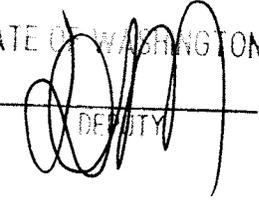


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

NO. 39672-6-II

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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ELINOR JEAN TATHAM,

*Respondent,*

v.

JAMES CRAMPTON ROGERS,

*Appellant.*

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. Appellant assigns error to Conclusion of Law No. 16.
2. Appellant assigns error to Conclusion of Law No. 17.
3. Appellant assigns error to Conclusion of Law No. 18.
4. Appellant assigns error to Conclusion of Law No. 19.
5. Appellant assigns error to the property division set forth in the judgment entered in Cause No. 07-2-00008-8.
6. Appellant assigns error to the trial court's denial of his motion for reconsideration.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. When making a division of quasi-community property at the end of a meretricious relationship, does it violate the rule of *Connell v. Francisco* for a trial court to consider a party's large amount of separate property and to use that as a justification for making a very disparate division of the quasi-community property?
2. Is a 75/25 split of quasi-community property an abuse of discretion and directly contrary to the rule laid down in *Wills v. Wills*, 50 Wn.2d 439, 312 P.2d 661 (1957), that in situations where neither party is at fault a property division should be more equal than a two-thirds to one-third split?
3. Is a 75/25 split of quasi-community property an abuse of discretion when the record establishes that the party receiving 25% (a) has not earned significant income in years; (b) suffers from a serious mental illness, and (c) that even his friends will no longer hire him to work for them because of his mental illness; while at the same time (d) the party receiving 75% of the quasi-community property is a physician who has worked continuously in salaried positions for the past 13 years and is younger and in good health?

## **C. STATEMENT OF THE CASE**

### **1. PROCEDURAL HISTORY**

On January 10, 2007, Elinor Tatham, age 47, filed a petition for equitable distribution of quasi-community property, seeking to divide the property acquired during her ten year relationship with James Rogers, age 52. CP 1-3, 11. In his answer Rogers admitted that the parties began a ten year committed intimate relationship in June 1997; that they cohabited continuously until February 2006; that they acquired property which would be characterized as community property if they had married; and that their relationship terminated on March 1, 2006. CP 8-9.

Because the parties had a nine year old female child (referred to here by her initials as "IRR"), on May 1, 2008, Tatham also filed a petition for a parenting plan. Tatham sought child support; Rogers acknowledged that he was the father of the child and sought visitation rights.

Both cases were tried to the Honorable Craddock Verser. Trial of the parenting petition began on April 16, 2009 and concluded in the morning of April 20, 2009. Trial of the property division petition began in the afternoon of April 20, 2009, and concluded that same day.<sup>1</sup> The

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<sup>1</sup> The verbatim report of proceedings consists of five volumes. The first three volumes contain the transcript of the trial of the parenting petition under Cause No. 08-3-00069-1,

parties and the Court treated the parenting petition as “part one” of the trial, and the property division petition as “part two” of the trial.<sup>2</sup>

On May 12, 2009, the court issued a memorandum opinion after the trial in the property division matter. CP 103-109. On the same day the Court issued a memorandum opinion in the parenting plan matter. CP 133-140.

On June 17, 2009, Rogers filed written objections to Tatham’s proposed findings of fact and conclusions of law in the property division portion of the case. CP 110-115.

On July 15, 2009, the Court heard argument on the proposed findings and conclusions, and then entered findings and conclusions. CP 116-120. The Court also entered judgment in the property division matter on that same day. CP 121-123.

Rogers filed a motion to reconsider on July 21, 2009, challenging the Court’s division of the quasi-community property as inequitable. CP

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as follows: RP I – April 16, 2009; RP II – April 16, 2009 (continuation); RP III – the morning of April 20, 2009. The last two volumes contain the transcript of the trial of the property division petition under Cause No. 07-2-00008-8, as follows: RP IV – April 20, 2009 (continuation); RP V – July 15, 2009.

<sup>2</sup> See RP III, 371 (THE COURT: Okay. Shall we go into phase two? Do we figure we can finish this today? The financial part, the property part, Mr. Olsen, is I that going to be done today, I hope? MR. OLSEN: Do our best. THE COURT: All right. I would like to make my decision on this case and if we can finish that part of it today, I’m thinking about setting a time maybe Thursday at four o’clock or something I can give my decision, both parts . . .”).

125, 126-129. On August 5, 2009, the Court denied Rogers' motion for reconsideration and adhered to its property division decision. CP 151-152.

Rogers filed timely notice of appeal on August 11, 2009. CP 153-158.

## **2. FACTS**

### **a. Evidence of Rogers' Mental Illness**

Dr. Tatham, the mother of the child, presented the testimony of several of Rogers' close friends, all of whom testified that beginning in April of 2008 they noticed a serious change in Rogers' behavior. RP I, 39 (Dorn), 83 (Carlson), 104 (Downing), 124 (Gibboney), 148 (Westerman). All of the witnesses had known Rogers for a long time and four of them for more than a decade. RP I, 34, 81, 102, 125, 145. All related that, since April of 2008, Rogers spoke very fast, talked in verbal loops, made no sense, repeated things over and over and had become verbally abusive. RP I, 39, 42, 104, 148. They reported that he was having "fantastical thoughts." RP I, 39. He "didn't make sense." RP I, 88. He told one friend he had "mystic visions." RP I, 50. It was "impossible to get a word in a conversation with him" and noted that "[h]e just talks very fast right over you." RP I, 130, 104. He "ranted and raved" at people who had been his close friends for years and making negative comments about them. RP I, 93, 111. They described his speech as "loosely organized repetitive talking," and said that he talked "in loops." RP I, 106, 150. As witness Carlson put it, "I

feel like the Jim I knew and loved is not present in this person right now.”

RP I, 91.

One witness testified that she “thought he was having some kind of psychotic break . . . as if he was losing touch with reality.” RP I, 134.

Another said the same thing. RP I, 153. Witness Gibboney testified that some of his speech was delusional. RP I, 131.

He told me he was a prophet. He told me that he had the ability to see that truth that other human beings did not possess. He told me he thought [IR, his daughter] was a three million year old being and that he was sent [to earth] as her protector.

RP I, 131.

Officer Fudally of the Port Townsend police department testified that on two separate occasions in April of 2008, police took Rogers to the hospital because he was acting very strangely and police were concerned that he was possibly a danger to himself or to others. RP I, 15, 20. Fudally said that on the first occasion Rogers “was having a manic episode.” RP I, 12. He was talking very fast and very loudly and said that his legs had psychic powers. RP I, 14-15. On the second occasion Rogers was lying in a field between his house and a neighbor’s house with signs that demanded that the neighbor apologize to him. RP I, 32.

Malcolm Dorn, a friend of Rogers for 24 years, finally made an appointment for Rogers to see a mental health professional named Barbara

Minchin and talked Rogers into going to see her. RP I, 37, 45. Mincheon gave Rogers some samples of a medication called Zyprexa but Rogers did not want the medicine so Dorn held on to it for him. RP I, 47. Later, after the police had taken Rogers to the hospital, Rogers became willing to take the medication and for one week he took the pills that Mincheon had provided. RP I, 48-49. Dorn said that Rogers told him the pills seemed to help. RP I, 49.

Another friend, Marc Downing, testified that when he told Rogers that he could not go to the Oregon County Fair with him because he had made plans to spend the day with other friends, Rogers started yelling at him. RP I, 113-114. Rogers got so close to Downing that Downing could feel the spray from his yelling on his face. RP I, 115. Rogers told Downing that Downing had to leave or else Rogers was not going to be able to control himself. RP I, 115. Downing responded by agreeing to leave. RP I, 115. This confrontation occurred in a restaurant and caused such a disturbance that the restaurant told Rogers he could no longer come there. RP I, 115.

When Rogers testified he said he had seen Dr. Vance Sherman three or four times, and that he had had long conversations with Dr. Eric Nygard and a mental health professional named Marsha Pearlman. RP II, 172. He acknowledged he had also seen a Dr. McBride, and that Dr. McBride had

written an evaluation report. RP I, 224. Rogers, however, did not read the report and said he did not know what Dr. McBride's diagnosis or treatment recommendations were. RP II, 224-226.

Dr. Tatham, although not a psychiatrist, testified that she felt that Rogers had had a manic psychotic episode. RP II, 259. She testified that she thought it was "a really bad idea" for Rogers to have unsupervised contact with his daughter IR. RP II, 275. "I think it's potentially unhealthy for [IRR] to be exposed to a parent who's so obviously unstable until there's a more comprehensive diagnosis, until there's a treatment plan, until there's at least some objective evidence that he's adhering to a treatment plan and making some sort of progress." RP II, 275.<sup>3</sup>

Rogers' attorney asked Dorn, Downing and Westerman, each of them a longtime friend of Rogers, if they would be willing to hire Rogers to do work for them given his current mental illness condition. All of them said they would not. RP I, 78, 118, 121, 157.

**b. The Parties' Real Properties**

The Court below found the following facts which are not in dispute:

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<sup>3</sup> See also RP III, 345 (argument of Tatham's counsel that Rogers should have no visitation with his daughter until he satisfied psychological evaluation and treatment conditions).

Tatham and Rogers met in 1996 and began living together in 1997. CP 116, ¶ 1. They had a daughter born in 2000. *Id.* They separated in February 2006. *Id.*

Tatham is a physician. *Id.*, ¶ 2 She inherited \$75,000 during the parties' relationship. *Id.* Rogers is a builder who worked full time on a house located at 3357 Pettygrove Street (hereafter the “Rosewind” property) which he purchased in 1994. *Id.*, ¶ 3. His main source of income was his inheritance which he received in 2001-2003. *Id.* He was unemployed during most of the relationship, devoting his energy, efforts and a portion of his income to the improvement of the Rosewind home. *Id.*

From 1997 to June 2002 the parties lived in a house they rented. *Id.*, ¶ 5. They moved into the Rosewind home in June of 2002 and remained there until they separated in February 2006, when Tatham and IRR moved out and went to live in a property on Eddy Street. *Id.* The parties had purchased the property on Eddy Street in Port Townsend during their relationship in January of 2001. *Id.*, ¶ 9.

In August 2003, the parties bought an unimproved parcel of property on Tibbals Street. *Id.*, ¶ 8. During their relationship Tatham also acquired a 1/6 interest in a medical professional corporation, and that corporation owns the Watership Medical Building. *Id.*, ¶ 10.

Rogers inherited real property in Stratford, Connecticut which he owns with four other people. *Id.*, ¶ 11.

**c. The Parties' Financial Accounts**

The Court found that the parties had the following financial accounts:

- (1) A Merrill Lynch account with Rogers' inheritance funds in it; this account contained \$924,634 in it at the time of the parties' separation;
- (2) A Quimper Credit Union account, funded primarily by Roger's inheritance, with a balance of \$4,069 at the time of separation
- (3) Three T.D. Waterhouse accounts with \$110,706 in it at the time of separation, of which a portion came from two Edward Jones accounts owned by Tatham, which had \$18,911 in it at the time the parties started their relationship;
- (4) Two Jefferson County Healthcare retirement accounts with a value of \$77,362 at the time of separation; and
- (5) A "529" account established by Rogers for the parties' daughter IR, with \$54,000 in it.

CP 118, Findings of Fact Nos. 12, 13, 14, 15 & 16.

**d. Characterization of the Parties' Property**

The parties agreed as to the characterization of their property and the Court accepted the parties' characterization of their property. The Court characterized their property as follows:

**Community Property**

1. The Tibbals property. Concl. Law No. 3.
2. The Eddy Street property. Concl. Law No. 4.
3. The 1/6 interest in the Watership Medical Building. Concl. Law. No. 5.
4. T.D. Waterhouse accounts. Concl. Law No. 9.
5. Jefferson Health Care Retirement account. Concl. Law No. 10.
6. The "529" account for the child. Concl. Law No. 11.

The Court concluded that the total value of all the property which would be characterized as community if they had been married was \$606,405.

CP 120, Concl. Law No. 13.

The Court found the following property was separate property:

<b>Tatham</b>	<b>Rogers</b>
\$18,911 from two Edwards Jones accounts, which was rolled into a T.D. Waterhouse account	Rosewind property
	Stratford, CT property
	Merrill Lynch account
	Quimper Credit Union Account

CP 120, Concl. Law Nos. 2, 6, 7, 8 & 15. The Court found that Rogers' total separate property was worth \$1,360,203 at the time of separation and that Dr. Tatham's separate property was worth \$18,911 at the time of separation. CP 120, Concl. Law Nos. 14 & 15.

The parties agreed that under settled law their separate property was not before the Court for division. RP IV, 504 (Tatham), 513 (Rogers).

**e. The Parties' Proposals for Division**

In closing arguments Tatham's counsel itemized which pieces of property should be awarded to Tatham and concluded that if the Court followed her recommendation for property division "[t]hat would mean that for the community property, or quasi-community property, Dr. Tatham would be getting 60% and Mr. Rogers would be getting 40%." RP IV, 510.

Tatham's counsel allowed that this division of the quasi-community property would be fair because Rogers had so much *separate* property. Rogers had received almost \$1 million in an inheritance from his parents. Tatham's counsel argued that this inheritance money, plus his separate property in the Rosewind house, put Rogers in a position of great wealth. Tatham's counsel proposed awarding Tatham all the community property except for the T.D. Waterhouse accounts, stating that if this recommendation were followed then, "Dr. Tatham will be left with a net worth of \$462,784.00 in assets," and "Mr. Rogers on the other hand by contrast, will be left with \$1,377,425 in assets." RP IV, 510.

However, in making this comparison of the total values of *all* the assets, Tatham's counsel included the parties' *separate* property even though she had already conceded that legally the parties' separate property was not before the Court.

Tatham's counsel had begun her argument by conceding that "the law says that property that would have been characterized as separate property had the parties been married is not before the Court for distribution." RP IV, 504. But notwithstanding this concession that the law did not allow the Court to distribute separate property, Tatham's counsel nevertheless encouraged the Court to consider the fact that Rogers had a lot of separate property because she said it was relevant to the economic circumstances that the parties would be in after property division:

The paramount consideration of a Court's determination about how to separate property is the economic circumstances in which the division will leave the parties. Mr. Rogers has substantial liquid assets. He has unencumbered real property, three pieces of unencumbered real property, as well as a pretty liquid Merrill Lynch account.

RP IV, 511.

Moreover, Tatham's counsel misrepresented the facts as to "the economic circumstances in which the division will leave the parties" since she ignored the fact that the nearly \$1 million in separate inheritance money which Rogers had received during their relationship and which had

been placed in the Merrill Lynch account had, by the time of trial, been more than half spent and was worth only \$482,000 by the end of 2008.

Tatham's counsel went on to describe Rogers as someone who was basically lazy and did not want to work:

He's been described as a masterful artisan who's capable of doing tremendous work; *he simply chooses not to*. Dr. Tatham's earning capacity isn't all that great. Fifty-five thousand dollars, even in Port Townsend, isn't a particularly high salary.

RP IV, 511. Noting that under her proposed property division the bulk of Tatham's assets would be tied up in IRA accounts and in the value of her home, Tatham's counsel argued that her proposed 60/40 property division was "fair and equitable." RP IV, 511.

Rogers' counsel argued for a 50/50 split and stressed the fact that Rogers had been unable to earn much money in the past six years, and noted that Rogers had a mental illness which made it hard for him to earn money. Counsel drew the trial court's attention to the extensive testimony on mental illness which the court had just heard in the trial of the parenting plan proceeding, and to the opinion in *In re Marriage of Urbana*, 147 Wn. App. 1, 195 P.3d 959 (2008),

[a] case out of Division II where our Division wrote that the Court, in determining how to distribute property, the Court may consider factors such as health and ages of the parties, *their prospects for future earnings, their education and employment histories*, their necessities,

financial abilities, their foreseeable future acquisitions and obligations, whether the property to be divided should be attributed to inheritance or efforts of one or both of the parties. When you look at the tax returns that have been submitted for Mr. Rogers, you see a very low earning capacity. And it appears that between 1997 and 2002 he was making, on average, more in capital gains on his Schedule D on those tax returns than from actual earnings. And I'd ask the Court to take judicial notice of the testimony we heard in the trial, related trial in this case that was just finished, where *numerous witnesses testified as to Mr. Rogers' current mental state, which certainly has an impact on his earning history. It is inconsistent to argue on one hand he is so mentally debilitated as to be disqualified from having contact with his daughter while at the same time arguing that for the purposes of property he's fine and dandy.*

RP IV, 514-15 (bold italics added).

Rogers' counsel noted that although there was \$924,634.32 in Rogers' Merrill Lynch account, from his inheritance from his parents, when Tatham and Rogers separated in 2006, about half of that was now gone. RP IV, 515. The account was now actually worth about \$482,000.<sup>4</sup>

Rogers' counsel argued that the Court should make an even 50/50 split of the quasi-community property. RP IV, 521. He noted that Rogers was not the only one who had spent a large portion of his separate property inheritance, RP IV, 521, since Tatham acknowledged that in the summer

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<sup>4</sup> Rogers' Trial Exhibit No. 14 showed that as of December 2008 there was only \$482,177.04 left in the Merrill Lynch account. Therefore, while the Superior Court eventually found that this account was Rogers' separate property, by the time the judgment was entered it was worth only about 52 % of the amount that it had been worth when the parties separated.

of 2007 she had received an inheritance of \$75,000 from her parents and that she had spent the entire amount prior to trial. RP IV, 443.

**f. The Trial Court's Findings Re Improvements to the Value of the Rosewind Property.**

The trial court found that that although the Rosewind property was the separate property of Rogers (CP 119, Concl. Law No. 2), both Rogers and Tatham had made community contributions which had increased the value of the property.

He [Rogers] was unemployed during most of the relationship, devoting his energy, efforts, and a portion of his income to the improvement of the Rosewind home.

CP 116-117, FF No. 3.

Dr. Tatham's income and efforts also contributed to improvements to the Rosewind property and supported the community.

CP 117, FF No. 4.

The court found that the Rosewind property appreciated in value from \$60,000 to \$345,000 from 1997 to the date of trial, due to community contributions, Mr. Rogers' inheritances and his labor, trades and earnings during that time." CF 119, FF No. 22. The court found that the value of Rogers' labor which he contributed to improving the home on the Rosewind property so that it could be inhabited was \$150,000. CP 119, FF No. 19. As to Tatham's contribution to the value of the Rosewind

property, the court noted that no evidence was presented as to the value of her contributions. CP 119, FF No. 20. The Court found that the community had earned a community property right of reimbursement in the amount of \$100,000 for the parties' contributions to the increased value of the Rosewind property. CF 119-120, Concl. Law No. 12.

**g. The 75% To 25% Division of the Quasi-Community Property.**

The trial court found that the total value of all quasi-community property before the court was \$606,405. CP 120, FF No. 13.

Although Tatham had only proposed that she receive 60% of the quasi-community property, the trial court awarded her 75% of the community property. The trial judge awarded Tatham the following property at the following values:

Eddy Street Property	\$110,816
Tibbals lot	\$ 90,000
Watership Medical Building Partnership interest	\$ 82,432
T.D. Waterhouse accounts after deduction of \$18,911 separate property of Tatham from Edward Jones accounts	\$ 91,795
Jefferson Healthcare retirement accounts	\$ 77,362
	<u>\$452,405<sup>5</sup></u>

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<sup>5</sup> This total is based on the arithmetic of appellant's undersigned counsel. The trial judge Concl. Of Law No. 17 states that the total value of these quasi-community assets

The trial court awarded Rogers the \$100,000 right of reimbursement which he found the community had earned through contributions to the increased value of the Rosewind property (which was Rogers' separate property) and the 529 account containing funds for the college education of the parties' child:

Mr. Rogers should be awarded the right to reimbursement in the Rosewind house and the 529 account. The total net value of these assets is \$154,000.

CP 120, Concl. Law No. 18,

The trial judge specifically stated that he made this disparate division because Rogers had a lot more separate property than Tatham:

Mr. Rogers has substantially more separate property than Dr. Tatham. The extent of his separate property in comparison to Dr. Tatham's minimal separate property is a compelling reason to award Dr. Tatham most of the property which would have been characterized as community property had the parties been married. In addition most of the community property was acquired as a result of Dr. Tatham's employment.

CP 120, Concl. Law No. 16.

The trial court expressly acknowledged that he had awarded 75% of the quasi community property to Tatham.

The award to Tatham represents 75% of the assets which would have been characterized as community had the

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awarded to Tatham amounts to \$452,504. This figure disagrees by \$99 with the addition of appellant's undersigned attorney, but for purposes of this appeal this arithmetic difference can be ignored.

parties been married which, in consideration of the findings of fact set forth above, is a fair and equitable division.

CP 120, Concl. Law No. 19.

**h. The Judgment Entered in the Property Division Matter**

Despite the fact that counsel for both parties had expressly acknowledged the holding in *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995) that the separate property of parties to a committed intimate relationship is not before the Court for division, the trial court entered a judgment which, on its face, purports to “award” separate property to each of the parties. The judgment states that Rogers “is *awarded* all right, title and interest in the following community *and separate property*,” (italics added) and proceeds to list, *inter alia*, Rogers’ separate property in the Rosewind real estate, the Connecticut real estate, his Merrill Lynch account containing his inheritance money, and the Quimper Credit Union account. CP 122.<sup>6</sup>

**i. The Decision Entered in the Parenting Plan Matter**

The trial court found that although there was no doubt that Rogers loves his daughter and has great affection for her, [b]ased on the evidence, the court finds that Mr. Rogers cannot express or act on that love and

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<sup>6</sup> Similarly, the judgment recites that Tatham “is awarded all right, title and interest in the following community *and separate property*,” (italics added), but no property which was Tatham’s separate property is listed. CP 122.

affection for I.R.R. unless and until he addresses the mental health issues and symptoms described by his oldest and closest friends.” CP 137.

The trial court noted that Officer Fudally had had to transport Rogers to Jefferson General Hospital and place him in protective custody because he was a danger to himself or others, and that in a second incident Officer Fudally believed Rogers was suffering from a manic episode and had to take him to the hospital again. CP 134-135. The trial court found:

Without exception each of the witnesses mentioned above, all close friends of Mr. Rogers and of the Tatham/Rogers family, describe Mr. Rogers as suffering from some form of mental change beginning in April of 2008. The witnesses describe Rogers as talking rapidly, “in loops,” not making sense, having “fantastical thoughts,” abandoning his friends and values, repeating things “over and over again,” “not grounded in reality,” having “no ability to communicate” and having “paranoid thoughts.”

CP 135.

The court noted that “Mr. Rogers’ bizarre conduct alarmed all of his close friends,” and that they repeatedly offered to assist him if he would just get some help dealing with his mental health. CP 135. The Court noted that while Mr. Dorn helped Rogers to see Barbara Minchin, and thus got some medication for Rogers, after taking that medication briefly Rogers did not make any efforts to follow up with any form of treatment or formal evaluation. CP 135. The trial judge concluded: “It is

apparent from the testimony that Mr. Rogers still suffers from whatever mental condition existed in April of 2008.” CP 136.

Accordingly, the trial judge ordered that Rogers could not have any residential time or any supervised visitation with his daughter “until he obtains a complete psychological evaluation by a licensed psychologist or psychiatrist, including, if recommended, a physiological component, and has participated in whatever therapy, including medication that is recommended, for a minimum of 30 days.” CP 138. In addition to his memorandum decision, the trial judge entered a final parenting plan which provided that Rogers could not have residential time or visitation with the child until he complied with the conditions of obtaining a complete psychological evaluation and following all treatment and medication recommendations. CP 149-150.

**j. Motion for Reconsideration of the Property Division**

Rogers’ attorney moved for reconsideration of the property division, noting that the court had awarded Tatham the vast majority of the community property even though Tatham had a history of working and clear potential to continue to earn a substantial income, whereas Rogers had had limited earnings “and since April of 2008, has suffered from debilitating mental illness.” CP 127.

Citing to *In re Marriage of Rockwell*, 141 Wn. App. 235,249, 170 P.3d 572 (2007), Rogers' counsel noted that the Rockwell Court had held that that "where one spouse is older, semi-retired, in generally ill health and the other spouse is employable, the Court does not abuse its discretion in ordering an unequal division of the community property." In *Rockwell* the trial court awarded the ill and unemployable spouse 60% of the community property. In the present case, Rogers' counsel noted, "the Court did just the opposite." CP 128.

Not only did the Court award an absurdly disparate property division, it awarded the lion's share of community property to the younger spouse with vastly better earning potential, in a mid-length relationship.

Neither in the Court's Findings nor in its Memorandum Opinion did the Court take into consideration the great disparity in the parties' earning potential; especially in the light of Mr. Rogers' mental illness.

CP 128.

The trial judge denied Rogers' motion for reconsideration and made these comments regarding a perceived lack of evidence regarding the *effect* of Rogers' mental illness on his potential to earn money:

Mr. Rogers did not introduce evidence in either the "parenting plan" phase of the litigation between these parties or in the "property division" phase of this litigation of: (1) a diagnosed mental illness (2) the effect of that alleged mental illness on his ability to earn an income (3) the effect of that alleged mental illness on his ability to manage his significant assets in order to earn an income. . .

CP 151.

**D. APPELLATE STANDARD OF REVIEW**

Courts review the division of property at the end of a committed intimate relationship for abuse of discretion. *Koher v. Morgan*, 93 Wn. App. 398, 401, 968 P.2d 920 (1998). Discretion is abused when it is exercised on untenable grounds. *Soltero v. Wimer*, 159 Wn.2d 428, 433, 150 P.3d 552 (2007). “A trial court would necessarily abuse its discretion if it based its ruling upon an erroneous view of the law.” *Choate v. Choate*, 143 Wn. App. 235, 240, 177 P.3d 175 (2008). *Accord Washington State Physicians v. Fisons*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Courts review conclusions of law under the *de novo* standard of review. *Id.* The question of whether a court has the power to consider the parties’ relative amounts of separate property when making a property division for parties to an ended committed intimate relationship is a question of law.

**E. ARGUMENT**

- 1. THE TRIAL COURT ERRED BY (a) CONSIDERING THE RELATIVE AMOUNTS OF SEPARATE PROPERTY WHICH THE PARTIES HAD AT THE END OF THEIR COMMITTED INTIMATE RELATIONSHIP WHEN DECIDING HOW TO DIVIDE THEIR QUASI-COMMUNITY PROPERTY; AND (b) BY PURPORTING TO “AWARD” ROGERS HIS SEPARATE PROPERTY.**

The trial judge concluded that the fact that the relatively large amount of Rogers' separate property "in comparison to Dr. Tatham's minimal separate property is a compelling reason to award Dr. Tatham most of the property which would have been characterized as community property had the parties been married." CP 120, Concl. Law No. 16. Rogers submits that this is simply incorrect, and that it is directly contrary to the Supreme Court's decisions in *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995) and *In re Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000). Those cases hold that once a trial judge determines that a committed intimate relationship exists, "the trial court then evaluates the interest each party has *in the property acquired during the relationship*," and "then makes a just and equitable distribution of *such* property." *Id.* at 602; *Connell*, 127 Wn.2d at 349.

This language demonstrates that the trial court is *not* authorized to evaluate the interest that each party has in his or her separate property and is *not* authorized to distribute their separate property. This conclusion was made even clearer by the Court's blunt statement that parties to committed intimate relationships were *not* to be treated the same as married persons.

The Court held that trial judges could distribute "the property acquired during the relationship . . . so that one party is not unjustly enriched at the end of such a relationship." *Connell*, at 349; *Pennington*, at 602. But at

the same time the Court clearly stated that a court could not touch separate property acquired before the relationship began, or property acquired by inheritance, because allowing a party to retain all such property would in no way cause any “unjust enrichment.”

Therefore, property owned by one of the parties prior to the meretricious relationship and property acquired during the meretricious relationship by gift, bequest, devise or descent with the rents, issues and profits thereof, is not before the court for division.

*Connell*, 127 Wn.2d at 351.<sup>7</sup>

The Supreme Court held that it would be impermissible to attempt to exercise control over the parties’ separate property because to do that would be treat committed intimate relationships as if they were common law marriages, and that would convert the relationship into one that the parties had deliberately chosen not to enter into:

***We conclude a trial court may not distribute property acquired by a party prior to the relationship at the termination of a meretricious relationship. Until the Legislature, as a matter of public policy, concludes meretricious relationships are the legal equivalent to marriages, we limit the distribution of property following a meretricious relationship to property that would have been characterized as community property had the parties been married.*** This will allow the trial court to justly divide

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<sup>7</sup> In the present case, there is nothing “unjust” about ignoring the fact that Rogers inherited nearly a million dollars from his parents, or the fact that he came into the relationship already owning the Rosewind property. Similarly, under *Connell* there is nothing “unjust” about ignoring the fact that Tatham inherited \$75,000 during the relationship. Because they were not married, neither party is entitled to have the other party’s inheritance given any consideration whatsoever.

property the couple has earned during the relationship through their efforts *without creating a common law marriage or making a decision for a couple which they have declined to make for themselves*. Any other interpretation equates cohabitation with marriage; ignores the conscious decision by many couples not to marry; confers benefits when few, if any, economic risks or legal obligations are assumed; and disregards the explicit intent of the Legislature that RCW 26.09.080 apply to property distributions following a marriage.

*Connell*, 127 Wn.2d at 349-350 (bold italics added). *Accord Olver v. Fowler*, 131 Wn. App. 135, 140, 126 P.3d 69 (2006), *aff'd* 161 Wn.2d 655, 138 P.3d 348 (2007).<sup>8</sup>

In this case, the trial judge disregarded the holding in *Connell* and expressly considered the parties' relative amounts of separate property. CP 120, Concl. Law No. 16. In so doing the court considered property acquired before the relationship began, and effectively equated their cohabitation with marriage, ignored the fact that the parties chose not to get married, and ignored the Legislature's intent to apply RCW 26.09.080 only to married people. The trial judge even went so far as to purport to "award" Rogers his separate property, CP 122, even though *Connell* and *Pennington* both explicitly hold that the parties' separate property is not

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<sup>8</sup> "Unlike the division of property upon dissolution of a marriage, when both community property and separate property are before the court for equitable distribution, *a court* dividing property acquired during a committed intimate relationship *may exercise its discretion only as to property that would have been community property* had the parties been married." (Bold italics added).

before the Court in a proceeding to equitably divide the jointly acquired property of a committed intimate couple.

Respondent Tatham may argue that while *Connell* holds that separate property is not before the court for equitable division, the trial court can nevertheless *consider* the parties relative amounts of separate property when deciding how to divide their quasi-community property. There are two reasons why such a contention must be rejected.

First, essentially this same proposition was advanced by the two dissenting justices in *Connell* and was *rejected* by the Court. In his dissent Justice Utter complained that by removing all separate property from trial judge consideration, the majority was making it hard for trial judges to make fair decisions:

By limiting the distribution of property following a meretricious relationship to property that would have been characterized as community property had the parties been married, the majority establishes a new rule that will be uncertain in application and will likely interfere with the ability of the courts to “make a just and equitable distribution of the property” as is required by [a prior decision of the Court].

*Connell*, 127 Wn.2d at 353 (Utter, J., *dissenting*). Although Justice Utter agreed that “meretricious” relationships and marriages were not the same, he argued that “the governing principles are the same.” *Id.* at 354.

**But Justice Utter's views did *not* prevail.** They were *rejected* by the Court. The Court held that the governing principles are *different* and that the separate property of the parties to a committed intimate relationship is "not before the Court." In the present case, it is evident that the trial judge was inclined to endorse Justice Utter's approach. He felt that it was only fair to consider the fact that Rogers had a lot more separate property than Tatham did. But that approach was expressly foreclosed by the *Connell* decision.

Second, Rogers notes that if courts were to hold that trial judges were permitted to "consider" the parties' relative amounts of separate property, even though they were not permitted to reallocate the separate property of one party to the other party, then the decision in *Connell* would be essentially eviscerated. *Connell* would merely become a rule that dictated the starting point of property division. The separate property would have to stay where it was. But trial judges would be free to effectively allow one party to obtain the windfall advantage of the other party's inheritance by using that as a justification for making a grossly disparate division of the quasi-community property. The *Connell* rule that the parties' separate property "is not before the Court" would become meaningless. And in the present case, the trial judge did just that, ignoring

the *Connell* rule by considering exactly what the *Connell* decision says he may not consider.

Third, Rogers notes that in *Soltero v. Wimer*, 159 Wn.2d 428, 150 P.3d 552 (2007), when a trial court judge attempted to evade the thrust of *Connell* by requiring one party to pay the other party a sum of money even though there was no quasi-community property at all, the Supreme Court reversed the decision because it ignored *Connell*. In *Soltero*, a female cohabitant sued the male cohabitant for equitable distribution after their committed intimate relationship had ended. The trial judge found that all of the property which the parties had was separate property. There was no community property at all, and like the man in this case, the man in the *Soltero* case had much more separate property than the woman. The opinion discloses that during the relationship the man's separate property grew from \$1.5 million to \$4.5 million while the woman's net worth did not materially increase at all. *Id.* at 431.

The trial judge ordered the man to pay the woman \$135,000 to compensate her for all the domestic-type services she did in gardening, decorating the home, and cooking. The Supreme Court reversed, finding the trial court had abused its discretion by ignoring the holding of *Connell*. *Id.*, at 433-434.

In *Connell* we clearly held that only property that would be considered community property in a marriage would be subject to a just and equitable distribution upon dissolution of a meretricious relationship. *Connell*, 127 Wn.2d at 349, 898 P.2d 831 [FN omitted]. . . . Unlike a property distribution in a divorce, the separate property of the parties is *not* subject to distribution. *Id.* at 350, 898 P.2d 831. ***If there is no community-like property, then there is nothing to justly and equitably distribute.***

*Soltero*, 159 Wn.2d at 434 (bold italics added).

The woman, *Soltero*, argued that “both parties ‘contributed to the community in the meretricious relationship and the entire community efforts are therefore what must be looked at in an equitable distribution.’”

*Id.* at 435. The Supreme Court held that her community efforts were irrelevant unless they created some community-like property:

If she means to say that contributions of effort to the community may increase the value of assets held by one party and create community-like interests in that increase, she is correct. But if she means to say that all of *Wimer*’s separate property is potentially subject to equitable distribution, she is incorrect. In *Connell* we held that only property that would be considered community property in a marriage is subject to distribution. *Connell*, 127 Wn.2d at 351-352, 898 P.2d 831. We have been given no grounds to reconsider that opinion.

Since the trial judge identified no community-like assets to distribute, no equitable distribution under the meretricious relationship doctrine is possible.

*Soltero*, 159 Wn.2d at 435.

In the present case, the trial court's decision violates the rule of *Connell* as it was reiterated and reaffirmed in *Soltero*. The entire universe of relevant assets which a court may consider when making an equitable distribution at the end of a committed intimate relationship consists *solely* of the community-like assets which were acquired during the relationship. The separate property of the parties is irrelevant. Here, as in *Soltero*, the man had much more separate property than the woman. But *Soltero* holds that is completely irrelevant. In *Soltero*, the Court noted that while the woman clearly did put a lot of work and effort into supporting the relationship, such work was irrelevant unless it created a community-like asset. In this case, the trial court noted that Tatham did a lot of work and earned far more money during the ten year relationship than Rogers did. But those earnings were only properly considered to the extent that they caused the acquisition of community property, or a community-like interest in the increase in the value of separate property. Thus, it was error for the trial court to consider Tatham's efforts and earnings for the purpose of deciding to give her a disparate share of the community-like property.

Finally, appellant notes that there is not a single reported case where a trial judge has justified a disparate division of quasi-community property by pointing to disparate amounts of separate property owned by the parties. Appellant suggests that there is no such case precisely because

no other trial court has deemed it permissible to so blatantly ignore the rule of *Connell*.

Accordingly, in this case the trial court judge erred when he (1) placed values on the parties' separate property; (2) purported to award Rogers his separate property; and (3) considered Rogers' large amount of separate property as a justification for a grossly unequal distribution of the parties' quasi-community property.

Since the trial court erred as a matter of law by considering and awarding the parties' separate property, the sole reason it gave as a justification for a 75% to 25% division of the quasi-community property is untenable, and therefore the trial court committed a manifest abuse of discretion when it entered judgment containing this property division.

**2. UNDER *WILLS* v. *WILLS*, A 75/25 SPLIT OF THE PROPERTY BEFORE THE COURT IS PRESUMPTIVELY AN ABUSE OF DISCRETION.**

In *Wills* v. *Wills*, 50 Wn.2d 439, 312 P.2d 661 (1957), the Court adopted the following rule of thumb in assessing the reasonableness of a property division:

We agree with appellant that when the parties are both without fault, the community property should be divided more equally than two thirds of it to one and one third to the other. Accordingly, we modify the decree herein in an attempt to divide the community property more equally.

*Wills*, 50 Wn.2d at 441.

*Wills* has been followed on a number of occasions, and it has never been overruled. For example, in *Dickson v. Dickson*, 65 Wn.2d 585, 399 P.2d 5 (1965) the held:

While . . . the law does not impel an equal or exact division of the community property, we agree with appellant that, under the evidence, it was a manifest abuse of discretion to award the respondent two-thirds of the community assets.

*Dickson*, 65 Wn.2d at 587, citing *Wills*, *supra*. Like the *Wills* court, the *Dickson* Court set aside the trial judge's property division as inequitable.

The *Wills* decision was rendered at a time when fault and marital misconduct *could* be taken into account. Thus, the *Wills* Court recognized that if there was marital misconduct on the part of one party, that *could* justify a property division that was as skewed as two-thirds to one-third. The two-thirds to one-third rule of thumb was specifically held to be applicable to cases where both parties were *without* fault.

Thereafter, the legislature enacted a no-fault marriage scheme of divorce and judges were no longer permitted to consider marital fault at all. Under the no-fault divorce regime, *every* case is a case where there can be no consideration of any fault by either party. Therefore, every case is now governed by the *Wills* rule that divisions that are as disparate as two-thirds/one-third or more are presumptively, by their very nature, a manifest abuse of discretion.

In this case, the property division is significantly more disparate than two-thirds/one-third. It is at least a 75%/25% division of the quasi-community property as the trial judge himself expressly recognized. CP 120, FF No. 19. Moreover, since a large portion of the “community” property awarded to Rogers was the \$54,000 in the 529 college education fund that he established for the parties’ daughter, it is somewhat misleading to assert that Rogers received 25% of the quasi-community property. Rogers can only use that \$54,000 for his own support if he deprives his daughter of the use of that money for her college expenses. As far as the record in this case discloses, he can *legally* do that because the deposit of funds into that account is not specified as irrevocable. But morally, Rogers would naturally be very reluctant to do that. So as a practical matter, as Rogers’ trial counsel pointed out in his objections, the property division in this case was “really” an 82% to 18% split, with Rogers receiving less than a fifth of the quasi-community property.<sup>9</sup>

The *Wills* principle that a property division this disparate is a manifest abuse of discretion should be applied to this case. *Wills* has

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<sup>9</sup> “The Court should not consider IRR’s 529 account in computing the parties’ share of community property. That fund was intended for IRR’s college – not for the parties’ expenses. After deducting the 529 plan, the court’s proposed distribution awards petitioner 82% and Respondent 18% of the parties’ community property. Such a distribution is on its face an abuse of discretion.” CP 115, ¶¶ 49-50.

never been overruled, it is binding upon all courts in Washington, and there is no reason not to follow it.

**3. THIS IS NOT A CASE WHERE A GROSSLY UNEVEN PROPERTY DIVISION CAN BE JUSTIFIED BY THE FACT THAT THE PARTY RECEIVING THE LION'S SHARE HAS VERY LITTLE OR NO CAPACITY TO EARN MONEY. IN THIS CASE, IT IS THE PARTY RECEIVING THE VERY SMALL SHARE THAT HAS A POOR FUTURE EARNING POTENTIAL.**

It is possible to conceive of a hypothetical case where a grossly uneven property division is justifiable due to the parties' very different capacities to earn income. For example, if Tatham was a very sick, elderly individual, who had not worked in recent years, and due to health problems was unlikely to be able to work again, a very disparate property division in her favor might be justified.

But as Rogers' trial counsel pointed out, the exact *opposite* situation exists in this case. CP 128. It is Rogers who had not worked significantly and thus has not earned significant income over the past ten years. And it is Rogers who is mentally ill, and who, as a result, is not capable of earning significant amounts of income.

If the trial court had made a 75 to 25 per cent property division in *favor* of Rogers, that might conceivably have been justifiable, although it would admittedly press the point very far past the presumptive abuse of discretion boundary of a two-thirds to one-third division. But to attempt

to justify a 75 to 25 per cent property division in favor of Tatham is simply untenable, since Tatham has worked regularly, and she is a highly skilled, employable professional who is also healthy and slightly younger than Rogers.

- a. **The Fact That The Record Does Not Contain a Diagnosis of Rogers' Mental Illness is Irrelevant. The Trial Court Found That Rogers' Existing Mental Illness Made it Unsafe for Him to Have Unsupervised Contact With His Own Child, Even Though The Court Was Convinced he Loved His Child Very Much and Had Never Hurt Her.**

The trial judge denied Rogers' reconsideration motion and rejected the contention that the disparate property division was unfair given Rogers' inability to get employment. The court stated that the record did not show that the effect of Rogers' mental illness was to prevent him from earning a living as a carpenter. CP 151. The trial judge asserted that he needed evidence to show what Rogers' exact diagnosis was. CP 151. Paradoxically, in the parenting plan proceeding the trial judge found as fact that, as of the time of trial in 2009, Rogers was still suffering from a serious mental illness which first surfaced in April of 2008. CP 136. But in his denial of Rogers' motion for reconsideration of the property division he referred to Rogers "alleged mental illness." CP 151.

**b. The Trial Court Acknowledged that Even Rogers' Own Friends Would Not Hire Him Because They Thought He was Mentally Ill and Impossible To Deal With.**

Moreover, the trial judge's assertion that he needed more testimony on the effect that the mental illness would have on Rogers' ability to manage his assets is completely untenable given the record in this case, and the trial judge's own findings of fact. Inexplicably, the same judge who accepted the testimony of Rogers' own friends that they could no longer communicate with Rogers, could not understand him when he spoke to them, and found him to be delusional and exhibiting fantastical thoughts, also concluded that the evidence did not show that the effect of this mental illness was such that Rogers could not get employment. The record contained witness Dorn's testimony that Rogers had contemplated buying an expensive house to live in when he already had one; witness Gibboney's testimony that Rogers thought his own daughter was a three million year old being, and a police officer's testimony that on two occasions Rogers had to be taken to the hospital because he was a danger to himself or others. And yet the trial judge suddenly concluded that the record did not contain enough evidence for him to conclude that Rogers' earning potential was impaired.

Appellant submits that the trial judge's decision to award Tatham 75% of the property and Rogers only 25%, cannot be justified by pointing to

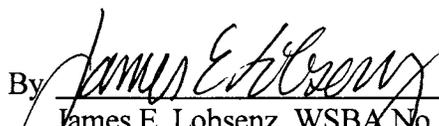
factors such as the age, health, and earning capacities of the parties. Accordingly, the property division constituted a manifest abuse of discretion and should be set aside.

**F. CONCLUSION**

For the reasons stated above, appellant asks this Court to vacate the judgment entered below, and to remand for further proceedings with directions to enter a property division which (1) does not rest upon any consideration of the relative amounts of separate property which the parties have; (2) which is closer to a 50/50 division; and which does not approach a division which gives 2/3 or more of the quasi-community property to respondent Tatham.

DATED this 1st day of March, 2010.

CARNEY BADLEY SPELLMAN, P.S.

By   
James E. Lobsenz, WSBA No. 8787  
Of Attorneys for Appellant

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NO. 39672-6-II

STATE OF WASHINGTON

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

DEPUTY



ELINOR JEAN TATHAM,

Respondent,

vs.

JAMES CRAMPTON ROGERS,

Appellant.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, hereby declares as follows:

1. I am a Citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

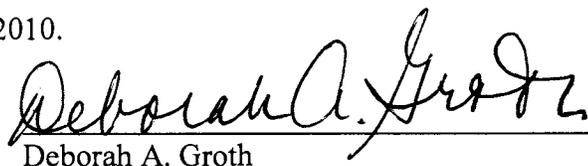
3. On March 3, 2010, I served the following documents:

**BRIEF OF APPELLANT**

on the following attorney VIA US MAIL:

Peggy Ann Bierbaum  
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Port Townsend, WA 98368-6557

DATED: March 3, 2010.

  
Deborah A. Groth

ORIGINAL