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No. 68455-8-1

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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C. MICHAEL RIDDELL, Appellant

v.

DEBORAH RHEA RIDDELL, Respondent

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REPLY BRIEF OF APPELLANT

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**I. Statement of the Case**

The responsive brief makes a number of inaccurate representations that misstate the record upon which it relies.

**A. As To Ms. Riddell's Search For Employment**

Ms. Riddell did not testify at RP 350, as argued, to what she was qualified to do. Ms. Riddell testified that she applied for jobs that she knew she was not qualified or able to perform (RP 57; 60; 350), hoping she would get a response that sounded close (RP 350).

**B. Mr. Riddell Did Not Use Ms. Riddell To Recover His Health And Then Divorce Her.**

The brief at pages 5-6 construes the testimony at RP 322, 323, 339-341 to create the impression that Mr. Riddell would have divorced her but for his health problems and that once Ms. Riddell helped nurse him back to health he left her for good. In fact, the testimony was as follows: "He, in frustration, told her he wanted a divorce in October 2009, and left their Arizona house" (RP 322-23). In December with back problems, he asked for her help (Exhibit 75). She helped in that effort and they reconciled in July or August of 2010 when they took trips and went on hikes (RP 339-340)). They remained together for three more months, until in November

2010, he again became disenchanted with the relationship, and their final separation occurred (RP 341).

There are numerous other misstatements of the evidence which will be addressed in the argument section which relate to the issues actually before the court in this appeal.

## **II. Argument:**

### **A. Assignment of Error #1: The Trial Court's Undue Emphasis On The Significance of Social Security Incomes Of Both Parties (Finding of Fact 2.8 (s))**

#### **1. The Oral Decision (OD12) Does Not Contradict Finding 2.8 (s)**

The response brief argues that the reference at O.D. 12 is not permissible because it contradicts finding of fact 2.8 (s). The court's comment in its oral decision does not contradict finding 2.8 (s). Instead it clarifies the significance of the court's finding as to comparative social security benefits between the parties. To justify its conclusion of law that dividing one half of his pension, which includes half of Mr. Riddell's separate property portion, is just and equitable.

Finding 2.8 (s) reads “Ms. Riddell’s eventual social security benefit will be less than Mr. Riddell’s benefit.” In the oral decision, in a colloquy with Mr. Riddell’s attorney, the following occurred:

“Mr. Anderson: So she gets his separate.

The Court: Half of his pension, Yeah, some of his separate.

One thing I considered...one of my considerations in making this allocation is the social security issue both in terms of the fact that she’s not going to get it for a while and that hers will be significantly less” (OD 12).

The oral decision clarifies the materiality of the finding to the conclusion of law that an uneven division of property is appropriate in this case (Conclusion of Law 3.3 a)) (CP359).

## **2. No New Theory Is Advanced On Appeal**

In this appeal Mr. Riddell is not advancing a new theory as to the treatment of social security benefits. Nor is he representing a lump sum present value of that stream of payments as argued at page 14 of the response brief. Instead, he has taken only the evidence of the anticipated future stream of those payments, if Ms. Riddell quits working at age 62, which Mr. Grambush was asked to assume (RP 494 and trial exhibit 61).

Mr. Riddell's brief merely summarized the total stream of payments and the amounts each month identified in Mr. Grambush's report.

**3. Substantial Evidence Does Not Exist To Support Finding Of Fact 2.8 (s)**

The information, as to social security benefits contained in trial exhibit 61, demonstrates the stream of payments Ms. Riddell will receive, as of her reaching age 70, will be greater per month than those Mr. Riddell receives at age 70. Trial exhibit 61 also demonstrates the total payments that the exhibit assumes she will receive in the aggregate if she begins working 18 months from trial and if she stops working at age 62, exceed the total payments Mr. Riddell will receive. The court knew that Ms. Riddell's total social security payments will actually be greater because it found that:

1. Ms. Riddell would begin working in six months, not eighteen months.
2. The court also knew that there is no evidence that she will stop working at age 62 to support the speculation of what her social security payments will be. Ms. Riddell did not testify that she would do so. She only testified that she did not want to work at all (RP 84). Mr. Grambush did not testify she would or even

could quit working at age 62. He merely assumed that she would, for reasons not explained. Thus, he only testified that taking her social security and pension at age 62 would make economic sense if she retires at age 62 (RP 494).

In fact, for her to do so defies economic reason. Her theory of approach to the court was that an equal division of community property including the community portion of Mr. Riddell's pension, will leave her with so little income per month after retirement at age 62 that she'll have to divest herself of her assets and that they will be depleted before she dies. That's what exhibit 62 is designed to demonstrate. That would mean that Ms. Riddell would give up over \$2,600 per month in income, increasing each year, to begin receiving \$1070 per month in social security income? To continue working and receive from employment more than twice the social security income at age 62, would mean even greater social security income if she were to later retire at age 66 or even 70. The court fashioned its property division on pure speculation that she would give all that up.

Thus, there is no substantial evidence to support finding 2.8 (s). It contradicts the very evidence that it relies upon and is based upon pure

speculation as to how early she will retire. The court has effectively penalized Mr. Riddell by assuming Ms. Riddell will not put herself in the more favorable financial circumstances in the future, that she is fully capable of creating for herself. This is contrary to the principles constituting a just and equitable distribution of property required by RCW 26.09.080. It is the opposite.

**B. Assignment of Error #2: The Loss of Continuity Of Service Affecting Pension Value In 2005 (Finding 2.8 f) And Ms. Riddell's \$50,000 Gift Of Separate Property To the Marital Community (Finding 2.9).**

Does a finding of fact that only focuses on the loss of potential pension value occasioned by one spouse's decision to retire during marriage, but ignores the effect of the other spouse's retirement, justify the disparate award of property that was ordered in this case? Does a finding that focuses on one spouse's contribution of separate property while ignoring the contribution of the other to the marital community justify the disparate award of property in this case? These one sided views of the evidence is not the focus on past financial circumstances that any case law permits to justify such a division of property. The response brief cites none.

Among the factors identified in RCW 26.09.080 is “(4) The economic circumstances of each spouse at the time the division of the property is to become effective...” contrary to the argument put forth in the responsive brief, the reference to “past circumstances of the marriage” contained in *In re Marriage of Crosetto*, 82 Wa App 545 at 556, 918 P.2d 954 (1996), is dicta. In *Crosetto*, supra, the trial court’s division of 60% of the community property to the wife was upheld because of the maintenance award and because the husband’s future earning capacity was several times greater than that of the wife. See, *In re Marriage of Crosetto*, supra at 557 (1996). Past circumstances of the marriage had nothing to do with the holding in the case.

Not a single published decision since the adoption of RCW 26.09.080 in 1973, that makes reference to past circumstances, has held that compensation for benefits that could have been created during the marriage or that looks only to one spouses separate property contributions, to justify a disproportionate division of the assets.

Ms. Riddell lost continuity of service because she quit in 1997, took a lump sum distribution rolled over into an IRA. Even if she had returned to work within a year she would still have had to start over (RP 421 and 507). That affected the current status of her Boeing retirement

benefit. She did not lose continuity of service by retiring in 2005, as found by the court. In actuality, Ms. Riddell had no intention of returning to Boeing because she lives in Tucson, Arizona, and wished to remain there. (RP 57-58) Thus, there is no substantial evidence to support the finding.

The responsive brief argues this court should disregard the trial court's failure to acknowledge Mr. Riddell's separate contributions to the marital community, as it rendered Ms. Riddell's contributions of \$51,000 so material as to make it a finding of fact because it presents a new theory without any evidentiary support. The court had the evidence of how much of Mr. Riddell's separate property pension payments were contributed to the community. The evidence was the time apportionment application to determine the separate property portion of his monthly pension benefits that were deposited to the use and benefit of the community after he retired in 2003 (RP 73 and 76).

Mr. Grambush's estimate that 44% of the time from date of hire in 1987 to date of retirement is premarital is objectively erroneous. The response brief argues that Mr. Kessler used the wrong hire date of April 2, 1984. Trial exhibit 14 is a letter from the Boeing Pension Service Center, dated May 9, 2003, a month before Mr. Riddell retired. It shows, at page

32, the total PVP vesting was 19.9959 years which corresponds to what it shows as the April, 1984 date at page 28. Page 28 of trial exhibit 14 also states a last high date of July, 1987. Thus, as to the first PVP, Mr. Kessler was not in error.

The span of time between the date of hire (July 1987) and the date of marriage (February 1995) is approximately 91 months. The approximate total service time through June 2003 when Mr. Riddell retired is 191 months. Thus, the separate pre-marital time is 48% of the total time, not 44% of the time.

Even if the court used the 1987 date of hire, as to the three pension plans with pre-marital components, the PVP (\$2228 per month) the supplemental PVP (\$1077 per month) and the SERV (\$106 per month) of the total \$3411 per month in payments. 48% of those payments are \$1,637 per month. That would mean, from the date of retirement to the date of separation, Mr. Riddell contributed over \$145,000 in separate property to the marital community. If, from 1984, 56% being separate, over \$170,000 in separate funds were contributed. Either way, Mr. Riddell's contributions far exceeded Ms. Riddell's.

To consider separate contributions is within the trial court's discretion. However, to render Ms. Riddell's contribution so material as

to make if a finding of fact as a basis for the conclusion that its property division is just and equitable, while ignoring Mr. Riddell's substantially greater separate property contributions offends the notion of justice and equity as explained by our State Supreme Court in *Worthington v. Worthington*, 73 Wn 2d 759, 440 P.2d 478 (1968) because rewarding her effectively penalizes him.

**C. Assignment Of Error #3: The Mischaracterization Of The Separate Value Of Mr. Riddell's Pension**

There are a number of important misrepresentations of the record in the responsive brief on this issue.

1. Contrary to the representation at pages 19-20, Mr. Grambush's analysis did not attempt to establish the separate value of Mr. Riddell's pension as of the date of marriage. Trial exhibit 61 b, on which the brief relies for that contention, in fact, states the opposite. The \$72,548 separate value is...“based on the PRESENT VALUE (emphasis supplied) of Mr. Riddell's accrued monthly benefit as of the date of marriage (trial exhibit 61 b page 2).

2. Thus, contrary to the representation in the response brief at page 21, there was no 69% increase in the value of his separate property portion during marriage and Mr. Grambush did not testify that there was.

3. Contrary to the representation contained in the responsive brief at page 24, the information supplied by the Boeing Company (trial exhibits 15 and 85) do not contradict each other, and trial exhibit 15 does not fail to disclose the second of three pre-marital pension benefits.”

At page 24 the brief represents that trial exhibit 15, which shows the existence of a “PVP” or Pension Value Plan as being inconsistent with trial exhibit 85. That is inaccurate. Both exhibits were admitted without objection. Trial exhibit 15 is a Boeing Company letter of November 17, 2011, that shows the start dates of a SERP pension benefit paying \$106.26 per month as of when he retired in 2003, and three PVP’s two of which began when he retired as well, paying as of then, \$2228.20 and \$1077.19 per month respectively. It reveals that the other PVP payments began December 1, 2011.

Trial exhibit 85 is a Boeing Company response on August 4, 2011 to a subpoena dated May 18, 2011, from Ms. Riddell’s counsel which asked for data related only to “The Pension Value Plan” (exhibit 85, page 2). The letter reveals the same data as to the plans that began paying out when he retired in 2003, contrary to the representation in the responsive brief. What it does not reveal is the community (not separate) PVP which would not begin paying out until December 2011 which was revealed by

the Boeing letter which is exhibit 15. Thus the response brief completely misstates the differences between the two exhibits as it relates to disclosure of PVP plans that had pre-marital separate components.

Whether the response brief argues Mr. Kessler assumed the wrong date of hire, April of 1984, instead of July of 1987, 39 months later, is not at all clear from the record. Trial exhibit 14 clearly shows the April, 1984 date, as well as 19.9959 years of "Total PVP Vesting" (1984 to 2003) (Trial exhibit 14 at page 28 and 32). It also says "Trans Boeing Vesting" 15.5 years, which translated to the July, 1987 date. The response brief argues that 44% is the correct separate component and that therefore the \$122,509 value as separate is supported by the evidence. This is incorrect, even assuming a July 1987 beginning point.

If the July 1987 date of hire is used, as previously explained, 48% of the total times of service was premarital, which equates to \$1637/mo in payments from three of the Boeing plans that arose before marriage. The total payments from all the plans are \$4,069 per month, \$1637 that equates to 40% of the total payments of \$4069 per month.

The trial court found the total present value of all plans collectively regardless of character to be \$486,826 (CP 354). 40% of that \$486,826 is \$194,730 of separate property value, adjusted for the mistake

Mr. Kessler is said to have made as to the date of hire. The trial court's conclusion in adopting \$122,509, of separate value is not consistent with the evidence mischaracterization is \$72,000. The correct value of the separate component leaves viable on this appeal the necessity to remand because the difference in the correct separate value and what the court found is still significant.

**D. Assignment Of Error #4: Mr. Grambush's Speculation About Financial Circumstances Of The Parties Until Death.**

*State v. Lord*, 117 Wn. 2d 829, 822 P.2d 177 (1991) is inapposite because it relates expert testimony as to cause and effect of historic information. The testimony would therefore go to the weight, depending upon whether other evidence supports the theory. Here, Mr. Grambush speculated about financial circumstances up to twenty years in to the future. Speculation based upon some assumptions that were in fact rejected by the trial court.

Whether he had thirty years' experience in helping clients plan their future goes to his competency to testify which was not challenged, not the admissibility of trial exhibit 61 and the unsupported speculation upon which it was based.

As argued earlier, were Ms. Riddell to start working a year earlier than trial exhibit 61 assumed as the court found, and work to age 66, based upon his own analysis, she would earn approximately \$10,000 per year more and increase her social security income by virtue of working four more years, or even better if she were to work until age 70 before retiring. Thus, for Ms. Riddell to retire at age 62, Grambush assumed, she would be creating her own economic adversity to justify a greater division in her favor, where there was no evidence that she actually would do so.

The response brief at page 15 argues that the court in *In re Marriage of Rockwell* 141 Wn Appl. 235, 170 p. 3d 572 (2007), assumed retirement at age 62. The issue was whether the trial court miscalculated the years remaining until he would retire and concluded age 62 was the intended age. In *in re marriage of Rockwell supra*, at 247 (2007), whether there was evidence upon which the retirement age assumption as based was not raised on appeal, and therefore has no merit in this case.

The response brief argues that equity dictates that she should be able to retire as young as Mr. Riddell was when he retired, especially since he is 14 years older than she is, and will not need as much because he will die so much sooner than will she?

Nothing in the findings of fact suggests that this way of looking at the evidence resulted in the conclusion of law that the disparate property division, including invading half of Mr. Riddell's separate Boeing Pension is just and equitable. Respondent has cited no case law, and appellant is aware of none, that stands for the proposition that a property division that compensates for pension benefits that would have been earned had the spouse continued working, or assumes a spouse will quit working in the future, not because it makes economic sense, or out of necessity, but rather because their spouse did so several years earlier and will die several years earlier, would be fulfillment of the goal of a just and equitable division required by RCW 26.09.080. In fact, even in a short term marriage with great age disparities between the parties, the notion that the closer one is to actuarial death, the less in property that spouse should receive would be a very maudlin concept of justice and equity under RCW 26.09.080.

**E. Assignment Of Error #5: Whether The Correct Value Determination Of Mr. Riddell's Separate Property Portion Of His Boeing Pension Would Have Influenced The Trial Court's Decision**

The responsive brief cites the dispositive case on this issue but misapplies its principles. *In re marriage of Stachovsky*, 90 Wn App 135 at 147, 951 P.2d 348 (1978) holds: "...if it is clear that the court would have

made the same division regardless of the mischaracterization” no remand is appropriate. *Stachovsky*, supra involved the mis-application of the time apportionment rule as if related to characterization of the separate and community components of stock options. The court emphasized what must be demonstrated as to whether it was “clear” that the court’s division would be the same regardless of mischaracterization. For it noted: “Here the court indicated it would not have changed the fifty/fifty split of this stock even if mischaracterized,” *In re marriage of Stachovsky*, supra at 147 (1978).

The trial court’s conclusion of law is quite different. It concluded that it kept in mind the characterization when it rendered its ultimate decision. This suggests characterization did influence its decision. That the outcome, given correct characterization, is not equitable, even acknowledging the correct adjustment for the value of the separate component, is pointed out in the initial brief filed on behalf of Mr. Riddell and will not be repeated here.

**F. Assignment Of Error #6: Equalizing The Parties’ Financial Circumstances Until Death**

The responsive brief argues that Mr. Riddell cites no cases that hold that equalization until death only applies to marriages of 25 years or

more. The only case law that mandates such equalization applies to marriages of 25 years or more, *In re Marriage of Rockwell* 157 Wn Appl. 449, 238 P.3d 1184 (2010). The brief relies upon *In re Marriage of Marzetta* 129 Wn

Appl. 607, 120 P.3d 75 (2005) which is inapposite because it dealt with the question of maintenance in lieu of property, relying upon *In re Marriage of Rink*, 18 Wn Appl. 549, 571 P.2d 210 (1977). Here there was no award of property in lieu of maintenance, nor maintenance in lieu of property.

### **III. Conclusion:**

The response brief misstates the thrust of Mr. Riddell's position on this appeal. At page 34 the response brief argues that his position is that "...the court could not create economic parity between them into the future." In fact, Mr. Riddell argued that the issue of economic parity as they faced the future (see brief in chief page 19). At page 41: "Mr. Riddell nevertheless claims that a court may only equalize the parties' economic positions at the end of a long term marriage of 25 years or more." Mr. Riddell's position is that the court is not mandated to equalize the financial positions of the parties until death in a mid-term marriage such as this.

The court here awarded nearly 60% of a community estate, 100% of her separate property and half the husband's separate property to a wife who has another 10 to 15 years of working life left, no mortgage to pay, based on an assumption she will quit working at age 62 in the absence of any supporting evidence. This is compared to a husband, 15 years her senior, who is in ill health, who cannot work, has a mortgage, and must live off the estate that exists. The outcome here is a total mis-application of the principles set forth in Rockwell and defies the principles of justice and equity mandated by RCW 26.09.080. The decision cries out for reversal.

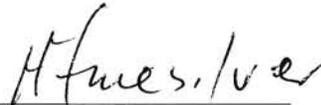
### **III. Attorney Fees**

The mis-statements of the record and mischaracterization of the arguments have caused an unwarranted degree of work by the attorney representing Mr. Riddell, such that fees based upon intransigence should be awarded. Intransigence has been defined in a number of ways, including putting the opposition to the task of doing work that should be unnecessary. *In re Marriage of Dalthorp* 23 Wa App 904 at 913, 598 p. 2d 788 (1979). Extensive work done to correct these misstatements should

have been unnecessary. It is intransigence for which an award of attorney's fees is justified.

DATED this 24 day of September, 2012.

Respectfully submitted,

Handwritten signature of H. Michael Finesilver in cursive script.

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COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

DEBORAH RHEA RIDDELL,	)	
	)	
Respondent,	)	DECLARATION
	)	OF SERVICE
v.	)	
	)	
C. MICHAEL RIDDELL,	)	
	)	
Appellant,	)	
_____	)	

I, Lester Feistel, state and declare as follows:

I am a Paralegal in the Law Offices of Anderson, Fields, Dermody & Pressnall, Inc., P.S. On the 24th day of September, 2012, I placed true and correct copies of the Reply Brief of Appellant with Seattle Legal Messengers for delivery on September 24, 2012 to:

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2012 SEP 24 PM 11:36  
CLERK OF COURT  
COURT OF APPEALS  
DIVISION ONE  
SEATTLE, WA

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED at Seattle, Washington, on this 24 day of September, 2012.



Lester Feistel

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