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Division III
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Court of Appeals
Division III

Appeal from the Superior Court of Spokane
Honorable Tony Hazel

Pedro Mendoza
Petitioner/Respondent

And

Amanda Mendoza
Respondent/Appellant

No. 368190
Spokane Superior Court #17-3-01992-3

Amended Opening Brief of Appellant

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I. Statement of Facts

The parties in this case are two young adults who met at a bone fire activity and at some Church of Jesus Christ of Latter Day Saints (hereinafter LDS) young adult activities, and were married. RP 54. The husband was in the Army Reserve and about 14 months into their marriage he was ordered to go overseas to work in military operations in Afghanistan. RP 63-64. It was not clear whether the husband's new military assignment was voluntary or not, but occurred after the parties were having some marital problems because of family religious belief differences and communication problems, including the fact that the wife felt clearly that the husband's father, and family did not like her, and wanted their marriage to be over. RP 72. In summary, this young couple was having marital difficulties, which they had not resolved before the husband moved out of their home to go to a new full-time duty assignment with the Army overseas. RP 70-74.

After the husband's new military he met with a JAG officer and he signed a Power of Attorney listing his father as his agent. RP 134 & CP 12. While in this overseas deployment stage, the husband also came back to their home to get his suit so he could wear it for a special military promotion. RP 197-198. When at the home to pick up these things his wife gave them to him and expressed her love, giving him a hug, telling him how proud she was of him, and congratulating him for his promotion. RP 197-198. Following this occasion, the wife lost track of the Petitioner, who was deployed to Texas, then Kuwait, and finally to

Afghanistan as an Army engineer soldier. RP 98. The parties communication appeared to stop following his move from the home, and deployment. RP 134 & 146. As he said in this testimony at trial, he had not spoken with his wife from the time he moved out to trial. RP 133-136. There was especially no discussions between them regarding the viability of their marriage. RP 133-136. [This will be discussed further in this brief.]

This almost 2 year lack of communication left the wife with no communication about the state of their marriage, which she believed was not over. RP 198. She did at one time testify that people may question why she never gave up on the marriage in light of their circumstances, however, she had no communication with him that would have forced her to admit that it was over, and she felt that this entire divorce was orchestrated by the husband's father, which bolster her concern that her marriage was salvageable. RP 266 & RP for wife generally. She held on to this belief in spite of the fact that the parties accounts were all closed, not knowing if this was her father in law's doing, or her husband's actions. Id. However, since she could not and had not talked to her husband she was convinced that the marriage was not over. Id. Ms. Mendoza also never testified that she did this for money, or for property, but that she genuinely thought their marriage was still viable. See RP 95 to 165. Finally, on this subject, the wife's

mother confirmed in trial testimony that her daughter never gave up her belief that this marriage was still intact to the date of trial. RP 191-194.

Even though the wife remained steadfast in her belief that the marriage was not over, and again, never once said that she thought it was over, this became increasingly difficult since she was suffering from substantial medical problems, and was not working a lot due to these problems. RP 206-208. She needed funds and motions for temporary orders had to be filed to obtain financial relief from her husband, which was her only way to get help; but that did not deter her steadfast belief that this marriage was still intact. RP 18.

After about a 2 year period with the husband in Afghanistan, the matter was set for trial. The Soldiers and Sailor's Relief Act had been followed and there was no problem with the implementation of that statute, except some minor differences in its application between the parties attorneys. RP 7-39.

At trial, on November 13-14, 2018, the following facts came to light with the testimony, and seemed to support the notion that Ms. Mendoza had a right to think that her marriage was still intact:

- a. Mr. Mendoza testified that he left the family home and apparently moved in with his parents in the summer of 2017. RP 124-128.
- b. He further testified that although his father was seemingly against the marriage, Mr. Mendoza testified that he offered to pay for marital

counseling to try and help their marriage, as long as it was not an LDS church sponsored counselor. RP 73-74.

- c. Mr. Mendoza also confirmed that he did not talk to Ms. Mendoza from the time he picked up his tux from her and trial. RP 143-145.
- d. After signing the power of attorney for his father, Mr. Mendoza did not see the Petition nor help with its drafting before it was file; that was done by his father. RP 47, 134.
- e. Mr. Mendoza also did not sign the Petition, thus not verifying the truthfulness of the allegation that the marriage was irretrievably broken. CP 3-12.
- f. Amanda Mendoza testified that a member of Pedro's family served her personally and Pedro was not involved. RP 140.
- g. On the date of October 31, 2017 Ms. Mendoza filed a Response to the Petition stating that she did not believe that her marriage was irretrievably broken. She also testified to that at trial. CP 16-21.
- h. At trial Mr. Mendoza testified that while in the army, until trial he never disavowed his marriage to his superiors since he enlisted as a married man and received spousal assistance pay the entire time he was in the service, again, not once telling anyone with the Army that his marriage was over. RP 151-153.
- i. Mr. Mendoza kept all his military pay, including Ms. Mendoza's portion and put it in savings by direct deposit to his bank. RP 138-160, 185.

- j. The husband also admitted that from the time of separation to trial, he did not communicate with Ms. Mendoza about their marriage or whether it was over or still salvageable. RP 134 & 145.
- k. The Petitioner never provided any exhibit letters or written communication that he sent to Ms. Mendoza that their marriage was over. RP 135-148.
- l. To support Amanda's testimony about the marriage, her mother testified that Amanda always felt her marriage was still intact and was very committed to that idea and notion even to the date of trial. RP 191-194.
- m. Amanda and her mother testified that it was also her strong religious belief that marriage is so important to her church and herself that she was committed to continue to make it work. RP 192-207.
- n. Finally, to be completely balanced, again, because there was no communication between Amanda and Pedro when he was in the Army, Amanda did testify that she understood that some people may say she was unrealistic in thinking that the marriage was still alive, however, she also said she did not care about that – she still felt the marriage was intact. RP 199-207.

With the backdrop of the trial and its testimony, the wife and her counsel decided to address this divorce with by use of the concept that this marriage was not irretrievably broken, and therefore, was not "defunct". This was not only important from a financial point of view,

since the husband saved all his military pay of about \$22,000.00, which would have made it community property; it was consistent with her religious views about the importance of marriage, and her personal feelings about the marriage. However, it should be noted that there was no evidence that Ms. Mendoza was committed to the concept that her marriage was not defunct because it meant more money or property. This was her position because of very important religious considerations, and the fact that although with her illnesses she could use extra money, she truly did not feel her marriage was over. The unique legal theory of a non-defunct marriage, although at times rarely used, clearly seemed to be supportable from the facts, and least of all did not seem in anyway frivolous.

Going back to the beginning of trial, the wife's attorney indicated in opening that he intended to argue that this marriage was not defunct. In response to this the husband's counsel admitted that she did not understand the concept of a defunct marriage but she argued against it saying it was not applicable. RP 48-49. The trial judge then seemed to take issue with the defunct marriage concept in his response to the wife's counsel's opening. RP 48-52. Nothing more was said about that legal theory until closing argument. RP 279-287.

Since the wife and her counsel felt there seemed to be substantial evidence to support the idea that this marriage not defunct, that issue was again argued by the Appellant's attorney in closing. During that

argument the Judge had a somewhat strong reaction to its use and had a somewhat stern colloquy with Ms. Mendoza's attorney, asking several times for a case where an appeals court found that once the responding party was served the Summons and Petition, that a court found that that date was not used for the determination of separate and/or community nature of the parties' property. In response to this, the wife's counsel cited the progeny of the defunct marriage cases along with Cross's writings on community property, Harry M. Cross, *The Community Property Law in Washington* (Revised 1985), 61 Wash.L.Rev. 13, 28 (1986), and finally cited the *Bunt* case, *Aetna Life Ins. Co. v. Bunt*, 110 Wash.2d 368, 372, 754 P.2d 993 (1988), which included a number of cases cited by the Supreme Court on this subject, and specifically the comment that it did not matter that there was a Petition for Dissolution filed or served, to determine if the defunct marriage concept could or should be used in this case.

It was clear from the tenor of the closing argument colloquy that the trial Judge was frustrated about the "defunct" argument and eventually ended the wife's counsel's argument rather abruptly by indicating that he was going to see if the case I cited met his request, as if it met this fact pattern. See RP 279-287. However, it also appeared that the court would not refuse further briefing on the issue if needed.

It took a few weeks for the bench ruling in this dissolution case. At the court's final hearing, the court gave the wife the house and its debt,

and did not deal with the concept of whether the marriage was defunct or not. The Judge found that the saved military pay was the husband's separate property for him to keep or use as he saw fit, found a date of separation and declared the marriage irretrievably broken, and did not award maintenance. RP 288=302.

After making the overall ruling as to the parties' property, debts, and maintenance, the judge went on to severely sanction the wife's counsel for what he seemed to feel was the very inappropriate non-defunct marriage argument. He felt the cases cited and the *Bunt* case was not on point, was misleading, and while apologizing to the Petitioner and his family, ordered the wife's counsel to pay all of the Petitioner's fees for this divorce. RP 288-302.

Given the gravity of the order to pay the Petitioner's fees of over \$12,000.00, the rather important religious views of the wife, and the effect of this ancillary ruling on her counsel the Appellant and her counsel filed a Motion for Reconsideration with an appropriate brief on these issues. Supp. Praecipe filed. The Appellant and her attorney's Reconsideration Motion included a supporting brief on the issue of why the concept of a non-defunct marriage applied to the facts of this case, the *Bunt* and other case's application to these facts, and that this argument was not frivolous or misleading as to this dissolution action. Id. The Petitioner's counsel responded but did not really respond to the defunct concept extensively. CP 254-277.

After filing the reconsideration, and at the hearing on reconsideration, the judge provided some relief from his original rather frustrated comments and found that the wife's counsel's argument that this marriage was not defunct was "not frivolous", but instead found that it was "borderline frivolous". However, this time he said that he felt it was interposed to delay the case, and that the cases that were provided were intended to misdirect the court. Therefore, the order to pay the Petitioner's fees was not overturned in spite of the "no bad faith" finding. (It should also be noted that the judge further indicated that the Soldiers and Sailors Relief Act was not an issue that was a problem for him in this case). RP 322-327.

The Respondent and her attorney have appealed this ruling regarding the use of the "non-defunct marriage" issue and the order to pay fees in this case.

II. Alleged Assignment of Error

The alleged errors are respectfully suggested as follows:

1. The Court failed to consider the argument that the parties' marriage was not defunct during the interlocutory period, even though there seemed to be substantial evidence to support this finding in the dissolution file and trial.
2. Although the Court found that the wife's counsel did not offer the non-defunct argument in "bad faith", the court would not reconsider the

order to pay the Petitioner's fees that it imposed in apparent contradiction of the law at CR11.

3. The Court's finding that the wife's attorney's "non-defunct argument" was meant to delay the case and deserved sanctions seemed particularly unfair given the trial testimony and facts of the case, since it may have ostensibly been malpractice for wife's attorney to not make such an argument given the wife's needs due to her illnesses.
4. The court's orders to order the wife's attorney to pay all the husband's fees caused a chilling effect on an attorney's ability to litigate complicated cases, where the law may be complicated to apply, but does in fact seem supported by the facts of the case.

III. Law and Argument

- A. The evidence in this case clearly supported the argument that the parties marriage was not defunct, and the court should have applied that legal theory in the distribution of the husband's saved military income, rather than concentrating on the date of separation or when the Summons and Petition were served.

Washington State has a unique legal construct/theory called the "Defunct Marriage Rule". See *Defunct Marriage: Possible app. in Idaho Divorce law*, Idaho Law Review Vol 30, No. 4 (1994). This concept states generally that if both parties to a marriage desire to no longer live together as husband and wife, and move away from one another with the intent to renounce the community, even though a petition for dissolution is not filed, their community no longer exists and all the

property they each obtain after separation is their separate property. *Id.* This concept has been clarified and detailed over time by the Washington State Supreme court in a number of Appeal and Supreme Court cases. See e.g. *In re Marriage of Short*, 125 Wn.2d 865, 890 P.2d 12 (1995).

There is a good number of cases on the defunct marriage concept, sufficient to say that it is a viable and important legal construct in marital dissolution cases and has been used successfully in many cases. *Id.* Most of the law on a defunct or non-defunct marriage starts with the community property statute RCW 26.16.140, which states that "When a husband and wife are living separate and apart, their respective earnings and accumulations shall be the separate property of each." However, case law has clarified that this statute does not apply unless the parties' marriage is defunct, whether or not there is a marital dissolution petition filed and served. See *Id.* and *In re Parentage of GW-F*, 170 Wn. App. 631, 285 P.3d 208 (Div. 1 2012).

Although the *GW-F* case was a committed intimate relationship (CIR) and parenting case, it analyzed some of its facts by using the "defunct marriage" analysis from the Supreme Court case of *Seizer v. Sessions*, 132 Wn.2d 642, 657, 940 P.2d 261 (1997). Citing *Sessions*, the *GW-F* court said further, "In a marital relationship, the Supreme Court has interpreted this statute to mean a marriage is defunct under RCW 26.16.140 only when the facts involve situations where both

parties demonstrated the marriage was over. In general, then, a marriage is defunct only when there is some conduct on the part of both spouses that the marriage is over, 'before we will apply the separate and apart statute and characterize property acquired by one spouse as his or her separate property.'" (Emphasis added). If the community is dissolved because the marriage is "defunct", the separate property statute applies and both debts and property become separate. *Id.* However, the *Sessions* case also said that mere physical separation does not dissolve the community or make the marriage defunct. To further clarify they said, there must be an intent by both parties to "renounce the community before that happens", again regardless of a petition or service. Citing *In re Marriage of Short*. Finally, the person asserting that the marriage is defunct must establish that fact by clear and convincing evidence versus the idea that the marriage is not defunct. *Oil Heat Co. of Port Angeles, Inc. v. Sweeney*, 26 Wn App. 351, 354, 613 P.2d 169 (1980).

These cases and this legal issue are very important in this case given the facts that were testified to, and the pleadings. First, this meant that it was the burden of Mr. Mendoza to prove that the parties' marriage was defunct after he moved out and went overseas. However, Mr. Mendoza did not do that, rather his testimony supported the notion that only he renounced the community, and not Ms. Mendoza. She never ever renounced the community, but rather continued to announce its

viability all the way from the day Mr. Mendoza left the home for the military, to his return for trial 2 years later. Therefore, the community was never defunct, given all the facts about the parties' non-communication during the interlocutory period of this dissolution. Using this theory in this case was neither frivolous nor inappropriate since many of the facts, if not all of them pointed toward the parties' marriage still being intact at the time of trial, it was again a proper theory to use.

In the wife's attorney's closing argument, after there was a discussion about the debts and property, he cited the cases of *Yates v. Dohring*, 24 Wash.2d 877, 881, 168 P.2d 404 (1946), *Peters v. Skalman*, 27 Wn.App. 247, 617 P.2d 448 (Div. 2 1980), *the Short* case, *supra*, the *Bunt* case, *supra*, and Cross's *The Community Property Law in Washington* (Revised 1985), 61 Wash.L.Rev. 13, 33 (1986). The *Dohring* and *Skalman* cases, *supra*, were cited as some of the original progeny of the Defunct Marriage concept, and the *Short* and *Bunt* case were cited, along with *Cross* because they contained a lot of case law to try and answer the court's questions about the importance of separation and a Petition for Dissolution's service. In *Bunt*, for example, the court specifically said, in answer to Judge Hazel's question, "While mere physical separation does not dissolve the community, *Kerr v. Cochran*, 65 Wash.2d 211, 396 P.2d 642 (1964), *it is not necessary for the operation of RCW 26.16.140 that a **dissolution action be final or even pending.** Togliatti v. Robertson*, 29 Wash.2d 844, 190 P.2d 575

(1948). Rather, this statute applies to those marriages that are for all practical purposes "defunct". *Rustad v. Rustad*, 61 Wash.2d 176, 180, 377 P.2d 414 (1963)," (emphasis added), *ipso facto*, if the marriage is not defunct, RCW 26.16,144 does not apply, regardless of the petition being filed or it's "served" status.

As indicated, toward the end of the Petitioner's closing argument, the Judge finally asked for the case that applied to the facts of this case, and the wife's counsel selected the *Bunt* case because of its language about its application regardless of a pending divorce action, since that concept included the answer to his question, showing that even though there was a Petition and service, the court can still find that the marriage is or is not defunct.

More specifically, the *Bunt* case utilized this quote from the *Short* case,

"To begin our analysis we review and reaffirm certain applicable presumptions. One such presumption is that in community property jurisdictions, assets acquired during marriage are community property. *Estate of Madsen v. Commissioner of Internal Rev.*, 97 Wash.2d 792, 796, 650 P.2d 196 (1982); Harry M. Cross, *The Community Property Law in Washington* (Revised 1985), 61 Wash.L.Rev. 13, 28 (1986). This presumption is rebuttable by establishing that the acquisition fits within a separate property provision. *Cross*, 61 Wash.L.Rev. at 29.

Separate property is defined as property acquired before marriage or acquired after marriage by gift, bequest, devise or descent. RCW 26.16.010, .020; *In re Marriage of Brown*, 100 Wash.2d 729, 737, 675 P.2d 1207 (1984). Separate property also includes the earnings and accumulations of a husband or a wife while living separate and apart. "When a husband and wife are living separate and apart, their respective earnings and accumulations shall

be the separate property of each." RCW 26.16.140; *Aetna Life Ins. Co. v. Bunt*, 110 Wash.2d 368, 372, 754 P.2d 993 (1988).

The "living separate and apart" statute contemplates a permanent separation, a "defunct" marriage. *Bunt*, 110 Wash.2d at 372, 754 P.2d 993; *Cross*, 61 Wash.L.Rev. at 34. A marriage is considered "defunct" when both parties to the marriage no longer have the will to continue the marital relationship. *Cross*, 61 Wash.L.Rev. at 34. In other words, when the deserted spouse accepts the futility of hope for restoration of a normal marital relationship, or just acquiesces in the separation, the marriage is considered "defunct" so that the "living separate and apart" statute applies. *Cross*, 61 Wash.L.Rev. at 35. The Superior Court made a finding of fact that Patricia and Robert separated on January 18, 1989. Neither party disputes this finding. Neither party argues the marriage was "defunct" on a date other than January 18, 1989.

Community property is all other property acquired by either spouse after marriage that is not separate property. RCW 26.16.030; *Brown*, 100 Wash.2d at 735-37, 675 P.2d 1207."

As can be seen, the *Short* court felt that the *Bunt* case answered the question regarding when the "defunct marriage" principles apply and whether it is even relevant that a dissolution action is pending. This law was in the brief in support of the Motion for Reconsideration by the Respondent's attorney [Supp Praecipe filed for this pldg.] wherein the *Seizer v. Sessions* case, again, like *Short*, quoted the *Bunt* case as they discussed the difference between a defunct and a non-defunct marriage. The *Sessions* case reiterated the *Bunt* case law that the filing of a petition and service do not matter when looking at what is separate or community in a dissolution of marriage, if the marriage is not defunct, as the *Sessions* court reiterated, "but it is not necessary for purposes of RCW 26.16.140 that a dissolution action be final or even pending."

Togliatti, 29 Wash.2d at 851-52, 190 P.2d 575. The statute applies, as we have previously noted, to marriages that are "defunct." *Rustad v. Rustad*, 61 Wash.2d 176, 180, 377 P.2d 414 (1963)."

In this case, and with as much respect as this author can engender for the Judge, the question of a case that specifically dealt with a filed petition and service of that petition is not the issue in deciding what is separate or community. This is especially true when there has been no communication between the parties about whether their marriage is over or not. And when only one of the parties says he or she believes their marriage is over, and the other does not. Under the facts of this case, until the final divorce decree is entered, the marriage is not defunct and income earned by one of the spouses is community property. Therefore, arguing the concept of a non-defunct marriage is neither frivolous or meant to delay the case, otherwise the attorneys in the *Short*, *Bunt* and other cases acted inappropriately as well.

B. The wife's counsel had a legal duty to argue the non-defunct nature of the parties' marriage, given the wife's medial problems and need for funds.

After learning the facts of this case, that the Petitioner neither verified the Petition, nor communicated with the Respondent about their marriage and its viability, the wife's counsel had a legal duty to argue the "non-defunct marriage" legal principle in this case. This was especially true since those facts dovetailed with the defunct marriage

principle in this state and the wife needed extra funds due to her medical problems. Unless that principle of law was argued, the court would not consider distributing the husband's saved military income as community, rather than giving it to him as his separate property.

An attorney has a duty to act in the best interests of his client. RPC 1.3, which in part states, "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with diligence in advocacy upon the client's behalf. . ." Ms. Mendoza had two important issues she wanted to tell the court, first, her marriage was not over (hence the non-defunct marriage argument); secondly, she needed money because she suffered from a sleep disorder and other medical difficulties that stood in the way of her earning as much as she could. And since a court commissioner had already found that there was not a basis for maintenance, and the trial judge upheld that ruling, maintenance was likely a long shot; however, being paid back for a married man's military spousal pay, or for half of it as community funds was a simple way to help with her finances. Again, this was especially true when the facts dovetailed with showing that her marriage was not defunct. Cf. *Short, Sessions, and Bunt* cases, *supra*.

Equally important to that rule is that an attorney needs to provide candor to the court, or the truth. RPC 3.3. However, this ethics rule also has a two-edge sword, it also states at (3) that it is a violation of this rule to “fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer . . .” which may be directly adverse to the position of the client and not disclosed by the opposing party. However, the comments to this rule also implies that part of that candor includes providing the appropriate law for the jurisdiction.

In this case, the wife’s attorney provided a legal argument that may have been unique, but in all “candor”, it applied to the facts of this case. Mr. Mendoza had not spoken to his wife about the viability of their marriage, he also told the US Army that he was still married and wanted funds for his wife included in his pay. If he was consistent with his testimony at court, he should have also been honest with his military superiors and told them his marriage was over, and he shouldn’t have received extra pay for a marital community he felt was over.

Mr. Mendoza did not tell the military the full story of his position on his marriage. He used it to get more money from the military. With these facts in mind, it does not seem that the wife’s attorney used an inappropriate or wrong legal theory in this case to help his client and do his duty toward her. The Defunct Marriage principle applied and was intended to help his client. What seemed inconsistent with this rule is that sanctioning her attorney for using a reasonably viable theory in this

case, to help the wife with her life's needs seems consistent with a family law attorney's responsibilities.

C. Given the court's reconsideration ruling, the court should have rescinded the order to pay the Petitioner's fees for this divorce.

The court found that the wife's counsel's argument was "not frivolous" but seemed to say that he intentionally caused the case to go down an unnecessary path by arguing a borderline legal theory. The judge used this to justify keeping the sanctions in effect, even though those sanctions were based on the conclusion that the wife's attorney's non-defunct marriage argument was found to not be frivolous. That fine seemed to be justified even though the facts showed that utilization of the principle of a non-defunct marriage for the Respondent wife was appropriate, even though it added to the length and complexity of the case and trial.

A court has the authority to impose sanctions when it finds that an attorney has engaged in "bad faith litigation conduct". *State v. S.H.*, 102 Wn. App. 468, 474-75, 8 P.3d 1058 (2000). The authority arises from the power vested in the court to "enforce order in the proceedings . . . [and] [t]o provide for the orderly conduct of proceedings before it[.]" *S.H.*, 102 Wn. App. at 473 (quoting RCW 2.28.010(2)-(3)).

However, if the attorneys' actions are not found to be frivolous it is error for the judge to sanction the attorney. *Id.* There must be a finding that the actions of the attorney are frivolous for sanctions to be levied. *Id.*

The court may say that delaying the court proceeding, regardless of whether it is intended in bad faith or not is a sanctionable action by an attorney. CR 11. There seems to be clear authority for the court to assign such sanction for such tactics. However, an appeals court reviews a trial court's decision to impose CR 11 sanctions for an abuse of discretion. *Biggs v. Vail*, 124Wn.2d 193, 197, 876 P.2d 448 (1994); *In re Recall of Lindquist*, 172 Wn.2d 120, 141, 258 P.3d 9 (2011).

A court abuses its discretion "only if there is a clear showing" that the decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). A discretionary decision is based on untenable grounds or untenable reasons if the trial court "relies on unsupported facts or applies the wrong legal standard." *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (emphasis added). A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. *Mayer*, 156 Wn.2d at 684[6] (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). Although the court's discretion may result in a decision upon which reasonable minds may differ, it must be upheld if it "is within the bounds of reasonableness." *Lindgren v. Lindgren*, 58 Wn.App. 588, 595, 794 P.2d 526 (1990).

As for CR11 sanctions, their purpose is to "deter baseless filings and to curb abuses of the judicial system." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 224, 829 P.2d 1099 (1992). "CR11 is not meant to act as a fee shifting mechanism, but rather as a deterrent." *MacDonald v. Ford*, 80 Wn.App. 877, 891, 912-P.2d 1052 (1996). A

filing is baseless if it is not well grounded in fact, existing law, or a good faith argument for the extension of existing law. *Hicks v. Edwards*, 75 Wn.App. 156, 162-63, 876 P.2d 953 (1994). But even a baseless filing is not subject to CR 11 sanctions unless the trial court also finds that the attorney who signed and filed the pleading, motion, or legal memorandum failed to conduct a reasonable inquiry into the factual and legal basis for the filing. *Bryant*, 119 Wn.2d at 220; *MacDonald*, 80 Wn. App. at 884. The court must evaluate an attorney's conduct under an objective reasonableness standard by asking whether a reasonable attorney in similar circumstances would believe that the attorney's actions were factually and legally justified. *Bryant*, 119 Wn.2d at 220-21.

In this case, the defunct and non-defunct marriage principle is a well-grounded legal issue that helps a dissolution court decide what is community or separate property after there is a separation of the parties in the case. Without using this principle the court is left with deciding things based simply on service and filing issues, and not their intent or understanding of the real facts of the case. For example, when the pleadings are filed and served, or when a husband moves out, has nothing to do with when the marriage is over in reality. It is only when the facts show the community is defunct that the character of property and debts is determinable, unless the parties join in the

petition and say the same things about their marriage. That is not the case here in this case and the facts shown at trial.

In terms of whether there was an attempt or actual violation of CR11, it is unreasonable at best to suggest that making the argument that the marriage is not irretrievably broken, and is not defunct is in any way a violation of that court rule. Otherwise, the standard form for a Petition for Dissolution needs to change and state something to the effect that "Your spouse has filed a Petition for Dissolution of Your Marriage, that means your marriage is irretrievably broken", etc. This is not the case in Washington State, and so it seems that it was appropriate to argue that this marriage was not defunct, while Mr. Mendoza was away in the military. The Appellant and her attorney ask this court to vacate the sanction orders in this matter, among other requests.

IV. Conclusion

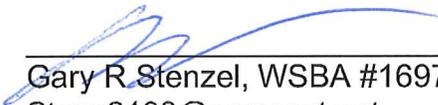
The husband moved out of the family home before he went overseas in the military. He gave his father a power of attorney to help him here in the states. His father filed a Petition for Dissolution for him that he did not see or sign. Although the husband claimed he did not want to be married when he left the home for the military, he still told the military he was married to get extra pay for his wife and family. At trial the husband said he never really talked to his wife about the marriage, but wanted to get divorced. In contrast the wife said she did

not feel the marriage was over, and her attorney argued that this marriage was not defunct, consistent with her desire to be married.

After the decision was made by the judge in this case he sanctioned the wife's attorney for arguing the non-defunct marriage concept, even though he provided one of the seminal cases on that issue. After a reconsideration motion was filed, the judge found that the attorney for the wife did not make a frivolous argument using the defunct marriage theory in this case, but that it wasted the court's time because it was not at all supported by the facts. He ordered that the attorney pay all the husband's fees for the divorce, and left it at that.

The wife and her attorney have filed this appeal to overturn the court's decision on the defunct marriage issue, and the sanctions for the attorney. There seemed clear evidence to support the "non-defunct" nature of the parties marriage, therefore, the non-defunct argument was not made in either bad faith, or to waste the court's time. Because the Court found that the wife's attorney did not offer the defunct argument in *bad faith*, the court should not have ordered sanctions for doing so, especially when that legal theory, if applied, would have changed the characterization, and possible distribution of the husband's saved military income in the wife's favor.

This amended brief is submitted this 15th day of May 2020 by,



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