

NO. 70415-0-1

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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JACQUELINE BERNI

APPELLANT

v.

WILLIAM BERNI

RESPONDENT

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**APPELLANT'S BRIEF ON APPEAL**

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## **I. ASSIGNMENTS OF ERROR**

1.1 Error #1. The court erred when it did not find that William Berni failed to comply with lawful court orders dated 3/30/12, 5/25/2012 and 8/2/2012 and the decree dated 3/19/2010. ¶ 2.1 CP 250

1.2 Error #2. The court erred in finding the Order(s) were not violated. ¶ 2.3 CP 66

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1.10 Error #10. The court erred in stating: "The court does not interpret the PSA to require that gambling income be included in income for the purposes of calculating maintenance." ¶ 3.10, CP 253. CP 136

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### **Issues Pertaining to Assignments of Error**

- A. Whether William Berni is in contempt of court for failing to pay maintenance based on income from all W-2 forms in 2010 and 2011. BRIEF ANSWER: YES.
- B. Whether the terms of the parties' separation contract are ambiguous or not. BRIEF ANSWER: NO.
- C. Whether the phrase "all W-2 forms" includes W-2G forms. BRIEF ANSWER: YES.
- D. Whether there is ambiguity sufficient to allow more than one reasonable interpretation of the agreement language. BRIEF ANSWER: NO.
- E. Whether the phrase "as reported on all W-2 forms, 1099s and the Husband's federal income tax return" should be given greater weight due to its specificity than the general term "earned income." BRIEF ANSWER: YES.
- F. If there is ambiguity, whether the court ruled on the intent of the parties. BRIEF ANSWER: NO.
- G. Whether there is substantial evidence to support an intent by the parties to exclude gambling income from maintenance calculations. BRIEF ANSWER: NO.
- H. Whether the parties' history of receiving gambling income and W-2G forms contextually defeats the position that W-2G income was not to be included. BRIEF ANSWER: YES.

- I. Whether the Husband made a unilateral mistake in failing to exclude W-2G income where other exclusions were expressly made. BRIEF ANSWER: POSSIBLY.
- J. Whether the court has authority to change the terms of an agreement based on unilateral mistake. BRIEF ANSWER: NO.
- K. Whether Bill is in contempt of court for failing to produce records he agreed to produce “to the satisfaction” of Jaci under the terms of the PSA, and later ordered to produce within 30 days. BRIEF ANSWER: YES.
- L. Whether Bill’s incremental disclosure of income information is intransigence. BRIEF ANSWER: YES.
- M. Whether Bill’s intransigence permeated the entire proceedings, dating back to the initial enforcement action. BRIEF ANSWER: YES.
- N. Whether the Husband should pay the Wife’s attorney fees for enforcement and on appeal on the basis of intransigence, contempt, need and ability or any other basis. BRIEF ANSWER: YES.

## **II. STATEMENT OF THE CASE**

**2.1 Background and Procedure:** This case is about how to interpret language in a Separation Contract where the Husband seeks exclusion of gambling income reported on a W-2G form when income defined as that which was “reported on all W-2 forms, 1099s and the Husband’s federal tax return” was to be the basis for spousal

maintenance. The Wife, Jaci Berni, filed a Motion to Enforce, for Contempt and Judgments on December 7, 2012. She sought to enforce the 2010 Separation Contract (CP 18-28) incorporated into the Decree of Dissolution and the Orders issued by Commissioner Jeske on 3/30/2012 (CP 31-39), 5/25/2012 (CP 41-46) and by Judge Middaugh on 8/3/2012 (CP 48-49). CP 8. After two continuances due to conflicts with *pro tem* Commissioners, it was heard by Commissioner Julia Garratt on January 25, 2013. CP 249-254. A Motion for Revision was denied by Judge Julie Spector on March 13, 2013. CP 268-269. A Motion for Clarification and/or Reconsideration was denied on April 26, 2013. CP 318. This timely appeal followed.

## **2.2 Statement of Facts:**

Appellant Jacqueline (“Jaci”) Berni and William Berni (“Bill”) were divorced on March 26, 2010. CP 126. They reached settlement on all terms pertaining to their divorce through mediation on March 10, 2010 (followed by ongoing negotiations) and a Separation Contract was drawn up by Bill’s attorney and was signed by both parties on March 24, 2010. CP 18-29.

During their marriage, Bill reported gambling income of

**\$63,800** in 2008 (CP 467-478) and **\$17,000** in 2009 (CP 482). Gambling was a secondary source of income for Bill. CP 214. Reportable gambling income dated back to 2003. CP 228. Interest was another source of income. CP 345.

Because Bill was receiving unemployment compensation at the time of settlement, maintenance for 2010 was set at \$750/month "so long as the Husband is still eligible for Unemployment benefits." CP 26. Unemployment income is reported on Form 1099-G. CP 351. Bill did private construction work, some of which was reported on his Schedule C in 2009.<sup>1</sup> CP 481. (Jaci recalled and itemized an income stream much higher than Bill reported. CP 214.) He acknowledged continued business income that he chose not to report in 2010. CP 92. (Jaci discovered records supporting almost \$19,000 in such income. CP 94.)

For future years, the Separation Contract directs that "earned income in excess of \$75,000.00, as reported on all W-2 forms, 1099s, and Husband's federal income tax return" was to be the basis for

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<sup>1</sup> Only a transcript was available to Jaci; Bill never gave her the entire return with all supporting schedules and forms for 2009.

calculating a sum due to the Wife (50% of all income in excess of \$75,000). CP 26. The Husband was to provide full and complete copies of "all W-2 forms, 1099 forms by the end of February and his federal income tax return on or before April 16 of each year." CP 26.

The Separation Contract specifically excluded two categories of income: "the Husband's earned income does not include any amount the Husband may withdraw from a 401K Plan or retirement plan" or "any income earned by an individual with whom the Husband may file a joint federal income tax return." CP 27. Commissioner Jeske later clarified that earned income did not include "income from his employer . . . to reimburse him for out of pocket work related costs" and "vacation funds." CP 43.

In 2010 and in 2011, W-2 forms reported gambling income for Bill. CP 353-368 (2010), CP 387-402 (2011). The form is labeled "Form W-2G." In 2010, Bill's W-2G income was **\$48,322**. CP 345. In 2011, Bill's W-2G income was **\$31,806**. CP 370. Bill did not provide these W-2 forms to Jaci until 4/16/2012. CP 58. He did not pay Jaci any spousal maintenance based on the income reported on these W-2G forms. CP 12, 14.

The Separation Contract also provided “FULL DISCLOSURE. Both parties shall provide answers to previously asked interrogatories to the other party’s satisfaction.” CP 20. And “If it is determined that either party has failed to disclose a community asset with a value in excess of \$1,000, the party who failed to disclose such asset will be awarded twenty-five percent (25%) and the other party will be awarded seventy-five (75%) of the asset’s fair market value at the time of discovery, or as of the date of this Agreement, whichever value is greater.” CP 19.

On January 30, 2012, Bill wrote to Jaci: “You requested my 2010 federal income tax return, however, I’m stating again, you will receive my 2010 and 2011 federal income tax return (once file), only after I receive proof that either you . . .” CP 96.

Jaci filed a Motion to Enforce in March 2012 based on nonpayment of maintenance and noncompliance with discovery-related requirements in the Separation Contract. The Orders that arose from that motion process are not the subject of this appeal—but these are the Orders that Jaci later sought to enforce when Bill continued to fail to comply with them. CP 7-8. And it was only as a result of these

Orders, that Bill disclosed to Jaci his W-2 forms, including the W-2G forms, for 2010 and later for 2011. CP 58. This gave rise to Jaci's second enforcement attempt, the subject of this appeal. The March 2012 Orders reserve to Jaci any judgments on maintenance owed by Bill (CP 34, 37).

Jaci requested spousal maintenance on the basis of the W-2G income that was disclosed following her Motion to Enforce. CP 76. Bill refused. CP 80. Jaci's second Motion to Enforce, filed in December 2012, sought a judgment against Bill for these sums (and other bases, which were eventually resolved). CP 7-8. The court denied Jaci's Motion and found that "gambling winnings are not considered earned income" (CP 251) and did not interpret the PSA to "require that gambling income be included in income for purposes of calculating maintenance." CP 253. The court's decision makes no mention of ambiguity or intent. Jaci sought revision and was denied. CP 268-269. Jaci's Motion for Reconsideration and/or Clarification was also denied. CP 318. Jaci appealed from those decisions and asks this court to find that "earned income as reported on all W-2 forms" includes W-2G forms, and/or that "Husband's federal income tax

return” includes gambling income reported therein, such that all income reported as earned by Bill in this manner is to be included in the calculation of maintenance owed to her (except those specifically excluded).

The March 2012 Orders also directed Bill to produce the missing discovery to Jaci’s satisfaction (CP 31). He was given 30 days to do so<sup>2</sup> after a specific list was provided through counsel. CP 39. That list was sent on April 4, 2012 (CP 51-56), so 30 days gave Bill until May 4, 2012 to comply. After waiting 33 days, a reminder was sent through counsel on May 7, 2012. CP 60. Bill provided additional information on May 8 (CP 62-64) and May 31, 2012 (CP 66-68), but still omitted information for a specified period (January-March 2010). CP 9. Another request was sent on August 29, 2012, with a list identifying specific deficiencies—such as duplicates sent and statements with missing pages. CP 70-71.

On September 14, 2012, Bill demanded payment by Jaci before he would produce records (“if she really wants those, please forward a

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<sup>2</sup> 3.10 . . . WILLIAM BERNI shall, within 30 days of receipt of specific requests, produce full and complete answers and responses to the discovery requests identified which were not answered to the Wife’s satisfaction. Counsel for

check..."). CP 73. An objection was sent on October 23, 2012. CP 75-77. Some missing records were supplied on October 26, 2012 (CP 79-81), with redactions that made it impossible to determine whether the unredacted portions were complete or not. CP 342-343. An updated list of deficiencies was sent on November 1, 2012. CP 83-84. Bill's counsel acknowledged errors and deficiencies on that same date. CP 86. More records trickled in on November 1, 6, and 9, 2012. CP 89, 90. Instead of 30 days, Bill took 219 days to selectively and partially comply with the court's order.

Bill was warned in the 5/25/2012 Order, "not to engage in obstructionist behavior." CP 45. He was on "clear notice" as to his obligation to produce records. CP 45.

Jaci sought a contempt finding and requested attorney fees for Bill's bad faith delays in producing records, and provided the court a list of items not yet produced, including full and complete copies of all tax returns 2009-2011, full disclosure and accounting for over \$106,789 taken from community bank accounts, documents and correspondence to verify self-employment income, a valid note for

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Petitioner shall identify specific deficiencies within 30 days.

payments he received from mother's trust on three separate occasions while she was in hospice care, and a copy of the Berni Family Trust. CP 52-56, CP 10-11 and CP 32, item 3. The court did not rule on this portion of Jaci's motion, either at the hearing before Commissioner Jeske, nor on revision, nor when the omission was raised in a Motion for Clarification/Reconsideration.

As a courtesy to the court, a summary timeline of events contained in the record is provided as **Appendix A**.

### **III. LEGAL ARGUMENT**

#### **3.1 Standard of Review.**

##### **3.1.1 Standard of review is *de novo* for language in a dissolution Decree.**

This court reviews *de novo* the language in a dissolution decree. ***Marriage of Smith.***<sup>3</sup> When an agreement is incorporated into a dissolution decree, the court must ascertain the parties' intent at the time of the agreement. ***Id.*** If the language of the decree is unambiguous, there is no room for interpretation. ***Id.*** An ambiguous decree may be clarified, but not modified. ***Marriage of Thompson.***<sup>4</sup>

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<sup>3</sup> 158 Wn. App. 248, 241 P.3d 449 (2010)

<sup>4</sup> 97 Wn. App. 873, 988 P.2d 499 (1999)

Interpretation of a decree is a question of law, subject to de novo review. **Id.** The intent of the parties is determined by examining their objective manifestations, including both the written agreement and the context within which it was executed. **Marriage of Boisen.**<sup>5</sup> If the agreement has two or more reasonable meaning when viewed in context, the court must identify and adopt that which reflects the parties' intent. In the latter situation, a question of fact is presented, and an appellate court reviews the trial court's determination only for substantial evidence. **Boisen.** "Substantial evidence" is evidence which, when viewed in the light most favorable to the party prevailing below, is sufficient to persuade a fair-minded, rational person that the declared premise is true." **Boisen.**

3.1.2 Review of a decision based on documentation only is de novo.

Motions to enforce judgment are reviewed *de novo* where the evidence consists of only declarations and affidavits. **Veith v. Xterra Wetsuits, LLC.**<sup>6</sup> The general rule is that where a trial court considers only documents, such as parties' declarations, in reaching its decision,

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<sup>5</sup> 87 Wn. App. 912, 943 P.2d 682 (1997)

<sup>6</sup> 144 Wn. App. 362, 183 P.3d 334 (2008)

the appellate court may review such cases *de novo* because that court is in the same position as trial courts to review written submissions.

***Marriage of Rideout.***<sup>7</sup>

3.1.3 Attorney fees awarded under a statute are reviewed de novo.

The award of attorney's fees on the Order being appealed also involves statutory interpretation and review is thus *de novo*.

3.2 Statutes incorporated into contract.

As a general rule, parties to a marriage settlement are presumed to contract with reference to existing statutes, and statutes which directly bear on the subject matter of settlement are incorporated into and become part of the decree. ***Marriage of Briscoe.***<sup>8</sup> Failure to exclude a statute results in automatic inclusion.

***In re Marriage of Williams.***<sup>9</sup>

3.3 Rules of construction.

The general rules of construction that apply to statutes, contracts and other writings also apply to findings, conclusions and

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<sup>7</sup>150 Wn.2d 337, 351, 77 P.3d 1174 (2003)

<sup>8</sup>134 Wn. 2d 344, 949 P.2d 1388 (1998).

<sup>9</sup>115 Wn.2d. 202, 209, 796 P.3d 421 (1990)

decrees. ***Marriage of Smith***.

3.3.1 Document is to be read in its entirety.

The court is to read a decree in its entirety and construe it as a whole to give effect to every word and part, if possible. ***Id.***

3.3.2 Specific terms control over general

Specific statements control over more general provisions. ***Marriage of Smith***. The Husband argues that gambling income is not “earned income” in a general sense; however, the parties defined “earned income” as being “reported on all W-2 forms, 1099s and Husband’s federal income tax return.” CP 26. Thus the parties negotiated a specific definition of earned income that has control over a more general term. Whether the definition of “earned income” if not specified in the Contract would have included gambling income is not an available argument or analysis. The parties’ specific term controls over the general.

3.3.3 Ambiguity exists only if terms are uncertain.

Words used have the legal effect as understood by the law at the time the decree was entered. ***Stokes v Polley***.<sup>10</sup> Generally, the court

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<sup>10</sup> 145 Wn.2d 341, 37 P.3d 1211 (2001)

gives words in a written agreement their ordinary, usual and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. **Marriage of McCausland.**<sup>11</sup> A decree can be considered ambiguous only if its terms are uncertain or susceptible to more than one meaning. **Harding v Warren.**<sup>12</sup> The court does not try to discern an ambiguity by imagining a variety of alternative interpretations. **Marriage of McCausland.**<sup>13</sup> Courts can neither disregard contract language which the parties have employed, nor revise the contract under a theory of construing it. **Wagner v Wagner.**<sup>14</sup> Applied to this case, these principles answer the question of ambiguity—the parties defined their definition of earned income, they identified the records they would use, they knew about the historical categories of income each had received (including gambling income) and they specifically excluded certain categories. If they had intended to exclude gambling income, knowing that gambling income is reported on a W-2 form, they could have (and would have) added that exclusion. They did not. The court cannot, simply for the sake of

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<sup>11</sup> 129 Wn. App. 390, 118 P.3d 944 (2005)

<sup>12</sup> 30 Wn. App. 848, 850, 639 P.2d 750 (1982).

<sup>13</sup> 159 Wn. 2d 607, 152 P.3d 1013 (2007)

argument, “imagine” an interpretation that does not make sense within the context of this relationship (i.e., the Husband’s attempt to assert that “all W-2 forms” doesn’t include “W-2G forms”).

#### **3.4 Terms of Decree should be enforced.**

The parties to a contract shall be bound by its terms. ***Adler v Fred Lind Manor***.<sup>15</sup> Specific terms and exact terms are given greater weight than general language. ***Id.*** The court’s findings emphasized the general “earned income” phrasing in the separation contract. This was error. That general term should be given less weight than the specific terms about what income was to be included—the specific term defined what the parties intended by “earned income.” It says, “as reported on all W-2 forms, 1099s, and Husband’s federal income tax return.” These specific parameters for defining earned income should be given greater weight than the categorical “earned income”—by this the parties intended to use the tax return, W-2s and 1099s as the collective basis for maintenance—with the exceptions delineated later (IRA withdrawals, a spouse’s earnings).

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<sup>14</sup> 95 Wn.2d 94, 101, 621 P.2d 1279 (1980).

### **3.5 Court cannot modify Decree by changing language**

A property settlement agreement incorporated into a dissolution decree that was not appealed cannot be later modified unless the court finds the existence of conditions that justify the reopening of a judgment. ***Marriage of Smith***. Jaci does not seek to modify the Decree, but to enforce it. The court in denying her relief modified the decree by failing to give meaning to the phrase “all W-2 forms, 1099s and the Husband’s federal income tax return”—in particular, the “all W-2 forms” phrase. A decree is modified when rights given to one party are extended beyond the scope originally intended, or reduced. A clarification, on the other hand, is merely a definition of rights already given, spelling them out more completely if necessary. ***Marriage of Thompson***. The Husband sought clarification in 2012 and clarification was given—two additional exceptions to “earned income” were defined by Commissioner Jeske: expense reimbursement and vacation funds. Gambling income was not before Commissioner Jeske because it had not yet been disclosed. Jaci’s first motion was her attempt to get the required disclosure. Once W-2G forms were disclosed, she pursued

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<sup>15</sup> 153 Wn.2d 331, 344, 103 P.3d 773 (2004)

her claim for maintenance based upon that income.

### **3.6 Court did not rule on intent of parties.**

In Jaci's second motion for post-decree enforcement, the trial court found "gambling winnings are not considered earned income" without further explanation (as to parties' intent, for example). It denied Jaci's request for maintenance based on income reported on Bill's 2010 and 2011 W-2G forms, income that totaled **\$80,100** and would have increased the spousal maintenance payment due to Jaci by almost **\$28,950** (plus interest of more than **\$4,500**, CP 15). The court did not state whether this finding related to the interpretation of "all W-2 forms" (i.e., finding that "all W-2 forms" does not include W-2G forms) or whether it was based on a finding about what the parties' intent was when the agreement was made (i.e., that the parties did not intend to include gambling income) or on some other basis. It was error to exclude income from a W-2 form when the parties' contract said income from "all W-2 forms" was to be the basis for maintenance.

### **3.7 "W-2 forms" includes all types.**

If the court's decision rests on defining "all W-2 forms," it should be reversed, because a W-2G form is a type of W-2 form which

is plainly included in the plural term chosen by the parties in their agreement. (Just as a 1099-I form is a type of 1099 form.) It is the duty of the court to declare the meaning of what is written, and not what was intended to be written. ***Berg v Hudesman***.<sup>16</sup> In following the context rule, extrinsic evidence is admissible to aid in ascertaining the parties' intent where the evidence gives meaning to words used in the contract. ***McCausland***, at 402. A plain-language understanding of "all W-2 forms" is that it would include all kinds of W-2 forms without having sub-categories of W-2 forms (such as a W-2G form) specifically identified. (The term "all apples," for example, would include MacIntosh, Granny Smith, Red Delicious, etc., unless a specific variety were excluded.) In context, the parties' longstanding gambling history, with each party knowing and understanding that gambling income, too, is reported on a W-2 form (when a certain amount is exceeded), illuminates the parties' intent to include gambling income.

### 3.8 **Gambling income was not to be excluded.**

If the court's finding rests on the parties' intent, there is no evidence in the record to support an exclusion of gambling income.

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<sup>16</sup> 115 Wn.2d 657, 669, 801 P.2d 222 (1990).

The context of the parties' agreement included a history of gambling income reported on W-2G forms, a known history of reporting gambling income, and a demonstrated ability to exclude specific types of income that were not intended to be included for purposes of spousal maintenance. It also included income from unemployment and interest, reported on various types of 1099 forms (1099-G for unemployment), as well as self-employment income reported on Schedule Cs as a part of the federal income tax return.

### **3.9 Context supports intent to include gambling income**

"Extrinsic evidence may not be used . . . to vary, contradict or modify the written word." *McCausland*. The court does not concern itself with unexpressed subjective intent, only objective manifestations of intent. *McCausland*, at 403. Given the various sources of income the parties had experience with, they intended to include the verification for all types—income reported using a W-2, a 1099, or which was otherwise included in the federal tax return (and all income is reportable on a federal tax return). They made two explicit exclusions in defining earned income—withdrawals from a 401K or retirement plan (which is still claimed on a federal income tax return)

and income earned by a spouse. If they had intended other exclusions, they would have listed them here as well.

**3.10 Exclusion of gambling income was impermissible modification**

The court's affirmative exclusion of gambling income impermissibly modified the Decree because the plain meaning of "W-2 forms" and "federal income tax return" would include all income reported on a W-2 form and all income reported on a federal income tax return. Both of these categories would include gambling income. A W-2G form is one type of W-2 form and the parties did not exclude any particular type of W-2 form when listing the source of income to be used in calculating spousal maintenance. They did take time to specify certain exclusions for other kinds of income: "any amount the Husband may draw from a 401(K) Plan or retirement plan" and "income earned by an individual with whom the Husband may file a joint federal income tax return." They chose not to exclude gambling income—a source of income known to and received by Bill historically during their marriage. This was no "surprise" source of income. However, because the maintenance award was limited to income that would appear on "W-2 forms," and thus be reportable on a federal

income tax return, the gambling income that would not trigger a W-2G form report was, by definition, excluded. (Per 26 U.S.C. §3402(q),<sup>17</sup>

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<sup>17</sup> (q) **Extension of withholding to certain gambling winnings.**—

**(2) Exemption where tax otherwise withheld.**—In the case of any payment of winnings which are subject to withholding made to a nonresident alien individual or a foreign corporation, the tax imposed under paragraph (1) shall not apply to any such payment subject to tax under section 1441(a) (relating to withholding on nonresident aliens) or tax under section 1442(a) (relating to withholding on foreign corporations).

**(3) Winnings which are subject to withholding.**—For purposes of this subsection, the term “winnings which are subject to withholding” means proceeds from a wager determined in accordance with the following:

**(A) In general.**—Except as provided in subparagraphs (B) and (C), proceeds of more than \$5,000 from a wagering transaction, if the amount of such proceeds is at least 300 times as large as the amount wagered.

**(B) State-conducted lotteries.**—Proceeds of more than \$5,000 from a wager placed in a lottery conducted by an agency of a State acting under authority of State law, but only if such wager is placed with the State agency conducting such lottery, or with its authorized employees or agents.

**(C) Sweepstakes, wagering pools, certain parimutuel pools, jai alai, and lotteries.**—Proceeds of more than \$5,000 from—

(i) a wager placed in a sweepstakes, wagering pool, or lottery (other than a wager described in subparagraph (B)), or

(ii) a wagering transaction in a parimutuel pool with respect to horse races, dog races, or jai alai if the amount of such proceeds is at least 300 times as large as the amount wagered.

...

**(5) Exemption for bingo, keno, and slot machines.**—The tax imposed under paragraph (1) shall not apply to winnings from a slot machine, keno, and bingo.

**(6) Statement by recipient.**—Every person who is to receive a payment of winnings which are subject to withholding shall furnish the person making such payment a

not all gambling earnings are reported on a W-2G form—only those that exceed \$600 in a single transaction and are 300 times the wager, or \$1,200 or more from a slot machine, bingo or keno game, or more than \$5,000 in poker. And further, such payments are to be treated as “wages paid by an employer to an employee.”) Only the gambling income that reached the reporting level was to be included. Including gambling income is consistent with the contextual history of these parties. This is what the contract language requires.

### **3.11 The court is not permitted to correct unilateral mistake**

Where there is a unilateral mistake, courts will not invoke their equitable powers to aid the party who was the sole cause of his misfortune. *Marriage of Mudgett*.<sup>18</sup> A court may not create a contract for the parties which they did not make themselves. It may neither impose obligations which never before existed nor expunge lawful provisions agreed to and negotiated by the parties. *Id.* (Mr. Mudgett

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statement, made under the penalties of perjury, containing the name, address, and taxpayer identification number of the person receiving the payment and of each person entitled to any portion of such payment.

**(7) Coordination with other sections.**—For purposes of sections 3403 and 3404 and for purposes of so much of subtitle F (except section 7205) as relates to this chapter, payments to any person of winnings which are subject to withholding shall be treated as if they were wages paid by an employer to an employee.

complained about a provision in his decree that allowed for payoff from home equity at the point his wife sold the home. But it did not specify a date by which the home was to be sold. It was his error to assume that there was a date specified when there was not. His mistake could not be remedied by the court after the fact.) If Bill did not intend to include W-2G income in the maintenance calculation, it was a mistake on his part to fail to provide for that exception. The court is not permitted to alter the contract agreed to just because he is now unhappy with it. In order to accomplish the result consistent with Bill's position, the court would have to redraft or add language ("except W-2G form income"), something it is not permitted to do. ***Hollis v Garwall, Inc.***<sup>19</sup>

**3.12 Bill's failure to comply with court orders was contempt of court.**

Bill was given "clear notice" that he needed to comply with the discovery provision in the Separation Contract. He was given another 30 days to comply with deficiencies that had already been outlined in Jaci's first motion in early 2012. He received the list of items again and

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<sup>18</sup> 41 Wn. App. 337, 704 P.2d 169 (1985)

<sup>19</sup> 137 Wn.2d 683, 974 P.2d 836 (1999)

again, but chose to partially comply and only after significant foot-dragging and incremental disclosures. This is the kind of behavior that the court found to be intransigent in *In re Marriage of Mattson*<sup>20</sup>.

**3.13 Bill's actions were intentional disobedience of a court order.**

Under RCW 7.21, contempt of court is defined as: “intentional . . . (b) disobedience of any lawful judgment, decree, order or process of the court.” Bill failed not only to comply with the 2010 Decree incorporating the Separation Contract, but with the court’s subsequent Orders of March 30, 2012 and May 25, 2012, which put him on notice that full compliance was expected. Bill nevertheless remains noncompliant, having failed to produce the records identified on CP 303-304. The court inexplicably failed to address this aspect of Jaci’s motion—either as to compliance (i.e., no further disclosure is required) or to motive (i.e., no intentional noncompliance). Given the multiple reminders to counsel about items missing, there is no basis to find either compliance or a reasonable excuse for Bill’s noncompliance. Bill’s willfulness was shown when he wrote to Jaci: “you will receive my 2010 and 2011 federal income tax return ... only

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<sup>20</sup>95 Wn. App. 592, 976 P.2d 157 (1999)

after I receive..." (CP 96) and through counsel: "if she really wants those, please forward a check..." (CP 73). He does not deny the obligation to produce the records, but adds conditions (nowhere in the court orders) before he will comply. His willful noncompliance cause Jaci to seek court intervention (and incur fees and costs).

**3.14 Failure by the court to address motion for noncompliance on discovery was error.**

The failure to exercise discretion is error. *State v Tharp*, 96 Wn.2d 591, 637 P.2d 961 (1981) (failure to exercise discretion in admitting evidence where record did not disclose conscious determination); *State v Wright*, 76 Wn. App. 811, 888 P.2d 1214 (failure to exercise discretion in determining whether offenses involved same criminal conduct for sentencing) *review denied*, 127 Wn.2d 1010 (1995); *Tacoma Recycling v Capitol Material*, 34 Wn. App. 392, 661 P.2d 609 (1983) (failure to exercise discretion in denying motion for new trial). It was error for the court not to address the content of Jaci's motion regarding discovery responses, either to grant her relief or to deny it. Without the full disclosure Jaci bargained for, she cannot yet ascertain whether Bill failed to disclose assets to which she would be entitled 75%, or whether there is

additional income from which she is entitled to spousal maintenance.

The disclosure must be ordered “to Jaci’s satisfaction” in order to comply with the Decree terms. Continued nondisclosure rewards Bill for his noncompliance and defeats the intent and purpose of the parties’ bargain. It was in consideration for this promised disclosure that Jaci agreed to the remaining terms in the Separation Contract. She should not be denied her relief by the court’s failure to address it.

Where the lower court was required to decide the matter in the first instance, the proper course is to remain for ruling on the motion.

***Wright.***<sup>21</sup> This should be remanded for a ruling.

**3.15 Attorney fees should be paid to Jaci.**

Fees should be paid to Jaci on the following grounds.

**3.15.1 Jaci should be awarded attorney fees on the basis of intransigence.**

Bill’s bad acts have permeated this entire proceeding. From thwarting communication attempts and hiding his whereabouts and employment (CP 221-223), to the nondisclosure of discovery information that led to Jaci’s first motion, to the 219 days he took to selectively produce records due within 30 days of request (the same

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<sup>21</sup> 76 Wn. App., at 829

request made prior to the March 2010 Decree), to his bad faith position that a W-2G form is not a W-2 form . . . all of these have contributed to and increased Jaci's legal expenses to enforce the clear language in the parties' Separation Contract.

Intransigence includes foot dragging and obstruction, filing repeated unnecessary motions, or making the trial unduly difficult and costly by one's actions." *In re Marriage of Bobbitt*.<sup>22</sup> *In re Marriage of Greenlee*.<sup>23</sup> *Chapman v. Perera*.<sup>24</sup> Intransigence includes "incremental disclosure of income." *In re Marriage of Mattson*.<sup>25</sup> Where a party's bad acts permeate the proceeding, it is not necessary to segregate fees resulting from intransigence and which did not. *In re Marriage of Burrill*.<sup>26</sup> "If intransigence is established, the financial resources of the spouse seeking the award are irrelevant." *Marriage of Crossetto*.<sup>27</sup> Bill engaged in foot-dragging when he failed to produce his records in the timeframe allowed. He made this process unduly

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<sup>22</sup> 135 Wn. App. 8; 30, 144 P.3d 306 (2006),

<sup>23</sup> 65 Wn. App. 703, 708, 829 P.2d 1120, *review denied*, 120 Wn.2d 1002 (1992)

<sup>24</sup> 41 Wn. App. 444, 455-56, 704 P.2d 1224, *review denied*, 104 Wn.2d 1020 (1985)

<sup>25</sup> 95 Wn. App. 592, 976 P.2d 157 (1999)

<sup>26</sup> 113 Wn. App. 863, 873, 56 P.3d 993 (2002), *review denied*, 149 Wn.2d 1007 (2003)

difficult and expensive by refusing to provide records unless Jaci paid his costs for obtaining them. Sending duplicate statements and leaving off every other page increased Jaci's fees by having to repeatedly identify these deficiencies. Redacting almost all meaningful information when a statement was produced created further expense. All of Jaci's fees should be paid by Bill from her first attempts to enforce through this appeal. Those fees total **\$37,950**. Of that sum, fees after March 2010 total **\$28,600**. Of that sum, fees related only to appeal total **\$5,600** (to be updated after the reply brief).

3.15.2 Alternatively, Jaci should be awarded fees on the basis of need and ability to pay under RCW 26.09.140.

The court from time to time can award attorney's fees based on the respective need and ability of the parties. RCW 26.09.140.<sup>28</sup> Bill

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<sup>27</sup> 82 Wn. App. 545, 563, 918 P.2d 954 (1996)

<sup>28</sup> **RCW 26.09.140 Payment of costs, attorneys' fees, etc.**

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 attorneys' 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.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

has far greater income and resources than Jaci. Jaci has the need for Bill to pay her attorney fees and he has the ability. In 2010, Bill's reported income was \$102,281. CP 12, CP 345-346. In 2011, Bill's income was \$113,024. CP 14, CP 432-464. Jaci's Financial Declaration will be filed within ten days of oral argument, as required in RAP 18(1)(c).

### 3.15.3 Contempt statute authorizes fee award.

Where a party is found to be in contempt of court, the court may order the offending party to pay the attorney fees of the other. RCW 7.21.030(3).<sup>29</sup> It is also within the court's discretion to award sanctions of up to \$2,000/day that noncompliance continues. RCW 7.21.030(2)(b).

For the reasons and on the statutory authority stated above and under **RAP 18.1**, Jaci should be awarded her attorney fees.

**RAP 14.2** allows for costs to the prevailing party and **RAP 14.3**

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The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

<sup>29</sup> The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in

includes reasonable attorney's fees as allowable costs. Jaci requests fees on this basis also.

#### **IV. CONCLUSION**

In the context of receiving income from a variety of sources, the parties sought to resolve the existing uncertainty about sources of income and create a formula for paying future maintenance following a long-term, 30-year marriage. Bill's momentary unemployment was not intended to preclude the equitable sharing of future income. In doing so, the parties reasonably listed the records that would verify all sources of possible income—W-2 forms, 1099s, and the catch-all, the federal income tax return. And they contemplated certain types of income that might otherwise appear there which they intended to exclude. Bill's attempt to re-write those terms to exclude categories known but not excluded (gambling) is a bad faith renegeing of his agreement. This was not a new or unexpected category of earnings based on the long-term marital history of reporting gambling income. Gross figures were to provide the basis for the maintenance, upon which Jaci would pay taxes and which would serve as a deduction for Bill. The language is

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connection with the contempt proceeding, including reasonable attorney's fees.

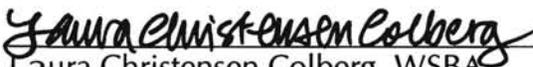
clear and illuminated by the parties' context. It should be enforced, judgments should enter in Jaci's favor, with interest dating back to the payment due date.

Bill's further intransigence in refusing to provide the records the parties agreed to exchange "to the other's satisfaction," contributed to Jaci's expenses in discovering the gambling income in the first place, and should likewise be sanctioned (and still required). Because the court did not rule on Jaci's motion, it should be remanded for a clear decision on the motion.

Attorney's fees to Jaci are appropriate for this enforcement action, on the basis of intransigence and/or under need and ability to pay.

RESPECTFULLY SUBMITTED this 28 day of October, 2013.

MICHAEL W. BUGNI & ASSOCIATES



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#26434

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CERTIFICATE OF SERVICE

I hereby certify that on the 28<sup>th</sup> day of October, 2013, the original of the foregoing document was transmitted for filing to the Court of Appeals, Division I, by US Mail:

Via US Mail:

Clerk of Court  
Court of Appeals, Division 1  
600 University Street  
Seattle, WA 98101

Attorneys for Petitioner via US Mail:

Doug Dunham  
2121 Fifth Avenue  
Seattle, WA 98121



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Dona Harris

**BERNI APPEAL - APPENDIX A**  
**Timeline Summary of Events**

<b>Date</b>		<b>Event</b>	<b>Source</b>
12/31/2009		Tax year end/Bill claims \$17,000 in gambling income	CP 482
3/24/2010		Separation Contract signed	CP 18-29
3/26/2010	ORD	Decree of Dissolution entered	CP 126
5/20/2010		Bill purchases new home	CP 235
12/31/2010		Tax year end/Bill claims \$48,322 in gambling income	CP 345
12/31/2011		Tax year end/Bill claims \$31,806 in gambling income	CP 370
1/30/2012		Bill tells Jaci he will send tax return only after he gets specific information from her	CP 96
3/30/2012	ORD	Hearing and Order on Enforcemen/Clarification of Decree (Jeske)	CP 31-32
3/30/2012	ORD	Order on Show Cause re Contempt/Judgment (Jeske)	CP 33-39
4/4/2012		List of requests sent from Colberg to Dunham	CP 51
4/16/2012		2011 Tax Return for Bill sent to Colberg	CP 58
4/20/2012		End date for statement heavily redacted	CP 342-343
5/7/2012		Reminder from Colberg to Dunham/records not received	CP 60
5/8/2012		Payroll information provided by Dunham	CP 62
5/8/2012		W-2 and W-2G forms sent from Dunham to Colberg for 2010	CP 64
5/25/2012	ORD	Order Granting Clarification, Denying CR 60 (Jeske)	CP 41-46
5/31/2012		Some discovery items sent by Dunham to Colberg	CP 68
8/3/2012	ORD	Order on Revision (Middaugh)	CP 48-49
8/29/2012		Deficiency notice sent by Colberg to Dunham	CP 70-71
9/14/2012		Response from Dunham demanding payment to receive records	CP 73
10/23/2012		Colberg response to request for payment/other records	CP 75-77
10/25/2012		Statements sent from Dunham to Colberg	CP 79-81
11/1/2012		Colberg itemizes duplications, missing pages, deficiencies	CP 83-84
11/1/2012		Dunham apologizes for incomplete materials	CP 86
11/6/2012		Updated statements (some) from Dunham to Colberg	CP 89
11/9/2012		Additional selective statements from Dunham to Colberg	CP 90
12/10/2012		Jaci files Motion for Contempt/Enforcement	CP 97-100
1/25/2013	ORD	Hearing and Order on Show Cause re Contempt	CP 249-254
2/4/2013		Motion for Revision filed	CP 255-265
3/13/2013	ORD	Order on Motion for Revision (denied)	CP 268-269
3/25/2013		Motion for Clarification and/or Reconsideration filed	CP 272-278
4/26/2013	ORD	Order Denying Motion for Clarification	CP 318
5/24/2013		Notice of Appeal filed	CP 319