

No. 72063-5
Whatcom County Superior Court No. 13-3-00205-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Marriage of:

GILLIAN K. HOPSON fka BEN-ARTZI,
Petitioner-Respondent,

v.

DR. ERIC N. BEN-ARTZI,
Respondent-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR WHATCOM COUNTY

The Honorable Deborra Garrett, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

1. The trial court erred in prohibiting Dr. Ben-Artzi from international travel with his children. *See* Parenting Plan at paras. 2.2 (CP 228, Other Factors), 3.10 (CP 231, Restrictions), and 3.13 (CP 232, International Travel); Decree at p. 4. (CP 255, Continuing Restraining Order). Petitioner specifically assigns error to the Court's findings and conclusions supporting the notion that Dr. Ben-Artzi would improperly remove the children from the United States. CP 225-26.

2. The trial court erred in its division of potential proceeds from Dr. Ben-Artzi's Whistleblower litigation in the following ways:

(a) The Court should have characterized any award from the SEC as a mere expectancy, which is not subject to division.

(b) The Court should have characterized any award for emotional damages as the separate property of Dr. Ben-Artzi.

(c) The Court should have characterized any potential award of punitive damages as the property of whichever estate or estates the award was intended to address.

(d) The Court unfairly placed the burden on Dr. Ben-Artzi to cover much of the expenses and attorney fees out of his own pocket rather than sharing them with Ms. Hopson.

(e) The Court failed to acknowledge Dr. Ben-Artzi's right to reimbursement for post-separation work in furtherance of the litigation.

These assignments of error include paragraphs 2.8, 2.9, 2.11, 3.7, and 3.8 of the findings and conclusions (CP 220-27) to the extent they relate to the division of litigation proceeds.

3. The trial court erred in awarding 100% of a community IRA to Ms. Hopson. *See* Findings and Conclusions at para 3.8 (CP 225); Decree at para. 3.3 (CP 254).

4. The income imputed to Dr. Ben-Artzi was clearly excessive. *See* Order of Child Support at p. 11 (CP 247).

5. If the trial court intended that Dr. Ben-Artzi pay the premiums for a policy insuring his life with Ms. Hopson as beneficiary, petitioner assigns error to that ruling. *See* Findings and Conclusions at para. 3.8 (CP 226); Decree at para. 3.15.6 (CP 258).

6. The trial court erred in the large awards of maintenance and attorney fees to Ms. Hopkins, in view of the already ample funds awarded to her. *See* Decree at para. 3.7 (CP 255); Decree at para. 1.1 (CP 252).

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the evidence sufficient to support a finding that Dr. Ben-Artzi posed a risk of abducting the children to Israel?

2. Did the trial court err in characterizing the various potential awards from Dr. Ben-Artzi's whistleblower actions?
3. Was it an abuse of discretion to place solely on Dr. Ben-Artzi the burden of paying significant portions of the attorney fees and costs of the whistleblower actions?
4. Did the trial court fail to take into account Dr. Ben-Artzi's post-separation efforts to further the whistleblower litigation?
5. Was it an abuse of discretion to impute annual income to Dr. Ben-Artzi of \$100,000 when he had not earned more than \$35,000 per year since being fired from Deutsche Bank for reporting it to the SEC?
6. Did the trial court intend for Dr. Ben-Artzi to pay the premiums for a life insurance policy in favor of Ms. Hopson and, if so, would that be an abuse of discretion?
7. Did the large awards of maintenance and attorney fees contribute to an overall unfair division of assets?

III. STATEMENT OF THE CASE

Dr. Eric Ben-Artzi and Gillian Hopson (formerly Ben-Artzi) married in New York on September 23, 2006. They have two children: Alexander Ben-Artzi and Daniel Ben-Artzi, ages two and six, respectively, at the time of trial. RP 61. Dr. Ben-Artzi has a Ph.D in mathematics and

Ms. Hopson has a masters degree in education. RP 62. Dr. Ben-Artzi worked on Wall Street for various financial institutions, ultimately moving to Deutsche Bank in 2010. Trial Exhibit (Tr. Ex.) 4 at p. 2.¹ At its peak, Dr. Ben-Artzi's income was in the neighborhood of \$150,000 per year. RP 103-06.

Dr. Ben-Artzi's job at Deutsche Bank included risk analysis for a certain complex financial product Deutsche Bank marketed. RP 65. This meant that he oversaw the valuation of the product. *Id.* (As the risk of an investment goes up, the value goes down.) He determined that Deutsche Bank's valuation as reported to investors was so inflated as to be fraudulent. In his view, had Deutsche Bank accurately reported the value during the financial crisis in 2008, it would have required a bail-out or completely foundered. RP 66. After failing to receive any satisfactory response through internal channels he ultimately reported the matter to the Securities and Exchange Commission (SEC). RP 66-67. On November 4, 2011, Dr. Ben-Artzi filed a "Tip, Complaint or Referral" with the SEC. Tr. Ex. 4 at p.2. Deutsche Bank terminated him three days later. *Id.* On May 1, 2012, Dr. Ben-Artzi filed a wrongful termination complaint with the Occupational Safety and Health Administration (OSHA).

¹ All trial exhibits were presented by Ms. Hopson.

After termination, the parties moved to Bellingham, Washington to make a new start. RP 70. As Ms. Hopson recognized, Dr. Ben-Artzi put considerable time, money, and effort into the SEC and OSHA actions. Among other things, Dr. Ben-Artzi worked with the Kilgour Williams Group (KWG) to help determine the damages to investors from Deutsche Bank's actions, which would assist him in obtaining a whistleblower award from the SEC. RP 77-78.

The parties separated on March 26, 2013, the date Ms. Hopson filed a petition for dissolution. RP 61-62. Over Dr. Ben-Artzi's objection, the Court granted Ms. Hopson's motion to relocate to Granville, Ohio on May 21, 2013. CP 33.

The trial began on April 22, 2014. Dr. Ben-Artzi was unable to attend. *See* CP 170-171. The only live testimony came from Ms. Hopson. The trial court permitted him to submit written testimony and objections to the court's tentative oral rulings. RP 156. That submission is at CP 170-215. Ms. Hopson presented written expert testimony from attorney Kenneth Brewe regarding the distribution of a potential whistleblower award. RP 20, 56; CP 121-161.

IV. ARGUMENT

A. STANDARD OF REVIEW

“A court’s characterization of property as either separate or community is a question of law subject to de novo review.” *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018, 1021 (2002), *review denied*, 148 Wn.2d 1023, 66 P.3d 637 (2003); *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000).

The trial court’s decisions regarding parenting, child support, and other financial issues are generally reviewed for abuse of discretion, which is defined as discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995) (citing Washington State Bar Ass’n, Washington Appellate Practice Deskbook § 18.5 (2d ed.1993)), *review denied*, 129 Wn.2d 1003, 914 P.2d 66 (1996).

Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

The trial court's factual findings will be upheld as long as there is "substantial evidence" in the record to support its decision. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959).

B. THE TRIAL COURT DID NOT HAVE A SUFFICIENT BASIS TO RESTRICT DR. BEN-ARTZI FROM TAKING THE CHILDREN TO ISRAEL

The trial court restricted Dr. Ben-Artzi from taking the children out of the country. *See* Parenting Plan at paras. 2.2 (CP 228, Other Factors), 3.10 (CP 231, Restrictions), and 3.13 (CP 232, International Travel); Decree at p. 4. (CP 255, Continuing Restraining Order). The trial court's detailed explanation for the restriction is at para. 3.8 of the Findings and Conclusions. CP 225-26.

The Husband is a flight risk with the children. These *Findings of Fact and Conclusions* provide a basis to determine that the Husband may improperly remove the children from the United States. He grew up in another country where he remains a citizen, served in the military, and has extensive contacts and influential family members in his country of origin. He is not a United States citizen. He has exhibited an extreme disregard for court orders, discovery rules, and his legal and financial duties to the community. The Husband is likely to violate any court order to permit travel. If he did so it would be harmful to the children and cause the Wife to incur substantial attorneys' fees and delay to obtain the children's return to the United States. For these reasons, and because it is in the children's best interests, the Husband should be prohibited from international travel with the children as provided in the *Parenting Plan*.

CP 225-26 (emphasis in original).

The trial court did not set out separately the findings of fact and conclusions of law. The factual findings are that Dr. Ben-Artzi is a citizen of another country (Israel), that he has various contacts with that country, and that he has violated some court orders that do not pertain to the temporary parenting plans. These findings, even if correct, are insufficient to support the conclusion that he would likely violate any order to permit travel.

The Washington Supreme Court addressed the issue of travel out of the country in *Katara v. Katara*, 175 Wn.2d 23, 283 P.3d 546 (2012), *cert. denied*, 133 S.Ct. 889, 184 L.Ed.2d 661 (2013). In that case, the father, an Indian citizen, had made threats to abduct the children to India, witnessed by the mother and two others. He had strong ties to India and had engaged in planning activities evidencing his intent to move there, including an attempt to obtain the children's passports. *Id.* at 34. The mother pointed out that India was not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction, "which provides for mandatory summary proceedings in cases of international child abduction." *Id.* at 30. "The treaty provides a remedy only if both countries are signatories." *Id.* An expert testified that the father presented several risk factors regarding abduction and the trial court found a significant danger of abduction. *Id.* at 33-38. A majority of the Court

found the evidence sufficient to justify the restrictions, although three Justices disagreed. In view of that split, *Katara* should be seen as the lower limit on the evidence needed to impose a restriction on international travel.

In this case, the evidence was far weaker than that in *Katara*. Perhaps most importantly, Israel, unlike India, is a signatory to the Hague convention.² Therefore, mandatory, summary proceedings would be available to Ms. Hopson in the event that Dr. Ben-Artzi did not return the children on time. Further, there was no expert testimony that Dr. Ben-Artzi posed a risk of abduction. It is true that Dr. Ben-Artzi is an Israeli citizen and that he has many relatives living in Israel. But that is exactly why it is so important for the children to visit the country. Children have a “deep need to understand their . . . culture, and heritage.” *Katara*, 175 Wn.2d at 50 (Madsen, C.J., dissenting). *See also In re Marriage of Chandola*, 180 Wn.2d 632, 653, 327 P.3d 644, 655 (2014) (“Without doubt, a trial court must consider cultural factors when imposing a parenting plan.”).

Unlike in *Katara*, Dr. Ben-Artzi has never threatened to abduct the children. At most, according to Ms. Hopson, he once suggested that he

² <http://travel.state.gov/content/childabduction/english/country/hague-party-countries.html>

could get a better ruling regarding child support from an Israeli court because he was Jewish and she was not. RP 86-87. This came up because they disagreed over whether income should be imputed to him. She acknowledged that, at the time Dr. Ben-Artzi made those statements, she did not interpret them to imply that he would abduct the children. Rather, she was upset that he was planning to be so litigious about financial issues. RP 88. But at trial she speculated that his comments might relate to the children. *Id.*

Ms. Hopson's attorney acknowledged that Dr. Ben-Artzi "has been seeing the boys pretty much on schedule," although he missed some visits. RP 29-30. It is undisputed that he has a normal relationship with his sons and can parent them. RP 30. He and Ms. Hopson have no disagreement over the division of residential time. Dr. Ben-Artzi believes it appropriate that the boys' primary home is with their mother.

The Court's reference in the findings to violations of court orders applies only to discovery and financial issues. It is mere speculation to infer that Dr. Ben-Artzi would likewise violate the parenting plan. He has never failed to return the children in a timely manner after his residential time.

In short, the evidence in this case was not sufficient to support the Court's finding that Dr. Ben-Artzi posed a risk of abduction. This Court should overturn the restriction on international travel.

C. THE TRIAL COURT MADE SEVERAL ERRORS IN DIVIDING THE POTENTIAL PROCEEDS FROM DR. BEN-ARTZI'S PENDING LAWSUITS

1. The Potential Award From The SEC was Not Subject to Division at all Because It is Not Property but Rather a Mere Expectancy

In its Findings of Fact and Conclusions of Law, the Court stated that the following was community property:

Net proceeds of litigation and/or potential litigation arising from events which occurred during or in relation to Husband's employment with Deutsche Bank. This includes proceeds, damages, monetary losses, earnings, claims, compensation, fees, rewards, entitlements, unpaid or lost wages, contingent future interests, costs, disbursements, awards, wrongful termination, punitive damages, or any other such monetary dispensation (distribution, payment, etc) in any action, litigation, wrongful discharge, administrative proceeding, case, cause, or any other such legal case, court matter or administrative proceeding including, without limitation, the whistleblower matter before the Occupational Safety and Health Administration and its derivative or related proceedings, and the whistleblower matter before the Security and Exchange Commission and its derivative or related proceedings.

CP 220-221 (Findings and Conclusions at para. 2.8). The gist of this somewhat redundant provision is that any and all proceeds from the

OSHA and SEC actions would appear to be treated as community property.

Paragraph 2.9 of the Findings and Conclusions, however, includes the following as the separate property of Dr. Ben-Artzi: “[P]otential future lost wages after March 26, 2013, and the non-community portion, if any, of possible emotional damages after March 26, 2013 with respect to the foregoing whistleblower action(s).” CP 221. Unless opposing counsel takes a contrary position in its response brief, Dr. Ben-Artzi will assume that paragraph 2.9 limits the community property described in paragraph 2.8. Nevertheless, even with this limitation, the characterization of community property is too broad in several ways.

First, although significant portions of any recovery on the OSHA claim would be community property, the SEC whistleblower action is not subject to division at all because it is only an expectancy.³ “In Washington law a mere expectancy does not rise to the level of a property right,” and is therefore not subject to division. *Marriage of Leland*, 69 Wn. App. 57, 847 P.2d 518, *review denied*, 121 Wn.2d 1033, 856 P.2d 383 (1993) (citation omitted). For example, a beneficiary of a will or an insurance policy has no property right because the testator or insured may change the

³ Dr. Ben-Artzi raises this issue in his written testimony. CP 180-181.

beneficiary at any time. *Estrada v. McNulty*, 98 Wn. App. 717, 988 P.2d 492 (1999). “[T]he designating party still retains the power of disposition, which is to say he still has ownership of the property.” *Id.* at 721. *See also, Estate of Baird*, 131 Wn.2d 514, 521-22, 933 P.2d 1031 (1997); *Freeburn v. Freeburn*, 107 Wash. 646, 650, 182 P. 620 (1919) (that a valuable mining contract entered into during the marriage could be renewed on similar terms after it expired was a mere expectancy and not a current property right; any income from a renewal would take place after the dissolution and would be separate property).

Dr. Ben-Artzi can receive an award from the SEC only if it decides to impose sanctions of at least \$1 million on Deutsche Bank. *See* CP 122 (declaration of Ms. Hopson’s expert, Kenneth Brewé). *See also* CP 134 (appendix to declaration setting out CFR 240.21F-3). The propriety of sanctions is entirely at the discretion of the SEC. Dr. Ben-Artzi has no right to enforce sanctions under any circumstances. *See, e.g., Block v. SEC*, 50 F.3d 1078 (D.C. Cir. 1995); *Dichter-Mad Family Partners, LLP v. United States*, 707 F.Supp.2d 1016 (C.D. Cal. 2010) (citing numerous cases on point). The SEC is immune from suit even when there are allegations that it botched an investigation and failed to follow its own protocols. *Donahue v. United States*, 870 F.Supp.2d 97 (D.D.C. 2012) (a suit stemming from the Bernie Madoff Ponzi scheme).

To be sure, Dr. Ben-Artzi has made considerable efforts to convince the SEC that he deserves an award. But that is no different from a person striving to convince a testator that he deserves to be recognized in a will.

Thus, the potential SEC award cannot be characterized as either separate or community property; it is not property at all. The trial court had no power to divide it under any circumstances.

In the alternative, if this Court determines that a potential SEC award is not an expectancy, then the analysis for the SEC action is the same as for the OSHA action discussed below.

2. The Court Incorrectly Characterized Certain Potential Awards as Community Property Rather than Dr. Ben-Artzi's Separate Property

As the trial court found, an award that compensates for lost earnings during the marriage (“back wages”) is community property. *See Brown v. Brown*, 100 Wn.2d 729, 738, 675 P.2d 1207, 1212 (1984). The Court also properly found that any award compensating Dr. Ben-Artzi for loss of earnings after the date of separation (“front wages”) was his separate property. However, its handling of awards for emotional damages (sometimes labeled “pain and suffering”) was only partially correct. It limited Dr. Ben-Artzi’s separate property to “*the non-*

community portion, if any, of possible emotional damages *after March 26, 2013*, the date of separation.” (Emphasis added).

In fact, *any* award for pain and suffering would be Dr. Ben-Artzi’s separate property, regardless of the date on which they were incurred. “[D]amages for physical injury and pain and suffering, which compensate the injured spouse for the harm to his or her separate individuality, should be separate property.” *Brown*, 100 Wn.2d at 738. In fact, the memorandum of law filed by Kenneth Brewe on behalf of Ms. Hopson concedes this point. CP 123.

The next issue is the characterization of a potential award for punitive damages, which are sought in para. F of Dr. Ben-Artzi’s request for relief in the OSHA case. Trial Ex. 11 at p. 34. As Mr. Brewe noted, whether punitive damages are separate or community property in Washington is a matter of first impression. *See* CP 124. He maintained that it should be considered community property since no statute specifies that it should be separate. But it is not surprising that the legislature failed to include an express provision for punitive damages since Washington generally does not permit them. The issue comes up only in unusual cases like this one.

The Alaska Supreme Court has held that punitive damages are related to the underlying compensatory awards and therefore take on the

character of those underlying awards – whether community or separate. *Lundquist v. Lundquist*, 923 P.2d 42 (AK, 1996). “[P]unitive damages are not received as a result of the parties’ joint efforts in the same sense that marital income is.” *Id.* at 51. Rather, they are over and above any award for compensation to the injured party. For that reason, they are not necessarily marital property. *Id.* “An award of punitive damages should be apportioned in the same manner as the underlying compensatory damages award.” *Id.* at 51. Washington should adopt the same rule. Under the Alaska analysis, punitive damages for the harm caused to Dr. Ben-Artzi’s reputation and future earning potential, for example, would be separate property.

Ms. Hopson may argue that the errors in characterization are harmless under the analysis of *In re Marriage of Shannon*, 55 Wn. App. 137, 142, 777 P.2d 8, 11 (1989):

Remand is required where (1) the trial court’s reasoning indicates that its division was significantly influenced by its characterization of the property, and (2) it is not clear that had the court properly characterized the property, it would have divided it in the same way. In such a case, remand enables the trial court to exercise its discretion in making a fair, just and equitable division on tenable grounds, that is, with the correct character of the property in mind.

This does not mean, however, that a trial judge may ignore proper characterization.

Characterization of property as community or separate is not controlling in division of property between the parties in a dissolution proceeding, but “the court must have in mind the correct character and status of the property before any theory of division is ordered.”

Brewer v. Brewer, 137 Wn.2d 756, 766, 976 P.2d 102, 108-09 (1999) (quoting *Blood v. Blood*, 69 Wn.2d 680, 682, 419 P.2d 1006 (1966)). See also, *Marriage of Griswold*, supra; *Marriage of Skarbek*, supra (reversing and remanding where trial court incorrectly characterized certain funds as community property).

Here, the trial judge was clearly influenced by the characterization of the property because she considered expert testimony on that issue and discussed it in her tentative oral ruling. RP 56, 157-61. It is true that the written order states that the 50-50 split is based on “all the circumstances of the case, including Husband’s failure to pay Wife as required by prior Orders of this Court.” CP 253 (decree at 2). But those “circumstances” clearly included the nature of the property.

The trial judge’s only statements suggesting that she might disregard community property reflected misunderstandings about the legal standards and the nature of the potential awards. First, although she recognized that awards for pain and suffering would be separate property, she mistakenly suggested that the actions at issue could not provide such relief. RP 160-61. In fact, both sides presented evidence that such awards

were authorized. Petitioner's exhibit 11, admitted at trial by Ms. Hopson, is Dr. Ben-Artzi's OSHA complaint under the Sarbanes-Oxley Act of 2002. The request for relief begins at page 30. Dr. Ben-Artzi's experienced lawyers are seeking, among other things, "non-economic damages for mental and emotional distress, embarrassment and humiliation." P. 31 at para. E. Such awards are proper to compensate a discharged whistleblower. *See Lockheed Martin Corp. v. Administrative Review Bd.*, 717 F.3d 1121 (10th Cir. 2013). The memorandum of law filed by Kenneth Brewe on behalf of Ms. Hopson concedes this point. CP 123.

Second, the trial court's reasoning regarding "front pay" was faulty. She noted that Ms. Hopson was injured by any diminution in Dr. Ben-Artzi's future wages because that would decrease her child support, and therefore suggested that Ms. Hopson should share in any award for front wages. RP 161. Dr. Ben-Artzi does not dispute that his child support obligation should increase to the extent that an award of front wages may increase his effective income during some time periods. But that is a far cry from awarding Ms. Hopson half of the front wages. Washington's child support schedule requires only a much more modest increase in child support. That is particularly true here, when the trial

court set the child support based on a high imputed income of \$100,000 per year. *See* section E, below.

It is not clear to what extent the trial court relied on Dr. Ben-Artzi's "failure to pay Wife," but it would be an abuse of discretion to strip him of all his separate property for that reason alone. The Court addressed the that issue by ultimately awarding Ms. Hopson 100% of a \$140,000 community IRA. *See* section D, below. It would not be "fair, just and equitable" to doubly punish Dr. Ben-Artzi by also depriving him of his separate property.

Thus the Court's errors in characterization were not harmless, and remand is required.

3. The Trial Court did Not Fairly Divide The Expenses of Litigation

The trial court listed, among other things, the following "separate liabilities" for Dr. Ben-Artzi:

[A]ll attorney fees, costs and expenses he has incurred or will incur with Kristen Reid, Ronald Hardesty, David Starks, Thad Guyer, Jordon Thomas, Adrian Fournier, McKinley Irvin, Belcher Swanson, Labaton & Sucharow, Kilgour Williams Group, or any other attorney with respect to any and all matters including, without limitation, this matter, the Securities and Exchange Commission (SEC), the Occupational Safety and Health Administration (OSHA) or any other such agency, entity, business, employer, or third party for any proceeding, matter or cause of action.

CP 224-225. (Findings and Conclusions at para. 3.7). Standing alone, this would seem to place the entire burden of attorney fees and costs on Dr. Ben-Artzi. Paragraph 3.8, however, reduces his responsibility to some extent.

Based on the court's weighing of the statutory factors for an equitable distribution of all property pursuant to RCW 26.09.080, the court record and the evidence at trial, the Husband should be ordered to pay indirect litigation expenses from his portion of the litigation proceeds described above, not the wife's portion. Direct litigation costs shall be paid from the gross proceeds before calculation of the net community proceeds, and shall include attorneys [sic] fees for his attorneys Thad Guyer and Jordan Thomas; fees paid to experts who testified or were identified in discovery as testifying experts; court reporter expenses for transcription necessary in the litigation; and any other expenses directly related to the litigation and agreed by the parties. Indirect litigation expenses include all expenses related to the litigation which are not included in "direct litigation expenses," above.

CP 226-227.

Unless Ms. Hopson disagrees in her response brief, Dr. Ben-Artzi will assume that this second provision limits the first one. He will also assume that the phrase "and agreed by the parties" refers only to "any other expenses directly related to the litigation" and not to any of the expenses specifically identified as shared.

Nevertheless, these provisions are inequitable. The Court should not have limited the fees of experts to those who testify or are disclosed as

witnesses. In whistleblower actions, consulting experts are necessary. CP 182 (written testimony at 13). Dr. Ben-Artzi currently has several partners in this private enforcement effort. All but the KWG have insisted that their names not be public. He could not afford to pay these partners out-of-pocket. Rather, all parties who are helping him are doing so in exchange for a percentage of a potential award. CP 182-183.

The most important factor in determining the size of the award and its allocation among the whistleblowers – and there are at least three known whistleblowers in this case – is the original contribution each made to the SEC investigation. Part or all of the information Dr. Ben-Artzi provided to the SEC in 2011 had likely been reported by the two whistleblowers who preceded him. It is important to the success of the case that this not be seen as a single event that happened in 2011. Rather, Dr. Ben-Artzi has pursued it as an ongoing private investigation. He has used percentages from the award to enlist partners, acquire key evidence, and finance the costs and expenses of travel, contracts, and insurance. CP 182.

None of these partners are strictly expert witnesses, even when they provide expert analysis. Original documents supporting the allegations are far more valuable to the success of the investigation. Besides providing testimony, all partners have also agreed to provide other

support. For example, KWG agreed to participate in a variety of important supporting efforts, such as media. CP 182. Dr. Ben-Artzi has used percentages from the award to enlist partners, acquire key evidence, and finance the costs and expenses of travel, contracts, and insurance. CP 182-183.

Dr. Ben-Artzi has paid lawyers to draft contracts with experts (such as KWG), as can be seen in the billing statement Ms. Hopson submitted as Exhibit 13. Dr. Ben-Artzi has carefully considered the risks and benefits of taking on partners on a percentage basis. His premise is that it is better to receive a smaller percentage of a more probable and larger award, than a larger percentage of zero. CP 183-184.

Further, the shared responsibility for attorney fees should not be limited to two lawyers. For unexplained reasons the trial court excluded from shared expenses the fees of any other attorneys, expressly naming Adrian Fournier. In addition to that lawyer, Dr. Ben-Artzi may require the services of additional lawyers, or may substitute other lawyers for the two the trial court found acceptable.

Under the trial court's ruling, Dr. Ben-Artzi will likely receive a negative net award, since he is solely responsible for the fees of all non-attorney partners as well as the fees of some attorneys. This will leave

Ms. Hopson with a windfall, although she has no role in pressing the litigation. The ruling is therefore an abuse of discretion.

4. The Trial Court Failed to Take Into Account Dr. Ben-Artzi's Post-Separation Efforts to Further The Litigation

Dr. Ben-Artzi's share of the separate and community property from the potential litigation awards should take into account his post-separation efforts to further the litigation. Under Washington law, any estate, separate or community, has a right to reimbursement for labor or work done to improve another estate. *In re Trierweiler's Estate*, 5 Wn. App. 17, 486 P.2d 314, *review denied*, 79 Wn.2d 1007 (1971). *See also, Marriage of Griswold*, 112 Wn. App. at 341 (bonus awarded to husband at the end of the year in which parties separated was earned in part with separate labor occurring after separation and thus, should be split between community and separate); *White v. White*, 105 Wn. App. 545, 549-50, 20 P.3d 481 (2001) (In dividing community property court could take into account "unusually significant" contributions to asset by spouse).

Here, Dr. Ben-Artzi continues to work very hard on both actions after separation, while Ms. Hopson plays no role. In fact, he has had more submissions and meetings with the SEC post-separation than before. This may continue for many years, possibly with no award whatsoever at the end. CP 182-184.

Ms. Hopson's expert, Mr. Brewster, recognized Dr. Ben-Artzi's efforts to some extent in his discussion of "onerous title." He correctly noted that Dr. Ben-Artzi's "toil, talent, or productive faculty" has been needed to litigate this case. CP 181-182. Ms. Hopson too acknowledged at trial that "Eric devoted a lot, a great deal of time and money and energy into those cases." RP 77. Besides the submissions to regulators, he prepared presentations and summaries for academics, finance/accounting professionals, and journalists. These are important to the ultimate success of the case, as they bring new evidence forward. For example, KWG would never have joined as partners without the Financial Times reporting, which Dr. Ben-Artzi arranged. CP 183.

Dr. Ben-Artzi will have more work going forward. He may also have to defend against any potential lawsuit by Deutsche Bank over documents it may consider improperly taken or used. Dr. Ben-Artzi has since received veiled anonymous death threats online in addition to the "character assassination" by bank-friendly "journalists." While threats of this type are a low priority for law enforcement, Dr. Ben-Artzi will always have to look over his shoulder for fear of retribution by powerful enemies. CP 183. The trial court recognized this danger when ordering Dr. Ben-Artzi to facilitate a \$2,000,000 life insurance policy with Ms. Hopson as beneficiary. "He has referred to threats to his safety due to his whistle

blowing actions, which is supported by evidence in the record of untimely and unique whistle blower deaths.” CP 226.

For all these reasons, the trial court abused its discretion by failing to take into account the significant efforts and risks taken on by Dr. Ben-Artzi post-separation, which will greatly increase the likelihood and size of Ms. Hopson’s share of a potential award. This Court should direct the trial court to recognize Dr. Ben-Artzi’s right to reimbursement when dividing any litigation proceeds.

D. THE TRIAL COURT IMPROPERLY AWARDED MS. HOPSON 100 PERCENT OF A COMMUNITY IRA

The trial court found that the parties had a Schwab IRA with a value of \$139,332 and that it was completely community property. CP 220-221. In earlier proceedings, the Court found Dr. Ben-Artzi in contempt for withdrawing funds from that account, and entered a judgment for \$100,733, which represented the total amount withdrawn by him. CP 116-20. At trial, the court issued another judgment for \$33,576.26, which represented further withdrawals by Dr. Ben-Artzi as well as all funds remaining in the account. CP 252.

In his written testimony, Dr. Ben-Artzi recognized that it was too late to challenge the pretrial ruling, but noted the unfairness of penalizing

him further. CP 172-173. The contempt finding was based on a routine, temporary restraining order, which included the following:

Both parties are restrained from transferring, removing, encumbering, concealing, damaging, or in any way disposing of any property except in the usual course of business or for the necessities of life as agreed in writing by the parties.

CP 10. Because he had little income after separation, the IRA was Dr. Ben-Artzi's primary source of funds for the "necessities of life," including payments of child support. CP 173. He noted that Ms. Hopson herself withdrew over \$40,000 from a joint checking account around the time of separation. *Id.* She admitted as much in her trial testimony. RP 133-34. Yet, she was never required to pay back any share of that to Dr. Ben-Artzi.

The trial court awarded an additional \$33,576 of the IRA to Ms. Hopson, effectively giving her the entire account. This result was clearly inequitable. Of the approximately \$180,000 of community funds at issue, Ms. Hopson was awarded 100%, although her conduct was similar to Dr. Ben-Artzi's. This amounted to an abuse of discretion.

E. THE INCOME IMPUTED TO DR. BEN-ARTZI WAS CLEARLY EXCESSIVE

The trial court found Dr. Ben-Artzi to be voluntarily unemployed and imputed income of \$100,000 per year based on a "reliable historical rate of pay" under RCW 26.19.071. CP 238. The finding of "voluntary"

unemployment and the use of an historical rate of pay are both unreasonable because they disregard the difficulties facing a whistleblower in a high-profile case.

In his written testimony on this issue, Dr. Ben-Artzi referred the Court to several pleadings filed earlier in this case. CP 174-176 (written testimony at p. 5-7). Ever since he was fired from Deutsche Bank for blowing the whistle on it in 2011, Dr. Ben-Artzi has found it impossible to obtain a job in finance.

My search for jobs in finance until July [2013] was both earnest and extensive. I applied for dozens of finance jobs across the world with no success. I had a number of top recruitment firms search for positions, with no success. While I never stopped looking for a job in finance, there was plenty of evidence that Wall Street was closed to me.

CP 39.

My specialization in modeling exotic derivatives is useful almost exclusively for a small number of Wall Street firms and hedge funds. In the years I worked on Wall Street, one of the primary recruiters (“head-hunters”) who helped me obtain interviews and a number of job offers was Push Patel of the Options Group. The email from his colleague [CP 43], which was unsolicited and came as a surprise, clearly demonstrates that this recruiter, like most others, no longer thinks I am hireable on Wall Street. The only recruiting firm that is still actively helping me is Selby-Jennings, and they only obtain a job lead every few months.

CP 174-175.

Dr. Ben-Artzi likewise had no luck finding other jobs involving mathematics.

The typical investment analyst, accounting, or other positions available in many firms across the U.S. are not intended for PhD-level mathematicians, and I am generally viewed as over-qualified for these.

Id. Dr. Ben-Artzi's written testimony also refers the Court to a declaration he filed on January 22, 2014 (CP 55-73), which sets out in greater detail his many efforts to find high-paying work. CP 174-175.

Ultimately, Dr. Ben-Artzi managed to obtain an adjunct professor position at Ohio State University (OSU). CP 174. This kept him busy essentially full time, for an annualized income of \$34,560. CP 38-40.

Additionally, I need to do research in my field, and start attending departmental seminars and meetings if I am to keep my job and win promotions...OSU is one of the top 30 math departments in the U.S., and I am both proud and fortunate to hold a teaching position here.

CP 39. Dr. Ben-Artzi pointed out that this was the best job available to him in commuting distance from Granville, Ohio – where Gillian had relocated the children against his wishes. His income was roughly double the median income for that area. CP 40. He could not obtain a tenure-track position without first publishing academic research outside the field of finance. CP 57.

On October 31, 2013, the Court issued a temporary order of child support which imputed Dr. Ben-Artzi's income at \$75,000 per year. Supp.

CP ____ (Dkt. 76 at p. 9, Temporary Order of Child Support).⁴ Dr. Ben-Artzi then informed the math department that he must seek a higher-paying job, which meant that he could not guarantee his availability for the entire upcoming semester. CP 57.

I notified my superiors ahead of the semester that I would be looking for other jobs and might not complete the term if there is an offer (Dkt. 115, Att. 4, p.14, [CP 68] and Dkt. 121, p. 3, paragraph 3 [CP 82], and Dkt. 136, p. 2-3 [CP 87-88]). These superiors have expressed their gratitude that I did not leave in the middle of the term, thereby harming the university and students. My communications with OSU have been amicable in the months since, and I can reasonably hope to get new courses in the Fall Semester. However, the monthly payment imputed by the Court would once again make this arrangement unsustainable . . . and delay my ability to methodically rebuild my career.

CP 175-76. He also hoped to start a business venture with other whistleblowers, which could fit in with his academic work. *Id.*

Under these circumstances, it would have been fair to impute income commensurate with an adjunct professor position, with adjustments if Dr. Ben-Artzi's position improved.

In her successful bid for relocation in May, 2013, Ms. Hopson acknowledged Dr. Ben-Artzi's poor job prospects.

⁴ Appellant is filing a Supplemental Designation of Clerk's Papers with the Whatcom County Superior Court today.

He is unable to get a job due to “blowing the whistle” on his former employer, Deutsche Bank. His status as a whistleblower has made it difficult for him to find employment . . . Eric’s employment prospects have suffered as a result of his poor relationships with his superiors . . . Even his dissertation adviser has publicly spoken out against him.

CP 17-18. Ms. Hopson pointed this out to justify the need to move to Ohio where she would have more support from her parents. CP 12-23.

Ms. Hopson should have been estopped from changing her position in the context of child support.

Judicial estoppel applies “only if a litigant’s prior inconsistent position benefited the litigant or was accepted by the court” Either of these two results permits the application of judicial estoppel. Both are not required.

Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 230-31, 108 P.3d 147, 151 (2005) (quoting *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 909, 28 P.3d 832 (2001)). There is no requirement that the litigant intentionally misled the court. *Cunningham*, 126 Wn. App at 233.

Here, Ms. Hopson argued that Dr. Ben-Artzi had few job prospects and therefore, the Court should permit relocation. Her position benefitted her as a litigant and was apparently accepted by the Court. She then took the opposite position at trial, in an effort to increase her child support. This Court should reject such tactics and hold Ms. Hopson to her initial position. It would then be undisputed that Dr. Ben-Artzi had no lucrative

job prospects and that the only useful historical data would be his work at OSU.

For these reasons, the Court should find it an abuse of discretion to impute income nearly three times higher than anything Dr. Ben-Artzi had earned since being fired from Deutsche Bank.

F. IF THE TRIAL COURT INTENDED DR. BEN-ARTZI TO PAY FOR A LIFE INSURANCE POLICY IN FAVOR OF MS. HOPSON, THAT WOULD BE AN ABUSE OF DISCRETION

Once again, conflicting provisions in the Findings and Conclusions make it difficult to address the trial court's ruling.

Because of the Husband's intransigence and pattern of misconduct, *he should be ordered to pay the Wife for her to maintain a life insurance policy insuring his own life* for so long as he has obligations owed to her or children under the Decree or an Order of Child Support. He has referred to threats to his safety due to his whistle blowing actions, which is supported by evidence in the record of untimely and unique whistle blower deaths.

Husband is ordered to cooperate with Wife to facilitate her purchase of term life insurance in an amount up to \$2,000,000, insuring Husband's life, with Wife a beneficiary. *Wife shall pay the premiums on this policy.* If Husband does not cooperate in the purchase of the policy, or takes any action resulting in a loss of coverage, he may be found in contempt and Husband and/or his estate will be required to reimburse Wife for any losses she suffers due to the loss of this life insurance.

CP 226. (emphasis added). The Decree of Dissolution at para. 3.15.6 states that Ms. Hopson must pay the premiums, and that the policy must be “not less than one million dollars.” CP 258.

Unless Ms. Hopson argues otherwise in her response brief, Dr. Ben-Artzi will assume that the second and third clauses control, that is, that the life insurance policy will be at Ms. Hopson’s expense. In view of the many financial burdens otherwise placed on Dr. Ben-Artzi, any other ruling would be an abuse of discretion.

G. THE LARGE AWARDS OF MAINTENANCE AND ATTORNEY FEES CONTRIBUTED TO AN UNREASONABLE OVERALL FINANCIAL BURDEN ON DR. BEN-ARTZI

Petitioner understands that awards of maintenance and attorney fees are generally left to the discretion of the trial court. He raises those issues here, however, because those awards contributed to an unreasonable overall financial burden.

The trial court ordered Dr. Ben-Artzi to pay \$3,000 per month in maintenance until April 30, 2015, and then \$2,500 per month until April 30, 2017. CP 255. As Dr. Ben-Artzi pointed out in his written testimony, he had no ability to pay for maintenance, and the relocation was itself sufficient to get Ms. Hopson back on her feet financially.

Gillian convinced the Court to allow the boys’ relocation partly on the basis of the comfortable position she enjoys here in Ohio. Her parents bought a house where

she and the boys live. Gillian's father, who lives in a house adjacent to Gillian and the boys, has an MBA from Harvard, and has been a senior executive for many years. In recent years, he has worked for private equity firms known for their enormous compensation packages. Gillian has a good teaching job – which apparently she could not obtain in Bellingham. She is in her early thirties, and is part of a tight-knit community where she attended high school and has many connections. On the other hand, I have few connections in Ohio, and have been unemployed for almost three years (with the exception of the temporary position at OSU). I am in my forties. I am broke. Like many other middle-aged, long-term unemployed people, my financial future is not bright. The preliminary ruling on maintenance would bury me under a mountain of crushing debt, which I have no realistic hope of repaying. As discussed above, a crushing financial burden would not only be unfair, it would also be counter-productive, hindering efforts to re-launch my career.

I suggest that, under the circumstances, granting the relocation was itself sufficient for her to start out on her own.

CP 84-85. *See also*, RP 127 (testimony of Ms. Hopson confirming that her parents went to Harvard Business School and her mother has a Ph.D in education from Penn. State). The Court also awarded \$45,000 in attorney fees. CP 252. Thus, the overall financial picture included the following:

- Ms. Hopson took out over \$40,000 in community funds.
- Ms. Hopson was granted the entire \$140,000 IRA.
- Dr. Ben-Artzi was ordered to pay child support based on an imputed income of \$100,000, although he had not earned more than \$35,000 since being terminated from Deutsche Bank.

- Dr. Ben-Artzi was ordered to pay \$45,000 of Ms. Hopson's legal fees.
- Dr. Ben-Artzi was ordered to pay \$3,000 per month in maintenance.
- The division of the potential whistleblower awards – which were Dr. Ben-Artzi's only hope of meeting all these obligations – were structured to ensure that he would receive little or nothing.

In short, the trial court imposed impossible financial obligations on Dr. Ben-Artzi, which he can never hope to meet. The Court should find the overall outcome to be an abuse of discretion.

**V.
CONCLUSION**

Based on the foregoing argument, this Court should reverse the trial court and remand for further proceedings.

DATED this 15th day of September, 2014.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below and in the manner listed below, I served one copy of this brief on the following:

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