

70562-8

70562-8



No. 70562-8-I

Court of Appeals of the State of Washington

Division 1

Zachary B Harjo,

Appellant

v.

Gelsey Hanson,

Respondent

Appeal from Superior Court of King County

Honorable Julie Specter, Judge

King County Superior Court Case No. 09-2-25941-1-SEA

Brief of Appellant

Zachary B Harjo
Pro Se
2325 NW Market Street
Seattle, WA 98107

Table of Contents

Section 1. Table of Authorities.....Page 3-4
Section 2. Introduction.....Page 5
Section 3. Assignments of Error/
 Issues pertaining to Assignments of Error...Page 6-8
Section 4. Statement of the Case.....Page 8-15
Section 5. ArgumentPage 15-37
Section 6. Conclusion.....Page 37-39
Section 7. Exhibit #1.....Attached, as page 40

I. TABLE OF AUTHORITIES

Cases

<i>Baird v. Baird</i> , 6 Wn.App. 587, 591, 494 P.2d 1387 (1972)	22-23
<i>Ethridge v. Hwang</i> , 105 Wash.App. 447, 460, 20 P.3d 958 (2001)	30-31
<i>Fisher Props., Inc. v. Arden-Mayfair, Inc.</i> , 106 Wash.2d 826, 849-50, 726 P.2d 8 (1986).....	30
<i>Id.</i> (citing <i>Mayer</i> , 156 Wash.2d at 684, 132 P.3d 115). <i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 669, 230 P.3d 583 (2010)	15
<i>In re Marriage of Hadley</i> , 88 Wn.2d 649, 658-59, 565, P.2d 790 (1977)..	23
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)	15,23
<i>In re Meretricious Relationship of Sutton</i> , 85 Wn. App. 487, 491, 933 P.2d 1069 (1997)	14
<i>In re Pennington</i> , 142 Wn.2d 592, 602, 14 P.3d 764(2000).....	15
<i>In re Pers. Restraint of Duncan</i> , 167 Wash.2d 398, 402-03, 219 P.3d 666 (2009) (quoting) <i>Mayer v. Sto Indus., Inc.</i> , 156 Wash.2d 677, 684,132 P.3d 115 (2006) (quoting <i>State v. Rohrich</i> , 149 Wash.2d 647, 654, 71P.3d 638 (2003»))	37
<i>Koher v. Morgan</i> , 93 Wn. App. 398, 401, 968 P.2d 920 (1998)	14
<i>Korst v. McMahon</i> , 136 Wn.App. 202, 206, 148 P.3d 1081 (2006).....	22
<i>Nordstrom Credit, Inc. v. Dep't of Revenue</i> , 120 Wn.2d 935, 942, 845 P.2d 1331 (1993)	14
<i>Soltero v. Wimer</i> , 159 Wn.2d 428, 435, 150 P.3d 552 (2007).....	15
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971) ...	23
<i>State v. Downing</i> , 151 Wn.2d 265, 272-73, 87 P.3d 1169 (2004)	15
<i>Sunderland Family Treatment Servs. v. City of Pasco</i> , 127 Wn.2d 782, 788, 903 P.2d 986 (1995)	22
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 879, 73 P.3d 369 (2003)	22
<i>Tradewell Group, Inc. v. Mavis</i> , 71 Wash.App. 120, 126, 857 P.2d 1053 (1993)	31
<i>W. Comm'ty Bank v. Helmer</i> , 48 Wn.App. 694, 699, 740 P.2d 359 (1987)	31
Other Authorities	
Internal Revenue Service 45, B Credit	17-18
RulesCr 26i	35
RAP 12.2 DISPOSITION ON REVIEW.....	36

II. INTRODUCTION

On remand from an unpublished decision of this court in case number 66749-1-I for the trial court “either to clarify its finding with respect to the amount due to Hanson for rental income or to adjust the equalization payment accordingly”, the trial court entered an order reducing the equalization and interest to judgment and awarding Hanson attorney fees. In a separate order the trial court entered a judgment to split profits from the business Ocho for 2010. Harjo appeals both of these judgments.

III. ASSIGNMENTS OF ERROR

1. The trial court erred in entering a Judgment and Order on May 28, 2013 awarding petitioner half of the pre-expense profits on the business Ocho for 2010 and denying reconsideration of the Judgment and Order.
2. The trial court erred in entering a Judgment and Order on June 10, 2013 reaffirming the equalization payment, granting new rights to one party while taking rights away from the other party on remand for clarification, and awarding attorney fees and denying reconsideration of the Judgment and Order.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is it an abuse of discretion for the court to award fifty percent of income before expenses (using ordinary income rather than profit) to a party and represent this as the split of profits for a jointly held business where the evidence does not support such a split, the moving party only asked for the split on a reply to a motion for discovery, and the court failed to consider the information in Response or showing the error presented on reconsideration?

2. Is it an abuse of discretion for a trial court when, on remand to either correct a calculation or clarify an award of rental income from a community property-like condominium, to then award double the amount of the original error without evidence and provide a rationale of relative need that it had already declined to adopt and where that rationale also has no evidence and is now at odds with Findings of Fact?
3. Is it an error for a court to award attorney fees on a motion when no statute or agreement allowed for such an award, and the stated basis for the award, that the appellant failed to follow a court order, is in error since no such order existed, and is it an error for the court to award attorney fees on a motion to compel accounting when the documents in question were already in the possession of the party who filed the motion to compel accounting?
4. Is it an error for the court to grant new rights to one party while taking rights away from the other party, when the only issue brought before the court on remand was to either clarify or recalculate the equalization payment on the issue of condo rents, and is it an error for the court to employ a pattern of irregular procedure where the result is one party not having the

opportunity to respond to a new proposed order by the opposing party, and is it an error for the court to sign an order on an issue that was only raised on reply, and is it an error for the court to sign an order presented by personal letter where that letter and order contain new information?

IV. STATEMENT OF THE CASE

This case for dissolution of a committed intimate relationship went to trial on November 1, 2, 3, 4, the morning of November 8, and the morning of November 9, 2010. The trial resulted in 15 pages of Findings of Fact and Conclusions of Law on December 22, 2010, and Harjo in this appeal seeks the binding rights found therein.

Parties had together acquired a home, a business and a condo during their relationship. The Decree was signed on January 24, 2011 and provided (while establishing a specific definition for “fair and equitable” as a 50/50 split) that 50% of the house, awarded to Hanson, should be offset against 50% of the business, awarded to Harjo, after considering the contributions of each party. The drastically under-water condo was awarded to Harjo, and Hanson’s financial involvement in the business continued to the end of 2010. Harjo appealed based on numerous arithmetical errors and that the final judgment was not supported by the

record in that the division was not equal, including miscalculated rents collected for the jointly owned condo. Court of Appeals Division 1 filed a Decision on these matters in December 2012. The issue of condo rents was remanded back to trial court. The Decision also points out that profits for 2010 and the manager's compensation for both 2009 and 2010 are unliquidated items.

1. Ocho Profits 2010

The court signed a judgment for ½ of Ocho profits for 2010, awarding Hanson \$5919. The court effectively awarded Hanson 10,000% of her share of profits as the IRS 1065 record identifies half of net income (profit) as \$57. The court used "Ordinary Income" to identify the amount of the award. "Ordinary Income" does not represent Ocho's profits, as explained throughout the IRS form, because that amount does not include non-deductible expenses, 1/2 of which total \$5862.

The court's judgment for a split of profits (demonstrating a 50/50 division as its intent) states that there is a discrepancy between the IRS return and the books of the business, and that it is the court's decision to rely upon the IRS return. The IRS Form 1065 used by the court for the split of profits demonstrates there is no discrepancy and that it has two distinctly different places to record 'net income (profit) per books' and 'ordinary income'. Harjo's response explains the CPA's handling of the

calculations, which included a large tax credit the business elected to use, and he stated the partners cannot claim the credit and also claim the amount as a deduction. To do so would be to effectively receive the benefit twice. Harjo's response to motion includes a letter from expert witness Janet Gibb, which states the correct value for net income (profit) is \$114. Currently Hanson's award for profits is 10,000% of the correct value and is not supported by the record, creating a loss for Harjo where an even 50/50 split of profits was the stated intent of the court.

2. Condo Rents

The Court of Appeals decision states in summary that the award of \$6500 to Hanson is unsupported by Findings of Fact and the trial court is directed to either clarify findings or adjust the equalization payment to reflect Findings of $\frac{1}{2}$ rents collected of \$3602 ($\frac{1}{2}$ of \$7204). The Court of Appeals noted also that the trial court already declined to adopt Hanson's suggestion that the record be amended to find that Harjo should pay Hanson for the value of rents after Harjo began to live at their condo. The current Order employs this previously declined argument. Harjo's occupying of the condo actually helped Hanson by absorbing her loss on the difference between the rent collected against the mortgage due. Her loss had been \$400 a month.

Hanson's motion states, "Court of Appeals found that more findings were needed in regard to the rents collected by Respondent [Harjo] but not shared with Petitioner [Hanson] and also what lost rents Petitioner [Hanson] is entitled to after Respondent [Harjo] began occupying the condo." Hanson was unable to produce this quote from Court of Appeals, or anything resembling it, because no such language from Court of Appeals exists. The court merely called for recalculation or clarification. The court accepted Hanson's statement at face value.

The signed judgment indicates that the \$13,000 award to Hanson (which doubles the trial court's original error and irrationally takes a \$3000 award and adds \$10,000) is justified because while not mathematically precise it accomplishes the courts goal of providing a fair result to Hanson given her greater need and the award of the businesses to Harjo. The language of this order is at odds with Findings of Fact which states and demonstrates that: the court's intent was a 50/50 split after considering contributions of parties, that relative need is not appropriate; that both parties are of good health, that both parties are professional servers, that Hanson's hourly earnings are higher than Harjo's, that it declined to amend findings per Hanson's suggestion that she is entitled to rental value after Harjo began to live in the condo. Greater need was not found for either party, relative need was not awarded, and that

maintenance does not apply and child support does not apply as Harjo is not the father of her child.

The court made a specific point of defining appropriate, fair and equitable for this case as a 50/50 division. The court had the authority to define equity for this case in any manner it found appropriate. The court record demonstrates in the handling of property calculations a precise 50/50 split even though, in calculating the offsets to achieve 50/50, many errors were made. Where the court identifies a specific percent, mathematical precision is indicated. The current Judgment is not an even split. Hanson acknowledges that the current orders do not achieve an even split. The order is at odds with Findings in that its inclusion of relative need contradicts the court's stated intent of a 50/50 split and therefore has no rationale; i.e., is not supported by the record.

3. Attorney's Fees

Hanson asked the court for attorney fees for having to bring the motion to compel accounting, claiming the court had ordered Harjo to produce accounting for 2010 and states Harjo did not comply with this order. Hanson did not provide evidence of any such order and cites to a record that does back her claim. Harjo argues that no such court order exists and therefore he did not fail to comply.

Hanson asked the court for attorney fees for having to bring the motion to compel accounting. Harjo argued that the award has no merit or basis in the record because Hanson in her reply states she was satisfied when Harjo provided in his response the IRS Form 1065 as the accounting record. She had that form in her possession, as supplied to her directly by the CPA, since July 2011, two years at the time of the motion.

4. Pattern of Irregular Procedure and Mistakes

The order for the split of 'profits' bore no relation to Hanson's original motion, Hanson presented it only on reply, it was signed on May 16, 2013, but not filed by the court until May 28, 2013. On Thursday June 6th Harjo had not received notification of a judgment, called the bailiff to inquire regarding a decision, and he received notice by mail of the judgment on Saturday June 8th. Because the judgment was presented and signed on reply there was no court procedure for Harjo to counter-argue the erred judgment; his Strict Reply was met with objection; and by the time Harjo was notified of the judgment the reconsideration had already timed out. Harjo therefore did not receive due process, resulting in material bias. All the while Harjo had pursued every available avenue to request Oral Argument once realizing that the process was irregular. No Oral Argument was granted. Meanwhile, Hanson's attorney had received an email notice of the judgment from the bailiff on Friday June 7th and he

sent that same day, via personal letter, an amended proposed order for issues raised in their original motion (with the addition of relative need in the order), the condo rents, the interest on the original \$52,000 judgment and the attorney fees for “having to bring this motion” for accounting. The court signed this new order on the following workday, Monday June 10th and did not clarify the language or adopt the correct amount per directions given in the Court of Appeals Decision. Instead the order doubles the original error without evidence to do so and includes language of relative need which grants new rights to Hanson and takes them away from Harjo where the only issue before the court was clarification. It has never been established that Hanson’s need is greater than Harjo’s; just that Hanson’s 2009 earnings were three times Harjo’s and that her hourly earnings exceed his. This outcome of new rights renders all arguments pertaining to offsets irrelevant as well as all of the rights granted in 15 pages of Findings that establish values for the business, real property, and separate property so that they can be divided equally, the core premise in Findings of Fact. The court also awarded attorney fees where no award was justified and for which the rationale is unsupported. The orders to award attorney’s fees, condo rents and the orders to deny reconsideration were all presented by Hanson’s personal letter to Court, wholly outside the court’s published process and at odds with RAP 12.2 which states that upon

issuance of the mandate of the appellate court, the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court. Hanson did not comply with the binding effect of the higher court's decision in her willful misrepresentation of the facts in her personal letters to the trial court. The net result of Hanson's Motion for accounting and to clarify a Remand by \$3000 one way or the other snowballed through this irregular process into an award to Hanson of over \$16,000 and the newly minted carte blanche umbrella of relative need.

V. ARGUMENT

The established standard of review for this case has been stated as follows:

Property distribution at the end of a meretricious relationship is reviewed for abuse of discretion. *Koher v. Morgan*, 93 Wn. App. 398, 401, 968 P.2d 920 (1998) (citing *In re Meretricious Relationship of Sutton*, 85 Wn. App. 487, 491, 933 P.2d 1069 (1997)). Among other things, discretion is abused when it is exercised on untenable grounds. *State v. Downing*, 151 Wn.2d 265, 272-73, 87 P.3d 1169 (2004). While we review conclusions of law de novo, findings of fact merely need to be supported by substantial evidence. E.g., *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 942, 845 P.2d 1331 (1993).

"A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts." Id. (citing Mayer, 156 Wash.2d at 684, 132 P.3d 115). Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

Washington has "a three-prong analysis for disposing of property when a meretricious relationship terminates." *In re Pennington*, 142 Wn.2d 592, 602, 14 P.3d 764(2000) (citing *Connell*, 127 Wn.2d at 349). First, the court decides whether a meretricious relationship existed. Second, "the trial court evaluates the interest each party has in the property acquired during the relationship. Third, the trial court then makes a just and equitable distribution of such property." Id. *Soltero v. Wimer*, 159 Wn.2d 428, 435, 150 P.3d 552 (2007)

The central issue in this appeal is the fact that the trial court fails to sign orders based on the record, negates rights set forth in Findings of Fact, and extends new rights where none existed and for which no evidence has been established. "A court's decision . . . is based on untenable grounds if the factual findings are unsupported by the record." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). Such a failure is abuse of discretion since it results in a factual error, which means the discretion is based on untenable grounds. Alternatively, by its own rulings, the ultimate distribution is unjust and inequitable. The

court went out of its way to specifically define just and equitable for this dissolution as 50/50:

“The court finds that an equitable division, taking into account the contributions of each and allocating the remainder to result in a 50/50 division of property is appropriate, fair and equitable.” Findings of Fact page 5, CP 5

1. Ocho Profit 2010

The definition of profit is the return received on a business after all operating expenses have been met; a financial gain. In the award dated May 16, 2013, Hanson was awarded 50% of income *before* all expenses of the partnership have been met resulting in the current award of 10,000% of profit to Hanson. (Note: This brief does not address the unliquidated item of Manager’s Salary as the trial court has chosen to deal with issues separately and a second appeal has been filed.)

The court calculated the award to Hanson by dividing “ordinary income”, page 1 line 21 of the 2010 US Return of Partnership Income, CP 148. ‘Net income’, CP 152, should have been used as the figure for splitting profits for this business because Ocho had \$11,724 in expenses that are non-deductible and cannot be used for IRS purposes in reducing “ordinary income” but should be included when splitting profit between partners.

For restaurants such as Ocho, where tips are given to employees, the expense for the employers' portion of Medicare and Social Security is non-deductible in calculating "ordinary income", but a credit is passed through to partners on their Schedule K-1's for the exact amount of this business expense. The credit is a dollar for dollar offset against income claimed by the individual on his IRS Form 1040.

Provided here is Internal Revenue Service 45, B Credit (Ex 1), which explains how the CPA must deal with the matter when electing to use the credit rather than the deduction, as Ocho did that year:

"Credit for Portion of Employer Social Security Paid with Respect to Employee Cash Tips (IRC 45 B Credit)

If you are an employer in the food and beverage industry, you may be entitled to a credit for the social security and Medicare taxes you pay on your employees' tip income. This credit is available under Internal Revenue Code (IRC) section 45 B, Credit For Portion Of Employer Social Security Paid With Respect To Employee Cash Tips. You must meet both of the following requirements to qualify for the credit:

1. You had employees who received tips from customers for providing, delivering, or serving food or beverages for consumption; and
2. You paid or incurred employer social security and Medicare taxes on these tips.

...The credit is part of the general business tax credit and is claimed on Form 8846, Credit for Employer Social Security and Medicare Taxes on Certain Employee Tips. Since it is an income tax credit, claimed on an income tax return, you may use it to offset any regular income tax liability, but not employment tax liabilities. A credit is a dollar for dollar reduction of your regular tax liability, where an expense deduction only reduces your taxable

income. Therefore, credits are usually more beneficial. *You cannot claim both the credit AND the expense deduction. If you claim the credit, you must reduce your social security and Medicare tax deduction accordingly* (emphasis added).” *IRS website/ small businesses/credit 45 b (Ex 1)*

Thus electing to use the credit reduces deductions and increases ordinary income by the amount of the credit but offers partners more flexibility, which is why it was used for this year. Therefore for Hanson to receive half of Ordinary Income as a split of profits is for her to receive the benefit of both the credit and the expense deduction *against IRS rules* (Ex 1) and for Harjo to effectively lose the benefit of both the credit and the deduction.

IRS Form 1065 provides several areas that specifically identify ‘net income’, M-1 and M-2 on page 5 are two examples, CP 152. The explanation for the non-deductible expense is reported on forms throughout the 1065 filing (e.g., page 12, Statement 4, non deductible expenses, CP 160, and page 10 Form 8846, calculation of the credit, CP 157).

Declaration Colleen Braa, CPA, CP 216, simplifies the matter stating as an expert witness:

“3. Ocho’s net income of the business for each year is located on IRS Form 1065, schedule M-1, page 5, line 1. Ocho’s taxable income, if it were a taxable entity (i.e., ordinary income for Federal income tax purposes) is set forth on its IRS Form 1065, page 1, line 22. Net Income frequently varies from a

business' taxable income due to limitations on deductibility on expenses and other special treatment for Federal income tax purposes. Ocho's Net Income is no different as it incurred certain expenses that reduced its Net Income... but which were no deductible for Federal Income tax Purposes.

4. For Ocho there are three areas where net income and taxable income differ. A. Tax credits and penalties... b. The tax credit for employer's tax on medicare and social security... c. Meals and entertainment expense..."

As stated above, in addition to the large tax credit, another non-deductible expense for Ocho in 2010 (which also increases "ordinary income" by the amount of the expense) are the fines and penalties Ocho was still cleaning up in 2010 for late filing of IRS 941's in 2008 and 2009. The fines and penalties associated with late tax filings are non-deductible and therefore not included in "ordinary income".

Turning to the last two pages of the return, CP 168-169, 1065 US Return of Partnership Income on Hanson's K-1, the document Hanson used to file her Individual IRS 1040, states \$5919 in box 1 as ½ the "ordinary income" of the business, and it also states she received a dollar for dollar tax credit of \$4,833 in box 15 for the payments to Medicare and Social Security that were not deducted from "ordinary income". The last page of Hanson's K-1 shows 50% of all non-deductible expenses total \$5,862. The difference between ½ ordinary income and ½ all of the non-deductible expenses is \$57.00, or half of the net income of \$114. ($\$5919 - \$5862 = \57.00)

Hanson's K-1, Item L, CP 168, also shows "current year increase" in the Partner's capital account analysis of \$57.00. This represents the profit due to Hanson for 2010. Hanson has had this information since filing her 2010 taxes in 2011.

Harjo's Response to Motion explained these matters in detail, CP 111-113, and included the letter from Janet Gibb CPA, CP 118, that identified net income properly as \$114.00. Upon Reply Hanson presented an order for split of 2010 'profit' per "ordinary income" and argued that there was a discrepancy between the books of the business and the tax filing of the business. The court signed the order and includes this inaccurate statement:

"The court previously ordered that Ocho profits for 2010 be split. Pursuant to the 2010 Ocho tax return, total profits were \$11,839. It is not appropriate to reduce this due to difference between the tax calculation and the kept books of the corporation. Petitioner is entitled to half this amount, or \$5919...." CP 186

The award for share of 2010 profits and the explanation provided in the order constitute an abuse of discretion which is untenable because the records indicate a different net income/profit for 2010, and the reasoning in the order is faulty because there was no discrepancy between the books and the IRS filing.

Hanson in her Reply here establishes her mis-direction to the court, "Schedule m reduces this to \$114 based on the difference between the tax

return and the books of the corporation. However, the tax return should be considered more accurate.” CP 176

IRS Form 1065 shows there is no discrepancy. The language of 1065 Schedule M-1, CP 152, says “Net Income per books” because these are expenses that the IRS does not accept in “ordinary income”. Hanson capitalized on this language of the IRS “Net income per books” and misrepresented to the court that there was a discrepancy between the books and Ocho’s IRS filing. The language “income per books” and “ordinary income” are *both within the IRS language on form 1065*. CP 148, CP 152

A trial court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." Id. " A trial court's decision is manifestly unreasonable if it ' adopts a view' that no reasonable person would take." In re Pers. Restraint of Duncan, 167 Wash.2d 398, 402-03, 219 P.3d 666 (2009) (quoting) Mayer v. Sto Indus., Inc., 156 Wash.2d 677, 684,132 P.3d 115 (2006) (quoting State v. Rohrich, 149 Wash.2d 647, 654, 71P.3d 638 (2003»).

"A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts." Id. (citing Mayer, 156 Wash.2d at 684, 132 P.3d 115).Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

It is unreasonable for the court to accept the IRS Form as the appropriate accounting document without using the accurate number for profit found in that document and it is unreasonable to justify an award

based on discrepancy where none exists. It is an abuse of discretion to award \$5919 to Hanson as profits as this figure does not follow from the record, and the court opted to ignore Harjo's explanation and the IRS Form 1065. Court of Appeals is asked to remand specifically to trial court that Hanson should be provided an offset for 50% of 2010 profit based upon the net income provided in the 2010 IRS Return of Partnership Income, \$57.00.

2. Condo Rents

Courts review "findings of fact under a 'substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.'" *Korst v. McMahon*, 136 Wn.App. 202, 206, 148 P.3d 1081 (2006) (quoting *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)). This is a deferential standard, which views reasonable inferences in a light most favorable to the prevailing party. *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995). If there is substantial evidence, then "a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently." *Sunny side Valley*, 149 Wn.2d at 879-80. A court will not disturb the trial court's approval of a property distribution unless there is a clear and manifest abuse of discretion. *Baird v. Baird*, 6

Wn.App. 587, 591, 494 P.2d 1387 (1972). A trial court abuses its discretion when its discretion is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). This court will not disturb a property valuation having reasonable support in the trial record. *In re Marriage of Hadley*, 88 Wn.2d 649, 658-59, 565, P.2d 790 (1977). However, as stated above "A court's decision . . . is based on untenable grounds if the factual findings are unsupported by the record." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

Court of Appeals previously decided that the award of \$6500 for rents was not supported by the record and that the trial court had previously declined to adopt that value. However, on remand the trial court entered the following, repeating and then doubling the original error:

The equalization payment in the amount of \$52,205 from Zachary Harjo to Gelsey Hanson is confirmed and reduced to judgment. The Court finds that Petitioner should be awarded a total of \$13,000 for half of the rents collected (\$6,500) and the rental value of the condo after the Respondent began occupying the condominium (\$6,500). Furthermore, the \$52,205 was intended to create a fair and equitable division of property, and while not mathematically precise, the higher amount accomplishes the court's goal of providing a fair result to Gelsey, given her greater need and the award of the parties' businesses to Zachary. CP 188

While it is true that the division of property does not have to be mathematically precise; it does have to be supported by the record. There is no basis in the record for relative need. The record *does* state that for this case a fair result is in fact mathematically precise and is 50% to each party. Furthermore, there is no basis in the record for either an award for \$6,500 to Hanson or the award of any rental value. Hanson has never cited any evidence that supports this claim.

From Hanson's Motion to Reduce Amounts:

"Petitioner requests that the original judgment of \$52,205 be affirmed on the basis that while not mathematically precise, it nevertheless reflects a fair and equitable division of the property between the parties. In the alternative, petitioner requests that the original judgment be affirmed because the court intended to create an offset for the rental value of the condo after Harjo occupied it, which was worth approximately \$2,898.

If the court recalculates the offset for rents without offset, then Hanson admits the new judgment should be \$49,307." CP 36

and

"...The court thus left open the sole question of whether additional findings would support the original judgment.

(If the court reduces the amount owed to Hanson to the difference between half of \$7204 and half of \$13,000, then this results in the judgment being reduced by \$2,898,¹ for a total of \$49,307.)

¹(\$13,000 / 2) - (\$7,204 / 2) = \$6,500 - \$3,602 = \$2,898" CP 34

Here Hanson suggests to the court that it accepts \$52,205 for either:

A. Not equal but equitable division (attempts to justify an unsupported \$2,898);

B. As an offset for rental value \$2,898 (court previously declined);
or alternatively,

C. Correcting the offset for condo rents collected per Findings of \$3,602.

Both option A and B fail to clarify the record as directed in the remand because rather than clarifying they add new rights not found in the record. The record states that 50% of rents collected is \$3,602 and that fair and equitable as defined for this case is a 50% split.

"[A]n order 'clarifying' a judgment explains or refines rights already given. It neither grants new rights nor extends old ones." *Kemmer*, 116 Wn.App. at 933 (citing *Rivard v. Rivard*, 75 Wn.2d 415, 418, 451 P.2d 677 (1969)).

While the motion itself suggests options A, B, or C the attached proposed order and the Judgment and Order on Motion substitutes a new option 'D' instead (which, again, is never argued but is signed regardless):

The equalization payment in the amount of \$52,205 from Zachary Harjo to Gelsey Hanson is confirmed and reduced to judgment. The court finds that petitioner should be awarded a total of \$13,000 for half of the rents collected (\$6,500) and the rental value of the condo after the Respondant began occupying the condominium (\$6,500). Furthermore, the \$52,205 was intended to create a fair and equitable division of property, and while not mathematically precise, the higher amount accomplishes the court's goal of providing a fair result to Gelsey, given her greater need and the award of the parties' businesses to Zachary. *Judgment and Order on Motion to Reduce Amounts Owed and Interest to Judgment, Enter Supplemental Findings, Compell Accounting, and for Attorney's Fees*, CP 188

Even though the order reads that the court "finds" something, no evidence has been presented, rendering these amounts arbitrary.

Furthermore, relative need is introduced and is a newly granted right, not a clarification, and is at odds with Findings of Fact. Relative need was not granted and “greater need” was not established for either party.

The order presented by Hanson via personal letter on June 7th, 2013 explains the options before the court in yet another way, misleading the court and further clouding the issue:

On May 16, 2013, you signed an order and judgment for profits for Ocho in this matter, which I enclose for your reference. (The order was filed May 28th, and I received the order by email yesterday.) While this order addressed the issue of additional profits owed to Ms. Hanson for 2010 (which Mr. Harjo raised in response), it did not address the primary questions raised in my motion. Those questions were (a) whether the \$52,205 judgment entered after trial on January 26, 2011 should be confirmed, or instead reduced to \$49,307; and (b) the amount of interest owing on the judgment (which would change based on the amount).

Since the Ocho profits have now been addressed, Ms. Hanson waives her request for further accounting, and I have therefore eliminated this requirement in the proposed order which I provide again herewith. I request that the court enter the order I enclose, with either the higher amount (per my request) or the lower amount (reflecting the concern raised by the Court of Appeals). *Louden's Letter to Trial Court dated June 7th, 2013, CP 230*

This is an example of the “shell game” at which Hanson excels and has been practicing in this case since the decree. Here she mis-characterizes what is before the court (issues on remand), states an incomplete and inaccurate context (the scope of the remand), and finally

replaces the “higher amount (per my request)” with yet a different amount, \$13,000. The court signed this order having been told she would be affirming her prior order of \$52,205 but it is actually double the original error of \$6,500 and the award now totals \$58,705. Also, the court having been led to believe it was only re-affirming a prior order it grants the new right of relative need which is in error and therefore untenable.

Hanson’s pursuit of rental value goes all the way back to her Response to Motion to Clarify Findings of Fact and /or Reconsider Same dated January 10th 2011, CP 225-226, in which she includes a fictional citation that was in fact never part of the record. It would support her claim for rental value if it were true (it’s not) and the court declined to amend the record in that way.

The court failed “either to clarify its findings or to adjust its calculation of the equalization payment” in regards to the rents collected on the condominium. As stated above, the court already declined to adopt the figure \$13,000 as the total rents collected and it therefore misapplied its own findings and contradicts the Court of Appeals summary of the Court’s Findings. As stated by the Court of Appeals in the Decision signed September 24, 2012:

Harjo also argues that the court's findings are inconsistent with its calculation. He points out that the court found that he collected rent of \$7204 after the parties' separation, but then calculated that he owed Hanson \$6500 for half of the rents collected, thus implying that he collected a total of \$13,000 in rental income. In its response to Harjo's post trial motion below, Hanson suggested that the court amend its findings to clarify that Hanson is entitled to compensation not only for the rental income collected, but also for the rental value of the condo after Harjo occupied it. The trial court declined to adopt this finding. We agree that the figure used to calculate the amount owed to Hanson for her half-interest in rent is unsupported by the court's findings. Accordingly, we remand for the trial court either to clarify its findings or to adjust its calculation of the equalization payment. CP 28

Relative need is specifically not available per the court record. Also, from *Findings of Fact*, CP 13, "2.12 Maintenance does not apply. Maintenance is not available in non-marital relationship dissolution." and "Maintenance does not apply" *Decree*, CP 20. Again, "The court finds that an equitable division, taking into account the contributions of each and allocating the remainder to result in a 50/50 division of property is appropriate, fair and equitable." CP 5 *Findings*, page 5, lines 17 – 19

The Court never finds Hanson is entitled to rents collected at all, it says Zach shall have the condo in his name and Gelsey shall pay the \$2,241:

"The parties rented out the condo for a period of time. Rent checks were historically deposited into the "Ocho" account and the condo mortgage was paid from that same business account. When Zach agreed to vacate the Crown Hill home, he made arrangements to

occupy the condominium, beginning in November 2009 rather than to incur an additional housing expense. Before he occupied the condo, he paid \$4,483 toward the homeowners' dues without contribution from Gelsey. Zach dealt solely with the rental for the year 2009, addressing tenant issues and dealing with damage caused by the tenants to the dryer appliance. He also deposited into his separate account \$7204 in rental income following separation. The payments from the business account from the condo's mortgage and dues (per the parties' agreed temporary order) were included in Zach's summary of benefits/draws/income as part of the compensation he received for his work in the business following separation. The court finds that Zach is entitled to repayment of ½ of the Homeowners dues from Gelsey in the sum of \$2,241.50 (1/2 of \$4,483). Zach shall have title transferred to him within ninety (90) days of this order". *Findings of Fact, CP 6*

Harjo agrees that the trial court records the rents collected as \$7204 and Court of Appeals previously agreed that there was a discrepancy between the Findings of Fact and the Decree, but it also remains that the current order for \$13,000 total to Hanson has no basis in Findings of Fact, first because the value awarded is incorrect, and second because while the court records the value of the rents collected, there was no finding for splitting the rents collected.

Hanson continues to re-litigate the trial:

"Court of Appeals found that more findings were needed in regard to the rents collected by Respondent [Harjo] but not shared with Petitioner [Hanson] and also what lost rents Petitioner [Hanson] is entitled to after Respondent [Harjo] began occupying the condo." *Petitioner's Motion to Reduce, CP 35*

Hanson misled the court here because as we have seen from the Court of Appeals decision,

“Accordingly, we remand for the trial court either to clarify its findings or to adjust its calculation of the equalization payment.”
Court of Appeals Decision signed September 24th, 2012, CP 28

A clarification is not an opportunity to re-litigate:

"[A]n order 'clarifying' a judgment explains or refines rights already given. It neither grants new rights nor extends old ones."
Kemmer, 116 Wn.App. at 933 (citing *Rivard v. Rivard*. 75 Wn.2d 415, 418, 451 P.2d 677 (1969)).

Here Hanson has been granted new rights with no basis in the record, and correspondingly Harjo has had rights taken away that were previously granted. The net result is that where there is a remand for clarification, the Order has the opposite effect of becoming even less clear, relying on an argument with no evidence to support it and the new right of relative need contradicts rights granted in Findings of Fact.

Therefore the amount indicated as half the rents collected (\$3602) should be amended as the award to Hanson or no award should be made to Hanson given that there is no basis in the record for an award and relative need should be removed from the record.

3. Attorney's Fees

Attorney fees may be awarded on the basis of agreement, statute or recognized ground of equity. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wash.2d 826, 849-50, 726 P.2d 8 (1986). Whether a party is entitled to an award of attorney fees is an issue reviewed de novo. *Ethridge v.*

Hwang, 105 Wash.App. 447, 460, 20 P.3d 958 (2001) (citing *Tradewell Group, Inc. v. Mavis*, 71 Wash.App. 120, 126, 857 P.2d 1053 (1993)).

Attorney fee awards under that statute are not available in actions arising from committed intimate relationships. *W. Comm'ty Bank v. Helmer*, 48 Wn.App. 694, 699, 740 P.2d 359 (1987).]

The sole basis stated for the award of attorney fees is “failure to comply with the court’s prior orders.” *Judgment and Order Motion to Reduce Amounts Owed*, CP 189. Hanson asserted that the court had ordered the turnover of the records requested in the motion but did not provide a copy of such an order. Her motion points only to this as evidence of the supposed order:

²Page 9, line 22 of the Findings of Fact provides, “Gelsey is entitled to her share of Ocho’s benefits through the end of 2010.” Page 5, line 4 of the Amended Decree provides, “The Court did not liquidate the benefits to which Gelsey is entitled through the end of 2010. With the Court’s finding that Gelsey received no money from the Ocho enterprise since the parties’ split in 2009, Gelsey shall have no tax responsibility for any tax arising from operation of the Ocho enterprise, the OctopiLLC or the parties’ partnership in 2010, except that which may arise from any benefit that may in the future actually be paid to her based on operation of the Ocho enterprise in 2010...” *Petitioner’s Motion to Reduce Amounts*, CP 35

A careful reading shows this is the best she can do because no such order exists. Additionally, Harjo provided records in response to the motion which had already been provided to Hanson in 2011. Indeed,

Hanson relied on a tax document that she had signed in 2011 in her reply.

Hanson stated that “tax returns do not constitute a full accounting” *Petitioner’s Supplemental Reply*, CP 176, but then agreed in her next document that these forms (already in her possession) were sufficient, “Since the Ocho Profits have now been addressed, Ms. Hanson waives her request for further accounting, and I have therefore eliminated this requirement in the Proposed Order which I provide herewith.” *Louden’s Letter to Judge Spector* dated June 7th, 2013, CP 230. Yet she continued to pursue attorney’s fees for “having to bring this motion”.

Hanson was provided a copy of the 2010 return at the same time Harjo was provided a copy in July 2011, along with the K-1 she used to file her 1040 return. As a partner in Ocho, Hanson had every right to question the accountant, as she had done regularly in the past, when the 2010 results were provided to her. Hanson asked for attorney fees because she had to ‘compel accounting’ due to “Mr. Harjo’s failure to comply with the court’s prior orders”, which is incorrect for her to state because the court had not previously ordered accounting. *The court never previously ordered or in any way mentioned Harjo should produce accounting records for 2010*, this is a wholly made-up charge by Hanson. Hanson is hereby challenged in her response to this brief to produce the ‘court order’ that demands accounting records from Harjo. Hanson did request

accounting in her negotiation letter in May 2011, CP 221-222. That Harjo could forego this burdensome request for accounting was offered by Hanson as incentive for accepting a lopsided settlement offer (the request failing to follow CR 37 which would have justified sanctions had Harjo failed to comply). The CPA's records were provided to Hanson in July 2011 in response to the settlement offer, as soon as the tax documents were completed and at the same time Harjo received them from Janet Gibb. It appears that Hanson didn't share this information with her attorney or they together misunderstood what the tax documents in her possession were.

The court awarded attorney fees "for Petitioner having to bring this motion". There is no rationale for this Judgment. The award for attorney fees on page 3,

"Accounting: The Respondent was ordered to provide an accounting to Petitioner. In his response to her motion, he produced tax returns which the court found sufficient to comply with the accounting requirement, and separately entered judgment based on those tax returns on May 28, 2013.

Attorney's Fees: the Petitioner shall be awarded attorney's fees in the amount of \$2,350 based on her having to bring this motion. These fees are awarded based on Mr Harjo's failure to comply with the court's prior orders." *Judgment and Order on Motion to Reduce Amounts*, CP 189

Attorney's fees are not applicable. The documents that were accepted were already in Hanson's possession and there was no court order to

provide accounting for Harjo to fail to comply with. Hanson additionally failed to demonstrate Harjo's "willful failure" to comply with a conference of counsel as she had never requested one.

Cr 26i: Motions; Conference of Counsel Required

The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsels certification that the conference requirements of this rule have been met.

4. PROCEDURAL ABNORMALITIES/ MATERIAL BIAS

Exponentially compounding the problem of the court sidestepping the published process by signing Orders on Reply and via personal letter as well as failing to provide signed orders in a timely fashion is Hanson's reliance on and successful implementation of a sleight of hand trick where she argues for 'a' , 'b', or 'c' but then includes an order for 'd'. This shell game has gone wholly undetected.

From Hanson's argument in Motion to Reduce Amounts:

A: "Petitioner requests that the original judgment of \$52,205 be affirmed on the basis that while not mathematically precise, it nevertheless reflects a fair and equitable division of the property between the parties." CP 36

B: "In the alternative, petitioner requests that the original judgment be affirmed because the court intended to create an offset for the rental value of the condo after Harjo occupied it, which was worth approximately \$2,898." CP 36

C: "If the court recalculates the offset for rents without offset, then Hanson admits the new judgment should be \$49,307." CP 36

Hanson's Proposed Order, attached to Motion, presents none of the above:

D: "The equalization payment in the amount of \$52,205 from Zachary Harjo to Gelsey Hanson is confirmed and reduced to judgment. The court finds that petitioner should be awarded a total of \$13,000 for half of the rents collected (\$6,500) and the rental value of the condo after the Respondent began occupying the condominium (\$6,500). Furthermore, the \$52,205 was intended to create a fair and equitable division of property, and while not mathematically precise, the higher amount accomplishes the court's goal of providing a fair result to Gelsey, given her greater need and the award of the parties' businesses to Zachary." *Judgment and Order on Motion to Reduce Amounts Owed and Interest to Judgment, Enter Supplemental Findings, Compel Accounting, and for Attorney's Fees*, CP 188

The result is that where 'd' does not follow from 'a' or 'b' or 'c', a new basis is injected into the record, and it creates the new right of relative need for Hanson, takes away the right of equitable distribution for both parties, and simply takes away the fair component for Harjo. This despite the fact that the court's stated intent is a 50/50 division. The two can't co-exist. That Harjo has been severely short changed from a 50/50 division of

property is undisputed and on that one issue parties certainly do agree. Furthermore, if relative need is now accepted by the trial court, as it suddenly is in the current awards, that rationale shouldn't assume that Hanson's need is greater because that wasn't established in trial. Findings of Fact actually would certainly suggest otherwise.

VI. CONCLUSION

“A trial court abuses its discretion when its discretion is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.”
State ex rel. Carroll v. Junker.

RAP 12.2 DISPOSITION ON REVIEW

The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require. Upon issuance of the mandate of the appellate court as provided in rule 12.5, the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court, unless otherwise directed upon recall of the mandate as provided in rule 12.9, and except as provided in rule 2.5(c)(2). After the mandate has issued, the trial court may, however, hear and decide post judgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court.

Hanson would like to pretend that the 15 pages of Findings of Fact are ambiguous or leave some amount of wiggle room so that she can continue to re-litigate the trial. The court could not have been more clear when stating that its intent is a 50/50 split. There is no rational basis for creating new rights or re-defining those that are perfectly clear.

A trial court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *Id.* " A trial court's decision is manifestly unreasonable if it ' adopts a view' that no reasonable person would take." *In re Pers. Restraint of Duncan*, 167 Wash.2d 398, 402-03, 219 P.3d 666 (2009) (quoting *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684, 132 P.3d 115 (2006) (quoting *State v. Rohrich*, 149 Wash.2d 647, 654, 71P.3d 638 (2003»).

A specific percent indicates mathematical precision and yet Hanson acknowledges that the current award fails to achieve this result. It's not surprising that she would prefer a record that supports relative need as she has argued that the court should consider her post-separation life choices when dividing the assets of a relationship that terminated in May 2009. However Findings of Fact is not up for interpretation on this subject. None of these facts keep Hanson from using every opportunity to mislead the trial court, employ diversions from clarity, and re-litigate. Unfortunately as the awards now stand her success at this rouse is apparent.

Therefore, in order for a just and equitable result Court of Appeals is requested to apply RAP 12.2 and "take any other action as the merits of the case and the interest of justice may require."

Because the trial court fails to comply strictly with the mandate rendered by the higher court and therefore is at odds with CR 12.2, "the action taken or decision made by the appellate court is effective and

binding on the parties”, and because it abuses its discretion in that orders do not follow from the record, Harjo requests that a special concession be made in the Court of Appeals Decision to amend and finalize the Judgments and Orders consistent with the record.

Harjo requests that the Court of Appeals modify and finalize the Judgments and Orders:

- A. That the correct sum of \$57 for half of the business Ocho’s 2010 net income be established in place of the pre-expense income used by the trial court to award the split of profits of Ocho for 2010.
- B. That the award of attorney’s fees be reversed or denied.
- C. That the amount indicated as half the rents collected (\$3602) be adopted as the award to Hanson *or* that no award should be made to Hanson given that there is no basis in the record
- D. That relative need be overturned and stricken from the record.

Respectfully submitted this 4th day of November, 2013


Zachary B Harjo, Pro Se
2325 NW Market Street
Seattle, WA 98107
(206) 909-7584
zachharjo@gmail.com

VII. Exhibit 1

1. *IRS Credit for Portion of Employer Social Security Paid with Respect to Employee cash Tips (IRC 45 B Credit)*

EXHIBIT 1



Small Business/Self-Employed

- [Industries/Professions](#)
- [International Taxpayers](#)
- [Self-Employed](#)
- [Small Business/Self-Employed Home](#)

Small Business/Self-Employed Topics

- [A-Z Index for Business](#)
- [Forms & Pubs](#)
- [Starting a Business](#)
- [Deducting Expenses](#)
- [Businesses with Employees](#)
- [Filing/Paying Taxes](#)
- [Post-Filing Issues](#)
- [Changing Your Business](#)

Credit for Portion of Employer Social Security Paid with Respect to Employee Cash Tips (IRC 45 B Credit)

For more information on the credit for business taxes, see page 10.

If you are an employer in the food and beverage industry, you may be entitled to a credit for the social security and Medicare taxes you pay on your employees' tip income. This credit is available under Internal Revenue Code (IRC) section 45 B, Credit For Portion Of Employer Social Security Paid With Respect To Employee Cash Tips. You must meet both of the following requirements to qualify for the credit:

1. You had employees who received tips from customers for providing, delivering, or serving food beverages for consumption; and
2. You paid or incurred employer social security and Medicare taxes on these tips.

The credit applies only to tips received by food and beverage employees. It is not applicable to other tipped employees.

The IRC section 45 B credit is available for taxes paid after December 31, 1993. The credit is available without regard to whether your employees reported the tips to you pursuant to IRC section 6053(a). You can claim or elect not to claim the credit anytime within three years from the due date of your return on either your original return or an amended return.

Minimum Wage Effect

The credit equals the social security and Medicare taxes you paid on the tips received by the employees. However, no credit is given for tips used to meet the federal minimum hourly wage rate. For example, if the minimum wage rate was \$5.15 per hour, and you paid the employee \$3.75 per hour and applied tips of \$1.40 per hour to reach the \$5.15 minimum wage, then the \$1.40 per hour tips cannot be used toward the credit. If, however, you paid each employee an amount equal to or more than the minimum wage without including tips, then you can compute the credit on all reported tips. Note: The Small Business Work Opportunity Act of 2007 froze the federal minimum wage at \$5.15 per hour for computation purposes, even though it will reach \$7.25 per hour by the summer of 2009.

Business Tax Credit

The credit is part of the general business tax credit and is claimed on Form 8846, Credit for Employer Social Security and Medicare Taxes on Certain Employee Tips. Since it is an income tax credit, claimed on an income tax return, you may use it to offset any regular income tax liability, **but not employment tax liabilities**. A credit is a dollar for dollar reduction of your regular tax liability, where an expense deduction only reduces your taxable income. Therefore, credits are usually more beneficial. You cannot claim both the credit AND the expense deduction. If you claim the credit, you must reduce your social security and Medicare tax deduction accordingly. You and your accountant should evaluate, annually, whether the credit or the expense deduction is more beneficial to you.

The IRC 45B credit is not refundable which means if the credit reduces your regular income tax below zero, to a negative amount, the negative amount is not sent to you as a tax refund. However, it is subject to carry back and carry forward provisions of the Internal Revenue Code, as are other components of the business tax credit. See IRC section 39. Credits arising in tax years beginning after December 31, 1997 may be carried back one year and forward 20 years. Credits arising in tax years beginning before 1998 may be carried back three years and forward 15 years. If you intend to carry back or carry forward.