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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.

Amended Reply Brief of Appellant

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1. Reply to Tomi's Statement of Facts

Tomi claims for the first time that John's motions to retain FMI at the end of the summer 2017 visitation related to materials that were previously raised at trial. Br. of Resp. at 7. Citing to her own declaration at CP 217, ¶ 9, Tomi's Brief states, "John had made similar allegations regarding pornography during the dissolution trial, using the same materials attached to his present motion." This assertion misrepresents the actual testimony in Tomi's declaration. The declaration states, "[John] claimed at trial in May 2016 that I read and wrote romance novels he considered pornography, and had books with inappropriate content in the house that the children might see. The only dated materials attached to John's current motion reflect a single web visit ... six months before trial." CP 217-18.

At most, this states that some subset of the materials presented in John's motion existed prior to trial. But at trial, no materials were presented to the court. John simply testified, and Tomi acknowledged, that she read and wrote erotica. John testified at trial that he feared the children would be able to find the materials. In John's 2017 motions, he presented materials that he discovered for the first time after trial and evidence that KAI had direct access. *See* CP 129, 169. The trial court had not been presented with these materials during the dissolution trial.

2. Reply Argument

John's opening brief raised three major issues. First, the trial court erred in misinterpreting and refusing to assert Washington's exclusive, continuing jurisdiction under the UCCJEA. Br. of App. at 15-23. 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, and the trial court abused its discretion in finding otherwise. Br. of App. at 24-31. Third, the trial court abused its discretion in finding John in contempt for withholding FMI when the trial court never considered the facts underlying his concerns for FMI's safety. Br. of App. at 31-37.

John's supplemental brief argued that the trial court failed to provide proper notice of the hearing under CR 7 and the UCCJEA. Supp. Br. of App. at 12-15. The trial court failed to consider the statutorily required factors before relinquishing jurisdiction as an "inconvenient forum." Supp. Br. of App. at 16-17. The trial court's amended findings were not supported by evidence in the record. Supp. Br. of App. at 17-24.

This Reply will address the UCCJEA issues first, namely: 1) the trial court's failure to communicate with Alaska in 2017 was error that must be addressed due to its likelihood of recurrence; 2) the trial court's inadequate notice of the "UCCJEA hearing" was error requiring reversal of the order relinquishing

jurisdiction; 3) the trial court's failure to consider the statutory factors was error requiring reversal of the order; and 4) the trial court's later-entered findings were not supported by evidence, again requiring reversal of the order.

The balance of the reply will return to the issues raised in John's opening brief: 5) that Tomi's use of the Alaska courts in violation of the UCCJEA was bad faith and the trial court abused its discretion in failing to impose contempt sanctions; and 6) that the trial court abused its discretion in imposing contempt sanctions on John based on prior rulings that failed to consider the evidence presented.

2.1 The trial court erred in refusing to assert its exclusive, continuing jurisdiction under the UCCJEA when that issue was first raised.

John's opening brief argued that the trial court erred in refusing in November and December 2017 to assert its jurisdiction to require the Alaska action be brought here in Washington. Br. of App. at 15-23. John described the key provisions of the UCCJEA, pointing out that the state that makes an initial child custody determination has exclusive, continuing jurisdiction of the matter and that all other states are forbidden from modifying the custody determination except under special circumstances that had not been satisfied in this case. Br. of App. at 16-18 (citing the UCCJEA as adopted in

Chapter 26.27 RCW and corresponding Alaska statutes).

Washington had exclusive, continuing jurisdiction over custody issues for KAI and FMI. Br. of App. at 19.

The Alaska court violated the UCCJEA by entertaining its Child In Need of Aid proceedings and entering temporary orders that modified the Washington parenting plan without taking proper actions under the UCCJEA to exercise temporary, emergency jurisdiction. Br. of App. at 20-22. When John notified the trial court of the Alaska court's actions, the trial court was obligated under the UCCJEA to contact Alaska to assert Washington's jurisdiction and require the action be brought here in Washington. Br. of App. at 22-23. The trial court erred when it failed to do so. Br. of App. at 23.

2.1.1 Even if the communication issue is moot, this Court should address it because it is a matter of substantial and continuing public interest.

Given the trial court's subsequent communication with the Alaska court, an order from this Court to communicate would be of little value at this point. However, this Court can provide other relief. This Court should determine that the Alaska courts acted without jurisdiction. As a result, Tomi was not entitled to rely on the void orders when she intentionally withheld visitation from John starting in September 2017. See below at 18-19.

This Court should still address the communication issue because it is a matter of continuing public interest on which the trial courts need authoritative guidance. *See In re McLaughlin*, 100 Wn.2d 832, 838, 676 P.2d 444 (1984). Before addressing a moot issue, the court considers 1) whether the issue is public or private, 2) whether an authoritative determination is desirable to provide future guidance, and 3) whether the issue is likely to recur. *Sessom v. Mentor*, 155 Wn.App. 191, 195, 229 P.3d 843 (2010). Interpretation and application of a statute that is likely to affect many cases in the future, even when part of a private dispute, is an issue of public interest. *Id.*

A trial court's obligation under the UCCJEA to contact the court of another state to protect this state's jurisdiction is a matter of public interest that is likely to affect many cases. Trial court judges would benefit from an authoritative interpretation of their duty to communicate. Because many separated parents live in different states, this issue is likely to recur.

2.1.2 The trial court erred in failing to communicate with the Alaska court to assert Washington's exclusive, continuing jurisdiction.

Once John informed the trial court of the jurisdictional problems with the Alaska court actions, the trial court had an obligation under the UCCJEA to communicate with the Alaska court to assert Washington's exclusive, continuing jurisdiction

and arrange for the case to be heard in Washington. Tomi's interpretation would lead to the absurd result of allowing a court to silently relinquish jurisdiction simply because there is no active custody litigation at the time. Such a result would defeat the purpose of the UCCJEA to prevent forum shopping and conflicting child custody orders. *See In re Custody of A.C.*, 165 Wn.2d 568, 574, 200 P.3d 689 (2009). Exclusive, continuing jurisdiction means nothing if our courts do not protect it.

When a court has exclusive, continuing jurisdiction, the UCCJEA places a mandatory, imperative duty to communicate with another court that attempts to take jurisdiction:

... A court of this state that is exercising jurisdiction pursuant to RCW 26.27.201 through 26.27.221, upon being 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) (emphasis added).

The statute does not define the term "exercising jurisdiction." But the meaning can be discerned from the cross-reference: "A court of this state that is exercising jurisdiction **pursuant to RCW 26.27.201 through 26.27.221.**" This "pursuant to" cross-reference defines the phrase "exercising jurisdiction." It

means that a court is “exercising jurisdiction” whenever jurisdiction exists under one of the referenced sections and has not been relinquished.

The cross-reference refers to three sections of the statute: RCW 26.27.201, .211, and .221. Jurisdiction for an initial custody determination is addressed in RCW 26.27.201. Jurisdiction for a modification is addressed in RCW 26.27.221. But the section that is relevant here is RCW 26.27.211, addressing when a court has exclusive, continuing jurisdiction.

Exclusive, continuing jurisdiction does not require any active litigation: “... a court of this state that has made a child custody determination consistent with RCW 26.27.201 or 26.27.221 has exclusive, continuing jurisdiction over the determination.” RCW 26.27.211. Thus, a court is “exercising jurisdiction pursuant to” RCW 26.27.211 without any active litigation, by virtue of the fact that it “has made a child custody determination” in either an initial proceeding or a modification. The trial court here was “exercising jurisdiction” because it still had exclusive, continuing jurisdiction as a result of the initial custody determination.

This meaning of “exercise” is further supported by the way it is used in other portions of the statute. An examination of the use of “exercise” in RCW 26.27.201(1)(b) and (c) and in RCW 26.27.261(1) and (2) reveals that a court “decline[s] to exercise

jurisdiction” by holding a hearing and entering an order to relinquish jurisdiction to another state. *See* RCW 26.27.261(1) and (2). A court that has jurisdiction may take such action “at any time,” not just when there is active litigation in that court over custody matters. RCW 26.27.261(1). Thus, a court that has exclusive, continuing jurisdiction without any active litigation is continuously “exercising jurisdiction pursuant to” RCW 26.27.211 until it affirmatively declines to exercise jurisdiction.

The trial court here was exercising exclusive, continuing jurisdiction pursuant to RCW 26.27.211 at the time John notified the trial court of the jurisdictional problems with the Alaska proceedings. The trial court had not yet held a hearing or entered an order declining jurisdiction. Upon being informed of the Alaska proceedings, the trial court had an obligation to communicate with the Alaska court for the purposes set forth in RCW 26.27.231: namely, to resolve the emergency and bring the matter back to Washington.

This Court should hold that the trial court had a mandatory duty to communicate with the Alaska courts to bring the Alaska matters to Washington or otherwise address the jurisdictional conflict through an appropriate hearing. Washington’s trial courts need an authoritative determination of their duties under the UCCJEA to provide guidance for future action when this issue recurs in other cases.

2.1.3 The trial court's error was not harmless because the trial court relied on its misinterpretation of the UCCJEA to excuse Tomi's intentional withholding of visitation from John.

The trial court's December 19 order found that Tomi had not acted in bad faith and found that John's motion was brought without reasonable basis. These findings were based on the trial court's erroneous interpretation of the UCCJEA and of its duties under that statute. *See* Br. of App. at 24-31. As a result, Tomi escaped liability for John's attorney fees, and John was ordered to pay Tomi's attorney fees. John was prejudiced by the trial court's error; it was not harmless.

2.2 In the subsequent UCCJEA hearing, the trial court violated John's rights of due process by failing to provide notice or a meaningful opportunity to be heard prior to relinquishing jurisdiction.

John's supplemental brief addressed the trial court's later orders relinquishing jurisdiction to Alaska. John argued that the trial court's email notice to the parties failed to provide adequate notice of the issues to be addressed in the hearing, in violation of the UCCJEA, CR 7, and his constitutional rights of due process. Supp. Br. of App. at 12-14 (citing, *e.g.*, RCW 26.27.101; CR 7(b)(1); *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985)). John could not have anticipated that the trial court was contemplating an inconvenient forum

decision, especially where the briefing in Alaska leading up to the hearing had all pointed toward an emergency jurisdiction communication intended to transfer the action to Washington. Supp. Br. of App. at 14-15 (citing CP 799, 805, 813-14; RCW 26.27.231(4)).

The UCCJEA and CR 7 require that parties receive particular notice of issues to be decided in a hearing.¹ The UCCJEA requires that parties “be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.” RCW 26.27.101(2). In order for parties to have the opportunity to present facts and legal arguments on a jurisdictional question, they must first be informed what the jurisdictional question is. The trial court’s email notice failed to inform the parties that **any** decision was being considered, let alone a jurisdictional decision on inconvenient forum.

Civil Rule 7 requires that any motion for a court order “shall state with particularity the grounds therefor, and shall set forth the relief or order sought.” CR 7(b)(1). The issue of inconvenient forum must be raised by motion, including by motion of the court. RCW 26.27.261(1). Tomi provides no

¹ Tomi incorrectly argues that John has not provided authority for the proposition that a court must inform the parties that a hearing will include discussion of the issue of inconvenient forum. As set forth in John’s supplemental brief and again here, the UCCJEA and CR 7 are the authority. *See* Supp. Br. of App. at 13-14.

authority for the false notion that a court's motion does not have to comply with the particularity requirements of CR 7. Her citation to RCW 2.28.150 is unavailing because the suitable process for giving notice of a motion in civil litigation has already been adopted via CR 7. There is no reason to excuse a court from following the requirements of the Civil Rules. The court's motion for an inconvenient forum decision was required to state the issue **with particularity**.

The trial court's email notice did not identify **any** order being sought or contemplated and did not state any grounds for an order. John cannot be said to have been "given the opportunity to present facts and legal arguments before a decision on jurisdiction is made," RCW 26.27.101(2).

Tomi incorrectly relies on a decision of the North Carolina Court of Appeals to argue that the improper notice was not reversible error. Br. of Resp. at 41 (citing *Westlake v. Westlake*, 231 N.C.App. 704, 709, 753 S.E.2d 197 (2014)). In *Westlake*, the trial court ordered, without a hearing, that North Carolina was no longer a convenient forum. *Westlake*, 231 N.C.App. at 705-06. The appellant argued that the UCCJEA required the trial court to give the parties advance notice and an opportunity to submit information prior to the decision. *Id.* at 709. The North Carolina court assumed that such notice was required, but held that the appellant had not shown error because he did not show that he

would have submitted information had he been given the opportunity. *Id.* at 709. The court still reversed because the trial court had failed to consider the statutorily required factors before making its decision. *Id.* at 710.

The North Carolina court's logic regarding advance notice is flawed. Once the trial court had made its decision, submitting information would have been futile. Washington's courts do not require litigants to perform futile acts as a prerequisite for relief. *See, e.g., State v. Young*, 198 Wn. App. 797, 801-02, 396 P.3d 386 (2017). This Court should not follow *Westlake* on the issue of adequate notice.

Unlike the appellant in *Westlake*, John **has** demonstrated what kind of facts and legal argument he would have presented had he been given proper notice. *See* CP 866-70 (legal argument in response to Tomi's motion for additional findings), 871-74 (John's declaration). Had John been given adequate notice of the inconvenient forum issue, he would have presented facts and legal argument opposing the Alaska court's motion. The *Westlake* court's reasoning on notice does not apply here.

Tomi argues that John should have anticipated and briefed "the full range of UCCJEA issues." In doing so, she claims "that same range of issues" was briefed in Alaska. Tomi's claim is disingenuous at best.

The only issues meaningfully briefed by the parties in Alaska were Washington’s exclusive, continuing jurisdiction and Alaska’s alleged temporary, emergency jurisdiction. Supp. Br. of App. at 4-5, 14-15. The GAL mentioned inconvenient forum but did not brief the issue. CP 802. Rather, the GAL agreed with all other parties that “the proper remedy ... is for the courts ... to confer” under the UCCJEA’s emergency jurisdiction provisions. CP 805 (GAL); *See* CP 799 (John), 813-14 (OCS).

The only issue John could have reasonably anticipated based on the Alaska briefing was a discussion between the judges regarding the appropriate length for Alaska’s temporary orders before the matter would be transferred to Washington where it belonged. *See* RCW 26.27.231(4).

The trial court erred as a matter of law when it failed to provide adequate notice of the inconvenient forum issue. This Court should reverse and remand for a hearing with proper notice and opportunity to present facts and legal arguments.

2.3 The trial court abused its discretion in failing to consider the factors required by the UCCJEA.

John argued that the trial court abused its discretion when it failed to consider the statutorily required factors for an inconvenient forum determination. Supp. Br. of App. at 16-17; *see also* 18-24 (the factors favor jurisdiction in Washington).

The *Westlake* court was correct when it reversed an inconvenient forum decision due to the trial court's failure to consider the required factors on the record. *Westlake*, 231 N.C.App. at 710 (“The transcript and record indicate no consideration by the trial court of the factors listed in [the UCCJEA]”). The statute requires, “the court ... **shall consider all** relevant factors, including [eight expressly listed factors].” RCW 26.27.261(2) (emphasis added). The statute does not give the court discretion to address only those factors it finds most relevant. At most, the trial court only addressed three of the eight required factors on the record, either orally or in writing.

This Court should reverse the May 17 order because the record does not show that the trial court considered all of the required factors.

2.4 The trial court's later findings were not supported by evidence in the record, and its conclusion that Washington is an “inconvenient forum” was based on untenable grounds.

2.4.1 Finding 2 relating to domestic violence is not supported by evidence in the record.

Factor (a) is “Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child.” RCW 26.27.261(2)(a). Tomi points out that there is evidence in the record that the Alaska

courts entered a domestic violence protective order against John. But this fact alone does not favor either state.

The relevant consideration under this factor is, given a finding of domestic violence, “which state could best protect the parties and the child.” RCW 26.27.261(2)(a). As noted in John’s supplemental brief, Washington is best able to investigate the allegations and protect the rights of the parties and the children. Supp. Br. of App. at 19-20. Tomi does not address this consideration in her response on this factor. This Court should reverse Finding 2 and the trial court’s conclusions regarding “inconvenient forum.”

2.4.2 Finding 7 regarding the location of evidence is not supported by evidence in the record.

Factor (f) is “The nature and location of the evidence required to resolve the pending litigation, including testimony of the child.” RCW 26.27.261(2)(f). John’s supplemental brief argued that this factor favors Washington because firsthand witnesses and evidence of alleged conduct in Washington will primarily be here in Washington. Supp. Br. of App. at 20-21.

Tomi argues that hearsay statements by the children to medical and counseling professionals during the course of treatment are admissible under ER 803(a)(4). However, at this point, such an argument is mere speculation not based on

evidence in the record. The trial court was not provided with the complaint in the CINA action, which is the “pending litigation” at issue. Without the complaint or any other description of the specific allegations, it was impossible for the trial court to determine whether the medical or counseling professionals would have any admissible evidence that is relevant to allegations that have not already been resolved in Washington. Finding 7 is not supported by evidence in the record. This Court should reverse.

2.4.3 Finding 8 regarding expeditious determination is not supported by evidence in the record.

Factor (g) is “The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence.” RCW 26.27.261(2)(g). Because nearly all of the allegations in the Alaska proceedings have already been determined unfounded here in Washington, Washington can most expeditiously decide the issues. Supp. Br. of App. at 21-22.

Tomi’s response raises only irrelevant points. John’s actions in relation to the CINA case are irrelevant. The lack of any pending litigation in Washington is irrelevant. Had the trial court decided correctly, a dependency action could have been initiated here in Washington, where it belongs and can be most expeditiously carried out.

In contrast, the Alaska court's failure to act expeditiously in taking required actions under the UCCJEA is highly relevant. Washington's experience with the unfounded allegations is highly relevant. Tomi has not pointed to any evidence in the record that Alaska could decide the CINA/dependency action more expeditiously. The trial court's finding and conclusions were patently unreasonable.

2.4.4 Finding 9 regarding familiarity with the case is not supported by evidence in the record.

Factor (h) is "The familiarity of the court of each state with the facts and issues in the pending litigation." RCW 26.27.261(2)(h). Washington's familiarity with these stale, unfounded allegations is much more important than Alaska's familiarity with more recent allegations. Supp. Br. of App. at 22-23. The trial court's conclusion that factor (h) favors Alaska was based on untenable grounds and untenable reasons.

2.4.5 The trial court's conclusion is based on untenable grounds and untenable reasons.

The trial court's conclusion that Washington is an "inconvenient forum" is patently unreasonable and based on untenable grounds and untenable reasons. This Court should reverse the trial court's May 17 and June 22 orders.

2.5 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.

John’s opening brief argued that it was manifestly unreasonable for the trial court to excuse Tomi’s withholding of the children from John on the basis of the involvement of Alaska courts in violation of the UCCJEA. Br. of App. at 24-31. Tomi intentionally disobeyed the parenting plan by withholding Skype calls and in-person visitation with John beginning in August 2017. Br. of App. at 26-29. Her intentional disobedience and forum shopping in Alaska was bad faith, requiring a finding of contempt and an award of attorney’s fees to John. Br. of App. at 29-30. John’s motion for contempt had a reasonable basis, making an award of attorney’s fees to Tomi an abuse of discretion. Br. of App. at 30-31.

John’s opening brief described Tomi’s long history of false allegations against John, her sharing of this false information with the children, and her use of therapists and other contacts to reinforce the false narrative that John is an abusive parent. Br. of App. at 28. The guardian ad litem predicted during the dissolution the destructive effect Tomi’s conduct would have on the children’s relationship with John. *See* CP 532.

When Tomi's efforts to cut John out of the children's lives failed here in Washington, she turned to the Alaska courts to seek the relief she was unable to obtain here. Tomi's blatant forum shopping in violation of the UCCJEA and encouragement of the children's attitudes against their father were intentional and done in bad faith.

The trial court found that Tomi's withholding of the children was intentional but excused her on the basis of the orders of the Alaska courts. Tomi's response brief also relies on those orders. But Tomi's violations of the parenting plan cannot be excused by the entry of void orders in Alaska in violation of the UCCJEA, particularly when she was the one seeking those orders in a court she should have known had no jurisdiction to act. The trial court's finding that Tomi did not act in bad faith and its finding that John's motion was brought without reasonable basis were an abuse of discretion based on untenable reasons.

This Court should reverse the November 17 and December 19, 2017, 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.

2.6 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.

The trial court abused its discretion in finding John in contempt for withholding FMI while he had unresolved concerns for FMI’s safety in Tomi’s care. Br. of App. at 31-36. The trial court twice refused to consider John’s concerns before denying his motions on procedural grounds. Br. of App. at 33-34. The trial court’s finding of bad faith for the withholding was based on untenable grounds and untenable reasons. Br. of App. at 34-35. John’s withholding of FMI was not in bad faith because he had valid concerns for FMI’s safety. Br. of App. at 36.

2.6.1 The trial court’s August 7 order is reviewable because it prejudicially affected the August 8 order.

Under RAP 2.4, this Court may review a trial court decision that was not timely designated in a notice of appeal if “(1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.” RAP 2.4(b). Tomi argues that the August 7 order did not prejudicially affect the August 8 order. Tomi is wrong.²

² John’s Assignment of Error #1 assigns error to the trial court’s August 7 “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.” Br. of App. at 2. John does not seek

There are at least two situations in which an earlier order or ruling prejudicially affects the decision timely designated in the notice. The first is when the timely designated decision would not have occurred in the absence of the earlier order. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 378-80, 46 P.3d 789 (2002).

The second is when the timely designated decision was based, at least in part, on the earlier ruling. *Behavioral Sciences Inst. v. Great-W. Life*, 84 Wn. App. 863, 870, 930 P.2d 933 (1997). This second situation is what we have here.

The trial court's August 8 order was expressly based on the August 7 ruling. The trial court's order states, "John [failed to deliver FMI to Alaska] despite having been denied a motion for immediate restraining order [on] June 28, 2017 **and despite the denial of his Motion for Temporary Order on August 7, 2017.**" CP 255 (emphasis added). At the August 8 hearing, the commissioner stated, "He has been before this Court a number of times and this Court continues to repeat to him what it is that he needs to do, whether it's a denial of the relief that he's requesting, **or it's in our hearing from yesterday**, and yet still we find ourselves here today with him not having returned the

relief from the August 7 order itself, only from this erroneous finding. This assignment serves John's arguments for reversal of the August 8 contempt order, which was based in part on the August 7 finding.

child.” RP, Aug. 8, 2017, at 32-33 (emphasis added). There can be no question that the August 8 contempt order was based, at least in part, on the August 7 order. As such, the August 7 order prejudicially affected the August 8 order, and this Court may review it under RAP 2.4(b).

2.6.2 The August 8 contempt order was based on the June 28 and August 7 hearings, at which the trial court never reviewed the facts of John’s concerns.

The August 8 order was an abuse of discretion based on untenable grounds and untenable reasons because it treated the prior, June 28 and August 7 orders as decisions on the merits of John’s concerns, which they were not. The trial court’s reason for the August 8 order was, essentially, “we’ve told him twice that he can’t keep FMI, yet here we are again and he still hasn’t complied.” *See* RP, Aug. 8, 2017, at 32-33. But neither the June 28 nor the August 7 order instructed John to return FMI or otherwise addressed the merits of his concerns. In fact, the August 7 order **struck out** language that would have required John to return FMI “forthwith.” CP 253.

At the June 28 hearing, the trial court denied John’s request on procedural grounds without reaching the merits of the request or the underlying facts. RP, June 28, 2017, at 7-8. At the August 7 hearing, the trial court denied John’s request on the grounds that it was a repeat of the earlier request, which

had already been denied. RP, Aug. 7, 2017, at 7 (“These are the same facts the Court has already considered.”). But the trial court never considered the facts.

Tomi speculates that perhaps the trial court’s statement that it had already considered these facts might have been because the materials were already considered at trial. But this cannot be true, because, as shown above, at 1, the materials were never presented at trial, and Tomi never said that they were (until now).

The trial court’s August 8 order of contempt was an abuse of discretion based on untenable grounds and untenable reasons because it was based on the faulty premise that John should have known that his concerns with FMI’s safety did not justify temporarily withholding FMI, even though the court had never reviewed or ruled on the underlying facts.

2.6.3 The trial court abused its discretion in finding John acted in bad faith, where he had legitimate and unresolved concerns for FMI’s safety.

Tomi’s argument relies on evidence that she presented in opposition to John’s testimony about the sexually explicit materials. Tomi’s reliance on the disputed facts is misplaced. The trial court’s finding of bad faith was expressly based on the false notion that the trial court had already considered the underlying facts and denied John’s motion on its merits in June.

That finding is not supported by the record. The trial court did not consider the facts before entering its June 28 order. The trial court did not consider the facts before entering its August 7 order. Rather, it denied the motion as an improper reapplication for relief previously denied.

At the time of the August 8 hearing, John's concerns for FMI's safety had never been addressed by the trial court. The OCS investigation was still ongoing. John had a reasonable excuse for keeping FMI in Washington until his concerns for FMI's safety were resolved. Indeed, this is the same excuse that the trial court allowed for Tomi's subsequent withholding of visitation from John starting in September 2017.

The trial court's August 8 finding of bad faith without considering the underlying facts was an abuse of discretion, based on untenable grounds and untenable reasons. This Court should reverse the order, vacate the findings of bad faith and contempt, and vacate the civil penalty and award of attorney's fees against John.

2.7 The Court should deny Tomi's request for fees and grant John's request.

John and Tomi request fees on the same grounds. This Court should award fees related to the contempt orders to whichever party prevails on each.

3. Conclusion

This Court should hold that the trial court had exclusive, continuing jurisdiction over custody of KAI and FMI and therefore had an obligation under the UCCJEA to communicate with the Alaska courts to resolve the alleged emergency and bring the Alaska matters to Washington or otherwise address the jurisdictional conflict through an appropriate hearing. Washington's trial courts need an authoritative determination of their duties under the UCCJEA in order to guide future action in this matter of substantial public interest.

This Court should reverse the trial court's May 17 and June 22, 2018, orders relinquishing jurisdiction under the UCCJEA, hold that Washington has jurisdiction, and remand to the trial court with instruction to communicate again with the Alaska court for the purpose of transferring the case to Washington, where exclusive, continuing jurisdiction lies.

This Court should reverse the November 17 and December 19, 2017, 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.

Finally, 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 28th day of August, 2018.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on August 28, 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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