

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

KIMBERLY ANN MOYER (f.k.a. KASSAB), Appellant

and

ELIE G. KASSAB, Respondent

BRIEF OF RESPONDENT

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DIVISION II
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I. STATEMENT OF THE CASE

A. Nature of the Action

This is an appeal from an order of the Superior Court for Clark County¹ granting Elie Kassab's ("Kassab") motion to enforce a property distribution provision of a decree of dissolution of marriage. The order (CP 236-241) appealed from required Kimberly Moyer (Moyer) - former wife - to execute, as trustee, an "Amended Consent of Members" (CP 154) acknowledging transfer of her interests in Prestige Development, LLC and those of three trusts, to Kassab. The order does not determine the effect of the signing, either as to Moyer's liability, or to transfer any interest in the L.L.C. (CP 236-241)

The Superior Court ruled:

To expand upon her present counsel's earnest money analogy, if Petitioner agreed to purchase a residence, contingent upon her obtaining financing, her failure to obtain financing would allow here to rescind the transaction, but would not allow her to take title and possession of the premises, but escape the obligation to pay therefore.

Both parties are entitled to what they bargained for. One of the things Respondent bargained for was to have Petitioner take all steps within her power to provide him with

¹The Honorable Judge Roger A. Bennett

the 100% ownership of Prestige Development L.L.C. This is exactly what her attorney represented she could do, and what she would do.

The fact that Petitioner's efforts to comply with her promise may be legally ineffective does not relieve her of her obligation. Mr. Mullins, in oral argument, made an interesting point; something to the effect that, for this court to compel Petitioner to transfer the children's interest in Prestige Development L.L.C. would be nonsensical, like compelling her to convey Mr. Mullin's house.

However, if Petitioner, in her offer to settle her dissolution, and in a stipulation filed with the court, had expressly represented that she could transfer the Mullin's house, and would do so, creates an obligation, regardless of whether or not her effort is legally effective. As trustee, Petitioner had the authority to transfer Prestige Development L.L.C. Whether or not the transfer is a breach of her fiduciary duty is a risk she assumed by entering into the stipulation, and whether or not the children can defend the transfer is not the subject of this action.

Respondent's motion to enforce the decree, requiring Petitioner to amend the consent of members of February 2001 to reflect a transfer in her individual capacity and as trustee for the children is granted. (CP 240-241)

B. Facts

Respondent, Elie Kassab does not accept Appellant Kimberly Moyer's statement of the case. It contains argument, fails to set forth all of the findings of fact, and omits the key facts adverse to Moyer's position. We therefore restate the facts and proceedings below, and set forth verbatim the Superior Court's

findings of fact.

1. Formation of Prestige Development, LLC

Prestige Development, LLC (“the L.L.C.”) was formed in 1997 to develop certain property (the “theater property”) (CP 38). The Operating Agreement, (CP 60-79), was not prepared until October 1998, when Moyer and Kassab also executed a Declaration of Gift, (CP 80), giving each of their three children a 33 percent interest in the L.L.C., and retaining a one-half percent share for each parent. Moyer and Kassab were the Voting and Managing Members (CP 61). The children’s interests were held in trust (CP 38). The trusts were the actual LLC members (CP 38). Moyer and Kassab were the sole co-trustees (CP 38). Velana Kassab and Vanessa Kassab were not minors in 1997. They executed trust documents (CP 81). The gift to Nicholas Kassab was granted in trust because he was under age 18 at the time of the gift (CP 80).

The children were each to contribute \$16,500 to fund their trust’s memberships (CP 78). Moyer and Kassab anticipated funding the trust memberships with funds from the Kimberly Moyer Kassab Trust (CP 38). They never funded the children’s shares

(CP 38).

2. Disposition of Prestige in the Dissolution Action

Early in the dissolution action, Moyer's attorney, Ted E. Runstein ("Runstein"), represented to Kassab's attorney, Scott J. Horenstein ("Horenstein"), that Moyer had the children's authority to negotiate on their behalf in matters related to the L.L.C. (CP 91). The children and Kassab were estranged (CP 178). Runstein instructed Kassab to cease all communication with the children (CP 89).

In late October 2000, Runstein proposed to Horenstein that Kassab be awarded all interest in the L.L.C., including the children's interest (CP 86). At that time, the theater tenant, Regal, was in a Chapter 11 Bankruptcy and the L.L.C. was losing money (CP 100-101). When Kassab did not immediately accept the offer, Moyer filed a Motion seeking to have Kassab removed as managing member of the L.L.C. and the Murdock Executive Plaza, LLC (CP 86). At Runstein's request, the children filed documents, with that Motion, supporting Moyer's request (CP 86).

Before the Motion could be heard, the parties negotiated a partial settlement of property and liabilities (CP 87). Kassab was to

be awarded the L.L.C. and the Murdock Plaza as his sole property, and, in exchange, was to give up all claims to Moyer's trust (CP 107-109). Moyer and Runstein agreed to take whatever steps necessary to transfer the children's interests to Kassab (CP 87).

The Honorable Roger A. Bennett entered a Stipulation and Order Regarding Partial Property and Liability Distribution on December 14, 2000 (CP 145-150). Kassab was awarded "all right, title, and interest in . . . Prestige Development, LLC, including the real property located at 801 C Street, Vancouver, Washington [the theater property]" (CP 146). The stipulation recites that all terms of the settlement were contingent on "cooperation by any third parties . . . including, but not limited to the parties' children." (CP 149).

3. The Parties Post-Distribution Treatment of the L.L.C.

The Decree of Dissolution was not entered until December 4, 2001 (CP 40). During that year, Moyer and Runstein made a number of representations indicating that the property had been transferred and that the children were aware of, and consented to, the transfers (CP 88).

In February 2001, Moyer and Kassab, with counsel,

renegotiated the L.L.C. financing with Bank of America, based on Kassab's sole ownership (CP 88). During the restructuring, Moyer and Kassab executed a Consent Of Members Of Prestige Development, LLC In Lieu Of Special Meeting, drafted by the L.L.C.'s business attorney, Randall E. Ferguson ("Ferguson") (CP 151). The Consent of Members recites:

The Organizers of the LLC intended to issue membership units to themselves and to their children upon receipt of certain contributions by the children. The contributions were never received and no membership interests were issued. The organizers under Washington law have treated the ownership as community property with each Organizer owning an undivided one-half interest (CP 151).

The document then lists Moyer and Kassab as the only members, each with a fifty percent ownership, and recites:

It is hereby resolved as follows: Kimberly A. Moyer Kassab hereby transfers all of her right title and interest in Prestige Development, LLC, consisting of an undivided one-half interest, to Elie Kassab. The transfer shall be recorded by the remaining member on the books and records of the company (CP 151).

Bank of America then authorized refinancing and the transfer of all L.L.C. interests to Kassab and documents were executed in February 2001. The First Modification Agreement (CP 161-165), recites:

. . . Bank has agreed to consent to a transfer of K. Kassab's and the Kassab Children's (as defined in the Modification Agreement) membership interests in [the L.L.C.] to E. Kassab (CP 162).

Kassab signed this document as "sole member." Moyer also signed the document, as did various officers of Bank of America (CP 161). Included in the refinancing paperwork were other documents calling for Kassab's signature as sole member (CP 169).

On November 13, 2001, Runstein wrote to Horenstein's associate, Katharine W. Mathews ("Mathews") to tell her that the parties' accountant, George Mack ("Mack"), had determined that the children would each incur an additional \$30,000 tax liability as a result of the transfer of their interests (CP 119-120). Runstein stated that the children had not anticipated the tax liability and lacked funds to pay it (CP 120). There had been "talk" of the children seeing a lawyer to protect their interests (*Id.*) Runstein conveyed Moyer's proposal that the parties amend all tax returns affected by the L.L.C. to reflect that the children had never had an interest in the L.L.C. (*Id.*) This would reduce each child's liability by \$22,000. (*Id.*) Moyer proposed that Kassab pay the remaining

\$8,000 tax for each child and, in exchange, the children would agree that they didn't own the theater property. (*Id.*)

Kassab accepted the offer and paid the children's taxes through a \$25,000 reduction in his cash settlement award. (*Id.*) Moyer was to issue checks to the various taxing agencies on behalf of the children. (*Id.*) Moyer was also to bear responsibility for having Mack prepare amended returns for 1998, 1999, and 2000 (CP 131).

The December 4, 2001 Decree of Dissolution incorporated a second stipulation incorporating this agreement and resolving the remaining issues. (CP 130-133) Moyer was ordered to "assume responsibility for timely paying, and hold Respondent harmless from, any debt, liability, or other obligations concerning preparation and filing of amended tax returns for the 801 C Street property, known as 'Prestige Development, LLC/Regal City Center 12 Cinema' (CP 88-89).

On January 29, 2002, Kassab signed the amended L.L.C. returns and the parties' amended personal returns in Mack's office (CP 41-42). Moyer had already signed the returns (CP 41-42). Kassab did not see the children's returns, but Mack told Kassab

they were ready for filing (*Id.*). The amended K-1s reflected the agreed position that the children had zero interest in the L.L.C. (CP 41). Kassab mailed the children's K -1 forms to Moyer's address, which was also the children's mailing address and the notice address designated by the Prestige Operating Agreement (CP 75-76).

Kassab's lawyers deposed Mack in August, 2005 regarding children's suit (CP 42). Mack brought copies of the children's amended tax returns to the deposition (CP 42). All of them were signed by Moyer, not the children, on January 29, 2002 (CP 42). Moyer did not sign on behalf of the children – she signed each child's name, as if the child had signed it (CP 42). For Vanessa, she signed amended federal, Oregon, and California income tax returns (CP 42). On the California return, she started to sign her own name, lined it out and signed "Vanessa Kassab" (CP 42). For Velana and Nicholas, she signed federal and Oregon state income tax returns (CP 42).

4. The Children's Present Lawsuit for Ownership of the L.L.C.

Kassab's three adult children, Vanessa Sturgeon, Velana

Colon, and Nicholas Kassab, are suing him for ninety-nine percent ownership of the L.L.C.² That case was dismissed on summary judgement, and is now also before the Court of Appeals, Case No. 35149-8-II.

5. Remedy Sought by Kassab in this Action

Moyer and Kassab signed the original Consent of Members in their individual capacities, but not “as trustees” for the trusts into which the children transferred their L.L.C. interests (CP 42). Kassab was advised by Ferguson that the Amended Consent of Members, signed in Moyer’s capacity as trustee of the member trusts in addition to the parties’ capacities, would eliminate doubt as to the effect of the transfer (CP 42). It was Ferguson’s opinion that if the children’s trusts’ interests were not eliminated by the failure to fund under the terms of the Operating Agreement, the trustee’s signatures would confirm the transfer to Kassab, as his sole property, of whatever interest the trusts may have had (CP 42).

The Findings of Fact and Conclusions of Law (CP 156-160), incorporated into the Decree, require the parties to sign all

² See Complaint and Summons, Clark County Superior Court Case No. 05-2-03198-4, Kassab Declaration, Exhibit 1.

documents required to effectuate the property distribution (CP 160). Moyer refused Kassab's January 4, 2006 request that she execute the Amended Consent of Members (CP 155).

C. The Hearing on Kassab's Motion to Enforce Decree

Moyer and Runstein filed declarations in opposition to Kassab's motion to enforce the decree.

At the start of the April 7, 2006 hearing, the court asked the parties "to proceed with witnesses." (RP 3) Counsel for both parties told the court that they had not anticipated calling witnesses and were willing to proceed on the documentary evidence submitted. (*Id.*) The court stated "We've got, apparently the evidentiary basis for both sides here in the record. Go ahead." (*Id.*)

D. The Superior Court's Findings of Fact

The following findings of fact are taken verbatim from the Superior Court's Ruling on Motion to Enforce Decree (CP 236-241) in which Judge Bennett found:

Prestige L.L.C. was created on October 14, 1998, and as of October 21, 1998, following various gifts and transfers to trust, ownership of Prestige L.L.C. resided in Petitioner (1/2%); Respondent (1/2%) and Petitioner and Respondent as trustees for Vanessa Kassab (33%); Velana Kassab (33%) and Nicholas Kassab (33%).

Petitioner and Respondent, during the course of their dissolution action, reached a stipulation and order regarding a partial property distribution, filed with the Clerk of the Court on December 14, 2000. This stipulation provides in part that Respondent shall receive “. . . as his sole and separate property, all right, title and interest in . . . Prestige Development L.L.C. . . .”

The stipulation of December 14, 2000 further provides that “all terms of the stipulation are contingent upon cooperation by any third parties who may claim or actually have an interest in any property . . . including . . . the parties’ children.”

The Order accepting the stipulation provides that: “. . . the agreement set forth herein be binding upon the parties, subject to the contingencies specified . . .” This language would permit either party to disavow “all terms of the stipulation,” upon the non-satisfaction of any such contingency. Certain events had occurred which caused Respondent to reasonably believe that Petitioner had the authority to convey the entirety of Prestige Development L.L.C. to Respondent.

In a September 12, 2000 letter to Respondent’s attorney, Petitioner’s attorney (her speaking agent) represented that “. . . all three of the children have indicated their mother has their Power of Attorney for dealing on their behalf with respect to the theater property.”

A December 7, 2000 letter from Petitioner’s attorney to Respondent’s attorney stated: “. . . Respondent will receive . . . Prestige Development L.L.C. . . .” Also, “. . . as part of this agreement, my client will arrange for the children to transfer their interest in Prestige Development L.L.C. to your client.”

After learning that the transfer anticipated by the December 14, 2000 stipulation would create substantial tax liability for the children, Petitioner and

Respondent agreed to restructure the proposed transfer by agreeing that the children's interest in Prestige Development L.L.C. never materialized.

In February 2001, Petitioner signed a Consent of Members of Prestige Development L.L.C. which recited that the children had no interest in Prestige Development L.L.C., and which purported to transfer the entirety of Prestige Development L.L.C. to Respondent.

On March 20, 2001 Respondent stated in a declaration, filed with the court, that referred to Prestige Development L.L.C. and the children, that “. . . as part of the dissolution, they have transferred that property to Respondent.”

On February 7, 2001, Petitioner, on behalf of herself and on behalf of Prestige Development L.L.C. executed a loan modification agreement with U.S. Bank, which recognized the transfer of Petitioner's “. . . and the Kassab children's . . . membership interest in (Prestige Development L.L.C.) to (Respondent).

On December 2, 2001, the parties' dissolution action was concluded with entry of Findings of Fact and Conclusions of Law, and a Decree. These documents adopted and incorporated the stipulation of December 14, 2000, and provided that each party shall execute necessary documents to effectuate the provisions therein.

There simply is no doubt that Petitioner and her attorney led Respondent to believe that he would receive all of Prestige Development L.L.C. in the dissolution. Late in the game, that is, in the stipulation of December 14, 2000, the possibility that the children might differ with the proposition was encountered, and provided for as a “contingency” in that stipulation. Despite the contingency, Petitioner continued to represent to Respondent and to third-parties, i.e. Bank of America, that Respondent was entitled to the full ownership of Prestige Development L.L.C. The legal effect of the contingency was to

allow either party a mechanism to rescind the stipulation and property distribution of December 14, 2000. Petitioner's current attorney has argued that Respondent has "waived the contingency".

Nowhere in the record, however, do I find any evidence that Respondent has waived performance of the transfer obligation. At best, he has waived the ability to rescind the entire property settlement for Petitioner's failure to secure the children's approval, as her attorney represented had been done. Respondent still, however, has the right to demand performance of the settlement agreement. Petitioner, on her behalf, does not seek to rescind the settlement agreement based upon her failure to obtain the children's agreement, she instead seeks to retain the benefits of the agreement while avoiding her obligation. (CP 236-241)

II. ARGUMENT

A. Standard of Review

1. Standard of Review Controlled by *Rideout*

Moyer asserts a de novo standard of review. Her argument was rejected by this Court in (*Rideout v. Rideout*, 110 Wn. App. 370, 374, 40 P.3d 1192 (2002)) and by the Supreme Court in its unanimous en banc affirmance. *In re Marriage of Rideout*, 150 Wn. 2d 337, 77 P.3d 1174 (2003). Although there is a general rule that cases decided entirely on documents are subject to de novo review, this case fits exactly *Rideout's* substantial evidence standard: Where, as here, the case involves enforcement of a

decree of dissolution and the trial court made credibility determinations based entirely on affidavits, declarations, and exhibits. *Id.* at 351. “The appropriate standard of review . . . is not de novo, but rather is whether the trial court’s findings of fact are supported by substantial evidence.” *Id.* at 352.

Moyer urges the Court to review the record de novo and substitute her proposed findings for those of the trial court. But *Rideout*, on the facts and procedural posture of this case, dictates a more deferential standard. We address each of the *Rideout* elements in turn.

2. Proceeding to Enforce Decree of Dissolution

This case, like *Rideout*, is a proceeding to enforce specific provisions of a decree of dissolution.³ *Id.* at 349. Kassab’s motion asked the court to order Moyer to execute a document purporting to transfer title to property he was awarded under the parties’ December 14, 2000 settlement agreement (CP 33 - 36). The property consisted of all membership shares in the L.L.C. *Id.* At

³*Rideout* was a proceeding to enforce, through contempt proceedings, a parenting plan incorporated in a decree; this case is a proceeding to enforce a property distribution provision of a decree through an order requiring Moyer to sign a document.

the time of the settlement agreement, the parties' adult children owned 99 percent of the membership interests (CP 38). Moyer and Kassab each owned one-half percent. *Id.* Moyer and her attorney represented, in writing and by various acts, that the children authorized Moyer to deal with their property interests and that they consented to the transfer of those interests to their father (CP 38).

The primary asset of the L.L.C. was a commercial building which housed a theater and other businesses. In late 2000, when Moyer first proposed that the L.L.C. be awarded to Kassab the theater property was heavily encumbered and was a high financial risk (CP 99; CP 177 - 78). A restaurant facility in the building was vacant with no prospective tenants (CP 99; CP 177 - 78). Regal Cinemas, the theater tenant, had just filed for Chapter 11 protection and had not decided whether it would affirm its lease (CP 99; CP 177 - 78). The L.L.C. members were facing a monthly cash drain "in excess of \$35,000." (CP 99).

After learning that the property was to be sold for many millions of dollars, the children filed suit in Clark County Superior

Court on June 20, 2005,⁴ claiming that they never knew that their parents' Decree awarded their property to their father and would not have consented to a transfer if they had.

Kassab's Motion in this action sought ensure that Moyer takes all necessary steps to ensure effective transfer of the L.L.C. interests she promised in the dissolution settlement. Moyer objected and asserted various defenses to performance based on hypothetical "facts" and unsupported assumptions.

3. Motion to Enforce Decree Decided on Affidavits and Exhibits

In *Rideout*, as here, the parties elected not to present testimonial evidence. *Id.* at 350. In both cases, the parties knew of, and argued, various contested issues of fact. *Id.*, (RP 3). The Supreme Court held:

[No] Washington appellate court reviewing documentary records has weighed credibility. Indeed, the general rule relating to de novo review applies only when the trial court has not seen or heard testimony requiring it to assess the credibility of the witnesses. Here, *where the proceeding at the trial court turned on credibility determinations and a factual finding of bad faith, it seems entirely*

⁴ Moyer's statement in her brief (Opening Br. 17) that the case was filed June 20, 2004, two and a half years after entry of the December 4, 2001 Decree, is incorrect. The case was filed June 20, 2005.

appropriate for a reviewing court to apply a substantial evidence standard of review.

...

We hold here that the Court of Appeals correctly concluded that the substantial evidence standard of review should be applied here where competing documentary evidence had to be weighed and conflicts resolved. *Id.* at 351 (internal citations omitted; emphasis added).

The Court created this narrow exception in family law cases because trial judges and court commissioners routinely hear family law matters. In our view, they are better equipped to make credibility determinations.” *Id.* at 351-352. The Court found that the issues in cases supporting the general (de novo) rule “did not require a determination of the credibility of a party. [*In Rideout*], credibility is very much at issue.” *Id.*

4. Contested Facts Before the Trial Court Required Determination of Credibility

Like *Rideout*, this case presented the trial judge with significant factual disputes, some of which required a determination of credibility in order to resolve them. The Superior Court was asked to resolve the following credibility issues created by Moyer’s declaration:

- a. Whether, during the dissolution, it was clear to

all parties and counsel that Moyer's March 2001 assertion that the transfer of the children's interests had in fact occurred was "a mistake" as Moyer asserted. (CP 178).

b. Whether Moyer was surprised by Kassab's discussion in October 2001 letter of the argument that failure to perfect the children's L.L.C. interest caused those interests to fail such that they had never had an interest in the L.L.C. (CP 179).

c. Whether Moyer took the position that the children's interests had never been perfected, with the risk that the children might sue, because she believed that the children would never sue her and she hoped that Kassab and the children would resolve the issues between them (CP 180).

d. Whether Moyer would have counseled the children to see their own attorney if she and the children had followed through on her obligation to transfer their ownership (CP 180).

e. Whether Moyer was authorized, as trustee, to cancel the children's L.L.C. ownership, and whether doing so would be a breach of her fiduciary duty to the children (CP 180).

f. Whether Moyer and Runstein had represented

to Kassab, Horenstein and Mathews, or otherwise implied in any way, that transfer of the children's interest had never been formally completed (CP 188).

Also contested was whether it was clear to all parties that the children would sue over the issue of their ownership interests (CP 188); whether the parties agreement to assert the children's non-ownership was a reasonable tax strategy or, as Moyer asserts, a knowing waiver of a contingency (CP 188- 89); whether Moyer's January 29, 2002 act of signing the adult children's names to their amended 1998, 1999, and 2000 state and federal income tax returns, and causing Kassab to know that the returns had been filed (CP 41), constituted further representation of her authority and the children's assent.

The trial court resolved all disputes in Kassab's favor.

5. *Brinkerhoff v. Campbell* Does Not Apply

Moyer's mistakenly relies on *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 994 P.2d 911 (2000). *Brinkerhoff* addressed review of a different issue – whether the party seeking to enforce a settlement agreement had met its “burden of proving that there is no genuine dispute over the existence and material terms of the

agreement.” *Id.* at 696-97. “When a moving party relies on affidavits or declarations *to show that a settlement agreement is not genuinely disputed*, the trial court proceeds as if considering a motion for summary judgment.” *Id.* at 696 (emphasis added). The question of whether genuine disputes exist should be reviewed *de novo*, just as it is for summary judgment. *Id.* at 697. That question is not in this case. The parties agree that they dispute material facts.

Moyer’s reliance on *Brinkerhoff* is also misplaced because *Brinkerhoff* and its predecessor cases⁵ concern the circumstance where parties were not given an opportunity to present testimony. The relief was remand “for an evidentiary hearing in which the parties are entitled to call and cross-examine witnesses to resolve factual disputes[.]” *Id.* at 700. Moyer and Kassab chose to proceed at the April 7, 2006 hearing without presenting live testimony (RP 3). They thus authorized the trial judge to rely solely on affidavits and declarations to assess credibility of witnesses, weigh the evidence, resolve conflicts, and draw inferences from the

⁵ *Callie v. Near*, 829 F.2d 888 (1987); *In re Marriage of Ferree*, 71 Wn. App. 35, 856 P.2d 706 (1993).

evidence. Nothing in *Brinkerhoff* supports remand for a hearing openly waived.

6. Conclusion on Standard of Review

“[N]otwithstanding the fact that the record [is] entirely documentary, the superior court’s findings should be given deference and evaluated to determine if there was substantial evidence to support them.” *Rideout*, 150 Wn. 2d at 359-60.

B. Assignment of Error No. 1, Issues 1 through 5: *Substantial Evidence Supports The Trial Court's Findings.*

1. Introduction

Moyer challenges six of the court’s findings of fact in five separate issue statements, all related to a single assignment of error.⁶ Because “substantial evidence” is the appropriate standard of review, the single question raised by Moyer’s first five issues is whether substantial evidence in the record supports the six contested findings. *Lantis v. Pfarr*, 67 Wn.2d 994, 995, 410 P.2d 900 (1966). “Substantial evidence’ is evidence in sufficient quantum to persuade a fair-minded person of the truth of the

⁶ To avoid confusion, Kassab’s brief follows Moyer’s designations regarding the Assignment of Error and Issues.

declared premise.” *Ridgeview Properties v. Starbuck*, 96 Wn. 2d 716, 719, 638 P.2d 1231 (1982).

If the review standard were de novo, the question would be whether the court’s findings are supported by a preponderance of the evidence. Under either standard, the court’s findings must be upheld because Moyer has produced no admissible evidence that would bring the court’s findings into question.

2. Evidence Not Discussed in Opening Brief

Moyer does not mention, much less discuss, the following uncontested material facts:

- a. On January 29, 2002, nearly two months after entry of the Decree, Moyer signed her adult children’s amended state and federal income tax returns for 1998, 1999, and 2000 reflecting that the children held no interest in the L.L.C. (CP 42). Moyer signed the children’s names to the returns and caused them to be filed by her accountant as though they had been signed by the children (CP 42).
- b. Awarding the L.L.C. to Kassab was first proposed by Moyer in October 2000 (CP 93).
- c. Amending the L.L.C.-related income tax returns as a

strategy to reduce the children's tax liability was proposed by Moyer's accountant and attorney (CP 120).

d. The children's amended K-1 forms, showing no ownership interest in L.L.C., were properly mailed to Moyer's residence address in January 2002 (CP 41- 42).

Further, Moyer's arguments and assertions invite the court to speculate regarding the following facts for which she failed to produce competent, admissible evidence which would be under her sole control if it exists:

a. A direct statement from Moyer regarding whether she or her lawyer informed the children, before she signed their amended tax returns, that their interests were being transferred to Kassab as part of their parents' property settlement. Moyer neither admits nor denies this fact, although it is a key issue on which the children's litigation depends.

b. A direct statement from Moyer regarding whether the children consented to the transfer of their interests at the time the agreement was made or, at the very least, before their amended tax returns were filed. Again, this fact is central to the children's litigation, as well as to the issues in this case. Moyer knows the

answer and has not produced it.

c. A direct statement from Moyer regarding whether the children received the amended K-1 forms and copies of their amended tax returns which were mailed to her residence address, which was also the mailing address for the children.

“When a party fails to produce relevant evidence within its control, without satisfactory explanation, the inference is that such evidence would be unfavorable to the nonproducing party.” *Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn. 2d 678, 689, 871 P.2d 146 (1994). Moyer’s silence on these key issues raises unrebutted inferences that the children did, in fact authorize Moyer to represent their interests, and that they were informed of, and consented to, the transfer of those interests to their father, and that they authorized the filing of their amended tax returns.

Moyer’s arguments must be viewed in light of these inferences.

**3. Moyer’s Reliance on Neutral or Irrelevant Facts:
*None of the Court’s Findings Are Invalidated by
Kassab’s Uncontested Knowledge in the Fall of
2000 That the Children Had 99% Ownership of
Prestige Development L.L.C.***

Moyer argues that the key to rejecting the contested findings is that Kassab was “fully on notice . . . that the parties’ children

claimed that they owned 99% of the ownership in Prestige Development.” (Opening Br. p. 32). It is uncontested that Kassab knew that the children owned a beneficial interest in ninety-nine percent of the L.L.C. in the fall of 2000. That fact does not affect the court’s findings, for the following reasons:

Issue No. 1: Authority to Transfer. Moyer does not explain how the fact of Kassab’s “notice” supports, much less requires, a conclusion that Kassab did not reasonably believe Moyer had the authority to transfer the L.L.C. in its entirety, in light of:

- a. Moyer’s September 12, 2000 representation that she had the children’s authority to deal on their behalf with the theater property (CP 91);
- b. Moyer’s offer to transfer the entire L.L.C. interest to Kassab (CP 93);
- c. The children’s “affidavits” filed in the parties’ dissolution November 17, 2000, in which all three children ask the court to remove their father as managing member of the L.L.C. and appoint their mother, or some other trustworthy person to look out for their interests (CP 104 - 106);

d. Moyer's express, written promise on December 7, 2000 to take care of the transfer formalities (CP 106-07);

e. Moyer's February 2001 assertion to the Bank of America that the children "wish to transfer their membership interests in [the L.L.C.] to Kassab." (CP 199);

f. Moyer's representation that the children's objection to transfer of their interests would be resolved if their income tax liabilities were taken care of, and the implied authority to represent the children inherent in that settlement proposal (CP 119 -120); and

g. Moyer's subsequent signing and filing of the children's amended state and federal income tax returns (CP 42).

Issue No. 2: Tax strategy. Neither does Moyer explain why Kassab's uncontested knowledge is inconsistent with the parties' agreement to reduce the tax consequences of the transfer by revising all state and federal returns to indicate that the children's interest was never perfected, in light of

a. The fact that Moyer was the party who first proposed this strategy as a resolution of the children's anger over their unanticipated tax liability (CP 119 - 120); and

b. Her actions in preparing, signing and filing the children's tax returns (CP 42).

Issue No. 3: Kassab led to believe he would receive one hundred percent of the L.L.C. Moyer does not explain how Kassab's knowledge creates doubt as to whether he was led to believe he would receive all of the L.L.C. in the dissolution, in light of:

a. Moyer's initial offer that Kassab receive the theater property and "all the equity associated with that property." (CP 93);

b. Runstein's confirmation that Kassab would "receive as his sole property . . . the theater property, Prestige Development LLC[.]" (CP 107);

c. Language in the December 14, 2000 Stipulation and Order that Kassab would "be immediately awarded as his sole and separate property *all right title and interest* in . . . Prestige Development, L.L.C., including the real property located at 801 C Street, Vancouver, Washington." (CP 111) (emphasis added).

Issue No. 5: Kassab bargained for Moyer to take all

steps to provide 100 percent ownership. Finally, Moyer fails to explain how Kassab's knowledge counters the court's finding that he bargained for her to take all steps necessary to ensure the transfer of those interests, and the related finding that her attorney represented that she could and would take such steps, in light of her promise (cited above) to undertake responsibility for the transfer of the children's interests and the actions she is known to have subsequently taken.

Conclusion: Moyer fails to show why, in light of the uncontested facts, any of the court's findings are impaired by Kassab's admitted knowledge in the fall of 2000 that his children were beneficial owners of 99 percent of Prestige Development, L.L.C.

Remaining arguments specific to each contested finding are discussed below.

4. Issue No. 1: Substantial Evidence Supports the Finding That "*Certain Events Had Occurred Which Caused Respondent to Reasonably Believe That Petitioner Had the Authority to Convey the Entirety of Prestige Development L.L.C. to Respondent.*"

Other than her argument regarding Kassab's knowledge of

the children's ownership, Moyer does not address the reasonableness of Kassab's understanding that Moyer had the authority to transfer all interests in the L.L.C. The evidence of her assertions, her proposals, her agreements, and her actions, especially regarding the amended tax returns, is not discussed in her brief. She argues as if those events had never occurred, or if mentioned, that somehow everybody knew her assertions did not mean what they clearly stated.

Authority To Convey: Moyer argues, without any supporting evidence, that "she has no more authority to convey the childrens' [sic] asserted interests in Prestige Development to [Kassab] than she has the authority to convey the Brooklyn Bridge to him." (Opening Br. p. 35). She argues that she cannot be expected to convey property that does not belong to her (Opening Br. 35).⁷ The Superior Court's finding does not address Moyer's

⁷ Moyer also argues that because the court found that the children had beneficial L.L.C. interests of 99 percent in October 1998 but made no findings of subsequent change, the "court's record demonstrates that the ownership situation did not change at any time subsequent to October 21, 1998." (Opening Br. 25) The record demonstrates nothing of the sort. What the court found and what the record demonstrates are separate concepts. The record may, and does, demonstrate something not addressed by the trial court, and the court's silence on a fact does not eliminate that fact from the record. The argument is irrelevant, however, because the fact of Kassab's knowledge of the children's interests does not impair the court's findings.

actual authority, but only whether her representations and other events caused Kassab to reasonably believe she had such authority. In addition to the major evidentiary omissions, Moyer did not produce evidence of facts contradicting Runstein's September 12, 2000 assertion that "[a]ll three of the children have indicated their mother has their power of attorney for dealing on their behalf with respect to the theater property." (CP 91).

Knowledge and Consent. Moyer argues that "obviously . . . the *children claim they never agreed* to transfer, or in fact transferred, their interest in [the L.L.C.] to their father." (Opening Br. p. 13) (emphasis added). There is no evidence that the children now make that claim. The children have not submitted declarations in this case. Moyer fails to present evidence that the children did or did not consent to five years ago, although she necessarily knows the facts.

Assumption of risk. Moyer casts Runstein's November 13, 2001 statement that "there has been talk of the children seeing an attorney to protect their rights" (CP 120) as the beginning of a series of warnings that the children had not consented to the transfer, that they did not, perhaps, know of the

agreement, and that they might sue their parents over L.L.C. ownership. There is no evidence in the record that the children had any concerns other than the tax issues raised in the November 13 letter. Those concerns Runstein proposed to resolve by amending and filing all tax returns related to the L.L.C., and having Kassab pay their remaining liability (CP 120). Runstein represented that this would resolve the children's concerns and forestall a lawsuit. (CP 120). Kassab accepted the proposal three days later (CP 206-07). Moyer argues that Kassab's refusal to "dignify" the threat of the children's lawsuit *over tax issues* (CP 207) was a knowing assumption of risk that the children might sue the parties sometime in the future over ownership. Moyer fails to show how Kassab accepted the risk of a lawsuit. He had just agreed to pay the children's tax liability based on Moyer's representation that, in exchange, the children would accept "his position that they do not and did not own the theater property." (CP 120). The uncontested evidence makes it highly probable that the children knew of and consented to the transfer of their interests, but were upset when they learned of the resulting income tax liability. There is no evidence that Moyer warned Kassab of other potential claims they

might have had.

Moyer asks this court to accept as true, without evidence, assertions made in children's June 2005 complaint against their father. Her refusal to produce key evidence has the opposite legal effect. It raises an inference that her evidence would show full knowledge and consent by the children in late 2000 through January 2002. *Lynott*, 123 Wn.2d at 689. That inference supports the finding that "certain events" had created in Kassab a reasonable belief that Moyer had the children's authority and consent to transfer all of their L.L.C. interests. In light of Moyer's representations in the record, especially the November 2001 assertion that the children were angry over their income tax liability, this Court should decline Moyer's unsupported invitation to believe, that the children did not know that she had promised their L.L.C. interests in her dissolution settlement.

The following uncontested findings of fact and other evidence in the record also justify the finding.

a. Uncontested Findings Of Fact Supporting Assertion Of Authority.

Moyer's failure to contest the following findings of fact are

inconsistent with her position and require affirmance:

i. *“In a September 12, 2000 letter to Respondent’s attorney, Petitioner’s attorney (her speaking agent) represented that ‘ . . . all three of the children have indicated their mother has their Power of Attorney for dealing on their behalf with respect to the theater property.’” Ruling on Motion To Enforce Decree, pg. 2 - 3, CP 237-38.*

ii. *“A December 7, 2000 letter from [Moyer’s] attorney to [Kassab’s] attorney stated: ‘ . . . [Kassab] will receive . . . Prestige Development L.L.C. . . .’ Also, ‘ . . . as part of this agreement, my client will arrange for the children to transfer their interest in Prestige Development LLC to your client.’” Ruling on Motion To Enforce Decree, pg. 3 (CP 238).*

iii. *“[The December 14, 2000] stipulation provides in part that Respondent shall receive ‘ . . . as his sole and separate property, all right, title and interest in . . . Prestige Development L.L.C. . . .’” (CP 237).*

b. Further evidence that Kassab’s belief in Moyer’s authority was reasonable

i. Kassab was completely estranged from his children while the dissolution was pending. In the September 12, 2000 letter referred to by the court, Runstein also wrote “Vanessa does not desire to contact her father to ask for her own funds. . . . There is no reason for Vanessa to have to contact your client.” (CP 90 - 91). Moyer’s March 1, 2006 declaration recites “our children were estranged from their father.” (CP 178).

ii. Runstein’s November 13, 2001 letter to

Mathews states “Needless to say, the children are unhappy about their tax liability and lack the funds to pay the obligation.

Apparently, there has been talk about the children seeing an attorney to protect their rights.” (CP 120). This assertion implies that the completed transfer was a *fait accompli* and represents that the children were fully aware of the facts. Runstein proposes Moyer’s global settlement offer, including the provision that Kassab “pay the children’s tax liability *for accepting his position that they do not and did not own the theater property.*” (CP 120) (emphasis added). The representation of Moyer’s authority to act on behalf of the children is undeniable.

vii. Finally, Moyer’s subsequent execution of amended income tax returns on January 29, 2002 raises the presumption that the children ratified their consent following entry of the December 4, 2001 Decree. Moyer has not told the court whether she had express or implied authority to sign tax returns with the names of her adult children, nor whether the children knew about the amended returns and what was asserted in them.

Washington Courts adopt the universal presumption that, absent evidence to the contrary, “the ordinary course of business

was followed and that the law was obeyed; also that official duty was regularly and faithfully performed.” *U.S. v. State of Wash.*, 233 F.2d 811, 816 (C.A. 9 1956) (citing *United States v. Crusell*, 81 U.S. 1, 20 L.Ed. 821 (1871); *President, Directors & Co. Of United States Bank v. Dandridge*, 25 U.S. 64, 6 L.Ed. 552 (1827); *Cavness v. United States*, 187 F.2d 719, 723, 341 U.S. 951, 71 S.Ct. 1019, 95 L.Ed. 1374 (9th Cir. 1951)). If the children did not consent to Moyer signing and filing their amended state and federal income tax returns, or if the assertions that the children’s interests never materialized were false, Moyer is guilty of at least one federal felony. 18 U.S.C. §495 prohibits publishing as true any forged document with intent to defraud the United States. 18 U.S. C. §1001(a)(2) prohibits the making or use of “any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or representation[.]” 26 U.S.C. §7206 prohibits making or subscribing any “return, statement, or other document which contains or is verified by a written declaration that is made under the penalties of perjury” when the signer does not believe it to be true and correct as to every material matter. Moyer has not rebutted the presumption that she acted

legally when she signed the children's tax returns, that is, that she had a good faith reason to assert non-ownership, and that the children had authorized her to make that representation on their behalf.

Based on all of the foregoing facts, the Court should affirm the finding that Kassab reasonably believed Moyer had the authority to transfer the L.L.C. in its entirety.

5. **Issue No. 2: Substantial evidence supports the finding that “*After learning that the transfer anticipated by the December 14, 2000 stipulation would create substantial tax liability for the children, Petitioner and Respondent agreed to restructure the proposed transfer by agreeing that the children’s interest in Prestige Development L.L.C. never materialized.*”** Ruling on Motion To Enforce Decree, pg. 3, ll. 9 - 14.

Moyer does not contest that she and Kassab agreed to assert that the children's L.L.C. never materialized, that she caused the children's amended state and federal income tax returns to be prepared, that she signed the children's names to their amended returns and submitted them as though they had been signed by the children. She argues instead that the tax agreement somehow erased all of her prior representations regarding authority, consent, and the actual fact of transfer. (Opening Br. 20). Moyer fails to

explain how the existence of the tax agreement precludes the court's finding that the parties considered the tax ramifications of their property distribution and restructured the method by which their intended property distribution would be carried out.

Moyer argues that she and Kassab could do nothing "as between themselves" to "deprive the children of their property interest." (Opening Br. 20). That is not true if the children authorized her to make the transfer on their behalf. The uncontested evidence makes it highly probable that the children had authorized their mother to dump a financial albatross on their father.

Moyer has also not rebutted the venerable presumption that parties follow the rules and that the law has been obeyed. *U.S. v. State of Wash., supra*. Kassab's argument that the children's interests had never been perfected complies with the laws requiring a good-faith argument to support amending the tax returns as suggested by George Mack. To assert a false fact in order to pare \$66,000 off a tax bill would violate 18 U.S.C. §1001(a)(2), a Class C felony.

Moyer argues that her obligation was merely to prepare and

file amended tax returns “*asserting* that the children’s ownership was not completed” (Opening Br. 29) (emphasis added). She argues that use of the word “asserting” notified Kassab that what the parties were about to submit to the I.R.S. as true “would be contrary to a different state of facts that [the parties’ children] might assert.” (Opening Br. 30). She asserts that Kassab’s “contention” that the children never had an interest was a “version of history” he understood was contrary to what was going on in minds of the children. (Opening Br. 28). Perhaps Moyer was undaunted by the prospect of filing tax returns on behalf of the children which asserted facts with which they might disagree. There is no evidence that Kassab shares her cavalier attitude.

The court’s finding that tax consequences led the parties to restructure the manner in which their agreement would be carried out is supported by substantial evidence.

6. **Issue No. 3: Substantial Evidence Supports the Finding That “*There simply is no doubt that petitioner and her attorney led Respondent to believe that he would receive all of Prestige Development L.L.C. in the dissolution.*”** Ruling on Motion To Enforce Decree, pg. 4 (CP 239).

All of the evidence supporting the court’s finding that certain

events occurred which caused Kassab to reasonably believe that Moyer had the authority to convey the entirety of the L.L.C. to Kassab also support the finding that Moyer and Runstein clearly represented that Kassab would receive the entire L.L.C. and not merely Moyer's one-half percent share. There is no contrary evidence in the record. The court's finding should be sustained.

7. **Issue No. 4. Substantial Evidence Supports the Court's Finding That "*Despite the contingency, Petitioner continued to represent to Respondent and to third parties, i.e. Bank of America, that Respondent was entitled to the full ownership of Prestige Development, L.L.C.*"** Ruling on Motion To Enforce Decree, pg. 4 (CP 239).

Moyer's elaborate denial of her own representations in the Bank of America Consent to Transfer, Ratification and First Modification Agreement is contradicted by her representation from page 2, ¶ J of the same document (CP 200): "Pursuant to the terms of a Stipulation and Order entered into between [Moyer] and [Kassab] in relation to their marital dissolution proceedings, [Moyer], *Nicholas Kassab . . . , Velana Kassab . . . and Vanessa Kassab . . . wish to transfer their membership interests in [the L.L.C.] to [Kassab].*" (CP 200). Moyer signed the document. (CP 204). Moyer's assertion that the Bank of America Consent to

Transfer did not include a representation that Kassab was to be sole owner of the L.L.C. is without merit.

Moyer also asserts that her representations in this transaction are irrelevant because the refinancing contract was with Bank of America, not Kassab. (Opening Br. at 32). The agreement is between Bank of America and Prestige Development, L.L.C., Kassab, and Moyer. (CP 198). A key provision is the bank's agreement "to consent to the requested transfer of the membership interests of "K. Kassab and the Kassab Children in [the L.L.C.] to E. Kassab[.]" (CP 199). Moyer's argument is without merit.

The Court should sustain the finding that Moyer represented to Kassab and third parties that Kassab was being awarded the entire L.L.C. interest.

**C. Assignment of Error No. 1, Issue Nos. 6,7 and 8:
*Execution of the Amended Consent of Members, as
Trustee Does Not Breach Fiduciary Duty or Violate
Public Policy.***

1. Introduction

Moyer's challenge to the court's conclusions that she, as trustee, had the authority to transfer the children's L.L.C. interests, and that she assumed the risk of breaching her fiduciary

duty when she entered into the December 14, 2000 stipulation (Issues No. 7 and 8), rest entirely on her argument that the court cannot order specific performance of a contract which forces her to breach her fiduciary duty or violates public policy, or that compels her to convey title to property that neither she nor Kassab owned prior to the dissolution.

Moyer's arguments fail because there is no competent evidence to suggest that the children did not authorize the transfer of their L.L.C. interests exactly as Moyer and Runstein asserted from September 2000 through January 2002.

2. Moyer's Arguments Predicated on Assumption, Not Facts in the Record

Moyer's arguments regarding breach of fiduciary duty and violation of public policy start with an assumption of breach and violation. There is no evidence to support those assumptions. The question is whether her agreement actually did breach fiduciary duty, whether it was against public policy, and, if so, whether it should be enforced. Because the evidence strongly indicates that the children originally gave their authority and consent to the transfer, Moyer's basic assumptions fail.

a. ***Breach of Fiduciary Duty of Trustee.*** Nothing in RCW 11.100.010 et seq. prevents a trustee from disposing of the corpus of a trust if the beneficiaries and trustees agree to such disposition. There is no evidence to indicate that Moyer entered into two mutually exclusive contracts, one with Kassab to transfer the L.L.C. and one with the children to prevent the transfer. There is no evidence that the children did not consent. There is evidence that the children did consent.

If Moyer were correct that the children did not consent, then Moyer was willing, as a founding member of the LLC, to breach her fiduciary duty to them as members of the L.L.C. when she executed the loan modification documents with Bank of America and the original *Consent of Members in Lieu of Special Meeting* in February 2001. She was willing to breach her co-member fiduciary duty to the children by asserting that they wished to have their interests transferred. She was willing to breach her fiduciary duty when she signed the children's names to amended state and federal income tax returns asserting that they had never had an interest in the LLC.

But the evidence supports a finding that the children did, in

fact, give their consent at the time. Moyer has no mutually-exclusive duties here. The only breach is of Moyer's fiduciary duty to Kassab by her bad-faith dealings throughout this action. The fiduciary relationship between husband and wife "does not cease upon contemplation of divorce." *In re Marriage of Sievers*, 78 Wn. App. 287, 310, 897 P.2d 388 (1995).

b. Violation of Public Policy. Moyer asserts that an order compelling her to sign the Amended Consent of Members would be illegal because such an order would grant specific performance of an illegal bargain in violation of public policy (Opening Br. 40).⁸ There is nothing inherently illegal about the agreement to transfer of the children's interests. Moyer signed the same document in her individual capacity in February 2000 (Opening Br. 14) She, and presumptively, the children, ratified the agreement when she filed their amended tax returns containing their assertion that they had never had an interest. Moyer's public policy argument rests only on her unsupported assertion of nonconsent. The children's consent is presumed from Moyer's

⁸ It is interesting that Moyer does not assert the "public policy" argument regarding her agreement to file on the children's behalf what she now implies may have been fraudulent amended tax returns.

failure to offer any admissible evidence that they did not and by all of her actions subsequent to entry of the stipulation. There is no violation of public policy.

c. Court's Jurisdiction To Order Conveyance.

Moyer asserts the wrong basis to challenge the court's jurisdiction. The question is whether the court has the authority to enforce its orders. "If a court of equity could not enforce its decrees, '... obviously the court would be rendered impotent and we would have neither law nor order but everyone could do as he or she pleased. Of course, such a situation cannot be countenanced by the courts for a moment[.]'" *In re Marriage of Peacock*, 54 Wn. App. 12, 17, 771 P.2d 767(1989). The court does have the authority to compel Moyer to execute documents necessary to carry out the property distribution provisions of the decree. The Superior Court did not order Moyer to dispose of property. The Superior Court ordered her to do what she had agreed to do. She chose to enter the stipulation, which became an order of the court. As the trial court found, "whether or not the transfer is a breach of her fiduciary duty is a risk she assumed by entering into the stipulation, and whether or not the children can defend the transfer is not the subject of this

action.” (CP 241).

D. Attorney Fees

Kassab is entitled to attorney fees in this appeal. RCW 26.09.140 authorizes an award of reasonable fees related to any proceeding under RCW 26 after consideration of financial resources of both parties. RCW 26.09.140. “Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.” *Id.* “An important consideration apart from the relative abilities of the two spouses to pay is the extent to which one spouse's intransigence caused the spouse seeking the award to require additional legal services.” *In re Marriage of Morrow*, 53 Wn. App. 579, 591, 770 P.2d 197 (1989). “When intransigence is established, the financial resources of the spouse seeking the award are irrelevant.” *Id.*

Attorney fees for intransigence may be awarded upon a showing of bad faith and breach of fiduciary duty to a spouse. *In re Marriage of Sievers*, 78 Wn. App. at 311. In *Sievers*, the husband and wife reached settlement which was put on the record, but the decree incorporating the agreement was not entered for another

four months. (*Id.* at 294). The agreement called for each party to be responsible for income taxes on their share of income distributed by their S Corporations through entry of the decree. (*Id.*) Income through the date of the settlement agreement was \$550,000. (*Id.* at 293) Between the settlement date and date of entry of the decree, the husband distributed an additional \$5.7 million to himself, but nothing to the wife. *Id.* at 295, FN2. The husband refused to admit liability for anything other than half of the tax on the entire \$6 million-plus distribution, although the wife had received only \$225,000. *Id.* at 295.

A “party to a property settlement agreement owes a fiduciary obligation and a duty of good faith and fair dealing to attempt to draft formal contract language that will honor that agreement.” *Id.* at 311. Moyer and her attorney assert that they inserted the language in the final property distribution that the children were not parties to the action as a warning to Kassab that the children might contest the transfer of their interests. (CP 180-189) Kassab, like the wife in *Sievers*, believed the insertion to be immaterial because of the multitude of representations that the children had especially Moyer’s assurance that the children would agree that they never

owned an interest in the L.L.C. if Kassab would pay tax liabilities remaining after amending the returns.

“Any deliberate effort to draft language intended to subvert the agreement is a breach of the fiduciary obligations of marriage and a blatant violation of the duties of good faith and fair dealing in the contractual relationship.” *Id.* Moyer’s actions in this stage of the dissolution proceedings show that her actions and assertions five years ago were designed to allow the children to attempt to get the L.L.C. back should it eventually prove profitable. In *Sievers*, the court found that the husband’s “attorney made no effort to advise Sievers’ attorney of the true facts or to phrase the October PSA in language that would clearly and accurately characterize the nature of the actual settlement agreement.” *Id.* It is clear from the facts in this case that Moyer and her attorney are actively supporting the children’s lawsuit by refusing to produce evidence of facts surrounding the making of Moyer’s multiple representations of authority and consent. The *Sievers* court noted “To the extent that [the husband’s] attorney may have knowingly participated in [the husband’s] scheme to shift additional tax liability to [the wife] without her knowledge and against the intent of the July PSA, the

attorney (who does not represent the husband in this appeal) exceeded the bounds of advocacy.” *Id.* The court awarded the wife attorney fees, based on the intransigence shown by the husband’s bad faith settlement dealings and his refusal to provide accurate income information for child support. *Id.*

The overwhelming evidence shows that children did consent five years ago. Moyer has a duty to present the facts. She cannot remain silent in support of the children’s suit while ignoring her own actions in the settlement process.

Moyer is fully responsible for not only the fees and costs Kassab has incurred in this case, but the costs he has incurred defending his property settlement against the children’s current litigation. Her bad faith and intransigence justify an award of fees, regardless of the parties relative economic position.

III. CONCLUSION

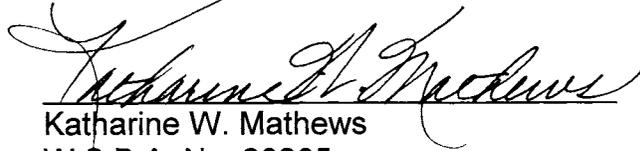
The court’s finding of fact and conclusions of law should be affirmed. Kassab should be awarded all fees and costs incurred in this appeal.

///

///

Respectfully submitted this 7th day of September, 2006.

COBB & BOSSÉ, LLP, by

A handwritten signature in cursive script, appearing to read "Katharine W. Mathews", written over a horizontal line.

Katharine W. Mathews

W.S.B.A. No. 20805

Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing BRIEF OF
RESPONDENT upon:

James D. Mullins
Attorney at Law
105 W Evergreen Blvd # 200
Vancouver, WA 98660-3123
Facsimile: (360) 693-1777

Of Attorneys for Appellant

by mailing a copy thereof in a sealed, first-class postage prepaid
envelope, addressed to address as shown above and deposited in
the U.S. Mail at Portland, Oregon on the date set forth below.

I further certify that I sent for filing, the original and one copy
of the same document to:

Washington State Court of Appeals
Division II
Attn: Court Clerk
950 Broadway, Suite 300
Tacoma, WA 98402-4454

by mailing one copy thereof in a sealed, postage prepaid envelope
via certified mail requesting a return receipt addressed to the
address as shown above and deposited in the U.S. Mail at
Portland, Oregon on the date set forth below.

///

FILED
COURT OF APPEALS
06 SEP 11 PM 2:51
STATION 4
BY [Signature]
DEFINITION

DATED this 7th day of September, 2006.

COBB & BOSSÉ, LLP, by

A handwritten signature in cursive script, appearing to read "Katharine W. Mathews". The signature is written in black ink and is positioned above the printed name.

Katharine W. Mathews

W.S.B.A. No. 20805

Of Attorneys for Respondent