

63603-1

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No. 63603-1-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

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In re the Marriage of:

JOHN PETER MELE,

Appellant,

v.

KIMBERLY KRISTEN MELE,

Respondent.

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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT

FOR KING COUNTY

THE HONORABLE PATRICIA CLARK

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

This is not as complex a case as it is voluminous. It is made more complicated by John's highly selective statement of facts, which leaves out numerous factors that are not only relevant, but were the basis for the trial court's decision.

The truth is the division of property in this case should have been relatively straightforward. The parties have very typical assets, including a family home, 2 timeshares, a brokerage account, 401(k) plans, stock options, checking and savings accounts, and one condominium purchased as an investment. After an 18 year marriage, there is a limited amount of separate property. The only business is the wife's hobby photography business. Neither party is or has been a "stay-at-home" parent; both parties have worked their entire professional lives. Neither party is self employed. Both parties have law degrees and have practiced as lawyers for over fifteen years. The case has become voluminous only because of John's obstructionist attitude, intransigence, voluntary unemployment, questionable credibility, unwillingness to pay child support, and demands for a property division and spousal maintenance that could not be substantiated by the assets or the

facts of the case.

John's appeal is a rehash of factual positions he took and lost at trial, rather than focused legal arguments appropriate for appeal. He assigns error to virtually all the court's substantive findings of fact and conclusions of law. Contrary to his assertions on appeal, there is substantial evidence to support all of the trial court's exercises of discretion in the dissolution decree.

Although John purports to appeal post dissolution orders of contempt and to enforce the divorce decree, he failed to file a notice of appeal from either post dissolution decisions, and has waived his rights to appeal the *Order on Show Cause re Contempt/Judgment* and the *Judgment and Order on Petitioner's Motion to Clarify and Enforce Decree* altogether.

This court should affirm the trial court's decision and award attorney fees to Kim for his intransigence at trial and for having to devote more time and resources to respond to this frivolous appeal.

## **II.CROSS APPEAL ASSIGNMENT OF ERROR**

### **A. Assignment of Error.**

**The trial court erred when it entered Finding of Fact 2.15 and failed to award attorneys fees in the Findings of Fact & Conclusions of law.**

## **B. Issues Pertaining to Assignments of Error.**

**Whether the trial court erred when it failed to award attorney's fees to Kim based on a lack of funds, despite finding evidence of John's intransigence**

### **III. RESTATEMENT OF THE CASE**

John's statement of facts is better described as a recital of evidence that the trial court heard and rejected. Moreover, John's brief fails to identify several key facts that were relevant factors considered by the court in its decision. This restatement of the case provides the background for the trial court's property division of the community property granting "60% to wife and 40% to husband", the valuation of Kim's separate property, the valuation of the assets including the pre-distribution to John, and the calculation of child support obligations.

#### **A. Background.**

Respondent Kimberly Mele and Appellant John Mele were married for 18 years. The parties separated in April 2007 and attempted to utilize the collaborative process, which was undermined and ultimately terminated due to John's actions. RP 560-2. Kim filed a Petition for dissolution on February 18, 2008. CP 1-7. Their marriage was dissolved on April 15, 2009, after an eleven day trial. RP 1222-1242.

Both Kim and John are lawyers. Kim has practiced since 1989 and began her legal career at Preston Gates and Ellis. She worked as in house counsel of Starbucks for five years and started as corporate counsel at Costco in 2008 where she is currently employed. She worked full time at Costco until being diagnosed with Multiple Sclerosis in January 2001. CR 23-8,1223. Since then, she worked on a part time basis and is on permanent, partial disability because of her disease.

John had practiced law for over 20 years, during which time he was a clerk for the Washington State Court of Appeals and a partner at Ryan, Swanson and Cleveland specializing in appellate work. CP 36, 38, 64. He was disbarred for integrity reasons on May 21, 2008. RP 714, 1034-1035, 1062, CP25. In 2005, prior to his disbarment, he left the Ryan firm to become the Chief Operating Officer for a start-up company, Electric Hendrix where he was making a salary of \$10,000 per month. RP 723, 974, 979, 983. He voluntarily terminated his position as COO with Electric Hendrix in October 2007. RP 1034,1040. Around the same time, during the collaborative process John requested a \$5000 "advance" from the joint brokerage account to pay his attorney's fees. RP 887.

John's brief fails to mention two crucial facts that occurred after he left Electric Hendrix. The first is that because he had no income, he unilaterally accessed two of the couple's community assets and depleted those funds. He used the community funds for his living expenses but failed to provide the court with a complete allocation of all of the funds.

In October of 2007, without Kim's knowledge, John received and retained their joint IRS 2006 tax refund in the amount of \$23,321, which he had directly deposited to their joint account. RP 875. He depleted the refund and provided none of it to Kim. RP 876-8. John also unilaterally accessed and liquidated the Ryan 401(k) plan with a value of \$274,000 in December of 2007. RP 933-34. Although the Ryan 401(k) was a community asset, the proceeds were not made available to the community. CR 1227. Instead, John cashed out the entire 401(k) account and deposited it into a newly opened IRA in his name only. RP 685, 813-818, 933. Instead of seeking employment, he used the proceeds to make up for his lack of income. RP 784.

When John cashed out the Ryan 401(k) plan he converted the securities into a finite amount of cash and established a value of the asset. RP 534,813. According to court documents and John's

testimony, there was only \$25,589 left in the IRA at the time of trial. RP 817-18; Ex.140. John made vague references to how he spent the money, (RP 814-819) but ultimately he presented no documentation to account for all of the community funds he alone had access to. RP 881, 940, 982, 1040-1. The evidence showed he spent a large portion of the funds on impulsive purchases like a new car, comic books, plasma TV, an iPhone and an iPod. RP 991-1002, 1042-1045. Regardless of his assertions otherwise, the court determined he did not spend the proceeds of the Ryan 401(k) or the IRS refund on the children or the community. CR 1227. The court accurately awarded the Ryan 401(k) plan and the IRS refund to John as a pre-distribution of community assets, valued as of the date of distribution. CR 1227, CP 620, FF 2.8.

The second fact John fails to mention is he made no effort whatsoever to seek employment until July of 2008. Sometime in 2008, John met with a career counselor and decided he wanted to become a teacher. RP 724-25. He testified that he “considered” a number of options including careers in marketing and advertising for which he was qualified, but instead chose to pursue a new a career that required additional post graduate education. He

enrolled in the Master of Education/Secondary Teaching program University of Washington.

John submitted no job applications or resumes between his voluntary resignation and July 2008, nor did he present any evidence indicating he could not work. RP1026. In fact, according to his bank statements, he appeared to spend most of his free time driving to comic books stores in the greater Seattle area. RP 991-1002; EX's 28 and 29. He eventually took a job as a tutor; this job was not the result of a job search but rather a random thought inspired by a sign he noticed while driving around. RP 1011-12. This job was a tutoring position helping students prepare for the SAT at Prep Northwest He had no prior tutoring experience but nevertheless easily landed the only job he applied for. Beginning in August of 2008 he worked approximately 5 hours per week at a wage of \$15-17 per hour. RP 727. He earned \$1894 as a tutor in 2008. RP 1030; EX 104.

In April of 2008, John stopped contributing any money toward child support or payment of community liabilities. CP 655, CR 1227. In July 2008, Kim filed a Motion for Temporary Order of Child Support. CP 11-12. Kim asked for income to be imputed

since John was voluntarily unemployed and had made no effort whatsoever to look for employment. CP25-39, CP110-177. His Declaration indicated his salary as COO of Electric Hendrix was “negative \$67,000” and was non-responsive to Kim’s position that he had made no effort to seek employment. CP 50-55, CP 60-107; CP 801-871; RP 976, 984, He asked the court to use his projected pay from his tutoring job to calculate child support. The court imputed income at \$30,000 to John pursuant to a Temporary Order of Child Support. EX 131; CP178-190. Kim filed a Motion to Reconsider the Commissioner’s ruling, specifically challenging the amount of income imputed and the determination of what expenses were reimbursable. The commissioner’s decision was reviewed and affirmed by Judge Patricia Clark, the same judge who was the presiding judge at trial. In her ruling, she commented that she was limited to the evidence provided to the commissioner at the hearing. However, she specifically stated that the imputation amount would be reserved and reviewed at trial and adjusted if necessary, based on the evidence presented at trial. RP1195. John did not attend the hearing and so any challenges asserted by John regarding Judge Clark’s commentary will be without foundation.

At trial, Kim asked for income to be imputed to John in the amount of \$120,000. The court heard testimony regarding the economy, John's job search, John's work history, historical earnings, experience and capabilities. RP 723, 885; EX 96. Instead of "negative \$67,000" John admitted his salary at Hendrix was \$10,000 per month. RP 723, 885, 972, 975. John presented no evidence whatsoever that he made any effort at all to look for a job and the trial court determined that he was voluntarily under-employed. CP 655. Based on John's education, experience and earning history, the trial court increased the imputed income to \$60,000 in the final Order of Child Support. CR1230, 1241, CP 640. The court based its decision on the evidence, that is, his refusal to seek work despite his employability and his "impressive resume". CR 1230.

John began classes in September of 2008 on a limited and part-time basis. RP 711-712. His projected graduation date was spring of 2010 and his projected starting salary was \$44,107. RP 721. John implies his "re-training" was necessary; the truth is, any "re-training" was a result of his unilateral decision to make a career change in his quest for job satisfaction and free time. RP 725. John did not begin classes until September 2008 and his class time was

minimal. Nevertheless, he did not seek full time employment. RP 1018, 1026. It is equally significant that John chose not to seek full time or better paying work despite his lack of any other source of income, the length of time until graduation, his current debts and his projected teacher's salary of only \$44,000. Although John repeatedly asserts the court "forced him to abandon his schooling and precluded him from establishing himself as a public school teacher" the fact is that the court's decision made no reference to or otherwise limited his enrollment in the Master of Education program.

**B. The Trial Court's Ruling.**

At trial, John requested to be awarded Kim's Costco 401(k) plan, her IRA, the remaining balance of the joint brokerage account, along with a property award of over \$280,831.50. RP 1048-49. John also requested spousal maintenance of \$2000 a month. RP 1047-48, CR 1224. He asked the court to make Kim responsible for all of the community liabilities along with some of his separate liabilities, including his \$9400 WSBA disbarment fine. RP 1200. He also asked the court to relieve him of any requirement to pay child support. RP1186-87, CR 1224. He testified if the court did not rule in his favor, he would "have to drop

out of school [and]...presumably live with my mom". RP 715.

The record shows the court did not force him to abandon his graduate studies. The truth is John made the decision to quit school on his own. John's actions and inactions left him without the financial ability to continue school. His refusal to work resulted in a lack of income. His rampant spending of community assets in amounts close to \$300,000 left him without financial resources to pay for his living expenses and tuition.

The court awarded Kim sixty (60) percent of the community assets and John was awarded forty (40) percent. Some of the community property was pre-distributed to both parties. CP 620, FF 2.8. Pre-distributions to Kim included Costco stock options (\$15,975); her Bank of America account (\$14,832); camera equipment (\$4000); and the community lien in the Beetle (\$1870). John's pre-distributions included the Ryan 401 (k)/Schwab IRA (\$274,476); his WAMU account (\$3,194); 2006 Tax refund (\$23,321); \$5,000 from the join brokerage account; and his comic book collection with a value of \$30,000. The court identified the community property and community liabilities (CP 618-20, FF 2.8 and 2.10) and distributed it as follows: Kim was awarded the family home valued at \$665,000. She was also awarded the Costco stock

options, a Schwab IRA, her Costco 401(k) plan, the joint brokerage account, the Ford Expedition and the personal property in the home. CP 627-636.

In addition to her separate liabilities, Kim was also made responsible for all of the community liabilities listed in Findings of Fact except the WAMU account and John's half of the Animadoodle loan. The liabilities assigned to Kim totaled \$557,056. CP 627-636. In addition, she also was made responsible for all liabilities associated with the Tacoma condo, Whistler and Hawaii timeshares until they were sold. CP 632-636, Sections 3.5 and 3.15.

John was awarded all the remaining funds in the IRA, the Nissan x-terra, all personal property in his possession and the stock from Animadoodle. CP 627-636. He was made responsible for only \$4624 of community liability. CP630, DD Sec.3.4. In addition to his separate liabilities he was liable for a property judgment of \$100,486. He was ordered to pay child support of \$812.15 per month for all three children and 36.6% of certain reimbursable expenses for the children. The amount was calculated based upon an imputed salary of \$60,000 which is less than half of the lowest salary John earned in previous years. A

judgment of \$4766 for back child support was entered against John; this reflected the adjustment for the increase in imputed income which was ordered based on the new evidence presented at trial. The court adopted the parenting plan proposed by the parent evaluator and awarded Kim sole decision making authority based on the evidence presented. The court also ordered Kim to be named the beneficiary of John's term life insurance policy to secure his child support payments. CP 635, DD Sec.3.15.

The court commented that the litigation had been extraordinarily expensive due to John's intransigence, but because he had no funds remaining, declined to award attorney fees to Kim. CP 622 FF.2.15; CR 1233.

The court's oral and written rulings reference all of the issues before the court and makes note of all of the relevant factors considered in its decision. CR 1222-1233.

### **C. Post Trial Motions Before the Court**

On September 3, 2009, Kim filed a contempt motion alleging that John failed to comply with the Decree and Order of Child Support since he had not reimbursed her for his share of the children's expenses for over twelve months. CP 997-1030, 1102-

1133. On October 9, 2009, the court held a hearing on the contempt motion and found John in contempt for intentionally failing to comply with requirements of Decree and Order of Child Support. CP 1134-1141.

In November of 2009, Kim discovered John improperly accessed the HELOC and wrote himself a check for \$10,000. CP 1144-1180, 1208-1219. Kim filed a motion and requested an injunction. On November 18, 2009, the court determined John improperly accessed funds to which he was not entitled and was ordered to return the entire amount. Kim was awarded attorney's fees. CP 1220-1222.

On January 5, 2010, John filed a motion for contempt against Kim for non-payment of reimbursable children's expenses. CP1223-1320. On January 27, 2010 the court denied the motion and instead of merely writing "denied" on his proposed order, the commissioner instructed Kim to draft a new order that made reference to her oral ruling and included her comments regarding John's intransigence, "un-clean hands" and his improper filing of a contempt motion. CP 1323-1326.

#### IV. MOTION TO DISMISS

This motion is made pursuant to RAP 10.4(d) and RAP 17.4(d). This court should dismiss John's appeal because he has been found in contempt for failing to comply with the decree. *Pike v. Pike*, 24 Wn.2d 735, 167 P.2d 401 (1946). John did not seek to stay the trial court's orders, and has failed to comply with the court's order, resulting in a contempt citation. CP 1134-1141.

In *Pike*, the mother appealed a custody decree designating the father as the primary residential parent, removed the children from the jurisdiction, and refused to reveal their location. The Supreme Court entered an order dismissing the appeal unless the mother complied with the decree, noting that it had "the right to dismiss an appeal in a case where the appellant is guilty of contempt of court." *Pike*, 24 Wn.2d at 742.

This court likewise should dismiss this appeal because John is in contempt. John should not be allowed to pursue his appeal for defying compliance with the court's order without supersedes or stay.

#### V. RESPONSE ARGUMENT

##### A. Standard of Review

In the area of domestic relations, the appellate courts have historically been loath to overturn trial court decisions. "[T]rial court decisions in marital dissolution proceedings are rarely changed on appeal." *In re Marriage of Williams*, 84 Wn. App. 263, 267, 927 P.2d 679 (1996), *review denied*, 131 Wn.2d 1025 (1997). The party challenging a dissolution decision bears the heavy burden of showing a manifest abuse of discretion. *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). The job of an appellate court is to simply determine whether the trial court's decision is rational and based on tenable grounds. The Court of Appeals must review the judge's orders for a manifest abuse of discretion:

Trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court.... The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion. *In re Marriage of Landry*, 103 Wn.2d 807, 809-810, 699 P.2d 214 (1985) (citations omitted).

Washington State appellate courts will not reverse a trial court's decision regarding property distribution and child support calculations absent a manifest abuse of discretion. *In re Drlik*, 121

Wn. App. 269, 274, 87 P.3d 1192 (2004), citing *In re Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001). As long as the findings of fact are supported by substantial evidence, they will not be disturbed on appeal. Any unchallenged findings are found to be true upon appeal. *Drlik* at 275. Substantial evidence exists where there is sufficient evidence to persuade a fair-minded, rational person of the truth of that determination. *Spreen* at 346. "Evidence is substantial if it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *In re the Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), review denied, 149 Wn.2d 1007 (2003).

**B. The Trial Court acted within its Broad Scope of Discretion and no Reversible Error has been Demonstrated**

The appellant has the burden of providing an adequate record for appeal. *In re Marriage of Haugh*, 58 Wn. App. 1, 6, 790 P.2d 1266 (1990). Although John has provided a verbatim transcript of the proceedings, the summary of the facts in his appeal brief are an abridged and selectively edited summary of the trial record. Many relevant facts are omitted and other facts are simply incorrect. John presents only his version of the record which is merely a rearguing of the facts he already presented at

trial. Insisting that the court should have adopted a valuation of property that is more favorable to him and a valuation less favorable to Kim, does not meet the standard of proving the evidence relied on was incorrect. Similarly, John already tried to convince the trial court of his version of the facts, specifically, that he spent the proceeds of the Ryan 401 (k) plan on community property; Kim has unrestricted access to the Medical/ Exemption Trust; and that he was entitled to pursue a graduate degree in education in lieu of employment and in lieu of paying child support. Merely rearguing the case already presented at trial does not show the court relied on incorrect evidence or applied the wrong legal standard. The trial court already heard and considered John's case. An appellate court must accept the trial court's findings of fact if the findings are supported by substantial evidence in the record. John's brief contains no new evidence, facts or information to meet the standard of proof required for a successful appeal.

**C. The Trial Court Acted Within its Broad Scope of Discretion and Based the 60/40 Property Division on the Relevant Facts in this Case.**

The court made a 60/40 property distribution in favor of Kim after considering all of the relevant facts and reviewing all of the evidence that was admitted by the court. CR 1227. Prior to

making her ruling, the judge references the evidence relied on the 150 exhibits she reviewed. She summarizes the issues before the court as follows: “the parenting plan, scheduling and decision making, child support, pre-distribution of community assets, valuation and how those pre-distributions will be allocated”, along with:

“father’s request for reimbursement for funds expended by the father to ‘aid’ the community, how much that would be, whether he would be entitled to reimbursement, any offset regarding the mother’s expenditures, the valuation of the primary residence, the allocation of improvements, characterization of the property, the house, the condo, the timeshares, the IRA’s, the mother’s trust fund.” CR 1223.

The judge noted that Kim has Multiple Sclerosis and is on part-time permanent disability and that her parenting skills are not affected by her disease. CR 1223. In her written ruling the judge notes the limitation of her disease and the fact that it can escalate at any time. CP653. Regarding the real property assets, the judge’s oral ruling notes that she considered the two different appraisals for the family home, the absence of valuation for the Tacoma condo and the Whistler and Hawaii timeshares, along with

the lengthy testimony regarding current market conditions. CR 1225-6. The judge also notes

John liquidated the marital community's largest asset, the Ryan Swanson 401(k) He withdrew the \$274,000 and spent these funds in a year's time. The evidence is unclear to this court how he spent the money but it is clear he did not spend it to support the community. Without employment except for the tutoring he has been able to purchase a 2008 Nissan SUV, a new iPhone and spend hundreds of dollars per month on comic books and unrelated expenses. At some point early in this process he unilaterally stopped paying .....child support and any support for the community". CR 1227.

The court awarded Kim "60 percent of the community property". CR1227, CP 658. Although John had asked the court for the same division in his favor (RP 1206), he claims that the same award in Kim's favor is an abuse of discretion. John claims the evidence before the court was inconsistent with any notion that its 60/40 community property split in favor of Kim produced an equitable result (App. Br. 15). John introduces no evidence to prove the court's decision was not equitable and instead misconstrues the facts and the valuations to make his case. For example, he refers to the Medical/Exemption Trust as "fully vested " implying unlimited access to the trust funds (App. Br. 15) and completely mischaracterizes the trust to imply Kim has the discretion to access and borrow unlimited funds (App. Br. 21). In fact, the court was so alarmed by John's attorney's suggestion on

redirect that no one would know if she took money from the trust (RP 644) that the court commented on the ethical and legal issues associated with the suggestion that Kim improperly access the trust funds. CP 659.

In his brief, John claims the trial court's decision resulted in all sorts of disparate distributions to Kim, based on different ways of looking at the decision and valuation. He asserts the court made a *"76.83% distribution to Kim, a 66.75% distribution to Kim, a 78.58% distribution to Kim, a 69.27% distribution to Kim, a 115.63% distribution to Kim, and a 81.73% distribution to Kim"*. App. Br. 18, 25, 27, and 28. The truth is that the court made a division of property, based on the court's valuation of the assets that was a 60/40 split of the ***community property*** (emphasis added) in Kim's favor. CR1227, CP 658. John submits numerous spreadsheets (App. Br., Appendix 6) with a variety of ways to calculate the property allocation based on many subjective and self serving variables. The spreadsheets should be discounted because they are not part of the court record and were submitted without permission from the court in violation of RAP 10.3. Furthermore, John uses the spreadsheets to contrive the evidence to somehow

persuade the appellate court that the trial court made a mistake. Although the court clearly awarded Kim 60 percent of the community property, John has manipulated the percentage calculations on his spreadsheets to include both community and separate property. His attempt to mislead this court with intentional miscalculations is manipulative, inappropriate, meritless, and deplorable. Changing asset values and allocations is the same tactic he used at trial. RP 843-6, 892, 943-980,1061, 1048-9, 1189; CR 1228. The record shows that throughout the trial, John revised his property division matrix, miscalculated asset valuations and admitted to several other egregious "mistakes". RP 891-21048-49, 1061, 1177,1189. His appeal is a continuation of the same; John presents false or manipulated calculations rather than providing factually accurate or complete information which is relevant and imperative to understanding the equity in the court's decision. John's statements are, at best, a misrepresentation of the trial court's ruling and decision and at worse, they are fabrications intended to mislead the appellate court. In either event, these statements in a filed brief are sanctionable under RAP 18.9. ***Lynn v. Labor Ready, Inc.***, 136 Wn. App. 295, 313, 1145,151 P.3d 201 (2006) (appellant's repeated misrepresentations, causing the court

and respondent "to waste considerable time checking for their accuracy," sanctionable under RAP 18.9).

John also claims the court left him without appreciable income or assets (App. Br.17) and that since he could no longer practice law, "*the only profession he was trained for*", he needed to be retrained. App. Br. 17. The court determined he had unilaterally decided to seek a career change. CR 1224. He later accuses the court of leaving him with a net worth of "negative \$300,000" and "negative \$550,000" (App. Br. 39) by falsely manipulating the facts and inflating and misstating his liability, presumably in an attempt to secure his role as victim in the eyes of the appellate court. The court made John responsible for only \$4624 of the community liability and left Kim responsible for remainder of the community liability in the amount of \$557,056. CP 631-32, DD Sec.3.5; CP 620 FF 2.10. John overlooks the fact that the court made Kim responsible for all liabilities associated with the Tacoma condo, Whistler and Hawaii timeshares until they were sold. CP 631-32, Sec. 3.5. He also does not mention that while the court determined there were two outstanding community debts owed to Kim's father's

estate in the aggregate amount of \$43,714, the court assigned those to Kim as her separate liability CR 1228.

Washington courts have acknowledged, "the longer the marriage, the more likely a court will make a disproportionate distribution of the community property. For example, where one spouse is older, semi-retired and dealing with ill health, and the other spouse is employable, the court does not abuse its discretion in ordering an unequal division of community property." *In re Marriage of Rockwell*, 141 Wn. App. at 243, 1112. In this case, John fails to mention that he is healthier than Kim and has no restrictions on his ability to work. Kim is limited to part time work and is on permanent, partial disability as a result of her Multiple Sclerosis. CR 1223; RP 653-4. John has fewer future medical/financial needs than Kim. He is well-educated, has a variety of work and project management experience and has historically held full time jobs earning a higher wage than Kim. Kim presented evidence showing that John routinely challenged reimbursement requests and he blatantly refused to pay many of the reimbursable expenses for the children. RP 497-516. Kim has more expenses than John since she pays for most of the children's educational, medical, extracurricular and living expenses. The

assets awarded to Kim are balanced by John's ability to work full time, along with the fact that his expenses related to the children are significantly lower than Kim's. He has no cap in his income potential whereas Kim's income is capped by her disability. As a result of John's voluntary underemployment, the award of child support is much less than it would be based on the lowest of his historical earnings.

After consideration of all the evidence presented at trial by both parties, the court awarded Kim her separate property and ordered a 60/40 split of community property in favor of Kim. In this case, the trial court made a just and equitable distribution of property based on the facts of the case. The property division provides Kim with resources to provide for the children; the equity of the distribution is based on the facts of the case and is supported by the record. The court did not abuse its discretion by failing to pick a scenario that suits John. John presents no evidence showing the trial court based its property division on untenable or unreasonable grounds. Accordingly, the court, therefore, did not abuse its discretion.

**D. Appellant's Claim the Court's Decision is Contrary to the Children's Best Interest is Without Merit.**

In dissolution of marriage cases involving minor children, Washington statutes mandate the court determine and allocate the parties' parental responsibilities and financial obligations based upon a standard of the child's best interests. RCW 26.09.002. In his brief, John makes the broad statement that the trial court's decision ultimately failed to serve the best interests of the parties' children as required by RCW 26.09.002. He asks this court for a reversal on those grounds. John does not elaborate on or support this argument and he fails to provide any evidence to even suggest the best interests of the children are adversely affected by the trial court's decision. Moreover, at no point during the trial did John assert that his proposed property allocation and request for spousal maintenance was in the best interests of the children. In fact, John requested a division of property along with spousal maintenance to serve his own interests, not the children's, based on his desire to avoid working in order to facilitate his elective graduate studies. RP 1206-7. Accordingly, any claim that the trial court's findings are not in the children's best interests is completely without merit.

**E. The Trial Court Properly Classified the Ryan 401(k), the IRS Refund and Money from the Joint Brokerage Account as a Pre-distribution of Community Property**

The trial court makes repeated references in its ruling to the

fact that John unilaterally liquidated the Ryan 401(k) plan and depleted the proceeds in a year on purchases that did not benefit the community. CR1227; CP 620 (FF 2.12); CP 657-8, RP 534. The court appropriately determined the Ryan 401(k) was assignable to John as a pre-distribution of community assets in the amount of \$274,607. The court also properly allocated the IRS refund of \$23,553 and the distribution of \$5000 from the community brokerage account to John as a pre-distribution of community assets.

John assigns error and claims the court abused its discretion in its pre-distribution to John. He provides no evidence of court error and his argument is merely a vain attempt to avoid being credited with the value of the monies he accessed unilaterally and spent foolishly on purchases outside of the community. At trial, John presented the same argument and attempted, unsuccessfully, to convince the trial court that he spent the funds on community property. The trial court already made a decision regarding the facts presented by John and determined "he did not spend that money to support community". CR 1227, CP 657-8. The trial court's factual determination is not subject to review by this court.

John fails to note that the court pre-distributed some community assets to Kim as well. Pre-distributions to Kim included \$14,832 in a Bank of America account and \$15, 975 in exercised Costco stock options. (FF 2.8). Kim exercised some Costco options in 2007 and she used the proceeds to pay attorney's fees, children's expenses and expenses related to community property. Kim's expenses are similar to the kinds of expenses John claims utilized some of the Ryan 401(k) funds. The court classified the proceeds of those stock options as a pre-distribution of community property to Kim, just like the pre-distribution of the Ryan 401(k) to John. The court correctly pre-distributed the expended community assets to the spouse who spent the community asset for their own benefit. The decision was equitable and is not subject to challenge.

**F. The Trial Court's Division of Property Is Fair and Equitable**

**i. The Evidence Supports the Findings.**

John challenges the trial court's classification and/or valuation of several assets, alleging that as a result, the property distribution was inequitable. John challenges the overall division of property claiming that that the trial court erred in its disposition of assets, leaving the parties in significantly disparate financial

circumstances. Similar to the division of property, the trial court has discretion in valuing assets. *In re Marriage of Hay*, 80 Wash.App. 202, 204, 907 P.2d 334 (1995).

The issue is whether the court made a just and equitable distribution of the parties' property. The trial court's distribution of property in a dissolution action is guided by statute, which requires it to consider (1) the nature and extent of community property, (2) the nature and extent of separate property, (3) the duration of the marriage, and (4) the economic circumstances of each spouse at the time the division of the property is to become effective. RCW 26.09.080. Wide discretion and latitude rests with the trial court in making the determination that a particular division of property meets the "just and equitable" standard found in RCW 26.09.080. *Davis v. Davis*, 13 Wn. App. 812, 813, 537 P.2d 1048 (1975). No single statutory factor has greater weight as a matter of law, but rather the trial court should weigh all relevant factors to arrive at a just and equitable division of property. *In Re Marriage of Konzen*, 103 Wn.2 470, 693 P.2d 97 (1985).

It is important to note the trial court is not required to make an equal division; it is only required to make a property division that is equitable. *In re Marriage of Nicholson*, 17 Wn.App.110, 117,

561 P.2d 1116 (1977). The goal of fairness is achieved "by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules." *In re Marriage of Tower*, 55 Wash.App. 697, 700, 780 P.2d 863 (1992), review denied, 114 Wash.2d 1002, 788 P.2d 1077 (1990). In her oral and written rulings, the judge references the issues before the court, all factors she considered and all the evidence she reviewed and relied upon to arrive at her decision, thereby meeting statutory requirements for RCW 26.09.080. John has not shown a manifest abuse of discretion occurred. Accordingly, the property division must stand on appeal. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

**ii. The Court's Valuation of the Assets was Reasonable and within its Discretion**

John asserts the court erred when it chose a value for the Costco stock. He claims (i) the court committed a manifest abuse of discretion by choosing the lowest of the valuations presented at trial and (ii) the valuation was based on an erroneously admitted trial exhibit . In a dissolution, when parties offer conflicting evidence of an asset's valuation, a court may adopt the value asserted by

either party, or any value in between the two. *In re Marriage of Sedlock*, 69 Wash.App. 484, 849 P.2d 1243 (1993).

John asserts the court erred by not using the same date of valuation for all the assets. John's suggestion that the court should have valued the Costco stock options retroactively to reflect the same date as the Ryan 401(k) valuation (December 2007) is made for the first time on appeal. At trial he proposed a December 2008 valuation date with a value of \$171,000. RP 831-32, EX 138. He also testified at trial that the Costco stock was "way off" compared to its value in 2007. RP 831. On appeal, John assigns error to the court's failure to value the Costco stock in an amount the he himself admitted was "way off". His argument is at odds with the long-standing rule in Washington that a trial court has wide discretion to consider all relevant facts and circumstances when valuing assets in a dissolution proceeding, and the trial court is not generally controlled by fixed standards. *In re Marriage of Hay*, 80 Wash.App. 202, 204, 907 P.2d 334 (1995), *Lucker v. Lucker*, 71 Wash.2d 165, 167-68, 426 P.2d 981 (1967).

There are numerous relevant factors to consider when determining the value of stock options. The most obvious factor is that unvested or unexercised stock options have a value "on paper"

that fluctuates daily with the rise and fall of stock market. Stock options are, as the name suggests, merely options to purchase stock at the grant price. When the stock is trading at price is lower than the grant price, the option "under water". Options are under water if the exercise price is higher than the value of the stock and the option has no value unless the stock recovers. Because there are no guarantees that a stock will bounce back or gain value, John's suggestion that the court should have valued the Costco stock options retroactively to reflect the same date as the Ryan 401(k) valuation (December 2007) is incongruous. In December of 2007 Costco stock was trading at \$74 a share; it began its steady decline with the rest of the stock market and by March 2, 2009 it had plummeted to \$40.84 a share, which was a price lower than the grant price of 12,000 of Kim's unexercised options. RP 915. Assigning a December 2007 value would have credited Kim with assets of \$478,098 that did not exist. That would be analogous to the court assigning a value to the family home based on a 2007 appraisal despite evidence of the significant decline in property values between 2007 and 2009.

It is reasonable for a court to value unexercised stock options at a price that reflects an accurate value of what the options

would be worth if they were exercised the day of valuation. It would be illogical for a court to choose a price that is so out of date to render it meaningless. John allegation the court erred when it failed to chose an out of date valuation which was *15 times greater* in value than the current value of the same options is completely ridiculous and without merit.

The court relied on Exhibit 86 to establish a current valuation of the Costco stock. John asserts the valuation was based on an erroneously admitted trial exhibit and makes a vague reference to an objection raised regarding the admission of EX 86. The only objection was that Exhibit 86 was not his testimony. RP 917. The court relied on the evidence as representation of price Costco stock on March 2, 2009. John's testimony acknowledged that based on the stock price shown on Exhibit 86, the largest portion of Kim's options were worthless. RP 915. He also agreed that a stock price of \$40.84 resulted in a valuation of \$32,352, or adjusted for tax consequences, a value of \$23,293. RP 915. This testimony was not revisited on redirect examination.

Although he objected to Exhibit 86, there are no specific evidentiary deficiencies in the record. John asserts the court's denial of his request for clarification was somehow an abuse of the

court's discretion. John's "request for clarification" was actually a challenge to the trial court's valuation of the Costco stock made after her ruling. CR1237-41. The judge did not deny the request for clarification; instead, when challenged, the judge indicated that she had based her decision on testimony and the evidence presented. RP 1238-1241. She also indicated that she would go back through her notes to confirm her decision and the evidence relied upon prior to issuing orders. RP 1239. The judge stated in her written decision that she was not going to engage in a retrial and took responsibility for reviewing the documents. CP652. The court relied on properly admitted evidence when it set a value for the Costco stock options.

On appeal, John asserts that the court erred by using the December 2007 valuation date for the Ryan 401(k). The court's decision to use the December 2007 valuation date is reasonable since it represents the date that John unilaterally liquidated the Ryan 401(k) and converted it to a finite amount of cash. The evidence is supported by the record and shows John alone had access to those funds and spent the money freely on himself, not the community. Furthermore, John's counsel said in her closing argument,

"we would ask the court to ...value it, with regard to

distributions, what he actually received as well as what was still remaining in the account as of January 31<sup>st</sup>. I think that's the best way to value that. RP 1195.

The judge states:

John unilaterally accessed the community's largest asset, the Ryan Swanson 401 (k) plan. He withdrew \$274,000 and spent the funds in a year's time. The evidence is unclear as to how he spent the money but it is clear he did not spend it to support the community. Without gainful employment he still has been able to purchase a 2008 Nissan SUV with a payment of \$600 per month, a new iPhone, spend hundreds of dollars on comic books and related expenses and live in an apartment. He unilaterally stopped paying child support or any money toward maintaining the community. In addition, he withdrew \$30,000 from community funds and used it for his own purposes. CP 658.

John assigns error to the court's failure to use the \$25,553 valuation of the Ryan 401(k). A trial court is not required to affix the valuation of an asset at the time of trial. Instead, it has the broad discretion in setting a date on which to value property ***Lucker v. Lucker***, 71 Wash.2d 165, 167-68, 426 P.2d 981 (1967) (discussing former RCW 26.08.110). Since the court determined the Ryan 401(k) plan was a pre-distributed community asset, it was reasonable for the court to value the Ryan 401(k) based on the date of the pre-distribution.

What is perhaps most disturbing is John assigns error to the

court for using a lower value for the Costco stock while at the same time assigns error to the court for not valuing the Ryan 401 (k) plan at its lowest. John fails to note the stock valuation is lower due solely to market fluctuations while the Ryan 401(k) was depleted by John's spending. At best, John is relying on the "throw it all against the wall and see what sticks" theory; at worse he is wasting the court's time and resources with a frivolous appeal. Either way, the arbitrary nature of John's allegation renders his argument meritless.

**iii. The Ryan 401(k) Was Not "Disposed Of"**

John also asserts the court erred because the Ryan 401(k) had been "disposed of" and was therefore not subject to distribution. John never asserted at trial that the Ryan account was "disposed of" and raises this for the first time on appeal.

John cites *In re Marriage of White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001) to make the argument that "if one or both parties disposed of an asset before trial, the court simply has no ability to distribute that asset at trial. His analogy is simply not accurate. In *White*, the property was a home and was disposed of via foreclosure, meaning that neither party benefitted from or had access to the proceeds of the disposed property. He also cites *In*

*re Marriage of Kaseburg*, 126 Wn. App. 546, 556, 108 P.3d 1278 (2005). This case is incongruous since *Kaseburg* involved foreclosure of a home along with fraud. In a foreclosure, the parties lose a house and get nothing in return which is very different from conscious spending on purchases that do not benefit the community.

John's own testimony further undermines his disposal argument because he testified using the Ryan 401 (k) funds for living expenses, tuition, taxes, child support, and attorney's fees. RP 783, 814-15 858-61, 934-35, 945, EXs 139 and 140. John also testified that the value would not have fluctuated had it been left in mutual fund account (RP 938); it was his management and spending of the funds that created the loss. Based on the evidence provided, the court determined the value of the Ryan 401(k) went from \$274,000 to \$25,553 because John spent the money. CR1227, CP 657-8, RP 934-935. John is asking the appellate court to classify the Ryan 401(k) differently than the trial court without foundation. John claims the Ryan 401(k) was "disposed of" in an attempt only to mischaracterize his wasteful spending. John points to the judge's comment "*the evidence is unclear as to how he spent the money*". App. Br. 28-30. However, Judge Clark

completed the sentence by adding "*but it is clear he did not spend it to support the community*". CR 1227. The only reason the court was "unclear" as to how he spent the money is because John's answers were evasive and his documentation deficient. John did not provide the court with a full accounting of how all the funds were spent, nor did he provide receipts for his alleged expenditures which left his testimony unsubstantiated. John also omitted numerous fund withdrawals that appeared to be an attempt to conceal his spending. RP 943-71, 976-8. John claims his bank statements easily showed how he spent the funds. App. Br. 31. To an extent, that is correct since his bank statements clearly illustrated his profligate spending to the court. EX's 28, 29 and 94; RP 991-1002. Despite his own testimony to the contrary, he is asking the appellate court to treat the Ryan 401(k) funds as simply gone. The blatant inconsistency renders his argument meritless.

To classify the Ryan 401(k) as "disposed" is tantamount to allowing a spouse to unilaterally liquidate community assets and spend the proceeds freely and without consequence. By supporting his position, the court would, in essence, be encouraging all parties engaged in dissolution proceedings to freely liquidate community with abandon and without accountability.

Permitting one spouse to squander marital property would make it impossible for the court to ever make an equitable division of property.

**iv. John's Dissipation of Community Assets is Relevant to this Case and Was Appropriately Considered by the Court in its Division of Assets**

The evidence proved the funds from the Ryan 401(k) plan were spent by John alone. Despite John's claims on appeal, the trial court already determined the funds were not spent on community assets. CR 1227. The court considered John's wasteful spending when making its division of property. Washington courts recognize that consideration of each party's responsibility for dissipating marital assets is relevant to the just and equitable distribution of property. *In re Marriage of White*, 105 Wn. App. 545, 551, 20 P.3d 481 (2001), *In re Marriage of Williams*, 84 Wn. App. 263, 927 P.2d 679 (1996). The trial court has discretion to consider whose 'negatively productive conduct' depleted the couple's assets and to apportion a higher debt load or fewer assets to the wasteful marital partner. *In re Marriage of Williams*, 84 Wn. App. at 263. The trial court can consider the conduct of one spouse to the extent it impacted the economic circumstances of the parties. *Marriage of*

**Steadman**, 62 Wn.App. 523, 528, 821 P.2d 59 (1991). The court determined John dissipated over \$274,000 in community assets, CP 626, FF 2.12, CP 657. Although John asserts Washington Courts have never defined dissipation, (App. Br. 33), the court is not precluded from finding that John dissipated community assets. Furthermore, it is established by Washington case law that courts are permitted to consider a spouse's wasting of assets. *In re Marriage of Konzen* 103 Wn.2d 470, 551. And, according to *Black's Law Dictionary*, "dissipation" is to destroy or waste, as to expend funds foolishly. *Black's Law Dictionary* 473, 6th ed. (1990).

The record in this case is replete with evidence that John wasted community assets. The evidence showed that despite his lack of income, John continued to liquidate the community assets on frivolous and impulsive purchases, including a new car, an iPhone, and thousands of dollars of comic books and related items. RP 991-1002, 1006-1010. Without Kim's knowledge or permission, John played fast and loose with one of the community's largest assets. He admitted he was not even looking for a job (RP 1010-11) so he knew he had no ability to replenish the funds that

he wasted. It is undisputed that John's behavior dissipated the Ryan 401(k). The expenditures were not for the community or the children. John's spending of a community asset for his own purchases, without question, negatively impacted the financial condition of the community.

**v. The Record Shows the Trial Court Considered Kim's Separate Property in its Division of Property.**

All property, whether community or separate, is before the court for distribution according to its broad discretion. *In re Marriage of Konzen*, 103 Wn.2d 470, 477-78. John contends that the court did not give sufficient weight to Kim's separate property. The record establishes that Kim inherited money from her father in 2006 in the form of an Exemption Trust which the court referred to as the "Medical Trust" and properly classified it as Kim's separate property. John claims the court mistakenly refers to the trust as a "Medical Trust" (App. Br. 20) however the court determined, based on the terms of the trust, that **during the year** Kim was only able to access trust funds for her medical expenses. CR 659. The record also established that her father also established a Marital Trust for his wife, Kathy. CR 659. Because Kim had no right to the Marital

Trust funds until Kathy died or remarried, the court determined Kim only had a “mere expectancy” interest in the Marital Trust. CP \_\_\_\_ John’s assertion the court did not consider the trust in its division of property is negated by the court’s numerous references to the Medical Trust in its ruling. It is curious at best to wonder why John claims the court failed to consider Kim’s separate property when John himself cites the following reference to the Medical Trust by the court:

The mother's father established two trusts as part of his estate planning: 1) Marital trust for his wife. The petitioner in this case is a co-trustee [-] she has no control unless the wife dies or becomes incapacitated. None of the money in that trust comes to the petitioner unless the wife dies; 2) Medical Trust created to provide an ongoing stream of funding to address the petitioners [sic] medical needs. Petitioner is the executor of the trust but may only draw \$21,000 per year to cover medical expenses. That trust is valued at over \$400,000. But the petitioner's access to it and ability to utilize the funds is limited to the specific terms of the trust. Kim’s [sic] suggestions during trial that as Executor of the Medical Trust and co-executor on the Marital Trust the petitioner could simply invade the trust to provide for her ongoing living expenses is not only untenable, it is a breach of her fiduciary duty and quite possibly illegal.

... The Medical Trust is the mother's separate property. However it's [sic] use is proscribed by the terms of the Trust. It is specifically designed to address the anticipated increases in the petitioners medical costs as her health deteriorates. CP 659.

John states that the court failed to include a reason for

omitting the trust from its oral ruling. App. Br. 19. However, the court acknowledged that it failed to do so. Specifically, the court said:

“The other thing I need you to understand is that when I made my oral ruling, I don’t recall making a ruling about the trust. I will include my findings in the documentation. RP1241.

The court properly determined that Kim’s access to and ability to use the Medical Trust was limited. Kim provided evidence she was entitled to the income of the Medical Trust and a discretionary draw of up to 5% of the trust value on an annual basis during a set 30 day window.RP 657.Although the court didn’t specifically mention this additional, limited draw, there is no harm or inconsistency since Kim’s access to the Medical Trust is still extremely restricted. John assigns error to the court’s omission of the value of the Medical Trust on the property matrix. Any error is harmless since the Medical Trust is listed in the Decree as Kim’s separate property. CP620, FF2.9. Furthermore, listing the value of the entire Medical Trust on the property matrix would be inaccurate since the court determined Kim did not have access to the totality of the Medical Trust. Instead, the court appropriately included Kim’s separate Charles Schwab account which contained the proceeds from the discretionary draws from the Medical Trust. RP 273, 551;

CP 626, line 17. (RP)

**vi. The Court Assigned Significantly More Community Liabilities to Kim.**

John fails to mention that in addition to \$557,056 of the community debts, the court made Kim responsible for the liabilities and expenses associated with the Tacoma condo and the timeshares. CR 632-35. The condo and timeshare expenses are not insignificant and average over \$1000 a month on an annualized basis. RP 800, 853, 963, 986, 990; EX 137; App. Br 30. Economic conditions have prevented the sale of the properties and Kim has been forced to bear the ongoing expenses of maintaining them. Furthermore, there is no reasonable expectation of generating enough proceeds to reimburse her for such expenses. Despite all of John's proposed variations regarding the division of property, at no time does he acknowledge the liabilities assigned to Kim are actually far greater than what appears on the property chart.

The court determined there were two outstanding community debts owed to Kim's father's estate totaling \$43,714; the court assigned those liabilities to Kim as her separate liability. CP 632. Instead of recognizing the additional liabilities assigned to Kim, John instead assigns error to the court for including the debts

on the property matrix. App. Br.37. These debts are correctly indicated as separate liability and were not included in the calculation of community liability or in division of property. CP626. The reason they are on the matrix is not an error; in fact, the explanation is quite simple. The court determined the matrix prepared by Kim was most equitable. CR 1228. That matrix shows all of the property identified by the court as either community or Kim's separate property. There is no impact to John whatsoever by including the debt on the matrix. The matrix correctly reflects the judge's classification of the debt and does not in any way affect the calculation of the distribution of community property.

**vii. The Trial Court Considered the Economic Conditions Of the Parties.**

John claims the trial court erred in its disposition of assets, leaving the parties in significantly disparate financial circumstances. The record shows the trial court considered the economic status of the parties at the time of dissolution. As demonstrated, there were numerous, relevant factors the court considered when it divided the assets and liabilities. These factors are identified by the trial court in its ruling and include the following: John spent almost \$300,000 of community assets on non-

community expenses without Kim's knowledge or consent. John is voluntarily unemployed or underemployed. John unilaterally decided to return to college in lieu of seeking employment. John unilaterally accessed and used community property for non community expenses. John was not diligent or earnest in his search for employment. John does not want to work full time. John has an impressive resume. John has an ability to earn up to \$60,000.00 per year. John's historical earnings are at least twice the imputed income. John does not want to pay child support. As supported by the record, the court relied on the testimony of the parties and the evidence submitted to conclude John's future income potential was greater than he claimed. Moreover, John is grossly mistaken in blaming the court for his economic condition. Based on the evidence, the court determined John's future financial condition would depend on his own choices and that he could do quite well based on his intelligence, education, breadth of experience, uncompromised health, and past work history. He even testified that he was qualified for entry level jobs that paid \$55,000. RP 717. If anything, his expenses would be reduced and his financial condition improved since he told the court he had the option of moving into his mother's house. RP 715. The trial court

established that Kim, on the other hand, was limited to part time employment because of the physical restrictions imposed by her multiple sclerosis and permanent part time disability. CP 653. Although the Temporary Order of Child Support made John responsible for the liabilities and expenses associated with the Tacoma condo and timeshare properties, in its final ruling, the court allocated such responsibility to Kim along with for the majority of the community debt which actually reduced John's financial burden. Any financial disparity claimed by John is a result of John's poor choices and mismanagement of community funds and not a result of the court's property division.

**viii. John Fails to Meet the Burden of Proof Necessary to Establish an Abuse of Discretion**

When a trial court demonstrates it has considered the evidence when making its decision, the appellate court must only determine whether substantial evidence supports the findings and in turn whether the findings support the conclusions of law. *In Marriage of Greene*, 97 Wn.App.708, 714, 986 P.2d 144 (1999). The appellate court does have the ability to substitute judgment, weigh the evidence or adjudge witness credibility. *In re Marriage of Rich*, 80 Wn.App. 252,259, 907 P.2d 1234 review denied, 129

Wn. 2d 1030 (1996). A trial court is presumed to have considered all of the evidence of record; the fact that a court does not specifically discuss each piece of evidence is insufficient to overcome this presumption.

The court made a property division based on the evidence presented at trial and with an adequate understanding of the parties' assets and liabilities. The court considered all of the relevant facts which are supported by evidence. Although John claims the court's decision was neither just nor equitable, he fails to identify an abuse of discretion. John claims the court's decision is "untenable" yet he does not assert any facts or evidence to suggest that no other trier of fact would reach the same conclusion based on the relevant facts nor does he show the court based its decision on unsubstantiated facts or on an erroneous view of the law. The only fact he highlights is that the court did not adopt his proposed property division. The fact that the court's division of property was not in accordance with John's desired outcome does not prove an error or that the court abused its discretion. Accordingly, the appellate court must affirm the trial court's decision.

## **G. The Trial Court Properly Calculated Child Support.**

An appellate court will not reverse the trial court's order of child support absent a manifest abuse of discretion. *In re Marriage of McCausland*, 159 Wash.2d 607,615, 152 P.3d 1013 (2007). In addition, an appellate court “cannot substitute [its] judgment for that of the trial court unless the trial court's decision rests on unreasonable or untenable grounds”. *In re Marriage of Leslie*, 90 Wash.App. 796, 802-03, 954 P.2d 330 (1998).

### **i. The Trial Court Properly Determined John was Voluntarily Unemployed and Underemployed**

The trial court determined John was voluntarily underemployed and imputed income at a level of \$60,000 per year for the purposes of calculating child support. John's underemployment was undisputed; in fact, John admitted he was unemployed and underemployed when he asked the court to qualify it as “involuntary”. CR 1224. The trial court only needed to determine whether his underemployment and unemployment was voluntary. “Voluntary” implies an action that is intentional rather than accidental and the result of one's own free choice. *In re Marriage of Blickenstaff*, 71 Wn. App.489, 493, 859 P.2d 646

(1993). John's testimony shows that his unemployment and underemployment was absolutely voluntary. RP 1010-30. John's exact words were "*Yes, I chose not to look for other employment.*" RP 1026.

In determining whether a parent is voluntarily underemployed, a court looks at the level of employment "at which the parent is capable and qualified." *In re Marriage of Schumacher*, 100 Wn. App. 208, 215, 997 P.2d 399(2000). In *Dewberry v. George*, 115 Wn. App. 351, 62 P.3d 525 (2003), the court determined the father was voluntarily underemployed since he working part-time in order to have a "flexible schedule" while pursuing a new career. Like John, he was a healthy, 47-year old college graduate with a history of executive-type jobs; all of the evidence indicated his underemployment was brought about by his own free choice.

John's unemployment and underemployment was a result of his free choice. John is a healthy, educated 47 year old, with varied work experience and no restrictions on his employability. John testified he was pursuing a teaching career for job satisfaction, security and time flexibility "to be a father". John enrolled in a graduate program at University of Washington in

lieu of seeking employment. John freely admitted he had not looked for work, stumbled upon his current job, was content with his erratic hours and nominal wage, and had no intention of seeking full time employment. John had always worked full time prior to quitting his job with Electric Hendrix. The record supports his historical earnings were between \$120,000 and \$180,000, and at no time during the marriage was John unemployed or working part time for a nominal wage. RP 971-989. The court properly determined John was voluntarily unemployed and underemployed .

**ii. The Court Properly Imputed Income Based on John's Voluntary Underemployment and Properly Calculated Child Support**

A court must impute income to a parent who is voluntarily unemployed or underemployed in order to prevent a parent from avoiding his or her child support obligation RCW 26.19.071(6); *In re Marriage of Pollard*, 99 Wn.App.48, 52, 991 P.2d 1201 (2000). Washington child support policy has two goals: to insure support adequate to meet the needs of children commensurate with the parents' income, resources, and standard of living and to equitably apportion that support obligation between the parents. RCW 26.19.001(1), *Marriage of Clarke*, 112 Wn.App. 370, 377-78, 48 P.3d 1032 (2002), citing RCW 26.19.001; *Marriage of*

***Ayyad/Rashid***, 110 Wn. App. 462,467, 38 P.3d 1033, rev. denied, 147 Wn.2d 1016 (2002). The child support statute directs the trial court to evaluate the parent's work history, education, health, age and any other relevant fact to determine employability. ***In re Marriage of Peterson***, 80 Wn.App.148, 153, 906 P.2d 1009 (1995).

John's claim that the court relied on insufficient proof to establish his income is without merit and contradicted by the record. Any insufficiency was self-created. John did not provide pay stubs and forced the court to go through all of his deposits, item by item, in order to prove his income at Hendrix was at least \$10,000 per month. RP 971-74, 976-80. Despite his own admission, he continues to manipulate his historical earnings. He didn't file 2007 taxes and the only paystubs John provided were for his tutoring job which showed his gross pay for 2008 as \$1894.00. RP 848, 1029-30, EX 104. His financial declaration lists his income first as zero, then as \$967. RP 727, 1031; EX 101. Despite the intentional insufficiency his documentation of earnings, the court was able to base its decision on his resume, his education, experience and employability. RP 1010-1030; EX 96. In her ruling, the judge made the following comments about John:

John has decided that his next career option is to return to college in order to obtain credentials to become a public school teacher and eventually an administrator. At present he is attending school and tutoring. He testified to locating his job from a sign he saw posted on the street. He's asking that he be found involuntarily unemployed or underemployed and that his salary be set at his current income that he is receiving for tutoring. Consequently he wants to pay little or no child support and receive maintenance from the mother until he completes his college education. It should be noted that his decision to return to college in lieu of seeking employment was made post separation and without consultation from the mother. CR 1244.

It is interesting to the court that the father wants to be determined to be involuntarily unemployed or underemployed, and the court simply does not find that. Yes, he had some hard knocks. Yes, he got disbarred. Yes, his company went under. But from that point he decided to be a teacher. He had in his control \$274,000 which could have gone toward getting him started in a new career, getting his family stabilized and moving on, and that's not where those dollars went. His testimony about his employment was equally interesting. I pulled out Exhibit no. 96 which is his resume, and it is really quite impressive. It's a very impressive resume. And to think he found his most recent job looking at a sign posted on the side of a street for tutoring paying something like...\$17 or \$18 an hour. Mom wants his income imputed at \$10,000 a month. That too is unrealistic. He's lost his job. That's not out there anymore. But the choices he made are also not realistic. So all the court could think of to do was to look at his education, to look at his age and to look at his capabilities, and I'm going to set his income at half of what the mother wanted and more than what he wanted, so I'm setting his income at \$5,000 a month. CR 1229-1230.

Occasional or subsistence employment is not customary for someone with John's skills, education and experience. The court did not use John's nominal tutoring pay to calculate child support and instead appropriately imputed income to John.

John's claim that the court failed to substantiate its rejection of a downward deviation is absurd. The court states "no good reason exists to justify deviation" (CP 640) which explains why his request for deviation was denied. Citing cases where courts failed to substantiate an upward deviation does not in any way support his assignment of error. When the parents' combined incomes exceed \$7000, it is permissible for a court to order support amounts **above** those in the schedule for combined incomes of \$7000. RCW 26.19.020. In this case, the court did not deviate downward as requested by John because it could not substantiate a reason for doing so. Written findings of facts are required to support any deviation; when no such facts exist, deviation is not allowed, and the child support **shall** be applied (emphasis added). RCW 26.19.035 (1); *In re Marriage of McCausland*, 159 Wash.2d at 620. Absent a compelling reason, any deviation would clearly be an error.

The legislature intended the best interests of the children, not parental job satisfaction to be the paramount priority. *In re Marriage of Mattson*, 95 Wn.App.592, 603, 976 P.2d 157 (1999). John asked the court for spousal maintenance and a downward deviation of child support so that he could attend school rather than

work and pay child support. John does not have the freedom to pursue a graduate education or career satisfaction in lieu of his support obligations. As a parent of three minor children, John is responsible for supporting his children based on a wage he is capable of earning. A parent cannot avoid child support obligations by voluntarily seeking and remaining in a low paying job. ***Dewberry v. George***, 115 Wn. App. 351, 36; ***In re Marriage of Foley***, 84 Wn. App. 839, 843, 930 P.2d 929 (1997).

Establishing the amount of child support owed by a parent rests within the discretion of trial court. ***Marriage of Clarke***, 112 Wn. App. 370 at 383. In setting child support, the court must consider all factors bearing upon the needs of the children and the parents' ability to pay. ***In re Marriage of Pollard***, 99 Wn.App. 48 at 52. An appellate court will not substitute its own judgment for that of the trial court where the record shows that the trial court considered all relevant factors and the award is not unreasonable under the circumstances." ***In re Marriage of Fiorito***, 112 Wn. App. 657, 664, 50 P.3d 298 (2002), citing ***Marriage of Stern***, 57 Wn. App. 707, 717, 789 P.2d 807, review denied, 115 Wn.2d 1013 (1990).

The court properly determined that John's independent choice to attend school does not relieve him of his obligation to support his children. Relying on the evidence presented at trial, the court found John voluntarily underemployed and rightfully imputed income to John for purposes of calculating child support. A trial court's award of child support including imputation of income is reviewed for an abuse of discretion. *In re Marriage of Shui*, 132 Wn. App. 568, 588, 125 P.3d180 (2005). The record shows John failed to demonstrate any good faith efforts to seek employment and did not want to pay child support. The record sufficiently establishes his prior earnings, skills, work history and employability. The only insufficiency is John's effort to seek employment, his credibility or his willingness to support his children, which is precisely why income is imputed.

**iii. It Was Within the Court's Discretion to Increase John's Child Support Obligation and Award Retroactive Child Support Based on New Evidence at Trial**

The Temporary Order of Child Support imputed income of \$30,000 and set child support according to the schedule. The order was, by its nature, "temporary" and intended to be replaced by a final order. When Judge Clark affirmed the commissioner's

temporary order she reserved the right to revisit the amount imputed at trial, based on the evidence presented. The Final Order of Child Support was not a modification but rather a replacement for the one that was merely temporary. Evidence was introduced at trial indicating the facts relied on by the court to calculate child support under the temporary order were false and incomplete. John's testimony at trial shows he misrepresented his salary as "negative \$67,000" in his response to the Temporary motion. At trial, the court relied on the evidence to determine John was voluntarily unemployed and had historic earnings much greater than he led the court to believe. Revising a temporary child support order to correct a calculation that was made on false evidence is not an abuse of the court's discretion.

#### **H. The Court is Not Obligated to Require Loan Refinancing**

John claims" the court's failure to require Kim to sell or refinance the home is an untenable magnification of the patent disparities in the parties' economic circumstances". John did not ask the trial court to require Kim to sell or refinance the home and brings it up for the first time on appeal. John asserts no rule or case law that requires a court to force the sale or refinance of the home. John alleges error because the court's written ruling says

“the home is to be sold and proceeds to the mother”. CP 656. The Decree does not required the sale of the house; it awards the house, along with the debt secured by the house, to Kim. Washington courts have made it clear if an appellate court has any doubt regarding the interpretation of the judgment of the trial court, the appellate court may look to the trial court’s oral decision to interpret the judgment of the trial court. ***City of Lakewood v. Pierce County***, 144 Wash. 2d 118, 30 P.3d 446 (2001); ***In re LaBelle***, 107 Wash.2d 196, 728 P.2d 138 (1986).

The oral ruling does not make any reference to Kim selling the family home. Moreover, John is not entitled to any of the equity in the home or any sale proceeds so there is no harm to John if Kim doesn’t sell the home. The Decree of Dissolution contains a hold harmless provision (Sec. 3.6) insulating John from any liability associated with his status as co-borrower. Consequently, there is no “magnification of ....disparity” and any assignment of error is completely without merit.

**I. The Court Did Not Abuse Its Discretion When it Awarded Sole Decision Making to Kim**

In fashioning a parenting plan, the trial court determines the residential arrangement that will serve the best interests of the child. RCW 26.09.187. Acting with broad discretion, the trial court considers several factors, including: the strength of the relationship between the parent and the child; the parent's performance of parenting functions; the emotional needs of the child; the child's relationship with siblings; the child's involvement in school or other significant activities; the wishes of the parent and of a sufficiently mature child; and the parents' employment schedules. ***Marriage of Wicklund*** 84 Wn. App.763,770, 932 P.2d 652 (1996). John argues that the trial court improperly limited his decision-making and residential time with the kids. The trial court was in the best position to gauge the credibility and demeanor of both the parents and relied on additional information including the testimony of the children's nanny, the children's counselor and the parent evaluator, Dr. Melanie English, PhD.

The court adopted the parenting plan submitted by Dr. English, which recommended giving sole decision making to Kim. EX 123; RP 653, 765-6. The evidence showed that Kim was the

parent primarily responsible for raising the children and the parent more likely to foster the children's relationship with the other parent. RP 160. The record is replete with evidence that John repeatedly and continuously refused to respond and/or cooperate with Kim in decisions regarding the children. RP 156-62. At one point the court interjected and stated that it heard "the dialog between them has been so fractious that they are not getting decisions made." RP 770.

RCW 26.09.187 (b) addresses under what circumstances the court can grant one parent sole decision making authority. The court **shall** (*emphasis added*) order sole decision-making to one parent when it finds that:

- (i) A limitation on the other parent's decision-making authority is mandated by RCW 26.09.191;
- (ii) Both parents are opposed to mutual decision making;
- (iii) One parent is opposed to mutual decision making, and such opposition is reasonable based on the criteria in (c) of this subsection .

RCW 26.09.187 (c) states: Except as provided in (a) and (b) of this subsection, the court shall consider the following criteria in allocating decision-making authority (i) The existence of a limitation under RCW 26.09.191; (ii) The history of participation of each parent in decision making in each of the areas in RCW 26.09.184(4)(a); (iii) Whether the parents have a demonstrated ability and desire to cooperate with one another in decision making in each of the areas in RCW 26.09.184(4)(a); and (iv) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

John wanted mutual decision making authority because he “defined himself as a father” and was not comfortable in “abdicated any aspect of that role”. RP 765. His comfort does not negate a court’s statutory obligation.

The judge was very precise in explaining her reason for granting Kim sole decision-making. In her oral ruling she says:

... the parties inability to make a decision together at this point in time justified putting sole decision making in the hands of the mother. I have looked at the history of this from beginning to end, there has not been an ability for these parties to make decisions. And it’s cost money because of the delays in getting these decisions made. CR 1233.

John provides no evidence to suggest this finding is improper, and such discrepancy cannot be implied. Unchallenged findings of fact regarding the parenting plan are treated as verities on appeal. *In re Marriage of Fiorito*, 112 Wn. App. 657, 665, 50 P.3d 298 (2002). Consequently, John’s claim completely lacks merit.

**J. The Court Acted Within its Discretion When it Required Kim be Named as the Beneficiary under John’s Life Insurance Policy to Secure Child Support Obligations**

It was within the discretion of the court to order John to designate Kim as the beneficiary of any life insurance proceeds to satisfy his child support obligations. John has provided no

evidence to the show that such a requirement was untenable. Furthermore, John voiced no objection to this requirement when he was presented with proposed orders. Challenging the court's designation for the first time on appeal is misplaced.

**K. The Court Committed no Error in Accepting a Personal Property Valuation of \$2.**

The trial court assigned a value of \$2 to each party for personal property. Neither party requested specific items of personal property from the court. During discovery, Kim provided John with a valuation of the personal property in the family home, as requested. The personal property consisted of older furniture, toys and décor that would be typically found in a house with three school aged children. RP 646, 695, 697. The record shows that John took what he wanted from the home when he moved out and continued to take personal property thereafter. RP 646-649, 839-842. The only collection of value was John's comic books taken from the home when John moved out and were not included in the personal property valuation. Consequently, the trial court's decision to not specifically value the personal property was most likely a time saving measure. Failure of the trial court to value an

asset is not significant enough to warrant reversal and remand where the court has made a fair, just and equitable division of the marital property. *In re Marriage of Wright*, 78 Wn. App. 230, 237, 896 P.2d 735 (1995). If the trial court somehow erred by not assigning a value to each item of personal property, or by not assigning a value to the package of personal property awarded to each spouse, the error was harmless. The ultimate division of the assets and liabilities was fair and equitable, as discussed above.

**L. The Appellate Court should Award Attorneys' fees to Kim**

RAP 18.9 provides the appellate court with broad authority to impose attorney fees as a sanction against the pursuit of frivolous claims and defenses or the abuse of court rules and procedures. In addition, the sanctions of CR 11 in the trial court are made applicable to appeals under RAP 18.9. *Bryant v. Joseph Tree*, 119 Wn.2d 210, 829 P.2d 1099 (1992); *Layne v. Hyde*, 54 Wn. App. 125, 773 P.2d 83 (1989). **RAP 18.9(a)** allows this court to sanction a party who files a frivolous appeal. Sanctions may include, as compensatory damages, an award of attorney's fees to the opposing party. *Legal Foundation v. The Evergreen State College*, 44 Wn.App. 690, 697,723 P.2d 483 (1986). A frivolous

action has been defined as one that cannot be supported by any rational argument on the law or facts. **Legal Foundation** at 697. John's appeal is frivolous as it nothing more than a re-arguing of facts he presented at court without the introduction of any objective error of law or proof that the trial court abused its discretion. Moreover, his brief presents an altered set of facts and miscalculations to confuse or mislead the court. There are no debatable issues upon which reasonable minds might differ, and his claims are so devoid of merit as to warrant sanctions. John's intransigence throughout the trial proceedings, and subsequent post trial motions has forced Kim to expend considerable time, effort, and money defending against meritless claims and bringing claims to compel his compliance with court orders. The appeal has been a waste of resources and unnecessary appellate litigation on issues that contain little substance. The trial court's decision was not only consistent with but was compelled by statutory and case law. Accordingly, due to the lack of merit in this appeal John should be ordered to pay Kim's attorney fees on appeal, without regard to Kim's need or John's ability to pay. **Greenlee and Greenlee**, 65 Wn.App.703, 711, 829 P.2d 1120 (1992).

Pursuant to RCW 26.09.140, the Court of Appeals may

award attorneys fees to Kim based upon financial need and upon John's ability to pay. Pursuant to RAP 18.1(c), Kim will file with this court a financial affidavit no later than 10 days prior to the date this case is set for hearing. Kim should be awarded her attorney's fees pursuant to RCW 26.09.140 based upon financial need brought about as a result of John's intransigence, contempt, dissipation of assets and refusal to pay any amounts toward the property judgment. John has demonstrated the ability to pay for this appeal, including the cost of the complete 1242 page trial transcript, 1326 pages of clerk's papers and 150 exhibits . John has the financial ability to retain counsel while Kim, for financial reasons, is forced to represent herself *pro se*.

## **VI. CROSS APPEAL FOR ATTORNEY FEES BASED ON JOHN'S INTRANSIGENCE**

**The Trial Court Committed a Reversible Error When it Failed to Award Kim Attorney's Fees Despite its Determination of John's Intransigence.**

At trial, Kim claimed she was entitled to attorney fees for John's intransigence. "Intransigence is the quality or state of being uncompromising." *In re Marriage of Schumacher*, 100 Wn. App. 208, 216, 997 P.3d 399 (2000). Intransigence may be

“demonstrated by litigious behavior, bringing excessive and unnecessary motions, or discovery abuses.” *In re Marriage of Wallace*, 111 Wash.App. 697, 710, 45 P.3d 1131 (2002) review denied, 148 Wash.2d 1011, 64 P.3d 650 (2003) (citing *Gamache v. Gamache*, 66 Wash.2d 822, 829-30, 409 P.2d 859 (1965) (*Eide v. Eide*, 1 Wash.App. 440, 445-46, 462 P.2d 562 (1969) Washington courts have found intransigence as a basis for attorney fees when a party fails to cooperate with counsel, or participates in other activities that make trial unduly difficult or that increase legal costs unnecessarily. *In re Marriage of Foley*, 84 Wn. App. 839, 846, 930 P.2d 929 (1997); *In re Marriage of Crosetto*, 82 Wn.App. 545, 564, 918 P.2d 954 (1996).

In this case, there were numerous, ongoing and prolonged examples of John’s intransigence. John’s recalcitrant, obstructionist attitude, frivolous challenges to court orders, refusal to settle, actions lacking in integrity, abuse of the collaborative process, ongoing “mistakes” in the property valuations submitted as evidence, refusal to respond to proposed orders, refusing to pay his court ordered share of the children’s expenses and improperly taking funds out of a formerly joint line of credit that was assigned to Kim are all examples of intransigent behavior that caused the

dissolution to take a long and protracted course, ultimately resulting in exorbitant attorneys fees for Kim. The trial court's oral and written ruling determined that John was intransigent. The court found evidence of intransigence by John as stated in its Findings of Fact 2.15 which states

*Other: There is evidence by intransigence by the father which contributed to the high attorneys' fees in this case. There are, however, no funds from which to award attorneys' fees. CP 626*

Kim was forced to bring a post trial motion to seek the court's assistance in recovering \$10,000 taken by John from the HELOC. The commissioner required John to return the funds and awarded Kim attorneys' fees. CP1220 (*Judgment and Order on Petitioner's Motion to Clarify and Enforce Decree*). Although there is no reference to "intransigence" in the order, John's improper actions were the sole reason for the injunction and the motion which would have been unnecessary but for his reprehensible and litigious behavior. John had claimed his lack of funds was the impetus for taking \$10,000 out of the HELOC. Despite John's claims of insolvency, the commissioner nevertheless awarded attorneys fees to Kim.

When John brought a contempt motion against Kim, the court referenced John's intransigence when she denied the motion.

CP1323-26. In her oral ruling on January 27, 2010, the commissioner referred to John's motion as retaliatory, chastising him for bringing a matter before the court with "unclean hands". Instead of merely denying the proposed order, she instructed Kim to draft an order that captured her ruling, including the references to intransigence, retaliation, bad faith and the doctrine of clean hands. CP1323-26. Kim represented herself *pro se*, and did not request attorney's fees.

John did not assign error to Finding of Fact 2.15, the court's determination of intransigence. Unchallenged findings of fact are verities on appeal. **Cascade Valley Hosp. v. Stach**, 152Wn. App. 502, 507, 215 P.3d 1043 (2009). The trial court acknowledged that in most cases the court would award attorneys' fees to Kim. The court did not do so in this case citing a lack of financial resources.

A party's intransigence provides a separate basis for award of fees in marital dissolution actions and a party's intransigence at the trial level may support an award of attorney's fees on appeal. Washington courts have long held that, in marital dissolution proceedings, a party's intransigence will justify an award of fees without regard to the parties' financial resources. **In re Marriage of Crosetto**, 82 Wash.App. 545, 564, 918 P.2d 954 (1996).

Kim has incurred over \$80,000 in legal fees as a result of the dissolution. These were in addition to the fees spent on the collaborative process that ended as a result of John's inability to participate in good faith. The court noted the exorbitant attorney's fees and made a factual determination regarding John's intransigence. This court should reverse the trial court's ruling and award Kim attorneys' fees that were a result of John's relentless intransigence.

## **VII. CONCLUSION**

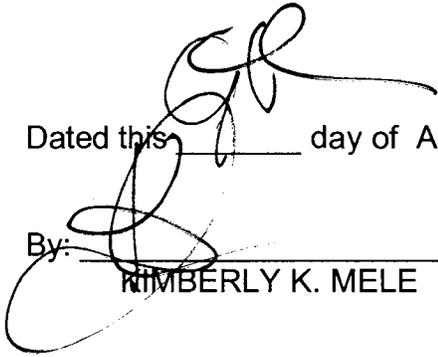
John argues in his appeal brief that the trial court erred in all of its substantive findings and all of the post trial orders. His appeal brief simply represents the same facts that were presented to the trial court and rejected. These facts were before the trial court with significantly more content than that which is attacked in the appellant's brief. The court had the benefit of eleven days of trial, reviewing 150 exhibits, hearing testimony from numerous expert and lay witnesses, and relied on a parenting plan submitted by the parenting evaluator. The court had the opportunity to hear both parties and to assess the evidence presented. It is the mandate of the trial court to decide all of the issues relative to the dissolution of the marriage; dividing the assets and liabilities, allocating parenting

responsibilities and parenting times, and restricting participation of a parent where the best interests of the child or children necessitate such under the law. In both its oral and written ruling, the trial court referenced the numerous issues considered and the volumes of exhibits reviewed. The findings of the court are clear and understandable and are supported by the record.

The court is vested with broad discretion in deciding all of the issues relative to the dissolution of the marriage and the parenting of the children, within the context of the best interests of the children. An abuse of the court's discretion is the standard of review and the basis for a reversal of the trial court. That abuse of discretion must be such that no reasonable person could come to the decision made because it is based on untenable grounds or untenable reasons. No evidence has been provided by the appellant or the record to indicate any abuse of discretion by the trial court.

The court considered all of the relevant facts and acted within its discretion to arrive at a ruling that was just and equitable given the circumstances in this case. Furthermore, there is no evidence to even suggest, let alone support, that the court's decision was anything other than in the best interest of the children.

This court should affirm the trial court's order and award attorney fees to the wife for having to respond to this appeal.

Dated this  day of April, 2010.

By: \_\_\_\_\_  
KIMBERLY K. MELE

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

In re the Marriage of:

JOHN PETER MELE

And

KIMBERLY KRISTEN MELE

APPELLANT,

RESPONDENT.

No. 63603-1-I

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON                    )  
  ) ss.  
COUNTY OF KING                    )

Kimberly K. Mele being first duly sworn on oath, deposes and says:

That on the 1 day of April, 2010, affiant caused to be served true and correct copies of the following documents on the parties and in the manner listed below:

Respondent's Brief  
Volumes 1-8 of the trial transcript

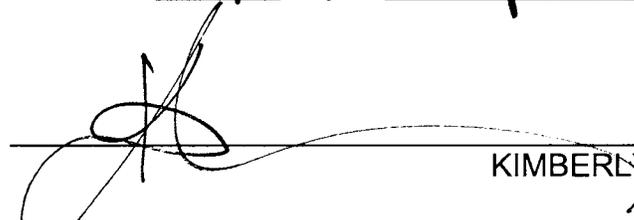
Directed and addressed to the following party:

Rhe Zinnecker  
14900 Interurban Ave S  
Suite 276  
Seattle 98168

Via US Mail.

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 9<sup>th</sup> day of April, 2010,

  
KIMBERLY K. MELE

I certify that I know or have satisfactory evidence that (name of person) is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument and acknowledged it to be (his/her) free and voluntary act for the uses and purposes mentioned in the instrument.

Dated: April 9, 2010

(Seal) 

Stephanie R. Gardner  
My Appointment Expires: 5-6-13  
Residing at: Redmond, WA

