

No. 337201

WASHINGTON STATE COURT OF APPEALS, DIVISION III

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In re the Marriage of

SHELLEY RENEE WILLSON,

*Appellant,*

v.

ROY CHARLES WILLSON,

*Respondent.*

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ON APPEAL FROM YAKIMA COUNTY SUPERIOR COURT  
Hon. Gayle Harthcock

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**SHELLEY WILLSON'S REPLY BRIEF**

Amended

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## I. INTRODUCTION

The response brief (“RB”) of Roy Willson<sup>1</sup> cannot save the trial court’s property division in this long-term marriage which does not place the parties in roughly equal financial positions for the rest of their lives. It fails the test of *In re the Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007) and other cases in Shelley Willson’s amended opening brief.

A further illustration of that abuse of discretion is that Shelley was subjected to disparate treatment as to her retirement and pension. While the trial court found no fault in Roy’s early retirement at age 50 despite no evidence he was unable to work, Shelley was penalized for taking her “early” retirement at age 55. The penalty imposed for taking “early” retirement was partly due to perceived marital misconduct by Shelley, based not on admitted evidence, but on comments from a deposition never admitted. Yet it apparently swayed the trial court. Shelley was penalized for not continuing to work when to do so would have possibly caused a forfeit of her pension due to her romantic relationship with a fellow worker. Her only genuine “fault” appears to be that she is a woman.

Roy’s procedural arguments were addressed by a commisisoner’s ruling ruling. They are no longer operative, though he did not remove them from his response brief. They are no reason to be diverted from the merits.

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<sup>1</sup> The parties are referred to by their first names for clarity.

## II. REPLY ARGUMENT

### A. **The Retirement and Disability Testimony Shows The Unfair And Disparate Treatment Of Shelley Who Was Penalized For A “Later” Early Retirement At Age 55 Than The “Earlier” Early Retirement Of Roy At Age 50.**

Roy claims that Shelley voluntarily quitting her job was a calculated trial tactic, implying it was to support an otherwise unnecessary maintenance claim. But Roy does not state upon what he bases that allegation. There is no basis for it. Though Shelley did file a motion to amend the Petition to assert a claim for maintenance, as did Roy, both parties ultimately abandoned their potential claims to maintenance on the first day of trial and it was ultimately stipulated that neither party would request maintenance. *See* I RP 5:16-17; CP 251 ¶5.<sup>2</sup>

Roy is a former chief of police for the City of Yakima who retired at a little over the age of 50 and has been receiving retirement benefits ever since under LEOFF 1. I RP 218-19. Roy testified that he was 62 years old and claimed to have multiple health problems. I RP 219-21. Roy did not provide any evidence that he was not able to work. No physician or vocational expert testified on his behalf. Roy presented no evidence that his retirement was anything other than voluntary by him, just as was Shelley's by her. Interestingly, Roy's RB does not tell the Court that the basis for his

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<sup>2</sup> I RP refers to the four consecutively paginated volumes of trial transcripts, I RP 1 – 379 for May 27, 28, 29, and June 1, 2015. II RP refers to the six post-trial hearing transcripts for June 11 and 29, July 17 and 31, and August 21, 2015, II RP 1 – 170.

retirement was that he was approximately 50 years of age and he was just too “pooped”: “Q Okay. So why did you retire? A I was pooped out.” I RP 218:20-21. Roy voluntarily retired early.

In his answers to interrogatories (Ex 1.43), Roy indicated that he was capable of working. I RP 289:14-16. The same would be true even with his alleged post-traumatic stress disorder that was not disclosed in his answers to discovery. RP 289:17-18. Roy never presented any documents or medical records to support his claims or document a genuine inability to work. The only evidence is that Roy has chosen not to work since 2003.

**B. The Award Of Pension Interests Is Inconsistent With The Facts And The Legal Test For Distribution Of Assets In A Long-Term Marriage.**

The trial court did not divide the assets according to *Rockwell, supra*. Shelley was awarded a residence in her divorce from a previous marriage. It is clear that she owned the residence prior to the parties’ marriage. In 2003 the parties executed a quit claim deed (Ex. 2.25) for Shelley’s home as her separate property to the marital community which stated on the deed “to create community property”. Shelley stipulated that the residential property was community. The issue for Shelley is that she asks the trial court to consider the source of the funds for this asset. The Court has the ability to take that into account in awarding separate or community property to the other spouse.

At the last minute Roy hired an expert to value the pensions. The Court allowed the testimony from that expert, which in part resulted in the Court's determination of a 55/45 split of community property in favor of Roy as set forth in Appendix A to Shelley's Opening Brief.<sup>3</sup> Appendix B sets forth a 50/50 distribution of separate property and community property. The value of Roy's separate health insurance plan for which the City of Yakima pays 100% of his insurance premiums, *see* I RP 44-45, 55, is estimated at \$750/month based on the cost of Shelley's City of Yakima health insurance she pays via COBRA. *See* I RP 44:8-45:8. The formula on the valuation is taken from Kevin Grambush's method used for the value of the retirement accounts, *i.e.*, life expectancy based on the actual life expectancy table. Ex. 1.21 (Grambush present value of Roy's pension).

**C. The Trial Court's Apparent Use Of The O'Rourke Testimony, Even Though Not Admitted, Erroneously Allowed Fault Into The Property Division, Contrary To Longstanding Washington Law And Requires Reversal.**

After trial the judge went back and forth whether or not to admit the testimony of Mr. O'Rourke. *See* II RP 7:2-6; p. 126:14-15; p. 128:16-17; p. 129:17-20; and p. 190:13-20. Under CR 32(a)(3) there was no basis to allow Mr. O'Rourke's testimony to be submitted by deposition as it was not being used to impeach him and he was readily amenable to a subpoena in Yakima where he worked.

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<sup>3</sup> Appendices A & B to the amended opening brief are based on CP 235. AOB, pp 17-18.

Nevertheless, the trial court did not expressly rule on whether to admit Mr. O'Rourke's deposition testimony excerpts for purposes of the trial. But the difficulty is that the Court *did* consider *and use* Mr. O'Rourke's "testimony" as seen by the trial court's belief Shelley should not have retired "early". This untenable conclusion was made even though, compared to Roy's early retirement at age 50 when in good health, Shelley's retirement was later, time-wise. Roy's counsel injected fault and Mr. O'Rourke's "testimony" into the proceedings every chance he could, whether verbally in trial and hearings<sup>4</sup> or in writing in his briefs,<sup>5</sup> submitting it on reconsideration,<sup>6</sup> even injecting it into Roy's post-trial declaration.<sup>7</sup>

Roy argues the trial court merely took into consideration the undisputed fact that Shelley "voluntarily" quit her job while the dissolution was pending. *But see* CP 377, order sealing counsel's declaration with O'Rourke deposition excerpts, which also stated: "The Court is not considering the issue that respondent was responsible for Petitioner quitting

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<sup>4</sup> *See, e.g.*, I RP 11:17-13:5 (counsel attempting to inject fault issues in opening statement and being instructed by the court that "the fault issues need to be skipped over"); I RP 100:3-21 (counsel questioning Shelley about what was allegedly testified to by O'Rourke at his deposition);

<sup>5</sup> *See, e.g.*, CP 372:13-20, Roy's reply on reconsideration, giving counsel's summary of Mr. O'Rourke's deposition testimony, showing both high animosity and force through use of the marital fault issue as a wedge against Shelley. Counsel's exuberance is understandable since it is exceedingly rare to take depositions on and argue at length about claimed sexual misconduct of the opposing party in a marital dissolution with only a property division. The ubiquity of the claims saturated the hearing. This Court should use this case to re-establish guidelines so trial judges can more easily navigate such matters, without them becoming such a fetid swamp.

<sup>6</sup> *See* CP 316-323, O'Rourke deposition excerpts attached to deposition.

<sup>7</sup> *See* CP 147, ¶5, summarizing the O'Rourke testimony for his advantage.

her job.” In fact, the trial court was too careful about trying to avoid fault and overdid it by ignoring the reasons Shelley quit – and is left with the “undisputed fact” she quit while the dissolution was pending to “help” her case or otherwise inexpicably hurt her personal financial position for no apparent reason, expecting Roy to pick up the slack when, according to the double hearsay from Roy and attorney statements, Shelley could “easily” get her old job back.

**D. The Facts Do Not Support The Property Division But Require Reversal Under *Rockwell* And Other Cases Because Shelley Was Given Far Fewer Assets To Live Out Her Life, And Also Because Of The Disparate Treatment Of Shelley As To Her Retirement.**

The greatest property value for these parties is the present value of their pension plans, and a residence which was previously Shelley’s separate property. The trial court in this case originally ruled that property would be split 55/45 in favor of Shelley. CP 111-120. At the hearing on Roy’s reconsideration motion, vacillating about whether Mr. O’Rourke’s desposition was going to be considered, the trial court indicated it had made a mistake in its calculations which, when “corrected”, resulted in a 55/45 split in favor of Roy. II RP p. 6 (6/29/15, p. 6).

The facts and ruling in this case means this Court has to ask: Why is it that when one spouse has been retired for 12 years beginning at age 50 because he was “pooped” and the other spouse retires at age 55, that the

second spouse is not allowed the same opportunity to be retired in her mid-50's, but instead is penalized for it? Shelley, in fact, had already worked longer than Roy before she retired. Shelley should have the same right and opportunity to be retired in her mid-50's without penalty if she wants to or needs to as her husband claimed for himself 12 years ago at age 50. This is particularly true here where, Shelley *had* to resign and retire to preserve her future pension rights once faced with Roy's threat to disclose the relationship to her employer.<sup>8</sup> Roy impermissibly tried to inject Shelley's perceived fault into the dissolution, even though fault has been outlawed since 1973. Use of fault in a property division is reversible error, whether inadvertent or not. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803-06, 108 P.3d 779 (2005) (property division infected by fault vacated); *In re Marriage of Urbana*, 147 Wn. App. 1, 13-15, 195 P.3d 959 (2008) (same).

### **1. Roy's Health**

Paragraph 8 of the Findings focuses on Roy's claimed health conditions and future ability to work and concludes that he has very limited future earning capacity. CP 251-52. But no evidence was provided by Roy or set forth in any expert testimony as to his employability. No one testified

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<sup>8</sup> It is more than a little unseemly that Shelley's resignation and retirement was effectively forced by Roy, who threatened to disclose the romantic relationship to Shelley's employer (*see* Ex. 2.48 (Shelley's Dep.), pp. 49-51, 53-54, 57-58, 112), then tried to blame her for taking the very action he forced her into because he believed she "misbehaved" during the marriage, the classic definition of fault. Moreover, his efforts are perilously close to blackmail. Roy should not benefit in any way from those efforts.

that Roy was not capable of working. The finding is not supported by substantial evidence. Roy may have numerous health issues which he complained about, but none affect his ability to work or otherwise be active. For example, Roy has been able to ride for weeks on motorcycle trips and has ridden from Yakima all the way to Mexico and back. I RP 225. In sum, Roy has shown no evidence of any disability and, most importantly, none were disclosed in Roy's interrogatory answers. *See* Exhibit 1.43.

## **2. Shelley's Income.**

Shelley received a four year bachelor's degree in general studies from Washington State University (WSU), essentially nothing that relates to her previous employment. It is also true that she had a two year civil engineering technical degree from Yakima Valley Community College. RP 107. Shelley is not a licensed engineer. She was appointed to the job as waste water treatment manager. Shelley voluntarily resigned/retired from her job on October 24, 2014. Ex. 2.48 (Shelley's Dep.), p. 69. While it may be true that Shelley would not have as easy a time financially in the near term by retiring then, the key is that if she had not resigned and retired then, she may not have protected her retirement, which of course is a long-term income stream, and been in a worse financial position and need a larger portion of community assets to achieve an equitable division. It is undisputed that if Shelley was called on the carpet for fraternization she

could both be fired and lose her PERS II pension or have it reduced. Ex. 2.48 (Shelley Dep.), pp. 44-45, 47, 60-62, 97, 118. As a practical matter, Shelley had no choice. Based on the fraternization policy she had violated, if and when it came to light, she was faced with the possibility of losing her job and her retirement. *Id.* Shelley therefore made the only reasonable, adult choice she had available once pressured by Roy.

In the introduction of his Response Brief, Roy states that Shelley's annual income was over \$100,000. In fact, Shelley's salary history showed her earning capability was much less, ranging between \$72,000 and \$80,500 between 2010 and 2013.<sup>9</sup> Ex. 1.6, Sheley's final 2014 pay stub after she resigned in October, 2014, shows an hourly rate of over \$47/hour yielding an annual salary rate of \$99,000, and that she received income for a one-time payment for vacation and sick pay totaling over \$32,000, which cannot properly be included in calculating Shelley's annual income rate for 2014.

### **3. The Parties' Home**

While Roy claimed that he remodeled the house and expended separate funds that he withdrew from his ICMA account in an effort to have the court award him those funds as his separate property, that amount cannot even be calculated even if it was the correct measure for calculating the separate propert lien on the house, which it is not. For the purposes of

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<sup>9</sup> The evidence is Shelley's income for 2010 was \$80,581.00 (Ex. 2.2); for 2011, \$78,460.00 (Ex. 2.3); for 2012, \$72,084.00 (Ex. 2.4); and for 2013, \$75,954.00 (Ex. 2.5).

such valuation, it is not how much money was paid, but rather, how much the asset in question increased in value because of the contribution. Moreover, if separate property is used by its owner to improve community property or the separate property of the other spouse as Roy alleges, there is a rebuttable presumption of a gift. *See* Cross, Harry M., “The Community Property Law in Washington (Revised 1985)”, 61 WASH.L.REV. 13, 69 (1986). Shelley stipulated that the residence was community property,<sup>10</sup> though she did not waive any arguments related to the source of the asset.

The “paramount” concern in the division of a marital property is the economic conditions of the parties. *In re the Marriage of Mathews*, 70 Wn. App. 116, 853 P.2d 462, *review denied*, 122 Wn.2d 1021 (1993) and *DeRuwe v. DeRuwe*, 72 Wn. 2d. 404, 408, 433 P.2d 209 (1967). While the characterization of the property is a relevant factor which the Court must consider when dividing the property, it is not a controlling factor, just one factor to be considered. *In re Marriage of Konzen*, 103 Wn.2d 470, 477-78, 693 P.2d. 97 *cert. denied*, 476, US 906 (1985). The property may be divided or even awarded to the other spouse in order to achieve a just and equitable division of property. Roy’s position is that he is to be compensated for the allegedly separate funds expended in remodeling the residence. The trial court may offset the community right of reimbursement

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<sup>10</sup> The parties stipulated the “Willson” residence was community property based on Shelley signing a quit claim deed. *See* Ex. 2.48 p. 78: 13-21.

against any community benefit from the use of separate property. *See In re the Marriage of Miracle*, 101 Wn.2d 137, 139, 675 P.2d 1229 (1984). Shelley wants the Court to understand that the residence she was awarded in her first divorce was used by the marital community as a place to live and was their home. Roy did not meet the burden of proof in establishing what the increase in value, if any, was as a result of his alleged remodel.

#### **4. Roy Willson's Retirement.**

Roy testified that he had a deferred compensation account due to his employment with the Yakima Police Department when he retired. The only information that was furnished by Roy was a statement of his deferred compensation account as of March 31, 2014, of \$43,382.86. I RP 248; Ex. 2.8. No information was provided as to what the deferred compensation was at the start of the marriage.<sup>11</sup> Roy claims “much of his deferred comp was his separate property. *See* I RP 247:17-18 (“the relevance would be that much of that was his separate property and it was used up . . .”). But Roy never provided any proof of what portion of the deferred compensation was separate property. The record thus does not indicate that his deferred compensation account was separate or community property. He failed to

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<sup>11</sup> Roy asserts his deferred comp account had “dwindled to \$40,000” from the time he retired, and much of it was used for home improvements. *See* RB p. 11. The trial court appeared to disregard Roy’s testimony of the size of the deferred comp account at the time of retirement, which was *during* the marriage. *See* I RP 247:7-19; 248:4-12 (“I do need to know what’s in there currently but see that’s what I need to know.”).

supply any and all documents as to what money he supposedly spent on the residence. Roy did not meet the burden of proof that there were payments from his deferred compensation that paid for the remodel. There were no invoices filed with the Court in regards to those expenses. That information was available to him. Under *In re Marriage of Seals*, 22 Wn. App. 652, 656, 590 P.2d 1301 (1979), the burden is on Roy as a spouse who has a fiduciary duty to furnish that information.

#### **5. Imputation of Income**

Roy asked the Court to find that RCW 26.19.071 is applicable to RCW 26.09.090. It is important to note that RCW 26.19.071 relates to child support. It is not mentioned in the maintenance statute. Roy presents no authority wherein a court has utilized RCW 26.19.071 to determine a party's income in a non-child support case.

#### **6. Maintenance.**

Roy still claims on appeal that Shelley is using a tactic to avoid maintenance. Both parties stipulated at the start of trial that neither party pays or receives maintenance.

#### **7. Fault.**

The property division statute specifically provides that property should be awarded without regard to marital "fault": "the court shall, **without regard to misconduct**, make such disposition of the property and

the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors. . .” RCW 26.09.080 (emphasis added). It is apparent that the trial court did not review Shelley’s deposition which was submitted and admitted as Ex. 2.48, though it should have. *See In re Marriage of Foran*, 67 Wn. App. 242, 258-59, 834 P.2d 1081 (1992) (affirming consideration of otherwise inadmissible evidence only for proper purposes). Shelley testified she was unemployed at the time of trial and, when asked why, she responded:

I couldn’t deal with the stress that I was under and did what I needed to do at work . . . I was under stress from you and from Roy . . . By the paperwork that was being filed in the courts that including mentioning employees that worked for me.

Ex. 2.48, p. 9.

Shelley’s answers to Roy’s counsel’s questions in deposition demonstrated the reasons for Shelley’s stress. When she was asked, “Does the City of Yakima have an anti-fraternization policy?”, Shelley answered, “Yes”. Ex. 2.48, p. 44:18-19. When she was asked whether the relationship with Mr. Cawley was an improper relationship, she answered “Yes”. *Id.*, p. 45:1-2. The deposition then continued:

Q: And that would be a basis for termination would it not?  
A: Yes.  
Q: And yet you continued to be involved with Mr. Cawley in a sexual relationship from March or April of 2014 while he worked for you. Is that correct?  
A: Not totally correct.

Q: Okay and you acknowledge that that's a violation of City policy and would be a basis for immediate termination. Is that correct? Up to and including termination, not necessarily terminated?

A: Ah huh.

A: I have emails from Roy telling me that he was going to give the information to the City.

Ex. 2.48, pp. 45:3-4, 46:15.

Shelley testified that Roy was threatening her that he was going to go to the City and disclose the relationship. *See* Ex. 2.48, p. 49:10-13. She testified: "I told [the HR director] that Roy had told me that he had this information and that he was going to give it to the City legal department" and that discussion would be about the relationship with Mr. Cawley. *Id.*, p. 50:21-25. Roy's attorney asked Shelley if she had told Mr. O'Rourke about her relationship with Mr. Cawley, and her response was "No". *Id.*, p. 52:11-14. Roy's attorney then asked: "So your quitting was entirely voluntary on your part? Is that correct?" to which Shelley testified: "My quitting was based on my knowledge of the City's policy because of the fraternization violation". Ex. 2.41, p. 60:21-22.

When Shelley was asked, "So that is the reason you're claiming that you decided to quit, because she thought you might be found out?", she answered: "Because I may be terminated". Ex. 2.48, 62:4-6. Shelley further testified that: "I was under too much stress. I could no longer do the

functions of my job because of the stress that I was due to the threats of the documentation being released”. Ex. 2.48, 62:10-12.

Roy contends the trial court stated it was not going to allow evidence of fault by either party, apparently arguing that this fault-infected testimony was of no consequence and had no bearing on the property division. The trial court stated on June 29 that “I will not consider for the purposes of this hearing any fault that caused the dissolution of the marriage, **any reason why Ms. Willson voluntarily terminated her job,** issues regarding irrigation problems which in this court’s mind were largely based on hearsay brought to the court’s attention.” II RP p. 6:16-19. However at the post-trial proceedings on July 17, 2015 when the court flipped its property award to be in favor of Roy, the trial court stated the reason it awarded, “more of the community [property] to Mr. Willson than [to] Mrs. Willson is that when I look at the economic circumstances of each of the spouses and find that they are in vastly different situations.” II RP 158:19-21. But then the trial court stated:

She had a very good paying job. It paid over \$100,000 a year.<sup>12</sup> At the time that she quit her job, she voluntarily quit the job. **I am not looking at any of the reasons why she quit her job,** that she

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<sup>12</sup> In fact, Shelley’s job history showed her salary was well below \$100,000 and it was only in 2014 that her hourly rate got her up to an annual salary of \$99,000. See Exs.2.2-2.5 (Shelley’s income ranged from \$72,000 to \$80,500 between 2010 and 2013) and Ex. 1.6 (Shelley’s hourly rate of \$47 yields annual income of \$99,000). Roy, on the other hand, enjoyed his pension income for 2013 of over \$93,000 per their joint tax returns, *see* while he also had all his health care insurance paid which provided 100% coverage, *i.e.*, which would cost Shelley over \$750/month or a \$9,000 benefit.

simply repeatedly testified that she voluntarily quit that job and **she quit that job during the pendency of this petition and it's very unfortunate she gave up significant benefits. She gave up pension benefits, she gave up salary, she gave up health care benefits and she knew that when she quit the job and I look at that very askance and look at it as if it's – like Mr. Willson's counsel was saying, this is how I evaluated that was that it's similar to someone quitting their job when they're supposed to be paying child support in order to get out of paying child support and I was just very unimpressed by that". . . . She didn't testify she wasn't capable of working. She testified that she wanted to work in a social services or something like that, but I was unconvinced that she's capable of working to her full capacity."**

RP 158:21-159:13 (emphasis added). The trial court went on to state:

**and I'm just astonished as to why she quit her job. I can't understand why she quit her job. And again, the testimony was, again, that she had voluntarily quit her job. So that's what I'm left with.**

RP 195:19-21 (emphasis added). Really, would a hard-working, working woman<sup>13</sup> faced with a divorce and earning the highest rate in her life “voluntarily quit her job” for no good reason? Of course not.

In fact, “voluntarily quit her job” for no good reason is *not* what the trial court was left with. Rather, the trial court chose to not consider the substantial testimony from Shelley about the Hobson's Choice she was faced with of potentially losing not just her job but also her pension once Roy

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<sup>13</sup> See I RP 163:22-164:4, Shelley's testimony of her hard work during the relationship and marriage, taking care of the bills, insurance, children, going to school for a degree, cleaning the house, and “being the responsible adult in the marriage” while Roy went on long motorcycle trips, including the majority of the time while her father was dying, then he turns around and asks for “everything” despite Roy being retired since age 50 and fully active and capable of working himself – except, apparently, around the house.

threatened to play the card of her marital misconduct to her employer.<sup>14</sup> The trial court mistakenly refused to consider the good and logical reasons Shelley felt compelled to give up her job and retire early, if for no other reason than to protect her largest asset, her pension in lieu of immediate continued income that had become of questionable duration given Roy's threats.

The trial court was understandably flummoxed by the imperative not to consider fault in the property division. But in seeking to avoid that error, it went too far in excluding all evidence as to why Shelley felt compelled to leave her job and retire early and how those circumstances played into her future earning capacity, not to mention, her right to not have to work in the future but, like Roy, take an early retirement if she so chose once faced with the job and pension-based uncertainties created by Roy's threats.

Shelley was prejudiced by this analysis which is not based on all the evidence, but excluded material, undisputed evidence on why Shelley had to resign and retire. Thus, the rulings are not based on substantial evidence, but on the lack of evidence. The irony is that while dressed in the guise of excluding any consideration of fault, in fact the ruling allows Roy's insinuation of Shelley's marital fault and his consequent retributive threats against her to drive the property division – which the statute expressly

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<sup>14</sup> See Shelley's deposition, Ex. 2.48, pp. 47-55, describing the circumstances Shelley was faced with and the threats Roy continued to make to her which caused both the fear of City action as well as tremendous stress, causing her to resign her position in order to insure she saved her very valuable pension.

forbids. Even if it was, in effect, back-doored, these comments and the undisputed testimony all demonstrate the trial court incorporated marital fault in its ruling. Reversal is required. *Mohammed, supra; Urbana, supra.*

**E. Roy's Complaints Should Not Divert The Court From The Central, Uncomplicated Issue In This Appeal: The Trial Court Abused Its Discretion By Failing to Meet The Correct Legal Standard Under The Facts Of this Case When it Failed To Leave The Parties To This Long-Term Marriage In Substantially Equal Financial Positions For the Rest Of Their Lives, per *Estes, Rockwell*, and Other Cases, and Allowed Fault to Play a Part in the Division.**

Roy's response brief makes a number of claims that Shelley's opening brief did not comply with the appellate rules, which were addressed by the Commissioner. His principle concern about appendices that set out the life expectancies of the parties was cured by references to exhibits admitted at trial. *See* Exs. 1.20-1.24 and AOB, 5, 22. The most salient point is that Shelley's central appeal issues of an unfair property division and use of fault against Shelley, which run afoul of established Washington law, are not affected by those assertions.

The Court can readily address Shelley's arguments and correct the trial court's mistakes. It can review the transcript, exhibits and findings and conclusions and determine that, under all the facts and circumstances, the trial court's second property division entered after Roy's reconsideration motion papers were filed did *not* correctly apply the law because they did

not place the parties in substantially equal financial positions for the remainder of their lives. This is what Shelley argues in her amended opening brief. *See* AOB pp. 23-26 (stating the standard of review for abuse of discretion); pp. 26-30 (arguing the core principles for property divisions in long-term marriages is to place the parties in roughly equal financial positions for the rest of their lives, focusing on *In re Marriage of Estes*, 84 Wn. App. 586, 929 P.2d 500 (1997), *Rockwell* and earlier decisions).<sup>15</sup> It is what she re-emphasizes in this Reply.

**1. Record citations complaint.**

Roy's response brief does not complain he was prejudiced by any procedural defects and does not ask for any relief. *See* RB p. 14. The amended opening brief is more than sufficient to apprise the Court of the central issue of an unfair property division under all the circumstances, particularly the parties' relative ages and life expectancies, dates of retirement, pensions, and other financial resources.<sup>16</sup> Such an appeal, by its very nature, does not require detailed citations to the record because it asks the Court to review the overall record and the economic positions in which

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<sup>15</sup> Shelley also points out at AOB pp. 30-33 that the trial court violated the modern-day no-fault principle enacted in 1973. She believes this explains why the trial court erred by changing its original property division filed and sent to the parties on June 3, 2015 (CP 111 – 121) and which she agrees is fair, just and equitable, and why if that June 3 property division is not affirmed by this Court, any remand should be to a different judge.

<sup>16</sup> *See, e.g., State v. Hensler*, 109 Wn.2d 357, 359, 745 P.2d 34 (1987) (court stated it reviewed the entire record in order to reach the merits" despite a statement of facts that "does not contain a single reference to the record.").

the parties are left. The overall record is not large. There is no material inconvenience. Further, Roy's response does not suggest he was prejudiced by any of the alleged defects and no action is needed by the panel.<sup>17</sup>

## **2. Assignments of error and issues on appeal.**

Roy complains the Opening Brief's assignments of error and statements of issues on appeal are inadequate, arguing some parts of review should be precluded. RB 16-21. They should not. The appellate courts regularly reject such challenges when the errors and issues, even if stated sparingly or unartfully, or even not stated at all, are apparent from the body of the brief, particularly where the opposing party was able to respond fully to the appeal, as is the case here. *See State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995) (appellate discretion to conduct full review "should normally be exercised" absent compelling reasons otherwise; where nature of appeal is clear and argued in body of the brief, there is no compelling reason to not consider the merits or issues). Roy's response brief proves his ability to respond to Shelley's appeal. His brief demonstrates why he did not claim prejudice, and that the nature of her appeal was sufficiently clear in

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<sup>17</sup> *See State v. Todd*, 101 Wn. App. 945, 949-50, 6 P.3d 86 (Div. III, 2000) (refusing to strike appellant's statement of the case despite allegedly being argumentative because the Court "could separate the wheat from the chaff so there is no prejudice"), *overruled on other grounds by State v. Rangel-Reyes*, 119 Wn. App. 494, 499 fn. 1, 81 P.3d 157 (2003).

her brief to let him respond. Roy's procedural defenses must be rejected. *State v. Olson*, 126 Wn.2d at 323.

### III. CONCLUSION

When measured against the correct legal standard, the facts here do not support the property division. Setting them out this way shows they do not meet the established legal standard of putting the parties to a long-term marriage in roughly the same financial positions for the rest of their lives, most recently stated by the *Rockwell* case. And the *Rockwell* case demonstrates, over multiple appeals, that a disparate property division – rather than a 50-50 division – may be required to get that result. That is the case under the facts and financial positions of the Willsons here. But the trial court ignored the actual facts and imposed a 55/45 of community property division in favor of Roy, despite the fact its inequitable result does not meet the legal standard. With all due respect, the trial court:

1. Relied on “so called” evidence that was never part of the record. Mr. O'Rourke's deposition was never admitted into evidence at trial. Mr. Connaughton is very well aware of the evidence rules and how to properly admit excerpts from the deposition into evidence. The fact of the matter is he did not. Mr. O'Rourke's testimony/deposition is only what Mr. Connaughton says it says. That's double hearsay and should not have been considered. Mr. Connaughton then attempted to place excerpts of Mr.

O'Rourke's deposition into the court file by attaching them to his own declaration and filing it with the court on June 25, 2015. The trial court ordered on 6/29/15 that the declaration be sealed. This issue of Mr. O'Rourke's testimony clearly made an impression on the Court. Did the trial court abuse its discretion by considering evidence that was not part of the trial? Petitioner respectfully submits that the trial court did not apply the evidentiary rules with respect to the oral representations of Respondent's counsel without evidence before the court. There has to be an evidentiary basis. Consideration of Mr. O'Rourke's testimony is not based on what the rule of law is.

Roy's counsel stated: "Roy subpoenaed the Yakima City Manager, who testified in his deposition he would gladly hire Shelley back". In the brief of Respondent, Roy's counsel states that there appeared to be a component of the failed strategy to quit her job and have Roy pay for it. There was no testimony to that affect. The City manager did not testify and if he was subpoenaed by Roy he did not appear at trial. Roy's attorney tries to put into evidence that which was not on the record by filing personal affidavits in this case. What Roy's attorney was doing was trying to get the deposition of the City manager into the record without calling Mr. O'Rourke to testify. Mr. O'Rourke's deposition was never put into evidence by Roy's attorney. It is apparent that the trial court relied upon the

representations, but the deposition was never published, Mr. O'Rourke never testified and Roy's attorney most certainly cannot testify on his client's behalf. Declarations are not evidence unless marked and admitted as an exhibit at trial.

2. Held Shelley at fault for resigning. In essence the trial court "spanked" Ms. Willson for what was considered misconduct on her part. Although the trial court indicated throughout the proceedings that she was not considering fault, the Court's comments at the July 17, 2015 hearing show it was: "and I'm just astonished as to why she quit her job. I can't understand why she quit her job." (RP 159). At the time of trial, Shelley had already worked longer than Roy. She was already older than her husband when he retired. Shelley respectfully submits that the trial court applied a different standard for women than men.

3. The trial court ruled that Roy received \$577,000.00 more than Shelley. Shelley should have received an additional award of \$288,500.00 for an equal division of 50/50.

4. Alternatively, this Court can and should review the trial court's initial property division at CP 111-120 filed and sent to the parties on June 3, 2015, determine that the trial court's decision was, in fact and law, fair, just, and equitable under the circumstances; and further, that its later changes to the June 3 property division after submission of Roy's

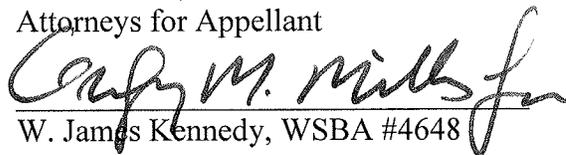
fault-loaded reconsideration papers must be disregarded because 1) the later property division is *not* fair, just, and equitable considering the economic circumstances it leaves the parties given their ages, life expectancies, pensions, and future earning potentials; and 2) because the later property division was arrived at only after the submission and consideration of the fault-loaded reconsideration papers, leaving a potential public perception that impermissible fault-based principles infected the decision. *See Tathan v. Rogers*, 170 Wn. App. 76, 106, 283 P.3d 583 (2012) (disproportionate property distribution under all the circumstances raised further concerns of possible prejudice to appellant based on challenge to trial court's impartiality, requiring remand to different judge for new proceedings).

For the above reasons, Shelley Willson respectfully asks the Court to vacate the final property division and affirm the trial court's initial June 3, 2015 property division as fair, just and equitable and remand for entry of final orders incorporating that property division; or, alternatively, to vacate the final property division and remand to a different judge to make a new property division that leaves the parties to this long-term marriage in roughly the same financial positions, one that is based on only the admitted evidence; and that does not penalize either party for alleged marital fault.

Respectfully submitted this 2<sup>nd</sup> of February, 2017.

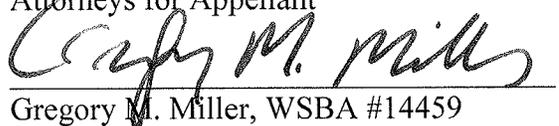
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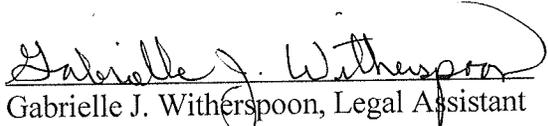
  
Gregory M. Miller, WSBA #14459

## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

<p>Blaine T. Connaughton Connaughton Law Office 514-B North 1<sup>st</sup> Street Yakima, WA 98901 P: 509-249-0080 Email: <a href="mailto:connlawoffice@gmail.com">connlawoffice@gmail.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Email <input type="checkbox"/> Other</p>
<p><i>[counsel for Respondent Roy Willson]</i></p> <p>W. James Kennedy Thorner, Kennedy &amp; Gano, P.S. PO Box 1410 Yakima, WA 98907 P: 509-575-1400 Email: <a href="mailto:wjk@tkglawfirm.com">wjk@tkglawfirm.com</a></p> <p><i>[counsel for Appellant Shelley R. Willson]</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Email <input type="checkbox"/> Other</p>

DATED this 2nd day of February, 2016.

  
Gabrielle J. Witherspoon, Legal Assistant