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No. 64574-9

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
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In re:

ERIK K. HANSEN,

Appellant,

And

ELIZABETH WEINER,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE JULIE SPECTOR

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OPENING BRIEF OF APPELLANT

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## I. Assignments of Error

1. The trial court erred in finding that the parties have community property as set forth in Exhibit A, incorporated by reference, in the initial and amended findings of fact and conclusions of law. FF 2.8, CP 14, 285, 290-291.
2. The trial court erred in finding that the parties have separate property as set forth in Exhibit A, incorporated by reference, in the initial and amended findings and conclusions. FF 2.9, CP 14, 285, 290-291.
3. The trial court erred in finding that parties have community liabilities as set forth in Exhibit A, incorporated by reference, in the initial and amended findings and conclusions. FF 2.10, CP 15, 286, 290-291.
4. The trial court erred in finding that the parties have separate liabilities as set forth in Exhibit A as set forth in Exhibit A, incorporated by reference, in the initial and amended findings and conclusions. FF 2.11, CP 15, 286, 290-291.
5. The trial court erred in finding that a continuing restraining order against the husband is necessary because:

The wife has been harassed by the respondent and she reasonably fears that the respondent, who currently lives in a residence adjacent to hers, will harass her in the future. FF 2.13, CP 15, 286.

6. The trial court erred in awarding \$2,500 in sanctions and attorney fees against the husband, in the findings and conclusions.

FF 2.15, CP 286.

7. The trial court erred in finding the husband “should be awarded” the joint home equity line of credit as follows:

Pursuant to Exhibit A, attached hereto, the husband should be awarded the parties' WSECU joint Home Equity Line of Credit account \*4356 as his separate debt. Beginning with the payment thereon due in November 2009, he should timely pay the minimum monthly debt thereon until it is paid in full. FF 2.21.1, 2.21.1.a, 2.21.3, 2.21.4, 2.21.6, 2.21.7, 2.21.10, CL 3.8, CP 16 -18, 286-289.

8. The trial court erred in finding that to equitably divide the assets and debts, the husband should pay \$0.00, in addition to the debts awarded to him. FF 2.21.9, CP 288.

9. The trial court erred in concluding that a continuing restraining order should be entered. CL 3.4, 3.5, CP 18, 289.

10. The trial court erred in concluding that the distribution of property and liabilities as set forth in the decree is fair and equitable. CL 3.4, CP 18, 289.

11. The trial court erred in concluding that attorney fees, other professional fees and costs should be paid. CL 3.7, CP 18, 289.

12. The trial court erred in awarding the husband the separate property as set forth in Exhibit A, incorporated by reference, in the

initial and amended decree. Decree 3.2, CP 27, 294, 300-301.

13. The trial court erred in awarding the wife the separate property as set forth in Exhibit A, incorporated by reference, in the initial and amended decree. Decree 3.3, CP 27, 294, 300-301.

14. The trial court erred in ordering the husband to pay the liabilities as set forth in Exhibit A, incorporated by reference, in the initial and amended decree. Decree 3.4, CP 27, 294, 300-301.

15. The trial court erred in failing to order the wife to pay the liabilities in the initial and amended decree. Decree 3.5, CP 27, 294, 300-301.

16. The trial court erred in entering the continuing restraining order against the husband. Decree 3.8, CP 25, 28-29, 292, 295-296.

17. The trial court erred in awarding \$2,500 in attorney fees against the husband. Decree 3.13, CP 296-297.

18. The trial court erred in awarding the joint home equity line of credit to the husband as follows:

Pursuant to Exhibit A, attached hereto, the husband should be awarded the parties' WSECU joint Home Equity Line of Credit account \*4356 as his separate debt. Beginning with the payment thereon due in November 2009, he should timely pay the minimum monthly debt thereon until it is paid in full. Decree 3.15.1, 3.15.2.a, 3.15.3-3.15.10, CP 30-31, 297-298, 300-301.

19. The trial court erred in denying the husband's motion for reconsideration on November 20, 2009. CP 143.
20. The trial court erred in considering the wife's post-trial motions and evidence, submitted by electronic mail, and in refusing to consider the husband's response to the submissions. CP 302.
21. The trial court erred in denying the husband's motion to post-trial relief, ruling it "no longer has jurisdiction in this case" due to the pending appeal and assessing \$750 in fees and costs. CP 984-985.
22. The trial court erred in denying the husband's motion for reconsideration of its order denying post-trial relief. CP 1012.
23. The trial court erred in denying the husband's motion to vacate finding no misrepresentation by the wife or her counsel and no mistake as to any of the assets and debts awarded in the amended decree for the reasons set forth in the order denying the motion to vacate to which appellant also assigns error in each of the following assignments of error. CP 1659-1662, Sub 157.
24. The trial court erred in finding that it properly "awarded the remainder of the Home Equity Line of Credit balance" to the husband based on evidence at trial. CP 1659-1662, Sub 157.
25. The trial court erred in finding that the exhibits attached to

the order denying the motion to vacate show a summary of the evidence at trial as to parties' use of the home equity line of credit and the balance of this obligation awarded to the husband as his separate obligation. CP 1659-1662, Sub 157.

26. The trial court erred in finding that the value of 1041 NE 96th Street "is supported by the evidence." CP 1659-1662, Sub 157.

27. The trial court erred in finding that there was no mistake in the value or the award of the husband's stocks in this employee stock investment plan and that he was sanctioned pre-trial for failing to cooperate in discovery as to these assets. CP 1659-1662, Sub 157.

28. The trial court erred in assessing \$2,024.57 in attorney fees and costs against the husband on grounds that the motion to vacate was "baseless." CP 1659-1662, Sub 157.

29. The trial court erred by including Exhibits A and B in its order correcting the order of July 23, 2010. CP 1659-1662, Sub 157.

## **II. Statement of Issues**

1. Did the trial court err in imposing continuing restraining orders against the husband, when the wife did not request the restraints or offer evidence to support them and the husband did not do anything to necessitate them?

2. Did the trial court err in awarding 80% of the net community assets to the wife, but only 20% of the assets—including all of the debt—to the husband?
3. Did the trial court err in assessing \$2,500 in attorney fees against the husband, when the wife earned significantly more than him and received 80% of the assets, while the husband merely attempted to represent himself at trial?
4. Did the trial court err in denying the husband's post-trial motion to confirm that he complied with requirements in the decree on the grounds that it was without jurisdiction due to the pending appeal—and assessing \$750 in attorney fees against him for bringing the motion?
5. Did the trial court err in refusing to vacate the final orders based on the mistakes and misrepresentations by the wife or her counsel, giving the false impression that the parties' net assets were being divided equally, when actually she was receiving a windfall of 80%, but the husband only 20%, of the assets.
6. Did the trial court err in assessing \$2,024.57 in attorney fees against the husband on the grounds that his motion to vacate was "baseless"?
7. Did the trial court err in allowing the wife's counsel, post-trial,

to repeatedly submit by email new allegations and evidence, along with requests for changes to the final orders, while rejecting the husband's attempts to respond to these submissions?

### **III. Statement of the Case**

#### **A. Introduction**

At the dissolution trial, the wife, represented by counsel, and the husband, pro se, asked the court to divide their marital property and debts, consisting largely of two houses, a mortgage, a debt to the wife's mother, and a home equity line of credit. The wife's attorney used a property division spreadsheet for illustrative purposes to give the impression that the net marital estate was to be divided equally between them. After trial, her attorney had extensive contact with the court by email, making new requests and submitting additional evidence, including the spreadsheet, on which he omitted the balance on the line of credit and overvalued the husband's house and retirement assets. The court meanwhile refused to hear the husband's objections. It adopted the wife's attorney's proposed final orders, relying on his spreadsheet, thereby giving the wife a windfall of 80% of the net assets, while imposing on the husband all of the marital debt, extensive continuing restraining orders, and an award of attorney fees.

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This Court should not condone this injustice – it should vacate the final orders and remand with specific instructions to properly characterize, value, and divide the balance on the home equity line of credit, the husband’s house, and his retirement assets as of the date of separation. The husband also should be awarded his attorney fees and costs incurred in bringing this appeal.

**B. History of Case.**

Elizabeth and Erik were married in January 1998. RP 1 at 13. At the time, Elizabeth was a single mom, raising her young daughter with an absent father, and she appreciated how supportive of her daughter Erik was. RP 1 at 7, 13, 20.

They lived in a house, located at 1035 NE 96<sup>th</sup> Street, in the Maple Leaf neighborhood of Seattle. RP 1 at 12. The house was originally purchased in 1997 by Elizabeth’s mother. RP 1 at 24-27, 33. Elizabeth and Erik paid Ruth monthly in rent until 2004, when she transferred the house to the couple, free of any encumbrances. RP 1 at 27, 28.

In 2006, Elizabeth and Erik bought the house next door, located at 1041 NE 96<sup>th</sup> Street, for \$250,000, taking a loan from Ruth for \$20,000 and a mortgage for the remainder, with monthly payments around \$2,000. RP 1 at 34, 52-53, RP 2 at 35. The

house was in extremely bad condition and needed to be completely gutted. RP 1 at 34, 53. To cover the costs of the renovation, in November 2006, they took out a home equity line of credit, secured against the house at 1035 NE 96<sup>th</sup> Street, in the amount of \$100,000. RP 1 at 41. However, they first used about \$38,000 of the funds to pay off existing obligations, including credit card debts, leaving about \$61,000 remaining on the line of credit. RP 1 at 34-38, 40.

Around the same time, the parties' relationship began to deteriorate. RP 1 at 39. Elizabeth gave Erik the remaining \$61,000 to persuade him to move out of the house. RP 1 at 39-41, 55, RP 2 at 16. He complied a few months later, in June 2007. RP 1 at 39. He began living at least part of the time at 1041 NE 96th Street, although it was still not habitable, as the walls, floors, bathroom, and kitchen had been ripped out. RP 1 at 53. In August 2008, Elizabeth filed a petition for dissolution of marriage. CP 3-6.

The \$61,000 on the line of credit became a major bone of contention between them. Elizabeth mainly made the monthly payment of \$973 on the line of credit, while Erik made the mortgage payment on 1041 NE 96th Street. RP 1 at 22-23, 57; Ex. 58.

Elizabeth was upset that he would not say what he did with

the funds. Meanwhile, Erik used \$50,000 of the \$61,000 to pay down the mortgage on the house at 1041 NE 96<sup>th</sup> Street, and the remaining \$11,000 for three payments on the line of credit, as well as for the 2008 property taxes and a new roof for the house at 1035 NE 96<sup>th</sup> Street. RP 1 at 59, 61, 72; RP 2 at 17; Ex. 111, 113, 114.

After he made his last large payment to the principle on the mortgage, Elizabeth obtained an ex parte restraining order, without notice to Erik, seeking to require him to deposit the funds into her attorney's trust account and also to make the monthly payment on the line of credit. CP 480-484. Thereafter, she persuaded the court to waive the settlement conference and they went to trial on October 20 and 21, 2009, before King County Superior Court Judge Julie Spector. RP 1 & 2.

Elizabeth and Erik each asked the court to divide their net assets equally or equitably. RP 1 at 54-55, RP 2 at 7. The heart of their dispute was over the balance on the line of credit.

Elizabeth was earning \$81,900 a year and Erik \$57,000 a year as a building inspector. RP 2 at 9-10, Ex. 58.

Erik proposed each party should receive the house where he or she was residing, instead of selling the houses. RP 2 at 7. He further proposed that he could assume two major debts—the

\$156,000 mortgage on 1041 NE 96th Street and the \$20,000 loan to Elizabeth's mother—which he would pay off by refinancing his house—and that Elizabeth could refinance the line of credit as her loan. RP 2 at 13-14, 16.

Elizabeth testified that she “would like the houses either divided up equally or sold as a unit with us then appropriately dividing what we get for them and the debt, and I would like the balance of the home equity loan paid back to me.” RP 1 at 54-55.

She agreed that the \$39,000 on the line of credit used to pay off their prior debts was a community obligation. RP 1 at 66. She also agreed that on the mortgage on 1041 NE 96th Street was a “community debt.” RP 1 at 44-45.

Nonetheless, Elizabeth contended that the \$50,000 payment on the mortgage on 1041 NE 96th Street did not benefit her in any way because she did not live there while she had been making the payments on the line of credit. RP 1 at 44-45, 55. She admitted, however, that she had not made any payments on the mortgage since they separated; that Erik “has taken the full responsibility of that”; even though the payments were over \$2,000 a month, considerably more than the \$973 she was paying on the line of credit. RP 1 at 22-23, 56-57, Ex. 58. She also admitted that when

she “asked him to help me with the payments, he agreed to do that.” RP 1 at 44-45. He did help with these payments three times, making two \$973 payments and one \$1,000 payment. RP 1 at 47, 59-60, 72.

Elizabeth testified that Erik was somehow trying to secure the \$50,000 for himself by asking her to assume the obligation for the funds that he used to pay down the mortgage on 1041 NE 96th Street. RP 2 at 19-20. Erik explained that this was not the case; that these funds were part of their “divisible” community assets, as the equity in 1041 NE 96th Street. RP 2 at 8, 17. Erik also pointed out that she was getting the better deal as he would assume the greater obligations—the \$156,000 mortgage and the \$20,000 loan to her mother. RP 2 at 20.

On cross examination, Elizabeth’s attorney, Matthew Cooper, implied that Erik improperly made his last payment on the mortgage, knowing that he was going to get an ex parte order restraining him from doing so the next day. RP 2 at 19-20. But Erik’s uncontested testimony was that he only knew that Mr. Cooper was “going to get orders at the court, but not the specific tallies of what the orders were about” and that he only heard about them later from Mr. Cooper. RP 2 at 19-20.

Elizabeth also contended that the \$4,392 that Erik he spent for a new roof for 1035 NE 96th Street was an unnecessary expenditure. RP 1 at 30-31. She testified that when the roof started leaking, she called him, “just to let you know”, and he had the entire roof “replaced against my wishes a little bit” without discussing it with her. RP 1 at 30-31. She claimed that a patch would have sufficed because “only a small area had leaked”, even though she “never got up to see” and she was “not a construction person.” RP 1 at 32. She further claimed that the expense was not necessary because the house “needs to be torn down” and she wanted to sell it. RP 1 at 29-31.

Erik disagreed. He testified that, as a building inspector, the new roof was necessary to protect the asset and to protect Elizabeth and her daughter as well. RP 2 at 25.

To value the houses, Elizabeth and Erik agreed to admit two appraisals of each house and to value the houses by taking the average of the appraisals on each house. RP 2 at 4, 12-13. The house that Lisa would receive, at 1035 NE 96<sup>th</sup> Street, was appraised at \$283,000 and \$250,000 for an average of \$266,500. Ex. 37 – 38.

The house that Erik would receive, at 1041 NE 96th Street,

was appraised at \$308,000 and \$280,000, for an average of \$294,000. Ex. 32 and 33. The second appraiser, noting that the interior “is currently in an unfinished condition”, concluded that the house had an “as-is market value” of \$280,000, which he determined by starting with a sales comparison value of \$360,000 from which he subtracted the cost of the renovation. Ex. 33 at 3, 5, 14-15.

However, Elizabeth’s attorney produced a property division spreadsheet for illustrative purposes only on which he valued 1041 NE 96th Street at \$334,000, \$40,000 higher than the average of the appraisals. RP 2 at 20; CP 145, 169-173. Erik objected to this value. RP 2 at 13.

Erik proposed that his retirement assets, which consisted of stock in his employee stock investment plan, could be valued by referring to two account statements. RP 2 at 11-12, 52-53; Ex. 18. On the first statement, dated on March 31, 2007, two months before the separation, the stock had a vested value of \$3,652. Ex. 18. On the second statement, dated March 31, 2008, ten months after the separation, the value of the vested stocks increased to \$7,334 on March 31, 2008. Ex.18. Erik, in unchallenged testimony, proposed that, as the statements were issued only annually, the

court could interpolate a value for the assets as of the date of separation based on the two statements. RP 2 at 11-12, 52-53.

But Elizabeth resisted revealing—and even obfuscated—the value of her retirement assets. Before trial, Erik repeatedly tried, through discovery, to get her to produce copies of her retirement plans. CP 534. Her attorney stonewalled. CP 534. Erik sent out discovery to no avail. CP 534. In September 2009, Erik wrote to Mr. Cooper insisting that he give him the retirement documents. CP 534.

Exasperated, in early September 2009, Erik filed a motion to compel Elizabeth to respond to his request for her retirement documents. CP 1222-1223. As he was representing himself at that point, however, his efforts were unsuccessful. The court denied the request, “pending further explanation of the basis of the requests.” CP 1222-1223. Additionally, in a motion to reconsider a continuance of the trial date, Erik again argued that Elizabeth still had not disclosed her retirement assets. Sub 54. He also twice unsuccessfully asked the court to issue subpoenas to obtain documents that would reveal her retirement assets. Sub 64-66.

At the start of trial, on October 20, Erik again renewed his request that Elizabeth be required to produce her retirement

documents. The court assured him that he “should not worry about what materials you have not received”, explaining that it had the power to “order anything in question to be produced” and “if there is anything outstanding you feel you haven’t had access to, that shouldn’t be a basis for the continuance, cuz I can get that before I enter of any kind of finding or conclusion in this matter.” RP 1 at 4-5. Erik relied on this assurance.

Erik was completely surprised, then, when Elizabeth, testifying about her retirement assets, failed to submit any supporting documentation and falsely claimed that she provided the relevant documents to him prior to trial. RP 1 at 40-49. She swore that her testimony “is the extent of my retirement history”, even though her pay checks in 2009 showed that she was receiving monthly contributions of over \$212 to an undisclosed retirement account from her employer, Seattle Cancer Care Alliance. RP 1 at 50; Ex. 6. She testified that she had “no meaningful available assets”, other than those she listed in the financial declaration, yet she failed to list those retirement contributions. RP 1 at 17; Ex. 58.

At the close of trial, Erik said that Elizabeth “still hasn’t produced all the retirement records,” expecting that the court would order her to do so. RP 2 at 85. The court refused to take this

action—and never knew the extent of her retirement assets. RP 2 at 85-86.

After the trial, Elizabeth’s attorney repeatedly sent emails to the court, making new allegations and offering evidence that was either not offered or admitted at trial, as well as requesting changes to the final orders. The court was continually receptive to his submissions but refused to hear Erik’s objections, rejecting even his properly filed motion for reconsideration and responsive papers.

After trial concluded on October 21, Mr. Cooper sent the court an email, attaching his property division spreadsheet, which he offered at trial for illustrative purposes only. CP 328-332. He specifically stated in the spreadsheet that the result was an “Equal division of Community Property.” CP 331. He also attached a chart purporting to analyze the parties’ use of the line of credit, which was not offered at trial or even based on evidence at trial. CP 332.

Two days later, on October 23, Mr. Cooper again wrote the court by email, stating that he was “preparing the findings and decree to reflect a different approach than what the court ordered.” CP 342. Making the unsubstantiated allegation that Erik “violated two court orders in this case”, he stated that he wanted “to change how the quit claim deed exchange will be handled.” CP 342. On

October 26, Mr. Cooper sent the court an email, attaching a motion for reconsideration to this end. CP 346.

On October 28, the court granted the motion in a telephonic hearing, entirely off the record, and Mr. Cooper revised the final orders accordingly. CP 351, 354, 356. He then wrote the court emails, claiming that Erik would not sign his proposed orders. CP 358. In response, the bailiff, asked the parties to “state your objections to the findings and decree” and promised a presentation hearing if they could not agree to the proposed orders. CP 378.

When Erik wrote that the restraining orders were improper and that the value for their assets and debts needs to be completed, the bailiff responded with a hearing date. CP 380, 382, 384. However, the next day, November 3, the bailiff wrote again, striking the hearing and saying that the judge “will be signing the proposed findings and decree today.” CP 386. Later that day, the bailiff sent the parties copies of the signed final orders by email. CP 388-406. Erik’s objections went unheard.

In the final orders, the parties’ property and liabilities were characterized, but not assigned values. CP 34, 35, 389-406. Erik was awarded 1041 NE 96th Street, along with all of the debts incurred during the marriage, including the balance on the home

equity line of credit. CP 30-31, 34-35, 402-403, 405. He was required to refinance the mortgage on his house and pay off all these debts, otherwise his house was to be sold for this purpose. CP 31, 402-403. He was restrained from recording the deed to his residence and from alienating his interest in land he owned with his mother in Whatcom County. The court retained jurisdiction to supervise this process. CP 31, 402-404. In addition, extensive continuing restraining orders were imposed on Erik for “molesting, assaulting, harassing, or stalking” as well as an award of attorney fees in an amount to be determined. CP 28, 29.

Elizabeth was awarded 1039 NE 96th Street, free of encumbrances, along with substantial separate property and only the debt that she incurred after separation. CP 34, 35.

On November 13, Erik filed a motion for reconsideration, objecting to the continuing restraining orders, to the overvaluing of 1041 NE 96th Street by \$40,000 above the average of the two appraisals, and to the assigning of the entire balance of the line of credit to him. CP 9-12. The court later denied the motion on November 23. CP 143.

A hearing was set for November 20 to review Erik’s progress on refinancing 1041 NE 98th Street. CP 410. On November 18,

Mr. Cooper wrote the court by email, seeking another new provision in the decree, this one requiring Erik to pay the line of credit by a deadline each month or be sanctioned. CP 414. He initially claimed that Erik had not paid on the line of credit that month, but later wrote that, in fact, Erik did make the payment. CP 414, 415.

On November 19, Mr. Cooper, by email, said that the court, at the review hearing, should fill in provisions in the final orders using his property division spreadsheet, which he claimed “was admitted during trial” as an exhibit. CP 419. Erik adamantly objected that the spreadsheet “was not admitted”, it “has false financial information on it”, and, if the court considers it, he should be allowed to offer his own, alternative spreadsheet. CP 424-436. Mr. Cooper, by email, conceded that his spreadsheet was not admitted at trial, but asserted that it was not false. CP 438.

The bailiff told Mr. Cooper and Erik to “stop with the emails”, calling them “really inappropriate”, and refused to give Erik’s objections and Mr. Cooper’s reply to the judge:

These last two emails have not and will not be given to the judge. She will have her hearing with you tomorrow. Until then I cannot continue to get emails of this nature. CP 445.

On November 20, the court, considering only Mr. Cooper’s spreadsheet, decided on the final orders without the review

hearing. CP 448. Once again Erik's objections went unheard.

Despite the bailiff's order to stop sending emails, Mr. Cooper asked the court three times by email that "additional changes be made" to the final orders and attaching his proposed amended final orders. CP 448-449, 466-468, 473.

Erik complied with the bailiff's directive. On November 30, he filed a declaration in response to Mr. Cooper's email request for additional changes to the final orders. CP 144. He pointed out that the property division was grossly unfair because Mr. Cooper, in his spreadsheet, omitted the \$90,185 balance on the line of credit and overvalued his house by \$40,000. CP 144-149. He also stated that he had done nothing to justify the restraining orders and the award of attorney fees. CP 148-149.

Erik filed a notice of appeal of the final orders and the adverse ruling on reconsideration. CP 237-258.

On December 3, the court issued a letter, rejecting Erik's responsive declaration as an untimely motion for reconsideration. CP 302. The court entered the amended final orders, granting Mr. Cooper's requested changes, which included \$2,500 in attorney fees against Erik. CP 296, 297.

Erik timely appealed the amended final orders. CP 303.

By March 2010, Erik had refinanced his mortgage, paying off the line of credit, the \$20,000 debt, and the \$2,500 fee award. CP 502-502. On April 16, he filed a motion, asking the court to confirm that he fulfilled his obligations under the decree and, accordingly, to lift the restraints on his property. CP 501-502. He also asked the court to remove the unwarranted continuing restraining order, and to resolve other post-trial matters. CP 505-506.

On May 10, the court denied his motion, stating that it “no longer has jurisdiction over this case” and assessed \$750 in attorney fees against him for bringing it. CP 984-985. On reconsideration, Erik showed that the court was required to hear his post-decree motion while his appeal was pending, but the court refused to reconsider its decision. RAP 7.2; CP 986-992, 1012.

Meanwhile, on April 27, Erik, now represented by counsel, filed a motion to vacate the final orders under Civil Rule 60(b), alleging that Elizabeth and her attorney, through mistake or misrepresentation, obtained entry of the final orders, using the property division spreadsheet to give the false impression that the parties’ net assets were being divided equally, when actually she was receiving a windfall of 80%, but he only 20%, of the net assets. CP 510-531. They achieved this result, he contended, by omitting

the \$90,185 balance on the home equity line of credit, by overvaluing his house by \$40,000, and by valuing his retirement assets at \$5,534 above their value just before the time of separation on the spreadsheet. CP 510-531.

On May 25, 2010, Mr. Cooper filed a “responsive certification” in which he avoided the merits of the motion, anticipating that the court would again simply rule that it lacked jurisdiction to hear the motion. CP 993-997.

At the hearing on May 28, the court decided to consider Erik’s motion, except for issues related to Elizabeth’s omitted retirement assets and the award of fees, but continued the hearing to June 14. RP 3 at 9, 20. The court again continued this date to July 9, on Mr. Cooper’s request. CP 1185-1186.

On June 10, Mr. Cooper filed his second “responsive certification”. CP 1061-1075. He attempted to justify the values he assigned to Erik’s house and retirement assets by alleging that Erik did not provide evidence at trial to dispute his values. CP 1061-1069. He also attempted to justify assigning the balance on the line of credit to Erik by alleging that he withdrew the funds for his separate use, refused to fully account for them, and forced Elizabeth to make the payments on the loan. CP 1069-1074.

At the hearing on July 9, the court denied the motion, ruling orally that Erik had agreed at trial to assume all of the parties' debts, including the home equity line of credit, and that he also agreed to the values that Mr. Cooper assigned to his house and to his retirement stocks in his property division spreadsheet. RP 4 at 10-11, 16. The court concluded that Erik had "buyer's remorse" and, in attempting to re-litigate the case, engaged in "a continuing pattern of intransigence." RP 4 at 17.

On July 23, the court, in its written order denying the motion, found no misrepresentation by Elizabeth or her counsel and no mistake as to any of the assets and debts awarded in the amended decree. CP 1661-1662. The court awarded Elizabeth \$2,024.57 in attorney fees, calling the motion "baseless." On August 9, the court granted a motion for reconsideration by Elizabeth, attaching to the prior order two exhibits, Mr. Cooper's property division spreadsheet and his analysis of the home equity line of credit. Sub 157.

Erik appealed this decision, and this Court consolidated his appeals for review. Sub 145.

#### **IV. Argument**

##### **A. The continuing restraining orders were not necessary.**

The trial court, in the decree, imposed continuing restraining

orders of such severity on Erik that it gives the impression that he engaged in some kind of reprehensible or violent behavior. He is restrained from “molesting, assaulting, harassing, or stalking” Elizabeth, from disturbing her peace, and from coming within 500 feet of her workplace, school, or home. CP 295-296. He also is restrained from possessing a firearm or ammunition pursuant to federal firearms law. CP 295-296. A violation of these restraints constitutes a criminal offense and subjects him to arrest. CP 296.

A trial court is authorized to “make provision for any necessary continuing restraining orders”, in entering a decree of dissolution of marriage. RCW 26.09.050 (emphasis added). Here, the court found these restraints “necessary” based on the following:

The wife has been harassed by the respondent and she reasonably fears that the respondent, who currently lives in a residence adjacent to hers, will harass her in the future. CP 286.

But the continuing restraining orders were not requested or supported by evidence, let alone necessary. At trial, Elizabeth did not request the continuing restraining orders. She did not make any allegations or offer any evidence to support the court’s findings that Erik harassed her or that she fears he will harass her in the future. Without support in the record, the continuing restraining orders were an abuse of discretion.

A review of the record as a whole reflects that Elizabeth did not request personal restraints on Erik in her petition for dissolution. CP 3-6. In the confirmation of issues, the parties both averred that there were no allegations of abuse of any kind. CP 1190-1191.

Just before trial, on September 9, Elizabeth obtained an ex parte restraining order without notice to Erik, restraining him from using the line of credit funds and also from disturbing her peace or coming near her work or home. CP 482. In her moving papers, however, she alleged only that he was secretive about his use of the funds and was phoning her frequently. CP 488. Erik did not respond or appear at the hearing, as he had not been notified. CP 481, RP 2 at 19-20. The commissioner maintained the restraints in a temporary order, but noted that the order "is subject to modification or revocation by the trial court". CP 264. The trial court was not informed of these restraints, and, in any event, they do not justify imposing the continuing restraints in the final orders.

The continuing restraining orders are simply the result of the court rubber-stamping the proposed final orders, prepared by Mr. Cooper, and refusing to hear Erik's repeated objections as to the injustice of the restraints. The court's imposition of the restraints is indicative of its treatment of Erik throughout the case. This Court

should vacate the restraints as a manifest abuse of discretion.

**B. The property division resulted in a patent disparity in the parties' economic circumstances.**

A property division made during the dissolution of a marriage will be reversed on appeal only if there is a manifest abuse of discretion. Urbana v. Urbana, 147 Wn. App. 1, 9, 195 P.3d 959 (2008). A trial court abuses its discretion if its decision is manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Id. at 9-10. While the trial court is not required to divide community property equally, if its dissolution decree results in a patent disparity in the parties' economic circumstances, the appellate court will reverse its decision because the trial court will have committed a manifest abuse of discretion. Id. at 10.

The court is required to divide the property and the liabilities of the parties, without regard to misconduct, as "shall appear just and equitable after considering all relevant factors" including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership; and
- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner

with whom the children reside the majority of the time.

RCW 26.09.080.

Although no single factor must be given greater weight than any other factor as a matter of law, the economic circumstances of each spouse upon dissolution is of paramount concern. In re Marriage of Olivares, 69 Wn. App. 324, 329, 848 P.2d 1281 (1993).

Here, the court's property division is supported by conclusory findings that do not evince fair consideration of the required statutory factors. The court did not state the basis for its property division; it merely assigned the property and liabilities to the parties and characterized each item as community or separate, except for the home equity line of credit, which it characterized as both. CP 290-291, 300-301. All of the debts incurred during the marriage were assigned to Erik. CP 290, 300. None of the property or liabilities was assigned values. CP 290-291, 300-301. Without adequate findings to review the basis for the property division, it is impossible to determine if it is just and equitable.

1. The court failed to consider the extent of the property.

The court's failure to assign values to any of the parties' property or liabilities was an abuse of discretion. The valuation of property in a divorce case is a material fact. Greene v. Greene, 97

Wn. App. 708, 712, 986 P.2d 144 (1999). The trial court is required to value the property to create a record for appellate review. Id. If the court fails to do so, the appellate court may look to the record to determine the value of the assets. Id. But if the values are in dispute, the reviewing court is unable to determine whether the property division is just and equitable. Id.

In Greene, the parties' major assets were two properties in North Carolina and their retirement assets. Greene, 97 Wn. App. at 711. The trial court, after hearing conflicting testimony as to the value of the properties, awarded them to the wife without valuing them. Greene, 97 Wn. App. at 712. The appellate court reversed, concluding that, due to the court's failure to value the properties, it was unable to review the fairness of its property division. Id.

Here, the court failed to value all of the parties' property and debts, and of their major assets—two houses—awarded one to the Elizabeth, free of encumbrances, and the other to Erik, along with all of the marital debts. As in Greene, the court's failure to value the property and debts here makes it impossible for the reviewing court to determine if the property division is fair. A review of the record shows that, in fact, it was not.

2. The property division spreadsheet was an untenable ground for the property division.

The record reveals that, after the trial, the court relied on the property division spreadsheet, submitted by email by Mr. Cooper, in making its division of property. CP 328-332. This is confirmed by the court's decision to affix the spreadsheet to its order denying the motion to vacate, apparently as findings. Sub 157. The spreadsheet purports to provide values for the parties' property and debts and to show that their net community assets were divided equally between them. CP 144-149, 424-426, RP 2 at 13, 20. However, the spreadsheet was used for illustrative purposes only at trial, it was not admitted into evidence, and it was objected to by Erik at trial and afterward. Accordingly, the values assigned to the parties' property and liabilities by Mr. Cooper on his spreadsheet are untenable grounds for the court's property division.

Further, the characterization and valuation of the parties' property and liabilities as set out in the spreadsheet are not supported by the evidence at trial. Erik specifically objected that the spreadsheet omitted the balance on the line of credit, overvalued 1041 NE 96th Street by \$40,000, and overvalued his

retirement assets by \$5,534. CP 144-149, 528-531. Contrary to the claimed equal division on the spreadsheet, the result was a patent disparity in the parties' economic circumstances—80% of the assets to Elizabeth and only 20% to Erik.

3. Erik's house was overvalued by \$40,000.

The court, by relying on the value that Mr. Cooper assigned to 1041 NE 96th Street in his spreadsheet, overvalued the house by \$40,000. Where there is conflicting evidence on the value of an asset, the court may adopt the value asserted by either party or the value demonstrated by other evidence. In re Marriage of Soriano, 31 Wn.App. 432, 435, 643 P.2d 450 (1982). Where the trial court's decision falls within the range of expert testimony given at trial, and is reasonable in light of the conflicting expert opinions, the decision is based upon substantial evidence and will be affirmed upon appeal. In re Marriage of Sedlock, 69 Wn.App. 484, 491-92, 849 P.2d 1243 (1993).

Here, there was no conflicting evidence over the value of either house. The parties agreed to admit the two appraisals of each house into evidence. RP 2 at 4, 12-13. They also agreed to value the houses by taking the average of the two appraisals of each of them. RP 2 at 4, 12-13. Mr. Cooper, in his property

division spreadsheet, properly valued the house awarded to his client by the agreed-upon method. But he did not do the same for the house awarded to Erik. To do so would have resulted in a value of \$294,000 for his house. CP 146. Instead of taking the average of the two appraisers' market values of 1041 NE 96th Street, Mr. Cooper used the second appraiser's initial sales comparison value of \$360,000, which the appraiser adjusted to \$280,000 to account for the fact that the interior of the house was unfinished. CP 146, 329. This resulted in an erroneous—and inequitable—value of \$344,000. CP 146, 329. The appraisers' opinions and the formula for determining the value of each house were fixed at trial by the parties' agreement. The court's decision was not based on the agreed upon range of evidence at trial, and, accordingly, it was not based on substantial evidence. It was based on the erroneous value assigned by Mr. Cooper, which was an abuse of discretion.

4. The court overvalued Erik's retirement assets.

The court also improperly relied on the value that Mr. Cooper assigned to Erik's retirement assets on his spreadsheet. The value of assets is a question of fact. In re Marriage of Luckey, 73 Wn. App. 201, 206, 868 P.2d 189 (1994). This Court reviews the trial

court's findings of fact on the asset valuation for substantial evidence. Robblee v. Robblee, 68 Wn. App. 69, 74, 841 P.2d 1289 (1992). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. In re Marriage of Monaghan, 78 Wn. App. 918, 923, 899 P.2d 841 (1995). An owner may testify as to the value of his property. Worthington v. Worthington, 73 Wn.2d 759, 763, 440 P.2d 478 (1968). Faced with conflicting evidence, the court may adopt the value asserted by either party or any value in between. In re Marriage of Soriano, 31 Wn. App. at 435.

Here, Erik provided statements showing the vested and unvested values of his retirement assets from two months before separation and ten months after separation. Ex. 18. The first statement showed a vested value of \$3,652, the second statement a vested value of \$7,334. Ex. 18. Erik testified that the statements were issued annually and he proposed that the court value these assets as of the separation date by interpolating between the two statements. RP 2 at 11-12, 52-53. Elizabeth did not challenge his testimony or offer conflicting evidence.

The court's discretion was limited to valuing Erik's retirement assets based on the evidence presented. It's reliance on Mr.

Cooper's use of the stocks' unvested value ten months after separation of \$9,178 was an abuse of discretion. CP 330.

Even if the court's reliance on Mr. Cooper's value could be considered as supported by substantial evidence, it was inequitable to value Erik's retirement assets at the highest possible value as of ten months after separation while valuing Elizabeth retirement assets at zero as of the date of separation. The court allowed Erik's retirement assets to be valued at its highest possible value, yet it allowed Elizabeth to omit the retirement assets that she was receiving from her employer at the same time. The court's failure to value these assets in a just and equitable manner was a manifest abuse of discretion.

5. The court omitted of the balance on the home equity line of credit.

The court failed to value the balance on the home equity line of credit in the final orders and--as with Erik's house and retirement assets—it relied exclusively on Mr. Cooper's property division spreadsheet. CP 329. But Mr. Cooper omitted the balance on the line of credit from his spreadsheet. This obligation was left out of the equation and ultimately borne entirely by Erik. CP 145-146, 329.

The record shows that the balance on the line of credit was \$91,043.59 just before trial on September 25, 2009. Ex. 24 at 41. It had been paid down to \$90,185 as of November 17, 2009. CP 145. The court's failure to value this obligation was an abuse of its discretion.

6. The court mischaracterized the balance on the home equity line of credit as Erik's separate debt.

In the final orders, the home equity line of credit was mischaracterized as both community and separate—and it is inequitably assigned to Erik outside of the equal division formula in the spreadsheet. CP 290-291. The record reflects that this debt was unmistakably community, not both community and separate or even Erik's separate debt.

The trial court has the duty to characterize the property as either community or separate. Matter of Marriage of Olivares, 69 Wn. App. 324 at 329. To accomplish this, the court may consider the source of the property and the date it was acquired. Id. In Washington, it is presumed that assets acquired during marriage are community property. In re Marriage of Chumbley, 150 Wn.2d 1, 4, 74 P.3d 129 (2003) (citing RCW 26.16.030. To rebut the presumption, a party must present clear and convincing evidence

that the acquisition fits within a separate property provision. Id. The legislature defines separate property as property acquired before marriage or acquired after marriage by gift, bequest, devise, or descent. Id. (citing RCW 26.16.010, .020).

Failure to properly characterize the property may be reversible error. Id. However, mischaracterization of property is not grounds for setting aside a trial court's allocation of liabilities and assets, so long as the distribution is fair and equitable. Id. Where there is mischaracterization, the trial court will be affirmed unless the reasoning of the court indicates (1) that the property division was significantly influenced by characterization and (2) that it is not clear that the court would have divided the property in the same way in the absence of the mischaracterization. Id. A trial court's characterization of property as community or separate is reviewed de novo. Id.

At trial, Elizabeth acknowledged that they took out the home equity line of credit with the purpose of fixing up 1041 NE 96th Street. RP 1 66. The parties obtained the \$100,000 loan during the marriage, in November 2006. They used \$39,000 to pay off existing community debts, leaving \$61,000. RP 1 at 37, 66. After they separated, Erik used \$50,000 to pay down the mortgage on

their house at 1041 NE 96th Street. RP 2 at 17-19. Elizabeth also agreed that this mortgage was a community debt. RP 1 at 44-45. Erik used \$11,000 for payments on the line of credit, the 2008 property taxes on 1039 NE 96th Street, and the new roof on that house. RP 1 at 59, 61, 72, RP 2 at 39. Elizabeth objected that his use of the funds to pay down the mortgage and to pay for a new roof did not benefit her. RP 1 at 30-31, 44-45, 55. But her objection did not change the community character of the funds, which were either used to pay community debts or became community assets as part of the equity in the two houses. Accordingly, the court erred in characterizing the balance on the line of credit as Erik's separate debt.

The court's mischaracterization of the balance on the line of credit cannot be affirmed. The court failed to make findings explaining its reasoning for its characterization of this debt. Assuming the court relied on the formula in Mr. Cooper's spreadsheet as its reasoning, the court's property division was significantly influenced by its mischaracterization and it is not clear it would have divided the property the same way otherwise. The spreadsheet purports to equally divide all of the community property while awarding the parties' all their separate assets and

debts. CP 329-331. Using this formula, if the court properly characterized the balance on the line of credit as community, it surely would have divided the balance equally between the parties. Accordingly, the court's mischaracterization resulted in a grossly inequitable division of property, warranting reversal.

**C. The award of \$2,500 in attorney fees was improper.**

The trial court's award of attorney fees is reviewed for an abuse of discretion. In re Marriage of Morrow, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). But trial courts must exercise their discretion on articulable grounds, making an adequate record so the appellate court can review a fee award. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). The trial court must enter findings of fact and conclusions of law to support an attorney fee award. Id.

Here, the court awarded \$2,500 in "sanctions and fees" against Erik without articulating any grounds. CP 296-297. The award is not supported by evidence in the record under any possibly applicable grounds.

a. Elizabeth has the ability to pay her own attorney fees.

In a dissolution action, the trial court may, "after considering the financial resources of both parties," order one party to pay the

other party's attorney fees. RCW 26.09.140. The trial court must balance the needs of the spouse requesting fees against the other spouse's ability to pay. Morrow, 53 Wn. App. at 590.

Here, Elizabeth has the ability to pay her own fees. She was earning \$25,000 more than Erik annually and she received 80% of the net community assets. RP 2 at 9-10, Ex. 58. Any award of fees under RCW 26.09.140 was an abuse of discretion.

b. Erik was not intransigent.

A trial court also may award fees based on the intransigence of a party, without regard to the parties' financial resources.

Marriage of Crosetto, 82 Wn. App. at 564, 918 P.2d 954. Erik did not engage in any conduct that could be considered intransigent.

Intransigence is reserved for cases involving conduct beyond the pale, such as extreme acts of frivolous obstructionism or outright maliciousness. For example, intransigence was found when the husband's recalcitrant, foot-dragging, obstructionist attitude increased the cost of litigation to his former wife in Eide v. Eide, 1 Wn. App. 440, 445-46, 462 P.2d 562 (1969). Intransigence was warranted where a husband filed numerous frivolous motions, refused to attend his own deposition, and refused to read correspondence from his wife's attorney, all of which conduct

caused numerous delays in the trial and unnecessarily increased the cost of the litigation in In re Marriage of Foley, 84 Wn. App. 839, 846, 930 P.2d 929 (1997).

Here, the record does not show that Erik did anything malicious or improper. He merely attempted to represent himself at trial—and this does not justify an award of fees for intransigence. The award of fees should be reversed.

**D. The court improperly refused to consider the post-decree motion and awarded fees.**

The court, in denying Erik's motion to resolve post-decree issues, ruled that it “no longer has jurisdiction in this case”, due to the pending appeal of the final orders, and accordingly assessed \$750 in attorney fees against him. CP 984-985. This was an error of law.

The trial court retains the broad authority to act in a matter, even after the appellate court accepted review. RAP 7.2(a). While an appeal is pending, the trial court “has the authority to enforce any decision of the trial court and a party may execute on any judgment of the trial court”, unless the decision is stayed, which does not apply here. RAP 7.2(c). Erik mainly asked the court to enforce its decision that he demonstrate that he paid off certain

financial obligations by refinancing his mortgage—an action clearly within the ambit of the court’s authority under the appellate rule.

Further, the trial court not only has the authority to determine post-judgment motions; it is required to do so. The post-judgment motion “shall first be heard by the trial court, which shall decide the matter.” RAP 7.2(e) (emphasis added). If the trial court’s determination “will change a decision then being reviewed by the appellate court”, a party is required to obtain permission from the appellate court simply “prior to the formal entry of the trial court decision. RAP 7.2(e).

Here, the court had the authority and the duty to hear and decide Erik’s motion. In refusing to do so—and in awarding attorney fees—the court abused its discretion. The fee award, at minimum, must be reversed.

**E. The trial court erred in denying the motion to vacate.**

Proceedings to vacate judgments are equitable in nature, and the court should exercise its authority liberally to preserve substantial rights and to do justice between the parties. In re Marriage of Hardt, 39 Wn. App. 493, 495, 693 P.2d 1386 (1985) (emphasis added). A trial court's decision on a motion to vacate is reviewed for abuse of discretion. Estate of Treadwell ex rel. Neil v.

Wright, 115 Wn. App. 238, 61 P.3d 1214 (2003). As a general rule, findings of fact which are supported by substantial evidence will not be disturbed on appeal, but exception to such rule is made in case where the court's findings are not based on oral testimony, and in such cases—like this one--the appellate court stands in the same position as the trial court, and it should independently review the record. In re Marriage of Hunter, 52 Wn. App. 265, 758 P.2d 1019 (1988).

Erik, in his motion to vacate the final orders under Civil Rule 60(b), revealed that Elizabeth and her attorney made—and perpetuated--mistakes or misrepresentations in the property division spreadsheet on which the court based its property division, despite Erik's objections at trial and afterward in his motion for reconsideration and his responses to Mr. Cooper's numerous requests for changes to the final orders by email. CP 510-531.

The court may vacate final orders based on the “misconduct” of a party, including fraud and misrepresentation. CR 60(b)(4). Fraud may consist of making false representations or concealing material facts. Alejandro v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2007). To prove fraudulent concealment or misrepresentation, the movant may simply show that the adverse party breached an

affirmative duty to disclose a material fact. Norris v. Church & Co., Inc., 115 Wn. App. 511, 63 P.3d 153 (2002). The fraudulent conduct or misrepresentation must *cause* the entry of judgment such that the losing party was prevented from fully and fairly presenting its case or defense. Lindgren v. Lindgren, 58 Wn. App. 588, 596, 794 P.2d 526 (1996).

Erik demonstrated that Mr. Cooper used his spreadsheet to give the false appearance that the parties' net marital assets would be divided equally, when, in fact, he concealed the balance on the home equity line of credit and overvalued Erik's house and retirement assets, as shown above. After trial, he submitted the spreadsheet to the court as if it had been admitted into evidence—and ultimately persuaded the court, through extensive email correspondence, to adopt his proposed final orders, based on his erroneous spreadsheet. CP 328-332, 342, 358, 414, 419, 448-449, 466-468, 473.

Nonetheless, the court denied the motion to vacate, ruling there was no mistake or misrepresentation, based on the scant findings that it properly “awarded the remainder of the Home Equity Line of Credit balance” to Erik, the value of 1041 NE 96th street “is supported by the evidence”, and no mistake was made in the value

or the award of the stocks in Erik's employee stock investment plan. CP 1661-1662. It also attached Mr. Cooper's property division spreadsheet and another spreadsheet in which he purported to analyze the parties' use of the home equity line of credit. Sub 157. As shown above, the values assigned by Mr. Cooper, and relied on by the court, for Erik's house and retirement assets are not supported by the record.

The court's finding that the balance on the line of credit was "properly awarded" to Erik apparently rests on Mr. Cooper's analysis in the second spreadsheet. This spreadsheet was first submitted to the court by Mr. Cooper by email after trial on October 21, 2009. CP 328, 332. It was not offered as evidence at trial or even based on other evidence offered at trial. Mr. Cooper claimed to independently calculate that Erik owed Elizabeth \$92,657 due to the parties' respective use of the line of credit, which he represented as Erik's "\$61,000 in separate use of funds", \$19,500 as half of \$39,000 in community use of funds, and \$13,553 in interest charged, with a small reduction of \$1,396 for payments to principle on the debt. CP 332. This analysis, created and submitted after trial by Mr. Cooper, does not support the finding that the balance on the line of credit was "properly awarded" to Erik.

The analysis itself consists of two additional misrepresentations. It mischaracterizes \$61,000 of the funds from the line of credit as Erik's separate debt, when his debt was clearly community, as shown above. CP 332. It also omits the fact that after they separated Erik, who earned the lower income, was paying a greater amount each month on the mortgage on 1041 NE 96th Street than Elizabeth was paying on the line of credit. At trial, Elizabeth admitted that this was true. RP 1 at 22-23, 56-57.

In light of this, Mr. Cooper's analysis is nothing more than a false representation of the parties' respective payments on community debts after separation. It serves only to justify the court's erroneous allocation of the entire balance of the line of credit to Erik.

The court, in its oral ruling, stated that there was no mistake or misrepresentation because Erik agreed to assume all of the parties' marital debts and that he also agreed to the values assigned to his house and retirement assets. RP 4 at 10-11, 16. This false belief is not supported by the record.

Erik did not agree to assume the balance on the line of credit. He generously proposed that, in order to equitably divide their assets, he could take the greater burden of the community

debts, namely, the \$156,000 mortgage and the \$20,000 debt to Elizabeth's mother, but he did not agree to assume all of the debts. RP 2 at 13-14. He proposed that Elizabeth could assume lesser debt of the balance on the home equity line of credit. RP 2 at 16. The court was without tenable grounds for allocating all of the parties' debts to Erik based on the false belief that he had agreed to do so.

Erik also did not agree to Mr. Cooper's valuation of his house, 1041 NE 96th Street. He specifically objected to it at trial. RP 2 at 13.

Finally, Erik did not agree that his retirement assets should be valued using the stock's unvested value of about \$9,178, ten months after separation. He proposed that the court determine the proper value as of the date of separation by interposing the values on the two annually-issued statements, one from two months before separation and the other from ten months after separation. RP 2 at 12, 52-53, Ex. 18.

In short, the court's refusal to vacate the final orders on grounds that Erik agreed to Mr. Cooper's property division spreadsheet was an abuse of discretion. This Court, independently reviewing the record, should vacate the final orders.

**F. The award of attorney fees to Elizabeth was error.**

A trial court's award of attorney fees is reviewed for abuse of discretion. Wheeler v. Catholic Archdiocese of Seattle, 65 Wn. App. 552, 829 P.2d 196 (1992). The trial court, in denying the motion to vacate, assessed \$2,024.57 in attorney fees against Erik on grounds that the motion was "baseless". Sub 157. The mere fact that the motion did not succeed is not grounds for an award of attorney fees. The award of attorney fees should be reversed.

In its oral ruling, the court found Erik intransigent based on its incorrect belief that he had agreed to assume all the parties' debt and also agreed to the value of his house and retirement assets, yet he was trying to relitigate these issues almost a year later. RP 4 at 17. This was not true. Erik did not agree to assume the parties' debts or to the values assigned to his assets, as shown above. He also did not wait almost a year to object. He objected both at trial and after trial. He exerted tremendous effort to be heard, but was refused consideration by the court. CP 9-12, 144-149, 380, 424-436, 501-506. For this reason, the award of attorney fees rests on untenable grounds and should be reversed.

**G. Erik's due process rights were violated.**

Integrity of the fact finding process and basic fairness of the

decision are principal due process considerations. Parker v. United Airlines, Inc., 32 Wn. App. 722, 728, 649 P.2d 181 (1982). Due process requires notice reasonably calculated to apprise a party of the pending proceedings affecting him and an opportunity to present his objections before a competent tribunal. Watson v. Washington Preferred Life Ins. Co., 81 Wn.2d 403, 408, 502 P.2d 1016 (1972). Generally, in looking at the degree of process that will be afforded in a particular case, the court balances the following interests: (1) the private interest to be protected; (2) the risk of erroneous deprivation of that interest by the government's procedures; and (3) the government's interest in maintaining the procedures. Id. at 408.

Here, the trial court allowed Elizabeth's attorney to repeatedly submit, by email, documents prepared by him that were not admitted into evidence at trial and that were not even based on evidence admitted at trial. CP 328-332, 342, 351, 354, 356. He sent the court his property settlement spreadsheet, which he offered at trial for illustrative purposes only. CP 328. He also sent the court a chart purporting to analyze the parties' use of the home equity line of credit. CP 332. He bombarded the court with emails, making multiple requests for changes to the final orders, even after

the bailiff told him to stop.

On the two occasions Erik responded by email, the bailiff refused to give his objections to the judge or the court ruled without the scheduled hearing. CP 380, 386, 424, 445. The court even refused to consider his properly filed response to one of Mr. Cooper's requests for reconsideration by email. CP 144, 302. As result, he was completely denied an opportunity to respond, while opposing counsel was given free rein to invent evidence, tailor the final orders to benefit his client, and request changes to those orders.

All of this occurred off the record, through email correspondence with the court, and was only made part of the record when Erik collected the correspondence and filed it with a declaration on March 17, 2010. CP 323-477.

In the months to follow, the court refused to consider Erik's post-decree motions, claiming it lacked jurisdiction, even though it specifically scheduled the review hearing, retaining jurisdiction to do so. In the end, it denied Erik's motion to vacate, ruling that his attempts to present his objections were intransigence and awarding fees on this basis. RP 4 at 17, Sub 157.

As a result, the court awarded Elizabeth 80% of the net

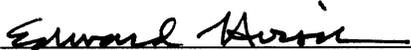
marital assets and saddled Erik with all of the debt, severe continuing restraining orders, and multiple awards of attorney fees, totaling almost \$5,275. CP 297, 984-985, Sub 157.

The court's process of fact finding and decision making was one-sided, allowing only Elizabeth's attorney to be heard, and outside of the proper court procedures, permitting her attorney to submit requests by email, off the record. This process lacked integrity and the resulting decisions unfairly deprived Erik of his liberty and property interests. Under the circumstances, the court's decisions were a manifest abuse of discretion and should be reversed.

#### **V. Motion for Attorney Fees and Costs**

Erin asks for an award of attorney fees and costs on appeal for intransigence and pursuant to RCW 26.09.140. In awarding fees, the arguable merit of the issues on appeal and the financial resources of the parties must be considered. In re Custody of Thompson, 34 Wn. App. 643, 648, 663 P.2d 164 (1983). Applying this standard, the Court should award fees to Erik.

Dated this 30th day of September, 2010.

  
Edward J. Hirsch, WSBA #35807  
Attorney for Appellant

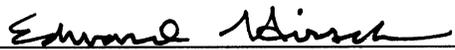
**DECLARATION OF SERVICE**

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

That on September 30, 2010, I arranged for service of the foregoing Opening Brief on the Court and the parties to this action as follows:

Office of Clerk Court of Appeals – Division I 600 University St Seattle, WA 98101-1176	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivered
Matthew Cooper, Attorney at Law 600 108 <sup>th</sup> Avenue NE, Suite 1002 Bellevue, WA 98004	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Electronic delivery

DATED at Seattle, Washington this September 30, 2010.

  
\_\_\_\_\_  
Edward J. Hirsch WSBA# 35807  
Attorney for Appellant