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

In re the Marriage of Ingersoll,

Tomi Lee Ingersoll (n/k/a Tomi Lee Winters),

Respondent

v.

John Patrick Ingersoll,

Appellant.

BRIEF OF RESPONDENT

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I. Introduction

When John Ingersoll's teenage daughter refused to visit him in the summer of 2017, John retaliated by keeping her younger brother for an additional 40 days. The trial court did not abuse its discretion when finding him in contempt for that conduct, or when finding his ex-spouse Tomi Winters (f/k/a Tomi Ingersoll) not in contempt. The trial court similarly did not abuse its discretion when concluding that Washington has become an inconvenient forum for further child custody determinations, relinquishing jurisdiction to Alaska -- where the children have lived since 2012 and where the State has taken temporary legal custody of them.

II. Re-Statement of Issues

John's opening brief seeks review of five parenting plan contempt rulings by the trial court, to which he assigns sixteen errors, grouped into three issues. Tomi accepts John's grouping of the alleged errors, but provides the following Re-Statement of Issues related to those groups.

1. John refused to return FMI for 40 days and nights beyond the end of summer visitation. John's motions to "suspend" the Parenting Plan based on allegations of child abuse and neglect against Tomi were twice denied by the trial court. Did the trial court abuse its discretion when finding John in contempt, ordering him to return FMI or report to jail, and awarding Tomi make-up time, sanctions and attorney fees? (assignments of error 1 – 7) *NO*.

2. The State of Alaska initiated Child In Need of Aid (CINA) proceedings to protect the children. Did the Washington trial court abuse its discretion by considering Alaska proceedings and orders when finding Tomi not in contempt of the Parenting Plan and awarding her attorney fees? (assignments of error 10-16) *NO*.
3. Did the trial court err by not initiating contact with the Alaska CINA court during John's contempt motions against Tomi? (assignments of error 8-9) *NO*.

John's Supplemental Brief seeks review of an additional, sixth ruling by the trial court, relinquishing UCCJEA jurisdiction over further custody disputes regarding the children to the State of Alaska. John assigns eight additional errors (numbered 17 to 24) to this ruling, grouped into three supplemental issues (numbered 4-6). Tomi also accepts John's grouping of these alleged errors, but restates the supplemental issues related to those groups as follows:

4. The trial court notified the parties by email of a UCCJEA conference requested by the Alaska CINA court and of the opportunity to submit pleadings for consideration at that conference. Did this notice violate the UCCJEA? (assignment of error 17) *NO*.
5. Were the trial court's findings regarding the statutory factors related to its inconvenient forum determination entered without support from substantial evidence in the record? (assignments of error 18-22) *NO*.
6. Was the trial court's conclusion that Washington had become an inconvenient forum and should relinquish UCCJEA jurisdiction to Alaska an abuse of discretion? (assignments of error 23-24) *NO*.

III. Counter-Statement of the Case

A. Brief Procedural Background.

John Ingersoll and Tomi Winters (formerly known as Tomi Ingersoll) have two children: a girl, KAI (age 15); and a boy, FMI (age 10). A Parenting Plan entered June 15, 2016 designated Tomi the primary residential parent and imposed limitations on John's residential time, based on his alcohol abuse. CP 764-775. That Parenting Plan was affirmed following John's appeal in *Marriage of Ingersoll*, No. 49229-6-II, 2017 WL 4653441 (Unpublished Opinion, October 17, 2017), 200 Wn. App. 1070, *rev. denied* 190 Wn.2d 1010 (2018).

Tomi and the children have lived in Fairbanks, Alaska since 2012. CP 917. John resides in Lakewood, Washington. Residential provisions of the Parenting Plan provide for the children to visit with John in Washington primarily during school breaks and summer vacation. The Parenting Plan also provides for regularly scheduled "Skype" video contact between the children and John during the school year, and an opportunity for John to schedule additional in-person visits in Fairbanks. CP 764-775.

During 2017 the Superior Court made multiple rulings on contempt motions – finding John in contempt of the 2016 Parenting Plan, and finding Tomi not in contempt of the same Parenting Plan. It also made

rulings denying John's requests to "suspend" the Parenting Plan. John seeks review of four contempt rulings and one ruling denying his request to "suspend" that Plan.

During the fall of 2017 Tomi obtained Domestic Violence Restraining Orders ("DVPOs") against John in Alaska. Shortly afterward, the State of Alaska initiated child welfare proceedings, temporarily removed custody of the children from both parents, placed them with Tomi and required court or agency approval for any contact with John. John assigns error to the trial court's failure to initiate contact with Alaska courts during the contempt proceedings. His Supplemental Brief assigns error to the trial court's subsequent decision, following a conference with the Alaska court, declining Washington's jurisdiction over any future child custody proceedings in favor of the child welfare proceedings already pending in Alaska.

B. Detailed Statement of Facts and Proceedings.

1. KAI refuses to travel to Washington for her summer visit.

On May 18, 2017, KAI and FMI were scheduled to travel from Fairbanks, Alaska, to SeaTac Airport in Washington for summer visitation with John. CP 3, 764-775. Tomi delivered FMI to the airport, but KAI refused to go. CP 6-24. KAI told her therapist that during John's February 2017 visit in Fairbanks she saw him download "dirty books" on her phone

and then call the police to report Tomi for allowing KAI to see these things. CP 951. KAI also told the therapist that John had been “drinking alcohol a lot” during her March 2017 visit to Washington, and described a threatening confrontation between John and his mother during that visit. *Id.* KAI told her therapist that if she were forced to go to Washington that summer “she would take a knife and stab her father then stab herself.” *Id.*

John sought contempt sanctions against Tomi for failing to deliver KAI to the airport. CP 1-5. A Commissioner overruled John’s objection to the therapist’s declaration, found that Tomi’s inability to deliver KAI for this visit was not in bad faith, and denied John’s contempt motion on June 19, 2017. CP 59-63. John’s Motion to Revise (CP 131-160) was denied by the Superior Court on July 14, 2017. CP 206-208. John did not appeal these rulings. Instead, he retaliated by refusing to return FMI when his visit ended.

2. John refuses to return FMI to Alaska.

Two days after the Commissioner’s ruling that Tomi was not in contempt, John made a report to the Alaska Office of Children’s Services (OCS) alleging that Tomi had exposed the children to inappropriate materials on an iPad and that KAI had physically abused FMI. CP 197, 465. On June 28, 2017, the day before FMI was scheduled to return to Alaska, John sought an *ex-parte* Temporary Restraining Order (TRO) to

“suspend” the Parenting Plan, allowing him to retain FMI, and putting both children in his custody pending the outcome of the investigation of his report to OCS. CP 64-127.

The *Ex Parte* Commissioner denied John’s request for a TRO. That Commissioner was concerned that in the absence of a petition to modify the Court lacked authority to consider John’s motion to suspend the Parenting Plan but invited John to brief the issue. RP June 28, 2017, at 7-9. The Commissioner also noted that “[i]f there is an emergency...CPS and law enforcement can take immediate custody independent of court orders. So far I haven’t seen that....I want more before the Court sticks its nose into that.” *Id.* at 9.

John did not file a petition to modify the Parenting Plan, or brief the Court’s authority to grant him relief without such a petition.

3. The Court finds John in contempt and orders him to return FMI or report to jail.

John refused to return FMI to Alaska on June 29, 2017 as required by the Parenting Plan. Tomi filed a motion asking the court to find John in contempt and order him to return FMI. CP 161-187. John responded with a second motion to “suspend” the Parenting Plan and place the children in his care pending the outcome of the Alaska OCS investigation. CP 194-

205. John again failed to file a petition to modify or to brief the issue of the court's authority to grant his requested relief without such a petition.

The Alaska OCS social worker assigned to John's claim of child abuse or neglect, Danah Frey, filed a declaration stating that she had no concerns for the children's safety in Tomi's home, but did have such concerns regarding John's home. CP 188-189. Tomi pointed out that John had made similar allegations regarding pornography during the dissolution trial, using the same materials attached to his present motion. CP 217, ¶ 9. Tomi also objected to the court considering John's second motion for an order suspending the Parenting Plan, citing to the modification statute and well-settled Washington precedent holding that the trial court lacks authority to enter such an order without a petition to modify. CP 209, 212.

The same Commissioner who found Tomi not in contempt for KAI's refusal to visit heard both new motions. On August 7, 2017 that Commissioner denied John's second motion for an order "suspending" the Parenting Plan. CP 250-253. This ruling was affirmed by the Superior Court on revision. CP 298-299. The next day, August 8, 2017 the Commissioner granted Tomi's motion, finding that John's refusal to return FMI as required by the Parenting Plan was intentional and in bad faith and concluded that he was in contempt of court. CP 255-256. As a purge condition, the Court ordered John to return FMI to Tomi that evening by

delivering him to SeaTac Airport for a flight on which Tomi had purchased a refundable ticket. CP 257. If John did not return FMI, he was ordered to report to jail. *Id.*

Facing incarceration, John finally returned FMI to Alaska after having kept him an additional 40 days and nights beyond the summer visit scheduled under the Parenting Plan. The Superior Court denied John's motion for revision (CP 260) and granted Tomi's cross-motion (CP 272), awarding her 40 days of make-up residential time. CP 295-297.¹

John's Notice of Appeal filed October 2, 2017 designated the Commissioner's contempt ruling dated August 8, 2017 and the Superior Court's ruling affirming the Commissioner dated September 1, 2017. John's Notice of Appeal also seeks review of the Commissioner's August 7, 2017 order denying his motion for a temporary order on the basis that it "prejudicially affected" the two orders that were timely appealed.

4. FMI discloses abuse by John during his extended summer visit, leading to protection order and child welfare proceedings in Alaska.

Following FMI's return to Fairbanks, he was interviewed by OCS as part of their investigation of John's report of abuse and neglect by Tomi. CP 614. During that interview FMI made disclosures prompting

¹ The September 1, 2017 Revision Order also directed that all future proceedings be heard by the Superior Court Judge rather than the Commissioner. CP 297.

OCS to also investigate John. CP 615. FMI was afraid of John, and of upcoming Skype calls with his father. *Id.* FMI complained of back pain and told his doctor that John repeatedly shot him in the back with nerf gun darts with a rock taped to their tip. CP 323. The doctor independently reported suspected child abuse of FMI by John to OCS. CP 321.

The children's therapist reported that "[b]oth children have expressed a fear of their father and they have developed traumatic stress reactions related to their experiences with him." CP 330. KAI's mental health symptoms worsened when she was forced to have contact with John, and FMI had "begun exhibiting somatic symptoms during times when he is supposed to be participating in Skype visits with his father." *Id.* The therapist recommended that the children not be forced to have visitation with John at this time and recommended a number of steps John could take to re-establish a healthy relationship with his children. *Id.*

OCS had strongly suggested to Tomi in August that she not allow the children to be alone with John, and on September 25, 2017 OCS sent her an email stating "significant concerns for the children's safety" if they had contact with their father during the continued investigation. CP 615, 621. Tomi asked John to postpone his scheduled visit to Fairbanks starting September 28, 2017 while she sought clarification from OCS about what they expected of her. CP 615.

John refused to reschedule. Upon arrival in Alaska he was served with a Long Term Domestic Violence Protective Order (DVPO) protecting only Tomi, issued September 20, 2017. CP 661, 665. This order found that John had committed, or attempted to commit, crimes involving domestic violence (including violating a protective order) against Tomi, and that he represented a credible threat to her safety. CP 667. Faced with conflicting demands -- by OCS that she protect the children from John, and by John that she provide them to him for a visit under the Parenting Plan -- Tomi made the difficult decision to withhold the children from John when he arrived on September 28, 2017. CP 714. In an effort to comply with OCS' demand that she protect the children, Tomi also sought legal assistance in Alaska and on October 13, 2017 obtained a 20-day Ex-Parte DVPO prohibiting contact between the children and John. CP 661, 673-681.

Before the 20-day DVPO involving the children expired, the State of Alaska interceded to protect the children by filing a "Petition for Adjudication of Children in Need of Aid (CINA) and for Temporary Custody" under Alaska Statutes chapter 47.10. CP 539, 661. At a hearing on November 2, 2017 the Alaska Juvenile Court took temporary custody of the children from both John and Tomi, temporarily placed the children

with Tomi, and ordered that they have no contact with John except as allowed by OCS or the CINA court. *Id.*, CP 570-578.

5. John seeks contempt against Tomi for missed Skype visits.

John filed a contempt motion claiming that Tomi had intentionally failed or refused to make the children available for Skype visits on four specific dates: August 13, 20, 25 and 27, 2017. (CP 582). Tomi's response explained that under the Parenting Plan weekly Skype calls were scheduled on Sundays during the school year, with a make-up for missed Sunday calls on the following Friday. CP 616. Just before the first scheduled call on August 20, FMI felt sick and went into the shower for 30 minutes, refusing to come out during the call. *Id.* Tomi's attempted make-up call on August 25 could not be connected due to computer network problems. CP 616-617. On the August 27 call FMI complained his head hurt and again went into the shower; KAI refused to participate at all. CP 617. Tomi was successful in getting both children to participate in a make-up call on September 1, 2017. *Id.*; CP 629-657. Tomi also explained the difficult context in which John was insisting on Skype visits despite the children's expressed fear of him following John's refusal to return FMI. CP 617-618.

The Superior Court denied John's contempt motion on November 17, 2017, noting the protection order and child welfare proceedings in Alaska. CP 793-700.

John filed a second contempt action regarding additional missed Skype visits on November 30, 2017. CP 705-708. This motion also alleged Tomi had violated the Parenting Plan in bad faith when she withheld the children from John on September 28, 2017 and that she had failed to provide him timely information about their healthcare and education. CP 706. Tomi filed a selection of communications with John informing him about the children's medical and educational status. CP 559-569. She pointed to the children's therapy, the OCS email and subsequent DVPO and CINA proceedings as evidence she was not acting in bad faith when withholding the children from John on September 28 or when failing to force them to participate in Skype visits. CP 713-715. On December 19, 2017 the Superior Court found that Tomi had complied with the requirement to inform John about the children's educational and health status. CP 757. It found that while she had not complied with the Parenting Plan regarding Skype visits and John's September 28 visit, her noncompliance was not in bad faith, and therefore was not contemptuous. CP 757-758. The Court also found that John's motion was not brought in good faith and awarded Tomi \$1000 in attorney fees. CP 758.

John argued in both the November 17 and December 19, 2017 contempt hearings that the DVPO and CINA proceedings in Alaska should not excuse Tomi from complying with the Washington Parenting Plan, pointing to Washington's exclusive continuing subject matter jurisdiction over decisions about the children's custody under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), chapter 26.27 RCW. CP 689, 704. In both hearings the Superior Court communicated its view that in contempt enforcement proceedings it was not exercising its jurisdiction to make a "child custody determination," and that any modification proceedings in family court would be subject to the control of the juvenile court.² *Eg.*, RP November 17, 2017 at 11; RP December 19, 2017 at 11-12.

² Once child welfare proceedings are initiated, any modification action filed by private parties would have been subject to the primary jurisdiction of the juvenile court. Each State has both a *parens patriae* interest in (and jurisdictional authority over) the welfare of minors present in its territory. Alaska's assertion of this interest and jurisdiction appears in AS 47.10.010(a): "Proceedings related to a child under 18 years of age residing or found in the State are governed by this chapter when the child is alleged to be or may be determined by the Court to be a child in need of aid under AS 47.10.011." In both Washington and Alaska, once a juvenile court asserts this authority over children in child welfare proceedings (called dependency in Washington, and Child in Need of Aid [CINA] in Alaska) any further determination of child custody must occur in the juvenile court, unless that court expressly authorizes family court to make such decisions. RCW 13.04.030 grants juvenile court exclusive original jurisdiction over children alleged to be dependent, and concurrent jurisdiction with family court over child custody proceedings. RCW 13.34.155 allows dependency court to establish or modify a parenting plan when doing so will implement a permanency plan of care for child and result in dismissal of the dependency case. Similarly, AS 47.10.113 provides that, except by agreement of the parties, any request to make,

John's Amended Notice of Appeal filed December 18, 2017 added the November 17, 2017 contempt ruling to this appeal. John's Second Amended Notice of Appeal filed January 16, 2018 added the December 19, 2017 contempt ruling to this appeal.

6. John seeks dismissal of the Alaska proceedings, prompting a conference between Courts and an Order Relinquishing Jurisdiction to Alaska.

There is no evidence John sought approval from OCS or the CINA court for contact with the children, or engaged with available services listed in the Alaska Temporary Custody Order. CP 572, 576. Instead, he moved to dismiss the CINA case, arguing that under the UCCJEA,³ Washington had exclusive jurisdiction to modify orders regarding the children's custody. CP 817. OCS and Tomi opposed dismissal, arguing that Alaska had appropriately asserted temporary emergency jurisdiction due to John's harmful conduct toward KAI and FMI. CP 812, 815. A Guardian ad Litem appointed for the children also opposed dismissal, CP 801, noting the option of moving any proceedings to Alaska using the inconvenient forum provisions of the UCCJEA, and suggesting that "jurisdictional concerns...be addressed through a conference between the courts in Alaska and Washington..." CP 802.

modify or vacate a custody or visitation order affecting a child alleged to be in need of aid must be heard as part of the CINA proceedings.

³ Ch. 26.27 RCW; Alaska Stat. § 25.30.300 *et seq.*

On May 9, 2018 the Washington Superior Court notified the parties by email of a UCCJEA conference set for May 17, 2018, requested by the Alaska court in response to John's motion to dismiss. CP 798, 833. The hearing notice stated that "[p]arties will not have a speaking role but may attend the hearing as well as provide pleadings." *Id.*

The Alaska CINA court provided the Washington court with copies of John's motion to dismiss, responses to that motion, and John's reply. CP 799-832. Neither John nor Tomi filed any additional pleadings in advance of the UCCJEA conference. Tomi appeared by counsel; John appeared in person with his appellate counsel. RP May 17, 2018 at 2.

The hearing started with the Alaska judge identifying the issue as "the determination regarding Alaska having jurisdiction over these children, rather than Washington." *Id.* at 3. The Washington judge observed "that Washington has jurisdiction, as we made a custody decision..." and identified the next question as "whether Washington has become an inconvenient forum..." *Id.* at 4. The Alaska judge described the CINA proceedings as taken "on the basis of an emergency" and requested that Washington allow Alaska to have jurisdiction:

Alaska is the place where the children and the mother reside...They have seen counselors in Alaska and are going to school in Alaska. So the information right now, I believe, regarding the children is basically in

Alaska. They have been appointed guardian ad litem in Alaska, and the mother has an attorney in Alaska. *Id.* at 4-5.

The Washington court concurred:

I would agree with you. I don't think there's much in Washington. What we have been doing is contempt hearings...But I would agree that at this point in time Washington should give up jurisdiction and allow Alaska to retain jurisdiction over these children. *Id.* at 5.

Later on May 17, 2018 the Washington court entered an Order on UCCJEA Hearing Relinquishing Jurisdiction to Alaska (the "*UCCJEA Order*"). CP 794. The Court found that the children had resided in Alaska for over four years, that there were allegations of domestic violence by John resulting in the Long Term DVPO issued in September 2017, and that Alaska had initiated a CINA petition regarding both children. The order concluded that "[p]ursuant to RCW 26.27.261, Washington is an inconvenient forum for any child welfare or child custody legal actions regarding the two children at issue in this case." *Id.*

John immediately filed a motion in the appellate court stating his intention to seek reconsideration of the *UCCJEA Order*, requesting permission to again amend his Notice of Appeal to add the *UCCJEA Order* or any order on reconsideration to this case, and seeking a stay of the *UCCJEA Order* pending his amended appeal. CP 841. A

Commissioner of this court granted his motion to amend but denied his request for a stay. CP 865. John never filed a Motion for Reconsideration of the *UCCJEA Order*. Tomi filed a Motion for Additional Findings and Conclusions by the trial court regarding the *UCCJEA Order*. CP 835. That motion was granted by entry of an order (with permission from this court, CP 865) on June 22, 2018 (the “*Amended UCCJEA Order*”). CP 909.

IV. Summary of Argument

The trial court’s 2017 order denying John’s request for a temporary order “suspending” the Parenting Plan should not be reviewed because it did not prejudicially affect a subsequent order being reviewed. If reviewed, it should be affirmed because the trial court lacked authority to consider John’s request without a petition to modify the Parenting Plan.

The trial court’s 2017 contempt rulings should be affirmed because John acted in bad faith when keeping FMI, and because Tomi’s failures to provide the children for scheduled time with John were not in bad faith.

The trial court’s notice of its scheduled conference with the Alaska court was proper, and its ruling that Washington has become an inconvenient forum for future child custody determinations, allowing the Alaska child welfare case to continue, was supported by substantial evidence and was not an abuse of discretion.

The trial court's awards of attorney fees and costs to Tomi should be affirmed, and Tomi should be awarded attorney fees on appeal.

V. Argument

A. **The Trial Court's August 7, 2017 Order Should Not Be Reviewed, But If Reviewed, It Should Be Affirmed.** (assignment of error 1)

1. **The August 7, 2017 order did not prejudicially affect the August 8, 2017 order finding John in contempt.**

The Commissioner's August 7, 2017 Order denying John's Motion for Temporary Family Law Order should not be reviewed in this appeal because it did not prejudicially affect the August 8, 2017 Contempt Order designated in John's Notice of Appeal.

The trial court's August 7, 2017 Order Denying Motion for Temporary Family Law Order is not a decision that John may appeal of right under RAP 2.2. It is not a final judgment, or a decision that determines or discontinues an action -- because no proceeding to modify was ever commenced. John's Notice of Appeal filed October 2, 2017 identified the August 7, 2017 decision as one prejudicially affecting the August 8 and September 1, 2017 contempt orders. CP 300.

The test for whether an order "prejudicially affects" a designated decision, authorizing its review together with the subsequent appealable order, is "that the order appealed from would not have happened but for

the first order.” *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002), *cert. denied* 540 U.S. 1149 (2004).

John cannot meet this standard because the trial court could easily have found him in contempt for refusing to return FMI on June 29, 2017 whether it had granted or denied his Motion for Temporary Family Law Order on August 7, 2017. John’s June 28, 2017 *ex parte* request for a temporary restraining order suspending the Parenting Plan and allowing him to keep FMI was denied the day before FMI’s scheduled return. CP 64; RP June 28, 2017 at 7-9. By the time of the August 7 hearing John had already kept FMI for an additional thirty-nine days. The *ex parte* Commissioner told John that he needed to file a petition to modify in order for the court to consider his request to suspend the Parenting Plan, but John failed to do so and instead just kept FMI until he could present the same request to another judge, again without filing a petition to modify. It was not the denial of his August 7 motion that caused John to be in contempt, but his own actions prior to that date.

- 2. If the August 7 order is reviewed, it must be affirmed, either on the apparent basis stated by the Commissioner or because the court lacked authority to consider John’s request to “suspend” the Parenting Plan.**

Trial court decisions regarding parenting plans, including requests to modify such plans, are reviewed for abuse of discretion. *Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014); *Marriage of McDevitt*, 181 Wn.App. 765, 769, 326 P.3d 865 (modification), *rev. denied* 337 P.3d 326 (2014). The reviewing court may affirm the trial court on any theory established in the pleadings and supported by proof, whether or not the trial court considered or relied upon this theory. *Potter v. Washington State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008); *Eubanks v. Klickitat County*, 181 Wn.App. 615, 619, 326 P.3d 796 (2014).

“Modification” occurs when a party’s rights are either extended beyond or reduced from those originally expressed in the decree or other final order. *Christel v. Blanchard*, 101 Wn.App. 13, 21, 1 P.3d 600 (2000). John’s Motion for Temporary Family Law Order requested that the court “suspend” the Parenting Plan and place the children in his care pending the outcome of the OCS investigation. CP 194-205. Granting this relief would have extended John’s rights and reduced Tomi’s, and thus was a request to modify that Parenting Plan.

The trial court’s statutory authority to enter temporary orders after a final decree is limited to “a *proceeding* for the modification of an existing decree.” RCW 26.09.060(10)(d) (emphasis added). Temporary orders in such proceedings do not prejudice the rights of a party at

subsequent hearings, may be revoked or modified at any time, and terminate when final orders are entered. RCW 26.09.060(10)(a – c).

The Court of Appeals has consistently reversed parenting plan modifications, including those imposed by temporary orders, where there was no modification proceeding commenced in accord with RCW 26.09.260. In *Christel*, the trial court’s temporary order improperly modified the parenting plan, because there was no modification proceeding even pending. 101 Wn.App. at 23. In *Custody of Halls*, 126 Wn.App. 599, 109 P.3d 15 (2005), this Court reversed a parenting plan modification where the father filed only a motion for contempt that did not ask for modification. In *Marriage of Watson*, 132 Wn.App. 222, 130 P.3d 915 (2006) this Court reversed the trial court’s temporary orders limiting visitation by the father after a hearing at which the court found that the mother’s petition to modify should be denied. The common thread is that without a pending modification proceeding the court lacks statutory authority to make any change to a final Parenting Plan, even a temporary change “suspending” the Parenting Plan as requested by John.

Tomi objected to the trial court even reaching the merits of John’s request, citing these authorities. CP 209-214; RP August 7, 2017 at 2-3. Tomi also pointed out that John had made similar allegations regarding pornography during the dissolution trial, using the same materials attached

to his present motion. CP 217. The Commissioner reached the merits of John's motion, but denied his request, stating "These are the same facts the court has already considered." RP August 7, 2017 at 7. It is unclear from these remarks whether the Commissioner meant facts previously considered at trial (as referenced by Tomi), or facts previously considered at John's *ex parte* motion on June 28, 2017 (as argued by John's brief). After John's counsel pointed out that his allegations about FMI being harmed by KAI were new, the Commissioner stated that she did not find those allegations sufficiently convincing to enter an order. *Id.* at 8.

John argues that the Commissioner's August 7 decision was an abuse of discretion because it gave "preclusive effect" to the June 28 decision. *Brief of Appellant* 34. However, this characterization is not consistent with the Commissioner's oral remarks clarifying that she was not persuaded that a temporary order was warranted on any facts presented to the court. RP August 7, 2017 at 8.

Even if the Commissioner intended to deny John's motion based on his unsuccessful prior request on June 28, 2017, her ruling denying the motion must be affirmed because absent a petition to modify the court lacked any authority to grant John's motion.

B. John's Refusal to Return FMI to Alaska Was Intentional and Done in Bad Faith, Warranting Contempt Sanctions.
(assignments of error 2 – 7)

The trial court's discretionary decisions in a contempt proceeding are reviewed for an abuse of discretion. *Marriage of Eklund*, 143 Wn.App. 207, 212, 177 P.3d 189 (2008). The trial court's findings of fact in such a decision are reviewed for substantial evidence, even if they are based solely on sworn statements, and conclusions of law are reviewed to see if they are supported by the findings. *Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003). A trial court abuses its discretion where its decision is manifestly unreasonable or based on untenable grounds or reasons. *Marriage of Black*, 188 Wn.2d 114, 127, 392 P.3d 1041 (2017).

RCW 26.09.160(2)(b) states:

If, based on all the facts and circumstances, the court finds after hearing that the parent, in bad faith, has not complied with the order establishing residential provisions for the child, the court shall find the parent in contempt of court.

“[A] parent who refuses to comply with duties imposed by a parenting plan is considered to have acted in ‘bad faith’... the burden is on a noncomplying parent to establish by a preponderance of the evidence that he or she lacked the ability to comply with the residential provisions of a court-ordered parenting plan or had a reasonable excuse for noncompliance.” *Rideout*, 150 Wn.2d at 352-53. John cannot show either

the inability to comply or a reasonable excuse. There is abundant evidence to support the trial court's findings that John's violation of the Parenting Plan was willful and in bad faith.

John does not even claim that he was unable to return FMI on time. John told Tomi on June 23 that he would not be returning FMI on June 29, 2017. CP 164-165. FMI was not on the prepaid return flight, and the flight's cost was refunded to John. *Id.* John refused to return FMI even after his *ex parte* June 28, 2017 request for an order authorizing him to keep FMI was denied. RP June 28, 2017.

John's second motion for a temporary order "suspending" the Parenting Plan (without filing a petition to modify) and his counsel's choice to note it for the day before Tomi's contempt motion was an obvious attempt to create and prolong an ostensible justification for retaining FMI. John's allegation that Tomi downloaded sexual images onto electronic devices accessible by the children was belied by KAI's statements to her therapist (made before John kept FMI) that she observed John himself download such material onto her iPhone during a visit in February, and then falsely claim that Tomi had done so. CP 951. John's unsupported claim that FMI was somehow at risk from his sister was promptly dismissed by the Alaska social worker. CP 188-189.

Under these facts and circumstances, the Commissioner's August 8, 2017 Contempt Hearing Order finding John in contempt, ordering him to return FMI or report to jail, and awarding \$3,524.50 in attorney fees and a \$100 civil penalty to Tomi, was neither manifestly unreasonable nor based on untenable grounds or reasons, and therefore not an abuse of discretion. Under the same analysis, the Superior Court's September 1, 2017 Order on Revision, affirming the Commissioner's ruling, must also be affirmed.

C. The Trial Court Did Not Abuse its Discretion When Finding Tomi Not in Contempt for Missed Skype Visits in 2017.
(assignments of error 10-16)

The trial court's November 17 and December 19, 2017 orders declining to find Tomi in contempt were not an abuse of discretion.

1. John's August 29 Motion (heard November 17, 2017).

John's August 29, 2017 contempt motion alleged Tomi had not provided the children for scheduled Skype visits on four dates: August 13, 20, 25 and 27, 2017. CP 581. Tomi's responsive declaration put these dates in context: John had finally returned FMI just a few days earlier, and after OCS interviewed FMI they suggested she not let the children have unsupervised contact with John. CP 615. Tomi also referenced the relevant provisions of the Parenting Plan: Skype calls were scheduled for Sundays 6-6:30 pm Alaska time, when John did not otherwise have residential time

during the school year. CP 616, 773-774. A missed regular Skype visit was to be made-up the following Friday, but missed make-up visits were not required to be made-up. *Id.* Tomi also explained that the August 13 date occurred before the start of the school year,⁴ so was not a scheduled Skype visit. CP 616.

On the first scheduled Skype visit (Sunday, August 20) FMI complained of pain and went into the shower, refusing to come out until after the attempted call had ended. *Id.* Tomi notified John she would hold a make-up visit the following Friday, August 25, but he threatened legal action even before that date. CP 615, 625. On August 25, Tomi's internet connection was not working properly and she could not put the call through. CP 616-617. She notified John, who again threatened legal action. *Id.*, CP 626-627. On Sunday, August 27, FMI complained of a headache and again went into the shower, and KAI refused to speak to John. CP 617. Rather than wait for the scheduled following Friday make-up call, John filed and served his contempt motion on August 29. CP 581.

On Friday, September 1, Tomi was successful in getting both children to participate in a make-up call for August 27. CP 617. KAI was angry at John because she had answered the door when a process server

⁴ The children's 2017-2018 School Calendar appears at CP 222.

brought the contempt paperwork for Tomi, but FMI spoke to John for at least 15 minutes. *Id.*, CP 629-656.

The following table from Tomi's declaration summarizes the four Skype call dates alleged in John's August 29, 2017 motion:

Date	Call Outcome
Sunday, 8-13-2017	No call required under Parenting Plan
Sunday, 8-20-2017 (regular)	Unsuccessful; make-up scheduled 8-25-17
Friday, 8-25-2017 (make-up)	Connection failure
Sunday, 8-27-2017 (regular)	Unsuccessful; make-up 9-1-17 successful

CP 617.

By the November 17, 2017 hearing date Tomi had received the email from OCS discouraging her from allowing the children to have contact with John and asking what she intended to do to protect them from him. CP 615. She had also obtained a 20-Day *ex parte* DVPO prohibiting John from having contact with the children. CP 661, 680. And, the State of Alaska had intervened by filing the CINA case. CP 661-662.

The trial court found that Tomi had obeyed the Parenting Plan with regard to the dates alleged in John's motion, concluded Tomi was not in contempt, and denied John's motion. CP 693-700. The court suggested

that John work on his relationship with the children rather than continue to pursue contempt sanctions:

THE COURT: I guess I would encourage you to read what the counselor and social worker is talking about and how your kids are doing and how they feel about you and try to work on some kind of therapeutic mode, as opposed to contempt and court hearings. You've got two kids, they are in Alaska. I think you need to work on that relationship.

RP November 17, 2017 at 7.

The trial court's finding that Tomi obeyed the Parenting Plan with regard to the four August dates alleged by John is supported by substantial evidence. No call was required on August 13 because the school year had not yet started. CP 222, 773. Tomi attempted to make-up the unsuccessful scheduled August 20 call, but was prevented from doing so by a failed internet connection, and was not required by the Parenting Plan to make-up that missed make-up call. CP 616-617, 774. The unsuccessful August 27 call was successfully made-up on September 1. CP 629-656.

The trial court's November 17, 2017 ruling that Tomi was not in contempt was not an abuse of discretion, and should be affirmed.

2. John's November 30 Motion (heard December 19, 2017).

Rather than work on the relationship with his children in a "therapeutic mode" as encouraged by the trial court, John immediately

filed a new contempt motion, again alleging that Tomi had failed to provide the children for Skype visits on dates reaching back to encompass those disposed of in his prior motion. CP 705-706. John also alleged that Tomi had failed to provide relevant educational, dental, religious and medical information about the children, and had also failed to provide them for an in-person visit scheduled for September 28 in Alaska. *Id.*

Tomi's response reiterated the context in which John's allegations arose: the OCS investigation following FMI's delayed return from visiting John; the OCS email asking what she was doing to protect the children from John; the 20-day emergency DVPO; the CINA petition; and the temporary custody orders entered November 2 in that case. CP 556-558, 570-578, 713-715. Tomi acknowledged not providing the children to John for his September in-person visit after he refused her request to reschedule that visit while she sought clarification from OCS about what they expected from her, and not providing them for six Skype visits prior to the entry of the DVPO orders. CP 714. Tomi also filed a 10-page selection of communications through the *OurFamilyWizard.com* portal with John, informing him about the children's school and medical needs and developments. CP 559-569.

At hearing on December 19, 2017 John's counsel limited his argument to the time period not covered by any of the Alaska orders,

apparently conceding that Tomi would not be in contempt for any dates encompassed by those orders entered in Alaska that precluded contact between John and the children.

MR. BYRD: And, Your Honor, there are four separate cause numbers up there in Alaska, each of them have orders...But there's a time period that was not covered by any of those orders that - in which case the provisions of this Parenting Plan was the only exclusive court order

RP December 19, 2017 at 6.

The trial court's Contempt Hearing Order entered December 19, 2017 found that Tomi had obeyed the Parenting Plan with regard to providing John information about the children, had violated it by not providing them for his visit to Fairbanks and six Skype dates, but that those violations were not in bad faith, so denied John's motion. CP 729-732. The trial court also found that John's motion was brought without reasonable basis, and awarded Tomi \$1,000 in attorney fees. CP 730.

All of these findings were supported by substantial evidence. John was required by the Parenting Plan to use the Our FamilyWizard.com communications portal. CP 773. He was therefore on notice of Tomi's communications to him through that portal regarding the children's educational and medical and status (CP 559-569) before he filed his contempt motion falsely claiming she had not done so. CP 706. The OCS

email discouraging Tomi from allowing John to have contact with the children, John's refusal to postpone his visit, and the Alaska DVPO and CINA filings and orders are more than sufficient to support a finding that Tomi did not act in bad faith. John knew about the DVPO and CINA orders before filing his November 30 motion, because he was served with them in court during the November 17 hearing on his prior motion. RP November 17, 2017 at 4-5. The amount of fees awarded was less than requested and supported by a declaration from Tomi's counsel. CP 722. The Superior Court's Order entered December 19, 2017, denying John's contempt motion and imposing \$1,000 attorney fees, should be affirmed. It was supported by substantial evidence and not an abuse of discretion.

D. The Trial Court Was Not Required to Initiate Contact With the Alaska Juvenile Court During John's Contempt Motions.
(assignments of error 8-9).

John alleges that the trial court erred by "misinterpreting" its jurisdiction and that of the Alaska courts (assignment of error 8) and by not contacting Alaska during the contempt proceedings "to assert Washington's continuing, exclusive jurisdiction" (assignment of error 9). The two courts have since communicated and Washington has declined to exercise its jurisdiction after determining that it is an inconvenient forum. CP 794, 909. Appellate review of that ruling is part of this case.

1. These issues are moot.

John does not show how he was prejudiced by the trial court's failure to communicate sooner, or identify any relief that could be awarded now to remedy that failure. A case is moot when a court can no longer provide effective relief. *Blackmon v. Blackmon*, 155 Wn.App. 715, 719, 230 P.3d 233 (2010). Courts generally do not review a question that is moot. *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845 (1983). This court should decline to review John's assignments of error 8 and 9 because the questions they present are now moot.

2. There was no pending child custody proceeding in which Washington was "exercising" or could "assert" jurisdiction.

Even if this court reviews these assignments of error, John's arguments fail because there was no pending child custody proceeding in which Washington was "exercising" or could "assert" its jurisdiction.

Much of John's argument on this issue in his initial brief focuses on alleged failures by the Alaska courts to act as required by the UCCJEA⁵ when exercising temporary emergency jurisdiction over the children. *Brief of Appellant*, at 20-21. As recognized by John's trial counsel, John's disputes with the actions of Alaska courts must be raised there, not in Washington. RP December 19, 2017 at 6; RCW 26.27.521.

⁵ Chapter 26.27 RCW, chapter 25.30 Alaska Statutes.

Whether a Superior Court has authority pursuant to the UCCJEA to exercise its subject matter jurisdiction to make or modify a child custody determination is a mixed question of law and fact. The reviewing court defers to the trial court's unchallenged findings of fact but reviews de novo its legal conclusions and questions of statutory interpretation. *Marriage of McDermott*, 115 Wn.App. 467, 483, 307 P.3d 717 (2013).

The UCCJEA is a pact between states limiting when one state can make or modify an initial child custody determination. *Custody of AC*, 165 Wn.2d 568, 574, 200 P.3d 689 (2009). The "initial child custody determination" regarding the Ingersoll children was made when the trial court entered the 2016 Parenting Plan. RCW 26.27.021(8); CP 764. Even though Tomi and the children have lived in Alaska since 2012, because John still lives in Washington this state retains "exclusive, continuing jurisdiction" over that determination, RCW 26.27.211, including over any proceeding to modify it. RCW 26.27.221. Courts are required to communicate with each other if simultaneous child custody proceedings continue beyond the temporary stage. RCW 26.27.251. Another state may exercise temporary emergency jurisdiction for so long as necessary to protect a child from abuse. RCW 26.27.231. When a Washington court that is "exercising jurisdiction" in either an initial or modification proceeding learns that a child custody proceeding has been commenced in

another state based on a claim of temporary emergency jurisdiction, the Washington court is required to communicate with the other state to determine the future course of proceedings in both states. RCW 26.27.231(4). Washington may also determine that it is no longer the most appropriate forum state. RCW 26.27.261.

“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....

Contempt proceedings such as those held November 17 and December 19, 2017 are not “child custody proceedings” in which the trial court was “exercising jurisdiction” either to make an initial child custody determination or to modify such a determination, and thus do not trigger the duty to communicate as John claims. The sole issue in the contempt hearings was whether Tomi had violated the parenting plan, not what its provisions would be. John cites no authority for the proposition that contempt proceedings are “child custody proceedings” or that a Washington court which learns of such proceedings in another state during a contempt hearing must immediately communicate with the other state even though there are no “child custody proceedings” pending in Washington. John’s argument appears based solely on his incomplete quotation of the second sentence of RCW 26.27.231(4), from which he

omits a key term.

The second sentence of RCW 26.27.231(4) provides, in pertinent part, as follows:

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 a 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. (emphasis added).

John's partial quotation of this sentence in his brief omits the italicized words above and replaces them with an introductory phrase of his own creation (italicized below) that changes the meaning of his quotation of the remainder of the sentence:

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 a 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." *Brief of Appellant* at 22. (emphasis added).

This modified quotation is an attempt to insert John's interpretation -- that contacting another state is required even if Washington is not then *exercising* its jurisdiction to make or modify a child custody determination in any proceeding -- into a statute that simply does not say what he claims.

Washington was not *exercising* its exclusive, continuing jurisdiction when the trial court ruled on John's contempt motions because modification proceedings have never been filed here by either party. As noted in Tomi's argument § A.2 above, the Washington court lacked statutory authority to even consider John's multiple requests to modify the Parenting Plan by "suspending" it in the absence of a petition to modify. The Washington court was not obligated to initiate communication with Alaska when it learned about the temporary emergency proceedings in Alaska, because Washington was not then *exercising* that jurisdiction, and there was no proceeding in which to "assert" its jurisdiction as demanded by John.

3. Even if contact with Alaska was required during contempt proceedings, any error was harmless.

Even if the trial court was required to contact the Alaska court during John's 2017 contempt motions, John does not show how its failure to do so affected the outcome of either the contempt hearings or the inconvenient forum determination. Error without demonstrated prejudice affecting the outcome of the case is not a basis for reversal on appeal. *E.g.*, *Carlisle Packing v. Sundanger*, 259 U.S.225, 42 S.Ct. 475, 66 L.Ed. 927 (1922); *McDonald v. Department of Labor & Industries*, 104 Wn.App. 617, 17 P.3d 1195 (2001).

E. John Had Adequate Notice of the UCCJEA Hearing.
(assignment of error 17)

John cites no authority and makes no reasoned argument that he has a constitutionally protected interest in the forum in which future child custody proceedings may be heard, requiring notice or hearing beyond what the UCCJEA requires. The trial court provided both parties with the notice and opportunity to be heard required by the UCCJEA.

1. John has failed to demonstrate a constitutionally protected interest in a UCCJEA forum determination.

John asserts broadly that he was denied due process by the time, manner and contents of the Court's notice to the parties regarding the conference between Washington and Alaska courts held May 17, 2018. *Supplemental Brief of Appellant* at 12. However, he provides no citations to authority showing that he has a constitutionally protected interest in the determination regarding which forum state, Washington or Alaska, will make future child custody decisions. *Id.* at 12-16. By failing to cite authority or offer reasoned argument on this essential component of any due process analysis, John has waived this claim of error. RAP 10.3(a)(6); *Brownfield v. City of Yakima*, 178 Wn.App. 850, 876, 316 P.3d 520 (2013).

Both state and federal constitutions protect against state deprivation of life, liberty or property without due process of law. U.S. Const. amend. XIV, § 1; Washington Const. art. 1, § 3. Due process is a flexible concept and the protections it requires vary based on specific circumstances. *E.g.*, *Matthews v. Eldridge*, 424 U.S. 319, 334, 965 S.Ct. 893, 47 L.Ed.2d 18 (1976). Absent an identified protected interest, constitutional due process protections are not triggered. *Id.*, 424 U.S. at 332. Parental rights in custody of their children are such a protected interest. *E.g.*, *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

However, the custody of the Ingersoll children was not at issue in the May 17, 2018 conference between Washington and Alaska courts. The only issue at this conference involved which forum should make future such decisions. Because John cites no authority and makes no reasoned argument even asserting that he has a constitutionally protected interest in the forum determination, this court should decline to address his constitutional due process claim, and confine its analysis to whether the Court's notice satisfied statutory requirements of the UCCJEA⁶. Even if this court nevertheless elects to reach the constitutional question, John has

⁶ *See, Sanchez v. Sanchez*, No. 45153-1-II, 2015 WL 1228726 (Unpublished Opinion, March 17, 2015), 186 Wn.App. 1030 (2015) (declining to reach constitutional question but reversing trial court's inconvenient forum determination because it failed to provide the parties with any notice of UCCJEA conference).

failed to cite any authority for the proposition that the general duty to provide notice of “the nature and character” of a proceeding sufficient for the parties “to intelligently prepare”⁷ requires mention of every subsidiary issue or possible outcome. John was not denied due process by the absence in the court’s notice of the UCCJEA conference of specific language telling him that the inconvenient forum issue might be raised in that conference.

2. The Court’s notice complied with the UCCJEA.

John asserts that the trial court erred by failing to give the parties advance notice that the May 17, 2018 conference of courts could include the “inconvenient forum” issue, by not specifically inviting briefing on that issue, and by not letting the parties make oral argument. *Supplemental Brief of Appellant* at 13-16. These claims are not supported by provisions of the UCCJEA or court rules, and are contradicted by the factual record.

The UCCJEA authorizes, but does not require, a court of this state communicating with a court in another state to allow the parties to participate in that communication. RCW 26.27.101(2) provides:

The court *may allow the parties to participate* in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made. (emphasis added).

⁷ *Supplemental Brief of Appellant*, at 12-13, citing *Nisqually Delta Ass’n v. City of DuPont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985).

Similarly, before making an inconvenient forum determination, “the court shall allow the parties to submit information...” RCW 26.27.261(2).

The trial court’s emailed notice of the May 17, 2018 UCCJEA conference informed the parties that they could attend, would have no speaking role, but could submit pleadings. CP 798, 833. Pleadings and briefs filed in Alaska regarding John’s motion to dismiss discussed the inconvenient forum issue. CP 802.

The UCCJEA expressly allows inconvenient forum issues to be raised “upon motion of a party, the court’s own motion, or the request of another court.” RCW 26.27.261(1). Parties (and their attorneys) notified of a scheduled UCCJEA conference between courts should anticipate that the full range of UCCJEA issues, including inconvenient forum or other issues that could be raised by the courts themselves, may be discussed and resolved. This is particularly true where, as here, the parties have already briefed that same range of issues in the sister court. CP 799-832. As noted previously, John cites no authority requiring that communicating courts notify the parties in advance of every issue that may arise or the range of possible results from their scheduled communication. Similarly, John

cites no provision of the UCCJEA or other authority requiring the opportunity to make oral argument.

In *Westlake v. Westlake*, 231 N.C.App. 704, 753 S.E.2d 197 (2014) the North Carolina Court of Appeals concluded that the trial court's failure to provide any advance notice that the inconvenient forum issue would be determined was not error because the appellant did not show that he was not allowed to submit information, that the trial court refused any information he offered, or what information he would have submitted. 231 N.C.App. at 709. As in *Westlake*, John's brief fails to identify or supply information that he would have submitted on the inconvenient forum issue if he had been expressly invited to address this issue in the trial court's notice informing him of the May 17, 2018 proceeding. This court should follow *Westlake* and conclude there was no violation of the UCCJEA.

John also cites to Civil Rule 7's provision requiring notice of a motion hearing to contain "the grounds therefor, and...the relief or order sought." *Supplemental Brief of Appellant* at 13. This rule did not apply to the May 17 proceedings, because neither John nor Tomi initiated those proceedings by filing a motion requesting relief from the Washington court. Instead, the conference was requested by the Alaska court in response to John's motion to dismiss filed there, and the inconvenient forum issue was raised

directly by the judges themselves during that conference. RP May 17, 2018 at 4-5.

The UCCJEA is silent on the precise form and content of notice required when the trial court acts to inform the parties of a scheduled conference between courts, and no other Washington authority specifically addresses this precise question. Similarly, though the UCCJEA requires that parties be allowed to “present facts and legal arguments” under RCW 26.27.101(2) and “to submit information” under RCW 26.27.261(2), it is silent on the precise form of the proceeding in which they are afforded these opportunities. Where the court has jurisdiction but “the course of proceedings is not specifically pointed out by statute, any suitable process or mode of proceedings may be adopted which may appear most conformable to the spirit of the laws.” RCW 2.28.150. The trial court’s email notice informing the parties that they could attend and submit pleadings for consideration, but would have no speaking role, falls well within this standard. This court should reject John’s claim of error regarding notice of the conference of courts held May 17, 2018.

F. Substantial Evidence Supports the Trial Court’s UCCJEA Findings. (assignments of error 18-22).

John argues both that the trial court failed to consider factors required by the UCCJEA, *Supplemental Brief of Appellant* at 16, and that

some of the trial court's findings addressing those factors were not supported by substantial evidence. *Id.* at 17-23.

Absent a contrary requirement of statute, court rule or case law, specific findings addressing each statutory factor are not required when evidence regarding those factors is before the court and its oral opinion or written findings reflect consideration of the statutory elements. *Eg.*, CR 52; *Marriage of Croley*, 91 Wn.2d 288, 588 P.2d 738 (1978); *Marriage of Dalthorp*, 23 Wn.App. 904, 598 P.2d 788 (1979); *Marriage of Murray*, 28 Wn.App. 187, 622 P.2d 1288 (1981). John cites no authority requiring specific findings on each factor listed in RCW 26.27.261 regarding an inconvenient forum determination.

The May 17 *UCCJEA Order* adequately reflects the trial court's consideration of relevant statutory factors. In that order, the trial court made findings on the factors it considered most relevant, including the occurrence of domestic violence (RCW 26.27.261(2)(a)), the length of time the children have resided in Alaska (RCW 26.27.261(2)(b)), and the familiarity of the Alaska court with the pending litigation (RCW 26.27.261(2)(h)). CP 794.

Even if this Court were to require findings specifically addressing each and every factor listed in the statute, such findings appear in the trial court's *Amended UCCJEA Order* entered June 22, 2018. CP 909. There is

more than substantial evidence in the record to support each of the findings challenged by John.

1. Finding 2 (domestic violence) – RCW 26.27.261(2)(a).

The trial court made the following finding regarding this factor:

There are allegations of domestic violence regarding the father which resulted in a long term domestic violence protection order (from Alaska) being served on the father in September 2017. CP 910.

John’s argument that this finding is not supported by substantial evidence focuses on alleged deficiencies in the Alaska CINA proceedings. *Supplemental Brief of Appellant* at 18-20. He ignores the Long Term DVPO expressly referenced by the trial court, finding that John had committed domestic violence against Tomi in Alaska, CP 665, and posed a credible threat to her safety. CP 667. This DVPO alone is substantial evidence supporting the trial court’s finding 2, which favors relinquishing jurisdiction to Alaska, and should be affirmed.

2. Finding 7 (location of evidence) –RCW 26.27.261(2)(f).

The trial court made the following finding regarding this factor:

The evidence required to resolve the pending litigation is primarily located in Alaska, including testimony of the children, their teachers, their doctors, their therapist, and a *guardian ad litem*. (italics original). CP 910.

John argues that “the evidence of any abuse should also be located, for the most part, here in Washington,” and that the “children’s teachers,

doctors and therapist in Alaska have only second-hand, hearsay knowledge...” *Supplemental Brief of Appellant* at 20. This argument poignantly ignores the evidence possessed by the children themselves, who have lived in Alaska since 2012 and have made admissible statements in the course of their treatment by medical and counseling professionals there. CP 321-323, 330; ER 803(a)(4). It also ignores the evidence developed by OCS in Alaska, where the only pending litigation regarding the children – the CINA case – is located. CP 188-189, 570-578, 621. The Alaska judge stated that the children’s residence, school attendance, and counseling in Alaska meant that “the information right now, I believe, regarding the children is basically in Alaska.” RP May 17, 2018 at 4-5. Together, this evidence is sufficient to persuade a fair-minded person that the evidence needed to resolve the pending litigation (the CINA case) is primarily in Alaska, rather than Washington. Finding 7, which favors relinquishing jurisdiction to Alaska, should also be affirmed.

3. Finding 8 (expeditious determination) – RCW 26.27.261(2)(g).

The trial court made the following finding regarding this factor:

Because Alaska has already initiated a CINA proceeding regarding current issues affecting the children, the Fairbanks, Alaska Superior court is better able to decide those issues expeditiously. CP 910.

John disputes this finding, arguing that Alaska has already failed to proceed expeditiously and has “withheld the children” from him for over nine months without holding a trial. *Supplemental Brief of Appellant* at 21. As John has himself argued, Alaska was not free to make other than temporary decisions regarding the children until resolution of UCCJEA jurisdictional issues with Washington, which did not occur until the May 17 conference of the two courts. As noted earlier, there is no evidence that John sought approval from OCS or the CINA court for contact with the children, engaged with available services listed in the CINA Temporary Custody Order, or did anything but move to dismiss that case. CP 572, 576, 817. John’s argument also ignores the fact that there are no pending child custody proceedings in Washington in which current issues affecting the children could even be adjudicated, without either the State commencing a dependency or John or Tomi initiating a modification action. Finding 8, which also favors relinquishing jurisdiction to Alaska, should be affirmed.

4. Finding 9 (case familiarity) – RCW 26.27.261(2)(h).

The trial court made the following finding regarding this factor:

While the Pierce County Superior Court is very familiar with the history of this case, it has made no child custody determination since June 2016, and the Fairbanks, Alaska Superior Court is familiar with the current facts and issues involving the children.

John claims this finding is not supported by evidence because the CINA petitions are not in the record. *Supplemental Brief of Appellant* at 22. The record does reflect FMI's disclosures to OCS and his doctor upon his return to Alaska in the summer of 2017, and that doctor's independent report of suspected child abuse. CP 615, 321-323. It also contains information provided by both children to their therapist in Alaska during 2017, and a description of their mental health symptoms when Tomi tried to get them to visit or Skype with John. CP 330. The Alaska judge specifically referenced the children's contact with doctors and counselors there in her description of the CINA case evidence. RP May 17, 2018 at 4-5. This information is sufficient to support the trial court's finding regarding Alaska's familiarity with current facts and issues. Finding 9, which also favors relinquishing jurisdiction to Alaska, should be affirmed.

5. Finding 10 (notice).

John disputes this finding by referencing his prior arguments regarding the alleged insufficiency of the trial court's email notice of that hearing. In response, Tomi also incorporates her prior arguments on this topic.

G. The Trial Court's Determination that Washington Had Become an Inconvenient Forum and Order Relinquishing Jurisdiction to Alaska Were Not an Abuse of Discretion.
(assignments of error 23-24).

The trial court's findings on the relevant criteria listed in RCW 26.27.261(2) are supported by substantial evidence. Considered individually or in combination, these factors clearly favor having current issues regarding the children's custody and visitation be determined in Alaska, where they have lived since 2012, and where their school, medical and counseling providers and records are located. The trial court's conclusion that Washington was an inconvenient forum and order relinquishing jurisdiction to Alaska was neither unreasonable nor based on untenable grounds. It was not an abuse of discretion, and should be affirmed.

H. Tomi Should Be Awarded Attorney Fees on Appeal.

An appellate court may award attorney fees where allowed by statute, rule or contract. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003). If attorney fees are allowable at trial, the prevailing party may recover fees on appeal. RAP 18.1.

An award of attorney fees and costs and a civil penalty is mandatory when the trial court finds a parent in contempt of residential provisions of a parenting plan. RCW 26.09.160(2)(b)(ii). Such an award is discretionary if the court finds that a contempt motion was not brought in good faith. RCW 26.09.160(7). The trial court awarded \$3,524.50 in fees and costs and a \$100 civil penalty to Tomi in its August 8, 2017 Order

finding John in contempt. CP 254, 256. It made a second award of \$1,000 in fees to Tomi in its December 19, 2017 order finding her not in contempt. CP 758. As previously argued in this brief, those trial court awards should be affirmed as part of each contempt order. The appellate court should also award fees to Tomi as the prevailing party in this appeal of those orders, and John's request for fees on appeal should be denied, pursuant to RAP 18.1.

VI. Conclusion

For all of the foregoing reasons, the appellate court should affirm all of the trial court orders appealed by John in this case and award Tomi attorney fees on appeal.

DATED this 13th day of August, 2018.

NORTHWEST JUSTICE PROJECT


John Purbaugh, WSBA #19559
Attorney for Respondent on Appeal,
Tomi Lee Ingersoll (n/k/a Tomi Lee
Winters)

Certificate of Service

I certify under penalty of perjury under the laws of the State of Washington that on August 13, 2018 I caused the foregoing document to be filed with the Court of Appeals, Division II, and to be served on the Attorney for Appellant listed below, via the Washington State Appellate Courts' Portal.

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Dated this 13th day of August, 2018.


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