

66029.2

66029.2
HK

No. 66029-2-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Matter of

LINDA RINALDI
Respondent

and

TAMAR BAILEY
Appellant

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 NOV 21 AM 11:35

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

REPLY BRIEF OF APPELLANT

PATRICIA NOVOTNY
Attorney for Appellant
3418 NE 65th Street, Suite A
Seattle, WA 98115
(206) 525-0711

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF ISSUES IN REPLY 2

III. ARGUMENT IN REPLY 2

 A. THE TRIAL COURT SHOULD HAVE GRANTED A
 CONTINUANCE CONTINGENT ON BAILEY PAYING TERMS. . 2

 B. AN INTIMATE COMMITTED RELATIONSHIP REQUIRES
 BOTH PARTIES TO BE COMMITTED TO THE OTHER..... 7

 C. BASED ON A MISREADING OF THE RELEVANT LAW, THE
 COURT REFUSED TO CONSIDER DISTRIBUTING THE
 PENSIONS BY MEANS OF A QDRO. 14

IV. CONCLUSION 19

TABLE OF AUTHORITIES

Washington Cases

Balandzich, et al., v. Demeroto, 10 Wn. App. 718, 519 P.2d 994 (1974)6

Barr v. McGugan, 119 Wn. App. 43, 78 P.3d 660 (2003)5

Bulicek v. Bulicek, 59 Wn. App. 630, 800 P.2d 394, 399 (1990) .. 18

Coggle v. Snow, 56 Wn. App. 499, 784 P.2d 554 (1990)6

Connell v. Francisco, 127 Wn.2d 339, 898 P.2d 831 (1995)9

Davis v. Baugh Indus. Contractors, Inc., 159 Wn.2d 413, 150 P.3d 545 (2007)4

In re Marriage of Pennington, 142 Wn.2d 592, 14 P.3d 764 (2000) 7, 8, 10

Peluso v. Barton Auto Dealerships, Inc., 138 Wn. App. 65, 155 P.3d 978 (2007).....3

Rhone v. Butcher, 140 Wn. App. 600, 166 P.3d 1230 (2007).. 18, 19

Tacoma Nat. Bank v. Peet, 9 Wash. 222, 37 P. 426 (1894).....5

Wilder v. Wilder, 85 Wn.2d 364, 534 P.2d 1355 (1975).....17

Statutes, Rules & Other Authorities

KCLCR 4(g)4

KCLCR 40(e)(2)4

L.R.C. § 152(d)(2)(H),16

RCW 4.12.030(3).....19

RCW 4.84.1004

Cases From Other Jurisdictions

Owens v. Automotive Machinists Pension Trust, 551 F.3d 1138 (9th
Cir. 2009)..... 15-19

I. INTRODUCTION

Bailey does not ask this Court to treat same-sex couples worse than different-sex couples, as Respondent bizarrely claims. Br. Respondent, at 1. Rather, the distinction at the heart of this case is between married people and unmarried people. In the first instance, where there is no question the parties are married, certain legal consequences pertain. In the second instance, a party seeking to attach legal consequences to a relationship must prove an unjust enrichment.

Whereas the committed intimate relationship doctrine treats all couples the same, not all unmarried couples are in committed intimate relationships. The doctrine applies only to those whose conduct over time establishes the existence of a relationship both intimate and purposing to permanency. The relationship here fails this test. Therefore, there was no unjust enrichment to remedy. In seeking to have the trial court's contrary conclusion corrected, Bailey seeks simply the same treatment afforded different-sex couples under the committed intimate relationship doctrine. Likewise, with respect to the pensions, she seeks merely the same treatment, fair treatment, not special treatment.

II. STATEMENT OF ISSUES IN REPLY

1. In light of the condition of Bailey's counsel, including her being sick and unprepared, and where there was no irreparable prejudice to Rinaldi, the court should have granted a continuance.

2. When only one party to a relationship is committed to it, the committed intimate relationship doctrine does not apply.

3. If there was a committed intimate relationship, the court could and should have distributed Bailey's pensions by means of a QDRO.

4. If the court could not distribute Bailey's pensions by means of a QDRO, it could not distribute them at all.

III. ARGUMENT IN REPLY

A. THE TRIAL COURT SHOULD HAVE GRANTED A CONTINUANCE CONTINGENT ON BAILEY PAYING TERMS.

For the entire year preceding trial, Bailey's attorney, Jan Dyer, was profoundly debilitated. Her work suffered. Immediately before, during, and after the trial, Dyer was in the midst of a medical crisis. Bailey was between a rock and hard place – whether to change horses midstream, with a trial date looming, or to rely on Dyer's prediction that improvement was forthcoming.

When the court denied the continuance Dyer sought, Bailey was forced to go to trial unprepared and with a gravely ill attorney; indeed, the attorney's leg was broken throughout the trial. 8RP 23. This was neither fair nor necessary. Rinaldi neither alleged nor established any prejudice flowing from another continuance. Even now she does not claim actual prejudice, but argues only that her trial preparation efforts "would *likely* need to be duplicated" if a continuance were granted. Br. Respondent, at 17 (emphasis added). She does claim that, in the event she did duplicate her efforts, the costs she would have incurred would be "unrecoverable." *Id.* But this is simply wrong. The court certainly had the authority to order Bailey to pay Rinaldi's fees as a condition of postponing the trial, irrespective of this being a committed intimate relationship case.

First, the judge has the inherent authority "to manage his or her courtroom so as to achieve the orderly and expeditious disposition of cases, to assure compliance with the court's rulings and observance of hearing and trial settings." *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 71, 155 P.3d 978 (2007) (and cases cited therein). Likewise, local rule allows the court to impose terms, including attorney fees, for failure to comply with the

case schedule. KCLCR 4(g). Likewise, KCLCR 40(e)(2) allows the court to grant a change of trial date “subject to such conditions as justice requires.” Moreover, to the extent Rinaldi would have experienced costs related to her expert witness, RCW 4.84.100 expressly authorizes compensation, as follows:

When an application shall be made to a court or referees to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed as the condition of granting the postponement.

Thus, by all these means, a trial court can ensure a fair trial to the party needing a continuance while also compensating the other party for costs incurred as a consequence of the continuance. This has long been the law in Washington and for good reason.

Washington strongly favors decisions on the merits. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 420, 150 P.3d 545 (2007).

In her response, Rinaldi further mistakes Bailey’s argument and dismisses it as relating to an expert witness and the discovery cut-off. Br. Respondent, at 18-19. She misses the point. Bailey needed a continuance because Dyer was unprepared and was very sick. It did not matter what discovery had been done in the months before trial if Dyer was not familiar with it. And a continuance could

certainly have helped on that score. Whether or not Dyer produced an expert witness, she could have enlisted an expert to investigate and analyze the complicated financial issues. She did not. Nor did she, obviously, understand the financial issues, as she admitted post-trial. 8RP 10-21 (acknowledging she never researched the pension issue, etc.). Certainly, she neither prepared herself nor her client to address those issues at trial. In short, this is not a discovery issue at all, so the cut-off dates are irrelevant. It is a matter of the attorney being unable to do her job.

Bailey's argument is simple. A person should not be deprived of a fair trial for reasons having to do with her attorney's medical crisis. See, e.g., *Barr v. McGugan*, 119 Wn. App. 43, 48, 78 P.3d 660 (2003) (clinical depression of attorney justified vacating dismissal of client's case). Through no fault of her own, but owing to the misfortune of and, arguably, the mismanagement by her counsel, Bailey was in an impossible position. The only – and the only fair – way out, was to grant the requested continuance, with terms to Rinaldi for costs she could prove she incurred. See *Tacoma Nat. Bank v. Peet*, 9 Wash. 222, 37 P. 426 (1894) (requirement of proof of costs); CP 204 (vague cost claims).

Rinaldi argues it does not matter because Bailey's fundamental rights are not at issue. Br. Respondent, at 17. Some people would consider the right to a fair trial fundamental. Certainly, an abuse of discretion can arise even where no fundamental right is at stake. See *Coggle v. Snow*, 56 Wn. App. 499, 508, 784 P.2d 554 (1990) (court abused discretion when it denied continuance despite clear need for certain witnesses). Whether or not fundamental rights are at stake, courts are obligated to take seriously requested continuances, by, for example, considering:

the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court.

Balandzich, et al., v. Demeroto, 10 Wn. App. 718, 720, 519 P.2d 994 (1974). Whether the trial court here even considered these circumstances or balanced the competing interests is simply unknown. Certainly, it appears the court ignored that its "primary consideration" in deciding whether to grant a continuance "should have been justice." *Coggle v. Snow*, 56 Wn. App. at 508. Here, as in *Coggle v. Snow*, it is impossible to "discern a tenable ground or

reason for the trial court's decision." *Id.* As a consequence, this case was not decided on its true merits.

B. AN INTIMATE COMMITTED RELATIONSHIP REQUIRES BOTH PARTIES TO BE COMMITTED TO THE OTHER.

Rinaldi treats Bailey's argument as a challenge to particular facts. Br. Respondent, at 20-30. She misses the point. Certainly, the record belies some of the "spin" Rinaldi gives the facts, as Bailey's opening brief explains. But Bailey's essential argument goes to what the facts mean. And this is a legal question, not "a question of fact," as Rinaldi claims. Br. Respondent, at 20. In fact, in a committed intimate relationship case, "review of a trial court's determination owes deference to the trial court's findings, *but* the legal conclusions flowing from those factual findings are reviewed *de novo*." *In re Marriage of Pennington*, 142 Wn.2d 592, 602-603, 14 P.3d 764 (2000) (emphasis added). This distinction is important, as is well-illustrated by the two cases analyzed in *Pennington*. In both the *Pennington* and *Chesterfield* cases few of the facts were in dispute. In both cases, the trial courts found the facts established a committed intimate relationship. In both cases, the Supreme Court reversed, finding the facts had much less significance than the trial courts thought.

Likewise, here, Bailey's argument is primarily a legal one. She knows perfectly well the parties had mutual wills, for example, since she was the driving force (against Rinaldi's resistance) behind all the planning for the future she envisioned, including the wills. See Br. Respondent, at 22, 24.¹ The fact that Rinaldi reluctantly participated in these efforts, while planning a different and separate future for herself, speaks louder than the boilerplate in the will that she signed.

Bailey does not dispute her own intent to be in a committed intimate relationship, or that her purpose was to "have and to hold until death." Rather, she argues that her intent alone was not sufficient. There must be mutuality of intent and purpose for there to be a committed intimate relationship, precisely as the Supreme Court has held. *Pennington*, at 142 Wn.2d at 604.

Perhaps not surprisingly, Rinaldi seems dismissive of the important pieces missing from the relationship with Bailey – commitment, intimacy, happiness, noting marriages also may lack these qualities. See, e.g., Br. Respondent, at 22-23. But this is not

¹ Bailey gave the wills to Rinaldi in the first instance as a Christmas present, wrapped and placed under the tree. 5RP 36. Similarly, the update in 2007 was all Bailey's doing. 5RP 37. Had Bailey known about the secret fund Rinaldi was accumulating, she would never have taken this initiative to protect the future she imagined them sharing. 5RP 37-38.

a marriage, and Rinaldi's attempt to blur the distinction is at complete odds with Washington law, which flatly does not equate the two. *Connell v. Francisco*, 127 Wn.2d 339, 350, 898 P.2d 831 (1995). The court has limited the remedy available under the committed intimate relationship doctrine precisely because of the differences, and rightly so. Marriage has many legal ramifications: benefits, risks, obligations, which parties voluntarily and definitively assume. Whether or not people are unhappy in their marriages does not alter the fact that they are married. Just as obviously, when people divorce, they make plain the lack of ongoing commitment to the marriage. In other words, both when they marry and when they divorce, the parties make clear their intent and purpose. Such certainty is lacking when a committed intimate relationship is claimed, which is why the comparison to marriage is useful only to a point.

Thus, it is unavailing when Rinaldi tries to evade the missing elements in her relationship to Bailey by drawing comparisons to failed marriages. Bailey does not limit her inquiry into Rinaldi's commitment to the final year or so of the relationship, the time leading up to separation, as Rinaldi suggests. Br. Respondent, at 23. Rather, and significantly, Bailey notes Rinaldi's repeated

refusals, throughout the relationship, to join her in a ceremonial commitment; Rinaldi's secretly stashing funds for nearly a decade in preparation for leaving the relationship; Rinaldi's resistance to planning a future together; and, yes, her inability to recall the details of their courtship. While a married person might manifest similar disengagement, such would not alter the fact of the marriage. You cannot be partly married. But these same facts, while irrelevant to determining whether a marriage exists, are the heart of the inquiry into whether a committed intimate relationship exists. This is the legal question at issue here. Can you be in a committed intimate relationship without being committed to it?

Rinaldi was not committed. She refused to wear a ring or in any other way to formalize the commitment. The court saw no significance in these refusals. CP 110. But, in *Pennington*, the Supreme Court reached a different conclusion on very similar facts, noting again the importance of mutuality in the intent of the parties, and concluding that "Pennington's refusal, coupled with Van Pevenage's insistence on marrying, belies the existence of the parties' mutual intent to live in a meretricious relationship." *Pennington*, 142 Wn.2d at 604. What troubles the court in *Pennington* likewise troubles this case. A party to a relationship

necessarily has an interest in ascertaining whether she shares the same “reality” as the person she loves. What better way to do so than to ask for a declaration of commitment? Bailey sought this affirmation repeatedly. Rinaldi repeatedly withheld it. There was no mutual intent here, anymore than there was in *Pennington*. And there is no reason to hold Bailey and Rinaldi to a different standard than the court used there.

The significance of Rinaldi’s refusals is not altered by her varied and varying explanations for why she declined to declare her commitment. In her brief, she repeatedly and inaccurately ascribes to Bailey a desire to have a “lavish” formalization of their relationship. See, e.g., Br. Respondent, at 25. But the facts do not support his claim; Bailey only wanted something – a celebration of whatever size or cost, even a ring. 2RP 104; 4RP 220-223, 5RP 101; 6RP 41, 50-52. She got nothing. Rinaldi claims she did not want a ceremony because she had not revealed to her parents that she was a lesbian. See, e.g., 1RP 95. But she acknowledges that she came out to her parents early in 2000, seven to eight years before the parties separated. 1RP 75, 79. Rinaldi continued for those eight years to reject Bailey’s proposals. The truth is, Rinaldi

did not want to proclaim her commitment because she was not committed to the relationship.

Indeed, during the years Rinaldi refused to make a commitment, she began and continued to secretly amass funds, telling her sister she and Bailey were breaking up. In Rinaldi's reality, she is breaking up with Bailey. In Bailey's, she is planning to grow old with Rinaldi. Again, the one-sided nature of the relationship undercuts the claim to commitment. Rinaldi, and the court, for that matter, claims the parties pooled their resources. In fact, Bailey opened her checkbook to Rinaldi, not vice versa. It is significant and symbolic that the couple did not have a joint checking account, as Rinaldi claims (Br. Respondent, at 5), but an account that was Bailey's to own, to which she added Rinaldi as a signer. By contrast, on Rinaldi's business account, Bailey had limited authority. 1RP 170. More importantly, Rinaldi opened other accounts in her name alone, unbeknownst to Bailey. Exhibits 331, 365-366; 1RP 171; 5RP 56, 84-87, 89-91. Similarly, Rinaldi makes it sound as if they purchased the West Seattle house with joint funds (Br. Respondent, at 6), but, in fact, the down payment came entirely from Bailey. 5RP 36, 40, 58, 173. And all of the money management was in Rinaldi's control, which left her able to move

money as she pleased. See, e.g., 2RP 17 (checks made out to herself for cash). Here, again, Bailey was all in, but Rinaldi was not. Rinaldi made less, gave less, and secretly kept some for herself. This is the opposite of pooling.

Rinaldi complains Bailey is accusing her of “marital misconduct.” Br. Respondent, at 29. In doing so, Rinaldi is taking matters out of order. When you have a marriage, property must be distributed at dissolution without regard to marital misconduct. But when you are trying to determine *whether* you have a “marriage-like” relationship, the parties’ conduct is directly relevant. The fact that, by at least 2000, Rinaldi had begun to stash cash in anticipation of leaving Bailey, says a lot about whether she was in a committed intimate relationship.

Finally, Rinaldi claims that she is being held to a “super marriage” standard. Br. Respondent, at 29-30. She is not. But the “marital-like” inquiry behind the committed intimate relationship doctrine is certainly focused on particular, and, perhaps, ideal, aspects of marriage, which only makes sense if you are trying to prove a relationship by looking back on conduct, rather than by presenting a marriage license. Marriages are infinitely variable, but that does not make all conduct within them “marital-like.” But

whatever the conduct, there is no question the parties are married. When we lack that certainty, we look for evidence of commitment, or the lack thereof. Planning and preparing for an exit seven or eight years before separation may or may not be "misconduct," but it certainly indicates a lack of commitment. Because there was no commitment, at least not after 2000, there was no unjust enrichment and no committed intimate relationship.

C. BASED ON A MISREADING OF THE RELEVANT LAW, THE COURT REFUSED TO CONSIDER DISTRIBUTING THE PENSIONS BY MEANS OF A QDRO.

If this Court holds there was a committed intimate relationship, it still should order the trial court to deal differently with the Bailey's pensions. Rinaldi does not dispute that the court included pensions in its distribution scheme. The court awarded the pensions to Bailey by placing them on the spreadsheet, offsetting them with a lump sum distribution to Rinaldi, because the court believed it could not distribute the pensions by means of a QDRO. Because the court was wrong to see this path foreclosed, remand is appropriate. "If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion." *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

Bailey's pensions are subject to federal regulation.² Recent 9th Circuit law declares they are also subject to state domestic relations law if, under said law, they are "marital property rights." *Owens v. Automotive Machinists Pension Trust*, 551 F.3d 1138 (9th Cir. 2009). In other words, federal law does not preempt the state's definition of marital property rights. Accordingly, if the pensions here are deemed community-like property, pursuant to the committed intimate relationship doctrine, they satisfy the first requirement for a QDRO.

The second requirement is that the pension's non-owner (i.e., Rinaldi, in this case) must be an "alternate payee," meaning a spouse or other dependent. In *Owens*, the court held a party to a committed intimate relationship to be a "dependent" if she satisfied the tax code definition of dependent. 551 F.3d at 1146-1147. The court did not say why it used the tax code definition and it did not *not* say a "dependent" for ERISA purposes had also to be claimed

² Contrary to Rinaldi's assertion (Br. Respondent, at 31 n.6), the pension argument encompasses both the defined benefit plan and the 401k, as do Bailey's assignments of error. The discussion in the trial court focused on the defined benefit plan, but both aspects of Bailey's pension are subject to the same restraint. Of course, the 401k is a contribution plan, meaning it is funded by Bailey's contributions and it exists in the form of money, whereas no benefit flows from the other pension until Bailey retires, so it presently has only actuarial value. In any case, the same laws and same arguments pertain to both plans.

as a dependent for tax purposes. Rather, and more simply, the court found that “[b]ecause Norma [Owens] qualifies as an ‘other dependent’ under L.R.C. § 152(d)(2)(H), we find she was properly designated as an ‘Alternate Payee’ ...” 551 F.3d at 1147. Under the tax code, Norma was a dependent because Phillip (the pension owner) provided over one-half of her support and because she and Phillip shared a principal place of abode.

Neither the code definition, nor the 9th Circuit in using the code’s definition, required further that the “dependent” file a joint tax return with the taxpayer, as the trial court mistakenly thought. CP 143. In *Owens*, it happened that Norma Owens was (incorrectly) designated as “wife” on Phillip’s tax forms. But that was not a sine qua non for her being an ERISA dependent.³ Rather, it was the fact that she and Phillips “shared ‘the same principal place of abode,’” along with Norma’s “undisputed financial dependence ... during their thirty-year long quasi-marital relationship,” that qualified her as a “dependent” under ERISA. The 9th Circuit used the tax

³ The tax code defines whom a taxpayer may claim as a dependent. Accordingly, it would not make any sense for this definition to include a requirement that the dependent also file a joint tax return with the taxpayer. (For example, dependent children do not file joint tax returns with their parents.) Because the 9th Circuit derives the definition it uses from the tax code, it likewise does not include a requirement for joint tax returns.

returns to establish Norma “was a member of Phillip’s household.” 551 F.3d at 1147. The court did not say other evidence would not also satisfy the requirement of establishing a party as a dependent. Yet, here, the trial court misread *Owens* as requiring that the parties file joint tax returns. CP 143. In fact, Rinaldi would satisfy the 9th Circuit’s definition by proof she shared with Bailey “the same principal place of abode” and was financially dependent on Bailey. These facts were established at trial.

The trial court’s error in misreading *Owens* substantially prejudices Bailey. First, she had to come up with cash to pay Rinaldi, meaning she had to take money from one of the pensions, the 401k, and suffer the penalty. Second, she must bear all the risk attendant to the defined benefit plan, which has yet to mature and which may never be worth Kessler’s actuarial estimate of its present value.

Rinaldi argues the court “rejected” the evidence of the pension’s contingent nature. Br. Respondent, at 35. That was error. When dealing with pensions, “the court must consider all the circumstances and evaluate the probability that the party who has a contingent right to a pension will eventually enjoy that pension.” *Wilder v. Wilder*, 85 Wn.2d 364, 369, 534 P.2d 1355 (1975). The

court is not excused from this obligation just because an expert may also fail to consider these factors. Indeed, precisely because the pension was not mature, a more fair distribution would have been accomplished by deferral. As has been noted by this Court:

An award of pension rights on a percentage, as-received basis is to be encouraged. Such a disposition avoids difficult valuation problems, shares the risks inherent in deferred receipt of the income, and provides a source of income to both spouses at a time when there will likely be greater need for it.

Bulicek v. Bulicek, 59 Wn. App. 630, 638-39, 800 P.2d 394, 399 (1990). The court thought this route foreclosed because it misinterpreted *Owens* and because of federal law on marriage. But as *Owens* makes clear, when the “alternate payee” status is based on being a “dependent,” federal law on marriage is immaterial. 551 F.3d at 1144.

Finally, Rinaldi cites *Rhone v. Butcher*, 140 Wn. App. 600, 166 P.3d 1230 (2007), for the proposition that the court could only distribute the pensions as a lump sum where the parties involved are unmarried. Br. Respondent, at 34. But that is not the holding of the case. Rather, *Rhone* involved interpretation and enforcement of a property settlement agreement, whereby the parties agreed on distribution of the pension, but, ultimately, disagreed on the method of distribution. In this case, there is no

property settlement agreement. Certainly, *Rhone* does not help Rinaldi's defense of the trial court's decision, since *Rhone* was decided prior to *Owens*. Because of the court's misinterpretation of the law, it refused to distribute the pension in the only fair way under the circumstances of this case.

IV. CONCLUSION

For the reasons stated above, and those given in the opening brief, Bailey asks this Court to remand for a new trial or to vacate the court's determination of a committed intimate relationship or to vacate the court's distribution and remand for entry of a Qualified Domestic Relations Order.

Dated this 18th day of November 2011.

RESPECTFULLY SUBMITTED,



PATRICIA NOVOTNY #13604
Attorney for Appellant