE COURT: “Gentleman, I’m going to re-read *Rockwell* just to be belt and suspenders. I’ll give you a letter ruling. And—I will be changing some things, obviously, I’ve tipped my hand on that.” RP 347, 10-13

There was no prejudice to either party and such judicial discretion is exactly what we should expect from our Trial Court judges when determining cases in equity such as the case at hand.

IV. CONCLUSION

The trial court here properly considered all the issues after trial, testimony and exhibits were placed before it; there was no abuse of discretion that substantiates reversal of its ultimate decision because it weighed all the evidence in light of the specific set of facts and circumstances before it.

Testimony was taken and evidence provides values on property to be distributed; characterization was clearly made and is not at issue in this appeal. To wit, the complaint is simply that the Court didn’t unequally

divide asset enough and that falls far short of finding abuse of discretion as well as not being supported by the record before this Court.

The Court carefully considered the evidence and exercised its judicial discretion in awarding the bulk of community assets to Ms. Doneen and even some of Mr. Doneen's separate property. To wit, it exercised property discretion and equitably determined the division in light of the totality of the evidence and circumstances.

As to the procedural "gotcha" argument related to the untimely death of Mr. Doneen and his reconsideration motion, it would be no different than this court denying and dismissing the pending appeal after multiple deadlines and rules were not followed by Ms. Doneen's counsel.

Based on the foregoing, the decree should be affirmed.

Respectfully submitted this 18 day of September, 2016.

PURCELL LAW, PLLC



MATHEW M. PURCELL, WSBA # 46219

FILED

SEP 20 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III**

In re the Marriage of:

ELLEN DONEEN,

No. 340643

Petitioner,

Affidavit of Service

and

JAMES DONEEN ESTATE,

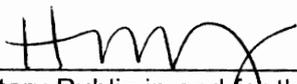
Respondent.

Mathew Purcell, being first duly sworn on oath, deposes and says on September 19, 2016, at approximately 10:30 a.m. affiant served Gary Stenzel, attorney for the petitioner, with one (1) copy of the Brief of Respondent by email to stenz2193@comcast.net and by U.S. mail service to 1304 W. College Avenue LL, Spokane, WA 99201.



Mathew Purcell

SUBSCRIBED AND SWORN TO before me this 19th day of September, 2016.



Notary Public in and for the State of
Washington, residing at PASCO, WA
Heather Martinez
NAME OF NOTARY PUBLIC
My Commission Expires: 10/28/2017

