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CONSOLIDATED

No. 61951-9-1

No. 62556-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LAWRENCE A. EDWARDS.

Appellant

v.

JULEA EDWARDS,

Respondent

RESPONDENT'S RESPONSE BRIEF
Amended to include Clerk's Papers designations

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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I

TABLE OF CONTENTS

I. Statement of the case..... 1

II. Chronology relevant to the appeal..... 1

III. Argument 5

A. The May 23, 2008 and June 12, 2008 orders should be affirmed..... 5

1. If the father wanted to be relieved of his agreement to pay for college, he should have sought to modify the child support order...... 6

2. While not required to do so, the court properly considered the statutory factors in requiring the father to contribute to his daughter’s college costs...... 7

3. The court properly rejected the father’s claim of impecuniosity...... 9

4. The mother timely filed the motion and the daughter was not an indispensable party...... 10

5. Father’s contract defense was properly rejected...... 11

6. The father’s constitutional objections to paying a share of his daughter’s college must be rejected...... 13

7. The award of attorney’s fees is justified...... 13

8. Conclusion...... 14

B.	The October 3, 2008 order denying the Motion to Vacate should be affirmed.....	14
1.	<u>The trial court properly denied the Motion to Vacate because the motion simply rehashed the same arguments advanced at the May 23rd hearing and the June 12th motion for revision.....</u>	14
2.	<u>The father’s alleged “efforts” to exercise his residential time with the parties’ youngest daughter was simply a set-up to file a contempt motion against the mother and a pretext to argue that the mother made “misrepresentations” to the court on May 23rd.....</u>	17
3.	<u>The award of attorney’s fees was appropriate based on the father’s bad faith.....</u>	18
C.	The award of fees in the denial of the <i>Motion for Contempt</i> should be affirmed.....	19
IV.	The father’s claim that the mother has engaged in delay tactics and he has been prejudiced.....	21
V.	The mother requests fees on appeal.....	22
VI.	Conclusion.....	22

TABLE OF AUTHORITIES

CASES

<i>In re Marriage of Scanlon and Witrak</i> 109 Wn.App. 167 (2001).....	7
<i>In Marriage of Kelly</i> 85 Wn.App. 785 (1997)	10
<i>Highlands Plaza, Inc. v. Viking Investment Corp.</i> 72 Wn.2d 865 (1967).....	11
<i>Eggers v. General Refrigeration Co.</i> 123 Mont. 205, 210 P.2d 636 (1949).....	11
<i>Refrigeration Engineering Co. v. McKay</i> 4 Wn.App. 963, 971 (1971).....	12
<i>Hunter v. Hunter</i> 52 Wn.App. 265, 274 (1988).....	14
<i>Sacotte Construction v. National Fire and Marine Ins. Co.</i> 143 Wn.App. 248 (2008).....	15
<i>In re Marriage of Kelly</i> 85 Wn.App. 785 (1997).....	16
<i>Eide v. Eide</i> 1 Wash.App. 440, 445, 462 P.2d 562 (1969).....	19
<i>In re Marriage of Morrow</i> 53 Wash.App. 579, 590, 770 P.2d 197 (1989).....	19
<i>Chapman v. Perera</i> 41 Wash.App. 444, 455-56, 704 P.2d 1224, <i>review denied</i> , 104 Wash.2d 1020 (1985).....	19
<i>In re Marriage of Pennamen</i> 135 Wn. App. 790 (2006).....	19

STATUTES

RCW 26.09.175.....7
RCW 26.19.090..... 7
RCW 26.09.140..... 13
RCW 26.18.160..... 14
RCW 26.09.160(4)..... 20
RCW 26.09.160 20

COURT RULES

CR 60(b)(1), (3), (4), (5) and (11)..... 15
CR 59(b)..... 15

OTHER SOURCES

Restatement of Contracts s 295 (1932)..... 11
5 S. Williston Contracts § 677 (3d ed.) 224, 225 (1961)..... 11

I. Statement of the Case.

The father and mother agreed to pay for their daughters' college education. That agreement was memorialized in the child support order. When their oldest had been accepted at the University of Washington, the mother sought to enforce the agreement and the order. The father, an attorney, vehemently opposed paying and put forth all manner of objections. The commissioner ordered him to pay his pro rata share. The father took it up on revision and the order was affirmed. The father then sought to vacate the order, which was denied. The father then "staged" a scene so he could file a motion for contempt. That motion was denied as well. The father then appealed all 4 orders.

In short, the father agreed to pay for college. If he wanted to change that, he needed to file a petition to modify – not complain when he is held to his agreement.

II. Chronology relevant to the appeal.

The following chronology, drawn from the various pleadings that are part of the record, should be helpful to the court.

July 2001 - The parties settle all aspects of the divorce, including an "Agreed Final Order of Child Support." CP 1. The parties agreed to section 3.14 which provides: "The parents shall pay for the post secondary

educational support of the child(ren). Post secondary support provisions will be decided by agreement or by the court.”

2001 – 2005 – The father’s relationship with the parties’ two daughters slowly deteriorates due to the father’s behavior. CP 754-760 .

June 2005 – The parties’ two daughters write a letter to their father expressing their feelings that their father did not care about them. The girls hoped it would start a dialogue between them and their father. CP 758.

June 7, 2005 – The father and his new wife send an email to the girls telling them they got the letter and basically saying “have a nice life.” CP 762-763.

August 2005 – The father and his new wife move from Bothell to southern California.

November 2005 – The youngest daughter visits her father in California. She does not want to return because of the bad things that were said about her older sister and her mother. CP 759.

January 27, 2006 – The child support order is amended. CP 666-680.

Section 3.14 of the 2006 Order states, “The parents shall pay for the post secondary educational support of the child(ren). Post secondary support provisions will be decided by agreement or by the court.” This

was the same language that was contained in the 2001 Order of Child Support.

2007 – The mother wrote several letters to the father and told him the girls need him and she asks him to re-establish contact with them. CP 764-768.

Christmas 2007 – The mother sent the father a Christmas card that included a Christmas picture of the girls. The father mailed back the card and the Christmas picture and he also returned all of the girls' baby photos. The girls were devastated. CP 759.

May 2008 – The mother filed a motion to enforce the Child Support order regarding payments of the oldest daughter's college expenses. CP 687-753.

May 23, 2008 – The motion is heard by Commissioner Sellers who grants the motion and issued an order requiring the father to contribute 43% towards the daughter's college expenses. CP 774-776.

June 12, 2008 – The father moved to revise the May 23, 2008 order and Judge Doerty heard argument. Judge Doerty denied the motion for revision. CP 777-778.

July 10, 2008 – Father files a notice of appeal from the June 12, 2008 order.

July 2008 – After years of no contact, the father suddenly began demanding his 4 weeks of visitation with the parties’ youngest daughter. The mother suggests a slow reintegration due to the fact that they had not seen each other in several years. The father makes no request for contact with his oldest daughter. CP 488.

August 1, 2008 – Father travels to Seattle and appeared before Judge Doerty, without notice to mother, asking for an order “reaffirming” the validity of the parenting plan. Judge Doerty states that father must give the mother notice of his motion. Appendix to father’s Opening Brief, p. 8. Judge Doerty signs an Order to Show Cause re mother’s contempt for failure to comply with the parenting plan. The father makes no effort to see either daughter on this trip even though he told Judge Doerty he was in Seattle for the entire weekend. Appendix, p. 9.

August 8, 2008 – The father serves the mother with a *Motion for Contempt* and a *CR 60 Motion* and noted them for August 22, 2008.

August 11, 2008 – Due to counsel’s unavailability mother asks father to continue the motions. Father refuses forcing mother to file a motion for continuance and motion to shorten time. CP 779-784.

August 18, 2008 – Judge Doerty grants the continuance and sets both motions for September 12, 2008. CP 779-784.

September 12, 2008 – Judge Doerty heard the *Motion for Contempt* and the *CR 60 Motion* and denied both.

October 3, 2008 – Judge Doerty enters orders based on the September 12th hearing.

November 6, 2008 – Father filed a notice of appeal from the October 3, 2008 orders.

January 5, 2009 – The two appeals were consolidated.

III. Argument.

The father has 2 challenges: 1) to the court's orders on May 23 and June 12, 2008; and 2) to the court's order on Contempt and the order on CR 60 entered on October 3, 2008. For clarity's sake, the mother will address her arguments in support of the orders in chronological order.

A. The May 23, 2008 and June 12, 2008 orders should be affirmed.

There were a number of issues raised in the mother's motion which the court ruled on at the May 23, 2008 hearing. The father challenges only the court's order as it relates to 1) rejecting his contract defense to the Child Support Order, 2) requiring him to pay a pro rata share of college expenses and 3) the award of attorney's fees. [Appellant's Opening Brief, Argument D – N.]

1. If the father wanted to be relieved of his agreement to pay for college, he should have sought to modify the child support order.

In 2001 the father entered into an agreed order of child support and in that order, he agreed to pay for college. The provision was carried through in the 2006 order of child support. The exact language is: “**The parents shall pay** for the post secondary educational support of the child(ren). Post secondary support provisions will be decided by agreement or by the court.” [emphasis added.]

Because of the father’s refusal to abide by the agreement in the order, the mother sought to enforce that agreement in court. The father then protested and protested, and then protested some more – he made all sorts of arguments as to why he should not be held to his agreement. But the court on May 23rd enforced the agreement the father already made by determining how much he should contribute.

If the father wanted to change the court order so that he was relieved of his duty to pay, the proper avenue would have been to file for a modification of the child support order.

26.09.175. Modification of order of child support

(1) A proceeding for the modification of an order of child support shall commence with the filing of a petition and worksheets. The petition shall be in the form prescribed by the administrator for the courts. There shall be a fee of twenty dollars for the filing of a petition for modification of dissolution.

(2) The petitioner shall serve upon the other party the summons, a copy of the petition, and the worksheets in the form prescribed by the administrator for the courts

“Modification action is commenced by service of a summons and petition and is resolved by trial.” *In re Marriage of Scanlon and Witrak*, 109 Wn.App. 167 (2001).

The father did not file for modification. The court properly enforced his agreement to pay a portion of his daughter’s college costs.

2. While not required to do so, the court properly considered the statutory factors in requiring the father to contribute to his daughter’s college costs.

Because the father had agreed to contribute to his daughter’s college education the court was not required to consider the factors of RCW 26.19.090 “Standards for postsecondary educational support awards.” But the court did consider the statutory factors and reached the proper conclusion.

(2) When considering whether to order support for postsecondary educational expenses, the court shall determine whether the child is in fact dependent and is relying upon the parents for the reasonable necessities of life. The court shall exercise its discretion when

determining whether and for how long to award postsecondary educational support based upon consideration of factors that include but are not limited to the following: Age of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities or disabilities; the nature of the postsecondary education sought; and the parents' level of education, standard of living, and current and future resources. Also to be considered are the amount and type of support that the child would have been afforded if the parents had stayed together.

The mother presented evidence that the father has a bachelor's degree, a master's degree and a J.D. She testified that when they were married they paid the full cost for his son [from his first marriage] to attend college. The mother testified that the daughter was an honors student in high school and had been accepted into the University of Washington. The mother testified the daughter had received a loan for \$2,704 for her freshman year at the University of Washington and that she had applied for about 25 scholarships and that she was an honors student. The mother testified that Jacquelyn had worked since June of 2007 but the money she earned she used to pay for her car insurance, gas and her spending money. CP 760.

The commissioner found: "that based upon the fact that the father has 3 post secondary degrees including a J.D. and that Jacquelyn is an honors student and that she has been accepted to the University of Washington, and based on the parties income, it is appropriate for the

father to contribute to the cost of Jacquelyn's post secondary education.”

CP 774-776.

3. The court properly rejected the father's claim of impecuniosity.

The father claimed he could not pay anything for college, but he failed to persuade the commissioner of that fact. Again, given that the father had agreed to pay for college, the court was not required to consider his ability to pay as it was not relevant. If the father wanted to change the court order so he was not obliged to contribute to college, he should have moved to modify the child support order. He did not do that. So in addition to the father's own agreement to pay for college, the court had sufficient evidence to require the father to contribute.

The evidence before the court was that the father's financial declaration in May 2008 claimed he was only making \$20,000 per year. But the mother argued it was impossible to verify his actual income. Sub CP 760. The father did produce his 2007 W-2s but he redacted the name of all but one of his many employers [he teaches at a number of community and 4 year colleges in the greater Los Angeles area]. Why would he redact the name of his employers? So his current income could not be verified. The father is a lawyer – he knows what to do. Yet, the redacted W-2's for 2007 show he made almost 3 times what he claimed as

income in 2008 – in 2007 he made \$58,434. CP 220. The evidence before the court included the mother’s testimony that the last year the parties were married the father made approximately \$200,000. CP 760.

The court properly rejected the father’s claim that he was too poor to pay.

4. The mother timely filed the motion and the daughter was not an indispensable party.

The father argued that the mother was required to file the motion before Jacquelyn turned 18 and that the daughter was an indispensable party; he cites *In Marriage of Kelly*, 85 Wn.App. 785 (1997) for both propositions. In the case at hand, the child support order stated that support shall be paid “until the children reach the age of 18 or as long as the children remain enrolled in high school, whichever occurs last.” The mother filed her motion before the daughter graduated from high school. But given the father’s express agreement to pay for college, that was not necessary.

Further, contrary to the father’s claim, *Kelly* does not state that the child is an indispensable party. On the contrary, the court expressly stated: [the child] was not a necessary party . . . If the Legislature had intended to make adult children necessary parties to support proceedings, it could have easily expressed itself.” *Id.* at 791.

5. Father's contract defense was properly rejected.

The father argues that he was not required to contribute to his daughter's college education because he had no relationship with her. He argues that having a "relationship" is an implied condition precedent to his duty to contribute to college costs, and absent a "relationship" his performance is excused. While an interesting and novel argument, it misses the mark - there was no contract between father and daughter. The father cannot invent a contract and then claim the daughter is bound by a condition precedent.

Even if there is a condition precedent, the father's behavior is the reason there is no relationship, therefore, his duty to perform is not excused.

The failure or nonoccurrence of the condition would not excuse the promisor's performance on the contract if the failure of such condition was due to the fault of the promisor. Restatement of Contracts s 295 (1932); *Highlands Plaza, Inc. v. Viking Investment Corp.*, 72 Wn.2d 865 (1967); *Eggers v. General Refrigeration Co.*, 123 Mont. 205, 210 P.2d 636 (1949).

A statement of the rule found in 5 S. Williston Contracts § 677 (3d ed.) 224, 225 (1961) is applicable to this case:

It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own

liability depends, he cannot take advantage of the failure.

In reflecting upon this jural proposition, a federal court has observed that ‘Where liability under a contract depends upon a condition precedent one cannot avoid his liability by making the performance of the condition precedent impossible, or by preventing it.

Refrigeration Engineering Co. v. McKay 4 Wn.App. 963, 971 (1971).

There was sufficient evidence before the court on May 23rd that the father was the cause of the relationship failure. The mother testified at length about how the relationship slowly deteriorated and how the girls tried to have a discussion with their father about it. The mother testified that the father essentially terminated his relationship and despite her pleas that he re-establish contact, he refused. The mother testified that in 2007 she sent the father a Christmas card with the girls’ Christmas picture but the father returned the card, the picture and the girls’ baby pictures. The girls were devastated. CP 757-759. Additionally, Judge Doerty specifically found, on the very same evidence, that “the father has been the primary cause in the failure of his relationship with his children and the reason they do not want to see him.” CP 789-790.

The court properly rejected the father’s argument that his duty is conditioned upon his daughter’s performance of a condition precedent.

6. The father's constitutional objections to paying a share of his daughter's college must be rejected.

The father *agreed* to pay a part of his children's college costs. The trial court simply enforced that obligation. The constitutional arguments are meritless.

7. The award of attorney's fees is justified.

a. RCW 26.09.140 authorizes an award of fees.

RCW 26.09.140 authorizes an award of fees based on need and ability to pay. The mother and the father's financial declarations and records were before the trial court. The father argued that he was too poor to pay for anything – the trial court rejected his argument. The evidence shows that the mother had need and the father had the ability to pay. See section A-3 above. The court rejected the father's claim that he could not pay.

The mother submitted evidence that the attorney's fees incurred in preparing the motion were \$1,144. CP 692. The mother then submitted evidence that the attorney's fees for reading and analyzing the father's lengthy response, drafting the reply, preparing for and attending the hearing were an additional \$2,750 for total fees of \$3,894. CP 761. The court awarded \$2,000 of the requested \$3,894 in fees. CP 774-776.

Judge Doerty had the same evidence before him when he denied the motion for revision and he awarded \$500 in fees. CP 777-778.

- b. RCW 26.18.160 authorizes an award of fees without regard to need or ability to pay.

The mother is entitled to an award of fees pursuant to RCW 26.18.160 which states: "In any action to enforce a support or maintenance order under this chapter, the prevailing party is entitled to a recovery of costs, including an award for reasonable attorney fees." An award under this statute does not require that it be based on showing of one party's need or other's ability to pay. *Hunter v. Hunter*, 52 Wn.App. 265, 274 (1988). The trial court's two awards of fees for \$2,000 and \$500 are not an abuse of discretion.

8. Conclusion.

There is substantial evidence to support the court's May 23, 2008 order and to support Judge Doerty's denial of the motion for revision entered on June 12, 2008. Both orders should be affirmed in all respects.

B. The October 3, 2008 order denying the Motion to Vacate should be affirmed.

- 1.) The trial court properly denied the Motion to Vacate because the motion simply rehashed the same arguments advanced at the May 23rd hearing and the June 12th motion for revision.

The father relied upon CR 60(b)(1), (3), (4), (5) and (11) in asking the court to vacate the May 23 and June 12 orders. CR 60(b) provides:

60(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud: Etc.

On motion and upon such terms as are just, the court may relieve party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes; inadvertence, surprise, excusable neglect or irregularly in obtaining a judgment or order;

...

(3) Newly discovery evidence which by due diligence could not have been discovered in time to move for a new trial under CR 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of the adverse party;

(5) The judgment is void;

...

(11) Any other reason justifying relief from the operation of the judgment.

To prevail on a CR 60 motion, Mr. Edwards must show that that there is substantial evidence to support at least a prima facie defense to the claim asserted. *Sacotte Construction v. National Fire and Marine Ins. Co.*, 143 Wn.App. 248 (2008). On May 23rd Commissioner Sellers heard his defenses and ruled against him. Judge Doerty then heard his defenses on revision and ruled against him. Mr. Edwards offered nothing new in the *Motion to Vacate*.

Mother's financial disclosures - All of the alleged issues the father now raises about the mother's financial declaration could have and should have been raised for the May 23, 2008 hearing before Commissioner Sellers. None of the issues about the mother's financial disclosure fall within CR 60(b).

The Orders are void – The father claims that Jacquelyn, the daughter bound for college, was a necessary party to the mother's motion. The father argued this on May 23rd before Commissioner Sellers and he lost. *In re Marriage of Kelly*, 85 Wn.App. 785 (1997) held that parties' college-aged daughter was not a necessary party to ex-wife's proceeding for modification of child support; court was able to afford complete relief to parties without joinder of daughter, and legislature did not expressly make adult children necessary parties to support proceedings. Thus, the court was correct, Jacquelyn was not a necessary party.

Misrepresentations and Irregularity – The alleged misrepresentations by the mother were in reality disputed fact issues. There was no ex parte contact with Commissioner Sellers; but even if there was, it was over 3 years prior to the May 23rd hearing and it related only to scheduling a continuance of a hearing in 2005 - it had no bearing on the issues before the court in May, 2008.

2. The father's alleged "efforts" to exercise his residential time with the parties' youngest daughter was simply a set-up to file a contempt motion against the mother and a pretext to argue that the mother made "misrepresentations" to the court on May 23rd.

The father claims that the mother's statements to the court on May 23 that she wanted the father to re-establish contact with his daughters was a "misrepresentation." So in July, two months later and after years of no contact, the father suddenly demanded to see his youngest daughter. Interestingly, he made no request to see his oldest daughter, who had turned 18. The father's was "staging" a contempt motion.

After losing the motion on May 23rd, the father was very angry. He lost the revision motion on June 12th, he again was angry. Then just one month later, in July, the father suddenly started demanding 4 weeks of visitation with his 16 year old daughter whom he has not seen in years. The father's request was not because he really wanted to see his daughter, it was a set up – he wanted to set the mother up for a contempt action.

Besides the uncanny timing of his sudden desire to see his daughter, the other reason it is clear he had no sincere desire to see her is that he was in Seattle at least twice during the summer of 2008 and he made no effort to call her, stop by the house, ask her to dinner – he made absolutely no effort to see her. Nor did he make any effort to see the parties' adult daughter. CP 488.

The father was in Seattle on Thursday June 12, 2008 as he appeared in court to argue his Motion to Revise. In addition, the father was in Seattle the weekend of August 1st when he appeared before Judge Doerty. The father told Judge Doerty that he was again in town the entire weekend of August 1st. Appendix to father's Opening Brief p 9. Did he call his daughter on either visit? No. Did he stop by the house on either visit? No. Did he ask either daughter to dinner on either visit? No. CP 488.

Thus, it is obvious that the father has no real interest in seeing his daughter. The father simply wanted to make a show that the mother was in contempt and that she "misrepresented" her desire that the father re-establish contact with his daughters.

3. The award of attorney's fees was appropriate based on the father's bad faith.

The trial court ruled that the father's *Motion to Vacate* was a rehash of the arguments he made at the May 23rd hearing and at the June 12th hearing. Other than the "staged" misrepresentation issue, there was nothing new. As a result, the court found that the father brought the motion in bad faith.

A trial court may consider whether additional legal fees were caused by one party's intransigence and award attorney's fees on that basis.

Eide v. Eide, 1 Wash.App. 440, 445, 462 P.2d 562 (1969). “When intransigence is established, the financial resources of the spouse seeking the award are irrelevant.” In re Marriage of Morrow, 53 Wash.App. 579, 590, 770 P.2d 197 (1989). Awards of attorney fees based upon the intransigence of one party have been granted when the party engaged in “foot-dragging” and “obstruction”, as in Eide, 1 Wash.App. at 445, 462 P.2d 562; when a party filed repeated motions which were unnecessary, as in Chapman v. Perera, 41 Wash.App. 444, 455-56, 704 P.2d 1224, review denied, 104 Wash.2d 1020 (1985); or simply when one party made the trial unduly difficult and increased legal costs by his or her actions, as in In re Marriage of Morrow, supra at 591, 770 P.2d 197.

The court may consider whether the intransigence or other conduct of a spouse caused the other spouse to incur additional attorney fees. To prove intransigence, one must show the other party acted in a way that made trial more difficult and increased costs, like repeatedly filing unnecessary motions. In re Marriage of Pennamen, 135 Wn. App. 790 (2006).

The father’s conduct in filing a motion that was a rehash of two prior motions was intransigent, in bad faith and unnecessarily increased the mother’s fees. The award was proper.

C. The award of fees in the denial of the *Motion for Contempt* should be affirmed.

The father filed a motion for contempt when the mother refused to allow their youngest daughter to leave for 4 weeks of visitation when the father had no contact with her for several years. The court denied the motion and found that: “the father is the primary cause of the failure of his relationship with his children and the reason they do not want to see him. Per RCW 26.09.160(4) the mother has a reasonable excuse for failing to comply with the parenting plan regarding visitation with Nilea.” The court awarded the mother \$2,000 in fees. CP 789-790.

On appeal the father claims that the trial court found he acted in bad faith in bringing the motion for contempt [Appellant’s Opening Brief, Argument A] – but the court made no such explicit finding. But based upon the record, the court implicitly found bad faith and properly awarded fees. As described above, the father’s efforts to see his daughter were “staged” – designed solely to provide the basis for a motion for contempt. Thus, the contempt motion was certainly in bad faith and unnecessarily increased the mother fees and justified and award of fees.

In addition, RCW 26.09.160 provides for an award of fees. The statute states:

(7) Upon motion for contempt of court under subsections (1) through (3) of this section, if the court finds the motion was brought without reasonable basis, the court shall order the moving party to pay to the nonmoving party, all costs, reasonable attorneys' fees, and a civil penalty of not less than one hundred dollars.

The trial court has considerable discretion with respect to attorney fees. The mother was the prevailing party on a contempt motion and was entitled to fees.

IV. The father's claim that the mother has engaged in delay tactics and he has been prejudiced is without merit.

The mother filed a motion for a 30 day extension to file her response brief. The father filed a 22 page objection claiming the mother had a pattern of engaging in delay tactics and that he was prejudiced by the continuance. The father claims the mother was not timely in filing her responsive pleadings for the September 12, 2008 hearing that resulted in the October 3rd orders. The mother sent her responsive pleadings to the father via USPS with guaranteed delivery by noon. The mother had no control if the delivery was a few hours late. In any event, the father received courtesy copies via email before the deadline. He suffered no prejudice.

The father has not been prejudiced by this short 30 day delay in filing her response brief.

V. The mother requests fees on appeal.

Pursuant to RCW 26.09.140 the mother requests an award of fees on appeal. The mother has need and the father has the ability to pay.

Pursuant to RCW 26.18.160 the mother requests an award of fees on appeal. The mother has incurred fees in enforcing a child support order. Need and ability to pay are not factors for consideration.

The mother asks for an award of fees for the father's bad faith.

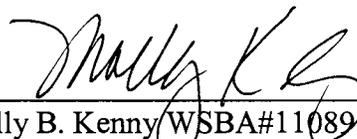
Finally, pursuant to RCW 26.09.160 the mother asks for an award of fees as the successful non-moving party defending against a contempt motion.

VI. Conclusion.

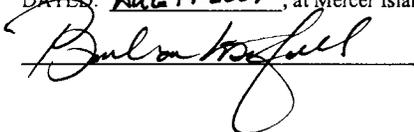
The mother asks the court to affirm the orders.

DATED this 19 day of August, 2009.

LAW OFFICES OF MOLLY B. KENNY

By: 
Molly B. Kenny WSBA#11089
Attorneys for Julia Edwards

CERTIFICATE OF SERVICE
On this day I sent by U.S. Mail, postage prepaid
 Legal Messenger Fax a copy of the document
on which this certificate is affixed to the attorneys of record.
I certify under penalty of perjury under the laws of the
State of Washington that the foregoing is true and correct.
DATED: Aug 19 2009, at Mercer Island, Washington.



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