

No. 36807-2-II

IN THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

In re the Marriage of:

Kimberly Esser (f/k/a Bobbitt), *Respondent*

and

Ron Bobbitt, *Appellant*

FILED
COURT OF APPEALS
DIVISION II
08 APR 25 PM 4:06
STATE OF WASHINGTON
BY DEPUTY

OPENING BRIEF

Ron Bobbitt, *Appellant pro se*

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ORIGINAL

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A. Assignments of Error

Assignments of Error

Error # 1: - The remand court erred when it entered Finding # 1 ("The Respondent refused to see the parties' son for a substantial period of time after the decree of dissolution, which led to the Petitioner's petition for modification of the residential schedule.")

Error # 2: - The remand court erred when it entered Finding # 2 ("Respondent trespassed on the property of Petitioner and manipulated the parties' son to take pictures of trash cans. The Respondent's purpose in doing so was to attempt to prove that Petitioner was an unfit mother.")

Error # 3: - The remand court erred when it entered Finding # 3 ("Respondent harassed Petitioner at her place of employment with false allegations regarding her use of office time.")

Error # 4: - The remand court erred when it entered Finding # 4 ("Respondent manipulated the parties' son to contact his grandparents and ask them why they were against him.")

Error # 5: - The remand court erred when it entered Finding # 5 ("The parties' son suffered as a result of Respondent's actions by making the child feel as if he must choose between his parents.")

Error # 6: - The remand court erred when it entered Finding # 6 ("When the GAL began her investigation in April of 2003, Respondent failed to pay his share of the GAL's retainer and failed to schedule an appointment with her or provide her with any written materials. This conduct resulted in a delay of the modification proceedings. Respondent did not request to meet with the GAL until September of 2003.")

Error # 7: - The remand court erred when it entered Finding # 7 ("Respondent harassed Petitioner's current husband requiring him to take legal action to obtain a restraining order.")

Error # 8: - The remand court erred when it entered Finding # 8 ("Respondent made a complaint to Child Protective Services against Petitioner that was unfounded and made solely for the purpose of harassment.")

Error # 9: - The remand court erred when it entered Finding # 9 ("Respondent violated the court's order making it necessary for Petitioner to file a motion for contempt.")

Error # 10: - The remand court erred when it entered Finding # 10 ("Respondent failed to take the parties' son to his counseling appointments.")

Error # 11: - The remand court erred when it entered Finding # 11 ("Respondent unilaterally removed the parties' son from the custody of the person that Petitioner had arranged as a caregiver while she was only a business trip and refused to return the parties' son to such person.")

Error # 12: - The remand court erred when it entered Finding # 12 ("Respondent made it a practice of blaming his problems on everyone but himself, including his own attorneys, the GAL and the Petitioner.")

Error # 13: - The remand court erred when it entered Finding # 13 ("Respondent did not object to the appointment of Dr. Klein until after Dr. Klein's report was filed.")

Error # 14: - The remand court erred when it entered Finding # 14 ("Respondent did not object to the GAL until February 18, 2004, which was nearly a year after her appointment on March 20, 2003.")

Error # 15: - The remand court erred when it entered Conclusion # 1 ("Respondent's conduct improperly placed the parties' son in the middle of the modification action.")

Error # 16: - The remand court erred when it entered Conclusion # 2 ("Petitioner was required to go through a lot of unnecessary litigation as a result of Respondents' actions.")

Error # 17: - The remand court erred when it entered Conclusion # 3 ("The modification proceedings were delayed because of Respondent's actions.")

Error # 18: - The remand court erred when it entered Conclusion # 4 ("Petitioner is entitled to an award of attorneys fees based on Respondent's intransigence and lack of cooperation. This court finds that \$5,000 is an appropriate amount of attorneys fees under all the circumstances rather than the \$10,000 attorney fee award that was previously reflected in a judgment

entered against Respondent on June 25, 2004. The \$10,000 judgment entered on June 25, 2004, incorporated the attorney fee judgment of \$750, entered on March 26, 2004,")

Error # 19: - The remand court erred when it determined the following: ("ORDERED, ADJUDGED, AND DECREED that Respondent is not entitled to an attorney fee award for attorneys fees incurred related to the litigation of the sale of the Yakima property in superior court because, on remand, Respondent failed to produce any evidence that he incurred attorneys fees related to this specific issue. Nonetheless, in reducing the previous attorney fee award of \$10,000 to the Petitioner, this court is taking into consideration the fact that Respondent unnecessarily incurred attorneys fees in responding to Petitioner's improper motion to compel the sale of the Yakima property.")

Error # 20: - The remand court erred when it entered the following: ("ORDERED, ADJUDGED, AND DECREED, that the net sale proceeds from the Yakima property (currently held in the Davies Pearson, P.C. trust account) to be allocated on remand is \$10,058.30, and such amount is awarded to the Respondent, subject, however, to offset of the following amounts to be allocated to the Petitioner:

- (1) \$3,274.14 for a Pierce County District Court judgment against Respondent and in favor of Petitioner on March 20, 2006, plus interest at 12% since entry of the judgment in the amount of \$523.86;
- (2) \$4,443.05 for the Pierce County Superior Court judgment entered against Respondent and in favor of Petitioner on February 24, 2006, with accrued interest in the amount of \$755.32; and
- (3) \$5,000 for the attorney fees awarded as part of this Order, for a total offset of \$13,996.37.")

Error # 21: - The remand court erred when it entered the following: ("ORDERED, ADJUDGED, AND DECREED, that, because the offsets owing to Petitioner exceed the \$10,058.30 amount to be allocated, the entire amounts of the funds currently held in the Davies Pearson Trust Account shall be paid to the Petitioner, and amount of \$3,938.07, with such judgment accruing interest at 12% from the date of this Petitioner shall be entitled to a judgment for the remaining balance of the offsets in the Order.")

Error # 22: - The remand court erred when it entered the following: (“ORDERED, ADJUDGED, AND DECREED, that Respondent's motion to be relieved of any further obligation owing to Guardian ad Litem is hereby granted. Any outstanding judgments awarded to Guardian ad Litem against Respondent are hereby vacated. Respondent's only obligation to Guardian ad Litem is the \$1,1709 which he has already paid to her.”)

Error # 23: - The remand court erred when it entered the following: (“ORDERED, ADJUDGED, AND DECREED that Respondent's motion for reimbursement for various expenditures is denied, including Respondents motion to be reimbursed for fees paid to GAL Virginia Ferguson. This denial is based on Respondent's intransigence during the time period after appointment of the GAL.”)

Error # 24: - The remand court erred when it entered the following: (“ORDERED, ADJUDGED, AND DECREED that Respondent’s motion to remove the supervised visitation restriction in the parenting plan is denied, however, Petitioner is not precluded from petitioning for a modification of the parenting plan and showing a substantial change of circumstances warranting a modification;”)

B. Issues Pertaining to Assignments of Error

Issue # 1: - Did the remand court err by ordering Appellant to pay a portion of Respondent’s reasonable attorney fees without either a finding of need and ability to pay or a finding of intransigence that is supported by appropriate findings?

Issue # 2: - Did the remand court err by determining that Appellant is not entitled to an award of reasonable attorney fees based on his proper resistance in the trial court to Respondent’s improper motion to sell the Yakima property?

Issue # 3: - Did the remand court err by denying an award of interest to Appellant deriving from Respondent’s unlawful possession of the Yakima property sale proceeds?

Issue # 4: - Did the remand court err by denying the motion for the GAL to disgorge the fees already paid by Appellant?

C. Statement of the Case

This is a second appeal from the trial court. After the mandate was issued, Respondent filed two motions entitled: “Motion on Remand From Court of Appeals for Entry of Findings Supporting Attorney Fee Award” [CP 1-7] and “Motion on Remand From Court of Appeals to Allocate Sale Proceeds Held in Trust” [CP 237-244]. Appellant filed one motion entitled: “Motion to Disburse Monies, Determine Fees, and Review GAL Information” [CP 235-236]. These motions were accompanied by several declarations by various people.

The trial court ruled against Appellant on all issues except the issue of additional fees for the GAL. [CP 489-496].

D. Summary of Argument

The remand court violated the “law of the case” by making decisions that are contrary to the holdings of the appellate opinion.

The remand court erred by misunderstanding a trial court’s authority to appoint/remove a GAL with a GAL’s entitlement to payment; by entering an award of attorney fees when the record contains no evidence of intransigence by Appellant; and by refusing to order the GAL to disgorge her unearned fees.

This court should reverse and remand with clear instructions, to avoid further relitigation and creative circumvention of its decisions.

E. **Argument**

The Law of the Case Doctrine

On a second review of a case, the following applies:

It has long been the law in this state (1) that in the absence of a substantial change of evidence on the second trial, questions determined or which could have been determined on the first appeal will not be redetermined on the second trial and appeal; [cites omitted] (2) it is enough if the contention advanced on the second appeal was necessarily involved in the decision on the first appeal even though no specific mention was made of the matter; [cites omitted] (3) accordingly, the decision on the first appeal on substantially the same pleadings and evidence becomes the law of the case, binding upon the parties. [emphasis added].

Highlands Plazas v. Viking Inv. Corp., 2 Wn. App. 192, 197-198, 467 P.2d 378 (1970).

The “law of the case” doctrine is not absolute. The other side of the issue is shown by the following:

Under the doctrine of stare decisis, the court is not obliged to perpetuate its own errors. This doctrine means that the rule laid down in any particular case is applicable to another case involving identical or substantially similar facts. [cite omitted]. But the doctrine will not be applied in cases in which to do so would perpetuate error and in which no property rights would be affected by the overruling of the prior decision. [cite omitted]. We see no reason why this principle should not apply where the allegedly erroneous decision is one which was rendered on a prior appeal of the same case. And in fact it is the increasingly accepted view that the doctrine of “law of the case” is a discretionary rule, which should not be applied where it would result in manifest injustice.

Greene v. Rothschild, 68 Wn.2d 5, 8, 414 P.2d 1013 (1966).

While the Supreme Court has the power and authority to over-rule itself or the Court of Appeals on a second review, no authority exists that

permits a trial court on remand to ignore the holdings of the appellate court opinion. If it were otherwise, the inferior court would effectively be permitted to review a higher court. Such an absurd result would not only be illogical but chaotic in that cases could never really end.

The holdings of the first appeal (Bobbitt I - CoA # 31997-7-II).

Appellant argued four trial court errors: (1) granting authority to Respondent to sell property that she did not own; (2) refusing to remove the GAL prior to trial; (3) entering judgment against him for GAL fees; and (4) awarding attorney fees to Respondent. Appellant prevailed on three of those four claimed errors.

The following passages from **Bobbitt I** are the basis for the law of the case for this second appeal:

“ . . . [W]e remand to the trial court to determine the proper distribution of the funds in Esser’s attorney’s trust account and for entry of such distribution order. We also remand Bobbitt’s request for attorney fees for having to defend and further litigate Esser’s sale of the Yakima property.”

{footnote – “We remand for further determination the distribution of sale proceeds as well as attorney fees. Because these decisions were by different judges, we recognize that more than one hearing may be necessary, but we leave it to the superior court how to assign the remanded hearings.”}

Slip Opinion, page 9.

“The GAL’s refusal to interview Bobbitt violated GALR 2(b), (f), (g), and (o), resulting in Bobbitt’s well-founded concerns which he brought to the trial court’s attention in his February, 2004 motion.”

Slip Opinion, page 15.

“The trial court did not err in refusing to remove the GAL, but in failing to order the GAL to conduct a proper investigation according to the GALRs.”

{footnote – “Bobbitt has not appealed the \$750 sanction imposed.”}

Slip Opinion, page 16.

“We disagree with Esser’s limited interpretation of the statute [regarding payment of GAL fees] and we grant Bobbitt’s request for relief from the judgment [for GAL fees].”

Slip Opinion, page 20.

“In fact, although the court expressly acknowledged the shortcomings of the GAL’s work, it did not enter findings of fact and conclusions of law addressing Bobbitt’s arguments about the GAL’s investigatory shortcomings in its award of fees. Instead, it simply imposed 50 percent of the charged fees and costs on Bobbitt. Given the dispute and the evidence of the GAL’s violations of GALR 2 such findings were necessary here. . . . [W]e reverse and remand for hearing on the GAL fees.”

Slip Opinion, page 22.

“We reverse and remand for determination of the distribution of the remaining proceeds from the sale of the Yakima property and for reconsideration of the proper allocation of attorney fees and GAL fee between the parties.”

Slip Opinion, page 22.

The scope of the remand regarding the property funds is limited to calculation of the amount due to Appellant because Respondent had no claim to the funds whatsoever.

Respondent sold property she did not own and pocketed the proceeds. While **Bobbitt I** accurately held that Respondent Esser had no interest in the Yakima property, it did not specifically rule that she had unlawfully converted the property to her own use. In retrospect, it appears that maybe the opinion should have held that she had.

In the trial court hearing on remand, Appellant sought to have interest awarded to him retroactive to the date of the sale of the Yakima property. The trial court refused to award interest, stating:

THE COURT: I think you are entitled to — he is entitled to the 10,000 number I mentioned. I think you [Esser] are entitled to an offset for the two judgments, one of which incorporated, I know, payments that she had made on the property as I recall, and the other Court of Appeals judgment.

I think you are also entitled to interest on those judgments. The fact that Mr. Smith's client is not going to get his interest on \$10,000 is, in part, because money it was held in trust by virtue of a court order. And generally, unless someone seeks to have that put in some sort of a blocked or other interest-bearing account, interest is not going to accrue. The fact that your client doesn't get interest on that is in part a result of not seeking to have it placed in some sort of an interest-bearing account and by virtue of the fact it was placed there by way of a court order.

VRP, 07/27/07, page 21.

This is clear error. Appellant is the victim of the real estate grab in defiance of the decree, not the Respondent. The issue is not whether the monies were placed in an interest bearing account or whether there was a court order to place them in an attorney's IOLTA account. The issue is whether Appellant is entitled to interest on his improperly held monies as a matter of law.

This is an issue of settled law:

... [W]here one party holds title and the other a lien, the parties' respective interests are more removed. A lien is merely an encumbrance to secure an obligation and involves no characteristics of co-ownership.

Byrne v. Ackerlund, 108 Wn.2d 445, 450, 739 P.2d 1138 (1987).

It is undisputed that Respondent never recorded a lien on the Yakima property. It is also undisputed that she never had authority to list the property for sale or to receive the proceeds from a sale regardless of how that sale came about, without a recorded lien.

Respondent has cited no authority to the trial court by which interest on the improperly held funds is not due to Appellant at the statutory rate. Much is made of other judgments owed by Appellant to Respondent and indeed those judgments were permitted to be offset against the principal amount held by Respondent's attorney.¹

In any event, the ruling of the remand court denying interest to Appellant for what essentially was embezzled monies is without authority.

Attorney fee awards

Law on reasonable attorney fee awards in dissolution actions.

The law is clear and well-known. It is codified at RCW 26.09.140, and is short-handed as "need-and-ability-to-pay." The alternative method of obtaining an award of *reasonable* attorney fees in a dissolution action is known as "intransigence." An often quoted appellate opinion states:

The court may also consider the extent to which one spouse's intransigence *caused the spouse seeking a fee award to require additional legal services*. [cite omitted]. If intransigence is established, the financial resources of the spouse seeking the fees are irrelevant. [emphasis added]

Marriage of Crosetto, 82 Wn. App. 545, 563-564, 918 P.2d 954 (1996).

¹ The denial of interest to Appellant is shocking since Respondent was awarded interest.

Basically, this is a “but for” standard – but for the bad behavior, the additional legal services would not have been needed. Implicit in this standard is the flip side – bad behavior that causes additional legal services is entitled to be reimbursed by the bad actor.

Crosetto identifies the main factor (at least in that particular case) as a “continual pattern of obstruction.” While this is not necessarily how bad it has to get before intransigence can be found, it is illuminating:

Respondent was angered and upset by the filing of this action. She made allegations of domestic violence which resulted in court orders awarding her temporary custody of Mary Alice and restricted and supervised visitation to petitioner. Even with those restrictions, she utilized allegations of illness, conflicts of schedule and the like to thwart contact between petitioner and their daughter. As the conflict grew, allegations of sexual abuse were later made which resulted in appointment or utilization of professional experts, juvenile court proceedings, police investigations and child protective service complaints. Even though certain experts claimed the daughter once supported a claim that she had seen her father undressed, it was never determined that such was in anything other than an ordinary family situation, and she continues to deny any impropriety by petitioner. All government agencies and most professionals have cleared the petitioner of any sexual misconduct toward his daughter.

Respondent's failure to concede on these issues, failure to allow a resumption of unsupervised visitation, and fears of undue manipulation of the daughter, resulted in a court order changing temporary custody to the petitioner and requiring supervised visitation for the respondent.

Crosetto, supra, at 564-565.

A quick reading of this passage, followed by a reading of the instant Findings of Fact # 1 through 14, shows a marked difference between

the two sets of facts. Even if Findings 1-14 are literally true, none of them relate even tangentially to *causing* additional legal services to be needed.

Additionally, Findings # 7 and # 9 relate to separate actions that are not an integral part of dissolution proceedings and which have their own provisions for awarding reasonable attorney fees.

Not a single other Finding relates to the clear Crosetto standard of awarding reasonable attorney fees based on intransigence – *increased legal work due to the bad acts*. The record on review (reflected in the findings) is barren of any description of legal work by Respondent’s attorney that was even alleged to have been caused by anything Appellant did.

It appears that subjective dissatisfaction with Appellant’s out-of-court behavior was put forth by Respondent as a basis for the remand court to find intransigence. Why the remand court swallowed it whole is a mystery but it is clear that those acts (if true) had no effect on legal fees.

However, Respondent and her attorneys did an awful lot of things that caused additional legal work for Appellant. By definition, fees for unnecessary services are not reasonable fees and thus cannot be awarded in any circumstance. See Scott Fetzer Co. v Weeks, 122 Wn.2d 141, 156, 859 P.2d 1210 (1993). (“We take this occasion to remind practitioners that such considerations [of reasonableness] apply whether one’s fee is being paid by a client or the opposing party.”)

Bobbitt I had already ruled that Appellant was disadvantaged by Respondent’s legal tactics and activities (such as filing motions and other

actions that were wrong on the law) in the Yakima property sale. Thus, Respondent's remand legal activities were largely unnecessary.

The Yakima property sale was obviously coordinated by Respondent and her attorney because they collaborated to get court approval to sell the property, using a false argument about payment of property taxes and mortgage payments even though those were not Respondent's obligation. Why the trial court did not recognize Respondent's motion as frivolous is a mystery. More of a mystery is why it granted the motion, thereby causing (in part) an appeal (**Bobbitt I**).

What is certain and clear is that this Court in **Bobbitt I** has already ruled that there was no legal basis for Respondent to sell property when she knew she didn't own it and then keep the sale money for years, regardless of any court order supposedly authorizing her to do so.

Thus, according to the holding of **Crosetto** on awards of reasonable attorney fees due to intransigence, she cannot be awarded reasonable attorney fees for any of the legal fees she incurred to deal with the matter. This is true for the trial court as well as the appeal in **Bobbitt I**.²

Respondent could have conceded the issue upon receipt of Appellant's opening brief in **Bobbitt I**; instead she fought on when it was fairly obvious that the law was not in her favor. On remand, she continued to fight on, morphing the issue into a set-off and used her ill-gotten gains to pay off other judgments owed to her while having successfully deprived

² It is arguably applicable to the instant appeal, also.

Appellant of both the use of his property (by selling it) and by depriving him of interest on money he owned but could not use.

Two of the findings made by the remand court (#6 & #14) relate solely to the GAL. Exactly how Appellant's issues with the GAL caused additional legal fees to Respondent that were unnecessary (the standard for intransigence) is incomprehensible. This is especially true since Appellant also prevailed on this issue in **Bobbitt I.**³

For about 75% of Appellant's legal fees on appeal, he was right on the law. For 100% of the remand issues, Appellant was right on the law at the time that the case arrived back in the superior court. Yet he again found himself on the losing end of a dispute that the appellate court had just said he won.

The remand court's Conclusions of Law, and the Orders and Judgments that emanated from them, are completely unsupported by the Findings, which in turn are irrelevant to the issue of awarding reasonable attorney fees. The remand court has simply repeated the errors that led to the first appeal.

Finally, Conclusion of Law # 4 states in part: "This court finds that \$5000 is an appropriate amount of attorney fees under all the circum-

³ It should be noted that the GAL caused most of the related legal fees by filing motions and otherwise acting as an attorney when she had no authority to do so. Sadly, none of the attorneys on either side challenged this notion that a GAL has authority to file motions when she does not represent either party. Vague references to RC 26.12.175 are unavailing when read in conjunction with RCW 26.09.010(2). In any event, the law of the case precludes any challenge to the GAL's purported authority but it is obvious that she certainly was capable of defending herself. Thus, there was no need for Respondent to perform any legal work related to the dispute between Appellant and the GAL.

stances . . . [.]” Putting aside the incongruity of a court to “find” anything within a conclusion of law, where in the record is the factual support for that dollar amount? Respondent’s attorney submitted two exhibits of attorney fee billings [CP 205-233 & CP 469-476]. Nowhere is there any breakdown of which items contained within those exhibits might be part and parcel of the \$5000 figure. The true source of the \$5000 amount is that it is the exact amount offered in settlement discussions. *See* CP 420, line 22-24; CP 449-456.⁴

It is virtually indisputable that this conduct by Respondent’s attorney violates ER 408, which states:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. *Evidence of conduct or statements made in compromise negotiations is likewise not admissible.* This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. [emphasis added].

To say that conduct of attorneys or parties after a remand from the appellate court is relevant to the subject matter of the remand hearing is to say that down is up. Under no circumstances can this effort by Respondent’s attorney be reconciled with the ER 408 prohibition. Additionally,

⁴ Surprisingly, Appellant’s remand attorney made no objection to this.

the comments and characterizations of negotiation conduct are an effort to introduce additional evidence beyond the scope of the remand.

The source of the \$5000 amount is found at CP 421, lines 1-8:

Pursuant to CR 11 and based upon Mr. Bobbitt's intransigence, Ms. Esser requests that Mr. Bobbitt be sanctioned, and that she be awarded her attorneys fees for the necessity of bringing this motion and responding to Mr. Bobbitt's frivolous requests. Ms. Esser requests an attorney fee award in the amount of \$5000. Ms. Esser has incurred in excess of \$5000 in attorneys fees [sic] in dealing with the issues on remand. Such amount would have been entirely unnecessary, but for Mr. Bobbitt's intransigence and his unfounded motion.

The remand court characterized the award of \$5000 as a reduction from the \$10,000 figure which was vacated in **Bobbitt I**, thereby rendering it non-existent. Using it as a starting point when it has no factual support merely repeats the erroneous thinking that caused the remand on that issue.

In short, the original *award* of attorney fees was error regardless of the amount. An attorney fee award that is vacated is one that never had any value, plus there is no difference to the parties than if it had never been entered in the first place. Nothing in **Bobbitt I** can be construed to imply any validity to the \$10,000 figure. Since the findings that were entered on remand do not relate to additional unnecessary legal work, the \$5000 award is still arbitrary and equally flawed as the vacated \$10,000 award.

As an observation, it appears that it is likely that the remand court had a mind to see intransigence since "need and ability to pay" was impossible due to Respondent's failure to submit financial information at the time of trial. Of course this observation necessarily implies that the re-

mand court had determined that no matter what, Appellant was going to pay some of Respondent's fees – the only question being how much.

GAL fee awards

The remand court decision that Appellant had no further obligation for any further billings of the GAL was correct but it did not go far enough. Unfortunately, the decision that Appellant was not entitled to a refund of GAL fees he had already paid was error, primarily because the language used by the remand court in Assignments of Error #22 & 23 lacks legal authority.

The statement that “Respondent's only obligation to Guardian ad Litem is the \$1,1709 which he has already paid to her” implies that those funds were paid for GAL services rendered in a proper and professional manner and were thus “earned” within the standards imposed on GALs. This inference is even stronger based on language in Assignment of Error # 23 which states:

“This denial is based on Respondent's intransigence during the time period after appointment of the GAL.”

Fees of GALs and intransigence have no legal connection. GALs are not authorized to collect fees based on intransigence and the GAL herein made no contrary claim.

In any event, Appellant cannot have been intransigent since this court, in **Bobbitt I**, already determined that the performance of the GAL fell far below objective minimum standards the GAL owed to the parties and Appellant in particular. Although arguably dicta, the **Bobbitt I** opin-

ion also stated that the trial court should have dealt better with the motion by ordering the GAL to perform professionally from that point forward.

This is the law of the case for this particular issue and the remand court is bound by it. No reasonable person can read the rather scathing analysis of the GAL in **Bobbitt I** and conclude that she was entitled to any payments at all, ever.

Assignments of Error # 22 & 23 are clearly contrary to established caselaw and thus are an abuse of discretion.

F. Appellate attorney fees in Bobbitt I

Appellant is only entitled to statutory attorney fees and costs for the instant appeal. However, under RCW 26.09.140 upon a showing of his need and Respondent's ability to pay, he is entitled to his reasonable attorney fees for the modification trial, for the appeal in **Bobbitt I**, and for the remand hearing.

Alternatively, Appellant is entitled to his reasonable attorney fees based on the intransigence of Respondent's legal strategy and tactics that forced two appeals.

The remand court specifically refused to rule on appellate attorney fees, opining that the Court of Appeals should handle the issue. Additionally, Respondent has conceded this point at CP 423, line 17-19, and should be estopped if she should attempt to alter her theory from that which she argued to the remand court.

G. Conclusion

Appellant requests that the remand court orders be reversed, and this matter remanded with instructions to a different trial court judge.

Respectfully submitted:

4-25-08
date


Ron Bobbitt, Appellant

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COURT OF APPEALS
DIVISION II
08 APR 25 PM 4:06
STATE OF WASHINGTON
BY 3 DEPUTY

No. 36807-2-II

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

Kimberly Bobbitt)	
)	
Respondent)	DECLARATION
vs)	OF SERVICE
)	
Ron Bobbitt)	
)	
Petitioner)	
)	

Lawrence Hutt declares as follows:

On April 25, 2008, I served a true copy of

OPENING BRIEF

upon the Respondent by delivering a copy to her attorney Carol Cooper at:

Davies Pearson law offices
920 Fawcett
Tacoma WA 98401

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated 4/25/08 at Tacoma WA

Lawrence Hutt
Lawrence Hutt, declarant