

No. 68455-8-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

C. MICHAEL RIDDELL, Appellant

v.

DEBORAH RHEA RIDDELL, Respondent

BRIEF OF APPELLANT

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FILED
APR 11 2011
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA
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A. Assignments of Error

1. The Court Erred In Rendering Finding of Fact 2.8 s): That Ms. Riddell's Eventual Social Security Benefit Will Be Less Than Mr. Riddell's Social Security Benefit.

Issues related to assignment of error:

- a. Whether there was substantial evidence to support the finding.
- b. Whether the finding is based upon pure speculation as to Ms. Riddell's future social security benefits since no evidence was presented as to when she will begin to draw it, or how much she will earn between now and when she does.

2. The Court Erred In Rendering The Following Additional Findings Of Fact:

a. Finding of Fact 2.8 f):

That by retiring from Boeing in 2005 Ms. Riddell lost continuity of service at Boeing which affected her pension.

Issues related to assignment of error:

Whether there was substantial evidence to support the finding:

If by loss of "continuity of service", the court meant, retirement outright, whether this finding fails to support the conclusions of law reached as to a 60% division in favor of Ms. Riddell of a \$1.96 million community estate, considering the court's failure to consider that the

retirement of Mr. Riddell in 2003 had the same effect as to his pension benefits.

b. Finding of Fact 2.9:

Finding 2.9, which credits Ms. Riddell \$51,000 of her separate property sale proceeds she used for the benefit of the community, but fails to credit Mr. Riddell with \$234,996.00 of his separate Boeing pension benefits also contributed to the benefit of the marital community before separation does not support the disproportionate division of the community estate.

3. The Court Erred In Admitting Testimony As To A Projection Of The Parties' Relative Economic Circumstances For The Rest Of Their Lives Over Objection As Speculative.

4. The Court Erred By Mischaracterizing As Separate Property \$122,509 Of The Value Of The Husband's PVP And Supplemental PVP Boeing Retirement Benefit Payments, Erroneously Confusing This Amount With The Value Of The Community Portion Of The PVP Benefit While Ignoring The Separate Value Of The Supplemental PVP Pension.

Issues pertaining to assignment of error:

- a. Whether there is no substantial evidence to support the finding
- b. Whether this mischaracterization compels remand.

5. The Court Erred In Coming To Conclusion Of Law 3.3 That An Uneven Distribution Of Property In Favor Of Ms. Riddell Is Just And Equitable

To wit: An award of all of Ms. Riddell's separate property to her, plus 60% of the parties' 1.96 million dollar estate plus an equal division of his \$4069.50/ month Boeing pensions which includes 50% of his separate property component even though the court found she has the ability and will go back to work within 6 months and is nearly 15 years younger than he is at age 70.

Issues pertaining to assignment of error:

Whether the court considered the length of the marriage as required by RCW 26.09.080.

Whether the award of 60% of a nearly \$2,000,000 community estate, plus half his separate pension property benefits unduly favors the advantaged spouse over the disadvantaged spouse, turning the principles announced in *In re Marriage of Rockwell*, 141 Wn. App. 235 at 251, 170 P.3d 572 (2007) and *In re Marriage of Schweitzer*, 81 Wn. App. 589, 915 P.2d 575 (1996) on their head.

B. Statement of the Case

1. History of the Parties

The parties were married in 1995 and separated on November 30, 2010 (C.P. 353). They have no children. At the time of trial Mr. Riddell had been fully retired for 8 years, was 70 years of age and in ill health (R.P. 55, 63 and 68). Ms. Riddell was 54 years of age who the trial court found should and will work full time and return to work within six months after trial (OD 8).

By agreement of the parties, Mr. Riddell retired effective August 2003 at age 61 (trial exhibit 15), in part because of what Ms. Riddell described, as a fabulous severance package that included the equivalent of one year's wages, stock etc. from the Boeing Company where he had worked for 18 years (R.P. 68 and 69).

Also by agreement of the parties, Ms. Riddell retired from Boeing in 2005 when she was earning approximately \$124,000 annually (R.P. 58). She had been in a management position facilitating and coordinating computer technicians to meet the specific needs of various customers through Boeing's Computer Services Division (R.P. 57 and 58).

2. Property Other Than Husband's Boeing Pensions

The court divided the assets and liabilities (not including Mr. Riddell's Boeing Pensions) as follows:

To Ms. Riddell:

Community:

The Tucson Home: \$385,000

Morgan Stanley Account: \$400,000

Her IRA: \$187,867

Survivor Benefit \$107,830

Her Boeing Pension \$113,830

Spyder Automobile: \$7,200

Total Not Including The Present Value Of His Boeing Pension
Awarded To Her: **\$1,201,727** (CP 355-358).

To Mr. Riddell:

Community:

Shelton Wash. Home: \$339,000 less mortgage balance
\$204,421) = \$134,579

Morgan Stanley Acct: \$105,498

Husband's IRA: \$512,709

Navy Life C.S.V.: \$19,137

Cadillac : \$20,000

Toyota: \$3,000

Total Community Not Including the Present Value
of His Boeing Pension: **\$794,923** (CP 355-358).

Thus, excluding a division of the stream of Mr. Riddell's monthly Boeing pension benefits, Mrs. Riddell was awarded 60% and he 40% of a community estate worth nearly two million dollars (\$1,996,650).

She was also awarded all of her separate property (an IRA worth \$122,885), one half the community portion of Mr. Riddell's Boeing Pensions and one half of his separate property components of those pension benefits (CP 355-358).

Mr. Riddell was awarded his separate IRA worth \$106,418, 50% of the community portion, and 50% of his separate property portion of the Boeing pension benefits.

3. The Present Value And Character Of The Husband's Four Boeing Pension Payments

Each party had a forensic expert testify as to the present cash value of each of four distinct monthly Boeing Pension benefits of Mr. Riddell. CPA Steve Kessler testified for Mr. Riddell. He used a different mortality table calling for a longer life expectancy and a different interest rate (6% vs. 5%) to discount to present value than did Ms. Riddell's expert CPA Kevin Grambush (RP 413, RP 479).

The experts also disagreed as to the appropriate method to determine the separate value of the two retirement benefits that began before the marriage, but continued during marriage (RP 416 and 504). Mr. Grambush only valued the separate and community portion of the PVP pension (Tr Ex 62), and utilized the subtraction method to derive the separate property value. This method has been rejected in favor of the time of service allocation method by Division I of The Court of Appeals in *In re Marriage of Rockwell*, 141 Wn. App. 235 at 251, 170 P.3d 572 (2007) (RP 413). The trial court utilized the time apportionment analysis used by Mr. Kessler. He came up with the following values: as to the Subsidiary PVP pension, the separate portion is worth \$47,048 and the community portion is worth \$36,168. As to the PVP pension, the separate

portion is worth \$159,361 and the community portion is worth \$122,509 (trial exhibit 6).

The trial court rendered a conclusion of law that the separate portion is \$122,509 (confusing it with the community component) instead of \$159,361 and ignored the \$47,048 pre-marital separate portion of the Supplemental PVP benefit (CP 356). The trial judge used the present values, derived by Mr. Grambush as to the combined separate and community property portions of all four pensions in the aggregate: \$486,826 (CP 354).

4. The Court's Ultimate Division of Separate and Community Property

The court found that Ms. Riddell should and will work (C.P. 354). The trial court found her immediate earning capacity to be \$25,000 - \$30,000 per year after 6 months of some brushing up on her skills but not with the Boeing Company since she will live in Tucson, Arizona where she will continue to reside (O.D. 8). While the court did not agree with the husband's expert that she could be earning over \$60,000 per year immediately, it did not preclude the possibility of her doing so at some point in the future. In her oral decision she observed: "...I think that a fifty - - woman in her mid-50's with a relatively significant lapse in her

work history...and a high school education is not going to get \$60,000 anytime soon.” (O.D. 7)

The aggregate payments of the four pensions were found to be \$4,069.50 per month (Tr. Ex 15 and CP 353-354). His Social Security is \$1,546 per month (Tr. Ex. 23).

His net after tax monthly income from these sources is \$2584.49 (Tr. Ex 23) due to him having to invade his IRA’s to meet his monthly needs and due to the requirements of federal tax law that he do so since he has reached age 71 (RP 114-115). The court awarded her the entirety of her Boeing pension and one half of the entire array of his Boeing pension payments, including his separate property portion. (CP 355-358).

C. Argument

1. Introduction: The Findings Of Fact To Which Error Has Been Assigned Do Not Fulfill The Following Principles Of Law

To justify a disproportionate division of community property or the invasion of separate property in favor of a disadvantaged spouse, there was must be a substantial disparities existing as the parties face the future tempered by the various factors set forth in RCW 26.09.080 such as the length of the marriage.

Disparities can be viewed from a variety of perspectives such as gross disparities of current and potential earning power (*In re Marriage of Dalthorp*, 23 Wn App 904 at 910, 598 P.2d 788) (1979), or even with retraining after an award of spousal maintenance after fourteen years of marriages, considering the burdens of child care. (*In re Marriage of Donovan*, 25 Wn. App 691 at 697, 612 P.2d 387) (1980); or where property has been squandered (*In re Marriage of Morrow*, 53 Wn. App. 579 at 584, 770 P.2d 197 (1989) or dissipated (*See In re Marriage of Clark*, 13 Wn. App 805, at 807, 538 P.2d 145 (1975), to make up for the economic loss to the marital community.

It is only with marriages lasting 25 years or more that the court's goal is to equalize the financial positions of the parties "...for the rest of their lives." (*In re the marriage of Rockwell, supra* at 243 (2007).

These are the considerations that circumscribe the exercise of the trial court's discretion. Whether those requirements have been fulfilled by a trial judge is measured by whether the court made findings of fact concerning all ultimate facts and material issues related to a disproportionate division or invasion to separate property. Such findings must, in turn, be based upon substantial evidence and must support the

conclusions of law reached by the court (*In re Marriage of Fahey*, 164 Wn. App. 42 at 55-56, 262 P.3d 128 (2011)).

“Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *In re Marriage of Fahey, supra* at 55 (2011). “A material fact is one which is... necessary, must be found, is essential to the conclusions upon which the outcome of the litigation depends” (*Wold v. Wold*, 7 Wn. App 872 at 875, 503 P.2d 118) (1972).

Ms. Riddell, who at age 54, has the ability to work, had earned \$124,000 per year when she seven years ago (RP 58). During the pendency of the divorce she did not interview for a job and did not network to help her find one (RP 56-57). She only applied for a job for which she knew she was not qualified (RP 59-60) and stated she does not want to work (RP 84). The court found that Ms. Riddell is intelligent, should and will begin working in 6 months (CP 354).

At 70 years of age Mr. Riddell’s sole source of income will be his Boeing pension payments, social security and withdrawals from his IRA. How then could the trial court justify awarding the advantaged spouse, Ms. Riddell, 60% of a \$2,000,000 community estate, plus her half of the community’s share of the pension payments, all her separate property, and

half of Mr. Riddell's separate property component of the Boeing pension benefits?

The findings of fact addressed in the following assignments of error. They do not support the conclusions of law that an uneven distribution of property in favor of Ms. Riddell is just and equitable as mandated by RCW 26.09.080.

2. Assignment of Error #1

Finding 2.8(s), that Ms. Riddell's eventual social security benefit will be less than Mr. Riddell's social security benefit is particularly significant since it appears to be a major reason why the court awarded her a significant portion of his separate estate and a significantly disproportionate division of the community estate even though Mrs. Riddell has an earning capacity for several more years and he has none. (O.D. 12).

The evidence presented as to social security benefits was by Mrs. Riddell's expert Kevin Grambush. His trial exhibit 62 is based on an assumption that she will begin drawing social security benefits at age 62 and that she will quit working at age 62. Given the speculative nature of that and other aspects of his analysis, objection to his testimony was made and overruled, which is a separate assignment of error.

Even assuming she retires at age 62 and begins receiving social security benefits then, Grambush calculated that her total social security benefits would be \$421,393 and that Mr. Riddell's would be \$286,046. Mr. Grambush also calculated that at age 70, Mr. Riddell's social security benefit is \$19,203 per year, and that when Mrs. Riddell reaches age 70 hers will be \$19,394 with hers to increase each year afterwards at higher levels than his for corresponding ages until the death of each (Tr. Ex. 62). Thus the only evidence related to the finding, in fact, belies it.

Furthermore there was no evidence presented that she will retire at age 62. It is clear that the longer she works her social security benefits will be even higher than what Mr. Grambush calculated. Therefore, the finding is in fact belied by the only evidence on the subject. Finding 2.8(s) cannot support the division of assets including the pension benefits, as concluded by the court to be just and equitable.

3. Assignment of Error #2

a. Finding 2.8(f)

Finding 2.8(f) is that when Mrs. Riddell retired in 2005, she "lost continuity of service with the Boeing Company which affected her pension". Webster's Dictionary defines continuity as "the quality or state of being continuous; connectedness" (Webster's International dictionary

1984, at 302). As it relates to employment, the word “continuity” connotes an interruption of employment, not a termination of it. Mrs. Riddell retired outright with no intent to return to Boeing, and no evidence that she would after trial. (R.P. 83-84). Thus the finding is not supported by substantial evidence.

If retirement outright is what the trial judge meant, she failed to consider the fact that with Mr. Riddell’s retirement from Boeing in 2003, the value of his pension was also adversely affected in the same way.

Whether Mrs. Riddell’s pension would be worth more had she not retired or whether Mr. Riddell’s pension would or should not have had any bearing on the ultimate division of the assets. Both pensions are worth whatever they are worth and have community property components capable of redistribution by the trial court. With the court only focusing on one part of the equation her pension’s value, the finding does not support a disproportionate division of the assets in Mrs. Riddell’s favor.

The paramount consideration in fashioning a just and equitable division of property is the financial circumstances of both parties as they face the future (*In re: Marriage of Gillespie*, 89 Wash.App. 390, 948 P.2d 1338 (1997). Finding 2.8f has no relationship to that consideration. The

court appears to have rewarded her for retiring, and penalizing him for the same joint decision.

b. Finding 2.9

Finding 2.9 is that Mrs. Riddell contributed over \$50,000 of her premarital separate property house sale proceeds to the use and benefit of the community as a gift to the community, while relevant to the ultimate determination, it ignores the fact that 56% of Mr. Riddell's PVP pension and his supplemental PVP pension payments are his separate property (Tr. Exh. 6) His PVP payments have been \$2,228.20 per month and supplemental PVP \$1,077.19 per month. Mr. Riddell's separate portion of the first two (56%) equate to \$1851.02 per month. Total community payments equate to \$2218.48 per month. He contributed this separate property to the use and benefit of the community, 56% of the payments being his separate property from 2003 until separation in 2011, over \$175,000 in separate contributions.

It is an abuse of trial court discretion to punish one spouse in a property division for his generosity in contributing separate property to the use of the marital community. See *Worthington v. Worthington*, 73 Wn. 2d. 759 at 777, 440 P.2d 478 (1968). Thus for the court to focus on Mrs.

Riddell's contribution while ignoring Mr. Riddell's, cannot serve as a basis to justify its ultimate property award.

4. Assignment of Error #3

The trial court admitted the testimony of CPA Grambush regarding the future financial circumstances of both parties until they die, were the community property to be divided equally including the community portion of his Boeing retirement payments (R.P 476 and 496) (Tr. Exh 62). Mr. Riddell's attorney objected to this testimony on the grounds that it is pure speculation. The trial court overruled the objection and gave Mr. Riddell's attorney a standing objection to all the testimony on this issue (RP 476).

Testimony based upon pure speculation is inadmissible. (*Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn. 2d 397, 418, 851 P.2d 662) (1993). Grambush made the following assumptions reflected in trial exhibit 62, based upon pure speculation. No evidence was presented to support any of them.

1. That Mrs. Riddell will not begin working until mid-2013. The court found that she should and will begin working by July 2012 (CP 354).

2. That Mrs. Riddell will assume over \$600 per month in healthcare premium costs. The parties stipulated that Mr. Riddell will keep

her on his healthcare plan cost free for a year (CP 356 and 359 and 366). Whether she will find employment that does not cover healthcare as a benefit of employment is completely speculative. There was no evidence that she would not.

3. That the value of Mr. Riddell IRA will increase by \$30,000 during the first year after the divorce (tr. Exh 62). The undisputed testimony was that Mr. Riddell will have to draw upon his IRA, pension and social security to cover his living expenses (R.P. 114, 115, and 489).

4. That Mrs. Riddell will only work for four months during the year she turns age 62 (Tr. Exh. 62) (R.P 494). There was no testimony that she will only work until age 62 (R.P 54-105 and 436-472). In fact, for her to do so does not make economic sense, particularly given the case she made for her need to earn income (R.P 54-105 and 436-472).

5. That Mrs. Riddell would never remarry for the rest of her life (tr. Exh. 62). The court itself was skeptical about that assumption (R.P. 521).

His analysis also involves a legal assumption. He attempted to equalize their financial positions until death. (Tr. Exh 62). This involves a legal assumption that in a mid-length marriage such as this one (15 years) that the trial court is to equalize their respective financial positions as they face the future until they die. In *In re Marriage of Rockwell, supra* only

places that goal on trial judges with long term marriages (to wit: marriages of 25 years or longer).

Because of the speculative nature of this testimony, not supported by any evidence, the objection as to its admissibility should have been sustained.

5. Assignments of Error #4 and #5

Trial Courts have the discretion to ignore the characterization of property as separate and community if necessary to effectuate a just and equitable division of the assets (*In re Marriage of Shannon*, 55 Wn App 137 at 145, 777 P.2d 8) (1989). If, in fact, the trial court is not influenced by the character of the property the question then becomes whether the ultimate disposition fulfills the requirements of RCW 26.09.080 to effectuate a just and equitable division of the assets. If the court was influenced by characterization, then mis-characterization requires remand. (*In re Marriage of Shannon*, 55 Wn. App 137 at 145, 777 P.2d 8 1989)

Although a trial court's determination of value that is within the field of testimony of the experts will not be overturned on appeal. (*In re Marriage of Sedlock*, 69 Wn App 484 at 507, 849 P.2d 1243) (1993) here, the trial court's conclusion of law 3.3 d) c. i. that the separate portion of

the stream of Boeing pension benefit payments is \$122,509 is erroneous for several reasons.

It is not within the field of values testified by the experts. Mr. Grambush's analysis of the separate component of Mr. Riddell's Boeing Pension payments was based upon the subtraction method, a method rejected as a matter of law by Division I of our court of appeals in (*In re marriage of Rockwell, supra*). That only left the testimony of Mr. Kessler, who utilized the time of service apportionment method that was approved by Division I in *Rockwell supra* (R.P. 412).

Mr. Kessler testified that the community portion of the supplemental PVP pension benefit is \$47,048 and that the community portion of the P.V.P pension benefit is \$122,509 (both 44% of the total benefits, the separate portions being 56%) (Trial Exhibit 6). The court mistakenly entered conclusions of law 3.3 (d)(c)(i) that the separate portion of both benefits is \$122,509 (CP 356). This is a clear error of characterization. In fact, the separate portion collectively of \$486,826 in combined pension benefits is \$206,409 (Trial Exhibit 6). This separate component is 42.4% of the total present value of the pension benefits in the aggregate.

If the court had not made its mistake, it is not clear whether it would have rendered the same decision as to property division if it had realized that the separate component is over 42% of the total present value.

D. Conclusion

The Findings do not support the outcome reached. In *In re the Marriage of Rockwell*, supra, is a long range marriage case that involved one spouse capable of earning a living who refused. As a result of which income was imputed to him, and the other spouse, incapable of working, dependent on her federal pension, was awarded 60% of the property after a 26 year marriage.

How in this mid-range marriage case, does this trial court justify one spouse, who is advantaged by virtue of the capacity to earn a living for the next several years, receiving nearly 60% of a \$2 million community estate, 100% of her separate property, and 50% of the other spouse's separate pension, where the other spouse is 70 years old, in ill health, and not capable of working? On its face, that result turns *Rockwell*, supra on its head. This leaves him at 70 years of age in the position of having to liquidate his estate to survive, contrary to the principles established in *Stringfellow v. Stringfellow*, 53 Wn. 2d 639, 335

P.2d 825 (1959). There is nothing in the findings, or in the trial judge's oral decision to justify that outcome.

Where one spouse is employable, a disproportionate division in favor of the other spouse, older and unable to work is appropriate (*In re Marriage of Schweitzer*, 81 Wn. App. 589, 915 P.2d 575 (1996)).

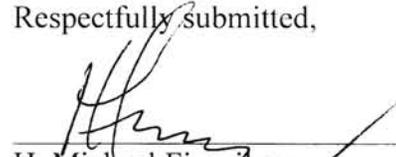
The decision in this case turns the principles set forth in both *In re Marriage of Rockwell*, *supra*, and *In re Marriage of Schweitzer*, *supra*, on their head. The decision must be reversed.

E. Costs

We seek costs per RAP 14.1 and 14.3.

DATED this 23 day of July, 2012.

Respectfully submitted,



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