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No. 63603-1-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In Re the Marriage of  
KIMBERLY KRISTEN MELE,  
Respondent,  
v.  
JOHN PETER MELE,  
Appellant.

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COURT OF APPEALS  
STATE OF WASHINGTON  
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**REPLY BRIEF OF APPELLANT  
BRIEF OF CROSS-RESPONDENT**

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## RESPONSE TO MOTION TO DISMISS

The Brief of Respondent includes a motion to dismiss the appeal by John Peter Mele (“John”) appeal based on the contention by Respondent Kimberly Kristen Mele (“Kim”) that John was “found in contempt for failing to comply with the decree” and “has failed to comply with the court’s order.” *See* Brief of Respondent, p. 15. In support of her motion, Kim cites *Pike v. Pike*, 24 Wn.2d 735, 167 P.2d 401 (1946).

Kim’s motion is legally and factually meritless and must be dismissed. Contrary to Kim’s implication, the doctrine set forth in *Pike* does not stand for the blanket proposition that an appeal in a dissolution action must be dismissed if the appellant has been found in contempt. Instead, the doctrine in *Pike* gives an appellate court the discretion to require an appellant to comply with a trial court order or face dismissal in circumstances “where it is made to appear that the appellant will not abide the appeal and will make impossible the execution of the decree.” *Sewell v. Sewell*, 28 Wn.2d 394, 397, 184 P.2d 76 (1947); *Pike*, 24 Wn.2d at 742-43. Thus in *Pike*, a conditional dismissal was held to be warranted when the appellant had removed and concealed the parties’ children and therefore put into question the court’s ability to enforce any decree involving them.

Kim's motion is unsupported by any evidence whatsoever, let alone evidence indicating that the execution of any portion of the trial court's ruling could be considered "impossible" or even in called into question. On the contrary, John fully complied with the terms of the trial court's Order on Show Cause re Contempt/Judgment entered on October 9, 2009, CP 1134-41, and Order on Petitioner's Motion to Clarify and Enforce Decree and Request for Attorney's Fees entered on November 18, 2009, CP 1220-22. In fact, as of the filing of Kim's Brief of Respondent, Kim had received payment in full of all monies owing under the orders, as well as payment in full for the "back child support" award included in the final Order of Child Support. *See* Declaration of John Mele in Opposition to Respondent's Motion to Dismiss. Under the circumstances, Kim's motion to dismiss must therefore be dismissed.

## **REPLY BRIEF OF APPELLANT**

### **I. ARGUMENT**

#### **A. The trial court's division of property was unjust and inequitable and must be reversed.**

1. The court's division of property produced patently disparate economic circumstances.

As noted in the Brief of Appellant, if a dissolution decree "results in a patent disparity in the parties' economic circumstances, a manifest abuse of discretion has occurred" and the court has therefore committed

reversible error. *In re Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572 (2007), *review denied* 163 Wn.2d 1055 (2008).

Kim does not dispute this legal standard in her Brief of Respondent. Instead, she claims that the calculations in the Brief of Appellant which show the drastic impacts of the trial court's various omissions and erroneous valuations are somehow "false and manipulated", "intentional miscalculations", and "manipulative, inappropriate, meritless and deplorable." *See* Brief of Respondent, p. 22. Despite her repeated claims, however, Kim fails to point to any aspect of the calculations that are unsupported by the trial record or mathematically inaccurate. Instead, it appears that Kim's principal objection to the calculations is that they "include both community and separate property." *Id.*

While a property division that does not account for the value of all the community and separate assets and liabilities awarded by the court, and does not take into consideration the economic condition of each spouse as a result of that division, obviously works to Kim's advantage, it is directly contrary to Washington law. *See, e.g.* RCW 26.09.080; *In re Washburn*, 101 Wn.2d 168, 177-81, 677 P.2d 152 (1984). The trial court committed a manifest abuse of discretion by failing to account for the value of all the property awarded in this matter and producing a patent

disparity in the parties' economic circumstances, and its decision must therefore be reversed.

2. The trial court's failure to account for the value of Kim's Exemption Trust in its division of property cannot possibly be considered "harmless."

Kim is the sole trustee and sole beneficiary of an Exemption Trust, which she valued at a minimum of \$423,356 at the time of trial. RP 1138. While the trial court awarded the Exemption Trust to Kim as her separate property, the court failed to make *any* accounting for the Trust when it calculated the value of the community and separate property it divided between the parties.

The impact of the court's failure is undeniable. According to the spreadsheet utilized by the trial court, the net value of the property it purported to divide was \$584,187, with \$342,692 going to Kim. In reality, however, the award of the Exemption Trust to Kim meant that the net value of the property awarded to her was at least \$766,048, more than twice the amount valued by the court. The trial court's failure to account for the Trust not only violated the express requirements of RCW 26.09.080, it was a primary factor in the patent disparity in economic circumstances produced by its decision.

In her Brief of Respondent, Kim claims makes no attempt to defend the merits of the court's omission. Instead, Kim argues (1) the

absence of the Trust from the court's calculation was "harmless" because the Trust was "listed in the Decree as Kim's separate property", and (2) a valuation of the Trust in the property division spreadsheet would have been "inaccurate since the court concluded that Kim did not have access to the totality of the [Exemption] Trust." *See* Brief of Respondent, p. 43.

Significantly, Kim fails to offer any legal authority to support the proposition implicit in her argument and the court's decision – that a trial court need not account for the value of a fully vested trust fund in making its division of property in a divorce if there are conditions on the amount of money which may be withdrawn from the trust at any given time. Because all trusts, by their nature, include some type of limiting condition on the distribution of trust assets, the lack of such authority is not surprising. In fact, no such authority exists. The trial court's omission was therefore based on an untenable reason, and thus constituted a reversible abuse of discretion.

Moreover, any notion that the court's omission was "harmless" is belied by the value of the Exemption Trust and its impact on the parties' post-dissolution economic circumstances. Nor can the court's grossly inaccurate characterization of the Exemption Trust in its written decision be excused because "there is no harm or inconsistency since Kim's access to the [Exemption] Trust is still extremely restricted." *See* Brief of

Respondent, p. 43. Both the court's and Kim's contentions regarding restrictions on the Trust are belied by the Trust document itself, which (1) obligates Kim to pay out all net income of the Trust to herself on an annual basis, (2) allows Kim to withdraw up to 5% of the Trust principal on an annual basis for her "medical needs", (3) allows Kim to withdraw up to an additional 5% of the Trust principal each January, and (4) allows Kim to borrow an unlimited amount of funds from the Trust at her discretion so long as it is in the form of loan is made at "reasonable rate of interest and for adequate security". See Ex. 106 (§§ 7.2, 7.3, 10.1.2). Thus to the extent the court's characterization of the Trust in its written decision rises to the level of factual findings, those findings are unsupported by the record and the court abused its discretion by basing its decision on untenable grounds.

3. The court's valuation of the Costco stock options was not based on "properly admitted evidence" and produced an inequitable result.

The inequity of the court's decision was magnified by the value it assigned to the Costco stock options awarded to Kim. Multiple valuations for the options were presented at trial: as of December 30, 2007, the options were worth \$510,450 (Ex. 17); as of December 27, 2008, the options had a value of \$171,854 (RP 833, Ex. 107); and as of January 29, the options were worth \$113,895 (RP 550; Exs. 48, 66). The trial court,

however, assigned a value of \$32,352 to the options based on the purported value of the options as of March 2, 2009 pursuant to Exhibit 86. CP 619; RP 1237-40.

As noted in the Brief of Appellant, the trial court abused its discretion by admitting Exhibit 86 and by relying on the valuation included in that exhibit. Exhibit 86 consisted of a page appearing to be a print-out from a website showing Costco stock at \$40.84 per share on March 2, 2009, and a page calculating the value of Kim's options at \$32,352. Exhibit 86 was offer by Kim's counsel during the cross-examination of John, who did not prepare Exhibit 86 and was only able to testify about what the exhibit appeared to show. RP 914-15. The court admitted Exhibit 86 over the objection of John's counsel for lack of foundation. RP 917, 1237-38.

Kim attempts to defend the court's reliance on Exhibit 86 by summarily claiming it was based on "properly admitted evidence" (*see* Brief of Respondent, p. 34) and that "there are no specific evidentiary deficiencies in the record" (*see* Brief of Respondent, p. 33). In light of the complete absence of foundation for the exhibit or the testimony elicited based on the exhibit, Kim's contention is nonsensical.

Kim also attempts to defend the court's valuation of the Costco stock options by insisting that any other valuation would have improperly

credited her with assets that “did not exist.” *See* Brief of Respondent, p. 32. Kim’s argument is, at a minimum, hypocritical given her defense of the court’s decision to value the John’s IRA retirement account as of December 2007 (\$274,607), instead of its value as of the close of trial (\$25,000).

Moreover, if Kim sincerely believed that the court was only obligated to give the Costco stock options a “current valuation” (*see* Brief of Respondent, p. 33), the options should have still been given a considerably higher value. In his post-trial motion for reconsideration, John noted the following alternate valuations for the options: \$57,775 as of the date of the court’s oral decision on March 17, 2009; \$91,143 as of the date of the presentation hearing on March 30, 2009; \$130,245 as of the date the parties’ proposed orders were filed; \$82,470 as of the date the final orders were signed on April 15, 2009; and \$119,367 as of the motion for reconsideration on April 24, 2009. CP 596-615.

Ultimately, Kim’s arguments miss the overriding error made by the trial court. By choosing the lowest possible valuation for the Costco stock options and other assets awarded to Kim while (a) choosing the highest possible values for the assets assigned to John and (b) omitting the value of other assets awarded to Kim and other liabilities assigned to John from

its property spreadsheet, the court produced a patently disparate property division in favor of Kim.

4. The court abused its discretion by valuing John's IRA retirement account and two other "pre-distributed" assets at \$302,938 in its property division.

As noted in the Brief of Appellant, the trial court compounded its inequitable division of property by valuing John's IRA retirement account and two other "pre-distributed" assets at \$302,938 (their initial value in 2007) rather than \$25,589 (the value of the assets remaining at the time of trial). Under Washington law, the trial court abused its discretion by purporting to distribute assets to John that no longer existed, and basing its division of property on those non-existent assets. *See, e.g., In re Marriage of White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001).

Kim attempts to distinguish *Marriage of White* and defend the trial court's distribution by arguing that *White* involved a home lost in foreclosure, and that unlike this case, the home in *White* was not subject to distribution by the court because "neither party benefitted from or had access to the proceeds of the disposed property." *See* Brief of Respondent, p. 36.

Contrary to Kim's claim, *White* did not involve the distribution of a home lost in foreclosure, and the rule in *White* was not conditioned by whether a party "benefitted" from the disposed property. Instead, the

issue in *White* concerned a wife's request that she be awarded \$30,511 she received as an inheritance as her separate property, even though she had spent the funds to pay off the couple's home and car prior to trial. The trial court awarded the wife the funds by giving her a right to the first \$26,511 in proceeds from the home and the first \$4,000 in proceeds from the car, with the remainders to be split evenly. On appeal, the court in *White* agreed with the husband that the court did not have authority to distribute the wife's inheritance as such since it no longer existed, but that it had not abused its discretion by simply accounting for the contribution of the inheritance in its distribution of existing assets. *Marriage of White*, 105 Wn. App. at 554.

Pursuant to *White*, therefore, the trial court could have taken the original value of the "pre-distributed" assets into consideration in deciding what proportion of the existing property should have been distributed to John and Kim, but it could not distribute non-existent assets as part of its property division. *See, e.g., Angelo v. Angelo*, 142 Wn. App. 622, 646, 175 P.3d 1096 (2008).

The trial court, however, did not provide any explanation for its decision to divide what it valued as community property 60/40 in favor of Kim or for its decision to award Kim 100% of what it considered her separate property. For her part, Kim repeatedly argues that whatever

decisions were made by the trial court were entirely justified by the statements in the court's oral and written decisions that John somehow "dissipated" the pre-distributed assets because "the evidence was unclear as to how he spent the money but it is clear that he did not spend it to support the community." CP 657-58; RP 1227-28.

As demonstrated in the Brief of Appellant, to the extent the court's statements were a basis for any of its decisions regarding the division of property, they were not only unsupported by any evidence in the record, but demonstrably false. Among other things, (a) \$46,421 of the funds was used to pay community tax obligations on early distributions from the IRA, (b) \$6,445 was spent on the community's obligation for the dues, utilities and mortgage on their Tacoma investment property, (c) \$7,363 was spent on the community's obligation for the dues and loan payments on their Whistler timeshare, (d) \$1,428 was spent on the community's storage unit, (e) \$8,016 was spent on child support and expense reimbursement under the court's Temporary Order of Child Support, and (f) \$20,081 was spent on the mortgage and security monitoring for the parties' home. RP 816-18, 945-50; Exs. 108, 109, 137-140; *see Brief of Appellant*, pp. 30-34.

For her part, the only evidence Kim can cite in support of the trial court's statements is that John spent \$2,661 on comic books and related

items for the period from January to June 2008. Ex. 94. Kim does not explain how the expenditure of \$2,661 on comic books can possibly justify any aspect of the trial court's disparate property division, or support her insistence that John's expenditures were "not for the community or the children." *See* Brief of Respondent, p. 41. Instead, Kim simply resorts to repeating the untrue and unsupported canard of John's "lavish" and "profligate" spending, apparently hoping that repetition will beget reality.

Even assuming the trial court's unsupported statements regarding John's "dissipation" of the "pre-distributed" assets were true, they do not in any event justify the inclusion and purported distribution of non-existent assets in the court's division of property.

5. The trial court erred in valuing the parties' personal at \$2, failing to account for all separate liabilities assigned to John, and including two purported liabilities of Kim in its property division.

Because no evidence exists to support the trial court's \$2 valuation of the parties' personal property, Kim attempts to defend the valuation by excusing it as an inconsequential "time saving measure." *See* Brief of Respondent, p. 62. Given the patent disparity in the economic circumstances of the parties as a result of the court's decision, and the size and impact of the judgment entered by the court against John, the mis-

valuation of any asset in this matter cannot possibly be considered inconsequential.

Kim also attempts to defend the court's failure to include the value of more than \$24,000 in "separate" liabilities assigned to John in its property division spreadsheet, and its inclusion of more than \$43,000 in rejected liabilities claimed by Kim, by claiming the court also omitted other "liabilities" assigned to Kim which are "actually far greater than what appears on the property chart." *See* Brief of Respondent, p. 44. In particular, Kim points to the post-trial expenses associated with the Tacoma condo and timeshares she was directed to sell by the court.

Kim's claim does not absolve the trial court's errors, nor is it at all comparable. Under the Decree of Dissolution, Kim was not made wholly liable for any of the expenses relating to the parties' Tacoma condo or timeshares. Instead, pursuant to the Decree, Kim was obligated to sell all three properties by May 2009, and was entitled to reimbursement for any expenditures from the sale proceeds, with any unreimbursed sums to be converted into a 50/50 debt of the parties. In the worst case, therefore, any potential future liability associated with the properties would not have an equal impact on the parties.

6. The disparity in the parties' economic circumstances was exacerbated by the court's failure to require Kim to sell or refinance the parties' home.

Kim defends the court's decision not to require her to sell or refinance the parties' home by insisting there is no "rule or case law that requires a court to force the sale or refinance of the home." *See* Brief of Respondent, p. 57. While Kim's contention is correct in one sense, her argument misses and misconstrues the problem with the court's failure to account for the debt associated with the house in its Decree.

Kim, for example, insists there is "no harm" to John resulting from his joint and several liability for the mortgage and home equity debts on the home because his is "insulated" from any liability by the hold harmless clause in the Decree. *See* Brief of Respondent, p. 58. Kim's contention, however, ignores the reality of John's ongoing liability for those debts. From the perspective of the lenders on those debts, and any other lenders, John remains jointly liable until those loans are repaid or refinanced, regardless of his ownership of the property securing the loans or any hold harmless clause in the Decree. Not only would John remain liable if the value of the home was not sufficient to cover the debts in the event of sale or foreclosure, but his ongoing liability affects his ability to obtain credit or otherwise transact business.

Thus while the trial court was not obligated to direct Kim to sell or refinance the house, its failure to take John's continuing liability into account in the context of all the other decisions it made only serves to underscore the fundamental flaw in this case. A trial court's "paramount" concern in a dissolution proceeding must be the economic condition of each spouse as a result of the division. *See, e.g., In re Washburn*, 101 Wn.2d at 181; RCW 26.09.080(4). Particularly in cases where both parents share responsibility for their children, a court's failure to consider each parties' economic condition and any resulting disparity in their economic circumstances, has a direct and negative impact on the parent-child relationship and the welfare and best interests of their children. *See* RCW 26.09.002.

By selectively including, omitting and/or valuing the community and separate property in this case, the trial court produced a patent disparity in the parties' economic circumstances in favor of Kim that is directly contrary to Washington statutory and case law. The court's property division was therefore a manifest abuse of discretion that must be reversed on appeal.

**B. The trial court abused its discretion in awarding “back child support” and in setting the parties’ prospective child support obligations.**

1. The trial court’s retroactive award of “back child support” and reimbursement obligations was directly contrary to Washington law.

The final Order of Child Support included an award to Kim for “back child support” totaling \$4,766, despite the fact that Kim never requested “back child support” or a modification of the Temporary Order of Child Support in any of her trial pleadings or at any time during the course of the trial. CP 310-43, 638. The Order also retroactively extended and increased John’s reimbursement obligation for certain child-related expenses. CP 644.

Washington law specifically prohibits the retroactive modification of child support obligations. *See* RCW 26.09.170(1); *In re Marriage of Scanlon*, 109 Wn. App. 167, 178-79, 34 P.3d 877 (2001). Moreover, not only did the trial court fail to enter the requisite findings to support its award, the only conceivable rationale offered by the court for its decision was demonstrably false: contrary to the court’s statement, John could not have possibly “stopped paying his court ordered child support in March of 2008” because no child support order existed as of March 2008 or any time prior to that. CP 655.

Kim attempts to defend the court's retroactive awards by inventing a rationale and a legal basis for the court without citation to the record or authority. According to Kim, the court's retroactive awards were within its "discretion" because "the facts relied on by the court to calculate child support under the temporary order were false and incomplete." *See* Brief of Respondent, p. 57. Kim's claims regarding the evidence before the court at the time of the temporary order are not only unfounded, but irrelevant. Pursuant to RCW 26.09.170(1), a trial court simply has no authority to retroactively increase existing child support obligations, or to enter a judgment based on such an increase.

2. The court erred in setting John's imputed income, and by failing to consider all of Kim's income and the parties' assets and liabilities in setting child support.

In setting child support, the trial court imputed income to John of \$5,000 per month and denied his request for a temporary downward deviation from the standard calculation without entering any of the findings required by state law. *See* RCW 26.19.075(3). Moreover, the trial court failed to comply with its statutory obligation to *all* sources of income from *any* source for each party when setting support obligations, including trust income, salaries, wages and disability benefits, as well as the each parent's respective "household assets", "household debts", "other household income" and "non-recurring income". *See* RCW 26.19.035(4),

RCW 26.19.071(1) and (3)(j); CP 648-49. Not surprisingly, therefore, the court imposed support obligations on John that were impermissibly disproportionate in light of the financial circumstances imposed by the court's property division and Kim's access to funds from her Exemption Trust.

Kim attempts to excuse the trial court's failures, and justify the income imputed to John by repeatedly insisting that the court's actions were entirely justified because John was "voluntarily underemployed" and the imputed income was justified by John's work history, education, health and age. *See, e.g.*, Brief of Respondent, p. 52. Regardless of John's purported "underemployment", however, Kim fails to point to any evidence in the record that supports the suppositions on which her entire argument is based.

For example, Kim fails to explain or point to any evidence that John's earnings, education and experience as a lawyer were relevant considerations after his disbarment, or how the money he received during one-of-a-kind employment in his own failed business venture could possibly justify the immediate imputation of income at \$60,000 per year. In fact, there was no evidence at trial that John met the qualifications for any jobs paying \$60,000, or that such jobs were available to him at all. On the contrary, the only evidence at trial was that John did not possess the

qualifications to immediately begin working at a management level job or equivalent employment that might earn \$60,000 per year. RP 716-17.

The impropriety of the trial court's decision was magnified by the fact that at the hearing in June 2008 setting his temporary support obligations, the court was aware of John financial situation, and also knew he had been admitted to the Master of Education program at University of Washington Bothell, had begun attending classes towards his degree, and had started working part time as a tutor. CP 56-107. The trial court not only permitted John to proceed with his plan at that time, but was aware at of trial that he had continued on that same path, had made significant progress, and would be finished in a little more than a year's time.

Despite allowing John to devote nine months of time and resources towards training for an education career, the court's final orders wastefully and inexplicably forced John to drop out of school and abandon plans that had the potential to return him to his pre-disbarment earnings in relatively short order. By making patently disparate property division, and failing to take that division into consideration at the same time it arbitrarily chose to base his support obligations on immediate employment at \$60,000 per year, the trial court breached its statutory obligations and abused its discretion.

**C. The trial court abused its discretion by requiring John to maintain Kim as the sole beneficiary on his life insurance policy.**

John is required to John to maintain Kim as the sole beneficiary on his \$1,050,000 life insurance policy under the Decree of Dissolution. CP 635. Kim attempts to defend the court's decision by arguing that John has failed to show the requirement is "untenable." See Brief of Respondent, p. 62. Kim's contention is unsupported by authority and meritless in any event. The trial court's decision cannot possibly be justified based on some inchoate notion of its practicality. Instead, the trial court's discretion to secure unpaid and/or foreseeable child support obligations simply does not extend to allow it to compel John to maintain Kim as a beneficiary on life insurance worth at least 10 times as much as any conceivable future support obligations. See *In re Marriage of Sager*, 71 Wn. App. 855, 861, 863 P.2d 106 (1993).

**D. The trial court abused its discretion by granting Kim sole decision-making authority under the Parenting Plan.**

In order to limit a parent's right to participate in decision-making under a parenting plan, a trial court must find that certain statutory requisites have been met. See RCW 26.09.187(2)(b) and (2)(c). The trial court in this case granted sole decision-making authority to Kim over "major decisions" involving education, non-emergency health care,

religious upbringing, extracurricular activities, high risk activity, trips without parents, and “tattoos, piercings, hair coloring, head shaving, etc. CP 668-69. Notwithstanding the expansive authority it granted to Kim, however, the trial court did not identify any of grounds listed in RCW 26.09.187(2)(c) as the basis for its decision.

Kim attempts to defend the court’s decision by incorrectly claiming that statement in the court’s oral ruling that “the parties’ inability to make a decision together does at this point in time justify putting sole decision making in the hands of the mother” (RP 1233) somehow constitutes an unchallenged finding of fact in support of the decision. Not only does the statement fail to rise to the level of a finding of fact, but it was challenged by John (*see* Brief of Appellant, pp. 62-63), and fails to satisfy any of the criteria in RCW 26.09.187(2)(c) in any event. The unsurprising existence of post-separation communication difficulties cited by the parenting evaluator as well as the judge are by themselves insufficient to support a determination that parents do not have “a demonstrated ability and desire to cooperate with one another in decision making in each of the areas in RCW 26.09.184(5)(a).” *See* RCW 26.09.187(2)(c)(iii).

**E. Kim is not entitled to attorney fees and costs on appeal.**

The Brief of Respondent includes a claim for an award to Kim of attorney fees and costs on appeal based on her claim (1) John's appeal is frivolous and thus an award is warranted under RAP 18.9, and (2) an award is warranted based on the parties' financial resources under RCW 26.09.140.

Kim's claim for fees and costs under RCW 26.09.140 is not possible to analyze until the parties submit their respective financial declarations. Kim's claim for fees and costs under RAP 18.9, however, must be rejected. Notwithstanding Kim's insistence, John's appeal cannot possibly be considered "frivolous". According to the court in *Kinney v. Cook*, 150 Wn. App. 187, 208 P.3d 1 (2009):

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

*Kinney*, 150 Wn. App. at 195. Based on the arguments and authority presented in support of this appeal, there can be no doubt that John's appeal has merit, and the Kim's request under RAP 18.9 must be denied.

## BRIEF OF CROSS- RESPONDENT

In her cross-appeal, Kim argues that the trial court erred in failing to award attorney fees and costs to her at trial. In support of her claim, Kim points to Finding of Fact 2.15, and contends that John failed to assign error to “the court’s determination of intransigence” in that finding. *See* Brief of Respondent, p. 68.

Kim’s contention regarding the language of Finding of Fact 2.15 highlights the utter fallacy of her claim for attorney fees. The full text of Finding of Fact 2.15 reads as follows:

Other: There is evidence of intransigence by the father which contributed to the high attorneys’ fees and costs. There are, however, no funds from which to award attorneys’ fees.

CP 622.

Finding of Fact 2.15 is notable for two reasons. First, contrary to Kim’s repeated claim, it does *not* contain a finding that John was intransigent. Instead, it merely states that there is “evidence of intransigence by the father.” More importantly, however, the court acknowledges the reality of its property award to John by declining to award attorney fees in any event because “there are no funds from which to award” such fees.

Given that the court did not make a finding of intransigence in Finding of Fact 2.15, John's decision not to assign error to the Finding is of no consequence. Kim's failure to assign error to the Finding, on the other hand, is fatal to her cross-appeal.

As the cross-appellant, Kim was obligated under the Rules of Appellate Procedure to assign error to the findings she sought to contest, and to devote a portion of her argument to the grounds for any claimed error. RAP 10.3. Because Kim failed to assign error or otherwise contest the trial court's determination in Finding of Fact 2.15 that "there are no funds from which to award" fees against John, and because that portion of the Finding is supported by ample evidence in any event, it cannot be said that the trial court abused its discretion by refusing to award fees and costs to Kim.

It must also be noted that nearly all of the "facts" cited in the Brief of Respondent as proof that the trial court should have awarded fees and costs to her as part of the dissolution are based on Kim's allegations regarding conduct which took place *after* the trial in chief in this case. *See* Brief of Respondent, pp. 66-68. Kim provides no authority for the notion that the trial court should have awarded fees and costs to her based on John's *future* actions.

Kim's cross-appeal must therefore be denied.

## CONCLUSION

For the reasons stated herein and in the Brief of Appellant, this court must:

(1) Reverse the Decree of Dissolution, Findings of Fact and Conclusions of Law, Parenting Plan Final, Order of Child Support Final Order, Order on Kim's Motion for Reconsideration and/or Amendment of Judgment Pursuant to CR 59, Order on Show Cause re Contempt/Judgment, and Judgment and Order on Petitioner's Motion to Enforce and Clarify Decree and Request for Attorney Fees;

(2) Remand for valuation and division of the parties' community and separate assets and liabilities consistent with Washington law;

(3) Remand for determination of child support and expense reimbursements consistent with Washington law;

(4) Remand for modification of the Decree of Dissolution to limit any requirement that John maintain Kim as a beneficiary on his life insurance policy to her right to receive an amount representing his foreseeable total support obligation;

(5) Remand for modification of the Parenting Plan Final to grant joint decision-making rights to the parties;

(6) Award reasonable attorney's fees and costs on appeal to John;

(7) Deny Kim's motion to dismiss; and

(8) Affirm the refusal to grant Kim's request for attorney's fees  
and costs at trial.

DATED this 30<sup>th</sup> day of June, 2010

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