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COURT OF APPEALS  
DIVISION II

2017 AUG 14 PM 1:25

STATE OF WASHINGTON

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DEPUTY

No. 50190-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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**In Re:**

MARINA NICOLE TURNER, Respondent,

vs.

RANDOM ERIK VAUGHN, Appellant

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Pierce County Superior Court

Cause Nos. 16-3-00665-4

The Honorable Judge Kitty-Ann van Doorninck

**Appellant's Brief**

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### ASSIGNMENTS OF ERROR

1. Judge Kitty-Ann van Doorninck committed error in concluding that the parties had a committed intimate relationship.
2. Judge Kitty-Ann van Doorninck committed error by reading and considering a declaration filed by the petitioner the day before the Judge was to issue her decision and without providing notice to the respondent that she would be considering that declaration in making her decision.
3. Judge Kitty-Ann van Doorninck committed error denying the respondent's motion for a new trial and to recuse herself from that trial for considering an ex parte communication in reading and considering a declaration that was provided to the court as a working copy without notice to the respondent that the declaration was intended to and would be submitted as a document to be considered by the court in issuing its ruling following a trial.
4. Judge Kitty-Ann van Doorninck committed error in her order dated March 31, 2017 wherein she denied the motion for a new trial and recusal of Judge in her finding 3.A. that there was no ex parte contact between petitioner's lawyer and the court.
5. Judge Kitty-Ann van Doorninck committed error in her order dated March 31, 2017 wherein she denied the motion for a new trial and recusal of Judge in her finding 3.D. wherein she found that providing a working copy to the court is presumed and in conformity with usual custom and practice in the Superior Court of Washington.
6. Judge Kitty-Ann van Doorninck committed error in her order dated March 31, 2017 wherein she denied the motion for a new trial and recusal of Judge in her finding 3.F and 3.G. that there was no misconduct by nor violation of RPC 3.5 by petitioner or her attorney.
7. Judge Kitty-Ann van Doorninck committed error in her order dated March 31, 2017 wherein she denied the motion for a new trial and recusal of Judge in her finding 3.H. that there was no legal or factual basis to grant a new trial.

8. Judge Kitty-Ann van Doorninck committed error in her order dated March 31, 2017 wherein she denied the motion for a new trial and recusal of Judge in her finding 3.I. that there with no legal or factual basis for recusal of the trial court.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does a committed intimate relationship exist where over a period of 4 years and 2 months the parties reside together (although during 18 months of that time the parties resided approximately half of that time in different states), are involved in a relationship that lasted 4 years and 7 months, had a relationship based upon love and affection and sex, only pooled their resources for basic living expenses and a car and did not pool their resources for any joint projects other than utilizing a joint bank account for business credit card deposits, had two children, and where the parties did not mutually intend to marry?
2. Should a new trial be granted based upon CR 59(a)(2), misconduct of a prevailing party, when the prevailing party violates RPC 3.5(a)&(b) by providing to a judge, the day before the judge is to deliver their decision in a trial, a new declaration as a working copy without providing notice to opposing counsel that the document was intended to be used for that purpose?
3. Should a new trial be granted based upon CR 59(a)(1), irregularity of proceedings of the court, when the judge in violation of CJC 2.9(A)(1) receives and considers, the day before she was to deliver her ruling in a trial, a new declaration as a working copy and provides no notice to opposing counsel that the declaration would be considered?
4. Should a judge recuse herself from a case based upon a violation of CJC 2.9 for ex parte communication that formed the basis for her decision in a trial?

## INTRODUCTION

Following 4 days of trial which ended on February 28, 2017, the court set over her decision to March 9, 2017. The day before the trial judge was to issue her decision, Marina Turner filed a declaration with the court wherein she claimed that Random Vaughn had filed a false child abuse claim against her with the police who came to her home to investigate. There was no motion attached to the declaration and there was no indication in the court file, nor to the attorney for Mr. Vaughn, to signify the purpose for which this declaration was being filed. (Throughout the case counsel for Ms. Turner had filed declarations and materials that were not associated with any motion nor anything pending before the court, they were simply filed in the court file.)

The next day the court in her ruling found that the parties had a committed intimate relationship and she also found that Mr. Vaughn had engaged in an abusive use of conflict based upon which she removed his visitation time from 8 hours unsupervised every other week and daily video phone contact to 2 hours supervised every other week and one day a week for a 5-minute video phone contact.<sup>1</sup>

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<sup>1</sup> The issues dealing with the parenting plan and relocation will be used in this brief for purposes of illustration regarding the issue of prejudice, but are not an ongoing part of this appeal as the parties have subsequently reached a settlement regarding those issues and this court will not be asked to reverse or decide those issues as a result.

In issuing her decision regarding the abusive use of conflict the court stated “I am going to find that the .191 restrictions are not — well, they weren’t dispositive until yesterday”. (RP 662)

When the court concluded issuing her decision, and right before restricting Mr. Vaughn’s visitation, the court initiated the following dialogue:

I wanted to, I guess, ask Mr. Dickinson if you've got anything. I looked in LINX, and I received a working copy of Ms. Turner's declaration of events that happened earlier this week.

MR. DICKINSON: Did the Court consider that in making its decision?

THE COURT: Well, I did change things a little bit, yes. (RP 667)

As a result of this, counsel for Mr. Vaughn filed a motion for a new trial and for the recusal of the judge due to her consideration of ex parte material that was not properly introduced at trial. That motion was denied and this appeal followed.

### **STATEMENT OF FACTS**

Random Vaughn and Marina Turner met in Washington State in March of 2011 and they had their first date in May. (RP 31) She was from New Mexico and went to cosmetology school in Denver where she also took massage therapy and studied to be an esthetician. (RP 29-31) She got her first job after graduation in Seattle. (RP 31, 115) Mr. Vaughn is

from Washington State and was working here doing video production. (RP 116, 203, 34)

In October 2011, they moved in together in an apartment in Lynnwood, Washington. (RP 35, 209-210) During this time, Ms. Turner worked 40 hours a week at True Spa at the Westin in Bellevue and she also worked for Aveda. (RP 33) When they first moved in together Mr. Vaughn was working in film production at his studio in Everett and they were splitting expenses. (RP 34) Although he began working with medical marijuana while they lived in Lynnwood, Mr. Vaughn was not making much money in it. (RP 34)<sup>2</sup>

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 purchased lights to assist with that. (RP 221-223) He then became involved with a collective garden called "Your Own Garden". (RP 226) He was contributing resources from his business, Original Investments, to purchase things like nutrients for the plants, pay electric bills, he also

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<sup>2</sup> This is from Ms. Turner's testimony, Mr. Vaughn denies making any money or personal profit as it was a nonprofit corporation. (RP248, 250, 355) Also, the collective he was involved in during this time closed down as there was not enough money to pay the bills to run it. (RP 242)

leased a farm in Monroe to grow marijuana. (RP 223-226) Ms. Turner was never a member of Your Own Garden. (RP 242)

Ms. Turner and Mr. Vaughn lived in Washington together until August 2012 when Ms. Turner moved to California. (RP 35) She wanted to move to California because she thought it was a more ideal place for her line of work. (RP 115) Mr. Vaughn assisted her with the move, but continued to live in Washington until October 2012 when he brought Ms. Turner'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) While she was in California she also spoke with Katrina Davenny, Mr. Vaughn's sister, about how she could break up with Mr. Vaughn. (RP 109, 520)

In Washington, Mr. Vaughn continued to pursue his career in film production and continued his involvement with medical marijuana. (RP 242-247, 206) When in California he did pitch TV show concepts to Discovery Channel and others, but the shows he was producing were being made in Washington State. (RP 206-208) None of these were picked up by any networks. (RP 206) Throughout this time Mr. Vaughn

maintained his film studio in Everett. (RP 33, 194-195, 204-205, 523) He also collected mail at his PO Box in Everett which is the address listed on his 2013 tax return. (RP 209)

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) The articles of incorporation for the nonprofit Pacific Green Collective were filed by Sam Becker on February 28, 2013. (RP 246-247)

On April 19, 2013, Ms. Turner's 21st birthday, Ms. Turner decided that she would go out that night and celebrate with her girlfriends. (RP 116-117) Mr. Vaughn had just flown back into town the day before and was not happy that he was not allowed to attend and celebrate her birthday

with her girlfriends. (RP 116-117, 254) The next day he broke up with her. (RP 117-118, 254) Ms. Turner notified both families regarding the breakup, including her mother and Mr. Vaughn's mother. (RP 117-118, 255)

After he had returned to Washington, she called him to let him know that she was pregnant. (RP 118-119, 256) Due to Marina being pregnant, Mr. Vaughn decided to try again to make the relationship work. (RP 256-257) He also gave her a promise ring. (RP 257) Ms. Turner claims that this was an engagement ring (RP 49), however, they never got married. (RP 102) Mr. Vaughn was married previously and due to a bad experience with that marriage advised Ms. Turner from day one that he was not going to get married again. (RP 101-103, 204, 347) Ms. Turner testified that they exchanged vows in Thailand, but they did not get married because Mr. Vaughn refused pay the \$3000 for someone to officiate the ceremony. (RP 102) When they return to United States Mr. Vaughn still refused to marry her because he was worried about the legal implications of his working in marijuana. (RP 102) Ms. Turner testified that Mr. Vaughn asked her to take his last name, but she refused. She was very close to doing it until she discovered his infidelity. (RP 103) Ms. Turner's father has never met Random. (RP 120)

After Dean was born on December 20, 2013 in California (RP 260), Ms. Turner stayed in California a short time and then went to New Mexico and stayed with her mother and father. (RP 260-261) On March 10, 2014 Ms. Turner return to Washington. (RP 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 was essentially a stay-at-home mom and 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 from March 2014 forward. (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)

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)<sup>3</sup>

Following the birth of Dean, Ms. Turner got pregnant again but lost the child in a miscarriage. (RP 128, 270) In April 2015, during a trip to Hawaii, Ms. Turner advised Mr. Vaughn that she was pregnant again. (RP 128) She says that he became angry that she was pregnant and told her that she had ruined the relationship. (RP 128) Mr. Vaughn testified

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<sup>3</sup> Testimony regarding the process of transferring the funds from the joint account to Pacific Green Collective was not provided at this point in the trial because the Court requested that the financial issues be dealt with in a separate trial following the initial determination of a CIR. For that reason, further elaboration on this issue will not be provided in this brief. (RP 286, 330)

that he did not want more children because Ms. Turner was having a hard enough time taking care of one. (RP 271) He believed that following Dean's birth Ms. Turner was on birth control. (RP 270) It was his testimony that he told her in Hawaii, after being advised that she was pregnant again that the relationship was over. (RP 271) Mr. Vaughn began spending less time at the residence in July 2015 when he rented a residence in Oregon for some work being done there. (RP 128-129, 283) Eventually, he moved out of the shared residence with Ms. Turner altogether on December 8, 2015. (RP 45, 64, 284-285)

On the last day of the four day trial, counsel for Mr. Vaughn asked the court to allow Mr. Vaughn to have unsupervised visitation. (RP 647) The visitation to that point had been supervised every other Saturday and Sunday from noon to 4 p.m.. (RP 647) After hearing from Ms. Turner's attorney, the court granted the request for unsupervised visitation for the weekend prior to her issuing her decision. (RP 648)

The Judge set March 9, 2017 as the date when she would give the parties a decision in the case. (RP 646) On March 8, 2017, counsel for Ms. Turner filed a declaration of Ms. Turner wherein she claimed that police came to her home on Tuesday, March 7, 2017 and did an investigation based on false allegations of child abuse made by Mr. Vaughn. (CP 69-71) She quoted one

of the officers as stating specifically that the allegations were made by Mr. Vaughn. (CP 70)

Although a copy of the declaration was provided to Mr. Vaughn's attorney, counsel for Ms. Turner did not note a motion or provide any notice of the intended purpose or use of the declaration. (CP 75) Counsel for Ms. Turner had filed material in the court file, with a copy to Mr. Vaughn's attorney in the past which were not associated with any motion nor anything else pending in the case at the time the material was filed. (CP 75) Unbeknownst to Mr. Vaughn's attorney a working copy of the declaration was sent to the trial judge. (CP 75-76) (RP 667)

On March 9, 2017 the trial judge issued her decision. (RP 654) The first finding that the court made was that she found Mr. Vaughn to be not credible. (RP 655) The trial judge then found that there was a committed intimate relationship. (RP 655)<sup>4</sup>

In analyzing the factors for a CIR the court combined the factors of continuous cohabitation with duration of the relationship and felt that a four-year period of time was a sufficiently long enough to show duration. (RP 655) The court felt that the intent to live together was established by the leases in both of their names from Lynnwood, West Hollywood, and Puyallup, cable bill for

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<sup>4</sup> Because the trial court separated the trial into 2 segments, one to establish whether or not a CIR existed and the other to determine the financial issues, including what money would go to Ms. Turner if a CIR was found to exist, the court has not yet entered findings of facts and conclusions of law in this case. The trial to deal with the financial issues was originally scheduled for August 7, 2017, but has now been continued to December 6, 2017. As a result, what follows will be based upon the court's oral decision only.

October 11, 2012 and the citation against Mr. Vaughn in California listing the West Hollywood address; the court found that they resided together. (RP 655-656) The court did not find it significant that they did not reside together more than 50% of the time once Ms. Turner moved to California. (RP 655) The court found that the relationship lasted from October 2011 to December 8, 2015. (RP 655, 656)

In regard to the purpose of the relationship the court found that it was love, intimacy, cohabitation, and share life and goals. This was demonstrated by greeting cards the receipt for the ring, a Facebook post from Mr. Vaughn as well as photos of them together as a family. (RP 656-657)

In regard to pooling of resources and services for joint projects, the court found that the joint bank account from which Ms. Turner could withdraw money with no questions asked was a supporting factor. (RP 657) Ms. Turner also ran the household and paid the monthly bills. (RP 657)

In regard to the intent of the parties the trial court felt that this was basically the same thing as the purpose of the relationship. (RP 657-658) The court then reiterated that she found Mr. Vaughn to be "not credible". (RP 558)

Lastly, the court commented that the list of factors was not exclusive and she then determined that a significant factor was that the parties had children together. (RP 658) The fact that there were 3 pregnancies and two children, one born December 2014 and one born and January 12, 2016 showed a committed intimate relationship. (RP 658)

The court then proceeded to issue her decision regarding the parenting plan. (RP 658) The court made a finding of .191 factors against Mr. Vaughn. (RP 659) She then reiterated that she had “huge concerns about his credibility.” (RP 659)

In issuing her ruling regarding the .191 factors the court made the following comment:

I am going to find that the .191 restrictions are not -- well, **they weren't dispositive until yesterday** (RP 662 emphasis added)

Thereafter the court concluded her analysis of the parenting plan as well as the relocation factors and allowed the relocation. (RP 662- 667)

Following the issuing of the court's decisions, the following dialogue occurred:

I wanted to, I guess, ask Mr. Dickinson if you've got anything. I looked in LINX, and I received a working copy of Ms. Turner's declaration of events that happened earlier this week.

MR. DICKINSON: Did the Court consider that in making its decision?

THE COURT: Well, I did change things a little bit, yes. (RP 667)

After some discussion regarding obtaining additional records regarding this, the court stated:

I had allowed Mr. Vaughn to have unsupervised contact, and I sort of, in reading the declaration of Ms. Turner, thought that that had really backfired (RP 668)

The court then proceeded to reimpose supervised visitation and reduced visitation to 2 hours on Saturday every other week and only one Skype visit per week. (RP 668-669)

Mr. Vaughn then filed a motion for a new trial based on CR 59 (a) (1) & (2), irregularity of proceedings and misconduct of a prevailing party and also that the trial judge recuse herself for violation of CJC 2.9(A)(1) for considering ex parte communications due to reading the declaration and considering it in making her decision. (CP 74-86) By order entered on March 31, 2017 the court denied the motion in full. (CP 150-151)

#### ARGUMENT

**1. A COMMITTED INTIMATE RELATIONSHIP DOES NOT EXIST WHERE OVER A PERIOD OF 4 YEARS AND 2 MONTHS THE PARTIES RESIDE TOGETHER (ALTHOUGH DURING 18 MONTHS OF THAT TIME THE PARTIES RESIDED APPROXIMATELY HALF OF THAT TIME IN DIFFERENT STATES), ARE INVOLVED IN A RELATIONSHIP THAT LASTED 4 YEARS AND 7 MONTHS, HAD A RELATIONSHIP BASED UPON LOVE AND AFFECTION AND SEX, ONLY POOLED THEIR RESOURCES FOR BASIC LIVING EXPENSES AND A CAR AND DID NOT POOL THEIR RESOURCES FOR ANY JOINT PROJECTS OTHER THAN UTILIZING A JOINT BANK ACCOUNT FOR BUSINESS CREDIT CARD DEPOSITS, HAD TWO CHILDREN, AND WHERE THE PARTIES DID NOT MUTUALLY INTEND TO MARRY.**

The standard for review of a committed intimate relationship or meretricious relationship was stated in the case of *Gormley v. Robertson*, 120 Wn. App. 31, 83 P.3d 1042 (2004) as deference as to findings of facts

and de novo review as to conclusions of law. (at 36, citing *In re Matter of Pennington*, 142 Wash.2d 592, 602–03, 14 P.3d 764 (2000)) The court went on to state:

We review findings of fact to determine whether they are supported by substantial evidence and, if so, whether the findings support the conclusions of law. *Willener v. Sweeting*, 107 Wash.2d 388, 393, 730 P.2d 45 (1986). Substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wash.2d 693, 712, 732 P.2d 974 (1987). Credibility is determined solely by the trier of fact. *Kinder v. Mangan*, 57 Wash.App. 840, 846, 790 P.2d 652, review denied, 115 Wash.2d 1018, 802 P.2d 127 (1990).(at 38)

In this case, because the court separated the trial to determine first whether or not there was a committed intimate relationship and then to determine the division of property, the court has not yet entered its findings of facts. The court has only entered a conclusion of law that there was a committed intimate relationship. However, the court did enter verbal findings as noted above. These verbal findings of facts do not provide substantial evidence from which the court could reach the conclusion of law that there was a committed intimate relationship that merited a division of property.

In the case of *In re Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000) our state Supreme Court first outlined and analyzed cases under 5 factors. Those factors deal with both the issues of whether a stable

cohabiting relationship existed as well as whether there is an equitable theory under which one of the parties should be awarded a recovery from the other. The court cited the law and the analysis to be applied as follows:

Accordingly, we listed five relevant factors to analyze when a meretricious relationship exists: “continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties.” *Connell*, 127 Wash.2d at 346, 898 P.2d 831 (citing *Lindsey*, 101 Wash.2d at 304-05, 678 P.2d 328; *Latham*, 87 Wash.2d at 554, 554 P.2d 1057; *In re Marriage of DeHollander*, 53 Wash.App. 695, 699, 770 P.2d 638 (1989)). These characteristic factors are neither exclusive nor hypertechnical. Rather, these factors are meant to reach all relevant evidence helpful in establishing whether a meretricious relationship exists. *Connell*, 127 Wash.2d at 346, 898 P.2d 831. Thus, whether relationships are properly characterized as meretricious depends upon the facts of each case. *In re Meretricious Relationship of Sutton*, 85 Wash.App. 487, 490, 933 P.2d 1069 (1997).

Under *Connell*, we further established a three-prong analysis for disposing of property when a meretricious relationship terminates. First, the trial court must determine whether a meretricious relationship exists. Second, if such a relationship exists, the trial court then evaluates the interest each party has in the property acquired during the relationship. Third, the trial court then makes a just and equitable distribution of such property. *Connell*, 127 Wash.2d at 349, 898 P.2d 831.

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 601-602)

Pursuant to this outline, the court in *Pennington* then proceeded to provide the first item by item analysis using the 5 factors with the general assumptions regarding dividing property.

In regard to continuous cohabitation, in the *Pennington* and *Van Pevenage* case the court found their relationship was not a continuous cohabitation. They lived together from August 1985 until March or April 1991, separated for a brief time then got back together until March 1993 and then dated other people until October 1994. They then resumed living together until they ultimately separated for good in October 1995. Because *Pennington* was married to someone else until 1990, it would also be challenging for the court to factor in the community interest of the marriage along with the overlapping periods of residing together and separation and as a result the continuous nature of the relationship was not established.

In regard to the duration of the relationship, the court found that from the time they started dating in 1983 until the end of their relationship in 1995, being a span of 12 years, was of a sufficient duration to satisfy this requirement. However, the court noted that this factor alone would not be sufficient to “justify the need for an equitable division of property acquired by the couple during the relationship”. (at 604)

The next element was the intent of the parties. The court found that whereas Van Pevenage intended to be a long-term relationship with expectations of marriage, Pennington denied sharing those expectations. He was married to someone else during the first 5 years and then when he dissolved his marriage he did not marry her. She says he gave her an engagement ring, but he said he gave her a “cocktail ring”. The court held that the intent must be mutual and in this case was not. They also noted that she also had affairs towards the end of their time together.

The pooling of resources is the next factor. The court acknowledged that Van Pevenage had “spent money on food, household furnishings, carpet and tile, and some kitchen utensils” (at 604) and that she “cooked meals, clean house, and help with interior decoration.” (at 604) However, the court did not find that to be sufficient to show a pooling of resources and services for joint projects. In this case she had not made any payments on a continuous basis to jointly or substantially

invest any time or effort into an asset to create any inequities. The court stated the following:

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)

Basically, the court added to the pooling of resources requirement an additional clarification that in order to be sufficient for the court to divide property the person requesting an equitable division of property must show that they have invested their time, efforts, and financial resources to a specific asset.

The last factor was the purpose of the relationship. The court found that the Pennington/Van Pevenage relationship included "companionship, friendship, love, sex, and mutual support and caring". (at 605) The court then concluded that one factor is not more important than another, but taken as a whole the court felt there was not a meretricious relationship.

In the case of Chesterfield and Nash, the court found that the first factor of continuous cohabitation was not met. The court felt that the trial court was correct that they live together continuously from July 1989 until October 1993, a period of 4 years and 3 months, but taken as a whole it

was not continuous when they got back together in 1994 and then separated in 1995.

With regard to the factor of duration of the relationship, the court found that the fact that the parties dated for 3 years before they resided together, making this a 7+ year relationship, was sufficient to establish duration.

The court next found that the intent of the parties was not clear enough to establish this element. The parties did not hold themselves out as married. Nash had purchased a diamond for Chesterfield when they decided to get married, but they never got married.

The factor of pooling of resources was once again determined to not be applicable. The fact that the parties have a joint checking account for living expenses into which they both deposited money was not considered sufficient. 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, was not sufficient. They even lived together in Chesterfield's home and jointly contributed towards the mortgage, but they maintained separate bank accounts and purchased nothing jointly. They also maintained their own careers, financial independence, and contributed separately to their

retirements. The court concluded by again citing the fact that looking at this factor as a whole the parties did not jointly “pool their time, effort, or financial resources enough to require an equitable distribution of property”. (at 607)

In the Chesterfield case the Supreme Court did not consider the factor of the purpose of the relationship because the trial court did not consider that factor. The court again concluded in this case that there was no committed intimate relationship. The court reasoned that whereas there was a continuous cohabitation and was sufficient duration for a meretricious relationship, the intent was “equivocal”. (at 607) The court continued 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)

Again, the requirement for the pooling of time and efforts became a deciding factor in this case.

In this regard, it would be helpful to consider the prior cases of *Matter of Marriage of Lindsey*, 101 Wn.2d 299, 678 P.2d 328 (1984) and *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995). In *Lindsey* the parties have lived together for 2 years prior to getting married. When

the parties dissolved their marriage 5 years later, the wife claimed an interest in insurance proceeds for a barn that had burned down. The trial court had ruled that she was not entitled to an interest in that property as it had been acquired and built prior to the marriage, although during the time period of the meretricious relationship. The husband stated that the wife “did very little work” on the barn but she stated that she “helped in framing, cementing, siding, and roofing the barn/shop. Additionally, she stated she did almost all the painting.”(at 306) The Supreme Court remanded the case for the court to decide what her interest in the property would be in light of this. In short, it was the fact that she had put in time and effort towards the building of the barn that gave her the equitable interest, not just the fact that they lived together.

In the *Connell* case, Connell was a dancer in a stage show produced by Francisco. The parties met in June 1983 and moved in together in November 1983. They then lived together until March 1990. During that time Connell continued to work as a dancer, but she also assisted Francisco with his businesses. In 1985 Francisco’s production company purchased a bed-and-breakfast on Whidbey Island. In June, Connell moved there and managed the bed-and-breakfast. Francisco moved there shortly thereafter and they continued to reside there together until the relationship ended in March 1990. Connell received no

compensation for her services for the first 2 years that she managed the bed-and-breakfast. In addition, the parties were viewed by many on Whidbey Island as being married, Connell used Francisco's last name, Francisco prepared a last will and testament leaving the bulk of his estate to Connell, they both had surgery to enhance their fertility, and in 1986 Francisco gave Connell an engagement ring. In that case the parties acknowledged that there was a meretricious relationship. The only question was the division of property.

The court in that case held that the property could be considered like community property and be divided. However, it needs to be borne in mind that in that case once again Connell put in time and effort. Connell was an active part of Francisco's business, especially the bed-and-breakfast. They also lived together continuously for nearly 7 years. It would have clearly been unjust to not divide property under those circumstances where Connell have given several years of her life working full time to manage the bed-and-breakfast without pay and her efforts towards making that asset a success. Hence in the cases where property is divided the purpose of the division is to avoid an inequity that would occur where a party has put in time, efforts, and financial resources towards an asset that then remains with the other party.

When this analysis is applied to the case of Ms. Turner and Mr. Vaughn it can be seen that there was no committed intimate relationship and there should be no division of assets. In regard to the factor of continuous cohabitation. The court found that the parties resided together from October 2011 until December 8, 2015. This is a time period of approximately 4 years and 2 months. However, the parties did not fully reside together between September 2012 and March 10, 2014. Even though their names were both on the lease in California, Mr. Vaughn resided approximately half of his time in Washington State. Ms. Turner's employment was in California and she spent her time pursuing her career there. Mr. Vaughn's employment was in Washington. He made movies in Washington and he would not have been able to qualify to be a part of a collective garden if he had moved to California. For approximately 18 months the parties essentially pursued separate lives in different states although Mr. Vaughn visited the state of California to be with Ms. Turner during about 9 of those months.

In regard to the duration of the relationship, it lasted from their first date in May 2011 to December 8, 2015. At most it was 4 years and 7 months long. This is shorter than any of the other relationships considered by the courts, as all the others were roughly 7 years or more including dating time.

Also the case of *In re G.W.-F.*, 170 Wn. App. 631, 285 P.3d 208, (2012) makes it clear that when one party communicates to the other that the relationship is over, it is over even if the parties remain living together. In that case the parties resided together for 25 years. In May of 2007 Dr. Gary Wieder advised Dr. Melissa Finch that he was ending the relationship. Even though he continued to reside with her until July 2009 the court concluded that the relationship ended in May 2007 because he had unequivocally communicated to her that it was over.

Mr. Vaughn unequivocally communicated to Ms. Turner in April 2015 while the parties were in Hawaii, that the relationship was over. She testified that he told her she had ruined the relationship. Even if he resided in the same home with her thereafter, had there been an intent to remain in a committed intimate relationship previously, it no longer existed. He thereafter found a house in Oregon where he moved in July and lived part time. Based upon this the duration of the relationship would have been 3 years and 11 months.

The next factor is the intent of the parties. Here the trial court confused this element with the purpose of the relationship and did not specifically address it. However, in considering this element in general, Mr. Vaughn says that from the beginning he let Ms. Turner know he had been in a bad marriage and he never intended to remarry. She says he

bought her an engagement ring, he says he bought her a promise ring. A date was never set for the marriage. Ms. Turner claimed that Mr. Vaughn wanted her to take his last name, but she refused. It is interesting to note that Mr. Vaughn has never even met Ms. Turner's father, how can you intend to marry someone you've never introduced to one of your parents? Ms. Turner says that they almost got married in Thailand, but did not due to Mr. Vaughn's unwillingness to pay \$3000 for someone to officiate the service. However, when the requirement to pay \$3000 was over and they were back in the United States, Mr. Vaughn still refused to marry Ms. Turner. The court requires that the intent factor be mutual and clearly in this case it was not.

Also, Ms. Turner discussed with Mr. Vaughn's sister, Katrina, how to break up with him when she moved to California. Ms. Turner had changed her residency, her work, everything to reside in California. She knew that Mr. Vaughn maintained his Washington residency, his driver's license, and his work. She knew that it was not possible for him to become a California resident and legally be involved in the marijuana industry in Washington State. Clearly this does not evidence an intent to remain in a continuous and ongoing committed intimate relationship.

The 4<sup>th</sup> factor is pooling of resources and services for joint projects. In the case of Mr. Vaughn and Ms. Turner, the only joint asset

they owned was a 2012 Honda Civic. They each maintained separate bank accounts and only had one joint account into which they deposited funds from which Ms. Turner could pay household expenses and personal items. This account was eventually used as a pass-through account when Mr. Vaughn found that banks refused to allow money with any connection to marijuana to be deposited into their bank for fear of federal law. As a result, the one joint account that the parties had was used as a pass-through account for those funds. However, this did not require any pooling of the parties' time or efforts and it required absolutely no financial resources on the part of Ms. Turner. So basically, it amounted to, he put money into an account and she spent it. This is not a pooling of resources.

Again, this element is key to an equitable division of property. As the court noted above in *Pennington* above, there must be a showing that “the parties jointly invested their time, effort, or financial resources in any specific asset to justify the equitable division of the parties’ property”. (at 605) Ms. Turner did nothing here to acquire property or to develop an asset, but rather all she did was to take advantage of the opportunity to take money in the amount of approximately \$9100 a month. She was receiving this money for doing nothing but allowing an account that was in both of their names to be used as a pass-through account. Even if it were considered to be some form of pooling of resources, she was well

compensated for all the “time, efforts, and financial resources” that she put into it. This does not justify a determination of a committed intimate relationship nor justify a division of property.

In this case, the marijuana nonprofit collective garden was not developed as a result of the efforts of Ms. Turner in terms of time, efforts, or financial resources, but rather was developed in spite of her efforts. Ms. Turner is the one who wanted to relocate to California. She fully intended to permanently reside in California. By her own testimony during the time that they resided together in Washington state prior to her moved to California Mr. Vaughn earned very little money in marijuana. Pacific Green Collective was developed by the effort of Mr. Vaughn and his associates in Washington state during the time that Ms. Turner was residing full time in California and spending 100% of her time pursuing her own career goals. There was no pooling of resources to develop this business.

The last factor is the purpose of relationship. In *Pennington* the court found that this included companionship, friendship, love, sex, and mutual support and caring and that was enough to support this element of a committed intimate relationship this element may be met in the relationship of Ms. Turner and Mr. Vaughn. However, in *Pennington* the

court found that this element alone was not sufficient even when combined with the duration of the relationship.

The court in this case considered a new element that has never been considered by the courts in the state of Washington previously. That is, that Ms. Turner got pregnant 3 times and they had 2 children together. However, it also needs to be borne in mind that Mr. Vaughn believed that she was on birth control. Apparently she had gotten pregnant the 2<sup>nd</sup> time while on birth control and Mr. Vaughn testified that he thought she was on birth control when she got pregnant the 3<sup>rd</sup> time. The testimony was unequivocal that he got mad when he learned that she was pregnant the 3<sup>rd</sup> time, even stating that she had ruined the relationship and that it was over. This does not appear to be a mutual intent to have multiple children. The evidence was to the contrary, so this should not form an appropriate basis to show that this is a committed intimate relationship. Sex is listed as one of the purposes of a relationship and this analysis would probably fit better under that category.

Based upon the above it is clear that there was no committed intimate relationship. The court found that the parties' relationship was continuous, but it was an interrupted 4 years 2 months. As to duration, it was 4 years 7 months and this duration was shorter than any other case that has been determined to be of substantial duration to be considered a

committed intimate relationship. The intent element is missing as Ms. Turner moved to California and seriously questioned whether this relationship would continue and considered breaking up with Mr. Vaughn. Furthermore, her intent was to remain in California knowing that this was contrary to the future direction in which Mr. Vaughn was proceeding. It was also clear that Mr. Vaughn never intended to marry Ms. Turner and refused to do so when potential opportunities presented themselves. Ms. Turner put absolutely no time, efforts, or financial resources into any joint projects and she has no equitable interest in the proceeds of Pacific Green Collective. Even with a finding regarding the purpose of the relationship this is still insufficient in light of the fact that there is no equitable basis for dividing the property in light of the fact that Ms. Turner did not put any time, effort, or financial resources into a joint project which would necessitate an equitable division. This court should reverse the trial courts determination that there was a committed intimate relationship and that Ms. Turner has any interest in any property.

**2. A NEW TRIAL SHOULD BE GRANTED BASED UPON CR 59(a)(2), MISCONDUCT OF A PREVAILING PARTY, WHEN THE PREVAILING PARTY VIOLATES RPC 3.5(A)&(B) BY PROVIDING TO A JUDGE, THE DAY BEFORE THE JUDGE IS TO DELIVER THEIR RULING IN A TRIAL, A NEW DECLARATION AS A WORKING COPY WITHOUT PROVIDING NOTICE TO**

**OPPOSING COUNSEL THAT THE DOCUMENT WAS  
INTENDED TO BE USED FOR THAT PURPOSE.**

The standard of review for a motion for a new trial is an abuse of discretion “except where pure questions of law are involved.” (*Boley v. Larson*, 69 Wn.2d 621, 624, 419 P.2d 579, 581 (1966) citing *Rettinger v. Bresnahan*, 42 Wash.2d 631, 257 P.2d 633 (1953); *Gardner v. Malone*, 60 Wash.2d 836, 376 P.2d 651, 379 P.2d 918 (1962)) In the case of *Vasquez v. Markin*, 46 Wn. App. 480, 731 P.2d 510 (1986) the court stated:

It is well settled that a motion for a new trial is directed to the sound discretion of the trial court. *Davis v. Globe Mach. Mfg. Co.*, 102 Wash.2d 68, 77, 684 P.2d 692 (1984); *Coats v. Lee & Eastes, Inc.*, 51 Wash.2d 542, 552, 320 P.2d 292 (1958); *Byerly v. Madsen*, 41 Wash.App. 495, 499, 704 P.2d 1236 (1985). The trial court may exercise considerable discretion in granting or denying the motion, and the reviewing court will not intervene unless there has been a manifest abuse of that discretion. *Coats*, 51 Wash.2d at 552, 320 P.2d 292. The test for an abuse of discretion is whether no reasonable judge would have reached the same conclusion. *In re Marriage of Landry*, 103 Wash.2d 807, 809–10, 699 P.2d 214 (1985); *Byerly*, 41 Wash.App. at 499, 704 P.2d 1236. (At 483)

In *Gestson v. Scott*, 116 Wn. App. 616, 67 P.3d 496 (2003), as amended (July 1, 2003) the court stated:

“A much stronger showing of abuse of discretion will be required to set aside an order granting a new trial than an order denying one because the denial of a new trial ‘concludes [the parties’] rights.’ ” *Palmer*, 132 Wash.2d at 197, 937 P.2d 597 (quoting *Baxter v. Greyhound Corp.*, 65 Wash.2d 421, 437, 397 P.2d 857 (1964)).(At 621)

Hence, the standard is an abuse of discretion unless the issue involves a pure questions of law. If it involves an abuse of discretion the test is whether no reasonable judge could reach the same conclusion, and the showing of abuse must be stronger if the order being appealed from granted a new trial.

In this case the order denied the motion for a new trial, but the issues involved are questions of law. The facts of what occurred are not in dispute, the attorney for Ms. Turner, the day before the judge was to issue her decision based upon 4 days of trial, submitted a declaration from his client without notice that the declaration was being submitted for consideration by the trial judge in making her decision. A copy of the declaration was provided to counsel for Mr. Vaughn, but without any notice of its intended purpose. The trial judge never requested any additional material from the parties in making her decision. The trial judge, without requesting any input or providing any notice to counsel for Mr. Vaughn, read the declaration. The next day she proceeded to give her decision and after doing so, for the first time, inquired of counsel for Mr. Vaughn if he had anything in regards to Ms. Turner's declaration. The trial judge then admitted that she read the declaration and considered it in making her ruling, which she changed as a result of the declaration. As a

result, the standard of review in this case is purely a question of error of law in the court's decision.

CR 59 (a) (2) reads as follows:

**(a) Grounds for New Trial or Reconsideration.**

On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

....

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from the juror's own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors.

**RPC 3.5 IMPARTIALITY AND DECORUM OF THE**

**TRIBUNAL** in pertinent part states as follows:

A lawyer shall not:

**(a)** seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

**(b)** communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

In this case counsel for Ms. Turner filed a new declaration with the court and then sent it to the trial judge as a working copy. Although it was filed in the court file and served on counsel for Mr. Vaughn, there was no notice provided that it was being submitted to the trial judge for consideration prior to her issuing her decision. There was no motion filed and no indication in the court file as to what, if any, use this declaration was to be made, nor when it was to be presented to the trial judge.

There is no question that given the fact that the declaration was delivered to the trial judge as a working copy, its clear intent was to influence her in regard to the decision which was pending the next day. The point of the declaration appeared to be that Mr. Vaughn, the opposing party, had made a report to the Los Angeles Police Department of abuse by Ms. Turner against her children. The only way that the declaration makes this point is through inadmissible hearsay, the alleged out-of-court statements of the police officers. Had this declaration been attempted to be introduced into evidence in trial it would have been objected to and the objection should have been sustained. However, by submitting the declaration as an ex parte document, there was no one to object to the inadmissible hearsay, nor to the trial judge's consideration of the same.

In denying the motion for a new trial, the court entered a finding that this was not an ex parte communication. In the case of *State v.*

*Watson*, 155 Wn.2d 574 122 P.3d 903 (2005) our State Supreme Court stated the following in providing a definition of an ex parte communication:

Neither RPC 3.5 nor CJC 3(A)(4), governing ethical restrictions for attorneys and judges regarding ex parte communications, defines the term “ex parte communication.” Washington case law also does not clearly define the term.

“[I]n the absence of a provided definition, this court will give a term its plain and ordinary meaning ascertained from a standard dictionary.” *State v. Taylor*, 150 Wash.2d 599, 602, 80 P.3d 605 (2003). Black's Law Dictionary defines “ex parte communication” as “[a] communication between counsel and the court when opposing counsel is not present.” BLACK'S LAW DICTIONARY 296 (8th ed.2004). That definition assumes that there is a proceeding involving the court, with counsel and opposing counsel, and that the communication regards the proceeding at hand. Black's further defines “ex parte” as something being made by one party: “Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other.” *Id.* at 616, 80 P.3d 605; see also *State v. Moen*, 129 Wash.2d 535, 541 n. 3, 919 P.2d 69 (1996) (“By definition, an ex parte order is done on the application of one party ...”). Black's multiple definitions of “party” also assume that a cause of action exists in which the party is a participant. See BLACK'S, *supra*, at 1154. (at 578-579)

In this case, the elements for an ex parte communication are met. First, the communication was “between counsel and the court when the

opposing party was not present”. The communication in this case was between counsel for Ms. Turner and the trial judge when opposing counsel was not present. The declaration was provided to the trial judge as a working copy. Simply filing the declaration in the court file would not or should not have been sufficient for the trial judge on her own to seek out the declaration. Simply filing it in the court file would have placed it there, but would not have called it to the trial judge’s attention. The act of calling it to the trial judge’s attention by providing a working copy to the trial judge, was a clear indicator that the trial judge was expected by the attorney providing the declaration to read the same.

Second, the definition assumes that there is a proceeding involving the court as well as counsel providing the ex parte communication and opposing counsel and that the communication involves a “proceeding at hand”. In this case the declaration was provided to the trial judge as a working copy at a time when the trial judge was in the process of determining her decision from 4 days of trial which it was to deliver the very next day.

The court in this case also entered a finding, in denying the motion for new trial, that filing a working copy of the declaration was “presumed in conformity with usual custom and practice in the Superior Court of Washington.” (CP 150) The providing of working copies is a convenience

for the court for a matter that is properly noted and pending before the court. However, in this case, there was nothing pending before the court for which a working copy would be provided. It was simply a hearing scheduled by the court as a date that she was going to issue her decision based upon 4 days of trial. The evidence had already been provided to the court, the parties had rested and provided closing arguments. This is not a customary proceeding where working copies are provided. There was no working copy of anything that needed to be given to the court. It was clearly intended as a means of giving the court improper additional information, an ex parte declaration.

Thirdly, an ex parte communication is something being made by one party for the interest of that party only. In this case the declaration was from counsel's client containing inadmissible hearsay that benefited her position only.

Fourth, the communication is done without notice to the other party. In this case the declaration was provided to counsel for Mr. Vaughn, but there was no notice as to the intended use of the declaration and the point in time in which it would be provided to the Court. There was no notice provided to opposing counsel that this declaration was being provided for consideration by the Court in making its determination from a four-day trial. Counsel for Ms. Turner did not provide so much as an

email or any notice to counsel for Mr. Vaughn that he intended to submit this declaration to the trial judge for consideration in making her determination.

It may be argued that if counsel for Mr. Vaughn was unaware of the intended use of the declaration, he should have contacted counsel for Ms. Turner to find out what he wanted to do with it. Were it to be presumed that it is incumbent upon the person receiving a document to divine or make further inquiry regarding the intended use of the document, that would completely shift the burden of providing notice from the person providing a document, to opposing counsel who is unaware it is intended purpose. This would clearly be a violation of the notice requirement of due process.

In the US Supreme Court case of *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) the court made it clear that the burden of providing notice falls on the person bringing the action they stated:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357; *Grannis v. Ordean*, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363; *Priest v. Board of Trustees of*

Town of Las Vegas, 232 U.S. 604, 34 S.Ct. 443, 58 L.Ed. 751; Roller v. Holly, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520. (at 314)

The mere filing of a declaration without providing information as to its intended use, whether that be to supplement material presented at trial, or is for a new motion, or whether it is just another random filing in the court file; must be provided in order to afford the opposing party an opportunity to present objections and basically respond. In this case had counsel for Ms. Turner sent counsel for Mr. Vaughn an email or in some way conveyed to him an intent to submit this to the trial judge, counsel for Mr. Vaughn could have filed an objection. He could have objected to the inadmissible hearsay at the very least, which would have eliminated the declaration from ever being considered by the Court.

Furthermore, the simple fact of providing a copy of the declaration to opposing counsel does not remove it from the realm of an ex parte communication once counsel for Ms. Turner gives it to the trial judge. A declaration simply filed in the court file is not admissible in evidence in the trial. This was not a trial based upon declarations, but based upon live testimony.

Clearly this attempt to influence the trial judge through an ex parte communication was not authorized by law. As a result, it was misconduct

by the prevailing party. This misconduct resulted in a prejudiced decision by the trial judge and also resulted in a drastic reduction of Mr. Vaughn's visitation with his sons. It is unknown what other influence it had on the trial judge's decision. Under these circumstances a new trial should have been granted.

**3. A NEW TRIAL SHOULD HAVE BEEN GRANTED BASED UPON CR 59(a)(1), IRREGULARITY OF PROCEEDINGS OF THE COURT, WHEN THE JUDGE IN VIOLATION OF CJC 2.9(A)(1) RECEIVED AND CONSIDERED, THE DAY BEFORE SHE WAS TO DELIVER HER RULING IN A TRIAL, A NEW DECLARATION AS A WORKING COPY AND PROVIDED NO NOTICE TO OPPOSING COUNSEL THAT SUCH DOCUMENT WOULD BE CONSIDERED.**

CR 59 (a) (1) reads as follows:

**(a) Grounds for New Trial or Reconsideration.**

On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

CJC 2.9(A)(1), Ex Parte Communications, states in pertinent part the following:

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, before that judge's court except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, or ex parte communication pursuant to a written policy or rule for a mental health court, drug court, or other therapeutic court, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

In this case the trial court received a new declaration as a working copy. The trial judge considered the document and made no efforts to contact counsel for Mr. Vaughn to advise that the document was being considered by the trial judge in making her decision. The first time counsel for Mr. Vaughn was aware that the trial judge was considering or had considered this document was after the trial judge issued her decision. Then, after the fact, she inquired whether or not counsel for Mr. Vaughn had a response or wished to file one.

The Code of Judicial Conduct makes it clear and mandatory that a court “shall not... consider ex parte communications”. It is also mandatory that the court shall not “consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter before that judge’s court.” When an ex parte communication is allowed under CJC 2.9(A)(1) that exception to the rule requires that the judge “promptly” give notice to “all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.” However, in this case none of the required exceptions apply, such as that the communication was for scheduling or pursuant to a written policy of a mental health or, drug court or other therapeutic court, and if it had applied the court would be required to promptly provide notice, which was not done. Also, counsel for Mr. Vaughn did not learn that the Court considered the document nor have any opportunity to provide any input or response prior to the Court issuing its decision.

The result of this is that there was a clear irregularity in the proceedings under CR 59(a) (1). A new trial must be ordered in this case.

A new trial should have been issued as to all issues of the case, not just the parenting plan and relocation issues. The ex parte communication was not disclosed prior to the Court’s decision and it is unknown the

extent of the prejudice engendered as a result of it. The fact that this was done prior to the Court's issuing of its ruling presents a taint on the entire decision of the Court which necessitates a new trial on all issues.

**4. A JUDGE MUST RECUSE HERSELF FROM A CASE BASED UPON A VIOLATION OF CJC 2.9 FOR EX PARTE COMMUNICATION THAT FORMED THE BASIS FOR HER RULING IN A TRIAL**

CJC 2.11 **Disqualification**, in section (A)(1) states:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

The comment to this section provides the following:

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply. In many jurisdictions in Washington, the term "recusal" is used interchangeably with the term "disqualification."

This comment makes it clear that the word disqualification is used interchangeably with the word recusal. Therefore, this section deals with the relief that is being requested.

CJC 2.11 (A) makes it mandatory that a “judge **shall** disqualified herself in any proceeding in which a judge’s impartiality might reasonably be questioned” (emphasis added). There are reasons cited, but the list is not exclusive. The comment also emphasizes that this applies to any situation where a “judge’s impartiality might reasonably be questioned, regardless of whether any of the specific provisions” below apply.

In this case, subsection (1) applies as the ex parte communication amounts to the equivalent of “personal knowledge of facts that are in dispute”. This communication became personal knowledge of the judge from sources outside of the trial and therefore is not information that was obtained in the proper course of the trial. This review by the trial judge clearly created a “personal bias or prejudice” as the court clearly stated that she had changed her decision as a result of her review of the declaration. That fact alone, is enough to taint the entire decision.

In the case of *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355, (1995), as amended on denial of reconsideration (Jan. 31, 1996), amended, (Wash. Jan. 31, 1996), the court found that an ex parte communication was a sufficient basis for a recusal of the trial judge. In that case, the trial judge was found to have violated the Code of Judicial Conduct by initiating an investigation on his own regarding the process used to monitor recovering physicians by the WMTP. In that case it was argued

that this action was only used to gain general information and did not prejudice the proceedings. The State Supreme Court determined that this was an ethical violation of Canon 3 of the CJC as it existed at that time as an ex parte communication. In regard to the issue of whether or not the judge should recuse himself from further participation in the case, the State Supreme Court commented that:

However, in deciding recusal matters, actual prejudice is not the standard. The CJC recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating. The CJC provides in relevant part: "Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned...." CJC Canon 3(D)(1) (1995). The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that "a reasonable person knows and understands all the relevant facts." *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988) (emphasis omitted), cert. denied, 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1012 (1989); see also *United States v. Murphy*, 768 F.2d 1518, 1538 (7th Cir.1985), cert. denied, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986). (at 205-206)

Two things are immediately to be noted from the above statement. The first is that where a court's decision is "tainted by even a mere suspicion of impartiality, the effect on the public's confidence in our judicial system can be debilitating." Taint or mere suspicion is sufficient to trigger recusal. The second thing to be noted is the change in the

language from the former Code of Judicial Conduct which is almost the same as the current one except that it said that judges “should” disqualify themselves. The current Code of Judicial Conduct has changed that to read “shall”. In short, previously it was a strong directive to disqualify themselves and now the disqualification or recusal is mandatory.

In this case, it is unknown how the trial judge would have decided the issues in the case had she not received the ex parte declaration. It is a fact that at the end of the trial the judge removed the supervision requirement from Mr. Vaughn’s visitation. It is equally clear and undisputed that based upon the declaration she not only reinstated the supervision requirement but drastically reduced his visitation. However, the taint remains that it is unknown to what extent she further altered her decision as a result of receiving that information. This applies equally to the committed intimate relationship determination as well as the parenting plan and relocation issues. The mere suspicion that this information prejudiced the Judge in her entire decision cannot be eliminated. The only way to maintain confidence in the judicial system is for the trial judge to recuse herself and a new trial must be ordered before a new judge.

## CONCLUSION

In this case it is clear that based on a de novo review of the court's conclusion that there was a committed intimate relationship, the trial court must be reversed. The continuous nature of the relationship was certainly in question given the 18 months that Ms. Turner lived full-time outside of the state of Washington while Mr. Vaughn continued his work in Washington state, only residing with her halftime. The duration of the relationship was only 4 years and 7 months. The purpose of the relationship was companionship, friendship, love, sex, and mutual support and caring, but as mentioned in *Pennington*, this alone is not sufficient.

In regard to the pooling of resources and services for joint projects, the courts have held that this also needs to be combined with the equitable consideration of the time, effort, and financial resources that are put into the joint projects. The only asset in this case, if in fact the proceeds of a nonprofit corporation can be considered assets, would be Mr. Vaughn's interest in the money available at the time of separation at Pacific Green Collective. However, there is no showing that Ms. Turner contributed anything to this other than allowing a joint account to be used for the receipt of credit card payments. From that account she took \$9140 a month. This clearly does not constitute time, effort, and financial

resources being expended by her which would justify an equitable distribution of funds.

The intent of the relationship was not clear as Ms. Turner wanted to get married and Mr. Vaughn clearly did not. While in California Ms. Turner considered breaking up with Mr. Vaughn and in fact they did break up for a short time until it was discovered that Ms. Turner was pregnant.

Lastly, the trial judge's consideration of 3 pregnancies and 2 children was not sufficient to constitute a committed intimate relationship. Marina's intent may have been to have multiple children, but this was clearly not a mutual intent. The determination that there was a committed intimate relationship was an error of law on the part of the court and must be reversed.

If this Court refuses to reverse based upon the above, a new trial as to the issue of there being a committed intimate relationship must be ordered in front of a new judge and the trial court's refusal to order a new trial and recuse herself must be reversed. Clearly there was an improper ex parte communication when counsel for Ms. Turner provided the court with a declaration without notice to the attorney for Mr. Vaughn. It was equally improper for the trial judge to consider that and base her decision upon it and then inquire as to whether or not counsel for Mr. Vaughn had any

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response. At that point the only proper remedy is a new trial in front of a new judge and that must be ordered.

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DEPUTY

For all these reasons the trial court must be reversed.

Respectfully submitted on August 14, 2017.



Clayton R Dickinson, WSBA No. 13723  
Attorney for Appellant

CERTIFICATE OF MAILING

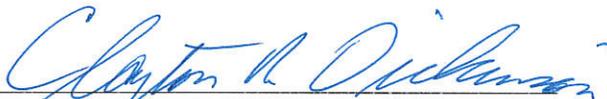
I certify that I mailed a copy of Appellant's Brief Review to:

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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 August 14, 2017.



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