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NO. 69047-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MICHAEL F. MORGAN,
Appellant/Petitioner

vs.

COLLEEN MORGAN,
Respondent.

APPELLANT'S BRIEF

Michael F. Morgan
Appellant/Pro Se Petitioner

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A. ASSIGNMENT OF ERROR

1. The wife was improperly awarded \$31,453 for funds she unilaterally removed from a community account after the parties separated.
2. The wife was improperly enriched when the court only awarded the husband \$4,403 for the separate debts of the wife when the husband detailed \$7,845 of separate debts of the wife and \$34,934 in community debts of the wife that the husband paid.
3. The court improperly characterized jewelry the husband inherited as community property when the court did not find that the husband had gifted the jewelry to the wife.
4. The court failed to make any award of a condominium that the wife identified as a community asset in her trial brief.
5. The court exceeded its authority and abused its discretion in ordering the husband to pay for the wife's supervised visits.

6. The court abused its discretion in entering findings of contempt against the husband for not paying for supervised visits when the wife was not compliant with the conditions of subsidized visitation and the supervised visit costs were not part of any of the court's financial orders.

7. The court erred in entering a contempt finding for the husband's failure to pay temporary maintenance from November 2011 through February 2012 when there was no valid order requiring the husband to pay temporary maintenance during that 4 month time span.

8. The court erred in imputing income to the husband in computing spousal support when the husband had actual income, there was no evidence to support an imputation of income, and imputed income is a child support standard and not a spousal support standard.

9. The court violated the open proceedings law by excluding the Guardian ad Litem from the courtroom

10. The court abused its discretion by not addressing the wife's intransigence that drove up the legal costs in this case when the wife falsified a urinalysis at trial; violated a court order; repeatedly perjured herself in declarations and interrogatory answers; repeatedly lied at trial; and made at trial (for the first time in the proceedings) a false domestic violence allegation against the husband.

B. STATEMENT OF THE CASE

Michael Morgan and Colleen Morgan married in King County, Washington on January 31, 1998 and separated on November 28, 2009. CP 1. Mr. Morgan filed for dissolution of the marriage in December 2009. CP 1.

Among the community assets at the date of separation was \$31,453 in a U.S. Bank account (Ex 13). On March 20, 2012 (RP 46-51) Mrs. Morgan's attorney argued that the Court Commissioner had awarded Mrs. Morgan \$31, 453 to supplement her spousal support--the record evidence (CP. 220) shows this to be a misrepresentation and there is no evidence that any judicial officer ever addressed prior to trial this U.S. Bank account asset. The trial court on March 20, 2012 (RP 46) awarded Mr. Morgan 45% of

this asset then, following Mrs. Morgan's counsel (RP 49) misrepresenting that this account was addressed in the "temporary orders," awarded Mr. Morgan 0% of this asset (RP 51).

The parties also had a community asset in a condominium in Moclips, Washington (CP 220) that was valued by the wife at \$130,000 and was listed as a community asset in the wife's trial notebook. The asset was never distributed by the trial court CP 213.

From the time of separation until the time of trial on September 12, 2011, the husband paid \$7,845 of the wife's separate debts and \$34,934 of the wife's community debts (Ex 3, 4,5,6,7, 16, 17, 49, 50, 51, 52, 53, 54). This fact was also established by the testimony of both parties on September 14, 2011 (RP 25-31, 48,-51, 75 et. seq.). The court had entered an order (CP 220) making each party responsible for their own bills. The trial court, however, awarded the husband only \$4403 (CP 213) without entering any findings indicating which bills were to be repaid and which bills were not to be repaid. A motion to reconsider (CP 222) was filed urging the court, among other things, to enter more clear findings. This motion was denied (CP 232).

The first day of trial on September 12, 2011 the court declared that ER 615 did not, as it did for other witnesses, allow for the exclusion of the

Guardian ad Litem (GAL) from the courtroom (RP 26). The last day of trial (September 26, 2011) the court instructed the GAL to leave the courtroom (RP 2). May 31 2012 (CP 232B) the court explained excluding the GAL from the courtroom based on the fact the GAL was a witness.

On November 9, 2011 the court announced its rulings. Among the court's rulings (in part) regarded some jewelry. The court said: *Mr. Morgan's mother's diamond ring, which Ms. Morgan testified at trial to wearing and losing while swimming, valued at \$18,300 total. As to this item, there was a substantial factual dispute at trial. Mr. Morgan testified he received the ring through inheritance from his mother, it was his separate property, and he never gifted the ring to Mrs. Morgan. Mrs. Morgan testified the ring was her separate property because it was gifted to her by Mr. Morgan. Since neither party proved by a preponderance of the evidence that the property was their own separate property, the Court exercised discretion and ruled the ring was community property (CP 222, RP 45-46).*

The Parenting Plan entered by the court established phases of supervised visitation between the wife and the child in common. There was no record evidence before the court as to the cost of supervised visitation and the court ordered 100% of the cost of Ms. Morgan's

supervisor for phase 1 visitation to be paid by Mr. Morgan and 50% of the cost of Ms. Morgan's supervisor for phase 2 visitations to be paid by Mr. Morgan (CP 204). Mr. Morgan's motion to reconsider this financial provision or, in the alternative, include this provision in the financial orders (CP 222, 224) was denied (CP 231). Mr. Morgan was subsequently found in contempt on August 29, 2012 for not following this condition of the Parenting Plan although there was uncontroverted evidence (CP 230) from a witness endorsed by Mrs. Morgan that she was not complying with the conditions of subsidized visitation as she was forging AA attendance slips and using a masking agent to produce clean urinalysis test results (RP 11-12). There was also uncontroverted evidence (RP 11-12) that Mrs. Morgan was not in compliance with other conditions allowing for subsidized visitation.

The court (CP 214) also found Mr. Morgan in contempt for violating temporary orders of support entered on January 11, 2010, March 11, 2010, April 22, 2010, and March 11, 2011 for not paying spousal support between the time final orders were announced and final orders were signed. Although the March 11, 2010 order did not include a provision for spousal support and the January 11, 2010 order had been superseded by the April 22, 2010 order and the April 22, 2010 order had been superseded by the March 11, 2011 order the court denied (CP 232A) Mr. Morgan's

motion (CP 224) to vacate that portion of the contempt finding. The court, in contradiction of its March 20, 2012 ruling superseded (CP 221) the March 11, 2011 order by deeming the period following the court's November 9, 2011 oral rulings as a period in which permanent support would commence.

The court's other relevant November 9, 2011 ruling was (RP 52) finding Mr. Morgan "underemployed" in imputing income to Mr. Morgan. The court cited no record evidence nor was there any record evidence to support such a finding.

The court on November 9, 2011 did not address Mrs. Morgan's intransigence. At trial on September 26, 2011 (RP 34) the GAL established that Mrs. Morgan had doctored a urinalysis test result to bolster her perjured testimony. The GAL also established through her reports (CP 66, 80, 111, 133, 134, 135, 179, 180 and through her testimony (RP 32 et seq) and her testimony on September 12, 2011 (RP 97) that Mrs. Morgan had lied repeatedly throughout the proceedings (RP 31, 143, 147-149, 150, 152, 156-158, 161-163) including the making of a false domestic violence allegation. Mrs. Morgan's testimony and interrogatory answers were also impeached through her own testimony (such as when she gave inconsistent accounts of her cocaine usage) and by

expert witness Lynne Martins on September 26, 2011 at RP 49 et. seq., and witnesses Michael Morgan (on September 26, 2011 at RP 60 et seq.), James Anderson on September 12, 2011 at RP 37 which Mrs. Morgan's attorney at RP 39 opined that "this is essentially undisputed," Stephen Morgan on September 12, 2011 at RP 43-47, John Neal on September 12, 2011 (RP 69-70, RP 72-74), Gerard Vacca on September 12, 2011 (RP 138-140) , Carl Nadeau on September 26, 2011(RP 27 et seq.) Rene Ewing on September 12, 2011 (RP 81) and various business records (Ex 56).

C. ARGUMENT

1. The wife was improperly awarded \$31, 453 for funds she unilaterally removed from a community account after the parties separated.

The Washington courts have stated:

With the exception of property owned by the spouses prior to marriage and that acquired subsequently by gift, bequest, devise or inheritance and the rents, issues and profits thereof, any property acquired after marriage in any manner whatsoever by either spouse, or both, is community property. All community property, both real and personal is owned by

both spouses equally. In re Towey's Estate, 22 Wash. 2d 212, 214, 155 P. 2d. 273, 275 (1945).

At presentation of orders on March 20, 2012 the court took note that a U.S Bank account with \$31,453 in funds at the date of separation had not previously been divided. Ms. Morgan's attorney claimed Commissioner Ponomarchuk had addressed these funds at the Motion for Temporary Orders on January 11, 2010 (this argument is false, Commissioner Ponomarchuk did not decide the disposition of this account and correctly left it as an issue for the trial court).

The wife's attorney appears to argue that if a spouse drains community funds at the beginning of the trial process and succeeds in spending all the funds before the trial date, this should not be considered by the court and instead that the party that takes the money should be awarded a windfall. This is not in conformance with the basic tenets of community property law.

The court deemed that a just and equitable distribution of community assets should be divided so 55% went to the wife and 45% went to the husband. The husband's overall transfer payment should be reduced by \$14, 154 to properly account for the funds in the U.S. Bank account.

2. The wife was improperly enriched when the court only awarded the husband \$4,403 for the separate debts of the wife when the husband detailed \$7,485 of separate debts of the wife and \$34, 934 in community debts of the wife that the husband paid.

At trial the husband detailed numerous community and separate liabilities; however, the Findings of Fact details almost nothing in Sections "2.10 Community Liabilities," and "2.11 Separate Liabilities."

Instead the *decree* cryptically states the following:

"Petitioner sought/claimed paid separate debt of the respondent in the amount of \$11,426. Petitioner is awarded \$4,403 which was taken into account when computing the cash payout by petitioner to respondent. *See Final Decree of Dissolution, Sec. 3.15.*

Since the court did not provide specific findings on these issues, there is no basis to determine how the court calculated a 39% reimbursement to the husband of the wife's separate debt when, under the law, separate debt should be reimbursed at 100%.

The husband sought reimbursement for wife's *separate*, post-separation debts. These debts included the following:

HOA Dues for wife's post-separation residence:	\$146
Property Taxes for wife's post-separation residence:	\$2,847
Insurance for wife's post-separation residence:	\$1,168
Wife's checking account overdrafts:	\$540
Wife's dining charges and (1/2) golf club dues:	\$572
Wife's theatre tickets and private club charges:	\$516
Insurance for wife's car:	\$814
Bank of America VISA charges:	\$28
FIA (Collection Account):	\$827.

The wife in page 5 of her trial brief conceded that the HOA dues were a community debt.

Reimbursement for separate debts by one party should reduce the transfer payment on a dollar for dollar basis. In short the husband used his separate funds to pay the wife's separate debts. The husband's transfer payment should be reduced by \$7,485 to properly account for these expenditures.

The husband also seeks reimbursement for the wife's pre-separation community debts. These debts include the following:

Bank of America VISA: \$20,760

2009 Income Taxes: \$11,936

Kahana Villa Timeshare: \$2,238

Crosetto v. Crosetto, 82 Wash. App. 545, 918 P.2d 954 (1996) is cited with approval in the wife's trial brief and recognizes income taxes as a community debt that is the responsibility of both parties to pay and recognized credit card debt as a community obligation of both parties.

The timeshare bill was recognized by the wife's attorney on page 5 of her trial brief as a community debt.

Reimbursement for community debts by one party should reduce the transfer payment on a 55%-45% basis since the court deemed a 55%-45% division to be just and equitable. The husband's transfer payment should be reduced by \$19,214 (55% is credited to the husband because the formula is Community Assets-Community Liabilities- Total Community Property--which was awarded 55% to the wife).

3. The court improperly characterized jewelry the husband inherited as community property when the court did not find that the husband had gifted the jewelry to the wife.

The court should reduce the transfer payment by \$9150 and find that the husband's mother's jewelry, valued at \$18,300 was the husband's separate property because he received it as an inheritance, and because the wife did not prove that she received it as a gift. The character of property (whether community property or separate property) is established at the date of acquisition. *See In re Estate of Borghi*, 167 Wash. 2d. 480, 219 P.3d 932 (2009). The Washington State Supreme Court made the following analysis in *Borghi, supra.*:

We begin with basic principles of Washington community property law. First, presumptions play a significant role in determining the character of property as separate or community property. Id at 483. Second, the character of property as separate or community property is determined at the date of acquisition. Id at 484. Moreover, the right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character

until some direct and positive evidence to the contrary is made to appear. Significantly, the evidence must show the intent of the spouse owning the separate property to change its character from separate to community property. Id at 484-5.

Thus if property at its acquisition was separate property, it shall remain separate unless there is evidence to the contrary. The court, however, made the finding that the inherited jewelry was community property which is impossible under these circumstances since no testimony established the ring was gifted to the community.

The husband established through oral testimony at trial on September 12, 2011 that he received the mother's ring as part of an inheritance that was bequeathed to the sons (RP 44). The testimony was uncontroverted; therefore, the property at the date of acquisition was Mr. Morgan's separate property. No testimony established that the wife was a beneficiary of any property in the husband's mother's will. While the wife suggested she received the ring as a gift from the husband, the husband denied this on September 14, 2012 (RP 53) and the court made a finding the wife was not credible on this issue. The wife did not meet the burden of establishing that the jewelry was transferred to her by gift (or the court would have found it was her separate property). In short, the husband

established that the jewelry was his separate property received through inheritance, and there was no credible testimony that the husband gifted the jewelry to the wife. The jewelry must be the husband's separate property.

The court accepted the value of the jewelry at \$18,300. The court also awarded possession of the jewelry to the wife. The court should award the husband \$18,300 as compensation, or \$9,150 more than the court awarded at trial. The transfer payment should be reduced by \$9,150 to account for the separate character of the jewelry.

4. The court failed to make any award of a condominium that the wife identified as a community asset in her trial brief.

The court should find that a condominium in Moclips, Washington is community property based on the evidence presented at trial, and it should be awarded to the wife. The transfer payment should be reduced by \$58,500 to reflect this asset.

Property acquired during the marriage is considered community property unless the presumption is overcome:

It is fundamental that property acquired during marriage is presumed to be community property. This presumption can be overcome only by clear and convincing evidence and the burden is on the party claiming the separate nature of the property. Beam v. Beam, 18 Wash. App. 444, 452, 569 P.2d. 719, 725 (1977).

The wife's trial brief ("Asset/Liability List) considers a condominium which is located at Moclips, WA. This real property was valued at \$130,000 by the wife but it was not awarded by the court. The property is described as "Moclips Hi-Tide Resort Condo # 5." There was no testimony that refuted the characterization of this property as a community asset or that the value of the asset as being \$130,000. The husband's transfer payment, therefore, should be reduced by 45% of the value of the condominium or \$58,500.

5. The court exceeded its authority and abused its discretion in ordering the husband to pay for the wife's supervised visits.

The Order of Child Support contemplates the financial positions of the parties relative to money paid on behalf of the child. The Order also contemplates that the financial circumstances of the parties may change

during the duration of a parenting plan. Thus, modification of the Order of Child Support is relatively easy (in King County), with a trial by affidavit schedule. By contrast the Parenting Plan is designed to be a more permanent document, an action for modification of a parenting plan results in a full trial schedule with a threshold hearing to determine whether a modification should even be undertaken. As the parties' finances can change, the cost of supervised visitation should have been drafted into the Order of Child Support and not the Parenting Plan as done in the instant matter.

During Phase 1 of the parenting plan the cost of visitation is wholly on the father. This is an abuse of the trial court's discretion since the father has no ability to control the wife's sobriety which is the reason visitation is being supervised. This also gives a sober father a financial disincentive to report to the court legitimate concerns about his child's safety when with the mother unsupervised--since a consequence of reporting such a legitimate concern is being assessed supervision costs. Providing a disincentive to a parent seeking legitimate safeguards for a child is not in a child's best interests.

During Phase 2 of the parenting plan the costs of supervised visitation is shared by both parents. Advancement to Phase 2 is conditioned on the

mother establishing her sobriety. This is a deterrent to the mother's sobriety and provides her a financial incentive to remain in Phase 1 and is a further abuse of the court's discretion.

There is statutory authority for a court to order supervised visits and there is statutory authority for a court to order to pay for such services as a GAL (RCW 26.12.175(d)). There is no statutory authority, however for the court to order the non-supervised party to pay for a supervised visit. A court is not to add language to a statute even if it believes the Legislature intended something else but failed to express it adequately. *Adams v. Department of Soc. & Health Servs.*, 38 Wn. App. 13, 16, 683 P.2d 1133 (1984). The trial court and Mrs. Morgan's attorney have never provided any authority in support of the provision in the Parenting Plan ordering Mr. Morgan to pay the supervision costs. The court exceeded its authority in ordering Mr. Morgan to pay for his wife' supervisor.

As noted, under RCW 26.12.175 the court can order a party to pay for a GAL following means testing. Even if the trial court had authority to order Mr. Morgan to pay for his wife's supervisor, based on the enabling legislation that does exist it would be incumbent on the court to conduct some means testing. There is no record evidence, however, as to the cost of supervised visitation prior to the entry of the Parenting Plan so the court

could not have conducted a means test. The Parenting Plan should have excised the references identifying the husband as being responsible for any of the supervision costs.

6. The court abused its discretion in entering findings of contempt against the husband for not paying for supervised visits when the wife was not compliant with the conditions of subsidized visitation and the supervised visit costs were not part of any of the court's financial orders.

Failure to make court ordered payments to a party or court ordered payments on behalf of another party do not constitute contempt in a dissolution action if those payments are not support payments. *In re Marriage of Young*, 26 Wn. App. 843, 615 P.2d 508 (1980). This is consistent with RCW 26.18.050 which provides a party a mechanism to seek an order to show cause for contempt only when an "obligor fails to comply with a support or maintenance order." The contempt finding in the instant matter was based on a finding that the husband did not pay for supervision costs as required in the Parenting Plan and not based on a violation of the court's support orders. The court, therefore, had no authority to enter a contempt finding.

Contempt, furthermore, requires under RCW 7.21.010 (1)(b) an "intentional disobedience of any *lawful* judgment, decree, order, or process of the court. Emphasis added. There is no *lawful* authority for a court to order a party to cover the costs of supervising another party and the husband's failure to cover those costs would not constitute contempt.

The Parenting Plan, on page 3 set conditions for subsidized visitation, specifically:

The mother's visitation shall be conditioned upon attendance in a state certified outpatient program for her alcoholism, and by satisfactory reports to the courts from the program. In addition the ABC supervisor shall provide the court with monthly written reports detailing Ms. Morgan's attendance and timeliness, the nature and emotional tenor of the interactions between Mrs. Morgan and Christine, and any signs of drug or alcohol consumption by Ms. Morgan. ABC shall file its visitation with the reports with the court by the first day of each month for the preceding month.

At the time of the contempt finding, no monthly reports were submitted by ABC which was a condition for subsidized visitation so the husband, by the terms of the Parenting Plan, was not required to pay for the wife's supervisor.

What was before the court at the time of the contempt finding and as early as April 25, 2012 (CP 227) was a declaration from a friend of the wife and a person on the wife's witness list. The declarant, Dave Snook, uncontroverted declaration was that the wife in his presence was using a masking kit to produce clean urinalysis test results, had forged her AA attendance slips, had repeatedly sought (presumably with funds she had received from spousal support) to hire Mr. Snook to assault the husband, and the wife had been recently hospitalized (which could be verified by a release of medical records) several times due to extreme intoxication. Under these circumstances, it was a manifest abuse of discretion for court to find the wife in compliance with the conditions for having subsidized visitation and the contempt finding should be vacated.

7. The court erred in entering a contempt finding for the husband's failure to pay temporary maintenance from November 2011 through February 2012 when there was no valid order requiring the husband to pay temporary maintenance during that 4 month time span.

The applicable statutory definition of contempt is set forth at RCW 7.21.010 (1) (b) as the "*intentional* disobedience of any lawful judgment, decree, order, or process of the court" (emphasis added). The intent

requirement was a specific addition to the contempt statute in the 1983 revisions. Consistent with this intent requirement, Washington common law provides that when a party is accused of disobedience of orders the court must *strictly construe* the alleged contemptuous conduct is a *plain violation*. See *Johnston v. Beneficial Mgmt Com.* 96 Wn. 2d 708, 713, 615 P.2d 508 (1982). The purpose of this "strict construction rule" is to protect parties from contempt proceedings based on violation of orders that are ambiguous or unclear. See *Graves v. Duerden*, 51 Wn. App. 642, 754 P.2d 1027 (1988). This strict construction requirement is consistent with the principle that "(t)he court's contempt power must be used with great restraint" because it is "uniquely is liable to abuse." *State ex rel Daly v Snyder*, 117 Wn. App. 602, 606, 72 P. 3d 780 (2003) (citing *In re M.B.*, 101 Wn. App. 425, 439, 3 P.3d 780 (2000)). That understanding as set forth on March 20, 2012 (RP 13) was that all support orders would be entered at the same time since the wife would receive spousal support and the husband would receive child support since this would be only fair and equitable. This understanding was consistent with what the court said in entering its oral rulings on November 9, 2011 in which the court only said that temporary financial restraining orders were to remain in effect but did not say that temporary support orders were to remain in effect (RP 48).

RCW 26.09.090, furthermore, sets forth that maintenance orders will be for such periods of time as the court deems just. The court deemed 5 years of spousal support, in addition to the 2 years of spousal support the wife received prior to trial just. The trial court did not deem an additional 5 years and 4 months of spousal support to be just yet the contempt finding requires maintenance to be paid 4 months longer than permitted under RCW 26.09.090. The contempt finding, if upheld, allows the wife to receive \$10,000 more in support than awarded by the court at a time she continued not to pay any child support.

The contempt finding furthermore was predicated on 4 temporary orders. Three of the orders (on January 11, 2010, April 22, 2010, and March 11, 2011) were superseded by later court orders. The one court order that was not superseded did not have a temporary support schedule so there was no basis to find contempt for a violation of a temporary order of support and these findings should be vacated.

8. The court erred in imputing income to the husband in computing spousal support when the husband had actual income, there was no evidence to support an imputation of income, and imputation of

income is a child support standard and not a spousal support standard.

The court ruled the husband was voluntarily underemployed and relied upon that finding in calculating spousal support. Voluntary underemployment, however, is a stated statutory factor in determining child support and not a stated statutory factor in determining spousal support. As established in *State v. Cronin*, 130 Wn. 2d. 392, 923 P.2d 694 (1996) and *State v. Clayton*, 84 Wn. App. 318, 927 P. 2d 258 (1996) the fact that different language (such as regarding voluntary underemployment) is used in comparable statutory provisions (such as the support statutes) indicates a difference in legislative intent. The Legislature, therefore, did not intend for voluntary underemployment, as the court stated it did on November 9, 2011, in determining spousal support.

As the wife's attorney conceded on pages 15 and 16 of her trial brief, voluntary underemployment is "unemployment that is brought about by one's own free choice and is intentional rather than accidental." and requires actual evidence. citing *In re Marriage of Bockopp*, 78 Wn. App. 441, 446, n.5, 898 P. 2d 849 (1995). There was no record evidence to support a finding of voluntary underemployment.

A spousal support award should consider both the needs of the wife, and the ability of the husband to pay:

Spousal maintenance is not a matter of right. In determining whether to award maintenance the court considers (the factors under RCW 26.09.090). In determining spousal maintenance, the court is governed strongly by the need of one party and the ability of the other party to pay an award. See In re Marriage of Foley, 84 Wash. App. 839, 845-6, 930 P. 2d 929, 932 (1997).

In the present case the court had not established that the husband had the ability to pay the maintenance award. Mere imputation of income does not income make. The financial source documents (Ex 128) submitted shows the spousal support award to the wife exceeding the husband's income--without factoring in any of the husband's expenses including the court ordering the husband to pay for the wife's supervisor. The court both abused its discretion and exceeded its authority in entering the maintenance award and the matter should be remanded to modify past and future support payments based on the correct statutory factors.

9. The court violated the open proceedings law by excluding the Guardian ad Litem from the courtroom.

At the start of the trial, the Court excluded all witnesses, but the GAL, from the courtroom pursuant to ER 615. Two weeks later, on September 26, 2011, the court excluded the GAL from the courtroom. Over 8 months later, on May 31, 2012 the court acknowledged instructing the GAL to leave the courtroom because of her status as a witness--in complete contradiction of its ruling at the start of the trial.

A trial court must articulate the "overriding interest" justifying any limit on public access to a proceeding and "must ensure" that "five criteria are satisfied" before closing court proceedings. *State v. Strode*, 167 Wn. 2d, 222, 217 P.3d 310 (2009).

The five criteria referred to as the *Bone-Club* factors or the *Ishikawa* factors are mandatory. *In re Personal Restraint of Orange*, 152 Wn. 2d, 75, 100 P. 3d 291 (2004). The court established only one factor for closure--and only 8 months after closing the proceeding and in complete contradiction of its early ruling.

Since a courtroom closure affects the very integrity of a proceeding, a party is entitled to a remedy irrespective of whether the party can show

they were prejudiced by the open proceedings violation. *State v. Easterling*, 157 Wash. 2d 167, 181, 137 P. 3d 825 (2006).

The remedy for a violation is a new open proceeding. *In re the Detention of D.F.F.*, 172 Wn. 2d. 37, 256 P. 3d 357 (2011).

The person directed to leave the courtroom by the court on September 26, 2011 was not just an onlooker but was the Guardian ad Litem (GAL) whom the court had identified as essentially a party. The issue discussed outside the GAL's presence was not some trivial administrative matter but whether a mistrial should be declared (RP 3-11). Among the reasons courtrooms are open is so that the performance of our judicial officers can be scrutinized--and the performance of the judicial officer in this case was among the issues explored outside the presence of the GAL. Specifically, the trial court disclosed an ex parte conversation he had permitted to occur in his presence that he had not promptly disclosed to the parties. The remedy of a new trial, therefore, is particularly appropriate in the instant case.

10. The court abused its discretion by not addressing the wife's intransigence that drove up the legal costs in this case when the wife

falsified a urinalysis at trial; violated a court order; repeatedly perjured herself in her declarations and interrogatory answers; repeatedly lied at trial, and made at trial (for the first time in the proceedings) a false domestic violence allegation against the husband.

Both parties in this case sought awards for intransigence, however, the court did not make any findings on intransigence.

A court may award attorney fees when one parent's intransigence causes the other parent to incur additional legal services, regardless of financial abilities. *Schumacher v. Watson*, 100 Wash. App. 208, 216-7, 997 P. 2d 399, 404 (2000).

Under RCW 26.09.140 the trial court can order a party in domestic relation actions to pay reasonable attorney fees, but generally the court must balance the needs of the party requesting the fees against the ability of the opposing party to pay the fees. But if intransigence is demonstrated, the financial status of the party seeking the award is not relevant. A party's intransigence can substantiate a trial court's award of attorney fees, regardless of the factors enunciated in RCW 26.09.140; attorney fees

based on intransigence are an equitable remedy. See Mattson v. Mattson, 95 Wash. App. 592, 604, 976 P.2d 157, 164 (1999).

The family courts initially did not know what to do with this case. On the one hand the court wanted to award custody to the mother because of her attacks on the father, and because the mother had been the historic caregiver. On the other hand the court had concerns about the allegations made by the father.

At the very first court appearance, the father through his attorney asserted that the mother was an alcoholic, that she was in need of state-certified treatment for alcohol, and that their child should be supervised in her presence. The mother denied this and stated the father was exaggerating her condition. CP 220, 222.

The parties went to court seven times on the issue of temporary custody. Slowly, over the course of the process, the court granted more and more custody to the father until the seventh court appearance on April 22, 2010 the court ordered the mother to vacate the family home, ordered no contact between the mother and the child for a minimum of two months, and later ordered what the father had requested at the first hearing-- that any visitation between the mother and the minor child be professionally supervised. It took an extraordinary seven separate hearings

with counsel for the courts to make the determination what the father asserted at the first hearing should be ordered.

The seventh court appearance was the first hearing following an incident at the Great Wolf Lodge in which the mother abandoned the minor child and was deemed to be drunk and disorderly.

The court had difficulty in this case because the mother, through her attorney, built the theme with statements like the following: *(Mr. Morgan) is an exaggerator, a purveyor of lies, distortions, deceits, and, quite frankly, outright lies.* The wife asserted the father's actions were all part of a *devious plan*. By the time of trial, the father had amassed legal fees in excess of \$130,000 (CP220) to protect his child and in order to respond to the outrageous behaviors of the mother.

Furthermore, at trial, the mother, through the GAL, provided a falsified urinalysis test. The mother also asserted (for the first time) that she was the victim of domestic violence perpetrated by the husband. The GAL testified that this was the first time that she had heard of this accusation by the mother, that the mother went out of her way to make accusations at the father's expense, and that she was trained to spot this issue, and there were no indications of domestic violence in the household. The child's therapist also said she inquired of the child of domestic violence in the household

and found no evidence to support the mother's claims. Mr. Morgan also denied the accusations.

The wife also lied throughout her trial testimony. Ms. Morgan in her interrogatories denied ever using cocaine but then admitted to using cocaine at trial--but only after the cat was out of the bag when a witness (whom was enrolled in law school) testified he had personally seen Ms. Morgan use cocaine several times.

The wife at trial also lied about her sobriety at a local country club (as established by Rene Ewing's testimony); lied about her sobriety when watching her daughter (as established by Steve Morgan's testimony); lied (in order to falsely perfect a community property claim) about co-habiting with the husband prior to marriage (as established by Gerard Vacca's testimony); lied about her contribution to the marital community (as established by Carl Nadeau's testimony); lied about an incident at the Great Wolf Lodge (as established by James Anderson's testimony), lied about her ownership interest in \$18,300 in jewelry (as established by the husband's testimony). A review of the wife's trial testimony and declarations it is almost impossible to discern any truthful statements she made regarding relevant issues before the court.

It is well established that fees based on intransigence of one party: *have been granted when the party engaged in "foot -dragging" and "obstruction" or simply when one party...increased legal costs by his or her actions...In re Marriage of Greenlee*, 65 Wash. App. 703, 708, 829 P.2d 1120 (1997); *accord State ex rel. Stout v. Stout*, 89 Wash. App. 118, 948 P.2d 851 (1997) (trial court's ruling remanded on attorney fees where intransigence established by party's failure to cooperate, causing the requesting party to incur needless attorney fees).

Crosetto v. Crosetto, 82 Wash. App 548, 918 P.2d 954 (1996) an intransigence finding was entered and remanded to determine whether the attorney fee award should be \$15,000 or up to \$50,000. The only evidence that Mrs. Crosetto had made a false domestic violence claim against Mr. Crosetto was the testimony of one expert witness. To paraphrase the work product of (now Justice) Charles Wiggins on an appeal brief he submitted in respect to the issue of intransigence, if Mrs. Morgan's conduct is not intransigence then what is? The case should be remanded for the entry of an attorney fee award against the wife in the amount of \$130,000.

D. CONCLUSION

The non-custodial parent was awarded 55% of the community property and spousal support (temporary and permanent) for seven years for a

marriage of less than 12 years duration. Under the circumstances of this or a typical case, these were favorable rulings for the wife.

The rulings under review, however, with one exception regarding the open proceedings violation, were also favorable financial rulings for the wife but rulings that cannot be supported by the law or the facts of the case. The failure of the trial court in this case to properly apply the law to the facts of this case is particularly troubling since this case involved the safety and welfare of a child. The trial court in this case made it financially prohibitive for the father to seek safeguards for his child-- safeguards several different judicial officers in this case deemed appropriate. The trial court said nothing about the mother doctoring a UA test result to bolster perjured testimony but on November 9, 2011 rebuked the father for being "emotive" with a facial expression (RP 23-4) when the father was being ordered to pay for his wife's supervisor, the father was being ordered to pay spousal support in excess of his income, the operative effect of the court's rulings about debts was to give the wife about 85% of the community property, and the father was being expected to work while being ordered to frequently interrupt his workday to facilitate visitation between his child and his mother. This court is being asked to do what the law contemplates a court will do (but the trial court neglected to do) which is enter just and equitable financial rulings and

rebuke the mother (with a financial award) for her intransigence that needlessly drove up the legal fees in this matter.

DATED this 13th day of December 2012.

Respectfully submitted.

A handwritten signature in cursive script that reads "Michael F. Morgan". The signature is written in black ink and is positioned above a horizontal line.

Michael F. Morgan

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