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I. The Appellant Properly Provided the Entire Transcript Needed for the Appeal.

RAP requires the portion of the transcript needed to resolve the appeal. Respondent argues that this was not done and, therefore, there is evidence that supports the courts determination that \$16,000. of personal property was in the possession of the husband. This is not true. The Report of Proceedings from about pages 112 through 116 demonstrate that the Court rejected the exhibit that listed the household goods and furnishings as it related to value of the items. It did so because Ms. Krause-Olson wanted to use a depreciated value, not a fair market value, in arriving at the value she put on the items. She never testified as to her opinion of the value of the household goods and furnishings and, in fact, the only testimony on value as that of Mr. Olson, where he placed the amount at about \$3,000.00. (RP 313-314)

What Ms. Krause-Olson testified to was that she spent \$8,000 to buy new items of household

goods but that sum included an unknown amount for deposits for utilities and rent. No evidence shows what the new items were worth and there is no dispute that she had possession of the items. (RP 440.) It is also pointed out that, by her own testimony, she was given unfettered access to obtain any of the household goods and furnishings she wished which would have alleviated the need to buy new items. (RP 176.)

II. No Substantial Evidence is Cited as to the value of the Neomedia Stock or what happened to the proceeds.

There is nothing in the record to point to the value of the Neomedia stock. There is reference to gain in the sale of the stock. The problem comes when there is a determination that the proceeds should be divided by the court in trial when the proceeds came to the parties in January of 2004 and was, by their own admission, spent. While Ms. Krause-Olson did not recall how the money was spent (PR 200-204) there is no dispute that the money was, in fact, spent. There

is no evidence that it was misspent, hidden or unavailable to Ms. Krause-Olson. Her own testimony was that she had unfettered access to all bank accounts and stock accounts. (RP 176) Likewise, there is no finding that questions the veracity of Mr. Olson and his testimony is clear that \$10,000 of the money from the sale of Neomedia went to purchase Quatro Records and that Ms. Krause-Olson actually wrote the \$10,000 check from their checking account for its purchase. (RP 126). He further testified as the expenditure of the remainder of the money realized from the sale of Neomedia. Hence, without substantial evidence that the money was misspent, no question as to the truthfulness of Mr. Olson, and no evidence that the money existed, even at the time of the separation of the parties in August of 2004, it was error to divide that non-existent money and require Mr. Olson to give \$8,000 to Ms. Krause-Olson. A court, as indicated by Appellant, abuses its discretion when it makes Findings of Fact that

are not supported by any evidence. In re the Marriage of Thomas, 63 Wn. App. 658, 660, 821 P2d 1227 (1991).

Appellant argues that this court can find an "implicit", albeit non-stated, determination that there is a question of the credibility of Mr. Olson by its ruling. There is no citation to authority for that proposition and, in fact, it is believed to be untrue. If the court is to determine that one is not credible there must be a finding of such. Otherwise, there would be no review. It is agreed that the court may choose evidence between conflicting testimony but that, by itself, is not a determination of credibility or lack thereof. Had Ms. Krause-Olson testified as to anything within her knowledge that refuted Mr. Olson's testimony there would likely be no appeal on this issue. However, the only evidence is that the money from the sale of Neomedia was spent and Ms. Krause-Olson, who had the bank statements in her possession from the time she

left Mr. Olson, (RP 176), never presented one such statement showing the continued existence of any extraordinary amount of money being held by the parties 8 months after the sale of the asset. There is just no evidence to support the trial court's ruling on this issue.

It is also contended that there is not a shred of evidence that the money from the sale of the Neomedia stock was wasted and there is no Finding of Fact concerning that matter either. Hence, it must be presumed that the parties spent whatever they had from the sale of Neomedia long before trial and it would be error to make an award of property that does not exist.

III. The Trial Court Abused its Discretion in Awarding Terms For Discovery Abuse

Appellant confuses the issue of awarding terms for discovery abuse and the award of terms for a trial subpoena. The claimed abuse of discovery, the seeking of a deposition after discovery cutoff, was argued before the trial. The matter of terms

was addressed to the court who denied any terms or attorney fees. The matter was closed, at that point, on that particular issue. There was no motion to reopen that ruling, set it aside or anything else.

In preparation for trial, Mr. Olson, through his attorney, had a trial subpoena issued requesting the production of documents, many of which would have been used in trial. It was that subpoena that the Respondent sought to have quashed and terms imposed. Clearly, the conduct of trial is left to the discretion of the trial court so quashing the subpoena is in her hands. However, Judge Grant went further by awarding attorney fees, not only for the trial subpoena but also for the previous motion relating to the taking of Ms. Krause-Olson's deposition after the discovery cut-off, where she had denied those fees. In other words, she retroactively imposed fees which she had denied before. That is the claimed error and the matter was brought to her attention by motion. (RP

15-16).

IV. The Court Abused its Discretion in Awarding Attorney Fees at Trial.

Attorney fees are not authorized unless there is a statute, agreement of the parties, or recognized equitable grounds. In Re Marriage of Greenlee, 65Wn. App. 703, 706, 829 P.2d 1120 (1992). In dissolution matters RCW 26.09.140 allows fees but only if there is need and ability to pay or a determination of conduct that increases the cost of litigation. There is no determination of intransigence. There was one instance, approximately 6 months before trial, where the husband was sanctioned for delay in answering interrogatories and he paid the terms assessed as required. (RP 229). It is not intransigence to go to trial over issues that are in dispute. Intransigence is not established merely because there is an assertion of it or because there was a contested trial. In Re Marriage of Wright, 78 Wn. App. 230,239, 896 P.2d 735 (1995).

Factually, there is no evidence of need on the

part of Ms. Krause-Olson and no showing of an inability to pay. Further, there is clearly an indication that the only source for Mr. Olson to pay for things such as attorney fees was to negotiate his Deferred Compensation because he had no other source of liquidity. (RP 471-476)

In determining need, the trial court is to consider the situation the parties find themselves in at the time of the dissolution. That would include the all the assets and debt. Ms. Krause-Olson was to have, essentially, cash whereas Mr. Olson was to have either property or future repayment of debt from other sources. Clearly, she could pay, from her own resources, her attorney fees. Ms. Krause-Olson was 38 at trial (RP 52), a teacher (RP 60), possesses a Masters Degree (RP 59), has no children and this was a short marriage of less than 5 years. (FF-CL 2.4 and 2.5 & CP 59).

She left a job earning about \$10,000 annually less than Mr. Olson (RP 149) and received substantial property in the dissolution. A party is not

entitled, as a matter of right, to an award of fees. As the Court of Appeals noted in In re the Marriage of Stachofsky, 90 Wn App. 135,148, 951 P.2d. 346 (1998), "Ms. Stachofsky was awarded substantial property in the dissolution and should be able to pay her own attorney fees on appeal". The same principle applies for fees at trial, an award of substantial property should defeat a request for fees.

Ironically, the very statement of Appellant in her brief is absolutely applicable to Mr. Olson where she states: ". . . a spouse need not become a pauper and sell assets to obtain the cash necessary for the litigation, nor should a spouse have to choose between paying living expenses or paying litigation expenses." Stibbs v. Stibbs, 38 Wn2d 565, 231 P.2d 310 (1951). Mr. Olson has to sell or dispose of almost all of his assets in order to pay this award.

Ms. Krause-Olson's contention that Mr. Olson was intransigent because he was ordered to pay

terms for discovery violations contradicts itself. First, assuming the terms hold, he was, in fact, punished for those two instances and has paid for them. That doesn't make him intransigent merely someone who was trying to be prepared for trial. Secondly, he was not punished twice for discovery violations but actually assessed terms for one instance, assuming that the award of fees the second time is separate from the late discovery request attempted. An allegation that Mr. Olson failed to agree to a joint statement of evidence is not in the record and, in truth, none was discussed between attorneys. Finally, what would the purpose be in a statute that requires the court to look at need and ability to pay in a dissolution matter if fees could be awarded because one or the other of the parties refused to settle the case?

Ms. Krause-Olson alleges that Mr. Olson didn't make a good faith effort to settle but admits that he participated in the mediation session (RP 229), made offers to settle that she rejected (RP 229)

and attempted to resolve the case during the course of the trial which was rebuffed (RP 239-241) There is no intransigence on the part of Mr. Olson, just a disagreement with the solution. Quite honestly, it is that very disagreement that makes for trials in civil cases.

V. REQUEST FOR FEES ON APPEAL

While it is true that this court has discretion in awarding fees on appeal the same should be denied in this instance. First, there is no financial need for fees, at least based upon the information available to Mr. Olson. A perusal of the Decree in this case shows that Ms. Krause-Olson was awarded significant cash assets, all of which have been paid. At the time of trial she was living in Snohomish County in the residence of friends and at no expense for rent. (RP 54). She is not entitled to fees on appeal.

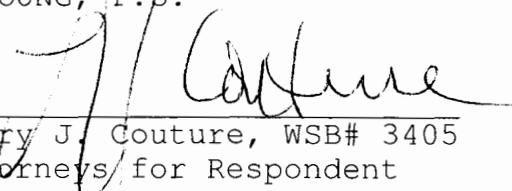
VI. Conclusion

Mr. Olson should receive the relief prayed for in his appeal. There is no need to remand this

matter. Ms. Krause-Olson should bear her own fees and costs on appeal and the award of fees below should be reversed.

Dated at Tacoma, Washington this 28th day of September, 2006, and respectfully submitted.

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