

NO. 39672-6-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

ELINOR JEAN TATHAM,

Respondent,

v.

JAMES CRAMPTON ROGERS,

Appellant.

FILED
COURT OF APPEALS
DIVISION TWO
10 MAY 11 PM 3:54
STATE OF WASHINGTON
BY _____

REPLY BRIEF OF APPELLANT

James E. Lobsenz
Attorney for Appellant

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
A. <u>ARGUMENT IN REPLY</u>.....	1
1. IF A LARGE IMBALANCE IN THE PARTIES’ RESPECTIVE AMOUNTS OF SEPARATE PROPERTY COULD BE “CONSIDERED” AS A LEGITIMATE BASIS FOR A VERY DISPARATE DIVISION OF QUASI- COMMUNITY PROPERTY, THEN THE PRINCIPLES UNDERLYING THE RULE OF CONNELL v. FRANCISCO COULD EASILY BE EVADED	1
2. WHEN A PARTY TO AN ENDING MERETRICIOUS RELATIONSHIP GETS TO KEEP ALL HIS (OR HER) SEPARATE PROPERTY, AND THE OTHER PARTY GETS NONE OF IT, THERE IS NO “UNJUST ENRICHMENT” BECAUSE THE SEPARATE PROPERTY WAS NOT EARNED THROUGH THE JOINT EFFORTS OF THE PARTIES	4
3. THIS CASE IS NOT DISTINGUISHABLE FROM <i>WILLS</i> AND <i>DICKSON</i>, AND THUS THE RULE THAT A TWO-THIRDS TO ONE- THIRD DIVISION IS USUALLY AN ABUSE OF DISCRETION IS FULLY APPLICABLE.....	5
4. ROGERS DID INTRODUCE EVIDENCE OF HOW HIS MENTAL ILLNESS AFFECTS HIS ABILITY TO EARN INCOME: HE CANNOT GET HIRED	7
B. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Connell v. Francisco</i> , 127 Wn.2d 339, 898 P.2d 831 (1995).....	1-5
<i>Dickson v. Dickson</i> , 65 Wn.2d 585, 399 P.2d 5 (1965).....	5-7
<i>In re Marriage of Davison</i> , 112 Wn. App. 251, 48 P.3d 358 (2002) (2007)	6
<i>In re Marriage of Urbana</i> , 147 Wn. App. 1, 195 P.3d 959 (2008).....	6
<i>Sutton v. Widner</i> , 85 Wn. App. 487, 933 P.2d 1069 (1997)	7
<i>Wills v. Wills</i> , 50 Wn.2d 439, 312 P.2d 661 (1957).....	5, 6

A. ARGUMENT IN REPLY

- I. IF A LARGE IMBALANCE IN THE PARTIES' RESPECTIVE AMOUNTS OF SEPARATE PROPERTY COULD BE "CONSIDERED" AS A LEGITIMATE BASIS FOR A VERY DISPARATE DIVISION OF QUASI-COMMUNITY PROPERTY, THEN THE PRINCIPLES UNDERLYING THE RULE OF *CONNELL v. FRANCISCO* COULD EASILY BE EVADED.**

Respondent Tatham argues that although a party's separate property may not be *distributed* to the other party in a case involving the division of property following a meretricious relationship, it nevertheless can be considered. Appellant Rogers noted in his opening brief, if Tatham's position was correct, then the principles underlying *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995) could be easily evaded, and the holding of that case that a Superior Court's property division powers are limited in a meretricious relationship case would cease to be meaningful.

To give one example, suppose at the end of a long term meretricious relationship the man has \$110,000 in separate property, the woman has \$10,000 in separate property, and the two of them have \$100,000 of quasi-community property. Suppose a trial judge in this situation were to divide the quasi-community property equally (\$50,000 to each) and also were to award \$50,000 of the man's separate property to the woman, and all (\$10,000) of the woman's separate property to the woman. Such a

division would achieve a total award of \$110,000 of property to the woman and \$110,000 of property to the man as follows:

	Awarded By The Court From The Man's Separate Property	Awarded By The Court From the Quasi- Community Property	Awarded By The Court From The Woman's Separate Property	Total Award
To the Woman:	\$50,000	\$50,000	\$10,000	\$110,000
To the Man:	\$60,000	\$50,000	\$0	\$110,000

Tatham agrees that *Connell* **forbids** such a division of the property because the separate property of the parties is not before the Court.

However, at the very same time Tatham argues that when dividing the \$100,000 quasi-community property the Superior Court may “consider” the facts that man has \$110,000 in separate property and the woman has only \$10,000 in separate property. Tatham maintains that although the Superior Court may not “award” or “distribute” either party’s separate property, the Court can nevertheless “consider” their separate property when deciding how to divide their quasi-community property. Therefore, Tatham maintains that although the judge has to leave each party with his or her own separate property, the judge can still even things up by giving *all* the quasi-community property to the woman and none of it to the man, thus reaching the exact same end result as follows:

	Awarded by The Court From the Quasi-Community Property	Left Undisturbed by the Court, Each Party Keeping His/Her Own Separate Property	Total
To the Woman:	\$100,000	\$10,000	\$110,000
To The Man:	\$0	\$10,000	\$110,000

Thus, Tatham's position is that the *Connell* rule can be simply avoided by acknowledging that where one party has much more separate property than the other, this disparity can be indirectly altered through a very disparate division of the community property. But this position, if accepted, would reduce the *Connell* rule to a meaningless admonition. While an imbalance in the ownership of separate property itself could not be corrected by a direct redistribution of the separate property, the very same imbalance could be corrected indirectly by ordering a very disparate division of the quasi-community property.

2. WHEN A PARTY TO AN ENDING MERETRICIOUS RELATIONSHIP GETS TO KEEP ALL HIS (OR HER) SEPARATE PROPERTY, AND THE OTHER PARTY GETS NONE OF IT, THERE IS NO “UNJUST ENRICHMENT” BECAUSE THE SEPARATE PROPERTY WAS NOT EARNED THROUGH THE JOINT EFFORTS OF THE PARTIES.

Tatham’s concept of what is a fair division of property at the end of a meretricious relationship completely misperceives the nature of such a relationship. As *Connell* recognizes, a meretricious relationship is *not* a marriage and is not to be considered an equivalent of marriage. Marriage partners agree to enter into a relationship where their economic fortunes are completely merged. Partners to a meretricious relationship make no such agreement, and *Connell* holds that the courts may not re-characterize the relationship which they chose for each other. If one partner in a meretricious relationship were to get a greatly disparate portion of the quasi-community property that the two acquired during their relationship, that *would* give rise to an unjust enrichment. But if one party in a meretricious relationship gets to keep all of their separate property which they acquired – as in this case -- from a bequest, there is no unjust enrichment at all. The *Connell* rule is designed to “allow the trial court to justly divide *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 did not make for themselves.” *Connell*, 127 Wn.2d at 349 (bold italics added).

3. THIS CASE IS NOT DISTINGUISHABLE FROM *WILLS* AND *DICKSON*, AND THUS THE RULE THAT A TWO-THIRDS TO ONE-THIRD DIVISION IS USUALLY AN ABUSE OF DISCRETION IS FULLY APPLICABLE.

In his opening brief Rogers cited to *Wills v. Wills*, 50 Wn.2d 439, 312 P.2d 661 (1957) and *Dickson v. Dickson*, 64 Wn.2d 585, 399 P.2d 5 (1965). In her response brief, Tatham asserts: “Neither of these two cases, however, has ever been cited for the proposition that a 75/25% division of property is presumptively an abuse of discretion.” *Brief of Respondent*, at 5-6. Tatham’s assertion is puzzling since one these two cases – *Dickson* – expressly holds that “it was a manifest abuse of discretion to award the respondent two-thirds of the community assets.” 65 Wn.2d at 587, citing *Wills, supra*.

Tatham seems to suggest that neither *Wills* nor *Dickson* established any general rule of law. Without citing to any specific portion of either opinion, she merely asserts that “the holdings in both cases were limited to the specific facts of those cases.” *Brief of Respondent*, at 6. She never says, however, what those “specific facts” were, or how the holdings of these two cases were limited.

It is true that the *Wills* opinion states that “when the parties are both without fault” there should not be an award of two-thirds of the property to one party. But this limitation provides no support for the result in the present case, since *all* cases are now no-fault cases. There is no suggestion that Rogers engaged in any martial (or quasi-marital) misconduct, and even if there were any such evidence, since no-fault divorce was adopted it has been established that such misconduct may not be considered when deciding how to divide the parties’ property. Thus, there is no basis for distinguishing the present case from either *Wills* or *Dickson*.¹

In an attempt to defend the 75/25% division in this case, Tatham points to *In re Marriage of Davison*, 112 Wn. App. 251, 258, 48 P.3d 358 (2002). She disingenuously describes *Davison* as a case where the Court held that “a 25/75% split of community property is not inherently inequitable.” *Brief of Respondent*, at 6. But *Davison* was a case involving the division of property between married persons and, as thus the opinion expressly notes that both the parties’ community property and their separate property was before the Court for distribution. Although the

¹ This case is more analogous to *In re Marriage of Urbana*, 147 Wn. App. 1, 195 P.3d 959 (2008), where, although the *Wills* rule that more than a two-thirds to one-third split is generally not justified was specifically mentioned, this Court found that a trial court’s division 20/80 percent split of marital property was not justified on the record before the Court.

husband complained that he got 25% of the community property, the opinion rejected his appeal with the observation that “Mr. Davison fails to note, however, that *he was awarded more than half of the parties’ total assets.*” *Id.* at 258. In the present case, the parties’ separate property was *not* (properly) before the Superior Court for distribution, and Mr. Rogers was *not* “awarded more than half of the parties” quasi-community property assets.²

4. ROGERS DID INTRODUCE EVIDENCE OF HOW HIS MENTAL ILLNESS AFFECTS HIS ABILITY TO EARN INCOME: HE CANNOT GET HIRED.

Tatham argues that Rogers “failed to offer evidence at trial regarding his mental condition and how that alleged mental illness affects his ability to earn income.” *Brief of Respondent*, at 7. To the extent that Tatham is claiming that there was no evidence at trial to show that he had some kind of mental illness, that is clearly false. As noted in Rogers’ opening brief, the Superior Court found overwhelming evidence that Rogers was suffering from some kind of mental illness.

To the extent that Tatham is arguing that Rogers did not offer evidence as to exactly what diagnostic label should be affixed to his

² Tatham also purports to rely on *Sutton v. Widner*, 85 Wn. App. 487, 933 P.2d 1069 (1997), but the division in that case, while it got close to the boundary of the rule that an award of two-thirds (66-2/3%) of the property before the court is an abuse of discretion, it did not quite get there, the division in that case being 64% to 36%.

particular mental illness, that is arguably true, although Tatham is a doctor and she testified without any objection that she felt Rogers had had a manic psychotic episode. RP II, 259. Several witnesses testified that Rogers was having fantastical or delusional thoughts. RP I, 39, 131. And the police officer who testified also said Rogers was having a “manic episode.” RP I, 12. Tatham’s attempt to spin the evidence record so as to characterize Rogers as merely suffering from an “alleged” mental illness is simply untenable.

Tatham’s assertion that Rogers failed to show “how” his mental illness affected his ability to earn income is similarly disingenuous. Tatham seemingly implies that since there was no evidence that Rogers could not perform the tasks of a carpenter, his mental illness had no affect on his ability to earn an income. But while Rogers never claimed that he could not wield a hammer or a saw or a chisel, he presented unrebutted evidence that even his good friends were no longer willing to hire him. While he could perform carpentry tasks, he could not secure carpentry jobs, and without the latter he could not earn any income from carpentry no matter how skilled he was.

B. CONCLUSION

For the reasons stated above and in his opening brief, appellant Rogers asks this Court to vacate the judgment below and to remand with

directions to enter a property division which does not exceed the 2/3 to 1/3 rule of *Wills* and which does not rest upon any consideration of the parties' relative amounts of separate property.

DATED this 8th day of May, 2010.

CARNEY BADLEY SPELLMAN, P.S.

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