

No. 67918-0-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

FORREST M. BURNARD, Respondent

v.

PATRICIA ANN BURNARD, Appellant

BRIEF OF APPELLANT

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I. Assignments of Error

A. Assignment of Error No. 1

The court abused its discretion by rendering a \$10,000 attorney fee award without findings of specific acts of intransigence.

B. Assignment of Error No. 2

The court abused its discretion in rendering a \$10,000 fee award without proof of what fees were incurred by the intransigent behavior.

II. Statement of the Case

On the 6th day of September, 2011, the parties' one day trial ended and the decree of dissolution was entered the following week after twenty four years of marriage. Mr. Burnard was represented by counsel, and Ms. Burnard was pro se. (CP 73-81).

Prior to trial, Mr. Burnard, through counsel filed a trial brief. In it there was no request and no analysis of any law as it related to an award of attorney fees. (CP 45 through 58). The only notice that fees would be sought prior to trial was in competing motions in limine in which Mr. Burnard sought an award of \$1,800 as a result (RP 15; RP 20). No request for additional fees was mentioned in the opening statement during the trial (RP 46-49). There was a fee request in proposed findings and decree

which Ms. Burnard did not she have an opportunity to read prior to trial. (RP 193).

In closing argument as she went through the proposed findings Ms. Burnard responded "...boy that's a new one... I never heard of that before." (RP 198).

There was no evidence presented at trial, as to what specific acts constituted the intransigence were committed. No fee declaration was submitted showing what acts of intransigence generated how much in fees. (CP 68-69). Mr. Burnard merely submitted \$10,000 request is proposed findings and made some general allegations without proof of intransigent behavior in closing argument with no proof and no correlation of the alleged intransigence with fees incurred. Reconsideration was timely filed. The motion was denied. Hence this appeal.

III. Argument

A. Introduction:

The standard on appeal is whether the court abused its discretion in awarding attorney fees of \$10,000 based upon intransigence. A trial court abuses its discretion when it renders an award on untenable grounds or for untenable reasons. See *Fluke Capital & Management Services v. Richmond*, 106 Wn. 2d 614, 625, 724 P.2d 356 (1986).

B. Assignments of Error #1 and #2:

A fee award based upon intransigent behavior requires findings supported by proof of facts, not mere “bald assertions and obstructionist tactics” of intransigence. See *In re the Marriage of Wright*, 78 Wn. App. 230 at 239, 896 P.2d 735 (1994). Here there was no evidence of specific acts of intransigence, nor any findings as to what if any intransigence was committed by Ms. Burnard, the acts constituting the intransigence, there were none found by the court.

In addition, to justify such an award there also must be proof of the fees incurred resulting from the specific intransigent behaviors. *In re the Marriage of Bobbitt*, 135 Wn. App 8 at 30, 144 P.3d 306 (2006). In the absence of those findings the court appeals will ordinarily, “...vacate the judgment and remand for a new hearing to gather adequate information and for entry of finding of fact and conclusions of law regarding the fee award.” *In re the Marriage of Bobbitt*, supra at 30, 144 P.3d 306 (2006).

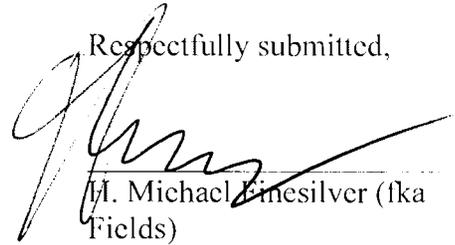
IV. Conclusion

The Bobbitt court, supra, did not reach the question of what effect if any does the failure to make requisite findings have on whether to reverse or remand. In this case, we are raising that issue. It was Mr. Burnard’s burden to prove specific acts of intransigence at trial. He failed

to do so. The absence of findings of intransigence is equivalent to a finding against Mr. Burnard on the issue. *In re the Marriage of Olivares*, 69 Wn. App. 324 at 334, 848 P.2d 1281 (1993). See also *George v. Helliar*, 62 Wn. App. 378 at 384, 814 P.2d 238 (1991). Therefore, the \$10,000 attorney fee award should be reversed.

DATED this 26 day of January, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Michael Einesilver', is written over a horizontal line. The signature is fluid and cursive.

M. Michael Einesilver (fka
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Attorney for Appellant
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COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

PATRICIA ANN BURNARD,)	
)	
Appellant,)	DECLARATION OF
)	SERVICE
v.)	
)	
FORREST M. BURNARD,)	
)	
Respondent,)	
_____)	

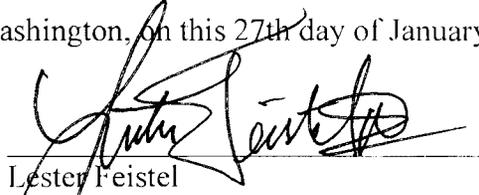
I, Lester Feistel, state and declare as follows:

I am a Paralegal in the Law Offices of Anderson, Fields, Dermody & Pressnall, Inc., P.S. On the 12th day of December, 2011, I placed true and correct copies of the Brief of Appellant with Seattle Legal Messengers for delivery on January 27, 2012 to:

Emmelyn Hart
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
206-574-6661

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED at Seattle, Washington, on this 27th day of January, 2012.



A handwritten signature in black ink, appearing to read "Lester Feistel", is written over a horizontal line.

Lester Feistel

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