

No. 426609-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JULIE RILEY

Appellant,

vs.

ROGER HORTON

Respondent.

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

BRIEF OF RESPONDENT

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I. RESTATEMENT OF ISSUES

1. The parties agreed that at the end of their relationship, joint assets would be divided equally. They also agreed to each retain their retirement assets, which had largely been earned during the relationship, as separate property. The parties separated less than two years after reaching this agreement. Consistent with their agreement, the respondent paid \$150,000, to the appellant based on what was then calculated to be her one-half interest in the community-like residence. The parties divided all other joint assets and debts equally, and retained individual retirement assets as separate property. The appellant subsequently challenged the parties' original agreement. Three years later, the trial court found that the original agreement was unenforceable because the parties had failed to accurately value their retirement assets. Did the trial court abuse its discretion in setting aside the parties' property division, which had been based on the unenforceable agreement, and making a new property division?

2. By the time of trial, the value of the family residence had significantly depreciated due to "market decline." The trial

court found that it would not be “fair to leave the party getting the real estate saddled with a high value on the house when at the time of trial there has been a dramatic decline in the value of the house.” Did the trial court abuse its discretion in awarding the family residence to the respondent using the value as of trial when, in dividing community-like assets at the end of a committed intimate relationship, the trial court is required to consider the parties’ economic circumstances “at the time the division of property is to become effective?”

3. At the time the parties separated, the respondent’s retirement with his new employer had not yet vested. Did the trial court abuse its discretion in excluding this retirement asset as a community-like asset, and awarding it to the respondent?

II. RESTATEMENT OF FACTS

A. The Parties Began Living Together At The End Of 1989. They Purchased A Home And Raised A Child Together.

Respondent Roger Horton, now age 58, and appellant Julie Riley, now age 54, began dating in Spring 1989, while they were married to other people, but both in the middle of divorce proceedings. (CP 20, 21; RP 132-33, 209-10) Mr. Horton has two children from his marriage. (RP 38)

The parties moved in together in November 1989 after their divorces were nearly final,¹ and soon after discussed having children together. (RP 210, 214) The parties' daughter, Alex, was born on July 28, 1992. (RP 37)²

Before Alex was born, the parties had maintained separate accounts. (RP 211) Once Alex was born in 1992, the parties began pooling their resources, and bought a new house together. (RP 211) Over the next sixteen years, the parties lived together as a family with their daughter, Alex, and Mr. Horton's children from his previous marriage also spending time in their home. (See RP 37-38)

B. In 2006, The Parties Entered Into An Agreement Confirming That Certain Assets Were Joint And Owned Equally, And That The Parties' Retirement Accounts Were To Remain Each Party's Separate Property.

In the Spring of 2005, Ms. Riley approached Mr. Horton about entering into a property agreement. (RP 183-85) Mr. Horton

¹ Ms. Riley's divorce was final on October 5, 1989. (RP 269) Mr. Horton's divorce was final on December 22, 1989. (RP 269)

² After the parties separated in 2008, Mr. Horton discovered that Alex, then age 16, was not his biological child. (RP 218-20) This revelation did not impact his relationship with Alex, and in fact, when Alex turned 18 during the proceeding, she tattooed "Horton" on the back of her neck. (RP 220)

agreed. (RP 184) Ms. Riley located an attorney to prepare the agreement. (RP 186)

Generally, the purpose of the Agreement was to set forth that certain assets of the parties would be considered “joint” and owned equally by the parties, and certain other assets would be considered separate property. (CP 8-22; Exhibit 1; RP 58-62) The most significant “joint asset” was the family residence. (CP 22; Exhibit 1) The parties agreed that if the parties separated, any jointly owned real property would either be sold or one party could “buy out” the other based on the fair market value of the property at the time less any debts owed on the property. (CP 15-16, Exhibit 1)

The parties’ most significant “separate” assets were their individual retirement accounts. (See CP 20-21; Exhibit 1) Both parties worked for the Washington State Department of Transportation (WSDOT). (CP 20, 21; Exhibit 1) Mr. Horton had a PERS 1 Plan, and had been working for WSDOT for nearly thirty years by the time parties entered into the Agreement. (RP 80-81, 87, 192) Mr. Horton retired from WSDOT within a year of entering the Agreement, and then began working for Exceltech. (RP 35,

236) Ms. Riley had a PERS 2 Plan, and had been working for WSDOT for over eleven years. (RP 72-73) Ms. Riley was still working for WSDOT at the time of trial. (RP 31)

Prior to entering into this Agreement, Mr. Horton told Ms. Riley that it was important for him to be able to retain his retirement accounts as his separate property. (RP 226) When the parties began dating, Mr. Horton was in the midst of a divorce from his ex-wife and his retirement was a significant issue. (RP 226) Mr. Horton was awarded his retirement assets in the divorce, but to balance out this award, Mr. Horton had to borrow money to pay his ex-wife because she had no retirement assets of her own. (RP 226) Because of his concern, Ms. Riley told Mr. Horton that she would never “take” his retirement from him. (RP 226)

The parties did not have the retirement accounts present valued. Instead, they valued their retirement accounts based on their then year-end statements. (RP 186; Exhibit 42, 43) Mr. Horton's PERS I was valued at \$171,444.69. (CP 20; Exhibit 1) His Deferred Compensation was valued at \$47,752.91. (CP 20; Exhibit 1) After trial, the trial court found that the present value of

Mr. Horton's PERS I plan alone was \$531,875. (Finding of Fact (FF) 2.5, CP 81)

Ms. Riley's PERS II was valued at \$16,727.39. (CP 21; Exhibit 1; RP 60-61, 239) Her Deferred Compensation was valued at \$122,753.93. (CP 21; Exhibit 1) The trial court found that the present value of Ms. Riley's PERS II plan was \$82,541. (FF 2.5, CP 81)

C. The Parties Separated In 2008. Based On The 2006 Agreement, The Parties Divided The Value Of The Joint Assets Equally And Retained Their Retirement Accounts Separately.

The parties separated less than two years after they executed the Agreement, in April 2008 when Ms. Riley moved out of the family residence. (RP 244) Mr. Horton relied on the 2006 Agreement for how the parties were going to divide their assets. (RP 193) Consistent with the Agreement, Mr. Horton offered to "buy out" Ms. Riley's interest in the family home. (RP 193-96, 223-24) The home was appraised at \$725,000, but the parties agreed to value the home at \$750,000 after Ms. Riley objected to the appraisal. (RP 195) The parties still owed approximately \$440,000 on the mortgage. (RP 196) They agreed that Ms. Riley's one-half interest in the net value of the home was \$150,000. (RP 196; See

also Exhibit 3) In order to cash Ms. Riley out, Mr. Horton refinanced the home. (RP 197)

With the exception of the retirement accounts, which the parties had previously agreed would be separate property, the parties divided their joint assets and debts equally. (RP 254; See Exhibit 36) Mr. Horton believed that this agreement was fair. (RP 220)

D. The Trial Court Found The Parties Were In A Committed Intimate Relationship And Set Aside The Parties' Earlier Agreement. The Trial Court Divided All Of The Assets Acquired During The Relationship, Including The Retirement Accounts, Equally.

Even though the parties had already divided their assets consistent with the Agreement, Ms. Riley filed a Petition for Equitable Distribution from Meretricious Relationship in Thurston County Superior Court on October 9, 2009. (CP 3) The parties appeared for trial before Thurston County Superior Court Judge Paula Casey on July 25, 2011 for a two-day trial.

At trial, Ms. Riley sought to confirm the property division that the parties had already effected, in particular with regard to the "buy-out" of Ms. Riley's equity interest in the family residence. (RP 14) But Ms. Riley also sought an award of one-half of Mr. Horton's

retirement accounts, which the parties had previously agreed would remain his separate property. (RP 14-15; CP 5) Ms. Riley also asserted that the retirement assets should be valued based on present value, and not on contributions. (RP 10-11)

Mr. Horton asked the court to confirm the parties' Agreement dividing the joint assets equally and awarding each party their retirement assets. (See RP 20) However, Mr. Horton asserted that in the event the court set aside the Agreement, that the court should find that the parties had not been in a committed intimate relationship. (RP 20-21) Mr. Horton also asked that if the trial court found the Agreement unenforceable that the trial court value the parties' family residence at the time of trial, because the value had dropped precipitously since the parties separated in 2008. (RP 22) Mr. Horton testified that by December 2010, the value of the family residence had plummeted to \$550,000 – \$200,000 less than the value at the time the parties separated. (RP 221-22) Mr. Horton testified that the net value of the home was “upside down” because more was now owned on the family residence than it was worth. (RP 200)

The trial court found that that the parties were in a committed intimate relationship between January 1990 and April 8, 2008. (FF 2.4, CP 80) The trial court found that while it recognized that Ms. Riley had had other relationships during this time period that this factor was not “determinative” as to whether a committed intimate relationship existed for purposes of an equitable distribution of community-like property. (See FF 2.4, CP 80)

The trial court found that the parties’ Agreement was unenforceable because the parties had not properly valued their retirement accounts prior to executing the Agreement. (FF 2.5, CP 80-82) The trial court found that the Agreement was not substantively fair because awarding each party their retirement accounts based on present value (and not contributions as set forth in the Agreement) resulted in Mr. Horton receiving \$531,000 in retirement assets, and Ms. Riley receiving \$205,000 in retirement assets. (FF 2.5, CP 81)

The trial court also found that the Agreement was not procedurally fair because there was “no evidence that the parties had an idea as to the present value of the retirement accounts or the significance of the present value of those accounts.” (FF 2.5,

CP 82) The trial court also found that the Agreement was based on a “mutual mistake” because “it does not appear that the importance of consulting with [independent] counsel” prior to entering the Agreement “was actually discussed with them.” (FF 2.5, CP 82)

The trial court concluded that “[b]ecause the 2006 Non-Marital Partnership Agreement is to be set aside, all property and debts accumulated during the committed intimate relationship must be considered by the Court in a new equitable division.” (FF 2.6, CP 82) The trial court concluded that it had “discretion to value assets either as of the time of separation or as of a different date.” (FF 2.6, CP 82-83) The trial court found “it is fair to value the parties’ home at the date of decree, rather than the date of separation.” (FF 2.6, CP 83) Based on Mr. Horton’s testimony, the trial court found that the value of the home was \$550,000. (FF 2.6, CP 83) Because the amount owed on the home was more than its value, the trial court found that the home had a zero value. (See CP 86)

The trial court also concluded that the property division should include any community-like interest in the parties’ WSDOT retirement accounts. (See FF 2.6, CP 82-83, 86) The trial court

found that there was no community-like interest in Mr. Horton's Exceltech retirement. (See FF 2.6, CP 83) Mr. Horton began working for Exceltech less than one year before the parties separated, and the trial court found that he was "not vested in the Exceltech retirement account" on the date of separation. (FF 2.6, CP 83)

After awarding each party their retirement accounts and taking into consideration the fact that Ms. Riley had already received \$150,000 in cash when the parties separated, the trial court awarded Ms. Riley an equalizing judgment of \$69,000. (See CP 83, 90) The trial court concluded that this "final order of equitable distribution entered herewith, is fair and equitable." (Conclusion of Law (CL) 3.2, CP 85)

Ms. Riley appeals. (CP 74)

III. ARGUMENT

A. The Trial Court Properly Set Aside The Parties' 2008 Property Division Because It Was Based On The Unenforceable 2006 Agreement.

Ms. Riley's claim on appeal that the trial court should have enforced the parties' purported "2008 Agreement" is misplaced. (See App. Br. 9-12) The only agreement that the parties had when they separated in 2008 was based on the 2006 Agreement that the

trial court found was unenforceable – a determination that Ms. Riley does not challenge on appeal. As the trial court noted, “if the 2006 agreement is set aside, all assets must be considered in a new equitable division of the property. [] All the assets divided by the parties will be subject to the new division.” (7/28 RP 21)

When the parties separated they divided what they considered at the time to be their “joint assets” based on the 2006 Agreement. (See RP 193-96, 223-24, 254) The parties also retained their separate retirement accounts based on the 2006 Agreement. (See RP 193, 254) But the trial court found that the 2006 Agreement was unenforceable. (FF 2.5, CP 80-82) Once the trial court concluded that the 2006 Agreement on which the 2008 division was based was unenforceable, the trial court was free to divide and value the assets in any way it found was just and equitable. See **Marriage of Bernard**, 165 Wn.2d 895, 906, ¶ 26, 204 P.3d 907 (2009) (recognizing that an amended prenuptial agreement could not be enforced when the underlying prenuptial agreement on which it was based was unenforceable due to substantive and procedural unfairness); see also **Rathke v. Yakima Valley Grape Growers Ass'n**, 30 Wn.2d 486, 509, 192

P.2d 349 (1948) (an agreement that is dependent upon an underlying agreement that is determined to be illegal and unenforceable is also unenforceable).

In any event, the purported “2008 Agreement” could not be enforced because the parties apparently did not have a “meeting of the minds.” According to Mr. Horton, the parties’ agreed upon division of the parties’ joint assets, including the valuation of the family residence and Ms. Riley’s “buy out,” was based on the parties retaining their separate retirement accounts as set forth in the 2006 Agreement. (RP 193) Ms. Riley apparently believed that the agreed upon division of the assets included an equal division of the parties’ retirement assets. (See RP 112) Because there was no “meeting of the minds,” the trial court did not abuse its discretion in not enforcing the purported 2008 agreement. See *Wagner v. Wagner*, 95 Wn.2d 94, 103, 621 P.2d 1279 (1980).

Because the trial court found the parties’ 2006 Agreement was unenforceable, it did not abuse its discretion in setting aside the parties’ subsequent division of property that was premised on that Agreement.

B. The Trial Court Did Not Abuse Its Discretion In Valuing The Family Residence As Of The Date Of Trial.

Trial courts have broad discretion in valuing property, and their determination will only be overturned if there has been a manifest abuse of discretion. *Marriage of Gillespie*, 89 Wn. App. 390, 403, 948 P.2d 1338 (1997). It is also within a trial court's discretion to determine on which date it chooses to value the parties' assets and obligations. See *Lucker v. Lucker*, 71 Wn.2d 165, 167-68, 426 P.2d 981 (1967). Here, because the trial court must consider the "economic circumstances of each [party] at the time the division of property is to become effective," the trial court did not abuse its discretion in valuing the family residence based on its value at the time of trial instead of its value more than three years earlier when the parties separated. RCW 26.09.080(4); *Connell v. Francisco*, 127 Wn.2d 339, 349, 898 P.2d 831 (1995) (trial court may look to RCW 26.09.080 for guidance in determining an appropriate property division at the end of a meretricious relationship); *Koher v. Morgan*, 93 Wn. App. 398, 404, 968 P.2d 920 (1998) (affirming the trial court's decision to value the assets as of the time of trial and not separation), *rev. denied*, 137 Wn.2d 1035 (1999). In order to consider the parties' economic circumstances at

the time the property division is effected, the trial court properly considered the current value of the family residence awarded to Mr. Horton.

There was nothing “inequitable” about the trial court’s decision to award the family residence to Mr. Horton based on its value at trial. In fact, the trial court acknowledged that it would not be fair to Mr. Horton if he is awarded an asset that has dramatically declined in value when the depreciation was due solely to market forces:

In today’s economy, both in settlement conferences and in trials dividing assets of parties to marriages and this type of relationship, I don’t think it is fair to leave the party getting the real estate saddled with a high value on the house when at the time of trial there has been dramatic decline in the value of the house. There is nothing that the parties could have done of their own making to preserve the value as to what it was at the time of separation. It was a matter of the market.

(7/28 RP 21-22) As the trial court recognized, both parties were equally impacted by the market decline. (7/28 RP 22: “It is my opinion that both parties suffer from the market decline.”)

Ms. Riley complains that the trial court’s decision was inequitable because “Horton had full possession and enjoyed all the rights of ownership of the former family residence for more than

three years prior to trial.” (App. Br. 14) But her complaint ignores that Mr. Horton also had the burden of continuing to pay the monthly mortgage, maintenance, and taxes during those three years.

Ms. Riley also complains that the trial court should have considered the decline in the value of Ms. Riley’s post-separation home. (App. Br. 14) But as the trial court noted, even if it wanted to consider this information, “there was no value indicated as to what the purchase value was, what the current value is.” (7/28 RP 24) Ms. Riley cannot complain that the trial court erred in failing to consider the value of her post-separation when she failed to present the evidence for the trial court to consider. ***Dependency of K.R.***, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (under the doctrine of invited error, a party cannot complain about an alleged error at trial that he set up himself).

Under the circumstances, when the asset awarded to Mr. Horton was significantly devalued by the time of trial through no fault of his own, the trial court did not abuse its discretion in placing the most current value on that asset instead of basing its award on a fiction.

C. There Was Substantial Evidence To Support The Trial Court's Determination That Horton's Retirement With His Current Employer Had Not Yet Vested When The Parties Separated.

There is substantial evidence to support the trial court's finding that "Mr. Horton was not vested in the Exceltech retirement account as of April 2008, there was no relationship interest in that account." (FF 2.6, CP 82) Mr. Horton was hired by Exceltech after he retired from the Washington State Department of Transportation in April 2007, less than a year before the parties separated. (RP 35, 236) Mr. Horton testified that by the time the parties separated in April 2008, his retirement with Exceltech was not yet vested. (RP 229) This testimony is "substantial evidence" on which the trial court could rely in finding that the parties had no community-like interest at the time of separation.

Evidence is "substantial" if it exists in a sufficient quantum to persuade a fair minded person of the truth of the declared premise. ***Marriage of Burrill***, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003). "So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it." ***Burrill***, 113 Wn. App. at 868. Even if parties had an interest in this retirement account, Ms. Riley admits

that at most it was only \$4,776. In light of the size of the community-like estate – \$1 million – this court should affirm because any error is de minimis. See *Marriage of Pilant*, 42 Wn. App. 173, 709 P.2d 1241 (1985).

In *Pilant*, the wife complained that the trial court erred in valuing the husband's retirement benefit in an amount contrary to the sole evidence presented at trial. 42 Wn. App. at 178. The amount of the alleged error was between 7% and 9% of the entire marital estate. 42 Wn. App. at 176, 181. The *Pilant* court recognized that the trial court has discretion to reject opinion testimony that it finds unpersuasive, 42 Wn. App. at 179, and held that since there was no evidence presented that could support the trial court's value, the trial court erred. It nevertheless affirmed the trial court's decision because a valuation error is not necessarily reversible. 42 Wn. App. at 181 ("we hold that the erroneous valuation of one items in this particular case, does not require reversal of the otherwise fair and equitable distribution of an estate worth between \$546,000 and \$675,000").

Likewise, even if the trial court erred in characterizing any interest in the Exceltech retirement as Mr. Horton's separate

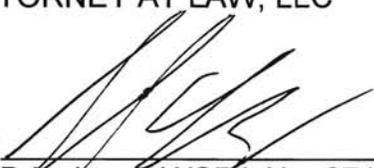
property, this court should still affirm because as the trial court found, as a whole the property division was just and equitable. **Gillespie**, 89 Wn. App. at 399 (“Although failure to properly characterize property may be reversible error, mischaracterization of property is not grounds for setting aside a trial court's property distribution if it is fair and equitable.”).

IV. CONCLUSION

The trial court did not abuse its discretion in valuing and distributing the parties' community-like property at the end of their committed intimate relationship. This court should affirm.

Dated this 3 day of April, 2012.

BRITA LONG
ATTORNEY AT LAW, LLC

By: 

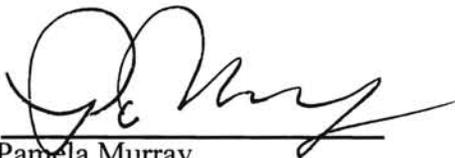
Brita Long, WSBA No. 27127
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CERTIFICATE OF SERVICE

I certify that on April 3, 2012 I sent a copy of the foregoing Brief of Respondent via email PDF attachment to Roger Madison, attorney for Appellant, at roger@madisonlf.com and via US Mail to Roger Madison at 2102 Carriage Dr. SW, Suite A-102, Olympia, WA 98502.

I further certify that on April 3, 2012 I sent the original and one copy of the foregoing Brief of Respondent via US Mail to the Office of the Clerk, Washington Court of Appeals, Division II, 950 Broadway, Ste 300, MS TB-06, Tacoma, WA 98402-4454.

Dated this 3rd day of April, 2012.

By: 
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