

original
FILED
COURT OF APPEALS

CS AP -2 AM 11:53
STATE OF WASHINGTON
BY Onum
DEPUTY

NO. 33595-6-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

M. FREIDA FENN,
Respondent,
and
JOHN LOCKWOOD,
Appellant.

REPLY BRIEF

WIGGINS & MASTERS, P.L.L.C.
Charles K. Wiggins, WSBA 6948
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorney for Appellant

TABLE OF CONTENTS

REPLY TO RESPONDENT'S STATEMENT OF THE CASE.....	1
REPLY TO ARGUMENT	3
A. Lockwood appropriately argued the lack of evidence to support the challenged findings of fact and Fenn fails to support the challenged findings.	3
B. Fenn does not dispute that the evidence supports Lockwood's proposed findings rejected by the trial court.	7
C. A meretricious relationship does not exist unless it is reasonable to infer an agreement that property acquired during the relationship should be treated as if it were community property.....	7
D. Lockwood and Fenn were not in a meretricious relationship under the five factor test of <i>Lindsey, Connell and Pennington</i>	9
E. Lockwood will not be unjustly enriched by awarding to each party the property titled in their own names.	10
F. The property division is grossly unfair if Pygmy is Lockwood's separate property.....	11
G. Property owned by tenants in common must be divided by partition or sale, not by awarding the property to one of the tenants with a credit to the other.	12
ARGUMENT OF CROSS-APPEAL.....	15
If this was a meretricious relationship, the trial judge was within her discretion in awarding 55% of the quasi-community property to Lockwood.	15
CONCLUSION	19

TABLE OF AUTHORITIES

STATE CASES

<i>Bill v. Gattavara</i> , 34 Wn.2d 645, 209 P.2d 457 (1949)	8
<i>Connell v. Francisco</i> , 127 Wn.2d 339, 898 P.2d 831 (1995)	9, 13, 16
<i>Heaton v. Imus</i> , 93 Wn.2d 249, 608 P.2d 631 (1980)	8
<i>In re Marriage of Pennington</i> , 142 Wn.2d 592, 14 P.3d 764 (2000)	7, 9
<i>In re Marriage of Wintermute</i> , 70 Wn. App. 741, 855 P.2d 1186 (1993)	15
<i>Von Herberg v. Von Herberg</i> , 6 Wn.2d 100, 106 P.2d 737 (1940)	13, 14, 15

STATE STATUTES

RCW 4.52.440	15
RCW 7.52.440	13
RCW 26.09.080	16, 17

MISCELLANEOUS

Rem. Rev. Stat., § 881 [P. C. § 8327]	14
---	----

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Fenn's 13-page Statement of the Case never disputes a single factual assertion in Lockwood's Statement of the Case.

Fenn does not dispute that in 1987, John Lockwood was determined not to become involved in a traditional American marriage, while Freda Fenn was an ardent feminist who insisted on earning her own money and owning her own property. BA 3-5.

Fenn does not dispute that she and Lockwood agreed not to be married, not to invoke the State in their relationship, and celebrated their relationship in a ceremony for which they deliberately had no marriage license. BA 5-8. Instead, Fenn resorts to the tactic she used at trial, generally labeling events as "engagement, wedding and honeymoon." BR 3. But she cannot dispute that she and Lockwood did not actually marry and never intended to marry.

Fenn does not dispute that she and Lockwood always maintained their own separate bank accounts but had two joint accounts for joint expenses during part of their relationship. BA 8-11. She vaguely quotes vague findings that they "shared

expenses,” BR 12, but she cannot dispute Lockwood’s description of the specific accounts. BA Appendix C¹.

Fenn does not dispute that other than the two joint bank accounts, she and Lockwood never pooled any resources in any asset except the Jefferson Street home, to which they took undivided shares of 58.5% for Lockwood and 41.5% for Fenn. BA 11-12.

Fenn does not dispute that she and Lockwood were paid wages, salary and bonuses for their efforts for Pygmy Boats. BA 16-18. She describes her efforts on behalf of Pygmy, BR 10-11, but she neglects to point out that she was paid for these efforts.

Fenn does not dispute that Lockwood actively parented their daughter Freya. BA 18-20. She simply ignores Lockwood’s evidence that he participated substantially in Freya’s upbringing, evidence she never disputed at trial and that the trial court never rejected.

Fenn does not dispute that in 1997, she demanded an ownership interest in Pygmy Boats, but Lockwood refused. BA 21-

¹ To be strictly accurate, Fenn could have contested one error in Appendix C. The second set of accounts, listed as U.S. Bank accounts from Ex. 170, 171, and 172, were in the name of Pygmy Boats, not in Lockwood’s name.

23. Nonetheless, the couple continued to live together for the next five years.

Fenn does not dispute that: she discussed with Lockwood his desire that both would work and own their own property; Lockwood “wanted shared economic activity”; Lockwood expected her to contribute economically to the household; and, Lockwood shared his dreams with her, but that she thought some of them impractical. BA 24.

REPLY TO ARGUMENT

A. Lockwood appropriately argued the lack of evidence to support the challenged findings of fact and Fenn fails to support the challenged findings.

Fenn incorrectly claims that Lockwood failed to argue his challenge to some of the contested findings of fact.

Fenn claims that Lockwood failed to address five of the challenged findings in his argument. BR 18 n. 10. Lockwood specifically argued three of the findings: F/F 59 at BA 40 n.12; F/F 80-81 at BA 33 n. 8. Lockwood does not dispute F/F 35 and withdraws this assignment of error. With respect to F/F 111, the only factual sentence is the first; the second and third sentences are simply conclusions from the first.

Fenn claims that some of the remaining assignments of error are inadequately argued. BR 18. In each case, the challenged finding is tied into the argument, which adequately addresses the error in the finding.

Fenn attaches to her brief an appendix that purportedly lists evidence supporting each challenged finding. Without going through the findings one by one, suffice it to say that the evidence fails to support them. A few examples follow.

The evidence cited does not support F/F 22 that their daughter Freya's name, Fennwood, reflected their dependence on one another. BR App. A, #1. The citation only supports their independence.

F/F 24 states that, "[b]oth parties specifically decided to create and participate in a marriage-like relationship without participating in a state substantiated process." CP 25. Besides being entirely conclusory, Fenn's Appendix simply quotes a friend who testified that Fenn—not Lockwood—told her that they didn't want to be legally married, but that "it was a marriage-like relationship." BR App. A #2, quoting RP 452. Even if this supports Fenn's intent at the time—which is unclear from the testimony—it does not show Lockwood's intent.

The evidence cited does not support F/F 29 that Lockwood did not want to share equally in the housework. BR App. A #4.

The evidence cited does not support F/F 32 that the parties intended to be in a meretricious relationship. *Id.* at #5.

F/F 37 states vaguely that the parties “mixed payment of expenses among these accounts” and that they “moved money in and out of accounts.” CP 27. Fenn’s Appendix cites several sources that fail to support this finding. One citation misleadingly quotes Lockwood’s testimony that “they were all co-mingled into this huge mishmash with all kinds of other accounts as well.” BR App. A #7 (quoting RP 193). This is misleading because it is out of context—Lockwood was describing Fenn’s analysis of bank accounts, not the bank accounts themselves. RP 192-93.

F/F 43 asserts that the parties “pooled their resources and services for joint projects” CP 28. None of Fenn’s citations support this finding. BR App. A #8.

F/F 52 says that the agreement to hold property separately and both contribute to the joint expenses was not proven by clear, cogent and convincing evidence. CP 29. Fenn’s only citation of evidence to support the finding is her own testimony that they did not “have an agreement as to how property would be distributed if

[they] broke up.” BR App. at #9, citing RP 418. Fenn’s testimony about distributing property on a break up does support the finding that they did not have an agreement to own their property separately.

Many of Fenn’s citations reflect her belief that the parties pooled their resources and efforts simply by virtue of having a child, and that this supports a finding of a meretricious relationship. BR App. at # 1, 4, 5, 8, 11, 13, 14, 15. She claims that when Lockwood contributed to child raising, he “pooled resources.” *Id.* #8. She claims that when Lockwood worked at Pygmy, Lockwood was not contributing equally and not following their agreement. *Id.* at # 11-15.

Prior cases have never held that a man and woman are necessarily in a meretricious relationship because they have a child together. Parties should be able to structure their personal relationships outside of marriage if they wish to do so. Having a daughter and caring for her together does not create a meretricious relationship.

B. Fenn does not dispute that the evidence supports Lockwood's proposed findings rejected by the trial court.

Fenn does not dispute that the evidence supports Lockwood's three findings rejected by the trial court. BR 19-21. The Court should treat these facts as established.

C. A meretricious relationship does not exist unless it is reasonable to infer an agreement that property acquired during the relationship should be treated as if it were community property.

Lockwood showed in his opening brief that the Court should not find a meretricious relationship unless the Court finds it reasonable to infer an agreement to treat all property acquired during the relationship as if it were community property. BA 28-35.

Fenn's primary response is that no such requirement was imposed in any prior meretricious relationship case. BR 28. Fenn overlooks the fact that the Supreme Court held in *Pennington* that the five factors it has used in past cases are "neither exclusive nor hypertechnical." *In re Marriage of Pennington*, 142 Wn.2d 592, 602, 14 P.3d 764 (2000). Rather, the goal of the meretricious doctrine is to identify the circumstances that would "justify the equitable division of the parties' property acquired during the course of their relationship." 142 Wn.2d at 605 and 607. What

better test could there be than to ask if the circumstances make it reasonable to infer such an agreement?

Fenn argues that this factor would “exclude couples who just never discussed the issue, agreed to disagree or harbored different ideas about property ownership.” BR 28. Fenn confuses actual contracts with implied contracts:

[T]he law recognizes two classes of implied contracts: those implied in fact and those implied in law. [Citation omitted]. A contract implied in fact is an agreement of the parties arrived at from their conduct rather than their expressions of assent. Like an express contract, "it grows out of the intentions of the parties to the transaction, and there must be a meeting of minds." [Citation omitted]. A contract implied in law, or "quasi contract", on the other hand, arises from an implied duty of the parties not based on a contract, or on any consent or agreement. [Citation omitted].

Heaton v. Imus, 93 Wn.2d 249, 252, 608 P.2d 631 (1980). Quasi-contracts are concerned with prevention of unjust enrichment:

Recovery in quasi contract is based on the prevention of unjust enrichment. Thus, the doctrine will be applied when money or property has been placed in one person's possession under circumstances that "in equity and good conscience, he ought not to retain it." **Bill [v. Gattavara]**, 34 Wn.2d 645, 209 P.2d 457 (1949), at 650.

Heaton at 252.

In the context of this case, the Court could look for an agreement implied in fact or one implied in law. But since the meretricious relationship doctrine is intended to prevent unjust

enrichment, BA 43, it probably makes the most sense to ask whether the Court should find a contract implied in law that the parties intended to treat their acquisitions as if they are community property. As discussed in Lockwood's opening brief, the Court should not find any implied agreement, either in fact or in law. BA 32-35.

Fenn argues that looking for an implied contract to treat acquisitions as community property "would reinstate the ***Creasman Presumption.***" BR 35. Not at all. Just as there is no longer a presumption that property is intended to be held in the same way as title is held, nor is there any presumption that property is intended to be held as if it were community property. In other words, there is neither a ***Creasman*** presumption nor a ***Latham/Lindsey/Connell/Pennington*** presumption. One seeking to establish a meretricious relationship must prove it, and an implied agreement to treat acquisitions as community property should be an element of the relationship.

D. Lockwood and Fenn were not in a meretricious relationship under the five factor test of *Lindsey, Connell* and *Pennington*.

Fenn argues the five factor test of ***Lindsey, Connell,*** and ***Pennington*** under the heading, "the parties had a family like

relationship[] requiring equitable distribution of property.” BR 21 (emphasis supplied). But a meretricious relationship is not a “family like” relationship. A couple can have a child and live together to parent the child and still not have a meretricious relationship. The question is whether their relationship is sufficiently marriage-like to justify treating their property as if it were community property and dividing it accordingly.

Fenn repeatedly characterizes her relationship with Lockwood as “family like”: even during the two hut household, they ate dinners together “as a family”; “they appeared as a family”; they “thrived as a family.” BR 26-28. Fenn’s argument for a “family like” relationship is telling, for it tacitly concedes that whatever their relationship was, it was not marriage-like. To the contrary, they expressly agreed not to be in a marriage. BA 36-38.

Considering all of the factors, the trial court erred in finding an intent to be in a meretricious relationship.

E. Lockwood will not be unjustly enriched by awarding to each party the property titled in their own names.

Lockwood pointed out in his opening brief that he will not be unjustly enriched by awarding to him the property held in his own name. BA 43-44. Fenn seems to argue that this would be unfair

because it would result in Lockwood's receiving "approximately 95%" of the "community assets." BR 45. This begs the question. Lockwood's argument assumes that there is no meretricious relationship and no community property.

Fenn argues, "Lockwood became sole shareholder of Pygmy Boats Inc. over Ms. Fenn's objection, and would have held such shares (and the income from the corporation) in constructive trust for the family." BR 44-48. Fenn's objection has nothing to do with it. Absent a meretricious relationship, there is no justification to award any part of Pygmy to Fenn. As shown in Lockwood's opening brief, Fenn and Lockwood entered into this relationship wanting to maintain their separate identities and rejecting marriage. It is only unjust to change the rules after Pygmy became a successful company and award Fenn a substantial part of the company Lockwood built over the years.

F. The property division is grossly unfair if Pygmy is Lockwood's separate property.

Lockwood argued in his opening brief that the property division is obviously unfair and improper if Pygmy is considered to be Lockwood's separate property. BA 44-45. Fenn seems to concede the point, simply arguing that Pygmy was quasi-

community property because the parties were in a meretricious relationship. BR 35-36.

G. Property owned by tenants in common must be divided by partition or sale, not by awarding the property to one of the tenants with a credit to the other.

Lockwood showed in his opening brief that in a partition action, property owned by tenancy in common cannot be awarded to one of the tenants, but must be divided in kind or sold. BA 45-47.

Fenn argues that Lockwood invited the error in closing argument. BR 36-38. The transcript of the closing argument shows that Lockwood was only willing to relinquish his interest in the Jefferson Street house if the trial court did not find a meretricious relationship:

John has authorized me to put before the Court that even if the Court does not find a meretricious relationship, and even if the Court -- excuse me, if the Court does not find a meretricious relationship, he is still willing to walk away from the equi-- his equity in the Jefferson Street property. So this Court would have to award that under an analysis of these joint ten-- maybe a partition or something, but he is willing to accept that, if that's this Court's decision.

RP 1965-66 (emphasis supplied).

Fenn argues that Lockwood failed to preserve this issue for appellate review. BR 36. To the contrary, Lockwood prayed for

partition in his answer to the complaint, for a sale of the property and distribution of the proceeds. CP 8-9

Fenn argues that it was appropriate to award the house to Fenn as part of an overall property division, citing ***Von Herberg v. Von Herberg***, 6 Wn.2d 100, 106 P.2d 737 (1940). BR 39-40. ***Von Herberg*** was a divorce proceeding, an appeal from a modification of an interlocutory decree of divorce. The property in question was all community property, not property held by a tenancy in common. In a divorce, all property is before the court for division, community and separate. By contrast, in a proceeding to divide property acquired during a meretricious relationship, the court cannot award the separate property of one party to the other party. ***Connell v. Francisco***, 127 Wn.2d 339, 349-50, 898 P.2d 831 (1995).

Von Herberg fails to support Fenn for an additional reason. The Court considered the statute that is now codified as RCW 7.52.440, which codifies the ancient doctrine of owelty:

When it appears that partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of them, the court may adjudge compensation to be made by one party to another on account of the inequality of partition; but such compensation shall not be required to be made to others by owners unknown, nor by infants, unless in case of an infant it appear that he has personal property sufficient for that purpose, and that his interest will be promoted thereby.

6 Wn.2d at 121, quoting Rem. Rev. Stat., § 881 [P. C. § 8327]. The precise issue in **Von Herberg** arose because the husband and wife owned more than one piece of property together. The trial court gave some of the properties to the wife and some to the husband. On appeal, the wife claimed that under the statute, the trial court was required to divide each item of property instead of awarding some properties to each party:

Appellant maintains, however, that the court, in a suit for partition, does not have the power to divide the property as was done in this case. Her counsel argue that each article of property should be partitioned and not the whole estate divided.

6 Wn.2d at 122. The court rejected this argument, holding that the trial court was not required to partition each piece of property between the parties:

We agree with the trial court that it was to the best interest of appellant, under the facts and circumstances of the case, to make the division which was made, and it was sufficient that the holdings were divided so as to enable each cotenant to receive property in exact proportion and value to his or her respective interest in the commonly owned property.

In so far as Rem. Rev. Stat., § 881, is concerned, we feel that it in no way conflicts with the general rule which we have found in the authorities considered. Owelty may still be awarded under this section, even though the estate divided be composed of several parcels separately awarded, rather than of a single parcel, unequally divided in kind.

6 Wn.2d at 124.

Von Herberg has been interpreted in subsequent dissolution cases to permit the court to award a piece of community property to one spouse with a compensating judgment to the other. *E.g., In re Marriage of Wintermute*, 70 Wn. App. 741, 745, 855 P.2d 1186 (1993), *rev. denied*, 123 Wn.2d 1009 (1994). But it should not be extended to division of property expressly held as tenants in common in a meretricious relationship. Such an extension would be inconsistent with the statute itself. RCW 4.52.440 does not permit an award of the entire property to one tenant with a compensating judgment to the other. Rather, it only permits a compensating judgment after the property has been divided, in order to equalize unequal portions.

ARGUMENT OF CROSS-APPEAL

If this was a meretricious relationship, the trial judge was within her discretion in awarding 55% of the quasi-community property to Lockwood.

Fenn argues that the trial court should follow the principles of property division following a marriage, even though she and Lockwood expressly decided not to be married. BR 40-43. This is incorrect because a meretricious relationship is not the same as a marriage and the court should not follow the same principles. Rather, the trial court has broader discretion in this equitable

proceeding than in a dissolution action. Thus, assuming that this was indeed a meretricious relationship, there is no abuse of discretion.

The Supreme Court has said unequivocally that a meretricious relationship is not the same as a marriage and that trial court's should apply marriage dissolution principles only by analogy:

While portions of RCW 26.09.080 may apply by analogy to meretricious relationships, not all provisions of the statute should be applied. . . . Until the Legislature, as a matter of public policy, concludes meretricious relationships are the legal equivalent to marriages, we limit the distribution of property following a meretricious relationship to property that would have been characterized as community property had the parties been married. This will allow the trial court to justly divide property the couple has earned during the relationship through their efforts without creating a common-law marriage or making a decision for a couple which they have declined to make for themselves. Any other interpretation equates cohabitation with marriage; ignores the conscious decision by many couples not to marry; confers benefits when few, if any, economic risks or legal obligations are assumed; and disregards the explicit intent of the Legislature that RCW 26.09.080 apply to property distributions following a marriage.

Connell, 127 Wn.2d at 349-50.

Fenn's argument relies entirely on RCW 26.09.080 and principles that govern marriage dissolution actions. These principles apply here only by analogy. This being an equitable

proceeding, the trial court should have much more discretion. Fenn falls far short of proving an abuse of discretion.

Fenn also ignores entirely Judge Conoley's reasons for the property division. Judge Conoley explained that she divided the property as she did because Lockwood was 62, while Fenn was 48. RP 18 (6/3/05). The parties had planned for Lockwood to retire. *Id.* The property division left Fenn with ample assets, a paid home and car, cash of over \$300,000, and the ability to pursue her own plans without financial difficulty. *Id.* Judge Conoley also pointed out that Lockwood and Fenn had always lived a very modest lifestyle, which Fenn could continue with the property awarded to her. *Id.* at 18-19. Fenn always understood that Pygmy Boats was Lockwood's "avocation and his second family." *Id.* at 20. Fenn also knew that Lockwood regarded Pygmy as his own company and that he refused to share it with her. *Id.* at 20-21.

Fenn offers several misguided arguments. First, she argues that Lockwood was awarded \$472,559 in separate property while she was awarded \$158,135 in separate property. BR 42. Legally, this is not a marriage and RCW 26.09.080 does not apply; the amount of separate property is not a factor to consider. Factually, Fenn is wrong. Fenn was awarded \$215,000 of Lockwood's

separate property, leaving Lockwood with much less than \$472,559 in separate property.

Fenn claims that Lockwood can retire and continue to collect \$300,000 per year from Pygmy for the next 17 years. BR 43. This is simply naïve. Pygmy succeeded because of Lockwood's constant work, creativity, and inspiration. If Lockwood retires, he must either sell Pygmy or hire someone to replace himself. It is unrealistic to think that a salaried employee would be a fraction as successful as Lockwood, for whom Pygmy was an avocation and a second family. The trial court found that Pygmy is worth \$500,000. It is not worth \$300,000 per year.

Lockwood, like Fenn, believes the property division to be unfair because it contradicts the beliefs and principles on which they built their lives together. Lockwood believes that Fenn received far more property than she should have received. But if this was a meretricious relationship, then Judge Conoley did not abuse her discretion in dividing the quasi-community property 55/45.

CONCLUSION

Lockwood and Fenn were not in a meretricious relationship. The Court should reverse and remand for a redistribution to each party of the assets held in their respective names. Even if the relationship had been meretricious, it was error to award Lockwood's interest in the Jefferson Street property to Fenn. The Court should reverse and remand for a partition or sale of the Jefferson Street property with a consequent adjustment in the way in which Fenn should receive her share of the property division.

RESPECTFULLY SUMMITTED this 1st day of August 2006.

Wiggins & Masters, P.L.L.C.



Charles K. Wiggins, WSBA 6948
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 4 day of August 2006, to the following counsel of record at the following addresses:

Counsel for Respondent Freida Fenn

Steven L. Olsen
Olsen & McFadden, Inc. P.S.
216 Ericksen
Bainbridge Island, WA 98110

Co-Counsel for Appellant John Lockwood

Paula T. Crane
Law Office of Paula T. Crane
9226 Bayshore Drive, Suite 202
Silverdale, WA 98382

FILED
COURT OF APPEALS
06 AUG -2 AM 11:54
STATE OF WASHINGTON
BY CKW
DEPUTY



Charles K. Wiggins, WSBA 6948
Attorney for Appellant John Lockwood