

RECEIVED
JAN 15 2009
COURT OF APPEALS
BY [Signature]

NO. 46217-6-II

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION TWO

THURSTON COUNTY SUPERIOR COURT NO. 12-3-01272-6

AUTUMN L. CURTIS,
Respondent on Appeal,

and

MARCUS S. HANSEN,
Appellant.

OPENING BRIEF OF APPELLANT

S. Tye Menser
of Morgan Hill, P.C.
Attorneys for Appellant

MORGAN HILL, P.C.
2102 Carriage Drive SW, Bldg. C
Olympia, WA 98502
Tel: 360/357-5700
Fax: 360/357-5761

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR1

III. STATEMENT OF THE CASE1

IV. ARGUMENT11

 A. Standard Of Review11

 B. The Court’s Oral Ruling Controls Where There Are No Written Findings Regarding an Issue On Appeal12

 C. The Court’s Finding Of Bad Faith Was Not Supported By the Evidentiary Record12

 1. *Concealing information re: Jessica Hansen’s mental health*.....13

 2. *Litigation re: Skype visits facilitated by Jessica Hansen*14

 D. The Other Grounds Identified By the Court Could Not Support an Award Of Fees Based On Bad Faith/Intransigence15

 1. *Motion to continue*16

 2. *Subpoenas to professional witnesses*16

 3. *Failure to settle*17

V. CONCLUSION19

TABLE OF AUTHORITIES

Washington Cases

Fleckenstein v. Fleckenstein
59 Wn. 2d 131, 366 P.2d 688 (1961)19

In re: Marriage of Burrill
113 Wn. App. 863, 56 P.3d 993 (Div. I 2002)11,12

In re: Marriage of Katare
125 Wn. App. 813, 105 P.3d 44 (Div. I 2004)11

In re: Marriage of Rich
80 Wn. App. 252, 907 P.2d 1234 (Div. III 1996)12

In re: Marriage of Thomas
63 Wn. App. 658, 821 P.2d 1227 (Div. III 1991)11

Marriage of Bobbitt
135 Wn. App. 8, 144 P.3d 306 (Div. II 2006) 11

Marriage of Greenlee
65 Wn. App. 703, 829 P.2d 1120 (Div. I 1992)12

Marriage of Griffin
114 Wn.2d 772, 791 P.2d 519 (1990)12

Marriage of Lilly
75 Wn. App. 715, 880 P.2d 40 (Div. I 1994)19

Marriage of Pennamen
135 Wn. App. 790, 146 P.3d 466 (Div. I 2006)12,19

Marriage of Sievers
78 Wn. App. 287, 897 P.2d 388 (Div. I 1995)19

Marriage of Wright
78 Wn. App. 230, 896 P.2d 735 (Div. II 1995)12,13,18

Rossmiller v. Rossmiller
112 Wn. App. 304, 48 P.3d 377 (Div. II 2002)11

Statutes/Rules

Civil Rule 52(a)(2)(B)12
Thurston County LSPR 94.03E(i)10,17

I. INTRODUCTION

In this case, the trial judge awarded Petitioner \$5,000 in attorneys fees based on bad faith and intransigence. The trial judge identified several facts that she believed supported that finding. Several of these findings, however, were not supported by the evidence; the others were not an adequate basis for a finding of intransigence. Accordingly, Mr. Hansen asks this Court to reverse the award of \$5,000 attorney fees based on bad faith and intransigence.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering paragraph 1.1 of the Order of Child Support, specifically in including \$5,000 of attorneys fees based on bad faith and intransigence in its overall fee award of \$5,560.00 to Petitioner. The issue pertaining to this assignment of error include whether the trial court abused its discretion in making an award of \$5,000 in attorneys fees based on bad faith and intransigence against Hansen.

III. STATEMENT OF THE CASE

Petitioner Autumn Curtis (“Curtis”) and Respondent Marcus Hansen (“Hansen”) were not married but had a child together, Coltin, in 2008.¹ A parentage action was filed in 2012. Curtis was represented by counsel through trial. Hansen, who had been represented through most of the case, had to proceed

¹RP 73:21 to 74:2. “RP” refers to the consecutively-numbered, three-day trial transcript; “RP (*date*)” refers to transcripts of non-trial hearings.

to trial without counsel because he did not have money to pay his attorney.²

Hansen is in the military and is stationed at an American base in Italy.³

The parenting plan specifics had been difficult all through the litigation because of Hansen's military station in Italy. Through many pre-trial motions and contested hearings, Hansen had been granted the right to have lengthy weekend Skype visits, supervised by his mother, Jessica Hansen ("Jessica").⁴ At the beginning of the case, the court had allowed visitation for Jessica based upon delegation of Hansen's time, but later, the court ruled that Jessica was not entitled to delegated time because Hansen had received a permanent, not temporary, station in Italy.⁵ Nonetheless, over the objection of Curtis, the court continued to allow Jessica to be the facilitator for Hansen's weekly Skype visits with Coltin, based on the higher quality of the father's visitations that were facilitated by Jessica (rather than Curtis).⁶ For example, Jessica could remain involved during the entirety of the visit, allowing Coltin to play games with his father and do other types of activities that enriched the quality of the Skype sessions, which consequently strengthened the bond between Hansen and Coltin.⁷

The issue of the grandmother-facilitated Skype visits was argued in court five separate times in between September 2012 and January 2014.⁸ Curtis fought

²RP (Feb. 20, 2014) 4.

³RP 384:23-25.

⁴*See, e.g.*, CP 291.

⁵CP 84-87; CP 11:13-16.

⁶CP 86-87; CP 291; CP 294-95.

⁷CP 242:3-14.

⁸*See*, citations to the record in notes 8 to 30, *infra*.

vigorously at every turn to terminate the facilitated Skype visits, citing the inconvenience to her family and Jessica's unstable mental health. The following hearings and evidence in the appellate record addressed Jessica's mental health and the Skype visits with Jessica/Hansen:

a. *September 10, 2012*: Curtis filed a declaration alleging mental illness, psychiatric treatment, and instantaneous rage by Jessica, arguing that her mental instability affected her ability to care for Coltin.⁹

b. *October 22, 2012*: Curtis files a supplemental declaration alleging Jessica "has threatened suicide thirteen (13) times, has attempted suicide then (10) times and has been hospitalized seven (7) times." She referenced 911 transcripts. She discussed Jessica's psychologist's diagnosis. She referenced fire department transcripts, alleged threats to kill Hansen, and multiple levels of concern she has about Jessica's ability to care for Coltin.¹⁰

c. *October 22, 2012*: 64 pages of 911 reports are filed by Curtis regarding the law enforcement contacts with Jessica Hansen.¹¹

d. *October 25, 2012*: a declaration from Jessica's psychologist is filed, discussing Jessica's mental health in depth, including suicide attempts, medication overdoses, and hospitalizations, and relating it to her potential care of her grandson.¹²

⁹CP 6:7-15.

¹⁰CP 8-12.

¹¹CP 13-77.

¹²CP 78-83.

e. *October 25, 2012*: Jessica’s mental health argued before Superior Court on a motion to revise a September 2012 commissioner’s ruling. The court permitted Jessica to facilitate weekly Skype visits with the father.¹³

f. *November 16, 2012*: Hansen filed a motion to establish the weekly visitation ordered on October 25, because Curtis had rejected all Hansen’s proposals for a schedule and denied the grandmother-facilitated Skype visits.¹⁴

g. *November 21, 2012*: Curtis filed a declaration continuing to “express concerns” about Jessica’s mental health.¹⁵

h. *November 21, 2012*: Curtis filed 23 pages of 911 transcripts related to Jessica’s suicide threats.¹⁶

i. *January 3, 2013*: At hearing, the court re-affirms the grandmother-facilitated Skype visitation for Hansen, sets a schedule, and orders make-up visits.¹⁷

j. *June 14, 2013*: Curtis continued to attack Jessica’s mental health in response to Hansen’s motion re: summer daycare.¹⁸

k. *November 26, 2013*: Curtis, with new counsel, filed a “Motion For Order Terminating Grandparent Visitation.”¹⁹ In the supporting declaration, Curtis describes how, in Fall 2012, she “learned the extent of some 911 calls that

¹³CP 84-87.

¹⁴CP 88-99.

¹⁵CP 101:5-14; CP 107:24-108:14.

¹⁶CP 118-141.

¹⁷CP 209-211.

¹⁸CP 227:14.

¹⁹CP 231-34.

had been made on behalf of Jessica”; she again raises “significant concerns about [Jessica’s] mental health.”²⁰ She asks the court again to terminate the grandmother-facilitated Skype visits, contending that they were illegal and nothing more than grandparent “visitation time.”²¹

1. *December 6, 2013*: Hansen responds to Curtis’s motion, discusses his position with respect to his mother’s mental health again at length,²² and explains that the court’s previous order was not for “grandparent visitation” but to facilitate his own Skype visits with his son.²³ He states that Jessica “has not had any incidents in over a year and a half.”²⁴

m. *December 9, 2013*: Curtis filed another declaration, spending nearly two more pages describing how, in the past, she “had no knowledge of how extreme Jessica’s mental disorders were,” but after reviewing 911 transcripts, she now knows “how suicidal and potentially dangerous Jessica” is.²⁵ She also analyzed Jessica’s psychologist’s statement and diagnosis.²⁶

n. *December 10, 2013*: The court at hearing clarified that the visits with Jessica are to facilitate Hansen’s Skype sessions, not “grandparent visitation.”²⁷ The court re-affirmed the importance of the grandmother-facilitated Skype visits

²⁰CP 232:17-18.

²¹CP 233:3-4, 21-22; CP 234:13-15.

²²CP 237:3-21.

²³CP 236:6-9.

²⁴CP 237:4-5.

²⁵CP 271:15-17.

²⁶CP 272:8-17.

²⁷CP 289.

with Hansen, and denied the motion to terminate the Skype visits.²⁸

o. *December 17, 2013*: The court signed an order denying the motion to terminate Hansen's grandmother-facilitated Skype visits.²⁹

p. *January 9, 2014*: The court entered Findings of Fact and Conclusions of Law explaining that the basis of the December 17 order for visitation for Jessica was the court's "authority, per statute, to order visitation between a father and a child."³⁰

q. *January 10, 2014*: Curtis argues a motion to revise the December 17 order continuing the grandmother-facilitated Skype visits. The Superior Court affirmed the ruling of the commissioner and denied the motion to revise: "Court ruled father has visitation rights (via Skype at grandmother's house) every Saturday."³¹

Finally, during argument on pre-trial motions on the morning of trial — in an effort to exclude Hansen's rebuttal evidence regarding Jessica's August 2013 contact with law enforcement — Curtis's counsel admitted that Jessica's mental health was "one of the primary issues" in the case ... for "a year and a half."³²

The GAL report was signed on April 10, 2013 and filed shortly thereafter.³³ In the report, the GAL did not support the concept of Coltin traveling

²⁸CP 289.

²⁹CP 291:2-4.

³⁰CP 294:19-20.

³¹CP 296.

³²RP (Feb. 25, 2014) 21:16-20; 22:2-5, 22-24.

³³Exhibit No. 4.

to Italy.³⁴ The GAL report did not say anything about Skype contact through Jessica Hansen, but after multiple Court rulings permitted those visits as a facilitation for Hansen's Skype sessions with Coltin, the GAL expressed support for their continuation.³⁵ During the week prior to trial, however, Hansen received new documents from the GAL related to an August 2013 law enforcement contact with Jessica, while Hansen was stationed in Italy.³⁶ These documents apparently changed the GAL's position as to whether Jessica should continue to facilitate weekly Skype visits with Hansen.³⁷

On February 13, 2014, Hansen's attorney withdrew from the case.³⁸ Immediately thereafter, Hansen moved to continue the trial, in an effort to (1) permit him to make arrangements to appear at trial in person rather than by phone, since he had lost his attorney the prior week, and (2) have additional time to prepare for trial as a *pro se* litigant.³⁹ The motion was heard on February 20, 2014,⁴⁰ the same day a Status Hearing had been set.⁴¹ Curtis complained — and the court expressed concern — about the lateness of the continuance motion. Hansen tried to argue that part of his reason for the lateness of the continuance

³⁴Exhibit No. 4, page 17, lines 10-13.

³⁵RP 23:7-10, 17-18.

³⁶RP 20:14-21; RP (Mar. 20, 2014) 6:17-18. Regarding Hansen being in Italy in August 2013: RP 404:19-24; RP 406:2-10; RP 425:24 to 426:14.

³⁷RP 23:7-11, 16-20; RP 21:1-5.

³⁸CP 304-05.

³⁹RP (Feb. 20, 2014) 4-5.

⁴⁰The first and third pages of the Report of Proceedings erroneously states that the date of the hearing was February 21, 2014. Pages 4-20 of the transcript, along with the Clerk's Notes (CP 306), indicate the correct date of February 20, 2014.

⁴¹RP (Feb. 20, 2014) 7.

motion was that he had been waiting for a response to a settlement offer that was not received until February 19, 2014, but Curtis objected to that argument and the court sustained the objection, even though Hansen was only explaining the timing of his motion, not the substance of settlement negotiations.⁴² The motion was denied.⁴³ The court awarded attorneys fees to Curtis for the time to appear at the hearing.⁴⁴ Trial proceeded on schedule on February 25, 2014.

In response to the new evidence from the GAL and the GAL's change of position on his mother facilitating Skype visits, Hansen attempted to subpoena the two police officers who had contact with Jessica during the August 2013 incident, as well as two of Jessica's mental health providers.⁴⁵ The Court excluded the two expert witnesses based on late notice to Curtis, and also excluded the officers, but conditioned the exclusion of the officers on whether the GAL actually testified about the August 2013 contact.⁴⁶ At trial, the GAL did testify about the incident, and the court then allowed one of the two subpoenaed officers to testify.⁴⁷

At trial, the contested issues in the case were: (1) whether Jessica could continue to facilitate Hansen's Skype visits; (2) whether Coltin would be permitted to travel to Italy in the summer to visit his father; (3) the length and duration of the father's time with Coltin, whether in Italy or Washington; (4)

⁴²RP (Feb. 20, 2014) 16.

⁴³RP (Feb. 20, 2014) 19.

⁴⁴RP (Feb. 20, 2014) 19. The court later set this amount at \$560. CP 513; RP (Apr. 2, 2014) 21:23 to 22:1.

⁴⁵RP 10-12.

⁴⁶RP 24:16-19.

⁴⁷RP 320-333.

payment of extracurricular/education and daycare expenses; and (5) payment of uninsured medical expenses, if the mother seeks treatment outside of Coltin's military insurance coverage.⁴⁸ The trial lasted two and half days. Curtis put on evidence for the majority of that time, while Hansen's case took just over a half-day,⁴⁹ and the majority of Curtis's case was spent presenting evidence regarding the mental instability of Jessica.

With respect to his mother's mental health, Hansen testified that his mother had experienced more serious problems in the past, but that she had been doing much better in the last two years, and that he had no concerns about her facilitating the weekly Skype visits.⁵⁰ He testified that Curtis knew about many — though perhaps not all — of his mother's 911 incidents and hospitalizations.⁵¹ As to the August 2013 911 call that it was alleged he had actively concealed, while he was in Italy, Hansen testified that he did not know about it at all until just prior to trial (from the GAL).⁵² This was consistent with Jessica's testimony.⁵³ Curtis did not introduce *any* evidence indicating that Hansen was aware of the August 2013 incident prior to the week before trial.

Following trial, the Court ruled that: (1) Hansen have two Skype sessions with his son each week facilitated by Curtis, not Jessica,⁵⁴ (2) Hansen have in-

⁴⁸CP 315-320.

⁴⁹RP 320-333 (Hansen's first witness taken out of order); RP 346-467.

⁵⁰RP 407:13-23; RP 431:19 to RP 432:1; RP 433:4-22.

⁵¹RP 385:13-17; RP 429:7 to RP 430:16.

⁵²RP 432:2-20.

⁵³RP 277:11 to RP 278:16.

⁵⁴RP (Mar. 20, 2014) 17:7-20.

person visitation, in Washington state only,⁵⁵ for four out of each five nights during the period of his military leave;⁵⁶ (3) Hansen will pay his proportionate share of work-related daycare;⁵⁷ (4) Hansen will pay his proportionate share of extra-curricular expenses up to \$150/month;⁵⁸ and (5) Hansen will be responsible for his proportionate share of uninsured medical expenses, even if mother seeks services outside of military facilities.⁵⁹

Curtis then asked for an attorneys' fee award based on bad faith/intransigence, referencing a Thurston County Local Rule that permits consideration of pre-trial, written settlement offers in considering an attorney fee request for bad faith or intransigence.⁶⁰ Curtis's counsel argued, without any evidentiary support, that the court's rulings were substantially similar to a settlement offer he had made prior to trial.⁶¹ Moreover, he did not disclose to the court that the "settlement offer" was made on February 19, 2014, less than a week prior to trial.⁶² The Court granted \$5,000 in fees based on bad faith/intransigence, ruling that: (1) Hansen litigated inappropriate issues at trial, specifically grandparent visitation, which turned a half-day trial into a unnecessarily long trial; (2) Hansen withheld information regarding his mother's mental health, which had

⁵⁵RP (Mar. 20, 2014) 19:1-12; RP (Mar. 20, 2014) 20:7-8.

⁵⁶CP 508.

⁵⁷RP (Mar. 20, 2014) 23:2-4.

⁵⁸RP (Mar. 20, 2014) 23:4-7; CP 518:17-20.

⁵⁹RP (Mar. 20, 2014) 22:5 to 23:1; CP 523:10-15.

⁶⁰RP (Mar. 20, 2014) 24:4-19; RP (Mar. 20, 2014) 29:11-31:8. The rule referenced was Thurston County LSPR 94.03E(i).

⁶¹RP (Mar. 20, 2014) 24:5-15.

⁶²RP (Mar. 20, 2014) 24:5-6; RP (Feb. 20, 2014) 16.

to be actively discovered by Curtis; (3) Hansen inappropriately asked for a last-minute continuance; (4) Hansen late-subpoenaed professionals for trial; and (5) Hansen should have settled given that the settlement offer was very close to what the Court's rulings were after trial.⁶³

Accordingly, Hansen brings the instant appeal to reverse the award of \$5,000 of attorneys fees based on bad faith and intransigence.

IV. ARGUMENT

A. Standard Of Review

A trial court's decision to award attorney's fees in a family law proceeding will not be disturbed by a reviewing court absent a clear showing of an abuse of discretion.⁶⁴ "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons."⁶⁵ "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard."⁶⁶

⁶³RP (Mar. 20, 2014) 33:17-35:10.

⁶⁴*Marriage of Bobbitt*, 135 Wn. App. 8, 29-30, 144 P.3d 306 (Div. II 2006).

⁶⁵*Rossmiller v. Rossmiller*, 112 Wn. App. 304, 309, 48 P.3d 377 (Div. II 2002).

⁶⁶*In re: Marriage of Katara*, 125 Wn. App. 813, 822-23, 105 P.3d 44 (Div. I 2004).

An appellate court will not re-try the facts on appeal, and will accept findings of fact as verities if they are supported by substantial evidence in the record.⁶⁷ Evidence is substantial when there is a sufficient quantum of evidence “to persuade a fair-minded person of the truth of the declared premise.”⁶⁸ “So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it.”⁶⁹ This court does not review the trial court’s credibility determinations, nor can it weigh conflicting evidence.⁷⁰

B. The Court’s Oral Ruling Controls Where There Are No Written Findings Regarding an Issue On Appeal.

Civil Rule 52(a)(2)(B) requires written findings “[i]n connection with all final decisions in adoption, custody, and divorce proceedings.” In this case, the Court made no written findings regarding bad faith, intransigence, or any other basis for its award of \$5,000 of attorneys fees to Curtis. “In the absence of a written finding on a particular issue, an appellate court may look to the oral opinion to determine the basis for the trial court’s resolution of the issue.”⁷¹

C. The Court’s Finding Of Bad Faith Was Not Supported By the Evidentiary Record.

Attorney fee awards based on a party’s intransigence requires evidence of foot-dragging or obstruction.⁷² “The party requesting fees for intransigence must

⁶⁷*In re: Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (Div. III 1991).

⁶⁸*In re: Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (Div. I 2002).

⁶⁹*Id.*

⁷⁰*In re: Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (Div. III 1996).

⁷¹*Marriage of Griffin*, 114 Wn.2d 772, 777, 791 P.2d 519 (1990).

⁷²*Marriage of Pennamen*, 135 Wn. App. 790, 807, 146 P.3d 466 (Div. I 2006).

show the other party acted in a way that made trial more difficult and increased legal costs, like repeatedly filing unnecessary motions or forcing court hearings for matters that should have been handled without litigation.”⁷³ Unsupported assertions about “intransigence and obstructionist tactics” are not a basis for awarding fees.⁷⁴ The fact that a family law case involves contested issues does not open a door to an award of fees, absent a showing of specific, inappropriate legal tactics.⁷⁵

In this case, trial court abused its discretion in awarding fees to Curtis based on intransigence. The Court’s oral ruling identified several bases for its fee award, but the two primary ones — inappropriate litigation about grandparent visitation and Hansen allegedly concealing evidence about his mother’s mental health — were mis-statements of fact that were not supported by the evidentiary record.

1. Concealing information re: Jessica Hansen’s mental health

The primary basis for fees identified in the trial judge’s oral ruling was that Hansen *and his mother* withheld information from Curtis regarding his mother’s mental health — information that had to be actively discovered by Curtis. But nothing could be further from the truth. Concerns about Jessica Hansen’s mental health had been *front and center* in the litigation from the

⁷³*Id.*; see also, *Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (Div. I 1992).

⁷⁴*Marriage of Wright*, 78 Wn. App. 230, 239, 896 P.2d 735 (Div. II 1995).

⁷⁵*Id.*

beginning. Transcripts of 911 calls, declarations from Curtis, declarations from Jessica's psychologist — the concerns about Jessica's mental health had been before the court for the entirety of the case. Curtis's counsel admitted it was a central issue in the case "for a long time." Jessica's mental health was argued in front of judicial officers in the case on five separate occasions. By no stretch of the imagination was Jessica Hansen's mental health a new, or unknown, issue in the case.

Moreover, Hansen is not obligated to conduct discovery and prepare Curtis's trial case for her. The fact that she discovered additional, cumulative pieces of relevant information on a topic that had been well-known and voluminously-litigated by the parties cannot possibly be a basis to find bad faith or intransigence. The law regarding bad faith and intransigence relates to conduct in *litigation*.

In addition, as to the key "newly-discovered" incident — Jessica's August 2013 law enforcement contact — there is no evidence in the record that Hansen knew about it until informed by the GAL just prior to trial. Hansen was on the other side of the world at the time, stationed in Italy beginning in September 2012.⁷⁶ The trial court cannot base a fee award against Hansen for bad faith for not disclosing information about incidents he knew nothing about.

2. *Litigation re: Skype visits facilitated by Jessica Hansen*

Second, the trial court, in awarding fees for bad faith, chastised Hansen

⁷⁶See, RP 404:19-24; note 36, *supra*.

because the major issue contested at trial was “grandparent visitation” — an inappropriate issue for trial — and that the limited legitimate issues for trial (summer visits, Skype visits, and child support) should have taken only a half day. This finding is wrong and should not have supported a fee award for three separate reasons.

First, and most significantly, this is a gross misstatement of the issue that was litigated. The issue was facilitating Skype visits *for the father* by the grandmother, and the quality of those visits, as had been ordered by court previously, on that basis. Hansen never argued at trial that he wanted grandparent visitation. He simply wanted to maintain what several other judicial officers had previously ordered to be appropriate and in Coltin’s best interests: weekly Skype sessions for the father facilitated by the grandmother, which enhanced the quality of those visits and helped strengthen his connection with Coltin. This *was* an appropriate issue for trial.

Second, the Court has mistakenly blamed Hansen for the quantity of trial time spent on the grandmother/Skype issue. But in fact *Curtis’s* counsel spent all that time — her side of the case took the vast majority of the 2 ½ trial days. And the vast majority of that time was spent presenting evidence regarding Jessica Hansen’s mental health, to un-do the previously-ordered Skype visits facilitated by her. The fact that Curtis put on too much evidence regarding a legitimate trial issue — whether the child’s best interests would be furthered by grandmother-facilitated Skype visits for Hansen — cannot be a basis for bad faith by Hansen.

Finally, it should be noted that Hansen is a *pro se* litigant. Even if the trial court was correct that the grandmother-facilitated Skype visits should not been litigated — or should not have been litigated as thoroughly — the court, or Curtis through objections of counsel, could have limited the presentation of irrelevant or cumulative evidence. Their failure to do so should not be considered *bad faith* by Hansen. He had no basis to know how long a family law trial should take.

D. The Other Grounds Identified By the Court Could Not Support an Award Of Fees Based On Bad Faith/Intransigence.

Three other grounds articulated by the trial court as a potential basis for awarding fees — Hansen’s motion to continue, subpoenas to professional witnesses, and failing to settle where the court’s rulings were substantially similar to a settlement offer — though true as a factual matter, could not have supported the court’s fee award as a matter of law.

1. *Motion to continue*

The court made passing reference in its ruling on fees to Hansen’s “requests at the last minute for a continuance.”⁷⁷ But Hansen had already been tagged with \$560 in attorneys fees for that motion — even though Curtis did not file a response and there was a status hearing set at that same time — and he is not appealing that award. The motion was denied, and there was no other consequence, financial or otherwise, to Curtis as a result of that motion.⁷⁸ Trial proceeded on schedule. In any case, the motion was well-founded, because

⁷⁷RP (Mar. 20, 2014) 34:8-9.

⁷⁸CP 306.

Hansen had recently lost counsel, and had been provided late discovery and been made aware that the GAL had changed her position on visits in Italy and Skype visits facilitated by his mother. His motion to continue was made in good faith. The court never identified any well-founded basis to conclude Hansen's motion was illegitimate or reflected intransigence.

2. *Subpoenas to professional witnesses*

Next, the court chastised Hansen for subpoenaing witnesses for trial, including professionals, and a law enforcement officer.⁷⁹ But a *pro se* litigant does not display bad faith by calling witnesses to support his case — that is what he is supposed to do. A quasi-professional witness — the Guardian ad Litem — was called by Curtis to provide evidence on a wide range of topics, including his mother's mental health and its impact on Coltin during the proposed Skype visits for Hansen. Indeed, as discussed above, much of Curtis's case was designed to discredit Jessica Hansen due to mental health concerns. Hansen had every right to try and rebut that testimony with evidence of his mother's sound mental health through the testimony of her mental health counselors, and law enforcement officers who contacted her during the most recent incident in question. For the court to cite that as evidence of bad faith or intransigence is utterly unwarranted, and an improper interference with his right to present his case.

⁷⁹RP (Mar. 20, 2014) 34:10-14.

3. *Failure to settle*

Finally, the court stated that the case “should have settled ... given ... that [the] ongoing offer, was basically, what the court ended up ruling after two-and-a-half days of trial.”⁸⁰ The court, upon the urging of Curtis’s counsel, referenced Thurston County Local Rule LSPR 94.03E(i), which provides that a court may consider written settlement offers communicated before trial in “considering a request for an award of fees and costs at trial based on bad faith or intransigence.” But the trial court’s reference to and reliance on this rule is error for at least three separate reasons.

First, Curtis was not clear about the *date* of her written settlement offer — a key consideration for the court in assessing whether failure to accept should equate to intransigence. In fact, the written settlement offer was not provided to Hansen until February 19, 2014 — 5 days before trial, and 6 days after his attorney had withdrawn, who might have been able to help him assess the offer.⁸¹ In light of these facts, reliance on counsel’s unsupported representations about a settlement offer was error. Moreover, Hansen tried to indicate to the court earlier, during the hearing on his motion to continue, that the lateness of his continuance motion was due to the fact that he *wanted* to settle the case and had been waiting

⁸⁰RP (Mar. 20, 2014) 34:16-20.

⁸¹All Curtis’s counsel stated was that “the proposed documents that we gave to the court were our proposal for settlement to Mr. Hansen.” RP (Mar. 20, 2014) 24:5-6. He did not tell the court that Hansen only got them the same day the court did: February 19, 2014. RP (Feb. 20, 2014) 16.

to a response to *his* offer from Curtis.⁸²

Second, as was evident during the pre-trial argument regarding preliminary trial matters, the GAL had flipped her position on at least one key issue in the case — whether Jessica could continue to facilitate Hansen’s Skype visitation — just prior to trial.⁸³ Certainly when key evidence in the case changes just days before trial, a party’s reluctance to accept an eleventh-hour settlement proposal cannot be evidence of bad faith or intransigence.

Finally, to hold Hansen as intransigent for failure to accept a settlement offer on these facts would constitute an interference with his right to trial. A party may contest the issues in a family law case without creating a basis for an award of fees based on intransigence if the party loses.⁸⁴ None of the cases found by counsel awarding fees for intransigence have based it on a party simply litigating close issues.⁸⁵ Intransigence that justifies a fee award requires acts that made trial more difficult and increased legal costs.⁸⁶ In this case, nothing was unreasonable about Hansen’s position on the major issue — his grandmother facilitating Skype visits — in that several courts had ordered that very thing over the preceding 18 months, and the GAL had supported the visits until right before trial! Certainly,

⁸²RP (Feb. 20, 2014) 16.

⁸³RP 23:7-11, 16-20; RP 21:1-5.

⁸⁴*See, Marriage of Wright*, 78 Wn. App. 230, 239, 896 P.2d 735 (Div. II 1995).

⁸⁵*See, e.g., Marriage of Lilly*, 75 Wn. App. 715, 719, 880 P.2d 40 (Div. I 1994) (procedural gamesmanship); *see also, Fleckenstein v. Fleckenstein*, 59 Wn. 2d 131, 133, 366 P.2d 688 (1961) (failure to comply with orders and failure to make payments); *Marriage of Sievers*, 78 Wn. App. 287, 311, 897 P.2d 388 (Div. I 1995) (bad-faith attempt to induce opposing party to sign an agreement that would have unfavorable tax consequences).

⁸⁶*Marriage of Pennamen*, 135 Wn. App. 790, 807, 146 P.3d 466 (Div. I 2006).

on this record, Hansen's refusal to settle on February 20, 2014 could not be bad faith or intransigence.

V. CONCLUSION

The trial court concluded that it was "appropriate" that Hansen contribute to Curtis's attorneys fees for trial "because of [his] actions" and the court rule that allows consideration of settlement offers. The court stated that Hansen had put Coltin "through an unnecessary trial, hanging over everyone's heads for many months." This ruling was error.

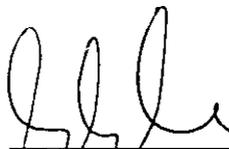
Intransigence that justifies a fee award requires actions that unnecessarily increase litigation costs. Hansen did not engage in any such acts. He simply sought to pursue rulings that he believed were in his son's best interests, and were in fact supported by the GAL until just prior to trial. He never got a settlement offer from Curtis until 5 days before trial, after he had lost his attorney. The trial court blamed Hansen for concealing evidence about one incident he knew nothing about, and other evidence that was entirely cumulative to volumes of similar evidence that had been filed by Curtis throughout the case.

Hansen made a good-faith motion to continue trial, and it was denied. He was blamed by the court for making the motion, assessed fees for bringing it, and he is not appealing that award. The GAL produced evidence of a new, unknown incident involving his mother the week before trial, and he was blamed by the court and accused of intransigence for trying to subpoena rebuttal evidence. The

attorney fee award of \$5,000 for bad faith/intransigence was an abuse of discretion.

DATED this 14th day of July, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'S. Tyc Menser', written over a horizontal line.

S. Tyc Menser, WSBA #37480
MORGAN HILL, P.C.
Attorneys for Respondent/Appellant

COURT OF APPEALS

2014 JUL 15 AM 9:40

STATE OF WASHINGTON

CLERK

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

)	
)	
AUTUMN CURTIS)	
Respondent on Appeal,)	No. 46217-6-II
)	
vs.)	AFFIDAVIT OF SERVICE
)	
)	Thurston County
MARCUS HANSEN)	Superior Ct. No.
Appellant)	12-3-01272-6
_____)	

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

The undersigned, being first duly sworn on oath, now deposes and states:

The undersigned is now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action and competent to be a witness therein.

I certify that on July 14, 2014, I arranged for personal service of a true and correct copy of the **Opening Brief of Appellant** upon the following individuals:

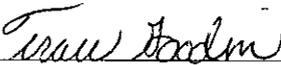
ORIGINAL

Washington State Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

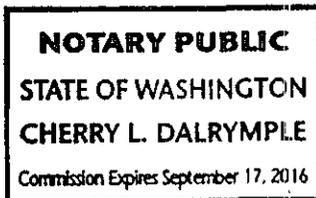
I certify that on July 14, 2014, I caused to be mailed, via first class regular mail and certified mail through the United States Postal Service, a true and correct copy of the Opening Brief of Appellant to the following individuals:

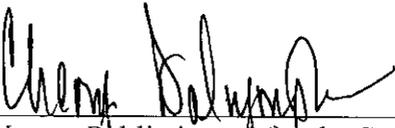
Christopher Martin Constantine
Of Counsel Inc., PS
P.O. Box 7125
Tacoma, WA 98417-0125

DATED this 14th day of July, 2014, at Olympia, Washington.


Name: Traci Goodin of
MORGAN HILL, P.C.

SUBSCRIBED AND SWORN to before me this 14th day of July, 2014, by Traci Goodin.




Notary Public in and for the State of
Washington, residing at: Olympia, WA
My commission expires 9-17-14
Print Name: CHERRY DALRYMPLE