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**Court of Appeals, Div. II,
of the State of Washington**

In re Marriage of Ingersoll,
Tomi Lee Ingersoll (n/k/a Tomi Lee Winters),

Respondent,

v.

John Patrick Ingersoll,

Appellant.

Brief of Appellant

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1. Introduction

John and Tomi Ingersoll were divorced in 2016 with two minor children. The relationship continues to be litigious. Tomi continues her previous pattern of making false accusations of abuse against John. Only now, she has brought her allegations to the authorities in Alaska in hopes of using the Alaska courts to cut John out of the children's lives.

Tomi began withholding the children from John before any orders were entered by the Alaska courts, but she still asserted the Alaska actions as reasonable justification for the withholding. The trial court agreed with Tomi based on the trial court's fundamental misunderstanding of the UCCJEA, which vests exclusive, continuing jurisdiction over custody and visitation in the courts of Washington. Alaska's actions violate the UCCJEA and are void, and therefore cannot justify Tomi's actions.

John requests this Court correct the trial court's misunderstanding of the UCCJEA, order the trial court to take appropriate actions under that statute to bring the matter back to Washington, and find Tomi in contempt for her bad faith in forum shopping in violation of the UCCJEA.

2. Assignments of Error

Assignments of Error

1. The trial court erred in its August 7, 2017, order by finding that the court had already reviewed the facts on which John's motion was based, when in fact the trial court had never previously reached the facts.
2. The trial court abused its discretion in its August 8, 2017, order by finding John in contempt based on previous orders that never considered the merits of John's concerns.
3. The trial court abused its discretion in its August 8, 2017, order by finding John in contempt based on his not returning FMI on August 7 even though the trial court's August 7 order specifically did not order John to do so and a plane ticket had already been purchased for FMI to return on August 8.
4. The trial court abused its discretion in its August 8, 2017, order by finding that John acted in bad faith in not returning FMI even though there was an ongoing investigation into concerns of FMI's safety at Tomi's residence.
5. The trial court abused its discretion in its August 8, 2017, order by ordering John to pay a civil penalty and attorney's fees when he was not in contempt.
6. The trial court abused its discretion in its September 1, 2017, order by finding that John had acted in bad faith without explaining its reasoning on the record.
7. The trial court abused its discretion in its September 1, 2017, order by upholding the August 7 and 8 orders, which were based on untenable grounds.
8. The trial court erred in its November 17 and December 19, 2017, decisions by misinterpreting its own

jurisdiction and the jurisdiction of the Alaska courts under the UCCJEA (chapter 26.27 RCW).

9. The trial court erred in its November 17 and December 19, 2017, decisions by failing to contact the Alaska courts to assert Washington's continuing, exclusive jurisdiction.
10. The trial court abused its discretion in its November 17, 2017, order by finding that Tomi had obeyed the parenting plan with regard to Skype calls in the month of August.
11. The trial court abused its discretion in its November 17, 2017, order by finding Tomi not in contempt.
12. The trial court abused its discretion in its December 19, 2017, order by finding that Tomi's withholding of Skype calls and in-person visitation with John violated the parenting plan only between September 3 and October 8, 2017.
13. The trial court abused its discretion in its December 19, 2017, order by finding that Tomi was not able to follow the parenting plan in regards to Skype calls.
14. The trial court abused its discretion in its December 19, 2017, order by finding that Tomi did not act in bad faith due to the Alaska OCS investigation and actions of the Alaska juvenile court.
15. The trial court abused its discretion in its December 19, 2017, order by finding that Tomi is willing but not able to follow the parenting plan.
16. The trial court abused its discretion in finding that John's motion was brought without reasonable basis.

Issues Pertaining to Assignments of Error

1. Under the UCCJEA (chapter 26.27 RCW), a state that enters a child custody order has exclusive, continuing jurisdiction. Another state can take temporary, emergency jurisdiction, but only long enough to allow the state with exclusive, continuing jurisdiction to take over and resolve the emergency. Alaska courts have attempted to take permanent jurisdiction over the children. The Washington trial court has taken no action. Did the Washington trial court misinterpret and fail to assert its proper jurisdiction? (assignments of error 8 and 9)
2. A party is in contempt of a parenting plan when the party disobeys the plan in bad faith. Tomi enlisted the aid of Alaska OCS and juvenile court to take custody of the children based on allegations that had already been determined unfounded in Washington (the state with jurisdiction), in an attempt to justify her complete withholding of the children from John. Did the trial court abuse its discretion in finding Tomi not in contempt? (assignments of error 10 through 16)
3. A party is in contempt of a parenting plan when the party disobeys the plan in bad faith. John temporarily withheld FMI from Tomi while there was an ongoing investigation and pending motions regarding concerns for FMI's safety at Tomi's residence. Did the trial court abuse its discretion in finding John in contempt? (assignments of error 1 through 7)

3. Statement of the Case

John and Tomi Ingersoll were married in 2000. They have two children, KAI and FMI. In May 2012, Tomi took the children and moved out of the marital home without any notice or explanation to John. *See* Br. of App. in *Ingersoll I*, COA No. 49229-6-II, at 3 (citing the trial record). Tomi petitioned for dissolution in June 2012. *Id.* She moved the children to Alaska. *Id.* John had no contact with the children from May to August of 2012. *Id.*

Throughout the dissolution proceedings, which spanned four years and two counties, Tomi made numerous allegations against John of domestic violence, sexual abuse, alcohol abuse, and abusive use of conflict. *See* Br. of App. in *Ingersoll I*, COA No. 49229-6-II, at 3 (citing the trial record). At trial, Tomi admitted that John had never physically attacked her. *E.g.*, CP 430. In the final orders and parenting plan, the only finding that permitted limitation of John's time with the children was a finding of past alcohol abuse. *See* RP, Aug. 8, 2017, at 30-31. Since then, John has completed the treatment required by the court. *Id.* at 31.

3.1 John requested a temporary restraining order to allow him to keep FMI at the end of his summer visit due to concerns for FMI's safety at Tomi's residence, but the commissioner refused to hear the merits of the request.

During visitation in Alaska in February 2017, John discovered sexually explicit materials on the iPad he had given the children. CP 129; *see, e.g.*, CP 86 (50 ebooks classified as “erotica,” 24 as “romance,” and 3 as “erotic romance”), 89-90 (showing titles of some of the ebooks revealing their sexually explicit nature). John attempted to resolve his concerns over these materials with Tomi, to no avail. CP 129. In June 2017, John reported his concerns to Alaska OCS (Office of Children's Services), which opened an investigation. CP 129.

Additionally, while FMI was with John for summer visitation in 2017 (KAI had refused to visit, *see* CP 32), FMI complained that KAI, his older sister, has physically abused him on multiple occasions. CP 130.

On June 28, John sought an ex-parte temporary restraining order requiring that FMI remain with John until Alaska OCS completed its investigation. CP 67-68. Believing John was asking to modify the parenting plan, the trial court (Commissioner Mark Gelman) refused to consider the request without first being presented with a brief citing legal authority for the commissioner to do anything other than enforce the

existing terms of the parenting plan. RP, June 28, 2017, at 7-8.

The court did not consider the merits of John's request.

3.2 John requested a temporary family law order, seeking the same relief, but was denied based on the commissioner's misunderstanding that the previous request was denied on the merits.

Having been denied on procedural grounds, John attempted to obtain the same relief through a different procedural mechanism. CP 194-97; RP, Aug. 7, 2017, at 4-5. The trial court (Commissioner Sabrina Ahrens) denied the request, reasoning, "These are all facts that the Court has previously had an opportunity to review." RP, Aug. 7, 2017, at 7.

The trial court inquired whether FMI had been returned to Tomi. RP, Aug. 7, 2017, at 7. Tomi's counsel responded that FMI had not been returned and there would be a contempt hearing the next day to address that issue. *Id.* The trial court's order crossed out language proposed by Tomi's counsel that would have read, "John Ingersoll shall return Fallon Ingersoll to Tomi Ingersoll forthwith..." CP 253. John was aware that Tomi had purchased a ticket for FMI to return to Alaska after the contempt hearing on August 8. *See* CP 269; RP, Aug. 8, 2017, at 22. Believing that would be adequate, John did not return FMI to Alaska on August 7. *See* CP 269.

3.3 Tomi sought an order of contempt for John's withholding of FMI.

Tomi brought a motion for contempt against John for failing to return FMI at the scheduled end of the summer visitation on June 29. CP 162. The trial court found John in contempt due to his failure to return FMI to Alaska after the denial of John's motions on June 28 and August 7. CP 255; RP, Aug. 8, 2017, at 32-33.

John sought revision of the August 7 and 8 orders, arguing, among other things, that he had not acted in bad faith because he had concerns for FMI's safety that were being investigated by Alaska OCS. CP 269, 291; RP, Sept. 1, 2017, at 15-17. The trial court (Judge Kitty-Ann van Doorninck) denied John's motion for revision. The trial court stated, without any detail, "I think it was in bad faith, given the history of the case." RP, Sept. 1, 2017, at 18.

Judge van Doorninck also ordered that she would personally retain jurisdiction of the case: "Family Court, Judge van Doorninck, retains jurisdiction; until further order all motions and other proceedings to be heard in this court rather than by commissioner." CP 297.

3.4 After FMI's return to Alaska, Tomi enabled the children to skip required Skype calls with John, then shut off all contact entirely.

After FMI's return to Alaska on August 8, Tomi refused to have a regular Sunday Skype call on August 13. CP 334. The following Sunday, Tomi claimed that FMI was in the shower and had a sore jaw; Tomi would not reschedule. CP 334. At the scheduled time for a make-up visit the next Friday, August 25, Tomi was late connecting the call, then claimed technical difficulties would make the call impossible. CP 334. On Sunday, August 27, Tomi again claimed that FMI was in the bathroom, this time with a headache. CP 334, 597. However, John was able to hear FMI talking and laughing in the next room before FMI was told to be quiet by Tomi. CP 592-94.

In the make-up call on Friday, September 1, John had to wait over 30 minutes before either of the children showed up to talk. CP 334. KAI had nothing but angry words for John. *E.g.*, CP 633-35. She told John that FMI said John had shot FMI with nerf bullets with rocks on the tips. CP 630. This was the first time John had heard about this allegation, three weeks after FMI's return to Alaska. CP 632, 636-37. FMI came to the room, and he and John had a pleasant conversation. CP 334, 639.

For the calls on September 3, 8, 10, 15, 17, 22, and 24, Tomi connected the call but did not produce the children to talk to John. CP 334-35. She left John alone staring at an empty

room for about 30 minutes per call, occasionally appearing to make excuses for why the children were not present. *E.g.*, CP 600-08 (September 17 call).

On September 17, Tomi claimed that FMI did not feel well and could not talk. CP 607. But John could hear FMI talking happily in the next room. CP 606-07. On September 22, John could hear Tomi in the next room telling one of the children to be quiet. CP 343, 346. Tomi claimed that everyone was too sick to talk. CP 349. On September 24, John could again hear Tomi in the next room telling FMI to be quiet. CP 355. Tomi claimed that FMI had a “massive headache.” CP 357.

On September 29 and on all call dates in October and November, Tomi did not have her Skype account online at all. CP 335, 703.

3.5 Tomi reported old allegations to Alaska OCS, resulting in Alaska juvenile court taking custody of the children and ordering no contact with John.

Soon after FMI’s return to Alaska, Tomi took him to the pediatrician with acute lower back pain. CP 321. Based on the report of modified nerf gun wars, the doctor made a report to OCS for suspected physical abuse. CP 321; *see* CP 323. Tomi also reported to OCS numerous prior allegations of abuse, but apparently did not tell OCS that most of those allegations had been resolved by Washington courts and CPS and determined to

be unfounded. *See* CP 519-20 (John’s 2017 withholding of FMI, resolved by the August 8 contempt order; 2014 allegations of sexual abuse, which were raised in the divorce proceedings and did not result in any findings; 2013 allegations of physical abuse, which were raised in the divorce proceedings and did not result in any findings).

John had scheduled an in-person visitation with the children in Alaska for September 28 to October 2. In a declaration filed September 27, Tomi claimed for the first time that Alaska OCS had “strongly suggested” to her in August that the children not be alone with John. CP 615. OCS’s concerns related to the potential for physical or sexual abuse of the children. CP 539. On September 25, Tomi received an email from OCS expressing concerns about contact between John and the children and asking what Tomi planned to do to keep the children safe. CP 615. Tomi asked John to postpone his visit but gave no indication that she would withhold the children from him. *See* CP 615.

When John attempted to pick up the children from school, he discovered that Tomi had kept the children home. CP 702. Tomi refused to deliver the children to John. CP 702. John returned to Washington.

On October 13, Alaska OCS filed a Non-Emergency Petition for Adjudication of Children in Need of Aid in the

Alaska courts. CP 539, 661. Alaska juvenile court held a probable cause hearing on November 2 without notice to John. CP 557-58, 571. The court found probable cause that the children were children in need of aid, and Alaska took custody of the children, placed them with Tomi, and ordered that they have no contact with John. CP 557-58, 572, 574.

3.6 The Washington trial court excuses Tomi for her withholding of the children and takes no action with regard to the Alaska court proceedings.

After the missed Skype calls in August, John moved for contempt. CP 581-83. After Tomi withheld the children in September, John filed a reply in support of his contempt motion that notified the trial court of the withholding and additional missed Skype calls. CP 333-35. After becoming aware of the Alaska juvenile court proceedings, John filed a Memorandum of Law on November 15, notifying the trial court of Alaska's attempt to take jurisdiction in violation of the UCCJEA (chapter 26.27 RCW and Alaska Statutes chapter 25.30). CP 684-91.

The contempt hearing was held November 17. The trial court declined to hear any issues other than the missed Skype calls in August, as presented in the original motion. CP 694. The trial court held that Tomi had obeyed the parenting plan with regard to the August Skype calls. CP 695. The trial court noted its awareness of the child welfare proceedings in Alaska, but

would not make a ruling on jurisdiction or otherwise take any action with regard to the Alaska proceedings. CP 696; RP, Nov. 17, 2017, at 10. The trial court noted, “there isn’t any other action pending in this case. So Alaska is going to do what Alaska is going to do, I think.” RP, Nov. 17, 2017, at 6.

John brought a second motion for contempt to address the additional Skype dates and the issue of jurisdiction under the UCCJEA. CP 705-06. John noted that there had never been a finding of emergency jurisdiction in Alaska. RP, Dec. 19, 2017, at 6. Again, the trial court failed to recognize Washington’s jurisdiction and refused to take any action regarding the Alaska proceedings: “I don’t know what to do now because the Alaska case is ongoing. And it’s not a UCCJEA deal yet. This is a Parenting Plan. The CPS involvement supersedes what’s going on.” RP, Dec. 19, 2017, at 12.

The trial court found that Tomi disobeyed the parenting plan regarding the September visitation and Skype calls from September 3 through October 8. CP 729. The trial court excused Tomi from Skype calls after Alaska no-contact orders were entered on October 13. CP 729. The trial court found that Tomi’s disobedience was not intentional because the children refuse to participate. CP 729. The trial court found that Tomi did not act in bad faith because of Alaska OCS’s concerns about contact between John and the children. CP 730. The trial court also

found that John's motion was brought without reasonable basis and awarded attorney's fees to Tomi. CP 730.

John has appealed from the trial court's orders dated August 7, August 8, September 1, November 17, and December 19. CP 733.

4. Summary of Argument

John raises three major issues on appeal. First, the trial court erred in misinterpreting and refusing to assert Washington's exclusive, continuing jurisdiction under the UCCJEA. This Court should hold that Washington has jurisdiction and instruct the trial court to take required action under the UCCJEA. The actions of the Alaska court are void. Those matters must be decided here in Washington.

Second, Tomi's forum shopping and use of the Alaska courts and OCS in violation of the UCCJEA in an attempt to justify her withholding of the children from John was bad faith. The trial court abused its discretion in finding otherwise. This Court should reverse the November 17 and December 19 orders, find Tomi in contempt, vacate the award of attorney's fees against John, and order Tomi to provide make-up time with the children and pay a civil penalty and attorney's fees.

Third, the trial court abused its discretion in finding John in contempt for withholding FMI while there was an ongoing

OCS investigation regarding FMI's safety at Tomi's residence. The trial court never considered the underlying facts. John had reasonable cause to withhold FMI until August 8.

John also seeks an award of attorney's fees on appeal pursuant to RCW 26.09.160(2)(b).

5. Argument

5.1 The trial court erred in refusing to assert its exclusive, continuing jurisdiction under the UCCJEA.

John notified the trial court of Alaska's improper exercise of jurisdiction over the children in advance of the November 17 contempt hearing. When the trial court declined to address the issue because it was not in the original motion, John raised the issue in a new motion for the December 19 hearing. The trial court misinterpreted the UCCJEA, stating, in essence, that it did not apply to bar any action by Alaska because there was no longer any active litigation in Washington.

There does not have to be any active litigation to trigger the UCCJEA. The UCCJEA grants exclusive, continuing jurisdiction to a court that makes a child custody determination (such as a parenting plan) and prohibits the courts of any other state from modifying that decision. At Tomi's urging, the Alaska court has improperly claimed jurisdiction over the children. The

matter must be returned to Washington, where exclusive, continuing jurisdiction lies.

5.1.1 Interpretation of the UCCJEA is a matter of law reviewed de novo.

Subject matter jurisdiction, interpretation of statutes, and application of statutes are questions of law that are reviewed de novo. *In re Parentage of Ruff*, 168 Wn.App. 109, 115, 275 P.3d 1175 (2012).

5.1.2 Statutory background

“Jurisdiction in interstate child custody disputes is governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), chapter 26.27 RCW. It is detailed, specific, and **mandatory.**” *Parentage of Ruff*, 168 Wn. App. at 111 (emphasis added). The UCCJEA was designed by a conference of states to deal with the problems of competing jurisdictions entering conflicting interstate child custody orders, forum shopping, and the drawn out and complex child custody legal proceedings often encountered by parties where multiple states are involved. *In re Custody of A.C.*, 165 Wn.2d 568, 574, 200 P.3d 689 (2009). Both Washington and Alaska have adopted the UCCJEA.

The UCCJEA limits the circumstances under which one state may modify an “initial child custody determination” made

by another state. *Custody of A.C.*, 165 Wn.2d at 574. Put simply, Alaska may modify the Ingersolls' parenting plan only if Washington expressly declines jurisdiction (for specific, permissible reasons) or if no party resides in Washington any longer. *See Id.*; RCW 26.27.211, .221; AS 25.30.310, .320. Neither of these has occurred. Alaska cannot be permitted to usurp the exclusive, continuing jurisdiction of Washington in this matter.

The UCCJEA applies to any "child custody determination" or "child custody proceeding." Both are broadly defined. *Custody of A.C.*, 165 Wn.2d at 575. "Child custody determination" means a judgment, decree, parenting plan, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child." RCW 26.27.021(3); AS 25.30.909(3). "Child custody proceeding" means a proceeding in which legal custody, physical custody, a parenting plan, or visitation with respect to a child is an issue. The term includes a proceeding for dissolution, divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear." RCW 26.27.021(4); AS 25.30.909(4).

Under the UCCJEA, once a court with proper jurisdiction to make an initial child custody determination has done so, the jurisdiction of all other states is "severely limited." *S.B. v. State, Dept. of Health & Social Services, Div. of Family & Youth*

Services, 61 P.3d 6, 10 (Alaska 2002). A court that makes a child custody determination consistent with the requirements for initial jurisdiction is vested with “exclusive, continuing jurisdiction over the determination” until that jurisdiction is terminated under circumstances not present in this case. RCW 26.27.211; AS 25.30.310. All other states are forbidden from modifying a child custody determination made by a court of the state with exclusive, continuing jurisdiction, except in circumstances not present in this case. RCW 26.27.221; AS 25.30.320.

There is an exception that allows a state to take temporary, emergency jurisdiction for circumstances in which a child would be placed in imminent danger if jurisdiction were not exercised. *Parentage of Ruff*, 168 Wn. App. at 120; RCW 26.27.231; AS 25.30.330. An order made under emergency jurisdiction is temporary, with a set expiration date. RCW 26.27.231; AS 25.30.330. The courts of the two states are required to communicate with each other so that the state with exclusive, continuing jurisdiction can take over and resolve the matter. RCW 26.27.231; AS 25.30.330; *In re C.T.*, 100 Cal.App. 4th 101, 112 (2002).

5.1.3 Washington has exclusive, continuing jurisdiction over residential placement and visitation for KAI and FMI.

The permanent parenting plan entered in this case is a “child custody determination” under the UCCJEA. It provides for legal custody, physical custody, and visitation with respect to KAI and FMI. Washington had jurisdiction to make the initial child custody determination under RCW 26.27.201. Therefore, under both RCW 26.27.211 and AS 25.30.310, Washington has exclusive, continuing jurisdiction over the child custody determination. No other state may make any determination that would modify the parenting plan. RCW 26.27.221; AS 25.30.320.

5.1.4 Alaska has violated the UCCJEA by attempting to take permanent jurisdiction over the children.

“Alaska’s jurisdiction to modify the child custody determinations of other states is severely limited by AS 25.30.320.” *S.B.*, 61 P.3d at 10. “Alaska Statute 25.30.310 grants exclusive, continuing jurisdiction over a child custody case to the court that made the initial child custody determination.” *Steven D. v. Nicole J.*, 308 P.3d 875, 879 (Alaska 2013).

The UCCJEA prohibits a state from conducting juvenile dependency proceedings regarding children subject to a child custody determination of another state. *In re C.T.*, 100 Cal.App. 4th at 106. A juvenile dependency proceeding, such as Alaska’s

child in need of aid proceedings, is a “child custody proceeding” under the UCCJEA because legal custody, physical custody, and visitation are at issue in such proceedings. *See* RCW 26.27.021(4); AS 25.30.909(4). The statutory definition specifically includes proceedings for neglect, abuse, dependency, or guardianship. *Id.*

Because these issues are involved in a dependency proceeding, any decision resulting from the proceeding would be an improper “modification” because it “changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child.” RCW 26.27.021(11); AS 25.30.909(11).

Thus, the UCCJEA’s prohibition against modifying a child custody determination of a state with exclusive, continuing jurisdiction prohibits Alaska from entering child in need of aid orders. *See In re C.T.*, 100 Cal.App.4th at 109-10. Under Alaska law, a finding that a child is a child in need of aid requires that the state take legal custody of the child. AS 47.10.080. This would be a modification in violation of the UCCJEA.

Alaska’s child in need of aid statutes also expressly make child in need of aid proceedings subject to the UCCJEA. The requirements of AS 25.24.010 – 25.24.180 apply to a request for a custody order under the child in need of aid statutes. AS 47.10.113(c). Under AS 25.24.150, the court handling child in

need of aid proceedings must have jurisdiction under the UCCJEA before it can make or modify an order for custody or visitation with the child.

As noted above, it may have been permissible for Alaska to take temporary, emergency jurisdiction under the terms of the UCCJEA, but Alaska did not do so—at least not properly. It is possible that the child in need of aid findings satisfy the level of emergency required to take temporary jurisdiction. However, the “Temporary Custody Order” entered by the Alaska court does not comply with the requirements of the UCCJEA that ensure that emergency jurisdiction is only temporary.

Under the UCCJEA, the court “must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction.” AS 25.30.330(c); RCW 26.27.231(3). The Alaska order does not do so. Instead, it provides that it will remain in effect until **the Alaska court** takes further action. CP 572. No provision is made for transferring the matter to Washington, where exclusive, continuing jurisdiction lies.

The UCCJEA also requires the court taking emergency jurisdiction to contact the court with exclusive, continuing jurisdiction. AS 25.30.330(d); RCW 26.27.231(4). There is no indication in the record that the Alaska court has ever communicated with the Washington trial court regarding the

children. The Alaska child in need of aid order was an improper attempt by the Alaska court to take permanent jurisdiction over the children.

5.1.5 The Washington trial court was obligated to contact the Alaska court and assert Washington’s exclusive, continuing jurisdiction.

When a court with exclusive, continuing jurisdiction under the UCCJEA is “informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.” RCW 26.27.231(4); AS 25.30.330(d).

John informed the trial court of the Alaska court’s actions prior to the November 17 hearing and as a major issue in the December 19 hearing. John notified the trial court that Washington has exclusive, continuing jurisdiction over the parenting plan and that the Alaska court had entered an order that would modify the parenting plan.

The trial court failed to recognize that there was any issue under the UCCJEA. The trial court misunderstood the UCCJEA to apply only to a conflict where two courts are simultaneously, actively exercising jurisdiction. But, as shown

above, Washington's exclusive, continuing jurisdiction does not depend on any active litigation in this state. Washington's jurisdiction exists permanently until it is expressly relinquished. Alaska's attempted exercise of jurisdiction does not destroy or otherwise effect Washington's permanent, exclusive jurisdiction over the matter. *See Steven D.*, 308 P.3d at 882.

The trial court, having been made aware of the Alaska court's actions, had an obligation to contact the Alaska court to resolve the emergency and bring the matter back to Washington. The trial court failed to do so. As a result, John has not seen his children in over eight months.

Washington has exclusive, continuing jurisdiction over custody and visitation of KAI and FMI. The Alaska court violated the UCCJEA by attempting to take jurisdiction and custody of the children without complying with the UCCJEA's emergency provisions. The Washington trial court erred in failing to assert Washington's exclusive, continuing jurisdiction.

This Court should reverse the trial court's November and December 2017 orders and remand with instructions for the trial court to immediately contact the Alaska court and assert Washington's exclusive, continuing jurisdiction over custody and visitation of KAI and FMI and bring the matter back to Washington without delay.

5.2 The trial court abused its discretion in not ordering Tomi in contempt for withholding the children from John and then attempting to justify her actions by forum shopping in bad faith, in violation of Washington’s exclusive, continuing jurisdiction under the UCCJEA.

As a result of the trial court’s misunderstanding of the UCCJEA, the trial court failed to recognize Tomi’s bad faith in forum shopping for more favorable decisions in Alaska than she had been able to obtain in Washington. It is manifestly unreasonable to excuse Tomi’s withholding of the children on the basis of the involvement of the Alaska courts and OCS, which was invited by Tomi in direct violation of the UCCJEA and in reliance on allegations that had already been resolved in John’s favor here in Washington. The trial court should have found Tomi in contempt.

5.2.1 Contempt decisions are reviewed for abuse of discretion.

This Court reviews a trial court’s decision in a contempt proceeding for abuse of discretion. *In re Marriage of Eklund*, 143 Wn. App. 207, 212, 177 P.3d 189 (2008). A trial court abuses its discretion when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014).

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. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). The trial court's discretion is cabined by applicable statutory provisions. *Chandola*, 180 Wn.2d at 642.

A trial court is required to find a parent in contempt who has, in bad faith, failed to comply with the provisions of a parenting plan. *Eklund*, 143 Wn. App. at 215. "Parents are deemed to have the ability to comply ... and the burden is on a noncomplying parent to establish by a preponderance of the evidence that he or she lacked the ability to comply ... or had a reasonable excuse for noncompliance." *In re Marriage of Rideout*, 150 Wn.2d 337, 352-53, 77 P.3d 1174 (2003).

5.2.2 The trial court's contempt decisions in November and December 2017 were based on untenable grounds and untenable reasons.

Because of the trial court's misunderstanding of the UCCJEA, the trial court gave credit to the actions of the Alaska court and OCS in first encouraging and then requiring that Tomi prevent any contact between John and the children. This

conclusion is untenable because the Alaska court and OCS were acting without jurisdiction. Their actions are void and cannot justify Tomi's disobedience to the parenting plan.

Other portions of the trial court's November and December contempt decisions were also based on untenable grounds or reasons.

5.2.2.1 Tomi intentionally disobeyed the parenting plan by withholding Skype calls and in-person visitation with John, beginning in August 2017.

The trial court's November contempt order indicated that Tomi obeyed the parenting plan with regard to August Skype calls. She did not. Tomi refused to have a call on August 13. CP 334. On August 20, 25, and 27, Tomi failed to produce the children for visits. CP 334. She claimed they were sick, but they could be heard in the background until Tomi told them to be quiet. *E.g.*, CP 592-94. There is no question that Tomi failed to obey the parenting plan in regards to these visits. The trial court's finding that she obeyed is based on untenable grounds.

The trial court's December contempt order acknowledged that Tomi disobeyed the order, but excused any disobedience after the Alaska court ordered no contact with John on October 13. As noted above, the acts of the Alaska court and OCS were without jurisdiction under the UCCJEA and were therefore void.

It is untenable to excuse Tomi's disobedience based on void Alaska orders.

The trial court's December contempt order also acknowledged that Tomi disobeyed the parenting plan in withholding the children from John's in-person visitation in September.

Tomi's disobedience in refusing Skype calls and in-person visitation was intentional. Tomi was able to comply but intentionally refused to do so. The trial court found that the children refused to visit and that Tomi made reasonable efforts to require visits. This finding is not supported by the record. A parent is in contempt when the parent either contributes to the child's recalcitrant attitude or fails to take reasonable efforts to require the child to comply with the parenting plan. *Rideout*, 150 Wn.2d at 356-57. The children's resistance is a result of Tomi's influence.

From the beginning of the couple's divorce, Tomi has engaged in a pattern of withholding the children, contributing to the children's bad attitudes toward John, and making false accusations of abuse in order to obtain court orders to keep John away from the children. During the divorce proceedings, Tomi accused John of physical abuse, sexual abuse, alcohol abuse, and abusive use of conflict. In the final orders, the only finding against John that permitted restriction of John's time with the

children was the finding of past alcohol abuse, for which John has complied with the court's requirements for treatment.

Throughout this time, Tomi has discussed her allegations against John with the children. *See, e.g.*, CP 32, 44 (KAI says, "Mom's been saying stuff—all the bad stuff you've been doing for five straight years"). She has kept the children inside of a "bubble" in Alaska, where all of their contacts, including their therapist, Shayle Hutchison, and the OCS case worker, Danah Frey, are a part of what GAL Cathcart described as "Team Tomi," where "everyone seems to support Tomi's version of the history of the relationship and the case and there never is heard a discouraging word." *See* CP 532. Cathcart also observed, "At some point in this continuum [John] will become completely irrelevant to his children and restoring a relationship will become exceedingly difficult or impossible." *Id.*

Having failed to cut off John's visitation with the children through the Washington courts, Tomi has shifted her efforts to the Alaska courts. In addition to the allegation of modified nerf gun wars, Tomi's report to Alaska OCS included numerous allegations that had already been heard and determined unfounded by Washington courts and CPS. Alaska OCS appears to have given credence to many of these past, unfounded allegations. Tomi has cooperated with and encouraged all of the actions of OCS seeking to restrict John's contact with the

children, even though, all the while she has been actively represented by counsel in Washington who could have brought these matters to the attention of the trial court here, where exclusive, continuing jurisdiction resides.

It simply cannot be said that Tomi's forum shopping and contribution to the children's attitudes are anything other than intentional. The trial court's findings are manifestly unreasonable and based on untenable grounds.

5.2.2.2 Tomi's intentional disobedience was in bad faith.

Tomi's actions were not only intentional but bad faith. Tomi was certainly able to follow the parenting plan. She could have refrained from alienating the children from John. She could have refrained from contributing to their recalcitrant attitudes. She could have made reasonable efforts to require Skype visits instead of making excuses that the children were sick while they were talking and laughing in the next room. She could have refrained from making repeated, unfounded allegations against John. She could have refrained from forum shopping.

Tomi knew or should have known that Alaska courts could not take jurisdiction to modify the parenting plan, particularly as she was represented throughout by Washington counsel who

knew or should have known that Washington retained exclusive, continuing jurisdiction under the UCCJEA.

Tomi could easily have complied with the parenting plan and given John his required Skype and in-person visits. Instead she has waged a campaign against John on every possible front. Tomi's actions were in bad faith. The trial court's finding to the contrary was based on untenable reasons. Tomi's conduct cannot be excused based on void actions of Alaska courts and OCS that Tomi actively sought in violation of the UCCJEA in an effort to cut John out of the children's lives. This Court should find Tomi in contempt.

5.2.2.3 John's motion was not brought "without reasonable basis."

The trial court also found that John's motion was brought without reasonable basis, entitling Tomi to attorney's fees under RCW 26.09.160(7). CP 730. The finding appears to be based on the notion that John knew about the Alaska proceedings and therefore should have known that Tomi's withholding of the children was justified. *See* RP, Dec. 19, 2017, at 16-18. However, as shown above, the Alaska proceedings themselves were not justified. The Alaska proceedings violated the UCCJEA and were therefore void. This leaves Tomi without any reasonable excuse for her noncompliance with the parenting plan. John had

a reasonable basis for his motion. This Court should reverse this finding and vacate the award of attorney's fees against John.

Due to the trial court's misinterpretation of the UCCJEA, it failed to recognize Tomi's actions as improper forum shopping in violation of Washington's exclusive, continuing jurisdiction over the children. The involvement of OCS and the Alaska juvenile court was the direct result of Tomi's forum shopping. Far from justifying her actions, rather it is conclusive evidence of her bad faith. John's motion had a reasonable basis.

This Court should reverse the trial court's November and December 2017 orders, vacate the award of attorney's fees against John, and remand with instructions to the trial court to find Tomi in contempt for withholding Skype calls and in-person visitation from August 2017 to the present. The trial court must order that John receive make-up time with the children and that Tomi pay a civil penalty and attorney's fees incurred by John in the trial court.

5.3 The trial court abused its discretion in ordering John in contempt for withholding FMI from Tomi while there was an ongoing investigation of John's concerns for FMI's safety.

John reported his concerns of sexually inappropriate materials and alleged abuse of FMI by KAI to Alaska OCS before the end of his scheduled summer visit with FMI. The investigation was ongoing throughout the time that John

withheld FMI. *See* CP 614 (still ongoing after August 8). John could not in good conscience return FMI to that environment until the investigation was complete.

John sought permission from the trial court by bringing an ex-parte motion for a restraining order on June 28, which would have required FMI to stay with John until the investigation was complete. When the ex-parte motion was denied for procedural reasons, John tried again through a different procedure. The trial court denied John's request again, without ever considering the factual basis of John's request. The trial court then found John in contempt for his failure to return FMI, apparently on the theory that John should have known the court disapproved, based on the two prior denials of his request (on procedural grounds, not on the merits, and even though the second denial was just the day before the contempt hearing).

The trial court's decisions in these matters were based on untenable grounds because the trial court never considered the factual basis of John's concerns for FMI's safety. Even though John disobeyed the parenting plan by withholding FMI, he had a reasonable excuse for doing so.

5.3.1 The trial court's contempt decisions in August and September 2017 were based on untenable grounds because the trial court never considered the factual basis of John's concerns for FMI's safety.

5.3.1.1 In the June 28 hearing, the commissioner denied John's motion without reaching the facts.

The June 28 ex-parte hearing was heard by Commissioner Mark Gelman. Tomi's counsel argued that John's motion was seeking a permanent modification of the parenting plan without making a petition for modification. RP, June 28, 2017, at 7. The commissioner refused to consider John's request without first being presented with a brief citing legal authority to modify the parenting plan without a petition. RP, June 28, 2017, at 7-8. The court did not consider the merits of John's request.

5.3.1.2 In the August 7 hearing, a different commissioner denied John's motion on the grounds that the matter had already been decided on its facts.

John's second attempt at obtaining permission to keep FMI during the investigation was heard by Commissioner Sabrina Ahrens. Tomi's counsel argued that John's request was an improper reapplication for a new decision based on facts already addressed by the court. RP, Aug. 7, 2017, at 3. The commissioner agreed and denied the request, reasoning, "These

are all facts that the Court has previously had an opportunity to review.” RP, Aug. 7, 2017, at 7.

But the court had not reviewed the facts. The June 28 hearing did not address the factual basis for John’s request. Because it was not a decision on the merits, the June 28 decision did not preclude John or the court from addressing the merits in John’s subsequent motion.

In essence, the trial court’s August 7 decision gave preclusive effect to the June 28 decision even though it was not a decision on the merits. The trial court’s August 7 decision was based on untenable reasons because the June 28 decision could not have preclusive effect. John was entitled to receive a decision on the merits.

5.3.1.3 In the August 8 hearing, the commissioner found John in contempt on the basis of the trial court’s repeated denial of his request, even though the trial court had still never considered the factual substance of that request.

In the August 8 contempt hearing regarding John’s withholding of FMI, the trial court found that John acted in bad faith when he continued to withhold FMI even though the court had rejected his June 28 and August 7 requests for permission. CP 255. This decision was also based on untenable grounds and untenable reasons because John had never received a decision

on the merits. Both motions had been denied on procedural grounds. The trial court never expressed an opinion on whether John was justified in withholding FMI during an ongoing investigation. The trial court had not sent any clear message as to what John should do, and John did not disobey the June 28 or August 7 orders, because neither expressed any order or opinion on what John must do.

The trial court also faulted John for not returning FMI to Alaska on August 7 after his second request was denied. This is also based on untenable grounds and untenable reasons. The trial court's August 7 order deleted proposed language that would have required John to return FMI on August 7. CP 253. John reasonably understood this to mean that he was not required to return FMI on August 7, particularly when there was going to be a contempt hearing the next day and Tomi had already purchased a ticket for FMI to fly home on August 8.

5.3.2 John's withholding of FMI was not bad faith when there was an ongoing investigation of his concerns for FMI's safety.

The record reflects that John had legitimate concerns regarding the availability of sexually explicit materials and the risk to FMI of physical abuse by KAI. Those concerns were being investigated. It is reasonable for a parent not to return a child to

such an environment before an investigation can be completed to determine whether the concerns are founded.

This is parallel to the excuse that Tomi gave for withholding Skype and in-person visits in September through November. But the disparate treatment of the parties reveals the trial court's abuse of discretion. When Tomi withheld the children, the trial court found the Alaska court and OCS involvement to be a reasonable excuse (although, as shown above, that decision was unreasonable because it was based on void actions of a court without jurisdiction). But when John withheld FMI, the trial court punished him with contempt.

The trial court never considered John's evidence of the concerns that justified his withholding of FMI while there was an ongoing investigation. John's evidence established that he was not acting in bad faith. In fact, John's reason for withholding FMI was the same as Tomi's later alleged reason for withholding Skype calls and in-person visits: ongoing investigations regarding the safety of the children. The trial court punished John for doing it, but later rewarded Tomi when she did the same thing. This imbalance reveals the trial court's abuse of discretion. John was not acting in bad faith.

This Court should reverse the trial court's August 7 and 8 and September 1 orders, vacate the findings of bad faith and

contempt, and vacate the civil penalty and award of attorney's fees against John.

5.4 John requests an award of attorney's fees on appeal under RCW 26.09.160(2)(b) for Tomi's contempt.

Under RCW 26.09.160(2)(b), when a party disobeys a parenting plan in bad faith, the party is required to pay a civil penalty and reasonable attorney's fees and costs incurred by the moving party. This statute also applies to attorney's fees and expenses on appeal. *Eklund*, 143 Wn. App. at 218.

If this Court reverses the November and December trial court orders and finds Tomi in contempt for her bad faith in withholding Skype and in-person visits from John, John is entitled to an award of attorney's fees and expenses incurred on appeal. John asks the Court make such an award subject to compliance with RAP 18.1.

6. Conclusion

The trial court erred in misinterpreting and refusing to assert Washington's exclusive, continuing jurisdiction under the UCCJEA. This Court should hold that Washington has jurisdiction and instruct the trial court to take required action under the UCCJEA.

Tomi's forum shopping and use of the Alaska courts and OCS in violation of the UCCJEA in an attempt to justify her

withholding of the children from John was bad faith. The trial court abused its discretion in finding otherwise. This Court should reverse the November 17 and December 19 orders, find Tomi in contempt, vacate the award of attorney's fees against John, and order Tomi to provide make-up time with the children and pay a civil penalty and attorney's fees, including fees and expenses on appeal.

The trial court abused its discretion in finding John in contempt for withholding FMI while there was an ongoing OCS investigation regarding FMI's safety at Tomi's residence. The trial court never considered the underlying facts. John had reasonable cause to withhold FMI until August 8. This Court should reverse the August 7 and 8 orders, vacate the findings of bad faith and contempt, and vacate the civil penalty and award of attorney's fees against John.

Respectfully submitted this 16th day of April, 2018.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on April 16, 2018, I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

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