FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

NO. 312992

IN RE:

DAWN D. NEUMILLER

Petitioner

vs.

STEVEN R. NEUMILLER

Respondent

APPELLANT'S REPLY BRIEF

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I. Table of Cases and Court Rules

Cases

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II. ARGUMENT

Appellant did not fail to identify the standards of review in her opening brief.

In his responsive brief, Mr. Neumiller argues that Ms. Neumiller violated **RAP 10.3(a)(6)** by not identifying the standards of review for the issues raised in her opening brief. **RAP 10.3(a)(6)** states that an appellant is encouraged to include a concise statement of review. Ms. Neumiller did not violate **RAP 10.3(a)(6)**.

In the argument section of her brief at page 14, Ms. Neumiller stated that the standard of review when reviewing the trial court's decision to grant or deny leave to amend a pleading is whether there was a manifest abuse of discretion.

In the argument section of her brief at page 17, Ms. Neumiller stated that a trial court's division of property is reviewed for a manifest abuse of discretion.

In the argument section of her brief at page 22, Ms. Neumiller stated that findings of fact are reviewed on appeal to determine wether they are supported by substantial evidence.

In the argument section of her brief at page 23, Ms. Neumiller stated that the trial court's decision regarding child support is reviewed for an abuse of discretion.

In the argument section of her brief at page 24, Ms. Neumiller stated that the the court's findings regarding a request for fees are reviewable under the substantial evidence standard and that the court's decision regarding an award of fees is reviewed for an abuse of discretion.

Contrary to Mr. Neumiller's argument in his responsive brief, **RAP 10.3(a)(6)** does not require an appellant to list the standards of review in a separate section from the argument section of the appellant's brief.

The inadvertent failure to provide a separate section in the appellant's opening brief regarding the assignments of error was a technical error that does not create verities on appeal.

RAP 1.2(a) provides as follows:

> These rules will be liberally interpreted to promote justice and facilitate the decisions of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands subject to restrictions in rule 18.8(b).

RAP 10.3(a)(4) does state that the brief of the appellant should include a

separate concise statement of each error made by the trial court, together with the issues pertaining to the assignment of error. Ms. Neumiller's opening brief inadvertently did not include a separate section regarding the assignments of error. However, this inadvertent error is not an error that would create verities of the trial court's findings.

The clear language of **RAP 1.2(a)** supports the conclusion that a technical violation of the Rules of Appellate Procedure should normally be overlooked and the case decided on its merits. **State v. Olson**, 126 Wn. 2d 315 (1995). In **State v. Olson** a defendant's motion to suppress evidence was granted by the trial court. The State then filed a motion, affidavit and order of dismissal, which was granted by the trial court and the case dismissed **State v. Olson** at 317. The State subsequently filed a Notice of Appeal of the dismissal order but the notice of appeal did not specifically refer to the suppression order. The notice of appeal did state, however, that the dismissal was based on the suppression order. **State v. Olson** at 318. In its opening brief, the State argued that the suppression order should be vacated and the dismissal order reversed. **State v. Olson**, at 318.

The defendant then filed a motion to dismiss the appeal based on

the State's failure to assign error to the dismissal order in the opening brief and failed to file a notice of appeal of the suppression order. **State v. Olson** at 318. The Court of Appeals denied the defendant's motion to dismiss, finding that the challenge was clear and that justice would be served by deciding the case on the merits, "promoting substance over form." **State v. Olson**, at 318.

The Supreme Court upheld the decision of the appellate court, finding that a technical violation of the rules, as the failure to to assign error to the dismissal order and failure to file a notice of appeal as to the suppression order was considered to be, should be overlooked in favor of deciding the case on its merits. **State v. Olson** at 318-319. The Supreme Court went on to state that such an outcome is particularly warranted when it is a minor violation that does not prejudice the opposing party and only minimally inconveniences the appellate court. **State v. Olson** at 323.

In evaluating the issue of prejudice and inconvenience, consideration should be given to whether the appellant completely failed to raise the issues in any way versus whether the issues were raised in other ways such as the argument portion of the brief or in the request for

relief. **State v. Olson** at 321. The Supreme Court found that an appellate court should only refuse to consider the case on the merits when an appellant "fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), and fails to present any argument on the issue or provide any legal citation". **State v. Olson** at 321.

> "The narrow rule makes perfect sense because in the situation where the issue is not raised at all, the Court is unable to properly consider the issue prior to the hearing and is given no information on which to decide the issue following the hearing. More importantly, the other party is unable to present argument on the issue or otherwise respond and thereby potentially suffers great prejudice." **State v. Olson** at 321.

In the present case, Ms. Neumiller filed a Notice of Intent to Appeal in which she specifically listed the findings of fact and conclusions of law in each order of the court about which she was seeking review. Each finding of fact and conclusion of law was designated by its provision number in each of the orders of the court. In Ms. Neumiller's opening brief, in the argument section, she separated the individual issues and addressed the alleged errors of the trial court, citing to case-law and specifically stating why she believes the court erred. Mr. Neumiller was able to identify each of the issues through the Notice of Appeal and Ms.

Neumiller's opening brief and respond to the issues accordingly.

Although the failure to include a separate section providing a concise statement of each alleged error was a violation of **RAP 10.3(a)(4)**, it is a technical error that should not result in the findings of the trial court being adopted as verities.

The majority of the cases cited by Mr. Neumiller on this issue pre-date **State v. Olson** and based their decisions on older appellate rules which at the time required the findings to be reproduced verbatim in the appellant's brief and failure to do so was an absolute bar to seeking an assignment of error as to the finding. **Martin v. Clinton**, 67 Wn.2d 608 (1965). Those older cases are inconsistent with the Supreme Court's decision in cases such as **State v. Olson**.

The trial court's refusal to consider the evidence regarding a committed intimate relationship pre-dating the marriage resulted in the entry of no findings of fact on that issue.

A bar to challenging the findings of fact made by the trial court as to the issue of whether or not a committed intimate relationship existed is that the trial court made no findings as to whether the relationship existed.

The trial court made no findings of fact as to the evidence and testimony presented on this issue.

The trial court abused its discretion in disallowing the appellant's amended petition.

In his responsive brief, Mr. Neumiller states that Ms. Neumiller did not have leave to amend her petition because his response was filed "simultaneously, and at the same time" as the amended petition. In support of that position, Mr. Neumiller cites to RP 217, which is a portion of the trial court's oral opinion. However, the trial court did not find that Mr. Neumiller filed his response "simultaneously, and at the same time". At RP 217, lines 3-7, the trial court stated, "She never pleads regarding the existence of a meretricious relationship in her dissolution, but curiously Mr. Neumiller never responded until August 6, 2012, which is essentially the day that he was served with the amended petition." At RP 217, lines 20-23, the trial court went on to state "But regardless, we ended up in trial, and the response wasn't filed by Mr. Peltram until essentially the day of trial when he received Mr. Nelson's amended petition for dissolution that included the discussion of a meretricious relationship." Mr. Neumiller's

response was not filed simultaneous with the amended petition. There being no response filed at the time of filing of the amended petition, Ms. Neumiller had a right to amend her petition pursuant to **Civil Rule 15(a)**.

Further, although he alleges that he would have been prejudiced by the amended petition, Mr. Neumiller offers no argument as to how he would have been prejudiced. Mr. Neumiller does not deny that he had filed a declaration in the parties 2009 dissolution action in which he stated under oath that the parties had lived together as a family, and he had supported them as a family, for years pre-dating the marriage. [RP 180 1-25, 181 1-5] Mr. Neumiller does not deny that he was represented by the same attorney in both the 2009 dissolution action and the 2011 dissolution action. [RP 178, line 2] The issue of the parties relationship pre-dating the marriage was not unknown to either party. Even if Mr. Neumiller felt he needed additional time to address this known circumstance through further discovery, the trial court could have granted a continuance pursuant to **Civil Rule 15(b)**. The trial court abused its discretion by disallowing the amended petition and by not addressing what minimal prejudice there may have been through less severe alternatives such as a continuance.

The trial court abused its discretion in prohibiting any consideration of a committed intimate relationship pre-dating the marriage.

As discussed in Ms. Neumiller's opening brief, the trial court heard testimony on the issue of whether or not a committed intimate relationship existed. Both parties testified and provided exhibits regarding all property and debt, including that acquired during the alleged committed intimate relationship and provided testimony touching on the factors considered when determining whether such a relationship existed. Although the court ultimately refused to consider the testimony offered by both parties, both Mr. and Ms. Neumiller were able to address the issues. The trial court's decision was a dismissal Ms. Neumiller's claim as to the committed intimate relationship, thereby restricting what evidence it would consider as to the characterization and division of property.

Mr. Neumiller cites to **In Re Marriage of Olivares**, 69 Wn.App. 324 (1993). In **Olivares**, the appellate court stated the following:

> Failure to properly characterize the property may be reversible error . Blood 69 Wash. 2d at 682, 419 P.2d 1006. However, mischaracterization of property is not grounds for setting aside a trial court's allocation of liabilities and assets, so long as the distribution is fair and equitable. **Olivares** at 330.

The appellate court went on to state:

> Where there is mischaracterization, the trial court will be affirmed unless the reasoning of the court indicates 1) that the property division was significantly influenced by characterization and 2) that it is not clear that the court would have divided the property in the same way in the absence of the mischaracterization.

Olivares at 330, citing **In Re Marriage of Shannon**, 55 Wash.App. 137 (1989)

The holding in **Olivares** supports Ms. Neumiller's appeal. The trial court's characterization of property was made without consideration of the existence of the committed intimate relationship. Because the trial court did not consider the relationship prior to marriage, it never addressed the issue of characterization of property acquired during that period of time prior to marriage, such as the family home. Had the trial court considered the relationship and determined it was in fact a committed intimate relationship, the characterization and division of property would likely have been different.

Ms. Neumiller does not dispute that the trial court has broad discretion with respect to property and debt divisions. However, it is also

undisputed that a manifest abuse of discretion exists if the trial court exercises its discretion on untenable grounds. **Olivares** at 328. The trial court's refusal to consider the evidence presented as to the existence of a committed intimate relationship had a direct affect on the characterization, and division, of the property before it. The trial court's decision was a manifest abuse of discretion.

Tbe trial court abused its discretion in denying the appellant's request for attorney fees, however the issue of attorney fees should be addressed on remand.

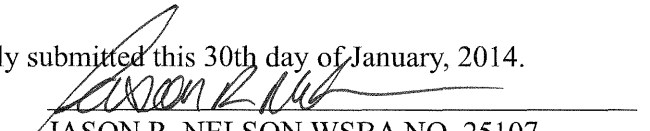
For the reasons stated in Ms. Neumiller's opening brief, the trial court abused its discretion in denying her request for fees. However, Ms. Neumiller's primary request for relief in her opening brief was to remand this matter for determination of whether a committed intimate relationship existed prior to marriage and if so, how would that affect the division of property and debt. If remand is ordered, the trial court's decision as to the financial resources of the parties may be affected. In **In Re Marriage of Terry**, 79 Wn.App. 866 (1995), the appellate court reversed the decision of the trial court as to the issue of when the marriage of the parties would be considered defunct. **Marriage of Terry**, at 870. The appellate court

then remanded the matter back to address the issues in light of the determination that the marriage was long-term. **Marriage of Terry**, at 870. Because the remand and redetermination would have an affect on such determinations as the financial resources available to each party, the appellate court left the issue of attorneys fees, including appellate fees, to be addressed by the trial court at that time. As in **Marriage of Terry**, the issue of fees should be left to the trial court should remand be ordered.

III. CONCLUSION

For the reasons stated above and in her opening brief, Ms. Neumiller requests that the appellate court grant the relief requested. The technical failure to comply with the Rules of Appellate Procedure did not prejudice Mr. Neumiller. The trial court's rulings as to the issue of the amended petition, the committed intimate relationship, the incomes of the parties, the characterization of property and debt, the division of property and debt, as well as the denial of a request for fees were not supported by the evidence and were manifest abuses of discretion.

Respectfully submitted this 30th day of January, 2014.



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DECLARATION OF DELIVERY

I, CHERYL GROWT, under penalty of perjury pursuant to the laws of the State of Washington, declare that on the 30th day of January, 2014, I had delivered a copy of this document to the law office of attorney Martin Peltram, 900 North Maple, Suite 200, Spokane, WA 99201, via legal messenger.

I swear that the above is true and correct, to the best of my knowledge and belief, under penalty of perjury pursuant to the laws of the State of Washington.

CHERYL GROWT, Legal Assistant