

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of

CARMEN P. ROCKWELL,

Respondent,

and

PETER G. ROCKWELL,

Appellant.

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No. 66269-4-I
(consolidated with
No. 66363-1-I)

DIVISION ONE

UNPUBLISHED OPINION

FILED: June 25, 2012

Appelwick, J. — Peter appeals the trial court’s division of marital property for the third time. He argues the trial court abused its discretion because its division of the assets failed to leave the parties in roughly equal financial positions for the rest of their lives, adjusted for pension payments received during the appeal, and awarded attorney

fees to Carmen. We affirm.

FACTS

Peter and Carmen Rockwell were married from 1978 until 2004. This case is here on its third appeal, and the majority of the underlying facts are set out in In re Marriage of Rockwell, 141 Wn. App. 235, 239-41, 170 P.3d 572 (2007) (Rockwell I) and In re Marriage of Rockwell, 157 Wn. App. 449, 451-52, 238 P.3d 1184 (2010) (Rockwell II). Following Peter's challenge to the original division of property, we rejected his claim that the trial court's overall 60/40 division of the property in favor of Carmen was not just and equitable. Rockwell I, 141 Wn. App. at 255. However, in response to Carmen's cross-appeal, we held the trial court abused its discretion when it used the subtraction method to calculate the separate property portion of Carmen's pension. Id. at 253-54. We remanded for application of the time rule to the pension characterization. Id. at 254.

On remand, the trial court applied the time rule method to the pension, awarded the separate portion of the pension to Carmen, and again divided the community property portion of the pension 60/40. Rockwell II, 157 Wn. App. at 452. It did not otherwise change the community property division. Under this new division, Carmen was awarded 75.2 percent of the pension and Peter was awarded 24.8 percent of the pension. The overall division of property was approximately 70 percent to Carmen and 30 percent to Peter. Rockwell II, 157 Wn. App. at 452. Peter again appealed, asserting the division of property was inequitable and challenging the court's prejudgment award of interest to Carmen.

On that appeal, in Rockwell II, this court affirmed the trial court's award of prejudgment interest to Carmen on the amounts Peter was overpaid from the pension while the first appeal was pending. Id. at 454. Peter had argued on remand that this court directed the trial court to divide the property 60/40. Id. at 453. Carmen argued that this court directed the trial court to adjust the pension division under the time rule but otherwise maintain the prior division. Id. at 452-53. It appeared the trial court followed Carmen's position. Id. This court had intended for the trial court to exercise its discretion on remand as to the overall division of assets, not that the trial court be bound to decide the matter based on the two choices presented by the parties. Id. at 453-54. Because this court could not discern from the record that the trial court had exercised its discretion in making the property division, we remanded for the second time. Id. at 454.

On July 22, 2010, after this court had issued its opinion in Rockwell II, Carmen filed a motion asking the trial court to confirm its exercise of discretion in dividing the estate equitably. And, because Carmen was entitled to 75.2 percent of the pension payments between 2005 and 2008 but only received 63.2 percent over that period, she also asked the court to order Peter to continue to pay his portion of the government pension to her until a new order dividing the pension 75.2/24.8 took effect. Peter filed a counter motion for post-appeal relief, proposing a property division that was more favorable to him. In support of this motion, he claimed he faced financial hardship as a result of the trial court's original distribution.

The trial court issued a decision on October 22, 2010, that again awarded

Carmen 75.2 percent of the pension, including 60 percent of the community property interest and 100 percent of her separate property interest. It reaffirmed its 2005 finding that “given the difference in age, earning capacity, physical condition, and that husband had the ability to earn income and save for retirement in the future, it is fair and equitable to divide the community property 60% to wife and 40% to husband.” The trial court recognized that the recharacterization of the wife’s pension, increasing her separate property interest, reduces the husband’s share of the overall marital estate. Nevertheless, it found, in its sound and independent exercise of discretion, “that this property distribution is still just and equitable under the circumstances of this case, including after consideration of the parties’ present economic circumstances.” The trial court also found that “[u]ntil the order directing the pension administrator to divide the annuity 75.2% to the wife and 24.8% to the husband takes effect, the husband shall continue to pay over to the wife the share of the annuity that he receives from the federal government under this court’s earlier August 31, 2005 order.”

Peter filed three separate motions after that order, including two motions for reconsideration. The trial court rejected each of them, and ultimately awarded Carmen \$5,000 in attorney fees for having to respond to them. Peter appeals for the third time.

DISCUSSION

Where the trial court has weighed the evidence, the reviewing court’s role is simply to determine whether substantial evidence supports the findings of fact, and if so, whether the findings in turn support the trial court’s conclusions of law. Rockwell I, 141 Wn. App. at 242. “A court should ‘not substitute [its] judgment for the trial court’s,

weigh the evidence, or adjudge witness credibility.” Id. (alteration in original) (quoting In re Marriage of Greene, 97 Wn. App. 708, 714, 986 P.2d 144 (1999)). In a dissolution action, all property, community and separate, is before the court for distribution. In re Marriage of Stachofsky, 90 Wn. App. 135, 142, 951 P.2d 346 (1998). The relevant factors in determining a just and equitable distribution of property are provided by RCW 26.09.080. Those factors include, but are not limited to: (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and (4) the economic circumstances of each spouse at the time the division of the property is to become effective. Id. In weighing these factors, the court must make a “just and equitable” distribution of the marital property. Id.

The trial court has broad discretion in distributing marital property, and its decision will be reversed only if there is a manifest abuse of that discretion. Rockwell I, 141 Wn. App. at 242-43. 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.

I. The Character of the Property

Peter first argues the trial court abused its discretion by treating the character of the property as “dispositive” in dividing the estate and failing to consider the other factors under RCW 26.09.080. He does not challenge the calculation of the separate property portion of Carmen’s pension under the time rule, nor does he challenge the

award of the separate property interest in that pension to Carmen. His assertion is, in essence, that the award of the increased separate property interest in the pension to Carmen should have been offset by an adjustment in the division of the community property, and the trial court's failure to do so constituted an abuse of discretion.

Peter admits that the character of the property is one factor properly considered by the trial court under RCW 26.09.080(1) and (2), but suggests the trial court relied on those factors to the exclusion of the others. The two factors he alleges were erroneously disregarded are the duration of the marriage, as required under RCW 26.09.080(3), and the economic circumstances of each spouse at the time the division of property was to become effective, as required under RCW 26.09.080(4). Alternatively, he argues that even if the trial court properly considered all the statutory factors, it failed to do so on the record.

Contrary to his assertions, however, the trial court's findings plainly reflect that it considered each of the factors under RCW 26.09.080, and there is nothing to suggest that it treated the property characterization as "dispositive." The trial court's October 2010 order both adopted and expanded upon its earlier January 2009 order, and explicitly reaffirmed its findings from the August 2005 order that originally divided the parties' assets. In those 2005 findings of fact, the court found that the parties were married in 1978 and separated in 2004. This satisfies the trial court's responsibility, under RCW 26.09.080(3), to consider the duration of the marriage. The 2010 order indicated that the trial court was also aware of its responsibility to "put the parties in roughly equal financial positions for the rest of their lives." (Quoting Rockwell II, 157

Wn. App. at 452.) And, by reaffirming its 2005 findings, it also satisfied its responsibility under RCW 26.09.080(4) to consider the economic circumstances of each spouse at the time of division. Those findings included that Peter was nine¹ years younger; that Carmen had health problems and was retired; and that Peter, with his education, knowledge, and work experience, had a much larger expected income of at least \$70,000 per year.

The trial court ultimately summarized its findings as follows:

- a. The court's property division awarding the wife 75.2% of her pension, which includes her separate property interest and 60% of the community property interest is just and equitable. This court reaffirms its previous finding in its August 25, 2005 order that "given the difference in age, earning capacity, physical condition, and that husband had the ability to earn income and save for retirement in the future, it is fair and equitable to divide the community property 60% to wife and 40% to husband."
- b. The court recognizes that the re-characterization of the wife's pension, increasing her separate property interest, reduces the husband's share of the overall marital estate. Nevertheless, in the sound and independent exercise of this court's discretion the court finds that this property distribution is still just and equitable under the circumstances of this case, including after consideration of the parties' present economic circumstances.

The decision to award Carmen her separate property interest in her pension does not reflect that the trial court erroneously believed it was bound to do so. Nor does it suggest the trial court felt it could not adjust the division of community property in light of the pension award, but rather, that it chose to do so in light of the appropriate statutory factors. Indeed, Peter can point to no evidence that supports his argument,

¹ As we noted in Rockwell I, "Peter is, in fact, eight years and four months younger than Carmen. . . . [W]e do not regard this rounding up as an error of fact. . . . Precision in the number of days or weeks or months in such a consideration is not necessarily required." 141 Wn. App. at 246.

except for the overall division of the estate, which he claims reflects an inherent misapplication of the RCW 26.09.080 factors. We reject his argument. The trial court's findings of fact are adequate, they demonstrate that it applied the correct legal standard and did not simply treat the character of the property as dispositive.

II. The Pension Payment Adjustments

In its January 2009 order, the trial court found that Carmen should have been entitled to 75.2 percent of the pension payments between 2005 (the original decree of dissolution) and 2008 (the trial court's order on first remand), but she only received 63.2 percent over that period. This resulted in an overpayment from the pension to Peter in the amount of \$35,908. As the trial court found, "The husband has had the benefit of the monies over paid by the wife (via pension plan) since September 1, 2005. The court calculates prejudgment interest on the \$35,908 he has held from September 1, 2005 through December 1, 2008 in the amount of \$6,898.85 [for a total of \$42,806.85]. A judgment should enter in favor of the wife." The trial court also entered a judgment against Peter for \$24,659.80 in attorney fees, plus prejudgment interest on those fees of \$2,861.77, and \$7,630 in attorney fees awarded by the trial court on remand, for total fees of \$35,151.57. The trial court went on to order that reimbursement for those pension overpayments and for attorney fees should be repaid from Peter's portion of the gross pension: "[W]ife shall receive payment of 100% of the pension until such time as the judgment is satisfied and paid in full at which time husband's pension payments shall be restored to 24.8% of the monthly gross pension payment." The attorney's fee judgment was satisfied through this portion of the order.

In October 2010, the trial court ultimately vacated the remaining \$35,908 and the \$6,898.85 judgments for the pension, but left in place the requirement that Peter pay his share of the pension to Carmen each month until the new government order took effect. It stated, "Until the order directing the pension administrator to divide the annuity 75.2% to the wife and 24.8% to the husband takes effect, the husband shall continue to pay over to the wife the share of the annuity that he receives from the federal government under this court's earlier August 31, 2005 order."

Peter now argues that order on the pension overpayment was an abuse of discretion, because it was done arbitrarily and without findings. He contends the amount that he would ultimately be required to repay under this order was arbitrary, because it was impossible to know how long the Office of Personnel Management would take to implement the 2010 court order. Peter next argues that he had already paid towards the vacated portions of the 2009 judgment in the amount of approximately \$9,000. He argues that when the trial court's October 2010 order vacated the \$35,908 judgment for the pension overpayments and the \$6,898.85 judgment in prejudgment interest, he was entitled under RAP 12.8 to receive restitution for the amount he had already repaid.

We reject Peter's arguments. First, the trial court made the necessary findings as to the overpayment and the interest owed to support the repayment order. The ongoing financial conflict between the parties was obvious. Peter's employment earnings by his own testimony were not regular or uninterrupted. Directing that the judgment amounts be satisfied out of the pension receipts he would have received was

within the trial court's broad discretion to fashion an equitable remedy to correct the earlier distribution of the pension payments. No additional findings were required.

Second, the funds transferred from Peter to Carmen under this provision of the order since January 2009 had satisfied the attorney fees portion of the judgment, but had not come close to off-setting what Peter had received in overpaid pension funds and the interest on those funds. While the October 2010 order was open-ended on its face, it provided Peter a motivation to assist in expediting the final pension order.² We do not find the order arbitrary and find no abuse of discretion in continuing the transfer until the new pension order was entered.

Third, while the court vacated the judgment, it retained the findings that he was overpaid pension funds and owed interest. The court was aware that Peter claimed he was entitled to restitution for approximately \$9,000. He asserted this is the amount by which his pension payments to the court registry exceeded the amounts due on the attorney fee judgment. Thus, they were attributable to the judgment on the overpayment of the pension. Knowing this, the trial court nonetheless decided to make no provision for restitution, which effectively denied Peter the relief he requested. Peter was relieved of more than \$43,000 of repayment obligation, but Carmen was allowed to retain the claimed over-payments. The court explained this in part: "In order to lessen any burden on the husband from the re-characterization of the wife's pension, and to finally sever any future financial ties between the parties, the husband shall not be obligated to repay the amount of the pension that he was overpaid while the first

² Carmen asserts and Peter does not dispute, that the government order went into effect in January 2011, terminating any further payments to her from his portion of the pension.

appeal was pending.” This became part and parcel of the overall division of the property of the parties. The net effect was an increase to Peter’s side of the balance sheet. No abuse of discretion occurred.

III. Disproportionate Share to Carmen

Peter next argues the trial court’s overall division of the assets resulted in a “patent disparity,” suggesting that the disproportionate award to Carmen was erroneous because it failed to leave the parties in “roughly equal financial positions for the rest of their lives.” Rockwell I, 141 Wn. App. at 243. While we noted this goal of leaving the parties in roughly equal positions, in our previous opinions, we also noted that we are not required to divide community property equally. Id. Where “one spouse is older, semi-retired, and dealing with ill health, and the other spouse is employable, the court does not abuse its discretion in ordering an unequal division of community property.” Id. “A property distribution need not be equal to be ‘just and equitable.’” In re Marriage of Tower, 55 Wn. App. 697, 700, 780 P.2d 863 (1989) (quoting In re Marriage of Nicholson, 17 Wn. App. 110, 117, 561 P.2d 1116 (1977)). “‘The key to an equitable distribution of property is not mathematical preciseness, but fairness.’ Fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules.” Id. (quoting In re Marriage of Clark, 13 Wn. App. 805, 810, 538 P.2d 145 (1975)).

In the initial appeal, Peter challenged the division as unfair and inequitable, arguing that a 50/50 division was required. We rejected his claim and indicated we could affirm the trial court’s 60/40 split, but for the pension recharacterization issue.

Rockwell I, 141 Wn. App. at 255. Peter now embraces that ratio of division and claims the 2010 re-division on remand, closer to 70/30, reflects an inherent patent disparity and thus is a manifest abuse of discretion. We did not suggest in the first appeal that the 60/40 split originally before us was the only possible division that would not be an abuse of discretion. Comparing the two divisions is of no significance by itself. The question is whether the final division of property is fair and equitable given the earning capacities of the parties, their life expectancies, and other factors.

The trial court's findings of fact belie Peter's argument, expressly reflecting that it weighed the circumstances of the marriage and the factors under RCW 26.09.080, and exercised its discretion. Reaffirming its findings from the August 25, 2005 order, it took into account "the difference in age, earning capacity, physical condition, and that husband had the ability to earn income and save for retirement in the future." (Quoting its August 25, 2005 order.) It also stated:

In exercising its discretion, this court also took into consideration the Court of Appeals' mandate that "the trial court must put the parties in roughly equal financial positions for the rest of their lives. This requires considering the combination of the division of property and the expected income and earnings of the parties" and this court has had all these factors in mind in dividing the parties' estate on remand.

(Citation omitted) (quoting Rockwell II, 141 Wn. App. 248-49).

In Rockwell I, we noted, "Peter was younger, in good health, and employable at a substantial wage. Moreover, substantial evidence showed that Carmen was retired, older, and in poor health. Accordingly, the trial court did not abuse its discretion when it compared Peter's age, health, and employability (and, thereby, future earning capacity) against Carmen's." 141 Wn. App. at 248. And, on remand for the second

time, the trial court expressly reaffirmed those original findings on the difference in age, earning capacity, physical condition, and future earning potential.

The majority of the facts about the parties' respective financial positions were the same when the trial court considered the distribution in 2010 as they had been upon first consideration in 2005. Carmen was still retired, unable to work, and had health problems causing her significant pain and discomfort and requiring the purchase of certain medications and health services. Peter of course remained eight years and four months younger than Carmen, and had the same two bachelor's degrees and work experience that informed the trial court's estimate that he was capable of working and earning at least \$70,000 gross per year.

Peter argues that under this division, he will be required to work until he is 70 while Carmen retired at 60; he argues that he has been able to earn a great deal less than the trial court expected him to earn; and that his own health is worsening. The record reflects that Peter did continue to work sporadically, and when he was fully employed, he earned significantly more than the trial court anticipated. For example, he earned \$160,114.90 in 2007 and \$110,170.81 in 2008. He was not regularly employed and earned considerably less the other three years, however: \$8,022.89 in 2005; \$14,748.00 in 2006; and \$32,072.01 in 2009. He contends his average gross income over the past five years is less than the trial court's 2005 estimate that he would earn \$70,000 per year. But, the trial court was just as readily entitled to look at his earning potential from 2007 and 2008 and find that he had the potential to earn much more than the \$70,000 per year it had originally estimated.

We find no support for Peter's assertion that there was a patent disparity or an abuse of discretion. The division here is not as disparate as in In re Marriage of Dessauer, 97 Wn.2d 831, 835, 839, 650 P.2d 1099 (1982) (affirming 75/25 split of assets in 25 year marriage when wife was seven years older than the husband and had health problems limiting her ability to work while husband had military pension and was employed), overruled on other grounds, In re Marriage of Smith, 100 Wn.2d 319, 322-23, 669 P.2d 448 (1983). The trial court was not required to arrive at an equal distribution of the marital property, but was required to consider the circumstances of the parties and the marriage, to be fair, and to apply its discretion. Tower, 55 Wn. App. at 699-700. The stated goal of putting the parties in roughly equal financial positions for the rest of their lives was achieved here.

IV. Award of Attorney Fees Below

After the trial court's order on second remand, Peter filed several motions challenging the decision, including: a motion to correct clerical error or in the alternative for reconsideration; a motion for reconsideration, arguing he should not have had to repay his share of the pension until the government pension order took effect; and a motion seeking judgment against Carmen for amounts he had allegedly overpaid. The trial court denied each of these motions. It also awarded Carmen \$1000 in attorney fees for having to respond to Peter's improperly filed motion for reconsideration and \$4000 for having to respond to Peter's motion for judgment on overpaid amounts. Carmen specifically sought that \$4000 fee award, stating in her response:

This court should deny Peter's motion for a judgment against Carmen and award her attorney fees for having to [defend against] this motion. Peter's relentless litigation must be stopped. The only way this is likely to happen is if this court sanctions Peter for bringing these incessant motions. . . . Carmen has incurred over \$4,300 [in attorney fees] attempting to formalize this court's ruling, and fending off Peter's repeated demands for payment from her based on his claims that he is owed money. This court should award Carmen attorney fees of \$4,000.

Peter responded that this "sanction" attorney fee award was sought without a supporting fee declaration and argued there was no justification for such an award. He raised the same argument against the \$1,000 fee award, noting that it too was unsupported by a fee declaration. This same assertion is echoed now on appeal. Peter contends that the \$5,000 in attorney fees must be reversed, because the trial court failed to determine these amounts based on the lodestar method or to make sufficient findings of fact and conclusions of law to develop an adequate record for review.

The trial court awarded the \$1,000 award for Carmen "having to respond to respondent's Motion for Reconsideration, which was improperly filed under CR 59(j)," which requires leave of the court for successive motions. And, the \$4,000 award was for Carmen's "having to respond to this motion, which seeks the same relief that respondent previously sought and was already denied." The court did not order sanctions. It merely awarded fees on equitable considerations. In re Marriage of Van Camp clearly holds the lodestar method need not be applied in dissolution proceedings. 82 Wn. App. 339, 340, 918 P.2d 509 (1996). The court in Van Camp noted that the primary considerations for the award of a fee in a dissolution action are equitable. Id. at 342. The overriding considerations are the need of the party

requesting the fees, the ability to pay of the party against whom the fee is being requested, and the general equity of the fee given the disposition of the marital property. Id.; RCW 26.09.140.

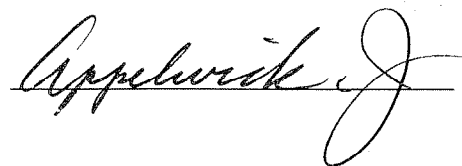
The trial court did not abuse its discretion by awarding \$5,000 in attorney fees.

V. Attorney Fees on Appeal

Both parties request attorney fees on appeal under RAP 18.1, based on the intransigence of the other party. In re Marriage of Mattson, 95 Wn. App. 592, 605, 976 P.2d 157 (1999). Intransigence is demonstrated by conduct such as litigious behavior, filing repetitive or excessive motions, or discovery abuses. In re Marriage of Wallace, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002). When intransigence is established, the parties' respective financial resources become irrelevant. Id.; In re Marriage of Morrow, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). We decline to award fees to either party on this basis.

Carmen also requests attorney fees under RCW 26.09.140, which provides, in relevant part: "The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith." This court declined to award fees to either party under RCW 26.09.140 on the last appeal. Rockwell II, 157 Wn. App. at 454. We decline to do so on this appeal as well.

We affirm.

A handwritten signature in black ink, appearing to read "Appelwick J.", written over a horizontal line.

WE CONCUR:

Leach, C. J.

Dwyer, J.