No. 96952-3

SUPREME COURT
OF THE STATE OF WASHINGTON

ROLFE GODFREY and KIRSTINE GODFREY, husband and wife and their marital community composed thereof,

Respondents,

v.

STE. MICHELLE WINE ESTATES LTD, dba CHATEAU STE. MICHELLE, a Washington Corporation; and SAINT-GOBAIN CONTAINERS, INC.,

Petitioners.

and

ROBERT KORNFELD,

Additional Respondent.

JOINT ANSWER TO PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

KORNFELD TRUDELL BOWEN & LINGENBRINK, PLLC

By: Robert Kornfeld
WSBA No. 10669

3724 Lake Washington Blvd. N.E.
Kirkland, WA 98033
(425) 893-8712

Attorneys for Respondents
Rolfe Godfrey, Kristine Godfrey, and Robert Kornfeld

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

STATE CASES

STATUTES

RULES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

A. Introduction.

The Court of Appeals correctly applied this Court's decision in *State v. Lile*, 188 Wn.2d 766, 398 P.3d 1052 (2017), in holding that the trial court's entry of a stipulated order continuing the parties' deadline for disclosure of witnesses "impacted only the parties' convenience" and "did not impact the court's calendar, the operation of the court, the parties' rights, orderly procedure or due process." Division Two's holding that respondent Rolfe Godfrey's affidavit of prejudice was timely under former RCW 4.12.050 because it was filed before the trial court made any discretionary rulings is entirely consistent with *Lile* and presents no issue of issue of substantial public interest. RAP 13.4(b)(1), (4). Mr. Godfrey and his co-respondent, trial counsel Robert Kornfeld, who was improperly sanctioned by the trial court following its rejection of the timely affidavit of prejudice, ask this Court to deny review of the Court of Appeals' unpublished decision.

B. Restatement of Issue.

Is a trial court's approval of the parties' stipulation extending only the deadline for the disclosure of their witnesses a nondiscretionary ruling under RCW 4.12.050 because it does not affect the court but only the rights or convenience of the parties?

C. Restatement of the Case.

Appellant Rolfe Godfrey suffered a devastating injury to his hand in February 2010, when a wine bottle manufactured by respondent Saint Gobain and bottled by respondent Chateau Ste. Michelle (collectively "St. Michelle") shattered while he was opening it. (Op. 1)[1] After Mr. Godfrey sued Ste. Michelle, Pierce County Superior Court Judge Katherine Stoltz ("the trial court") denied Mr. Godfrey's affidavit of prejudice under former RCW 4.12.050, ruling the affidavit untimely because she had already exercised discretion in signing a stipulated order extending the deadline for Ste. Michelle to disclose its primary witnesses and for disclosure of all rebuttal witnesses. (Op. 1; CP 158-59, 205-06)[2]

After denying Mr. Godfrey's affidavit of prejudice, the trial court presided over a bench trial in October 2014, at which it excluded nearly all of Mr. Godfrey's liability evidence (as well as his expert testimony based on that evidence), while admitting every

---

[1] This Restatement of the Case is supported by citation to the Court of Appeals Unpublished Opinion, cited as "Op.," and the record before the trial court.

[2] The trial court also ruled that it had exercised discretion in signing a stipulated order for a CR 35 exam of Mr. Godfrey. (CP 206) In fact, however, the trial court did not sign the CR 35 stipulation – a superior court commissioner did. (CP 163) Ste. Michelle has now abandoned its argument that another judicial officer's order could constitute an exercise of the trial court's discretion. (*See* Pet. 4)

exhibit offered by Ste. Michelle, as a sanction for failing to file a "separate" Joint Statement of Evidence. (*See generally* App. Br. 7-15) Mr. Godfrey's trial counsel, respondent Kornfeld, had developed a massive infection from dental surgery on the date the Joint Statement of Evidence was due; he was then hospitalized and unable to work for two weeks. (CP 484) While Mr. Kornfeld was incapacitated, Ste. Michelle unilaterally filed a "Joint Statement of Evidence Submitted by Defendants," which did not include Mr. Godfrey's previous objections to Ste. Michelle's exhibits. (CP 314-36)

The trial court found in favor of Ste. Michelle and entered judgment against Mr. Godfrey. (CP 765-66) The trial court also imposed monetary sanctions of $10,000 against Mr. Kornfeld for not filing a separate Joint Statement of Evidence. (CP 761-62)[3]

In a July 2016 unpublished opinion, the Court of Appeals reversed, holding Mr. Godfrey's affidavit of prejudice was timely. The Court of Appeals did not address Mr. Godfrey's alternative

[3] On the second day of trial, September 30, 2014, Mr. Godfrey filed a separate "Plaintiff's" JSE, listing the same exhibits that Ste. Michelle had listed in the JSE it had filed a month earlier, as well as objections to Ste. Michelle's proposed exhibits. (CP 527-86)

argument that the trial court erred in excluding nearly all of his liability evidence. (*See* App. Br. 25-38; Reply Br. 9-23)

In January 2017, this Court deferred ruling on Ste. Michelle's petition for review, pending its decision in *State v. Lile*, No. 93035-0. After issuing that decision, this Court, in November 2017, granted the petition and remanded to the Court of Appeals for reconsideration in light of *State v. Lile*, 188 Wn.2d 766, 398 P.3d 1052 (2017).

Over one year later, after considering *Lile* and the parties' supplemental briefing, the Court of Appeals again held in a December 27, 2018, unpublished decision that the trial court did not exercise discretion by signing the stipulated order extending witness disclosure deadlines. (Op. 1) Focusing on the substance of the trial court's order, the Court of Appeals held that the trial court's approval of the stipulation in this case was not discretionary because "extending the deadline for the parties to disclose witnesses to each other impacted only the parties' convenience" and "did not impact the court's calendar, the operation of the court, the parties' rights, orderly procedure, or due process." (Op. 5) The Court of Appeals remanded for a new trial before a different superior court judge.

Over nine years after Mr. Godfrey was injured, almost five years after trial, and almost three years after its initial petition, Ste. Michelle again petitions for review.

D. Argument Why Review Should Be Denied.

1. The Court of Appeals faithfully applied *Lile* in holding that the trial court's approval of the parties' stipulation extending witness disclosure deadlines did not involve discretion because it affected only the parties, and not the duties or functions of the court.

The Court of Appeals decision does not conflict with *Lile* or this Court's other decisions. *See Lile* specifically rejected the notion, espoused by St. Michelle, that *any* stipulated order calls for the trial court's exercise of discretion. Rather, *Lile* held that approving a stipulation does not invoke the trial court's discretion when – as here – it "affect[s] *only* the rights or convenience of the parties," 188 Wn.2d at 778, ¶ 28 (emphasis in original), and did not impact the "'duties and functions of the court.'" 188 Wn.2d at 778, ¶ 29, quoting *State v. Parra*, 122 Wn.2d 590, 603, 859 P.2d 1231 (1993). This Court should deny review. RAP 13.4(b).

The version of RCW 4.12.050(1)[4] at issue in this case granted any party or the party's attorney the absolute right to establish the prejudice of a judge by filing an affidavit stating his or her belief that the judge cannot be fair and impartial:

> Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge.

Former RCW 4.12.050(1) placed no limits on the right to file such an affidavit of prejudice, except that the affidavit must be filed before the judge has made a ruling involving discretion:

> PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion . . . .

---

[4] Mr. Godfrey filed his affidavit of prejudice in 2014, before the recent amendments to RCW 4.12.050. *See* Laws of 2017, ch. 42. Ste. Michelle agrees that the version of RCW 4.12.050 in effect in 2014 governed Mr. Godfrey's affidavit of prejudice (Pet. 4 n.1), and thus all references to RCW 4.12.050 in this Answer are to the 2014 version.

Lile interpreted this former version of RCW 4.12.050. In *Lile*, the defendant filed an affidavit of prejudice after the trial court granted the parties' stipulated request to continue the trial date. 188 Wn.2d at 771, ¶ 9. The trial court ruled that granting the agreed continuance was a discretionary decision and thus the affidavit of prejudice was untimely. 188 Wn.2d at 772, ¶ 11.

In affirming the trial court, this Court held that "*the substance and impact* of a request is the most relevant consideration for assessing whether discretion is employed in ruling on the request." 188 Wn.2d at 778, ¶ 27 (emphasis added). This Court held that approving the stipulated trial continuance was discretionary because continuing a trial date "impacted the 'duties and functions of the court'" by contributing to delays in the case that ultimately forced its transfer to another judge. 188 Wn.2d at 772, 778, ¶¶ 12, 29, quoting *Parra,* 122 Wn.2d at 603. The *Lile* Court explained that while approving a stipulation that impacts the court involves discretion within the meaning of RCW 4.12.050, the same is not true of a stipulation "affect[ing] *only* the rights or convenience of the parties, [and] *not* involv[ing] any interference with the duties and functions of the court." 188 Wn.2d at 778, ¶ 28, quoting, *Parra,* 122 Wn.2d at 603 (emphasis in original; alterations in original and added).

The Court of Appeals decision on remand in this case is entirely consistent with *Lile*. As this Court instructed, the Court of Appeals determined whether the stipulation extending witness disclosure deadlines was discretionary "by considering the substance and impact of the request," specifically whether "the request impacts the functions and duties of the courts and the efficient operation of the courts" or "only the rights or convenience of the parties." (Op. 4, citing, *Lile*, 188 Wn.2d at 778) The Court of Appeals then observed that the stipulation "extending witness disclosure deadlines did not impact the court's functions or duties," and instead "impacted only the parties' convenience," and thus its approval was nondiscretionary. (Op. 5)

The Court of Appeals correctly focused on the "substance and impact" of the stipulation as mandated by *Lile*. 188 Wn.2d at 778, ¶ 27. Unlike the continuance at issue in *Lile*, extending the witness disclosure deadlines in this case impacted only when the parties would exchange information *between themselves*. The stipulation did not continue a hearing, did not change a trial date, did not affect how or when the case would be resolved, and did not require any action whatsoever from the trial court.

Indeed, in briefing the issue twice in the Court of Appeals and twice in this Court, Ste. Michelle has *never* identified any impact that the stipulation in this case had on the trial court. Instead, Ste. Michelle discussed the impacts of continuing *a trial* highlighted by this Court in *Lile* (Pet. 11), nowhere explaining how the continuance of a witness disclosure deadline has the same, or any, "significant impact on the efficient operation of our courts" caused by a trial continuance. *Lile*, 188 Wn.2d at 778, ¶ 29.

All of the cases identified by *Lile* as "relevant precedent" involved continuances of a trial date. 188 Wn.2d at 777, ¶ 26 (citing *Floe v. Studebaker*, 17 Wn.2d 8, 134 P.2d 718 (1943); *State v. Espinoza*, 112 Wn.2d 819, 774 P.2d 1177 (1989); *State v. Dennison*, 115 Wn.2d 609, 801 P.2d 193 (1990)). The same is true of the only other case cited by Ste. Michelle, which involved a stipulated "continuance" of a trial date. *See Marriage of Welton*, 180 Wn. App. 1027, 2014 WL 1514595 (2014) (unpublished, cited per GR 14.1) (Pet. 12-13 n.8).[5] As this Court noted in *Lile*, the impacts of a trial continuance are especially pronounced in criminal cases where –

[5] While the decision here is entirely consistent with *Lile*, this Court should reject Ste. Michelle's suggestion that a purported "inconsistency" with *Welton* – an *unpublished* decision – supports review. RAP 13.4(b)(2) provides that a conflict with "a *published* decision of the Court of Appeals" may provide grounds for accepting review. (emphasis added).

unlike civil cases – both the defendant and public have an important interest in a speedy trial. 188 Wn.2d at 778, ¶ 29.

Ste. Michelle ignores that *Lile* did not overrule prior cases holding that rulings on scheduling matters that do not result in the continuance of trial, including setting discovery deadlines, do not involve discretion under RCW 4.12.050. *See, e.g., Hanno v. Neptune Orient Lines, Ltd.*, 67 Wn. App. 681, 682-83, 838 P.2d 1144 (1992) (order setting dates for mediation, plaintiff's settlement demand, and pretrial conference was "arrangement of the calendar"); *Tye v. Tye*, 121 Wn. App. 817, 821, 90 P.3d 1145 (2004) (affidavit was timely though filed after case scheduling order specifying dates for discovery cutoff and other deadlines). *Accord, Matter of Adoption of A.W.A.*, 4 Wn. App. 2d 1036, 2018 WL 3238966, *2 (2018) (distinguishing *Lile* because order setting new case schedule deadlines following appellate court's decision on discretionary review "is not a discretionary decision under former RCW 4.12.050(1), rather than continuance of a preexisting trial date.") (unpublished, cited per GR 14.1). These cases confirm that a stipulated extension of witness disclosure deadlines cannot involve discretion under former RCW 4.12.050.

Faced with the irrefutable fact that extending witness disclosure deadlines did not impact the "duties and functions of the

court," *Lile*, 188 Wn.2d at 778, ¶ 29, Ste. Michelle argues that *Lile* actually held that "a discretionary decision is one that implicates choice." (Pet. 14) *Lile* nowhere adopted this "bright-line rule."

Ste. Michelle takes entirely out of context this Court's observation in *Lile* that "[t]o either grant or deny a motion involves discretion" (Pet. 11). First, this Court was referring to the decision to grant or deny *a motion*, not approve a stipulation. *See Lile*, 188 Wn.2d at 778, ¶ 28 (quoting *Parra*, 122 Wn.2d at 601);[6] *see also Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 578, 754 P.2d 1243 (a court's discretion is invoked where "the court may either grant or deny *a party's* request") (emphasis added) (cited at Pet. 13 n.9), *rev. denied*, 111 Wn.2d 1025 (1988), *cert. denied*, 490 U.S. 1015, 109 S.Ct. 1736, 104 L.Ed.2d 174 (1989). More importantly, however, Ste. Michelle ignores the *Lile* Court's reaffirmation of "the proposition that the substance and impact of a request is the most relevant consideration . . . *regardless of what form the request takes.*" 188 Wn.2d at 778, ¶ 27 (emphasis in original). *Lile* expressly distinguished "certain stipulated agreements," *i.e.*, those affecting only the parties, from motions because unlike a motion they "would

[6] *Parra* involved unopposed motions, which this Court distinguished from stipulations, explaining that "a party's decision not to object does not constitute a stipulation by that party." *Parra*, 122 Wn.2d at 602.

not invoke the discretion of the court for resolution." 188 Wn.2d at 778, ¶ 28 (quoting *Parra*, 122 Wn.2d at 600 (internal quotation and alterations omitted)).

Moreover, Ste. Michelle's purported "bright line rule" renders the word "discretion" in RCW 4.12.050 entirely superfluous. "Statutes must be interpreted and construed so that all the language used is given effect." *Spokane Cty. v. Dep't of Fish & Wildlife*, 192 Wn.2d 453, 458, ¶ 9, 430 P.3d 655 (2018) (quoted source omitted). Every decision of a judge – by definition – "implicates choice" (Pet. 14), regardless whether it is considered an "order or ruling involving discretion" within the meaning of former RCW 4.12.050(1).

Indeed, Ste. Michelle concedes that under its interpretation of *Lile* any court ruling is discretionary simply because it "requires action by a trial court." (Pet. 6) But that is not what former RCW 4.12.050 says – only "an[] order or ruling involving *discretion*" deprives a party of their right to disqualify a judge. (emphasis added) The Court of Appeals correctly rejected Ste. Michelle's circular argument that "the inquiry for discretion" is "whether the court had discretion to grant or deny the relief." (Op. 4)

Ste. Michelle's bright-line rule is also entirely divorced from the reasoning of *Lile*. Approving a stipulation impacting the duties

and functions of the court involves discretion because a court cannot rely on the parties to assess those impacts and must instead assess them itself. But Ste. Michelle's contention that courts may *never* consider the substance or impact of a decision at all, only the fact that a decision – any decision – was made is directly contrary to *Lile*, 188 Wn.2d at 778, ¶ 27 (emphasis in original).

Ste. Michelle's reliance on the unremarkable fact that trial courts generally have discretion to make "case management rulings" does nothing to explain how a ruling on a stipulated request affecting only the parties could be discretionary within the meaning of former RCW 4.12.050(1). (Pet. 13-16) The same is true of Ste. Michelle's reliance on Pierce County Local Civil Rule 3(e)'s requirement that "good cause" exist to amend a case schedule, failing to address the *Lile* Court's observation that the parties' agreement to modify a deadline affecting only themselves, in and of itself, constitutes good cause and reason enough to approve it. 188 Wn.2d at 778, ¶ 28.

Ste. Michelle's stilted interpretation of former RCW 4.12.050(1) would nullify the long-standing right of parties to disqualify a judge – a right this Court affirmed was "unqualified." *Lile,* 188 Wn.2d at 781, ¶ 35. If affixing its signature to the stipulation in this case required the trial court to exercise "discretion" under

RCW 4.12.050, then approving any stipulation – no matter how mundane or irrelevant to the operation of the court – would be a discretionary act. Parties should be encouraged to resolve matters that affect only themselves by stipulation without forfeiting the right to a change of judge. *Parra*, 122 Wn.2d at 601 ("Stipulations are favored by courts and will be enforced unless good cause is shown to the contrary."). For that reason, parties do not "invoke[] the discretion of the court" by resolving "pretrial disputes" among themselves such "as admissibility of evidence, discovery, identity of witnesses, and anticipated defenses." *Parra*, 122 Wn.2d at 600.

The Court of Appeals decision is entirely consistent with *Lile* and *Parra*. The Court of Appeals properly vacated the trial court's judgment, as well as the sanctions order entered against respondent Kornfeld because the trial court lost authority to act once Mr. Godfrey filed a timely affidavit of prejudice. This Court should deny Ste. Michelle's renewed petition for review.

2. Review would hinder, not further, the public interest.

Ste. Michelle's assertion that the Court of Appeals unpublished decision raises an issue of substantial public interest is without merit. RAP 13.4(b)(4). The Court of Appeals did not "muddle[]" the law or adopt a "vague," "highly subjective and . . .

unworkable" "'duties and functions' test" (Pet. 17) by applying the standard this Court adopted in *Lile* – whether "the request impacts the functions and duties of the courts" or "only the rights or convenience of the parties." (Op. 4, citing, *Lile*, 188 Wn.2d at 778)

Equally unfounded is Ste. Michelle contention that under the Court of Appeals decision a *sua sponte* ruling "chang[ing] a court date" would negate the right to file an affidavit of prejudice (Pet. 16 (emphasis removed)) – a hypothetical nowhere suggested by Division Two's unpublished decision. The Court of Appeals properly focused on whether a trial court exercises discretion in approving an order sought by both parties that does nothing to the court's schedule. (Op. 5 (stipulation was nondiscretionary because "[u]nlike in *Lile*, the parties here did not request a trial continuance or otherwise seek a change that would impact the court's schedule").

Finally, Ste. Michelle's concern that parties may "unknowingly waive their right to disqualify a judge by agreeing to an early case management request" (Pet. 17) rings entirely hollow given its conduct in this case, in which it has consistently sought to delay Mr. Godfrey's ability to recover for his disabling injury suffered in 2010. Mr. Godfrey could have never predicted that Ste. Michelle would spend more than five years and untold attorney's fees arguing that the parties'

agreement to continue a deadline affecting only themselves deprived him of his "unqualified" right to file an affidavit of prejudice.

"Justice in all cases shall be administered openly, and without unnecessary delay." Wash. Const. Art I, § 10. If there is a "substantial public interest" at play here, RAP 13.4(b)(4), it is Mr. Godfrey's right to a prompt and impartial determination of his claims against Ste. Michelle, not Ste. Michelle's interest in prolonging that resolution, while making it as expensive as possible for Mr. Godfrey. This Court should deny review and allow Mr. Godfrey's claim to proceed to trial before a fair and impartial judge.

3. RAP 13.7(b) requires this Court, or the Court of Appeals, to address the trial court's error in excluding nearly all of Mr. Godfrey's evidence before affirming the judgments.

Respondents have consistently argued in the Court of Appeals and in this Court that the trial court's error in excluding nearly all of Mr. Godfrey's liability evidence and imposing $10,000 in sanctions against Mr. Kornfield for failing to file a "separate" Joint Statement of Evidence provides an independent basis for reversal. (App. Br. 25-38; Reply Br. 9-23; 2016 Ans. to Pet. 17 n.6; Supp. Br. 9) Ste. Michelle's contention that respondents have now waived an alternate

argument they consistently advanced is entirely frivolous.[7] Before the judgments in this case may be affirmed, either this Court or the Court of Appeals on remand must resolve whether the trial court independently erred in excluding nearly all of Mr. Godfrey's liability evidence and in sanctioning trial counsel. RAP 13.7(b).

E. Conclusion.

This Court should deny review so that Mr. Godfrey receives a fair trial before an impartial tribunal.

Dated this 25th day of April, 2019.

SMITH GOODFRIEND, P.S.

By: _____
Howard M. Goodfriend
WSBA No. 14355
Ian C. Cairns
WSBA No. 43210

KORNFELD TRUDELL BOWEN & LINGENBRINK, PLLC

By: _____
Robert Kornfeld
WSBA No. 10669

Attorneys for Respondents
Rolfe Godfrey, Kristine Godfrey, and Robert Kornfeld

---

[7] RAP 13.7(b) expressly provides that if this Court "reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, [this] Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues." That is precisely what Mr. Godfrey argued in his Answer to Ste. Michelle's 2010 Petition, in which Ste. Michelle claims he waived review of this alternative argument. (Answer 17 n.6)

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 25, 2019, I arranged for service of the foregoing Joint Answer to Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	___ Facsimile ___ Messenger ___ U.S. Mail _✓_ E-File
Robert Kornfeld Kornfeld Trudell Bowen & Lingenbrink PLLC 3724 Lake Washington Blvd. N.E. Kirkland, WA 98033-7802 robert@kornfeldlaw.com	___ Facsimile ___ Messenger ___ U.S. Mail _✓_ E-Mail
Emily J. Harris Kelly H. Sheridan Corr Cronin LLP 1001 4th Ave Ste 3900 Seattle, WA 98154-1051 eharris@corrcronin.com ksheridan@corrcronin.com	___ Facsimile ___ Messenger ___ U.S. Mail _✓_ E-Mail
Michael B. King Gregory M. Miller Carney Badley Spellman PS 701 5th Ave Ste 3600 Seattle WA 98104-7010 king@carneylaw.com miller@carneylaw.com	___ Facsimile ___ Messenger ___ U.S. Mail _✓_ E-Mail
Russell A. Metz Metz & Associates, P.S. 2101 4th Ave., Suite 2400 Seattle, WA 98121 russm@metzlawfirm.com	___ Facsimile ___ Messenger ___ U.S. Mail _✓_ E-Mail

DATED at Seattle, Washington this 25th day of April, 2019.

Sarah N. Eaton

No. 96952-3

SUPEME COURT
OF THE STATE OF WASHINGTON

ROLFE GODFREY and KIRSTINE GODFREY, husband and wife and their marital community composed thereof, Respondents, v. STE. MICHELLE WINE ESTATES LTD. dba CHATEAU STE. MICHELLE, a Washington Corporation; and SAINT-GOBAIN CONTAINERS, INC., Petitioners, and ROBERT KORNFELD, Additional Respondent.	RESPONDENTS' GR 14.1 AUTHORITY

180 Wash.App. 1027

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 3.

In re the MARRIAGE OF Gene Edward WELTON, Appellant,
and
Marina Lee Martin Welton,
Respondent and Cross Appellant.

No. 31073–6–III.
|
April 17, 2014.

Appeal from Chelan Superior Court; Honorable Ted W. Small Jr., J.

Attorneys and Law Firms

Gregory Mann Miller, Carney Badley Spellman PS, Seattle, WA, Michael E. Vannier, Jeffers Danielson Sonn & Aylward PS, Wenatchee, WA, for Appellant.

Kyle David Flick, Attorney at Law, Wenatchee, WA, Kenneth Wendell Masters, Masters Law Group PLLC, Bainbridge Island, WA, for Respondent/Cross–Appellant.

UNPUBLISHED OPINION

SIDDOWAY, C.J.

***1** Gene Welton appeals the outcome of the dissolution of his marriage to Marina Martin. He argues that the trial court erred in dismissing his affidavit of prejudice as untimely, giving Ms. Martin an equitable lien on his separate property interest in a limited liability company (LLC), and awarding Ms. Martin attorney fees. Ms. Martin cross appeals, arguing that the trial court abused its discretion by not awarding her a just and equitable amount. We find no error or abuse of discretion and affirm.

FACTS AND PROCEDURAL BACKGROUND

Gene Welton and Marina Martin met in the spring of 1996 and were married in July 1997 when they were 37 and 40 years old, respectively. Ms. Martin had two sons from a prior marriage. Mr. Welton had been married twice before, but had no children. They had no children together.

At the time of the marriage Mr. Welton worked as the operations manager of an orchard and controlled atmosphere (CA) warehouse operation owned by him and his parents. He began working for his parents' orchard operation when he graduated from high school in 1978. The orchard operation was later organized as a limited liability corporation, Welton Orchards & Storage LLC, before Mr. Welton and Ms. Martin met. Approximately 18 months before Mr. Welton's marriage to Ms. Martin, his parents gifted him a 33 percent interest in the LLC, retaining 67 percent ownership and control.

Before marrying Mr. Welton, Ms. Martin had worked for Costco in Anchorage, Alaska for two years, where, as a manager in training, she earned more than $34,000 a year plus benefits. In 1995, she moved to Wenatchee and began work at the East Wenatchee Costco, assigned to various positions. All paid less than had her management training position in Anchorage.

During the 12–year marriage, Mr. Welton received a modest salary for his work for the LLC, ranging from $1,600 to $3,000 a month. In addition to his salary, he received rent free a double-wide home on orchard property, health and dental insurance, and a cell phone.

Ms. Martin's employment during the marriage was interrupted by work related injuries and periods of disability. In 2000, she began suffering from intermittent lower back problems that required time off. She was off work for the better part of two years and Costco eventually let her go in 2002. She received short-term and then long-term disability payments from insurance and eventually qualified for Social Security disability. During the period she was unable to work outside the home, Ms. Martin operated an in-home business preparing scrapbooks and photo albums that never earned a significant net income.

Between 2000 and 2006, Ms. Martin received treatment that enabled her to return to work full time for Costco in June 2008. Thereafter, though, she twice suffered work

injuries. The pain from her injuries was quite severe and included acute symptoms and migraines. Her primary physician imposed work restrictions.

Mr. Welton petitioned for dissolution of the marriage in March 2009 and the couple separated on March 29, when Ms. Martin was served with the petition. She filed a pro se response to the petition two weeks later. In September 2009, with no lawyer having appeared for Ms. Martin, Mr. Welton filed a note for trial setting and the case was set for a two-day trial in December. On October 29, the parties entered into a stipulation to continue trial to early May of the following year. The agreed continuance order was signed by Chelan County Superior Court Judge Ted Small.

***2** Ms. Martin engaged a lawyer thereafter, and brought a motion for temporary orders. Within the week before it was to be heard, Mr. Welton filed a motion and affidavit of prejudice against Judge Small. The court (through a different judge, the Honorable John Bridges) denied the motion as untimely because Judge Small had exercised discretion by signing the continuance order. On the morning before the afternoon hearing on the motion for temporary orders, Mr. Welton's lawyer was notified of the dismissal of the motion and affidavit and filed a memorandum contesting the conclusion that the affidavit was untimely.

Judge Small presided at the afternoon hearing, heard argument on the affidavit issue, and rejected Mr. Welton's argument that his affidavit of prejudice was timely.

A three-day trial took place before Judge Small in December 2011 and January 2012. At the time of trial Mr. Welton was receiving a salary of $2,000 a month from the LLC. The parties stipulated that Mr. Welton's minority interest in the LLC was worth $1,095,870. Ms. Martin was receiving a total of approximately $2,600 a month at the time of trial, between part-time earnings and disability payments. She had been attending school online and by the conclusion of trial had received her associate of arts degree. She hoped to complete her bachelor's degree.

Judge Small divided the parties' modest community assets, allocating approximately $20,000 more in value to Ms. Martin than to Mr. Welton. To achieve a 50–50 split of the community assets, a $10,000 payment by Ms. Martin would have been required.

On the more substantial issues of whether Ms. Martin should be awarded a portion of the almost $1.1 million value of Mr. Welton's interest in the LLC or whether an equitable lien should be imposed, the court found in Ms, Martin's favor on both—but because the LLC's operating agreement did not allow transfer of membership interests, the court imposed an equitable lien. Having concluded that the value of Mr. Welton's interest in the LLC had increased during the marriage by an amount "between $305,07[4] and $413,694," it arrived at a figure of $360,000 as the measure of the increase. Clerk's Papers (CP) at 167. On that basis, it imposed an equitable lien of $175,000 after taking into consideration the $ 10,000 equalizing payment from Ms. Martin to Mr. Welton required to balance out the parties' shares of the community assets.

As to maintenance, Judge Small found that while Ms. Martin had proved a need for maintenance, she had not proved Mr. Welton's "current ability" to pay it, in light of his parents' control of the LLC and underpayment of their son. Clerk's Papers (CP) at 168. He awarded Ms. Martin $10,000 in attorney fees. The final judgment entered in favor of Ms. Martin was $195,115.58 after taking into consideration pre- and postjudgment interest and attorney fees.

The court made a number of findings (some labeled conclusions) that during the dissolution proceeding Mr. Welton had failed or refused to pay amounts to Ms. Martin that he had been court ordered to pay. It also found that he had exerted little if any effort to allow access to the LLC property and financial records for Ms. Martin's appraiser and accountant to review and that his parents had not been forthcoming with financial records of the LLC.

***3** Mr. Welton appeals and Ms. Martin cross appeals.

ANALYSIS

I. Affidavit of Prejudice

Mr. Welton first challenges the trial court's refusal to honor his motion for change of judge and affidavit of prejudice. RCW 4.12 .040 and 4.12.050 extend to parties a right to one change of judge upon the timely filing of a motion supported by an affidavit of prejudice. A motion

and affidavit of prejudice are timely filed if called to the court's attention "before the judge presiding has made any order or ruling involving discretion." RCW 4.12.050. The parties dispute whether the court exercised discretion when it signed the stipulated order for a continuance.

Ms. Martin places substantial reliance on the Washington Supreme Court's decision in *In re Recall of Lindquist,* 172 Wn.2d 120, 258 P.3d 9 (2011) as demonstrating that a continuance is a discretionary ruling. *Lindquist* involved a petition for the recall of the county prosecuting attorney under RCW 29A.56.270. At a prehearing telephone conference, "Lindquist's attorney 'made an oral motion that ... the court ... continue the hearing until the 19th of November, when Respondent [Lindquist]' would be available to attend." *Lindquist,* 172 Wn.2d at 126 (most alterations in original). A continuance would have delayed the hearing beyond the statutory time limit set forth in RCW 29A.56.270. The trial judge denied the motion. The petitioners later filed an affidavit of prejudice requesting assignment to a different judge. The trial court dismissed the affidavit of prejudice because it was not accompanied by a signed motion and was untimely because it had been filed after " 'discretionary rulings includ[ing] ... denial of Respondent's motion for continuance.' " *Lindquist,* 172 Wn.2d at 127 (alterations in original).

On review, the Supreme Court found both grounds for dismissal of the affidavit of prejudice to be valid. The petitioners had argued that continuance of the recall hearing was not discretionary because the hearing date was mandated by statute. The Supreme Court disagreed, observing that the procedures set forth in the recall statute are regarded as mandatory only if they affect the actual merits of an election. Since the timing of the hearing did not affect the merits, the trial court enjoyed discretion to set a different hearing date, and exercised its discretion in declining to do so.

Mr. Welton relies on the Supreme Court's decisions in *State v. Parra,* 122 Wn.2d 590, 859 P.2d 1231 (1993) and *State ex rel. Floe v. Studebaker,* 17 Wn.2d 8, 134 P.2d 718 (1943). In *Parra,* the parties presented the trial court with an omnibus order resolving 23 potential defense motions and 20 potential motions by the State. Neither party objected to the other's motions. The trial court signed the order and sometime thereafter the defendant filed a motion and affidavit of prejudice. On appeal, the Supreme Court found that the trial judge's ruling on the omnibus order was a discretionary act. *Parra,* 122 Wn.2d at 594. In doing so, it distinguished *Floe,* in which a stipulated order consolidating two actions for trial had been held not to invoke the court's discretion. *Floe,* 17 Wn.2d at 16–17.

***4** The *Parra* court distinguished the agreement reached in *Floe* from the omnibus order in *Parra* because "by bringing their respective issues before the judge in the form of motions, the parties [in *Parra*] were submitting those matters to the court for resolution." *Parra,* 122 Wn.2d at 594. It observed that generally, the trial court does not exercise discretion for purposes of an affidavit of prejudice when entering agreed orders or stipulations on "matters relating merely to the conduct of a pending proceeding, or to the designation of the issues involved, affecting only the rights or convenience of the parties, not involving any interference with the duties and functions of the court." *Id.* at 603.

In the criminal context, the grant of a stipulated continuance is regularly regarded as a discretionary ruling. *E.g., State v. Dennison,* 115 Wn.2d 609, 620 n. 10, 801 P.2d 193 (1990). But the criminal rules explicitly treat it as such. CrR 3.3(f)(1) (formerly CrR 3.3(h)) provides that "the court *may* continue the trial date to a specified date" upon written agreement of the parties, signed by the defendant or defendants. (Emphasis added.) In *State v. Guajardo,* 50 Wn.App. 16, 19, 746 P.2d 1231 (1987), the court explained that the signing of a stipulated continuance is a discretionary ruling because the court "must consider various factors, such as diligence, materiality, due process, a need for an orderly procedure, and the possible impact of the result on the trial."

Although there is no equivalent civil rule, most of the same factors must be considered in the civil context, in which trial courts are concerned with the timely disposition of cases and the court's own calendar, even if civil cases do not present the same issues of due process. Mr. Welton's and Ms. Martin's stipulated continuance made clear that they had agreed to a later trial date but the scheduling of trial is not, to quote *Parra,* an issue "affecting only the rights or convenience of the parties, not involving any interference with the duties and functions of the court."

Because Judge Small exercised his discretion in determining whether to sign the continuance order or hold the parties to the existing schedule, the trial court did not err in finding that Mr. Welton's affidavit was untimely. We

need not reach Ms. Martin's alternative argument that the parties had agreed to trial before Judge Small as part of their stipulation to continue trial.

II. Division of Property

Mr. Welton next challenges the $175,000 equitable lien awarded Ms. Martin, arguing that it was unsupported by evidence demonstrating an increase in the value of his LLC interest or that he was undercompensated.

In a marriage dissolution action, the trial court must make a "just and equitable" distribution of the parties' property. RCW 26.09.080. The statute provides the trial court broad discretion in awarding property and this court will reverse only upon the appellant's showing of a manifest abuse of discretion. *In re Marriage of Zier,* 136 Wn.App. 40, 45, 147 P.3d 624 (2006). This deferential standard of review exists because the trial court is "in the best position to assess the assets and liabilities of the parties" in order to determine what constitutes an equitable outcome. *In re Marriage of Brewer,* 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

***5** The trial court found that "[t]he primary issue in this case is whether it is a fair and equitable distribution to award the petitioner all of his interest in the L.L.C., or whether the respondent should receive a judgment amount and/or equitable lien against the petitioner[/husband]'s interest in the L.L.C." CP at 166. Mr. Welton recognizes that "[c]ompeting community property principles come into play when a spouse performs services to benefit separate property" and that a growth in value of separate property attributable to services that the community has a right to claim can be subject to a right of reimbursement protected by an equitable lien. Br. of Appellant at 23.

When awarding an equitable lien against separate property to account for the labor of a spouse, which is a community property contribution, the court may determine the value of the community contribution by either determining a reasonable wage or assessing the resulting increase in value. *In re Marriage of Pearson–Maines,* 70 Wn.App. 860, 869, 855 P.2d 1210 (1993) (citing Harry M. Cross, *The Community Property Law in Washington (Revised 1985),* 61 WASH. L.REV.. 13 (1986)).

Here, the trial court determined that Mr. Welton had not received a reasonable wage *and* that the value of the property had increased. Mr. Welton argues that these determinations were not supported by evidence of a beginning-of-marriage value for his 33 percent interest in the LLC or the amount of salary and benefits received by operations managers of comparable orchard and CA warehouse operations.

The trial court's unchallenged findings are verities on appeal, *In re Marriage of Akon,* 160 Wn.App. 48, 57, 248 P.3d 94 (2011), and most of the findings we discuss hereafter are unchallenged. Where findings are challenged, we review them for substantial evidence. *In re Marriage of Wilson,* 165 Wn.App. 333, 340, 267 P.3d 485 (2011). Whether the findings of fact support the trial court's conclusions of law is reviewed de novo. *In re Marriage of Herridge,* 169 Wn.App. 290, 297, 279 P.3d 956 (2012). We review a trial court's decision to grant an equitable lien for an abuse of discretion. *In re Marriage of Marshall,* 86 Wn.App. 878, 882, 940 P.2d 283 (1997).

A. Increase in the Value of the LLC Interest

The LLC's value at the conclusion of the marriage was addressed by Ms. Martin's expert, Rick Linder, who expressed his opinion that 33 percent of the fair market value of the LLC's assets as of the year-end 2010 was $1,826,450. After applying a 40 percent discount for the fact that Mr. Welton's interest was an unmarketable minority interest, Mr. Linder valued the interest at $1,095,870. Mr. Welton stipulated to that value. Among the LLC's assets valued by Mr. Linder were property, buildings and equipment worth over $6 million, and "other investments" reported on schedule L to the partnership tax return worth $487,599. Ex. 10.

As to the increase in value during the marriage, Mr. Welton does not challenge the trial court's findings that relatively early in the marriage, in 2000, one of the warehouse tenants failed to pay rent, the LLC was forced to refinance to stay in business, and Ms. Martin signed a disclaimer of her interest in the LLC's property due to her concern about the prospect of a business bankruptcy. Mr. Welton does not challenge the court's findings that the LLC members' capital accounts totaled <-$239,182> and <-$347,088> at the beginning and end, respectively, of 2003 and by 2009 had increased to $266,769 and $274,139

at beginning and year-end. He does not challenge the finding that during the marriage the "other investments" reflected on schedule L of the partnership tax return grew from nothing before 2007 to $305,083 by the beginning of 2009 and $487,599 by the end of 2010, and that, in addition, the LLC purchased two parcels of real property during the marriage and before separation for a total cost of $336,000.

*6 Mr. Welton nonetheless argues that this evidence of a substantial increased value fails to support the equitable lien because Ms. Martin failed to present evidence of the value of his interest in the LLC at the inception of the marriage. He cites no authority for the proposition that in order to find a right of reimbursement supporting an equitable lien the increase in value of separate property must be measured from the inception of the marriage. Here, there is evidence that financial reverses took the LLC to the brink of bankruptcy three years into the marriage, that it recovered, and that in the remaining nine years of the marriage the value of Mr. Welton's interest grew to a stipulated value (after a substantial marketability discount) of approximately $1.1 million. If a separately owned business struggles but then recovers and thrives at any point during the marriage, the increase in its value may be traceable to a community contribution.

Mr. Welton next argues that even if the value of his interest *did* increase by hundreds of thousands of dollars, Ms. Martin failed to present evidence that the increase was due to his efforts.

There is a presumption that any increase in the value of separate property is separate in nature, but the presumption can be rebutted by direct and positive evidence that the increase is attributable to community funds or labors. *In re Marriage of Elam,* 97 Wn.2d 811, 816, 650 P.2d 213 (1982). The community is also entitled to a share of the increase in value due to inflation in proportion to the value of community contributions to the property. *Id.* at 816–17. If evidence is presented that the increased value of separate property is attributable to community labor, then the spouse with the separate ownership interest may counter with evidence that the increase in value is attributable not to community contributions or labor, but to rents, issues and profits or other qualities inherent in the business. *In re Marriage of Lindemann,* 92 Wn.App. 64, 69–70, 960 P.2d 966(1998).

Mr. Welton does not challenge the trial court's findings that in 1999 his mother stopped working for the LLC other than to do payroll and his father also cut back, occasionally working in the warehouse and helping during harvest. It is undisputed that Mr. Welton's job duties increased as he took up the slack in the warehouse and took over equipment maintenance in addition to his duties of running the orchard, and that as operations manager for the LLC he was responsible for supervising all of the LLC's employees (including as many as 50 during harvest) and was on call 24 hours a day, 7 days a week, working 12 to 16 hours a day at peak times, including the weekends. Evidence that the increase in the LLC's value occurred during a period when Mr. Welton was managing the orchard and warehouse operations, working long hours, and was the member most actively involved in the business is direct and positive evidence of a community contribution to the increase.

*7 Mr. Welton was entitled to defend against this evidence with any proof that the increase in value was attributable to other factors. He made some attempt to do so, offering evidence of capital infusions by his parents, but the trial court was not persuaded. We defer to the fact finder on issues of witness credibility and the persuasiveness of the evidence. *Akon,* 160 Wn.App. at 57.

The court ultimately found that "the separate estate of the petitioner/husband grew in an amount between $305,07[4] and $413,694" during the marriage, finding the increase to be $360,000. CP at 167. Substantial evidence supports the trial court's findings.

B. Undercompensation During Marriage

As an alternative basis for imposing the equitable lien, the trial court found that the draws that Mr. Welton received from the LLC were unreasonable considering the amount of time and effort that he spent running its operations. Mr. Welton challenges this finding on the basis that Ms. Martin failed to present evidence of the salary received by managers of comparable orchard and warehouse operations. He also argues that the trial court erred in awarding Ms. Martin the equitable lien amount of $175,000 without applying an offset equal to the rent free double-wide home and other benefits he received as a member-employee of the LLC.

Addressing the latter contention first, a trial court may offset the community's right to reimbursement against a reciprocal benefit received by the community for its use of individually owned property. *Connell v. Francisco,* 127 Wn.2d 339, 351, 898 P.2d 831 (1995); *In re Marriage of Miracle,* 101 Wn.2d 137, 139, 675 P.2d 1229 (1984). Whether to do so is discretionary; there is no requirement that a court offset the lien if it will result in a distribution that is not fair and equitable.

In this case the trial court specifically concluded that "[w]hile the community did receive an offsetting benefit of living on the L.L.C.'s property rent and utility free, this benefit is not enough when one considers the same benefit was provided to at least one employee and the separate estate of the petitioner/husband grew in an amount between $305,70[4] and $413,694." CP at 167. The court therefore arrived at the lien amount with Mr. Welton's employment benefits in mind. In any event, it was not required to reduce the equitable lien by the benefit and Mr. Welton fails to demonstrate how it abused its discretion by declining to reduce the lien.

Turning to proof of undercompensation, Ms. Martin presented evidence that Mr. Welton took monthly draws during some periods that were only $100 to $1,100 per month more than another full-time employee who Mr. Welton supervised and who also received free housing. The trial court could and did find from this evidence that the draws taken by Mr. Welton were unreasonable considering the time and effort he spent and responsibility he bore for operations of the LLC. Neither party presented evidence of fair market salaries for comparable orchard and warehouse management services, however, so here, as in *Pearson–Maines,* 70 Wn.App. at 869, the trial court lacked sufficient evidence to measure the lien by a reasonable wage. The increase in value of the LLC was therefore the better measure. *See id.* Ms. Martin presented evidence that Mr. Welton took draws that were only a fraction of his share of available net rental income, [1] but evidence that he was being undercompensated by some amount and leaving substantial net rental income in the LLC—while further establishing the community contribution to the growing value of his interest in the LLC—still does not provide a reliable wage amount.

***8** Finally, as Ms. Martin points out, the trial court could also have awarded Ms. Martin a portion of Mr. Welton's interest in the LLC if necessary to achieve a just and equitable distribution. *See In re Marriage of Konzen,* 103 Wn.2d 470, 478, 693 P.2d 97 (1985); RCW 26.09.080 (providing that the court is to "make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable). The only requirement is that the court keep the separate property character in mind. *In re Marriage of Hadley,* 88 Wn.2d 649, 656, 565 P.2d 790 (1977). If we were not satisfied that the trial court's imposition of the equitable lien was supported by proof of a $175,000 right of reimbursement, we would affirm on the basis that the trial court's distribution was, on the whole, fair, just, and equitable. *In re Marriage of Brady,* 50 Wn.App. 728, 731–32, 750 P.2d 654 (1988) (affirming distribution as fair, just, and equitable despite shortcomings in evidence of the source of the separate property's increased value); *cf. In re Marriage of Pilant,* 42 Wn.App. 173, 709 P.2d 1241 (1985) (affirming fair and equitable distribution notwithstanding erroneous valuation).

III. Attorney Fee Award

Mr. Welton's remaining challenge is to the trial court's award to Ms. Martin of $10,000 in attorney fees. Mr. Welton contends there was no evidence he could afford to pay, pointing to the trial court's explanation that it was denying Ms. Martin spousal maintenance because Mr. Welton is underpaid, his parents control what draws he receives, and Ms. Martin "failed to prove that [he] has a current ability to pay maintenance." CP at 168. Under RCW 26 .09.140, the trial court may award attorney fees "after considering the financial resources of both parties." The trial court must balance the needs of the requesting party against the other party's ability to pay. *In re Custody of Brown,* 153 Wn.2d 646, 656, 105 P.3d 991 (2005).

The determination of attorney fees is a matter left to the discretion of the trial judge. *Ausler v. Ramsey,* 73 Wn.App. 231, 234, 868 P.2d 877 (1994). We review a trial court's decision to grant or deny a statutory attorney fee award for abuse of discretion. *In re Marriage of Coy,* 160 Wn.App. 797, 807, 248 P .3d 1101 (2011). A trial court abuses its discretion if its decision is based on untenable grounds or untenable reasons. *In re Marriage of Farmer,* 172 Wn.2d 616, 625, 259 P.3d 256 (2011).

The evidence before the court demonstrated that the LLC had paid Mr. Welton's lawyer in excess of $70,000 over

the same period in which Mr. Welton failed to pay fees incurred by Ms. Martin that he had been court ordered to pay. Mr. Welton and his mother testified that this preferential payment of his lawyer's fees was through a loan from the LLC. But there was only one promissory note, for $29,674.84, and no loan in any amount appeared on the LLC's financial statements admitted into evidence. No payments had been made on the note. The court found that "[g]iven the closely held nature of the corporation and the unwillingness to be forthcoming with complete financial statements, it is unlikely [Mr. Welton] will have to pay his attorneys' fees at all." CP at 168.

***9** While the LLC's coffers were open to compensate Mr. Welton's lawyer, the court found that Ms. Martin had been required to sell the couple's double-wide home in order to obtain the funds she needed to retain an accountant and lawyer.

There may be a superficial inconsistency between the trial court's finding that Mr. Welton did not have a current ability to pay spousal maintenance and its order that he pay an additional $10,000 toward Ms. Martin's attorney fees, to be included in her judgment. There is a rational distinction when the findings and conclusions are considered as a whole. Mr. Welton clearly had the financial ability to pay $10,000 toward Ms. Martin's fees even though his parents, with or without his collusion, might delay his doing so. Monthly maintenance, on the other hand, was likely to present an ongoing battle. A rational court could award attorney fees to Ms. Martin after engaging in the balancing required by RCW 26.09.140 while at the same time deciding to accomplish a just and equitable settlement without ordering spousal maintenance.

IV. Attorney Fees on Appeal

Ms. Martin asks that we award her attorney fees on appeal under RCW 26.09.140, or alternatively on the basis of what she characterizes as the frivolous nature of Mr. Welton's appeal and his intransigence. A party may request fees on appeal if applicable law grants him or her the right to recover reasonable attorney fees on review. Ms. Martin has not served and filed the financial affidavit required by RAP 18.1(c) to recover fees under RCW 26.09.140.

RAP 18.9(a) provides for the imposition of sanctions where a party brings a frivolous appeal. An appeal is frivolous if we are convinced that it presents no debatable issues on which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal. *In re Marriage of Foley,* 84 Wn.App. 839, 847, 930 P.2d 929 (1997). A civil appellant has a right to appeal under RAP 2.2, and all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. *See Streater v. White,* 26 Wn.App. 430, 434–35, 613 P.2d 187 (1980).

Intransigence is a basis for awarding fees on appeal separate from RAP 18.9 and RCW 26.09.140. *In re Marriage of Mattson,* 95 Wn.App. 592, 605, 976 P.2d 157 (1999). It includes obstruction and foot dragging, filing repeated unnecessary motions, or making a proceeding unduly difficult and costly. *In re Marriage of Bobbin,* 135 Wn.App. 8, 30, 144 P.3d 306 (2006).

While the trial court found intransigence on Mr. Welton's part during proceedings below, he has not exhibited such behavior in the conduct of the appeal. Nor do we find his appeal frivolous. We deny the request for fees.

CROSS APPEAL

Ms. Martin cross appeals, assigning error to the trial court's failure to award her the $300,000 she requested at the close of trial. She asks that we remand for entry of an equalizing judgment in her favor, together with a charging order against the LLC for $300,000.

***10** RCW 26.09.080 requires consideration of four factors in reaching a just and equitable property division: the nature and extent of (1) the community property and (2) the separate property of the parties, (3) the duration of the marriage, and (4) the economic circumstances of the parties at the time of the property division. *In re Marriage of Rockwell,* 141 Wn.App. 235, 242–43, 170 P.3d 572 (2007). As earlier discussed, the standard of review is deferential in light of the superior ability of the trial court to determine an equitable outcome.

The final disposition of property was an award to Mr. Welton of his separate property interest in the LLC subject to an equitable lien, for a net value of $1,022,000. Ms. Martin was awarded $180,786.56. Taking into consideration the limited community property, the

uncontested separate character of Mr. Welton's interest in the LLC and the trial court's findings as to the range of increase in its value during the marriage, the 12–year duration of the marriage, and the economic circumstances of the parties at the time of the property division, we cannot say that the trial court abused its discretion.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: BROWN and KORSMO, JJ.

All Citations

Not Reported in P.3d, 180 Wash.App. 1027, 2014 WL 1514595

Footnotes

1 While Mr. Welton challenges the trial court's findings that there were years when Mr. Welton took draws of only a half to a third of his share of the partnership's net rental income, those findings are largely, if not entirely, supported by the partnership tax returns admitted in evidence. Schedules E and K–1 to the 2009 return show that the LLC's net rental income was $345,361 (rather than $392,648), that Mr. Welton's share was correctly found by the court to be $129,574, and that the court correctly found that he took draws of only $42,768 that year. The same schedules to the 2010 return show that the trial court correctly found the LLC's net rental income to be $250,452 and that Mr. Welton's share was $82,649, but that he took draws of $32,570 (rather than $42,570) that year.

End of Document

4 Wash.App.2d 1036

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

In the MATTER OF the ADOPTION
OF A.W.A., a minor child,
M.D.B., Petitioner,
v.
J.D.A., Respondent.

No. 50598-3-II
|
Filed July 3, 2018

Appeal from Pierce County Superior Court, 14-5-01009-1, Honorable Michael E. Schwartz, Gretchen Leanderson, Elizabeth Martin, JJ.

Attorneys and Law Firms

Douglas N. Kiger, Blado Kiger Bolan, PS, 4717 S. 19th St. Ste. 109, Tacoma, WA, 98405-1167, for Appellant.

Chris D. Maharry, McGavick Graves, P.S., 1102 Broadway Ste. 500, Tacoma, WA, 98402-3534, for Respondent.

UNPUBLISHED OPINION

Johanson, J.

***1** MDB [1] challenges the denial of his motion to disqualify the trial court judge assigned to his step-parent adoption case. Because the trial court judge did not make any discretionary rulings that limited MDB's ability to move to disqualify a judge under former RCW 4.12.050 (2009), we reverse the order denying MDB's motion to disqualify the assigned judge and remand for further proceedings.

FACTS

AWA was born in 2007. AWA's mother and MDB were married in 2009. In December 2014, MDB petitioned to terminate AWA's biological father's parental rights and to adopt AWA. AWA's mother joined in the petition.

On February 13, 2015, an order amending case schedule and setting the trial for August 2015 was entered by Judge K. A. Van Doorninck. After several continuances, the trial was eventually set for April 26, 2016.

About two months before the trial date, MDB moved for discretionary review of a pretrial discovery order. On April 1, the assigned judge stayed the trial court proceedings pending disposition of the discretionary review. In the order staying the case, the judge specifically stated that (1) the trial date and other deadlines already scheduled were stayed and (2) "[a] new case schedule shall be issued upon disposition of the pending appeal." Clerk's Papers (CP) at 33.

On May 19, 2017, we issued a published opinion reversing the trial court's pretrial ruling and remanding the case back to the trial court for further proceedings. [2] *See In re Adoption of A.W.A.*, 198 Wn. App. 918, 397 P.3d 150 (2017). On June 16, this case was reassigned to the family court, and Judge Michael Schwartz was assigned to the case.

Also on June 16, Judge Schwartz signed an order stating, "Trial date is set for November 13, 2017. [Guardian ad litem (GAL)] report shall be due 60 days before trial. Discovery cutoff shall be 90 days before trial." CP at 52. The order was simply captioned as an "order," without specifying what the nature of the order was. Both parties signed this order. Neither the order nor the caption mentioned any continuance. [3] Judge Schwartz issued an amended case schedule the same day.

On June 27, MDB moved to disqualify Judge Schwartz and to change judges under former RCW 4.12.040 (2009) and former RCW 4.12.050. Judge Schwartz denied the motion that day, ruling that the motion was untimely in light of his June 16 order setting the trial date. Judge Schwartz noted that he had been "presented with an Order Continuing the Trial and extending the discovery cutoff signed by both parties on June 16, 2017" and had granted that request. CP at 60. The presiding judge later denied MDB's motion for reconsideration.

MDB sought discretionary review of the June 27, 2017 order denying the motion to change judges and the

order denying reconsideration. We stayed the trial court proceedings and granted discretionary review.

ANALYSIS

***2** MDB argues that Judge Schwartz erred in denying MDB's motion to disqualify the judge because Judge Schwartz had not made any discretionary rulings before MDB filed the motion.[4] Because the June 16, 2017 order was an order arranging the calendar and setting a date for a hearing or trial, not a discretionary decision that prevented the judge from recusing, we agree.

A party in a superior court proceeding is entitled to one change of judge upon the timely filing of an affidavit of prejudice. Former RCW 4.12.040(1), .050(1); *State v. Lile*, 188 Wn.2d 766, 774-75, 398 P.3d 1052 (2017). An affidavit of prejudice is timely if it is filed " 'before the judge presiding has made any order or ruling involving discretion.' " *Lile*, 188 Wn.2d at 775 (internal quotation marks omitted) (quoting *In re Recall of Lindquist*, 172 Wn.2d 120, 130, 258 P.3d 9 (2011)). "[T]he arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial ..., shall not be construed as a ruling or order involving discretion within the meaning of [former RCW 4.12.050(1)]."[5] Former RCW 4.12.050(1). Whether a trial court's order or ruling involves discretion is a question of law that we review de novo. *Lile*, 188 Wn.2d at 776.

The dispositive question here is whether the June 16, 2017 order involved discretion. We hold that it did not.

In his ruling denying MDB's motion, Judge Schwartz characterized the June 16, 2017 order as an order continuing the trial date, which he considered a discretionary act. But as of June 16, this case had been stayed pending the motion for discretionary review of the discovery ruling, the last trial date set had long passed, there was no trial date currently set, and the order staying the case specifically provided that a new case schedule would have to be issued after we resolved the discovery issue. Additionally, the June 16, 2017 order did not purport to address a continuance—it merely set the new trial date and other deadlines that were necessary once the stay was lifted as was required under the order staying the case. These facts lead us to conclude that the June 16, 2017 order was an order arranging the calendar and setting an action for trial, which is not a discretionary decision under former RCW 4.12.050(1), rather than a continuance of a preexisting trial date.

***3** Since orders arranging the calendar and setting an action for trial are not discretionary acts under former RCW 4.12.050(1), we hold that Judge Schwartz did not make any discretionary decisions in this case and was required to recuse himself. Accordingly, we reverse the order denying MDB's motion for an order changing judges and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

MAXA, C.J.

SUTTON, J.

All Citations

Not Reported in Pac. Rptr., 4 Wash.App.2d 1036, 2018 WL 3238966

Footnotes

1 We use initials instead of names pursuant to General Order 2017-1 of Division II, *In re Changes to Case Title* (Wash. Ct. App.).

2 We mandated this opinion on June 26, 2017.

3 We note that our record does not contain a transcript of the proceedings that resulted in this order.

4 In his response to the motion for discretionary review, AWA's biological father agreed with MDB's statement of the case and stated that he (AWA's biological father) had not taken a position in this matter in the trial court and that he did not take a position on discretionary review. AWA's biological father has not filed a response to MDB's opening brief, but he filed a letter stating that he is not taking any position on the issue before us.

5 The legislature amended former RCW 4.12.050(1) in 2017. LAWS OF 2017, ch. 42, § 2. These amendments took effect in July 2017. The 2017 amendment added "ruling on an agreed continuance" to the list of actions that do not prevent the filing of an affidavit of prejudice. *See* RCW 4.12.050(2). But prior to this amendment, the case law held that rulings on agreed continuances were discretionary decisions that prevented an affidavit of prejudice. *See Lile*, 188 Wn.2d at 776. Because this was a substantive change that is relevant to this case, we apply the version of the statute in effect when the trial court made its decision.

End of Document

SMITH GOODFRIEND, PS

April 25, 2019 - 11:53 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96952-3
Appellate Court Case Title:	Rolfe and Kirstine Godfrey and Robert Kornfeld v. Ste. Michelle Wine Estates, Ltd., et al.
Superior Court Case Number:	12-2-12968-7

The following documents have been uploaded:

- 969523_Answer_Reply_20190425115103SC364434_5753.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 2019 04 25 Joint Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- eharris@corrcronin.com
- ian@washingtonappeals.com
- king@carneylaw.com
- ksheridan@corrcronin.com
- miller@carneylaw.com
- msullivan@corrcronin.com
- rob@kornfeldlaw.com
- russm@metzlawfirm.com
- sdamon@corrcronin.com

Comments:

Sender Name: Sarah Eaton - Email: sarah@washingtonappeals.com
Filing on Behalf of: Howard Mark Goodfriend - Email: howard@washingtonappeals.com (Alternate Email: andrienne@washingtonappeals.com)

Address:
1619 8th Avenue N
Seattle, WA, 98109
Phone: (206) 624-0974

Note: The Filing Id is 20190425115103SC364434