

original

No. 34155-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DARLENE D. COX,
Respondent

v.

FREDERICK J. COX,
Appellant

FILED
COURT OF APPEALS
DIVISION II
JAN 11 2016
PULSBO, WA

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERRORS

1. *Assignment of Errors.*

No 1. The trial court's property distribution is not fair and equitable.

No. 2. The trial court abused its discretion in disposing of a CSRS pension.

No. 3. The trial court erred in not characterizing an award of an income stream as maintenance.

No. 4. The Court erred by failing to consider or make a finding of fact concerning the parties separate property Stipulation.

No.5 The trial Court's Findings of Fact and Conclusions of Law as contained herein together with the Decree are deficient and inconsistent.

2. *Issues Pertaining Thereto:*

No. 1: Did the trial court abuse its discretion in making the property distribution contained in the Decree?

*No. 2: Did the trial court err as a matter of fact by valuing a pension for purposes of a "roughly equal" property distribution and then **ALSO** distributing the income stream produced thereby?*

*No. 3: Assuming arguendo the trial court did not err by valuing a pension for property distribution and then **distributing** the asset a second time by awarding its income stream, did the trial court err in awarding an income stream and then not characterizing the income stream as maintenance?*

No. 4: Did the trial court, by failing to make a finding of fact regarding the separate property contribution regarding the community residence as stipulated to by the parties at trial and by

failing to utilize the same in its property distribution, err in both law and fact?

B. STATEMENT OF THE CASE

I.

This was a 17 year childless marriage with both parties retired in their seventies. According to the Court, the “sole issue at trial” was “property distribution” RP I, 7.

There were two primary assets. The first asset was the community residence which was valued by the Court for the property distribution at \$400,000.00. At the commencement of trial the parties stipulated as to each of their respective separate property contributions towards the community residence: \$71,000.00 for the Petitioner/Husband and \$9,000.00 for the Respondent/Wife. RP I 4-5. The trial court affirmed their agreement. *Id.*

The second asset was the Petitioner/Husband’s Civil Service Retirement System (CSRS) pension characterized by the trial court as separate property. RP 8/19/05, 7. Proceeds from the pension were pooled during the marriage whereby the parties relied upon the same for their living expenses. *Id.*

At the conclusion of trial, the Court used a “present-day-value” approach to value the pension as an asset for purposes of making a property distribution. RP 8/19/05, 8-9. This was the relief requested by the Petitioner/Husband and opposed by the Respondent/Wife. The Court ALSO awarded a percentage of the income from the asset without characterizing the award as maintenance. *Id.* This was the relief requested by the Respondent/Wife and opposed by the Petitioner/Husband. Consequently, the court either distributed the pension twice or failed to characterize the second award as maintenance.

II.

At trial, the Petitioner/Husband asked the Court to adopt a “present day value” approach to the CSRS pension. Under this approach, the Court would assign a value to the CSRS pension as an asset, award the asset to him, and offset that amount with the Respondent/Wife being awarded an asset or group of assets of equal value to the value assigned to the CSRS pension. The Petitioner/Husband offered expert testimony that the present day value of the pension was \$208,464.00. RP I, 59. The expert further testified in explaining the “theory” of present day value:

If [the Petitioner/Husband] paid 208,460 dollars, he could buy an annuity that would currently pay him 2,366 dollars per month [i.e., the current monthly payment]. . . over his [8.39 year] life expectancy.

RP I, 59.

III.

The Respondent/Wife asked the Court NOT to adopt the Petitioner/Husband's request to award the CSRS as an asset and instead requested to receive a portion of the pension as an income stream: "That's why we don't choose . . . that it should be valued in the manner that [Respondent through his expert] has valued it, because we are seeking a portion of it as an income stream." RP I at 7. The Respondent/Wife further urged the court as follows:

under property for the husband . . . I subtracted out the . . . present day value of the Civil Service pension. Because my analysis of it means that you shouldn't treat it that way. *It's not an asset like that. It's not an asset with a cash value. I'm treating -- my proposal is that it be put in the income stream, and therefore it is not appropriate to use* [the present day value approached requested by Petitioner/Husband].

Emphasis added. RP II, 172. The Respondent/Wife then totaled all of the parties remaining property and argued for a roughly equal division *without* assigning any value to the pension as an asset: "adding it all up, this is again not having the Civil Service pension as an asset but as only as a stream of

income, both of these parties are going to leave with over 540,000 dollars”.

RP II 173.

IV.

At the conclusion of trial the Court held:

The sole issue in this case . . . is a property division. Regarding the CSRS pension, that was the second biggest item that was addressed during trial, I note that it was the separate property of the husband's. He had earned that 30 years prior to their even getting married. There is no doubt that at the time they got married it was separate property.

On the other hand, the court notes that the parties were living on the income from the pension for the duration of their marriage. So the income from this separate property asset was used for community purposes . . . [and] I'm finding that the income generated from the pension was used for community purposes.

What the court is trying to do, finding that it's a long-term marriage, I think it's in the parties' best interest *to put them [in] as equal a position as possible*. . . .

To do that *I am awarding the wife a portion of the CSRS*.

I am awarding her *approximately 30 percent*. *The court's intent is that she could receive a monthly payment of about 700 dollars from his pension*. This is important to give her sufficient income on which to live, and it's also important . . . that she needed to be on his CSRS in order to continue being on his health insurance.

Because I'm awarding it, I've tried to use some figures of what -- there is testimony as to the present day value of the pension, and that's reflected in the work spreadsheet of \$208,460 dollars. Taking 30 percent of that is about 62,538. So from that I made two columns of the husband's assets and the wife's.

So on each side I've got 200,000.00 for the house, either share of the house. The 62,538 for the wife's share of the

pension and the husband is 145,922 dollars.

Thereafter an attempt to keep -- to award each party their separate property and to give each party the same amount of assets.

Emphasis added. RP 8/19/05, 7- 9. The Court continued:

I believe the husband's share was a total of 650,101 dollars. And if you add up the wife's column of all her property, her total amounts to 651,799 dollars.

And even though I'm awarding the house to be sold, I was *trying to equate the parties' income* after they're done. And in awarding the wife 30 percent, or approximately 700 dollars, I did that for two reasons. Because I agree with respondent in this case that she needs to earn additional income from the house.

By awarding the wife about 700 dollars a month from the husband's CSRS, he will have approximately 2,100 dollars a month to live on. And I was trying to have the similar figure for the wife.

Emphasis added. RP 8/19/05 at 12

Despite the above-quoted language allocating the stream of income, the Court stated upon presentation of the Decree and after the Petitioner/Husband's objection to inclusion of language under the paragraph for provision of maintenance *supra*, "I did not award maintenance but rather gave her the percentage of the pension, to give her roughly 700 a month" RP 9/30/05 at 14.

V.

The final pleadings were entered as follows:

A. Qualified Domestic Relations Order.

Divides only income from CSRS pension without reference to a monetary figure.

B. Findings of Fact and Conclusions of Law.

Paragraph 2.9 entitled "SEPARATE PROPERTY" states:

Respondent earned a Civil Service Retirement System pension both prior to and during the marriage. Of the total of 30 years he was employed in the CSRS system, 29 years were prior to the marriage. The CSRS pension is the major income source for the parties. During the marriage they lived on it and shared it

CP 6.

Paragraph 2.12 entitled "MAINTENANCE" states:

Wife's need for future income is handled by the division of the civil service pension so that each of the parties have equal incomes . . .

C. Decree of Legal Separation.

Paragraph 3.7 entitled "SPOUSAL MAINTENANCE" states:

There is a provision for the division of the CSRS pension herein. This division is IN LIEU (defined instead by Webster) of and enforceable by the court as spousal maintenance."

Emphasis added. CP12.

Paragraph 3.2 entitled "PROPERTY TO BE AWARDED TO HUSBAND" and referencing Exhibit A lists as the first asset awarded "70% of his CSRS pension". The exhibit concludes by further referencing the pension: "The 70% share of the CSRS will be paid to husband after

payment of [costs] for both parties”. *Id.*

Paragraph 3.3 entitled “PROPERTY TO BE AWARDED TO WIFE” and referencing Exhibit B lists as the second asset awarded “30% of the CSRS pension of the Respondent”. The Exhibit concludes by further contemplating the asset as income stream/maintenance: “the 30% of the CSRS pension awarded herein will be after the payment of [costs] for both parties. Wife’s share will receive the same cost of living increases as the CSRS pension as a whole.” *Id.*

VI.

Respondent asked the Court for Reconsideration on the grounds the Court, by awarding petitioner 30% of the present day value for purposes of the property distribution AND 30% of respondent’s CSRS income, had essentially distributed the pension TWICE. CP 18. The motion was denied without explanation (CP 33) and the Petitioner appealed (CP 34).

C. SUMMARY

The court either distributed the pension twice or failed to characterize the second award as maintenance. To do so was manifestly unreasonable. All parties agreed as to one method of distribution as

opposed to the other but under no circumstances both methods as was done by the trial court.

D. ARGUMENT

1. The trial court, by valuing the pension for purposes of a "roughly equal" property distribution and ALSO dividing the income stream produced thereby, erred both as a matter of fact and as a matter of law by abusing its discretion in the property distribution.

Judges are human and, as such, prone for mistakes. They are not machines. So long as our justice system remains reliant on the former, Courts will make occasional mistakes. Hence the Court of Appeals.

The essential consideration in the distribution of property and debts between spouses is whether the final distribution is fair, just, and equitable under the circumstances. RCW 26.09.080; *Marriage of Olivares*, 69 Wn.App. 324, 328, 848 P.2d 1281 (1993); *Marriage of Crosetto*, 82 Wn.App. 545, 556, 918 P.2d 954 (1996). The division need not be equal nor focus on mathematical preciseness: the goal of fairness is achieved "by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules." *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989), *review denied*, 114 Wn.2d 1002 (1990). A trial court's division of marital property will stand on appeal absent a

showing of manifest abuse of discretion. *Marriage of Wright*, 78 Wn.App. 230, 234, 896 P.2d 735 (1995). More is required to establish an abuse of that discretion than disagreement with the trial court's opinion or an honest difference of opinion. *Marriage of Nicholson*, 17 Wn.App. 110, 114, 561 P.2d 1116 (1977). To constitute an abuse of discretion, the discretion must have been *exercised upon a ground, or to an extent, clearly untenable or manifestly unreasonable*. *Friedlander v. Friedlander*, 80 Wn.2d 293, 304, 494 P.2d 208 (1972)(emphasis added). In order to conclude that a trial court manifestly abused its discretion, an appellate court is required to find that no reasonable person would have ruled as that trial judge did. *Nicholson*, at 114. *Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985).

Here, the trial court clearly and unequivocally exercised discretion on untenable grounds and the negative standard of "reasonableness" is established by the record. All the parties agreed, the pension must be distributed in one of two ways: *either* valuing the pension as an asset and utilizing the value in the property distribution *or* distribution of the income stream by means of a Qualified Domestic Relations Order. They are two distinct and legally oppositional approaches regarding distribution of

property and it is either one way or the other but not both. This is not a mere “disagreement with the trial court’s opinion or an honest difference of opinion” as was the case in *Marriage of Nicholson, supra*. The trial court awarded the asset twice and the “goal of fairness” was not achieved.

First, the entire theory of opposing party’s case focused on the CSRS *not* being valued for purposes of the property distribution and the vehement objection to any use of the present day value “theory”. Second, the Petitioner/Husband urged the court to value the asset for purposes of the property distribution BUT NOT award an income stream. All parties were in agreement: one way or the other but not both.

Third, the Respondent/Wife, upon Petitioner/Husband’s Motion for Reconsideration, argued, under *Konzen, supra.*, that the Court’s decision was justified since “any asset can have this dual impact” and cited two examples contained in the Decree. CP 27. The first example was a separate residence awarded to the Respondent/Wife where the Court also imputed a rental income therefrom *for the purposes of computation* of the Respondent/Wife’s income. The second example was a sales contract awarded to the Petitioner/Husband where the court again assigned a value for purposes of the property distribution and again utilized the income *for*

computation of the Petitioner/Husband's income. *Id.*

To the contrary, neither *Konzen* nor the enunciated examples justify the Court's decision. First, *Konzen* is directly on point as argued by ***both parties***. In that case, the court held that the trial court did not abuse its discretion in awarding a portion of the husband's "military retired pay" to the wife. *Id.*, at 472. The Court held that the "military retired pay", even though the separate property of the husband, was divisible. But that is not the issue here. The *Konzen* court ***did not also*** utilize a present day value and account for the asset's distribution in the property division. To do so would, like here, have been reversible error.

Second, both of the examples cited from the law of this case involve the assets being valued and utilized in the property distribution and the income stream therefrom ***being taken into consideration*** by the Court in determining the parties income. The CSRS pension is drastically different since the asset was first being valued and utilized in the property distribution and then distributed a second time by means of the Qualified Domestic Relations Order. The income stream was not merely being taken into consideration for determining the parties income, it was being ***distributed a second time.***

Finally, as a matter of fact and as established on the record, the pension *has no value*. It is a conceptual number to support a theory available to the court in making a property distribution. It is a conceptual number utilized to establish what the cost would have been to the Respondent/Wife to secure an annuity to provide an income stream which would be equal to the Petitioner/Husband's pension. The asset is the income stream and there is no value to the asset apart from the income stream. As stated by the opposing party at trial: "*It's not an asset like that. It's not an asset with a cash value.*" RP II at 4

In conclusion, the pension was *either* an asset to be valued and utilized in the property distribution *or* an asset which results in an income stream with the income stream being divided. They are two distinct and legally oppositional approaches. It is akin to any asset: the asset is *either* assigned a value and distributed accordingly *or* the proceeds from the asset (by sale or QDRO as here) are physically distributed. It is one or the other, not both. Accordingly, the trial court's treatment of the pension in this case was based on untenable grounds, was manifestly unreasonable, and

does not achieve the goal of fairness.¹

2. *Assuming arguendo the trial court did not err in utilizing the value of the pension for property distribution and then distributing the asset a second time by awarding its income stream, did the trial court err by not characterizing the income stream as maintenance?*

Assuming arguendo this Court determines the trial court neither abused its discretion or erred as a matter of fact regarding distribution of the pension, the Petitioner/Husband would argue that the court erred in not classifying the income stream as maintenance. As evidenced by the Court's oral opinion, the Findings of Fact, and the Decree, the nature of the CSRS pension is unclear at best. The court states there is no award of maintenance but awards the income form an asset which has already been valued and utilized in the property distribution. The Findings of Fact state the wife's need for future income is being handled by division of the pension while the Decree states the property distribution is "*in lieu*" (defined by Webster's Dictionary as instead) of an award of maintenance. The bottom line argument is identical to the one above. The Court must

¹ Several other factors contribute to the Court abused its's discretion inherent in the property distribution contained herein. As discussed *infra*, the Court failed to recognize the parties' separate property Stipulation. The Court also, again as discussed *infra*, failed to characterize the stream of income as maintenance.

choose one method or the other, not both. Furthermore, the results are extreme. Maintenance awards result in significant tax implications and, unlike awards of property, are modifiable upon changed circumstances.

3. *Did the trial court, by failing to make a finding of fact regarding the separate property contribution regarding the community residence as stipulated to by the parties at trial and by failing to utilize the same in its property distribution, err in both law and fact?*

The Stipulation regarding the separate property contributions of the parties towards the community residence was agreed to, placed on the record at the commencement of trial, and acknowledged by the Court. However, neither the Findings of Fact, the Court's oral decision, or the Decree reference the Stipulation. This was a critical finding which should have been included and some form of analysis given as to reasons regarding failure to incorporate it into the property distribution.

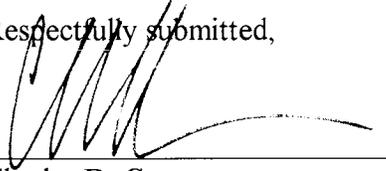
E. CONCLUSION.

For the reasons outlined above, the Petitioner/Husband respectfully requests that this court order a new trial or, in the alternative, remand to the trial court with appropriate instructions. The Petitioner/Husband would also request attorney's fees upon Declaration and pursuant to RAP

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DATED this 30th day of June, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. Creason', written over a horizontal line.

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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COMMUNICATIONS
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In re the Marriage of DARLENE)
D. COX and FREDERICK J. COX)
DARLENE D. COX,)
Respondent,)
vs.)
FREDERICK J. COX,)
Appellant.)

DECLARATION OF SERVICE/
MAILING

On July 1, 2006, I deposited in the United States Mail a properly stamped and addressed envelope addressed to the following:

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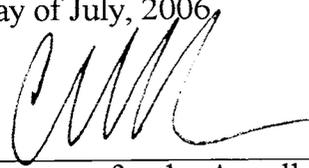
which contained the original in regards to the later and a copy in regards to the former of the Appellants Opening Brief and, in regards to Counsel for Respondent, a Copy of the VRP in this case.

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I declare under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

DATED at Poulsbo, Washington, this 1st day of July, 2006,



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