

**FILED**

NOV 16 2016

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**DIVISION III COURT OF APPEALS  
STATE OF WASHINGTON**

No. 34151-8

**Grant County Superior Court Case No. 15-2-00839-7  
The Honorable David G. Estudillo  
Superior Court Judge**

**RESPONDENT'S RESPONSIVE BRIEF**

**In Re:**

**THOMAS THORN, PETITIONER**

**V.**

**DEBRA CROMER, RESPONDENT**

**Stenzel Law Office  
Gary R. Stenzel, WSBA # 16974  
Attorney for Appellant  
1304 W. College Ave. LL  
Spokane, Washington 99201  
Stenz2193@comcast.net  
(509) 327-2000**

**Table of Contents**

Table of Contents.....i

Citations to Authorities .....i

I. Facts and Circumstances of this Case.....1

II. Law and Argument.....4

    A. Since a CIR is a somewhat new concept in this state, it may be helpful to look at some of the law on dissolutions to help determine the date of separation......4

    B. It made little or no sense for Dr. Thorn to wait to the very last minute to file this action and the simple fact that he “thinks” their psychological separation was July 17<sup>th</sup>, 2012 is insufficient to overcome the actual date of separation as the date their CIR ended......7

    C. In this summary proceeding the administrative evidence and Dr. Thorn’s admissions regarding the date he left their home were highly germane to the issue of when this relationship stopped and were important and proper for the court to consider, and showed that there was no genuine issue of fact as to when the parties’ separated......9

    D. This appeal is frivolous and fees and sanctions should be awarded to Ms. Cromer.....12

III. Conclusion.....14

**Citations to Authorities**

<b><u>Authorities</u></b>	<b><u>Page</u></b>
<i>WA Supreme Court</i>	
<i>Croton Chem. Corp. v. Birkenwald, Inc.</i> , 50 Wn.2d 684, 685, 314 P.2d 622 (1957).....	8
<i>Hartley v. State</i> , 103 Wash.2d 768, 774, 698 P.2d 77 (1985).....	9, 10
<i>In Re Estate of Armstrong</i> , 33 Wash.2d 118,	

204 P.2d 500 (1949).....	5
<i>Kerr v. Cochran</i> , 65 Wash.2d 211, 396 P.2d 642 (1964).....	6
<i>Lamon v. McDonnell Douglas Corp.</i> , 91 Wash.2d 345, 349, 588 P.2d 1346 (1979).....	9
<i>Rustad v. Rustad</i> , 61 Wash.2d 176, 377 P.2d 414 (1963).....	6
<i>Togliatti v. Robertson</i> , 29 Wash.2d 844, 190 P.2d 575 (1948).....	5
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wn.2d 169, 176, 4 P.3d 123 (2000).....	7
<u><i>Washington Appeals Court</i></u>	
<i>Bill of Rights Legal Foundation v. Evergreen State College</i> , 44 Wn.App. 690, 696-7, 723 P.2d 483 (1986).....	13
<i>In re Kelly</i> , 170 Wn.App. 722, 287 P.2d 12 (2012).....	1
<i>In re Marriage of Nuss</i> , 65 Wn.App. 334, 344, 828 P.2d 627 (1992).....	4
<i>In Re Estate of Osicka</i> , 1 Wash.App. 277, 461 P.2d 585 (1969).....	5
<i>In re Marriage of Rich</i> , 80 Wn.App. 252, 259, 907 P.2d 1234, review denied, 129 Wn.2d 1030 (1996).....	8
<i>MacKenzie v. Sellner</i> , 58 Wash.2d 101, 361 P.2d 165 (1961).....	5
<i>Oil Heat Co. v. Sweeney</i> , 26 Wn.App. 351, 354, 613 P.2d 169 (1980).....	4, 5, 6
<i>Peters v. Skalman</i> , 27 Wn.App. 247, 617 P.2d 448 (Div. 2 1980).....	5
<i>Schorno v. Kannada</i> , 167 Wn.App. 894, 904, 276 P.3d 319 (2012).....	12
<u><i>Washington Rules of Appellate Procedure</i></u>	

RAP 18.9.....12, 13

**I. Facts and Circumstances of This Case**

This case involves the alleged Committed Intimate Relationship (herein after CIR) between the Appellant, Thomas Thorn and the Respondent Debra Cromer and Dr. Thorn's failure to file his Petition to Determine a CIR within the three year statute of limitations. Instead Dr. Thorn filed his Petition three years and one day after the date of their "separation" and so his CIR Petition was dismissed. CP 1-12, 251-53, 410-11. (See *In re Kelly* 170 Wn App 722, 287 P2d 12 (2012). Dr. Thorn has appealed that dismissal because he feels it is a party's subjective intent that determines such separations, and not such things as their "move out" date. CP 89.

The parties' history shows that they had been living in an alleged CIR relationship for a few years, having one child in common. CP 36-7, 89. During this relationship, and in the middle of the month of July 2012 the parties apparently had a substantial argument at the residence they were living which also allegedly involved physical violence. CP 90-1. This argument occurred on the date of July 16<sup>th</sup>, 2012 as admitted by Dr. Thorn in his own opening brief where in his attorney stated that this July 16<sup>th</sup> argument resulted "in Dr. Thorn leaving the home to stay at his friend's home in Soap Lake." Citing page 1 (B.3.) of Appellant's opening brief. See also CP 89-91. His counsel then said in the next sentence of their brief, "While the last daytime hours of Dr. Thorn's

relationship with Ms. Cromer took place on July 16, 2012, he moved out on July 17, 2012.” *Id.*; further emphasis added.

One of the reasons that Dr. Thorn argues that his separation was actually July 17<sup>th</sup>, 2012 was because it was that day he knew their relationship was over because she had him arrested causing him to be incarcerated for the next 3 ½ months. *Id.* That before that happened he did not know their relationship was over. See Opening Brief page 1-2.

This argument was less than effective in persuading the trial judge that he did not separate when he moved out on July 16<sup>th</sup>, 2012. In what appeared to be an attempt to get to the bottom of the actual “separation date” the judge began a colloquy with his attorney about previous statements under oath to an administrative judge in his child support hearing, wherein he specifically referred to the 16<sup>th</sup> of July as the date of “separation”. RP 37. More specifically, at the summary judgment hearing the judge referred to testimony that Dr. Thorn had provided in an Administrative hearing on the determination of his support responsibility in which he testified that they separated July 16<sup>th</sup>, 2012. RP 37. Based on this, and his attorney’s answers to questions, the judge decided that there was no dispute that Dr. Thorn left Ms. Cromer’s residence exactly on the 16<sup>th</sup> of July 2012. CP 92, RP 35. The judge also concluded that Dr. Thorn’s subjective intent was not the dominant factor in a determination of the date of separation in a CIR, rather it was Dr. Thorn’s own

reckoning that led the court to the conclusion that the statute of limitations time started to run July 16, 2012. RP 20-30.

The question in this case became what was the correct date of separation for the tolling of the statute of limitation in this CIR case? The Superior Court Judge ruled that the date of July 16<sup>th</sup>, 2012 was the actual date of separation since it was the last time this couple either lived together or had any kind of relationship. To summarize, the following is a list of the facts that the Judge based his ruling:

1. It was undisputed that everyone knew Dr. Thorn left the place they called home on July 16, 2012 even though it was just before 12 midnight that day; RP 20-28.
2. There was an administrative determination for child support purposes that indicated a finding that the first date for retroactive support for their child was July 16, 2012; *Id.*
3. Dr. Thorn's own declaration indicated that he left their home and stayed with another person on July 16, 2012; *Id.*
4. Dr. Thorn was arrested on July 17, 2012 and was incarcerated until October 9, 2012, however, there is no indication that either Ms. Cromer or Dr. Thorn resumed their CIR relationship at any point after July 16<sup>th</sup> 2012; *Id.*
5. Dr. Thorn's own counsel admitted in argument and colloquy that the better practice would have been to file the claim at least two days before they filed. RP 28.

Based on these facts and the clear date of July 16<sup>th</sup> 2012 being the last date the parties were together, this appeal should be dismissed.

## **II. Law and Argument**

A. Since a CIR is a somewhat new concept in this state, it may be helpful to look at some of the law on dissolutions to help determine the date of separation.

The law on separations in dissolution cases is fairly consistent when the determination is being used for purposes of child support, maintenance, income, or property and debt allocation in a divorce. In a dissolution case the courts take each case on a case by case basis in determining the date of separation. *In re Marriage of Nuss*, 65 Wn.App. 334, 344, 828 P.2d 627 (1992). "The test is whether the parties by their conduct have exhibited a decision to renounce the community, with no intention of ever resuming the marital relationship." *Nuss*, 65 Wn.App. at 344 (quoting *Oil Heat Co. v. Sweeney*, 26 Wn.App. 351, 354, 613 P.2d 169 (1980)). In the *Nuss* case the date of separation was determined as the date Mr. Nuss was arrested and removed from the family home. *Id.* However, the analysis did not stop there, the *Nuss* court also indicated that the parties had attempted to reconcile several times, had gone to counseling together, had not dated anyone else, had had sexual relations with one another, and otherwise did not change their relationship. *Id.* The *Nuss* court stated "[t]here was also strong evidence, absent in *Boober*, that the parties were attempting reconciliation. While the parties lived

apart in a manner of speaking, the portions of the Bothell home they occupied were connected by a passageway and the parties visited and slept in each other's portions of the home. As in *Boober*, the period of the claimed separation was short, no separation agreement was signed nor divorce proceeding initiated, and the parties continued social and conjugal contact.” *Nuss, supra* 65 Wn.App. 334, 828 P.2d 627 (Div. 1 1992). This case then showed that one way to determine what is not a separation is to look at their social patterns as it relates to the particular couple; and if they are trying to keep their relationship alive, the date of separation would fade away as a legal date of independence from the other party.

Unlike other jurisdictions, Washington has a special rule regarding marital separations called the Defunct Marriage Rule. See *Peters v. Skalman*, 27 Wn.App. 247, 617 P.2d 448 (Div. 2 1980). This rule shows how important this state sees the date of separation since this rule creates a bar against third parties attempting to sue the other spouse for an alleged community debt. *Id.* It states that “A defunct marriage exists where it can be determined that the spouses, by their conduct, indicate that they no longer have a will to union. *In Re Estate of Osicka*, 1 Wash.App. 277, 461 P.2d 585 (1969); *MacKenzie v. Sellner*, 58 Wash.2d 101, 361 P.2d 165 (1961); *In Re Estate of Armstrong*, 33 Wash.2d 118, 204 P.2d 500 (1949); *Togliatti v. Robertson*, 29 Wash.2d 844, 190 P.2d 575 (1948). Physical separation, by itself, does not negate

the existence of the community. *Kerr v. Cochran*, 65 Wash.2d 211, 396 P.2d 642 (1964); *Rustad v. Rustad*, 61 Wash.2d 176, 377 P.2d 414 (1963). The test is whether the parties through their actions have exhibited a decision to renounce the community "with no intention of ever resuming the marital relationship." *Oil Heat Co. v. Sweeney*, *supra* 26 Wash.App. at 354, 613 P.2d at 171.

It appears that the test for the determination of the date of separation in a dissolution of marriage focuses on several factors, however, most important is the date at which both parties actually separated physically from one another and whether they subsequently do anything to abrogate that date, such as counseling, intimacy, courting, and/or living together.

The rule then in Washington regarding the date of the separation can best be described as a close look at these four questions before a date of separation is determined:

1. What date did one of the parties move out of their joint home to live elsewhere?
2. Why did they move to separate living arrangements?
3. Did they do anything after they went their separate ways to reconcile or continue in their relationship? and
4. Is their separation capped with both a failure to try and reconcile and the filing of a legal action to end their relationship?

In this case, Dr. Thorn admitted he left their joint residence to avoid this volatile argument. He moved to another person's home and stayed overnight to the 17<sup>th</sup> of July. CP 92. Although Dr. Thorn was arrested the next day (the 17<sup>th</sup>), the parties did nothing to try and continue their relationship over the next three years. CP 25, 40. In fact, it appeared from the record that their relationship was marked with litigation, both criminal, administrative as to child support and civil. CP 39-40, 90-91 & RP 22, 35. The child support hearing alone shows a complete break in their relationship, since its notion alone is that the payor of support is no longer either living in the home or contributing to joint expenses. CP 335. Additionally, in some of their litigation Dr. Thorn admitted they separated the 16<sup>th</sup> of July 2012 and also reconfirmed this as the date they went their separate ways, even in his own Opening Brief. The parties were separated on July 16<sup>th</sup>, 2012 and this CIR case should have been filed on July 16<sup>th</sup>, 2012.

B. It made little or no sense for Dr. Thorn to wait to the very last minute to file this action and the simple fact that he "thinks" their psychological separation was July 17<sup>th</sup>, 2012 is insufficient to overcome the actual date of separation as the date their CIR ended.

The judge in this summary proceeding found that the evidence was sufficiently clear that the parties ended their alleged CIR relationship when Dr. Thorn left the residence after their argument on July 16<sup>th</sup>, 2012. Regardless of the argument that in Dr. Thorn's mind they still were a

couple and he still “lived” in the Respondent’s home, and had his things there he did nothing to reconcile. RP 20-30.

A summary judgment looks at the evidence under a substantial evidence standard, which is defined as “evidence sufficient to persuade a reasonable person that the premise is true.” *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). If this standard is satisfied, the reviewing court should not substitute its judgment for the trial court's even though it may have resolved a factual dispute differently. *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 685, 314 P.2d 622 (1957). A reviewing court does not review the trial court's credibility determinations or weigh conflicting evidence. *In re Marriage of Rich*, 80 Wn.App. 252, 259, 907 P.2d 1234, review denied, 129 Wn.2d 1030 (1996).

In this case, Dr. Thorn indicated in argument that he thought they still had a relationship on the 17<sup>th</sup>. RP 21-27. However, what he told another judge was relevant to the question of credibility for this judge to simply say, in so many words that there was nothing in this subjective assertion that changed what he saw in the evidence. This included the importance of the date of July 16<sup>th</sup>, 2012 and the fact that Dr. Thorn’s own declaration sited that date as the “last” time they were together. RP 20-30. Surely the judge can surmise that at the very least the date of the 16<sup>th</sup> should have been a huge consideration for Dr. Thorn and his counsel. In fact the judge and Dr. Thorn’s counsel admitted that he

should have taken a better safe than sorry approach and filed a couple days earlier. See RP 28.

- C. In this summary proceeding the administrative evidence and Dr. Thorn's admissions regarding the date he left their home were highly germane to the issue of when this relationship stopped and were important and proper for the court to consider, and showed that there was no genuine issue of fact as to when the parties' separated.

A Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *CR 56(c)*. The burden is on the moving party to demonstrate that there is no genuine issue of material fact; and all reasonable inferences from the evidence are to be resolved against the moving party. *Hartley v. State*, 103 Wash.2d 768, 774, 698 P.2d 77 (1985); *Lamon v. McDonnell Douglas Corp.*, 91 Wash.2d 345, 349, 588 P.2d 1346 (1979).

In this case, Dr. Thorn and his counsel allude to the notion that it was somehow improper for this judge to *sua sponte* consider what Dr. Thorn said under oath in an administrative hearing about his child support for the parties' joint child. It was completely proper to look at this evidence to determine when the parties' relationship ended. It may have even been error for this judge not to consider this evidence in this case. This evidence becomes even more convincing when the judge's question and answer session occurred about this date. In that regard, the record shows at RP 20-23 that this information was neither objected to or

was asked to be stricken. With regard to this information, the judge specifically asked Mr. Albright:

*THE COURT: Your, or his declaration at paragraph ten says that the admin law judge um, agreed with me and determined that our relationship ended July 16, 2012. RP 22.*

Mr. Albright then responded with the interesting argument that what is important in determining the date of separation is when the other person to the CIR does something that shows they do not want the relationship to continue, like have their client arrested. In answer to the judge's legitimate question he argued:

*MR. ALBRIGHT: Right and he did leave the home for the last time on the 16th, that night when they got into a fight he went to that, the friend's house. But they would have returned together. But the next day is when she had him arrested. So, that's what he always considered to be their actual um, relationship termination. And so even though they last resided in the home together, the last time they woke up in a bed together, would have been on the 16th. . . RP 23.*

The judge and Dr. Thorn's attorney went back and forth on this issue with the doctor's attorney continuing to make the argument that the 16<sup>th</sup> did not matter, it was what was in Dr. Thorn's head that mattered and "what they would have done" had he not been arrested. RP 20-28. However, the judge failed to see the nexus that Dr. Thorn's attorney was trying to show. As indicated, in a Summary Judgment matter, the burden is on the moving party to show there are no issues of fact. *Hartley, supra*. However, in this case the non-moving party himself provided un rebutted evidence that the parties had separated on July 16<sup>th</sup>, 2012. Mr. Albright

also conclusively proved in his argument that this date was the date they separated when he said “But they would have returned together. But the next day [July 17<sup>th</sup>, 2012] is when she had him arrested”. RP 23. Personally, this writer cannot think of a clearer message that their CIR was finished than having the other party arrested. Had he attempted to reconcile and it was reciprocated, this would be a different story; but that is not the case. July 16<sup>th</sup>, 2012 was the last time they were together in this alleged CIR and was the date that had to be used for the running of the statute of limitations.

The obvious problem in Mr. Albright’s argument about what was in Dr. Thorn’s head about the relationship is that a separation must be a signal to both parties that it’s over, and when Dr. Thorn left, this provided a clear date of demarcation for their relationship. The arrest just added to the clarity of that date, it could not change the fact that he left the night before. And looking at it from another perspective, had he not been arrested and they got back together with even a text message, this then would have possibly changed the entire argument and facts of this case. But that is not the case, and as the judge pointed out, the fact that Dr. Thorn filed this matter one day late instead of two days early changes the entire outcome of this summary judgment proceeding. As the judge said, and Mr. Albright agreed,

*THE COURT: It only becomes an issue though because of the date of the filing of the complaint. I mean if it would have been filed two days before it wouldn't be an issue. MR. ALBRIGHT: Right, right I know that. RP 28.*

As can be seen, the judge did not take anything out of context or pick and choose something that was inappropriate to base his ruling. He took the facts as Dr. Thorn portrayed them and made a clear and appropriate decision.

D. This appeal is frivolous and fees and sanctions should be awarded to Ms. Cromer.

RAP 18.9 indicates that:

- a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or authorized transcriptionist preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party. If an award is not paid within the time specified by the court, the appellate court will transmit the award to the superior court of the county where the case arose and direct the entry of a judgment in accordance with the award.

“RAP 18.9 authorizes us to award sanctions against a party who uses the Rules of Appellate Procedure for the purposes of delay, filed a frivolous appeal, or fails to comply with the Rules of Appellate Procedure.” *Schorno v. Kannada*, 167 Wn.App. 894, 904, 276 P.3d 319 (2012). “A frivolous action has been defined as one that cannot be

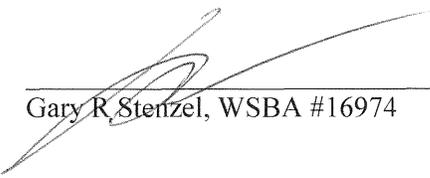
supported by any rational argument on the law or facts.” *Bill of Rights Legal Foundation v. Evergreen State College*, 44 Wn.App. 690, 696-7, 723 P.2d 483 (1986). As previously stated, the statute of limitations for a CIR is three years from the date the parties ended their relationship. *Kelly, supra*. The appellant, by his own admission in his declaration for this proceeding and his testimony before an administrative child support law judge, showed that the appellant knew that they had separated on July 16, 2012 when he left the house. *Supra*. The mere fact that he returned the following day to move his possessions out does not continue the relationship to that day, it only further ratifies that the relationship is over. The three year statute of limitations began to run from July 16, 2012 and the appellant failed to file his action within the required three years. He must have known that there may be a question of fact as to when he separated, and he could have avoided all this by simply filing on the 15<sup>th</sup>, to be sure. As it is Ms. Cromer now has thousands of dollars in defending against Dr. Thorne’s own case, which he and his attorney filed incorrectly. Ms. Cromer should be awarded fees under RAP 18.9 for having to respond to this frivolous action because there is no reasonable argument that the judge erred in anyway; in fact the judge gave Mr. Albright every chance to try and convince him that the 16<sup>th</sup> was an improper date to use, only to make it even more clear that this action should have been filed then or just before on the three year anniversary.

### III. Conclusion

The facts of this case clearly show that the parties CIR ended on the date of July 16, 2012 when the Appellant moved out of their joint residence. There was ample evidence to show that that was the date that the parties CIR ended, even from the Appellant himself. Even so the Appellant files this appeal based on the unsubstantiated legal theory that if one of the parties still thought that their relationship was viable that the actual date of moving out, did not matter in the determination of the statute of limitations time limits for filing such actions. However, the Appellant himself indicated that July 16<sup>th</sup> 2012 was the last time they lived or stayed together, never to resume the CIR. He filed his claim 3 years and 1 day after the date he moved out, and it was time barred. The judge found that this was substantiated by ample evidence and dismissed the case.

Filing this case under this set of facts was and is frivolous and has caused the Respondent to incur thousands of dollars in fees to defend this action, when her primary defense was the Appellant's own statements against interest. He should be ordered to pay her fees for having to respond to this appeal.

Respectfully submitted on this 16<sup>th</sup> day of November 2016 by:

  
\_\_\_\_\_  
Gary R. Stenzel, WSBA #16974

**Declaration of Mailing**

I, Lisa Burns, declare under penalty of perjury pursuant to the laws of the state of Washington that I am now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of twenty-one years; that on November 16, 2016, a copy of this Responsive Brief was delivered by mail to the office of Nathan Albright, Attorney for Petitioner, at 406 W. Broadway Ave, #D, Moses Lake, WA 98837.

Dated this 16<sup>th</sup> day of November 2016.

  
Lisa Burns