

71391-4

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No. 71391-4

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

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IN RE: THE MARRIAGE OF:  
AMANDA J. HALLIGAN,  
RESPONDENT,  
and  
JOHN K. HALLIGAN,  
APPELLANT.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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BRIEF OF APPELLANT

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## I. INTRODUCTION

In the dissolution of the marriage of Amanda and John Halligan, Amanda was the Petitioner and John was the Respondent. In this brief, they are referred to as “Amanda” and “John.” In the record, John is sometimes referred to as “Kevin,” which is his middle name. Amanda and John were 39 and 41 years old respectively and were married for 16 years when the petition for dissolution was filed on 6/13/2012. Amanda’s attorney was Ms. Rosemarie LeMoine. John’s attorney was Mr. Hank Michael Finesilver. Their trial began 8/19/2013 and concluded 9/3/2013. Final findings, decree, and orders were filed 9/30/2013. The order denying the motion for reconsideration was filed 12/3/2013.

## II. ASSIGNMENTS OF ERROR

1. Assignment of Error No. 1. The trial court erred in the finding adopting the value of the Raytheon pension as \$34,052, because the value was based on the false assumption that the benefit amount at early retirement age 55 is the same as at normal retirement age 65, which significantly overvalues the pension (CP 167, FNFCL, p. 5, LN 14-22).
2. Assignment of Error No. 2. The trial court erred in the finding that Amanda had the need for reimbursement of attorney’s fees and costs and John had the ability to pay these fees and costs (CP 171, FNFCL, p. 9, LN 12-16).
3. Assignment of Error No. 3. The trial court erred in its decision to strike John’s expert witness, Mr. Neil Bennett, and the vocational report about Amanda’s earning potential, which was the most critical issue in

the case with the largest financial impact (CP 200-201, Order striking witnesses, pp. 2-3).

4. Assignment of Error No. 4. The trial court erred in the finding that John's post-separation contributions to his Fidelity 401(k) were community property (CP 168, FNFCL, p. 6).
5. Assignment of Error No. 5. The trial court erred in giving the federal income tax exemption for the child to Amanda in all years, because the parties had agreed it would be split equally between the parents in even and odd years, which is fair in this case (CP 193, ORS, p. 8, LN 12-16).
6. Assignment of Error No. 6. The trial court erred in not requiring proof of work-related daycare expenses for reimbursement, because the unique nature of Amanda's work and daycare situation provides potential for abuse of the support order, and because proof would be relatively easy to provide (CP 204).

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The trial court based the present value of the Raytheon pension on an assessment that assumed the benefit amount at early retirement age 55 is the same as for normal retirement age 65 (Assignment of Error No. 1).
  - a) Was there any evidence to support the false assumption?
  - b) Did the evidence presented sufficiently disprove the false assumption?
  - c) Did the court abuse its discretion when it ignored the evidence, which was undisputed by the expert witness, Mr. Steve Kessler, LeMoine, and Finesilver?
  - d) Was it apparent that the benefit amount at retirement age was critical to placing a present value on the pension, and that using the false assumption overvalued the pension?
2. The court based the award of attorney's fees on Amanda's need and John's ability to pay (Assignment of Error No. 2).
  - a) Did Amanda have the ability to pay her own attorney's fees?

- b) Did John have the ability to pay Amanda's attorney's fees?
  - c) Which party had the greater need?
  - d) Should John be forced into debt to pay attorney's fees for Amanda, if she has the ability to pay, and her expenses are no fault of John's?
  - e) Did the court consider the financial situation and resources available to both parties at the conclusion of the trial?
3. The court excluded John's expert witnesses and reports because they were disclosed late; and, because they addressed the most critical issues to the case, Amanda was prejudiced by not having enough time to rebut the evidence (Assignment of Error No. 3).
- a) Should the court have allowed Mr. Neil Bennett to testify and admitted the vocational report for consideration?
  - b) Was the disclosure of Mr. Neil Bennett timely because it was made within the case schedule local rules that both Amanda's and John's attorneys had adopted?
  - c) If not, was it willful?
  - d) Was the exclusion of this information prejudicial to John because it was critical to the most important and financially valuable issue in the case?
  - e) Did Ms. LeMoine have an opportunity to depose the witness and conduct discovery regarding the report?
  - f) Were lesser sanctions considered, and could the trial have been continued to allow more time for discovery because of the critical importance to the case and serving justice?
4. The trial court characterized John's post-separation contributions to his Fidelity 401(k) as community property (Assignment of Error No. 4).
- a) Was there agreement by the parties on the characterization and value of the separate property?
  - b) Did the court hear sufficient evidence to support the characterization and value of separate property?
  - c) Did the court hear any evidence opposing the characterization and value of separate property?
  - d) Was there a logical explanation for the court's decision?

- e) Why were similar contributions to John's Securian 401(k) treated differently?
5. The trial court gave the federal income tax exemption for their child exclusively to Amanda in all years, but the parties had previously agreed to split the exemption equally in even and odd years (Assignment of Error No. 5).
- a) Was there prior agreement by the parties to divide the tax exemption evenly?
  - b) Was there good cause for the equal division of the exemption?
  - c) Was there a reason for the court to change the allocation from what the parties had agreed?
6. The trial court denied John's request to require proof of work-related daycare expenses billed to him for reimbursement (Assignment of Error No. 6).
- a) Does the unique nature of the Amanda's work and daycare situation provide potential for abuse of the support order?
  - b) Is it an invasion of Amanda's privacy to verify the amount she bills John each month is for daycare?
  - c) Does the request for proof of the work-related nature of the daycare place undue burden on Amanda?
  - d) Does Amanda have the ability to provide proof?
  - e) With no obstacles to Amanda's ability to provide proof of work-related daycare expenses, there is no logical reason for not doing it.

#### IV. STATEMENT OF THE CASE

**1. Facts related to the value of the Raytheon pension (Assignment of Error No. 1).**

John and Amanda jointly hired Mr. Steve Kessler to calculate the present value of the John's pension from his former employer, Raytheon. Amanda's attorney, Ms. LeMoine, gave Mr. Kessler information from

John's answers to interrogatories to use in the valuation (Ex. 19). Included in that information was a letter from Raytheon that stated the value of the monthly pension benefit at normal retirement age 65. Mr. Kessler used that information to calculate the present value of the pension for normal retirement age.

Later, on 7/30/2013, Ms. LeMoine asked Mr. Kessler to value the pension for early retirement age 55, the age Ms. LeMoine assumed from the Raytheon letter that John was eligible to start receiving retirement benefits under the early retirement provision. For Mr. Kessler to calculate the present value of the pension, he needed the amount of the monthly benefit payments Mr. Halligan would receive starting at age 55. The Raytheon letter produced from interrogatories clearly stated the benefit amount at early retirement would be less than at normal retirement age:

Please note that these figures have been calculated according to the provisions of the Raytheon Non-Bargaining Non-Contributory Retirement Plan. ... If you wish, you may elect to begin receiving your payments on or after age 55, actuarially reduced for Early Retirement. Please consult the Summary Plan Description (SPD) for further clarification on Early Retirement. (Ex 19, underscore added for emphasis).

But the Raytheon letter did not state the amount of the benefit payment at age 55, only that it would be reduced from the benefit amount at age 65, so Mr. Kessler immediately asked LeMoine for the missing information

needed to calculate the present value. His request was referenced in a letter from Ms. LeMoine to Mr. Finesilver dated 8/5/2013: “Steve Kessler has asked for that information, and he has been ignored.” (Ex 60) At the time of Ms. LeMoine’s letter, two weeks before the start of the trial on 8/19/2013, neither party had the Summary Plan Description (SPD) that was referenced in the Raytheon letter to calculate the reduced benefit payments at early retirement.

The letter from Ms. LeMoine also provides evidence she knew the present value of the pension for early retirement could not be calculated without the benefit amount. She wrote, “Now, I have asked for the information vital to calculating the early retirement amount.” (Ex 60, underscore added for emphasis)

Mr. Kessler never received the information he requested from the attorneys. So, under pressure of the upcoming trial date, nine days before the trial, he calculated the present value of the pension at age 55, assuming the benefit payments were the same as at age 65, even though this assumption was blatantly wrong, according to the letter he had from Raytheon that stated that the benefit amount was reduced for early retirement. To address this issue, Mr. Kessler clearly stated in his revised letter of valuation dated 8/10/2013: “In my opinion, the total present value of Mr. Halligan’s pension benefit with retirement at age 55 and assuming

no reduction in benefits is \$34,052 as of June 13, 2012.” (Ex 20, underscore added for emphasis). Kessler’s letter was received the following Monday, 8/12/2013, only one week before trial.

Around the same time of Mr. Kessler’s revised valuation, both Ms. LeMoine (on 8/7/2013) and John (on 8/8/2013) separately obtained the information to calculate the benefit amount at early retirement that Mr. Kessler had requested. They both attempted to inform Mr. Kessler, but for some reason, he didn’t receive or use the information. At trial Mr. Finesilver provided (RP V5, p. 87) the complete Raytheon retirement plan documentation (Ex 133) that clearly stated the simple formula for the reduction in monthly benefit payments for early retirement:

“If you begin receiving your pension before your Social Security Retirement Date, your pension may be reduced actuarially from that Social Security Retirement Date, or reduced by ½ of 1% for each month your Annuity Start Date precedes your Social Security Retirement Date, if that provides a larger pension.” (Ex 133, p. 8)

This evidence confirmed what the letter from Raytheon stated, “payments on or after age 55, actuarially reduced for Early Retirement.” (Ex 19). In addition, the evidence clearly proved the amount of the reduction at early retirement age to be significantly less than the monthly benefit amount at normal retirement age. At trial, John read the Raytheon retirement plan for the court and used the formula it provided to calculate the reduced

benefit amount at age 55, which is 60% less than at age 65:

A. So using one-half of one percent, the difference between the amount that was provided at age 65 to 55 would be 10 years. The calculation is six percent per year times 10 years. It's a 60 percent reduction. If the base amount at age 65 is \$450.88 provided on that letter --

Q. When you say that letter, you mean Kessler's report?

A. Yes. Kessler's report used that letter as --

Q. Uh-huh.

A. -- its basis. Then the correct amount at age 55 would be a reduction of 60 percent of that, which would be \$180.35 that I would be eligible to receive monthly, starting at age 55. (RP V 5, pp. 44-45)

In Ms. LeMoine's cross-examination of John (RP V 5, pp 133-138), she never disputed these facts, and thoroughly reinforced them.

a) That the benefit amount is reduced for early retirement:

BY MS. LEMOINE:

Q. The letter dated September 29th, 2008 states in the second paragraph that you may elect to begin receiving your payments on or after age 55, actuarially reduced for early retirement, doesn't it?

A. It does. (RP V 5, p. 136)

b) That Mr. Kessler needed the benefit amount at early retirement age 55

to calculate the present value:

Q. Do you recall that it was an issue for Mr. Kessler, the amount of your early pension benefit from Raytheon? (RP V 5, p. 137)

...

Q. Okay. And did you offer Mr. Kessler the information so he could determine the age 55 value for your Raytheon pension? (RP V 5, p. 138)

c) That the information was in the Raytheon retirement plan booklet:

Q. And it told you in the letter to look at the Raytheon summary plan booklet, didn't it?

A. Yes. It did. (RP V5, pp. 136-137)

d) That the information was admitted as evidence and available to the court:

Q. And that's Exhibit 132 --

A. Okay.

Q. -- and 133.

THE COURT: 133, uh-huh.

BY MS. LEMOINE:

Q. Isn't that correct?

A. I believe that's correct. (RP V5, pp. 137)

e) That Mr. Kessler never received the information he needed:

Q. Do you recall that I had asked for this booklet repeatedly?

A. I remember hearing something about it within the last few weeks, that you were asking for it. (RP V5, p. 137)

...

Q. You provided Mr. Kessler information about some of your pension benefits, your military pension benefit, didn't you?

A. Yes. I did.

Q. All right. Did you speak with Mr. Kessler over the telephone?

A. Yes. I did.

Q. Okay. And did you offer Mr. Kessler the information so he could determine the age 55 value for your Raytheon pension?

A. I don't believe there was any reason to. It wasn't part of the discussion. (RP V5, p. 138)

## **2. Facts about the award of attorney's fees and costs to Amanda (Assignment of Error 2).**

The trial court ordered John to pay \$18,000 to Amanda for attorney's fees (CP 184, DCD, p. 11). The award was based upon the

following finding:

**2.15 Fees and Costs**

The wife has the need for the payment of fees and costs and the husband has the ability to pay these fees and costs. The wife has incurred reasonable attorney fees and costs in the amount of \$60,621. The amount is reasonable, given the amount of work involved in presenting the case at trial, the length of trial, and the complexity of some of the trial issues. The husband has the ability to contribute something toward the wife's attorney's fees and costs (CP 171, FNFCL p. 9, LN 13-16).

**a) Amanda's and John's financial need:**

- The court found that Amanda's legal expenses were \$60,621 (CP 171, FNFCL p. 9, LN 14). Her financial declaration indicated that she had incurred \$38,441 fees and costs as of 8/6/2013, and she had paid \$22,312 (Ex 10, p. 5). In Amanda's testimony about her financial declaration, she thought she owed \$34,000 after a payment since her declaration (RP V1, pp. 143-144).
- John's total legal fees and expenses prior to the trial date of 8/19/2013 were approximately \$62,434 (Ex 124). This did not include the cost of the trial. Finesilver's memo to the court on 9/20/2013 quoted his then-current unpaid attorney's fees at \$15,152 (CP 92, Memo, p. 3), which did not include attorney's fees for post-trial work on the final orders and the motion for reconsideration.

- Amanda's and John's financial declarations show their routine living expenses to be about the same (Ex 10, Ex 101).

**b) Amanda's and John's ability to pay legal expenses:**

- The court awarded Amanda a disproportionate 60% share of the community property (CP 180, DCD, p. 7, LN 10-12), which was achieved in part by two large financial account transfers of \$79,726 from a retirement savings account (CP 180, DCD, p. 7, LN 10-12), and \$66,000 cash from non-retirement accounts (CP 176, DCD, p. 3, LN 14-16). The portion of the property value awarded to John was largely in the form of real property (equity in the family home), the present value of pensions (not available until retirement), and a retirement savings account.
- The party's final division of property was calculated using the property matrix submitted by Ms. LeMoine (CP 112, Wife's Reply Re: Final Documents, rows 11-26). It showed Amanda had total liquid assets of \$164,442, and John had \$38,452.
- At trial, before the division of property was finalized, Finesilver argued that Amanda's proposed division would leave her with \$154,000 in liquidity, and John only \$38,000 from which to pay settlement fees and expenses (RP V5, pp. 77-78, LN 19 on).

- In addition to the \$18,000 in attorney's fees, three other one-time payments were awarded to Amanda to cover any potential expenses she may or may not have incurred during their separation. These were a \$26,000 credit for maintenance that was separate from the 60/40 division of assets (CP 167, FNFCL, p. 5, LN 1-2), \$900 award of attorney fees for the motion to exclude witnesses (CP 184, CP 199, CP 171), and \$3,867 award of retro daycare expenses (CP 186, ORS, p. 1, LN 22).
- Finesilver's memorandum to the court (CP 92, CP 128-130) and the accompanying updated financial statements (CP 206-224) filed 9/20/2013 for the post-trial calculations of the property division show John's cash account value is about \$92,500.
- The court awarded Amanda \$3,500 per month spousal maintenance that she requested to equalize their standard of living for five years (CP 171, FNFCL p. 9, LN 7-9).

**c) Evidence to justify the \$18,000 amount of the award was as follows:**

- The trial judge provided no justification for the amount of the award (RP V7, p. 11, LN 9-16).
- Amanda's final statement of fees and expenses was not submitted, but was reserved for Exhibit 64. At trial, LeMoine said she would

submit her billing statements if fees were awarded (RP V6, p. 35, LN 19-20), but that did not occur.

**d) The court heard the facts about the parties' relative ability to pay legal expenses as follows:**

- At trial, through financial declarations, exhibits, testimony, and argument. Finesilver argued the potential disparity in Amanda's and John's relative financial circumstances would leave her with \$154,000 in liquidity, and John with \$38,000, if the court accepted Amanda's proposed property division (RP V6, pp. 77-78).
- Finesilver's memorandum to the court filed 9/20/2013 to correct the draft findings, decree, and orders showed that the proposed property division would leave Amanda with \$164,442 in cash after the transfer of \$66,000 to Amanda to achieve a 60% proportion of assets in her favor. John had \$92,505 in liquidity at that time, and would be left with about \$26,000 to pay the \$18,000 attorney's fees awarded to Amanda in addition to all his other fees and expenses (CP 92, Memo, p.3, LN 6-17; and CP 100, Attachment 2; and CP 130, Corrected Attachment 2).
- Finesilver's motion for reconsideration filed 10/8/2013 reiterated the evidence that Amanda was left with \$164,442 cash on hand to

pay her own attorney's fees and John's debt obligations exceeded his ability to pay (CP 155-156, Memo, pp. 4-5).

**3. Facts about the decision to strike John's expert witness, Mr. Neil Bennett, and the vocational report about the Amanda's earning potential (Assignment of Error No. 3).**

Amanda filed for divorce and a case schedule was issued on 6/13/2012. On 2/26/2013, the case was continued for three months so the parties could participate in mediation. A new case schedule was requested, but was never issued, so the attorneys followed local rules for the intermediate case deadlines. The offsets for all remaining case deadlines were consistent with local rules (LCR 4).

The following table is a timeline of events related to the deadlines for disclosure of witnesses and discovery. In the table, the second column shows the deadlines of the original case schedule. The third column shows the deadlines the attorneys adopted from local rules for those same events. The fourth column shows the actual dates those case events occurred, and other events relevant to this issue and referenced in the trial.

**Table 1. Case Schedule Deadlines and Actual Dates of Occurrence.**

(1) Case Event	(2) Original Case Schedule Deadline	(3) Deadline Parties Adopted from Local Rules	(4) Actual Date Case Event Occurred and Other Events
<b>Disclosure of possible primary witnesses</b>	2/19/2013	n/a, original case schedule in effect	2/7/2013: LeMoine filed disclosure of witnesses 2/19/2013: Starks filed disclosure of witnesses 2/19/2013: LeMoine filed second disclosure of witnesses
<b>Deadline for change in trial date</b>	3/4/2013	n/a, original case schedule in effect	2/26/2013: The case was continued for three months to participate in mediation. The agreement was that all case schedule deadlines were delayed three months to conform to new trial date. A new case schedule was requested, but never issued.
			2/27/2013*: John's attorney, David Starks, withdrew and was substituted by Hank Finesilver. 5/20/2013: LeMoine gave notice of absence for vacation. 6/3/2013: Start of LeMoine's scheduled absence.
<b>Deadline for disclosure of possible additional witnesses</b>	3/18/2013 (Trial - 9 wks)	6/17/2013 (Trial - 9 wks)	<b>6/25/2013 (late): Finesilver filed a disclosure of witnesses, naming Neil Bennett, Diane Hayes, general contractors, and an appraiser of the investment property.</b> <b>7/25/2013: In a letter to Finesilver before mediation, LeMoine first raised an objection to late disclosure of witnesses, and wrote, "...even though a new case schedule was not issued when the trial was continued, <u>I am applying local rules to determine what the latest date for witness disclosure was.</u>"</b>
			7/11/2013: LeMoine's scheduled return to work from vacation.
<b>Discovery cutoff</b>	4/15/2013 (Trial - 5 wks,	7/15/2013 (Trial - 5 wks,	3/4/2013: Finesilver issued interrogatories for Amanda; answers from signed 4/8/2013.

<b>(1) Case Event</b>	<b>(2) Original Case Schedule Deadline</b>	<b>(3) Deadline Parties Adopted from Local Rules</b>	<b>(4) Actual Date Case Event Occurred and Other Events</b>
	same as 35 days before start of trial)	same as 35 days before start of trial)	<p>3/20/2013: Finesilver requested Hayes appraise the house value.</p> <p>3/20/2013: LeMoine issued interrogatories for John, answers returned end of April 2013.</p> <p>4/30/2013: Hayes performed site visit for house appraisal.</p> <p>5/2/2013: LeMoine subpoenaed John's deposition.</p> <p>5/6/2013: LeMoine requested Kessler value John's pension.</p> <p>5/14/2013: Kessler completed John's pension valuations.</p> <p>5/16/2013: John provided initial house repair estimates to Hayes.</p> <p>5/16/2013: Finesilver requested Kessler value Amanda's pension.</p> <p>5/17/2013: LeMoine provided missing answers to Amanda's interrogatories production.</p> <p>5/20/2013: CR 37 Conference with Finesilver and LeMoine.</p> <p>5/20/2013: Finesilver requested Amanda's business financial documents from LeMoine.</p> <p>5/20/2013: Finesilver requested Stephanie Breyfogle appraise the investment property.</p> <p>5/21/2013: Amanda requested service transcripts from her former employer needed to calculate her federal pension.</p> <p>5/22/2013: LeMoine requested Kessler value Amanda's federal pension.</p> <p>5/22/2013: LeMoine requested additional financial documents from John.</p> <p>5/30/2013: Oral depositions of John and Amanda on financial issues.</p>

(1) Case Event	(2) Original Case Schedule Deadline	(3) Deadline Parties Adopted from Local Rules	(4) Actual Date Case Event Occurred and Other Events
			<p>5/28/2013: Finesilver requested Neil Bennett perform an employment assessment for Amanda.</p> <p>5/29/2013: Finesilver subpoenaed Amanda's deposition for parenting issues.</p> <p>5/30/2013: LeMoine requested additional financial documents from John and provided requested business financial documents to Finesilver.</p> <p>6/3/2013: Hayes completed the house appraisal.</p> <p>6/5/2013: John requested Rick Winters appraise the investment property.</p> <p>7/2/2013: Winters completed the investment property appraisal.</p> <p><b>7/3/2013: Finesilver sent LeMoine the employment report from Neil Bennett the day after it is received. It provides Amanda's current and future earning potential (CP 78)</b></p> <p>7/2-7/9/2013: John received detailed cost estimates for needed house repairs from Bernie Wilson and other contractors.</p> <p>7/11/2013: Finesilver provided Kessler information to correct valuation of military pension.</p> <p>7/12/2013: Pre-trial conference with Finesilver and LeMoine.</p> <p>7/18-7/19/2013: Kessler completed John's pension evaluations</p> <p>7/19/2013: John provides detailed house repair cost estimates to Hayes for revising the house appraisal, as requested.</p> <p>7/25/2013: Finesilver requested Hayes revise house appraisal.</p> <p>7/24/2013: LeMoine requested John's financial documents from</p>

<b>(1) Case Event</b>	<b>(2) Original Case Schedule Deadline</b>	<b>(3) Deadline Parties Adopted from Local Rules</b>	<b>(4) Actual Date Case Event Occurred and Other Events</b>
			<p>Finesilver.  <b>7/25/2013** Ms. LeMoine claims she first saw Neil Bennett's report for Amanda's current and future earning potential. (RP V1, p. 5)</b>  7/30/2013: Kessler completed Amanda's pension valuation.  7/30/2013: LeMoine first requested Kessler to value John's Raytheon pension for early retirement.  8/2/2013: Finesilver requested updates to Amanda's financial account balances.  8/12/2013: Kessler's valuation of John's Raytheon pension for early retirement delivered (emailed Saturday, 8/10/2013).  8/12-8/16/2013: Supplementations of financial documents were made up to the week before trial (RP V1, p. 129, LN 1-5).</p>
<b>Deadline for engaging in alternative dispute resolution</b>	4/22/2013 (Trial - 4 wks)	7/22/2013 (Trial - 4 wks)	7/31/2013 (late): Settlement Conference/Mediation/ADR with Howard Bartlett.
<b>Deadline for exchange of witness and exhibit lists and documentary exhibits</b>	4/29/2013 (Trial - 3 wks)	7/29/2013 (Trial - 3 wks) (8/7/2013 est. at pre-trial conference)	8/7/2013 (late): LeMoine sent initial list to Finesilver.
<b>Deadline for joint</b>	5/13/2013	8/12/2013	8/12/2013 (late). LeMoine submitted joint statement of evidence.

<b>(1) Case Event</b>	<b>(2) Original Case Schedule Deadline</b>	<b>(3) Deadline Parties Adopted from Local Rules</b>	<b>(4) Actual Date Case Event Occurred and Other Events</b>
<b>statement of evidence</b>	(Trial - 1 wk)	(Trial - 1 wk) (8/9/2013 est. at pre-trial conference)	
<b>Trial week</b>	5/20/2013	8/19/2013	8/19/2013: Start of trial.

\* Ms. LeMoine misrepresented the date of appearance as 3/4/2013 in her motion to strike witnesses.

\*\* Ms. LeMoine received Neil Bennett's report the first time on 7/3/2013 (CP 78), not on 7/25/2013 as she implied in her motion. (RP V1, p.5)

The deadline for discovery cutoff was 7/15/2013, 35 days before start of trial, based on local rules. (LCR 37). In motions, oral argument, and final order, all parties agreed this was the deadline, as evidenced by the following:

- a) LeMoine's motion to exclude states that 6/25/2013 (the day Finesilver filed a supplement disclosure of witnesses) was 20 days prior to the discovery cutoff, putting the discovery cutoff date at 7/15/2013, which is 35 days before trial started on 8/19/2013 (Motion to exclude, p. 2, Lines 22-24).
- b) LeMoine's motion states she was using a discovery date "...35 days before the new trial date of August 19, 2013, in an effort to be fair. That 'new' discovery cutoff date was July 15, 2013 (Motion to exclude, p. 4, Lines 3-6)."
- c) The final order to strike witnesses, exhibits and awarding fees to Amanda states the discovery cutoff date was July 15th, 2013 (CP 200, p. 2, LN 12-13).

**4. Facts about John's post-separation contributions to his Fidelity 401(k) (Assignment of Error 4).**

- a) The finding that John's post-separation contributions to his Fidelity 401(k) were community property was:

"11. The husband has a Fidelity Raytheon 401k savings account,

worth \$175,159 as of August, 2013, but against which a loan of \$25,626 is owed. The entire 401k account was accumulated during the marriage and is community property. The parties borrowed money from the husband's Fidelity Raytheon 401k account to buy property in Ronald, WA. The husband has been paying that loan back. The outstanding balance of the loan, \$25,626, is deducted from the account's gross value. The husband has asked that his payments toward the loan, which are deposited back into the husband's Raytheon 401k account, be treated as separate property because they were made with post separation earnings. The Court declines to do this (CP 168, FNFCL, p. 6, LN 18-24)."

- b) The finding that John's post-separation contributions to his Securian 401(k) were separate property was:

"12. The husband has a Tectura Securian 401k, accumulated through his current employment with Tectura. This account was worth \$43,628 as of August, 2013. The parties agree that \$16,844 of this amount is the husband's separate property, contributed by him or his employer after the date of separation. The balance is community property (CP 168-169, FNFCL, pp. 6-7)."

- c) The separate value of the Fidelity 401(k) was \$7,039 (Ex 102, row 25).

During the trial, the values of this account and others were updated to the latest available asset value as of 8/3/2013. The revised matrix was admitted on 8/21/2013 (RP V5, pp. 53-55). The method of calculating the separate value of both the Fidelity and Securian 401(k) accounts was admitted as Exhibit 107, and examined during trial (RP V5, pp. 76-78). There was no objection at trial to the characterization of separate property, the value of the separate portion, or the method of calculation.

- d) LeMoine agreed John's post-separation contributions to his Fidelity 401(k) were separate property, but argued against an additional credit to reimburse his expenses on row 34 of John's property matrix (Ex 102, row 34). In her closing argument, LeMoine said,
- “So they borrowed money from their 401(k) plan while they were still married. And Mr. Halligan has been paying it back. We have agreed that what he paid back is his separate property and we have -- because he's paid it back since they separated (RP V6, p. 34, LN 7-11, underscore added for emphasis).”
- e) In Finesilver's closing argument, he reiterated the agreement of the parties on the separate and community portions of both 401(k) accounts,
- “And the accuracy of the tracing as to the separate and community components of the 401(k)s is not disputed, either. And it was meticulous by some degree of particularity. There was a huge degree of particularity in coming to those apportionments of value (RP V6, p.57, LN 4-8, underscore added for emphasis).”
- f) The court did not mention this issue in its oral decision (RP V7).
- g) Finesilver's memo to the court on 9/20/2013 to correct errors in the draft orders, findings, and decree noted the omission of the separate property portion of the Fidelity 401(k) in LeMoine's draft property matrix (CP 91, LN 10-13), and provided a corrected property matrix (CP 97, row 21). LeMoine's reply memo to the court on 9/24/2013 appeared to mistake the issue Finesilver raised with the separate trial issue of credits that were requested for reimbursement of expenses

related to servicing the Ronald investment property (CP 109, LN 5-16). The credit she referenced, on row 34 of John's proposed property matrix (Ex 102), had been previously denied in the court's oral decision. Finesilver never challenged this decision. LeMoine attached a proposed property matrix to her reply memo, which again omitted the separate value of the Fidelity 401(k), but it did include the separate value of the Securian 401(k) (CP 112-113).

- h) Finesilver's memo re: motion for reconsideration filed on 10/8/2013 called out the error in the findings, the inconsistency with how the court correctly characterized post-separation contributions to the Securian 401(k), and argued there was no logical reason for the decision and none was provided (CP 153-154).

**5. Facts about the federal income tax exemption for child (Assignment of Error 5).**

The timeline of the drafting of the Order of Support, which includes the allocation of the income tax exemption follows:

- 8/12/2013, LeMoine and Finesilver filed their pre-trial briefings (CP 1-10 and CP 22-29).
- 8/13/2013, LeMoine proposed a draft set of orders. The draft Order of Child Support divided the income tax exemption equally between Amanda and John as follows:

“3.17 Income Tax Exemptions

Tax exemptions for the child shall be allocated as follows:

To the mother in odd numbered years and to the father in even numbered years.

The parents shall sign the federal income tax dependency exemption waiver (draft ORS, p. 8, Sec. 3.17).”

- 8/19-9/3/2013, During the trial, the tax exemption was never disputed by the parties, and there was no mention of the issue by the court. In its oral decision, the court ordered John to pay Amanda \$729/mo for child support using the standard calculation (RP V7, p. 4, LN 5-7).
  - 9/9/2013, Following the trial, LeMoine sent a notice of presentation and draft documents to Finesilver, including a notice for hearing to present the final documents, without oral argument, on Tuesday, September 24<sup>th</sup>, 2013. The draft Order of Child Support still split the income tax exemption equally between Amanda and John in odd and even years (draft ORS, p. 8, Sec. 3.17).
  - 9/23/2013. Rosemarie sent Finesilver her final drafts of documents to be presented to the court at the hearing the next day, 9/24/2013. This version of the Order of Child Support gave the tax exemption to Amanda in all years (CP 138).
- 6. Facts about the unique nature of Amanda’s work and daycare situation that necessitate proof of work-related daycare expenses (Assignment of Error 6).**

Amanda is self-employed and works from home. She works mostly independently and sometimes with her business partner, who is also a personal friend. She works non-traditional hours in varying amounts as required by her contracts (RP V3, pp. 64-65). Her contracts are typically short duration, and she sometimes has no paying clients at all (RP V6, pp. 47-50). The nanny provides daycare in Amanda's home (RP V3, p. 57). Amanda uses the same nanny for both personal and work-related daycare (RP V3, p. 64, RP V6, p. 40). She occasionally uses the same block of daycare time to run personal errands and meet with clients (RP V3, pp. 58-62).

Finesilver asked the trial court to insert language in the Order of Support to require Amanda to provide proof of work related daycare expenses (CP 95, CP 152-153). The court declined to do so (CP 204).

## V. ARGUMENT

- 1. The trial court erred in adopting the value of the Raytheon pension as \$34,052, because it was based on a false assumption that the benefit amount at early retirement age 55 is the same as for normal retirement age 65; and therefore, the pension was significantly overvalued. (Assignment of Error 1)**

From the letter from Ex 19, Mr. Kessler, who calculated the present value of the pension, knew that: 1) the benefit payments at retirement are calculated according to the provisions of the Raytheon Non-

Bargaining Non-Contributory Retirement Plan; 2) the benefit payments are actuarially reduced for Early Retirement; and 3) the Summary Plan Description (SPD) provides further clarification on early retirement. Mr. Kessler acknowledged that he needed more information to value the pension at age 55 when he asked the attorneys for the reduced benefit amount. Because he didn't receive that information before trial, he clearly qualified his valuation by stating his assumption that his calculation was based on the benefit not being reduced for early retirement.

A) Was there any evidence to support the false assumption? There simply was none.

B) Did the evidence presented sufficiently disprove the false assumption? Yes. The Raytheon retirement plan was admitted as evidence and was fully discussed at trial. It provided the formula needed to calculate the reduced benefit amount for early retirement. The pension plan was the authoritative document, and that fact is not disputed. Ms. LeMoine did not dispute the facts at trial, and her correspondence with Finesilver is consistent.

There was no dispute that the benefit amount is less for early retirement. The court even entered a finding of fact that reinforced this: "A reduced benefit is available to the husband at age 55." (CP 167, FNFCL p5, LN 18-19). That finding is correct, and is supported by the

proof. The plan and the letter Kessler had from Raytheon clearly showed that Kessler's valuation was based on an erroneous assumption.

The court's finding of fact about Mr. Kessler's value is incorrect. The finding states, "Mr. Kessler has indicated the value of the pension, assuming the husband begins collecting it at age 55, is \$34,052."

(FNFCL p. 5, CP 167, underscore added for emphasis). This finding is not accurate and is not supported by the evidence. Mr. Kessler clearly stated the pension value would be \$34,052, "assuming no reduction in benefits." (Ex 20, underline added for clarity) of what Mr. Kessler said.

C) Did the court abuse its discretion when it ignored the evidence, which was undisputed by the expert witness, Mr. Steve Kessler, the Petitioner, and the Respondent? Yes. Finesilver pointed out the error in the motion for reconsideration. (CP 153-154) Nevertheless, the Court ignored the evidence presented at trial, the memo, the motion for reconsideration, and the expert witness, Kessler himself, who stated he assumed no reduced benefit at age 55. Any reasonable judgment would have found that the valuation was incorrect.

D) Was it apparent that the benefit amount at retirement age was critical to placing a present value on the pension, and that using the false assumption overvalued the pension? Yes. There was no dispute that the benefit amount was a key factor in the calculation of the present value of

the pension. Mr. Kessler, LeMoine, and John all stated so. At trial, John calculated the benefit was reduced by 60% from the formula in the retirement plan. Kessler used the benefit at age 65 (\$450.88 per month). The un-rebutted testimony at trial was that at age 55 the benefit is \$180.35 per month. Because this is a significant change, the court should have asked for recalculation of the present value.

**Remedy requested:** The appellate court should remand this decision back to the trial court for recalculation of the correct present value of the pension using a 60% reduction in benefit for early retirement age 55. The difference between the proportion of the erroneous value of \$34,052 that was transferred to Amanda, and the proportion of the correct value that she should have received should be refunded to John.

**2. The trial court erred in the finding that Amanda had the need for payment of attorney's fees and costs and John had the ability to pay these fees and costs. (Assignment of Error No. 2)**

The finding was that Amanda had the need and John the ability to pay. Thus, the award is based upon John's ability and Amanda's need for \$18,000 in attorney fees. RCW 26.09.140 allows the court to award fees to a needy party for the cost of attorney's fees.

RCW 26.09.140. Payment of costs, attorneys' fees, etc. "The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to

the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, ...”

There is substantial evidence showing Amanda had the ability to pay her own attorney’s fees and expenses. The award of attorney's fees is based on the economic circumstances the parties are left in at the time of divorce. The disproportionate award of 60% of their assets to Amanda gave her a significant advantage in the amount of cash at her disposal to pay attorney’s fees. Much of the transfer of assets to achieve the 60% distribution was in the form of cash transferred directly to her bank account. The bulk of assets left to John were in the form of the appraised value of his pension which would not mature for 12-22 years, the house equity, and his retirement 401(k)-type accounts, leaving him with no liquidity to pay Amanda’s attorney’s fees and his other expense obligations.

Looking first at the cash available to the parties after the conclusion of the trial, the final division of property was calculated using the values on the property matrix submitted by LeMoine (CP 112-113, Wife’s reply Re: Final Documents). The bank and cash accounts from rows 11-26 of the property matrix are provided in Table 2 below.

**Table 2. Extract of property matrix showing liquid assets.**

	<b>Bank and cash accounts</b>	<b>Gross</b>	<b>Community</b>	<b>Community</b>
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		<b>value</b>	<b>value to husband</b>	<b>value to wife</b>
1	True NW Comm bank acct (Wife's business ckg acct)	6,700		6,700
2	Wife's Chase ckg acct *4563	4,473		4,473
3	US Bank checking #6177	10,312		10,312
4	US Bank checking #6177	3,788		3,788
5	US Bank savings #9078	6,314		6,314
6	Wife's Chase savings acct #8360 (reduced by amount of \$26,000 retro maintenance award)	66,855		66,855
7	Ford Interest Advantage *0363 (closed)	92,610	26,610	66,000
8	USAA checking *9234 (closed)	11,420	11,420	
9	USAA savings *9226 (closed)	25	25	
10	USAA brokerage acct *4623 (closed)	397	397	
11	<b>TOTAL (liquid assets)</b>	<b>202,894</b>	<b>38,452</b>	<b>164,442</b>

Amanda was awarded the accounts in rows 1-5. John was awarded the accounts in rows 7-10, and ordered to transfer \$66,000 (highlighted on row 7) to Amanda to accomplish the 60/40 division of community property in Amanda's favor (CP 173, DCD 3.2 5(d), p3; CP 176; CP 179). Before the cash transfer, John had \$104,452 in liquid assets (sum of rows 7-10 gross value) according to the property matrix. After the transfer, John was left with \$38,452 and Amanda was left with \$164,442 in total liquid assets (row 11). This is substantial evidence that was adopted by the court, showing the wide disparity in the amount of liquidity the parties

were left with to pay attorney's fees and expenses.

To make matters worse, John's account balances were actually less than the property matrix indicated. Mostly where it benefited Amanda, the court adopted her bank account values at the time of trial. But the court adopted the value of John's bank account statements at the time of separation, which was 15 months earlier, even though those accounts were closed shortly after their separation. John or his attorney could not have known during the trial that the court would take this action. Immediately after trial, filed 9/20/2013, Finesilver provided the court with John's most current account balances (CP 92, Memo, p. 3; CP 206-224, Sealed Financial Documents; and CP 128-130, Att 2 correction). The value of John's bank accounts at the time of the trial are shown in Table 3.

**Table 3. John's bank account balances current at time of trial.**

	<b>John's bank and cash accounts</b>	<b>Reference to the Record</b>	<b>Value</b>
1	USAA checking *3107 (as of 9/18/2013)	CP 221*	25,408
2	Chase checking *2900 & savings *7500 (as of 9/6/2013)	CP 213	15,946**
3	Ford Interest Advantage *8034 (as of 7/26/2013 )	CP 207	51,152
4	<b>TOTAL (liquid assets available)</b>	CP 92	<b>92,506</b>

\* Note: the difference between the USAA checking balance as of 9/18/2013 in Table 3 and the bank statement balance as of 8/31/2013 in CP 221 is mostly due to a large credit card payment of \$17,889 made on 9/9/2013 to U.S. Bank Visa credit card # ending in 1606. Had the date of the statement balance been used, the balance on that credit card shown in Table 4, row 7 would have been substantially higher. The source of the

credit card charges were mostly legal fees, and as was declared (Ex 101, p. 5), John customarily paid the balance of credit cards every month.

\*\*Note the memo from CP 213 incorrectly provided a balance of \$92,505, a difference of \$1 due to rounding error of the combined checking and savings account balances.

As shown on row 4 of Table 3, John actually had \$92,506 in his bank accounts (CP 92, Memo, p. 3). This is almost \$12,000 less than the \$104,452 value used in the property matrix. The court had this updated information and bank records (CP 206-224) to substantiate these account balances along with the property matrix prior to its decision of the final cash transfer amount of \$66,000.

Looking next at John's immediate debt obligations at the time of trial, they totaled \$105,131, as shown in Table 4 below.

**Table 4. John's debt obligations current at time of trial.**

	<b>John's debt obligations</b>	<b>Reference to the Record</b>	<b>Value</b>
1	Cash transfer payment from John's bank accounts to achieve the 60/40 division of community property in Amanda's favor	CP 179	(66,000)
2	Award of Amanda's attorney's fees	CP 184	(18,000)
3	Award of Amanda's attorney's fees for motion to exclude witnesses	CP 184, CP 199, CP 171	(900)
4	Award of retro daycare expenses through 7/15/2013	CP 186	(3,867)
5	John's attorney's fees outstanding balance as of 9/20/2013	CP 92	(15,152)
6	John's credit card balance (Amex *1004)	CP 100	(604)
7	John's credit card balance (US Bank Visa *1606)	CP 100	(608)

8	<b>TOTAL (debt obligation)</b>		<b>(105,131)</b>
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The first four debt obligations (rows 1-4) were court awards to Amanda for attorney's fees, retro daycare expenses, and the cash transfer to achieve the 60/40 division of property in Amanda's favor. The fifth item (row 5) was the outstanding balance John owed his own attorney for his defense in this case. The final two items (rows 6-7) were the then-current balance on John's credit cards, which he used for attorney's fees and daily living expenses and paid off every month (Ex 101, p. 5, Financial Declaration).

Finally, combining their cash assets and immediate liabilities, Table 5 below compares John's ability to pay to Amanda's at the conclusion of the trial.

**Table 5. Comparison of net liquid assets and liabilities.**

	<b>Source of asset or debt obligation</b>	<b>Value to Husband</b>	<b>Value to Wife</b>
1	Bank and cash accounts	92,505	98,442
2	Cash transfer to achieve 60% property division	(66,000)	66,000
3	Award of Amanda's attorney's fees	(18,000)	18,000
4	Award of Amanda's attorney's fees	(900)	900
5	Award of retro daycare expenses	(3,867)	3,867
6	Outstanding attorney's fees at conclusion of trial	(15,152)	(34,000)
7	Credit card balance (Amanda's Chase Freedom Mastercard)		(14,908)
8	Credit card balance (John's Amex)	(604)	
9	Credit card balance (John's US Bank Visa)	(608)	
10	<b>TOTAL</b>	<b>(12,625)</b>	<b>138,301</b>

Amanda started with \$164,442 (Table 5, sum of rows 1+2, or Table 2, row 11). On top of that, she was awarded another \$22,767 from John (sum of rows 3+4+5). Amanda declared that she owed \$34,000 (row 6) (RP V1, p 144, LN 11) in outstanding attorney's fees and had a credit card balance of \$14,908 (row 7) (Ex 10, p.4). Ms. LeMoine used these debts to justify the award of attorney's fees. Table 5 shows that, if Amanda paid all her own attorney's fees, and other obligations, she still would have been left with \$138,301 in cash (row 10). She clearly had the ability to pay her own attorney's fees.

By contrast, John's total bank balance at time of trial was \$92,506 (Table 3, row 4 or Table 5, row 1) and he owed \$105,131 (Table 4, row 8, or Table 5, sum of rows 2-9). That left John \$12,625 in debt after spending every dollar he had available, with no ability to pay that debt off! Whether the court used John's bank balance of \$104,452 at the time of separation, or his actual balances of \$92,506 at time of trial, his immediate liabilities still outstripped the balance of his bank accounts. The court erred in leaving John with more debt than he had the ability to pay. Clearly, John did not have the ability to pay Amanda's attorney's fees.

Amanda's attorney's fees were a one-time expense. Amanda was also awarded long-term maintenance, child support, and proportional contributions to work-related childcare expenses that more than made up

for any long-term differences in lifestyle, and saddled John with a recurring monthly budget deficit from these payments. In addition to the \$18,000 in attorney's fees, the three other one-time payments awarded to Amanda covered any potential expenses she may or may not have incurred during their separation. These were a \$26,000 credit for retro maintenance that was treated separately from the 60% division of assets (CP 167, FNFCL, p. 5, LN 1-2), \$900 award of attorney fees for the motion to exclude witnesses (CP 184, CP 199, CP 171), and \$3,867 award of retro daycare expenses (CP 186).

At trial, LeMoine argued that Amanda did not have money to pay her bills in full each month for expenses such as attorney's fees and an auto repair of \$4,700 (RP V6, p. 84, LN 16-22). This was incorrect. Amanda and John split their bank account balance approximately in half after separation, and each had a little more than \$100,000 in their bank accounts at the start of the case (RP V1, pp. 122-126) Both spent a little more than \$60,000 in attorney's fees and expenses prior to trial. Amanda had no reason to accumulate credit card debt during that time, because at the time of trial, she still had a hefty Chase savings account balance of 68,854 (RP V1, p. 135), and total liquid assets of \$98,442 (Table 5, row 1) to pay it off. She simply chose not to.

John had a substantial need for funds to repair his home. At trial,

Stephanie Hayes testified John's house needed substantial repair and renovation (RP V3, pp. 12-13).

In light of the facts of the case, Amanda obviously had the resources to pay all of her attorney's fees without help from John. In a divorce "if the wife has money of her own it is error to award attorney fees." *Valley v. Selfridge* 30 Wn.Ap. 908, 639 P.2d 225 (1982). The burden is on the party seeking fees to prove their inability to pay their attorney fees. See *In re the Marriage of Young* 18 Wn.Ap. 462, 569 P.2d 70 (1977). In this case, Amanda and LeMoine never presented evidence of the amount of the attorney's fees owed, nor did the trial court provide justification for the amount of the award in the ruling.

The trial court had substantial evidence of Amanda's ability to pay her own attorney's fees, and John's lack thereof. The court heard these facts and comparison of the parties' need and ability to pay legal expenses three times: at trial, in the memorandum to the court filed 9/20/2013, and in the motion for reconsideration filed 10/8/2013. It was an abuse of discretion to award attorney's fees to Amanda.

**Remedy requested:** Upon review of the case, the appellate court should reverse the trial court's decision to award Amanda \$18,000 for attorney's fees and costs (RAP 2.4(a)), and the full amount should be refunded to John.

- 3. The trial court erred in its decision to strike John's expert witness, Mr. Neil Bennett, and exclude the vocational report about the Amanda's earning potential, which was the most critical issue with the largest financial impact in the case (Assignment of Error No. 3).**

Was the disclosure of Mr. Neil Bennett as a witness and the delivery of the vocational report timely because they were within the case schedule local rules that both Amanda's and John's attorneys had adopted? Following local rule, the vocational report was timely. See Table 1. Discovery must be completed no later than 35 days before the trial date in parentage cases (LCR 37).

The disclosure of Bennett was about a week late, but Table 1 shows most of the case deadlines were missed, and the late disclosure was not willful. There were extenuating circumstances, explained later.

Was the exclusion of the witness and the report prejudicial to John because it was critical to the most important and financially valuable issue in the case? Absolutely. This decision had large impact on the decision to imputing income to Amanda. John was substantially prejudiced. It was prejudicial to John to not be afforded a proper defense. The evidence and witness had direct impact on the issue in forefront of this case, the question of Amanda's voluntary underemployment. She left her federal job less than a year before separation that paid almost \$90,000/yr, started a business with her partner, making roughly the same salary working only

20 hrs/wk, and suddenly after separation claimed her earning potential had precipitously dropped to only about \$38,000/yr. The order striking witnesses (CP 200, p. 2, Lines 17-20) says this was a critical issue to Amanda's request for maintenance. In fact, the maintenance award was the largest financial transfer in the case, totaling \$210,000 over 5 years.

Was the late disclosure of witnesses willful? No reasonable interpretation of the facts could conclude that it was willful. Both attorneys struggled with the deadlines in this case. Both attorneys made mistakes explaining the case to the court to try to keep the dates straight. Table 1 shows a pattern of leeway for the case deadlines that was established by the attorneys. Neither party was adhering to case deadlines.

The original case schedule was definitely not being used. Table 1 shows all of the events after the continuance did not occur according to the original case schedule. In addition, the case events that were slid three months not adhered to by either party. LeMoine didn't submit exhibits list on time, ADR was late, etc. Almost all discovery occurred after the original case deadline of 4/15/2013 (see Table 1). And much of the discovery was after the date established by local rules of 7/15/2013, including the pension evaluations, detailed house repair cost estimates provided to Hayes for revising the house appraisal, as she requested, and exchange of other financial documents right up to the week before trial. In

fact, the appraisal for the Raytheon pension evaluation for early retirement was requested by LeMoine less than three weeks before trial, and it was only received on 8/12/2013, the week before trial started.

Regarding the deadlines for disclosure of witnesses, according to the original case schedule, 2/19/2013 for primary witnesses, and 3/18/2013 for additional witnesses, the only discovery that had been initiated by the latter date was issuing interrogatories to Amanda. Experts asked to perform the house appraisal and pension evaluations were not even known by the 3/18/2013.

And the decision didn't explain why only three of the five witnesses disclosed were struck. Diane Hayes was first identified as a possible witness in Finesilver's disclosure on 6/25/2013 and she was allowed to testify; but Neil Bennett was identified in the same disclosure, and was excluded.

Finesilver and LeMoine adopted a revised case schedule:

- Ms. LeMoine's motion to exclude, p.2, Lines 22-24, states June 25, 2013 (the day Finesilver filed a supplement disclosure of witnesses) was 20 days prior to the discovery cutoff, putting that date at July 15<sup>th</sup>, which is 35 days before trial started on Aug 19<sup>th</sup>. This proves she was operating on a revised case schedule based off of the new trial date (motion to exclude, p.2, Lines 22-24).
- Ms. LeMoine's motion states she was using a discovery date "...35 days before the new trial date of August 19, 2013, in an effort to be

fair. That ‘new’ discovery cutoff date was July 15, 2013 (motion to exclude, p.4, Lines 3-6).”

- The final order to strike witnesses, exhibits and awarding fees to Petitioner also puts the discovery cutoff date at July 15<sup>th</sup>, 2013 (CP 200, p. 2, LN 12-13).

Finesilver sent the report to LeMoine the day after he received it from Mr. Bennett (CP 78, response declaration, email from Mr. Bennett on July 2nd, forwarded to LeMoine July 3rd). This shows there was no willfulness of the violation. Bennett’s research and reporting was moving as fast as it would go. Ms. LeMoine’s motion states she received the vocational report on July 25th (Motion to exclude, p.3, Lines 1-5), but the report was sent to her on July 3<sup>rd</sup> (CP 78, Response Declaration, email to OC), well within the discovery cutoff date they were operating within. Mr. Finesilver should have shared the report with Katrina Zafiro, the attorney helping Ms. LeMoine with the case when Ms. LeMoine was on vacation, but Ms. LeMoine has no excuse for not noticing the report delivered to her on July 3<sup>rd</sup> upon her return from vacation on July 11<sup>th</sup>. She apparently received the house appraisal while on vacation, corresponded with her blackberry throughout (RP V1, p. 5, LN 18-22), and upon her return between July 12 and July 25<sup>th</sup>, when she said she finally discovered the report, she had almost daily communication by email with Finesilver’s office.

With all the confusion, there was nothing willful about the late disclosure of witnesses or the missteps that occurred on both sides. There were contributing factors to the situation:

- Finesilver appeared in the case 2/27/2013, immediately the after the stipulation for continuance on 2/26/2013, and after the original witness disclosures on 2/19/2013.
- The attorneys were operating under a revised case schedule after the case was continued, that was clearly practiced.
- Ms. LeMoine was on vacation when Mr. Neil Bennett's vocational report was sent to her. She received it, but had trouble reading it.
- The vocational report was not sent to LeMoine's substitute, Katrina Zafiro, by mistake.

Did Ms. LeMoine have an opportunity to depose the witness and conduct discovery regarding the report? Ms. LeMoine did not raise an objection about Finesilver's disclosure of witnesses on 6/27 until 7/25 just prior to mediation (Table 1). She had almost two months before trial started on 8/19, and she made no effort, and she did not request more time. The court seems to have put the burden on John to demonstrate why he, the Respondent, didn't offer to accommodate the Petitioner, rather than the burden on the Petitioner to explain why she didn't attempt to get the information she needed.

Were lesser sanctions considered, and could the trial have been continued to allow more time for discovery because of the critical importance to the case and serving justice? Yes, the court could have

easily continued the trial for LeMoine to depose the witness.

The court did not show a consideration of a lesser sanction (Burnet v. Spokane Ambulance, Blair v. TA-Seattle East No 176). The court ordered the harsher sanction of dismissal. The Burnet decision compels the court to first consider whether less severe sanctions would compensate. Because there was not a willful violation of the discovery rules, lesser sanctions would have been appropriate.

Should the court have allowed Mr. Neil Bennett to testify and admitted the vocational report for consideration? Yes. There were options to admit evidence, but the court chose the harsher of sanctions. As a result, John's expert witnesses and reports, so crucial to the key issue of the case, were not heard. He was not allowed to mount a proper defense as the Respondent in this case.

**Remedy requested:** Upon review of the case, the appellate court should remand the case to the trial court and require the court admit the expert witness, Neil Bennett, and the vocational report. In addition, the appellate court should reverse the \$900 sanction imposed on John for the motion to exclude witnesses, and the amount should be refunded to him.

**4. The trial court erred in the finding that John's post-separation contributions to his Fidelity 401(k) be treated as community property (Assignment of Error No. 4).**

Was there agreement by the parties on the characterization and value of the separate property? Yes. Both parties, on the record, specifically acknowledge their agreement of the characterization of a separate portion of the Fidelity 401(k). LeMoine: “We have agreed that what he paid back is his separate property and we have -- because he's paid it back since they separated (RP V6, p. 34, LN 7-11).” Finesilver: “And the accuracy of the tracing as to the separate and community components of the 401(k)s is not disputed, either (RP V6, p.57, LN 4-8).”

In the court’s decision, delivered orally, there was no mention of characterizing John’s post-separation contributions as community property. The court was silent on the issue because the parties were in complete agreement. Neither party asked for a decision on the matter or clarification, because there was no reason to.

Did the trial court hear opposing evidence to the characterization or value of the separate property? No. There was no evidence or argument to support the finding that the entire value of the Fidelity 401(k) was community property.

Did the court hear sufficient evidence to support the characterization and value of separate property? Yes. The method of calculating the separate value of both the Fidelity and Securian 401(k) accounts was admitted as Exhibit 107. The updated values of both

accounts as of 8/3/2013 were admitted as Exhibit 102, rows 25-26. The evidence was examined (RP V5, pp. 76-78). After the error was discovered, Finesilver brought it to the court's attention with two memos filed on 9/20/2013 and 10/8/2013 (CP 91 and CP 153-154). LeMoine provided no opposing argument about this issue.

The first mention of characterizing John's post-separation contributions to his Fidelity 401(k) as community property appeared in the final findings. Was there a logical explanation for the court's decision? No, and none was offered. And there was plenty of opportunity during and after the trial to do so. The explicit agreement between the parties at trial speaks volumes to indicate this is a pure and simple error, and an abuse of discretion by the court. It was possibly caused by confusing this issue with the separate issue of "credits" that were requested to reimburse the post-separation expenses John incurred for maintaining the parties' joint investment property. However, the credits were a different line item and a different value on the property matrix.

If the court had a reason for its decision, then why was the Securian 401(k) treated differently? John's post-separation contributions to the Securian 401(k) were from separate earnings, the same as the contributions made to the Fidelity 401(k), and during the same time. And the court properly treated that portion of the Securian 401(k) as separate property.

There is no logical reason to treat them differently. There was no dispute that both these instances of post-separation contributions were from post-separation earnings, and therefore, separate property.

**Remedy requested:** The trial court's finding that John's post-separation contributions to the Fidelity 401(k) were community property should be reversed. The \$7,039 separate portion of the Fidelity 401(k) should be treated the same as that of the Securian 401(k). Because Amanda received 60% of the community property, which the \$7,039 was incorrectly characterized as, John should be refunded the 60% portion of the \$7,039 he is owed, or \$4,223, plus the gain or loss on this investment since the valuation date of 8/3/2013.

**5. The trial court erred in giving the federal income tax exemption for the child to Amanda in all years, because the parties had agreed it would be split equally between the parents in even and odd years, which is fair in this case (Assignment of Error No. 5).**

Was there prior agreement by the parties to split the tax exemption evenly? Yes. As shown by the timeline on this issue in Section IV, Statement of the Case, from the very first draft of the Order of Support, there was never a dispute to the equal division of the tax exemption.

Was there good cause for the equal division of the exemption? Yes. An equal division of the tax exemption is customary and fair, given

the shared custody of the child, the co-parenting arrangements the couple made for their child, and their parenting plan, which gradually increases the number overnights the child spends with the father to a 50/50 share between the mother and father when the child is 11 years old. John pays 53% of the child's medical, daycare and other expenses, in addition to the \$729/mo child support he pays to Amanda. The purpose of the federal income tax deduction is to offset the cost of supporting dependents, which is exactly what John does. He bears more than half of the financial cost of supporting the child; and therefore, it is only fair and equitable that John and Amanda share the federal income tax exemption.

Was there a reason for the court to change the allocation from what the parties had agreed? The court gave no reason or warning. John was surprised to learn of the switch in early 2013 when he was preparing his 2012 tax return. It may have been a scrivener's error.

**Remedy requested:** The appellate court should correct the error in the Order of Support to what was agreed prior to trial and undisputed throughout the trial, allocating the income tax exemption "To the mother in odd numbered years and to the father in even numbered years."

- 6. The trial court erred in not requiring proof of work-related daycare expenses for reimbursement, because the unique nature of Amanda's work and daycare situation provides potential for abuse of the support order, and because proof would be relatively**

**easy to provide (Assignment of Error No. 6).**

Amanda's work and daycare situation described in the statement of the case is somewhat unique. Does the unique nature of the Amanda's work and daycare situation provide potential for abuse of the support order? Yes. The bills Amanda sends John are written by her own hand without any third-party verification. At issue is whether or not Amanda can and should provide proof that the bills she sends John for work-related daycare expenses are in fact for daycare and are work-related. Her response to John has essentially been "trust me." But John has no reason to trust Amanda about this issue, nor should he have to when Amanda has the ability to provide proof.

Is it an invasion of Amanda's privacy to verify the amount she bills John each month is for daycare? No. She is required by the IRS to keep proof of daycare expenses to substantiate the federal income tax deduction. And Amanda is required to keep records and file quarterly reports of hours with the Washington State Employment Security Department for her nanny, classified as a household employee. Is it an invasion of Amanda's privacy to verify the amount she bills John each month is work-related? No. Amanda's client invoices produced at trial were redacted as desired for privacy. A similar thing could be done here. John does not ask for a record of her personal babysitting.

Is it an undue burden on Amanda to submit proof of the work-related nature of the daycare? No. She tracks the date and times she works for the purpose of invoicing her clients for her hours and invoices them for expenses. This same information could easily be provided as it was done for interrogatories, and if desired, redacted for privacy. Amanda also has a book-keeper for her business, who is also her personal friend. Amanda would provide this information anyway for periodic review of her income for child support purposes. For proof that the daycare was actually performed, it is standard practice for the provider to track the dates and times they work, and submit an invoice for those hours. Amanda supposedly already pays separately for work-related and personal daycare expenses, so she must already track each portion.

With no obstacles to Amanda's ability to provide proof of work-related daycare expenses, there is no logical reason for not doing it. Because John pays for the majority of Amanda's work-related daycare expenses, it is fair and just that Amanda verify that his hard-earned money is being spent for the purpose it is intended. He is entitled to this, as it is customary with any financial transaction. If this were a case where Amanda had a traditional workplace, or worked consistent and normal business hours, or in an office with other people, or used a regular business provider of daycare with open access, this would not be an issue.

But this is not that case.

**Remedy requested:** The appellate court should remand the case to the trial court to modify the Order of Support to require proof that the bills she sends to John are in fact for daycare and are work-related.

## VI. CONCLUSION

The trial court made several errors in this case and adverse determinations toward John. In this case, the trial court:

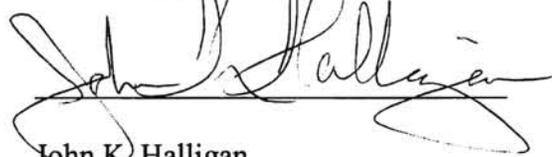
1. Over-valued the Raytheon pension awarded to John, despite overwhelming evidence to the contrary.
2. Awarded attorney's fees to Amanda, though she had the greater ability to pay.
3. Imposed the harshest sanction against John to strike his expert witness and deny reports that were critical to the most important issue of the case, when there was no willful intent, and lesser sanctions were available.
4. Characterized John's post-separation contributions to his Fidelity 401(k) as community property, despite the parties' agreement that they were separate property.
5. Surprisingly gave the tax exemption exclusively to Amanda rather than dividing it evenly, as the parties agreed and was fair.
6. Denied John a basic way to verify that his blind support payments to Amanda are used for the purpose of work-related daycare.

Specific remedies for each issue were provided in argument. In summary, the appellate court should reverse Error 2, remand the case to the trial court to adjust the final property division using the facts produced at trial for Errors 1 and 4, modify the Order of Support for Errors 5 and 6, and finally, remand the case to the trial court to allow John's witness and other

evidence as briefed in Error 3.

DATED this 30 day of JUNE, 2014.

Respectfully submitted,



John K. Halligan  
Appellant / Pro Se

### CERTIFICATE OF SERVICE

I certify that on the 30 day of JUNE, 2014, I caused a true and correct copy of this motion to be served on the following in the manner indicated below:

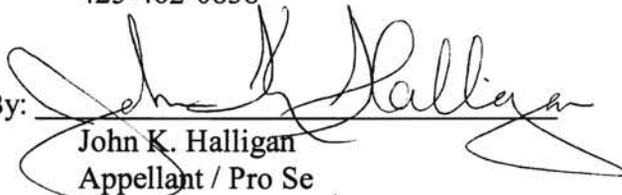
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