

**NO. 31320-4-III**

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

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**BRIAN DALE HAMOND,  
APPELLANT,  
vs.**

**PATRICIA ABRAMS HAMOND,  
RESPONDENT.**

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**BRIEF OF APPELLANT BRIAN DALE HAMOND**

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## **I. ASSIGNMENTS OF ERROR**

1. By way of entry of the Court's "Order Re Utilities, Visa Card Account And Allocation Of Retirement" dated October 01, 2012 the Superior Court of Spokane County, State of Washington (hereafter Superior Court) erred in the division and award of Mr. Hamond's LEOFF Plan 2 Retirement, (CP 134-136), and specifically, the Court erred wherein the Court stated "the Respondent wife be awarded in total her defined benefit plan and that the petitioner husband be awarded in total his deferred compensation account. The balance of the accounts (LEOFF plan, TERS III plan, Spokesman Review retirement plan) are entirely community and shall be divided equally between the Petitioner and Respondent." (CP 135).

2. By way of the Superior Court's Conclusions of Law, at section 3.4, entered October 25, 2012, the Superior Court erred in concluding "the distribution of property and liabilities as set forth in the decree is fair and equitable." (CP 141).

3. The Superior Court further erred on October 25, 2012 in its "Decree of Dissolution at section 3.2, wherein the Superior Court awarded the husband "as his separate property the following property . . . 1/2 the LEOFF Plan . . . ." (CP 146).

4. The Superior Court further erred on October 25 2012 in its “Decree of Dissolution” at section 3.3 wherein it awarded to the wife “as her separate property . . . ½ the LOEFF Plan . . . .” (CP 146).

5. The Superior Court further erred in November 16, 2012 in its “Order on Reconsideration” wherein it ruled Petitioner Brian Hamond’s motion for reconsideration is forthwith denied.” (CP 161).

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the Superior Court’s division of the LEOFF Plan 2 retirement was an abuse of discretion mandating remand for failure to implement a time formula? (Assignments of Error 1-5).

2. Whether the Superior Court’s division of the LEOFF Plan 2 retirement was an abuse of discretion mandating remand for failure to consider Mr. Hamond’s foregone Social Security benefits.? (Assignments of Error 1-5).

### **III. STATEMENT OF THE CASE**

On June 13, 2011, Petitioner, Brian Dale Hamond filed for dissolution of the marriage. (CP 1-5). On October 26, 2012, the Superior Court issued its Decree of Dissolution. (CP 145-148). On November 16, 2012 the Superior Court tersely denied Mr. Hamond's motion for reconsideration. (CP 161). Mr. Hamond, as noted above, objects to the court's division of his LEOFF Plan 2 retirement and the Courts failure to consider foregone Social Security benefits. (CP 115-118).

In the petition, Mr. Hamond indicated he was born April 07, 1959, (CP 3), making him 52 years old at the time of the decree. (CP 145). It was also indicated Ms. Hamond was born September 26, 1960, (CP 2), making her 50 years old at the time of the decree. (CP 145). There were no minor children dependent upon the Hamonds for support. (CP 3). The Hamonds separated March 17, 2011. (CP 4). In Ms. Hamond's response, all of the allegations were admitted. (CP 4-7). Spousal maintenance was not requested by either party. (CP 1-5; 6-7). The parties are still employed. (CP 153).

On August 16, 2012, the Superior Court received a Civil Rule 2A agreement from Mr. and Mrs. Hamond. (CP 8-10). The stipulation

provided the community home would be sold and divided equally. (CP 8). Real property at Newman Lake property was also to be marketed and divided equally. (CP 8). Mr. and Ms. Hamond also agreed to keep the vehicles in his/her respective possession. (CP 9). The Hamonds also agreed to each receiving a boat, with Ms. Hamond receiving the 20 foot Cabin Cruiser, (CP 9), and Mr. Hamond receiving the 1966 fiber form boat. (CP 9). Mr. Hamond also received his motorcycle, a 1966 Mustang, and a recreational vehicle. (CP 9).

Pursuant to the stipulation, Ms. Hamond also received various household furnishings, (CP 9), and the Hamonds divided photographs. (CP 9). The debts were roughly split equally. (CP 9).

Despite the above agreements, the Hamonds were unable to resolve the division of the retirements, payment of the joint visa card debt and payment of utilities. (CP 9). Consequently, these unresolved issues were presented to the Superior Court in declaration form for resolution without oral argument or testimony. (CP 9).

On August 24, 2012, Ms. Hamond filed her position by declaration. (CP 11-15). Ms. Hamond argued she had overpaid utilities by \$928.00 and asked for a refund. (CP 12). She also asked Mr. Hamond be responsible for the utilities as he was residing in the

home receiving the utilities. (CP 12). Ms. Hamond further argued Mr. Hamond should be awarded the Visa debt as Mr. Hamond allegedly incurred all the debt on the card after separation. (CP 12).

As concerns the retirements, Ms. Hamond indicated Mr. Hamond had a deferred compensation plan valued at time of separation at \$51, 134.98 (CP 13; 86;118) and a LOEFF plan 2 with accumulated contributions of \$150,714.14 (CP 13; 89). Ms. Hamond also stated she had a TERS 3 retirement plan with a present value of \$63,839.00 (CP 117; 130); a defined benefit plan valued at \$54,501.95. (CP 97); and a Spokesman Review plan valued at \$91,280.808 (CP 107) of which 13,652.72 was community property. (CP 118). Ms. Hamond proposed the deferred benefit plan be awarded to herself and the deferred compensation be awarded to Mr. Hamond. (CP 14). Ms. Hamond further requested the balance of the accounts be split equally. (CP 14).

In response, Mr. Hamond filed his declaration/affidavit position on October 01, 2012. (CP 111-118). Mr. Hamond objected to paying all of the utilities pointing out he was making substantial improvements to the home to ready the home for sale and increase the home's market value. (CP 112 - 113). Mr. Hamond also pointed

out he was making the mortgage payments each month with his separate property earnings. (CP 112-113). He also pointed out he took on the recreational vehicle debt and other reasons for offset. (CP 113). And. Mr. Hamond indicated, Ms. Hamond had more financial liquidity than himself. (CP 113).

As concerns the joint Visa debt, Mr. Hamond responded the date of separation was actually January 2009, (CP 114), not March 17, 2011, as stated in his petition. (CP 3). The Hamonds, he noted, had however subsequently reconciled after January 2009. (CP 115). Thus, Mr. Hamond argued, the debt was community debt, (CP 115), to be divided equally.

As concerns the retirements, Mr. Hamond asked for an equal division of the retirements other than his LOEFF retirement. (CP 115). As concerns the LOEFF Plan 2, Mr. Hamond's position was "When Patricia retires she is asking that she get 1/2 of my LOEFF retirement and all of her Social Security. When I retire I only would get 1/2 of my LOEFF retirement. It is not equitable by any stretch of the imagination that she would receive so much more upon retirement than I would simply because I have no Social Security benefit due to Law Enforcement retirement planning." (CP 115-116). He further

argued, “concerning the LOEFF plan I am asking that the court follow Brian Gosline’s analysis of the plan which sets out what portion of the plan would constitute or equate to Social Security benefits. I am perfectly willing to divide the portion of the LOEFF plan which would not equate with Social Security Benefits. To do otherwise would leave me in the position of having drastically reduced retirement benefits without any ability to claim Social Security benefits to supplement my retirement income. Patricia will receive Social Security benefits no matter what she receives in retirement. I cannot do so because of the nature of the LOEFF plan. It is specifically set up so that I give up my right to claim Social Security and receive the LOEFF retirement in lieu of Social Security. (CP 116). In support of his position, Mr. Hamond offered the analysis of Brian Gosline, (CP 116-118; 128-133), and Marriage of Rockwell, 141, Wn. App. 235, 170 P. 3d 572 (2007). (CP 119-127). It has never been denied that Mr. Hamond, by participation in LEOFF Plan 2 retirement, cannot receive Social Security benefits. (CP 14).

Based upon the above submissions, on October 1, 2012 the Superior Court ordered that commencing November 1, 2012 all utilities for the former family home would be paid by Mr. Hamond as

requested in part by Ms. Hamond without reimbursement for past amounts paid. (CP 134). The Superior Court also equally divided the joint visa credit card as requested by Mr. Hamond. (CP 135). The Superior Court also awarded Ms. Hamond her defined benefit plan and Mr. Hamond his deferred compensation account as offsetting values. (CP 135). The Superior Court also divided the TERS III and Spokesman Review retirement plans equally. (CP 135). However, as concerns the LOEFF retirement, the LOEFF Plan 2 was also divided “equally” without consideration of the foregone future Social Security benefits unavailable for Mr. Hamond. (CP 135). Moreover, no formula was used for division of the LEOFF plan 2 nor a date suggested upon which the division would be effective. On October 25, 2012 findings of fact and a decree were entered embodying the Superior Court’s order. (CP 137-148).

On October 31, 2012 Mr. Hamond sought reconsideration. (CP 149-154). In the motion for reconsideration the issue of LOEFF Plan 2 retirement benefits being in lieu of Social Security was revisited by Mr. Hamond. (CP 151). Mr. Hamond argued that by ordering the LOEFF plan 2 retirement benefits to be divided equally the Superior Court was in essence also awarding Ms. Hamond what would have

been Mr. Hamond's Social Security. (CP 151). Mr. Hamond conceded there was no calculation presented as to the equivalent value in Social Security benefits foregone by himself as part of his LOEFF Plan 2 retirement. (CP 151). However, in a form of rough parity, Mr. Hamond suggested an approximate Social Security present value for Ms. Hamond should be substituted for the unknown value attributable to his foregone benefits. (CP 153). Mr. Hamond also requested the Superior Court award all of the TERS 3 plan and Spokesman Review plan at present value to Ms. Hamond and grant a corresponding present value offset for his one half of the retirements against his LOEFF Plan 2 retirement. (CP 151; 152). Lastly, Mr. Hamond argued, there was a disproportionate difference due to each spouse's age at retirement. (CP 152-154).

In response, Ms. Hamond erroneously argued such a proposal for offsetting present values for Social Security benefits or consideration of the same was precluded by operation of law. (CP 155-160). Consequently, on November 16, 2012 the Court denied Mr. Hamond's motion for reconsideration without any stated reason. (CP 161).

Yet, as Mr. Hamond stated, “[i]f the LOEFF retirement account is simply divided equally then I receive absolutely no benefit for giving up my right to Social Security . . . [b]y dividing the LOEFF retirement equally, I am essentially being ordered to split what would have been my Social Security with Patricia . . . I am requesting that portion of my retirement account which equated to Patricia’s social Security benefits . . . be subtracted from the LOEFF retirement before an equal division of the remainder to provide substantial justice.” (CP 150-151). As Mr. Hamond stated at trial, “[i]t is not equitable by any stretch of the imagination that she would receive so much more upon retirement than I would simply because I have no Social Security benefits due to Law Enforcement retirement planning. . . . I am perfectly willing to divide the portion of the LOEFF plan which would not equate with Social Security benefits. (CP 116).

#### **IV. STANDARD OF REVIEW**

The issues raised herein are governed by the following standards of review. First, since this case involves mixed questions of law and fact, such review is treated as a question of law, to be viewed in the light of the facts and evidence presented. State v. Horrace, 144 Wn. 2d 386, 392, 28 P.3d 753 (2001). Second, pure legal errors including, the proper interpretation and application of a statute, court rule, or prior case law are reviewed de novo. State v. Horrace, 144 Wn. 2d 386, 392, 28 P.3d 753 (2001). Third, with respect to issues addressing the exercise of discretion, the standard of review is “abuse of discretion.” And, when the reviewing court addresses an alleged abuse of discretion, questions can and should be separated into questions of fact and the conclusions of law based on those facts. Bartlett v. Betlach, 136 Wn. App. 8, 19, 146 P. 3d 1235 (2006), review denied, 144 Wn. 2d 1004 (2007).

A Superior Court’s discretion is abused when the Court has based its decision on untenable grounds or for untenable reasons, or has otherwise failed to abide by the governing law. Deyoung v. Cenex Ltd., 100 Wn. App. 885, 894, 1 P. 3d 587 (2000), review denied, 146 Wn. 2d 1016 (2002). As stated in In re Parentage of Jannot, 110 Wn.

App. 16, 22, 37 P. 3d 1265 (2003), aff'd in part, 149 Wn 2d 123, 65

P. 3d 664 (2002):

. . . The abuse of discretion standard is not, of course, unbridled discretion. Through case law, appellate courts set parameters for the exercise of the judge's discretion. At one end of the spectrum the trial judge abuses his . . . discretion if [her] decision is completely unsupportable, factually. On the other end of the spectrum, the trial judge abuses [her] discretion if the discretionary decision is contrary to the applicable law. .

..

## V. ARGUMENT

### **1. The Superior Court abused its discretion by failure to employ a time rule formula when dividing the LEOFF retirement necessitating a remand.**

When dividing a retirement, the Court is to apply the time rule formula of 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." In re: Marriage of Rockwell, 141 Wn. App. 235, 251-252, 170 P. 3d 572 (2007); In re: Marriage of Harris, 107 Wn. App. 597, 602, 27 P. 3d 656 (2001); In re: Marriage of Greene, 97 Wn. App. 708, 713, 986 P. 2d 144 (1999); In re: marriage of Chavez, 80 Wn. App. 432, 434, 436, 909 P. 2d 314 (1996); In re: Marriage of Bulicek, 59 Wn. App. 630, 636-37, 800 P. 2d 394 (1990); In re: Marriage of Pea, 17 Wn.

App. 728, 731, 566 P. 2d 212 (1977) . In applying such a formula, the Court avoids mischaracterizing and including in the award any pre-marital separate property interests not subject to division as marital community interests. As the time formula clearly indicates, it is the number of years of marriage prior to separation which is divided not any pre-marital acquisition.

As stated in Rockwell, supra. the time rule method is “the correct formula to determine the community share of the total pension credits earned by the retiree.” (Emphasis added) here, the court’s simple formula of 50/50 division was thus error necessitating remand.

Indeed, such a formula is only the start however, as the goal is to only award the community interest of the pension by use of a formula. In re: Marriage of Pea, supra. And as Marriage of Chavez, supra., indicates, the formula avoids awarding post separation earnings.

Here, Mr. Hamond is still employed and has not fully retired. (CP 153). The Court’s failure to employ a time formula in dividing the LEOFF Plan 2 retirement pension requires remand.

**2. The Superior Court abused its discretion in awarding one half of the LEOFF Plan 2 retirement to Ms. Hamond without considering Mr. Hamond's foregone future social security benefits.**

The precise issue presented was discussed in In re: Marriage of Rockwell, 141 Wn. App. 235, 170 P. 3d 572 (2007), review denied, 163 Wn. 2d 1055, 187 P. 3d 752 (2008). In Rockwell, the trial court made an adjustment for Social Security benefits that [a spouse] would have received but for [the spouse's] type of . . . pension." As referenced in the opinion, "the trial court stated that it was 'backing out the Social Security contribution assessment . . . ." This was the value of Social Security that Carmen would have received if she was not receiving her particular type of . . . pension. The trial court "compensated" her for that amount in its written findings of fact." Rockwell, at 241. This was precisely the request to the Superior Court below. In fact, Mr. Hamond submitted the Rockwell opinion for the Court's review. (CP 119-127).

Despite the similarity between Mr. Hamond's request below and Rockwell, unlike Rockwell, here the trial court, in addressing the division of the LEOFF pension, failed to even note or recognize either Ms. Hamond's entitlement to Social Security benefits or Mr.

Hamond's lack of Social Security benefits due to his type of retirement. Additionally, unlike Rockwell, there is absolutely no finding concerning Mr. Hamond's inability to receive Social Security benefits as his pension was in lieu of Social Security benefits. Moreover, there was no finding as to how the Court could even determine an equitable division without such a recognition. In this regard the Court's mischaracterization of the pension as "entirely community" to be divided equally between the Petitioner and Respondent," [CP 135], was clear error. For failure to recognize a portion of the benefits comprising Mr. Hamond's retirement was partially in lieu of Social Security benefits failed to recognize that part of the LEOFF pension was "indivisible separate property." In re: Marriage of Zahm, 138 Wn. 2d 213, 219, 978 P. 2d 498 (1999) (citing 42 U.S.C. sec 4079(a)) of the Social Security Act and its interpretation under Hisquierdo v. Hisquierdo, 439 U.S. 572, 590, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979). This failure to recognize, quantify, characterize, or find the existence of the benefits in lieu of Social Security necessitates remand.

Indeed, the fact Mr. Hamond's pension deprived him of Social Security was a mandated part of the analysis the Superior Court was obliged to undertake. As illustrated in Rockwell, at 245, given the "existence and structure of [Mr. Hamond's] . . . pension, there would be no question that this was appropriate . . . in order to put them on

comparable footing prior to dividing the remaining assets . . . as a fair and proper means of considering Social Security or achieving overall fairness.”

In sum, as to this issue, a remand is necessary for the Superior Court to consider the Social Security benefits foregone by Mr. Hamond’s pension and an appropriate adjustment removing Mr. Hamond’s foregone Social Security benefits from the equation in order to put the Hamond’s on comparable footing prior to dividing the remaining assets. For, as this division stated in In re: Marriage of Martin, 22 Wn. App. 295, 298, 588 P. 2d 1235 (1979) where it is impossible to determine the character and value of property because the court failed to “adequately consider the character of [that] property,” *Id*, remand is appropriate for the taking of such evidence. Stated another way, to the extent the Superior Court failed to consider the nature and extent of the property as mandated by RCW 26.09.080(1);(2) the court erred. As the Supreme Court in In Re: Marriage of Zahm, said, consideration of social security benefits is a relevant factor for consideration.

Of course, as recently noted by Division Two in In Re: Marriage of Smith, 158 Wn. App. 248, 241 P. 3d 449 (2010) there is a clear substantive basis for remand. In Smith Division two addressed a similar argument. The husband received a federal pension as an air traffic controller. As a consequence, like here, the pension provided

benefits in lieu of Social Security. However, unlike here, only on reconsideration did the husband contend the benefits in lieu of Social Security could not be awarded. To quote extensively:

Smith argues next that because he was not eligible for Social Security benefits, which are the recipient's separate property, the trial court should have calculated and removed the portion of his retirement received in lieu of social security before calculating [wife's] share. As support he cites the following Washington cases. Federal law precludes the division of Social Security benefits in a marital property distribution case. In Re: Marriage of Zahm, 138 Wn.2d 213, 210, 978 P. 2d 498 (1999). Although a trial court cannot calculate a future value of Social Security benefits and award that value as a precise property offset as part of its property distribution, the possibility that one or both parties may receive Social Security benefits is a factor the court may consider in making its distribution of property. In re: Marriage of Rockwell, 141 Wn. App. 235, 244-45, 170 P. 3d 572 (2007), review denied, 163 Wn. 2d 1055 (2008). Consequently the trial court in Rockwell properly compensated the wife for the Social Security benefits she would have received but for her federal pension. 141 Wn. App. at 425. In his briefing below, Smith cited, Rimel v. Rimel, 913 A. 2d 289 (Pa. Super. Ct. 2006). The Rimel Court held that a husband was entitled to social security offset against his pension before those pension benefits were divided between the parties. 913 A. 2d at 292; see also Kelly v.

Kelly, 198 Ariz 307, 309, 9 P. 3d 1046 (2000)(in dividing husband's pension benefits as community property, court was required to place a value on the Social Security he would have received had he participated in that system during the marriage, and to deduct that amount from the value of his pension on the date of dissolution.) As the trial court recognized here, the holdings in Rimel and Kelly are not yet reflected in Washington law. Characterizing the pension received in lieu of Social Security as separate property is not mandatory in Washington, particularly where the parties never suggested that characterization. To the contrary, the parties here included Social Security benefits "and the like" in their list of community property. And the trial court noted, "[Y]ou can't enter an order telling the court that this is a community property pension and it's part of an entire dissolution proceeding and then go back and say, no, it's not what we thought it was when we equitably divide the property." Report of Proceedings (RP) (Oct 31, 2008) at 7. The trial court did not err in considering the total amount of Smith's retirement benefits in calculating [wife's ] share.

Here, unlike Smith, the issue of Social Security benefits was specifically and clearly directed to the trial court from the very beginning. Here, unlike Smith, the issue was not brought to the Court's attention after the Court's decision by way of reconsideration. As such, to this extent Smith is distinguishable as the decision rests not on a substantive analysis but upon a failure to raise the issue. Yet,

the analysis of the issue, as reflected in the Rimel and Kelly opinions referenced by Smith, cannot be avoided here due to a similar procedural irregularity. Rather, the opinions in Rimel, and Kelly are not only persuasive, but Kelly is substantially similar in logic to the analysis of our Supreme in In Re Marriage of Zahm, 138 Wn. 2d 213, supra. See also, Cornbleth v. Cornbleth, 397 Pa. Super. 421, 580 A. 2d 369 (Pa. Super. Ct. 1990)(state pension in lieu of Social Security in equity exempt from the marital estate); Kohler v. Kohler, 211 Ariz. 106, 118 P. 3d 621 (2005); Silcox v. Silcox, 6 S.W. 3d 899 (Miss. 1999) (division of a state pension in lieu of Social Security disallowed for the same reasons Social Security is exempt); Bohon v. Bohon, 102 S. W. 3d 107 (Mo. Ct. App. 2003) (further analyzing Silcox); Walker v. Walker, 112 Ohio App. 3d. 90, 677 N. E. 2d 1252 (1996).

The fact, the Superior Court failed or refused to even consider Mr. Hamond's foregone Social Security benefits by virtue of his LEOFF Plan 2 retirement prevented an equitable consideration and division of the assets and violated RCW 26.09.080(1);(2) necessitating a remand. Indeed, as stated in Cornbleth, participation in retirement plans in lieu of Social Security inflicts "a double blow of sorts" to persons in Mr. Hamond's position, because "the pension will become

part of the marital estate and, thus, divided, there will be no Social Security benefit awaiting to cushion this financial pitfall.”

#### **VI. CONCLUSION & REQUEST FOR ATTORNEY FEES**

Mr. Hamond respectfully requests the challenged decisions of the Superior Court as set forth in the assignments of error and this appeal be reversed and the matter remanded for further consideration. Pursuant to RAP 18.1 and Chapter 26.09.140, Mr. Hamond also requests reasonable attorney's fees and expenses. A financial declaration consistent with RAP 18.1(c) will be filed and served no later than ten days prior to the date the case is set for argument or consideration on the merits.

Respectfully submitted this 25 day March, 2013.

  
\_\_\_\_\_  
ROBERT R. COSSEY  
WSBA# 16481  
Attorney for Brian Hamond

**DECLARATION OF SERVICE**

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington, that on this date declarant personally filed the original and one copy of the document entitled: APPEAL BRIEF OF BRIAN HAMOND at:

Court of Appeals of the State of Washington, Division III  
Clerk of the Court  
500 N. Cedar Street  
Spokane, WA 99201

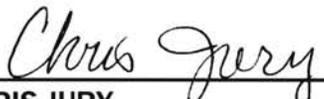
AND

that on this date declarant placed in the mails of the United States Postal Service a properly stamped and addressed envelope containing a true and correct copy of: APPEAL BRIEF OF BRIAN HAMOND directed by first class mail to Opposing Counsel, namely:

Shannon Doenier  
William Schroeder  
PAINE HAMBLEN LLP  
717 W Sprague Suite 1200  
Spokane WA 99201

Brian Hamond  
414 E Gem Lane  
Colbert WA 99005

DATED this 25 day of March, 2013.

  
\_\_\_\_\_  
CHRIS JURY  
Office Manager