

NO. 63397-0-1

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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KATHERINE GUNN-BOHM

APPELLANT

v.

CARL BOHM

RESPONDENT

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APPELLANT'S BRIEF ON APPEAL

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## **I. ASSIGNMENTS OF ERROR**

1.1 Error #1. The trial court erred characterizing the Husband's Weyerhaeuser qualified pension as 38% community property and assigning all of the separate property portion to the Husband; and characterizing the supplemental pension as 64% community property. (Findings of Fact, 2.8 (9) (b) and (c); 2.9 (b) and (c); 2.21.13(C), (E), (G) and corresponding provisions in Decree.)

1.2 Error #2. The trial court erred in its distribution of property which left the Wife with approximately \$700,000 and the Husband with approximately \$1.6 million in total assets following a marriage which they entered on approximately equal financial footing. (Findings, 2.21.30, 2.21.32, 2.21.35, 2.21.37, ,2.21.38; also "Summary" between 2.21.27 and 2.21.28 (unnumbered) and corresponding provisions in Decree.)

1.3 Error #3. The trial court erred in determining the overall distribution of assets driven by the characterization of assets. (Findings, 2.21.30, 2.21.32, 2.21.35, 2.21.37, ,2.21.38; also "Summary" between 2.21.27 and 2.21.28 (unnumbered) and corresponding provisions in Decree.)

1.4 Error #4. The trial court erred in failing to find intransigence on the part of the Husband in disclosing his periods of employment and related information. (Findings, 2.21.34 and

corresponding provisions in Decree.)

1.5 Error #5. The court erred in finding the Wife to have earned \$100,000/year. (Findings of Fact, 2.21.6 and corresponding provisions in Decree.)

1.6 Error #6. The court entered findings of values for property without supporting evidence—Roslyn home, and Mercer Shorewood Club. (Findings, 2.21.23 (C) and (F) and corresponding provisions in Decree.)

1.7 Error #7. The court erred in requiring agreement for child-related expenses. (Findings, 2.21.40 (\*) and corresponding provisions in Decree and Child Support Order.)

#### **Issues Pertaining to Assignments of Error**

A. Whether, as a matter of law, the Bulicek formula should include as part of the denominator premarital employment periods during which no retirement benefit accrued.

B. Whether the court abused its discretion in failing to place the parties in a substantially equivalent place post-dissolution when they entered into the marriage with minimal financial disparity in their respective financial holdings.

C. Whether the court inappropriately allowed the characterization of property to determine its division of assets.

D. Whether a party has an affirmative duty to correct an

inaccurate Interrogatory Answer that affects the valuation and characterization of an asset, absent a specific request to do so, and whether that constitutes bad faith or intransigence to support and award of fees on that basis.

E. Whether finding a party's earning capacity to be 42% higher than actual historical income undermines the equity of the division of property.

F. Whether unsupported values of assets resulted in an inappropriate division of assets.

G. Whether section 191 restrictions are required for the court to authorize the parent with sole decision-making to make decisions with financial implications for the other parent, without that parent's consent.

## **II. STATEMENT OF THE CASE**

**2.1 Background and Procedure:** The key issue in this dispute is whether an earlier period of employment during which no retirement benefits accrued can be "grandfathered in" for purposes of applying the Bulicek formula to arrive at a ratio of community versus separate property, and how far the characterization of a single substantial asset should drive the overall distribution of assets between the parties. The Husband in this action was awarded as his separate property 62% of his

qualified pension, as a result of the court adding 104 months of employment to the only period of employment (176 months) during which retirement benefits accrued. Using 280 total months as the denominator in the Bulicek formula instead of 176 months significantly reduced the community property estate. However, no retirement benefit actually accrued during the first 104 months of employment. The characterization of this substantial asset determined the court's overall distribution of assets, as evidenced when a "corrected" decision was issued, changing the characterization ratio and reducing the award to the Wife in a corresponding fashion. Other issues pertaining to the overall award demonstrate its inequity. This appeal follows trial before King County Superior Court Judge Helen Halpert, a Motion for Clarification and Presentation. The Wife appealed; the Husband cross-appealed. Both were timely.

## **2.2 Statement of Facts:**

The parties, Katherine Gunn-Bohm and Carl Bohm became engaged in November 1998 and moved in together at that time. RP 6:23-25. Katherine's employment position was being terminated at that time, and together they decided she would not look for work in order to have her available to parent Carl's children from a prior marriage, and also in anticipation of having a child together. RP 7. RP 234.

They married on May 1, 1999. RP 6:20. Their child, Caroline, was born on November 17, 2000. Caroline was 8 at the time of trial. RP 8:2. Katherine had the opportunity to pursue a work position in 2005/2006, but due to the travel requirements, the parties together decided she was needed at home to care for the children. RP 235. At trial, she had been out of the workforce for ten years. RP 236:14-15.

At the time of marriage, Katherine owned a home in West Seattle. RP 14:10-12. The home sold in 2001 for \$275,694, netting approximately \$164,000. Trial Exhibits 3 and 4. Carl owned a home on Mercer Island, the home Katherine moved into. RP 7:2. The parties committed substantial resources into the remodeling/rebuilding of the Mercer Island home, including the proceeds from the West Seattle home owned by Katherine prior to marriage, and \$6,000 from Katherine's inheritance. RP 22:25 to RP 37. Trial Exhibits 4A, 4B, 4C and 4D. The court found that the parties considered the Mercer Island home to be community property at the time of trial. CP 111. Although not specified, neither party contested this finding. At the time of marriage, Katherine had retirement benefits of almost \$39,000. Trial Exhibit 54. Carl had retirement benefits of almost \$42,000. Trial Exhibit 55. Carl had property in Roslyn, Washington, which he received from his mother's estate. Katherine had \$27,000 in savings. Trial Exhibit 90. Katherine was earning almost \$70,000 per year; Carl

was earning \$117,000 per year. Trial Exhibits 71 and 75. RP 233:20-22. Carl had debt obligations to his former spouse, Steve Ann Chambers, totaling \$96,882, which were incorporated into the debt paid from his earnings during the marriage. RP 40, Trial Exhibit 7. The parties' respective interests at the time of marriage were:

<b>Asset</b>	<b>Carl</b>	<b>Exh</b>	<b>Katherine</b>	<b>Exh</b>
Savings	\$ 12,500.00	<b>137</b>	\$ 27,000.00	<b>90</b>
Real property (net of mortgage & debt to ex-wife)	\$163,000.00		\$164,000.00	<b>4/4A</b>
401(k)	\$ 41,857.00	<b>55</b>	\$ 38,900.00	<b>54</b>
Basic pension	[\$1,629/month]	<b>63</b>		
Supplemental pension	[\$131/month]	<b>63</b>		
Roslyn home	\$ 50,000.00	<input type="text"/>		
Inheritance funds			\$ 6,000.00	<b>4B</b>
Coca-cola shares (678 sh)			\$ 29,974.38	<b>9</b>
Vehicle	\$ 14,500.00	<b>128</b>	\$ 10,000.00	<b>45</b>
Safe deposit box	\$ 9,434.00	<b>127</b>		
Woodstone savings	\$ 3,676.00	<b>32</b>		
Mercer Shorewood club	\$ 2,500.00	<input type="text"/>		
Owed to ex-wife	(\$ 96,881.71)	<b>7</b>		
<b>Net worth</b>	<b>\$297,467.00</b>		<b>\$275,874.38</b>	

At the time of separation, September 2007, Carl was an executive at Weyerhaeuser earning \$321,673.14 per year in combined salary and bonus income. Trial Exhibit 66. His basic pension had increased to over \$6,000/month; supplemental pension to \$1,601/month; 401(k) to \$193,000. Trial Exhibit 63. At trial Katherine's 401(k) was worth \$36,000. Trial Exhibit 54, last page.

Katherine's house had been sold and invested into Carl's home. RP 14:17. At the time of trial, Carl had been offered (and accepted) a severance package with Weyerhaeuser which included:

<b>Description</b>	<b>Value</b>
One year compensation	\$321,673.14
2008 annual bonus	\$ 81,079.26
Accrued vacation (Exh 104)	\$ 6,186.00
COBRA continuation	\$ 10,000.00
Outplacement support	\$ 20,000.00
	<b>\$438,938.40</b>

Trial Exhibits 139, 104.

Carl's employment with Weyerhaeuser (hereafter "Wy") was twofold: He first began working in September 1976. RP 304:14. He left sometime between May 1985 (RP 304:20) and June 1985 (Exhibit 92) and July 1985 (RP 150:7); sources did not agree. At then end of this first period of employment, a total of 104 (or 106) months, he had not participated in and had no interest in a pension benefit. RP 443:19-21. Carl then returned to work at Wy in March 1994 (RP 305:6), and worked there until November 2008 (RP 304:8), a total of 176 months. His total period of employment at Wy was 280 months (104 + 176).

When returning to work for Wy in 1994, Carl negotiated with Wy that the formula for calculating his benefits and overall compensation include his prior years of employment at Wy and Wy agreed, although it was not their usual policy at the time. RP 441: 18-

20, 442:15-23, 444:7-8. (The exact formula Wy used in determining Carl's actual retirement benefit did not correspond to the actual years or months of service—they use 298 months (24.85 years) when the actual years Carl worked at Wy was 280 months. RP 169:19, RP 170:22-24. See also RP 173:20:22, RP 174:1-2. RP 448:9-12.) Carl actually "entered" the Plan on 3/18/1994, his second date of hire. Exhibit 62. RP 175:17-18. RP 219:22 to 220:7. The opportunity for him to work in his prestigious position came about shortly after the marriage (2001), and with it, additional compensation and benefits, including the supplemental pension. RP 207:12-18, 208:2-6. RP 220:20 to 221:1. RP 315:12-22. Between 2000 and 2001 his salary increased from \$126,000/year to \$158,000/year (not including bonuses or stock options) due to these promotions. Trial Exhibit 76. RP 262:10-11. In 2003, the compensation package was \$315, 672. Trial Exhibit 78. In 2005 Carl's compensation was \$425,828 from all sources and in 2006, \$203,602. Trial Exhibit 77. In 2007, Carl's W-2 showed \$436,382 in Medicare wages. Trial Exhibit 79, last page.

There is no dispute but that Katherine managed the household, cared for the children and otherwise played a supporting role that enabled Carl to work the hours needed and to travel (60-70% of the time) wherever needed in advancement of his career. RP 449:1-9. RP 208. She was the one to oversee the home rebuilding in his absence,

to entertain business contacts in their home, etc. RP 238:8 to 241:6. It was she, also, who encouraged him to increase his 401(k) contributions, which occurred shortly after the marriage. RP 210-211. Trial Exhibit 56.

At trial, Judge Halpert used 280 as the number of total months of employment service in determining the community property portion of Carl's qualified pension benefit (CP 121), instead of 176 which is the time period of employment during which pension benefits actually accrued based on the plan entry date (March 1994 to November 2008). Exhibit 62. The pension pay-out to Carl as a part of his severance package was \$878,387. CP 121. The difference between 38% being considered community property (\$333,787) and 60.2% (\$529,028) is \$195,242. The court awarded Katherine 60% of the community property portion of this asset. CP 122. Katherine's 60% of the omitted community property portion of this asset is \$117,145. The court altered its decision when correcting a different error related to the apportionment of this asset (using 162 months for duration of the marriage instead of 106 months), and changed the award to the Wife in direct correlation to the characterization. CP 121. The net result of the court's decision was to award Carl over \$1.5 million in total assets and Katherine \$722,271, even after an award of attorney fees to Katherine and a transfer from Carl to Katherine of \$50,000. CP 151.

At trial, Katherine requested attorney fees on the basis of intransigence. CP 12-68. When asked in Interrogatories to set out his dates of employment, Carl answered "September 1976 until 1986." RP 446:18. He told Katherine he returned to work in 1993. RP 447:5. His answer added a year to both his first and his second years of employment—two years' total. He took no steps to correct that mistake, because he had not been "asked to." RP 447:16-17. Nor did he attempt to correct the "mistakes" in the appraisal's report, before mentioning them first at trial. RP 207:2-4.

Carl also provided, on the first day of trial, records regarding his 401(k) activity that had not been previously provided. RP 215:20 to 216:4, Trial Exhibit 85. These were not all that were provided to Mr. Nelson, however. RP 496:4 to 498:4. Katherine also had to incur the cost of subpoenaing records when Carl did not provide them. RP 274:13-20. One subpoena attempt close to trial was opposed by Carl and quashed, leaving Katherine without records to which she had no independent access. RP 275. Even though Carl had online access to the information requested, he did not feel he needed to provide it because "he" wasn't asked. RP 437-439. Carl provided no documentation to support his valuation of the Roslyn property. RP 333, 362. Other records he left at home or at his attorney's office when asked to verify his figures. RP 429:5-8. Records pertaining to

Restricted Stock Units and Plan Stock Units were not provided prior to trial, despite receipt by Carl in February 2008. RP 489:6-13, 490:12-25.

The parties agreed on a Final Parenting Plan which reserved the issue of RCW 26.09.191 restrictions and gave sole decision-making to the Mother based on “the history of contact between the parties.” CP \_\_\_\_ The court required agreement by the parties for extracurricular activities that involve a financial contribution from the Father. CP 193.

### **III. LEGAL ARGUMENT**

#### **3.1 Standard of Review on Characterization.**

The court’s classification of property as separate or community is a question of law. Marriage of Skarbek, 100 Wn. App. 444, 447, 997 P.2d 447 (2000). Consequently review is *de novo*. Marriage of Marzetta, 129 Wn. App. 607, 120 P.3d 75 (2005). When the trial court has incorrectly characterized the parties’ property, remand is required only if:

- (1) the trial court’s reasoning indicates that its division was significantly influenced by its characterization of the property, and
- (2) it is not clear that had the court properly characterized the property it would have divided it in the same way.

Hurd, at 55.

However, factual findings upon which the court's characterization is based may be reversed only if they are not supported by substantial evidence. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. Marriage of Griswold, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002).

### 3.2 Standard of Review on Division of Property.

In weighing the statutory factors for accomplishing a "just and equitable" distribution of marital property, the trial court has broad discretion and its decision will be reversed only if there is a manifest abuse of discretion. Rockwell, 141 Wn. App. 235, 242-243, 170 P.3d 572 (2007). A manifest abuse of discretion occurs when the discretion was exercised on untenable grounds. Id., at 243. If the decree results in a patent disparity in the parties' economic circumstances, a manifest abuse of discretion has occurred. Id., citing In re Marriage of Pea, 17 Wn.App. 728, 731, 566 P.2d 212 (1977).

### 3.3 Characterization of pension benefits.

Before making a property division, the trial court must determine the nature and extent of the parties' community and separate property. RCW 26.09.080. Marriage of Hurd, 69 Wn. App. 38, 45, 848 P.2d 185 (1993). Vested or mature benefits are property which must be allocated in a dissolution action. Id. Because Carl Bohm's pension benefits were to be paid to him in a lump sum following termination of his employment, this was both a vested and matured benefit. Earnings arising from services performed during marriage are community property. Hurd, at 47. The superior court, in the exercise of its discretion, determines the value of the community's interest in a future pension after considering *all* relevant factors. Marriage of Wright, 107 Wn. App. 485, 487 (2001).

In Marriage of Bulicek, 59 Wn. App. 630, 800 P.2d 394 (1990), the court approved a "percentage allocation method"<sup>1</sup> as one acceptable means of handling allocation of pension rights when applied to future benefits paid, rather than requiring a "present value"

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<sup>1</sup> Months of marriage = community property ratio  
Total months of service for which pension rights were earned

to offset against other property. Bulicek, at 637. It did not rule out or eliminate the “lump sum” approach. The goal in providing a formula for future application to pension benefits when paid out was to appropriately allocate benefits to efforts made during the marriage and to those outside the marital term.

Over time, the Bulicek formula has been described as “the correct formula” to be “encouraged” as the means by which to award pension rights on an as-received basis, In re Chavez, 80 Wn. App. 432, 436-437, 909 P.2d 314 (1996); later denoted “the typical formula” used to determine the total community share of a pension Marriage of Greene, 97 Wn. App. 708, 713, 986 P.2d 144 (1999), Marriage of Harris, 107 Wn. App. 597, 27 P.3d 656 (2001); and yet case law has not abolished the principle that “there can be no set rule for determining every case and as in all cases of property distribution, the trial court must exercise a wise and sound discretion.” Harris, at 603. “In valuing assets in a dissolution proceeding, the trial court is not generally controlled by fixed standards. It has wide discretion to consider all relevant facts and circumstances.” Marriage of Wright, 107 Wn. App. 485, 488 (2001). There remains flexibility in the application

of Bulicek: Chavez, supra (using “gross” versus “net” pension values for division); Wright, supra (earliest possible retirement date not required in valuation).

In the present case, Bulicek was applied to a value-known, lump-sum cash payout of Carl’s pension asset. It is unclear whether the scenario for which the “Bulicek formula” was intended is present. There was no question about future benefits or increases to same. There was no ongoing, future employment or contributions to same. The formula was applied as a means to look backward and allocate this lump sum between pre- and post-marital efforts.

#### **3.4 Subtraction rule analysis under Rockwell.**

The court recently rejected the “subtraction rule” because it would “disproportionately undervalue” early years of service by freezing the front-end contribution. Rockwell, at 253. The court stated that “Washington cases have used only the time rule method,” but does not apply a blanket restriction. Rockwell, at 254. It found the subtraction rule inequitable as applied in that case.

The facts in this case are distinguishable from those in Rockwell, however. In Rockwell, the first 16 years of the Wife’s military service

occurred prior to marriage. She was on a steady track of increased benefits—pension and salary—throughout her military career. In the present case, Carl received no pension benefits for the first 104 months of his employment with Wy. He was not on a steady trajectory of increased earnings and positions. While his entire work history at various companies no doubt gave him a skill set that gained in value over time, the significant jump-up in salary and overall compensation (including stock options, 401(k) matching and supplemental pension benefits) did not occur until after the marriage and could not have occurred without Katherine’s ability and willingness to “step in” and cover the obligations Carl was unable to meet due to the travel and entertainment demands of the executive position he took in 2001.

It cannot be said that “but for” Carl’s past employment history, he made the professional “jump up” that he did (which is what the court found to be the case in Rockwell, at 253: “but for her first 16 years with the federal government . . .”). Katherine’s presence and her contributions made the jump in lifestyle, standard of living, income, etc., possible. Thus the contributions of the marital community are more significant and should outweigh any number of work years prior

to marriage that could not, on their own, have allowed Carl the advancement that Katherine's efforts made possible.

While rejecting the subtraction rule in Rockwell, in favor of the now-standard Bulicek calculation, the court was attempting to make sure merit was equitably compensated. It is appropriate, however, to consider that in some circumstances, the "subtraction rule" may be a more equitable means to measure community contributions over separate efforts. From 1994 to 1998, all of Carl's employment efforts had earned him pension benefits amounting to about \$1,750 per month. The commitment and contributions of *both* Carl and Katherine from that point forward resulted in a benefit worth \$7,642 over a nine-year period. Exhibit 63. There is no comparable historical rate of increase due to Carl's employment efforts alone. The promotion he was able to accept meant that Katherine was burdened with management and care of the household while Carl traveled around the world. She oversaw the complete rebuilding of their home. She entertained business contacts 1-2 times per month. It is appropriate and equitable to consider, by "subtraction," that marital efforts are the primary reason for the \$5,892, or more than threefold increase in this

benefit/asset—73% of the basic pension at separation;<sup>2</sup> 92%<sup>3</sup> of the supplemental pension.

The fact that the pension benefit has been reduced to a lump sum and that no future employment will factor in is also useful, thus simplifying the apportionment of this asset. There is no need to speculate or apply a formula intended to protect the separate property interest in ongoing post-separate contributions. There are no more to be had.

**3.5 Even under Bulicek, pension benefits were 60.2% community property, not 38%.**

The court applied the Bulicek formula (number of months of the marriage over the total months of employment during which pension benefit accrued) but used the wrong denominator. Despite testimony to the contrary, the court included an extra 104 months, the Husband's prior period of employment, during which he testified he did not accrue any portion of the pension benefit. The denominator is to represent "the total number of years of service for which pension rights were earned." Rockwell, at 252. No pension rights were earned prior

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<sup>2</sup>  $\$6,041 - \$1,628 = \$4,413 / 6041 = 73\%$

<sup>3</sup>  $\$1,601 - \$130 = \$1,471 / 1,601 = 92\%$

to 3/18/1994. The Husband's Plan Entry Date was 3/18/1994, and only employment after that date is appropriately included in apportioning separate versus community property. From March 1994 to November 2008 was 176 months. Of these 176 months, the parties cohabited or were married for 106, during which their acquisitions are presumed community property. This is 60.2% of this asset. The court erroneously included the months of prior employment in the denominator, reducing the community property portion to 38%. Based solely on this characterization, the Husband was awarded 62% of this significant asset as separate property. This reduced the community estate by more than \$195,000, and the Wife's portion by \$117,000.

### **3.6 Husband had burden to prove separate property.**

The law favors characterization of property as community property unless there is clearly no question of its separate character. Marriage of Davison, 112 Wn. App. 251, 258, 48 P.3d 358 (2002). Assets acquired during the marriage are presumed to be community property. This presumption may be rebutted by showing the assets were acquired as separate property. Griswold, at 339. Carl does not meet his burden of demonstrating that he acquired pension benefits when employed by Wy from 1976 to 1985. At best, he testified that

Wy somehow “grandfathered in” a period of past employment when he negotiated the terms of this second, 176-month employment term. No pension benefits were given to Carl as compensation during the first 104 months of employment with Wy. The consideration for all pension benefits were Carl’s services after March 1994. This is consistent with the Plan Entry date of 3/18/1994 and there is no evidence to support any other “start date” for the period of pension accrual. Carl has not met his burden.

### **3.7 Court gave undue weight to characterization.**

Even if the court’s characterization of the pension asset at 38% community property were correct, the court gave too much weight to this characterization, allowing it to drive the property division more than equity. The court corrected an unrelated error—using 162 for the months of marriage instead of 106 (CP 121-122)—which likewise altered its initial characterization ratio and overall award. In correcting the characterization, the court correspondingly changed the award of property. The sole difference was characterization, and this appeared to “automatically” alter the court’s ruling, shifting approximately \$214,000 to the Husband regardless of the equity of the resulting division. When asked to clarify this intended result, the court did not “close the gap” resulting from the shift in characterization.

“Remand is required when it appears the trial court’s division of

property was dictated by a mischaracterization of the separate or community nature of the property.” Marriage of Skarbek, 100 Wn. App. 444, 450, 997 P.2d 447 (2000). Here, as in Skarbek, the court changed its property division based on characterization alone, when a mathematical error was brought to its attention. The court did not explain how the resulting disparity in property was fair or equitable when \$214,000 in property was shifted from “community” to “Husband’s separate” based solely on a change in characterization, disproportionately affecting the Wife’s net property award.

Failure to properly characterize the property may be reversible error. However, mischaracterization of property is not grounds for setting aside a trial court’s allocation of liabilities and assets so long as the distribution is fair and equitable. Marriage of Griswold, 112 Wn. App. 333, 346, 48 P.3d 1018 (2002). Where there is a mischaracterization, the trial court will be affirmed unless the reasoning of the court indicates (1) that the property division was significantly influenced by characterization and (2) that it is not clear that the court would have divided the property in the same way in the absence of the mischaracterization. Griswold, at 346.

Here, the court’s two written opinions demonstrate that the characterization did significantly influence the division of the pension asset—correcting an error in the number of months resulted in more

than \$200,000 being shifted to the Husband's separate property award.

It is clear that the court would have divided the property differently based on characterization—it did that very thing when correcting the characterization ratios. CP 121-122. This is reversible error. The court could have (should have) noted a correction in characterization, if needed, but still affirmed the overall division of property in its first written opinion based on fairness and equity.

This is what the court did in In re Marriage of Donovan, where \$13,000 of the Husband's real property was characterized as separate property, even though potentially \$63,500 was attributable to separate property. The court affirmed the overall division as fair and equitable in spite of this error in characterization. The court further found error in the characterization of the husband's pre- and post-marital retirement benefits—they should have been designated as separate property. The court still found the allocation of property fair and equitable, even though the Husband ended up with approximately half of what was awarded to the Wife. The court reasoned that the Husband's substantial salary and employment history justified the disproportionate award favoring the Wife, finding that her salary potential would be less than a third of her Husband's even after training. (The Husband at trial was on medical leave of absence, but the court considered the probability of his full reinstatement.) Consideration of the financial

condition, job preparedness, age, duration of marriage and lifestyle were given weight, perhaps even more weight than the characterization of property. Donovan, at 696-697. In the present case, the reverse application occurred—the Husband, the primary breadwinner, the executive, was awarded 65% of the total assets based primarily on characterization.

### **3.8 Property division was not just and equitable.**

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 property is to become effective.

RCW 26.09.080. Rockwell, at 242. Primary among those factors is the economic circumstances in which the decree will leave the parties. In re Chavez, 80 Wn. App. 432, 439, 909 P.2d 314 (1996). All of the parties' property, both community and separate, is before the court for distribution. Marriage of Griswold, 112 Wn. App. 33, 339, 48 P.3d 1018 (2002). Courts have statutory authority to consider separate property in making a fair and equitable division of property in a

dissolution. Marriage of Landry, 103 Wn.2d 807, 811, 699 P.2d 214.

In Marriage of Davison, Mr. Davison complained that he received just 25% of the community property, but the court noted that he received more than half of the total assets. Davison, at 258. In this case, the court awarded Carl more than 75% of the total assets: \$1,209,452 in separate property plus 40% of the community property, a total of over \$1,650,000, from which \$50,000 was shifted to Katherine, as well as \$30,000 in attorney fees (still almost \$1,600,000 to Carl). Katherine's share of the total property before the court was 34%. Her proposed division would have given her 40% of the total property, still giving Carl a disproportionate award in consideration of the characterization of his separate property.

The court in Griswold summarizes the history of distribution considerations:

While both separate and community property have always been considered to be before the court in a dissolution action, it was not until the statute was revised in 1949 that the allocation of separate property was explicitly governed by statutory criteria . . . Prior to this change the courts were free to weigh the character of the property more heavily than other factors when allocating separate property. However, the current statute specifically applies the statutory criteria to separate property

. . . This court will not single out a particular factor, such as the character of the property, and require as a matter of law that it be given greater weight than other relevant factors. The statute directs the trial court to weigh all of the factors, within the context of the

particular circumstances of the parties, to come to a fair, just and equitable division of property. The character of the property is a relevant factor which must be considered, but is not controlling.

Griswold, at 348, citing In re Marriage of Konzen, 203 Wn.2d 470, 477-478, 693 P.2d 97 *cert denied*, 473 U.S. 906 (1985). A court need not find exceptional circumstances to justify awarding a portion of one spouse's separate property to the other spouse. Applied to the present case, Katherine's proposed property division, i.e., approximately \$1 million in assets to herself and \$1.5 million to Carl, was just and equitable even if her proposed division of the pension assets included a portion of Carl's "separate property," under Bulicek or any other formula. The parties entered the marriage on close-to-equal economic footing. It is more than equitable to Carl to leave the marriage with 50% more assets than Katherine. It is not equitable for Katherine to leave the marriage with less than half what was awarded to Carl.

"The characterization of property is not what is controlling, but is only one of many factors to be considered by the court." In re Marriage of Donovan, 25 Wn. App. 691, 693, 612 P.2d 387 (1980). The dispositive question is whether the property division is just and equitable. Id. The court should consider that the vast increase in assets

from income and related benefits came about *after* the marriage, not before. Carl's 2001 promotion could come about only with Katherine's support—caring for his children to allow extensive travel; entertaining business contacts to allow for supportive social connections; overseeing the rebuilding of the family home—efforts and labor for which she is not compensated in the least. Carl was not simply on a trajectory for basic increases at a steady rate over time. This significant jump to an officer-of-the-company status could not have occurred without Katherine's sacrifices and efforts. It was not due solely to Carl's longevity with the company, no matter how many years or months were credited to him when he re-entered employment with Wy in 1994. There is no substantial evidence that Carl would have attained this level of compensation (including bonuses, stock options, supplemental pension benefits) without and directly tied to Katherine's commitment to his career (albeit uncompensated).

### **3.9 Earning potential was mistaken**

Future earning potential is a substantial factor to be considered by the trial court in making a just and equitable property division. Rockwell, 244, citing Marriage of Hall, 103 Wn.2d 236, 248, 692 P.2d

175 (1984). The court found that Katherine had earned approximately \$100,000 per year, but there is no substantial evidence to support this. Katherine's earnings were \$70,000 the last year she worked. It is unknown how this erroneous determination of the Mother's past income altered the court's consideration of her future earning capacity nor how that played into the inequitable property division.

**3.10 Attorney fees should have been awarded to Katherine on basis of intransigence.**

The court ordered Carl to pay \$30,000 in fees to Katherine at trial. The court denied Katherine's request for fees (\$40,000) on the basis of intransigence. The basis for Katherine's request was set forth in CP 12-68 and summarized briefly in the Statement of Facts above. Carl's withholding of information, failure to correct misrepresentations regarding employment periods and moving to quash Katherine's attempt to obtain information directly from Wy increased her litigation costs, hampered efforts to settle short of trial (she was in the position of trying to mediate with incomplete and inaccurate information) and otherwise demonstrates bad faith, controlling the flow of information that Katherine did not have direct access to. Holding a party responsible for refusing to produce information, thus depriving the other party of the only evidence available to prove or defend a claim is

not abuse of discretion. Marriage of Manry, 60 Wn. App. 146, 150, 803 P.2d 8 (1991).

CR 26(e)(2), governing answers to interrogatories, requires that a party is “under a duty seasonably to amend a prior response” if he knows the answer is incorrect or is no longer true; a “failure to amend the response is in substance a knowing concealment.” Seals v Seals, 22 Wn. App. 652, 654, 590 P.2d 1301 (1979). As in Seals, Katherine was not required to resort to subpoenas to discover information (and when she did, Carl moved to quash and the court granted his motion). “The exercise of reasonable diligence does not require a party to look behind the answers.” Seals, at 656. Carl had a duty to accurately disclose his employment history when said history pertained directly to the characterization of his retirement assets. Fees are appropriate if the losing party’s conduct constituted bad faith. Seals, at 658. There is bad faith on the part of Carl. A trial court may award attorney fees against a party whose conduct in litigation is intransigent or who acts in bad faith. In re Marriage of Eide, 1 Wn. App. 440, 445, 462 P.2d 562 (1969) A party may recover fees for intransigent conduct without regard to the financial imperative of RCW 26.09.140. Marriage of Crosetto, 82 Wn. App. 545 (1996), at 563-64 Fees on the basis of intransigence should have been awarded, both at trial and on appeal.

### **3.11 No evidence to support values**

The court had no evidence to rely on in finding the values of the Roslyn home and the Mercer Shorewood Club assets to be what Carl stated them to be. There is no substantial evidence in the record to support these findings.

### **3.12 Consent for child-related expenses contrary to sole decision-making.**

The parties' agreement, based on conflict, was that the Mother be awarded sole decision-making. The court undercut that authority in requiring the Mother to seek the Father's consent for extracurricular expenses for the child, in order to request a contribution from him. This result is contrary to Marriage of Mansour, 126 Wn. App. 1 (2004), in which the court stated that "a father's financial veto substantially diminishes the mother's decision-making authority . . . converting her authority to decide into an authority to propose." The context of Mansour also included an analysis of the conditions that mandate restrictions under RCW 26.09.191, but the principle remains the same even where there are no -191 restrictions. The meaning of "sole decision-making" cannot be one thing for "ordinary" decisions and another for decisions that involve a financial obligation (in fact, one might argue that very few decisions in the upbringing of children do not have a price tag of some sort attached!).

The parties negotiated the terms of their Parenting Plan, reserving the issue of –191 restrictions (it was not an “all clear” on this issue). They compromised on the severity and harshness in tone so that the issues of domestic violence would not have to be litigated. They entered a permanent restraining order by agreement. Conflict was acknowledged. Sole decision-making was assigned to the Mother. To undercut the application of sole decision-making because of the absence of formal –191 factors will seriously discourage similarly situated parents who are otherwise willing to compromise on the language of “findings” in order to obtain the actual relief and protection they need within the body of the Order. It is contrary to the parties’ agreement that the Mother have sole decision-making to force her to negotiate or seek consent from the Father on any decision that could carry a price tag that would normally be shared proportionate to income. It will force her to choose between interacting with the Father (where there is an acknowledged history of conflict) or simply bearing the cost in order to make a “sole” decision, as was intended. This provision should be stricken, to preserve to the Mother the sole decision-making that was intended.

**3.13 Attorney fees on appeal should be awarded to Katherine.**

RAP 18.1 allows this court to award fees where it is statutorily allowed.

RAP 14.2 allows for costs to the prevailing party. If Katherine prevails, he should be awarded his costs.

RCW 26.09.140 authorizes this court, in its discretion, to award reasonable fees on appeal after considering the financial resources of the parties. Wright, 107 Wn. App., at 489. The general equity of the fee given the disposition of the marital property is also considered. Marriage of Davison, 112 Wn. App. 251, 259, 48 P.3d 356 (2002). The significant disparity in the division of assets leaves Carl in the position of having much greater ability to pay Katherine's attorney fees. The property award to her has significantly diminished due to attorney fees spent litigating new issues raised by Carl following trial. She must preserve what assets she can in order to tide her over until she finds employment, while at the same time having to address issues related to the child's well-being and safety. (Payment of attorney fees may leave a party in an economically disadvantaged position in comparison with an ex-spouse. Bulicek, at 640.) The disparity in income is also relevant—Carl most recently earned over \$400,000/year; Katherine's best year was almost \$70,000, ten years ago. Her financial declaration will be submitted in accordance with RAPs.

#### IV. CONCLUSION

The court had a complex set of facts and figures before it at trial, but lost sight of the basic premises—what accrued prior to and during

the marriage. There was no accrual of pension benefit in the first 104 months of employment. This was incorrectly included. Correcting this ratio will alter the division of assets, as evidenced by the court's own change when the percentage was adjusted for other reasons. The court should also consider whether a different method (subtraction) might be appropriate in a case where marital efforts outweigh employment history in advancing to a new position.

Relying too heavily on characterization resulted in an inequitable distribution. Katherine's overall proposal was equitable—40% of all property to her and 60% of all property to Carl, including separate property. The court lost sight of the economic reality facing Katherine, apparently misunderstood her own earning history, and the shift of over \$200,000 to Carl without accounting for the resulting economic disparity was erroneous. Regardless of characterization, Katherine's proposal was fair, given the almost-equal footing on which the parties entered the marriage.

Katherine further faced challenges obtaining information that was under Carl's control, which was not timely provided until trial. Misinformation was given and not corrected. Carl's approach was that

he didn't have to provide information unless asked or made to do so. There was no good faith in procuring information regarding Wy benefits. This hampered Katherine's ability to negotiate or avoid trial, if that were possible, because she was unable to verify what Carl was telling her (which was, in fact, erroneous). Carl should compensate Katherine for his "bad acts" which increased her costs.

Decision-making should not be tied to finances. Assets values should be based on evidence. Fees should be awarded to Katherine.

DATED this 19th of October, 2009.

MICHAEL W. BUGNI & ASSOCIATES

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2009, the original of the foregoing document was transmitted for filing to the Court of Appeals, Division I, by US Mail:

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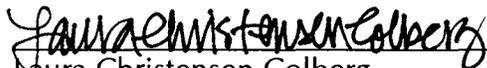
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