Filed
Washington State
Court of Appeals
Division Two
May 22, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Committed Intimate Relationship of: MARINA N. TURNER, Respondent, and. RANDOM E. VAUGHN, Appellant.	No. 50190-2-II ORDER CORRECTING SCRIVENER'S ERROR AND DENYING MOTION FOR RECONSIDERATION

Respondent, Marina N. Turner, moves this court to correct a scrivener's error in its April 24, 2018 unpublished opinion. Appellant, Random E. Vaughn, moves this court to reconsider its April 24, 2018 opinion.

After review of this record, we grant Respondent's motion and correct a scrivener's error on page two, paragraph one, the last full sentence reading, "The trial court found Turner lacked credibility on this point," to be corrected to read: "The trial court found Vaughn lacked credibility on this point."

We deny Appellant's motion for reconsideration.

IT IS SO ORDERED.

Panel: Jj. Johanson, Maxa, Melnick.

Melnick, J.

Johanson, J.

Maxa, C.J.

Filed
Washington State
Court of Appeals
Division Two

April 24, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Committed Intimate Relationship of: MARINA N. TURNER, Respondent, and. RANDOM E. VAUGHN, Appellant.	No. 50190-2-II UNPUBLISHED OPINION

Random Vaughn appeals from a trial court ruling that he and Marina Turner entered into a committed intimate relationship (CIR). In the alternative, he argues that, if a CIR existed, the court erred in establishing its duration. Vaughn challenges some of the court's findings of fact. He also argues the court erred by denying his motions for a new trial and for recusal of the trial court judge.

We affirm.

FACTS

I. TURNER AND VAUGHN'S RELATIONSHIP

Vaughn and Turner started dating in May 2011. Throughout the relationship, Vaughn repeatedly asked Turner to take his last name. In greeting cards, he referred to Turner as his wife. On Facebook, he held himself out as a married man.

The couple jointly signed a lease for an apartment in Lynwood, Washington, and moved in together in October 2011. Initially, Turner and Vaughn each paid half the rent.

By November 2011, the couple opened a joint bank account. Both Turner and Vaughn also maintained separate bank accounts. Turner used the joint account to pay for the couple's household and personal expenses. Vaughn claimed he only put Turner on the account to process payments for his marijuana business, and that he told Turner she could not take any of the money in the account from the marijuana business. The trial court found Turner lacked credibility on this point.

Vaughn used Turner's social security number for debit and credit transactions of his marijuana business, and then deposited the funds into their joint account. Turner testified that Vaughn told her she had no budget, and that she withdrew $9,140 a month on average without protest from Vaughn.

In April 2012, Turner purchased a vehicle and had it titled in both of their names.

In September 2012, Turner and Vaughn moved from their Lynwood apartment after jointly signing a lease for a California apartment. From September 2012 to March 2014, Vaughn spent half his time in California with Turner, and half his time in Washington for work. During their time in California, Vaughn received pay stubs, business invoices, bank statements, and utility bills listing the address of the California apartment. The couple also received a vet bill from a pet hospital in California showing both their names.

Turner worked full time in California, contributing to payments for rent and shared expenses. In November 2012, Vaughn sent Turner an e-mail telling her he loved her. He referred to their apartment in California as their home. Throughout 2013, Vaughn had some business meetings in California, but still maintained a place of business in Washington and received mail at a post office box in Washington.

In April 2013, the couple had an argument. Vaughn claimed the two then broke up. Turner told her family and Vaughn's family about the argument. Days later, Turner told Vaughn that she was pregnant, and the two reconciled. Shortly thereafter, Vaughn bought a ring for Turner.

A month later, the couple traveled to Thailand with family. While there, the couple exchanged vows and rings and took photos. Vaughn wore a ring on his wedding finger. The couple never received a legal certificate of marriage. Vaughn claimed that he told Turner from the beginning of the relationship that he would not get married. Upon returning home, Vaughn refused to marry Turner. "[H]e was worried about the federal ramifications of being married with his activity in marijuana." Report of Proceedings (RP) (Feb. 15, 2017) at 102.

In August, Vaughn expressed his love for Turner. In December, the couple's first child was born. After the birth, the family moved back to Washington. They stayed with Vaughn's parents until jointly signing a lease for an apartment in Puyallup. Turner stopped working and cared for their child. The couple also sent out family Christmas cards in 2014 and 2015. Turner had a second pregnancy, but had a miscarriage.

In April 2015, Turner discovered she was pregnant for a third time. Vaughn became upset and told Turner he thought another baby would ruin their relationship. Vaughn claimed this argument amounted to a break up, because he told Turner that the relationship was over, but the trial court found he lacked credibility on this point. In July, Vaughn began spending a few nights a week in Oregon for work. Around the same time, he started a relationship with another person.

In early December, Vaughn moved out of the couple's Puyallup apartment. The couple's second child was born about a month later. In February, Turner became aware of Vaughn's other relationship.

II. PETITIONS FOR TERMINATION OF CIR AND A PARENTING PLAN

In February 2016, Turner filed a petition for termination of the CIR[1] and a division of the couple's property and liabilities. The petition claimed the CIR terminated on December 8, 2015. Shortly thereafter, Turner filed a separate petition for a parenting plan and child support. The trial court consolidated the cases but later bifurcated them. A trial occurred on whether a CIR existed and, if it did, its duration.[2]

The day before ruling, Turner electronically filed a declaration, served a copy on Vaughn, and provided the court with a copy. The declaration asserted that Vaughn filed a false police report of child abuse against Turner three days before the judge was set to issue her oral rulings. Vaughn's counsel denied the assertion and the court set a hearing and ruled on the merits.

The trial court, relying on *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995), ruled that the parties had a CIR from October 2011 through December 2015. Despite conflicting testimony, the court found the CIR terminated on December 8, 2015, when Vaughn moved out of the Puyallup apartment. The court found that "throughout the entire trial, [Vaughn had] been incapable of telling the truth." RP (Mar. 9, 2017) at 660. The court considered the declaration in making the parenting plan decision and in disallowing Vaughn unsupervised contact with the children. The judge also said her decision that Vaughn had engaged in an abuse of conflict was not dispositive until reading the declaration.

The court issued a written order on the CIR issues and the parenting plan, which formalized its oral ruling.

---

[1] Although the parties used the term "dissolution," because they never married, the legal term "dissolution" is inapplicable. Ch. 26.09 RCW. We use the term termination.

[2] The trial also included child support and parenting plan issues. However, the parties later settled these issues.

Vaughn filed a motion and declaration for a new trial and recusal of judge. Vaughn primarily argued that the declaration affected the court's ruling on the parenting plan, but that he was entitled to a new trial on all issues because the declaration may have affected the court's decision on all contested issues. He argued that by providing a working copy of the declaration to the judge, Turner engaged in an ex parte communication in violation of RPC 3.5(a) and (b). In the alternative, Vaughn argued that by considering the alleged ex parte communication, the judge created an irregularity in the proceeding under CJC 2.9(A)(1), requiring a new trial and recusal if the court granted a new trial. The court denied the motions. Vaughn appeals.

ANALYSIS

I. CIR

Vaughn argues the trial court erred in concluding he and Turner had a CIR. He also argues, if a CIR existed, the trial court erred by ruling it ended in December 2015, instead of in April or July of 2015. We disagree.

A. Standard of Review

We review the trial court's conclusion relating to the existence of a CIR de novo. Whether a CIR existed between the parties presents "a mixed question of law and fact." *In re Pennington*, 142 Wn.2d 592, 602, 14 P.3d 764 (2000). Although we defer to the trial court's unchallenged findings of fact, as well as challenged findings supported by substantial evidence, we review de novo whether the trial court's legal conclusions properly follow from those findings. *Pennington*, 142 Wn.2d at 602-03. With respect to challenged factual findings, evidence is "substantial" if it would persuade a rational, fair-minded person of the finding's truth. *In re Marriage of Fahey*, 164

Wn. App. 42, 55, 262 P.3d 128 (2011). We neither weigh the evidence nor judge the credibility of the witnesses. *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999).

B. Legal Principles

A CIR "is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." *Connell*, 127 Wn.2d at 346. The CIR, based on equitable principles, protects the interests of unmarried parties who acquire property during their relationships by preventing the unjust enrichment of one at the expense of the other when the relationship ends. *Pennington*, 142 Wn.2d at 602.

Connell established five nonexclusive factors considered by courts in determining whether the parties had a CIR. 127 Wn.2d at 346. The factors are: (1) continuity of cohabitation, (2) "duration of the relationship," (3) "purpose of the relationship," (4) "pooling of resources and services for joint projects," and (5) "the intent of the parties." *Connell*, 127 Wn.2d at 346. Courts should not apply these factors in a hypertechnical fashion, but must look at the circumstances of each case. *Pennington*, 142 Wn.2d at 602. The weight given to each factor has not been established, nor has how to balance one factor against any other factor or factors. 21 KENNETH W. WEBER, WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW § 57.8, at 396-402 (2nd ed. 2015).

C. The Parties Entered Into a CIR

On appeal, Vaughn argues that the court erred in finding a CIR existed. He also argues that if one did exist, the court erred in finding its duration. We disagree.

1. Substantial Evidence Supported the Trial Court's Findings

Vaughn challenges the trial court's findings that the couple continuously cohabitated and pooled resources and services. Vaughn argues the parties did not continuously cohabitate because

he spent half his time in Washington from September 2012 to March 10, 2014, while Turner worked full time in California. Vaughn appears to argue he and Turner did not pool resources and services because Turner did not contribute financial resources to their joint bank account. We disagree with Vaughn.

We review the challenged factual findings for substantial evidence. Then we review the conclusion that a CIR existed de novo. *Pennington*, 142 Wn.2d at 602-03. If a CIR did exist, we review when the CIR terminated for substantial evidence. To the extent Vaughn does challenge the court's findings, substantial evidence supports them. He does not challenge the trial court's findings that the purpose of the relationship "was love, intimacy, cohabitation, and shared life and goals," RP (Mar. 9, 2017) at 656, or that the couple had two children. Substantial evidence also supports those two findings.

First, as to the continuous cohabitation finding, Vaughn concedes he and Turner jointly signed a lease for their California apartment in September 2012, and that he resided in California with Turner when he was not in Washington. Vaughn also concedes he and Turner jointly signed other apartment leases covering the entire period from October 2011 to December 2015. Substantial evidence supports the trial court's finding of continuous cohabitation.

As to the pooled resources and services argument, Turner's withdrawals from the joint bank account, without corresponding deposits, weighs against a pooled resources finding. However, Turner used the joint bank account to pay household and personal expenses from 2011 to 2015. Turner also contributed money to rent and shared expenses during the relationship and contributed time, energy, and resources by raising their child and keeping up their home. Vaughn argues that the joint account was a pass through account for money from his marijuana business;

however, it is undisputed that money from this account paid for household expenses. Substantial evidence supports the trial court's finding of pooled resources and services for joint projects.

2. The Factual Findings Support the Conclusion that a CIR Existed

Next, we review de novo the trial court's legal conclusion that a CIR existed. In reviewing the conclusion, we consider the challenged and unchallenged findings of the trial court. Like the trial court, we utilize the nonexclusive *Connell* factors and reach a determination based on the circumstances of this case. 127 Wn.2d at 346.

The trial court made the following findings of fact. The approximately four year relationship constituted continuous cohabitation and was sufficient in duration. The couple's purpose in the relationship was love, intimacy, cohabitation. They shared life goals. The couple pooled resources and services, as evidenced by their joint bank account and Turner's running the household for the couple. The court did not clearly state a finding on the "intent of the parties" *Connell* factor, but said it "goes along with, sort of, what was the purpose of the relationship." RP (Mar. 9, 2017) at 658. Aside from the *Connell* factors, the court considered the couple's three pregnancies and two children.

a. *Connell* Factor One: Continuity of Cohabitation

The court found that the parties cohabitated for over four years. The findings show the parties lived together continuously from October 2011 through December 2015, and jointly signed leases for apartments covering all but three months where they stayed with Vaughn's parents. On these facts, the parties had a "stable cohabiting relationship." *Pennington*, 142 Wn.2d at 603. This factor favors the existence of a CIR.

b. *Connell* Factor Two: Duration of the Relationship

The court found the parties had a relationship that lasted four years and two months. The record shows the parties were in a dating relationship while living together as a couple for a total of just over four years. "While a 'long term' relationship is not a threshold requirement, duration is a significant factor." *Connell*, 127 Wn.2d at 346. Here, the duration factor moderately favors that a CIR existed.

c. *Connell* Factor Three: Purpose of the Relationship

The court found the purpose of the relationship was love, intimacy, cohabitation and shared life goals. They lived together and raised a child together. They also presented themselves to the world as a family by holding themselves out as husband and wife. Among other ways, they did so in Thailand and on social media, and by sending family Christmas cards. This factor strongly favors that a CIR existed.

d. *Connell* Factor Four: Pooling of Resources and Services for Joint Projects

The court found that the parties pooled resources. As discussed above, the couple had a joint bank account, joint assets, and both parties contributed time, energy, and resources to the relationship, and to raising their children. This factor favors that a CIR existed.

e. *Connell* Factor Five: The Intent of the Parties

Vaughn does not challenge the trial court's findings that the purpose of the relationship "was love, intimacy, cohabitation, and shared life and goals," and that the couple had two children. RP (Mar. 9, 2017) at 656. The trial court found Vaughn's denial of "any kind of a relationship" was not credible, and his testimony on the intent of the parties was not credible. RP (Mar. 9, 2017) at 655. The court stated, the parties' intent "goes along with, sort of, what was the purpose of the relationship." RP (Mar. 9, 2017) at 658. This factor favors that a CIR existed.

f. Conclusion: Existence of a CIR

We conclude the *Connell* factors support a determination that Vaughn and Turner had a CIR. *In re Meretricious Relationship of Long*, 158 Wn. App. 919, 927, 244 P.3d 26 (2010), is in accord. In *Long*, the factors favoring a CIR, included cohabitation, joint planning for the future, and holding themselves out as a couple, notwithstanding some physical absences from each other. 158 Wn. App. at 927. Similarly the facts support the conclusion that Vaughn and Turner entered into a CIR, despite the fact that Vaughn split his time between Washington and California for part of their relationship.

D. The CIR Terminated in December 2015

Vaughn argues that even if a CIR existed, it ended in April 2015, when Vaughn discovered Turner's second pregnancy and when he told her she had ruined the relationship, or in July 2015, when he began spending a few nights a week in Oregon. We disagree.

Vaughn relies on *In re Parentage of G.W.-F.*, 170 Wn. App. 631, 649, 285 P.3d 208 (2012), where the court held that a CIR terminates after one party "unequivocally" communicates an intent to end the CIR, which was "understood by the other party to the relationship," even if the parties continue to live together. In *G.W.-F.*, the trial court concluded that the CIR terminated when one party "unequivocally ended the commitment to the marital-like relationship," though the parties continued sharing their residence until they could sell it two years later. 170 Wn. App. at 648-49. Importantly, and unlike here, the other party clearly understood that the party ending the CIR no longer wanted to be in the relationship. *G.W.-F.*, 170 Wn. App. at 649.

This case is factually distinguishable from *G.W.-F.* Here, the trial court found Vaughn lacked credibility in testifying about the April 2015 argument. After April 2015, Vaughn knew Turner wanted to continue trying to rebuild the relationship, and would do family activities with

her and their child, including taking family photos. Even after April 2015, Vaughn's Facebook page said he was "married" to Turner. RP (Feb. 16, 2017) at 286. Turner believed they were in a monogamous relationship.

The couple cohabitated from October 2011 to December 2015, and they held themselves out as husband and wife, raised a child, and lived together as a family during that time. Vaughn was living with Turner, and attending medical appointments related to the birth of their second child, until the day he ended the relationship, December 8, 2015. Substantial evidence supports the trial court's finding that the relationship ended on that date.

II. DENIAL OF MOTION FOR NEW TRIAL AND FOR RECUSAL

Vaughn argues that the court erred in denying his motion for new trial and for recusal. Vaughn premises all of his arguments on his assertion that the declaration Turner electronically filed, served on Vaughn, and provided to the court was an improper ex parte communication with the trial judge. We disagree.

A. Denial of New Trial

We usually review the denial of a new trial to determine if the trial court's decision is manifestly unreasonable, exercised for untenable reasons, or based on untenable grounds. *Edwards v. Le Duc*, 157 Wn. App. 455, 459, 238 P.3d 1187 (2010). But when a party cites an error of law as grounds for a new trial, we review the alleged error of law de novo. *Mears v. Bethel Sch. Dist. No. 403*, 182 Wn. App. 919, 927, 332 P.3d 1077 (2014). The error of law complained of must be prejudicial. *Alum. Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

Generally, the term ex parte means "communications made by or to a judge, during a proceeding, regarding that proceeding, without notice to a party." *State v. Watson*, 155 Wn.2d 574, 579, 122 P.3d 903 (2005) (footnotes omitted). "A written communication to a judicial officer with a copy sent timely to opposing parties or their lawyers is not ex parte." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 113 cmt. c.

Vaughn assigns error to the following findings of fact made by the court in its order denying the motions for a new trial and recusal. No ex parte communication occurred. Providing a working copy of a filed declaration to the court presumptively conformed to the usual custom and practice in the Superior Court of Washington. No misconduct or violation of RPC 3.5 by Turner occurred. No legal or factual basis existed to grant a new trial. No legal or factual bases existed for the trial court to recuse itself.

Vaughn admits Turner served him with the challenged declaration, and that he reviewed it. However, Vaughn argues that the declaration constituted an impermissible ex parte communication, which warranted a new trial. Vaughn contends that the declaration was an improper ex parte communication because Turner did not attach the declaration to a motion, did not indicate its intended purpose, and did not give notice that Turner would provide a copy to the judge.[3]

[3] To the extent Vaughn argues the declaration contained hearsay, and was an improper supplement to the record filed after closing argument, he cites no authority stating that consideration of a declaration in those circumstances warrants a new trial or recusal. "Where no authorities are cited in support of a proposition, [we are] not required to search out authorities, but may assume that that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

The local rules for Pierce County Superior Court provide that parties may provide working copies of electronically filed documents to the judge. *See* PCLR 30(b)(5)(C). These rules comport with the recognition that "working copies of pleadings" are given to judges as a "reality of modern trial practice." *Green v. Normandy Park*, 137 Wn. App. 665, 678-79, 151 P.3d 1038 (2007) (internal quotation omitted).

No ex parte communication occurred. The trial court did not err in denying the motion for a new trial.

B. Denial of Recusal Motion

Vaughn argues that if a new trial had been granted, it should have been remanded before a new judge. Because the trial court did not err in denying the motion for a new trial, we do not consider this argument.

III. ATTORNEY FEES

Arguing that Vaughn's appeal is frivolous, Turner requests attorney fees under RAP 18.9. In response, Vaughn requests fees under RAP 18.9, claiming Turner violated the appellate rules.

"'[A]ttorney fees may be awarded only when authorized by a private agreement, a statute, or a recognized ground in equity.'" *In re Committed Intimate Relationship of Kelly*, 170 Wn. App. 722, 739, 287 P.3d 12 (2012) (quoting *Fisher Props., Inc. v. Arden–Mayfair, Inc.*, 106 Wn.2d 826, 849–50, 726 P.2d 8 (1986)). RAP 18.9(a) authorizes us to order a "party or counsel" who "files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by . . . the failure to comply."

An appeal is not frivolous if it raises even one debatable issue "upon which reasonable minds might differ." *Advocates for Responsible Dev. v. Wash. Growth Mgmt. Hr'gs Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010). Because Vaughn's appeal is not frivolous on the issues related to the CIR determination, we decline to award attorney fees to Turner.

A party requesting fees under RAP 18.9, based on a violation of the rules of appellate procedure, bears the burden of proving the requisite harm suffered by the failure to comply with the rules. RAP 18.9(a). Vaughn fails to make a sufficient showing of harm suffered as a result of the alleged violations in Turner's brief. We decline Vaughn's request for fees.

We affirm the trial court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Johanson, J.

Maxa, C.J.