

63079-2

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No. 63079-2-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

PETER G. ROCKWELL,

Appellant,

vs.

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

Respondent.

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

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal, the husband's second challenge to the trial court's division of the marital estate, is based on a gross mischaracterization of both this court's earlier decision and the trial court's decision on remand. In an earlier appeal, this court rejected each of the husband's challenges to the trial court's disproportionate property division in favor of the wife, and reversed on the single discrete legal issue, raised by the wife's cross-appeal, of the formula used to characterize her federal pension. This court's mandate directed the trial court to use the time-rule method to characterize the wife's federal pension and to apply its 60/40 community property split to the community portion of the pension. ***Marriage of Rockwell***, 141 Wn. App. 235, 253, ¶ 35, 170 P.3d 572 (2007). On remand, the trial court precisely followed this court's mandate, recharacterizing the federal pension "as 38 percent separate property and 62 percent as community property," and applying the "60/40 division . . . to the community property of the pension." ***Rockwell***, 141 Wn. App. at 253, ¶ 35.

The husband's second appeal hinges entirely on his claims that this court affirmed a "60/40 *overall* division" of the marital

estate and that the trial court's decision on remand results in a "70/30 *overall* division." Both of these claims are false. The trial court did not order a 60/40 "overall" division. Instead, it found that it was "fair and equitable to divide the *community property* 60% to wife and 40% to husband." (Finding of Fact (FF) 2.20(5), CP 42, *emphasis added*) Nor did this court affirm a 60/40 "overall" division. Instead, it held that substantial evidence supported the trial court's finding that the "60/40 split of the *community property*" was fair and equitable. **Rockwell**, 141 Wn. App. at 249, 254-55, ¶¶ 24, 38-39. The husband's claim that the trial court's decision created a "70/30 overall division" also is an utter misrepresentation of the trial court's decision, and depends upon the husband's claim that the wife was not entitled to a Social Security offset that this court in its earlier decision expressly determined was appropriate. **Rockwell**, 141 Wn. App. at 245, ¶ 16. Remarkably, the husband repeatedly makes this false claim of a 70/30 division without even acknowledging that this court rejected his argument against the Social Security offset in the first appeal.

By the time this appeal is considered the parties will have been divorced for nearly five years. The husband's repeated,

meritless claims to more of the marital estate have gone on for long enough. This court should affirm and once again award the wife her attorney fees for having to respond to this appeal.

II. RESTATEMENT OF THE CASE

The history of the parties' 26-year marriage is more fully described in this court's earlier decision, attached as Appendix A to this brief. This restatement of the case provides the background of the trial court's original property division of the "community property 60% to wife and 40% to husband," this court's decision affirming the trial court's "60/40 split of community property" even while reversing the trial court's characterization and distribution of the federal pension, and the trial court's decision on remand:

A. Background.

The appellant Peter Rockwell, then age 53, and respondent Carmen Palomera, then age 62, separated in 2004. *Rockwell*, 141 Wn. App. at 239, 246, ¶¶ 2, 18; (CP 37, 42) When the parties separated, Carmen was retired, in ill health, and living off her federal pension. *Rockwell*, 141 Wn. App. at 240, 249, ¶¶ 3, 24; (I RP 60; III RP 136, 141) Peter, who was in good health and well-educated, had been voluntarily unemployed for at least two years, enjoying recreational activities such as mountain climbing.

Rockwell, 141 Wn. App. at 239-40, 249, ¶ 2, 24; (I RP 29, 31, 56, 175) Peter sought employment only after being ordered to do so pending trial. *Rockwell*, 141 Wn. App. at 247, ¶ 21; (I RP 27, 33) The parties divorced on August 25, 2005 after a four-day trial before Judge James Doerty. (CP 49)

B. The Trial Court Divided The Community Property 60/40 In Favor Of The Wife, Using The Subtraction Method To Characterize The Wife's Separate Interest In Her Federal Pension.

At trial, the contested issues were the division of property and the characterization of Carmen's federal pension, which she had earned over her 40-year employment with the federal government – 16 years before marriage and 24 years during marriage. *Rockwell*, 141 Wn. App. at 239, ¶ 2; (FF 2.8(13)(b),(c), CP 38) By the time the parties separated, Carmen's pension was in "pay status" and paid a monthly pension benefit of \$7,010. 141 Wn. App. at 240, ¶ 3; (FF 2.8(13)(I), CP 39)

Carmen's pension payments are based on her years of government service. *Rockwell* 141 Wn. App. at 253, ¶ 35; (II RP 45, III RP 70-71) Both parties' financial experts analyzed how the pension would be characterized under the "time rule" method, which determines the community portion of a pension by dividing

the number of years an employee worked while married by the total number of years in service. *Rockwell* 141 Wn. App. at 251-52, ¶ 32; (II RP 17, 95, 101) Based on this method, the experts agreed that the community portion of the pension was 60%. (II RP 95)¹

The husband's expert also testified to a "subtraction" method of characterizing a pension, calculated by subtracting the monthly benefit of the pension at the time of marriage from the benefit at the time of retirement. *Rockwell*, 141 Wn. App. at 253, ¶ 35; (II RP 78-79) Using this method, the husband claimed that the community portion of the pension was between 92% and 93.8%. See *Rockwell*, 141 Wn. App. at 250, ¶ 28. Over Carmen's objection that the subtraction method could not be used as a matter of law under *Bulicek v. Bulicek*, 59 Wn. App. 630, 800 P.2d 394 (1990), the trial court held the community/separate split of the pension to be 92/08. *Rockwell*, 141 Wn. App. at 251, ¶ 30; (FF 2.8(13)(I), CP 39)

¹ The husband's expert concluded the community portion was 60.78%; the wife's expert testified to a community portion of 60%. (II RP 18) The difference appears to be based on the husband's inclusion of a three month period of cohabitation prior to marriage. (II RP 94)

Because Carmen was enrolled in the federal Civil Service Retirement System (CSRS), she is not entitled to and can never receive Social Security benefits. **Rockwell**, 141 Wn. App. at 244, ¶ 14; (II RP 10) Based solely on his earnings before separation, Peter will be eligible for Social Security benefits of \$1,078 to \$1,888 per month, depending on when he retires. (FF 2.8(13)(f), CP 38-39) In its property division, the trial court “set off” the present value to Carmen of Social Security benefits that she will never receive, in an amount Peter did not challenge, finding that was “fair and equitable to compensate the wife in this amount, since husband will receive social security benefits.” (FF 2.8(13)(e), CP 38)

The trial court determined the community property should be divided 60/40 in favor of the wife. (FF 2.20(5), CP 42) In making its award, the court specifically referenced the wife’s need to purchase a home and for additional ongoing income, and (contrary to his wishes and claims at trial), the husband’s ability to get a job, estimating his future income at \$70,000 a year. (IV RP 106, 108, 110-11)

To effect its distribution, the court held that the community portion of the wife’s pension should be split 60/40. (FF 2.8(13)(n),

CP 39) Because the trial court determined that 8% of the wife's pension was her separate property, this meant that the husband received 36.8% of the wife's pension payments. (FF 2.8(13)(o), CP 39) The parties' other community property, including the value of their respective survivor benefits in the wife's pension, the family home, bank accounts, and both parties' IRAs and vehicles, were distributed to effect an overall 60/40 division of the community property. (See Appendix C: July 1, 2006 Brief of Appellant, Appendix D)

As a result of the trial court's property division, Peter received over \$1.1 million of community property and Carmen received nearly \$1.7 million of community property, plus her separate interest in the pension. (See Appendix C) Although not specifically considered in the property distribution, there was also evidence presented that the husband was a beneficiary in a trust that he will share with two siblings on the death of his stepmother, who was age 75 in 2005. (III RP 180-82, IV RP 50-51) The trust was worth \$345,000 and generated more income than current trust distributions to the stepmother. (III RP 180-82, IV RP 50-51)

In support of its disparate property division in favor of the wife, the trial court found that “given the difference in age, earning capacity, physical condition, and that husband had the ability to earn income and save for retirement in the future, it is fair and equitable to divide the community property 60% to wife and 40% to husband.” (FF 2.20(5), CP 42) The court also found that “it is fair and equitable to divide the community property portion of the pension 60% to wife and 40% to husband, and to award wife her separate property portion of the pension.” (FF 2.8(13)(n), CP 39)

C. This Court Affirmed The 60/40 Division Of Community Property On The Husband’s Appeal, But Reversed The Trial Court’s Use Of The Subtraction Method To Characterize The Wife’s Pension.

Peter appealed the trial court’s property division, raising five issues directed to the supposed inequity of a 60/40 community property split in favor of Carmen. First, Peter challenged the trial court’s finding that the pension was 92% rather than 93.8% community property – an “error” that would have resulted in \$35 more a month to Peter. *Rockwell*, 141 Wn. App. at 250, ¶ 27. Second, Peter challenged the trial court’s finding that he was nine years younger than Carmen, instead of eight years and four months younger. *Rockwell*, 141 Wn. App. at 246, ¶¶ 17-18. Third, Peter

complained that the trial court's property division presumed that he would, at age 54, work for another seven years. **Rockwell**, 141 Wn. App. at 246, ¶ 19. Fourth, Peter challenged the trial court's "offset" of social security benefits to Carmen. **Rockwell**, 141 Wn. App. at 243-44, ¶ 13. Finally, Peter claimed that the combination of these alleged errors resulted in an unfair property division. **Rockwell**, 141 Wn. App. at 254-55, ¶ 38; (see also Appendix D: July 1, 2006 Brief of Appellant, Excerpts)

Carmen cross-appealed on the single discrete legal issue whether the trial court could use the subtraction method to characterize her pension. **Rockwell**, 141 Wn. App. at 251, ¶ 30. Carmen asserted that had the trial court used the proper time-rule method to characterize her pension, her separate interest in the pension would have been 40%, not 8% as calculated under the subtraction method. **Rockwell**, 141 Wn. App. at 251, ¶ 30; (see also Appendix E: August 23, 2006 Brief of Cross-Appellant, Excerpts)

This court agreed with Carmen, and reversed the trial court's characterization of the pension in a published decision. **Marriage of Rockwell**, 141 Wn. App. 235, 170 P.3d 572 (2007). This court

held that the time-rule method, not the subtraction method, was the proper formula to characterize Carmen's pension because the "subtraction rule disproportionately undervalues those early years by freezing the value of Carmen's front-end contribution and disallowing the separate interest to benefit from any income increases that became possible only because of her earlier years of service." **Rockwell**, 141 Wn. App. at 253, ¶ 35. This court held that using the time-rule method, the pension should have been characterized as 38% separate property and 62% community property. **Rockwell**, 141 Wn. App. at 253, ¶ 35. Applying the trial court's 60/40 community property division, this court directed that on remand "Peter will receive 24.4 percent of the gross pension, and Carmen will receive 74.6 percent of the gross pension." **Rockwell**, 141 Wn. App. at 253, ¶ 35. This court held that "[t]his division more appropriately values Carmen's first 16 years of work for the federal government." **Rockwell**, 141 Wn. App. at 253-54, ¶ 35.

This court rejected Peter's appeal in its entirety, affirming both the 60/40 community property split and the award of Carmen's separate property interest in the pension to her. **Rockwell**, 141 Wn.

App. at 254-55, ¶¶ 38-39. This court specifically rejected Peter's claim that the trial court was "required to divide community property equally" in a long-term marriage:

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

Rockwell, 141 Wn. App. at 243, ¶ 12.

The court noted that "substantial evidence showed that Carmen was retired, older, and in poor health. Accordingly, the trial court did not abuse its discretion when it compared Peter's age, health and employability (and thereby, future earning capacity) against Carmen's as a basis for its 60/40 split of the community property." **Rockwell**, 141 Wn. App. at 249, ¶ 24. This court also affirmed the trial court's decision to offset Carmen's lost social security benefits. **Rockwell**, 141 Wn. App. at 245, ¶ 16.

In conclusion, this court held that "[a]bsent the error in characterizing the federal pension, we affirm the trial court's division of property as fair and equitable."

We reverse the trial court's characterization of Carmen's federal pension and affirm on the other issues appealed. We remand for further proceedings consistent with this opinion.

Rockwell, 141 Wn. App. at 255, ¶ 41. This court also awarded attorney fees to Carmen under RCW 26.09.140 and RAP 18.1.

Rockwell, 141 Wn. App. at 255, ¶ 40.

Peter unsuccessfully petitioned for review. The mandate was returned on October 22, 2008.

D. On Remand, The Trial Court Precisely Followed This Court's Mandate, Recharacterizing The Pension Using The Time-Rule Method And Dividing The Community Property 60/40.

On remand, Peter once again asked the trial court to divide the community property equally, claiming he was entitled to a \$135,679 judgment against Carmen as an "equalizing payment." (CP 24, 32) The trial court instead followed this court's mandate, recharacterizing Carmen's pension using the time-rule method and awarding Carmen 75.2% of the gross pension (a combination of her interest in the community portion and her separate portion of the pension) and Peter 24.8% of the gross pension.² (CP 213) The trial court otherwise maintained its 60/40 community property division.

² This court's decision failed to account for one percent of the pension. The trial court found that one percent to be community property, to be divided 60/40 in favor of Carmen. (Finding of Fact (FF) 1, CP 213)

Even after redistribution of the pension, Peter's award totaled nearly \$1 million, not including his separate property expectancy. A chart accurately setting out the trial court's property distribution on remand is Appendix B to this brief. The trial court also ordered Peter to reimburse Carmen for the overpayments of the pension made to Peter while the appeal was pending, with prejudgment interest and reduced to judgment the award of attorney fees to Carmen in this court and the Supreme Court. (CP 212-13)

Through a second set of appellate attorneys, Peter once again appeals the trial court's property division. (CP 193-94)

III. ARGUMENT

A. The Trial Court Properly Followed This Court's Mandate By Dividing The Community Property 60/40 After Correctly Characterizing The Wife's Pension.

1. This Court's Mandate Was Binding On The Trial Court.

The trial court could not, as urged by Peter on remand, reconsider the property division and "award[] each party one half of the community property." (CP 24) "The trial court's authority to take actions not in strict conformance with the appellate decision are limited to post judgment motions raising issues *not already*

decided by the appellate court.” **Farhood v. Allyn**, 132 Wn. App. 371, 378-79, ¶ 16, 131 P.3d 339 (2006) (*emphasis added*).

Here, this court decided in Peter’s first appeal that the trial court’s “60/40 split of the community property” was supported by substantial evidence and “fair and equitable”. **Rockwell**, 141 Wn. App. at 248-49, 254-55, ¶¶ 24, 38-39. This court expressly rejected Peter’s claim that the trial court erred in its earlier decree by ordering the community property divided 60/40 in favor of the wife:

As noted above, the trial court must put the parties in roughly equal financial positions for the rest of their lives. This requires considering the combination of the division of property and the expected income and earnings of the parties. And, where one spouse is older, semi-retired and dealing with ill health, and the other spouse is employable, the court does not abuse its discretion in ordering an unequal division of community property. Peter was younger, in good health and employable at a substantial wage. Moreover, substantial evidence showed that Carmen was retired, older and in poor health. Accordingly, the trial court did not abuse its discretion when it compared Peter’s age, health and employability (and thereby, future earning capacity) against Carmen’s as a basis for its 60/40 split of community property.

Rockwell, 141 Wn. App. at 248-49, ¶ 24 (*citations omitted*).

The trial court’s 60/40 division of the community property in favor of the wife thus became “law of the case.” On remand, the trial court properly rejected Peter’s requests that it reconsider its

earlier property distribution and divide the community property equally. See **Kennett v. Yates**, 45 Wn.2d 35, 37, 272 P.2d 122 (1954) (“upon the retrial, the parties and trial court were bound by the law stated in the decision on the first appeal. The parties and this court are also bound by that decision until it is authoritatively overruled”). This court’s mandate from the earlier appeal was binding on the trial court. The mandate from this court was narrow and unambiguous: “[We] reverse and remand with instructions to characterize Carmen’s federal pension according to the time rule method.” **Rockwell**, 141 Wn. App. at 254, ¶ 36. “[The mandate] must be strictly followed and carried into effect according to its true intent and meaning as determined by the directions given by this court.” **Ethredge v. Diamond Drill Contracting Co.**, 200 Wash. 273, 276, 93 P.2d 324 (1939).

On remand, the trial court was required to recharacterize the wife’s federal pension “consistent with this [court’s] opinion” using the time-rule method. **Rockwell**, 141 Wn. App. at 254, 255, ¶¶ 36, 41. The trial court was also required to re-distribute the pension to effect the 60/40 community property division that this court affirmed. **Rockwell**, 141 Wn. App. at 253, ¶ 35; **Ethredege**, 200

Wash. at 276. The trial court could not, as Peter urged, re-open the property division that this court had already affirmed. The trial court was required to follow the specific direction of the appellate court and only exercise its discretion when directed. ***Harp v. American Sur. Co. of N.Y.***, 50 Wn.2d 365, 368-69, 311 P.2d 988 (1957); see also ***Marriage of McCausland***, 129 Wn. App. 390, 118 P.3d 944 (2005), *overruled on other grounds*, ***Marriage of McCausland***, 159 Wn.2d 607, 152 P.3d 1013 (2007).

In ***McCausland***, Division Two reversed the trial court's decision after an earlier appeal because the trial court failed to adhere to the Court of Appeals mandate on remand. 129 Wn. App. at 400, ¶ 22. Division Two held that its mandate was "binding" on the superior court and "must be strictly followed." ***McCausland***, 129 Wn. App. at 399, ¶ 16 (*citing Harp*, 50 Wn.2d at 368). Division Two acknowledged that its use of the term "reconsider" granted the trial court some discretion on remand, but held that "the remand did not open all other possible dissolution-related issues nor could the trial court ignore our specific holdings and directions on remand." ***McCausland***, 129 Wn. App. at 400, ¶ 18. Thus, Division Two

reversed the trial court for a second time and remanded the case to a new judge.

Here, the trial court's discretion on remand was even more limited than the trial court's in *McCausland*. Unlike *McCausland*, the Court of Appeals in this case did not instruct this court to "reconsider" any issues on remand. Instead, it specifically directed the trial court to recharacterize the wife's pension using the correct method and to divide it 60/40 accordingly. The trial court properly limited its actions on remand to recharacterizing the pension under the time rule and entering an order dividing the community portion of pension 60/40 in favor of the wife and awarding the separate portion of the pension entirely to the wife.

The fact that Carmen in her brief in the earlier appeal suggested that "any remand should be limited to directing the trial court to consider whether the wife should be awarded more of her federal pension given the trial court's mischaracterization," did not broaden the trial court's authority on remand. (App. Br. 14) This court could have, based on this suggestion, remanded for the trial court to "reconsider" the division of the pension. It did not. Instead, it directed the trial court on remand to divide the community portion

of the pension 24.4% to Peter and 74.6% to Carmen. **Rockwell**, 141 Wn. App. at 253, ¶ 35.

2. This Court Has Already Rejected The Husband's Claim For A Different Property Distribution In Light Of The Trial Court's Earlier Mischaracterization Of The Pension.

Peter misplaces his reliance on cases in which the appellate court specifically directed the trial court to reconsider the property division as part of its mandate after reversing a trial court's mischaracterization of property. See e.g. **Marriage of Kraft**, 119 Wn.2d 438, 451, 832 P.2d 871 (1992) (App. Br. 21) ("we remand to the trial court for reconsideration of the property distribution in light of this opinion"); **Marriage of Shui and Rose**, 132 Wn. App. 568, 592, ¶ 42, 125 P.3d 180 (2005), *rev. denied*, 158 Wn.2d 1017 (2006) (App. Br. 22-23) ("we reverse the trial court's order distributing the parties' assets and remand for reconsideration of their distribution"); **Marriage of Schweitzer**, 81 Wn. App. 589, 596, 915 P.2d 575, *rev. granted*, 130 Wn.2d 1001 (1996) (App. Br. 21-22) ("it is not clear that the court would have made the same 55/45 split of community property if it had characterized all the property as community property. Consequently, remand is required"). Here,

unlike in those cases, the trial court did not direct the trial court to reconsider its property division on remand.

This court rejected Peter's argument that the subtraction method was properly used to characterize the pension because the time-rule method would have resulted in a larger award to Carmen in the earlier appeal. Peter argued:

The trial court could not have adopted the time rule method without exacerbating the disproportionate property distribution and without ignoring the facts of this case, this pension, and this marriage... Obviously, the court would not have further reduced its award to Peter based on a different characterization of the pension.

(Appendix F: January 8, 2007 Reply Brief of Appellant, Excerpts)

Carmen also pointed out in her earlier appellate briefing that using the subtraction method created a "swing" of nearly \$600,000 in the value of her separate interest in the pension. (See Appendix E) Knowing the consequence of its decision, this court rejected the husband's proposal that it affirm the distribution of the pension even if it was erroneously characterized: "Even if there were [error], the failure to characterize property properly will not justify setting aside a property distribution that is otherwise fair and equitable."

(Appendix F)

This court was aware that the recharacterization of the pension on remand would result in a greater “overall” division in favor of the wife even though the community property division of 60/40 would remain the same. It nevertheless declined to direct the trial court to reconsider its property division. To the contrary, this court calculated precisely how the percentage division in the pension would change as a result of a proper characterization:

When the trial court's 60/40 division of the property is applied to the community property of the pension, using the time rule method means that Peter will receive 24.4 percent of the gross pension, and Carmen will receive 74.6 percent of the gross pension. This division more appropriately values Carmen's first 16 years of work for the federal government.

Rockwell, 141 Wn. App. at 253-54, ¶ 35. The trial court properly refused to go beyond this court’s decision to reconsider its original property division, except to follow this court’s mandate.

3. The Trial Court’s Decision On Remand Maintained The “60/40 Split Of Community Property” That This Court Affirmed In Its Earlier Decision.

Peter states a total of twenty-seven times in his second opening brief in this appeal that the trial court initially made a “60/40 *overall* division” and that this court affirmed a “60/40 *overall* division.” (App. Br. 1, 2, 3, 4, 5, 6, 13, 14, 15, 16, 18, 25, 26, 27,

28, 29, 30, 33) These statements are simply not true; repeating them *ad nauseum* does not make them so.

The trial court's decision was based on a 60/40 community property division and a 62/38 overall division. (See Appendix C) At best, the husband's claims are a misrepresentation of the trial court's earlier decision and of this court's published decision. At worse, they are fabrications intended to mislead this court. In either event, these statements in a filed brief are sanctionable under RAP 18.9. ***Lynn v. Labor Ready, Inc.***, 136 Wn. App. 295, 313, ¶ 45, 151 P.3d 201 (2006) (appellant's repeated misrepresentations, causing the court and respondent "to waste considerable time checking for their accuracy," sanctionable under RAP 18.9).

The trial court divided the *community property* 60/40 and awarded any separate property to its owner based on its findings that doing so was "fair and equitable:"

Given the difference in age, earning capacity, physical condition, and that husband had the ability to earn income and save for retirement in the future, it is fair and equitable to divide the *community property* 60% to wife and 40% to husband.

(FF 2.20 (5), CP 42, *emphasis added*)

The court finds that it is fair and equitable to divide the *community property* portion of the pension 60%

to wife and 40% to husband, and to award wife her separate property portion of the pension.

(FF 2.8(13)(n), CP 39, *emphasis added*)

This court rejected the husband's appeal and affirmed these findings, holding that the trial court's property division, including the 60/40 division of the community portion of the pension, was a "fair and equitable distribution" and supported by substantial evidence:

Moreover, substantial evidence showed that Carmen was retired, older and in poor health. Accordingly, the trial court did not abuse its discretion when it compared Peter's age, health, and employability (and thereby, future earning capacity) against Carmen's as a basis for its *60/40 split of the community property*.

Rockwell, 141 Wn. App. at 249, ¶ 24 (*emphasis added*).

In light of the discretion afforded to the trial court in determining what will be a fair and equitable distribution, and the factors that it can appropriately consider, we conclude that there was no abuse of discretion in making this final distribution. Absent the error in characterizing the federal pension, we affirm the trial court's division of the property as fair and equitable.

Rockwell, 141 Wn. App. at 255, ¶ 39.

The trial court's property division was premised on a 60/40 community property division, which this court expressly affirmed. Accordingly, based on Peter's own argument in this appeal: "the

trial court was obligated, without the exercise of any discretion, to recharacterize the pension accordingly to the time rule *and* to maintain the “60/40’ [community property] division affirmed by this Court as the standard of a fair and equitable division that placed the parties in roughly equal financial positions for the rest of their lives.” (App. Br. 26)

This is exactly what the trial court did on remand. After following this court’s mandate and re-characterizing the wife’s pension using the time-rule method, the trial court divided the community portion of the pension 60/40 – awarding the husband 24.8% of the monthly pension payment to the husband, and 75.2% to the wife, including her separate property interest – resulting in the 60/40 division of the community property that this court affirmed. On remand, the trial court properly followed this court’s mandate by dividing the community property 60/40 after correctly characterizing the wife’s pension. This court should affirm.

B. The Trial Court’s Property Division On Remand Was Fair And Equitable.

Even if the trial court could have reconsidered its property division, the result on remand was not an abuse of discretion, as it was just and equitable under the circumstances of this particular

case. **Rockwell**, 141 Wn. App. at 242-43, ¶ 11 (“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”). This court can independently determine that the property distribution was fair and equitable under RCW 26.09.080 without requiring a second remand. See **Marriage of Crosetto**, 82 Wn. App. 545, 557, 918 P.2d 954 (1996) (on review, the appellate court must determine “whether the property division is fair and equitable, based upon consideration of all the facts and circumstances”). For the same reasons that this court rejected Peter’s challenge to the disproportionate award to Carmen in his first appeal, this court should once again reject his same complaints in this appeal.

First, Peter claims twenty-one times in his opening brief that the trial court’s decision on remand resulted in a “70/30 overall division.” (App. Br. 2, 4, 5, 13, 14, 15, 17, 18, 25, 27, 28, 29, 30, 33) This is false. The decision resulted in a 60/40 community property division, and a 67/33 overall division, including Carmen’s separate interest in the pension as determined by this court. (See Appendix B)

Peter's claim of a "70/30 overall division" is particularly egregious because it is based on "add[ing] back in wife's social security offset." (See App. Br., Appendix B) But this court already approved the trial court's decision to offset the present value of the Social Security benefits that the wife would have received but for her federal pension – a value that Peter did not challenge – in rejecting Peter's first appeal on this issue:

We conclude that the challenged finding is supported by substantial evidence and that the trial court properly considered and compensated for the Social Security benefits that Carmen would have received, but for her federal pension.

Rockwell, 141 Wn. App. at 245, ¶ 16; (See IV RP 92). Peter's brief in this appeal fails to acknowledge this court's rejection of his argument based on the Social Security offset in the first appeal, making no mention of this court's earlier decision. As a result, Peter repeatedly misrepresents the true division on remand.

Second, a 60/40 community property division, and 67/33 overall division, was fair and equitable under the circumstances of this case, and well within the trial court's discretion. As this court has already acknowledged, "the longer the marriage, the more likely a court will make a disproportionate distribution of the

community property. Where one spouse is older, semi-retired and dealing with ill health, and the other spouse is employable, the court does not abuse its discretion in ordering an unequal division of community property.” **Rockwell**, 141 Wn. App. at 243, ¶ 12.

Here, the husband is younger, healthier, well-educated, and has fewer future medical/financial needs than the wife. (See FF 2.20(1), (2), (3), (5), CP 42) The wife’s greater assets are balanced by the husband’s higher income potential. The husband also has a superior future earning capacity – a factor that has been specifically identified as the basis for a disproportionate split of property in many cases. See, e.g., **Kraft**, 119 Wn.2d at 448, 450 (net distribution of 32% to husband and 68% to wife would not be an abuse of discretion on remand); **Marriage of Dessauer**, 97 Wn.2d 831, 838-39, 650 P.2d 1099 (1982) (affirming 75/25 split of assets when wife was seven years older than the husband and had eye problems limiting her ability to work) (*overruled on other grounds by Marriage of Smith*, 100 Wn.2d 319, 323, 669 P.2d 448 (1983)); **Marriage of Crosetto**, 82 Wn. App. 545, 556-57, 918 P.2d 954 (1996) (affirming 60/40 split of community property after a 21-year marriage based on the husband’s superior earning capacity);

Donovan v. Donovan, 25 Wn. App. 691, 696-97, 612 P.2d 387 (1980) (affirming 67/33 split of community property); **Marriage of Rink**, 18 Wn. App. 549, 551-53, 571 P.2d 210 (1977) (affirming 67/33 division of the marital estate); **Stacy v. Stacy**, 68 Wn.2d 573, 574-75, 577, 414 P.2d 791 (1966) (remanding with directions to increase the wife's property award to 85% of the marital estate and to double the maintenance award for five years).

Finally, as the trial court found, "it is more likely than not that [Carmen] will predecease [Peter]." (FF 2.8(13)(m), CP 39) After Carmen's death Peter will receive 55% of the full pension amount until his death – an asset that had an unchallenged present value of \$253,289. (FF 2.8(13)(g), CP 39) Therefore, even though Carmen was "awarded" \$326,400 as the present value of the survivor benefit for the pension³, the trial court found that it is unlikely that Carmen will ever enjoy this benefit.

³ The trial court erroneously included Carmen's separate interest in the calculation of the community value of both parties' survivor benefits. (See CP 38-39, 45) Peter in fact received more than 40% of the community property, because by treating the survivor benefit as entirely community property, the trial court awarded a portion of Carmen's separate property interest (38%) in the survivor benefit to Peter.

This court has already affirmed the trial court's disproportionate property division, which remains unchanged on remand except for the redistribution of the pension that this court directed in its earlier decision. Peter fails to show that the trial court's property division on remand was a manifest abuse of discretion and this court should affirm.

C. The Award Of Prejudgment Interest On The Overpayment Of Pension Benefits Received By The Husband Was Warranted.

An award of prejudgment interest is reviewed for abuse of discretion if based on disputed facts or on principles of equity. See e.g. *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 775-76, ¶¶ 34, 35, 115 P.3d 349 (2005) (reviewing trial court's equitable award of prejudgment interest for abuse of discretion where respondent did not dispute that it in fact owed the money); *Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wn. App. 286, 300-01, 991 P.2d 638 (1999) (reviewing trial court's denial of prejudgment interest under abuse of discretion standard where there were disputed facts regarding the cost of repairs which required the jury to rely upon opinions to reach their verdict. Here, the trial court did not abuse its discretion by ordering the husband

to reimburse the wife for the overpayments of the monthly pension benefit he received while the earlier appeal was pending, and by awarding prejudgment interest on those overpayments.

The principle underlying the law of restitution is that a person who has received a benefit at the expense of another must make restitution to the other. *See Restatement of Restitution* § 1(a person who has been unjustly enriched at the expense of another is required to make restitution to the other); *see also State v. A.N.W. Seed Corp.*, 116 Wn. 2d 39, 45, 802 P.2d 1353 (1991) (“one person may be accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer loss”); RAP 12.8 (if a party has satisfied a trial court decision which is modified by the appellate court, the parties is entitled to restoration of the value of the property or restitution). Restitution in this case includes both the return of the overpayments made to the husband, and prejudgment interest. *See Restatement of Restitution* § 74, comment e (the judgment debtor is entitled to specific restitution together with the value of its use in the meantime).

Washington law follows the Restatement of Restitution.

A.N.W. Seed, 116 Wn.2d at 45. Under the Restatement:

[A] person who has a duty to pay the value of a benefit which he has received, is also under a duty to pay interest upon such value from the time he committed a breach of duty in failing to make restitution, if:

- (a) The benefit consisted of a definite sum of money, or
- (b) the value of the benefit can be ascertained by mathematical calculation from the terms of an agreement between the parties or by established market prices, or
- (c) payment of interest is required to avoid injustice.

Restatement of Restitution § 156. Thus, in **A.N.W. Seed**, the Court held that the respondent was liable for interest as well as the proceeds of the sale of the appellant's property. 116 Wn.2d at 47.

Prejudgment interest awards are based on the principle that a defendant who retains money which he ought to pay to another should be charged interest on it. **Bailie Communications, Ltd. v. Trend Business Systems, Inc.**, 61 Wn. App. 151, 157, 810 P.2d 12 (1991) (citations omitted). Interest prior to judgment is allowable when an amount claimed is liquidated. **Bailie**, 61 Wn. App. at 156. A "liquidated" claim is a claim where the evidence furnishes data

which, if believed, makes it possible to compute the amount with exactness without reliance on opinion or discretion. *Bailie*, 61 Wn. App. at 157; see also *Prier v. Refrigeration Engineering, Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968) (a claim is liquidated where the “evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion.”).

The overpayments made to the husband as a result of the trial court’s erroneous use of the subtraction method in characterizing the pension were liquidated claims because it was undisputed that the time-rule method would result in 62/38 split of the pension between community and separate. The time-rule method is a set formula, which does not require the court to use “opinion or discretion.” *Bailie*, 61 Wn. App. at 157. The husband’s assertion that the overpayments were unliquidated because the “trial court on remand could have determined that the original overall division was fair and equitable notwithstanding the incorrect ratio of separate and community interests in the pension” (App. Br. 32) is wrong.

First, the trial court did not have discretion to maintain the original division of the pension because this court specifically directed the trial court to reallocate the pension. *Rockwell*, 141 Wn. App. at 253, ¶ 35. Second, even if the trial court had discretion to do something other than reapportion the pension as directed by this court, that does not make the claim unliquidated. As this court has stated: “that the parties put forward a motley of variously plausible theories as to how the Polygon settlement should be allocated does not make their obligations discretionary with the trial court and thus ‘de-liquidate’ that settlement.” *Polygon N.W. Co. v. American Nat. Fire Insurance Co.*, 143 Wn. App. 753, 792-93, ¶ 67, 189 P.3d 777, *rev. denied*, 164 Wn.2d 1033 (2008).

The trial court did not abuse its discretion in awarding prejudgment interest on the overpayments received by the husband while the appeal was pending.

D. This Court Should Deny The Husband’s Request For Attorney Fees And Award Attorney Fees To The Wife.

There is no basis for an award of attorney fees to Peter under RCW 26.09.140. As this court recognized in the earlier appeal, Carmen is older, in ill-health, and retired. She has a far greater need for her attorney fees to be paid than Peter, who was

(finally) employed and has the ability to pay both his own fees and Carmen's fees. This court instead should award attorney fees to Carmen under RCW 26.09.140.

This court should also award attorney fees to Carmen for having to respond to this appeal under RAP 18.9(a). The previous appeal resolved all the issues presented by this appeal concerning whether a 60/40 community property division is fair and equitable under the facts of this case. The husband's continued challenge of the trial court's property division is intransigent and warrants an award of attorney fees to the wife who must continually come to court to defend the trial court's decision. ***Marriage of Greenlee***, 65 Wn. App. 703, 829 P.2d 1120, *rev. denied*, 120 Wn.2d 1002 (1992).

Further, the husband's appeal is based on blatant, repeated misrepresentations of both the trial court's decision and this court's published decision. He should be sanctioned for these misrepresentations. ***Lynn v. Labor Ready, Inc.***, 136 Wn. App. 295, 313, ¶ 45, 151 P.3d 201 (2006). While the husband has switched counsel in this appeal, all of his attorneys on appeal have been skilled and experienced appellate practitioners. There is no

excuse for his misrepresentations of this court's published decision or the record below either before or after the decision on remand.

IV. CONCLUSION

The trial court properly followed the court's mandate by re-characterizing the pension using the time-rule method and distributing the community portion of the pension 60/40 in favor of the wife. This court should affirm and award attorney fees to the wife.

Dated this 9th day of November, 2009.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

LAW OFFICES OF CYNTHIA B.
WHITAKER

By: 

By: 

Catherine W. Smith
WSBA No. 9542
Valerie Villacin
WSBA No. 34515

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WSBA No. 7292

Attorneys for Respondent

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 November 9th, 2009, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Mary Hammerly Attorney at Law 22525 SE 64th Place, Suite 118 Issaquah WA 98027	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Mr. Gregory M. Miller Jason Anderson Carney Badley Spellman, P.S. 701 Fifth Avenue. Suite 3600 Seattle, WA 98104-7010	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Cynthia B. Whitaker Attorney at Law 1200 Fifth Avenue, Suite 2020 Seattle, WA 98101-3100	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 9th day of November, 2009.



Carrie O'Brien

APPENDIX A
Marriage of Rockwell, 141 Wn. App. 170 P.3d 572 (2007)

H

Court of Appeals of Washington,
Division I.

In re the Matter of the MARRIAGE OF Carmen P.
ROCKWELL, Respondent,
and

Peter G. Rockwell, Appellant.
No. 56954-6-I.

Aug. 27, 2007.

Publication Ordered Oct. 19, 2007.

Background: Wife filed for dissolution of marriage. After a trial, the Superior Court, King County, James A. Doerty, granted dissolution and divided property 60 percent to wife and 40 percent to husband. Husband appealed, and wife cross appealed.

Holdings: The Court of Appeals, Appelwick, C.J., held that:

- (1) record supported a finding that value of Social Security that wife would have received but for her type of federal pension was \$159,404;
- (2) trial court could compensate wife for value of Social Security that wife would have received but for type of her federal pension;
- (3) record supported trial court's finding that husband was capable of earning a salary of \$70,000 per year;
- (4) trial court acted within its discretion when it compared husband's age, health, and employability, and thereby his future earning capacity, against wife's age, health, and employability as a basis for its decision to divide property;
- (5) trial court acted within its discretion when it characterized wife's federal pension as 92 percent community property and eight percent separate property;
- (6) appropriate method to characterize wife's federal pension as community property or separate property was time-rule method, rather than subtraction method; and

(7) trial court acted within its discretion in dividing property 60 percent to wife and 40 percent to husband.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Divorce 134 ↪252.1

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k252.1 k. Discretion of Court. Most

Cited Cases

Divorce 134 ↪286(5)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k278 Appeal

134k286 Review

134k286(3) Discretion of Lower Court

134k286(5) k. Disposition of Prop-

erty. Most Cited Cases

A trial court has broad discretion in distributing marital property, and its decision will be reversed only if there is a manifest abuse of discretion. West's RCWA 26.09.080.

[2] Divorce 134 ↪286(5)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k278 Appeal

134k286 Review

134k286(3) Discretion of Lower Court

134k286(5) k. Disposition of Prop-

erty. Most Cited Cases

If a dissolution decree distributing marital property results in a patent disparity in the parties' economic circumstances, a manifest abuse of discretion has

occurred. West's RCWA 26.09.080.

[3] Divorce 134 ⚡ 252.3(2)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k252.3 Particular Property or Interests and Mode of Allocation

134k252.3(2) k. Joint or Community Property. Most Cited Cases

A trial court is not required to divide community property equally in distributing property in a marital dissolution action. West's RCWA 26.09.080.

[4] Divorce 134 ⚡ 252.2

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k252.2 k. Proportion or Share Given on Division. Most Cited Cases

In a long-term marriage of 25 years or more, a trial court's objective in distributing marital property in a dissolution action is to place the parties in roughly equal financial positions for the rest of their lives. West's RCWA 26.09.080.

[5] Divorce 134 ⚡ 252.3(2)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k252.3 Particular Property or Interests and Mode of Allocation

134k252.3(2) k. Joint or Community Property. Most Cited Cases

When one spouse is older, semi-retired, and dealing with ill health, and the other spouse is employable, a trial court does not abuse its discretion in ordering an unequal division of community property in marital dissolution action. West's RCWA 26.09.080.

[6] Divorce 134 ⚡ 253(3)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k253 Proceedings for Division or Assignment

134k253(3) k. Valuation of Assets.

Most Cited Cases

Record supported a finding that value of Social Security that wife would have received but for her type of federal pension was \$159,404, for purposes of determining property division in dissolution action, where expert testified that wife's type of federal pension was in lieu of Social Security and valued Social Security that wife would have received at \$159,404, which was based on a recalculation of updated numbers. West's RCWA 26.09.080.

[7] Divorce 134 ⚡ 252.3(4)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k252.3 Particular Property or Interests and Mode of Allocation

134k252.3(4) k. Insurance, Retirement, or Pension Rights. Most Cited Cases

Trial court could compensate wife for value of Social Security that wife would have received but for type of her federal pension when determining property division in dissolution action; given that husband would receive Social Security, trial court's adjustment method, which reduced community-property portion of pension by amount of Social Security that wife would have received and treating it as if it were Social Security, simply removed both parties' Social Security benefits from equation to put them on comparable footing before dividing remaining assets. West's RCWA 26.09.080.

[8] Divorce 134 ⚡ 252.3(4)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property
134k252.3 Particular Property or Interests
and Mode of Allocation
134k252.3(4) k. Insurance, Retirement,
or Pension Rights. Most Cited Cases

Divorce 134 ↪ 253(3)

134 Divorce
134V Alimony, Allowances, and Disposition of
Property
134k248 Disposition of Property
134k253 Proceedings for Division or As-
signment

134k253(3) k. Valuation of Assets.
Most Cited Cases

A trial court is not permitted in a dissolution action
to value and distribute Social Security benefits; in
particular, the trial court cannot calculate a future
value of those monies and award that value as a
precise property offset as part of its property distri-
bution. Social Security Act, § 207(a), 42 U.S.C.A. §
407(a); West's RCWA 26.09.080.

[9] Divorce 134 ↪ 252.3(4)

134 Divorce
134V Alimony, Allowances, and Disposition of
Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests
and Mode of Allocation
134k252.3(4) k. Insurance, Retirement,
or Pension Rights. Most Cited Cases

Possibility that one or both parties may receive So-
cial Security benefits is a factor that a trial court
may consider in making its distribution of property
in a dissolution action. West's RCWA 26.09.080.

[10] Divorce 134 ↪ 286(8)

134 Divorce
134V Alimony, Allowances, and Disposition of
Property
134k278 Appeal
134k286 Review

134k286(6) Questions of Fact, Ver-
dicts and Findings

134k286(8) k. Disposition of Prop-
erty. Most Cited Cases

Trial court's finding that husband was nine years
younger than wife when husband was in fact eight
years and four months younger than wife would not
be considered an error of fact on appeal in dissolu-
tion action; trial court rounded up and used that
number only to consider parties' ages in context of
property division, and precision in number of days
or weeks or months in such a consideration was not
necessarily required. West's RCWA 26.09.080.

[11] Divorce 134 ↪ 253(2)

134 Divorce
134V Alimony, Allowances, and Disposition of
Property
134k248 Disposition of Property
134k253 Proceedings for Division or As-
signment

134k253(2) k. Evidence. Most Cited
Cases

Record supported trial court's finding that husband
was capable of earning a salary of \$70,000 per year,
for purpose of determining property division in dis-
solution action, even though husband, who had
been employed in technical sales in his last year of
employment, testified that he was not interested in
jobs outside certain area due to concerns about his
daughter's health; salaries to which husband testi-
fied ranged from \$38,000 as a teacher to about
\$90,000 in his last years of employment, husband
had training and experience to pursue technical-
sales positions as well as more recent training to
sell real estate, and daughter's health concerns did
not bar a search for jobs outside area. West's
RCWA 26.09.080.

[12] Divorce 134 ↪ 252.2

134 Divorce
134V Alimony, Allowances, and Disposition of
Property
134k248 Disposition of Property

134k252.2 k. Proportion or Share Given on Division. Most Cited Cases
Trial court acted within its discretion in dissolution action when it compared husband's age, health, and employability, and thereby his future earning capacity, against wife's age, health, and employability as a basis for its decision to divide property 60 percent to wife and 40 percent to husband; husband was younger than wife, in good health, and employable at a substantial wage, and wife was retired, older, and in poor health. West's RCWA 26.09.080.

[13] Divorce 134 ⚡252.2

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k252.2 k. Proportion or Share Given on Division. Most Cited Cases
Future earning potential is a substantial factor to be considered by a trial court in making a just and equitable property distribution. West's RCWA 26.09.080.

[14] Divorce 134 ⚡252.2

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k252.2 k. Proportion or Share Given on Division. Most Cited Cases
In considering a party's future earning capacity for purposes of property division, a trial court may consider the age, health, vocational training, and work history of the party. West's RCWA 26.09.080.

[15] Husband and Wife 205 ⚡249(3)

205 Husband and Wife

205VII Community Property

205k249 Property Acquired During Marriage in General

205k249(2) Particular Property or Circumstances of Acquisition

205k249(3) k. Insurance and Retirement Benefits. Most Cited Cases

Trial court acted within its discretion in dissolution action when it characterized wife's federal pension as 92 percent community property and eight percent separate property, where split was within range of evidence offered by both parties. West's RCWA 26.09.080.

[16] Divorce 134 ⚡253(3)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k253 Proceedings for Division or Assignment

134k253(3) k. Valuation of Assets.

Most Cited Cases

When parties offer conflicting evidence in valuation of property, a trial court considering a property division may adopt the value asserted by either party or any value in between the two. West's RCWA 26.09.080.

[17] Husband and Wife 205 ⚡249(3)

205 Husband and Wife

205VII Community Property

205k249 Property Acquired During Marriage in General

205k249(2) Particular Property or Circumstances of Acquisition

205k249(3) k. Insurance and Retirement Benefits. Most Cited Cases

Appropriate method to characterize wife's federal pension as community property or separate property was time rule method, rather than subtraction method, for purpose of determining property division in dissolution action; subtraction rule disproportionately undervalued early years of wife's service by freezing value of wife's front-end contribution and disallowing separate interest to benefit from any income increases that became possible only because of wife's earlier years of service. West's RCWA 26.09.080.

[18] Divorce 134 ↪252.3(4)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k252.3 Particular Property or Interests and Mode of Allocation

134k252.3(4) k. Insurance, Retirement, or Pension Rights. Most Cited Cases

For the purpose of dividing property in a dissolution action, pension benefits constitute property rights in the nature of deferred compensation, even if benefits are not presently available. West's RCWA 26.09.080.

[19] Husband and Wife 205 ↪249(3)

205 Husband and Wife

205VII Community Property

205k249 Property Acquired During Marriage in General

205k249(2) Particular Property or Circumstances of Acquisition

205k249(3) k. Insurance and Retirement Benefits. Most Cited Cases

If a pension was accumulated partly prior to marriage and partly after marriage, it is proportionately classified, with the portion acquired during marriage characterized as community property. West's RCWA 26.09.080.

[20] Husband and Wife 205 ↪249(3)

205 Husband and Wife

205VII Community Property

205k249 Property Acquired During Marriage in General

205k249(2) Particular Property or Circumstances of Acquisition

205k249(3) k. Insurance and Retirement Benefits. Most Cited Cases

Generally, the community share of a pension is calculated by dividing the number of years of marriage prior to separation by the total number of years of service for which pension rights were earned and

multiplying the results by the monthly benefit at retirement; this is known as the "time rule method." West's RCWA 26.09.080.

[21] Divorce 134 ↪252.2

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k252.2 k. Proportion or Share Given on Division. Most Cited Cases

Trial court acted within its discretion in dissolution action in dividing property 60 percent to wife and 40 percent to husband. West's RCWA 26.09.080.

****574** Patricia S. Novotny, Attorney at Law, Seattle, WA, for Appellant.

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APPELWICK, C.J.

***239 ¶ 1** Peter Rockwell challenges the fairness of a 60/40 division of property in the dissolution of a long term marriage. He argues the trial court improperly considered his future earning capacity as a factor in the overall fairness of the division. He claims the trial court erred in making an adjustment for social security benefits that his wife would have received but for her type of federal pension. Carmen Rockwell cross-appeals, arguing that the court erred when it chose the subtraction method to characterize and value her federal pension. We reverse the trial court's use of the subtraction method for pension characterization and valuation, but affirm on all other issues and remand for further proceedings.

FACTS

¶ 2 Peter and Carmen Rockwell were married from 1978 until 2004, a total of 26 years. ****575** Carmen

FN1 had been employed in the federal civil service for 16 years prior to the marriage. During those 16 years, she took two breaks from this service, one for a period of about fourteen months, and another for a period of just under five years. She continued in this field for 24 more years during their marriage. Peter has bachelor's degrees in mechanical engineering and liberal arts. He worked as an engineer in Washington, D.C. before seeking a position in technical sales. In order to advance Carmen's career, the couple moved to New York in 1984, and then to Seattle in 1986. Each time, Peter gave up his current employment and sought re-employment in their new location. In 1999, when Peter was 48, he was laid off. In his last year of employment, he had earned a \$72,000 salary and a *240 commission of about \$18,000. He searched for employment in similar fields but without success, and stopped seeking employment after the spring of 2002.

FN1. For purposes of maintaining the distinction between the parties we will refer to them by their first names.

¶ 3 Carmen retired in 2002 at age 60, testifying to health concerns that kept her from continuing her employment. She had advanced from a position as a GS-3 clerk to a GS-15 executive, for which she earned a \$120,000 salary as the head of the Northwest Regional Office of Civil Rights. Because she was enrolled in the Civil Service Retirement System (CSRS), she earned a substantial pension that is in lieu of any social security benefits. This pension is now in "pay status."

¶ 4 In 2004, Carmen filed for dissolution of the marriage. At trial, the parties and their experts presented lengthy testimony regarding Carmen's career and health, Peter's career, job search and health, the future possible income streams of both parties, the community debts, and the tangible assets available to each. The trial court received evidence on various real and personal properties, including the family home, Carmen's IRA and Thrift Savings Plan, Peter's contributory and rollover

IRA's, two automobiles, rental proceeds, life insurance policies, Peter's disability insurance policy, frequent flier miles, and Carmen's CSRS pension.

¶ 5 In its oral ruling issued on June 24, 2005,^{FN2} the trial court stated that it was "back[ing] out the Social Security contribution assessment for that Mr. Kessler provided, that's \$159,464." This is the value of social security that Carmen would have received if she was not receiving her particular type of federal pension. The trial court "compensated" her for that amount in its written findings of fact.

FN2. Because the findings are not clear as to how the court arrived at its conclusions, we rely on the trial court's oral opinion. *In re Marriage of Yates*, 17 Wash.App. 772, 565 P.2d 825 (1977) (an appellate court may use a trial judge's oral opinion to clarify formal findings with which the oral opinion is consistent). *Cf. Shinn v. Thrust IV, Inc.*, 56 Wash.App. 827, 838, 786 P.2d 285 (1990) (an oral opinion is not itself the judgment, and cannot be used to impeach or contradict unambiguous written finding).

*241 ¶ 6 In addressing the division of the pension, the trial court noted Peter's entitlement to Social Security benefits and their potential to increase, Carmen's lack of Social Security benefits due to her type of pension, and Peter's inheritance funds that he gifted to the community. It accepted the "subtraction method" that Peter's actuary expert used to value Carmen's pension, finding that 92 percent of the pension was community property and 8 percent was Carmen's separate property. The trial court concluded that it was fair and equitable to divide the community property portion of the pension 60 percent to Carmen and 40 percent to Peter, and to award Carmen her separate property portion of the pension. This meant that Peter is to receive 36.8 percent of the gross value of the pension.

¶ 7 Both parties moved for reconsideration of the oral ruling filing a motion and response to the same

on July 26, 2005. There are no significant differences between what the parties raised in their motions for reconsideration and the issues raised on appeal. The trial court denied Peter's motion for reconsideration in its entirety. The trial court also denied Carmen's motion for reconsideration in its entirety, but did revise the **576 proposed order to reflect that the pension was 8 percent Carmen's separate property and 92 percent community property.

¶ 8 The trial court issued its written findings of fact on August 26, 2005. Based on those findings, the trial court stated “[g]iven the difference in age, earning capacity, physical condition, and that husband had the ability to earn income and save for retirement in the future, it is fair and equitable to divide the community property 60 percent to wife and 40 percent to husband.” It also ordered the family home to be sold in order to provide liquidity to both parties.

¶ 9 Neither party moved for reconsideration of the written findings of fact. Peter filed his notice of appeal on September 26, 2005. Carmen filed her notice of cross-appeal on October 4, 2005.

*242 ANALYSIS

I. Standard of Review

¶ 10 Appellate courts apply the substantial evidence standard of review to findings of fact made by the trial judge. See Washington Family Law Deskbook, 2nd Ed. § 65.4(1) at 65-9. As long as the findings of fact are supported by substantial evidence, they will not be disturbed on appeal. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wash.2d 570, 575, 343 P.2d 183 (1959). “Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *In re Marriage of Griswold*, 112 Wash.App. 333, 339, 48 P.3d 1018 (2002). Where the trial court has weighed the evidence, the reviewing court's role is to simply determine whether substantial evidence supports the find-

ings of fact, and if so, whether the findings in turn support the trial court's conclusions of law. *In re Marriage of Greene*, 97 Wash.App. 708, 986 P.2d 144 (1999). A court should “not substitute [its] judgment for the trial court's, weigh the evidence, or adjudge witness credibility.” *Id.* at 714, 986 P.2d 144 (citing *In re Marriage of Rich*, 80 Wash.App. 252, 259, 907 P.2d 1234 (1996)).

[1][2] ¶ 11 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 *243 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 Wash.App. 728, 731, 566 P.2d 212 (1977).

[3][4][5] ¶ 12 However, the court is not required to divide community property equally. *In re Marriage of White*, 105 Wash.App. 545, 549, 20 P.3d 481 (2001). 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. 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. Where one spouse is older, semi-retired and dealing with ill health, and the other spouse is employable, the court does not abuse its discretion in ordering an unequal division of community **577 property. *In re Marriage of Schweitzer*, 81 Wash.App. 589, 915 P.2d 575 (1996).

II. Social Security Benefits

[6] ¶ 13 Peter assigns error to the trial court's consideration of Carmen's social security benefits. First, he assigns error to the following finding of fact:

2.8.

13.e. Wife is not entitled to receive Social Security benefits as her pension is in lieu of Social Security benefits. The *244 present value of wife's social security benefits is \$159,464. The court finds it is fair and equitable to compensate wife in this amount, since husband will receive social security benefits.

¶ 14 Mr. Kessler, Carmen's expert, testified that Carmen's type of federal pension is in lieu of Social Security. He valued the Social Security that she would have received at \$159,404, which was based on a recalculation of updated numbers. This amount was not challenged. He noted that Peter will receive Social Security benefits that will increase from cost-of-living adjustments every year. When asked whether it was reasonable for Carmen to ask the court to deduct the value of her Social Security benefits from the value of the pension for purposes of property division, he replied that it was necessary to ensure fairness:

[I]f we were truly trying to have an apples-to-apples analysis, for instance, in the case of Mr. Rockwell who will receive Social Security benefits, we needed to put a value on the Social Security benefit and deduct it from the value of Ms. Rockwell's CSRS benefit that does not entitle her to Social Security benefits.

The evidence is sufficient to persuade a fair-minded rational person that the value of Carmen's foregone Social Security, which would have been indivisible separate property, was \$159,404.

[7][8][9] ¶ 15 Next, Peter argues that the trial court improperly compensated Carmen for the fact that her federal pension is in lieu of social security. The law does not permit the court to value and distribute social security benefits. *In re Marriage of Zahm*, 138 Wash.2d 213, 219, 978 P.2d 498 (1999) (citing 42 U.S.C. § 407(a) of the Social Security Act and its interpretation under *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979)). In particular, the trial court cannot calculate a future value of those monies and award that value as a precise property offset as part of its property distribution. *Zahm*, 138 Wash.2d at 217, 978 P.2d 498. However, the possibility that one or both parties may receive Social Security benefits is a factor the court *245 may consider in making its distribution of property. *Id.* “A trial court could not properly evaluate the economic circumstances of the spouses unless it could also consider the amount of social security benefits currently received.” *Id.* at 223, 978 P.2d 498.

¶ 16 Carmen's expert testified to the present value of the Social Security that *Carmen* would have received but is not entitled to draw due to the structure of her federal pension. The trial court “compensated” Carmen by reducing the community property portion of the pension by that amount and treating it as if it were social security. The fact that Peter would receive social security was confirmed, but its value was not considered. Neither the “in lieu of” portion of the pension nor Peter's social security were added to either parties' column for pur-

poses of dividing the present assets. Once set aside, these amounts were excluded from the equation used by the court to determine a fair division of property. By doing this, the trial court did not value Peter's social security and offset it against other property, nor did it divide his social security benefit. That would have been error under *Zahm*. Rather, the trial court focused solely on *Carmen's* foregone, indivisible social security benefits and valued them for purposes of comparing her economic future against Peter's. But for the existence and structure of *Carmen's* federal pension there would be no question that this was appropriate—the trial court's adjustment method simply removed both parties' social security benefits from the equation in order to put them on comparable footing prior to dividing the remaining assets. We do not read *Zahm* to preclude this calculation **578 as a fair and proper means of considering social security or achieving overall fairness. We conclude that the challenged finding is supported by substantial evidence and that the trial court properly considered and compensated for the social security benefits that *Carmen* would have received, but for her federal pension.

***246 III. Husband's Earning Capacity**

[10] ¶ 17 Peter argues the trial court erred when it found that he was capable of earning a salary of at least \$70,000 a year. To support this finding, the trial court relied on the following findings of fact:

2.20.

1. Husband is nine years younger than wife and in good health.

...

3. Husband has two bachelor's degrees, significant experience and knowledge in a variety of areas and is capable of working and earning at least \$70,000 gross per year.

¶ 18 Peter is, in fact, eight years and four months

younger than *Carmen*. *Carmen* was born on September 19, 1942. Peter was born on January 25, 1951. While the record could be corrected to be this precise, we do not regard this rounding up as an error of fact. The court used the number only to consider the parties' ages. Precision in the number of day or weeks or months in such a consideration is not necessarily required.

¶ 19 Peter also argues that the trial court erred when it underestimated his age because its oral ruling stated that he would have seven more years of work until the age of sixty. He contends that this results in an inaccurate valuation of his future earnings as a basis for the 60/40 split. We recognize that the trial court, in its oral ruling, stated “[a]nd what I have done in terms of trying to look at the big picture is estimate incomes from him until he is at age 60, so I'm talking about seven years.” However, by the end of trial in June 2005, Peter was 54.5 years old. He will be 60 years old on January 25, 2011. This results in 5.5 years of work at an estimated salary of \$70,000, rather than seven years. Peter argued this same issue to the trial court in his motion for reconsideration: “The court indicated that it determined that [Peter] would be able to earn \$490,000 in future earnings between now and the time he is 60.” Confronted *247 with this factual error the trial court denied reconsideration. We can infer from this denial that the seven year period was the intended duration as opposed to age 60 being the intended endpoint. We conclude that the implication in the findings of fact and rejection of Peter's motion for reconsideration is that the trial court estimated that Peter would retire at age 62. This would mean that Peter in fact had seven years in which to earn a \$70,000 salary. There is no error.

[11] ¶ 20 In regards to his potential salary, Peter testified that he has bachelor's degrees in mechanical engineering and liberal arts. In 1999, when he was 48, he was laid off. In that last year of employment, he had earned a \$72,000 salary and a commission of about \$18,000. He testified that in pursuing another job, what he considered suitable for

his age and experience was a sales job involving a great degree of technical experience paying a minimum of \$70,000. He also testified that during his two-year job search from 2000 until 2002, he only looked for jobs that would pay \$70,000 and up. During his testimony he described his lengthy but unsuccessful job search. He acknowledged that he may have a better chance of finding a position in technical sales if he mounted a nationwide job search. But he was not interested in jobs outside of the Seattle area due to concerns regarding his daughter's health at the time. He stopped seeking employment after the spring of 2002.

¶ 21 In December of 2004 the court ordered Peter to again look for work. According to his testimony, he first pursued leads in technical sales, but was discouraged by the lack of positive responses. He then considered becoming a math teacher but was again discouraged by the training required and the low pay-scale, which would begin at \$38,000 per year. He settled on becoming a real estate agent, and joined a real estate firm in May of 2005. At the time of trial in June of 2005, he had not made any listings or sales, but had incurred business costs. Since becoming**579 a real estate agent, he inquired into one or two opportunities in technical sales, but did not receive a job offer in that field. During his *248 testimony he indicated that while his daughter is now an adult and lives in Bellingham, he would prefer to remain in the Seattle area, again due to her health concerns.

¶ 22 If a trial court's finding is within the range of the credible evidence, we defer. *In re Marriage of Sedlock*, 69 Wash.App. 484, 491, 849 P.2d 1243 (1993). Here, the salaries to which Peter testified ranged from \$38,000 as a teacher to about \$90,000 in his last years of employment. While he may have had difficulty in securing a technical sales position with such a salary in Seattle, Peter has the training and experience to pursue such positions, as well as more recent training to sell real estate. Further, while we recognize his legitimate concerns for his daughter's health, he is not so constrained by those

circumstances that he cannot look for jobs outside of Seattle. The trial court's finding is both within the range of credible evidence, and is supported by substantial evidence showing that Peter would be able to work and earn a salary of \$70,000 per year.

[12][13][14] ¶ 23 Next, Peter argues that his future earning capacity should not have been considered in dividing the property. Future earning potential "is a substantial factor to be considered by the trial court in making a just and equitable property distribution." *In re Marriage of Hall*, 103 Wash.2d 236, 248, 692 P.2d 175 (1984). While Peter cites this case as prohibiting the consideration of future earning potential as a divisible asset, the *Hall* court only declined to offset future earning capacity as an asset against goodwill. *Id.* Instead, because a spouse has no property interest in the earning capacity of the other spouse, *Hall* only forbids treating earning capacity as a present asset, placing it among other community assets, and dividing it as property. *In re Marriage of Kraft*, 119 Wash.2d at 448, 832 P.2d 871. Further, in considering a party's future earnings capacity, a trial court may consider the age, health, vocational training and work history of the party. Washington Family Law Deskbook, § 32.3(4)(a) (1st ed.).

¶ 24 As noted above, the trial court must put the parties in roughly equal financial positions for the rest of their lives. *See* Washington Family Law Deskbook, § 32.3(3) at *249 17 (2d ed.2000). This requires considering the combination of the division of property and the expected income and earnings of the parties. And, where one spouse is older, semi-retired and dealing with ill health, and the other spouse is employable, the court does not abuse its discretion in ordering an unequal division of community property. *In re Marriage of Schweitzer*, 81 Wash.App. 589, 915 P.2d 575 (1996). Peter was younger, in good health and employable at a substantial wage. Moreover, substantial evidence showed that Carmen was retired, older and in poor health. Accordingly, the trial court did not abuse its discretion when it compared Peter's age, health and

employability (and thereby, future earning capacity) against Carmen's as a basis for its 60/40 split of the community property.

¶ 25 Peter's final assignment of error in regards to his future earning capacity is based on the following finding of fact:

2.8.

13.f. Husband is entitled to receive Social Security benefits at this time of up to \$1,888 (age 70) per month depending upon when he elects to begin receiving the benefit, *which benefits will increase in the future from husband's employment*. If he retires at age 62 his social security benefit would be \$1,078 per month.

(emphasis added.) By emphasizing the underlined language, Peter challenges only that his benefits will increase based on future employment, not the actual valuation of his benefits. But the appropriateness of imputing his income has already been established above. Further, because the value of his Social Security benefits has been set aside and is not part of the equation of equitable division, there is no possible error here.

IV. Characterization of Federal Pension

[15] ¶ 26 Peter asserts that the findings of fact regarding the community percentage ****580** of the federal pension is erroneous because the court committed a mathematical error.

***250** 2.8.

13.1. The court accepts the actuarial analysis of husband's expert Mr. Dallas and finds that the "subtraction method" of valuing the pension is the appropriate method. *Pursuant to that method, the increase in the benefit during the marriage is \$6,194 and therefore 92 [percent] of the retirement benefit is community property and 8 [percent] is separate property.*

...

13.o. 40 percent of the community property portion of the pension equates to 36.8 percent of the gross value of the pension (calculated as follows: 40 percent of 92 percent).

(emphasis added).

¶ 27 Peter contends that the trial court should have characterized the pension as 93.2 percent community property and 6.8 percent separate property, rather than the 92/8 split that was used in the final order. Arguing that this is mathematical error, he is concerned that he will receive about \$35 less per month than he should, resulting in a \$8,400 shortfall over twenty years.

¶ 28 Peter submitted two exhibits in which his actuary estimated the community property portion of the pension. Exhibit 71 supported a 93.2/6.8 split. But Exhibit 76, prepared by Peter, supports a 91.8/8.2 split. The trial court orally accepted Peter's actuary's *assessment and valuation* of the pension for the purposes of its analysis of the 60/40 split. However, in the final order, it accepted a 92/8 split, which was proposed by Carmen.

[16] ¶ 29 As noted above, when the parties offer conflicting evidence in valuation, the court may adopt the value asserted by either party, or any value in between the two. *In re Marriage of Sedlock*, 69 Wash.App. at 484, 849 P.2d 1243 (1993). The final split is within the range of evidence offered by both parties. Moreover, Peter argued this very point in his motion for reconsideration, which was rejected by the trial court. This rejection eliminates the possibility of an inadvertent choice or mere mathematical error in favor of the trial court's conscious ***251** choice of a value within the range of evidence. We conclude that the trial court did not abuse its discretion when stayed within the range of evidence offered by both parties. There was no mathematical error.

[17] ¶ 30 In her cross-appeal, Carmen assigns error

to the trial court's use of the subtraction method, rather than the time rule method in characterizing her pension as 92 percent community property. She asserts that Washington cases have only used the time rule method, under which the proportion would be 60/40 in her favor. Peter counters that both methods result in the percentage formula that has been encouraged by Washington courts, but neither one has been definitively chosen over the other. Instead, he argues, courts have used the method that best applies to the circumstances of the case and creates the most equitable results. However, he does not cite to any Washington cases that explicitly approve of the subtraction rule method. Even the out-of-state cases he cites to support his "best application to the circumstances" argument *reject* the subtraction method. Similarly, the Washington cases cited by both Peter and Carmen have used a time rule method or a close variation thereof. *See e.g. In re Marriage of Bulicek*, 59 Wash.App. 630, 636-37, 800 P.2d 394 (1990); *In re Marriage of Chavez*, 80 Wash.App. 432, 434, 436, 909 P.2d 314 (1996); *In re Marriage of Greene*, 97 Wash.App. 708, 713, 986 P.2d 144 (1999) (noting that the time rule was the typical formula for apportioning a pension, but approving the trial court's use of a "slightly different formula but [that] made the same basic calculation").

[18][19] ¶ 31 "Pension benefits constitute property rights in the nature of deferred compensation, even if benefits are not presently available." *In re Marriage of Bulicek*, 59 Wash.App. at 636-37, 800 P.2d 394. If the pension was accumulated partly prior to marriage and partly after marriage, it is proportionately classified, with the portion acquired **581 during marriage characterized as community property. *See In re Marriage of Landry*, 103 Wash.2d 807, 699 P.2d 214 (1985).

[20] ¶ 32 In deciding the distribution of property in a dissolution, the trial court has wide discretion. *Bulicek*, 59 Wash.App. at 636-637, 800 P.2d 394. Generally, the community share is *252 calculated by dividing the number of years of marriage (prior

to separation) by the total number of years of service for which pension rights were earned and multiplying the results by the monthly benefit at retirement. *Id.* This is known as the time rule method.

¶ 33 In *Bulicek*, the parties were married for 22 years before separation. The husband had continued to work after their dissolution. *Bulicek*, 59 Wash.App. at 631, 800 P.2d 394. The value of his monthly retirement benefits was to increase based on these post-dissolution working years. The court used the time rule method to ensure that the wife would receive a certain percentage of the husband's retirement benefits, even though the monthly payout would increase after dissolution. *Id.* at 638, 800 P.2d 394. The court recognized that the husband's prospective increase in retirement benefits was based on the 22 years of community effort supporting his career, performance and therefore past and future pay increases contributing to his benefit. *Bulicek*, 59 Wash.App. at 639, 800 P.2d 394. Emphasizing that the trial court has wide discretion in awarding property in a dissolution, this Court upheld and encouraged the time rule method of dividing pension rights as a means of recognizing the community contribution to such increases. *Id.*

¶ 34 The time rule method was also recognized as "the correct formula to determine the community share" of the total pension credits earned by the retiree in *Marriage of Chavez*, 80 Wash.App. at 434, 436, 909 P.2d 314. There, the parties' marriage was dissolved in 1986, and the husband retired seven years later. *Chavez*, 80 Wash.App. at 434-35, 909 P.2d 314. Because he was a military pension recipient, after 20 years of service he would be entitled to 50 percent of his base salary, and his pension would increase by another 2.5 percent of his salary (i.e. "service credit") for each additional year of service after 20 years. *Id.* Due to his 30 years of service, he was entitled to a pension of 75 percent of his base salary. *Id.* He challenged the decree of dissolution, which had awarded the wife 50 percent of this pension, arguing that his salary at retirement should not be used to calculate the wife's share of the pension

because *253 that salary was different from his salary at the time of divorce. *Id.* at 437, 909 P.2d 314. The court disagreed, citing *Bulicek's* conclusion that benefits increase based on higher salaries made possible by the community effort, and concluded that “increases in pension benefits based on a retiree's higher salary at the time of *retirement* should be included in the community share.” *Id.* at 437, 909 P.2d 314 (emphasis added). The court was careful to note however, that the wife's share of the pension should *not* be increased due to the additional “service credits” that the husband earned subsequent to the divorce. *Id.* at 437, 909 P.2d 314.

¶ 35 We draw on the above principles to conclude that the trial court erred when it approved the use of the subtraction rule to characterize Carmen's federal pension. If post-dissolution pension increases are apportioned to make an equitable division, increases in pensions due to pre-marriage efforts should also be apportioned to make an equitable division. Like the court in *Bulicek* we recognize that Carmen's salary increased substantially during the marriage. However, such increases would not have occurred but for her first sixteen years in the federal government. Similar to the indivisible “service credits” in *Chavez*, increases due to her years of service *prior* to the marriage should not be divisible community property. The subtraction rule disproportionately undervalues those early years by freezing the value of Carmen's front-end contribution and disallowing the separate interest to benefit from any income increases that became possible only because of her earlier years of service. There is a sharp contrast between the subtraction method, which characterizes the pension as only 8 percent separate property and 92 percent community property, and the time rule method which characterizes the pension **582 as 38 percent separate property and 62 percent as community property. When the trial court's 60/40 division of the property is applied to the community property of the pension, using the time rule method means that Peter will receive 24.4 percent of the gross pension, and Carmen will receive 74.6 percent of the gross pension. This divi-

sion more *254 appropriately values Carmen's first 16 years of work for the federal government.

¶ 36 Washington cases have only used the time rule method, not the subtraction method. We conclude that the trial court erred when it used the subtraction method and reverse and remand with instructions to characterize Carmen's federal pension according to the time rule method.

¶ 37 Having concluded the pension was improperly characterized, we need not reach Peter's assignments of error relating to mathematical error in the percentages assigned to community and separate interests in the pension.

V. Overall Division of Property

[21] ¶ 38 Peter challenges the overall division of the property. He challenges the following findings specifically:

2.8.

13.m. The court accepts the actuarial analysis of husband's expert and finds that although *husband is nine years younger than wife* and it is more likely than not that wife will predecease him ...

13.n. The court finds that it is fair and equitable to divide the community property portion of the pension 60 [percent] to wife and 40 [percent] to husband, and to award wife her separate property portion of the pension.

...

2.20.

5. Given the difference in age, earning capacity and physical condition, and that husband had the ability to earn income and save for retirement in the future, it is fair and equitable to divide the community property 60 [percent] to wife and 40 to husband.

...

END OF DOCUMENT

8. The distribution of property and liabilities as stated herein and as set forth in the Decree is fair and equitable [Repeated as a Conclusion of Law at 3.3.2.]

*255 Based on these alleged factual errors, Peter also assigns error to provisions 3.2, 3.3, 3.14.1, and 3.14.2 in the decree of dissolution which divide the property.

¶ 39 Altogether, the trial court concluded that “the basics of the ruling are a 60/40 split,” based on the difference in age, earning capacity, physical condition, and that Peter has the ability to earn income and save for retirement in the future. 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 Marriage of Griswold*, 112 Wash.App. 333, 339, 48 P.3d 1018 (2002). In light of the discretion afforded to the trial court in determining what will be a fair and equitable distribution, and the factors that it can appropriately consider, we conclude that there was no abuse of discretion in making this final distribution. Absent the error in characterizing the federal pension, we affirm the trial court's division of the property as fair and equitable.

VI. Attorney Fees

¶ 40 Both parties assert the right to attorney fees on appeal under RCW 26.09.140 and RAP 18.1. We award Carmen attorney fees and costs subject to the provisions of RCW 26.09.140 and RAP 18.1.

¶ 41 We reverse the trial court's characterization of Carmen's federal pension and affirm on the other issues appealed. We remand for further proceedings consistent with this opinion.

WE CONCUR: DWYER and GROSSE, JJ.
Wash.App. Div. 1, 2007.
In re Marriage of Rockwell
141 Wash.App. 235, 170 P.3d 572

APPENDIX B
Trial Court's Distribution On Remand

<u>ASSET</u>	<u>HUSBAND</u>	<u>WIFE</u>
Community portion of pension using "time rule method"	\$354,899.16	\$ 532,348.74
Pension survivor benefits	\$253,289.00	\$ 326,400.00
Social security benefit offset		(\$ 159,464.00)
Thrift Plan		\$ 84,965.00
Charles Schwab Contributory IRA	\$ 65,389.00	
Charles Schwab Rollover IRA	\$ 31,163.80	\$ 280,474.20
Vehicles	\$ 6,746.00	\$ 1,000.00
Proceeds from sale of Family Residence	\$ 243,557	\$ 373,443.00
Total Community Distribution	\$955,043.96 40%	\$1,439,116.94 60%
Separate portion of pension using "time rule method"		\$ 543,797.10
Total Overall distribution	\$955,043.96	\$1,982,914.00

APPENDIX C
Trial Court's August 25, 2005 Distribution

Table I

COURT'S DISTRIBUTION (using 92/8 ratio for pension, "offsetting" for social security)						
Asset	Gross Value	Encumbrance	Community Net Value	Award to Husband	Award to Wife	COMMENT
Pension (Valuing Community Portion as 92% and Separate Portion/Encumbrance as 8%)						
Actuarial Present Value	\$1,431,045.00	\$114,483.60	\$1,316,561.40	\$526,624.56	\$789,936.84	Exhibit 78; Finding 2.8.13.1
Pension Distributed	\$1,431,045.00	(\$114,483.60)	\$1,316,561.40	\$526,624.56	\$789,936.84	Exhibit 78
Percentage				40.00%	60.00%	
Pension Survivor Benefits						
Husband	\$253,289.00	\$0.00	\$253,289.00	\$253,289.00	\$0.00	
Wife	\$326,400.00	(\$159,464.00)	\$166,936.00	\$0.00	\$166,936.00	Less Social Security Benefit
Subtotal Survivor Benefit	\$579,689.00	(\$159,464.00)	\$420,225.00	\$253,289.00	\$166,936.00	
Tangible Assets: Retirement Benefits						
Wife's IRA	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	Finding 2.8.2
Wife's Thrift Plan	\$84,965.00	\$0.00	\$84,965.00	\$0.00	\$84,965.00	Finding 2.8.3; Decree 3.3.2
Husband's Contributory IRA	\$65,389.00	\$0.00	\$65,389.00	\$65,389.00	\$0.00	Finding 2.8.4; Decree 3.2.11
Husband's Rollover IRA	\$311,638.00	\$0.00	\$311,638.00	\$31,163.80	\$280,474.20	Finding 2.8.5; Decree 3.2.12 & 3.3.3.
Tangible Assets: Vehicles						
Subaru Forester 2003	\$17,895.00	(\$11,149.00)	\$6,746.00	\$6,746.00	\$0.00	Finding 2.8.6; Decree 3.2.2
Subaru Forester 2005	\$1,000.00	\$0.00	\$1,000.00	\$0.00	\$1,000.00	Finding 2.8.7; Decree 3.3.4
Tangible Assets: Real Property						
Family Home	\$710,000.00	(\$93,000.00)	\$617,000.00	\$246,800.00	\$370,200.00	Finding 2.8.1; Decree 3.2.1 & 3.3.1
Percentage				40.00%	60.00%	1RP 110-112 (Drebin Appraisal)
Award to Wife from Proceeds				(\$2,640.00)	\$2,640.00	Decree 3.14.1
Award to Wife from Proceeds				(\$603.00)	\$603.00	Decree 3.3.8
Subtotal Family Home				\$243,557.00	\$373,443.00	
SUBTOTAL TANGIBLE ASSETS			\$1,086,738.00	\$346,855.80	\$739,882.20	
PERCENTAGE				31.92%	68.08%	
Total Community Property Distribution						
Distribution	\$3,201,621.00	(\$378,096.60)	\$2,823,524.40	\$1,126,769.36	\$1,696,755.04	
Percentage				39.906%	60.094%	
Total Assets Distributed (Including Separate Property Portion of Annuity)				\$1,126,769.36	\$1,811,238.64	\$2,938,008.00
				38.35%	61.65%	

APPENDIX D
Excerpts from July 1, 2006 Brief of Appellant

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By _____

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ESSG
ATTORNEYS AT LAW

No. 56954-6-1

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

In re the Marriage of
CARMEN ROCKWELL
Respondent
and
PETER ROCKWELL
Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Hon. James Doerty

APPELLANT'S OPENING BRIEF

PATRICIA NOVOTNY
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B. ASSIGNMENTS OF ERROR

1. The distribution is inequitable given the length of the marriage, the assets, the parties' equal contributions, the erroneous calculations and assumptions, and it means the husband and wife will have substantially different financial futures.

2. The court improperly distributed the social security benefit.

3. The court improperly and inequitably distributed Peter's estimated future earnings as an asset and overvalued them.

4. Because of arithmetical errors, the inequity of the distribution is compounded.

5. The trial court erred when it entered the following findings of fact (or underlined portions thereof):

2.8.13.e. Wife is not entitled to receive Social Security benefits as her pension is in lieu of Social Security benefits. The present value of wife's social security benefits is \$159,464. The court finds it is fair and equitable to compensate wife in this amount, since husband will receive social security benefits.

2.8.13.f Husband is entitled to receive Social Security benefits at this time of up to \$1,888 (age 70) per month depending upon when he elects to begin receiving the benefit, which benefits will increase in the future from husband's employment. If he retires at age 62 his social security benefit would be \$1,078 per month.

2.8.13.l The court accepts the actuarial analysis of husband's expert Mr. Dallas and finds that the "subtraction method" of valuing the pension is the appropriate method. Pursuant to that method, the increase in the benefit during the marriage is \$6,194 and therefore 92% of the retirement benefit is community property and 8% is separate property.

2.8.13.m The court accepts the actuarial analysis of husband's expert and finds that although the husband is nine years younger than wife and it is more likely than not that wife will predecease him ...

2.8.13.n The court finds that it is fair and equitable to divide the community property portion of the pension 60% to wife and 40% to husband, and to award wife her separate property portion of the pension.

2.8.13.o 40% of the community property portion of the pension equates to 36.8% of the gross value of the pension (calculated as follows: 40% of 92%).

2.20.1 Husband is nine years younger than wife and in good health.

2.20.3 Husband has two bachelor's degrees, significant experience and knowledge in a variety of areas and is capable of working and earning at least \$70,000 gross per year.

...

2.20.5 Given the difference in age, earning capacity, physical condition, and that husband had the ability to earn income and save for retirement in the future, it is fair and equitable to divide the community property 60% to wife and 40% to husband.

...

2.20.8 The distribution of property and liabilities as stated herein and as set forth in the Decree is fair and equitable. [Repeated as a Conclusion of Law at ¶ 3.3.2.]

CP 117-118 (attached as Appendix A).

6. The trial court erred when it entered provisions 3.2, 3.3, 3.14.1, and 3.14.2 in the Decree of Dissolution, a copy of which is attached as Appendix A and incorporated herein by this reference.

Issues Pertaining to Assignments of Error

1. Is the disproportionate division of property inequitable?
2. Did the court err when it compensated the wife for a fictitious social security benefit?
3. Did the court err when it distributed as an asset an estimate of the husband's future earnings?
4. When the court awarded this asset, did it overvalue it, both by calculating it incorrectly and by assuming, without a substantial evidentiary basis, that the husband could earn that much before retirement?
5. Did the court's other arithmetical errors exacerbate the inequity of the distribution?
6. Even assuming the "best case" and ignoring the errors, does the court's distribution fail to accomplish the rough

equality of economic futures for the parties intended by the court and is that result unjust and inequitable?

C. MOTION FOR ATTORNEY FEES

Because the husband has a need for attorney fees, relative to the wife's ability to pay, he should be granted fees on appeal.

D. STATEMENT OF THE CASE

Carmen and Peter Rockwell were married for 26 years. Together they substantially reared Carmen's sons from her previous marriage and together had a child, Maria, who is now an adult. CP 112; 1RP 20, 39, 49-50, 52-55; 3RP 75-80, 86-90, 94, 102-103; 4RP 18. For most of the marriage, both spouses worked in professional capacities and, by dissolution, had accumulated separate and community assets of approximately \$3 million. 1RP 22-31, 61-65. At separation, both were effectively retired. 1RP 42, 60; 3RP 129-131, 155; 4RP 54-55.

1. THE PARTIES' MARRIAGE WAS ALSO AN EQUAL ECONOMIC PARTNERSHIP.

Carmen owned a condominium when she married Peter, with equity worth about \$10,000, which they shortly put into joint ownership and later sold at a profit. 1RP 159-160, 4RP 68; Exhibit 22; CP 115 (Finding 2.9). During the first decade of their marriage, Peter received trust disbursements and inherited funds worth

APPENDIX E
Excerpts from August 23, 2006 Brief of Cross-Appellant

No. 56954-6-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

PETER G. ROCKWELL,

Appellant/Cross-Respondent,

vs.

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

Respondent/Cross-Appellant.

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

BRIEF OF RESPONDENT/CROSS-APPELLANT

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

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influenced by its characterization of the property, and (2) it is not clear that had the court properly characterized the property, it would have divided it in the same way.” *Marriage of Shannon*, 55 Wn. App. 137, 142, 777 P.2d 8, 11 (1989). The court made clear that it had contemplated various distributions of the community property based on the needs of the parties (IV RP 108), and it is unlikely that the mathematical errors the husband complains of on appeal would change the overall division given the length of the marriage and the needs and capacities of the parties. Because there is substantial evidence to support the pension split if the subtraction method is proper and any error is balanced by other errors in calculating the wife's separate property interest, no remand is needed to address the issues raised by the husband's appeal.

CROSS-APPEAL

C. **The Trial Court Erred By Failing To Use The Time Rule Method In Characterizing The Wife's Pension.**

The trial court erred, however, in characterizing the wife's federal pension by the subtraction, instead of the time rule, method. The trial court's characterization of property as community or separate is a question of law, reviewed de novo. *Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447, 450 (2000).

Because of the court's legal error here, the pension the wife spent 16 years earning prior to her marriage and 24 years after was characterized as 92% community property. (FF 2.8(13)(l), CP 114) Under the correct time rule method, the proportion would be 60/40.

The time rule method calculates the community portion of a pension by dividing the number of years of service while the employee is married by the total years of service. The subtraction method divides the total value of a pension at retirement by the amount of pension if only the years of married service were considered. (II RP 17, 79, 101) Every case in Washington addressing the valuation and characterization of pensions use the time rule method. No cases support the subtraction method, and the reasoning of cases discussing the time rule method is inconsistent with application of the subtraction method in this case.

The lead case discussing how to value and distribute pensions at dissolution is *Bulicek v. Bulicek*, 59 Wn. App. 630, 800 P.2d 394 (1990). The issue in *Bulicek* was how to distribute a pension earned by the husband during employment beginning before marriage and likely to continue for several years after divorce. The husband contended his pension should have been reduced to present value and distributed at the time of the divorce,

James, 950 P.2d 624, 627-28 (Colo. App. 1997) (trial court abused its discretion in using subtraction method to characterize nearly half of a pension as marital property when four of 32 years of service occurred during the marriage); **Caudill**, 912 P.2d at 918 (time rule only appropriate method for defined benefit plan; subtraction method inequitable because it distorts the value of benefits earned before and after marriage); **Humble v. Humble**, 805 S.W.2d 558, 561 (Tex. App. 1991).

These cases demonstrate the trial court's error here in using subtraction method, and its consequent failure to account for the significance of the wife's 16 years of federal service prior to marriage. During that time, she rose from GS-3 to GS-14, got a college degree at night while working during the day, and moved 15 times for the sake of her career. (I RP 61-62) The wife's later years of higher salaries and promotions were based on the contributions of those early years. **Bulicek**, 59 Wn. App. at 638-39.

Unlike the *de minimus* calculation errors the husband complains of, the trial court's legal error in using the subtraction method to characterize the wife's pension clearly influenced the outcome. The characterization method changed the pension valuation from 8% to 40% separate. This difference, of almost one-

third of the pension, is a swing of \$592,508 in value (31% of \$1,911,317). If the wife's pension had been correctly characterized, the distribution of property in the decree greatly advantages the husband, contrary to the trial court's intention, as his 36.8% ongoing share of the full pension translates to 61% of the community portion. Even if the trial court shifted from a 60/40 split to a 50/50 split of the pension in light of its proper characterization as 40% separate property, the wife would still be entitled to a significantly greater monthly payment than she was in fact awarded. The trial court erred in characterizing the wife's pension using the subtraction method, and should be directed to recharacterize and redivide the pension using the time rule method on any remand.

D. The Husband Should Bear His Own Attorney's Fees, and Pay The Wife's.

The husband claims a right to attorney's fees on appeal citing his current poverty, without any citation to the record. He complains that he may have to work at age 52 because he was awarded only 36.8 percent of a pension that the wife would never have received without 16 years of her labor before the parties' 24-year marriage. Given the merits of the appeal and cross-appeal and the parties' respective financial condition, the husband should

APPENDIX F
Excerpts from January 8, 2007 Reply Brief of Appellant

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No. 56954-6-1

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

In re the Marriage of
CARMEN ROCKWELL

Respondent

and

PETER ROCKWELL

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Hon. James Doerty

CROSS-RESPONDENT'S BRIEF
APPELLANT'S REPLY BRIEF

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of her own hard work and the support and career sacrifices of her husband. 1RP 21-26, 60-65; 2RP 100, 155-156; 3RP 76, 99-105.

Thanks to these combined efforts, as well as the couple's repayment of the withdrawn portions of the pension, Carmen was able to increase her pension from less than \$6,000/year at the time of the marriage to \$84,000/year at the time of the divorce. 2RP 78 (\$505/monthly payment x 12 = \$6,060); 2RP 12-14 (\$7,010 x 12 = \$84,120); 2RP 73-76, 96-97 (repayment of withdrawals). At trial, an actuarial expert, whose valuations are rarely questioned because they cannot be skewed to favor one or another party, testified that the difference between these amounts best measures the community property portion of the pension. 2RP 63-72, 79. The trial court adopted this method, the subtraction method, over that proposed by the other expert. CP 114; 4RP 107, 111.

C. ARGUMENT IN RESPONSE TO CROSS-APPEAL

1. THERE IS NO MISCHARACTERIZATION OF THE PENSION, CERTAINLY NOT ONE THAT CONTROLLED THE TRIAL COURT'S DECISION.

There was no characterization error here, for reasons explained below. Even if there were, the failure to characterize property properly will not justify setting aside a property distribution that is otherwise fair and equitable. *Marriage of Griswold*, 112

Wn. App. 333, 346, 48 P.3d 1019 (2002). In this case, the overall distribution is not fair, but the unfairness lies in the errors described in the opening brief and, below, in the reply portion of this brief.

With respect to the pension, based on the testimony of an overwhelmingly credible expert, the trial court properly characterized the community and separate portions. In any case, even where mischaracterization occurs, the trial court will be affirmed unless the reasoning of the court indicates (1) that the property division was significantly influenced by characterization and (2) that it is not clear that the court would have divided the property in the same way in the absence of the mischaracterization. *Griswold*, 112 Wn. App. at 346, citing *Marriage of Shannon*, 55 Wn. App. 137, 142, 777 P.2d 8 (1989). Neither condition is met here. Rather, here, the trial court could not have adopted the time rule method without exacerbating the disproportionate property distribution and without ignoring the facts of this case, this pension, and this marriage. We know where the court was headed and it has been demonstrated how the court unintentionally deviated from the course. Obviously, the court would not have further reduced its award to Peter based on a different characterization of the pension.