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State of Washington
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PATRICIA ANN BELL, APPELLANT

v.

CARLO ALEXANDER DILORENZO, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Karena Kirkendoll

No. 16-3-04479-3

BRIEF OF RESPONDENT

LAW OFFICE OF SOPHIA M.
PALMER, P.L.L.C.
Stacey Swenhaugen, WSBA No. 41509
615 Commerce Street, Ste 101
Tacoma, WA 98402
PH: (253) 777-4165
Attorney for Respondent

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Patty failed to preserve her claim of error that the trial judge applied the incorrect legal standard and thereby abused her discretion
2. The correct legal standard for determining a motion to change venue under RCW 4.12.030(2) is whether there is reason to believe an impartial trial cannot be had.
3. There is no sufficient evidence to overcome the presumption of impartiality of the trial court.
4. There is no admissible evidence of an “internal memo” between Pierce County Judges.
5. Patty should not be rewarded for manufacturing any alleged perceived bias.
6. In order to determine the existence of wealth, the court must consider both assets and liabilities of a party. The Court considered Carlo’s \$700,000 inheritance pre-distribution and also considered his reasonable liabilities.
7. A party’s liabilities need not be “legally enforceable” in order to be considered in an exercise to determine wealth.

8. Even if the Court did err in failing to find that Carlo possessed wealth, the Court did not err in denying Patty's request for an upward deviation of child support because there was no evidence presented that an upward deviation was either reasonable or necessary based upon the needs of the children.

9. The trial court did not abuse its discretion in denying Patty's request for attorney's fees under after considering the income and financial ability of Carlo and after considering \$90,000 that Patty received in property distribution in the Albany County divorce case.

10. The trial court did not abuse its discretion in denying Patty's request for attorney's fees after finding that Patty's unreasonable behavior throughout the Washington litigation served no purpose but to increase stress and litigation costs for Carlo".

11. The Contempt Order is supported by a finding of bad faith and intentional misconduct of the underlying court order.

12. The trial court's finding of bad faith and intentional misconduct is support by substantial evidence.

13. Carlo should be awarded attorney's fees under RCW 26.26.140, RAP 18.1 and RAP 18.9.

C. STATEMENT OF THE CASE.

The parties, Patricia Bell (“Patty”) and Carlo DiLorenzo (“Carlo”) were married on December 5, 2014 (RP 464) and separated on October 27, 2016 (RP 46). They have two children, Patrick and James (RP 28). In November 2016, Carlo filed a Petition for a Divorce in Albany, New York (RP 126). At the time of filing, the children had been in Washington for 5.5 months (RP 620).

Also at the time of filing, both parties were unemployed (RP 30, 35). Carlo had owned and operated a Jimmy John’s franchise in Albany with his mother (who acted as a silent investor), which he started prior to the marriage. The business was sold for a loss in March 2016 (RP 427, 404, 425). The start-up capital for the business was advanced by Carlo’s mother, and therefore, sale proceeds were returned to her (RP 471, 455). At the time of sale, the Carlo signed a Promissory Note, guaranteeing that he would repay the balance of his mother’s financial contribution, in the amount of \$458,604 (RP 454).

During the marriage, while Jimmy John’s did not generate income, the parties relied solely on financial support from family. (RP 201, 83-85). Carlo’s mother paid for the parties’ monthly apartment rental and provided

them with just over \$4,000 per month for monthly living expenses (RP 469, 464, 497). She agreed to provide compensation through October 2016. Patty was aware of the agreement. (RP 61).

Carlo's father died intestate, in January 2016. Carlo expected to inherit roughly 3.9 million dollars from his father's estate, but no funds had been received during the marriage or at the time of separation (RP 407-410, 417, 442). In March 2016, Carlo and his mother agreed that upon receipt of his inheritance, Carlo would repay her for the various financial contributions she made during his adult life. (RP 466).

In the months leading up to the parties' separation, Patty demanded that Carlo hire an attorney to seize his mother's assets (RP 616).

After separation, Carlo cancelled Patty's credit card when she began dissipating their financial accounts. He notified her of the cancellation and asked her to set up an account where he could deposit money for herself and the children (RP130).

In November 2018, Patty obtained a Domestic Violence Protection Order, claiming that she and the parties' two children, were physically and financially abused (RP 127). Carlo denied Patty's claims, arguing that her Petition was retaliatory (RP 636, 638).

Jeffery Robinson was attorney of record for Patty. Mr. Robinson is married to retired Pierce County Commissioner, Mary Dicke. Commissioner Dicke was still active in Pierce County Superior Court, and had not been retired at that time (RP 20 2/2/2018, CP 293).

On November 22, 2016, Patty filed a Petition for Dissolution of Marriage in Pierce County, together with a motion requesting that Carlo have supervised parenting time with supervisor, Kate Lee (RP 638, 680, CP 788). Patty also requested \$5,000 in child support (RP 684).

On February 14, 2017, Judge Frank Cuthbertson determined that the state of Washington would retain jurisdiction over the children, while the state of New York would hear matters related to the dissolution (RP 22, CP 38-41).

In advance of the Temporary Orders hearing, Carlo disclosed to the Court and to Patty, that he was notified of an imminent advanced distribution from his father's estate, in the amount of \$200,000. Carlo had not yet received the funds at the time of the hearing (RP 450, CP 832, 842).

On February 9, 2017, Commissioner Barbara McInville ordered Carlo to have professionally supervised visitation with Kate Lee, and deviated child support upward by \$4,438.94 over the standard calculation,

due to “access to wealth”) (CP 13-37). The Order stated the deviation was based on “evidence mother filed including stock interests, vehicles owned, real estate, Facebook posts, ownership of Jimmy Johns, inheritance and access to wealth”. (RP 26). Carlo denied he had ownership of any asset except for one vehicle (CP 814).

At a March 10, 2017 Revision hearing, Judge Cuthbertson reduced child support to \$4,600, stating, “the Grandparents have routinely provided financial support during the marriage” (CP 42-44). Judge Cuthbertson adopted Patty’s proposed child support worksheets imputing Carlo’s income to \$600,000 per year, and leaving Patty’s income at \$0, despite her voluntary unemployment (CP 43, RP 468). Carlo’s mother had to pay his monthly child support payment obligation (RP 469, 478-486).

Carlo received \$200,000 from his Father’s estate on February 17, 2017 (RP 451). On March 3, 2017, Carlo paid \$199,000 to his mother. The purpose of the transfer of funds was to reimburse Carlo’s mother for her capital contribution to the Jimmy John’s franchise (RP 459).

On March 20, 2017, Carlo started a job an annual salary of \$80,000 (RP 440-441). He started paying roughly \$1,600 in child support from his own salary, and his mother paid the balance. (RP 469).

On May 17, 2017, Carlo and his mother signed a second Promissory Note, guaranteeing Carlo's mother a sum total of \$393,643 based upon the following expenses she had paid for him: living allowance for both parties from November 2015 to October 2016, Patty's \$22,000 engagement ring, a 2009 BMW, a "coding school" loan, and tuition for a "boot camp prep/Amtrak". Also included were expenses for attorney's fees/costs totaling \$45,069, college tuition for \$158,355, child support payments of \$20,400, and apartment rental expenses (RP 434, 460-486).

On September 11, 2017, Carlo received a second interim distribution in the amount of \$500,000 (RP 457). Patty was notified of the distribution (RP 450). On September 29, 2017, Carlo wrote a check for \$276,769.41, which represented the remaining balance Carlo owed to his Mother on the March 14, 2016 Promissory Note. (RP 459).

Also on September 29, 2017, Carlo paid his mother \$223,000 for payment of the Promissory Note signed on May 17, 2017 (RP 460). Upon payment, the May 17, 2017 Promissory Note was cancelled, and a new Promissory Note was created for \$174,780.23. (RP 460-463). This third note represented the balance of what was owed, plus interest (RP 463).

Carlo's mother paid additional funds for him after the signing of

the May 17, 2017 Note, totaling roughly \$187,000, that have not been reflected in any Promissory Note (RP 573-585, explanation of various expenses paid; RP 578).

In October 2017, Kate Lee was contacted by private investigator Ronald Bone, who had been hired by Patty (CP 65). Ms. Lee later discovered that several vehicles parked at her home and titled to her family members, were subject to vehicle inquiries with the Department of Motor Vehicles (CP 144). This revelation, and her communication with Mr. Bone, caused her to withdraw from the case as visitation supervisor, feeling personally violated (CP 144).

On October 23, 2017, Carlo filed a Motion to Change the Temporary Parenting Plan (CP 82-94). Carlo asked the court order unsupervised residential time (CP 52-53). Carlo listed several bases for his requests that did not have anything to do with Kate Lee (CP 54-63).

On November 3, 2017, Carlo filed a second Motion for Temporary Orders, asking the court to enter a Restraining Order against Patty because Patty had hired a private investigator to keep *him* under surveillance during his residential time, and Patty had admitted to such. (CP 61-62).

In her late-filed response, Patty filed Kate Lee's criminal history

documents, evidencing her convictions over 10 years prior (CP 116-117, 182-207). Carlo only had 24 hours to submit a reply (CP 320). Through counsel, he consulted with Kate Lee about the filed criminal background information. Kate Lee believed the information related to cases where she was the victim of identify theft, and not the criminal defendant. (CP 320) Carlo did not have sufficient time to independently verify this information (CP 320). Ms. Lee provided a declaration that did not deny her criminal convictions, but did not admit to her criminal history either (CP 144, 147).

Both motions were heard before pro-tem Commissioner Wendy Zicht on November 16, 2017. Carlo filed a Motion for Revision of the November 16, 2017 Order (CP 157-158).

On December 1, 2017, Judge VanDoorninck heard Carlo's Motion for Revision. (CP 157-158). In relevant part, Judge VanDoorninck granted Carlo's request for unsupervised day visits (although Carlo had requested overnights), and entered a restraining order protecting Carlo from Patty. (CP 157-158). The Restraining Order contained some scrivener's errors that would later be amended. (CP 159-165). Judge VanDoorninck indicated that she was displeased with the fact that Patty and her counsel filed the personal background information of Kate Lee,

without first having a discussion with her about it (CP 242).

On January 9, 2018, Patty filed a document titled, “New Evidence that GAL Kate Lee is an unqualified felon. Motion for Judge VanDoorninck to Recuse Self for Retaliation Against Party Raising this Actual Fact”. (CP 209-228). The motion was never properly noted or served. (CP 318). The document contained factual statements that were not submitted under penalty of perjury, and contained no reference to any legal standard for which the court could base its ruling (CP 209-228). Attached, were mug shot photos of Kate Lee (CP 209-228).

Patty’s “Motion” for recusal of Judge VanDoorninck was never heard (CP 318). On January 17, 2018, the Court filed a standard letter indicating that Judge Karena Kirkendoll was taking over the case from Judge VanDoorninck, via planned judicial rotation for all family law cases assigned to FAMILY COURT 2 (CP 946).

On January 20, 2018, an article ran in the Tacoma News Tribune about the parties’ divorce case and Kate Lee’s involvement in it (CP 421-424). The media was tipped off because James Egan, who would later appear as attorney of record for Patty, brought the story to a reporter’s attention (CP 245). The reporter, Sean Robinson, contacted the court for

comment (CP 421-424). The reporter states that on January 17, 2018, “presiding Judge Elizabeth 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 421-424). No judicial officer or other third party is quoted making this statement (CP 421-424). It is unclear how Sean Robinson obtained this information or whether it is true. Judge Martin was quoted discussing how visitation supervisors in Pierce County are chosen generally, discussing Kate Lee’s prior reputation (CP 421-424). Judge VanDoorninck is quoted one time in the article, stating that she “relied on the declaration” of Kate Lee (CP 421-424). Neither judicial officer made a comment about either or the parties, the merits of the case, or the attorneys involved (CP 421-424).

On January 23, 2018, Patty filed a calendar note, setting a hearing for a “Motion to Change Venue” before Judge Kirkendoll (CP 968-969). Patty also filed “Petitioner’s Affidavit and Notice of Request for Continuance and Change of Venue to King County” (CP 245-246). While the Affidavit largely focused on previous visitation supervisor, Kate Lee, it cited to *State v. Crudup*, 11 Wn.App. 583 524 P.2d 479 (1974), for the contention that the court should authorize a change of venue due to pre-

trial publicity (CP 245-246). Patty's only argument in support of her request was that two judicial officers made public comments to a reporter about the case, which Patty interpreted to be statements made against her (CP 245-246).

On January 30, 2018, only three (3) days before the venue hearing, Patty untimely filed a document titled "Petitioner's Affidavit and Immediate Motion to Strike Restraining Order and All Findings Based on Now Impeached Witness, Plan Venue Change" (CP 267-281). The motion was never properly noted or served. The affidavit contained threats against the judiciary. Patty claimed that she was seeking to file a "Section 1983 Claim against Pierce Family Court". Her affidavit states, "Let it be please known that among reasons the entire Pierce County Superior Court should recuse itself from this case and transfer it up to King County as I'm requesting, is the obvious circumstance that I now have a right to and am preparing to file a Section 1983 federal civil rights action against Judge VanDoorninck and the entire Pierce County Superior Court". She accuses the court of infringing upon her free speech rights and further states, "this obvious and actual civil liability of the Court is yet another reason the Court must then transfer it out of Pierce County...If

you take corrective action, it will be a mitigating factor for me. If you do nothing and leave me stuck with this restraining order and my children with unsupervised parenting, and me with frequent ordered communication with this minor 1% abusive parent, as I leave Pierce Family Court, this will be an aggravating factor in my opinion and in any subsequent legal actions against the Pierce Family Court.”. Patty further states, “to satisfy me, this hearing must absolutely accomplish the following three things if they have not yet occurred ex parte by this date...” Patty goes on to recite that she wants “all December 1, 2017 orders to be “vacated”(CP 267-281)

On January 31, 2018, Carlo filed both a declaration and a Legal Memorandum in response to the Motion to Change Venue. (CP 282-341). His responsive documents raised several procedural objections and cited to numerous cases addressing the issue of impartiality/bias (CP 282-341).

On February 2, 2018, before argument commenced, there was colloquy between the Court and both counsel regarding late filed and improper documents by Patty. Judge Kirkendoll indicated she would not consider any documents that were not served on Carlo and would not consider any working copies that were received from her counsel the night

before hearing (RP 1-7, 2/2/2018). At that point, the only document that had been served on Carlo was the January 23, 2018 affidavit and calendar note hearing (RP 7, 2/2/2018). Judge Kirkendoll denied the “motion” to change venue, discussing her analysis under RCW 4.12.030 (RP 37-39, 2/2/2018).

On February 13, 2018, Commissioner Terri Farmer denied Carlo’s requests to place the children primarily with him (CP 423-428).

On March 26, 2018, the Court denied Carlo’s request to terminate counseling services with Hope Sparks (CP 997-998).

On May 10, 2018, the parties executed a Civil Rule 2a Agreement to resolve the final parenting plan. (CP 1011-1020).

Trial commenced on May 30, 2018, to resolve issues related to child support, attorney’s fees, and Carlo’s request for a Restraining Order (RP 984). Patty requested over \$200,000 in attorney’s fees and private investigator costs based upon her need and Carlo’s ability to pay (RP 243-244). Carlo requested attorney’s fees based upon Patty’s intransigence (RP 990). Patty’s father testified that he expected Patty to repay him \$322,803 (RP 243-244). Patty and her father had an agreement “on day

one” that she would be required to repay him any funds he advanced to her after the parties separated (RP 254).

On June 14, 2018, Judge Kirkendoll made significant findings regarding the income and resources of the parties, the needs of the children, child support, attorney’s fees, intransigence by Patty, abusive use of conflict by Patty and restraining orders (RP 985-997).

On August 10, 2018, Judge Kirkendoll denied Carlo’s motion to invalidate the May 10, 2018 CR 2a Agreement (RP 1020-1021, CP 595-596).

On September 21, 2018, Judge Schwartz denied Carlo’s motion to remove James Egan as attorney of record for Patty (CP 1080-1081).

On December 12, 2019, Commissioner Craig Adams granted Carlo’s Motion for Contempt regarding six parenting plan violations (CP 729-732, RP 779-781 1/9/19). On January 11, 2019, Judge Schwartz granted Patty’s Motion for Revision in part, finding Patty had only violated three provisions (CP 747-748, RP 33-34, 1/9/19). Judge Schwartz’s Order included that Patty had failed to pay her portion of mediation fees, failed to post all appointments for the children to Our Family Wizard, and failed to assist the children properly with skype calls (CP 747-748, RP 33-34, 1/9/19).

D. ARGUMENT

(1) Patty failed to preserve her claim of error that the trial judge applied the incorrect legal standard

Appellate courts will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). In her January 23, 2018 document requesting a change of venue, Patty at no time utters the word “bias”. She at no time directs the court to the appropriate legal standard that she champions in her moving Brief. Instead, she asked the Court to rely upon *State v. Crudup*, 11 Wn.App. 583 524 P.2d 479 (1974), for the proposition that pretrial publicity can deny a party’s right to trial by an unprejudiced jury.

At the February 2, 2018 hearing, Mr. Egan he speaks the word “bias” one time, but only to explain why the court should enter an Order changing venue “ex parte” without proper notice to Carlo.

Now, for the first time in her moving Brief, Patty instructs the court to apply a different standard, whether a “judge’s impartiality might reasonably called into question”. Patty failed to preserve her claim by not asking the Court to apply that standard in her underlying motion.

In a similar case, *State v. Gentry*, 183 Wn.2d 749356 P.3d 714

(2015), the Appellant requested that the Judge recuse himself under the appearance of fairness doctrine, based upon ties to the prosecutor's office. The Judge responded similarly to Judge Kirkendoll, that he had no prior interaction with the case and felt that he was distant enough that the appearance of fairness doctrine did not apply. For the first time on appeal, the Appellant argued that the court erred in failing to treat his letter and motion as an affidavit of prejudice, which required recusal under RCW 4.12.040(1) and .050(1). The court there held that the Appellant failed to preserve his claim or error because he, at no point prior to the appeal, suggested that he was bringing an affidavit of prejudice.

In the present case, Patty asked the court to change venue due to pre-trial publicity. It wasn't until her appeal, that the Patty argued for the first time, that the correct legal standard based upon CJC 2.11, was whether a judge's impartiality could reasonably called into question. For this reason, the Court should find that Patty failed to preserve her claim of appeal, and affirm Judge Kirkendoll's ruling denying the change of venue.

(2) The Trial Court did not abuse its discretion by applying an incorrect legal standard on a Motion to Change Venue.

The correct legal standard in this case is whether there is reason to

believe an impartial trial cannot be had under RCW 4.12.030(2). Patty seems confused about the Order she is requesting the Appellate Court to review. The February 2, 2018 Order that on appeal relates to her request to change venue based upon pre-trial publicity. No “Motion for Recusal” of Judge Kirkendoll was ever noted for hearing or heard by the court.

The trial court's decision to grant or deny a motion for a change of venue is within the trial court's discretion, and appellate courts are reluctant to reverse the trial court's decision absent a showing of abuse of discretion. *State v. Clark*, 143 Wn.2d 731, 756, 24 P.3d 1006, cert. denied, 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (2001); *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). The Court of Appeals reviews a venue decision only for abuse of discretion. *West v. Osborne*, 108 Wn.App. 764, 34 P.3d 816 (2001). “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Kovacs*, 121 Wn.2d at 801, 854 P.2d 629 (1993); *In re Marriage of Wicklund*, 84 Wn.App. at 763, 932 P.2d 652 (1996). 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 standard. *State v. Rundquist*, 79 Wn.App. 786, 905 P.2d 922 (1995), review denied, 129 Wn.2d 1003, 914 P.2d 66 (1996).

Patty incorrectly argues that the trial court's ruling was based upon untenable reasons because Judge Kirkendoll did not apply the correct legal standard required by the Code of Judicial Conduct in recusal matters. However, there was never a motion for recusal before the Court, so the Code of Judicial Conduct does not apply here.

The appropriate legal standard in matters of venue change, can be found directly from RCW 4.12.030(2), which provides that a trial court *may* transfer a case to a different county when it appears by affidavit or other satisfactory proof "[t]hat there is reason to believe that an impartial trial cannot be had therein[.]". *West v. Osborne*, 108 Wn.App 764, 34 P.3d 816 (2001) (emphasis mine). RCW 4.12.030 provides the court with the basis to consider a *permissive*, not mandatory, change of venue.

This is an important distinction because Patty claims that the trial court was *required* to recuse Judge Kirkendoll under the Code of Judicial Conduct. Disqualification under the appearance of fairness doctrine and

the CJC is mandatory when there is evidence that that a particular judge is biased against a party, or if his or her impartiality may be reasonably questioned. *Wolfkill Feed and Fertilizer Corp. v. Martin*, 103 Wn.App. at 836, 14 P.3d 877 (2000). In the present case, the Patty seeks to overturn a decision based upon a request for venue change. The court was tasked with reviewing the applicable statute and determining under RCW 4.12.030(2) whether an there was reason to believe that an impartial trial in Pierce County could be held. Even if the Court's partiality could be questioned, the statute does not require the court to order a change of venue, leaving that to the discretion of the Court.

As will be addressed below, Carlo does not believe Patty has met her burden to establish proof of impartiality (whether actual or potential), based upon similar cases, where the court has rejected both recusal and changes in venue after consideration blatant facts evidencing bias.

Patty has cited to no authority supporting her contention that the more rigid requirements of the appearance of fairness doctrine should be extended to decisions in change of venue motions. She argues that Judge Kirkendoll incorrectly based her ruling on whether "actual bias" existed in Pierce County. However, nowhere in Judge Kirkendoll's oral ruling, nor in her written order, does the phrase "actual bias" exist. Judge

Kirkendoll's written order states plainly, "The court denies the Petitioner's request to Change Venue, having found under RCW 4.12.030(2) that the Court cannot identify any bias or impartiality of any of the 22 Pierce County judges, and particularly of Judge Kirkendoll, who has just entered the family law rotation and his no history with this case". Neither her oral ruling or written order delineates between actual or perceived bias. In her oral ruling, she states that she "just entered into this rotation from a criminal rotation. I have no background in this case. I have no understanding of what's going on in this case. I have no knowledge of either party or any relationship with anyone in this case".

First, Patty's argument must fail because Judge Kirkendoll's ruling specifically references the appropriate statutory authority for venue matters. Further, the ruling does not plainly dismiss the consideration of "potential" bias. There is no evidence to suggest that Judge Kirkendoll did not contemplate whether potential bias or perceived bias existed.

Additionally, Judge Kirkendoll was provided, in advance of her decision, with Carlo's January 31, 2018 Legal Memorandum, briefing many of the cases discussed in herein, and she was also provided with a the complete *West v. Osborne*, 108 Wn.App 764, 34 P.3d 816 (2001)

decision. As such, it should be inferred that Judge Kirkendoll considered the relevant cases and applied the appropriate legal standard.

(3) Patty did not present sufficient evidence to overcome the presumption of impartiality

The trial court is presumed to have properly discharged its official duties without bias or prejudice. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). “The party seeking to overcome that presumption must provide specific facts establishing bias.” *Davis*, 152 Wn.2d at 692. “Judicial rulings alone almost never constitute a valid showing of bias.” *Davis*, 152 Wn.2d at 692.

If the Court finds here that the appearance of fairness doctrine does extend to RCW 4.12.030(2) cases, then *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010) contains the appropriate legal standard, stating, “the question under the appearance of fairness doctrine is whether a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing. *Id.* To succeed in an appearance of fairness claim, a party must show evidence of a judge’s actual or potential bias. *Id.* Litigants must submit proof of actual or perceived bias to support an appearance of impartiality claim. *Hyundai*

Motor, 141 Wn.App. at 523, 170 P.3d 1165. Patty's burden to submit sufficient evidence of actual, perceived or potential impartiality, is high.

Sherman v. State, 128 Wn.2d 164, 905 P.2d 355 (1995), as cited by Patty, is distinguishable from the present case, and not only because it addresses recusal vs. change of venue. In *Sherman*, recusal was required for judge's violation of CJC 3(A)(3,4), prohibiting judicial initiation or consideration of ex parte communications when he directed his legal extern to contact third parties involved in the case. Here, Judge Kirkendoll did not violate any provision of the CJC. In *Sherman*, there was evidence of an actual violation by the trial judge, whereas in the present case, there are mere allegations that other judicial officers' comments could potentially create an appearance of bias.

Another Pierce County Case involving Judge VanDoorninck, *In re Marriage of Meredith*, 148 Wn.App. 887201 P.3d 1056 (2009), involved an Appellant who made bald allegations of judicial bias in favor of immigrants, that were not supported by the record. The Appellant there stated that the Judge's alleged financial obligations to Northwest Immigration Rights Project and the Judge's questioning about a party's immigration status was evidence of bias. Similar to this case, there was no

evidence of a Judge's financial contributions just as there is no evidence of Judge Martin's "internal memo". Further, the Court there held that it cannot infer bias toward immigrants simply because a Judge makes financial contributions to immigrant rights organizations and asks questions about a party's immigration status. In the present case, the court should similarly have a hard time finding a direct link or nexus between a non-trial judge's public comments and Judge Kirkendoll's ability to be impartial, particularly where no evidence exists.

Patty claims that the "internal memo" circulated to the Pierce County judiciary automatically extended bias to every decision-maker on the Pierce County bench. However, there were many hearings that followed between the Venue hearing and the date of trial, for which Patty was the prevailing party, to include motions heard by Judge Kirkendoll. On February 13, 2018, Commissioner Farmer entered an Order denying Carlo's Motion to place the children primarily with him. On March 9, 2019, Judge Kirkendoll revised the December 13, 2019 Restraining Order on Patty's motion, including less restrictive language against her. On March 26, 2018, Commissioner Farmer entered an Order denying Carlo's motions for orders related to the counseling of the children.

Judge Kirkendoll denied Carlo's post-trial motion to invalidate the CR 2A on August 10, 2018. On September 21, 2018, Judge Schwartz denied Carlo's request to disqualify James Egan as Patty's attorney. On January 11, 2019, Judge Schwartz granted Patty's motion in part, revising the Contempt Order in her favor.

Patty's position that the Court's handling of the Kate Lee situation proves bias or potential bias against her as to all Pierce County judicial officers, is a failure to acknowledge that the court made decisions in this case based upon the merits. The December 1, 2017 restraining order (and later amended 12/13/17 and 3/9/18), for example, was entered because of Patty's surveillance activities against Carlo himself, and had nothing to do with Kate Lee. The order dismissing the supervised visitation requirement was based upon the fact that Carlo had completed the services the Guardian ad Litem asked him to do. The Order of Child Support entered on August 10, 2019, was based upon Carlo's actual income and imputed income to Patty because she was voluntarily unemployed. The Court did not award attorney's fees to Patty because the Court found Patty did not have a need for fees given her \$90,000 property award, and that Patty had unreasonably increased the legal expenses of

both parties. The court's findings on the financial issues had nothing to do with Kate Lee, and Patty's conviction that the two issues are connected is based on pure speculation.

The trial did not address parenting plan issues. Kate Lee's supervised visitation reports were not admitted as exhibits at trial because the Father's parenting was not at issue. Kate Lee was not called as a witness to support or discredit either party.

The burden is on Patty to overcome the presumption of an impartial Judge by alleging specific facts supported with evidence. Patty's "evidence" of potential bias comes in the form of comments made by other judicial officers, and not made by Judge Kirkendoll herself. Disadvantageous judicial rulings and comments alone are not enough to prove bias or potential bias. The State and Federal cases outlined below involve judicial comments/rulings far more inflammatory than anything stated by Judges' VanDoorninck and Martin, yet motions to transfer venue or motions for the recusal of judges in the following cases were all denied:

1. *State v. Jefferson*, 199 Wn.App. 772, 429 P.3d 467 (2017)

(reversed and remanded on other grounds): Trial judge's admonition of defense counsel did not show actual or apparent bias in criminal prosecution.

2. *Club Envy of Spokane, LLC v. Ridpath Tower Condominium Ass'n*, 184 Wn.App. 593, 337 P.3d 1131 (2014): Judge's comments indicating that she was familiar with a party to lawsuit did not show actual or potential bias against the party, and therefore, did not violate appearance of fairness doctrine.

3. *U.S. v. McTiernan*, 695 F.3d 882 (2012): Expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display, do not establish bias or partiality; the judge who has become exceedingly ill disposed towards the defendant is not thereby recusable for bias or prejudice, since her knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings.

4. *U.S. v. Sutcliffe*, 505 F.3d 944 (2007): Generally, even hostile judicial remarks made during the course of a trial will not support a challenge to the judge's partiality.

West v. Osborne, 108 Wn.App 764, 34 P.3d 816 (2001) hails from Pierce County Superior Court, Division II of the Court of Appeals, and addresses a 4.12.030(2) claim dealing with a judge's ability to be impartial. There, the mother of in a family law action attempted to sue the Guardian ad Litem for making "negligent recommendations". After many judges in Pierce County recused themselves, the mother filed a motion for change of venue. Judge Larkin denied the motion, and declined to recuse himself, being newly appointed to the case, and indicating there was a "lack of any reasonable basis for recusal". The Mother appealed, citing (properly) RCW 4.12.030(2). The Court of appeals affirmed, indicating that the mother produced "nothing that would show, or even suggest" that Judge Larkin was biased. The Court of Appeals commented that it did not overlook previous judge's decisions to recuse and their comments made to that effect. In all, the decision is very clear that proof of bias or perceived bias must be provided and must be very specific to the Judge presiding over the case.

Moreover, Patty's claim of impartiality under the appearance of fairness doctrine is hypocritical at best. Patty's attorney of record from November 2016 to December 2017 was married to Pierce County

Commissioner Mary Dicke. During that period, Carlo was the non-prevailing party in two domestic violence hearings, a UCCJEA hearing, a Temporary Orders hearing, a Motion for Revision of the Temporary Orders, a Motion to Modify Temporary Orders, and the Guardian ad Litem report heavily favored Patty. Surely there is perceived impartiality when the attorney of a party is married a close colleague of the very same judicial officers who are hearing the case. If Carlo were to adopt Patty's argument, he would be claiming that every single ruling in that first 13 months was a result of the connection between Jeff Robinson and the judiciary, and had nothing to do with the merits. Such an argument would fall flat and so should Patty's argument as to this Kate Lee situation.

Patty provides no proof of actual or perceived bias against her. A newspaper article quoting other non-trial judges' statements about Kate Lee with no negative connotation to Patty, is not proof of actual or perceived bias. An "internal memo", if one exists, directing judicial officers not to approve Kate Lee as a supervisor, is not proof of actual or perceived bias against Patty. In the absence of sufficient evidence to the contrary, judges are presumed to act without bias or prejudice. Patty has not provided sufficient evidence to overcome this presumption.

(a) There is no admissible evidence to support the existence of an “internal memo” circulated to Judge Kirkendoll

Patty states, “due to the public comments and internal memo, Pierce County judges’ impartiality could reasonably be called into question”. The notion of an “internal memo” stems from a Tacoma News Tribune reporter’s hearsay statement, that one may have existed. No evidence of said “internal memo” has ever been presented, so Patty has no personal knowledge of its existence or substance. If we are to take the statement at face value, the only information we know to have been communicated to Judge Kirkendoll, is that Kate Lee shall not be approved as a visitation supervisor in future cases. It is unclear how this directive can be contrived as a negative condemnation against Patty.

(4) Even if perceived bias exists, Patty should not be rewarded for manufacturing such bias

Patty’s participation in Kate Lee’s disqualification has not swayed the court against her. Rather, Patty’s blatant perjury, intentional lack of transparency, refusal to follow court rules, and circus antics related to disclosure of this case to the media have colored the court’s perception of her credibility. Patty intentionally set out to create a media circus and a call for “public fury” in order to bolster her request for a change in venue.

She accused Judge VanDoomick of being involved in a scandal to cover up Kate Lee's history, and then threatened the entirety of the Pierce County Superior Court with a Federal Claim if Judge Kirkendoll did not "satisfy" her requests.

There are several cases which stand for the proposition that demands for recusal based upon threats to the judiciary are improper. In *State v. Bilal*, 77 Wn.App720, 839 P.2d 674 (1995), the court found that the trial court did not err in denying a motion for recusal where there was no evidence of bias and recusal would have allowed defendant to benefit from threats against court. In that case, the Appellant assaulted the judge on the bench after the ruling was read, and sought recusal prior to sentencing. The court there reviewed and analyzed several out-of-state cases, as follows:

Other jurisdictions similarly follow the rule that a party cannot demand recusal after threatening or assaulting the judge, but rather that decision generally rests with the judge. In *State v. Prater*, 583 So.2d 520 (La.App.1991), the defendant sent a series of threatening letters to the judge throughout the course of the trial. Prior to sentencing, the defendant moved for the judge's recusal claiming a violation of the appearance of impropriety standard. The motion was denied. On appeal, the trial court's refusal to recuse was upheld on the basis that:[g]ranteeing Prater's motion to recuse the trial judge based upon conduct by Mr. Prater would open the doors for any defendant to get rid of a presiding judge by

the simple expedient of making a threat against the judge. *Prater*, at 527-8. See also *In re Marriage of Johnson*, 40 Colo.App. 250, 576 P.2d 188 (1977) (recusal not required where wife made motion after husband threatened her, attorney and court); *Smith v. District Court For Fourth Judicial Dist.*, 629 P.2d 1055 (Colo.1981) (threats overheard by officer and relayed to judge; refusal to recuse upheld); *State v. Brown*, 121 Idaho 385, 825 P.2d 482, 489 (1992) (trial court not required to disqualify itself after learning judge was on defendant's death threat list).

State v. Bilal, 77 Wn.App720, 839 P.2d 674 (1995). After thorough analysis of these cases, the Bilal Court affirmed the denial of the motion to recuse because it was inappropriate for the Appellant to benefit from the use of force against the court.

While Patty has not physically harmed the judiciary, she has made threats of continued legal action and complaints against the judiciary through her affidavits. This is similar to *State v. Prater*, above, where the defendant sent a series of threatening letters to the judge. In review of the other cases considered by the *Bilal* Court, it would appear that not even death threats against the judiciary are enough to render an appearance of impropriety. Lesser threats of civil action against the judiciary should not gander better results for the Patty in this case.

(5) The Trial Court did not err in finding that Carlo had no possession of wealth

A child support award will be overturned on appeal only if the party challenging the award shows that the trial court's decision constitutes an abuse of discretion. *In re Glass*, 67 Wn.App. 378, 384, 835 P.2d 1054 (1992). The reviewing court must determine whether the trial court made an error of law and whether substantial evidence supports the findings of fact. A court abuses its discretion if the decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *In re Marriage of Griffin*, 114 Wn.2d 772, 791 P.2d 519 (1990).

When a court deviates from the standard calculation or denies a request for a deviation, it must enter findings that specify the reasons for its decision. *Brandli v. Talley*, 98 Wn.App. 521 991 P.2d 94 (1999).

In the present case, Judge Kirkendoll did enter specific findings denying Patty's request for a child support deviation, as stated in the Order of Child Support: "Mr. DiLorenzo has no possession of wealth at this time. Furthermore, the evidence shows it could take years for Mr. DiLorenzo to realize his inheritance. Until such time, Mr. DiLorenzo has no wealth that would form the basis for an upward deviation of child

support”. Further, the findings of fact in the Judgement and Order dated August 10, 2017, stated, “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”.

Patty contends that the trial Court did not base it’s finding that Carlo had no wealth on substantial evidence, and that namely, the Court “ignored” Carlo’s \$700,000 pre-inheritance distribution. Carlo disagrees.

Evidence submitted by Carlo supported that he received \$700,000 in 2017, and from that, he paid his debts to his mother to include her investment in Jimmy John’s, her payment of Carlo’s legal expenses (including fees for attorneys, visitation supervisors, professional assessments, travel costs for visitation and child support). None of these financial obligations were Carlo’s mother’s responsibility, and she advanced the funds to him, pending receipt of his inheritance.

Carlo also repaid his mother for living expenses incurred by both parties, as Carlo’s mother paid nearly 100% of their living expenses

through their 22 months of marriage. Carlo also repaid his mother for Patty's engagement ring, a vehicle, college tuition and tuition for additional certifications/trainings. Carlo testified that he and his mother entered into said agreement of repayment for the forgoing items in March 2016, before the parties eventual October 2016 separation.

The first question the court must answer is whether \$700,000 truly represents "wealth". Carlo's pre-distribution funds were not recurring and Carlo testified that did not know when he would receive any additional funds from his inheritance. The second question is whether a parties' debts and expenses should be taken into consideration when determining "wealth". Carlo contends that substantial evidence of debts he owed for obligations his mother paid on his behalf, is sufficient to support the Court's finding that he did not possess any wealth at the time of trial.

Patty suggests that even if Carlo did have debts, that the fact that the debts were owed to his mother, as an "insider", makes said debts avoidable. Patty's position is disingenuous because both Patty and her father testified that she owed several hundreds of thousands of dollars to her father for repayment of legal fees, private investigator fees and living expenses. If both parties similarly testified that they were expected to

repay his/her parents for their respective financial contributions, then a fair minded person is likely to conclude that the debts were valid.

(6) Whether Carlo had a Legal Obligation to Repay his Mother is irrelevant.

Patty contends that Carlo's total payment of \$700,000 was made without receiving any value, and as such the transfer was nothing more than a gift. Patty's contention is not supported by the evidence. The court admitted into evidence proof that the source of the payments for Jimmy John's, Patty's engagement ring, child support payments, litigation fees, and the like, was Carlo's mothers' various separate financial accounts. This was the uncontroverted evidence Judge Kirkendoll spoke of, showing that Carlo's mother paid for each and every item or service that Carlo eventually used his \$700,000 to repay her for. The value received by Carlo was his mother's advanced payment for those items or "credit", prior to his receipt of inheritance.

Had Carlo received \$700,000 several years prior, Carlo likely would have used these funds to pay his own expenses, rather than rely on the generosity of his mother. If that had been the case, no fair-minded person would conclude that Carlo should not have dissipated his own

funds by investing in Jimmy John's, purchasing an engagement ring, paying for his own education and training, and paying for his own legal expenses and child support obligation. Similarly, no fair-minded person could conclude at the time of trial that Carlo had "wealth" if all of those obligations had been paid by himself. Either way, Carlo's \$700,000 pre-distribution funds went to pay reasonable expenses under the circumstances. Debts incurred for Jimmy John's, legal expenses and child support alone far exceeded \$700,000. The fact that Carlo's Mother advanced the funds before Carlo had the funds, doesn't change the reasonableness of the expense incurred.

Given the fact that Carlo received significant value in exchange for the \$700,000 he later transferred to his mother, the transfer cannot be deemed "voidable". Whether or not a Promissory Note was attached to the debt incurred by Carlo is irrelevant; however the existence of the Notes serve to document the date when Carlo and his mother reduced their agreements to writing. The question is whether Carlo had debts and whether it was reasonable for Carlo to pay those debts when he received his pre-distribution funds. Judge Kirkendoll found, based upon evidence and testimony, that Carlo did have reasonable debts and did not find that

he gifted his inheritance in effort to avoid paying child support.

(7) Even if Carlo did have access to “wealth” it was neither reasonable or necessary to grant an upward deviation

The mere ability of either or both of the parents to pay more, whether based on consideration of income, resources or standard of living, is not enough to justify ordering more support. *In re Marriage of Scanlon and Witrak*, 109 Wn. App. 34 P.3d 877 (2001). The test is the necessity for and reasonableness of the amount considering the totality of the circumstances. This test looks at the standard of living of both parents, not just the one with the higher income. Child support is not intended to be used to equalize the standard of living of the parents’ households. That is the function of maintenance.” *In re Marriage of Daubert*, 124 Wn. App. 483, 99 P.3d 401 (2004).

In the present case, Patty did not testify about any special financial needs of the children, above and beyond basic necessities. (PR 323-338). Carlo, on the other hand, was paying 100% of all costs associated with visiting the children. Carlo presented evidence at trial to show the parties’ spending patterns during the marriage (RP 517-519). Patty’s drastically increased her expenses after separation, to include hiring a Nanny while

she stayed at home and remained unemployed (CP 795-796)

The Court in *In re Marriage of Daubert*, 124 Wn.App 438, 99 P.3d 401(2004), reversed an Order of additional support based on additional needs of the children because the record did not contain evidence of the future need for expenditures, and the trial court made no findings about the necessity and reasonableness of any additional expenses. The Court there said “the fact that the children will benefit by the opportunities available to them from additional funds is not the test for additional support. It is not enough that the funds might be spent on allowable or beneficial opportunities. The opportunities and expenditures must be appropriate bases for adding additional support and must be both necessary and reasonable.” *Id.*

Judge Kirkendoll did not make any findings about necessary or reasonable expenses of the children to warrant an upward deviation, because there was not testimony or evidence to support such a finding.

(8) The court did not err in denying Patty’s request for Attorney’s Fees based upon Need and Ability

Patty requested attorney’s fees under RCW 26.09.140. A party to a dissolution action is not entitled to attorney fees as a matter of right.

Stachofsky v. Stachofsky, 90 Wn.App. 135, 951 P.2d 346 (1998), review denied 136 Wn.2d 1010, 966 P.2d 904. Trial court has great discretion in setting attorney fee awards in connection with dissolution actions, and the reviewing court will not reverse determination unless it is untenable or manifestly unreasonable. In re *Marriage of Fernau*, 39 Wn.App. 695, 694 P.2d 1092 (1984). In *Fernau*, the Wife argued that the court erred in denying her fees due to her Husband's increased earning potential. The Court disagreed, stating that the trial judge did not abuse his broad discretion because he did consider the Husband's income and financial ability. Judge Kirkendoll also considered Carlo's income and financial ability in the present case, as well as the fact that Patty had recently been awarded \$90,000 in the New York Divorce case. As such, her decision should not be overturned.

(9) Patty did not incur reasonable attorney's fees

In determining reasonable attorneys' fees in divorce action, the court should consider factual and legal questions involved, time necessary to prepare and present case, and amount and character of property involved, as well as results obtained and all other factors bearing thereon. *Abel v. Abel* 47 Wn.2d 816, 289 P.2d 724 (1955). The parties had a 22

month marriage and no community property to divide.

Judge Kirkendoll found that “each party has incurred fees well into the six-figure range. This is largely attributable to the aggressive litigation stance taken by Ms. Bell, which Mr. DiLorenzo asserts was solely due to his anticipated inheritance. Based upon testimony at trial, it appears Ms. Bell has retained no less than nine different attorneys and contracted with several private investigators in New York, Texas, Washington State, and the Philippines during this dissolution. The Court finds that during the course of the Washington State litigation, Ms. Bell engaged in unreasonable behavior that served no purpose except to increase Mr. DiLorenzo's stress and costs” (RP 990-991). The trial court properly found that amount of attorney and other professional fees incurred for such a short term marriage was unreasonable, given the legal questions involved.

The proceedings spun out of control because Patty wanted revenge for being left, and she sought to capitalize on Carlo's future inheritance. In order to award fees under RCW 26.09.140, the court has to find that the fees incurred are “reasonable”.

(10) The trial court did not abuse its discretion in finding Patty in contempt of the parenting plan

Contempt orders are reviewed for an abuse of discretion. *In re Marriage of James*, 79 Wn.App. 436, 903 P.2d 470 (1995). Discretion is abused if based on untenable grounds or untenable reasons. *Id.* at 440, 903 P.2d 470. In reviewing a contempt finding the Court looks for facts constituting a plain order violation and strictly construe the order. *In re Marriage of Humphreys*, 79 Wn.App. 596, 903 P.2d 1012 (1995). A contempt finding will be upheld on review if the Court finds the order is supported by a “ ‘proper basis.’ ” *State v. Hobble*, 126 Wn.2d 283, 292, 892 P.2d 85 (1995).

RCW 26.09.160(2)(b) requires the court to find contempt after it has found the parent has in “bad faith”, failed to comply with the parenting plan. Patty contends that the trial court’s finding did not consider whether Patty acted in bad faith. However, the 12/12/2018 Contempt Order states, “The failure to follow the order was intentional. When this person did not obey the parenting/custody order, s/he acted in bad faith” (CP722). Further, Commissioner Adams stated, “I find that under the totality of those matters that effect the children, not including restraining order violations and the like, that there is a willful and intentional violation of

the court order and I do believe it is in bad faith” (RP 780-781 12/12/18).

(11) Patty intentionally refused to comply with the court order requiring her to pay mediation fees, in bad faith.

Patty and Carlo attended mediation in November 2018. Patty contends for the first time on appeal that the parenting plan does not make it clear how or when mediator fees are to be paid. The parenting plan says that each party shall pay “per the child support worksheet”. Line 6 of the child support worksheet indicates that Patty’s proportional share of income is 34.1%. Patty attempts to appear confused by the parenting plan’s directive to pay for mediation based upon each party’s proportional shares of income. However, in Carlo’s declaration, he states, “Under the worksheets, Patty’s share is 34%...two days before the mediation, Patty’s attorney indicated she “does not have any money’ to pay Mr. Margullis’ fee...Patty’s attorney sent an email indicating Patty would cancel the mediation unless I paid the full fee” (CP 660-661). In her own 12/7/2018 Declaration, Patty does not contradict the notion that she owed 34% of the mediator fees. Instead, she states, “The mediation was a waste of everyone’s time, its only purpose was to further impoverish me, tying up my time and costing me attorney fees to accomplish nothing. I should not be ordered to pay for a worthless mediation” (CP 678-679). Patty made her intention clear that she refused to pay fees because she didn’t think the

mediation was successful, not because the Order was somehow confusing. Her statement made it clear that she did not ever intend to pay the mediator fees, so her position that the parenting plan is silent as to “when” fees shall be paid, does not hold water.

Patty also contends that the mediation fee is a “civil debt” and does not apply to contempt findings. However, Patty relies on distinguishable case precedent which prohibits the court from finding contempt over violations of property awards. The provision regarding the mediator fee is included in the parenting plan, and it relates to a parental duty to engage in alternative dispute resolution as a means to reach joint decisions. RCW 26.09.160 states in relevant part, that “the performance of parental functions and the duty to provide child support are distinct responsibilities in the care of a child. An attempt by a parent...to refuse to perform the duties provided in the parenting plan, or to hinder the performance by the other parent of duties provided in the parenting plan, shall be deemed bad faith and shall be punished by the court by holding the party in contempt of court and by awarding to the aggrieved party reasonable attorneys' fees and costs incidental in bringing a motion for contempt of court.” *RCW 26.09.160*. Here, Patty made it clear that she would “cancel mediation” and not perform her duties required under the parenting plan. There is substantial evidence of bad faith and the court did not abuse its discretion.

(12) Patty intentionally refused to comply with the order requiring her place appointments and activities for the children on the Our Family Wizard Calendar, in bad faith.

The parenting plan states, “All schedules pertaining to the children’s’ therapy, medical apts, school an activities shall be loaded onto the calendar”. At the time the Contempt motion was filed, Carlo lived in New York. As a practical matter, he did not make appointments for the children or schedule any ongoing activities for them. Patty was the master of the children’s’ schedule and participated regularly with the children in weekly therapy appointments, medical appointments, swimming lessons and the like.

Patty claims that because another provision of the parenting plan states that “each parent shall have full and equal access to education *records* and counseling records for the children” (emphasis added) and that “each parent shall input information that the other parent cannot get directly from the school, doctor or counselor’s office” into Our Family Wizard”, that she had no obligation to calendar appointments, stating Carlo could have found out about the appointments of his own accord.

The trial court disagreed with Patty’s argument and so does Carlo. The Calendar is a feature of Our Family Wizard. The requirement to calendar appointments is different from an obligation to upload records

into the program that the other parent cannot otherwise get directly. Patty is comparing apples and oranges.

Patty states that at worst, she was negligent for not calendaring information because she was confused about the requirement. Her argument is disingenuous. Carlo's motion for Contempt stated, "despite several requests by myself and my lawyer to be updated of the children's appointments and schedules, and for Patty to upload information on the OFW calendar, Patty has refused/failed to use the calendar feature, at all, until after our failed mediation session on 11/16/18. Otherwise, I have not been advised in advance of appointments for the children" (CP 663). Carlo provided proof of email correspondence between counsel, requesting that Patty comply by using the calendar feature of the program (CP 625-629). In Patty's response to the motion, she took no responsibility and basically chastised Carlo for not being involved enough with the children's providers to know about the upcoming appointments (CP 681-682). Patty's position was that Carlo had the responsibility to upload onto the calendar appointments that Patty made, even though she never told him about the appointments. This argument fails because due to the lack of notification, Carlo wouldn't know to request any records, and from whom, unless he was informed in advance of the appointment or activity (CP703-704). Carlo further stated that he didn't even know which school Patrick

was attending, that Patty refused to tell him despite requests for the information (CP 659). Patty asserted she was not required to provide that information to Carlo (CP 668). Commissioner Adams found Patty's arguments disingenuous, found that she had violated the parenting plan in bad faith, and ordered her to provide information to Carlo, particularly for appointments and activities that she herself, schedules for the children. Judge Schwartz affirmed the ruling, stating, "The whole purpose of putting the appointments on the calendar is so that the other parent can schedule themselves. It doesn't make any sense to do it after the fact" (RP 13 1/9/19). Judge Schwartz further stated that Patty didn't deny failing to calendar appointments and provided no evidence that she complied with the provision, particularly after she was put on notice of her obligation to do so (RP 12-13 1/9/19). There was substantial evidence of an intentional violation in bad faith.

(13) Patty intentionally refused to comply with the court order requiring her to assist the children with Skype calls with Carlo, in bad faith.

Patty once again argues that the requirement to assist the children with skype calls with Carlo is either confusing and "impossible" to follow because the Order also state that "the goal as [the children] get older is the parents shall promote unimpeded and unmonitored contact with the other parent via telephone or Skype". The intent behind this provision can be

found in Judge Kirkendoll's ruling at the August 17, 2019 presentation hearing where this provision is discussed. After come colloquy with counsel, Judge Kirkendoll clearly states, "What I'm saying is I think at this point they need assistance. Somebody's got to turn it on. Somebody's got to hold it. Somebody's got to direct their attention. But when they're old enough to hold this themselves, they should be able to talk to their mother in private and talk to their father in private" (RP 1037-1038).

It is par for the course for Patty to feign confusion, but she was present at the August 17, 2019 hearing and the ruling was crystal clear. Carlo's motion states, "Patty has been increasingly deficient in ensuring there is proper adult facilitation for my Skype calls – namely, for the last several fortnightly sessions, there have been times where the camera has been turned off for a lengthy period of the call or where some sort of toy or other object was blocking the screen, despite my several verbal requests to the skype facilitator to unblock the screen.... I have seen no indication of any adult attempting to step in to keep the calls on track. It is as if an iPad is thrown onto a playroom floor and the children are left in the room alone to do what they want with it. There is no or limited "physical assistance" as required by this provision" (CP 662-663). Patty's response to the motion simply does not refute or deny that she failed to facilitate physical assistance during Carlo's skype calls (RP 27-28 1/9/19). Based upon the

information provided, the Court found that Patty intentionally violated the provision in bad faith. Based upon the totality of the information before the court at this hearing, Commissioner Adams also found that “the mother has done all she can to exclude [the father] and not be as inclusive as is contemplated by prior orders of this court” (RP 781). It is clear that the Court believed Respondent had acted in bad faith.

(14) Carlo should be awarded attorney’s fees

Pursuant to RAP 18.1, this Court may award attorney fees if authorized by applicable law. RCW 26.26.140 provides, in relevant part, that “The court may order that all or a portion of a party's reasonable attorney's fees be paid by another party” without consideration of need or ability. RCW 26.26.140 is likely more applicable to the present case because the court decided it did not have jurisdiction over the dissolution action, but rather, Washington only had jurisdiction to decide the issues of parenting and child support.

RAP 18.9 authorizes an award of fees against a party who files a frivolous appeal. *See Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872 (1999). An appeal is frivolous if there are “ ‘no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility’ of success.” *In re Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003).

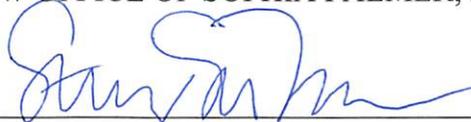
Patty's argument on appeal is meritless for the aforementioned reasons. Carlo requests this Court exercise discretion under this authority, consider the arguable merit of Patty's issues on appeal, and the trial court's extensive findings of Patty's intransigence in awarding him reasonable attorney's fees.

E. CONCLUSION.

The trial court properly exercised its broad discretion when it denied a Motion to Change Venue, denied Patty's request for an upward deviation of child support, denied Patty's request for attorney's fees and found Patty in Contempt. For the foregoing reasons, Carlo respectfully requests this Court affirm the findings and conclusions made by the trial court identified herein, and award him attorney's fees and costs.

DATED: September 12, 2019.

LAW OFFICE OF SOPHIA PALMER, PLLC



STACEY SWENHAUGEN, WSBA No. 41509
ATTORNEY FOR RESPONDENT

Certificate of Service:

The undersigned certifies that on this day she delivered email and Courts.Wa.Gov electronic service to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/12/19

Date

Signature



LAW OFFICE OF SOPHIA M. PALMER

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