

COURT OF APPEALS  
 DIVISION I  
 OF THE STATE OF WASHINGTON

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ZACHARY B. HARJO,  
 Petitioner,

v.

GELSEY HANSON,  
 Respondent.

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RESPONSIVE BRIEF OF RESPONDENT

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WECHSLER, BECKER, LLP




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## **I. INTRODUCTION**

Two issues principally concern this second appeal in this case: (1) whether \$2,898 should be included in the judgment against Harjo; and (2) the amount of profits from 2010 that should be reduced to judgment against Harjo. As to the \$2,898, the trial court acted within its discretion in making a distribution of property that was not exactly 50-50. As to the profits, the trial court acted within its discretion in interpreting the tax return and awarding \$5,910 for Hanson's share of profits for 2010.

The trial court also properly awarded Hanson attorney's fees based on Harjo's noncompliance with the court's orders. The trial court should furthermore award fees to Hanson on appeal.

## **II. ASSIGNMENTS OF ERROR**

The respondent does not assign error to the decisions of the trial court. The trial court considered the narrow issues presented, and Judge Spector's rulings were within her sound discretion.

## **III. STATEMENT OF THE CASE**

Zachary Harjo and Gelsey Hanson engaged in a 8-year, marital-like,

equity relationship.<sup>1</sup> CP 2. Trial occurred in November, 2010. CP 1. The court made extensive findings of fact and conclusions of law, divided the parties' assets and liabilities, and entered a judgment against Harjo. The Decree was updated and amended on January 24, 2011. CP 16, 69.

The Decree reserved one issue – that of Hanson's share of Ocho's profits in 2010. CP 19-20.

Harjo appealed. On appeal, this court affirmed the decision of the trial court, except for one, narrow issue: the trial court was directed "either to clarify its findings with respect to the amount due to Hanson for rental income or to adjust the equalization payment accordingly." CP 70. This was essentially a \$2,898 question. CP 34.

On May 9, 2011, Hanson had requested an accounting from Harjo in order to calculate the amount due to her for 2010 from Ocho. CP 72. Harjo responded with a settlement offer and notes of a state audit, but without documentation sufficient to analyze Ocho's income, expenses, owner compensation, or other facts necessary to establish profits. CP 75-108.

On April 26, 2013, Hanson brought a motion to reduce amounts

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<sup>1</sup> Washington courts have variously described such relationships as "meretricious," "quasi-marital," "marital-like," "committed intimate relationships," and most recently, "equity relationships." *In re Long and Fregeau*, 158 Wn. App. 919, 244 P.3d 26 (2010).

owed to judgment, including interest, enter supplemental findings on remand, compel an accounting from Harjo of the 2010 Ocho profits, and for attorney's fees. CP 33-108. In his late response, Harjo finally produced 2009 and 2010 tax returns for Ocho, along with profit and loss statements. CP 120-172. Significantly (for purposes of attorney's fees), he requested that the interest rate on the judgment be halved to 6%, that profits be calculated at a *negative* figure of \$24,350, and that the judgment be reduced by amounts owed to the Washington State Department of Revenue for years prior to 2010. CP 116.

Hanson submitted a "supplemental" reply. CP 175-9. (Since Harjo's response was late, she had first submitted a reply indicating that no response had been received. CP 174.) Despite the lack of any support for the figures claimed on the tax returns (e.g. bank statements, deposit receipts, accounting of cash receipts, expense breakdowns), Hanson opted to simply accept the stated profits on the 2010 tax return for purposes of litigation. CP 176. The profits in 2010 were \$11,839 (CP 148), so she requested a judgment of \$5,919. CP 176. (This amount also reflected her "Partner's Share of Profits" on Form K-1. CP 168.) Harjo submitted a "Strict Reply to Petitioner's Supplemental Reply." CP 180.

On May 16, the court granted the request to reduce the 2010 Ocho

profits to judgment. CP 185-6. And on June 10, 2013, the court granted Hanson's motion to reduce amounts due to judgment, with interest, and awarded fees to Hanson. CP 187-9.

Hanson brought two motions for reconsideration. On June 11, 2013, he filed a "Motion for Reconsideration or Vacate Judgment Under CR 59 or CR 60." On June 17, he filed a "Motion for Reconsideration or Vacate Judgment Dated June 10, 2013 Under CR 59 or CR 60/ Petitioner's 'Judgment and Order on Motion to Reduce Amounts Owed and Interest to Judgment, Enter Supplemental Findings, Compel Accounting, and for Attorney's Fees.'" CP 195-98.

An order denying reconsideration was entered June 24, 2013. CP 199.

#### **IV. MOTION**

Hanson moves to strike pages 12 and 13 from Harjo's Brief of Appellant; Hanson also moves generally to strike those factual allegations which occur throughout Harjo's brief which contain no citations to the record.

RAP 10.4(f) requires that references to the record should designate the page and part of the record referred to.

Harjo's Brief's Statement of the Case contains no references to the records whatsoever. However, due to the relatively short (and to Hanson, familiar) record, this does not present an insurmountable hurdle; it only requires some additional work on the part of her attorney. However, pages 12 and 13 of Harjo's Brief contain numerous allegations of facts that are nowhere supported in the record, including statements of phone calls he made and e-mails sent and received. It is impossible to respond to any of these allegations based on the record. These pages should be stricken and not considered by the court.

The remainder of Harjo's brief also contains regular assertions of fact with no citation to the record, which should be ignored by the court. (For example, he alleges that Hanson had certain documents in her possession at certain times in the past, an allegation raised for the first time on appeal.) These allegations should also be ignored.

#### **IV. ARGUMENT**

##### **1. The Relevant Standard of Review is Abuse of Discretion**

In his brief, at page 14-15, Harjo argues the standard of review is abuse of discretion. Hanson agrees.

**2. The Court Did Not Err in Awarding \$5,910 in Ocho Profits for 2010 to Hanson (Harjo's Assignment of Error Number 1).**

*In re Marriage of Farmer*, 172 Wn.2d 616, 625, 259 P.3d 256 (2011), clarified that “a trial court necessarily abuses its discretion if it awards damages based upon an improper method of measuring damages.” However, the calculation of damages is a question of fact. *Id.*, at 632. The court in *Farmer* recognized that there are many ways to value stock options: valuation “does not lend itself to one universal approach.” *Farmer*, at 627. Likewise, there are multiple, different, and equally acceptable methods for valuing retirement assets. *Id.*, 630-1.

Here, there are multiple, possible approaches for determining corporate profits. For example, a court may or may not allow for depreciation in a given year when determining that particular year's income. (Ocho had depreciation of \$1,853 in 2010. CP 148.) A court may choose not to permit deduction of certain expenses, particularly deductions that include personal expenses. In 2010, Ocho claimed \$2,720 for telephone, \$4,822 in “bar expenses” (not including costs of goods sold, i.e., liquor), and \$15,865 in professional fees (during a year Mr. Harjo was incurring significant attorney's fees). CP 159. Judge Spector heard a week's worth of

testimony which included questions of Ocho's income, expenses, assets, and valuation, so Judge Spector is particularly suited to know what approach for determining Ocho's 2010 profits is most appropriate. When determining profits, a court may delve deeply into the actual income and expenses of the business, *or* the court may accept, at face value, the calculation of profits presented by the tax return.

Here, the measure of profits was perfectly acceptable. It is exactly the amount of Ordinary Business Income that appears on line 22 of the Partnership Tax Return. CP 148. It is the amount of profit on which Hanson will have to pay income tax. CP 168. The finding that the tax return's calculation of profits constituted the business "profits" for purposes of this equity relationship is therefore supported by substantial evidence.

Harjo's distinction between nondeductible expenses as either a credit or an expense is irrelevant. First, this is again a question left to the discretion of the trial court. Second, Harjo elected to employ the credit instead of using the expense because it was even more beneficial to him to do so. The effect is that both he and Hanson have greater income, but they also both benefit from the credit (more than they would have from the deduction). So while they both have to claim the K-1 income on their personal tax returns (and pay tax on that income), they also benefitted from

the tax credit. Harjo is attempting to deny Hanson her proper share of the business income by denying the distribution to her. The court properly calculated the income due to Hanson.

**3. The court Did Not Err in Denying Harjo's Request to Offset Condo Rents. (No assignment of error specified.)**

First, Harjo does not assign error to the court's failure to offset condo rents against the judgment. RAP 10.3(a)(4) requires a separate concise statement of each error a party contends was made by the trial court. Unchallenged findings are verities on appeal. *Zunino v. Rajewski*, 140 Wn. App. 215, 220, 165 P.3d 57 (2007). Harjo's failure to assign error to this finding means the Court of Appeals need not consider the argument on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992). However, since argument was directed to the point, Hanson responds as follows.

Harjo misleads the Court of Appeals regarding what the trial court ordered. The trial court, *in its 2010 orders*, required Harjo to reimburse Hanson for \$6,500 for half the rents collected on the condominium. CP 11. In his appellate brief, Harjo implies that the Court of Appeals reversed the entire award, when in fact the Court of Appeals only requested clarification.

(At times, Harjo admits that the actual amount at issue is only \$2,898. CP 116.) Clarification is exactly what the trial court did when it found that the contested \$2,898 should be allocated to Hanson based on the overall fairness of the property division.

Judge Spector clearly found that “while not mathematically precise, the higher amount accomplishes the court’s goal of providing a fair result to Gelsey, given her greater need and the award of the parties’ businesses to Zachary.” CP 188. Harjo is incorrect when he asserts “no evidence has been presented.” Brief of Appellant, 25. Again, Judge Spector was the trial judge in this matter, and she is best able to determine what is fair and equitable to the parties under the circumstances. “The court’s continuing equitable jurisdiction includes the ability to grant whatever relief the facts warrant. *Ronken v. Bd. of County Comm’rs of Snohomish County*, 89 Wn.2d 304, 313, 572 P.2d 1 (1977) (quoting *Kreger v. Hall*, 70 Wn.2d 1002, 1008, 425 P.2d 638 (1967)).” *Marriage of Farmer*, at 625. As in a dissolution action, the division of property need not be equal nor focus on mathematical preciseness; the goal of fairness is achieved by considering the totality of the circumstances of the parties. RCW 26.09.080; *Pennington v. Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000); *In re Marriage of Davison*, 112 Wn. App. 251, 48 P.3d 358 (2002). “The key to an equitable distribution of

property is not mathematical preciseness, but fairness. This is attained by considering all of the circumstances of the marriage, past and present, with an eye to the future needs of the persons involved. Fairness is decided by the exercise of wise and sound discretion not by set or inflexible rules.” *In re Marriage of Rink*, 18 Wn. App. 549, 571 P.2d 210 (1977), citing *In re Marriage of Clark* 13 Wn. App. 805, 810, 538 P.2d 145 (1975).

Judge Spector was well within her authority to determine that the disputed \$2,898 should fall towards Hanson instead of Harjo. Harjo received a business worth \$222,000, in addition to other property. CP 8. The \$2,898 is a negligible percent of the overall distribution of property. While the court originally found that a 50/50 division was fair and equitable, the court may nevertheless find that a 50.5/49.5 division is also fair and equitable under the circumstances.

#### **4. The Trial Court Did Not Err in Awarding Attorney’s Fees.**

This is an action in equity, and therefore, attorney’s fees are not authorized under RCW 26.09.140, as they would be in a dissolution of marriage. However, fees are likewise not barred. As in *In re Cook*, 93 Wn. App. 526, 969 P.2d 127 (1999), fees may be awarded based on the frivolous suit statute (RCW 4.84.185), the court’s inherent equitable authority under

*Hsu Ying Li v. Tang*, 87 Wn.2d 796, 798, 557 P.2d 342 (1976), and CR 11. Here, Harjo engaged in multiple acts before the trial court that justify an award of attorney's fees.

First, it is undisputed that Harjo did not produce an accounting of business profits. The only way to determine profits, of course, is through information in Harjo's possession. In her letter requesting documentation, Hanson set forth what would be reasonably considered sufficient: business records, receipts, programs, files, books, ledgers, bank statements, etc., with which she could independently verify the business profits. CP 72. In response to the letter, Harjo provided none of this, instead producing limited information only marginally relevant to the question of profits. CP 78-108. Petitioner therefore was forced to bring a motion to compel production of documentation that had already been required by the court. (While the court had not specifically ordered Harjo to produce the records, there was no other way to calculate Hanson's share of profits.) In response to the motion, Harjo still did not provide evidence that any accountant would minimally want to review in order to establish business income: bank statements, credit card statements, expense statements, cash receipts. Ocho, as a restaurant and bar, takes in significant cash revenue which is difficult to prove and trace. Instead, Harjo provided only self-serving, self-generated tax returns and profit and loss statements. While Hanson may have abandoned her request for a proper accounting out of exhaustion, this does not excuse Harjo's

failure to provide the accounting. The court has authority to sanction a party for failure to respond to a request for production of documents under CR 37(d).

Second, it is undisputed that Harjo refused to share in the business profits, as ordered. He did not offer *any* amount that would satisfy the court's order that Hanson receive half the profits.

Third, Harjo raised a number of frivolous arguments in response to Hanson's motion. He sought to reduce the judgment by funds he felt he should have been paid from Ocho; he sought an additional reduction for taxes due in 2008-2010, even though these were already allocated by the Decree; he sought to reduce the judgment interest rate to 6% because he felt the statutory rate unfair. CP 116. These requests were frivolous in violation of RCW 4.84.185 and in violation of CR 11: they were not warranted by the law or any argument to modify existing law, and they were interposed to increase Hanson's costs.

As in *In re Cook*, the court was within its discretion to award fees.

#### **5. This Court Should Award Attorney's Fees on Appeal.**

Attorney's fees for responding to this appeal should be awarded to Hanson under RAP 18.9(a) and RCW 4.84.185. The issues raised are within the sound discretion of the trial court. Harjo has shown no abuse of that discretion. While he is not incurring attorney's fees himself, he is forcing

Hanson to incur fees which substantially offset any benefit she receives from the court's awards in her favor.

RCW 4.84.185 is not restricted to statutory fees, but allows the court to award all fees incurred by the party responding to the frivolous action. *White Coral Corp. v. Geysler Giant Clam Farms, LLC*, 145 Wn. App. 862, 189 P.3d 205 (2008).

While the issues raised by Harjo may have been debatable at the trial court, the resolution is within the trial court's discretion. There are no debatable issues on appeal.

## **VI. CONCLUSION**

Harjo misunderstands the law of equitable division of property following a marital-like relationship. He may be correct that "there is only one version of exact." However, exactitude is not the standard – equity is. Within its broad discretion, the trial court made a fair and equitable decision in resolving this property dispute.

We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality.... The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.

*In re Marriage of Landry*, 103 Wash.2d 807, 809-10, 699 P.2d 214 (1985).

The decision should be affirmed, with fees awarded to Hanson on appeal.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of January, 2014.

WECHSLER BECKER, LLP

A handwritten signature in black ink, appearing to read "Michael W. Louden", written over a horizontal line.

MICHAEL W. LOUDEN, WSBA #24452  
Attorney for Respondent Gelsey Hanson

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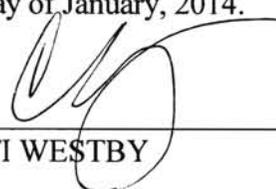
On this date, I personally deposited a copy of the Brief of Respondent,  
along with this Proof of Service into the mails of the United States, first class  
postage prepaid, addressed to the following:

Mr. Zachary Harjo  
2325 NW Market St  
Seattle, WA 98107

I declare under penalty of perjury under the laws of the State of  
Washington that this is true and correct.

DATED this 21<sup>ST</sup> day of January, 2014.

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