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DIVISION III COURT OF APPEALS
STATE OF WASHINGTON

No. 34064-3

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

PETITION FOR REVIEW BY THE WASHINGTON STATE SUPREME COURT

In Re:

ELLEN DONEEN, PETITIONER

V.

JAMES DONEEN, RESPONDENT

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Table of Contents

Table of Contents.....i

Citations to Authorities i

I. Case Information 1

II. Issues Presented.....1

III. Facts.....2

IV. Legal Argument for Acceptance of Review 10

A. This Appeals Court decision appears to conflict with this Court's decisions regarding the application of the *Rockwell* case, and RCW 26.09.080.....10

B. Allowing Mr. Doneen's reconsideration motion to be argued contradicts case law on the application of CR 25 & 59, and needs this court's review and/or clarification.....16

V. Conclusion.....19

Citations to Authorities

Authorities **Page**

WA Supreme Court

In re Gordon v. Hillman, 109 Wash. 223, 186 P. 651 (1919).....17

In re Marriage of Konzen, 103 Wn.2d 470, 693 P.2d 97 (1985).....13

Merkel v. Merkel, 39 Wn.2d 102, 234 P.2d 857 (1951).....12

Sullivan v. Sullivan, 52 Wash. 160, 100 P. 321 (1909).....10

Washington Appeals Court

Barker v. Mora, at 764 P.2d 1014, 52 Wn.App. 825
(Wash.App. Div. 1 1988).....17

In re Griswold, 112 Wash.App. at 339,
48 P.3d 1018 (citing In re Marriage of Kraft,
119 Wash.2d 438, 450, 832 P.2d 871 (1992)).....14

In re Marriage of Pea, 17 Wn.App. 728,
566 P.2d 212 (1977).....14

In re Marriage of Tahat, 334 P.3d 1131, 182 Wn.App. 655
(Wash.App. Div. 3 2014).....19

In re Marriage of Larson, 178 Wn.App. 133,
313 P.3d 1228 (2013).....12

In re: Rockwell, 141 Wn.App. 235,
170 P.3d 572 (2007).....1, 4, 9 – 16, 21

Washington Statutes

RCW 26.09.080.....10,13

Court Rules

CR 25 .....16, 17, 21

CR 59.....16, 18, 19

I. CASE INFORMATION

1. Parties: The ex-wife and the person filing this Petition is Ellen Doneen; her ex-husband and the original Respondent in the dissolution action in Whitman County Superior Court was James Doneen, however, his estate is now the Appellant Respondent.
2. Attorneys: Mr. Doneen's estate is represented by Matthew Purcell of Richland, WA; and Ms. Doneen is represented by Gary R Stenzel, WSBA #16974.
3. Superior Court Information: Doneen v. Doneen No. 14-3-00042-3; Decree of Dissolution of Marriage entered by Judge Dixon of Adams County, visiting judge.
4. Appellate decision filed February 28, 2017, cause no. 34064-3, Division III; No Motion for reconsideration was filed; Due date for filing this Petition for Review - March 30th, 2017.

II. ISSUES PRESENTED

This Petition for Review deals with the following issues:

1. Should the trial and Appeals courts have utilized the law from the *Rockwell* case, cited herein, indicating that in a long-term marriage, the court should focus on insuring that both parties awards will insure that they are both in similar economic situations?
2. Does this case erode the law affirmed in the *Rockwell* case as to the economic condition of the parties at the time of the decree?

3. Did the trial court and Appeals court place greater importance on insuring that the husband's separate property farm land and accounts remained his separate property than trying to ensure that the wife had a similar economic future as the husband?
4. Was it error for both courts to allow a reconsideration motion be heard even though the husband died before it was filed and the attorney for the husband had no authority to file said motion since he no longer had a client to authorize the same?

III. FACTS

The Doreen's were an elderly couple who had been married since July 1969, for 46 years. RP 15. By anyone's standards this was an extremely long term marriage. Mr. and Mrs. Doneen were farmer who received money from various sources related to the use and development of some farm land that Mr. Doneen inherited. RP 23 lines 5-10, see also e.g. RP 82-84, 269-270 & 281. This land was in Whitman County and totaled 235.41 acres of prime Whitman County farm land. RP 187-189. Ms. Doneen worked with Mr. Doneen for the farm and also worked for JC Penny's in Spokane. (RP 17-19, see also RP 73-74, 86-89 for example). Mr. and Mrs. Doneen paid taxes on these 235 acres throughout the years, using what had to be community

funds. RP 322, 326, 331-333. The Doneen's also bought and/or serviced farm equipment, and other farm related items during their marriage. RP 301.

The "farm land" was a primary issue in the case. It also came with a home that the parties used, fixed up and maintained for many years. RP 18-19, 46 & 98-99. The court valued the family farm land at $588,525 CP 068-070. They also had other property but the land was the most valuable. Regarding the farm land, it was clear that the parties intended to continue to use that land for their retirement, because they only had small social security allowances, verifying why they kept it for so long. See RP 306-307. Additionally, there was never any evidence in terms of a will or other document presented in the matter that Mr. Doneen wanted to save the land for his grandchildren to inherit, other than his one answer to his attorneys at the time of trial, and his attorney. RP 305 – 306 & RP generally. It was also uncontested that Ms. Doneen always supported Mr. Doneen and his efforts to work the farm and use that as his employment during the marriage, even his attorney verified this during argument. RP 301 -306. In contrast, Ms. Doneen contributed for many years to the community as a JC Penny's salesperson, contributing that income for the family. RP 17 - 89. It was also clear that Mr. and Mrs. Doneen did not have a lot of extra income to use and if it was not

for the CRP payment, they may have had to use savings. See Mr. Doneen's attorney's argument who indicated that they planned on using the farm land to subsidize their retirement along with their savings. See RP 297 - 306.

It was also clear from the testimony that the farm land house was their last primary, which they used for free. RP 72 - 76. At trial the wife further verified that they not only kept that residence up, they actually improved it with many items and changes. RP 72 – 76.

As was indicated there were several accounts, most in both their names; they were worth approximately $388,000. As for the farm land, it was valued by the court at about $2,500.00 an acre, totaling almost $600,000, and was very marketable. RP 272–277; CP 068-070.

At argument, the wife's counsel cited the case of *In re: Rockwell* at 141 Wn.App. 235, 170 P.3d 572 (2007), arguing for a balanced distribution of all property because of the obvious long term relationship, judge took the matter under advisement and filed a written decision. CP 068-070. The judge's ruling was in the form of a somewhat brief letter with just values, and who would receive the items, and only a transfer of $225,000 in "separate property" funds to Ms. Doneen based on equity. See CP 068-070. The first set of final papers were entered on June 2nd, 2015. CP 076-079. Unfortunately, Mr.

Doneen died of a heart attack one week later on June 9th, 2015. CP 091-096.

Before knowing of Mr. Doneen's death, Mrs. Doneen had signed and sent a motion for reconsideration to the court that was about the issues of maintenance and the need for to make a larger distribution of their property to the wife to balance her economic situation with her former husband's situation. This was filed on the date of June 11, 2015. CP 080-084. Mr. Doneen had signed a declaration for his own motion for reconsideration before his death and his attorney, regardless of his death, and likely knowing that his client had passed, filed this posthumous motion as well on the date of June 11, 2015. CP 085. However, he did nothing to obtain an emergency CR 25 order for a substitution of the estate for his former client. This important court rule was completely ignored by him until later in the proceedings when he apparently relied upon the wife's attorney who filed a CR 25 motion for his client's motion.

After seeing that Mr. Doneen's posthumous CR 59 motion was going to be argued, Ms. Doneen, filed a motion and memorandum of law for an order striking her deceased husband's reconsideration. See CP 091-098. Judge Dixon later indicated that he would hear both motions, and did not deal with the issue of jurisdiction for filing their

reconsideration motion and eventually heard the competing motions, denying Ms. Doneen's motion for reconsideration and partially granting Mr. Doneen's motion. CR 116-124. A new Decree was entered based on the Reconsideration order. CP 116-124. This final distribution was as follows:

Property to be awarded to Ms. Doneen:

1. 2006 Mazda - $3,325;
2. White truck - $1,200;
3. Dodge Lancer - $2,000;
4. US Bank account - $1,697;
5. Amer West account - $ 2,420;
6. MFS account - $4,034;
7. STCU account - $2,111;
8. Amer Equity account 021- $81,250;
9. STCU savings - $135;
10. Any pension or social security she earned;
11. Amer Equity account 976 - $225,000 of that account;
12. Loan to their daughter (unspecified amount)

Total amount = $323,172

Property to be awarded to Mr. Doneen:

1. Tractor - $2,000;
2. 1970 International - $500;
3. GMC pickup - $1,500;
4. 1987 Plymouth - $500;
5. Horse trailer - $500;
6. Bailer - $200;
7. Shop tools & welder - $5,800;
8. Compressor/drill press - $250;
9. Boat - $24,000;
10. Thunderbird – unknown value;
11. Any pension or social security he earned;

12. All of US Bank accounts 4069 & 2477 to date of trial (no value determined);
13. Residence & farm land located in Whitman County, Washington (residence at $50,000, Shop at $25,000, acreage at $2,500 per acre);
14. Disc, nominal value;
15. Ameriprise account - $21,755;
16. First Invest. account - $6,299;
17. Guggenheim account - $14,928;
18. Wels Fargo account - $10,017;
19. Amer Eq account 976 - $245,578 except $225,000 to wife (leaving $20,578);
20. Amer Eq account 972 - $72,694;
21. Amer Eq account 489 - any remaining balance;
22. Amer Eq account 682 - $7.964;
23. Amer Eq account 483 - $7,240;
24. Amer Eq account 642 - $2,353;
25. Amer Eq account 029 - $7,580.

Sub-Total Amt = $281,658 w/o land

Land value = $588,525

Final Total = **$870,183** *(Id.)*

This final distribution shows that the parties had 1.2 million dollars in total property, with Ms. Doneen receiving only 27% distribution to a 73% distribution for Mr. Doneen. The percentages meant little compared to the type of property received. In addition, and of significance was the fact that Ms. Doneen received no property that she could earn any extra money except interest, most important was the fact that she no longer had a place to live because Mr. Doneen received the farm house they had lived in so long, and the prime wheat land that

could produce many times its value over the years if need; not to mention the CRP funds that simply flowed to the owner. Ms. Doneen was left with a "Sophie' choice", she could either choose to be an elderly divorced woman with $300,000 in the bank and no home, or buy an average house with her $300,000, and have no additional money to live on except a small social security check, and an even smaller JC Penny's pension payment.[1] RP 297-306. In contrast, Mr. Doneen had his free house back with its improvements, all his farm land to either work or provide annual CRP money from, or both; and all his recreational items and still had $172,000 in the bank to use however he wanted. There was a stark difference between the parties future financial situation, given their standard of living (free housing), and the fact that she was simply significantly left fewer options.

The Decree was appealed to Division III and in a published opinion the court affirmed Judge Dixon's final orders. That ruling indicated that it was a proper application of the law to allow Mr. Doneen to be awarded most of his "separate property", including his free farm house, and Ms. Doneen would have to be satisfied, after 46

[1] The wife's request for maintenance was also not ordered. See CP 116-124. However, it is obvious that even if it was awarded it would have stopped due to Mr. Doneen's untimely death a week after the decree was entered. The judge also did not agree with the Petitioner on the CR 25 issues, and the Respondent's "client-less" reconsideration motion was partially granted, reducing the wife's portion of property even further. Id

years, no income producing property, and again, just her smaller social security and pension.

The Appeals Court seemed to indicate that the *Rockwell,* case did not really apply to this case nor stand for the proposition that the court had a duty to equalize the parties' financial circumstances by using separate property to do so. Further, that it was proper to leave the farm land and home to Mr. Doneen for the grandchildren; and that such a factor is appropriate in awarding separate property to one party. They also seemed to not deal with the fact that the parties used the farm land to help pay for their expenses. Neither did the judge even try to fashion a remedy to allow the husband to keep the farm land but give the wife some of the CRP moneys as a property division like a trust for her lifetime (as an example only).

The Appeals court's final ruling seemed unfair on its face and did not even give lip service to the Rockwell mandates to insure financial equality for both long term spouses. It almost seemed Ms. Doneen was treated like a "sojourner" in Mr. Doneen's life, instead of someone who gave him almost 59 years of her life. Further it was also very sad that she was also treated as possibly selfish by Mr. Doneen's attorney in her argument because she did not seemed to agree with the notion that the grandchildren should get everything, and she should do without to

make that happen. This, among other reasons was why this matter was appealed, and now is requesting a review by the Supreme Court. It not only speaks to important public policies dealing with the elderly divorced parties and their situation in life before they pass, it also deals with potential unfortunate gender and generational issues, not to mention the clear challenge to the *Rockwell* case's holdings.

IV. ARGUMENT FOR CONSIDERATION OF REVIEW

A. This Appeals Court decision appears to conflict with this Court's decisions regarding the application of the *Rockwell* case, and RCW 26.09.080.

The *Rockwell* case (*supra*) initially outlined what to do in a dissolution between a divorcing couple who had been in a long-term marriage regarding the parties' future financial wellbeing. *Rockwell* indicated generally that when confronted with such facts, as the parties were married over 25 years; that the court should attempt to equalize their financial living situation at the time of their decree. That court specifically said,

> In a long term [sic] 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. *Washington Family Law Deskbook*, § 32.3(3) at 17 (2d. ed. 2000); see also Sullivan v. Sullivan, 52 Wash. 160, 164, 100 P. 321 (1909) (finding that for a marriage lasting over 25 years, "after [which] a husband and wife have toiled on together for upwards of a

quarter of a century in accumulating property . . . the ultimate duty of the court is to make a fair and equitable division under all the circumstances"). The longer the marriage, the more likely a court will make a disproportionate distribution of the community property. *In re Marriage of Rockwell*, p.243, emphasis added.

In summary, pursuant to the *Rockwell* case, courts with dissolutions of lengthy marriages should make an effort to reduce any negative financial impact on the parties by using its discretion to order whatever property distribution that will help insure equality in their financial well-being.

In this case, there is no doubt that the parties counted on the farm land to supplement their incomes when they were married. Mr. Doneens monthly income alone was almost twice what Ms. Doneen received, including all their sources (CRP, social security, and a small pension from JC Pennys). He had $1,900 a month compared to her $1,100 a month. The parties therefore started off unequal if looked at individually, even before this case was filed. Therefore, with that in mind, it was important that the trial court understand that if nothing more was done than just split the community property, that Ms. Doneen would be put in a lessor financial situation with the divorce than Mr. Doneen. And given the fact that the parties have been married almost twice the number of years that parties were in the *Rockwell* case, the

judge needed to look long and hard at insuring that Ms. Doneen could meet her financial needs adequately before the final division of property was made.

What was and is difficult to understand in the Appeals court ruling is that they also agreed with and cited the *Rockwell* case several times, reiterating the importance of making sure that the parties could meet their financial needs at the time of the divorce. For example, the appeals court also cited cases in their opinion stating that the court had the right to use separate property to equalize the other party's financial circumstances if necessary. Although they did say that the invasion of separate property was only to be used in "rare circumstances". At one point, in their opinion the Appellate court even authored the concept that when trying to equalize financial circumstances it is appropriate to disregard the character of the property. The following quote from their ruling seems to show that this concept was primarily their idea, instead of being primarily authored by the Appellant, they said:

> All property, community and separate, is before the court for distribution. In re Marriage of Larson, 178 Wn.App. 133, 137, 313 P.3d 1228 (2013). Prior to 1985, Washington courts held that the trial court should award a spouse the separate property of the other spouse only in "exceptional circumstances." E.g., Merkel v. Merkel, 39 Wn.2d 102, 115, 234 P.2d 857 (1951); 2 Wash. State Bar Ass'N, Family Law Deskbook, § 32.3(2) at 32-16 (2d. ed. 2000 & Supp. 2012). Our Supreme Court specifically discarded this rule in 1985, stating:

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 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 relevant factor which must be considered, but it is not controlling. Citing In re Marriage of Konzen, 103 Wn.2d 470, 478, 693 P.2d 97 (1985). (Emphasis added)

Instead of analyzing the trial court's ruling from this point of view, which was consistent with *Rockwell*, they upheld a completely opposite decision, putting Ms. Doneen in a drastically different financial situation than she enjoyed during the marriage, and one that does not even come close to satisfying the standards for a 46-year marriage, making the character of the property of primary importance over Ms. Doneen's financial situation. Especially when there were many ways to accomplish a more equal economic division. They also completely disregarded the fact that under *Rockwell* this judge's decision was clearly a manifest abuse of discretion.

In *Rockwell* at 242 & 243 the court stated the following:

"The trial court's distribution of property in a dissolution action is guided by statute, which requires it to consider multiple factors in reaching an equitable conclusion. These factors include (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 division of the property is to become effective. RCW 26.09.080. In weighing these factors, the court must make a "just and equitable" distribution of the marital property. RCW 26.09.080. In doing so, the trial court has broad

discretion in distributing the marital property, and its decision will be reversed only if there is a manifest abuse of discretion. In re Griswold, 112 Wash.App. at 339, 48 P.3d 1018 (citing In re Marriage of Kraft, 119 Wash.2d 438, 450, 832 P.2d 871 (1992)). A manifest abuse of discretion occurs when the discretion was exercised on untenable grounds. In re Marriage of Muhammad, 153 Wash.2d 795, 803, 108 P.3d 779 (2005). If the decree results in a patent disparity in the parties' economic circumstances, a manifest abuse of discretion has occurred. In re Marriage of Pea, 17 Wn.App. 728, 731, 566 P.2d 212 (1977). (Emphasis added)

Again, this distribution resulted in a patent disparity in the parties economic circumstances. One left the marriage with almost 1 million dollars, which included valuable money making property, and the other left the marriage with cash that would soon be used up just to find a home. This is the exact case the *Rockwell* court warned against. And is the kind of case that cries out for the use of separate property creatively to assist the disadvantaged elderly spouse make ends meet at this time in her life, rather than help the up and coming generation.

It also needs to be said that the Appeals Court mistakenly indicateds that Ms. Doneen's argument that in a long-term marital dissolution the court should ignore the character of the separate nature of the property and divide everything equally. They indicated that, "*Ellen argues the trial court abused its discretion by erring as a matter of law when it distributed the assets unequally in favor of James. Relying on Rockwell, 141 Wn.App. 235, she contends the trial court was required to put her*

and James in roughly equal financial positions-regardless of the property's character-given the length of their marriage." (Emphasis added). This was absolutely not true. Ms. Doneen's did not say that the character of the property should be disregarded; what she said was that *Rockwell* said that equalizing the parties' financial situation upon divorce is more important than the character of the property, as summarized in her first argument position, as follows: "The case of *In re Marriage of Rockwell* and others stand for the proposition that any marriage over 25 years is a long term marriage and that the trial judge has an 'ultimate duty' to put both parties in roughly equal financial positions for the rest of their lives in their decision." Section III.A. p. 5 Appellant's Opening Brief.[2]

Ms. Doneen's counsel was fully aware that RCW 26.09.080 has as one of its factors for the distribution of property that the court should consider the separate or community nature of the property, and would never have argued that this factor should be completely ignored. What was argued by the Appellant was that all the parties "marital" property is in front of the court for consideration and possible award, and did not say to disregarding the statutory factors, but that it was not as important

[2] It should be noted that there was also no oral argument, therefore, any position that Ms. Doneen took in this appeal was in written form, therefore, it is thus easy to see what her position was in this matter.

as making sure that the parties were able to meet their economic needs at the time of the decree. *Id.* It is also ironic that the Appeals court ruling itself also used this notion in their analysis, therefore, it is hard to see why they said what they said about Ms. Doneen's position in this case.

This decision is in direct contravention of the *Rockwell* case warnings, and its use by other courts in this state. This case basically changed the application of Rockwell, putting separate property first, rather than an equal economic condition for both parties Should this published opinion stand, it will cause a substantial rift between the appeals court divisions that cannot be good for both courts and practitioners. It is the Appellant's position that this needs to be resolved by this court as both a matter of public policy and to provide consistency in rulings across the state.

B. Allowing Mr. Doneen's reconsideration motion to be argued contradicts case law on the application of CR 25 & 59, and needs this court's review and/or clarification.

Division III of the Appeals Court upheld the Judge's allowance of Mr. Doneen's former attorney's filing of a Motion for Reconsideration, even though when it was filed Mr. Gauper had no client to tell him to file the same. This was an error in the application of the court rules, specifically CR 59, and CR 25.

When a party dies during a case, their attorney is left without a client to represent. The case of *Barker v. Mora,* at 764 P.2d 1014, 52 Wn.App. 825 (Wash.App. Div. 1 1988) makes this abundantly clear. The court rule CR 25 deals with what to do when a party dies during a case and is very clear as to what needs to be done to keep the case alive. Section 1 of this court rule indicates that someone on behalf of the decease's estate can file a motion to have the estate substituted for the deceased so that any motions can be filed. This was not done in this case and so the Respondent's trial attorney was without any authority to file anything on behalf of the deceased. *Id*; and see *e.g. In re Gordon v. Hillman,* 109 Wash. 223, 232-33, 186 P. 651 (1919).

In *Barker v. Mora,* 764 P.2d 1014, 52 Wn.App. 825 (Wash.App. Div. 1 1988) which said, "[at] common law, all actions pending abate upon the death of a necessary party. If the cause of action was one that did not survive, death finally ended the action; but if a cause of action was one that did survive, a new action by or against the personal representative of the deceased party was necessary to prosecute the remedy," referring to CR25. *Id.* (emphasis added).

Since no CR25 order substituting the estate for Mr. Doneen in this case was entered on Monday June 11, 2016, there was no party to file the reconsideration motion that day, therefore, it could not be

considered timely under the rules and, since the entire case abated upon his death, and the final decree was entered after his death, the amended decree was of no affect.

CR 59 requires that a motion for reconsideration be filed on or before 10 days have expired since the date of entry of the final orders. Section (b) states:

> (b) **Time for Motion; Contents of Motion**. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

The filing of a Motion for Reconsideration is to be done within 10 days after the final orders are entered. Since Mr. Doneen no longer was alive, no one but his estate could file such a motion pursuant to CR 25. As indicated earlier, this required a order to be entered allowing the substitution of the estate in, within that time frame. Such a motion likely would not have been objected to even if it was done by phone long distance. (See CP records generally) However, this was not done in a timely manner; therefore, the Respondent's trial attorney was without authority to unilaterally file this reconsideration motion on his own.

Case law on Rule 59 motions is very specific and if the proper procedure is not followed there is no basis for the motion, since strict compliance is required. For example, filing a Motion for Reconsideration based simply on the date of a memorandum opinion early does not trigger the 10 days' requirement. *See e.g. In re Marriage of Tahat,* 334 P.3d 1131, 182 Wn.App. 655 (Wash.App. Div. 3 2014). The ten-day requirement is mandatory and if the motion is not filed properly within that time limit, there is no jurisdiction to hear the matter. *Id.*

The next question is whether the Respondent's trial attorney, having a signed declaration by his former client, gave his attorney the right to file the motion on the 11th. The answer to this question is no, since on the 11th, the attorney had no client to say he still wanted him to file this Therefore, this motion for reconsideration was ineffective to accomplish what they had originally intended, and should never have been allowed by the court. Since the entire reconsideration motion granted only what Mr. Doneen's trial attorney argued in their motion for reconsideration, all those decree modifications should be stricken and not be ordered.

V. Conclusion

The trial judge ordered basically a 25/75% dissolution for these parties, with the wife receiving a lot of the community property, but only some cash from what was found to be the separate property investments of the husband. This would be a normal distribution and maybe even a good result in a marriage that was not long term in nature. However, this was a 46-year marriage and the wife had depended on the use of the husband's free farm home the majority of her life, as well as using CRP moneys from $550,000 worth of prime wheat land. This distribution left the parties in a substantially different financial condition at the time of the decree. Leaving Mrs, Doneen with no way to supplement her income, and only had enough cash to buy a house, she was looking at a life of scraping by, in contrast to her husband who had a fee house now, monthly income from his land, more monthly social security, and the capability to earn more money from his land if needed.

The trial judge did not follow the law set out in the *Rockwell* case which requires a look at the financial condition of the parties at the time of the decree; instead he followed a more "probate" type distribution awarding all the land to Mr. Doneen, his farm home they had fixed up and maintained through the years and more money coming in monthly than his exwife. The Appeals Court upheld this ruling,

basically changing the law in the *Rockwell* case, saying only that that case did not fit this scenario, when in fact it did.

Finally, although the husband died one week after the decree was entered, his attorney without a client to represent, filed a reconsideration without first requesting a CR 25 substitution. This was granted and allowed the estate to have even more property from the wife's side of the distribution making her even less capable of meeting her financial needs after the divorce, and it should not have happened. The Supreme Court should overturn the reconsideration order as the court had no jurisdiction to rule on the deceased husband's attorney's motion for reconsideration.

Respectfully submitted this 30th day of March 2017 by,

Gary R Stenzel
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Appendix

FILED
FEBRUARY 28, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In re Marriage of:	)	No. 34064-3-III
	)	
ELLEN DONEEN,	)	
	)	
Appellant,	)	
	)	
and	)	PUBLISHED OPINION
	)	
JAMES DONEEN,	)	
	)	
Respondent.	)	

LAWRENCE-BERREY, A.C.J. — Ellen Doneen appeals the trial court's property distribution in the dissolution of her 45-year marriage to James Doneen. She primarily argues the trial court erred as a matter of law when it failed to distribute all property, regardless of its character, roughly equally. We take this opportunity to clarify the law: In reaching a just and equitable distribution of property under RCW 26.09.080, trial courts must consider multiple factors, including four statutory factors. Although the duration of the marriage or domestic partnership is one statutory factor, this factor may not be considered so heavily so as to exclude the other statutory factors. Because the trial court

properly considered multiple factors, including the four statutory factors, we affirm the trial court's distribution of the parties' property.

FACTS

James and Ellen Doneen married in July 1969. Around this time, the couple moved into a farmhouse in Whitman County that James's grandparents had homesteaded in the 1800s. James eventually inherited the house and land from his father, mother, and aunt. He inherited the property free and clear, and the couple never paid rent or a mortgage. Over the years, the couple completed various remodeling and maintenance projects on the home.

James worked as a farm hand and Ellen worked at J.C. Penney's. They each made roughly $20,000 per year, and their combined annual income was typically between $40,000 and $44,000. They lived paycheck to paycheck and did not have extra money to save or invest. They had no debts. James later inherited several hundred thousand dollars in investment accounts from his parents and his aunt.

In April 2014, Ellen petitioned to dissolve the marriage. The two separated in September 2014 after 45 years of marriage.

At the time they separated, they were both 72 years old. Ellen's monthly income was roughly $1,100 per month, which was from social security and a J.C. Penney's

pension. James's income was roughly $1,900, which was from social security and payments from a federal crop reclamation project.

Ellen's health was good, except for high blood pressure and blood clots in her leg, which prevented her from working. James was in remission from cancer and had suffered three heart attacks, but believed he was able to work.

At trial, a primary issue was how to characterize the various property, including the investment accounts and the real property. James testified the farm had been in his family for 150 years. He testified that when he died he wanted to leave the farm and land to his grandsons, who wanted to become farmers.

Ellen called the chief appraiser for Whitman County to opine on the land's value. The appraiser testified the land was worth between $2,000 and $3,000 per acre.

In closing, Ellen argued that under *In re Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007), the trial court was required to place the parties in roughly equal financial positions for the rest of their lives, regardless of the character of the property. James asked the court to distribute nearly all of the community assets to Ellen and, if necessary, also award her a portion of his separate property. After both parties' closing arguments, the trial court took the matter under advisement and stated it would issue a letter opinion.

In its letter opinion, the trial court found that most of the investment accounts as well as all of the real property—which included the land, the house, and the shop—were James's separate property because he had inherited them from his family. The court found the real property was worth $600,000 and the investment accounts were collectively worth $425,978, for a total of $1,025,978. Of James's separate property, the court awarded James $800,978 and Ellen $225,000.

The trial court found the community marital property was worth $151,143.00. Of the community property, the court awarded Ellen $106,532.50 and James $44,610.50. Taking the separate and community property together, the court awarded James a grand total of $845,588.50 and Ellen a grand total of $331,532.50.

The trial court asked the parties to prepare the findings of fact and conclusions of law. The findings, conclusions, and the decree of dissolution were entered on June 2, 2015.

Several days later, James suffered a heart attack and died.

On June 11, Ellen moved for reconsideration. She again argued *Rockwell*, 141 Wn. App. 235 required the court to equalize the financial circumstances of the parties because they had a long-term marriage, regardless of the character of the property. She argued the court failed to do this, as it had awarded James substantially more property.

That same day, James's attorney also moved for reconsideration.[1] James's attorney argued the trial court should have awarded the tractor to James. He also argued the court mischaracterized the Mitsubishi Lancer, the Formula boat, and two U.S. Bank accounts as community property. He argued James had bought the car, bought the boat, and funded the U.S. Bank accounts with funds from one of his separate annuities, and therefore they should have been characterized as James's separate property. James's attorney attached a declaration in support of the motion for reconsideration, which James had signed a few days before he died.

Ellen later moved to strike James's motion for reconsideration. She argued James's attorney did not have authority to move for reconsideration after James's death, and the estate was not substituted as a party before the 10-day deadline for filing a motion for reconsideration had expired. Ellen moved to substitute the estate as a party under CR 25, acknowledging that she needed a party to oppose her motion for reconsideration. The personal representative of James's estate also moved to substitute himself as a party.

The court held a telephonic hearing to discuss the status of the case in light of James's death. The court stated it would like to achieve substantial justice and reach the merits of the parties' reconsideration motions. The court instructed James's attorney to

[1] There is no evidence James's attorney knew about James's death before he filed

file another motion for reconsideration after it substituted the estate as a party. The court then entered an order substituting the personal representative of James's estate as a party.

Two months later, the court held a hearing on both parties' reconsideration motions. At the beginning of the hearing, the trial court stated,

> Gentlemen,—each of you has on a motion for reconsideration. And as I've previously told you, I'm of a mind to consider both motions, and waive any requirement that they—should have been filed within a certain time, because of the extraordinary circumstances of the respondent's death.

Report of Proceedings at 318.

The court then heard Ellen's motion for reconsideration. Ellen asked the court to explain why it distributed roughly 75 percent of the total property to James and 25 percent to her. The court explained that the majority of the property was James's separate property, and that it had relied on the presumption that courts award separate property to its owner except when necessary to avoid a serious inequity to the other party. The court also agreed that James should keep the real property so he could leave it to his side of the family. The trial court further explained that it did not want to totally invade James's separate property, but wanted to invade it enough to make the distribution slightly more equitable.

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the motion for reconsideration.

The court then heard James's motion for reconsideration. The court agreed it mistakenly characterized the Mitsubishi Lancer and Formula boat as community property and stated it would recharacterize them as James's separate property.

The court entered new findings, conclusions, and a decree of dissolution in light of the parties' motions for reconsideration. The court made several changes to its previous property distribution. The court recharacterized the Formula boat and U.S. Bank accounts as James's separate property and awarded them to James's estate. The court also recharacterized the Mitsubishi Lancer as James's separate property, but nevertheless awarded it to Ellen. The court awarded the tractor to James's estate.

Following reconsideration, the court's final property distribution was as follows: the community marital property was worth $107,422. Of this sum, the court awarded Ellen $96,172 and James $11,250—roughly a 90 percent/10 percent split in favor of Ellen. James's separate property was worth $1,023,408. Of this sum, the court awarded Ellen $228,000 and James $795,408—roughly a 78 percent/22 percent split in favor of James.[2] The court found that Ellen had no separate real or personal property. In sum,

[2] In its initial order, the court found the U.S. Bank accounts were worth $16,721 and the American Equity 489 account was worth $29,570. However, on reconsideration, the court did not make findings as to the value of any of these assets. The lack of values for these assets accounts for the difference in the overall property value between the initial orders and the orders on reconsideration.

taking the separate and community property together, the court awarded James a grand total of $806,658 and Ellen a grand total of $324,172—roughly a 71 percent/29 percent split in favor of James.

Ellen appeals.

ANALYSIS

A. PROPERTY DISTRIBUTION

Ellen argues the trial court abused its discretion by erring as a matter of law when it distributed the assets unequally in favor of James. Relying on *Rockwell*, 141 Wn. App. 235, she contends the trial court was required to put her and James in roughly equal financial positions—regardless of the property's character—given the length of their marriage. Ellen does not challenge any of the trial court's characterizations of the property as separate or community.

RCW 26.09.080 requires a trial court dividing property in a dissolution proceeding to make a "just and equitable" distribution of property. This statute requires the trial court to consider multiple factors in reaching a "just and equitable" distribution. These factors include (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 the parties at the time of the property division. RCW 26.09.080.

All property, community and separate, is before the court for distribution. *In re Marriage of Larson*, 178 Wn. App. 133, 137, 313 P.3d 1228 (2013). Prior to 1985, Washington courts held that the trial court should award a spouse the separate property of the other spouse only in "exceptional circumstances." *E.g., Merkel v. Merkel*, 39 Wn.2d 102, 115, 234 P.2d 857 (1951); 2 WASH. STATE BAR ASS'N, FAMILY LAW DESKBOOK, § 32.3(2) at 32-16 (2d. ed. 2000 & Supp. 2012). Our Supreme Court specifically discarded this rule in 1985, stating:

> 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 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 relevant factor which must be considered, but it is not controlling.

In re Marriage of Konzen, 103 Wn.2d 470, 478, 693 P.2d 97 (1985).

The trial court has broad discretion to determine what is just and equitable based on the circumstances of each case. *Rockwell*, 141 Wn. App. at 242. Because the trial court is in the best position to determine what is fair, this court will reverse its decision only if there has been a manifest abuse of discretion. *Larson*, 178 Wn. App. at 138. This discretion applies to determinations regarding division of property. *In re Marriage of Wright*, 179 Wn. App. 257, 262, 319 P.3d 45 (2013).

Although the property division must be "just and equitable," it does not need to be equal. *Larson*, 178 Wn. App. at 138; *Rockwell*, 141 Wn. App. at 243. Nor does it need to be mathematically precise. *Larson*, 178 Wn. App. at 138. Rather, it simply needs to be fair, which the trial court attains by considering all circumstances of the marriage and by exercising its discretion—not by utilizing inflexible rules. *Id.*

In arguing that the trial court abused its discretion by distributing the assets unequally in favor of James, Ellen relies chiefly on the following quotation from *Rockwell*: "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*, 141 Wn. App. at 243.

At issue in *Rockwell* was the trial court's distribution of the wife's pension. *Rockwell*, 141 Wn. App. at 254. The trial court found that 92 percent of the pension was community property and 8 percent was the wife's separate property. *Id.* at 241. Of the community property portion of the pension, the trial court awarded 60 percent to the wife and 40 percent to the husband. *Id.* The trial court did this because the husband was younger, in good health, and employable at a substantial wage, whereas the wife was retired, older, and in poor health. *Id.* at 249, 254. The trial court awarded the wife her separate property portion of the pension. *Id.* at 241.

The husband appealed, and the *Rockwell* court affirmed the trial court's 60 percent/40 percent division of the community property. *Id.* at 249, 255. The court reasoned that trial courts have broad discretion in determining what will be a fair and equitable distribution. *Id.* at 255. The court further reasoned that "where one spouse is older, semiretired, 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." *Id.* at 249.

Ellen's reliance on *Rockwell* is misplaced. The *Rockwell* court affirmed the trial court; its holding was permissive in nature, not mandatory. *See also Sullivan v. Sullivan*, 52 Wash. 160, 162-64, 100 P. 321 (1909) (affirming trial court's award of $92,500 to wife and $129,000 to husband). *Rockwell* does not support Ellen's contention that trial courts are *required* to divide all the property equally in a long-term marriage and ignore the property's character.

In making this argument, Ellen focuses almost entirely on the third factor in RCW 26.09.080: the duration of the marriage. Her argument suggests that the trial court should have relied on this factor to the exclusion of the others. But the *Konzen* court explicitly rejected any approach that focused on one factor and excluded all others.

Konzen, 103 Wn.2d at 478. Ellen ignores that RCW 26.09.080 also directs trial courts to consider the nature and extent of the separate and community property.

Here, the trial court awarded Ellen $96,172 of the community property, which was about 90 percent. The trial court also gave her $228,000 of James's separate property—roughly 22 percent of it—explaining that it did not want to totally invade James's separate property, but wanted to invade it enough to make the distribution slightly more equitable.[3] In doing so, the trial court declined to utilize an inflexible rule, but rather properly considered all the circumstances of the marriage and exercised its discretion to attain a result in accordance with RCW 26.09.080.

We conclude the trial court did not abuse its discretion by distributing the property unequally in favor of James.

B. POSTDECREE PROCEDURAL ISSUES

Ellen argues the trial court erred when it considered James's motion for reconsideration. She argues that James's attorney did not have authority to move for

[3] Ellen argues in her reply that the trial court erred in awarding the farmland to James because there was no evidence at trial "that there was a will or other future transfer of the Doneen land to [James's] grandchildren." Reply Br. of Appellant at 3. It is unclear how this is relevant. It is undisputed the land was James's separate property, and the trial court awarded it to James because it had been in his family for generations and he intended to leave it to his grandsons. This was within the court's discretion.

reconsideration after James's death, and that the estate was not substituted as a party before the 10-day deadline for filing a motion for reconsideration had expired. She asks this court to reverse the portions of the order on reconsideration that granted relief to James.

"If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties." CR 25(a)(1). All time limits applicable to substitution of parties are within the court's discretion under CR 25. *Barker v. Mora*, 52 Wn. App. 825, 831, 764 P.2d 1014 (1988).

Under CR 59(b), however, a party must move for reconsideration "not later than 10 days after the entry of the judgment, order, or other decision." The trial court "may not extend the time for taking any action under . . . [CR] 59(b)." CR 6(b). Consequently, trial courts have no discretionary authority to extend the time to file a motion for reconsideration under CR 59(b). *See Metz v. Sarandos*, 91 Wn. App. 357, 360, 957 P.2d 795 (1998) (trial court's enlargement of 10-day CR 59 deadline was reversible error).

Here, James's attorney filed the reconsideration motion within the 10-day limit. While James's death prior to the filing caused the filing to be without proper authority, this infirmity was removed once the estate was substituted and the estate ratified the motion.

Affirmed.

Lawrence-Berrey, A.C.J.

WE CONCUR:

Korsmo, J.

Pennell, J.

RCW 26.09.080

Disposition of property and liabilities—Factors.

In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

(1) The nature and extent of the community property;

(2) The nature and extent of the separate property;

(3) The duration of the marriage or domestic partnership; and

(4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

[2008 c 6 § 1011; 1989 c 375 § 5; 1973 1st ex.s. c 157 § 8.]

NOTES:

Part headings not law—Severability—2008 c 6: See RCW **26.60.900** and **26.60.901**.

Declaration of Service

On the date of March 30th 2017 I did personally place a copy of this Petition for Review with the post office addressed to:

Mathew Purcell
PURCELL LAW, PLLC
2001 N Columbia Center Blvd
Richland, WA 99352-4847

I sign this under penalty of perjury under the laws of the State of Washington

Dated: 3-30-17

Gary R Stenzel, WSBA #16974