

No. 71017-6-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

BARBARA G. KAYE, Respondent

v.

KARL H. KAYE, JR., Appellant

2014 JUN 27 PM 3:03
COURT OF APPEALS
DIVISION ONE
STATE OF WASHINGTON
K

BRIEF OF APPELLANT

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71017-6-I

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I. Assignments Of Error

A. Assignment Of Error #1: That The Pre-Nuptial Agreement Of The Parties Is Unfair And Unenforceable

Issues Related To Assignment of Error:

1. As To Substantive Fairness:

a. Whether the court focused its determination of substantive fairness on the circumstances as they evolved as of the time of trial rather than on the circumstances that existed at the time of execution of the agreement.

b. Whether there was substantial evidence that the agreement was completely one sided (finding #2.7).

2. As To Procedural Fairness:

a. Whether there was substantial evidence that:

1) That Ms. Kaye “only had” two weeks to sign the agreement before the wedding (Finding 2.7)

2) That neither party understood the agreement when it was entered into (finding 2.7);

b. Whether, as a matter of law, a trial court can conclude that the party opposing enforcement of a pre-nuptial agreement did not have the requisite knowledge of the legal consequences of the agreement, where that party had the opportunity to obtain legal counsel but chose not to do so before she decided when to set the date of the wedding.

B. Assignment of Error #2:

Whether the court erred in deeming the marriage defunct as of March 23, 2011 (CP 49, Finding of Fact 2.8).

Issues Related To Assignment of Error:

1. Whether the marriage was “defunct” when the physical separation of the parties occurred in March 2011, or not until the marital dissolution pleadings were served on the respondent in June 2012?

2. Whether finding of fact 2.8 undervalues the marital community’s interest in the Columbia Bank 401(k) by failing to use the value as of the filing of the petition for dissolution.

3. Whether conclusion of law 2.9 mischaracterizes the Columbia Bank Stock as being entirely the separate property of Barbara Kaye, in light of concluding the parties legally separated 15 months earlier.

C. Assignment of Error #3

Whether the trial court abused its discretion in limiting the award of spousal maintenance to three months, where, after 28 years of marriage, the wife worked throughout the marriage, is in good health at 59 years of age earns over \$151,000 per year, and the husband is 66 years old has not worked in 34 years, and has health problems.

Issues Related To Assignment of Error:

- 1) Whether there was substantial evidence to support finding 2.12 that maintenance of 3 months was sufficient time to enable the husband to either sell the entire Sunrise Drive property, sell a sub-dividable portion of it, or obtain a reverse mortgage on the property as a whole?
- 2) Was there any evidence that the trial court considered the required factors under RCW 26.09.070?

II. Statement of the Case

A. Background

Barbara and Karl Kaye were married on July 12, 1984 (CP 48). They had lived together continuously since the summer of 1982 in the home in which he was born. They continued to do so throughout the marriage. (RP 138 and 144-145).

As of the time of trial Barbara was regional manager of Columbia Bank, responsible for 11 branches and oversight of both the residential and commercial loan department (RP 24). She began working in the banking industry in the 1970's as a loan processor and was a manager of loan processors by the time the parties married in 1984 (RP 120). Karl had not worked since 1979 (RP 144). When the parties married they had no expectation that he ever would work during the marriage (RP 92-93).

B. The Pre-Nuptial Agreement

1. The Circumstances At The Time The Agreement Was Executed

Each party had been divorced previously (RP 145). Karl wanted a pre-nuptial agreement that would ensure that he would be awarded his separate property in case of death or divorce (RP 148). Barbara acknowledged that at the time of marriage there was no expectation that he

would work during the marriage (RP 92-93). Thus, it was anticipated that his contributions to the community during marriage would be from his separate estate which, in fact, occurred as the court acknowledged (O.D. 7/10/13; pages 319-320).

Karl contributed well over \$650,000 of his separate estate to the community. Before 2003 he contributed distributions from his stock account at Dean Witter which were worth \$166,000 when the agreement was signed (trial exhibit 104, page 8) and which he managed and grew during marriage until they ran out (RP 152-153).

Starting in 2003 he contributed over \$500,000 in sales proceeds of his rental units also, to the marital community (RP 95 and 152-153). The court acknowledged these as contributions of his separate property to the community (7/10/13 O.D. 320).

2. The Agreement In Substance

Barbara admitted that the agreement does not preclude the building of a community estate, and that it defines community property consistent with the legal definition under RCW 26.16.140 et seq. (RP 116; trial exhibit 104). Another provision of the agreement treats contributions of separate property to the community as gifts (trial exhibit 104). And yet

the court found the agreement to be one-sided in favor of the husband: a “one-way street” (July 10, 2013 O.D. 319).

3. The Procedural Safeguards

In the agreement each party fully disclosed all assets, their values, their debts and the balances owed (trial exhibit 104). Barbara selected the date of the marriage by arranging for it through a justice of the peace and only after she had read the agreement, decided not to consult a lawyer, and decided to sign the agreement. (RP 146; 151). She considered consulting legal counsel which Karl suggested she do (RP 115). She decided not to because she said she did not care (RP 115; 150-151).

No invitations were sent out; no formal announcement of the wedding was made. No family or friends were invited to the wedding. It was only attended only by three neighbors. (RP 113 - 115).

C. The Marriage Was Defunct When Karl Kaye Was Served With Dissolution Pleadings in June 2012.

Barbara left the home in March 2011 (RP 75). That same month she and Karl began attending marriage counseling every other week every month through April 2012 (RP 222). Karl did not want the divorce (RP 142). Barbara was ambivalent: torn between her love for him, and her

feelings toward her boss's boss, her boyfriend, with whom she was living (RP 80-81). This ambivalence was communicated to Karl in marriage counseling as confirmed by their marriage counselor who testified: "She discussed that she had mixed feelings, actually about both, both gentlemen, and that she was not clear how she felt about the gentleman who she was living with at that time; that her feelings were mixed" and that as to Karl, "She certainly expressed caring for him and concern for him." (RP 224).

In rebuttal testimony, Barbara Kaye admitted: "As far as this ambivalence thing goes, it was ambivalence and do I want to come back to him, or stay out of the house." (RP 242). Karl did not acquiesce in the reality that the marriage was over until he first knew there was no hope for reconciliation. That did not occur until he was served with divorce papers in June 2012 (RP 143).

D. The Duration of "Transitional Maintenance": Three Months

At the time of trial Karl was 68 years of age, treated for depression, chronic back pain, including a herniated disc, and developing cataracts (RP 138, 161). He had no work history for 34 years (RP 144). Barbara Kaye was in good health, age 59, worked throughout the marriage

in the banking industry and as of the time of trial is an officer and loan manager for Columbia Bank earning over \$151,000 per year. (RP 41, 106, and 119-120). She was cohabitating rent free throughout the physical separation (RP 109).

Karl continued to reside in his home on Sunrise Drive which the court valued at \$1.2 million less a \$375,000 mortgage indebtedness (CP 50). His income was \$1,120 per month, a combination of social security and an annuity pension. (RP 158; CP 24).

E. Outcome:

The trial court found the pre-nuptial agreement unfair substantively and procedurally (CP 48-49). The court deemed the marriage defunct as of when Barbara moved out in 2011, awarded Barbara \$235,624 in what it determined to be community property, and Karl, \$87,000 in community property, a 73/27 split in her favor.

The court in essence awarded him his separate property home in lieu of maintenance (9/6/13 O.D. 12) to enable her to save more for retirement (7/10/13 O.D. 315), since, it observed she had none (7/10/13 OD 322). This included Barbara's 401(k) worth \$9,298 when Barbara physically moved out but worth \$58,309 by the time of trial (RP 35). The

Court awarded Karl three months of what it termed “transitional maintenance” during which time it expected him to either sell it, sell a sub-divided portion or obtain a reverse mortgage on it (CP 39; 7/10/13 oral decision 339).

III. Argument

A. Assignment of Error #1: The Enforceability Of The Prenuptial Agreement

Whether a pre-nuptial agreement is valid and enforceable is a question of law. Questions of law are reviewed by appellate courts de novo. *In re Marriage of Matson*, 107 Wn. 2d 479, 730 P.2d 668 (1986). Whether the findings that support the trial court’s legal conclusions are binding depend upon whether there is substantial evidence to support them. “Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise” (see *In re the Marriage of Hall*, 103 Wn. 2d 236, 246, 692 P. 2d 175 (1984)). An abuse of discretion occurs where the trial court’s decision is based upon untenable grounds or for untenable reasons.

1. The Standards of Fairness

Whether a prenuptial agreement is valid and enforceable turns on a two pronged test established in *In re Marriage of Matson*, supra (1986). The first prong involves a determination of whether the agreement is fair in substance.

If fair in substance when executed, the inquiry ends and the second factor or “prong” is not reached. *In re Marriage of Matson*, supra at 481-482, 730 P.2d 668 (1986). If unfair in substance the agreement must be enforced, none the less, if entered into in a procedurally fair manner. Procedural fairness is established if there was full disclosure of the character and value of the assets, and the agreement was entered into fully and voluntarily on independent advice of counsel and with full knowledge of the person’s rights. *In re Marriage of Mattson*, supra at 482 (1986).

2. The Agreement Was Fair In Substance, At The Time Executed

Whether an agreement is fair in substance involves two considerations: a) whether at the time the parties executed the agreement b) the provisions of the agreement are fair in substance to the spouse not seeking its enforcement. Whether the agreement turned out to be unfair as the marriage evolved at the time of enforcement when trial occurs is not the test. Our State Supreme Court has held squarely on this point.

Where a husband had urged the court to evaluate substantive fairness at the time of enforcement, rather than the time of execution of the agreement the court held: “We refuse. To do so would change the test from one of fairness to fortuity. We adhere to the settled rule that ‘the validity of prenuptial agreements in this state is based on the circumstances surrounding the execution of the agreement.’” *In re the Marriage of Bernard*, 165 Wn. 2d 895 at 904, 204 P.3d 907 (2009). Thus the test of fairness of the agreement is neither measured in the crucible of where the parties find themselves 28 years later at the time of trial nor why the circumstances are what they are at that time.

In this case, the trial court’s determination that the prenuptial agreement was not valid in substance turned upon a finding that the agreement was completely one sided in favor of the husband and therefore unreasonable and unfair (CP 48-49; trial exhibit 104). However, there is no evidence to support that finding.

A one sided prenuptial agreement would preclude or severely restrict the creation of a community estate as was the case in *In re Marriage of Foran*, 67 Wn. App 253, 834 P.2d 1081 (1992) and *In re the Marriage of Bernard*, 165 Wn. 2d 895, 204 P.3d 907 (2009). However the

prenuptial agreement here, in fact, allowed for the creation of a community estate consistent with existing principles of community property law. Page 3 of the agreement provides that "...wages, salaries and employment benefits attributable to labor after marriage is deemed to be community property..." (trial exhibit 104). This is consistent with the statutory definition of community property under RCW 26.16.030 and the principles established in *Kolmorgan v. Schaller*, 51 Wa2d 94, 316 P.2d 111 (1957).

In the event of a dissolution of the marriage, the community property is to be divided equally and to the extent proven, separate property to the spouse owning the separate property (trial exhibit 104). However, the agreement also contained a provision that separate property contributed to the community is deemed a gift to the community (trial exhibit 104). The agreement gives no credit to the separate estate for contributions to be made for the benefit of the marital community in the event of death or dissolution of the marriage (trial exhibit 104). This was fair because at the time the agreement was executed it was contemplated that Karl Kaye would contribute his separate property to the community since he was not expected to work (RP 91 and 92).

The court made no findings nor commented in its oral decision as to any particular provision that it considered “one-sided” or a “one-way street” in favor of the husband. In fact there is none. There is no evidence to support the finding.

The trial court’s oral decision demonstrates that it erroneously focused on post nuptial circumstances as they developed as of trial when Mr. Kaye sought enforcement rather than when executed. The court observed the agreement is:

“...a one-way street wherein the wife ended up liquidating all of her separate property, put all of her community earnings to service debt on this separate property house, along with obviously the other community debt, ending up having no retirement and ostensibly no interest in the equity in the house, yet was stuck with the mortgage liability and her name on the mortgage...

...Now to be fair, it is true that the evidence does suggest that the husband did liquidate some of his separate property in terms of the rental home... did go to paying community debts over a series of years. But... that was very little of what the parties actually lived on over the years.” 7/10/13 O.D. 319-320.

Thus the court’s determination of fairness was based on what occurred during the marriage that created the circumstances in which the

parties were left at the time of enforcement. This is precisely the test of fairness urged by Mr. Bernard that our State Supreme Court rejected.

The court made no findings as to the fairness of the agreement when the agreement was executed because it failed to invoke that test. This is clear from the court's observations of what she was "ending up with" at the time of trial and by comparing the \$650,000 of his separate property contributions to the marital community as being "very little of what the parties lived on..." compared to her earnings through work. This betrays a looking back focus which is the fortuity of the circumstances at trial repudiated by *Bernard*, supra.

The evidence was that Karl contributed over \$650,000, the entirety of his Dean Witter account until 2003 and over \$500,000 of his rental property sales proceeds from 2003 (RP 152-154) which did not run out until the year of physical separation (RP 154).

3. The Agreement Was Entered In To In A Procedurally Fair Manner

As to procedural fairness, the trial court determined that there was no fraud or misrepresentation and that Karl's failure to disclose values he did not know as to the beneficial interests of trusts referenced in the agreement that he may never enjoy may not have been possible given his

status as remainder beneficiary (trial exhibit 104; 7/10/13 OD 321). Thus the court did not invalidate the agreement for that omission.

Finding 2.7 provides that "...neither party entered in to the agreement with full understanding of its provisions or their significance...The wife did not receive legal advice. She had only two weeks prior to the wedding to do so. She certainly did not receive independent advice and thus did not have full knowledge of her rights (sic) the legal consequences of the agreement (CP 48 and 49). These findings are misleading because they beg the essential questions case law requires be answered to justify a conclusion that the agreement was entered in to in a procedurally unfair manner.

Whether Karl Kaye signed without understanding what he was signing is not the test because he is not opposing enforcement of the agreement. He did not understand at the time of trial provisions as to gifting that he did not care about when he had the agreement drawn up (RP 208). But, as to his understanding when he signed the agreement 28 years before, he was asked on cross examination: "So you didn't understand it any better than Barbara did, did you? Answer: I – I guess I did after I read it I did..." (RP 207).

The scenario in *In re Marriage of Matson*, supra and *In re Marriage of Bernard* supra, involved economically disadvantaged spouses who only saw the drafts of the agreements under the duress of the wedding invitations having gone out, wedding arrangements made and the wedding date set. They only had two days before the wedding before being presented with the agreement for signature.

Here, Barbara was the one who contacted the justice of the peace to decide upon the wedding date after she had read the agreement. (RP 113; 115; 150-151). Thus she was in control of the wedding date which she did not set until after she read over and considered the draft (RP 115).

The subject of consulting a lawyer before signing was discussed before she did so. She did not consult a lawyer, or hire appraisers, before signing for one reason only: she did not care (RP 113-115). It simply did not matter to her (RP 115).

When she signed, no one had been invited to the wedding beforehand; not family or friends. There were only three other people, neighbors who attended.

In fact the court observed in its oral decision: “And this court does not have any concerns regarding... fraud... or misrepresentation...”

There was no evidence that he was the one rushing her to have this wedding quickly. "... she had at least two weeks to review the prenuptial agreement language.. that perhaps she should see a lawyer. And there's no evidence that, for example, he told, quote/unquote, half the story as has been suggested in... published cases." (7/10/13 O.D. 321).

Thus the finding as to her having no independent legal advice and therefore no knowledge of her rights suggests that as a matter of law, having independent counsel is a prerequisite to finding procedural fairness. But that is not the law.

Division I of the Court of Appeals recently observed that "...there is nothing inherently fatal about signing a prenuptial agreement five days before the wedding...and who did not testify that she needed more time to review the agreement...we cannot say that effective independent counsel is required when independent counsel is not required in all cases...It is sufficient that she had adequate opportunity to consult independent counsel." *Kellar v. Estate of Kellar*, 172 Wn. App 562 at 589, 291 P.3d 906 (2012). The court went on to hold, "Knowledge of ones' legal rights is a conclusion that flows from the opportunity to obtain counsel...It is sufficient that she had adequate opportunity to consult independent legal

counsel.” *In re Estate of Kellar*, supra at 589 (2012). That is the situation here, where the spouse considers but decides not to seek out the advice of a lawyer before signing and before she sets the wedding date the timing of which is within her sole discretion.

Nor was this a scenario in which the spouse seeking enforcement was economically dominating with far superior business acumen and the one opposing enforcement, unsophisticated or emotionally or physically abused, as in *In re Marriage of Foran*, supra and *In re Marriage of Bernard* supra. Barbara Kaye was not an economically disadvantaged spouse, without acumen. She did not sign under duress. Mr. Kaye had not been employed for five years prior to the marriage (RP 92). Barbara Kaye had no expectation that he would ever work during the marriage, when she signed the agreement and decided to marry him. (RP 92 and 93).

The test of procedural fairness was met. The agreement should have been deemed fair and enforceable.

B. Assignment of Error #2

The correct date of legal separation implicates both the community value of the 401(k) and the character of the restricted Columbia Bank stock. A trial court has the duty to accurately characterize the property of

the parties (see *In re the Marriage of Hadley*, 88 Wn. 2d 649 at 656, 565 P.2d 790 (1977)). Mischaracterization of property “is rarely a proper basis to reverse the court’s property distribution... because the dispositive inquiry... is that the court’s is just and equitable...” *In re Marriage of Kraft*, 119 Wn. 2d 438 at 450, 832 P.2d 871 (1992). There are two reasons why reversal is necessary here.

One is that if the prenuptial agreement is valid, it requires the community property of the parties to be divided equally (trial exhibit 104). Second, the statute requires the court to consider all enumerated factors. “[T]he court shall... make such disposition of the property and liabilities of the parties as shall appear just and equitable after considering all relevant factors including but not limited to...” RCW 26.09.080. There is nothing in the findings of fact or conclusions of law to indicate that the court considered and implemented the factors governing property divisions under RCW 26.09.080

The test of whether parties are legally separated is twofold. First, whether they were physically separated because the statute says “when a husband and wife are living separate and apart...” (RCW 26.16.140). However physical separation is not enough (see *Seizer v. Sessions*, 132

Wn.2d 642, 940 P.2d 261 (1997). For example, where the wife filed for divorce against her husband who was a traveling salesman, his defense that the oil heat she obtained and failed to pay for was incurred after she filed, was insufficient to protect him against the creditor's action against him. The court held that proof of physical separation was insufficient. He also had the burden of proving that the marriage was defunct. See, *Oil Heat Co., v. Sweeney*, 26 Wn. App. 351, 613 P.2d 169 (1980). Thus there is a second related question.

At what point was the marriage defunct? This occurs when one spouse gives up all hope in the marriage relationship being made viable and the other acquiesces by that time (see *In re Marriage of Short*, 125 Wn. 2d 865 at 871, 890 P.2d 12 (1995)). Thus, if defunct before the date of physical separation, then when they began living apart is the date they were legally separated. If not defunct until after the date of physical separation, then the date the marriage became defunct after physical separation is when the parties were legally separated. That was the case here.

After Barbara had moved out in March of 2011, and although living with her boyfriend throughout the two years before trial (RP 80-81;

O.D. 7/10/13 325), the parties attended bi-weekly marriage counseling sessions for more than a year (RP 110). Karl did not want the divorce. He hoped the marriage could be saved after 26 years. Barbara was undecided, ambivalent between her desire to stay married and her love for her boss's boss with whom she was involved and her love for Karl. Thus it was only clear that the marriage was over and Karl acquiesced when she filed for divorce in June 2012 which is when he first accepted the realization that the marriage was over (RP 142; O.D. 316).

Her own testimony on cross examination reflects her ambivalence, nor only as to whether or not to return home (RP 242).

The fixing of the date of legal separation implicates the community value of her 401(k) a difference of nearly \$50,000 (RP 35) and the character of the restricted Columbia Bank stock as her separate property (CP 49-50).

The court mischaracterized the Columbia Bank stock as being entirely her separate property (CP 49-50). Where property is acquired during the marriage it is presumed to be community in nature. However, proof as to its separate character must be based upon clear cogent and convincing evidence. *Berol v. Berol*, 37 Wn.2d 380, 223 P.2d 1055

(1950). Here there was no evidence to prove its separate character, irrespective of when the marriage was defunct.

C. Assignment of Error #3

1. No Evidence To Justify Three Months Of Spousal Maintenance

The court awarded three months of what it termed “transitional maintenance” to enable Mr. Kaye to either sell his residence, property valued at \$1.2 million, subdivide it, or obtain a reverse mortgage, all within a three month period (7/10/13 O.D. 338-339; CP 39). There was no evidence as to whether he could accomplish any of those tasks within 3 months.

There was no evidence presented that within three months Karl Kaye could obtain a reverse mortgage or how much would be available if he could obtain one. There was no evidence as to how long it would take to sell the property for \$1.2 million, or how long it would take to sell off a sub-dividable portion of it, or how much he would have left over after the payment of the mortgage, closing costs and capital gains tax. Here the findings were supported by no evidence that any of the things the court

expected him to do to provide sufficient funds to support himself in lieu of maintenance could in fact be accomplished in as short a time as 3 months.

Where the earning ability of one is significantly less than the other, results in permanent maintenance being awarded in long term marriages. See in *In re Marriage of Brossman*, 32 Wn. App. 851, 650 P.2d 246 (1982) and *In re the Marriage of Bulicek*, 59 Wn. App. 630, 800 P.2d 394 (1990). See also *In re Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989) for a spouse was not self-supporting.

RCW 26.09.090 mandates the trial court to consider a number of factors to determine the amount and duration of spousal maintenance:

“(1) In a proceeding for dissolution of marriage... The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently.”

(d) the duration of the marriage and:

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance”

“An award that does not evidence a fair consideration of the statutory factors results from an abuse of discretion.” *In re Marriage of Mathews*, 70 Wn. App. 116, 123, 853 P.2d 462 (1993). Even where a trial court considers the statutory factors, but it relies on other factors determining the duration of maintenance, it abuses its discretion. *In re the Marriage of Spreen*, 107 Wn. App. 341 at 349-350, 28 P.3d 769 (2001).

Not only is there no evidence to support a three month award, there is nothing in the record to show that the trial court fulfilled its obligation to base its decision on the factors required under RCW 26.09.090(1)(a)(d) or (e).

IV. Conclusion:

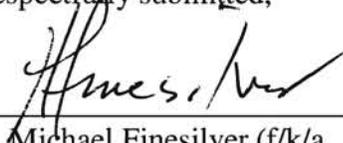
The court should fashion the following relief:

1. Determine the prenuptial agreement valid and enforceable.
2. Reverse the decision of the property division to conform to the division outlined in the pre-nuptial agreement.
3. The revised property division should reflect the correct value of the 401(k) and the correct characterization of the reserved Columbia Bank stock.

4. It should reverse the duration of spousal maintenance to continue for a longer period of time consistent with the factors contained in RCW 26.09.090.

DATED this 27 day of January, 2014.

Respectfully submitted,



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COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

KARL H. KAYE, JR.,)	
)	
Appellant,)	DECLARATION OF
)	SERVICE
v.)	
)	
BARBARA G. KAYE,)	
)	
Respondent,)	
_____)	

I, Lester Feistel, state and declare as follows:

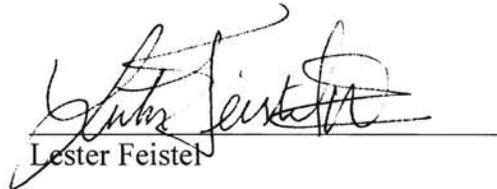
I am a paralegal in the Law Offices of Anderson, Fields, Dermody, Pressnall & McIlwain, Inc., P.S. On the 27th day of January, 2014, I placed true and correct copies of the Brief of Appellant with Seattle Legal Messengers for delivery on January 27, 2014 to:

Carolyn J. Balkema
9100 Roosevelt Way NE, Suite 201
Seattle, WA 98115-2801
206-524-2775

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

2014 JAN 28 AM 11:33
COURT OF APPEALS
STATE OF WASHINGTON
NEELM

DATED at Seattle, Washington, on this 28 day of January,
2014.



Lester Feistel

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