

No. 42660-9-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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**In re Committed Intimate Relationship of:**

**JULIE RILEY,**

**Appellant**

**and**

**ROGER HORTON,**

**Respondent**

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**APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
THE HONORABLE PAULA CASEY**

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**BRIEF OF APPELLANT**

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## I. ASSIGNMENTS OF ERROR

- A. The trial court erred in entering the portions of the findings of fact/conclusions of law set forth in **Appendix 1** hereto.
- B. The trial court erred in not enforcing the parties' 2008 agreement dividing all their property except the retirement accounts. CP 83, 86, 91.
- C. In the alternative that the parties' 2008 agreement is not enforceable, the trial court erred in considering a decline in one party's real property value between the date of separation and the trial date while not considering a similar decline the other party's real property value when arriving at a fair and equitable division of property. CP 83, 86, 91.
- D. The trial court erred in not considering the vested portion of Horton's Exeltech retirement account in arriving at a fair and equitable division of the parties' assets. CP 83, 86 91.

## II. STATEMENT OF ISSUES

- A. The trial court determined that the separate property agreement entered by the parties in 2006 was unenforceable under the two-pronged analysis set forth in *Marriage of Bernard*,<sup>1</sup> yet declined to apply that same analysis to an agreement reached by the parties in

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<sup>1</sup> *Marriage of Bernard*, 165 Wn.2d 895, 204 P.3d 907 (2009).

March 2008. Did the trial court err in not applying the *Bernard* two-pronged analysis to the March 2008 agreement?

- B. In arriving at a fair and equitable division of the parties' assets, did the trial court abuse its discretion in considering a decline in the value of one party's real property between the time of separation and trial while declining to consider a similar decline in the value of the other party's interest in the same real property during the that time period?
- C. The undisputed evidence showed that the value of the vested portion of a party's retirement account earned during the committed intimate relationship was \$4,776.02 at the time of separation. Did the trial court err in finding that the account had no vested balance and thereby awarding the entire account to the party in whose name it was held?

### **III. STATEMENT OF FACTS**

For over eighteen years (January 1990 to April 8, 2008), Julie Riley ("Riley") and Roger Horton ("Horton") were involved in a committed intimate relationship.<sup>2</sup> CP 79-80. During this time, they held

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<sup>2</sup> Throughout this brief, the parties' relationship is referred to as a "committed intimate relationship." Such relationships were formerly referred to in the case law as "meretricious relationships." See *Connell v. Francisco*, 127 Wn. 2d 339, 898 P.2d 831 (1995). However, recently, the courts have begun to use the more neutral term of

themselves out as a couple and family, together raised their daughter to adulthood, and provided love, support and companionship for each other. Id. They also pooled resources and owned property together. Id.

For most of the time the parties were together, Horton worked for WSDOT as an engineer, having started his career there in 1977. RP 34-35. In April 2007, Horton retired from WSDOT and began his current employment as an engineer at Exeltech. RP 35, 236. At the time the parties separated, Horton earned \$13,535 per month, including \$5,922 per month from his PERS 1 retirement and \$7,613 per month from his employment at Exeltech. RP 250, 264.

Since 1994, Riley has worked for WSDOT as a Transportation Planning Specialist 3. RP 31, 34. At the time of trial, Riley earned \$5,813 per month from her employment. RP 33.

In 2006, the parties executed a “Non-Marital Partnership Agreement” (the “Separate Property Agreement”) which purported to set forth the parties’ agreement with respect to the character and distribution of their property in the event of death or if the parties ceased living together. CP 8-22, 80. The Separate Property Agreement listed the value of Horton’s PERS 1 retirement account as \$171,444.69 and the value of

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“committed intimate relationship,” so this trial brief will use this new descriptive term. See *Olver v. Fowler*, 161 Wn.2d 655, 657 n. 1, 168 P.3d 348 (2007).

his deferred compensation account as \$47,752.91.<sup>3</sup> CP 20. Riley's PERS 2 account value was listed as \$16,727.39 and the value of her deferred compensation account as \$122,753.93. CP 21. The Separate Property Agreement provided that each party was to retain his/her respective retirement accounts. CP 9-10, 20, 21. Because it was executed before Horton began working for Exeltech, the Separate Property Agreement did not address the disposition of the retirement benefits Horton earned at Exeltech. As of April 2008, Horton's Exeltech retirement account had a vested balance of \$4,776.02. Ex. 12. The Separate Property Agreement also provided that the parties would continue to jointly own the family residence and certain other assets if their relationship ended, CP 10-11, 22, and further provided a process for selling the jointly-owned family residence. CP 15-16.

In March 2008, Riley and Horton entered a second agreement (the "2008 Agreement") equally dividing all their assets except for the retirement accounts. Ex. 3, 36; RP 48-50, 112, 120, 252. Rather than own their former family residence and bank accounts as tenants in common after the end of their relationship as provided in the Separate Property Agreement, the parties agreed that Horton would keep the home and pay

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<sup>3</sup> After the parties executed the Separate Property Agreement, Horton transferred all of his deferred compensation account into additional benefits under his PERS 1 account. Accordingly, the trial court did not divide Horton's deferred compensation account.

Riley for her share of the equity in the home and in some bank accounts. RP 49-50, 112. The parties agreed to value the home at \$750,000, and at that value the parties' equity totaled \$302,000. CP 83; RP 49-50, 112; Ex. 3. Horton refinanced the home and paid Riley \$150,000 for her share of the equity. CP 83. Both parties testified as to the existence and terms of the 2008 Agreement, and the trial court admitted exhibits evidencing the 2008 Agreement and its terms. RP 48-49, 195-99; Ex. 3, 36.

Upon the parties' separation, Riley quit claimed her interest in the home to Horton. Ex. 2. Horton chose to continue to live in the home after separation and continued to live there through trial. RP 62. Horton later refinanced the home again, receiving an additional \$40,000 - \$50,000. RP 222. Riley used her \$150,000 share of the home equity to purchase another home for \$445,000. RP 111. The parties' other assets were divided according to the terms of the 2008 Agreement. RP 195-99, CP 83.

On October 9, 2009, Riley filed a petition for equitable distribution from committed intimate relationship. CP 3-22. On May 13, 2010, Horton filed a petition for residential schedule/parenting plan and child support for Alexandria under Thurston County Superior Court No. 10-3-00650-9, and the trial court entered an order consolidating the two cases on June 21, 2011. CP 23-24. On July 25-26, 2011, trial was held, and final orders were entered on September 9, 2011. CP 78-93. This appeal

timely followed on October 7, 2011, and Horton has not filed any cross appeal. CP 74-93.

The trial court applied the two-pronged analysis of *Marriage of Bernard* to determine that the Separate Property Agreement was unenforceable. CP 80-82; 84. The trial court found that the value of the quasi-community interest in the parties' State of Washington retirement accounts was as follows:

Riley's deferred compensation account	\$122,753
Riley's PERS 2 account	<u>\$ 82,541</u>
Total of Riley's retirement accounts	\$205,294
Horton's PERS 1 account	\$531,875

CP 81. Horton also had a substantial separate property interest in his PERS 1 account, which was valued by Riley's expert at \$491,847.<sup>4</sup> RP 84.

Because the Separate Property Agreement allocated much more in the value of retirement accounts to Horton than to Riley, the trial court found that it was substantively unfair. CP 81. Based on the trial court's *Bernard* analysis of the Separate Property Agreement's procedural fairness, the trial court found the agreement to be unenforceable.<sup>5</sup> CP 81-

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<sup>4</sup> Total value of the PERS 1 account of \$1,023,722, less the quasi-community portion valued by the Court at \$531,875. CP 81.

<sup>5</sup> The trial court found that there was a mutual mistake of fact with respect to the values of the parties' retirement accounts, and declined to enforce the Separate Property Agreement on that basis. CP 82.

82. Neither Riley nor Horton seeks review of this portion of the trial court's decision.

Riley requested that the trial court apply the *Bernard* analysis to the 2008 Agreement. CP 36, 39; RP 275, 278-79, 281, 282. However, the trial court declined. CP 82-83. The only explanation offered by the trial court for its decision not to analyze the 2008 Agreement under the *Bernard* framework was as follows:

I am not really that satisfied with this result [not enforcing the Separate Property Agreement]. When people are dealing with matters of this much importance, when people are making decisions in the middle of a 17-year relationship, it seems to me that people need to take some responsibility for getting some proper advice. I know we are a do-it-yourself society. We go to Home Depot for materials to repair our homes. We go to the Internet to get some diagnosis of our medical problems. We use Turbo Tax to prepare our tax returns. We think we know it all when it comes to legal matters, but in fact we don't.

The truth is that at the end of this case I really wanted to leave the parties right where they are just because they were foolish enough not to get some legal advice, but I don't think I can leave these two with their decision to do it themselves because of the big mistake that was made in recognizing what their retirement assets were worth.

So that takes us to what happens next. If the [Separate Property Agreement] is set aside, all assets must be considered in a new equitable division of the property at the end of the committed intimate relationship. All the assets divided by the parties will be subject to the new division. Ms. Riley has suggested well, let's just leave the house alone; we agreed what it was. We split it in 2008, and we

are going to leave it there. I am not in a position to do that.  
RP 7/28/11:20-21.

Instead, the trial court used the 2011 value of Horton's share of the equity in the former family home in arriving at an equal division of assets, while declining to consider any decline in Riley's share, which she invested in a new home just after the date of separation. CP 82-83, 84-85. The trial court also found that none of Horton's Exeltech 401K had vested at the time of the parties' separation, and therefore awarded the entire balance of that account to Horton. CP 83. Based on its analysis, the trial court entered judgment in Riley's favor for \$69,000.<sup>6</sup> CP 90.

#### IV. ARGUMENT

##### A. STANDARD OF REVIEW

**1. Enforceability of the 2008 Agreement.** The trial court's analysis of the enforceability of the 2008 Agreement is a question of law, which this Court reviews *de novo*. *Marriage of Foran*, 67 Wn. App. 242, 251 n. 7, 834 P.2d 1081 (1992)(citing *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990)).

**2. Division of Property.** The fairness and equity of a trial court's division of property from a committed intimate relationship is reviewed

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<sup>6</sup> The trial court found that a judgment of \$74,000 in Riley's favor was necessary to equalize the parties' interests in the quasi-community assets, and this amount was reduced by \$5,000 to reflect back child support owed by Riley to Horton. CP 91.

for abuse of discretion. *Meretricious Relationship of Sutton*, 85 Wn. App. 487, 491, 933 P.2d 1069, *rev. denied*, 133 Wn.2d 1006, 943 P.2d 664 (1997). If its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, the trial court has abused its discretion. *Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 136 (1997). The trial court abuses its discretion if it applies the incorrect standard in reaching its decision. *Littlefield*, 133 Wn. at 47.

**3. Findings of Fact.** In order to be upheld on appeal, the trial court's findings of fact must be supported by substantial evidence. *Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991). Evidence is "substantial" if it is sufficient to persuade a fair-minded, rational person of the truth of the finding. *Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001).

**B. THE COURT SHOULD ENFORCE THE 2008 AGREEMENT BECAUSE IT WAS SUBSTANTIVELY FAIR UNDER THE TWO-PRONGED *BERNARD* ANALYSIS.**

Under well-established case law, the property acquired during a committed intimate relationship should be fairly and equitably divided by the trial court at the end of the relationship by applying community property principles by analogy. *Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000); *Connell v. Francisco*, 127 Wn.2d 339, 349, 898 P.2d

831 (1995). Separate property of the parties, however, is not before the Court for division. *Connell*, 127 Wn.2d at 351.

Oral separate property agreements are enforceable when clear and convincing evidence shows the existence of the agreement and the mutual observance of the agreement. *Marriage of DewBerry*, 115 Wn. App. 351, 359, 62 P.3d 525 (2003). Here, *both* parties testified as to the existence of the 2008 Agreement,<sup>7</sup> they both substantially complied with the 2008 Agreement,<sup>8</sup> and documentary evidence was admitted establishing the terms of the 2008 Agreement.<sup>9</sup>

Whether a separate property agreement will be enforced is determined by a two-pronged inquiry. *Marriage of Bernard*, 165 Wn.2d 895, 902, 204 P.3d 907 (2009); *Marriage of Matson*, 107 Wn.2d 479, 482-83, 730 P.2d 668 (1986); *Marriage of Foran*, 67 Wn. App. 242, 249, 834 P.2d 1081 (1992). First, the trial court inquires whether the agreement is substantively fair. For an agreement to be substantively fair, it must make a fair provision for both parties. *Bernard*, 165 Wn.2d at 902; *Matson*, 107 Wn.2d at 482; *Foran*, 67 Wn. App. at 249-51. If an agreement is

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<sup>7</sup> RP 48-49, 195-99.

<sup>8</sup> Ex. 2; RP 62, 111, 195-99, 222; CP 83.

<sup>9</sup> Ex. 3, 36.

substantively fair, the agreement is enforceable. *Id.* If an agreement is substantively unfair, the trial court proceeds to the second prong of the inquiry. *Bernard*, 165 Wn.2d at 903-05

The second prong of the trial court's inquiry is to determine whether (a) full disclosure has been made of the amount, character, and value of the property involved and (b) the agreement was entered into fully and voluntarily on independent advice with full knowledge by both parties of their rights. *Bernard*, 165 Wn.2d at 902-03; *Matson*, 107 Wn.2d at 483; *Foran*, 67 Wn. App. at 249.

Here, the trial court went to great lengths to analyze the Separate Property Agreement under the *Bernard* two-pronged analysis, and neither party asks this Court to review the trial court's analysis of that agreement. However, the trial court did not apply the same analysis to the 2008 Agreement, apparently because the trial court felt that the parties "were foolish enough not to get some legal advice." RP 7/28/11:21.

The 2008 Agreement allowed the parties to avoid the complications of owning the former family residence and other assets as equal tenants in common by evenly dividing those assets. Under the circumstances, where Horton's income at the time of separation was nearly triple Riley's income, it is inconceivable how an equal division of such assets could be construed as substantively unfair to Horton.

Accordingly, the division of assets in the 2008 Agreement met the first prong of the *Bernard* test and should have been enforced by the trial court.

Had the 2008 Agreement been enforced, the values of the assets at issue would have been as follows:<sup>10</sup>

	VALUE	AWARD TO RILEY	AWARD TO HORTON
<b>Quasi-Community Property:</b>			
Residence, net of mortgages	\$ 300,000	\$150,000	\$ 150,000
Horton's PERS 1	\$ 588,225		\$ 588,225
Riley's PERS 2	\$ 132,217	\$132,217	
Riley's Deferred Compensation	\$ 158,345	\$158,345	
Sub-totals	\$1,178,787	\$440,562	\$ 738,225
<b>Separate Property:</b>			
Horton's PERS 1	\$ 491,847		\$ 491,847
Grand Totals	\$1,670,634	\$440,562	\$1,230,072

The trial court determined that an equal division of the parties' net quasi-community assets was fair and equitable. CP 84-85. Should this Court enforce the 2008 Agreement, an equal division of those net assets would result in an equalizing payment from Horton to Riley in the amount of \$143,831.50,<sup>11</sup> rather than the \$69,000 ordered by the trial court.

<sup>10</sup> Compare the trial court's values set forth at CP 86.

<sup>11</sup>  $50\% \times (\$738,225 - \$440,562)$ , less \$5,000 for back child support. See footnote 5, *supra*.

**C. THE TRIAL COURT ABUSED ITS DISCRETION BY CONSIDERING THE DECLINE IN HORTON'S SHARE OF THE EQUITY IN THE FORMER FAMILY HOME WHILE NOT CONSIDERING A SIMILAR DECLINE IN RILEY'S SHARE.**

If the 2008 Agreement is not enforced, then the trial court was required to fairly and equitably divide the property acquired during the parties' committed intimate relationship by analogy to community property principles. *Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000); *Connell v. Francisco*, 127 Wn.2d 339, 349, 898 P.2d 831 (1995). The trial court should look to the factors set forth in RCW 26.09.080 in arriving at a fair and equitable division. *See Connell*, 127 Wn.2d at 349. The trial court has discretion in valuing such assets as of the date of separation, or the date of trial, or any other date reasonable under the circumstances. *Lucker v. Lucker*, 71 Wn.2d 165, 167-68, 426 P.2d 981 (1967); *Koher v. Morgan*, 93 Wn. App. 398, 404, 968 P.2d 920 (1998), *rev. denied*, 137 Wn.2d 1035 (1999). However, the trial court's discretion is not without limits, as the valuation date chosen must still result in a fair and equitable division of assets:

It may be inequitable to value certain assets as of the date of separation and other assets as of the date of trial. In *Lucker v. Lucker* [citation omitted], the parties separated seven years before trial. The trial court valued the personal property acquired prior to separation at its depreciated

value as of the date of trial. However, the trial court valued the real property acquired prior to separation at its value as of the date of separation, thus ignoring seven years' worth of appreciation. The Supreme Court noted:

If the property is to be valued as of the date of trial rather than the date of separation, appreciation as well as depreciation in value should be considered in making an equitable division.

WSBA, *Washington Family Law Deskbook* §31.2(4) at 31-6 (2d ed. 2000)(quoting *Lucker*, 71 Wn.2d at 165).

Here, the trial court's decision to value Horton's interest in the family home as of the date of trial while valuing all other assets (including Riley's interest in the family home) as of the date of separation results in an inequitable division of assets for two reasons.

First, in the typical dissolution situation, the parties clearly continue to own the family residence as community property throughout the pendency of the dissolution action. Almost as a matter of course, the parties are restrained by temporary orders from selling the home or borrowing against it. Here, Horton had full possession and enjoyed all the rights of ownership of the former family residence for more than three years prior to trial. In fact, Riley had quit claimed her interest to Horton, and Horton had twice refinanced the home—once to generate funds to buy Riley's equity and a second time to remove an additional \$40,000 - \$50,000 in Horton's own equity. As the sole title holder of the former

family home, Horton had the right to sell it at any time after the separation. He chose not to do so, so he should bear the market risks—both up and down—from that decision.

Second, if the trial court were to consider the decline in value of the former family home between the separation date and the date of trial, it should also consider the decline in value of Riley's share of that equity during the same time period. Like Horton, Riley chose to keep her share of the equity invested in a family home. Both parties were similarly affected by the nationwide decline in real estate values in the intervening years.

The *only* equitable manner in which to divide the former family home equity is to follow the parties' agreement and course of conduct over the three years between their separation and trial. Both parties chose to invest their respective shares of the family home equity in their homes: Horton in the former family home, and Riley in her new home. To consider the decline in Horton's home value while ignoring the similar decline in Riley's home value is inequitable under the principles set forth in *Lucker*. For that reason, the trial court abused its discretion and its decision to value Horton's share of the former family home as of the trial date while valuing Riley's share as of the date of separation was an abuse of discretion and should be reversed.

**D. THE TRIAL COURT'S AWARD OF ALL OF THE EXELTECH RETIREMENT ACCOUNT TO HORTON SHOULD BE REVERSED BECAUSE, CONTRARY TO THE TRIAL COURT'S FINDING, A PORTION OF THE EXELTECH ACCOUNT WAS VESTED DURING THE COMMITTED INTIMATE RELATIONSHIP.**

The trial court found that none of Horton's Exeltech retirement account had vested as of the April 2008 date of separation and, therefore, "there was no relationship interest in that account." CP 83. There is no substantial evidence in the record to support this finding. The evidence in the record shows that the vested portion of Horton's Exeltech retirement account as of the separation date was \$4,776.02. RP 51; Ex. 12. Accordingly, the trial court's omission of this quasi-community asset in the division of assets was based on untenable grounds and should be reversed. Riley respectfully submits that the Court should award her one-half, or \$2,388.01, from that account.

**VI. CONCLUSION**

The trial court correctly analyzed the Separate Property Agreement under the two-pronged substantive and procedural fairness tests set forth in *Bernard*. The trial court erred in not analyzing the 2008 Agreement using the same framework, as such an analysis would have resulted in the enforcement of that agreement as substantively fair. This Court should

reverse this portion of the trial court's decision and enforce the 2008 Agreement.

In the alternative that the Court does not enforce the 2008 Agreement, the trial court abused its discretion in valuing one party's interest in the family home as of the date of trial while using the much higher valuation as of the date of separation for the other party's interest. Under the equitable principles set forth in *Lucker*, this decision of the trial court amounted to an abuse of discretion and should be reversed on that basis.

Finally, the trial court apparently simply made a mistake in finding that none of Horton's Exeltech retirement account had vested as of the date of separation. As shown in Trial Exhibit 12, \$4,776.02 of that account's balance had vested as of the separation date. The Court should reverse this aspect of the trial court's decision and award Riley 50% of that amount.

Respectfully submitted this 31st day of January, 2012.

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**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:

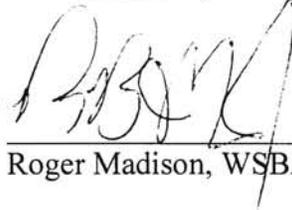
That on January 31, 2012, I arranged for service of the foregoing Brief of Appellant, to the court and counsel for the parties to this action as follows:

Office of Clerk  
Washington Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

~~Via Hand Delivery ~~US Priority 1st class postage~~ RBM~~  
Via ABC Legal Messengers

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Via email and U.S. mail

Dated at Olympia, Washington this 31st day of January, 2012.

  
\_\_\_\_\_  
Roger Madison, WSBA 15338

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## APPENDIX 1

1. The Court believes it is fair to value the parties' home at the date of decree, rather than the date of separation. CP 83.
2. Ms. Riley suggested that she should be given credit for the reduction in the value of the home she purchased with the proceeds she received. The Court will not examine how Ms. Riley chose to spend the money she received from the parties' division of their assets. CP 83.
3. Because Mr. Horton was not vested in the Exceltech retirement account as of April 2008, there was no relationship interest in that account. CP 83.
4. The values of the relationship interest in the parties' assets to be divided by the Court are as set forth in Exhibit 1. CP 83, 86.
5. The distribution of property and liabilities as set forth in Exhibit 1 hereto, as adjusted by the equalizing payment set forth in the final order of equitable distribution entered herewith, is fair and equitable. CP 84-86.
6. The first line of the table at CP 86, indicating a value of zero to the family residence.