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No. 50456-1-II

THE STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION II

THURSTON COUNTY SUPERIOR COURT NO. 10-3-00073-0

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ERIC CHASTAIN,  
Appellant,

and

STEPHANIE CHASTAIN,  
Respondent.

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BRIEF OF APPELLANT

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## I. INTRODUCTION

Appellant Eric Chastain seeks a ruling overturning the trial court's award of attorney fees in favor of Respondent Stephanie Childress (f.k.a Chastain). Three and a half months after the trial court dismissed Appellant's Relocation Action, Respondent brought a motion for fees although the dismissal order of the underlying action did not reserve the issue. The trial court found that Respondent had need for assistance and that Appellant had the ability to contribute to her fees and awarded the same pursuant to RCW 26.09.140. The trial court's ruling should be overturned because there is insufficient evidence to support a conclusion that Respondent had need for assistance with her fees, because there is insufficient evidence to support the conclusion that Appellant has the ability to assist with her fees, and because there is no legal basis for an award of fees after entry of the dismissal order.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred when, on the sole basis of finding need and ability to pay, it invoked the manifest injustice exception to the rule that a court loses jurisdiction after a final order of dismissal is entered.
2. The trial court erred in finding that Respondent was in need of assistance to pay her attorneys fees because the evidence on the record demonstrates that her parents financially support her and that her parents have ample funds to pay her legal fees.

3. The trial court erred in finding that Respondent has no other source of income, except child support from Petitioner, as Respondent failed to file any supporting documentation such as income tax records, bank statements, and the like.

4. The trial court erred in finding that Appellant has the ability to pay Respondent's legal fees when Appellant's own financial difficulties prevented him from filing necessary legal paperwork in the expeditious fashion the trial court expected of him.

5. The trial court erred in ruling that the statement of the Respondent's mother, "I don't want to give our attorney another \$20k" was hearsay, offered to prove the truth of the matter asserted, when it was being offered to show that Respondent's mother considered Respondent's attorney to be the parents' attorney and that the parents were prepared to pay Respondent's legal fees.

### III. STATEMENT OF THE CASE

#### A. Procedural History

The parties married on May 1, 2003, in Pierce County, Washington. The parties finalized their divorce on January 11, 2011.<sup>1</sup> The parties have one (1) child of their marriage, Wyatt, now age 10.<sup>2</sup> As part of the dissolution proceeding, the Thurston County Superior Court entered a final parenting plan on

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<sup>1</sup> CP 126:22-24

<sup>2</sup> CP 7:3, 127:1

January 22, 2011, which provided a 50/50 schedule requiring Wyatt to spend equal time with both parents on a rotating weekly basis.<sup>3</sup> For years following the entry of the decree of dissolution and final parenting plan, Appellant resided in the family home in Tenino and Respondent moved around, ultimately settling in with her parents in Rochester.<sup>4</sup>

Appellant works for the United States Army and in April of 2016, he learned he would either have to move to Joint Base Lewis-McChord or Washington D.C.<sup>5</sup> Appellant served Respondent with his notice of intent to relocate on August 2, 2016.<sup>6</sup> The matter proceeded through litigation and trial was scheduled for November 15, 2016.<sup>7</sup> On November 10, 2016, both parties filed their trial briefs with the Thurston County Superior Court.<sup>8</sup> Within her trial brief, Respondent also brought a motion to dismiss pursuant to CR 12(b)(6) for failure to state a claim for which relief can be granted.<sup>9</sup> Respondent argued that the relocation act did not apply to 50/50 parenting plans.<sup>10</sup> At this time, the Court of Appeals had not yet published its opinion on the subject matter under *In re Marriage of Worthley*, 198 Wn. App. 419, 393 P.3d 859 (2017). Respondent also requested an award of attorney fees in her trial brief pursuant to RCW 26.09.140

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<sup>3</sup> CP 5:6-7; CP 128:7-9; CP 147:1

<sup>4</sup> CP128:11-20

<sup>5</sup> CP 130:12-14

<sup>6</sup> CP 130:22

<sup>7</sup> CP 124-5

<sup>8</sup> CP 126-153

<sup>9</sup> CP 146-153

<sup>10</sup> CP 149:19-21

(need versus ability to pay).<sup>11</sup>

At trial on November 15, 2016, the trial court took up Respondent's 12(b)(6) Motion to Dismiss as a preliminary matter.<sup>12</sup> After considering argument from both parties' attorneys, the trial court granted Respondent's Motion to Dismiss, finding that the relocation statute does not apply to 50/50 parenting plans.<sup>13</sup> The parties did not discuss the issue of fees and the trial court did not rule on the issue of fees, despite the Respondent having included the issue in her motion to dismiss.<sup>14</sup>

On December 2, 2016, the trial court signed an order, prepared by Respondent's attorney, dismissing the relocation action.<sup>15</sup> The order makes no reference whatsoever to the issue of fees, Respondent's request for fees, and in no way reserved the issue for a later date.

B. Respondent's Motion for Fees

On March 13, 2017, Respondent filed a Motion for Order for Payment of Attorney Fees and Costs and an Attorney Fee and Cost Declaration requesting an award of \$29,909.15 against Appellant.<sup>16</sup> Respondent based her request for fees on RCW 26.09.140, which allows the court to award attorney fees after considering each of the parties' financial situation. The trial court heard argument

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<sup>11</sup> CP 152:20

<sup>12</sup> RP 3:21-22

<sup>13</sup> RP 29:21-23

<sup>14</sup> RP (5-5-17) 19:6-7

<sup>15</sup> CP 158-163

<sup>16</sup> CP 188-205

from the parties at a hearing on May 5, 2017, and issued a ruling from the bench that included a finding that Appellant has the ability to assist Respondent with her attorney's fees and costs and included a finding that Respondent has a need for Petitioner's assistance in paying her fees.<sup>17</sup> The trial court also issued a very convoluted ruling to get to the conclusion that Appellant should pay Respondent's attorney fees and costs, notwithstanding the fact that the case had been dismissed without reserving the issue of fees. The trial court said,

*"Is it unusual for the court to get a request for attorney fees after a case is over, after the final ruling? Not unusual to get that. Is it unusual after an order of dismissal was entered where it does not say fees are reserved? Yes, I do think that that is unusual. Normally, the issue of attorney fees, if it is going to be further argued to the court, even if a dismissal order is entered, it normally says the issue of attorney fees is reserved.*

*And that is the general rule, that the court would lose jurisdiction after the dismissal had been entered, and everyone agrees, unless it would be manifestly unjust, and that's the Marriage of Lowe (sic) case that was cited in Ms. Johnson's brief. And in looking at that case, it does talk about when looking at manifest - - what I'm going to call manifest injustice, is to really look at when the issue is the issue of a party who had very small financial means, they used 'financially weaker,' but less means to pay costly litigation, and that in looking at that case would be a basis for the court to find a manifest injustice that would allow the court to address the issue of*

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<sup>17</sup> RP (5-5-17) 21:13; RP (5-5-17) 22:2-3

*attorney fees.*”<sup>18</sup>

On May 19, 2017, the trial court signed an order reflecting its May 5, 2017 ruling from the bench ordering Appellant to pay Respondent’s attorney \$15,000.<sup>19</sup> With respect to the finding of a manifest injustice, the May 5, 2017 Order states, “Invocation of the ‘manifest injustice’ exception is even more imperative where statutory rights exist, such as RCW 26.09.140, that are intended to protect a financially disadvantaged party from the expense of costly litigation or vexatious custody disputes. Such manifest injustice exists here.”<sup>20</sup>

The trial court also made specific findings that Appellant was not intransigent or acting in bad faith.<sup>21</sup>

*1. Respondent’s Ability to Support Herself and Assistance From Family Members*

The record before the trial court contained ample evidence that Respondent has sufficient means to pay her attorney fees. Respondent has an impressive level of education that includes a BA in business and finance, a certificate as an EMT, and certification as a national Pony Club instructor and evaluator.<sup>22</sup> In February of 2017, immediately before filing her motion for an award of attorney fees, Respondent took a nineteen day cruise with her father, traveling to places like Uruguay, Drakes Passage, Antarctica, the Falkland Islands,

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<sup>18</sup> RP (5-5-17) 19:23-25, 20:7-20

<sup>19</sup> CP 321-326

<sup>20</sup> CP 314:6-8

<sup>21</sup> CP 314:23-24; RP (5-5-17) 22:22-25, 23:1-7

<sup>22</sup> CP 207:11-16

and Buenos Aires.<sup>23</sup>

Respondent resides on her parents' family farm and performs work for them in exchange for the basic necessities of life.<sup>24</sup> Respondent claims that extraordinary expenses, such as attorney's fees and costs of litigation, are not included in her compensation from her parents and were neither foreseen nor contemplated when she entered into her arrangement with her parents.<sup>25</sup> Yet on October 22, 2016, Respondent's mother, Sally, sent a letter to Appellant's wife, Jeanie, that states, "Frankly I don't want to give our attorney another 20k and I expect you don't want to either."<sup>26</sup> During oral argument, counsel for Respondent objected to the admission of this statement on the basis that it is hearsay and the trial court sustained the objection.<sup>27</sup> The statement was not hearsay and was offered to show that Respondent's parents assumed responsibility for paying Respondent's legal fees and had every intention of paying additional fees for future court action.

Respondent's parents owned a five and a half acre lot in Tumwater that was listed for \$925,000 in the fall of 2016.<sup>28</sup> Respondent asserts that the proceeds from the sale of the property would be used in part to build her a home on her parents' property.<sup>29</sup> If Respondent's parents are going to use proceeds from a

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<sup>23</sup> CP 113:21-22; CP 207:18-25; CP 230-233

<sup>24</sup> CP 190:6-8

<sup>25</sup> CP 190:85-11

<sup>26</sup> CP 235

<sup>27</sup> RP (5-5-17) 13:21-25, 14:1-6;

<sup>28</sup> CP 36:23-24, 37:1-4; CP 96-97

<sup>29</sup> *Id.*

property that is worth one million dollars to build Respondent a home on their property, some of the proceeds from the sale of the property should also be used to pay for Respondent's attorney fees.

The only documentation Respondent provided during the entire litigation regarding her financial situation was a Financial Declaration filed with the Thurston County Superior Court on October 19, 2016.<sup>30</sup> Respondent's financial declaration claims that she makes no money and that there is no income from other adults living in her home.<sup>31</sup> Respondent did not file any tax returns or W2s for herself or her parents. There is absolutely no information on the record regarding Respondent's parents' income or assets, other than the five and a half acre parcel worth nearly one million dollars and the horse farm where Respondent and her parents reside.

2. *Appellant's Inability to Contribute to Respondent's Finances*

When the trial court dismissed Appellant's Relocation Action the morning of trial, it held that a subsequent Petition for Modification pursuant to RCW 26.09.260 would have priority status.<sup>32</sup> At the May 5, 2017 Hearing on Respondent's Request for Attorney Fees, the trial judge almost chastised Appellant for not having already filed his Petition for Modification. The trial court stated,

*"Finally, although not related to attorney fees, I would indicate that*

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<sup>30</sup> CP 16-21

<sup>31</sup> CP 17:12, 18:12

<sup>32</sup> RP (5-5-17) 30:4-13; RP (5-5-17) 32:13-17; CP 162:9-11

*the court never - - the reason I ordered an expedited trial is because I did not want this child driving from Lewis-McChord down to what would have been, I don't know if it's an hour, probably close to an hour each way, when he spends the week with his dad. In fact, I ordered the expedited trial so that would not happen, and so the court is somewhat surprised that - - I understand why neither party has pursued the modification, but certainly in the long term, it's not in the parties' son's best interests in maintaining that schedule.*"<sup>33</sup>

Indeed, the trial court was correct. The trial court dismissed Appellant's relocation action on November 15, 2016.<sup>34</sup> Respondent filed her motion for fees on March 13, 2017. By May 5, 2017, when the trial court heard argument on the issue of fees, the modification action still had not commenced and Appellant was continuing to drive the parties' son from Joint Base Lewis-McChord to Rochester every day during the father's residential time.<sup>35</sup> Appellant had not yet filed this very necessary petition because he was still making payments on his legal fees from the Relocation Action and trying to save money to file the Petition to Modify.<sup>36</sup> Although Appellant makes significantly more money than Respondent, he has significant expenses that prohibit him from being able to contribute to Respondent's attorney fees.<sup>37</sup>

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<sup>33</sup> RP (5-5-17) 23:8-19

<sup>34</sup> RP 1

<sup>35</sup> CP 140:14-19

<sup>36</sup> CP 210:5-7; CP 211:11-14

<sup>37</sup> CP 210:9-12

#### IV. ARGUMENT

##### A. Standard Of Review

“In matters affecting the welfare of children, such as parenting plans, the trial court has broad discretion, and its decisions are reviewed only for abuse of discretion.” *In re: Marriage of Caven*, 136 Wn.2d 800, 806, 966 P.2d 1247 (1998). “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.” *Rossmiller v. Rossmiller*, 112 Wn. App. 304, 309, 48 P.3d 377 (Div. II 2002). “A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *In re: Marriage of Katare*, 125 Wn. App. 813, 822-23, 105 P.3d 44 (Div. I 2004).

An appellate court will not re-try the facts on appeal, and will accept findings of fact as verities if they are supported by substantial evidence in the record. *In re: Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (Div. III 1991). Evidence is substantial when there is a sufficient quantum of evidence “to persuade a fair-minded person of the truth of the declared premise.” *In re: Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (Div. I 2002). “So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it.” *Id.* This court does not review the trial court’s credibility

determinations, nor can it weigh conflicting evidence. *In re: Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (Div. III 1996).

“Statutory interpretation and the question of whether a statute applies to a particular set of facts are issues of law reviewed de novo.” *In re: Dependency of T.L.G.*, 139 Wash.App. 1, 16, 156 P.3d 222 (2007). Similarly, an appellate court reviews a trial court’s application of the law de novo. *Rossmiller v. Rossmiller*, 112 Wn. App. 304, 309, 48 P.3d 377 (Div. II 2002); *In re: Marriage of Flynn*, 94 Wn. App. 185, 192, 972 P.2d 500 (Div. III 1999).

In the instant case, Appellant assigns two errors to the trial court that are factual and reviewed for abuse of discretion on appeal: the finding that Appellant had ability to pay Respondent’s attorney fees and the finding that Respondent had need for assistance in paying her attorney fees. The remaining three assigned errors involve interpretation and application of law and are therefore reviewed on appeal de novo: 1) the trial court’s conclusion that need versus ability to pay amounts to a “manifest injustice” that acts as an exception to the rule that the court loses jurisdiction upon entry of a dismissal order; 2) the trial court’s failure to address the issue of waiver; and 3) the trial court’s conclusion that the statement, “”Frankly I don’t want to give our attorney another \$20k” is hearsay.

B. The Trial Court Erred When It Concluded That Need And Ability To Pay Amounts to a Manifest Injustice

As a general rule, a court loses jurisdiction of a case after an order of dismissal has been entered. *In re Marriage of Low*, 44 Wn.App. 6, 9-10, 720 P.2d

850 (Div. I 1986); *Seals v. Seals*, 22 Wn.App. 652, 657-58, 590 P.2d 1301 (Div. III 1979); *see also*, *In re Marriage of Firchau*, 88 Wn.2d 109, 112-14, 558 P.2d 194 (1977). Courts, however, have recognized that this rule is not absolute and is not followed when to do so would be manifestly unjust. *Marriage of Low* at 10, citing *Marriage of Firchau* and *Seals v. Seals*. Invocation of this exception is even more imperative where statutory rights exist that were intended to protect a financially weaker party from the expense of costly litigation or vexatious custody disputes. *Id.* In Washington State, three cases demonstrate and help define what constitutes a manifest injustice that gives rise to an exception to the general rule in the context of awarding fees on the basis of need versus ability to pay after an order of dismissal has been entered in an action under RCW 26.09.

In *Marriage of Low*, the Respondent, Robert Low, filed a petition to modify child custody provisions of the decree of dissolution from his ex-wife, Sunrae Low. After the case had almost reached trial, Mr. Low filed a motion to dismiss his own petition pursuant to CR 41(a). Ms. Low responded with a request for attorney fees pursuant to RCW 26.09.140 and RCW 26.09.260(2), which allows the trial court to assess fees against the petitioner if a petition to modify a residential schedule is brought in bad faith. The Court of Appeals held,

*“to enable a party to avoid the import of these statutes by voluntarily dismissing his case would defeat their intent and potentially result in injustice. Accordingly, this court holds that a petitioning party in a custody modification dispute may not avoid liability for the other party’s attorney fees under RCW 26.09.140 or 26.09.260(2) by simply*

*dismissing his petition pursuant to CR 41(a)."*

*Id.* It should be noted that in the order dismissing Mr. Low's case, the dismissal order specifically reserved the issue of fees for a later determination.

In *Marriage of Firchau*, Mrs. Bobbie Firchau hired an attorney to represent her in the dissolution of marriage action against Mr. Albert Firchau. After about three months, Mrs. Firchau instructed her attorney to dismiss the dissolution action as she had reconciled with Mr. Firchau. Mrs. Firchau's attorney refused to dismiss the action until her fees and costs had been paid. In response, Mr. Firchau hired an attorney who drafted a dismissal order, had Mrs. Firchau sign it, and presented the order to the court commissioner who then signed it. Mrs. Firchau's attorney was not given notice of the dismissal order. Thereafter, Mrs. Firchau's attorney filed a motion for attorney fees and costs and Mr. Firchau's attorney objected, arguing that the court had lost jurisdiction to hear the matter when it entered the order of dismissal. The trial court found that the Firchaus "procured the order of dismissal in pursuit of a scheme to avoid the payment of attorney fees and costs to [Mrs. Firchau's attorney]." *Marriage of Firchau* at 113. The Supreme Court determined that there was substantial evidence in the record to support this finding and therefore upheld the trial court. *Id.* at 114-3.

In *Seals v. Seals*, Mrs. Doris Seals filed a partition action in superior court four months after her divorce had been finalized. Ms. Seals discovered that her ex-husband, Mr. Max Seals, had concealed from her and the trial court the

existence of \$50,420 plus several hundred shares of stock in two corporations. The trial court in a subsequent partition action brought by Ms. Seals found that Mr. Seals breached his fiduciary duty to his wife and willfully and fraudulently failed to disclose assets to her and the trial court. Although the dissolution trial court had dismissed the proceeding and Ms. Seals sought division of the concealed funds pursuant to a separate partition action, the Court of Appeals held that in this instance, it would be manifestly unjust to apply the rule that a court loses jurisdiction to award fees in a dissolution proceeding after entry of the order of dismissal. *Seals* at 657-8. The Court of Appeals also held that to deny Ms. Seals the ability to seek an award of fees pursuant to RCW 26.09.140 would be to penalize her for Mr. Seals' fraudulent conduct. *Seals* at 657.

In all three cases, there is a bad actor and an innocent party and the Courts invoke the "manifest injustice" exception to right a wrong committed by one party against the other. Robert Low acted badly by wracking up his wife's attorney fees and then dismissing his own petition at the last minute in a deliberate attempt to escape having fees assessed against him. The specific holding of the *Low* case was that a party may not escape liability pursuant to RCW 26.09.140 by dismissing his own petition pursuant to CR 41(a). In *Marriage of Firchau*, the husband and wife colluded behind the wife's attorney's back in order to get out of having to pay the wife's attorney for services rendered in the divorce proceeding. The parties engaged in wrong-doing as a deliberate attempt to skirt out of paying money Ms. Firchau legitimately owed her attorney. The husband in *Seals* had

fraudulently concealed tens of thousands of dollars from his wife during their divorce trial and the Court properly concluded that it would be manifestly unjust to not allow the wife to collect attorney fees incurred by recovering her legal interest in the hidden assets.

In each of these cases, there exists some form or combination of collusion, bad-faith, intransigence, fraud, and/or malfeasance. The bad actors made deliberate attempts to skirt their responsibilities and disadvantage the other side to the bad actor's benefit. The threshold for a finding of manifest injustice should require a finding of bad faith, intransigence, collusion, or other similar malice to generate an exception to the rule that the court loses jurisdiction of a case after an order of dismissal has been entered.

Conversely, the trial court in this case did not make any such findings and none exist in the record. In fact, the court specifically found that Appellant was not intransigent, and despite the Respondent's arguments to the contrary, the trial court found that he had not acted in bad faith. The trial court's conclusion that it would be manifestly unjust to not grant Respondent's request for an award of fees is solely and entirely based upon the trial court's finding of need and ability to pay. The consequence of the trial court's ruling means that any time there is need on one side and ability to pay on the other, a litigant could come back at any time and ask the court to award fees. The trial court would always retain jurisdiction over this issue.

The trial court did correctly cite the *Marriage of Low* case, which holds

that invoking the manifest injustice exception “is even more imperative where statutory rights exist that were intended to protect a financially weaker party from the expense of costly litigation or vexatious custody disputes.” *Marriage of Low* at 10. However this language from the *Low* case states that it is the ability of a moving party to *invoke* the exception that is imperative when there exists a disparity in incomes or resources. The *Low* case does not stand for the proposition that the mere existence of disparity in resources, with nothing else, is in and of itself the definition of a manifest injustice. However, this is how the trial judge read the language from the *Low* case and applied it to this case.

Furthermore, the trial court’s reading of the *Low* case is not consistent with the case law in Washington State demonstrating what constitutes a “manifest injustice.” Absent a finding of bad faith, fraud, collusion, intransigence, or some other similar finding, the mere fact that there is financial disparity between the parties in a contentious custody dispute should not, in and of itself, with nothing more, rise to the level of a manifest injustice that would create an exception to the rule that the court loses jurisdiction after an order of dismissal is entered. This was not the holding of the *Low* case and should not be the law in the State of Washington.

If, however, the language from the *Low* case stands for the proposition that the existence of need versus ability to pay can be a basis for finding manifest injustice, such injustice does not exist here. Appellant filed his Notice of Intent to Relocate on August 2, 2016. Respondent sat on her CR 12(b)(6) motion to

dismiss for two and a half months and only raised the issue in her trial brief. During this time, she wracked up nearly \$30,000 of attorney fees. After the trial court granted Respondent's motion to dismiss on the first day of trial, she then, through her attorney of record, drafted the order of dismissal. Respondent and her attorney failed to reserve the issue of her request for attorney fees. Then, three and a half months later, Respondent returns to court asking the trial court to award her fees that she herself could have and should have prevented by filing her 12(b)(6) Motion to Dismiss at the onset of the case, and without having reserved the issue in the Final Order of Dismissal. Without any bad faith, intransigence, collusion, or malice on the part of Appellant and with the Respondent's missteps, there is absolutely no basis to find that it would be a manifest injustice to uphold the general rule that a court loses jurisdiction upon entry of an order of dismissal, even if there exists need and ability to pay.

C. The Trial Court Erred in Finding That Respondent Had Need for Financial Assistance

The evidence on the record demonstrates that the Respondent should have been able to pay her own attorney fees. Respondent may not earn much money, but she has the capacity to work and to hold down a job and earn more money than she actually does, and is therefore voluntarily underemployed. She is not in "need" of financial assistance because she possesses the capacity to earn more than she actually does.

Respondent relies heavily on her parents for support and their finances are inextricably intertwined. Respondent's parents own a horse farm and have

enough money that Respondent's father and Respondent went on a nineteen day cruise through the South Pacific and Antarctica. Respondent's mother has referred to Respondent's attorney as the parents' attorney and has admitted to being prepared to pay Respondent's attorney fees. The only information Respondent provided to the trial court, both in the underlying relocation action and in her motion for fees, was a self-serving financial declaration that appeared to show she has zero income. The trial court ignored the Respondent's parents as resources available to Respondent to help her pay her attorney fees. This was an abuse of discretion and the trial court's finding that Respondent has a need for assistance from Appellant should be overturned.

D. The Trial Court Erred in Finding That Appellant Had Ability To Provide Respondent with Financial Assistance

Appellant does not have the ability to assist with Respondent's legal fees. He and his wife together have four other children besides Wyatt. The financial declaration of Appellant demonstrates where his expenses go, but his wife also has expenses for herself and her children that were not listed in Appellant's financial declaration. Although their household has significant income, their expenses are significant, too. Their budget leaves little room to pay Appellant's own significant attorney fees, let alone Respondent's.

For years following their divorce, Appellant and Respondent resided nearly one mile away from one another in Tenino and Rochester, respectively. Shortly before the relocation case went to trial, Appellant and his family moved to

Joint Base Lewis McChord, which is 42 miles north of Rochester. Appellant's finances were so limited, that he and his wife had to drive Wyatt from JBLM to Rochester every day during their residential time because they still owed attorney fees from the relocation action and could not start saving for an advance fee deposit on a modification action. The trial court acknowledged that this schedule was not in Wyatt's best interest, and it certainly was not in the best interest of Appellant, his wife, or their other children. Yet because their finances were so strapped, this is what they had to do from November of 2016 until the end of the school year in 2017. The trial court erred in finding that Appellant had sufficient disposable income to be able to contribute to Respondent's attorney fees and that finding should be overturned on appeal.

E. The Trial Court Erred in Sustaining An Objection To An Out-Of-Court Statement by Respondent's Mother

The trial court ruled, in error, that a statement from Respondent's mother is inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). As part of his response to Respondent's request for an award of attorney fees, Appellant provided a copy of a letter signed by Respondent's mother. The letter states, "I don't want to give our attorney another 20k and I expect you don't want to either." The "truth of the matter asserted" is that Respondent's mother does not want to give Respondent's attorney of record \$20,000. This was not what Appellant offered the statement to show. Appellant offered this

statement to show first, that Respondent's mother thought of Respondent's attorney of record as the parents' attorney, which is a strong indicator that Respondent's parents are the ones paying for Respondent's attorney fees, and second, that Respondent's parents had already given Respondent's attorney of record \$20,000 and were planning on providing her with an additional \$20,000 if the parties did not reach a settlement. If the trial court had considered the letter from Respondent's mother for this purpose, it could not have found that Respondent had a need for Appellant to assist with Respondent's legal fees, as the evidence indicates Respondent's parents had already supplied Respondent's attorney of record with substantial money and were planning on supplying her with more fees if the case were to move forward.

Respondent did not file any financial information for her parents, but in the relocation action, she did file evidence that they owned a 239,580 square foot parcel of property in Olympia, Washington and were planning to sell it. The asking price in September of 2016 was \$925,000. Respondent stated under oath that her parents were planning on using the proceeds from the sale of this property to build her a home. If Respondent's parents had the resources to build her a new home, they certainly had the ability to pay the \$20,000 owing to Respondent's attorney. The trial court erred in ruling that the out of court statement was hearsay and the trial court should have considered it.

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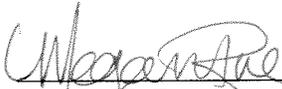
F. This Court Should Order Respondent to Pay Appellant's Attorney Fees On Appeal

Given the significant errors that the trial court made, Appellant requests that the Court of Appeals grant him an award of attorney fees against Respondent pursuant to Rule of Appellate Procedure 18.1.

V. CONCLUSION

Appellant respectfully requests that this Court overturn and vacate the order of the trial court entered on May 19, 2017, ordering Appellant to pay \$15,000 to Respondent's attorney, and that any and all fees paid to date be returned to him.

Respectfully submitted,

  
Megan K. Rue, WSBA #42425  
MORGAN HILL, P.C.  
Attorneys for Petitioner/Appellant

**MORGAN HILL, P.C.**

**February 05, 2018 - 2:32 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50456-1  
**Appellate Court Case Title:** Eric Chastain, Appellant v. Stephanie Chastain (Childress), Respondent  
**Superior Court Case Number:** 10-3-00073-0

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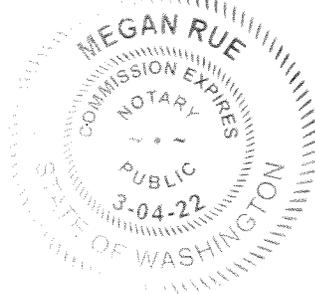
Stephanie Childress (f.k.a. Chastain)  
4811 - 176<sup>th</sup> Ave SW  
Rochester, WA 98579

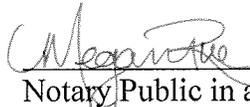
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Name: Cheryl L. Faul of  
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SUBSCRIBED AND SWORN to before me this 5<sup>th</sup> day of February 2018, by Cheryl L. Faul.





Notary Public in and for the State of  
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My commission expires 3/4/2022  
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