

No. 36807-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

RONALD K. BOBBITT,

Appellant/Respondent

vs.

KIMBERLY S. ESSER f/k/a KIMBERLY S. BOBBITT,

Respondent/Petitioner

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DIVISION II
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STATE OF WASHINGTON
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RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

This is an appeal following remand pursuant to this court's prior decision published in part in *In re Marriage of Bobbitt*, 135 Wn. App. 8, 144, 42 P.3d 306 (2006). Many of the relevant facts are set forth therein.

A. The Sale of the Yakima Property.

Kimberly Esser and Ronald Bobbitt dissolved their marriage in 2002. The dissolution decree (1) awarded Mr. Bobbitt the "Property located in Yakima, Washington" as his separate property; (2) assigned to Mr. Bobbitt the mortgage liability for the Yakima property; and (3) provided that Mr. Bobbitt should pay certain debts and liabilities of the parties. *Id.*, at 14. Bobbitt listed the property for sale immediately following the entry of the decree. *Id.*, at 14.

In November 2002, the mortgage holder for the Yakima property informed Mrs. Esser that Mr. Bobbitt had not made mortgage payments for four months and that he was not returning telephone calls. *Id.*, at 14. To preserve her credit rating, Mrs. Esser voluntarily paid \$580 to bring the payments current, continued to make monthly payments on the property, and paid two years' back taxes. *Id.*, at 14.

When a third party made an offer to purchase the property in October 2004, Mrs. Esser moved the trial court for permission to sell the

property with a special power of attorney allowing her to sign all necessary documents to close the transaction and to place the proceeds from the sale in her attorney's trust account. *Id.*, at 14-15. The court granted the motion, the Yakima real property was sold, and net proceeds in the amount of \$10,058 were deposited into attorney John Hickman's trust account. *Id.*, at 15. Attorney John Hickman was subsequently appointed to the bench and Carol Cooper of Davies Pearson, P.C. appeared on behalf of Mrs. Esser. On June 30, 2006, the trial court authorized the funds in John Hickman's trust account to be transferred to the Davies Pearson IOLTA Trust Account, where the funds remain today. CP 248. The funds in this account did not accrue interest. RP. 10.

On January 5, 2006, Mrs. Esser moved for a judgment against Mr. Bobbitt for the amounts she expended to preserve the Yakima property. On February 24, 2006, the trial court entered a judgment based on the stipulation of the parties against Mr. Bobbitt and in favor of Mrs. Esser in the amount of \$4,443,05. CP 257. The judgment accrued interest at 12% per annum. CP 257.

On March 20, 2006, Mrs. Esser obtained a second judgment against Mr. Bobbitt in Pierce County District Court in the principal amount of \$3,274.14. That judgment was transferred to Superior Court on May 12, 2006. CP 261-266.

B. The Modification of the Parenting Plan.

Following their dissolution in 2002, Mrs. Esser and Mr. Bobbitt shared joint residential time with their 11 year-old son, K.B. *Id.*, at 21. In February 2003, Mrs. Esser petitioned to modify the parenting plan based on (1) K.B.'s integration into her family with Mr. Bobbitt's consent, in substantial deviation from the parenting plan; (2) the detrimental effect on K.B.'s physical, mental or emotional health resulting from the original parenting plan; and (3) the advantages of this change outweighing any harm from such a change. *Id.*, at 21. Virginia Ferguson was appointed Guardian ad Litem by stipulation. *Id.*, at 21.

The bench trial on Mrs. Esser's petition for parenting plan modification began on March 25, 2004. The court found that K.B. had been integrated into Mrs. Esser's family with Mr. Bobbitt's consent and that the existing parenting plan was detrimental to the child. *Id.*, at 22-23. The court established Esser as the primary residential parent and limited Bobbitt to supervised visitation. The court also entered judgments against Bobbitt for \$7,168.07 in back child support and \$10,000 in attorney's fees. *Id.*, at 23.

On November 22, 2004, the GAL filed a motion and declaration seeking Bobbitt's unpaid GAL fees. The court entered judgment in favor of the GAL, awarding her \$4,070.74 in unpaid GAL fees based on the

GAL's fee agreement and copies of her bills to Esser and Bobbitt. *Id.* at 23.

C. This Court's Decision on the First Appeal.

Mr. Bobbitt appealed both (1) the trial court's orders authorizing the sale of the Yakima property, and (2) the trial court's award of attorney's fees and GAL fees in the modification proceeding. Both matters were consolidated on appeal.

Regarding the Yakima property, this court found that the trial court acted beyond its authority when it authorized Esser to sell the Yakima property in order to receive payment on her judgments against Bobbitt; however, this court further held that Bobbitt was not entitled to damages for the wrongful sale of the property. *Id.*, at 20. This court remanded the matter back to the trial court to determine the proper distribution of the funds in Esser's attorney's trust account and for entry of an appropriate distribution order. *Id.*, at 20. This court also remanded Bobbitt's request for attorney's fees for having to defend and litigate Esser's sale of the Yakima property. *Id.*, at 20.

Regarding the modification, this court found that the investigation of the court appointed GAL was deficient; however, the trial court did not err in refusing to remove the GAL, and the trial court's findings of fact supported its conclusions of law that the parenting plan should be

modified to make Esser the primary residential parent. *Id.*, at 28-29. This court did find that the trial court failed to make sufficient findings of fact and conclusions of law to support Esser's award of attorney's fees in the modification proceeding. *Id.*, at 230. This court vacated the \$10,000 judgment for attorney's fees and remanded the matter to the trial court for the entry of specific findings of fact and conclusions of law regarding any attorney's fees award. *Id.*, at 30. The court also reversed and remanded for further hearing on the award of GAL fees. *Id.*, at 32.

D. Findings on Remand

On remand, the trial court entered the following Findings of Fact and Conclusions of Law:

1. Findings of Fact

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.

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.

3. Respondent harassed Petitioner at her place of employment with false allegations regarding her use of office time.

4. Respondent manipulated the parties' son to contact his grandparents and ask them why they were against him.

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.

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.

7. Respondent harassed Petitioner's current husband requiring him to take legal action to obtain a restraining order.

8. Respondent made a complaint to Child Protective Services against Petitioner that was unfounded and made solely for the purpose of harassment.

9. Respondent violated the court's order making it necessary for Petitioner to file a motion for contempt.

10. Respondent failed to take the parties' son to his counseling appointments.

11. Respondent unilaterally removed the parties' son from the custody of the person that Petitioner had arranged as a caregiver while she was on a business trip and refused to return the parties' son to such person.

12. Respondent made it a practice of blaming his problems on everyone but himself, including his own attorneys, the GAL and the Petitioner.

13. Respondent did not object to the appointment of Dr. Klein until after Dr. Klein's report was filed.

14. Respondent did not object to the GAL until February 18, 2004, which was nearly a year after her appointment on March 20, 2003.

2. *Conclusions of Law*

1. Respondent's conduct improperly placed the parties' son in the middle of the modification action.

2. Petitioner was required to go through a lot of unnecessary litigation as a result of Respondent's actions.

3. The modification proceedings were delayed because of Respondent's actions.

4. Petitioner is entitled to an award of attorney's fees based on Respondent's intransigence and lack of cooperation. This court finds that \$5,000 is an appropriate amount of attorney's fees under all the circumstances rather than the \$10,000 attorney's 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's fee judgment of \$750, entered on March 26, 2004.

CP 490-492

Based upon the Findings of Fact and Conclusions of Law, the trial court entered Orders on remand as follows:

ORDERED, ADJUDGED, AND DECREED that Respondent is not entitled to an attorney's fee award for attorney's 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 attorney's fees related to this specific issue.

Nonetheless, in reducing the previous attorney's fee award of \$10,000 to the Petitioner, this court is taking into consideration the fact that Respondent unnecessarily incurred attorney's fees in responding to Petitioner's improper motion to compel the sale of the Yakima property. It is hereby further,

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's fees awarded as part of this Order, for a total offset of \$13,996.37. It is further,

ORDERED, ADJUDGED, AND DECREED, that, because the offsets owing to Petitioner exceed the \$10,058.30 amount to be allocated, the entire amount of the funds currently held in the Davies Pearson Trust Account shall be paid to the Petitioner, and Petitioner shall be entitled to a judgment for the remaining balance of the offsets in the amount of \$3,938.07, with such judgment accruing interest at 12% from the date of this Order. It is further,

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 \$1,179 which he has already paid to her. It is further,

ORDERED, ADJUDGED, AND DECREED that Respondent's motion for reimbursement for various expenditures is denied, including Respondent's 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.

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;

ORDERED, ADJUDGED, AND DECREED that Virginia Ferguson's motion for all additional GAL fees is hereby denied.

Mr. Bobbitt now appeals this order on remand.

II. ARGUMENT

- A. **The Trial Court's Order Distributing the Funds in Trust From the Sale of the Yakima Property to Mr. Bobbitt, Denying Mr. Bobbitt's Request for Prejudgment Interest, and Setting Off the Judgment Amounts Owed Mrs. Esser is Supported by Substantial Evidence and is Not an Abuse of Discretion.**

The trial court was instructed to determine on remand the proper distribution of the proceeds from the sale of the Yakima property held in Mrs. Esser's attorney's trust account and to enter an appropriate

distribution order. *Id.*, 135 Wn. App. at 20. On remand, the trial court ordered as follows:

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's fees awarded as part of this Order, for a total offset of \$13,996.37. It is further,

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 Petitioner shall be entitled to a judgment for the remaining balance of the offsets in the amount of \$3,938.07, with such judgment accruing interest at 12% from the date of this Order. It is further,

This distribution order is supported by substantial evidence. The closing statement from the sale of the property shows that the net proceeds from the sale of the Yakima property, after payment of the encumbrances

secured against the property, commissions, closing and escrow fees, title insurance fees, recording fees, and property taxes was \$10,058.30, the exact amount held in trust and the exact amount awarded to Mr. Bobbitt. CP 344. It was appropriate for the trial court to award Mr. Bobbitt the proceeds from the sale of his property. Mr. Bobbitt does not argue to the contrary.

Mr. Bobbitt does argue that it was error for the trial court to not award him prejudgment interest on the \$10,058.30 in proceeds held in the trust account. Mr. Bobbitt, however, cites no authority for his argument. RAP 10.3(a)(5) requires every appellant to present argument regarding all issues presented for review, including citation to legal authority and reference to relevant parts of the record. Arguments without citation to applicable authority will not be considered on appeal unless well taken on their face. *State v. Kroll*, 87 Wn.2d 829, 838, 558 P.2d 173 (1976).

A trial court's decision to not award prejudgment interest is reviewed for abuse of discretion. *Mehlenbacher v. DeMont*, 103 Wn. App. 240, 250, 11 P.3d. 871 (2000). "[A] trial court abuses its discretion when its decision is arbitrary, manifestly unreasonable, or based on untenable grounds." *Id.*, 103 Wn. App. at 250-251. Here, the trial court's decision not to allow prejudgment interest is supported by the record and was an appropriate exercise of discretion.

The proceeds from the sale of the Yakima property were placed in Mrs. Esser's attorney's IOLTA Trust Account, which account did not accrue interest. CP 248; RP. 10. The trial judge in his oral ruling specifically commented that Mr. Bobbitt should not receive interest on the funds in trust because, in part, the monies were held in trust by virtue of a court order and the account did not accrue interest. RP 21. The court noted, "unless someone seeks to have [the funds] put in some sort of a blocked or interest-bearing account, interest is not going to accrue." RP 21. It was not appropriate to award Mr. Bobbitt interest on the proceeds from the property when Mr. Bobbitt never made any property or tax payments to preserve the property. But for Mrs. Esser's payments to preserve the property, the property could have been lost. The court, in its discretion, denied the request for prejudgment interest based on the evidence in the record. Mr. Bobbitt cites no authority indicating the trial court abused its discretion.

The trial court properly setoff against the \$10,058.30 in sale proceeds awarded to Mr. Bobbitt (1) the Pierce County District Court judgment in favor of Mrs. Esser in the amount of \$3,274 plus judgment interest of \$523.86; (2) the Pierce County Superior Court judgment in favor of Mrs. Esser in the amount of \$4,443.05 plus judgment interest of \$755.32; and (3) the \$5,000 in attorney's fees awarded to Mrs. Esser on

remand due to Mr. Bobbitt's intransigence in the modification trial as further discussed below. Mr. Bobbitt cites no authority indicating the setoff was improper. In argument before the trial court, counsel for Mr. Bobbitt told the court that if the court found that Mrs. Esser was owed money by Mr. Bobbitt, it made "sense" to reimburse her from the trust account in the distribution order. RP 8. The trial court followed Mr. Bobbitt's counsel's suggestion. He cannot now complain. It was within the trial court's discretion to setoff the judgments against the property proceeds. The setoffs are supported by the evidence.

B. The Trial Court Properly Denied Mr. Bobbitt a Specific Award of Attorney's Fees for Defending the Sale of the Yakima Property When Mr. Bobbitt Failed to Produce Evidence that He had Incurred Attorney's Fees Related to that Issue; and the Court Properly Reduced Mrs. Esser's Attorney's Fees in the Modification Proceeding to \$5,000 Based on the Circumstances and the Intransigence of Mr. Bobbitt.

1. Mr. Bobbitt's Attorney's Fees Regarding the Yakima Property.

This court remanded back to the trial court Mr. Bobbitt's request for attorney's fees for having to defend and litigate the sale of the Yakima property. 135 Wn. App. at 20. The trial court understood its duty on remand was to hear Mr. Bobbitt's request for attorney's fees incurred defending that matter at the trial court level; not on his first appeal. RP 22-23. Mr. Bobbitt, however, did not provide any information to the

court regarding the attorney's fees he incurred defending against the sale of the property at the trial court level. RP 22; CP 492. The trial court authorized the sale on November 5, 2004, and the sale closed on November 11, 2004. CP 252, 344. Mr. Bobbitt only provided the court with attorney's fees information from January 2006 and thereafter, more than 18 months after the sale of the property. CP 353-358. The attorney's fees information provided references only expenses incurred on appeal. Nothing was provided regarding attorney's fees incurred at the trial court level. RP. 22; CP 492.

Without any information on which to evaluate Mr. Bobbitt's request, the trial court properly denied Mr. Bobbitt's request for fees regarding the Yakima property trial court litigation. The decision to award attorney's fees is within the trial court's discretion. *Crosetto v. Crosetto*, 82 Wn. App. 545, 563, 918 P.2d 954 (1996). The party challenging the trial court's decision bears the burden of proving the trial court exercised its discretion in a way that was "clearly untenable or manifestly unreasonable." *Id.*, 82 Wn. App. at 563. Mr. Bobbitt cannot argue the trial court's denial of attorney's fees was manifestly unreasonable when he provided no information regarding the amount of attorney's fees he in fact incurred.

2. Mrs. Esser's Attorney's Fees Regarding the Modification.

In the first appeal this court found that the trial court failed to make sufficient findings of fact and conclusions of law to support the award of \$10,000 in attorney's fees to Mrs. Esser in the modification proceeding. *Id.*, 135 Wn. App. at 230. This court vacated that award and remanded to the trial court for the entry of specific findings of fact and conclusions of law in support of its attorney's fees award. *Id.*, 135 Wn. App. at 30.

The trial court's award of attorney's fees is based on the intransigence of Mr. Bobbitt in the modification proceeding, not the relative resources of the parties. CP 491-492. An award of attorney's fees based upon the intransigence of a party is warranted when a party made the proceedings unduly difficult and increased legal costs by his or her actions. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992). When intransigence is established, the financial resources of the spouse seeking the fees are irrelevant. *Crosetto*, 82 Wn. App. at 563.

Here, the court made 14 findings of fact and 4 conclusions of law regarding the intransigence of Mr. Bobbitt. CP 490-492. Although Mr. Bobbitt assigns error to all 14 findings of fact, he does not provide any argument, cite any portion of the record, or set forth any legal theory indicating why those 14 findings are error. Assignment of error

unsupported by citation to authority or legal argument will not be considered. *Hamilton v. State Farm*, 83 Wn.2d. 787, 795, 523 P.2d 193 (1974). Assignments of error not developed in the brief and for which no authority is cited should be deemed waived and not considered. *State v. Bello*, 142 Wn. App. 930, 932, 176 P.3d 554 (2008) (FN 3). The unchallenged findings are a verity on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

The trial court's unchallenged findings regarding the intransigence of Mr. Bobbitt include the following:

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.
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.
3. Respondent harassed Petitioner at her place of employment with false allegations regarding her use of office time.
4. Respondent manipulated the parties' son to contact his grandparents and ask them why they were against him.
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.

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.

7. Respondent harassed Petitioner's current husband requiring him to take legal action to obtain a restraining order.

8. Respondent made a complaint to Child Protective Services against Petitioner that was unfounded and made solely for the purpose of harassment.

9. Respondent violated the court's order making it necessary for Petitioner to file a motion for contempt.

10. Respondent failed to take the parties' son to his counseling appointments.

11. Respondent unilaterally removed the parties' son from the custody of the person that Petitioner had arranged as a caregiver while she was on a business trip and refused to return the parties' son to such person.

12. Respondent made it a practice of blaming his problems on everyone but himself, including his own attorneys, the GAL and the Petitioner.

13. Respondent did not object to the appointment of Dr. Klein until after Dr. Klein's report was filed.

14. Respondent did not object to the GAL until February 18, 2004, which was nearly a year after her appointment on March 20, 2003.

CP 490-491.

Appellant argues that these findings of fact, even if true, do not support an award of fees based on intransigence because “none of them relate even tangentially to *causing* additional legal services to be needed.” Brief at 14 (emphasis in original). Nothing could be farther from the truth. The findings show that Mr. Bobbitt’s disruptive actions caused, without basis, complexity, multiple court hearings, request for restraints, increased attorney contact, delay, and increased costs. As in *Crossetto*, these findings show a “continual pattern of obstruction,” which is the essence of intransigence. *Id.*, 82 Wn.2d at 564. Based on these findings the court entered specific conclusions of law that “Respondent’s conduct improperly placed the parties’ son in the middle of the modification action;” that “[p]etitioner was required to go through a lot of unnecessary litigation as a result of Respondents’ actions;” that “[t]he modification proceedings were delayed because of Respondent’s actions;” and that the “[p]etitioner is entitled to an award of attorney’s fees based on Respondent’s intransigence and lack of cooperation.” CP 491-492. The trial court’s findings of fact specifically support the ultimate conclusion of law that Mrs. Esser is entitled to attorney’s fees based on Mr. Bobbitt’s intransigence.

The trial court concluded that, under all of the circumstances, \$5,000 was an “appropriate amount of attorney’s fees” to be awarded Mrs.

Bobbitt, “rather than the \$10,000 attorney’s fee award that was previously reflected in a judgment entered against [Mr. Bobbitt].” CP 491-492. In reducing this amount from \$10,000 to \$5,000, the trial court “took into consideration the fact that [Mr. Bobbitt] unnecessarily incurred attorney’s fees in responding to [Mrs. Esser’s] improper motion to compel the sale of the Yakima property,” although he had failed to document any of the specific fees incurred. CP 492; TR. 22. This was an appropriate exercise of the trial court’s discretion. The trial courts decision to award attorney’s fees is within the trial court’s discretion. *Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994). The party challenging the ruling bears the burden of proving that exercise of discretion was “clearly untenable or manifestly unreasonable.” *Id.*, 82 Wn. App. at 563. That has not been shown in the case at hand.

C. The Trial Court Properly Exercised Its Discretion in Its Award of Fees to the GAL.

The trial court entered the following unchallenged findings of fact regarding Mr. Bobbitt’s involvement with the GAL which are verities on appeal:

4. Respondent manipulated the parties’ son to contact his grandparents and ask them why they were against him.

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.

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.

...

12. Respondent made it a practice of blaming his problems on everyone but himself, including his own attorneys, the GAL and the Petitioner.

...

14. Respondent did not object to the GAL until February 18, 2004, which was nearly a year after her appointment on March 20, 2003.

CP 490-491

Based upon these findings, the trial court, after due consideration of this court's admonishment of the GAL's performance, ordered as follows:

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. It is further,

ORDERED, ADJUDGED, AND DECREED that Respondent's motion for reimbursement for various expenditures is denied, including Respondent's 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.

The trial court's determination that Mr. Bobbitt should not be restored the funds he had already paid the GAL was within the discretion of the judge. The findings support the court's conclusion that Mr. Bobbitt's intransigence and resistance throughout the GAL process had compounded the difficulties of the proceeding and increased the GAL's expense. The court reasonably held that Mr. Bobbitt should bear a small portion of that expense. The decision was within the sound discretion of the trial court and should be approved.

D. This Court Should Deny Mr. Bobbitt's Request for Attorney's Fees on his First Appeal.

Mr. Bobbitt acknowledges in his brief that he is not entitled to attorney's fees on this second appeal. Brief at 20. He does, however, request an award of fees on his first appeal. Brief at 20. That request should be denied. This court did not award Mr. Bobbitt attorney's fees in the first appeal. Mr. Bobbitt's brief in his first appeal did not request attorney's fees on appeal. To receive an award of attorney's fees on appeal, a party must devote a section of the brief to the fee request. RAP 18.1(b). The rule requires more than a bald request for attorney's fees on appeal. *Phillips Building Co. v. An*, 81 Wn. App. 696, 704, 9156

P.2d 1146 (1996). Argument and citation to authority are required under the rule. *Id.*, 81 Wn. App. at 704. When, as here, attorney's fees on appeal are either requested and denied or not requested at all in a first appeal, attorney's fees for that first appeal should not thereafter be awarded by the trial court or on a subsequent appeal. See *Corey v. Grenley*, 91 Wn. App. 919, 928-930.

E. Mrs. Esser Should be Awarded Attorney's Fees on Appeal.

This court has written that “[i]ntransigence is a basis for awarding fees on appeal, separate from RCW 26.09.140 (financial need) or RAP 18.9 (frivolous appeal).” *Mattson v. Mattson*, 95 Wn. App. 8592, 605, 976 P.2d 157 (1999). “Moreover, a party's intransigence in the trial court can also support an award of attorney's fees on appeal. *Id.*, citing *Eide v. Eide*, 1 Wn. App. 440, 445-456, 462 P.2d 562 (1969).

As an independent ground we may award attorney's fees and costs based on the intransigence of a party, demonstrated by litigious behavior, bringing excessive motions, or discovery abuse. [citations omitted] If intransigence is established, we need not consider the parties' resources. [citations omitted]

In re Marriage of Wallace, 111 Wn. App. 697, 710, 45 P.3d 11341 (2002), review denied, 48 Wn. 2d 1011, 64 P.3d 650 (2003).

The trial court made 14 findings of fact regarding Mr. Bobbitt's intransigence below. The order from which Mr. Bobbitt now appeals was filed in August 2007. His Notice of Appeal was filed September 28, 2007.

He did not file a statement of arrangements until sanctioned by the court, and he did not provide Mrs. Esser with copies of the transcripts from the trial court hearings. Mr. Bobbitt did not file his opening brief until April 25, 2008, seven months after his Notice of Appeal. Mr. Bobbitt's intransigence and obstruction continues. This court should award Mrs. Esser her attorney's fees for defending this action.

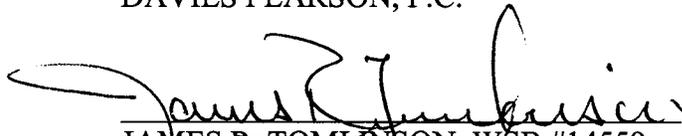
III. CONCLUSION

The trial court's order of distribution from the sale of the Yakima property is supported by substantial evidence. The decision to not award Mr. Bobbitt prejudgment interest on those funds was within the trial court's discretion. The trial court properly setoff against those funds the preexisting judgments against Mr. Bobbitt and in favor of Mrs. Esser as Mr. Bobbitt's counsel had condoned. The trial court properly denied Mr. Bobbitt's request for attorney's fees for defending the Yakima property trial court's litigation when Mr. Bobbitt produced no information regarding those attorney's fees expenses. The court's findings of fact regarding Mr. Bobbitt's intransigence supports the trial court's initial award of \$10,000 in attorney's fees to Mrs. Esser in the modification proceeding; however, the court properly reduced that amount to \$5,000 in consideration of Mr. Bobbitt's unnecessary expenses to defend the sale of the Yakima property. The decision of the trial court

should be affirmed. This court should deny Mr. Bobbitt's request for attorney's fees on appeal and grant Mrs. Esser's request for fees.

Respectfully submitted this 19th day of June 2008.

DAVIES PEARSON, P.C.


JAMES R. TOMLINSON, WSB #14559
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby declares under the penalty of perjury under the laws of the State of Washington in the County of Pierce that on June 19, 2008, I personally served via regular mail a true and correct copy of the Respondent's Brief addressed to the following:

Ronald K. Bobbitt
10121 221st Avenue East
Bonney Lake, WA 98391

DATED at Tacoma, Washington, this 19th day of June 2008.

Sondra Lee

Sondra Lee
Legal Assistant

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