No. 89862-6

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 69833-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CHRISTOPHER R. LARSON,

Petitioner,

vs.

JULIA CALHOUN,

Respondent.

PETITION FOR REVIEW

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A. Identity of Petitioner.

Appellant Christopher Larson asks this Court to accept review of the Court of Appeals decision designated in Part B of this Petition.

B. Decision Below.

Division One filed its published decision affirming the trial court's debt-free award to respondent Julia Calhoun of property valued at $70 million more than the net value of the parties' $109 million community property estate on November 25, 2013. (Appendix A) Division One denied Larson's timely motion for reconsideration on December 19, 2013. (Appendix B)

C. Issues Presented for Review.

Under what circumstances should a court, in the exercise of its discretion under RCW 26.09.080, "invade" separate property and award more than the net value of the community property estate to the "disadvantaged" spouse?

D. Statement of the Case.

Chris Larson had been working at Microsoft for eleven years when he and Julia Calhoun married in July 1986. (RP 95, 129) Larson continued working at Microsoft, taking full advantage of its employee stock option and stock purchase plans, until he retired in

2001. (FF 7, CP 281) During the marriage, Larson "meticulously" maintained his separate property estate, derived from Microsoft stock he had acquired prior to marriage, and his various post-marriage acquisitions from his separate property, including a 30% interest in the Seattle Mariners. (FF 24, CP 290; FF 19, CP 287; FF 18, CP 287; CP 300-01; RP 656, 659) By the time the parties divorced in early 2012, the net value of Larson's separate property estate was nearly $400 million. The net value of the parties' community property estate, largely derived from Microsoft options Larson had acquired before marriage but exercised thereafter, was $109 million. (*See* CP 299-301)

The primary factual issues at trial were 1) the nature and extent of Larson's separate property estate; 2) the value of community real property in the City of Shoreline, and of Larson's interest in the Seattle Mariners; and 3) the dates to be used for the beginning and ending of the marital community. (CP 278) Neither party disputes on appeal the character or value of the assets before the court, including the $176 million value placed on Larson's minority interest in the Seattle Mariners or the $20 million value placed on the Shoreline property, the two non-income-producing

assets that together comprised almost two-thirds of the court's net property award to Larson.

At trial, Larson proposed that Calhoun be awarded assets worth $104 million – more than 95% of the net value of the community property estate – including $25 million in cash, $20 million in Microsoft stock, and no debt, freeing her from over $120 million in community debt and the $1.5 million annual cost of maintaining the Shoreline properties. (RP 27-28, CP 70-71) Instead, the trial court awarded Calhoun $180 million in unencumbered assets – $70 million more than the net value of the community property estate – and ordered Larson to pay all the community debt, in addition to his separate debt. (CP 299-300) Larson was left with liquid assets of $242 million – $17 million less than the $259 million in combined separate and community debt

and "transfer payments" to Calhoun the decree ordered him to pay. (CP 299-301; Exs. 116, 117, 124; *see* Reply Br. 9, fn. 6)[1]

The trial court's stated reason for its "lopsided division of community assets" and invasion of Larson's separate estate was that otherwise Calhoun "will leave the marriage in a less advantageous position than her husband." (FF 29(d), (e), CP 295) Larson appealed, arguing that the trial court erred in failing to follow this Court's decisions holding that when the spouses can be "amply provided for" by community property, the court should limit its award to the community property estate. (*See* App. Br. 23-27) This Court transferred Larson's appeal to Division One, which affirmed on the grounds that *Marriage of Konzen,* 103 Wn.2d 470, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985), left "no doubt that

[1] As she has below, respondent will undoubtedly try to obfuscate the effect of the property division by arguing that the total community assets (ignoring liabilities) awarded to Larson exceed the separate property assets awarded to Calhoun. Such an argument is misleading because it ignores the $120 million in community debt Larson was ordered to assume, making his net community property award a negative $70 million. The court has the obligation to "without regard to marital misconduct, make such disposition of the property and *liabilities* of the parties, either community or separate, as shall appear just and equitable." RCW 26.09.080 (emphasis added). Assigning $120 million in community debt to one spouse without a commensurate award of community assets is no different than making a $120 million invasion of separate property.

separate property is no longer entitled to special treatment" (Appendix A ¶ 16), and that it was "not free to ignore binding Washington Supreme Court precedent." (Appendix A ¶ 22) Division One denied a timely motion for reconsideration on December 19, 2013. (Appendix B)

E. Argument Why This Court Should Accept Review.

This appeal raises a single issue, but one that is significant in many marriage dissolutions: under what circumstances should a court, in the exercise of its discretion under RCW 26.09.080, "invade" separate property and award more than 100% of the net value of the community property estate to the "disadvantaged" spouse? Petitioner urges this Court to accept review under RAP 13.4(b)(1) and RAP 13.4(b)(4).

1. Division One's decision conflicts with this Court's decisions in *Stokes, Borghi,* and *Holm.* (RAP 13.4(b)(1))

"Washington courts refrain from awarding separate property of one spouse to the other if a just and equitable division is possible without doing so." *Stokes v. Polley,* 145 Wn.2d 341, 347, 37 P.3d 1211 (2001). "[T]he right of the spouses in their separate property is as sacred as is their right in their community property." *Estate of Borghi,* 167 Wn.2d 480, 484, ¶ 8, 219 P.3d 932 (2009), *quoting*

Guye v. Guye, 63 Wash. 340, 352, 115 P. 731 (1911). Division One's decision is in conflict with this Court's decisions in *Stokes, Borghi,* and *Marriage of Holm*, 27 Wn.2d 456, 465-66, 178 P.2d 725 (1947), which held that when a just and equitable division of property can be made from the community property estate alone, the court should refrain from awarding separate property of one spouse to the other. RAP 13.4(b)(1).

In *Holm*, the trial court divided the entire estate before it for distribution, including the husband's separate property, equally. 27 Wn.2d at 465. This Court reversed, holding that "the division made by the trial court [was] unjust and inequitable in so far as it awarded to the respondent a portion of what was appellant's separate property" because the community property alone was sufficient to make "adequate provision" for the wife. *Holm*, 27 Wn.2d at 465-66. Division One in this case concluded that this Court's decision in *Marriage of Konzen,* 103 Wn.2d 470, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985) somehow "rejected" *Holm* – even though this Court in *Konzen* never cited, much less overruled, *Holm*. (Appendix A ¶ 14)

In *Konzen,* this Court affirmed the trial court's decision awarding the wife 30% of the husband's separate property military

pension, after dividing the community estate equally between the parties. The trial court "had chosen to award a portion of Mr. Konzen's separate property, rather than a disproportionate share of the community property, to Mrs. Konzen because the [husband's separate] military retired pay was a more liquid asset." *Konzen,* 103 Wn.2d at 472. Most of the *Konzen* opinion addresses the impact of federal laws on the state court's authority to consider and divide a spouse's military retired pay. *See* 103 Wn.2d at 473-77.[2] The *Konzen* Court rejected the husband's argument that because his military pension was a separate property asset, it could not be awarded to the wife. 103 Wn.2d at 478.

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[2] In *McCarty v. McCarty,* 453 U.S. 210, 235-36, 101 S. Ct. 2728, 69 L.Ed.2d 589 (1981), the U.S. Supreme Court held that state courts could not divide military retired pay on divorce. *Konzen* was one of a series of cases decided in the mid-1980s dealing with the much-criticized consequences of the U.S. Supreme Court's characterization of federal benefits in *McCarty* and other cases. *See also, e.g., Marriage of MacDonald,* 104 Wn.2d 745, 709 P.2d 1196 (1985); *Marriage of Landry,* 103 Wn.2d 807, 699 P.2d 214 (1985). A decision by this Court in *Konzen* prohibiting "invasion" of the husband's separate military pension could have had the effect of putting a multitude of federal benefits "off-limits" for distribution on divorce. Instead, recognizing that the illiquid community property (which had been evenly divided between the spouses) was not adequate to provide for the wife, the Court held that the court's obligation to make a "just and equitable" division of property justified an award to the wife of a portion of the husband's separate property military pension, then in pay status. *See Konzen,* 103 Wn.2d 470, 472, 478, 693 P.2d 97 (1985).

In *Konzen,* this Court held that among the four factors that RCW 26.09.080 directs a trial court to consider in dividing the property on divorce – 1) the nature and extent of community property; 2) the nature and extent of separate property; 3) the duration of the marriage; and 4) the economic circumstances of each party – the character of the property should not be given "greater weight than the other relevant factors," and is not "controlling." 103 Wn.2d at 478. The Court in *Konzen* affirmed an award of one spouse's separate property to the other spouse, but the total award to the other spouse was still less than 100% of the value of the community property. Thus, in net terms, there was not an invasion of separate property.[3] *Konzen* did not address, much less decide, the issue presented by this case.

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[3] That was also the case in *Marriage of Holm*, 27 Wn.2d 456, 178 P.2d 725 (1947), where the wife's total property award was less than the net value of the community estate, but included some of the husband's separate property. To the extent *Konzen* implicitly rejected any part of *Holm*, it was only an interpretation of that case as prohibiting the award of a separate *asset* to the other spouse. Petitioner has never argued that the court cannot award one spouse's separate property to the other. Petitioner's argument, instead, is that the "disadvantaged" spouse's award should not exceed 100% of the value of the community property estate if the *extent* of the community property is sufficient to provide a just and equitable division. That is not inconsistent with the court's consideration of the *nature* of both community and separate assets (including liquidity) in deciding the asset mix of a "just and equitable" property division. *See* RCW 26.09.080 (directing court to consider "nature and extent" of both community and separate property).

In arguing that he is entitled to preserve the value of his separate property estate when the value of the community property can "amply provide" for Calhoun, Larson is not asking for "special treatment" (Appendix A ¶ 16) for separate property. Nor is he arguing that only "unusual or exceptional circumstances" justify invasion of separate property. (Appendix A ¶ 17) Instead, Larson asks the Court to address the consequence of the distinction between separate and community property required by RCW 26.09.080, and long recognized by this Court in holding that when a spouse can be "amply provided for" from the community property, the court should limit its award to the community property estate. *Holm*, 27 Wn.2d at 466; *see also, e.g., Marriage of Bodine,* 34 Wn.2d 33, 35-36, 207 P.2d 1213 (1949); *McNary v. McNary*, 8 Wn.2d 250, 253-54, 111 P.2d 760 (1941).

Konzen did not "reject" (Appendix ¶ 14) or even cite *Holm*. The *Holm* principle that the property distribution on divorce should be limited to the value of the community property estate if that value is sufficient to adequately provide for the spouses is fully consistent with *Konzen*. Indeed, the result affirmed in *Konzen,* which awarded a portion of the husband's separate pension to the wife because of the illiquidity of the community property, was

similar to what Larson proposed here: Larson proposed an award to Calhoun of liquid assets from his separate estate, and offered to take all the parties' debt, so long as 1) he received sufficient illiquid properties from the community property estate equal in value to the community debt, and 2) Calhoun's largely liquid and debt-free award did not exceed the value of the community property estate. (*See* CP 70-75)

It can hardly be disputed that $109 million (the net value of the Larson/Calhoun community property estate) was more than adequate to provide Calhoun "with substantial earning capacity, moderate liquidity and assets that can be liquidated prudently as time goes by." (FF 29(f), CP 295, *quoted at* Appendix A ¶ 26) Accordingly, the reasons given by the courts below for awarding Calhoun $70 million more than the net value of the community property estate were insufficient to justify invasion of Larson's separate property estate.

First, Division One relied on the trial court's finding that it was awarding Larson's separate property to Calhoun because of her "intangible contributions to the marital community." (Appendix A ¶ 25) While this might be a reason to award Calhoun more of the

community property,[4] it is not a reason to also invade Larson's separate property, particularly when the trial court found that the "community had [already] received significant benefits from the husband's separately maintained assets," including "substantial tax benefits due to the losses experienced by various separate assets." (FF 29(b), CP 294)

The only other justification for the award suggested by either the trial or appellate court was to give Calhoun "immediate liquidity," by awarding her Microsoft stock and cash from Larson's separate property estate. (Appendix A ¶ 26) But the trial court's award included over $3 million in cash and over $7 million in Microsoft shares from the community property estate alone; Larson proposed a debt-free award to Calhoun of 95% of the net value of the community property estate that would have left her with $45 million in cash and Microsoft stock. Calhoun could have had

[4] Specifically, the trial court relied on findings that "this was, after all, a long-term marriage in which the wife made a major contribution to all that the community accomplished" (FF 29(e), CP 295), and that "both the community at large and the marital community benefited greatly from her serving as, in her phrase, the 'approachable face' of the couple." (FF 4, CP 280) The fact that the court sees one spouse as more personable than the other cannot possibly be a legal justification for awarding the personable spouse $70 million of the other spouse's separate property, yet that is the premise of the trial and appellate courts' rulings. The courts would never countenance giving tens of millions of dollars of someone's money to his partner just because their contractual relationship had lasted a long time and the partner was a nice person.

"immediate liquidity" without an award of $70 million from Larson's separate property, including $27 million in cash "transfer payments." (CP 70, 299-300)

Both spouses are entitled to the benefit of the community estate acquired during their long marriage. The decisions below leave Larson with none of the fruits of the community's hard work and good fortune. He leaves the marriage with less than $85,000 in cash from the $109 million community estate, and is now individually responsible for over $259 million in obligations, including $120 million in community debt. (CP 299-301) The obligations the court ordered Larson to assume exceed his "liquid" award by $17 million; "while retaining a substantially greater paper value with his separate property assets, [he] will shoulder all of the parties' debt, most of the risk, heavy carrying costs and interest payments and a considerable amount of trapped-in tax liability." (FF 29(f), CP 295) (*See* CP 299-301; Reply Br. 9, fn. 6) Neither Calhoun's "intangible contributions" to the community property estate nor the desire to give her "immediate liquidity" (and, apparently, to leave Larson with none) were an "ample, tenable justification" (Appendix A ¶¶ 26, 27) for the invasion of Larson's separate property.

Division One relied on the statements that the character of property is not "controlling," and that "exceptional" circumstances are not required to invade separate property, in holding that it was "bound" by this Court's "precedent" in *Konzen*. (Appendix A ¶ 22) But its interpretation of *Konzen* goes too far, ignoring the plain language of RCW 26.09.080 requiring the court to consider the "nature and extent" of both community and separate property in dividing the marital estate. Division One's decision goes far beyond not making the character of property controlling. It instead makes the character of property irrelevant, in conflict with this Court's decisions in *Holm* and *Guye,* affirmed in this Court's post-*Konzen* decisions in *Stokes* and *Borghi,* that a spouse has a right to preserve his or her separate property. This Court should accept review under RAP 13.4(b)(1).

2. By failing to provide any standard for invasion of separate property, Division One's decision raises an issue of public import. (RAP 13.4(b)(4))

Proper characterization of the property before it has always been a requirement before division on divorce under Washington law. *See Blood v. Blood,* 69 Wn.2d 680, 682, 419 P.2d 1006 (1966) ("the court must have in mind the correct character and status of

the property as community or separate before any theory of division is ordered"). Division One's decision leaves courts, attorneys, and litigants with no guidance in determining when, having the correct character of the property in mind, invasion of separate property is then warranted. Lower courts have been left with no reasoned standard for their exercise of discretion in dividing estates that include significant separate and community components, raising an issue of substantial public import meriting review by this Court. RAP 13.4(b)(4).

Division One's decision was premised on its concern that it was being asked to create a "rule for wealthy people,"[5] because of the "unique (and possibly incomparable) nature of the case before it." (Appendix A ¶ 24) This is not the case. The rule petitioner seeks would apply to estates of all sizes: if a spouse is "meticulous" in keeping separate property separate (as the trial court found here), and if the community property alone is sufficient to "amply provide for" the other spouse given the factors of RCW 26.09.080, then the court should not also invade separate property. This issue arises in the division of estates under circumstances that are not

[5] September 17, 2013, Oral Argument audio at 19:40, Cause No. 69833-8-I.

"unusual" or "exceptional," making this Court's guidance more, not less, necessary.

Respondent will undoubtedly argue that the trial court's "broad discretion" (Appendix A ¶ 10) in family law matters is best left unsullied by any reasoned analysis of the factors relevant to its exercise. But the correct standard of review for discretionary family law decisions is whether "the decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). This standard of review properly focuses on whether the trial court's decision is based on the correct legal standard and whether the facts as found by the trial court meet the requirements of the correct legal standard. (*See* App. Br. 20; Reply Br. 3-4) Importantly, this standard of review also recognizes that the appellate courts have a role in establishing the factors relevant to the trial court's exercise of its discretion.

In particular, the failure to provide guidance in this case will exacerbate the recent misuse in the lower courts of Division One's statements that "[i]n 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" in *Marriage of*

Rockwell, 141 Wn. App. 235, 243, ¶ 12, 170 P.3d 572 (2007), *rev. denied*, 163 Wn.2d 1055 (2008) (*quoted at* Appendix A ¶ 10 for the court's "broad discretion" in dividing property), *on remand*, 157 Wn. App. 449, ¶ 4, 238 P.3d 1184 (2010), *rev. denied after second remand and appeal*, 176 Wn.2d 1012 (2013). Litigants now routinely rely on this dicta to argue that the character of the property is irrelevant and the trial court must divide the combined separate and community estates equally after a long-term marriage.[6]

Thus, *Rockwell's* "roughly equal" dicta is now relied upon as "controlling" the division of property in long-term marriages. Combined with its pronouncement in this case that the character of "meticulously" maintained separate property is irrelevant to the division of property, Division One has managed to remove from RCW 26.09.080 one statutorily-required factor in the division of

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[6] This argument, and property divisions based on it, ignore the actual holdings of *Rockwell,* where Division One initially remanded for reconsideration of the property division because the trial court had mischaracterized the wife's separate property interests in her federal pension, then in pay status. Division One on appeal from a second remand affirmed the trial court's award to the wife of *more* of the pension, based on its separate character. It is regrettable that citation to *Rockwell* has devolved into an "anything goes" approval of the trial court's "broad discretion" (*see* Appendix A ¶ 10), which fails to recognize that Division One ruled as it did in *Rockwell* because of the importance of the character of property in the division of the marital estate on divorce.

property, while substituting another that finds no support in the language of the statute or any case law interpreting it.

Given the spouses' "sacred" right in their separate property, *Estate of Borghi*, 167 Wn.2d at 484, ¶ 8, there must be some standard before a court may invade separate property at the end of the parties' marriage. All Larson is asking for here is that the courts articulate that standard, consistent with RCW 26.09.080. To be clear: Larson, unlike the husband in *Konzen*, is not advocating a rule that the court can never award separate property of one spouse to the other. Instead, the issue is under what circumstances the trial court should be allowed to do so. RCW 26.09.080's requirement that the court have in mind the "nature and extent" of the separate and community property is meaningless if there are no factors governing distribution of each. A decision from this Court identifying the factors to be considered in deciding when to award one spouse's separate property to the other spouse will be of benefit in many cases where the assets before the court include both community and separate assets and liabilities. This Court should accept review pursuant to RAP 13.4(b)(4).

F. Conclusion.

To bring clarity to Washington State law, this Court should accept review under RAP 13.4(b)(1) and (4) to decide when a court, in the exercise of its discretion under RCW 26.09.080, can "invade" one spouse's separate property and award more than the net value of the community property estate to the other spouse.

Dated this 21st day of January, 2014.

SMITH GOODFRIEND, P.S.

By: _____
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Attorneys for Petitioner

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 January 21, 2014, I arranged for service of the foregoing Petition for Review, to the court and to counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 21st day of January, 2014.

V. Vigoren

Victoria K. Vigoren

313 P.3d 1228
(Cite as: 313 P.3d 1228)

C

Court of Appeals of Washington,
Division 1.
In re MARRIAGE OF Christopher Ross **LARSON**,
Appellant,
and
Julia **Larson** CALHOUN, Respondent.

No. 69833–8–I.
Nov. 25, 2013.

Background: Husband and wife instituted marriage dissolution action. The Superior Court, King County, William L. Downing, J., dissolved marriage and divided property. Husband appealed.

Holding: The Court of Appeals, Lau, J., held that trial court acted within its discretion in awarding wife approximately $40 million of husband's separate property.

Affirmed.

West Headnotes

[1] Divorce 134 ⚿727

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)3 Proportion or Share Given on Division
134k727 k. Equity and proportionality in general. Most Cited Cases

Divorce 134 ⚿729

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)3 Proportion or Share Given on Division
134k729 k. Percentage or share in general. Most Cited Cases
A just and equitable division of property in a marriage dissolution action does not require mathematical precision, but, rather, fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of parties. West's RCWA 26.09.080.

[2] Divorce 134 ⚿727

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)3 Proportion or Share Given on Division
134k727 k. Equity and proportionality in general. Most Cited Cases
In dividing property in a marriage dissolution action, fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules. West's RCWA 26.09.080.

[3] Divorce 134 ⚿728

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)3 Proportion or Share Given on Division
134k728 k. Equality. Most Cited Cases
In dividing property in a marriage dissolution action, the statutory requirement of a just and equitable distribution does not mean that the court must make an equal distribution. West's RCWA 26.09.080.

[4] Divorce 134 ⚿687

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)2 Property Subject to Distribution or Division
134k679 Separate or Marital Property in General
134k687 k. Distribution of separate property. Most Cited Cases

In dividing property in a marriage dissolution action, under appropriate circumstances, the trial court need not award separate property to its owner. West's RCWA 26.09.080.

[5] Divorce 134 ⚿1283(1)

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(I) Appeal
134k1277 Discretion
134k1283 Disposition of Property
134k1283(1) k. In general. Most Cited Cases

A property division made during the dissolution of a marriage will be reversed on appeal only if there is a manifest abuse of discretion. West's RCWA 26.09.080.

[6] Divorce 134 ⚿687

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)2 Property Subject to Distribution or Division
134k679 Separate or Marital Property in General
134k687 k. Distribution of separate property. Most Cited Cases

Trial court acted within its discretion in awarding wife approximately $40 million of husband's separate property, in marriage dissolution proceeding in which husband's combined award totaled approximately $327 million and wife's combined award totaled approximately $181 million; trial court recognized wife's intangible contributions to long-term marriage, court found that husband was in better position to acquire future wealth than wife, separate property award provided wife with immediate liquidity, and trial court properly characterized all separate and community property. West's RCWA 26.09.080.

[7] Costs 102 ⚿194.44

102 Costs
102VIII Attorney Fees
102k194.44 k. Bad faith or meritless litigation. Most Cited Cases

Pretrial Procedure 307A ⚿44.1

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak44.1 k. In general. Most Cited Cases

As an independent ground, the Court of Appeals may award attorney fees and costs based on intransigence of a party, demonstrated by litigious behavior, bringing excessive motions, or discovery abuses. West's RCWA 26.09.140.

[8] Divorce 134 ⚿1141

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(H) Counsel Fees, Costs, and Expenses
134k1137 Grounds and Considerations for Award or Amount in General
134k1141 k. Conduct of litigation; misconduct in general. Most Cited Cases

Divorce 134 ⚿1163

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(H) Counsel Fees, Costs, and Expenses
134k1159 Stage or Condition of Cause
134k1163 k. Appeal or review. Most Cited Cases

Husband's appeal of division of marital property, despite property division that favored husband, did not constitute intransigent conduct, as could support award of appellate attorney fees to wife. West's RCWA 26.09.140.

***1229** Catherine Wright Smith, Valerie A. Villacin, Smith Goodfriend PS, Seattle, WA, Thomas Gerard Hamerlinck, Thomas G. Hamerlinck PS, Bellevue, WA, for Appellants.

Janet A. George, Janet A. GeorgeInc P.S, Seattle, WA, Philip Albert Talmadge, Emmelyn Hart, Talmadge/Fitzpatrick, Tukwila, WA, for Respondents.

LAU, J.

¶ 1 This case requires us to determine whether a trial court's authority to award one spouse's separate property to the other spouse in a dissolution action is limited to circumstances where a spouse cannot be amply provided for from community property alone. We conclude that RCW 26.09.080 does not single out the property's character or any other factor to be given more weight. This statute and controlling case authority direct the trial court to make a fair and equitable property division after weighing all relevant factors within the context of the parties' specific circumstances. Because the trial court properly exercised its discretion when it applied this rule to determine a fair and equitable property division, we affirm.

FACTS

¶ 2 Before marrying Julia Calhoun in 1986, Christopher Larson acquired an equity interest in a young company called Microsoft.[FN1] This interest developed into a colossal fortune, which Larson held principally as his separate property. The marital community also amassed considerable wealth, traceable largely to Microsoft stock options exercised by Larson during the marriage. Larson treated all purchased stock as a community asset, thereby relinquishing any claim to the separate property portion of the asset.[FN2]

FN1. Larson worked part-time for Microsoft in 1975, in association with Bill Gates. Upon graduation from college in 1981, he worked full-time until he retired in 2001.

FN2. *See In re Marriage of Short,* 125 Wash.2d 865, 890 P.2d 12(1995).

¶ 3 During this long-term marriage, Calhoun "made a major contribution to all that the community accomplished, measured in terms of their children, their foster children, their impact in the broad community and their more narrow business interests." The trial court found that "the marital community benefitted greatly from [Calhoun] serving as, in her phrase, the 'approachable face' of the couple."

¶ 4 Following a three-week trial, the court entered detailed findings of fact and conclusions of law, identified the couple's assets and liabilities, determined their value, characterized each as separate or community, and directed a fair and equitable division. The court awarded Calhoun various community assets worth approximately $139 million. Larson assumed a net community obligation of approximately $29.5 million. Calhoun retained separate property worth $669,000. She assumed no community debt.

¶ 5 Citing its "broad equitable powers" to "make a lopsided division of community assets and also invade a separate estate to the extent necessary to achieve a just result," the court also awarded Calhoun more than $40 million dollars of Larson's separate property. To effectuate this award, it

ordered Larson to transfer shares of Microsoft stock, valued at approximately $14 million,[FN3] and to make three cash installment payments totaling $27 million.

FN3. Posttrial, the parties agreed to sell the Microsoft stock for tax purposes and to transfer the cash proceeds to Calhoun.

¶ 6 Larson ultimately retained separate assets worth approximately $357 million. His combined award totaled approximately $327 million dollars. Calhoun's combined award totaled approximately $181 million. Larson appeals the award of a portion of his separate property to Calhoun.

***1230** *ANALYSIS*

¶ 7 Larson challenges the trial court's decision to award approximately $40 million of his separate property to Calhoun. He asserts no challenge to the court's decision to award Calhoun 100 percent of the net community estate or to the court's valuation or characterization of the parties' property. He acknowledges, "[T]his is not a factual appeal." Br. of Appellant at 4.

¶ 8 Larson contends that the trial court "applied an improper legal standard and consequently abused its discretion in awarding Calhoun a significant share of [his] separate estate in addition to the net value of all the community property, because more than ample provision could have been made for Calhoun from the parties' $109 million net community estate." Br. of Appellant at 4–5. He argues that we should "reverse the trial court's distribution of the marital estate and direct the trial court on remand to limit its award to the wife to the net value of the community estate." Br. of Appellant at 42.

¶ 9 In a dissolution action, the trial court must order a "just and equitable" distribution of the parties' property and liabilities, whether community or separate. RCW 26.09.080. All property is before the court for distribution. *Farmer v. Farmer,* 172 Wash.2d 616, 625, 259 P.3d 256 (2011). When fashioning just and equitable relief, the court must consider (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and (4) the economic circumstances of each spouse at the time the property distribution is to become effective. RCW 26.09.080. These factors are not exclusive. The statute requires the court to consider all "relevant factors." RCW 26.09.080.

[1][2][3][4] ¶ 10 The court has "broad discretion" to determine what is just and equitable based on the circumstances of each case. *In re Marriage of Rockwell,* 141 Wash.App. 235, 242, 170 P.3d 572 (2007). A just and equitable division "does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of parties." *In re Marriage of Crosetto,* 82 Wash.App. 545, 556, 918 P.2d 954 (1996). "Fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules." *In re Marriage of Tower,* 55 Wash.App. 697, 700, 780 P.2d 863 (1989). "Just and equitable distribution does not mean that the court must make an equal distribution." *In re Marriage of DewBerry,* 115 Wash.App. 351, 366, 62 P.3d 525 (2003). "Under appropriate circumstances ... [the trial court] need not award separate property to its owner." *In re Marriage of White,* 105 Wash.App. 545, 549, 20 P.3d 481 (2001).

[5] ¶ 11 The trial court is in the best position to decide issues of fairness. *Brewer v. Brewer,* 137 Wash.2d 756, 769, 976 P.2d 102 (1999). Accordingly, "[a] property division made during the dissolution of a marriage will be reversed on appeal only if there is a manifest abuse of discretion." *In re Marriage of Muhammad,* 153 Wash.2d 795, 803, 108 P.3d 779 (2005).

> A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.

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

In re Marriage of Littlefield, 133 Wash.2d 39, 46–47, 940 P.2d 1362 (1997) (citation omitted). "Trial court decisions in dissolution proceedings will seldom be changed on appeal." *In re Marriage of Stenshoel,* 72 Wash.App. 800, 803, 866 P.2d 635 (1993).

¶ 12 Larson contends that while the trial court generally has broad discretion to order a just and equitable distribution under RCW 26.09.080, Washington law prohibits the award of separate property to the nonowning spouse if "ample provision for the [nonowning] spouse can be made from the community ***1231** estate alone." [FN4] Br. of Appellant at 21. As discussed below, controlling Washington law imposes no such restriction on the trial court's broad discretion to make a fair and equitable property distribution.

FN4. Larson earlier argued in his statement of grounds for direct review that our Supreme Court should limit the award of separate property of one spouse to another except in exceptional circumstances. He does not make this claim on appeal.

¶ 13 Larson relies on several cases but principally on *Holm v. Holm,* 27 Wash.2d 456, 178 P.2d 725 (1947), to support his contention. In *Holm,* the trial court awarded the wife half of the parties' community property (worth $269,397.66) and half of the husband's separate assets (worth $72,836.01). On appeal, the husband argued the distribution was inequitable because it failed to account for the character of the property. The Supreme Court reversed the separate property award, reasoning in part that the wife could be "amply provided for out of the community property, without invading the separate property of the appellant." *Holm,* 27 Wash.2d at 466, 178 P.2d 725. It explained, "This is not a case where, in order to make adequate provision for the necessitous condition of the wife, the court is constrained to take from the husband his separate property." *Holm,* 27 Wash.2d at 465, 178 P.2d 725. It then concluded, "We consider the division made by the trial court unjust and inequitable in so far as it awarded to the respondent a portion of what was appellant's separate property." *Holm,* 27 Wash.2d at 466, 178 P.2d 725.

¶ 14 Larson thus argues, "[A]n award to the wife [Calhoun] of more than $100 million in community property meets the threshold of 'ample provision' that prohibits invasion of the husband's separate estate." [FN5] Br. of Appellant at 42. Holm is unpersuasive. To the extent the above quoted language in *Holm* constitutes a holding, this approach was rejected in *Konzen v. Konzen,* 103 Wash.2d 470, 693 P.2d 97 (1985).

FN5. Larson claims, "[A]n award of 100% of the value of the community estate to the wife, debt-free, would have generated income for her of at least $2,196,000 a year, without invasion of principal." Br. of Appellant at 34. The court made no such finding.

¶ 15 In *Konzen,* the trial court awarded 30 percent of the husband's separate military pension to the wife to help maintain liquidity. *Konzen,* 103 Wash.2d at 472, 693 P.2d 97. It also ordered an equal division of the parties' community property. On appeal, the husband challenged the award of his separate property. He relied on *Bodine v. Bodine,* 34 Wash.2d 33, 207 P.2d 1213 (1949), a case predating the enactment of RCW 26.09.080. In *Bodine,* the court stated, "[W]hile the superior court may, under certain circumstances, award part or all of one spouse's separate property to the other, the situations which warrant such action are exceptional." *Bodine,* 34 Wash.2d at 35, 207 P.2d

1213.

¶ 16 *Konzen* leaves no doubt that separate property is no longer entitled to special treatment. It noted that when *Bodine* was decided, "courts were free to weigh the character of the property more heavily than other factors when allocating separate property." [FN6] *Konzen,* 103 Wash.2d at 477, 693 P.2d 97. Unlike its predecessors, RCW 26.09.080, enacted in 1973, "specifically applies the statutory criteria to separate property." *Konzen,* 103 Wash.2d at 477, 693 P.2d 97. The court concluded:

> FN6. *Holm* and *Bodine* relied on Remington's Revised Statutes § 989, which provided, "In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the conditions in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage."

> This court will not single out a particular factor, such as the character of the property, and require as a matter of law that it be given greater weight than other relevant factors. The statute [RCW 26.09.080] directs the trial court to weigh all of the factors, within the context of the particular circumstances of the parties, to come to a fair, just and equitable division of property. *The character of the property is a* ****1232*** *relevant factor which must be considered, but is not controlling.*
> *Konzen,* 103 Wash.2d at 478, 693 P.2d 97 (emphasis added).

¶ 17 In *In re Marriage of Griswold,* 112 Wash.App. 333, 48 P.3d 1018(2002), Division Three of this court addressed the husband's claim that the trial court abused its discretion when it awarded $138,000 of his separate property to the wife without finding "unusual or exceptional circumstances." *Griswold,* 112 Wash.App. at 347, 48 P.3d 1018. Rejecting *Bodine* and the cases following it, the court reasoned:

> [N]one of these cases acknowledges that in the same year the court decided *Bodine,* the Legislature revised the dissolution statute, listing the specific factors to be considered. *See* Laws of 1949, ch. 215, § 11. The revision modified the principle that one factor should weigh more heavily than others:
>
> ....
>
> Under *Konzen,* a court need not find exceptional circumstances to justify awarding a portion of one spouse's separate [property] to the other spouse. The trial court here thus did not abuse its discretion by failing to find there were exceptional circumstances.

Griswold, 112 Wash.App. at 347–48, 48 P.3d 1018.

¶ 18 Larson also contends that Washington courts applying RCW 26.09.080 and *Konzen* continue to award separate property to the nonowning spouse only when necessary to prevent the nonowning spouse from "falling into poverty." Br. of Appellant at 28 (formatting omitted). He relies on *Griswold, In re Marriage of Williams,* 84 Wash.App. 263, 927 P.2d 679 (1996), and *Bulicek v. Bulicek,* 59 Wash.App. 630, 800 P.2d 394 (1990) , among others, to support this contention.[FN7] In each case, the wife earned less than her husband earned or had lesser earning potential. In each case, the court upheld the distribution of the husband's separate property. *Griswold, Williams,* and *Bulicek* do not establish a rule that poverty or "necessitous circumstances" alone justify the award of separate property to the nonowning spouse.[FN8]

FN7. Larson also cites *Oestreich v.*

> *Oestreich,* 2 Wash.2d 72, 97 P.2d 655 (1939), to support his claim that the trial court is allowed to award one spouse's separate property to prevent impoverishing the other. *Oestreich* is not applicable because the court reasoned that the trial court was free to award all separate and community property to the wife if justified by the circumstances, regardless of her financial circumstances. Larson's reliance on *Luithle v. Luithle,* 23 Wash.2d 494, 161 P.2d 152 (1945), is also not applicable. There, the court took into account the wife's permanent loss of her monthly social security benefit on marriage in concluding this loss counterbalanced the separate property award. The key consideration in affirming this award was the wife's necessitous condition and the husband's financial ability.
>
> FN8. We are likewise unpersuaded by Larson's reliance on case authority from Wisconsin, Minnesota, Alaska, and Mississippi. As discussed above, RCW 26.09.080 and *Konzen* control.

¶ 19 In *Griswold,* discussed above, the court relied on *Konzen* to hold that the trial court properly declined to find exceptional circumstances existed because it was not required to do so. The court concluded the trial court properly weighed all the facts to determine the distribution was just and equitable.

¶ 20 In *Williams,* the husband contended, among other issues, that the trial court improperly based the maintenance award on retirement benefits not then accessible and that included four years of his premarital military service. Division Three of this court affirmed, acknowledging that four years of premarital military benefits were, "strictly speaking, [the husband's] separate property." *Williams,* 84 Wash.App. at 269, 927 P.2d 679. Nevertheless, it held, "[T]he status of property as community or separate is not controlling.... [T]he ultimate question is whether, under the circumstances, the award is just." *Williams,* 84 Wash.App. at 269, 927 P.2d 679 (citing in part RCW 26.09.080).

¶ 21 In *Bulicek,* the husband contended that the trial court's pension formula improperly allowed the wife to share in his postseparation contributions to the plan. We observed, "The result is that [the wife] will in effect receive a portion of the postdissolution retirement contributions, which are [the husband's]***1233** separate property." *Bulicek,* 59 Wash.App. at 636, 800 P.2d 394. Affirming the trial court's pension formula, we reiterated the RCW 26.09.080 factors that the trial court is required to consider when making a just and equitable disposition of marital property. We stated:

> We acknowledge that [the husband's] retirement fund may receive proportionately higher future contributions based upon his career longevity and anticipated increases in annual pay. We further acknowledge that the formula utilized for division of future retirement benefits could result in [the wife's] sharing in those increases. However, far from condemning this apportionment method, we specifically approve it as a means of recognizing the community contribution to such increases.
>
> *Bulicek,* 59 Wash.App. at 638–39, 800 P.2d 394.

¶ 22 Larson also relies on *Stokes v. Polley,* 145 Wash.2d 341, 37 P.3d 1211 (2001), a quiet title and partition action involving the disputed meaning of a term in a dissolution decree. Unlike the present case, *Stokes* involved no dispute regarding an award of separate property to the non-owning spouse upon the dissolution of marriage. Nevertheless, Larson points to the court's passing comment that "Washington courts refrain from awarding separate property of one spouse to the other if a just and equitable division is possible without doing so." *Stokes,* 145 Wash.2d at 347, 37

P.3d 1211. Larson mistakenly characterizes this bare statement as a binding "limitation on the trial court's authority to invade separate property...." Br. of Appellant at 26. As discussed above, *Konzen* controls this issue. We are not free to ignore binding Washington Supreme Court precedent and we err when we disregard it. *See 1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wash.2d 566, 578, 146 P.3d 423 (2006) (Washington Supreme Court decisions are binding on all lower courts in the state); *State v. Wentz*, 149 Wash.2d 342, 346, 68 P.3d 282 (2003) (the Washington Supreme Court has the ultimate authority to say what a statute means).

[6] ¶ 23 We conclude the trial court acted well within its broad discretion by awarding Calhoun approximately $40 million of Larson's separate property. During a three-week trial, the court "listened closely to the testimony of the parties and ten additional witnesses," "reviewed the exhibits admitted into evidence as well as extensive legal briefing," and "heard closing arguments of counsel." Following trial, the trial judge issued 25 pages of carefully-drafted findings of fact and conclusions of law. It later issued 16 additional pages of amended findings and conclusions to reflect certain posttrial agreements. The record supports Calhoun's correct assertion that "[t]he trial court, an experienced trial judge, did not make a capricious decision." Resp't's Br. at 10.

¶ 24 The court recognized the unique (and possibly incomparable) nature of the case before it. It stated, "To first address the 'elephant in the ballroom', this is not a case like so many others where the concern is with making sure all in the family are housed, clothed and fed." It recognized that Larson "leaves the marriage in excellent fiscal and physical health," and that Calhoun's "fiscal and physical conditions are likewise strong." It also noted, "Both of these impressive people will go on to do well and to do good."

¶ 25 The court found it necessary to award a portion of Larson's separate estate to Calhoun "to achieve a just result." According to the trial court, the separate property award served two objectives. First, it recognized Calhoun's intangible contributions to the marital community. The court explained, "This was, after all, a long-term marriage in which the wife made a major contribution to all that the community accomplished, measured in terms of their children, their foster children, their impact in the broad community and their more narrow business interests." It found that the marital community benefited from Calhoun's engagement with the community at large:

> During her marriage, [Calhoun] was active as a parent, foster parent, overseer of major construction projects and the generous and committed benefactor of numerous charitable organizations. Both the community at large and the marital community benefitted greatly from her serving as, in ***1234** her phrase, the "approachable face" of the couple.

In other words, while Larson generated the couple's considerable wealth, Calhoun's intangible contributions served equally to benefit the marital community.

¶ 26 Second, the award helped ensure Calhoun's short-and long-term financial security. The court found that Calhoun held a college degree in English literature but was not "gainfully employed" during the marriage. Larson, in contrast, obtained significant employment and investment experience during the marriage. The court found he had a "keen business sense" and that, "[i]n recent years, he has stayed busy actively managing his extensive investments and philanthropic endeavors." As between the two, Larson was in a better position to acquire and manage future wealth. The court stated, "It is not that [Calhoun] leaves the marriage in need but the fact is she will leave the marriage in a less advantageous position than her husband." [FN9] The $40 million separate property award—consisting of Microsoft stock and cash—provided Calhoun with immediate liquidity.

Meanwhile, the $139 million community property award—consisting largely of real property and fine artwork—helped guarantee Calhoun's long-term financial health. The court found, "The division to be effectuated will provide the wife with substantial earning capacity, moderate liquidity and assets that can be liquidated prudently as time goes by."

> FN9. Although Larson assigns error to this finding, he does not contend that the finding is unsupported by substantial evidence.

¶ 27 The trial court provided ample, tenable justifications for its decision to award a portion of Larson's separate estate to Calhoun. Its decision fell well within "the range of acceptable choices, given the facts and the applicable legal standard." *Littlefield,* 133 Wash.2d at 47, 940 P.2d 1362. It properly characterized all separate and community property and made a just and equitable distribution of the marital property in accordance with RCW 26.09.080. Finding no abuse of discretion, we affirm the trial court's property distribution and its decree of dissolution.[FN10]

> FN10. Given our disposition in this case, we do not address Calhoun's invited error claim.

ATTORNEY FEES ON APPEAL

[7][8] ¶ 28 "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. "As an independent ground we may award attorney fees and costs based on intransigence of a party, demonstrated by litigious behavior, bringing excessive motions, or discovery abuses." *In re Marriage of Wallace,* 111 Wash.App. 697, 710, 45 P.3d 1131 (2002). "If intransigence is established, we need not consider the parties' resources." *Wallace,* 111 Wash.App. at 710, 45 P.3d 1131.

¶ 29 Calhoun contends she is "entitled to her fees on appeal due to Larson's intransigent conduct." [FN11] Resp't's Br. at 42. She does not argue that Larson was intransigent below.[FN12] Instead, she contends that Larson's appeal constitutes intransigence justifying a fee award. She explains:

> FN11. Calhoun states, "While RCW 26.09.140 provides that a party in a dissolution action may recover his or her attorney fees on appeal, the statute is not the basis for Calhoun's fee request. Rather, she is entitled to her fees on appeal due to Larson's intransigent conduct." Resp't's Br. at 42.
>
> FN12. The trial court did not find that Larson was intransigent. To the contrary, it described the parties as "more congenial ... than is typical." It also stated, "To the credit of both the parties and their counsel, many potentially thorny points of contention have been agreed upon."

> In this case, there was no need for this appeal....
>
> .... An experienced trial judge ruled in Larson's favor on the legal issue of the characterization of the marital property after a 3–plus week trial. The court then made a discretionary decision to allocate the spouses' property on a 65–35 basis *that favored Larson.* That should have been the end of this case. But Larson could not stand the fact that his ex-wife received that allocation of marital property and he ***1235** pursued this needless appeal, seeking to overturn established precedent.

Resp't's Br. at 42–43. She concludes, "Larson's appeal is motivated by self-interest and spite." Resp't's Br. at 43–44.

¶ 30 "Intransigence is the quality or state of being uncompromising." *In re Marriage of Schumacher,* 100 Wash.App. 208, 216, 997 P.2d

399 (2000); *see, e.g., In re Marriage of Foley,* 84 Wash.App. 839, 846, 930 P.2d 929 (1997) (appellant filed "numerous frivolous motions," refused to show up for his deposition, and refused to read correspondence from the opposing party's attorney); *see also Eide v. Eide,* 1 Wash.App. 440, 462 P.2d 562 (1969) (appellant tampered with exhibits). Finding no intransigent conduct by Larson, we deny Calhoun's fee request.[FN13]

> FN13. Calhoun does not contend that Larson filed a "frivolous appeal" within the meaning of RAP 18.9(a).

CONCLUSION

¶ 31 Because the record shows no abuse of trial court discretion, we affirm the decree of dissolution. Calhoun's attorney fees request is denied.

WE CONCUR: VERELLEN and SCHINDLER, JJ.

Wash.App. Div. 1,2013.
In re Marriage of Larson and Calhoun
313 P.3d 1228

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re Marriage of:	)	NO. 69833-8-I
	)	
CHRISTOPHER ROSS LARSON,	)	DIVISION ONE
	)	
Appellant,	)	
	)	
and	)	
	)	
JULIA LARSON CALHOUN,	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
Respondent.	)	
	)	

Appellant Christopher Larson moved on December 16, 2013, to reconsider the court's November 25, 2013 opinion. The court has determined that the motion should be denied. Therefore, it is

ORDERED that appellant's motion for reconsideration is denied.

DATED this 19th day of December 2013.

FOR THE PANEL: