Supreme Court No. 95993-5
Court of Appeals No. 50190-2-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In Re:

MARINA NICOLE TURNER, Respondent,

vs.

RANDOM ERIK VAUGHN, Appellant

Pierce County Superior Court

Cause Nos. 16-3-00665-4

The Honorable Judge Kitty-Ann van Doorninck

Petition for Review

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I. IDENTITY OF PETITIONER

Random Erik Vaughn, the appellant below, asks this Court to review the decision of Division II of the Court of Appeals referred to in Section II.

II. DECISION OF THE COURT OF APPEALS

Random Erik Vaughn seeks review of the unpublished opinion, filed on April 24, 2018, in In re the Committed Intimate Relationship of Marina N. Turner v. Random Erik Vaughn, in COA No. 50190-2-II reconsideration denied on May 22, 2018. A copy of the Unpublished Opinion and Order Denying Motion for Reconsideration are attached.

III. ISSUE PRESENTED FOR REVIEW

> To establish the pooling of resources and services for joint projects factor for determining if a committed relationship existed, is it sufficient to show that the parties invested time, efforts and financial resources into their relationship and the raising of a child?

IV. STATEMENT OF THE CASE

Random Vaughn and Marina Turner met in Washington State in March 2011. (RP 31) She got her first job in Seattle after massage therapy school. (RP 31, 115) Mr. Vaughn is from Washington State and was self employed working here doing video production. (RP 116, 203, 34) In October 2011 they moved in together and ultimately rented an apartment

in Lynnwood, Washington. (RP 35, 209-210)

During this time, the parties shared their expenses equally. (RP 34) Ms. Turner worked full time earning approximately $200 a day plus tips working five days a week. (RP 34) Mr. Vaughn earned money through film production out of his studio in Everett, Washington. (RP 34)

Mr. Vaughn's involvement with medical marijuana began in 2011 when he got a medical marijuana card due to back pain. (RP 218) Through associates at his production company, Mr. Vaughn became involved with growing medical marijuana.(RP 220-223) He became involved with a collective garden called "Your Own Garden". (RP 226) Ms. Turner testified that although Mr. Vaughn began working with medical marijuana when they resided in Lynnwood, he was not making much money in it. (RP 34)

Ms. Turner was never a member of Your Own Garden. (RP 242) One time she briefly helped do some trimming at the farm in Monroe that was used by Your Own Garden. (RP 106) Ms. Turner also obtained a medical marijuana card in February 2012 so that Mr. Vaughn could grow more marijuana plants. (RP 72-73) The card expired in February 2013 and she never renewed it. (RP 99) Ms. Turner never signed any paperwork for Your Own Garden. (102)

They lived in Lynnwood until August 2012 when Marina moved to

California. (RP 35) Random assisted her with the move and both of their names were on the lease in California, which was signed on September 13, 2012. (RP 42, 211, 212) However, Random continued to live in Washington until October when he brought Marina's things to her in California. (RP 211, 212) Thereafter, he spent half his time in California with her and half his time in Washington. (RP 215)

In California Ms. Turner continued to pursue her career. (RP 109) She was working 3 jobs at a time, 6 days a week working 8-9 hours a day. She also did massages on the side. (RP 114) In Washington, Random continued to pursue his career in film production and marijuana. (RP 242-247, 206)

Your Own Garden was shut down in December 2012 because it was running in the red every month as the donations that they were receiving were not sufficient to cover the bills to operate the collective. (RP 242) At this same time, Mr. Vaughn rescinded the lease on the farm for the collective in Monroe on December 3, 2012 . (RP 242-243)

When Your Own Garden closed, Mr. Vaughn leased storage space in a warehouse in the City of Pacific to store property from Your Own Garden. (RP 243-244) The landlord told them of an available suite that he had for rent if they wanted to set up another collective garden and they decided to give it another try.(RP 245) At this time, Sam Becker, one of

the former members of Your Own Garden, formed Pacific Green Collective, which included himself and Mr. Vaughn, among others. (RP 246)

In April 2013, Mr. Vaughn broke up with Ms. Turner. (RP 117-118, 254) Thereafter, Ms. Turner advised him that she was pregnant and they reconciled. (RP 256-257) Ms. Turner then remained in California until after the birth of their son Dean on December 20, 2013. She did not however return to the state of Washington until March 10, 2014. (RP 260-261)

When Ms. Turner returned to Washington, she and Mr. Vaughn resided with his parents until they were able to find an apartment of their own. (RP 262-263, 530-531) They ultimately ended up residing in Puyallup. (RP 263, 530-531) Ms. Turner did not work full time again from Dean's birth through the parties' separation on December 8, 2015. (RP 82, 265, 531))

In October or November 2011, Ms. Turner and Mr. Vaughn opened a joint checking account at Chase Bank. (RP 33) This account was used to pay household expenses. (RP 83)

Pacific Green Collective began accepting credit cards in August 2013. (RP 484) In order to accept credit cards they had to have a bank account. (RP 484) The company they were working with to do this was

called Square. (RP 484) Square canceled their account because they did not like the products that Pacific Green Collective was involved in. (RP 546-547) Also, banks refused to provide services for businesses that work with marijuana. (RP 425) The account had been in Mr. Vaughn's name and therefore he needed a new bank account in which to place the Square funds. As a result, he talked with Ms. Turner and she agreed to allow those funds to be deposited into the joint account because it had her name on it. (RP 59, 547-548) This also meant that her social security number could be attached to it. (RP 59) However, when it was used, Mr. Vaughn took the steps necessary to correct it for taxes. (RP 550-553)

Ms. Turner testified that after the credit card money from Square began being deposited into this account that she continued to have unlimited access to the funds and that Mr. Vaughn told her that she had no budget. (RP 83-84) She further testified that she withdrew on average $9140 a month from the account and that on average $100,000-$200,000 a month would go into the account through Square. (RP 84-85)

Mr. Vaughn testified that at the time they discussed the money being deposited from Square into their joint account, he told her that the money was the proceeds of Pacific Green Collective and that she was not to take that money. (RP 573-574)

On December 8, 2015, Mr. Vaughn found an apartment and

permanently moved out of the formerly shared residence in Puyallup. (RP 284-285) On February 23, 2016, Ms. Turner filed a petition for a committed intimate relationship claiming an interest in Mr. Vaughn's "medical marijuana business". (CP 50-51)

The trial court on March 9, 2017 found that there was a committed intimate relationship. (RP 655) The Court of Appeals affirmed the trial court in a decision issued on April 24, 2018. A motion for reconsideration was denied by the court on May 22, 2018. That order and the unpublished opinion of the Court of Appeals are attached hereto as Appendix A.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THE SUPREME COURT SHOULD ACCEPT REVIEW AND REVERSE THE COURT OF APPEALS DIVISION II DETERMINATION THAT A COMMITTED INTIMATE RELATIONSHIP EXISTED BASED UPON A POOLING OF RESOURCES AND SERVICES FOR JOINT PROJECTS THAT CONSISTED OF THE TIME AND EFFORTS THE PARTIES PUT INTO THEIR RELATIONSHIP AND IN RAISING THEIR CHILD WHICH IS DIRECTLY CONTRARY TO THIS COURT'S RULING IN *IN RE MARRIAGE OF PENNINGTON*, 142 WN.2D 592, 14 P.3D 764 (2000) WHEREIN IT WAS STATED THAT TO ESTABLISH THE POOLING OF RESOURCES AND SERVICES FOR JOINT PROJECTS THE PARTIES MUST "JOINTLY INVESTED THEIR TIME, EFFORT, OR FINANCIAL RESOURCES" IN A SPECIFIC ASSET.

RAP 13.4, Discretionary Review of Decision Terminating Review, under (b) Considerations Governing Acceptance of Review states in

relevant part as follows:

> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court;

In this case Division II of the Court of Appeals has taken a position in two published opinions and again in this case, which is contrary to this Court's decision in *In Re Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000) by allowing the pooling of resources and services for joint projects factor to be satisfied by showing that the parties expended time and efforts into their relationship or in the raising of a child which directly conflicts with Pennington's requirement that the parties expend time, efforts, or financial resources into a specific asset. This appears to be a confusion and mixing of the factors of the intent of the parties and purpose of the relationship with the factor of pooling of resources and services for joint projects which has the effect of essentially eliminating the pooling of resources and services for joint projects as a factor to be considered by the court. Essentially, the Court of Appeals decisions have the effect of overruling or reversing Pennington.

In the case of *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995) in determining whether or not a meretricious relationship (now

known as a committed intimate relationship) existed the court listed 5 factors to be considered. They were "continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties." (at 346) In the Pennington case the Court began their analysis of these factors by stating:

> While property acquired during the meretricious relationship is presumed to belong to both parties, this presumption may be rebutted. Connell, 127 Wash.2d at 351, 898 P.2d 831. We have never divorced the meretricious relationship doctrine from its equitable underpinnings. For example, in both Connell and Peffley-Warner, we stated that "property acquired during the relationship should be before the trial court so that one party is not unjustly enriched at the end of such a relationship." Connell, 127 Wash.2d at 349, 898 P.2d 831 (emphasis added) (citing Peffley-Warner, 113 Wash.2d at 252, 778 P.2d 1022). If the presumption of joint ownership is not rebutted, the courts may look for guidance to the dissolution statute, RCW 26.09.080, for the fair and equitable distribution of property acquired during the meretricious relationship. Connell, 127 Wash.2d at 350, 898 P.2d 831. (At 602)

Basically, the purpose of finding a meretricious relationship or committed intimate relationship is to avoid an unjust enrichment in property that was acquired during the relationship. The focus has been on determining what property the parties have an equitable interest in. Hence, the Court has "never divorced the meretricious relationship doctrine from its equitable underpinnings", the point being to avoid a situation where the parties have jointly developed an asset and yet because of the fact that one person's name

was not on the asset, that person may not have a legal interest in the asset to the unjust enrichment of the other.

The Court in Pennington went even further then they did in Connell in highlighting factor number 4, the "pooling of resources and services for joint projects" (Connell, at 346). The Pennington court in its analysis of both cases before it (Pennington [Van Pevenage] v Pennington and Chesterfield v. Nash) added the following requirements to ensure that the division of an asset acquired during a committed intimate relationship was appropriate. The Court in finding that Van Pevenage had "spent money on food, household furnishings, carpet and tile, and some kitchen utensils" (at 604) and that she "cooked meals, cleaned house, and helped with interior decoration." (at 604), basically kept the house, stated:

> Van Pevenage has no evidence to suggest she made constant or continuous payments jointly or substantially invested her time and effort into any specific asset so as to create any inequities. Given the evidence presented at trial, we cannot conclude the parties **jointly invested their time, effort, or financial resources in any specific asset** to justify the equitable division of the parties' property acquired during the course of their relationship. (at 605 emphasis added)

In regard to the Chesterfield portion of the Pennington case, the Court felt that even though the parties had a joint checking account for living expenses into which they both deposited money; the fact that each of them assisted the other with work-related issues, including assistance with travel logs, office emergencies, accounts payable, and office correspondence; the

fact that they lived together in Chesterfield's home and jointly contributed towards the mortgage, but otherwise maintained separate bank accounts (other than a joint account to pay bills) and purchased nothing jointly; and the fact that they also maintained their own careers, financial independence, and contributed separately to their retirements; this did not show that they pooled "their **time, effort, or financial resources** enough to require an equitable distribution of property". (at 607 emphasis added). The court continued by stating:

> Similarly, the parties maintained separate accounts, purchased no significant assets together, and did not significantly or substantially pool their time and effort to justify the equitable division of property acquired during the course of their relationship. (at 607)

Basically, to the 4th factor of pooling of resources and services for joint projects, the Court added the requirement that to establish this it must be shown that the parties pooled their "time, effort, or financial resources" (at 605) into a particular asset. Without this there is no equitable basis upon which the court can establish an interest in property acquired during the relationship, hence, there is no basis to establish a committed intimate relationship.

However, Division II in the case of *Walsh v. Reynolds*, 183 Wn. App. 830, 335 P.3d 984 (2014) in finding that a committed

intimate relationship existed, stated the following in their analysis regarding pooling of resources:

> *Pooling of Resources*: The trial court found that, although Walsh was the principal income earner, both Walsh and Reynolds "contributed their time and energy to ... **raising ... their family**" and to "joint projects such as the extensive remodel of the Federal Way home." Suppl. CP at 411.(at 846 emphasis added)
>
> In *Muridan v. Redl*, 3 Wn. App. 2d 44, 413 P.3d 1072 (2018)

Division II stated the following in analyzing the pooling of resources factor:

> Second, Muridan argues that he and Redl did not pool resources, pointing out that the parties maintained separate accounts and that each party paid bills throughout the relationship. This argument also fails. Pointing to individual assets that the parties kept separate does not refute the trial court's finding that pooling occurred. The trial court did not find that the parties pooled all resources. The record contains substantial evidence, unrefuted by Muridan, to support the finding that Muridan and Redl pooled at least some of their resources. They shared daycare expenses, they both contributed to groceries, and they maintained a joint checking account. Before declaring bankruptcy, Muridan asked Redl to hold onto $20,000 of his cash. This evidence would persuade a rational, fair-minded person that some pooling of resources did occur. Fahey, 164 Wash. App. at 55, 262 P.3d 128. The court's finding is supported by substantial evidence. (at 57-58)

The court continued by stating:

> The court found that the parties pooled resources. As discussed above**, both parties contributed time, energy, and resources to the relationship and to raising their son**. Muridan paid for housing and utilities; Redl paid for

> health insurance and cable. Both parties contributed to groceries and daycare expenses. Furthermore, evidence exists of explicit comingling of funds. Muridan argues that the parties did not pool resources. Although both parties kept at least some aspects of their finances separate, they also pooled many of their finances. This factor favors that a CIR existed. (at 59-60 emphasis added)

In the present case of Turner v. Vaughn, Division 2 stated the following:

> As to the pooled resources and services argument, Turner's withdrawals from the joint bank account, without corresponding deposits, weighs against a pooled resources finding. However, Turner used the joint bank account to pay household and personal expenses from 2011 to 2015. Turner also contributed money to rent and shared expenses during the relationship and **contributed time, energy, and resources by raising their child and keeping up their home**. Vaughn argues that the joint account was a pass through account for money from his marijuana business; however, it is undisputed that money from this account paid for household expenses. Substantial evidence supports the trial court's finding of pooled resources and services for joint projects. (at 8-9 emphasis added)

The court continued in its analysis stating the following regarding the pooling of resources and services for joint projects:

> d. Connell Factor Four: Pooling of Resources and Services for Joint Projects
>
> The court found that the parties pooled resources. As discussed above, the couple had a joint bank account, joint assets, and **both parties contributed time, energy, and resources to the relationship, and to raising their children**. This factor favors that a CIR existed. (at 10 emphasis added)

The Court's introductory statement, "As to the pooled resources and services argument, Turner's withdrawals from the joint bank account, without corresponding deposits, weighs against a pooled resources finding." is accurate. However, what the Court never says or comments on regarding that issue is how the asset from which the money deposited into that account was developed. As noted above, Pacific Green Collective was a nonprofit medical marijuana collective that came about from the efforts of Mr. Vaughn and others over a period of several years during which time Ms. Turner was working full time, first in the state of Washington, and then full time in the state of California pursuing her own career. (RP 33-34, 109, 114) Other than one time helping to prune plants at one of the collective gardens (RP 106), the collective that was shut down because it would not producing enough money to pay for itself (RP 242), and allowing credit card money to be deposited into the joint bank account for Pacific Green Collective (RP 59, 547-548), Ms. Turner did nothing to develop the marijuana business, but focused her full time attention on developing her own career. (RP 33-34, 109, 114)

The only asset that the parties acquired in both of their names was a new 2012 Honda that Mr. Vaughn bought for Ms. Turner because she did not have a car. (RP 37, 39, 232-233) She drove it until their first child was born and then she drove Mr. Vaughn's separate property Honda Pilot

because the child's car seat would not fit in the civic. (RP 234)

The Court states "However, Turner used the joint bank account to pay household and personal expenses from 2011 to 2015." (at page 8) This was expressly found in the Pennington case, the Chesterfield portion of it, to be insufficient to demonstrate a pooling of resources. ("The trial court found Chesterfield and Nash had a joint checking account for living expenses, into which they both deposited money." Pennington at 606) The Court continues by stating that "Turner also contributed money to rent and shared expenses during the relationship" (at page 8). In the Pennington case, both the Pennington and Chesterfield portions, the parties contributed to the joint finances of the home and this was determined to be insufficient.

It is at this point that the analysis shifts to their new position. The Court states in the concluding portion of the sentence quoted above, "and contributed time, energy, and resources by raising their child and keeping their home." As to the keeping of the home, that is listed above as being something that the court in Pennington rejected. However, the new element, that has only been cited by Division II now comes into play, that is that essentially taking care of a child becomes a pooled resource. This position is made abundantly clear on page 10 of Court's analysis of factor number 4. There the Court stated: "As discussed above, the couple had a joint bank account, joint assets, and both parties contributed time and energy and

resources to the relationship, and to raising their children." (It should be noted that the word "children" here is incorrect due to the fact that while living together the parties only had one child. Their second child was born after the parties separated. (RP 7))

In this case, it is abundantly clear that the only joint "asset" that the parties had in this case was their child, Dean. Ms. Turner received the value and benefit of the car that was purchased during the relationship and she did nothing to develop or assist Pacific Green Collective. The only things cited by Division II to support a pooling of resources for joint projects were things that had been previously rejected by this Court in its decision in Pennington (joint bank account for household expenses, sharing of household expenses, housekeeping in the jointly occupied home). Since that is the case, the only thing left as an "asset" is something that was not raised in the Pennington case, that is, the raising of a child and the parties' relationship. Under a clear reading of Pennington, the pooling of resources for joint projects is a factor that deals with property, assets that the parties may have jointly developed as in developing or increasing its financial value. Therefore, Division II's ruling is clearly in conflict with this Court's decision in Pennington.

Children are not property, they are not assets to be jointly developed by the parties. One could certainly not say that this particular child is now worth 50% more than the child would have been worth had the parties not

pooled their time and efforts into it. A child is not property, a child has its own intrinsic value, and at the end of a relationship the law has already established a basis for determining how people are financially compensated for their efforts in raising a child in the future, that is child support. We do not divide children as financial assets. This is not a proper factor for determining the pooling of resources for joint projects. The Court's reference to contributing time, energy and resources to the relationship, is likewise not property and the above analysis applies equally to that.

It may be argued that if one person stays home and takes care of the parties' child, that allows the other party to spend their time in the pursuit of the development of an asset and therefore they have pooled their time and efforts into the asset by the fact that one party is not required to obtain daycare for the child. If the parties' intent was that there was to be no daycare because they wanted to raise their children themselves due to some opposition to daycare and therefore a choice was made that one party would stay home full time with the children, that conscious decision may be something the court might factor in under appropriate facts. However, this would still go to the intent of the parties as opposed to a pooling of resources and would still not apply to this factor.

Nevertheless, that is not the scenario that we have in the case of Mr. Vaughn and Ms. Turner. Ms. Turner stayed home and had all of her needs

fully met by Mr. Vaughn. Not only were all her needs met, but she was able to put away over $9100 a month for a period of approximately 16 months in addition to having all of her needs met. Essentially, she received the equivalent of full maternity leave, with all expenses paid plus, for the time that she did not work outside the home. Thereafter, she simply went back to work at the very same place she was working in California before moving to Washington and continued her career the same as before. (RP 43, 73) The children were thereafter put into daycare (RP 138-139) while both parties continued to pursue their own careers. This is not a scenario where one party sacrificed their life for the other or due to a moral, philosophical, or religious aversion to daycare stayed at home with the children and at the time of the separation was had nothing.

In an effort to further elaborate and clarify this, let's assume for a moment that in March 2014 Ms. Turner changed her mind and decided to remain in California, essentially ending the relationship. At that point in time, it would have been abundantly clear that Ms. Turner did nothing for Pacific Green Collective and she had been fully engaged in pursuing her own separate career interests throughout the relationship, first in Washington state and then in California. Mr. Vaughn on the other hand had pursued his video production business from which he paid shared expenses and he also pursued medical marijuana in the state of Washington. He only lived half the time in

California. Had the parties separated at that point in time Ms. Turner would clearly have done nothing but pursue her own separate interests and career in both Washington and California. She would have had no interest in any proceeds from Pacific Green Collective, even under the analysis of Division II.

If Ms. Turner remained in California and ended the relationship, and assuming that the child remained with her, she would have still had to take care of the him. After a time of maternity leave she would have returned to work. She would also have been entitled to child support. However, she clearly would not have been entitled to an interest in the proceeds of Pacific Green Collective simply because the child was residing with her. The simple fact that she cared for the parties' child and was able to do so without working, is not enough to justify an equitable interest in Pacific Green Collective.

There was no evidence that she expended time, efforts, or financial resources in Pacific Green Collective. As the Court of Appeals correctly observed, if all she did was to remove funds from the joint account that had been deposited there for Pacific Green Collective, without her depositing anything into the account, this would weigh "against a pooled resources finding." (at 8)

Since the mere agreement to allow the Square money for Pacific

Green Collective to be deposited into their joint account did not require her to expand any time, effort or financial resources, it was clearly not sufficient for a finding of pooling of resources. The fact that Mr. Vaughn spent funds to purchase a car for Ms. Turner for her use and put it in both of their names was likewise, not an asset from which Ms. Turner did not benefit during the relationship, and not an asset that is being sought in this action. The asset being sought in this action are the proceeds from Pacific Green Collective, Mr. Vaughn's "medical marijuana business". (CP 50-51) (If that is an asset, given that it is a nonprofit corporation.) Ms. Turner expended no time, efforts, or financial resources towards the development of that asset that would make it inequitable for her not to be awarded an interest in it.

She invested her full time efforts into her own career interests and only took a break from those career interests to take care of the parties' child. Since a child is not an asset, and it cannot be argued that caring for the child invested time, efforts, or financial resources in the development of an asset, in this case, Pacific Green Collective, the fact that the parties jointly raised their child does not bypass this Court's prior requirements for the parties to invest time, efforts, or financial resources into an assest.

As a result, this decision of Division II and its' prior rulings that the time spent on the relationship or the time spent caring for the parties' child, is a pooling of time, efforts, or financial resources in a specific asset

is in conflict with this Court's decision in Pennington and review must be granted to reverse this error.

VI. CONCLUSION

For the foregoing reasons, the Supreme Court must accept review and reverse the Court of Appeals and Trial Courts determination that a CIR existed. The only basis for this determination under the pooling of resources and services for joint projects factor was not time, efforts, or financial resources invested in an asset, but contrary to this Court's decision in Pennington, it was time and efforts spent in the relationship and raising the parties' child. Therefore, this Court must accept review and correct the clear error made by Division II of the Court of Appeals.

Respectfully submitted on June 19, 2018.

Clayton R Dickinson, WSBA No. 13723
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that on June 19, 2018 I emailed a copy of Appellant's Petition for Review to:

Jason P. Benjamin
jason@attorneys253.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Fircrest, Washington on June 19, 2018.

Clayton R Dickinson, WSBA No. 13723
Attorney for Appellant

Appendix A

Filed
Washington State
Court of Appeals
Division Two
May 22, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Committed Intimate Relationship of: MARINA N. TURNER, Respondent, and. RANDOM E. VAUGHN, Appellant.	No. 50190-2-II ORDER CORRECTING SCRIVENER'S ERROR AND DENYING MOTION FOR RECONSIDERATION

Respondent, Marina N. Turner, moves this court to correct a scrivener's error in its April 24, 2018 unpublished opinion. Appellant, Random E. Vaughn, moves this court to reconsider its April 24, 2018 opinion.

After review of this record, we grant Respondent's motion and correct a scrivener's error on page two, paragraph one, the last full sentence reading, "The trial court found Turner lacked credibility on this point," to be corrected to read: "The trial court found Vaughn lacked credibility on this point."

We deny Appellant's motion for reconsideration.

IT IS SO ORDERED.

Panel: Jj. Johanson, Maxa, Melnick.

Melnick, J.

Johanson, J.

Maxa, C.J.

Filed
Washington State
Court of Appeals
Division Two

April 24, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Committed Intimate Relationship of: MARINA N. TURNER, Respondent, and. RANDOM E. VAUGHN, Appellant.	No. 50190-2-II UNPUBLISHED OPINION

Random Vaughn appeals from a trial court ruling that he and Marina Turner entered into a committed intimate relationship (CIR). In the alternative, he argues that, if a CIR existed, the court erred in establishing its duration. Vaughn challenges some of the court's findings of fact. He also argues the court erred by denying his motions for a new trial and for recusal of the trial court judge.

We affirm.

FACTS

I. TURNER AND VAUGHN'S RELATIONSHIP

Vaughn and Turner started dating in May 2011. Throughout the relationship, Vaughn repeatedly asked Turner to take his last name. In greeting cards, he referred to Turner as his wife. On Facebook, he held himself out as a married man.

The couple jointly signed a lease for an apartment in Lynwood, Washington, and moved in together in October 2011. Initially, Turner and Vaughn each paid half the rent.

By November 2011, the couple opened a joint bank account. Both Turner and Vaughn also maintained separate bank accounts. Turner used the joint account to pay for the couple's household and personal expenses. Vaughn claimed he only put Turner on the account to process payments for his marijuana business, and that he told Turner she could not take any of the money in the account from the marijuana business. The trial court found Turner lacked credibility on this point.

Vaughn used Turner's social security number for debit and credit transactions of his marijuana business, and then deposited the funds into their joint account. Turner testified that Vaughn told her she had no budget, and that she withdrew $9,140 a month on average without protest from Vaughn.

In April 2012, Turner purchased a vehicle and had it titled in both of their names.

In September 2012, Turner and Vaughn moved from their Lynwood apartment after jointly signing a lease for a California apartment. From September 2012 to March 2014, Vaughn spent half his time in California with Turner, and half his time in Washington for work. During their time in California, Vaughn received pay stubs, business invoices, bank statements, and utility bills listing the address of the California apartment. The couple also received a vet bill from a pet hospital in California showing both their names.

Turner worked full time in California, contributing to payments for rent and shared expenses. In November 2012, Vaughn sent Turner an e-mail telling her he loved her. He referred to their apartment in California as their home. Throughout 2013, Vaughn had some business meetings in California, but still maintained a place of business in Washington and received mail at a post office box in Washington.

In April 2013, the couple had an argument. Vaughn claimed the two then broke up. Turner told her family and Vaughn's family about the argument. Days later, Turner told Vaughn that she was pregnant, and the two reconciled. Shortly thereafter, Vaughn bought a ring for Turner.

A month later, the couple traveled to Thailand with family. While there, the couple exchanged vows and rings and took photos. Vaughn wore a ring on his wedding finger. The couple never received a legal certificate of marriage. Vaughn claimed that he told Turner from the beginning of the relationship that he would not get married. Upon returning home, Vaughn refused to marry Turner. "[H]e was worried about the federal ramifications of being married with his activity in marijuana." Report of Proceedings (RP) (Feb. 15, 2017) at 102.

In August, Vaughn expressed his love for Turner. In December, the couple's first child was born. After the birth, the family moved back to Washington. They stayed with Vaughn's parents until jointly signing a lease for an apartment in Puyallup. Turner stopped working and cared for their child. The couple also sent out family Christmas cards in 2014 and 2015. Turner had a second pregnancy, but had a miscarriage.

In April 2015, Turner discovered she was pregnant for a third time. Vaughn became upset and told Turner he thought another baby would ruin their relationship. Vaughn claimed this argument amounted to a break up, because he told Turner that the relationship was over, but the trial court found he lacked credibility on this point. In July, Vaughn began spending a few nights a week in Oregon for work. Around the same time, he started a relationship with another person.

In early December, Vaughn moved out of the couple's Puyallup apartment. The couple's second child was born about a month later. In February, Turner became aware of Vaughn's other relationship.

II. PETITIONS FOR TERMINATION OF CIR AND A PARENTING PLAN

In February 2016, Turner filed a petition for termination of the CIR[1] and a division of the couple's property and liabilities. The petition claimed the CIR terminated on December 8, 2015. Shortly thereafter, Turner filed a separate petition for a parenting plan and child support. The trial court consolidated the cases but later bifurcated them. A trial occurred on whether a CIR existed and, if it did, its duration.[2]

The day before ruling, Turner electronically filed a declaration, served a copy on Vaughn, and provided the court with a copy. The declaration asserted that Vaughn filed a false police report of child abuse against Turner three days before the judge was set to issue her oral rulings. Vaughn's counsel denied the assertion and the court set a hearing and ruled on the merits.

The trial court, relying on *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995), ruled that the parties had a CIR from October 2011 through December 2015. Despite conflicting testimony, the court found the CIR terminated on December 8, 2015, when Vaughn moved out of the Puyallup apartment. The court found that "throughout the entire trial, [Vaughn had] been incapable of telling the truth." RP (Mar. 9, 2017) at 660. The court considered the declaration in making the parenting plan decision and in disallowing Vaughn unsupervised contact with the children. The judge also said her decision that Vaughn had engaged in an abuse of conflict was not dispositive until reading the declaration.

The court issued a written order on the CIR issues and the parenting plan, which formalized its oral ruling.

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[1] Although the parties used the term "dissolution," because they never married, the legal term "dissolution" is inapplicable. Ch. 26.09 RCW. We use the term termination.

[2] The trial also included child support and parenting plan issues. However, the parties later settled these issues.

Vaughn filed a motion and declaration for a new trial and recusal of judge. Vaughn primarily argued that the declaration affected the court's ruling on the parenting plan, but that he was entitled to a new trial on all issues because the declaration may have affected the court's decision on all contested issues. He argued that by providing a working copy of the declaration to the judge, Turner engaged in an ex parte communication in violation of RPC 3.5(a) and (b). In the alternative, Vaughn argued that by considering the alleged ex parte communication, the judge created an irregularity in the proceeding under CJC 2.9(A)(1), requiring a new trial and recusal if the court granted a new trial. The court denied the motions. Vaughn appeals.

ANALYSIS

I. CIR

Vaughn argues the trial court erred in concluding he and Turner had a CIR. He also argues, if a CIR existed, the trial court erred by ruling it ended in December 2015, instead of in April or July of 2015. We disagree.

A. Standard of Review

We review the trial court's conclusion relating to the existence of a CIR de novo. Whether a CIR existed between the parties presents "a mixed question of law and fact." *In re Pennington*, 142 Wn.2d 592, 602, 14 P.3d 764 (2000). Although we defer to the trial court's unchallenged findings of fact, as well as challenged findings supported by substantial evidence, we review de novo whether the trial court's legal conclusions properly follow from those findings. *Pennington*, 142 Wn.2d at 602-03. With respect to challenged factual findings, evidence is "substantial" if it would persuade a rational, fair-minded person of the finding's truth. *In re Marriage of Fahey*, 164

Wn. App. 42, 55, 262 P.3d 128 (2011). We neither weigh the evidence nor judge the credibility of the witnesses. *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999).

B. Legal Principles

A CIR "is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." *Connell*, 127 Wn.2d at 346. The CIR, based on equitable principles, protects the interests of unmarried parties who acquire property during their relationships by preventing the unjust enrichment of one at the expense of the other when the relationship ends. *Pennington*, 142 Wn.2d at 602.

Connell established five nonexclusive factors considered by courts in determining whether the parties had a CIR. 127 Wn.2d at 346. The factors are: (1) continuity of cohabitation, (2) "duration of the relationship," (3) "purpose of the relationship," (4) "pooling of resources and services for joint projects," and (5) "the intent of the parties." *Connell*, 127 Wn.2d at 346. Courts should not apply these factors in a hypertechnical fashion, but must look at the circumstances of each case. *Pennington*, 142 Wn.2d at 602. The weight given to each factor has not been established, nor has how to balance one factor against any other factor or factors. 21 KENNETH W. WEBER, WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW § 57.8, at 396-402 (2nd ed. 2015).

C. The Parties Entered Into a CIR

On appeal, Vaughn argues that the court erred in finding a CIR existed. He also argues that if one did exist, the court erred in finding its duration. We disagree.

1. Substantial Evidence Supported the Trial Court's Findings

Vaughn challenges the trial court's findings that the couple continuously cohabitated and pooled resources and services. Vaughn argues the parties did not continuously cohabitate because

he spent half his time in Washington from September 2012 to March 10, 2014, while Turner worked full time in California. Vaughn appears to argue he and Turner did not pool resources and services because Turner did not contribute financial resources to their joint bank account. We disagree with Vaughn.

We review the challenged factual findings for substantial evidence. Then we review the conclusion that a CIR existed de novo. *Pennington*, 142 Wn.2d at 602-03. If a CIR did exist, we review when the CIR terminated for substantial evidence. To the extent Vaughn does challenge the court's findings, substantial evidence supports them. He does not challenge the trial court's findings that the purpose of the relationship "was love, intimacy, cohabitation, and shared life and goals," RP (Mar. 9, 2017) at 656, or that the couple had two children. Substantial evidence also supports those two findings.

First, as to the continuous cohabitation finding, Vaughn concedes he and Turner jointly signed a lease for their California apartment in September 2012, and that he resided in California with Turner when he was not in Washington. Vaughn also concedes he and Turner jointly signed other apartment leases covering the entire period from October 2011 to December 2015. Substantial evidence supports the trial court's finding of continuous cohabitation.

As to the pooled resources and services argument, Turner's withdrawals from the joint bank account, without corresponding deposits, weighs against a pooled resources finding. However, Turner used the joint bank account to pay household and personal expenses from 2011 to 2015. Turner also contributed money to rent and shared expenses during the relationship and contributed time, energy, and resources by raising their child and keeping up their home. Vaughn argues that the joint account was a pass through account for money from his marijuana business;

however, it is undisputed that money from this account paid for household expenses. Substantial evidence supports the trial court's finding of pooled resources and services for joint projects.

2. The Factual Findings Support the Conclusion that a CIR Existed

Next, we review de novo the trial court's legal conclusion that a CIR existed. In reviewing the conclusion, we consider the challenged and unchallenged findings of the trial court. Like the trial court, we utilize the nonexclusive *Connell* factors and reach a determination based on the circumstances of this case. 127 Wn.2d at 346.

The trial court made the following findings of fact. The approximately four year relationship constituted continuous cohabitation and was sufficient in duration. The couple's purpose in the relationship was love, intimacy, cohabitation. They shared life goals. The couple pooled resources and services, as evidenced by their joint bank account and Turner's running the household for the couple. The court did not clearly state a finding on the "intent of the parties" *Connell* factor, but said it "goes along with, sort of, what was the purpose of the relationship." RP (Mar. 9, 2017) at 658. Aside from the *Connell* factors, the court considered the couple's three pregnancies and two children.

a. *Connell* Factor One: Continuity of Cohabitation

The court found that the parties cohabitated for over four years. The findings show the parties lived together continuously from October 2011 through December 2015, and jointly signed leases for apartments covering all but three months where they stayed with Vaughn's parents. On these facts, the parties had a "stable cohabiting relationship." *Pennington*, 142 Wn.2d at 603. This factor favors the existence of a CIR.

b. *Connell* Factor Two: Duration of the Relationship

The court found the parties had a relationship that lasted four years and two months. The record shows the parties were in a dating relationship while living together as a couple for a total of just over four years. "While a 'long term' relationship is not a threshold requirement, duration is a significant factor." *Connell*, 127 Wn.2d at 346. Here, the duration factor moderately favors that a CIR existed.

c. *Connell* Factor Three: Purpose of the Relationship

The court found the purpose of the relationship was love, intimacy, cohabitation and shared life goals. They lived together and raised a child together. They also presented themselves to the world as a family by holding themselves out as husband and wife. Among other ways, they did so in Thailand and on social media, and by sending family Christmas cards. This factor strongly favors that a CIR existed.

d. *Connell* Factor Four: Pooling of Resources and Services for Joint Projects

The court found that the parties pooled resources. As discussed above, the couple had a joint bank account, joint assets, and both parties contributed time, energy, and resources to the relationship, and to raising their children. This factor favors that a CIR existed.

e. *Connell* Factor Five: The Intent of the Parties

Vaughn does not challenge the trial court's findings that the purpose of the relationship "was love, intimacy, cohabitation, and shared life and goals," and that the couple had two children. RP (Mar. 9, 2017) at 656. The trial court found Vaughn's denial of "any kind of a relationship" was not credible, and his testimony on the intent of the parties was not credible. RP (Mar. 9, 2017) at 655. The court stated, the parties' intent "goes along with, sort of, what was the purpose of the relationship." RP (Mar. 9, 2017) at 658. This factor favors that a CIR existed.

f. Conclusion: Existence of a CIR

We conclude the *Connell* factors support a determination that Vaughn and Turner had a CIR. *In re Meretricious Relationship of Long*, 158 Wn. App. 919, 927, 244 P.3d 26 (2010), is in accord. In *Long*, the factors favoring a CIR, included cohabitation, joint planning for the future, and holding themselves out as a couple, notwithstanding some physical absences from each other. 158 Wn. App. at 927. Similarly the facts support the conclusion that Vaughn and Turner entered into a CIR, despite the fact that Vaughn split his time between Washington and California for part of their relationship.

D. The CIR Terminated in December 2015

Vaughn argues that even if a CIR existed, it ended in April 2015, when Vaughn discovered Turner's second pregnancy and when he told her she had ruined the relationship, or in July 2015, when he began spending a few nights a week in Oregon. We disagree.

Vaughn relies on *In re Parentage of G.W.-F.*, 170 Wn. App. 631, 649, 285 P.3d 208 (2012), where the court held that a CIR terminates after one party "unequivocally" communicates an intent to end the CIR, which was "understood by the other party to the relationship," even if the parties continue to live together. In *G.W.-F.*, the trial court concluded that the CIR terminated when one party "unequivocally ended the commitment to the marital-like relationship," though the parties continued sharing their residence until they could sell it two years later. 170 Wn. App. at 648-49. Importantly, and unlike here, the other party clearly understood that the party ending the CIR no longer wanted to be in the relationship. *G.W.-F.*, 170 Wn. App. at 649.

This case is factually distinguishable from *G.W.-F.* Here, the trial court found Vaughn lacked credibility in testifying about the April 2015 argument. After April 2015, Vaughn knew Turner wanted to continue trying to rebuild the relationship, and would do family activities with

her and their child, including taking family photos. Even after April 2015, Vaughn's Facebook page said he was "married" to Turner. RP (Feb. 16, 2017) at 286. Turner believed they were in a monogamous relationship.

The couple cohabitated from October 2011 to December 2015, and they held themselves out as husband and wife, raised a child, and lived together as a family during that time. Vaughn was living with Turner, and attending medical appointments related to the birth of their second child, until the day he ended the relationship, December 8, 2015. Substantial evidence supports the trial court's finding that the relationship ended on that date.

II. DENIAL OF MOTION FOR NEW TRIAL AND FOR RECUSAL

Vaughn argues that the court erred in denying his motion for new trial and for recusal. Vaughn premises all of his arguments on his assertion that the declaration Turner electronically filed, served on Vaughn, and provided to the court was an improper ex parte communication with the trial judge. We disagree.

A. Denial of New Trial

We usually review the denial of a new trial to determine if the trial court's decision is manifestly unreasonable, exercised for untenable reasons, or based on untenable grounds. *Edwards v. Le Duc*, 157 Wn. App. 455, 459, 238 P.3d 1187 (2010). But when a party cites an error of law as grounds for a new trial, we review the alleged error of law de novo. *Mears v. Bethel Sch. Dist. No. 403*, 182 Wn. App. 919, 927, 332 P.3d 1077 (2014). The error of law complained of must be prejudicial. *Alum. Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

Generally, the term ex parte means "communications made by or to a judge, during a proceeding, regarding that proceeding, without notice to a party." *State v. Watson*, 155 Wn.2d 574, 579, 122 P.3d 903 (2005) (footnotes omitted). "A written communication to a judicial officer with a copy sent timely to opposing parties or their lawyers is not ex parte." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 113 cmt. c.

Vaughn assigns error to the following findings of fact made by the court in its order denying the motions for a new trial and recusal. No ex parte communication occurred. Providing a working copy of a filed declaration to the court presumptively conformed to the usual custom and practice in the Superior Court of Washington. No misconduct or violation of RPC 3.5 by Turner occurred. No legal or factual basis existed to grant a new trial. No legal or factual bases existed for the trial court to recuse itself.

Vaughn admits Turner served him with the challenged declaration, and that he reviewed it. However, Vaughn argues that the declaration constituted an impermissible ex parte communication, which warranted a new trial. Vaughn contends that the declaration was an improper ex parte communication because Turner did not attach the declaration to a motion, did not indicate its intended purpose, and did not give notice that Turner would provide a copy to the judge.[3]

[3] To the extent Vaughn argues the declaration contained hearsay, and was an improper supplement to the record filed after closing argument, he cites no authority stating that consideration of a declaration in those circumstances warrants a new trial or recusal. "Where no authorities are cited in support of a proposition, [we are] not required to search out authorities, but may assume that that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

The local rules for Pierce County Superior Court provide that parties may provide working copies of electronically filed documents to the judge. *See* PCLR 30(b)(5)(C). These rules comport with the recognition that "working copies of pleadings" are given to judges as a "reality of modern trial practice." *Green v. Normandy Park*, 137 Wn. App. 665, 678-79, 151 P.3d 1038 (2007) (internal quotation omitted).

No ex parte communication occurred. The trial court did not err in denying the motion for a new trial.

B. Denial of Recusal Motion

Vaughn argues that if a new trial had been granted, it should have been remanded before a new judge. Because the trial court did not err in denying the motion for a new trial, we do not consider this argument.

III. ATTORNEY FEES

Arguing that Vaughn's appeal is frivolous, Turner requests attorney fees under RAP 18.9. In response, Vaughn requests fees under RAP 18.9, claiming Turner violated the appellate rules.

"'[A]ttorney fees may be awarded only when authorized by a private agreement, a statute, or a recognized ground in equity.'" *In re Committed Intimate Relationship of Kelly*, 170 Wn. App. 722, 739, 287 P.3d 12 (2012) (quoting *Fisher Props., Inc. v. Arden–Mayfair, Inc.*, 106 Wn.2d 826, 849–50, 726 P.2d 8 (1986)). RAP 18.9(a) authorizes us to order a "party or counsel" who "files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by . . . the failure to comply."

An appeal is not frivolous if it raises even one debatable issue "upon which reasonable minds might differ." *Advocates for Responsible Dev. v. Wash. Growth Mgmt. Hr'gs Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010). Because Vaughn's appeal is not frivolous on the issues related to the CIR determination, we decline to award attorney fees to Turner.

A party requesting fees under RAP 18.9, based on a violation of the rules of appellate procedure, bears the burden of proving the requisite harm suffered by the failure to comply with the rules. RAP 18.9(a). Vaughn fails to make a sufficient showing of harm suffered as a result of the alleged violations in Turner's brief. We decline Vaughn's request for fees.

We affirm the trial court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Johanson, J.

Maxa, C.J.

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