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ORIGINAL

No. 66510-3-I
King County Superior Court No. 04-3-01252-3SEA

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

KENNETH KAPLAN,
Petitioner-Appellee,
v.

SHEILA KOHLS,
Respondent-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable James Doerty

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

- 1) The trial court erred in finding Kohls in contempt of the child support order.
 - a) The record cannot support a finding that Kohls intentionally violated in bad faith any clear provision of the order.
 - b) In addition, the trial court abused its discretion procedurally because the initial order on revision did not find Kohls in contempt of the child support order, and Kaplan's motion for reconsideration did not raise this issue. Kaplan first brought it up in his reply on his motion for reconsideration, when Kohls had no opportunity to respond.
- 2) The trial court erred in finding Kohls in contempt of the parenting plan.
 - a) The record cannot support a finding that Kohls intentionally violated any clear provision of the plan.
 - b) To the extent that ruling is based on a factual finding that Kohls acted in "bad faith" it is not supported by the record.
- 3) Even if the findings of contempt were valid, the trial court's purge conditions are improper.

- 4) The trial court erred in denying Kohls' motion to enforce the portion of the child support order requiring Kaplan to pay the majority of the uninsured portion of Dr. Varley's fees.
 - a) Under any interpretation of the evidence, Kaplan clearly failed to pay his share of the fees.
 - b) The trial court's ruling was also procedurally flawed because Kaplan submitted evidence to the superior court that was not submitted to the commissioner.
- 5) The trial court's award of over \$13,000 in costs and legal fees to Kaplan was an abuse of discretion.
 - a) To the extent the trial court's ruling was based on a finding that Kohls' motion to enforce child support obligations was "retaliatory," that finding is not supported by the evidence.

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1) Does the record support a finding of contempt against Kohls?
- 2) Assuming that the trial court's findings of contempt are valid, are the purge conditions nonetheless improper?

- 3) Did the trial court abuse its discretion in denying Kohls' motion for enforcement of the child support provisions regarding Dr. Varley's fees?
- 4) Assuming, for the sake of argument, that the trial court's underlying rulings were correct, did it abuse its discretion in awarding over \$13,000 in fees and costs to Kaplan?

III. STATEMENT OF THE CASE

A. BACKGROUND

This Court summarized some of the history of this case in its most recent ruling in *Marriage of Kaplan and Kohls*, No. 64114-0-I, 158 Wn. App. 1021, 2010 WL 4290447 (Nov. 1, 2010), *review denied*, 171 Wn.2d 1004, 249 P.3d 181 (March 3, 2011).

Kenneth Kaplan and Sheila Kohls were married in May 1992. The court dissolved their marriage in March 2005. Kohls and Kaplan have two children, a daughter, I.K., and a son, Z.K. At the time of the dissolution decree, the court also approved an agreed parenting plan, designating Kohls as the primary residential parent and providing for joint decision-making on major decisions. The dispute resolution provisions of the parenting plan provide that if the parties cannot reach agreement, they are first required to participate in mediation with either a designated mediator or another agreed individual. If mediation fails, they are then required to arbitrate.

Shortly after the parenting plan was entered by the court, a dispute arose between the parties regarding the appropriate course of medical evaluation and treatment for their daughter, I.K. When the parties were unable to agree on a mutually acceptable course for addressing the problem through the ADR process designated in the parenting plan, Kohls filed a petition to modify the parenting plan, seeking sole decision-making authority. She submitted a declaration in support of her petition, alleging that joint decision-making had become impossible. She claimed that Kaplan used the joint-decision making power as a weapon to harass her and that, as a result, necessary and important decisions regarding the children were delayed.

Id. at *1 (footnotes omitted).

The superior court initially found no adequate cause for modification but this Court reversed, finding “evidence in the record that this mechanism may not be working as intended.” *Id.* at *2. “Moreover, there is evidence in the record that the delays caused by the alleged ineffectiveness of the mechanism may have an adverse impact on the children.”

On remand, superior court judge James Doerty held a trial and concluded that the parenting plan should not be modified. *Id.* The trial court denied Kaplan’s motion for CR 11 sanctions against Kohls for bringing the motion to modify the parenting plan. *Id.* This Court upheld the trial court’s rulings. It found that “there is absolutely nothing in this record to justify the imposition of sanctions against former counsel or

Kohls for violation of CR 11.” *Id.* at *6. This Court also found that the trial court did not abuse its discretion in denying the petition for modification. *Id.* at *10.

The instant appeal involves Kaplan’s new motion for contempt and Kohls’ new motion to enforce child support obligations. At the time these motions were filed, Z.K. was 15 and I.K. was 12. CP 124. Although some hearings and pleadings address both motions, Kohls will set out the facts and procedural history for each motion separately, in the interest of clarity.

B. KAPLAN’S MOTION FOR CONTEMPT

On June 2, 2010, Kaplan filed a motion for a finding that Kohls was in contempt of the parenting plan and the order on child support. 2nd Supp. CP¹ ___ (Dkt. 321, 6/2/10 Order To Show Cause Re Contempt). He alleged that Kohls violated the joint decision making provision of the parenting plan by making doctors’ and dentists’ appointments for the children without notifying him in advance. CP 4-6. Among the examples was an appointment for the son, Z.K., to see his pediatrician for a headache. This is the only appointment for which Kohls was ultimately found in contempt. It is undisputed that Kohls notified Kaplan of the

¹ “2nd Supp. CP” refers to documents designated in the Appellant’s Second Supplemental Designation of Clerk’s Papers filed today in King County Superior Court.

appointment for January 15, 2010. According to Kaplan, he said he would take Z.K. to it. CP 5. His only proof that he wished to take Z.K. was a handwritten note that he claimed to have delivered to Kohls. CP 67. Kaplan alleged that Kohls then switched the appointment to the day before without telling him. CP 5-6.

Kaplan also maintained that Kohls was in violation of the child support order because she refused to pay \$188.63 for her share of the children's books. CP 6-7. As Kaplan acknowledged, the child support order requires Kohls to pay 28% of educational expenses, but only "to the extent petitioner proves he has no funds for this purpose paid by his father." CP 6. *See also*, CP 27-28. Kaplan also acknowledged that he had agreed to pay 100% of the cost of University Preparatory School, at which both children were enrolled, but he claimed that agreement was meant to cover only tuition. CP 6-7.

In the same motion, Kaplan asked the court to enforce an arbitration decision that Kohls be required to communicate with him by email rather than fax. CP 7-9. He did not suggest that Kohls could be found in contempt on this matter in the absence of any court order.

In response, Kohls explained that she had been particularly careful to ensure that Kaplan was aware of I.K.'s appointments with Dr. Varley

because that treatment had been a contentious subject for years. CP 123. Kohls attached a declaration from the clinic manager confirming that all notices of appointments and all doctor's reports are mailed to Kaplan. CP 122-23; 141-45. Similarly, Kaplan received notices from the doctor's office for Z.K.'s routine, twice-yearly appointments for Attention Deficit Disorder (ADD). CP 125.

Regarding Z.K.'s headache appointment, Kohls explained that she placed Z.K. on the call list for an earlier appointment if one became available because his headaches were becoming worse. She denied that Kaplan ever suggested that he would take Z.K. to the appointment and maintained that the note Kaplan submitted with his declaration was fabricated for purposes of his motion. CP 123-24. She pointed out that it would make no sense for Kaplan to ask for the name and location of Z.K.'s doctor since Z.K. had been seeing the same pediatrician for 15 years. *Id.* In fact, Kaplan had *never* taken either child to an appointment with their pediatrician and had never requested to do so. *Id.*

In any event, the only thing that happened at Z.K.'s appointment was a referral for a CT scan. Kohls provided Kaplan with a copy of the referral and gave him four days notice of the appointment for the proposed scan. She also encouraged him to keep a headache log, as recommended

by the doctor, and to contact the doctor directly if he had any questions or concerns. CP 124; CP 147; 2nd Supp. CP ____ (Dkt. 335; sealed Ex. 10 to declaration).

After the CT scan, Dr. Smith prescribed antibiotics which were picked up and administered by Ken [Kaplan] at his regular Friday visit. At the visitation exchange, I told Ken about the appointment and also that Dr. Smith had recommended that [Z.K.] be seen by Dr. Cadera, an ophthalmologist, for a routine eye exam to rule out eye problems as a source of [Z.K.'s] headaches. Ken did not express any objections.

CP 124. Kaplan has never claimed he disagreed with these efforts to diagnose and treat Z.K.'s headaches.

As noted above, Kaplan claimed that he had agreed only to pay for the children's private school tuition, but not for their books. Kohls produced an arbitration brief filed by Kaplan's lawyer, however, which stated that "Ken is willing to pay the *entire cost* of any private school chosen." CP 149 (emphasis added). The brief does not distinguish between tuition and other expenses. Further, Kaplan did not claim that the death of his father occurred before the school books were bought, nor did he explain why his father's death would prevent Kaplan from having funds for that purpose from his father.

At the July 15, 2010 hearing, Commissioner Sassaman rejected Kaplan's contention that Kohls violated the joint decision making

provisions of the parenting plan. “I find that the father is misunderstanding what a decision is.” 7/15/10 RP 10. “[T]hese medical providers and the appointments that the father complains of missing were not appointments aimed at making any kind of decision or change to the regular care.” *Id.* In fact, the commissioner noted that it was Kaplan and not Kohls who wished to make a major change to the treatment protocol for I.K. Such a change would be subject to the joint decision making provisions. *Id.* The commissioner found that it was up to Kaplan to keep himself informed of regularly scheduled appointments. *Id. See also*, CP 342. As for the school books, the commissioner found that Kaplan had not proved that he had no funds for this purpose provided by his father. Therefore Kohls was not required to pay. 7/15/10 RP 11-12. The commissioner declined to award fees to either side. CP 213-14. In a separate order, the commissioner affirmed the arbitrator’s decision that Kohls should communicate by email with Kaplan. CP 344.

Kaplan then filed a motion for revision of Commissioner Sassaman’s rulings. CP 260-62.² This included the commissioner’s ruling

² Due to the complex procedural history following Commissioner Sassaman’s initial ruling, Kaplan actually filed three motions for revision. This third one is the one considered by Judge Doerty.

that “wife does not owe Petitioner for her share of the children’s school books.” CP 260.

In his written ruling on revision, Judge Doerty found Kohls to be in contempt in regard to a single incident: failing to notify Kaplan of the changed appointment for Z.K.’s headache. CP 291-92. He noted that Kohls conceded the “severity and concern” of the headaches in her responsive declaration at p. 5.³ The court found that Kohls’ “bad faith” was proved in part by her statement that “Ken needs to be proactive and be involved with his children.” CP 292, citing Kohl’s Responsive Declaration at p. 13. The court did not find Kohls in contempt regarding the school books.

Kaplan then filed a motion for “clarification and/or reconsideration” of the order. CP 293-97. This included the following: 1) that in order to purge the contempt, Kohls must consult with Kaplan before scheduling any medical appointments for the children, and coordinate the scheduling of visits with him; 2) clarify that, going forward, compliance with the requirement to communicate via email means that

³ For some reason, the Court also noted Kohls’ statement that Z.K. suffered from “asthma and life threatening food allergies.” CP 291, citing Kohls’ Responsive Declaration at p. 11. Kohls made these statements when explaining how she wished Ken would volunteer to participate in Z.K.’s boy scout camping events. Kaplan never alleged that there was any joint decision making issue regarding the asthma or allergies.

Kohls will have email access at her home and will check her email daily to assure that communication takes place in a timely fashion and that this will be another requirement of purging the contempt; 3) clarify that Kaplan is not responsible for contributing to the costs of past or future medical expenses incurred without documented notice to Kaplan; 4) clarify that Kaplan is entitled to attorney fees for various proceedings. This motion did not seek reconsideration regarding the school books.

In her response, Kohls noted, among other things, that it would be inappropriate to order that she pay the full cost of Ken's legal bills when his motion for contempt had been granted only in small part. CP 300. She also noted that she earns only about \$2,000 per month as a public school nurse while Kaplan is an attorney and owner of Kaplan Real Estate Services. CP 300-01.

In his reply brief, Kaplan switched positions and argued that Kohls should be found in contempt regarding payment for the books. CP 319-20.

Judge Doerty granted nearly all of Kaplan's requests. CP 332-34. The court now found Kohls in contempt for failing to pay \$188.63 for the school books. CP 333. The court's only explanation for that ruling was that "Mr. Kaplan's agreement to pay private school tuition does not act as

a modification absolving Ms. Kohls of responsibility for all other education expenses.” *Id.*

The court ordered the following “in order to purge the contempt.”

Respondent Sheila Kohls shall (1) consult with Petitioner, Mr. Kaplan, before or while she is scheduling any medical appointments for the children, and coordinate the scheduling of visits with him, and (2) have e-mail access at her home and check her e-mail daily to assure that communication takes place in a timely fashion. Furthermore, Respondent Ms. Kohls shall (3) pay all uninsured charges, including copays, for any medical expenses incurred (past or future) for visits that Mr. Kaplan did not receive notice of. This includes the \$15 copay that Mr. Kaplan was ordered to pay in Commissioner Sassaman’s 7/15/10 order; that part of the order is hereby vacated in that respect.

CP 334. The court also ordered Kohls to pay all of Kaplan’s legal expenses regarding the cross motions.

C. KOHLS’ MOTION TO ENFORCE CHILD SUPPORT

On July 1, 2010, Kohls filed a motion and supporting declaration to enforce child support obligations. CP 91-119. The primary contention was that Kaplan refused to pay his share of the uninsured costs for I.K.’s ADHD treatment. This problem had a long history, some of which was summarized by this Court in *Marriage of Kaplan*, 144 Wn. App. 1015, 2008 WL 1868688 (2008).

Kenneth B. Kaplan appeals the trial court's award of attorney fees to Sheila Kohls arising from their disputes relating to the parenting plan regarding their children. . . .

The parties acknowledged in this [parenting] plan that their children needed mental health counseling and that I.K., age nine, needed to be evaluated for ADHD. In case of decisionmaking disputes, the parenting plan requires "mediation, and if no agreement is reached, arbitration by Larry Besk, or another agreed individual."

Several months after the entry of the order approving the parenting plan, Kaplan and Kohls disagreed over counseling and ADHD treatment for their daughter, I.K. Her teachers advised the parents that I.K. should be evaluated for ADHD and recommended several therapists. Kohls proceeded to set up an appointment with one of the recommended professionals, Dr. Suzanne Engelberg.

Kaplan objected and involved the parties' attorneys in the dispute. Eventually, he acquiesced and allowed I.K. to see Dr. Engelberg and agreed to pay his part for her therapy. Several months later, Kaplan stopped paying Dr. Engelberg's fees. He contended the treatment had continued too long, he had received no feedback from Dr. Engelberg, and believed her to be "antagonistic" toward him. Kaplan and Kohls also disagreed about whether I.K. should take medication for ADHD.

Kohls invoked the parenting plan's dispute resolution process. Kaplan refused to arbitrate issues and then cancelled the mediation and/or arbitration session the day before it was scheduled to occur. Kohls' attorney rescheduled an appointment for two weeks later. Kaplan agreed to the date, set forth new issues to be addressed, and informed Kohls he no longer wanted to mediate or arbitrate his objections to Dr. Engelberg. He also said that he would pay her past fees as set out in court orders. He did not pay.

Kohls moved for an order holding Kaplan in contempt of the order of child support. In response to her motion,

Kaplan paid what was due. Accordingly, Kohls cancelled the contempt hearing, and the court entered an agreed order to reserve the issue of attorney fees for later determination.

Id. at *1. The commissioner ultimately awarded attorney fees to Kohls and this court affirmed. *Id.* at *2-3.

Kohls set out some additional details in her motion for enforcement of child support. Paragraph 3.14(n) of the parenting plan provides for various counseling of the children. Among other things, “[e]ach parent shall monitor I.K. and, if necessary, have her evaluated for ADHD.” CP 18. Kohls sought to have I.K. evaluated by Dr. Dassel. As an arbitrator noted in a March 23, 2007 ruling, Kaplan fought against the evaluation and treatment.

I am concerned about the father’s failure to timely act on this issue. With full knowledge of the difficulties that [I.K.] was having, and full knowledge that [I.K.] had been seen by Dr. Dassel, the father did little to address the issues. The father could have, and should have, initiated mediation/arbitration with the undersigned quite some time ago. Instead, the father merely put up roadblocks and prohibited teachers from giving input to Dr. Dassel, and affirmatively told Dr. Dassel he could not see [I.K.].

CP 122; 137-38. Despite Kaplan’s conduct, the arbitrator permitted Kaplan to belatedly seek an additional evaluation. CP 138. On May 25, 2007, the arbitrator followed Ms. Kohls’ recommendation and appointed Dr. Christopher Varley to treat I.K. for ADHD. CP 94; 113-14. Kaplan

filed two motions for clarification or reconsideration, which were denied. *Id.* Kaplan then appealed the arbitration rulings to the superior court and, after losing that motion, unsuccessfully sought reconsideration. CP 94.

After I.K. began seeing Dr. Varley in July, 2007, Kaplan apparently continued his opposition by declining to pay his share of the uninsured expenses. CP 95. Under paragraph 3.15 of the child support order, Kaplan must pay 72% of “counseling” expenses. CP 103. Under paragraph 3.19, he must likewise pay 72% of “extraordinary health care expenses” in any month in which medical expenses exceed \$76.70 (5% of the basic support obligation). CP 104. As of July 1, 2010, Kohls had paid \$570 towards Dr. Varley’s bills and Kaplan had paid nothing. Treating Dr. Varley’s services as “counseling,” Kohls calculated Kaplan’s share as \$1659.95. CP 94. Kohls attached as Ex. 3 to her declaration the billing statements from Children’s University Medical Group (CUMG) on behalf of Dr. Varley. CP 94; 2nd Supp. CP ___ (Dkt. 330). As this exhibit shows, CUMG had by this time treated much of the amount owed as “bad debt.”

In his response, Kaplan maintained that he made a single payment to CUMG for Dr. Varley’s fees of \$38.34, but did not claim to have made

any other payment. Supp. CP⁴ ___ (Dkt. 336, 7/9/10 Declaration of Kenneth Kaplan in Response to Motion Re Child Support at p. 1-8). He claimed, however, that Kohls' figures for the amounts owing were "at odds with my own communications with Children's making sure that my account was current some time ago." Supp. CP ___ (*Id.* at p. 4). That apparently referred to calls he claimed to have made between March and May, 2009, at which he was told that "a number of adjustments" had been made to the account leaving a balance of only \$38.34. (As discussed below, those "adjustments" included writing off much of the amounts Kaplan owed as "bad debt.") He frankly admitted that he had deliberately withheld payments as to any appointments scheduled "without prior notice." *Id.* "I felt and continue to feel that this is a reasonable reaction on my part." *Id.*⁵ Ironically, an exhibit Kaplan himself filed in support of his contempt motion shows that the Explanations of Benefits from Regence insurance regarding Dr. Varley's fees were mailed to him. CP 65. He did not deny that, for every visit, he would receive an accounting of the "patient responsibility."

⁴ "Supp. CP" refers to documents designated in Kaplan's Supplemental Designation of Clerk's Papers filed on April 20, 2011.

In reply, Kohls pointed out that she was actually the one who paid the \$38.34. CP 162. She produced a receipt as proof. CP 162, citing to 2nd Supp. CP ___ (Dkt. 330; sealed Ex. 3 at p.7). *See also*, CP 373. In fact, the receipts for *all* the payments show that they were made by Kohls and they correlate precisely with all “patient payments” on the billing statements. CP 162; 2nd Supp. CP ___ (Dkt. 330; sealed Ex. 3 at pp. 5-10). Kaplan received verification of the \$38.34 payment because his address is the only one associated with that account. CP 162.

Kohls noted her many efforts over the years to get Kaplan to pay his share of Dr. Varley’s bills. CP 160-61; 167-83. She also attached a statement from “Sherry D”, Patient Services Lead at CUMG. CP 162; 2nd Supp. CP __ (Dkt. 339; Ex. 7). The statement shows that a total of about \$1,500 had been written off as “bad debt” regarding I.K.’s nine appointments with Dr. Varley from July 17, 2007 through September 16, 2009. It explained that the charges were adjusted to “bad debt” when full payment was not made. However, “[i]f a Guarantor makes a payment then the Bad Debt adjustment is reversed” and “ CUMG continues to try to collect the Debt.” *Id.* “[I]f CUMG can not collect balance from Guarantor

⁵ Kaplan maintains in his declaration that this approach was justified due to “Judge Doerty’s ruling” but no ruling authorized him to withhold payment for I.K.’s appointments under any circumstances.

then charges are re-adjusted to Bad Debt status.” *Id.* This explains, of course, how CUMG could have reported a relatively small amount “owing” at certain points in time, even though Kaplan had failed to make any payments.

At the hearing on July 15, 2010, Kaplan maintained that he did not understand that some of the adjustments on the CUMG bills were for “bad debt.” 7/15/10 RP 13-14. Commissioner Sassaman pointed out that it was irrelevant whether Kaplan was truly confused about how much he owed to CUMG, since Kohls was not seeking contempt but merely enforcement of the child support obligation. 7/15/10 RP 14.

Commissioner Sassaman ruled that the bills from Dr. Varley should be treated as “extraordinary medical expense” rather than “counseling.” RP 24.⁶ She directed Kaplan to contact CUMG, find out the status of the debt, and pay what he owes. The commissioner set a presentation hearing for August 16, 2010 in the event the parties could not agree on the amount Kaplan owed. CP 219. The hearing was actually held on September 15, 2010.

Prior to the presentation hearing, Kohls produced a declaration from Stephanie Dunnihoo, who had replaced Sherry D. at CUMG billing.

CP 236-38. Her itemized list of the patient expenses incurred for Dr. Varley totaled \$2602.94. Of that, payments of \$570.92 had been made by Kohls, and no payments had been made by Kaplan. Ms. Dunnihoo specifically confirmed that the \$38.34 payment on May 26, 2009 was made by Kohls. CP 236-37. The total unpaid balance was \$1635.80. CP 238. Kaplan did not contact CUMG regarding the outstanding balance as ordered by Commissioner Sassaman. CP 237-38.

In view of Commissioner Sassaman's ruling that Dr. Varley's bills should be treated as "extraordinary medical expenses" rather than "counseling expenses," Kohls carefully went through her records to determine to what extent Dr. Varley's charges exceeded her responsibility for the first \$76.70 in each month at issue. CP 221-22. She precisely calculated that she owed an additional \$136.92 to CUMG, leaving Kaplan with responsibility for the remainder. CP 222. The sealed supporting documents regarding Kohls' and Dunnihoo's declarations are at CP 335-73. Kohls requested attorney fees for having to litigate the amounts owed. Her lawyer sent two letters to Kaplan's lawyer with her calculations but received no response at all. CP 223; 230-35.

⁶ Kohls has chosen not to contest that ruling.

On September 15, 2010, Commissioner Sassaman issued an order finding that Kohls' calculations were credible. She ordered, among other things, that Kaplan pay \$1429.26 to CUMG. She also awarded attorney fees of \$2900.00 to Kohls for the presentation hearing. CP 241-43. *See also*, CP 281-82.

Kaplan filed a motion for revision. CP 260-80. Ten days later, he filed a motion for sanctions against Kohls' lawyer for "inducing CUMG to file a declaration on her client's behalf without providing full disclosure regarding both parties' positions concerning the relevant issues." Supp. CP ___ (Dkt. 396, 9/30/10 Motion to Award Terms). In his supporting declaration, he noted that he had filed a civil complaint against CUMG "setting forth the REAL situation concerning CUMG." Supp. CP __ (Dkt. 396 at p. 3) (emphasis in original). Interestingly, one of the documents Kaplan attached to his declaration is a letter to him from CUMG dated February 2, 2010 that includes the following: "Your account is seriously PAST DUE!" Supp. CP ___ (Dkt. 398, 9/30/10 Declaration of Kenneth Kaplan).⁷

⁷The amount sought in that letter is only \$99.54, but that is, of course, consistent with CUMG's policy of declining to collect on "bad debt" after a certain number of billing cycles have passed. *See* Declaration of Sherry D., discussed above.

At the revision hearing before Judge Doerty, Kohls' lawyer explained that both children continue to see doctors at CUMG so Kaplan's failure to pay is an ongoing problem that needs to be addressed. 10/8/10 RP 22. She also pointed out that even if Kaplan's "bad debt" is disregarded, Kohls has still paid \$570 and Kaplan has paid nothing, so Kaplan would owe Kohls 72% of the \$570. RP 21. Kaplan once again expressed his opinion that he could withhold payment as to any doctors' appointments for which he did not receive notice. RP 13, 29. Kaplan became so enraged at Kohls and her lawyer during this hearing that Judge Doerty had to repeatedly tell him to calm down. "It is probably a good idea that you quit practicing law. You were getting all worked up about [sic] all over again, so don't." RP 27.

In his initial order on revision, Judge Doerty declined to revise Commissioner Sassaman's ruling regarding the CUMG payments. CP 291. He denied Kaplan's motion for sanctions. CP 292.

On October 19, 2010, Kaplan filed a supplemental declaration in support of his motion for sanctions, even though the motion had already been denied. CP 283-90. The thrust of it was that Kohls' lawyer had induced Ms. Dunnihoo to improperly resurrect charges that had been written off as bad debt. He agreed that money was owed on the more

recent charges, but continued to argue that he need not pay those because he did not have proper notice of the appointments. CP 284.

On October 29, 2010, Kaplan filed a “Motion for Clarification And/Or Reconsideration” of the order on revision. CP 293-97. He asked the court once again to revise the commissioner’s ruling regarding the CUMG payments “as Children’s has since issued a statement showing that Mr. Kaplan has a 0 balance.” CP 294. Kaplan expressly urged the Court to consider materials submitted in support of his motion for sanctions, filed *after* Commissioner Sassaman’s ruling.

With respect to his motion to reconsider the denial of his motion for revisions of Commissioner Sassaman’s Orders of September 15 and 17, Mr. Kaplan directs the court’s attention to his supplemental declaration of October_11_2010 [sic]⁸, which attaches a statement from CUMG dated October_12_2010 showing a 0 balance due. This was submitted shortly before the court issued its order, and Mr. Kaplan does not know whether the court had the opportunity to consider it before issuing its order. This is new information that was not previously available, as CUMG only issued this statement several weeks ago in response to its discussions with Mr. Kaplan.

CP 295-96. In fact, the statements Kaplan submitted with this supplemental declaration, CP 286-90, were not materially different from the ones Kohls submitted with her initial motion on July 1, 2010. CP 162;

⁸ The document was actually filed on October 15, 2010.

2nd Supp. CP __ (Dkt. 330 at Ex. 3). Both clearly showed that significant amounts had been written off as “bad debt.” Further, *all* of Kohls’ pleadings regarding this issue had correctly stated that CUMG’s designation of “bad debt” was never permanent, but that the debt would be revived if payments were made towards it.

As Kohls pointed out, the billing documents Kaplan submitted with his October 15 supplemental declaration apparently came with a cover letter (sent to both parties) which he conveniently omitted. *See* CP 301-02. The pages of Kaplan’s exhibit have a fax header at the top which indicate that they are five pages of seven sent on 10-12-10 from the University of Washington. CP 286-90. Kohls likewise received a seven-page fax from the same source three minutes earlier. CP 309-15. The first two pages are a letter from the general counsel for CUMG, which actually confirms everything that Kohls had been telling the court. First, the letter explains that billing statements had automatically been sent to Mr. Kaplan.⁹ Second, the letter explains that *all* payments on this account not covered by insurance were made by Ms. Kohls. Third, the letter clearly explains CUMG’s policy regarding “bad debt.”

⁹ For some reason, the letter describes that as an error.

Consistent with its policy for collection for professional services provided at Seattle Children's Hospital, after three statements demanding payment were issued, CUMG wrote off the remaining balance of \$1518.60 in two separate actions, on March 19, 2008 and February 22, 2010, respectively. Thus, the account is now at zero although at various times between the dates of service and the action to write off the balance the account would have reflected the amount owing for these clinical services. Note that the CUMG policy also provides that if a payment is offered on an account that has been written off after three statements, CUMG will reverse the write-off action, and at the same time reduce the amount owing to the exact amount of the payment. **In other words, after three efforts to collect for professional services provided to patients, CUMG will not engage in further affirmative collection actions but will accept any payment on the account as payment in full.**

CP 309-10.

In his reply on his motion for reconsideration, Kaplan once again asked the court to consider the materials he had submitted in support of his motion for sanctions. CP 320-21.

In his order granting Kaplan's request for reconsideration, Judge Doerty reversed his position concerning the CUMG expenses.

In light of the information presented with the supplemental declaration of Mr. Kaplan, the invoice from CUMG showing a zero balance, and the correspondence from CUMG (submitted by Ms. Kohls) verifying that the bill had been written off and no balance was owed, the court reconsiders and vacates its prior order on revision to the extent that it denied Mr. Kaplan's motion for revision of Commissioner Sassaman's orders dated 9-15-10 and 9-17-10.

CP 333-34. The court also order Kohls to pay Kaplan attorney fees of over \$13,000, including those incurred “responding to and arguing respondent’s retaliatory motion to enforce child support.” CP 334.

Kohls filed a timely notice of appeal on December 17, 2010. CP 374-80.

IV. ARGUMENT

A. STANDARD OF REVIEW

The trial court’s findings of fact must be upheld if they are supported by “substantial evidence.” In family law cases, that standard applies even when the trial court based its ruling on written submissions rather than live testimony. *Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003). The trial court’s conclusions of law are reviewed de novo. *King v. Snohomish County*, 146 Wn.2d 420, 423-24, 47 P.3d 563 (2002).

A trial court’s decision on contempt is reviewed for abuse of discretion. *Marriage of Davisson*, 131 Wn. App. 220, 224, 126 P.3d 76, *rev. denied*, 158 Wn.2d 1004, 143 P.3d 828 (2006). *Marriage of James*, 79 Wn. App. 436, 439-40, 903 P.2d 470 (1995). Abuse of discretion is generally defined as discretion manifestly unreasonable, or exercised on

untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citations omitted).

Findings of contempt are reviewed with greater scrutiny than most family law rulings. "In reviewing a contempt finding we look for facts constituting a plain order violation and strictly construe the order."

Davisson, 131 Wn. App. at 224, citing *Marriage of Humphreys*, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995). "Contempt of court is defined in part as intentional disobedience of a lawful court order." *Id.* at 599, citing RCW 7.21.010(1). In the context of a dissolution order, there can be no contempt unless the parent's failure to comply was in bad faith. *Id.*, citing RCW 26.09.160(2).

We hold that the moving party has the burden of proving contempt by a preponderance of the evidence. This showing must include evidence from which the trial court can find that the offending party has acted in bad faith or engaged in intentional misconduct or that prior sanctions have not secured compliance with the plan.

James, 79 Wn. App. at 442. “Contempt remedies can be very serious. The court’s contempt powers should be reserved for situations in which a parent who has been clearly told that he or she must comply with the [parenting plan] violates it in bad faith.” *Id.* at 445.

B. THE TRIAL COURT ERRED IN FINDING MS. KOHLS IN CONTEMPT

1. School Books

For many reasons, the finding that Kohls was in contempt for failing to pay \$188.63 for school books was a clear abuse of discretion. First, the parenting plan requires Kohls to pay for 28% of educational expenses only “to the extent Petitioner proves he has no funds for this purpose paid by his father.” CP 28. Kaplan noted that his father had died “last year”, but did not claim that this happened before the books at issue were bought. CP 6. Kaplan also claimed – with no proof – that his father had not provided funds for the children’s education for “several years.” *Id.* Kohls produced a declaration from the business manager of the children’s former school, however, confirming that tuition for the prior three years, through March, 2009, had been paid by “Abe and Rhoda Kaplan,” who are Kenneth Kaplan’s parents. CP 126; CP 151. Further, the death of Kaplan’s father did not necessarily mean that Kaplan no longer had *funds*

from his father. Commissioner Sassaman properly found that Kaplan failed to prove he had no funds from his father to pay for these expenses.

Second, Kaplan had stipulated that—notwithstanding the provisions of the child support ruling—he would pay the “entire cost” of private school.¹⁰ CP 149. Although Kaplan now maintains that this was meant to refer only to tuition, Kohls could reasonably interpret the statement to apply to all school-related expenses. A parent cannot be held in contempt if her deviation from a court order was done with the agreement of the other parent. *Marriage of James*, 79 Wn. App. at 445.

As noted above, contempt is reserved for *clear* violations of court orders, typically where the court has previously told the litigant exactly what she must do yet she then fails to comply. Here, Kohls reasonably believed that she did not owe the money for the books at all. No court had ever told her otherwise. In fact, Commissioner Sassaman *agreed* with Kohls that she did not owe the money. If Judge Doerty disagreed with the commissioner on this point, he would perhaps not abuse his discretion by ordering that Kohls should pay for the books. If she *then* refused to pay, contempt might be appropriate. But it was a clear abuse of discretion to

¹⁰ Kaplan made this statement during arbitration in a successful effort to convince the arbitrator that the children should attend a private school acceptable to him.

find Kohls in contempt when her interpretation of the child support ruling, and of Kaplan's stipulation during arbitration, was entirely reasonable. Judge Doerty never explained why he was holding Kohls in contempt regarding this matter.

The trial court's ruling was also an abuse of discretion for procedural reasons. Kaplan's revision motion did not make it clear he was seeking contempt on this matter rather than merely reversal of the commissioner's ruling that he owed money. Judge Doerty initially affirmed the commissioner on this point. In his motion for reconsideration of the revision ruling, Kaplan did not seek reconsideration regarding the school books. It was only in his *reply* on the motion for reconsideration that Kaplan suddenly switched positions – after Kohls had no chance to respond.¹¹ Kohls therefore could not defend herself against the serious accusation of contempt.

2. Z.K.'s Headaches

It is not clear what provision of the parenting plan Judge Doerty believed Kohls to have intentionally violated regarding Z.K.'s headaches since he never cited to any. Nor did Kaplan ever clearly state in his own

¹¹ This portion of the reply brief clearly violated court rules because it was not responding to any argument made by Kohls. KCLCR 7(b)(4)(E).

pleadings what specific provision of the parenting plan was violated here. Both Kaplan and Judge Doerty complained loosely of Kohls' failure to give Kaplan email notifications of all doctors' appointments, but the parenting plan contains no such requirement.

The Order on Revision states first that "Sheila Kohls is found to have been in contempt with respect to notification of medical appointments." CP 291. Although this seems to suggest that she was in contempt regarding more than one appointment, Judge Doerty then disclaimed that the contempt concerned the "routine medical appointments" or the "several pages of history about the therapy appointments." *Id.* Rather, he narrowed the issue to "the appointment in question." *Id.* This must refer to Z.K.'s headache because the court then explains, in regard to that problem, that Kohls "acknowledges the severity and concern of the medical issue" because she asked to be placed on the call list for an earlier appointment. *Id.* The court then criticized Kohls for failing to inform Kaplan by email or text message when the earlier appointment became available. CP 291-92. Thus, Judge Doerty found that Kohls was in contempt because she failed to re-notify Kaplan when Z.K.'s pediatrician appointment for headaches changed to an earlier date.

It is impossible to tell from the ruling on revision what provision of the parenting plan Judge Doerty believed Kohls to have violated. (The ruling on reconsideration provides no additional explanation.) The plan contains no requirement that Kohls notify Kaplan in advance of doctors' appointments in *any* manner, much less that she specifically do so by email or text message. One can glean from the ruling that Judge Doerty believed the headaches to involve an urgent and potentially serious medical problem rather than a routine appointment for a check-up or a pre-existing condition. But if the judge believed there was a violation of the "major decisions" provision of the parenting plan, he never explained what that decision was or how Kaplan was excluded from that decision.

It is not necessary to remand for clarification, however, because the evidence simply cannot support a finding that Kohls violated *any* provision of the parenting plan. Contrary to Judge Doerty's apparent belief, there is no provision in the parenting plan that requires notification of medical appointments.¹² There are at most two sections of the plan that could apply here.

¹² To be sure, the failure to give notice of a non-emergency appointment *could* give rise to a violation of the parenting plan if a major healthcare decision is made at that meeting and acted upon before the other parent can participate in the decision. But that is not the case here.

Section VI (“Other Provisions”) appears to be the most specific provision applicable here. It includes the following:

Health Care. The parent responsible for the children shall be empowered to obtain emergency health care for each child without the consent of the other parent.

Each parent shall notify the other parent as soon as reasonably possible of any illness requiring medical attention, or any emergency involving a child. Each parent shall have access to the child and the medical staff.

CP 21. Kohls reasonably understood this provision to apply to Z.K.’s severe and sudden headaches. It is undisputed that Kohls did promptly inform Kaplan of the headaches, told him they required medical attention, and permitted him full access to Z.K. and the medical staff. In fact, Kohls expressly urged Kaplan to contact the medical staff if he had any questions. This provision does not require Kohls to give Kaplan notice of medical appointments, although she did make some effort to do so by telling him about the originally-scheduled date. She certainly did not violate Section VI by taking advantage of the earlier opening that came up.

Arguably, section IV (“Decision Making”) of the parenting plan might also play a role regarding some aspects of the headache care.

Subsection 4.1 (“Day-to-Day Decisions”) states:

Each parent shall make decisions regarding the day-to-day care and control of each child while the child is residing with that parent. Regardless of the allocation of decision-

making in this parenting plan, either parent may make emergency decisions affecting the health or safety of the children. Any emergency decision should be communicated to the other parent with all vital information.

CP 19. Subsection 4.2 (“Major Decisions”) states that major decisions regarding “non-emergency health care” are “joint.”

Under subsection 4.1, Kohls clearly had authority to make emergency decisions regarding Z.K.’s headaches. Judge Doerty’s description of the headache problem suggests that he agreed it was a matter that must be handled on an emergency basis. Subsection 4.1 does not require Kohls to inform Kaplan in advance of a doctor’s appointment dealing with an emergency. Nor does it even require her to inform him in advance of a decision that must be made regarding care. It requires only that she inform Kaplan of any decision that has been made “with all vital information.” She certainly complied with that requirement by informing him of the headache problem, the referral for a CT scan, the prescription for antibiotics and the need for follow-up with an ophthalmologist. She also emphasized to him the need to keep a log of the headaches while Z.K. was in Kaplan’s care. *See* Section III(B), above.

Subsection 4.2 may also apply here, although it is difficult to determine at what point the headache care ceased to be an “emergency” and what decisions involved, if any, should be characterized as “major”

ones. Regardless, to the extent the headache care involved a “major decision” regarding “non-emergency care” under section 4.2, Kohls clearly followed the joint decision-making requirement. Certainly no “major decision” was made at the pediatrician’s office. The doctor did not diagnose the problem or prescribe any course of treatment. Rather, the doctor merely referred Z.K. for a CT scan in order to determine what treatment decisions should be made. At most, the decision to have a CT scan, and the follow-up decisions to give antibiotics and to see an ophthalmologist might arguably fall within paragraph 4.2. Kohls fully informed Kaplan, in advance, of all the appointments after the initial pediatrician’s visit, encouraged him to speak directly with the doctors, and gave him every opportunity to voice his opinions regarding the appropriate follow-up care. He did not object to any decision, nor did he attend any appointment. In fact, Kaplan himself picked up the antibiotics and administered them to Z.K., confirming that he was in agreement with the decision to prescribe them. Kaplan did not claim there was *any* dispute regarding the care for Z.K.’s headache.

The trial court’s conclusion that Kohls acted in “bad faith” is irrelevant in the absence of a showing that the parenting plan was violated. In any event, there is no basis for the finding. Somehow the court found

that Kohls' bad faith was proved by two of her statements: (1) "The Father has failed to provide evidence that he has made affirmative efforts to be involved with his children's medical care;" and (2) "Ken needs to be proactive and be involved with his children." CP 291-92, citing Responsive Declaration of Kohls at p. 11 and 13.

Kohls made the first statement in the context of explaining that Kaplan was not excluded from any major decisions concerning medical care. CP 130. She made the second statement in a paragraph responding to Kaplan's allegations that Kohls generally tries to keep him out of the children's lives. Kohls was explaining that Kaplan does not truly wish to be more involved in the children's lives but merely wishes to attack Kohls through legal proceedings. CP 132 (Responsive Declaration of Sheila Kohls Opposing Father's Motion at para. 32). *See also*, CP 129. It is hard to understand how Kohls' comments about these matters show that she was acting in bad faith regarding Z.K.'s pediatrician appointment. Even if Kohls were mistaken about Kaplan's general interest in the children's lives and medical issues, that would not mean she acted in bad faith when she took the earlier appointment without re-notifying Kaplan.

Thus, the trial court's finding of contempt was based on untenable reasons. The evidence presented to the trial court simply cannot support a

finding that Kohls intentionally violated a clear provision of the parenting plan in regard to Z.K.'s headaches. This Court should reverse and remand with instructions to vacate the order of contempt.

C. EVEN IF THE CONTEMPT FINDING WERE APPROPRIATE,
THE PURGE CONDITIONS WERE IMPROPER

A trial court's contempt powers are generally limited to statutory authority. "[I]nherent contempt powers are appropriately exercised only when the powers conferred by statute are demonstrably inadequate." *Interests of M.B.*, 101 Wn. App. 425, 452, 3 P.3d 780 (2000), *rev. denied by Interests of Hansen*, 142 Wn.2d 1027, 21 P.3d 1149 (2001). Here, the trial court's statutory authority stems from RCW 7.21.030 ("Remedial sanctions – Payment for losses"). The court could not impose "punitive sanctions" under RCW 7.21.040 because it did not follow the restrictive procedural requirements of that section. Nor could the court impose sanctions under RCW 26.09.160(2)(b) because that applies only when a parent is in contempt of the "residential provisions" of a parenting plan. It does not apply to other provisions, such as the joint decision making clauses at issue in this case.

RCW 7.21.030 states in relevant part:

(2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court

and impose one or more of the following remedial sanctions:

(a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1)(b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.

(b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.

(c) An order designed to ensure compliance with a prior order of the court.

(d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

Although the statute does not mention the term “purge conditions,” case law establishes that they are a necessary part of any remedial sanction. *M.B.*, 101 Wn. App. at 446, citing, among other cases, *Moreman v. Butcher*, 126 Wn.2d 36, 42-43, 891 P.2d 725 (1995). “An order of remedial civil contempt must contain a purge clause under which a contemnor has the ability to avoid a finding of contempt and/or incarceration for non-compliance.” *Marriage of Didier*, 134 Wn. App. 490, 501, 140 P.3d 607 (2006), *rev. denied*, 160 Wn.2d 1012, 161 P.3d 1026 (2007) (citations and internal quotation omitted). In *Marriage of Davisson, supra*, as here, the mother was found in contempt for violating the joint decision making provision of a parenting plan. *Id.*, 131 Wn. App.

at 222-24. She was permitted to purge her contempt by participating in mediation. *Id.* at 225.

In this case, the trial court purported to set out purge conditions, but in fact gave Ms. Kohls no opportunity to avoid the finding of contempt. The conditions apply forever, regardless of her compliance. Essentially, the trial court made permanent modifications to the parenting plan.

Further, the conditions are excessive. Generally, contemnors should be permitted to purge a first finding of contempt by promising to comply in the future. *M.B.*, 101 Wn. App. at 450. Only when that promise is “demonstrably unreliable” may the court impose a more stringent condition.

This condition must meet three requirements. First, it must be designed to serve remedial aims; that is, it must be directed at obtaining future compliance. Second, the condition must be within the power of the [contemnor] to fulfill. Third, the condition must be reasonably related to the cause or nature of the [contemnor's] contempt.

M.B., 101 Wn. App. at 450.

In this case, Kohls promised in her response to Kaplan's motion for reconsideration that she would carefully comply in the future with the requirement of joint decision making for major medical decisions. CP 299. The court should have found that sufficient. Further, two of the

actual conditions imposed by Judge Doerty go well beyond assuring compliance with existing conditions in the parenting plan.

Condition 1 requires Kohls to consult with Kaplan before scheduling *any* medical appointment. Nothing in the parenting plan requires that. As Commissioner Sassaman recognized, routine appointments for established treatment do not involve any “major decision” and therefore require no notice to the other parent. This condition does not coerce compliance with the parenting plan but rather modifies the plan to Kaplan’s liking.

Condition 3 is clearly punitive. It requires Kohls to “pay all uninsured charges, including copays, for any medical expenses incurred (past or future) for visits that Mr. Kaplan did not receive notice of.” Once again, there was never any requirement in the parenting plan that Kohls notify Kaplan of all medical appointments. Judge Doerty found only one occasion when her failure to notify amounted to a violation of the joint decision making provision. Yet this condition requires her to pay even for appointments at which she acted properly under the plan.

Assuming, for the sake of argument, that condition 1 were a proper purge condition, it might be permissible to ensure compliance with it by directing that *in the future*, Kohls would pay for the uninsured costs if she

did not comply. This would at least serve the general rationale of purge conditions, which is to give the contemnor an opportunity to avoid more severe sanctions by complying in the future with existing orders.

Requiring Kohls to pay for all appointments into the distant past, however, is mere punishment.¹³

D. THE TRIAL COURT IMPROPERLY DENIED KOHLS' MOTION FOR PAYMENT OF MEDICAL EXPENSES

This issue demonstrates Kohls' utter frustration in dealing with her angry and litigious ex-husband. All she asked was that he pay his share of the patient expense for Dr. Varley's bills. It is beyond dispute that, since 2007, I.K. had been seeing Dr. Varley, that every single visit resulted in an amount owing for patient responsibility, that Kaplan knew this because he maintained the insurance and received the explanations of benefits, and that the parenting plan required Kaplan to pay most of the patient responsibility. Yet, even by his own account, Kaplan paid at most \$38.34 regarding a single visit. For the 2007 and 2008 payments, his only excuse was that CUMG had written the amounts off as bad debt so he should

¹³ A further problem with this provision is that it will inevitably engender massive litigation on Kaplan's part. As the pleadings on the motion for contempt show, Kohls maintains that Kaplan had notice of nearly all medical and dental appointments, in part because Kohls ensured that the offices send all notices to Kaplan. Kaplan denied

never have to pay (even though it was undisputed that CUMG would revive the bad debt if payments were made towards it). For the 2009 and 2010 amounts, his position was that he should not have to pay because he did not receive adequate, advance notice of the appointments. Had Kaplan shown any willingness to pay what he owed, any minor disagreements concerning the exact amount could have been easily worked out.

Although Kohls did not seek contempt for Kaplan's failure to pay, such a motion would have been warranted. It can hardly be a coincidence that Kaplan failed to pay the bills of Dr. Varley – the very doctor he had fought tooth and nail to prevent from treating I.K. This in itself tends to show bad faith. Further, Kaplan frankly admitted that he *deliberately* refused to pay his share of the appointments since 2009 because, in his view, Kohls had not provided adequate notice of the appointments. Such behavior is expressly defined by statute as contempt.

The performance of parental functions and the duty to provide child support are distinct responsibilities in the care of a child. If a party fails to comply with a provision of a decree . . . , the obligation of the other party to make payments for support or maintenance . . . is not suspended. An attempt by a parent, . . . *to condition payment of child support upon an aspect of the parenting plan* . . . shall be deemed bad faith and shall be punished by the court by

receiving such notices. Neither Commissioner Sassaman nor Judge Doerty resolved this issue.

holding the party in contempt of court and by awarding to the aggrieved party reasonable attorneys' fees and costs incidental in bringing a motion for contempt of court.

RCW 26.09.160(1) (emphasis added). This statute is cited in the parenting plan. CP 21.

Here, Kaplan expressly conditioned "payment of child support" for the fees of Dr. Varley on "an aspect of the parenting plan," that is, Kohls' compliance with joint decision making for major decisions regarding medical care. Even if Kaplan were correct that Kohls failed to provide notice of Dr. Varley's appointments and that such failure was a violation of the parenting plan (which no court has found to be true), he would still be in contempt regarding his child support obligation.

But Kohls did not move for contempt; she merely requested that Kaplan pay what he owed. As Commissioner Sassman noted, that rendered irrelevant Kaplan's excuses for failing to pay.

As discussed above, Commissioner Sassaman ruled that Kaplan pay his share of Dr. Varley's bills. Initially, Judge Doerty declined to revise that ruling. Judge Doerty changed his mind on reconsideration, however, based on the letter and billing records provided to the parties by CUMG on October 12, 2010. There are several problems with the court's reasoning.

First, the new materials should not have been considered at all because they were not before the commissioner. A motion for revision must be decided solely on the factual record before the commissioner. *In re Marriage of Moody*, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999); *Goodell v. Goodell*, 130 Wn. App. 381, 389, 122 P.3d 929 (2005); *In re Marriage of Balcom and Fritchle*, 101 Wn. App. 56, 59-60, 1 P.3d 1174 (2000). There does not seem to be any case discussing whether a party may nevertheless present new evidence in a motion for reconsideration of a ruling on revision, but it would make no sense to permit that. Parties could then invariably circumvent the rule that all facts must be presented to the commissioner by waiting until a motion for reconsideration of the revision ruling to present new facts.

Second, the “new” information did not in any event change the picture presented to the commissioner and to the superior court on revision. As Kohls explained from the start, some of the amounts owing had been graciously written off at various points in time as “bad debt.” Presumably CUMG does not consider it worth the effort to attempt to collect from deadbeats. Nevertheless, CUMG is more than happy to accept payments towards bad debt it has written off, in which case it will “revive” the debt to the extent of the new payments made. All this was

explained in the declaration of Sherry D. which Kohls presented on July 13, 2010. *See* Section III(C), above. The October 12, 2010 letter from CUMG's general counsel said exactly the same thing. Thus, while some printouts showed a balance of over \$1500, and others showed a lower balance, there was never any question that the difference was due to whether or not the bad debt was counted. Thus, the October 12, 2010 statement from CUMG was no reason to grant reconsideration.

Third, under any interpretation of the CUMG billings, Kaplan owed at least *some* money to *someone*. Even if Kaplan was right that all amounts written off as bad debt should be excluded from the calculations, that would still mean that he owed several hundred dollars to Kohls. After all, she had paid over \$570 out of pocket to CUMG. The child support order, however, required her to pay only 28% of the out of pocket expenses. That means that Kaplan should reimburse Kohls by \$410.

But Kohls is not asking this Court to adopt that interpretation of the child support order. A parent should not be permitted to evade his child support obligations by withholding payments to third parties until they are written off as bad debt. Many businesses would stop providing services under those circumstances, which would be harmful to the children. Further, the other parent would perpetually live in fear that the

business might come after her for the amounts owing. Even a friendly business like CUMG might change its policies at some point. Kohls is not asking to receive money from Kaplan; she merely wants him to pay what he owes to I.K.'s doctor.

This Court should therefore reinstate the commissioner's ruling on this issue, including the award of attorney fees.

E. THE TRIAL COURT'S ASSESSMENT OF ATTORNEY FEES AGAINST KOHLS WAS AN ABUSE OF DISCRETION

As noted above, the trial court ultimately awarded Kaplan over \$13,000 in attorney fees and costs. Kohls' first position, of course, is that she should not be required to pay any attorney fees since the trial court should not have ruled in Kaplan's favor on any claim. While the basis for the trial court's fee award is not completely clear, it certainly could not have been based on the relative ability of the parties to pay under RCW 26.09.140. Kohls is a public school nurse earning about a little over \$2,000 per month, while Kaplan is the owner of Kaplan Real Estate Services, which owns and manages over 10 apartment buildings. Until very recently, at least, Kaplan was also a litigation attorney. CP 300.

Further, Kohls should have been awarded costs and attorney fees on her motion to enforce the support obligation.

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 obligor may not be considered a prevailing party under this section unless the obligee has acted in bad faith in connection with the proceeding in question.

RCW 26.18.160. As discussed above in Section IV(D), there was strong evidence that Kaplan refused in bad faith to pay his share of Dr. Varley's bills.

In the alternative, to the extent this Court upholds the underlying rulings of the trial court, Kohls maintains that the amount of the fee award is excessive. To be sure, an award of costs and *reasonable* attorney fees is mandatory when a motion for contempt is granted. RCW 26.09.160 (1). The amount of attorney fees, however, is within the trial court's discretion. *Parentage of Schroeder*, 106 Wn. App. 343, 353, 22 P.3d 1280 (2001), citing *Marriage of Wolk*, 65 Wn. App. 356, 359 n.3, 828 P.2d 634 (1992). In this case, however, the bulk of Kaplan's contempt allegations were never sustained. In his motion, he argued broadly that Kohls had for years repeatedly violated the parenting plan by refusing to provide notice of doctors' and dentists' appointments for the children. Except for the single appointment involving Z.K.'s headache, however, no court found that any lack of notice amounted to a violation of the parenting plan.

The trial court never explained why it ordered Kohls to pay Kaplan's attorney fees in responding to her motion for payment of child support, other than a passing reference to it being "retaliatory." To the extent the Court may have intended to impose fees based on intransigence, its reasoning was faulty.

A court may award one party attorney fees based on the other party's intransigence if the other party engages in foot-dragging and obstruction. The party requesting fees for intransigence must show the other party acted in a way that made trial more difficult and increased legal costs, like repeatedly filing unnecessary motions or forcing court hearings for matters that should have been handled without litigation.

Marriage of Pennamen, 135 Wn. App. 790, 807, 146 P.3d 466 (2006) (footnote omitted). There was no showing here that Kohls deliberately drew out the motion for child support. In fact, it was Kaplan who blew the issue out of proportion by fighting so vigorously against the motion, including filing a motion for sanctions. A finding of intransigence may also be proper when a party's "unsubstantiated, false, and exaggerated allegations . . . permeated the entire proceedings." *Burrill v. Burrill*, 113 Wn. App. 863, 873, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007, 67 P.3d 1096 (2003). But that could hardly apply here when Kohls' main allegation – that Kaplan had never paid his share of Dr. Varley's bills – was *undisputed*. The trial court denied Kohls' claim, not because she

attempted to deceive the court, but because in its view Kaplan need not pay for amounts that CUMG had given up on collecting.

It is not clear how the trial court's use of the adjective "retaliatory" could otherwise be a basis for a fee award. In any event, there was no substantial evidence to support a finding that Kohls' motion was made merely to retaliate against Kaplan's contempt motion. Kohls had to hire an attorney to respond to Kaplan's motion for contempt in any event. It made sense to raise the child support issue because, by Kaplan's own admission, the two matters were interrelated. Kaplan's position was that Kohls was in contempt for failing to give him advance notice of doctor's appointments, and for that reason he admittedly refused to pay some of Dr. Varley's bills. Kohls' position was that she had given whatever notice was required under the parenting plan, and that Kaplan should be required to pay the bills. As Kaplan's response to Kohls' motion showed, there was not the slightest chance that the matter could be settled amicably. Further, Kohls was not merely dredging up some old matter but rather trying to resolve an ongoing problem. I.K. continues to see Dr. Varley, and Kohls was reasonably concerned that Kaplan's failure to pay his share would cause CUMG to deny services or perhaps pursue her for Kaplan's share.

It was especially unfair to hold Kohls responsible for all the fees involved on the child support issue when Kaplan could have quickly resolved the entire matter by simply paying off the bad debt. That would have cost far, far less than litigating endlessly his position that he no longer owed the money because CUMG had stopped chasing him for it.

V.
REQUEST FOR ATTORNEY FEES AND COSTS

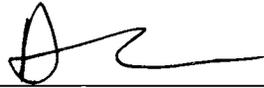
Ms. Kohls asks this Court to award her attorney fees and costs based on the relative resources of the parties and the merits of the appeal. *See* RCW 26.09.140; RAP 18.1; *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003, 972 P.2d 466 (1999).

VI.
CONCLUSION

This Court should reverse the finding that Kohls was in contempt of court. It should also reverse the superior court's ruling denying her motion for enforcement of child support and reinstate the commissioner's ruling granting that motion and awarding attorney fees.

DATED this 25th day of April, 2011.

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized initial 'D' followed by a long, sweeping horizontal line that ends in a small upward hook.

David B. Zuckerman, WSBA #18221
Attorney for Sheila Kohls

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail, postage prepaid, and email, one copy of the foregoing brief on the following:

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April 25, 2011
Date

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