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IN THE SUPREME COURT OF  
THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II NO. 43574-8-II

LEWIS COUNTY SUPERIOR COURT NO. 11-3-00226-0

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RONALD LAVERNE GATES,  
Respondent,

and

KYON CHA BRUNDAGE,  
Appellant.

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RESPONDENT'S ANSWER TO PETITION  
FOR DISCRETIONARY REVIEW

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**ORIGINAL**

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## I. INTRODUCTION

Appellant Kyon Brundage seeks to reverse rulings by the trial court in the dissolution trial that was held on May 9-10, 2012. Brundage changed attorneys multiple times prior to trial, trial was continued due to her conduct, and the court perceived that she was engaging in delay tactics. Her motion to continue trial was denied; she complained that the denial of a continuance was an abuse of discretion. Gates filed a Motion On the Merits and Motion To Dismiss, and the Court of Appeals granted it and awarded attorneys fees. Brundage now contends that this ruling directly conflicts with eight different prior appellate cases. It does not, and Brundage's Petition should be denied.

## II. STATEMENT OF FACTS

Ronald Gates ("Gates") and Kyon Brundage ("Brundage") were married on August 19, 2004 and separated on May 24, 2011.<sup>1</sup> A petition for dissolution was filed on June 8, 2011, served by mail in July, and trial was set for February 29, 2012.<sup>2</sup>

On the same day as the first settlement conference, January 31,

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<sup>1</sup>CP 2.

<sup>2</sup>CP 27.

2012 — *on Brundage's motion*<sup>3</sup> — an “Order Striking Trial Dates” was entered, “based upon the need for continuing discovery, and compliance with existing discovery requests,” as well as a potential scheduling conflict with the court.<sup>4</sup> The discovery issues were the result of Brundage’s — not Gates’s — failure to meet her discovery requirements.<sup>5</sup> Brundage’s change in attorneys also factored into the continuance.<sup>6</sup>

Brundage’s first attorney, Robert Schroeter, withdrew on February 1, 2012, the day after the first settlement conference and the day after the trial date had been moved.<sup>7</sup> On February 13, 2012, her second attorney, Dana Williams, substituted in and the court set a new trial date of May 9, 2012.<sup>8</sup> A second settlement conference was held on March 13, 2012, and on March 14, 2012, Mr. Williams withdrew Brundage fired him.<sup>9</sup> A third attorney, Roberta Church, entered a Limited Notice of Appearance for Brundage, signed April 4, 2012 — five weeks before the scheduled trial date — that would only become effective on June 1, 2012.<sup>10</sup> The Notice indicated that it “assumed” that the May 9 trial date would be continued.<sup>11</sup>

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<sup>3</sup>CP 51.

<sup>4</sup>CP 51.

<sup>5</sup>Brief of Respondent, Appendix, Verbatim Transcript of Proceedings (June 8, 2012) 17.

<sup>6</sup>RP (Apr. 20, 2012) 5; CP 64-65.

<sup>7</sup>CP 52-53.

<sup>8</sup>CP 54-57.

<sup>9</sup>CP 58-59; CP 64.

<sup>10</sup>CP 60.

<sup>11</sup>CP 60.

On April 11, Brundage filed a *pro se* motion to continue trial, signed April 5, and noted a hearing for April 20, 2012, with the docket notice signed by Church.<sup>12</sup>

At the April 20, 2012 hearing on the motion to continue, Gates argued prejudice,<sup>13</sup> the court denied the motion for a continuance, finding “this matter has a long history,” the fact that one continuance had already been granted, and further stating: “the court does not want to encourage the hiring and firing of attorneys to continue trials.”<sup>14</sup>

The trial began on May 9, 2012.<sup>15</sup> Brundage appeared without counsel and indicated that she was ready for trial.<sup>16</sup> Both parties came to the marriage with substantial separate property, including multiple pieces of real property.<sup>17</sup> The trial evidence established that as of a credit report dated March 2009, Gates had no delinquent accounts or late payments regarding his various assets.<sup>18</sup> Brundage admitted the same.<sup>19</sup>

On December 15, 2009, Gates had a debilitating stroke.<sup>20</sup> As a result, he was no longer able to care for himself, and his thought processes

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<sup>12</sup>CP 61-63.

<sup>13</sup>RP (Apr. 20, 2012) 5-6.

<sup>14</sup>CP 66; RP (Apr. 20, 2012) 7.

<sup>15</sup>1RP 1.

<sup>16</sup>1RP 3.

<sup>17</sup>1RP 4.

<sup>18</sup>1RP 46-48.

<sup>19</sup>2RP 22.

<sup>20</sup>1RP 17.

were no longer clear.<sup>21</sup> For this reason, on January 11, 2010, Brundage was given a power of attorney over Gates's affairs.<sup>22</sup> Gates presented evidence at trial establishing that Brundage breached her fiduciary duty to him after his stroke by: (1) allowing his real property to go into default and/or foreclosure by not making payments;<sup>23</sup> (2) failure to make credit card payments on Gates's accounts, though the charges were hers, resulting in multiple collections lawsuits against him;<sup>24</sup> (3) writing herself checks from Gates's accounts;<sup>25</sup> (4) keeping property rents for herself and not applying them to mortgage payments;<sup>26</sup> (5) allowing waste of personal assets;<sup>27</sup> (6) allowing renters to damage property so bad that property condemned by City;<sup>28</sup> (7) withdrawing \$55,000 from Gates's retirement account for her personal use;<sup>29</sup> and (8) signed his vehicles over to herself, in one instance after being given notice that her power of attorney was formally revoked.<sup>30</sup> Further, Brundage borrowed \$30,000 prior to the marriage from Gates and did not repay the money.<sup>31</sup> All in all, Brundage's

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<sup>21</sup> 1RP 17-18, 63; Appellant's Brief, Appendix A.

<sup>22</sup> 1RP 17.

<sup>23</sup> 1RP 75-77, 86-88, 89-90, 106-07.

<sup>24</sup> 1RP 42-43, 58-61, 73.

<sup>25</sup> 1RP 36.

<sup>26</sup> 1RP 75-76, 80-82, 88-89.

<sup>27</sup> 1RP 92, 98, 107-08.

<sup>28</sup> 1RP 85, 90.

<sup>29</sup> 1RP 24-25, 30, 32.

<sup>30</sup> 1RP 21-23; 2RP 45-46.

<sup>31</sup> 1RP 14.

waste and mismanagement over just 15 months reduced Gates's \$214,000 of net wealth to \$12,000.<sup>32</sup> Gates revoked the power of attorney on May 23, 2011.<sup>33</sup>

All through trial, the judge actively enforced the rules of evidence against Gates even where Brundage did not make an objection.<sup>34</sup> In the middle of the first day of trial, Brundage made an additional motion for a continuance.<sup>35</sup> Her stated basis as that she had talked to yet a fourth lawyer, Joseph Enbody, on May 8, the day before trial.<sup>36</sup> The judge denied the motion, indicating that Brundage had had plenty of time to get a lawyer.<sup>37</sup> Brundage called three witnesses in her case, as well as presented her own testimony.<sup>38</sup> She introduced and had admitted numerous financial documents.<sup>39</sup> Brundage admitted much of the conduct that constituted misuse/misappropriation of Gates's assets.<sup>40</sup>

The court made a division of property that included an award of some of Brundage's separate property to Gates.<sup>41</sup> The court found that

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<sup>32</sup>1RP 32; 2RP 74, 77.

<sup>33</sup>1RP 22-23.

<sup>34</sup>*See, e.g.*, 1RP 36-37, 69-70.

<sup>35</sup>1RP 78-79.

<sup>36</sup>1RP 78.

<sup>37</sup>1RP 79.

<sup>38</sup>2RP 2.

<sup>39</sup>1RP 126, 128, 129; 2RP 6-9, 12-16.

<sup>40</sup>2RP 15-16, 23-24, 31, 38-41, 45.

<sup>41</sup>2RP 88.

Brundage violated her fiduciary duty to Gates in multiple ways, “resulting in a nearly total destruction of the petitioner’s financial well-being”<sup>42</sup>:

She did that in, as clearly described in the evidence, both oral and documentary, including but not limited to taking all the rent money from the various places, placing it in her own account, not using that money to pay the mortgages that the rent covered, allowing the houses to go into foreclosure and taking no action to save them, not inspecting the Centralia house with the result that it was condemned, not paying the credit card bills or defending the resulting lawsuit, withdrawing money from petitioner’s IRA and using the funds to purchase a home in her own name and all the actions which are multiple and too difficult to actually identify separately, transferring credit card balances and using the petitioner’s credit cards for her own purposes, and finally, probably the most obvious use of [sic] her misuse of the power of attorney, was the attempt to transfer the vehicles on the day that the power of attorney was revoked.<sup>43</sup>

Additionally, the court found that Brundage’s claim that Gates told her not to make payments on his properties as not credible.<sup>44</sup> Moreover, the court found her contention that she did all she could to save Gates’s property as his power of attorney but yet did manage to save all her own property, while admittedly using his money along the way, as not credible.<sup>45</sup>

At a later hearing on June 8, 2012 regarding a stay, the court recounted the case history and elaborated on its thinking in denying Brundage’s mid-trial motion for a continuance:

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<sup>42</sup>2RP 88.

<sup>43</sup>2RP 88-89.

<sup>44</sup>2RP 89.

<sup>45</sup>2RP 89.

This case was filed in June of 2011. There were some out-of-state service problems and the Answer wasn't filed until August when she had an attorney, Mr. Schroeter, who lasted until just after the first settlement conference in February of 2012. *The original trial date of December 11<sup>th</sup> was continued as the Respondent had not met her discovery requirements* among other reasons.

Two settlement conferences were held in which the Respondent balked at any settlement. Her second attorney, Dana Williams, was on the case for a month. And his withdrawal was two months prior to the second trial date. Now, the Respondent did get a third attorney who was unavailable for the trial schedule. That should have been a little signal that maybe we should find a different attorney.

But, no, she decided that she would stay with that attorney, and even though the attorney moved for a continuance that was denied on May 20<sup>th</sup> by Judge Lawler, the Respondent did not even so much as contact an attorney until the day before trial. There was no motion for a continuance made the morning of trial. And I asked specifically: Are the parties ready for trial? And Ms. Brundage said, "Yes."

It was only after we did 80 pages of transcript and did almost all of the Petitioner's testimony that Ms. Brundage decided that she needed to ask for an attorney. During this time, it became apparent to me that the Respondent's entire approach to this case was to delay this case as long as possible in hopes that either the Petitioner would die or delay judicial discovery of her transactions and misuse of her power of attorney.

And that also became apparent — her intransigence became apparent when she made her request for how the property was to be divided. And let me make it clear that there was no way that she did not understand what was happening. She may have made that appearance during the course of the trial, but as soon as we started talking about her assets, she was clearly focused on exactly what she wanted and it was: I want everything that's mine, and I also want everything that's his. He doesn't get anything. I get it all.

So that has been her position from the beginning. And that's why I denied her mid-trial motion to continue. *She did not act with due diligence to obtain counsel who would be available for the May trial date.* And because of all those reasons, I denied the motion to continue. It was very, very clear from all of this that her whole point in this was to delay this matter from being resolved and take advantage of Mr. Gates' physical condition.<sup>46</sup>

### III. ARGUMENT

A. The Court of Appeals Decision In This Case Did Not Involve Direct Conflict With Another Decision of an Appellate Court.

Rule of Appellate Procedure ("RAP") 13.4(b) governs what types of cases will be accepted by the Washington Supreme Court on a petition for review. RAP 13.4(b) is based on RAP 4.2 and RCW 2.06.030. *See*, Note, RAP 4.2. RCW 2.60.030 discusses "cases involving substantive issues on which there is a *direct conflict* among prevailing decisions of panels of the court or between decisions of the supreme court." RCW 2.06.030(e) (emphasis added).

A "direct conflict" on substantive issues between appellate courts is relatively rare. None of the cases cited by Brundage involve direct conflict, as discussed below. Brundage asserts in her Petition that *eight* different cases involve direct conflict with a simple ruling denying a

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<sup>46</sup>Brief of Respondent, Appendix, Verbatim Transcript of Proceedings (June 8, 2012) 17-19 (emphasis added).

continuance, which is reviewed solely for an abuse of discretion. This is obviously ridiculous on its face, and the Petition should be denied.

B. None of the Specific Cases Discussed By Brundage Conflict With the Court's Decision in This Case.

1. *Chamberlin v. Chamberlin*

Brundage's argument that a 1954 dissolution case, *Chamberlin v. Chamberlin*,<sup>47</sup> is in conflict with the instant case should be rejected. In *Chamberlin*, the Washington Supreme Court ruled that the trial court had abused its discretion in denying a continuance where an elderly party located out of state had become seriously ill one week before a dissolution trial and been advised by doctors not to travel, and no prior continuance had been requested. Due to the denial, the party's "attorney was forced to try the case without the presence and assistance of his client, without witnesses, without evidence, without means of presenting an adequate defense and without an opportunity to refute respondent's testimony. Furthermore, this situation arose without fault on the part of the appellant as no question has been raised as to any lack of due diligence on her part."<sup>48</sup>

*Chamberlin* is inapposite to the present facts for a variety of

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<sup>47</sup>44 Wn.2d 689, 270 P.2d 464 (1954).

<sup>48</sup>*Id.* at 704.

reasons. First, the unavailability of the *party* in *Chamberlin* — as opposed to an attorney — is a key distinction. Without the party present, the attorney in *Chamberlin* apparently had no ability to present evidence or any means of providing an adequate defense, thereby effectively denying the litigant her day in court. Second, in *Chamberlin*, unlike the instant case, there had been no prior continuance of trial. This was an explicit condition of the *Chamberlin* holding.<sup>49</sup> Third, and most importantly, in *Chamberlin* there was “no question” about a lack of due diligence on the part of the moving party. Her inability to be present was based on “bona fide illness” and doctor’s orders regarding long-distance travel. In this case, on the other hand, as noted by the trial court on June 8, 2012, the record is replete with evidence of intransigence and wrongdoing by Brundage.

2. *In re: V.R.R.*

*In re: V.R.R.*,<sup>50</sup> and the cases discussed therein, is completely inapposite. All of those cases deal with waiver and forfeiture of a guaranteed statutory right to counsel (pursuant to RCW 13.34.090) in a *dependency* proceeding. None of the cases shed light on abuse of discretion vis-a-vis denial of a continuance in a dissolution case. Further

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<sup>49</sup>*Id.* at 703.

<sup>50</sup>134 Wn. App. 573, 581, 141 P.3d 85 (Div. I 2006).

distinguishing features from the case at bar include the absence of the party, unprepared counsel, and no prior continuances. Similarly, the other two cases cited by Brundage and *V.R.R.* are dependency matters, and their analyses concerned forfeiture of the right to counsel under RCW 13.34.090(2). As such, none of these cases bear upon a straightforward denial of a continuance in a dissolution case, and none of them conflict with the Court of Appeals' decision in this case.

3. *Balandzich v. Demeroto*

The Petition does not articulate any comprehensible basis as to how *Balandzich* conflicts with the instant case. Brundage apparently believes that the *Balandzich* factors dictate a different outcome — but that is merely disagreement with the court's analysis, not a conflict between decisions. To the contrary, the ruling granting the Motion On the Merits *applied* the *Balandzich* factors in its analysis.<sup>51</sup> Brundage's disagreement with that analysis does not constitute a conflict of law.

Moreover, Brundage is mistaken that the Court of Appeals' affirmance of the trial court's denial of a continuance does not comport with *Balandzich*. As to the first factor, the prompt disposition of the litigation, the "long history" referred to by the trial court was explained in

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<sup>51</sup>Ruling Granting Motion On the Merits to Affirm, pp. 4-5.

greater detail by Judge Hunt on June 8, 2012, and consisted of several distinct factors delaying the case, all caused by Brundage's actions.

The second factor, "needs of the moving party," does not favor Brundage. Brundage never demonstrated any additional evidence, or improperly-admitted evidence, that would have changed the result of the court's property division. To the contrary, the trial record shows that despite her misconduct, she received more than half of the property before the court for division.<sup>52</sup> Brundage seems to argue that her age and Korean-American heritage alone prove that she suffered prejudice. But Brundage has lived in the United States for over 50 years, run a business here since 1978, owned property, evicted tenants, and participated in 22 different legal proceedings over 24 years, including a prior dissolution of marriage.<sup>53</sup> She has drafted her own rental agreements and lease-to-own agreements for her and her tenants.<sup>54</sup> While serving as power of attorney for Gates, Brundage was managing eight rental units, between hers and Gates's properties.<sup>55</sup> Brundage has also filed motions in both Washington and Arizona courts without the assistance of an attorney.<sup>56</sup> Clearly

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<sup>52</sup>CP 78-79.

<sup>53</sup> Answer To Motion To Modify Commissioner's Ruling, Appendix, Declaration of Renell Hull, Appendix.

<sup>54</sup>Id.

<sup>55</sup>Id.

<sup>56</sup>Id.

Brundage is a relatively sophisticated party who sat in no disadvantaged position relative to other litigants in this type of case.

Third, the *possible* prejudice to Gates must be considered.

Brundage, with the benefit of hindsight, can say that Gates is still alive and suffered no prejudice, but the record established that Gates was ill and in failing health, and the trial court did not abuse its discretion on April 20, 2012 in believing that Gates could suffer possible prejudice by another delay of trial, given his health and his severe financial needs.

Fourth, the prior history of the litigation, *including prior continuances*, was discussed by the trial court in the various hearings, and, as conceded by Brundage, was a factor suggesting that the motion should be denied. Brundage contests the *weight* that was given to that factor by the trial court, but does not argue that this factor favored granting the continuance. The fifth factor, previous conditions imposed on continuances, does not apply one way or the other in this case.

Sixth and finally, Brundage emphasizes the fact that the court mentioned at the time of denying the continuance that the case might be continued due to other conflicting, higher-priority criminal trials. But this comment is of no legal significance — every case might get continued based on court priorities. This is not a factor favoring Brundage.

As such, virtually all the *Balandzich* factors, to the extent they apply, supported the trial court's decision to deny the motion to continue. As such, the Court of Appeals properly granted the Motion To Dismiss and Motion On the Merits, and there is no conflict between the decision of the Court of Appeals and *Balandzich v. Demeroto*.

4. *Borghi/Olivares*

Brundage argues that the trial court's award of four pieces of Brundage's separate property to Gates is in direct conflict with *Marriage of Olivares*<sup>57</sup> and *In re: Estate of Borghi*<sup>58</sup> because the trial court awarded separate property of Brundage to Gates. The court, however, may award the separate property of one spouse to the other spouse if the result is fair, equitable, and just under all of the circumstances. There is no conflict in this case.

Contrary to Brundage's contention, "courts seem to have abandoned an older notion, once valid in Washington, that the separate property of one spouse may be awarded to the other spouse only under *exceptional* circumstances."<sup>59</sup> Further, the court may consider the fiscal

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<sup>57</sup>69 Wn. App. 324, 848 P.2d 1281 (Div. I 1993).

<sup>58</sup>167 Wn. 2d 480, 219 P.3d 932 (2009).

<sup>59</sup>20 WA PRAC § 32.9 n.8; *see also, Marriage of Konzen*, 103 Wn.2d 470, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985); *accord, Marriage of Griswold*, 112 Wn.App. 333, 348, 48 P.3d 1018 (2002) (exceptional or unusual circumstances not required).

misconduct of one party in a just and equitable property division under

Title 26.<sup>60</sup>

Washington courts recognize that consideration of each party's responsibility for creating or dissipating marital assets is relevant to the just and equitable distribution of property. (Citation omitted). The trial court has discretion to consider whose "negatively productive conduct" depleted the couple's assets and to apportion a higher debt load or fewer assets to the wasteful marital partner.<sup>61</sup>

That is exactly what occurred in this case. As detailed above, the court had overwhelming evidence of fiscal misconduct and breach of fiduciary duty by Brundage. As such, the court awarded certain pieces of Brundage's property to Gates.

Nothing in *Olivares* or *Borghi* precluded the trial court's award of Brundage's property to Gates on these facts. *Borghi* simply mentions a presumption, which can of course be rebutted. *Olivares* mentions unusual circumstances — even if that were the state of current law, the circumstances of this case more than justified the court's award. Accordingly, there is no direct conflict in the case law that would support review by the Supreme Court because the overall result was fair, equitable,

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<sup>60</sup>*Marriage of Urbana*, 147 Wn. App. 1, 14, 195 P.3d 959 (Div. II 2008) ("marital misconduct," which a court may not consider under RCW 26.09.080, does not encompass "gross fiscal improvidence" or "the squandering of marital assets"); *Marriage of Williams*, 84 Wn. App. 263, 270, 927 P.3d 679 (Div. III 1996).

<sup>61</sup>*Williams*, 84 Wn. App. at 270.

and just.

5. *Muhammad/Spreen/Kinney*

RCW 26.09.140 governs the availability of attorney's fees in a dissolution matter, including appeal. Pursuant to that statute, the "appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs." RCW 26.09.140. In doing so, the court will consider "the arguable merit of the issues on appeal and the financial resources of the respective parties."<sup>62</sup> The relevant time period with respect to financial need and ability to pay is the time the appeal is pending.<sup>63</sup>

In this case, Brundage's entire appeal is based on her contention that the court abused its discretion in denying her motion to continue trial on April 20, 2012. But in light of the prior continuance that resulted from her conduct, and her change of attorneys three times in a six-week period, the court was well within its discretion to conclude that the continuance request was a product of Brundage's own conduct and should be properly denied. As such, the appeal is frivolous in light of the overwhelming evidence supporting the trial court's ruling. Thus, Gates is entitled to recover his attorney's fees on this basis alone.

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<sup>62</sup>*Johnson v. Johnson*, 107 Wn. App. 500, 505, 27 P.3d 654 (Div. II 2001) (citation omitted).

<sup>63</sup>*Young v. Young*, 44 Wn. App. 533, 538, 723 P.2d 12 (Div. II 1986).

Nonetheless, Brundage argues that the award of attorneys fees to Gates conflicts with a series of cases on appeal-related fee awards: *Marriage of Muhammad*, *Spreen v. Spreen*, and *Kinney v. Cook*. But Brundage misstates the law as it relates to attorney fee awards on appeal in a dissolution matter. Under RCW 26.09.140, a court considers two separate things in determining whether or not to grant fees in an appeal: (1) need vs. ability to pay *and* (2) “the arguable merit of the issues raised on appeal.”<sup>64</sup> *Muhammad* required remand for evidence on parties’ economic circumstances because the issues raised on appeal, unlike this case, “had considerable merit.”<sup>65</sup> *Muhammad* does not hold, as implied by Brundage, that fees *cannot* be granted under RCW 26.09.140 without a determination of need/ability to pay where a party files a meritless appeal.<sup>66</sup> Here, the issues raised on appeal do not have merit, as reflected by the Commissioner’s granting of motion on the merits. As such, the Commissioner could award fees regardless of the need/ability to pay analysis.

Moreover, Gates filed a financial declaration on January 15, 2013,

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<sup>64</sup>*Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (Div. I 1998).

<sup>65</sup>153 Wn. 2d 795, 807 (2005).

<sup>66</sup>*See, Stout v. Stout*, 89 Wn. App. 118, 126-27, 948 P.2d 851 (Div. I 1997) (fees may be awarded under RCW 26.09.140 based on intransigence and merits of issues raised on appeal separate and apart from need/ability analysis); *see also, Marriage of Vander Veen*, 62 Wn. App. 861, 869, 815 P.2d 843 (Div. I 1991).

along with his Motion To Dismiss and Motion On the Merits, establishing his financial need. In that declaration, he describes the desperate state of his finances, showing a \$5,319.19 shortfall each month based on the debts created primarily by Brundage. He described that he has no assets that have not been tied up by Brundage through this frivolous litigation and her filing of *lis pendens* liens on the properties he was awarded by the court. This showing of need was also addressed in Gates's Brief of Respondent, and the Motion To Dismiss and Motion On The Merits. Further, the Declaration of Sharlynn Gates, attached as an Appendix to the Motion To Dismiss and Motion On the Merits, discussed relative need and ability to pay.<sup>67</sup> Brundage addressed her financial position in detail in her Answer to the motion. As such, the Commissioner had a sufficient basis to award fees under RCW 26.09.140 pursuant to a need/ability-to-pay analysis. There is no conflict between the cases.

Finally, though the Commissioner cited RCW 26.09.140 as a basis for fees, an award would have been equally justified under RAP 18.9. That rule permits attorneys fees where an appeal is frivolous or solely for purpose of delay. A correct ruling should not be disturbed merely because it was based on an incorrect or insufficient reason.<sup>68</sup> In this case, both

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<sup>67</sup>Motion To Dismiss/Merits, Appendix, p. 8.

<sup>68</sup>*State v. S.S.*, 67 Wn. App. 800, 812, 840 P.2d 891 (Div. I 1992).

frivolousness and delay would support an award of fees.

The very reason Brundage's motion to continue was denied in the first place was because the trial court recognized her multiple attempts at delay.<sup>69</sup> In the ruling on June 8 on the motion to stay, the trial court stated the same explicitly: "***It was very, very clear from all of this that her whole point in this was to delay this matter from being resolved*** and take advantage of Mr. Gates' physical condition."<sup>70</sup> In light of this record, the Commissioner could easily conclude that Brundage's appeal was being pursued for purposes of delay. Because of that, attorneys fees were properly granted.

Brundage cites *Spreen v. Spreen*<sup>71</sup> for apparently the same purpose as *Muhammad* — to argue that fees cannot be awarded in this case absent an analysis of financial circumstances. This does not constitute a basis for review under RAP 13.4(b) because, as argued above, (1) analysis of financial circumstances is not necessarily required where the appeal has no merit, (2) the record contained ample evidence of financial circumstances of the parties, and (3) the Court in this case never said anything in its ruling that creates a confusing conflict between decisions. Brundage

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<sup>69</sup>RP (Apr. 20, 2012) 7.

<sup>70</sup>Brief of Respondent, Appendix, Verbatim Transcript of Proceedings (June 8, 2012) 19 (emphasis added).

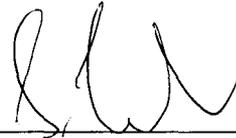
<sup>71</sup>107 Wn. App. 341, 28 P.3d 769 (Div. II 2001).

simply disagrees with the application of the legal principles, and this does not create a direct conflict between decisions that requires resolution by the Supreme Court. As such, the Petition should be denied.<sup>72</sup>

#### IV. CONCLUSION

For the foregoing reasons, Brundage's Petition For Discretionary Review should be denied.

Respectfully submitted this 1st day of October, 2013.



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<sup>72</sup>Brundage also makes the bald assertion that *Kinney v. Cook*, 150 Wn. App. 187, 208 P.3d 1, 5 (Div. III 2009), is in conflict with this case, but fails to articulate how, so that case is not addressed in this Answer.