

66269-4

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No. 66269-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

PETER G. ROCKWELL,

Appellant,

vs.

CARMEN P. ROCKWELL, n/k/a PALOMERA,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JAMES DOERTY

BRIEF OF RESPONDENT

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I. INTRODUCTION

It has been seven years since Carmen Palomera and Peter Rockwell separated. After a four-day trial, two earlier appeals, and two hearings on remand, Rockwell once again challenges the trial court's discretionary property division awarding Palomera, the retired, older spouse, 60% of the community property and her separate property interest in a pension that she began earning 16 years before the parties married. In Rockwell's last appeal, this court remanded because it could not ascertain whether the trial court had exercised its discretion when it re-divided the marital estate after correcting the characterization of Palomera's pension based on this court's decision in the first appeal. In its most recent decision, the trial court "in the sound and independent exercise" of its discretion affirmed its prior property division and found that once the new government order dividing the pension takes effect it would not require Rockwell to repay any of the amounts that he was overpaid from Palomera's pension while the first appeal was pending, effectively increasing Rockwell's share of the community property.

This court should affirm the property distribution as a just and equitable exercise of the trial court's discretion and once and for all end this litigation. This court should also award attorney fees to Palomera, whose assets – on which the trial court intended her to live the rest of her life – continue to be depleted by Rockwell's relentless quest for even more of her pension than he will inherit upon her death.

II. RESTATEMENT OF FACTS

The following Restatement of Facts is adopted in part from this court's decisions in *Marriage of Rockwell (One)*, 141 Wn. App. 235, 170 P.3d 572 (2007), *rev. denied*, 163 Wn.2d 1055 (2007) and *Marriage of Rockwell (Two)*, 157 Wn. App. 449, 238 P.3d 1184 (2010):

A. The Parties Divorced After 26 Years Of Marriage. Palomera Was Older, Retired, And In Ill Health. Rockwell Was Younger, In Good Health, And Employable.

Appellant Peter Rockwell, now age 60, and respondent Carmen Palomera, now age 68, were married from 1978 until 2004, a total of 26 years. Palomera had been employed in the federal civil service for 16 years prior to the marriage, including two breaks in service. She continued as a government employee for 24 more

years during their marriage. ***Marriage of Rockwell One***, 141 Wn. App. 235, 239, 246, ¶¶ 2, 18, 170 P.3d 572 (2007).

Rockwell graduated from Princeton, spent a year and a half in law school, and was studying engineering at George Washington University when the parties married. (I RP 21, 27, 166) Rockwell had a successful career in engineering and sales until 1999, when at age 48 he was laid off. (III RP 105-06) In Rockwell's last year of employment, he earned \$72,000 salary and commissions of about \$18,000. After searching for employment only in similar fields without success, Rockwell stopped seeking employment altogether after the spring of 2002, when he was 51. ***Rockwell One***, 141 Wn. App. at 239-40, ¶ 2.

In her 40 years of government service Palomera advanced from a GS-3 clerk to a GS-15 executive, the highest civil service rank outside of Washington D.C. Palomera was already a GS-14 executive when the parties married in 1978. (I RP 61-62) Palomera retired in 2002 at age 60 due to ill health. (III RP 133-141, 144; I RP 71, 78) When Palomera retired she was earning \$120,000 annually as the head of the Northwest Regional Office of Civil Rights. (II RP 45) ***Rockwell One***, 141 Wn. App. at 240, ¶ 3.

Because Palomera was enrolled in the Civil Service Retirement System (CSRS), Palomera's substantial pension was in lieu of any Social Security benefits. Palomera's CSRS pension was in "pay status" when the parties separated. **Rockwell One**, 141 Wn. App. at 240, ¶ 3. Palomera had chosen a survivor benefit for Rockwell when she retired in 2002, and \$753 a month is deducted from the gross pension amount, which was \$7,419 a month at the time of trial. (FF 2.8(13)(g),(h),(k), CP 411) If Palomera dies before Rockwell, he will receive 55% of Palomera's full pension amount until his death. (FF 2.8(13)(g), CP 411) The trial court found that "it is more than likely than not" that Palomera will predecease Rockwell. (FF 2.8(13)(m), CP 411)

B. In Light Of The Parties' Ages, Palomera's Ill Health, And Rockwell's Continued Employability, The Trial Court Awarded Each Party Their Separate Property And Split The Community Property 60/40.

Palomera filed for dissolution in July 2004. (I RP 50) The trial court ordered Rockwell to look for a job in December 2004. (III RP 117) At a 4-day trial in 2005, the parties and their experts presented testimony regarding Palomera's career and health, Rockwell's career, job search, and health, future possible income streams for both parties, and community debts and assets.

Rockwell One, 141 Wn. App. at 240, ¶ 4. The trial court's August 26, 2005 findings were that "[g]iven the difference in age, earning capacity, physical condition, and that husband had the ability to earn income and save for retirement in the future, it is fair and equitable to divide the community property 60 percent to wife and 40 percent to husband." (FF 2.20(5), CP 414)

In dividing the marital estate, the trial court reduced the components of the pension, including the survivor benefit, to present value, based on actuarial testimony. (FF 2.8(13)(i),(j),(m), CP 411) In characterizing Palomera's pension – by far the largest asset of the marital estate – the trial court accepted the "subtraction method" that Rockwell's actuary expert had used to value Palomera's pension, holding that 92 percent of the pension was community property and 8 percent was Palomera's separate property. (FF 2.8(13)(i), CP 411) The trial court found that "it is fair and equitable to divide the community property portion of the pension 60% to wife and 40% to husband, and to award wife her separate property portion of the pension." (FF 2.8(13)(n), CP 411)

Rockwell appealed. Palomera cross-appealed the trial court's use of the "subtraction method" to characterize her pension.

Rockwell One, 141 Wn. App. at 239, ¶ 1.

C. In The First Appeal, This Court Affirmed The Disparate Property Division But Reversed The Trial Court's Characterization Of The Pension, Holding That Palomera's Separate Property Interest Was Greater Than Found By The Trial Court.

Rockwell's appeal raised many trivial, fact-bound issues directed to the "equity" of the trial court's decision.¹ This court rejected Rockwell's appeal in its entirety, affirming both a disproportionate community property award and the award of Palomera's separate property interest in the pension to her. **Rockwell One**, 141 Wn. App. at 254-55, ¶¶ 38-39. This court specifically rejected Rockwell's claim that the trial court was "required to divide community property equally" in a long-term marriage:

¹ For example, Rockwell challenged the trial court's finding that he was "nine years younger than wife" because he is eight years and four months younger than Palomera. Rockwell also argued that the community property interest in Palomera's pension was 93.2%, not 92% as found by the trial court because the parties had cohabitated for four months before their marriage in 1978. This court recognized that the consequence of any error in these decisions was an (undiscounted) "shortfall of \$8,400 over twenty years," or \$420 annually. **Rockwell One**, 141 Wn. App. at 246, 250, ¶¶ 18, 27.

Where one spouse is older, semi-retired and dealing with ill health, and the other spouse is employable, the court does not abuse its discretion in ordering an unequal division of community property.

Rockwell One, 141 Wn. App. at 243, ¶ 12.

This court noted that “substantial evidence showed that [Palomera] was retired, older, and in poor health. Accordingly, the trial court did not abuse its discretion when it compared [Rockwell]’s age, health and employability (and thereby, future earning capacity) against [Palomera]’s as a basis for its 60/40 split of the community property.” **Rockwell One**, 141 Wn. App. at 249, ¶ 24. This court awarded attorney fees to Palomera, concluding that “[a]bsent the error in characterizing the federal pension, we affirm the trial court’s division of property as fair and equitable.” **Rockwell One**, 141 Wn. App. at 255, ¶ 39.

Palomera’s cross-appeal asserted that had the trial court used the proper time-rule method to characterize her pension, her separate interest in the pension would have been 38%, not 8% as calculated under the subtraction method. **Rockwell One**, 141 Wn. App. at 251, 253, ¶¶ 30, 35. This court agreed with Palomera, and reversed the trial court’s characterization of the pension. **Rockwell One**, 141 Wn. App. at 254, ¶ 36. This court held that the time-rule

method was the proper formula to characterize the pension, because the “subtraction rule disproportionately undervalues those early years by freezing the value of [Palomera]’s front-end contribution and disallowing the separate interest to benefit from any income increases that became possible only because of her earlier years of service.” *Rockwell One*, 141 Wn. App. at 253, ¶ 35. This court held that using the time-rule method, the pension should have been characterized as 38% separate property and 62% community property. *Rockwell One*, 141 Wn. App. at 253, ¶ 35. Applying the trial court’s 60/40 community property division, this court decreed that “Rockwell will receive 24.4 percent of the gross pension, and Palomera will receive 74.6 percent of the gross pension.”² *Rockwell One*, 141 Wn. App. at 253, ¶ 35.

D. On Remand, The Trial Court Re-Characterized The Pension And Awarded Palomera Her Separate Property Interest And 60% Of The Community Interest In The Pension.

On remand from the first appeal, the trial court applied the time rule method to the pension, awarded the separate portion of the pension to Palomera, and divided the community portion of the

² This court’s calculation did not account for one percent of the pension.

pension 60/40 in her favor. (FF 11.1, CP 303) Under the court's re-division, Palomera was entitled to 75.2% of the pension and Rockwell was entitled to 24.8% of the pension.³ (FF 11.1, CP 304)

Because its previous order had awarded Rockwell 36.8% of the pension, Rockwell had been overpaid from the pension. (FF 11.2, CP 303) The trial court found that because Rockwell had "the benefit of the monies over paid by the wife (via pension plan) since September 1, 2005," he should pay Palomera for prejudgment interest that had accrued between September 1, 2005 and December 1, 2008. (FF 11.3, CP 303) On January 27, 2009, the trial court entered a judgment for the amount of the pension that Rockwell was overpaid while the first appeal was pending, \$35,908, plus pre-judgment interest of \$6,898.85 through December 1, 2008. (CP 302) The trial court also entered a judgment against Rockwell for \$24,659.80 in attorney fees awarded to Palomera by this court (CP 73), plus pre-judgment interest of \$2,861.77, and \$7,630 in attorney fees awarded by the trial court on remand, for total fees of \$35,151.57. (CP 302) After finding that Palomera had the

³ This tracked precisely with this court's opinion, *Rockwell One*, 141 Wn. App. at 253, ¶ 35, taking into account the 1% of the pension that was not addressed in the opinion.

“immediate need of the reimbursement funds and attorney’s fees,” the trial court ordered Rockwell to pay his 24.8% of monthly pension annuity directly to Palomera until the judgments entered against him were satisfied. (FF 11.7, CP 304)

E. On Rockwell’s Second Appeal, This Court Remanded Because It Was Unsure Whether The Trial Court Had Exercised Its Discretion In Dividing The Property On Remand.

Rockwell appealed, once again asserting that the trial court’s property division was inequitable (CP 283) and challenging the trial court’s award of prejudgment interest to Palomera. Palomera did not cross-appeal. To accommodate the concerns of the federal government administering the pension payments, the parties agreed to postpone entering an order that would have directed the pension plan administrator to pay 24.8% of the pension to Rockwell and 75.2% of the pension to Palomera until the second appeal was resolved. (CP 319) The parties agreed that Rockwell would transfer to Palomera any pension payment received by him to both satisfy the outstanding judgments and to pay Palomera her share of the pension that would continue to be directed to Rockwell under the 2005 government order. (CP 319)

This court affirmed the trial court's award of prejudgment interest to Palomera on the amounts that Rockwell was overpaid from the pension while the first appeal was pending. *Rockwell Two*, 157 Wn. App. at 454, ¶ 7. Then, without commenting on the equity of the trial court's property division, this court once again remanded. This court held it had intended for the trial court to exercise its discretion on remand, and that it was not bound to decide the matter based on the two choices presented by the parties. *Rockwell Two*, 157 Wn. App. at 453-54, ¶ 6. Because this court could not ascertain from the record that the trial court had exercised its discretion in making its property division, it remanded to the trial court. *Rockwell Two*, 157 Wn. App. at 454, ¶ 6.

F. On The Second Remand, The Trial Court Decided To Not Order Rockwell To Repay More Than \$35,000 He Had Been Overpaid And Confirmed Its Exercise Of Discretion In Dividing The Marital Estate.

This court issued its decision on Rockwell's second appeal on July 6, 2010. (CP 328) As it did not appear that either party intended to pursue further review, and in an effort to once and for all resolve litigation that Rockwell had relentlessly pursued for over six years, Palomera on July 22, 2010, filed a motion pursuant to RAP 7.2(e) asking the trial court to confirm its exercise of discretion

in dividing the marital estate, and to vacate the pension judgment that it had entered on January 27, 2009, in order to finally free the parties of any financial obligation to the other. (CP 314-15) Palomera did ask the trial court to order Rockwell to continue to pay his portion of the government pension to her until a new order dividing the pension 75.2/24.8 took effect, however, to encourage Rockwell to not further delay proceedings, and to satisfy any amounts still owed to her on the trial court's January 27, 2009 judgment.⁴ (CP 324-25) Palomera set the matter for hearing on July 30, 2010. (CP 312)

Palomera's concern that Rockwell would drag his feet proved warranted. The trial court continued the hearing until September 17, 2010, on Rockwell's motion to continue the hearing until after the mandate issued. (CP 377, 396-97) Rockwell then filed his own motion for "post-appeal relief," (CP 400) proposing a property division that he claimed would put the parties in "equal position," with entry of a money judgment against Palomera for

⁴ If the trial court upheld its January 27, 2009 judgment for the overpayment of the pension to Rockwell, approximately \$5,000 of the attorney fee judgment would still be owed to her because of the accrued interest on the pension judgment. (CP 324-25, 360)

\$282,206.58.⁵ (CP 405, 439, 441) Rockwell's proposal would have given him a larger share of the marital estate than he had been originally awarded in the original property division, even though this court had rejected his claim that he was entitled to a larger award in **Rockwell One**, 141 Wn. App. at 249, 254, ¶¶ 24, 39. (Compare CP 233 and CP 439)

In support of his motion for a judgment against Palomera on remand, Rockwell claimed he was "faced with financial catastrophe" as a result of the trial court's original property division. (CP 452) But Rockwell failed to present any recent information regarding his finances (see CP 450-55), and only provided limited financial information in his reply, revealing that he in fact had earned significantly more than the trial court's prediction of \$70,000 annually in two of the four years his appeals had been pending – over \$160,000 in 2007, and over \$110,000 in 2008. (Sub. No. 245,

⁵ Rockwell's proposal included an "equalizing" judgment of \$149,734, \$91,268 for prejudgment interest on the purported equalizing judgment, and \$41,204.54 for amounts he claimed he had overpaid, plus interest. (CP 404-05) Rockwell argued that this court's decision in **Rockwell Two** compelled the trial court to enter a judgment against Palomera in this precise amount in order to place the parties in "equal positions." (CP 439) Although Rockwell claims that he also proposed a more "reasonable" division that would not require a judgment against Palomera (App. Br. 21), Rockwell made this proposal for the first time after the trial court made its decision on remand. (CP 565, 664-25)

Supp. CP ___) By the time of the remand, though, Rockwell claimed that he was once again “earning almost no income.”⁶ (CP 452-53)

Rockwell’s claim that on remand Palomera “argued that the trial court had only two options” (App. Br. 21) is untrue. Palomera argued that the only limitation on the trial court’s discretion was that it should not give Rockwell “an equal share of the marital estate [as he has argued in his initial pleadings on the second remand] when the Court of Appeals already held that an unequal division of assets in [Palomera]’s favour was appropriate. [] Awarding more assets to [Rockwell] than the Court of Appeals already determined he was entitled [to] would utterly defeat the Court of Appeals’ original

⁶ Rockwell has never revealed whether he received or will soon receive an interest in his stepmother’s trust, of at least \$115,000. (CP 508) At the time of the dissolution trial in 2005, the trust was worth \$345,000, and Rockwell was to receive one-third when his stepmother died. (CP 508) The trust generated more income than the trust distributions to Rockwell’s stepmother, and it was expected that once the stepmother died, the trust would be worth much more. (CP 508) This trust was an expectancy that was not considered in the trial court’s original 2005 property division. (CP 508) Rockwell did not deny that he had received his interest in the trust since trial. Instead, while claiming that placing the parties in “equal positions” compelled a six-figure “equalizing” judgment against Palomera, he argued that “this revisionary interest [he] had in [his] step-mother’s trust was raised by Ms. Palomera at the time of trial. It is not an issue that needs to be addressed at this time. It was resolved at the time of trial and the issue was not appealed.” (CP 525)

decision.” (CP 497) Otherwise, Palomera clearly argued that the trial court “must confirm that any property division it makes on remand is based on [its] discretion.” (CP 529)

On September 29, 2010, the trial court issued a decision, made in its “sound and independent exercise of discretion,” that awarded the wife 75.2% of her pension, which included her separate property interest and 60% of the community property interest. (CP 564-65)⁷ The trial court also reaffirmed its August 25, 2005 finding that “given the difference in age, earning capacity, physical condition, and that husband had the ability to earn income and save for retirement in the future, it is fair and equitable to divide the community property 60% to wife and 40% to husband.” (FF 2(a), CP 825-26)

In exercising its discretion, the trial court expressly stated that it had taken into consideration the Court of Appeals’ mandate that “the trial court must put the parties in roughly equal financial positions for the rest of their lives. This requires considering the combination of the division of property and the expected income

⁷ After this court issued its mandate on October 12, 2010 (CP 613), the trial court formally entered its order on October 22, 2010. (CP 824-27)

and earnings of the parties and this court has had all these factors in mind in dividing the parties' estate on remand." (FF 2(c), CP 826) The trial court recognized "that the re-characterization of the wife's pension, increasing her separate property interest, reduces the husband's share of the overall marital estate. Nevertheless, in the sound and independent exercise of this court's discretion the court finds that this property distribution is still just and equitable under the circumstances of this case, including after consideration of the parties' present economic circumstances." (FF 2(b), CP 826)

The parties' "present economic circumstances" included the fact that Palomera was retired, her health had worsened, and she had been living off the assets already awarded to her. (CP 367-70) Rockwell, on the other hand, had worked after the parties' divorce, earning upwards of \$160,000 and \$110,000 during those years that he worked full time. (Sub. No. 245, Supp. CP __) While Rockwell was underemployed again at the time of the second remand

hearing, there was nothing that prevented him from continuing to pursue full-time employment.⁸ (CP 453)

Rockwell still owed Palomera \$35,908 for those amounts that he was overpaid from the pension while the first appeal was pending, and prejudgment interest of \$6,898. (CP 360) The trial court ruled that “in order to lessen any burden on the husband from the re-characterization of the wife’s pension, and to finally sever any future financial ties between the parties, the husband shall not be obligated to repay the amount of the pension that he was overpaid while the first appeal was pending.” (FF 2(d), CP 826) Eliminating the judgment of \$42,806.85 for the pension overpayment and prejudgment interest resulted in a community property division of 58/42 in favor of Palomera, and an overall property division of 66/34.

⁸ Rockwell steadfastly refused to pursue employment outside of the Seattle area despite his claims that he has had difficulty finding employment in this area, claiming once again on the second remand that because the parties’ adult, married, and employed daughter lives in the area he must stay here to “support” her emotionally. (CP 453, 501) This court recognized at the time of the first appeal that “[w]hile [Rockwell] may have had difficulty in securing a technical sales position with such a salary in Seattle, [Rockwell] has the training and experience to pursue such positions, as well as more recent training to sell real estate. Further, while we recognize his legitimate concerns for his daughter’s health, he is not so constrained by those circumstances that he cannot look for jobs outside of Seattle.” *Rockwell One*, 141 Wn. App. at 248, ¶ 22.

Rockwell had already needlessly delayed formal resolution of the distribution of the marital estate by over two months by the time the trial court ruled. The trial court ordered that “until the order directing the pension administrator to divide the annuity 75.2% to the wife and 24.8% to the husband takes effect, the husband shall continue to pay over to the wife the share of the annuity that he receives from the federal government under this court’s earlier August 31, 2005 order.” (CP 827)

Confirming the wisdom of the court’s order requiring payment of pension proceeds to Palomera until the new government order was entered, Rockwell filed multiple motions challenging the trial court’s decision. On October 11, 2010, Rockwell filed a “Motion to Correct Clerical Error in the Alternative [sic] for Reconsideration,” challenging the trial court’s order requiring Rockwell to continue to pay his share of the pension to Palomera until the new government order dividing the pension takes effect. (CP 582-83) On October 22, 2010, the trial court denied this motion (CP 695) and ordered the release of the pension payments that Rockwell had paid into the court registry to avoid

paying them to Palomera, as the parties had previously agreed.
(CP 838)

On November 1, 2010, Rockwell filed a second Motion for Reconsideration, arguing that he should not be required to pay over his share of the pension until the government pension order took effect. (CP 699) The trial court denied this motion as well, finding that it was improperly filed under CR 59(j), but also finding that it would have denied the motion even it were properly filed, as these payments were part of its "just and equitable" division:

Under the circumstances of this case, the October 22, 2010 Order on Remand setting forth the division of the parties' marital estate was just and equitable, including requiring respondent to continue to pay the pension annuity to petitioner until the new government order takes effect.

(CP 856) Because the trial court found that Rockwell's motion was "improperly filed," it awarded Palomera \$1,000 in attorney fees.
(CP 856)

While his second motion for reconsideration was pending, on November 4, 2010, Rockwell filed yet another motion, seeking a "judgment on overpaid amounts" against Palomera, alleging that he had overpaid \$9,086.89 to Palomera because he had purportedly satisfied the attorney fee judgment and interest. (CP 720) The trial

court denied Rockwell's third motion as well, noting that his "motion seeking repayment of amount[s] that he claims he overpaid to [Palomera] is essentially an unauthorized motion for reconsideration of the court's previous rulings releasing the funds in the court registry to [Palomera] and ordering [Rockwell] to continue to pay over his share of the pension until the government pension order takes effect." (CP 791) The trial court awarded an additional \$4,000 to Palomera for having to respond to "this motion, which seeks the same relief that respondent previously sought and was already denied." (CP 791)

Despite the trial court's orders requiring Rockwell to pay his share of the pension to Palomera, Rockwell refused to do so. Palomera was forced to begin garnishment proceedings against Rockwell's employer and bank accounts. (Sub No. 279, 300, Supp. CP ___) Only after these garnishment proceedings were commenced and after Palomera started supplemental proceedings to require Rockwell to disclose current financial information, the day before his employer would have revealed his current income in response to garnishment proceedings, did Rockwell finally pay the

fee judgments owed to Palomera. (Sub Nos. 279, 300, 317, 318A, Supp. CP ___)

The government order went into effect in January 2011, terminating any further payments from Rockwell to Palomera from his pension. This order was effected approximately two months after the trial court's order was entered, but six months after Palomera first sought a final resolution on remand – a resolution that was delayed solely by Rockwell's actions.

Rockwell appeals for the third time.

III. ARGUMENT

A. The Trial Court Was Required To Consider The Character Of Property In Distributing The Marital Estate, And It Was Within Its Discretion To Award Each Party Their Separate Property. (Response to App. Br. 30-33)

The trial court did not abuse its discretion in considering Palomera's separate property interest in her federal pension in making its property division. While the character of property is not "controlling," the trial court is statutorily required to consider the character of property in dividing the parties' property. RCW 26.09.080(2) (the court must consider, among other factors, "the nature and extent of the community property; the nature and extent of the separate property"); *Marriage of Donovan*, 25 Wn. App.

691, 693, 612 P.2d 387 (1980) (“the characterization of property is not what is controlling, but only one of many factors to be considered by the court”).

“The court is required to consider among other facts the separate property of the parties, but this consideration does not require the court to invade the separate property.” **Moore v. Moore**, 9 Wn. App. 951, 953, 515 P.2d 1309 (1973); *see also Ovens v. Ovens*, 61 Wn.2d 6, 8, 376 P.2d 839 (1962) (affirming disparate property division in favor of the husband, who had greater separate property; “an equitable division of the total property involved does not entail a right to an equal division of separate property”). In other words, even if “no exceptional circumstances are required to award one spouse’s separate property to the other spouse” (App. Br. 31), exceptional circumstances also are not required to award separate property to the spouse who owns it.

Rockwell argues that the trial court necessarily abused its discretion by awarding Palomera her separate property because it gave her a greater share of the overall marital estate, citing **Sullivan v. Sullivan**, 52 Wash. 160, 100 P. 321 (1909). (App. Br. 36) In **Sullivan**, after a marriage that the court described as

“upwards of a quarter of a century,” the parties had community property of \$204,000 and the husband had separate property of \$20,000. The wife was awarded \$92,500, plus \$2,500 for attorney fees. The husband was awarded the remaining property. Overall, the wife received 45% of the community property; the husband received 55% of the community property and all of his separate property.

On appeal, the husband challenged the trial court’s characterization of the property, asserting that his separate estate was in fact larger than the trial court gave it credit. The Supreme Court affirmed, holding that “in the end,” the trial court’s decision was “a fair and equitable division under all the circumstances.” *Sullivan*, 52 Wash. at 164. In *Sullivan*, then, as here, the spouse who owned separate property received a disproportionate share of the community property and was awarded his separate property. *Sullivan* does not stand for the claimed proposition that at the end of a long-term marriage the trial court cannot consider the character

of property when dividing the marital estate, and instead must divide the estate “roughly equally”.⁹

That the trial court here awarded Palomera her separate property interest in her federal pension does not mean that the character of the property was “dispositive” (App. Br. 30-31), when, “in the end,” the trial court found that the overall property distribution was “just and equitable.” (CP 826) Whether the trial court awards separate property to the spouse who owns it is discretionary decision that should not be disturbed on appeal absent a showing of a manifest abuse of discretion. See **Marriage of Brewer**, 137 Wn.2d 756, 769, 976 P.2d 102 (1999) (“The trial court is in the best position to assess the assets and liabilities of the parties and determine what is ‘fair, just and equitable under all the circumstances.’”).

⁹ The statement in this court’s decisions that “In a long term marriage of 25 years or more, the trial court’s objective is to place the parties in roughly equal financial positions for the rest of their lives,” (**Rockwell One**, 141 Wn. App. at 243, ¶ 12; **Rockwell Two**, 157 Wn. App. at 452, ¶ 4) has made much mischief, causing many litigants besides Rockwell to argue that, contrary to RCW 26.09.080, the character of property is no longer relevant in dividing property at the end of a long term marriage. This court should use its opinion in **Rockwell Three** to disabuse the family law bar of that notion.

Rockwell also wrongly claims that “this Court cannot determine whether the trial court exercised its discretion with respect to the overall division because the court did not address the other statutory factors [under RCW 26.09.080] on the record.” (App. Br. 33) Consistent with this court’s direction on remand, the trial court’s findings clearly confirm that it exercised its discretion in making its property division. (See *e.g.* FF 2.2(b), CP 826: “*in the sound and independent exercise of this court’s discretion*, the court finds that the property distribution is just and equitable,” emphasis added). The trial court considered all of the factors under RCW 26.09.080, including the “nature and extent” of the community and separate property, the duration of the marriage, and the economic circumstances of the parties, in dividing the property in a “just and equitable” manner. (See FF 2.2(a),(b),(c), CP 825-26) The trial court applied the correct legal standard by considering all of the factors of RCW 26.09.080 in dividing the parties’ property, and did not abuse its discretion in doing so.

B. The Trial Court's Award To Palomera Of A Disproportionate Share Of The Community Property Was Just And Equitable. (Response to App. Br. 33-38)

1. A Disproportionate Award To The Retired, Older, Ill Spouse Was Well Within The Trial Court's Discretion.

The trial court's property division does not result in a "patent disparity" in the parties' economic circumstances. (App. Br. 33) While this court had stated that the parties should be placed in "roughly equal financial positions" at the conclusion of their marriage, *Rockwell Two*, 157 Wn. App. at 452, ¶ 4, this court held and Rockwell now concedes that this does not necessitate an "equal" division of the marital estate. See *Rockwell One*, 141 Wn. App. at 255, ¶ 39 (affirming a 60/40 property division in wife's favor); App. Br. 34 (the roughly equal standard "does not mean the court must divide the assets equally"). "[A] property distribution need not be equal to be 'just and equitable.' The key to an equitable distribution of property is not mathematical preciseness, but fairness. Fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules." *Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989), *rev. denied*, 114 Wn.2d 1002 (1990) (citations omitted).

Instead of simply dividing the parties' estate equally to ensure "rough equality" of the parties' economic circumstances, the trial court by statute and case law must consider the parties' ages, health and prospects for future earnings, and "whether ownership of the property is attributable" to the efforts of one or both spouses:

The court may consider the health and ages of the parties, their prospects for future earnings, their education and employment histories, their necessities and financial abilities, their foreseeable future acquisitions and obligations, and whether ownership of the property is attributable to the inheritance or efforts of one or both spouses.

Marriage of Gillespie, 89 Wn. App. 390, 399, 948 P.2d 1338 (1997) (citations omitted). This is exactly what the trial court did here. The trial court found that "given the difference in age, earning capacity, physical condition, and that husband had the ability to earn income and save for retirement in the future, it is fair and equitable to divide the community property 60% of wife and 40% to husband." (FF 2(a), CP 825-26) In awarding the wife her separate interest in the pension, the trial court explicitly recognized that the wife would be receiving a greater share of the entire marital estate, and found that "in the sound and independent exercise of this

court's discretion the court finds that this property distribution is still just and equitable under the circumstances." (FF 2(b), CP 826)

The facts of this case support the trial court's decision. Rockwell is younger, healthier, better educated, and has a superior future earning capacity, with fewer future medical/financial needs than Palomera, who is 8 years and 4 months older, in ill health, and retired. All of these factors support a disproportionate division of the overall marital estate to Palomera. See, e.g., **Marriage of Kraft**, 119 Wn.2d 438, 448, 450, 832 P.2d 871 (1992) (net distribution of 32% to husband and 68% to wife would not be an abuse of discretion on remand); **Marriage of Dessauer**, 97 Wn.2d 831, 650 P.2d 1099 (1982) (affirming 75/25 split of assets when wife was seven years older than the husband and had eye problems limiting her ability to work), *overruled on other grounds*, **Marriage of Smith**, 100 Wn.2d 319, 322, 669 P.2d 448 (1983); **Marriage of Crosetto**, 82 Wn. App. 545, 556-57, 918 P.2d 954 (1996) (affirming 60/40 split of community property after a 21-year marriage based on the husband's superior earning capacity); **Marriage of Donovan**, 25 Wn. App. 691, 696-97, 612 P.2d 387 (1980) (affirming 66.5/33.5 split of community property).

In particular, the trial court properly recognized that while Palomera would be required to live entirely off of the assets awarded to her for the rest of her life, Rockwell would continue to amass assets through his future employment and future inheritance from a family trust. In fact, during the pendency of Rockwell's appeals he has exceeded the trial court's expectation that he could be capable of earning \$70,000 per year (FF 2.20(3), CP 414), and when fully employed earned significantly more than the trial court predicted. In 2007, Rockwell earned \$160,114.90. In 2008, Rockwell earned \$110,170.81. (Sub. No. 245, Supp. CP __) Since the 2005 divorce through August 2010, Rockwell had earned gross income of at least \$301,759.84. (Sub. No. 245, Supp. CP __) Rockwell also had the opportunity to contribute \$17,314.73 to a 401(k) plan, plus further contribute to Social Security, which will further increase the benefit he will receive in the future. (Sub. No. 245, Supp. CP __)

Meanwhile, Palomera, who is retired due to ill health, must live off her existing pension (reduced by Rockwell's survivor benefit) and has no means to add to the property awarded to her. Thus, while Palomera has a monthly fixed income of \$5,178 from

her pension and cost of living adjustments, Rockwell will have his \$2,001 monthly income from this same pension, his earned income, and later his Social Security, which at the time of the dissolution trial was expected to be \$1,888 if he retired at age 70.

Rockwell, having strung this case out until he is 60, also complains that he is now entitled to retire, as Palomera had at age 60 eight years earlier. (See App. Br. 35; see also CP 459) But Palomera worked her entire adult life, and retired due to ill health. (I RP 157, II RP 17, 100) Rockwell had been voluntarily unemployed or underemployed since 1999, and stopped working completely in 2002 at age 51. (I RP 26, III RP 106, 117) He did not seek work again until December 2004, when the court ordered him to find employment pending trial. (RP 33) Rockwell had the ability then – and continues to have the ability now – to be employed full time. That he chooses to spend his time trying to hound his ex-wife into an early grave is no grounds for a greater award than the trial court in its discretion made.

2. The Property Division Is More Favorable To Rockwell Than He Claims.

This court's property division has been described as a 60/40 community property division and a 67/33 overall property division.

(App. Br. 23-24) In fact the property division is more favorable to Rockwell than he claims:

First, the trial court's property division in this second remand provides Rockwell over \$40,000 more than the purported 67/33 overall property division because Rockwell is not required to fully repay the amount of the pension that he was overpaid during the first appeal. The actual percentage division of the community property reflecting that forgiven debt is 58/42, and a 66/34 overall property division. (CP 364)

Second, the actual split is even more favorable to Rockwell because as part of its original property division this trial court "awarded" to Palomera as an undiscounted community "asset" the present value of the survivor benefit if Rockwell died before her. (CP 411) Rockwell's expert estimated the current value to Palomera of her future pension payments if Rockwell predeceased her at \$326,400, but admitted she had only a 43% chance of surviving Rockwell (II RP 80; Ex. 78), and the trial court made an unchallenged finding that "it is more likely than not that [Palomera] will predecease [Rockwell]." (FF 2.8(13)(m), CP 411) Thus, this is a \$326,400 asset that Palomera will likely never receive. Removing

this phantom asset from Palomera's side of the ledger the community property division is more realistically 52/48 in Palomera's favor, and the overall property division is 62/38.¹⁰ (CP 366)

Finally, the trial court's calculations fail to take into account that 38% of the pension's survivorship benefit is actually Palomera's separate property, of which a portion was awarded to Rockwell. Under the circumstances of this case, the trial court's property division left the parties in roughly equal positions and was just and equitable.

C. The Trial Court Did Not Abuse Its Discretion In Ordering Rockwell To Continue To Pay Palomera's Pension To Her Until The New Government Order Took Effect, And In Ordering Rockwell To Pay Palomera's Attorney Fees.
(Response to App. Br. 38-43)

Although Palomera was entitled to 75.2% of the pension payments between September 2005 when the original decree of dissolution was entered and December 2008 when the first order on remand was entered, she only received 63.2%. During that period, Rockwell received 12% more of the pension than he was entitled. Rockwell complains that ordering him to pay his share of

¹⁰ The analysis in this subsection is reflected in the spreadsheet attached as an Appendix to this brief. (CP 364, 366)

the pension to Palomera until the new government order takes effect somehow “overpays” Palomera. This is utterly false.

To effect the trial court’s award of 75.2% of the pension to Palomera, Rockwell would have owed \$42,806.85 to Palomera for the overpayments that *he* received during the first appeal, plus the awarded prejudgment interest. There is no dispute that Rockwell has not come even close to satisfying this obligation. By requiring Rockwell to continue to pay his share of the pension to Palomera until the government order took effect the trial court properly recognized that Rockwell had already received more than he was entitled to while the first appeal was pending. Its order merely shifted a fraction of those funds back to Palomera both as part of its “just and equitable” property distribution and to assure that Rockwell would cooperate in effecting the new government order that would implement the trial court’s decision and finally end the parties’ financial ties to each other.

The trial court recognized that these parties needed finality and to accomplish that it terminated any further payments between the parties once the new government order dividing the pension took effect, regardless if it resulted in less property to Palomera and

more property to Rockwell than it intended. See **Marriage of Foley**, 84 Wn. App. 839, 844, 930 P.2d 929 (1997) (“spouses are entitled to receive their share of the community property within a reasonable time”). While Rockwell attempts to dress up the trial court’s decision in a variety of ways to claim error, the fact of the matter is that it simply was an equitable decision by the trial court that was made well within its discretion.

The trial court also did not abuse its discretion in awarding \$5,000 in attorney fees to Palomera for having to respond to motions that the trial court found were “improperly filed” (CP 856) and “unauthorized,” and which repeatedly made the same arguments of “overpayment” that the court had already rejected. (CP 847) The party challenging the trial court’s decision on attorney fees bears the burden of proving the trial court exercised its discretion in a way that was clearly untenable or manifestly unreasonable. **Marriage of Crosetto**, 82 Wn. App. 545, 563, 918 P.2d 954 (1996). Rockwell’s intransigence in bringing these motions increased Palomera’s legal fees by requiring her to respond, and the trial court did not abuse its discretion in making its awards. **Marriage of Burrill**, 113 Wn. App. 863, 56 P.3d 993

(2002), *rev. denied*, 149 Wn.2d 1007 (2003); ***Marriage of Wallace***, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn.2d 1011 (2003).

Rockwell does not challenge the reasonableness of the amount of attorney fees awarded to Palomera, the basis for the attorney fees, nor the fact that substantial evidence supports the trial court's award of attorney fees. (See CP 539-40, 760, 789) Instead, his sole challenge on appeal is that the trial court failed to make findings of fact "according to the lodestar method." (App. Br. 42) But in dissolution proceedings, trial courts are not required to apply the lodestar method. ***Marriage of Van Camp***, 82 Wn. App. 339, 340, 918 P.2d 509, *rev. denied*, 130 Wn.2d 1019 (1996). Because an award of attorney fees in a dissolution action is based on equitable considerations, consideration of the factors under the lodestar method is not required. ***Van Camp***, 82 Wn. App. at 342. The trial court's award of attorney fees to Palomera for having to respond to Rockwell's motions was not an abuse of discretion.

D. This Court Should Deny Rockwell's Request For Attorney Fees On Appeal And Award Palomera Her Fees. (Response to App. Br. 43)

There is no basis for an award of attorney fees to Rockwell based on any alleged intransigence by Palomera. Instead, attorney fees should be awarded to Palomera for Rockwell's bull-headed intransigence in continuing to litigate these matters. Rockwell complains that "the second remand turned out to be a waste of time and resources," (App. Br. 44) but that is clearly only his opinion because he lost in his claims, already twice rejected on appeal, that the court was obligated to divide the entire marital estate, without regard to character, in "roughly equal" measure. Rockwell's claim that Palomera asserted to the trial court that its "discretion was limited to entering the division supposedly mandated by this Court" is false. (App. Br. 44) Instead, Palomera's position on remand – in response to Rockwell's demand for more assets than he was awarded in the trial court's original property distribution – was that to the extent that the trial court's discretion was limited it was only within the confines of this court's prior rulings. (CP 497)

In the first appeal, Rockwell challenged the trial court's rejection of his demand for an equal division of all of the assets. In

affirming the trial court's property division, this court held that the trial court did not err in awarding more assets to Palomera. **Rockwell One**, 141 Wn. App. at 255, ¶ 39. Thus, in the second remand, Palomera properly argued that while the trial court had discretion to divide the pension differently than a 60/40 community property division and a separate property award to Palomera, it should not do so in a way that would result in an equal property division, since this court had already rejected the argument such a division was required. **Roberson v. Perez**, 156 Wn.2d 33, 41, ¶ 21, 123 P.3d 844 (2005) ("once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation").

There is no basis for an award of attorney fees to Rockwell. This court should instead award Palomera her attorney fees for having to respond to Rockwell's third appeal. **Marriage of Greenlee**, 65 Wn. App. 703, 829 P.2d 1120, *rev. denied*, 120 Wn.2d 1002 (1992). Palomera has now been dragged to this court three times. The parties have been divorced for six years, yet Palomera remains involuntarily bound to Rockwell while he

continues to demand more, illusory assets, pleading poverty while selectively enjoying a six-figure employment income.

Palomera has made efforts to end the litigation with Rockwell, but all of her attempts have been rebuffed. (CP 371-72) Before filing the motion in the second remand, Palomera made another offer to Rockwell that would have made the remand motion unnecessary. (CP 372) Rockwell continues this litigation when he is well aware that Palomera must live off the assets awarded to her, which continue to be depleted by his relentless litigation tactics. For example, the trial court awarded Palomera some proceeds from the sale of the family home “to provide liquidity to both parties and to allow wife to be able to purchase a residence.” As contemplated, Palomera purchased a home. But she was then forced to take out a mortgage to pay attorney fees for counsel in both the trial and appellate courts. Palomera was also forced to withdraw from her IRA to pay attorney fees. (CP 368-69)

An award of attorney fees to Palomera is also warranted under RCW 26.09.140. As this court recognized in the last two appeals, Palomera is older, in ill health, and retired. She has a far greater need for her attorney fees to be paid than Rockwell, who is

employed and has the ability to pay both his own fees and Palomera's fees.

E. Any Remand Must Be To The Trial Court Who Presided Over The Parties' Four-Day Trial In 2005. (Response to App. Br. 44-46)

Any remand should be to the judge who has presided over the case since the parties' four-day trial in 2005. The trial court's property division is not evidence of bias. *Marriage of Sievers*, 78 Wn. App. 287, 314, 897 P.2d 388 (1995). "Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit." *Santos v. Dean*, 96 Wn. App. 849, 857, 982 P.2d 632 (1999), *rev. denied*, 139 Wn.2d 1026 (2000) (citations omitted). This court should reject Rockwell's meritless argument that any remand be to a different judge.

IV. CONCLUSION

It has been seven years since Palomera and Rockwell separated. The trial court acted well within its discretion in awarding Palomera her separate interest in her pension and 60% of the community property after a long term marriage. Rockwell fails for the third time to explain how such a division is a manifest abuse of the trial court's broad discretion, and seems bent on forcing Palomera to deplete all of her assets and drive her into an early

grave so he can enjoy the survivor benefits of her pension. It is time for this court to “end this matter:”

We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. . . . The trial court carefully analyzed the respective positions of the parties, exercised its discretion and rendered a thoughtful decision. That ends the matter.

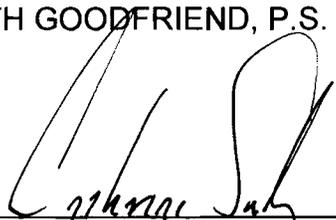
Marriage of Landry, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985).

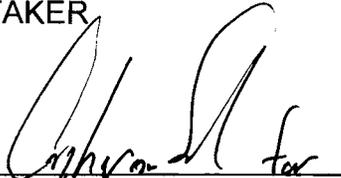
This court should affirm and award attorney fees to Palomera.

Dated this 3rd day of June, 2011.

SMITH GOODFRIEND, P.S.

LAW OFFICES OF CYNTHIA B.
WHITAKER

By:  _____

By:  _____

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DECLARATION OF SERVICE

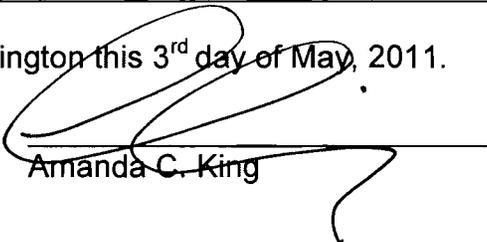
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 3, 2011, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Mary Hammerly Attorney at Law 22525 SE 64th Place, Suite 118 Issaquah, WA 98027	<input type="checkbox"/> E-Mail <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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DATED at Seattle, Washington this 3rd day of May, 2011.


 Amanda C. King

PALOMERA/ROCKWELL DIVISION (VACATING JUDGMENT)

	Separate	Community	Husband	Wife
Pension	\$543,797.10	\$887,247.90	\$354,899.16	\$532,348.74
Judgment			\$42,806.85	-\$42,806.85
Survivor Benefit		\$579,689.00	\$253,289.00	\$326,400.00
Social Security offset		-\$159,464.00		-\$159,464.00
Tangible Assets		\$1,086,738.00	\$346,855.80	\$739,882.20
Subtotal	\$543,797.10	\$2,394,210.90	\$997,850.81	\$1,396,360.09
Community percentage			42%	58%
Separate Property			\$0.00	\$543,797.10
Total with Separate			\$997,850.81	\$1,940,157.19
			34%	66%

(CP 364)

PALOMERA/ROCKWELL DIVISION (VACATING JUDGMENT) w/o Survivor Benefit

	Separate	Community	Husband	Wife
Pension	\$543,797.10	\$887,247.90	\$354,899.16	\$532,348.74
Judgment			\$42,806.85	-\$42,806.85
Survivor Benefit		\$253,289.00	\$253,289.00	
Social Security offset		-\$159,464.00		-\$159,464.00
Tangible Assets		\$1,086,738.00	\$346,855.80	\$739,882.20
Subtotal	\$543,797.10	\$2,067,810.90	\$997,850.81	\$1,069,960.09
Community percentage			48%	52%
Separate Property			\$0.00	\$543,797.10
Total with Separate			\$997,850.81	\$1,613,757.19
			38%	62%

(CP 366)