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No. 50213-5-II

Court of Appeals, Division II,
of the State of Washington

Eric Marvin Wirkkala,

Respondent,

v.

Lori Denise Wirkkala,

Appellant.

Reply Brief of Respondent

Gary A. Morean
Attorney for Respondent
gmorean@izglaw.com
Ingram, Zelasko & Goodwin, LLP
120 East First Street
Aberdeen, WA 98520
(360) 533-2865
WSBA #12052

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I. Introduction

The divorce of Eric and Lori Wirkkala¹ took nearly seven years to complete.² Grays Harbor County Superior Court Judge F. Mark McCauley called it “the most ridiculous divorce file I’ve ever seen.”³ While significant portions of this case involved parenting issues regarding the party’s child Kyle, born September 27, 1998, by the time the final papers were entered Kyle was an adult and those issues were moot.

The community business founded in 1994, before the parties were married, known as Wirkkala Contracting, Inc., dba Wirkkala Construction (WCI), is the central focus of this appeal.

When they filed for divorce, Lori ran the office and Eric the field work for WCI. Although contentious from the start, the court quickly established what would become the status quo for the next four years as to the operation of WCI and the shared custody of the minor child.

After a contested hearing in April 2014, and a child interview in chambers, the court removed Lori from her control of WCI and gave Eric sole control of the business, as well as primary custody of Kyle.

¹ To avoid confusion the party’s first names will be used. No disrespect is intended.

² The first court hearing was on October 28, 2010, and the final hearing was on June 9, 2017, encompassing twenty-five appearances in court for hearings, trial and arguments.

³ This is the Judge’s assessment after being involved with this case for only a few months, having heard only two pre-trial motions, and with more than two years remaining before the end of this case. (RP, June 4, 2015, 28)

The parties agreed to, and WCI paid for, appraisals of the real estate and the business equipment, but they were unable to agree upon experts to look into any other values. Lori wanted to destroy the business, sell it off for scrap, and split the proceeds. Eric wanted to keep and run the business, and pay Lori for her share.

Judge McCauley gave Eric the choice to accept a disproportionate division of the WCI assets or one-half of a dismembered business.⁴ Eric accepted the 60/40 split of the WCI assets and has fully paid Lori for her interest in all of the community assets. Lori complained and this appeal followed.

I. Reply to Appellant's Assignments of Error

1. The trial court properly exercised its authority and discretion in the 2014 removal of Lori from control of WCI.
2. The trial court's record more than adequately supports its determinations, and they are fair, just and equitable under all the circumstances herein.
3. Lori failed to provide proof to challenge the court's designation of a portion of her PERS account as community property.

II. Statement of the Case

Eric and Lori Wirkkala were married on May 25, 1998. (CP 6)

⁴ "It is equitable under all the facts and circumstances to require Mr. Wirkkala to pay 60 percent of the value of the business assets to Ms. Wirkkala. If he believes that percentage is unfair, the business assets can be sold, and then the net proceeds can be divided equally." (CP 329)

The union resulted in one child, Kyle, born September 27, 1998. (CP 28) Kyle was eighteen when the Decree was entered, so no final parenting plan was entered. (CP 629, 641-642; RP, March 10, 2017, 47)⁵

Before their marriage in 1994, the parties created WCI.⁶ (3 RP, June 24, 2015, 38) Over time, the parties settled into a pattern where Lori did mostly office work and Eric did, or controlled, the work in the field, which was the business model/structure when the parties separated on August 21, 2010. (2 RP, June 23, 2015, 70)

Although the business and personal relationships were contentious right from the start of the dissolution, the court quickly established what would become the status quo for the next four years as the divorce continued on; the custody of the minor child would be equally split between the parents with 50/50 shared time, and WCI would be operated jointly and cooperatively by the parties. (CP 39-43; See 1 RP, October 28, 2010, 20-28)

⁵ The Verbatim Report of Proceedings in this case is extensive, spanning seven years, two counties, five court reporters and twenty-five separate hearings or days of trial. While there are eight volumes of various hearings clustered around the individual court reporters preparing the initial transcripts, eight other hearings are combined in a single unnumbered volume, and eight more hearings are transcribed separately. For clarity sake, all citations to the various transcripts will include the date of the hearing, but will also include volume numbers when one exists.

⁶ Sometime in 2002 or 2003 the parties changed the ownership structure of WCI to try to take advantage of preferential treatment as a women's minority business. (7 RP February 3, 2016, 64) It was, however, never meant to change the equal/joint community ownership and control of the business, and it was never used as a benefit in bidding any work project for WCI. *Id.*

At the very start of the initial hearing in this case, Judge Goelz informed both parties and their attorneys of a business/legal connection that put the Judge in contact with Eric only one day prior to the initial hearing. (1 RP, October 28, 2010, 4-5) After the disclosure the parties were given an opportunity to consult with their attorneys about filing Affidavits against the judge, but both parties had no objection and waived any conflict, thus allowing Judge Goelz to proceed ahead and hear the issues in the case and to make the rulings that were needed to be made. *Id.*

Lori changed lawyers before the entry of the initial orders based upon the court's October oral rulings. (CP 25) Her new attorney appeared in November 2010, and, via an *ex parte* letter sent directly to the Judge, he requested that Judge Goelz immediately recuse himself in this case. *Id.* Judge Goelz declined this invitation, noting, "[h]aving given the opportunity to object and having made discretionary rulings in this matter, the Court declines to grant the request." Until this appeal, nothing further has been pursued on this issue. (CP 940)

On December 20, 2010, the court entered a Temporary Order and Temporary Parenting Plan. (CP 39-43) At the time of the entry of the December 20, 2010 temporary orders, the parties were struggling with how the business would operate in this bifurcated mode. (*See* 1 RP, December 20, 2010, 40-41) Even as early as the very first hearing in this

matter, Lori had the idea of hiring an outside “accountant” or “business management consultant” to help the parties run the business. (1 RP, October 28, 2010, 7) It was Lori who, two months later, proposed the accounting firm of Powell Seiler, specifically Nichola Goodin (a non-CPA, bookkeeper), to come into WCI to help sort things out, to help the parties straighten out the bookkeeping, and to report to the court about the status and issues of the business. (1 RP, December 20, 2010, 41) After the court disclosed a potential conflict regarding Ms. Goodin, and both parties having had no objections and having waived the conflict, Ms. Goodin was appointed as noted in the Temporary Order. (*Id.* at 42-43, CP 39-43)

Even with the outside bookkeeper in place, the peace was short-lived. In March 2011, Eric renewed his request for Lori’s removal from her role at WCI due to her lack of cooperation with Ms. Goodin and her unwillingness to allow Eric access to the business accounts and records. (CP 44-46) This was the second time for this request, as the same issue was raised at the very start of this case. (*See* 1 RP, October 28, 2010, 5-6) Given assurances of more openness and cooperation from Lori, the matter was shelved for the time-being. (*See* CP 47-79)

Three years later, in March of 2014, Eric’s frustration with the way Lori was running the office part of WCI brought this matter to a head once more, for the third time. (*Id.*, CP 44-46, *See* 1 RP, October 28, 2010, 5-6)

The allegations over failing to cooperate and provide open access to the business accounts and records had merely grown with time.⁷ *Id.* Along with a renewed motion to remove Lori from the day-to-day operation of the business, Eric sought to terminate the 50/50 shared custodial arrangement for their fifteen year old son. (CP 47-79)

At this time, Eric was proceeding *pro se* before the court. (CP 51) The court warned Eric that going against Lori's experienced attorney without his own attorney would not go well for him, but Eric pushed on. (1 RP, April 24, 2014, 56, 57 and 58) At the conclusion of the court argument on April 24, 2014, the Judge indicated that he would meet with the minor child in chambers the next day and thereafter fully review the pleadings and make his ruling. (1 RP, April 24, 2014, 66)

After considering the court file, the pleadings presented for and against Eric's motions, and having conducted his interview with Kyle in chambers, the court prepared and filed the April 25, 2014 Memorandum Opinion. (CP 80-83) These rulings were eventually memorialized by the Court's Order on Motion Pursuant to Court's Memorandum Opinion, dated June 6, 2014. (CP 182-185) The order cites the specific sections of the temporary orders that Lori violated. (CP 182) It is significant to note

⁷ As early as December 2011, another outside accountant was hired personally by Lori and she began conspiring with Lori to take, hide and prevent Eric from seeing and gaining access to WCI business records. (Exhibit 2; 2 RP, June 23, 2015, 174-177)

that the court also found a change in circumstances warranting a major modification of the temporary parenting arrangement going from joint/shared physical custody to making Lori a weekend parent only. *Id.*

These events that took place at, or were the result of, the April 24, 2014 hearing and the April 25, 2014 interview with the child in chambers, are what Lori calls a “fraud against the court” committed by the petitioner, but that the court not only “allowed” it to happen, but also “helped him in this endeavor.” (CP 410) Contrary to Lori’s “hostile takeover” rhetoric, the Court’s decision was supported by the ample records and materials supplied to the court. (*See* 5 RP, February 2, 2016, 188, 199)

The court discarded Lori’s arguments that there was some kind of collusion between Eric and Ms. Goodin. (*See* 1 RP, August 18, 2014, 114-115) After full disclosures, both parties waived any concerns. (1 RP October 28, 2010, 4-5; 1 RP, August 18, 2014, 72) Independently, Eric and Ms. Goodin testified to not having a “friend” relationship with the Judge. (4 RP, June 24, 2015, 198; 2 RP, June 23, 2015, 160) Those statements remain uncontroverted and there is no proof or evidence of any impropriety or wrong-doing by or between the Court, Ms. Goodin or Eric.

At a hearing on August 18, 2014, another potential conflict between the Judge and Ms. Goodin was brought forth and, as with all the prior issues brought to the attention of the parties, both parties waived any

problems on the record. (1 RP, August 18, 2014, 72)

Four and one-half months after the entry of the June 6, 2014 Order, (four years after the commencement of this action), Judge Goelz filed a Voluntary Disqualification of Judge on October 23, 2014.⁸ (CP 186) All of the potential conflicts and connections between the various parties to this proceeding were fully disclosed and reviewed by the parties on the record, and all were set aside as being unworthy of further attention or concern.⁹ (1 RP October 28, 2010, 4-5; 1 RP, August 18, 2014, 72)

Leading up to the trial in this matter, which eventually occurred on June 23 and 24, 2015 and February 2, 3, and 4, 2016, the parties continued to have issues, but did manage to come to some agreements and stipulations about some valuation of property issues. (CP 281-282)

On the first day of trial, June 23, 2015, the parties reached an agreement about property valuations and how to pay for that. (CP 281-282) It was agreed to hire a real property appraiser and for WCI to front

⁸ Lori immediately filed an Affidavit of Prejudice against Judge Sullivan, the only sitting judge in Pacific County and the case was assigned to Grays Harbor Superior Court Judge F. Mark McCauley. (CP 968-969)

⁹ There is one troubling notation in the Brief of Appellant which states, “[b]efore the scheduled interview [with Kyle on April 25, 2014], Judge Goelz was seen in the hallway speaking with Eric and the guardian ad litem.” (Brief of Appellant, pg. 9) This event never occurred, and there is no credible evidence or proof anywhere in the record to support this unsubstantiated event. The citation in the Brief of Appellant is to “CP 302.” This citation takes you to the “Procedural History” section of the Trial Memorandum filed by Lori’s attorney. (CP 302) This attorney statement is evidence and proof of nothing. While presumably from the context of the statement it was Lori who was the source of this comment, she never testified about, nor filed any proof verifying this bizarre event. No proof, evidence or testimony of this incident was ever presented to the court.

the cost. It was also agreed to have the equipment of WCI appraised by a professional and for WCI to front the cost. The parties stipulated to accept the values reached by these appraisers at trial.¹⁰ *Id.*

As for the crucial business valuation, the parties were ordered to “make every effort to cooperate to identify and retain a single business evaluator to value the business.” *Id.* Judge McCauley had made it clear that a highly trained business evaluator was needed to value the business and that both parties needed to get on this. (RP, March 2, 2015, 9-11) As a warning to both parties to cooperate and find a business evaluator, the Judge warned that failing that he might just order the business shut down, liquidated and sold off for parts. (RP, June 16, 2015, 43; RP, June 24 2015, 224-225; RP, September 21, 2015, 79) The parties never reached an agreement on a business valuation expert. (*See* CP 305-06)

After the first two days of trial and in anticipation of the parties not reaching an agreement on a joint business evaluator, Judge McCauley opened up the business records and banking records so that either party could proceed and get their own independent evaluation. (CP 938-939; RP, June 24, 2015, 227-232) Eric did propose a couple of names for business evaluators. (RP, July 20, 2015, 3) Lori rejected Eric’s proposals and finally put forth her own name. (RP, August 10, 2015, 51) It

¹⁰ Lori’s various challenges to the validity of some of these appraisals and her efforts made to avoid the stipulated values were never taken seriously by the court.

eventually became clear that Lori was not interested in any of Eric's proposals and she only wanted Eric to accept the one name she was fixated on. (RP, September 8, 2015, 4-7, 11-12; RP, September 21, 2015, 61-63, 65) As it became clear to the court that an agreement over a mutually retained business appraiser was not going to be reached, the court finally told the parties to get their own expert, or proceed without one. (RP, September 8, 2015, 13-16; RP, September 21, 2015, 69)

Eric chose to proceed to the financial phase of the trial without a business evaluations expert, opting for a hard asset valuation of the business that he wished to maintain and to continue to operate in the future.^{11 12} (CP 283-287, 292-299)

Lori tried and failed to present her long-time business accountant and financial advisor, Toni Ellsworth, as an expert to prove an additional goodwill value in WCI.¹³ (7 RP, February 3, 2016, 3-9, 48-51, 89-113)

At the conclusion of the trial, Judge McCauley recognized the futility of any attempt to even try to evaluate WCI, stating,

...but primarily from Ms. Wirkkala...my impression was

¹¹ When Eric purchased the business that formed the infrastructure of WCI from Swensen Contracting, he paid only for the equipment, the land and for consulting fees from Mr. Swensen. (5 RP February 2, 2016, 90-91) There was no goodwill or blue sky included in the value. *Id.*

¹² There was ample testimony at trial that WCI, itself, has no value or goodwill over and above the value of the land and of the iron in the yard, but that any added value was personal to Eric himself. (See 5 RP, February 2, 2016, 23-30, 30-36, 36-40, 40-46)

¹³ The court rejected Ms. Ellsworth as being unqualified to provide the necessary expert opinion to establish any additional value in WCI. (*Id.* at 111, 112, 113)

anyone trying to evaluate the business would have a heck of a time trying to do it, because they rely on good recordkeeping and tax returns and all of the other things to be accurate. And there was a certain combining of personal and business expenses for years in this business. And it was, frankly, I guess – my impression was it was a total mess as far as bookkeeping was going on.

(RP, March 3, 2016, 16)

Eventually, the court put forth its letter ruling on this case on April 8, 2016. (CR 328-330) The letter ruling was further clarified by an Order entered on July 22, 2016. (CP 339-342) After four more hearings clarifying and sorting out pieces of the court's ruling on July 27, 2016, January 19, 2017, February 3, 2017 and finally on March 10, 2017, the final Findings and Decree of Divorce were signed by the court in Grays Harbor County and sent to Pacific County for entry on March 17, 2017. (CP 638-642 and 624-637)

The final numbers and calculations in compliance with the terms of the Decree, however, did not get argued, finalized or signed by the court in Grays Harbor County until June 9, 2017, which was sent to Pacific County for entry on June 12, 2017. (CP 907-909)

III. **Argument**

1. **The trial court properly exercised its authority and discretion in the 2014 removal of Lori from control of WCI.**

The trial court's temporary order putting Eric in control of WCI

and granting him primary residential placement of Kyle was squarely within the power of the court as granted by RCW 26.09.060. Even though the court's actions in 2014 are at best moot, and at the very least irrelevant to the outcome of this case, the court properly exercised its discretion and power to protect the child, the community assets and the parties.

The court's power under the plain reading of the various sections of RCW 26.09.060 is indisputable.¹⁴

Lori was given reasonable notice of the hearing that was brought by Eric (*pro se*). She was fully aware of the content of the proceeding pending before the court, had ample time to prepare and respond to Eric's motions, and had a full opportunity to present her positions and arguments to the court. Due process was followed in every particular. *See State v. Ralph Williams*, 87 Wn.2d 327, 335, 553 P.2d 442 (1976).

There is no support for the innuendo floated by Lori of judicial

¹⁴ (2) ...either party may request the court to issue a temporary restraining order...providing relief proper in the circumstances, and restraining or enjoining any person from:

- (a) Transferring, removing, encumbering, concealing, or in any way disposing of any property except in the usual course of business...
 - (b) Molesting or disturbing the peace of the other party...
 - (c) Going on the grounds of or entering the...workplace...
 - (d) Knowingly coming...or...remaining within...a specified location...
- (6) The court may issue a temporary restraining order...on such terms as are just and proper in the circumstances.
- (10) A temporary order...:
- (a) Does not prejudice the rights of a party...which are to be adjudicated at subsequent hearings in the proceeding;
 - (b) May be revoked or modified...
 - (c) Terminates when the final decree is entered...

bias, collusion, fraud, or anything else, other than Lori just did not like the outcome of the court's decision. Just as it was with court's initial disclosure of contact with Eric the day before the initial hearing, Lori had no problem with the judge hearing the initial temporary order and saw no need to avail herself of the privileges given her under RCW 4.12.050 to file an Affidavit of Prejudice. It was only after the judge made his discretionary rulings in the case, which she did not like, that she suddenly had the desire to remove him from the case.

The actions of the court make all the sense in the world. There were allegations of harm to the corporation and community business due to the secretive and wasteful actions of Lori. The actions of the court were designed to best maintain the peace, the status quo and to preserve the significant financial resource/asset of the parties.¹⁵ The court had the best interests of the minor child in mind, as well as the best interests of WCI and of the parties themselves.

RCW 26.09.060 provides the court or judge with the power to make any temporary orders in the cause or disposition of the party during the progress of the proceedings that justice may require, such as temporary custody, possession of homes and vehicles, payment of debts, payment of attorney fees, keeping the peace, maintaining the status quo, and

¹⁵ In spite of her removal from control, Lori continued to receive full income and distributions through the conclusion of this case. (CP 329, 630 & 908; Exhibits 12 & 13)

management of all of the community assets, including a closely held corporation. To suggest otherwise is anathema to the policies behind the divorce statutes and the mandatory ninety day cooling off period. Lori's argument would undermine the power of the court and, in this case, would leave a business in limbo. It would be just as ridiculous to force marital combatants to continue to try to cordially maintain a working relationship at the joint business, as it would be to force estranged couples to jointly occupy the family home, particularly when harmful and damaging acts are being alleged.

Lori also confuses the actions of the court in 2014, under the power of RCW 26.09.060, with the final distribution power under RCW 26.09.080. She claims that this order acted as a "disposing of property" and a "terminating" of her employment. (Brief of Appellant, p. 18) Neither of those things occurred. WCI was not disposed of until the Decree was entered on March 10, 2017, and, even then, Lori continued as a full owner and a fully paid employee of WCI up until the final hearing date on June 9, 2017. (CP 630)

Lori was removed from the company's day-to-day operations. (CP 182-185) She was never denied her rights of discovery that are granted all those involved in civil proceedings. As the trial approached and the court saw that the parties were not going to be able to reach an agreement about

a joint business appraiser to be paid from the income of WCI, the court removed all access restrictions to the business banking records. (CP 938)

We do not know what efforts she made to look online at the bank records and other information within her grasp. We do know that Lori never made any effort at additional discovery, never had her expert audit the books, and never identified the name and/or existence of a qualified business evaluator. Lori's attorney admitted that they had been working on getting their own business appraisal since November 5, 2015. (5 RP, February 2, 2016, 16).

Instead, she showed up on day four of the trial and asked the court to consider hearing the testimony of their "expert witness" via telephone on the issues of goodwill value and business valuations. (7 RP, February 3, 2016, 4). The court allowed Lori to try to qualify her alleged expert (going so far as to instruct her counsel as to the proper questions and inquiry required¹⁶), but she failed to do so. (7 RP, February 3, 2016, 89-114)

There is no evidence that Eric failed to cooperate in efforts to identify and agree upon a business appraiser.

The net result of the lack of proof in this area was the court's ruling that Eric accept a 60/40 split of the WCI assets to compensate Lori

¹⁶ 7 RP, February 3, 2016, 100.

for extra value in the business that she failed to prove, or the court would order everything liquidated and split the garage sale values 50/50. (CP 329) By accepting the 20% valuation swing in Lori's favor, Eric is paying her for her interest in WCI well above and beyond the value of the land and hard assets, above and beyond what she failed to establish in court, and well beyond what she would have received had those assets been liquidated as she had requested. (5 RP, February 2, 2016, 6-7)

2. **The trial court's record more than adequately supports its determinations, and they are fair, just and equitable under all the circumstances herein.**

The court did its job, and then some, in dissolving this marriage and fairly dividing the separate and community assets of the parties based upon the totality of the facts and circumstances presented to the court.

After five days of trial, the court urged the parties to try to resolve this matter between themselves. (8 RP, February 4, 2016, 60-68) Lori immediately rejected such a solution and made it clear that she was not interested in a settlement or settlement discussion; rather, she was asking the court to move ahead to sell the business and the business assets immediately and divide the proceeds. (RP, March 3, 2016, 2-3, 20) Lori's attorney made it clear that a settlement was not going to happen and that, "I think my client has more confidence in getting a ruling from the evidence, Your Honor." *Id.* at 20.

A month later, on April 8, 2016, the court delivered its written decision in a letter to counsel. (CP 328-330) The terms and conditions of this letter ruling were not immediately translated into final divorce papers and presented to the court for entry (that would not come for nearly a year). In addition to the argument asking for a final ruling (March 3, 2016), the letter ruling itself was the subject of four additional interim clarification and supplementation hearings (June 21, 2016, July 27, 2016, January 19, 2017, and February 3, 2017), a lengthy argument upon presentation and entry of the final divorce pleadings (March 10, 2017) (CP 624-42), and argument and an order establishing additional financial credits and determinations (June 9, 2017). (CP 907-9)

RCW 26.09.080 gives the trial court its instructions on final disposition of property and debts in a divorce.¹⁷

There has never been a case where all of the relevant factors were more reviewed, considered, discussed and worked over than this case. Appraisals were done on all of the real property (Exhibits 24-28, 35-36, 46) and the heavy equipment (Exhibit 42), while other assets were sold

¹⁷ *...the court shall...make such disposition of the property and the liabilities of the parties, either community of separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:*

- (1) The nature and extent of the community property;*
- (2) The nature and extent of the separate property;*
- (3) The duration of the marriage...; and*
- (4) The economic circumstances of each spouse...at the time of the division of the property becomes effective...*

and values fixed (Exhibits 43-45). With what remained, the court weighed all relevant facts and ultimately exercised its reasonable judgment.

A party is not allowed simply to fail and/or refuse to pursue proper avenues of discovery or fail to seek out and hire appropriate experts, or unsuccessfully try to present the opinion of an unqualified expert about unknown, unstated, and unproven valuations and then blame the court for not doing its job. Lori ran all of the financial aspects of WCI from 1995 to 2014, and, after her removal from control, she had more than two years to gather any additional information that she needed to do an evaluation or hire an expert.

The court was not persuaded by her post-trial complaint, noting that, “[s]he could have hired an expert and had him -- I would have allowed him or her to go in and evaluates (sic) anything that was there. She had knowledge of stuff that was there for years when she was there.” (RP, July 27, 2016, 12) Lori did not do so.

Judge McCauley reversed his thinking on goodwill¹⁸ and, instead, bent over backward to be more than fair to Lori, stating,

¹⁸ The Court: So you’re not going to argue any goodwill argument then?

Ms. Hoke: I can’t, if you dismissed her [Toni Ellsworth] testimony.”

The Court: That’s kind of what I --

Mr. Morean: Okay, no goodwill, that’s fine. Okay, that’s off the table.

The Court: Yeah, I didn’t think there was any real substantial testimony for me to find goodwill, especially to put a number on it...because it would just be guessing. (8 RP, February 4, 2016, 16)

...I said the business is going to be divided 60/40, because he gets an ongoing business ***with goodwill and all the things that we didn't have expert testimony about...***but also saying if he doesn't like the 60/40, then let's sell everything and liquidate it and then we know they get 50/50.

(Emphasis added) (RP, January 19, 2017, 106-107)

Even without expert testimony, he gave Lori value for goodwill,

I recognize *there's goodwill* in Wirkkala Contracting or their job performance or jobs in the past and the key personnel and the fact that they're well respected in the area. **That's where I – I tacked on the 60/40...**

(Emphasis added) (RP, January 19, 2017, 112)

Sensing that in spite of his letter ruling, as already clarified, Lori was never going to be satisfied and this matter would continue, the court stated that Lori is

...coming in with a whole bunch of arguments about the past and what [Eric] did, you know, three year ago or what he's doing now. And – and I'm not going to open this up for a new trial about what's gone on in the past. I'm going to try to simplify it and get it crunched down to a number to pay off her and get this thing over with.

(RP, January 19, 2017, 89)

The day the final papers were entered, the court concluded, “[t]his is my ruling. I think what I've done is the most fair and equitable that I could under the circumstances with what I was given....” (RP, March 10, 2017, 20)

Under RCW 26.09.080 trial courts have broad discretion in the distribution of property and liabilities in marriage dissolution proceedings...Distribution of property by the trial court should be disturbed only if there has been a manifest abuse of discretion. The trial court is in the best position to assess the assets and liabilities of the parties and determine what is 'fair, just and equitable under all the circumstances.

In re Marriage of Brewer, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

3. Lori failed to provide proof to challenge the court's designation of a portion of her PERS account as community property.

Lori was given multiple and repeated opportunities to provide her PERS information and to rebut the value and division Eric presented to the court. Having failed to do so, she cannot complain over the outcome.

As noted in the record, the proposed PERS1 numbers were "purely speculation" and the community number is not "mathematically precise" because Eric did not have the current values because they were never supplied.¹⁹ (Exhibit 48) Eric's attorney argued,

I want a current statement. I want a statement that says she was employed on this date. She got – she started living together on this day so we started accumulating the – committed in the (sic) [intimate] relationship and then separated on this date or she was terminated on this date and that's when the PERS ended and we do exactly the math.

(8 RP, February 4, 2016, 51)

¹⁹ In spite of multiple requests and multiple chances to supply the court with up to date information, proof and documentation, and in spite of the fact that the trial on this matter took place in 2016, Lori only supplied records from 2008 and 2009, seven years stale.

Eventually in 2016 (after the trial was over), Lori only supplied her statement for 2014. Eric's attorney, again argued,

I find it incredibly unbelievable that the 2015 statement is not available. So, again, somebody is hiding something, I don't know why. I would like the Court to order her to give me every statement, 2010 to 2015, and one that says what it is today on this date in 2016....

(Emphasis added) (RP, March 3, 2016, 9-10)

In response, Lori's attorney promised: "...she anticipates having all the materials that he requested tomorrow...." (RP, March 3, 2016, 30) It never came.

One year later, the court finally received the 2015 numbers that should have been available at trial two years before. There was still no information for 2016 or 2017. Lori had been asked repeatedly for "current" information, but never provided it. (RP, March 10, 2017, 6-11)

All of the information and dates and times were needed because this was not simply about the date of employment, the date of marriage and the date of Lori's termination of her employment. This is more complicated because of the committed intimate relationship aspects and calculations. Lori's attorney admits the 17% calculation comes from a committed intimate relationship argument at the entry of the Decree. (RP, March 10, 2017, 8-9)

Frustrated over the lack of openness and production of easily obtainable information, the Court stated, “[b]ut you’re the one that has control or the ability to get information from that account.” (RP, March 10, 2017, 9), and further clarifies the court’s intent and lays out the ultimatum that, “I’m going to complete the paperwork and reserve on that issue and give her 90 days to **come up with the actual information or else I will accept Mr. Morean’s number.**” (Emphasis added). (RP, March 10, 2017, 11) He wanted not just 2016, but also “a current” 2017 amount. *See Id.* Even more, the court clarifies,

I think – I mean in today’s world I can’t believe that can’t be obtained if you make an honest effort to get it...But it might take her effort to get it...Or else a release from you or something. But maybe you need to take charge of it, because she doesn’t seem to be able to get it.

(RP, March 10, 2017, 12)

To further amplify the court’s point, the language at page 8 of the Decree was augmented in handwriting.²⁰

On the final day before the court when “all current PERS1 value information” was mandated, or else “the amount listed shall remain unchanged,” Lori completely failed to complete her mandated task. *Id.*

²⁰ *The calculation of the property balancing amount shall be changed at Exhibit B as noted below, and all adjustments shall be determined at the hearing set for June 9, 2017, or sooner.

A. Respondent **must present all current PERS1 value information**, or the amount listed **shall remain unchanged**; (Emphasis added) (CP 631)

(See CP 854-859) The financial records supplied only shows the 2016 amount value – \$390,839.91 and completely fails to show the “current value,” today’s value, the 2017 value. (CP 856) Lori gave the court no explanation or reason for failing to have the current value in her Declaration dated May 30, 2017. (CP 854-55) The only reference is the handwritten notation: “2017 Online PERS statement” that simply lends support to the argument that proves her utter lack of “honest effort” as demanded by the Judge when it ordered “all current PERS1 value information.” (CP 856; CP 631; RP, March 10, 2017, 12)

Not only does Lori fail to comply with the mandates of the court, but the only other evidence presented is from a previously undisclosed, post-trial, surprise “expert” witness, who has not been qualified by the court to give an opinion, who has not been vetted and who has not been cross-examined to this day. In addition, this “expert” witness uses the trial number of \$64,000.00 that was based upon 2008-09 information, rather than the real numbers available to Lori in her contemporaneously filed materials. (CP 848-853; 854-59) In addition, this “expert” does not address anything with regard to the impact of the committed intimate relationship aspects of any pre-marriage contribution issues. (CP 848-853)

At the conclusion of the trial, the court correctly summarized the law when discussing Lori’s PERS account saying,

[b]ecause the law seems to say that if it was a committed relationship, then it's – anything earned during that period is like community income or community property; and, so, then it seems like from the date of the committed relationship we'd be looking at her Oregon PERS and dividing it into community and separate.

(8 RP, February 4, 2016, 57)

The record amply supports a committed intimate relationship.²¹

We need, and have in this case, a stable, marital-like relationship, where both parties cohabit with the knowledge that a lawful marriage between them does not exist. The relevant factors are: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties.²² See *Connell v. Francisco*, 127 Wn.2d 338, 346, 898 P.2d 831 (1995).

IV. Conclusion

After seven years of litigation, five days of trial, six post-ruling hearings, all spanning twenty-five verbatim transcripts, fifty exhibits and a thousand pages of clerk's papers, the respondent remains unsatisfied.

²¹ Cohabitation started in 1994 while Lori was still working and contributing to the PERS1 account, and continued until June 22, 1999. WCI was incorporated in 1995, while they were living together. (3 RP, June 24, 2015, 38) In September 1996, they obtained a \$100,000.00 loan together to buy Swensen's equipment and land that formed the assets and basis of WCI business thereafter. They worked WCI together and she stayed at her job at the county until she was terminated. They married on May 25, 1998.

²² Further, "[c]haracterization of property as community or separate is not controlling in division of property between the parties in a dissolution proceeding...All property, both separate and community is before the court." *In re Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999).

She is the source of her dissatisfaction having failed to do discovery, hire and present a qualified expert, supply up-to-date and current PERS1 information, affidavit the Judge, and object to and/or prove a conflict with the appointment of the bookkeeper she initially proposed. She hopes to wash away her own failures in this seven year odyssey by pointing the finger at the Judge, Eric and Ms. Goodin. Her own actions and inactions are her worst enemy, but even then she fails to show how she has been negatively impacted by them, and/or what, short of dissolving the company and selling it for scrap, would be fairer for her.

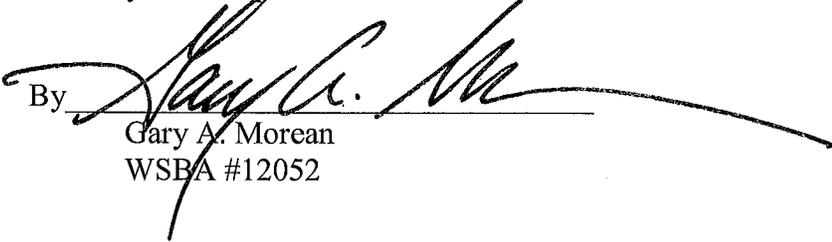
The court's rulings are correct. The court sorted through the seven year morass and made a fair and equitable decision that is amply supported by the record. The court did not abuse its discretion.

We ask this court to affirm the lower court in every particular and dismiss this appeal.

Respectfully submitted this April 18, 2018.

INGRAM, ZELASKO & GOODWIN, LLP
Attorneys for Respondent

By


Gary A. Morean
WSBA #12052

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No. 50213-5-II

Court of Appeals, Division II,
of the State of Washington

Eric Marvin Wirkkala,

Respondent,

v.

Lori Denise Wirkkala,

Appellant.

Certificate of Service

Gary A. Morean
Attorney for Respondent
gmorean@izglaw.com
Ingram, Zelasko & Goodwin, LLP
120 East First Street
Aberdeen, WA 98520
(360) 533-2865
WSBA #12052

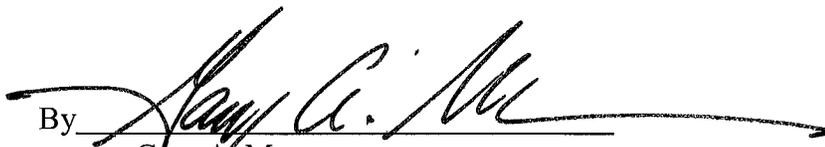
CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On April 18, 2018, I filed the Reply Brief of Respondent with the Court and served a copy on the undersigned in the manner indicated:

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INGRAM, ZELASKO & GOODWIN
Attorneys for Respondent

By 
Gary A. Morean
WSBA #12052

INGRAM, ZELASKO & GOODWIN, LLP

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Superior Court Case Number: 10-3-00080-7

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