

COURT OF APPEALS

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NO. 33883-1-II

STATE OF WASHINGTON

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

yn

GREGORY M. HOWE,
Appellant/Cross-Respondent

v.

MIA K. FRYE,
Respondent/Cross-Appellant.

BRIEF OF RESPONDENT/CROSS-APPELLANT

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INTRODUCTION

Greg Howe brought two separate contempt motions asserting five different theories, totaling about 21 separate contempt allegations. Howe's contempt allegations dated back to just months after the parties entered the Parenting Plan in March 2001, and spanned over three years. Trial on Howe's many contempt allegations lasted 4.5 court days. CP 359.

After careful consideration, the court rejected all but one of Howe's allegations, issuing a single contempt finding for failure to comply with a telephonic-contact provision. That finding is based on three missed calls out of a possible 138 over 2.5 years.

The record supports all of the trial court's findings, except its contempt findings. Howe convinced the court to rely on a several-month period when Frye's ex-boyfriend – not an unbiased witness – may have been at Frye's home. But the ex-boyfriend identified no specific dates. The court nevertheless found three specific violations spread over three months – months in which Frye actually encouraged Howe and G's contacts. Since the trial court found Howe's own testimony insufficient, the record fails to support its contempt finding. The Court should reverse the contempt finding, affirm on all other grounds, and award Frye fees on appeal.

RESTATEMENT OF THE ISSUES

1. Was the trial court within its broad discretion in finding that

Mia Frye was not in contempt in the following situations:

- ◆ For providing part, but not all of the Parenting Plan to G's preschool, elementary school, and clinic, where the Parenting Plan does not require Frye to "provide all, none, or any part of the Parenting Plan." CP 359-60, F/F 2.2, 2.3, 2.4.
- ◆ For asking Howe to agree to an alternate site to transfer G, but picking him up in King County as required by the Plan, when Howe refused to compromise. CP 362, F/F 2.5
- ◆ For restricting visitation when G was sick – as permitted by the Parenting Plan – where Howe did not exercise his right to ask G's doctor whether he was too sick for visitation, or provide any other evidence that G was not sick. CP 362-63, F/F 2.6.
- ◆ For making allegedly "disparaging comments" to the preschool providers, where Howe's relationship with preschool providers was jeopardized due to his offensive behavior toward them, not any comment Frye made. CP 363, F/F 2.7.
- ◆ For making allegedly disparaging comments to G's doctor, where, if Frye made any comments at all, she did not do so in G's presence, and the Parenting Plan prohibits only disparaging comments made in the child's presence. CP 363, F/F 2.7.

2. Does the trial court have discretion to find that three failures to make G available for telephonic contact is a pattern of behavior amounting to one contempt?

3. Is Howe entitled to make-up "residential time" for the missed phone calls, where phone calls are not residential time?

4. Is a \$500 award to Howe sufficient to satisfy RCW 26.09.160, where the trial court found that Howe's litigiousness unnecessarily increased fees and Howe spent comparatively little time pursuing the one successful contempt claim?

5. Was the trial court within its broad discretion in awarding Frye fees, where Howe unnecessarily increased the scope of litigation, and thus the fees?

6. Even if Howe prevails on appeal, should the Court deny his fee "request," which consists of one sentence in the Conclusion?

7. Should the Court award Frye appellate fees based on Howe's continued intransigence?

RESTATEMENT OF THE CASE

Howe's appeal is largely factual, challenging each of the trial court's findings on his many contempt claims. BA 1-3, challenging Findings 2.2 to 2.8.¹ These facts are organized by each challenged contempt finding fore the Court's convenience.

G was born on March 19, 1999. CP 1. The parties never married, and nearly two years after G's birth, they entered an

¹ A copy of the Findings and Conclusions is attached.

agreed Parenting Plan following a settlement conference. CP 11, 52. Frye is the primary residential parent. CP 6-7.

A. The Parenting Plan does not address providing the Plan to childcare providers, and Frye gave G's schools and doctors relevant portions of the Plan. (F/F 2.2-2.4; BA 31-33).

Frye provided portions of the Parenting Plan to G's doctor, preschool and elementary school. CP 362-63, F/F 2.2-2.4. Howe argued that Frye was in contempt (three times) for having done so, although the Parenting Plan does not address providing all or any part of the Plan to childcare providers. *Id.* The trial court found that Frye did not violate the Parenting Plan. *Id.*

1. Doctor's Office. (BA 33).

Although the trial court found that Frye provided only a portion of the Parenting Plan to G's doctor's office (CP 360, F/F 2.4), Frye testified that the clinic never asked her for a copy of the Parenting Plan and that she never provided one. April RP 79.² Further, Kimberly Robbins, the only person from the doctor's office who testified, could not say how the Parenting Plan came to the clinic. RP 208-09. The Parenting Plan is not usually placed in a

² One proceeding held in April is paginated separately. It is called "April RP" to avoid confusion.

child's file, but Robbins suspected that the doctor had ordered it to be placed in G's file because of a provision in the Plan permitting Frye to cancel a visitation if G was too ill to exercise visitation. RP 209-10; CP 11, ¶ 6.7.

In any event, the trial court correctly found that nothing in the Parenting Plan requires either party to provide all or any part of the Plan to any of G's childcare providers, including the doctor's office. CP 360, F/F 2.4.

2. Little Christian Daycare. (BA 31-32).

G attended Little Christian Daycare for preschool. RP 531. When a child's parents are unmarried, the school often has separate sections in the child's file for the mother and father. RP 131, 134-35. Frye gave the preschool a Parenting Plan when she enrolled G. RP 526. She agrees that that Parenting Plan was missing pages, and on the school's request, she later provided a complete Plan from the courthouse. *Id.*³

³ Exhibit 11 is a copy of the partial Parenting Plan Frye provided to G's preschool (CP 359, F/F 2.2) and there was some confusion at trial as to whether Ex 11 was a correct copy of the Plan Frye provided. RP 526-30. Frye did not think that it was a copy of the Plan she provided because there was writing on it that was not hers. *Id.* The writing belonged to Tamara Bjorhus, the director of Little Christian Daycare. RP 100, 109.

Although Bjorhus invited Howe to submit his own enrollment form, Parenting Plan, and any other information he wanted in G's file, he never did. RP 132, 134-35, 290-91. Howe argued that he was not "allowed" to provide any documents, but conceded that he simply was not asked to do so and that no one prevented him from providing a Plan or other documents. RP 376-77.

Howe repeatedly demanded documents from G's file (RP 133-35) but while a parent may access his own section, he may not access the other parent's section. RP 132-34. Thus, there was some confusion on the preschool's part as to what information they could give to Howe. RP 133-35. Bjorhus contacted legal counsel to clarify her responsibilities to Howe, who told her that her responsibility was to Frye because she enrolled G. *Id.* Frye had nothing to do with the refusal to show Howe the file. RP 291-92.

If Howe was denied information in G's file, it was due to confusion on the preschool's part, not to Frye's partial Parenting Plan. RP 133-35. Howe never informed Frye that he was having difficulty getting information from the preschool. RP 486. Nothing precluded Howe from contacting the preschool, and Frye always told the faculty that Howe had access to G's file. RP 532. Bjorhus

agreed that Frye never tried to block Howe's access to G's records.
RP 131-32.

3. Castle Rock Elementary. (BA 32-33).

Principal Tom Byrne of Castle Rock Elementary, where G attended (RP 340) told Frye that the Parenting Plan would be helpful, so she brought him the entire Plan. April RP 56-57. But Byrne asked Frye for the pertinent pages only, and she complied. *Id.* Two days later, Howe met with Byrne to discuss the Parenting Plan. RP 344. Howe noticed some pages of the Parenting Plan were missing and he subsequently faxed-in page 10 (RP 346) which includes a provision indicating that both parents may participate in G's school activities. CP 10 ¶ 6.2. Frye did not leave out page 10 intentionally – she had never referred to it before. April RP 59-60.

Although there were many other pages missing, Howe did not provide them. RP 348. Byrne asked Howe to provide a full copy of the Parenting Plan, but Howe did not do so, deciding that any other missing pages were irrelevant. RP 382; Ex 30.

Shortly thereafter, Frye came to the school and told Byrne that she did not want Howe's legal rights restricted in any fashion. RP 346. Howe does not provide any citation to the record

indicating that his legal rights were restricted. BA 32-33. Nor does Howe cite the record to support his claim that Frye was acting in bad faith when she provided a redacted copy of the Parenting Plan. BA 33. Frye provided only the relevant portions of the Parenting Plan because Byrne expressly asked her to do so. April RP 56-57.

B. Preschool faculty testified that Frye did not make derogatory comments about Howe and that his own behavior created problems with the school. (F/F 2.7; BA 36-37).

Howe's problems with G's preschool began when one of the preschool teachers, Beverly Bangs, told Howe that she could not give him Frye's section of G's file. RP 290. Frye's section of G's file did not contain any records pertinent to G's schooling – it contained registration papers, telephone numbers, emergency contact information, and the Parenting Plan. RP 290.

Howe told Bangs that he belonged to a fathers-support group and insisted that he had a constitutional right to see the file. RP 293. Howe also claimed that his lawyer said Howe had the "right" to see the file. RP 293-94. Howe was "in your face and rude, very, very, condescending." *Id.* at 293.

Howe then proceeded to demean Frye to Bangs. RP 138-40, 296-97. Howe told Bangs that Frye was "unstable" and that he

had befriended Frye's ex-boyfriend, who said that Frye did not have very good judgment. RP 296-97. Bangs and Bjorhus both felt that Howe was disparaging Frye to change their opinion of her and to put them in the middle. RP 138-40, 297-298. On the other hand, Frye never made derogatory statements about Howe, and never attempted to put the preschool in the middle. RP 305.

Howe became so angry that the preschool faculty moved the children into a soundproof room. RP 299-300. Bangs asked Howe to leave, but he refused. RP 300. Howe subsequently threatened to sue the school. RP 136-37.

After Howe threatened suit, the school's chairman, Harold Erdelbrock, became involved. RP 159-60. Erdelbrock required Bangs to prepare an apology to Howe because he had threatened to sue the school. RP 161-62. But Erdelbrock's experience was also that Howe was trying to get the upper hand in a custody battle against Frye. RP 156-59.

C. On four occasions, Frye has cancelled or questioned visitation because G was too sick, and on each occasion she was acting on a doctor's recommendation – this is expressly permitted under the Plan. (F/F 2.6; BA 35-37).

On June 29, 2001, nearly three years before the contempt proceedings (CP 302) G was diagnosed with pneumonia and Frye

obtained a note from the doctor indicating that G, who was just over two-years-old, was too sick to travel to Howe's house for visitation. RP 231-32; Ex 32. The doctor's note states G's diagnosis, that he had received an intramuscular dose of antibiotics, that he needed to be rechecked the following day, and that he should not have visitation. Ex 32.

Howe went to the doctor's office and convinced her to change her mind and allow the visitation. RP 232. Although Howe initially admitted that he had visitation following his meeting with G's doctor (*id.*) he later stated that he could not remember. RP 233.

Although he had his visitation on August 15, 2002, Howe also argued that Frye wrongfully cancelled that visitation which occurred nearly two years before the contempt proceeding. CP 362, F/F 2.6; RP 235-36, 479. On August 14, 2002, Frye took G to the doctor's office because he was having skin problems and running a temperature of nearly 103°. April RP 80-81. The doctors originally diagnosed G with scabies, but it turned out to be an allergic reaction to flea bites. *Id.* G had a week-long visitation with Howe coming up, so Frye inquired about visitation. *Id.* at 81-82. The doctor told Frye that if she was planning to allow G to go for visitation, then she needed to instruct Howe on how to administer

G's medications and about cross-contamination of the households. *Id.* Frye called Howe to discuss how he wanted to proceed, but the conversation went very poorly, with Howe blaming Frye for G's sickness. RP 478-79. Howe was very rude and hung up on Frye. April RP 82. Frye called Howe back and told him that she would get a note and cancel visitation if Howe did not want it. *Id.* Howe had his visitation. RP 235-36, 479.

Howe also raised December 5, 2003 (CP 362, F/F 2.6), at which time G was going on five-years-old. CP 1. On that occasion, G had the flu and Frye obtained a doctor's note indicating that G was "so ill that he should remain home until his symptoms resolve." Ex 32; April RP 71. Frye emailed Howe to cancel his visitation, and thought that she also called him. April RP 71-72. Howe told Frye that he was coming down anyway (*id.*) and started calling her a few minutes after the transfer time. *Id.* at 72-73. Frye did not answer, and Howe showed up at her home at 6:00 p.m. *Id.* Howe had called the police and they were with him when he arrived. *Id.* Frye showed the police the doctor's note, the Parenting Plan, and G sound asleep in his room. *Id.* The police left. *Id.*

Unfortunately, Howe did not. April RP 72-73. Howe stood in the street in front of Frye's house for an hour. *Id.* Frye did not have

any contact with Howe as she was taking care of G, whose fever had now escalated above 104°. *Id.* at 73. Frye eventually called the police, but they could not do anything as Howe was standing in a public street.⁴ *Id.* at 74.

Howe also raised June 10, 2004, but on that date G was diagnosed with a “severe ear infection” and the doctor ordered rest for several days. Ex 32. G was in “a lot of pain” and the doctor prescribed antibiotics and pain medication. April RP 75. As soon as Frye returned from the clinic, she gave G his medication and emailed Howe about the visitation. *Id.* at 76; Ex 28, 16-1.

Howe did not dispute that G had a severe ear infection, but argued that Frye was in contempt for denying visitation on this occasion because the doctor’s note did not expressly say that G could not travel or have visitation. RP 398-99. Although Howe had in the past successfully convinced a doctor to allow visitation despite G’s illness, he did not speak to G’s doctor on this occasion to determine whether G could have visitation. *Id.*

⁴ Although Howe could not specifically remember whether that was the date upon which he stood outside Frye’s house and called the police, he concedes that he did so at some point. RP 410.

D. One time, Frye asked Howe to compromise on the transfer location, but Howe refused and Frye picked G up as designated in the Plan. (F/F 2.5; BA 33-35).

Under the Parenting Plan, Howe has discretion to exercise a Friday visitation with G. CP 2 ¶ 3.1. The Plan provides that Howe would pick up G in Kelso, Washington, near Frye's residence, and that Frye would pick up G in Bellevue, Washington, near Howe's residence. CP 5 ¶ 3.11. For several years after the parties entered the Parenting Plan, however, Howe would bring G back to Cowlitz County after these visits. April RP 44. Howe eventually stopped bringing G back to Cowlitz County, but failed to tell Frye that he was going to stop. *Id.* at 45. Howe expected Frye to pick G up at different locations, but would not tell her where in advance. *Id.* Rather, whenever Howe decided where he would be, he would tell Frye where to pick G up. *Id.*

The Friday visit at issue occurred on May 28, 2004, when G was five. CP 361, F/F 2.5. One-and-one-half weeks earlier, Frye began having car trouble. April RP 36. The car ended up in two different repair shops, and the repairs were eventually completed on Friday, May 21, 2004. *Id.* at 17-18. Frye drove the car home and it seemed okay. *Id.* at 37. She drove the car to Bellevue for the Sunday exchange, and although it did not break down, the

temperature gauge shot up and shifted erratically. *Id.* Frye's dad told her that the car would probably have to go back into the shop. *Id.* at 20.

Howe sent Frye an email indicating that he was going to exercise his visitation the following Friday, May 28. RP 465-66. Frye responded that she would not be able to transfer G in Bellevue because she was having car problems. *Id.* Howe did not respond. April RP 38-39. Frye emailed Howe again the morning of May 28, but he still did not respond. *Id.* at 39. She was not sure if Howe was coming, but took G to the transfer anyway. *Id.*; Ex 28, 12-3.

Howe came to the transfer location to get G, but refused to tell Frye where he was going to take G, leaving her no idea where she was supposed to pick G up that afternoon. April RP 39-40. Frye eventually convinced Howe to return G to Cowlitz, and he signed an email from Frye indicating his agreement to change the transfer location. *Id.*

But when Frye returned to the Cowlitz transfer location, Howe was not there. April RP 40-41. There is a 30-minute grace period under the Parenting Plan, so Frye waited for half-an-hour before contacting Howe. *Id.* When she finally called, Howe was at his Bellevue home with G. *Id.* Frye drove to Bellevue to pick up G,

and did not return home until close to midnight given the distance and traffic. *Id.* at 25.

E. Howe also claimed that Frye interfered with telephonic contact numerous times, dating back to just after the provision took effect.

The parties entered the Parenting Plan when G was about two-years old. CP 1. The Plan provides that Howe is entitled to telephonic contact every Tuesday night between 7:30 and 8:30, beginning when G turned three. CP 6, ¶ 3.13(E). Howe claimed that Frye intentionally interfered with this provision 12 times, beginning in March 2002, just after G turned three. CP 304. In the relevant time-frame, there were 138 possible calls (*id.*) – the trial court found that Frye missed three.⁵

G was three when these phone calls began, and Howe's own witness agreed that children that age do not understand the use of a phone. RP 195-96. They have short attention spans and cannot maintain long conversations. *Id.* Moreover, G often does not want to take the calls at all, and Frye has to "bribe him or coax him" into taking to Howe. April RP 8. G frequently asked Howe if

⁵ Frye cross-appeals from this finding and the facts surrounding the three missed phone calls are discussed in the cross-appeal, *infra*.

he could end the call and became upset when Howe would not let him. *Id.* at 12-13. Sometimes G just hung up. *Id.*

F. Procedural History.

In two separate contempt motions, Howe pursued five different contempt theories, totaling about 21 separate contempt allegations (CP 55-62, 70-74, 359-64):

- ◆ Failure to provide the whole parenting plan to childcare providers – three contempt allegations;
- ◆ Request to negotiate transfer location for Friday visitation – one contempt allegation;
- ◆ Using G's medical condition to deny visitation – four contempt allegations;
- ◆ Making disparaging comments about Howe to childcare providers – two contempt allegations;
- ◆ Interference with telephonic contact – 12 contempt allegations.⁶

The trial court found one violation. CP 363-64, F/F 2.8.

The trial court also found that Howe engaged in excessive discovery, subpoenaing five witnesses (CP 143-47) serving subpoena *duces tecum* on nine entities (CP 153-72) and asking Frye to produce over 21 items. CP 161-64, 175-76. Frye moved to limit the depositions and subpoenas, arguing that four of the nine

⁶ Howe also raised additional theories, such as abusive use of conflict (CP 73), but it does not appear that he actually pursued a contempt finding on such issues.

subpoenas were irrelevant (CP 175), and moved to limit the items she was required to produce. CP 161-64, 175-76. The court granted her motion and awarded her \$500 in attorneys' fees. CP 286-88. The trial court also awarded Wayne Frye fees for the oppressive subpoena Howe served on him. CP 347.

The court also found that Howe's subpoenas "went far beyond the scope of the issues" into personal matters and that Howe was engaged in a "fishing expedition." CP Volume II 52. Howe also failed to comply with Frye's discovery request, forcing Frye to file a motion to compel. CP 279-82, 291-93.

Trial consumed 4.5 court-days (CP 359) and Howe called six witnesses. RP 40, 99, 150, 175, 207, 340. The trial court issued only one contempt finding for failure to comply with the telephonic-contact provision. CP 6, ¶ 3.13(E); 358-70; CP 364, F/F 2.8. The contempt is based on three missed phone calls out of a possible 138 calls in a two-and-one-half year period. CP 304.

The trial court awarded Howe \$500 for the contempt. CP 367, F/F 3.7. The court also awarded Frye attorneys' fees, finding that Howe unnecessarily increased the scope – and therefore the cost – of the litigation. CP 368, ¶ 3.7. The court awarded Frye less

than half of her fees, and deducted \$500 for the award to Howe. *Id.* The result is a judgment to Frye for just over \$9,000. CP 358.

That did not stop Howe from immediately filing a third contempt motion. CP Volume II 17, 18.⁷ The court found that Frye had complied with the Parenting Plan and that Howe's motion was "frivolous," awarding Frye \$1,000. CP Volume II 21, ¶ 2.7.

Before the court ruled on Howe's third contempt motion, Howe appealed from the order on the first two motions. Howe subsequently appealed from the order on his third motion, and Frye consolidated the two appeals. Howe later dismissed the appeal from his frivolous contempt claim.

ARGUMENT

A. Standard of Review.

A trial court's decision in a contempt proceeding will not be reversed absent an abuse of discretion. *In re Marriage of James*, 79 Wn. App. 436, 440, 903 P.2d 470 (1995); *In re Marriage of Humphreys*, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995). In determining whether the facts support a contempt finding, courts

⁷ Howe did not include any of these proceedings in the Clerk's Papers. Frye supplemented the CPs, adding her response to Howe's motion, the pleadings noting the motion, and the trial court's ruling. CP Volume II 1-23. Frye's response is dated September 29, 2005. CP V II 6.

must strictly construe the parenting plan allegedly violated. **Humphreys**, 79 Wn. App. at 599. The alleged contempt must “constitute a plain violation of the” parenting plan. *Id.*

Howe agrees that this Court reviews the trial court’s decisions for an abuse of discretion (BA 11) and that findings are upheld if supported by substantial evidence. BA 12; **In re Marriage of Myers**, 123 Wn. App. 889, 892-93, 99 P.3d 398 (2004). But Howe apparently misunderstands the substantial evidence standard of review, stating that on appeal, he “has the burden of producing a preponderance of the evidence . . . [that] there is reasonable cause to believe [Frye] has not complied with the” Parenting Plan. BA 24. Howe’s evidentiary burden at trial was to produce a preponderance of the evidence. **Myers**, 123 Wn. App. at 893. On appeal, Howe must show that the findings he challenges are not supported by substantial evidence – evidence sufficient to convince a fair minded person of the fact found. 123 Wn. App. at 893. He must also show that any contempt he alleges is a “plain violation” of the Parenting Plan. **Humphreys**, 79 Wn. App. at 599.

B. The trial court was well within its broad discretion in finding that Frye was not in contempt on myriad issues Howe raised. (BA 31-37, 38-39).

Howe brought two contempt motions, alleging 21 separate contempts. CP 59-64, 66-67, 73-74, 76-79, 82-83, 302-04. The trial court issued one contempt finding. CP 358-70. The evidence supports the trial court's findings that Frye was not in contempt on 99% of Howe's allegations, and the trial court was well within its broad discretion in so finding. The Court should affirm.

1. Frye did not violate the Parenting Plan by giving childcare providers a portion of the Plan, where nothing requires her to provide all, none, or any of the Plan. (F/F 2.2-2.4; BA 31-33).

Howe argues that Frye attempted to "hinder . . . his performance of his parental functions" when she allegedly gave part, but not all of the Parenting Plan to G's preschool, elementary school, and doctor. BA 31-33. But nothing in the Parenting Plan either requires Frye to provide a full Plan, or prevents her from providing any part of the Plan. *Compare* CP 359-60, F/F 2.2, 2.3, and 2.4 *with* CP 1-12. Providing G's teachers and doctors with only relevant portions of the Parenting Plan did nothing to interfere with Howe's ability to parent G. Under the strict construction of the Parenting Plan required, there was no "plain violation" of the Plan, and the Court should end its inquiry here. ***Humphreys***, 79 Wn.

App. at 599. Even under a loose construction, Howe's claims are meritless.

For instance, Howe does not provide a single example of how his ability to perform parental functions was hindered, nor does he offer evidence that Frye acted in bad faith. BA 31-33. Howe does not cite the record (RAP 10.3) and the record does not indicate that his ability to perform parental functions was in any way limited by the partial Parenting Plans G's childcare providers received. Howe himself never provided a full Parenting Plan to any of these childcare providers (RP 132, 376, 382), and his own behavior caused any difficulty he had with these parties. *See supra* Restatement of the Case § B.

In sum, Frye provided the portions of the Parenting Plan that in her best judgment were relevant to the particular childcare provider. Nothing in the Plan prohibits her from having done so, and Howe simply does not support his argument that Frye was acting in bad faith. The Court should affirm.

2. It is not contempt to try to compromise on a transfer location. (F/F 2.5; BA 33-35).

Howe next challenges the trial court's Finding 2.5 that Frye attempted to renegotiate the Parenting Plan on one occasion when

she asked Howe to agree to a different-than-normal location to transfer G. CP 361-62, F/F 2.5. But Howe challenges only the trial court's use of the word "renegotiation," arguing that Frye did not seek to renegotiate the Plan, but to "change" it for one day. BA 33-35. This is a difference without a distinction.

Undisputed testimony established that Frye had car trouble immediately preceding the May 28 incident. See *supra* Restatement of the Case § D. The trial court correctly found that she was not acting in bad faith in attempting to persuade Howe to agree to a different transfer location. CP 361-62, F/F 2.5. Nothing prevents the parties from trying to compromise.

In any event, there was no consequence to Frye's efforts at compromise. Howe had his visitation. CP 361-62, F/F 2.5. Both the pickup and drop-off occurred at the transfer locations specified in the Parenting Plan. Compare April RP 25 with CP 5, ¶ 3.11. Frye followed the Plan, and no contempt occurred.

3. The Parenting Plan expressly permits Frye to cancel a visitation when G is too sick, upon his doctor's recommendation – exercising that provision of the Plan is not contempt. (F/F 2.6; BA 35-37).

Howe next challenges the trial court's finding that Frye was not in contempt when she denied visitation based on a doctor's

recommendation that G was too sick. BA 35-36; CP 362-63, F/F

2.6. Howe concedes that the first three of the four paragraphs in Finding 2.6 are accurate, challenging only the fourth paragraph:

If the Respondent father chooses not to exercise his right under the Parenting Plan, efforts by the Petitioner mother to restrict visitation under section 6.7 are not specifically in violation of the language of the Parenting Plan. There is no contempt of a court order.

CP 363, F/F 2.6. Howe claims that this paragraph is not supported by substantial evidence because Frye did not provide evidence that visitation actually occurred on the dates Howe claimed he was denied visitation. BA 36.

Howe's argument has nothing to do with the finding challenged. *Compare* BA 36 *with* CP 363, F/F 2.6. The finding is based on a provision of the Parenting Plan permitting Frye to deny visitation after consulting with G's doctor when G is too sick for visitation. CP 363, F/F 2.6; CP 11, ¶ 6.7. When Frye cancels visitation under this provision, the Plan permits Howe to contact the doctor's office to verify. CP 11, ¶ 6.7. The challenged paragraph simply states that no violation occurred when Howe fails to contact the doctor's office to verify the child's illness. CP 363, F/F 2.6. There is nothing unreasonable about that conclusion.

Howe also misunderstands his burden. BA 36. Howe argues that Frye had the burden to produce “substantial credible evidence” that “visitation actually occurred on the dates” he claimed it was denied. *Id.* But it is Howe’s burden to make out a claim of contempt, not Frye’s burden to prove that no contempt occurred. **Meyers**, 123 Wn. App. at 893. Further, the issue is not whether visitation occurred (BA 36), but whether Frye canceled visitation based on a doctor’s recommendation, as permitted under the Plan. CP 11, ¶ 6.7.

In any event, Howe was not improperly denied visitation on any of the four dates he alleges. *See supra* Restatement of the Case § C. Howe’s argument on this finding is baseless as to the June 29, 2001 incident, where Howe’s own testimony is that he had visitation or that he cannot specifically remember whether he had visitation. RP 232-33. Frye obtained a note from the doctor excusing her very sick son from visitation. Ex 32. Although the doctor subsequently changed her mind at Howe’s urging, that does not change the fact Frye acted appropriately under the Parenting Plan. CP 11, ¶ 6.7.

Howe also concedes that he had visitation on August 15th. RP 235-36, 479; CP 362, F/F 2.6. Although Howe claims that he

called the doctor's office to confirm that there were no restrictions on G's visitation (RP 235-36) Frye never asserted a restriction. April RP 80-82. Rather, she called Howe to discuss whether he wanted to have visitation, in which case he would have to treat G's skin condition and deal with potential cross-contamination of the household. *Id.* Again, it was not a violation of the Parenting Plan for Frye to initiate a discussion about whether Howe wanted visitation when G was sick, and to instruct him on how to treat G.

Howe also claims that he was wrongfully denied visitation on December 5, 2003 (CP 362, F/F 2.6); but here also, Frye acted exactly as the Parenting Plan requires. CP 11, ¶ 6.7. When G became very ill, Frye obtained a doctor's note stating that G should remain home with her. April RP 71-72; Ex 32. If Howe doubted the truthfulness of the note itself, or of Frye's representation about the note, then he could have contacted the doctor to verify the information. CP 11, ¶ 6.7. Although he had done so in the past (RP 233), there is no indication that he did so. Nothing contradicts the note, Frye's testimony about the occasion, or the fact that the police were satisfied by the note, Parenting Plan, and G asleep in bed. April RP 72-73.

Finally, Howe claims that he was wrongfully denied visitation on June 10, 2004 (CP 362, F/F 2.6) but no violation occurred. G had a severe ear infection and was in “a lot of pain.” April RP 75; Ex 32. The doctor specifically prescribed G rest for “several days.” Ex 32. It is certainly fair that Frye interpreted G’s illness, his pain level, and the doctor’s recommendation that he rest for several days to mean that he was too sick for visitation. If Howe felt otherwise, he was more than capable of clarifying with the doctor whether G could have visitation. RP 233. He elected not to do so. That was his choice.

4. Frye did not disparage Howe to childcare providers – Howe’s own behavior created problems with childcare providers. (F/F 2.7; BA 35-37).

Howe claims that Frye contemptuously violated the Parenting Plan by making disparaging comments to G’s preschool and doctor. BA 36-37. The Plan prohibits the parties from making derogatory comments about each other in G’s presence. CP 11, ¶ 6.5. Howe does not allege that Frye made any disparaging comment in G’s presence. BA 36-37. He does provide the comment Frye allegedly made to G’s doctor. BA 37. As to the preschool, Howe’s only claim is that Frye stated that Howe had previously been a problem. BA 36 (citing RP 146). There was no

“plain violation” of the Plan, which prohibits only disparaging comments made in G’s presence. CP 11, ¶ 6.5. The Court should end its inquiry here. **Humphreys**, 79 Wn. App. at 599.

Further, the testimony supports the findings that Howe’s own behavior caused the problems with G’s preschool. See *supra* Restatement of the Case § B; CP 363, F/F 2.7. Faculty found Howe very rude and condescending (RP 293) and felt he put them in the middle to gain the upper-hand in the parties’ dispute. RP 138-40, 156-59, 297-298. On the other hand, they also testified that Frye did not disparage Howe (RP 305) Howe provides no evidence to the contrary, and there is none in the record. BA 36-37.

As to the comments allegedly made to G’s doctor, Howe does not deny that none of the alleged comments were made in G’s presence. BA 37. As such, there was no violation of the Parenting Plan. CP 363, F/F 2.7. Further, Howe fails to provide even one reference to the record or one specific comment that he alleges Frye made to G’s doctors. BA 37. Frye cannot respond to an argument that Howe has not really made. **Dickson v. Kates**, 132 Wn. App. 724, 733 n.10, 133 P.3d 498 (2006).

5. The trial court correctly found that Frye is presently capable of complying with the telephonic-contact provision of the Parenting Plan. (F/F 2.13; BA 38-39).

Howe argues that the evidence does not support the trial court's finding that Frye is presently able to follow the Parenting Plan because: (1) Frye does not think her acts were contemptuous; and (2) she did not testify that she would follow the Plan in the future. BA 38-39. Howe's argument again ignores the nature of the finding he challenges. *Compare* BA 38-39 *with* CP 365, F/F 2.13. The trial court's finding that Frye would follow the Parenting Plan is specific to the contempt finding on telephonic contact. CP 365, F/F 2.13. Much of the issue about the missed phone calls revolved around Frye having no land-line and different cell phone numbers. RP 429-31, 509-16. The trial court's finding simply clarifies that Frye now has cellular service to provide telephonic contact under the Plan. CP 365, F/F 2.13.

Further, nothing requires Frye to admit or believe that her acts were contemptuous for the trial court to find that she is presently capable of following the Parenting Plan. BA 38-39. And contrary to Howe's claim, Frye expressly testified that she wants to stick to the Parenting Plan because straying from the Plan in the past has created confusion between the parties. RP 459-60. As

Howe points out, Frye also testified that she frequently refers back to the Parenting Plan for guidance. BA 38 (citing RP 489-90). This testimony is more than sufficient to support the finding that Frye is presently able and willing to comply with the Parenting Plan.

6. Howe is not entitled to make-up “residential time” for the three missed phone calls because phone calls are not residential time. (C/L 3.3; BA 40).

Howe next challenges the trial court’s refusal to award him makeup “residential time” for missed telephonic contact. BA 40. During trial, Howe sought “residential time” – visitation for each missed phone call he alleged – not a makeup phone call. RP 645-46. While the trial court indicated that it would consider some “equitable remedy,” he did not see the missed phone calls as a visitation issue because Howe was never denied visitation. RP 645. Nonetheless, the trial court indicated that it would hear arguments on the point at the presentation hearing. RP 647. Although Howe drafted the proposed order presented at the May 13 presentation hearing (RP 648) he did not ask for makeup residential time at the hearing. RP 648-718.

The trial court’s initial indication was correct – a phone call is not residential time. RP 645-46. As such, RCW 26.09.160 does not require makeup time. Thus, the most that can be said is that

the trial court had discretion to – or not to – give Howe make-up phone calls. There was no abuse of discretion – Howe did not even ask for makeup phone calls, and dropped the argument on residential time. RP 645-46, 648-718.

Moreover, Frye already gave Howe additional telephonic contact. The trial court found only three missed phone calls out of 138 possible calls in a two-and-one-half year period. CP 59, 63-64, 77-78, 302-04. During this time, Frye documented 14 calls from Howe to G outside of the Tuesday calls, although none were expressly designated as makeup calls. RP 450.

In sum, the trial court correctly found that a missed telephone call is not missed residential time. Thus, the contempt statute does not require the trial court to order additional residential time. RCW 26.09.160 (2)(b)(i).

C. Assuming *arguendo* that any contempt occurred, the trial court was within its broad discretion in issuing one contempt finding for three missed phone calls, as opposed to a separate contempt finding for each missed call. (F/F 2.8; BA 27-31, 37)

The trial court found that Frye interfered with three phone calls between Howe and G, amounting to one contempt. CP 364, F/F 2.8. Assuming *arguendo* that Frye's behavior was contemptuous at all, there is nothing untenable or unreasonable in

finding that the three missed calls constitute a pattern of behavior that is contemptuous, thus, one contempt – as opposed to three separate contempt findings, one for each missed call. Howe does not offer any authority to the contrary, and the Court should reject this argument and affirm.

As discussed above, this Court must strictly construe the Parenting Plan to determine whether the facts alleged as to the three missed phone calls “constitute a plain violation of the” Plan. *Humphreys*, 79 Wn. App. at 599. The relevant portion of the Parenting Plan provides that Howe “shall be entitled to telephone contact with [G] at his own expense on the on [sic] Tuesdays from 7:30 p.m. to 8:30 p.m..[sic] after age three.” CP 6, ¶ 3.13(E).

Howe does not challenge the trial court’s finding that the majority of missed phone calls Howe alleged were not contemptuous. BA 27-31. Rather, the only error he alleges on this point is that the trial court abused its discretion in failing to issue a separate contempt finding for each missed phone call. BA 27.

Howe correctly anticipates that Frye is cross-appealing from the contempt finding. BA 27. The facts relevant to the three missed phone calls are addressed below in the cross-appeal. This

section responds to Howe's argument that the trial court erroneously failed to enter three contempt findings. BA 27-31, 37.

Howe's argument on this point is inaccurate and misleading. Howe begins by incorrectly stating that the trial court found that Frye interfered with telephonic contact on nine separate dates:⁸

The first paragraph [of F/F 2.8] lists nine separate dates that the trial court found Ms. Frye had interfered with Mr. Howe's access to his son via telephone

BA 37. But while the trial court listed nine alleged dates, it rejected the majority of Howe's claims:

The Court is not persuaded that this happened every time, and some of the allegations are very stale.

CP 364, F/F 2.8. The court found that Frye frustrated three calls – not nine (or 12). CP 364, F/F 2.8.

Howe argues that “the statute” – presumably RCW 26.09.160 – does not permit the trial court to enter a single contempt finding, as opposed to a separate finding for each of the three missed phone calls. BA 37. Howe does not discuss RCW 26.09.160 or any cases addressing the statute. BA 37. He offers no argument or citation to authority to support this argument. *Id.*

⁸ Actually, Howe argued that Frye frustrated 12 phone calls, raising nine in his July 2004 contempt motion and 3 more in his October 2004 contempt motion. CP 59-64.

The Court should reject this argument because Howe has not provided any authority, and Frye cannot to respond to an argument never made. **Dickson**, 132 Wn. App. at 733 n.10.

Moreover, Howe is simply incorrect. The trial court has discretion to find that one missed phone call alone is not contempt, but several missed calls might establish a pattern. For example, a contempt finding may be based on “a pattern of deliberately interfering with the” residential schedule in a parenting plan. **In re Marriage of Rideout**, 150 Wn.2d 337, 343-44, 77 P.3d 1174 (2003). There, the mother repeatedly failed to make the parties’ daughter available for visitation, denying the father access to his daughter for three weekends in a row. *Id.* Although the father in **Rideout** did not seek a separate contempt finding for each missed weekend visit, there is nothing unreasonable about basing one contempt on such a pattern of behavior.

Thus, in some circumstances three missed phone calls over several weeks might establish a pattern of behavior amounting to a contempt. As discussed below, however, Frye did not interfere with two of the three calls the court found, and the third is highly questionable. *See infra*, Cross-Appeal. In any event, the trial court did not abuse its discretion in refusing to order three contempts.

CROSS-APPEAL

The trial court found that Frye frustrated telephonic contact on three specific dates within a three-month period – November 12 and December 3, 2002, and January 21, 2003. CP 364, F/F 2.8. The court based this finding on testimony from Ernest Cook, Frye’s ex-boyfriend. *Id.*; RP 690. But Cook had no recollection of the dates upon which Howe alleged that Frye frustrated telephonic contact. RP 176-80, 192-98. Further, on two out of the three alleged dates, Frye did not frustrate contact – the contact either occurred, or Howe did not call at all. Evidence on the third call is weak at best, and this particular missed call alone is not enough to ground a contempt finding. Howe offered particular dates to the court, but the record does not support those findings.

This Court must strictly construe the telephonic-contact provision in the parenting plan to determine whether Frye’s conduct was a “plain violation.” *Humphreys*, 79 Wn. App. at 599. In light of the already scant evidence on this issue, sufficient evidence does not support findings. Since the record does not support the findings, the conclusion also must fall. The Court should reverse the single contempt finding, and award fees to Frye.

CROSS-APPEAL ASSIGNMENTS OF ERROR

1. The trial court erred in finding that Frye frustrated telephonic contact in bad faith, and in finding her in contempt for doing so. CP 364, F/F 2.8.
2. The court erred in finding that Frye violated the Parenting Plan by failing to make G available for telephonic contact. CP 365, F/F 2.11.
3. The court erred in finding that Frye did not comply with the telephonic-contact provision of the Parenting Plan. CP 364, F/F 2.9; CP 365-66, F/F 2.15.
4. The court erred in awarding Howe \$500 for the contempt. CP 367, ¶ 3.6; CP 367-68, ¶ 3.7.
6. The court erred in entering a judgment reflecting the \$500 award to Howe. CP 358-70.

CROSS-APPEAL ISSUE

Does the contempt finding lack sufficient evidentiary support, where (1) Howe spoke to G on one of the three 'missed' calls, and called the wrong number on another; (2) evidence on the third call is weak at best; and (3) the witness on whom the court's findings crucially relied did not recall any specific dates?

CROSS-APPEAL STATEMENT OF THE CASE

As discussed above, Howe alleged that Frye intentionally interfered with telephonic contact on 12 occasions. *See supra* Restatement of the Case § E. The court found that Frye interfered with three phone calls, amounting to one contempt. *Id.* The trial court stated that testimony from Frye's ex-boyfriend, Ernest Cook, "tipped the balance between [the] he said, she said" that was going on between Frye and Howe regarding the calls. RP 690; *see also* CP 364, F/F 2.8.

Cook and Frye dated on-and-off for about seven months. RP 176. Toward the end of their relationship, Cook sought out Howe, contacting him by using the redial button on Frye's phone. RP 177, 186, 606. Cook and Howe became friends. RP 296-97. On one occasion, they stood outside Frye's house in the street when she had cancelled visitation because G had a 104° fever. RP 410, 481-82; April RP 73. The trial court noted that Cook was not an unbiased witness. RP 640.

Although Cook testified that Frye interfered with telephonic contact, he did not testify about any specific dates. RP 176-80, 192-98. The court indicated that it could not find specific dates upon which Frye allegedly frustrated telephonic contact. RP 690.

But Howe cross-referenced the missed phone calls alleged and the time-frame Cook and Frye were dating to provide a “window of opportunity.” RP 690. The trial court arrived at the missed phone-call dates based on that window. RP 690, 692.

Frye’s notes made immediately following the November 12, 2002 phone call indicate that Howe and G spoke. RP 428. On November 11, 2002, Howe sent Frye an email indicating that he would be calling from Los Angeles the following day for his scheduled call. RP 428; Ex 28, 5-1. Howe testified that when he called G, Frye told him G was sleeping. RP 241-42. But Frye’s handwritten note on Howe’s email stated that Howe called at 7:09 and that the call ended six minutes later at 7:15. Ex 28, 5-1. These calls were frequently short. April RP 8; RP 195-96. Frye’s calendar also indicates that Howe spoke to G. Ex 28, 5-1; RP 428.

As to the January 2003 phone call, Howe testified that he called he heard a recorded message indicating that Frye’s cell phone was not working. RP 247; Ex 17. He subsequently called Frye’s father and grandmother, but did not reach G. Ex 28, 7. But Howe’s phone records indicate that he called Frye’s father first, and then called Frye’s old land-line, not her cell phone. RP 429-30; Ex 17. Howe never called Frye’s cell phone that night. RP 429-30.

Frye's calendar also indicates that Howe did not call her to speak to G in January 21, 2003. Ex 28, 1-5. Instead, he called Frye's father and told him that he was snowboarding in the mountains. *Id.*

Frye had previously informed Howe that her land-line was no longer operating (RP 429-30; Ex 28, 2-2) and reminded him to use her cell phone. Ex 28, 17-14. Thus, when Howe called on the 21st, he received a message indicating that Frye's phone was not working because he called her out-of service land line. *Compare* RP 247 & Ex 17 *with* RP 429-30 & Ex 28, 2-2.

Finally, Howe testified that Frye told him G was sleeping when he called on December 3, 2002. RP 246-47. Frye does not have an entry in her calendar for this date, which indicates that the telephone call was successful. RP 426.

Both the November and December 2002 calls occurred in a time-frame during which Frye and Howe were trying to improve their relationship for G's sake. RP 435. For example, although Frye had G for Thanksgiving in 2002, Frye shared the holiday with Howe. RP 436-38. Frye and G stayed at Howe's house the entire holiday weekend. *Id.* Frye also had G for Christmas, but shared that holiday with Howe as well, again spending days at Howe's home. RP 438.

CROSS-APPEAL ARGUMENT

“The court's contempt power must be used with great restraint” because it “uniquely is ‘liable to abuse.’” ***State ex rel. Daly v. Snyder***, 117 Wn. App. 602, 606, 72 P.3d 780 (2003) (citing ***In re M.B.***, 101 Wn. App. 425, 439, 3 P.3d 780 (2000) *rev. denied sub nom, In re Hansen*, 142 Wn.2d 1027 (2001); and quoting ***Int'l Union, United Mine Workers of Am. v. Bagwell***, 512 U.S. 821, 831, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)) *rev. denied*, 151 Wn.2d 1005 (2004). As noted, the Court must strictly construe the telephonic-contact provision in the parenting plan to determine whether Frye committed a “plain violation.” ***Humphreys***, 79 Wn. App. at 599. The trial court abuses its discretion in ordering contempt by exercising its discretion in an untenable or unreasonable manner. See, e.g., ***Trummel v. Mitchell***, 156 Wn.2d 653, 671-74, 131 P.3d 305 (2006).

The contempt finding here is untenable because Cook's testimony does not support the finding of specific dates of alleged interference with telephonic contact. All Cook provided was a “window of opportunity” – a time-frame in which Cook might have been at Frye's house when Howe alleges she interfered with his telephonic contact. CP 6, ¶ 3.13 (E). But that does not prove that

Cook was actually present during the allotted phone-call time, from 7:30-8:30 on Tuesday nights, much less that anything improper occurred on those evenings. CP 6, ¶ 3.13 (E). On the contrary, Cook was uncertain, but thought that the telephone calls occurred on Thursdays. RP 177, 198. Howe did not ask Cook about specifics dates, and Cook did not provide any. RP 176-80, 192-98.

The trial court chose these dates out of the 12 Howe alleged simply because they overlapped with the general period during which Cook might have been present at Frye's house. RP 690, 692. Cook did not testify that Frye frustrated telephonic contact on any one of the dates the court chose (RP 176-80, 192-98), and the evidence does not support the finding on at least two of the three dates found. Frye's records indicate that Howe spoke to G on November 12, 2002. RP 428, Ex 28, 5-1. As to the December call, Howe did not even call Frye's cell phone, the only working phone she had. RP 429-30; Ex 17. This is not substantial evidence to ground a contempt finding.

The evidence supporting the remaining call on December 3, 2002, is weak at best. Frye testified that Howe and G spoke on this date (RP 428) and Howe claims that Frye told him G was sleeping. RP 246-47. But why would Frye intentionally frustrate this phone

call when the parties were trying to improve their relationship for G's sake during this same period? RP 435. Within weeks before and after this call, Frye had both Thanksgiving and Christmas alone with G under the Parenting Plan, yet Frye and G spent these holidays with Howe. RP 437-38. Frye and G even stayed at Howe's house for several days over both holidays. *Id.* Frye was plainly trying to improve contact, not frustrate it. RP 435.

In light of the weak evidence on frustration of telephonic contact, the mere possibility that Cook was at Frye's home on the three dates when Howe alleged violations is not a tenable ground for a contempt finding. Frankly, the court picked the dates out of a hat because Howe offered a window of opportunity. But the trial court did not find Howe credible, and Cook gave no specific dates. The contempt finding is unsupported. The Court should reverse.

ATTORNEYS' FEES

The trial court awarded Frye fees, finding that Howe was intransigent and motivated by a desire to control the case:

The Court finds that the scope of this litigation is inappropriate; this seems to reflect [Howe's] desire to control the situation.

CP 368, ¶ 3.7; RP 717-18. The court explained that Howe's behavior had unnecessarily increased the parties' fees:

This is the essence of the award of attorney's fees. The scope of the litigation is inappropriate, and it seems to reflect Mr. Howe's desire to control the situation. That's why the litigation was so expensive. That's why it was. . . . Howe made this litigation expensive; and he's going to bear the brunt of that.

RP 717-18. Frye had to share in the costs because of the contempt finding. *Id.*

The court awarded Howe a \$500 judgment for the contempt finding. CP 367, ¶ 3.7. To calculate Frye's fee award, the court took the total fees and costs incurred and prorated the amount based on the percentile of the parties' income. CP 368, ¶ 3.7. The court then offset Frye's prorated fees by the \$500 judgment to Howe, resulting in a fee award to Frye of just over \$9,000 – less than half of her total fees. *Id.*

Thus, there are two fee awards at issue here – fees awarded due to intransigence, and fees awarded under the contempt statute. As to the former, a trial court typically has broad discretion in awarding attorneys' fees, and will be reversed only for a manifest abuse of discretion. ***In re Parentage of J.M.K.***, 155 Wn.2d 374, 395-96, 119 P.3d 840 (2005). A trial court may award attorneys' fees when a party's intransigence increases fees. ***In re Marriage of Burrill***, 113 Wn. App. 863, 873, 56 P.3d 993 (2002). If the

intransigent “bad act” continue throughout the trial, then the court does not have to segregate those fees that were incurred as a result of intransigence from fees that were not. **Burrill**, 113 Wn. App. at 873.

Under RCW 26.09.160, if the trial court finds a party in contempt, then it must order the party to pay reasonable attorneys’ fees, court costs, and a statutory penalty. **In re Parentage of Schroeder**, 106 Wn. App. 343, 353, 22 P.3d 1280 (2001). The trial court maintains discretion in setting the amount of fees, and the fees must be reasonable and “incurred as a result of the noncompliance” with the parenting plan. RCW 26.09.160(2)(b)(ii); **Schroeder**, 106 Wn. App. at 353.

a. The court properly awarded Frye fees based on Howe’s intransigence.

There is more than enough evidence to support the trial court’s conclusion that Howe was intransigent. *See supra* Restatement of the Case § F. Howe misused and overused the litigation process from the beginning. *Id.* His litigiousness unnecessarily increased fees, and the trial court was well within its broad discretion in awarding Frye less than half of her fees. *Id.*

Without addressing the basis of the court's ruling, Howe argues that the trial court's fee award "may well be the most outrageous abuse of discretion," characterizing it as follows:

The trial court created its own law out of thin air, brought its own motion under the law, filled in its own blanks to support that motion, and issued an order based in its own law. All of this can only have one purpose – to punish Appellant Greg Howe.

BA 42. Howe argues that the trial court – not he – made the litigation expensive. BA 43.

The remainder of Howe's argument is essentially that the trial court should have ordered Frye to pay all of Howe's attorneys' fees because of the single contempt finding. BA 43, 46. He also argues that the fee award is "per se unreasonable" because RCW 26.01.160 does not authorize fees to the contemnor. BA 40.

Howe apparently misunderstands RCW 26.09.160. The contempt statute requires the trial court to award fees reasonably "incurred as a result of the noncompliance" with the court-ordered parenting plan – not all fees in the entire litigation in which only one of many contempt claims was successful. RCW 26.09.160(2)(b)(ii). Howe is entitled only to those fees – if any – that were *reasonably* expended on the pursuit of proving that Frye interfered with telephonic contact on the three dates found. *Id.* Howe is not

entitled to recover fees for the rest of the litigation as those fees were incurred pursuing claims he lost. *Id.*

Further, it is irrelevant that RCW 26.09.160 does not authorize fees to the contemnor (BA 40) because the court awarded Frye fees due to Howe's intransigence – not under the statute. CP 367-68, ¶ 3.7. As discussed above, the trial court was well within its broad discretion in awarding Frye fees based on Howe's intransigence. Howe "made th[e] litigation expensive" and he should have to pay for it. RP 717-18.

b. Awarding Howe \$500 as an offset against fees is sufficient to comply with RCW 26.09.160.

Howe argues that the \$500 "sanction" is no sanction at all because it does not "cause pain or discomfort." BA 41. But the contempt statute is remedial not punitive – the sole purpose of RCW 26.09.160 is to coerce compliance with a parenting plan, not to punish. *In re Marriage of Farr*, 87 Wn. App. 177, 187, 940 P.2d 679 (1997) *rev. denied*, 134 Wn.2d 1014 (1998).

Thus, the only question on the \$500 award to Howe is whether it is sufficient to comply with RCW 26.09.160, which required the court to award a \$100 sanction, plus fees and costs reasonably incurred in proving the three missed phone calls. RCW

26.09.160(2)(b). The answer is yes, first and foremost because it was not reasonable to expend any fees to pursue these missed phone calls. Further, the trial court could reasonably determine that Howe should have expended only \$400 to prove three missed phone calls. This is *de minimus* and a five day trial was completely unnecessary to prove three missed calls. Further, as discussed above, Frye did not frustrate at least two of the three calls. See *supra*, Cross-Appeal.

c. Even if Howe prevails on appeal, his fee request is inadequate, and the Court should deny fees.

A party may receive appellate fees only if he devotes a section of his brief to the fee request. ***Phillips Bldg. Co. v. An***, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996) (citing RAP 18.1(b)). RAP 18.1(b) requires argument and citation to authority in support of a fee request – a “bald request” is insufficient. ***Phillips***, 81 Wn. App. at 705.

This Court has recently denied attorneys’ fees for the failure to adequately set forth the request: ***In re Marriage of Kaseburg***, 126 Wn. App. 546, 562, 108 P.3d 1278 (2005); ***Quality Rock Products, Inc. v. Thurston County***, 126 Wn. App. 250, 275 n. 23, 108 P.3d 805 (2005); ***Myers***, 123 Wn. App. at 894.

In the last sentence of the Brief of Appellant, in the Conclusion, Howe asks this Court to remand with instructions to award him appellate fees. BA 46. Howe does not devote a section of his brief to this request, nor does he provide any argument or citation to authority. *Id.* Howe's fee request is nothing more than a "bald request," and the Court should disregard it. ***Philips***, 81 Wn. App. at 705.

d. The Court should award Frye fees on appeal, where Howe's intransigence continues.

Where a trial court awards fees based on intransigence, the intransigence in the trial court can serve as the basis for an award of attorneys' fees on appeal. ***In re Marriage of Mattson***, 95 Wn. App. 592, 606, 976 P.2d 157 (1999). Further, intransigence at the appellate level is a basis for awarding fees on appeal, independent of RCW 26.09.140 and RAP 18.9. ***Mattson***, 95 Wn. App. at 605. Thus, even if an appeal does not reach the level of frivolity, fees are appropriate if a party's intransigence increases the other's fees. 95 Wn. App. at 605.

The Court should award Frye fees for the same reason the trial court awarded them – Howe has unnecessarily increased Frye's fees. CP 368, ¶ 3.7. The trial court's fee award to Frye

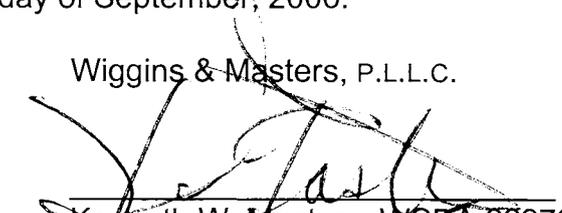
based on Howe's intransigence and subsequent sanction for a frivolous contempt motion apparently served no warning to Howe, as he pursued on appeal each and every claim the trial court rejected. *Compare* BA 1-3 with CP 359-64. Further, Howe has repeatedly failed to comply with RAP 10.3, forcing Frye to respond to unsupported factual assertions and arguments that are not even clearly set forth and lack any authority. See *e.g.*, BA 5-10, 28-31, 37. The Court should award Frye fees both because the trial court properly awarded fees based on intransigence and because Howe's intransigence continues on appeal. **Mattson**, 95 Wn. App. at 605-06.

CONCLUSION

For the reasons stated above, Frye respectfully asks the Court to affirm on all grounds raised in the Brief of Appellant, reverse the one contempt finding, and award her appellate fees.

DATED this 6th day of September, 2006.

Wiggins & Masters, P.L.L.C.



Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 6th day of September 2006, to the following counsel of record at the following addresses:

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Attorney for Respondent/Cross-Appellant

FILED
COWLITZ COUNTY COURT
JUL 12 12 13
CLERK OF COURT
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COWLITZ COUNTY SUPERIOR COURT, STATE OF WASHINGTON

In re Parentage of:
GRANT ALEXANDER HOWE,

MIA K. FRYE,

Petitioner,

vs.

GREGORY M. HOWE,

Respondent.

NO. 99-5-00280-8

ORDER ON SHOW CAUSE RE
CONTEMPT/JUDGMENT
(ORCN)

Next Hearing Date:
 Clerk's Action Required

05 9 0 2 0 8 8 8 =

I. JUDGMENT SUMMARY

Judgment summary is as follows:

- | | | |
|----|--|-------------------------------|
| A. | Judgment Creditor | <u>Mia Frye/Noelle McLean</u> |
| B. | Judgment Debtor | <u>Greg Howe</u> |
| C. | Principal judgment amount (back support)
from _____ to _____ | \$ <u>0.00</u> |
| D. | Interest to date of Judgment | \$ <u>0.00</u> |
| E. | Attorney's fees | \$9,010.00 |
| F. | Costs | \$ <u>0.00</u> |
| G. | Other recovery amount | \$ <u>0.00</u> |
| H. | Principal judgment shall bear interest at _____% per annum. | |
| I. | Attorney's fees, costs and other recovery amounts shall bear interest at <u>12%</u> per annum. | |
| J. | Attorney for Judgment Creditor | <u>Noelle A. McLean</u> |
| K. | Attorney for Judgment Debtor | <u>Stephen G. Smith</u> |

ORDER ON SHOW CAUSE RE CONTEMPT/JUDGMENT
WPF DR 05.0200 (6/2000)RCW 26.09.160
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APPENDIX

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ORIGINAL
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THIS MATTER comes before the Court on Respondent Greg Howe's Motions for Contempt filed July 27, 2004 and October 29, 2004, which came before the Court for evidentiary hearing and trial on the following dates: March 15 and 16, 2005; April 15 and 28, 2005; and May 2, 2005.

The Court, having heard live testimony from the Respondent, Tammy Bjorhus, Beverly Bangs, Tom Byrne, Harold Erdelbrock, Ernie Cook, the Petitioner, and Wayne Frye, as well as considering various exhibits received into evidence and declarations filed herein, enters the following findings of fact and conclusions of law.

II. FINDINGS AND CONCLUSIONS

THIS COURT FINDS:

2.1 **Original Parenting Plan.** A Parenting Plan was entered by order of court in this matter on March 2, 2001. Three years later Greg Howe filed a petition to modify the Parenting Plan. There has been no history of contempt findings prior to the custody filing.

2.2 **Parenting Plan, Little Christian Daycare.** The Petitioner, Mia Frye, intentionally supplied a redacted copy of the Parenting Plan to Little Christian Daycare. Trial Exhibit #11 is the redacted Parenting Plan presented by Mia Frye to Little Christian Daycare. It is distinguished from the original Parenting Plan (trial Exhibit #1) in that it is missing portions or all of paragraphs 3.1, 3.2 and 3.13 (f).

The Court finds the parenting relationship between the parties continues to be conflicted. Neither parent supports the other parent's parenting with the child; they begrudgingly tolerate it.

The Parenting Plan filed on March 2, 2001, contains no provision or mandate which

compels the Petitioner to provide all, none, or any part of the Parenting Plan to Little Christian Daycare. The Parenting Plan does not address this issue at all. The Petitioner, by not giving a full and complete Parenting Plan to Little Christian Daycare, has acted consistent with the attitude of begrudging toleration to the Parenting Plan but it is not contempt of court.

2.3 **Parenting Plan, Castle Rock Elementary.** Petitioner Mia Frye had given to Castle Rock Elementary School a partial Parenting Plan with the page numbers missing. Trial Exhibit #29 is the Parenting Plan presented to Castle Rock Elementary by Mia Frye. It is missing pages 3, 4, 5, 7, 10 and 12.

The portions of the Parenting Plan not given to the Castle Rock Elementary School by Petitioner Mia Frye were portions which specifically would affect the Respondent's ability to interact with Castle Rock Elementary School.

The Parenting Plan contains no provisions which would compel Petitioner Mia Frye to provide all, none or any part of the Parenting Plan to the Castle Rock Elementary School. The failure to supply a complete parenting plan is not a contempt of court.

2.4 **Parenting Plan, Child and Adolescent Clinic.** Petitioner Mia Frye provided a portion of the Parenting Plan to the Child and Adolescent Clinic, which is the primary medical provider for the child, Grant Howe. Trial Exhibit # 14 is the Parenting Plan presented to the Child and Adolescent Clinic by Mia Frye. It is missing pages 2 through 7, and 9 through 11.

The Parenting Plan entered into herein contains no provisions whereby Petitioner Mia Frye was obligated to provide all, none, or any part of the Parenting Plan to the Child and Adolescent Clinic, and the failure to provide a complete parenting plan is not a contempt of

court.

2.5 **Custodial Interference, May 28, 2004.** Petitioner Mia Frye sent to the Respondent an e-mail on May 26, 2004, Trial Exhibit #20 and # 28 page 12-2. The Court finds that this was an effort to renegotiate the transportation provisions of the Parenting Plan as it pertains to the Friday day visits which the Respondent exercised with his son, Grant Howe.

On May 28, 2004, the date of the day visit, at 8:11 a.m., the Petitioner sent to the Respondent yet another e-mail, Trial Exhibit # 28 page 12-3. The Court finds this was a further effort to renegotiate the transportation aspects of the Parenting Plan as they pertained to Friday day visits. The Respondent was scheduled to pick up his son, Grant Howe, for a day visit at the Cowlitz County Courthouse at 10:00 a.m. as set forth in the Parenting Plan.

The Petitioner had been experiencing automotive problems, and the evidence demonstrates that the Petitioner's motor vehicle had been in the shop on May 21, 2004, but was not in the shop on May 28, 2004, despite Petitioner's declaration made under oath to this effect.

On May 28, 2004, the Petitioner untruthfully stated to the Respondent during the course of the exchange of Grant that she was having car problems and requested Respondent's signature upon the e-mail as an assurance of Grant's return to the Cowlitz County Courthouse at 4 p.m. that day.

The Respondent signed said email and exercised his day residential time with his son, Grant. The Petitioner drove to Cowlitz County Courthouse at 4 p.m. to reacquire primary care over Grant Howe to observe that neither Greg nor Grant were present. Upon calling Respondent, the Petitioner learned that Grant was at the Bellevue exchange location with the Respondent.

Thereafter, the Petitioner drove to Seattle and picked Grant up. The court finds that Greg Howe's interpretation of the parenting plan is literal but unrealistic. Petitioner, Mia Frye negotiated with Greg Howe to return the child to Kelso at 4:00 pm on 05/28/04. Petitioner, Mia Frye attempted to renegotiate the provisions of the parenting plan, but did not violate the parenting plan. Mia Frye obtained the child in King County as required by the parenting plan. There is no contempt of court for these actions.

2.6 Medical Excuses/Doctor Notes as a means to deny residential time. Under the language of the Parenting Plan, Section 6.7, the Respondent's entitlement to residential time may be denied under circumstances wherein the child's health is insufficient for the exercise of residential time pursuant to doctor recommendations. In this same paragraph, the father/respondent has an entitlement to contact the medical provider and question the provider in order to make a determination as to the legitimacy of said medical condition as a denial of residential time.

The Respondent father in this matter draws the Court's attention to various dates wherein the father alleges that the Petitioner mother, in bad faith, utilized the medical provisions of the Parenting Plan to deny father's residential time. The following dates have been drawn to the Court's attention: June 29, 2001, August 15, 2002, December 5, 2003, and June 10, 2004.

Historically, it is apparent to the Court that the Respondent father is aware of the Parenting Plan provisions wherein he can question the medical provider and has, in fact, done so on occasion so as to cause the medical provider to issue a second note wherein father's residential time could occur given the medical condition of the child, Grant Howe.

If the Respondent father chooses not to exercise this right under the Parenting Plan, efforts by the Petitioner mother to restrict visitation under section 6.7 are not specifically in violation of the language of the Parenting Plan. There is no contempt of a court order.

2.7 Disparaging Comments. The Respondent alleges that disparaging comments made by the Petitioner are made in bad faith.

Disparaging comments made to the daycare people are not extensive, and nothing that the Petitioner said to the daycare people affected the relationship of Respondent with the daycare. The daycare personnel were offended by Greg Howe's controlling behavior toward them in the daycare setting. Greg Howe's behavior was of his own choice, and had nothing to do with Mia Frye.

Disparaging comments to the medical provider. There is no evidence of any disparaging remarks made in the presence of the child to the medical provider. Comments made by the Petitioner to the medical provider do not violate any provision of the Parenting Plan. There is no provision in the Parenting Plan that precludes either parent from making disparaging comments to third persons about the other. Paragraph 6.5 of the Parenting Plan prohibits disparaging remarks to be made by either parent in front of the child. Petitioner Mia Frye did not violate paragraph 6.5 of the Parenting Plan.

2.8 Telephonic Contact. Obstruction or bad faith avoidance of telephonic contact.

The Respondent is alleging that various telephonic contacts were obstructed by the Petitioner. The dates which are alleged to have been obstructed in bad faith by the Petitioner are as follows: July 16, 2002, November 12, 2002, December. 3, 2002, January 21, 2003, January 28,

2003, April 6, 2004, August 3, 2004, August 10, 2004, and September 14, 2004. The Court finds that the Petitioner decided on her own to frustrate these telephonic contacts, and while not an unbiased witness, the Court is persuaded by the testimony of Ernest Cook, which testimony suggests that the Petitioner mother misrepresented the child's availability and/or put the child to bed in advance of the telephonic contacts so as to thwart the Respondent's efforts to have telephonic contact with his son.

The Court is not persuaded that this happened every time, and some of the allegations are very stale.

The Court makes a finding that the Petitioner mother has not always made Grant available for telephonic contact, that she has done so in bad faith. The Petitioner mother's behavior as it pertains to the following dates was contemptuous:

Nov 12, 2002 _____

Dec. 3, 2002 _____

Jan 21, 2003 _____

Statutory Penalty. The Respondent is awarded a statutory penalty of \$500.00 pursuant to RCW 26.09.160 for violation of the residential provisions of the Parenting Plan to be offset against the attorney fees provision herein.

2.9 COMPLIANCE WITH COURT ORDER.

Petitioner Mia Frye failed to comply with a lawful order of the court to wit the Parenting Plan dated March 2, 2001.

2.10 NATURE OF ORDER.

The order is related to the Parenting Plan (custody/visitation).

2.11 HOW THE ORDER WAS VIOLATED.

This order was violated in the following manner:

See paragraph 2.8 .

2.12 PAST ABILITY TO COMPLY WITH ORDER.

Petitioner Mia Frye had the ability to comply with the order as follows:

Petitioner had the ability to make her son, Grant, available for telephonic visitations with his father, the Respondent herein, as provided for under the express terms of the Parenting Plan and she failed to do so.

2.13 PRESENT ABILITY AND WILLINGNESS TO COMPLY WITH ORDER.

Petitioner Mia Frye has the present ability and willingness to comply with the order as follows:

Petitioner Mia Frye has cellular service as her only contact method (she does not maintain a land line). Under the terms of the Parenting Plan the Petitioner is obligated to make her son Grant available for telephonic contact with the Respondent father on Tuesdays between the hours of 7:30 p.m. and 8:30 p.m. The Petitioner mother has stated she is now willing to comply with the Parenting Plan by making her son available for telephonic contact on Tuesdays between the hours of 7:30 p.m. and 8:30 p.m.

2.14 BACK SUPPORT/MAINTENANCE.

Back support/maintenance is not addressed in the contempt motion.

2.15 COMPLIANCE WITH PARENTING PLAN.

Petitioner Mia Frye has not complied with

- the residential (telephonic visitation) provisions of the Parenting Plan and had the ability to comply with the Parenting Plan, and is presently willing to comply. The noncompliance with the residential provisions was in bad faith.
- decision making provisions of the Parenting Plan and had the ability to comply with the Parenting Plan, and is presently unwilling to comply.
- dispute resolution provisions of the Parenting Plan and had the ability to comply with the Parenting Plan, and is presently unwilling to comply.

Other:

2.16 ATTORNEY FEES AND COSTS.

The attorney fees and costs awarded in paragraph 3.7 below have been incurred and are reasonable.

III. ORDER AND JUDGMENT

IT IS HEREBY ORDERED:

3.1 Petitioner Mia Frye is in contempt of court. (see paragraph 2.8)

3.2 IMPRISONMENT.

Does not apply.

_____ [Name] is to be confined in the _____
[Name of County] County Jail.

Confinement shall commence immediately and shall continue until _____ [Date] or until the contempt is purged as set forth in paragraph 3.6 below, in which case the contemnor shall be released immediately.

Confinement is suspended as follows:

other:

3.3 ADDITIONAL RESIDENTIAL TIME.

Does not apply.

Respondent Greg Howe shall have additional residential time as follows:

ORDER ON SHOW CAUSE RE CONTEMPT/JUDGMENT
WPF DR 05.0200 (6/2000)RCW 26.09.160
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June 10-12, 2005	_____
June 24 - 26, 2005	_____
July 8 - 10, 2005	_____
July 22 - 24, 2005	_____
August 12 - 14, 2005	_____
August 26 - 28, 2005	_____
September 9 -11, 2005	_____

Such make up residential time shall be under the same transportation provisions established in the Parenting Plan.

3.4 JUDGMENT FOR PAST CHILD SUPPORT.

Does not apply.

3.5 JUDGMENT FOR PAST SPOUSAL MAINTENANCE.

Does not apply.

3.6 CONDITIONS FOR PURGING THE CONTEMPT.

The contemnor may purge the contempt as follows:

By paying a sanction of \$500.00. Said monetary sanction shall be deducted from the attorney fees awarded to Mia Frye from Greg Howe. Satisfaction of the sanction is acknowledged as fully and completely satisfied upon entry of this order with the court. It is acknowledged Mia Frye has purged the contempt finding upon entry of this order with the court.

3.7 ATTORNEY FEES/COSTS.

By virtue of the Petitioner having been found in contempt for violations of the telephonic contact provisions of the Parenting Plan, the Respondent shall be awarded judgment in the amount of \$500.00 against the Petitioner to be offset against his share of the attorney's fees.

The parties hereto have incurred substantial attorney fees in the pursuit of this litigation.

The Court finds that the scope of this litigation is inappropriate; this seems to reflect Respondent's desire to control the situation. The Court will make an attorney fee award based upon a prorated formula of income between the parties. The Court will impute income to the Petitioner mother using figures from the current index.

In arriving at an attorney fee award, the Court will first determine the total amount of fees and costs incurred and then prorate the amount to be paid based upon the percentile of current income of the parties. Under circumstances wherein the Petitioner remains unemployed, such income for the Petitioner shall be imputed to her. From the net obligation of the Respondent shall be deducted the \$500.00 award of fees indicated above. Accordingly, attorney fees shall be allocated using the following formula:

Frye Fees	\$21,227.00	
Howe Fees	<u>\$32,030.00</u>	
Total	$\$53,257.00 \times 78\% = \$41,540.00 - \$32,030.00 = \$ 9,510.00$	
		-\$500.00 Award to Howe as a Statutory Penalty
		\$9,010.00 Net to Mia Frye

3.8 REVIEW DATE.

Does not apply.
 The court shall review this matter on _____ [Date] at _____
[Time].

3.9 OTHER:

The parties hereby stipulate to a "modification"/ "clarification" of the Final Order Parenting Plan entered in Cowlitz County Superior Court on 03/02/01 at paragraph 3.5 SUMMER SCHEDULE, the following language shall be added "Every first, third, and fifth weekend as

defined by Fridays, from Friday at 5:00 p.m. to Sunday at 5:00 p.m.”.

3.10 SUMMARY OF Ch. 21 Laws 2000 §§5 - 10, RCW 26.09.430-480 REGARDING RELOCATION OF A CHILD:

This is a summary only. For the full text, please see Ch. 21 Laws 2000.

If the person with whom the child resides a majority of the time plans to move, that person shall give notice to every person entitled to court ordered time with the child.

If the move is outside the child’s school district, the relocating person must give notice by personal service or by mail requiring a return receipt. This notice must be at least 60 days before the intended move. If the relocating person could not have known about the move in time to give 60 days’ notice, that person must give notice within 5 days after learning of the move. The notice must contain the information required in Ch. 21 Laws 2000 § 6. See also form DR 07.0500 (Notice of Intended Relocation of A Child.)

If the move is within the same school district, the relocating person must provide actual notice by any reasonable means. A person entitled to time with the child may not object to the move but may ask for modification under RCW 26.09.260.

Notice may be delayed for 21 days if the relocating person is entering a domestic violence shelter or is moving to avoid a clear, immediate and unreasonable risk to health and safety.

If information is protected under a court order or the address confidentiality program, it may be withheld from the notice.

A relocating person may ask the court to waive any notice requirements that may put the health and safety of a person or a child at risk.

Failure to give the required notice may be grounds for sanctions, including contempt.

If no objection is filed within 30 days after service of the notice of intended relocation, the relocation will be permitted and the proposed revised residential schedule may be confirmed.

A person entitled to time with a child under a court order can file an objection to the child’s relocation whether or not he or she received proper notice.

An objection may be filed by using the mandatory pattern form WPF DR 07.0700, (Objection to Relocation/Motion for Modification of Custody Decree/parenting Plan/Residential Schedule (Relocation)). The objection must be served on all persons entitled to time with the child.

The relocating person shall not move the child during the time for objection unless: (a) the delayed notice provisions apply; or (b) a court order allows the move.

If the objecting person schedules a hearing for a date within 15 days of timely service of the objection, the relocating person shall not move the child before the hearing unless there is a clear, immediate and unreasonable risk to the health or safety of a person or a child.

WARNING: Violation of residential provisions of this order with actual knowledge of its terms is punishable by contempt of court and may be a criminal offense under RCW 9A.040.060(2) or 9A.40.070(2). Violation of this order may subject a violator to arrest.

Dated: _____

9/12/05

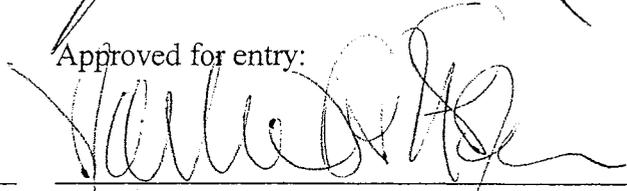
James E. Warne, Judge

Presented by: _____



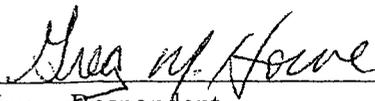
Stephen G. Smith, WSBA # 11185
Attorney for Respondent

Approved for entry: _____



Noelle McLean, WSBA # 22921
Attorney for Petitioner

Greg Howe, Respondent



Mia Frye, Petitioner



RCW 26.09.160. Failure to comply with decree or temporary injunction -- Obligation to make support or maintenance payments or permit contact with children not suspended - Penalties

(1) 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 or temporary order of injunction, the obligation of the other party to make payments for support or maintenance or to permit contact with children is not suspended. An attempt by a parent, in either the negotiation or the performance of a parenting plan, to condition one aspect of the parenting plan upon another, to condition payment of child support upon an aspect of the parenting plan, to refuse to pay ordered child support, to refuse to perform the duties provided in the parenting plan, or to hinder the performance by the other parent of duties provided in the parenting plan, shall be deemed bad faith and shall be punished by the court by 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.

(2) (a) A motion may be filed to initiate a contempt action to coerce a parent to comply with an order establishing residential provisions for a child. If the court finds there is reasonable cause to believe the parent has not complied with the order, the court may issue an order to show cause why the relief requested should not be granted.

(b) If, based on all the facts and circumstances, the court finds after hearing that the parent, in bad faith, has not complied with the order establishing residential provisions for the child, the court shall find the parent in contempt of court. Upon a finding of contempt, the court shall order:

(i) The noncomplying parent to provide the moving party additional time with the child. The additional time shall be equal to the time missed with the child, due to the parent's noncompliance;

(ii) The parent to pay, to the moving party, all court costs and reasonable attorneys' fees incurred as a result of the noncompliance, and any reasonable expenses incurred in locating or returning a child; and

(iii) The parent to pay, to the moving party, a civil penalty, not less than the sum of one hundred dollars.

The court may also order the parent to be imprisoned in the county jail, if the parent is presently able to comply with the provisions of the court-ordered parenting plan and is presently unwilling to comply. The parent may be imprisoned until he or she agrees to comply with the order, but in no event for more than one hundred eighty days.

(3) On a second failure within three years to comply with a residential provision of a court-ordered parenting plan, a motion may be filed to initiate contempt of court

proceedings according to the procedure set forth in subsection (2)(a) and (b) of this section. On a finding of contempt under this subsection, the court shall order:

(a) The noncomplying parent to provide the other parent or party additional time with the child. The additional time shall be twice the amount of the time missed with the child, due to the parent's noncompliance;

(b) The noncomplying parent to pay, to the other parent or party, all court costs and reasonable attorneys' fees incurred as a result of the noncompliance, and any reasonable expenses incurred in locating or returning a child; and

(c) The noncomplying parent to pay, to the moving party, a civil penalty of not less than two hundred fifty dollars.

The court may also order the parent to be imprisoned in the county jail, if the parent is presently able to comply with the provisions of the court-ordered parenting plan and is presently unwilling to comply. The parent may be imprisoned until he or she agrees to comply with the order but in no event for more than one hundred eighty days.

(4) For purposes of subsections (1), (2), and (3) of this section, the parent shall be deemed to have the present ability to comply with the order establishing residential provisions unless he or she establishes otherwise by a preponderance of the evidence. The parent shall establish a reasonable excuse for failure to comply with the residential provision of a court-ordered parenting plan by a preponderance of the evidence.

(5) Any monetary award ordered under subsections (1), (2), and (3) of this section may be enforced, by the party to whom it is awarded, in the same manner as a civil judgment.

(6) Subsections (1), (2), and (3) of this section authorize the exercise of the court's power to impose remedial sanctions for contempt of court and is in addition to any other contempt power the court may possess.

(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.