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SEP 21 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**DIVISION III COURT OF APPEALS
STATE OF WASHINGTON**

No. 296504

**Spokane County Superior Court Case No. 09-3-01991-4
The Honorable Gregory Sypolt
Superior Court Judge**

In Re the Marriage of

AMY BOWEN, PETITIONER

V.

JOE HARMON BOWEN, RESPONDENT

OPENING BRIEF

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I. Judicial Errors

The trial Judge erred in the following ways:

1. By failing to value that part of the parties military retirement (70%) that was not disability pay, and by failing to include the part that was not disability pay in the distribution of assets of the parties;
2. By finding that the 70% of the parties disposable military pay that was not for the husband's 30% disability was not distributable by the court;
3. By ordering that the husband be awarded almost 97% of the net asset value in the case and failing to make a finding to support this imbalanced distribution;
4. By imputing income to a lady who both has not worked fulltime for years, and was ordered to have maintenance because of her financial needs.

II. Facts of the Case

The parties ended a 16 year marriage by dissolution trial on December 10, 2010. RP 336. The evidence presented indicates that the parties were also married for more than 10 years while the husband was in the military for 10 years, complying with the Federal "10-10 rule" regarding the distribution of the husband's military retirement.

During the course of the marriage the parties obtained property, including a Thrift Savings, newer Silverado truck, miscellaneous personal property, and some cash. CP 566-574. They had very little

debt, except the wife had \$20,000 in attorneys fees owed at the time of the divorce trial. CP 568. When the wife received that entire debt, it basically wiped out any equity. Id.

At trial the parties focused on parenting plan and relocation issues, and the wife was given primary custody and allowed to relocate to Oregon near her parents, applying all the factors in the Act. CP 530-538 RP 695-728. The husband was given liberal visitation, but this certainly would be hampered by an almost 600 mile travel distance from Spokane to exercise that visitation. RP 713. Meanwhile, as is obvious from their Final Parenting Plan the mother has the children a substantial percentage of each month since the father is not in the area, however, this is even made more of a burden since the Judge felt that her parents were so negative about Mr. Bowen, and had a history of some possible issues with corporal punishment, that she could not either live with them for financial help, or have her parents help her with the children, leaving her to fend for herself and the children virtually all alone. CP 537-538.

During the course of the trial the issue came up that Mr. Bowen was on disability pay with the military, and was discharged due to this 30% disability. RP 315. In his final ruling Judge gave Mr. Bowen his entire military pension saying that he could distribute any of it under federal law, but did not distribute it. CP 567 (3.3) & 550. Ms. Bowen then filed a motion for reconsideration and argued that his total “pension”

included only a smaller percentage that was “disability” and requested that the court could either award maintenance for the shortfall, or distribute the larger 70% portion. Id. & 749. More specifically, his attorney argued that although the paperwork indicated that he received only a 30% VA disability, since he was “discharged” in a letter from the Air Force as a “disabled person”, his entire pension pay should be deemed all disability; put another way, they argued that he was the recipient of “two kinds” of disability pay, one portion (30%) was for his actual VA disability, and the other (70%) was pay given to him as a “disabled person”, ipso facto, it should be considered all disability pay. CP 465-466. More specifically, his attorney argued their position using a declaration by Mr. Bowen which seemed to be the primary basis for their argument that his pension was all disability. Id. The operative section of his declaration which was argued was this section,

“Per Petitioner’s exhibit from the Department of the United States Air Force **Special Order number ACD-02094 (See attached)** it states:

“Effective 12 Nov 08 you are relieved from active duty, above organization and station of assignment. Effective 13 Nov 08 you are **PERMANENTLY DISABILITY RETIRED** in grade of TSG per AFI 36-3212 with compensable percentage for physical disability of 030 percent.” CP 466 line 4-7.

After taking the reconsideration under advisement, the Judge simply denied the request without explanation (CP 470), upholding his ruling making the entire pension, both the 30% disability portion and the 70% disposable portion all not disposable. CP 566-574. This was in

spite of the fact that even Mr. Bowen's own declaration indicated that it was only a 30% proportionate disability pension, obviously leaving the corpus disposable. CP 465-466.

The Judge also failed to value the pension, nor did he even distribute it as Mr. Bowen's separate property. CP 567. In spite of all this the court did order that Mr. Bowen pay some maintenance to Mrs. Bowen, showing at least that he recognized that the wife/mother was in need of help financially. CP 568.

In addition to the pension, the husband also received approximately \$42,000 of the parties' property, and he came away with little debt. CP 567-574. The husband's net worth after the decree was entered was \$40,000+ after the GAL debt was removed or paid. Id. This does not include the value of the his pension itself, which Ms. Bowen's counsel argued would increase over its present value. CP 750-751. In contrast, the wife received about \$23,000 in property, but left with over \$22,000 in debts to pay (according to their decree), basically leaving her net worth of \$1,000. CP 567-568. In essence this distribution then became a 3%/97% split of net worth for the parties, as described in the following taxonomy:

| <u>Item - Property Value</u> | <u>Husband</u> | <u>Wife</u> |
|------------------------------|----------------|-------------|
| Personal prop. | \$25,785.00 | \$12,310.00 |
| Silverado truck | 20,000.00 | 13,475.00 |
| Thrift Savings | 12,379.00 | 6,189.50 |
| Trust Account | 7,478.00 | 3,739.00 |
| Total value | \$65,642.00 | \$42,238.50 |
| | | \$23,403.50 |

| <u>Item – Debt</u> | <u>Value</u> | <u>Husband</u> | <u>Wife</u> |
|--------------------|--------------------|--------------------|--------------------|
| GAL fees | \$ 3,062.50 | \$ 1,837.50 | \$ 1,225.00 |
| Fees | 20,000.00 | | 20,000.00 |
| Misc debts | 940.00 | | 940.00 |
| Total debts | \$24,000.50 | \$ 1,837.50 | \$22,165.00 |
| Net Worth | \$41,641.50 | \$40,401.00 | \$ 1,238.50 |

All in all the decree leaves the wife with virtually nothing in the case but a small amount of taxable cash from a retirement fund. There is no finding or explanation for the reason for this terribly disproportionate distribution, nor is there a clear explanation about why the military pension was left out of the case, even though federal law only recognizes only one kind of VA disability pay, not two different kinds.

Finally, the Judge also imputed income to Ms. Bowen in the Child Support worksheet, even though he also ordered maintenance to be paid because she could not afford her expenses and was unemployed. CP 557-565. Although the Order of Child Support indicates that the reason she was imputed the medium aged income was because she was “voluntarily unemployed”, this seems to conflict with a finding that she was in need of maintenance. *Id.* The court also ordered that Mr. Bowen receive the tax deductions for both children, to compensate him for travel expenses, therefore, it could be hardly said that this imputation of income was based on anything but an arbitrary finding, since she was again left with virtually nothing. CP 562.

III. Law and Argument

A. Although the court may order a disproportionate distribution in a dissolution decree, they must make findings to support such a ruling; and if they do not it is an abuse of discretion to move so drastically away from a 50/50 distribution that it appears unfair and inequitable.

It is axiomatic that the Judge in a dissolution case is vested with broad discretion in the distribution of assets and debts, and absent error, a disproportionate distribution is generally upheld if there are findings to support the division. *See In re Marriage of Rockwell, 141 Wn.App. 235, 170 P.3d 572 (Wash.App. Div. 1 2007)*. The general rule is that the longer the marriage, toward a long term 25 year marriage, the more reason there may be to uphold a disproportionate distribution. *Id.* However, even then, findings must support the decision. *Id.* In turn, the less the length of the marriage, the closer to equal the court should distribute the property, unless there is some finding that would support a disproportionate distribution. *Id.*

In order to avoid a finding that the decision is an abuse of discretion for a disproportionate distribution that is not 50/50, the court must make a finding to support the distribution and it should be consistent with the factors outline int RCW 26.09.080. *Id.* In *Rockwell* the court stated,

¶ 11 The trial court's distribution of property in a dissolution action is guided by statute, which requires it to consider multiple factors in reaching an equitable conclusion. These factors include (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and

(4) the economic circumstances of each spouse at the time the division of the property is to become effective. RCW 26.09.080. In weighing these factors, the court must make a "just and equitable" distribution of the marital property. RCW 26.09.080. In doing so, the trial court has broad discretion in distributing the marital property, and its decision will be reversed only if there is a manifest abuse of discretion. *In re Griswold*, 112 Wash.App. at 339, 48 P.3d 1018 (citing *In re Marriage of Kraft*, 119 Wash.2d 438, 450, 832 P.2d 871 (1992)). A manifest abuse of discretion occurs when the discretion was exercised on untenable grounds. *In re Marriage of Muhammad*, 153 Wash.2d 795, 803, 108 P.3d 779 (2005). If the decree results in a patent disparity in the parties' economic circumstances, a manifest abuse of discretion has occurred. *In re Marriage of Pea*, 17 Wn.App. 728, 731, 566 P.2d 212 (1977).

In this case the judge gave Mr. Bowen what amounts to between 97% distribution of the parties property, after debts were removed, without stating why he ordered this patently unequal division. See CP 544-556. There must be some apparent reason for the distribution other than simply passion or arbitrary decision making. *Rehak v. Rehak*, 1 Wn.App. 963, 465 P.2d 687 (Wash.App. Div. 1 1970). Without any findings as to why the husband received this disproportionate distribution it must be assumed that this decision was based on passion rather than equity. This is further exacerbated by the fact that Ms. Bowen is the holder of virtually all the factors that RCW 26.09.080 say are reasons for her to receive a larger portion of the property, not to mention that the judge also found her needy enough to order Mr. Bowen to pay her maintenance for an albeit short period of time. CP 547. There is no basis for this distribution and it should be set aside as an abuse of discretion by the court.

B. All the facts in RCW 26.09.080 support at least a 50/50 distribution in this case, if not an imbalance in favor of the wife/mother, given the fact that she was awarded the children and was in need of maintenance.

A trial court has broad discretion in making a property and debt division for divorcing spouses. *In re Marriage of Nicholson*, 17 Wn. App. 110, 118, 561 P.2d 1116 (1977). A decision of the trial court will be reversed only for a manifest abuse of discretion. *In re Marriage of Monkowski*, 17 Wn. App. 816, 817, 565 P.2d 1210 (1977). It abuses its discretion only when its decision is manifestly unreasonably, or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The essential consideration of whether the decision is an abuse or not is whether the final distribution is fair, just, and equitable under the circumstances, considering the factors outlined in RCW 26.09.080. *In re Marriage of Hadley*, 88 Wn.2d 649, 656, 565 P.2d 790 (1977)); *In re Marriage of Olivares*, 69 Wn.App. 324, 328-29, 848 P.2d 1281 (1993) The factors to be considered are (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and (4) the economic circumstances of the parties. See RCW 26.09.080. A trial court is not obligated to make an equal division of property if under these factors there is a basis for an unequal division. *Rogstad v. Rogstad*, 74 Wn.2d 736, 737-38, 446 P.2d 340 (1968).

RCW 26.09.080 states that the court should consider several factors in dividing the debts and property in a dissolution. Those factors are,

1. *The nature and extent of the community property;*
2. *The nature and extent of the separate property;*
3. *The duration of the marriage;*
4. *The economic circumstances of each spouse;*
5. *The spouse who received the family home; and*
6. *Who received the children the majority of the time. (Emphasis added).*

In this case, the extent of the community property is reasonably important for a small family who has been in the military, it totaled about \$65,000; Ms. Bowen was also saddled with \$22,000 in debts. When the final tally is complete, Ms. Bowen received \$1,238.50 in overall net value, and Mr. Bowen realized \$40,401.00 net value, for his property and debt distribution. In terms of percentages it shows Ms. Bowen with a 3% net value and Mr. Bowen received 97% of the net value.

Mr. Bowen may try and say that this 97% property allocation is simply an aberration because he has attorney's fees too. See CP 567. However, the problem with that argument is that he had a chance to place the amount of his fees owed to Mr. Maxey in the Decree but chose not to do that, rather opting simply to put nothing in that description. It is therefore somewhat disingenuous now for him to argue that he has fees commensurate with Ms. Bowen when there is nothing in any of the record or pleadings to show what that was. Since

he put nothing in the decree for the amount it can only be assumed that his fees were minimal at best, otherwise he would have placed them in the decree to show that he too had a large bill to pay. As it is, since all property and debts is before the court, separate and community, Ms. Bowen in reality came out with little or nothing for 16 years of marriage. Even then the property division, before the debts were disparate as well, with Ms. Bowen receiving 35% and Mr. Bowen receiving 65%,

In addition to all this, when this unequal distribution is added to the fact that Mr. Bowen received his entire military pension, and that her attorney argued that this would increase over time and the court could divide his non-VA portion (see RP 685), this division is so inequitable as to question its basis. Then, when the statutory factors are considered there appears absolutely no reason for this distribution what so ever. For example, Ms. Bowen was needy financially, so much so that she was in need of maintenance, having not worked much during their marriage and was unemployed. CP 545-547. In addition, Ms. Bowen is also the primary parent so she has the parties children with her, meaning her poverty will translate to her children's lifestyle, exactly what the legislature did not want to happen in a marital distribution. See RCW 26.09.080(4). CP 530-538. Finally, the parties had no separate property, except for Mr. Bowen's 30% portion of his pension as disability. She has no family home, a cheap car, no retirement pay,

little or no Thrift Savings, basically nothing as compared to Mr. Bowen, and is just starting out as a substitute teacher if she can find that work. The inequities pile up when considering the statute. As indicated in the previous section of this brief, case law seems to support a finding of error in this case, since there is no finding by the court why such an inequitable distribution was made. *Rockwell, supra*.

C. There are only two kinds of military retirement pay, either it is for a disability as a percentage of the pay, or it is normal retirement pay that is divisible by a state dissolution court.

In the Findings of Fact and Conclusions of Law in this case it states at page 7 number 27, line 4, “The court found Mr. Bowen’s Veteran’s Disability pay and Air Force Disability pay is beyond the reach of the court and is not awardable” (Emphasis added to CP 544-556). This was apparently based on a letter from the Air Force that indicated that Mr. Bowen was now discharged from the Air Force as permanently disabled.

The US Code makes it clear that there is but one military service which includes the Naval, Air Force or military. See 38 USC 101 (2). The definition of a “veteran” does not distinguish between Air Force and the other branches. A veteran is a veteran. *Id.* Further 10 USC 1408(C)(1) indicates that a state court may dispose of that portion of the veteran’s pay that is “disposable” and identified as such under 10 USC 1408(A)(4). This section clarifies all this by stating clearly that in order to calculate a pension that is divisible by a state court, you first

start with the disposable portion (the “total retirement pay”) of the veteran, less any amounts waived for a disability payment or for an annuity payment and annuity amounts owed for survivor’s benefits (ie. in this case for Ms. Bowen). *Id.* Since Mr. Bowen’s initial retirement was reduced by the waived amount of 30% of this pay, this leaves 70% minus the survivor’s benefit payment for the court to divide pursuant to federal law and the *Mansell* case at 490 U.S. 581, 588-89, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989).

To further bolster this argument, in the case of *In re Marriage of Mansell, supra*, the U.S Supreme Court held that “disposable military retirement pay” is subject to division in a state court dissolution proceeding, but the language of the USFSPA specifically defines “disposable” to exclude military retirement pay waived in order to receive VA disability payments. However, at the same time, the code also clearly speaks to only two kinds of military pay benefits, disposable military retirement pay and VA disability payments. There are no other kinds of military pay identified in the USFSPA; as indicated the “Air Force retirement pay” falls under the Veteran’s affairs statutes as well as 10 USC 1400 et seq. and is “military pay.” *Id.*

Under the USFSPA (US Code) and *Mansell*, military retirement benefits that are not disability pay benefits substituted for the same, are

considered community property subject to distribution in a marital dissolution. At the same time disability pay benefits are not subject to distribution. *See Mansell; In re Marriage of Jennings, 138 Wash.2d 612, 980 P.2d 1248 (1999)*. In *Jennings* more specifically, that court clearly showed that a disability pension is not always a 100% thing; it is not “either you get disability pay or you do not”; it is a percentage items, as in the *Jennings* case itself, the original amount may have gone down if it was partially VA disability, but the other portion was disposable pay, subject to division. *Id.* It is therefore, inconsistent with any statute or case law on the subject to say that just because Mr. Bowen received a letter saying he was 30% disabled that 100% of all his military pay is non-disposable by the courts. In this case, 70% should have been distributed and 30% not, instead of the entire pay being left out of the distribution.

D. At a minimum it is error for a trial court in a dissolution action to not either characterize or distribute military pension funds if the 10/10 rule applies in the case.

RCW 26.09.080 indicates that the Superior Court is required to divide all the parties property, even separate. The *Mansell* case indicates that by federal code states that States have the right to dispose of that portion of a military pension that is disposable in nature and not a Veteran’s Disability Pension supplement. The case of *In re Marriage of Skarbek, 100 Wash.App. 444, 447, 997 P.2d 447 (2000)*. indicates that is error for a judge not to characterize property correctly as either

community or separate property. Such issues are considered so important as to allow a de novo review by the appellate court for improper characterization. *Id.*

The case law on military pensions state that if the parties meet the 10 years marriage, while 10 years in the service, then they are authorized and have a duty to distribute that pension that is “disposable income”, or not disability supplanted income. *See e.g. Mansell; Jennings, supra.* In this case, the parties met the requirements of the statute to be able to have a distribution of the pension that was disposable. As it stood, the judge did not properly characterize or distribute 70% of Mr. Bowen’s pension.

E. The court imputed income to the wife, even though it found that she was in such need of financial help as to order maintenance, something that is contradictory to the entire notion of why maintenance was needed, and shows that the court was not interested in making things easy for Ms. Bowen economically.

One of the key factors in the setting or ordering of maintenance is whether or not the person seeking the maintenance is “self supporting”. If they are not, then the “need” part of the RCW 26.09.090 equation is usually satisfied. *See e.g. In re Marriage of Foley, 84 Wn.App. 839, 930 P.2d 929 (Wash.App. Div. 3 1997).* When considering whether to impute income or not in a child support determination the court looks at the parent's work history, education, health, age, and other relevant factors. *Dewberry v. George, 115 Wn.App. 351, 62 P.3d 525 (Wash.App. Div. 1 2003); In re Marriage of Shui and Rose, 132*

Wn.App. 568, 125 P.3d 180 (Wash.App. Div. 1 2005). RCW 26.19.071 also indicates that the court shall not impute income to someone who is “unemployable”. See also *In re Marriage of Brockopp, 78 Wn.App. 441, 898 P.2d 849 (Wash.App. Div. 2 1995)*.

In this case the court’s oral opinion is inconsistent with the imputation of income since in that the Judge indicates that she would receive maintenance in the amount of \$400.00 a month for 12 months. How can the court say there is a need for maintenance and then say she is purposefully unemployed. Those two facts would seem mutually exclusive. Ms. Bowen asks that until the maintenance is terminated that she not be imputed income.

IV. Conclusion

In conclusion, the Appellant has filed this appeal for the court to review what clearly appears to be errors by the trial court in the distribution of the parties property in this matter. The initial distribution is a 65/35 distribution and when the wife’s debts are added it is a 3%/97% net affective distribution. No findings of fact have been entered to justify this distribution, therefore, it can only be assumed that this was not ordered to be an equitable division, given the factors in the case law and statute. In addition, the court failed to characterize or distribute the husband’s military pension, even though the testimony was clear that only 30% of that pension was for disability. At the very least more than simply a decision to leave the entire pension out of the

distribution is needed. Finally, the court also imputed income to the mother, even though it also found she was needy enough to order maintenance from the husband. Not that imputation cannot be made, but the finding that such an imputation was appropriate seems antithetical with a finding of need under the statute. All in all the Appellant asks that these rulings be overturned by this court.

Respectfully submitted this 20th day of September 2011.



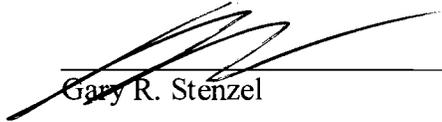
Gary R. Stenzel, WSBA #16974

I, Gary R. Stenzel, being first duly sworn upon oath deposes and says:

That he is now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of eighteen years; that on the 21st day of September, 2011, affiant enclosed in an envelope a copy of the following document:

Opening Brief of Appellant to -. Attorney Kenneth Kato
1020 N. Washington
Spokane, WA 99201

Said address being the last known address of the above-named individual, and on said date deposited the same so addressed with postage prepaid in the United States Post Office in the City and County of Spokane, State of Washington. I declare under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.



Gary R. Stenzel