

MAR 27 2012

**No. 30203-2-III**

**COURT OF APPEALS - DIVISION III  
STATE OF WASHINGTON**

Spokane County Superior Court, Cause # 09-3-02687-2  
The Honorable Annette Plese  
Superior Court Judge

**In re the Marriage of  
WALTER VAN HEEMSTEDE OBELT,  
Petitioner  
v.  
SUSAN VAN HEEMSTEDE OBELT,  
Respondent**

RESPONSIVE BRIEF  
of  
APPELLEE/RESPONDENT  
Susan van Heemstede Obelt

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### Issues Pertaining to - Intransigence

1. Is the standard of review on appeal “abuse of discretion?”

Brief Answer: Yes.

2. Did the court abuse it’s discretion when it found the husband intransigent when he repeatedly: (a) violated court orders, (b) refused to provide discovery despite three court orders and 19 documented attempts, (c) failed to pay court appointed experts, (d) frustrated efforts to sell the house, (e) filed false and misleading declarations, (f) stipulated to “abusive use of conflict” in the parenting plan, (g) demonstrated a lack of candor to the court, and (h) used the court just for conflict?

Brief Answer: No, a party is intransigent when he engages in foot-dragging, delay tactics, and unnecessarily causes the other party to incur fees and costs.

3. Was \$5000 in attorney’s fees reasonable following a finding of intransigence?

Brief Answer: Yes, the award of fees was limited to those reasonably due to intransigence and because Susan had not been fully compensated for these fees.

4. Is the husband’s initial objection to “imputed income” (for child support purposes) “deemed abandoned” if he fails to brief the issue on appeal?

Brief Answer: Yes.

5. Are attorney's fees on appeal appropriate when the appealing party has demonstrated consistent intransigence throughout the proceedings, including upon appeal?

Brief Answer: Yes. The husband's appeal is frivolous and the wife should be awarded fees on appeal.

### Statement of the Case - Reply Facts

Appellant omits numerous facts in his "Statement of the Case."

Mr. Walter van Heemstede Obelt ("Walter") and Mrs. Susan van Heemstede Obelt ("Susan") separated on October 17, 2009. Susan had obtained a preliminary Domestic Violence Protective Order removing Walter from the home. A few days later Walter filed for divorce.

In both cases, Susan provided extensive evidence of CPS and police intervention indicating Walter had a long-standing history of domestic violence and child abuse. CPS made several "founded" findings of child abuse against Walter.<sup>1</sup> Susan also filed evidence of Walter's domestic violence charges in 2003.<sup>2</sup> (CP 477) Walter unequivocally denied all acts of violence or abuse.

Both Walter and Susan claimed to be the primary caretaker of the children. Walter stated that he provided virtually all care for the children despite long absences with the military. He stated that he equally shared doctor and dentist visits with Susan although the dentist filed a declaration that Walter had never been seen in the office with either child. (CP 105, CP 129) Walter also claimed Susan was financially irresponsible, manipulative, and had made false allegations that he was violent and abusive. (CP 99-114, CP 126-128) But between November 2009 and March 2010, the children

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<sup>1</sup> Several years later Walter appealed these findings. Neither Walter nor DSHS gave the mother notice of the appeal. No reason was given for overturning the findings. Walter refused to provide these records in discovery.

<sup>2</sup> These charges were "continued for dismissal" when Walter agreed to attend counseling, a domestic violence perpetrator's program, and commit no further acts of domestic violence. (CP 477) After being released from probation in 2004, the police were called to several assaults between Walter and the step-son in 2007.

called and wrote the GAL asking to live with their mother and limit time with their father. (CP 455-465)

In November 2009 at the first Temporary Orders hearing was held. The Commissioner found the pleadings to be totally in conflict and he declined to give either party the upper hand. He appointed a Guardian Ad Litem (GAL), and set a review hearing for January 15<sup>th</sup>, 2010 (8 weeks later) expecting the GAL to make preliminary recommendations. (CP 119) The GAL does not begin her investigation until her initial retainer is paid. Consequently, Susan's attorney attempted to induce Walter to pay the GAL with four separate orders, costing Susan extra fees:

Temporary Order (11/13/2009) –

“GAL shall be appointed and paid pro rata according to income by 11/20/2009...GAL shall be Mary Ronnestad or Julia Pelc. (CP 115-119)

Order of Continuance (11/20/2009) –

“*Each party shall pay \$1000 to GAL so she can get started (and get Order entered) and reserve exact % for 12/4/09.*” (CP 131-132)

Temporary Order – Financial (12/04/2009) –

*Petitioner shall promptly pay the GAL so Ms. Ronnestad can begin her investigation.* (CP 133-137)

Order Appointing GAL (12/04/2009) –

The fees and costs of the guardian ad litem shall be paid as follows: 66% by the father and 33% by the mother...the initial advance of \$2000. (CP 141)

Susan paid the GAL immediately. (CP 141) When Walter didn't pay the GAL for three months (mid-February 2010), Susan also advanced part of Walter's fees to expedite the GAL's investigation. Still, Walter's delay caused the review hearing to be continued four times between January 15<sup>th</sup> and March 24<sup>th</sup>. (CP 145-146, CP 147-148, CP 149-150, CP 151-152) Susan

incurred fees for each of these Continuance Hearings. At trial Walter's explanation for his delay in paying the GAL at trial was that he "did not know how much to pay." (RP vol. II 90-91 and RP vol. II 109-111). However, Walter conceded he had been present in court for all hearings and admitted he signed the GAL Order. (RP vol. II, 43)

When the review hearing was finally held on March 24<sup>th</sup>, 2010 the Commissioner changed the temporary parenting plan. Susan was granted primary placement of the children and possession of the home. Walter was granted one 24-hour visit each week.

Throughout the proceedings, the trial was continued five times.<sup>3, 4</sup> The first continuance, April 2010, was due to difficulties in retaining a forensic expert and Walter's failure to provide discovery. (CP 198) The second continuance, October 2010, was again due to difficulties in retaining a forensic expert and Walter's failure to provide discovery. (CP 291) At the third continuance, February 2011, the Court found that a continuance was necessary due to Walter's failure to pay the forensic expert. The court gave him three weeks to pay or the case would go to trial. (CP \_\_\_\_\_, CP 153) The fifth continuance, June 21<sup>st</sup>, 2011, allowed Walter a final opportunity to provide discovery in lieu of having his testimony/exhibits stricken at trial. (CP 414) Each time, Susan's incurred more attorney fees.

In addition to four avoidable continuances of the trial, Susan had to file motions asking the court to:

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<sup>3</sup> Appellant's statement that trial was "originally set for June 20<sup>th</sup>, 2011" is misleading as it was the fourth of five trial dates

<sup>4</sup> One of the five continuances, June 6<sup>th</sup> 2011 was due to Susan's counsel's emergency surgery.

- Require Walter to provide discovery when normal requests failed. (CP 218)
- Require Walter to file 2009 federal tax return. (CP 276)
- Require Walter to pay and communicate with the forensic expert. (CP 276, CP 2/7/11 #152)
- Allow Susan to accept a sales offer on the home when Walter refused to accept a reasonable offer. (RP vol. I 17-18, 22-24; CP 2)

Each motion cost Susan additional fees.

Although these orders were not appealed, in many instances, Walter failed to comply with these, and other, orders. In eighteen months, Susan had to bring three motions for contempt to obtain Walter's compliance: (a) October 28, 2010, (b) December 16, 2010, and (c) November 4, 2011.<sup>5</sup> (CP 248, CP 318, CP 420) Each time, the Commissioner found Walter in contempt. Each time the findings of contempt (i.e intransigence) were not appealed and are, therefore *res judicata*.

At the first contempt hearing, Walter was found in contempt for (a) failure to pay the GAL, (b) failure to pay support per both temporary support orders, and (c) failure to comply with an Order Compelling Discovery. (CP 10/28/10 #138) Walter failed to comply with the 1<sup>st</sup> Temporary Order of Support requiring payment by the 5<sup>th</sup> of the months starting December 2009. This left Susan without support over Christmas. When Walter's child support increased in August 2010, Walter again failed to pay the new amount

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<sup>5</sup> The third Motion for Contempt was brought after trial to address, in part, pre-trial violations of Orders.

for August, September, and October. (CP 341) Susan's attorney sent several letters asking Walter to comply with the new order. Even after being served with the motion for contempt in early October,<sup>6</sup> Walter failed to make the correct payment that month. (CP 284) Walter explained that his non-compliance was because he "didn't know the amount to pay." (CP 296) He blamed Susan's attorney and/or his attorney for failing to communicate with him. (RP vol. II 92) However, Walter had been present at the hearing and had not appealed the order.

At the second contempt hearing, Walter was found in contempt for refusing to cooperate with Susan's attempts to file the 2009 tax return. (CP 341)

At the third contempt hearing, Walter was found in contempt for (a) failure to provide the children with health insurance cards, (b) failure to provide the children with military dependent ID cards, and (c) failure to comply with restrictions in the parenting plan.<sup>7</sup> (CP 501) The Commissioner summarized Walter's behavior:

If ever there was a case of a client dragging their feet, this is that case. You're sort of passive-aggressive on almost all these issues and it's costing everybody a lot more time. (CP 513-514)

Even after being served with these three motions for contempt, Walter elected to fight the motions rather than comply with the orders (thereby purging his

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<sup>6</sup> This would have given Walter notice of his non-compliance even if all prior notice escaped him.

<sup>7</sup> As indicated above, the contempt involved pre-trial violations of temporary orders. In his request for court appointed counsel, Walter's financial declaration failed to disclose \$27,000 in cash assets from sale of the home that he received 4 weeks prior (CP 438-440 and Decree at CP 51-58)

contempt). As a result, Susan incurred additional fees. The fees Susan was awarded did not cover her expenses.

In addition to out-of-the-ordinary orders and motions for contempt, Susan incurred huge expense pursuing discovery. (CP 218) Susan was unaware of the extent of the marital estate because Walter had handled the finances. Susan also had to disprove many of Walter's statements that Susan was a poor parent. Between November 2009 and July 2011, Susan undertook a 20-month effort of obtain complete and truthful disclosure from Walter. It is undisputed that her attorney undertook 19 separate attempts to obtain full and truthful discovery. (RP vol I 35-36)

In June 2010, after seven months and five requests for compliance, Susan filed a Motion to Compel. (CP 200) Walter didn't file a response to Susan's motion and his attorney admitted that discovery was missing. (CP 218) Judge Sybolt found that there had been "inexcusable delay" and entered an Order Compelling Production of Documents by July 8<sup>th</sup>, 2010. He ordered fees in the sum of \$500. (CP 218) The award of fees covered the expense of compelling discovery to date, but not the extensive efforts that came after. This order was not appealed and the finding of "inexcusable delay" is *res judicata*.

Walter did not provide discovery by July 8<sup>th</sup> and in September Susan was compelled to bring her first motion for contempt to enforce the Order Compelling Production.<sup>8</sup> (CP 284) In his Responsive Declaration, Walter indicated he had provided all discovery to his attorney. However, the attachments to his declaration did not support this contention. (CP 299) The Commissioner found Walter in

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<sup>8</sup> As stated above two other counts were included: Non-payment of the GAL, and non-payment of support.

contempt. Walter was again ordered to provide the bulk of the discovery by November 15<sup>th</sup>, 2010. Fees of \$500 were ordered. (CP 10/28/10 #138) The award of fees did not cover Susan's expenses because it omitted fees incurred for an additional continuance hearing, responding to Walter's Declaration, and the hearing itself. (CP 284-288)

Walter partially complied with discovery on November 15<sup>th</sup>, 2010, one year after originally receiving Susan's Requests for Production. He provided paystubs, partial tax returns, credit card statements, and partial military records. However, rather than provide income and investment information, Walter answered three Requests untruthfully:

- Denied receiving unemployment compensation,
- Denied possessing investment (TSP and AIG), and
- Refused to provide CPS correspondence<sup>9</sup>

First, Walter repeatedly indicated that he had no income other than "Retirement" or "retirement and disability." (CP 99 and CP 126) This was Walter's position until he was compelled to provide his 2009 tax information. At that time, it was discovered that Walter had, in fact, also received unemployment compensation between August and December 2009. When questioned at trial, Walter explained that he wasn't obligated to disclose the unemployment because by the time he answered the Requests for Production *a year late*, it had been more than six months since he had received unemployment so he was outside the "look-back period" in the Request. (RP vol. II 30 and RP vol. II 81)

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<sup>9</sup> Counsel did not pursue this omission because an agreed parenting plan was entered which admitted child abuse, domestic violence and "abusive use of conflict." (CP 405)

Second, Walter denied possession of any investments in his financial declaration and in answers to Susan's discovery. (CP 99, CP 126) However, Walter's paystubs conflicted with his declarations/responses to discovery which showed that Walter had been deducting money for a TSP account. Susan again requested information, this time pertaining to the TSP. Walter did not provide the actual statements for another two months at which time it was discovered that the TSP was worth \$60,000. (CP 127) (CP 318)

Third, Walter's responses to inquiries into an AIG account had been vague, "*Do not have any AIG. Have nothing to give.*" (RP vol. I 53 and 55) Susan did not believe this statement because she had found a letter thanking Mr. van Heemstede Obelt for his business. It was concerning that Walter responded only "in the present" when the Request for Production went back three years. Another six months passed and no further disclosure was made. Interestingly, at no point did Walter deny that there had *not* been an AIG account, only that he didn't currently have statements or an active account. At trial, his attorney also tacitly admitted that there were AIG investments at one time. (RP vol. I 54-56)

In addition to difficulties obtaining discovery, Walter frustrated Susan's efforts to put the home up for sale and preserve the equity because she was unable to pay the mortgages. In February 2011, Walter agreed to an order putting the house up for sale. A buyer offered \$160,000. This was an amount in excess of three market analyses but \$5000 under list price. (CP 1, CP 2) Susan provided evidence that the realtor recommended accepting the offer. (RP vol I 4) The listing was "as is" and the house needed carpet, paint,

and a roof. Time was of the essence, so Susan brought a motion on shortened time asking the court to allow her to accept the offer. (CP at 1) Susan's declaration stated that Walter refused to communicate with the realtor or negotiate. (RP vol. I 3) Walter filed no response and provided no conflicting evidence. But at the hearing, his attorney argued that either (a) the court had no legal authority to allow the sale or (b) that Susan should pay the difference between the asking price and the sale price. The court found Walter's position illogical and reserved fees for trial. (RP vol I 23) The decision was not appealed. Susan incurred fees to attempt to communicate with counsel, prepare the motion, and argue the motion.

On June 21<sup>st</sup>, 2011, the trial judge held the fifth pre-trial hearing. Susan's attorney was prepared to proceed to trial. However, Walter hadn't provided (a) the mandatory Domestic Trial Management Report<sup>10</sup>, 2010 tax information although it appears he had filed a 2010 return. (RP vol. II 8, line 6)<sup>11</sup>, and AIG information. (RP 33) The judge gave Walter a final opportunity to provide the AIG statements in lieu of proceeding to trial without testimony or evidence. Walter, through counsel, elected to take the continuance and comply with the court's order regarding the AIG account. The trial judge made her intent clear; Walter was to provide the AIG statements or a sworn declaration:

He can do a declaration that says we haven't had it from 2006. It was cashed out. We don't have any. But that's what he needs to do in a declaration, which is part of the interrogatories. (RP vol. I 56)

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<sup>10</sup> Susan had filed her own Domestic Trial Management Report when Walter failed to provide his side of the report. (RP vol. I 35 referring to CP 3-13)

<sup>11</sup> RCW 26.19.071 requires that each party provide 2 years tax returns and income information.

You're going to provide...the AIG, either declaration or statements prior to the next court date. (RP vol. I 59-60)

You can do a declaration that he "hasn't had it" or "there was an account and it's gone as of the date of whatever," but "I currently don't have statements" is vague...He's got to answer the question. (RP vol. I 62)

The order reads, "provide AIG statements." (CP 414) At trial, Walter provided neither the AIG statements nor a sworn declaration.<sup>12</sup> The trial judge asked Walter's attorney for the declaration. Walter's attorney conceded that he could not provide one. (RP 184-185) On appeal, Walter argues that he was not obligated to provide a sworn Declaration because the 6/21/11 Order did not "expressly" require it.

Prior to trial, the parties reached a partial settlement. Walter agreed to entry of a Parenting Plan. Contrary to all prior testimony, Walter admitted in the parenting plan that he had abused and neglected the children, committed acts of domestic violence, and engaged in "abusive use of conflict." Had Walter conceded this point initially, Susan could have avoided the costs associated with the GAL, the costs of three hearings surrounding appointment of a forensic expert, the cost of the forensic expert herself, and numerous hours in fees to refute Walter's false statements regarding Susan's parenting.

In July 2011, the court tried the remaining issues: (a) division of the military COLA (RP vol. I 24-33), (b) child support, (c) intransigence, and (d) attorney's fees. (RP vol. II 5-219) As to support, Walter repeatedly admitted to being ready willing and able to work, but objected to the court imputing income to him for voluntary unemployment. The court imputed income

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<sup>12</sup> No information whatsoever has ever been provided.

based on a minimum wage job. Walter also asked the court to require Susan to amend her tax return and allow him to claim one of the children. The court declined this request because he hadn't paid support as ordered and had very limited visitation. (RP 209)

At trial Susan testifies that her fees were \$14,000 "prior to trial." She did not include prior awards of fees (\$1500) or costs of trial. She testified that most of her fees had been incurred to enforce the court's orders, file the 2009 tax return, obtain discovery, refute false statements, and preserve the equity in the house. (RP vol. II 177-181)

The court found that Walter had lacked candor with the court and had used the court system for conflict. (RP 213) The court based its findings on testimony as well as the contents of the file. She expressly referred to multiple findings of contempt, refusal to provide discovery over a long period, obstructing the sale of the house, dragging out who gets the tax exemption, voluntary unemployment, and Walter's failure to provide information on AIG. (RP vol. I 212-214) Consequently, the court found Walter intransigent and awarded Susan \$5000 (of \$14,000+ fees) by segregating the portion she believed attributable to Walter's intransigence from normal or expected fees.

Walter timely appeals the court's findings of intransigence, voluntary unemployment, and award of fees.

## Law and Argument

A. The standard of review upon a factual finding of intransigence is “abuse of discretion.”

Attorney’s fees in a divorce can be based on either (a) “need and ability to pay” pursuant to RCW 26.09.140 or (b) in equity when a party has been intransigent. *Marriage of Greenlee*, 65 Wash.App. 703, 708, 829 P.2d 1120 (1992). A trial judge has sound discretion to craft equitable relief for a husband’s intransigence by awarding attorney’s fees.

The standard of review of a trial judge’s fee award for intransigence is “abuse of discretion:”

The party challenging the award [of attorney’s fees] must show that the court used its discretion in an untenable or manifestly unreasonable manner. *Mattson v. Mattson*, 95 Wn.App. 592, 976 P.2d 157 (1999) (citing *Knight*, 75 Wash.App. at 729, 880 P.2d 71.)

A trial court's decision is manifestly unreasonable *only* if it takes a view no reasonable person would take. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010)

B. The trial court’s finding that Walter was intransigent is reasonable and well supported by the facts.

Susan did not seek attorney’s fees based on RCW 26.09.140 (need). Instead, she sought reimbursement for her fees due to Walter’s intransigence because he had engaged in a persistent and calculated pattern of delay, obstruction, and non-compliance. Once intransigence is established, the financial resources of Susan are irrelevant. *In re Marriage of Morrow*, 53 Wash.App. 579, 590, 770 P.2d 197 (1989). Intransigence can include many types of behavior. Generally, though, intransigence may be summarized as

actions taken or not taken by one party to obstruct, delay or frustrate the proceedings, with the result that the other party incurs additional fees and costs that are unnecessary. The appellate courts have found intransigence where a party:

- Engages in "foot-dragging and obstruction." *Matter of Marriage of Greenlee*, 65 Wn.App. 703, 829 P.2d 1120 (1992)(citing *Eide v. Eide*, 1 Wash.App. at 445, 462 P.2d 562)
- "Forces the other party to come to the court to enforce her decree." *Id at 708*
- "Produces conflicting information about income and, by his actions, forced the wife to conduct intense discovery, which increased her legal bills." *Mattson v. Mattson*, 95 Wn.App. 579, 592, 976 P.2d 157 (Wash.App. Div. 2 1999)
- "Makes unsubstantiated, false, and exaggerated allegations against the other party concerning her fitness as a parent, which caused her to incur unnecessary and significant attorney fees." *Burrill v. Burrill*, 113 Wn.App. 863, 873, 56 P.3d 993 (2002)(Rev. denied at 149 Wn.2d 1007, 67 P.3d 1096 (Wash. 2003))
- "Is voluntarily unemployed which constitutes intransigence. *Mattson at 600*
- "Makes the trial unduly difficult and increases legal costs by his or her actions." *Morrow at 591*
- "Attempts to prevent the respondent from refinancing the house." *Greenlee at 711*

And,

- "Engages in bad acts which permeate the entire proceedings." *Burrill at 873*

The court should consider the *entire* record when reviewing an argument for attorney's fees based on intransigence. *In re Marriage of Foley*, 84 Wn.App. 839, 930 P.2d 929 (Wash.App. Div. 3 1997)

The trial judge clearly considered the entire record commenting that she had “read over the entire file” and personally heard several pre-trial motions and trial testimony from both parties. (RP vol II 206)

In her opening statement, Susan attorney noted that Walter had stipulated to “abusive use of conflict” in the parenting plan. (RP vol. II 204 referring to CP 405) She also reminded the court that prior awards of \$1500 in fees “was a drop in the bucket given all the issues that had to be addressed and coming back [to the court] time and time again.” (RP vol. II 206)

The court found Walter had been intransigent throughout the entire proceedings: **(1)** Walter had refused to comply with court orders and had been found in contempt on numerous counts. (RP 208) **(2)** Walter consistently refused to provide discovery despite numerous letters, motions, orders, and hearings.<sup>13</sup> (RP vol. II 212) **(3)** Walter misrepresented his income and hid assets. (RP vol. II 212) **(4)** Walter claimed a right to a tax exemption in poor faith. (RP vol. II 207) **(5)** Walter was voluntarily unemployed. (RP vol. II 210) **(6)** Walter forced Susan to bring an unnecessary motion to sell the house. (RP vol. II 212) **(7)** Walter lacked candor when testifying at trial and had “come back to court continuously just for conflict.” (RP vol. II 213)

In comparison with established case law set forth above, it is clear that Walter has engaged in every type of behavior associated with intransigence. Thus the court’s finding was reasonable.

Walter’s Brief conceded six of the court’s seven findings of intransigence, **which therefore stand**. Instead, he takes issue with a single

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<sup>13</sup> Even at trial, when Walter’s attorney claimed to have provided repeated Declarations regarding the AIG account, the court challenged him to provide one and Walter’s attorney conceded that no such declaration existed.(RP vol. II 185)

finding of intransigence, namely whether Walter was obligated to provide a sworn declaration if he failed to “provide the AIG statements.” (RP vol II 33; CP 414) Walter interprets the Judge’s June 21<sup>st</sup> order literally. Overlooking the inconsistency in his own argument (i.e. the obligation to provide the statements), Walter believes he had no obligation to provide a declaration in lieu of the statements. This interpretation is incorrect for three reasons. First, if the court adopts his position, Walter was unequivocally obligated to provide the statements themselves. Therefore, having failed to do so, he was still intransigent. Second, Walter asks the court to take position that if he didn’t provide the actual statements, he was obligated to **do nothing**. This defies logic and rewards an intransigent party for his non-compliance. Third, the trial judge expressly and repeatedly instructed Walter to “do a declaration” if no statements were provided. (RP vol. II 56, 59, 62 ) To interpret her order in direct contravention of her clear intent violates well established rules of judicial construction.

Nevertheless, even if Walter is correct that the court improperly found him intransigent due to his refusal to provide a declaration regarding the AIG account, the six other findings of intransigence are undisputed. Thus, intransigence is still well established in fact. The court made a reasonable finding that Walter was intransigent throughout the entire divorce proceedings. Walter’s argument is frivolous.

- C. The trial court’s award of \$5000 in attorney’s fees and costs was reasonable and directly related to the husband’s intransigence.

The award of fees is soundly within the court's discretion. Where a party's "*bad acts permeate the entire proceedings,*" the court need not segregate which fees were incurred as a result of intransigence and which were not. (RP vol II 213) *Burrill at 873* For example, in *Buchanan v. Buchanan*, 150 Wn.App. 735, 207 P.3d 483 (2009), the court declined Mr. Buchanan's invitation to overturn the trial judge's fee award because he hadn't segregated the fees due to intransigence from those attributable to normal litigation. The appeals court found that the trial judge acted within his discretion in deciding not to segregate attorney fees because Mr. Buchanan's course of bad behavior was interwoven throughout the entire proceedings. .

However, in the case at bar, the court nevertheless attempted to segregate Susan's fees due to intransigence from those attributable to normal costs of litigation. (RP vol. II 213) Thus, the trial judge went above and beyond the legal standard to craft an equitable remedy for Walter's bad behavior.

Walter's suggestion that Susan's attorney was fully compensated prior to trial is without foundation. He cites no fact in support of this contention. Nor was evidence presented at trial suggesting that Susan's attorney had been fully compensated. Quite to the contrary, Susan testified that even after receiving the \$1500 award, her fees were in still excess of \$14,000. (RP vol. II 179) Costs for the unnecessary trial were not included in the \$14,000. Second, the court had specifically reserved attorney's fees for trial in March 2011 (Motion to sell the home) and again on June 21<sup>st</sup> (the pre-

trial hearing). (RP vol. I 24, RP vol. I 62) Thus, there is no basis to Walter's argument of full compensation and the award of fees was reasonable.

D. Any issue, initially alleged to have been in error, is deemed abandoned if not briefed upon appeal.

Walter's Notice of Appeal initially asked for review of the trial judge's decision to impute income to him for "voluntary unemployment." (CP 59) However, Walter's brief on appeal makes no mention of "imputed income," "voluntary unemployment," or any support related issue.

It is a well established rule on appeal that an issue not argued in the appellant's brief is deemed abandoned. This rule applies to domestic cases. For example, in *Marriage of Bernard* the court of appeals determined that

[Since] he has not briefed the issue, nor cited any authority to this court, his challenge to the fees will not be reviewed. *Marriage of Bernard*, 137 Wn.App. 833, 155 P.3d 177 (2007)

Just last year, the court affirmed this rule in *Skagit County v. Waldal*:

[This] is an issue not briefed by the parties, and we do not address it. *Skagit County v. Waldal*, 163 Wn.App. 284, 261 P.3d 164 (2011)

The reasons for this rule are well founded in judicial economy, good common sense, and equity. On the one hand, the appellate courts should reasonably expect appellants to argue the issues they appeal in an orderly and timely fashion. It can only be assumed that an Appellant's failure to brief an issue is based on lack of legal foundation or lack of interest. Further, the responding party (the Appellee) should not be burdened with responding to issues not argued, therefore arguing "blind."

Thus, Walter's initial appeal of the trial judge's decision to impute income for a minimum wage job is abandoned and should not be reviewed.

E. Attorney's fees on appeal are appropriate when the appealing party has demonstrated consistent intransigence throughout trial and appeal.

An award of attorney's fees **on appeal** is within the discretion of the appellate court and may be awarded for one of three reasons:

- (a) Need pursuant to RCW 26.09.140,
- (b) a frivolous appeal pursuant to RAP 18.9, and
- (c) a party's intransigence at the *trial level* may support an award of attorney fees on appeal. *Mattson* at 606.

Susan seeks attorney's fees on appeal for each of these three reasons.

First, Susan has been impoverished by the costs of litigation over the past 2 ½ years.

Second, an award of fees on appeal is appropriate where there is a frivolous appeal. RAP 18.9 An appeal is frivolous if Walter does not present debatable issues upon which reasonable minds could differ and there is a possibility of reversal. *Foley* at 847, 930 P.2d 929. Walter has not raised a valid issue of law or fact. His only arguments, (no requirement to provide a sworn declaration and prior compensation) have been dispensed with above.

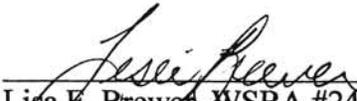
Three, Walter was found intransigent at trial. Walter's intransigence at trial is on-going because he did not properly designate the record on appeal (Clerk's Papers). This caused Susan to incur additional fees to preserve the true record for the appeals court.

### III. Conclusion

A reasonable person would find Walter intransigent given the voluminous evidence of foot-dragging, delay tactics, false statements, and

unnecessarily litigation. Therefore, the trial judge did not abuse her sound discretion by making such a finding. The award, also within the sound discretion of the court, was reasonable. The appellate court should affirm both the finding of intransigence and award of fees. The appellate court should award Susan attorney's fees for responding to a frivolous appeal

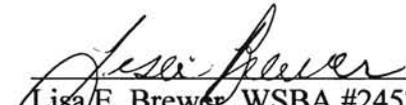
RESPECTFULLY SUBMITTED on March 27<sup>th</sup>, 2012

  
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Lisa E. Brewer, WSBA #24579  
Attorney for Susan Scott  
(formerly Susan van Heemstede Obelt)

**Declaration/Affidavit of Service**

I, Lisa E. Brewer, hereby state under penalty of perjury of the laws of the State of Washington that I personally served the Law Office of Bryan P. Whitaker at 815 W. 7<sup>th</sup> Ave., Spokane, WA 99204 with a copy of this brief on this date *at 11:30 am*

Dated: *Tuesday* March *27<sup>th</sup>*, 2012

  
\_\_\_\_\_  
Lisa E. Brewer, WSBA #24579  
Attorney for the Respondent/Wife