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No. 64574-9

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

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In re the Marriage of Erik K. Hansen

Appellant,

and

Elizabeth Weiner,

Respondent

Respondent's Responsive Brief

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A. ASSIGNMENT OF ERROR

Respondent assigns no errors to the trial court's decision.

B. STATEMENT OF ISSUES

1. Whether the court acted within its discretion by imposing restraining orders against the husband when, prior to trial, the wife requested such relief, the husband did not oppose it, and evidence in the record supports the request for it?
2. Whether the court acted within its discretion when it awarded approximately equal portions of the parties' net assets to each party?
3. Whether the court acted within its discretion by sanctioning appellant \$2,500 in attorney fees for failing to comply with the court's order (1) compelling him to fully and completely respond to respondent's discovery requests and (2) restraining him from using the balance of his Home Equity Line of Credit (HELOC) funds in any way other than depositing them in a custodial account?
4. Whether the appellant is entitled to request relief from the trial court's order on his Motion for Post-trial Relief, when appellant did not timely file an appeal of the said motion?
5. Whether the court acted within its discretion when it denied appellant's Motion to Vacate when appellant failed to prove any misrepresentation made by respondent or mistake made by the court?

6. Whether the court acted within its discretion in sanctioning appellant \$2,024.57 in attorney fees on the ground that his motion was baseless?

7. Whether the court acted within its discretion when it used, and encouraged the parties to use, email messages to communicate with the court for the purpose of (1) arranging hearing times; (2) exchanging draft documents, such as the Findings of Fact and Conclusions of Law and Decree of Dissolution; (3) informing the parties of the court's decisions; (4) communicating requests to the parties and receiving responses to the said requests from the parties; but (5) not allowing email messages to be used as a means for litigating the substance of the case.

C. STATEMENT OF THE CASE

Discovery Issues

Prior to separation, the parties applied for and received a \$100,000 Home Equity Line of Credit (HELOC). RP 1 at 66. The HELOC obligation was taken out for the purpose of paying off community debt in the amount of about \$39,000 and to provide funds for the future improvement of the parties' home at 1041 NE 96th St. RP 1 at 38, 66, 67.

Shortly after the funds became available, Erik withdrew the remaining \$61,000 balance of the credit, but not for the purpose of making improvements to the parties' home at 1041 NE 96th St. RP 2 at 16 to 18. On the contrary, according to his testimony, he stored it, as a check, with his secure medical files. RP 2 at 17.

Erik refused to provide an accounting of his use of the funds to Lisa, necessitating the service of discovery requests upon Erik's attorney at the time, Michael Primont. Sub 20.

On May 15, 2009, Mr. Primont received Petitioner's First Set of Interrogatories and Requests for Production. Sub 19 at Ex. A. On June 17, Mr. Primont received a letter from the undersigned requesting an LR 37 conference to take place on June 22, 2009, regarding his client's overdue response to Lisa's discovery requests. Sub 19 at Ex. B. On June 22, Mr. Primont represented that he would deliver complete responses to those discovery requests on or before June 29. Sub 19 at Ex. C.

On June 29, 2009, the undersigned received Erik's responses to discovery. Sub 19 at Ex. D. However, his responses were not complete. On July 2, 2009, the undersigned sent a letter to Mr. Primont requesting that he supplement his client's discovery responses. The undersigned also scheduled an LR 37 conference to take place on July 15. Sub 19 at Ex. F. Due to the paucity of Erik's responses to discovery, the requests for supplementation were extensive, including requests for supplementation of 24 interrogatories, many with multiple sub-parts, and six requests for production. During the scheduled LR 37 conference, Mr. Primont represented that his client's supplemental responses would be delivered to counsel on July 27. Sub 19 at Ex. F.

On July 27, 2009, the undersigned received a series of email messages from Mr. Primont with bank statements for Erik's accounts, not

labeled in accordance with CR 26(g)(1), apparently supplementing Erik's to Petitioner's Request for Production No. 2. Erik had not supplemented his answers to a single interrogatory. Of particular concern, Erik had not supplemented his answer to Interrogatory 34, an interrogatory requesting disclosure of bank and investment accounts in which Erik held an interest during the marriage. Sub 19 at Ex. H.

On July 31, 2009, the undersigned sent a letter to Mr. Primont re-requesting supplementation of his client's discovery responses. Sub 19 at Ex. H.

In early August 2009, Erik told Lisa that the \$61,000 he took was never put in an account, that she would never find it, and that most of the money had already been spent. Sub 20.

On August 21, 2009, Mr. Primont was informed that counsel specifically wanted an accounting of his client's use of the \$61,000 and all pertinent documentation of its use. Sub 19 at Ex. I. Interrogatory 87 and Request for Production 33, obligated Erik to provide an accounting of the funds he hid from Lisa. Sub 19 at Ex. K.

By September 4, no supplemental responses were received, so a motion was filed to compel Erik to fully respond to all discovery requests. Sub 19.

In a letter dated September 8, 2009, Mr. Primont stated "except for the amounts listed below [totaling \$29,069.82] Erik never placed the [HELOC] funds in an account. He has kept the money in cash in a secure

place. Therefore, the money has never shown up on a bank statement or on any other account statement.” Sub 36A at Ex. C . Mr. Primont stated that \$5,000 of the HELOC money had been used by Erik to pay his attorney fees. Sub 36A at Ex. C. In a Declaration dated September 9, 2009, Erik represented to the court that the said letter provided a “full accounting” of his use of the HELOC funds. Sub 25.

On September 8, 2009, the undersigned sent an email message to Mr. Primont insisting that the remaining HELOC funds be deposited in an account beyond the reach of the parties, except for \$5,000, which should be received by Lisa to pay attorney fees, since Erik had afforded himself \$5,000 of these funds for this purpose. CP 36A at Ex. G.

On September 9, 2009, counsel received an email message from Mr. Primont in which he stated that, after “double checking,” Erik “discovered” that he had not used HELOC funds to pay attorney fees. Sub 36A at Ex. H.

Erik’s “discovery” was convenient for him and not credible. Did he confuse \$5,000 he might have had available from other sources with the thousands of dollars in cash he obtained from the HELOC, and kept beyond Lisa’s reach? Unfortunately, without a meaningful accounting for the HELOC funds he expended, there is no way to know to what purpose Erik put the HELOC funds.

On September 10, Mr. Primont was informed that the undersigned would be in the ex parte department the next day to obtain appropriate

restraints. Sub 36A at Ex. H. Later that same day (at 4:58 p.m.), the undersigned received an email message from Mr. Primont stating that his client used the remaining \$36,930.18 in cash that very day to pay down the balance of his mortgage on his residence. Sub 37 at Ex. C. On September 11, 2009, counsel obtained an Ex Parte Restraining Order and Order to Show Cause. CP 480.

On September 22, 2009, Judge Washington entered an Order on Motion to Compel Respondent to Respond to Petitioner's Interrogatories and Requests for Production. Judge Washington ordered Erik to do the following (Sub 46):

1. Fully and completely respond to Petitioner's First Set of Interrogatories and Requests for Production within seven (7) days of this order.
2. Fully and completely document to what use he has put the money he withdrew from the parties' WSECU Line of Credit, including the location of any such funds and/or items he has purchased with such funds.

The order also awarded sanctions in the amount of \$1,000.00 against Erik for failure to respond to Lisa's discovery requests. Aside from paying the sanctions, Erik never complied with this court order. Erik's intransigence resulted in substantial legal fees to Lisa. Sub 22; Ex. 60.

The Motion to Adjust Trial Date

On September 10, 2009, Erik was notified that counsel intended to file a motion which would prevent him from making any further use of these funds pending the court's decision on Lisa's motion that the funds be

deposited into one of the attorneys' trust accounts. Sub 29; Sub 36A at Ex. J. Instead of complying with the court's order, Erik used these funds to pay down the mortgage on his own house, or so he testified.

(Presuming that Erik actually used the HELOC money to pay down his mortgage, he did so in express violation of the Order to Show Cause. RP 2 at 17, 18; Sub 28).

Whether Erik actually paid down his mortgage with HELOC funds was never proved. Lisa testified that she did not know what Erik did with his money. RP 1 at 41. Erik testified that he paid down his mortgage in order to lower his mortgage payments by \$100 per month. RP 2 at 18.

Prior to trial, seeing that Erik had absconded with the remaining HELOC funds, that he refused to account for what he had done with those funds, and that he thumbed his nose at the court's orders designed to determine what he had done with the funds, it became clear to Lisa that Erik was not acting in good faith and it was no longer possible to negotiate with him at a settlement conference. Therefore, Lisa moved the court to waive the requirement to conduct a settlement conference and to adjust the trial date. On September 25, 2009, the court granted the motion. Sub 36A at page 6; Sub 47. The court also entered temporary restraining orders on that date. CP 261.

Exhibit 59: The Basis of the Parties' Property Division

At trial, the undersigned presented a spreadsheet showing Lisa's proposed property division, including values for the assets and debts

therein. The clerk marked this spreadsheet as Exhibit 59. RP 2 at 20; CP 1705 to 1707. Exhibit 59 is an illustrative exhibit. It was not admitted at trial. CP 273. All of the information set forth in this exhibit was directly available to the trial court in the form of admitted exhibits and testimony. Please see Appendix A.

At the close of trial, the court asked the undersigned to provide a copy of Exhibit 59 and a spreadsheet analyzing the parties' HELOC obligation. Compliance with the court's request was immediate. CP 328. Regarding the court's use of the spreadsheet analyzing the parties' HELOC obligation, please see Appendix B. This appendix is helpful in understanding the reasons why the trial court ruled the way it did regarding Erik's HELOC repayment obligations.

Erik contends that the trial court "relied" on these spreadsheets. Opening Brief (OB) at 30. He also contends that the trial court did not independently determine the value of the parties' property based on the evidence and testimony presented at trial. His contentions are groundless speculation and not based on any evidence.

In contending that the court "relied" on Exhibit 59, Erik insists that the court valued the parties' property as set forth in Exhibit 59. OB at 30. On this point, Lisa agrees and the record supports this conclusion, as explained below.

Erik's Opening Brief presumes the court assigned the parties' assets and debts as set forth in Exhibit 59. Specifically, he contends that

the court valued his (1) house at \$344,000, (OB 32); (2) his retirement assets at \$9,178 (OB 34); and (3) the community obligation on the HELOC account at \$0 (OB 34). Again, Lisa agrees. Please note that Erik made these same arguments in Motion to Vacate. CP 682 to 693.

The trial court's division of assets, which awarded the parties' assets as set forth in Exhibit 59, supports Erik's contention. CP 329 to 333; CP 157. Erik's contention that the court valued the parties' assets and debts as set forth in Exhibit 59 is also supported by statements made by Judge Spector, and statements made Mr. Hirsch not contradicted by the court, at the hearings on Erik's Motion to Vacate. RP 3 at 4 to 7, 10, 18; CP 1700 to 1709.

Erik contends, without reference to the record, that he objected to the use of Exhibit 59 at trial and afterward. In fact, Erik did not so object. Erik did nothing more than testify that he disagreed with specific values set forth in the Exhibit. In fact, Erik himself relied on Exhibit 59 when referring to values of the parties' property. RP 2 at 14, 84.

Both parties referred to Exhibit 59 at trial, using it as a basis to testify about values of their assets and debts. RP 2 at 14, 19, 49, 54, 84. Erik does not dispute that he agreed to most of the values attributed to the parties' assets and debts as set forth in Exhibit 59. CP 1248; RP 49 to 51.

Erik's position is that *the values* assigned to the parties' assets and debts, as set forth in Exhibit 59, are not tenable grounds for dividing the

parties' assets. OB at 30. The basis for this contention is that Exhibit 59 was not admitted as evidence at trial and that Erik objected to it.

Erik's point, in this regard, is not well taken. The exhibit itself is not evidence. It sets forth values which Lisa argued were correctly assigned to the parties' assets and debts. Whether the values of the various assets and debts, themselves, are tenable bases for dividing the parties' property depends on whether they are supported by the evidence, not whether Erik agreed to them.

Eric did not object to the use of Exhibit 59, although he testified that he disagreed with the values assigned to specific assets and debts therein. Judge Spector was therefore aware of, and considered, Erik's positions as to the value of the assets and debts in question.

The Parties' HELOC Obligation

As established above, Erik never complied with the court's order compelling him to "fully and completely" answer Lisa's discovery requests. Among other things, he did not provide the documents necessary to trace his use of the HELOC funds he hid from her. Sub 46.

At trial, Erik offered evidence showing that he paid for the following expenses: Three months' worth of loan payments for the HELOC (\$2,946; Ex. 110, 111, 113), the real estate taxes due on Lisa's home in April 2009.(\$2,809; Ex. 114), replacing the roof on Lisa's residence (\$4,342; Ex. 115), and paying property taxes on his separate property in Whatcom county (\$973; Ex. 112). Mr. Primont represented

that these expenses were paid from HELOC funds. Sub 36A at Exhibit C. Erik also testified that these expenses were paid from the use of HELOC funds. RP 2 at 37, 38.

The last two of these expenses – replacing Lisa’s home’s roof against her express desire that he not do so and paying property taxes on his separate property, arguably are Erik’s separate expenses. Also noteworthy is that Mr. Primont mistakenly represented that Erik’s \$973 payment of his property taxes was actually a payment made on the HELOC. Sub 36A at Exhibit C; Ex. 112.

Erik testified that he used \$50,000 of the HELOC funds to pay down his mortgage. RP 2 at 17 to 19. However, Erik did not offer any evidence at trial to support his contention that he paid down his mortgage or that he used HELOC funds to do so.

When asked how one would know whether Erik had used HELOC or other money to pay various expenses, he was evasive. RP 2 at 38. He merely asserted that his bank records supported his testimony. RP 2 at 17. However, the bank records admitted at trial do not support his testimony. The checks showing what expenses he did pay are cashier’s checks, not checks drawn directly on a bank account. Ex. 110 to 115.

Erik’s failure to comply with the court’s pretrial order to provide bank records so that an accounting of his use of the HELOC funds could be prepared had consequences that he could have anticipated. These consequences included an inability to determine what amount of the

HELOC's funds were used for purposes benefitting the marital community; Erik, himself; or Lisa. Lisa incurred additional attorney's fees as a consequence of Erik's obstreperousness.

After trial, but prior to the entry of the First Amended Findings of Fact and Conclusions of Law and Decree of Dissolution, ***Erik represented to the court that a total of \$38,504.03 of the HELOC funds were spent on community expenses.*** CP 39, 40. This left a balance of approximately \$61,000 of funds for which he never accounted as the court had ordered before trial.

At trial, Lisa testified that Erik never informed her as to what he did with the \$61,000. RP 1 at 41. Prior to trial, Erik had informed her that the money had never been deposited into an account and that she would never find it. Sub 20.

At trial, Lisa testified that she made the required \$973 monthly payment on the HELOC obligation for the period December 2007 to the time of trial, which was October 20, 2010. RP 1 at 18, 45.

In short, Mr. Hansen withdrew \$61,000 from the parties' HELOC account, secured by Lisa's house, hid it from her and later refused to account for his use of the money, despite being ordered to do so. He forced Lisa to make the minimum payments on this debt for over two years while it went unused or was used as he saw fit for his own purposes.

Lisa's Analysis of the HELOC Obligation

As established above, at the close of trial, the court requested counsel to provide an analysis of the parties' HELOC obligation and a copy of Exhibit 59, showing Lisa's requests regarding the court's characterization, valuation and allocation of the parties' assets and debts. The undersigned immediately complied. The court thereafter entered orders which characterized, valued and allocated the parties' assets and debts as Lisa suggested.

After trial, Erik filed a Motion to Vacate, in which he alleged, among other things, that the court improperly valued the parties' HELOC obligation. CP 682. Attached to the Order denying Erik's Motion at Exhibit B is the spreadsheet requested by, and delivered to, the court, illustrating the basis on which Lisa proposed to characterize, value and allocate the parties' HELOC balance owing. CP 332, CP 1709

In its order denying Erik's Motion to Vacate, the trial court found, in pertinent part, as follows (CP 1702):

The evidence adduced at trial established that the court properly awarded the remainder of the Home Equity Line of Credit balance to the respondent. A table summarizing the evidence adduced at trial as to how the funds in that account were used by the parties, and mainly by the respondent, is attached at **Exhibit B**. Exhibit A [Exhibit 59] shows that the balance of this obligation was awarded to the respondent as his separate obligation.

The figures in Exhibit B are supported by the evidence and testimony taken at trial as follows:

1. As established above, about \$39,000 of the HELOC funds were

- used to pay community debt. RP 1 at 38.
2. Lisa's nominal one-half share of that debt was \$19,500.
 3. After subtracting Lisa's nominal share of the community debt in the amount of \$19,500 from the original \$100,000 HELOC funds available, the remaining debt of \$80,500 (comprised of Erik's nominal one-half share of community debt in the amount of \$19,500 plus \$61,000 in separate debt) was allocated to Erik.
 4. As of September 25, 2009, the balance on the HELOC was \$91,043. That being so, the parties had paid \$8,957 in principle. Ex. 24. ($\$91,043 + \$8,957 = \$100,000$)
 5. Lisa made a total of \$31,917 in payments on the HELOC. Ex. 24.
 6. Erik was given credit for \$5,754 the three HELOC payments he gave to Lisa (\$2,946; Ex. 110, 111, 113); and Lisa's property tax expenses (\$2,808; Ex. 114).

A detailed analysis of this obligation is set forth in the table attached as Exhibit B to the Order on Motion to Vacate. CP 1709. After the trial concluded, the court asked the undersigned to forward the said table, and this was promptly done. CP 328 to 332. A detailed explanation of the calculations illustrated in the table was presented to the trial court in response to Erik's Motion to Vacate. Sub 137 at pages 13, 14. This analysis is reiterated at Appendix B.

Erik never disagreed with the methods used to analyze this obligation. Mr. Hirsch stated that this table did "a beautiful job of justifying [Lisa's] reasons for the improper math and division, but they don't go back to the point here, which is that the math was wrong on the spreadsheet." RP 4 at 1, 2. Mr. Hirsch did not elaborate as to how the "math was wrong" at the hearing, nor in Erik's Opening Brief, except to argue that Lisa should be obligated for debt on money Erik put in his pocket.

To briefly summarize the salient points: the trial court admitted evidence showing that:

(1) Lisa paid a total of \$36,917 on the HELOC debt, mainly after the parties separated;

(2) the total interest charged to the parties for the use of the HELOC funds was \$20,878; and

(3) the principle paid back on the HELOC obligation was \$8,957 (\$100,000 - \$91,043). Ex. 24. The net result is that the payments Lisa made on the HELOC obligation were \$1,614 greater than her nominal one-half proportionate share of community debt and post-separation debt that benefitted her only, such as the real estate taxes due on her house. CP 1709. Accordingly, the trial court valued the community balance on this obligation at \$0. That is why there is no dollar figure in the community line item entry for the value of this debt: Lisa had already paid it.

Erik's central theory on appeal is that the court divided the parties' assets and debts 80/20, favoring Lisa. However, his theory completely ignores the fact that the court attempted to allocate the HELOC debt between the parties in a fashion reflective of how those HELOC funds were used by the parties, to include the large amount of interest that was paid to that obligation pretrial, mainly by Lisa.

The Value of Erik's Residence

The parties in this case own two homes which are next-door to each other. RP 2 at 34. The physical separation of the parties occurred

when Erik moved out of the marital home (“1035”) to the home next door (“1041”). Both parties had appraisals prepared as to both homes. The parties’ real property was appraised as follows (Ex. 32, 33, 37, 38; CP 328 to 331):

	Appraisal by Eng & Kennedy	Appraisal by R2 Inc.	Average
1035 (Lisa’s)	\$283,000	\$250,000	\$266,500
1041 (Erik’s)	\$308,000	\$360,000	\$334,000

At trial, the parties agreed to value the wife’s residence at \$266,000, but did not agree as to the value of Erik’s house. RP 2 at 12 and 13.

The disagreement regarding the valuation of Mr. Hansen’s house stems from the appraisal report issued by his appraiser. In that report, the appraiser stated that the value of the house, based on the Sales Comparison Approach, was \$360,000. Ex. 33 at page 4.

On page 5 of the report, in the section entitled “Final Reconciliation,” the appraiser states that the indicated value of the property is \$360,000 but that the market value of the property was \$280,000. On page 14 of the report, in the section entitled ‘Assumptions,’ the appraiser stated the following:

This report is based on an extraordinary assumption. The interior of the home is currently unfinished. I make the assumption in the Sales Comparison Approach that the interior has been renovated per the estimates provided by the Client. I have taken the post-renovation value and subtracted the cost of the renovation to

determine the as-is value. ***If the estimates provided are not accurate, the reliability of the assignment results will be affected. I attach by reference a 17 page list of estimates*** that indicate the cost to repair the home into ***above average*** condition to be \$78,191.59....

(Emphasis supplied)

Mr. Primont did *not* include the alleged 17 page list of estimates with this exhibit when he delivered it to the undersigned, nor was it ever produced by either party at trial. Please note that on page 4, the report states that it is 16 pages long, *including* exhibits. Ex. 33. Erik not only failed to produce the 17 page list of estimates, but he also did not call any witnesses to testify as to the said estimates.

Erik testified at trial that he thought roughly \$80,000 would have to be spent on the home to make it “habitable.” RP 2 at 31. To his mind, this expense was to include a new electrical system, new fixtures, new plumbing fixtures, dry-wall work, and insulation. RP 2 at 31 to 33.

No documentation of the estimated costs to make the home “habitable” was submitted by Erik at trial. It is important for the court to note that the appraiser said spending \$78,191.59 would bring the home up to “above average condition” (page 14 of the report), while Erik testified spending roughly the same amount would make it only “habitable.” Notably, Erik did not testify as to what work anticipated by the appraisal had been done and, if work had been done, what the actual cost had been, nor where the money had come from to pay for the work done.

Turning back, briefly, the pretrial discovery orders Erik ignored, the court will please bear in mind that Erik failed to document any estimates and actual repairs or improvements to his home as the pretrial court had ordered. On May 14, 2009, two months after R2 Appraisal issued its report regarding the value of Mr. Hansen's house, counsel sent discovery requests to Mr. Primont, as established above.

Interrogatories 59, 87 and Request for Production 33 requested disclosure of information and documentation regarding the parties' real estate as follows (Sub 19 at Ex. K; Sub 137 at Ex. D):

INTERROGATORY NO.59: State the name, address, home and work telephone numbers and employment of ***all persons having knowledge concerning any of the facts, debts, or property in which you claim any interest or obligation***, whether identified in your answers to these Interrogatories, or in the documents produced by you, ***designating which facts***, debts, or property such person or persons have knowledge of. This request is to include all such persons known to you or your attorneys. If any such person cannot be identified by name or address, state all circumstances which might aid in locating or identifying such person:

INTERROGATORY NO. 87: ***Do you know of any documents***, ledgers, books, papers, invoices, checks, accounts, letters, computer records or files, photographs, motion pictures, videotapes, audio tapes, drawings, plans, objects, measurements, written descriptions or other items containing evidence relating to this action which is not otherwise listed herein? If yes, identify each such item:

REQUEST FOR PRODUCTION NO. 33: ***Please produce legible copies of each and every item identified in the preceding interrogatory*** over which you have control or ready access.

(Number 87 was the "preceding interrogatory" to which Request for Production No. 33 referred.)

In answer to Interrogatory 59, Erik provided no information about the HELOC. In answer to Interrogatory 87, Erik stated as follows: “No.” In response to Request for Production 33, Erik did not provide a single document. Sub 137 at Ex. E.

According to Erik’s discovery responses, his real estate appraiser had a “*17 page list of estimates*” which indicated the cost to restore his house to *above average* condition was \$78,191.59. This list, presuming that it ever existed, was discoverable but never produced. As it was not produced, Lisa never had an opportunity to analyze it or depose the contractor(s) who prepared the alleged estimates.

The Value of Erik’s Stock

Erik owned retirement assets which consisted of stock in his employee stock investment plan. RP 2 at 11. At trial, Erik testified that statements for this asset are issued annually and that, at the time of trial, he owned stock in his employer’s company, The Kleinfelder Group, Inc., valued at around \$9,000. RP 2 at 11 and 12.

In a sworn statement, Erik testified that he agreed to the valuation of the majority of the parties’ assets, including his retirement assets, which consisted of stock in his employee stock investment plan. CP 1248. In another sworn statement, Erik specifically stated that the parties agreed his retirement stock should be valued \$9,167.77. CP 147.

The court should note that Erik did not provide discoverable information and documentation pertaining to this asset.

The undersigned requested documentation pertaining to Mr. Hansen's employment benefits, including retirement benefits, and information and documentation pertaining to all of his assets, including stock and brokerage statements as follows (Sub 137 at Ex. D):

Interrogatory No. 34: During this marriage, through the date you respond to these interrogatories, have you had any savings, checking, credit union, money market, cash management accounts, *or any other investment of any kind whatsoever*, solely in your name, or together with any other person or persons, on deposit with any bank, financial institution, or brokerage? Yes [] No []. If so, for each such account state:

- a. Entity
- ...
- c. Type of Account
- ...
- f. Present Balance

REQUEST FOR PRODUCTION NO. 2: For each account described above, please produce legible copies of all check registers, computer files (such as Quicken or Microsoft Money), canceled checks, bank statements and brokerage statements for the past two (2) years, the date of marriage to the opposing party, the date cohabitation commenced with the opposing party and the date of separation from the opposing party.

INTERROGATORY NO. 37: Do you presently own any securities, stocks, bonds, debentures, contracts, mortgages or deeds of trust? Yes [] No []. If so, for each state:

-
- (e) Present value;
-

REQUEST FOR PRODUCTION NO. 5: Produce all broker or other statements for any account in which any such item is held in your name or in street name for your benefit and, if any such item is identified in your answer to the interrogatory immediately above is not held in an account, produce a legible copy thereof.

Erik's response to Interrogatory 34 was "... see corresponding Request for Production [i.e., Request for Production No. 2]." Erik's response to Request for Production No. 2 contained no statements pertaining to his Kleinfelder Stock. Sub 137 at Ex. E. However, at Request for Production 5, Erik did provide such statements, which were submitted to the court as Exhibit 18 but never admitted. CP 273.

At trial, Erik testified that statements for this account were issued annually. RP 1 at 53. However, the statement Erik supplied was dated March 31, 2008, whereas the discovery requests were received by Erik in May 2009. Sub 137 at Ex. H.

In a letter to Mr. Primont dated July 2, 2009, the undersigned noted that Erik, in answer to Interrogatory 37, stated that he did not have any stock or securities, yet he had provided evidence of such securities in response to Request for Production 5. Mr. Primont therefore was asked to supplement Erik's response. The undersigned reiterated these requests in a subsequent letter to Mr. Primont dated July 31, 2009. Sub 19 at Ex. F.

Erik did not supplement his responses to these discovery requests as had been requested. His answers and responses to these discovery requests did not establish that he did not have any further information or documentation pertaining to this asset. He simply failed to respond to the requests, even after being ordered to do so.

Erik's Bad Faith Misrepresentations

Lisa's Retirement Assets

Reviewing Erik's Opening Brief, one is led to believe that Erik was not represented by counsel until April 2010. In fact, he was represented by Michael Primont from September 5, 2008 when he accepted service of the Petition up to and including September 14, 2009. Sub 6.

Erik's Opening Brief makes no mention of Mr. Primont's representation of Erik yet he asserts that Erik's difficulties in this case were due to his lack of counsel.

Erik's Opening Brief claimed that Lisa obtained an ex parte restraining order without providing notice to Erik. OB at 10, 26. However, Erik was represented by counsel at the time and the proof has established that his attorney knew, a day in advance, of the pending ex parte motion. Erik's attorney alleges in his Opening Brief that Erik did not respond to the ex parte motion because he was unaware of it. However, at trial, Erik testified that he was aware of the motion. RP 2 at 19. Also, Mr. Primont was aware of the motion the day before it was presented, which is the only notice requirement for such a hearing.

Erik's counsel's claims regarding Erik's attempts to get information pertaining to Lisa's retirement plans are distortions of the truth, unfortunately.

As established above, Erik was represented by counsel up to and including September 14, 2009. On September 8, 2009, while represented, Erik noted his motion to compel. Sub 26. (Lisa's discovery responses were due on September 3, 2009 and were delivered on September 10, 2009.) Sub 40. Erik did not file the motion. Also, neither Erik, nor Mr. Primont, conducted a discovery conference prior to filing the motion, as required by King County LCR 37 (f). Nevertheless, the court ruled on his motion, denying it. CP 1222.

Contrary to Mr. Hirsch's representations to this panel, Erik's motion did not raise any issue regarding his need for Lisa's retirement documents. Sub 40. The undersigned received a letter from Erik dated September 18, 2009, (ten days after filing his motion to compel) inquiring as to various issues pertaining to discovery. CP 638, 639. The undersigned responded to his letter. Erik did not inform the court of the undersigned's response to his letter.

After Lisa's discovery responses were delivered to Erik, he did not file any subsequent motion to compel Lisa to comply with his discovery requests, whether concerning her retirement assets or any other issue. However, without any notice to the undersigned, he did file an ex parte motion for issuance of a subpoena directed to Washington State Employees Credit Union. Erik's motion was denied. CP 1692 to 1684.

At trial, Lisa testified regarding her retirement assets. RP 1 at 48 to 51. The court accepted her testimony as credible. RP 3 at 21. Mr.

Hirsch claimed, without support, that Erik was “completely surprised” when Lisa testified as to her retirement assets. OB at 16. In point of fact, Erik cross-examined Lisa but did not bother to raise any issue regarding her retirement issues. RP 1 at 55 to 70. Erik cannot be heard to complain of being “surprised” by Lisa’s testimony when he had the opportunity to cross-examine her on it.

During trial, Erik testified that Lisa “still hasn’t produced all her retirement records.” RP 2 at 85. Erik’s statement was made in an effort to vacate an order sanctioning him for his failure to comply with discovery. It is a falsehood to state, as Erik’s appellate attorney has done, that Erik made this statement as an appeal to the trial court to order Lisa to produce documents.

Email Correspondence between the Parties and the Court

Mr. Hirsch argued that the trial court was receptive to the undersigned’s email messages, but not Erik’s. OB at 17. In fact, the court sent to, received from, and responded to, email messages from both parties. CP 323 to 477. Both parties (or their counsel, as the case may be) were copied on all email messages by the parties and the court. The court sometimes initiated these exchanges. For example, please refer to CP 328 and 378. The court objected only to the parties’ use of email messages as a means for litigating the case. RP 3 at 11; CP 445.

Mr. Hirsch claims, without referring to the record, that Lisa offered evidence post-trial that was either not offered or admitted at trial. OB at

17. Presumably, Mr. Hirsch is referring to Exhibit 59 and a table analyzing the parties' HELOC obligation. These documents were neither allegations nor evidence; they were illustrative evidence presented to the court.

These documents were requested by the court and the court was well within its right to make such a request. CP 328. Had these documents been attached to the Findings of Fact and Conclusions of Law and Decree, Erik would have no basis for objecting.

The Court's Treatment of the Parties

Mr. Hirsch argues that the court rejected his Motion for Reconsideration. OB at 17. The court did no such thing; it considered his motion and denied it. CP 143.

On October 28, 2009, after a telephonic hearing, the court elicited the parties' objections to the proposed Findings of Fact and Conclusions of Law and Decree of Dissolution as drafted by counsel. CP 351, 354, 356. Erik submitted his objections on November 2, 2009, after which the court entered the orders without a presentation hearing. CP 380. Mr. Hirsch contends, without support, that the court did not consider Mr. Hansen's objections. The appellate court may infer that the court considered Erik's objections but found them unpersuasive.

Post-Trial Matters

On April 16, 2010, Erik filed a motion for post-trial relief which was denied on April 30. CP 510, 984.

On April 27, 2010, Erik filed a motion to vacate which was heard on May 28, 2010, and July 9, 2010. CP 682. At the May 28 hearing, Judge Spector stated that she would “go through this [i.e., the Findings of Fact and Conclusions of Law and Decree of Dissolution] line by line to make sure there was no error.” RP 3 at 15.

On July 9, 2010, after hearing arguments, Judge Spector denied Erik’s motion, finding that it was “baseless.” Attached to the order denying Erik’s motion, the court attached a copy of Trial Exhibit 59 at Exhibit A and the spreadsheet on which it based its analysis of the parties’ HELOC obligation at Exhibit B. CP 1700 to 1709.

D. STANDARD OF REVIEW

When parties are dissatisfied with the substance of a dissolution decree, the appellate court applies abuse of discretion standard of review. In re Marriage of Kowalewski, 163 Wn.2d 542, 553, 182 P.3d 959, 965, 2008 WL 1970904 (2008).

All of the issues raised by the respondent are reviewed based on an abuse of discretion standard. A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Fiorito, 112 Wn.App. 657, 663-64, 50 P.3d 298, 302, 2002 WL 1608476 (Div. 1, 2002) (citations in footnotes omitted).

E. SUMMARY OF ARGUMENT.

Prior to trial, Erik was intransigent in responding to Lisa's discovery requests. He was defiant of court orders compelling him to respond to discovery. He purposefully violated court orders designed to prevent him from using HELOC funds in his possession.

Acting within its discretion, the trial court awarded the parties an approximately equal net division of property based on evidence presented at trial and supported by the record. The trial court provided other relief to Lisa, such as imposing restraints on Erik, as was within its discretion.

F. ARGUMENT.

The Continuing Restraining Order

Erik requests that the restraints be vacated. However, the restraints themselves expired on October 28, 2010. The issue is moot.

Nevertheless, the court acted within its discretion by imposing restraining orders against the husband when, prior to trial, the wife requested such relief, the husband did not oppose it, and evidence in the record supports the request for it.

The court is authorized to "make provision for any necessary continuing restraining order in entering a decree of dissolution of marriage." RCW 26.09.050. Mr. Hirsch contends that the trial court abused its discretion in entering a restraining order against Erik. Mr.

Hirsch cites no case law supporting his contention, and counsel is unaware of a single case in which a Washington court has been found to have abused its discretion in entering such an order pursuant to RCW 26.09.050.

At trial, Lisa testified that Erik hired a roofing company to replace the roof on Lisa's home, against Lisa's express desire that the work not be done. RP 2 at 63. Please note that this action entailed Erik requesting third parties to trespass on Lisa's property. Erik did not live in the house at the time.

The record contains the following additional evidence of the Erik's harassment of Lisa prior to trial:

1. Erik told Lisa's mother, Ruth Weiner, that he would "give" her \$31,000, apparently meaning he wanted to give her the balance of HELOC funds he claimed not to have spent (CP 489); and
2. Lisa received many unwanted phone calls from Erik, sometimes several telephone calls a day, although she had made it clear that she did not want to have any contact with him. CP 489.

Please note that the trial court awarded Erik the parties' residence which is located next door to Lisa's residence. RP 1 at 34. Given the above circumstances, the trial court did not manifestly abuse its discretion in restraining Erik from disturbing Lisa's peace and going onto the grounds of her home and workplace.

In his Opening Brief, Erik claims that Lisa obtained a no-notice ex parte restraining order. This allegation makes no sense and contradicts Erik's testimony that he "was aware that [Lisa] was going to get orders at

the court.” RP 2 at 18 to 20. More to the point, Erik was represented by Michael Primont until September 14, 2009. Sub 23. On September 10, 2009, Mr. Primont was notified that Lisa would be seeking ex parte restraining orders for personal and financial restraints against Erik. CP 491, Sub 36A at Ex. I.

This court should dismiss Erik’s request to vacate the restraining orders.

Property Division

The court acted within its discretion when it awarded approximately equal portions of the parties’ net assets to each party.

The trial court has broad discretion in awarding property in a dissolution action, and will be reversed only upon a showing of manifest abuse of discretion. In exercising its discretion in a marital dissolution proceeding, the trial court is required to make a “just and equitable” property distribution, and is guided by the following factors: (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 the division of property is to become effective. Fiorito at 667, 668. See also RCW 26.09.080.

The purpose of requiring that the trial court set forth its valuation of the property in a dissolution action is to provide the appellate court with an opportunity to discover whether there has been an abuse of discretion.

When the reviewing court is able to determine from the available evidence the value of the entire estate and the value of the awards to each of the spouses, no error will be assigned. In re Marriage of Hadley, 88 Wn.2d 649, 657, 565 P.2d 790, 794 (1977).

The trial court is required to value the property to create a record for appellate review. Greene v. Greene, 97 Wn.App. 708, 712, 986 P.2d 144 (Div. 2, 1999). If the trial court fails to do so, the appellate court may look to the record to determine the value of the assets. Greene at 712. But if the values are in dispute, the reviewing court is unable to determine whether the property division is just and equitable. Greene at 712.

Where the value placed upon the property by the trial court is greater than that given by one witness and less than that presented by another witness, the trial court had substantial evidence to support its findings. In re Marriage of Soriano, 31 Wn.App. 432, 435, 643 P.2d 450, 451 (Div 1, 1982) citing In re Marriage of Lukens, 16 Wn.App. 481, 558 P.2d 279 (Div. 2, 1976).

In Erik's Motion to Vacate as well as in his Opening Brief, he argued that the trial court erroneously assigned the parties' assets and debts as set forth in Exhibit 59 and that the said exhibit misrepresented the value of the parties' assets. CP 682 to 693; OB at 30 to 38. Mr. Hirsch correctly noted that the trial court, in its order denying Erik's motion to vacate, confirmed that Exhibit 59 was the basis of its division of the parties' property. OB at 30. In short, the parties actually agree that the

trial court valued the property and created a record adequate for appellate review.

It is disingenuous for Erik simultaneously to assert that the trial court erred in not assigning values to assets and debts while at the same time arguing that the trial court erred in valuing the said assets and debts as it did. This self-contradictory aspect of Erik's argument is made evident by the following statement in his Opening Brief: "the court's failure to value the property and debts here makes it impossible for the reviewing court to determine if the property division is fair. A review of the record shows that, in fact, it is not." Both propositions cannot be true.

As established below, the trial court awarded a roughly equal division of the parties' assets, not an 80/20 split, as Mr. Hansen alleges. In doing so, the trial court was within its discretion to value the parties' assets and debts as set forth in Exhibit 59.

I. The Value of Mr. Hansen's Home

The value of the assets and debts is a question of fact, with the decision of the trial court being sustainable if it is within the evidence presented. In re Marriage of Sedlock, 69 Wn.App. 484, 490, 849 P.2d 1243 (Div. 1, 1993), rev den, 122 Wn.2d 1014, 863 P.2d 73 (1993) citing Soriano at 435.

Erik and Lisa disagreed at trial with how the trial court should analyze the value of his house. RP 2 at 12, 13. At trial, no testimony was taken as to the reason for the dispute. However, evidence in the record

supports valuing Erik's house in the range between \$280,000 and \$360,000. Ex. 32, 33. In his Opening Brief, Erik contends that the house was valued by the trial court at \$340,000. Lisa agrees.

Substantial evidence supports the trial court's valuation of Erik's house. Each party had an appraisal prepared for each of the parties' two houses. Ex. 32, 33, 37, and 38. At trial, the parties stipulated to the entry of each of these appraisal. RP 2 at 29. The parties valued the properties by averaging the appraised values. However, the dispute stems from an ambiguity in the appraisal of the Erik's house by R2, his appraiser. The R2 appraisal states valuation of his property at \$360,000 on pages 3 and 4 and \$280,000 on page 4. Ex. 33 at pages 3, 4.

As explained above, the appraiser's reasons for setting forth a \$80,000 variation in his valuation of Erik's house was supposed to be attached to the appraisal. However, the said documentation was not attached and was never provided to Lisa in response to her discovery requests.

After trial, in a sworn statement filed with the trial court on November 30, 2009, (prior to entry of the First Amended Findings of Fact and Conclusions of Law and Decree of Dissolution), Erik represented to the court that the net value of the parties' real property was not disputed. CP 147 at line 6. The court should note that, in this statement, Erik contended that the trial court had distributed the parties' assets in a 28.4% to 71.6% split. Yet, in his Opening Brief, his attorney alleges that the

division was 20%/80%, which is a substantial difference. Nowhere in the brief is this oversight explained.

Given the state of the evidence, as provided by Erik, the trial court acted within its discretion in setting the value of his home at the average figure of \$334,000. CP 1705 to 1707.

II. The Characterization and Allocation of the Parties' HELOC Debt

The trial court must have in mind the character of property as community or separate. Hadley at 655, 656 citing Baker v. Baker, 80 Wn.2d 736, 498 P.2d 315 (1972).

However, characterization of the property is not necessarily controlling. The ultimate question is whether the final division of the property is fair, just and equitable under the circumstances. Hadley at 656 citing Baker at 745, 498 P.2d at 321. See also In re Marriage of Dalthorp, 23 Wn.App. 904, 910, 598 P.2d 788 (Div. 2, 1979); In re Marriage of Gillespie, 89 Wn.App. 390, 399, 948 P.2d 1338, 1343 (Div. 2, 1997) (mischaracterization is not ground for reversal if the distribution of property is fair and equitable); In re Marriage of Williams, 84 Wn.App. 263, 269, 927 P.2d 679, 682 (Div. 3, 1996); In re Marriage of Langham, 153 Wn.2d 553, 563–64, 106 P.3d 212 (2005) (remand for mischaracterization is necessary only if the characterization of property is crucial to the distribution); In re Marriage of Marzetta, 129 Wn.App. 607, 622, 120 P.3d 75 (Div. 3, 2005), rev. den. 157 Wn.2d 1009, 139 P.3d 349 (2006) (mischaracterization is harmless error unless it is clear the trial

court would have made the same property division in the absence with a proper characterization); In re Marriage of Shui and Rose, 132 Wn.App. 568, 586, 125 P.3d 180 (Div. 1, 2005), rev. den. 158 Wn.2d 1017, 149 P.3d 377 (2006) (remand for mischaracterization is necessary only if mischaracterization “significantly influenced” property division).

When the issue on appeal is whether the trial court mischaracterized the property as community or separate, a remand is appropriate if (1) the trial court's reasoning indicates that its division was significantly influenced by its characterization of the property, and (2) it is not clear that had the trial court properly characterized the property, it would have divided it in the same way. In such a case, remand enables the trial court to exercise its discretion in making a fair, just and equitable division on tenable grounds, that is, with the correct character of the property in mind. In re Marriage of Shannon, 55 Wn.App. 137, 142, 777 P.2d 8, 11, 1989 WL 87527 (Div 1, 1989); See also Baker at 746, 747.

At trial, Erik testified that \$39,000 of the parties' HELOC debt was used to pay off community obligations soon after the account was opened. RP 2 at 16. He testified that he took the remaining balance in the form of a cashier's check for \$61,000 and kept its whereabouts unknown. RP 2 at 16, 17. The trial court admitted documents showing that, after separation, Erik gave \$5,754 to Lisa to cover three of the parties' monthly HELOC debt payments and some real estate taxes due on Lisa's house. The trial court also admitted documents showing that Erik spent \$4,342 to replace

the roof on Lisa's house against her express wishes. As established above, the trial court admitted evidence that Erik used \$973 in HELOC funds to pay property taxes on his separate property.

Erik offered no documents pertaining to his alleged paying-down of his mortgage. Lisa testified that she did not know what he had done with the money. The trial court was permitted to conclude that Erik retained the remaining balance.

In a sworn statement, Erik himself tacitly admitted that more than \$61,000 of this obligation was used for his separate purposes. In his Motion for Reconsideration, Erik stated that, "A sum of \$38,504.03 was spent by the community for the community, using funds from the [HELOC]..." and "...approximately 39% of the [HELOC] funds were spent on community needs." CP 38.

As established above, substantial evidence supports the figures in the table analyzing the parties' HELOC obligation (marked Exhibit B) attached to the trial court's Order Denying Motion to Vacate. CP 1709.

Mr. Hansen argues that the trial court erred in mischaracterizing the HELOC funds as both community and separate funds. (The HELOC funds were taken by Erik during marriage but spent, if at all, after separation.) However, as established above, the record supports the conclusion that Erik spent \$3,782 of the HELOC funds on his separate expenses (\$973 on his separate property taxes and \$2,809 on replacing Lisa's roof against her will).

Also, Lisa testified that she allowed Erik to take the \$61,000 only because he said he would not leave the marital home unless she gave him the balance of the loan. RP 2 at 39.

A spouse is required to act in good faith when managing community property. In re Marriage of Chumbley, 150 Wn.2d 1, 9, 74 P.3d 129, 133, 2003 WL 21939573 (2003). In that Erik took the HELOC funds and subsequently refused to inform Lisa as to what he had done with these funds and refused to respond to a court order that he account for them, it is clear that Erik did not act in good faith in managing these funds.

Given these circumstances, the trial court was within its discretion to characterize the entire \$61,000 as Erik's separate property and debt.

Here, the trial court explicitly stated in its oral opinion that it believed its characterization of the parties' properties was critical to its decision. Shannon at 142, 143.

Even if the \$61,000 in HELOC funds should have been characterized as community funds, it is clear that this fact would not have changed the trial court's distribution of the parties' assets. The trial court's characterization of the HELOC funds as separate expresses the trial court's determination that they were used by Erik for his separate purposes. He withdrew funds from the HELOC in the amount of \$61,000. Therefore, the trial court made him responsible for payment of \$61,000 in debt as his separate obligation.

In Shannon, the trial court explicitly stated in its oral opinion that it believed its characterization of the parties' properties was critical to its decision. Shannon at 142. In the instant case, it is clear that the trial court's "characterization" of the parties' debt reflects the trial court's view of how the money was used and how it should fairly be apportioned.

III. The Value of Mr. Hansen's Stock

At trial, Erik testifies that "the last [he] knew [his stock] was probably [valued at] around \$9,000, and at the time of separation it was around \$4,500, maybe a little more." RP 2 at 11, 12. In a sworn statement filed with the trial court on November 30, 2009, (prior to entry of the First Amended Findings of Fact and Conclusions of Law and Decree of Dissolution), Erik represented to the trial court that the community value of his stock, \$9,186, was not disputed. CP 147.

Erik reiterated his contention that he did not dispute Lisa's valuation of his stock in his declaration dated April 23, 2010. CP 1248.

Erik repeatedly acknowledged that the value of his retirement stock was worth \$9,186 or "about \$9,000." Erik did not raise an issue concerning the valuation of his retirement stock until he filed his Motion to Vacate on April 16, 2010. RAP 2.5 (a) bars Erik from raising an issue concerning the value of this asset after the time for moving for reconsideration has passed.

Conclusion Regarding Property Division

The appellate court should dismiss Erik's claims regarding the trial court's improper division of property. If the appellate court finds that the trial court erred in failing to assigning values to the assets and debt in dispute, it should assign the said assets and debt values as set forth in Exhibit 59. Alternatively, it should remand the issue to the trial court with instructions to assign values as to each specific asset and debt the appellate court finds was in dispute.

The appellate court may modify the terms of a Decree of Dissolution. In re Marriage of Barnett, 63 Wn.App. 385, 388, 389, 818 P.2d 1382, 1384-85, 1991 WL 234334 (Div 3, 1991). In Barnett, the trial court awarded Ms. Barnett a \$100,000 lien on the husband's business and awarded her maintenance of \$500 per month, apparently with no termination date set. The appellate court found that the maintenance award was an attempt to distribute Mrs. Barnett's share of the business, in effect distributing the same property twice. The appellate court modified the decree so as to limit the duration of Mrs. Barnett's maintenance award to one year, thus correcting the trial court's error.

Attorney Fees

The court acted within its discretion by sanctioning appellant \$2,500 in attorney fees for failing to comply with the court's order (1) compelling him to fully and completely respond to respondent's discovery requests and (2) restraining him from using the balance of his Home

Equity Line of Credit (HELOC) funds in any way other than depositing them in a custodial account.

The award of \$2,500 in attorney fees was proper. The trial court's award of attorney fees is reviewed for an abuse of discretion. In re Marriage of Morrow, 53 Wn.App. 579, 590, 770 P.2d 197 (1989). The trial courts must exercise discretion on articulable grounds, making an adequate record so the appellate court can review a fee award. Mahier v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

A trial court may award fees based on the intransigence of a party, without regard to the parties' financial resources. Matter of Marriage of Crosetto, 82 Wn.App. 545, 564, 918 P.2d 954 (Div 2, 1996). For example, intransigence was found when the husband's recalcitrant, foot-dragging, obstructionist attitude increased the cost of litigation to his former wife in Eide v. Eide, 1 Wn.App. 440, 445 to 446, 462 P.2d 562 (Div. 1, 1969).

At trial, the court admitted Lisa's counsel's history bill for the court showing over \$10,000 in fees and costs had been incurred by her in the case. Ex. 60. A large part of these costs were incurred due to Erik's intransigence. Erik's refusal to provide an accounting for his use of the \$61,000 necessitated Lisa's filing of a Motion to Compel, an ex parte restraining order, a motion to adjust trial schedule, and taking the case to trial rather than conducting a settlement conference. All of Lisa's motions

were granted. CP 261, 480; Sub 46, 47. Even so, Erik never supplemented his discovery requests.

During the July 9, 2010, hearing on Motion to Vacate, Judge Spector repeatedly stated on the record that Erik had been intransigent with regard to responding to discovery requests. RP 4 at 7, 9, 17. At the May 28, 2010, hearing on Motion to Vacate, Judge Spector stated that “I’m going to leave that sanction award of \$2,500, which was, frankly, minimal.... I said, you know, this could be a lot worse, but I think it was more symbolic than anything.” RP 3 at 15. In short, the award to Lisa of attorney fees is supported by evidence in the record. The record supports the judgment awarded against Erik.

Husband's Post-trial Motion

Erik is not entitled to request relief from the trial court’s order on his Motion for Post-trial Relief, as he did not timely file an appeal of the said motion.

RAP 5.2 requires that an appellant file a Notice of Appeal within 30 days after the entry of the decision of the trial court. RAP 2.4 (b) provides as follows:

The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, ***before the appellate court accepts review***. A timely notice of appeal of a trial court decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise appealable under rule 2.2(a) unless a timely notice of appeal has been filed to seek review of the previous decision.

Erik's appeal was accepted for review on December 22, 2009.

Erik's Motion for Post Trial Relief was filed on April 16, 2010. CP 510. The trial court's order on his post-trial motion for relief was entered April 30, 2010. CP 984. Erik did not timely appeal this order.

As the order was entered after Erik's appeal was accepted for review, he was required to file a Notice of Appeal with regard to it preserve any possible entitlement to relief.

Erik requested that "at minimum" the fee award within this order be reversed. He did not state what other relief he sought. The fee award does not "prejudicially affect the decision designated in the notice." This being the case, he would not be entitled to relief had he filed an appeal of the order, which he did not do.

This court should affirm that Erik is barred from obtaining relief in regard to the said order.

The Trial Court's Denial of Erik's Motion to Vacate

The court acted within its discretion when it denied appellant's Motion to Vacate when appellant failed to prove any misrepresentation made by respondent or mistake made by the court.

A trial court's decision to grant or deny a motion to vacate under CR 60(b) will not be overturned on appeal absent an abuse of discretion. Estate of Treadwell ex rel. Neil v. Wright, 115 Wash. App. 238, 249, 61 P.3d 1214, 1219, 2003 WL 169916 (Div 1, 2003) citing Lindgren v. Lindgren, 58 Wn.App. 588, 594-95, 794 P.2d 526 (Div 1, 1990), review

denied, 116 Wn.2d 1009, 805 P.2d 813 (1991). Discretion is abused if it is exercised on untenable grounds for untenable reasons. Treadwell at 249 citing In re Marriage of Tang, 57 Wn.App. 648, 653, 789 P.2d 118 (Div. 1, 1990).

An appellate court reviews a trial court's findings of fact for substantial evidence in support of the findings. Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise. A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence. Unchallenged findings of fact are verities on appeal. Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162, 164, 2010 WL 1380169 (2010) (Citations omitted).

Erik, citing In re Marriage of Hunter, 52 Wn.App. 265, 758 P.2d 1019 (1988), argued that, in this case, the appellate court stands in the same position as the trial court, and it should independently review the record. In Hunter, prior to review, the evidence, consisting entirely of affidavits, was taken by a court commissioner and, subsequently, the trial court. In this case, unlike in Hunter, the evidence before the trial court included the testimony of witnesses and oral argument. Statements made by Judge Spector make it clear that she considered testimony taken at trial in making her decision. RP 3 at 20, 21; RP 4 at 11 to 13, 16, 17.

Therefore, the appellate court does not stand in the same position

as the trial court, and it should accept the trial court's findings supported by substantial evidence, in accordance with Merriman.

Erik's Motion to Vacate was denied because it was without merit and ill-conceived. His allegation that Lisa misrepresented facts to the trial court is false and not supported by the evidence. CP 157. In his Opening Brief, Erik does not cite a single instance of alleged misrepresentation (or mistake) in Lisa's testimony or any other evidence admitted at trial.

Erik argues that, in his Motion to Vacate, he "revealed" Lisa's alleged misrepresentation of the proper valuation of various assets as set forth in Exhibit 59, which was not admitted at trial.

As established above, the values set forth in Exhibit 59 were based on, and supported by, substantial evidence admitted at trial. Further, the basis of the disputes between the parties over the values of various assets has nothing to do with fraud or misconduct but, at most, a disagreement with how the value of those assets should be determined given the state of the evidence before the court. In short, the disputes between the parties regarding the value of their assets are justiciable matters, not evidence of fraud.

The Valuation of Erik's House

The value of the assets and debts is a question of fact, with the decision of the trial court being sustainable if it is within the evidence presented. Sedlock at App. 484, 490, 849 P.2d 1243 (Div. 1, 1993), *rev den*, 122 Wn.2d 1014, 863 P.2d 73 (1993) citing Soriano at 435.

The trial court herein relied on evidence produced by the parties as to the value of Erik's home. That value was the subject of two appraisals and the value assigned to it by the trial court is within the range of the values the evidence supports. Ex. 32, 33.

The Valuation of the HELOC

The trial court heard much testimony and admitted several exhibits pertaining to the parties' HELOC obligation. CP 1700 to 1709; Ex. 19, 20, 21, 24, 110 to 115. As established above, Erik agreed that only \$39,000 of the HELOC debt was used for community purposes. In its Order on Motion to Vacate, the trial court attached a table illustrating its analysis of the parties' HELOC obligation. CP 1709. Substantial evidence supports the figures in that table.

The Valuation of Erik's Retirement Stock

The trial court admitted no exhibits pertaining to Erik's retirement stock. As established above, Erik testified that the value of the stock was "about \$9,000" at the time of trial. Also, as established above, prior to the entry of First Amended Findings of Fact and Conclusions of Law and Decree of Dissolution, Erik represented to the court that the community value of his stock, \$9,186, was not disputed. CP 147. The trial court's valuation of Erik's stock is supported by substantial evidence.

Conclusion Regarding Erik's Motion to Vacate

The values of the assets and debts represented in the spreadsheet are supported by substantial evidence. Nothing prevented Erik from

submitting his own spreadsheet or critiquing the one submitted to the court, which he did by disagreeing with the values of specific assets as set forth within it. For example, see RP 2 at 12, 13.

Erik's Motion to Vacate amounts to an allegation that Lisa committed fraud by disagreeing with him. The fact that the trial court agreed with Lisa's valuation of the parties' assets and debts does not make Lisa a liar. In essence, Erik's Motion to Vacate was a second attempt at a Motion for Reconsideration. Obviously, Erik believes that the trial court made errors. The Court of Appeals is the proper forum to address such issues. Errors of law may not be corrected by a CR 60 motion, but must be raised on appeal. In re Marriage of Thurston, 92 Wn.App. 494, 499, 963 P.2d 947, 949, 1998 WL 658618 (Div 1, 1998).

Erik's allegation that Lisa committed fraud by means of "misrepresentations" and "undisclosed material facts" is ironic in that Erik failed to disclose information and documents to Lisa pursuant to her discovery requests and as ordered by the court. Needless to say, Erik had an affirmative duty to make these disclosures.

The trial court was within its discretion to deny Erik's Motion to Vacate and this court should affirm the trial court's decision in this regard.

Attorney Fees re: Motion to Vacate

The court acted within its discretion in sanctioning Erik \$2,024.57 in attorney fees on the ground that his motion was baseless. The trial court deemed Erik's Motion to Vacate "baseless" and awarded Lisa

\$2,024.57 in attorney fees for having to respond to it. CP 1700 to 1709.

In his Opening Brief, Erik contended that the trial court abused its discretion by awarding the fees. However, he did not cite any case law to support his contention.

Erik contends that the trial court incorrectly believed that, for purposes of trial, he and Lisa agreed to the value of his house and retirement assets, and that he would assume the rest of the parties' debt. As established above, after trial, Erik had represented to the trial court in a sworn statement that he and Lisa agreed to the value of the parties' real estate and his retirement stock. CP 147

The basis of Erik's Motion to Vacate was not that Lisa "misrepresented" to the trial court that the parties *agreed* to the value of any asset or debt. Rather, the basis was that Lisa's representations of the values of these assets and debts were fraudulent *and that the court relied on her representations, not the evidence*. His contention in this regard is false; he failed to prove otherwise. "We must presume that the court considered all evidence before it in fashioning the order." In re Marriage of Kelly, 85 Wn.App. 785, 793, 934 P.2d 1218, 1223, 1997 WL 189806 (Div 1, 1997).

In the Order Denying Motion to Vacate, the trial court found that "there was no misrepresentation by Ms. Weiner, nor her counsel." CP 1702. As established above, the trial court's decision was correct.

Counsel filed a Cost Bill informing the trial court of Lisa's fees associated with responding to Erik's Motion. CP 1648 to 1652.

The trial court was acting well within its discretion in awarding fees against Erik for bringing his meritless motion and this court should affirm the trial court's decision in this regard.

Erik's Due Process Rights

The court acted within its discretion when it used, and encouraged the parties to use, email messages to communicate with the court for the purpose of (1) arranging hearing times; (2) exchanging draft documents, such as the Findings of Fact and Conclusions of Law and Decree of Dissolution; (3) informing the parties of the court's decisions; (4) communicating requests to the parties and receiving responses to the said requests from the parties; but (5) not allowing email messages to be used as a means for litigating the substance of the case.

Erik contends that the trial court violated his right to due process. Due process requires notice reasonably calculated to apprise a party of the pending proceedings affecting him and an opportunity to present his objections before a competent tribunal. Watson v. Washington Preferred Life Ins. Co., 81 Wn.2d 403, 408, 502 P.2d 1016 (1972).

Erik contends that counsel "bombarded" the trial court with email messages containing "documents prepared by [counsel] not admitted into evidence at trial and that were not even based on evidence admitted at trial." OB at 48. As established above, this contention is equivalent to

contending that the trial court is not allowed to use email messages to communicate with the parties to (1) arrange hearing times; (2) exchange draft documents, such as the Findings of Fact and Conclusions of Law and Decree of Dissolution; (3) inform the parties' of the court's decisions; (4) communicate requests to the parties' and receive responses to the said requests from the parties.

For example, on November 2, 2009, the court, via an email message, asked the parties to inform it of any objections they had to the Findings of Fact and Conclusions of Law and Decree as drafted by counsel. CP 378. On November 2, 2009, Erik responded, via an email message, with his objections. CP 380. The court considered Erik's objections, but was not persuaded by them.

Mr. Hirsch claims that counsel sent email messages to the court after being told not to do so. His claim is inaccurate. To support his contention, Mr. Hirsch quoted an email message from the bailiff dated November 19, 2009. However, in the same message, the bailiff wrote "*these last two emails* have not and will not be given to the Judge.... Until [tomorrow] I cannot continue to get *emails of this nature.*" (Emphasis supplied.) CP 445.

Clearly, the court objected to the *nature* of the parties' email messages, not the use of email messages per se. Only the two messages which were "litigious" in nature (one from Erik and a response to it from the undersigned) were not considered by the court. CP 424 to 446.

Contrary to Mr. Hirsch's contention that the court refused to consider all of Erik's post-decree motions, the court considered Erik's Motion for Reconsideration and Motion to Vacate but denied them. CP 143, 144, 1700 to 1709.

The record supports the conclusion that Erik received notice reasonably calculated to apprise him of the pending proceedings and an opportunity to present his objections before the trial court. This court should dismiss Erik's claim that his due process rights were violated.

Erik's Motion for Attorney Fees

Erik's appeal has no merit and no attorney fees should be awarded to him. Also, Erik's Response to Petition states that, "The husband requests that each party pay his/her own costs and fees." CP 260. He would have appeared to have taken the position, in advance, that he would not seek an award of fees and costs in the case.

Lisa's Motion for Attorney Fees

Erik's appeal has no merit. Erik should pay Lisa's attorney fees pursuant to RCW 26.09.140 and RAP 18.1.

Dated November 15, 2010

Respectfully submitted,



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Appendix A

Documentary and Testimonial Evidence Pertaining to the Parties' Assets and Debts

PROPERTY	Trial Exhibit	RP 1	RP 2	Awarded to Husband	Awarded to Wife
Real Estate and Related Debt - Community					
1035 NE 96th St	37, 38		12, 22 to 27		X
WSECU HELOC *4356	21, 24, 110 to 115	18	23 to 30, 68	X	
1041 NE 96th St	32, 33		31 to 34, 36, 37	X	
Loan from Ruth Weiner	30		13	X	
Mortgage on 1041 NE 96th St			14, 35, 36	X	
Land in Whatcom County	41, 42, 44, 45, 103		12, 41 to 48	X	
Bank Accounts - Community					
WSECU *4356			48, 49		X
WSECU *9950			49, 50		X
WSECU *5574			50	X	
North Coast *001			51	X	
Washington Mutual (Chase) * 7244			51	X	
Washington Mutual (Chase) * 2970			51	X	
Investments - Community					
Kleinfelder Group Stock			12, 51 to 53	X	
Vehicles					
1995 GEO Metro			54	X	
1999 Ford Escort			54	X	
II. HUSBAND'S SEPARATE PROPERTY AND SEPARATE DEBT					
WSECU *4356 HELOC debt	24		41 to 48	X	
Land in Whatcom County			12, 41 to 48	X	
Land in Jefferson County		64, 65		X	
III. WIFE'S SEPARATE PROPERTY AND SEPARATE DEBT					
Wife's interest in the wife's residence	35	24, 25, 26	28, 29		X
Wife's 2006 KIA Spectra		50			X
Wife's loan with Wachovia on 2006 KIA	58	50, 51			X

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Appendix B

The following is an explanation of a table entitled “Analysis of Home Equity Line of Credit Obligation” and illustrative table provided to the trial court at its request (CP 328 to 332) and attached to Order on Motion to Vacate at Exhibit B (CP 1700 to 1709). Please note that the figures in the following analysis are derived from data found at Ex. 18.

As about \$39,000 of the HELOC obligation represents community debt, each party is allocated \$19,500 of that debt. The remaining \$61,000, withdrawn by Erik, is allocated to him alone, making his portion of the total obligation \$80,500.

Lisa made \$31,163 in payments prior to trial. Erik received credit for \$5,754 in payments on this obligation based on payments he made on Lisa’s behalf which he represented were paid with HELOC funds. The HELOC was paid by the parties at a ratio of 84% to 16% (favoring Lisa).

As of September 25, 2009, the balance of the HELOC was \$91,043. Ex 24. As the original balance was \$100,000, the principal had been paid down in the amount of \$8,957. Credit for payment of the principle was allocated to the parties in proportion to the total payments they made (i.e., 16%, or \$1,396, to Erik and 84%, or \$7,561, to Lisa). Taking the parties’ initial obligation and subtracting the principle they were credited with paying resulted in a net principle obligation of \$79,104 (\$80,500 - \$1,396) to Erik and \$11,939 (\$19,500 - \$7,561) to Lisa.

The total interest charged on the HELOC prior to trial was \$20,878. Ex. 24. This interest obligation was allocated to each party in proportion to their obligation on the debt (i.e., 80.5%, or \$16,807, to Erik and 19.5%, or \$4,071, to Lisa). However, the parties were credited with payment of it in proportion to their payment to the HELOC (i.e., 16%, or \$3,254, to Erik and 84%, or \$17,624, to Lisa). In other words, Lisa had overpaid interest on her part of the obligation by \$13,553, and Erik had underpaid his interest obligation by the same amount.

Subtracting Lisa's net principal obligation (\$11,939) from her interest overpayment (\$13,553) results in her net overpayment (\$1,614). Similarly, adding Erik's net principal obligation (\$79,104) to his interest underpayment (\$13,553) results in his net obligation (\$92,657, or the HELOC balance of \$91,043 plus \$1,614 for Lisa's overpayment).

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No. 64574-9

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

In re the Marriage of Erik K. Hansen

Appellant,

and

Elizabeth Weiner,

Respondent

Declaration of Service

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ORIGINAL

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 15, 2010, I arranged for service of Respondent's Responsive Brief to the court and the parties to this action as follows:

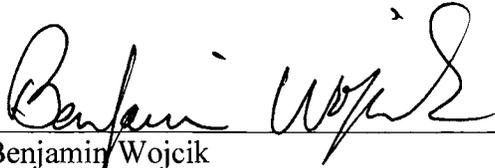
Office of Clerk
Court of Appeals – Division I
600 University St
Seattle, WA 98101-1176

Messenger

Edward James Hirsch, Jr.
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Seattle WA 98104-2818

Email and Messenger

DATED November 15, 2010 at Bellevue, Washington.



Benjamin Wojcik
Paralegal to Matthew I. Cooper