IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 1031599

In re the Marriage of:

JOYCE CALHOUN NKA JEFFERY,
PETITIONER/APPELLANT

v.

ALLEN CALHOUN, RESPONDENT/ APPELLEE.

SECOND AMENDED PETITION FOR DISCRETIONARY REVIEW BY SUPREME COURT

William C. Budigan
2601 42nd Avenue W
Seattle, WA 98199
206-284-5305

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Court of Appeals Division I Decision and Order of 4-15-24 denying Appeal AND 5-9-24 Order denying Motion for Reconsideration of Decision and Order of 4-15-24.

III ISSUES PRESENTED FOR REVIEW

1) Does the Court of Appeals and the WA Supreme Court lack power to review extensive arguments, evidence, and case law in an Appellant's Opening Brief supporting manifest abuse of discretion by the trial judge and arguing that this led to an unfair, unjust, inequitable trial decision contrary to the constitutional right to a fair trial, as exceptions to the general rule that one not showing up to trial cannot have any review of that trial because that party was not at the trial to raise objections at trial, because RAP 2.5 was not literally cited in the Opening Brief?

2) Must an Appellant literally cite to a specific RAP in an Appellant's Opening Brief on appeal to be allowed to have the general subject, facts and cases cited in the Opening Brief (meeting the elements of the RAP) even to be reviewable by the Court of Appeals?

3) If you do not raise an objection to evidence at trial, but when you get the final rulings in the mail or email days later and see obvious error by the court not reasonably weighing all the evidence and choosing some incorrect or less credible evidence or not following precedent contrary to case law and statues and the US and WA Constitutions, do you lose the right to direct appeal to Court of Appeals if you fail to literally cite RAP 2.5 in your appeal Opening Brief?

IV STATEMENT OF THE CASE

In the Decision and Opinion Denying Appeal on 4-15-24 (the motion for reconsideration was filed on 5-6-24, and was denied in one sentence 3 days later on 5-9-24, without addressing any merits), the Court of Appeals, without reaching the merits, dismissed the appeal. There, a 72 year old wife did not attend a one hour divorce trial of their 54 year marriage when she just recently had been released from a

voluntary mental hold and she communicated to the court through the judge's bailiff days before the trial that she was pro se and needed more time to locate a new attorney after her prior attorneys withdrew and that she was not competent on the computer to prepare any trial exhibits to be loaded up into Sharefile or appear by Zoom for the trial a few working days off. The trial RoP beginning pages show conclusively that the trial judge knew his staff had talked to Ms. Calhoun right before the trial, but the court did not report anything about what Ms.Calhoun said to the clerk or what the clerk said in response, and the record is silent that the clerk informed him of her need for continuance and her inability to represent herself at trial and it is very unclear about the change of trial date that came later in the day and whether Ms. Calhoun was ever informed of the change by phone as it is undisputed she had not been using email. The Court of appeals ruled had not raised any objections to anything during her un-attended trial and therefore could not raise any objections to the trial on the first time on appeal except through RAP 2.5 (Decision page one: "Because she was not present at the trial on the dissolution

of the marriage and does not argue that an exception to RAP 2.5 applies, her claims are not preserved for appeal.").

The Court of Appeals refused to reach the merits of the arguments in the Opening Brief supporting exceptions allowing review spelled out in RAP 2.5 because RAP 2.5 was not specifically cited. The Court of Appeals also ruled that Appellant's only remaining avenue of review was a motion to vacate the judgment at the superior court level (Decision at 6: her "**procedural mechanism is a motion to vacate judgment, which is not reviewable on this particular appeal. Accordingly, we decline to reach the merits of Joyce's arguments.**") .

This is contrary to the right to direct appeal of a decision of a superior court to the Court of Appeals and it is contrary to the facts and argument that Appellant raised in the Opening Brief and Reply Briefs (Amended Replies One through Three filed at the Court of Appeal's request to take out of the appeal issues regarding the trial court's later denial of a motion to vacate the trial decision and the Court of Appeal requested that be in a separate, second appeal of the

denial of vacating the trial decisions).The Court of Appeals denied Appellant's motion to just add the appeal of the motion to vacate into the issues in this first appeal and instead ruled it would be decided later in the new COA case number 86190-5, still pending briefing now.

V ARGUMENT

The Court of Appeals erred in this case, refusing to review the merits of the arguments in Appellant's Opening Brief supporting manifest abuse of discretion of the trial judge in valuing and characterizing and dividing the assets and evaluating income and maintenance needs and for fair trial rights determining payment deadline taking into account huge tax penalties greatly reducing the award to the wife and eliminating maintenance but giving almost all the community assets to the husband who has three times the income.

Of course, Appellant, who was not at the trial for excusable neglect reasons and not notified of the correct trial date, argued in the Opening Brief for the facts and law of points (2) and (3) directly below and there is no requirement in the law to cite to RAP 2.5, but Appellant met her duty of raising the many errors for review, complying with RAP 2.5:

RAP 2.5(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was ***not raised in the trial court.*** However, a party **may** raise the following claimed errors for the first time in the appellate court:

(1) lack of trial court jurisdiction,

(2) failure to establish facts upon which relief can be granted, and

(3) manifest error affecting a constitutional right.

D and O at 6:

> "As she did not attend trial, each of these challenges is presented for the first time before this court. **Failure to raise an issue before the trial court generally prevents a party from presenting it for the first time on appeal. RAP 2.5(a)**. "The purpose of this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials."

D and O At 6-7

> "**Joyce did not appear for trial** and, thus, did not present any evidence or **raise any objections.** Consequently, the **trial court** did not have the opportunity to consider the arguments that she now raises."

If it were the law that attorneys must raise objections at trial or waive them except for RAP 2.5 grounds, the attorney law standard of care would become: object to everything at trial because if an attorney fails to object to anything, it would be unreviewable and malpractice by the trial attorney and this would really lengthen trials and not

serve justice with constant objections. It is often the case that a party will present its own evidence and yet the judge will admit the other sides evidence and then at the end of the trial or a week or two later give a decision based on some evidence of the other side not objected to at trial because there may not have been any proper reason other than that it is plain incorrect, false, or misleading, as here in the Calhoun trial where the judge erred time and again based on improper evidence . Of course, everyone would agree that though there was no objection at trial in these circumstances, the rulings in error are reviewable as a matter of right at the court of appeals.

D and O At 7

“ More critically, *Joyce fails to provide any argument on appeal* as to why this court should reach the merit of her claims through *an exception to RAP 2.5*…..Accordingly, we **decline to reach the merits of Joyce’s arguments**.”

D and O first appeal 4-15-24

At 7:

“Because…she **failed to *address the applicability of RAP 2.5* in her Opening Brief to establish an applicable exception, we award attorney fees** to Allen…

Importantly, because the court of appeals thought RAP 2.5 must be mentioned to be considered, the court stated it would not ever reach the merits of the 50 pages of errors in the trial and instead made Wife pay the other side $12,000 in attorney fees without expressly stating the reason or making any written findings, but earlier noted that Respondent Husband argued that not mentioning RAP 2.5 in the Opening Brief meant that the 50 pages was a frivolous appeal despite all the arguments, Trial EXs, CPs, RoPs , and case law detailed and analyzed and basis for remand for new trial and award of fees to Wife, who should have prevailed.

(A) ANALYSIS OF THE DECISION AND ORDER DENYING PETITIONER'S FIRST APPEAL FOR ALLEGEDLY NOT ARGUING RAP 2.5 (a) (2) and (3) GROUNDS FOR REVIEW GROUNDS FOR REVIEW

First, the Court of Appeal's hands are not so tied here by RAP 2.5 and possesses the long-held –in innumerable case rulings– authority to review any newly raised issue on appeal if the court so chooses. RAP 2.5 states:

"(a) Errors Raised for First Time on Review. ***The appellate court may*** refuse to review any claim of error which was not raised in the trial court."

Clearly, the Washington Supreme Court in setting these Rules allowed by this language a choice within the power of the court of appeals to hear issues it thinks was not raised at trial and clearly by RAP 2.5, the Washington Supreme Court did not tell the Court of Appeals that it only had this power in cases of RAP 2.5 (a) (1-3), which involve situations where a **PARTY** is allowed to raise issues for the first time on appeal and the Court of Appeals can still allow review of new issues on its own anyway:

RAP 2.5 (a) : However, **a party *may raise the following claimed errors for the first time in the appellate court:*** (1), (2), (3)...

Second, Appellant did raise and establish in the Opening Brief numerous considerable and shocking "**facts upon which relief can be granted",** meeting RAP 2.5(a)(2) and specifically raised many manifest errors affecting constitutional rights to fair trials and due process meeting RAP 2.5 (a)(3). The Court of Appeals ***itself*** pointed out **briefly** the issues and facts raised in Appellant's Opening Brief. Decision at 5-6: in her Opening Brief, but it did not reach the merits of the many trial errors.

However, the Court of Appeals then ignored all the *FACTS UPON WHICH RELIEF CAN BE GRANTED* HERE: DETAILS,

CPs of many, many flawed TRIAL EXs husband presented, the TRIAL TRANSCRIPT where the Husband testified to just downright incorrect values contrary to his own TRIAL EXs, AND the factual errors of the trial court in its findings and decree memorandum laid out in excruciating detail in Appellant's 50 page Opening Brief.

The Court of Appeals ignored all the actual FACTS establishing need for relief meeting RAP 2.5 (a) (2) and facts meeting RAP 2.5(a)(3) "manifest error" affecting a constitutional right to fair trials and due process.

Furthermore, citation to the specific words or number of RAP 2.5 is NOT necessary so long as all the arguments and facts are made complying with the RAP 2.5.

(1) Appellant's Opening Brief for 50 pages outlined the many errors in this trial and met RAP 2.5 (a)(2) And (3) :

Due to word limitations in a Petition for Review, Petitioner begs this Court to look at the table of contents to her Court of Appeals Opening Brief. It goes through each error of asset division, separate property, maintenance, income disparity, etc. and the Court of Appeals did not address any of the merits of the Appeal and ignored all of these errors in support of review through RAP 2.5. Summarily, here:

At 9: ".... Petitioner notes a number of errors in the characterization, the valuation and division of assets. Respondent uploaded to Sharefile 25 TR EXs…The court erred in not admitting all 25 exhibits that it relied on. This is an irregularity and mistake and these exhibits show it was an inequitable division and the Court of Appeals should review all these exhibits.

The Judge erred in his ruling in the following divisions of assets, all discussed in greater detail below…"
See detail therein.

This is the main problem with the case because the court overvalued the community assets and gave them all to the husband and gave him such a large amount of the wife's inheritance.

At 20: "The trial court erred and should have awarded solely to petitioner her separate, only in her name, inheritance accounts that have always been treated as separate property and have never been commingled with community assets. Respondent makes 5x the amount Petitioner makes per year (see section below on yearly "income" from pensions and social security benefits for each party), is not currently ordered to pay maintenance to Petitioner, and stands to receive over half a million dollars in just a fair and equitable split of all ***community*** assets in this marriage, so no need to touch her inheritance. He has much more in liquid funds than she received. Petitioner's separate, only in her name inheritance accounts, should have been protected from division in this divorce."

Opening Brief at 24-34 details evidence showing the false

testimony by Husband clearly contrary to the exhibits, but accepted by the court in error, and shows grounds for RAP 2.5(a)(2)(3), as they support manifest error in granting the husband's relief granted and in thereby denying wife her constitutional rights to fair trial/due process.

(2) Appellant's Briefs met RAP 2.5 (a) (3) by arguing manifest error affected constitutional right to fair trial and due process.

FROM APPELLANT'S OPENING BRIEF AT 1:

> "I ASSIGNMENTS OF ERROR
>
> 1. The court erred in not fairly basing its findings and conclusions on proper valuations and instead on valuations which were speculation, unsupported, or outdated and failed to **equitably and fairly and justly divide assets in this case."**

At 2 of Appellant's Opening Brief:

> "Byerley v. Cail, 183 Wash.App. 677, (2014):
>
> We review a trial court's **property division following dissolution of a marriage for *manifest abuse* of discretion.** ..a trial court falls short of this standard if it bases its decision on **untenable grounds or acts for untenable reasons or if the decision is manifestly unreasonable.** …Where *"substantial evidence"* in the **record does not support a finding from which a trial court draws a conclusion of law,** the court has abused its discretion. ..Under this standard, evidence is "substantial" if it would persuade a rational, fair-minded person of the finding's truth. …Although a trial court need not divide community property equally, **the court also fails the *manifest abuse* of discretion standard if the property division creates**

a patent disparity in the parties' economic circumstances.

This is the case here.

The Court of Appeals Decision does not address anywhere a single factual **or legal error affecting a constitutional right TO DUE PROCESS IN HAVING A FAIR TRIAL WHERE THE JUDGE FAIRLY WEIGHS THE EVIDENCE AND DOES NOT IGNORE THE FACTS AND LAW OF WASHINGTON STATE REGARDING DISSOLUTION AND COMMUNITY PROPERTY** raised by Appellant in the Opening Brief. The Court of Appeals and Appellee ignored all the actual facts and LAW and constitutional rights involved in following Washington dissolution and community property law, meeting RAP 2.5 (a) (3) .

(3) All the elements of RAP 2.5 were met in Appellant's THIRD AMENDED Reply Brief

At the beginning of the REPLY BRIEF Argument section at 8, Appellant addressed RAP 2.5(a) and then proceeded to detail all of the factual errors the court improperly relied upon. We request this Court look at the Third Amended Reply Brief table of contents for a brief overview of the numerous manifest errors in fact and law which must be reversed.

(B) RAP 13.4 (b) Considerations Governing Acceptance of Review.

A petition for review will be accepted by the Supreme Court in four situations:

(1) THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH A DECISION OF THE WASHINGTON SUPREME COURT.

In re Gharst states:

> **Washington Supreme Court in Winstone v. Winstone, wherein it was recognized that negligence or carelessness does not prevent a court in equity from discretion to relieve a litigant from an adverse judgment.** 40 Wash. 272, 274 …(1905).

The Washington Supreme Court has definitely spoken on the topic of whether one can raise for the first time on appeal RAP 2.5 issues—yes . In Gross v. City of Lynnwood, 90 Wn.2d 395, (1978) the Court ruled this is allowed if a party wants to so raise them on appeal:

> "A party may raise failure to establish facts upon which relief can be granted for the first time in the appellate court. RAP 2.5(a)(2)."

In State v. Ermert, 94 Wn.2d 839, (1980), the WA Supreme Court ruled that due process violations can be raised *at any time and even in a Petition for Review,* as here and as undisputedly raised and quoted with specific language of due process by Petitioner/Appellant in the Motion for Reconsideration to the Appellate court dated 5-6-24: Specifically citing all of

the places in the Petitioner's Opening Brief where some forty errors after errors, factual, application of statutes and case law were discussed at length for both errors in the relief granted without proper basis and constitutional errors of lack of fair trial in the decisions of the judge lacking good basis in the evidence submitted by the Respondent Husband and relying on unsupported testimony by the Husband. We will not overburden this court with the 50 page Opening Brief (detail of all of these errors of the judge and the spelled out misrepresentations and fraud by the Husband on the court and decisions by the Judge contrary to WA divorce law, but we direct this court to that brief) and in this Petition for Review.

(2) THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH A PUBLISHED DECISION OF THE COURT OF APPEALS.

The subject Division I case on appeal is in conflict with COA Divisions II and III.

1) There is no harmless error here in the valuation/division of assets/funds. In Hart v. Hart, No. 54823-2-II (WA App 2022), the COA found $20K errors in valuation of husband's 401K and equally divided his inheritance, found this not "harmless". Here, in our case, the errors are far more than $20K –and indeed here hundreds of thousand at stake.

2) New issues on appeal (not argued at trial) are allowed if there is sufficient trial record to weigh the issue at the appellate level and the court of appeals is required to examine that record, especially to see if constitutional rights are violated in this retrospective review. **State v. Barker, 162 Wash.App. 858, (Div II 2011):**

> "[a] party may present a ground for affirming a trial court decision which was **not presented to the trial court *if the record has been sufficiently developed to fairly consider the ground."*** RAP 2.5(a); see also Plein v. Lackey, 149 Wash.2d 214, 222… (2003). Thus, **we must examine the record** to determine whether there is sufficient evidence to decide whether Barker's due process rights were violated."

3) New issues on appeal (not argued at trial) are allowed for the first time at the appellate level and that is the level at which the appellant must show manifest error. Divisions disagree with Div I. **State v. Barge,** 139 Wash. App. 1035 **(Div II 2007)**:

> "Generally, an appellant cannot raise an issue for the first time on appeal unless there is a manifest error affecting a constitutional right. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 333…(1995)...**It is the showing of actual prejudice that makes the error "manifest" and allows for appellate review.** McFarland, 127 Wn.2d at 333 (citing State v. Scott, 110 Wn.2d 682, 688… (1988))."

Note that this court does not say manifest error has to be raised for the first time at trial and here we showed incredible manifest error in the 50

pages of the Appellant's Opening Brief filed 8-10-23, and Wife was beyond dispute prejudiced by the decision that she must pay $900K of her $1.07M separate inheritance funds within 45 days of the decision.

4) <u>In re Marriage of Gharst, 25 Wn.App. 2d 752, 525 (Div III 2023)</u>, where a Pro se petitioner, represented on appeal by Kenneth Kato, failed to appear at her 2021 divorce trial due to microstrokes in 2015 that still affected her coming to court six years later. Trial proceeded in Ms. Converse's absence with Husband Mr. Gharst as the only witness. During the trial, there was no discussion of Ms. Converse's stroke and related hardships. The trial court entered the final divorce order, declining to award spousal support to her and finding no transfer of personal property was required.

The Division III Court of Appeals held there was excusable neglect and remanded for a new trial and agreed with the US Supreme Court, 9th Circuit, and Washington Supreme Court cases on excusable neglect, as involved here for pro se Joyce Calhoun who failed to attend trial for significant reasons of mental health and inability to represent herself, affirming higher court review in equity:

> **Ms. Converse claimed her failure to appear for trial was due to excusable neglect.**

The United States Supreme Court has addressed the meaning of excusable neglect in the context of the federal rules of civil procedure. According to the Court, excusable neglect does not require a showing of blamelessness. **See Pioneer Inv. Servs., 507 U.S. at 394… Instead, excusable neglect may apply when a party's actions are attributable to negligence.** Id. Although the Court addressed excusable neglect under the federal rules, **our courts have looked to the federal courts for guidance in interpreting CR 60, since our state rule is analogous to the federal rule.** Pybas v. Paolino , 73 Wash. App. 393, 402…(1994). The United States Supreme Court's discussion of the excusable neglect standard is similar to one identified by the **Washington Supreme Court in Winstone v. Winstone, wherein it was recognized that negligence or carelessness does not prevent a court in equity from discretion to relieve a litigant from an adverse judgment.** 40 Wash. 272, 274 …(1905)."

Interpreting the United States Supreme Court's excusable neglect standard, the United States Court of Appeals for the Ninth Circuit has recognized that an ***unrepresented litigant's struggles with mental illness and lack of familiarity with the legal system can support a finding of excusable neglect.*** TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 699 (9th Cir. 2001), overruled on other grounds by Egelhoff v. Egelhoff ex rel. Breiner , 532 U.S. 141 …(2001). Absent evidence of a deliberate attempt to manipulate the legal system, **a party unfamiliar with the legal system who fails to respond during a time of *"extreme personal difficulty"* should not be considered culpable for purposes of the excusable neglect standard**. Id.2 The Ninth Circuit's observations are consistent with our own case law, which holds that **a pro se litigant who also suffers from a significant mental disability should not be held to the same standard as an attorney.** Carver v. State , 147 Wash. App. 567, 575…(2008)."

McFarland Farm Prop. Owners' Ass'n v. Ryan, 57231-1-II (Wash. App. Div II 1-9-24) UNPUBLISHED (See

GR 14.1 allows citation to unpublished post-3-1-13 cases as having precedential value)

…**Division Three has more generally held that in some circumstances, courts must treat pro se litigants with disabilities differently [than as lawyers] . Carver v. State, 147 Wn.App. 567, 575…(2008); In re Marriage of Gharst, 25 Wn.App. 2d 752, 759…(2023).**

…. More recently, in Gharst [Div. III] , a pro se litigant "filed a pro se motion for relief from judgment under CR 60(b) shortly after she failed to appear for her divorce trial," arguing excusable neglect and attributing "her nonappearance to a brain injury that was a result of a series of strokes." 25 Wn.App. 2d at 754. The court held that relief "from judgment based on excusable neglect requires an analysis of . . . a litigant's mental state" and noted "that a pro se litigant who also suffers from a significant mental disability should not be held to the same standard as an attorney." Id. at 759."

Appellant HERE, suffered from a stroke 2 years before trial, which profoundly impacted her mental capabilities and she suffers from intense emotional and psychological breakdowns that required hospitalization ***just a week before*** Declaration of Petitioner RE: Sealed Health Care Records; CP 481-484, Associated Sealed Health Care Records; CP 485-651**.** Appellant here, like in Gharst, has extreme difficulty using computers, email, and other forms of technology that, when she was earlier represented, her attorney would handle for her, but her attorney withdrew and she was left pro se at the

time of trial. This and her request to the Judge's Bailiff (who called her 3 working days before trial) for more time to hire an attorney because she could not understand the sharefile exhibits system of uploads or how to represent herself in the trial are explained in greater detail and citations in Appellant's Opening Brief and in Petitioner's Declaration, *id.*

Appellant HERE, at the time of trial, is "**a party unfamiliar with the legal system who fails to respond during a time of 'extreme personal difficulty' [who] should not be considered culpable for purposes of the excusable neglect standard**." *Gharst*, supra.

Appellant's suicidal state, hospitalization and mental and emotional instability constitutes an "extreme personal difficulty" (Declaration of Petitioner RE: Sealed Health Care Records, *id*.

(3) A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION OF THE STATE OF WASHINGTON OR OF THE UNITED STATES IS INVOLVED.

Constitutional issues can be raised at any point in the proceedings:

> "CR 51(f); RAP 2.5(a); Reed v. Pennwalt Corp., 93 Wash.2d 5… (1979).The issue of the effectiveness of trial counsel denying due process was first raised in the petition for review. **However, the question is appropriately raised at any point in the proceedings** and a conviction will be overturned if counsel was

so ineffective as to violate the defendant's right to a fair and impartial trial."

In Rideout v. Rideout, 150 Wn. 2d 337, (2003), the WA Supreme Court held:

…there are cases that stand for the proposition that appellate courts are in as good a position as trial courts to review written submissions and, thus, may generally review **de novo** decisions of trial courts that were based on affidavits and other **documentary evidence.**

In Sunnyside Valley Irr. Dist. v. Dickie, 149 Wash.2d 873 (2003) the WA supreme Court held:

"Questions of law and conclusions of law are reviewed de novo."

Here, Respondent Husband presented 25 trial exhibits of assets, but there was no cross- examination of husband and no testimony from wife and so no credibility comparison happened. Therefore, the Court of Appeals erred in not reviewing any of the trial exhibits showing the significant errors of the trial court in analyzing the facts–never got to the merits and should have de novo reviewed the facts as required by the WA Supreme court, above. Here, the Court of Appeals failed in its due to review de novo the documentary Trial EXs challenged here. See State v. Baker and State v Barge, quoted above.

Here, we are asking the court to require **de novo review** the division of assets and maintenance and intransigence based on the

Trial Exhibits and pleadings in the file in determining proper characterization, valuation and division, and for intransigence issues.

(4) THE PETITION INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE WASHINGTON SUPREME COURT.

Pro se litigants not showing up for trial has been rampant during COVID and this bad economic time when people cannot find or afford attorneys, appellants counsel himself has handled more than four of these reviews after one sided arbitrations or trials and this presents a substantial public interest when objections are not made at trial and the reviewing courts totally ignore the arguments and evidence clearly showing error that inequitable, unconstitutional decisions especially hiding behind a position that in an RAP was not cited when making those arguments and clearly showing error after error.

VI ATTORNEY FEES REQUEST

RCW 26.09.140 authorizes this court to award reasonable attorney fees after considering the parties' financial need and ability to pay. RAP 18.1 allows fees on appeal. Here, Wife has expended a good amount of fees to bring this appeal and as prevailing party will

be entitled to fees given the great disparity of their monthly cash flows.

VII CONCLUSION

Petitioner asks that this Court reverse the Court of Appeals decisions herein ,including award of attorney fees and costs to Respondent and vacate the superior court financial/assets division final judgments and the intransigence sanction and remand these issues back to the trial court and award attorney fees and costs to Petitioner for this Appeal at all stages.

VIII CERTIFICATE OF COMPLIANCE

I declare that this document contains 4,989 words per RAP 18.17 (c)(1) . I am filing an amendment to this by 10am next working day because something i n edits went wrong and we have to meet the 5pm today deadline.

DATED this 24th day of June, 2024 at Seattle, Washington.

/S/William C.Budigan
William C. Budigan, WSBA 13443
Attorney for Appellant Joyce Calhoun
(k/n/a Jeffery)
2601 42nd Avenue W
Seattle, WA 98199
(206) 284-5305

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of JOYCE LEE CALHOUN, Appellant, and ALLEN WALTER CALHOUN, Respondent.	No. 84785-6-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, A.C.J. — Joyce Calhoun challenges the findings and conclusions about a marriage entered by the trial court and the distribution of real and personal property directed in the final divorce order. Because she was not present at the trial on the dissolution of the marriage and does not argue that an exception to RAP 2.5 applies, her claims are not preserved for appeal and we affirm.

FACTS

Joyce and Allen Calhoun[1] married on March 15, 1968. On September 4, 2020, Joyce filed a petition for dissolution of the marriage in King County Superior Court and later filed an amended petition on December 24.

[1] For clarity, because they share the same last name, we refer to Joyce and Allen by their first names. No disrespect is intended.

On January 22, 2021, the trial court entered a temporary order addressing the community and separate property that required Allen to make $2,400 monthly spousal support payments to Joyce, allowed Joyce to continue residing in the family home, directed Allen to deposit $80,000 into the parties' joint checking account, and required Joyce and Allen to each pay 50 percent of the property taxes and homeowner's insurance on the family home. Although trial was originally scheduled for August 2, Allen and Joyce jointly requested that it be moved to November 1, in anticipation of successful mediation on July 12, and the request was granted.

Allen and Joyce engaged in mediation in the summer of 2021, but were unable to resolve the issues. They rescheduled private arbitration for November 30, filing a certificate of settlement without dismissal with the court. Arbitration was cancelled when Joyce's attorneys withdrew. Allen's attorney attempted to contact Joyce and reschedule arbitration twice but Joyce failed to respond. On April 14, Allen filed a motion to vacate the certificate of settlement and to reset a trial date. On May 3, the trial court granted the motion and set trial roughly for a year later on May 1, 2023. On June 24, the court granted Allen's request to reschedule the trial on the basis that the temporary family law order requiring maintenance and 50 percent of the property taxes was creating a financial hardship for him. The trial was set for November 7, 2022.

On October 21, Joyce presented to the hospital, concerned that she was experiencing a stroke. After she was medically cleared by physicians at the hospital, she was transferred to another facility on a voluntary basis for mental

health monitoring. Joyce was discharged on October 25 with various medical diagnoses and two psychiatric diagnoses. On November 2, a pretrial conference was held using a digital platform for remote proceedings. Joyce did not appear and the court noted that she had not responded to the bailiff's attempts to contact her. Joyce asserted, and subsequently presented medical documentation to support that, on November 7, she attended an appointment at another medical facility to follow up on her previous hospitalization for mental health care.

The dissolution trial was conducted remotely on November 9, 2022. Allen attended the trial but again Joyce did not appear. The judge mentioned that his bailiff had communicated with Joyce a few days prior and confirmed that Joyce had the information that she needed to join the trial, so the judge proceeded "with the assumption that she has chosen not to join us." During the trial, the court reviewed evidence of regular expenses and ascertained each party's source of income. On November 14, the court entered findings of fact and conclusions of law about the marriage, along with a final order characterizing and distributing the various assets and dissolving the marriage.

The court determined the total value of all assets in the marriage and ruled that Joyce must make a transfer payment to Allen as an offset in the property distribution because the judge allowed Joyce to remain in the marital home, which had been deemed a community asset. The court also ruled that Joyce would pay Allen the value of his retirement account and a marital lien payment. The court concluded that, after these payments, Allen would leave the marriage with $900,000 in assets and no interest in the home and Joyce would retain $1,246,990

in assets, which includes the value of the home. The court also terminated spousal maintenance payments to Joyce because it had awarded her $346,990 more than Allen in the property distribution. The final order established that Allen would retain all financial accounts and insurance policies established in his name and Joyce would retain all accounts created in her name as well as both of their accounts with an investment management company. At Allen's request, the court also ordered Joyce to pay reasonable attorney fees that Allen incurred subsequent to the failed arbitration. Joyce was mailed a copy of the final orders at the address of the marital home.

On December 12, 2022, Joyce filed an appeal as to the findings and conclusions about a marriage, the final divorce order, and "all prior and subsequent orders and judgments in the case." On August 11, 2023, while the appeal was pending in this court, Joyce filed motions in the trial court for reconsideration and to vacate the judgment pursuant to CRs 59 and 60, and for an order to show cause as to why a new trial should not be granted. On September 12, the trial court denied the motions, concluding that Joyce had not demonstrated mistake or excusable neglect for her failure to attend trial because there was established communication between her and the court that demonstrated that she was aware of the trial date.

On November 10, Joyce filed a motion with this court to amend her appeal to include challenges to the post-judgment order that denied the motion to vacate the trial orders. Allen opposed the motion to amend. On January 12, 2024, a commissioner of this court ruled that Joyce's new argument regarding the trial

court's postjudgment decisions must be addressed in a separate appeal, assigned a distinct case number to that appeal, and directed Joyce to file accompanying clerk's papers and statement of arrangements. Joyce filed an amended brief in this case, to which Allen objected on the basis that it impermissibly included argument related to the post-judgment decisions now the subject of the separate appeal. On February 5, the commissioner ruled that "Section V" of Joyce's amended brief possibly included argument related to postjudgment matters and ordered her to file a revised reply without such argument by February 16, 2024. At the time this panel considered the case, Joyce had not filed an amended brief complying with this directive.

ANALYSIS

Joyce appeals several of the findings and conclusions incorporated in the final divorce order "and all prior and subsequent orders and judgments in the case." As a threshold matter, the scope of our review in this case is necessarily limited to the assignments of error Joyce presents regarding the November 14, 2022 final divorce order and findings and conclusions about the marriage. Her challenges to any prior or subsequent orders, including the September 12, 2023 order denying her motion to vacate judgment, will not be considered here pursuant to the commissioner's directive that those issues be raised in a separate appeal.

Joyce assigns error to the trial court's valuation of the marital home based on Allen's testimony rather than a previous appraisal. She also argues that the trial court erred in terminating maintenance payments, ordering an award of attorney fees based on intransigence, and failing to award her half of the pensions

and life insurance policies. As she did not attend trial, each of these challenges is presented for the first time before this court. Failure to raise an issue before the trial court generally prevents a party from presenting it for the first time on appeal. RAP 2.5(a). "The purpose of this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials." *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447 (2001). Although RAP 2.5 generally serves as a procedural bar to appeal when a party does not object at trial, it can be circumvented if the appellant demonstrates that the trial court did not have jurisdiction, that the opposing party did not establish facts upon which relief could be granted, or that a manifest error affecting a constitutional right occurred. RAP 2.5(a). To satisfy the final exception, an appellant must identify the constitutional error and demonstrate that the error resulted in actual prejudice, meaning that there were practical and identifiable consequences at trial. *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).

Joyce did not appear for trial and, thus, did not present any evidence or raise any objections. Consequently, the trial court did not have the opportunity to consider the arguments that she now raises. More critically, Joyce fails to provide any argument on appeal as to why this court should reach the merit of her claims through an exception to RAP 2.5. Her sole reference to RAP 2.5 is found in her reply brief, where she refutes Allen's argument that it applies, asserting that "[a]ppeals of pre- and final orders and judgments, whether a party was present or not, definitely are reviewable by the court of appeals." She then contends that there is a "procedure for vacating judgments after trial when one does not appear,"

but that procedural mechanism is a motion to vacate judgment, which is not reviewable on this particular appeal. Accordingly, we decline to reach the merits of Joyce's arguments.

Finally, both parties request attorney fees on appeal pursuant to RAP 18.1. However, the rule expressly states that a party requesting fees "must devote a section of its opening brief to the request for the fees or expenses." The rule requires more than a bare request for the fees on appeal; "[a]rgument and citation to authority are required under the rule to advise the court of the appropriate grounds for an award of attorney fees as costs." *Boyle v. Leech*, 7 Wn. App. 2d 535, 542, 436 P.3d 393 (2019) (quoting *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d 9 (2012). Because Joyce does not prevail, she is not entitled to fees. Allen appears to seek fees on the basis that Joyce's appeal is frivolous, citing "the complete disregard for the rules and conventions of this [c]ourt" in briefing. Because the issues Joyce presents in this appeal were not preserved in the trial court and she failed to address the applicability of RAP 2.5 in her opening brief to establish an applicable exception, we award attorney fees to Allen subject to compliance with the procedural requirements of RAP 18.1.

Affirmed.

WE CONCUR:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of JOYCE LEE CALHOUN, Appellant, and ALLEN WALTER CALHOUN, Respondent.	No. 84785-6-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration on May 6, 2024. After review of the motion a panel of this court has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

BUDIGAN LAW FIRM

June 24, 2024 - 1:55 PM

Transmittal Information

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Appellate Court Case Number:	103,159-9
Appellate Court Case Title:	In the Matter of the Marriage of: Joyce Calhoun and Allen Calhoun

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