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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

In Re The Marriage of:

JEANNE MARIE HARRIS

Appellant

v.

ROGER DUANE KELL

Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR COWLITZ COUNTY

The Honorable Judge Michael Evans

OPENING BRIEF OF APPELLANT

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ORIGINAL

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A. Assignments of Error

Error No. 1 The trial court erred when it denied Jeanne Harris a continuance of the trial based upon her attorney of record replacing himself with a brand new associate;

Error No. 2. The trial court erred when it held an off the record hearing on whether to continue the trial;

Error No 3. The trial court erred when it failed to enter an order denying the continuance of the trial until more than 13 weeks had passed and Jeanne Harris' attorney of record was not present to contest or clarify the entry;

Error No. 4 The trial court erred when it prevented Jeanne Harris from presenting evidence as to the character of her severance pay and awarded this separate property to Roger Kell as a discovery sanction absent making specific findings that Jeanne Harris willfully withheld the information;

Error No 5. The trial court erred when it mischaracterized Jeanne Harris' severance pay as a community asset and suppressed evidence which would have clarified its status;

Error No. 6. The trial court erred when it gave Jeanne Harris' companion dog of four years, purchased and registered in the name of Jeanne Harris to Roger Kell;

Error No. 7 The trial court erred when it failed to allow Jeanne Harris to contest those portions of the final orders which did not match the court's actual findings and signed an erroneous order which was inconsistent with its own findings, without allowing Jeanne Harris to apprise the court of the errors or making the necessary changes;

Error No. 8. The trial court erred when it required Jeanne Harris to have a payment plan instead of a simple judgment on monies owed to Roger Kell;

Error No. 9. The trial court erred when it directed Jeanne Harris to pay attorney fees for Roger Kell when she lacked the ability to pay and he established no need;

Error No. 10. The trial court erred when it calculated the value of property to be divided, failed to include all assets for division in its findings, (including pension fund values, savings plans, life insurance policies), miscalculated the values, and then awarded a disproportionate amount of property to the husband without justification;

Error No. 11. The trial court abused its discretion when it failed to conduct a trial in a dissolution case in a reasonable time period causing the dissolution to languish for four years without resolution.

B. Issues Pertaining to Assignments of Error

Does the court commit and abuse of discretion when it denies a brand new attorney a continuance of trial based upon the court's insistence that Jeanne Harris claimed she would be ready for trial if the court allowed her funds by which to hire an attorney, but the attorney hired suddenly announces his unavailability and then replaces himself with a brand new associate which could not have been anticipated by Jeanne Harris?
(assignment of error No.1)

Does the court commit and abuse of discretion when it conducts a hearing off the record and in chambers and then does not create any findings of fact or conclusions of law itself, but instead relies upon the prevailing party to create the order 13 weeks later and enters the order, but only after counsel for Jeanne Harris who was present at the off record hearing has left the case and cannot argue against the accuracy of the order?
(Assignment of Errors 2 & 3).

Does the court commit an abuse of discretion when it disallows Jeanne Harris from testifying as to the character and nature of her separate property which must be allocated during the trial as a discovery sanction

without making any findings which would support such an exclusion?

(Assignment of Error No. 4)

Does the court commit an abuse of discretion when it summarily mischaracterized severance pay as a community asset after denying Jeanne Harris the opportunity to present evidence that it was her income?

(Assignment of Error No. 4 & 5).

Does the court commit an abuse of discretion when it places the companion animal of four years owned by Jeanne Harris, with Roger Kell, when the testimony is clear that the animal has been the companion of Jeanne Harris, was purchased by her, registered to her and was never placed in the care of Roger Kell? (Assignment of Error No. 6)

Does the court commit an abuse of discretion when it fails to allow an opposing party the opportunity to correct the record and enter orders which are not consistent with the court's own findings? (Assignment of Error No. 7)

Does the court commit an abuse of discretion when it not only orders a judgment against Jeanne Harris, but specific allotted terms of payment, for which there is no statutory authority? (Assignment of Error No. 8)

Does the court commit an abuse of discretion when it directs Jeanne Harris to pay attorney fees to Roger Kell, despite the evidence presented that Jeanne Harris made much less than Roger Kell and did not have the ability to pay? (Assignment of Error No. 9)

Does the court commit an abuse of discretion when it assigns value to property without evidence in the record to support the numbers, fails to allocate the disposition of all property before it, miscalculates the value allotted to each party in its orders, and then allows orders to be entered over the objection of the non-moving party when the orders do not match the court's own findings? (Assignment of Error No. 10.)

Does the court commit an abuse of discretion when it allows a dissolution case to languish for four years because it fails to assign proper resources to hear the matter and repeatedly continues the trial due to "court congestion"? (Assignment of error No. 11).

C. Statement of the Case

Jeanne Harris and Roger Kell met in January of 2001. In May of 2001 Roger Kell moved in with Jeanne Harris. Jeanne was self employed in a consulting business and served as an elected official on the Vancouver City Council. CP 7. Between her two jobs, she made about \$4500.00 per month. Roger Kell worked out of a union hall and owned three rental houses in Cowlitz County. (CP 7-8). He eventually began working for Boeing earning over \$80,000 a year RP 418-419, 430-433.

Jeanne Harris married Roger Kell on May 3, 2003. They separated on May 31, 2008. The divorce was not finalized until July 6, 2012.

Throughout the proceedings delays were caused in bringing the matter to resolution due to reported "court congestion". Due to a request for a continuance by Mr. Kell, the court continued the trial from its original date in 2010, to May of 2011. The court then sua sponte continued the trial three more times, due to what it called, "court congestion" thereby extending the litigation into a four year battle. Trial was not held until April of 2012. (CP 1). The court blamed Jeanne Harris for the cost of litigation and ordered her to pay attorney fees to Mr. Kell. The court failed to make findings that she had the ability to pay or that Roger Kell had any need. CP 1451-55. Roger Kell moved for one continuance which was

granted, and the court set over the other trial dates because it could not

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handle its own caseload. This resulted in the parties waiting four years to obtain a decree. (CP 1446-1455). At the time of separation, Roger Kell was earning at least \$76,000.00 per year. CP 13. His tax return later revealed that he earned \$93,965.00. CP 36. During the period of separation, each party maintained their own home. Jeanne Harris purchased a dog and it resided with her during the entire separation. CP 1446-1455. At the conclusion of trial, the court awarded Jeanne's dog to Roger. CP 1451. In addition, throughout the case, discovery was drawn out for both sides. CP 200-207, 263-306, 1294-1322 . Jeanne Harris lost her insurance business and was given a severance package. CP 1269. The court misidentified her income as community property and divided this asset, giving a percentage to Roger Kell, despite Roger Kell making at least \$89,000.00 a year on his own, and his ownership of several rental properties. This amounted to an award of maintenance to the husband. CP 1512. On the day of trial, Roger Kell's attorney moved to exclude evidence which would show that Jeanne Harris's TPP payment from Allstate was income. RP 4. Jeanne Harris' new attorney had apparently not read the court file which was voluminous and was unable to counter that the document in question had been produced in court records the month prior to trial. (CP 1269). Citing what it believed was a discovery

violation, the court improperly excluded Jeanne Harris' 1099g from

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consideration by the court. RP 468. This resulted in the court mischaracterizing her income as a “community asset”. CP 1451-55. The court ordered the payment of this income, in its entirety to Roger Kell over the course of the next eleven months. CP 1512.

The primary issues in this case is the abuse of discretion by the court in its decision making, the miscalculation of values of property and debt in the final orders and the prejudice the court expressed toward Jeanne Harris.

D. Argument

In the area of domestic relations, the appellate courts have historically been loath to overturn trial court decisions. *In re Parentage of Jannot*, 149 Wn.2d 123, 126-28, 65 P.3d 664 (2003). Appellate Courts will overturn the trial court decision when it finds that an abuse of discretion has occurred. An abuse of discretion is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997) It is a decision based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Id. The trial court here abused its discretion at every level. A trial court

abuses its discretion if its decision is manifestly unreasonable or based on

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untenable grounds or untenable reasons. *In re the Marriage of Littlefield*, 133 Wn.2d 39,46-7,940 P.2d 1362 (1997). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Robinson v. PEMCO Ins. Co.*, 71 Wn. App. 746,753, 862 P.2d 614 (1993). Throughout this case, the trial court erred repeatedly against Jeanne Harris and denied her any meaningful opportunity for a fair outcome.

1. The court abused its discretion when it denied Jeanne Harris a Continuance of the trial.

At the time of trial Petitioner's counsel was participating in his first trial. He had requested a continuance so that he could properly prepare for trial. CP 1413-1414, 1476-78. The court apparently conducted a telephonic hearing which was not on the record, not recorded and no specific findings were issued by the court itself. (Appendix "A"). This resulted in Roger Kell's counsel preparing findings of fact on the motion which could not be substantiated by the later pro se Petitioner some 13 weeks after the

unrecorded hearing. CP 112, 1477,1656. The findings of the court were

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that the Petitioner had somehow assured the court that her new counsel would be prepared for trial and that was the reason for a denial of a continuance. CP 1477,1656. There is no mention in the findings that Jeanne Harris had been surprised that her attorney suddenly assigned a new associate to the case, which was a tactical decision outside of her control. CP 1476-1480. There would have been no prejudice to Roger Kell to continue the trial to allow the new attorney to get up to speed and prepare for trial. In fact, the attorney of record who had been hired by the Petitioner was not available for trial and he provided a substitute at the last minute. (CP 1413-14, 1477-79,1657). Mr. Ott had no prior trial experience (WSBA 43722), and was not capable of presenting evidence at trial which would substantiate the claims for relief of the Jeanne Harris. CP 1413-1414, when he came on board of the four year case a week before trial was to be heard. The continuance should have been granted so that the Jeanne Harris was in a position to present evidence at trial in support of her case. The court's error in not granting the continuance placed the new attorney in a Hobson's choice: Commit malpractice or abandon his client altogether. The new attorney did not have the ability to present evidence in the case in chief which would have secured better results for his client. CP 1413-14, 1477-79. He did not have the ability to review the case file, which was voluminous in nature, and in fact failed to

observe that the disputed 1099g which would be later excluded from being introduced at evidence of the character of the Allstate TPP payments had been provided to Roger Kell's counsel in March of 2012. (CP 1269). Based on this abuse of discretion, and that substantial justice has not been achieved, Jeanne Harris should be granted a new trial. In this case, there was no argument that Adam Dean had been hired to represent the Petitioner and that assertions had been made that Adam Dean would be prepared for the trial to go forward. CP 1378, 1657. What Jeanne Harris could not have anticipated would be for Adam Dean to substitute in, Mr. Ott, a brand new attorney who had never done a trial before, to complete a complex case which had been litigated for four years. CP 1413-14,1657. Understanding that he could not be prepared for trial in the amount of time he had to prepare, Mr. Ott moved the trial court to continue it. CP 1413-14,1657. The motion was not heard on the record and the arguments presented were not preserved for appeal. After the closed hearing off the record, the court issued no findings of its own as to the rationale. No order was entered until it was brought to Roger Kell's attorney's attention that no order denying the request had been entered; Mr. Ott had left the case by that time and there was no record by which the Petitioner could support her objections to the proposed order, which was entered thirteen weeks after the off the record telephone hearing was held. (CP 1477-

1478). Jeanne Harris was severely prejudiced by the lack of a continuance as evidenced by the fact her new attorney was not in a position to correct opposing counsel when she moved to exclude evidence which had been provided in discovery prior to trial. (CP 1269, RP 1-4) When Jeanne Harris appeared pro se to object to the entry of the order, the court cut her off; preventing Jeanne Harris from making a record. (RP 468-481). When Jeanne Harris attempted to inform the court that the final orders did not comport with the court's findings, the court refused to allow her to make any argument in support of her position. (RP 468-481).

2. The Trial Court Erred when it Mischaracterized the TPP Payout as Community Property

Prior to the trial, the court and the parties had misidentified the TPP payout as a property settlement rather than income. CP 693-698 1097-1100, 1371-1374. Not until the Petitioner had her accountant prepare her tax accounting that she was notified that the TPP payout was a severance package and it was 12 month's salary, for which she would pay income tax and not capitol gains. CP 1269. On the day of trial, the attorney for Jeanne Harris made a motion to allow the 1009g be produced in day two of trial. Rp 1-4. Roger Kell's counsel argued that because the evidence had not been provided to her, that the evidence should be excluded. She

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failed to advise the court that she had in fact received documentation, including the 1099g in discovery. RP 1-4, CP 611, CP1120. CP 1232. She improperly argued that the February 17, 2012 contempt order precluded the court from considering the evidence. Jeanne Harris' counsel was not aware that the 1099g had already been filed as part of Jeanne Harris' March 2012 motion to stop payments from going to Roger Kell's attorney. CP 1269, RP 1-4. Without the ability to correct the inaccurate statement of Roger Kell's attorney, the court suppressed entry of the 1099g in trial. "Sanctions are appropriate only when a party fails 'to obey an order to provide or permit discovery.' CR 37(b)(2)." In other words, obtaining an order to compel is mandatory before expecting any sanctions to be applied for failure to cooperate in discovery. *Chen v. State Farm Ins.*, 123 Wn. App. 150, 94 P.3d 326 (2004) "When the trial court 'chooses one of the harsher remedies allowable under CR 37(b), ... it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed,' and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial. *Snedigar v. Hodderson*, 53 Wn. App. 476, 487, 768 P.2d 1 (1989) 'it is an abuse of discretion to exclude testimony as a sanction [for

noncompliance with a discovery order] absent any showing of intentional

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nondisclosure, willful violation of a court order, or other unconscionable conduct.’ Fred Hutchinson Cancer Research Ctr. v. Holman, 107 Wn.2d 693, 706, 732 P.2d 974 (1987) (quoting Smith v. Sturm, Ruger & Co., 39 Wn. App. 740, 750, 695 P.2d 600, 59 A.L.R.4th 89, review denied, 103 Wn.2d 1041 (1985))”Magana v. Hyundai Motor America, 141 Wn. App. 495, 170 P.3d 1165 (2007); Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) “[We] hold that the reference in Burnet to the ‘harsher remedies allowable under CR 37(b)’ applies to such remedies as dismissal, default, and the exclusion of testimony—sanctions the affect a party’s ability to present its case—but does not encompass monetary compensatory sanctions under CR 26(g) or CR 37(b)(2). Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 690, 132 P.3d 115 (2006). In this case, the court was misinformed that the information had never been provided to Roger Kell. That was not true as the 1099g was in fact part of the court record as of March 2012. CP 1269. The court later made erroneous findings that Jeanne Harris’ characterization of the payment as a commission rendered her not credible. (CP 1437). Had the continuance been granted, Jeanne Harris’ counsel would have been able to substantiate her testimony that the money from Allstate was severance pay. Even if it had not been obvious to Roger Kell’s attorney that the 1099g was part of the court record. the remedy for a delay in receiving discovery, is in fact a

delay of the proceeding, not exclusion of the evidence. In fashioning the remedy for a discovery violation the record must look to three things: (1) the willfulness of the discovery violation; (2) the prejudice to the opposing party's ability to prepare for trial; and (3) whether a lesser sanction would have sufficed. *Burnet v. Spokane Ambulance*, 131 Wash.2d 484, 494-95, 933 P.2d 1036 (1997); If the court had given Jeanne Harris the continuance she had requested, the 1099g could have been fully vetted and compared to the previous discovery which had been submitted by Jeanne Harris on the status of the Allstate Payments. Mr. Ott would have been in a position to advise the court, that the 1099g had been provided to Mr. Kell's attorney nearly a month prior to trial. (CP 1269) and that Jeanne Harris' characterization of the nature of the property as income, was in fact - completely credible. Post-separation severance pay is separate property and should not have been given, in whole or in part to Roger Kell. Kenneth W. Weber, 19 Washington Practice, Family and Community Property Law, §11.19 (1997) *In re Marriage of Bishop*, 46 Wn. App. 198, 203, 729 P.2d 647 (1986). "Where pretrial discovery rules have been violated, the court may penalize the offender under CR 37. See Trautman, Discovery in Washington, 47 Wash. L. Rev. 409, 436 (1972). However, a trial court should not exclude testimony unless there is a

showing of intentional or tactical nondisclosure, of willful violation of a court order, or the conduct of the miscreant is otherwise unconscionable.” *Barci v. Intalco Aluminum Corp.*, 11 Wn. App. 342, 351, 522 P.2d 1159 (1974) The objecting party’s diligence is not a consideration in determining a sanction for discovery violations. *Roberson v. Perez*, 123 Wn. App. 320, 334, 96 P.3d 420 (2004) Jeanne Harris’ new counsel was unable to advise the court that the 1099g had been provided in discovery and that Roger Kell’s attorney had misinformed the court as to it never having been presented prior to trial. RP 468-481. The evidence indicated that the only other income to the Petitioner was \$1200.00 net per month from her part time job. RP 66. The Respondent made \$89,000.00 even after using his FMLA leave in 2011. RP 418-419, 430-433. None the less, the court ordered 60% of the Petitioner’s severance pay to be paid to the Respondent.(CP 1446-1455). This was error and an abuse of discretion. The court made specific findings that Jeanne Harris’ characterization of payment from the TPP payout, as commissions was not credible. This was not in accordance with evidence presented which showed the TPP payment as a Commission Payment. CP 1120-1126. 1166, 1269. This evidence was given to Roger Kell and he listed it on his ER 904 Statements. (CP 1232). Therefore it was not unreasonable for Jeanne

Harris to characterize her severance in the same manner as Allstate had

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and the court erred in labeling her testimony as incredible. The court further erred in prohibiting her from presenting evidence to support her statements. RP 468-481. Counsel for Roger Kell stated that she had not received any information on the TPP status, but in fact including the financial information in her ER 904 Statement. CP 382-394. CP 1232, 1269. She also had documents from Allstate regarding the severance as early as May of 2011. CP 611. Jeanne Harris submitted the 1099g as part of her reply to Respondent's Reply Motion/Declaration for an order to stop Temporary Payment to Respondent. CP 1266-1269. Roger Kell failed to notify the court that he had received these documents and incorrectly stated it had not been provided. RP 323-324, 396. The court ordered that payments received from Allstate be deposited into Roger Kells' attorney's trust account. CP 1098, despite the fact the severance pay was the separate property of Jeanne Harris. *In re Marriage of Bishop*, 46 Wn. App. 198, 203, 729 P.2d 647 (1986). The severance pay should have been determined to be the separate property of Jeanne Harris and awarded to her as her separate property. The statutory factors in RCW 26.09.080 are not limiting in the awarding of property and the trial court may consider other factors such as "the health and ages of the parties, their prospects for future earnings, their education and employment histories, their necessities and financial abilities, their foreseeable future

acquisitions and obligations, and whether the property to be divided should be attributed to the inheritance or efforts of one or both of the spouses.” *In re Marriage of Urbana*, 147 Wn. App. 1, 11, (2008); *In re Marriage of Zahm*, 138 Wn.2d 213, 218, 978 P.2d 498 (1999); *In re Marriage of Olivares*, 69 Wn. App. 324, 329, 848 P.2d 1281 (1993) “[T]he economic circumstances of each spouse upon dissolution [are] of paramount concern.” *In re Marriage of Gillespie*, 89 Wn. App. 390, 399, 948 P.2d 1338 (1997); *In re Marriage of Chavez*, 80 Wn. App. 432, 439, 909 P.2d 314, review denied, 129 Wn.2d 1016 (1996) *In re Marriage of Olivares*, 69 Wn. App. 324, 330, 848 P.2d 1281 (1993). “Future earning potential ‘is a substantial factor to be considered by the trial court in making a just and equitable property distribution.’ *In re Marriage of Rockwell*, 141 Wn. App. 235, 248, 170 P.3d 572 (2007); *In re Marriage of Hall*, 103 Wn.2d 236, 248, 692 P. 2d 175 (1984). At the time of trial it was established that the Jeanne Harris was making \$1200.00 per month from her part time employment and had no other income.RP 66. Roger Kell was making \$89,000.00 per year. RP418-419, 430-433. Yet the court mischaracterized Jeanne Harris’ severance pay as community property and transferred Jeanne Harris’ entire Allstate income to Roger Kell, who established no need for maintenance and there was no establishment That

Jeanne Harris had the ability to pay for it. RP 418-418, 430-433. Because

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Jeanne Harris was not allowed the ability to present evidence of its true character, the court misidentified the TPP payout as property and not severance pay not subject to division by the court. RP 468-481. At the beginning of the trial, the new attorney Mr. Ott properly asked the court to allow testimony regarding the characterization of the TPP payout. RP 1-11. He asked for the court to allow him to present the 1099g, on day two of trial. Roger Kell's counsel moved to have the evidence excluded and not considered claiming that it had not been produced prior to trial in violation of discovery orders. That clearly was inaccurate information in that the 1099g was part of Jeanne Harris' reply motion submitted to Roger Kell's counsel in March of 2012. (CP 1266-1269). The 1099g was CP 1269. The court granted Roger Kell's motion, but allowed testimony from Roger Kell on the TPP Payout, which characterized it as property and not income. RP 323-324. Mr. Ott, brand new to the case and perhaps to family law, obviously did not know he had the opportunity to present rebuttal evidence and that rebuttal evidence would not fall under the exclusions. Had he been allowed the continuance he requested, he would have discovered that the 1099g form had been previously disclosed to opposing counsel and a part of the court file. (CP 1269). So therefore, but for the unpreparedness of the attorney, which he recognized and sought

relief from the court on, Jeanne Harris would have been able to present her

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evidence of the TPP Payout being income, and the 1099g, as rebuttal evidence to the Roger Kell's claim it be deemed property and not income. Mischaracterization of separate property may require remand. Kenneth W. Weber, 19 Washington Practice, Family and Community Property Law, §32.9 (1997); *In re Marriage of Skarbek*, 100 Wn. App. 444, 450, 997 P.2d 447 (2000); *In re Marriage of Brewer*, 89 Wn. App. 425, 428, 949 P.2d 404 (1998); *In re Marriage of Hurd*, 69 Wn. App. 38, 848 P.2d 185, review denied, 122 Wn.2d 1020 (1993). In his ER-904 exhibits, Roger Kell presented his own evidence as to the true nature of the TPP award as income. CP 1232 #119. His attorney was aware that the 1099g was in fact submitted to the court in a reply motion and misled the court asserting it was a discovery violation despite her awareness that the 1099g existed in the court file and had been provided to her nearly a month before trial. (CP 1269). To exclude such essential evidence from the trial was error and resulted in the award of maintenance to a spouse who had no need, and the transfer of Jeanne Harris' severance pay – her separate property – to her husband.

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3. **The Trial Court Erred when It Allowed Orders To Be Entered that
Were not Consistent With Its Findings and Created a
Disproportionate Distribution of Property.**

The court essentially prepared its own findings, CP 1446-1455. When the Findings of Fact and Conclusions of Law were reproduced by Roger Kell's attorney, Jeanne Harris objected because they did not match the court's own allocations of property and debt. RP 468-481. The court improperly prohibited Jeanne Harris from making a record that the documents had been prepared in error, and failed to correct the mistakes contained in the paperwork. RP 468-481. The court failed to recognize that the Sunterra property which it valued at \$2000.00, (CP1446-1455), was valued at \$4000.00 in the proposed new findings. CP 1482. It was then valued at \$8000.00 in the Decree. The court valued the Cornell Pension Plan at \$15,756.00 at date of marriage. CP1451, however the Findings showed a value of \$23,870 at time of marriage. CP 1487. The Court valued the EE portion of the Cornell Pension Plan at \$1896.00 at time of marriage, yet the findings filed with the court show a value of \$3879.00 at time of marriage. (CP 1451, 1487). The court valued the Alcoa Pension at \$5590, but the decree values it at \$45950.00 CP 1443,1503. The court found that the Husband's Kraft 401K was valued at \$10,126.00 and should be divided equally. (CP 1450). The balance sheet

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attached to the decree improperly values it at \$8010.00 CP 1515. The decree awarded the 401K to the husband with a value of \$8010.00, not the \$10,126.00 valued by the court. (CP 1503).

In the Court's findings, the Boeing Pension was valued at \$6768.00. The court stated that \$4262.00 was the husband's separate property. (CP 1451). The court makes no mention in the findings how the Savings plan is to be distributed, however the decree states that the husband receives the Boeing Pension valued at \$11,030 (not \$6758.00) and that he also receives all of the Boeing Savings Plan valued at \$32,651.00 (CP 1503). The balance sheet attached to the decree does not match these figures provided by the court and there is no explanation for why they differ. CP 1515. Other than being listed on the ER 904 of Roger Kell (CP 1232 #125), there is no discussion of when that asset was first obtained, how much was community or separate property. Mr. Kell testified that he felt that contributions to the savings plan post separation should be his, but a numerical value was not given. RP 299-300. Given that the court divided the Boeing Pension plan as community property, the savings plan should have been given a similar disposition. CP 1446-1455. It was error for the court not to dispose of this asset properly in its order and for Roger Kell to claim it in its entirety in the decree. A trial court's failure to give a

valuation of property over which there is a dispute about value is reversible error because it would otherwise make appellate review impossible. *In re Marriage of Greene*, 97 Wn. App. 708, 712, 986 P.2d 144 (1999); *In re Marriage of Hadley*, 88 Wn.2d 649, 657, 565 P.2d 790 (1977) The law favors characterization of property as community property “unless there is clearly no question of its [separate] character.” Harry M. Cross, *The Community Property Law in Washington* (Revised 1985), 61 WALR 13, 28 (1986)*In re Marriage of Davison*, 112 Wn. App. 251, 258, 48 P.3d 358 (2002); *In re Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). Here the court made no finding in the record of how much of the Boeing Savings Plan belonged to the husband as his separate property, but the husband’s attorney awarded the full amount to the husband in the decree.

The court made findings that the Lincoln Life Benefit was valued at \$1329.00 and should be divided equally among the parties. CP 1451. In the decree this asset was assigned to Jeanne Harris. (CP 1498-1520). The court valued the Pacific Guardian Life Policy at \$1627 to be divided equally. CP 1451. In the decree it is awarded to Jeanne Harris. CP 1505.

The court found that the Sunterra Property was owned as 91 points by

Jeanne Harris prior to marriage and that she purchased another 105 points

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during the marriage. It assessed a total value of \$2000.00. CP 1449. The Decree mistakenly states that the wife was awarded 196 points, purchased during the marriage and valued at \$8000.00. CP 1505. The balance sheet attached to the decree appoints a value to Jeanne Harris of \$4000.00. CP 1515. The court found that the husband would be entitled to 50% of the wife's PERS II account, valued at \$22,728 at time of separation. CP 1451. The Decree awards 100% to Jeanne Harris without explanation. CP 1505, The balance sheet apportions her \$11,364.00. CP 1515. It is no wonder that Jeanne Harris struggled to explain to the court that she opposed entry of orders which were confusing and not consistent with the court's ruling and where the documents conflicted with each other. RP 468-481, CP 1446-1455.. It was an abuse of discretion for the court not to allow her to correct the record and enter orders consistent with the court's own ruling. It was an abuse of discretion to award the majority of property and assets to the husband. Unjustifiably disproportionate awards are subject to reversal. *In re Marriage of Tower*, 55 Wn. App. 697, 780 P.2d 863 (1989), review denied, 114 Wn.2d 1002 (1990); *In re Marriage of Pea*, 17 Wn. App. 728, 566 P.2d 212 (1977); *Wills v. Wills*, 50 Wn.2d 439, 312 P.2d 661 (1957), the court reviewed the documents provided by Roger Kell's counsel and distributed property in a prejudicial manner against Jeanne

Harris. This was an abuse of discretion and subject to reversal by the Appellate Court.

4. **The court, without specificity, made a finding that \$42,000.00 of community property was dissipated by the Petitioner's filing for bankruptcy.**

The court does not delineate how it came up with this figure or what the property was which was allegedly dissipated.(CP 1440, 1446-1455,1630). The decree simply states that “community property” was discharged. This was error. The court directed that the Petitioner pay debts which had been discharged in bankruptcy which is contrary to law. CP 1512. While the court could make an equitable distribution of remaining property, the court re-assigned a debt to the Petitioner which had been discharged in bankruptcy.CP 1446-1455. It is not known what the court is referring to when it says that approximately \$42,000.00 in community property was discharged in bankruptcy. CP 1446-1455. This is a misstatement of law. Only debts can be discharged in bankruptcy. CP 1512. Roger Kell cannot be entitled to \$15,000 of a community asset discharged in bankruptcy. CP 1512. This order of the court is both confusing and is not supported in law.

5. **The court abused its discretion when it valued the Community**

Property Distribution.

The court gave no explanation for its determination that a pension plan which was valued at \$27,197 at date of separation, and valued at \$15,756.80 at date of marriage (showing a value of \$11,441) to the community had a reduced community value of \$3320.00 CP, 1384, 1441, 1641-42. This was error. There was no explanation as to how the court came up with this math. Additionally, the finding also indicates the Boeing employee plan was valued at \$6715 at date of separation, and \$1896 at date of marriage. (showing a community value of \$4819) but was valued by the court at only at \$2836.00 when final orders were entered. This was error. The two values owned by the community equal \$11,441 plus \$4819 for a total of \$16,260.00 and that is the number that should have been divided. The wife was entitled to \$8130.00 as her portion of the community asset. As to the wife's PERS II plan, the court failed to take date of marriage and date of separation values into consideration and summarily determined that the community was entitled to 50% of the value as of the date of separation 1446-1455. The court should have used the date of marriage and date of separation values to calculate the community's ownership of the plan and to guesstimate its value was error.

6. The Court abused its discretion when it ordered the transfer of

Jeanne Harris's dog to Roger Kell

The Court directed the dog Lily to be turned over the Respondent,(CP 1622) despite testimony that the dog had been in the Petitioner's care for four years and there was conflicting testimony over whether the dog was originally purchased as a gift by the Petitioner for the Respondent.RP 56-62, 67, 338-339, 425. There was no argument that the dog was purchased by the Petitioner, that it was registered in her name and that she had developed a strong bond over the four years she was the sole provider for the animal. CP 317, 321. RP 52-62, 67. Roger Kell had no contact with the dog after he moved out of the home in 2008. RP 338-339, CP 235. There was no argument that the Respondent had purchased his own dog since separation.RP 338-339, 425. CP 317. The court abused its discretion when it made a finding that "Petitioner owned several Yorkies before marriage and demonstrably loves dogs. Lily was purchased during the marriage. After separation Respondent (Roger Kell) purchased another Chihuahua, Phoebe. At one point during the period of separation, Petitioner (Jeanne Harris) had difficulty paying a vet bill and her mortgage. Given the circumstances, Lily is awarded to the Respondent. (Roger Kell)". There was no justification to taking the wife's dog, whom

she had loved and cared for solely, especially in the four years since

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separation and summarily handing it over to the husband who had obtained his own dog, post separation. The trial court should have considered sentimental value in fashioning a just and equitable property distribution of Lily. Washington State Bar Association, Family Law Deskbook 2nd Ed., § 31.2(3) at 31-4 (2000). It was error for the court to tear away Jeanne Harris' companion of four years.

7. **The Court abused its discretion when it assigned a payment plan with specific payments from the Petitioner to the Respondent.**

The decree of dissolution provides for a \$35,000 judgment against Jeanne Harris. CP 1618. The language of the judgment also mandates that Jeanne Harris shall pay no less than \$500 per month commencing 7/01/2012 (CP 1618, line 13). There is no authority in law for the court to assign a payment plan. While it is acceptable to give a judgment to a party in a dissolution, there is no authority, absent an agreement to put forth a payment plan to be enforced by the court. A judgment comes with its own remedies. In addition, nothing in the court's findings authorized such a payment plan in the decree. CP1446-1455. This language was arguably added by Roger Kell without court authority. CP 1446-1455. When Jeanne Harris attempted to argue against the improper language of the

order, the court cut her off mid-sentence and refused to allow her to voice

her concerns regarding the order. (RP 468-481. Additionally, the court awarded all of Jeanne Harris's severance pay to be given to Roger Kell (CP1630) to satisfy a judgment. This was an improper award of her income to the husband.

Findings of fact and conclusions of law should be sufficient to suggest the factual basis for the ultimate conclusions. Groff v. Department of Labor & Indus., 65 Wn.2d 35,40,395 P.2d 633 (1964); (A trial court is required to create an adequate record of the proceedings for appellate review); In re LaBelle, 107 Wn.2d 196, 219, 728 P.2d 138 (1986) (citing Maehren v. Seattle, 92 Wn.2d 480,487-88, 599 P.2d 1255 (1979) (trial court must establish and set forth the existence or nonexistence of determinative factual matters), cert. denied, 452 U.S. 938 (1981)). Inadequate written findings may be supplemented by the trial court's oral decision or statements in the record. LaBelle, 107 Wn.2d at 219 ; State v. Black, 100 Wn.2d 793, 802, 676 P.2d 963 (1984). At the entry of the final findings and decree, Jeanne Harris requested to go through the orders line by line because she disagreed with the orders and this was rejected by the court. RP 468-481. This resulted in the findings and decree being entered over the objections of Jeanne Harris. It was an error of law to not allow Jeanne Harris to make a record of her objections to the entry of the final orders.

When Jeanne Harris attempted to object to inaccuracies in the record, the court cut her off completely and refused to allow her to voice her objections in the following dialogue:

Judge: Okay. I think it's as of the signing of the Order – as of when the Findings were made.

JH: So tell me that again because there's different dates throughout this entire thing. So you're saying as of April 4th and 5th, is that correct?

Judge: That's right. That's when I made my Findings.

JH: I'm sorry. I couldn't hear you because the man coughed. What did you say?

Judge: WOW! WOW!

JH: I'm sorry.

Judge: Time out! Time out! Time out!

JH: I'm sorry.

Judge: I'm signing the Order. If you want to submit your objections in writing, please do so –

JH: I'm sorry.

Judge: - I'm signing the Order. That's way out of line. And at this point there's been objections made – not a single one has a basis – at least in my mind. (RP 480-481).

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8. **The court abused its discretion when it awarded attorney fees to Roger Kell and Failed to Conclude the Case for Four Years.**

The court awarded Roger Kell \$6,500.00 in attorney fees to be paid by Jeanne Harris. (CP 1446-1455, 1629). Under RCW 26.09.140, the trial court may award attorney fees to either party. *Spreen v. Spreen*, 107 Wn. App. 341, 351, 28 P.3d 769 (2001). In determining whether it should award fees, the trial court considers the parties' relative need versus ability to pay. After considering the financial resources of both parties, the trial court has discretion under RCW 26.09.140 to award attorney fees. *In re Marriage of Stenshoel*, 72 Wn. App. 800, 813, 866 P.2d 635 (1993). The trial court must balance the needs of the spouse requesting them with the ability of the other spouse to pay. *Id.* Attorney fees were not based on need an ability to pay. The testimony during trial was that the Jeanne Harris made \$1200.00 per month, and Roger Kell made \$89,000.00 gross in 2011. RP 66, 418-419, 430-433. The court previously ordered the husband to pay maintenance to the wife of \$1500.00 per month. CP 261. He was also ordered to pay \$3000.00 of her attorney fees. CP 262. Roger Kell then filed a motion requesting that the maintenance be reduced, which the court granted. CP 380. Roger Kell was still required to pay Jeanne Harris \$1000.00 per month. CP 380. After numerous delays in getting to trial, Roger Kell brought a third motion to reduce maintenance

which was granted June 23, 2011. CP 504. No attorney fees were awarded to either party. CP 504. Despite testimony regarding the disparity of the income of the parties, the court directed that the Jeanne Harris pay a portion of the Roger Kell's attorney fees. This was improper in that Roger Kell's counsel argued that there were several motions heard by the court which did not result in a favorable ruling for Jeanne Harris. She failed to note that in those cases, attorney fees had already been granted to Roger Kell. CP 1223-26, CP 1127. Both parties spent in excess of \$50,000.00 in attorney fees in the case, despite the disparity in their income. (CP 1653). A trial court may consider whether legal fees were caused by one party's intransigence and award attorney fees on that basis. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120, review denied, 120 Wn.2d 1002 (1992). However, in order to do so, the court must find facts sufficient to support the conclusion. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). When Jeanne Harris filed and lost motions, she was previously ordered to pay attorney fees. (CP 1653, CP 1099, CP 1371, CP 1375). The court made no mention of the fact that Roger Kell was intransigent himself in that he received discovery demands in August of 2008 and by January of 2009, nothing had been received by Jeanne Harris. CP 13. Jeanne Harris had to file her own motion to

compel to obtain discovery February 2, 2009. CP 200. The court erred

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when it stated that Jeanne Harris, “*doggedly* abused the discovery process and has been found in contempt for that abuse, which dramatically increased attorney fees”. CP 1442. The case record shows that the trial was set in this case on June 11, 2010, September 7, 2010, May 24, 2011 and August 19, 2011. None of the cancellations of the trial were at the behest of Jeanne Harris. One was requested by Roger Kell (CP 1413-1415), the remaining dates were cancelled due to “Court Congestion”. CP 340, 396- 397, 503-504, 1476 . Despite the cancellations by the court numerous times, the only one continuance requested by Jeanne Harris was denied. CP 1477-1478. One of the real reasons for the increase in litigation fees was the failure of the court to conduct the trial in a timely manner. There were no findings made on the record by the court as to what caused “court congestion” but suffice it to say that to allow a contested dissolution to languish for four years, was in and of itself an abuse of discretion of the court. Additionally, the majority of motions filed in the case, were filed by Roger Kell’s attorney CP 326-311, 1206-1208, 1418-1420, 308-313, 341-347, 397-405, 1413-1415, 1456-1457. Both sides submitted motions to compel discovery during the course of the litigation. CP 326-331, 263-306, 200-227. The court’s summary statement regarding Jeanne Harris is not supported by the evidence. Additional fees were not warranted and were an abuse of discretion.

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E. **Conclusion**

Jeanne Harris moves this court to:

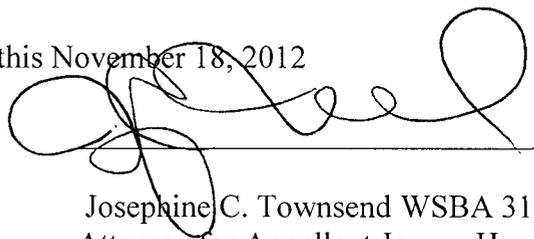
1. Vacate the findings of fact and conclusions of law and final decree;
2. Remand the case for a new trial with a new judge;
3. Disgorge Jeanne Harris' separate property (TPP severance pay) from Roger Kell and have it returned to her pending further proceedings;
4. Return Lily to Jeanne Harris
5. Award Jeanne Harris attorney fees for having to bring this appeal

Upon a request for fees and costs, this court will consider the parties' relative ability to pay and the arguable merit of the issues raised on appeal.

In re Marriage of Leslie, 90 Wn. App. 796, 807, 954 P.2d 330 (1998).

This Court should award attorney fees to Jeanne Harris pursuant to RCW 26.09.140 and RAP 18.1.

Respectfully submitted this November 18, 2012



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LICENSED IN WASHINGTON & OREGON

October 17, 2012

Cowlitz County Clerk's Office
Attn: Karen Unruh
312 SW 1ST Avenue, Room 233
Kelso, WA 98626

RE: Harris/Kell
08-3-00609-8

Dear Ms. Unruh:

This letter is to confirm our email and telephone requests for a video or audio of the hearing held on April 2, 2012 for docket number 220 (motion by Petitioner to continue trial) and that you have responded that you have no record available.

Please sign below in the space provided. I have included check # 11241 to pay for the clerk's services fee.

Thank you for your courtesies.

Sincerely,

Judy L. Fryer
Paralegal
Josephine C. Townsend, Attorney

Confirmed that no record is available for docket No. 220 (motion by Petitioner to continue trial)

Print: KAREN Y. UNRUH

Title: Bookkeeper

APPENDIX A

TELEPHONE: 360- 694-7601
FACSIMILE: 360-694-7602
JCTOWNSEND@AOL.COM

CERTIFICATE OF SERVICE

I hereby certify , that on this date, I served the attached Amended statement of arrangements VIA email (PDF) to

Noelle A. McLean PS
Attorney At Law
206 West Main Street
P.O. Box 757
Kelso WA 98626

via U.S. Mail and PDF onto:

Valerie A. Villacin
Catherine W. Smith
Attorneys At Law
Smith Goodfriend P.S.
500 Watermark Tower
1109 First Avenue
Seattle WA 98101

VIA U.S. Mail onto

Court Of Appeals
Division II
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