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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 BRIEF

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I. Statement of the Case

Petitioner Dawn Neumiller and Steven Neumiller had previously filed for dissolution of their marriage under Spokane County Cause No. 09-3-027980-4. [RP 213, lines 12-14]. That action was dismissed on August 13, 2013. [RP 213, lines 14-15]. The agreed order dismissing the action included a finding that the parties were attempting to reconcile and no longer wished to dissolve their marriage. [RP 177, lines 15-25, RP178, lines 1-15].

Petitioner Dawn Neumiller filed a subsequent petition to dissolve the parties marriage under Cause No. 11-3-01328-4. [RP 213, lines 1-5]. The petition for dissolution alleged a separation date in May 2009. The petition did not allege the existence of a committed intimate relationship prior to marriage. [RP 217, lines 3-5].

An Amended Petition for Dissolution was filed on the day of trial. [RP 217, lines 21-23]. A Response to the original Petition for Dissolution of Marriage was also filed on the day of trial. [RP 217, lines 5-6, 12-15]. No response had been previously filed.

The Amended Petition listed the date of separation as May 2011. The Amended Petition also alleged the existence of a committed intimate relationship that pre-dated the parties marriage. [RP 217, lines 22-23]. The respondent brought an oral motion prior to the start of testimony seeking to exclude testimony regarding the existence of a committed intimate relationship. [RP 215, lines 16-20]. The court took the issue under advisement but allowed testimony on the issue to proceed.

At trial, the court found that the parties married on January 28, 2005. [RP 220, lines 25-25]. The court also made a finding that the parties separated in May 2009. [RP 220 line 25, RP 243, lines 1-2]. At trial, the petitioner testified that after the parties 2009 separation, the parties attempted to reconcile and dismissed the dissolution action that had been filed that year. [RP 48, lines 13-25]. The respondent admitted the agreed order stated that the parties were attempting to reconcile and did not want to dissolve their marriage. [RP 177, lines 15-25, RP 178, lines 1-15]. No other dissolution action was filed until the 2011 filing.

At trial, the petitioner testified that the parties met and shortly thereafter began dating. [RP 27, lines 8-15, RP 29, lines 18-25]. The

parties began living together, according to the petitioner, in approximately August 1998, three months before the birth of their first child. [RP 31, lines 3-25]. The respondent moved into the home occupied by the petitioner and her daughter from a previous marriage. [RP 39, lines 6-8]. The respondent's daughter, who lived with him half the time, moved in with them. [RP 31, lines 3-25]. The home in which the parties lived was titled in the name of the petitioner's father. [RP 31, lines 2-20].

Shortly thereafter, the parties purchased the home from the petitioner's father. [RP 32, lines 2-20]. The home was titled in the respondent's name and the mortgage was taken out in the respondent's name due to petitioner's credit issues. [RP 31, lines 2-20]. The mortgage was later refinanced but remained solely in the respondent's name. [RP 34, lines 7-9]. The home was insured in the names of both the petitioner and the respondent. [RP 35, lines 1-2]. No money was put down on the purchase of the home. [RP 38, lines 12-15].

The petitioner testified at trial that the parties told their friends and family that they were legally married when they moved in together. [RP 39, lines 15-21]. The parties lived together continuously from the date

they began living together until the date of marriage. [RP 47, lines 5-10].

The parties had a son shortly after they began living together, subsequently lost two children due to miscarriage and then gave birth to a daughter. [RP 42, lines 4-22].

During the marriage, the parties budgeted their household expenses as one household. [RP 47, lines 12-25, RP 48, lines 1-12]. Although the parties did not have financial accounts held in both their names prior to marriage or after marriage. [RP 44, lines 21-25]. The petitioner testified that the respondent worked outside the home while she primarily stayed home with the children. [RP 41, lines 21-25, RP 42, lines 1-2].

The parties made improvements to the home in which they lived. The petitioner testified about the specific improvements and each party's involvement. [RP 40, lines 1-25]. The petitioner further testified that the parties took trips together prior to marriage, participated in family events together prior to marriage and enjoyed recreational activities together prior to marriage. [RP 42, lines 4-22]. The petitioner testified that the parties discussed marriage but that the respondent referred to their relationship as a "covenant marriage". [RP 43, lines 8-19].

The petitioner testified that she completed high school and attended some college classes but did not have a college degree. She last took college classes in 1989 [RP 21, line 15-23]. The petitioner had attended a one-week long and a two-day long sewing seminar. [RP 22, lines 5-18]. In the two years prior to trial, the petitioner had worked as a volunteer at the children's schools doing recycling, cleaning and odd jobs and had also worked two months as a camp counselor. [RP 23, lines 14-25; RP 89, lines 23-24]. The petitioner earned \$1,000.00 per month as a camp counselor. [RP 90, lines 8-12]. The petitioner testified that she had been diagnosed with relapsing, remitting MS and that she suffered from chronic fatigue. [RP 63, lines 23-25].

The respondent testified that he had a Master's Degree and was certified by the National Board for Certified Counselors. [RP 190, lines 14-22, RP 191, line 1]. The respondent further testified that his income in 2012 consisted of social security benefits that he began drawing at age 62, \$638.18 he was being paid monthly for mentoring and additional income from grant-writing. [RP 132 24-25, RP 133, 1-12]. The respondent testified that he could continue to earn up to \$15,000.00 net per year

without affecting his social security benefits or those paid to the parties children based on his retirement. [RP 135, lines 3-7].

Based on the respondent's retirement, the children receive \$767.00 each in monthly social security benefits. [RP 238 lines 24-25, RP 239, lines 1-2]. Prior to trial, the parties entered a shared Parenting Plan. [RP 239, lines 3-17]. Each parent received one of the children's social security checks in each household. [RP 239, lines 3-17]. The trial court imputed a net income of \$1,536.00 to the petitioner. [RP, lines 14-17]. The trial court found the respondent's income to be equal to his social security payments of \$1,537.00 per month. [RP 239, lines 18-20]. The trial court declined to include any additional income for the respondent. [RP 239 21-25, RP 240, 1-5].

The respondent testified that the American Funds account in his name was his separate property and that he established the account in 1994. [RP 168, lines 10-22]. The respondent admitted that he did not provide any documents for the account showing a balance prior to 1998. [RP 198, lines 1-8]. The respondent testified that he made contributions to the account each year from 1994 through 2002. [RP 168, lines 10-22].

As to the issue of a committed intimate relationship, the trial court found that allowing the issue to be raised at trial would violate fundamental fairness and due process. [RP 219, 1-25, RP 220, 1-13]. The trial court ruled that it would only consider those issues raised in the dissolution filing on May 26, 2011. [RP 220, 11-13].

The trial court found that the home in which the parties lived during their relationship had been purchased by the respondent prior to marriage. [RP 222, lines 19-23]. The court found that the home was titled in the respondent's name and that his was the only name on the mortgage. [RP 222, lines 21-25]. The trial court valued the home at \$150,000.00 and concluded it was the separate property of the respondent. [RP223, lines 3-8]. The court found two mortgages existed against the home: a first mortgage of \$24,654.00 and second mortgage that was partially community and partially separate. [RP 227, lines 17-23].

Based on the trial court's decision to consider only those issues arising during the period of the parties marriage, the court found that the American Funds account was entirely the separate property of the respondent. [RP 227, lines 8-16]. Other retirement accounts accumulated

by the respondent prior to the beginning of the parties relationship were awarded to the respondent as his separate property. [RP 226, 14-25, RP 227, lines 1-2.]

The trial court found that the petitioner failed to demonstrate a need for spousal maintenance and that no maintenance should be ordered. [RP 236, lines 8-19]. Based on the determination of the parties incomes, the court determined that the petitioner had a need for assistance with attorneys fees but that the respondent did not have an ability to pay. [RP 237, 4-15].

II. ARGUMENT

1. **The trial court's decision to not consider testimony related to the issue of a committed intimate relationship constituted a manifest abuse of discretion.**

A. Amended Petition

Washington's Superior Court Civil Rule 15(a) allows a party to amend a pleading at any time prior to the filing of a responsive pleading. If a responsive pleadings has been filed, then the petitioning party must seek leave of the court or the agreement of the opposing party. In the present case, the respondent opposed the introduction of testimony regarding the existence of a Committed Intimate Relationship. The trial court ruled that allowing the issues in the amended petition to be raised would be prejudicial to the respondent. However, it was undisputed that the respondent failed to file a response until the amended petition was filed. Leave of the court to file an amended petition was not required.

Washington's Superior Court Civil Rule 15(b) also allows the court to consider evidence even if one party objects that that the evidence is not

within the issues raised in the pleadings, if presentation of the evidence would assist the court in getting to the merits of the action. In such a circumstance, an amendment of the pleadings to conform to the evidence should be freely granted unless the objecting party proves that the amendment would be prejudicial. A continuance may be granted under CR 15(b) to allow the opposing party to address the amended pleadings and evidence.

In Wilson v. Horsley, 137 Wn. 2d 500 (1999), the plaintiff sought to amend the complaint. The time to amend as a matter of course had expired, requiring the plaintiff to seek leave of the court or consent by the defendant. **Id at 505.** On review, the Supreme Court held that the decision to grant leave to amend a pleading is discretionary and therefore the appealing party must show a manifest abuse of discretion. **Id. at 505.** The Supreme Court defined the standard as a clear showing that the discretion exercised was manifestly unreasonable or exercised upon untenable grounds or for untenable reasons. **Id at 505.** The focus should be on the prejudice to the non-moving party considering such factors as unfair surprise and undue delay. **Id at 505-506.**

In the present case, it is undisputed that the parties filed a dissolution action in 2009. It is also undisputed that the respondent filed a declaration in that action in which he stated under oath that the parties lived together as a family, and that he supported them as a family, for a number of years prior to marriage. [RP 180 1-25, 181 1-5] The respondent was represented by the same attorney in both the 2009 dissolution action and the action later filed and ruled on by the trial court. [RP 178, line 2] There was no unfair surprise to the respondent.

Further the parties submitted the same list of property, and the same proposed values, at trial as would have been submitted even had the initial petition referenced the committed intimate relationship issues. Because all property, community and separate, was before the court, the parties had to submit their proposed values as to each item of property, as well as their position on whether it was community or separate. Further the trial judge had to make findings as to the value of both community and separate property. No additional appraisals, valuations or itemizations of property were necessary to address the issue. Having already been aware of the nature and extent of his relationship, the respondent did not need

additional time to prepare. In fact, the respondent did testify about the factors considered by the court in determining whether or not a committed intimate relationship existed. Consideration of the issue would not have caused undue delay.

If any actual showing of prejudice would have been presented, the appropriate remedy would have been to continue the matter and allow the respondent additional time to seek or present evidence in response.

Clearly whether or not the parties had a relationship prior to marriage, during which the most valuable assets under consideration were acquired, goes to the merits of the action as contemplated under CR15(b). Even if the petitioner was required to have leave of the court to amend despite the failure to file a response, the court's refusal to allow such an amendment was a manifest abuse of discretion.

In **Snedigar v. Hodderson**, 53 Wn. App. 476 (1989), the appellate court addressed the issue of the trial court dismissing an action due to a party's failure to follow a discovery order. The appellate court held that when a severe sanction such as dismissal is ordered, the record must be clear that the trial court explicitly considered whether a lesser sanction

would have been sufficient. **Id at 487.** The trial court's decision to not consider whether or not a committed intimate relationship existed was tantamount to a dismissal of the petitioner's claim. The trial court did not consider or offer any other less severe sanctions before, during or after the close of testimony. The trial court's failure to do so was a manifest abuse of discretion.

B. An amended petition was not necessary for the court to consider the issue of whether or not a committed intimate relationship existed prior to marriage.

In Marriage of Lindsey, insurance proceeds were paid after the destruction of a barn/shop that had been constructed prior to marriage but during the course of the parties relationship that pre-dated the marriage by two years. **Id at 306.** The parties presented conflicting testimony regarding each party's involvement in the construction of the barn/shop. **Id at 306.** After abandoning the Creasman presumption, the court concluded ". . .we adopt the rule that courts must examine the [meretricious] relationship and the property accumulations and make a just and equitable disposition of the property. **Id at 304.** A court's division of

property is reviewed for a manifest abuse of discretion. In re Marriage of Landry, 103 Wn. 2d 807 (1985).

In the present case, the assets with the greatest value, i.e. the family home and the American Funds account, were awarded to the respondent for the sole reason that they were acquired and accumulated in the respondent's name prior to marriage. The court concluded that the American Funds account was opened in 1994, a year prior to the date the parties began living together. Contributions were made each year thereafter through 2002, while the parties lived together as a family. [RP 168, lines 10-22]. The petitioner lived in the family home prior to the parties living together. [RP 27, lines 8-15]. The respondent moved into the home and it was purchased and held in his name while the parties and their children resided together as a family prior to and during the marriage. [RP 31, lines 3-25]. Substantial improvements were made during the relationship. [RP 40, lines 1-25]. The trial court's failure to consider the committed intimate relationship and the effect the existence of such a relationship had legally on the characterization and division of the assets was a manifest abuse of discretion.

C. Substantial testimony was presented to establish a committed intimate relationship.

"An equity relationship is a stable marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." In re Long and Fregeau, 158 Wn. App. 919 (2011), citing Connell v. Francisco, 127 Wn. 2d 339 (1995). Relevant, non-exclusive factors include continuous cohabitation, relationship duration, relationship purpose, pooling of resources and services for joint projects and the intent of the parties. Long and Fregeau at 926.

i. Continuous Cohabitation

The petitioner testified the parties moved in together in approximately August 1998. [RP, lines 3-25]. The respondent filed a declaration in the parties previous dissolution action alleging the parties had been together since 1996 and that he had provided for the family continuously since 1998. [RP 180, lines 1-25]. The petitioner testified the parties lived together continuously from 1998 through the date of marriage. [RP 47, lines 5-10].

ii. Relationship duration

According to the testimony of the petitioner and respondent as set forth above, the parties lived together in the same residence from 1998 until their date of separation and the filing of the second dissolution action in 2011. Their relationship was 13 years in duration.

iii. Relationship purpose

The parties began dating before living together and were pregnant with their first child before beginning to live together. [RP 31, lines 3-25]. The petitioner testified that the parties discussed getting married but that the respondent said they had a "covenant marriage". [RP43, lines 8-17]. The petitioner further testified that the parties held themselves out as married to family and friends. [RP 39, lines 15-21]. The parties attempted to grow their family by having additional children; two additional children were lost to miscarriages and then the petitioner gave birth to their daughter. [RP 43, lines 1-7]. The petitioner testified that the parties had a traditional family with the respondent working outside the home and she raising the parties children. [RP 41, lines 21-25, RP 42, lines 1-2]. The

petitioner and respondent took trips together, engaged in family activities together and participated in recreational activities together. [RP 42, lines 4-22].

iv. Pooling of resources and services for joint projects

The respondent moved into the home in which the petitioner and her children from a previous marriage lived and the parties made substantial renovations to the home. [RP 40, lines 1-25]. Both parties physically worked on the renovations to the home. [RP 40, lines 1-25]. The parties budgeted their household as one household. [RP 48, lines 1-12]. The petitioner took care of not just the parties children but also the respondent's child from a previous relationship. [RP 41, lines 21-25, RP 42, lines 1-2].

v. Intent of the parties

The respondent moved into the petitioner's home, with his child from a previous marriage, combining both parties families. [RP 31, lines 3-25]. The parties established a traditional household with the petitioner caring for the children and the respondent working outside the home. The parties discussed marriage and then ultimately married.

Had the court made findings as to whether or not a committed intimate relationship existed, it would have found substantial evidence was admitted regarding the existence of the relationship.

2. Substantial evidence did not exist for the court's finding that the parties separated in 2009.

Findings of Fact are erroneous if on review the appellate court finds that substantial evidence, i.e. evidence sufficient to persuade a reasonable person that the finding is true, does not exist. Wenatchee Sportsman Assn v. Chelan County, 141 Wn. 2d 169 (2000). The trial court found that the parties separated in 2009, commensurate with the filing of their previous dissolution action. However, the evidence is undisputed that the parties entered an agreed order in August 2010 dismissing that action on the basis of their reconciliation attempts and their desire to not dissolve their marriage. Although it is undisputed that the parties did not reside together after the filing of the 2009 dissolution action, Washington law is clear that mere physical separation does not negate the existence of the marital community. "The test is whether the parties by their conduct have exhibited a decision to renounce the

community, with no intention of ever resuming the marital relationship." **In re Marriage of Nuss**, 65 Wn. App 334 (1992). Although the respondent denies the reconciliation attempts, his self-serving statements made in the current trial are clearly contradicted by the agreed findings in the court order.

The court's finding that the parties separated in 2009 rather than in May 2011 is not supported by substantial evidence.

3. The court abused its discretion in the calculation of the respondent's income and in the imputation of income to the petitioner.

A court's decision regarding child support is reviewed for an abuse of discretion. **In re Marriage of Booth**, 114 Wn. 2d 772 (1990). This includes the court's determinations regarding imputations of income. **Marriage of Shui**, 132 Wn. App. 568 (2005). "A court abuses its discretion by making a decision based on findings of fact that are not supported by the record or based on an incorrect standard or facts that not meet the requirements of the correct standard." **In re Marriage of Littlefield**, 133 Wn. 2d 39 (1997).

A. Respondent's Income

The respondent testified that his 2012 income as of the date of trial consisted of his social security benefits, a \$638.18 monthly payment for a mentoring program and \$7,627.30 he had earned writing grants. He further testified that he could earn up to \$15,000.00 net per year without a reduction in his social security benefits or the benefits paid on behalf of the children. [RP 135, lines 3-7]. RCW 26.19.071(3) lists some of those sources that should be considered as income to a party including social security benefits, wages and contract-related benefits.

The trial court found that the respondent's income was limited to the social security benefits he received as a result of his retirement. The trial court rejected the petitioner's request to include the respondent's other sources of income to the respondent and to impute any further income to the respondent. [RP 239 18-25].

At the time of trial, the respondent earned an income in addition to his social security benefits. [RP 132, lines 24-25, RP 133, lines 1-12]. He testified about his ability to earn without affecting those benefits. [RP 135, lines 3-7]. No evidence was presented about an inability to work.

The court's failure to consider the additional sources of income or to impute income to an individual who is not full-time employed owing a support obligation to minor children was an abuse of discretion. The end result was a substantial reduction in the determination of the respondent's income and a reduction in the amount of child support due for the support of the parties children.

B. Petitioner's Income

The court should impute income to an able-bodied party who is not full-time, gainfully employed. RCW 26.19.071(6). RCW 26.19.071(6) also sets out a hierarchy for determination of imputed incomes. RCW 26.19.071(6)(d) directs the court to impute minimum wage to a parent who has a recent history of minimum wage earnings.

The petitioner testified that she has a high school degree, that she has attended some college courses and that she is certified in sewing machine instruction. [RP 21, line 1, 22-23, RP 22, lines 5-18]. The petitioner also testified that with the respondent's agreement, she primarily stayed home during the marriage. [RP 26, lines 4-9]. The respondent testified that he agreed that the petitioner should stay home with the kids

when they were younger. [RP 163, 14-23]. The petitioner testified that her most recent employment was as a camp counselor earning \$1,000.00 per month for a two month period. [RP 90, lines 8-12]. Finally, the petitioner testified that she has been diagnosed with MS causing chronic fatigue. The respondent testified that the petitioner had told him she had MS.. [RP 164, lines 2-8].

The trial court concluded that the petitioner should be imputed virtually the same income imputed to the respondent who holds a Master's Degree. *The imputation of income at that level to the petitioner was an abuse of discretion*. The result of the trial court's decision was an increase in the petitioner's child support obligation as well as her responsibility for uncovered medical expenses. It was also a factor in the court's *determination to order a zero transfer payment.*

4. Substantial evidence did not exist for the court's finding that the respondent did not have the ability to pay attorneys fees and costs.

The trial court's determinations regarding the division of property resulted in virtually all of the property with any value being awarded to the respondent. Further, the trial court's decision to deny the request to impute income to the respondent or include all of his income sources

resulted in an artificially low child support number for the respondent and left the respondent with assets and income far greater than that of the petitioner. The trial court's finding that the respondent did not have the ability to assist the petitioner with her attorney's fees was not supported by the evidence and was an abuse of discretion.

RELIEF REQUESTED

The trial court abused its discretion when it refused to consider whether or not the parties were engaged in a committed intimate relationship prior to marriage. The trial court's decision to consider and exclude such evidence was without consideration of other alternatives. Further, failure to consider the existence of such a relationship prevented the court from evaluating the just and equitable nature of the division of property and debt.

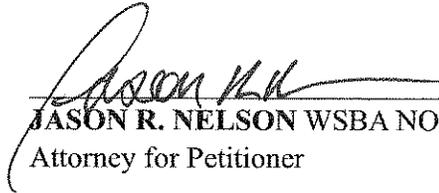
No substantial evidence existed for the court's finding that the parties separated in 2009 and the findings made by the court in dismissing the 2009 action contradict the court's later findings.

The court abused its discretion in its decision to not include

income earned by the respondent and/or impute income to him. Likewise the court abused its discretion in its imputation of income to the petitioner. Considering the income factors and property division the court also abused its discretion when it determined, without substantial evidence, that the respondent had no ability to assist the petitioner with fees and costs.

The petitioner requests that the appellate court remand the matter back to the trial court for a determination of whether or not a committed intimate relationship existed prior to the parties marriage and, if so, how that would affect the division of property and debt. The petitioner further requests that the court grant the appeal as to the calculation of the incomes of the parties and the determination of respondent's ability to pay fees and costs.

Respectfully submitted this 14 day of October, 2013.



JASON R. NELSON WSBA NO. 25107
Attorney for Petitioner

DECLARATION OF DELIVERY

I, CHERYL GROWT, under penalty of perjury pursuant to the laws of the State of Washington, declare that on the _____ day of October, 2013, 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