

68841-3

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No. 68841-3-I

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION ONE

JOYCE ZAMELIS,

Respondent,

vs.

ZINTARS ZAMELIS

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 FEB -7 PM 4:29

BRIEF OF RESPONDENT

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II. RESTATEMENT OF FACTS

The facts of this case are plainly set forth in the trial court's Findings of Fact and Conclusion of Law, attached hereto as *Appendix A*.

Joyce Zamelis and Zintars (Zee) Zamelis married in 1963. CP 7 at 4; RP 51 at 6. Consistent with the social mores of the time, Mr. Zamelis controlled the finances in the marriage. CP 7 at 5; RP 53 at 19-24; RP 54 at 24-25; RP 55 at 6-7. In 1971, the parties purchased a home in Honeymoon Bay, Washington (hereafter "the property"). *Exhibit 1*, CP 7 at 6; RP 52 at 17-19. The property was approximately 2.25 acres, encompassing 204 feet of high bank waterfront on Whidbey Island. RP 51 at 24-25, 52 at 1. It faced the north and had a beautiful view of Honeymoon Bay and the mountains. RP 51 at 20-22. The home situated on the property had three bedrooms and one bathroom. RP 52 at 3. The underlying mortgage was \$20,000. *Exhibit 2*, RP 53 at 11-13. It was the parties' only asset of value. RP 61 at 10-19.

Shortly after they bought the property, Mr. Zamelis told Ms. Zamelis that if they ever divorced, he would see to it that she got nothing. CP 12 at 9-11; RP 56 at 12-14.

In 1976, Mr. Zamelis told Ms. Zamelis that he owed money to his Latvian fraternity brother, Victor Otlans. RP 57 at 1-11. He told Ms. Zamelis that they must quit claim the property to Mr. Otlans to satisfy the debt. RP 56 at 23-13. Ms. Zamelis did as she was instructed and signed

the deed. Exhibit 3; RP 57 at 7-8. Mr. Zamelis told her that the house now belonged to Victor Otlans, but that at some point in the future, Mr. Otlans would sign the property back over to them. RP 58 at 8-13.

After the transfer, Zee paid the mortgage and taxes on the property. CP 7 at 16-17 RP 58 at 19-21. As far as Ms. Zamelis knew, they were paying rent to Mr. Otlans. CP 7 at 18-19. The parties continued to live on the property. RP 58 at 18. Nothing changed about their living arrangements from before the deed was signed versus after the deed was signed. RP 58 at 22-25.

Mr. Zamelis next asked Ms. Zamelis to execute a power of attorney authorizing him to conduct business on her behalf. *Exhibit 4*. He explained to her that he was involved in a couple of businesses and it would save a lot of effort if she didn't need to sign so many documents. RP 59 at 15-20. Ms. Zamelis signed the power of attorney. *Exhibit 4*.

Sometime later, Mr. Zamelis' business failed and his debts were discharged in bankruptcy. RP 235 at 18-20. Ms. Zamelis knew of the bankruptcy, but did not know any of the details. RP 59 at 1-6. Ultimately, the Zamelis' debts were discharged. RP 174 at 14-15.

The parties' marriage was not good. Mr. Zamelis told Elizabeth Friez a number of times that if the parties ever divorced, he'd see to it that Ms. Zamelis never got anything because in his opinion, she never contributed anything. CP 12 at 9-11; RP 30, lines 18-21.

In November 1983, the parties separated when Ms. Zamelis left the property. RP 102 at 11-13. She had asked to stay and have Mr. Zamelis leave, but Mr. Zamelis told her that Mr. Otlans wouldn't let her. CP 8 at 19-20. RP 102 at 22-24. The property stood in the name of Victor Otlans and he and Mr. Otlans were fraternity brothers; Ms. Zamelis had no relationship with Mr. Otlans. RP 102 at 18-19; RP 103 at 1-6.

So Ms. Zamelis left, leaving the house in good condition. CP 7 at 21. RP 60 at 20. The property was the only asset of value that she knew of and it stood in Victor Otlans name. RP 61 at 17-22. She worried that she would be left with nothing. RP 61 at 10-19.

Ms. Zamelis retained attorney Katherine Hershey to represent her in her divorce. RP 61 at 23-24. In February 1984, she filed a lis pendens against the property. *Exhibit 5*; RP 62 at 7-10. The case languished. Ms. Zamelis did not have the funds to keep her attorney and let her go. RP 65 at 4-6.

By August of 1986, Mr. Zamelis really wanted to get divorced. RP 131 at 12-14. But Ms. Zamelis would not let the issue of the house go. RP 131 at 18-21. Mr. Zamelis acknowledged that Ms. Zamelis believed the title to the house was a sham transaction between Mr. Otlans and him. RP 131 at 20-21.

So, Mr. Zamelis wrote, in his handwriting, a contract between Ms. Zamelis and him. *Exhibit 30*, RP 132 at 21-22. It stated that its sole

purpose was “purchasing, renting and selling” the house. *Exhibit 30*; RP 133 at 8-11.

Mr. Zamelis was to be the active partner. *Exhibit 30*. First, he needed to arrange for financing. RP 133 at 18-20. Thereafter, each party would pay the sum of \$150 per month to meet any difference between the mortgage and the rent, and also to pay for repairs. *Exhibit 30*, RP 134 at 1-10.

Ms. Zamelis doesn't remember signing the agreement. RP 103 at 18-23. Mr. Zamelis kept the only original. RP 135 at 10-12.

Four months later, Mr. Zamelis recovered ownership of the house from Victor Otlans by Quit Claim Deed dated December 30, 1986. CP 7, 9, *Exhibit 8*. Notably, the property was titled in the name of Zintars Zamelis only as his “sole and separate property.” *Exhibit 8*. Ms. Zamelis' name appeared nowhere on the deed; neither did the name of any partnership.

Consideration for the transfer was “assumption of liability only.” *Exhibit 8*. No new debt was referenced. At that time, the mortgage balance was about \$12,000 and the payment was \$144 per month. *Exhibit 9*, RP 150 at 1-2. The monthly real estate tax bill was less than \$200 per month. RP 147 at 12-5. During that same period of time, the houses Ms. Zamelis sought to rent were going for \$700 per month, more than twice what Mr. Zamelis was paying for their waterfront property on Honeymoon

Bay. RP 74 at 4-6; 154 at 13-21.

Mr. Zamelis admitted that as of January 1, 1987, he had legal ownership of the property. *Exhibit 12, pp. 9-10.* The parties could have sold the house at that time and divided the proceeds.

But as he testified at trial, Mr. Zamelis did not want to sell it. RP 141 at 12-13. The property was approximately 2.25 acres, encompassing 204 feet of high bank waterfront on Whidbey Island. RP 51 at 24-25, 52 at 1. It faced the north and had a beautiful view of Honeymoon Bay and the mountains. RP 51 at 20-22. He paid only \$144 per month in a mortgage payment. He paid less than \$200 per month for taxes. RP 154 at 17-20. He couldn't rent a place for the same amount of money he was paying for the property.

Mr. Zamelis had negotiated with Mr. Otlans to have the home transferred to him in his name only. *Exhibit 8.* Then, he put the quit claim deed in his safe deposit box, where he left it until 2005. RP 1433 at 11-18.

Mr. Zamelis acknowledged at trial that he could recall having no conversations with Ms. Zamelis in the year that followed Mr. Otlans' execution of the deed. RP 138 at 3-23. Moreover, he delivered no documents to Ms. Zamelis at any time after December 30, 1986. RP 138 at 3-23; RP 70 at 2-4. Thus, there was no way for Ms. Zamelis to know that legal title to the property had been recovered from Mr. Otlans.

Ms. Zamelis, however, remembers one conversation with Mr.

Zamelis in 1987. Mr. Zamelis told her that if she didn't release the liens on the property, Mr. Otlans would sue her. RP 65 at 1-3. Ms. Zamelis, unrepresented, at that time, released it. *Exhibit 34*; RP 65 at 22-24. She hoped that if she cooperated, Mr. Zamelis would be fair with her. RP 96 at 20-21.

A year later, Mr. Zamelis prepared the decree of dissolution that would dissolve their marriage.¹ RP 118 at 407. In the decree, Ms. Zamelis was awarded a one half interest in partnership real property. *Exhibit 10 at 4*. She was also responsible for a debt in favor of Mr. Otlans. *Exhibit 10 at 6*. She didn't know what it was for other than what Mr. Zamelis told her. RP 68 at 9-13. She saw no documents to evidence the debt and never received any calls from anyone, including Mr. Otlans, to collect the debt. RP 68 at 14-22.

After the parties divorced, Ms. Zamelis called Mr. Otlans about the property. RP 69 at 3-7. After her call, she felt reassured that when legal title was recovered, the property would stand in both parties' names. RP 69 at 8-11. At no time did she ever hear from Mr. Otlans that she owed him \$11,000. RP 68 at 14-22. He never collected on the alleged debt Mr. Zamelis had listed.

Ms. Zamelis went to Island County to check the real property

¹ At trial, Mr. Zamelis denied that he prepared the decree and then later admitted it after being impeached. RP 116 at 16-19; RP 118 at 4-7.

records. RP 70 at 11-13. At first, she did it every year and then it turned into every couple of years and sporadically after that. RP 70 at 16-21. Year after year, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004, the records invariably showed that the property remained in Victor Otlans' name. RP 143-52.

During this time, Ms. Zamelis rented rooms from her sister or her friend. RP at 72-73. Thereafter, she bought a trailer. RP 74 at 12.

In 2005, Ms. Zamelis retired and moved to Oregon to live with her daughter. RP 70 at 20-25; RP 71 at 1; RP 74 at 23-25. The same year, Mr. Zamelis recorded the 1986 quit claim deed he had held for so long in his safe deposit box. *Exhibit 8*. From January 18, 2005 forward, he held himself out as the sole owner of the property on Honeymoon Bay. *Exhibit 8*.

Ms. Zamelis did not discover the deed until the fall of 2008. RP 75 at 14. When she saw that it was executed in 1986, 22 years earlier, she was stunned. RP 76 at 5, 18. To her dismay, she also saw that the deed had transferred title solely to Zintars Zamelis. *Exhibit 8*. Immediately, she began seeking an attorney and in 2009, she commenced an action to quiet title and partition the property. RP 75 at 17.

Mr. Zamelis counterclaimed for adverse possession. CP 160-61. He also claimed that Ms. Zamelis owed him \$486,274.29, including

prejudgment interest, according to his interpretation of their partnership agreement. *Exhibit 53, last page.*

At trial, Mr. Zamelis contradicted himself repeatedly. He admitted that in his Answers to Amended Complaint, he averred gaining the property three years after separation, by deed dated December 30, 1986 and that it was his sole and separate property. CP 159-60. He affirmed this position in his Answers to Interrogatories when he acknowledged that he had an ownership interest in the subject property as of January 1, 1987, two days after the deed was executed. Exhibit 12, pp 9-10. Thus, according to Mr. Zamelis' own statements under oath, the parties could have sold the property and divided the proceeds at that time.

But then Mr. Zamelis changed his story. He testified that he didn't receive the deed on its date of December 30, 1986. Instead, he claimed he purchased the real property by oral contract with Mr. Otlans and that he made payments on that contract. RP 137 at 16. He produced promissory notes that he had executed in favor of Mr. Otlans in the sum of \$22,000 and \$6,400 after the parties separated. *Exhibits 32, 33.* He claimed that these notes were to pay Mr. Otlans for the property, despite the fact that the notes nowhere referenced the real property, nor was the real property encumbered by the notes. *Exhibits 32,33.*² He never explained how the

² He attempted to relate the promissory notes to a deed of trust allegedly executed by Victor Otlans, but he produced two different deeds of trust for allegedly the

quit claim deed failed to reference these new debts as consideration for the transfer of property.

The decree of dissolution did not identify either of the debts as encumbering the real property. *Exhibit 10 at 4-7*. In fact, the decree did not reference the \$6,400 note at all. *Exhibit 10 at 4-7*; RP 220 at 16-20.

Nevertheless, Mr. Zamelis contended that Ms. Zamelis was to have paid one half of both of those notes for the real property, even though he didn't talk to her in the year after he allegedly executed them, and never showed her the promissory notes. RP 203, RP 138 at 6-23.

Mr. Zamelis conceded that, under his new version of events, if Mr. Otlans elected not to deliver the deed after Mr. Zamelis paid these alleged promissory notes, Mr. Zamelis would have no recourse against him for any payments he made.³ RP 137 at 17-20. But he testified that he trusted Mr. Otlans fully. RP 139 at 4-6. He explained that Latvian people have a code of honor and they honor each other's words. RP 139 at 7-9. He then testified that he paid the notes off and received the deed in 1991. RP 139 at 24-25, 140 at 1-2, 162 at 9-11. Although he kept meticulous documents, dating back to 1971, he provided no proof that he had ever actually paid the sums due on the alleged promissory notes. *See e.g. older*

same transaction and the amount listed in the deed of trust did not match the amounts in the promissory notes. *Exhibits 28, 55, 32 and 33*; RP 215-17.

³ The same, therefore, would be true of any payments he alleged Ms. Zamelis was to have made.

documents included at Exhibits 1,2,3, and 11.

Nevertheless, Mr. Zamelis admitted at trial that as of 1991, he could have shown Ms. Zamelis that they had legal title to the house. RP 140 at 3-7. He acknowledged that he could have sold the property and divided the proceeds with Ms. Zamelis as provided in their partnership agreement. RP 140 at 12-17. He admitted that any monies he thought he was owed by Ms. Zamelis at that time could have been reconciled and recovered from the proceeds of the sale of the property. RP 141 at 6-9. Moreover, any taxes, maintenance and repair he paid after 1991 could have been avoided had the property been sold. RP 153 at 22-25, 154 at 1.

But Mr. Zamelis readily admitted that he did not want to sell the property. RP 141 at 12-13. He acknowledged that the quit claim deed transferred the property into his name only, not to both parties as the parties' contract stated that it should. RP 140 at 8-11. Instead, he put the deed in his safe deposit box and went about his life. RP 143 at 16-18. For the next 14-18 years, the public records erroneously showed that the property stood in the name of Victor Otlans. RP 147-52. As far as Ms. Zamelis knew, Mr. Zamelis continued to pay rent to Mr. Otlans. CP 7 at 18.

In the meantime, Mr. Zamelis met Kris Muzzy, whom he later married. RP 251 at 1. Ms. Muzzy testified that when she arrived at the

property 10 years after Ms. Zamelis had left, the property was a dump, with the main living areas tidy, but the rest of the rooms filled with boxes and rubbish and the whole place smelling of rodents. RP 238 at 15-25. Ms. Muzzy testified to investing monies to repair and restore the home. CP 11 at 4; RP 243-46. By the time she was finished, the home was in high average, but not good condition. *Exhibit 16, pp. 1, 4.*

Ms. Muzzy and Mr. Zamelis converted the garage to an accessory living unit. RP 252 at 5-6. Then, they built a detached garage on the property. The net increase in the value of the property after loss of the garage, addition of the apartment, and the construction of another garage, was \$27,500. RP 41, lines 11-13, 17-21. The parties stipulated that the total value of the property was \$450,000.

At trial, Ms. Zamelis sought rent from January 18, 2005, the date when Mr. Zamelis recorded the deed declaring to the world that the property belonged to him alone as his sole and separate property. The fair rental value of the property at the time of trial was \$1,465 per month, of which \$650 per month would come from the auxiliary living unit. RP 45, lines 11-12; 22-23. At trial, Mr. Zamelis reversed his position again and claimed, as he does on appeal, that there was no ouster. He affirmed the parties' ownership of the property as tenants in common.

The trial court accepted Mr. Zamelis' new position at trial that the parties own the property as tenants in common. It found that Mr. Zamelis

was not credible in his testimony. CP 12 at 8. It found that Mr. Zamelis had threatened to ensure that Ms. Zamelis never got anything out of the divorce and further, that his actions after the parties separated bear out that threat. CP 12 at 13. Based upon its findings, the court concluded that Mr. Zamelis had repudiated the parties' partnership agreement and it set it aside. CP 14 at 25. It ordered that the property be sold and the proceeds divided equally. CP 15.

Mr. Zamelis appeals.

III. ARGUMENT

A. Substantial Evidence Supports Trial Court's Findings/Conclusions of Law Flow from the Findings. Mr. Zamelis assigns error to 14 Findings of Fact and six Conclusions of Law. An appellate court reviews findings of fact for substantial evidence. *Pennington v. Pennington*, 93 Wn. App. 913, 101, 971 P.2d 98 (1999). Substantial evidence is a sufficient quantum of evidence to persuade a fair-minded person of the truth of the declared premise. *Hanson v. Estell*, 100 Wn. App. 281, 286, 997 P.2d 426 (2000). Findings that are supported by substantial evidence in the record are verities on appeal. *In re Marriage of Crosetto*, 101 Wn. App. 89, 98, n.5, 1 P.3d 118 (2000). An appellate court reviews *de novo* whether the trial court's conclusions of law flow from the findings. *Department of Labor & Industries v. Shirley*, 288 P.3d 390, 394 (2013). But the relief a trial court orders in an equitable proceeding is

reviewed for abuse of discretion. *Friend v. Friend*, 92 Wn. App. 799, 803, 964 P.2d 1219 (1998) (Trial court in partition action accorded broad discretion in fashioning relief under its equitable powers, including sale of property). See e.g. *Brown v. Voss*, 105 Wn.2d 366, 372, 715 P.2d 514 (1986) (Injunctive relief is equitable in nature); *Farmer v. Farmer*, 172 Wn.2d 616, 624, 259 P.3d 256 (2011) (Dissolution invokes equitable proceedings in which trial court enjoys broad discretion).

A court will not review assignments of error which are not supported by argument and citation to authority. *Raum v. City of Bellevue*, 171 Wn. App. 124, 149, 286 P.3d 695 (2012), citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (Plaintiffs waived review of assignment of error regarding a finding of fact because they presented no argument in support of their assignment).

In this case, Mr. Zamelis assigned error to numerous Findings of Fact, but then made no reference to them in his argument. He did the same with the six conclusions of law to which he assigned error. The Court need not consider his assignments of error number 2-21.

Substantively, the trial court did not err as follows:

a) Finding of Fact 54. In the context of what property was awarded to Ms. Zamelis in the parties' decree of dissolution, the trial court found, "She did not know what the asset was." *Appendix A*. Mr. Zamelis admitted that he prepared the parties' decree of dissolution. RP 118 at 4-

7. The decree listed an asset awarded to Ms. Zamelis of “\$5,000 paid on property/partnership.” *Exhibit 10, Exhibit A*. Ms. Zamelis testified that she neither received \$5,000, nor did she pay any \$5,000. RP 66 at 18-21. She testified that she did not know what it meant. RP 66 at 16-17. There is no error.

b) Finding of Fact 56. The trial court found that after Ms. Zamelis left the property, “Mr. Zamelis did very little to maintain the property.” Ms. Zamelis testified that when she left the house in 1983, it was in good, but not excellent condition. RP 60 at 18-20. Mr. Zamelis testified that he was injured and unable to work on the house after the divorce. RP 188 at 20-25. Ms. Muzzy testified that when she saw the property 10 years after Ms. Zamelis left, it was a “dump” with rooms filled with boxes and rubbish and the smell of rodents everywhere. RP 238 at 20-23. Mr. Zamelis was the one, who lived in that property between 1983 and 1993. Moreover, although he produced receipts for improvements and repairs he testified he made after M. Muzzy’s arrival, he produced nothing from before that time. *Exhibit 51*. And Ms. Muzzy testified that she was the one, who invested substantial sums into the property. RP at 252. Substantial evidence supported the trial court’s finding that Mr. Zamelis did very little to maintain the property.

c) Finding of Fact 79. The trial court found, “He knew that if Ms. Zamelis knew of the deed, she would sue to recover the property.”

The parties' agreement stated clearly that Mr. Zamelis' role was to purchase the property so that they could sell it and divide the proceeds. *Exhibit 31*. Mr. Zamelis recovered the deed, which he had caused to be put into his name only. *Exhibit 8*. At that time, he had already gone through several years where Ms. Zamelis had filed a lis pendens and refused to agree to a divorce settlement that did not include her right to one half of the property. *Exhibit 5*. The eventual decree of dissolution included her right to one half of the property. *Exhibit 10*. Mr. Zamelis did not file the deed, but put it in his safe deposit box until 2005. CP 13 at 5; RP 1433 at 11-18. Substantial evidence supports the trial court's finding.

d) Finding of Fact 87. The trial court found, "It is not credible that Mr. Otlans would wait 10 years, during which time the parties declared bankruptcy, to recover his debt." CP 12, at 22-23. At trial, Mr. Zamelis claimed that Ms. Zamelis was obligated to pay him one half of two alleged promissory notes in favor of Victor Otlans: one for \$6,400 and one for \$22,000. *Exhibits 32 and 33*. He offered testimony that the promissory note of \$22,000 was related to the real property, of which Mr. Otlans had gained ownership some 10 years earlier. RP 179; *Exhibits 3 and 8*. He testified that the \$6,400 note was for a roof for his business from long before the parties declared bankruptcy. RP 205 at 2-5. Between 1976 when Victor Otlans took legal title to the property and 1986 when he deeded the property back to Mr. Zamelis, the parties declared

bankruptcy. Substantial evidence supported the trial court's finding that if Mr. Otlans was a legitimate creditor, he would have sought to collect any debts he was owed much sooner than 1986.

e) Finding of Fact 88. The trial court found, "The timing of the debt is suspicious. It was incurred only by Mr. Zamelis during the parties' separation and without Ms. Zamelis' knowledge." Mr. Zamelis' trial testimony was replete with contradictions. *See citations to the record contained in the Statement of Facts herein*. Mr. Zamelis had made repeated statements that he intended to see to it that Ms. Zamelis did not get the property in the divorce. *Exhibits 32 and 33* confirm that these alleged debts were incurred as the trial court stated, only by Mr. Zamelis during the parties' separation. Moreover, Mr. Zamelis' own testimony confirmed that he had no conversation with Ms. Zamelis and showed her no documents from the date of his signing of the promissory notes. This supports the trial court's finding that Ms. Zamelis had no knowledge of these alleged debts. There is no error.

f) Finding of Fact 90. The trial court found, "If Mr. Zamelis had told Ms. Zamelis in 1991 that he had possession of the deed, this action would have commenced in 1991." When Ms. Zamelis commenced the dissolution of marriage action, she filed a lis pendens on the property. *Exhibit 5*. Mr. Zamelis testified that Ms. Zamelis would not let go of her belief that the conveyance of the home from the Zamelises and Mr. Otlans

was a sham. RP 131 at 20-24. The moment she discovered the deed in the fall of 2008, she sought an attorney and commenced this action. Substantial evidence supports the trial court's finding.

g) Finding of Fact 91. The trial court found, "Mr. Zamelis hid the quit claim deed in a safety deposit box." Mr. Zamelis testified that when he received the quit claim deed that recovered legal title to the property, he did not show Ms. Zamelis the deed, but instead put the deed in a safe deposit box. RP 143 at 11-18. He did not file the deed until January 18, 2005. *Exhibit 8*. Substantial evidence supports the trial court's finding.

h) Finding of Fact 92. The trial court found, "The Court strongly suspects that Mr. Zamelis had possession of the deed on December 30, 1986, the same day that Mr. Zamelis signed the promissory notes." Mr. Zamelis admitted that the property was quit claimed to him "[t]hree years after the date of separation, in December 1986 . . ." CP 160, lines 14-20. He admitted that as of January 1, 1987, he owned the property. *Exhibit 12, p. 9 at 20-25, p. 10 at 15*. The trial court's finding was supported by the evidence.

i) Finding of Fact 94. The trial court found, "The timing of the promissory notes after separation, the date of the quit claim deed and Mr. Zamelis' vow to make sure Ms. Zamelis received nothing from the marriage combined with the deep friendship between Mr. Zamelis and Mr.

Otlans convinced the Court that Mr. Zamelis is trying to cut Ms. Zamelis out of the subject property, which both parties acknowledge is a community asset.” This finding is based upon citations to the record, which have been repeated throughout the statement of facts and in the argument herein. Substantial evidence supports this finding.

j) Finding of Fact 95. The trial court found, “Mr. Zamelis did not provide any proof, other than testimony, which was riddled with inconsistencies, that he actually paid Mr. Otlans the sums due on the notes.” Mr. Zamelis did not call any witnesses other than himself to testify about his payment on the notes. None of the exhibits he offered proved payment on the notes.⁴ The trial court’s finding was supported.

k) Finding of Fact 96. The trial court found, “Although Mr. Zamelis was able to find other documents more than 20 years old, he offered not one cancelled check, not one bank statement to show proof of payment.” At trial, Mr. Zamelis produced numerous records, including Exhibits 32 and 33, which allegedly dated from 1986 through 1991. He produced a Rainier Financial Services mortgage statement from early 1986. *Exhibit 9*. But he produced no bank statements and no canceled

⁴ Exhibits 32 and 33 were redacted to exclude the hearsay handwriting that appeared on the documents. RP 184, 205. Mr. Zamelis’ testimony about Exhibit 32 was based upon the hearsay of a deceased person, Victor Otlans, and the objection to it was sustained. RP 181 at 7-10.

checks that would corroborate his self-serving testimony that he paid these alleged debts to Victor Otlans. The trial court's finding was supported.

l) Finding of Fact 99. The trial court found, "Mr. Zamelis' payments on the property were far below fair rental value." At trial, Mr. Zamelis acknowledged that the mortgage and taxes he paid on the property were far less than the \$700 per month in rent Ms. Zamelis was facing to rent a house. RP 154 at 13-21. This testimony was unrebutted by any evidence from Mr. Zamelis that the rents in the area at that time were lower than the \$700 per month that Ms. Zamelis testified to. The trial court's finding was supported.

m) Finding of Fact 100. The trial court found, "Mr. Zamelis now claims that he is owed \$150 per month from Ms. Zamelis since 1986." At trial and again on appeal, Mr. Zamelis has argued that Ms. Zamelis owed him \$150/mo under the parties' contract and further, that she breached the contract by failing to pay. *Brief of Appellant, at 36*. There is no error.

n) Finding of Fact 103. The trial court found, "If Mr. Zamelis had notified Ms. Zamelis in late 1986, when the Court believes he got the quit claim deed, of his title to the real property, the property would have been sold or rented then." This finding is supported with the same evidence that supports Finding of Fact 90 as discussed above. There is no error.

o) Conclusion of Law 3. The trial court concluded, “The notes that Mr. Zamelis signed to Mr. Otlans in 1986 were not for financing the subject property because the notes were unsecured.” This conclusion of law is supported by Exhibit 8, which references consideration for the transfer of “assumption of liability only.” The only liability against the property was Rainier Financial Services. *Exhibit 9.* Exhibits 32 and 33 made no reference to the real property and did not indicated in any way that they were secured by the real property. This conclusion of law properly flows from Findings of Fact 45, 46, 47, 80, 84, 85, 86, and 87. *Appendix A.*

p) Conclusion of Law 4. The trial court concluded, “The liability against the subject property referenced in the 1986 deed was the note and deed of trust in favor of Rainier National Bank, which, in 1986, was \$12,000.” This conclusion flows from Finding of Fact 45, 46, 47, 80, and 85. *Appendix A.* There is no error.

q) Conclusion of Law 5. The trial court concluded, “Mr. Zamelis repudiated the 1986 partnership agreement.” This conclusion naturally flows from Findings of Fact 32, 33, 34, 35, 36, 40, 68, 69, 72, 76, 80, 81, 83, 91, 92, 93, 94, 97, 98, 99 and 104. *Appendix A.* There is no error. The conclusion is also supported by the analysis of the law regarding repudiation at section 3(B) herein.

r) Conclusion of Law 6. The trial court concluded, “The partnership agreement should be set aside.” This conclusion flows out of the findings of fact identified above. The conclusion is also supported by the analysis of the law regarding repudiation at section 3(B) herein.

s) Conclusion of Law 11. The trial court concluded, “It is equitable that the subject property is sold and the proceeds be divided equally.” This conclusion flows from Findings of Fact 77, 78, 80, 105, 106 and 107. The conclusion is also supported by the analysis of the law regarding the equitable offset between taxes paid and rent owed upon ouster as set forth in section 3(C)(3) herein.

t) Conclusion of Law 13. The trial court concluded, “In exchange for exclusive occupancy of the residence, he should pay the taxes and insurance and maintenance for the property and he should pay rent to Ms. Zamelis in the sum of \$1,000 per month, commencing April 1, 2012. The Findings of Fact, taken as a whole, that recount the deception and overreaching on the part of Mr. Zamelis, render this conclusion just and equitable and well within the discretion accorded the trial court, as discussed more fully in section 3(C) herein.

B. Trial Court Properly Set Aside the Parties’ Agreement. On appeal, Mr. Zamelis takes contradictory positions. He first contends that the trial court erred in failing to enforce the parties’ contract by awarding him what he believes he should receive under the contract: \$486,000.

Exhibit 53, p. 3. Then in his request for relief, he abandons that figure and claims that the property should be sold and the proceeds divided using a different accounting. *Brief of Appellant at 37-38.* Either way, he misapprehends the law.

Preliminarily, an action on a contract must be brought within six years of the alleged breach. RCW 4.16.040.⁵ In this case, Mr. Zamelis attempts to enforce an agreement signed in 1986, which he claims was breached from 1987 forward. Far more than six years have passed. His claim is time barred.

Substantively, however, the trial court correctly concluded that he had repudiated the parties' contract and the court properly set it aside. An intent to repudiate a contract may be expressly stated or circumstantially manifested by conduct. *CKP v. GRS Const. Co.*, 63 Wn. App. 601, 620, 821 P.2d 63 (1991). When one party repudiates a contract, it is considered a breach that excuses the other's performance. *CKP*, 63 Wn. App. at 620. An anticipatory breach occurs when one of the parties to a bilateral contract either expressly or impliedly repudiates the contract prior to the time for performance. *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994). This may be shown by a positive statement or action indicating distinctly and unequivocally that the

⁵ Although not argued below, an appellate court may affirm a trial court's decision on any grounds supported by the record. *Washington Federal Sav. & Loan Assn. v. Alsager*, 165 Wn. App. 10, 14, 266 P.3d 905 (2011).

repudiating party will not substantially perform his contractual obligations. *Wallace*, 124 Wn.2d at 898. In *CKP*, this Court affirmed the trial court's conclusion that a general contractor had repudiated a contract when it repeatedly threatened to withhold payment from a subcontractor unless the subcontractor signed a modification to the original agreement. *CKP*, 63 Wn. App. at 620.

Whether facts have been established showing repudiation is a question for the finder of fact. *CKP*, 63 Wn. App. at 620. As already stated herein, findings of fact are reviewed for substantial evidence. *Pennington v. Pennington*, 93 Wn. App. 913, 101, 971 P.2d 98 (1999).

In this case, Mr. Zamelis drafted the contract the parties executed. That contract related to the disposition of property acquired during the marriage. It was signed after separation but before the entry of the parties' decree of dissolution. As a result, Mr. Zamelis owed Ms. Zamelis the highest duty of care in disclosing all material facts in the execution and performance of that contract. *Seals v. Seals*, 22 Wn. App. 652, 655, 590 P.2d 1301 (1979). (Husband violated fiduciary duty to wife by failing to disclose existence of community property that went undivided at the time of decree).

This fiduciary obligation is similarly imposed upon him under Mr.

Zamelis' theory of the case: that the parties formed a partnership.⁶ General partners owe limited partners a fiduciary duty that is described as "the highest standard of conduct." *Diamond Parking, Inc. v. Frontier Bldg. Ltd Partnership*, 72 Wn. App. 314, 318, 864 P.2d 954 (1993). These duties include the "utmost good faith, fairness, and loyalty." *Diamond Parking, Inc.*, 72 Wn. App. at 318-19.

Substantial evidence reflects that Mr. Zamelis never intended to abide by the parties' contract. First, the contract, as drafted by him, provides that its "sole purpose" was "purchasing, renting and selling this parcel of real property . . ." *Exhibit 31*. Mr. Zamelis was to be the active partner. He was to "solicit and arrange the financing of this property." *Exhibit 31*. All capital improvements were required to be in writing, signed by both parties. *Exhibit 31*. Finally, Mr. Zamelis agreed "to divulge within 10 days and share equally any monies and real benefits that come to him now or in the future as a result of the community property period of the marriage." *Exhibit 31*.

After the contract was signed, Mr. Zamelis recovered the property

⁶ Partnership, under the Revised Uniform Partnership Act cited by Mr. Zamelis, is defined as, "[A]n association of two or more persons to carry on as co-owners a *business for profit* formed under RCW 25.05.055, predecessor law, or comparable law of another jurisdiction. RCW 25.05.005 [emphasis added]. In this case, the parties were involved in a dissolution of marriage, contracted to purchase and sell community property, and divide the proceeds. The portion of the RUPA definition that requires a business for profit, does not apply to the purpose of the parties' agreement.

by quit claim deed dated December 30, 1986. *Exhibit 8*. But he conducted the transaction in his name only, expressly causing the deed to state that the property was his sole and separate property. *Exhibit 8*. This directly contradicts the parties' agreement, and later decree of dissolution, that the property was to be partnership property. *Exhibits 31 and 10*. See also, RCW 25.05.065 (Partnership property to be acquired, *inter alia*, in name of partnership or name of person as a partner).

Although Mr. Zamelis was obligated to divulge his recovery of the property within 10 days, he admitted at trial that he had no conversation with Ms. Zamelis in the year following the execution of this deed. He admitted that he never showed her any documents to evidence the real estate transaction. In short, he did nothing to alert Ms. Zamelis that he had recovered the property.

Instead, he hid the deed from public detection until January 2005, a period of 18 years. CP 13 at 5; Exhibit 8. Rather than renting the property on behalf of the partnership, he used the property for his own personal residence. See e.g. RCW 25.05.150(7) (Partner not to use partnership property for personal use).

He did this because in his words, he had no intention of selling the property. *RP 141 at 12-13*. His statement is completely at odds with the express purpose of the contract: to sell the property. Mr. Zamelis' conduct mirrored his vow to Elizabeth Frieze that he would ensure Ms.

Zamelis never got anything out of their divorce. The trial court correctly concluded that Mr. Zamelis repudiated the contract.

Mr. Zamelis contends that he had no obligation to sell the property because Ms. Zamelis didn't pay \$150/mo as provided in the contract. He has it backwards. A contract can contain conditions as well as promises. *Colorado Structures, Inc., v. Insurance Co. of the West*, 161 Wn.2d 577, 588, 167 P.3d 1125 (2007). A condition is precedent if its occurrence triggers a duty of performance that had not arisen previously. *Colorado Structures, Inc.*, 161 Wn.2d at 588.

In this case, both parties were to pay "\$150 per month to the partnership *to meet any shortages between the mortgage and rent and also to pay for repairs.*" *Exhibit 31* [emphasis added]. As of the signing of the contract, the property was titled in the name of Victor Otlans. As far as Ms. Zamelis knew, Mr. Zamelis continued to rent the property from Mr. Otlans. Until the parties owned the property, there was no mortgage to pay. And Mr. Zamelis, as a non-owner, had no authority to rent it. Thus the condition precedent to Ms. Zamelis' obligation to pay was the recovery of legal title to the property in the names of both parties. Because she never received any notice that they had recovered legal title to the property, her obligation to pay was not triggered.

To hold otherwise would produce an absurd result. Mr. Zamelis admitted that if the real estate transaction was not in writing, there would

be no recourse if Mr. Otlans elected not to deliver the deed, despite the parties' payments. RP 137 at 17-20. Ms. Zamelis could not reasonably be expected to pay sums towards a property that was not legally titled in her name. The trial court properly set aside the parties' contract.

C. Trial Court's Remedy was Equitable.

1) Breach of Fiduciary Duty Makes Equal Interest in Property Equitable. Mr. Zamelis next relies on *Cummings v. Anderson*, 94 Wn.2d 135, 614 P.2d 1283 (1980) for his contention that the trial court should have given him credit for his payment of the mortgage and that Ms. Zamelis should be charged with one half of the taxes and insurance on the property from 1987 to 2005. In *Cummings v. Anderson*, a husband and wife purchased a home on a real estate contract. *Cummings*, 94 Wn. 2d at 137. A few months later, the wife left the property, taking nearly all of the personal property of the parties, including the cash in the parties' bank account. *Cummings*, 94 Wn.2d at 137. Thereafter, she obtained a default divorce and eventually married another man. *Cummings*, 94 Wn.2d at 137.

Some years later, she returned to the property, seeking one half its equity value, plus payment by her former husband equivalent to one half of the fair rental value of the property. *Cummings*, 94 Wn.2d at 137-38. The trial court, sitting in equity, ruled that she could not reap the benefit of the increase in equity for which her former husband had solely paid.

Cummings, 94 Wn.2d at 143. Similarly, it rejected her claim of rent.

In reviewing the case, the Washington Supreme Court noted the fiduciary obligations tenants in common owe to one another. *Cummings*, 94 Wn.2d at 143. It described two situations that give rise to most of the problems between tenants in common:

- a) An effort by one tenant to buy in and later assert a superior title to the detriment of his cotenants; and
- b) The making of an agreement with other cotenants to gain advantage by overreaching the others.

Cummings, 94 Wn.2d at 143, n.3. In *Cummings*, the Court affirmed the trial court after it expressly observed that the husband had not breached any fiduciary duty owed to his former wife. *Cummings*, 94 Wn.2d at 143.

Mr. Zamelis cannot say the same in this case. The law is well settled that a cotenant may not interfere with the co-equal rights of the other cotenants. *Butler v. Craft Engineering Const. Co., Inc.*, 67 Wn. App. 684, 695, 843 P.2d 1071 (1992). But for 18 years, from December 1986 to January 2005, Mr. Zamelis represented in public records and to Ms. Zamelis that the property was legally titled in the name of Victor Otlans. He represented in public records and to Ms. Zamelis that he was merely a tenant on Victor Otlans' property. He concealed from Ms. Zamelis the real nature of the title to the property. And during this period of time, he paid far less than the fair rental value of the property. He paid

a mortgage payment of \$144 per month and taxes of less than \$200 per month, while Ms. Zamelis looked for houses to rent at \$700 per month. RP 154 at 17-20.

Moreover, in 1997, the small mortgage was paid off. Thereafter, Mr. Zamelis paid very little in real estate taxes: just \$788 for the entire year in 2010. RP 153 at 16-18. That equates to \$65/mo for a waterfront home on Honeymoon Bay. RP 153 at 16-18. During that time, Ms. Zamelis was renting a room from friends or family members. CP 11 at 11-12.

But for Mr. Zamelis' deceit, the parties would have sold the property in 1987 and divided the proceeds. Mr. Zamelis acknowledged that had he sold the property when he had recovered title to it, he would have paid none of the taxes for which he claimed reimbursement at trial. RP 153 at 22-25, 154 at 1.

Mr. Zamelis maintained in his pleadings right up to the day of trial that he had ousted Ms. Zamelis and owned the property by adverse possession. CP 152, 160. His later claim that he was a forthright tenant in common with Ms. Zamelis is unsupported in the record.

The evidence adduced at trial amply demonstrated Mr. Zamelis' violation of his fiduciary duty to Ms. Zamelis. The record reflects Mr. Zamelis' intentional interference in Ms. Zamelis' cotenancy of the

property, resulting in overreaching that violates the duties of a tenant in common.

The trial court equitably determined that Mr. Zamelis should not get credit for mortgage payments and taxes he paid during the period of time that he represented to the world that he was merely a renter, particularly when he paid far less than fair rental value for the property during that time. His acts were particularly egregious in juxtaposition with Ms. Zamelis, who was reduced for more than 20 years to renting rooms from friends and family and living in a trailer. An equal division of the property was appropriate.

2. *Current Value of Property is Proper.* Mr. Zamelis next contends that the trial court erred by not using a 1988 value of the property when determining Ms. Zamelis' share of the property. *Brief of Appellant at 33.* Mr. Zamelis does not support his contention with any citation to authority. The Court need not consider it. RAP 10.3(a)(6); *McKee v. Am.Home Prods., Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989).

Substantively, Mr. Zamelis presented no evidence at trial of the value of the property in 1988. The only evidence of the property's value was its current value, testified to by appraiser, Peter DenHollander. *Exhibit 16.* Mr. Zamelis stipulated at trial to the current value of the property at \$450,000. RP 34 at 21-22; Exhibit 16. He cannot fairly be

heard to complain that the trial court erred in failing to consider evidence that was not before it.

Finally, his position is not equitable. The vast majority of the property's current value is appreciation of the real estate market since its purchase in 1971. The net value of his improvements were only \$27,500. CP 14 at 13-15. Mr. Zamelis acknowledges that he and Ms. Zamelis are tenants in common. He cannot equitably claim that he is entitled to 100% of the market appreciation on an asset in which he has only a 50% interest.

The trial court correctly used the current value of the property.

3. *Increase in Value in Improvements Offset by Rent Due Upon Ouster*. Mr. Zamelis next complains that the trial court inequitably awarded Ms. Zamelis one half the value of the improvements made upon the property. Generally, a cotenant may not seek to recover the cost of improvements made to a common estate without the consent of the other cotenant. *Cummings*, 94 Wn.2d at 141. But in a partition action, a court, in its discretion may award that party the enhanced value of the property. *Cummings*, 94 Wn.2d at 141. A trial court abuses its discretion if its ruling is manifestly unreasonable or stated another way, if "no reasonable judge would take the position adopted by the trial court." *Bauman v. Turpen*, 139 Wn. App. 78, 93, 160 P.3d 1050 (2007).

In this case, Mr. Zamelis converted the parties' garage to an accessory living unit without the knowledge or consent of Ms. Zamelis.

Similarly, he constructed a detached garage on the property, again without the knowledge or consent of Ms. Zamelis. The un rebutted testimony at trial was that these improvements added \$27,500 in value to the property. CP 14 at 13-15. Thus, the trial court had discretion to award that value to Mr. Zamelis if it considered such a result to be equitable.

But the trial court also considered the rent Mr. Zamelis began to owe from January 18, 2005, when he commenced his attempt to oust Ms. Zamelis from the property. A cotenant ousts another cotenant when he engages in acts or conduct signifying his intention to hold, occupy, and enjoy the premises exclusively, and of which the tenant out of possession has knowledge. *Fritch v. Fritch*, 53 Wn.2d 496, 503, 335 P.2d 43 (1959). The claimant must show a definite assertion of adverse right by overt acts of unequivocal character, clearly indicating an assertion of ownership of the premises to the exclusion of the right of the other cotenants. *Fritch*, 53 Wn.2d at 503-04. (Parties divorced for nearly 13 years still tenants in common where husband treated the property as his own; the wife did not reside on the property; but husband did not overtly tell the wife that he was holding the property adversely to her interest).

In this case, Mr. Zamelis resided on the property, but he represented to Ms. Zamelis and to the world that the property belonged to his friend, Victor Otlans. Until 2005, he made no overt statement to Ms. Zamelis that he intended to do her out of the property.

But on January 18, 2005, he recorded the quit claim deed in Island County that purported to transfer title from Victor Otlans to Mr. Zamelis as his sole and separate property. On that date, Mr. Zamelis took the overt, unequivocal act of asserting a right of ownership adverse to Ms. Zamelis. On that date, he began his attempt to oust her from the property. Indeed, Mr. Zamelis maintained all through the pendency of this litigation up to the date of trial that he was the sole legal owner by quit claim deed and adverse possession. There is no doubt that he intended to oust Ms. Zamelis.

When an occupying cotenant commences ouster against a non-occupying cotenant, the occupying tenant begins to owe rent. *Yakavonis v. Tilton*, 93 Wn. App. 304, 309, 968 P.2d 908 (1998). In this case, the unrebutted testimony at trial was that the fair rental value of the total property is \$1,465 per month. RP 45 at 11-12. The fair rental value of the accessory living unit is \$650 per month. RP 45 at 21-23. Thus, the fair rental value of the property, less the improvements that Mr. Zamelis made to it is \$815/mo. At that rate, the total rent from January 2005 to January 2012 at the time of trial was \$68,460. Subtracting the taxes due over that period of time of \$5,500 leaves a net rental sum due of \$63,000. Ms. Zamelis' one half share would be \$31,500.

The trial court did not award Mr. Zamelis \$27,500 in enhanced value of the property and \$31,500 in rent to Ms. Zamelis. Instead, it

evidently concluded that the two claims offset each other and it ordered that the property be sold and the proceeds divided equally. The trial court acted within its discretion. There is no error.

4. *No Modification of Decree of Dissolution Occurred.* Contrary to Mr. Zamelis' claim, the trial court did not retroactively modify the decree of dissolution when making the division of property. The decree of dissolution awarded one half of the real property to Ms. Zamelis and ordered her to pay the "partnership liability on real property." *Exhibit 10, p. 6.* As described earlier, Ms. Zamelis' obligation to pay the underlying encumbrance against the real property would take effect when she received the property. But as of the date of the entry of the decree of dissolution in 1988, Mr. Zamelis had actively concealed from Ms. Zamelis the fact that the parties had recovered legal title. Ms. Zamelis did not receive the property awarded to her in the decree.

By the time she did receive legal title to the property by order of the trial court in this case, the small mortgage balance of \$12,000 had been paid off 12 years earlier. There was no longer any encumbrance to order her to pay. The trial court did not err in failing to order her to pay an encumbrance that no longer exists.

Mr. Zamelis nevertheless argues that Ms. Zamelis should be retroactively required to pay one half of the mortgage balance as of the date of the parties' decree of dissolution. He is mistaken. In the area of

family law, it is well settled that a trial court may offset one spouse's beneficial use of the property against the amount of funds expended toward that property. *Miracle v. Miracle*, 101 Wash.2d 137, 137-138, 675 P.2d 1229 (1984) (Trial court properly refused to impose equitable lien in favor of community when community had been adequately compensated for its payments by its beneficial use of the premises).

In this case, Mr. Zamelis indeed paid the small \$144/mo mortgage on the property. He did, indeed, pay real estate taxes ranging from \$65 - \$300/mo. But the evidence was also unrebutted that the payments he made were far *less* than fair rental value of the property. Any payments he made were more than offset by his beneficial use of the property over the more than 25 years he resided on it. In fact, were this action in the context of family law, the community would have an equitable lien against him for the difference between the fair rental value of the property and the lesser amounts he actually paid.

Finally, Mr. Zamelis argues that Ms. Zamelis should be required to pay to him \$11,000, representing the alleged debt to Victor Otlans she was assigned to pay in the parties' decree of dissolution. *Exhibit 10, p. 6*. His position is contrary to the evidence adduced at trial. At trial, the quit claim deed transferring legal title back to Mr. Zamelis expressly provided that consideration for the transfer was "assumption of liability only." The only liability associated with the property was the mortgage in favor

Rainier Financial Services in the sum of approximately \$12,000. *Exhibit 9*.

The decree of dissolution requires Ms. Zamelis to pay \$11,000 to Victor Otlans and to separately pay the liability on the real property. *Exhibit 10 at 6*. Nowhere in any document is the alleged debt of \$22,000 to Victor Otlans associated with the real property. Mr. Otlans never collected payment from Ms. Zamelis. Finally, Mr. Zamelis offered no proof that he actually paid this alleged debt. CP 13 at 16-19. The trial court did not err in refusing to require Ms. Zamelis to pay a 30 year old alleged debt to a deceased third party, which was unsecured by the real property at issue.

D. **Attorney Fees Appropriate Under RCW 26.09.140 and for Frivolous Appeal.** Division Three has held that fees under RCW 26.09.140 are appropriate within the context of this case. *Seals v. Seals*, 22 Wn. App. 652, 657-78, 590 P.2d 1301 (1979). Moreover, this Court may award fees under RAP 18.9(a) when a party incurs fees for responding to a frivolous appeal. An appeal is frivolous when the appeal presents no debatable issues upon which reasonable minds could differ and when the appeal is so totally devoid of merit that there is no reasonable possibility of reversal. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987).

In this case, Mr. Zamelis assigned error to 14 findings of fact and six conclusions of law, but failed to argue any of those assignments of error. His assignments caused considerable work for the Respondent to copiously comb the record for the evidence that would substantiate the trial court's findings.

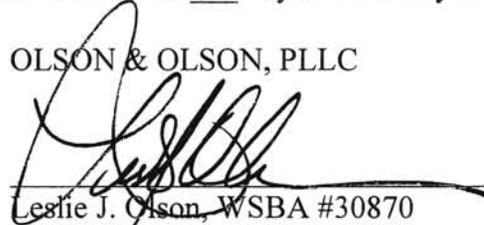
Mr. Zamelis also asserted that the trial court erred by failing to make findings for which he presented no evidence at trial. He claimed errors in the body of his brief that were not consistent with the relief he sought in his conclusion. Overall, his brief failed to evidence any abuse of discretion in the decision of the trial court below. His appeal has delayed the resolution of this matter at a time when the parties are 76 and 75 years of age. His appeal is not brought in good faith, but is rather designed to further delay Ms. Zamelis' receipt of the property she was awarded so long ago. Ms. Zamelis should be awarded her attorney fees incurred in defending this appeal.

IV. CONCLUSION

Substantial evidence supported the trial court's findings. The trial court's conclusions followed from its findings. It acted within the range of evidence to reach an equitable result. The judgment should be affirmed and Ms. Zamelis should be awarded her attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 7th day of February 2013.

OLSON & OLSON, PLLC

A handwritten signature in black ink, appearing to read 'Leslie J. Olson', is written over a horizontal line.

Leslie J. Olson, WSBA #30870
Attorneys for Respondent
1601 Fifth Avenue, Suite 2200
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CERTIFICATE OF SERVICE

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

I am employed at Olson & Olson, PLLC. On February 7, 2013, I caused to be sent via facsimile and/or personal delivery a true and correct copy of Brief of Respondent and Certificate of Service to the Court of Appeals and to:

KATHRYN JENKINS
2200 Sixth Avenue, Suite 1250
Seattle, WA 98121
Facsimile: 800-655-8586
Email: kjenkins@kjenkinslaw.com

Signed at Seattle, Washington this 7th day of February 2013.


Greg Hardgrave

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APPENDIX A

FILED
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DEBRA VAN PELT
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**SUPERIOR COURT OF WASHINGTON
COUNTY OF ISLAND**

JOYCE ZAMELIS,

vs.

ZINTARS ZAMELIS,

Plaintiff,

Defendant.

Judge: Hon. Vickie I. Churchill

NO. 09-2-00254-6

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

THIS MATTER having come on duly and regularly for trial before the Honorable Vickie I. Churchill, and the Court, having considered the exhibits admitted into evidence and the testimony of the following witnesses:

- 1. Joyce Zamelis
- 2. Elizabeth Friez
- 3. Peter DenHollander
- 4. Zintars Zamelis
- 5. Kristine Muzzy

NOW therefore hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

I. FINDINGS OF FACT

- 1. This matter came before the Court for a trial to the bench on February 7, 2012.
- 2. The subject matter of this lawsuit is the real property commonly described as 4411

*Findings of Fact and Conclusions
of Law - Page 1 of 11*

ORIGINAL

OLSON & OLSON, PLLC
1601 FIFTH AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101-1651
TELEPHONE: (206) 625-0085
FACSIMILE: (206) 625-0176

1 Honeymoon Bay Road, Greenbank, Washington 98253, situated on Honeymoon Bay,
2 Whidbey Island, Washington and more particularly and legally described as follows:

3 SITUATE IN THE COUNTY OF ISLAND, STATE OF WASHINGTON:

4 THAT PORTION OF GOVERNMENT LOT 1 OF SECTION 27, TOWNSHIP
5 30 NORTH, RANGE 2 E.W.M., DESCRIBED AS FOLLOWS:

6 BEGINNING AT THE SOUTHWEST CORNER OF SECTION 27; THENCE
7 PROCEEDING ALONG SOUTH LINE OF SAID SECTION NORTH 89°40'52"
8 EAST 786.23 FEET; THENCE NORTH 144.70 FEET TO A POINT ON THE
9 NORTH MARGIN OF THE COUNTY ROAD WHICH IS THE SOUTHEAST
10 CORNER OF THE TRACT CONVEYED TO HANNIAH NELSON BY DEED
11 RECORDED IN VOLUME 62 OF DEEDS, PAGE 426, UNDER AUDITOR'S
12 FILE NO. 66369, RECORDS OF SAID COUNTY, AND WHICH IS THE
13 SOUTHWEST CORNER OF THE HEREIN - DESCRIBED TRACT AND THE
14 TRUE POINT OF BEGINNING; THENCE NORTH 14°03'08" EAST 521.36
15 FEET; THENCE ALONG THE MEANDER LINE IN SAID SECTION 27
16 SOUTH 82°17'28" EAST 204.04 FEET TO THE NORTHWEST CORNER OF
17 THE TRACT CONVEYED TO ISADOR J. LA MAE, BY DEED RECORDED
18 IN VOLUME 60 OF DEEDS, PAGE 590, UNDER AUDITOR'S FILE NO.
19 63486, RECORDS OF SAID COUNTY; THENCE SOUTH 17°14'55" WEST
20 532.58 FEET; THENCE ALONG THE NORTHERLY MARGIN OF THE
21 COUNTY ROAD NORTH 79°57'42" WEST 173.53 FEET TO THE TRUE
22 POINT OF BEGINNING.

23 TOGETHER WITH TIDELANDS OF THE SECOND CLASS IN FRONT OF
24 AND ADJACENT THERETO.

25 TOGETHER WITH AN EASEMENT FOR INGRESS AND EGRESS OVER
26 AND ACROSS THE PRIVATE ROAD LOCATED ON THE FOLLOWING
DESCRIBED PROPERTY:

COMMENCING AT THE SOUTHWEST CORNER OF SAID SECTION 27;
THENCE ALONG THE SOUTH LINE OF SAID SECTION 27 NORTH
89°40'52" EAST 957.11 FEET; THENCE NORTH 13.49 FEET TO A POINT
OF THE NORTHERLY MARGIN OF THE COUNTY ROAD, WHICH POINT
IS THE SOUTHWEST CORNER OF THE TRACT HEREIN DESCRIBED
AND THE TRUE POINT OF BEGINNING; THENCE NORTH 17°14'55"
EAST 532.58 FEET TO THE MEANDER LINE; THENCE ALONG
MEANDER LINE IN SAID SECTION 27 SOUTH 60°47'28" EAST 100 FEET;
THENCE SOUTH 18°50'04" WEST 502.08 FEET TO THE ROAD; THENCE
ALONG THE NORTHERLY MARGIN OF THE COUNTY ROAD ON A
CURVE TO THE LEFT, HAVING AN INITIAL COURSE OF NORTH

1 78°02'10" WEST AND A RADIUS OF 1176.30 FEET FOR A DISTANCE OF
2 39.53 FEET; THENCE NORTH 79°57'42" WEST 45 FEET TO THE TRUE
3 POINT OF BEGINNING; AS GRANTED BY INSTRUMENT RECORDED
4 MARCH 13, 1948 UNDER AUDITOR'S FILE NO. 70832.

5 (hereinafter referred to as "the Subject Property.")

6 3. Zintars Zamelis and Joyce Zamelis married September 7, 1963.

7 4. Mr. Zamelis controlled the parties' finances during their marriage.

8 5. On July 20, 1971, the parties purchased the subject property as husband and wife.

9 6. In 1976, Mr. Zamelis told Ms. Zamelis that he owed Victor Otlans \$7,000 because Mr.
10 Otlans had put a roof on a commercial building where Mr. Zamelis' business, Alert Glass, was
11 located.

12 7. Mr. Zamelis told Ms. Zamelis that they must transfer the subject property to Victor
13 Otlans by quit claim deed to satisfy the \$7,000 debt.

14 8. Mr. Zamelis assured Ms. Zamelis that once debt was repaid, they would get the
15 property back from Mr. Otlans.

16 9. As a result, on November 30, 1976, the parties quitclaimed the subject property to
17 Victor Otlans.

18 10. The parties continued to reside on the property, pay the taxes and insurance on the
19 property, and continued to maintain the property.

20 11. As far as Ms. Zamelis knew, they were paying rent to Victor Otlans.

21 12. Mr. Zamelis persuaded Ms. Zamelis to execute a general power of attorney on June 29,
22 1976, to facilitate his management of their finances.

23 13. Mr. Zamelis continued to control the parties' finances, without much input from Ms.
24 Zamelis.

25 14. In 1979, a business creditor, H&D Corporation, sued the parties and Victor Otlans for
26 fraudulent transfer of the subject property.

15. The lawsuit was dismissed on October 31, 1979, subject to the restriction that the

1 lawsuit could be re-filed if the subject property was ever repurchased by the parties or on their
2 behalf for less than fair consideration.

3 16. On January 30, 1980, the parties and Alert Glass filed for bankruptcy.

4 17. On March 28, 1980, the US Bankruptcy Court entered a discharge of debtors.

5 18. Financial troubles continued to plague Mr. Zamelis. On February 22, 1983, Rainier
6 National Bank filed a complaint for foreclosure of mortgage and appointment of receiver
7 against Mr. and Ms. Zamelis and Victor Otlans for default on loans the parties had with the
8 bank.

9 19. These loans were in the form of a promissory note for \$40,000 secured by the subject
10 property, a \$5,000 renewal note that was intended to substitute for the original \$40,000 note,
11 and an advance to Alert Glass, Inc. for \$100,000.

12 20. With interest, the amounts owed were much larger.

13 21. On March 2, 1983, Mr. Otlans executed a short form Deed of Trust in the sum of
14 \$18,000, which apparently satisfied the bank's complaint.

15 22. Rainier filed a satisfaction of mortgage on January 12, 1984, for the \$40,000 loan.

16 23. The parties were having marital troubles.

17 24. The parties separated December 12, 1983.

18 25. Ms. Zamelis left the parties' home, even though her oldest daughter remained at home
19 for her senior year of high school, because Mr. Zamelis told her that Victor Otlans would not
20 let her stay in the residence.

21 26. When she left, the subject property was in good, not excellent condition.

22 27. Ms. Zamelis filed a petition for dissolution on February 3, 1984.

23 28. At that time, she filed a lis pendens against the subject property to preserve her interest
24 in the residential property.

25 29. She still believed that Mr. Otlans would deed the property back to the parties.

1 30. Ms. Zamelis removed the lis pendens January 27, 1987 because Mr. Zamelis told her
2 that Mr. Otlans would sue her if she did not remove it.

3 31. Mr. Zamelis testified that Ms. Zamelis removed the lis pendens as a result of an
4 agreement they signed five months earlier.

5 32. On August 3, 1986, both parties signed an agreement drafted by Mr. Zamelis.

6 33. According to the agreement, its sole purpose was, "to dispense all past, present, or
7 future aspirations by either party in regard to their posture," on the subject property.

8 34. The agreement was to be a, "limited and equal partnership for the sole purpose of
9 purchasing, renting, and selling" the subject property.

10 35. The parties contemplated getting the property back, then renting it and selling it.

11 36. Mr. Zamelis was designated the active partner, who was to arrange for financing and
12 was to maintain the property in a rentable condition.

13 37. Mr. Zamelis was to be paid \$15 per hour for his time and materials for maintaining the
14 property, and he was to keep the property rented.

15 38. The parties were to each pay \$150 per month to meet any shortages between the
16 mortgage and the rent and also to pay for repairs.

17 39. Each party enjoyed a first right of refusal if there was a bona fide purchaser for the
18 subject property.

19 40. Mr. Zamelis was, "to divulge within 10 days and share equally any monies and real
20 benefits that come to him now or in the future as a result of the community property period of
21 the marriage."

22 41. The agreement required Ms. Zamelis to remove the lis pendens against the subject
23 property.

24 42. Four months after signing the agreement and three years after separation, Mr. Zamelis
25 executed a commercial promissory note on December 30, 1986, in favor of Victor Otlans in
26

1 the sum of \$22,000.

2 43. He testified that this amount represented the \$18,000 deed of trust from Mr. Otlans to
3 Rainier National Bank to satisfy the bank's complaint for foreclosure, plus attorney fees.

4 44. Mr. Zamelis testified that he paid off this loan in December 1991 by paying \$300 and a
5 balloon payment at the end.

6 45. The promissory note was not secured by any real property.

7 46. On December 30, 1986, three years after the parties separated, Mr. Zamelis executed
8 another commercial promissory note in the sum of \$6,400 payable to Victor Otlans.

9 47. Mr. Zamelis testified that this was the original cost of putting the roof on his business
10 property in 1976.

11 48. Mr. Zamelis admitted that he prepared the decree of dissolution of the parties.

12 49. The decree of dissolution was entered March 14, 1988.

13 50. The parties' decree of dissolution purported to give each one half of the partnership
14 property and Ms. Zamelis, "\$5,000 paid on the property/partnership."

15 51. Both were to pay the partnership liability on real property, which was not specified.

16 52. They were each to pay \$11,000 to Victor Otlans, for a total of \$22,000.

17 53. Ms. Zamelis never received nor paid \$5,000 on the partnership property.

18 54. She did not know what that asset was.

19 55. Mr. Zamelis continued to reside at the subject property after the dissolution was final.

20 56. Mr. Zamelis did very little to maintain the property.

21 57. Mr. Zamelis paid the sum of \$144.57 per month for the mortgage to Rainier National
22 Bank until January 31, 1997, when it was paid off.

23 58. Mr. Zamelis paid on the two commercial promissory notes in favor of Victor Otlans.

24 59. Mr. Zamelis started dating his present wife, Kristine Muzzy, in 1993.

25 60. Ms. Muzzy testified that when she saw the house in 1993, it was a dump.

26

1 61. She testified that she would not move into the house until 1997, after the house was
2 extensively repaired and central heating was installed.

3 62. Ms. Muzzy and Mr. Zamelis married in August 2000.

4 63. Ms. Muzzy contributed money of her own to improve the house, as did her mother.

5 64. The funds invested by Ms. Muzzy contributed to a garage/shop and to the remodel of
6 the existing garage into an auxiliary living unit.

7 65. Mr. Zamelis inherited a residence in Latvia. Mr. Zamelis and Ms. Muzzy spend a
8 portion of the year in Latvia.

9 66. Mr. Zamelis and Ms. Muzzy started renting out the subject property in 2006, but later
10 stopped, because the rental income was not worth the effort or wear and tear on property.

11 67. Ms. Zamelis rented an apartment for \$700 per month, failed in the purchase of a mobile
12 home, and finally moved in with relatives because she could not afford a home of her own.

13 68. Ms. Zamelis checked the public records of Island County annually, then every two
14 years and sporadically after that to verify the title status of the property.

15 69. Each time she looked, she found that Mr. Otlans still remained on the title.

16 70. Ms. Zamelis moved from Washington to Oregon in April 2005.

17 71. Mr. Otlans passed away some time in 2005 in Arizona.

18 72. Mr. Zamelis recorded the quit claim deed to the subject property in 2005.

19 73. In 2009, Ms. Zamelis checked the records and found that Mr. Zamelis filed a quit claim
20 deed from Victor Otlans to Zintars Zamelis on January 18, 2005.

21 74. The only compensation given for the subject property was "assumption of liability
22 only."

23 75. The quit claim deed was dated December 30, 1986 at the same time that Mr. Zamelis
24 signed the commercial promissory notes.

25 76. Mr. Zamelis claims that he did not receive the deed until 1991, when he testified that
26

1 he paid off the \$22,000 loan to Mr. Otlans.

2 77. He also claims that he called Ms. Zamelis in 1991 to tell her that he had the deed to the
3 subject property.

4 78. Mr. Zamelis put the deed in his safe deposit box and did not file it until 2005, after
5 Victor Otlans died, because he did not want to involve Mr. Otlans in a suit against the
6 property.

7 79. He knew that if Ms. Zamelis knew of the deed, she would sue to recover the property.

8 80. Mr. Zamelis was not credible.

9 81. He stated during the marriage that if the parties ever divorced, he would see to it that
10 Ms. Zamelis did not get anything because, as he stated to his sister-in-law, Ms. Zamelis never
11 contributed to anything.

12 82. The subject property was the only asset of value of the parties.

13 83. Mr. Zamelis' actions bear out this threat.

14 84. Mr. Zamelis signed the commercial promissory note in 1986, three years after the
15 parties' separation and almost five months after the parties signed the partnership agreement.

16 85. The only debt that was secured by the subject property in 1986 was \$12,000 in favor of
17 Rainier National Bank.

18 86. The promissory note for \$6,000, which Mr. Zamelis claims was for the roof of his
19 business property, was not signed until 10 years after the parties signed a quit claim deed
20 purportedly because they couldn't pay Victor Otlans what they owed him for the roof on the
21 business property in 1976.

22 87. It is not credible that Mr. Otlans would wait 10 years, during which time the parties
23 declared bankruptcy, to recover his debt.

24 88. The timing of the debt is suspicious. It was incurred only by Mr. Zamelis during the
25 parties' separation and without Ms. Zamelis' knowledge.

26

1 89. As soon as Ms. Zamelis knew that the property had transferred from Mr. Otlans to Mr.
2 Zamelis, she brought this action.

3 90. If Mr. Zamelis had told Ms. Zamelis in 1991 that he had possession of the deed, this
4 action would have commenced in 1991.

5 91. Mr. Zamelis hid the quit claim deed in a safety deposit box.

6 92. The Court strongly suspects that Mr. Zamelis had possession of the deed on December
7 30, 1986. Mr. Otlans signed the quit claim deed on December 30, 1986, the same day that Mr.
8 Zamelis signed promissory notes.

9 93. Mr. Zamelis testified that Mr. Otlans was a good friend, one who would bail him out of
10 financial troubles.

11 94. The timing of the promissory notes after separation, the date of the quit claim deed and
12 Mr. Zamelis' vow to make sure Ms. Zamelis received nothing from the marriage combined
13 with the deep friendship between Mr. Zamelis and Mr. Otlans convinced the Court that Mr.
14 Zamelis was trying to cut Ms. Zamelis out of the subject property, which both parties
15 acknowledge was a community asset.

16 95. Mr. Zamelis did not provide any proof, other than his testimony, which was riddled
17 with inconsistencies, that he actually paid Mr. Otlans the sums due on the notes.

18 96. Although Mr. Zamelis was able to find other documents more than 20 years old, he
19 offered not one canceled check, not one bank statement to show proof of payment.

20 97. Mr. Zamelis continued to reside for 20 plus years on the subject property and paid
21 only \$144.57 per month for the mortgage until it was paid off in 1997.

22 98. Mr. Zamelis represented in public records that he rented the subject property from
23 Victor Otlans from 1976 to 2005.

24 99. Mr. Zamelis' payments on the property were far below fair rental value.

25 100. Mr. Zamelis now claims that he is owed \$150 per month from Ms. Zamelis since
26

1 1986.

2 101. This sum was to cover any shortfall between the rent and the mortgage and for
3 repairs. Mr. Zamelis never rented the property until years later and he never shared any rent
4 with Ms. Zamelis.

5 102. He claims that he is owed \$15.00 per hour for work he did on the property. But he
6 did very little to the property until Ms. Muzzy invested her own monies into the house.

7 103. If Mr. Zamelis had notified Ms. Zamelis in late 1986, when the court believes he
8 got the quit claim deed, of his title to the real property, the property would have been sold or
9 rented then.

10 104. Only in 2005, when the county assessor changed the records to reflect a change of
11 ownership interest in the subject property, did the true nature of legal title to the subject
12 property come to light.

13 105. The property has a current value of \$422,500 without the garage/shop and
14 auxiliary living unit.

15 106. It has a total value of \$450,000.

16 107. The fair rental value of the property is \$1,425 per month.

17 **II. CONCLUSIONS OF LAW**

18 1. The subject property was the community property of the parties during the marriage.

19 2. The language of the parties' 1986 partnership agreement required Mr. Zamelis to
20 advise Ms. Zamelis regarding the status of legal title to the property within 10 days.

21 3. The notes that Mr. Zamelis signed to Mr. Otlans in 1986 were not for financing the
22 subject property because the notes were not secured.

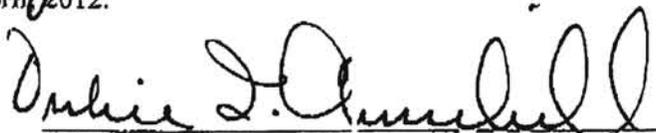
23 4. The liability against the subject property referenced in the 1986 deed was the note and
24 deed of trust in favor of Rainier National Bank, which, in 1986, was \$12,000.

25 5. Mr. Zamelis repudiated the 1986 partnership agreement.

26

- 1 6. The partnership agreement should be set aside.
- 2 7. The language in the decree referring to "one half interest in partnership real property"
- 3 refers to the subject property.
- 4 8. The property is not susceptible to physical partition.
- 5 9. Ms. Muzzy has recourse against Mr. Zamelis, for monies she put into the subject
- 6 property.
- 7 10. Title should be quieted in the names of both parties.
- 8 11. It is equitable that the subject property be sold and the proceeds divided equally
- 9 between the parties.
- 10 12. Mr. Zamelis should continue to reside at the property until sale.
- 11 13. In exchange for his exclusive occupancy of the residence, he should pay the taxes and
- 12 insurance and maintenance for the property and he should pay rent to Ms. Zamelis in the sum
- 13 of \$1,000 per month, commencing April 1, 2012.

14 Dated this 7 day of ^{May}~~April~~ 2012.

15 
 16 Judge Vickie I. Churchill

19 Presented by:
 20 OLSON & OLSON, PLLC

Consent to entry granted, form and content
 approved, and receipt of copy acknowledged
 this ____ day of April, 2012.

21 
 22 _____
 23 Leslie J. Olson, WSBA #30870
 Attorneys for Plaintiff

23 _____
 Kathryn Jenkins, WSBA #16332
 Attorney for Defendant