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**Court of Appeals, Div. II,  
of the State of Washington**

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In re Marriage of Wirkkala,

Eric Marvin Wirkkala,

Respondent,

v.

Lori Denise Wirkkala,

Appellant.

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**Reply Brief of Appellant**

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## **1. Introduction**

The trial court in this dissolution case failed to make a record of the methods and factors considered in its valuation of the parties' family business. Early in the case, the trial court, without statutory authority, ejected Lori from the business pending final orders. The ejection order left Lori unable to obtain or present competent valuation testimony from which the trial court could have made a more well-considered decision.

The trial court also erred in calculating the community property portion of Lori's PERS account. The trial court's calculation was not supported by evidence and must be reversed.

Eric's response brief fails to point to any evidence to support the trial court's PERS decision. He fails to demonstrate any statutory authority for the ejection order. He fails to point to anything in the record that satisfies the trial court's obligation to make a record of the methods and factors considered in valuing the business.

As a remedy for the trial court's abuses of discretion, this Court should reverse the trial court's PERS finding and its valuation of the business. This Court should remand with instructions to award Lori \$20,600 for the error in the PERS calculation and to hold a new trial on business valuation, with opportunity to present new evidence to aid the court.

## **2. Reply Argument**

### **2.1 The trial court's finding that 17 percent of Lori's PERS account was community property was not supported by any evidence in the record.**

In her opening brief, Lori argued that there was no evidence in the record to support the trial court's finding that 17 percent of her PERS account (\$64,000) was community property. Br. of App. at 14-16. The 17 percent figure was based on Eric's late argument of a committed intimate relationship, which was expressly rejected by the court at trial. Br. of App. at 15; 8 RP 59. By the time of the final hearing on the issue, the trial court had forgotten its position on the committed intimate relationship issue and left the question to be corrected on appeal based on the record. Br. of App. at 16; RP, June 9, 2017, at 239-41.

The record shows that the trial court intended the community property portion of the PERS account to be calculated based on the amount that accrued during the marriage, not during any committed intimate relationship. Br. of App. at 15-16. The only evidence in the record is that \$22,789 accrued during 13 months of marriage. Br. of App. at 16; CP 850, 853. Because there is no evidence to support the trial court's finding that \$64,000 of the PERS account was community property, this Court should reverse the finding and remand to

the trial court to enter a corrected finding and award Lori \$20,600 to compensate for the error.

Eric's response complains at length about the evidence he thought Lori should have provided regarding the PERS account. But this appeal is not about what the parties might have placed into evidence. It is about what the parties **did** place into evidence and what the trial court did with the evidence. There is no evidence to support Eric's 17 percent figure. **There is evidence to support Lori's figure.** It is that simple. Eric's brief fails to point to any evidence in the record that would support the trial court's finding. There is none. The finding must be reversed.

Eric attempts to rely on a statement by the trial court on March 10, 2017, that it would rely on Eric's number. However, by June 9, 2017, the trial court had changed its mind. At the June 9 hearing, the trial court stated, as its final decision on the matter, "If [Eric] is saying that the record will support that he – he proposed as part of the analysis of her pension that they had been together from a certain date, including a period before they were married, and that was basically accepted by the parties and the Court, then I would go with his analysis. And ... if the record doesn't support that then I guess I would support [Lori's] expert's analysis that it's just a period of whatever, 13 months or something like that, and let the record tell the story." 8 RP 239. "I guess I'm sending a message to the Court of Appeals, if the

transcript does not support what [Eric] is representing, then I – I would default to [Lori’s] analysis.” 8 RP 241.

An examination of the trial transcript demonstrates that the trial court rejected Eric’s committed intimate relationship theory and intended the PERS calculation to be based only on the amount that accrued during the marriage: “It has never been a big argument by either side that they wanted to establish a period of committed relationship ... [T]he two of you can submit ... in a Brief ... what the separate portion is **based on the testimony regarding when they were married** and ... when she left Oregon government ... employment.” 8 RP 58-59.

It makes no difference whether the record supports a committed intimate relationship. Eric did not make that argument until the close of trial. The trial court rejected the argument. The trial court’s final decision, on June 9, 2017, was to follow what it had decided at trial: that the community property portion of the PERS account (which the trial court intended to split 50/50 between the parties) would be calculated based on the amount that accrued only during the marriage. Lori presented evidence to calculate that figure. Eric did not.

There is no evidence in the record to support the trial court’s finding that \$64,000 of Lori’s PERS account was community property. This Court should reverse the finding and

remand with instruction to the trial court to correct the finding and award Lori \$20,600 to compensate for the error.

## **2.2 The trial court abused its discretion in entering the temporary order ejecting Lori from all involvement in the business.**

Lori's opening brief argued that the trial court's temporary order ejecting Lori from all involvement in the family business was an abuse of discretion because it was outside of the trial court's statutory authority. Br. of App. at 17-19. The ejection order was entered under suspicious circumstances that call the order's validity into question. Br. of App. at 19-21. These problems with the ejection order are significant because Lori's exclusion from the business and any access to business records prevented her from presenting a competent business evaluation at trial. Br. of App. at 21.

Eric's argument that the order is authorized under RCW 26.09.060 fails to identify any particular provision of the statute that would allow the court to determine ownership of the business or to terminate Lori's employment or shareholder rights prior to trial. This is because a plain reading of the statute **does not authorize** such an order.

The statute's first section authorizes the court to order temporary maintenance or temporary child support prior to trial or final judgment in a dissolution case. RCW 26.09.060(1). The

second section authorizes, as part of a request for temporary orders, an order “restraining or enjoining any person from” five specific types of conduct: a) from transferring, encumbering, or disposing of any property except in the usual course of business; b) disturbing the peace of the other party; c) going onto the grounds of the home or workplace of the other party; d) coming within a specified distance of a specified location; or e) removing a child from the jurisdiction of the court. RCW 26.09.060(2).

None of these types of injunction allow the court to distribute property or to terminate employment or shareholder rights.

Under this statute, the court can only order a party to refrain from certain conduct, such as contacting the other party or going to a certain location. The statute does not authorize the court to remove a business owner from any participation in the business.

The statute also requires that a restraining order that would restrain a party from contacting the other party or from going to or within a certain distance of a particular location “shall prominently bear on the front page of the order the legend: VIOLATION OF THIS ORDER WITH ACTUAL NOTICE OF ITS TERMS IS A CRIMINAL OFFENSE UNDER CHAPTER 26.50 RCW AND WILL SUBJECT A VIOLATOR TO ARREST.” RCW 26.09.060(7). The order in this case does not bear such a legend. CP 182. Nothing on the face of the order

indicates that it was, in any way, a restraining order under RCW 26.09.060.

Eric incorrectly suggests that RCW 26.09.060 authorizes the court to “make any temporary orders ... that justice may require.” Br. of Resp. at 13. By its own plain terms, it does not. The statute authorizes only a specific, limited range of temporary orders, as shown above. The order here goes far beyond the bounds of the restraining orders authorized under RCW 26.09.060. CP 182-85. Far from preserving the status quo, it created a whole new arrangement, taking from Lori to give to Eric, without providing Lori any compensation for her loss.

It makes no difference whether the trial court’s actions “make sense” to Eric or his counsel. In all dissolution cases, the trial court’s broad discretion is still limited by the provisions of chapter 26.09 RCW. *In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014). A trial court abuses its discretion when its decision is “outside the range of acceptable choices, given the facts and the applicable legal standard.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). An order not authorized by statute is, *per se* outside the range of acceptable choices.

The trial court’s order here was outside of its statutory authority. Eric does not suggest any other statutory authority for the order. Lori can find none. Because the order was not

authorized by statute, it was an abuse of discretion. This Court should reverse the order and provide Lori with the only relief possible at this point: a new trial on the value of the business.

Eric is incorrect in arguing that the ejection order had no effect on the trial. The order barred Lori from accessing any information about the business. It gave Eric all management, control, decisionmaking power, authority, and possession of all aspects of the business. CP 183. It ordered Lori to turn over all of her records of the business, including physical and digital files, computers, and passwords. CP 183-84. It ordered Lori to have “no contact or access” to any company financial records. CP 185. Eric argues in his brief that Lori should have used discovery to get the information she needed, but in the trial court, when Lori **had requested** the information, Eric refused to produce it, arguing that it was too burdensome for him to dig up business records for her when he was busy trying to run the business. RP, Sept. 8, 2015, at 10.

But for the ejection order, Lori would have had access to the information necessary to provide a competent valuation of the business, either through an expert or her own lay testimony as an owner. This Court should correct the trial court’s abuse of discretion in entering the order by granting Lori a new trial on the value of the business, with opportunity for the parties to present new evidence, including expert valuations.

### **2.3 The trial court failed to make an adequate record of the factors it considered in valuing the business.**

In her opening brief, Lori argued that the trial court abused its discretion in the manner in which it valued the business. Br. of App. at 21-25. The trial court failed to make a record of the factors and methods it considered, aside from book value (which is per se insufficient), in reaching its finding of value. Br. of App. at 22-24; *In re Marriage of Berg*, 47 Wn. App. 754, 756-58, 737 P.2d 680 (1987). The appropriate remedy is to remand for a new trial on the value of the business, with opportunity for the parties to present new evidence of value. Br. of App. at 24-25.

Eric fails to address the trial court's *Berg* error, instead hoping that this Court will excuse the trial court for "doing the best it could." *Berg* does not permit an excuse. "When a trial court values a closely held corporation for purposes of a dissolution, **it must set forth on the record which factors and method were used in reaching its finding.**" *Berg*, 47 Wn. App. at 757 (emphasis added, quotation omitted). "An appellate court must be able to determine the method by which the trial court determined valuation and the weight that the trial court gave to the factors relevant to valuation." *Id.*

The trial court did not create a record of the method or factors it considered in determining the valuation of the

business. In fact, the trial court did not even arrive at a final value of the business. The trial court arbitrarily split the appraised value 60/40 as its way of accounting for an uncalculated goodwill that Eric would receive with the company. There is nothing in the record to explain how the trial court arrived at that division.

The trial court's decision falls short of its obligations under *Berg*. Even with scant evidence, the trial court must make a record of how it arrived at the value of a closely-held business. This Court should follow the *Berg* court's lead and remand for a redetermination of the value of the business, giving the parties the opportunity to present additional evidence to aid in the trial court's determination. *See Berg*, 47 Wn. App. at 758.

### **3. Conclusion**

As a remedy for the trial court's abuses of discretion, this Court should reverse the trial court's PERS finding and its valuation of the business. This Court should remand with instructions to award Lori \$20,600 for the error in the PERS calculation and to hold a new trial on business valuation, with opportunity to present new evidence to aid the court.

Respectfully submitted this 8<sup>th</sup> day of June, 2018.

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## Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on June 8, 2018, I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

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## Transmittal Information

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