

FILED
Court of Appeals
Division III
State of Washington
9/9/2020 9:30 AM

No. 37225-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CATHY LONG (fka KEELE),

Appellant

v.

BRIAN KEELE,

Respondent

APPELLANT'S REPLY BRIEF

Zachary C Ashby, WSBA #49617
Attorney for Cathy Long (fka Keele)
Appellant

Pacific Northwest Family Law
1359 Columbia Park Trail
Richland, WA 99352

APPELLANT'S OPENING BRIEF

Table of Contents

1. Argument 1

2. Conclusion 5

TABLE OF AUTHORITIES

Cases

<i>Aissa v. Aissa</i> , 151 Wash. 468, 276 P. 547 (1929).....	2, 3
<i>Bernier v. Bernier</i> , 44 Wn.2d 447, 267 P.2d 1066 (1954)	2
<i>Fahn v. Cowlitz County</i> , 628 P.2d 813, 685, 628 P.2d 813 (1998)	5
<i>In re dependency of J.M.R.</i> , 160 Wash.App.929, 249 P.3d 193 (2011).....	1
<i>In re Marriage of Brown</i> , 247 P.3d 466, 470, 247 P.3d 466 (2011)	5
<i>In re Marriage of Irwin</i> , 64 Wn.App. 38, 822 P.2d 797, review denied, 119 Wn.2d 1009 (1992).	5
<i>In re Marriage of Sedlock</i> , 69 Wn. App. 484, 849 P.2d 1243	2, 4
<i>Wells v. Wells</i> , 130 Wash. 578, 228 P. 692 (1924)	2

Statutes

RCW 26.09.140.....	5, 6
--------------------	------

Rules

RAP 18.1	5, 6
RAP 5.1.....	1, 6
RAP 5.2(f)	1

1. ARGUMENT

Mr. Keele brings up for the first time several errors in his responsive brief without notice as required in RAP 5.1. The time allotted for such notice under RAP 5.2(f) has long since passed. Accordingly, all arguments regarding the issue of a tenancy in common versus a lien cannot be considered by the Court¹.

The only argument before the based on our Notice of Appeal and is addressed to the limited issue asserting that the trial court erred by delaying division of community property for 9 and 16 years after the final orders were entered.

Mr. Keele's arguments that the length of the tenancy in common is a valid exercise of the Court's discretion are without merit. The Court simply lacked the authority to prolong the partnership between the parties—although essentially cutting Ms. Long out of any control or oversight—because the parties neither agreed to continue it nor is there evidence anywhere that the business is viable or will be viable long-term.

Finally, Mr. Keele's counter request for attorney's fees must be rejected because he is not an attorney and cannot earn attorney's fees. Ms. Long, however, having hired an attorney may request fees at the attorney's rate regardless of whether said attorney is pro bono or not.

1.1. This is not a short term tenancy in common

Mr. Keele is correct in pointing to *In re Marriage of Sedlock*, 69 Wn. App. 484, 849 P.2d 1243, in arguing that a tenancy in common is allowed under Washington State law. As Mr. Keele admits, however, the Court did not consider a long-term tenancy in common as is before

¹ Mr. Keele argued below that the tenancy in common was a valid resolution and the Court agreed with him. When a party actively participates in the entry of order, he cannot later claim that order in error. This rule applied to a father seeking to withdraw his stipulation to terminate his parental rights in *In re dependency of J.M.R.*, 160 Wash.App.929, 249 P.3d 193 (2011). In that case, the father had "actively engaged in the decision to enter into the stipulation." *Id.* at 943. He also had "ample opportunity to discuss the decision with his attorney before agreeing to do so." *Id.* Mr. Keele, likewise, was represented by two attorneys at trial

the Court.

In addition, the division into a tenancy in common in *Sedlock* was found valid by that Court specifically because it left “the parties as tenants-in-common for a short duration.” *Id.* at 500. But the duration here is almost twice the length of the marriage.

On the contrary, the present case is much closer to *Bernier v. Bernier*, 44 Wn.2d 447, 267 P.2d 1066 (1954), where the trial court ordered that one party would have sole use and occupancy of the marital home until the minor child reached 16 years old or that party remarried. *Id.* at 448. Likewise, here, Ms. Long cannot access any value in the home until the youngest child turns 23 and she cannot access any value in the commercial property or business until he turns 30. Only then can she collect any interest and most likely only after Court action to enforce the division.

Mr. Keel’s further reliance on *Wells v. Wells*, 130 Wash. 578, 228 P. 692 (1924) and *Aissa v. Aissa*, 151 Wash. 468, 276 P. 547 (1929) is equally unfounded. In *Wells*, “the trial court awarded to each of the parties an undivided one-half interest in their 37-acre productive fruit farm.” *Id.* at 580. The Court upheld the division because “its earning power will probably furnish to both a living.” *Id.* at 581. And because dividing it would yield in “less than its real value.” *Id.* And the parties were still able at any time to divide the farm by a partition action. *Id.*

Here, however, the land is the only valuable part of the business. As Mr. Keele indicates “As of the date of trial, the business had not yet been profitable, and no income had been derived from it. The expectation has always been that it will become profitable. During the last year of our marriage, our income was from the wife’s SSI, her employment, and from savings.” Responsive brief of B. Keele, citing Testimony of Brian Keele, p. 229-30. In addition, Ms. Long does not enjoy the ability to seek a partition, she does not share in any profits and

has no oversight whatsoever of the business as indicated in the final order. She is completely at Mr. Keele's grace and mercy to tell her if the business is doing well or poorly.

In *Aissa* the court awarded property to the parties as tenants in common "until their minor children become of age". *Aissa*, 151 Wash. at 471. The Court, there, changed the decree to award an undivided one-half interest . . . in fee simple, resulting, of course, in giving to each an equal share in the rents and profits thereof." *Id.* at 472. In doing so, the Court observed "Ordinarily, of course, it is undesirable to decree undivided interests in property as between parties to a divorce decree. But the property . . . seems impracticable of physical severance . . . without sale, and we are not advised a sale at this time would be desirable." *Id.* The Court also left open the option for either party to seek a partition of the property.

Here, again, there is no sharing of rents or profits. Mr. Keele has total and complete control. He controls whether taxes are paid, whether the area is kept up, whether marketing is done for the business, whether all codes are met, who enters the property, and how it is used. Ms. Long suffers only negative effects of ownership with all the liability of an owner and none of the benefits. Further, the property in question, the house and the commercial property, is completely owned and could be burdened with a mortgage, sold, or otherwise divided without losing its use value to Mr. Keele. But none of those options are currently available and will not be available to Ms. Long to take advantage of property she owns and must report on any applications, for 9 and 16 years respectively.

Contrary to supporting Mr. Keele's argument that the property should not be divided now, *Wells* and *Aissa* tend to indicate that it should be divided as soon as possible.

1.2. The trial court simply does not have the authority to delay the division of property for the time it has

The Court has carved out two narrow exceptions to the general rule that the court cannot award property to the parties as tenants in common. A trial court has authority to

award a family residence to divorcing spouses as tenants in common, provided that the tenancy is for a short duration and the spouses' respective interests in the residence are clearly established. *In re Marriage of Sedlock*, 69 Wn.App. 484, 849 P.2d 1243, review denied, 122 Wn.2d 1014 (1993). A divorce decree making spouses tenants in common of a parcel of real property until an optionee decides whether to exercise an option to purchase the parcel is also an award within the trial court's discretion. *In re Marriage of Irwin*, 64 Wn.App. 38, 822 P.2d 797, review denied, 119 Wn.2d 1009 (1992). But neither of these examples applies. We are dealing with 16 years on commercial property and a term of 9 years on residential property—both of which are long terms.

It was, thus, error for the trial court to order that the property should be held for a long-term. The property division should otherwise come into effect now and the option to partition restored or Ms. Long empowered to collect her interest in the property now.

1.3. Attorneys working pro bono may obtain an award of attorney fees

Mr. Keele cannot receive an award of attorney fees because he is not an attorney. Only an attorney acting pro se may request an attorney fee award. *In re Marriage of Brown*, 247 P.3d 466, 470, 247 P.3d 466 (2011) (“We previously explained that *lawyers* who incur fees representing themselves should be awarded attorney fees where fees are otherwise justified because they must take time from their practices to prepare and appear as any other lawyer would. *Leen v. Demopolis*, 62 Wash. App. 473, 486-87, 815 P.3d 269 (1991). But no Washington case extends this reasoning to a nonlawyer pro se litigant.”)

On the other hand, neither RAP 18.1 nor RCW 26.09.140 prohibit an award of attorney fees for an attorney working pro bono. *See Fabn v. Cowlitz County*, 628 P.2d 813, 685, 628 P.2d 813 (1998) (“Appellant argues, however, that counsel for respondents agreed to take the case on a pro bono basis, and thus may not now claim statutory attorney fees. Even if this

disputed allegation is true, the statute does not prevent an award of statutory attorney fees in such a situation.”) Thus, an award of attorney fees may be granted under RAP 18.1 and RCW 26.09.140 regardless of whether the attorney works pro bono or for profit.

2. CONCLUSION

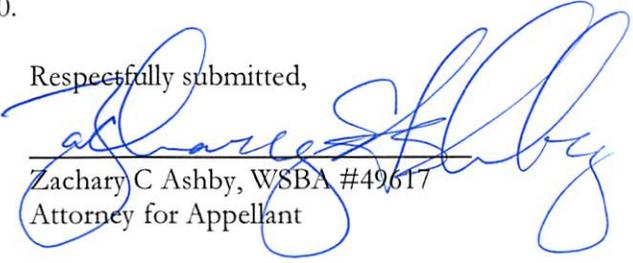
Mr. Keele attempts to assign error without notice of appeal or a cross notice of appeal as required by RAP 5.1 and 5.2(f). His arguments regarding tenancy in common being changed to a lien cannot be considered by the Court.

Mr. Keele’s reliance on case law is mistaken. The cases show that the Court may only make an property division as a tenancy in common for a short term, if at all. The division, as determined by the trial court, should become effective without delay and Ms. Long free to seek that division as both parties were able to do under cases cited.

Ms. Long further requests fees under RAP 18.1 and RCW 26.09.140.

Dated this 4th day of September 2020.

Respectfully submitted,



Zachary C Ashby, WSBA #49617
Attorney for Appellant

PACIFIC NORTHWEST FAMILY LAW

September 09, 2020 - 9:30 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 37225-1
Appellate Court Case Title: In re the Marriage of: Cathy Ann Keele and Brian Keele
Superior Court Case Number: 17-3-00497-0

The following documents have been uploaded:

- 372251_Briefs_20200909092712D3229279_3846.pdf
This File Contains:
Briefs - Petitioners Reply - Modifier: Amended
The Original File Name was Appellant Reply Brief - Signed.pdf

A copy of the uploaded files will be sent to:

- bdkeele4@yahoo.com
- kimmy@pnwfamilylaw.com

Comments:

Sender Name: Zachary Ashby - Email: zca@pnwfamilylaw.com

Address:

1359 COLUMBIA PARK TRL

RICHLAND, WA, 99352-4770

Phone: 509-572-3700

Note: The Filing Id is 20200909092712D3229279