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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 43574-8-II

COURT OF APPEALS OF  
THE STATE OF WASHINGTON  
DIVISION TWO

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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BRIEF OF RESPONDENT

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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. In that trial, evidence was presented that Brundage breached her fiduciary duty under a power of attorney and decimated her husband Ron Gates's financial well-being through a combination of misappropriation and mismanagement of his assets.

Prior to trial, Brundage had changed attorneys on multiple occasions, the first of those changes, right after the settlement conference, resulting in a trial continuance from the original date of February 29, 2012 to May 9, 2012. A second settlement conference was then held, and Brundage's second attorney withdrew. A third attorney signed a limited Notice of Appearance on April 4, exactly 5 weeks before the scheduled trial date. She agreed to represent Brundage only if the May 9 trial date was moved due to a scheduling conflict. Rather than seeking an attorney that was available, Brundage filed a motion to continue on April 11, which was denied after argument at a hearing on April 20.

The judge cited the "long history" of the case, and felt that Brundage was attempting delay through the frequent and unexplained

changes of attorney. On May 9, Brundage indicated that she was ready for trial, and proceeded without counsel. She now complains that the denial of a continuance on April 20 was an abuse of discretion. It was not, and this appeal 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, and was signed for by Brundage on July 26, 2011.<sup>2</sup> Trial was set for February 29, 2012.<sup>3</sup>

On the same day as the first settlement conference, January 31, 2012 — *on Brundage’s motion*<sup>4</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>5</sup> The discovery issues were the result of Brundage’s — not Gates’s — failure to meet her discovery requirements.<sup>6</sup> The other issue

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<sup>1</sup>CP 2.

<sup>2</sup>CP 1, 5, 8.

<sup>3</sup>CP 27.

<sup>4</sup>CP 51.

<sup>5</sup>CP 51.

<sup>6</sup>Appendix, page 17, lines 16-18.

that caused the first continuance was accommodating Brundage's change in attorneys.<sup>7</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>8</sup> Her second attorney, Dana Williams, substituted in on February 13, 2012.<sup>9</sup> That same day, the court set a new trial date of May 9, 2012.<sup>10</sup> A second settlement conference was held on March 13, 2012, and on March 14, 2012, Mr. Williams withdrew after being fired by Brundage.<sup>11</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>12</sup> The Notice indicated that it “assumed” that the May 9 trial date would be continued.<sup>13</sup> 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>14</sup>

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<sup>7</sup>RP (Apr. 20, 2012) 5; CP 64-65.

<sup>8</sup>CP 52-53.

<sup>9</sup>CP 54-56.

<sup>10</sup>CP 57.

<sup>11</sup>CP 58-59; CP 64.

<sup>12</sup>CP 60.

<sup>13</sup>CP 60.

<sup>14</sup>CP 61-63.

At the April 20, 2012 hearing on the motion to continue, Gates's counsel argued that the first trial continuance accommodated Brundage's first change of attorneys.<sup>15</sup> A second settlement conference was held thereafter, costing Gates additional attorneys' fees.<sup>16</sup> Then Brundage fired the second attorney, and hired a third attorney that was not available for the scheduled trial date.<sup>17</sup> Gates argued that Brundage was trying to drag out the proceedings to take advantage of his failing health.<sup>18</sup> Moreover, because Brundage had deprived Gates of all his assets, he was prejudiced by any further delay.<sup>19</sup>

Brundage was not present. Church was present, asserted her unavailability for trial on May 9, and indicated that, "Brundage approached me about being her attorney for the trial and I explained to her that I have other commitments at that time, and then she went ahead with this if I would agree to help her if the trial date got continued."<sup>20</sup> Church further stated that, "I don't have any knowledge of the history of the case

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<sup>15</sup>RP (Apr. 20, 2012) 5.

<sup>16</sup>RP (Apr. 20, 2012) 5.

<sup>17</sup>RP (Apr. 20, 2012) 5-6.

<sup>18</sup>RP (Apr. 20, 2012) 6.

<sup>19</sup>RP (Apr. 20, 2012) 6.

<sup>20</sup>RP (Apr. 20, 2012) 6-7.

because I haven't gotten into it at this point ...."<sup>21</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>22</sup>

The trial began on May 9, 2012.<sup>23</sup> Brundage appeared without counsel and indicated that she was ready for trial.<sup>24</sup> Both parties came to the marriage with substantial separate property, including multiple pieces of real property.<sup>25</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>26</sup> Brundage admitted the same.<sup>27</sup>

On December 15, 2009, Gates had a debilitating stroke.<sup>28</sup> As a result, he was no longer able to care for himself, and his thought processes were no longer clear.<sup>29</sup> His discharge orders indicated Gates was to be

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<sup>21</sup>RP (Apr. 20, 2012) 7.

<sup>22</sup>CP 66; RP (Apr. 20, 2012) 7.

<sup>23</sup>1RP 1.

<sup>24</sup>1RP 3.

<sup>25</sup>1RP 4.

<sup>26</sup>1RP 46-48.

<sup>27</sup>2RP 22.

<sup>28</sup>1RP 17.

<sup>29</sup>1RP 17-18, 63; Appellant's Brief, Appendix A.

attended at all times.<sup>30</sup> For this reason, on January 11, 2010, Brundage was given a power of attorney over Gates's affairs.<sup>31</sup> On December 20, 2010, Gates had a heart attack, alone in Arizona, while Brundage was in Washington.<sup>32</sup> In May 2011, Gates sustained serious injuries during a fall from the steps of his travel trailer in Washington.<sup>33</sup> Brundage was not present.<sup>34</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>35</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>36</sup>

(3) writing herself checks from Gates's accounts;<sup>37</sup>

(4) keeping property rents for herself and not applying them to

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<sup>30</sup>1RP 63.

<sup>31</sup>1RP 17.

<sup>32</sup>1RP 64-65, 67.

<sup>33</sup>1RP 71.

<sup>34</sup>1RP 70-71.

<sup>35</sup>1RP 75-77, 86-88, 89-90, 106-07.

<sup>36</sup>1RP 42-43, 58-61, 73.

<sup>37</sup>1RP 36.

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mortgage payments;<sup>38</sup>

(5) allowing waste of personal assets;<sup>39</sup>

(6) allowing renters to damage property so bad that property  
condemned by City;<sup>40</sup>

(7) withdrawing \$55,000 from Gates's retirement account for her  
personal use;<sup>41</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>42</sup>

Further, Brundage had borrowed \$30,000 prior to the marriage  
from Gates and did not repay the money.<sup>43</sup> All in all, Brundage's waste  
and mismanagement over just 15 months reduced Gates's \$214,000 of net  
wealth to \$12,000.<sup>44</sup> Brundage's power of attorney was revoked on May  
23, 2011.<sup>45</sup>

All through the trial, the judge actively enforced the rules of

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<sup>38</sup>IRP 75-76, 80-82, 88-89.

<sup>39</sup>IRP 92, 98, 107-08.

<sup>40</sup>IRP 85, 90.

<sup>41</sup>IRP 24-25, 30, 32.

<sup>42</sup>IRP 21-23; 2RP 45-46.

<sup>43</sup>IRP 14.

<sup>44</sup>IRP 32; 2RP 74, 77.

<sup>45</sup>IRP 22-23.

evidence against Gates even where Brundage did not make an objection.<sup>46</sup> In the middle of the first day of trial, Brundage made an additional motion for a continuance.<sup>47</sup> Her stated basis as that she had talked to yet a fourth lawyer, Joseph Enbody, on May 8, the day before trial.<sup>48</sup> The judge denied the motion, indicating that Brundage had had plenty of time to get a lawyer.<sup>49</sup>

Brundage called three witnesses in her case, as well as presented her own testimony.<sup>50</sup> She introduced and had admitted numerous financial documents.<sup>51</sup> She attempted to introduce an Arizona police report regarding domestic violence but did not articulate how it was relevant to the case.<sup>52</sup>

Brundage admitted that she used Gates's credit for remodeling on and investment in her separate property.<sup>53</sup> She testified that she stopped making payments on an Arizona home because she was instructed to by

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<sup>46</sup>See, e.g., 1RP 36-37, 69-70.

<sup>47</sup>1RP 78-79.

<sup>48</sup>1RP 78.

<sup>49</sup>1RP 79.

<sup>50</sup>2RP 2.

<sup>51</sup>1RP 126, 128, 129; 2RP 6-9, 12-16.

<sup>52</sup>1RP 123-24.

<sup>53</sup>2RP 15-16.

advisors assisting with a loan modification.<sup>54</sup> She claimed that multiple balance transfers to and from Gates's credit card accounts were merely to secure better interest rates.<sup>55</sup> She admitted transferring large sums from Gates's retirement account to herself to purchase another home in Arizona, without any understanding of Gates's financial position or ability to afford the purchase.<sup>56</sup> Brundage claimed that Gates told her not to pay on the Port Angeles home that eventually went into foreclosure on her watch.<sup>57</sup> She offered no explanation as to any of the other financial misconduct documented by Gates. In spite of all the evidence of misconduct by Brundage presented at the trial, in her closing argument she proposed that she retain all of her property, and control over all of Gates's property, too.<sup>58</sup>

The court made a division of property that included an award of some of Brundage's separate property to Gates.<sup>59</sup> The court found that Brundage violated her fiduciary duty to Gates in multiple ways, "resulting

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<sup>54</sup>2RP 23-24.

<sup>55</sup>2RP 31.

<sup>56</sup>2RP 38-41.

<sup>57</sup>2RP 45.

<sup>58</sup>2RP 79.

<sup>59</sup>2RP 88.

in a nearly total destruction of the petitioner's financial well-being<sup>60</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>61</sup>

Additionally, the court found that Brundage's claim that Gates told her not to make payments on his properties as not credible.<sup>62</sup> Moreover, he 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>63</sup>

Following the court's ruling, Brundage refused to sign any of the quitclaim deeds ordered by the court and was threatened with contempt.<sup>64</sup>

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<sup>60</sup>2RP 88.

<sup>61</sup>2RP 88-89.

<sup>62</sup>2RP 89.

<sup>63</sup>2RP 89.

<sup>64</sup>2RP 95.

Brundage complained about not being given a right to consult a lawyer before signing the quitclaim deeds.<sup>65</sup> The court stated:

You had plenty of time to get a lawyer. You went through three lawyers. They either wouldn't represent you or you fired them. Then you waited until the day of trial to come in and say now I've hired a lawyer but we need a continuance.<sup>66</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:

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

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<sup>65</sup>2RP 95.

<sup>66</sup>2RP 96.

laid out six factors for the court to consider in exercising its discretion on a motion for continuance. 10 Wn. App. 718, 720, 519 P.2d 994 (Div. I 1974).<sup>68</sup> These factors include: (1) the necessity of reasonably prompt disposition of the litigation; (2) the needs of the moving party; (3) the possible prejudice to the adverse party; (4) the prior history of the litigation, including prior continuances granted the moving party; (5) any conditions imposed in the continuances previously granted; and (6) any other matters that have a material bearing upon the exercise of the discretion vested in the court. *Balandzich*, 10 Wn. App. at 720.

In this case, though the ruling was not lengthy, the *Balandzich* factors were considered and addressed in the court's ruling denying the continuance. The court made reference to the "long history" of the case, and the prior trial continuance, showing a consideration of factors (1) and (4). The court expressed concern that Brundage was hiring and firing attorneys for purposes of delay and securing continuances. This goes to factors (2) and (3). Factors (5) and (6) do not appear to apply in this case.

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<sup>68</sup>These factors have been analyzed in Washington Supreme Court and other Court of Appeals cases. See, e.g., *Trummel v. Mitchell*, 156 Wn.2d 653, 670, 131 P.3d 305 (2006); *Harris v. Drake*, 152 Wn.2d 480, 497, 99 P.3d 872 (2004) (dissent); *Willapa Trading Co., Inc. v. Muscanto, Inc.*, 45 Wn. App. 779, 785-86, 727 P.2d 687 (Div. I 1986). Brundage references a similar set of factors from *Tacoma v. Bishop*, 82 Wn. App. 850, 861, 920 P.2d 214 (Div. II 1996), a case dealing with a different issue and continuance standard as explained later in this section, *infra*.

*Both* of Brundage’s first two attorneys withdrew the day after settlement conference. Obviously that was not the result of a coincidence — she fired them. Timing was everything. On April 4, three weeks after her second attorney withdrew, and five weeks prior to trial, she hired Roberta Church, who told Brundage that she had “other commitments” and would not be available for the scheduled trial date.<sup>69</sup> Yet as of the motion hearing on April 20, Church still had no “knowledge of the history of the case because I haven’t gotten into it at this point.”<sup>70</sup>

Brundage argues on appeal that because of the April 20 denial of her motion to continue, she “was unable to obtain counsel for the trial.”<sup>71</sup> But as of April 20, Brundage had done nothing to prepare her third attorney for trial, though she had hired her by at least April 4.<sup>72</sup> And then Brundage waited another 18 days, finally talking to a fourth attorney, Joseph Enbody, on May 8, the day before trial. Brundage claimed at trial that she did not have the money to retain an attorney prior to May 8, but she had enough money to retain Church in early April for trial and presumably that money was returned after the trial continuance was

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<sup>69</sup>RP (Apr. 20, 2012) 6.

<sup>70</sup>RP (Apr. 20, 2012) 7.

<sup>71</sup>Appellant’s Brief, p. 19.

<sup>72</sup>RP (April 20, 2012) 7.

denied. Further, as argued above, Church *told her* prior to April 4 that she was not available for the scheduled trial date. Brundage's actions, therefore, support the trial court's suspicion that Brundage was dragging her feet and seeking delay by manipulating the trial date through changes in attorneys.

The "long history" referred to by Judge Lawler on April 20 was discussed in further detail by Judge Hunt on June 8. Although he was explaining his May 9 denial of Brundage's mid-trial motion to continue, most of his analysis bears equally on the denial of a continuance on April 20 that is the subject of this appeal. Specifically, Judge Hunt emphasized the need for a first trial continuance because of Brundage's conduct, the withdrawal of two prior attorneys immediately after settlement conferences, and Brundage's hiring of a third attorney, five weeks before trial, who told her up front she was not available for the scheduled trial date.<sup>73</sup>

Numerous Washington cases have considered the denial of a trial continuance based on unavailability of counsel — or need for substitute counsel to prepare — and found no abuse of discretion. *See, Willapa*

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<sup>73</sup>Appendix, pp. 17-18.

*Trading Co., Inc. v. Muscanto, Inc.*, 45 Wn. App. 779, 785-86, 727 P.2d 687 (Div. I 1986) (no abuse of discretion in allowing counsel to withdraw and denying a continuance when there was insufficient time for a substitute counsel to prepare for trial); *Rich v. Starczewski*, 29 Wn. App. 244, 245-46, 628 P.2d 831 (Div. I 1981); *De St. Romaine v. City of Seattle*, 5 Wn. App. 181, 182, 486 P.2d 1135 (Div. I 1971); *Jankelson v. Cisel*, 3 Wn. App. 139, 142, 473 P.2d 202 (Div. I 1970) (no abuse of discretion in denying request for continuance where party obtained new counsel nearly two weeks prior to the trial date); *see also, Eberhart v. Murphy*, 110 Wash. 158, 163-64, 188 Pac. 17 (1920).

Moreover, where the “lack of representation results from some act or omission of the moving party, a motion for a continuance on that ground is properly denied.” 17 Am. Jur. 2d, Continuance § 24, p. 644 (2004); *accord, Jankelson*, 3 Wn. App. at 142; *Harms v. Simkin*, 322 S.W.2d 930, 933-34 (Mo. App. 1959) (multiple lawyers for purpose of delay); *Benson v. Benson*, 204 P.2d 316, 318 (Nev. 1949) (divorce case); *see also, Northeast Women’s Center, Inc. v. McMonagle*, 939 F.2d 57, 68 (3d Cir. 1991) (party asked attorney to withdraw to represent self); *Arabian American Oil Co. v. Scarfone*, 939 F.2d 1472, 1479 (11<sup>th</sup> Cir.

1991) (no abuse of discretion to deny continuance where counsels' repeated withdrawals appear to be an attempt by party to delay proceedings).

Here, the trial court made it clear that much of its basis for denying Brundage's continuance request was exactly because the lack of representation resulted from her own conduct, in several ways. She changed attorneys twice after settlement conferences. She hired a third attorney on April 4 that was not available for the scheduled trial, and filed a motion to continue on April 11. Further, Brundage's acts of intransigence throughout the proceeding made it "very, very clear" to the court that she was acting in bad faith and seeking delay to take advantage of Gates' physical condition.<sup>74</sup>

B. The Cases Relied Upon By Brundage Concern Waiver/Forfeiture of Statutory Right to Counsel in Dependency Proceedings.

The cases relied upon by Brundage are completely inapposite. All three deal with the issue 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.

*In re V.R.R.*, the primary case relied upon by Brundage, involved a

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<sup>74</sup>Appendix, pp. 18-19.

termination of parental rights trial in a dependency case, an area involving constitutional due process rights and a guaranteed right to counsel under RCW 13.34.090(2). 134 Wn. App. 573, 581, 141 P.3d 85 (Div. I 2006). The court's holding and legal analysis in that case, as it related to the denial of a motion to continue, concerned forfeiture of a guaranteed right to counsel under RCW 13.34.090(2) (finding no forfeiture under the specific facts of the case). Indeed, the heading of the section of the opinion quoted by Brundage is "Forfeiture of Right to Counsel." Further distinguishing features from the case at bar included the absence of the party, unprepared counsel, and no prior continuances. The trial court had failed to appoint an attorney for the party until the day before trial — with no reason for the delay on the record — and then refused to continue when that counsel was not prepared for trial. *Id.* at 584. These facts do not shed light on the instant case, as Brundage had no guaranteed and statutory right to counsel.

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). In *Tacoma v. Bishop*, the court discussed waiver or forfeiture of the right of representation, and found abuse because the court did not warn the defendant about the consequences of inaction, *as it related to waiver of right to counsel.* 82 Wn. App. 850,

860, 920 P.2d 214 (Div. II 1996). “Although characterizing the defendant’s conduct as ‘almost complete inaction,’ the court concluded it was not egregious enough to result in *forfeiture of the right to representation.*” *Id.* at 859 (internal quotation omitted; emphasis added). Brundage does not explain that the third case cited, *In re G.E.*, also was a termination of parental rights in a dependency case, and the legal analysis concerned forfeiture of statutory rights under RCW 13.34.090(2). 116 Wn. App. 326, 337, 65 P.3d 1219 (Div. II 2003). As such, none of these cases bear upon a straightforward denial of a continuance in a dissolution case.

Moreover, Brundage’s citation to a 1954 case, *Chamberlin v. Chamberlin*, 44 Wn.2d 689, 270 P.2d 464 (1954), though it is a dissolution case, is also misplaced. 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.” *Id.* at 704.

*Chamberlin* is inapposite to the present facts for a variety of reasons. First, the unavailability of the *party* in *Chamberlin* — as opposed to the 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. *Id.* at 703. 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, the record is replete with evidence of intransigence and wrongdoing by Brundage.

A more pertinent decision to the case at bar is *Jankelson v. Cisel*. In *Jankelson*, a medical malpractice case, an attorney for the defendant appears and then withdraws, and the defendant answers the complaint pro se. Trial is set for June 9, and the new attorney withdraws on May 1. On May 26, the defendant gets a third attorney, who filed a motion to continue, which was denied twice by the presiding judge. The motion was renewed and again denied after assignment to the trial judge. The *Jankelson* court

made clear that a party may not secure a trial continuance simply by hiring and firing their lawyer:

The withdrawal of an attorney in a civil case or his discharge does not give the party an absolute right of continuance. (Citations omitted). The rationale for this rule is that if a contrary rule should prevail, all a party desiring a continuance, under such circumstances, would have to do would be to discharge his counsel or induce him to file a notice of withdrawal.

3 Wn. App. at 141. This rule applies even where the party's attorney withdraws just prior to the time the action is called for trial, where the withdrawal is unexplained. *Peterson v. Crockett*, 158 Wash. 631, 635-36 (1930).

The facts of the present case are strikingly similar to *Jankelson*. Brundage's second attorney withdrew on March 14, 2012. Her third attorney entered a limited notice of appearance for trial on April 4, 2012, but indicated from beginning she was not available for trial on May 9. Brundage nonetheless "went ahead" with the third attorney and sought a continuance.<sup>75</sup> She apparently contacted a fourth attorney on May 8 — the day before trial — and tried to use that fact to secure a mid-trial continuance. The trial court found that Brundage was attempting just the sort of manipulation feared by *Jankelson* and *Peterson*.

C. Brundage Was Not Prejudiced By the Denial Of Continuance.

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<sup>75</sup>RP (Apr. 20, 2012) 6-7.

Even assuming *arguendo* that the trial court abused its discretion in denying the trial continuance, Brundage has not demonstrated any prejudice that resulted from the denial on the facts of this case.

1. *Brundage has not demonstrated prejudice*

Even if a court improperly denies a continuance, an appellate court will not disturb the ruling in the absence of proof of some *specific* prejudice at trial. In *Sullivan v. Watson*, for example, the Court of Appeals found no abuse of discretion to deny a trial continuance, in part because “there was no showing as to anything that the defendant could, or would, have said not covered by his deposition; nor is there any showing as to what the missing witness could have added to the testimony before the jury.” 60 Wn.2d 759, 764, 375 P.2d 501 (1962).<sup>76</sup>

This case is similar to *Sullivan*, in that even if we assume the trial should have been continued, Brundage has not demonstrated in this appeal any additional evidence, or improperly-admitted evidence, that would have changed the result of the court’s property division. Although Brundage did not have counsel at the trial, she testified, and was given great latitude to comment on any issue before the court. She also called three additional witnesses, and introduced numerous documents to support her case.

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<sup>76</sup>A need to demonstrate specific prejudice is implicitly recognized in Appellant’s Brief, as it dedicates more than four pages to discussing alleged prejudice to Brundage from the denial of a continuance. Appellant’s Brief, pp. 20-24.

Brundage does not articulate in her appeal what additional evidence she might have brought that would have led to a different outcome. The only argument she makes in this regard is that the court erred in making a finding that Gates was a vulnerable adult. The issue regarding the conflicting trial evidence on vulnerable adult — and why it is not germane to this appeal — is addressed in subsection 2, *infra*. The basis of the court's property division was not that Gates was vulnerable, but that Brundage misappropriated and mismanaged his property. Brundage, however, has not identified *any* further testimony she would have offered, any other document she would have introduced, or any other witness she would have called, that might have presented specific evidence to cast doubt on the trial court's finding that she breached a fiduciary duty to Gates, misappropriated his assets, and left him in complete financial ruin, thus justifying an award of her separate property to Gates. 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>77</sup>

2. *Trial court had authority to award Brundage's separate property to Gates if award fair and equitable*

Despite her failure to show she would have admitted any additional relevant evidence if represented by counsel, Brundage argues that the trial

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<sup>77</sup>CP 78-79.

court's award of four pieces of Brundage's separate property to Gates was "unprecedented" and a "travesty of justice."<sup>78</sup> 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.

Contrary to the case cited by Brundage, "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>79</sup>:

The final issue raised by petitioner is whether the trial court abused its discretion in awarding a portion of petitioner's separate property, 30 percent of his military retired pay, to his former spouse. Petitioner relies on *Bodine v. Bodine*, 34 Wn.2d 33, 35, 207 P.2d 1213, 1214 (1949), in which the court stated that the situations which warrant an award of one spouse's separate property to the other spouse are 'exceptional.' ... However the current statute specifically applies the statutory criteria to separate property. RCW 26.09.080 states: 'In a proceeding for dissolution of the marriage ... the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable ...' ... The character of the property is a relevant factor which must be considered, but is not controlling .... Under the circumstances of this case, we find no abuse of discretion.

*In re Marriage of Konzen*, 103 Wn.2d 470, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985); *accord*, *In re Marriage of Griswold*, 112 Wn. App. 333, 348, 48 P.3d 1018 (2002) (exceptional or unusual circumstances not

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<sup>78</sup>Appellant's Brief, p. 24.

<sup>79</sup>20 WA PRAC § 32.9 n.8.

required). In *Konzen*, the circumstances of the case which justified the award of petitioner's separate property was the economic circumstances of the parties — the husband's greater earning power and the wife's minimal education and work history — and the fact that the separate property was more liquid than the available community property. 103 Wn.2d at 472.

The court may consider the fiscal misconduct of one party in a just and equitable property division under Title 26. *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).

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.

*Williams*, 84 Wn. App. at 270. 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, it awarded certain pieces of Brundage's property to Gates.

Accordingly, in this case, there was no error in the trial court awarding Brundage's separate property to Gates because the overall result

was fair, equitable, and just.

3. *A “vulnerable adult” finding was not pertinent to court’s property division*

Brundage assigns error to the trial court’s finding that Gates was a vulnerable adult. Indeed, it is the only claim of error, or prejudice to Brundage, resulting from the denial of a continuance. Brundage’s argument fails for two separate reasons, however. First, substantial evidence supported the trial court’s finding that Gates was vulnerable. Second, and more importantly, this finding is irrelevant to the issues in the appeal because a vulnerable adult finding was not required to justify the court’s division of property.

First, substantial evidence supported the trial court’s finding that Gates was a vulnerable adult. Whether Gates was a vulnerable adult — presumably under RCW 74.34.020(17)(a), though no statute is ever cited by Gates’s counsel or the court — is a factual issue. *See, Inland Foundry v. Labor & Indus.*, 106 Wn. App. 333, 340, 24 P.3d 424 (Div. III 2001) (a determination whether evidence shows that something occurred or existed is a finding of fact).<sup>80</sup> If substantial evidence supports a finding of fact, “it

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<sup>80</sup>Clearly on the facts of this case, the determination that Gates was vulnerable — i.e., “has the functional, mental, or physical inability to care for himself” — is a factual question. It was simply a supporting fact underlying the court’s ruling on property division and did not bear on any ultimate legal issue the court needed to decide. *In re Detention of M.K.*, – Wn. App. –, 273 P.3d 1059, 1061 n.3 (Div. II 2012) (fact determination may be considered a conclusion of law if it relates to ultimate issue in case). Even if, however, the court treated the finding that Gates was

does not matter that other evidence may contradict it.” *Burrill v. Burrill*, 113 Wash. App. 863, 868, 56 P.3d 993 (2002).

Here, there was plenty of evidence showing Gates’s vulnerability — his functional, mental, and physical inability to care for himself. Medical records introduced showed that following his December 2009 stroke, Gates had deficits in thought organization and sequencing, and needed someone present with him at all times. Renell Hull testified that Gates was unable to manage his financial affairs on his own, was unable to think clearly, and was unable to care for himself physically. In December 2010, Gates suffered a heart attack,<sup>81</sup> one year after his stroke. In May 2011, Gates fell from the steps of his travel trailer and was hospitalized. The evidence of Gates’s vulnerability was substantial, at a minimum.

Brundage’s chief complaint seems to be that Gates did not introduce evidence from a doctor to verify the substantial evidence of vulnerability, but there is no such requirement in law. Whether someone has the ability to care for themselves does not require an expert opinion, and Brundage has cited to no authority to the contrary. The trial evidence provided a substantial basis to conclude that Gates was physically, mentally, and functionally unable to manage his affairs, and the court made that factual

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vulnerable as a conclusion of law, the result would not change — the court’s finding was supported by a preponderance of the trial evidence.

<sup>81</sup>A heart attack, not a second stroke, as Brundage argues in pages 21-23 of her Brief.

finding.

Moreover, the court's exclusion of an Arizona police report supposedly involving domestic violence offered by Brundage does not bear on this finding. First, the court's exclusion of the document was based on hearsay and authentication grounds.<sup>82</sup> The court informed Brundage that she would need a live witness to "verify" the document.<sup>83</sup> As an afterthought, the court stated, "... aside from the fact it's not relevant ... that issue goes to children and custody."<sup>84</sup> Second, nothing in the record indicates the *date* of the incident contained in the proposed exhibit — under Brundage's theory of relevance (to rebut Gates's claim of physical infirmity after his December 2009 stroke) the report could not be relevant if the incident involved occurred prior to December 2009. Third, it is never articulated how the police report would support Brundage's apparent contention that Gates had the "physical ability to function" after his stroke. A report of domestic violence can easily be made in the absence of any physical conduct on the part of the party complained about; e.g., based on threats.

Second, whether Gates was or was not a "vulnerable adult" under RCW 74.34.020(17)(a) has *no bearing whatsoever* on a trial court's ability

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<sup>82</sup>1RP 123.

<sup>83</sup>1RP 123.

<sup>84</sup>1RP 123-24.

to award the separate property of one party to another. Brundage has cited no authority for such a proposition, and none exists. To the contrary, all of the separate and community property of the parties is before the court in a dissolution proceeding. RCW 26.09.080. As discussed above, a court may award separate property of one spouse to another if the overall division is fair and equitable; fiscal misconduct of a party is a relevant consideration in that analysis. *Marriage of Williams*, 84 Wn. App. 263, 270, 927 P.3d 679 (Div. III 1996). In the context of dissipation of marital assets, whether or not the victim-spouse is physically or mentally “vulnerable” – either under RCW 74.34.020 or otherwise — is not necessary or sufficient for such an award. *See, e.g., Williams*, 84 Wn. App. at 270 (Washington courts focus on whose labor or negatively productive conduct was responsible for creating or dissipating certain marital assets).

Although the trial judge made passing reference to Gates as a “vulnerable adult,” any such finding is a “red herring” as to the issues in this appeal. The court had ample basis to make its property award based on the fiscal misconduct by Brundage and multiple breaches of fiduciary duty under the power of attorney, as explained above. The court’s additional finding that Gates was “vulnerable” simply went to the overall assessment of whether the property division was just and equitable under all the circumstances.

D. Gates Is Entitled To Attorneys' Fees Pursuant To RCW 26.09.140.

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." *Johnson v. Johnson*, 107 Wn. App. 500, 505, 27 P.3d 654 (Div. II 2001) (citation omitted). The relevant time period with respect to financial need and ability to pay is the time the appeal is pending. *Young v. Young*, 44 Wn. App. 533, 538, 723 P.2d 12 (Div. II 1986).

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.

Further, the astronomical costs of litigation in this case have

financially decimated Gates. As is clear from the trial record, at the time of Gates's stroke in 2009, he owned three pieces of real estate and had a retirement asset of \$214,000. He had no debts and all of his financial obligations were current. By the date of separation, 15 months after Brundage was given power of attorney over Gates's affairs, he was left with \$12,000 in a retirement account, a condemned piece of real property, and crushing debts.

Then, after the trial court addressed this "financial devastation" wrought by Brundage by sharing the available real property between the parties, Brundage launched a firestorm of litigation in both the trial court and Court of Appeals regarding a stay, challenging the supersedeas bond, moving to revise at every step, and filing a motion for discretionary review with the Washington Supreme Court. (See concurrently filed motion on the merits and to dismiss for a complete post-Decree chronology). When those efforts all failed, she filed *lis pendens* on all the properties awarded to Gates in the dissolution. As a result, he has not been able to sell any of the properties he was awarded — to pay debts, or provide for even his most basic needs such as groceries. Meanwhile Brundage has retained assets and properties free and clear, and has the ability to sell them or distribute the rental income from them as she sees fit.

The net result of these actions have placed an even larger financial

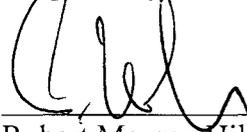
and debt burden on Gates, who was already victimized by Brundage from December 2009 through early 2011. As such, the Court should award reasonable attorneys fees to Gates in this case. Gates will file a supporting Affidavit of Financial Need pursuant to RAP 18.1(c).

#### V. CONCLUSION

The trial court's denial of a continuance in this case was not an abuse of discretion and should not be disturbed. Additionally, Gates should be awarded his reasonable attorney's fees in this matter, for the reasons set forth above.

DATED this 15<sup>th</sup> day of January, 2013.

Respectfully submitted,



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Robert Morgan Hill, WSBA #21857  
S. Tye Menser, WSBA #37480  
MORGAN HILL, P.C.  
Attorneys for Respondent

FILED  
COURT OF APPEALS  
DIVISION II

2013 JAN 15 PM 3:24

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

In re the Marriage of: )  
)  
RONALD LAVERNE GATES, )  
Respondent, )  
)  
vs. )  
)  
KYON CHA BRUNDAGE, )  
Appellant. )  
\_\_\_\_\_ )

No. 43574-8-II

AFFIDAVIT OF SERVICE

Lewis County  
Superior Ct. No.  
11-3-00226-0

STATE OF WASHINGTON )  
) ss.  
COUNTY OF THURSTON )

The undersigned, being first duly sworn on oath, now deposes and states:

The undersigned is now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action and competent to be a witness therein.

I certify that on January 15th , 2013, I caused to be personally served a true and correct copy of the **Brief of Respondent, Motion to**

ORIGINAL

**Dismiss and Motion on the Merits and Financial Declaration of**

**Respondent** upon the following individuals:

Washington State Court of Appeals, Division II Court Clerk  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

Clayton Richard Dickinson, Attorney at Law  
6314 19<sup>th</sup> St. W., Ste 20  
Fircrest, WA 98466-6223

Ronald Gates, Client  
1190 A. Tennyson  
Centralia, WA 98532

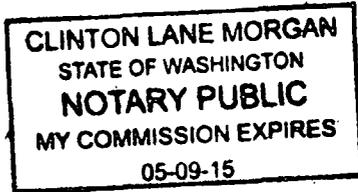
DATED this 15<sup>th</sup> day of January, 2013, at Olympia, Washington.

*Traci Goodin*

Name: Traci Goodin of  
MORGAN HILL, P.C.

SUBSCRIBED AND SWORN to before me this 15<sup>th</sup> day of January, 2013,  
by Clinton Morgan.

*Clinton Morgan*  
Notary Public in and for the State of  
Washington, residing at: Olympia  
My commission expires 5/9/15



# Appendix

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
2 IN AND FOR THE COUNTY OF LEWIS

3  
4 RONALD GATES,

5 Petitioner,

6 vs.

7 KYON BRUNDAGE,

8 Respondent.

)  
)  
) Superior Court  
) No. 11-3-00226-0  
)  
)  
)

9 **COPY**

10  
11 VERBATIM TRANSCRIPT OF PROCEEDINGS  
12 June 8, 2012  
13 Motion to Stay

14 Before the  
15 HONORABLE NELSON HUNT

16 A P P E A R A N C E S

17 For the Petitioner:

18 KELLI S. BRINGOLF  
19 Attorney at Law  
1009 Mellen Street  
Centralia, Washington 98531

20 For the Respondent:

21 Clayton Dickinson  
22 Attorney at Law  
6314 19th Street West  
Tacoma, Washington 98466

23 Natasha Natalizio, CCR No. 3251  
24 Official Court Reporter  
Lewis County Superior Court  
25 Department 1  
Chehalis, Washington 98532

1 BE IT REMEMBERED that on June 8, 2012, the  
2 above-captioned cause came on duly for hearing before the  
3 HONORABLE NELSON HUNT, Judge of the Superior Court in and  
4 for the County of Lewis, State of Washington; the following  
5 proceedings were had, to wit:

6  
7 <<<<<< >>>>>>

8  
9 THE COURT: Before we get started,  
10 Mr. Dickinson, a word about the confusion about the  
11 starting time. We have a motions judge. We don't have  
12 master calendars. And if you want to have a hearing other  
13 than Friday at 9:30, you need to contact the Court  
14 Administrator's Office. It all worked out, so it's not a  
15 big deal. Just for future reference, I could have easily  
16 and, in fact, was scheduled to be in trial this morning.  
17 In which case, this matter would not have been heard.  
18 You're fortunate, we're fortunate. It all worked out.

19 MR. DICKINSON: I appreciate the Court's  
20 indulgence.

21 THE COURT: This is 11-3-226-0, Gates vs.  
22 Brundage. Mr. Gates is here with counsel, Ms. Bringolf.  
23 And Mr. Dickinson is representing Ms. Brundage, who is not  
24 present.

25 It's your motion, Mr. Dickinson, so go ahead.

1 MR. DICKINSON: We are asking that the Court  
2 stay the decree, at this point in time, pending the outcome  
3 of the appeal. Obviously, the basis for that, is in the  
4 event that Ms. Brundage does prevail, if the assets are  
5 dissipated, then she is in a position where we come to  
6 court and then those assets are gone and then we end up  
7 with a miscarriage of justice at that point in time.

8 We believe that there is a valid basis for appeal  
9 based on the continuance at this point. I haven't read the  
10 transcript of the trial at this juncture, but we believe  
11 this is a good-faith appeal. And we believe there's a  
12 reasonable likelihood of a favorable outcome to her.

13 In essence, to preserve that, we are asking the Court  
14 then stay the decree. They have requested that the Court  
15 deny the motion, and they have also requested that the  
16 Court grant a bond. Essentially, the bond that they are  
17 requesting would essentially be, if you will, a denial by  
18 bond because the bond -- if we are talking \$500,000, we  
19 have got a bond that potentially is so high that that  
20 becomes prohibitive in and of itself.

21 In this case, we believe there is no basis and no need  
22 for a bond for a number of reasons: First of all, they  
23 talk about the properties. They have sellers immediately  
24 which, I think, illustrates a need for a stay. But the  
25 fact of the matter is, the current real estate market is

1 improved from, I think, hitting rock bottom. And I believe  
2 in the next 18 months or so, it is only likely to go up,  
3 not down. And the assets will be there. I don't believe  
4 there is any realistic concern for damage to the properties  
5 because these are properties that Ms. Brundage is  
6 requesting to retain. She has every interest to maintain  
7 those.

8 I don't know if the Court is aware, but the property  
9 taxes were all paid through April. They were current at  
10 the time that you folks came to court in May. Basically,  
11 those properties will be maintained.

12 Incidentally, they asked the question in their  
13 material: Who is going to pay the taxes? Who is going to  
14 pay the insurance? Who is going to maintain the property?  
15 Ms. Brundage will do that. And we have no problem with her  
16 assuming that responsibility. So those assets are not  
17 going to go down in value.

18 And, certainly, real estate is going up more in value  
19 than money. If they were liquidated and money was put in  
20 the bank, banks aren't paying much at this point. So you  
21 are not likely to get a lot of interest on something  
22 sitting in a bank account somewhere.

23 Basically, at this point, he would make as much or  
24 more money if the properties were sold later. They have  
25 also raised the issue of current enjoyment of the assets.

1 Well, is he really going to sell all those properties and  
2 then just spend the money immediately or in the next 18  
3 months? Hopefully not. Hopefully he's going to still live  
4 for a number of years.

5 We do have a doctor's statement, and certainly at age  
6 84, you do have health issues. Prostate cancer is not a  
7 fast growing cancer. There is nothing here indicating a  
8 limited number of years. Basically, there is every reason  
9 to believe that at the end of this, he will be alive and  
10 well, and the assets can be taken care of at that point in  
11 time.

12 They have indicated that there are potentially tax  
13 liabilities that they are incurring. If you look at the  
14 tax liability that they have listed, it would basically put  
15 him in the 28th percentile in terms of tax brackets given  
16 the income of between 85,000 and 175,000 a year. He has  
17 income and resources.

18 But I would also point out that if, in fact -- he says  
19 that basically he was an innocent spouse, had nothing to do  
20 with these being sold. There is certainly tax -- tax  
21 issues that can be raised. An innocent spouse being one,  
22 where someone else has incurred this expense without my  
23 knowledge or done this.

24 If it's stolen, he could claim theft. There are ways  
25 with his accountant that you could work around this. In

1 any event -- even in the event that none of those prevailed  
2 and the tax has to be paid and there were taxes or  
3 penalties or interest that was incurred, Ms. Brundage,  
4 whereas she is not cash wealthy, she does have property and  
5 that property could certainly be executed on at that point  
6 to pay for any penalties that he had.

7 At the end of this whole thing, we are not in a  
8 position where there would not be other assets that could  
9 be attached or sought to cover any damages that  
10 Mr. Brundage (sic) may have suffered, if any, in the course  
11 of this appeal.

12 Certainly, this being essentially the continuance for  
13 the disillusion of marriage, if you will, it perhaps may  
14 not be inappropriate to simply order that neither party  
15 dispose of any assets except for the usual course of  
16 business, if they are concerned about whether or not she is  
17 going to do anything with her property or anything, that  
18 may be a means of ensuring that that doesn't happen.

19 We are not in a position where, at the end of the day,  
20 the other party would be adversely effected if the appeal  
21 was lost and he ended up getting his property only 18  
22 months down the road or thereabouts. So it's not like  
23 there won't be anything to pay those. His property is  
24 likely to be worth more and is likely to -- there will  
25 certainly be assets available.

1           Also, at this point, she lives in Arizona in the house  
2 there. Whereas it is free and clear, meaning there is no  
3 mortgage on the property, so there is no lien attaching to  
4 that property, she did incur debt: over \$50,000. This is  
5 documented in her financial declaration from last August  
6 where she points out that there are three credit cards and  
7 a friend and her sister to whom she owes money for that  
8 property. So she is making a monthly payment on that  
9 property.

10           MS. BRINGOLF: Objection, Your Honor. None of  
11 that is in the record, and I'm not sure anything has been  
12 filed to show that.

13           MR. DICKINSON: All of the --

14           THE COURT: It really doesn't matter.

15           MS. BRINGOLF: Okay.

16           MR. DICKINSON: It's basically August -- I  
17 believe it was August 24th of last year her financial  
18 declaration shows that property. Basically, she is, in  
19 essence, making the equivalent of a house payment every  
20 month. And if she were not living in the property, she  
21 simply is making an equivalent of a house payment for  
22 property that she is not living in.

23           We have proposed that the rents from the properties  
24 that she currently owns, that that money be paid to the  
25 registry of the court either by going to Ms. Brundage and

1 her being required to pay into the registry of the court,  
2 or having to render it directly pay that money to the  
3 registry of the court pending this appeal. So none of  
4 those funds or assets would be lost in the process.

5 We believe she should be allowed to continue residing  
6 in that property as well, and that would continue to  
7 maintain the status quo there.

8 Basically, it's our position that this is the best way  
9 to ensure that justice will be maintained throughout. And  
10 we believe that this will enable the parties to proceed  
11 with this and end up in the same position that they would  
12 have been at the end of the day.

13 So we would ask the Court to allow the stay and to not  
14 impose the bond. Also we are opposed to any request for  
15 attorney fees. We would point out that Mr. Brundage (sic)  
16 did have counsel at trial -- excuse me, Mr. Gates did.  
17 Ms. Brundage did not. Basically, they point out in their  
18 material, they are claiming that because she doesn't have  
19 the income from the Fords Prairie property, that she  
20 doesn't have income to maintain the property.

21 So on the one hand they claim she doesn't have income  
22 sufficient. On the other hand, they ask for attorney fees.  
23 There is an attorney fee exception in dissolution of  
24 marriage actions on appeal, and that's got its foundation  
25 in the fact that we have a statute allowing attorney fees

1 in a dissolution of marriage, which is based on the  
2 standard of needs versus an ability to pay.

3 Ms. Brundage does not have the ability to pay. We  
4 would put forward that Mr. Brundage (sic) has not  
5 demonstrated need at this juncture, so we would ask the  
6 Court to also deny any ward of attorney fees in this  
7 regard. Thank you.

8 THE COURT: Go ahead.

9 MS. BRINGOLF: Thank you, Your Honor. We are  
10 asking the Court to stay -- to deny the stay based on the  
11 fact that it could deprive of Mr. Gates of enjoyment of  
12 what he worked his lifetime to achieve. As the Court is  
13 aware, Mr. Gates is in poor health. He did suffer a  
14 stroke, a heart attack. He has now been diagnosed with  
15 prostate cancer, which has led to bone cancer.

16 All of those issues would deprive him of any enjoyment  
17 of the property he was awarded under the decree. And we  
18 believe that it is imperative that he be able to enjoy that  
19 property now. Counsel argued, well, even if he was able to  
20 sell the properties, is he just going to spend the money?

21 Unfortunately, due to Ms. Brundage's actions, he has  
22 incurred substantial debt to the IRS. He's incurred credit  
23 card debt for monies that she transferred from her cards to  
24 his cards. He has debt on mortgages for properties she  
25 allowed to foreclose, along with a line of credit.

1           He still has to pay all of that debt. And of course  
2 the only means that he has to pay that debt is the means  
3 from selling and receiving proceeds from the properties  
4 awarded under the decree. My understanding was that was  
5 the whole purpose of the award, was to offset some of the  
6 damage she had done to his financial state.

7           We have also proven at trial and ask, and this further  
8 necessitates the need for a bond, that Ms. Brundage  
9 mismanages her property. She allowed waste of two of  
10 Mr. Gates' homes to go into foreclosure. She allowed one  
11 to be condemned. She has not attended to the necessary  
12 repairs on the Fords property that she owns.

13           Counsel argued, well, it's her property; she's going  
14 to take care of it, but she hasn't. And her own renters'  
15 declaration filed on her behalf indicates that she has not  
16 attended to necessary repairs to allow the property to be  
17 managed properly.

18           This is a real concern. If the property is left in  
19 her care and the stay is granted, that there will be  
20 nothing left worth of value, which is why we are asking the  
21 Court to enter a bond of 547,000 at the high end, and 345  
22 at the low end, depending on how the Court looks at his  
23 deprivation of use of the property.

24           Finally, the Rules of Appellate Procedure 7.2(d) does  
25 allow this court to award attorney fees in litigation

1 expenses for an appeal in a marriage. It does not state  
2 that it is based on need and ability to pay. It is a  
3 situation where, in this particular case, Ms. Brundage had  
4 a fair trial, she had the opportunity to present her case,  
5 and now she wants to take another bite at the apple when  
6 there hasn't been any misuse of the Court's discretion in  
7 this particular case and really, there isn't any reason for  
8 the appeal other than to drag out his award of the  
9 property.

10 We ask the Court to deny the stay. At the very least,  
11 if the Court grants the stay, we are asking for a bond in  
12 the amount of \$547,000.

13 THE COURT: Mr. Dickinson, you have the final  
14 word if you want it.

15 MR. DICKINSON: Your Honor, we are talking  
16 about a period of time of about 18 months. We do have  
17 assets in property here if there are additional fees or  
18 costs are incurred, she has other assets that could be  
19 attached to pay for those to cover any damages that may be  
20 presented at that point in time at the end of this.

21 So that could certainly be revisited at that juncture  
22 if it needed to be. I don't recall anything in my client's  
23 declaration, nor the declaration of the renters, that said  
24 anything about any damage. Any alleged damage --

25 THE COURT: Actually, oh, it's there. There's

1 a hole in the floor that Ms. Mywildersyde whom, by the way,  
2 I am familiar with due to another case says there has been  
3 a hole in the floor that has not been fixed for a long  
4 time. I don't recall if it was months or years that she  
5 requested Ms. Brundage to take a look at it, and she hasn't  
6 done it.

7 MR. DICKINSON: That is not in her declaration  
8 that we submitted. That is hearsay on the declarations  
9 that they presented. There was no declaration from her  
10 other than hearsay saying that. Therefore, that is not  
11 before the Court and cannot be considered.

12 THE COURT: It doesn't really matter. In any  
13 event, it's not going to effect my decision.

14 MR. DICKINSON: Basically, she did have the  
15 property taxes paid. We know that. She had -- everything  
16 has been paid and taken care of. Basically, we believe  
17 that the appeal is certainly in good faith. My research  
18 indicates that there is a very solid basis for the appeal  
19 in regard to the continuance.

20 There was a very brief continuance. And the basis for  
21 that was because allegedly she was attorney shopping.  
22 There is no proof of attorney shopping in that whole thing.  
23 It was a very brief continuance. My experience with folks  
24 attorney shopping is when they are trying to delay a trial  
25 is you are going to push it out months. You are not going

1 to come in and say we want to continue it a few weeks.

2 If it is, you are a very poor attorney shopper because  
3 you are going to put yourself in a position where you are  
4 going to be spinning that wheel every couple of weeks.  
5 This is somebody coming in with an attorney by her side  
6 ready to say, I am willing to step in. I can't do it on  
7 this date. Give me another couple of weeks. That's not  
8 attorney shopping. That was appropriate. And that was due  
9 to the costs and the fees involved that she was unable to  
10 afford.

11 We would ask the Court to grant the stay. The only  
12 purpose for a bond is because there is no means of  
13 sufficiently protecting somebody. In this case, at the end  
14 of the 18 months, there will be protection there. The  
15 properties that we are talking about are going to be  
16 present. The properties that my client has in addition to  
17 that would be present.

18 I guess, if they are really concerned about is she  
19 going to mismanage the properties, then I suppose perhaps  
20 he can pay the costs for managing those and add those onto  
21 a slate of damages at the end of the day if he seriously  
22 believes she is not going to maintain those properties, or  
23 have some kind of co-management.

24 I don't know. I am kind of thinking off the cuff  
25 here, but there may be a way of dealing with that and

1 trying to alleviate that concern. But the bottom line is,  
2 we do have assets in properties sufficient here. There is  
3 no need to add complicating costs to protect something that  
4 doesn't need protecting because there are assets there that  
5 are not going to be lost or damaged in this period of time.  
6 Thank you.

7 THE COURT: I am of two minds in this, but I  
8 have to first state that, Mr. Dickinson, I don't doubt that  
9 your statements are made in good faith and that you believe  
10 there is a good faith basis for a continuance. That's not  
11 the case with your client.

12 Your client has zero credibility. If there was a way  
13 to have negative creditability, she would have it as far as  
14 it could possibly be done. The two minds that I am in are  
15 whether to just deny the motion for a stay. Neither party  
16 has referenced in the oral argument here RAP 8.1, which  
17 seems to make it mandatory that I grant a stay, but since  
18 you are not arguing that, I am a little bit -- I don't know  
19 that I have to follow that.

20 It appears that it is addressed to my discretion then.  
21 Here is what I am of two minds: either deny the stay,  
22 which if it's of a matter of right, it will come right  
23 back, or the Court of Appeals will grant the stay, or to  
24 grant the stay on conditions that I think are appropriate  
25 in this case, which will be very favorable to the

1           Petitioner.

2           The reason why I am inclined to deny the stay is that  
3           no bond here in any amount is going to protect the  
4           Petitioner. The Respondent essentially stole his property  
5           and misused her power of attorney: used it to acquire and  
6           protect her own assets at his expense. This has left him  
7           destitute and ill.

8           And we can downplay -- or Ms. Brundage can downplay  
9           that all she wants, but it was her whole strategy in this  
10          matter was to be intransigent to any settlement and wait  
11          out Mr. Gates until he dies, is the way I read the entire  
12          evidence in this case. And I will get to that in a moment.

13          Granting the stay in this case would perpetuate this  
14          theme of abuse, and I believe that the rule which seems to  
15          say that there should be matter of right does not  
16          contemplate these circumstances, and I am not going to be a  
17          party to it.

18          The Petitioner needs his property, and he needs it  
19          now, not after his death. If, on the other hand -- and I  
20          am going to give Ms. Bringolf the choice here -- the issue  
21          becomes well, the stay should be granted, then I am going  
22          to grant it in the amount of \$500,000 plus some -- the bond  
23          will be that, plus whatever attorney fees reasonably can be  
24          projected.

25          I find the reasonable value of the use of the property

1 is inadequate as been put forth here. I am not exactly  
2 sure where the half million dollars comes from, but that's  
3 actually the figure I was thinking in any event.

4 I am making this finding because of the trial evidence  
5 in this case which shows that, again, the Respondent  
6 basically stole the Petitioner's property from him in  
7 several ways, that her actions have left the Petitioner,  
8 who is in poor health, without retirement funds and without  
9 the assets he acquired to support himself in his hour of  
10 need, which is now; and the Respondent has engaged in a  
11 course of conduct designed to delay resolution of this case  
12 until after the Petitioner dies, so that the grant of the  
13 stay accomplishes that result now even after a trial has  
14 established her culpability.

15 So if we are going to have a stay, the amount will be  
16 that \$500,000 plus sufficient bond to cover the attorney  
17 fees from here through the appeal. But, frankly, I have no  
18 faith in the Respondent's ability to care for the property  
19 in good faith under these circumstances.

20 So should she post the bond, the stay is conditioned  
21 upon her paying the taxes, maintaining the insurance, and  
22 providing reasonable maintenance on all the properties.  
23 She shall also provide Ms. Bringolf with monthly statements  
24 supported by documentation showing compliance with these  
25 conditions, and all funds received from the use of this

1 property shall be deposited into the registry of the court.  
2 No single item of property is to be sold or further  
3 incumbered without prior approval of the Court with notice  
4 to the Respondent. That's only if Ms. Bringolf decides  
5 that the bond -- that's the way she wants to go.

6 Now, I also want to address the issue of a  
7 continuance. Her motion for a continuance to me was made  
8 in the middle of trial. And I did not make perhaps as good  
9 a record because I didn't have all the documentation really  
10 in front of me and the opportunity to review it when I  
11 denied her mid-trial motion for a continuance.

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

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

1 attorney.

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

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

18 And that also became apparent -- her intransigence  
19 became apparent when she made her request for how the  
20 property was to be divided. And let me make it clear that  
21 there was no way that she did not understand what was  
22 happening. She may have made that appearance during the  
23 course of the trial, but as soon as we started talking  
24 about her assets, she was clearly focused on exactly what  
25 she wanted and it was: I want everything that's mine, and

1 I also want everything that's his. He doesn't get  
2 anything. I get it all.

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

11 So my next question then is to you, Ms. Bringolf,  
12 which way do you wish to go? Do you want the bond, or do  
13 you want the denial of the stay?

14 MS. BRINGOLF: May I ask for just a few moments  
15 to consult with my client?

16 THE COURT: Do you want me to step out while  
17 you do that?

18 MS. BRINGOLF: I think that would be good.

19 THE COURT: I'll do that.

20 (Court at recess.)

21 THE COURT: Ms. Bringolf?

22 MS. BRINGOLF: Thank you, Your Honor. My  
23 client has opted to go with the bond of \$500,000. My  
24 understanding from the rules is that bond would be posted  
25 within seven days. And we are asking that attorney fees

1 not be included in the bond, but be paid directly.

2 THE COURT: Attorney fees for exactly what?

3 MS. BRINGOLF: 15,000 is what he is asking for.  
4 He spent over 15 in this divorce, and we are recognizing  
5 that an appeal would be more expensive than the divorce.

6 MR. DICKINSON: She doesn't have 15,000 cash.  
7 It is going to cause more issues, so I would say a bond  
8 would be a more realistic approach to this at this point in  
9 time. She doesn't have it.

10 THE COURT: Do you know -- do either of you  
11 know, if I order any attorney fees, is that the final word  
12 on it, or is that just to get you started?

13 MS. BRINGOLF: I don't believe it is the final  
14 word, but it's not specific in the rule.

15 THE COURT: I don't think it should be because  
16 it could be less or it could be more.

17 MS. BRINGOLF: Right.

18 THE COURT: Well, \$5,000. She will have to  
19 come up with that.

20 MS. BRINGOLF: Within seven days, same as the  
21 bond?

22 MR. DICKINSON: She doesn't have the cash. If  
23 you order to do something in seven days, you are setting  
24 her up her contempt.

25 THE COURT: I understand that. That's why I

1 was looking at you. The money is payable within 30 days,  
2 but the bond has to be filed in accordance with the rule.

3 Do you have an order ready, Ms. Bringolf, or are you  
4 going to be circulating one?

5 MS. BRINGOLF: I will circulate one, Your  
6 Honor. I would like to include your findings. And they  
7 were quite lengthy and very quick.

8 THE COURT: I know. I wasn't aware that you  
9 were going to do that. Just circulate the order. I will  
10 be gone next week on vacation, but I will be back on the  
11 following Monday, so hopefully it will be there by then.

12 MS. BRINGOLF: I would like to prepare it this  
13 morning. And I will do that just so that -- actually, I  
14 will just circulate it. That's fine.

15 THE COURT: You can do it either way. I will  
16 be here until 5:00. Anything further?

17 MS. BRINGOLF: I don't believe so.

18 MR. DICKINSON: Nothing.

19 (Motion concluded.)  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF LEWIS

RONALD GATES,

Petitioner,

vs.

KYON BRUNDAGE

Respondent.

)  
)  
)  
) Superior Court  
) No. 11-3-00226-0  
)  
)  
)

REPORTER'S CERTIFICATE

STATE OF WASHINGTON

COUNTY OF LEWIS

)  
) ss  
)

I, Natasha Natalizio, Official Court Reporter in the State of Washington, County of Lewis, do hereby certify that the forgoing transcript is a full, true, and accurate transcript of the proceedings and testimony taken in the matter of the above-entitled cause.

Dated this 18th day of June, 2012.

**COPY**

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Natasha Natalizio, CCR  
Official Court Reporter  
CCR #3251