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No. 52604-2-II

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

In re Marriage of

Patricia Bell,

Appellant,

v.

Carlo DiLorenzo,

Respondent.

Brief of Appellant

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1. Introduction

Trial court judges must be held to standards of fairness and impartiality, even when faced with difficult litigants on both sides. When a simple background check revealed that the visitation supervisor had a history of crimes of dishonesty and the trial court's reaction was to admonish Patty, it is understandable that Patty might question the impartiality of the judge. When the presiding judge distributed a memo to all Pierce County judges and commissioners about the situation, it is understandable that Patty might question the impartiality of all of the judges. Indeed, the trial court abused its discretion when it found no cause for the judges to recuse. This Court should reverse and remand for a new trial in a new venue or before a visiting judge.

The trial court also erred in failing to consider Carlo's partial inheritance of \$700,000 as wealth accessible to him for purposes of determining attorney's fees under RCW 26.09.140 and deviation from the standard child support calculation under RCW 26.19.075. This Court should reverse and remand for re-determination of attorney's fees and child support.

The trial court abused its discretion in finding Patty in contempt of vague provisions of the parenting plan without sufficient evidence of willful disobedience.

2. Assignments of Error

Assignments of Error

1. The trial court abused its discretion in denying Patty's motions to recuse or change venue.
2. The trial court abused its discretion in entering the final orders in this case.
3. Finding of Fact 14.8 is not supported by substantial evidence. In particular, that part that reads, "Uncontroverted evidence in the form of bank records, financial institution records, tax records, correspondence from the probate attorney handling Alexander DiLorenzo's estate, and credible testimony from Carlo DiLorenzo, his mother, Ms. Bernadette Gaerlan, and even Petitioner's private investigator, Ron Bone, proved Mr. DiLorenzo has no possession of wealth at this time." CP 462.
4. Finding of Fact 14.9 is not supported by substantial evidence. It reads, "Until such time, Mr. DiLorenzo has no wealth that would form the basis for an upward deviation in child support."
5. The trial court erred in giving credit to Carlo's voidable transfer of \$700,000 to his mother and allowing him to fraudulently put this wealth out of Patty's reach.
6. The trial court abused its discretion in failing to consider Carlo's wealth in determining attorney's fees under RCW 26.09.140.
7. The trial court abused its discretion in failing to consider Carlo's wealth in determining deviation from the standard child support calculation under RCW 26.19.075.

8. The trial court abused its discretion in finding Patty in contempt.
9. The trial court's findings of fact in support of the contempt order were not supported by substantial evidence.

Issues Pertaining to Assignments of Error

1. Recusal is required when a judge's impartiality might reasonably be questioned. The judges' public statements and internal memo regarding the outing of Kate Lee by Patty Bell created reasonable cause to question the judges' impartiality. Did the trial court abuse its discretion in denying Patty's motions to recuse or change venue?
2. Was Carlo's transfer of his \$700,000 partial inheritance to his mother a voidable transfer?
3. Did the trial court abuse its discretion when it did not consider this wealth in determining an attorney fee award under RCW 26.09.140?
4. Did the trial court abuse its discretion when it did not consider this wealth in determining deviation from the standard child support calculation under RCW 26.19.075?
5. Did the trial court abuse its discretion in finding Patty in contempt of vague provisions of the parenting plan without evidence of willful disobedience?

3. Statement of the Case

3.1 From the beginning of their relationship, Carlo exhibited significant wealth, leading Patty to believe he owned substantial assets.

When Patty Bell and Carlo DiLorenzo started dating, Carlo was the owner of a Jimmy Johns franchise in upstate New York. 3 RP 404. Carlo claimed to own multiple cars, a percentage of his mother's house, and a portfolio of stocks. 1 RP 59-61. He told Patty that his father gave him \$250,000 per year until age 25. 1 RP 60.

When they moved in together, Carlo told Patty that he was paying the rent. 1 RP 59. Carlo took care of the finances, mostly online; Patty was not involved. 1 RP 58, 73, 80; 4 RP 547-48. Patty had a credit card for day-to-day expenses. 1 RP 80. Carlo had two other credit cards that he used regularly, but Patty didn't know how they were paid. 1 RP 80-81.

Carlo admitted at trial that through the first year of the marriage there was no clear communication with Patty about his finances. 4 RP 556; 5 RP 767, 769, 779-80. Up until 2015, Patty believed that Carlo was the sole source of support for their young family. 1 RP 68.

In early 2016, Carlo and Patty learned that Carlo could expect to inherit about \$4 million from his father who had passed away. 3 RP 408-09.

3.2 In the second year of the marriage, Carlo began to tell Patty that his mother was the true owner of the wealth, which Patty found difficult to believe.

In late 2015, Carlo's mother, Ms. Gaerlan, set up a meeting between herself, Patty, and Carlo, facilitated by a Dr. Horowitz, with whom they were all familiar, to clear the air about the finances. 6 RP 863-65. At this meeting, Carlo and Ms. Gaerlan explained that Carlo had no money of his own, did not own any stocks, and did not own a share in his mother's house. 4 RP 558. Ms. Gaerlan told the couple she would give them a total of \$50,000 over the next year, but that would be the end of her support. 6 RP 864-65.

The meeting was very upsetting to Patty, who was confused by this sudden change of fortune and lost much of her trust in Carlo and Ms. Gaerlan. 1 RP 72-73; 4 RP 558; 6 RP 865. Patty was not convinced that this new story was the truth. *See, e.g.*, 1 RP 68 (testifying that she was told that Ms. Gaerlan had been supporting the family, but that didn't mean she knew it).

The Jimmy Johns franchise was sold in March 2016. 3 RP 404. The business had been losing an average of \$13,000 per month. 3 RP 404.

With Ms. Gaerlan's support about to come to an end, Patty and Carlo decided that Carlo should pursue a certificate in software engineering at a program in Austin, Texas. 3 RP 403,

405. While Carlo was studying in Texas, Patty lived at her parents' house in Gig Harbor with the children. 1 RP 33. When Carlo completed the program, he came to Washington and started looking for work. 1 RP 33-34.

In Washington, Carlo emphasized to Patty that they had no money. 1 RP 94. But he would alternate between bragging about stocks he planned to buy and telling her that they had no money at all, leaving Patty confused. 1 RP 95. Trying to find a solution, Patty suggested that they could use Carlo's ownership interests in the various assets he had mentioned over the years, including his mother's home. 1 RP 118-19. Patty and her parents pressured Carlo to make use of these assets. 4 RP 612-14, 616.

That proved to be the last straw for Carlo, who could not understand how Patty still thought he had any claim to any of his mother's property. 4 RP 619-20.

3.3 Carlo suddenly moved back to New York without notice and filed for divorce, leaving Patty feeling abandoned in Gig Harbor with their two young children.

At this same time, Carlo had landed what he thought was a big interview—he was confident he would get the job. 1 RP 34. By the morning of the interview, Carlo had decided he needed to file for divorce. 4 RP 620. He called a few attorneys, including his attorney back in New York, who advised him to fly back immediately for a meeting and to file in New York. 4 RP 620-21.

The attorney told him not to tell Patty what he was doing, only that he was okay and everything would be fine. 4 RP 621-22. Carlo followed this advice and flew to New York after his interview without telling Patty. 6 RP 794.

When Carlo didn't come home that night, Patty feared the worst. 1 RP 35. There had been no indication that anything was wrong or that Carlo had any reason not to come back. 1 RP 35. When Patty reached out to Carlo, his texts in response were mysterious—not explaining where he was or what was going on but only saying things like he needed time to think about what's next. 1 RP 35-36. Patty did not understand what was going on. 1 RP 36. She tried to reach out to his mother or his friends but could not get any more information. 1 RP 36-37.

Within a few days, Patty's debit and credit cards were unusable. 1 RP 39. Carlo had misunderstood some advice from his attorney about how to handle the cards. 4 RP 623-24, 626. He reached out to try to start sending money to Patty. 4 RP 624. But by then the damage was already done—Patty felt entirely abandoned and thought she and the boys would have ended up in a homeless shelter if not for support from her parents. 1 RP 134.

3.4 The divorce proceedings were bifurcated between New York (property issues) and Washington (child custody issues), and the Washington trial court issued a temporary parenting plan and child support order.

Carlo filed his divorce petition in New York. Patty filed her own petition in Washington. CP 1. On cross-motions of the parties and after a UCCJEA conference between the courts of the two states, the divorce was bifurcated. CP 38-39. New York retained jurisdiction over the dissolution and property issues. CP 38. Washington retained jurisdiction over the children. CP 39.

The trial court placed the children with Patty and gave her sole decision-making authority. CP 15. The temporary parenting plan limited Carlo to “liberal supervised visits” with the children. CP 14. The plan specified that visits would be supervised by professional supervisor, Kate Lee. CP 14.

The trial court ordered an upward deviation in child support based on evidence of Carlo’s “stock interests, vehicles owned, real estate, facebook posts, past ownership in Jimmy Johns, inheritance and access to wealth.” CP 26. The commissioner ordered Carlo to pay \$5,000 per month. CP 26. On revision, a judge modified the amount to \$4,600 per month, also “recognizing Grandparents have routinely provided financial support during the marriage.” CP 43.

3.5 Carlo received partial distributions from his father's estate, totaling \$700,000, which he immediately transferred to his mother, ostensibly as payment of debts he claimed to owe her.

While the divorce was pending, Carlo received two partial distributions from his father's estate, totaling \$700,000. 3 RP 410-11, 450. By the time of trial, Carlo still did not know when the rest of the inheritance would be received or what form it would take. 3 RP 411, 4 RP 541. Carlo paid the full amount of these distributions to his mother, claiming he was repaying debts he owed her. 3 RP 429-30, 436.

Ms. Gaerlan had been a member of the LLC that owned the Jimmy Johns franchise, with 51 percent ownership. 3 RP 424-25, 427. She had contributed a total of \$571,000 to the LLC to start the business and keep it afloat. 3 RP 425. When the franchise was sold, the net proceeds of \$106,000 all went to Ms. Gaerlan. 3 RP 425-26. Carlo also signed a promissory note, promising to repay his mother for the rest of her losses. 3 RP 428.

In May 2017, in the middle of the divorce, Carlo signed a second note to his mother, for \$393,643. 3 RP 434. The note represented amounts that Ms. Gaerlan had given to Carlo over the years, going back to his college tuition and expenses as early as 2008. 3 RP 434, 464-69 (detailing the specific gifts). At the time Ms. Gaerlan gave these gifts, there was no expectation of

repayment. *E.g.*, 3 RP 466 (Carlo not expected to pay for his BMW); 5 RP 769 (no agreement to repay college costs).

When Carlo received the first distribution of \$200,000 from the estate in February 2017, he immediately paid it over to his mother, referencing it as partial payment on the first note (Jimmy Johns losses). 3 RP 436. When he received the second distribution of \$500,000 in September 2017, he paid it over to his mother in two checks: one for the balance of the first note (about \$277,000) and another as partial payment (about \$223,000) on the second note. 3 RP 429-30, 433, 459-60.

3.6 Patty discovered that the court-approved visitation supervisor, Kate Lee, was a felon guilty of crimes of dishonesty. When Pierce County judges got involved and made public statements in favor of Lee, Patty moved for their recusal and a change of venue.

After a few months under the temporary parenting plan, Patty had reason to question the performance and impartiality of the court-approved visitation supervisor, Kate Lee. CP 115-16. Knowing that Lee could be called as a witness at trial, Patty asked her private investigator, Ron Bone, to do a background check on Lee. CP 97-98. The investigator discovered that Kate Lee was an ex-felon, convicted in the late 2000s of crimes of dishonesty, including identity theft, forgery, and perjury. CP 116, 167, 186-87, 192, 209.

The investigator contacted Lee to see if she could explain what he had found. CP 144, 209. Lee, whose career depended on a reputation for integrity, was troubled by this inquiry into a past that she had worked hard to keep hidden. CP 65, 144. Rather than risk being exposed, she withdrew from her position as visitation supervisor, asserting that the investigation into her background “crossed the line.” CP 65.

Lee’s hopes of quietly disappearing were dashed when Carlo complained to the court that Patty drove Lee off the case. CP 54. Patty felt compelled to explain to the court what she had found—that Kate Lee had a history of felonies of dishonesty and could not be trusted as a witness. CP 97-98, 115-16.

Lee filed a declaration in which she not only refused to acknowledge her criminal past but insinuated that she was actually the victim and had cleared her name and passed background checks. CP 143-48.¹ The trial court (Judge Kitty-Ann van Doorninck) believed Lee’s declaration and concluded that Patty was making false allegations. CP 247, 258 (“I relied on the declaration”). But the allegations were true: Kate Lee was a convicted felon. CP 186-87, 192, 323.

¹ Carlo’s attorney, Stacey Swenhaugen, filed this misleading declaration on Nov. 14, 2017, even though Lee had confessed her criminal past to Swenhaugen on Nov. 1. CP 323.

The trial court castigated Patty for investigating Lee's past:

The behavior with Ms. Lee is appalling to me. Ms. Lee has been a respected professional person in the community for a long time. For her to feel forced that she needs to respond to the allegations, without the professional courtesy of talking to her—Mr. Robinson, you have requested, and I have put in orders multiple times, that Ms. Lee be the supervisor. And to have this kind of declaration in this court file is, frankly, appalling to me, without the courtesy of talking to her about whatever the issue was. And just putting it all in for the public. So I'll just say that for the record.

CP 242.

One of Patty's attorneys reached out to a local reporter, who wrote an article for the Tacoma News Tribune. CP 245. The article told the story of how Patty's discovery effectively ended Lee's career as a visitation supervisor. CP 421-24. Lee admits that she committed identity theft, forgery, and perjury, for which she was convicted in 2002, 2003, and 2005. CP 421. Due to Lee's criminal past, Pierce County Superior Court Presiding Judge Elizabeth Martin told the paper, "My concern is that she's impeachable as a witness." CP 422. On Jan. 17, 2018, Judge Martin "sent a directive to judges and court commissioners, telling them that Lee shouldn't be approved as a visitation supervisor in future family-court cases." CP 421.

Speaking to the reporter, Judge Martin described the outing of Lee as “a really sad situation.” CP 424. The reporter also spoke with Judge van Doorninck, who stated, “I relied on the declaration,” referring to Lee’s misleading Nov. 14 declaration. CP 423. The reporter wrote, “Van Doorninck took the statement at face value, and assumed the allegations about Lee weren’t true.” CP 423. Unfortunately, as Lee finally admitted, Patty had been right.

Patty sought to recuse not only Judge van Doorninck, but all Pierce County judges and commissioners who had received Presiding Judge Martin’s memo. CP 215 (motion to recuse), 247 (motion to change venue), 408 (motion for reconsideration). The motions were heard on Feb. 2, 2018, by Judge Karena Kirkendoll. RP, Feb. 2, 2018, at 1. Judge Kirkendoll denied the motions, stating that she could not find actual bias on the part of all 22 Pierce County judges. RP, Feb. 2, 2018, at 37-38. The judge subsequently denied Patty’s motion for reconsideration. CP 429.

3.7 The parties settled the property issues in New York and the main points of a parenting plan in Washington, but proceeded to trial on issues of child support, attorney’s fees, intransigence, and restraining orders.

In January 2018, the parties held a mediation before a New York judge and arrived at an agreement to settle the

property issues in the divorce. 4 RP 560-62. Patty received \$90,000 from the divorce settlement, but almost all of the money was paid to her New York attorneys and to repay her father for divorce-related expenses. 1 RP 53; 4 RP 563.

Shortly thereafter, the parties had a mediation in Washington regarding custody issues. 3 RP 381. They agreed to a parenting plan that gave Carlo incentives to become more involved with the children. 3 RP 381. If Carlo moved back to Washington, he would get more parenting time, in phases, until reaching a 50/50 coparenting plan. 3 RP 382.

The trial, which had originally been scheduled for three weeks, was completed in six days. *See* CP 440. Four issues were addressed at trial: child support, attorney's fees, intransigence, and protective orders. 7 RP 984.

The trial court awarded child support of \$980.95 per month, based on the standard calculation from Carlo's actual income and income imputed to Patty. 7 RP 985-86, 989. The trial court found that Carlo had no wealth and therefore denied Patty's requested deviation on the basis of wealth. 7 RP 986-88. For the same reason, the trial court denied Patty's request for attorney's fees on the basis of need and ability to pay. 7 RP 989. The trial court found numerous examples of intransigence by Patty, concluding that her intransigence "permeated the proceedings." 7 RP 990-95. The trial court inserted into the

agreed parenting plan a finding of abusive use of conflict by Patty. 7 RP 996. The trial court awarded Carlo attorney's fees of \$10,000 for intransigence, \$3,000 for defeating Patty's change of venue motion, and \$2,500 for discovery violations. 7 RP 996. The trial court granted Carlo's request for a continuing restraining order. 7 RP 997.

Within days after the final orders were entered, Judge Kirkendoll recused herself from the case without explanation. CP 502.

3.8 Three months after final orders, Carlo made a wide-sweeping motion for contempt, which the trial court largely denied but found Patty in contempt on three narrow issues.

In November 2018, just three months after the final orders were issued, Carlo filed a wide-sweeping motion for contempt. CP 658. Carlo alleged that Patty was not involving him in major decisions; was not paying her share of mediation costs; did not sufficiently cooperate in obtaining a second opinion on the children's need for counseling; did not end their counseling with Hope Sparks; did not sufficiently facilitate Skype visits between Carlo and the children; did not post appointments and activities on the calendar in Our Family Wizard; made derogatory comments about him in front of the children; and kept Carlo under surveillance. CP 658-73.

The trial court commissioner found that most of these were willful violations of the parenting plan, sanctioned Patty for contempt, and held that she could purge her contempt by “follow[ing] the parenting plan.” CP 722-24. On revision, the judge held that most of the commissioner’s findings were not supported by substantial evidence or that the provisions of the parenting plan were not specific enough to support a contempt order. CP 734. The judge affirmed three grounds for contempt: 1) Patty did not pay mediation fees; 2) Patty did not post all appointments on Our Family Wizard; and 3) Patty did not sufficiently assist with Skype calls. CP 733-34.

Patty moved for reconsideration, arguing among other things that there was insufficient evidence to support a finding that she violated the parenting plan in bad faith. CP 735-45. The trial court denied the motion. CP 765.

4. Argument

4.1 The trial court abused its discretion in denying Patty’s motions for recusal and change of venue in the face of public comments by Pierce County judges bemoaning Patty’s discovery of visitation supervisor Kate Lee’s prior crimes of dishonesty.

“A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.” CJC 2.11. The trial court denied Patty’s motion for

recusal because it could not find actual bias. “However, in deciding recusal matters, **actual prejudice is not the standard.**” *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995) (emphasis added). Due to the public comments made by two judges and the internal memo distributed to all Pierce County Superior Court judges and commissioners regarding Patty Bell and Kate Lee, the impartiality of every judicial officer might reasonably be called into question. The trial court’s refusal to recuse prejudiced Patty through the remainder of the proceedings in the trial court. This Court should reverse, disqualify all Pierce County Superior Court judicial officers, and remand for a new trial in another county or before an untainted visiting judge.

4.1.1 The standard of review is abuse of discretion.

A judge’s decision not to recuse is reviewed for abuse of discretion. *See State v. Gentry*, 183 Wn.2d 749, 761, 356 P.3d 714 (2015). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Id.* If a trial court applies the incorrect legal standard, “it necessarily abuses its discretion.” *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). The correct legal standard is a question of law reviewed de novo. *Id.* at 833-34.

4.1.2 The legal standard for recusal is whether a judge’s impartiality might reasonably be called into question.

The Code of Judicial Conduct includes many provisions that are relevant to the events surrounding Kate Lee, the newspaper article, and the memo distributed to all Pierce County judicial officers.

“A judge ... shall perform all duties of judicial office fairly and impartially.” CJC 2.2. “The law goes farther than requiring an impartial judge; it also requires that the judge **appear to be impartial.**” *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172, *amended at* 837 P.2d 599 (1992) (emphasis added).

“A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety **and the appearance of impropriety.**” CJC 1.2 (emphasis added). “The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s ... impartiality.” CJC 1.2, Comment [5].

“A judge shall not make any public statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.” CJC 2.10. “This Rule’s restrictions on judicial speech are essential to

the maintenance of the independence, integrity, and impartiality of the judiciary.” CJC 2.10, Comment [1].

All of these rules are embodied in the appearance of fairness doctrine. “The CJC recognizes that where a trial judge’s decisions are tainted by **even a mere suspicion of partiality**, the effect on the public’s confidence in our judicial system can be debilitating.” *Sherman*, 128 Wn.2d at 205 (emphasis added).

The legal standard to be applied to Patty’s motions to recuse or change venue is concisely stated in Code of Judicial Conduct 2.11: “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.” CJC 2.11. “The test for determining whether the judge’s impartiality might reasonably be questioned is an objective test that assumes that ‘a reasonable person knows and understands all the relevant facts.’” *Sherman*, 128 Wn.2d at 206.

The trial court denied Patty’s motions to recuse or change venue because she could not find actual bias on the part of all 22 Pierce County judges. RP, Feb. 2, 2018, at 37-38. But, as noted above, actual bias is not the legal standard. The correct legal standard is whether the judge’s impartiality might reasonably be questioned. The trial court applied the incorrect legal standard and thereby abused its discretion.

4.1.3 Due to the public comments and internal memo, Pierce County judges' impartiality could reasonably be called into question.

The test for whether a judge's impartiality might reasonably be called into question is an objective test from the point of view of a reasonable person who knows and understands all of the relevant facts. Here, the facts are as follows. Patty ran a background check on visitation supervisor, Kate Lee, and discovered that Lee was a convicted felon who committed crimes of dishonesty. If Lee were to be called at trial, her past felonies could be admissible impeachment evidence under ER 609. Knowing she had been caught, Kate Lee withdrew from the case of her own accord. Carlo blamed Patty and raised the issue in court, arguing Patty had acted improperly. Patty responded by revealing the relevant ER 609 evidence she had legitimately obtained. Lee responded with a misleading declaration that tried to hide the truth of her criminal past. Judge van Doorninck believed Lee and castigated Patty for her legitimate investigation into Lee's background.

When the truth was finally confirmed, Judge van Doorninck made public comments to the media explaining her error in believing Lee's declaration. Presiding Judge Martin distributed a memo to all judicial officers warning them not to approve Kate Lee as a visitation supervisor due to the risk that

she could be impeached as a witness now that Patty had revealed Lee's criminal past. Judge Martin also made public comments to the media, praising Lee's past work in numerous cases and describing Patty's outing of Lee as "a really sad situation."

A reasonable observer knowing all of these facts might reasonably question whether any of the judges who received the memo—that is, all Pierce County Superior Court judges and commissioners—could preside impartially over Patty's case when they realized—as they inevitably would by reviewing the file—that this was the case that created the "sad situation" described in the memo and that Patty was the one who discovered the impeaching evidence that ended Kate Lee's career.

From an objective perspective, the judges' impartiality can reasonably be called into question. This is an unusual and extreme situation, but it meets the standard as to all of these judges. Due to the public comments and the internal memo distributed to all judicial officers, there is an appearance that Pierce County judges might not be able to remain impartial in this case. Under the proper legal standard, the trial court should have recused and ordered either a change of venue or a visiting judge. This Court should reverse, vacate the final orders, and

order a new trial in a different county or before an untainted visiting judge.

4.1.4 The trial court's denial of Patty's motions resulted in prejudice to Patty at trial and in post-trial motions.

The appearance of unfairness reared its ugly head at trial and in post-trial motions. It appears that the judges may have been animated against Patty because of the Kate Lee situation. The issues discussed below in Parts 4.2 and 4.3 of this brief may have been affected.

The trial court failed to consider the \$700,000 inheritance distributions received by Carlo during the divorce as wealth accessible to him for purposes of attorney's fees under RCW 26.09.140 and of deviation from the standard child support calculation. In contrast, the trial court **did** consider Patty's receipt of \$90,000 from the New York divorce. The trial court did not treat these similar situations equally—for what reason is unclear.

Carlo received these large sums of money at a time when he was under significant child support obligations under the temporary orders. Yet he chose to pay the whole \$700,000 to his mother in repayment for phantom debts and divorce-related expenses she had paid on his behalf. Patty also paid all of her \$90,000 to her attorneys and to her father for divorce-related

expenses he had paid on her behalf. Yet the trial court counted Patty's \$90,000 against her when considering her financial need but did not count any of Carlo's \$700,000 when considering his ability to pay attorney's fees or child support. The trial court's impartiality could reasonably be questioned.

In the post-trial contempt hearing, the trial court held Patty in contempt of three provisions of the parenting plan. However, as shown in Part 4.3, below, the provisions of the plan are not sufficiently clear to give rise to a finding of contempt, and substantial evidence does not support a finding that Patty willfully violated the provisions in bad faith. It appears the decision may have been improperly influenced by some bias against Patty. In making his oral ruling, Judge Schwartz made a telling Freudian slip:

THE COURT: I know you all want to sit here and argue about this more, but, look, there is sufficient evidence from below that **Ms. Lee [sic]** did not comply ...

MS. SWENHAUGEN: Ms. Bell, Your Honor.

THE COURT: I'm sorry. Ms. Bell ...

RP, Jan. 11, 2019, at 32 (emphasis added). It appears that the impartiality of the judges can reasonably be questioned. The trial court abused its discretion in denying Patty's motions to recuse or change venue. This Court should reverse, vacate the

final orders, disqualify the judges, and remand for a new trial in a new county or before an untainted visiting judge.

4.2 The trial court erred in failing to consider the \$700,000 partial inheritance distributions received by Carlo as wealth accessible to him for purposes of attorney's fees under RCW 26.09.140 and of deviation from the standard child support calculation.

Even if this Court declines to reverse and remand for a new trial due to the appearance of unfairness, there are other, discrete issues on which this Court should reverse and remand for new findings and conclusions.

The trial court erred in failing to consider Carlo's \$700,000 inheritance distribution as wealth accessible to him for purposes of ability to pay attorney's fees under RCW 26.09.140 and deviation from the standard child support calculation under RCW 26.19.075. Carlo should not be permitted to erase this significant wealth by gratuitously transferring it to his mother as payment for phantom debts that were not supported by consideration. The trial court should have considered the \$700,000 when determining attorney's fees and child support.

4.2.1 Carlo's gratuitous transfer of his inheritance distributions to his mother should not be credited because the promissory notes were not supported by consideration.

The trial court found that Carlo "has no possession of wealth at this time." CP 462 (Finding of Fact 14.8); CP 473 (findings regarding deviation from standard calculation); 7 RP 987. This finding was not supported by substantial evidence because it ignored the \$700,000 Carlo received while the divorce was pending.

This Court reviews a trial court's findings of fact for substantial evidence and conclusions of law de novo. *In re Marriage of Stern*, 68 Wn. App. 922, 929, 846 P.2d 1387 (1993). Findings of fact will be reversed if they are not supported by substantial evidence. *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the finding. *Id.* "Where the trial court mislabels a conclusion of law as a finding of fact, we review the conclusion de novo." *Casterline v. Roberts*, 168 Wn. App. 376, 381, 284 P.3d 743 (2012).

The trial court's finding that Carlo had no wealth was not supported by evidence sufficient to persuade a fair-minded person of its truth. Rather, a fair-minded person viewing the

evidence could only be persuaded that Carlo had \$700,000 of wealth, which he gratuitously gave to his mother in order to avoid having to give any of it to Patty.

Carlo had no legal obligation to pay the notes to his mother because the notes were not supported by consideration. *See* RCW 62A.3-303 (the maker of a note has a defense if the note was issued without consideration). Carlo's notes to his mother were gratuitous and unenforceable. As a result, his transfer of the \$700,000 to his mother was nothing more than a gift—a gift that enabled Carlo to argue that he had no wealth despite having received such a substantial sum.

Carlo's transfer of the \$700,000 to his mother bears the hallmarks of a voidable, fraudulent transfer. *See* RCW 19.40.041 and .051. The transfer was made without receiving value in exchange (because the promissory notes were unenforceable). The transfer rendered Carlo insolvent and placed all of his assets outside of Patty's reach. The transfer was to an "insider," his mother. Carlo arguably retained some control over the assets because he knew that his mother would continue to pay his child support obligations and litigation expenses. The trial court should have treated the transfer as void as to Patty and considered it for purposes of attorney's fees and child support.

4.2.2 The Jimmy Johns note was not supported by consideration.

At the time Carlo's mother contributed money to Carlo's Jimmy Johns enterprise, she received consideration for her contributions in the form of her 51 percent ownership interest. 3 RP 456-57. Her interest came by way of cash contributions; Carlo's 49 percent interest came by way of sweat equity—that is, Carlo ran the business and his mother financed it. His mother's interest entitled her to receive 51 percent of the net profits. 3 RP 456-57. The LLC operating agreement was silent as to losses.

Carlo had no legal obligation to guarantee against his mother's losses. Although Carlo testified that he had promised his mother from the beginning that he would pay her back, 3 RP 428, his testimony is insufficient to convince a fair-minded person in the face of the rest of the evidence. For example, Carlo claimed that the promise was memorialized in a Facebook message. 3 RP 428. But that message only stated, "I don't want you to get involved in Jimmy John's. The only role that you will play will be the bank in the project." 3 RP 456. This message proves nothing more than the arrangement described above: Carlo will run the business, contributing sweat equity for his interest, while his mother will contribute cash for her interest. The Facebook message says nothing about Carlo guaranteeing against any losses in Ms. Gaerlan's investment.

Ms. Gaerlan testified that her role was as a bank making a loan but she also characterized her contributions as an investment in the business. 6 RP 833. She testified that it was important to her to have the 51 percent ownership edge over Carlo because she was providing the money. 6 RP 833. When asked about the original understanding of her contributions, she testified that they never expected to lose money. 6 RP 834. No promissory notes were made contemporaneously with Ms. Gaerlan's contributions. 4 RP 428-29; 6 RP 887-88. She explained that her original expectation was to regain her money through her 51 percent share of profits or through a profitable sale of the business, not through a promissory note. 6 RP 888-89.

The evidence shows that at the time Ms. Gaerlan made her contributions to the Jimmy Johns enterprise, she did so just as any business investor, taking the risk of loss in hopes of reaping the reward of profits. Ms. Gaerlan had no expectation of being repaid for her contributions except in the ordinary course of business, through net profits or a profitable sale of the business a few years down the line.

The notion that Carlo had promised to repay her for any losses is not supported by substantial evidence. In fact, the two were so excited about the possibility of profits that they neglected to consider what would happen in the event of loss.

Because Ms. Gaerlan had already been compensated for her contributions through her ownership interest, those contributions could not be consideration for Carlo's later promise to repay. Carlo's promissory note to his mother for the Jimmy Johns losses was not supported by consideration and therefore was not enforceable. As a result, Carlo's transfer of his inheritance distributions to his mother was gratuitous and voidable. In making determinations based on wealth, the trial court should have treated the transfer as having never been made.

4.2.3 The May 17, 2017 note was not supported by consideration.

In May 2017, in the middle of the divorce, Carlo signed a second note to his mother, for \$393,643. 3 RP 434. The note represented amounts that Ms. Gaerlan had given to Carlo over the years, going back to his college tuition and expenses as early as 2008. 3 RP 434, 464-69 (detailing the specific gifts). At the time Ms. Gaerlan gave these gifts, there was no expectation of repayment. *E.g.*, 3 RP 466 (Carlo not expected to pay for his BMW); 5 RP 769 (no agreement to repay college costs).

A past benefit received is not consideration for a later promise to pay unless all of the elements of the "material benefit rule" are established. *Snow v. Nellist*, 5 Wn. App. 140, 143, 486

P.2d 117 (1971). In order for Ms. Gaerlan's past gifts to her son to serve as consideration for the May 17, 2017 promissory note, it must appear from the evidence that 1) the gifts conferred an actual material benefit to Carlo; 2) that Ms. Gaerlan expected to be compensated and did not intend them as gifts; 3) that the circumstances were such as to create a moral obligation on Carlo's part; and 4) the benefit received has not constituted the consideration for another promise. *See Id.*

Ms. Gaerlan's past gifts to Carlo all fail this test, at least as to element 2. There is no evidence that Ms. Gaerlan expected to be compensated at the time she gave the gifts. As such, the gifts cannot serve as consideration for Carlo's promissory note.

This same rule applies to the Jimmy Johns note as well. Because Ms. Gaerlan's contributions to the LLC constituted consideration for receiving a 51 percent ownership interest, those contributions cannot also serve as consideration for the later promissory note.

Carlo's promissory notes to his mother were not supported by consideration and therefore were not enforceable. As a result, Carlo's transfer of his inheritance distributions to his mother was gratuitous and voidable. In making determinations based on wealth, the trial court should have treated the transfer as having never been made. The trial court's finding/conclusion that Carlo had no wealth was not supported by substantial

evidence. This Court should reverse and remand for entry of new findings consistent with the evidence and reconsideration of attorney's fees and child support based on Carlo's wealth.

4.3 The trial court abused its discretion in finding Patty guilty of contempt.

4.3.1 This Court reviews contempt decisions for abuse of discretion.

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

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). The trial court's discretion is cabined by applicable statutory provisions. *Chandola*, 180 Wn.2d at 642.

4.3.2 The trial court’s finding of contempt was based on untenable grounds because the trial court did not consider whether Patty acted in bad faith.

If a trial court finds after a hearing that a parent has “not complied with the order establishing residential provisions” of a parenting plan in “bad faith,” the court “shall find” the parent in contempt of court. RCW 26.09.160(2)(b). In determining whether there has been a bad faith failure to comply with a parenting plan, the Court must strictly interpret the provisions thereof, the “violation of which provides the basis for contempt proceedings.” *Graves v. Duerden*, 51 Wn. App. 642, 647, 754 P.2d 1027 (1988). Thus, “[i]n contempt proceedings, an order will not be expanded by implication beyond the meaning of its terms. The facts found must constitute a plain violation of the order.” *Johnston v. Beneficial Mgmt. Corp. of Am.*, 96 Wn.2d 708, 712-13, 638 P.2d 1201 (1982).

The trial court’s contempt order was based on untenable grounds because it did not consider whether Patty acted in bad faith. Substantial evidence does not support a finding that Patty violated the parenting plan in bad faith.

4.3.2.1 At worst, Patty was negligent in not calendaring events in Our Family Wizard.

The parenting plan requires, “The parents will utilize the calendar feature in Our Family Wizard. This means that all

schedules pertaining to the children's therapy, medical [appointments], school and activities shall be loaded onto the calendar." CP 497. This provision is further clarified in the following paragraph: "Each parent shall have full and equal access to education and health care records, including health insurance records and counseling for the children. Each parent shall input information that the other parent cannot get directly from the school, doctor [or] counselor's office, into Our Family Wizard." CP 498.

The provision is problematic. First, the general provision places a duty on both parties to post, apparently, all information that is known to them at any time. Where the obligation applies equally to both parties, how can one be found in contempt for an absence of information? The clarifying provision is not much help. It seems to modify the duty such that a parent is only required to input information that the other parent cannot get directly. But since both parties are given full and equal access, how is either parent to know if the other parent somehow is unable to get a particular piece of information directly from the school, doctor, or counselor?

To constitute a clear, bad faith violation of this provision, Patty would have had to have had access to information that Carlo could not get directly; have known or had reason to know

that Carlo could not get that information; and have intentionally failed to input that information.

The evidence of this alleged violation was that initially no events had been calendared. Then, after mediation, when Patty realized that there was information that Carlo was unable to get directly, she input two events. This is evidence of good faith, not willful noncompliance. Initially she assumed that, per the order, Carlo would have direct access to learn about upcoming events. As the purpose of these provisions is to ensure that both parents have information, it makes no sense to hold a parent in contempt for failing to post information that was directly accessible by the other parent. When Patty realized Carlo was not getting full information, she posted the events. At worst, Patty was negligent in failing to recognize her obligation. She did not willfully violate these provisions of the parenting plan.

4.3.2.2 Patty did not willfully fail to promote Skype contact.

Paragraph 14(a) of the parenting plan requires “Unmonitored Communication Between the Children and Parents.” CP 497. “At this age the children need physical assistance with technical communication; however the goal as they get older is the parents shall promote unimpeded and

unmonitored contact with the other parent via telephone or Skype at reasonable times.” CP 497.

This provision is also problematic. It acknowledges that young children will need some physical assistance but fails to provide any guidance on how that should be accomplished. It does not require any specific conduct on the part of either parent. It states a goal but does not require conduct. Even the stated goals are in opposition to each other. A parent cannot ensure that a Skype conversation is both unimpeded and unmonitored. A parent cannot provide “physical assistance with technical communication” without monitoring the call to be sure the children are using the hardware and software properly. Impossibility of complying with an order provides a complete defense to contempt. *Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 933, 113 P.3d 1041 (2005). This provision is not amendable to a finding of contempt.

The evidence does not support a finding that Patty was willfully violating this provision—that instead of promoting unimpeded and unmonitored contact, she was intentionally preventing that access or monitoring that contact. Instead, the evidence shows that Patty made time for the children and their father via skype and did so without constantly monitoring that conversation. Thus, she was attempting to comply with this provision in good faith.

4.3.2.3 The trial court failed to address bad faith in ruling on failure to pay the mediator's fee.

The parenting plan requires the parties to take their conflicts under the plan to mediation before they go to court. Paragraph 6.b. of the parenting plan provides, "The parents will pay for the mediation ... as follows: Each parent shall pay per the child support worksheet." CP 489. The Child Support Worksheet does not specify any method, amount, or percentage of payment for mediation or any other expense other than the child support transfer payment. *See* CP 481-85. It specifies the parties' proportional share of income, but this does not clearly tell the parties how they should pay for mediation. CP 481.

Even assuming the parenting plan intended to refer to the Child Support Order, rather than the Worksheet, the order does not clearly tell the parties how to pay for mediation, either. The order refers to the proportional share of income as a method for calculating shares of specified expenses for the children, but not for costs of mediation. It may be that the language of the parenting plan was intended to require each party to pay a percentage of mediation fees according to their proportional share of income, but it cannot be said that this is clear from the face of the order. This provision is not amenable to an order of contempt unless it is first clarified.

The order also does not specify any timeline for payment of the mediation expenses. Should a parent be subject to contempt for not paying on the day of the mediation? Within two weeks? One month? Three months? The parenting plan does not draw the line. There could be many reasons for a parent's delay in payment. Without a due date, how can a parent be found to have willfully disobeyed the payment requirement?

The mediation fee is a civil debt. By paying it, Carlo steps into the shoes of the mediator to collect the debt from Patty. Either Carlo or the mediator has an adequate remedy for collecting the debt by obtaining a judgment. Contempt for nonpayment is proper only when the payment is related to support. *In re Marriage of Curtis*, 106 Wn. App. 191, 198, 23 P.3d 13 (2001). Payment of a mediator's fee is not related to support of either parent or children. Contempt cannot lie for this civil debt.

Finally, the trial court failed to address the issue of bad faith. The sum total of the trial court's analysis at the hearing was as follows:

THE COURT: I understand that. Let's go to the next one. Refusing to pay mediator fees. This is found in 6(b) of the Parenting Plan. 6(b) says that the mediator fees are to be paid per the child support worksheet. Were those paid?

MR. MILLS: No.

THE COURT: Okay. The next one says...

RP, Jan. 11, 2019, at 17.

The trial court's findings of contempt were based on untenable grounds because substantial evidence does not support a finding that Patty clearly violated unambiguous provisions of the parenting plan or that such violations were willful. This Court should reverse the contempt order and its award of fees and penalties.

5. Conclusion

The trial court abused its discretion in denying Patty's motions to recuse or change venue. The public comments of Judges van Doorninck and Martin, combined with the memo distributed to all judicial officers regarding the outing of Kate Lee by Patty, resulted in violation of the appearance of fairness doctrine. This Court should reverse the trial court's denial of the motions, vacate the final orders, disqualify all Pierce County Superior Court judicial officers who received the memo, and remand for a new trial in a new county or before an untainted visiting judge.

Even if the Court finds the judges were not disqualified, the trial court erred in failing to consider Carlo's \$700,000 partial inheritance as wealth for purposes of considering attorney's fees under RCW 26.09.140 and of deviation from the

standard child support calculation under RCW 26.19.075. This Court should reverse, vacate the finding that Carlo had no wealth, and remand for re-determination of attorney's fees and deviation from the standard calculation.

Additionally, the trial court abused its discretion in finding Patty in contempt. The three provisions of the parenting plan that Patty allegedly violated are not specific enough to form the basis of a contempt order. Substantial evidence does not support a finding that Patty willfully violated an unambiguous order. This Court should reverse and vacate the contempt order together with its judgment for attorney's fees, mediator fees, and civil penalties.

Respectfully submitted this 13th day of May, 2019.

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