

63603-1

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No. 63603-1-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

In re the Marriage of:

JOHN PETER MELE,

Appellant,

v.

KIMBERLY KRISTEN MELE,

Respondent.

APPEAL FROM THE SUPERIOR COURT

FOR KING COUNTY

THE HONORABLE PATRICIA CLARK

REPLY OF RESPONDENT / CROSS APPEAL

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REPLY TO APPELLANT'S RESPONSE ON CROSS APPEAL

A. INTRODUCTION

As previously stated, this case is more voluminous than it is complex. The only reason it may appear complicated is because of John's preference for obfuscation. His brief and his response set forth a highly selective and often inaccurate version of the facts. He makes little reference to the trial transcript, disregards or mischaracterizes the trial court's conclusions without support and continues to present evidence that was already heard and rejected by the court. All of this is done in a self-serving effort, hoping to create such confusion that the appellate court feels compelled to grant the appeal and reverse the lower court's decision. Instead, John's style merely highlights his obstructionist attitude, intransigence, questionable credibility and meritless appeal.

B. ASSIGNMENT OF ERROR

In his reply brief, John boldly condemns Kim for her failure to assign error or otherwise contest the trial court's determination in Finding of Fact 2.15. John states "Kim's failure to assign error to the Finding...is fatal to her cross-appeal." See Reply Brief of Appellant, page 24. The fact is Kim's brief clearly assigned error to

the Finding of Fact 2.15. The following appears on page 2 of her brief:

II.CROSS APPEAL ASSIGNMENT OF ERROR

A. Assignment of Error.

The trial court erred when it entered Finding of Fact 2.15 and failed to award attorneys fees in the Findings of Fact & Conclusions of law.

B. Issues Pertaining to Assignments of Error.

Whether the trial court erred when it failed to award attorney's fees to Kim based on a lack of funds, despite finding evidence of John's intransigence

John's lack of credibility is highlighted by his adamant refusal to acknowledge what Kim's brief identified as the real issue; that is, John himself did not assign error to Finding of Fact 2.15, and is therefore precluded from challenging the court's determination of intransigence. RAP (4) 10.3 states as follows:

The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

Assignments of Error. A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

Washington case law has routinely stated that a party's failure to assign error to the lower court's findings renders the finding

unchallenged. Unchallenged findings of fact are verities on appeal. ***Cascade Valley Hosp. v. Stach***, 152Wn. App. 502, 507, 215 P.3d 1043 (2009). John's failure to assign error to the Finding of Fact 2.15 prohibits any challenge by him to the court's factual determination of intransigence. John's utter refusal to acknowledge his own error coupled with his vain attempt to accuse Kim of his own omission, demonstrates his preferences for obfuscation over integrity.

C. NO EVIDENCE TO SUPPORT CLAIM

The trial court's oral and written ruling determined that John was intransigent. The court found evidence of intransigence by John as stated in its Findings of Fact 2.15:

Other: There is evidence by intransigence by the father which contributed to the high attorneys' fees in this case. There are, however, no funds from which to award attorneys' fees. CP 626

In his reply brief, John claims Kim's contention regarding the language of Finding of Fact 2.15 highlights the "utter fallacy of her claim for attorney fees." In his signature style of making that which is clear seem opaque, he implies Kim omitted a portion of the

Finding of Fact 2.15 when he makes reference to citing “the **full** text which reads as follows”:

Other: There is evidence by intransigence by the father which contributed to the high attorneys’ fees in this case. There are, however, no funds from which to award attorneys’ fees. CP 622

John cites the exact same excerpt as Kim yet offers nothing additional to support his claim for the “utter fallacy” of Kim’s argument. The only fallacy is John’s belief that he may challenge the court’s factual determination of intransigence without assigning error to the relevant Finding of Fact. It is undisputed that unchallenged findings of fact are verities on appeal.

Perhaps most disturbing is John’s argument that the Finding of Fact 2.15 does **not** contain a finding that John was intransigent. John states “*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.*” See Reply Brief of Appellant, pg 24. John characterizes the courts factual determination of intransigence as follows: “it merely states that

there is evidence of intransigence by the father." See Reply Brief of Appellant, pg 23.

In a dissolution proceeding, the court is required to consider all of the evidence presented at trial and interpret the evidence. After considering the evidence presented, a court presents its interpretation in the *Findings of Facts*. The *Findings of Fact* identify the evidence the judge found to be true and the conclusions of law she reached regarding those facts. This allows the parties to know how and why the judge reached her decision and whether an appeal is warranted.

John claims that the court did not make a finding of intransigence and implies the phrase "*there is evidence by intransigence by the father*" means something other than the court made a determination of intransigence. Not only is his argument unsupported and utterly self-serving, it is also simply untenable.

John was a clerk for the Washington State Court of Appeals, and had an appellate and litigation practice for almost 20 years. As litigators, both John and his lawyer know that "evidence" consists of the sworn testimony of witnesses, the exhibits which have been received into evidence, and facts contained in the court record along with those facts to which all the lawyers have agreed or

stipulated. Arguments and statements by lawyers are not evidence. When the trial court states in its Findings of Fact that there is “evidence of intransigence” its meaning is indisputable. In other words, based on the evidence presented, the judge made a factual determination of John’s intransigence.

Moreover, John fails to acknowledge that the judge’s written decision also supports the determination of John’s intransigence as fact. Judge Clark said:

“This litigation has been extraordinarily expensive in large part due to the respondent’s [John’s] intransigence. In most circumstances the court would order him to pay the petitioner’s [Kim’s] attorneys’ fees. In this case it is not feasible. There are no funds from which to award fees. CP 660

Likewise, in her oral decision Judge Clark said

“I really thought long and hard about attorney’s fees because they have become really astronomical. And there is evidence of intransigence, and I really struggled with whether or not to impose attorney’s fees, particularly on the father for his part in the intransigence. CR 1233

Accordingly, there is no merit whatsoever behind John’s argument that the court did not make a finding of intransigence. It undisputed that an appellant waives an assignment of error by presenting no argument in support of the assigned error. **Cowiche Canyon Conservancy v. Bosley**, 118 Wn.2d 801, 809, 828 P.2d

549. Even if John had appropriately assigned error to the trial court's determination of intransigence, John has provided no evidence to show that he was not intransigent.

D. CASE LAW PRESENTED BY RESPONDENT NOT REFUTED

The trial court acknowledged that in most cases the court would award attorneys' fees to Kim. The trial court did not do so in this case citing a lack of financial resources. Kim's brief cited numerous cases as precedent, illustrating clearly that Washington courts have long held that, in marital dissolution proceedings, a party's intransigence will justify an award of fees without regard to the parties' financial resources. *In re Marriage of Crosetto*, 82 Wash.App. 545, 564, 918 P.2d 954 (1996).

John's response does not refute or even respond to the precedence established by these cases, nor does he present any precedence whatsoever regarding lack of financial resources as an acceptable basis for denying attorneys' fees when there is intransigence. Moreover, he does not even acknowledge the cases cited by Kim; he simply ignores them in an attempt to deny or ignore their credibility. Instead, John focuses on his lack of funds as justification for the judge's decision. Presenting no evidence and

making no argument to contradict the case law precedence established by Kim, in essence, renders John's response meritless. On the other hand, Kim has presented solid legal grounds, without substantive challenge, for awarding her attorney's fees.

E. LACK OF FUNDS ARGUMENT HIGHLIGHTS LACK OF CREDIBILITY

John claims that Finding of Fact 2.15 is supported by ample evidence regarding the lack of funds. See Reply Brief of Appellant, pg 24. Since Washington courts have long held that, in marital dissolution proceedings, a party's intransigence will justify an award of fees without regard to the parties' financial resources; his argument is of no consequence. *In re Marriage of Crosetto*, 82 Wash.App. 545, 564, 918 P.2d 954 (1996).

What is notable however is John's attempt to identify a portion of 2.15 as a factual statement while at the same time claiming the other half is not a factual statement. This shows his intentional manipulation of the facts and his complete disregard of the rules of appellate procedure despite his seasoned appellate background. As indicated, when there is intransigence in a dissolution proceeding, Washington courts do not consider the

intransigent's party ability to pay as relevant to the award of attorney's fees.

Although John's "lack of funds" argument offers no substantive bearing on the award of attorney fees, it does provide another example of John's fundamental lack of credibility. In his reply brief he presents documentation to show that, after he was found in contempt of court, he has since become current with regard to all monies owing under the post trial orders, as well as in payment in full for the "back child support" award included in the final Order of Child Support. See Reply Brief of Appellant, pg 2.

It is curious at best to wonder how someone with a "complete lack of funds" is able to suddenly generate over \$15,000 to satisfy a judgment, especially in light of the fact that the same person declared under oath in his contempt hearing that he had no money to pay such debt. Furthermore, since the filing of Kim's reply brief, it has been brought to her attention by the Washington State Attorney General's office that John is currently pursuing an administrative appeal against the State of Washington for denial of his teaching certificate for integrity reasons. John has hired yet another attorney to represent him in that appeal. It is quite apparent

that his lack of funds argument is clearly lacking in one specific area, *i.e.*, credibility.

F. SANCTIONS ARE JUSTIFIED

The Sanctions of CR 11 in the trial court are made applicable to appeals under RAP 18.9. ***Bryant v. Joseph Tree***, 119 Wn.2d 210, 829 P.2d 1099 (1992). RAP 18.9(a) allows this court to sanction a party who files a frivolous appeal. John's appeal is frivolous as it nothing more than a re-arguing of facts he presented at court without the introduction of any objective error of law or proof that the trial court abused its discretion. Moreover, both his appeal brief and his response to Kim's cross appeal present an altered set of facts to confuse or mislead the court, along with vividly highlighting his lack of integrity. There are no debatable issues upon which reasonable minds might differ, the lower court's rulings are not lacking in clarity and his attempt to discredit them without support or citation leaves them his claims so devoid of merit as to warrant sanctions.

G. CONCLUSION

John's failed to assign error to Findings of Fact 2.15 and is thereby prohibited from challenging the lower court's factual determination of intransigence. The finding of John's intransigence

was clearly articulated by the court in its Findings of Fact and in its written and oral decision.

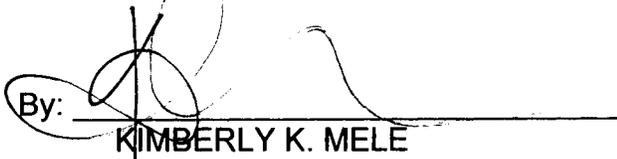
The Court of Appeals does not disturb a trial court's findings of fact if substantial evidence supports the findings and defers to the trial court as the fact finder on issues concerning the evidence presented. ***Weyerhaeuser v. Tacoma-Pierce County Health Dep't.***, 123 Wn. App. 59, 65, 96 P.3d 460 (2004); Unchallenged findings are verities on appeal. ***In re Interest of Mahaney***, 146 Wn.2d 878, 895, 51 P.3d 776 (2002).

Washington courts have long held that, in marital dissolution proceedings, a party's intransigence justifies an award of fees without regard to the parties' financial resources. ***In re Marriage of Crosetto***, 82 Wash.App. 545, 564, 918 P.2d 954 (1996). The fact that John was determined intransigent remains a fact on appeal. The lack of funds is not relevant to an award of attorney's fees when there is a finding of intransigence. Kim properly assigned error to Findings of Fact 2.15 and, based on the precedence presented by case law, is entitled to a reversal of the lower court's failure to award attorney fees to her in light of John's intransigence.

John's brief and response brief fail to support his argument with legal authority, meaningful analysis, or references to the record

as required under RAP10.3(a) (5). This court should not consider arguments subject to such deficiencies. This court should affirm the trial court's order and award attorney award attorneys' fees to Kim based on the trial court's determination of John's intransigence. In addition, based on frivolous nature of his appeal and meritless arguments presented, John and his attorney should be sanctioned.

Dated this 20th day of August, 2010.

By: 
KIMBERLY K. MELE

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

JOHN PETER MELE

and

KIMBERLY KRISTEN MELE

APPELLANT,

RESPONDENT.

No. 63603-1-I

AFFIDAVIT OF SERVICE

2010 AUG 10 AM 10:00
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Kimberly K. Mele being first duly sworn on oath, deposes and says:

That on the 20th day of August 2010, affiant caused to be served true and correct copies of the following documents on the parties and in the manner listed below:

Reply Brief of Respondent / Cross Appellant

Directed and addressed to the following party:

Rhe Zinnecker
2255 Harbor Avenue SW
Suite 207
Seattle, WA 98126

Via U.S. Mail.

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

EXECUTED this 20th day of Aug, 2010, at Issaquah, WA.

[Signature]
KIMBERLY K. MELE

I certify that I know or have satisfactory evidence that (name of person) is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument and acknowledged it to be (his/her) free and voluntary act for the uses and purposes mentioned in the instrument.

Dated: August 20, 2010

[Signature]
Stephanie R. Gardner
My Appointment Expires: 5-6-13
Residing at: Redmond, Washington

(Seal)

