No. 43574-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re the Marriage of:

RONALD L. GATES, Respondent,

vs.

KYON BRUNDAGE, Appellant

Lewis County Superior Court

Cause Nos. 11-3-00226-0

The Honorable Judge Nelson E. Hunt

Appellant's Reply Brief

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ASSIGNMENTS OF ERROR

1. Judge James W. Lawler committed error by denying the appellant's motion for a two-week continuance to allow her new counsel to represent her due to counsel's conflict on the day of trial.

2. Judge Nelson E. Hunt committed error in Finding of Fact 2.21 by finding that Ronald Gates was a vulnerable adult and that Kyon Brundage violated her fiduciary duty and thereby caused him financial ruin.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was it an abuse of discretion for the court to refuse a brief continuance of a couple of weeks to allow ms. brundage to proceed to trial with counsel?

STATEMENT OF FACTS

The statement of the case as presented in the appellant's opening brief is Incorporated herein by reference. The following are facts presented for the intent of clarifying facts presented in the respondent's brief.

It is absolutely false, and undocumented anywhere in the record, that Ms. Brundage ever failed to meet any discovery requirements. The order continuing the trial date stated as one of the reasons for continuing the case "based upon the need for continuing discovery, and compliance with existing discovery requests" (CP 51) There is no mention in this of any fault on the part of either party, nor is there anything in this that indicates that either party had violated any discovery requests only that

there was a need for continuing discovery and compliance with existing discovery requests. The insinuation that this was brought about by Ms. Brundage comes from a misstatement by the trial judge in the post-trial motion for a stay.

In the hearing on June 8, 2012 the Judge, on his own recited his opinion of the case, although irrelevant to his ruling in the matter. On that occasion he claimed, without any citation to the record or any documentation the following: "The original trial date of **December 11th** was continued as the Respondent had not met her discovery requirements among other reasons"(emphasis added) (RP June 8, 2012 attached to Respondent's Brief 17).

The problem with that statement is that it is not consistent with the court file. The original court date in this case was set on October 20, 2011 (signed by the court on October 19, 2011) (CP 27) This set the trial date for February 29-March 1st, 2012 and it set the settlement conference for January 31, 2012. Attached hereto as Appendix 1 is a Notice of Assignment dated October 27, 2011 which was mistakenly placed in the Gates v. Brundage court file. It unfortunately has the Gates v. Brundage cause number on it but the caption is for a different case and the attorneys listed are completely different. It is that case that was listed for a jury trial

on December 13-14, 2011. There is nothing in the court file ever noting Gates v. Brundage for trial on December 11, 2011.

There is also nothing in the file noting a motion to compel for failure to provide discovery, nor are there any orders in the file ever sanctioning anyone or changing anything because of a failure to comply with any discovery requirements. These were nothing more than the confused statements of the trial judge. They should be treated as such. There is no evidence in this court record to verify that the first continuance was granted due to any failure on the part of Ms. Brundage to comply with any discovery requirements.

Mr. Gates comments in his facts that Ms. Brundage "admitted numerous financial documents". (Respondent's brief page 8) An example of Ms. Brundage's inability to submit financial documents is the admission of Exhibit 101. Ms. Brundage submitted a canceled check that she had paid to Mr. Gates. (RP Vol. I 125) The court explained to her that she needed to admit it as an exhibit and see if Ms. Bringolf had any objection to it. (RP Vol. I 125) Ms. Bringolf did not have an objection to it and the court stated "It will be admitted as 101, whatever it is. It is a check, that is all I know."(RP Vol. I 126) Ms. Brundage never said anything further in her testimony regarding it but went on to discuss a house that they sold in 2005. (RP Vol. I 126) Although she admitted some financial exhibits, she

did not understand that the court did not look at these items independently and draw a conclusion. She did not understand that she needed to provide testimony regarding what the documents were and explain their significance to her case.

In Mr. Gates' brief he states that Ms. Brundage in her closing argument was requesting that she retain all her property "and control over all of Gates property, too." (Respondent's brief page 9) The exact quote by Ms. Brundage was as follows: "And of course, I want to keep all his property for him." (RP II 79) This is an example of Ms. Brundage being a native Korean speaker and speaking English as a second language. Her clear intent there is that he keeps all of his property, not that she keeps his property. She is stating that of course she wants him to keep all of his property in the property division; she was not requesting that the court give her all of his property to manage for him.

ARGUMENT

IT WAS AN ABUSE OF DISCRETION FOR THE COURT TO REFUSE A BRIEF CONTINUANCE OF A COUPLE OF WEEKS TO ALLOW MS. BRUNDAGE TO PROCEED TO TRIAL WITH COUNSEL.

Mr. Gates cites the case of *Balandzich v. Demeroto*, 10 Wash. App. 718, 519 P.2d 994 (1974) for the following rule of law:

> Whether a motion for continuance should be granted or denied is a matter discretionary with the trial

> court, reviewable on appeal for manifest abuse of discretion. Jankelson v. Cisel, 3 Wash.App. 139, 473 P.2d 202 (1970). In exercising its discretion, the court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court. (at 720)

The reasoning of the court in that case for its facts was as follows:

> In the instant case, the action was commenced in August 1967. Plaintiffs had been represented by various counsel and six continuances had been granted. The sixth continuance was granted on July 29, 1971 to January 12, 1972, a date suggested by plaintiff husband. In granting the continuance, however, the court imposed the condition that 'Plaintiffs shall have no more continuances for any reason.' Viewed against the totality of the circumstances brought to the trial court's attention on plaintiffs' motion for a seventh continuance, we cannot say the court's exercise of discretion was 'upon a ground, or to an extent, clearly untenable or manifestly unreasonable.' Friedlander v. Friedlander, 80 Wash.2d 293, 298, 494 P.2d 208, 211 (1972). (at 720-721)

The facts in that case were clearly distinct from those of Ms. Brundage. Not only had there been multiple prior attorneys, but there had been 6 prior continuances, the last one having been granted for a period of 6 months. The new trial date was a date selected by the moving party. Also, the court noted on the order that there would be no further

continuances. Clearly the facts of this case are quite distinct from those of Ms. Brundage.

When Ms. Brundage's case is analyzed using the 6 factors listed it can be seen that there was an abuse of discretion. First of all, in terms of reasonably prompt disposition, the requested continuance of approximately 2 weeks would have meant that the case would have been tried approximately a year from the date of filing. In Pierce County most dissolutions of marriage are noted for the first time a year from the date of filing and may have to be continued from that date. A continuance of a couple of weeks would not have caused this litigation to be unreasonably prompt in its disposition.

As to the second item, the needs of Ms. Brundage were great. She did not have the legal training or background sufficient to try this case by herself. She needed an attorney and she found one that she could work with if a short continuance were granted. Also, as demonstrated in our opening brief, the prejudice to Ms. Brundage was great. She was not able to properly represent herself at trial, being unable to properly object to evidence submitted; her inability to cross examine witnesses; and her ability to present evidence. In short, she was not able to represent herself to any realistic degree in trial.

In regard to the third item, although Mr. Gates complained that Ms. Brundage was continuing the case in hopes of taking advantage of his poor health, there was no showing that a continuance of 2 or even 3 or 4 weeks posed any health risk for Mr. Gates. The fact of the matter was that even on the trial date for which the continuance was being requested, Mr. Gates did not testify in the trial. His ability to testify in the proceedings was irrelevant. There was no showing that his death was imminent and that a continuance of a couple of weeks would mean that everything would go to Ms. Brundage. Other than the cost of his attorney showing up for the continuance motion (which attorney fees were reserved in any event and then not entered by the trial court) there was absolutely zero prejudice shown by Mr. Gates.

The prior history of the litigation equally does not show a basis to deny the continuance. Although the judge in his order denying the motion did state that there is a "long history" in this case the basis of that appears extremely subjective. The case had only been continued once before and that was by stipulation of the parties. Ms. Brundage's first attorney withdrew following the settlement conference, there is no evidence in the record to show that this was the result of anything inappropriate by Ms. Brundage. Her second attorney was apparently discharged, but the reason for that is entirely a matter of speculation. The cost of an attorney is also a

basis to let him go. If his trial retainer was too high it would be understandable for her to let that attorney go and to seek an attorney that she could afford. That would also make total sense as to why this occurred.

There is substantiation for this in the court record. When Ms. Brundage brought her motion to continue during the trial, she explained that she went to an attorney the day before because she did not have the money prior to that. (RP I 78) She stated that she went to an attorney the day before because she finally had the money. She said that she had tried to negotiate with them but they needed a full $5000 up front. (RP I 78) If her second attorney's trial retainer was too high it would make total sense that she would advise him that she was unable to pay that. If she was able to afford Ms. Church then that is why she would request that she represent her even if it meant that the trial date had to be continued a couple of weeks. Mr. Gates argues that Ms. Brundage should have been able to retain an attorney with the money that she paid Ms. Church, the fact that she did not have the money to afford the next attorney that she found, clearly indicates that the amount of money that she paid Ms. Church was actually not very much compared to other attorneys.

In regard to her efforts to retain Ms. Church it also needs to be borne in mind that Ms. Church's statements would also be indicative of

Ms. Brundage's intentions when she sought to retain her. There is nothing stated by Ms. Church indicating that Ms. Brundage was retaining her with the intent to obtain a continuance. In the motion for continuance Ms. Church stated the following:

> Ms. Brundage approached me about being her attorney for the trial and I explained to her that I have other commitments at that time, and then she went ahead with this if I would agree to help her if the trial date got continued. (RP Motion for Continuance 6)

The intent here was clearly not one of attempting to retain an attorney for the purpose of getting a continuance, rather the focus was on obtaining an attorney and it was the attorney who needed to have the case continued due to a conflict that she had, not because of time to prepare for the trial. This is further substantiated by the fact that Mr. Gates' attorney did not seem to understand until the actual hearing itself that the point of the continuance was not so that the attorney could prepare, but rather was because of a conflict on the part of the attorney Ms. Brundage was able to retain. (RP Motion for Continuance 5)

If someone were attempting to hire and fire attorneys in order to obtain a continuance, why would they retain an attorney that had a conflict that granted them at best a continuance of a couple of weeks? Would it not make more sense to retain an attorney who needed several months to prepare and seek a continuance of a more significant time that a couple of

weeks? This was clearly not a situation where somebody was seeking a new attorney for the purpose of obtaining a continuance, but a person seeking an attorney who happened to need a continuance in order to represent them at trial.

There had been no prior conditions imposed at the time of the first continuance and therefore, as conceded by Mr. Gates in his brief, the fifth item does not apply. There also does not appear to been any other matters that have a bearing on this. There had been no discovery violations. There had been no prior depositions of witnesses that could of been introduced at trial. There were no other considerations for the court that could of been a justifiable basis for denying the continuance. Therefore, based upon the analysis of the *Balandzich* case, it was an abuse of discretion to deny this motion for continuance.

Mr. Gates cites several cases for the proposition that there is no abuse of discretion in the denial of a continuance based upon unavailability of counsel. However, those cases are factually distinct from the facts in Ms. Brundage's case. In *Willapa Trading Co., Inc. v. Muscanto, Inc.*, 45 Wash. App. 779, 727 P.2d 687 (1986) the court utilized the *Balandzich* factors above and found that the denial was not an abuse of discretion because the court had previously stated in a continuance that there would be no further continuances. The court also found that Mr.

Weeldon, the president, director, and sole shareholder of Willapa, had known of his attorney's decision to withdraw 2 months prior to trial; had not retained new counsel during that time; and had drafted his own pleadings during the course of the litigation indicating his experience and ability to do so. This is much different than Ms. Brundage who was not experienced in litigation and was unable to properly represent herself. There was also never a notation in the court file prohibiting further continuances.

In *Rich v. Starczewski*, 29 Wash. App. 244, 628 P.2d 831(1981) although trial counsel advised that he would not be available for trial a few hours before the trial, his associate did appear and the court found that the associate was available to begin the jury selection until the attorney was available. Therefore there was no need for a continuance.

In *St. Romaine v. City of Seattle*, 5 Wash. App. 181, 486 P.2d 1135 (1971) the plaintiff had represented himself from the inception of the case in Municipal Court and into Superior Court over the course of 2 years. The plaintiff never actually requested a continuance, but rather when he was unable to get his exhibits admitted and refused to go forward with his case until they were, the court treated his refusal to proceed as a motion for continuance which he denied. Ms. Brundage requested a continuance prior to the trial date and never represented herself prior to the date of trial. She

only proceeded to trial herself when she had no attorney to represent her because of the conflict with Ms. Church's schedule.

In the case of *Jankelson v. Cisel*, 3 Wash. App. 139, 473 P.2d 202 (1970) Mrs. Cisel, had 4 prior attorneys and her 5th attorney was retained 2 weeks prior to the trial. Given the fact that the 4th attorney had 11 months to prepare and withdrew because she would not respond to him, the court denied the continuance. These facts are clearly distinct from those of Ms. Brundage, whose case itself had only been pending for 11 months at the time of the trial. Ms. Brundage also was not seeking a continuance because she chose to retain new counsel 2 weeks before trial, but Ms. Church had a conflict and was only requesting a continuance of a couple weeks.

Eberhart v. Murphy, 110 Wash. 158, 188 P. 17, rev'd, 113 Wash. 449, 194 P. 415 (1920) was a case in which the Yakima County Sheriff was being sued for false imprisonment. In discussing the continuance the court noted that his attorneys had represented him for nearly 2 years prior to their withdrawal and he had a month before trial to prepare. The sheriff claimed that he was too busy doing the important work associated with the selective service act to be preparing for trial, but the court noted that the selective service work he was doing was winding down at this time. It is also important to note that this case was ultimately reversed on other

grounds and remanded for a new trial. The important thing to bear in mind about this case however is the fact that it had gone on for over 2 years and the person who would be preparing for trial was a County Sheriff, someone who was familiar with courts and the legal process. It was not a 71-year-old woman for whom English was a second language; who had hearing difficulties; and no experience in litigation. Ms. Brundage's case also went to trial in 11 months from being filed and the requested continuance would have only place the trial at approximately a year from the date of filing.

In the case of *Harms v. Simkin*, 322 S.W.2d 930 (Mo. Ct. App. 1959) the court noted that Mr. Simkin had retained a series of lawyers in an effort to obtain continuances prior to trial dates. The trial judge also was aware that he had utilized a similar delaying tactic in a prior case in front of him. Finally, the Court of Appeals noted that he had 4 different attorneys representing him just in the appeal. Once again, these facts are clearly distinguishable from those of Ms. Brundage. As noted above, she had not retained new counsel for the purpose of obtaining a continuance, but her new counsel required a short continuance due to a conflict.

In the case of *Benson v. Benson*, 66 Nev. 94, 204 P.2d 316 (1949) Mr. Benson filed for dissolution of marriage in Nevada and the parties had resided together during our marriage in Connecticut where other

dissolution of marriage proceedings had existed. After Ms. Benson was served with the Nevada dissolution papers in Connecticut, she retained counsel in Connecticut who then retain counsel in Nevada who answered the complaint and apparently did not raise any issues regarding the Connecticut dissolution. When Ms. Benson was advised by a different attorney that she should withdraw from the Nevada case, she was advised by her attorney that she had already submitted herself to the jurisdiction of Nevada. She then discharged her attorney and waited until the day before trial to retain new counsel, whose request for continuance was denied. This case is also factually distinct from that of Ms. Brundage as she clearly attempted to retain counsel with sufficient time to prepare, and in fact, counsel was not objecting to the time she had prepare, but simply had a conflict on that trial date and requested a short continuance.

In *Northeast Women's Ctr., Inc. v. McMonagle*, 939 F.2d 57 (3d Cir. 1991) the court refused to reverse a denial of a motion for continuance when the defendant claimed that she had needed it for the purpose of retaining new counsel. However, the court noted that she told the trial court that she had discharged her attorney because she wished to represent herself, but wanted more time to prepare. That case is factually different because she did have counsel available to her for the hearing, but chose to discharge her at the last minute in favor of representing herself. Ms.

Brundage did not ever attempt to or advised the court that it was her desire to represent herself but she sought a continuance for the purpose of allowing her new counsel to be present on the day of trial.

In the case of *Arabian Am. Oil Co. v. Scarfone*, 939 F.2d 1472 (11th Cir. 1991) the defendant have been represented by 4 different attorneys and had always obtained new counsel on the eve of the taking of depositions or other court actions in an apparent attempt to delay the case. That would have been the equivalent of Ms. Brundage discharging counsel prior to settlement conferences, not having counsel withdraw after settlement conferences.

In the case of Ms. Brundage, as noted above, there was no intent to retain Ms. Church for the purpose of delay, the only reason for a short continuance of a couple of weeks with because of a conflict with counsel's schedule. Not for any intent to delay the proceedings themselves.

Mr. Gates comments that "Brundage's acts of intransigence throughout these proceedings made it "very very clear" to the court that she was acting in bad faith in seeking delay to take advantage of Mr. Gates condition." (Respondent's Brief p. 20) The label of "intransigence" was one that trial counsel for Mr. Gates first utilized in the motion for continuance, without any elaboration. At that time she stated "And we are also seeking the court award $440 in attorney fees for intransigence." (RP

Motion for Continuance 6) Since the attorney fees were being requested for the motion for continuance, it would appear that she was implying that the intransigence was for bringing the motion to continue the trial date. However, this motion was only brought because of the fact that the attorney that she wished to retain have a conflict and was requesting a very short continuance. Although the court reserved on the issue attorney fees, there were no attorney fees awarded by the trial court. There is nothing in these facts that establishes any kind of intransigence.

Generally intransigence applies to a situation where somebody is refusing to comply with discovery requests or is repeatedly violating court orders in an effort to obstruct the court process, there is nothing in this record to indicate that. The issue is raised only because Ms. Brundage attempted to obtain a roughly two-week continuance in the trial date. There was no intransigence in this case.

There is equally, as noted above, no proof that there was any effort nor intent, to seek a continuance in an effort to take advantage of Mr. Gates physical condition. Once again, he never testified at trial and there was no medical evidence presented to indicate that he was in any immediate physical peril or imminent death.

Although the case of *In re V.R.R.*, 134 Wash. App. 573, 141 P.3d 85 (2006) was a dependency case and certainly the court took that into

consideration in their decision, however, the quote cited in our opening brief required the same legal standard to be applied to a continuance, that is, a manifest abuse of discretion. However, the court stated further

> When denial of a motion to continue allegedly violates constitutional due process rights, the appellant must show either prejudiced by the denial or the result of the trial would likely have been different if the continuance was granted. (at 581)

Therefore, there is actually a higher standard that is applied to a case where the allegation is a violation of the constitutional due process right. Beyond that, the standard is still a manifest abuse of discretion.

The case of *Chamberlin v. Chamberlin*, 44 Wash. 2d 689, 270 P.2d 464 (1954) is very much on point with the case of Ms. Brundage. In that case the State Supreme Court applied the manifest abuse of discretion standard to a divorce case specifically. The court provided the following cite specifically stating:

> Most courts, including this court in the Strom and Zulauf cases, follow this general rule:
>
> > 'Whether the ruling of a court on a motion for a continuance is within the proper exercise of its sound discretion usually depends on the facts of the particular case, the chief test being whether the grant or denial of the motion operates in the furtherance of justice. * * * a continuance should be granted if a denial thereof would operate to delay or defeat justice; and courts have been said to be liberal in continuing a

> cause when to do otherwise would deny applicant his day in court.' (Italics ours.) 17 C.J.S., Continuances, § 6, p. 194. (at 703)

This is a very specific and pertinent statement by the court regarding how abuse of discretion should be determined in the case of a dissolution of marriage. The ultimate standard being for a motion to continue a case is whether the denial thereof would "operate to delay or defeat justice; and courts have been said to be liberal in continuing the case when to do otherwise would deny applicant his day in court."

In the case of Ms. Brundage the denial of the motion to continue the case defeated justice. The 2 to 3 week delay would not have defeated justice in the least, the case would still only been about a year old. However, the denial of the motion to continue the case absolutely denied Ms. Brundage, the applicant, her day in court. In the *Chamberlain* case, the attorney representing the client without the client present was unable to properly present the case and therefore the applicant was denied her day in court. In the case of Ms. Brundage, the denial of the continuance for a brief period of time equally denied Ms. Bundage her day in court. She did not understand the rules of evidence; nor how to submit evidence; nor how to cross examine witnesses; nor how to present testimony, either for herself or her witnesses; she did not know how to properly argue her case. The record is evident that she did not get her day in court and as a result

she was mischaracterized and labeled intransigent without evidence of the latter and without the ability to put evidence in proper perspective to avoid the former. Under the *Chamberlain* court's definition this case did present a manifest abuse of discretion.

As stated by the *Chamberlain* court each case is also dependent on its own facts. The *Jankelson* case cited by Mr. Gates, and as noted above, had facts that are very distinct from those of Ms. Brundage. In that case, first of all, her second attorney had been representing her for as long as Ms. Brundage's case took to get through trial, i.e., 11 months. Secondly, she hired her third attorney two weeks prior to the date set for trial and moved for a continuance based upon counsel's need to prepare for trial. Ms. Brundage's motion was filed roughly a month before trial and the continuance was based upon a conflict with counsel's trial schedule. The time requested was a very short continuance of a couple weeks. That continuance would still have the case tried within approximately a year from its filing. The *Jankelson* case is not factually the same case as Ms. Brundage.

The case of *Peterson v. Crockett*, 158 Wash. 631, 291 P. 721 (1930) held:

> It is clear that the unexplained withdrawal, on the eve of trial, of the attorney for one of the parties to an action, as was the case here, affords no compelling ground

> for an application for a continuance, as, if the contrary rule should prevail, all a party desiring a continuance under such circumstances would have to do would be to discharge his counsel or induce him to file a notice of withdrawal. (at 636)

However, in so declaring the court did not cite any other court, and appeared to be focused on the facts of that case alone. In that case the defendant's attorney literally withdrew the day before the trial. The defendant appeared on the trial date with an attorney to represent him only for the continuance and then, believing that the other 2 cases set ahead of him would last until the next day, the defendatn left Port Orchard and went to Tacoma to find an attorney to represent him the next day. The defendant had also demanded a jury. The 2 cases scheduled ahead of him resolved more rapidly than he had anticipated and the case was called to trial. Because it was a jury trial, and a prospective jury was present, the court denied his attorney's request for a continuance and the matter proceeded to trial. It was against this backdrop of facts that the court denied the unexplained withdrawal of the other attorney on the eve of trial and also because the defendant was not justified in assuming he could leave the court when his matter was pending for trial and go to Tacoma. Furthermore, the court was concerned about the fact that he had demanded a jury, which was present, and therefore the trial court was justified in proceeding to trial.

In the case of Ms. Brundage there is nothing indicating that she was retaining new counsel for the intent of getting a continuance. She found an attorney who could represent her, but that attorney needed a brief continuance of a couple weeks because of a trial conflict with her schedule. This was not the case of the withdrawal of counsel the day before trial necessitating a continuance.

In regard to the issue of prejudice, it first of all needs to be borne in mind that prejudice does not need to be shown unless it is alleged that there was a violation of constitutional due process rights. (*In re V.R.R.*, at 581) However, that being said, Ms. Brundage was clearly prejudiced in this matter as more fully outlined in our opening brief, but in brief as follows: Ms. Brundage did not understand the rules of evidence and as a result, evidence was admitted that should not have been. Even if the trial judge did on his own not allow some evidence in, he did not prevent all inadmissible evidence from coming in. Furthermore, Ms. Brundage did not have a clue how to cross examine witnesses and after objection was made to her first question of Renell Hull, she did not even attempt to ask any more questions. She did not know how to call witnesses, believing that she could simply submit declarations (something that Mr. Gates' attorney had done with his financial declaration). She simply did not know

how to present her case and as a result Mr. Gates' attorney was allowed near free reign in presenting whatever she wanted to.

In regard to the issue of the trial court's award of Ms. Brundage's separate property to Mr. Gates, Mr. Gates cites the case of *In re marriage of Konzen*, 103 Wn.2d 407, 693 P.2d 97, cert. denied, 473 US 906 (1985) and *In re marriage of Griswold*, 112 Wn. App. 333, 48 P.3d 1018 (2002) for the proposition that there is no need for exceptional unusual circumstances to award separate property of one spouse to the other. However, the cases that we cited in our opening brief are from our State Supreme Court in 2009, *In re Estate of Borghi*, 167 Wash. 2d 480, 484-85, 219 P.3d 932, 935 (2009) and a Court of Appeals case from 1993, *In the Matter of Marriage of Olivares*, 69 Wash. App. 324, 848 P.2d 1281(1993) disapproved of on other grounds by *In re Estate of Borghi*, 167 Wash. 2d 480, 219 P.3d 932 (2009).

Ms. Brundage would agree with Mr. Gates' assessment that a determination that Mr. Gates was a vulnerable adult was not something that was needed for the court to make its decision. Since it was not necessary, that information and testimony was therefore irrelevant. As a result of it being irrelevant its only purpose was to inflame the passions of the court which led to an unjust result. As such, this is a further

demonstration of the prejudice suffered by Ms. Brundage as a result of her not having competent counsel to represent her at trial.

In regard to attorney fees, this appeal by Ms. Brundage is not frivolous, but is brought in good faith because of the abuse of discretion in failing to grant a very short continuance in this case. The result of that was that she was forced to proceed to trial without counsel and face experienced trial counsel at court. The result of that was that she lost 4 pieces of property that she owned free and clear of any debt as her separate property.

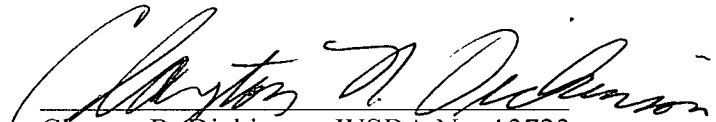
Her proper and lawful efforts to stay the enforcement of the decree and preserve the assets on appeal should not be penalized. Her further lawful efforts by filing a proper lis pendens does not prevent Mr. Gates from selling the property, but it does put the world on notice that it is subject to this appeal. If Ms. Brundage loses the appeal, then any sale by Mr. Gates of the property at this time will be final and binding and no one will ever have to return any property to Ms. Brundage. If he is so confident that this is a frivolous appeal, then he should perhaps convey that notion to potential sellers and guarantee to them that he will reimburse them any money that he receives as a result of the sale if Ms. Brundage prevails in the appeal. The reality is that this is not a frivolous appeal, but a valid appeal. Mr. Gates knows that if this appeal is won by Ms.

Brundage that would void any property sales and the properties would be returned to Ms. Brundage; pending retrial of the case. Given his confident assertions, how is it that he is now unable to sell those properties and has no funds? It should also be noted that the court below did not award attorney fees for the trial. His request for attorney fees should be denied.

CONCLUSION

The denial of a continuance in this case was a clear abuse of discretion. The request for a short couple week continuance was to enable Ms. Brundage's new attorney to be present at trial due to a prior conflict. The continuance would have still allowed for reasonably prompt disposition of the case as it would have still been resolved in roughly a year from filing. Ms. Brundage needed to have counsel to represent her as she was not legally trained and clearly not capable of representing herself. The prejudice to Mr. Gates amounted to the cost of his attorney showing up the fight the continuance motion. Although there had been one prior continuance, it was stipulated to by the parties and even that had been a relatively short continuance. There had been no conditions placed on the continuance such as that this would be the last continuance allowed by the court. All of the basic factors of the *Balandzich* case are met in the case of Ms. Brundage and this matter should be reversed and remanded for a new trial where Ms. Brundage may be properly represented by counsel.

Respectfully submitted on February 14, 2013.



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Samuel Tye Menser and Robert Martin Morgan Hill
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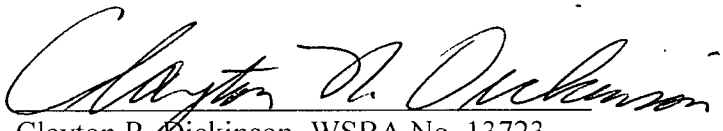
All postage prepaid, on February 14, 2013.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Fircrest, Washington on February 14, 2013.



Clayton R. Dickinson, WSBA No. 13723
Attorney for Appellant

Appendix 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF LEWIS

In re: _____)	NO. 11-3-00226-0
A.W. & A.W. _____) Minor Children,	NOTICE OF ASSIGNMENT
and. _____)	
ANTHONY WHEATON, _____) PETITIONER/PLAINTIFF	PREASSIGNED TO DEPARTMENT____
and.	JUDGE NELSON E. HUNT _____
MANDI GOODMAN, _____)	JUDGE JAMES W. LAWLER _____
_____)	JUDGE RICHARD L. BROSEY ____
_____) RESPONDENT/DEFENDANT.	CT COMM TRACY MITCHELL____

__X__ NON-JURY TRIAL December 13-14, 2011

SETTLEMENT CONF. November 15, 2011 @ 9:00 in courtroom 4 w/CC Mitchell

DATE: October 26, 2011

COPIES: w/encl.

Anthony Wheaton
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Chehalis, WA 98532

SUSIE E. PARKER/jmg
COURT ADMINISTRATOR

LEWIS COUNTY SUPERIOR COURT
345 W. MAIN STREET-4TH FLOOR
CHEHALIS, WA 98532

ALL TRIALS BEGIN AT 9:30 AM UNLESS A DIFFERENT TIME IS SPECIFIED.
MAIL ALL DOCUMENTS FOR FILING TO THE LEWIS COUNTY CLERK, 345 W. Main St., MS:CLK-01, CHEHALIS, WA 98532