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DIVISION I

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**Court of Appeals No. 70728-1-1
Snohomish County Cause No. 12-3-01771-1**

**COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON**

DEE ANN JOHNSTONE,

Appellant
(Respondent Below)

v.

TIMOTHY JOHNSTONE

Respondent
(Petitioner Below)

APPEAL BRIEF OF APPELLANT DEE ANN JOHNSTONE

Decisions to be Reviewed:

Final Orders of Snohomish County Superior Court Judge Richard Okrent of 07/10/13 as Final PP, OCS, and denial of Mother's Legal Fees

Stuart E. Brown
WSBA #35928
Attorney for Dee Ann Johnstone
2535 15th Ave. NE, #201
Seattle, WA 98125
206-407-9183

Bruce Peterson
WSBA # 18688
Attorney for Timothy Johnstone
Bank of America Building
1604 Hewitt Ave, Suite 601
Everett, WA 98201
425-259-4151

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I. INTRODUCTION

COMES NOW, the Appellant (Respondent Below), **DEE ANN JOHNSTONE**, by and through his attorney of record, Stuart E. Brown (WSBA #35928), and appeals the final court orders of 07/10/13 (CP 141, Final PP; CP 142, Final OCS; CP 143, FNFCL; CP 144, DOD, CP 135, Transcript of Judge's Oral Ruling) of the Honorable Snohomish County Superior Court Judge, Richard Okrent, and specifically as to the Final Parenting Plan (PP) and Final Order to Child Support (OCS) signed by the court, and Judge Okrent's denial of Dee Ann Johnstone's request for legal fees. The Appellant is not contesting the issue of the trial court's final rulings as to the sale of the family home as the court has now ruled that the house is to be put up for sale as requested by the Appellant in a motion for reconsideration . In addition, the Appellant is not appealing the court decisions as other division of assets and liabilities. In short, the Appellant is appealing only the final PP, OCS, and the court's denial of legal fees to her when in fact the trial evidence and the court's own oral ruling clearly pointed to the father's deception and false claims as to the mother, being the clear 'cause' for a trial being 'necessary.'

The Appellant, Dee Ann Johnstone, maintains with all due respect to Judge Okrent, that the court below (Judge Okrent), abused its discretion

by ordering shared custody (50/50) to both parties after a week-long trial after his oral ruling (CP 135, Oral Ruling of Judge Okrent) made it 100% clear that the court found RCW 26.09.191 restrictions against the father (also included in the final PP), found the father to be an untreated long term alcoholic, found him to lack credibility at almost every level, found him to have been deceitful to the court and to the GAL, found him to have serious anger problems, found him to have engaged in abusive use of conflict (AUOC), and ordered him to complete an A&D evaluation and treatment as an untreated alcoholic. In essence, Dee Ann Johnstone maintains that it is simply an abuse of discretion completely at odds with Judge Okrent's own factual decisions as to the father's serious deceptive practices, pathology and parenting issues, to order a shared custody decision with joint decision making, as opposed to granting the mother full and primary custody with full decision making and with supervised visits for the father until he completed an A&D evaluation and entered treatment and signaled that he intended to follow all treatment recommendations

Further, the Appellant maintains that the court below erred in ordering that the father receive \$676.15 in monthly child support from the mother (Appellant) even accepting for the sake of argument the 50/50 schedule, for all of the reasons raised in the Appellant's motion for reconsideration (CP 136, Mother's Motion for Reconsideration) which

was denied by the court other than as to the issue of the sale and division of assets as to the family home. The court refused a deviation downward for the Appellant, or any form of corrective action to address the gross inequity and windfall to the father that resulted from the parties being given equal time with the children but with the father being granted essentially child support as if he had the children full time. This too represents abuse of discretion by the court in the Appellant's view.

We respectfully ask the Court of Appeals to reverse Judge Okrent's final orders as to: 1) The Final PP and grant the mother full custody with sole decision making and order the father to have alternate weekends but only after he completes his required A&D evaluation and completes a significant amount of treatment, with professionally supervised visits required before that time; 2) The final OCS and direct the court to recalculate child support based on the mother having full custody and the father alternate weekends; and 3) The denial of the trial court to grant the Appellant's request for approximately \$24,000 in legal fees that were unquestionably only necessitated as a direct result of the father's fraud and deception on the court over the year prior to the trial and at the trial itself. The court clearly erred in refusing to order the father to pay for such costs.

II. ASSIGNMENT OF ERROR

The trial court (Judge Richard Okrent) erred in denying the mother's motion for reconsideration of its oral ruling of 06/10/13 as to the parenting plan (PP), order of child support (OCS) and denial of her request for \$24,000 in legal fees and erred in its final orders of 07/10/13 as to the final PP and final OCS and order that each side pay its own legal fees. In ordering shared (50/50) custody and joint decision making to the parties, and in then ordering that the mother make a child support transfer payment of \$676/15 to the father (despite ordering shared custody aside from the error in granting the father such shared custody), the court acted in direct contradiction to and violation of its own factual findings that the father was found to have .191 limitations; that he had lied consistently to the court, the GAL, past evaluators, etc., including while under oath; that he had engaged in abusive use of conflict; that he was essentially a lifelong untreated alcoholic; that he had very likely lied to the court regarding his claim that he had stopped using all alcohol and illegal drugs since 2009; that he was a narcissist and likely pathological liar; that he had likely stalked the mother; that he was responsible for abuse of the entire family at least up to 2009; etc. In short, the court abused its discretion by ordering the final PP and OCS and denial of legal fees to the mother by blatantly ignoring its own factual findings including .191 restrictions as to the father and not to the mother and by ignoring the fraud perpetrated on the courts

by the father through his deceit and manipulation but for which he never would very likely have never been granted temporary custody of the children prior to trial and but for which no trial would likely have been necessary resulting in huge legal costs to the mother.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

Did the trial court err in denying the mother's motion for reconsideration of its oral ruling of 06/10/13 as to the parenting plan (PP), order of child support (OCS) and denial of her request for \$24,000 in legal fees, and in its final orders of 07/10/13 as to the final PP and final OCS and order that each side pay its own legal fees.

Answer: Yes.

IV. STATEMENT OF THE CASE

The parties to the underlying Snohomish County dissolution case (12-3-01771-1) are TIMOTHY JOHNSTONE, the Petitioner below and Respondent on appeal (hereafter referred to as 'the father') and DEE ANN JOHNSTONE, the Respondent below and Appellant on appeal (hereafter referred to as 'the mother'). The two children at issue in this case are Tiffany Johnstone (DOB: 07/09/98; 15 years of age) and Alex Johnstone (DOB: 01/20/02; 11 ¾ years of age). The father is employed as a freight truck driver for the Fed Ex Company while the mother is employed as a

postal carrier for the United States Postal Service. The mother had not been married prior to her marriage to Timothy Johnstone while Mr. Johnstone had one prior marriage to Wendy Loucado and has one now adult child from this prior marriage, Kayla Lee (fka Kayla Johnstone), who is approximately 23 years of age and testified at the dissolution trial in behalf of the mother. While growing up, Kayla Lee spent almost every weekend at the home of her father (Timothy Johnstone) and her step-mother (Dee Ann Johnstone) from the time her parents (Wendy Loucado and Timothy Johnstone) divorced in 1996 when she was approximately five years of age until she was 18 years of age when she decided to end visits with her father and moved out on her own (CP 69, Declaration of Kayla Johnstone).

The parties started dating when the mother was 19 years of age and the father 23 years of age, moved in together more than a year later and lived together from that point onward and married in August of 1998, two months after the oldest child, Tiffany, was born. After 11 years of marriage in 2009, the mother initially filed for divorce as she was no longer able to tolerate the father's constant drinking, regular inebriation, and waste of marital funds on his excessive drinking and substance abuse (CP 21, Declaration of Mother; CP 23, Response of Mother; CP 24, Motion and Affidavit/Declaration of Mother). As detailed at length below,

even the father admitted consistently in his sworn declarations (CP 40, 57), in his trial brief (CP 128) and at testimony at trial, that he was drinking excessively up to that time (2009) but then falsely claimed that he had stopped drinking completely since 2009. As detailed below, both the mother and numerous credible witnesses at trial testifying in behalf of the mother (neighbors and friends of the parties; relatives, such as the mother's mother (Anne Davis) who resided with the parties for many years until the time of their separation), reported having directly observed the father using alcohol regularly after 2009 and at least up to the time the parties separated for good in 2012, casting unquestionable doubt as to the father's lack of credibility in terms of alcohol use as well as other issues (CP 124, Trial Brief of Mother; CP 27, Declaration of Jennifer Rodriguez; CP 28, Declaration of Monica Schneider; CP 29, Declaration of Suzanne Iverson; CP 31, Declaration of Kandis Goetz; CP 33, Declaration of Ann Davis; CP 36, Declaration of Jennifer Reid, incorrectly numbered as CP 33 in Designation of Clerk's Papers; CP 48, Affidavit of Mother; CP 69, Declaration of Kayla Johnstone; CP 70, Declaration of Arlan Turner; CP 71, Declaration of Louise Lewandwski; CP 84, Declaration of Wendy Loucado).

At the request of the father, the mother in what she admitted at trial was perhaps the biggest mistake of her life, agreed to withdraw the

divorce petition at his request and agreed to give him another chance if he would stop drinking. When he again began to drink alcohol regularly after a brief respite; returned to use of controlling and emotionally abusive treatment of her she claimed at been on-going since early in their relationship; pushed and choked her early in 2012; and placed a GPS device on her car without her knowledge to track her every movement; she decided to end the relationship once and for all (CP 134, Trial Exhibit 5, Petition for Order of Protection Filed by Mother on 06/06/12). The proverbial 'last straw' occurred on 06/03/12 after he had texted her well after 1:00 am in the morning (CP 134, Trial Exhibit 52, Screen Shots of Text Messages) and admitting that he was drinking and feeling sexual and tracked her (through GPS) to her friend's house (Monica Schneider) where she was staying for the night and where shortly after receipt of the aforementioned text message, both the mother and her friend observed the father drive up to the friend's house after 1:00 am in the morning , found that the friend's (Monica Schneider) tire had been slashed (CP 28, Declaration of Monica Schneider; CP 134, Trial Exhibit 5, Petition for Order of Protection) . Feeling frightened as to what might come next from the father; the mother sought a protection order several days later. When she then arrived at court on 06/21/12 to seek a permanent protection order, she was served with divorce papers by the father who then became the

Petitioner in the divorce action (CP 2, Father's Summons and Petition for Dissolution; CP 6, Father's Proposed Parenting Plan; CP 7, Father's Motion and Affidavit/Declaration).

Ms. JoAnn Primavera was appointed by the court as a GAL to investigate parenting issues and make recommendations as to a permanent parenting plan (PP) (CP 13, Order Appointing GAL). Based solely on the father's false claims as to the mother having a past and current drinking problem, while denying steadfastly that he had not consumed any alcohol or illegal drugs since 2009, the GAL initially recommended that *only* (italicized here and below for emphasis) Dee Ann Johnstone complete an alcohol and drug (A&D) evaluation (CP 16, Declaration of GAL; CP 55, Report of GAL) despite there being no history of any alcohol related problems or issues on the mother's part and despite the GAL being provided with extensive information regarding the father's *actual* extensive and *admitted* (by the father) long term alcohol abuse for which he had never received treatment (see above referenced CP documents). The mother argued throughout the pendency of the case and at trial that this began a clear process of both incompetency and clear bias on the part of the GAL in terms of her reports and investigations as to the case.

Despite the court then not ordering her to complete such an evaluation, the mother nonetheless volunteered to complete the A&D

examination and did so with the results showing no alcoholic risks or concerns (CP 134, Trial Exhibits 13 and 16, Assessment Summaries of Evergreen Manor A&D Treatment as to the Mother). Evidence and testimony presented at trial validated that the father had been required to complete an A&D evaluation as a function of his divorce case with his first wife (Wendy Lucado) and that during that earlier evaluation process, he had admitted to the evaluator at that time that he had lied regarding the degree and frequency of his past use of alcohol and drugs during a still earlier evaluation when he was placed in an inpatient treatment center as a late teen due to problems with drugs (CP 134, Trial Exhibits 33A and 33B, Alternatives to Chemical Dependency Re Wendy Bowen (aka Wendy Lucado) and Timothy Johnstone; CP 84, Declaration of Wendy Lucado).

In short, the trial record clearly validated that the father had a serious lifelong alcohol abuse problem that he greatly minimized while also being deceitful regarding his drinking and substance abuse behaviors after 2009 (including extensive trial testimony by the father's ex-wife that he had had serious and extensive alcohol abuse and control issues during their four year relationship (CP 84, Declaration of Wendy Lucado); and trial testimony from the father's now adult daughter, Kayla Lee, that she had personally observed regular alcohol and substance abuse on her father's part during the entire period she lived with him and Dee Ann

Johnstone from the time she was 5-18 years of age) (CP 69, Declaration of Kayla Johnstone).

The GAL completed a very brief initial report of 07/04/12 a short time after her appointment (CP 16, Declaration of GAL) which recommended that the father receive alternate weekend visits and a mid-week visit with the children with the children remaining in the primary custody of the mother. The GAL then completed a more extensive report of 08/10/12 (CP 55, Report of GAL) where she did finally recommend that the father complete an A&D evaluation which he then failed to complete or even attempt to complete right up to the time of the trial with no argument or objection from the GAL. The father was eventually finally ordered to complete a comprehensive A&D evaluation and seek treatment *only* as a result of the trial court's ruling at the close of trial (CP 135, Oral Ruling of Trial Judge Richard Okrent).

The GAL report of 08/10/12 then recommended a shared custody arrangement for the parties (one week on and one week off) while suggesting that the mother was somehow minimizing her drinking behavior and its impact on the family. The mother had in fact completed her own A&D evaluation by then which showed she had no alcohol abuse or alcohol dependency issues (CP 134, Trial Exhibits 18, Evergreen

Manor Assessment Summary) but this evaluation was ignored by the GAL in her report of 08/10/12.

At a temporary orders hearing of 08/16/12, the Commissioner (Brudvik) decided (CP 61, Order Re Temporary Orders) that given the degree of animosity and conflict (which the mother maintained was generated almost exclusively by the father through mistruths and false allegations) she perceived in the case, she would not agree to shared custody and awarded primary custody to the father and ordered the mother to leave the family home and gave her only alternate weekend visits. The Commissioner appeared to base her ruling in very large part based on the father's false claims as to his being 100% clean and sober since 2009 and his claims that the mother drank regularly and failed to come home many nights and was thus was abandoning the children.

The GAL's updated report for the 08/16/12 hearing (CP 55, GAL report) included virtually none of the mother's collateral contacts that she had asked the GAL to interview including the father's ex-wife and persons that had directly observed the father drinking alcohol very recently and who could testify to the mother's lack of any alcohol problems and who have confirmed that she was a social drinker who had one or two drinks one to two times a month. The GAL did in fact interview the father's adult daughter, Kayla Lee, who indicated that her father had drank extensively

and heavily and ignored her and the other children, while she had been living with him and Dee Ann until she was 18 years of age. She also noted to the GAL and at trial that the mother (Dee Ann Johnstone) had *never* had a drinking problem of any form

The mother then eventually replaced her prior attorney and retained the services of this attorney (Stuart Brown) at the close of 2012. This attorney then set the case for trial (05/06/13) and requested of the GAL that she complete an updated final report for trial as she had had absolutely *no* involvement of any form in the case in the prior 6-7 months since the time of issuing her last report and appearing at the 08/16/12 hearing. The GAL issued her final report on 03/25/13 (CP 121, GAL report). Despite receiving sworn declarations from persons that had personally seen the father drinking in the past three years (CP 24-36 as noted above) and speaking to at least one witness who confirmed that the father had been drinking recently, the GAL reported in her final report that despite this clear evidence, “the mother however has failed to prove that the father’s drinking impacted his parenting of the children.” She thus overlooked again the father’s deception and clear alcohol problems, ignored evidence offered to her as to the father placing a GPS device on the mother’s care to track her, ignored evidence of his controlling and abusive behavior toward the mother, and recommended that the father

have full custody of the children with the mother having alternate weekends and still failed to recommend that the father have A&D treatment despite his still failing to complete the very A&D evaluation she had reluctantly recommended he complete a full 7-8 months before.

After a week-long trial from May 5-10, 2013 where both parties had ample opportunity to present evidence, sworn testimony of witnesses in the form of direct and cross examination, documentary evidence, and legal arguments, the court (Judge Richard Okrent) issued his oral ruling (CP 135, Trial Judge's Oral Ruling) on 06/05/13. That ruling pertaining to the PP, OCS, and denial of legal fees to the mother; and the Final Orders signed by the court on 07/10/13 reflecting said orders, are contradictory and illogical given the clear finding of the court that the father had lied, had no credibility, had engaged in extensive abusive use of conflict, had a serious long term alcohol problems that required treatment, that he was an untreated alcoholic, and that .191 restrictions were warranted and ordered (CP 135, Trial Court Transcript of Oral Ruling).

Based on the court's detailed oral ruling of 06/05/13, the mother filed a motion for reconsideration as to the PP, OCS, division of assets including as to disposition as to the family home, and as to denial of her request for legal fees on 06/10/13 (CP 136, Mother's Motion for Reconsideration). The court granted the mother's motion for

reconsideration as to the issue of sale of the family home and division of house proceeds (CP 149, Order of Motion for Reconsideration) but did not rule on any other requests for relief in mother's motion for reconsideration. Final orders were then prepared and entered on 07/10/13 and based on argument from mother's counsel (Stuart Brown) prior to entry of the orders, did change and reduce its oral ruling that the mother be required to pay a transfer payment of \$876.15 per month to the father to \$676.15 (CP 142, Order of Child Support, Page 3). Based on the court having not ruled as yet on mother's motion for reconsideration as to all other requests other than as to the sale and distribution of proceeds from the family home, this attorney then contacted Judge Okrent's Bailiff, John Berry, requesting that some final decision be made as to these other motion for reconsideration requests (PP, OCS, request for legal fees). The court then issued its Order Denying the mother's Motion for Reconsideration as to all other requests other than the sale and distribution of the proceeds of the family home as ordered by the court on 08/01/13 (this order should have been listed as CP 155, Order of 09/09/13 as to Mother's Motion for Reconsideration but was inadvertently left out of Designation of Clerk's papers and is thus attached as Exhibit 1 to this appeals brief). The mother appeals as to this final denial of her requests to the court for all of the reasons noted herewith.

The mother asks this court to review both the trial court's oral ruling (CP 135), the motion hearing notes (CP 133), and the mother's Motion for Reconsideration which details at great length (CP 136), the mother's concerns and objections to the trial court's final orders as to the PP, OCS, and denial of her request for legal fees.

V. ARGUMENT

CR 59(a) as to 'New Trials, Reconsideration, and Amendment of Judgments' allows for a change in orders or decisions of the court under nine conditions or situations including the following: (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial; (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or decision, or that it is contrary to the law; and (9) That substantial justice has not been done. The mother believes the final orders of Snohomish County Superior Court trial Judge, Richard Okrent, as to the final Parenting Plan (PP), the final Order of Child Support (OCS), and as to denial of the mother's request for nearly \$24,000 in unnecessary legal fees on her part, should be overturned under CR 59(a)(1), (7) and (9). The above noted court decisions appear to have diverged significantly from the actual facts proven at trial and in fact diverge significantly even from the court's own announced findings as

discussed at length below. The mother believes that any sanguine view of the court's *own* conclusions regarding the parties dynamics, their history, trial evidence including witness testimony, behavior of the parties at trial, and review of the history of the legal action and case; makes it abundantly clear that substantial justice *has not* been done or served, that there is no evidence or reasonable inference from the evidence to justify the verdict or decisions noted as to the final PP, final OCS, and denial of legal fees for the mother; and the court below has abused its discretion by essentially substantially and significantly ignoring its own factual findings. The actual rulings and decisions of the have so far diverged from its own factual findings that the rulings could have only been based on emotionalism, bias, or other non-factual bases.

CR 60(b) as to 'Relief From Judgment or Order' allows for relief from a Trial Court's Judgment or Order for "Mistakes, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud; etc.," and notes, "On motion and upon such terms that are just, the court may relieve a party or his legal representative from a final judgment, or order, or proceeding for the following reasons (among others): (1) Mistakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order; (4) Fraud, misrepresentation, or other misconduct of

an adverse party; and (11) Any other reason justifying relief from the operation of the judgment.

Standard of Review: In *In Re the Marriage of Landry v. Landry*, 103 Wash.2d 807, 809, 699 P.2d 214, 215 (1985), our State Supreme Court announced its rule as to limits as to discretion allowed a trial judge in dissolution actions and as to what constitutes an abuse of discretion in such cases. The court noted, “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 spouse who challenges such decisions bears a heavy burden of showing a manifest abuse of discretion on the part of the trial court. *In re Marriage of Konzen*, 103 Wash.2d 470, 478, 693 P.2d 97 (1985); *Baker v. Baker*, 80 Wash.2d 736, 747, 498 P.2d 315 (1972). The trial court’s decision will be affirmed unless no reasonable judge would have reached the same conclusion.” “Abuse of discretion has been defined as what happens when a court’s decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775, 784 (1971). The mother believes without question that this

is in fact what has occurred here in terms of the trial court's decisions as outlined at length below.

For all of the reasons and evidence offered above and below, the mother asks this court to reverse and overturn the final orders as to the Parenting Plan and Order of Child Support and denial of the mother's request for legal fees based on CR 60(b)(1), (4) and (11) and based on her firm belief that given the facts related to the trial court's decision, no reasonable judge could have reached the conclusion reached by Judge Okrent as to the final PP, the final OCS, and as to the mother's request for payment of her legal expenses by the father.

As to the Parenting Plan (PP), the court correctly notes (CP 135, Trial Court's Oral Ruling, Page 2, line 25), that the temporary orders in effect ordered "No alcohol or drugs [were] to be used." The evidence and witnesses presented at court provided ample evidence that the father violated this order throughout the pendency of the action as even announced by the court in its final ruling and orders (CP 134, Trial Exhibit 52, 53, 88 and 89; above noted declarations and testimony of numerous individuals reporting the father's recent alcohol use) where the court found the father to have no credibility as to his denial of alcohol use, of his abusive use of conflict, and of his using a GPS device to control and essentially stalk the mother. On page 3, line 7 of the court's oral ruling,

the transcript notes, "On 08/16/12 the review hearing took place. At that point, the GAL made a report which indicates as follows: That Dee Ann had a drug and alcohol evaluation, but there was some skepticism about whether or not this was appropriate. That Tim (the father) had said he stopped drinking. That alcohol plays a major part in this family and I find it does. The drinking restrictions still applied to both parents."

On page 3, line 15, the transcript (CP 135) continues with, "There were issues regarding the tire slashing incident.... There were issues regarding how the father had been dealing with the maternal grandmother (Ann Davis) who lived at the home." Thus, Judge Okrent himself recognized the many problems the father had and clearly did not believe he was credible. The court noted itself in the oral ruling that the father was a drunk and absent parent until 2009 when the children's character would have been fully formed by every theory of personality development and also noted that the mother was the primary parent up to 2011 or 2012 or when the father then engaged in deception to the court in claiming falsely that the mother had a serious alcohol problem while he did not, which without question is what led to his getting custody under false premises. The trial evidence, including such poignant and powerful testimony of the father's now 23 year old daughter Kayla Lee, clearly and without any question, established that Dee Ann was an excellent mother, had healthy

and powerful values that she imparted to the children despite the father being drunk almost every day, and that she did not have any drinking problem. The mother maintained before and at trial that the claim by Judge Okrent that the “children were doing very well” at the time of the change in custody and up to the time of the trial, was in fact due to the mother’s long term hard work and diligence as a parent and in spite of the father’s years of drinking and having little to do with the children. The mother (and numerous other witnesses) maintained that father inherited good and stable kids at the time he lied to the GAL and the court on 08/16/12 as to his and the mother’s drinking history and was then granted temporary custody, solely because of the mother. It was the mother who returned to school on her own to get three degrees to improve herself and modeled such commitment and diligence for the kids including for her daughter Tiffany in terms of excellent grades. The father essentially did nothing to improve himself over the years and was an admitted controlling drunk throughout his entire adulthood up until claiming he became 100% sober in 2009, which court evidence and testimony clearly proved was and is a fabrication on his part as he in fact used alcohol and powerful prescription medications up to the time of the trial. The trial evidence showed that the father disliked and was at odds with almost everyone in

the neighborhood and he could provide *no* family or neighbors as witnesses on his behalf at trial.

The court itself notes on page 4, line 9 of the oral ruling transcript, “The 08/16/12 hearing was problematic for me. I could not quite figure out what the court was doing, but apparently the court had concerns about the mother’s minimizing her drinking.” The mother agrees that she does not understand what the court did here, noting that any concerns that the mother was “minimizing her drinking” came from the father only and were clearly addressed by her evaluation reports and validated by witness after witness at trial that she has *never* had a drinking problem. The father’s purposeful misleading and untruthful claims as to the mother having a drinking problem (and his having none) were in the mother’s view, the single cause of her losing temporary custody on 08/16/12 and having to go to trial, while also being aided by an incompetent and biased GAL.

The evidence strongly showed at trial that the father was engaging in abusive use of conflict (AUOC) and alienating Tiffany Johnstone (here daughter) from her mother and even Judge Okrent noted his belief that the father continued to discuss court issues and engaged in AUOC even after he had custody. The court’s ultimate PP decision is hard to fathom at any level given the trial court’s own findings in its oral ruling that the father

suffered from a deficient conscience, had no credibility, lied at every turn in evaluations and under oath, was narcissistic, and did whatever it takes to get his way. The evidence is without challenge that he avoided a recommended A&D evaluation by the GAL for $\frac{3}{4}$ of a year and right up to the time of trial when such an evaluation was finally ordered by Judge Okrent, *but after* the court had awarded him joint custody and joint decision making. To reward the father in the face of this overwhelming negative evidence as to his character, parenting, life-long drinking problems, and utter lack of honesty and credibility, and give him primary parent status, is simply not appropriate in the mother's view and in direct contradiction to the evidence presented at trial and the trial court's own findings (see above and below).

On line Page 4, line 22 of its oral ruling, the court notes, "There was some evidence and *still is* that the father had been talking to the children about the case. For example, Alex (now 11 year old son of the parties) knew about child support, [and] knew about the cameras the father had put around the house (not to mention the father communicating his false claim to the child that the grandmother was stealing his mail)." Thus, Judge Okrent specifically and correctly reports evidence that that the father engaged in abusive use of conflict (AUOC) even *after* he was granted custody.

On page 6, line 5 of its oral ruling, Judge Okrent notes that RCW 26.09.107 lists a series of criteria the court must analyze in reaching a final PP and then proceeds to do so. The court then also notes on page 6, line 19, "However, RCW 26.09.191 talks about limitation factors and this case has been rife with limitation factors." He continues, "The father in this case *is an alcoholic*." The court correctly based this finding on the overwhelming evidence presented at trial while the overwhelming evidence presented at trial was that the mother has no such alcohol problem and never has and thus validates that the father lied in making his claims that she had an alcohol problem, which without question led to the loss of custody for the mother. Judge Okrent continues, "He has been an alcoholic most of his life." He continues on line 25, "The history here is that prior to 2009, and I will put it very bluntly, you were a lousy father. You were *narcissistic*. You were *controlling*. You essentially *abused your family* even though you never put a finger on anybody." Actually, as correct and incriminating (as to the father's negative character and personal and parenting dynamics) as all of this was from the bench, it is also not completely accurate. In fact, the mother and her mother (Anne Davis) testified at trial that the father had choked the mother; another neighbor witness (Ms. Kandis Goetz) testified that she had seen the father throw a garbage can at his son Alex *after* he was granted temporary

custody of the child on 08/16/12, and the testimony of Kalya Lee (father's daughter from a prior marriage) revealed the father's brutal physical abuse of the family dog she had directly observed. The evidence was and is thus clear that the father was and still is physically abusive as well.

The court continues on page 7, line 4 of its oral ruling, "And everything that happened to these kids and they observed and to your ex-wife (both ex-wives to be frank) *is a result of your drinking.*" Thus, it is very difficult or impossible to understand how the court could assign the father primary custodial status and allow joint decision making to the father while claiming that justice has been done. It has not in the mother's view. On page 7, line 12 of its oral ruling, the court notes, "After 2009, when he became injured, the father's testimony was that he was using pain medications and that he went 'cold turkey' and became sober." The trial evidence of witness after witness including from several neighbors who indicated that they were fearful of retribution from the father, stated that without question they had personally observed Mr. Johnstone drinking past 2009 and right up to the current time."

On page 7, line 23 of his oral ruling, Judge Okrent states, "I find that he (the father) is an untreated alcoholic." With all due respect, the court is however in error when it states on the previous line, "While no one has actually seen Mr. Johnstone have a drink (since 2009) he has not

engaged in treatment.” Witness after witness testifying to direct knowledge of the father’s recent drinking (and certainly after 2009 when he claims he stopped completely), a photograph of an alcohol flask in the safe that he wanted locked to hide such evidence but which was then opened by the mother as testified to at trial, *his own text* reporting that he was ‘buzzed’ on the night he went to Monica Schenider’s house and very likely slashed her tire at 1:30 am in the morning, and the mother’s testifying as did many other trial witnesses, that they actually saw him drink, all support the obvious reality that he was and is lying about recent drinking. It is difficult to understand how the court could conclude that no one has seen Mr. Johnstone drinking since 2009 given the trial evidence.

On page 7, line 25 of its oral ruling, the court notes, “He has given me A&D (past) evaluations which have multiple problems in them. He has a history of *falsifying information* on A&D evaluations. He said himself that everyone lies... He has a history of blaming others for those issues [such as] his first wife....” On page 8, line 6, the court continues, “The father when suggested by the GAL and reading the GAL report closely, that he engage in an A&D evaluation, declined to do that.” And yet the court below granted the father shared custody, primary custodial custody and joint decision making. The court continues, on page 8, line 17, “in addition to which, I have an issue that is really bothering me, and that is

the numerous times he goes to taverns and draws money at those taverns I am to assume when he goes to a bar for some event and someone sees him with a beer on the table or near the table, that he is not drinking [and] that it is someone else's beer. *I can't assume that based on the testimony I have in front of me.*" Thus, it is quite clear that this court does not believe the father has not been drinking since 2009 and thus assumes as the evidence showed at trial that he is pure and simply being deceitful with no credibility. The mother questions how a pathological liar and a narcissist in this court's own words, and an untreated alcoholic in this court's own words, can be considered a good and reformed parent.

On page 9, line 1 of its oral ruling, the court states, "I find the father has limitation factors. That he is an alcoholic, that I think he has claimed that he is sober, but I do not have sufficient evidence to indicate that fact." Again with all due respect, we believe the court below had more than enough trial evidence to "indicate that fact" that the father is still drinking and has lied again about his being sober since 2009. The court continues on line 5, "The father's own behaviors concern me. His testimony on the stand, his demeanor, his increased anger over the days of the trial, his treatment of his mother in law, his treatment of his wife, the tire slashing incident I have trouble with [all of] that. I have trouble with someone who puts a GPS tracker [device] on his wife's car. That

demonstrates either one of two things. If he is not an alcoholic, he is engaging in controlling, anger style manipulative behavior or he is an alcoholic who is engaging in controlling types of behaviors” The mother certainly agrees with all of these factual conclusions and yet the trial court granted the father shared custody and decision making and names him primary custodial parent. There is no factual basis to allow or grant such rights to the father based on Judge Okrent’s own findings that could not be any more clear and powerful.

On page 9, line 22, the court notes that “the father has a few things going for him, including that from the time that the mother had begun to leave the home and I put that at about 2009, he has bonded to the children.” The evidence presented at trial validates both that the mother “did not begin to leave the home in 2009” or even later, and validates that the father did not begin to positively bond with the children after 2009, but was simply at home not working, going out drinking with his friends at taverns, mixing alcohol with pain medications, being critical and controlling of the mother and demeaning her in front of the children. The trial court’s own findings as his pathological lying, narcissism, AUOC, alienating the other parent from the children, lying about drinking, etc., all contradict the notion that he was or is even capable of healthy bonding

with his children given such character flaws and modeling of such behavior for his children.

On page 10, line 10 of its oral ruling, the court begins to address the mother's situation and notes correctly, "The mother was the primary psychological nurturer of the children up until approximately I would say until probably *around 2011, 2012.*" That is correct based on all of the evidence. What is not correct based on all of the trial evidence with all due respect is the next line stating, "when (in 2011, 2012) the mom became less active in the home...." I do not mean this in gigantic terms. *She was working hard* (as she had to do given the father not only not working but spending at least \$800 per month of his \$2200 monthly disability check on himself and friends and not on family debts). *She was the primary breadwinner. She was the disciplinarian and the organizer at home.*" The mother believes the court was correct here and that she did what was needed given the father's lack of responsibility to deal with supporting the family at every level. To somehow then state as the court does on page 10, line 18, "She sacrificed some of her nurturing abilities to leave the home and she continued to drink which I think was somewhat payback in the face of the father's long-term alcoholism and the *destruction he wrought,*" is simply unfair, not based on the facts presented to the court at trial and in error in the mother's opinion that the court apparently used at some level

to support its unsupportable decision to award joint custody and joint decision making. Actually, the trial evidence clearly suggested that *it was the father* who again deceptively accused the mother of being gone great periods of time and out drinking with friends and especially with friend Monica Schneider, to the court, the GAL and to the children in clear and demeaning and false AUOC. Testimony at trial from Ms. Schneider showed that the mother was with her only on average one time a month or even one time every other month and even then often with the children with her as Ms. Schneider also had children. Witness after witness including Ms. Schneider testified under oath that the mother normally nursed a single drink over hours or at most two on the few occasions each month she did drink. There was no 'payback' to the father and there is no evidence to suggest such, but instead very clear and consistent evidence that the mother was a rare, limited and safe drinker, much like millions of parents who have no A&D history, DUI history, A&D treatment history, unlike the father. To castigate her for such implied negative drinking and implied even minor abandonment behavior is not only an error but is with all due respect, highly inconsistent with the facts presented at trial and the trial court's own conclusion that the father has no credibility and lies even under oath consistently. To thus give credibility to claims coming solely from the father that the mother somehow abandoned the children, simply

makes no sense and is unjustified and unwarranted. To fault the mother for attending yoga classes and socializing occasionally with friends is simply unfair and frankly at odds with the facts. To then somehow equate this behavior with that of the father's egregious behavioral, parenting, emotional and psychological defects and defective conscious, is also unreasonable, unfair and at odds with the facts. At no time as suggested by the court on page 11, line 3, did she "sacrifice her relationship with the children," nor as claimed on line 10, did the mother, "stabilize herself emotionally and Tiffany and Alex paid the price." There is no evidence from the trial to support this unfortunate and unsupportable court finding and as the actual witnesses and trial evidence showed, the mother remained actively involved at every level with the children while spending what would have to be viewed by almost any reasonable analysis, a very normal and appropriate period of time being a normal human being by taking some time to balance her life with healthy activities such as taking a yoga class or meeting with a friend or two occasionally after work. The court then further unfairly and unreasonably castigates the mother on page 11, line 13, when it states, "if the father was drinking as much as she said he was up to 2009, she should have filed those restraining orders and divorced him back in 2009." In fact, she did file for divorce in 2009 as she and the father both testified but she relented when he begged her not to

leave and indicated he would change and relented only because of her commitment to family and a belief that she should at least try to keep the family together. On page 11, line 19 of its oral ruling, the court then notes in error, “You (the mother) understood that despite the facts that you may have had concerns about him (the father) and that you may have had concerns about his drinking and maybe his drinking based on the evidence, you knew he was good enough to watch those kids so that they would be okay.” Actually, the court appears to have forgotten the mother’s testimony and that of her mother that her mother, Ms. Anne Davis, was living at the family home all those years and was available to watch the kids such that the mother had a safe means in her mother of assuring that the children were safe and secure. She did not in fact trust the father at any complete level. Despite these comments which again the mother claims are in error and not factually correct, the trial court found no .191 restrictions as to the mother. Quite stunningly and certainly in error in the mother’s opinion, the trial court then notes on page 14, line 10 of its oral ruling, that “because I do find the father has limitation factors and I am going to do something to adjust that, *but I am going to make the father the custodial parent in this case....*” The mother believes this is simply inappropriate at every level and implore this court to reverse and overrule

Judge Okrent's as to the parenting plan which is *not* in the best interests of the children.

The trial court then appears to justify its decision by ordering the father to complete an A&D evaluation which the father of course should have done almost a year ago but avoided in this court's own words, in addition to attending AA groups, and in addition to requiring UA tests. The court then states that it considered having the father attend anger management in clear recognition of the court's own observation of his having serious anger problems (including slashing tires and putting GPS devices on the mother's car to control her and when he does not get his way). The court appears to not order such needed treatment due only to 'funding concerns.' Rather than providing any justification for his errant ruling, Judge Okrent here clearly provides substantial proof of the father's long term alcohol problem and factual reasons why the father *should not have joint custody and decision making* in the mother's view.

On page 18, line 1 of its oral ruling, Judge Okrent states, despite the .191 limitations and other serious deficiencies noted as to the father by this court, the court orders joint decision making." This as well is an error based on the evidence before this court and the mother should have sole decision making.

As to the Order of Child Support (OCS), On page 20, line 9 of the trial court's oral ruling, the court notes that the father's gross monthly income is \$2,923.54 while his net monthly income is \$2,398.86. The mother's gross monthly income is reported to be \$4,281.90 while her net monthly income is noted to be \$3,512.71. Trial evidence noted that the problem with this determination relates to the reality that the father has chosen a position where he is in essence voluntarily under-employed in terms of hours (CP 134, Trial Exhibit 78, Father's Financial Declaration; CP 134, Trial Exhibit 39, Mother's Financial Declaration). The father provided pay stubs for the period from 01/13/13 until 04/13/13 which were offered as evidence at trial. The weekly paystubs for this time noted in terms of hours worked by the father and in weekly order from 01/13/13 to 04/20/13 the following total weekly hours worked: 20.30; 18.93; 12.43; 24.35; 27.57; 30.02; 25.17; 21.24; 19.50; 24.88; 24.05; 20.97; and 29.74; for an average of 23.01 hours per week over a little more than one quarter of time. This is also consistent with the W2 he provided for the tax year for 2012. While the father claimed that his hours increased seasonably with greater hours over the summer, the reality is that he chooses to stay at a position where he works approximately 57% of the time. The trial court's decision as to child support makes it feasible and even advantageous for him to continue to work at this very relaxed schedule and rely on the mother's support to

essentially take it easy at her expense. The mother thus believes and testified as such at trial, that the father's net income should thus be imputed not at \$2,398.86 as set by the court, but instead at \$3,597 based on his current work schedule of two thirds time. Thus, the net income of the father would be \$3,597 and that of the mother would be set at \$3,512 or essentially equal. Even accepting a shared custody arrangement (50/50 time) for the sake of argument, the mother argued at trial and argues here, that there should be no child support transfer for either party. The trial court also refused any form of deviation downward which certainly was within its discretion, despite ordering that the children be with the mother a full 50% of the time. There appears to be absolutely no basis for refusal of such a deviation downward as the father will have to support the children only half of the month and to refuse such a deviation downward would simply provide an undeserved windfall profit for the father. If of course this court overturn's Judge Okrent's shared custody PP and provides the mother with full custody with alternate weekends to the father after completing his A&D evaluation and follows through with treatment recommendations as she is requesting, we ask that new child support calculations and worksheets be completed using the above suggested net income for the father of \$3,597.

Finally as to the issue of the mother's request for Legal fees,
the granting of legal fees in a court action such as this is governed by RCW

26.09.140. A trial court may award attorney's fees if one spouse's intransigence increased the legal fees of the other party. *In Re the Marriage of Morrow*, 53 Wash.App. 579, 590, 770 P.2d 197 (1989). In that event, the financial resources of the parties is irrelevant. *Morrow*, 53 Wash.App. at 590, 770 P.2d 197. Where a party's bad acts permeate the entire proceedings, the court need not segregate which fees were incurred as a result of intransigence and which were not. *In Re the Marriage of Sieveres*, 78 Wash.App. 287, 312, 897 P.2d 388 (1995). In *Burrill v. Burrill*, 113 Wash.App. 863, 873, 56 P.3d 993 (2002), the court specifically stated:

"In this case, the trial court found that Cindy had made unsubstantiated, false, and exaggerated allegations against Don concerning his fitness as a parent, which caused him to incur unnecessary and significant attorney fees. The record demonstrates that Cindy's allegations permeated the entire proceedings, obviating the need for any segregation of the fees. The court did not abuse its discretion in awarding fees (of \$25,000)."

The overlay between our case and that of *Burrill* above could not be greater. There is absolutely no question based on the facts presented at trial and noted at length in this court's oral comments and orders of this court, that the father was untruthful on sworn documents and in his reports to the GAL as well as under oath at this trial, that for example he had not consumed alcohol since 2009. However, the areas of deceit and deception do not end there as the trial made clear and in fact Mr. Johnstone's bad behavior permeated the proceedings. He lied about not placing a GPS

device on his car and then changed his story as to his having done so but then claimed (also another falsehood) did not turn the device on; he lied during trial testimony about not talking to his son Alex about his false allegations regarding the maternal grandmother stealing his mail, stating that the boy had overheard this from a second story window (a claim the trial court simply dismissed as having any credibility); he lied not drinking after 2009 despite his own text message that he sent to the mother late on the night he tracked her to her friend's home using the very GPS system he claimed he did not turn, when he noted that he was 'buzzed' (had a good deal of alcohol) that very night in the summer of 2012; etc., However, by far the most egregious and costly (to the mother) series of deceptions from the father were those given at the very start of the case when he indicated in sworn declarations, and through testimony at hearings through his attorney, and in terms of his reports given to the GAL, that he had not consumed alcohol or illegal drugs since 2009 and that the mother had a serious drinking problem. There is no question that *but for* these allegations, temporary custody would not have been granted to the father and there would have very likely been no trial and the mother's \$24,000 in legal fees by this attorney would not have been generated.

Despite argument to the trial court as to this justification for legal fees to be paid to the mother, the trial court denied this request. With all due

respect to Judge Okrent, we believe that the father's behavior based on the *trial court's own negative findings as to the father* warrants a granting of legal fees to the mother for all of the reasons noted above and we ask this court to award the mother legal fees in the amount of \$24,000.

VI. CONCLUSION

Based on all of the above, we respectfully request that the Court of Appeals find that the trial court did clearly abuse its discretion in ordering a final PP and OCS that without question was not reasonably based on the facts as announced by the trial court itself, and further abused its discretion in violation of the facts and controlling case law as to its denial of legal fees for the mother when the evidence showed unequivocally that the father perpetrated a fraud on the courts by consistent deception and falsehoods under oath that necessitated on-going legal actions during the pendency of the case and a trial that never should have occurred. The mother respectfully asks this court to overturn Judge Okrent's orders as to the final PP and OCS and order that the mother be given primary custody of the two children at issue in the case with the father being granted alternate weekends from Friday after school until Sunday evening at 6:00 pm and a mid-week four hour visits on those weekends he does not have the children, assuming he completes a comprehensive A&D evaluation

and enters treatment and follows all treatment recommendations as ordered by the trial court. Until that time that he does so (completes A&D evaluation and enters treatment and continues in treatment), the mother requests that the father's visits be professionally supervised. The mother also requests that based on her being granted primary custody as above, the Court of Appeals orders a recalculation of the Washington State Child Support Worksheets using the net income figures outlined above for both parties and orders that the father pay a transfer payment to the mother based on these recalculations and change of custody. Finally, the mother asks this Court of Appeals to order that the father pay the mother \$24,000 for her legal fees which were necessitated solely due to his fraud and deception perpetrated on the courts as outlined above.

Respectfully submitted this 31st day of October, 2013 by:



Stuart E. Brown, WSBA #35928
Attorney for Appellant Dee Ann
Johnstone

**EXHIBIT 1: TRIAL COURT ORDER AS TO MOTHER'S MOTION
FOR RECONSIDERATION**



Stuart Brown <fstnat@gmail.com>

Johnstone and Johnstone, 12-3-01771-1

1 message

Berry, John <John.Berry@snoco.org>

Mon, Sep 9, 2013 at 2:27 PM

To: Stuart Brown <fstnat@gmail.com>, Bruce Peterson <bapeterson@everettlaw.com>

Counsel,

Please find an electronic copy of the Court's Order Denying Petitioner's Motion for Reconsideration attached. The original was filed with the Court today. Let me know if you have any questions or concerns.

Regards,

John Berry

Law Clerk to the Honorable Richard T. Okrent

Snohomish County Superior Court

425.388.3571

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