

**FILED**

OCT 17 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COA No. 31297-6-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

DREW C. OLSEN,

Appellant,

v.

MEGAN M. OLSEN,

Respondent.

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. An award of attorney fees on appeal is unwarranted..... 1  
II. Response to Ms. Olsen’s other arguments..... 1  
III. Conclusion.....3

TABLE OF AUTHORITIES

Table of Cases

*Barr v. MacGugan*, 119 Wn. App. 43, 78 P.3d 660 (2003).....2  
*Cmty. Dental Servs. v. Tani*, 282 F.3d 1164  
(9<sup>th</sup> Cir. 2002).....3  
*In re Marriage of Fernau*, 39 Wn. App. 695,  
694 P.2d 1092 (1984).....2  
*In re Marriage of King*, 66 Wn. App. 134,  
831 P.2d 1094 (1992).....1  
*In re Marriage of Leslie*, 90 Wn. App. 769, 954 P.2d 330  
(1998), *review denied*, 137 Wn.2d 1003 (1999).....2  
*In re Marriage of Oblizalo*, 54 Wn. App. 800,  
776 P.2d 166 (1989)..... 1

Statute

RCW 26.09.140..... 1

I. An award of attorney fees on appeal is unwarranted.

The appellate court may, in its discretion, order a party to pay attorney fees under RCW 26.09.140:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

The court may award attorney fees based on the parties' financial resources and a showing of financial need of the party requesting the fees and the ability of the other party to pay. *In re Marriage of King*, 66 Wn. App. 134, 139, 831 P.2d 1094 (1992).

Here, Mr. Olsen does not have the ability to pay as Ms. Olsen well knows after attaching his bank accounts and garnishing his wages. She is making as much, if not more, than he is and she has as much, if not more, than he does. The paramount consideration in awarding fees under RCW 26.09.140 is one party's ability to pay and the other's need. *In re Marriage of Oblizalo*, 54 Wn. App. 800, 806, 776 P.2d 166 (1989). In deciding whether to award fees, the court may consider the arguable merit of an appeal, but it is not a dispositive factor and has little weight, if any, when

there is no need and no ability to pay. *In re Marriage of Leslie*, 90 Wn. App. 769, 806 fn 2, 954 P.2d 330 (1998), *review denied*, 137 Wn.2d 1003 (1999); *In re Marriage of Fernau*, 39 Wn. App. 695, 708, 694 P.2d 1092 (1984). The *Leslie* court observed:

Our decision is also furthered by public policy. Mandating costs and attorney fees for all cases where a parent is unable to secure a better result upon de novo review has the potential to work an economic hardship on a custodial parent. This supports granting the court wide latitude in determining the appropriateness of such awards only after considering both parties' financial resources and balancing the requesting parent's need against the other's ability to pay.  
*Id.*

Ms. Olsen does not have the need; Mr. Olsen does not have the ability to pay. The parties should bear their own fees.

## II. Response to Ms. Olsen's other arguments

Contrary to Ms. Olsen's contention, Mr. Olsen does not claim his erstwhile lawyer, Mr. Mickey, was simply negligent or incompetent. (Br. of Resp., pp. 17, 29). Rather, he argues Mr. Mickey suffered from a disability, *i.e.*, medical and personal problems as reflected in the record (CP 151-55), causing him to abdicate his duties and responsibilities as a lawyer to Mr. Olsen. There was such a failure of representation that, as a practical matter, Mr. Mickey offered no representation at all to his client when it mattered most. *Barr v. MacGugan*, 119 Wn. App. 43, 47-

48, 78 P.3d 660 (2003); *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164 (9<sup>th</sup> Cir. 2002). In these circumstances, the sins of the lawyer are not, and cannot be, visited on the client. *Id.*

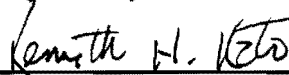
As for her remaining arguments, Mr. Olsen rests on his opening brief for his response and the record before this Court.

### III. Conclusion

Based on the foregoing facts and authorities, Mr. Olsen respectfully urge this Court to reverse the denial of his CR 60(b) motion to vacate default and final orders, to remand for further proceedings, and to deny an award of attorney fees on appeal to Ms. Olsen.

DATED this 17<sup>th</sup> day of October, 2013.

Respectfully submitted,



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### CERTIFICATE OF SERVICE

I certify that on October 17, 2013, I served a copy of the Reply Brief of Appellant by first class mail, postage prepaid, on Michael D. Franklin, Kelly Konkright, and Terence R. Whitten, Lukins & Annis, 717 W. Sprague, Ste 1600, Spokane, WA 99201.

