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No. 53648-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

MARIALYCE ESSER,

Appellant,

v.

GERALD ESSER,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Amber L. Finlay

OPENING BRIEF OF APPELLANT

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A. INTRODUCTION

This is a case about a trial court judge who put the cart before the horse. The trial court committed legal error when it failed to conduct a mandatory pretrial *Gannon*[1] hearing to determine if divorce is in the best interests of the incapacitated party, Gerald Esser. Instead, the trial court folded the pretrial *Gannon* hearing into the trial and made a *Gannon* finding at the conclusion of trial.

Had the court conducted the required pretrial *Gannon* hearing, the rest of the trial issues would likely have been resolved via mediation, since the parties had successfully mediated before. By failing to follow *Gannon*, the trial court deprived the wife, Mari[2], of a significant settlement opportunity, forcing Mari to pay for an entire trial before finding out how the trial court would resolve a threshold issue. The decree of dissolution and all associated rulings must be vacated and remanded for a new trial preceded by a separate pretrial hearing as mandated by *Gannon*.

The trial court abused its discretion when it excluded evidence of Gerald's incapacity at the time he filed the petition for

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[1] 104 Wn.2d 121, 702 P.2d 465.

[2] The parties are referred to by their first name for clarity. No disrespect is intended.

dissolution as irrelevant to the issue of the LGAL's authority to maintain the dissolution action; Gerald had been diagnosed with Alzheimer's three years before he filed the petition.

The trial court also erred in ordering Mari to reimburse Gerald's children $47,862.70 for Gerald's post-separation legal fees for items like drawing up a new will that cut out Mari and bequeathed Gerald's estate to his children, drawing up the unsuccessful Petition For Protection Of Vulnerable Adult, the Counterpetition for Dissolution, and other related items at the beginning of separation. Because the trial court failed to articulate any findings or basis either oral or written for ordering Mari to pay these attorney fees and no basis existed in the record, the order must be vacated.

B. ASSIGNMENTS OF ERROR

1. The trial court committed reversible legal error when it proceeded to trial in the absence of a special petition filed by the LGAL seeking authority to proceed with the dissolution.

2. The trial court committed reversible legal error when it denied Mari's motion to hold a *Gannon* hearing before trial commenced. 1 RP 48-49.

3. The trial court abused its discretion when it excluded

evidence regarding Gerald's incapacity at the time of filing the counterpetition for dissolution as irrelevant to the issue of whether a dissolution is in his best interest. 5 RP 699.

4. The trial court abused its discretion when it ordered Mari to pay $47,862.70 of Gerald's post-separation attorneys fees and legal costs without articulating a basis for that order. CP 393-94.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In *Gannon,* our Supreme Court explicitly directed that "[i]n cases in which the guardian or GAL believes a dissolution to be in the best interests of the incompetent ward, such authority must be sought specifically by a special petition for that purpose. The court must then hold a hearing to obtain evidence of what action is in the best interests of the ward." 104 Wn.2d at 125. Here, Gerald brought no such petition and when Mari moved for a pretrial *Gannon* hearing the court refused to conduct such a hearing. Did the trial court commit reversible error by conducting a trial without first determining whether the LGAL had authority to seek a dissolution for Gerard? (Assignments of Error 1 and 2.)

2. Nationwide, courts have identified pre-incapacity filing for divorce as indicating intent to divorce, and thus relevant to the

determination of the incapacitated person's best interest.[3] Here, the trial court excluded Mari's evidence that Gerald was already incompetent at the time he filed the counterpetition, ruling it is irrelevant to the best interest determination. 7 RP 6. The trial court based its decision that divorce is in Gerald's best interest in large part upon Mr. Esser's filing of a counterpetition for dissolution. 7 RP 6. Should Washington follow other states that have held that capacity at the time of filing the petition for dissolution is relevant to the best interest determination? If yes, did the trial court abuse its discretion when it excluded evidence regarding Gerald's incapacity at the time of filing the counterpetition for dissolution as irrelevant to the issue of whether a dissolution is in his best interest? (Assignment of Error 3.)

3. "Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record." *Mahler v. Szucs*, 135 Wn.2d 398, 433-35, 957 P.2d 632 (1998). Here, the trial court ordered Mari to pay $47,862.70 in

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[3] *See*, *In re Salesky*, 157 N.H. 698 (2008); *In re Marriage of Burgess*, 189 Ill.2d 270 (2000); *Northrop v. Northrop* No. CN94-9882 (Delaware 1996); *In the Matter of Parmer*, 755 S.W.2d 5 (1988).

Gerald's post-separation legal fees and costs without entering any findings or conclusions to support the fee award. Must the fee award be vacated and remanded? (Assignment of Error 4.)

D. STATEMENT OF THE CASE

Mari and Gerald married in 1989 and separated in September, 2016. 2 RP 118.[4] According to Mari's uncontroverted testimony, Gerald was diagnosed with Alzheimer's in 2014 and they discussed his condition many times, definitively agreeing in 2015 that they would stay married throughout his disease. 4 RP 633-35.

Sadly, as his Alzheimer's progressed, Gerald became more physically and verbally violent toward Mari. 4 RP 636. After he was violent to Mari, Gerald would apologize and say, "please, please don't leave me," and Mari would agree to stay with him. 4 RP 634. On September 20, 2016 Gerald physically attacked Mari again and Mari was afraid he would kill her. 4 RP 637. Mari defended herself. 5 RP 740-52. Both parties sustained injuries. *Id.* After the incident ended, Gerald helped Mari get up and help her replace the splint

[4] The Report of Proceeding consists of 8 volumes. Volumes 1-6 and Volume 8 are sequentially numbered and will be referred to by the volume number followed by "RP" followed by the page number. Volume 7, the court's ruling, was transcribed prior to appeal by a different court reporter and is numbered separately. It will be referred to as "7 RP" followed by the page number.

that had been ripped off her. 5 RP 678-9. Mari told Gerald that she was leaving, she needed to get out of the house and she was afraid she was going to get killed if she stayed there. 5 RP 678. Gerald then said, "I'm going to get my stuff and I'm going to go" and then went across the street to their neighbor Mary Twohy's home and asked her for help, telling her that he needed to get out of the house, he was afraid of Mari, and he was going to get killed if he stayed there. 2 RP 101, 104.

Ms. Twohy called the police, who arrested Mari. 2 RP 104, 107. Mari was charged with assault, and the case was dropped in the pretrial stage. 7 RP 7. Medics contacted Gerald's daughter Cheri and she and her brother came to pick up Gerald at the hospital. 2 RP 230-31. Cheri and her brother Scott retained an attorney and helped Gerald file a Petition For Vulnerable Adult Protection Order to protect him from Mari. 2 RP 232-34. That Petition was dismissed as well. 7 RP 8. Cheri and her brother also retained an attorney to change their father's will. 3 RP 309. An attorney was hired to handle legal separation/dissolution and to handle guardianship issues. 3RP 303-04. Mark Elgot was appointed Guardian Ad Litem for Gerald at some point in 2016 before September 22, 2016, exact date not in this record. 3 RP 304, CP 13.

On September 22, 2016, a Durable Power Of Attorney for Health Care for Gerald A. Esser and a Durable Power of Finances for Gerald Esser were executed. CP 12. Mari filed for legal separation on December 6, 2016. CP 1. On March 9, 2017, a settlement order was entered dismissing Gerald's guardianship and putting in place attorneys-in-fact to handle Gerald's affairs for him. 2 RP 119. GAL Mark Elgot indicated by his signature on the dismissal that he deemed Gerald competent and able to understand this document. CP 13.

With his childrens' help, Gerald filed a counterpetition for divorce on August 23, 2017, three years after he was diagnosed with Alzheimer's. 2 RP 118. On February 9, 2018, Mari filed for a Litigation Guardian Ad Litem (hereinafter, "LGAL") to be appointed for Gerald. 2 RP 140. Mr. Kogut was appointed LGAL on March 21, 2018 and testified that when he met with Gerald in April 2018 Gerald "had the ability to communicate with me" but when he met with Gerald a second time in June, 2019, Gerald did not recognize him and could not communicate with him. 2 RP 115-16, 141.

Neither Gerald's attorney nor the LGAL filed the special petition mandated by *Gannon*. As a result, Mari's attorney moved

pretrial for a *Gannon* hearing. 1 RP 3. Gerald's attorney told the court "I think it's pretty clear, Your Honor, that we learned of *Gannon* when Ms. Denton filed her motion two weeks before trial." 4 RP 547. The court denied Mari's motion for a pretrial hearing and chastised Mari for bringing the motion so soon before trial. 1 RP 30. The trial court appeared to believe that despite *Gannon*'s explicit instruction to require a "special petition" and "a hearing" to determine whether the guardian has authority to pursue the dissolution, (104 Wn.2d at 125), no special petition was needed and the *Gannon* issue could be integrated as part of the trial, "not a separate proceeding." 1 RP 48-49.

At trial it was established that Gerald's children Cheri and Scott paid a total of $47,862.70 in attorney fees on behalf of their father to have the unsuccessful Petition for Vulnerable Adult protection order filed, to change their father's will, to handle the guardianship and attorney-in-fact documents, and to handle the separation/dissolution. 3 RP 266-67, 309, 398. The trial court ordered that Mari pay this amount directly out of her share of the property award. CP 393-94. The court did not orally articulate a basis for this fee award, nor did it enter any findings explaining the fee award.

On the fourth day of trial, the court reminded the parties that it had not yet made a decision on *Gannon*. 4 RP 547. Mari attempted to elicit testimony to support her argument that Gerald was already incapacitated by the time his children obtained an attorney for him to file the petition for dissolution on his behalf, and thus the petition was not a reliable indicator of his intent to be divorced but instead reflected his children's desire to inherit his estate. 5 RP 687. The trial court ruled that this evidence and the argument were inadmissible because they were irrelevant, stating that "whether he was incapacitated before I don't find relevant to the issue of is it in his best interest because the court makes that decision based on the fact that he's incapacitated now." 5 RP 694, 699.

At the conclusion of trial, the court orally ruled that it was in Mr. Esser's best interests to be divorced. 7 RP 6. The court distinguished *Gannon*, saying that the difference between them is that "Mr. Esser was deemed competent prior to filing a counter-petition for a dissolution. So, we had an active dissolution proceeding at the time that he then was found to be incompetent and a litigation guardian ad litem was appointed to represent his interest." 7 RP 2.

During the trial and subsequent oral rulings, the trial court discussed *Gannon* a great deal; yet it did not discuss or acknowledge the fact that *Gannon* requires Mr. Esser's LGAL to file a special petition to obtain authority to proceed with the dissolution. Neither did the trial court discuss or acknowledge *Gannon*'s requirement that a special pretrial hearing be conducted to determine whether the LGAL should have this authority.

Ms. Esser moved for reconsideration and this appeal timely followed. CP 223, 404, 517.

E. ARGUMENT

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT CONDUCTED TRIAL IN THE ABSENCE OF A SPECIAL PETITION AND A PRETRIAL *GANNON* HEARING

a. The standard of review is *de novo*. The Supreme Court did not leave it up to the trial court to decide as a discretionary matter whether to require the LGAL to file a special petition for authority to proceed with a dissolution; the filing of a petition is mandatory. *Gannon*, 104 Wn.2d at 125. When the court's discretion is not at issue, the standard of review is *de novo*. *Robinson v. American Legion Department of Washington, Inc.*, 452 P.3d 1254, 1262 (2019). Similarly, *Gannon* mandates that a

hearing be held to determine whether dissolution is in the best interest of the incapacitated ward. *Id*. The court's discretion is not at issue. A *Gannon* hearing can be analogized to a summary judgment proceeding as both are threshold proceedings which may be dispositive. As when this court reviews summary judgment proceedings, the appropriate standard of review here is *de novo*. *Brinkerhoff v. Campbell*, 99 Wn.App. 692, 994 P.2d 911 (2000).

b. The trial court did not have authority to proceed with the dissolution because the LGAL failed to seek authority to act by a special petition. *Gannon* instructs that "[i]n cases in which the guardian or GAL believes a dissolution to be in the best interests of the incompetent ward, such authority **must** be sought specifically by a special petition for that purpose." 104 Wn.2d at 125. [Emphasis added.] Bringing a special petition is therefore not optional, it is obligatory. When words of common meaning are used, that meaning must be applied unless the result is absurd or incongruous. *In re Lehman*, 93 Wn.2d 25, 604 P.2d 948 (1980). "Must" is an auxiliary verb meaning 1. To be obliged or bound to by an imperative requirement, 2. To be under the necessity to; need to, 3. To be required or compelled to, as by the use or threat of force. Dictionary.com https://www.dictionary.com/browse/must

The plain language of *Gannon* provides that unless a special petition is brought by the LGAL (or guardian or GAL), that LGAL lacks authority to pursue a dissolution on behalf of the ward. If the LGAL lacks authority to pursue the dissolution, the court cannot proceed with the dissolution trial.

Gannon remains good law in Washington and no subsequent case or statute has altered it. Washington appears to be unique in its procedural requirement for a guardian to submit a petition for a hearing to seek authority to proceed with a dissolution. Given the lack of cases on this topic in Washington or any other state, *Gannon* must be taken to mean what it says: "such authority **must** be sought specifically by a special petition for that purpose." 104 Wn.2d at 125. [Emphasis added.] There is no ambiguity in this language. The bringing of a special petition is mandatory and in the absence of such a petition, the court lacked authority to proceed with the dissolution. Reversal is required.

c. The trial court committed reversible error when it denied Mari's motion to hold a *Gannon* hearing before trial commenced. *Gannon* explicitly obligates the trial court to hold a hearing to determine whether a guardian or GAL possesses authority to move forward with a dissolution on behalf of an

incapacitated party. 104 Wn.2d at 125. "…[S]uch authority must be sought specifically by a special petition for that purpose. The court **must then hold a hearing** to obtain evidence of what action is in the best interests of the ward." *Id*. [Empasis added.]

Mari acted in good faith by bringing her own motion alerting the court to the need for a *Gannon* hearing when, shortly before trial, it became obvious that the LGAL was not going to do so. 1 RP 3, 4 RP 547. Mari had no obligation to bring such a motion as *Gannon* places the burden of bringing the special petition squarely upon the LGAL: "In cases in which the guardian or GAL believes a dissolution to be in the best interests of the incompetent ward, **such authority must be sought specifically by a special petition for that purpose**." 104 Wn.2d at 125. [Emphasis added.] Mari was concerned as it appeared that the issue of whether the LGAL had authority to pursue dissolution for Gerald was not going to be addressed at all unless she raised it. The LGAL's attorney admitted he had never heard of *Gannon* before Mari brought her motion. 4 RP 547. Yet when she brought her motion one week before trial, the LGAL's attorney accused her of being "disingenuous" and the trial court chastised her, telling her she should have brought the motion – one she had no obligation to

bring at all and that the opposing party was obligated to bring and failed to bring – sooner: "It makes no sense to the court that it was brought a week before the trial." 1 RP 30. "I do find that it is untimely. I do find that on the facts that it is based on, this could have very well have [sic] been made earlier and not the week before trial." 1 RP 31. The trial court reserved the issue of an award of attorneys fees against Mari for bringing the motion. *Id*.

The trial court spoke about *Gannon* at great length throughout the trial as well as after the trial. Yet in none of its lengthy pronouncements and analyses did the trial court address *Gannon*'s requirements of a special petition and a pretrial hearing. The court never acknowledged the petition requirement or the LGAL's complete failure to bring such a petition.

At the beginning of the proceeding, the trial court stated it would handle the *Gannon* issue as a motion in limine. 1 RP 36. Then the court clarified that it would integrate the *Gannon* issue into the trial as a whole: "[s]o it's an issue that has to be resolved in the context of the trial.... It's a motion in limine, so it's part of the trial ... obviously, if the court finds it's not in the best interest, that obviously changes the complexion of what we do .... but it is part of this trial. It's not a separate proceeding." 1 RP 48-49. The trial court

did not rule on the issue of whether the LGAL had authority to pursue the dissolution until the end of trial. 7 RP 6-12.

This fact pattern is not found in any other Washington appellate case and Washington appears to be unique in its procedural requirement for a guardian to submit a petition for a pretrial hearing to seek court authority to maintain a dissolution on behalf of an incapacitated ward. Yet *Gannon* lies on the more permissive end of the national spectrum on this issue because it does not require a specific statutory basis for the guardian to maintain a divorce. 24 Am.Jur.2d Divorce and Separation § 200, February 2020 Update. Two other states have considered the need for a pretrial hearing on this issue and both have decided that when a *Gannon*-type hearing is required, it must be held before trial, not as part of the trial.

In *In the Matter of Parmer*, 755 S.W.2d 5 (1988), decided three years after *Gannon*, the Missouri Court of Appeals held that a trial court acted correctly when it held a pretrial hearing on a guardian's petition to determine whether the dissolution was in the incapacitated person's best interests. 755 S.W.2d at 7. Once that threshold determination was made, the guardian was ordered to proceed with the dissolution. *Id*.

In *Northrop v. Northrop* No. CN94-9882 (1996)[5], the Delaware appellate court, after conducting an extensive review of other states' treatment of this issue, remanded a case for a separate pretrial hearing "to permit the presentation of evidence as to whether circumstances exist in this matter which would justify permitting this divorce action to go forward." *Id*. at 9. The appellate court approved an exception to the majority rule of an absolute bar on divorces litigated by a guardian for an incompetent petitioner when "the incompetent spouse, when competent, expressed a strong desire to be divorced and when evidence establishes that but for the incompetency, that spouse would have proceeded with a divorce action." *Id*. at 9.

Nationwide, there is a split of authority on the issue of whether a suit for divorce may ever be brought by a guardian on behalf of an incompetent person. 24 Am.Jur.2d Divorce and Separation § 200, February 2020 Update. The majority of cases support the view that in the absence of a statute specifically authorizing suit for divorce by a guardian on behalf of an

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[5] Unpublished; this decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. GR 14.1.

incompetent ward, such a suit cannot be instituted and maintained by a guardian of an incompetent, because a marriage can be dissolved only with the consent and at the instigation of the injured spouse personally, and such consent cannot be given by one who was legally incompetent. *Id*. Thus, in some jurisdictions, a spouse who is mentally incompetent may not maintain an action for divorce either on his or her own behalf or through a guardian. *Id*.

In other jurisdictions, where a guardian, committee, or next friend may maintain a divorce action, such a cause of action is predicated upon an express statute or a general statute relating to actions by incompetent persons. *Id*. But "[i]f a general guardian or guardian ad litem for an incompetent believes a dissolution is in the best interests of a ward, he or she may specially petition the court for specific authority to seek dissolution. The court must then hold a hearing to determine the best interests of the ward in relation to the necessities and interests of the competent spouse. [citing *Gannon*.]"

The *Gannon* court took note of the national trends on this issue and chose where on the spectrum to place Washington on this issue. 104 Wn.2d at 125. In so doing, our Supreme Court instituted two specific safeguards – the requirement of bringing a special

petition and the requirement of a pretrial hearing. *Id*. Even so, *Gannon* was a split decision, with three justices preferring to maintain the long-standing rule barring a guardian from maintaining a dissolution without specific statutory authorization. 104 Wn.2d at 124-6. If this court fails to uphold the *Gannon* safeguards, Washington, which has no specific statute authorizing a guardian to maintain a dissolution on behalf of an incompetent ward, will lie far outside the national spectrum on this issue and risk violating the sanctity of marriage.

d. <u>The trial court's failure to conduct the pretrial hearing caused Mari real harm because it required her to pay for an entire trial before finding out the result of a threshold determination</u>. Of more immediate concern is the very real harm to Mari from the trial court's failure to hold a pretrial hearing. The trial court's failure to determine pretrial whether the LGAL had authority to proceed with the dissolution caused Mari to have to pay to litigate the full trial before finding out the trial court's ruling on this threshold issue. Mari had demonstrated that she was amenable to coming to a CR2A agreement with the other party during this proceeding (CP 13-18). As with a summary judgment motion or an adequate cause hearing for modification of a parenting plan, the purpose of a threshold

hearing is to prevent useless litigation. *In re Marriage of Adler*, 131 Wn.App. 717, 724, 129 P.3d 293 (2006). In this case, the trial may very well have been useless because once a threshold determination is made, the appetite for trial often diminishes and settlement frequently occurs. Because of the trial court's error, Mari had to endure and pay for an entire trial that likely would have been avoided had the trial court held the required pretrial hearing.

e. <u>The trial court abused its discretion when it excluded evidence regarding Gerald's incapacity at the time of filing the counterpetition for dissolution as irrelevant to the issue of whether a dissolution is in his best interest</u>. Nationwide, courts that have addressed this issue have identified pre-incapacity filing for divorce as indicating intent to divorce, and thus highly relevant to the determination of the incapacitated person's best interest.

In *In re Marriage of Burgess*, 189 Ill.2d 270 (2000), the court relied heavily upon the fact that the petitioner was not found incapacitated until almost a year after he filed a petition for dissolution of marriage. *Id*. at 271, 279. *Burgess* especially noted the importance of determining with certainty that the ward would have wanted to end the marriage. *Id*. at 276, 279. *Burgess* pointed to 755 ILCS 6/11a-17 which provides:

> If the ward filed a petition for dissolution of marriage under the Illinois Marriage and Dissolution of Marriage Act before the ward was adjudicated a disabled person under this Article, the guardian of the ward's person and estate may maintain that action for dissolution of marriage on behalf of the ward.

The *Burgess* court observed that "majority jurisdictions choose an absolute bar [to permitting a guardian to maintain a divorce action on behalf of an incompetent spouse] as the lesser of two evils, protecting the possibility that the incompetent spouse might elect to remain married if competent, even if it effectively prevents the incompetent spouse from ending the marriage while under the adjudication of incompetency." *Id*. at 276. *Burgess* explicitly highlights that the competency of the spouse when the petition was filed is not only a relevant issue, it is central.

Similarly, In *In re Salesky*, 157 N.H. 698 (2008), the court determined that the petitioner was still competent when he initiated the divorce, finding this an important factor in allowing the guardian to maintain the divorce on the petitioner's behalf once the petitioner became incapacitated. *Id*. at 705.

Likewise, in *Northrop v. Northrop*, 1996 WL 851489

(Delaware 1996),[6] the court arrived at a similar conclusion after conducting an exhaustive nationwide survey of relevant cases. The *Northrop* husband petitioned for divorce on his 81st birthday after 53 years of marriage; seven months later he was diagnosed with Alzheimer's and his doctor attested he was now mentally infirm. *Id.* The court's analysis centered on the fact that the husband was not yet incapacitated when he filed the petition. *Id.* at 2-3. The *Northrop* court viewed the competency of the petitioner at the time of filing the petition to be of especial importance, allowing a guardian to proceed with divorce "especially when the incompetent spouse, when competent, expressed a strong desire to be divorced and when evidence establishes that but for the incompetency, that spouse would have proceeded with a divorce action." *Id.* at 9.

In the same way, in *In re Parmer*, 755 S.W.2d 5, the Missouri Court of Appeals affirmed a trial court judgment permitting the mother of a wife who had been appointed guardian of the wife over the objection of the husband, to file a petition seeking authorization to prosecute on behalf of her ward the divorce action which the wife

[6] Unpublished; this decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. GR 14.1.

had begun before she was declared incompetent. Because the ward demonstrated her desire to divorce before she was declared incapacitated and because the court, after a hearing, concluded that it was in the ward's best interest to dissolve the wife's marriage, the Missouri court approved the guardian's maintenance of the divorce action. *Id.*

These cases demonstrate the widespread view that the mental capacity of the petitioner at the time of filing the petition is a central issue in determining whether the LGAL has the authority to maintain the dissolution.

Yet here, Mari attempted to testify that she began to notice Gerald's mental problems and difficulty in understanding particular things like real estate contracts in 2014, the year he was diagnosed with Alzheimer's, **three (3)** years before he filed the petition for dissolution. 5 RP 687. The trial court excluded this evidence, ruling that it was not relevant: "**whether he was incapacitated before I don't find relevant to the issue of is it in his best interest because the court makes that decision based on the fact that he's incapacitated now**." 5 RP 699. [Emphasis added.] The court also declared: "The court makes the decision whether or not it is in his best interest. I'm making that decision only because

currently, he is incapacitated. So I'm not sure incapacitated before is very relevant to the court's decision." 5 RP 694. This was an abuse of discretion because evidence of Gerald's capacity or lack thereof is not irrelevant to the best interests determination; it is central to that determination.

Gerald was diagnosed with Alzheimer's three years before he filed the divorce petition. CP 106. He was subject to guardianship due to mental incapacity from Alzheimer's dementia before he filed the petition. CP 12-17. Even though guardianship was temporarily ended in favor of an attorney-in-fact arrangement, Gerald never regained control of his own affairs; the guardianship transitioned directly to an attorney-in-fact arrangement whereby others controlled Gerald's financial and medical affairs for him. *Id*. Gerald was found incompetent and in need of guardianship long before he filed the petition and he never again was in control of his own affairs.

The only indication of competence is that a nonmedical GAL, Mark Elgot, signed a document saying he believed that on the day he ended his guardianship (and Gerald's affairs were taken over by attorneys-in-fact) that Gerald was competent. CP 13. Together, these facts cast serious doubt on Gerald's competency at the time he

filed the counterpetition.

This case demonstrates why the procedure set forth in *Gannon* makes sense. Requiring the LGAL to file a special petition puts the court and the respondent on notice that evidence will be taken on a particular date on the issue of the LGAL's authority to maintain the dissolution action. As shown above, this necessarily includes evidence on the petitioner's capacity at the time she or he filed the petition. When notice is given and a hearing date is set, the parties have due process and sufficient time to marshal and present their evidence on the issue. When the pretrial hearing is held, the parties have the opportunity to present their evidence and the court has the information it needs to make the threshold determination. Depending on the outcome, the parties have an opportunity to choose to settle the case rather than proceed to an expensive trial. It is a fair and logical procedure; and it is mandatory.

Here, in contrast, the LGAL never filed a special petition and no hearing was held. Mari was forced to litigate both the threshold issue and the merits of the case simultaneously rather than having the opportunity to focus the court properly on the threshold issue. The trial court excluded Mari's evidence on the central issue of Gerald's competence when he filed the petition. It is not possible to

give deference to the trial court's decision on this factual issue because the trial court expressly declined to hear evidence on it, terming Gerald's capacity before the present time "irrelevant." 5 RP 694, 699. Yet the trial court based its decision that divorce is in Gerald's best interest in large part upon Gerald's filing of a counterpetition for dissolution, simply assuming that although it is undisputed that he had been diagnosed with Alzheiemer's three years previously, he was competent at the time he filed the petition because on that date he was between guardianships and his affairs were handled by attorneys-in-fact. 7 RP 6.

The trial court's treatment of this issue in no way resembles the logical, orderly and fair process mandated in *Gannon*. The trial court abused its discretion when it excluded evidence regarding Gerald's incapacity at the time of filing the counterpetition for dissolution as irrelevant to the issue of whether a dissolution is in his best interest, and abused its discretion in disregarding Gannon's requirements of a special petition and pretrial hearing on the issue of the LGAL's authority. This court must reverse and remand for a new trial to be preceded by a pretrial *Gannon* hearing at which evidence is taken on Gerald's competence at the time he filed the counterpetition.

2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED MARI TO PAY $47,862.70 OF GERALD'S POST-SEPARATION ATTORNEYS FEES AND LEGAL COSTS WITHOUT ARTICULATING A BASIS FOR THAT ORDER.

Liabilities incurred after separation, including attorney fees incurred, are presumed to be the separate debt of the incurring spouse. *Oil Heat Co. of Port Angeles, Inc. v. Sweeney*, 26 Wn.App. 351, 354, 613 P.2d 169 (1980). Trial courts must provide sufficient findings of fact and conclusions of law to develop an adequate record for appellate review of an attorney fee award. *In re Marriage of Bobbitt*, 135 Wn.App. 8, 30, 144 P.3d 306 (2006).

In *Bobbitt*, the trial court awarded $10,000 in attorney fees merely "for the necessity of having to pursue this action." *Id.* at 30. This court reversed the fee award, holding that the trial court provided insufficient findings of fact and conclusions of law regarding the award to provide a record for appellate review. *Id.*

Appellate courts exercise a supervisory role to ensure that the trial court's discretion to award fees is exercised on articulable grounds. *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998). In *Mahler*, our Supreme Court noted that "Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the

award to the trial court to develop such a record [citations omitted]. Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record." *Id*. at 433-35.

In *Mahler*, there were no findings and the record contained fee affidavits from four different counsel or firms who represented Mahler and the appellate court could not discern from the record if the trial court thought the services of four different sets of attorneys were reasonable or essential to the successful outcome. *Id*. at 435. Additionally, the Supreme Court could not tell from the record if the trial court considered whether there were any duplicative or unnecessary services or whether the hourly rates were reasonable. *Id*. at 435. The Supreme Court concluded "Fee decisions are entrusted to the discretion of the trial court [citation omitted], but we will exercise our supervisory role to ensure that discretion is exercised on articulable grounds." *Id*. at 435.

Here, the trial court awarded Gerald's children Cheri and Scott a total of $47,862.70 in attorney fees, ordering Mari to pay this amount from her share of the property award. CP 393-94. The fees incurred were for Gerald to have the unsuccessful Petition for

Vulnerable Adult protection order filed, to change Gerald's will to make his children his beneficiaries, to handle the guardianship and attorney-in-fact documents, and to handle the separation/dissolution. 3 RP 266-67, 309, 398. The court did not orally articulate a basis for this fee award or indicate any way in which Mari caused these fees to be incurred, nor did it enter any written findings explaining the basis for the fee award.

The trial court's assorted remarks at points during and after trial generally indicated that it believed Cheri and Scott should be paid back for the various expenses they incurred on behalf of Gerald. The trial court did not specifically indicate why the attorneys fees should awarded to Gerald or why Gerald should not be required to pay his children back for his attorney fees. Neither did the trial court refer directly or indirectly to need or ability to pay the attorneys fees, intransigence at the time of separation or relating specifically to the matters for which the attorneys fees were expended, or any way in which Gerald was a prevailing party against Mari in these matters.

A fee award must be supported by findings of fact and conclusions of law sufficient to establish a basis for review. *Mahler*, 135 Wn.2d at 433-35. Given that the fee award here was supported

by no findings or conclusions and no remarks that could be construed as findings or conclusions, this Court is unable to review the fee award. It must be reversed. *Id.*

3. ON REMAND, THIS MATTER MUST BE HEARD BY A DIFFERENT JUDICIAL OFFICER

Litigants are entitled to a judge who appears to be and is impartial. *Magana v. Hyundai Motor Am.*, 141 Wn.App. 495, 523, 170 P.3d 1165 (2007), *rev'd on other grounds*, 167 Wn.2d 570 (2009). Where a trial court judge appears to have difficulty setting aside a previously expressed opinion, this Court will order a new judge be appointed to preserve the appearance of fairness. *See In re Custody of R.*, 88 Wn.App. 746, 762, 947 P.2d 745 (1997) ("justice must satisfy the appearance of impartiality"), *superseded by statute as stated in In re Marriage of Tostado*, 137 Wn.App. 136, 151 P.3d 1060 (2007).

In *Saldivar v. Momah*, 145 Wn.App. 365, 186 P.3d 1117, *reconsideration granted in part*, *rev. denied*, 165 Wn.2d 1049 (2009), the appellate court remanded to a different judge because the trial judge's statements—impugning certain witnesses' credibility—suggested that she would have a hard time setting aside previously expressed opinions. And in *McCausland v.*

McCausland, 129 Wn.App. 390, 417, 118 P.3d 944 (2005), *reversed on other grounds*, 159 Wn.2d 607 (2007), the appellate court remanded to a different judge where the trial judge failed to strictly follow the mandate on remand. Reassignment is more appropriate when the appellate court's decision does not effectively limit the trial court's discretion on remand. *State v. McEnroe,* 181 Wn.2d 375, 387, 333 P.3d 402 (2014).

Here, the trial court emphatically and repeatedly stated that it believed the issue of Gerald's competence at the time he signed the petition for divorce is irrelevant to the issue of whether maintaining the divorce is in his best interest. 5 RP 694, 699. Given the trial court's repeated statements on this matter, it would be difficult for the trial court to set aside this belief and give proper weight to the issue of his competence on remand.

Additionally, the trial court was tone deaf to the evidence that Gerald's children had used their influence over him to persuade him to change his will to their benefit, cutting Mari out; the trial court apparently believed such evidence to be irrelevant. 5 RP 694, 699. Yet *Gannon* takes such concerns seriously, cautioning that a dissolution must be in "the best interests of the ward, not just

of his heirs." 104 Wn.2d at 125. A different judicial officer should hear this matter on remand.

4. THIS COURT SHOULD AWARD ATTORNEYS FEES TO MARI

Pursuant to RAP 18.1, a party may recover attorney fees and costs at trial and on appeal when granted by applicable law. RCW 26.09.140 provides for an award of reasonable attorney's fees for maintaining or defending an action under RCW Chapter 26.09. Mari should not have had to pay attorneys fees for a trial and appeal since the obligatory pretrial threshold *Gannon* determination was not made until the end of trial. Gerald's attorney admitted that he had no intention of bringing the special petition *Gannon* requires and he urged the trial court to disregard *Gannon* and sanction Mari for bringing the motion. 1 RP 11-17, 4 RP 547, The trial court's failure to follow the procedure set forth in *Gannon* cost Mari attorneys fees at trial and on appeal. Further, Mari has filed for bankruptcy and thus presents a case of genuine financial need for fees. Mari will file an affidavit of need as required by RAP 18.2(c) more than ten days before oral argument. Under RAP 14.2, this Court should award these costs and fees if Mari is the substantially prevailing party in this action.

F. CONCLUSION

The trial court committed reversible legal error when it proceeded to trial in the absence of a special petition required by *Gannon* that would provide the LGAL authority to proceed with the dissolution. Additionally, the trial court committed reversible legal error when it denied Mari's motion to hold a *Gannon* hearing before trial commenced, instead ruling on the threshold *Gannon* issue at the end of trial. In so doing, the trial court forced Mari to pay for an entire trial before receiving the court's ruling on a threshold matter. This deprived Mari of the opportunity to pursue settlement based on the outcome of the *Gannon* ruling and avoid the cost of a trial.

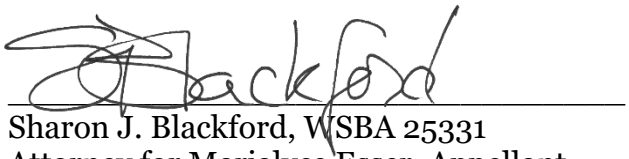
Further, the trial court abused its discretion when it excluded evidence regarding Gerald's incapacity at the time of filing the counterpetition for dissolution as irrelevant to the issue of whether a dissolution is in his best interest. 5 RP 699.

Finally, the trial court abused its discretion when it ordered Mari to pay $47,862.70 of Gerald's post-separation attorneys fees and legal costs without articulating any basis, either oral or written, for that order.

The final orders must be reversed and remanded for a new trial preceded by a pretrial *Gannon* hearing.

DATED this 6th day of April, 2020.

Respectfully submitted:



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CERTIFICATION OF SERVICE

I, Sharon J. Blackford, certify that on the 6th day of April, 2020, I caused a true and correct copy of **Opening Brief of Appellant** to be served on:

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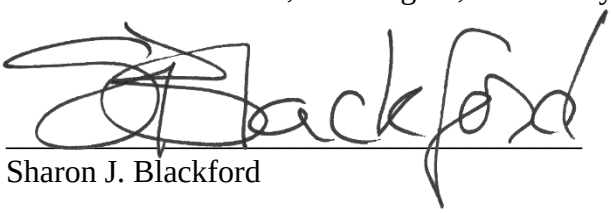
VIA the Washington Appellate Courts eFiling portal.

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED in Shoreline, Washington, this 6th day of April, 2020.



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