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ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to continue trial.
2. The trial court erred when it failed to distinguish Appellant's evidence from his arguments at each stage of the trial.
 - a. The trial court erred if it terminated testimony before both parties had "rested."
 - b. The trial court erred if it disposed of property and liabilities before considering "all relevant factors".

STATEMENT OF THE CASE

This action for dissolution of marriage was originally filed in Pierce County Superior Court on April 18, 2007. (CP¹ 4-12) The petition indicates, at the time of filing, the parties had assets worth in the aggregate near 3 million dollars.

PRE-TRIAL PROCEEDINGS

The Appellant's attorneys initially appeared on April 23, 2007 (CP 13) and withdrew on March 24, 2007, without providing the required 10 days notice. (CP 115-118) A few weeks later, on April 15, 2008, Appellant's attorney entered a limited notice of appearance for the stated purpose of "all communications between counsel for settlement purposes and specifically excludes representation in court or at trial." By its own terms the limited

¹ "CP" refers to the Clerk's Papers. Document page number(s) assigned by the clerk follow.

notice of appearance terminated on May 6, 2008, the day before the date set for trial. (CP 129)

On April 25, 2008, the Appellant filed a motion to continue the trial date. In connection with that motion the Appellant declared, “I am now representing myself and need the time to learn the process.” (CP 136-137)

HEARING ON PRE-TRIAL MOTIONS

The matter came on for trial on May 7, 2008. (CP 22-23) There had been no prior continuances. The Appellant was still acting pro se. The Honorable Judge Brian Chushcoff who was then presiding over another trial, and thus unable to hear the case. Nonetheless, Judge Chushcoff heard Appellant’s request for a continuance. See, generally, VRP² 5/7/08 (Chushcoff), pages 4-14.

The Appellant explained to Judge Chushcoff that the law firm representing him had assigned four different attorneys to the case, that none of them had conducted any discovery, and that when he confronted them about that they withdrew from the case. VRP 5/7/08 (Chushcoff), p 4, l 22³ – p 6, l 7.

Upon further questioning by the court, the Appellant said that he had just discovered that several bonds had not been accounted for and that some community assets had been given away. VRP 5/7/08 (Chushcoff), p 6, l 21 – p 7, l 3. When asked how much time he needed the Appellant said, “I don’t know how long these things take, but I need to do the interrogatories. Once I get those back, then I can

² “VRP” means Verbatim Report of Proceedings.

³ Transcript page and line numbers are shown herein as “p xx, l xx”

formulate the questions that I need to ask to get to the bottom of it.”
VRP 5/7/08 (Chushcoff), p 7, l 6-10.

Counsel for the Appellee said the parties had been separated for two years, the petition had been filed a year ago and the Appellee wanted “the divorce to be final and over with.” VRP 5/7/08 (Chushcoff), p 7, l 16-20. According to opposing counsel the original petition had listed a proposed division of property, which proposal had “not significantly changed”. Citing to Civil Rule 40(e), Appellee’s counsel argued the Appellant had “ample opportunity and notice what these issues were” and was not entitled to a continuance. VRP 5/7/08 (Chushcoff), p 7, l 21 – p 8, l 21.

After further debate between the Appellant and Appellee’s counsel about the status of discovery, VRP 5/7/08 (Chushcoff), p 9, l 9 – p 12, l 11-20, the Appellant took issue with the Appellee’s Statement of Evidence, arguing it was “based upon their opinion”. VRP 5/7/08 (Chushcoff), p 13, l 3-4. Continuing, the Appellant said, “I just don’t have all of the information to make a decision of where I’m going to go with this or that we have all of the information to properly make a decision on the division of assets. If the court needs to, I do have some documents here of things that I have found to show that all of the assets haven’t been accounted for.” VRP 5/7/08 (Chushcoff), p 13, l 11-18.

The court denied the motion for continuance, (CP 155-156) but then said the case would be trailed for up to three days, and may wind up getting continued anyway. Upon Appellee’s counsel’s representation that the Appellee was unavailable the following week, the court ruled the case would be trailed for one day only. VRP

5/7/08 (Chushcoff), p 14, l 11 – p 15, l 8.

Later that morning, the case was reassigned to the Honorable Judge Sergio Armijo. (CP 160) Appellee's counsel said he was ready to proceed to trial, but the Appellant wanted to make a statement. The Appellant told the court, "not enough information is available to adequately make the proper decisions at this time." Appellee's counsel had not provided information that had been requested, including without limitation monies taken from community accounts, bonds that had not been disclosed, taxes on separate property paid with community assets. VRP 5/7/08 (Armijo), p 5, l 15 – p 7, l 3.

Appellee's counsel told the court that the Appellant had asked Judge Chushcoff for a continuance based on the same reasons. VRP 5/7/08 (Armijo), p 7, l 7-9. Appellee's counsel attempted to outline the sequence of events surrounding the withdrawal of the Appellant's counsel, but misstated the effective dates. He also acknowledged that no settlement negotiations occurred during the time of the attorney's limited appearance. VRP 5/7/08 (Armijo), p 8, l 4-9. Repeating his Civil Rule 40(e) argument, he told Judge Armijo he had asked Judge Chushcoff for up to \$10,000 in attorney fees and terms if the case were continued.⁴ VRP 5/7/08 (Armijo), p 8, l 10 – p 9, l 10.

The Appellant alleged the attorney he previously had was not properly representing him and had failed to conduct discovery. He

⁴ It should be noted here that Appellee's counsel had requested up to \$5000 from Judge Chushcoff. VRP 5/7/08 (Chushcoff), p 9, l 9– p 10, l 6.

withdrew without prior notice to the Appellant.⁵ The Appellant told the court that he is “discovering new information all the time” and that some information was not “truthful and forthcoming to properly divide the assets.” VRP 5/7/08 (Armijo), p 10, l 8 – p 11, l 5.

The court ruled the trial would proceed, but warned the parties that he had been assigned a criminal case that morning, “which means I have to stop for maybe half and hour to an hour on this matter. But I’ll try and give you as much time today and maybe even Friday. VRP 5/7/08 (Armijo), p 11, l 25 – p 12, l 10. In answer to a question from Appellee’s counsel, the court acknowledged that it had another criminal case starting the following day and that the parties should “do as much as we can with the limited time that we have.” VRP 5/7/08 (Armijo), p 11, l 12 – p 11, l 19.

TRIAL

Day 1

After opening statements the Appellee’s counsel called the Appellant to the stand and questioned him about various assets and liabilities of the parties, and about the care and education of the parties’ children. VRP 5/7/08 (Armijo), p 23, l 14 – p 68, l 24.

During the Appellant’s testimony the court was looking at what were described as two pre-trial information forms. VRP (Armijo) 5/7/08, p 33, l 24. However the Appellant was unable to verify the accuracy of many of the values assigned by the Appellee

⁵ It may be recalled that the attorney’s notice of withdrawal did not include the required 10 days notice. (CP 115-118)

on that form. See, e.g., VRP 5/7/08 (Armijo), p 34, l 20 – p 35, l 10; p 38, l 21; p 42, l 23; p 45, l 6; p 45, l 15. Those pre-trial information sheets were never offered and never admitted into evidence.

When the Appellee's counsel had completed his examination the Appellant was not offered an opportunity provide any response testimony. Rather, the court simply told him to step down. VRP 5/7/08 (Armijo), p 68, l 25.

Then the Appellee's counsel called the Appellee to the stand and questioned her about the assets and liabilities of the parties, and about the children. VRP 5/7/08 (Armijo), p 69, l 14 – p 117, l 6. The Appellant began his cross-examination near the end of the first day, VRP 5/7/08 (Armijo), p 117, l 8,

Day 2

On May 9, 2008, which was a short trial day due to the trial court's motion's docket, the proceedings opened with a short colloquy between Appellee's counsel, the Appellant and the court regarding the need to finish the case that day because the court was "tied up" the following Monday. Both the court and the Appellee's counsel expressed "concerns" about finishing that day. VRP(1)⁶ 5/9/08, p 3, l 3-15. There, the court admonished the Appellant that certain real property in Florida, about which the Appellant had been

⁶ There are three transcript excerpts for the proceedings of May 9, 2008 before the Honorable Judge Armijo, referred to here as VRP(1), VRP(2) and VRP(3), respectively. Each was arranged on different dates for different purposes. The Appellant believes that the combination of the three excerpts represent the entire proceedings held on May 9, 2008.

examining the Appellee in the previous session, was “gone” and the court did not see the need to “go into it”. VRP(1) 5/9/08, p 3, l 15-22.

At the beginning of the afternoon session for May 9, 2009 the court again reminded the parties that it was scheduled to begin a two week murder case, saying: “If we could push it along and get the questions asked and let's see if we can finish today. I don't know, we'll find out. Let's see. Let's push it along.” VRP(1) 5/9/08, p 32, l 4-6. A short while later, while the Appellant was cross-examining the Appellee, he attempted to introduce an expense spreadsheet identified in the Exhibit Record as Exhibit 22. VRP(1) 5/9/08, p 34, l 6-7. The first transcript excerpt for May 9, 2008 ends there.

The second transcript excerpt for May 9, 2008 generally reflects the following: The Appellee's counsel complained the Appellant's questions regarding Exhibit 22 would waste the court's time, apparently by engaging in “some sort of forensic accounting” VRP(2) 5/9/08, p 6, l 7-8. The Appellant acknowledged “I'm here before you today shooting in the dark, basically, of trying to pull things together and put together the best case that I can, based upon the charges that have levied, that I haven't made payments, I haven't done my duties as a father, in the family.” VRP(2) 5/9/08, p 9, l 7-11.

Nonetheless, the Appellant defended Exhibit 22, saying that he can “back up every one of those charges with a receipt” VRP(2) 5/9/08, p 7, l 20-21, and stated “when the court sees all of the records,” VRP(2) 5/9/08, p 9, l 14, it will see that the Appellant had paid “a lot more,” VRP(2) 5/9/08, p 9, l 14 in family expenses than

the Appellee admitted.

The court observed the Appellee was not substantiating the Appellant's argument, "which means at some point you have to go through all of these numbers again..." VRP(2) 5/9/08, p 10, l 3-8. The court also observed, at the urging of Appellee's counsel, the relative proportion of the expenses in dispute to the overall estate and asked the Appellant why he did not, as Appellee's counsel advocated, agree to "call it a wash." VRP(2) 5/9/08, p 11, l 16 – p 12, l 11. The Appellant argued that the Appellee's estimate of the expense amounts was erroneous, and the court asked where the Appellant is going to get "the numbers," VRP(2) 5/9/08, p 12, l 14-24, apparently forgetting the Appellant had just said, at page 7, lines 20-21, that he had the receipts to support his spreadsheet.

The Appellant then argued, "there's more to the bonds than what is here." VRP(2) 5/9/08, p 13, l 1-2. Apparently missing the Appellant's point, the court asked why the Appellee's proposed division of the bonds wasn't fair. VRP(2) 5/9/08, p 13, l 3-6. The Appellee's counsel denied the Appellant's claim about the missing bonds, arguing the Appellant had no proof. VRP(2) 5/9/08, p 13, l 22 – p 14, l 6.

In response, the Appellant said he understood "the whole picture" but argued, even if he didn't have all the data he still needed an opportunity to "to defend myself ... to verify, prove or disprove the information that's been submitted ... I haven't presented my side." VRP(2) 5/9/08, p 14, l 7-20.

The court told the Appellant, "But if both people are going to walk out of here with over a million dollars, you're going to ask me

to say, well, she might get 30, \$40,000 more than I do, therefore it's not fair in the whole picture? I don't think you're going to be able to do that." VRP(2) 5/9/08, p 15, l 1-5. The court further told the Appellant that several of the assets the Appellant has brought up in previous testimony are now co-mingled, and thus "gone," and that one cannot extract separate property from co-mingled property. VRP(2) 5/9/08, p 15, l 6-18.

The Appellant responded by arguing that he still had a community interest in real property in Port Orchard, regardless of the Appellee's claims to the contrary. VRP(2) 5/9/08, p 15, l 19 – p 17, l 14. The Appellant ended his comments regarding the Port Orchard property by acknowledging "we need to move on" and the "line of questioning that I've got here is probably going to put a lot of stress on Carolyn, and at this point, I'm willing to withdraw and let the court make a decision." VRP(2) 5/9/08, p 17, l 16-20.

The court then asked Appellee's counsel to answer the Appellant's argument about the Port Orchard property. VRP(2) 5/9/08, p 17, l 21-22. Five pages later the Appellee's counsel went beyond the scope of the court's question about the Port Orchard property, and described the Appellant's offer to "withdraw" as one to "Withdraw the whole thing, you have enough before you to make this decision" VRP(2) 5/9/08, p 22, l 15.

This assertion, that the court had heard "enough ... to make a decision," plainly misstated nearly all of the Appellant's prior statements about the sufficiency and accuracy of the evidence that had been presented by the Appellee, particularly since he had just said he had receipts to back up his expense claims and that he had

not “presented [his] side” a few minutes earlier.

The last half of the second transcription excerpt, beginning at page 17, is dominated by the Appellee’s counsel’s argument why the court should accept the Appellee’s proposed property division, and by Appellant’s attempts to explain why the Appellee’s information was wrong. At one point the Appellant said that he intend to “discuss” the accounting of a joint line of credit “later on”, VRP(2) p 29, l 6-12, but he never got that chance. The second transcript excerpt concludes with the Appellant’s assertion that he knew “there’s funds that are unaccounted for.” VRP(2) 5/9/08, p 32, l 16).

The court never asked if the Appellant agreed that the case was ready to submit for a decision or if the Appellant had any additional evidence to present. Neither did the court invite closing arguments.

The third transcript excerpt for 5/9/08, which begins where the second transcript excerpt ended, purports to be the “JUDGE’S DECISION” VRP(2) 5/9/08, p 2, l 1. After the court made a few findings and conclusions, it announced it was going to accept the property division proposed on the Appellee’s pre-trial information form, VRP(3) 5/9/08 p 4, l 13-15, p 5, l 7 – p 6, l 8.

This form was a later version of the form that the Appellant was unable to verify as being accurate, see, generally, VRP 5/7/08 (Armijo), p 34, l 20 – p 45, l 15, and which Appellee’s counsel had replaced in the beginning of the second day of trial, see, VRP(1) 5/9/08, p 4, l 8. Neither the original nor the replacement was ever offered nor admitted as an exhibit.

Thereafter, the transcript generally reflects an ongoing,

haphazard colloquy with the Appellant, the Appellee and the Appellee's counsel. The Appellant took issue with certain entries on the Appellee's proposal, and the court addressed them, taking the testimony of both parties. For examples of what Appellant contends was offered and probably considered as evidence, while the court was considering and making its ruling, see, e.g., VRP(3) 5/9/08, p 7, l 5 – p 9, l 4; p 10, l 17-22; p 13, l 18-20; p 14, l 14-23; p 15, l 1 – p 16, l 8; p 17, l 12 – p 19, l 16; p 21, l 9 – p 22, l 25; p 23, l 21 – p 24, l 19; p 24, l 25 – p 25, l 7; p 25, l 12 – p 26, l 12.

PRESENTMENT HEARINGS

At the first presentment hearing, on June 6, 2008, the Appellant, still appearing pro se, argued that he never got a chance to present his side of the case, VRP 6/9/08, p 10, l 12, and that he never testified on his own behalf. VRP 6/9/08, p 20, l 11. Based on the Appellant's concerns and on his additional claims that much of the information relied upon by the court in reaching its decision was erroneous, the court, ordered the Appellant to produce the second transcript excerpt and continued the presentment hearing for two weeks. VRP 6/9/08, p 20, l 18 – p 22, l 11.

At the second presentment hearing, on June 20, 2008, Appellee's counsel recited the parts of the second transcript excerpt of May 9, 2009, which specifically mentioned the word "withdraw" and then argued the Appellant was "fully engaged" in a discussion during the rendering of the judge's decision. VRP 6/20/08, p 6, l 1-2. Appellee's counsel then cited to several examples from the third transcript excerpt of May 9, 2008 wherein the Appellant had

something to say about the Appellee's proposed division of assets and liabilities. VRP 6/20/08, p 5, l 18 – p 9, l 19. Despite the Appellant's numerous protests, e.g., VRP 6/20/08, p 13. l 1 – p 14, l 24; p 16, l 6 – p 19, l 10; p 22, l 14-22, the court signed the final dissolution papers. VRP 6/20/08, p 32, l 18-21, (CP 170-203).

Notice of Appeal was timely filed on July 11, 2008. (CP 204-209)

ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO CONTINUE THE TRIAL

Due process essentially requires the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mansour v. King County*, 131 Wn.App. 255, 264 (Div I 2006)(citation omitted). Here, the Appellant was deprived of his opportunity to be heard in a meaningful manner.

When this matter came on for trial, it was obvious the Appellant was not prepared to proceed. His attorney had dumped him twice, finally on the day just prior to the trial. His declaration in support of his motion to continue, filed two weeks prior to the date of trial (CP 136-137), stated he needed time "to learn the process". In colloquy, he told the court that he needed answers to discovery to "formulate the questions" he needed to ask at the trial. VRP 5/7/08 (Chushcoff), p 7, l 6-10. Later he said, "I just don't have all of the information to make a decision of where I'm going to go with this...." VRP 5/7/08 (Chushcoff), p 13, l 11-18.

Appellee's counsel opposed the continuance on the basis of

Civil Rule 40(e), when it was obvious, regardless of the status of the evidence or the discovery, that the Appellant needed the continuance to prepare his case. Appellee's counsel articulated no material prejudice that would occur if the continuance had been granted.

Plainly, the Appellant, who was appearing pro se, and whose attorney had abandoned him, needed time to "learn the process" and to organize the evidence that he did have. As the trial unfolded it became more and more obvious that the Appellant was unprepared, because he had limited ability to prove or disprove the property values and expenses of a complex marital estate as claimed by the Appellee. Neither was he versed in the protocols of offering evidence or the procedures at trial.

"The withdrawal of an attorney in a civil case or his discharge does not give the party an absolute right of continuance." *Jankelson v. Cisel*, 3 Wn.App. 139, 473 P.2d 202 (1970)(citing *Grunewald v. Missouri Pac. R.R.*, 331 F.2d 983 (8th Cir. 1964); Annot., 48 A.L.R.2d 1155 (1956). "[T]he decision whether to grant or to refuse a continuance in such a situation ... will not be disturbed except for manifest abuse of discretion." *Martonik v. Durkan*, 23 Wn.App. 47, (1979)(citations omitted)

Nonetheless, "the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high." *State v. James* 38 Wn. App. 264, 686 P.2d 1097 (Div I 1984) (citing *Lassiter v. Department Of Social Servs.*, 452 U.S. 18, 31, 68 L. Ed. 2d 640, 101 S. Ct. 2153 (1981)).

"In exercising its discretion, the court may properly consider

the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court.” *Jankelson, supra*.

In this case, there had been no prior continuances. The marital community that was the subject of the trial owned or had interest in over 3 million in assets, including 4 parcels of real estate, 3 federal pensions, stocks, bonds and several community and separate financial accounts. The parties each had substantial incomes and employment benefits packages. The Appellant had lost the benefit of his counsel in the preparation of his case in the highly critical last month prior to trial.

Here, the Appellant had the obvious need to “learn the process” or retain other counsel⁷, as well as the time to organize his case. The Appellant asked merely for enough time to submit and get answers to interrogatories, which might have meant 60 days at the outside. While he dwelled on the discovery issue in oral argument, he made at least two statements to the court that clearly indicated he was not prepared to proceed in a meaningful manner—he needed time to “formulate” questions for the trial and he had not, in essence, developed a theory of the case. The Appellant was not claiming a

⁷ The Appellant reserved the option of retaining counsel when presenting his argument for continuance. VRP 5/7/09 (Chushcoff), p 7, 13-14.

constitutional right to counsel, as the appellant was in *James*, supra, but was asking merely for adequate time to prepare his case. The prejudice to the Appellant in going forward far exceeded the prejudice to the Appellee in a continuance.

None of the cases found by the Appellant that affirm the denial of a request for continuance due to the last minute absence of counsel match this fact pattern. See, e.g., *Willapa Trading co., Inc. v. Muscanto, Inc.*, 45 Wn.App. 779 (Div I 1986); *Martonik*, supra, *Eberhart v. Murphy*, 110 Wash. 158 (1920); *Catlin v. Harris*, 7 Wash. 542 (1893). The common factor in these cases appears to be some failure of the litigant whose request had been denied. Here, there had been no prior delays. The Appellant had done nothing but trust his attorney to prepare the case and represent him in the dissolution proceedings. The attorney left him out on a limb with only a few weeks to prepare for a trial with a complicated marital estate. The trial court should have granted the request for continuance, and it was a manifest abuse of discretion to deny that request.

THE TRIAL COURT ERRED WHEN IT FAILED TO SEPARATE THE PARTIES' EVIDENCE FROM THEIR ARGUMENTS AT EACH STAGE OF THE TRIAL

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)). Due process is a flexible concept in which varying situations can demand differing levels of procedural protection. *Id.* at 334. In evaluating the process due in a particular

circumstance, we must consider (1) the private interest impacted by the government action, (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) the government interest, including the additional burden that added procedural safeguards would entail. Id . at 335.

Gourley v. Gourley, 158 Wn. 2d. 460, 467-468 (2006)

As a general rule, non-jury trials proceed with opening statements and the plaintiff's case in chief, ending with the plaintiff resting. Then the defendant presents his case in chief and rests. The parties offer any rebuttal evidence and/or closing arguments. Then the court enters its decision and judgment. *Tegland*, 14A Wash. Prac., Civil Procedure §§ 30.3, 30.4. RAP, Rule 9.2(e)(2)(B) requires, *inter alia*, when preparing the transcripts, that the court reporter is to include on the table of contents "the page were the plaintiff rests and the defendant rests."

Here, from beginning of the second transcript excerpt until the end of the third transcript excerpt of 5/9/08, the Appellant had no way to tell whether he was defending his line of questioning, making an offer of proof, providing testamentary evidence or presenting arguments on the evidence. Neither party stated affirmatively that he or she had "rested" and the court never asked. The lack of formal closing arguments and the failure of the court to ask if the parties had rested both show that the trial court failed to clearly define the progress or posture of the case. In addition to suggesting the court was more interested in finishing the case than in assuring the litigants had a fair, impartial and neutral hearing, *State v Bilal*, 77 Wn.App. 720, 893 P.2d 674, rev. den. 127 Wn.2d 1013 (1995), this

failure deprived the Appellant of due process and prevents meaningful review.

If the trial court considered the Appellant's statements as argument then the court stopped taking evidence without confirming the parties had rested. If the court deemed they were evidence, then the court began rendering its decision before considering "all the relevant factors." RCW 26.09.080.

Neither should the trial court have adopted the Appellee's pre-trial information form as the basis for its division of the property and liabilities of the parties. That form was never an exhibit. Its content is not fully described in the record. The Appellant was unable to verify its accuracy. The Appellee's counsel replaced it on the second day of the proceedings, after his own client had testified. The consideration by the trial court of its contents "other than as substantiated by the testimony of the parties constituted error."

Blood v Blood, 69 Wn.2d 680 (1966)

Here, the Appellant is prevented from obtaining clarification of the evidence the court relied upon because Judge Armijo was replaced by an intervening public election by a successor judge.⁸

CR 63(b) provides:

Disability of a Judge. If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may

⁸ See, <http://www.co.pierce.wa.us/pc/abtus/ourorg/aud/Elections/Archives/pri08/results.htm> (last viewed April 26, 2009)

perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

There is no Washington case specifically on point, but it appears that this rule would apply, as here, when a judge is replaced by an election of the people. See, e.g., RCW 2.28.030(2); and *Zachman v Whirlpool Financial Corp.*, 123 Wn.2d 667 (1994) (judge defeated in reelection deemed “retired” for purposes of Const. Art 4, § 7)

Under this rule, it is not possible for a successor judge to take up and complete a case after the original judge has adduced evidence. *State v. Johnson*, 55 Wn.2d 594 (1960). Neither can a successor judge enter findings of fact based on evidence presented to a different judge. *Tacoma Recycling v. Capital Material*, 42 Wn.App. 439 (Div II 1985). Because the presiding judge has been replaced the nature of the statements and comments of the litigants in the second and third transcript excerpts of 5/9/08 cannot be clarified as evidence or as argument. Neither can the successor judge identify the pre-trial information form relied upon by the trial judge. Therefore, a new trial is required under CR 63.

The trial court erred when it terminated testimony before both parties had “rested”

While a trial court has the general authority to alter the mode and order of presenting evidence, see e.g., ER 611(a), the exercise of that authority must be reasonable, and serve the objective of ascertaining the truth. *Tegland*, supra, §30.5.

It is a well recognized rule, ... that a trial judge

presiding at a jury trial is not restricted to the function of a mere umpire in a contest between opposing parties. He is charged by law and conscience with the fundamental duty of seeing that truth is established and justice done, under the statutes and rules of law. *Talley v. Fournier*, 3 Wn.App. 808, 819, 479 P.2d 96 (Div II 1970)(Emphasis added)

None of the cases affirming the authority of the court to alter the mode and order of presenting evidence, e.g., *Wilson v Overlake Hospital Medical Center, Inc.*, 77 Wn.App. 909 895 P.2d 16 (1995) (no abuse of discretion to take witnesses out of order), *Marriage of Olson*, 69 Wn.App. 621, 850 P.2d 527 (1993) (no abuse of discretion to restrict scope of cross-examination), affirm the authority of the court to stop taking evidence or to tell a litigant which kinds of evidence he should or should not offer. Termination of testimony because of a pre-determined time for completion of the trial is reversible error. *Baxter v. Jones*, 34 Wn.App. 1, 658 P.2d 1274 (1983).

Here, the trial court stated three times on the record that it had a potential scheduling conflict and was concerned that the testimony would not be completed in the available time. VRP 5/7/08 (Armijo), p 11, l 25 – p 12, l 10; VRP(1) 5/9/08, p 3, l 3-15; p 32, l 4-6. Shortly after proceedings began on the last afternoon, the Appellee's counsel complained the Appellant was wasting the court's time. VRP(2) 5/9/08, p 6, l 7-8. The Appellant argued, inter alia, that he had not yet had an opportunity to present his case. VRP(2) 5/9/08, p 14, l 13-20. The court responded that a difference of up to \$40,000 in expenses paid wasn't going to affect its final decision in this case⁹

⁹ The court said this apparently because the expenses at issue

and that the Appellant's once separate property, since co-mingled, is now "gone" for purposes of the current property division.¹⁰ VRP(2) 5/9/08, p 1, l 1-18.

The court was clearly telling the Appellant, who was still pro se, that there was evidence that it did not want to hear. Given the court's prior concerns about its schedule, the court was depriving the Appellant of the opportunity to present his case. It was in this context that the Appellant offered to withdraw his line of questioning of the Appellee. VRP(2) 5/9/08, p 17, l 16-20.

"Judges should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." CJC 2

"The judicial duties of judges should take precedence over all other activities. ... In the performance of these duties, the following standards apply: (A) Adjudicative Responsibilities. ... (3) Judges should be patient, ..." CJC 3

Here, by announcing three times that he had another case starting the next court day, and by admonishing the Appellant about what evidence he wanted to hear, the judge demonstrated that he was not being patient with the Appellant.

Even though the Appellant also said he would "let the court make a decision," it does not follow that the Appellant felt that the

represented perhaps 1% of the aggregate marital estate. However, \$40,000 is still, by most estimates, a significant amount of money.

¹⁰ In so doing the court precluded the Appellant from showing that the historical behavior of the parties was to co-mingle everything until the wife apparently changed her mind a few years before they separated, and without telling him.

time was ripe for the court to decide the entire case.¹¹ He had just told the court a few minutes earlier that he had not presented his “side” to the case. VRP(2) 5/9/08, p 14, l 7-20. Several times throughout the proceedings, too numerous to list, before and after this statement, he had told the court that the evidence presented by the Appellee was incomplete, erroneous and/or misleading.

The court has a duty to ensure that the proceedings are fair, proper and orderly. “Judges should accord to every person who is legally interested in a proceeding ... full right to be heard according to law,” CJC 3(A)(4). Similarly, the appearance of fairness doctrine requires that a reasonably prudent and disinterested observer may conclude that all parties obtained a fair, impartial and neutral hearing. *State v Bilal*, 77 Wn.App. 720, 893 P.2d 674, rev. den. 127 Wn.2d 1013 (1995). At minimum, the court should have had the Appellant clarify whether he did, indeed, intend for the case to be submitted on the record created up to that point. Failure to do so was reversible error.

The trial court erred when it disposed of property and liabilities before considering all relevant factors

When Appellee’s counsel told the court “you have enough before you to make this decision.” VRP(2) 5/9/08, p 22, l 15, he was misstating the law of property division in dissolution actions. The question is not whether the court has “enough” evidence to render a decision, but whether the court had considered “all the relevant

¹¹ The Appellant may simply have wanted to “move on,” and “let the court make a decision” after the presentation of his own case in chief.

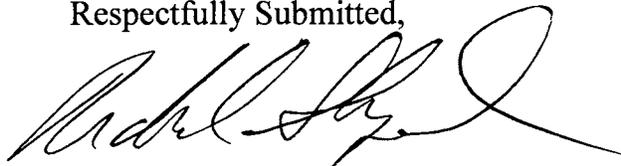
factors,” R.C.W. § 26.09.080.

The third transcript excerpt reflects that several matters were raised for the first time, and decided by the court, after the court had ruled it was adopting the Appellee’s proposed property division. Thus, the court in this case was still taking evidence at the same time that it was announcing its decision. This is, in itself, a basis for vacation, because a court may only order “disposition of the property and the liabilities of the parties, ... *after considering all relevant factors*” (emphasis added) RCW § 26.09.080. Stated alternatively, the court must have taken all the evidence and both parties must have “rested” before the court can begin to divide the assets and liabilities of a marriage. The trial court did not do that here, and the decree thereon must be vacated.

CONCLUSION

For the foregoing reasons, the decree of dissolution dividing the assets and liabilities of the parties, and setting obligations for support of the parties’ children, should be vacated, and a new trial should be ordered.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Richard Shepard', written in a cursive style.

RICHARD SHEPARD, WSBA #16194
Attorney for the Appellant

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STATE OF WASHINGTON
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DEPUTY

IN THE COURT OF APPEALS - DIVISION
TWO OF THE STATE OF WASHINGTON

In Re the Marriage of:

CAROLYN T READ,

Respondent

and

CURT M READ,

Appellant

Case No: 37964-3-II
SC No: 07-3-01314-7

CERTIFICATE OF DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this date s/he hand delivered the following document(s):
APPELLANT'S OPENING BRIEF.

to the following party(ies):

JOHN PATRICK O'CONNOR
2115 N 30TH St # 201
Tacoma, WA 98403

DATED Monday, April 27, 2009, at Tacoma, Washington.

[Signature]
JENNIFER JOHNSON
Legal Assistant, Shepard Law Office, PLLC

CERTIFICATE OF DELIVERY

- Page 1 of 1

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SHEPARD LAW OFFICE, P.L.L.C.

818 So. Yakima Ave., #200
Tacoma, WA 98405
(253) 383-2235