

FILED

JUN 03 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31073-6-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

In re Marriage of:

GENE EDWARD WELTON,

Appellant/Cross Respondent,

v.

MARINA LEE MARTIN WELTON,

(nka Marina Lee Martin)

Respondent/Cross Appellant.

On Appeal from Chelan County Superior Court, Hon. T.W. Small

GENE WELTON'S REPLY BRIEF
AND RESPONSE TO CROSS APPEAL

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I. INTRODUCTION & GENERAL REPLY

Sifting through the unnecessary animus directed at Appellant Gene Welton and his parents, the irony of Ms. Martin's response and cross appeal brief ("Response") is that it seeks the same core relief as Mr. Welton: vacation of the property division and remand for "entry of a just and equitable distribution." Response, p. 28. The main difference is she also seeks fees on appeal, the fees awarded below, and that the case go back to the same judge. But despite its efforts, the Response cannot shake Mr. Welton's argument that Judge Small erred by failing to recuse following the affidavit of prejudice, since he had not then made a discretionary decision. The cases cited by the Response do not apply, as discussed *infra*. The controlling cases include *State ex rel. Floe v. Studebaker*, 17 Wn.2d 8, 134 P.2d 718 (1943) and *State v. Parra*, 122 Wn.2d 590, 859 P.2d 1231 (1993). They hold that signing a stipulated continuance of a trial date in a civil matter is not a discretionary decision for purposes of RCW 4.12.050 and .060 so that recusal was required.

The recusal issue is first in time and in logic. It requires vacation of Judge Small's rulings and remand to a new judge. Because it is dispositive, the Court need not address the other issues.

Even were the recusal issue not deemed dispositive, reversal and remand would still be required for the reasons in the Opening Brief and because the Response agrees the property division was an abuse of discretion, albeit for other reasons. Both parties contend the property division should be vacated as not fair, just, and equitable.

While the Response argues Mr. Welton's appeal is frivolous, that argument fails the "straight face" test since the Response makes the exact same claim and request for relief -- vacation of the property division as an abuse of discretion and remand for a new property division. She cannot have it both ways. The appeal should be granted and the case remanded for new proceedings.

Finally, the Response in its cross appeal mistakenly asks this Court to make its own, new "just and equitable" determination of what the property division should be by unilaterally adopting what she requested at trial and what the trial court rejected. Such requests to the appellate court to independently exercise its discretion and make its own determination of what is the fair, just, and equitable division are beyond the appellate function, which is to review the decision below, not to substitute its own judgment, especially in a matter with as much discretion as a marital property division.

Finally, to the extent that other arguments or fact issues presented in the Response are not addressed herein, they are not conceded, but are either adequately dealt with in the Opening Brief or of insufficient consequence to warrant a reply, such as the fee issues in the Response, which should be denied for the reasons given in the Opening Brief.

This abbreviated treatment is particularly appropriate to shorten the briefing given the core position in the Cross Appeal that the property division should be vacated and the matter remanded for a re-determination, the same relief requested by Mr. Welton.

II. REPLY ARGUMENT ON APPEAL

A. Review of the Facts in the Response.

The Response makes a few statements that, surprisingly, are at odds with the record and should be corrected in the event the Court addresses any of the issues beyond the recusal issue.

Gene was not in charge of the LLC. Gene was not solely responsible for the Orchard. Mel and Lil controlled it, and Mel did all the business and financial side and organization. CP 160:20-23, FoF 7.j. (Lillian kept the books and Mel Welton is the business manager). The trial court made specific findings that Lil and Mel

controlled the LLC – not Gene. *Id.*; CP 168: 12-14, COL O. Gene was the operations manager, not a CEO, nor a CFO. CP 160: 20-23. He was a minority shareholder who did his job as operations manager. *Id.* He thus did not operate the LLC as his own business, as a physician or attorney might operate his or her own practice as their sole business, or a business owner who was the sole owner of a business might do. He had no control over the LLC's finances. *Id.*

The LLC did not dramatically increase in value during the marriage. The Response makes the claim that an increase in the value of the LLC and of Gene's share in the LLC can be seen in part from increased real estate holdings – but this ignores the continuing capital contributions of Mel and Lil, which were well documented, and other factors. *See* the discussion in the Opening brief, at pp. 35-40, and *infra*, § C.2.

This was not a long-term marriage. The marriage was less than 12 years, from July 1997 until separation in March, 2009. CP 154, FOF 1.a. Both Gene and Marina were mature, older adults when married, and Marina had two sons from her prior relationships while Gene had been divorced twice. Opening Brief, p. 6. Marina has good work skills and was engaged in improving her post-

secondary education level during the pendency of the divorce.

CP 155-56, FOF 3. Gene finished high school. CP 154, FOF 1.b.

B. Recusal Reply Argument.

1. The Text of the Statute and Facts of This Case, and Cited Cases, Control; There Is No Disregard of Precedent.

The Response tries to avoid the inescapable conclusion that Judge Small erred when he denied Mr. Welton's affidavit of prejudice on the basis of the stipulated continuance of the trial date by arguing *In re Recall of Lindquist*, 172 Wn.2d 120, 258 P.3d 9 (2011), controls and supports the trial court ruling. The problem with this argument is it ignores the on point Supreme Court precedent of *State ex rel. Floe v. Studebaker*, 17 Wn.2d 8, 134 P.2d 718 (1943) and *State v. Parra*, 122 Wn.2d 590, 859 P.2d 1231 (1993), which actually controls. It also requires a mistaken reading of the record to claim the parties expressly stipulated to trial before Judge Small, a new argument not made below and which is factually incorrect. Once the correct legal rules are applied to the actual facts of this case, reversal and remand to a different judge is required. First, it helps to recall what the recusal statutes do.

2. It is Settled Law that Stipulated Continuances Are Not Discretionary Decisions as Contemplated by the Statute. Refusing Recusal in These Circumstances is Error and Frustrates the Purpose of the Statute.

The purpose of RCW 4.12.040 and 4.12.050 is to prevent litigants who have already obtained a discretionary ruling of the court from thereafter filing an affidavit of prejudice because they are dissatisfied with that judge's ruling. *State v. Dixon*, 74 Wn.2d 700, 703, 446 P.2d 379 (1968); *In re Marriage of Hennemann*, 69 Wn. App. 345, 348-49, 848 P.2d 760 (1993). See Opening Brief at 17-20. The purpose of the rule is undercut where, as here, the parties have not invoked a discretionary ruling of the court and the affidavit of prejudice to which they are entitled under the statute is denied.

Although the Response stridently argues that *In re Recall of Lindquist* controls, that is not correct. The Response apparently both misread the case and also failed to uncover genuinely controlling authority. The Response unfortunately failed to realize that 1) the facts of *Lindquist* are materially different from those here; and 2) the Supreme Court has long held that, in civil cases, *stipulated* motions for a continuance do **not** invoke the discretion of the trial court. *State ex rel. Floe, supra*.

As to the difference in facts, *Lindquist* does not apply for the simple reason that it involved a motion for a continuance to which the opposing party had not stipulated or otherwise agreed, and likely would not have agreed to since it would have mooted the proceeding by moving the merits hearing beyond the statutory time limit; it was far from a stipulated continuance. *See Lindquist*, 172 Wn.2d at 126, ¶7.¹ This distinction makes all the difference since when a single party seeks a continuance without agreement, it is normally a discretionary ruling. *See Lindquist*, 172 Wn.2d at 130-31. It also is a discretionary ruling that is, on occasion, reversed. *See, e.g., Coggle v. Snow*, 56 Wn. App. 499, 505-07, 784 P.2d 554 (1990) (vacating the denial of a motion to continue).

But in *Lindquist*, there was no agreement or stipulation. In this case there was a stipulation by the two parties for a continuance; there was formal, stipulated agreement by the two parties.

¹ The Court stated at 172 Wn.2d at 126 (emphasis added):

One of the issues discussed at the [prehearing telephone] conference was an affidavit Lindquist filed stating that he would be on a family vacation until November 18, 2010, making him unable to appear at the hearing on the merits scheduled for November 16, 2010. **During the conference, Lindquist's attorney "made an oral motion that ... the court ... continue the hearing until the 19th of November, when Respondent" would be available to attend. CP at 712. A continuance would have delayed the hearing beyond the statutory time limit of RCW 29A.56.270. Judge Cayce denied the motion.**

Our courts distinguish stipulated motions from those where trial court discretion must be exercised. In *State ex rel. Floe v. Studebaker*, *supra*, the Supreme Court rejected precisely the argument that the Response makes here. The Court held that a trial court does *not* exercise its discretion by entering an order granting a continuance where, as here, all the parties have stipulated that such order be entered. *Floe*, 17 Wn.2d at 17. *Floe*, which was not cited or discussed in *Lindquist* or in the Response, controls.

In *Floe*, the respondent argued that the affidavits of prejudice were not effective because the judge had been called upon to make rulings in the case which involved discretion. *Id.*, 17 Wn.2d at 13. There were two rulings at issue: The first order, dated December 3, 1941, was entered pursuant to the parties' stipulation to continue one case scheduled for trial so that it could be consolidated with another case. The order granted the continuance. *Id.* at 15. The second order, dated June 15, 1942, also entered by stipulated motion, consolidated the two cases. *Id.* On review, the Supreme Court held that, for purposes of an affidavit of prejudice, the stipulated orders did not invoke the trial court's discretion:

Neither do we think it can be said that the court was called upon by any of the attorneys connected with this case to make any ruling involving discretion, as contemplated by the statute. We do not believe it can be said that the court is required to exercise discretion when asked to make an order involving preliminary matters such as continuing a case, or for consolidation, where all the parties have stipulated that such order be made.

Floe, 17 Wn.2d at 16. *Floe* disposes of the Response's argument.²

Floe is good law. In *State v. Parra*, 122 Wn.2d 590, 859 P.2d 1231 (1993), the Court affirmed that the "distinction drawn in *Floe* relating to stipulations makes sense." *Parra*, 122 Wn.2d at 599:

As *Floe* implicitly acknowledged, many issues may be resolved between the parties and presented to the court in the form of an agreed order. These matters will generally resolve pretrial disputes regarding such issues as admissibility of evidence, discovery, identity of witnesses, and anticipated defenses. ***If the parties have resolved such issues among themselves and have not invoked the discretion of the court for such resolution, then the parties will not have been alerted to any possible disposition that a judge may have toward their case.***

Parra, 122 Wn.2d at 600 (emphasis added).

Although the Supreme Court has suggested that in criminal matters a trial court exercises its discretion in ruling on a stipulated motion for a continuance pursuant under CrR 3.3, *see State v.*

² The Response recognized in discussing *Lindquist* that the issue of whether the court exercised its discretion is "independently dispositive." *See* Response, p. 8, n. 4.

Dennison, 115 Wn.2d 609, 620, n. 10, 801 P.2d 193 (1990), it has made no such ruling with regard to civil matters³ and, indeed, would have to overrule *Floe* and *Parra*, among other cases, to do so.

In short, *Lindquist* does not control because it did not involve a stipulated continuance which, under *Floe*, does not ask the court to exercise any discretion. The stipulated continuance is simply a matter of the mutual convenience of the parties – matters over which the parties clearly have jurisdiction. *See Parra*, 122 Wn.2d at 603 (matters “affecting only the rights or convenience of the parties” may be the subject of a stipulation). Here, as in *Floe*, the parties resolved the issue of a continuance of this trial between themselves. They did not submit the matter to the court for resolution. The stipulation to continue the trial did not invoke the trial court’s discretion. As such, the trial court erred in denying Mr. Welton’s affidavit of prejudice.

³ CrR 3.3(f)(1) provides (emphasis added), “Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court **may** continue the trial date to a specified date.” Criminal cases are, of course, different: the criminal rule specifies the trial court has discretion by use of “may” and also has speedy trial and other constitutional and public trial issues to balance that are not manifest in a civil, marital dissolution case between private parties.

3. Mr. Welton Did Not Waive his Right to a Change of Judge by Stipulating to a Continuance Because There Is No Evidence He Knowingly Gave Up That Valuable Statutory Right or his Right to an Unbiased Judge Under the Appearance of Fairness.

The Response also argues in passing that Mr. Welton “stipulated to a trial with Judge Small,” citing to the parties’ stipulation to continue the trial date. Response, p. 10. The Response unfortunately misunderstands the stipulation. The order is titled “Stipulation and Agreed Order Continuing Trial Date.” CP 19. It does not say, “And Agreeing To Trial Before Judge Small.” No such “agreement” was part of the stipulation. Nor does anything in the text of the stipulation suggest that, by agreeing to continue the trial, Mr. Welton also knowingly and willingly gave up his substantial right to a change in judge and affirmatively chose a trial with Judge Small. Nor does anything in the record support finding a waiver.

The classic statement of waiver is an “intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right.” *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). Nothing in the stipulation or its title demonstrates that Gene Walton knew he was giving up his statutory right to a change of judge as a matter of right

by agreeing to a continuance. Rather, Mr. Welton's motion for change of judge before the first substantive motion was to be heard on temporary maintenance is evidence of actual or constructive knowledge that he still possessed and had not given up his right to a change of judge. There was no waiver of the statutory right by Mr. Welton.

Nor is there anything in the stipulation that arguably shows he waived his right under the appearance of fairness to seek a different judge based on the judge's prior representation of him and his father in earlier, separate matters – facts brought up in the January 4, 2010 hearing. A showing of waiver related to recusal of a judge based on appearance of fairness “depend[s] on a demonstration that the waiving party knew of the grounds requiring recusal before the complained of determination.” *Tatham v. Rogers*, 170 Wn. App. 76, 93-96, 283 P.3d 583 (Div. III 2012). The fact that a former client -- and son of another former client – wants the former attorney to recuse from being a judge indicates the belief that, rather than being favored as a former client, he would be penalized. The combination of the prior representation of Mr. Welton on a domestic violence matter and the request by the former client for recusal shows a fear that prior knowledge unrelated

to the case at hand would be brought to bear in a way that would hurt the former client; their earlier relationship may not have concluded happily. These circumstances would make a disinterested observer question the fairness of the judge remaining on the case over that objection.

The Response failed to meet its burden of demonstrating waiver of the appearance of fairness basis for recusal. Mr. Welton requested the recusal based on the judge's earlier representation of him, and also when hearing about Judge Small's representation of his father, at the January 2010 hearing, long before the judge made any discretionary or substantive rulings, much less the ultimate property division itself. *See Tatham v. Rogers*. The recusal request for appearance of fairness reasons was timely and not waived.

Judge Small should have recused to insure the appearance of fairness once these facts and Mr. Welton's obvious concern were raised (as the commissioner had done on first presentation of the motion), even if he thought the request for a statutory change of judge was late. The judgment and all of Judge Small's rulings must be vacated and the matter remanded for proceedings before a different judge. *Tatham v. Rogers*.

- C. Property Division Reply Argument: The Case Must Be Remanded for a New Property Division Because the Parties Agree the One Made by the Trial Court is Not Just and Equitable and Because the Trial Court Erred in 1) Calculating the Alleged Increase in Mr. Welton's Separate Property; 2) Determining Whether Mr. Welton Was Underpaid; and 3) If he Was Underpaid, by Failing to Determine by How Much So That Only That Underpayment Was a Basis for Determining the Alleged Community Interest in Mr. Welton's Separate Property Interest.**
- 1. The Property Division Should be Vacated Because Ms. Martin's Response and Cross Appeal Agree the Trial Court Abused its Discretion in Making the Award.**

Though the Response is loathe to admit it, the Response (and the Cross Appeal) in fact agree with the essence of Mr. Welton's substantive appeal that the trial court abused its discretion in making the property division and that the property award should be vacated. There can be no other meaning of the final sentence of the Response's conclusion and prayer to the appellate court in which it asks the court to deny Mr. Welton's appeal but, nevertheless, to "reverse on [Ms. Martin's] cross appeal and remand for entry of a just and equitable distribution." Response, p. 28.

It should be a simple proposition for the appellate court to reverse and remand for a new property division without parsing the

parties' arguments to determine which ones may be more correct than the other.

2. The Trial Court Erred in Calculating the Alleged Increase in the Value of the Mr. Welton's Separate Property Interest, his Minority Interest in the Welton Orchards LLC.

The record is plain that there is insufficient evidence to do the math required to calculate if there was an increase in the value of Mr. Welton's separate property interest in the LLC over the course of their marriage and, if so, what that increase was. As described in the Opening Brief at 30-35 (and the Response does not refute), there is no valuation of the LLC at the time of the marriage in July 1997 to compare with a subsequent valuation as of the date of separation in March, 2009. Opening Brief, p. 35. There is neither a gross valuation for the entire operation, nor an expert opinion specifying the value taking into account the discount that must be given for the facts of Gene Welton's minority position and the fact his interest in the privately held company is not readily marketable, nor any evidence of just how much Gene Welton's efforts caused the claimed increase, a finding that Ms. Martin had the burden to establish. Opening Brief, pp. 30-33.

The Response asserts the claimed land value of over \$5 million dollars shows that Mr. Welton's separate property must have benefited from his work over the marriage and show there was an increase in the overall value of the separate property. *First*, as pointed out in the Opening Brief at 37 - 39, this ignores the continuing capital contributions made by Mel and Lillian to both keep the operation going and to buy new properties, as well as the loans against those properties and the business. Any attempt at a proper mathematical calculation fails.

Second, as also pointed out in the Opening Brief but ignored by the Response, the only gross measure of the overall financial health for the LLC over the marriage from evidence in the record is that it *decreased* in value over that time, once the continuing capital contributions and inflation are taken into account. *See* Opening Brief, pp. 37-40. In 1995 it was first capitalized by Mel and Lillian for a total of \$5,188,180. Opening Brief, p. 39. Exhibit 10 found that its overall value in December 2010 (21 months after separation) was nominally about the same at \$5,479,351 -- a figure that necessarily includes the capital contributions that easily exceeded the difference between the two values of about \$291,000.

This means that over the period from 1995 to 2010, which covered the entire marriage, the business as a whole lost value.⁴ There thus is no proper basis for imposing a lien on Gene Welton's 1/3 minority share of the "increase" in value over the course of the marriage because there was no increase.

Since the valuation of property in a divorce is a material fact, the failure to do a necessary calculation of property values cannot be left to the appellate court where there is a dispute over the values. *In re Marriage of Greene*, 97 Wn. App. 708, 712, 986 P.2d 144 (1999). If the valuation of the increase in Mr. Welton's separate property interest in the LLC is to be used, it must be reasonably accurate and not made up with partial figures taken from a period within the marriage. But on this record, since there is no such evidence

⁴ The trial court's findings and conclusions consistently used values from different parts of the marriage to support a conclusion the LLC had increased in value. An example is Finding N.1., which says Gene's efforts "significantly enhanced" the value of the LLC based on the fact it was "close to filing bankruptcy" – which was in 2000, though the year is not referenced -- and had improved to "now being worth over \$5,000,000 during the course of the marriage." CP 166. This analysis fails to take into account the initial capitalization of the LLC at over \$5,000,000 when it was formed in 1995, shortly before the marriage. It is clearly erroneous to calculate the "increase in value" of property during the entire course of the marriage by comparing the value at its lowest point somewhere during the marriage with the value at separation or trial. When one uses a more appropriate starting point for value, closer to the capitalization value in 1995 two years before the marriage, and takes into account additional capital contributions, a correct calculation of value can be made. This the trial court did not do.

available to do the calculation, the trial court erred in making its calculation because it was not supported by substantial evidence. It must be vacated.

3. The Trial Court Erred in Determining Whether Mr. Welton Was Underpaid for Lack of Sufficient Evidence and, in Particular, by Failing to Determine How Much he was Underpaid in Order to Use Only That Underpaid Amount to Calculate any Value for Reimbursement to the Community.

A key component of the trial court's property division was the finding Mr. Welton was underpaid for his work. As set out in the Opening Brief, the record is wholly deficient to support that finding. Opening Brief, pp. 27-30. Not only is the record bare of any evidence showing what Mr. Welton should have been paid even in the final years of the marriage (much less throughout the entire time of the marriage), the trial court failed to make a finding of the total amount of underpayment over the course of the marriage, or to give appropriate credit for the non-monetary compensation, especially the free housing over the marriage. Opening Brief, 33-34.

Because these findings were not made, and cannot be made due to deficiencies in the record, there is nothing the Response can do to argue the trial court should nevertheless be affirmed. But since

the Response also contains the Cross Appeal which seeks the same relief of a new property division, that becomes moot.

III. RESPONSE TO CROSS APPEAL

A. Introduction and Summary of Response to Cross Appeal.

The Cross Appeal seeks one element of specific relief: vacation of the property award and remand for an equitable award which, the Response asserts, should be “for a larger judgment” (Response at 27) that it suggests should be the \$300,000 Ms. Welton requested at trial. Response at 26. Further, it requests it be in the form of “a revised Charging Order against the LLC for \$300,000.” Response, p. 26. The Cross Appeal does not request a fee award or that the fee award made in the trial court be affirmed or modified in any way; all the points made by Ms. Martin as to fees is in the response to Mr. Welton’s appeal. In addition, no error is assigned to any findings, including the finding that Mel and Lillian Welton operate and fully control the LLC, and that Gene Welton does not, which are therefore verities on appeal.

The Cross Appeal thus asks the appellate court to decide the precise property division that is fair, just, and equitable on the appellate record, then require the trial court to enter an order

enforcing that property division against the LLC, a non-party, without citing any authority.

Both requests are beyond what appellate courts do in marital dissolutions. No divorce court, either at the trial level or the appellate level, has any jurisdiction over any person other than the divorcing parties and their children. Nor does the appellate court in this modern era vacate a trial court's discretionary decision and replace it with one the appellate judges prefer, particularly where it is a determination of what is "fair, just, and equitable" given a multitude of disputed facts.

The Cross Appeal is unusually brief, apparently due to its concurrence in the ultimate result requested by Mr. Welton's Appeal. The Cross Appeal in fact agrees with Mr. Welton's appeal that the trial court's property division was not fair, just, and equitable and must be vacated as an abuse of discretion, Response at 26,⁵ though it refuses to make any statement that might be considered as "agreement" with anything Mr. Welton's briefing

⁵ "Judge Small abused his discretion in not awarding [Ms. Welton] enough because the award is not just or equitable to her. . . . the trial court's award is not fair and equitable to Ms. Martin . . ." Response at 26.

stated.⁶ It argues there are different reasons to get to the same place, but does not argue with the ultimate result of vacating the property division and having it re-done.

While it might be tempting to an appellate court to conclude that, if both parties are unhappy with the trial court result it must have reached a proper result that did not overly favor one party or the other so that the case should be affirmed, such would not be appropriate here. Mr. Welton suggests that, should the Court get past the recusal issue and reach the property division issues, the errors that infect the trial court's determinations laid out in his Opening Brief and *supra* demonstrate that this property division cannot be affirmed at minimum because it is not supported by the

⁶ Unfortunately, both the underlying record and the appellate briefing are filled with unnecessary invective directed at Mr. Welton and his parents, which is out of place in the era of no-fault divorce. Rather, it harkens back to the earlier days when misconduct both had to be established and could be taken into account in making the property division. *See, e.g., In re Marriage of Steadman*, 63 Wn. App. 523, 527-28, 821 P.2d 59 (1991) (footnotes omitted):

Under the prior statute the court could consider the "merits of the parties" in apportioning property. Laws of 1949, ch. 215, § 11, p. 701. Trial courts did so, considering cruelty or infidelity, for instance. Indeed, the appellate courts had to limit abuse of this factor. The "merits", as used in those cases, clearly refers to immoral conduct within the marital relation. The legislature wished to eliminate such considerations and did so by providing that the court may not consider "marital misconduct" in dividing property. Thus, marital misconduct refers to substantially the same conduct previously considered in evaluating the "merits" of the parties.

kind of evidence and findings that are required. In that sense it is contrary to the applicable law and an abuse of discretion that must be vacated to maintain the integrity of the legal system. Sometimes trial judges make mistakes; appellate courts exist to insure the law is followed, including in cases like this.

B. The Cross Appeal Seeks Vacation of the Property Award – Mostly the Same Relief as Mr. Welton’s Appeal – and Should Be Denied as Moot Due to the Recusal Issue or Due to Mr. Welton’s Request to Vacate the Property Award. The Cross Appeal’s Request to Direct a Charging Order for an Equalizing Payment Against the LLC and to Have the Appellate Court Usurp the Trial Court’s Role to Determine a Fair and Equitable Property Division Must Be Denied.

1. The Cross Appeal Should Be Denied as Moot.

If Mr. Welton prevails on the recusal issue the case will be remanded for a new property division – the same relief the Cross Appeal requests – and also will require vacation of all of Judge Small’s rulings. These would make it impossible to grant the additional relief the Cross Appeal requests of increasing her judgment and getting a charging order against the LLC. It should therefore be denied as moot. For the same reasons it also should be denied as moot if the Court reaches and grants Mr. Welton’s appeal

of the property division itself, as there would be no further relief sought by the Cross Appeal the Court could grant.

2. The Cross Appeal's Request that the Appellate Court Determine the Property Division on the Appellate Record Must be Denied Since it is Beyond the Function of the Appellate Court.

It is fundamental appellate procedure that the appellate court is reviewing the decision of a trial judge, not making its own. And that distinction dictates the appellate court's approach. It reviews the reasons for the court's decision and then passes judgment on that underlying decision. It does not impose its own decision from the appellate bench. This rule in Washington is long settled:

We have repeatedly and consistently held that we will not substitute our judgment for that of the trial court as to the disposition of property in a divorce action in the absence of a manifest abuse of a wide discretion by the trial court. *Morris v. Morris*, 69 Wn.2d 506, 419 P.2d 129 (1966); *Mumm v. Mumm*, 63 Wn.2d 349, 387 P.2d 547 (1963); *Friedlander v. Friedlander*, 58 Wn.2d 288, 362 P.2d 352 (1961); *High v. High*, 41 Wn.2d 811, 252 P.2d 272 (1953).

Pugel v. Pugel, 74 Wn.2d 281, 282, 444 P.2d 783 (1968) (refusing to change the property award as requested by the appellant and finding no abuse of discretion).

This is true even where the appellate court has found an abuse of discretion, as this Court and the Supreme Court have long held:

We believe the language found in *Stringfellow v. Stringfellow*, 56 Wn.2d 957, 959, 350 P.2d 1003, 1004, 353 P.2d 671 (1960), is appropriate:

The power of this court is appellate only, which does not include a retrial here but is limited to ascertaining whether the findings are supported by substantial evidence or not. [Even i]f we were so disposed, . . . we are not authorized to substitute our judgment for that of the trial court.

Knapp v. Hoerner, 22 Wn. App. 925, 928-29, 591 P.2d 1276 (Div. III 1979). *Accord, In re Marriage of Greene, supra*, 97 Wn. App. at 714 (“We will not substitute our judgment for the trial court’s, weigh the evidence, or adjudge witness credibility,” reversing for legal error in property division in close case). The remedy is remand for a new hearing. *See, e.g., Greene* (remanding for a new hearing after vacating property division for legal error); *In re Marriage of Rockwell*, (“*Rockwell I*”), 141 Wn. App. 235, 170 P.3d 572 (2007), *review denied*, 163 Wn.2d 1055 (2008) (reversing property division and remanding for exercise of discretion); *In re Marriage of Rockwell* (“*Rockwell II*”), 157 Wn. App. 449, 238 P.3d 1184 (2010) (vacating property division and remanding trial court’s failure to actually exercise its discretion on remand).

Here, the decision is in the form of a judgment providing for a division of the separate and community property of the marital

community after a less-than 12 year marriage which did not yield any children. The Court's job is to review the trial court's findings of fact and conclusions of law. *Knapp; Greene*, 97 Wn. App. at 714. But being in the position to review the judgment made by the trial court does not put the appellate court in the position of exercising its own judgment on what the property division should be. That is a job for only the trial court.

3. Trial and Appellate Courts in Marital Dissolution Cases Only Have Authority Over the Married Persons and Have No Authority Over Non-parties Such as Welton Orchards & Storage, LLC and Mr. Welton's Parents. The Request for Entry of a "Charging Order" Against the LLC Must be Denied Because it is Beyond the Jurisdiction of the Courts in this Marital Dissolution.

The Cross Appeal makes plain that Ms. Martin incorrectly thinks that Mr. Welton's parents, or Welton Orchards & Storage, LLC, or both, are or can be part of the dissolution proceeding and property division. But neither the parents nor the LLC are, nor can be, parties to this marital dissolution property division.

The Supreme Court held in *Arneson v. Arneson*, 38 Wn.2d 99, 101, 227 P.2d 1016 (1951), that in a dissolution proceeding the only proper parties are the spouses. This was not changed by the

1973 Dissolution Act. Rather, this Court has applied those principles directly to hold that, while the dissolution court has “unlimited power” over the divorcing spouses’ property, that power extends

only as between the parties. *Arneson*, at 102. The dissolution court has no power over the property as to the rights of third parties claiming an interest in the property.

#

As with the dissolution statute in *Arneson*, the current statute only provides for division of property as between the spouses. See RCW 26.09.050; RCW 26.09.080.

In re Marriage of Soriano, 44 Wn. App. 420, 421-22, 722 P.3d 132 (1986), *rev. den.*, 107 Wn.2d 1022 (1987). *Accord*, *In re Marriage of McKean*, 110 Wn. App. 191, 195-96, 38 P.3d 1053 (2002) (“But the trial court does not have authority to adjudicate the rights of parties not before the court, even if they have an interest in the property at issue.”).

At issue in the *McKean* marital property division appeal was a trial court order transferring trust assets owned for the benefit of the couple’s children to a corporate trustee because it had found “both parents had manipulated this property, treating it as their own, and would likely continue to do so.” *McKean*, 110 Wn. App. at 194. The trial court’s action was to try to protect the trust property for the

protection of the children’s financial assets. *Id.* Division II reversed the order because, as Judge Seinfeld explained, despite the fact the parents were the trustees, under applicable law including RCW 11.96A.040, the dissolution court had no jurisdiction over the trusts, their property, or the trustees; “even if [the husband and wife] also served as trustees, they were not parties to the dissolution proceeding in their representative capacity as trustees.” *Id.*, at 195.

Whatever may be Ms. Martin’s frustration that Mr. Welton has not paid the judgment against him, under settled law of *Arneson*, *Soriano*, and *McKean*, she cannot get a charging order against his parents Mel and Lillian, or the assets of the LLC, none of whom are subject to the dissolution court’s jurisdiction, just as she cannot try to charge Gene Welton with contempt for failing to pay the un-superseded judgment.⁷

⁷ See *In re Marriage of Curtis*, 106 Wn. App. 191, 198-202 (Div. III 2001); *In re Marriage of Young*, 26 Wn. App. 843, 844-46 (1980).

IV. CONCLUSION

Appellant Gene Welton respectfully asks the Court to grant his appeal to vacate the property division and all underlying orders and remand to a new judge because his motion for a change of judge was erroneously denied, and deny Ms. Martin's cross appeal as moot. Alternatively, he requests the court grant his appeal to vacate the property division and fee award for the errors described above and in the Opening Brief for an abuse of discretion, remand for a new trial on property division, and deny the Cross Appeal.

DATED this 31st day of May, 2013.

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NO. 31073-6

WASHINGTON STATE COURT OF APPEALS, DIVISION III

In re the Marriage of:

GENE EDWARD WELTON,

Appellant,

vs.

MARINA LEE MARTIN
WELTON,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date stated below, I caused to be delivered in the manner indicated a copy of *Appellant's Reply Brief and this Certificate of Service* on the following parties:

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