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No. 50809-5-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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**In re the Parenting and Support of T.W.:**

**Lucas Wagoner, Appellant.**

**v.**

**Alexandria Russum, Respondent.**

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REPLY BRIEF OF APPELLANT

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## Argument

- 1. Respondent's Statement of the Case misrepresents the factual basis of the case and is an overt attempt to shift focus from the legal issues presented by Mr. Wagoner's appeal and to cast dispersion upon him.**

The inclusion of the majority of information presented by Respondent in her Statement of the Case does not go to the issues presented but rather is an attempt to shift focus from the legal issues presented in Mr. Wagoner's appeal and cast him in a negative light to persuade this court to rule against Mr. Wagoner. This court is not the trial court and should not allow itself to be persuaded in the legal arguments presented by this blatant attempt at disparaging Mr. Wagoner. For example, the more than a page worth of direct quotations from the report of the Guardian ad Litem does not go to the substance of this appeal other than it does lend support for Mr. Wagoner's argument that he was prejudiced by the denial of his motion for continuance as he was faced in trial with confronting a biased Guardian ad Litem report drafted after limited investigation.

It is true that Mr. Wagoner was the party to place the matter on the trial calendar. However, this is also supportive of Mr. Wagoner's position that the court should have granted him a new trial as he was the individual to place the matter on the trial calendar and he was the individual that requested a continuance of the trial, without objection from Respondent, which he asked to be set. Mr. Wagoner made no objection to the withdrawal of his attorney as he was dissatisfied with the performance of

his attorney and had no advance notice that his attorney intended to withdraw, Other than receiving the Notice of Withdrawal in the mail. Furthermore, Mr. Wagoner has no legal training, as previously stated in Mr. Wagoner's brief, and was unaware of the ability to and the process for objecting to the withdrawal of his attorney. Respondent incorrectly states that Mr. Wagoner gave no basis for his request for a continuance. Mr. Wagoner requested the continuance based on his need to hire new counsel to represent him at the trial.

Respondent misstates the facts in her statement of the case where she asserts that Mr. Wagoner stated to the court that he was ready to proceed to trial. Quite the opposite is true. (Verbatim Report of Proceedings (hereinafter VRP) p.3, ll. 21, p.5, ll. 19-21, p.47 ll. 10-12. *See also* VRP p.7, ll. 7-10. *See also* VRP p.90 . l. 21-p.90 l. 9). The court was advised by Mr. Wagoner and Mr. Wagoner's father that he was attempting to retain new counsel and that he was having problems doing so at the trial readiness hearing. Respondent goes so far as to include a lengthy quote from the trial transcript that stands in direct opposition to her assertion that Mr. Wagoner agreed to go forward with trial without representation and a common sense reading of that leaves only the conclusion that he did in fact inform the court that he was ill prepared to move forward without representation. As stated in Mr. Wagoner's brief, his participation in the trial was extremely limited and reflects the

disadvantage placed on Mr. Wagoner by being forced to proceed through trial without representation. (Brief of Appellant, p. 12).

**2. The Superior Court abused its discretion in proceeding to trial after denying Mr. Wagoner's motion for continuance.**

Mr. Wagoner's original brief establishes that the trial court abused its discretion in denying his motion for a continuance based on his lack of counsel. (*See generally* Brief of Appellant). Furthermore, Mr. Wagoner does not assert that he was entitled to a continuance but rather that the particular facts of the case show that it was an abuse of the trial court's discretion to deny his motion for a continuance. Additionally, Respondent's argument that the continuance was within the discretion of the trial court is conclusory and whether or not the trial court had discretion to deny the continuance does not absolve the trial court from an abuse of the discretion to make that decision. Finally, Mr. Wagoner has asserted that prejudice resulted from the decision to move forward with trial without allowing Mr. Wagoner time to retain counsel.

This is evident in light of the considerations a trial court may take in exercising this discretion. Specifically, the needs of the moving party are in favor of a continuance given the facts of the case in that Mr. Wagoner had found himself without counsel the day of the readiness hearing when he requested the continuance. There was no possible prejudice to the adverse party. In fact, Respondent did not object to Mr. Wagoner's request for a continuance as the position of the case at the time of Mr. Wagoner's request was such that the parenting plan entered by the

court at the trial was in most provisions identical to the parenting plan in place and Respondent would suffer no prejudice from the continuance of the trial. No prior continuances had been granted in the case at hand.

Other matters that had a material bearing upon the exercise of discretion also are in favor of granting Mr. Wagoner's motion for a continuance. Specifically, Mr. Wagoner was prejudiced in his presentation of his case, especially when facing opposition from a seasoned family law attorney. This prejudice is apparent given the case was a highly contentious and complex case involving multiple potential witnesses, a Guardian Ad Litem, and far serious ramifications, the timing of the withdrawal of Mr. Wagoner's attorney being less than six weeks prior to trial, the objectionable material put forward by Counsel for Respondent, Mr. Wagoner's limited objections to objectionable information put forward coupled with the court's decision to overrule all of his objections, and the limited amount of time dedicated during the trial to Mr. Wagoner's case-in-chief and cross-examination of witnesses.

**3. Mr. Wagoner does not argue that he was entitled to a trial continuance because his attorney withdrew; rather, the Superior Court abused its discretion when it denied Mr. Wagner's Motion for Continuance.**

Respondent cites *Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn.App 779, 727P.2d 687 (1986), in support of her proposition that Mr. Wagoner is incorrect in his assertion that the trial court's denial of his request for a continuance was an abuse of discretion. (Brief of Respondent, p.11). It is important to note some differences between that

case and the case at hand. First, although *Willapa* is a civil case it is not a family law case. Second, the Appellee, Muscanto, had already requested and been granted a continuance in *Willapa*. *Willapa* at 785. In the case at hand, this was the first time Mr. Wagoner had requested a continuance. Next, in *Willapa*, the court specifically stated when it granted the first continuance that no further continuances would be granted. *Id.* In the case at hand, the court continued the case once due to a scheduling error by the court to setting trial on a court holiday and no ban on future continuances at the request of the parties was ordered by the court.

In citing to *Willapa*, Respondent neglects to include the court's discussion of the considerations a trial judge is to give when exercising the discretion of whether to grant or deny the continuance, as they cut in favor of Mr. Wagoner's argument that it was an abuse of discretion on the part of the trial court to deny his continuance. The court in *Willapa* states "In *Balandzich v. Demeroto*, (internal citation omitted), the court discussed some of the considerations for a trial judge's exercise of discretion in this area. In exercising its discretion, the court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court. *Id* at 785-786.

In the case at hand, there was not a necessity of reasonably prompt disposition of the litigation. Respondent alleges in her introduction and statement of the case that Mr. Wagoner's actions had placed the child in this case in danger. However, Respondent neglects to inform this court that at the time of the litigation, Mr. Wagoner's visitation was restricted two 4 hour visits per month at Innovative Services NW, a professional supervisor, with Ms. Russum attending those visits. (Clerk's papers (hereinafter CP) 202). Furthermore, as a prerequisite to exercising these visits Mr. Wagoner had to maintain a clean and sober lifestyle, which is an ambiguous and undefined requirement. *Id.* In addition to the ambiguous clean and sober lifestyle requirement, Mr. Wagoner was ordered, at the time that the trial court was exercising its discretion in considering Mr. Wagoner's request for a continuance, to complete a litany of other requirements, including; be evaluated for substance abuse, start and comply with treatment requirements, have an additional evaluation after the initial evaluation to be completed at the six month mark, engage in drug testing, and maintain 18 months of sobriety after completion of his treatment program with twice weekly UAs for that additional 18 month period. *Id.* In short, the overly restrictive parenting plan in effect at the time that Mr. Wagoner requested his continuance is evident of the prejudice Mr. Wagoner suffered and provided ample protection for Respondent and the minor child and prompt disposition of the litigation was not necessary given the foregoing.

Next, there were no previous conditions imposed in the continuance previously granted. The previous continuance was not even granted but rather was imposed by the court due to the court's error in scheduling the trial on a court holiday. Finally, other matters were material upon the exercise of the discretion vested in the court. Namely those set forth in Mr. Wagoner's original brief and listed in the foregoing.

Respondent cites to *Martonik v. Durkam*, 23 Wn.App 47, 596 P.2d 1054 (1979), and admits that a number of considerations, all of which cut in favor of granting Mr. Wagoner a continuance, inform a trial court's decision whether to grant or deny a continuance. (Brief of Respondent, p.13). Again, this case is significantly different than the case at hand. First, this is yet another case cited to by Respondent that is not a family law case. Next, in *Martonik*, the court was dealing with the seventh request for a continuance, not the first, as was the situation in the case at hand. *Martonik*, at 51. In *Martonik*, the initial trial date was set for January 14, 1976 and trial ultimately took place on August 22, 1977, nearly a year and a half after the original trial date. *Id.* at 48. In the case at hand trial was originally set for January 2, 2017, a court holiday, and reset by the court to August 11, 2017, a mere six months later and at no time did the court grant a continuance of the matter.

As outlined in the foregoing, the necessity of reasonably prompt disposition of the litigation supports granting a continuance. Needs of the moving party are in favor of a continuance given the facts of the case and

that Mr. Wagoner had found himself without counsel the day of the readiness hearing when he requested the continuance. There was no possible prejudice to the adverse party. In fact, Respondent did not object to Mr. Wagoner's request for a continuance as the position of the case at the time of Mr. Wagoner's request was such that the parenting plan entered by the court at the trial was in most effects identical to the parenting plan in place and Respondent would suffer no prejudice from the continuance of the trial. As stated in Mr. Wagoner's initial brief, no prior continuances had been granted in the case at hand. Other matters that had a material bearing upon the exercise of discretion also are in favor of granting Mr. Wagoner's motion for a continuance, some of which are set forth in Mr. Wagoner's initial brief and in this brief.

This case was a highly contentious and complex case involving multiple potential witnesses, a Guardian Ad Litem, and far serious ramifications. Respondent was represented by a seasoned attorney and Petitioner's attorney withdrew effective the day prior to the Readiness hearing and only 39 days prior to trial. Denying Mr. Wagoner's request for a continuance did not operate in the furtherance of justice but instead defeated justice in this case. Based upon the standard set forth in *Martonik*, cited by Respondent, and the facts of the case at hand, no reasonable person would take the view adopted by the trial court. It is important to note that cases cited to by Respondent in majority are not divorce cases. As stated in Mr. Wagoner's original brief, in divorce cases

the court is take a liberal view of granting continuances and especially so when, as in the case at hand, it is the first continuance sought. (Brief of Appellant, p. 10-11 ).

Respondent states that the judge was familiar with the case but the judge's familiarity with the case is not a consideration in regards to a trial court's decision to grant or deny a continuance. Next, respondent makes a point to raise the fact numerous times throughout this section of her brief that Mr. Wagoner was the individual who placed the case on the trial calendar. Again, this is not a consideration that may inform a trial court's decision whether to grant or deny a continuance. Moving forward, Respondent attempts to make a point that the court moved the trial due to a scheduling error. It appears that Respondent would like that the reschedule of trial by the court to be attributed to Mr. Wagoner. However, the court rescheduling trial sua sponte is not a continuance, is not attributable to either party, and does not equate to a prior continuance in regards to the considerations informing the trial court's decision to grant or deny a continuance.

As both parties have stated, this case had extensive pre-trial litigation which included serious allegations with far reaching ramifications. Moreover, a Guardian ad Litem had been appointed, performed an investigation, and written an extensive report. Mr. Wagoner's attorney withdrew effective less than six weeks from the day of Mr. Wagoner's trial. Given the foregoing. it is very reasonable and

understandable that Mr. Wagoner had difficulty in procuring counsel that would be willing to take on his case. This is especially so in light of the trial court's previous refusal to continue the trial date.

Given that Respondent was prepared to proceed to trial, coupled with the then current posture of the case; it is not likely that further delay would likely necessitate additional legal costs for Respondent. The extensive pretrial motion practice leads to the reasonable inference that additional legal fees would be limited. This is especially true when looking at the posture of the case at the time of Mr. Wagoner's request. Moreover, the limited likelihood of some additional legal costs is the only potential prejudice that Respondent points to. It is important to highlight that Respondent did not object at the time of the request to the continuance, therefore; Respondent cannot be considered an adverse party in relation to Mr. Wagoner's motion for a continuance. When including the limited potential for some additional legal costs and the lack of objection to the continuance by Respondent in the calculus of the court's consideration of Mr. Wagoner's request, weighed against forcing Mr. Wagoner to proceed to trial without counsel, the potential for limited increased legal costs to a party not in opposition to the motion should not have had a significant impact on the court's discretion in granting or denying Mr. Wagoner's request for a continuance. Furthermore, the trial court did not state that prejudice to Respondent was a basis for its denial

of Mr. Wagoner's request. Frankly, the trial court gave no reasoning for its decision in this regard.

Respondent's contention that adjourning the trial date and leaving the case unresolved would have resulted in further uncertainty and unwarranted delay that would not have been in the best interest of T.W. is not supportable given the facts of the case. First, the parenting plan in effect at the time of Mr. Wagoner's request was highly restrictive in regards to Mr. Wagoner's time with T.W., granting him only short supervised visits at a professional supervisory agency which has to be additionally supervised by Respondent. Second, the permanent parenting plan entered by the court is virtually identical to the parenting plan in effect at the time of Mr. Wagoner's request in all relevant parts relating to Mr. Wagoner's custodial time with T.W. (*See* CP 202; *compare* CP 237). Third, whether or not a statute gives precedence to hearing actions involving minor children does not bear on the consideration of discretion of whether or not to grant a family law litigant's first request for a continuance. Respondent alleges that the trial court took all of the factors raised in her brief into consideration in exercising its discretion in regards to Mr. Wagoner's request for a continuance. This allegation is wholly devoid of support.

**4. Mr. Wagoner has demonstrated prejudice resulting from the denial of his request for a continuance.**

Respondent's argument that Mr. Wagoner's appeal must be rejected because he failed to demonstrate how the denial of his request for

a continuance resulted in prejudice to his case is without merit. Respondent cites to the criminal case of *State v. Early*, 70 Wn.App. 452, 458, 853 P.2d 964, (Div. 3 1993), in support of her contention that an abuse of discretion depends on Mr. Wagoner demonstrating that the denial of his motion resulted in prejudice, or in the alternative, that the trial would have had a different outcome if the continuance would have been granted. There are important distinctions between *Early* and the case at hand. First, *Early* is a criminal case and the case at hand is a civil family law case. As such, the standards applied by the court in *Early* are not readily applicable to the case at hand. The court in *Early* is weighing a criminal defendant's right to counsel against a late request for a continuance. *Early* at 458. In the case at hand, the trial court was tasked with weighing Mr. Wagoner's timely request for a continuance against the considerations set forth by the higher courts in cases such as *Martonik*. Second, the defendant in *Early* had requested and been granted at least two, and possibly three, prior continuances. *Id.* In the case at hand, this was Mr. Wagoner's first request for a continuance. Third, the defendant in *Early* had six months to retain counsel of his choosing. *Id.* in the case at hand, Mr. Wagoner had less than six weeks to retain new counsel.

Respondent alleges that Mr. Wagoner must adduce in his brief specific evidence that would have potentially been presented that would have been beneficial to his case. Respondent alleges that Mr. Wagoner must adduce in his brief what evidence his hypothetical attorney might

have impeached. Respondent alleges that Mr. Wagoner must adduce in his brief what additional witness would have been called and what their testimony would have been. Respondent alleges that Mr. Wagoner must demonstrate in his brief that the witnesses that were called should have been excluded or that they would have been cross-examined to impeach their credibility. Respondent alleges that Mr. Wagoner must specify what objections might have been raised by an attorney at trial. However, Respondent provides no rule of law in support of her allegations. Additionally, Mr. Wagoner is not aware of a rule which requires inclusion of the foregoing to demonstrate prejudice.

As stated in his original brief, the denial of Mr. Wagoner's request for a continuance deprived Mr. Wagoner of a meaningful opportunity to be heard. It is evident from the record that Mr. Wagoner was prejudiced by the denial of his motion for a continuance. Mr. Wagoner pointed to many objectionable questions posed by opposing counsel. (Brief of Appellant, p.12). Furthermore, Mr. Wagoner alleged prejudice in his original brief in that he informed the court that he was not ready to proceed and that he did not know how to proceed. (*Id.* at 13). Mr. Wagoner's statement that he was not ready to, nor knew how to, proceed is supported by the record, which shows that Mr. Wagoner cross-examined Ms. Krebs for only one minute and Ms. Russum for only three minutes. (CP Sub No. 233). Finally, Mr. Wagoner alleged prejudice in his original

brief in that he stated that every request of Respondent was granted without qualification.

5. **Mr. Wagoner has demonstrated prejudice resulting from the denial of his request for a continuance and Mr. Wagoner does not argue that he had a “right to counsel” in the Superior Court proceeding.**

Mr. Wagoner does not erroneously presume that he had a due process right to legal counsel in the case at hand. That is because Mr. Wagoner does not presume this at all. A right to legal counsel is not the only way in which Mr. Wagoner’s due process rights can be violated. Denial of a motion to continue violates due process if the parent can show " either prejudice by the denial or the result of the trial would likely have been different if the continuance was granted." *In re Welfare of R.H.*, 176 Wn.App. 419, 309 P.3d 620, (Div. 2 2013). As stated in the foregoing relating to the prejudice suffered by Mr. Wagoner, he has demonstrated that he was prejudiced by the denial of his motion for a continuance. Therefore, by this denial of his motion for a continuance that resulted in prejudice Mr. Wagoner’s right to due process was violated.

Respondent’s contention that the record clearly establishes that Mr. Wagoner relinquished his opportunity to be represented by counsel is without merit. Mr. Wagoner was not afforded sufficient time to retain new counsel. As argued above, Mr. Wagoner had less than six weeks to retain new counsel in the time between the readiness hearing and trial. The trial court had already evidenced its unwillingness to retain new counsel. Given

the facts of the case at hand, it is reasonable that Mr. Wagoner was unable to procure new counsel despite his best efforts to do so.

Respondent's argument presupposes that were Mr. Wagoner to retain new counsel, Mr. Wagoner's counsel would have been able to request and obtain a continuance of trial in order to properly prepare for the case. This contention is also without support and quite the opposite is true. Given that the trial court flatly denied Mr. Wagoner's request for a continuance without giving any reason it is highly likely that had Mr. Wagoner been able to procure counsel and had Mr. Wagoner's new counsel requested a continuance that request would have been denied.

Respondent acknowledges in her brief that due process involves more than a right to counsel. (Brief of Respondent, p. 21-22). That said, Respondent alleges that Mr. was given a reasonable opportunity to be heard. Respondent basis of this allegation is the fact that Mr. Wagoner showed up to trial. Respondent further bases her contention that Mr. Wagoner was given a reasonable opportunity to be heard because, according to her allegation, Mr. Wagoner had prepared remarks and intended to call witnesses. The facts of this case do not support this allegation. (VRP p.3, ll. 21, p.5, ll. 19-21, p.47 ll. 10-12; *See also* VRP p.7, ll. 7-10; *See also* VRP p.90 . l. 21-p.90 l. 9). In view of what Mr. Wagoner stated at trial, and in light of the prejudice suffered by Mr. Wagoner, Respondent's claim that Mr. Wagoner was offered a reasonable opportunity to be heard is simply without merit.

**5. Mr. Wagoner did not waive any objection to proceeding to trial without counsel.**

Respondent alleges that Mr. Wagoner's actions amounted to a waiver of counsel. This contention is unsupported by the record. Respondent's continual argument that Mr. Wagoner was the party that filed a Notice to Set for Trial has no bearing on this argument or any of the previous arguments wherein Respondent attempts to make this point. Again, this action was performed while Mr. Wagoner had the benefit of legal counsel.

Next, Respondent attempts to equate the time between when the Notice was filed to the trial date as illustrative of the amount of time Mr. Wagoner had to preserve the relationship with his attorney. Again, this argument is without merit and unrelated to the argument that Mr. Wagoner somehow waived any objections to proceeding to trial without counsel. To reiterate, Mr. Wagoner was without counsel for less than six weeks and his attorney's Notice of Withdrawal was filed barely over six weeks prior to trial. The filing of this Notice of Withdrawal caught Mr. Wagoner by surprise. Mr. Wagoner was unaware of any issues between his attorney and himself prior to receiving this Notice of Withdrawal by mail around six weeks prior to trial. Also, Mr. Wagoner has no legal training and no formal education beyond a high school diploma. Mr. Wagoner did not know how to proceed in light of his attorney's Notice of Withdrawal.

Respondent contends that when Mr. Wagoner's attorney's withdrawal became effective trial was not imminent and Mr. Wagoner had ample time to secure counsel. Imminent is synonymous with fast approaching or close at hand. Given the overall timeframe of the case at hand, and frankly any case involving custody of minor children, it is disingenuous to state that less than six weeks for a trial is not fast approaching or close at hand. Respondent's argument that less than six weeks is ample time to secure counsel also ignores the real world difficulties facing Mr. Wagoner at this juncture in his case. First, Mr. Wagoner had to schedule appointments with potential attorneys, which he did. Second, he would have to procure funds to hire legal counsel, which he did. Third, he would have to find an attorney that was willing to take on a contentious case, that had been ongoing for two years, with less than six weeks to prepare, and which the trial court had made evident that it was unwilling to continue. Mr. Wagoner gave his best effort to complete all of these tasks in the short timeframe he had to do so. Ultimately, he accomplished everything that he could but was unable to procure legal counsel that was willing to take on his case given the timeframe with which to prepare.

Respondent next contends that Mr. Wagoner advised the trial court that he was ready for trial. Nothing could be further from the reality of what occurred at the outset of this trial and Respondent fails to support this allegation with any evidence from the trial. Mr. Wagoner, as a pro se

litigant, did the best that he could to inform the court that he objected to proceeding without representation. Mr. Wagoner informed the Court and opposing counsel that he did not know how "...this Court stuff works..." (VRP p.3, ll. 21, p.5, ll. 19-21, p.47 ll. 10-12). Furthermore, Mr. Wagoner told the Court that he was not ready to proceed. (Cite VRP p.7, ll. 7-10). Respondent's contention that despite sufficient time and opportunity, and due to Mr. Wagoner's delay and failure to obtain new counsel, that Mr. Wagoner waived legal representation is wholly without merit or support as described in the foregoing.

6. **The Superior Court's award of attorney's fees was not reasonable given the lack of the court's application of the rules regarding attorney fees to the case and that the court treated attorney fees as an afterthought.**

Respondent cites to *Marriage of Firchau*, 88 Wn.2d 109, 558 P.2d 194, (1977) in support of her contention that the trial court's award of attorney fees was reasonable and should be upheld. (Brief of Respondent, p.27). However, the question before the court in *Firchau* was not whether a trial court has complete discretion over an award of attorney fees or whether attorney fees are reasonable. Rather, the question presented in *Firchua* was whether there existed a right to a jury trial in regards to reasonableness of attorney fees in a divorce case at the time the Washington State Constitution was adopted. *Firchau* at 114.

Next, Respondent cites to *Marriage of Knight*, 75 Wn.App. 721, 880 P.2d 71, (Div. 2 1994) in support of her contention that Mr. Wagoner

bears the burden of proving an abuse of discretion in regards to attorney fees. Respondent makes a correct yet incomplete statement of law in citing to this case. While the court in *Knight* does state that it is the burden of the person challenging an award of attorney fees to prove an abuse of discretion, the court in *Knight* goes on to lay out the rules by which a review of this discretion is made. Specifically, “[t]he trial court must indicate on the record the method it used to calculate the award. Further, the trial court must balance the needs of the spouse seeking the fees against the ability of the other spouse to pay. In calculating a fee award a court should consider: (1) the factual and legal questions involved; (2) the time necessary for preparation and presentation of the case; and (3) the amount and character of the property involved.” *Knight* at 729-730. Respondent’s contention that Mr. Wagoner has failed to meet his burden of proving the trial court abused its discretion in awarding attorney fees in the case at hand is without merit given the record, or more to the point the lack of record, in this case.

Next, Respondent cites to *In re Marriage of Van Camp*, 82 Wn.App. 339, 918 P.2d 509, (Div. 3 1996), in support of her argument that the *Lodestar* method has specifically been rejected in proceedings pursuant to RCW 26.09.140. (Brief of Respondent, p.28). While Respondent is correct that under 26.09.140 equitable considerations are of primary concern, and the “overriding” considerations are need versus ability to pay and the reasonableness of the fee, *Van Camp*, does not

specifically reject the *Lodestar* method, but rather; the court said that the trial court rejected the *Lodestar* method but went ahead and utilized many of the *Lodestar* factors in calculating the reasonableness of the attorney fee award. *Van Camp* at 342. Essentially, the *Lodestar* methodology is the methodology by which the reasonableness of fees, as required by RCW 26.09.140, is determined. Respondent does not provide any authority to support her contention that the *Lodestar* method of calculating reasonableness of attorney fees does not apply because no such authority exists. Moreover, Respondent cites to no authority or evidence to contend that the trial court took an active role in determining the correct award of attorney fees in the case at hand. Rather, Respondent intends for her trial memorandum to stand in the place of the trial court's task of consideration, on the record, of the factors laid out in RCW 26.09.140, *Knight*, *Van Camp*, *Lodestar*, and their progeny. In short, the trial court did not take an active role in determining the award of fees in the case at hand. The trial court made no findings on the record at the trial to support its award of attorney fees. At most, the trial court signed the orders prepared and submitted by Counsel for Respondent without stating any basis for the provisions in relation to attorney fees. Moreover, Respondent's Trial Memorandum cannot stand in the place of the determinations tasked to the trial court.

7. **This court should not award Russum attorney fees as Mr. Wagoner's appeal was not frivolous and he does not have the ability to pay and she does not have the need.**

Respondent states that Mr. Wagoner should be required to pay attorney fees based on both her need and his ability to pay, as well as her contention that Mr. Wagoner's appeal is frivolous. Respondent cites to *In re Guardianship of A.G.M.*, 154 Wn.App. 58, 83, 223 P.3d 1276, (Div. 2 2010) for her definition of frivolity. (Brief or Respondent p.33). What Respondent neglects to include in her argument is that in that same case the court also said "We resolve all doubts against finding an appeal frivolous." *A.G.M.* at 83. Essentially, Respondent's argument is that Mr. Wagoner's appeal is without merit because Mr. Wagoner set the case for trial and he failed to establish any prejudice resulting from the trial court's denial of his motion for continuance. Respondent also argues that Mr. Wagoner's argument in relation to attorney fees is without merit.

Respondent's argument for attorney fees based upon her contention that Mr. Wagoner's argument is without merit fails in view of the contents of his original brief, as supported by his reply brief, especially in light of the resolution of doubts against finding an appeal frivolous. Mr. Wagoner has established an abuse of discretion of the trial court in denying his motion for a continuance in that the decision was manifestly unjust. As outlined in the foregoing, the necessity of reasonably prompt disposition of the litigation supports granting a continuance. The needs of the moving party are in favor of a continuance given the facts of the case

and that Mr. Wagoner had found himself without counsel the day of the readiness hearing when he requested the continuance. There was no possible prejudice to the adverse party. In fact, Respondent did not object to Mr. Wagoner's request for a continuance as the position of the case at the time of Mr. Wagoner's request was such that the parenting plan entered by the court at the trial was in most effects identical to the parenting plan in place and Respondent would suffer no prejudice from the continuance of the trial. As stated in Mr. Wagoner's initial brief, no prior continuances had been granted in the case at hand.

Other matters that had a material bearing upon the exercise of discretion also are in favor of granting Mr. Wagoner's motion for a continuance, as set forth in Mr. Wagoner's initial brief. Specifically, that Mr. Wagoner was prejudiced in his presentation of his case, especially when facing opposition from a seasoned family law attorney. This prejudice is apparent given the case was a highly contentious and complex case involving multiple potential witnesses, a Guardian Ad Litem, and far serious ramifications, the timing of the withdrawal of Mr. Wagoner's attorney being less than six weeks prior to trial, the objectionable material put forward by Counsel for Respondent, Mr. Wagoner's limited objections to information put forward and the court's decision to overrule all of his objections, and the limited amount of time dedicated during the trial to his case-in-chief and cross-examination conducted by Mr. Wagoner.

Respondent also argues that she should be awarded fees based on her need and Mr. Wagoner's ability to pay. Respondent provides no information in support of this argument. Moreover, this argument does not take into account the parties current financial situations nor does Respondent state that she intends to do so. In short, this issue is not ripe at the time of the signing of this brief and Mr. Wagoner reserves on this issue until the timeframe is appropriate under RAP 18(c).

### CONCLUSION

For the foregoing reasons, and the reasons contained in Mr. Wagoner's original brief, Mr. Wagoner respectfully requests that this court grant his appeal and remand this case for a new trial. Furthermore, for the foregoing reasons, and the reasons contained in Mr. Wagoner's original brief, Mr. Wagoner respectfully requests that this court set aside the award of attorney fees and not order that Respondent not be awarded attorney fees incurred on appeal.

August 29, 2018

Respectfully submitted,



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Travis D. Spears, WSBA No. 50875  
Attorney for Appellant

**BRIAN WALKER LAW FIRM, P.C.**

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