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Court of Appeals  
Division III  
State of Washington  
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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

No. 37225-1-III

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CATHY LONG (fka KEELE),

Appellant

v.

BRIAN KEELE,

Respondent

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APPELLANT'S OPENING BRIEF

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APPELLANT’S OPENING BRIEF

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## 1. ISSUE

Under Washington divorce law, does a trial court err by entering a final order that causes the parties to be tenants-in-common and delays the disposition of the property for another 9 and 16 years after the final orders were entered upon completion of a full trial?

## 2. STATEMENT OF THE CASE

2.1. The parties were married on February 15, 2003. CP 66.

2.2. A Divorce trial was held the week of May 29, 2019

2.3. Final Divorce Orders were entered on September 9, 2019. CP 13-41.

2.4. A motion for reconsideration was filed on September 16, 2019 CP 42-48.

2.5. The Court's Order on Motion for reconsideration was issued on October 31, 2019 which allowed for sale or financing of the real property. CP 49-51.

2.6. Amended Final Orders were entered on December 10, 2019 which are identical to the orders entered on September 9, 2019 but add the language allowing for sale or financing of the real property. CP 55-76.

2.7. During the marriage, the parties signed a Community Property Agreement, converting all property to community property. RP 230-232

2.8. Before filing for divorce, the parties purchased the marital home ("Home", real property zoned for commercial use ("Commercial Property"), and started a business selling plants and landscaping ("Business"). RP 226

2.9. The Court awarded 50% of the net proceeds from sale of the House, the

Commercial Property, and the Business to each party. CP 66-76

2.10. Neither the House nor the Commercial Property are burdened with debt. RP 99, 112

2.11. Neither party has appealed the equal division of property.

2.12. Appellant (“Wife”) is disabled and receives Social Security Disability Insurance (SSDI) payments and works part-time as a substitute teacher as her only source of income. RP 108-09

2.13. Appellee (“Husband”) runs the Business and receives income from it. RP 314-18.

2.14. Husband also has possession of the House and the Commercial Property.

2.15. Husband has no rent or mortgage obligation.

2.16. Wife must pay rent.

2.17. Husband was named the primary residential parent. CP 55-65

2.18. At the time of trial, the youngest child was 14 years old. CP 55-65.

2.19. During the marriage, the only sources of income were Wife’s SSDI and income generated from the Business. RP 108-109.

2.20. Husband receives SSDI money as the responsible payee on behalf of the children. CP 24-30.

2.21. Husband also received 65% of his Hanford Employee Welfare Trust (HEWT) Pension to benefit the children.

2.22. The parties have two children: the younger child is on the autism

spectrum and has bowel incontinence that is expected to be cured through therapy; the oldest child has been diagnosed with Oppositional Defiant Disorder.

RP

2.23. At no time has there been a finding that either child would be dependent on Husband for the next 16 years.

2.24. The Final Divorce Order divides the property in half, but Wife cannot receive any benefit from the House until "the youngest child's 23rd birthday," and no benefit from the Commercial Property "on the youngest child's 30th birthday."

CP 49-51.

2.25. Before she may exercise her option, she must return to court for further litigation because" the court shall retain jurisdiction over said property and the parties' co-ownership thereof. This shall include the court's ability to hear matters related to financing, improvements, and future "buy-out" of the Wife's interest in the properties." CP 49-51.

2.26. Wife is left as tenant in common of the property, but has the following restrictions: "The Husband shall have exclusive use and possession of the properties and shall maintain them as a reasonably prudent owner, including an obligation to maintain taxes, (including any past due property taxes), insurance, and utilities. The Husband may list any of the properties' (sic) for sale, and shall have exclusive decision making regarding all aspects of the property and specifically with regard to a decision to sell the entirety of either property." CP 71-76.

2.27. The trial court included in its order a finding that “In so doing, the Court balances [Wife’s] reasonable interest in accessing this equity with the need to provide for both children and in particular considers the challenges faced by the youngest child to become self-sufficient.” CP 49-51.

2.28. Wife is 54 years old and will be 63 when she receives her share of the House and 70 when she receives her share of the Commercial Property.

2.29. Based on the division of property, the court awarded no spousal maintenance.

### 3. ARGUMENT

The Court should find that the trial court made an error of law when ordering that the division of property be delayed until after 9 years for the House and 16 years for the Commercial Property from entry of the Final Divorce Orders.<sup>1</sup> The trial court’s interpretation of case law is reviewed *de novo*. *State v. Willis*, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004). By delaying the division of property and prolonging the period of tenancy-in-common, the court subjects the parties to further litigation and subjects Wife to the burdens and liabilities of property ownership without any benefit to her.

#### **3.1. The court may order a tenancy-in-common when it is for a short duration.**

When a “tenancy-in-common [is] intended to be of short duration and the

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<sup>1</sup> The division of the property is not at issue. Indeed, no party has appealed the division of the property itself. The only issue is whether the trial court followed case law in delaying the effect of its order for more than a decade, leaving the parties as tenants-in-common for a period of time longer than they were married.

parties' respective interests in the home [are] clearly established by the court" the court fulfills its mandate to dispose of all property before it. *Marriage of Sedlock*, 69 Wash.App. 484, 500, 849 P.2d 1243 (1993). In *Sedlock*, the Court was asked to determine the application of *Shaffer v. Shaffer*, 43 Wash.2d 526, 262 P.2d 763 (1953) to a trial court decision to leave the parties as tenants-in-common. In *Sedlock*, the trial court has awarded the family home to the parties as tenants-in-common and required the home be sold for fair market value within a fixed period of time. *Sedlock*, 43 Wash. 2d. at 498. The court in that case refused to find fault with the order reasoning that "the vice of the award [in *Shaffer*] was that it did not finally fix the parties' interests in the home . . . the result was as if the property had not been divided at all." *Id.* at 499. The court found that "the tenancy in common was intended to be of short duration and the parties' respective interest in the home were clearly established by the court." *Id.* at 500. It further held that the tenancy-in-common approach considers taxing issues and that "an order to sell within a short period of time and a ruling concerning the parties' fractional shares" avoid undesired tax consequences. *Id.* In other words, a tenancy-in-common is an approved form of division if the tenancy is for a fixed, short period.

Here, as in *Sedlock*, the court ordered that the parties remain tenants-in-common for a fixed period of time. Unlike *Sedlock*, however, the parties will be required to remain financially connected until the youngest child is 30 years old or 16 years from entry of the Final Divorce Order. In other words, they must remain tenants-in-common for a period *longer than* they were married. Contrary

to *Sedlock*, the parties here will be tenants in common for a long duration. This is done even though the Husband already receives all SSDI benefits on behalf of the children and the HEWT Pension division was done to benefit the children.

### **3.2. The court's order subjects the parties to further litigation**

Unlike *Sedlock*, the court not only leaves them subject to potential further litigation, but encourages litigation by leaving them tenants-in-common over the next 16 years. Certain duties are placed upon Husband to maintain the property, taxes, insurance, etc. that subject him to suit by Wife should he fail to do so. He is also obligation to pay taxes under the order, but Wife will have no recourse should he fail to do so and jeopardize their shared interest than to file suite against him. Again, once the 9 and 16 year periods have ended, Wife must once again go to the court in order to exercise her option to have the properties financed or sold.

### **3.3. The order came after a trial in which the parties asked for a division of property**

The court may order parties to be tenants in common when done in connection to a settlement agreement. *Byrne v. Ackerlund*, 108 Wash.2d 445, 739 P.2d 1138 (1987). In *Byrne*, the parties had entered into a settlement agreement under which they would share ownership for community property for an indefinite period. *Id.* at 446. Under the agreement, the wife was also given a lien that would be satisfied upon sale of the property. *Id.* at 446-47. The wife filed to have the property partitioned to satisfy her lien, but the Court declined to do so. *Id.* at 447. In declining her request, the Court distinguished *Shaffer* on three

grounds. First, a lien is different than the tenancy-in-common that gave rise to *Shaffer*. *Id.* at 449. Second, a lien is less likely to give rise to future litigation. *Id.* at 450. Third, and most importantly, the parties in *Byrne* had agreed on the outcome. *Id.* at 451. The Court specifically held that “Shaffer does not prevent a court from accepting such an arrangement in effectuating the parties’ intent.” *Id.*

The parties here, unlike in *Byrne* did not agree to a long-term co-ownership of the property nor to delay the division of the property. The delay itself was an invention of the trial court. The Final Divorce Order was entered as a result of several days of trial.

**3.4. The Court left Wife financially worse off due to the prolonged tenancy in common and the delayed division of property.**

As a “co-equal” owner of the House and the Commercial Property, the trial court has subjected Wife to the liabilities of property ownership without any way to protect herself. Should Husband fail to maintain the Commercial Property and a customer is injured, Wife would be subject to suit. If someone is injured while visiting the House, Wife must make up the difference if Husband hasn’t bought enough insurance. If the Husband fails to pay taxes, Wife is liable. If the parties incur a tax lien because Husband fails to pay taxes, Wife cannot defend against it. If the Husband neglects the upkeep, Wife must file suit and incur attorney fees. If the Husband does anything to damage the value of the property, Wife suffers the damage without protection.

Wife, as a tenant-in-common, must report that she is an owner of

considerable property over the next 16 years. However, because she cannot use, possess, receive rents from, or otherwise benefit from the property she receives only the burdens of ownership.

As a recipient of SSDI, Wife's income is limited and supplemented with some substitute teaching income of about \$500 a month averaged during the year. But the high worth of assets disqualify her from applying for welfare benefits. While she must find a way to pay rent, buy food, buy clothing, provide transportation and other living expenses on her limited income; she is prohibited from receiving most forms of welfare benefits because she is a co-owner of the House and the Commercial Property. So that not only has the court delayed her ability to benefit from her ownership of the House and the Commercial Property for 9 and 16 years respectively, it has forced her to rely on income that is less than the minimum wage in Washington.

Even if she were to recover financially and find a source of income that allows for a living standard above poverty, any time she applies for a loan the House and Commercial Property will be included in any credit report. Along with her ownership would come any liens or other obligations that Husband may incur by neglect, accident, or liability. Nothing stops Husband's creditors from filing their own liens and nothing stops Husband from allowing liens to attach from his own debts.

On the other hand, Husband receives all the benefit of ownership. He receives income generated from the Commercial Property, has no rent or mortgage

obligation, and determines whether he pays taxes or not. Husband determines how the property is used or not used, which means that he only must consider himself, even though other co-owners of the property may be harmed.

Furthermore, Wife receives no benefit from the Commercial Property Until she is 70 years old. That means well into retirement she must scrape by on SSDI and hope that she continues to receive substitute teaching appointments. Of course, she also must also hope that she survives to see any benefit at all.

If she cannot exercise her rights as a tenant in common and do things like alienate her tenancy or charge rent, Wife has been given an empty award—one from which she may never see the benefit.

The court should find that the Final Divorce Order errs by delaying the division of the property for a period of 9 years and 16 years, and order that the property be divided within a short period of time.

#### **4. CONCLUSION**

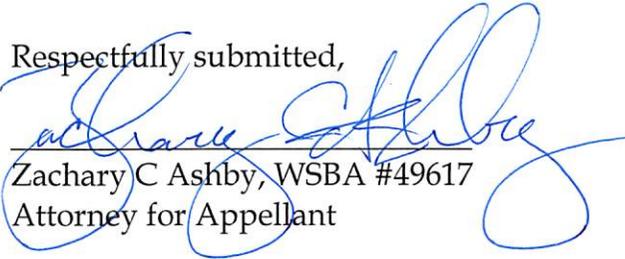
Because the trial court erred in ordering that the division of House not take place for 9 years and the division of the Commercial Property not take place for 16 years from entry of the Final Divorce Decree, Cathy Keele asks the Court to shorten the time until she may benefit from the division of real property.

**Attorney Fees and Costs:** Ms. Long respectfully requests an award of attorney fees and costs pursuant to RCW 26.09.140. The appellate court has the discretion to order a party to pay the other party's attorney fees and costs associated with the appeal of a dissolution action. RCW 26.09.140. In exercising its

discretion, the Court should consider the arguable merit of the issues on appeal and the parties' financial resources. *In re Marriage of King*, 66 Wash.App. 134, 139, 831 P.2d 2094 (1992). Ms. Long will file her financial declaration at least ten days before the date of oral argument, as required by RAP 18.1(c).

Dated this 2<sup>nd</sup> day of March 2020.

Respectfully submitted,



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Attorney for Appellant

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**March 02, 2020 - 4:06 PM**

**Transmittal Information**

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