

No. 43788-1

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

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DEPUTY

JEANNE HARRIS,

Appellant/Cross-Respondent,

vs.

ROGER KELL,

Respondent/Cross-Appellant.

APPEAL FROM THE SUPERIOR COURT  
FOR COWLITZ COUNTY  
THE HONORABLE MICHAEL EVANS

BRIEF OF RESPONDENT/CROSS-APPELLANT

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## **I. INTRODUCTION**

Appellant Jeanne Harris challenges virtually every discretionary decision made by the trial court in resolving this prolonged divorce – from its award of \$6,500 in attorney fees because of Harris’s abusive litigation to its decision that Lily the Chihuahua should live with respondent Roger Kell. The trial court fairly exercised its discretion in dissolving this short-term marriage and in dividing the parties’ modest estate. This court should affirm and award attorney fees to Kell for having to respond to this appeal. Only if this court remands to the trial court on any of the issues raised by Harris, Kell asks this court to correct the trial court’s errors in failing to award statutory interest on the judgment awarded to him, and in ordering him to reimburse Harris for “rent” for the period that the parties lived in Harris’s separate property home even though the mortgage was paid with community funds.

## **II. RESTATEMENT OF THE CASE**

Harris makes 11 assignments of error (App. Br. 1-2), but does not challenge any findings of fact. RAP 10.3(g) (“a separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number”). The trial court’s findings are thus verities on appeal.

*Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999).

The following statement of facts is based on the trial court's unchallenged findings and the evidence presented at trial:

**A. Kell Worked As An Electrician During The Parties' Short-Term Marriage While Harris Pursued Her Political Career.**

Respondent Roger Kell and appellant Jeanne Harris were married on May 3, 2003 and separated on May 31, 2008. They have no children. (FF 2.4-2.5, 2.16-17, CP 1482, 1495; RP 81) Kell is an electrician; he worked for Kraft/Nabisco and Boeing during the marriage. (RP 286-91, 429) As he had before marriage, Kell contributed to 401(k) pension and savings plans at his employers. (FF 2.8.E-G, CP 1483; RP 210-12, 289-92, 301-06) Kell also owns and maintains several rental properties that he acquired before marriage; the rent from these properties barely covers their mortgages. (FF 2.9.A-B, CP 1485; RP 432-33)

Harris owned a consulting company and was a City of Vancouver Councilwoman when the parties married. (FF 2.12.C, CP 1494; RP 22, 85) Harris earned \$4,500 a month between her two jobs and participated in a PERS II pension. (FF 2.8.J, 2.9.E, 2.12.C, CP 1483, 1489, 1494; RP 91, 110-11) In 2004, Harris

unsuccessfully ran for Clark County Commissioner. (RP 30) Harris still serves as a City Councilwoman. (RP 66)

Prior to marriage, the parties maintained separate residences. (RP 187) During the marriage, the parties lived in Harris's home. (FF 2.9.A, CP 1488-89; RP 187) From their community earnings, Harris paid the mortgage and Kell paid utilities and purchased food. (FF 2.9.A, CP 1489; RP 187, 405-06) Kell also made substantial improvements to Harris's home, installing a fish pond, replacing the backyard fence, and extending the backyard deck. (FF 2.9.A, CP 1489; RP 77, 153, 244-65, 410-11)

The parties kept their finances largely separate both before and during marriage, with the notable exception of a joint Bank of America credit card to which only Harris had access. (FF 2.9.M, 2.9.F, 2.10.B, 2.11, CP 1487-94; RP 84, 187-89) The parties had several dogs, including Lily the Chihuahua, who was purchased during the marriage. (FF 2.8.V, CP 1484; RP 338-39)

Throughout the marriage, the parties used a timeshare that operated on a "point" system. (FF 2.8.A, 2.9.B, CP 1482, 1489; RP 268-69) Harris owned 91 points prior to the marriage; the parties purchased 105 more points during the marriage. (FF 2.8.A, 2.9.B, CP 1482, 1489; RP 268-69)

**B. Harris Started An Allstate Insurance Agency Branch In 2006. In 2011, Allstate Redeemed The Agency In Exchange For Monthly Buyout Payments.**

In 2006, Harris started the Harris Insurance Group Company through Allstate Insurance. (FF 2.8.B, CP 1482-83; RP 33-34, 320; Ex. 2A(3)) Harris testified that she often paid for business expenses with her personal credit card or paid for personal expenses with the business credit card. (RP 40-42) The trial court found that Harris commingled her personal and business affairs through the community business. (FF 2.8.B.2, CP 1482-83)

In March 2009, nearly a year after the parties separated, Harris executed two promissory notes intended to “align” the expenses for tax purposes, purportedly on the advice of her accountant. (FF 2.8.B.2, CP 1482-83; CP 1449-50; RP 41-42; Ex. 2A(6)) The community business executed a \$42,011 promissory note in favor of Harris, for business expenses purportedly paid on Harris’s personal credit card, obligating the community business to pay Harris \$1,000 per month. (FF 2.8.B.2, CP 1482-83; CP 1449-50; Ex. 2A(6); RP 42) Harris executed a \$42,517.20 note in favor of the community business, for Harris’s personal expenses purportedly charged to the business credit card, obligating Harris to

pay the company \$50 per month. (FF 2.8.B.2, CP 1482-83; CP 1449-50; Ex. 2A(6); RP 42)

Kell was unaware that Harris had executed these promissory notes. (RP 321) However, after a review of Harris's bank accounts, Kell was able to confirm that Harris had indeed drained \$42,517 from the community business, which was the basis of the \$50/month note in favor of the company. (RP 322) In addition, Harris transferred \$23,000 to her separate personal account from the community business between April 2009 and May 2010, again without Kell's knowledge, apparently based on the \$1,000/month note in favor of Harris. (FF 2.8.B.2.a, CP 1482-83; RP 321)

Harris successfully ran the business until the recent economic downturn. Without Kell's knowledge, Harris attempted to sell the business for nearly \$200,000 after the parties were separated, but no others were made. (RP 320-21; Ex. 1A(14)) As payment for Harris's "economic interest ... in your Allstate customer accounts," Allstate redeemed the agency by agreeing to pay Harris almost \$67,000 in "TPP" monthly buyout payments of \$5,562.31 beginning in November 2011 and ending in October 2012. (FF 2.8.B.3, CP 1483; CP 567, 605, 1450; RP 323; Ex. 2A(1); Ex. 2A(3) at 7)

**C. After The Parties Separated, Harris Accumulated Massive Credit Card Debt, And Eventually Filed For Bankruptcy.**

When the parties married in 2003, Harris had separate credit card debt of nearly \$16,000. (FF 2.10, CP 1490) In 2004, Harris transferred over \$10,000 of her separate debt onto the community's sole credit card. (RP 380-82) After the parties separated in May 2008, Harris accumulated tens of thousands of dollars in additional credit card debt. (FF 2.11, 2.12.C, CP 1493-94; RP 367-90)

In February 2011, Harris filed for bankruptcy. (FF 2.12.C, CP 1494; RP 83) Among other debts, Harris sought to discharge the \$42,000 note she still owed to the community business. (FF 2.8.B.2.b, 2.11, CP 1483, 1494; CP 1450; RP 322) The bankruptcy relieved Harris of an "astronomical" amount of debt, and she emerged better positioned financially after separation than before. (FF 2.12.C, CP 1494; CP 1448; CP 542-43) As a result of Harris's bankruptcy, Bank of America is now seeking to recover over \$15,000 from Kell for credit card debt incurred solely by Harris during the marriage. (FF 2.10.B, CP 1490; CP 1454; RP 385)

**D. Procedural History.**

**1. Kell Paid 39 Months Of Maintenance For A 60-Month Marriage Based On Harris's Flagrant Concealment Of Income.**

Harris petitioned for dissolution on November 19, 2008. (CP 1-5) On March 17, 2009, Cowlitz County Superior Court Judge James Warne ordered Kell to pay Harris \$1,500/month in temporary maintenance and \$3,000 for attorney's fees. (CP 260-62) The court restrained both parties from disposing of any property worth more than \$1,000 except as necessary, and required notice be given to the other party upon such disposition. (CP 261) In seeking temporary maintenance, Harris did not disclose to Kell or the court that she was withdrawing \$2,000 a month from the community business in addition to her \$1,260/month salary from the business, and the \$1,744/month Harris was paid as a City Councilwoman. (CP 26; RP 121, 319-20, 395)

In total, Harris had over \$6,500 in income available to her every month. Meanwhile, Kell worked substantial overtime and discontinued payments into his Boeing 401(k) in order to pay the court-ordered temporary maintenance. (RP 292, 297, 306-08) On October 15, 2010, Judge Warne decreased temporary maintenance

to \$1,000/month based on its belief that “the petitioner is making more money than she has disclosed.” (CP 379-80)

Harris also never told Kell that she had filed for bankruptcy. (RP 395-96) Although her monthly expenses decreased by over \$2,200 after her credit card debts were discharged, Harris did not notify Kell or the court that her financial circumstances had changed. (RP 396) After finally learning of Harris’s bankruptcy discharge, Kell moved for a second reduction in temporary maintenance. (CP 397-402) Cowlitz County Superior Court Judge Michael Evans (“the trial court”) reduced Kell’s maintenance obligation to \$775/month effective June 13, 2011. (CP 503-04, 542-43) The trial court further reduced maintenance to \$500/month on September 27, 2011, and to \$250/month on December 19, 2011. (CP 695-97, 1097-1100) Kell continued to pay maintenance until trial. (FF 2.12.D, CP 1494)

**2. The Trial Was Continued Multiple Times Due To Court Congestion And Health Concerns Of Harris’s Attorney And Kell.**

The parties’ initial mandatory settlement conference was scheduled for June 24, 2010. (CP 399) Harris’s attorney continued the conference twice because of an eye surgery. (CP 399)

After settlement discussions failed, the case was set for trial on February 15, 2011. (CP 340, 399) The trial date was continued until May 2011 because of court congestion. (CP 395, 399) On May 19, 2011, a commissioner granted Harris's motion to continue the trial date to August 23, 2011. (CP 396) The August trial date was then continued after Kell was diagnosed with cancer and needed to undergo chemotherapy. (CP 1319; RP 313-14)

Trial was finally set for April 4, 2012 – nearly 2 ½ years after Harris filed her petition. On March 27, 2012, at Harris's request, the trial court awarded \$2,500 to each party's attorney from community funds. (CP 1378) Harris assured the trial court she would use the funds to retain an attorney, and that she would be ready for the April 4 trial. (CP 1325-28, 1477-78) On March 30, 2012 – three days after being awarded the funds that she requested, and five days before trial - Harris moved for a 4-week continuance, arguing that her newly retained counsel needed additional time to prepare. (CP 1413-15) The trial court denied the motion. (CP 1477-78)

**3. The Trial Court Excluded Testimony From Harris Regarding The Character Of The Allstate Buyout Because Of Her Repeated Abuse Of The Discovery Process.**

The trial court found that Harris had “doggedly abused the discovery process.” (FF 2.15.C, CP 1495) Most pertinently, Harris refused to respond to Kell’s discovery requests regarding the Allstate buyout, and then failed to comply with two orders requiring her to produce documentation relevant to the Allstate buyout. (CP 695-97, 750-52) On February 17, 2012, the trial court entered a third order finding Harris in contempt for “willfully” violating the trial court’s earlier order by retaining funds from the Allstate buyout (CP 1222-26; FF 2.8.X, CP 1484), and as a condition of purging contempt ordered Harris to “provid[e] documentation as to the basis of the Allstate Insurance buyout . . . no later than 2/24/2012.” (CP 1225) Harris never provided the documentation. (FF 2.8.B.3, CP 1483; RP 396)

On the first day of trial, the trial court excluded testimony from Harris regarding the character of the Allstate buyout payments because of her failure to comply with the three orders requiring production of documentation establishing the basis for the payments. (RP 4-12) The trial court rejected Harris’s offer to

provide the court an IRS 1099 form from Allstate the next day because “It’s too late. We’re – we’re at trial today.” (RP 12) Harris did not request or make an offer of proof what her testimony would have been.

**4. The Trial Court Entered Extensive Findings Explaining The Basis For Its Property Division.**

Following a two-day trial, the trial court issued a memorandum decision on April 26, 2012 outlining its contemplated division of property. (CP 1436-45) The trial court entered an amended decision the following day. (CP 1446-55) In its amended decision, the trial court found that Harris, and in particular her testimony regarding her handling of the Allstate buyout funds, was not credible. (CP 1447)

Presentation of Kell’s proposed findings and decree was scheduled for July 6, 2012. Cowlitz County Local Rule 88(d) requires a party to submit written objections to proposed orders not less than two days before the hearing. Harris did not submit written objections and instead appeared pro se at the July 6 hearing to object to the findings. (RP 468) Although the trial court listened to Harris’s objections, it eventually discontinued the hearing and invited her to submit written objections to the findings. (RP 481)

In the meantime, the trial court entered its findings of fact and conclusions of law and its decree dissolving the parties' marriage. (CP 1481-1520)

The trial court's findings documented in detail its property division, which was intended to be approximately equal. The trial court awarded Harris \$10,500 in "reimbursement of rent," finding that Harris's expenditures on the mortgage "were unequal" to Kell's expenditures on food and utilities. (FF 2.9A, CP 1488-89) The trial court awarded Kell \$15,000 for Harris's waste and "dissipation" of the community business assets, including the \$42,000 debt that Harris owed to the business. (FF 2.8.B.2.b, CP 1483) The trial court awarded sixty percent of the remaining Allstate buyout payments to Harris and forty percent to Kell. (FF 2.8.B.3, CP 1483) The trial court awarded each party the pension plans in their names. (FF 2.8.E-J, 2.9.F-K, 2.9.E, CP 1483, 1487, 1489, 1515) The trial court valued the timeshare points acquired during marriage at \$4,000 and the points held by Harris prior to marriage at \$4,000 and awarded them all to Harris. (FF 2.8.A, FF 2.9.B, CP 1482, 1489) The trial court awarded Lily the Chihuahua to Kell. (FF 2.8.V, CP 1484)

The trial court denied Harris further spousal maintenance, finding that she had already received 39 months of maintenance after a 60-month marriage, and “is in a reasonably similar position today as she was the date of marriage.” (FF 2.12.C, CP 1494) Based on its finding that Harris had “doggedly abused the discovery process,” and repeatedly “filed motions that were not well grounded in fact or law that unnecessarily increased costs,” the trial court awarded Kell \$6,500 in attorney fees. (FF 2.15.C, 2.15.D, CP 1495; *see also* CP 1452)

The trial court entered a \$35,082 equalizing judgment in favor of Kell. (CP 1500, 1512) The judgment bears interest at six percent per annum and includes a payment plan requiring Harris to pay \$500 monthly minimum payments to Kell. (CP 1500, 1512, 1517)

Harris appeals. Kell conditionally cross-appeals. (CP 1615-57, 1659-61)

### **III. ARGUMENT**

#### **A. Harris Challenges Trial Court Decisions That Are Reviewed Only For A Manifest Abuse Of Discretion.**

As Harris concedes (App. Br. 8), trial courts have great discretion in the area of domestic relations. *Marriage of Landry*,

103 Wn.2d 807, 809-10, 699 P.2d 214 (1985). “Trial court decisions in a dissolution action will seldom be changed upon appeal—the spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court.” *Marriage of Bowen*, 168 Wn. App. 581, 586, ¶ 12, 279 P.3d 885, *rev. denied*, 290 P.3d 994 (2012). The reason for such deference is that “[t]he emotional and financial interests affected by such decisions are best served by finality.” *Landry*, 103 Wn.2d at 809. In particular, the trial court is given “broad discretion” in the division of property “because it is in the best position to determine what is fair, just, and equitable.” *Marriage of Wallace*, 111 Wn. App. 697, 707, 45 P.3d 1131 (2002), *rev. denied* 148 Wn.2d 1011 (2003).

Harris’s repeated attempts to blame her trial counsel for the trial court’s actions also provide no basis for reversal. (*See, e.g.*, App. Br. 10-13, 15, 19-20) The Sixth Amendment right to effective assistance of counsel applies only to criminal cases and does not extend to parties in a civil proceeding. *Seventh Elect Church in Israel v. Rogers*, 34 Wn. App. 105, 120, 660 P.2d 280, *rev. denied* 99 Wn.2d 1019 (1983).

Harris has not met her “heavy burden” to show that the trial court manifestly abused its discretion by dividing the parties’ property, excluding Harris’s testimony, or otherwise managing the trial. This court should affirm.

**B. The Trial Court Did Not Abuse Its Discretion In Scheduling The Trial Or Denying Harris A Continuance Days Before A Long-Delayed Trial.**

Harris inconsistently argues that the trial court erred both by denying her second motion for continuance and by not bringing the case to trial sooner. (App. Br. 9-12, 31-33) “Whether to grant or deny a continuance is a question addressed to the sound discretion of the court, and the exercise of that discretion will be set aside only for a manifest abuse thereof.” *Tucker v. Tucker*, 14 Wn. App. 454, 455, 542 P.2d 789 (1975) (citations omitted). “The burden rests on the appellant to establish that the denial was manifestly unreasonable.” *Port of Seattle v. Equitable Capital Group, Inc.*, 127 Wn.2d 202, 214, 898 P.2d 275 (1995), *superseded on other grounds by Ashley v. Hall*, 138 Wn.2d 151, 156, 978 P.2d 1055 (1999). Here, Harris fails to establish the trial court abused its discretion in denying her request for continuance or that the delay in trial was the result of reversible error.

At Harris's request, the trial court awarded her \$2,500 based on her assurance that she would use the funds to retain an attorney and that she would be ready for the trial, which was set for hearing eight days later. (CP 1325-26, 1477-78) When Harris then moved for a 4-week continuance three days later, the trial court properly denied her motion based on her earlier assurance that she would be ready. (CP 1325-26, 1477-78)

Harris failed to preserve her claim of error regarding the delay in entry of a written order denying a continuance because she did not request a written order when her motion was denied. *See Creso v. Philips*, 97 Wn. App. 829, 831, 987 P.2d 137 (1999) ("A party should not be permitted to gamble on the outcome of a trial" by "sit[ting] on' . . . a minor procedural defect, . . . a party seeking to rely on it should be required to act before trial or not at all"), *aff'd sub nom. Haywood v. Aranda*, 143 Wn.2d 231, 19 P.3d 406 (2001). In any event, she fails to show how she was harmed by delayed entry of the order. *Ford v. Chaplin*, 61 Wn. App. 896, 899, 812 P.2d 532 (1991) (Appellant must show that her case was materially prejudiced by a claimed error. Absent such proof, the error is harmless.), *rev. denied*, 117 Wn.2d 1026.

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The only “harm” that Harris alleges is that she could not substantiate the trial court’s findings because the hearing was “not heard on the record.” (App. Br. 11) The trial court’s order sets forth its reasons for denying a continuance, and no further record is necessary to “substantiate” its decision. *See State v. Walker*, 16 Wn. App. 637, 639, 557 P.2d 1330 (1976), *rev. denied*, 89 Wn.2d 1004 (1977) (a record is adequate if appellate court can determine the reasons for the trial court’s decision on a motion to continue the trial date). Further, Harris admits that she did in fact “assure” the court that she and her proposed attorney would be ready for trial by April 4, which was the basis for the trial court’s decision denying the motion to continue. (*See* CP 1479)

Harris’s complaints regarding the delay in trial are equally unfounded. The trial was continued because of court congestion that was “no fault of either party.” (CP 395, 696, 751) Harris erroneously states that “[n]one of the cancellations of the trial” were at her request (App. Br. 33), when in fact she obtained a continuance on May 19, 2011. (CP 396, 1414) The trial was continued again after Kell was diagnosed with cancer and needed to undergo chemotherapy. (CP 1319; RP 313-14) If anything, Harris

benefited from the delay, as she received over \$25,000 in temporary maintenance while the case was pending. (CP 1098)

**C. The Trial Court Properly Exercised Its Discretion By Excluding Evidence About The Allstate Buyout.**

**1. Harris Did Not Make An Offer Of Proof And Never Asked The Trial Court To Make Findings Or To Consider An Alternative Remedy.**

Harris failed to preserve her argument that the trial court erred by excluding her testimony regarding the character of the Allstate buyout payments. First, Harris failed to make an offer of proof of what her testimony would have established. *See* ER 103(a)(2); *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 618, 762 P.2d 1156 (1988) (in order to preserve error for review party must make an offer of proof sufficient to “advis[e] of the specific testimony to be offered and the reasons supporting its admissibility”). At most, Harris stated that she would have offered a 1099 IRS-Form to somehow prove that the Allstate buyout payment was a “severance package.” (CP 1523-24) But the proffered form contains no explanation for the basis of the buyout payments, and it certainly does not describe the funds received as a “severance package.” (*See* CP 1269)

Second, Harris cannot complain when she never asked the trial court to enter findings or to consider alternative remedies. *Marriage of Studebaker*, 36 Wn. App. 815, 818, 677 P.2d 789 (1984); see also RAP 2.5(a); *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (declining to review issue, theory, argument, or claim of error not presented at the trial court). This court should reject Harris's unpreserved challenge to the exclusion of her testimony.

**2. Harris Failed To Comply With Three Separate Discovery Orders About The Proffered Evidence.**

Even had Harris preserved this issue for review, she fails to show that the trial court abused its discretion. “[A] trial court has broad discretion as to the sanction to impose for the violation of a discovery order or discovery rules.” *Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 737, 75 P.3d 533, rev. granted 150 Wn.2d 1017 (2003). A trial court does not abuse its discretion by excluding testimony for intentional nondisclosure or willful violation of a court order. *Carlson*, 116 Wn. App. at 737. Contrary to Harris's assertion (App. Br. 13), “a motion to compel compliance with the rules is not a prerequisite to a sanctions motion.” *Carlson*, 116 Wn. App. at 739.

Harris was ordered to “provid[e] documentation as to the basis of the Allstate Insurance buyout” in three separate – and unchallenged – orders. (CP 695-97, 750-52, 1222-26; FF 2.8.X, CP 1484) The trial court acted well within its discretion by excluding Harris’s testimony based on her failure to comply with these court orders “without reasonable excuse.” *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 769, 82 P.3d 1223 (2004) (violation of discovery order is “willful” if “done without reasonable excuse”); *see also Carlson*, 116 Wn. App. at 740 (trial court did not abuse its discretion by excluding testimony based on party’s repeated discovery violations).

Harris’s assertion that she did comply with the court’s orders fails because she has not assigned error to the trial court’s finding that she never provided the required documentation. (FF 2.8.B.3, CP 1483; *see also RP 9, 396) Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999) (unchallenged findings are verities on appeal). In any event, the record belies Harris’s claim that she complied with the court’s orders. Harris apparently submitted a 1099 tax form regarding the buyout payments in response to Kell’s motion to terminate temporary maintenance, but only *after* the deadline imposed in the court’s contempt order. (*Compare App.*

Br. 14 (“the 1099g was in fact part of the court record as of March 2012”) *with* CP 1225 (Harris ordered to “provid[e] documentation as to the basis of the Allstate Insurance buyout . . . no later than 02/24/2012.”)) Moreover, the 1099 form contains no explanation for the basis of the buyout payments as required by the court’s orders. (CP 1269) Nor do any of the other documents Harris asserts demonstrate compliance with the court’s orders indicate the basis for the final buyout payments. (*See* CP 611, 1120-26; RP 11)

Without documentation establishing the basis for the buyout payments, Kell could not meet Harris’s allegation that the payments were her post-separation income. As Harris acknowledges, the characterization of the payments turned on whether they were precipitated by events occurring during or after the marriage. (App. Br. 15, *citing* Kenneth Weber, 19 Washington Practice, Family and Community Property Law § 11.19 at 177 (1997), *citing* *Marriage of Bishop*, 46 Wn. App. 198, 203, 729 P.2d 647 (1986)).

Harris’s argument that the trial court should have imposed a lesser sanction is without merit. (App. Br. 13-15) A lesser sanction would not have prompted Harris to produce records she had already refused to produce on three separate occasions on threat of contempt. (CP 1225; RP 400) *Roberson v. Perez*, 123 Wn. App.

320, 338, 96 P.3d 420 (2004) (trial court did not abuse its discretion in not considering a lesser sanction because it was “readily apparent that a lesser sanction would not cure the improper behavior”), *rev. denied* 155 Wn.2d 1002 (2005).

Harris’s suggested alternative “sanction” of granting a continuance (App. Br. 14-15) is no sanction at all. “The purposes of sanctions are to deter, punish, compensate, educate, and ensure that the wrongdoer does not profit from the wrong.” *Roberson*, 123 Wn. App. at 337 (citing *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993)). Postponing trial would have rewarded Harris’s repeated refusal to obey the court’s orders, by granting her the continuance she sought. The trial court did not abuse its discretion in excluding Harris’s testimony based on her repeated violation of the court’s orders.

**D. The Trial Court’s Division Of The Marital Estate Was Well Within Its Discretion.**

Harris argues that the trial court abused its discretion in its valuation and division of property, but fails to assign error to a single finding of fact. (App. Br. 21-25) Instead, Harris asks for wholesale vacation of the findings based on alleged discrepancies between the trial court’s memorandum decision and its findings of

fact and decree of dissolution. (App. Br. 21-25, 34) Any such “conflict” is no basis for reversal, because a trial court’s findings take precedence over a memorandum decision. *State v. Mallory*, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966) (“A trial court’s oral or memorandum opinion is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.”). Regardless, the record shows that the trial court consistently and fairly valued the parties’ property. A trial court does not abuse its discretion by assigning values to property within the scope of the evidence. *See Marriage of Soriano*, 31 Wn. App. 432, 435, 643 P.2d 450 (1982).

**1. The Trial Court Did Not Abuse Its Discretion In Awarding Kell A Portion Of The Note That Harris Owed The Community Business.**

A trial court may consider one spouse’s “gross fiscal improvidence” or “squandering of marital assets” in making a fair and equitable distribution of the parties’ assets and liabilities. *Marriage of Steadman*, 63 Wn. App. 523, 528, 821 P.2d 59 (1991); *see also Marriage of Wallace*, 111 Wn. App. 697, 707-708, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn.2d 1011 (2003) (court may consider “waste or concealment of assets.”) Here, the trial court

correctly recognized that Harris deprived the community of \$42,000<sup>1</sup> when she drained more than that amount from the community business for her own benefit, and then went bankrupt. (FF 2.8.B.2.b, 2.11, CP 1483, 1494; CP 1450; RP 321-22) The trial court recognized that but for Harris’s unilateral actions, the community would have either had \$42,000 in the community business or held the promissory note as an asset available for distribution upon dissolution. Instead, the asset was lost as a result of Harris’s “gross fiscal improvidence,” and it was well within the trial court’s discretion to award \$15,000 to Kell to compensate him for this “dissipated” community asset. *Steadman*, 63 Wn. App. at 528.

**2. The Trial Court Did Not Abuse Its Discretion In Dividing The Buyout Payments.**

The trial court found that the Allstate buyout payments were community property based on the evidence presented, and properly divided them between the parties. (FF 2.8.B.3, CP 1483)<sup>2</sup> Harris

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<sup>1</sup> Harris’s allegation that the trial court did not explain the basis for the \$42,000 figure (App. Br. 25) ignores the finding that “\$42,000 of community property was discharged in bankruptcy,” and specifically described the \$42,517 promissory note held by the community business just prior to making this finding. (FF 2.8.B.2, CP 1482-83; *see also* CP 1450)

<sup>2</sup> Harris erroneously states that the trial court awarded 60% of the buyout payments to Kell. (App. Br. 16) In fact, the trial court awarded 60% of the remaining payments to Harris. (FF 2.8.B.3, CP 1483)

has not assigned error to the trial court's finding that the payments were community property – reason enough for rejecting Harris's claim of error. In any event, the record fully supports the trial court's characterization and distribution of the buyout payments.

The business clearly had value - Harris sought to sell it for nearly \$200,000 during the separation. (RP 320-21; Ex. 1A(14)) Based on this evidence, the trial court could reasonably conclude that when Allstate redeemed Harris Insurance Group, a community asset, and made monthly payments to Harris, it was to acquire the business's assets. (FF 2.8.B.3, CP 1483; CP 1450; RP 323) This court "reviews all reasonable inferences in the light most favorable to the prevailing party. Though the trier of fact is free to believe or disbelieve any evidence presented at trial, appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact." *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 104-05, ¶ 8, 267 P.3d 435 (2011).

Harris baldly asserts that the Allstate buyout was "severance" pay, and thus her separate property under *Marriage of Bishop*, 46 Wn. App. 198, 729 P.2d 647 (1986). (App. Br. 17) But she fails to prove that the buyout payments were "severance" for her post-separation work, rather than in exchange for the community's

“economic interest” in the Allstate agency. *Marriage of Griswold*, 112 Wn. App. 333, 341, 48 P.3d 1018 (2002) (distinguishing bonus from severance payments because bonus was received for past services), *rev. denied* 148 Wn.2d 1023 (2003). As a result, the trial court was free to reject Harris’s claims that the buyout payments were “severance.” Severance pay is defined as “money (apart from back wages or salary) paid by an employer to a dismissed *employee*.” Black’s Law Dictionary 1107 (Abridged 7<sup>th</sup> Ed. 2000) (emphasis added). But the agency agreement signed by Harris and Allstate specifically states that Harris is “not an employee of the Company.” (Ex. 2A(3) at 1)

The 1099 form relied on by Harris (App. Br. 12-20) contains no explanation of the basis of the buyout payments, or any support that the payments are “severance.” It is far from the clear and convincing evidence Harris would be required to present to prove that the agency, which she opened during the marriage, was separate property. *Marriage of Janovich*, 30 Wn. App. 169, 171, 632 P.2d 889 (1981) (“An asset acquired during marriage is presumed to be community property, and this presumption can be overcome only by clear and convincing proof to the contrary”), *rev. denied* 95 Wn.2d 1028.

Even if the Allstate buyout payments were Harris's separate property, the trial court has discretion to award one spouse's separate property to the other in order to make a just and equitable division of property. RCW 26.09.080; *Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985) ("This court will not single out a particular factor, such as the character of the property, and require as a matter of law that it be given greater weight than other relevant factors."). The trial court awarded Kell 40% of the remaining buyout payments, or approximately \$15,600. This was an appropriate award in light of the fact that he paid Harris \$25,000 from his post-separation earnings as "temporary maintenance" when she had more property available to her than she disclosed. Regardless whether the Allstate buyout payments were community or separate property, it was just and equitable to award Kell a portion of the future payments.

**3. The Trial Court Did Not Abuse Its Discretion In Valuing The Timeshare.**

Harris's argument that the trial court reached conflicting values regarding the timeshare erroneously conflates its various findings. (App. Br. 21, 23-24) The trial court valued the timeshare at \$8,000 in the decree because it had separately valued the

timeshare “points” acquired by Harris prior to marriage and those acquired during marriage, and found that each were worth \$4,000 - \$8,000 in total. (FF 2.8.A, 2.9.B., CP 1482, 1489; RP 270) Harris is wrong when she claims that the trial court valued the whole community interest in the timeshare at \$2,000. (App. Br. 21, *citing* CP 1449) The trial court found the value of community interest in the timeshare was \$4,000. (*See* FF 2.8.A, CP 1482; RP 270) In its memorandum decision, the trial court only valued Kell’s interest in the timeshare (1/2 the community value) at \$2,000 – not the full community interest. (*See* CP 1449, 1515)<sup>3</sup> The trial court then awarded all of the timeshares to Harris, with an offset to Kell for \$2,000 – his half interest in the community portion of the timeshare. (*See* CP 1449, 1515) Based on the evidence presented, the trial court properly valued the time shares.

**4. The Trial Court Did Not Abuse Its Discretion In Valuing Or Dividing The Parties’ Pensions.**

Harris again nitpicks the trial court’s valuations of the parties’ pensions without assigning error to any findings. Worse, Harris misleadingly presents the court’s values. (App. Br. 21-24,

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<sup>3</sup> The decree of dissolution correctly values all of the points at \$8,000, although it erroneously states that all were purchased during marriage. (CP 1505)

26) For instance, Harris asserts that the trial court valued Kell's Cornell Pension Trust at \$15,756 in its memorandum decision, but then valued it at \$23,870 in its findings. (App. Br. 21 (citing CP 1451 and 1487)) The trial court did not inconsistently value the pension plan, but rather found that due to market forces, Kell's separate property portion of the plan had increased in value from \$15,756 at the time of the marriage to \$23,870 at the time of separation. (FF 2.9.J; CP 1487; RP 302-03; *see also* CP 1515) The same is true regarding the trial court's valuation of the Cornell Pension EE – the difference in value was due solely to market forces. (CP 1451, 1487; RP 304-06)<sup>4</sup>

Harris's complaints regarding the trial court's valuation of Kell's Kraft 401k are also without merit. (App. 21-22) The decree valued the plan at \$8,010, which was its value on the date of the parties' separation, and is wholly consistent with Kell's testimony and the evidence presented. (*Compare* CP 1503, 1515 *with* RP 290; Ex.1A(16)) While Harris is correct that the memorandum decision and findings state a different value for the Kraft 401k (*See* CP 1450,

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<sup>4</sup> The trial court's valuation of Kell's ALCOA pension plan in its memorandum decision erroneously stated its value at \$5,950. (CP 1448) The decree correctly valued it at \$45,950. (CP 1503; RP 210) Harris fails to show any prejudice due to the trial court's mistake in its memorandum decision, which was clearly corrected in its decree of dissolution.

1483), there is no evidence to support the value stated in the memorandum and findings. The decree properly corrects the value based on the only evidence presented. While it may have been preferable for the mistake to have also been corrected in the findings, Harris fails to show any prejudice.

With regard to Kell's Boeing pension plan, Harris again misrepresents the trial court's findings, conflating the separate, community, and total values. (App. Br. 22) The trial court found that the plan was part community (\$6,768) and part separate (\$4,262). (CP 1451) The trial court then valued the entire plan at \$11,030 in the decree (\$6,768 plus \$4,262). (CP 1503) In the balance sheet appended to the decree, the trial court again noted the values of the separate and community portions. (CP 1515)

Likewise, the trial court did not find that all of Kell's Boeing Savings Plan was separate property (App. Br. 22), but valued \$8,505 as community and \$24,246 as separate. (FF 2.8.F, CP 1483, 1515) Harris provides an equally misleading discussion of her PERS pension plan (App. 24) and again conflates the trial court's findings

regarding the total value of the asset and the separate/community values. (*Compare* CP 1505 *with* CP 1451, 1515)<sup>5</sup>

Trial courts have broad discretion in valuing property, and will only be overturned if there has been a manifest abuse of discretion. *Marriage of Gillespie*, 89 Wn. App. 390, 403, 948 P.2d 1338 (1997). If the trial court's finding on value is supported by substantial evidence, viewed in the light most favorable to the prevailing party, its decision will be affirmed. *Gillespie*, 89 Wn. App. at 403-04. Any valuation within the scope of the evidence is not an abuse of discretion. *Marriage of Mathews*, 70 Wn. App. 116, 122, 853 P.2d 462, *rev. denied*, 122 Wn.2d 1021 (1993). The trial court did not abuse its discretion in valuing and dividing the pensions.

**5. The Trial Court Did Not Abuse Its Discretion In Awarding Lily The Chihuahua To Kell.**

Harris acknowledges that the testimony regarding the parties' companion dog Lily conflicted sharply, yet still asks this court to substitute its discretion for that of the trial court. (App. Br. 27-28) The trial court found in its memorandum decision that

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<sup>5</sup> Harris also appears to complain that the trial court awarded her various insurance policies. (App. Br. 23) Harris was not prejudiced by the award of additional property and this "error" is not grounds for reversal. *Welfare of Ferguson*, 41 Wn. App. 1, 5, 701 P.2d 513 (1985), *rev. denied* 104 Wn.2d 1008; *Ford v. Chaplin*, 61 Wn. App. 896, 899, 812 P.2d 532 (1991).

Harris struggled to care for all her dogs after separation. (CP 1451; *see also* RP 162, 339) Kell testified that during the marriage he and Lily “went everywhere together.” (RP 338-39) That Harris kept Lilly for four years after the parties is irrelevant (App. Br. 27), particularly in light of the fact that she refused Kell’s request for Lilly. (RP 339) The trial court did not abuse its discretion by awarding Lily to Kell.

**E. The Trial Court Did Not Abuse Its Discretion By Requiring Harris To Submit Written Objections To The Findings Of Fact And Conclusions Of Law.**

Harris’s allegation that the trial court erred by refusing to allow her to object to its findings is meritless. First, Harris failed to comply with Cowlitz County Local Rule 88(d), requiring that any objections be made in writing at least two days before the hearing. Even so, the trial court listened to Harris’s oral objections at the presentation hearing, but eventually became exasperated with her refusal to heed its repeated warnings regarding courtroom decorum and procedure. (RP 468-81) The trial court did not abuse its discretion by then inviting Harris to submit written objections in lieu of continuing a hearing with an intransigent party. *Baldwin v. Silver*, 165 Wn. App. 463, 470, ¶ 12, 269 P.3d 284 (2011) (“A trial court has discretion to reasonably control the presentation of a

party's argument to secure fair, effective, and efficient proceedings.”).

**F. The Trial Court Did Not Abuse Its Discretion In Ordering A Payment Plan That Allows Harris Over Seven Years To Pay A \$35,000 Judgment.**

The trial court included in the decree a payment plan that required Harris to pay Kell \$500 per month and gave Harris seven years to pay the \$35,000 equalizing judgment. (CP 1500, 1512, 1518-20) The plan charged Harris six percent interest, rather than the twelve percent interest allowed under RCW 4.56.110(4) and RCW 19.52.020(1). (CP 1500, 1512, 1518) Harris's argument that “there is no authority in law” for such a provision (App. Br. 28) ignores that trial courts may take steps necessary to enforce a decree, and ensure a party's compliance. *See, e.g., Marriage of Burrill*, 113 Wn. App. 863, 873-74, 56 P.3d 993 (2002) (trial court retained jurisdiction to enter postjudgment order enforcing decree), *rev. denied*, 149 Wn.2d 1007 (2003). Harris provides no explanation for how the court's generous payment plan prejudiced her. To the extent there was any error, it was the trial court's decision to award less than statutory interest on the judgment. (*See* Cross-Appeal §B.1)

**G. The Trial Court Did Not Abuse Its Discretion In Granting Kell A Modest Attorney Fee Award Based On Harris’s Abusive Litigation Tactics.**

Harris misses the mark when she argues that the trial court erred by awarding Kell \$6,500 in attorney fees because that award was “not based on need an[d] ability to pay.” (App. Br. 31) The trial court did not base its award on the parties’ financial resources, but rather on Harris’s intransigence during discovery and throughout trial, which resulted in dramatically increased attorney’s fees for Kell.

“An award of attorney fees is within the trial court’s discretion.” *Mattson v. Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999). “A trial court may [] award attorney fees if one spouse’s intransigence increased the legal fees of the other party.” *Burrill v. Burrill*, 113 Wn. App. 863, 873, 56 P.3d 993 (2002). “[I]f intransigence is demonstrated, the financial status of the party seeking the award is not relevant.” *Mattson*, 95 Wn. App. at 604. “Where a party’s bad acts permeate the entire proceedings, the court need not segregate which fees were incurred as a result of intransigence and which were not.” *Burrill*, 113 Wn. App. at 873.

In an unchallenged finding, the trial court found that Harris “doggedly abused the discovery process and has been found in

contempt for that abuse which dramatically increased fees. Additionally, petitioner filed motions that were not well grounded in fact nor law that unnecessarily increased costs to Respondent, Roger Kell.” (FF 2.15.C, CP 1495; *see also* CP 1228-29 (Harris abused discovery by failing to update witness disclosures), CP 1373 (Harris was “very close to future CR 11 sanctions due to the filing of motions which are without merit”), CP 1375-77 (Harris “abused the discovery process” when she issued subpoenas seeking irrelevant medical records without providing proper notice)) Harris never produced the Allstate buyout documents she was ordered to produce. (FF 2.8.B.3, CP 1483) Harris also deceived the court and Kell by failing to disclose the funds she withdrew from the community business and by failing to provide notice that her monthly expenses decreased by over \$2,200 after she bankrupted her credit card debt. (CP 379-80; RP 319-20, 395-96)

Kell described in detail how Harris’s conduct had unnecessarily increased his attorney fees, including through her numerous motions for reconsideration that were all denied. (RP 392-400; CP 542-43, 1293, 1658) Although the trial court ordered Harris to pay modest fee awards on a few occasions (App. Br. 32, *citing* CP 1099, 1371, 1375)), on others it denied Kell’s request for

fees. (RP 395; CP 504, 541, 1284) Although Harris's intransigence permeated the litigation – negating the need to segregate fee awards – the trial court explicitly stated that the award of fees after trial was separate from its previous awards. (FF 2.15.D, CP 1495) Harris fails to show that the trial court abused its discretion in awarding Kell \$6,500 in attorney fees after four years of abusive litigation.

**H. Kell – Not Harris – Is Entitled To An Award Of Attorney Fees On Appeal Based On Harris's Intransigence Below And On Appeal.**

This court should deny Harris's request for fees on appeal (App. Br. 34) and should award Kell his fees incurred in responding to this appeal. Harris continues her pattern of intransigence on appeal by repeatedly misleading the court regarding the record. (See, e.g., § III.D.4; (App. Br. 33) (erroneously stating that Harris did not previously seek to continue the trial)) Kell has again incurred substantial fees responding to Harris's meritless contentions. Kell is entitled to his fees on appeal based on Harris's intransigence below and on appeal. *Mattson v. Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157 (1999) (awarding fees on appeal based on "intransigence at trial" and "appeal of that outcome"); see also *Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002).

#### **IV. CONDITIONAL CROSS-APPEAL**

Only if this court remands to the trial court on any of the issues raised by Harris, Kell asks this court to consider the trial court's error in failing to award statutory interest on the judgment awarded to him, and in ordering him to reimburse Harris for "rent" for the period that the parties lived in Harris's separate property home when the mortgage was paid with community funds.

##### **A. Cross-Appeal Assignments of Error.**

1. The trial court erred in awarding only 6% interest on the judgment awarded to Kell. (CP 1500, 1512, 1518)

2. The trial court erred in finding that "[d]uring the term of the marriage, petitioner paid the mortgage for the marital home, while the respondent paid for utilities and food. These expenditures were unequal in the utilities/food expenditures were less than the value of the housing costs. The court finds the petitioner is entitled to \$10,500 of reimbursement of rent (\$175 per month for 60 months of marriage)." (FF 2.9.A, CP 1488-89)

**B. Cross-Appeal Argument.**

**1. The Trial Court Erred In Failing To Award Statutory Interest On The Judgment Awarded To Kell Without Providing An Adequate Reason For The Reduction.**

The trial court erred by awarding Kell a judgment of \$35,082 that bears interest at only 6%, instead of the statutory rate of 12% under RCW 19.52.020. A trial court's judgment must comply with RCW 4.56.110, which requires that interest on judgments accrue at the maximum rate permitted under RCW 19.52.020. *Marriage of Harrington*, 85 Wn. App. 613, 630-32, 935 P.2d 1357 (1997). The failure to enter a judgment in compliance with RCW 4.56.110 "constitutes error meriting remand for correction of the judgment's interest rate to the statutory rate." *Harrington*, 85 Wn. App. at 631 (quoting *Marriage of Knight*, 75 Wn. App. 721, 731, 880 P.2d 71 (1994), *rev. denied*, 126 Wn.2d 1011 (1995)).

An exception to this general rule arises in dissolution cases, where the trial court has discretion to reduce the interest rate on deferred payments in the decree of dissolution. *Harrington*, 85 Wn. App. at 631; *Knight*, 75 Wn. App. at 731. However, the trial court abuses its discretion if it reduces the interest rate without "setting forth adequate reasons for the reduction." *Harrington*, 85

Wn. App. at 631; *see also Knight*, 75 Wn. App. at 731 (“a trial court abuses this discretion if it provides for an interest rate below the statutory rate without setting forth adequate reasons for doing so”). The trial court erred here by imposing an interest rate lower than the statutory rate without setting forth adequate reasons.

**2. The Trial Court Erred By Awarding Harris “Reimbursement Of Rent” For The Parties’ Use Of Her Separate Property Residence When The Mortgage Was Paid With Community Funds.**

The trial court also erred by ordering Kell to reimburse Harris for “rent” for the period that the parties resided in her separate property home during the marriage. The basis for the trial court’s decision was its determination that Harris’s payments toward the mortgage exceeded Kell’s payments towards food and utilities. But in either event, community earnings were used to pay the mortgage. *Marriage of Lindemann*, 92 Wn. App. 64, 72, 960 P.2d 966 (1998) (the community is entitled to the “fruits of all labor performed by either party to the relationship because each spouse is the servant of the community.”), *rev. denied* 137 Wn.2d 1016 (1999). Thus, regardless of who paid which expense, community funds were used to pay the mortgage on Harris’s separate property

home, and there is no basis in law or fact to require Kell to further “reimburse” Harris for the use of her home during the marriage.

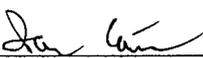
## V. CONCLUSION

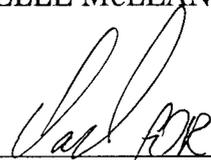
This court should affirm the trial court in its entirety and award Kell his attorney fees on appeal. In the event that this court remands on any issue raised by Harris, it should impose statutory interest on the money judgment awarded to Kell, and reverse the trial court’s order requiring Kell to “reimburse” Harris for rent.

Dated this 22nd day of January, 2013.

SMITH GOODFRIEND, P.S.

NOELLE McLEAN, P.S.

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Attorneys for Respondent/Cross-Appellant

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 22, 2013, I arranged for service of the foregoing Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Noelle McLean Noelle McLean, P.S. P.O. Box 757- 206 West Main Street Kelso, WA 98626	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Josephine C. Townsend 211 E 11th St Ste 104 Vancouver, WA 98660-3248	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

**DATED** at Seattle, Washington this 22nd day of January, 2013.

  
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Victoria K. Isaksen