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STATE OF WASHINGTON  
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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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In re the Marriage of

KAREN S. HELM  
Respondent

and

HANS U. HELM  
Appellant

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ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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BRIEF OF RESPONDENT

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## I. ISSUES IN RESPONSE

1. Does the party asserting an accord and satisfaction bear the burden of proving one exists?
2. Did Hans fail to prove the elements of accord and satisfaction?
3. Are the trial court's factual findings entitled to deference on review?
4. Did the trial court properly enforce the decree?
5. Because of the disparity in financial circumstances, should Hans pay Karen's attorney fees on appeal?

## II. RESTATEMENT OF THE CASE

The parties separated in 2002 after thirty years of marriage. They negotiated an agreement, on which the decree of legal separation was based. CP 18 (findings based on agreement). In the decree, the parties split the marital assets 50/50 and, specifically, split the retirement benefits earned by Hans, the husband, at Boeing. CP 16-17. The findings and the decree included a list of assets awarded to each party (Exhibits W & H). CP 16-17, 26-27. On the wife's list, she is specifically awarded "by way of a Qualified Domestic Relations Order [QDRO] a 50% interest of the pension in the name of the husband at The Boeing

Company with the date of valuation being June 30, 2002.” CP 16, 26. Both parties refer to this defined benefit plan as “the Pension.” See, e.g., CP 85 (Hans) and CP 169 (Karen). On the husband’s list, he is awarded “50% of pension plans, retirement plans, profit sharing, 401 (k) plans, and life insurance policies on his life or owned by him.” CP 17, 27.<sup>1</sup>

Several years later, in 2005, the court entered an order converting the decree of legal separation into a decree of dissolution. CP 29. By this time, the parties had sold the marital residence, which was subject to distribution per the decree of legal separation (split 50% after payment of “the debts of the marital community”). CP 16-17, 32 (residence sold in 2004).

Just before entry of the decree of dissolution, the parties executed a CR 2A mediation agreement, which, by its terms, was to be “incorporated into the decree of dissolution.” CP 355. (The order converting the decree of dissolution mentions only the decree of legal separation, not the CR 2A. CP 29.)

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<sup>1</sup>Some of the language in both parties’ schedule may be surplusage, meaning it may overstate what assets the parties had, at least as concerns retirement benefits from Boeing, which consist of a defined benefit plan (“Retirement Plan”), a contributory plan (“Voluntary Investment Plan”), and another contributory plan (“Financial Security Plan”). CP 62-63.

The CR 2A agreement contained the “terms of settlement” as follows:

Hans U. Helm agrees to immediately pay to Karen S. Helm the amount of seventy-five thousand seven hundred forty seven dollars and fifty cents (\$75,747.50). Karen S. Helm agrees to accept as partial payment as soon as practicable and as a rollover, 100% of the following IRA currently held at Primerica Account Number [omitted] and specifically;

[account names omitted]

BALANCE OF AMOUNT DUE SHALL BE PAID VIA CASHIER'S CHECK NO LATER THAN THE 6<sup>TH</sup> OF MAY 2005.

CP 355. The stipulation contains no other information regarding its subject matter.

Six years later, in 2011, Hans retired from Boeing. CP 80. Later that year, Karen, through counsel, requested Hans's cooperation in executing a QDRO for the remaining asset to be distributed, the Boeing pension. CP 33. When he refused, she sought enforcement in court. CP 31-69.

Hans countered with a claim for accord and satisfaction. CP 77-78. According to Hans, in 2005 he paid Karen funds representing her 50% interest in all of the marital assets, including the Boeing pension. CP 77-80. He said that he obtained an “actuarial valuation” of the pension earlier that year for the purpose

of determining Karen's share. CP 80, 86. When he attended the mediation, his "intention was to cash out [Karen's] interests in all of the pensions." CP 189. In support of his contention that the settlement accomplished his intention, Hans attempted to reconstruct their historical financial dealings, an effort hindered by records lost to fire and time. CP 82-89. Karen made a similar effort, with different results. CP 168 (compare to CP 119).<sup>2</sup>

Karen disagreed their settlement in 2005 encompassed anything other than completing the distribution of the liquid community assets, pursuant to their decree. CP 32-33. That is, they divided the accounts that "had dollars in them," not the defined benefit pension account. CP 204. Specifically, Karen was "certain that we did not include any 'cash value' for the Boeing pension." CP 204. She never saw the valuation letter and she "never agreed to be 'cashed out' for [her] share of the Boeing pension," which the decree awarded by QDRO. CP 169.<sup>3</sup> She noted that as a housecleaner, she views the pension as very valuable. Id. She noted neither the CR 2A nor the notes Hans purportedly made at the time (CP 114) make mention of the defined benefit pension. Id.

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<sup>2</sup> These accounting efforts are reviewed in greater detail in the argument section.

<sup>3</sup> She also pointed out the valuation is suspect. CP 171-172.

(They do mention the “VIP” and “FSP” retirement benefits.) Karen observed that if they had made an agreement of the kind Hans claims, the paralegal would have included it in the CR 2A. CP 169. The fact was, “we never made any agreement that I would surrender my right to his pension.” Id.

First the commissioner, then the judge on revision, agreed with Karen. The commissioner found: Hans had not met his burden of proving accord and satisfaction; “[t]here is no evidence there was a meeting of the minds that the 2005 settlement was a full and final satisfaction of all obligations from 2002 Decree of Legal Separation”; and “[t]here is nothing in the CR 2A that she was relinquishing her rights to the Boeing pension.” CP 248. The commissioner further held that “the orders are clear and are not ambiguous.” CP 249.

A superior court judge denied revision. CP 352. The judge agreed Hans had the burden of proof on accord and satisfaction, including “proving full disclosure and everything.” CP 353; RP (07/06/12) 31. Instead, what the judge heard, “if anything, from the husband’s perspective: We didn’t really talk about a lot of this.” RP (07/06/12) 32. The judge also noted that “[t]he CR 2A didn’t address a lot of things.” CP 353.

The husband appealed. Supp. CP \_\_ (sub 69: Notice of Appeal). Karen will address in the argument section some of the instances where Hans, in his brief, embellishes upon what the evidence actually establishes.

### III. ARGUMENT IN RESPONSE

#### A. HANS MUST PROVE THERE WAS AN ACCORD AND SATISFACTION.

Hans both resists enforcement of the decree of dissolution and seeks enforcement of an accord and satisfaction, a type of contract. His main problem is proving that an accord and satisfaction exists.

##### 1) The standard of review.

Whether there has been an accord and satisfaction is usually a mixed question of fact and law. *U.S. Bank Nat'l Ass'n v. Whitney*, 119 Wn. App. 339, 350, 81 P.3d 135 (2003). Where the facts are undisputed, it is a pure question of law. *Id.*

Here, some key facts are disputed. Most significantly, Karen disputes that the Boeing defined benefit pension was a subject of the 2005 mediation. She disputes that the subsequent transfer of funds to her from Hans compensated her for the right to 50% of Hans's defined benefit pension by means of a QDRO. The court commissioner and the judge believed Karen. CP 248 (the

commissioner finding “there is no evidence that the 2005 settlement was a full and final settlement in full satisfaction of all obligations”); RP (07/06/12) 31 (judge finding Hans did not meet his burden of proof).<sup>4</sup>

Hans argues this Court should review the record and come to its own conclusions. Br. Appellant, at 13-14. However, usually this Court accords deference to the trial court’s resolution of this kind of factual dispute. See *In re Marriage of Langham and Kolde*, 153 Wn.2d 553, 559, 106 P.3d 212 (2005) (*de novo* review is appropriate only if the record consists solely of documentary evidence and credibility is not an issue). Our Supreme Court has noted this deference is especially appropriate in family law cases. See *In re Marriage of Rideout*, 150 Wn.2d 337, 350-353, 77 P.3d 1174 (2003); *In re Parentage of Jannot*, 149 Wn.2d 123, 126-128, 65 P.3d 664 (2003). Our court has recognized “that a trial judge generally evaluates fact based domestic relations issues more frequently than an appellate judge and a trial judge's day-to-day experience warrants deference on review.” *Jannot*, 149 Wn.2d at 127; see, also, *Rideout*, 150 Wn.2d at 351. Accordingly, here, the

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<sup>4</sup> The superior court judge denied the motion for revision, declaring “I don’t see any reason to change the commissioner’s bottom-line order.” RP (07/06/12) 31.

court's finding that Hans failed his burden of proof, as a factual matter, is entitled to deference. The court's legal conclusions are, of course, reviewed *de novo*.

2) Hans has the burden of proof.

The fact that Karen disputed key facts is especially important in light of the burden of proof. The trial court properly held that Hans has the burden to prove the existence of an accord and satisfaction. CP 353. *U.S. Bank*, 119 Wn. App. at 350. Hans claims to the contrary, that is, that Karen had “to show by clear and convincing evidence that there was no accord and satisfaction[.]” Br. Appellant, at 15, 20. He cites no authority to support this claim, and there appears to be none. Indeed, this argument puts the cart before the horse: you cannot enforce a contract before you have proven it exists.

The authority Hans cites makes this clear. Br. Appellant, at 20, citing *Paopao v. Dep't of Soc. & Health Servs.*, 145 Wn. App. 40, 46, 185 P.3d 640 (2008). For example, in *PaoPao*, an accord and satisfaction was proven; the question presented concerned other aspects of the underlying dispute. This Court held that “[w]hen an accord is fully performed, the previously existing claim is discharged and all defenses and arguments based on the

underlying contract are extinguished.” But, here, the question is whether there was an accord and satisfaction at all. This is a question Hans bears the burden of answering.

**B. HANS FAILED TO PROVE THE ELEMENTS OF ACCORD AND SATISFACTION.**

Accord and satisfaction has the following elements: a bona fide dispute, an agreement to settle the dispute for a certain sum, and performance of the agreement. *Ward v. Richards & Rossano, Inc., P.S.*, 51 Wn. App. 423, 429, 754 P.2d 120 (1988); *Perez v. Pappas*, 98 Wn.2d 835, 843, 659 P.2d 475 (1983). Hans failed each of these prongs.

In advance of addressing these failures serially, it bears noting that at trial and in his brief, Hans embellishes the facts. For example, he claims he “made a clear offer to Karen” (Br. Appellant, at 23) and that he “tendered the net present valuation letter at mediation” (Br. Appellant, at 18-19). Maybe Hans wishes he did these things. But he failed to prove he did.

Similarly, he claims “[c]learly, [Karen] was aware of Hans’ offer” (Br. Appellant, at 18) and “Karen admits that they discussed the offer” (Br. Appellant, at 18 and 19). In fact, Karen’s statements are uncertain and contingent. She said only “[a]t best, we may have discussed it, but that is all, ...” CP 169. In these and other

instances, Hans overstates his evidence, perhaps in good faith, but, still, he overstates. If anything is proved by the parties' different versions of events, and the documents they executed, it is that Hans failed to communicate his purported intention.

1) There is no dispute.

First, there does not appear to be a dispute. The parties resolved their marriage and agreed Karen would receive half the Boeing pension. There may be a dispute now about whether she did receive her half, but there does not appear in the record an antecedent dispute about whether she should receive half the Boeing pension.

Nor is there a dispute about the value of the pension, whether valued as monthly payments or as a lump sum, because the parties did not include valuation (as other than a percentage as of June 30, 2002) in their agreement. They agree Karen was awarded half the pension. (And Karen never saw the actuarial letter, so that number is not the subject of a disagreement. CP 169.) The only disagreement is that Hans says he paid Karen and Karen says he did not. Hans essentially concedes this is the only dispute when he argues, from facts not actually in evidence, that the accord is proved by "the fact that Hans offered to pay for

Karen's 50% of the net value." Br. Appellant, at 19. Accordingly, he says, "there exists a dispute that one of two different amounts is due, either a division-in-kind by QDRO or payment in cash plus assumption of all community debt and the transfer of 100% of Hans' other assets to Karen." *Id.* But this is merely a description of the purported accord and satisfaction, not of a dispute the accord settled. In other words, the only dispute here is whether there was an accord and satisfaction.

Hans argues further that the pension award is unliquidated because it does not appear how much is due. Br. Appellant, at 17. This argument ignores the context and the asset at issue here. In Washington, a pension may be distributed by award of a percentage interest on an as-received basis. *In re Marriage of Bulicek*, 59 Wn. App. 630, 639, 800 P.2d 394 (1990). Thus, an award of this type is not unliquidated, since the amount Karen was to receive is "[a] figure readily computed, based on an agreement's terms." *Black's Law Dictionary*, 2005 (defining "liquidated amount"). Indeed, the award can be easily implemented. CP 65-69, 184.

2) There was no agreement.

Certainly, Hans failed to prove there was an agreement to settle the “dispute” for a certain sum. Not only did Karen vigorously deny she ever agreed to surrender her right to receive by QDRO her interest in the Boeing pension, the decree of legal separation unambiguously awards her that interest. Nothing else in the decree, including the incorporated CR 2A, alters that award.

Like any contract, accord and satisfaction requires a meeting of the minds, an intention on the part of both parties to create an accord and satisfaction as a matter of law. *U.S. Bank*, 119 Wn. App. at 351. Both judicial officers below noted the utter lack of any evidence to support Hans’s claim of accord and satisfaction. As described by this Court, to prove this meeting of the minds, “[t]he tender must be accompanied by conduct and declarations by the debtor from which the creditor cannot fail to understand that the money is tendered on the condition that its acceptance constitutes satisfaction.” *Id.* For example, a cover letter that specifically declares that a tendered sum is meant as full settlement of the dispute may satisfy this requirement. *Oregon Mutual Insurance Company v. Barton*, 109 Wn. App. 405, 410, 36 P.3d 1065 (2001).

Here, as both judicial officers noted, there is nothing about the CR 2A that in any way suggests it represents an accord and satisfaction of the pension provision in the decree. Indeed, the CR 2A offers no indication of its specific subject matter at all. It appears to be just what Karen thought it was: an accounting of the distribution of the parties' remaining liquid assets. This is the distinction Hans ignores. See, e.g., Br. Appellant, at 19. For Karen, the issue resolved in 2005 related to the accounts that "had dollars in them," not the pension account. CP 204. Certainly, the decree and everything else proffered by Hans fails to make clear, to Karen or to anyone else, that her acceptance of the money he paid to her extinguished her right to half of the Boeing pension.

Hans tries to evade this problem by declaring "his offer was clear." Br. Appellant, at 16, 23. But it was not clear to Karen. His retrospective calculations do not make it any clearer, even if they added up the way he seems to think. (They do not. See, § III.C, below.) Granted, his effort is not aided by the loss of records to fire and time. CP 88-89. Still, it is his burden to prove.

Hans may have believed they agreed as he now claims. But Karen did not agree. Perhaps the marriage was plagued by similar

communication problems. In any case, there was no meeting of the minds, and, therefore, no accord and satisfaction.

Hans also argues that a meeting of the minds is not required. Br. Appellant, at 22. This is simply incorrect, as is made plain by his citation to *State v. J-Z Sales Corp.*, 25 Wn. App. 671, 681, 610 P.2d 390 (1980). In that case, the court did not say an accord and satisfaction could be created by a one-sided understanding that the parties were making a contract. Rather, the question in *J-Z Sales* is whether one of the parties could accept the amount tendered as full payment while still negotiating the terms of the accord. Nothing like that happened here. Karen did not even know they were negotiating about the Boeing pension, let alone that she would surrender her interest in the pension by receiving funds she thought to be her share of the liquid assets.

3) There was no performance.

Finally, as to the final prong, performance, the evidence of what Hans actually paid to Karen does not prove that these funds satisfied Karen's right to half the pension. She agrees he paid her money, but this was the amount owed her from the liquid assets. This amount is also consistent with what she and they expected her to receive from these assets, not including the pension. Payment

of these amounts does not prove they had an accord and satisfaction.

C. HANS'S ARGUMENTS TO THE CONTRARY ARE MISPLACED AND MISLEADING.

Hans includes a number of additional arguments, the pertinence of which is uncertain. For example, he argues unilateral contract, or reverse unilateral contract, by which he seems to mean Karen was obligated not to seek enforcement of the decree. Br. Appellant, at 24-25. Because this argument relies on proof of an accord and satisfaction, it does not help Hans. Likewise, the cases he cites are inapposite. See, e.g., *Browning v. Johnson*, 70 Wn.2d 145, 422 P.2d 314 (1967) (where the issue involved adequacy of consideration versus legal sufficiency of consideration). Here, again, the problem is that Hans continues to rely on a set of facts he failed to prove (i.e., that he "made an offer" and that "Karen promised to refrain" from enforcing the decree). Br. Appellant, at 26. There was no agreement, so the question of consideration is irrelevant.

Hans also argues Karen did not have to understand the legal consequences of accepting the payments. Br. Appellant, at 21. But she did have to understand the facts as Hans's claims them to be. That is, for there to be an accord and satisfaction, she had to

know the payments he made to her extinguished his right to the Boeing pension. This contract was never formed, so the question of its legal consequences is premature.

Hans also argues that the court was obligated to ignore the plain terms of the decree and fulfill his understanding of the parties' intent. Br. Appellant, at 27-29. Here, again, Hans has a problem with the proof. He argues the parties intended a 50/50 split of everything and that enforcing the pension award to Karen results in a disproportionate distribution. In the first place, it is not clear the distribution is disproportionate.<sup>5</sup>

Hans makes a strenuous effort to reconstruct a decade's worth of financial transactions, but the effort does not prove his point. First, obviously, it is hard to reconstruct a complicated financial history, a difficulty exacerbated here by the fact that Hans cannot procure all the records. CP 85-86. He acknowledges that some lists may be incomplete (e.g., list of repairs: CP 86; son's college expenses/bank statements lost: CP 87) and that the paralegal's calculations are lost (CP 86) and that records of some

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<sup>5</sup> Judge McCullough did not find the distribution was disproportionate, but found "it is not unfair for there to be a greater than 50% award" to one spouse. CP 353. He may have been giving Hans the benefit of the doubt or otherwise trying to render the ruling comprehensible to Hans by citing a family law axiom. Either way, the question of the split might be relevant if the court was trying to interpret an ambiguous contract.

accounts are lost (CP 87: Karen's IRA; CP 82: records lost to fire). He acknowledges his figures "are not exact." CP 89. Indeed, even in his declarations and briefing, he gets confused about the numbers. Compare CP 82 and CP 86.<sup>6</sup>

Additionally, the parties have different recollections about some important facts. Hans lists an IRA in Karen's name that does not appear on her list, and he cannot produce a record of it. CP 87, 128, 203. Hans is certain he gave Karen the valuation letter. CP 86. Karen is just as certain she never saw it. CP 169. The parties recall differently the assets and their values, including as affected by different valuation dates. CP 203 (Karen's list); CP 128 (Hans's spreadsheet). The difference with respect to the 401K is about \$30,000, attributable to investment losses in the six months intervening between when the parties value the asset. See, e.g., CP 136. It is unknown whether they even agreed on a valuation date for this asset; the decree includes only a valuation date for the Boeing defined benefit plan. See, e.g., *Lucker v. Lucker*, 71 Wn.2d

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<sup>6</sup> Karen reports that the payments she received included a payment for \$25,037 and for \$28,557. CP 169. Hans agrees in one place, though he says the second amount was \$25,558. CP 88. In another place, he says this amount was \$28,775. CP 82. He produces a copy of a cashier's check for \$28,557.50. CP 135. In his brief, he perpetuates this confusion, and includes another number ("cash \$28,500 cash payment" at Br. Appellant, at 12). This and similar errors make his accounting a little hard to follow.

165, 168, 426 P.2d 981 (1967) (may value property at date of separation or date of dissolution). What date they thought fair for the different assets, whether in 2001 or 2005, or somewhere in between, is unknown.<sup>7</sup>

They dispute how much debt was joint debt. CP 128 (Hans's spreadsheet crediting him with payment of \$38,706 in debt); CP 204 (Karen disputing the debt was joint). According to the decree of legal separation, any joint debt was to be paid from the house proceeds, which they received in 2004. CP 16-17. He now claims he was trying in 2005 to recoup some of these costs, an effort Karen opposed, or, at least, did not understand in the same way as Hans does. CP 84, 86, 204, 297.<sup>8</sup>

At the end of the day, the parties seem to agree that Karen received about what they expected her to receive in the decree of legal separation. According to Karen, she received \$283,101 for

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<sup>7</sup> Karen used mostly 12/31/02 in her list, with the exception of a Scottrade account. CP 203. The parties agreed on the date for that asset, except Hans valued it at \$1000 more. CP 119. For the other assets, Hans used 6/1/02 and 12/31/01 valuation dates in his 2002 spreadsheet and 2003, 2004, and 2005 dates in his 2005 ("CR 2A") spreadsheet. CP 119, 128.

<sup>8</sup> The parties distributed the house proceeds in 2004, but Hans claims they did not subtract what was owed him. CP 84-85. This appears contrary to the decree of legal separation. CP 16-17. At one point, he says "[t]he house proceeds were equally divided, ..." CP 196. But he also claims that in 2005, "[a]s planned, we agreed to equalize our assets using the house sale cash proceeds, ..." CP 86. The plan in the decree was to pay the joint debt and costs of sale from the house proceeds and split everything else. Now he claims that in 2005 they were settling up for "expenses, property taxes and revolving credit..." CP 297.

her half of the parties' assets, not including the defined benefit pension. CP 169. According to the schedule attached to the decree of legal separation, her anticipated share was to be \$281,775, and she was not to receive any less than this. CP 16. Obviously, this figure did not include the Boeing pension.

According to Hans, the "net marital estate" in 2002 was worth \$281,925, not including the Boeing pension. CP 83-84. Later he says Karen received \$295,102, which he says includes half of the 2002 value of the Boeing defined benefit pension. CP 89. In other words, for her interest in the defined benefit plan, Karen received \$13,177. No wonder she does not remember making this deal.

As Hans said, he "did [his] best" to reconstruct his version of their assets and ultimate distribution (CP 81), but this is a futile effort. Even Hans cannot keep the numbers straight, as, mentioned above. See, also, CP 250-251 (correcting earlier calculations). Contracts involve subjective intent; memories can be faulty; numbers are tricky. This is why people write down their contracts and why, in this case, the parties' agreement must be what they said it was – in writing – in 2002, as incorporated in the decree of dissolution in 2005.

Hans also argues there was confusion about what the parties meant by “pension.” Br. Appellant, at 29-31. It is not clear where this gets him, since they both refer to the defined benefit plan by the term, “pension.” Nevertheless, Hans argues Karen, to be consistent, should also lay claim to half his 401k, because the Internal Revenue Code defines it as a pension, along with defined benefit plans. But the IRC definition is not as important as Karen’s definition, which distinguished between the defined benefit plan, with its monthly payments in perpetuity, and the plan with “dollars” in it. CP 204. In 2005, Karen understood the parties to be completing the distribution of the dollars they had. Reasonably, she did not believe the pension was part of that deal.

The deal Karen made is contained in the decree of dissolution. As both parties understood, it awards her 50% of the Boeing pension by means of a QDRO. The court could not and, properly, did “not create a contract for the parties which they did not make themselves.” *In re Marriage of Mudgett*, 41 Wn. App. 337, 341, 704 P.2d 169 (1985). Hans may, in good faith, believe they made a different deal; if so, he has made a unilateral mistake. *Id.*

#### IV. MOTION FOR ATTORNEY FEES

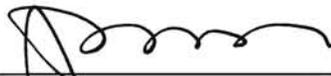
Karen should receive her fees on the basis of her need relative to Hans's ability to pay. RCW 26.09.140. The disparity in their circumstances at the time of separation justified an agreement for maintenance. CP 13, 21 (wife has a need for maintenance). The disparity continues, with Karen working still as a housecleaner. CP 70-76. (Hans did not submit a financial declaration.) This litigation has taken a toll on her already strained finances. She is already behind on her mortgage and seeking modification so that she does not lose her residence. CP 72. Hans is entitled to his day in court, but, because he is better able to afford the cost of that effort, he should pay Karen's fees.

#### D. CONCLUSION

For the foregoing reasons, Karen Helm respectfully asks this Court to affirm the trial court and to award her fees on appeal.

Dated this 14th day of March 2013.

RESPECTFULLY SUBMITTED,



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