

71391-4

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No. 71391-4

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

In Re: the Marriage of:
AMANDA J. HALLIGAN,
Respondent,
and
JOHN K. HALLIGAN,
Appellant.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. Summary of Reply..... 1

II. Reply Argument..... 2

 A. Substantial evidence exists to persuade a fair-minded, rational person that Mr. Kessler used an erroneous assumption to value the Raytheon pension for early retirement age, and that the pension benefit was far over-valued. 2

 B. In awarding attorney’s fees to Amanda, the trial court abused its discretion by ignoring the real financial situations of the parties at the conclusion of the trial, which left John with no ability to pay, and Amanda with no need for the award. 12

 1. Award of Attorney’s Fees by the Trial Court..... 12

 2. Request for Attorney’s Fees on Appeal Based on Need and Ability to Pay 20

 C. The argument for the remainder of issues is as previously briefed..... 21

III. Conclusion..... 23

TABLE OF AUTHORITIES

Cases

	Pages
Marriage of Griswold, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002) (quoting Bering v. SHARE, 106 Wn.2d 212, 220, 721 P.2d 918 (1986))	3

I. SUMMARY OF REPLY

In the dissolution of the marriage of Amanda and John Halligan, the trial court abused its discretion by ignoring substantial evidence regarding the value of the Raytheon pension for early retirement age. On her side of the argument Amanda has the opinion and uninformed, erroneous assumption of Mr. Kessler. On his side, John has the undisputed facts from the Raytheon Company, the source of the pension. Amanda's response briefing does not refute that substantial evidence was available to the court disproving Mr. Kessler's assumption and subsequent valuation.

Amanda's response briefing largely ignores John's argument that he had no ability to pay her attorney's fees and all the liens imposed on him at the conclusion of the trial, and instead argues a supposed income disparity. Amanda's portrayal of their incomes is a partial representation of the facts merely to support her argument. In the complete balance of their financial situation at the conclusion of trial, Amanda was left with \$164,442 in cash on hand, 60% of all the community assets, and a long-term net income after expenses about equal to John's. John was left with no liquid assets, no way to pay his immediate bills imposed on him by this case, and a huge monthly budget deficit to work through. The only

rational conclusion is that Amanda had the ability to pay her own attorney's fees, and John did not, which is the standard for award of such fees.

II. REPLY ARGUMENT

A. Substantial evidence exists to persuade a fair-minded, rational person that Mr. Kessler used an erroneous assumption to value the Raytheon pension for early retirement age, and that the pension benefit was far over-valued.

The basis of Amanda's argument regarding the valuation of the Raytheon pension is that the opinion of the expert was not challenged by cross-examination and the correct information that the expert overlooked was not timely disclosed by John. Amanda does not argue that the expert's valuation is correct. She cannot make that argument, because the evidence before the court proved that the valuation of the Raytheon pension at early retirement age was incorrect because it was based on an incorrect assumption. That the benefit amount at early retirement age 55 is vital to the calculation of the present value of the pension is unchallenged. That the assumption of the benefit amount is incorrect is also unchallenged. Therefore, Amanda does not argue the merits of the evidence. Her response uses conjecture and works at the edges to try to create doubt about the straightforward meaning of the evidence presented

at trial. This line of argument was newly introduced in Amanda's response briefing. No such doubt was raised at trial, and the meaning and significance of the evidence was undisputed.

Amanda's response does not address John's argument that there was substantial evidence that disproved the assumption Mr. Kessler used to value the Raytheon pension. In case law,

“Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002) (quoting *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)).

Here is the summary of the evidence before the trial court that proves the pension benefit would be reduced at age 55:

1. **Exhibit 19**: The letter from Raytheon says the member may be eligible to receive a benefit at age 55, but that it would be actuarially reduced from normal retirement age. It says, “If you wish, you may elect to begin receiving your payments on or after age 55, actuarially reduced for Early Retirement. Please consult the Summary Plan Description (SPD) for further clarification on Early Retirement.” (Ex 19, underscore added for emphasis).
2. **Exhibit 133**: The complete Raytheon retirement plan handbook referred to as the Summary Plan Description (SPD) in Exhibit 19,

clearly states the simple formula for calculating the reduced monthly benefit payments for early retirement. It says, “If you begin receiving your pension before your Social Security Retirement Date, your pension may be reduced actuarially from that Social Security Retirement Date, or reduced by ½ of 1% for each month your Annuity Start Date precedes your Social Security Retirement Date” (Ex 133, p. 8).

3. **John’s undisputed testimony** made the calculation right from the Raytheon handbook to prove the pension benefit would be reduced to \$180.35 per month at age 55. Mr. Kessler assumed no reduction, and that the benefit amount would be \$450.88. (RP V5, pp 44-45)
4. **Exhibit 20**: Mr. Kessler’s opinion letter clearly states that the value of the pension was based on an assumption there would be no reduction in benefits for early retirement. He assumed the benefit amount would be \$450.88. The letter says, “In my opinion, the total present value of Mr. Halligan’s pension benefit with retirement at age 55 and assuming no reduction in benefits is \$34,052 as of June 13, 2012.” (Ex 20, underscore added for emphasis).

5. **Exhibit 60**: The letter from Ms. LeMoine proves Mr. Kessler needed the reduced benefit amount, did not have it, and that it was “vital to calculating the early retirement amount.” (Ex 60)

The reason why Mr. Kessler got it wrong was that he didn't have the information about the amount of the reduced benefit contained in the SPD, so he made a bad assumption. That assumption was disproved in court. The letter from Raytheon (Ex 19) and the SPD (Ex 133) undermines the very basis for Kessler's opinion, and, coupled with John's undisputed testimony about what the actual reduced benefit is, a rational person would not believe that the pension would be worth \$34,052 because it is clearly based on the erroneous assumption of no reduction in benefit.

The fact that Mr. Finesilver didn't cross-examine Mr. Kessler is irrelevant and doesn't change the result – there isn't substantial evidence to support the ultimate finding. It was unfortunate Mr. Finsilver did not cross-examine Kessler, but John's testimony and the exhibits make it crystal clear the benefit would be reduced.

If anything, the trial court could have, and should have, ordered Mr. Kessler to do a new valuation, and then the parties could have worked that new value into the court's overall property division and adjusted the

equalizing lien. This is the remedy requested on appeal.

The lack of cross-examination of Mr. Kessler was likely an oversight due to the lack of time to adjust to the issue raised by Ms. LeMoine just days before trial. The trial started on August 19, 2013 and spanned over three weeks. There was plenty of time during that period to achieve clarity on this topic if the court desired, or in the succeeding period of time when the court considered John's motion of reconsideration to fix the error.

Amanda's response briefing blames the rush just before trial to calculate the value of the Raytheon pension at early retirement age, which resulted in Kessler not receiving the correct benefit amount for early retirement, which ultimately resulted in the error in valuation, on "John's failure to timely disclose all the requested pension benefit information in discovery," (Brief of Respondent p. 5). Ms. LeMoine, by her late request of Kessler to make this valuation, is partly to blame for the confusion it caused. Any such request should have been made far in advance of the discovery deadline, customarily 35 days before the start of trial, and in this case as early as the original case schedule on April 15th, more than four months before trial. Ms. LeMoine requested the early retirement valuation of Mr. Kessler on July 30, 2013, just 13 working days before trial. When Kessler responded to Ms. LeMoine asking for the amount of the benefit at

age 55 so he could make the calculation that she requested, it was a scramble to obtain the information. The information that Mr. Kessler had requested was finally obtained by LeMoine (on 8/7/2013) and John (on 8/8/2013), just 6-7 working days before trial, in the midst of a flurry of trial preparation and dispute resolution activities. Kessler's letter of valuation was received the following Monday, 8/12/2013, just 5 working days before trial began. He did not receive the information he requested, so he clearly listed his erroneous assumption in his letter to make that clear to all parties.

Amanda's response briefing states that John's response to interrogatories in April 2013 asking "for the date on which John would be eligible for early retirement under the Raytheon pension, John responded 'Unknown.' Ex 58." (Brief of Respondent, p4). This was a true and accurate statement - John did not know at the time. In response to the interrogatory, John provided all information he had from Raytheon, which was the letter that indicated he may be eligible, but to "consult the Summary Plan Description (SPD) for further clarification on Early Retirement." (Ex 19) The interrogatories were in mid-April. On May 6th, Mr. Kessler was jointly hired and Ms. LeMoine requested he value the Raytheon pension at normal retirement age. In April and early May, John had no way to anticipate that on July 30th, Ms. LeMoine would request

Mr. Kessler value the Raytheon pension for early retirement age 55. Her request was well after the discovery cutoff date, 13 working days before trial and the day before the settlement conference, at a point when a lot of preparation was going on. However, John did request the additional info contained in the SPD from Raytheon, and so did Amanda or Ms.

LeMoine. The information is publically available, as shown by the fact that the information was obtained independently by both parties. As soon as the information was received, both parties made several attempts to communicate the information to Mr. Kessler, but it was unfortunately not received in the short time remaining before trial. It was obviously in John's best interest to get the information to Mr. Kessler, and he had no reason not to because the information says the amount of the benefit is significantly reduced from that at normal retirement age.

Regardless of the pre-trial confusion to get the information to Mr. Kessler, the correct pension benefit amount for early retirement was received and was provided to the court. It is straight from the source, the Raytheon Company. It is without ambiguity or dispute that it is fact. The Raytheon Company - not Mr. Kessler - is the "expert" in this case on what amount is paid if an employee opts for payments earlier than normal retirement age. While Mr. Kessler assumed some benefit value because he didn't have anything else to go on, the information from Raytheon is

not an assumption. It is fact. It is the formula that will determine the real amount of money John will receive if he opts to begin receiving retirement benefits at age 55.

Amanda's response briefing pp 6-7 attempts to create doubt about the meaning of simple language used in the exhibits. The letter from Kessler is clearly written stating that he assumed the benefit amount for the early retirement age valuation was the same as the benefit amount for normal retirement age. The meaning of the phrase "assuming no reduction in benefits" is obvious. Furthermore, Amanda's response briefing p. 7 questions the language of the Raytheon SPD, which is written clearly in lay-person's language as a guide for Raytheon's 80,000 employees so that they can determine, for themselves, if they are eligible to start receiving benefits before their normal retirement date, and how to exactly calculate the benefit amount to make an informed decision. It is unambiguous and does not require a CPA to interpret. Moreover, the concept of a reduced benefit amount for early retirement is common sense. Everyone who is eligible to receive social security is mailed an annual statement of their benefits that describes the tradeoff. If one opts to begin taking benefits at early retirement age, they receive a lower monthly benefit amount for life than if they wait to start taking benefits at normal, or later, retirement age. That tradeoff is common knowledge.

Amanda's response briefing states several times that Mr. Kessler's opinion was unchallenged in court. That is not true. His opinion of the value and the assumption used to derive that opinion was challenged in court by the admission of evidence directly to the contrary and by John's testimony. The court had the evidence. Because the issue was raised late in the case, it was unfortunate that Mr. Finesilver did not cross-examine Mr. Kessler on the second day of trial. But the trial spanned over three weeks, and it took additional months for the motion to reconsider this issue. The court abused its discretion by continuing to ignore trusted, expert source material from the Raytheon Company, and assigning value to an asset based on an erroneous assumption by an otherwise very qualified CPA, who, just days before trial, simply lacked the correct information to correctly value the pension for early retirement.

The evidence is clear and convincing. On the one hand, the court has Mr. Kessler's pension valuation letter, which states that the value was calculated based on the assumption that the benefit amount at age 55 is the same as age 65. There is no evidence to support this erroneous assumption. On the other hand, the court has two pieces of evidence from the Raytheon Company that clearly state the benefit at early retirement age 55 is less than at full retirement age 65, and prove without a doubt that Mr. Kessler's assumption was wrong. The letter (Ex 19), states the benefit

would be reduced, but it does not state by how much, and references the SPD. The actual pension plan description (Ex 133) again states the benefit amount is reduced for early retirement, and also states exactly by how much the benefit is reduced. The court also has John's undisputed testimony about the correct amount of the benefit, \$180.35, not \$450.88 as Mr. Kessler assumed (RP V5, pp 44-45), calculated according to the instructions of the Raytheon pension plan handbook (Ex 133). The court has Mr. Kessler's letter that clearly states the benefit amount is required to calculate the present value. The court has the letter from Ms. LeMoine dated August 5th, just 10 working days prior to trial that states Mr. Kessler doesn't have the information he needs to correctly value the pension, and that the info is vital to the calculation. (Ex 60) All the evidence contrary to Mr. Kessler's erroneous assumption is clearly written for any lay person to understand and is undisputed.

The consequence of ignoring substantial evidence that the pension is not worth \$34,042 is that Amanda received a windfall in the form of a cash payout from John. John will never receive the erroneous value of the pension from Raytheon because the value simply does not exist and will never exist. The cost of correcting this error is miniscule. It is likely 10-15 minutes of work, only because of the time it takes to plug the numbers into the calculator, and prepare a revised letter to document the value.

B. In awarding attorney's fees to Amanda, the trial court abused its discretion by ignoring the real financial situations of the parties at the conclusion of the trial, which left John with no ability to pay, and Amanda with no need for the award.

1. Award of Attorney's Fees by the Trial Court

Amanda's response briefing says that at the time of trial, Amanda owed \$34,000 in attorney's fees, and the court took a moderate approach to awarding slightly more than half of what she owed, or \$18,000. This rationale for how the court derived the \$18,000 award does not exist in the record. Furthermore, Amanda had no reason to have an outstanding balance due for attorney's fees. She had \$98,442 cash in her checking and savings accounts, which was plenty of money to pay her attorney's fees in full. The reason why she took on \$34,000 debt at the time of trial was her choice, not a "need."

Amanda's main argument for the need and ability to pay is based on the income disparity between the parties. There is no record that income disparity was used as a basis for judgment of award of attorney's fees as Amanda's response argues. Furthermore, Amanda's briefing states that John's briefing "completely ignores this [income disparity]" That is a false statement. John's appellant's briefing addresses the issue:

“Amanda’s attorney’s fees were a one-time expense. Amanda was also awarded long-term maintenance, child support, and proportional contributions to work-related childcare expenses that more than made up for any long-term differences in lifestyle, and saddled John with a recurring monthly budget deficit from these payments.” (Brief of Appellant, p. 34).

Regarding this income disparity, the court ordered maintenance to address the income disparity. Maintenance was used “to equalize the parties’ standard of living for a reasonable period of time.” (CP 171, FNFCL Sec. 2.12, p. 9 (Maintenance)). In this case, maintenance was substantial: \$3,500 per month for 5 years.

In Amanda’s response brief, she characterizes the supposed income disparity three times without accounting for the maintenance award:

1. “Even though Amanda is living on roughly \$1,600 a month less than John, with John’s higher income (pre-maintenance) this leaves him a \$4,396 surplus per month, whereas with Amanda’s income (without maintenance) this leaves her a \$3,722 deficit per month.” (Brief of Respondent, p. 21)

2. “Similarly, in this case, unchallenged Finding #2.12 demonstrates a nearly ten thousand dollar per month income advantage in favor of John.” (Brief of Respondent, p. 41)
3. “On the need side of the equation, the record before the trial court showed that, even though Amanda was living on about \$1,600 per month less than John, she was running a \$3,722 per month deficit, compared to his \$4,396 per month surplus (pre-maintenance).” (Brief of Respondent, p. 41)

Amanda’s presentation of her argument continually using a pre-maintenance income disparity is irrelevant to their actual income, because significant, long-term maintenance *was* awarded, and has the effect of balancing Amanda’s and John’s incomes. This was their real situation at the time of the decision, which is the time that a potential award of attorney’s fees is based on.

In her argument, Amanda cherry picks the presentation of incomes with the maintenance included. She says, “Even accounting for the effects of the maintenance award, John’s income far exceeds Amanda’s, \$9,549 versus \$6,731 per month.” (Brief of Respondent, p. 21). This completely ignores the other real deductions from income such as taxes to look at their net incomes, which is the standard practice of the Washington State Child Support Worksheet.

Table 1 shows Amanda's and John's complete and accurate income and expenses from the court record, and the difference between them.

Table 1. Income and Expenses, Showing Approximately Equal Net Monthly Income.

	John	Amanda	Difference
1. Gross Monthly Income			
Wages and Salaries	12,215	3,231	8,984
Business Income	834		
Maintenance Received		3,500	
Total Gross Monthly Income	13,049	6,731	6,318
2. Monthly Deductions from Gross Income			
Income Taxes (Federal and State)	1,881	792	
FICA (Soc Sec + Medicare)/Self-Employment Taxes	787	247	
Voluntary Retirement Contributions	416		
Maintenance Paid	3,500		
Total Deductions from Gross Income	6,584	1,040	
3. Net Monthly Income			
Net Income (Line 1 minus Line 2)	6,465	5,691	774
Child Support Payment Received		729	
Total Net Monthly Income	6,465	6,420	45
4. Monthly Expenses			
Declared Expenses	8,653	6,953	
Child Support Offset Payment	729		
Total Expenses	9,382	6,953	
5. Net Monthly Surplus/Deficit After Expenses (Line 3 minus Line 4)	-2,917	-533	-2,385

*All values are in U.S. dollars.

Lines 1, 2, and 3 are exactly as they appear in the final Washington State Child Support Worksheet the trial court adopted. Amanda's

response briefing accurately presents the portion of the financial picture in Lines 1 and 4. But Amanda's response briefing neglects to include Line 2, Monthly Deductions from Gross Income, which includes taxes. So the monthly net income shown on Line 3 shows John's and Amanda's net incomes of \$6,465 and \$5,691 respectively, a difference of \$774, not the exaggerated "ten thousand" in Amanda's briefing, which she artificially arrived at by taking the difference between John's and Amanda's gross incomes *before* maintenance, taxes, deductions and other expenses. Furthermore, after subtracting their declared expenses at trial and the child support transfer payment that covers some of Amanda's declared expenses, John has a significantly higher monthly deficit than Amanda. John's deficit is \$2,917 per month vs. Amanda's deficit of \$533 per month. This is the complete true story, not the partial-truth Amanda portrays in her brief as follows, "...with John's higher income (pre-maintenance) this leaves him a \$4,396 surplus per month, whereas with Amanda's income (without maintenance) this leaves her a \$3,722 deficit per month." (Brief of Respondent, p. 21) By Amanda's calculation using only gross income, John would have an \$896 monthly surplus. The problem with Amanda's portrayal is that she uses *gross* income rather than *net* income. She ignores taxes and other real deductions shown in Table 1, Line 2. John's federal income tax is \$1,881 monthly, which, by itself,

more than wipes out any monthly surplus. And these taxes, calculated from the standard child support worksheet software, are as close to actual taxes as possible, not income tax withholding amounts, which are generally higher.

Even if their expenses were exactly the same, the \$729 child support payment, which offsets a portion of Amanda's child-related expenses she declared during trial, almost eliminates the \$774 difference in net incomes on Line 3 in Table 1. The actual difference in their monthly net incomes is only \$45. **In conclusion, the net income disparity is completely erased with the maintenance award and child support payments to Amanda.**

On the "need" side of the equation, as evident on Line 5 in Table 1, John still has a large monthly deficit of \$2,917 compared to Amanda's smaller \$533 monthly deficit. This is due to John's higher fixed housing expenses in the home that was awarded to him.

This argument shows a concise and complete picture of the financial income and expenses situation that was presented to the trial court. And it puts it in the objective and clear format of the Washington State Child Support Worksheet, which shows differences in income.

There is no mention in the record that income disparity was used as a basis for judgment of award of attorney's fees as Amanda's response

argues. But if it did, the complete financial picture of both parties that was presented to the court and summarized in Table 1, shows net incomes approximately equal for the “ability to pay” side of the equation, and John with higher expenses and monthly deficit on the “need” side of the equation.

Amanda argues that John’s brief “... fails to account for the full spectrum of assets awarded to him. These include the Ronald, WA property with an equity of \$34,300, to be sold and the proceeds equally divided;” (Brief of Respondent, p. 23). To the contrary, John’s brief does say that 60% of the total assets and \$164,442 in liquid cash went to Amanda, and the bulk of assets awarded to John were in the form of pensions, a retirement account, and equity in the family home.

Furthermore, the court could not have considered the sale of the Ronald property in his ability to pay attorney’s fees. First, there was no reason to believe the property would sell soon, because the nearest comps upon which the appraisal was based remained on the market for several years before sale. In the appraisal, the days on the market for the two properties were 1325 and 1006 days. Second, the transaction cost of the sale was anticipated to mostly offset any equity to be gained in the sale of the property. For these reasons, the property value and equity were not considered in the overall property division matrix because Amanda and

John agreed to share the cost and/or value equally when/if the property sold.

For similar reasons, John's home, awarded in the judgment, was not a liquid asset that could be tapped to pay Amanda's attorney's fees at the conclusion of trial.

Amanda's response briefing largely ignores John's argument that he had no ability to pay for all the liens imposed on him at the conclusion of the trial.

In the balance of their financial situation at the conclusion of trial, Amanda was left with \$164,442 in liquid cash on hand, 60% of all their assets, and a long-term net income after expenses about equal to John's. John was left with no liquid assets, no way to pay his immediate bills imposed on him by this case, and a huge monthly budget deficit. During trial, John had no way to anticipate the outcome of the trial court's decisions that would leave him in financial straits. The court's adoption of his bank account balances at the date of separation in the property matrix vs. using Amanda's account balances as of the date of the trial benefited Amanda greatly. There was no way for John to know this would be the outcome, or that he would be ordered to pay attorney's fees that he had no way to pay. This situation was created with the court's decision at the end of the trial, which is why it was necessary for John to show the

consequences of the court's decision on John's ability to pay with his most up-to-date bank account balances at the conclusion of trial. This is an acceptable time to sort through the issue, given the real financial picture of the parties at the conclusion of trial, and is the reason why updated attorney's fees billing statements are customarily produced after the conclusion of trial, because they can't be known for certain at the outset.

2. Request for Attorney's Fees on Appeal Based on Need and Ability to Pay

Regarding Amanda's request in her response briefing for award of *additional* attorney's fees on appeal based on need and ability to pay, no additional evidence of need and ability to pay was provided by Amanda. John's financial situation is little changed from the conclusion of the dissolution, which, as evident from John's appeal briefing and this response briefing, left him with no ability to pay.

John is appealing pro se precisely because he doesn't have the resources to hire an attorney to represent him. He incurred a lot of expenses to defend himself in the dissolution case petitioned by Amanda, and in the succeeding reconsideration of the errors in the court's decision. But an expert is not required for the basic inspection of the value of the Raytheon pension for early retirement and the negative balance of John's

bank account vs. the lien against those at the conclusion of trial. A fair-minded, rational person can see in the truth in black and white in the evidence, and apply the customary legal standards.

C. The argument for the remainder of issues is as previously briefed.

The argument for the remainder of the issues on appeal are as previously briefed in John's appellant's briefing. The following is a brief reply to Amanda's arguments raised in her response briefing:

- There was no intentional calculation to mislead with the timing of the disclosure of witnesses and Mr. Bennett's vocational report. The court should have all the information available for this issue critical to the case.
- John's post-separation contributions to his Fidelity 401(k) are not the same as paying the mortgage on the Ronald property. It was a personal loan, and Amanda should not benefit from John's post-separation income, to be consistent with similar judgments in this case.
- The federal income tax exemption for the child was agreed to be split equally every other year prior to trial, because that is only fair. The issue was never raised at trial, and John would never have

willingly agreed to a change after trial for which he obviously does not benefit.

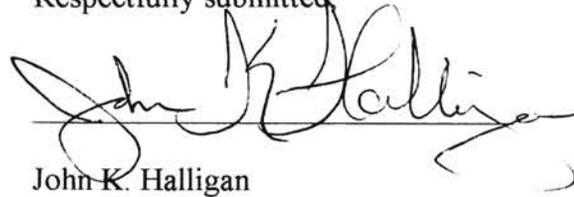
- Proof of work-related nature of daycare expenses is only fair, given the circumstances of Amanda's employment situation. John has the right to documentation and records about the child care arrangements for which he has been ordered to reimburse, and it does not impose an unnecessary burden on Amanda.

III. CONCLUSION

Specific remedies for each issue were provided in argument. In summary, the appellate court should reverse the award of attorney's fees to Amanda (Error 2), remand the case to the trial court to adjust the final property division lien using the facts admitted at trial to correct the value of the Raytheon pension at early retirement (Error 1). The appellate court should also remand the case to the trial court to correct the separate value of the Fidelity 401(k) (Error 4), modify the Order of Support to fairly split the federal income tax exemption for the child (Error 5), provide for proof of work-related daycare expenses (Error 6), and allow John's witness and other evidence as briefed (Error 3).

DATED this 29th day of September, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John K. Halligan", written over a horizontal line.

John K. Halligan
Appellant / Pro Se

CERTIFICATE OF SERVICE

I certify that on the 27 day of ~~SEPTEMBER~~ 2014, I caused a true and correct copy of this motion to be served on the following in the manner indicated below:

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