

NO. 308758-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

AARON MATTHEW SILK,

APPELLANT,

vs.

TERESA ANN BROADSWORD,

RESPONDENT.

BRIEF OF APPELLANT AARON MATTHEW SILK

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TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENTS OF ERROR	5
II. ISSUES ON ASSIGNMENTS OF ERROR.....	9
III. STATEMENT OF THE CASE.....	10
IV. STANDARD OF REVIEW	13
V. ARGUMENT.....	14
VI. REQUEST FOR ATTORNEY'S FEES	23
VII. CONCLUSION	23

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Banuelos v. TSA Washington Inc.</u> , 134 Wn. App. 603, 140 P. 3d 652 (2006).....	13
<u>Bartlett v. Betlach</u> , 136 Wn. App. 8, 146 P. 3d 1235, <u>review denied</u> 144 Wn. 2d 1004 (2007)	13
<u>Cleaver v. Claeever</u> , 10 Wn. App. 14, 516 P. 2d 508 (1973).....	17
<u>Connell v. Francisco</u> , 127 Wn. 2d 339, 898 P. 2d 831 (1995)	17
<u>Deyoung v. Cenex Ltd.</u> , 100 Wn. App. 885, 1 P 3d 587 (2000) <u>review denied</u> , 146 Wn. 2d 1016 (2002)	14
<u>In re Parentage of Jannot</u> , 110 Wn. App. 16, 37 P. 3d 1265 (2003) <u>aff'd in part</u> , 149 Wn. 2d 123, 65 P. 3d 664 (2002).....	14
<u>In re Marriage of Anderson</u> , 134 Wn. App. 111, 138 P. 3d 1118 (2006).....	15, 16
<u>In re Marriage of Bulicek</u> , 59 Wn. App. 630, 800 P. 2d 394 (1990)	15
<u>In re Marriage of Greene</u> , 97 Wn. App. 708, 986 P. 2d 144 (1999)	21
<u>In re Marriage of Horner</u> , 151 Wn.2d 884, 93 P.3d 124 (2004)	18
<u>In re Marriage of Luckey</u> , 73 Wn. App. 201, 868 P. 2d 189 (1994)	17, 19

<u>In re Marriage of Pea,</u> 17 Wn. App. 728, 566 P. 2d 212 (1977)	15
<u>In re Marriage Of Rockwell,</u> 141 Wn. App. 235, 170 P. 3d 572 (2007)	15
<u>In re Marriage of White,</u> 105 Wn. App. 545, 20 P. 3d 1 (2001)	21
<u>State v. Horace,</u> 144 Wn. 2d 386, 28 P. 3d 753 (2001)	13
<u>State v. Mallory,</u> 69 Wn. 2d 532, 419 P. 2d324 (1966)	22
<u>Western Community Bank v. Helmer,</u> 48 Wn. App. 694, 740 P. 2d 359 (1987)	18
<u>Wold v. Wold,</u> 7 Wn. App. 872, 503 P. 2d 118 (1972)	20, 21
<u>Hisquierdo v. Hisqueirdo,</u> 439 U.S. 572, 99 S. Ct. 802, 59 I. Ed. 2d 1 (1979) <u>superceded in part</u> <u>by 45 U.S.C. 231m(b)(2)</u>	15

<u>Statutes and Court Rules</u>	<u>Page</u>
RAP 18.1	23
RCW 26.09.090	16-18
RCW 26.09.140	22, 23
42 U.S.C. sec 301-1397jj.....	16
45 U.S.C. sec 231	16
45 U.S.C. sec 231m(b)(2).....	16

A. ASSIGNMENTS OF ERROR

1. By way of entry of "Memorandum Opinion" dated March 05, 2012, the Superior Court of Lincoln County, State of Washington (hereafter Superior Court) erred in the division and award of Mr. Silk's Tier II Railroad Retirement earned prior to marriage. [CP 20-21].

2. By way of "Memorandum Opinion" of Law on Petition For Residential Schedule" dated March 05, 2012, the Superior Court erred in the determination and award of spousal maintenance. [CP 23-24].

3. By way of "Memorandum Opinion" dated March 05, 2012 the Superior Court erred in the determination and award of cash to Ms. Broadsword. [CP 24].

4. By way of "Memorandum Opinion" dated March 05, 2012 the Superior Court erred in the award of attorney fees to Ms. Broadsword. [CP 24-25].

5. The Superior Court further erred on April 10, 2012 in its Findings of Fact and Conclusions of Law finding No 2.8 which states:

"The parties have the following real or personal community property . . . retirements. . . ." [CP 68]

6. The Superior Court also erred on April 10, 2012 in its finding No 2.9 of its Findings of Fact and Conclusions of Law which state:

. . . The husband has the following real or personal separate property: Any and all property acquired before June of 1997 and after the date of separation . . . The wife has the following real or personal property: Any and all property acquired before June 1997 and after the date of separation . . .” [CP 68].

7. The Superior Court likewise erred on April 10, 2012 in its Findings of Fact and Conclusions of Law in entering finding No. 1.12, which states:

. . . “Maintenance should be ordered because: The petitioner’s take home pay is more than twice as much as respondent’s. The parties were together for approximately 14 years. The respondent’s ability to work as a machine operator was limited by having and being the primary caregiver for their child and she only recently secured full time work and benefits. The petitioner has incurred a substantial amount of time, money, and transportation costs in acquiring/hoarding various airplane parts, tools machines, business, and these costs of acquiring are much higher than if such property would be resold at this time.”. . . [CP 69]

8. The Superior Court simultaneously erred on April 10, 2012 in its Findings of Fact and Conclusions of Law in entering finding No. 2.15 which states:

. . . .”The wife has the need for the payment of fees and costs and the other spouse has the ability to pay these fees and costs. The wife has incurred reasonable attorney fees and costs in the amount of what she already paid and an additional \$5,371.00.” [CP 69]

9. The Superior Court also erred on April 10, 2012 in its Findings of Fact and Conclusions of Law in entering Conclusion of Law 3.4 which states:

. . . The distribution of property and liabilities as set forth in the decree is fair and equitable. . .” [CP 71].

10. The Superior Court also erred on April 10, 2012 in its Findings of Fact and Conclusions of Law in entering Conclusion of Law 3.7 which states:

“Attorney fees, other professional fees and costs should be paid.” [CP 71].

11. The Superior Court simultaneously erred in entering its Decree of Dissolution at section 3.2 which states:

. . . The husband is awarded as his separate property the following property . . . one half of Tier II retirement with railroad (specifically the earnings, dividends, and interest from January 1, 1997 through May of 2011); . . . to be divided by QDRO . . . equalization payment awarded to respondent. . . . [CP 74].

12. The Superior Court simultaneously erred in entering its Decree of Dissolution at section 3.3 which states:

. . . The wife is awarded as her separate property the following property: . . . one half of Tier II from the petitioner’s railroad retirement from January 1, 1997 through May of 2011; an equalization payment from the petitioner in the sum of \$7,500 for her interest in the items on the property being awarded to petitioner, and petitioner’s possible dissipation of marital assets The monthly payment to the respondent for the

\$7,500.00 shall be no less than \$250.00 per month with interest on the balance at the statutory 12% rate. This payment shall begin June 1st 2012. . . . [CP 75].

13. The Superior Court simultaneously erred in entering its Decree of Dissolution at section 3.7 which states:

. . . The husband shall pay \$250.00 maintenance. Maintenance shall be paid monthly. The first maintenance payment shall be due on 8/1/2012. Maintenance shall continue until Quinlan is 18 years of age or graduates from high school, whichever occurs last. The obligation to pay further maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance. Payments shall be made to the Washington State Child Support Registry (only available if child support is ordered.) [CP 76].

14. The Superior Court simultaneously erred in entering its Decree of Dissolution at section 3.13 which states:

. . . Attorney fees, other professional fees and costs shall be paid as follows: The respondent has financial need and the petitioner has the ability to pay fees and costs. The petitioner shall pay the respondent \$5,000.00 for fees and \$371.00 for transcription charges. . . . [CP 76].

15. The Superior Court simultaneously erred in entering its Decree of Dissolution at section 3.15 which states:

. . . The one half of the . . . Tier II retirement benefit awarded to the husband shall be subject to a lien in favor of the respondent to secure the petitioner's payments to the respondent for spousal maintenance, property equalization and attorney fees . . . The parties shall equally pay an expert to have the QDRO prepared to divided the retirements). MERETRIOUS RELATIONSHIP: The court finds that the parties

began residing together in 1997 and were exclusively in a meretricious relationship for 14 years. The Memorandum Opinion filed March 5, 2012 is adopted as to the full details of this ruling. [CP 77].

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Superior Court could award a portion of Mr. Silk's Tier II Railroad Retirement for a period including the time prior to marriage, and, if so, was such an award fair and equitable or an abuse of discretion?

2. Whether the Superior Court's award of spousal maintenance pursuant to RCW 26.09.090 was based upon insufficient evidence of the appropriate statutory factors and purpose of spousal maintenance and, if so, was such an award fair and equitable or an abuse of discretion?

3. Whether the Superior Court abused its discretion by ordering a property equalization payment from Mr. Silk despite the lack of any evidence or value or any valuations of the property before the Court?

4. Whether the Superior Court abused its discretion by ordering attorney fees and costs to Respondent pursuant to RCW 26.09.140 despite a lack of any evidence of an ability to pay by Mr. Silk or a need for payment by Ms. Broadsworth?

C. STATEMENT OF THE CASE

Procedural Background: On May 11, 2012 Mr. Silk filed a Petition for Dissolution of Marriage. [CP 3-12]. On June 13, 2011 Ms. Broadsword filed a Response to the Petition. [CP 13-15]. On February 24, 2012 trial was joined with Mr. Silk representing himself and Ms. Broadsword represented by experienced and skilled trial counsel. [CP 13;35] [RP1-283]. Only the parties testified before the court. [RP1-283].

On March 05, 2012 the Superior Court issued a Memorandum Opinion. [CP18-24]. On April 10, 2012 the Superior Court issued its Findings of Fact and Conclusions of Law, and Decree of Dissolution. [CP 67-80]. That same day, the Superior Court also issued a Child Support Final Order [CP 52-61] and child support worksheets [CP62-66] setting Mr. Silk's and Ms. Broadsword's net monthly incomes.

Factual History:

Aaron Silk was born August 12, 1971. [TR 17 lines 18]. He began employment with Burlington Northern Railroad on or about

November 11, 1996. [CP 20; TR 18 lines 13-16]. At trial, Mr. Silk was a signal maintainer. [RP 47 line 25; 48 lines 1-3]. He was 40 years old.

Mr. Silk and Ms. Broadsword began living together in the summer of 1997. [CP 19; TR173 lines 23-25; 174 lines 1-11]. They had a son Quinlan born October 28, 1999. [CP 3 at section 1.3; 13 at section 1.3; 19; RP 49 lines 10-11]. They were married on December 11, 2004. [CP 4 at section 1.5; 13 at section 1.5; RP 26 lines 2-4; RP 172 lines 1-3]. They remained together for almost 14 years until their separation on or about May 11, 2011. [CP 19; RP 21 lines 12-17].

Mr. Silk receives a disability from the VA of \$127.00 per month. [RP 25 lines 12-13]. He purchased a home in 2004, [RP 25 lines 24-25], the same year he and Ms. Broadsworth were married, with a minimal down payment. [RP 26 lines 17-25]. The home was purchased for \$124,500.00. [RP27 lines 6-8].

The monthly house payment is \$1,113.00 on the first mortgage or \$1,510.00 [RP 41 lines 14-25] with late fees and \$153.26 on the second mortgage with a principle debt on the second mortgage of \$11,709.61. [RP 42 lines 21-22] [RP 29 1-25]. The home's asses-

sed value is \$126,400.00. [RP 38 lines 15-21; 187 lines 20-15; 188 lines 1-2]. As of December 31, 2010, the first mortgage owing was \$115,177.65. [RP 41 lines 10-14]. As Mr. Silk testified, the home had no equity value. [RP 40 lines 13-22].

According to Mr. Silk, his monthly gross wage was \$5,523.51. [RP 51 lines 3-9]. This was in addition to his disability pay of \$127.00 a month. [RP lines 14]. With overtime, Mr. Silk once earned \$6,500.00 gross a month [RP 4 lines 3-18] to \$7,500.00 per month. [RP 55 lines 13-14]. But, as Mr. Silk testified, he no longer holds the position of foreman and thus has less overtime. [RP 61 lines 1-13]. Throughout the litigation, Mr. Silk was required to make all of the house payments for the home in which Ms. Broadsworth was residing. [RP 32].

Ms. Broadsword was born June 29, 1964. At trial she was 47 years old. [RP 171 lines 20-23]. She works five nights a week Monday through Friday, [RP 185 lines 22-24; 185 lines 1-8], for Triumph Industries. [RP 188 lines 13-14]. She earns \$11.75 an hour which she commenced receiving in October 10, 2011. [RP 188 lines 15-16; 22]. When Ms. Broadsword met Mr. Silk, she was earning \$25.00 per hour as a heavy equipment operator. [RP 196

lines 17-25; RP 197 lines 1-17].

D. STANDARD OF REVIEW

The issues raised herein are governed by the following standards of review. First, a Superior Court oral or memorandum decision, if included in the record, may be considered on appeal. Banuelos v. TSA Washington Inc., 134 Wn. App. 603, 616, 140 P. 3d 652 (2006). Second, since this case involves mixed questions of law and fact, such review is treated as a question of law, to be viewed in the light of the facts and evidence presented. State v. Horrace, 144 Wn. 2d 386, 392, 28 P.3d 753 (2001). Third, pure legal errors including, the proper interpretation and application of a statute, court rule, or prior case law are reviewed de novo. State v. Horrace, 144 Wn. 2d 386, 392, 28 P.3d 753 (2001). Fourth, with respect to issues addressing the exercise of discretion, the standard of review is "abuse of discretion." And, when the reviewing court addresses an alleged abuse of discretion, questions can and should be separated into questions of fact and the conclusions of law based on those facts. Bartlett v. Betlach, 136 Wn. App. 8, 19, 146 P. 3d 1235 (2006), review denied, 144 Wn. 2d 1004 (2007).

A Superior Court's discretion is abused when the Court has based its decision on untenable grounds or for untenable reasons, or has otherwise failed to abide by the governing law. Deyoung v. Cenex Ltd., 100 Wn. App. 885, 894, 1 P. 3d 587 (2000), review denied, 146 Wn. 2d 1016 (2002). As stated in In re Parentage of Jannot, 110 Wn. App. 16, 22, 37 P. 3d 1265 (2003), aff'd in part, 149 Wn 2d 123, 65 P. 3d 664 (2002):

. . . The abuse of discretion standard is not, of course, unbridled discretion. Through case law, appellate courts set parameters for the exercise of the judge's discretion. At one end of the spectrum the trial judge abuses his . . . discretion if [her] decision is completely unsupported, factually. On the other end of the spectrum, the trial judge abuses [her] discretion if the discretionary decision is contrary to the applicable law. . . .

E. ARGUMENT

1. As a matter of law, the Superior Court erred in dividing Mr. Silk's Tier II Railroad Retirement earned for a period of time prior to the marriage and by failing to use the time formula and thus abused its discretion.

When dividing a retirement, the Court is to apply the time rule formula of number of years of marriage (prior to separation) by the total number of years of service for which pension rights were earned and multiplying the results by the monthly benefit at

retirement.” In re: Marriage of Rockwell, 141 Wn. App. 235, 251-252, 170 P. 3d 572 (2007); In re: Marriage of Bulicek, 59 Wn. App. 630, 800 P. 2d 394 (1990); In re: Marriage of Pea, 17 Wn. App. 728, 566 p. 2d 212(1977). In applying such a formula, the Court avoids mischaracterizing and including in the award any pre-marital separate property interests not subject to division as marital community interests. As the time formula clearly indicates, it is the number of years of marriage prior to separation which is divided not any pre-marital acquisition. As stated in Rockwell, the time rule method is “the correct formula to determine the community share of the total pension credits earned by the retiree.”

Here, by operation of federal law, the pre-marital years of contribution are not subject to division by a divorce court. As described in In re: Marriage of Anderson, 134 Wn. App. 111, 138 P. 3d 1118 (2006), retirement pensions for railroad workers are governed by the federal RRA. See, 45 U.S.C. sec 231. The Railroad Retirement Act provides two tiers of benefits that resemble a social welfare plan and a private pension plan. (i.e., a defined benefit plan) These two levels are generally referred to as Tier I and Tier II benefits. See, Hisquierdo v. Hisquierdo, 439 U.S. 572, 574, 99 S. Ct. 802,

59 L. Ed. 2d 1 (1979), superceded in part by, 45 U.S.C. 231m(b)(2).

As described in Anderson, Tier I benefits are the larger of the two benefits and are the equivalent of the benefits that the railroad employee would have received if covered by the Social Security Act, 42 U.S.C. sec 301-1397jj. Id. at 575. . . . Tier II benefits function as a private pension, and the benefits are contingent upon earnings and career service. Id. at 574.

As made clear in RRA division of a RRR is governed by federal law. Federal law does not allow division of any portion of a Tier II acquired during a non-marital relationship. 45 U.S.C. sec 231.

2. As a matter of law, the Superior Court abused its discretion in awarding Ms. Broadword spousal maintenance by failing to properly apply the statutory factors and purpose of spousal maintenance.

An award of spousal maintenance is to be based on a consideration of the statutory factors set forth at RCW 26.09.090. Those factors are: (a) the financial resources of the party seeking maintenance, including community or separate property apportioned to her, and her ability to meet her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party; (b) the

time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to her skill, interests, style of life, and other attendant circumstances; (c) the standard of living established during the marriage; (d) the duration of the marriage; (e) the age physical and emotional condition and financial obligations of the spouse seeking maintenance; and (f) the ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance. See also, In re: Marriage of Luckey, 73 Wn. App. 201, 868 P. 2d 189 (1994). The policy of the law is the wife has a duty to prepare herself and gain employment if possible. Cleaver v. Cleaver, 10 Wn. App. 14, 516 P. 2d 508 (1973)

As RCW 26.09.090 makes clear, spousal maintenance is not available in a Committed Intimate Relationship aka Meretricious relationship. Thus, to the extent the obligation is based on a consideration of pre-marital years when Mr. Silk and Ms. Broadsword were in a Committed Intimate Relationship the award is an abuse of discretion. Spousal maintenance is not allowed for Committed Intimate Relationships. Connell v. Francisco, 127 Wn.

2d 339, 898 P. 2d 831 (1995); Western Community Bank v. Helmer, 48 Wn. App. 694, 740 P. 2d 359 (1987); RCW 26.09.090. Indeed, from the date of marriage or December 11, 2004 to the date of separation or May 19, 2011 this is a relatively short term marriage (6 ½ years). The decision in this case fails to address each of the statutory factors set forth at RCW 26.09.090. Cf. In re Marriage of Horner, 151 Wn.2d 884, 93 P.3d 124 (2004) (Court must enter specific findings of fact as to each statutory element).

Despite the factors set forth at RCW 26.09.090 the Superior court also based its award on disparity in income, Ms. Broadsworth's prior no longer existing years of unemployment and due to acquisitions during the marriage. However a, disparity in income is not automatically indicative of need for an award of spousal maintenance particularly when the testimony is the payor's income is not reliable in the future and as shown below once child support and the equalization payment are considered there is no factual disparity to justify an award of spousal maintenance to the payee. And., acquisitions of no value acquired during the relationship are irrelevant.

Moreover the Superior Court's award was more akin to an

award of child support rather than maintenance and for this reason also improper. Indeed, the award is not tied to Ms. Broadsword's necessities as required by statute RCW 26.09.090 and case law such as In re: Marriage of Luckey, but apparently to Quinlan's support. The decree states, the spousal maintenance award of \$250.00 per month commencing August 01, 2012 continues through the child's eighteenth birthday (October 28, 2017) or graduation from high school whichever occurs last. Clearly this is child support language separate and apart from any analysis of Ms. Broadsworth's need.

Further, as the order of child support [CP 52-61] indicates Mr. Silk's net monthly income is \$4,6911.00, less \$1,097.00 child support, or \$3,594.00, minus a property equalization payment of \$250.00, or \$3,340.00. On the other hand, Ms. Broadsworth's net monthly income is \$2,138.00, plus \$1,097.00, or \$3,235.00, with a property equalization payment of \$250.00, or \$3,485.00. In other words, Ms. Broadsworth actually has more income than Mr. Silk.

And, if as this Court observed in Luckey, at 209, "the purpose of spousal maintenance is to support a spouse typically the wife, until she is able to earn her own living or otherwise becomes self

supporting” the purpose does not exist in this case. Rather, Ms. Broadsword is employed full time earning a decent wage with benefits. And, Mr. Silk was already charged with providing residence to Ms. Broadsworth at no charge to her for the duration of the proceedings. [RP:32 lines 16-25; RP 44 lines 23-25].

4. Additionally, the Superior Court erred and abused its discretion by ordering a property equalization payment without a determination of the values or any valuation of the property to be equalized.

The Superior Court could not, on the facts before it, or actually not before it, order a property equalization payment when there was little to no testimony nor proof as to any values of the property to be equalized. Wold v. Wold, 7 Wn. App. 872, 503 P. 2d 118 (1972). Indeed, it appears Ms. Broadsword’s strategy to overcome her failure to value the properties was to request an auction or sale of the unvalued properties [CP 267 lines 17-25] and division of the net proceeds; [CP 268 lines 12-25] something the Superior Court could not do. For as stated in Wold, in order that a Court may make a just and equitable division of the property of the parties it must have evidence concerning the value of the various properties. It is obvious that the trial court abused its discretion when it orders a

division of property without having knowledge of the value of a substantial part of it. Wold, at 878. See also, In re: Marriage of Greene, 97 Wn. App. 708, 712, 986 P. 2d 144 (1999). On this record, given the lack of values, there should not be a \$7,500.00 equalization payment to Ms. Broadsword. In fact, absent valuation, the Superior Court could not base the need for an equalization payment upon the unquantifiable speculative belief there was some “value” in not having to replace a home or costs to move, any more than it could determine that certain property items were acquired at Mr. Silk’s behest; or that the property items might cost more to acquire than they may presently be worth; or that there was a possible dissipation of assets. The record doesn’t support such speculation.

Indeed, as indicated in Marriage of White, 105 Wn. App. 545, 549, 20 P. 3d 1 (2001) if a party has disposed of assets before trial the court has no ability to distribute that asset at trial. And dissipation was not even proven below and the findings do state such. In short, there was no value nor sufficient values of properties to determine the amount of \$7,500.00 was a fair and equitable equalization payment and thus no evidentiary basis to make such

an award.

5. The Superior Court abused its discretion in awarding attorney fees and costs to Ms. Broadsworth from Mr. Silk.

The Decree of Dissolution and Findings and Conclusions indicate the award of attorney fees and costs was based upon need and ability to pay rather than any other foundation. [CP 76 section 3.13]. The Findings and Decree specifically fail to adopt the Memorandum Opinion as to a finding of intransigence. [CP 24]. One has to assume therefore, the Superior Court reconsidered and abandoned its Memorandum Opinion finding of intransigence as such a finding was not incorporated in the Superior Court's subsequent Findings and Decree. State v. Mallory, 69 Wn. 2d 532, 533-534, 419 P. 2d 324 (1966).

Yet when the rest of the Superior Court's orders re Child Support, Spousal Maintenance and Property are considered, there was no need established for attorney fees and no establishment of an ability to pay. RCW 26.09.140. Rather, as previously noted, the Order Child Support and worksheets set Mr. Silk's net monthly income at \$4,691.00 less \$1,097.00 or \$3,594.00 less \$250.00 for a transfer payment or \$3,344.00. The Order of Child Support and worksheets also set Ms. Broadsworth's monthly net income at

\$2,138.00 plus \$1,097.00 or \$3,235.00 plus \$250.00 a month property equalization payment or \$3,485.00. The differential is \$29.00 dollars to Ms. Broadsword. In sum, Mr. Silk is the person in need and Ms. Broadsword is the one able to pay.

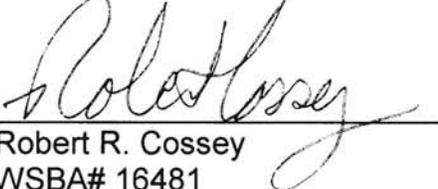
F. REQUEST FOR AWARD OF ATTORNEY'S FEES

Pursuant to RAP 18.1 and Chapter 26.09.140 Mr. Silk requests reasonable attorney's fees and expense.

G. CONCLUSION

Mr. Silk respectfully requests the challenged decisions of the Superior Court as set forth in the assignments of error and this appeal be reversed.

Respectfully submitted this 24 day February 2013


Robert R. Cossey
WSBA# 16481
Attorney For AARON SILK

Declaration of Service

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington, that on this date declarant personally filed the original and one copy of the document entitled: BRIEF OF AARON SILK at:

Court of Appeals of the State of Washington, Division III
Clerk of the Court
500 N. Cedar Street
Spokane, WA 99201

AND

that on this date declarant placed in the mails of the United States Postal Service a properly stamped and addressed envelope containing a true and correct copy of: BRIEF OF APPELLANT AARON SILK directed by first class mail to Counsel for Respondent, namely:

Julie Harrington
Attorney for Respondent
2824 E 29th Ave
Spokane WA 99223-4810

Aaron Silk
3012 N Altamont
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DATED this 25 day of February, 2013


CHRIS JURY
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