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No. 68266-1-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

GABRIEL Y. LEE, Respondent

v.

CAROL ANN KENNARD, Appellant

BRIEF OF RESPONDENT

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A. Response to Appellant's Assignments of Error

1. Assignment of Error No. 1

The court did not err by concluding that the “automatic escalator clause” of the child support order is unenforceable.

Issues Pertaining to Assignment of Error:

a. The court did not conclude that the child support order contained no “lid” (CP 51, 53 and Verbatim Reports of motion hearings December 9, 2011 [#1] and December 14, 2011 [#2]).

b. Ms. Kennard's counsel did concede during oral argument on December 9, 2011 that the child support escalator clause is unenforceable (Verbatim Report 1, p. 16). At follow up hearing on December 14, Appellant's counsel again failed to argue the point even after the court during colloquy commented that counsel appeared to concede the point. (Verbatim Report 2, p. 19).

2. Appellant's Assignment of Error No. 2

The Court did not err determining that agreed automatic escalation

clauses contained in non-modifiable maintenance contracts are voidable as a matter of law.

Issues pertaining to Assignment of Error:

a. The court concluded that the parties were free to agree to impose an “automatic escalator clause” on spousal maintenance. (CP 51).

However, the court also ruled that the clause is voidable as contrary to well established Washington substantive decisional law existing at the date of the Contract and ever since and that consequently, the clause should be now, at Dr. Lee’s request, be voided. (CP 51).

b. The court concluded that the Contract’s now-declared void “automatic escalation” support and maintenance clauses were unenforceable retroactively and prospectively (CP 51). The court then determined that the void provisions were severable, thereby leaving other provisions of the Contract valid and enforceable. (CP 51).

The remaining, valid maintenance provisions of the Agreement require Dr. Lee to continue paying \$9,000 per month maintenance until Dr. Lee is 65 in the year 2020 resulting in a maintenance obligation of 20 years following a marriage of 20 years. (Appendix 1 [Marital Separation Agreement of February 9, 2000] p. 10 and CP 38).

c. The court did not find that an agreed provision specifying how maintenance will be reduced if Dr. Lee's income is reduced, is necessary as a matter of law. (CP 51 and 53 and Verbatim Report 2). Accordingly, the court did not rule on the "issue" of the sufficiency of maintenance reduction provisions expressed in Contract.

3. Assignment of Error No. 3: The Court Erred In Failing To Enter The Qualified Domestic Relations Order Presented by the Appellant.

1. The evidence is sufficient to support the court's decision to reject the Q.D.R.O. proposed by the Appellant (CP 51, 53 and Verbatim Report 2 p. 2). The court was required to interpret the Agreement term splitting Dr. Lee's retirement benefit by Q.D.R.O. because the Agreement was ambiguous. Ambiguity resulted from the fact that the Agreement purported to incorporate an attached Q.D.R.O. but did not. No evidence was introduced that would support a finding that a Q.D.R.O. was even in existence at the time the Agreement was signed on February 9, 2000. (Appendix 1, CP 23, 25, 26, 45, 46).

2. The court did not reform the Contract, rather interpreted it as a result of ambiguity. Substantial evidence supports use of the stipulated date of marital separation (Appendix 1 p. 2) as reasonable.

3. The trial court's adoption of the date of separation as the Plan division "date of segregation" date does not deprive Ms. Kennard of post-segregation earnings on her retirement share earned after the "segregation date". (CP 32, 52). The standard of proof for this determination is not "clear, cogent and convincing" evidence.

4. Assignment of Error No. 4: The Court Erred By Awarding CR 11 Sanctions Against The Attorney for Ms. Kennard

The court did not err in awarding CR 11 sanctions against Mr. Finesilver. The record of oral decision supports the determination. (Verbatim Report 2; p. 24 – 27).

5. Assignment of Error No. 5

The court did not err in failing to award Ms. Kennard statutory family support enforcement fees.

B. Statement of the Case

Respondent adds the following to Appellant's Statement of the Case:

The parties' February 2, 2000 spousal maintenance and property division agreement ("Agreement") is incorporated into the agreed Decree, and may be viewed in CP 38. The Agreement is attached here as Appendix 1. The Agreement references an attached and incorporated Qualified Domestic Relations Order (Q.D.R.O.). No Q.D.R.O was in fact attached

and no evidence or argument was presented during this proceeding that would support a finding that Appellant's counsel even drafted a Q.D.R.O. before 2011. (CP 23, 38, 51, Verbatim Reports 1 and 2). Appellant's only proposed Q.D.R.O. is dated for signature in 2011 (CP 23 and Appendix 2).

The Agreement expresses the parties' stipulation that the date of marital separation is February 15, 1999 (Appendix 1 p. 2 and CP 38).

This Appellant's proposed Q.D.R.O. states that the Plan segregation date should be the "date of this order" (CP 23, Appendix 2, page 3). At no time did Mr. Finesilver provide a copy of the Decree or Agreement to the Plan Administrator. (CP 32). Mr. Finesilver affirmed "date of Q.D.R.O. entry" as the appropriate segregation date when the Administrator questioned him on use of a current date for segregation. (CP 32). Counsel for Dr. Lee responded by proposing the date of marital separation (February 15, 1999) as the corrected segregation date for use in the Q.D.R.O. (CP 32).

At the first hearing on December 9, 2011, counsel for Ms. Kennard advised the court that she did not personally draft the Appellant's proposed Q.D.R.O and conceded that she could not explain why the drafter of the ex-wife's proposed Q.D.R.O. urged "the date of entry of this Order" in response to the court's question. (Appendix 2, page 3 and

Verbatim Record No.2 page 26, 27). Mr. Finesilver signed the motion for entry of the ex-wife's proposed Q.D.R.O. (CP 23).

The Q.D.R.O. entered December 14, 2011 fully divided the shares of the ex-spouses in the Plan (CP 52).

The parties' child support agreement ("Support Agreement") is fully expressed in the Support Order and Worksheets (Appendix 3, CP 23)

The parties do not dispute that both the Agreement and Support Agreement (together: "Contract") are fully merged into the Decree. (CP 51, p. 5 footnote 1).

The provisions of the Contract are enforceable under the terms of the Contract, as a contract as well as being enforceable as a judgment. (Appendix 1 p. 3, CP 37).

Dr. Lee has never paid increased child support or spousal maintenance payments based on the automatic escalation clauses of the Contract (CP 38). Nevertheless, Dr. Lee has paid Ms. Kennard \$9,000 per month as (unadjusted) spousal maintenance since entry of the Decree in February 2000. (CP 38).

Ms. Kennard did not seek court enforcement of the Contract or Decree between 2000 and the 2011 filing this motion to enforce. (CP 23, 38). Ms. Kennard's motion requests judgment for back support and

maintenance based solely on the “automatic escalation clauses”. (CP 23 and 38).

C. ARGUMENT: ASSIGNMENT OF ERROR #1

The trial court did not err in concluding that the Child Support Agreement provision (Appendix 3 p.) automatically increasing future child support based on the Consumer Price Index is unenforceable.

In general, back child support due under a court order is vested in the month due and may not be retroactively modified. *In Re Marriage of Schumacher*, 100 Wn. App. 208 (2000). However, the trial court has inherent equitable power to decline to enforce accrued arrears.

Respondent concedes that prospective agreements not to enforce child support obligations are against public policy on the basis that child support is for the child's benefit and the custodial parent has no personal interest in the child support money. *Hartman v. Smith*, 100 Wn.2d 766, (1984); *Ditmar v. Ditmar*, 48 Wn.2d 373, 374 (1956); *In re Marriage of Pippins*, 46 Wn. App. 805, 808 (1987). However, public policy does not bar the court from declining to enforce retrospective child support payments, because payment of past due support reimburses the custodial parent and is thus a claim that “lies with the custodial parent--not with the child.” *Hartman*, supra 768. Although retrospective support payments are not generally subject to modification because each payment “vests when

due,” *Hartman*, supra 768, Washington courts may under the proper circumstances, apply “equitable principles to mitigate the harshness of particular claims for retrospective support if it will not work an injustice to the custodian or the child.” *In re Marriage of Capetillo*, 85 Wn. App. 311, 316-17, review denied, 132 Wn.2d 1011 (1997).

The paying parent has the burden of proving mitigating “special circumstances” when seeking to avoid a judgment for support arrears. “Special circumstances” favoring mitigation must lie within a recognized principle of equity. *In Re Marriage of Shoemaker*, 128 Wn. 2nd 116 (1995) En Banc. In addition, the paying parent must prove that non-enforcement will not work an injustice on the obligee parent or child. *In Re Parentage of Hilborn*, 114 Wn. App. 275 (2002) and *In Re Marriage of Oliver*, 43 Wn. App. 423 (1986).

The evidence before the trial court is more than sufficient to establish both equitable factors.

Contrary to Appellant’s argument in her Brief, the court did not rely on obligee’s “waiver” as the equitable basis for declining to enforce the automatic escalation clause of the Support Agreement retroactively. At the first hearing, Ms. Neale did concede that automatic escalation clauses in child support orders are not enforceable:

“Assuming In Re Oliver stands for the proposition as it seem to that an agreement that includes a (sic.) escalation clause of the nature we’re discussing today is not enforceable, I would turn the Court and the focus of today’s – of my argument to the maintenance clause.” (Verbatim Record 1, page 16).

At the next hearing, Ms. Neale remained silent on the support issue even when questioned by the court:

Court: Your focus seems to be on maintenance and not on child support. You seem to be conceding the child support issue, Counsel, although your request did include spousal maintenance. Verbatim Record 2, page 19.

Nevertheless, the Appellant’s argument that the court treated Counsel’s argument as a child support “waiver” is misplaced. The court did not make such a finding (CP 51, 52, and Verbatim Reports 1 and 2.) At worst, the concession during oral argument may be treated as an “invitation to error” by signaling to the court that the issue need not be determined because it has been abandoned by the party. State v Young, 63 Wn. App.324). “Waiver” requires a voluntary and informed decision by the person holding the right. State v Henderson, 114 Wn. 2d 870).

In this case, the trial court voided the “automatic escalation clause” of the Contract as a matter of law, rendering the clause unenforceable. (CP 51).However, even if the appellate court accepts the Appellant’s argument that a non-enforcement decision must rest on an established equitable basis, such basis clearly exists here. The appropriate “recognized principle of equity” is laches.

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A defendant asserting laches has the burden of proving that: (1) the plaintiff had knowledge of the facts constituting a cause of action or a reasonable opportunity to discover such facts; (2) there was an unreasonable delay in commencing the action; and (3) there is damage to the defendant resulting from the delay. *Buell v. Bremerton*, 80 Wn.2d 518, 522 (1972). Laches may be applied by the court to avoid inequitable claims for back child support. *In Re Marriage of Watkins*, 42 Wn. App 371 (1985).

Ms. Kennard's claim is properly avoided on the laches doctrine as applied to her conduct. Ms. Kennard was continuously aware that Dr. Lee was not increasing his child support payments between 2000 and 2011 even though the automatic escalation clause based on the CPI was ostensibly increasing the amount of base support due each year. (CP 45). She was aware that she had a claim for increased base support based on the automatic adjustment clause (CP 45). Dr. Lee detrimentally relied on Ms. Kennard's delay in seeking enforcement of the automatic escalation clause. Had Ms. Kennard timely asserted the claim while the children were still minors, Dr. Lee could have initiated a suit to modify child support, and/or sought a post-secondary support order. The modification court would have been compelled by *In Re Marriage of Edwards*, 99 Wn. 2d 913 (1983) and its' progeny (CP 39) to prospectively vacate the automatic escalation clause of the 2000 support order. As it stands, Dr.

Lee continued to pay full “base support” for both children as well as separately paying for their college tuition even after the children graduated from high school.

It is not reasonable to conclude that non-enforcement will work injustice or harm on the obligee or children. In the first instance, the Support Agreement more than tripled the base support as calculated in the Worksheet at \$572.13 for both children, to \$1,750 per month. (Appendix 3, p. 3 and 9). At the time of the motion to enforce the automatic adjustment provision in 2011, the parties’ children were ages 19 and 25. Further, Dr. Lee purchased GET credits under the Support Agreement since 2000 when the children were 9 and 14. (Appendix 3 p 5, CP 38). GET credits were in fact applied to prepay the college tuition of both children. (CP 38). The older “child” is a currently in medical school and the younger an undergraduate student using GET credits for her tuition. (CP 38). Neither child resides with either parent. (CP 38, 45).

The mother has continuously received \$9,000 a month in spousal maintenance from March 2000 and will continue to receive these payments until 2020. (CP 38 and Appendix 1, page 9). By December 1, 2011, she had received 142 monthly maintenance payments totally \$1,278,000. Ms. Kennard will receive another 132 payments (\$1,188,000) before the obligation terminates. (Verbatim Report 1, p. 9-

11). Aside from her claimed \$5,000 per month expenditures for “gifts”, Ms. Kennard’s Financial Declaration states her monthly expenses as less than \$5,000. (CP 43).

Although the Agreement is silent on this, Dr. Lee acknowledged receipt of \$20,000 for his share of the equity in the parties’ former marital residence, which was awarded by Agreement outright to Ms. Kennard. (Appendix 1, p. 8-9 and CP 38). Ms. Kennard continued to live in the residence following dissolution until she sold it in February 2011, netting approximately \$430,000 (CP 38, page 3, 4).

Although the court’s decision is supported by the equities in this case as argued above, the court correctly identified the basis of its decision to void the automatic escalation clause as being a matter of law. (CP 51).

Since 1982, Washington courts have consistently held that “automatic escalation clauses” in child support orders are voidable because they are not related to the paying parent’s ability to pay or the needs of the child and thus contrary and to the public policy of this state. (CP 39). Trial court decisions to void the clause may be rendered in the context of motions to enforce (CP 51).

The court’s discretion in setting child support in 2000, as now, was curtailed by RCW 26.19, which requires that child support be established and modified only in accordance with the provisions of Chapter 19.

(CP 39). Spouses settling dissolution related issues are presumed to contract with reference to existing law; agreement to avoid existing law must be expressly stated. *In Marriage of Briscoe*, 134 Wn. 2d.344 (1998) En Banc. This Support Agreement was created in 2000, fully eighteen (18) years after the *Edwards* decision. There is no such express waiver in the Contract. (Appendix 1).

Since 1989, trial courts have been required to determine base child support in Washington based solely on the income of both parents and the number and ages of the children of the parties. (CP 39). Even simple mathematical extrapolation to increase base support above the maximum “Worksheet” chart amount proportionately to substantially higher than “chart” income of the parents, has been held to be error without special findings sufficient to support the deviation. *In Re Marriage of Daubert*, 124 Wn. App. 483 (2004).

Beginning with the *Edwards* decision in 1983, the court has consistently held that agreements based on use of the C.P.I. or other “automatic escalation” clauses are voidable. When the trial court is asked to enforce a child support order which includes this “voidable” provision the court may declare the provision “void”. *In Re Marriage of Edwards*, 99 Wn. 2d. 913 (1983). *In Re Marriage of Ortiz*, 108 Wn. 2d.643 (1987). Once declared “void” the offending provision may not be enforced by the

court; rather, the court must leave the parties in the condition in which it found them. Thus, if the court finds the provision “void” after the increased payments have been made, the payor is not entitled to reimbursement. *In Re Marriage of Ortiz*, 108 Wn. 2d. 643 (1987). Conversely, as here, if the “automatic escalation” amounts have not yet been paid when the court declares the provision “void”, the obligee parent may not thereafter retrospectively enforce it. *In Re Marriage of Stoltzfus*, 69 Wn. App. 558 (1993), Review Denied, 122 Wn. 2d. 1011 (1993).

ARGUMENT: ASSIGNMENT OF ERROR #2

Appellant argues that the court erred in voiding the automatic escalation clause of the Settlement Agreement because parties simply did as they are free to do under RCW 26.09.170, that is, they entered into a non-modifiable spousal maintenance agreement. The Appellant argues that since the maintenance provisions of the Agreement must be honored, the court is prospectively compelled to enforce the automatic escalation clause. The argument is misplaced because the Agreement was not modified by this court’s decision.

Respondent concedes that the maintenance terms of the Agreement are expressly non-modifiable, and that non-modifiability of agreed maintenance is specifically authorized by RCW. 26.09.070(7). Respondent further concedes that an agreed provision of “non-

modification of maintenance” cannot be subsequently voided by the court so as to render the maintenance agreement modifiable, even if current enforcement would be harsh due to unforeseen change of circumstances. *In Re Marriage of Yearout*, 41 Wn. App. 897 (1985).

However, under RCW 7.24 the court has statutory power in addition to its inherent powers (RCW 26.07.050) to declare any contract, or the severable provisions of any contract, invalid as a matter of law and to determine the resultant rights of the parties if a contract or contract provision is declared invalid. RCW 26.07.020, .030 and .080. This power arises when the court is confronted with a justiciable controversy that is, one that may be “fully resolved by a declaratory decree, order or judgment”. RCW 26.07.060. A “justiciable” controversy has been held to exist when:

"(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive." *Osborn v. Grant County*, 130 Wn.2d 615, 631 (1996) En Banc.

A party’s motion to enforce an agreed automatic adjustment clause in a child support order is sufficient to invoke the court’s power to declare the clause void. The argument is misplaced because the Agreement was not modified by this court’s decision. *In Re Marriage of Stoltzfus*, 69 Wn. App. 558 (1993), Review Denied, 122 Wn. 2d. 1011 (1993). *In Re*

Marriage of Coyle, 61 Wn. App. 653 (1991), for the first time, the court also voided an automatic adjustment in a maintenance decree, which like here, mandated that maintenance be annually increased proportionately to cost of living increases published as the annual Consumer Price Index (CPI).

Appellant argues allowing the court to declare a heretofore merely “voidable” clause “void” in a “non-modifiable” maintenance contract will open a floodgate of litigation by making doubtful all non-modifiable maintenance contracts. This is not so. The court not only has the power to declare an “automatic adjustment” maintenance clause “void”, the substantive law of the state of Washington compels this result.

Our courts have long held that the issue of alimony, which did not exist at common law, is a matter of public policy “peculiarly within the province of the legislature”. *Jones v Jones*, 48 Wn. 2d.862 (1956) En Banc. This being so, the legal obligation to pay, and right to receive maintenance must be consistent with the statutory framework under which maintenance may be created.

RCW 26.09.170 identifies the exclusive statutory grounds for an award of maintenance:

(1) In a proceeding for dissolution of marriage... the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to

misconduct, after considering all relevant factors including but not limited to:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage or domestic partnership;
- (d) The duration of the marriage or domestic partnership;
- (e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and
- (f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

As a general rule, parties are presumed to contract with reference to existing statutes. *Wagner v. Wagner*, 95 Wn. 2d. 94 (1980). A statute affecting the subject matter of a contract is incorporated into a contract unless the parties wish to provide for other legal principles to govern their contractual relationship and expressly set forth their intention in the contract. “Absent a clear intent to the contrary disclosed by the contract, the general law will govern.” *Wagner*, supra 102, citing *Dopps v. Alderman*, 12 Wn.2d 268 (1942).

In ascertaining the parties' intent in the context of formation of a marital settlement agreement, the court should consider that parties must necessarily anticipate that they will need the court to accept and incorporate their maintenance contract into their decree as "fair and equitable". RCW 26.09.040. This is the only way a settlement agreement can achieve its' purpose of allowing the parties to avoid trial.

Here, the parties' Contract expresses their understanding of the need for each provision of the Contract to comport with the law of the state of Washington by including a provision allowing severability if any provision is found to be unlawful or unenforceable:

"2.8 Partial Invalidity: In the event that any portion of this Agreement shall be declared invalid by any court of competent jurisdiction, those parts not at issue shall still be of full force and effect." Appendix 1, page 6.

This court found the automatic adjustment provision of the agreed Decree incorporating the Agreement "voidable" at the time of contract formation and unenforceable as "void" both retroactively and prospectively, thereby with respect to the severed clause, leaving the parties as it found them (CP 51). The court then properly severed the automatic adjustment provision, leaving the balance of the Agreement intact, including the continued \$9,000 per month maintenance payment for the remaining duration. (CP 51).

Appellant argues that the court's declaration of the unenforceability of the severed clause constitutes a "modification" of maintenance and thereby violates the Appellant's right to enforce all maintenance provisions of the Agreement. Appellant cites *In Re Marriage of Glass*, 67 Wn. App. 378 (1992) for the proposition that a "non-modifiability" provision restrains the court from voiding a severable provision of the Contract. This reliance is misplaced.

In *Glass*, the appellate court did indeed reverse the modification court's decision to the extent the decision in effect modified an expressly "non-modifiable" maintenance term but upheld the court's decision to stay maintenance payments for one year so long as interest accrued. The decision of the trial court to allow a stay was upheld because repayment on the judicially adjusted schedule could be accomplished within the remaining agreed-upon duration of maintenance. The appellate court reasoned that although the non-modifiability provision of the maintenance contract was enforceable, the court retains equitable power to fashion an equitable remedy for breach of contract. The appellate court held that the trial court's decision to stay enforcement correctly balanced the equities of both the ex-husband's striated current circumstances and the wife's contractual rights. In *Glass*, there was no issue of the illegality and consequent voidability of any provision of the maintenance agreement. Thus, the *Glass* court was not called on to consider another of the trial

court's equitable powers, viz., the power to declare a maintenance contract provision, deemed voidable and unenforceable as against the public policy of this state, "void" and decline to enforce it.

The court has equitable power to refuse to enforce a contract provision on the grounds that its enforcement would violate public policy:

Restatement of Contracts 2d. Chapter 8, Section 178, "When a Term is Unenforceable on Grounds of Public Policy:

(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or in the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

(2) In weighing the interest in the enforcement of a term, account is taken of (a) the parties' justified expectations, (b) any forfeiture that would result if enforcement were denied, and

(c) any special public interest in the enforcement of the particular term.

(3) In weighing a public policy against enforcement of a term account is taken of

(a) the strength of that policy as manifested by legislation or judicial decisions,

(b) the likelihood that a refusal to enforce the term will further that policy,

(c) the seriousness of any misconduct involved and the extent to which it was deliberate, and

(d) the directness of the connection between that misconduct and the term."

Our courts have held that the issue of alimony, which did not exist at common law, is a matter of public policy "peculiarly within the

province of the legislature”. *Jones v. Jones*, 48 Wn. 2d. 862 (1956) En Banc.

RCW 26.09.070 allows spouses to contract the terms of spousal maintenance, but this right is not absolute; maintenance awards must comport with RCW 26.09.170. Parties to a marital settlement contract are assumed to incorporate statutory and case law in existence at the time of formation of the contract, unless the contract manifests clear intention of the parties to the contrary. *Wagner v. Wagner*, 95 Wn. 2d. 94 (1980).

Here, Ms. Kennard waited over a decade to seek retroactive enforcement of an increase to her \$9,000 per month maintenance award between 2001 and 2011. The retroactive increase, for which enforcement was sought, is solely attributable to the CPI, a practice specifically prohibited by *Edwards* and its progeny.

Dr. Lee waived presentation hearing in 2000. Mr. Finesilver presented the Decree ex parte. In 2011, when Ms. Kennard moved for enforcement, Dr. Lee defended the automatic escalation clause/enforcement motion by asking the court to invalidate the clause. In doing so he placed a justiciable controversy before the court. The court’s declaration voiding the clause did not “modify” the maintenance provisions of Agreement as contemplated under RCW 26.09.170. Question of illegality of a contract sued on may be raised at any time when

the fact of its illegality has been made to appear to the court. *Wright v. Corbin*, 190 Wash. 260 (1937).

ARGUMENT: ASSIGNMENT OF ERROR #3

The Respondent's Brief assigns error to the court's conclusion that the Q.D.R.O. proposed by Ms. Kennard's attorney (Appendix 2) is not consistent with "the award of monthly pension" to Ms. Kennard in the Contract.

At the outset it should be noted that the actual property division provisions of the Agreement do not refer to a "pension plan". The reference is erroneous. The actual award requiring a Q.D.R.O. to accomplish is expressed in the Agreement p. 8 section 4.1(g): "One half of the husband's Group health retirement benefits, subject to the terms and conditions as outlined on the QDRO which accompanies this Agreement, except for the 401(k)." The parties do not dispute (a) the identity of the asset at issue is correctly stated in the Appellant's motion and proposed Q.D.R.O. (b) that neither spouse has received any distribution of this asset to date and (c) that the asset is a "defined contribution" type of 26 USC 414(p)(2) Qualified Plan rather than a "defined benefit" or pension-type Plan (CP 52).

The issue on appeal with respect to the Q.D.R.O. is the date the court should assign as the "segregation date" that is, the date that the

parties' interests in Dr. Lee's Plan should be valued for property division purposes. Ms. Kennard's Q.D.R.O. proposed "the date of this [qualified domestic relations] order"(Appendix 2, p. 3 line 12). Dr. Lee's proposed Q.D.R.O. (which the court entered and from which this appeal is taken) divides the Plan interests as of the date of marital separation (CP 52). The court made the most reasonable inference as to the parties' intention possible under the law in deciding the segregation date. The interpretation of a contract is solely a question of law if (1) the interpretation does not depend on the use of extrinsic evidence or (2) only one reasonable inference can be drawn from the extrinsic evidence. *Dice v. City of Montesano*, 131 Wn. App. 675 (2006).

Contrary to Appellant's Brief, the standard of proof in this, a contract interpretation proceeding, is not "clear, cogent and convincing" evidence; the standard is merely "preponderance of the evidence". *Lopez v. Reynoso*, 129 Wn. App. 165 (2005).

Appellant's Brief argues that the court erred in finding the Contract ambiguous and therefore improperly "reformed" the Contract. This is not so. The court was compelled to interpret the Contract to address the time of valuation ambiguity. A contract provision is ambiguous if it uncertain or subject to more than one meaning. *Mayer v. Pierce Medical Bureau*, 80 Wn. App. 416, 421 (1995). The absence of agreed Q.D.R.O. that was to

be incorporated into the Contract rendered the date of Plan segregation uncertain. (CP 51 p. 7). This uncertainty had to be corrected in order for the court to sign any Q.D.R.O because the parties intended the order to qualify as a Q.D.R.O. in order to provide resultant benefits of the early withdrawal penalty waiver and federal income tax benefit. A “Qualified” Domestic Relations Order must include certain specific information and instructions, including either a stated dollar amount of the Alternate Payee’s principal share, or the intended date of share segregation. 26 USC 414(p)(2). This Agreement expresses the parties’ intent to comply with these requirements by specific reference to this section of the tax code, (Appendix 1, page 8-9 and 2 page 6) but then fails to state either a sum or date certain for the intended 50/50 Plan division (CP 51, p.7). Thus, the court had no way to comply with Ms. Kennard’s motion to enforce the Agreement by entry of a Q.D.R.O. without first determining the parties’ intent as to the missing date.

All provisions of a contract should be considered together by a court called on to construe a contract. *Dice v. Montesano*, supra 677. In this case, the Agreement supports the date of separation as the most reasonable inference based on the “four corners” of the Agreement. An Agreement expresses the intention of the parties that the Agreement fully and finally divide all of their property. (Appendix 1 p. 3-4).

A specific Agreement provision recites the parties' intention that Washington substantive law be applied in interpreting the contract:

2.7 Applicable Law. The parties do hereby stipulate that interpretation of this document may be made by any court of competent jurisdiction which may be call upon to interpret it and, in so doing, said court shall apply the substantive law and law of modification of the State of Washington." (Appendix 1 page 6, and CP 51).

Washington substantive law on the issue of the character of retirement assets is that contributions made after separation constitute the separate property of the contributing spouse. *In re Marriage of Bulicek*, 59 Wn. App. 630 (1990). While one spouse's separate property may be distributed to the other, such distributions are "neither common nor favored and are not warranted except under exceptional circumstances". *Moore v. Moore*, 9 Wn. App. 951 (1973). Here, the Agreement does not include language expressing mutual intent to the extraordinary proposition that separate contributions made by Dr. Lee after a 2000 divorce, continuing to an indeterminate future date (2011, as it turns out, when the Appellant first sought entry of the Q.D.R.O.) should be tacked on to Ms. Kennard's half of the community interest in the Plan. Nor does any extrinsic evidence suggests any basis for this result.

Since the precise date of segregation is not stated in the Agreement, the court properly looked to extrinsic evidence. Such evidence may be considered to ascertain "the parties' intent, subject matter

and objective, circumstances of the formation, subsequent conduct of the parties and the reasonableness of their interpretations.” *Berg v. Hudesman*, 115 Wn.2d 657 (1990).

Appellant presented no extrinsic evidence that the fall of 2011 was intended by the parties as the Plan “segregation date” except Appellant’s statement that she expected the Plan split would be made “sometime in the future”. (CP 45). In 2011, Dr. Lee was 54 years old. There is no evidence that in 2011 he was planning early retirement. Indeed, the Agreement’s harsh, non-modifiable maintenance provisions only allow reduction of his 20 year \$9,000 per month maintenance obligation if his income is involuntarily reduced before the maintenance termination date in 2020. (Appendix 1).

In contrast, specific language in the Agreement expressly favors Dr. Lee’s proposed segregation date:

“2.1 Except as otherwise authorized by this Agreement, each spouse hereby covenants to make no claim upon the property or earnings assigned herein to the other party by way of marital community interest therein, and hereby releases any and all rights or interest in any real or personal property after the date of separation of the parties [February 15, 1999] or the date of this Agreement [February 9, 2000] whichever date occurs first. Both parties agree that neither will assert any claim or demand of any kind against the other except as expressly recognized herein.” (Appendix 1, page 4).

Except for this Plan all other assets of the parties were divided at the time of dissolution.

The timing and circumstances at the time of contract formation also support the “date of marital separation” as the intended Plan division date. When the parties signed the Agreement, dissolution trial was only a month away; dissolution trial had been scheduled for March 13, 2000 by the April 23, 1999 Case Scheduling Order. (Trial Court Docket #2). Mr. Finesilver withdrew on February 24, 2000 (Trial Court Docket #21). The next activity on the court’s docket occurred on November 11, 2011, when Mr. Finesilver appeared on behalf of Ms. Kennard for entry of the Q.D.R.O.(CP #22).

In constructing and interpreting contracts, absurd results should be avoided:

“When a provision is subject to two possible constructions, one of which would make the contract unreasonable and imprudent and the other of which would make it reasonable and just, the latter should be adopted. *Dice v. Montesano*, 131 Wn. App. 675 (2006) citing *Dickson v. United States Fid. & Guar. Co.*, 77 Wn. 2d 785, 790 (1970).

To award Ms. Kennard one half of Dr. Lee’s twelve years of post-separation contributions to his Plan by Dr. Lee would be patently unreasonable.

Respondent also argues for application here of the general principal of contract construction, that when a writing is ambiguous the

court should construe the language against the drafter. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 459 (2002). Mr. Finesilver (f/k/a Fields) is the apparent drafter of both the Contract and of Ms. Kennard's 2011 proposed Q.D.R.O.(CP 23). Dr. Lee was *pro se* at the date of formation (CP 38). Mr. Finesilver remains Ms. Kennard's attorney of record on appeal. As counsel who both drafted and presented the Contract *ex parte* for merger in the agreed Decree, Mr. Finesilver is responsible for the failure to attach "an agreed Q.D.R.O." to the Contract (CP 51). He offered no explanation to the motion court why he did not do so. Appellant's Brief is also silent on the issue. Nor did Mr. Finesilver offer any explanation to the trial court as to why the Appellant waited eleven years to present a Q.D.R.O. and why, contrary to the language of the Contract, the Q.D.R.O. he presented in 2011 was not "agreed" in 2000, or indeed, in 2011, while simultaneously arguing in Appellant's Brief that there is "no ambiguity" in this Contract.

ARGUMENT ON ASSIGNMENT OF ERROR #4

Procedurally, Appellant's Brief argues that the trial court's imposition of CR 11 sanctions requires written findings of fact and that failure to provide this constitutes an "abuse of discretion", citing *Just Dirt v. Knight Excavating*, 138 Wn. App. 409 (2007). Respondent

acknowledges that a trial court must make adequate findings of fact in support of a CR 11 sanctions award.

Substantively, the Appellant's Brief argues that the trial court must determine that an attorney acted in "bad faith" as the basis of CR 11 sanctions, citing *Recall of Pearsall-Stippe*, 136 Wn. 2d. 255 (1998). Appellant seeks reversal of the sanctions order as the sole remedy. No legal authority is cited for the latter proposition.

In reviewing a trial court decision to impose CR 11 sanctions against an attorney, the court applies an "abuse of discretion" standard. *Bryant v. Joseph Tree, Inc.*, 119 Wn. 2d. 210, En Banc (1992). Although written findings of fact are required, if sanctions are based on written documents, the appellate court may independently review the evidence and in the absence of adequate findings, make the requisite findings of fact itself if the court is persuaded the record supports this. *Bryant v. Joseph Tree*, supra 214. If the record is not clear, the appellate court may remand the case back to the trial court for necessary findings of fact. The standard on review of a CR 11 sanctions decision on appeal is "abuse of discretion." *Johnson v. Mermis*, 91 Wn. App. 127 (1998). The appellate court may refer to a trial court's oral decision if the written findings are not adequate and that it appears that the court intended for the oral decision to be incorporated into the order. *Johnson*, supra 132. Judge

Fleck's oral decision of December 14 (Verbatim Report 2, p.24-30) clearly reflects the court's deliberation on each issue required by CR 11.

CR 11 applies when a claim lacks a factual or a legal basis and the attorney failed to conduct a reasonable inquiry into the factual and legal bases of the claim. The trial court's imposition of CR 11 sanctions does not specifically require a finding of bad faith as Appellant argues.

Pearsall-Stipek, supra is distinguishable in that the sanctioned party there was not an attorney but a "citizen" who initiated multiple baseless recall petitions against a county official. In denying the second petition, the trial court awarded the official her attorney fees under RCW 4.84.185. On appeal, the court held that the court had erred because that statute cannot support the award. However, the appellate court ruled that award could be affirmed under CR 11 based on the appellate court's finding that the petitioner had acted to harass the official and thus acted in bad faith.

Determination that an attorney has acted in "bad faith" under CR does not require a findings of malicious animus. Rather, an attorney acts in bad faith under CR 11 if the court finds that the attorney failed to meet his or her professional duty by making a reasonable inquiry into the factual and legal bases of a claim. The court needs to takes into account:

"(1) the time available to the attorney; (2) the extent of the attorney's reliance upon the client for factual support; (3) whether the attorney, upon acceptance of the case from another attorney, acquired sufficient knowledge of the factual and legal bases of the

claim; (4) the complexity of the factual and legal issues; and (5) the need for discovery to develop the facts underlying the claim.” *Bryant v. Joseph Tree Inc.*, 119 Wn.2d 210, En Banc, 1992.

The court should apply an objective standard in determining whether an attorney’s investigation into the fatal and legal basis of the claim was adequate. *Eller V.E. Sprague Motors v. R.V. 'S INC.*, 159 Wn. App. 180 (2010). The court must apply an objective standard, viz.:

“whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified.” *Sprague*, supra, and *Biggs v. Vail*, 124 Wn.2d 193,197, En Banc (1994) [*Biggs II*].

Dr. Lee sought CR 11 sanctions against Appellant’s counsel, Mr. Finesilver, personally and not against Ms. Kennard, based on the facts of this case. The court concurred, sanctioning only Mr. Finesilver. (Verbatim Record #2 p.30 and CP 53). The court found that the Q.D.R.O. attached to Mr. Finesilver’s presentation motion (Appendix 2, CP 23) was unsupported by fact or law with respect to the “current date” segregation claim. (Verbatim Report #2. p. 27-30). No rational argument was offered at either hearing to explain why the court should award Ms. Kennard’s half of Dr. Lee’s twelve years of post-dissolution separate contributions in addition to her half of the community interest. (Verbatim Reports 1 and 2). Mr. Finesilver (WSBA 5495) sent an associate, Ms. Gretchen Neale (WSBA 36349) to argue at both hearings. At the second hearing, although repeatedly asked by the trial court, Ms. Neale could not explain why the Q.D.R.O. states that the date of segregation should be the

current date, noting that she “could not speak” for the drafter. (Verbatim Record 2, page 26 and Appendix 2 page 3, line 12).

Mr. Finesilver had more than sufficient time and notice that he needed to correct the proposed segregation date of his Q.D.R.O. (CP 32). Dr. Lee’s counsel, undersigned, investigated the date of segregation issue Ms. Kennard’s counsel’s assertion in support of the Q.D.R.O., that the Plan Administrator had approved the Appellant’s proposed Q.D.R.O. Counsel for Dr. Lee then warned Mr. Finesilver of the problem to allow him to correct the error, by filing a Motion to Continue rather than a Response to the Motion for Adoption of the Q.D.R.O. (CP 32). During this investigating Respondent’s counsel discovered that Mr. Finesilver had not provided the Administrator with the Agreement. The Administrator did not purport to determine if the proposed “current date” as date of segregation, was consistent with the Contract, and indeed is not charged with that duty by law. 26 U.S.C. Section 414(p)(6)(4). Respondent placed the entire email correspondence between both counsel and the Plan Administrator in evidence and offered a stipulated Q.D.R.O. correcting the segregation date (CP 32). Mr. Finesilver rejected the stipulated Q.D.R.O. by proceeding on the Motion to Adopt his proposed Q.D.R.O. He subsequently also briefed in favor of entry of his Q.D.R.O. (CP 46). The brief presented not a single legal authority in support of his position that the additional twelve years of separate contributions should be added to

his client's community property share of the Plan.(CP 46). Nor was Ms. Neale able to provide any legal authority in oral argument (Verbatim Report 2, p. 4).

A sanctioning court must review actual fees incurred as a result of the sanctionable act. This court complied, limiting sanctions based on four hours of the Respondent's fees that were clearly and directly related only to the Q.D.R.O. date selection misconduct. (Verbatim Record #2 page 28). The oral decision also demonstrates that the court properly considered the minimal sanction it deemed appropriate to discourage further misconduct. (Verbatim Report 2 page 29). In light of the record here, which is replete with examples of Mr. Finesilver's professional conduct that at best barely stays on the ethical side of "zealous advocacy", sanctions are clearly warranted. The court must impose sanctions when it finds an attorney has violated CR 11. *Johnson v. Mermis*, 91 Wn. App.127 (1998). Appellant does not argue that the amount of the sanction award was not too extreme to be "chilling". The oral decision clearly demonstrates the court's proper consideration of this issue as well. (Verbatim Report #2 p 30).

ARGUMENT ON ASSIGNMENT OF ERROR # 5

Appellant claims fees under RCW 26.09.040, RCW 26.18.160 and RAP 184.1(1) and (3). The requests are without merit and should be denied.

RCW 26.09.140 requires a spouse seeking fees to demonstrate their need and the other party's ability to pay. To facilitate this determination, King County Local Family Law Rule 10 requires the movant to provide income tax returns, wage documentation and bank account records and a Financial Declaration. Ms. Kennard did not comply with this Rule other than by providing a Financial Declaration (CP 43). The motion court was thus without sufficient evidence to make the required determination of relative need/ability to pay. Appellant's Financial Declaration alone demonstrates ability to pay her own fees by reporting that her spousal maintenance income far exceeds her demonstrated needs. (CP 43).

Ms. Kennard's motion requested \$5,000 in fees, but the motion was not supported by any evidence of actual fees incurred. The record was not supplemented at or after either hearing. The motion evidence was accordingly insufficient to support a fee award.

As the Appellant's brief notes, RCW 26.18.160 provides Appellant with a possible second statutory basis for fees:

"In any action to enforce a support or maintenance order under this chapter [18], the prevailing party is entitled to a recovery of costs, including an award for reasonable attorney fees. An obligor may not be considered a prevailing party under this section unless the obligee has acted in bad faith in connection with the proceeding in question."

The Appellant did not prevail. Further, Respondent has raised serious issues of “bad faith” in this Brief with respect to her support and maintenance retroactive “automatic adjustment” enforcement claims.

Respondent concurs that an award of cost, including statutory attorney fees under RCW 4.84.080(2) should be awarded to the prevailing party under RAP 14(1).

RESPONDENT’S MOTION FOR ATTORNEY FEES ON APPEAL

1. MOTION FOR FEES.

Dr. Lee requests that the Court of Appeals award him attorney fees under RAP 18.9, 18.7 and/or CR 11 on the basis that this appeal is frivolous. Each of Appellant’s Assignments of Error are separately discussed below in support of this motion.

RAP 18.9 provides broad authority for the appellate court to impose attorney fees as a sanction. In addition, the sanctions of CR 11 are made applicable to appeals under RAP 18.7. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210 (1992); *Layne v. Hyde*, 54 Wn. App. 125, review denied 113 Wn.2d 1016 (1989).

The appellate court may award a party attorney fees as sanctions, terms, or compensatory damages when the appeal is frivolous. *Reid v. Dalton*, 124 Wn. App. 113 (2004). An appeal is frivolous if considering

the record in its' entirety, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn. 2d 225 (2005). An appeal should be deemed frivolous if all determinations of the trial court are supported by substantial evidence or well established law. *Dearborn Lumber v. Upton*, 34 Wn. App. 490 (1983). Such is the case here.

When considering whether an appeal is frivolous, the appellate court is required to consider several factors:

(1) a civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Streater v. White*, 26 Wn. App. 430, review denied, 94 Wn.2d 1014 (1980).

Respondent argues that all of these factors are established as to each of the Appellant's five assignments of error, addressed below:

APPELLANT'S ASSIGNMENT OF ERROR #1. Appellant's first assignment of error is utterly devoid of merit. The use of "automatic escalator clauses" in child support orders had been prohibited since the 1982 *Edwards* decision. Subsequent decisions of the trial court, including *Oliver* and *Stoltzfus*, supra, require the

trial court to “void” and refuse to enforce such provisions both retrospectively and prospectively. At the time this support Order was entered in 2000, Washington law was already well settled on this point, yet Mr. Finesilver drafted and submitted an Order ex parte containing the prohibited restrictions. The Order was agreed to by a *pro se* opponent, albeit a “highly educated” one as the court noted (Verbatim Report 2 p. 24). Even in 2000, Mr. Finesilver had actual notice of the problem of substantive law that this Agreement was certain to create when Ms. Kennard may need to seek court enforcement of the clause in future, from Dr. Lee’s counsel’s letter (CP 45).

Case law on the “no automatic escalator clause” has remained consistent and predictable continuing to move consistently in the opposite direction than the direction urged by Mr. Finesilver. Nevertheless, in 2011, Mr. Finesilver signed a motion requesting that such a clause be enforced retroactively, by moving for judgment based solely on the prohibited CPI based increases to judgment (CP 23). As discussed above, Mr. Finesilver’s associate had no choice during oral argument but to concede unenforceability. (Verbatim Reports 1 and 2). On appeal, Appellant has made no new argument or cited any authorities that would support complete reversal of this established decisional law.

Respondent submits that the trial court had substantial evidence supporting an award of fees as sanctions under CR 11 against Mr. Finesilver on this issue. Under such circumstances it is error not to award sanctions. *Eller v E. Sprague Motors*, 159 Wn. App. 180 (2010).

ASSIGNMENT OF ERROR #2. *In Re Marriage of Coyle*, 61 Wn. App 653 (1991), the court extended the existing line of cases banning “automatic escalator” clauses from support to include maintenance orders. Yet Mr. Finesilver drafted such a potentially voidable order in 2000 and moved for retroactively enforcement in 2011 (CP 23).

Appellant argues that the fact that the maintenance terms of this Agreement are “non-modifiable” compels the court to enforce the provision, despite two decades of inapposite and consistent law. The trial court ruled against the Appellant on this issue but declined to award CR 11 sanctions on the basis that the Appellant’s argument, although rejected, had the “thin basis” basis needed to avoid CR 11 (Verbatim Report 2 page 24).

Since the trial court decision, the Appellant has taken two additional opportunities to put meat on the bones of the “thin” argument, by reconsideration motion (CP 54, denied at CP 53) and

Appeal Brief but presents no new legal argument or persuasive authority.

Reversal of the trial court's decision on the maintenance issue would require the law to enable parties to enter into "non-modifiable" maintenance contracts previously deemed against public policy but nonetheless thereafter with impunity force the court to enforce contract terms Washington courts have deemed voidable as against public policy.

The argument that voiding this term would impair the certainty of all "non-modifiable" contract in future is also specious. *In Re Marriage of Yearout*, 41 Wn. App. 897 (1985) already protects this boundary by disallowing modification to remove a "non-modifiable" provision. The court must enforce non-modifiable maintenance. Its equitable power is limited to fashioning appropriate remedies designed to mitigate harshness while protecting contractual rights.

The need for the court to be able to refuse to enforce illegal contracts must be given more weight than the need of an ex-spouse to enforce an invalid maintenance agreement that was clearly voidable at the date of formation. To illustrate this point, as Respondent's reconsideration brief (CP57) notes: what if the court

were required to enforce a “non-modifiable” maintenance provision requiring the recipient spouse to grant sexual favors to the paying spouse as a condition of continued maintenance?

Appellant here challenges, without providing the appellant court with any new legal authority or argument, that the court has no power to avoid enforcing a contract term it deems void, on appropriate challenge. This is particularly unjust given that this Agreement includes as albeit “boiler plate” severability provision in case a contract term is declared invalid as a matter of law. Severability clauses have become “boiler plate” for a reason: reasonable attorneys realize that the equitable power of our court to decline to enforce a void contract term is inherent in our system of justice. The trial court did not “modify” this order. The court carefully protected Ms. Kennard’s right to continue to receive \$9,000 per month maintenance until 2020 by severing the void provision. The record establishes that \$9,000 per month gross income from maintenance alone is more than sufficient to meet Ms. Kennard’s declared needs. (CP 43).

Washington substantive law clearly contemplates now, as in 2000, that spouses are only free to establish maintenance within the perimeters of RCW 26.09.170, which *Coyle* confirmed cannot

include enforceable “automatic increases bearing no relation to the actual need and ability of the respective parties. This should even more be so when the court cannot modify the contract by statute even if the maintenance award has been rendered inequitable by changed circumstances. The need to assure that the court can declare voidable provisions “void” is also heightened by the inherently emotionally vulnerable nature of many divorcing spouses trying to negotiate marital settlement.

Further, this court has historically extended heightened equitable protection to parties signing prenuptial agreements, recognizing the inherently emotionally vulnerable position of parties conducting such negotiations at that time in their lives. *Friedlander v. Friedlander*, 80 Wn. 2d. 293 (1972).

Mr. Finesilver’s client provided him with opposing counsel’s 2000 letter to Dr. Lee (CP 45) which put Mr. Finesilver on notice that he may be dealing with an emotionally vulnerable pro se. The letter also proves that Mr. Finesilver was specifically aware of the Coyle decision and the consequent “voidability” issue he drafted into the Agreement. (CP 45).

3. ASSIGNMENT OF ERROR #3. Mr. Finesilver signed the motion for adoption of Ms. Kennard’s proposed Q.D.R.O. The

motion provides no factual or legal basis to support a retirement asset division date of 2011, nor was this deficiency rectified in oral argument. At hearing, the court provided the opportunity in colloquy for Mr. Finesilver's associate attorney to explain this choice. At the continued hearing she was still unable to do so. (Verbatim report #2 page 2). Finally, the record establishes that Mr. Finesilver refused to either explain or change this choice of segregation date upon inquiry conducted by both the Plan Administrator and Respondent's counsel prior to hearing on his motion. (CP 32).

Substantial evidence supports the trial court decision to divide the asset as of the date of separation (1999). It is preposterous to interpret the parties' intent as dividing the asset at an indeterminate future time that turned out to be 2011 when Appellant first proposed an actual Q.D.R.O. Interpreting the Agreement as Mr. Finesilver proposes would allow Ms. Kennard half of nearly twelve years of Dr. Lee's post-dissolution separate earnings. Further, as the trial court noted, the need to interpret the Agreement contract to supply the asset division date was itself created by Mr. Finesilver's failure in 2000 to present the "agreed Q.D.R.O." with the Agreement despite the express "incorporation"

of the Q.D.R.O. into the Agreement and Decree. (Verbatim Report 2, p. 26).

The court awarded CR 11 sanctions against Mr. Finesilver personally with respect to this motion. Oral decision makes it clear that the court opined that modest sanctions were probably sufficient to effectuate the intention of CR 11, viz., to discourage continuation of the type of conduct sanctioned. (Verbatim Records 2 page 29). Considering the entire record on appeal, it is now appropriate for the court of appeals to impose compensatory sanctions under RAP 18.9, bearing in mind the insufficiency in light of the apparent insufficiency of the underlying sanction order to achieve the intended purpose.

4. ASSIGNMENT OF ERROR #4. The Appellant's Brief argues that the award should be reversed because the court did not make the requisite written findings. Yet the court's detailed deliberation, including the court's reading of portions of *Physicians Ins. Exchange v. Fisons Corp.*, 122 Wn. 2d. 299, En Banc (1993) into the record, provides substantial evidence that the court considered all necessary CR 11 factors. (Verbatim Report #2, p. 23-31). The standard on review is abuse of discretion. *Biggs v. Vail* [II], supra. Appellant's Brief provides no substantive

evidence of judicial abuse. Further, rather than requesting remand for entry of sufficient findings, Appellant instead, did not supply the verbatim Reports of the oral decision for the record until ordered to do so on Respondent's motion, requesting that the decision be reversed.

5. ASSIGNMENT OF ERROR #5. Appellant requested fees on the basis of RCW 26.09.140 below, but failed to provide the motion court with the mandatory evidentiary require for all family law fee motions. KCLFL 10. Mr. Finesilver also failed to provide documentation of the amount of \$5,000 he requested as fees in the Q.D.R.O. enforcement motion (CP 23). These evidentiary omissions made it impossible for the court to decide fees.

With respect to Appellant's request for fees under RCW 26.18.160 as stated in Appellant's Brief signed by Mr. Finesilver, this statute requires that the party seeking enforcement "prevail". Mr. The Appellant's Brief provides no legal argument or authority for the position that Ms. Kennard should have been determined to be the "prevailing party" rendering this Assignment of Error frivolous.

2. SANCTIONS REQUESTED EVEN IF SOME BUT NOT ALL OF APPELLANT'S ASSIGNMENTS OF ERROR ARE DEEMED FRIVOLOUS

Dr. Lee further requests that even if this court, after considering the record on appeal as a whole, determines that some but not all Assignments of Error are sanctionable under RAP 18.9(a) that the court nevertheless impose “partial” sanctions to compensate the Respondent’s for his fees incurred on appeal related to those issues only.

Respondent concedes the general rule for purposes of awarding fees under RAP 18.9 is that all Assignments of Error on appeal must be considered, in their entirety, and fees denied if even Assignment is arguably meritorious. However, the court has allowed fees in at least one instance where one claim was allowed. *In Re Marriage of Fare*, 87 Wn. App. 177 (1997), Review Denied 134 Wn. 2d. 1014 (1998). The family law court’s parenting contempt order was upheld as to all Assignments of Error except one. The Appellant’s one successful claim was having his one day in jail [moot] overturned on the basis that incarceration as a remedy of imprisonment in parenting contempt motions cannot be punitive and must therefore provide an opportunity to purge. The Assignments that were affirmed consisted of multiple, intentional acts of misconduct in violation of the Parenting Plan.

Another means of severing claims is available to the court of appeals via RAP 18.7. CR 11 does permit the Court of Appeals to award attorney fees in instances of bad faith on appeal. *Recall of Ackerson*, 143 Wn.2d 366, 377, 20 P.3d 930 (2001).

CR 11 does not require a case “entirety” finding like RAP 18.9 and RCW 4.84.185. In *Biggs v. Vail* [I], 119 Wn. 2d 129 (1992), En Banc, the Supreme Court conducted an extensive analysis of the “frivolous lawsuit” statute, RCW 4.84.185, to establish principals for balancing the competing interests of litigants’ right of access to the courts with the need to address court congestion and the protection of citizens from harassing litigation:

The frivolous lawsuit statute [RCW 4.84.185] was originally enacted in 1983. The enactment provided for an award of fees when the trial judge found that an "action, counterclaim, cross claim, third party claim, or defense as a whole" was frivolous. However, the award of fees could not be made until after final judgment... Legislative history of that first enactment shows an intent to have the statute apply to actions which, as a whole, were spite, nuisance or harassment suits. The 1983 Final Legislative Report explains it as follows: The courts in Washington are experiencing significant congestion. Such congestion might be reduced if lawsuits, claims and defenses brought solely for harassment, delay, nuisance or spite were eliminated. One method of eliminating such claims and defenses is to award attorneys' fees to the prevailing parties in frivolous and unreasonable lawsuits. . . . The Washington State Bar Association supported the enactment of the frivolous lawsuit statute and filed a written endorsement with the Legislature. The language of the act was developed by a task force of Washington State Bar Association members. In its support of the task force proposal, the bar association stated: ‘Statement of Washington State Bar Association, Senate Judiciary Committee file on Senate Bill 3130. There is a clear need to discourage the abuse of the legal system which is too frequently occasioned by frivolous law suits and defenses advanced without reasonable cause. Accordingly, the Washington State Bar Association has proposed that the courts of this state be given the authority to award attorney fees and reasonable expenses to the prevailing party when, considered as a whole, suits are commenced or defenses asserted which have been found by the court to be frivolous and advanced without reasonable cause.

The purpose of imposition of CR 11 sanctions specifically on counsel differs from the purpose of sanctions allowed by RCW 4.84.185. In *Biggs v. Vail* [II], 124 Wn. 2d 193 (1994) the court engaged in an equally thorough analysis of CR 11:

“the imposition of a CR 11 sanction is not a judgment on the merits of an action. ‘Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate.’ *Cooter & Gellv. Hartmarx Corp.*, 496 U.S. 384, 396, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990).

CR 11 sanctions are used to patrol the litigation waters at all times and may be awarded against an attorney rather than a party.

Dr. Lee contends that the record here demonstrates the point clearly made by Judge Fleck in her oral decision: there is an ethical line, certainly not “bright” but nonetheless crucial to the effective administration of justice, between “zealous representation” and disregard for procedural or substantive law.

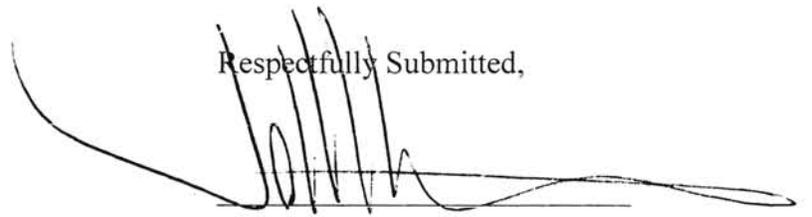
D. CONCLUSION

Respondent requests that the appellate court (a) affirm both the Qualified Domestic Relations Order and Order Denying Motion for Judgment entered by the trial court on December 14, 2011 (CP 52, 53) and (b) affirm the Order Denying Reconsideration (CP 58). Further (c) the Respondent request that the Court of Appeals impose additional sanctions

against Mr. Finesilver under RAP 18.9, and RAP 18.7/CR 11 for pursuing this frivolous appeal, and that if any Assignment of Error be determined to be “not frivolous”, that sanctions taking that exception into account be imposed in any event.

Dated: October 10, 2012

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Janet Watson', with a long horizontal flourish extending to the right.

Janet Watson, WSBA 15442
Attorney for Respondent

Attorney for Respondent:

Janet M. Watson

Law Office Watson & Toumanova

108 S. Washington St., #304

Seattle, WA 98104

Telephone (206) 340-1580

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**SUPERIOR COURT OF WASHINGTON
COUNTY OF KING**

In Re the Marriage of:)
)
Gabriel Lee)
)
 Petitioner,)
)
 and)
)
 Carol Kennard)
)
 Respondent.)
_____)

NO. 99-3-03079-0 SEA
**SEPARATION CONTRACT AND
PROPERTY SETTLEMENT
AGREEMENT**

I.

RECITALS

1.1 THIS AGREEMENT is made and entered into between GABRIEL LEE (hereinafter referred to as "husband" or "spouse", for himself, his personal representatives, heirs and assigns), and CAROL KENNARD (hereafter referred to as "Wife" or "spouse", for herself, her personal representatives, heirs and assigns), in order to promote the amicable settlement of disputes attendant upon their separation and the filing of a Petition for Dissolution of their marriage.

1.2 The parties hereto were married on July 22, 1979 in King County, Washington, and ever since said date have been and now are husband and wife; and

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1.3 The parties separated on or about February 15, 1999.

1.4 Two children were born as issue of this marriage, and the wife is not now pregnant.

1.5 Both parties agree and warrant to one another that they are:

- a) Residents of the State of Washington;
- b) Husband and wife; and
- c) Neither party is an active member of the Armed Forces of the United States.

1.6 Both parties warrant and agree that this Agreement is at this time (to-wit: at the time of execution) fair, just and equitable and that they are affixing their signatures hereto freely, knowingly, and voluntarily without duress or coercion of anyone.

1.7 Each spouse deems himself and the other spouse of sound mind, and each so warrants to the notary attesting to the validity of their signatures.

1.8 Both spouses acknowledge that the property and obligations hereafter listed and divided are all of the property and obligations that either or both have accumulated.

1.9 Both spouses acknowledge that each has an understanding of the nature of their property and the benefits that are derived from said property.

1.10 Both parties acknowledge that each has had the opportunity to seek independent counsel concerning disposition of their rights, property and obligations as set forth herein prior to the signing of this Contract. Counsel means both an attorney and/or other financial advisor.

1 Failure to seek out such counsel is deemed a waiver thereof. Because of irreconcilable
2 differences, the parties intend to live separate and apart.

3
4 1.11 The parties desire to confirm their separation and make arrangements in
5 connection therewith, including settlement of all questions relating to their property rights and
6 other rights and obligations drawing out of this marital relationship.

7 1.12 Both parties agree to submit themselves and all of their property, no matter where
8 situated, to the jurisdiction of the State of Washington to dispose of as set forth following.

9 1.13 Both parties agree that a dissolution which may be entered hereafter shall be
10 limited to the terms of this Agreement, and which agreement shall be incorporated in Findings of
11 Fact and Conclusions of Law and the Decree of Dissolution upon entry.

12
13 1.14 The parties are not contracting to dissolve their marriage, but agree that if a
14 Decree of Dissolution is obtained, this Separation Contract shall be incorporated in said Decree
15 of Dissolution and merged therein and be given full force and effect through said Decree.
16 Notwithstanding that the provisions of this Agreement are to be included and merged in such a
17 Decree of Dissolution, it is also the intention of the parties that this Agreement retains its status
18 independently as a contract between the parties, each spouse to enforce their rights as they arise
19 from this Agreement by contract law, as well as those remedies available for the enforcement of
20 judgments and dissolution law specifically including the use of the contempt power of the court.
21 It is understood and agreed by the parties that this Contract shall be final and binding upon
22 execution by both parties, whether or not a Decree of Dissolution is obtained. This Agreement
23 may be terminated and modified on a written document so reflecting, signed by both parties.
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1.15 In consideration of the mutual promises, agreements and covenants of the parties, the rights each receives or relinquishes, the mutual promises made and of the acts to be performed by each, and having understood each paragraph hereinbefore set forth, the parties have agreed, and by the affixing of their signatures last hereto, agree as follows:

**II.
WAIVERS**

2.1 Except as otherwise authorized by this Agreement, each spouse hereby covenants to make no claim upon the property or earnings assigned herein to the other party by way of marital community interest therein, and hereby releases any and all rights or interest in any real or personal property after the date of separation of the parties or the date of this Agreement, whichever date occurs first. Both parties agree that neither will assert any claim or demand of any kind against the other except as expressly recognized herein.

2.2 Except for the enforcement of rights hereunder, each spouse hereby relinquishes and waives any right and/or interest which he may have in the estate of the other spouse unless under a Will executed subsequent to the effective date hereof, and each hereby covenants to make no claim for any such right and/or interest upon the death of the other party by way of community property interest or as a widow, widower, heir, next of kin, or successor under the laws of descent and distribution, or under any other provision of any statute or under any rule of common law. These covenants, relinquishments and waivers include, but are not limited to, all rights of inheritance and/or the rights of administration of the state of the deceased spouse, the

1 right to take against or make objections to the Will of the deceased, any right to homestead or
2 award in lieu thereof, and any right to allowances and exemptions or money and property,
3 personal and real, out of the estate of the deceased spouse. These covenants, relinquishments and
4 waivers extend to all rights and interests as under the law at the death of either spouse. Each
5 party retains, however, all rights accorded to him or her by virtue of the Social Security Act, as
6 amended, notwithstanding the fact that some or all of those rights accrued solely by virtue of the
7 marriage of the parties and contributions of the other party.
8

9 2.3 Inducements: Each party hereto acknowledges that he or she is making this
10 Agreement of his or her own free will and volition and acknowledges that no coercion, force,
11 pressure or undue influence whatsoever has been employed against himself or herself in
12 negotiations leading to the execution of this Agreement either by the other party hereto or by any
13 other person or person whomsoever, and declares that no reliance whatsoever is placed upon
14 representation other than those expressly set forth herein.
15

16 2.4 Legal Representation: Each party to this Agreement does hereby stipulate with
17 the other that he or she has been either represented in negotiations for and the preparation of this
18 Agreement, by counsel or his or her own choosing, or has had the opportunity to have this
19 Agreement reviewed by independent counsel and has declined to do so. The parties have read
20 this Agreement and have had it fully explained to them prior to signing.
21

22 2.5 Entire Agreement: This Agreement embodies in its entirety the agreements of the
23 parties concerning the disposition of their proprietary and their property rights; provisions for the
24
25

1 children, if applicable; maintenance of the spouse, if applicable; and all other issues between
2 them. There are no other agreements existing between the parties with reference to such matters.

3
4 2.6 Modification: No modification or waiver of any of the terms of this Agreement
5 shall be valid as between the parties unless in writing and executed with the same formality of
6 this Agreement; and no waiver of any breach or default hereunder shall be deemed a waiver of
7 any subsequent breach or default of the same or similar nature, no matter how made or how often
8 recurring.

9
10 2.7 Applicable Law: The parties do hereby stipulate that interpretation of this
11 document may be made by any court of competent jurisdiction which may be called upon to
12 interpret it and, in so doing, said court shall apply the substantive law and law of modification of
13 the State of Washington.

14 2.8 Partial Invalidity: In the event that any portion of this Agreement shall be
15 declared invalid by any court of competent jurisdiction, those parts not at issue shall still be of
16 full force and effect.

17
18 2.9 Findings and Decree: This Separation Contract shall be embodied as is provide
19 din the format of the Findings of Fact and Conclusions of Law and Decree of Dissolution under
20 Chapter 157 of the Laws of 1973, First Extraordinary Session.

21 2.10 Court Approval of Separation Contract: It shall be the intent of both parties that
22 the court approve this Separation Contract as fair and equitable at the time it was entered into,
23 and thus enforceable. Either party may apply to the Superior Court of the State of Washington
24 for a Decree dissolving the marriage and granting all relief provided for in this Agreement. By
25

1 executing this Agreement, each party voluntarily consents to the jurisdiction of the Superior
2 Court of the State of Washington to award all such relief and ratify all rights and obligation set
3 forth herein.
4

5 **III.**

6 **EXECUTION OF INSTRUMENTS**

7 3.1 In full consideration of the mutual agreements contained herein, each spouse will
8 execute any deeds, bills of sale, assignment, promissory notes, transfers or other instruments and
9 documents necessary to complete and effectively carry out the terms of this Agreement. This
10 paragraph shall also be binding upon and inure to the benefit of the heirs, executors,
11 administrators, successors and assigns of each of the parties.
12

13 3.2 In the event that legal descriptions are omitted, incorrect or insufficient, each
14 party agrees to promptly execute such additional or new documents as may be required to
15 effectuate the terms of this Agreement.
16

17 3.3 Each of the parties shall take all steps necessary to set forth all of the provisions
18 contained in this Separation Contract are given full effect. Each party shall allow delivery to the
19 other party within thirty (30) days of the date hereof those items of personal property awarded to
20 the other which are at the present time in his or her possession. Each party shall make available
21 to the other those insurance policies awarded to the other which are in his or her possession, as
22 well as all those records relating to assets awarded to the other party which are in his or her
23 possession. The parties will contact one another and make suitable arrangements for the delivery
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1 and receipt of said documents and/or items of personalty. Each party is obliged to exert his or
2 her best efforts to complete these transfers.

3
4 **IV.**

5 **PROPERTY AND OBLIGATIONS OF THE PARTIES**

6 4.1 Property to Wife: The parties agree that the wife shall be awarded as her sole and
7 separate property, free and clear of any claims of the husband, any and all interest in and to the
8 following:

- 9 a) The real property located at 4853 167th Avenue SE, Bellevue, Washington.
10 b) All personal property in her possession and control, including all bank
11 accounts in her name.
12 c) All certificates of deposits standing in the names of the parties through
13 Washington Mutual Savings Bank.
14 d) All Washington Mutual Bank Accounts and Washington State Employees
15 Credit Union CDs and accounts.
16 e) The Schwab stock account.
17 f) The 1999 Honda Van.
18 g) One-half of the husband's Group Health retirement benefits, subject to the
19 terms and conditions as outlined in the Qualified Domestic Relations Order which accompanies
20 this Agreement, except for the 401(k).
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1 reaching the age of 65, or upon his death, whichever shall first occur. In the event of his death, he
2 shall maintain term life insurance in the sum of \$1,000,000 until the children of the parties are
3 each over the age of 25, or upon Carol's death, whichever comes first. Carol shall be the primary
4 beneficiary. The secondary beneficiaries shall be Christopher and Anastacia, the parties' children.
5 There shall be no other beneficiaries of this policy. The purpose of the policy is to secure the
6 support and maintenance obligations hereunder (see accompanying Order of Child Support).
7

8 If husband's salary is reduced due to involuntary reduction of salary or full-time
9 equivalent, spousal maintenance shall reduce proportionately, to-wit: as his actual reduced income
10 on an annual basis bears to \$226,258 in gross annual income. To illustrate through a hypothetical
11 example, let's assume husband's income is reduced to \$181,406. That figure is 80% of the annual
12 salary on which the maintenance amount of \$9,000 per month was based. His maintenance
13 obligation would then reduce by 20% (\$7,200). Once his total annual earned income, pre-tax,
14 increases up to the \$226,758 level or greater, the amount of the spousal maintenance shall increase
15 back to the pre-reduction level.
16

17 If husband becomes disabled temporarily or permanently, partially or completely, then
18 spousal maintenance will be reduced proportionate to the reduced disability income.
19

20 If the husband changes employment involuntarily due to termination by Group Health for
21 any reason, then spousal maintenance shall be the lesser of one-half of husband's new income pre-
22 tax or \$9,000, plus accumulations for CPI adjustments.
23

24 If husband changes his practice voluntarily when either child is under the age of 18,
25 spousal maintenance will equal the last amount prior to leaving Group Health. If this occurs when

1 both children are over the age of 18, spousal maintenance will be equal to the lesser of one-half of
2 husband's new *pre-tax* income or the last amount of spousal support prior to leaving Group
3 Health, but not less than \$6,000 per month, plus CPI adjustment. Husband will provide wife with
4 six months notice (see discussion in college funding).
5

6 Maintenance is otherwise non-modifiable by either party, unless agreed to in writing by the
7 parties.

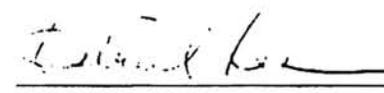
8 VI.

9 LEGAL FEES

10 Each party shall be solely liable for their own legal fees and costs of suit incurred herein.
11

12
13 IN WITNESS WHEREOF the parties hereto have affixed their signatures as of the 9th
14 day of January, 2000.
15

16 
17 CAROL KENNARD
18 Respondent/Wife

16 
17 GABRIEL LEE
18 Petitioner/Husband

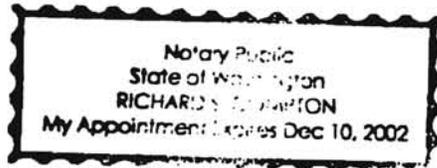
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STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On this day personally appeared before me CAROL KENNARD, to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged to me that she signed the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 6th day of February, 2000.

(seal or stamp)



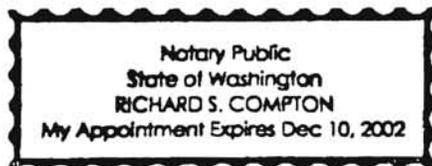
Richard S. Compton
Printed Name: Richard S. Compton
NOTARY PUBLIC in and for the State of
Washington, residing at Kent
Commission Expires: 12/10/2002

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On this day personally appeared before me GABRIEL LEE, to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged to me that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 9th day of February, 2000.

(seal or stamp)



Richard S. Compton
Richard S. Compton
Printed Name: GABRIEL LEE Richard S. Compton
NOTARY PUBLIC in and for the State of
Washington, residing at Kent
Commission Expires: 12/10/2002

1 Income Security Act of 1974, as amended ("ERISA"), and Section 414(p) of the
2 Internal Revenue Code of 1986 (the "Code"). This QDRO is granted in
3 accordance with RCW 26.09, which relate to marital property rights, child
4 support, and/or spousal support between spouses and former spouses in
5 matrimonial actions.
6

7 2. That Gabriel Y. Lee (the "Participant"), born on December 28, 1955, currently
8 residing at 28835 - 14th Court SE, Federal Way, WA 98003, Social Security
9 Number 536-68-5528, and Carol Ann Kennard (the "Alternate Payee"), born on
10 June 9, 1947, currently residing at 4853 - 167th Avenue SE, Bellevue, WA
11 98006, Social Security Number 535-50-8679, were married on the 22nd day of
12 July, 1979, and were continuously married from that date to the date of
13 February 11, 2000.
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16 3. That Participant was employed by Group Health Permanente Medical Group
17 (hereinafter the "Company") or an affiliate of the Company and such
18 employment continues.
19

20 4. That the Company provides certain benefits for its employees under the
21 Group Health Permanente Medical Group Pension Plan (the "Plan"), the
22 Participant participates in the Plan, and this order relates to the Plan.
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1 5. That the amounts credited to Participant's accounts under the Plan from July
2 22, 1979 to February 11, 2000 are the community property of both Participant
3 and Alternate Payee.
4

5 6. That, with respect to the Plan:

6 (a) Alternate Payee is entitled to a portion of the amounts credited to
7 Participant's accounts in the Plan as part of a just and right division of the
8 estate of the parties. Such portion is hereafter defined as "Alternate Payee's
9 Share of Plan Benefits." "Alternate Payee's Share of Plan Benefits" shall be an
10 amount equal to a portion of the total amount held in Participant's accounts
11 under the Plan, as of the date of this Order. The portion assigned for the
12 Alternate Payee's Share of Plan Benefits shall be a percentage equivalent to fifty
13 percent (50%) of the total vested amount held in Participant's accounts under
14 the Plan, exclusive of any Plan loans outstanding, adjusted for investment gains
15 and losses attributable thereto, in accordance with the terms of the Plan, until
16 distributed. Alternate Payee's Share of Plan Benefits shall be segregated in a
17 separate account in the Plan for the benefit of Alternate Payee and shall be
18 credited with its pro rata share of earnings and losses in the manner specified in
19 the Plan generally for allocating earnings and losses to participant accounts until
20 such amounts are
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1 distributed to Alternate Payee.

2 (b) The Alternate Payee's Share of Plan Benefits shall be distributed to Alternate
3 Payee in a form permitted under the terms of the Plan, and the Alternate Payee
4 agrees to permit the Plan Administrators and the trustees to withhold from
5 payments due to Alternate Payee such sums as may be required by law to be
6 withheld.
7

8 (c) The Alternate Payee may designate a beneficiary with respect to the
9 benefits to which the Alternate Payee is entitled hereunder in accordance with
10 Plan procedures.
11

12 7. That Alternate Payee shall, prior to the distribution of benefits awarded
13 hereunder, complete and return all applications, forms and other documents
14 required by the Plan Administrator, the trustees or federal, state or local law.
15 The Alternate Payee shall inform the Plan Administrator in writing of any
16 changes to Alternate Payee's address or telephone number.
17

18 8. That the parties to this Order intend that it comply with the applicable
19 provisions of ERISA and the Code. Nothing in this Order shall require the Plans
20 or the Plan Administrator:
21

22 (a) To pay any benefits not permitted under the Code or ERISA;
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1 (b) To provide any type or form of benefit or any option not provided by the
2 Plans;

3 (c) To pay total benefits with a value in excess of the benefits Participant would
4 otherwise be entitled to receive under the Plans;

5
6 (d) To pay benefits to the Alternate Payee that are required to be paid to
7 another alternate payee under another QDRO that is in effect prior to the date
8 of this Order.

9
10 9. In the event that the Plan Trustee inadvertently pays to the participant any
11 benefits that are assigned to the Alternate Payee pursuant to the terms of this
12 order, the Participant shall immediately reimburse the Alternate Payee to the
13 extent that he or she has received such benefit payment and shall forthwith pay
14 such amount so received directly to the Alternate Payee within ten (10) days of
15 receipt.
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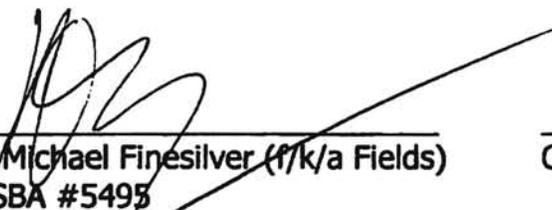
17 10. The Participant and the Alternate Payee shall hold the Plan, the Employer,
18 and any fiduciaries harmless from any liabilities which arise from this domestic
19 relations order, including all reasonable attorney's fees which may be incurred
20 in connection with any claims which are asserted because the Plan honors this
21 order.
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1 11. This court shall retain jurisdiction of this cause for the purpose of making
2 any clarifying orders that are necessary for proper enforcement of the orders
3 and provisions contained herein and that may be necessary to ensure the
4 acceptability of this order as a QDRO.
5

6
7 DONE IN OPEN COURT this ____ day of _____, 2011.

8
9 _____
10 JUDGE/COURT COMMISSIONER

11 Presented by:

12 
13 _____
14 H. Michael Finesilver (f/k/a Fields)
15 WSBA #5495
16 Attorney for Respondent

17 _____
18 Carol Ann Kennard, Alternate Payee

19
20 Copy Received, Approved by Entry,
21 Notice of Presentation Waived:

22 _____
23 Gabriel Y. Lee, Participant
24
25

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SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

In re the Marriage of:)	NO. 99-3-03079-0 SEA
)	
Gabriel Lee)	ORDER OF CHILD
)	SUPPORT
and)	(ORS)
)	
Carol Kennard)	
)	
Respondent.)	

I. JUDGMENT SUMMARY

Does not apply because no attorney's fees or back support has been ordered.

II. BASIS

2.1 TYPE OF PROCEEDING.

This order is entered pursuant to a decree of dissolution, legal separation or a declaration of invalidity.

2.2 CHILD SUPPORT WORKSHEET.

The child support worksheet which has been approved by the court is attached to this order and is incorporated by reference or has been initialed and filed separately and is incorporated by reference.

2.3 OTHER:

Does not apply.

ORDER OF CHILD SUPPORT
WPF DR 01.0500 (7/97)
RCW 26.09.175; 26.26.132(5)
Page 1

ANDERSON, FIELDS & KAHAN
A PROFESSIONAL SERVICE CORPORATION
207 EAST EDGAR STREET
SEATTLE, WASHINGTON 98102
(206) 322-2060

III. ORDER

IT IS ORDERED that:

3.1 CHILDREN FOR WHOM SUPPORT IS REQUIRED.

Name	Date of Birth	Soc. Sec. Number
Christopher Lee	6-26-86	535-13-3954
Anastacia Lee	8-26-91	531-27-6204

3.2 PERSON PAYING SUPPORT (OBLIGOR).

Name: Gabriel Lee
Current Residential Address:
3718 78th Avenue Court W #P201
University Place, WA 98466
and Telephone Number: (253) 565-8830
Soc. Sec. Number: 536-68-5528
Date of Birth: 12-28-55
Driver's License Number/State: LEE**GY454R8/WA
Employer & Address: Group Health
Tacoma, WA
Employer Telephone: (253) 596-3370

THE OBLIGOR PARENT SHALL UPDATE THE ABOVE INFORMATION IN THIS PARAGRAPH 3.2 PROMPTLY AFTER ANY CHANGE IN THE INFORMATION. THE DUTY TO UPDATE THE INFORMATION CONTINUES AS LONG AS ANY MONTHLY SUPPORT REMAINS DUE OR ANY UNPAID SUPPORT DEBT REMAINS DUE UNDER THIS ORDER.

THE OBLIGOR PARENT'S PRIVILEGES TO OBTAIN OR MAINTAIN A LICENSE, CERTIFICATE, REGISTRATION, PERMIT, APPROVAL, OR OTHER SIMILAR DOCUMENT ISSUED BY A LICENSING ENTITY EVIDENCING ADMISSION TO OR GRANTING AUTHORITY TO ENGAGE IN A PROFESSION, OCCUPATION, BUSINESS, INDUSTRY, RECREATIONAL PURSUIT, OR THE OPERATION OF A MOTOR VEHICLE, MAY BE DENIED, OR MAY BE SUSPENDED IF THE OBLIGOR PARENT IS NOT IN COMPLIANCE WITH THIS SUPPORT ORDER AS PROVIDED IN CHAPTER 74.20A REVISED CODE OF WASHINGTON.

Monthly Net Income: \$7,223.51

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3.3 PERSON RECEIVING SUPPORT (OBLIGEE):

Name: Carol Kennard
Current Residential Address: 4853 167th Avenue SE
Bellevue, WA 98006
and Telephone Number: (425) 401-1026
Soc. Sec. Number: 535-50-8679
Date of Birth: 6-9-47
Driver's License Number/State: KENNACA530LZ/WA
Employer & Address: N/A
Employer Telephone: N/A

THE OBLIGEE PARENT SHALL UPDATE THE ABOVE INFORMATION IN THIS PARAGRAPH 3.3 PROMPTLY AFTER ANY CHANGE IN THE INFORMATION. THE DUTY TO UPDATE THE INFORMATION CONTINUES AS LONG AS ANY MONTHLY SUPPORT REMAINS DUE OR ANY UNPAID SUPPORT DEBT REMAINS DUE UNDER THIS ORDER.

Monthly Net Income: \$6,943.00 (spousal maintenance)

The parent receiving support may be required to submit an accounting of how the support is being spent to benefit the children.

3.4 SERVICE OF PROCESS.

Service of process on the obligor at the address listed above in paragraph 3.2 or any updated address, or on the obligee at the address listed above in paragraph 3.3 or any updated address, may be allowed or accepted as adequate in any proceeding to establish, enforce or modify a child support order between the parties by delivery of written notice to the obligor or obligee at the last address provided.

3.5 TRANSFER PAYMENT.

The obligor parent shall pay the following amounts per month for the following children:

Name	Amount
Christopher Lee	\$ 875.00
Anastacia Lee	\$ 875.00
TOTAL MONTHLY AMOUNT	\$1,750.00

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3.6 STANDARD CALCULATION.

Does not apply.

3.7 REASONS FOR DEVIATION FROM STANDARD CALCULATION.

Does not apply.

3.8 REASONS WHY REQUEST FOR DEVIATION WAS DENIED.

Does not apply.

3.9 STARTING DATE AND DAY TO BE PAID.

Starting Date: 2-1-00

Day(s) of the month
support is due: 1/2 on 1st & 15th of ea. mo.

3.10 INCREMENTAL PAYMENTS.

Does not apply.

3.11 HOW SUPPORT PAYMENTS SHALL BE MADE.

The Division of Child Support does not provide support enforcement services for this case. Support payments shall be made to:

Directly to Respondent/Mother

A party required to make payments to the Washington State Support Registry will not receive credit for a payment made to any other party or entity. The obligor parent shall keep the registry informed whether he or she has access to health insurance coverage at reasonable cost and, if so, to provide the health insurance policy information.

3.12 WAGE WITHHOLDING ACTION.

Withholding action may be taken against wages, earnings, assets, or benefits, and liens enforced against real and personal property under the child support statutes of this or any other state, without further notice to the obligor parent at any time after entry of this order unless an alternative provision is made below:

[If the court orders immediate wage withholding in a case where Division of Child Support does not provide support enforcement services, a mandatory wage

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assignment under Chap. 26.18 RCW must be entered and support payments must be made to the Support Registry.]

1 3.13 TERMINATION OF SUPPORT.

2 Support shall be paid in the amount of \$875 per month,
3 per child, until each child reaches age 18 or, if either
4 child goes to college and continues to live at home, as
5 long as the particular child remains at home after age
6 18.

7 3.14 POST SECONDARY EDUCATIONAL SUPPORT.

8 Gabriel will continue to pay into the GET accounts for
9 Chris and Stacia until 400 units for each has been paid
10 off.

11 Tuition will be paid for by the GET, assuming that the
12 particular child goes to an in-state public institution
13 of higher learning. If a particular child goes to a
14 private college or out-of-state, then the court reserves
15 the authority to decide the responsibilities of the
16 parents accordingly at that time.

17 Gabriel and Carol will share reasonable college
18 educational related expenses. In no event shall the
19 obligation of the parents go beyond any child reaching
20 age 25. Each child will be responsible for his or her
21 own post-graduate educational costs.

22 3.15 PAYMENT FOR EXPENSES NOT INCLUDED IN THE TRANSFER
23 PAYMENT.

24 Does not apply because all payments, except medical, are
25 included in the transfer payment.

3.16 PERIODIC ADJUSTMENT.

Child support shall be adjusted periodically as follows:

The amount of child support will be increased every
three (3) years based on the cost of living index,
but in no event shall the amount be in excess of
\$1,500 per month, per child, nor any less than \$875
per month, per child.

3.17 INCOME TAX EXEMPTIONS.

Tax exemptions for the children shall be allocated as
follows:

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1 The father shall claim the children as income tax
2 exemptions and the mother as head-of-household. If
3 in any given year the father will receive no
4 benefit by claiming the children as exemptions,
5 then the mother shall be entitled to claim the
6 children in said year(s).

7 The parents shall sign the federal income tax dependency
8 exemption waiver.

9 3.18 MEDICAL INSURANCE.

10 Gabriel will maintain medical and dental insurance for
11 the children listed in Paragraph 3.1 so long as they are
12 eligible to be covered, as defined by the insurance
13 policy and/or the IRS rules.

14 A parent who is required under this order to provide
15 health insurance coverage is liable for any covered
16 health care costs for which that parent receives direct
17 payment from an insurer.

18 A parent who is required under this order to provide
19 health insurance coverage shall provide proof that such
20 coverage is available or not available within twenty
21 days of the entry of this order or within twenty days of
22 the date such coverage becomes available, to the
23 physical custodian or the Washington State Support
24 Registry if the parent has been notified or ordered to
25 make payments to the Washington State Support Registry.

If proof of health insurance coverage is available or
not available is not provided within twenty days the
obligee or the Department of Social and Health Services
may seek direct enforcement of the coverage through the
obligor's employer or union without further notice to
the obligor as provided under Chapter 26.18 RCW.

3.19 EXTRAORDINARY HEALTH CARE EXPENSES.

The OBLIGOR shall pay one-half of health care expenses
not covered by insurance in excess of \$500 per child.
Gabriel will be consulted prior to any elective
procedures and/or tests that need to be done.

3.20 BACK CHILD SUPPORT.

Back child support does not apply, and therefore is not
addressed in this order.

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3.21 BACK INTEREST.

Back interest does not apply, and therefore is not addressed in this order.

3.22 OTHER:

The child support amount ordered in paragraph 3.5 is based upon the total financial circumstances of the parties pursuant to In Re the Marriage of Leslie, 90 Wn. App. 796, 954 P.2d 330 (1998), since the net monthly incomes of the parties exceed \$7,000 per month.

Dated: 2/11/00

151 S. Geddis
Judge/Court Commissioner

Presented by:

Approved for entry:
Notice of presentation
waived:

Michael Fields
H. Michael Fields
W.S.B.A. #5495
Attorney for Respondent

Gabriel Lee
Gabriel Lee
Petitioner Pro Se

APPROVED BY:

Carol Kennard
Carol Kennard
Respondent/Mother

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**Washington State Child Support Schedule
Worksheets**

Mother: Carol Kennard
County: KING

Father: Gabriel Lee
Superior Court Case Number: 99-3-03079-0 SEA

CHILDREN AND AGES: Christopher, 13; Anastacia, 8

PART I: BASIC SUPPORT OBLIGATION

1. GROSS MONTHLY INCOME	FATHER	MOTHER
a. Wages and Salaries	\$19,457.00	-
b. Interest and Dividend Income	-	-
c. Business Income	-	-
d. Spousal Maintenance Received	-	\$9,000.00
e. Other Income	-	-
f. TOTAL GROSS MONTHLY INCOME (add Lines 1a through 1e)	\$19,457.00	\$9,000.00
2. MONTHLY DEDUCTIONS FROM GROSS INCOME		
a. Income Taxes	\$2,409.26	\$2,057.00
b. FICA/Self-Employment Taxes	\$657.23	-
c. State Industrial Insurance Deductions	-	-
d. Mandatory Union/Professional Dues	-	-
e. Pension Plan Payments	\$167.00	-
f. Spousal Maintenance Paid	\$9,000.00	-
g. Normal Business Expenses	-	-
h. TOTAL DEDUCTIONS FROM GROSS INCOME (add Lines 2a through 2g)	\$12,233.49	\$2,057.00
3. MONTHLY NET INCOME (Line 1f minus Line 2h)	\$7,223.51	\$6,943.00
4. COMBINED MONTHLY NET INCOME (Line 3 amounts combined)		\$14,166.51
5. BASIC CHILD SUPPORT OBLIGATION (Combined Amount -->) Christopher \$707.98 Anastacia \$574.02		\$1,282.00
6. PROPORTIONAL SHARE OF INCOME (Each number on Line 3 divided by Line 4)	.510	.490
7. EACH PARENT'S BASIC CHILD SUPPORT OBLIGATION (Each number on Line 6 times Line 5)	\$653.82	\$628.18

PART II: HEALTH CARE, DAY CARE, AND SPECIAL CHILD REARING EXPENSES

8. HEALTH CARE EXPENSES		
a. Children's Monthly Health Insurance	\$100.00	-
b. Children's Uninsured Monthly Health Care	-	-
c. Total Monthly Health Care Expenses (Line 8a plus Line 8b)	\$100.00	-
d. Combined Monthly Health Care Expenses (Add father's and mother's totals from line 8c)		\$100.00
e. Maximum Ordinary Monthly Health Care (Line 5 times .05)		\$64.10
f. Extraordinary Monthly Health Care (Line 8d minus Line 8e)		\$35.90

PART II: HEALTH CARE, DAY CARE, AND SPECIAL CHILD REARING EXPENSES (cont.)		
9. DAY CARE AND SPECIAL CHILD REARING EXPENSES	FATHER	MOTHER
a. Day Care Expenses	-	-
b. Education Expenses	-	-
c. Long Distance Transportation Expenses	-	-
d. Other Special Expenses (listed below)		
	-	-
	-	-
	-	-
e. TOTAL DAY CARE AND SPECIAL EXPENSES (Add Lines 9a through 9d)	-	-
10. COMBINED MONTHLY TOTAL DAY CARE & SPECIAL EXPENSES (Combine amounts on Line 9e)		-
11. TOTAL EXTRAORDINARY HEALTH CARE, DAY CARE, & SPECIAL EXPENSES (Line 8f plus Line 10)		\$35.90
12. EACH PARENT'S OBLIGATION FOR EXTRAORDINARY HEALTH CARE, DAY CARE, AND SPECIAL EXPENSES (Multiply each number on Line 8 by Line 11)	\$18.31	\$17.59
PART III: STANDARD CALCULATION CHILD SUPPORT OBLIGATION		
13. STANDARD CALCULATION SUPPORT OBLIGATION (Line 7 plus Line 12)	\$672.13	\$645.77
PART IV: CHILD SUPPORT CREDITS		
14. CHILD SUPPORT CREDITS		
a. Monthly Health Care Expenses Credit	\$100.00	-
b. Day Care and Special Expenses Credit	-	-
c. Other Ordinary Expense Credit		
	-	-
	-	-
	-	-
d. TOTAL SUPPORT CREDITS (Add Lines 14a through 14d)	\$100.00	-
PART V: NET SUPPORT OBLIGATION/PRESUMPTIVE TRANSFER PAYMENT		
15. Net Support Obligation (Line 13 minus 14d)	\$572.13	\$645.77
PART VI: ADDITIONAL FACTORS FOR CONSIDERATION		
18. Household Assets (Present estimated value of all major assets)	FATHER'S HOUSEHOLD	MOTHER'S HOUSEHOLD
a. Real Estate	-	-
b. Stocks & Bonds	-	-
c. Vehicles	-	-
d. Boats	-	-
e. Pensions/ IRAs/ Bank Accounts	-	-
f. Cash	-	-
g. Insurance Plans	-	-
h. Other	-	-
	-	-
	-	-
	-	-

17. Household Debt (List liens against household assets, extraordinary debt.)	FATHER'S HOUSEHOLD	MOTHER'S HOUSEHOLD
a.	-	-
b.	-	-
c.	-	-
d.	-	-
e.	-	-
f.	-	-
18. Other Household Income		
a. Income of Current Spouse (if not the other parent of this action) Name _____ Name _____	-	-
b. Income of Other Adults in Household Name _____ Name _____	-	-
c. Income of Children (if considered extraordinary) Name _____ Name _____	-	-
d. Income From Child Support Name _____ Name _____	-	-
e. Income From Assistance Programs Program _____ Program _____	-	-
f. Other income (describe) _____ _____	-	-
19. Non-Recurring Income (describe) _____ _____		
20. Child Support Paid for Other Children Name/Age: _____ Name/Age: _____		
21. Other children Living in Each Household (First names and ages) _____ _____ _____		

22. Other Factors for Consideration

Signature and Dates

I declare, under penalty of perjury under the laws of the State of Washington, the information contained in these worksheets is complete, true, and correct.

Carol Kennard
Mother's Signature

2/9/00 Belleme
Date City

Debra Lee
Father's Signature

2/10/00 Belleme
Date City

Judge/Reviewing Officer

Date

Worksheet certified by the State of Washington Administrator for the Courts.

