

No. 4<sup>6</sup>/2176-II

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

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In re the Parenting and support of

C.S.H.,

Child,

AUTUMN CURTIS  
Petitioner/Respondent,

and

MARCUS HANSEN,  
Respondent/Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
2014 SEP 29 PM 4:59  
STATE OF WASHINGTON  
BY DEPUTY

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APPEAL FROM THE SUPERIOR COURT OF THURSTON COUNTY  
THE HONORABLE ANNE HIRSCH, JUDGE

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RESPONDENT'S AMENDED BRIEF

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### III. RESPONSE TO APPELLANT'S STATEMENT OF THE CASE

Respondent takes issue with numerous inaccuracies in appellant's Statement of the Case. Appellant states that on February 13, 2014, his attorney withdrew from the case. AB 7. Appellant fired his attorney.<sup>1</sup>

Appellant asserts that the trial court continued to allow Ms. Hansen to be the facilitator for appellant's weekly Skype visits with CH based on the allegedly higher quality of appellant's visitations that were facilitated by Ms. Hansen. AB 2. Appellant's cited references to the record do not support his assertion. Neither the Order on Motion for Revision<sup>2</sup> nor the Order on Motion to Terminate Grandparent Visitation<sup>3</sup> contains any language that finds the quality of appellant's visitations when facilitated by Ms. Hansen was higher than when facilitated by Ms. Curtis. Similarly, the Findings of Fact and Conclusions of Law on Petitioner's Motion for Order Terminating Grandparent Visitation<sup>4</sup> likewise contain no such finding. Nor does appellant point to any such finding elsewhere in the record.

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<sup>1</sup> RP 2/20/14 pp. 4, 8, 14, 18; RP 3/20/14 p. 30:17-19, 32:12; RP 4/2/14 p.21:3-4.

<sup>2</sup> CP 85-87

<sup>3</sup> CP 290-91

<sup>4</sup> CP 292-95

Appellant asserts that "grandmother-facilitated Skype" visits were argued in court five separate times between September 2012 and January 2014. AB 2. Appellant's cited references to the record do not support his assertion. The appellant through all declarations filed from October, 2012 and prior to December, 2013 when referencing the visitation between CH and Ms. Hansen, appellant refers to these visits as "*his mother's visits*".<sup>5</sup> Appellant also testified at trial that the original order was for visitation between CH and Ms. Hansen.<sup>6</sup> Ms. Hansen also stated in her declaration filed on November 16, 2012, that the court order entered on October 25, 2012 was visitation for her.<sup>7</sup> Ms. Hansen also testified at trial that up until a couple of months before trial, the visits were for her.<sup>8</sup> Similarly, Neither the Order on Motion for Revision<sup>9</sup> or the Agreed Order re: Weekly Visitation<sup>10</sup> makes any reference to "*grandmother-facilitate Skype*".

Appellant's discussion of respondent's efforts to introduce, in connection with the October 25, 2012 hearing on revision of the October 9, temporary order, evidence of Ms. Hansen's mental state is seriously misleading. AB 3-4. Respondent's supplemental declaration and the 64 pages of 911 reports regarding law enforcement contacts with Ms. Hansen

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<sup>5</sup> CP 88-94; Exhibit 14.

<sup>6</sup> RP III pp 406:21-23; 426:22- 427:13; 459:11-16 & 20-22.

<sup>7</sup> CP 96:21-22; CP 98:19.

<sup>8</sup> RP II p 237:2-6, p 275:23-p. 276:13 &17-20.

<sup>9</sup> CP 85-87.

<sup>10</sup> CP 209-211.

were filed on October 22, 2012.<sup>11</sup> An amended declaration from Ms. Hansen's psychologist was filed on October 25, 2012.<sup>12</sup> The parties had agreed to supplement the record with those documents, but that agreement was undermined by the filing of Ms. Hansen's responsive declaration.<sup>13</sup>

Ultimately, the court declined to address Ms. Hansen's mental health issues at the October 25, 2012 hearing:

...I am not going to get into the issue of the grandmother's alleged issues other than to say there are a lot of people that have a lot of trauma in their history that are perfectly fine to be around children that have a lot to give and offer. I don't know what the specifics are and I don't want to know them...<sup>14</sup>

In light of the foregoing, it is not accurate for appellant to argue that Ms. Hansen's mental health issues were litigated at the October 25, 2012 revision hearing.

Appellant argues that respondent continued to address her concerns about Ms. Hansen's mental health in a declaration filed in November, 2012. AB 4. On November 21, 2012, Respondent filed a declaration in which she continued to express concerns for Ms. Hansen's mental

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<sup>11</sup> CP 8-12; 13-77.

<sup>12</sup> CP 78-83.

<sup>13</sup> RP 10/25/12 p. 14:1-p. 15:12.

<sup>14</sup> RP 10/25/12 p. 26: 13-19.

health.<sup>15</sup> Respondent also on that date filed a transcript of the 911 tapes regarding her contacts with the mental health system concerning her mental health issues.<sup>16</sup> Neither document was considered by the court at that time, as on January 3, 2013, the parties entered into an agreed order regarding weekly visitation between CH and Ms. Hansen.<sup>17</sup>

Appellant argues that respondent continued to attack Ms. Hansen's mental health in her declaration filed on June 14, 2013. AB 4. Respondent's reference in her declaration to Ms. Hansen's mental health issues consisted of a single passing reference to those issues.<sup>18</sup> Appellant fails to establish whether those issues were considered by the court at that time.

Appellant cites respondent's declaration<sup>19</sup> filed on November 26, 2013, in support of her Motion for Order Terminating Grandparent Visitation. AB 4. Appellant also cites to his responsive declaration<sup>20</sup> filed on December 6, 2013. AB 5.

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<sup>15</sup> CP 101: 4-14; CP 107:24-108:14.

<sup>16</sup> CP 118-141.

<sup>17</sup> CP 209-211.

<sup>18</sup> CP 227:14.

<sup>19</sup> CP 232-34.

<sup>20</sup> CP 235-67.

In his declaration, appellant boldly announced that Ms. Hansen had not had any incidents in over a year and a half.<sup>21</sup> Appellant testified at trial that he was aware of Ms. Hansen's summer 2012 incidents with law enforcement and hospitalizations before the custody action had started and did not inform the respondent.<sup>22</sup> Ms. Hansen testified that on June 4, 2012, Chris Kotke, her LA fitness trainer, call to 911 because she stated that she was going to kill herself.<sup>23</sup> Ms. Hansen also testified at trial that on June 23, 2012, her psychologist, Dr. McCollom, called 911 to report had taken Ambien and Alcohol.<sup>24</sup> Ms. Hansen testified at trial, however, that she had been hospitalized for mental health reasons between June 23, 2012 and July 3, 2012.<sup>25</sup> Ms. Hansen also testified that on July 19, 2012, her psychologist, Dr. McCollom, called 911 to report that she did not show up for an appointment.<sup>26</sup> 911 transcripts of these calls were filed with the court. (CP 118-141). Ms. Hansen also testified that she had been hospitalized in a psychiatric hospital for better than a month in August 2012, followed by 2 week outpatient program.<sup>27</sup> Ms. Hansen also testified to an incident on August 5, 2013, in which an employee at Medicare

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<sup>21</sup> CP 237:4-5.

<sup>22</sup> RP III p. 427:25 -p. 433:22.

<sup>23</sup> RP II p. 254:12-14.

<sup>24</sup> RP II p. 254:15- p 255:12

<sup>25</sup> RP II p. 256:13-23.

<sup>26</sup> RP II p. 255: 13-18

<sup>27</sup> RP II p. 241:25 -p. 242:4.

called 911 to report that she had said that she was going to jump off a bridge.<sup>28</sup>

The Order on Motion to Terminate Grandparent Visitation entered on December 17, 2013, makes no mention of Ms. Hansen's mental health issues.<sup>29</sup> Instead, the order identified, as grounds for the order, that a substantial change of circumstances had occurred in that respondent, due to a change in her work schedule, she was no longer able to transport CH to or from visitations at Ms. Hansen's residence, and respondent's parents were not willing to transport CH.<sup>30</sup> The court therefore ordered Ms. Hansen to transport CH to and from those visits.<sup>31</sup>

On revision, the court entered findings of fact and conclusions of law.<sup>32</sup> The court's findings once again made no mention of Ms. Hansen's mental health issues.<sup>33</sup>

The Order on Motion to Terminate Grandparent Visitation made a significant change from the October 25, 2012, Order on Revision. The Order on Motion to Terminate ordered that "[t]he father shall continue to have Skype privileges with the child at the paternal grandmother's home

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<sup>28</sup> RP II p. 258:14-p. 259:6

<sup>29</sup> CP 290-91.

<sup>30</sup> CP 290.

<sup>31</sup> CP 290: 24-25.

<sup>32</sup> CP 292-295.

<sup>33</sup> *Ibid.*

*every Saturday for three hours...*<sup>34</sup> In contrast, the October 25, 2012, Order on Revision provided, in pertinent part, that “[t]he child shall have at least weekly contact with the paternal grandmother for at least several hours per week.”<sup>35</sup>

Appellant points to a statement by respondent’s attorney that Ms. Hansen’s mental health was one of the primary issues in the case for a year and a half. AB 6. The argument of respondent’s attorney does not erase the fact that Ms. Hansen’s mental health is not mentioned once in any pretrial order in this case.

Appellant states that while the GAL report was silent about Skype contact through Ms. Hansen, but after court hearings, the GAL expressed support for their continuation. AB 7. Appellant’s citation to the record on this point is to his opening argument, and not to any testimony by the GAL. AB 7 n. 35 (citing RP I p. 23:7-10, 17-18).

Appellant states that the GAL’s review of documents concerning an August 2013 law enforcement contact with Ms. Hansen apparently changed the GAL’s position on whether Ms. Hansen should continue to facilitate CH’s weekly Skype visits with Appellant. AB 7. Appellant fails to discuss his conversation with the GAL after the August 2013 incident.<sup>36</sup>

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<sup>34</sup> CP 291.

<sup>35</sup> CP 87.

<sup>36</sup> RP Vol. I, p. 116:13-p. 117: 2.

Appellant fails to discuss the GAL's concern that appellant did not grasp the full extent of Ms. Hansen's mental health issues.<sup>37</sup> Appellant fails to disclose that he hindered the GAL investigation by failing to disclose that he resided with Ms. Hansen during the prior year on both the "Order Authorizing Release of Criminal History Record & Child Protective Services Records to Guardian ad Litem,"<sup>38</sup> and "Supplemental GAL Order/Order Authorizing Release of Records,"<sup>39</sup> as Ms. Hansen indicated at trial.<sup>40</sup> Appellant fails to discuss that the GAL expressed concerns regarding Ms. Hansen's Mental Health and believed that 191 restrictions applied in her initial report filed with the court on April 16, 2013.<sup>41</sup> Appellant fails to discuss that the GAL testified at trial "*...I did have concerns and I did note them in my report*"<sup>42</sup> Appellant fails to discuss his discussion with the GAL at trial, where the GAL indicated that she voiced her concerns in her initial report dated April 10, 2013.<sup>43</sup> Appellant fails to discuss that the GAL testified at trial that she continued to have concerns regarding Ms. Hansen significant history of mental health issues.<sup>44</sup> Appellant fails to discuss the GAL's concern that appellant is unaware that

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<sup>37</sup> RP Vol. 1, p. 117: 15-25.

<sup>38</sup> CP 591-597.

<sup>39</sup> CP 598-605.

<sup>40</sup> RP II p. 269:7-12.

<sup>41</sup> CP 614:23-25.

<sup>42</sup> RP I p. 95:3-5.

<sup>43</sup> RP I p. 133:16-19.

<sup>44</sup> RP I p. 93:23 - p 94:9.

Ms. Hansen's mental health issues are ongoing.<sup>45</sup> Appellant fails to discuss that the GAL is concerned that appellant perceives Ms. Hansen's mental health issues as situational, rather than long-term.<sup>46</sup> Appellant fails to discuss the GAL's concern that appellant isn't truly aware of Ms. Hansen's mental health issues and that Ms. Hansen was not disclosing her mental health history to appellant.<sup>47</sup>

Appellant discusses the trial court's denial of his motion for a continuance. AB 7. Appellant discusses the trial court's concern about the lateness of Appellant's motion. *Id* Appellant fails to discuss the multitude of other reasons given by the trial court for denying his motion. Appellant fails to discuss the court's concern that trial had been continued once already.<sup>48</sup> Appellant fails to discuss the court's concern that appellant's firing of his attorney on February 13, 2014 was a delay tactic.<sup>49</sup> Appellant fails to discuss the trial court's concern that appellant's untimely motion for a continuance created prejudice to CH and respondent.<sup>50</sup> Appellant fails to discuss the trial court's concern that a delay of trial of a few months is a lifetime to CH.<sup>51</sup> Appellant fails to discuss the trial court's

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<sup>45</sup> RP Vol. I, p. 121: 2-4.

<sup>46</sup> RP Vol. I, p. 118: 14: 22.

<sup>47</sup> RP Vol. I p. 120: 23-p. 121: 16.

<sup>48</sup> RP 022014 p. 17.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*, p. 18.

concern that appellant's case had involved a lot of litigation.<sup>52</sup> Appellant fails to discuss the trial court's concern that if the firing of appellant's attorney just before trial was a detriment to appellant, it was of his own making.<sup>53</sup> Appellant fails to discuss the trial court's deep concern over what appeared to be appellant's bad motives.<sup>54</sup> Appellant fails to discuss the trial court's finding that appellant's motion for a continuance was not brought in good faith.<sup>55</sup>

Appellant discussion of the contested issues in the case omits whether continued unsupervised contact between CH and Ms. Hansen was in CH's best interests. AB 8-9. Respondent maintained that continued unsupervised contact between Ms. Hansen and CH was not in CH's best interests, in view of Ms. Hansen's mental health history, including numerous hospitalizations and multiple contacts with law enforcement over her threats to harm herself.<sup>56</sup>

Appellant points out that he testified at trial that despite her history of mental health problems, Ms. Hansen was doing better in the previous two years. AB 9. Appellant fails to mention the June 4, 2012 call to 911 by Ms. Hansen's trainer at LA Fitness, who reported that she had been

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*, p. 19.

<sup>56</sup> CP 318-320.

threatening suicide.<sup>57</sup> Appellant fails to mention the June 23, 2012 call to 911 by Ms. Hansen's doctor, who reported her speech slow and slurred, and that Ms. Hansen had reported taking Ambien and alcohol.<sup>58</sup> Appellant fails to mention the August 2013 incident or the fact that she had been hospitalized for mental health reasons between June 23, 2012 and July 3, 2012.<sup>59</sup> Appellant fails to mention the July 19, 2012, incident in which her psychologist, Dr. McCollom, called 911 to report that she did not show up for an appointment.<sup>60</sup> Appellant fails to mention that Ms. Hansen was hospitalized for one month at a psychiatric hospital in Phoenix during August, 2012.<sup>61</sup> Appellant fails to mention that Ms. Hansen stayed at the psychiatric hospital's outpatient center for an additional two weeks.<sup>62</sup> Appellant fails to mention the GAL's concern that appellant isn't truly aware of Ms. Hansen's mental health issues and that Ms. Hansen was not disclosing her mental health history to appellant.<sup>63</sup> Appellant fails to mention the GAL's concern that appellant is not concerned about the long-term character of Ms. Hansen's mental illness: "*I just don't believe that he is concerned about it.*"<sup>64</sup> Appellant fails to mention the GAL's concern

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<sup>57</sup> EX 5.

<sup>58</sup> EX 5.

<sup>59</sup> RP II p. 256;13-23.

<sup>60</sup> RP II p. 255;13-18.

<sup>61</sup> RP II p. 240;25-p. 242: 4.

<sup>62</sup> *Id.*

<sup>63</sup> RP Vol. I p. 120: 23-p. 121: 16.

<sup>64</sup> RP Vol. I p. 120: 8-9.

that Ms. Hansen is not disclosing her mental health incidents to appellant, and the risk that poses to CH.<sup>65</sup> Appellant fails to mention the GAL's concern that Ms. Hansen continues to view her mental health issues as situational, and not ongoing.<sup>66</sup> Appellant fails to mention that the GAL was concerned that Ms. Hansen could not in her deposition recall facts from her mental health incidents.<sup>67</sup> Appellant fails to mention that Ms. Hansen testified that she does not feel that she has to disclose her mental health history to respondent.<sup>68</sup>

Appellant states that he testified that respondent knew about “*many-though perhaps not all*” of Ms. Hansen’s 911 incidents and hospitalizations. AB 9. Appellant fails to mention that respondent testified that she did not know until 2013 that Ms. Hansen had been tasered in May, 2011, and that neither appellant nor Ms. Hansen told her about that incident.<sup>69</sup> Appellant fails to mention that respondent testified that she did not find out about Ms. Hansen’s mental health incidents in 2012 until they were filed in court.<sup>70</sup> Appellant fails to mention that he testified at trial that he did not disclose the summer 2012 incident to the

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<sup>65</sup> RP Vol. I p. 121: 5-16

<sup>66</sup> RP Vol. I p. 121: 20-p. 122: 1.

<sup>67</sup> RP Vol. I p. 122: 2-6.

<sup>68</sup> RP Vol. II p. 262:16-p. 263:1.

<sup>69</sup> RP Vol. II p. 300: 2-15.

<sup>70</sup> RP Vol. II p. 301: 17-25

respondent.<sup>71</sup> Appellant fails to mention that the respondent found out about the 911 tapes regarding Ms. Hansen's mental health incidents through research, and not through Appellant or Ms. Hansen.<sup>72</sup> Appellant fails to mention that respondent learned about Ms. Hansen's hospitalization in Phoenix through a declaration filed by Ms. Hansen in court.<sup>73</sup> Appellant fails to mention that Ms. Hansen testified that she told respondent about "some", but not all, of her mental health incidents.<sup>74</sup>

Appellant states that he testified that he did not know about the August, 2013, incident involving Ms. Hansen until he was informed of that incident by the GAL shortly before trial. AB 9. Appellant fails to mention the GAL's concern that Ms. Hansen is not disclosing her mental health incidents to appellant, and the risk that poses to CH.<sup>75</sup>

Appellant mistakenly asserts that respondent's attorney did not disclose to the court that respondent's settlement offer was made on February 19, 2014. AB 10. Appellant fails to mention that during the pre-trial hearing on November 1, 2013, respondent and her attorney met with appellant's attorney to try to resolve issues in the case, including Ms.

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<sup>71</sup> RP III p. 428:18-p. 429:17; p. 430:23-p.433:22.

<sup>72</sup> RP Vol. II p. 302: 8-13.

<sup>73</sup> RP Vol. II p. 302: 14-19.

<sup>74</sup> RP Vol. II p. 287:22-p. 288: 3.

<sup>75</sup> RP Vol. I p. 121: 5-16.

Hansen's visitation with CH.<sup>76</sup> Appellant's attorney represented that he would talk to appellant and get back to respondent.<sup>77</sup> Respondent waited three weeks and never heard any response from appellant or his attorney regarding settlement.<sup>78</sup> Appellant fails to mention that during trial it was disclosed that the appellant did not respond to the respondents' November 1, 2013 offer until after the New Year.<sup>79</sup> Nor does Appellant mention that on February 20, 2014, the court allowed filing of the parties' proposed parenting plans on Monday, February 24, 2014.<sup>80</sup>

The court gave well-grounded reasons for its award of attorney fees to respondent. The court noted that while there is no right to grandparent visitation, a great deal of the case involved Ms. Hansen's visitation with CH.<sup>81</sup> The court further noted that quite a bit of time was spent talking about what respondent had to actively discover, because of appellant's and Ms. Hansen's active withholding of information.<sup>82</sup> The court expressed its belief that the case should not have gone to trial, and that with the very limited issues presented of summer visits, Skype visits and child support, at the very most, the case should have been a half a

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<sup>76</sup> CP 275: 11-21.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*; RP Vol. III p. 503: 7-10.

<sup>79</sup> RP III p. 503: 7-19.

<sup>80</sup> RP 02/20/14 p. 20.

<sup>81</sup> RP 03/20/14 p. 33: 20-23.

<sup>82</sup> RP 03/20/14 p. 33.23-p. 34: 1.

day's worth of trial.<sup>83</sup> Instead, the court noted, there were requests at the last minute for a continuance, many people were called to testify at trial, including professionals, who had other work to do.<sup>84</sup> The court also noted that a police officer was subpoenaed to testify.<sup>85</sup> The court also noted that two-and-a-half days were spent to accomplish what respondent's attorney had made in an ongoing offer.<sup>86</sup> For those reasons, and based upon Thurston County LSPR 94.03E (i), the court awarded attorney fees to respondent.<sup>87</sup> The court also expressed its belief that CH was put through an unnecessary trial, and that was not in his best interests.<sup>88</sup>

On April 2, 2014, the court entered Findings of Fact and Conclusions of Law on Petition for Residential Schedule/Parenting Plan or Child Support<sup>89</sup>, Judgment and Order Establishing Residential Schedule/Parenting Plan and Child Support<sup>90</sup>, Order of Child Support Final Order<sup>91</sup>, and Parenting Plan Final Order.<sup>92</sup> In the Order of Child

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<sup>83</sup> RP 03/20/14 p. 34: 3-7.

<sup>84</sup> RP 03/20/14 p. 34: 8-14.

<sup>85</sup> *Id.*

<sup>86</sup> RP 03/20/14 p. 34: 15-20.

<sup>87</sup> RP 03/20/14 p. 34: 21-25.

<sup>88</sup> RP 03/20/14 p. 35: 6-10.

<sup>89</sup> CP 501-504.

<sup>90</sup> CP 498-500.

<sup>91</sup> CP 513-529.

<sup>92</sup> CP 505-512.

Support, the trial court awarded Respondent judgment for attorney fees in the amount of \$5,560.00.<sup>93</sup>

On May 1, 2014, appellant filed a notice of appeal to the Court.<sup>94</sup>

#### **IV. ARGUMENT**

##### **A. The trial court's award of attorney fees to respondent is supported by substantial evidence.**

Appellant argues that Ms. Hansen's mental health was not a new or unknown issue. AB 13-14. Appellant's argument is conspicuous for the absence of any authority cited in support thereof. Appellant's argument should therefore not be considered. RAP 10.3 (a) (6) ("*The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated: . . . The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.*"); *Saviano v. Westport Amusements, Inc.*, 144 Wash. App. 72, 84, 180 P.3d 874 (2008); *Mattingly v. Palmer Ridge Homes LLC*, 157 Wash. App. 376, 393 n. 13, 238 P.3d 505 (2010).

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<sup>93</sup> CP 513; RP 04/02/14 p. 21:17-p. 22:1.

<sup>94</sup> CP 530-548.

Appellant testified at trial that he was aware of the summer 2012 incidents and hospitalizations with his mother prior to this court case and did not disclose them to the respondent.<sup>95</sup> Appellant testified at trial that he found his mother semi-unconscious in 2010, called 911 and did not disclose this incident to respondent.<sup>96</sup> It was further discovered at trial that appellant knew about quite a few of the law enforcement contacts.<sup>97</sup>

Appellant argues that the trial court's award of fees based on its conclusion that appellant's litigation of grandparent visitation was an inappropriate issue for trial. AB 14-15. Once again, appellant's argument is unsupported by a single citation to authority. Appellant's argument should therefore not be considered. RAP 10.3 (a) (6); *Saviano*, 144 Wash. App., 84; *Mattingly*, 157 Wash. App., 393.

Appellant argues that the trial court's denial of his motion for a continuance cannot support an award of attorney fees. AB 16-17. As appellant cites no authority in support of his argument, that argument should not be considered. RAP 10.3 (a) (6); *Saviano*, 144 Wash. App., 84; *Mattingly*, 157 Wash. App., 393.

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<sup>95</sup> RP III p. 430:23- p. 431:24.

<sup>96</sup> RP III p. 441:1- p 442:20.

<sup>97</sup> RP II p. 277:11-17

Appellant argues, without citation to authority or the record, that his motion to continue was made in good faith. AB 17. Appellant's argument is contradicted by the court's finding that appellant's motion for a continuance was not brought in good faith.<sup>98</sup>

Appellant argues that the trial court never identified any well-founded basis to conclude that appellant's motion was illegitimate or reflected intransigence. AB 17. To the contrary, the trial court found multiple reasons for denying appellant's motion for continuance. The court expressed concern that trial had been continued once already.<sup>99</sup> The trial court expressed concern that appellant's firing of his attorney on February 13, 2014 was a delay tactic.<sup>100</sup> The trial court expressed concern that Appellant's untimely motion for a continuance created prejudice to CH and respondent.<sup>101</sup> The trial court expressed concern that a delay of trial of a few months is a lifetime to CH.<sup>102</sup> The trial court expressed concern that appellant's case had involved a lot of litigation.<sup>103</sup> The trial court found that if the firing of appellant's attorney just before trial was a

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<sup>98</sup> *Id.*, p. 19.

<sup>99</sup> RP 022014 p. 17.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*, p. 18.

<sup>103</sup> *Id.*

detriment to appellant, it was of his own making.<sup>104</sup> The trial court's deep concern over what appeared to be appellant's bad motives.<sup>105</sup>

Appellant argues that subpoenas to professional witnesses cannot support the trial court's award of attorney fees. AB 17. As Appellant cites no authority in support of his argument, that argument should not be considered. RAP 10.3 (a) (6); *Saviano*, 144 Wash. App. 84; *Mattingly*, 157 Wash. App. 393. The court expressed concerns regarding appellant failure to disclose professional witness until Friday February 21, 2014, stating "*It is not appropriate to conduct trial by ambush basically.*"<sup>106</sup> At trial, argument was presented as to the legality of the subpoenas issued by the appellant and the court expressed that it was not appropriately requested.<sup>107</sup>

Appellant argues that the trial court erred in awarding attorney fees under Thurston County Superior Court LSPR 94.03E (i). AB 18-19. That rule provides as follows:

In considering a request for an award of attorney fees and costs at trial based on bad faith or intransigence, the court may consider settlement proposals that have been communicated in writing before trial. However, these settlement proposals shall not be submitted to the court or referred to

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> RP I p. 15:4-13

<sup>107</sup> RP I p. 15:23- p 17:7

in argument until a ruling on all other issues has been rendered.

In interpreting a court rule, the Court uses the same rules of construction that apply to statutes. *Lane v. Skamania Cnty.*, 164 Wash. App. 490, 496, 265 P.3d 156 (2011). In this regard, when a statute uses both “*may*” and “*shall*”, the use of the term “*may*” is presumed to be discretionary. *Gorman v. Pierce Cnty.*, 176 Wash. App. 63, 79, 307 P.3d 795 (2013) *review denied*, 179 Wash. 2d 1010, 316 P.3d 495 (2014).

Here, LSPR 94.03E (i) employs both “*may*” and “*shall*”. Therefore, it may be presumed that LSPR 94.03 E (i)’s use of the word “*may*” indicates that consideration of written settlement proposals is discretionary.

*Gorman*, 176 Wash. App. 63

Moreover, LSPR 94.03E (i)’s only limitation on when to file a written settlement proposal is that it may not be filed prior to the resolution of all other issues. LSPR 94.03E (i) contains no limitation on when such written settlement proposals must be served on opposing counsel. Appellant provides no authority as to when a written settlement proposal must be served upon opposing counsel.

However, in this case, respondent’s written settlement proposal consisted of the proposed documents required by LSPR 94.03E (h).<sup>108</sup> Those proposed documents are required to be provided to the court. *See*

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<sup>108</sup> RP Vol. 03/20/14 p. 24:5-6.

LSPR 94.03E (h) (“*In proceedings involving children, each party shall provide a proposed parenting plan and a proposed order of child support and child support worksheets for use as trial exhibits.*”). Respondent’s filing of her proposed parenting plan and proposed order of child support with the court was therefore proper. Appellant failed to file a proposed order of child support and child support worksheet for use as trial exhibits. Appellant failed to file his trial court documents such as trial brief, witness list and exhibit list and therefore are not part of the evidentiary record.

Nothing in LSPR 94.03E prohibits the use of a proposed parenting plan to double as a party’s written offer of settlement. Appellant presents no contrary authority on this issue.

Appellant misplaces reliance upon *In re Marriage of Wright*, 78 Wash. App. 230, 896 P.2d 735 (1995). AB 19 n. 84. In *Wright*, the appellant fail to describe the conduct of the respondent that supported an award of attorney fees. Here, in contrast, the trial court identified, as a ground for its award of attorney fees, the active withholding of information by appellant and Ms. Hansen.<sup>109</sup> Withholding of information is a recognized ground intransigence supporting an award of attorney fees. *Mattson v. Mattson*, 95 Wash. App. 592, 976 P.2d 157 (1999) (Appellant produced conflicting information about his income and, by his actions, forced

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<sup>109</sup> RP 03/20/14 p. 33.23-p. 34. 1.

respondent to conduct intense discovery, which increased her legal bills.); *In re Marriage of Wallace*, 111 Wash. App. 697, 710, 45 P.3d 1131 (2002)(Appellant's conduct, including failure to provide complete financial information, established an intransigence supporting an award of attorney fees.); *Eide v. Eide*, 1 Wash. App. 440, 445, 462 P.2d 562 (1969) (Appellant's foot-dragging, obstructionist attitude, increased the cost of this litigation to respondent.).

A party's action that increases costs to the other party or wastes court time also constitutes intransigence. *Matter of Marriage of Greenlee*, 65 Wash. App. 703, 708, 829 P.2d 1120 (1992); *In re Marriage of Morrow*, 53 Wash. App. 579, 591, 770 P.2d 197 (1989). The court's ruling on attorney fees recognized that appellant's actions had increased costs and wasted the court's time: "*Two and a half days of trial were spent on something that truly, I believe, should have been settled and could have been settled...*"<sup>110</sup>

It is no answer for appellant to argue that most of the time spent at trial was spent by respondent. The time spent by respondent was required to address appellant's steadfast adherence to having his mother, Ms. Hansen, involved in appellant's visitation with CH. The trial court recognized this fact in its oral ruling on attorney fees. "*There is no right, as I indicated, to*

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<sup>110</sup> RP 03/20/14 p.34:15-17.

*grandparent visitation, yet it seems to me that a great deal of this case was about your mother's visitation...*"<sup>111</sup>

The trial court's comment regarding no right to grandparent visitation is well supported. *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), and in this court, *In re Custody of Smith*, 137 Wash. 2d 1, 969 P.2d 21 (1998) *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *In re Parentage of C.A.M.A.*, 154 Wash. 2d 52, 109 P.3d 405 (2005).

Appellant misplaces reliance upon *In re Marriage of Pennamen*, 135 Wash. App. 790, 146 P.3d 466 (2006). AB 19 n. 86. In *Pennamen*, there was no evidence to support a finding of intransigence. Here, in contrast, the court found active withholding of information by appellant and Ms. Hansen.<sup>112</sup> The court in this case also found that appellant had cause the unnecessary expenditure of time at trial.<sup>113</sup> Thus, the facts of this case are different than the facts in *Pennamen*.

**B. Respondent requests an award of attorney fees on appeal.**

A party's intransigence in the trial court can also support an award of attorney fees on appeal. *Mattson*, 95 Wn. App. 606; *Eide*, 1 Wash. App. 440, 1 Wn. App. 445-46. The financial resources of the parties need not be

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<sup>111</sup> RP 03/20/14 p. 33:20-23.

<sup>112</sup> RP 03/20/14 p. 33:23-p. 34: 1.

<sup>113</sup> RP 03/20/14 p. 33:20-23; p. 34:15-17.

considered when intransigence by one party is established. *Mattson*, 95 Wn. App. 606; *Greenlee*, 65 Wn. App. 711; *In re Marriage of Morrow*, 53 Wash. App., 590. Therefore, the Court may award attorney fees on appeal to respondent, based upon the intransigence of appellant in the trial court.

Attorney fees on appeal are also authorized under RAP 18.1 (a) (“*If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.*”).

RCW 26.26.140 provides as follows:

The court may order reasonable fees of experts and the child's guardian ad litem, and other costs of the action, including blood or genetic test costs, to be paid by the parties in proportions and at times determined by the court. The court may order that all or a portion of a party's reasonable attorney's fees be paid by another party, except that an award of attorney's fees assessed against the state or any of its agencies or representatives shall be under RCW 4.84.185.

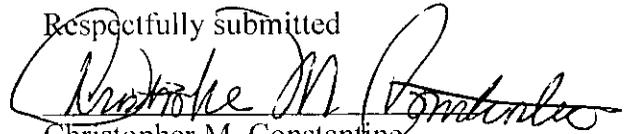
§ 26.26.140, unlike RCW 26.09.140, does not require consideration of need or ability to pay in making an award. *In re Marriage of Wendy M.*, 92 Wash. App. 430, 441, 962 P.2d 130 (1998). Therefore, in the event

that she prevails, respondent requests an award of attorney fees on appeal.

**V. CONCLUSION**

The judgment of the Thurston County Superior Court should be affirmed. Respondent's request for attorney fees on appeals should be granted.

Respectfully submitted

A handwritten signature in black ink, appearing to read "Christopher M. Constantine", written over a horizontal line.

Christopher M. Constantine

WSBA # 11650

Attorney for Respondent

**VI. CERTIFICATE OF MAILING**

I, Christopher M. Constantine, certify that on September 29, 2014,

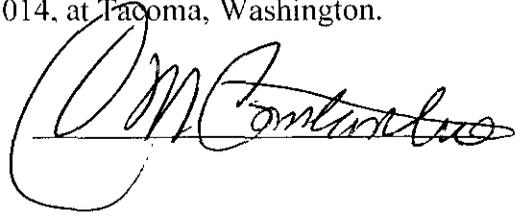
I served upon appellant copy of RESPONDENT'S AMENDED BRIEF

upon all parties listed below at their address of record.

Appellant/Respondent Marcus Hansen:  
S. Tye Messner  
Morgan Hill, P.C.  
2102 Carriage Dr. SW, Bldg. C  
Olympia, WA 98502 (USPO-First Class Mail)

Clerk, Washington State Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454 (By Fax)

Dated this 29<sup>th</sup> day of September, 2014, at Tacoma, Washington.



FILED  
COURT OF APPEALS  
DIVISION II  
2014 SEP 29 PM 4: 59  
STATE OF WASHINGTON  
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