

NO. 42453-3

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

BRYAN LEE ESTILL, APPELLANT

v.

EVELYN MATEO ESTILL, RESPONDENT

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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Appeal from the Superior Court of Pierce County  
The Honorable James Orlando

No. 10-3-00432-6

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**REPLY BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES..... i**

**A. APPELLANT'S ISSUES IN REPLY..... 1**

1. Dr. Rybicki did not offer expert testimony the mother was not alienating the child. .... 1

2. It was not necessary for the father to hire an expert to rebut Dr. Rybicki's testimony when Dr. Rybicki was unable conclude the mother was not engaging in alienating behavior and the uncontested and evidence admitted by the mother supports the finding of alienation. .... 1

3. The mother's actions prevented the father from having an active role in his son's life. .... 1

4. The only factor the trial court relied on when it applied RCW 26.09.187 (3) (a) (i) was the mother's cultural heritage..... 1

5. The trial court erred when it found all the factors in RCW 26.09.187 (3) (a) weigh heavily in favor of the mother. .... 1

**B. ARGUMENT..... 1**

1. DR. RYBICKI DID NOT CONCLUDE THE MOTHER WAS NOT ALIENATING THE CHILD. .... 1

2. THE TRIAL COURT FAILED TO PROPERLY APPLY RCW 26.09.187..... 9

i. Duration of care is irrelevant to a proper determination pursuant to RCW 26.09.184 and RCW 26.09.187(3)(a).. 12

ii. The trial court put undue emphasis on Ian's cultural heritage..... 15

iii. The trial court abused its discretion when it found all statutory factors weigh heavily in Evelyn's favor..... 16

iv. The trial court should have found RCW 26.09.191 factors existed. .... 17

3. THE FATHER SHOULD BE AWARDED ATTORNEY FEES. 18

**C. CONCLUSION..... 18**

**TABLE OF AUTHORITIES**

**STATE CASES**

In re Marriage of Burrill, 113 Wn.App. 863, 872, 56 P.3d 993 (2002) .....10

**STATUTES**

RCW 26.09.184.....5

RCW 26.09.187.....1, 8, 9

RCW 26.09.191.....10

**ADMINISTRATIVE CODE**

WAC 246-924-445.....3

**SECONDARY SOURCES**

BLACKS LAW DICTIONARY 962 (6<sup>th</sup> ed. 1997).....9

A. APPELLANT'S ISSUES IN REPLY.

1. Dr. Rybicki did not offer expert testimony the mother was not alienating the child.

2. It was not necessary for the father to hire an expert to rebut Dr. Rybicki's testimony when Dr. Rybicki was unable conclude the mother was not engaging in alienating behavior and the uncontested and evidence admitted by the mother supports the finding of alienation.

3. The mother's actions prevented the father from having an active role in his son's life.

4. The only factor the trial court relied on when it applied RCW 26.09.187 (3) (a) (i) was the mother's cultural heritage.

5. The trial court erred when it found all the factors in RCW 26.09.187 (3) (a) weigh heavily in favor of the mother.

B. ARGUMENT.

1. DR. RYBICKI DID NOT CONCLUDE THE MOTHER WAS NOT ALIENATING THE CHILD.

Evelyn relies heavily on the testimony of Dr. Rybicki to support her contention that she was not alienating Ian from his father. This reliance is misplaced, misstates the testimony at trial and is unsupported by the record.

Dr. Rybicki said consistently that he can offer *only* “a piece of the puzzle” and that Evelyn does not fit the *profile* of an alienating parent. RP 215, 226, 227, 233. Because Dr. Rybicki did not conduct a full parenting evaluation, he was unable to conclude that Evelyn was not engaging in alienating behavior. RP 241. As Evelyn aptly points out, Dr. Rybicki’s testimony is unchallenged. His testimony regarding his evaluation and opinion is as follows:

**A:** All I can say on that database is there’s nothing here that shows alienation. But, to say that *it may be somewhere else*.

RP 216

**Q:** But if you have failures to comply with court orders, you have derogatory comments, you have statements to the child indicating a loyalty bind, taking all those things together, may result in a hypothesis that would make you look further into alienation.

**A:** All of that would be then a clue to start doing systematic analysis *which neither I nor Ms. Sandstrom have done*.

RP 236.

**Q:** Well, let’s talk specifically about the alienation issues.

**A:** Okay

**Q:** You testified on direct that that requires direct observation of parent/child interactions with both parents. *That was not done here*, correct?

**A:** By me, correct.

**Q:** And there was no observations by you of the parent/child interactions between the father and the child.

**A:** That's correct.

**Q:** So you would be unable to offer an opinion to this court as to whether alienating is actually occurring because you didn't do that investigation, correct?

**A:** *That's correct. I made it clear in my report I did not do that investigation...But in answer to your question, no, to get to the bottom of those issues would have required a more appropriate systematic investigation which I did not do...*

RP 212-213.

In her brief, Evelyn claims Dr. Rybicki “engaged in intensive testing” *and then opined that neither alienation nor abusive use of conflict occurred.* Br. Of Respondent at Pg 10. This misstates the evidence adduced at trial and contained in the record before this Court. Evelyn met with Dr. Rybicki once for approximately five hours for an evaluation that did not comply with WAC 246-924-445. The evaluation time was comprised of testing and an interview. RP 210, 212, 213.

Evelyn took one self-report psychological exam (the Minnesota Multiphasic Personality Inventory (MMPI)) and two self-report parenting assessments. RP 174. The parenting assessments provide a rough estimate of how a parent views their own parenting abilities. RP 190. Several months later, Evelyn sent an 11 minute, surreptitiously recorded video of

her an Ian (during a supervised visitation) for Dr. Rybicki's review. RP 193.

Dr. Rybicki testified the video was fairly representative of Evelyn and Ian's interactions at mealtime and clean up. RP 228. However, he questioned whether or not the video contained enough data to establish a representative sample of Evelyn's parenting behaviors. RP 228. He would have preferred a video sample on average of 30 minutes or better. RP 228.

Regarding the MMPI, Dr. Rybicki testifies as follows:

**Q:** Have you ever had a parent conduct or participate in a MMPI evaluation where the results were one thing, but the other facts surrounding the case were something different that did recommend or did result in you recommending a .191 restrictions?

**A:** I have had cases where let's say MMPI was one instrument of many where the person may have taken a fake good profile... So there are cases where it is possible for the MMPI to fail to detect, *and why we use multiple sources of data.*

RP 226 (emphasis added).

The MMPI was the only psychological test performed on Evelyn.

Dr. Rybicki further describes what a thorough assessment would have involved:

**A:** ...It's a complex assessment to do. What I am getting at is, we need to follow the systematic models that exist, use the various data sources we have, apply to those models, and then get our best guesstimate. Even then it may be that we are

dealing with other components because it may be that the child looks like they are alienated, when they're also somewhat estranged or aligned. So there may be some blurring of descriptive or diagnostic categories.

RP 216.

After admitting a relative lack of data from a very limited assessment he concludes the following:

**Q:** ...you said that the MMPI results argue against mental health concerns or .191 restrictions, but the fact is, you really need a lot more information in order to make that evaluation or that recommendation to the court.

**A:** Correct. I can only bring my piece of the puzzle and say it's not here.

RP 216.

Dr. Rybicki's trial testimony does no more than tell the Court that Evelyn *does not fit the profile* of a parent engaging in alienation and has a democratic and permissive style of parenting *based on her self-reported testing*. Yet, Dr. Rybicki's testimony establishes that Evelyn was engaging in behavior that is consistent with an alienating parent. For example, Dr. Rybicki states in his report that Evelyn, placed Ian in a "loyalty bind" during her "inappropriate" phone calls with him, which Dr. Rybicki testified is consistent with alienation. RP 229, 233. Dr. Rybicki testified that failing to follow court orders or making derogatory comments about the other parent is also consistent with alienation. RP 236. He also testified that often, an alienating parent is "quite angry and often vengeful in their

behavior toward the other parent.” RP 233-234.

Evelyn failed to provide Dr. Rybicki’s report and analysis to this Court therefore, the report must not have contained any further supporting analysis to sustain Rybicki’s trial testimony. The record establishes Dr. Rybicki reached a questionable clinical opinion in consideration of the substantial amount of evidence to the contrary, no direct observation of Bryan and Ian, no systematic analysis and working from a limited record. RP 205.

In reviewing the phone calls between Evelyn and Ian, Dr. Rybicki concluded they were “sad and poorly conducted... There are indications here of overt and covert influences on the child with create for him a loyalty bind. While Evelyn appears to be engaged in questionable conversation with the child... There are no indications of efforts to alienate by the mother.” CP 916. This conclusion not only defies all logic, but is inconsistent with Dr. Rybicki’s testimony that *he was unable to determine whether or not the mother was engaging in alienation because he did not conduct the proper assessment to make that determination.*

Dr. Rybicki’s testimony focuses primarily on critiquing the guardian ad litem system as a whole as well as the guardian ad litem personally rather than producing any relevant opinions regarding Evelyn’s behavior. The evaluation Dr. Rybicki conducted did not produce any recommendations regarding what was in Ian’s best interests.

Conversely, the guardian ad litem spent over 65 hours on the case,

had access to the full record, the parties, the child, the visitation supervisor and other collateral contacts. RP 2, CP 406-413, 451- 452, 461-473, 557-562, 563-568, 789-791, 804-812. She observed, investigated and made the following observations:

1. Bryan attempted to bring Ian to the United States from the Philippines. CP 516.
2. Ian had made friends, was adjusting well and integrating into his community in Canada. CP 517.
3. Katrina reported, "It is clear [Ian] has a good, stable relationship with his father, and is bonded to him as well." CP 532.
4. Ian's daycare providers stated that Bryan was working with them regarding Ian's developmental issues, specifically his diet. One daycare provider (Kitty) commented that Ian was going much better with his eating. CP 517, 523.
5. Ian had his own room. CP 520.
6. Bryan took Ian to a nutritionist and attempted to involve Evelyn in addressing Ian's diet issues. CP 531.
7. Bryan enrolled Ian in play therapy on his own initiative. CP 531.
8. Bryan participated in a parenting program. CP 905.

The guardian ad litem was in a better position to make recommendations regarding what residential schedule was in Ian's best interests. She spent 13 times more time investigating, talking to *both*

*parents*, talking to collateral contacts and observing Ian with both parents.

Evelyn avers that because Bryan provided only two phone calls where she engaged in a spectacular disregard for Ian's best interests, that somehow is not enough to establish her improper behavior. This argument is wholly without merit. How much more evidence should have been provided of Evelyn's alienating conduct? The record is replete with examples of her abusive use of conflict and alienating behavior; evidence of *more alienating acts was not necessary*. Without denying the content of the phone calls, Evelyn argues that because only two were submitted, every other call *must* have been proper. There is no evidence in the record to support such an inference. In fact, if there is any inference from the record before the Court it is that Evelyn was unable to control her inappropriate behavior when she interacted with Ian and that likely *every phone call was inappropriate*.

Evelyn criticizes Bryan's decision not to call a rebuttal witness to contradict Dr. Rybicki's testimony. However, it was unnecessary for Bryan to rebut Dr. Rybicki's testimony when Dr. Rybicki testified that he was unable to conclude Evelyn's behavior was not alienating Ian, that he did not conduct the necessary evaluation for determining whether alienation was occurring and that he did not perform a "thorough and systematic" investigation of the issues he was called to testify about. In calling Dr. Rybicki, Evelyn failed to present any evidence that was contrary to the record, which is replete with admitted examples of

Evelyn's detrimental behavior by exposing Ian to abusive use of conflict and alienating behavior that were incontrovertible not in his best interest.

2. THE TRIAL COURT FAILED TO PROPERLY APPLY RCW 26.09.187.

Evidence of the behavior that Evelyn engaged in that was adduced at trial, was *admitted* by Evelyn and is consistent with the behavior of an alienating parent. That Evelyn was "clearly angry" with Bryan, was *specifically found* by the trial court, another factor Dr. Rybicki testified was consistent with alienation. CP 1014-1015.

Evelyn does not deny, in any way, her behaviors that are clearly detrimental to Ian and not conducive to fostering a healthy relationship between a parent and child. Instead, Evelyn admits her behavior but dismisses it as irrelevant by blaming Bryan<sup>1</sup>. Nonetheless, behaviors are relevant to the factors the court must consider in assessing each parents ability to promote the stability of the child, the strength and nature of their relationship with the child, and the ability of each parent in meeting the child's emotional needs according to RCW 26.09.187 (a) (i)-(iv) and RCW 26.09.184(b), (e) (g). Evelyn's uncontested actions, ignored by the

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<sup>1</sup> Evelyn tries to prove that Bryan's initial proposed parenting plan somehow supports an inference of abusive use of conflict. Br. Of Respondent at 5. This argument is not supported by the record. Dr. Rybicki's testimony was that Bryan's proposed plan *could* have "serious effects on the mother." RP 219. However, the testimony was purely hypothetical; the initial proposed plan was not part of the materials he reviewed in conjunction with Evelyn's evaluation, therefore he was unable to offer any relevant facts or evidence regarding its relevance to the issues the court would have considered. RP 219.

trial court, are as follows:

1. Evelyn told Bryan via email that she would “nurture Ian’s mind” to hate Bryan and kill. Every action Evelyn has taken with respect to Bryan’s relationship to Ian has been to carry out her plan.
2. Evelyn was engaged in hindering Bryan’s right to perform parenting functions by withholding her consent to relocate Ian from the Philippines to the United States.
3. Evelyn brought Ian to court in the Philippines where he was exposed to testimony by Evelyn’s sister that Bryan abused him.
4. The Philippine civil and criminal cases were initiated with the intent of keeping Ian away from Bryan because Evelyn wanted more money and did not like the way Bryan disciplined Ian.
5. Evelyn did not inform Bryan that she removed Ian from the Philippines and brought him to the United States.
6. Evelyn cancelled doctor’s appointments for Ian without Bryan’s knowledge or consent.
7. Evelyn did not encourage Ian to go with Bryan during the exchanges and exacerbated and encouraged Ian’s reluctance to go.
8. Evelyn filed a petition for a domestic violence protection order on July 12, 2011 without knowledge to all parties in an attempt to thwart Bryan’s residential time on July 17, 2011.
9. Despite the fact that the ex-parte protection order was modified to allow the July 17, 2011 to occur, Evelyn refused Bryan his residential time and stated Ian was too

sick to travel.

10. To support her fraudulent claim Ian was sick, Evelyn *requested* a doctor's note that prevented Ian from travelling to Canada with Bryan on July 17, 2011, put Ian in daycare for 4 of the 5 days he was "sick" and was absent from her home with Ian for over an hour on the date he was allegedly too sick to travel.
11. Evelyn's conversations with Ian on the phone were inappropriate; involved Ian in conflict and were replete with negative and alienating comments about Bryan.
12. Evelyn often criticized, interfered or was uncooperative when Bryan attempted to co-parent and involve her.

Evelyn states that even the guardian ad litem did not recommended RCW 26.09.191 restrictions. This is a misstatement of the evidence in the record. After hearing the phone calls between Ian and Evelyn, the guardian ad litem reported to the trial court the following:

These recordings further this investigator's concern regarding alienation. Given the totality of the circumstances as outlined in the reports previously submitted by this investigator, it is now clear that *parental alienation is an issue*; the mother is the perpetrator and the father is the victim....While I am not a mental health expert, it is clear that there is alienation in this case; the attached recordings support this conclusion.

CP 523 (emphasis in original). When asked whether or not she would recommend an RCW 26.09.191 restriction she testified:

**Q:** ...So you would not support a .191 factor in that regard, correct?

**A:** *I don't know* because we have the abusive use of

conflict factor as well. So I'm – I didn't make a recommendation regarding .191 restrictions one way or the other....

RP 34-35.

Despite the volume of uncontested evidence, Evelyn avers the trial court did not err when it applied RCW 26.09.184. This contention is not supported by the record, is wholly without merit and confuses the standards required by RCW 26.09.184 and RCW 26.09.187.

Evelyn asserts that because she moved within several hours of Bryan's home that somehow is evidence she was not withholding or alienating Ian from his father. If that were true, why would she refuse to tell Bryan Ian was in no longer in the Philippines but just a few hours away in Puyallup? Why did Bryan have to file a court order before Evelyn would allow him to see his son? Why did Bryan have to call the Philippines to learn Ian was no longer enrolled in school? Her continued protestations that she was not engaging in alienating behavior, abusive use of conflict and withholding Ian for a protracted period of time is belied by her actions.

- i. Duration of care is irrelevant to a proper determination pursuant to RCW 26.09.184 and RCW 26.09.187(3)(a).

In support of her claim, Evelyn argues that she “provided the vast majority of Ian's care from birth to just shy of five years and Bryan provided very little care during this time period.” Br. Of Respondent at

Page 4. However, *duration* of care is not a factor that RCW 26.09.184 or RCW 26.09.187 requires the trial court to consider. Rather, *RCW 26.09.187(3)* seeks to address what is in Ian's best interests by reviewing the *quality* of care and parenting of each parent as well as evaluating how best to protect the child from past and on-going abuse use of conflict.

The record establishes Evelyn was not meeting Ian's emotional needs, was not providing him with emotional stability and was not minimizing his exposure to conflict. Evelyn argues this Court should find the trial court met the requirements of RCW 26.09.184 based on the duration of her care for Ian and the lack of a finding of alienation by Dr. Rybicki. Both factors are irrelevant to the court's determination under *either* statute and ignores *all of the admitted behavior Evelyn has engaged in*. Thus, her argument fails.

Although Evelyn was the parent Ian resided with from birth until April 2008, it was Bryan who sought to retrieve Ian from the Philippines in September 2009 after Ian had been away from *both parents for 17 months*. RP 71. It was only after Bryan contacted Evelyn in an attempt to obtain her consent to bring Ian to the United States and then travelled to the Philippines to be with Ian that Evelyn returned to the Philippines. Upon arrival in the Philippines, Evelyn began her campaign to alienate Ian's relationship with his father and to withhold Ian from his care. RP 71-75. Thus, her contention that Bryan "opted-out" of Ian's life is erroneous. The time Bryan did not have with Ian after he left the Philippines in

November 2010 was due to Evelyn's improper actions and her attempts to thwart Bryan's involvement in Ian's life.

Bryan made every attempt to discuss parenting issues with Evelyn and resolve them amicably. RP 76, 78, TE 3 Page 34. His request was met with erroneous and perjurious statements filed *under oath* in the Philippines and United States alleging he "brutally assaulted" Ian. Evelyn's campaign continued by failing to arrive for exchanges, lying to Bryan, the guardian ad litem *and the court*, by saying Ian was too sick to travel (and specifically requesting Ian's doctor write a note corroborating her fabricated statements), putting him in day care (when he was allegedly too sick to travel), and cancelling doctor's appointments, among other obstructive behavior.

Evelyn avers that Ian was in her care for all but 15 ½ months. Br. Of Respondent at Pg 9. This claim is not only erroneous and unsupported by the record, but also ignores the time Ian was in Bryan's care from August 2010 through trial in May 2011. CP 500-507, 1014-1015. Even if this Court accepts the time frame set forth by Evelyn, Ian was out of Evelyn's care for *twenty-five months*. At trial, Ian was approximately 4.75 years old and had spent approximately 40% of his life with Bryan and 60% with Evelyn. Nonetheless, Evelyn claims that *at the time of trial* Ian was only out of her care was between July 2008 and October 2009. These facts, and their impact on a determination pursuant to RCW 26.09.187 (3)(a), were ignored in their entirety by the trial court.

- ii. The trial court put undue emphasis on Ian's cultural heritage.

Evelyn argues that the trial court did not put undue emphasis on Ian's cultural heritage. This argument ignores the plain wording of the trial court's ruling. In its ruling, the trial court stated:

[Evelyn's] relationship with Ian is stronger than with the father. Ian was born in the Philippines and speaks the same dialect as Ms. Estill. He was raised in the Philippines culture with his maternal extended family. He did not meet his parental relatives until this action was commenced in 2010.

CP 1014-1015. The court is required to give RCW 26.09.187 (3)(a)(i) the greatest weight when making a residential placement determination. Directly after stating the applicable standard, the trial court made findings that *all* relate to Ian's Philippine heritage. The court then moves on to address the other factors set forth in RCW 26.09.187 (3)(a). Thus, these were the *only facts* the court relied on when it determined that Evelyn's relationship with Ian was stronger than with Bryan thereby improperly relying solely on Ian's cultural heritage in addressing the strength, nature and stability of Ian's relationship with each parent. In making its findings on RCW 26.09.187 (3)(a), the trial court failed to address Bryan's relationship with Ian *at all*.

In addressing RCW 26.09.187(3) (a) (iii), the Court is required to address *each parent's* past and *potential* for future parenting functions. The trial court made *no findings* regarding either parent's potential for

future parenting functions, and focused only on what occurred between Ian's birth and when both parties left the Philippines in April 2008. This was a misapplication of the statute and an error of law.

- iii. The trial court abused its discretion when it found all statutory factors weigh heavily in Evelyn's favor.

Manifest is defined as, "[e]vident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evidence and self-evident." BLACKS LAW DICTIONARY 962 (6<sup>th</sup> ed. 1997).

Even if the trial court had found Bryan *and* the guardian ad litem not credible, and Evelyn and Dr. Rybicki credible, the evidence *still* does not support the finding made by the trial court. Evelyn admitted to all of the behavior and Dr. Rybicki testified only that he did not conduct a complete assessment to offer an opinion regarding the presence of alienating behavior by Evelyn.

Evelyn's behavior and intent throughout this case is unmistakable and self-evident. Reviewing the actions Evelyn admittedly engaged in as set forth above, and replete in the record, it is abundantly clear that her intention was to keep Bryan out of Ian's life and *in her own words* "nurture [Ian's] brain to hate" Bryan. On this record, the trial court's ruling is clearly and unmistakably in error and should be reversed.

- iv. The trial court should have found RCW 26.09.191 factors existed.

RCW 26.09.191(3)(e) permits a trial court to place restrictions on a parent's involvement in the child's life where there is “abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development.” The statute does not require a showing of *actual damage* to the child's psychological development, only a *danger* of such damage. In re Marriage of Burrill, 113 Wn.App. 863, 872, 56 P.3d 993 (2002) (emphasis added).

Generally, a court finds an abusive use of conflict where one parent inserts the child into a parental conflict, which could psychologically damage the child. See generally Burrill, 113 Wn.App. 863. For example, if the parent makes unsubstantiated reports about the other parent's drug use, anger management problems, and possible sexual abuse of the child, the court can find abusive use of conflict. See Burrill, 113 Wn.App. at 868–70. Or, a parent who falsely claims that the children hate going to the other parent's home, is subject to parental restrictions for an abusive use of conflict. Burrill, 113 Wn.App. at 869.

Here, the trial court expressly found that the case for abusive use of conflict and alienation had not been made. Yet, Evelyn engaged in much of the behavior condemned by the Burrill court. She inserted Ian into the conflict by making exchanges difficult, discussing the case with him, telling him that Bryan was trying to take him away from her,

withholding visitation and threatening to withhold affection if he did not align with her.

Further, for the trial court to find that she had a *right* to submit a perjurious statement, that Bryan “brutally assaulted” Ian, to both the Philippine court and the trial court below defies reason and is the embodiment of abusive use of conflict and alienation.

3. THE FATHER SHOULD BE AWARDED  
ATTORNEY FEES.

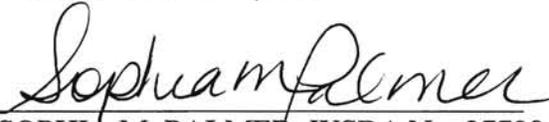
Because Evelyn’s intent to alienate and engage in abusive use of conflict is so evident, blatant and in bad faith, the trial court should have awarded Bryan fees not only for Evelyn’s intransigence, which was all but admitted by her at trial, but also for the finding of contempt entered against her.

C. CONCLUSION.

For the foregoing reasons, Bryan respectfully requests this Court reverse Judge Orlando’s ruling naming Evelyn the primary residential parent and award Bryan attorney’s fees.

DATED: June 4, 2012.

TUELL & YOUNG, P.S.

  
SOPHIA M. PALMER, WSBA No. 37799

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/6/12 *Diane de Leon*  
Date Signature

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