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No. 63397-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

KATHERINE GUNN-BOHM,

Appellant,

v.

CARL R. BOHM,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE HELEN HALPERT

BRIEF OF RESPONDENT
(RAISING CONDITIONAL CROSS-APPEAL)

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I. INTRODUCTION

After eight years of marriage, the wife, who is eight years younger than the husband and in good health, appeals a decree that leaves her with 60% of the community assets; two years of maintenance at \$7,000 per month, for a total of three and a half years of support after separation; \$30,000 of the \$40,000 in attorney fees that she requested below; an additional \$50,000 in cash from the husband's separate property; and the right to remain in the family residence after trial, at the husband's expense, until the home sold.

None of the issues raised by the wife in her scatter-shot appeal have any merit. The wife challenges the use of the "time-rule" method to characterize the husband's pension based on arguments addressed and rejected by this court only two years ago in *Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007), *rev. denied*, 163 Wn.2d 1055 (2008). The wife's remaining challenges are to fact-based discretionary decisions that are supported by substantial evidence or were not preserved below. This court should affirm and award attorney fees to the husband for having to respond to this frivolous appeal.

II. STATEMENT OF FACTS

A. **The Parties Lived Together And Were Married For Less Than Nine Years. They Have One Child Together.**

In November 1998, respondent Carl Bohm and appellant Katherine Bohm began living together in Carl's Mercer Island home. (RP 6-7) The parties married May 1, 1999. (RP 6) Carl has two children from a prior marriage, who are now ages 20 and 21. (RP 7, 303-04) The parties' daughter was born on November 17, 2000. (RP 8) The parties separated September 10, 2007. (RP 8)

Early in the marriage, the parties extensively remodeled Carl's separate home using a combination of community property and each parties' separate property. (RP 16, 20-23) As a result of the remodel and appreciation, the home increased in value from \$460,000 a year before the parties married to an appraised value of \$1.25 million at trial. (RP 11, 13, 47-48) The parties sold the home four months after trial for \$980,000, netting approximately \$375,000. (See CP 143, 147, 158, 187, fn. 1) Carl agreed that the home could be treated as an entirely community asset. (Finding of Fact (FF) 2.2.11, CP 187))

B. Both Parties Are Well-Educated And Experienced In The Workforce. Neither Was Employed At The Time Of Trial.

1. The Wife Has A Business Degree And Anticipated She Could Immediately Earn \$50,000 To \$60,000 Once She Found Employment.

Katherine, age 49 at trial, whose health is “really good,” has a business degree and experience in sales and marketing. (RP 6, 233, 245) When the parties began living together, Katherine worked in the healthcare industry, earning approximately \$70,000 annually. (RP 233) Katherine was laid off shortly before the parties married. (RP 234) The parties agreed that Katherine would stay home to help care for Carl’s older children and in anticipation of having their own child. (RP 234) Their daughter was born in November 2000. (RP 8)

Katherine testified that if she were to obtain employment similar to the job that she had before marriage, she could earn a base salary of \$80,000 to \$90,000. (RP 235) With bonuses, Katherine testified that she could earn over \$100,000. (RP 235) However, Katherine testified that she did not want similar employment as it would likely require travel, and the parties had agreed that Katherine would be the primary residential parent for their daughter, who was age 8 at trial. (RP 235) Katherine testified that in an “entry-level” sales or marketing position that did not

require travel, she could earn \$50,000 to \$60,000 in her first couple of years. (RP 237) Katherine testified that it would take at least a year to find a job. (RP 237, 265) Even though she was contacted by a recruiter in early 2006, she testified that she made no effort to pursue employment in the 14 months between separation and trial. (RP 235-36)

2. The Husband Was A Weyerhaeuser Executive Until He Was Laid Off Just Before Trial.

Carl, age 57 at trial, started working for Weyerhaeuser right out of graduate school in September 1976, first in sales and then as a planning manager for the Fine Paper division. (RP 303, 304, 442, Ex. 134) Carl remained at Weyerhaeuser through May 1985. (RP 304) When he left Weyerhaeuser of his own accord to gain additional sales and marketing experience, Carl negotiated a one-month severance package. (RP 304)

Carl returned to Weyerhaeuser in March 1994 to become director for its container packaging business. (RP 305) In negotiating his return, Weyerhaeuser agreed that Carl's original work service of approximately nine years would be grandfathered in for purposes of calculating his benefits, including his pension. (RP 442; Ex. 92) It has now become standard policy at Weyerhaeuser

for employees who return to have their prior service history credited for purposes of establishing benefits. (RP 444)

At the end of 1994, Carl became eligible for Weyerhaeuser's supplemental pension, which is a "reward" for "key executives above and beyond the basic plan." (RP 157, 306) The supplemental pension, just like Carl's "basic" pension, credited Carl for his prior service at Weyerhaeuser. (RP 442-43; *see also* Ex. 138 at 5) By the time of trial at the end of 2008, Carl was credited with a total of 24.85¹ years of service, which included both his first and second tenures at Weyerhaeuser. (RP 442; Exs. 92, 138 at 5)

Carl was promoted in 1995 to director of mill supply for Weyerhaeuser's recycling business. (RP 307) In 2001, after approximately 16 years with Weyerhaeuser and two years after the parties married, Carl was promoted to vice president of the containerboard business. (RP 315) Two years later, Carl became an officer of Weyerhaeuser. (RP 315)

The parties separated in September 2007. (RP 8) Four months earlier, in May 2007, Carl had learned that his business within Weyerhaeuser was being put up for sale, which would result in

¹ In reality, Carl was employed at Weyerhaeuser for a total of 280 months, or 23.3 years.

him being laid off. (RP 222, 317) In an effort to remain at Weyerhaeuser, Carl developed a strategic plan to improve the performance of the business to enable the board of directors to keep the business within Weyerhaeuser. (RP 317) Ultimately, Carl's efforts failed to keep the business within Weyerhaeuser, but as a result of Carl's efforts, International Paper purchased the business from Weyerhaeuser. (RP 317-18) The sale closed in August 2008. (Ex. 102) For his efforts, Carl received a "special recognition" bonus of \$10,000. (RP 367; Ex. 102) Although Carl earned this bonus for work after separation (RP 367), Katherine received 60% of this bonus. (CP 200)

Carl's efforts to remain at Weyerhaeuser in another position were fruitless. (RP 318) Carl approached International Paper about a job, but International Paper ultimately decided against retaining Weyerhaeuser's business management team. (RP 318) Carl's last day of work at Weyerhaeuser was November 17, 2008, approximately one month before trial. (RP 317)

Carl was offered a severance package that was conditioned on him signing both a non-compete agreement and a confidentiality agreement. (RP 318-19) Carl initially resisted the non-compete because it would limit his employment opportunities, but in light of

the economy and his prospects for finding immediate employment in late 2008, Carl decided to sign the non-compete and accept the severance package. (RP 350-51) As a result of the non-compete, Carl could not work within the same industry or for a competitor for one year and could not solicit employees, customers, or suppliers of Weyerhaeuser for two years following his termination. (RP 319)

The gross value of Carl's severance package was a little less than \$419,000:

Annual base salary:	\$229,766.53
Target annual bonus (40% of base salary):	\$ 91,906.61
Prorated annual bonus for 2008:	\$ 81,079.26
Accrued vacation:	\$ 6,186.02
COBRA:	<u>\$ 10,000.00</u>
Total:	\$418,938.42 ²

(Exs. 104, 139) After taxes and other deductions, Carl netted approximately \$307,000 for his severance, from which he continued to pay the \$4,000 monthly mortgage on the family residence, where Katherine resided with the parties' daughter through trial. (RP 321; Exs. 104, 105) By the time of trial, only \$286,050 remained of Carl's severance. (See Ex. 105)

² Carl also received outplacement support as part of his severance package, valued at \$20,000. (Ex. 139)

Although he had been laid off, Weyerhauser technically considered Carl, age 57, "retired." (RP 358) Weyerhauser gave Carl the option of cashing out his basic pension instead of waiting until he turned 65 to receive the monthly benefit. (RP 151) However, the cash-out would be treated as ordinary taxable income, and the taxes would be "horrendous." (RP 151-52) Roland Nelson, a certified public accountant, recommended that Carl roll the pension into an IRA to avoid the tax. (RP 151-52) The value of the basic pension was \$888,396. (FF 2.21.13(C), CP 187)

The supplemental pension, a "non-qualified pension," would be paid to Carl over five years starting at the end of 2008, in the amount of \$44,946.63 per year. (FF 2.21.13(D), CP 188) The supplemental pension was valued at \$171,270.24, using a 4% discount rate to determine its present value after consideration of income taxes³ that will be paid on the pension. (FF 2.21.13(F), (G), CP 188)

At trial, Carl testified that he had been actively looking for new employment since learning he would be laid off. (See RP 347-54) Carl needed to continue working because he has two children

³ Even though the supplemental pension is payable over five years, the trial court only discounted for the income tax that the husband would be required to pay for the first two years. (FF 2.21.13(F), CP 188)

from his prior marriage in college, and the parties' daughter is still young. (RP 359-60) Carl is obligated by a child support order to support his older children during their post-secondary education. (RP 359) While Carl and his former wife had set up an account to assist with their children's tuition, the parents must cover the children's "non-tuition" post-secondary support, including room, board, and other living expenses. (RP 359) Carl's monthly obligation for his older children is approximately \$2,600 per month. (CP 154; Ex. 111 at 4, 5) Carl testified that he believed he needed to continue working for at least another five years before he can really retire. (RP 359)

C. The Trial Court Divided The Community Property 60/40 In Favor Of The Wife, Awarded All Of The Wife's Separate Property To Her, And Most Of The Husband's Separate Property To Him.

When the parties separated in September 2007, they equally divided the funds in their bank accounts. (RP 68-69; FF 2.21.10, CP 187) The parties also agreed that after certain fixed expenses were paid (e.g. mortgage, insurance), the parties would divide Carl's paycheck 60/40 in favor of Katherine, with whom the parties' daughter resided. (Ex. 125 at 6-7) In reality, after Carl was laid off he continued to pay Katherine the equivalent of 60% of the balance

of his monthly income after he paid the parties' fixed expenses from his severance package through trial. (RP 321-22; Ex. 105)

In December 2008, the parties appeared before King County Superior Court Judge Helen Halpert for trial. The parties had already agreed to a parenting plan for their daughter. The issues at trial were property distribution, maintenance, and child support.

1. The Trial Court Used The Time-Rule Method To Characterize The Value Of The Husband's Weyerhaeuser Pensions.

One of the most disputed issues at trial was the character of Carl's pension at Weyerhaeuser, which was also the largest asset of the marital estate. Katherine presented testimony from her expert witness, Robert Moss, supporting the "subtraction" method for characterizing the pensions. Mr. Ross purported to determine the character of the pension by subtracting the monthly benefit of the pension at the time of marriage from the benefit at the time of retirement. (RP 121-22) Using this method, Mr. Moss estimated the community portion of the husband's supplemental pension at 92%. (RP 122) Using the same subtraction method for the basic

pension⁴, Katherine asserted that 73% of the husband's basic pension was community property. (See Exs. B, C; RP 543)

Carl's expert witness, Roland Nelson, rejected the subtraction method as "on its face grossly inequitable." (RP 154) Mr. Nelson testified that the formula "skew[s]" the characterization of a pension asset by ignoring the fact that the early years of employment are required to get to the final benefit. (RP 154) Instead, Mr. Nelson calculated the character of the pensions using the "time-rule" method, which divides the number of years of service while the employee is married by the total years of service. (See RP 154) Assuming that the community started when the parties began cohabiting, Mr. Nelson determined that the parties were together for 106 months and that Carl had worked at Weyerhaeuser for 298 months, based on information from the pension plan. Mr. Nelson calculated that the community's interest in both pensions was approximately 36%. (See Exs. 115, 116)

The trial court found that the time-rule method was the "more sound approach" to characterize the pensions. (FF 2.21.13(C), CP 187) For the basic pension, the trial court used what it found was

⁴ Mr. Moss originally supported the time-rule method to characterize Carl's basic pension (Ex. 67), but at trial he advocated for the subtraction method. (RP 125-26)

the husband's actual time of service – 280 months – rather than the 298 months calculated by pension administrator (FF 2.21.3(C), CP 187) and found that the basic pension was 38% community property. (FF 2.21.3(C), CP 187-88) The trial court found the community interest in the basic pension was \$333,787; the husband's separate interest was \$554,609. (FF 2.21.13(C), CP 188)

For the supplemental pension, the trial court found that the denominator should be based on the months that the husband was “eligible” for the pension, due to the “specialized nature” of the benefit. (FF 2.21.3(E), CP 188) Ignoring the pension plan's determination that the supplemental pension was based on 298 months of service, the trial court found that the husband's months of service for the supplemental pension was 166 months – from January 1995 through November 2008. (FF 2.21.13(E), CP 188) Accordingly, the trial court found that the community interest in the supplemental pension was 64%. (FF 2.21.3(E), CP 188) The trial court found that the community interest in the pension was \$109,612; the husband's separate interest was \$61,657. (FF 2.21.13(G), CP 188)

2. The Trial Court's Overall Property Division Left The Husband With 63% Of The Total Marital Estate, Including Most of His Separate Property.

The trial court divided the community property 60/40 in the wife's favor. (FF 2.21.30, CP 191) The trial court awarded each party their separate property but ordered the husband in addition to pay an additional \$50,000 to the wife from his severance, which it found was his separate property; all of the 2008 tax of approximately \$27,599; all of the \$4,000 monthly mortgage payment for the family residence where the wife resided until sold, and lump sum maintenance for one year of \$84,000. (FF 2.21.37, CP 192; CP 201-02) The trial court ordered a second year of maintenance at \$7,000 per month, beginning March 2010 and ending February 2011. (CP 203) The trial court ordered the husband to pay the wife 60% of the community property interest in his supplemental pension in the lump sum of \$65,767.20, even though the pension was payable over five years, from his share of the equity in the family residence. (CP 200)

The trial court also awarded \$30,000 of the \$40,000 in attorney fees requested by the wife. (CP 13, 204) The trial court rejected the wife's request for fees on the basis of intransigence,

and instead awarded attorney fees based on need and ability to pay. (FF 2.21.34, CP 192)

After all of the husband's court-ordered obligations (except for his future obligation for the second year of maintenance and his child support obligation) are paid, the effect of the trial court's property division and orders was a 63% division of the total estate to Carl:

	<u>Katherine</u>	<u>Carl</u>
Community Property ⁵	\$ 584,919.39	\$ 389,946.26
Separate Property ⁶	\$ 57,353.00	\$1,209,452.00
Community tax liability ⁷		(\$ 27,599.00)
Post-trial payment of community expenses ⁸		(\$ 19,827.00)
Additional property award ⁹	\$ 50,000.00	(\$ 50,000.00)
Lump sum maintenance (1 st year) ¹⁰	\$ 84,000.00	(\$ 84,000.00)
Attorney fee award ¹¹	\$ 30,000.00	(\$ 30,000.00)
Total	\$ 806,272.39	\$1,387,972.26
	37%	63%

⁵ CP 191, fn. 6.

⁶ CP 191; FF 2.21.37, CP 192

⁷ CP 129, 205

⁸ Carl paid \$12,359 from his severance in February 2009 for post-trial community expenses (CP 126), and was obligated to pay an additional \$7,468 for the mortgage on the home where Katherine resided for March and April 2009, when the home was sold. (CP 152)

⁹ CP 201-02

¹⁰ CP 202

¹¹ CP 201

The wife challenges nearly every decision by the trial court. The husband conditionally cross-appeals the trial court's failure to use the pension plan administrator's stated total years of service when it applied the time-rule method to the husband's pensions.

III. ARGUMENT

A. The Trial Court Properly Characterized The Husband's Pension Using The Time-Rule Method.

1. This Court Has Already Rejected The Subtraction Method Advocated By The Wife In This Appeal As A Means Of Characterizing Pensions.

a. The Wife's Claim On Appeal That The Trial Court Should Have Used The Subtraction Method Is Wrong As A Matter Of Law.

The wife's advocacy for the subtraction method over the time-rule method established in *Bulicek v. Bulicek*, 59 Wn. App. 630, 800 P.2d 394 (1990) was rejected by this court in *Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007), 16 months before the trial here. The wife claims that our courts "did not rule out or eliminate the 'lump sum' approach" (App. Br. 14) and that "in some circumstances, the 'subtraction rule' may be a more equitable means to measure community contributions over separate efforts." (App. Br. 17) This argument is the same as that rejected in *Rockwell*. The wife's appeal under these circumstances, where a

very recent case has rejected precisely the arguments she made at trial and makes on appeal, is frivolous.

In ***Rockwell***, the husband appealed, raising multiple challenges to the trial court's property division; the wife cross-appealed the trial court's use of the subtraction method to characterize her pension. This court affirmed on the husband's appeal, and reversed on the wife's cross-appeal. The husband in ***Rockwell*** attempted to defend the trial court's use of the subtraction method to value the wife's pension, claiming that our courts had not "definitively" chosen the time-rule method over the subtraction method and that "courts have used the method that best applies to the circumstances of the case and creates the most equitable results." 141 Wn. App. at 251, ¶ 30. But as this court accurately recognized in ***Rockwell***, the husband, like the appellant wife here, "does not cite to any Washington cases that explicitly approve of the subtraction rule method." 141 Wn. App. at 251, ¶ 30. As this court also noted in ***Rockwell***: "[e]ven the out of state cases [the husband] cites to support his 'best application to the circumstances' *reject* the subtraction method." 141 Wn. App. at 251, ¶ 30 (emphasis in original).

In the trial court, the wife sought to bolster her advocacy for subtraction method with “expert” testimony that “pension plans are weighted to be of much more value to the worker in the later years of employment than in the early years, ‘cause in the early years salaries are low; in the later years salaries [] are much higher.” (RP 141) But both ***Bulicek*** and ***Rockwell*** rejected precisely this theory, that later service years with higher salaries should count more than early service years with lower salaries, recognizing to the contrary that because early years are the foundation for later ones this is in fact a reason the subtraction method must be rejected as a matter of law:

If post-dissolution pension increases are apportioned to make an equitable division, increases in pensions due to premarriage efforts should also be apportioned to make an equitable division... The subtraction rule disproportionately undervalues those early years by freezing the value of [the participant]’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; see also ***Bulicek***, 59 Wn. App. at 638-39.

Without exception, every case in Washington addressing the valuation and characterization of pensions uses the time-rule method, recognizing it as both the “correct” and “typical” method.

See *Marriage of Greene*, 97 Wn. App. 708, 713, 986 P.2d 144 (1999) (refers to time-rule formula as “typical” in considering whether husband was entitled to post-divorce increases in pension based on further service); *Marriage of Chavez*, 80 Wn. App. 432, 436, 909 P.2d 314, *rev. denied*, 129 Wn.2d 1016 (1996) (time-rule method is “correct formula” for measuring community share of pension). The wife makes no better nor different legal argument than the cross-respondent in *Rockwell* for this court to adopt the subtraction method over the time-rule method, and her legal argument is frivolous.

b. This Court Rejected Use Of The Subtraction Method To Characterize A Pension Under Similar Factual Circumstances.

In further support of her claim that the husband’s later years of service should be weighed more heavily, the wife makes the false factual assertion that “the significant jump-up in salary and overall compensation (including stock options, 401(k) matching and supplemental pension benefits) did not occur until after the marriage.” (App. Br. 16) While the husband’s salary did increase during the marriage, those benefits that the wife points out – stock options, 401(k) matching, and supplemental pension – were part of the husband’s initial compensation package that he negotiated

when he returned to Weyerhaeuser in 1994 as a director five years before the parties married:

I was fortunate enough to come back to Weyerhaeuser...It was a director level position at Weyerhaeuser.... So it was a significant level position, and at that time I was qualified for the management incentive program, stock options, special recognition rewards. And at - - at the end of 1994 I also became qualified for the supplemental retirement plan.

(RP 305-06) Further, any “jump-up” in compensation and benefits that Carl received in 1994 was due to his prior nine years of service at Weyerhaeuser:

Part of my total compensation negotiations with my hiring manager, Bill Hall, at that time [1994] was to – to grandfather my original work experience of almost ten years at Weyerhaeuser into my current history of vacation and compensation and pensions.

(RP 442)

The wife attempts to distinguish **Bulicek** by asserting that because the husband in this case was considered “retired” by Weyerhaeuser, “there was no question about future benefits or increases to same,” (App. Br. 15) claiming that the concerns in **Bulicek** are not present here because “there is no need to speculate or apply a formula intended to protect the separate property interest in ongoing post-separate contribution.” (App. Br. 18) But the wife’s attempt to distinguish **Bulicek** runs her right into

the facts of *Rockwell*, which definitively rejected the subtraction method two years ago. In *Rockwell*, the pension plan participant – the wife – was also retired, and her pension was already in “pay status” when the parties separated and she had been receiving monthly payments for three years by the time of trial. See 141 Wn. App. at 240, ¶ 3, 6. The wife makes no better nor different argument than the cross-respondent in *Rockwell* to distinguish *Bulicek*, and her efforts to distinguish both cases are factually inaccurate and frivolous.

c. Even If The Trial Court Had Discretion To Use The Subtraction Method, It Properly Found That The Time-Rule Method Was The “More Sound Approach” In This Case.

Even if the trial court had discretion to choose the subtraction over the time-rule method, the trial court in fact considered both methods and found that “Mr. Nelson’s approach – in essence an application of the *Bulicek* formula – is the more sound approach.” (FF 2.21.13(C), CP 187) In light of the arguments made by the wife below, which were no different than those rejected in *Rockwell*, the trial court did not abuse its discretion in using the time-rule method to characterize the value of the husband’s pension.

2. The Trial Court's Findings Of Fact Underlying Its Application Of The Time-Rule Method Are Supported By Substantial Evidence.

The wife's challenge to the trial court's factual determination underlying its application of the time-rule method is equally without merit. "The factual findings upon which the court's characterization is based may be reversed only if they are not supported by substantial evidence." ***Marriage of Griswold***, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002), *rev. denied*, 148 Wn.2d 1023 (2003). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." ***Griswold***, 112 Wn. App. at 339 (*citations omitted*).

Here, there is substantial evidence to support the trial court's finding that the husband's earlier employment at Weyerhaeuser from 1976 to 1985 should be factored in for purposes of applying the time-rule method to his basic pension for purposes of characterization. (FF 2.21.13(C), CP 187-88) While the pension statement stated that the husband "entered" the plan on March 18, 1994 (Ex. 62), the husband testified that in fact, he negotiated having his previous employment of nine years factored in for purposes of determining his benefits – including pension benefits –

when he returned to Weyerhaeuser as an executive in 1994. (RP 441-42) The husband's testimony was supported by letters from the pension administrator stating that for purposes of determining the husband's pensions, the husband was credited for 24.85 years of service. (Ex. 92, 138) Because the husband's second stint at Weyerhaeuser started in 1994 and concluded in 2008, the years of service must have included the husband's earlier employment of approximately 9 years from 1976 to 1985.¹²

The wife presented no evidence to the contrary. Regardless whether the wife believed the husband's testimony regarding his negotiation of his pension benefits on his return to Weyerhaeuser, the trial court clearly did, and its credibility determinations are not subject to review. The role of the appellate court is "not to substitute its judgment for that of the trial court or to weigh the evidence or credibility of witnesses." ***Marriage of Rich***, 80 Wn. App. 252, 259, 907 P.2d 1234, *rev. denied*, 129 Wn.2d 1030, 1031 (1996). Accordingly, this court must affirm because substantial evidence supports the trial court's findings. ***Marriage of Burrill***, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149

¹² The trial court's failure to use the husband's full service at Weyerhaeuser is the subject of the husband's conditional cross-appeal. See § IV. Conditional Cross-Appeal, ¶ C, *infra*.

Wn.2d 1007 (2003) (“an appellate court will uphold a finding of fact if substantial evidence exists in the record to support it”).

The trial court’s factual determination on this issue is supported by substantial evidence and the wife presented no contrary evidence to rebut either the husband’s testimony or the pension plan’s statement that 24.85 years of service were credited to the husband for purposes of calculating his pension benefits. The wife’s challenge to the trial court’s calculation of the husband’s separate interest in his pension using his earlier service years at Weyerhaeuser is also frivolous.

B. The Trial Court’s Property Distribution Was Not A Manifest Abuse Of Discretion.

1. The Trial Court’s Disproportionate Award To The Husband Was Justified By His Financial Responsibilities And The Disproportionate Award Of Community Property To The Wife.

Trial courts have broad discretion in the distribution of property and liabilities in marriage dissolution proceedings. “The trial court is in the best position to assess the assets and liabilities of the parties and determine what is ‘fair, just and equitable under all the circumstances.’” *Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). In light of the trial court’s broad discretion, a trial court’s property distribution will not be reversed on appeal

absent a showing of a manifest abuse of discretion. **Brewer**, 137 Wn.2d at 769. Here, the trial court's disproportionate award to the husband was not a manifest abuse of discretion in light of his financial responsibilities at the end of the marriage, the extent of his separate property, and the fact that the wife was awarded the majority of the community property.

The wife falsely claims that the trial court abused its discretion by awarding the husband "more than 75% of the total assets." (App. Br. 24) In truth, the trial court's property division left the husband with approximately 63% of the total assets (*supra* § II.C.2), not "more than 75%," *plus* an additional year's maintenance obligation to the wife of \$7,000 per month. This property distribution is in fact not far off of the 60% property distribution that the wife proposed that the husband receive at trial "in consideration of the characterization of his separate property." (App. Br. 24) As the wife concedes, a disproportionate award of the total estate to the husband was warranted. (See App. Br. 24)

An award of a greater portion of the total estate to the party with more separate assets after a less than nine-year marriage is not an abuse of discretion. Our courts have regularly affirmed awards of this kind. See *e.g.* **Brewer**, 137 Wn.2d at 759, 763, 771

(affirming an award of 88% of the total estate to spouse with greater separate property after a 7-year marriage); **Marriage of Dewberry/George**, 115 Wn. App. 351, 356, 358, 366, 62 P.3d 525, *rev. denied*, 150 Wn.2d 1006 (2003) (affirming an award of 82% of the total estate to spouse with greater separate property after a 14-year marriage); **Rehak v. Rehak**, 1 Wn. App. 963, 465 P.2d 687 (1970), *disapproved on other grounds by*, **Coogle v. Snow**, 56 Wn. App. 499, 506, 784 P.2d 554 (1990)(affirming an award of 67% of the total estate to the spouse with greater separate property).

A disparate property award to the husband was also warranted after consideration of the parties' relative economic circumstances after the property division is effected. See *e.g.*, **Ovens v. Ovens**, 61 Wn.2d 6, 376 P.2d 839 (1962). The husband's severance package, which was intended to provide him with income through 2009, was largely exhausted after the trial court's property distribution due to the payments he was required to make to the wife and the community obligations for which the trial court left him responsible. (See CP 129) The husband also has greater financial responsibilities than the wife, as he is obligated under a court order to support his older children, he must continue to pay maintenance to the wife through 2010, and he must pay monthly

child support for their child. (CP 203; Sub no. 109, Supp. CP ___; Ex. 124)

In **Ovens**, our Supreme Court affirmed a property division that divided the community property equally and awarded each party their traceable separate property, which resulted in a greater award to the husband. 61 Wn.2d at 8-9. The Court held that the division was “equitable in view of [the husband]’s inheritance and the obligations of support, alimony, court costs and attorneys’ fees, which were imposed upon him.” **Ovens**, 61 Wn.2d at 9.

Contrary to appellant’s argument, it is not a manifest abuse of discretion under these circumstances to award more of the marital estate to the spouse who historically earned higher earnings. For example, in **Dewberry**, this court affirmed an award of 82% of the total estate to the wife, whose income was over \$1 million annually, compared to the husband whose annual income was historically in the \$40,000 to \$50,000 range. 115 Wn. App. at 357, 358, 366. The trial court in **Dewberry** awarded the husband the majority of the community property and some limited amount of the wife’s separate property. 115 Wn. App. at 358. Here, the trial court awarded the wife 60% of the community property, and approximately \$164,000 from the husband’s separate property.

Awarding the remaining assets to the husband left him with approximately 63% of the total estate. The wife will also receive an additional year of maintenance through February 2011, which the husband will pay from his separate property or earnings.

Finally, a disparate award of the entire marital estate to the husband, who is eight years older than the wife and will be in his sixties before this appeal is concluded, made sense because his career longevity is significantly shorter than the wife. In *Rockwell*, this court affirmed a disparate award of property to the wife, who was “older [and] semi-retired,” compared to the husband, who was eight years younger, in good health, and “employable at a substantial wage,” even though he was not currently employed at the time of trial. 141 Wn. App. at 246, 249, ¶¶ 18, 24. The award to the wife in *Rockwell* included all of her separate interest in her pension, even though, as in this case, she had historically earned more than the younger spouse. 141 Wn. App. at 239-40, 241, ¶¶ 2, 3, 6. This court held that the trial court did not abuse its discretion when it compared the husband’s “age, health and employability” against the wife’s as a basis for a disproportionate division. *Rockwell*, 141 Wn. App. at 249, ¶¶ 24.

2. The Trial Court Was Required To Consider The Character Of Property In Distributing The Marital Estate And It Was Within Its Discretion To Award Each Party Their Separate Property.

While the character of property is not “controlling” in a property division, the trial court is required to consider the character of property in dividing the parties’ property. RCW 26.09.080 (the court must consider among other things “the nature and extent of the community property; the nature and extent of the separate property”); *Marriage of Donovan*, 25 Wn. App. 691, 693, 612 P.2d 387 (1980) (“the characterization of property is not what is controlling, but only one of many factors to be considered by the court”). The fact that the trial court awarded each party their separate property does not mean that the trial court “gave too much weight to [] characterization, allowing it to drive the property division” (App. Br. 20), warranting reversal. As this court has stated: “the court is required to consider among other facts the separate property of the parties, but this consideration does not require the court to invade the separate property.” *Moore v. Moore*, 9 Wn. App. 951, 953, 515 P.2d 1309 (1973).

Contrary to the wife’s claim on appeal, trial courts are not discouraged from awarding separate property to its owner, nor do

any of the cases cited by the wife support such a claim. **Marriage of Skarbek**, 100 Wn. App. 444, 997 P.2d 447 (2000) (App. Br. 21) in fact supports the proposition that it is within the trial court's discretion to award an asset to one spouse for the sole reason that it was that spouse's separate property. In **Skarbek**, the trial court originally characterized \$46,000 as the husband's separate property and awarded the entire amount to him. After the wife filed a motion for reconsideration, the trial court changed its ruling and found that the cash was community property and awarded half of the amount to the wife. On appeal, Division Three held that the cash was the husband's separate property, reversed the property division, and remanded to the trial court to reconsider its award of one-half of the husband's separate property to the wife, as the award was clearly based on the trial court's erroneous characterization. **Skarbek**, 100 Wn. App. at 450.

Further, none of the other cases cited by the wife in her brief support her claim that this court must reverse a property distribution because the trial court considered the character of property when awarding each party his or her separate property. For example, in **Donovan** (App. Br. 22-23), this court affirmed a property division despite the fact that there may have been errors in characterization,

because the property division was otherwise just and equitable. 25 Wn. App. at 694-97. Similarly, in ***Marriage of Griswold***, 112 Wn. App. 333, 48 P.3d 1018 (2002) (App. Br. 21), Division Three affirmed a property distribution despite the fact that the trial court may have mischaracterized the property because the distribution was otherwise just and equitable and, unlike ***Skarbek***, it did not appear that the trial court's division was guided by the character of the property. 112 Wn. App. at 346; see also ***Ovens***, 61 Wn.2d at 8, 9 (affirming disparate property division in favor of the husband, who had greater separate property; "an equitable division of the total property involved does not entail a right to an equal division of separate property").

The wife's challenge to the trial court's discretionary decision dividing the parties' marital estate is frivolous, as it is based wholly on a misrepresentation of the facts and the law. The facts do not support the wife's claim that the husband was awarded "more than 75% of the total assets." (App. Br. 24) Further, her claim that this court must remand because the trial court's property division was guided in part by the character of the assets is not an accurate characterization of the law, nor do any of the cases cited by the wife support such a claim. This court should affirm because the

trial court's property division was well within its discretion after a proper consideration of the factors under RCW 26.09.080.

C. This Court Must Reject The Wife's Unpreserved Challenges To The Trial Court's Findings.

This court also should reject the wife's wholly factual and unpreserved claims regarding the trial court's factual findings:

1. Roslyn Home.

The wife falsely claims that there was "no evidence" to support the trial court's value for the Roslyn home. (App. Br. 29) But the husband testified to the value of the Roslyn home as being slightly less than \$200,000 to no more than \$250,000. (RP 361) The trial court's finding that the Roslyn home was worth "approximately \$215,000" was well within its discretion and supported by unchallenged testimony. *Marriage of Soriano*, 31 Wn. App 432, 435, 643 P.2d 450 (1982) (a trial court does not abuse its discretion by assigning values to property within the scope of the evidence). It was within the trial court's discretion to accept the husband's testimony to the value, especially in light of the fact that the wife presented no different value. *Worthington v. Worthington*, 73 Wn.2d 759, 763, 440 P.2d 478 (1968) (the trial court has broad discretion with regard to the weight to be given a

property owner's testimony as to the value of his or her own property).

2. Mercer Shorewood Club.

The wife's complaint that the trial court erred in valuing the Mercer Shorewood club membership at \$2,500 is also without merit, since she herself presented that value in her spreadsheets to the court that were submitted as evidence. (See Exs. B, C) To the extent the trial court erred in its valuation of this asset, the wife invited the error. ***Dependency of K.R.***, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (under the doctrine of invited error, a party cannot complain about an alleged error at trial that he set up himself).

Further, even if the trial court erred in its valuation of the Mercer Shorewood club, this court should nonetheless affirm, as the claimed error is less than 1% of the entire estate and would not require remand. ***Marriage of Pilant***, 42 Wn. App. 173, 709 P.2d 1241 (1985). In ***Pilant***, the wife complained that the trial court erred in valuing the husband's retirement benefit in an amount contrary to the sole evidence presented at trial. 42 Wn. App. at 178. The amount of the alleged error was between 7% and 9% of the entire marital estate. ***Pilant***, 42 Wn. App. at 176, 181. The ***Pilant*** court held that since there was no evidence presented that

could support the trial court's value, the trial court erred. 42 Wn. App. at 181. It nevertheless affirmed the trial court's decision because a valuation error is not necessarily reversible, stating, "we hold that the erroneous valuation of one item in this particular case, does not require reversal of the otherwise fair and equitable distribution of an estate worth between \$546,000 and \$675,000." *Pilant*, 42 Wn. App. at 181.

3. Wife's Income.

The wife claims that remand is required because the trial court erred in finding that the wife had earned \$100,000 before the parties married. (App. Br. 26-27) First, to the extent the trial court erred in making this finding, the wife failed to preserve this issue because she did not bring it to the court's attention at the time final papers were entered. Second, any error is harmless because there is no evidence that the trial court's property distribution was based on its determination of the wife's past income. Instead, the trial court specifically found that the "given the current economic climate, the court is satisfied that there is little possibility of the wife currently earning more than the median earnings for a woman her age. This amount is \$2051 net per month." (FF 2.21.28, CP 191) Finally, the wife testified that she *could* earn over \$100,000 if she

had a position similar to the one that she had before the parties married, but she no longer chooses to pursue that line of work. (RP 235)

The wife's challenges to each of these unpreserved alleged errors by the trial court are meritless. Absent any indication in the record that the wife advanced these particular claims in any substantive fashion at trial, they cannot even be considered on appeal. *Marriage of Studebaker*, 36 Wn. App. 815, 818, 677 P.2d 789 (1984); see also RAP 2.5(a); *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (declining to review issue, theory, argument, or claim of error not presented at the trial court level). This court must reject the wife's unpreserved challenges to the trial court's findings.

D. The Trial Court Did Not Abuse Its Discretion In Requiring Joint Decision-Making For Extra-Curricular Activities Towards Which The Father Will Be Required To Contribute.

The trial court did not abuse its discretion in ordering joint decision-making on issues related to extra-curricular activities for the child if the father is required to contribute financially. (CP 193) First, the parents' agreed parenting plan is not binding on the trial court. RCW 26.09.070 (3); *Marriage of Thier*, 67 Wn. App. 940,

944, 841 P.2d 794 (1992), *rev. denied*, 121 Wn.2d 1021 (1993) (custody provisions of parties' agreement is not binding on the court). Second, the trial court's decision does not contradict the parties' agreed parenting plan because the plan did not address decision-making for extra-curricular activities. (See CP 234) Third, the trial court's decision was consistent with the agreed parenting plan, as the plan already acknowledged that joint decision-making would be allowed when the father is required to contribute financially. For example, the parties agreed that there would be joint decision-making for orthodontia. (CP 234) The parties also agreed that while the mother normally has sole decision-making for education decisions, if the decision is related to enrolling the child in private school the decision shall be joint "if the father is expected to pay for private school." (CP 234)

The wife's reliance on ***Marriage of Mansour***, 126 Wn. App. 1, 106 P.3d 768 (2004) (App. Br. 29-30) to support her claim that the trial court could not order joint decision-making is misplaced. In ***Mansour***, this court reversed an order requiring joint decision-making when the trial court found that the father physically abused the child during the marriage. This court held that "[o]nce the trial court finds that a parent engaged in physical abuse, it must not

require mutual decision-making.” *Mansour*, 126 Wn. App. at 10, ¶ 20. This court held that because the trial court found physical abuse, it was required to impose RCW 26.09.191 (1), (2) limitation on the father, including “not require[ing] mutual decision-making.” *Mansour*, 126 Wn. App. at 10, ¶ 23.

Here, there was no evidence at trial that the father physically abused the child or that there was any other basis for RCW 26.09.191 restrictions. Accordingly, there were no findings under RCW 26.09.191 (1), (2), or (3) that limited the father’s contact with the child. While the parties agreed that the mother be allowed sole decision-making on most issues because of the “history of conflict between the parents,” the parties also agreed on joint decision-making for other issues such as private school and orthodontia. (CP 234) The trial court did not abuse its discretion in also ordering joint decision-making for extra-curricular activities to which the father would be required to financially contribute. The wife’s challenge to this discretionary decision by the trial court is not only wholly without merit, but insulting to the father in its reliance on *Mansour*.

E. The Trial Court Did Not Abuse Its Discretion In Denying Attorney Fees Based On Intransigence.

The trial court's decision to deny or limit an award of attorney fees is within the trial court's discretion. *Spreen v. Spreen*, 107 Wn. App. 341, 351, 28 P.3d 769 (2001). This court will only reverse a trial court's decision on attorney fees "if the decision is untenable or manifestly unreasonable." *Spreen*, 107 Wn. App. at 351. This court will affirm a trial court's decision denying when the record supports the trial court's decision finding no intransigence. See *Schumacher v. Watson*, 100 Wn. App. 208, 997 P.2d 399 (2000) (affirming an order denying attorney fees based on intransigence when the record showed no intransigence); *Marriage of Wright*, 78 Wn. App. 230, 896 P.2d 735 (1995) (affirming an order denying attorney fees based on intransigence when appellant's "bald assertions" of bad acts by respondent was not reflected in the record).

The wife's challenge to the trial court's decision awarding her \$30,000 of the \$40,000 attorney fees that she requested below is frivolous. (See CP 13) Notably, the wife does not challenge the amount of fees awarded to her; rather, her complaint is that the trial court failed to find the husband "intransigent." (App. Br. 27-28) The

trial court properly found that “there was no basis for an award of attorneys’ fees based on intransigence.” (FF 2.21.34, CP 192) There was substantial evidence that the husband answered interrogatories and provided discovery to the wife’s counsel as requested. (See Sub no. 89, Supp. CP __) To the extent that the wife felt that the husband’s answers to her discovery requests were lacking, she could have (but did not) pursue a motion to compel under Civil Rule 37. The trial court did not abuse its discretion in not finding the husband intransigent.

F. This Court Should Deny Attorney Fees To The Wife And Award Attorney Fees To The Husband On Appeal.

This court should deny the wife’s request for attorney fees based on her need and the husband’s ability to pay under RCW 26.09.140. The wife was awarded substantial assets in the property division. Unlike the husband’s award, the wife’s award was largely liquid. In addition to her share of the proceeds from the sale of the house, the wife received cash of \$84,000 as lump sum maintenance, \$50,000 from the husband’s severance, \$65,757 as an advance on her interest in the husband’s supplemental pension (which he will receive over the next five years), and no responsibility for any community obligations. Meanwhile, as a

result of these payments to the wife, the husband's severance – which was intended to serve as replacement income, was largely depleted even though he was obligated to support the wife in the family residence until the home was sold, to pay the parties' 2008 tax liability, and to pay \$30,000 of the wife's fees, plus his own attorney fees. The largest asset awarded to the husband was his basic pension, which is not liquid and which would generate a "horrendous" tax obligation if he sought to liquidate it. The wife has the ability to pay her own attorney fees on appeal, and in any event the husband does not have the ability to pay.

This court should instead award attorney fees to the husband for having to respond to the wife's appeal, which is frivolous. RAP 18.9(a) (authorizing terms and compensatory damages for a frivolous appeal); RAP 18.1. The wife's challenge to the trial court's use of the time-rule method is sanctionable because her arguments on appeal advocating the subtraction method are the same as those expressly rejected by this court only two years earlier in *Rockwell*. (See § III Argument, ¶ A, *supra*). In her appeal, the wife provides "no authority for reversal based on existing law, nor does [she] make a rational, good faith argument for modification of the existing law." *Delany v. Canning*, 84 Wn.

App. 498, 510, 929 P.2d 475, *rev. denied*, 131 Wn.2d 1026 (1997);
see also Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220, 829
P.2d 1099 (1992).

The wife's remaining challenges were not preserved below, and/or are based on a mischaracterization of the facts, the law, or (in most instances) both. The wife's approach to this appeal has been to throw in every challenge "but the kitchen sink." Fortunately, the "kitchen sink" has a garbage disposal. The wife should be ordered to pay all the husband's attorney fees for having to respond to this appeal, because it is wholly frivolous. RAP 18.9(a); RAP 18.1; *Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114, *rev. denied*, 100 Wn.2d 1023 (1983) (an appeal may be so devoid of merit to warrant the imposition of sanctions and an award of attorney fees).

IV. CONDITIONAL CROSS-APPEAL

Only if this court remands to the trial court on any of the issues raised by the wife, the husband asks this court to consider the trial court's error in failing to use the husband's full service as defined by the pension administrator in the denominator when it characterized the husband's pension using the time-rule method.

A. Cross-Appeal Assignments of Error.

1. The trial court erred in finding that “the actual months that the husband worked at Weyerhaeuser was somewhat less – 280 months, of which the community portion is 106 months (see above). The court will use the actual months worked as the denominator, with 106 months as the numerator, resulting in a community share of 38% or \$333,787. The husband's separate interest is \$554,609.” (FF 2.21.13(C), CP 187-88)

2. The trial court erred in finding that “application of a straight Bulicek formula based on total years of service would be unwarranted, because of the specialized nature of this benefit. Rather, the court will use as the denominator the number of months that the husband worked for Weyerhaeuser during which he qualified for the supplemental pension. This is 166 months. The numerator will be 106 months (date of marriage until date of separation). This results in a determination that the community interest in the pension is 64%.” (FF 2.21(E), CP 188)

B. Statement of Issue for Cross Appeal.

This court has described the time-rule method to determine the community share of a pension as 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. ***Marriage of Rockwell***, 141 Wn. App. 235, 251-252, ¶ 32, 170 P.3d 572 (2007). Did the trial court err in using what it found was the time period for the husband's service at Weyerhaeuser, instead of the years of "benefit service" as defined by the pension plan administrator?

C. Cross-Appeal Argument.

The trial court properly used the time-rule method in characterizing the value of the husband's pension but erred when it failed to use the "total number of years of service for which pension rights were earned" as the denominator in its formula. ***Rockwell***, 141 Wn. App. at 252, ¶ 32. The "number of years of service for which pension rights were earned" should be defined by the pension plan, not a simple counting of the calendar months that the participant was employed by the company.

Here, the plan administrator described that the husband received one year of "benefit service" if he worked 2000 or more hours of service during a calendar year. (Ex. 92) If the husband "complete[d] less than 2000 hours of service in a calendar year the employee shall be credited with a fraction of a year of benefit

service.” (Ex. 92) Thus, for purposes of calculating the husband’s pension benefits, the pension plan based it on hours of service in a calendar year – not merely months of employment. By basing its calculation under the time-rule method on the husband’s months of employment the trial court did not properly account for the husband’s service, which earned him the pension. For example, according to the pension plan administrator, the “benefit service” for Carl’s first period of employment at Weyerhaeuser was 9.9230 years, or 119 months. But based on the trial court’s calculation, the husband was only credited for 104 months during his first period of employment. Thus, the trial court undervalued the actual service performed by the husband during his first period of employment at Weyerhaeuser, 13 to 22 years before marriage.

Had the trial court properly applied the time-rule method to the basic pension, it would have found that the community interest in the pension was 36% (106 months of marriage/298 months of benefit service) or \$316,219.37. The husband’s separate interest would be 64% or \$562,167.68.

The trial court’s use of the improper denominator for the supplemental pension was even more egregious because the trial court used only that period of time that it found the husband was

“qualified for the pension.” (FF 2.21.3(E), CP 188) But as detailed by the plan administrator, the husband’s interest in the supplemental pension was calculated based on his entire service at Weyerhaeuser, not just when he became eligible for the pension. (See Ex. 138) Had the trial court properly applied the time-rule method to the supplemental pension, it would have found that the community interest in the pension was 36% (106 months of marriage/298 months of benefit service) or \$61,657.29. The husband’s separate interest would be 64% or \$109,612.95.

The trial court erred as a matter of law by using its own arbitrary determination of the husband’s total service for Weyerhaeuser that earned him his interest in his pensions. The trial court should have used the actual “number of years of service for which pension rights were earned” as defined by the pension plan. If this court remands on any one of the wife’s multitude of issues, this court should also reverse the trial court’s characterization of the pension due its faulty application of the time-rule method.

V. CONCLUSION

None of the issues raised by the wife in her appeal of the trial court’s decision have any merit. The wife’s challenges are either wrong as a matter of law, wrong as a matter of fact, and in

most instances, both. This court should affirm and award attorney fees to the husband for having to respond to this frivolous appeal.

In the event this court remands on any of the issues raised by the wife in her appeal, however, this court should grant the husband's cross-appeal and reverse the trial court's characterization of the pensions due to its faulty application of the time-rule method.

Dated this 17th day of December, 2009.

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

BELL, FLEGENHEIMER
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DECLARATION OF SERVICE

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

That on December 17th, 2009, I arranged for service of the Brief of Respondent (Raising Conditional Cross-Appeal), to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Valerie Bell Bell, Flegenheimer & Nance 119 First Avenue S., Suite 500 Seattle WA 98104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Laura Christensen Colberg Attorney at Law Michael W. Bugni & Associates 11320 Roosevelt Way NE Seattle WA 98125	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 17th day of December, 2009.



Carrie O'Brien