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Division III  
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COA No. 36474-7-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

LINDA LOU MITROVICH,

Respondent,

v.

SVETISLAV MITROVICH,

Appellant.

---

BRIEF OF APPELLANT

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II. 1) Petitioner asks the Court to reconsider the amount Petitioner was ordered to pay Respondent for the equalization payment. The Court reviewed the Court’s notes and calculations and finds that an error was made by the Court and needs to be corrected; the Court intended to order the Petitioner to pay \$91,992 but included the wrong number (\$130,000) in the memorandum opinion. That will be corrected. The Petitioner’s motion for reconsideration is granted.

2) Respondent bases his motion on three separate declarations. Many of the same issues are repeated in each of the declarations. Some issues are raised but there is no request to change anything in the Findings, Conclusions, or Final Order. The Court makes the following findings:

a) The amount of the equalization payment has been addressed in paragraph (1) above. . .

e) With regard to the order requiring the Respondent to pay \$10,000 of attorney’s fees, the Court believes this order is appropriate, based on intransigence, not ability to pay. This part of the motion is denied.

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a. Wife’s inheritance: The Wife received various assets upon the death of her mother, Mildred Brossia, including numerous bank accounts and investment accounts and CDs. The inheritance is the Wife’s separate property. . .

c. Wife’s separate accounts: Substantial evidence was produced by the Wife tracing her inheritance and settlement funds and the Wife did not commingle them with community funds. The Court finds she adequately traced her separate funds and the following bank accounts are her separate property:

(1) Banner Bank Acct. # 0527	\$6715
(2) Banner Bank Acct. # 9291	\$31, 972
(3) Bank of America IRA	\$6418
(4) The Principal Funds	\$270,559
(5) Edward Jones Annuity Trust	\$63601.43
(6) Bank of America CDs	\$2001
(7) Thrivent Insurance	\$6490

d. Wife’s Bank Accounts since separation:

(1) Bank of America # 3937	\$682
(2) Bank of America # 8218	\$1501. . .

14. Fees and Costs

The Petitioner incurred fees and costs of approximately \$45,000 and seeks contribution from the Husband for his intransigence . The Court awards to the Wife \$10,000 attorney’s fees to be paid by the Husband, as there is evidence of intransigence. The court finds that the amount awarded is reasonable. Such amount to be deducted from the transfer payment to be made by the Wife. . .

22. Other findings and conclusions

The Court finds the total Community Assets is \$233,528.00 and the total Community debt is \$1637. The Net Community estate is \$221,891.00.

An equal distribution of all community assets is \$91,992.00 to each party. The Wife is to pay the Husband a transfer payment for a total community property award to him of \$91,992.00. Accordingly a transfer payment less the \$933.64 auto insurance and \$10,000 attorney’s fees, of \$81,058.16 is to be paid to Mr. Mitrovich. . .

E. The court erred by making its amended final divorce order in reliance on its erroneous amended findings and conclusions, as set forth verbatim in assignments of error

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## I. ASSIGNMENTS OF ERROR

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B. The court erred by making these findings in its Order re Motions for Reconsideration:

II. 1) Petitioner asks the Court to reconsider the amount Petitioner was ordered to pay Respondent for the equalization payment. The Court reviewed the Court's notes and calculations and finds that an error was made by the Court and needs to be corrected; the Court intended to order the Petitioner to pay \$91,992 but included the wrong number (\$130,000) in the memorandum opinion. That will be corrected. The Petitioner's motion for reconsideration is granted.

2) Respondent bases his motion on three separate declarations. Many of the same issues are repeated in each of the declarations. Some issues are raised but there is no request to change anything in the Findings, Conclusions, or Final Order. The Court makes the following findings:

a) The amount of the equalization payment has been addressed in paragraph (1) above. . .

e) With regard to the order requiring the Respondent to pay \$10,000 of attorney's fees, the Court believes this order is appropriate, based on intransigence, not ability to pay. This part of the motion is denied.

C. The court erred in making its amended findings and conclusions about a marriage.

D. The court erred by entering the following amended findings about a marriage:

10. Separate Personal Property

The court further makes the following findings and awards:

a. Wife's inheritance: The Wife received various assets upon the death of her mother, Mildred Brossia, including numerous bank accounts and investment accounts and CDs. The inheritance is the Wife's separate property. . .

c. Wife's separate accounts: Substantial evidence was produced by the Wife tracing her inheritance and settlement funds and the Wife did not commingle them with community funds. The Court finds she adequately traced her separate funds and the following bank accounts are her separate property:

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The Petitioner incurred fees and costs of approximately

\$45,000 and seeks contribution from the Husband for his intransigence. The Court awards to the Wife \$10,000 attorney's fees to be paid by the Husband, as there is evidence of intransigence. The court finds that the amount awarded is reasonable. Such amount to be deducted from the transfer payment to be made by the Wife. . .

## 22. Other findings and conclusions

The Court finds the total Community Assets is \$233,528.00 and the total Community debt is \$1637. The Net Community estate is \$221,891.00.

An equal distribution of all community assets is \$91,992.00 to each party. The Wife is to pay the Husband a transfer payment for a total community property award to him of \$91,992.00. Accordingly a transfer payment less the \$933.64 auto insurance and \$10,000 attorney's fees, of \$81,058.16 is to be paid to Mr. Mitrovich. . .

E. The court erred by making its amended final divorce order in reliance on its erroneous amended findings and conclusions, as set forth verbatim in assignments of error B and D.

### *Issues Pertaining to Assignments of Error*

1. Did the court err by entering its Order re Motions for Reconsideration granting Ms. Mitrovich's motion for reconsideration and denying Mr. Mitrovich's motion for reconsideration?

(Assignment of Error A).

2. Did the court err by making the findings of fact, set forth verbatim in Assignment of Error B, in its Order re Motions for

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3. Did the court err by making its amended findings and conclusions about a marriage? (Assignment of Error C).

4. Did the court err by making the findings of fact, set forth verbatim in Assignment of Error D, in its amended findings about a marriage as they are unsupported by substantial evidence and/or are errors in law? (Assignments of Error C, D).

5. Did the court err by awarding attorney fees to Ms. Mitrovich based on intransigence when the court failed to articulate why Mr. Mitrovich was intransigent? (Assignments of Error C, D).

6. Did the court err by making its amended final divorce in reliance on its erroneous amended finding and conclusions, as set forth verbatim in Assignments of Error B and D? (Assignments of Error C, D, E).

## II. STATEMENT OF THE CASE

Svetislav and Linda Mitrovich married on April 12, 1985. (RP 51). The court found the date of separation was June 16, 2016, although Mr. Mitrovich claimed it was December 31, 2016. (CP 441, 672). The primary issue at trial was the division of property following this long-term marriage of over 30 years.

Ms. Mitrovich received a personal injury settlement in 2010 of \$136,427 for her pain and suffering only. (CP 443). She also received various assets on the death of her mother. (*Id.*). The court found the settlement and inheritance were Ms. Mitrovich's separate property by law. (*Id.*). It further found "she kept her separate assets, the inheritance, and any remaining funds from the tort claim, separate and did not commingle with community assets." (CP 443-444). The court noted Mr. Mitrovich presented no evidence contradicting her position that no commingling occurred and her separate assets were kept separate. (CP 444). Ms. Mitrovich had over \$400,000 in separate assets. (CP 447, 673-74).

Of the community assets, Mr. Mitrovich received \$27,082 from the business account, \$2781 for the Toyota pickup, \$6554 of the personal property, and \$1400 from copyright income of the defunct business, Northwest Map Services, for a total of \$37,907. (CP 447, 672-73). Of the community assets, Ms. Mitrovich received \$220,000 for the home, \$2289 for the Subaru, \$968.17 from the household account, and \$271 of the personal property, for a total of \$221,891. (CP 672-73, 675). The court found total community assets were \$223,528 and total community debt was \$1637, leaving a net community estate of \$221,891. (CP 675).

On reconsideration, the court determined an equal division of all community assets was \$91,992 to each party, with Ms. Mitrovich paying a transfer payment to Mr. Mitrovich of \$91,992 minus \$933.84 auto insurance and \$10,000 attorney fees awarded to her for his intransigence. (CP 675). The net transfer payment was \$81,058.16. (*Id.*).

As for the finding of intransigence, the court in its August 3, 2018 memorandum decision, incorporated by reference in the amended findings and conclusions, stated:

The wife seeks attorney fees based upon intransigence. There were some instances of intransigence, including multiple hearings due to Mr. Mitrovich's failure to comply with discovery requests and untenable legal theories. The total fees requested were approximately \$45,000, were not all incurred due to intransigence. The Court awards attorney's fees of \$10,000. (CP 448).

Amended finding 14, Fees and Costs, provided:

The Petitioner incurred fees and costs of approximately \$45,000 and seeks contribution from the Husband for his intransigence. The Court awards to the Wife \$10,000 attorney's fees to be paid by the Husband, as there is evidence of intransigence. The court finds that the amount ordered is reasonable. Such amount to be deducted from the transfer payment to be made by the Wife. (CP 674).

Mr. Mitrovich appealed. (CP 683).

### III. ARGUMENT

A. The court erred by granting Ms. Mitrovich's motion for reconsideration of the amount of the equalization payment and denying Mr. Mitrovich's motion for reconsideration.

The standard of review on a trial court's decision on a motion for reconsideration is abuse of discretion. *Singleton v. Naegeli Reporting, Corp.*, 142 Wn. App. 598, 612, 175 P.3d 594 (2008). That discretion was abused here because the trial court failed to take into account the extent of Ms. Mitrovich's separate property in making its distribution of assets and committed mathematical errors that did not comport with its stated intention. These mistakes in law are, in and of themselves, an abuse of discretion. *In re Marriage of Spreen*, 107 Wn. App. 341, 349-50, 28 P.3d 769 (2001).

The court's original memorandum decision set the equalization payment at \$130,000:

Considering only the community assets, a transfer payment is necessary to make an equitable distribution. The Court orders the wife to pay the husband a total of \$130,000. This amount will be offset by the amounts the husband owes for the auto insurance payments noted above, and by the attorney fees awarded below. (CP 448).

On reconsideration, the court changed the amount of the

equalization payment from \$130,000 to \$91,992 on the basis it had used the wrong number in its memorandum decision. (CP 671).

After the offsets, the court ordered an equalization payment of \$81,058.16. (CP 675). In making its final distribution of property, the court expressly made findings that it was making an equal division of the community assets only as separate property was not even mentioned:

The Court finds the total Community Assets is \$223,528.00 and the total Community debt is \$1637. The net community estate is \$221,891.00.

An equal division of all community assets is \$91,992.00 to each party. The Wife is to pay the Husband a transfer payment for a total community property award to him of \$91,992.00. Accordingly, a transfer payment less the \$933.84 auto insurance and \$10,000 attorney's fees, of \$81,058.16 is to be paid to Mr. Mitrovich. . . (CP 675).

This was legal error and an abuse of discretion. *Spreen, supra*.

RCW 26.09.080 provides:

In a proceeding for dissolution of the marriage. . . the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage . . . , and

(4) The economic circumstances of each spouse . . . at the time of the division of property is to become effective . . .

All property, both community and separate, is before the court for distribution. *In re Marriage of Kittleson*, 21 Wn. App. 344, 346, 585 P.2d 167 (1978), *review denied*, 92 Wn.2d 1009 (1979). Separate property is subject to distribution as long as it is just and equitable to do so because the essential consideration is the property division must be fair, just, and equitable. *Id.* at 352. Characterization of the property as separate or community is not controlling. *In re Marriage of Irwin*, 64 Wn. App. 38, 47-48, 822 P.2d 797, *review denied*, 119 Wn.2d 1009 (1992). The trial court is thus not required to award separate property to its owner. *In re Marriage of Konzen*, 103 Wn.2d 470, 477-78, 693 P.2d 97 (1985). The court's distribution of property is reviewed for an abuse of discretion. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

The court stated Ms. Mitrovich had in excess of \$400,000 in separate assets, but awarded it all to her with no consideration of the inequity it caused by leaving Mr. Mitrovich with only his half of the community property minus offsets for his share of the property distribution. In this regard, Mr. Mitrovich assigned error to the

court's findings as to her separate property as they were simply not considered by the court in making its final distribution of property as it should have been. This is contrary to the mandate of RCW 26.09.080(4). And by its own words, the court was well aware he was being left with little. (CP 447).

The court determined their monthly income was about the same so the distribution left Mr. Mitrovich with a net sum of \$81,000 and Ms. Mitrovich a net sum of over \$530,000 after a 30-year marriage. She received all the income-producing assets. The court must make a distribution of property that is fair, just, and equitable. *Kittleson*, 21 Wn. App. at 346. She received 85% and he received 15%, which was the same percentage used by the court in its original memorandum decision. (CP 447). The distribution of community property was the only property divided when all property should have been before the court for distribution. Although the distribution need not be equal, the division of property was unfair, unjust, and inequitable. *In re Marriage of Hadley*, 88 Wn.2d 649, 656, 565 P.2d 790 (1977).

If the court's decree results in a patent disparity between the parties' economic circumstances as here, a manifest abuse of discretion occurs. *In re Marriage of Rockwell*, 141 Wn. App. 235,

243, 170 P.3d 572 (2007), *review denied*, 163 Wn.2d 1055 (2008).

The court's failure to consider the factors in RCW 26.09.080 was another abuse of discretion requiring reversal. *Brewer, supra*.

The court also miscalculated the equalization payment in its findings and conclusions, thus abusing its discretion as the numbers were untenable. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971). The court determined an equal division of all community assets was \$91,992 to each party. (CP 675). But the net community assets were 221,981 so an equal division is \$110,945.50 – not \$91,992. The court erred.

It found the total community assets were \$223,628. This is also incorrect. Counting only the community property, the court determined the house was \$220,000; the Subaru \$2289; the Toyota \$2871; the household account \$968.17, the business account \$27,082; personal property \$6825; and the copyright invoices \$1400. In its original memorandum decision, which was adhered to on reconsideration, the court found the total community assets were \$261,435.17 – not \$223,528. (CP 447). It was undisputed the only community debt was \$1637. Accordingly, the net community assets were \$259,798.17 – not \$221,891. (CP 443-675). The court clearly confused the total community property

awarded to Ms. Mitrovich as the total for all community property in its order re motions for reconsideration. That was incorrect by the court's own numbers in the original memorandum decision, which was adhered to on reconsideration. (*Compare* CP 447 with CP 675). The distribution of assets is thus erroneous because the court used a value for the total and net community assets that was \$37,907 less than what it really was. The court's distribution of property was an abuse of discretion as it was based on untenable grounds or reasons due to the mathematical error. *Junker, supra*. Its distribution of property must be reversed and the case remanded for further proceedings in any event.

B. The court erred by awarding Ms. Mitrovich \$10,000 attorney fees for Mr. Mitrovich's intransigence.

The determination that Mr. Mitrovich was intransigent is a legal conclusion and must be based on facts supporting that determination. See *In re Kelly*, 170 Wn. App. 722, 739-40, 287 P.3d 12 (2012), *review denied*, 176 Wn.2d 1018 (2013). Intransigence may be shown by "litigious behavior, bringing excessive motions, or discovery abuses." *In re Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002). The court has also deemed intransigence to describe parties motivated by

their desire to delay proceedings or to run up costs. *Id.* In its original memorandum decision, the court found there were some instances of [his] failure to comply with discovery requests and untenable legal theories.” (CP 448). Keeping to its decision on reconsideration, the court did not make any further findings on intransigence. (CP 674). The basis for concluding Mr. Mitrovich was intransigent was thus based on multiple hearings due to his failure to comply with discovery requests and his untenable legal theories.

Findings of fact supporting why he caused Ms. Mitrovich to incur those additional expenses are required. *See Sentinel C3, Inc. v. Hunt*, 181 Wn.2d 127, 144, 331 P.3d 40 (2014). If the purported failure to comply with discovery requests and untenable legal theories are findings, they must still be supported by substantial evidence. *In re Marriage of Raskob*, 183 Wn. App. 503, 510, 334 P.3d 30 (2014). They are not.

As for the failure to comply with discovery requests, the same could be said for Ms. Mitrovich. (10/20/17 RP 2, 6, 7, 12). She and Mr. Mitrovich had cross motions to compel. (*Id.*). One of the problems with the discovery requests stemmed from Mr. Mitrovich’s previous attorneys who all withdrew and his then

appearing pro se. (*Id.* at 4, 13). Both parties awaited interrogatory answers from the other, so fault was shared and not borne solely by Mr. Mitrovich. (*Id.* at 6, 7). He had answered interrogatories from Ms. Mitrovich and gave them to his former attorney. (*Id.* at 9). They apparently sat at his attorney's, but Mr. Mitrovich now had them back. (*Id.*). Since Ms. Mitrovich had not filed her financial statement and asset/liability list as of October 20, 2017, she was to do so in the next ten days. (*Id.* at 13).

The court told the parties to hold a discovery conference and for Mr. Mitrovich to give her lawyer the interrogatory answers. (10/20/17 RP 12). Tellingly, the court noted that the parties both got caught up with his different lawyers and ended up getting off track. (*Id.*). This hearing shows there was no intransigence by Mr. Mitrovich by failing to comply with discovery requests. Ms. Mitrovich was equally noncompliant with his discovery requests. Neither was more culpable than the other. Moreover, only one hearing was held on motions to compel. Other hearings were on temporary orders and mediation. (5/22/17 RP 5; 7/19/17 RP 18; 3/2/18 RP 25).

With respect to untenable legal theories, the court made no findings on what those theories were, how they caused delay, or

how they ran up costs. In her trial memorandum, Ms. Mitrovich asked for attorney fees based on his intransigence. (CP 416-19). Untenable legal theories by Mr. Mitrovich were not cited as a ground for finding intransigence. (*Id.*). Nothing in the trial showed foot-dragging or vexatious behavior by Mr. Mitrovich prolonging the proceeding and increasing costs. The court wasted no time in cutting off his questioning based on irrelevance and its memorandum decision and order re motions for reconsideration reflect that. (CP 442-43, 446, 667-68). The record shows Mr. Mitrovich's "untenable legal theories," if any, did not rise to the level of intransigence when the court's findings failed to identify them and failed to reflect any effects from raising them that caused unnecessary litigation or delayed the proceedings.

Substantial evidence fails to support the court's finding of intransigence against Mr. Mitrovich and it cannot stand. *In re Marriage of Raskob*, 183 Wn. App. at 510. The purported finding of intransigence was based on facts failing to meet the requirements of the correct legal standard, thus constituting an abuse of discretion for which reversal is the remedy. *In re Marriage of Krieger*, 147 Wn. App. 952, 959, 199 P.3d 450 (2008).

C. Mr. Mitrovich should be awarded attorney fees on appeal under RCW 26.09.140 and RAP 18.1.

Mr. Mitrovich is entitled to an award of attorney fees on appeal because he has the need and Ms. Mitrovich certainly has the ability to pay. *In re Marriage of King*, 66 Wn. App. 134, 139, 831 P.2d 1094 (1992); RCW 26.09.140. As required by RAP 18.1(c), he will submit a declaration of financial need as required.

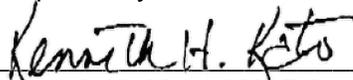
#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Mitrovich urges this court to reverse the trial court's order granting Ms. Mitrovich's motion for reconsideration of the amount of the equalization payment and denying Mr. Mitrovich's motion for reconsideration, reverse the award of \$10,000 for intransigence, and remand for further proceedings.

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DATED this 30<sup>th</sup> day of December, 2019.

Respectfully submitted,

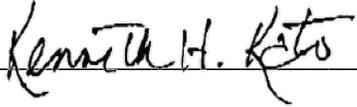


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CERTIFICATE OF SERVICE

I certify that on December 30, 2019, I served a copy of the Brief of Appellant through the eFiling portal on Jonathan Lee at his email address.

  
\_\_\_\_\_

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