

FILED  
JANUARY 10, 2017  
Court of Appeals  
Division III  
State of Washington

No. 337201

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

---

In Re the Marriage of

SHELLEY RENEE WILLSON,

*Appellant,*

vs.

ROY CHARLES WILLSON

*Respondent.*

---

AMENDED OPENING BRIEF

---

W. JAMES KENNEDY  
WSBA #4648  
Counsel for Shelley R. Willson

THORNER, KENNEDY & GANO P.S.  
PO BOX 1410  
YAKIMA, WA 98907  
(509) 575-1400

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii, iiiii, iiiiii
I. INTRODUCTION .....	1
II. ASSIGNMENT OF ERROR .....	11
A. Assignment of Error .....	11
B. Issues on Appeal .....	13
III. STATEMENT OF THE CASE. . . . .	17
IV. ARGUMENT .....	23
A. Standard of Review .....	23
B. Property Division Principles .....	26
C. The Broad Prohibition Against Use of Any Kind of Marital Fault in Property Division; the Paramount Concern is the Economic Condition In Which the Parties are Left .....	30
V. CONCLUSION .....	34

**APPENDICES**

APPENDIX A: Spreadsheets re: Court's ruling .....	A
APPENDIX B: Spreadsheet re: Mrs. Willson's Position .....	B

## TABLE OF AUTHORITIES

### **Washington Cases**

	<u>Page</u>
<i>In re the Marriage of Glorfield</i> , 27 Wn. App. 358, 617 P.2d. 1051 (1980).....	3, 21
<i>In re Mead</i> , 101 Wn. 2d. 137, 139, 675 P.2d. 229 (1984).....	3
<i>Seals v. Seals</i> , 22 Wn. App. 652, 656, 590 P. 2d 1301, 1304 (Division III, 1979).....	5,15 23
<i>Thorndike v. Hesperian Orchards, Inc.</i> , 54 Wn.2d 570, 575, 343 P.2d 183, 186 (1959) .....	23
<i>In re the Marriage of Vander Veen</i> , 62 Wn. App. 861, 865, 815 P.2d 843.....	24
<i>Magnuson v. Magnuson</i> , 141 Wn. App. 347, 351, 353, 170 P.3d 65 (Div. III, 207), <i>rev. den.</i> , 163 Wn.2d 1050 (2009).....	24, 25
<i>Marriage of Kovacs</i> , 121 Wn.2d 795, 801, 854 P.2d 629 (1993).....	24
<i>Coggle v. Snow</i> , 56 Wn. App. 499, 507-07, 784 P.2d 554 (1990).....	24
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) .....	24

<i>In re Marriage of Wicklund</i> , 84 Wn. App. 763, 770 n. 1, 932 P.2d 652 (1996) .....	25
<i>State v. Lord</i> , 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).....	25
<i>Mayor v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 684, 132 P.3d 115 (2006).....	25
<i>In re the Marriage of Konzen</i> , 103 Wn. 2d 470, 693 P.2d 97 (1985).....	27
<i>In re the Marriage of Rockwell</i> , 141 Wn. App. 235, 239, 170 P.3d 572 (2007).....	27, 29 30
<i>In re the Marriage of Estes</i> , 84 Wn. App. 586, 593, 929, P.2d 500 (1997) .....	28
<i>Sullivan v. Sullivan</i> , 52 Wash. 160, 164, 100 P.321 (1909) .....	28
<i>In re the Marriage of Bundy</i> , 149 Wash. 464, 271 P. 268 (1928), <i>cert. denied</i> , 279 U.S. 842 (1929).....	28
<i>In re the Marriage of Kraft</i> , 119 Wn. 2d. 438, 450, 832 P. 2d. 871 (1992) .....	29
<i>In re the Marriage of Stachofsky</i> , 90 Wash. App. 135, 142, 951 P.2d. 364 (1998).....	29, 30
<i>In re the Marriage of Washburn</i> , 101 Wn.2d 168, 176 n.2, 677 P.2d 152 (1984).....	31, 33
<i>In re the Marriage of Little</i> , 96 Wn. 2d 183, 192, 634 P.2d 498 (1981).....	31

*In Marriage of Muhammad*,  
153 Wn.2d at 806, ¶16..... 32, 33

*In re the Marriage of Sheffer*,  
60 Wn. App. 51, 53, 57-58 & n. 2, 802 P.2d  
817 (1990) .....33

**State Statutes and Court Rules** **Page**

Civil Rule 32 ..... 20

RCW 26.09.080..... 26,31

RCW 26.09.090 . . . . . 31

RCW 26.09.030..... 31

**Miscellaneous** **Page**

Hon. Nancy Ann Holman, *A Law in the Spirit of  
Conciliation and Understanding: Washington's  
Marriage Dissolution Act*, 9 Gonzaga L. Rev.  
39 (1973)..... 30

Luern N. Reike, *The Dissolution Act of 1973: From  
Status to Contract?* 49 Wash. L. Rev. 375,  
376-377 (1974)..... 30

## I. INTRODUCTION

This appeal seeks vacation of a property division. The parties were married or lived together in an intimate relationship (for one year prior to marriage). The parties were married on September 6, 1991 and separated on March 29, 2014. Roy moved into Shelley's home one year prior to marriage. No children were born of this marriage. Each party had children from previous marriages.

The parties were well employed before and during their marriage. During the marriage, Roy retired as the Chief of Police for the City of Yakima in 2003 at age 50. His retirement was valued based on his highest yearly salary, which was during their marriage. The amount of Roy's pension under LEOFF was based on his salary as the chief of police for Yakima, i.e., Roy's last 12 months. At the end of one year as police chief, Roy retired based on that one year. He has been unemployed since.

Roy retired and began drawing on his retirement pension (\$5,505.39 net). Roy has a high school education and military training. He attended the Washington State Police Academy and the FBI Police Academy.

Shelley has a two year degree in civil engineering technology from Yakima Valley Community College and a general studies degree from Washington State University. She worked for many years for the City of Yakima. At the time of the separation she was the manager of the City of Yakima Waste Water Treatment Plant.

The parties stipulated at the time of trial that neither party would be seeking maintenance from the other. The parties also stipulated that the marital community residence located at 581 Hill Road, Moxee, Washington is community property. Originally the residence was Shelley's separate property, having received the property as a gift from her family. CP 21, line 18. Shelley paid with her own funds for the home construction. Shelley's parents also assisted with cash for construction loan. This all took place prior to the marriage. Shelley signed and executed a quit claim deed after the parties' marriage.

The property with pole barn was purchased from Shelley's family at a reduced price. Shelley signed a quit claim deed to the marital community. It is Shelley's position that the Court should look at the source or character of the house at the time of the

marriage and do an equitable division considering the character of the residence. *In re the Marriage of Glorfield*, 27 Wn. App. 358, 617 P.2d. 1051 (1980).

There was no testimony or findings that any of the improvements by the community increased the value of the home. *In re Mead*, 101 Wn. 2d. 137, 139, 675 P.2d. 229 (1984).

Roy's pension plan is LEOFF 1. Members of that plan may not be eligible to receive social security.

Shelley earned a pension under PERS 2 and was eligible for early retirement, in which she took advantage of this past summer when she elected to take her PERS 2 2008 early retirement benefit.

Shelley is also entitled to receive social security benefits in the future. Shelley's social security has to be backed out of that portion of Roy's LEOFF pension that is in lieu of social security.

Roy receives a gross monthly income from LEOFF 1 of \$6,817.00, which he commenced receiving in 2003. His net is \$5,505.39. CP 251¶7. The City of Yakima covers his health insurance premiums and any out-of-pocket medical costs, the value of which exceeds \$750.00 a month based on the cost of

Shelley's. See CP 252:15-16. City of Yakima does not provide dental or vision.

Roy is 62 years of age and has a type of leukemia. CP 251¶8. There was no documentation presented at trial as to his form of leukemia. The treatment is taking blood thinners and giving blood every six weeks. There was no testimony as to what the prognosis would be. As a result, there was no testimony as to the stage or type of leukemia and how it would be treated. At the present time there is nothing that causes any concern, particularly as he was able to go on a three week motorcycle ride to Mexico and many other trips, including traveling north of the Arctic Circle.

The Trial Court found the treatment for Roy's form of leukemia as manageable. There certainly was no testimony that should it progress to stage 2 of the disease, that may need more aggressive treatment.

Everyone agrees that Roy has been an active person since his retirement in 2003. It is important to note that no documentation was received or admitted in court in support of any basis that Roy can't work. Roy had previously stated under oath, in his interrogatories (Ex 1.43), that he did not suffer from anything that

prevented him from being employed. *Seals v Seals*, 22 Wn. App. 652, 656, 590 P. 2d 1301, 1304 (Division III, 1979).

The Trial Court stated that it was mindful that Roy is at an age when many people retire and that his retirement was a status quo in this marriage for over a decade before the parties separated. The Trial Court found that Roy has at least 7 years less of future earning capacity than Shelley. It found Roy is seven years three months older than Shelley. CP 250 ¶3, and a life expectancy of 21 years. CP 253 ¶6. What the Trial Court did not find was how long Shelley is going to live. According to the testimony of Mr. Grambush, based on mortality tables from the State of Washington, Roy has 21 years and Shelley has 30. See Exs. 1.20 – 1.24. Shelley is expected to live nine years more than Roy and Shelley will need nine more years of living expenses than Roy.

The Trial Court, without any findings of fact, stated: “The likelihood of Roy earning anywhere near what Shelley can earn is slim”. Roy’s retirement is much greater than Shelley Willison’s. Roy has not even applied for work since turning 50. He is now 62.

As the Trial Court pointed out, future earning capacity for Roy was not well developed. Roy has made no effort to find

employment. He was the former police chief in town the size of Yakima; certainly there are other positions available in smaller towns or even larger towns. If he is unable to find that he is employable it is a result of not going to work after retiring or making any effort to go to work. Roy never presented his position as to future employment. At no time has Roy indicated that he was not going to work. The Trial Court did not receive any testimony that Roy is unable to be employed. It is Roy's burden to prove he cannot work.

It is true that Shelley had a salary for the last two years of \$95,000.00 to \$105,000.00 gross. Since she retired at age 55, Shelley still had to work 5 years longer than Roy, who explained why he didn't look for work was because he was just too "pooped". CP 218, line 21. The Trial Court also noted that Roy chose not to seek employment. Shelley is 54 years of age. Shelley has to work at least another 10 or 14 years to receive social security (depends upon age Shelley applies for).

At the time of Shelley's retirement, Shelley was paying \$753.00 per month for health coverage. CP 253 ¶10. Roy does not have to pay anything for his health insurance and non-covered

medical expenses because it is paid by the City of Yakima. CP 251 ¶7. As expected by the Trial Court, Shelley did opt for her 2008 early retirement factor (see CP 275:9-10), which she receives at the rate of \$4,126.00 gross per month. CP 252 ¶10. She has out-of-pocket expenses of \$753 per month for health coverage. *Id.* Also, the 2008 early retirement factor election means that she cannot seek employment with an employer in the PERS 2 capacity before the age of 65. If Shelley selects an alternate plan she can work for DRS for a time but will have her pension reduced and receive only \$3,612.00. *Id.*

Shelley also indicated that she would like to move to a different venue to obtain employment in Seattle, Pullman, Olympia, Portland, Walla Walla. What the Trial Court failed to see was what the circumstances are. There is no documentation or proof that she had any ability to be capable of earning between \$95,000.00 and \$105,000.00 beyond her job as manager of City of Yakima Waste Water Treatment Plant. Shelley stated she had worked her way up through the ranks, but that may not be true for the other entities who want not only a person with experience but also with engineering degrees. The Court found that she had been actively

looking for work. CP 45. No one has offered Shelley employment. Roy testified that Shelley had a job any time she wanted at an engineering firm, Huibregtse, Louman Associates. No documentation or proof was presented. Roy's statements are hearsay and should have been stricken from the record.

Shelley suffers from depression and anxiety as a result of the dissolution. CP 252 ¶11. She takes medication and believes/hopes she will be off the medication in a year. *Id.* The Court found that she is capable of working fulltime at a similar job as the job that she quit with the City of Yakima. The actual finding should be that she will need to work at least nine more years to meet her expenses, not to accumulate more wealth, but just to pay her expenses since Roy's life expectancy is 21 years and Shelley's is 30 years. The Court failed to consider that Roy was able to retire at 50 and he did not go back to work. Roy lived off his pension and Shelley's salary. It is only reasonable that she now have the benefit of his income.

According to the Trial Court, Shelley has extremely good future earnings potential. CP 253:1-2. The Trial Court did not make a finding of fact upon what it bases that statement.

The Trial Court considered the testimony of the expert as to the value of Roy's retirement/pension, including social security, and the present value of Roy's pension and social security backout with a discount rate of 6% for consistency. CP 253 ¶16. See I RP 50-73; Exs. 1.20 – 1.21. The Trial Court found that Roy's life expectancy is approximately 252 months (21 years), consistent with this evidence. CP 253 ¶16. What was missing from the Court's Findings of Fact and Conclusions of Law was what the life expectancy of Shelley is based on her age at trial of 54 (Husband was 62 at valuation date). Husband is 7 years and 3 months older than Wife and the life expectancy for Shelley is 360 months, or 30 years. See Exs.1.22-1.24. The Trial Court made no finding that it considered Shelley's future expenses based on life expectancy.

Both parties did provide information about anticipated monthly costs of living expenses versus actual current overall expenses. This included \$850.00 in anticipated rent costs for Shelley and anticipated \$1582.00 mortgage, tax and insurance for Roy in the event he purchases a new home. At the present time, Roy, does not have any housing expenses. He is living in his brother's house and has the occupancy of the marital house in East

Valley. There was no testimony by Roy that he was going to have to expend labor and expenses on the real property. There was no testimony as to what that amount is, was, or will be.

Both parties supported their respective children during their dependency. Both assisted some children and stepchildren past majority financially as many parents do. Roy came into the household with a child support obligation for three children. The community operated as such during the marriage supporting one another as well as the children. The family home was added on to and remodeled to make room for the three children through Roy and Shelley's labor after retirement. There was no testimony that any of the action that Roy or the community took to the East Valley real property has increased the value of the real property. The parties stipulated to the value of the real property. The marital home and land is valued at \$230,000.00 and the adjacent pole building is valued at \$100,000.00. The Ocean Park property was valued at \$90,000.00.

## II. ASSIGNMENT OF ERROR

### A. Assignments of Error

1. The Trial Court erred in entering the property division which was not fair and/or equitable.

2. The Trial Court failed to take into account the economical circumstances in failing to grant Petitioner's Motion for Reconsideration.

3. The Trial Court erred in failing to follow the statutory factors and case law for property division.

4. The Trial Court erred in not taking into account the residence was previously owned by Shelley as her separate property. The Court made no finding of any of the repairs or maintenance to the residence resulted in an increase in the value of the residence and/or land.

5. The Trial Court erred in failing to consider the value of Roy's health insurance monthly premium, valued at more than \$750.00, which is paid for by the City of Yakima and all uncovered medical expenses are covered by the City of Yakima.

6. The Trial Court erred in failing to make findings as to the living expense for each party respectively and/or the life expectancy of each party.

7. The Trial Court erred when she signed the Decree awarding Roy's social security to him. At trial Roy testified he did not have any social security benefit. That should be stricken.

8. The Trial Court erred in finding that Shelley has seven years until social security. The Trial Court erred in stating that that gives Shelley seven years to acquire additional wealth. The Trial Court erred in failing to find Roy is capable of working.

9. The Trial Court erred in not requiring Roy to return to work as he is physically capable of working and the Court made no finding that he was not (CP 79, lines 1-4).

10. The Trial Court erred in failing to compare the parties' incomes from pension as follows:

	ROY	SHELLEY
Pension Gross	6817.00	4126.00
Taxes	<1312.00>	<559.00>
Net	5505.00	3567.00
Health insurance	<u>750.00</u>	<u>&lt;750.00&gt;</u>
	<b>6255.00</b>	<b>2817.00</b>

Difference: \$3,438.00

The Court erred in failing find that Roy's pension income per month is at least \$3,438.00 greater than Shelley's pension income.

**B. Issues on Appeal**

1. The first property division ruling in this case was on June 3, 2015. The Court accomplished this by its preparation of the Findings of Fact and Conclusions of Law. CP 111-120. The final order was entered July 20, 2015. CP 250-259.

2. The Court found that Roy was seven years and three months older than Shelley. CP 250 ¶3. However, there was no decision by the Court as to the length of time each party would live, just Roy at 252 months. CP 253 ¶16. The Trial Court found that Roy retired at age 50 as the Chief of Police for the City of Yakima in 2003. The Court further found that Roy retired at that time and has been unemployed since drawing on his LEOFF pension.

The Court found that Shelley has a two year degree in civil engineering technology from Yakima Valley Community College and a general studies degree from the Washington State University. CP 251 ¶4. The fact that she worked at the City of Yakima for a number of years is significant as she had to work her

way up. At the time of separation Shelley was employed as the manager of Yakima's Waste Water Treatment Plant. *Id.*

3. The Court noted that the parties had stipulated at the time of trial that neither party would be seeking maintenance. *Id.*, ¶15.

4. Further, the Trial Court found that the residence the parties were living in located at 581 Hill Road, Moxee, Washington was converted to community property as a result of the refinance on Shelley's residential property. *Id.*

5. The Trial Court found that Roy's pension is LEOFF 1, which he has been receiving since he turned 50. Shelley's pension is a PERS 2. She was eligible for early retirement which she took in late summer of 2015 after she turned 55. CP 275:9-10.

6. The Trial Court found that the social security of Shelley was backed out in regards to Roy's assets. According to the Trial Court sufficient testimony was taken on the record to warrant a back out of the portion of Roy's LEOFF 1 pension that is in lieu of social security that he would have received had he not been LEOFF 1. CP 251 ¶6.

7. The Trial Court did find that his health insurance premiums were paid by the City of Yakima, but does not value that asset (as perhaps a back out). CP 251 ¶7.

8. The Trial Court found Roy is now 62 years of age, he suffers from a number of health issues including a form of leukemia for which he takes blood thinners. CP 251 ¶8. The Trial Court failed to note that part of the treatment is simply giving blood.

9. The Trial Court made findings that should he progress to Stage 2 of the disease he may need a more aggressive treatment such as chemotherapy. CP 251 ¶8.

10. The Trial Court also found that Roy has PTSD due to an incident that occurred while he was a member of the county's search and rescue team. CP 251 ¶8. However, the Trial Court erred in not restricting that testimony when Roy had indicated in his answers to interrogatories that were no physical reasons that he is incapable of working. The Trial Court did find that Roy has been a very active person since his retirement in 2003 and he is capable of some unknown type of employment. What was done was that he simply stated he was not going to go to work. *See, Seals v Seals*, 22 Wn. App. 652, 590 P. 2d 1301.

11. The Trial Court erred in not finding that Roy is physically able to work but has made no effort to apply for work.

12. The Trial Court found that the future earnings capacity of Roy was not developed. CP 252:5-6. Certainly Roy had that in his capability in order to supply any information if the Court desired. He presented no testimony and he provided no testimony that he is not capable of working.

13. Shelley was 54 at trial and the Court was correct in noting that if she was to retire on her 55<sup>th</sup> birthday in summer 2015 and elected a 2008 early retirement factor she would receive a pension gross of \$4,126.00. See CP 252 ¶10.

14. The Trial Court's findings also revealed that Shelley suffers from depression and anxiety, but she is capable of working. *Id.* According to the Trial Court, if Shelley retired at age 62 she would have seven years to accumulate more wealth. CP 252 ¶11. The Trial Court failed to find that Shelley will have to provide for her expenses for nine years longer than Roy. The Trial Court made no such finding of Roy, but yet he too is fully capable of working.

15. The Trial Court stated that Shelley has extremely good future earning capacity if she can find a job. However, she

has not been able to find a job. Shelley testified to that at the time of trial. The Trial Court failed to find Shelley was unable to find work.

16. The Trial Court indicates that the Willson family home was added on and remodeled. There was no testimony other than the value of \$230,000.00. There was no testimony that any part of the \$230,000.00 is based upon the repairs and/or the remodeling that Roy did.

17. The Trial Court found that Roy should be awarded \$1,672,531 and Shelley awarded \$1,095,448. CP 256. At the end of this 24 year relationship Shelley gets 39% having worked the entire marriage and Roy was awarded 61% of all the assets; community or separate. Roy has not worked for 12-13 years. Shelley has worked all the years since the parties were married.

### **III. STATEMENT OF THE CASE**

This appeal focuses on the inequitable division of assets and the denial of Shelley's request for an equal property division taking into account the Husband's net pension on a monthly basis is approximately \$3,438.00 greater than the Wife's. See Appendix A and B (illustrative comparison of trial court property division on

6/3/15 and 6/29/15 and Shelley's proposed 50-50 split, based on CP 235 which compared the first two rulings and her 50-50 proposal for purposes of reconsideration). The Trial Court's decision results in a difference between what assets the Husband was awarded and the assets the Wife was awarded, resulting in a sum of \$634,940.00 more to the Husband Roy.

The Trial Court had filed Findings of Fact and Conclusions of Law on June 3, 2015. CP 111-120. Attached to the findings were certain attachments relating to the distribution of assets. On Attachment "A", page 2, it clearly shows Wife was awarded a certain amount of the overall assets. CP 117.

On June 29, 2015 there was a hearing in regards to a Motion for Reconsideration and presentation of final papers. The Court indicated that it was her intention to give Roy 55% of the community property, not the overall property. She may think it is obvious, Shelley does not. Did the Trial Court mean to state that it was her intent that the parties keep their separate property? The Decree of Dissolution signed by the Trial Court results in Shelley receiving 38-39% of the total community and separate property. See Appendix A (based on CP 235) and CP 256.

"I have a confession to make. I made a mistake in my calculations". CP 06-29-2015, lines 7, 8, 9. Based on the June 3, 2015 hearing and apologized for her mistake. On the day of the proceedings where the Trial Court advises the parties Roy would be receiving 55% of the community property, plus all his separate property. The Trial Court went on to state on June 29, 2015 that she would not consider for the purposes of anything in this hearing any fault that caused the dissolution of the marriage, any reason why Ms. Willson voluntarily terminated job, issues regarding irrigation problems which in this Court's mind were largely based on hearsay brought to the Court's attention. The troubling statement made by the Court: "If the wife is seriously arguing that she is unemployable at the same rate of pay that she is receiving I will consider Mr. O'Rourke's testimony" (page 12, lines 24-25). This is all set forth in the Assignments of Error, Paragraph II. Roy claimed that he was going to call Mr. O'Rourke at trial. He did not. A deposition was taken without perpetuation. That particular statement made by Mr. O'Rourke something to the effect that he would hire her back. What he does not mention is that this is a civil service job and Mr. O'Rourke does not have the control. More

importantly, Roy keeps trying to put the deposition in evidence that was taken. Under CR 32 there is no basis. As a result, Mr. O'Rourke's testimony was never admitted. It was mentioned three or four times by the Court stating if Shelley took a certain position that the Court was going to allow the O'Rourke deposition as evidence. CP 123, lines 10-15. On one occasion the Court did say that the Court probably did not have authority to admit as an exhibit. Basically, did or didn't the Court consider fault? There was no testimony and no documents were set forth to be testimony that would back up the Court's statement about her considering Mr. O'Rourke's testimony. The Trial Court's actions had no basis in law or fact and was inappropriate.

The Trial Court never made any finding as to each party's cash flow. If one takes the net income of Roy at \$5,505.00, subtract his monthly expenses of \$3,557 leaving a surplus of \$1,948.00 per month or the sum of \$23,376 annually. That does not take into account the health expense paid by the City of Yakima for Roy or Shelley's \$753 for health insurance that she pays personally. CP 252 ¶10.

The next issue relates to Roy's medical insurance costs Roy has paid by the City of Yakima, which should be valued at \$750.00 a month based on the cost of Shelley's City health insurance. Roy's health insurance plan is between him and the City of Yakima. The result is that Shelley has to spend approximately \$9,000.00 a year for health insurance and the health insurance paid on behalf of Roy comes from the City of Yakima and is worth approximately \$9,000.00 a year.

The Trial Court awarded all of Roy's separate property to him, but does not give credit of any type to Shelley for her having to quit claim the residential property in order to refinance the house only that any other work done actually increased the value of the property. The burden of proof is on Roy. *See, In re the Marriage of Glorfield*, 27 Wn. App. 358, 617 P.2d. 1051 (1980).

The Trial Court failed to make a finding on the following evidence:

1. Roy retired in 2003 when he was 50 years of age. He now receives a net income of \$5,055.00 subject to medical insurance benefit from the City of Yakima, which is in addition to the \$5,055.00. He has been retired for approximately 13 years.

This does not include the \$200,000.00 from the ICMA account that was awarded to Roy and can be withdrawn any time in any amount up to the balance of the account.

2. Roy gets approximately \$750.00 a month in the value of his health insurance over the span of Roy's lifetime, which is 252 months.

3. The Trial Court failed to take into account the life expectancy of the parties. The Trial Court failed to consider longevity of the parties and that Shelley needs to save money in order to be able to survive. Roy has a life expectancy of approximately 21 years and Shelley has 30 years. See Exs. 1.20-1.24.

4. The Trial Court continues to talk about \$95,000.00 to \$105,000.00 for salary relating to Shelley. That is true for the last two years but the Yakima situation is unique because it did not require an engineering degree and because she had been employed for so long by the City.

5. A review of the transcript shows that the Trial Court's position on Mr. O'Rourke's testimony has jumped back and forth and has implication of fault.

6. Shelley is 54 years of age and appears to have retired as of 2015. In regards to employment, the Trial Court never commented on the interrogatory answers wherein Roy conceded that he has no illnesses or injuries that prevent him from being employed. See, *Seals v Seals*, 22 Wn. App. 652, 590 P. 2d 1301. As stated: "A husband and a wife contemplating dissolution of their marriage have a fiduciary duty to each other to disclose separate and community assets, particularly where they have superior knowledge. A spouse is entitled to rely on the other spouse's answers to interrogatories as to the existence of assets". Same should be true for any interrogatory under oath which is material to the issue at hand.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

Review of the Trial Court's Findings of Fact and Conclusions of Law is limited to determining whether the Findings are supported by substantial evidence since "the constitution does not authorize this Court to substitute its findings for that of the Trial Court." *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183, 186 (1959). Substantial evidence means "evidence in

sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise.” *In re the Marriage of Vander Veen*, 62 Wn. App. 861, 865, 815 P.2d 843 (1991). *Accord, Magnuson v. Magnuson*, 141 Wn. App. 347, 351, 353, 170 P.3d 65 (Div. III, 207), rev. den., 163 Wn.2d 1050 (2009).

A trial court abuses its discretion when its decision is manifestly unreasonable; or is exercised or based on untenable grounds or reasons concerning the purposes of the trial court’s discretion; or for no reason, since then there is no exercise of discretion. *Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993) (reversing for abuse of discretion). *Accord, Coggle v. Snow*, 56 Wn. App. 499, 507-07, 784 P.2d 554 (1990) (vacating discretionary decision); *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (same).<sup>1</sup>

Abuse of discretion thus can be boiled down to the following:  
a “court acts on untenable grounds if its factual findings are

---

<sup>1</sup> “A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.”

unsupported by the record; the court acts for untenable reasons if it has used an incorrect standard or the facts do not meet the requirements of the correct standard; and the court acts unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard.” *In re Marriage of Wicklund*, 84 Wn. App. 763, 770 n. 1, 932 P.2d 652 (1996) (reversing trial court). The appellate court re-emphasized that “an abuse of discretion is found if the trial court applies the wrong legal standard or bases its ruling on an erroneous view of the law. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007) (citing *Mayor v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)).” *Magnuson v. Magnuson, supra*, 141 Wn. App. at 353 ¶15 (Kulik, J., dissenting).

In short, a trial court must exercise its discretion in a principled fashion based on the correct legal standard and supported by the record or admitted facts.

As discussed *infra*, the Trial Court abused her discretion in making the property division for one basic reason: the Trial Court failed to meet the applicable legal standard of a fair, just and equitable property division given all of the circumstances of a this

24 year marriage and intimate relationship, and failed to meet Washington's legal rule that the parties to a long-term marriage are to be placed in substantially the same economic situation for the future because the award of property marginally in excess of a 50-50 split is inadequate to serve as a financial bridge for Shelley to social security eligibility in approximately 10 years, much less keep her living comfortably over the remainder of Shelley's 30-year life expectancy.

**B. Property Division Principles.**

On a substantive level, the division of the parties' property and liabilities is governed by RCW 26.09.080.

In a proceeding for dissolution of marriage . . . , the court shall, without regard to misconduct, make such disposition of the property and liabilities of the parties, either community or 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 or domestic partnership;  
and
- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic

partner with whom the children reside the majority of the time.

The bottom line of a “just and equitable” property division is that it is fair to both parties and that this judgment be made keeping in mind the parties’ unique circumstances. *In re the Marriage of Konzen*, 103 Wn. 2d 470, 478, 693 P.2d 97(1985).

Here the factors one and two are not at issue because it is agreed all property are at issue. Trial court divided and awarded community property subject to an adjustment, based on the fact the residence was Shelley's separate property at the time of marriage. Each party had separate interest on respective pensions. The Court should have factored that into the property to be awarded to the parties. Factors three and four, however, come into play and give the most guidance. Factor three, duration of the marriage, which here is 24 years (including one year of residing together) weighs heavily on the need to assure the parties are placed in equivalent positions post-decree, even if it means a division of property other than roughly equal. *In re the Marriage of Rockwell*, 141 Wn. App. 235, 239, 170 P.3d 572 (2007). Factor four simply

states: the economic circumstance of each spouse at the time of division.

While the goal following a short marriage typically is to return the parties to the same economic condition they enjoyed at the inception of the marriage and divide equally between them that which they gathered together,<sup>2</sup> for long-term marriages, the suggestion has always been that the parties should be placed in roughly equal financial positions for the remainder of their predictable life span, taking into account both working to their respective earning capacities and managing properties awarded reasonably. *In re the Marriage of Estes*, 84 Wn. App. 586, 593, 929, P.2d 500 (1997) (this award must be just in light of the relevant factors ...). This is consistent with long-standing Washington law. See, *Sullivan v. Sullivan*, 52 Wash. 160, 164, 100 P. 321 (1909).<sup>3</sup>

---

<sup>2</sup> This is consistent with long-standing Washington case law. See, e.g., *Bundy v. Bundy*, 149 Wash. 464, 271 P. 268 (1928), *cert. denied*, 279 U.S. 842 (1929).

<sup>3</sup> “Furthermore, after a husband and wife have toiled on together for upwards of a quarter of a century in accumulating property, what they may have had to start with is a matter of little concern. The origin of property is only a circumstance in the case, and the ultimate duty of the court is to make a fair and equitable division under all the circumstances.

These parties married somewhat later in life. One party, Roy, is 62 and Shelley is 55. Roy and Shelley's relationship was for 24 years, not quite 25 years. That should be sufficient to establish that the property should be divided equally. See Appendix B, "Wife's Proposal," contained in CP 235.

A more recent case is that of *In re the Marriage of Rockwell*, 141 Wn. App. 235, 239, 170 P.3d 572 (2007). The *Rockwells* were married for a period of 26 years. This was before the Court of Appeals, *In re the Marriage of Rockwell*, 141 Wn. App. 235, 239, 170 P.3d 572 (2007). The facts underlying the first appeal of the dissolution and of the community are set forth *In re the Marriage of Rockwell, supra*. The facts underlined in the first appeal are set forth in that first ruling of *Rockwell*. In response to the challenge to the division of property, the court affirmed the trial court's overall 60-40 division of the property in favor of the wife as just and equitable.

*In re the Marriage Kraft*, 119 Wn. 2d. 438, 450, 832 P.2d. 871 (1992). Under a dissolution action the court pointed out that all property community and separate is before the court for distribution. *In re the Marriage of Stachofsky*, 90 Wash. App. 135,

142, 951 P.2d. 346 (1998). The appellate court pointed out that the relevant factors in determining a just and equitable distribution of property are provided by RCW 26.09.080. The appellate court went on to state that it had been a marriage of 25 years or more, the trial court must put the parties in roughly equal financial positions for the rest of their lives. *Rockwell*, 141 Wn. App. at 243.

The appellate court vacated the judgement and remanded the matter for further proceeding. The remand opinion actually stated that there was not a mandate that the trial court preserve the 60-40 overall division left over from *Rockwell I*.

**C. The Broad Prohibition Against Use of Any Kind of Marital Fault in Property Division; the Paramount Concern is the Economic Condition in Which the Parties are Left.**

Before 1973, dissolutions in Washington, as in other states, were grounded in fault of one or both of the parties. Hon. Nancy Ann Holman, *A Law in the Spirit of Conciliation and Understanding: Washington's Marriage Dissolution Act*, 9 Gonzaga L. Rev. 39 (1973); Luvern N. Reike, *The Dissolution Act of 1973: From Status to Contract?* 49 Wash. L. Rev. 375, 376-377 (1974). The use of fault necessarily affected all aspects of the resolution: how the

property would be distributed; whether there would be maintenance and, if so, how much; child custody arrangements and support.

*See id.*

This was supposed to change in the 1970s, and by and large did.

The Dissolution of Marriage Act of 1973 eliminated fault as a relevant consideration in a dissolution proceeding. Under RCW 26.09.030, the sole basis for a dissolution of a marriage is that it is irretrievably broken. RCW 26.09.080 and RCW 26.09.090 further provide that marital misconduct is not to be considered by the court in distributing the property and liabilities of the parties, or awarding maintenance.

*In re the Marriage of Washburn*, 101 Wn.2d 168, 176 n.2, 677 P.2d 152 (1984). *Accord, In re the Marriage of Little*, 96 Wn. 2d 183, 192, 634 P.2d 498 (1981) (the new act "rejected fault" as an element").

However, despite the fact the new statute and court decisions proclaimed this fundamental change in how dissolutions are sorted out, human nature and frailties continue to impermissibly inject fault into analyses used in trial courts, even though often unintentional, and even though on a conscious level, at least, the judge (or proponent party) genuinely do not believe they are

employing any kind of fault-based concept. The Trial Court had to ask Roy's counsel to keep his comments away from fault. The fault issues need to be skilled over (CP 13, lines 3-5).

Two recent decisions demonstrate by their reversals of the trial courts that the concept of fault is not only construed broadly, its use remains reversible error whether it was recognized as fault by the trial court or not. They apply here and require reversal of the property division.

In *Marriage of Muhammad*, 153 Wn. 2d. 806, ¶16, Supreme Court vacated the property award and maintenance where the trial judge adjusted the property division and maintenance award in favor of the Husband by explicitly taking into account the effect of domestic violence protection order obtained by the Wife and which precluded the Husband from further work as a police officer. The Court determined that "the language in the trial court's oral ruling and written findings of fact, along with the questionable aspects of the property division itself, establish clear inference that the court improperly considered [the wife's] decision to obtain a protective order against *Muhammad* as "marital misconduct," the use of which

in dissolution proceedings is strictly prohibited. 153 Wn.2d at 806, ¶16.

These principles apply to this case and require the property division be vacated. It is apparent from the Trial Court's decision and allocation of the assets that Shelley was essentially faulted for quitting her job given the assertion that Shelley took an early retirement. But these points are, or should be, totally irrelevant to a property disposition in a long-term marriage which is focused on, or should be, what property most appropriately goes to another to equalize the post-dissolution standard of living of the parties. *Washburn*, 101 Wn.2d at 179; *Sheffer*, 60 Wn. App. at 57. There is no conceivable, property relevance in the context of this case to reaching those conclusions and making those comments.

Thus the "marital misconduct" here occurred by what was not said or done, but it is no less objectable. The marital misconduct that was being punished was displayed by Roy and, in effect, accusing Shelley of not working as she should have. While at first glance this may seem thin, other circumstantial evidence, much like corroborating evidence that is in the *Muhammad* decision, reinforces that fault was brought into play, even if not

labeled as such, given the reluctance of the Trial Court to place Shelley genuinely on par with Roy.

## **V. CONCLUSION**

Shelley, believes that the following should occur based on information and exhibits entered below and on appeal to this Court.

Shelley requests that the Court review the record and require a redistribution of the assets of this marital community.

1. That the Court require that the Decree of Dissolution be amended and that reference to social security under Roy's column is contradictory to the testimony that he has no social security benefits available.

2. It is Shelley's position that the Court should take into account the health insurance expenses that are paid on behalf of Roy, which exceeds \$750.00 a month. The payment of health insurance was not considered in the overall transfer of assets under RCW 26.09.080.

3. Both parties are retired and both parties have the capability of working. Roy is has made absolutely no effort to be employed. On the other hand, Shelley has tried and been unable to find employment. Perhaps that as a result of the fact that she

does not have an engineering degree and that she was an in-house promotion and was able to acquire the skills to run a waste water plant.

4. The Trial Court made no finding as to the life expectancies for these parties and on Shelley being younger than Roy and that she is female which, results in a person who is going to live nine years longer than Roy. The effect on Shelley between her younger age and her longer life expectancy means that the amount of future income or pension benefits available to her is simply unknown but that she is going to need a substantial sum of money. The Trial Court basically just said: "Well she's going to have seven years to acquire additional wealth." She will have to pay living expenses longer than Roy and, because of her economic circumstances as set out on Exhibit A to the Findings of Fact, (CP 255-56) will have insufficient funds to meet her needs and expenses. We direct the Court's attention to Appendix B, "Wife's Proposal" which simply divides the assets 50/50 to the parties in equal positions. See CP 235.

5. If each party took the award of the Trial Court and amortized them on an annual basis to each particular party the

Court would see that Roy had a greater lifestyle as a result of his pension, \$200,000.00 of Shelley's ICMA account, and other property to sell. Appendix A shows different kind of combinations, but it is not just the amount that is in error, it's the failure on the Trial Court to take into account that the parties should be able to receive equal amounts of their assets and expenses.

The following indicates what funds are available to each party based on the Trial Court's final ruling at CP 256. The Trial Court's decision dramatically changes the parties' economic circumstances and leaves them in unequal positions.

	Husband	Wife
Number of months life expectancy	252	360
Age	62	55
Assets	\$1,672,531	\$1,095,448
	÷ 252	÷ 360
Monthly	<u>\$6,637.00</u>	<u>\$3,042.00</u>
Gross pension payments, FOF:	<u>\$ 6,817.00<sup>4</sup></u>	<u>\$4,126.00<sup>5</sup></u>
	\$13,454.00	\$7,168.00

<sup>4</sup> Gross pension monthly income: CP 112 ¶7; 251 ¶7.

<sup>5</sup> Gross pension monthly income: CP 113 ¶10; 252 ¶10. See CP 275:9-10 (Shelley's declaration specifying pension she chose).

The Trial Court's ruling did not leave the parties in equal sharing of the assets after 24 years of the parties' relationship. It should be vacated and corrected.

Respectfully submitted this 10<sup>th</sup> of January, 2017.

THORNER, KENNEDY & GANO, P.S.  
Attorneys for Petitioner



---

**W. JAMES KENNEDY**, WSBA #4648  
P.O. Box 1410  
Yakima, Washington 98907-1410  
(509) 575-1400

# APPENDIX "A"

In re the Marriage of WILLSON and WILLSON					
Yakima County cause no: 14-3-00358-0		Value		To Husband	To Wife
<b>Per court's ruling 6/3/15:</b>					
<b>COMMUNITY ASSETS</b>					
Community assets total:	\$909,141.00			\$451,967.00	\$457,174.00
Community pensions total:	\$944,654.00			\$388,550.00	\$556,104.00
<b>TOTAL COMMUNITY PROPERTY:</b>	<b>\$1,853,795.00</b>			<b>\$840,517.00</b>	<b>\$1,013,278.00</b>
<b>SEPARATE ASSETS</b>					
Separate assets total:	\$914,184.00			\$681,872.00	\$232,312.00
<b>TOTAL ALL PROPERTY:</b>	<b>\$2,767,979.00</b>			<b>\$1,522,389.00</b>	<b>\$1,245,590.00</b>
Result of court's 6/3/15 ruling:				55%	45%
<b>Per court's ruling 6/29/15:</b>					
<b>COMMUNITY ASSETS</b>					
Community assets total:	\$909,141.00			\$451,967.00	\$457,174.00
Community pensions total:	\$944,654.00			\$388,550.00	\$556,104.00
<b>TOTAL COMMUNITY PROPERTY:</b>	<b>\$1,853,795.00</b>			<b>\$840,517.00</b>	<b>\$1,013,278.00</b>
In order to divide community assets				\$179,070.25	(\$179,070.25)
55/45 as per court's ruling:				\$1,019,587.25	\$834,207.75
<b>SEPARATE ASSETS</b>					
Separate assets total:	\$914,184.00			\$681,872.00	\$232,312.00
<b>TOTAL ALL PROPERTY:</b>	<b>\$2,767,979.00</b>			<b>\$1,701,459.25</b>	<b>\$1,066,519.75</b>
Result of court's 6/29/15 ruling:				62%	38%
<b>Per court's ruling 7/17/15:</b>					
<b>COMMUNITY ASSETS</b>					
Community assets total:	\$909,141.00			\$648,667.00	\$260,474.00
Community pensions total:	\$944,654.00			\$341,992.00	\$602,662.00
<b>TOTAL COMMUNITY PROPERTY:</b>	<b>\$1,853,795.00</b>			<b>\$990,659.00</b>	<b>\$863,136.00</b>
In order to divide community assets				\$28,928.25	(\$28,928.25)
55/45 as per court's ruling:				\$1,019,587.25	\$834,207.75
<b>SEPARATE ASSETS</b>					
Separate assets total:	\$914,184.00			\$681,872.00	\$232,312.00
<b>TOTAL ALL PROPERTY:</b>	<b>\$2,767,979.00</b>			<b>\$1,701,459.25</b>	<b>\$1,066,519.75</b>
Result of court's 7/17/15 ruling:				61%	39%

In re the Marriage of WILLSON and WILLSON Yakima County cause no: 14-3-00358-0	Value	To Husband	To Wife
<b>Per court's ruling 7/17/15:</b>			
<b>COMMUNITY ASSETS</b>			
Community assets total:	\$909,141.00	\$648,667.00	\$260,474.00
Community pensions total:	\$944,654.00	\$341,992.00	\$602,662.00
<b>TOTAL COMMUNITY PROPERTY:</b>	<b>\$1,853,795.00</b>	<b>\$990,659.00</b>	<b>\$863,136.00</b>
In order to divide community assets 55/45 as per court's ruling:		\$28,928.25	(\$28,928.25)
		\$1,019,587.25	\$834,207.75
<b>SEPARATE ASSETS</b>			
Separate assets total:	\$914,184.00	\$681,872.00	\$232,312.00
<b>TOTAL ALL PROPERTY:</b>	<b>\$2,767,979.00</b>	<b>\$1,701,459.25</b>	<b>\$1,066,519.75</b>
Result of court's 7/17/15 ruling:		61%	39%
<b>Wife's Proposal:</b>			
TOTAL COMMUNITY PROPERTY:	\$1,853,795.00	\$840,517.00	\$1,013,278.00
TOTAL SEPARATE PROPERTY:	\$914,184.00	\$681,872.00	\$232,213.00
<b>TOTAL ALL PROPERTY:</b>	<b>\$2,767,979.00</b>	<b>\$1,522,389.00</b>	<b>\$1,245,491.00</b>
Lien:		(\$138,449.00)	\$138,449.00
<b>NET AWARD:</b>		<b>\$1,383,940.00</b>	<b>\$1,383,940.00</b>
		50%	50%

# APPENDIX "B "

In re the Marriage of WILLSON and WILLSON				
Yakima County cause no: 14-3-00358-0	Value		To Husband	To Wife
<b>Per court's ruling 7/17/15:</b>				
<b>COMMUNITY ASSETS</b>				
Community assets total:	\$909,141.00		\$648,667.00	\$260,474.00
Community pensions total:	\$944,654.00		\$341,992.00	\$602,662.00
<b>TOTAL COMMUNITY PROPERTY:</b>	<b>\$1,853,795.00</b>		<b>\$990,659.00</b>	<b>\$863,136.00</b>
In order to divide community assets			\$28,928.25	(\$28,928.25)
55/45 as per court's ruling:			\$1,019,587.25	\$834,207.75
<b>SEPARATE ASSETS</b>				
Separate assets total:	\$914,184.00		\$681,872.00	\$232,312.00
<b>TOTAL ALL PROPERTY:</b>	<b>\$2,767,979.00</b>		<b>\$1,701,459.25</b>	<b>\$1,066,519.75</b>
Result of court's 7/17/15 ruling:			61%	39%
<b>Wife's Proposal:</b>				
<b>TOTAL COMMUNITY PROPERTY:</b>	\$1,853,795.00		\$840,517.00	\$1,013,278.00
<b>TOTAL SEPARATE PROPERTY:</b>	\$914,184.00		\$681,872.00	\$232,213.00
<b>TOTAL ALL PROPERTY:</b>	<b>\$2,767,979.00</b>		<b>\$1,522,389.00</b>	<b>\$1,245,491.00</b>
Lien:			(\$138,449.00)	\$138,449.00
<b>NET AWARD:</b>			<b>\$1,383,940.00</b>	<b>\$1,383,940.00</b>
			50%	50%

1  
2  
3  
4  
5  
6  
7 **IN THE COURT OF APPEALS**  
8 **OF THE STATE OF WASHINGTON**  
9 **DIVISION III**

10 **In re:**

11 SHELLEY RENEE WILLSON, nka  
12 SHELLEY RENEE SCHUT

**Petitioner,**

13 **and**

14 ROY CHARLES WILLSON

**Respondent.**

**No. 337201**

**CERTIFICATE OF SERVICE**

15  
16 I certify that on January 10, 2017, I hand delivered a copy of the Appellant's  
17 Amended Opening Brief to the law office of Mr. Blaine T. Connaughton, Attorney at  
18 Law, 514B N. 1<sup>st</sup> Street, Yakima, Washington, 98901.

19   
20 COREENA HOLDEN