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**Court of Appeals No. 71624-7
Whatcom County Cause No. 11-3-00824-0**

**COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON**

LAURA NIWRANSKI,

Appellant
(Respondent Below)

v.

HARRY NIWRANSKI

Respondent
(Petitioner Below)

APPEAL BRIEF OF APPELLANT LAURA NIWRANSKI

Decisions to be Reviewed:

Final Orders of Whatcom County Superior
Court Judge Ira Uhrig of 12/13/13

Stuart E. Brown, WSBA 35928
Attorney for Laura Niwranski
12535 15th Ave. NE, #201
Seattle, WA 98125

Catherine Wright Smith, WSBA #9542
Valerie Villacin, WSBA #34515
Smith Goodfriend PS
Attorneys For Harry Niwranski
1619 8th Ave North
Seattle, WA 98108

Paula McCandlis, WSBA
Brett Murphy Coats Kanpp McCandlis Brown
1310 10th St. Suite 104A
Bellingham, WA 98225

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I. INTRODUCTION

COMES NOW, the Appellant (Respondent Below), **LAURA L. NIWRANSKI**, by and through her attorney of record, Stuart E. Brown (WSBA #35928), and appeals the final court orders of 12/13/13 (CP 142, Final Parenting Plan (PP); CP 144, Final Order of Child Support (OCS); CP 141, and Findings of Fact and Conclusions of Law (FNFCL); CP 145, Decree of Dissolution (DOD) of the Honorable Whatcom County Superior Court Judge, Ira J. Uhrig, after the parties completed a nine day trial from 10/08-23/13. The Appellant asks this Court of Appeals (COA) to vacate the final orders of 12/13/13 and grant the Appellant a new trial based on the reasons, facts, and evidence presented below.

The Appellant maintains that in signing final orders, the trial court erred in a number of respects to be outlined at length below, including: 1) By refusing to grant the Appellant a brief continuance as requested (Appellant's attorney requested a brief 30 day continuance of the trial court), after discovering at the start of the trial that her (Laura Niwranski) trial attorney, Amir Showrai, had failed to timely file and submit a witness list to the Petitioner's (below) counsel, Paula McCanlis, until a few days before the trial (and *never* filed or provided an exhibit list to Ms. McCandlis or the court), which in turn resulted in exclusion of critical

witnesses for the Appellant in terms of both financial and parenting/custody issues before the court, and the ability of the Appellant to conduct a fair trial through no fault of her own; 2) By refusing to grant the Appellant's motion for a stay of entry of final orders, to review, consider and weigh critical additional evaluation evidence as to the parties conflicting claims regarding the Domestic Violence (DV)/anger behavior and dynamics of each party and as to the Alcohol and Drug (A&D) behavior and dynamics of each party, despite the trial court having *specifically* (italicized here and below for emphasis) ordered such additional testing and evaluations for both parties prior to entry or consideration of final orders in its three page written decision of 11/08/13; 3) By abusing its discretion and disregarding extensive trial evidence by ordering primary custody of the children to the Petitioner (below), in stark contradiction to the large body of evidence and testimony before the trial court that the Petitioner (below) was in fact a violent, physically and emotionally abusive, highly controlling, and alcoholic individual. In addition, the Appellant maintains that the court also abused its discretion regarding final distribution of property/assets by utterly ignoring clear trial evidence of joint ownership of assets and instead determining that a significant number of such assets at issue were the separate property of the Petitioner (below).

In addition, the appellant maintains that final orders should be vacated by this COA due to the grossly inadequate representation of the Appellant's trial attorney, Amir Showrai, in terms of his stunning failure to timely file and serve to opposing counsel (OC) a witness list (as well as an exhibit list) for the Appellant, which in turn resulted in denial of lay and expert witnesses critical to her case regarding determination of a final PP and property distribution and her ability to receive a fair trial.

II. ASSIGNMENT OF ERROR

1. The trial court erred by refusing to grant the Appellant a brief continuance after discovering at the start of the trial that her trial attorney had failed to timely file and serve a witness list to OC until only *days* before the trial (as well as never providing an exhibit list), resulting in exclusion of critical witnesses for the Appellant in terms of both financial and parenting issues before the court, and resulting in an unfair trial.
2. The trial court erred by refusing to grant Appellant's motion for a stay of entry of final orders, to allow the court to review, consider and weigh critical additional evaluation evidence as to the parties DV/anger and A&D history, behavior and dynamics, which the court itself had *specifically* ordered *after* the completion of the trial

and *before* entry of or consideration of final orders, in its three page written decision of 11/08/13.

3. The trial court erred by signing the final orders of 12/13/13 and by denying the Appellant's Motion for Reconsideration 12/23/13, thereby abusing its discretion in disregarding extensive and significant trial evidence and witness testimony by granting primary custody and sole decision making to the Petitioner in the final PP, and in in terms of the final property distribution by granting significant property and assets to the Petitioner (below) after determining that such property and assets were the separate property of the Petitioner (below) in the face of contradictory trial evidence that such property and assets were in fact marital property to be divided between the parties.
4. While clearly not an error attributable to the trial court (but related to the court's refusal to grant a brief trial continuance noted in error #1 above), the Appellant claims that as a result of the Inadequate Representation and failure of her trial attorney to present a timely witness list (and Exhibit List) resulting in exclusion of critical witnesses and evidence, she was denied a fair trial.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. Did the trial court err by refusing to grant the Appellant a brief continuance after discovering at the start of the trial that her trial attorney had failed to timely file and serve a witness (and Exhibit List) list to OC until only *two* days before the trial? Answer: Yes.
2. Did the trial court err by refusing to grant Appellant's motion for a stay of entry of final orders, to allow the court to review, consider and weigh critical additional evaluation evidence as to the parties DV/anger and A&D history, behavior and dynamics, which the court *specifically* ordered? Answer: Yes.
3. Did the trial court err by signing the final orders of 12/13/13 and by denying the Appellant's Motion for Reconsideration of 12/23/13, thereby abusing its discretion in disregarding extensive and significant trial factual evidence and witness testimony in favor of the Appellant in granting primary custody and sole decision making to the Petitioner and in granting the Petitioner the large majority of assets and property at issue in the case? Answer: Yes.
4. Should the COA grant the Appellant a new trial based on the basis of Inadequate Representation of her trial attorney in failing to meet required court/trial deadlines by failing to file and serve a timely

witness list (and Exhibit List) for the Appellant, resulting in exclusion of her critical parenting/custody and financial witnesses and resultant inability to have a fair and equitable trial? Answer: Yes.

IV. STATEMENT OF THE CASE

The parties to the underlying Whatcom County Dissolution case (11-3-00824-0) are HARRY G. NIWRANSKI (DOB: 02/21/54; 60 years of age), the Petitioner below and Respondent on appeal (hereafter referred to as 'the father') and LAURA L. NIWRANSKI (DOB: 03/12/63; 51 years of age), the Respondent below and Appellant on appeal (hereafter referred to as 'the mother'). The two children at issue in this case are Kaily Niwranski (DOB: 08/16/00; almost 14 years of age) and Harry Niwranski, Jr. (DOB: 06/20/02; 12 years of age).

The parties met and started dating in March of 1998 of at a time the mother was residing in the Vancouver, BC area (she was and remains a dual citizen of Canada and U.S.) while the father resided in Blaine, Washington as a Canadian citizen on a E-2 visa (and did not receive his U.S. citizenship until 2005 through his marriage to the mother). The parties moved in together within a few weeks after starting to date. The mother became pregnant with their oldest child Kaily in December of 1999 and the parties married on June 16, 2000. The mother had worked as

a dental hygienist in Vancouver, Canada up until a few months before the birth of their first child in August of 2000 (she left her employment the day after the couple marriage), making approximately \$60,000 a year (CP 27). At the time the parties married, the father operated and owned a small aviation parts (helicopter parts) supply company known as HPI/ACS (Helicopter Parts International, Inc.) making approximately the same \$60,000 per year as the mother (CP 28; Trial Transcript Vol. IV, P.681, Lines 14-20, Testimony of Appellant) (hereafter reference to trial transcript referred to as TT) with HPI/ACS generating profits of approximately \$100,000 per year (with \$60,000 drawn as salary by the father). The mother did not return to work as a dental hygienist after the birth of their first child but began to work exclusively and full time at the HPI/ACS/ACS firm (ACS or Aviation Component Services, Inc. is an Federal Aviation Administration (FAA) repair station which was at its initial stages of development at the time of the marriage) from January 2001 onward when she drew her first pay check (TT Vol. IV, P.677, Line 18 – P.679, line 25; P.685, line 4 – P688, line 12; P.690, lines 4-8). Over the next decade before the current action began, the Appellant's significant contribution to the firm resulted in HPI/ACS/ACS expanding from a small start-up firm to a multi-million dollar annual profit company (CP 16-19). The mother maintained at trial that she was entitled to a

significant portion of HPI/ACS due to her contribution and investment in expanding the firm from January 2001 until November 2011.

The mother alleged that she was being subjected to escalating physical and emotional spousal abusive at the hands of the father as well as claiming to have discovered that he was having an affair with their then 18 year old nanny, and filed for divorce in May of 2009 and remained separated from May until December of 2009 when the parties reconciled and moved back in together. The couple remained together until November 11, 2011 when the police came to the parties' home to investigate the father's 911 call and the mother was arrested and charged with DV/4th degree assault and accepted a deferred prosecution despite her on-going claim that she had never struck or been physical any time with the father and that indeed *she* had been the victim of physical abuse at his hands and with the father holding a knife to her and threatening to kill her (CP 43, 45, 51 and 52; TT Vol. V, P.776, line 7 – P.786, line 20) after having consumed a large amount of alcohol in what she noted was a daily ritual for him as an alcoholic. The mother testified that the father hit himself to make it appear as if he had been the victim prior to calling the police. The parties never resided together again and the father then filed for divorce on December 7, 2011 as Petitioner under Whatcom County

Cause No. 11-3-00824-0. David Nelson (attorney) was appointed as the GAL in the case on May 16, 2012.

The 2011 DV incident as well as a prior domestic dispute between the parties in May of 2009 (TT Vol. 5, P.756, line 13 – P. 767, line 3) became a major issue at trial and appears to be *the* major factor in the trial court ordering primary custody and sole decision making to the father (CP 146, Exhibit 1, Court's Three Page Written Decision of 11/08/13 as to Trial) despite extensive and overwhelming evidence provided by *all* professional expert witnesses in the case other than the GAL (David Nelson) that the father was abusive, controlling, insensitive to the children's needs, an alcoholic, threatened and stalked women, physically assaulted the mother, and in short was clearly not appropriate to be the custodial parent of the two children at issue. The mother claimed that she had always been the primary caretaker of the children prior to the November 2011 break-up (TT Vol. 5, P.796, line 12 – P.797, line 3).

After a series of delays and a continuance, the trial started on October 8, 2013 and the actual nine day trial took place over a three week period of time from 10/08-23/13. Only minutes after the start of the trial on 10/08/13, Judge Uhrig noted, "As I understand it, everybody is ready for trial, *sort of*. There is a bit of a problem with presenting a witness list or something like that?" The mother's attorney (Mr. Showrai) responded,

“Yes your honor.” Judge Uhrig noted, “Well, that is a problem, isn’t it?” (TT Vol. 1, P.3, lines 10-17). The mother believes that this ‘problem’ resulted in her receiving an unjust and unfair trial by exclusion of witnesses and exhibits that could have clearly assisted in proving her case. OC then noted that she had received the mother’s witness list including expert witnesses for parenting/custody and financial issues, the prior Thursday evening at 10:45 pm or *one court day* before the scheduled trial. OC appropriately and strenuously objected to this stunningly late offering of expert witnesses which gave her no option to depose such experts or have any idea as to what they would testify to (TT Vol. 1, P.3, line 25 – P.4, line 4). The court and the attorneys for the parties then engaged in an extensive discussion/argument (TT Vol. 1, P.4, line 5 – P.32, line 3) as to this issue with the mother’s attorney admitting that he had woefully missed the 30 day deadline for offering witness lists (and exhibit list) and noting, “I guess I can’t impress upon the court enough that it wasn’t wilful, that’s for sure. *It’s my error, I acknowledge that.* But it wasn’t a purposeful hiding of the ball.” (Vol. 1, P.19, lines 21-24). He further stated, “[A]re we going to have a trial with one side with experts and the other without? Or which would essentially be a lopsided trial, which would wind up most likely the only evidence the court will hear would be one sided (TT Vol. 1, P.20, lines 8-13). The court then asked of Mr.

Showrai, “And your statement is that you forgot to send it (witness list out?” Mr. Showrai then responds, “Yes, well, I believed that I had filed it. To make a long story short.” The court then states, “You believed that you filed it and sent it?” (TT Vol. 1, P.23, lines 9-13). Mr. Showrai had previously suggested to the court that OC had “at least constructive notice” of his witnesses among other rather weak attempts to excuse his inexcusable behavior including that he believed he had mailed a copy of his proposed witness in August of 2013 stating, “[M]y impression is I’m sure I mailed it. I can’t prove it. That’s the problem.” (TT Vol. 1, P.24, lines 10-17).

Mother’s attorney then sought a brief continuance suggesting that to do otherwise would produce an unfair trial and further suggesting that a brief continuance would allow OC to have time to depose mother’s proposed experts and other witnesses. The court denied the continuance (TT Vol. 1, P.29, lines 21-22) as being impractical and unfair to OC and suggested that Mr. Showrai pare down the 14 person lay and expert witness list he was presenting on the first day of trial, while the court took the entire problem under advisement and began the trial. While the mother understands the dilemma the court faced due to her own attorney’s negligence and failure to adequately represent her by carrying out his ethical and professional duties, she nonetheless notes that this was simply

of no fault of her own and beyond any control as she fully expected her attorney to know what he was doing given the more than \$160,000 she paid him for his legal services. The mother had provided Mr. Showrai with a list of some 40 professional and lay witnesses she believed were critical to her case only to have him prepare a list of only 14 witnesses that he then failed to timely file and serve to OC. Thus, even the witness list her attorney attempted to convince the court to accept, was according to the mother, woefully inadequate to fully propound her case successfully. The mother was never consulted with or given any witness list by Mr. Showrai *at any time* and thus had no idea of who was or was not intended to be presented by her attorney as trial witnesses.

In addition, mother's attorney then attempted to have a critical witness, Robert Gillespie, (his very first 'witness') who claimed to have personally witnessed the father punching the mother in the stomach and thus validating her critical claim that the father was the batterer and not her, testify by phone, which was objected to by OC who stated that she had no idea who this person was and had no opportunity to previously depose or examine him (TT Vol. 1, P.33, line 10 – P.36, line 12). Mr. Gillespie was not allowed to testify by phone thus marking another example of mother's attorney's failure to adequately represent her and prepare for her case. By failing to set a pre-trial motion to allow telephonic

testimony *well in advance* of trial so that he could secure his (Mr. Gillespie) in person testimony had the court denied the telephonic testimony request, Mr. Showrai substantially damaged the mother's case by falling to secure important witnesses for trial. Further, Mr. Showrai also indicated that he had failed to contact another critical witness, Mr. Horst Schoffl, who along with Mr. Gillespie had claimed to have personally observed the father punching the mother in the stomach and who had in fact provided a sworn declaration as to such in preparation for the 2009 dissolution trial which was dismissed when the parties reconciled (CP 50; TT Vol. 1, .36, line 13 – P.41, line 10). Mother's attorney requested that the court allow his testimony by electronic means or via Skype or video testimony which was denied by the court. Here again, Mr. Showrai's 'efforts' at overcoming his own failure to adequately prepare for trial in behalf of the mother were frankly clumsy and ineffective and provide further evidence of his overall lack of competent preparation for trial. Had both of these critical witnesses (or even one) been able to testify, the mother believes the court would have had critical evidence of Harry Niwranski having a clear history of being physically abusive to her. However, as will be detailed below, the court clearly overlooked the overwhelming evidence of the father's abusive and highly controlling behavior aside from these missing and/or disallowed witnesses.

While the court eventually did allow a number of mother's experts to testify as to parenting and custodial (PP) issues (see below), several were allowed to testify strictly as rebuttal witnesses or fact witnesses, thus limiting the power of their 'testimony' in support of the mother's proposed PP (CP 70).

In terms of financial issues, the court's eventual decision to reject the mother's *only* financial experts entirely, left her simply without a case in terms of the property division, ownership, tracing, valuations, and contribution issues, while the *only* testimony the court heard in terms of these critical issue considering the millions of dollars at issue in the case, came from the father's experts. These included father's CPA, Michael Lamoreux of the Multop Firm; Allen Knutson, Business Evaluator; Don Gustafson, property appraiser; and CPA Jack Curnow. The mother's business evaluation expert, well known professional Steve Kessler, whom the mother had paid \$12,000 in full to complete a thorough business valuation of HPI/ACS, was not allowed to testify by the court, nor was his extensive valuation report allowed. This was also the case for the mother's property appraiser, Greg Snyder (whom she paid an additional \$7,000) whose appraisal reports were disallowed by the court as they had as well been given to OC by Mr. Showrai only days before the trial despite having been completed a full year earlier (TT Vol. I, P.132, line 14 – P.137, line

18). The mother was thus left with *no experts* to testify as to property division (TT Vol. II, P.229, line 7 – P.289, line 23; the court also addresses its lengthy decision as to exclusions/restrictions as to her proposed PP and custody claims and requests at trial in this transcript section) and her attorney was left to only being allowed to cross examine the father's experts who testified at *great* length (TT Vol. I, P.42, line 7 – P.132, line 13, as to testimony of Don Gustafson; TT Vol. 1, P.138, line 20 – P.227, line 10, as to testimony of Michael Lamoreux; TT Vol. II, P.291, line 8 – P.325, line 23 as to testimony of Alan Knutson; and CP 39 and TT Vol. III, P.348, line 20 – P.367, line 2, as to testimony of Jack Curnow). None of these experts for the father *ever* consulted with the mother to obtain her view of any financial issues before the court.

The mother thus reiterates that she had absolutely *no* financial experts allowed to testify in her behalf due to the failure of her attorney to provide a timely witness or exhibit list. Without arguing the merits of the financial claims of the parties here, the critical importance of the mother's lack of any financial experts becomes apparent in highlighting the stunning difference in valuations by father's *allowed* valuation expert, Allan Knutson vs. the mother's claim as to what her *disallowed* expert, Steve Kessler would have claimed had he been allowed to testify (TT Vol. V, P.810 – P.826, line 23). While Mr. Knutson valued HPI/ACS

businesses at a combined 3.3 million dollars, Steve Kessler's valuation study valued these two business entities at approximately six million. Given that the mother was claiming that she should receive a substantial share of HPI/ACS due to her own substantial contribution to the growth of these entities since the time of the parties' marriage (in addition to the legal reality that all separate and community property was before the court for equitable distribution), Steve Kessler's valuation testimony and reports had they been allowed at trial, did in fact trace the value of HPI/ACS back to the time of the parties' marriage and provided an estimate of the 'contribution value' of the mother's efforts toward these businesses. Mr. Knutson valuation investigation on the other hand failed to investigate the value of HPI/ACS prior to 2008 and not from the time the parties were married. As will be addressed below, the court as well appears to have made no effort to even *consider* the issue of mother's contribution and resultant share of HPI/ACS and simply decided that these properties were the separate properties of the father to be given 100% to him in spite of the basic rule that 'all properties both separate and community are before the court for equitable distribution,' even if it did consider HPI/ACS and other properties to be the separate property of the father (see below). The court also granted the father *all* business and personal banking accounts worth approximately 1.5 million dollars again simply deciding without any real

investigation that these accounts were the separate property of the father (CP 55). The father thus received the lion's share (approximately 1/8 of the approximately nine million dollars of assets before the court) of all assets and property of the parties while the mother received relatively little in comparison when the court used and adopted without modification, the *father's* proposed division of property as presented to the court and as backed by *his* experts (CP 55) while disallowing the mother's proposed asset and property division (without experts) and allowing it only for illustrative purposes (CP 72 and 73; TT Vol. V, P.825, line 21 – P.826, line 23), making the exhibit essentially irrelevant and worthless in terms of the court's final decision.

Further, it should be noted here that even disregarding the mother's lack of any financial experts allowed at trial, *and* disregarding the court's failure to investigate tracing and contribution issues as to the parties' assets, the court ignored the reality that the father had quit claimed a number (five) of properties to the mother in 2005 that he claimed as separate properties previously, meaning that the mother was certainly entitled to half ownership of these properties (CP 107-111; TT Vol. VII, P.1254, line 6 – P.1259, line 15; TT Vol. IV, P.547, lines 4-16). These quit claim deeds as noted in the above references to the trial transcripts and testimony as to this issue, were notarized, witnessed, and recorded by

several persons making the father's claim as to his "not realizing what he was signing," simply without *any* credibility.

In returning to the issue of the expert and lay witnesses allowed by the court after taking the issue under advisement until the second day of the trial (TT Vol. II, P.229, line 7 – P.289, line 23), the court determined that it would not allow the testimony of her prior 2011 DV/assault attorney, Jeff Lustik, who was offered as a trial witness to testify that the mother had *never* admitted to any physical behavior against the father in the November 2011 DV incident, in agreeing to enter a Deferred Prosecution program. While OC indicated her concern that such testimony from a prior attorney could result in loss of attorney/client confidentiality privilege, the mother had already willingly agreed to allow Mr. Lustik to testify in her defense and willingly give up any privilege.

It is noted that Mr. Showrai also failed to enter into the record the police reports as to both the 2009 and 2011 DV alleged incidents which provided the mother's extensive defense of herself as to the father's claims and showed that the mother was not convicted of DV as a result of the May 2009 incident but pled to a charge of disorderly conduct for her part in the incident and not for DV/assault despite OC stating at numerous points during trial that the mother "had a long-term *history* of DV assault."

As noted above, the court rejected the telephonic testimony of

Robert Gillespie. The court allowed the testimony and reports of the following lay and professional witnesses: 1) Psychologist Natalie Novick Brown, Ph.D., the court appointed Parenting Evaluator in the initial dissolution action filed by the mother in 2009 and later dismissed when the parties reconciled, who heavily supported the mother in terms of receiving primary custody (and sole decision making) of the children while castigating the father as being an alcoholic, abusive to the mother, and insensitive to the needs of the children based on all data and analysis available to her (TT Vol. VII, P.1099, line 20 – P.1253, line 18; CP 47, 48, 103 and 135A); 2) Licensed Mental Health Therapist John Plummer, Ph.D., Supervisor of DV Programs, who completed a DV/anger evaluation for the probation department as a function of the mother's request for entry into the Deferred Prosecution program relating to the November 2011 DV incident and then treated her for 1 ½ years up to the time of the trial and viewed her as a victim of abuse and not a perpetrator (TT Vol. VI, P.865, line 15 – P.884, line 8; CP 74); 3) Don Layton, MSW, who served as Parenting Coach for eight months on a weekly basis and observed all family members in the initial 2009 dissolution action and was allowed to testify only as a fact witness and not as a mental health expert despite having extensive expertise as a trained GAL and parent evaluator in the initial dissolution action of 2009 which was later dismissed when

the parties reconciled (TT Vol. VIII, P.1287, line 14 – P.1351, line 6; CP 67 and 118). Mr. Layton’s testimony included his statement that the “father needed to work with a Psychologist skilled in entrenched *destructive* behaviors; 4) Psychologist Susan Kane-Ronning, Ph.D., the initial child therapist for the two Niwranski children for 1 ½ years, who was allowed to testify solely as a rebuttal and fact witness and without rendering an expert opinion as to the best interests of the children despite her long term and extensive involvement with both the children and family (TT Vol. VIII, P.1367, line 14 – P.1407, line 15; CP 49); 5) Psychologist, Melody Rhode, Ph.D., who provided the mother with personal and marital therapy starting in November of 2009 and treated her for a total of three years for battered spouse syndrome among other marital and personal issues up to the time of the trial and viewed her as a victim of abuse and not a perpetrator (TT Vol. VI, P.931, line 19 – P.1004, line 3); and 6) Julie Fosty, GAL in the initial 2009 dissolution case eventually dismissed when the parties reconciled, who testified that she was fearful of the father *only* (in contradiction to the inaccurate claim of GAL, David Nelson, who noted in his GAL reports to the court (CP 41 and 42) that Ms. Fosty was fearful of *both* parties (TT VIII, P.1492, line 7 – P.1495, line 4). Ms. Fosty, who was only allowed to testify as a rebuttal witness at trial, did testify that she was fearful of the father, and only the father, when he

followed her to her car and put his knee into her car door to stop her from leaving after a meeting with her and stated at trial that she believed this behavior was a “blatant act of intimidation.”

In addition to the above professional witnesses, the court allowed testimony for the Appellant from: 1) John Bishop, the director of the Northwest Ballet Academy as to his involvement with both Niwranski children as ballet students and his personal knowledge of the father coming onto the dance stage where children were publically performing without his shirt and under the influence of alcohol (TT Vol. V, P.728, line 1 – P.752, line 6; CP 124 and 125); 2) From JoAnn Armstrong, music teacher for the Niwranski children (TT Vol. VI, P.912, line 12 – P.918, line 5) who testified as to her personal experience and knowledge regarding the father’s use of alcohol when he came to music activities for the children and as to her personal knowledge of witnessing the father’s disruptive behavior at a public ballet performance where Kaily Niwranski was performing while he was under the influence of alcohol; 3) From Richard Nolin, long-term family friend starting with his relationship with the father some 17 years ago (TT Vol. VI, P.918, line 15 – P.926, line 11) who testified that he personally observed the father and the father alone, instigate a number of profanity laced arguments with the mother that escalate with the father becoming enraged, and testified that “it was

violent in my estimation and it was very *brutal* [and] *very humiliating*.”

He also testified that some of these events occurred in front of the children and that the father had called the mother “a fucking bitch, broad, and cunt” in front of the children and that the father had bragged about “how much [alcohol] he could hold;” 4) From Josephine Gilchrist, music teacher for Kaily Niwranski (TT Vol. VI, P.1006, line 24 – P.1019, line 13) who testified that Kaily had personally told her that despite her wanting to continue with lessons, her father had told her to say that she did not want to come to lessons anymore despite this not being the truth; 5) From Barbara Johannesson, the mother’s sister, who testified to her personal involvement regarding the alleged DV incident regarding the mother in 2011 and who was at the scene of the 2011 DV incident shortly after it occurred and made a sworn statement to investigating police at the time of the mother’s arrest that included her smelling alcohol on the breath of the father when she arrived at the scene (her statement to the police was included in the actual 2011 police report that was never offered to the court during the trial as noted above). Ms. Johannesson also testified as to her personal witnessing of the father’s regular use of alcohol to the point of being drunk on multiple occasions (TT Vol. VI, P.1056, line 12 – P.1068, line 13; and 6) From Lee Slade, the mother’s brother, who testified to his personal knowledge of the controlling, coercive and

physically abusive behavior of the father toward the mother as well his personal knowledge of the father's regular alcohol use and specifically testified to personally witnessing the father forcefully pushing the mother against a filing cabinet in the company office and holding her there against her will at the time the mother and her was getting ready to leave Bellingham to travel to California for her step- mother's funeral (TT Vol. VIII, P.1351, line 21 – P.1366, line 2).

Excluded from testimony due to Mr. Showrai's failure to provide a timely witness list, and/or due to the requirement of the court that he (Mr. Showrai) pare down his late witness list, and/or due to his (Mr. Showrai's) decision to simply not include in any final witness list, were:

- 1) Peggy Miller, the mother's probation officer, whose file (also not subpoenaed by Mr. Showrai) included the evaluation report of Dr. John Plummer (evaluated the mother as to DV/anger behavior and risk and found her to be a victim of abuse and not a perpetrator) and the report of Psychiatrist Dr. Russell Sheinkopf, who treated the mother and also found her to be a victim of abuse and not a perpetrator and also found her to suffer from no mental disorders and was not in need of medication; 2) Norma Esperance, of the Domestic Violence and Sexual Assault Services of Bellingham, the DV treatment professional for the mother (2011 incident), who spent 93 hours with the mother and also found the mother

to be a victim of abuse and not a perpetrator and placed the mother in a victim's group; 3) Attorney Lynnette Korb who would have testified that she felt threatened by the father during the initial dissolution case of 2009 when he followed her in his car; 4) Psychologist Anthony Zold, Ph.D., who completed a CR 35 evaluation of the mother requested by the father when he claimed the mother was suicidal and where the report (had he testified and presented his report) would show that the mother was found to be in abusive marriage and was not suicidal and not a danger to the children; and 5) From Courtney Hall, the father's past employee who saw the father threaten the mother by attempting to run the mother over in his car and who quit the next day after witnessing this event.

POST TRIAL EVENTS

Following the three week trial ending on 10/23/13, the trial court issued a three page written ruling (Attached as Exhibit 1 to CP 146) which provided the court's ruling and rather sparse justifications for its decisions. That three page written decision also stated on page 3 that "because of each party's concerns with the behavior and habits of the other, *both* parents *shall be required* to submit to and comply with a substance abuse evaluation and a batterer's/anger management/controlling behavior evaluation. The substance abuse component shall include confirmation of

results by hair follicle testing, if available. Compliance with this directive must be accomplished within 30 days.”

In one of his final acts as attorney for the mother, Mr. Showrai submitted a motion to the court to stay final orders pending completion of DV and A&D evaluations for both parties as ordered by the court and argued said motion at the date set for presentation of final orders on 12/13/13. That motion argued that as the court had ordered that both parties *shall* complete DV and A&D evaluations with hair follicle testing, the court was clearly seeking additional information as to these dynamics on the part of both parties *before* making any final decisions (CP 136 and 137). The court denied the mother’s motion (CP 139) and explained that despite its order that the parties *shall* complete DV and A&D evaluations within 30 days (prior to entry of final orders), the court (Judge Uhrig) had never intended that this requirement would change his decision indicating at the same time that “that was certainly a possibility” (changing his mind based on the ordered evaluations from his written decision of 11/08/13) in what certainly is a highly confusing set of statements on the trial court’s part (TT Vol. VIII, P.1606, line 14 – P.1606, line7). The court also now also decided that its order for the parties to complete a hair follicle test as part of its court ordered post trial evaluations was no longer warranted and in fact the now court decided that hair follicle tests were not scientifically

supported (without any factual evidence being presented by the court as to such claims) and indicated it no longer required such a test from the father (TT Vol. VIII, P.1602, line 17 – P.1604, line 24). The mother in fact completed a hair follicle test.

The mother's attorney argued at the 12/13/13 hearing that if the court intended to place no weight on these additional evaluations it had ordered, it appeared that such evaluations were a worthless endeavor with no goal or purpose to their being ordered. The court however denied the mother's motion to stay final orders and signed all final orders (TT Vol. VIII, P.1592, line 1 – P.1629, Line 23).

The mother then retained her present attorney (Stuart Brown, WSBA #35928) to file a motion for reconsideration of final orders which was filed on 12/23/13 (CP 146). That motion also included a verbatim transcript under Exhibit 4 which further revealed the father's use of angry and foul language (profanity laced) to his own 11 year old daughter and to the mother and directly revealed his abusive nature that the mother and others had clearly testified to and which the father completely denied.

The father filed his response to the Motion for Reconsideration on 01/14/14 (CP 148). The mother then filed her Memo to the Court on 01/23/14 which included her completed A&D evaluation with Greg Bauer (CP 151 and 151A) which indicated the mother had no A&D problems

(CP 150) as well as her reply to the father's response to her motion for reconsideration (CP 149). The mother then filed her completed DV/anger evaluation report from nationally known DV/Anger/Violence Risk expert, Psychologist Roland Maiuro, Ph.D. (CP 153, 152, and 152A) which revealed no DV/anger issues for the mother and noted her to be a victim of coercive control at the hands of the father, continuous with the conclusions of all other professional experts at trial (see above and below) other than the GAL David Nelson. He also stated that the mother had no mental illness of any form. The mother again maintained that the evaluations completed by the father were grossly inadequate, did not meet professional standards, were completed by one individual at a total cost of a little more than \$300, were based on total self-report by the father and did not include collateral input, and did not include a hair follicle test as ordered by the court and in short were grossly inadequate.

The court denied the mother's motion for reconsideration with little or no explanation on 02/21/14 (CP 155) and the mother filed her notice of appeal to this COA on 03/12/14 (CP 156).

V. ARGUMENT

CR 59(a) as to 'New Trials, Reconsideration, and Amendment of Judgments,' allows for a change in orders or decisions of the court under nine conditions or situations including the following: (1) Irregularity in the

proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial; (5) Damages (to the mother in terms of both the PP orders which restricts her time and decision making as to her children and in terms of the court's property division orders) so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice; (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or decision, or that it is contrary to the law; and (9) That substantial justice has not been done. The mother believes the final orders of 12/13/13 signed by Whatcom County Superior Court trial Judge, Ira Uhrig, as to the PP, OCS, FNFCL, and DOD, should be overturned under CR 59(a)(1),(5),(7) and (9) and that the mother should be granted a new trial.

In terms of CR 59(a)(1), the mother believes that the irregularities which took place at the trial included the failure of the court to order a continuance once it discovered at the very start of the trial that mother's trial attorney had clearly and seriously damaged her case at every level by his clear and admitted failure to timely file and serve a comprehensive witness list and exhibit as detailed above. The court clearly could have and should have ordered a continuance and provided sanctions against Mr. Showrai and developed meaningful relief to the father and his attorney for

the delay caused without exception by the unprofessional behavior of mother's attorney. The mother had no responsibility for Mr. Showrai's egregious behavior which clearly damaged the mother's ability to present her case. The mother should not be penalized for her attorney's inadequate representation at trial and inability to present her complete defense.

In addition, the mother believes the irregularities under CR 59(a)(1) include abuse of discretion by the court which interfered with her ability to receive a fair trial in large part due to the reality that the above noted court decisions appear to have diverged significantly from the actual evidence and facts proven at trial under CR 59(a)(7). As this COA well knows, a finding of abuse of discretion on the part of a trial judge is a difficult threshold to reach. In *In Re the Marriage of Landry v. Landry*, 103 Wash.2d 807, 809, 699 P.2d 214, 215 (1985), our State Supreme Court announced its rule as to limits as to discretion allowed a trial judge in dissolution actions and as to what constitutes an abuse of discretion in such cases. The court noted, "We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears a heavy burden of showing a manifest

abuse of discretion on the part of the trial court. *In re Marriage of Konzen*, 103 Wash.2d 470, 478, 693 P.2d 97 (1985); *Baker v. Baker*, 80 Wash.2d 736, 747, 498 P.2d 315 (1972). The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion." "Abuse of discretion has been defined as what happens when a court's decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775, 784 (1971). The mother believes without question that this is in fact what has occurred here in terms of the trial court's decisions as outlined above. The court's decision was most assuredly unreasonable and untenable given all of the powerful evidence before the court as to the father's abusive, controlling, destructive, intimidating, dangerous, and alcoholic behavior and dynamics.

As noted in the above cited testimony of *every* professional expert other than that of GAL David Nelson (TT Vol. III, P.367, line 19 – P.517, line 8; TT Vol. VIII, P.1407, line 10 – P.1442, line 6) as well as from every lay witness other than the father himself, all witnesses consistently testified under oath that they were fearful of the father based on his aggressive and unwanted behavior toward them (especially as to women); and/or had noted the father to be physically or emotionally abusive to the mother; and/or had observed the father to engage in crude and vulgar

public behavior and language in the presence of his children and other children and members of the public; and/or had observed the father to use alcohol regularly or to be publically intoxicated; and/or testified to the strong likelihood that the mother had been the victim of the father in terms of his long-term coercive control, intimidation of the mother, and likely physical abuse at his hands; and/or was likely to be an alcoholic; and/or had been insensitive to the needs of the children. This despite the fact that many of the mother's proposed witnesses were not allowed to testify at trial or were restricted to fact or rebuttal testimony due to her trial attorney's failure to provide a timely witness list which resulted in the court's restricting of mother's witnesses or due to her attorney's failure to secure the testimony of mother's proposed witnesses (see above) including his failure to subpoena such witnesses and/or their records which would have further validated the mother's claims as to the father's controlling, angry, emotionally and physically abusive behaviors toward her for years. The father stunningly failed to present a *single* lay or professional witness that supported his version of events and facts other than himself and the GAL, David Nelson.

As to Mr. Nelson, he admitted that he had failed to review the first five volumes of the case pleadings; claimed that he believed that the father had more insight than the mother despite the overwhelming trial evidence

to the contrary as outlined in this appeal; overlooked the many reports from lay and expert witnesses who reported abusive and intimidating behaviors on the part of the father and especially toward females; mischaracterized the prior GAL's (Julie Fosty) report as to her being fearful of the father alone (and not of both parties as he claimed in his report) when she in fact clearly stated that she was fearful only of the father; ignored the negative A&D evaluation of A&D expert Bob Chambers who found the father to be an alcoholic (despite expressing his deep respect for Mr. Chambers while having no knowledge of the other A&D evaluators secured by the father on his own); ignored the reports of many individuals having regular contact with the father that he drank alcohol regularly and even daily which supported Mr. Chambers findings; discounted the professional findings of both Dr. Melody Rhode and Dr. Susan Kane-Ronning raising serious concerns as to the father's abusive behaviors and mistreatment of the mother based on his (David Nelson) claiming that he somehow "found them to be antagonistic toward Mr. Niwranski;" admitted that he in fact did not know if Harry Niwranski was an alcoholic; admitted that he had last spoken to the children's current therapist Jayme Fergoda a full six months before the trial; claimed that Dr. Novick Brown had little to say to him when she herself testified that Mr. Nelson "had no data to support his claims and that he failed to provide

child focused reports and viewed the father as exerting coercive control over the mother (consistent with the many professional reports and testimony of such experts at trial); admitted that Dr. John Plummer had indicated to him that he believed that the mother was a long-term victim of DV and that she did not manifest the profile of someone who has exercised dominance and control over her former partner (the father); admitted that he reviewed the CR 35 psychological evaluation (but apparently ignored) of the mother by Psychologist Anthony Zold in which Dr. Zold finds the mother is not suicidal does not suffer from any mental illness or disorder (no medical or psychological professional has ever reported any form of mental illness on the part of the mother) as claimed by the father and suggests that the mother is a victim and not a perpetrator; almost unbelievably failed to complete a single observational visit with the mother and children together while having multiple observational visits with the father in the family home and office; failed to even meet with the mother for a full nine months before the trial; actually recommended more time for the mother with the children than did the court (six days per month); and failed to order a full psychological evaluation of the children at any time; all of which make his investigation and recommendations lacking in credibility.

The resultant orders of the court as to the highly restrictive and punitive PP in regards to the mother thus appear to be so extreme and unjustified that they must have been the result of some form of bias or prejudice against the mother on the part of the court.

The damages inflicted on the mother in terms of the property division including exclusion of all of her financial experts and ignoring evidence of legally executed quit claim deeds of some half dozen properties by the father to the mother, clearly suggest damages so excessive that they (the court's orders as to property division issues) must have been the result of passion or bias/prejudice on the part of the court. Clearly, substantial justice was *not* done in this case.

In short, for all of the reasons and evidence offered above, the mother asks this court to reverse and overturn the final orders as to the PP, OCS, DOD and FNFCL based on CR 60(b)(1),(5) (7) and (9) and based on her firm belief that given the facts related to the trial court's decision, no reasonable judge could have reached the conclusion reached by Judge Uhrig as to the final orders of 12/13/13.

Further, the mother notes that the court's decision to disregard its own appropriate order to seek further DV/anger and A&D evaluations from the parties as outlined above, and allowing the father to complete clearly less than professionally valid evaluations while she completed

highly comprehensive and professionally credible evaluations which supported all of her claims, further suggest the trial court's unfortunate decision to ignore the factual evidence in this case and thus find in favor of the father without cause or justification. The trial court sought appropriate additional evidence as to DV/anger and A&D dynamics of the parties and so ordered that they *shall complete such evaluations*, and then summarily ignored his own orders to the detriment of the children while justifying belatedly his newfound reasoning for no longer requiring or being interested in such critical new information.

As to case law regarding Inadequate Representation at Family Law Dissolution trials, to prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's conduct was deficient and (2) that he or she was prejudiced by counsel's inadequate representation. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's representation is deficient if it fell below an objective standard of reasonableness based on the particular circumstances of the case. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Deficient representation is prejudicial if there is a reasonable likelihood that the outcome would have been different without the errors. *State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991). Additionally, if counsel's conduct was a legitimate trial tactic or

strategy, it cannot be the basis of an ineffective assistance of counsel claim. *Lord*, 117 Wn.2d at 883.

It is without *any* question based on the evidence before the trial court and now this COA, and by his own admission to the trial court, that the representation of Mr. Showrai was grossly deficient, highly damaging in all respects to the mother and highly ineffective. This claim is even supported by the direct comments of the trial court noted above. It is clear that the mother was in fact prejudiced and damaged by his ineffective counsel and representation at trial. Finally, it is clear that Mr. Showrai's failure to provide a timely witness list (and exhibit list) and to assure witnesses aimed at zealously defending the mother's parenting and financial interests, clearly was *not* a trial tactic and was simply and clearly the result of egregious error and irresponsible and unprofessional behavior on his part which the mother could not foresee and for which the mother should not be held responsible or penalized as clearly has been the case.

VI. CONCLUSION

Based on all of the above, we respectfully request that the COA vacate the findings of the trial court and order a new trial where the mother can be properly represented and where she can present *all* of the necessary witnesses and exhibits to defend herself and prove her case which was not the case at the trial below. The mother believes the trial

court did abuse its discretion by not ordering a continuance and by disregarding an extensive array of evidence and testimony that supported her claims and rejected the claims of the father. The mother believes that the court did clearly abuse its discretion in signing final orders and rejecting the mother's motion for reconsideration (and disregarding its own *shall* order as to requiring additional post trial data regarding DV/anger and A&D behavior and dynamics of both parties).

The mother respectfully asks this court to overturn Judge Uhrig's final orders and order a new trial and order that the mother be given temporary primary custody and sole decision making as to the two children at issue in the case, with the father being granted alternate weekends from Friday after school until Sunday evening at 6:00 pm and a mid-week four hour visits on those weekends he does not have the children, until the new trial.

Respectfully submitted this 22nd day of July, 2014 by:



Stuart E. Brown, WSBA #35928
Attorney for Appellant Laura
Niwranski