

63397-0

63397-0

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

2010 FEB -9 10:50 E

NO. 63397-0-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

KATHERINE GUNN-BOHM

APPELLANT

v.

CARL BOHM

RESPONDENT

**APPELLANT'S REPLY BRIEF
AND RESPONSE TO CONDITIONAL CROSS-APPEAL**

Laura Christensen Colberg, WSBA #26434
Attorney for Appellant

MICHAEL W. BUGNI & ASSOCIATES, PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
Telephone: (206) 365-5500

TABLE OF CONTENTS

	<u>Page No.</u>
Introduction	1
I. Argument in Reply	2
1.1 It is arguable that the “subtraction method” may be equitable in some circumstances.....	2
1.2 Employment formula not tied to actual employment period	5
1.3 Carl should not be rewarded for excluding information that could have resolved this question.....	6
1.4 Case law distinguished	6
1.4.1 <u>Greene</u> and <u>Chavez</u> were government pensions	6
1.4.2 Efforts resulting in acceleration can be considered .	7
1.4.3 Property distribution not at issue in <u>Brewer</u>	7
1.4.4 <u>Dewberry</u> followed prenuptial agreement.....	8
1.4.5 Rehak awarded almost all community property to spouse without separate property	9
1.4.6 The Ovens court awarded 43% of Husband’s income as maintenance to Wife where disparate separate property awarded to Husband	9
1.4.7 Skarbek remanded based on mischaracterization.....	10
1.5 Distribution of property should not include maintenance or attorney fees.	10

1.6 Actual Percentage of estate to Carl is higher.	11
1.7 Severance used in lieu of other intact assets.	13
1.8 Findings re age, health and employability	14
1.9 Financial obligations fall under Child Support Order.....	15
1.10 Attorney fees should be ordered to Katherine for intransigence.	17
1.11 Fees on appeal should be awarded to Katherine, not Carl.	19
1.11.1 Need versus ability still present	19
1.11.2 Not a frivolous appeal	19
II. Response to Cross-Appeal.....	20
2.1 No information in record to correlate credited service to actual employment.....	20
2.2 Even Husband’s expert had to speculate about formula	21
III. Conclusion	22

TABLE OF AUTHORITIES

<u>Table of Cases</u>	<u>Page No.</u>
<u>Doe v Gonzaga University</u> , 99 Wn.App. 338, 992 P.2d 545 (2000)	18
<u>In re Chavez</u> , 80 Wn. App. 432, 909 P.2d 314 (1996).....	6
<u>Henderson v. Tyrell</u> , 80 Wn. App. 592, 606, 910 P.2d 522 (1996)	6
<u>Marriage of Brewer</u> , 137 2d 756, 766, 976 P2d 102 (1999).....	5, 7, 8
<u>Marriage of Dewberry</u> , 115 Wn. App. 351, 62 P.3d 525, <i>rev. denied</i> , 160 Wn.2d 1006 (2003).....	8
<u>Marriage of Greene</u> , 97 Wn. App. 708, 986 P.2d 144 (1999)	6
<u>Marriage of Healy</u> , 35 Wn. App. 402, 406, 667 P.2d 114, <i>rev. denied</i> , 100 Wn.2d 1023 (1983).....	20
<u>Marriage of Mansour</u> , 126 Wn. App. 1 (2004)	15
<u>Marriage of Rockwell</u> , 141 Wn. App. 235, 170 P.3d 572 (2007)	1, 2, 3, 4, 7, 14, 19
<u>Marriage of Schumacher</u> , 100 Wn. App. 208, 217 (2000).....	19
<u>Marriage of Skarbek</u> , 100 Wn. App.444, 997 P.2d 447 (2000).....	10
<u>Ovens v Ovens</u> , 61 Wn.2d 6, 376 P.2d 839 (1962).....	9
<u>Rehak v Rehak</u> , 1 Wn. App. 963, 465 P.2d 687 (1970).....	9
<u>Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</u> , 122 Wn.2d 299, 342, 858 P.2d 1054 (1993) 122 Wn.2d at 342.	18

Table of Statutes and Regulations

RCW 26.09.070(3) 16
RCW 26.19 16

INTRODUCTION

While on its face some of the language and arguments in Appellant's brief appear to echo those made in Rockwell, there are distinguishing issues before this court for the first time—how to treat “service credits” grandfathered in, for example, and not “earned” during a first period of employment. Secondly, whether the court should assume that all years of service be treated equally, or conversely, whether it is appropriate to apply the “time rule” blindly without regard for increases made possible only because of the nonworking spouse's efforts, (i.e. an acceleration of the rate of benefits increase during marriage, which is not directly tied to, or “but for” earlier years of service).

That a “time rule” analysis has been labeled as “typical” or “correct” does not make it the “only” equitable means to divide pension assets, nor should equity be denied in circumstances such as those present here, when adherence to this formula fails to recognize opportunities and gains directly attributable to a supporting spouse.

Furthermore, in prior cases, there has been no “disconnect” between the actual “time” of employment and the time used to

calculate benefits. Here, the formula utilized by the company does not align with actual months or years of employment.

I. ARGUMENT IN REPLY

1.1 It is arguable that the “subtraction method” may be equitable in some circumstances.

While the court did, in Marriage of Rockwell, 141 Wn. App. 235, 170 P.3d 572 (2007) find the subtraction method to be an inappropriate method of equitably determining the community property portion of a retirement asset, it did so under facts different from those in the present case. In Rockwell, the 16 years of service prior to the marriage (in employment for the federal government, with standard increases over time) built up the longevity required to reap the total benefit at the time of retirement (“only because of earlier years of service,” Rockwell, at 253, and retirement benefits began to accrue from day one). In the present case, not only had Carl’s retirement benefit begun accruing in 1994, a relatively short period prior to the parties’ cohabitation in 1998, but the terms of these benefits were directly and primarily tied to the promotions Carl was able to accept *only because* he had Katherine’s support enabling him to do so, after 1998. No benefits accrued “from day one,” i.e. between 1978 and 1985.

Without Katherine’s willingness to sacrifice her career

opportunities to stay home with Carl's children; without Katherine's support of the extensive travel required of Carl, without Katherine's support by entertaining company executives in their home (which was remodeled with her primary oversight), it is reasonable to conclude that Carl's success would have been less than it was, or would have occurred at a slower rate. App. Brf, 8, 9. Where the efforts of a spouse serve to accelerate the other spouse's success or "rise to the top" and where opportunities could not have been accepted but-for the supporting spouse's willingness to manage household and family responsibilities (at the sacrifice of independent career and retirement-building), it is equitable to consider the "before" and "after" situation of the career spouse rather than assuming that all years of employment are "equal" in terms of contributing to a final benefit at the time of retirement. It is not accurate to conclude that Carl's ending retirement benefits came about "only because" of past employment (especially in the case of the supplemental pension, for which Carl was not eligible until he was able to accept a position which demanded that he travel—which Carl could do only with Katherine's support on the homefront). This is a change or clarification in existing law Katherine is asking the court to consider making in the interests of equity. This was not addressed in Rockwell.

The question is: Were the increases that came to Carl during the marriage possible only because of earlier years of service (the basis for the court's decision in Rockwell)? The answer in this case is "No."

Before Carl married Katherine he was on one career path. After marrying Katherine, and due to her support, he was able to accept and pursue a more lucrative (and demanding) position and both spouses should equally benefit from those increases. It should not be an excluded consideration that a supporting spouse's efforts, not just the cumulative years of experience by the working spouse, can and should factor into a community property determination, rather than having it be a foregone conclusion tied just to the timing of the marriage in a spouse's overall career/retirement trajectory. (The opposite argument could likewise apply equitably—in some cases a marriage, or the actions of a spouse might in fact hinder a spouse's career trajectory such that greater weight should be given the efforts prior to marriage than during.)

Whether labeled the "subtraction method" or other means of looking at the "before" and "after," it is rational and reasonable to ask that the court give consideration to the marital contributions of the non-working spouse, especially where there is no information that the retirement benefits at the end of the marriage, were all but guaranteed had the working spouse simply carried on in the same or similar

position as before.

1.2 Retirement formula not tied to actual employment period.

Weyerhaeuser's formula for calculating Carl's retirement benefits did not correspond to his actual employment period, even if the earlier term of employment is included. Carl concedes this in his response. Resp. Brief, 11, 12. He did not work 24.85 years (298 months). He worked 23.3 years (280 months). It is therefore improper to conclude that Weyerhaeuser's retirement package for Carl was tied to any particular period of employment. It was a benefit for which Carl negotiated as part of his compensation package in consideration for his second term of employment beginning in 1994 and ending in 2008. Without his return to Weyerhaeuser, there would have been no retirement benefit compensation at all. The court "has favored characterizing property as community instead of separate property unless there is clearly no question of its character." Marriage of Brewer, 137 2d 756, 766, 976 P2d 102 (1999). Ambiguity in this regard must be construed against Carl, whose burden it is to demonstrate his separate property interest by clear, cogent and convincing evidence.

1.3 Carl should not be rewarded for excluding information that could have resolved this question.

The competing evidence about Carl's actual terms of employment, start and end dates, as well as how those periods correspond (if at all) to the formula used by Weyerhaeuser in calculating the final retirement benefit could have been resolved and clarified by testimony directly from a Weyerhaeuser employee with this personal knowledge. (In addition, Carl could have submitted correct responses to Katherine's Interrogatories, but he did not.) Katherine's attempts to subpoena records and the testimony of just such a person for trial were opposed and denied. "Where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him." Henderson v. Tyrell, 80 Wn. App. 592, 606, 910 P.2d 522 (1996). The court should conclude that had this information favored Carl, he would have allowed it in; the inference is that it would not have been favorable to him.

1.4 Case law distinguished.

Authority cited by Respondent is not on point.

1.4.1 Greene and Chavez addressed government pensions.

As in Rockwell, the Greene¹ and Chavez² pension benefits were from a government plan—military. There was no period of employment during which benefits were not accruing. There was no rate of calculation that differed from actual time/years/months of employment. There is no evidence that the worker’s promotions were accelerated due to efforts by a spouse.

1.4.2 Efforts resulting in acceleration can be considered.

In Chavez,³ increases due to Husband’s post-dissolution years of service, which increased benefits at an accelerated rate, were preserved to him as separate property. It follows that increases at an accelerated rate due to community/marital support should likewise benefit the community—and not be tied strictly to the calculation of time.

1.4.3 Property distribution not at issue in Brewer.

Respondent cites this case as an example of the court affirming a disproportionate property award. The property award was not at issue on appeal, however. The question presented in the Brewer case was the characterization of the

¹ Marriage of Greene, 97 Wn. App. 708, 986 P.2d 144 (1999)

² In re Chavez, 80 Wn. App. 432, 909 P.2d 314 (1996)

³ After 20 years of employment, the pension benefit increased by 2.5%. Six of the ten “2.5%” years occurred post-dissolution and that increase went to the Husband as separate property (though arguably, the community years made the 20+ increase possible).

post-dissolution proceeds of a disability insurance policy when premiums had been paid during the marriage. The court said nothing about the propriety of the property distribution. It did affirm the principle that “the court must have in mind the correct character and status of the property before any theory of division is ordered.” Brewer, at 766. Appellant herein believes the court did not properly characterize the Husband’s pension asset, and as a result its theory and actual distribution was not supported.

1.4.4 **Dewberry followed prenuptial agreement.**

Likewise, comparison of this case to Marriage of Dewberry, 115 Wn. App. 351, 62 P.3d 525, *rev. denied*, 160 Wn.2d 1006 (2003), is not particularly useful. In Dewberry, the court analyzed and found enforceable the parties’ oral prenuptial agreement to keep earnings separate, to create minimal, if any, community property, and honored their subsequent words and actions to reflect their intent to protect each party’s separate property, even if the resulting separate property totals were disparate. The court divided the property in accordance with the prenuptial agreement. There was no such agreement between Carl and Katherine. There were no intentions or actions to keep accounts separate or not to create community property.

1.4.5 Rehak awarded almost all community property to spouse without separate property

In Rehak v Rehak, 1 Wn. App. 963, 465 P.2d 687 (1970),⁴ cited by Carl as a disparate property case, the Husband's premarital \$30,000 inheritance was awarded to him and \$5,760 in community property (almost all) was awarded to the Wife. This case, however, supports a higher-than-60% award of community property to a spouse without the separate property resources of the other.

1.4.6 The Ovens court awarded 43% of Husband's income as maintenance to Wife where disparate separate property awarded to Husband

The controlling factor in Ovens v Ovens, 61 Wn.2d 6, 376 P.2d 839 (1962), was the Husband's \$21,255 in 1950s dollars inherited by the Husband over a 12-year marriage ending in 1960. It's hard to say how a \$250/month support and alimony award in 1960 translates to 2009 dollars, but even looking at percentages, \$3,000/year to the Wife was almost 43% of Husband's income (\$7,000/year). No similar rate award was made in the present case to offset the disparate property award (\$84,000 + \$6,876 = \$90,876, or 28% of Carl's 2009

⁴ *disapproved on other grounds by* Coggle v. Snow, 56 Wn. App. 499, 784 P.2d 554 (1990)

severance compensation, \$321,673).

1.4.7 Skarbek remanded based on mischaracterization

Skarbek's ruling on the characterization of property supports one theory of the Wife's appeal—that the court's award was based on a mischaracterization of a significant asset. Skarbek, Wn. App. 444, 450, 997 P.2d 447 (2000). Judge Halpert's second opinion letter demonstrates that characterization was the sole basis, not resulting economics result to each, for the change in her award. In Skarbek, the court remanded to reconsider the 50/50 division of the Husband's separate property funds (erroneously characterized as community property). It did not, and does not, stand for the proposition that separate property should be awarded to a spouse for that reason, exclusive of other factors to consider.

1.5 Distribution of property should not include maintenance or attorney fees.

The issues of property division and maintenance are separate determinations based on separate factors. Including the maintenance award as property "skews" the percentages. If viewed in this manner, then Katherine received "zero" maintenance following almost nine years of marriage and after sacrificing her career in order to support

Carl's—this is an equitable result and contrary to the application of factors used to determine a maintenance award. In fact, the court intended a 60:40 split of community property (though improperly characterizing retirement assets as separate property when, as discussed above, a greater share of which should be considered community property) and separately, found that maintenance was appropriate given the history of Carl's earnings and his ability to pay, from his severance award replacing future earnings, two years of maintenance.

Further, it is not equitable to consider that attorney's fees Carl was ordered to pay to Katherine's attorney constitute a "property award" to Katherine. These should likewise be excluded from a determination of the overall property ratio.

1.6 Actual Percentage of estate to Carl is higher.

Appellant's Brief, page 23, states that Carl received 65% of the total estate. In a different paragraph, the division is stated: "34%" to Katherine and "more than 75%" to Carl. Appellant's Brief, page 24. At a glance, it should be evident that a typographical error occurred and that "more than 65%" is the mathematical difference instead of "more than 75%" in this context. By including maintenance as property, Carl arrives at 63% being the total of all property awarded to him. Given the size of the total estate, the difference in each percentage point is significant. The difference between 60% and 65% is over \$100,000 to

Katherine in this case. Since “separate property” is what drives Carl’s argument that this award was fair and equitable, the characterization of property is a pivotal issue—however, characterization alone does not control distribution, and should not have been given the weight it was in this case (however, correcting the characterization error would reach an equitable result). Using the figures in Respondent’s Brief, page 14, and simply removing maintenance from the “property” award list, Carl received 67% of the total estate:

	Katherine	Carl
Community property	\$ 584,919.39	\$ 389,946.26
Separate property	\$ 57,353.00	\$1,209,452.00
CP tax		\$ (27,599.00)
Post-trial payments		\$ (19,827.00)
Additional property award	\$ 50,000.00	\$ (50,000.00)
Attorney fee award	\$ 30,000.00	\$ (30,000.00)
	\$ 722,272.39	\$1,471,972.26
	33%	67%
Total	\$2,194,244.65	

Without fees included as property, Carl ends up with 68%

	Katherine	Carl
Community property	\$ 584,919.39	\$ 389,946.26
Separate property	\$ 57,353.00	\$1,209,452.00
CP tax		\$ (27,599.00)
Post-trial payments		\$ (19,827.00)
Additional property award	\$ 50,000.00	\$ (50,000.00)
	\$ 692,272.39	\$1,501,972.26
	32%	68%
Total	\$2,194,244.65	

1.7 Severance used in lieu of other intact assets.

The fact that Carl utilized his severance package to meet the property division that was awarded did not leave him in a lesser economic position after dissolution. He opted to receive over \$800,000 in lump-sum for his retirement. Paying with severance funds in order to leave other assets intact did not diminish the overall award to Carl, which was twice what was awarded to Katherine. Carl has no specific obligation for post-secondary support for his older children.⁵ The account designated to be used for college costs had not been depleted at the time of trial, but held over \$17,000. Exhibit 37. His maintenance obligation was modifiable for the second year (CP 203), so is not a “sure” obligation. Child support was set at the advisory amount based on tables that capped income at \$7,000/month—when

⁵ That child support order says:

“The parties shall maintain the Ragen MacKenzie Account as a joint account (with two signatures required) to be utilized for the children’s post-high school education, including tuition, books, room and board. Half of the balance in that account as of the date that Michael graduates from high school will be for Anna and half will be for Michael. Once the funds in the account are depleted the parties shall pay for the children’s post-high school education based upon their income and financial resources at the time. In the event either or both children do not exhaust the fund in the account for post-high school education, he and/or she shall receive his or her share of the remaining funds at age 28... Exhibit 124

his severance package was based on compensation for 2009 of \$33,613 per month. CP 256. \$573/month is 1.7% of his income—a minimal burden to the Father. Final Order of Child Support, CP 250.

1.8 Findings re age, health and employability.

The court's determination of property division was based almost solely on characterization and using 60:40 as an appropriate division of community property. While stating in general terms that age and earning capacity were factored in, there is no specific analysis. Findings of Fact, 2.21.24. Furthermore, the court's recitation of Katherine's former earnings (\$100,000) was incorrect and unsupported by the record. Findings of Fact, 2.21.6. Carl argues that Katherine did not preserve this error by objecting at the trial court level—however, there is no rule by which a party is allowed or expected to interrupt a judge's ruling at the time the decision is being issued. The court issued its ruling in written form and presentation of orders that incorporated that written decision was made. The time for argument, objections or further debate about the evidence was over. The court's finding was inaccurate and is not supported by the evidence presented as to Katherine's *former*, not potential future, earnings. The facts concerning Katherine's actual earnings were presented at trial. Exhibits 70, 71 This is not an issue raised for the first time after trial. "If a trial court's finding is within the range of credible evidence, we defer." Rockwell,

at 248. The \$100,000 income figure was not within any range of evidence as to Katherine's former income. Respondent concedes the projected future income for Katherine was \$50,000 to \$60,000. The court's findings are silent to future incomes so it appears the court may have relied, erroneously, on a too high past income figure in analyzing this factor. Likewise, the valuation of the Roslyn home was different on the Wife's spreadsheet—\$250,000 instead of \$215,000, so this item too was opposed at trial.⁶ Trial Exhibit B. The Wife concedes that the \$2,500 valuation on the Mercer Shorewood Club membership is of minimal import given the overall estate. This alone would not have been a basis for appeal, but contributes to the overall imbalance in the court's division of assets and values.

1.9 Financial obligations fall under child support order.

While Mansour, 126 Wn. App. 1 (2004), arose in the context of abuse and section 191 restrictions, the court interpreted "sole decision-making" as just that—the ability to make *decisions* for the child, not *suggestions*. Adding to the parties' agreed Parenting Plan which included a discrete list of areas in which joint decision-making was expected goes beyond what the parties agreed to and improperly alters the terms of their contract. While agreed Parenting Plans are not binding on the court, the purpose behind this provision is to protect

⁶ Respondent cites to Appellant's spreadsheet as evidence for the club membership value. Resp. Brf, 32.

and preserve the children's best interests. Allocation of expenses is something that pertains to support of a child, triggering a review for compliance with RCW 26.19. RCW 26.09.070(3).

The parties' agreement to jointly decide two areas of future expenses—private school and orthodontia, did not “open the door” to decision-making on every single child-related expense that has a cost. Private school and orthodontia are “big ticket” financial items, thus reflecting the intent that the Mother would not simply incur a major financial responsibility and send the Father the bill. But the day-to-day decision of whether ballet or art lessons or music lessons or sports should be a part of the child's life—these small decisions, smaller expenses, if a joint decision is required, will only invite a continuation of the “history of conflict” between the parties, which was the basis for sole decision-making to the Mother in the first place.

In this regard, the court's order did contradict the intended sole decision-making authority to the Mother. Forcing the Mother to engage the Father at this level is contrary to what was agreed between them, and given the property awarded to the Father, the amounts in question are not likely to be burdensome to the Father, but rather will create an opportunity for the perpetuation of conflict (or, conversely, the child will go without opportunities if the only way to accomplish them is by engaging in that conflict or seeking a court order, an expense that

would not be justified given the relatively minor amounts at stake in most extracurricular activities). Giving the Father “veto” power will effectively deprive the child of those opportunities—or will disproportionately burden the Mother if she must pay for all.

1.10 Attorney fees should be ordered to Katherine for intransigence.

Katherine appeals the award of \$30,000 in fees based on need versus ability instead of the \$40,000 requested on either that or the basis of intransigence. The difference, \$10,000, is the amount in dispute on appeal. If intransigence is found, there is no consideration of need and ability. The court had evidence of Carl’s failure to correct inaccurate discovery answers, and failure to provide other evidence until trial. See App. Brf, 10. Katherine had no personal knowledge that Carl’s answers were inaccurate or incomplete, knowledge she would have to have had in order to bring a Motion to Compel. On its face, Carl appeared to answer the questions posed. That he gave incorrect and incomplete information was not within Katherine’s ability to ascertain until further evidence was produced and testified to at the time of trial. Her reliance on Carl’s mistaken information detrimentally affected her ability to prepare for trial (and/or to avoid trial through settlement discussions based on full disclosure). His under-oath falsehoods in answering discovery are a basis to find intransigence and

warrant sanctions. These actions caused Katherine to incur additional legal services in order to expose them and to adjust calculations even at trial.

Carl's failure to provide information about assets until right before trial was also detrimental—nor could Katherine ascertain the incompleteness of his answers without personal knowledge. "The purpose of CR 26(g) is to encourage a "spirit of cooperation and forthrightness during the discovery process." Doe v Gonzaga University, 99 Wn.App. 338, 992 P.2d 545 (2000), citing Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 342, 858 P.2d 1054 (1993) 122 Wn.2d at 342. Sanctions are mandatory if the court finds that a party violated the rule. Fisons, 122 Wn.2d at 346. The court reviews sanctions decisions for abuse of discretion. Fisons, 122 Wn.2d at 338. In the spirit of Fisons, it was Carl's responsibility to fully disclose complete and accurate information about his employment and pension history in a timely fashion. He did not. The court's analysis for fees was only based on need and ability to pay and thus the award was limited. A finding of intransigence does not depend on the offending party's ability to pay. The attorney fee

award to the Mother should have been the full amount requested because the record does show intransigence.

1.11 Fees on appeal should be awarded to Katherine, not to Carl.

1.11.1 Need versus ability still present.

On the facts and circumstances at trial below, need versus ability was a supported basis for the partial fee award that was granted, and Carl does not challenge that finding. Now, just a year later, the same disparity still exists. The gap may close slightly if the court remands as requested in order to shift the property award as Katherine requests, but the disparity between the parties' income capacities, earning history and ability to pay will not have been materially altered.

1.11.2 Not a frivolous appeal.

Whether Katherine's appeal has put forth a rational, good faith argument for modification of the application and scope of the Rockwell rejection of the "subtraction method" is for this court to decide. "An appeal is not frivolous if it presents debatable issues upon which reasonable minds could differ and there is a possibility of reversal." Marriage of Schumacher, 100 Wn. App. 208, 217 (2000). Existing law, as cited to and argued in Katherine's Brief on Appeal does support a finding that the court abused its discretion—relying almost entirely on characterization and incorrectly characterizing a substantial asset as separate, when in fact it should be community property. The court

should not award fees to Carl on this basis. Fees instead should be awarded to Katherine as set forth on appeal. There is nothing frivolous in Katherine's appeal. The case "devoid of merit," Marriage of Healy, 35 Wn. App. 402, 406, 667 P.2d 114, *rev. denied*, 100 Wn.2d 1023 (1983), involved an appeal in which the party failed to include challenged findings of fact. The present appeal has complied with RAPs in this regard. It is an attempt to right a wrong, to fix a substantial error below—both in fact (no retirement received for first employment period) and in application (community property mistakenly characterized as separate property) and result (an inappropriately disparate award of property given the post-dissolution economic status of the parties who entered the marriage on relatively equal financial footing).

II. Response to Cross-Appeal

2.1 No information in record to correlate credited service to actual employment.

Missing from Carl's cross-appeal claim is evidence that would demonstrate how many months of "benefit service" are attributable to each period in his second round of employment with Weyerhaeuser—before/after marriage and during marriage. He proposes to claim "extra" months of credited service (aside from actual time calendar

months) for his first period of employment, but then takes “straight” calendar months for the months of the marriage, without pointing to any evidence upon which to make a determination about which months between 1994 and 2008 also earned “extra” months of credited service.

Thus even if there were an articulable formula by which to determine which fraction of which employment period earned what portion of the variable in the overall retirement formula, Carl failed to submit any reliable information that would either (a) support his formula or (b) allocate that “benefit service” over the second period of employment so that it could be divided between marital and non-marital periods. He cites to nothing in the record to support the assumption that “no” extra benefit service accrued during the marriage, but that one month of marriage = exactly one month in the benefit formula.

2.3 Even Husband’s expert had to speculate about formula

The evidence in this regard at trial was so nebulous that even Carl’s expert, Roland Nelson, was left guessing or speculating at the difference between 24.85 years of credited service (298 months) and the 23.3 (280 months) of actual calendar time Carl actually worked—conjecturing about “bonus” months. RP 170-173. Not to mention that there were three different months put forward as Carl’s first

employment termination month. App. Brf. 7. Had Carl not objected to and excluded the witness from Weyerhaeuser who could have shed light on this subject or verified his approach, the trial court and this court might have a better basis to ascertain where “benefit service” was credited—in order to even consider whether that analysis should replace or be used in lieu of the time rule (which, by definition, is linked to linear time, not “service”). RP 186-191. That Carl opposed and excluded this witness leads to the inference that this testimony would not have been favorable to his position or he would not have objected.

III. CONCLUSION

Carl has not set identified evidence in the record nor authority in case law that would defeat Katherine’s appeal as presented—it is up to this court to determine these issues of first impression. The circumstances presented differ from case law on pension divisions and warrant a review from an equitable, rather than formulaic, approach. Employment periods in which no retirement was earned should not be allowed to dilute the community property portion of employment for which benefits were negotiated. The overall award to Katherine should be more balanced, given the relative economic positions of the parties

at the time of marriage and at the time of dissolution, regardless, ultimately, of characterization, or as a result of correcting same. Fees should be awarded as requested and decision-making should be free of financial influence except as the parties agreed. Appellant's requested relief should be granted.

There is no foundation in the record for the assertions contained in Carl's Cross-Appeal, which should be denied.

DATED this 8th of February, 2010.

MICHAEL W. BUGNI & ASSOCIATES



Laura Christensen Colberg, WSBA

#26434

Attorney for

Appellant/Katherine Gunn-Bohm

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February, 2010, the original of the foregoing document was transmitted for filing to the Court of Appeals, Division I, by US Mail:

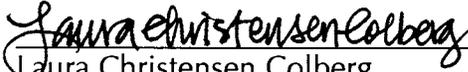
Via US Mail:

Clerk of Court
Court of Appeals, Division 1
600 University Street
Seattle, WA 98101

Attorneys for Petitioner via US Mail:

Valerie Bell
119 First Ave South Suite 500
Seattle, Washington 98104

Catherine Smith
Edwards, Sieh, Smith & Goodfriend, P.S.
1109 First Avenue, Suite 500
Seattle, WA 98101-2988



Laura Christensen Colberg