

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FORREST MICHAEL BURNARD,)	No. 67918-0-1
)	)
Respondent,	) DIVISION ONE
)	)
v.	)
)	) UNPUBLISHED OPINION
PATRICIA ANN BURNARD,	)
)	)
Appellant.	) FILED: January 22, 2013

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Schindler, J. — Patricia Burnard appeals the trial court's award of attorney fees in this dissolution action. Although the court did not abuse its discretion in awarding fees based on intransigence, we remand for clarification of the findings and the amount of attorney fees incurred from intransigence.

FACTS

Patricia Ann and Forrest Michael (Mike) Burnard married in 1979 and separated in 2010. Patricia filed a petition for dissolution in September 2010, and the court issued a case scheduling order setting trial for September 6, 2011.<sup>1</sup> Among other things, the order required the parties to disclose primary witnesses by June 7, 2011, and possible additional witnesses by July 5, 2011.

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<sup>1</sup> We refer to the parties by their first names for purposes of clarity and mean no disrespect by doing so.

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Mike timely filed his witness disclosures. Patricia, whose attorney withdrew in June 2011, proceeded pro se and failed to timely file her witness list.

Mike filed a motion in limine seeking to exclude testimony from witnesses Patricia did not timely disclose. In response, Patricia filed a motion in limine, seeking to exclude the opinion and expert testimony of several witnesses. Mike asked the court for \$1,800 in attorney fees for having to file his motion in limine and for having to respond to Patricia's "baseless" motion in limine. In support, he cited authority allowing attorney fees for an opposing party's intransigence.

In his trial brief, Mike again requested attorney fees for Patricia's intransigence, stating in part:

Ms. Burnard has exponentially increased the costs of litigation to both parties. Ms. Burnard filed a Motion for Temporary Orders after she removed funds from the parties' joint Charles Schwab account and did not give Mr. Burnard access to the accounts. . . . In his Response Mr. Burnard revealed that Ms. Burnard had withheld disclosure of two bank accounts at US Bank and one account at Washington Federal containing funds acquired during the marriage. He had to send subpoenas duces tecum to [the banks] to obtain records which showed that Ms. Burnard was concealing funds and arranging with Charles Schwab to link her individual Washington Federal checking account with the parties' Schwab accounts. Only after Mr. Burnard countered with this information did Ms. Burnard agree to financial restraints against herself . . . . She has filed a frivolous Motion in Limine to prohibit Mr. Burnard from using properly disclosed exhibits and witnesses ostensibly in retaliation for a properly based motion filed by Mr. Burnard. Mr. Burnard's counsel has had to respond to this frivolous motion. Ms. Burnard has submitted late exhibits, many of which are protected by ER 408 as they were settlement materials. . . .

Due to Ms. Burnard's uncooperativeness in this matter, Mr. Burnard's attempt at mediation was fruitless and a waste of time and money. . . .

Mr. Burnard's counsel . . . prepared documents that a petitioner typically prepares (Joint Confirmation of Trial Readiness and the Joint Statement of Evidence). Because Ms. Burnard has acted as a pro se litigant in this matter, the burden fell on Mr. Burnard's counsel to prepare

the disclosures by either party into one succinct statement of evidence. Mr. Burnard's counsel received late disclosures from Ms. Burnard causing additional work and additional attorney's fees, which included having to file a Motion in limine to exclude Ms. Burnard's untimely witnesses and exhibits.

Mr. Burnard should be compensated the attorney's fees he has had to incur to bring this case to a final resolution, as many of the fees were caused by Ms. Burnard's intransigence and lack of counsel and many [of] which have benefitted Ms. Burnard.<sup>[2]</sup>

Mike requested \$10,000 in fees for "unnecessary expense incurred throughout this litigation." Mike testified that he incurred over \$25,000 in attorney fees and costs but presented no evidence itemizing those fees.

In September 2011, the court conducted a bench trial. At the outset, the court struck any documents Patricia submitted relating to settlement negotiations and any exhibits she failed to provide in a timely fashion. During trial, Mike's counsel reiterated his bases for attorney fees. Patricia conceded "being not on time and not complying with all the rules."

On September 7, 2011, the court entered a decree of dissolution and subsequently entered amended findings of fact and conclusions of law. The court awarded Mike \$10,000 in attorney fees based on finding Patricia's intransigence resulted in additional attorney fees. Finding of Fact 2.15 expressly states:

[Patricia]'s intransigence has caused [Mike] to incur additional attorney fees. Further, [Patricia] has benefitted from the work performed by [Mike]'s counsel and it is fair and equitable that [Patricia] contributes to [Mike]'s attorney fees as ordered by the Court.

Patricia moved for reconsideration, arguing in part that the court failed to specify the intransigent acts on which it based its fee award. In its order on reconsideration,

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<sup>2</sup> Patricia vigorously disputes these claims in her reply brief on appeal.

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the court stated that “[t]he specific acts of intransigence committed by [Patricia] are as

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follows: as stated on the record.”

Patricia appeals the court's attorney fee award of \$10,000 to Mike.

#### ANALYSIS

Patricia contends the award must be reversed because the court entered inadequate findings to support the award, and because there was insufficient evidence to support a finding of intransigence.

A court may award attorney fees for “intransigence” if one party's intransigent conduct caused the other party to incur additional legal fees. In re Marriage of Bobbitt, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). Intransigence includes obstruction and foot-dragging, filing repeated unnecessary motions, or making a proceeding unduly difficult and costly. Bobbitt, 135 Wn. App. at 30. An award of fees for intransigence must be supported by findings. Bobbitt, 135 Wn. App. at 30; see Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998) (trial courts must exercise their discretion to award fees on articulable grounds and make an adequate record to review the award).

When awarding fees for intransigence, the court should segregate the fees caused by the intransigence from those incurred for other reasons. In re Marriage of Crosetto, 82 Wn. App. 545, 565, 918 P.2d 954 (1996). Segregation is not required, however, if intransigence permeates the entire proceedings. In re Marriage of Burrill, 113 Wn. App. 863, 873, 56 P.3d 993 (2002). The absence of adequate findings requires a remand to the trial court for entry of proper findings. Mahler, 135 Wn.2d at 435. An award of attorney fees is reviewed by this court for abuse of discretion. In re Marriage of Mattson, 95 Wn. App. 592, 604, 976 P.2d 157 (1999).

Patricia contends the trial court's fee award must be reversed because the court failed to enter findings specifying the acts of intransigence supporting the award. But the cases she cites do not require such findings. In re Marriage of Wright, 78 Wn. App. 230, 238-39, 896 P.2d 735 (1995), simply does not address the issue, and Bobbit is distinguishable. In Bobbit, the court did not make a finding of intransigence, but awarded \$10,000 in attorney fees "for the necessity of having to pursue this action." Bobbit, 135 Wn. App. at 23. Division Two of this court remanded to the trial court to provide "sufficient findings of fact and conclusions of law . . . for appellate review of a fee award." Bobbit, 135 Wn. App. at 30. Here, unlike in Bobbit, the court found Patricia's intransigence resulted in unnecessary fees, and a finding of intransigence is supported by the record.<sup>3</sup>

Patricia also contends the findings are inadequate as to the amount of the court's award because the court did not segregate the fee amounts due to intransigence from those incurred for other reasons. As noted above, the law requires either a finding that intransigence permeated the entire proceeding, in which case segregation is unnecessary, or findings segregating the fees due to intransigence from other fees. Because the court entered neither finding, we must remand for it to do so.

On remand, the trial court must also clarify the extent to which the court's award is based on grounds other than intransigence or equity. The court should also enter findings supporting the amount of those fees, Mike's need for them, and Patricia's

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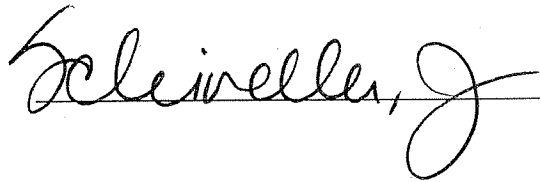
<sup>3</sup> In her reply brief, Patricia challenges the assertions supporting intransigence but concedes the motion in limine she filed was without justification. A declaration from Mike's counsel indicates that the motion in limine resulted in unnecessary fees of at least \$1,125.

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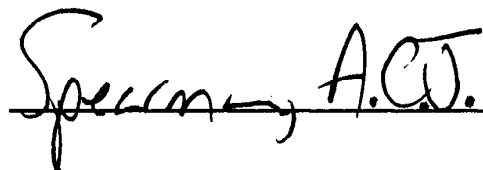
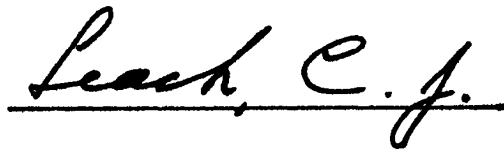
ability to pay. Mattson, 95 Wn. App. at 604 (although need and ability to pay are irrelevant to an award of fees based on intransigence, they are relevant to other bases for fees). The court's finding that "[f]urther, [Patricia] has benefitted from the work performed by [Mike]'s counsel and it is fair and equitable that [Patricia] contributes to [Mike]'s attorney fees as ordered by the Court," is ambiguous. It is unclear whether this finding relates to intransigence or some other basis for fees.

Mike's motions to strike Patricia's statement of the case and several addenda to her reply brief are denied.<sup>4</sup> His request for fees on appeal is also denied.

We conclude the trial court did not abuse its discretion in awarding attorney fees based on intransigence. However, we remand for clarification of the findings and the amount incurred from the intransigence.



WE CONCUR:



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<sup>4</sup> Under RAP 10.3(a)(8) and RAP 10.4(c), "[a]n appendix may not include materials not contained in the record on review without permission from the appellate court," unless the material is text from "a statute, rule, jury instruction, finding of fact, exhibit, or the like." Though they are not part of the record on review, the challenged appendices at least arguably come within the exception in RAP 10.4(c) for statutes, regulations, instructions, exhibits, "or the like."