89265-2

Supreme Court No.
Court of Appeals No. 43574-8-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

RONALD L. GATES, Respondent
vs.
KYON BRUNDAGE, Appellant

Lewis County Superior Court
Cause Nos. 11-3-00226-0
The Honorable Judge Nelson E. Hunt

Petition for Discretionary Review

Kyon Brundage
511A Highway 603
(623) 680-6886

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A. IDENTITY OF PETITIONER

Kyon Brundage asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Kyon Brundage seeks review of the Order Denying Motion to Modify filed in Division II on August 7, 2013. A copy of the Order Denying Motion to Modify is in Appendix A. A copy of the Ruling Granting Motion on the Merits to Affirm is in Appendix B.

C. ISSUES PRESENTED FOR REVIEW

I. Ms. Brundage sought a continuance in the trial court because of a conflict of her attorney's schedule. Her continuance was denied, forcing her to act as her own attorney in a case that involved $487,000 of her own separate property that was free and clear prior

to the marriage. The Court of Appeals affirmed that decision.

When a continuance of a few weeks is requested a month before trial because a party is attempting to retain counsel who has a conflict on the date of trial and the requested time for trial would place it at approximately one year from the time of filing and the case had previously been continued by agreement of the parties because of an ongoing need for discovery and the fact that on the prior trial date it was very unlikely that they would go to trial due to a murder trial set for the same week, was it in error for the court to deny a continuance of a few weeks to allow the requesting party to be represented by counsel?

II. The trial court awarded Mr. Gates six pieces of real estate that Ms. Brundage owned prior to the marriage free and clear.

Was it proper for the trial court award the separate property of one spouse to the other?

III. The Commissioner awarded attorney's fees to Mr. Gates based upon his opinion that the case was clearly without merit.

a. This case is clearly not frivolous.

b. The Commissioner should have considered ability to pay versus needs.

D. STATEMENT OF THE CASE

A decree of dissolution of marriage was entered on May 10, 2012. The notice of appeal was filed with the court on May 30, 2012. Ms. Brundage is appealing the denial of her motion for continuance which was made on April 20, 2012. It is Ms. Brundage's position that error was committed when Judge James W. Lawler denied Ms. Brundage's request to continue the trial date for a couple of weeks. She brought the motion because the attorney that she was attempting to hire was not available on the day of the trial. Her first attorney quit because he got mad at her for double checking some information she had received from him regarding survivor's beneficiary benefits. She let

her second attorney go because he quoted her $3000 up front and another $3000 after the divorce. But after the second settlement conference, he increased his fee to $25,000 up front, which she could not afford.

The new court date would have put the trial at one year from the date of filing. The denial of continuance put Ms. Brundage in a position where she was unable to proceed with counsel at trial. As a result, this 71-year-old Korean woman who worked very hard all her life, with no knowledge of the legal system and speaking English as her second language, was forced to proceed to trial on her own. A trial with 112 ER 904 exhibits which ultimately became 120 exhibits at trial.

Ms. Brundage has no legal training. She did not know how to make an opening argument. She did not know how to make an objection, nor did she know the rules of evidence. She did not know how to question witnesses. She did not know how to call witnesses. Ms. Brundage also has a hearing disability. English is her second language.

Mr. Gates' attorney was able to ask leading questions because Mrs. Brundage

did not know how to object. She submitted evidence that was inadmissable because Ms. Brundage did not know how to object.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. RAP 13.4 (b)(1) and (b)(2) provide that a petition for review will be accepted by the Supreme Court if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court or another Court of Appeals decision.

I. CONTINUANCE

The decision of the Court of Appeals is in conflict with *Chamberlin v. Chamberlin*, 44 Wash. 2d 689, 703, 270 P.2d 464 (1954). Cited in Ms. Brundage's Answer to Motion on the Merits, page 7; Motion to Modify Ruling, page 5, line 15; Reply to Answer to Motion to Modify Ruling, page 6, line 7; Appellant's Reply Brief, pages 17, 18, 19; Appellant's Brief, page 16, 17.

In defining an abuse of discretion the *Chamberlin* court further commented that:

> a continuance should be granted if a denial thereof would operate to delay or defeat justice; and courts have been said to be liberal in continuing a cause when to do otherwise would deny applicant his day in court. (at 703)

In short, this determination of a continuance requires a consideration of the facts on the record with an eye to providing the applicant, the party moving for the continuance, his day in court. In this case, Ms. Brundage was clearly denied her day in court. The failure to grant a continuance of a couple of weeks, when that could make the difference between her being represented by counsel or not, was an abuse of discretion.

The case of *Chamberlin* and the cases cited therein were specifically on point with a dissolution of marriage case and clearly showed that this case presented a manifest abuse of discretion. In that case the State Supreme Court dealt with a continuance specifically in the context of a dissolution of marriage. In that case they defined "abuse of discretion as follows:

> The meaning of the term 'abuse of judicial discretion' as applied to divorce cases is not confined to deciding a case by whim, caprice or arbitrary deciding a case by whim, caprice, or arbitrary conduct, through ulterior motives or in willful disregard of a litigant's rights, but it also includes a discretion exercised upon ground or to an extent clearly untenable or manifestly unreasonable. Holm v. Holm, 27 Wash.2d 456, 178 P2d 725; Gordon v. Gordon, Wash., 266 P.2d 786.

In the case of Ms. Brundage, based upon the above standard, the trial date should have been continued a few weeks. First of all, the continuance would not have been unduly delayed or defeated justice. Although Mr. Gates argued that he was not getting any younger, there was no evidence presented to the court to indicate that he was in imminent danger of death. He is still alive today and living alone without any assistance. His argument that it would cost him more money was completely unsubstantiated in the record by anything other than the normal amount of attorney fees that may be associated with the motion to continue the case. There was nothing extraordinary in this at all. There was also nothing in the record to show that Mr. Gates would have otherwise been prejudiced in any degree in the presentation of his case.

However, the situation was the reverse for Ms. Brundage. The failure to continue the case a matter of a few weeks, denied her the ability to have counsel present at the trial. She did not have the education, training, or background to properly represent herself and did not know what she was doing at trial. English for her was a second language, as she is a Korean

native. At 71 years of age, she also suffered from hearing loss. This was a very involved case with a 112 ER 904 documents that had been admitted, as well as additional exhibits that were presented at trial. The case involved complicated financial issues with an outcome to her that would approach $500,000. The denial came 19 days before the trial date and whereas Ms. Church believed that she could be ready for trial if it were continued a couple weeks, it was virtually impossible for another attorney to get ready for trial as complicated as this was in a mere 19 days.

The irony in all this is that when the court made the decision to deny the continuance, the judge admitted on the record that there was a good likelihood that the case would end up getting continued anyway. Even in the face of that, the court denied the motion. This also further mitigates against there being any serious delay or defeat of justice if the case were continued because the judge was well aware that the case was likely to be continued in any event. However, in this case, by chance, the case went out on the assigned trial date. Clearly, in this case, the continuance would not have operated to delay or defeat justice, but it also very clearly denied the applicant, Ms. Brundage, her day in court. Under this analysis, the case law clearly favors a continuance for Ms. Brundage, and it was a manifest abuse of discretion for the court to deny it. Therefore, the Commissioner was clearly in error when he ruled that Ms. Brundage's case was "clearly without merit".

The decision of the Court of Appeals also conflicts with *In re V.R.R.*, 134 Wash. App. 573, 141 P.3d 85, 89 (2006). Cited in Appellant's Brief, page 13; Appellant's Reply Brief, page 16, 17, 21; Motion to Modify Commissioner's Ruling, page 5, line 6.

The standard for review of a motion for continuance is for an abuse of discretion. The case of *In re V.R.R.*, 134 Wash. App. 573, 141 P.3d 85, 89 (2006) presented the standard as follows:

> We review a trial court's decision to deny a continuance for manifest abuse of discretion. City of Tacoma v. Bishop, 82 Wash.App. 850, 861, 920 P.2d 214 (1996). A trial court abuses its discretion when it exercises that discretion based on untenable grounds or reasons. State ex rel Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). In deciding a motion to continue, the trial court takes into account a number of factors, including diligence, due process, the need for an orderly procedure, the possible effect on the trial, and whether prior continuances were granted. Bishop, 82 Wash.App. at 861, 920 P.2d 214. When denial of a motion to continue allegedly violates constitutional due process rights, the appellant must show either prejudice by the denial or the result of the trial would likely have been different if the continuance was granted. State v. Tatum, 74 Wash.App. 81, 86, 871 P.2d 1123, rev. denied, 125 Wash.2d 1002, 886 P.2d 1134 (1994). (at 580-581)

The above case involved a termination of parental rights following a dependency. The father had counsel represent him in the dependency. The petition for termination of parental rights was filed in August 2004 and the father, representing himself, participated in a court hearing on August 12, 2004. On October 25, 2004 a notice of the trial date was set for a two-day trial on January 25, 2005. The father did not get counsel appointed until the day before trial (there was nothing in the record to indicate why the attorney was appointed the day before the hearing). It was the same counsel that had represented him previously in the dependency. The father's attorney requested a continuance from the attorney for DSHS and it was agreed to, until father failed to show up for trial the next day. The father had missed the bus. The father's attorney's motion to continue the trial so that he could prepare was denied. The attorney for DSHS opposed the motion because the father was not present and the Guardian ad Litem opposed the motion because the father's attorney had represented him in the dependency proceedings and because the matter "had been pending for at least three years and the children needed resolution." (at 579) The trial court denied the motion to

continue the trial.

In its analysis reversing the trial court, the court cited the case of *City of Tacoma v. Bishop,* 82 Wash. App. 850, 920 P.2d 214 (1996) where Bishop had been given several continuances to allow him to obtain counsel and he had failed to do so. Finally, the court in that case denied his request for continuance and forced him to go to trial. In that case, Division II, ruled that Bishop's conduct was not sufficiently egregious to forfeit his right to representation and reversed because the court had not warned him of the consequences of his failure to obtain an attorney. (Bishop, at 860)

The Court next considered the case of *In re Welfare of G.E.,* 116 Wash. App. 326, 65 P.3d 1219 (2003) where the father had gone through three appointed attorneys and then on the day of trial he wanted a new attorney and a continuance. The court allowed his third attorney to withdraw, but did not appoint new counsel and required him to represent himself.

Once again, Division II ruled that this was not sufficient to deny him his right to counsel. (at 337)

Citing these cases, the Court in *In re V.R.R.*, supra, concluded that the father's conduct was not such that a continuance should not have been granted. As a result, they reverse the trial court.

In the case of Ms. Brundage, she had never been long without an attorney. When her first attorney withdrew on January 31, 2012, 13 days later she had a new attorney. After the notice of withdrawal of the second attorney, a limited notice of appearance was filed by Ms. Church three weeks later. It also has to be borne in mind that Ms. Brundage was residing in Arizona at this time and even despite the fact that she was residing out of state, she had still obtained new counsel in relatively short periods of time.

There also was no proof that she fired her second attorney or that she

was hiring Ms. Church in order to get a continuance. If she were in fact trying to get a continuance, would it not have made more sense to request a continuance in excess of a couple weeks? There was nothing here to substantiate any inference that she was seriously seeking to delay the trial. She clearly was acting with due diligence to obtain counsel at all times.

The decision of the Court of Appeals also conflicts with *Balandzich v. Demeroto*, 10 Wash. App. 718, 519 P.2d 994 (1974). Cited in Answer to Motion on the Merits, page 8; Reply to Answer to Motion to Modify Commissioner's Ruling, page 7, line 19; Motion to Modify Commissioner's Ruling, page 9, line 14; Appellant's Reply Brief, pages 4, 10, 24.

Probably the closest thing to providing a standard for an abuse of discretion comes from the case of *Balandzich v. Demeroto*, 10 Wash. App. 718, 519 P.2d 994 (1974). That case laid out six items for the court to consider in making its decision in regard to a continuance motion and our analysis, which is spelled out fully in our reply brief on pages 4-10. The

analysis of that case shows that in this case the failure to grant the continuance was an abuse of discretion.

II. PROPERTY

The decision of the Court of Appeals is in conflict with *In re Estate of Borghi*, 167 Wash. 2d 480, 484-85, 219 P.3d 932, 935 (2009). Cited in Appellan't Brief, page 19, 20; Appellant's Reply Brief, page 22.

Without an attorney to represent her, Ms. Brundage lost six pieces of her best income-producing real estate that she owned prior to the marriage free and clear. Those were the best pieces of her separate property, ready to sell. In the case of *In re Estate of Borghi,* 167 Wash. 2d 480, 484-85, 219 P.3d 932, 935 (2009) the State Supreme Court stated:

> Once the separate character of property is established, a presumption arises that it remained separate property in the absence of sufficient evidence to show an intent to transmute the property from separate to community property. 19 Weber, supra, at 134. As we stated in Guye v. Guye, 63 Wash. 340,

115 P. 731 (1911):

> Moreover, the right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear. Id. at 352, 115 P. 731. (at 484)

The decision of the Court of Appeals conflicts with *Matter of Marriage of Olivares*, 69 Wash. App. 324, 848 P.2d 1281(1993). Cited in Appellant's Brief, page 20; Appellant's Reply Brief, page 20.

In regard to the division of separate property, in the *Matter of Marriage of **Olivares**,* 69 Wash. App. 324, 848 P.2d 1281(1993) *disapproved of on other ground by In re Estate of Borghi,* 167 Wash. 2d 480, 219 P.3d 932 (2009) the court stated:

> Only in unusual circumstances would the trial court award the separate property of one spouse to the other. *Merkel v. Merkel,* 39 Wash.2d 102, 115, 234 P.2d 857 (1951). (at 330)

Against this jurisprudential backdrop, Judge Hunt awarded Mr. Gates six pieces of Ms. Brundage's best income-producing separate property that were free and clear and ready to sell. Those properties were for Ms. Brundage's retirement after running a successful business for 30 years.

III. ATTONRNEY'S FEES

The decision of the Court of Appeals is in conflict with *In re Marriage of Muhammad*, 153 Wash.2d 795, 108 P.3d 779 (2005). Cited in Motion to Modify Ruling, page 12, line 12; Reply to Answer to Motion to Modify Commissioner's Ruling, page 10, line 22.

The request for attorney fees in the motion on the merits was brought under RAP 18.9(c) under the claim that the appeal was frivolous. The Commissioner did not find in his ruling that the appeal was frivolous and did not award fees under RAP 18.9(c). Instead, he awarded fees under RCW 26.09.140.

RCW RCW 26.09.140 allows for an award of attorney fees, but the standard of needs versus ability to pay applies to both the trial court level as well as on appeal. The Court in the case of *In re Marriage of Muhammad*, 153 Wash.2d 795, 108 P.3d 779 (2005) stated as follows:

> An award of attorney fees and costs may be granted in an appellate court's discretion under RCW 26.09.140. Upon a request for fees and costs under RCW 26.09.140, courts will consider "the party's relative ability to pay" and "the arguable merit of the issues raised on appeal." In re Marriage of Leslie, 90 Wash.App. 796, 807, 954 P.2d 330 (1998). In this case, we find that the issue raised by Gilbert on appeal had considerable

> merit. However, the current economic circumstances of the parties are unknown. Accordingly, upon remand, the parties may submit evidence regarding Muhammad's ability to pay attorney fees associated with the appeal and the trial court may order such payment if appropriate. (at 807)

Therefore, even when attorney fees are awarded on appeal, there must still be a determination by the court that one party has a need and that the other party has the ability to pay.

In the case of Ms. Brundage, she provided a financial declaration in her answer to the motion on the merits in Appendix 1 at page 10, the attachment to the Responsive Declaration of Kyon Brundage signed October 2, 2012. (Appendix C) In that, she provided a financial statement for the months of July, August, and September showing that her total income from rental property and SSI was between $1865.50 and $1570 and her expenses ranged from $3145.79 to $2726.31 during that time period. In short, her expenses were in excess of her income. In addition, if this appeal is lost, then she as also lost property worth $487,000 to Mr. Gates.

The decision of the Court of Appeals also conflicts with *Spreen v. Spreen*, 107 Wash. App. 341, 28 P.3d 769 (2001). Cited in Motion for Discretionary Review, page 14.

RCW 26.0 9.140 has generally been analyzed on a needs versus ability to pay basis. In this regard in ***Spreen v. Spreen***, 107 Wash. App. 341, 28 P.3d 769 (2001) Division II stated:

> Under RCW 26.09.140, the court may award attorney fees to either party in a maintenance action. In determining whether it should award fees, the court considers the parties' relative need versus ability to pay. *In re Marriage of Shellenberger,* 80 Wash.App. 71, 87, 906 P.2d 968 (1995). We review this decision for abuse of discretion. *In re Marriage of Terry,* 79 Wash.App. 866, 871, 905 P.2d 935 (1995). We will reverse an attorney fees award if the decision is untenable or manifestly unreasonable. *In re Custody of Salerno,* 66 Wash.App. 923, 926, 833 P.2d 470 (1992).(at 351)

In the case of Mr. Gates and Ms. Brundage it is interesting to note that there was no award of attorney fees for Mr. Gates in the dissolution of marriage proceeding. There was also no analysis or finding by the trial court in its decision on the motion for a stay to determine Mr. Gates' financial need and Ms. Brundage's ability to pay. Therefore, this award of attorney fees at this

time and under these circumstances was an abuse of discretion and should be reversed as a condition for the stay. It is also probable error on the part of the Court of Appeals to have upheld this decision. As a result, this Court should accept review and reverse the trial court.

The decision of the Court of Appeals is in conflict with *Kinney v. Cook*, 150 Wash. App. 187, 208 P.3d 1, 5 (2009). Cited in Answer to Motion on the Merits, page 10.

In that case the court stated in part:

> "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal." Lutz Tile, Inc. v. Krech, 136 Wash.App. 899, 906, 151 P.3d 219 (2007), review denied, 162 Wash.2d 1009, 175 P.3d 1092 (2008). Further, all doubts as to whether an appeal is frivolous are resolved in favor of the appellant. Id. (at 195)

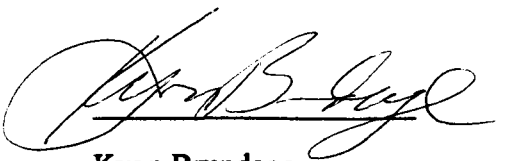
All doubts are to be resolved in favor of the appellant.

CONCLUSION

The denial of a continuance in this case was a clear abuse of discretion. The request for the continuance was to enable Ms. Brundage's new attorney to be present at trial due to a prior conflict. The requested continuance was for a very short period of time consisting of a few weeks. It would have placed the trial at approximately one year from the date of filing. There was no proof of any intent to hire new counsel in order to obtain a delay in the trial and there was no showing of any harm to Mr. Gates by the continuance other than an unspecified amount of attorney fees. At the time the continuance was requested, its denial insured that Ms. Brundage would be unable to be represented by counsel at the trial. Under these facts it was an abuse of discretion to deny the motion for a short continuance and require a 71-year-old woman with no legal training to represent herself pro se in the dissolution proceedings. For the foregoing reasons, this Court must reverse the decision of Judge Lawler denying the continuance and remand the case for a new trial.

This court must also reverse the Commissioner's award of attorney's fees.

Respectfully submitted this 9th day of September, 2013.



Kyon Brundage

Appellant, Pro Se

APPENDIX

A

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE MARRIAGE OF:

RONALD L. GATES,

Respondent,

and

KYON BRUNDAGE,

Appellant.

No. 43574-8-II

ORDER DENYING MOTION TO MODIFY

Appellant Kyron Brundage's motion to modify the commissioner's April 12, 2013 ruling granting Respondent Ronald L. Gates's motion on the merits is denied. In reaching this decision, the court has not considered any of the materials noted in Appellant's motion to strike; accordingly, the motion to strike is moot. Finally, because Brundage filed a timely answer to the motion to modify, her motion for extension of time is moot. Accordingly, it is

SO ORDERED.

DATED this 7th day of August, 2013.

PANEL: Jj. Hunt, Bjorgen, Johanson

FOR THE COURT:

Johanson, A.C.J.
ACTING CHIEF JUDGE

APPENDIX

B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE MARRIAGE OF: RONALD L. GATES, Respondent, and KYON BRUNDAGE, Appellant.	No. 43574-8-II RULING GRANTING MOTION ON THE MERITS TO AFFIRM

Kyon Brundage appeals the trial court's order dissolving her marriage to Ronald Gates. Gates filed a motion on the merits to affirm under RAP 18.14(e)(1). Concluding that Brundage's appeal is clearly without merit, this court grants the motion on the merits to affirm the trial court's order.

In June 2011, Gates petitioned to dissolve his marriage to Brundage. On August 19, 2011, Robert Schroeter filed a notice of appearance for Brundage. On October 20, 2011, the trial court set a trial date of February 29, 2012, and a

settlement conference for January 31, 2012. On January 31, 2012, by stipulation of the parties, that trial date was stricken. On that same day, Schroeter filed a notice of intent to withdraw as Brundage's attorney.

On February 13, 2012, Dana Williams filed a notice substituting himself as Brundage's attorney. On February 14, 2012, the trial court set a trial date of May 9 and 10, 2012, and a settlement conference for March 13, 2012. On March 14, 2012, Williams filed a notice of intent to withdraw as Brundage's attorney, stating that he had been discharged by Brundage.

On April 11, 2012, Roberta Church filed a limited notice of appearance for Brundage. In her notice, Church stated "[t]his notice of appearance will not take effect until June 1, 2012 and assumes that the trial dates of May 9-10, 2012 will be continued." Clerk's Papers (CP) at 60. That same day, Brundage filed a pro se motion to continue the trial dates. Gates opposed the motion. The trial court denied the motion to continue, ruling that:

> The Court finds this matter has a long history. The trial has been reset once already & the court does not want to encourage the hiring & firing of attorneys to continue trials.

CP at 66.

Brundage represented herself at the trial on May 9 and 10, 2012. She did not make another motion to continue the trial. On May 10, 2012, the trial court findings of fact, conclusions of law and a decree dissolving the marriage of Gates and Brundage. The trial court awarded Gates some of Brundage's separate property, making the following Finding of Fact:

> **2.21 Other:** The petitioner was a vulnerable adult & the respondent violated her fiduciary duty to protect his assets under the Power of Attorney by total destruction of the petitioner's financial well-being. The evidence presented showed the respondent did this by keeping rents received instead of applying the rent to the mortgage payments, which would have covered most of the mortgage; by allowing foreclosure of the petitioner's real property and not taking any action to save the petitioner's property; by not taking care to protect the petitioner's Centralia property to the point that it was condemned; by not making any payments on the petitioner's credit card obligations resulting in lawsuits & judgments against the petitioner; by withdrawing the petitioner's retirement funds and purchasing real property in her name; by using credit cards in petitioner's name for her own purposes; by transferring balances from her debt to credit cards in petitioner's name; most egregious is the transfer by respondent of petitioner's vehicle to her own name the day the power of attorney was revoked.
>
> The court does not find the respondent's testimony credible that the petitioner told her not to pay his financial obligations. If he understood his financial situation he would [not] need a power of attorney. Further, she let all of petitioner's assets go, but managed to save all of her property in a down economy.

CP at 70-71.

First, Brundage argues that the trial court abused its discretion in denying her motion to continue the trial. She contends that in deciding a motion to continue, the trial court is to take into account a number of factors, including diligence, due process, the need for orderly procedure, the effect on the trial, and whether prior continuances were granted. *In re Dependency of V.R.R.*, 134 Wn. App. 573, 580-81, 141 P.3d 85 (2006) (citing *City of Tacoma v. Bishop*, 82 Wn. App. 850, 861, 920 P.2d 214 (1996)). Brundage contends that these factors demonstrate that the trial court abused its discretion in denying her motion for a continuance. *V.R.R.*, 134 Wn. App. at 580. She notes that she moved for a continuance within three weeks of the withdrawal of her second attorney,

demonstrating diligence, and that she was only seeking a short continuance, demonstrating that it would have had little effect on the trial. Finally, she contends that the denial of the continuance forced her to represent herself, which she was ill prepared to do, so the denial of the continuance did not operate in the furtherance of justice. *Chamberlin v. Chamberlin*, 44 Wn.2d 689, 703, 270 P.2d 464 (1954).

V.R.R. and *Bishop* do not set the applicable standard for this case because in each, the party seeking a continuance of the trial date in order to obtain counsel had a right to appointed counsel. Where, as here, the party does not have a right to counsel, in exercising its discretion whether or not to grant a continuance, the trial court is to consider:

> the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court.

Trummel v. Mitchell, 156 Wn.2d 653, 670-71, 131 P.3d 305 (2006) (citing *Balandzich v. Demeroto*, 10 Wn. App. 718, 720, 519 P.2d 994, *review denied*, 84 Wn.2d 1001 (1974)).

This court reviews the trial court's exercise of its discretion for manifest abuse, which occurs when the decision is clearly untenable or manifestly unreasonable. *Trummel*, 156 Wn.2d at 670-71. In denying Brundage's motion to continue the trial, the trial court considered the need for reasonably prompt disposition of the litigation, particularly given the age and ill health of Gates,

Brundage's need for counsel, the possible prejudice to Gates, and Brundage's history of having had two attorneys withdraw already and having retained an attorney who was not available for the scheduled trial date. In concluding that these factors militated toward a denial of Brundage's motion, the trial court did not manifestly abuse its discretion.

Second, Brundage argues that the trial court erred in finding that Gates was a vulnerable adult under former RCW 74.34.020(17)(a) (Laws of 2011, ch. 89 § 18). However, as Gates responds and Brundage concedes in her reply brief, that finding, even if made under that statute, was not pertinent to the trial court's decision on distribution of the couple's property. As the finding is surplusage, this court declines to review it. And even if it did review the finding, the evidence of Gates's ill health, which precipitated the creation of the power of attorney that Brundage used, would adequately support the finding.

An appeal is "clearly without merit" under RAP 18.14(e)(1) if the issues on review:

> (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court . . . .

Brundage's appeal is clearly without merit, under RAP 18.14(e)(1)(b) and (c). Accordingly, it is hereby

ORDERED that Gates's motion on the merits is granted and that the trial court's order is affirmed. It is further hereby

ORDERED that Gates's request for an award of appellate attorney fees and costs, under RCW 26.09.140, is granted. Upon compliance with RAP 18.1, a commissioner of this court will make an appropriate award of attorney fees and costs.

DATED this 12th day of April, 2013.

Eric B Schmidt

Eric B. Schmidt
Court Commissioner

cc: Clayton R. Dickenson
Robert M. Hill
S. Tye Menser
Hon. Nelson E. Hunt

APPENDIX

C

SUPERIOR COURT OF WASHINGTON
COUNTY OF LEWIS

In re the Marriage of: **RONALD L. GATES** Petitioner, and **KYON BRUNDAGE** Respondent.	CAUSE No. 11-3-00226-0 RESPONSIVE DECLARATION OF KYON BRUNDAGE

I declare and state as follows:

I make this declaration in response to the motion for contempt. First of all, my attorney has advised me that for contempt it has to be shown I have the ability to make the payments and that I am intentionally refusing to do so. At this time I owe my attorney over $5000 that I have been unable to pay. In addition to that it should be noted that Mr. Gates is well aware of my low income. In Sharon Gates' declaration signed June 6, 2012, page 2 beginning at line 14, it reads:

> Kyon only has a small Social Security income and rental income from the properties awarded to her in the dissolution. Kyon does not have enough to maintain the taxes, insurance and upkeep on the properties.

Now they're asking this court to put me in jail for not paying $6500 in attorney fees.

Law Offices of Clayton R. Dickinson
6314 19th Street West, Suite 20
Fircrest, WA 98466-6223
Tel.: (253) 564-6253
Fax: (253) 564-6523

I would ask for attorney fees for having to respond to this motion. Clearly they know that I do not have the money to pay their fees at this time. I did not have enough money to pay for an attorney in the dissolution of marriage. I had to borrow the money to pay my current attorney to represent me in the appeal and he now needs more money in order to proceed. Mr. Gates also had me removed from the property in Arizona where I was living. He knows very well the financial box that I am in and it is frivolous for him to be bringing this motion at this time.

Is my understanding that this court did not find me in contempt at the last hearing for not paying the $5000 attorney fees for the appeal due to the confusion whether the fees were to be paid as a part of a condition of the supersedeas bond or independently of that. Unfortunately when the order was presented it was written stating that there was contempt. When my attorney became aware of this after the hearing, he did not pursue the matter because I did not have the money to pay the fees by the 24th of August and the cost of my attorney going back to Lewis County to argue about it would have just run up fees. However, at this time I am aware that the court order did state that I was in contempt and did give Mr. Gates a judgment. I have not contested that judgment and I understand that judgments run with interest. However, there is no reason to run up fees and costs just to get a judgment for $147.39 interest. The only other reason that Mr. Gates is insisting on this motion is to put me in jail.

Attached hereto and Incorporated herein by reference is a financial statement listing my finances for July, August, and September. It should be noted that my income never exceeded $1865.50 during this time and for the month of September it was $1570. Fortunately, my expenses over that three-month period of time also decreased

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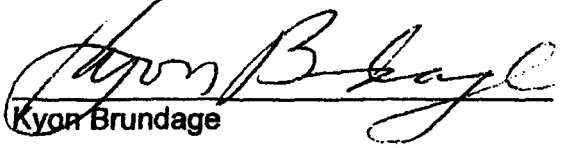
but the lowest month was still $2746.31, over $1200 more than my income. This does not include the debt payments that I have to make every month which is listed below my other debts. For the month of September that was $803. Basically I am roughly over $2000 a month in the red every month. A few of those expenses, Avondale Water, Universal Insurance Avondale, and SRP are for expenses associated with the residence I was living in an Avondale before I was removed from the property. However, that only comes to $299.20 a month. The bottom line is I do not have the funds to make the payments on those attorney fee judgments at this time and Mr. Gates is well aware of that. I would ask the court to deny his motion and order attorney fees to me for having to respond to this motion.

I would also remind the court that Mr. Gates moved for an emergency hearing in regard to the lis pendens that I filed on the properties. My attorney, who does not specialize in real estate, had to bill me for additional research that he had to do in order to show that what I had done was appropriate. Those are additional fees and expenses that I had to incur as a result of an improper motion brought by Mr. Gates. I believe that this current motion is being brought for purposes of harassment and to run up unnecessarily fees and costs. As a result, and in light of the prior motion, I would ask for attorney fees in the amount of at least $1500 for having to respond.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Fircrest, Washington, on this the 2nd day of October, 2012.



Kyon Brundage

Law Offices of Clayton R. Dickinson
6314 19th Street West, Suite 20
Fircrest, WA 98466-6223
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Fax: (253) 564-6523

FINANCIAL STATEMENT FOR KYON BRUNDAGE

2012	JULY	AUGUST	SEPTEMBER
INCOME			
RENT	1017.5	936.9	722
SSI	848	848	848
TOTAL	1865.5	1784.9	1570

MONTHLY EXPENSES	JULY	AUGUST	SEPTEMBER
AMEX	170	207	205.01
CAPITAL ONE	470.6	85	60
B OF A LOAN (509)	1272.25	1272.25	1272.25
NHWA WATER (509)		113.2	
NHWA WATER (511)		38	
PUD	370	370	370
COX	30	30	30
SRP	137.58	127.69	110
AVONDALE WATER	70.69	68.53	58.2
VERIZON	69.22	112.44	84.4
SAFECO INSURANCE	234.45	234.45	235.45
WELLS FARGO (CAR)	190	190	190
UNIVERSAL INS. AVONDALE	131	131	131
TOTALS:	3145.79	2979.56	2746.31

CREDIT CARD DEBT ACCRUED TOWARD PURCHASE OF PRIMARY HOME IN AVONDALE, AZ

	TOTAL DEBT	JULY (MIN)	AUG (MIN)	SEPT (MIN)
BofA	21,000.00	186.00	184.00	180.00
BofA	4,000.00	67.00	65.00	63.00
DISCOVER 0360	12,000.00	225.00	203.00	199.00
DISCOVER 2803	6,000.00	107.00	105.00	103.00
CAPITAL ONE 7974	6,700.00	63.00	61.00	59.00
CHASE 5286	2,750.00	58.00	57.00	56.00
CHASE 6006	5,800.00	150.00	147.00	143.00
TOTAL:	58,250.00	856.00	822.00	803.00