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No. ~~66044-6-1~~

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

CHRISTOPHER ANDREW HEATH, Respondent

and

BARBARA JEAN HEATH (n/k/a Latham), Appellant

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant, Barbara Latham (formerly Heath) attempted to defraud her former husband, respondent, Christopher Heath, out of house sale proceeds the parties agreed in their 2005 divorce belonged to Christopher.¹ She sold the house in August, 2008, for a net of \$269,090.67. Instead of paying Christopher his 45 percent share, Barbara used the money to purchase a new home for herself and her new husband.

In June, 2009, Barbara² tried to get Christopher to pay her retirement funds he owed her by submitting proposed orders for him to sign without revealing her misappropriation of the house sale money.

Barbara's scheme was discovered by Christopher on about September 11, 2009.

Eventually, the Court ordered that Barbara's share of the retirement funds should be reduced by the value of the house sale proceeds that Barbara misappropriated. In addition the Court assessed attorney fees against Barbara, and sanctioned Barbara and criticized her attorney for their role in the transactions and for making false statements and unfounded claims in this case.

Barbara appealed.

¹ First names are used only for clarity. A timeline for this case is in Appendix A.

² Counsel for Barbara on this appeal has been her attorney throughout. Christopher had different counsel during his divorce proceedings from his present counsel.

Over six years after entry of the Decree, the property covered by the Decree is still not fully distributed.³ Barbara had years to comply with the Decree. Instead, she stalled, committed fraud and engaged in bad faith litigation. This forced Christopher to spend thousands of dollars to defend his interests in the matter.

The trial court should be affirmed in this appeal.

II. COUNTER-STATEMENT OF THE CASE

The parties divorced on February 28, 2005. CP 1. As part of their settlement, they agreed to divide the equity in the family house 55/45 in favor of Barbara. They also agreed to divide two of Chris' retirement accounts by the same ratio.

Their Decree required the parties to draft appropriate QDROs and, specifically, that "Wife's attorney shall prepare the the (sic) appropriate Orders." CP 7. The relevant provisions in the Decree read at paragraph 7:

The parties hereto shall divide the family home, the husband's 401 K, pension and retirement funds 55/45, with 55% going to the wife. The wife shall be quitclaimed the family residence by the husband and the parties stipulate that the house has a fair market value of \$360,000 as of this date and a mortgage of approximately \$117,000. Pension and retirement funds have the following values: LEOFF 2 Plan is valued at \$327,646 and the value of the MEBT is \$240,339. The parties shall draft

³ Christopher is ready, willing and able to pay the funds the Court ordered be paid to Barbara in full satisfaction of his retirement payment obligation in the Decree.

appropriate Qualified Domestic Relation Orders to accomplish these distributions. *Wife's attorneys shall prepare the the (sic) appropriate Orders.*⁴

Barbara's attorney did not prepare the orders until June 28, 2009, despite several intervening requests by Christopher that they be prepared.⁵ *See e.g.*, CP 68-73.

On January 23, 2009, Barbara's attorney issued Subpoenas for the valuation information about Christopher's retirement accounts. CP 164-72. These Subpoenas produced over 200 pages of account information. CP 158.

On February 25, 2009, Christopher emailed Counsel seeking a response to his prior email and asking for a "time frame" for the resolution of the property division issues. CP 73. . In that email, Christopher asked for a response from counsel by March 10, 2009, in the hope that all of the outstanding issues could

be resolved without the need to burden the courts or incur further attorney fees. . . . I feel that 4 years is an excessive amount of time to comply with the requirements stated in the divorce decree and feel compelled to move forward through whatever channels necessary to bring this to a close.

⁴ Nothing in the Decree required these properties to be divided at the stated values. CP 62. Barbara argued she was entitled to "all accumulated appreciation on her share" of the retirement accounts. CP 68; 190.

⁵ The proposed Orders were unacceptable because they did not contemplate the consequences of Barbara's fraud.

Counsel did not respond to this email.⁶ CP 61.

As a consequence, Christopher engaged an attorney to assist him with the enforcement issues. CP 61. On April 3, 2009, Christopher's attorney wrote Barbara's attorney a letter. CP 75. This letter included much of the above information and made three alternate proposals for a resolution of this matter. The letter concluded as follows:

Because of the unreasonably long time this matter has taken to this point, Mr. Heath's offer to resolve this matter through one of the above three choices will lapse at noon on April 14, 2009. If this matter has not been resolved by then, he has authorized me to file a motion to enforce Paragraph 7 and to seek related attorney fees from your client for having to do so. CP 78.

There was no response by April 14. CP 15; 62. Therefore, Christopher authorized his attorney to engage in more formal discovery and a motion to resolve the property issues.

For awhile the case progressed along parallel tracks: one involving discovery; the other involving Christopher's effort to enforce the Decree.

On May 1, 2009, Christopher moved to enforce the Decree and for his fees and costs. CP 9; 11; 35; 60; 149. This motion languished while Christopher attempted to learn through discovery about what happened to the house. CP 62.

⁶ Christopher noted a pattern of such unresponsiveness. CP 61.

Both sides sought discovery: Barbara about Christopher's retirement accounts;⁷ Christopher about Barbara's real estate transactions and, eventually any house sale closing statements.⁸ Barbara stonewalled Christopher's discovery.⁹ *See, e.g.*, CP 16-18; 62; 332; 341.

In about June 29, 2009—over four years after entry of the Decree—Barbara's attorney finally forwarded proposed retirement account transfer orders to Christopher's attorney. CP 108; 110-16. Christopher was reluctant to do anything about these orders until he knew what happened to the house and any related sale proceeds. CP 159.¹⁰ Given the circumstances, it was inequitable for Christopher to have to make a distribution out of his two retirement funds without concurrent payment to him of the house sale proceeds.¹¹

Consequently, on July 6, 2009, Christopher moved to compel disclosure of the house sale information, CP 11; 13, which Barbara

⁷ CP 164-72.

⁸ CP 314;

⁹ On June 10, 2010, Barbara's attorney questioned Christopher's right to conduct discovery, CP 154, ignoring the fact that he had conducted his own discovery the prior January. CP 164-72.

¹⁰ In May, 2008, Christopher executed a Quit Claim Deed to the family home so that Barbara could sell it. CP 277; 290

¹¹ Barbara repeatedly complained that Christopher ignored her draft orders. *See, e.g.*, CP 87; 98; 108-09; 182-83; 203. In doing so, she appears to be tone deaf with regard to Christopher's reasonable objections to the orders she submitted. *See, e.g.*, CP 15-16; 159; 177-78; 356. Moreover, her proposed Orders ignored the consequences of her fraud, CP 185, and her earlier suggestion that she set off the house sale proceeds she retained against her share of Christopher's retirement. CP 154.

resisted. CP 16-18. Judge John P. Erlich denied Christopher's motion and ordered the parties to confer about disclosure issues. CP 28.

While the motion was pending, Christopher learned the sale details¹² and that the net sale proceeds of \$269,090.67, CP 80; 338-42, were used to purchase a new home by his former wife and her new husband who apparently claimed an interest in the house sale proceeds.¹³ CP 339-41. Christopher's 45 percent share is \$121,090.80.

After Christopher discovered that Barbara had long before sold the house, he nonetheless tried to resolve the matter by proposing to set-off the house sale proceeds he should have received against his retirement account payment obligation. CP 159; cf., 154.

A problem with this was trying to compare apples and oranges. The retirement account funds were before tax proceeds; the house sale proceeds were not tax encumbered. Therefore, they could not be set-off dollar for dollar.

Christopher engaged Louise Green, CPA, to help him reconcile the numbers. Her Declaration is at CP 230. It indicates that a transfer of \$8,497.39 would fully compensate Barbara for her interest in

¹² See CP 80 which is the closing statement for the house sale.

¹³ Every day that followed with Barbara not paying Christopher the sale proceeds she owed him amounted to an interest free loan from Christopher to Barbara. CP 159; 180.

Christopher's retirement accounts after setting-off the house sale proceeds she misappropriated.

Christopher renewed his motion to compel on September 2, 2009, CP 21; 24.

On September 28, 2009, Judge Paris Kallas ruled on Christopher's revised motion to compel and entered an Order sanctioning Barbara for her failure to timely provide the closing statement. CP 56. In this Order, Judge Kallas found, among other things, that:

- Barbara and her attorney had not timely followed through with their discovery obligation to provide the house sale closing statements, CP 57;
- This required Christopher to pursue further litigation to obtain it, CP 57;
- This, in turn, caused Barbara to finally produce the closing statement (which showed the house had been sold on August 14, 2008 for a net of \$269,090.67), CP 57-8; and
- Barbara's action in the matter amounted to "intransigence" which caused Christopher to incur unnecessary fees and costs. CP 58.

Judge Kallas, therefore, ordered Barbara to pay Christopher \$1,887.50 as sanctions within 10 days of the Order. CP 58.¹⁴

On September 24, 2010, Christopher again attempted to settle the matter through a letter to Barbara's attorney. CP 93.¹⁵ The attempt was unsuccessful.

On October 21, 2010 Christopher again renewed his motion to enforce the Decree and for other relief. CP 35; 60; 87; 100; 149; 155; 158; 355. This motion was supported by Christopher's Declaration, CP 60, and included Christopher's proposal of how to deal with the consequences of Barbara's fraud, CP 52, and other information. CP 355.

Barbara obtained a continuance of the motion so she could respond. CP 358; 373.

Then Barbara opposed the motion. CP 95. As part of her opposition, and possibly to deflect attention from her own fraud, *her attorney*, with no disclosed basis for the statement other than the fact that Christopher had purchased a home since his divorce, declared to the Court on November 24, 2010:

We believe that Mr. Heath has illegally withdrawn money from these pensions and has kept this a secret. . . . *We believe* he has used pension funds

¹⁴ This sum will be "paid" as part of the Court's ultimate orders in this case. *See* CP 194.

¹⁵ This letter reflects some confusion about whether Barbara still had an attorney. In an email of August 25, 2010 she stated that Mr. Simmerly was no longer her attorney. CP 92. On September 1, Mr. Simmerly said he still represented Barbara. CP 94.

belonging to [Barbara] for this purchase. Mr. Heath and Mr. Hall also failed to disclose this apparent use of the pension funds to Judge Kallas who ruled on this matter in September, 2009. CP 109. (Emphasis added).

Christopher denied he had withdrawn money from his retirement accounts, CP; 100; 156; 158; 175; 178,¹⁶ and vigorously objected to counsel's "unprofessional, outrageous and baseless accusations." CP 156.

In another effort at obfuscation, on November 24, 2010, Barbara moved for an accounting of Christopher's retirement accounts, CP 104; 107, and accused Christopher of refusing to provide an accounting of his pension benefits to Barbara. CP 98; 108-09; 145. Barbara also sought a *second* continuance so she could have her own expert, Mr. Jerome Scowcroft, review Ms. Green's reconciliation. CP 96; 149; 156; 182; 364. Christopher objected to Barbara's stalling, CP 100; 159-60; 173; 179; 355, and questioned why Barbara had waited so long to engage her expert. CP 359.

Barbara's motion was supported by a Declaration *by counsel* in which he complained that neither Christopher nor his attorney had responded to his June, 2009 retirement account draft property division

¹⁶ Barbara's attorney made a second unsupported claim of illegality which Christopher denied. CP 174; 178.

orders. CP 108.¹⁷ However, as late as October 11, 2010, Barbara was asserting she could not consider any settlement until she had the latest statements form Christopher's retirement accounts confirming the absence of any withdrawals from them. CP 144.¹⁸

Christopher objected to Mr. Scowcroft because he had a conflict of interest and could not legitimately render an opinion for Barbara. CP 156; 355. Moreover, Christopher maintained Barbara was not entitled to an accounting beyond what he had already provided to her. CP 173-76; 177-79; *see also* CP 68-71.

Christopher further described the problems he had encountered in trying to resolve the post-Decree property distribution issues and told the Court that Barbara's motion did not disclose that (CP 149-54)):

- Barbara violated the terms of her Decree by wrongfully appropriating petitioner's share of the house sale proceeds and which she apparently could not pay to petitioner;

¹⁷ Some of these new draft orders were apparently prepared by attorney Jerome C. Scowcroft—presumably at Barbara's request. They too were inadequate because they ignored the consequences of Barbara's fraud.

¹⁸ At the same time, he was being advised by Mr. Scowcroft that such information was discoverable. CP 98. Presumably, counsel already knew this because he had obtained over 200 pages of Christopher's account information through his first set of subpoenas in January, 2009! CP 151; 164-72. Nothing prevented him from further discovery. In fact, Barbara prepared new subpoenas., CP 151. Barbara's complaint, in her Brief at page 6, that her discovery effort was "rebuffed," is not supported by the record.

- Barbara hid from Christopher, for about a year, the fact that she had sold the house, what she had sold it for and that she had used the proceeds to purchase a new one for herself. As a consequence of Barbara's deception, Judge Kallas assessed attorney fees against Barbara "as sanctions for her intransigence" in failing to timely disclose the house sale closing statement;
- In June of 2009—over four years after the Decree was entered—Barbara's attorney finally prepared proposed Orders for Christopher to sign, transferring to Barbara the retirement funds covered by the Decree while, at the same time, not disclosing the misappropriation of the house sale funds by Barbara; and
- A basis for her motion for a continuance was to have "her own expert review the opinion of Petitioner's expert. . . .", CP 96, which apparently was not done, even after an initial continuance was granted, because she still maintained she has not had an opportunity to respond to the material submitted by Christopher's accountant.¹⁹ Barbara had the relevant account balance statements for Christopher's

¹⁹ CP 140; 358; 372.

retirement accounts since the Motion to Enforce Decree was made, but persisted in claiming she is still unable to evaluate retirement account allocation issues.²⁰

Christopher also moved that counsel be sanctioned for including his social security number in several papers he recently filed. This motion was denied, CP 192, though the offending documents were ordered to be replaced.

Judge Laura Inveen denied Barbara's motion for an accounting on January 26, 2011. CP 184; Appendix B. Among other things, Judge Inveen found that Barbara's motion was without merit and in violation of CR 11. CP 184. Moreover, Judge Inveen specifically found that counsel's declaration was "not well grounded in fact, is not warranted by existing law, and is interposed for an improper purpose, by causing unnecessary delay and increased cost of litigation." CP 184-85. Judge Inveen then recited the facts supporting her conclusions, sanctioned Barbara and required her to pay (through a set-off of Christopher's share of the house sale proceeds against the retirement funds Christopher owed her) \$1,234.50. On the same day, Judge Inveen entered an order granting

²⁰ For the first time, Barbara asked for an accounting of Christopher's retirement accounts. Yet literally for years, she had the means of obtaining all of Christopher's account statements, independent of Christopher, through Subpoenas—which she actually utilized. CP 164-72. Moreover, Christopher's current account statements were included as a part of his motion. CP 161.

Christopher's Motion to Enforce Decree and Awarding Attorney Fees/Sanctions. CP 187; Appendix C.

The bottom line after all of the motions and Orders is that Barbara is owed \$6,119.59 in payment of all obligations Christopher had under the Decree. CP 194.

Barbara moved for Reconsideration, CP 200, 202, which was denied. CP 219.

Barbara appealed, and then amended her appeal notice. CP 248.

III. STANDARD OF REVIEW

Barbara, on little authority, claims the standard of review in this case is *de novo* because the hearing below was—or should have been, she claims, one for summary judgment.²¹ Christopher disagrees: he points out there was no genuine material issue of fact before the court. The provisions of the Decree were clear. They only had to be enforced in view of Barbara's fraud. Barbara's fraud was clear and convincing. The set-off remedy established by the Court was appropriate in view of Barbara's refusal to pay Christopher his share of the house sale proceeds.

Instead, what Barbara requested was an evidentiary trial with discovery, witnesses, cross examination, etc. CP 203. She argued

²¹ Opening Brief of Appellant Barbara Jean Latham ("Brief") at page 6. Elsewhere Barbara maintains the case cannot be treated as a summary judgment. Brief at page 9.

“Contested issue of fact cannot be resolved in a motion.” CP 204. But they are, all the time.

Barbara’s motion was denied. CP 219. Due process does not require a particular form or procedure other than proper notice of the proceeding and an opportunity to be heard. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 699, 41 P.3d 11754 (2002). Due process was followed in this case.

The proceedings below were in equity and they involved the inherent power of the Court to compel obedience to its lawful Decree. That Decree was clear and unambiguous about Barbara’s—and her attorney’s—obligation to prepare the appropriate property distribution orders.

Christopher maintains the resulting standard of review is abuse of discretion because: (1) the relief that was granted was pursuant to the Court’s equitable powers over the parties’ dissolution and an order distributing property, *In re Marriage of Kraft*, 119 Wn.2d 438, 450, 832 P.2d 871 (1992); (2) this is the same standard of review for a sanctions order, *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 338-40, 858 P.2d 1054 (1993); and (3) it is the same standard for a denial of a motion for reconsideration, *Kleyer v.*

Harborview Medical Center of University of Washington, 76 Wn., App. 542, 545, 887 P.2d 468 (1995).

Christopher suggests a resolution of the standard of review question is found in *Farmer v. Farmer*, 83960-3, 2100 WL 3929114 (___ Wn.2d ___, filed September 8, 2011). There, in a somewhat similar case appellant tried to defraud his former wife out of property awarded to her in a divorce action. The Court held:

Sitting in equity, a trial court enjoys broad discretion to grant relief to parties in a dissolution based on what it considers to be “just and equitable.” RCW 26.09.080. Here, the trial court reopened the decree of dissolution to make a redistribution of property following Daniel's fraudulent conversion of the stock options awarded to Teresa. The court's actions fall squarely within its equitable jurisdiction over the parties' dissolution. We therefore review for abuse of discretion the trial court's ultimate remedy.

In our case, the Court also made an equitable distribution of the property in view of Barbara's fraud. The standard of review is whether the Court abused its discretion in doing so.²²

A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

²² *Farmer* held that the measure of damages is a question of law and that an award based on an improper measure of damages would be an abuse of discretion. There was no issue of “damages” in the instant case.

Christopher suggests that the standard of review is not dispositive because of the substantial evidence about, for example: Barbara's fraud and violation of the Decree which required the Court's practical and discretionary resolution of the property issues through a set-off. Further, the Court had both parties before it. To the extent Barbara believed she needed more evidence, she had ample opportunity to obtain it during the almost six years between the time the Decree was entered and the Court's orders that enforced it.

IV. ARGUMENT

1. **The Brief Of Appellant Contains Objectionable Statements.**

Barbara's opening Brief contains assertions that are not supported by the record. They should be disregarded. For example:

- Brief at pages 3-4: Barbara states: "It was alleged by Ms. Latham that at least some of these funds used to purchase this [Christopher's new] home came from Mr. Heath's retirement funds, 55% of which belonged to Ms. Latham CP 108-109." Barbara fails to point out that this reference to the Clerk's Papers is to her attorney's November 23, 2010 Declaration (signed pursuant to CR 11) in which *counsel* makes the statement that "We believe that

Mr. Heath has illegally withdrawn money from these pensions and kept this a secret.” CP 109. This statement by counsel formed part of the basis for the Court’s determination that counsel had violated CR 11. CP 253;

- Brief at page 7: The statement that “The Decree was drafted by the former attorney for Mr. Heath. . . .” is totally lacking in any proof, and none is offered—the fact that the Decree is on the stationary of Mr. Heath’s attorney is not proof that he drafted it;
- Brief at page 10: the statement that “Ms. Latham has, at all times, acted in good faith. . . .” is simply false given her effort to defraud Christopher of his share of the house sale proceeds—something not even mentioned in the Opening Brief of Appellant (!); and
- Brief at page 11: The statement that the trial court “failed to consider the intransigence of [Christopher’s] former counsel, Mr. Trujillo . . . ”²³ is nothing less than a grasp at straws and mudslinging. Counsel cites nothing in the record to support his defamation of Mr. Trujillo. There is no evidence that Mr. Trujillo (or Christopher or his current

²³ Mr. Trujillo retired sometime after his representation of Christopher in 2005. CP 36.

attorney for that matter) have been intransigent in this matter and this statement appears to be another violation of CR 11 by Barbara.

2. Barbara Has Failed To Demonstrate Why Specific Findings Of The Trial Court Are In Error.

Barbara's Assignment of Error²⁴ is general. It refers to no specific finding of the trial court that she claims is in error. This omission is not cured by her following "Issues Pertaining to Assignments of Error," and should prove fatal to her appeal.

In *In re Estate of Palmer*, 145 Wn.App. 249, 267, 187 P.3d 758 (2008) the Court wrote:

Counsel is obligated to demonstrate why specific findings of the trial court are not supported by the evidence and to cite to the record in support of that argument. *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). We can waive some technical violations of the rules where the briefing makes the nature of the challenge perfectly clear, *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 710, 592 P.2d 631 (1979), but the Supreme Court has stated:

Strict adherence to the aforementioned rule is not merely a technical nicety. Rather, the rule recognizes that in most cases, like the instant, there is more than one version of the facts. If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view toward constructing

²⁴ Opening Brief of Appellant ("Brief") at page 1

arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do. *Lint*, 135 Wn.2d at 532. In the absence of a clear challenge, we treat findings of fact as verities on appeal. *Lint*, 135 Wn.2d at 533.

Further, Findings of fact supported by substantial evidence are verities on appeal. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990). “Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978)). Unchallenged findings are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

Barbara presents no debatable issues; her appeal challenges factual findings which are supported by substantial evidence. It is well settled that this court is constitutionally prohibited from substituting its judgment for that of the trial court in factual matters. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959).

**3. Barbara's Attorney Was Required To Prepare The
Property Transfer Orders Which He Failed To Do For Over Four
Years.**²⁵

The Decree is explicit in requiring Barbara's attorney to propose the appropriate property transfer orders from which the ultimate orders would then be drafted by "the parties." CP 7. Someone had to start the process and the Decree required that person to be Barbara's attorney.

The evidence is clear. Counsel did not propose the orders, despite multiple requests from Christopher, until after Christopher had to engage counsel and after more than four years had passed since entry of the Decree.

This litigation might have been avoided, and this appeal too, if the orders had been properly prepared. They were not.

Moreover, the unreasonable delay in providing the orders gave Barbara cover to defraud Christopher. Until the orders were proposed, the property transfer and related details did not have to be addressed.

Barbara's stalling ultimately did require Christopher to assume the burdens of litigation which Barbara callously claims, in her Brief at page 10, he should have assumed if he was "unhappy" with Barbara's inaction.

²⁵ Response to issues 1 and 2 of "Issues Pertaining to Assignments of Error" ("Issues") at pages 1-2 of Brief. Argument as to specific Issues is not intended to indicate that the argument should not be more broadly applied where appropriate.

4. Barbara Attempted To Defraud Christopher By Selling The House And Misappropriating The Net Sale Proceeds.²⁶

The evidence is clear:

- (1) The net sale proceeds of the house when sold were to be divided 55/45 in Barbara's favor. CP 7;
- (2) Barbara sold the house on about August 14, 2008. CP 80;
- (3) Christopher was not told of this sale until September 11, 2009. CP 62;
- (4) Barbara misappropriated Christopher's share of the funds for herself;
- (5) Barbara has never tendered Christopher's 45 percent share of the net sale proceeds to him; and
- (6) All of the property orders prepared by Barbara were fundamentally flawed since they did not reflect Barbara's fraudulent activity.

Barbara's contention in her Brief at page 10 that she "has at all times acted in good faith" makes one wonder about her definition of "good faith." It also makes one wonder why her fraud, or at least Christopher's claim about her fraud, is not addressed in her Brief.

²⁶ Issue 2.

5. The Presentation Of Proposed Orders In June, 2009, Before The House Sale Was Fully Disclosed, Was A Further Element In Barbara's Effort To Defraud Christopher.²⁷

The Orders finally proposed by Barbara's attorney were silent about the house sale and any set-off in view of Barbara's retention of Christopher's share of the proceeds. One hopes Barbara's attorney was unaware of the sale when he produced the proposed papers. However, Barbara certainly knew this critical fact and that she was unfairly proposing that Christopher deal with property division issues without full knowledge of the facts.

6. Barbara Was Not Entitled To An Accounting.²⁸

a. **An accounting is an equitable remedy to which Barbara was not entitled.** A request for an accounting seeks an equitable remedy. *Saletic v. Stamnes*, 51 Wn.2d 696, 698, 321 P.2d 547 (1958). The universal rule is that a person who seeks equity must come to court with clean hands. *Income Investors v. Shelton*, 3 Wn.2d 599, 601-02, 101 P.2d 973 (1940). A person may, by his misconduct, be precluded from a right to an accounting in equity. *Id.*

Barbara acted inequitably in her fraud and misappropriation of money that belonged to Christopher, including her sustained effort to

²⁷ Issue 2.

²⁸ Issues 3 and 4.

conceal the misappropriation from Christopher and benefit from, in effect, a resulting interest free loan.

A complaint for an accounting has several elements. It must specifically show there is a fiduciary relationship between the parties, or that the account is so complicated that it cannot conveniently be pursued in an action at law. *Seattle Nat'l Bank v. School District No 40*, 20 Wash 368, 373-74, 55 Pac. 317 (1898); *Corbin v. Madison*, 12 Wn.App. 318, 327, 529 P.2d 1145 (1974). It must also allege that the plaintiff has demanded an accounting from the defendant, and the latter's refusal to render it, in order to state a cause of action for an accounting. *Starks v. Field* 198 Wash. 593. 601, 89 P.2d 513 (1938).

The gist of an action for an accounting is the inability of the plaintiff to procure the requested relief herself, and the refusal of the defendant to render such accounting to her. Both elements must be established. See *Wiegardt v. Becken*, 8 Wn.2d 568, 569-70, 113 P.2d 60 (1941). Barbara established neither. She had the ability to obtain the accounting information herself; she did obtain it through subpoenas; current information was provided by Christopher as part of his motion to enforce the Decree.

Barbara was not entitled to an accounting.

b. **Barbara's motion for an accounting was without merit because she already had the information she sought or had the ability to independently obtain it.** Barbara falsely states Christopher refused to provide an accounting. CP 105. To begin with, she never sought one until after Christopher made his final motion to compel compliance with the Decree in this matter. CP 104; 159; 359. Christopher provided an accounting of his retirement accounts (through his accountant, Ms. Green, and otherwise) in connection with his motion. If counsel was dissatisfied with what Christopher provided, he has had the clear ability to subpoena the underlying records for almost six years. In fact, he did subpoena them in January, 2009, CP 158; 164-72, and nothing prevented him from doing so again.

Judge Inveen ruled Barbara's motion for an accounting was without merit and in violation of CR 11. CP 252. This was in part because Barbara had already received hundreds of pages of Christopher's account information when she subpoenaed that information in January, 2009. If, as she claimed, Christopher had misappropriated funds from his retirement account to purchase a new house, CP 109, she either had the information about the accounts that would at least show if money had been withdrawn from the accounts at critical times, or had within her control

the means of obtaining that information- a new set of subpoenas or other discovery.

Barbara's Motion for an accounting was another example, in almost six years, of her stalling and litigiousness.

c. **Barbara's motion for an accounting was an admission she had a fiduciary duty to Christopher.** A request for an accounting requires a fiduciary relationship, *Seattle Nat'l Bank v. School District No 40*, 20 Wash at 373-74. Therefore, in moving for an accounting, Barbara admitted she believed she had a fiduciary relationship with Christopher.²⁹

Barbara's motion for an accounting was, in effect, an admission she had a fiduciary relationship with Christopher, which she violated, regarding the house sale funds.

Moreover, the relationship of spouses and former spouses can implicate the entirety of the law, including the laws of partnership, property, and corporations. Thus, whether under the theory of laws of partnerships, co-ownership of property, corporate law, or otherwise, there is a fiduciary relationship between the parties until the properties and assets of a community regime have been divided and accounted for between the former spouses. *See, e.g., Queenan v. Queenan*, 492 So 2d 902, 912 (La. 1988).

²⁹ The existence of a fiduciary duty is a question of law and review is de novo. *Lang v. Haugan*, 136 Wn.App. 708, 717, 150 P.3d 622 (2007).

One who has a fiduciary duty to another occupies a relation which justifies the other person to expect that his interest will be cared for by the person with the duty. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

By selling the house and not tendering Christopher's share of the net sale proceeds to him, but instead converting it to her own use, Barbara violated her fiduciary responsibilities to Christopher. *Deskins v. Waldt*, 81 Wn.2d 1, 5, 499 P.2d 206 (1972); *see also Puget Sound Nat'l Bank v. Burt*, 86 Wn.App. 868, 786 P.2d 300 (1990) (former wife breached fiduciary duty to former husband by misappropriating money that belonged to former husband through use of an unrevoked power of attorney).

7. **Barbara Was Not Entitled to Any More of a Hearing Beyond That Which She Received.**³⁰

Barbara contended that the enforcement of the Decree, and related motion, could not be resolved by treating them as Civil Motions or a Summary Judgment Motion. CP 203. Instead, she sought an evidentiary hearing with discovery, testimony and cross-examination. CP 203-04. The proceedings that determined the orders were a motion to enforce the court's 2005 Decree of Dissolution consistent with CR 60 and the Court's

³⁰ Issue 3.

authority to clarify its orders under *In re Marriage of Thompson*, 97 Wn.App. 873, 878, 988 P.2d 499 (1999). CP 35; 190. These matters were resolved by declarations and briefing as provided by the Civil and Local Rules.

Barbara had every opportunity to make her case, including a continuance so she could prepare it. She received a hearing on her claims and they were found to be wanting. CP 184. Nothing prevented Barbara from presenting all of the declarations and other evidence she believed were necessary. She presumably knew that at some point she would be called upon to justify her action with regard to the house sale proceeds and that a logical way to deal with the issue was to offset what she owed Christopher with what he owed her. As noted above, at one point, she even suggested this as a way of resolving the matter. The fact that she apparently slept on her rights and the preparation of her case is not the responsibility of Christopher.

8. The Court Has Continuing Authority To Enforce Its Orders.³¹

Christopher asked the Court to enforce the Decree. Under the “doctrine of continuing jurisdiction,” a Washington court has continuing jurisdiction to clarify or enforce its own Decree. *See, e.g., Heuchan v.*

³¹ Issue 3.

Heuchan, 38 Wn.2d 207, 213-14, 228 P.2d 470 (1951); *State v. Superior Court for King County*, 78 Wash. 372, 374, 139 Pac. 42 (1914).³² This is consistent with the Conflict of Law Restatement provision that:

“If a state obtains judicial jurisdiction over a party to an action, the jurisdiction continues throughout all subsequent proceedings which arise out of the original cause of action. . . .” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 26 (1988)

9. Barbara Breached her Duty to Christopher.³³

The divorce awarded the family home to Barbara but, in effect, gave Christopher a lien for 45 percent of the net sale proceeds when the house sold. The Court approved this as part of the parties’ just and equitable property division. RCW 26.09.080. Barbara violated the Decree by appropriating to herself Christopher’s portion of the net sale proceeds.

10. The Economic Consequences of Barbara’s Fraud Had a Legitimate Bearing on the Terms of the Required Property Transfer Orders and Required a Set-Off of the House Sale Funds Against the Retirement Funds Christopher Owed Barbara.³⁴

- a. The retirement accounts contained pre-tax funds;

³² See also RCW 26.09.170 concerning the continuing authority of a court to modify its Decree.

³³ All issues.

³⁴ Issue 2.

b. The money owed Christopher from the house sale was not tax encumbered; and

c. Insofar as the requirements of the 2005 Decree of Dissolution were concerned, any contribution to the value of the family home by Barbara's new husband was irrelevant.

11. Barbara Had Ample Opportunity To Obtain Any Legitimate Expert Advice She Required.³⁵

Barbara had five years to carry out her duties under the Decree or prepare for her case. She also had at least two of those five years to build a defense for her fraud. She issued subpoenas in January, 2009, and prepared new ones in the fall of 2010. She could have served discovery on Christopher, as he did on her. Nothing stopped her from retaining her own expert at any time, or from obtaining a legitimate expert to analyze the opinions and approach of Christopher's CPA when her report was filed with the court.

Instead she slept on her rights, stalled the resolution of the matter and tried to deflect attention from her bad faith by accusing Christopher of acting "illegally." Her complaints about all of this are hollow and too late.

³⁵ Issue 3.

**12. Any Unilateral Contributions Barbara's New Husband Made
To The House Value Were Irrelevant.**³⁶

Barbara provides no proof of any house value contributions by her new husband. But even if she had, it would not be relevant to her obligations to Christopher. The Decree gave Christopher 45 percent of the net sale value of the house. There is nothing in the Decree which contemplates any reduction of that interest. Barbara's contrary contention is just another of her frivolous claims in this matter.

13. CR 11 Sanctions Against Barbara Were Appropriate.³⁷

Barbara's attorney—and through him, Barbara—twice stated that HE believed Christopher had “illegally withdrawn money” from his retirement accounts “and kept this a secret.” Christopher vigorously denied this accusation. Counsel had no supporting evidence for his assertion; there is none. His effort to make something of Christopher's Yakima home purchase did not prove illegality. There is nothing connecting that purchase with anything that is relevant to this case. It was insulting and unprofessional of counsel to make an unsupported accusation of illegal action on Christopher's part based simply on conjecture.

Counsel's baseless accusation was sanctionable.

³⁶ Issue 3.

³⁷ Issue 5.

Moreover, in another outrageous statement, Barbara now claims that Christopher “never denied the basic allegation made by [Barbara] that she believed [Christopher] cashed in pension funds and used them to purchase a new house.”³⁸ Apparently, Barbara did not read Christopher’s multiple denials.

Indeed, Barbara’s sanctionable conduct in this matter is pervasive and is well grounded in the trial court’s numerous actual findings contained in the orders in Appendix C.

Finally, insofar as it is raised as an appeal issue, Judge Inveen found that Barbara had filed documents containing personal identifiers, to which Christopher objected. CP 191. She ordered that they be replaced. CP 192. This has been done. Similar documents inadvertently placed in the file by Christopher have also been replaced.

There is no evidence this issue, regarding the filing of documents, materially influenced the court regarding its rulings on the merits and concerning sanctions and attorney fees. In fact, Christopher’s request that Barbara be sanctioned regarding the filings was crossed out by Judge Inveen. CP 192.

³⁸ Brief at page 12-13. Presumably this claim is not that Christopher never denied that this was Barbara’s *belief*, which would be irrelevant, but that he never denied her claim that he misused his pension funds—which he emphatically and repeatedly did deny.

14. The Court's Award Of Attorney Fees To Christopher Was Appropriate.³⁹

Barbara was clearly intransigent throughout. This was determined by two judges. CP 58; 191. Barbara did not appeal from the first finding.

Barbara also violated CR 11. CP 184.

Respondent's Motion for an Accounting and additional relief was denied and Christopher's motion to enforce the decree was granted. This was in part because:

- Of the trial court's findings that Barbara was not entitled to equitable relief or attorney fees in this matter;
- Barbara attempted to defraud Christopher and then tried to cover it up; and
- Barbara did not comply with the conditions precedent to bringing an action for an accounting.

The attorney fees awarded to Christopher were modest—amounting to only about \$3,200, CP 56; 186, in comparison to what he had to pay. *See* CP 351.

Barbara has not established that the trial judge abused her discretion when she awarded Christopher attorney fees in this matter.

³⁹ Issue 6.

**V. ATTORNEY FEES SHOULD BE AWARDED TO
RESPONDENT IN THIS APPEAL**

Judge Inveen in her January 26, 2010 Order Granting Motion to Enforce Decree and Awarding Attorney Fees/Sanctions, CP 187, determined that Barbara “shall be responsible for all of Petitioner’s attorney fees incurred to finalize this matter.” CP 191. This was largely because of Barbara’s intransigence as explained in Judge Inveen’s two January 26 Orders. CP 184; 187. Christopher’s resources are limited. CP 347 and Appendix D.

Consistent with Judge Inveen’s declaration that Barbara should be responsible for all of Christopher’s fees incurred to finalize this matter, Christopher should not be required to bear the attorney fee and litigation costs that have resulted from Barbara’s fraudulent and intransigent behavior in this appeal.

Therefore, Christopher respectfully asks for an award of fees, and appropriate sanctions, under RAP 18.1. To the further extent it is appropriate, Christopher also seeks fees pursuant to RCW 26.09.140.

VI. CONCLUSION

Christopher patiently waited for years for Barbara's attorney to carry out his duties under the Decree. He ultimately had to resort to expensive litigation to force Barbara and her attorney to act. In the course of the litigation, Christopher learned Barbara tried to cheat him out of the house sale proceeds she was ordered to give him by the Decree and then tried to cover up her fraud by submitting draft property transfer orders for Christopher to sign that failed to disclose, or take into consideration, her fraudulent activity. Further, in a transparent effort to deflect from the magnitude of her fraud, she and her attorney falsely accused Christopher of illegal activity.

Barbara also initiated court proceedings in violation of CR 11.

Actions have consequences. Ultimately, Barbara's deceit caught up with her. Two judges ruled she was intransigent in the case. Judge Inveen further found Barbara had violated CR 11 and should be sanctioned because of it.

An award of modest attorney fees to Christopher followed.

All of this is well supported by the record and the court's specific findings.

Over six years have passed since entry of the Decree. This matter is still unresolved because of this appeal.

Judge Inveen's Orders are comprehensive and resolve all matters. They should be affirmed on the grounds stated by Judge Inveen or on other grounds suggested in this Brief, such as the failure of Barbara to establish why specific findings lack substantial evidence. In this connection, the trial court may be affirmed on any basis supported by the record, even if the trial court did not consider the argument. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

DATED: September 19, 2011.

Respectfully submitted,

CAMDEN HALL, PLLC

A handwritten signature in black ink, appearing to read "Camden M. Hall". The signature is written in a cursive style with a large, stylized initial "C".

Camden M. Hall, WSBA No. 146
Attorney for Respondent

1001 Fourth Avenue, Suite 3312-13
Seattle, WA 98154
(206)749-0200

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington, that by the end of the day on September 19, 2011, I will have served, or had served, this Respondent's Brief and Declaration of Service upon the following individuals in the manner indicated below:

Paul E. Simmerly
Herman, Recor, Araki, Kaufman, Simmerly & Jackson, PLLC
2100 - 116th Avenue Northeast
Bellevue, WA 98004

Via Messenger

DATED: September 19, 2011 at Seattle, Washington.

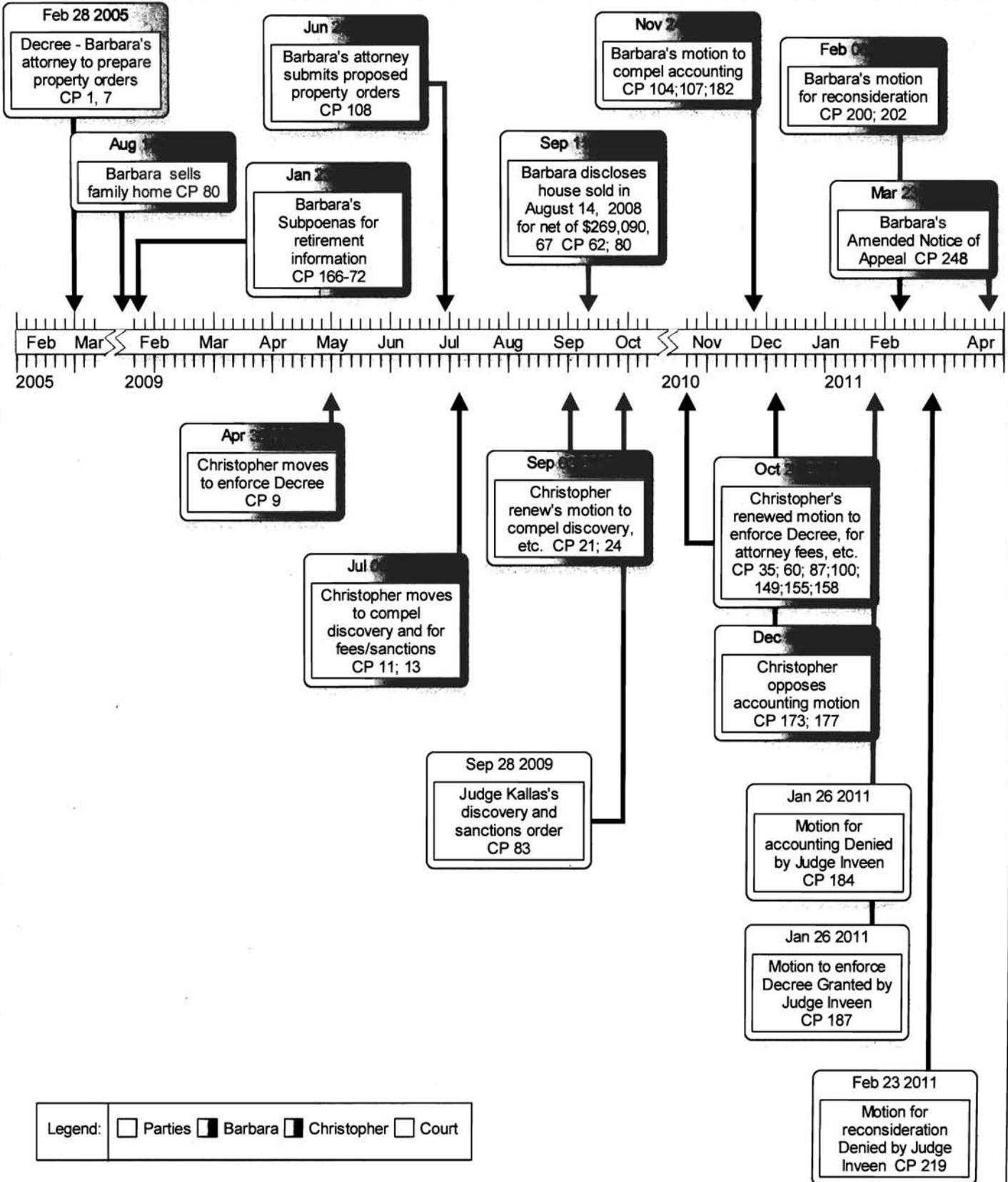


Camden M. Hall

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STATE OF WASHINGTON
2011 SEP 19 PM 4:34

APPENDIX A

HEATH APPEAL TIMELINE



APPENDIX B

FILED
KING COUNTY, WASHINGTON

JAN 26 2011

SUPERIOR COURT CLERK
BY JANIE SMOTER
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CHRISTOPER HEATH,

Petitioner,

v.

BARBARA HEATH.,

Respondent.

No. 04-3-01407-1SEA

ORDER DENYING MOTION FOR
ORDER COMPELLING
ACCOUNTING OF PENSION
FUNDS

This matter was noted to be heard December 8, 2010 while Petitioner's Motion to Enforce Decree was pending to be heard on November 29, 2010 (both without oral argument). In determining this matter, the following was considered: Motion for Order to Compel Accounting of Petitioner's Pension funds, Declaration of Counsel for Respondent in Support of Motion to Compel Accounting of Peitioner's (sic) Pension Funds, Response in Oppositon (sic)To Motion to Compel Accounting, Declaration of Christopher Heath in Opposition to Motion to Compel Accounting, and Declaration of Camden M. Hall Regarding Attorney Fees, Costs, Etc., Incurred in Opposing Motion for Accounting, Etc. In addition, the court considered all materials provided the court in reference to Petitioner's Motion to Enforce Decree, as set out in the Order Granting Motion to Enforce Decree, entered this same date.

Respondent indicates the evidence to be relied upon in support of her motion is solely the Declaration of Counsel Paul E. Simmerly. She also indicates in that motion the sole legal authority relied upon is "The Court's inherent authority to enforce its own orders." This motion is without merit, and in violation of CR 11. The court specifically finds the Motion and Declaration of Paul E. Simmerly is not well grounded in fact, is not warranted by existing law, and is interposed for an

ORDER DENYING MOTION FOR ACCOUNTING - 1

1 improper purpose, by causing unnecessary delay and increased cost of litigation. Facts considered
2 by the court in making this determination include the following:

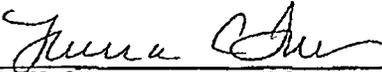
- 3
- 4 1. Counsel Simmerly's declaration upon which the motion is based makes egregious
5 representations that "We believe that Mr. Heath has illegally withdrawn money from
6 these pensions and kept this a secret". These representations are made without providing
7 any basis, and the unrebutted evidence before the court clearly demonstrates that this
8 assertion is flat out wrong.
- 9 2. Simmerly asserts that Petitioner refused to "provide input into the language of the
10 orders", clearly attempting to place the responsibility for the delay in entering the orders
11 on Petitioner. The court finds Simmerly misrepresents through omission necessary facts:
12 that he did not prepare the orders or ever provide them to Petitioner for over four years,
13 that when he did, he neglected to address or provide information about the sale proceeds
14 of the parties' house which had occurred one year prior, and that the parties were in
15 continued negotiations during the time when he asserts Petitioner refused to provide
16 input.
- 17 3. Respondent's counsel had the ability, and in fact did subpoena the requested documents
18 without any need for an accounting in 2009. No motion was necessary.
- 19 4. Respondent's counsel was ordered to prepare the orders in question when the decree was
20 entered in 2005. There is no evidence before the court that any effort was made to enter
21 the necessary orders until 2009. This motion was brought only in response to and in
22 retaliation for Petitioner filing his motion to Enforce Decree.

23 Respondent's Motion for Accounting is DENIED.

24 It is further Ordered that for violating CR11, Respondent shall pay Petitioner's Attorneys
25 fees to respond to this motion. The Declaration of Camden M. Hall Regarding Attorneys Fees,
26 Costs, Etc. is unrebutted. The court finds his hourly billing rate of \$375 is reasonable for his
27 experience, and the 3.3 hours expended was reasonably incurred to respond to the motion, for a total
28

1
2 of \$1,234.50. This amount shall be offset against funds owing the Respondent in finalization of this
3 matter, as set out in the Order to Enforce Decree entered this date.

4 DONE IN OPEN COURT this 25th day of January, 2011

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8 JUDGE LAURA C. INVEEN
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APPENDIX C

1 On about February 28, 2005, petitioner and his former wife entered a Decree that ended
2 their marriage. There were several exhibits attached to the Decree, of which the accompanying
3 Exhibit C ("Husband's Obligations") is currently relevant. Paragraph 7 in Exhibit C provides:

4 7. The parties hereto shall divide the family home, the husband's 401 K,
5 pension and retirement funds 55/45, with 55% going to the wife. The
6 wife shall be quitclaimed the family residence by the husband and the
7 parties stipulate that the house has a fair market value of \$360,000 as of
8 this date and a mortgage of approximately \$117,000. Pension and
9 retirement funds have the following values: LEOFF 2 Plan is valued at
10 \$327,646 and the value of the MEET is \$240,339. The parties shall draft
11 appropriate Qualified Domestic Relation Orders to accomplish these
12 distributions. *Wife's attorneys shall prepare the appropriate Orders.*¹

13 While Paragraph 7 of Exhibit C contemplates that the former wife's attorney,
14 Paul Simmerly, "shall [timely] prepare the appropriate [Qualified Domestic Relation] Orders,"
15 this has never been done despite several intervening requests by petitioner that it be done.²

16 Since February, 2005, there have been several communications between Mr. Simmerly
17 and Mr. Heath in which ^{Heath is} he sought resolution of all of the Paragraph 7 distribution issues. (Mr.
18 Heath's attorney in the dissolution proceedings has since retired.) On January 21, 2009, Mr.
19 Simmerly emailed Mr. Heath, in response to Mr. Heath's inquiry about why he had recently
20 asked for a current Schwab account statement. Mr. Simmerly's responsive email stated: "B. J.
21 is entitled to the value of the account at the time of the Decree and all accumulated appreciation
22 on her share since then." Subsequently, Mr. Simmerly issued Subpoenas for valuation
23 information.

24 On February 25, 2009, Mr. Heath emailed Mr. Simmerly seeking a response to prior
25 email and asking for a "time frame" for the resolution of the property division as required by
26 Paragraph 7. In that email, Mr. Heath asked for a response from Mr. Simmerly by March 10,
2009 in the hope that the outstanding issues could "be resolved without the need to burden the

¹ Emphasis added. The current value of Ms. Latham's interest of the MEET (Schwab) account is \$157,561.86. See Exhibit I. The LEOFF 2 account is an annuity, the "value" of which does not change.

² Last June, Mr. Simmerly attempted to at last prepare the required Orders. However, they were unacceptable because he and his client refused to reveal the facts about the house sale and the resulting funds that should have been paid to petitioner long ago.

1 courts or incur further attorney fees. . . I feel that 4 years is an excessive amount of time to
2 comply with the requirements stated in the divorce decree and feel compelled to move forward
3 through whatever channels necessary to bring this to a close.”

4 Mr. Simmerly did not respond to this email.

5 As a consequence, Mr. Heath engaged attorney Camden M. Hall to assist him with the
6 enforcement issues. On April 3, 2009, Mr. Hall wrote Mr. Simmerly a letter. This letter
7 included much of the above information and made three alternate proposals for a resolution of
8 this matter. Mr. Hall’s letter concluded as follows:

9 “Because of the unreasonably long time this matter has taken to this
10 point, Mr. Heath’s offer to resolve this matter through one of the
11 above three choices will lapse at noon on April 14, 2009. If this
12 matter has not been resolved by then, he has authorized me to file a
13 motion to enforce Paragraph 7 and to seek related attorney fees
14 from your client for having to do so. “

15 There was no response by April 14. Therefore, Mr. Heath was compelled to incur the
16 additional expense of engaging Mr. Hall to try to do what his former wife agreed would be
17 done, largely by Mr. Simmerly, in 2005.

18 One of the unresolved problems dealt with the intervening sale of the house referenced
19 in the Decree. For many months, the former wife ^{through} and her attorney refused to provide Mr. Heath
20 with the details of her sale. Consequently, Mr. Heath had his attorney move to compel the
21 disclosure of the required information. While the motion was pending, Mr. Heath learned the
22 house had been sold³ and the net sales proceeds were used to purchase a new home for the
23 former wife. All of this resulted in a September 18, 2009 sanctions Order by Judge Paris K.
24 Kallas against the former wife and an award of attorney fees—which has never been paid. The
25 evidence establishes that the net sales proceeds from the house sale were \$269,090.67—of
26 which Mr. Heath’s 45 percent share totals \$121,090.80.

³ See Exhibit 2 which is the closing statement for the house sale—authenticated by Mr. Simmerly in his September 11, 2009 Declaration filed with the Court.

1 Neither the former wife nor her attorney acted to enforce the Decree completely—let
2 alone at the values set out in it. Given the circumstances, it is inequitable for Mr. Heath to have
3 to make a distribution out of his two retirement funds at the values set out in the Decree.
4 Indeed, other than stating the “values” of these funds when the Decree was entered, there is
5 nothing in the Decree that requires these funds (or the house) to be divided at those values.
6 Under the circumstances, and as a clarification of the Decree, the distributions should be
7 determined from the actual sales figures from the house sale, and current values of Mr. Heath’s
8 retirement funds. As shown by the accompanying Declaration of Louise Green, CPA, when all
9 of this is taken into consideration, Mr. Heath owes Ms. Latham ^{6,119.59 JCB} ~~\$6,556.69~~,⁴ which he proposes
10 should be transferred to her by a distribution of that amount from his Schwab account as final
11 satisfaction of all obligations of paragraph 7 in Exhibit C to the Decree.

12 Mr. Heath has tried diligently to either settle this matter or seek the information
13 necessary to protect his interests. He has waited since the September, 2009 Court Order for his
14 former wife’s counsel to prepare the appropriate orders to implement Judge Kallas’ Order by
15 equitably setting off the house sale proceeds respondent should have paid petitioner against the
16 retirement account proceeds petitioner owes respondent, as conceptually suggested by
17 respondent in a June 10, 2009 email. Not having received the required orders, he has had to
18 incur further expenses in having his own attorney prepare them—and this Motion. He has spent
19 many thousands of dollars in accounting and attorney fees in his attempts. Meanwhile, Ms.
20 Latham and her attorney have frustrated his effort to resolve this matter and have stalled and
21 refused to do what they were required to do by the Decree.

22 In summary, over five years have passed since entry of the Decree in this matter. An
23 equitable resolution and clarification of the distributions required by the Decree is to equitably
24

25 ~~_____ this date _____~~
26 ^{11/25/11} ⁴ This is as of ~~November 29, 2010~~ ^{this date} and includes additional statutory interest on the Judgment from October 11 to
~~November 29 of \$29.79 and additional statutory interest on Mr. Heath’s portion of the house sale funds from~~
~~October 11 to November 29 of \$1,910.91. The court is not awarding add’l interest on~~

ORDER GRANTING MOTION TO ENFORCE DECREE AND
AWARDING ATTORNEY FEES/SANCTIONS - 4

CAMDEN HALL, PLLC
1001 FOURTH AVENUE, SUITE 3312-13
SEATTLE, WASHINGTON 98154 ♦ 206-749-0200

(fn & cont'd) after 10/11/10, as it has no information about the offsetting retirement accounts after that date.

1 set off the home sale proceeds Mr. Heath was supposed to have been paid from his financial
2 obligation to his former wife.

3 Finally as to the Decree implementation issues, Respondent's action in this matter, as
4 summarized in respondent's Motion to Enforce Decree and the related Declaration of
5 Christopher Heath and Reply papers served November 24, 2010, amounts to intransigence and
6 support petitioner's motion for additional attorney fees based on that intransigence. ^{Respondent} shall be
7 responsible for all of Petitioner's attorney fees incurred to finalize this matter.

8 In addition, petitioner has asserted several evidentiary and other objections in his
9 November 24, 2010 Reply papers. Those objections are incorporated into this Order with
10 regard to respondent's request for attorney fees, the involvement of attorney Jerry Scowcroft in
11 these proceedings, hearsay and counsel as witness issues and the placing of restricted personal
12 identifiers of petitioner into the public Court file. Paragraph 9 of Declaration

13 of Simmerly, and Paragraph 6 of Ex A is hearsay and provided

14 without foundation, and shall not be considered by the Court.
15 Scowcroft's opinion has not been properly placed before

16 the Court, and has not been considered. Respondent
17 has filed documents in the court's file containing

18 petitioner's personal identifiers, in violation of 6R22.
19 The Court finds the hourly rate and time expended by counsel

20 for petitioner is reasonable and necessary. Therefore, set out in his declarations were
21 reasonable and necessary. The Court further finds the fees

of Louise Green reasonable and necessary.

22 1. Petitioner's Renewed Motion to Enforce Decree and for Attorney Fees is
23 GRANTED.

24 2. Petitioner shall transfer to respondent the sum of \$6,119.59 out of his Schwab
25 account in full satisfaction of all of both parties' obligations under Exhibit C, paragraph 7 of the

26 Decree and in full satisfaction of the September 18, 2009 attorney fee award against respondent,
and in full satisfaction of the fees awarded against
3 Respondent shall pay an additional \$_____ on or before 10 days

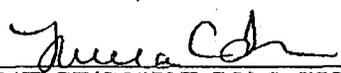
Respondent in the 1/25/11 Order Denying Accounting.
following the entry of this Order to the law firm of Camden Hall, PLLC as sanctions because
petitioner had to bring this Renewed Motion to Enforce Decree and for Attorney Fees.

ORDER GRANTING MOTION TO ENFORCE DECREE AND
AWARDING ATTORNEY FEES/SANCTIONS - 5

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1 4. Respondent shall pay an additional \$ _____ on or before 10 days
2 following the entry of this Order to petitioner, care of the law firm of Camden Hall, PLLC, as
3 sanctions because respondent placed restricted personal identifiers of petitioner in the public
4 Court file in violation of the Court Rules. In addition, respondent's counsel shall, within 10
5 days of this Order, *move to seal all pleadings filed with personal*
6 *identifiers (with specificity), per WGR 15, and shall re-file*
7 *redacted copies of the same, containing no personal*
8 *identifiers.* ~~This Order shall also consist of the Court's authorization and authority to the Court~~
9 ~~Clerk to allow respondent's counsel to (1) remove the offending pages, (2) their redaction and~~
10 ~~replacement or (3) their independent filing as Sealed Financial Records in this matter.~~
11 *terms in the amount of \$100 for each day overdue*

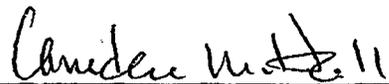
17 Dated: January 15, 2010.



JUDGE/COURT COMMISSIONER

19 Presented by:
20
21 CAMDEN HALL, PLLC

Approved for entry;
Notice of Presentation Waived:
HERMAN, RECOR, ARAKI, KAUFMAN,
SIMMERLY & JACKSON, PLLC

23 
24 Camden M. Hall, WSBA No. 146
25 Attorney for Petitioner
26 *(signed as typed; without interlineations)*

Paul E. Simmerly, WSBA No. 10719
Attorney for Respondent

EXHIBIT 1

CAMDEN HALL, PLLC
1001 FOURTH AVENUE, SUITE 3312-13
SEATTLE, WASHINGTON 98154 ♦ 206-749-0200

Value of Retirement Accounts (October 4, 2010)

WA Dept. of Retirement A/C (Note 4)	\$ 136,038.97
Percent of Proceeds due to Barbara Jean Latham	55%
Amount Due Barbara Jean Latham	\$ 74,821.43
 Charles Schwab IRA xxx8070 (Note 5)	
Proceeds due to Barbara Jean Latham per February 28, 2005 Decree	\$ 132,186.45
Earnings Thru October 11, 2010	\$ 25,375.41
Amount Due Barbara Jean Latham	\$ 157,561.86
 Total	\$ 232,383.29

Tax Consequences of Christopher Heath Cashing in Retirement Accounts

(To convert the cash value of CH interest in house to tax encumbered value to offset tax encumbered value of retirement funds to be transferred to former wife)

Cash Proceeds - Sale of Family Residence	\$ 269,090.67
Percent of Proceeds due to Chris Heath	45%
Amount Due to Chris Heath	\$ 121,090.80
Principal Interest Due to Chris Heath (Note 3)	\$ 30,136.68
 Penalty on Early Withdrawal of IRA (Note 1)	\$ 12,109.00
Additional Income Tax as Result of Higher Tax Bracket (Note 2)	\$ 43,663.00
 Value Required to Compensate Chris Heath	\$ 206,999.48

Payment Breakdown

Retirement Funds	\$ 232,383.29
Less House Sale Funds	\$ 206,999.48
Sub Total	\$ 25,383.81
Less Attorney Fees and Statutory Interest	\$ 13,753.77
Less Accounting Fees	\$ 3,132.65
Total Due Barbara Jean Latham	\$ 8,497.39 6,119.39

*jeff **
16,131.57

*** Fee calculation:**

- 1) Attys fee through 9/15/09
(includes 1887.50 ordered previously on 9/18/09 + unpaid) 7,669
- 2) costs thru 9/15/09 272
- 3) interest on 9/18/09 judgment 312.07
- 4) fees 9/15 - 10/11 5,844.00
- 5) fees 10/11 - present 800.00
- 6) fees from order denying Acctg Page 194, 234.50

Total 16,131.57

Footnotes to Tax Consequences of Christopher Heath Cashing in Retirement Accounts

Note 1 Because Ms. Latham does not have available funds to pay Mr. Heath the amount due for his share of the proceeds from the sale of the family residence, it is necessary for Mr. Heath to obtain the funds from Ms. Latham's share of the retirement money. There will be an early withdrawal penalty of 10%. The penalty is based on the amount withdrawn that will include the sale proceeds plus the tax consequences of having to pay income taxes on the amount withdrawn from retirement money. Mr. Heath is only 50 and is subject to IRS mandated early withdrawal penalties. The amount is calculated as follows:

House proceeds	\$121,090.80
10% Penalty	\$12,109

Note 2 Mr. Heath's 2009 taxes were recalculated adding additional taxable income resulting from withdrawing this sum from the IRA and mandatory court awarded interest. Had Ms. Latham had the cash available to pay Mr. Heath upon the sale of the house, it would not be necessary to take money from the IRA and there would be no taxes due. Unfortunately, this is not the case. Mr. Heath is pushed into the 33% marginal tax bracket.

Note 3 Statutory Interest is computed from September 14, 2008, one month after the closing of the house sale at \$39.81 per day or \$30,136.68 to October 11, 2010.

Note 4 The value of the LEOFF 2 account is set by the State of Washington and is documented at \$136,038.97.

Footnotes to Tax Consequences of Christopher Heath Cashing in Retirement Accounts

Note 5 The value of the Charles Schwab rollover IRA is the account value as of October 4, 2010. Ms. Latham's interest in this account is her 55% interest in the MEBT account as of February 28, 2005 and adjusted for growth. Ms. Latham's interest as of 2/28/05 was \$132,186.45 and is currently \$157,561.86.

Mr. Heath has continued to contribute to this account post divorce so Ms. Latham's current interest is less than 55%. The quarterly rates of return of the MEBT account are below. The Schwab account grew at a little more than 3.2% for the period from April 2008 to October 4, 2010. Calculations of the account are available upon request.

MEBT Quarterly Rates of Return	2005	2006	2007	2008
Q1		4.07%	1.33%	-6.63%
Q2	2.00%	-1.76%	4.12%	
Q3	3.70%	3.66%	2.20%	
Q4	2.27%	5.14%	1.17%	

EXHIBIT 2

CAMDEN HALL, PLLC
1001 FOURTH AVENUE, SUITE 3312-13
SEATTLE, WASHINGTON 98154 ♦ 206-749-0200

A. U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT FINAL SETTLEMENT STATEMENT	B. TYPE OF LOAN:				
	1. <input type="checkbox"/> FHA	2. <input type="checkbox"/> FmHA	3. <input type="checkbox"/> CONV. UNINS.	4. <input type="checkbox"/> VA	5. <input type="checkbox"/> CONV. INS.
	6. FILE NUMBER: 0807070			7. LOAN NUMBER:	
	8. MORTGAGE INS CASE NUMBER:				

C. NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "[POC]" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.
1.0 3/98 (WESTLUND-LATHAM0807070/27)

D. NAME AND ADDRESS OF BUYER: BRETT M. WESTLUND 807 289th Avenue NE Carnation, WA 98014	E. NAME AND ADDRESS OF SELLER: MICHAEL RUSSELL LATHAM BARBARA JEAN LATHAM 803 291st Ave NE Carnation, WA 98014	F. NAME AND ADDRESS OF LENDER: Guild Mortgage Company 9160 Gramercy Drive San Diego, CA 92123
--	--	--

G. PROPERTY LOCATION: 803 291st Ave NE Carnation, WA 98014 King County, Washington Lot 11 Hawthorne Ridge Div 1 V133/P39-40	H. SETTLEMENT AGENT: 20-3418117 Integrity Escrow Services, Inc. PLACE OF SETTLEMENT 301 Bendigo Blvd N North Bend WA 98045	I. SETTLEMENT DATE: August 14, 2008
---	--	--

FINAL

J. SUMMARY OF BUYER'S TRANSACTION	K. SUMMARY OF SELLER'S TRANSACTION
100. GROSS AMOUNT DUE FROM BUYER:	400. GROSS AMOUNT DUE TO SELLER:
101. Contract Sales Price	401. Contract Sales Price 422,500.00
102. Personal Property	402. Personal Property
103. Settlement Charges to Buyer (Line 1400)	403.
104.	404.
105.	405.
<i>Adjustments For Items Paid By Seller in advance</i>	
106. City/Town Taxes to	406. City/Town Taxes to
107. County Taxes to	407. County Taxes to
108. Assessments to	408. Assessments to
109.	409.
110.	410.
111.	411.
112.	412.
120. GROSS AMOUNT DUE FROM BUYER	420. GROSS AMOUNT DUE TO SELLER 422,500.00
200. AMOUNTS PAID BY OR IN BEHALF OF BUYER:	500. REDUCTIONS IN AMOUNT DUE TO SELLER:
201.	501. Excess Deposit (See Instructions)
202. Principal Amount of New Loan(s)	502. Settlement Charges to Seller (Line 1400) 30,994.59
203. Existing loan(s) taken subject to	503. Existing loan(s) taken subject to
204.	504. Payoff First Mortgage to Washington Mutual/Q024829 111,970.40
205.	505. Payoff Second Mortgage
206.	506.
207.	507.
208. seller credit pg 2 & 3** items	508. seller credit pg 2 & 3** items 10,000.00
209.	509.
<i>Adjustments For Items Unpaid By Seller</i>	
210. City/Town Taxes to	510. City/Town Taxes to
211. County Taxes to	511. County Taxes 07/01/08 to 08/14/08 444.34
212. Assessments to	512. Assessments to
213.	513.
214.	514.
215.	515.
216.	516.
217.	517.
218.	518.
219.	519.
220. TOTAL PAID BY/FOR BUYER	520. TOTAL REDUCTION AMOUNT DUE SELLER 153,409.33
300. CASH AT SETTLEMENT FROM/TO BUYER:	600. CASH AT SETTLEMENT TO/FROM SELLER:
301. Gross Amount Due From Buyer (Line 120)	601. Gross Amount Due To Seller (Line 420) 422,500.00
302. Less Amount Paid By/For Buyer (Line 220)	602. Less Reductions Due Seller (Line 520) 153,409.33
303. CASH (FROM) (X TO) BUYER	603. CASH (X TO) (FROM) SELLER 269,090.67

EXHIBIT "2"

L. SETTLEMENT CHARGES

		PAYD FROM	PAYD FROM
		BUYER'S	SELLERS
		FUNDS AT	FUNDS AT
		SETTLEMENT	SETTLEMENT
00. TOTAL COMMISSION Based on Price	\$ 422,500.00 @ 5.0000 % 21,125.00		
<i>Division of Commission (line 700) as Follows:</i>			
01. \$ 4,225.00	to Cook Real Estate		
02. \$ 16,900.00	to John L. Scott, Inc.		
03. Commission Paid at Settlement			21,125
04.	to		
00. ITEMS PAYABLE IN CONNECTION WITH LOAN			
01. Loan Origination Fee	% to		
02. Loan Discount	% to		
03.	to		
04.	to		
05.	to		
06.	to		
07.	to		
08.	to		
09.	to		
10.			
11.	to		
00. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE			
01. Interest From	to @ \$ /day (days %)		
02. Mortgage Insurance Premium for	months to		
03. Hazard Insurance Premium for	years to		
04.			
05.			
000. RESERVES DEPOSITED WITH LENDER			
001. Hazard Insurance	@ \$ per		
002. Mortgage Insurance	@ \$ per		
003. City/Town Taxes	@ \$ per		
004. County Taxes	@ \$ per		
005. Assessments	@ \$ per		
006.	@ \$ per		
007.	@ \$ per		
008. Aggregate Adjustment	@ \$ per		
100. TITLE CHARGES			
101. Escrow Fee (+53.75 s/t)	to Integrity Escrow Services, Inc.	**	67
102. Escrow Fee 2nd Loan	to		
103. Courier Fee	to		
104. Wire Fee	to Integrity Escrow Services, Inc.	**	2
105. E-Doc Prep 1st (+4.30 s/t)	to		
106. Subescrow Fee	to		
107. Reconvey Track Fee (+3.01 s/t)	Integrity Escrow Services, Inc.		3
<i>(includes above item numbers:)</i>			
108. Title Insurance	to Pacific Northwest Title	Inc Sales Tax **	1,19
<i>(includes above item numbers:)</i>			
109. Lender's Coverage	\$ 380,200.00		
110. Owner's Coverage	\$ 422,500.00		
111.			
112.			
113.			
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES			
1201. Recording Fees: Deed \$; Mortgage \$; Releases \$			
1202. City/County Tax/Stamps: Deed \$; Mortgage \$			
1203. State Tax/Stamps: Deed \$; Mortgage \$			
1204. Local Excise Tax	to King County Treasurer		2,1
1205. State Excise Tax	to King County Treasurer		5,4
1300. ADDITIONAL SETTLEMENT CHARGES			
1301. Survey	to		
1302. Pest Inspection	to		
1303.			
1304. Courtesy Reduction	to Integrity Escrow Services		-19
1305. See addit'l disb. exhibit	to		60
1400. TOTAL SETTLEMENT CHARGES (Enter on Lines 103, Section J and 502, Section K)			30,90

SUPERIOR COURT OF WASHINGTON COUNTY OF KING

In re the Marriage of:

CHRISTOPHER ANDREW HEATH,

Petitioner,

and

BARBARA JEAN HEATH (n/k/a LATHAM),

Respondent.

NO. 04-3-01407-1 SEA

PETITIONER'S REPLY IN
SUPPORT OF MOTION TO
ENFORCE DECREE AND FOR
SANCTIONS

Respondent, Ms. Latham, has had nearly five and a-half years to do what she and her attorney were ordered to do under the parties' Decree. Last month she sought, and received, a continuance of petitioner, Christopher Heath's, Motion to enforce the Decree so she could have more time to respond to the Motion. Now, having had the requested additional time, she seeks even more time and delay in doing what she was long ago ordered to do.

In seeking more time, Petitioner's Response is remarkable for what it does not tell the Court.

- It does not tell the court that Ms. Latham violated the terms of her Decree by wrongfully appropriating petitioner's share of the house sale proceeds which she received on about August 14, 2008) and which she apparently cannot now pay to petitioner.¹

¹ Ms. Latham has offered to set off Mr. Heath's share of the house sale proceeds from the retirement funds he is required to pay her (see the attachment to the accompanying Objection to Declaration of Counsel, etc.) but has never offered to pay Mr. Heath his share of the house sale proceeds—which she apparently used as a down payment for her new house. See also the accompanying Reply Declaration of Christopher Heath ("Heath Decl.") at 2:11-12.

- 1 • It does not tell the court that respondent hid from Mr. Heath, for about a year, the
2 fact that she had sold the house, what she had sold it for and that she had used the
3 proceeds to purchase a new one for herself and new family.²
- 4 • It does not tell the court that, as a consequence of her deception, Judge Kallas
5 assessed attorney fees against petitioner “as sanctions for her intransigence . . .”
6 in failing to timely disclose what she had done.³
- 7 • It does not tell the Court that in June of 2009—over four years after the Decree
8 was entered—her attorney finally prepared documents, which he proposed that
9 Mr. Heath sign, transferring to Ms. Latham the retirement funds covered by the
10 Decree while, at the same time, not fully disclosing the misappropriation of the
11 house sale funds by Ms. Latham.⁴
- 12 • It does not tell the Court that, in response to the transfer documents prepared by
13 counsel, and after learning of respondent’s deception, *petitioner* proposed to
14 respondent and her attorney that the house sale proceeds respondent should have
15 paid to petitioner be equitably set off from the retirement funds owed to
16 respondent, a position which she has now apparently rejected.⁵
- 17 • It does not tell the Court that a basis for her recent motion for a continuance was
18 to have “her own expert review the opinion of Petitioner’s expert. . . .”⁶ which
19

20 ² Heath Decl. at 2:4-11.

21 ³ September 18, 2009 Order.

22 ⁴ Heath Decl. at 2:1-12.

23 ⁵ See the attached June 10, 2009 email. Counsel for respondent complains that “Evidence of offers of settlement
24 are barred under ER 408.” Supplemental Declaration of Counsel for Respondent in Opposition to Motion to
25 Enforce Decree, Etc. (“Simmerly Decl.”) at 3:15. This, of course is not the law when such evidence is offered for
26 the purpose of proving collateral issues. The only time evidence of settlement negotiations is excluded under the
Rule is when it is offered “to prove liability for or invalidity of the claim or its amount.” This exclusion does not
include instances when such evidence is offered to prove lack of good faith. See, e.g., *Matteson v. Ziebarth*, 40
Wn.2d 286, 242 P.2d 1025 (1952); Karl B. Tegland, WASHINGTON PRACTICE “Courtroom Handbook on
Washington Evidence” Rule 408 at 272 (2010-2011 ed.).

⁶ Declaration of Counsel for Respondent in Opposition to Motions to Enforce Decree for Fees and other Relief and
In support of Respondent’s Motion for a Continuance (“continuance Decl.”) (served October 27, 2010 but dated
July 27, 2009) at 2:21.

1 apparently has not been done, even after the continuance was granted, because
2 she still maintains she has not had an opportunity to respond to the material
3 submitted by petitioner's accountant.⁷

- 4 • It does not tell the Court that her counsel asserted in her motion for continuance
5 that her counsel "advised Mr. Hall that we have an expert and need more time to
6 evaluate this matter and respond, but he has refused to continue the matter."⁸

7 There is no evidence of such a request *or refusal* before the Declaration in which
8 this statement is made.

- 9 • It does not tell the Court that respondent has had the relevant current account
10 balance statements since the Motion to Enforce Decree was made, nearly a
11 month ago, but persists in claiming she is still unable to evaluate retirement
12 account allocation issues.⁹

- 13 • It does not tell the Court that in January, 2009, she subpoenaed Mr. Heath's
14 retirement accounts that produce the account statements she now claims he
15 refuses to produce in an "accounting," These Subpoenas produced over 200
16 pages of responsive material.¹⁰ Ms. Latham also fails to explain why, if she
17 believed Mr. Heath was not providing necessary information, she failed to serve
18 Requests for Production on him or to again Subpoena more current records from
19 the record holders.

- 20 • It does not tell the Court that her having to make the mortgage, tax and other
21 payments on the house mentioned in the Decree was essentially under her

23 ⁷ Simmerly Decl. at 3:1-2.

24 ⁸ *Id.*,

25 ⁹ For the first time, respondent appears to ask for an accounting of petitioner's retirement accounts. Yet literally for
26 years, she has had the means of obtaining all of petitioner's account statements, independent of petitioner, through
 Subpoenas—which she actually utilized. Moreover, she even provides new Subpoena drafts, apparently prepared
 by Mr. Scowcroft, for the information she could have sought long ago.

¹⁰ See the accompanying Sealed Financial Documents which demonstrates some of the documents respondent
 obtained by her first set of Subpoenas.

1 control. She determined when the house was sold and chose to sell it about three
2 and a half years after the Decree was entered. In addition, she lived in the house
3 rent free for that entire period.

4 *On the other hand, respondent's papers do tell us that she once suggested the relief Mr.*
5 *Heath now seeks in the equitable set-off of the house sale proceeds against the retirement funds*
6 *that should be transferred to respondent.¹¹*

7 Respondent now asks for reimbursement for certain expenses she paid while leaving
8 rent-free in the Heath family home before it was sold. While the Decree contemplated that she
9 would live in the home before it was sold, it did not contemplate (though it could easily have
10 done so if it was the intent of the parties) that she be reimbursed for her mortgage, tax,
11 improvement and other expenses of the house before it was sold. To now require such
12 reimbursement would amount to an improper modification of the Decree—unlike the CR 60
13 relief or clarification sought in the pending motion by Mr. Heath.¹²

14 Respondent's claim for an equitable accounting from Mr. Heath is also misplaced. This
15 is in large measure because of respondent's unclean hands, her delay in asserting her claim and
16 the absence of a timely demand and refusal.

17 In addition:

18 Respondent's duplicity should not be rewarded with still more time and delay in
19 bringing this matter to an end and compensating Mr. Heath with what he was to receive under
20 the Decree.

21
22
23
24 ¹¹ Accompanying the Simmerly Decl. is an email sent to the undersigned on June 10, 2009—before disclosure of
25 the house sale price that gave rise to Judge Kallas' sanctions Order. In that email, which is attached to this Reply,
26 counsel states: "I believe it makes the most sense for my client to keep the house sale proceeds (we will certainly
agree to verify the amount) and then divide up equally amounts from the [retirement accounts] to accomplish the
required split."

¹² See *In re Marriage of Thompson*, 97 Wn.App 873, 878, 988 P.2d 499 (1999).

1 Respondent's intransigence and breach of her fiduciary duty¹³ to Mr. Heath should not
2 be rewarded with still more delay.

3 Respondent's inequitable behavior should not be rewarded with still more time. This is
4 especially true where she should be equitably disqualified because of her unclean hands from
5 seeking more delay and relief beyond that which Mr. Heath has proposed.

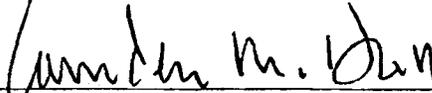
6 In summary, this matter should now be concluded. Respondent has had about a month
7 to respond to the pending motion and Mr. Heath's proposal for distribution of the funds covered
8 by the February, 2005 Decree. This is on top of the years she has had to resolve this matter.

9 The relief sought by Mr. Heath should be granted in the form of the revised Order he
10 submits with these papers.

11 Dated: November 24, 2010.

12 Respectfully submitted,

13 CAMDEN HALL PLLC

14 

15 Camden M. Hall, WSBA No. 146
16 Attorney for Petitioner

17
18
19
20
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25
26 ¹³ See, e.g., *Puget Sound Nat'l Bank v. Burt*, 86 Wn.App. 868, 786 P.2d 300 (1990) (former wife breached fiduciary
duty to former husband by misappropriating money that belonged to former husband through use of an unrevoked
power of attorney).

Paul E. Simmerly

From: Paul E. Simmerly
Sent: Wednesday, June 10, 2009 5:35 PM
To: 'Camden Hall'
Subject: FW: Emailing: 7. Heath--4-3-09 C.Hall ltr to P.Simmerly
Importance: High

Mr. Hall: I believe it makes the most sense for my client to keep the house proceeds (we will certainly agree to verify the amount) and then divide up equally amounts from the Schwab and LEOFF 2 to accomplish the required split.

As I am sure you will agree, when you prepare a QDRO, the first thing that you do is get the information and templates from the plan administrators. You prepare the QDRO using the form that they want. This minimizes the review time that the parties will be charged by the plan administrators because you are using a format that they are used to.

PAUL E. SIMMERLY
Attorney at Law
(425) 451-1400

-----Original Message-----

From: Paul E. Simmerly
Sent: Wednesday, June 10, 2009 5:13 PM
To: 'Camden Hall'
Subject: RE: Emailing: 7. Heath--4-3-09 C.Hall ltr to P.Simmerly
Importance: High

Mr. Hall: I received your fax. I do not understand either the content or the tone. Today I sent you over the materials I have received pursuant to my four (4) subpoenas that your client forced me to prepare and serve because of his failure to cooperate so I could obtain this material voluntarily. Those materials include copies of the laws and guidelines used by the plan administrators and the templates of the orders they require. It is our intention to prepare the QDRO's with your participation. What else do you want?

As for your discovery, what entitled you to conduct discovery? There is no proceeding pending. My client's assets are completely irrelevant to any issue in this case. If you disagree, please advise in writing.

If you really want to go to court, be advised that I will file my own motion for fees for your clients failure to voluntarily cooperate with my request for information and documentation. He also owes money to my client for medical expenses.

PAUL E. SIMMERLY
Attorney at Law
(425) 451-1400

-----Original Message-----

From: Camden Hall [mailto:CHall@camdenhall.com]
Sent: Friday, June 05, 2009 4:22 PM
To: Paul E. Simmerly
Subject: Emailing: 7. Heath--4-3-09 C.Hall ltr to P.Simmerly

<<7. Heath--4-3-09 C.Hall ltr to P.Simmerly.pdf>> The message is ready to be sent with the following file or link attachments:

7. Heath--4-3-09 C.Hall ltr to P.Simmerly

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

APPENDIX D

1
2
3
4
5
6
7 SUPERIOR COURT OF WASHINGTON COUNTY OF KING

8 In re the Marriage of:

9 CHRISTOPHER ANDREW HEATH,

04-3-01407-1 SEA

10 and Petitioner,

FINANCIAL DECLARATION

11 BARBARA JEAN HEATH (n/k/a LATHAM),

12 Respondent.

13 Name: Christopher Andrew Heath Date of Birth: 01/30/59

14 I. Summary of Basic Information

15 Declarant's Total Monthly Net Income (from § 3.3 below) \$ 4,954.99 ____
16 Declarant's Total Monthly Household Expenses (from § 5.9 below) \$ 3,851.04 ____
17 Declarant's Total Monthly Debt Expenses (from § 5.11 below) \$ ____
18 Declarant's Total Monthly Expenses (from § 5.12 below) \$ 3,851.04 ____
19 Estimate of the other party's gross monthly income (from § 3.1f below) [] \$ ____
[X] unknown

20 II. Personal Information

21 2.1 Occupation: pilot

22 2.2 The highest year of education completed: college course level

23 2.3 Are you presently employed? [x] Yes [] No

24 a. If yes: (1) Where do you work. Employer's name and address must be listed on
the Confidential Information Form.

25 Hangar and Pilot Services
26 PO Box 343
Tieton, WA 98947

- 1 (2) When did you start work there (month/year)?
July 2007
- 2
- 3 b. If no: (1) When did you last work (month/year)? _____
- 4 (2) What were your gross monthly earnings? \$ _____
- 5 (3) Why are you presently unemployed?

6 III. Income Information

7 If child support is at issue, complete the Washington State Child Support Worksheet(s), skip Paragraphs
8 3.1 and 3.2. If maintenance, fees, costs or debts are at issue and child support is Not an issue this entire
9 section should be completed. (Estimate of other party's income information is optional.)

10 3.1 Gross Monthly Income

11 If you are paid on a weekly basis, multiply your weekly gross pay by 4.3 to determine your
12 monthly wages and salaries. If you are paid every two weeks, multiply your gross pay by 2.15.
13 If you are paid twice monthly, multiply your gross pay by 2. If you are paid once a month, list
14 that amount below.

	Name	Name
	Chris Heath _____	_____
a. Wages and Salaries	\$ 6,375.00__	\$ _____
b. Interest and Dividend Income	\$ 5.45_____	\$ _____
c. Business Income	\$ _____	\$ _____
d. Spousal Maintenance Received		
From _____	\$ _____	\$ _____
e. Other Income	\$ _____	\$ _____
f. Total Gross Monthly Income (add lines 3.1a through 3.1e)	\$ <u>6,380.45</u>	\$ _____
g. Actual Gross Income (Year-to-date)	\$ <u>35,978.68</u>	\$ _____

19 3.2 Monthly Deductions From Gross Income

a. Income Taxes	\$ <u>1,112.78</u>	\$ _____
b. FICA/Self-employment Taxes	\$ <u>274.48</u>	\$ _____
c. State Industrial Insurance Deductions	\$ <u>38.20</u>	\$ _____
d. Mandatory Union/Professional Dues	\$ _____	\$ _____
e. Pension Plan Payments	\$ _____	\$ _____
f. Spousal Maintenance Paid	\$ _____	\$ _____
g. Normal Business Expenses	\$ _____	\$ _____
h. Total Deductions from Gross Income (add lines 3.2a through 3.2g)	\$ <u>1,425.46</u>	\$ _____

1 3.3 Monthly Net Income (Line 3.1f minus line 3.2h or \$ 4,954.99 \$ _____
line 3 from the Child Support Worksheet(s.)

2

3 3.4 Miscellaneous Income

4 a. Child support received from other relationships \$ _____ \$ _____

5 b. Other miscellaneous income (list source and amounts)

6 _____ \$ _____ \$ _____

7 _____ \$ _____ \$ _____

8 _____ \$ _____ \$ _____

9 c. Total Miscellaneous Income
(add lines 3.4a through 3.4b) \$ _____ \$ _____

10 3.5 Income of Other Adults in Household \$ _____ \$ _____

11 3.6 If the income of either party is disputed, state monthly income you believe is correct and explain
below:

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16 IV. Available Assets

17 4.1 Cash on hand \$ 375.00

18 4.2 On deposit in banks \$ 37,901.33

19 4.3 Stocks and bonds, cash value of life insurance \$ _____

20 4.4 Other liquid assets: \$ _____

21 V. Monthly Expense Information

22 Monthly expenses for myself and _____ dependents are: (Expenses should be calculated for the
future, after separation, based on the anticipated residential schedule for the children.)

23 5.1 Housing

24 Rent, 1st mortgage or contract payments \$ 1,272.62

25 Installment payments for other mortgages or encumbrances \$ _____

26 Taxes & insurance (if not in monthly payment) \$ 329.86

Total Housing \$ 1,602.48

1	5.2	Utilities	
2		Heat (gas & oil)	\$ 13.33 ____
3		Electricity	\$ 135.56 ____
4		Water, sewer, garbage	\$ 41.85 ____
5		Telephone	\$ 34.99 ____
6		Cable	\$ 174.30 ____
7		Other	\$ _____
8		Total Utilities	\$ 400.03 ____
9	5.3	Food and Supplies	
10		Food for <u>2</u> persons	\$ 376.79 ____
11		Supplies (paper, tobacco, pets)	\$ _____
12		Meals eaten out	\$ 303.64 ____
13		Other	\$ _____
14		Total Food Supplies	\$ 680.43 ____
15	5.4	Children	
16		Day Care/Babysitting	\$ _____
17		Clothing	\$ _____
18		Tuition (if any)	\$ _____
19		Other child-related expenses	\$ _____
20		Total Expenses Children	\$ _____
21	5.5	Transportation	
22		Vehicle payments or leases	\$ _____
23		Vehicle insurance & license	\$ 150.00 ____
24		Vehicle gas, oil, ordinary maintenance	\$ 276.39 ____
25		Parking	\$ 32.75 ____
26		Other transportation expenses	\$ _____
27		Total Transportation	\$ 459.14 ____
28	5.6	Health Care (Omit if fully covered)	
29		Insurance	\$ _____
30		Uninsured dental, orthodontic, medical, eye care expenses	\$ 227.10 ____
31		Other uninsured health expenses	\$ _____
32		Total Health Care	\$ 227.10 ____

1 5.7 Personal Expenses (Not including children)

2 Clothing \$ 24.67____

3 Hair care/personal care expenses \$ 102.49____

4 Clubs and recreation \$ 103.33____

5 Education \$ _____

6 Books, newspapers, magazines, photos \$ 17.79____

7 Gifts \$ 70.08____

8 Other \$ _____

9 Total Personal Expenses \$ 318.36____

10 5.8 Miscellaneous Expenses

11 Life insurance (if not deducted from income) \$ _____

12 Other legal _____ \$ 163.50____

13 Other _____ \$ _____

14 Total Miscellaneous Expenses \$ 163.50____

15 5.9 Total Household Expenses (The total of Paragraphs 5.1 through 5.8) \$ 3,851.04____

16 5.10 Installment Debts Included in Paragraphs 5.1 Through 5.8

<u>Creditor</u>	<u>Description of Debt</u>	<u>Balance</u>	<u>Month of Last Payment</u>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

17 5.11 Other Debts and Monthly Expenses not Included in Paragraphs 5.1 Through 5.8

<u>Creditor</u>	<u>Description of Debt</u>	<u>Balance</u>	<u>Month of Last Payment</u>	<u>Amount Monthly Payment</u>
_____	_____	_____	_____	\$ _____
_____	_____	_____	_____	\$ _____
_____	_____	_____	_____	\$ _____
Total Monthly Payments for Other Debts and Monthly Expenses				\$ _____

18 5.12 Total Expenses (Add Paragraphs 5.9 and 5.11) \$ 3,851.04____

VI. Attorney Fees

6.1 Amount paid for attorney fees and costs to date: \$ 588.33

6.2 The source of this money was: liquid assets

6.3 Fees and costs incurred to date: \$ 9,475.83__

6.4 Arrangements for attorney fees and costs are: due in full monthly

6.5 Other:

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

Signed at _____, [City] ___WA___ [State] on _____ [Date].

See attached
Chris Heath

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VI. Attorney Fees

6.1 Amount paid for attorney fees and costs to date: \$ 588.33

6.2 The source of this money was: liquid assets

6.3 Fees and costs incurred to date: THROUGH
SEPTEMBER 14, 2011 CH \$ 9,475.83

6.4 Arrangements for attorney fees and costs are: due in full monthly

6.5 Other:

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

Signed at YAKIMA, [City] WA [State] on 9/18/11 [Date].



Chris Heath

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7 COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

8 In re the Marriage of:

9 CHRISTOPHER ANDREW HEATH,
Respondent,

10 and

11 BARBARA JEAN HEATH (n/k/a LATHAM),
Appellant.
12

NO. 66044-6-I

DECLARATION OF FACSIMILE

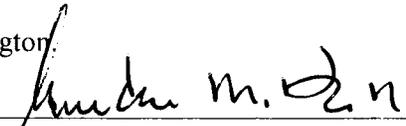
13 Camden M. Hall declares as follows:

14 1. I am the attorney representing Christopher Heath, and my office is at Camden Hall,
15 PLLC at 1001 Fourth Avenue, Suite 3312-13, Seattle, Washington 98154; telephone: 206-749-0200;
16 facsimile (206)749-0821.

17 2. Pursuant to Washington State Rule of General Application 17(a)(2), I have examined the
18 foregoing Financial Declaration, determined that it consists of 8 pages, including a duplicate of page 6,
19 (6A) containing Chris Heath's signature, and this Declaration page. I have determined that the pages are
20 complete and legible. This document was faxed to our office by Chris Heath and, by his signature, he
21 represents that he reviewed, signed and approved for entry, the document in its entirety.

22 I declare, under penalty of perjury under the laws of the state of Washington that the foregoing is
23 true and correct to the best of my knowledge and belief.

24 DATED: September 19, 2011 at Seattle, Washington.

25 
26 _____
Camden M. Hall

DECLARATION OF FACSIMILE - 1

CAMDEN HALL, PLLC
1001 FOURTH AVENUE, SUITE 3312-13
SEATTLE, WASHINGTON 98154 ♦ 206-749-0200

No. 66856-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

CHRISTOPHER A. HEATH,

Respondent,

v.

BARBARA JEAN HEATH (k/n/a
LATHAM),

Appellant.

ATTORNEY FEE
DECLARATION OF CAMDEN
M. HALL

SEP 10 2011

Camden M. Hall declares as follows:

I am an attorney for respondent, Chris Heath. As such, I have personal knowledge about the following and I am competent to testify about it.

Various professionals in our office have assisted in preparing Respondent's case. Total fees and costs directly incurred by respondent, or

billed or advanced by Camden Hall, PLLC, that give rise to this motion, are detailed below.

I have practiced law since 1965. My CV can be found at www.camdenhall.com.

The following are the billing rates and time spent by the attorney and legal assistant who have worked on the preparation of respondent's case from the approximate time period of when we opened our file on this appeal on June 7, 2011 to September 14, 2011, as shown on the accompanying billing summary of fees and costs.

<u>Name of Attorney/Paralegal</u>	<u>Billing Rate</u>
Camden M. Hall	\$395
Robert Cook	\$145
Michael Overlie	\$60
TOTAL	

5. I anticipate our office will generate additional fees and costs which will be submitted to the Court through supplementary documents.

6. The monetary values described above are based upon our normal hourly billing rates, which are uniformly charged to all of our clients. Based upon my experience and work with other law firms, I believe the indicated hours and tasks shown on the accompanying billing summary were reasonable and the listed hourly billing rates are also

reasonable and consistent with the normal hourly billing rates of attorneys and legal assistants in the Seattle area with similar experience and background.

7. Time spent in preparing respondent's appeal papers necessarily precluded gainful employment on other legal matters, by me as well as by others who worked on this case.

8. Our law firm has billed, or will bill, respondent for our services in these proceedings.

9. As noted, some of our services have been or will be completed by non-lawyer personnel. Under *Absher Construction Co. v. Kent School Dist. No 415*, 79 Wn. App. 841, 845, 917 P.2d 1086 (1995), the Court may grant a request for payment of non-attorney time if: (1) the services were performed by the non-lawyer personnel are legal in nature; (2) the performance of the services must be supervised by an attorney; (3) the qualifications of the person performing the services must be specified in the request for fees in sufficient detail to demonstrate that the person is qualified by virtue of education, training, or work experience to perform substantive legal work; (4) the nature of the services performed must be specified in the request for fees in order to allow the reviewing court to determine that the services performed were legal rather than clerical; (5) the amount of time expended must be set forth and must be reasonable;

and (6) the amount charged must reflect reasonable community standards for changes by that category of personnel.

10. All of these fees were reasonably and necessarily incurred in preparing respondent's appeal papers. All of the work prepared by Michael Overlie, a non-lawyer, was completed under my supervision and was legal in nature. Mr. Overlie provides technical services as necessary.

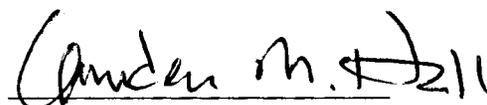
Therefore, we ask the Court to award attorney fees and sanctions to Christopher Heath in the amount of \$9, 475.83, including costs. This number will be supplemented as we get closer to our hearing date.

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

DATED: September 19, 2011.

Respectfully submitted,

CAMDEN HALL, PLLC

A handwritten signature in black ink that reads "Camden M. Hall" followed by a stylized flourish.

Camden M. Hall, WSBA No. 146
Attorney for Respondent

1001 Fourth Avenue, Suite 3312-13
Seattle, WA 98154
(206)749-0200