

**FILED**

NOV 14 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

NO. 309371

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION THREE

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In re the Marriage of

KIRSTEN M. HESS (NACHTMANN)

Respondent

v.

SCOTT D. HESS

Appellant

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Joseph Schneider, Commissioner

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REPLY BRIEF OF APPELLANT

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Scott D. Hess, Pro Se  
\*Address in court file, and  
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**A. ISSUES IN REPLY TO RESPONDENT'S BRIEF**

In regards to Respondent's opening argument

1. Nachtmann argues that all issues in this case are subject to abuse of discretion standard, but they are wrong because some issues are matters of law.

In regards to attorney fees (Respondent brief "Issue 1"):

2. Nachtmann is inferring more from Commissioner Schneider's ruling than what was actually stated or ruled by him, as the Commissioner never ruled that the mother was the substantially prevailing party as insinuated by Respondent.

3. Both statute and case law cited/referenced by Nachtmann are irrelevant to this matter.

4. Two parties on opposite sides of a court case simply cannot both be a prevailing party.

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10. (Respondent Issue 7) The trial court did error because Saturday visitation was addressed in mediation when the parties agreed and it was entered into the parenting plan that the father decides Saturday visitation in even months and the mother decides odd months, and the record supports this.

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11. (Respondent Issue 8) The trial court did err because it is not within its discretion to arbitrarily decide which aspects of a parenting plan must be adhered to, and the Commissioners ruling equated to a modification of the parenting plan.

In regards to notice of relocation and joint decision making contempt allegation

(Respondent Issue 9):

12. (Respondent Issue 9) Respondent oversimplifies this, as 2 items are of issue here: the joint decision-making requirement and the notice of relocation. Further, the larger question is a question of law, as to what specifically it was the mother was required to give notice of.

13. (Respondent Issue 10) The trial court did err by not ruling on the contempt allegation regarding the joint decision making requirement despite Respondent's protests, and the record supports that.

In regards to Attorney's Fees and Costs (Respondent Issue 11)

14. (Respondent Issue 11) The mother should not be awarded attorney's fees in this matter, as she should not have been awarded attorney fees in the first place.

**B. ARGUMENT**

1. (\*Note- In this reply brief, Appellant will sometimes use reference to his Appellant Brief for the sake of brevity and avoiding redundancy.) Respondent states that all issues in this case are subject to the abuse of discretion standard. Br. Respondent, at 3. However, Nachtmann is wrong, as many of these issues are questions of law, such as whether a trial court must rule on all issues presented to them or can willfully "cherry pick" which one's they want to rule on. For example, ruling on the November 4th, 2011 visitation but ignoring the June 3rd, 2011, visitation allegation. Br. Appellant, at 35-37. Also ruling on the October 22nd, 2011, Saturday visitation while ignoring the October 29th, 2011, visitation allegation as

well as ignoring the November 2011 visitation allegation in entirety. Br. Appellant, at 38-41. Another de novo issue is whether or not the trial court slightly modified the parenting plan when it said that Nachtmann did not have the requirement to e-mail the father as required by the parenting plan. Br. Appellant, at 44. Another being the de novo issue of law in terms of *what* a parent is required to communicate via "notice" in relocation, regardless of the *type* of notice that is required. Though joint-decision making and the relocation were filed under the same alleged violation of a provision, Hess clearly requests 2 instances of contempt (which the Commissioner has the ability to collapse into a single finding, obviously). Hess states in oral arguments that there are "at the very least 10 instances of clear and concise contempt violations." Transcript Pg 32. He also states that, " Based on my declarations, I'm asking the court to find Ms. Nachtmann in contempt for lack of notice, **and** lack of adhering to the requirement for joint decision-making for educational." Transcript Pg 20. Hess can't get to 10 contempt allegations without those 2 issues being segregated. So, the joint-decision making was not ruled on at all by the Commissioner and thus should be ruled on de novo, and the relocation aspect being the question of law as to what specifically a parent must communicate in notice should also be reviewed de novo. Br. Appellant, at 44-45 and 48-49. Lastly, the determination of whether a statute provides for an award of fees is a "question of law and is reviewed de novo." Br. Appellant, at 16. And, Guillen v. Contreras, 147 Wn. App. 326, 195 p.3d 90 (2008) at ¶7, (citing Lindsay v. Pac. Topsoils, Inc., 129 Wn. App. 672, 684, 120 P.3d 102 (2005), *review denied*, 157 Wn.2d 1011 (2006)). So, obviously the issue of attorney fees should be reviewed de novo.

The fact of this case is that it sets an incredibly dangerous precedent to allow a court or judge to pick and choose which matters it will issue decisions on. If the issue is presented, it must be ruled upon and this is consistent with case law cited in Eklund (cited below, not included here to avoid redundancy). A court's duty and purpose is not to "cherry pick" what it should rule upon and what it should not, unless the matter is frivolous and should thus not be heard at all, but again, that is then covered by statute on the basis of frivolous motions and similarly. A court's purpose is to issue decisions for **all** the questions or issues at hand based on the requests, testimony, argument, declaration, and evidence submitted, **or** deem them frivolous. Canon 2. Rule 2.7, & RCW 2.08.240 and 2.08.190.

Respondent's overall argument and rebuttal seems to be that because the Commissioner made "a" decision on each general contempt allegation, the matter has therefore been decided upon and all other specificities related to the allegations are irrelevant and moot. Nachtmann believes that when Hess claims 3 violations of a provision of the parenting plan, that the trial court can pick any 1 of the 3 allegations it wants to rule on and that then somehow meets the requirement of something being fully decided upon. Yet courts frequently find multiple and specific contempt allegations for a single breach of a parenting plan, and proceed to collapse those "extra" contempt violations into a single finding. Marriage of Rideout, 150 Wn.2d 337, 77 P.3d 1174 (2003). And, Rideout, 150 Wn.2d at 348. And, Myers, 123 Wn. App. at 892. And, In Re Marriage of Eklund, 143 Wn. App. 207, 177 p.3d 189 (2008). If courts did not bother to hear, review, and decide upon **each and every** distinct issue presented to them, it would be impossible for courts to collapse

multiple findings into a single finding. Hess was aggrieved here because the trial court appears to have ruled strictly on issues that were favorable to the mother, and did not rule, opine, or make decisions on other issues that were presented and alleged to the trial court in writing and orally, yet weren't even refuted by the mother (such as the November 2011 Saturday visitation cited, Br. Appellant, at 40). The trial court erred here, as it was given specific dates, times, and instances of specific aspects of the parenting plan that were alleged to be violated, and the Commissioner "cherry picked" which issues he would rule upon and that is improper.

As described extensively in his brief, the Appellant Hess filed with the trial court in his original complaint, argued the matter orally, described in declaration, and provided extensive exhibits as to the dates and issues in question, as well as exactly how he alleged the parenting plan was violated, along with clear verbal and written requests for decisions to be made on those allegations. Yet, the trial court ignored many of those issues and provided no ruling. The issues should and must be decided upon de novo if they were not previously ruled upon, and should not be relegated back to the lower court but decided upon now based on the record.

2. Nachtmann attempts to lead the court to believe that prevailing party standards apply here and that's what the trial court ruled, when in fact the trial court made no such ruling. Yet, she also fails to point to anywhere in the record where the trial court actually ruled that Nachtmann is "the" prevailing party. The problem with Nachtmann's argument is that they fail to make any reasonable argument or legal reference as to when or how it is appropriate for both parties to be mutually prevailing, and that is what the trial court decided here. CP 123.

Nachtmann attempts to muddle the issue by citing the ruling that "Commissioner Schneider awarded Hess costs and attorney's fees 'if appropriate'". Br. Respondent, at 2. The reason that the Commissioner ruled this way is that Hess is a Pro Se litigant, therefore attorney's fees were unlikely and thus he made the 'if appropriate' reference. Still, it is clear that Hess prevailed on contempt. So did Nachtmann. Hess was ordered to pay Nachtmann's attorney fees, and Nachtmann to pay Hess' attorney fees "if appropriate". Both parties prevailed, both were ordered to pay the other's attorney fees. CP 123. The Commissioner's intent and ruling were clear. Therefore there was no single "substantially prevailing party" as argued by the mother, nor do they cite the record in any capacity to support that notion.

*When there is one primary issue, the party prevailing on that issue is entitled to its costs and fees as the "prevailing party" even though the party lost on another issue. Osborn v. Grant County, 130 Wn.2d 615, 630, 926 P.2d 911 (1996). Guillen V Contreras, 147 Wn. App. 326 (2008), at ¶12.* The fact is, there was one primary issue here being contempt, and the father prevailed on contempt.

Nachtmann is inferring more from Commissioner Schneider's ruling than what was actually stated or ruled by him, as the Commissioner never ruled that the mother was the substantially prevailing party as insinuated by Respondent, nor does the mother point to anything in the record that states as much. They are simply drawing their own conclusions based on the result, trying to sway this court into their favor without evidence or citation to the record to support that thought.

3. Nachtmann cites irrelevant statute and case law. She cites 1) RCW 4.84.330. 2) Marine Enters., Inc. v. Security Pac. Trading Corp., 50 Wn.App. 768

774, 750 P.2d 1290, review denied, 111 Wn.2d 1013 (1988). 3) *Marassi v. Lau*, 71 Wn.App. 912, 915, 859 P.2d 605 (1993). 4) *Kysar v. Lambert*, 76 Wn.App. 470, 493, 887 P.2d 431, review denied, 126 Wn.2d 1019 (1995). 5) *Riss v. Angel*, 80 Wn.App. 553, 564, 912 P.2d 1028, review granted, 129 Wn.2d 1019 (1996). All these from Br. Respondent, at 4-5.

Of those case law and statute: 1) *RCW 4.84.330* strictly references attorney fees on the basis of actions on a contract or lease. It is not applicable to contempt proceedings, nor relevant. Other statutes cover contempt proceedings. 2) *Marine Enters Inc v. Security Pac Trading Corp* is another contractual dispute that went to arbitration, between a fish processing vessel and a fish supplier. 3) *Marassi v. Lau* is another contract dispute, but related to a real estate purchase and sale agreement. 4) *Kysar v. Lambert* is another contractual dispute, but related to a purchase and sale of Christmas trees between 2 business entities, one in WA state and one in the state of MA. 5) *Riss v. Angel* is another contractual dispute between a homeowners association and a proposed development by the landowners.

Every single one of the issues cited in this matter by Nachtmann and counsel are *related to contractual law and money damages*, and have no relevance to contempt proceedings. Nachtmann is taking the most simple of prevailing party issues and trying to apply it to contempt proceedings. "When the question is one of money damages, the decision about which party prevails or substantially prevails is easy. The party that receives judgment is the prevailing party". *Guillen*, 147 Wn. App. 326 (2008), at ¶12, citing *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 571, 740 P.2d 1379 (1987)." Whereas with contempt, it is a status, therefore the mother

cannot be simultaneously in contempt and not in contempt at the same time. Interest of N.M., 102 Wn. App. 537, 7 P.3d 878 (2000), at 545. She was found in contempt. CP 123. Thus, the father is the prevailing party, or at worse mutually prevailing in which case both parties pay their own costs and fees. Further, all issues were adjudicated simultaneously so the mother must either be in contempt, or not in contempt since contempt is a status. The father could have filed and adjudicated each allegation separately, but he chose not to.

Nachtmann completely ignores the statute and case law related to contempt because it does not help her cause. The mother here does not attempt to utilize extensive case law regarding contempt and attorney fees because she cannot find anything substantial to support her weak argument. Instead, she has to try to convince the court that contractual statutes and case law somehow loop back to this contempt hearing in some unbeknownst and convoluted way. It is a stretch by any imagination, at best.

4. Two parties on opposite sides of a court case simply cannot both be a prevailing party, and yet Nachtmann argues this is appropriate without providing case law or statute to support the argument. Washington state follows the "American Rule" that a prevailing party does not generally recover its attorney fees unless expressly authorized by statute, by agreement of the parties, or upon a recognized equitable ground. Guillen v. Contreras, 147 Wn. App. 326, 195 p.3d 90 (2008), at ¶7 (citing Panorama Vill. Condo. Owners Ass'n Bd. v. Allstate Ins. Co., 144 Wn.2d 130, 143, 26 P.3d 910 (2001)). If the mother "substantially prevailed", then the father would not have been awarded attorney fees. He was awarded attorney fees and costs.

CP 123. In Guillen, it reads: "*Id.* at 985-986. Similarly, in *Goedecke v. Viking Investment Corporation*, 70 Wn.2d 504, 513, 424 P.2d 307 (1967), the court concluded its opinion: 'Since neither party has completely prevailed, each will bear his own costs.' Many other cases are similar--if both parties prevail in part, then neither is a 'substantially prevailing party.' *E.g.*, *Ennis v. Ring*, 56 Wn.2d 465, 473, 341 P.2d 885, 353 P.2d 950 (1959)." *Guillen V Contreras*, 147 Wn. App. 326 (2008), at ¶12. In reality, Hess prevailed on contempt since contempt is a status, but even barring that, each person in this matter should bear their own costs since neither party has completely prevailed. This is not a contractual money matter as Nachtmann's reference to statute and case law infers, but it is instead a contempt issue, and the 2 statues governing contempt are RCW 26.09.160 on violating a parenting plan and RCW 7.21 on contempt of court. Neither of those statutes help Nachtmann get to her argument.

5. Extending beyond the "bad faith" argument by Nachtmann: The trial court *did* err by not finding the mother in contempt for the November 4th, 2011, allegation regarding the father's weekend visitation. Nachtmann argues that Commissioner Schneider ruled she was not in contempt because the refusal of visitation was "not in bad faith". The Commissioner does not cite that as his reason, nor does Nachtmann cite anywhere in the record that the lower court ruled no finding of contempt because it was not in bad faith.

To refuse to perform the 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. RCW 26.09.160(1). The mother does not argue that she refused to

perform the duties provided in the parenting plan, or that she refused to allow the father access to the child until 3.5 hours past his pick up time. The word "shall" (in RCW 26.09.160(1) ) demands that it is thus a non-optional action by the court or otherwise, and "shall" be deemed bad faith. "Shall" indicates it is not optional. *Eklund*, 143 Wn. App. 207 (2008), at ¶20 and ¶21. And: *James*, 79 Wn. App. 436, 903 P.2d 470 (1995), at 442. She refused to perform the duty in the parenting plan, and therefore is required to provide reasonable excuse. 26.09.160(4). A "willful" finding or a finding of bad faith is not required as argued by Nachtmann. Br. Respondent, at 8. All that is required is a refusal to perform a duty in a parenting plan or an order. *Marriage of Davisson*, 131 Wn. App. 220, 126 P.3d 76, at ¶8. Nachtmann refused to perform her duty, and she does not cite anywhere in the record a reasonable excuse for doing so.

6. Nachtmann argues "Hess has the burden of proof to provide evidence of a willful violation and was unable to do so". Br. Respondent, at 6-7. A "willful" finding or a finding of bad faith is not required. All that is required is a refusal to perform a duty in a parenting plan or an order. *Marriage of Davisson*, 131 Wn. App. 220, 126 P.3d 76, at ¶8. The mother refused to perform the duty required in the parenting plan.

Further, Hess provides the most clear and extensive proof as possible in his Appellant Brief showing the efforts he took to getting the mother to understand it was his weekend with the child, and that she was confused. In Hess' Appellant Brief, he repeatedly cites the record referencing the mother's admitted confusion. Br. Appellant, at 28-35. The issue of who was confused is incredibly important and not

"irrelevant" as cited by Nachtmann. With the extensive proof of e-mails, phone calls, and text messages cited in the record by Hess, it is impossible for any reasonable person to surmise that he was confused even for a moment as to whose weekend it was with the child. There is no substantial evidence supporting a notion that the father was confused about whose weekend it was, nor does Nachtmann provide even an iota of argument, reference, or citation to the record as to the father's confusion. "Substantial evidence" is evidence that would persuade a fair-minded, rational person of the truth of the declared premise. *In re Welfare of C.B.*, 134 Wn. App. 942, 953, 143 P.3d 846 (2006). Without the father's supposed confusion, the mother has no reasonable excuse such as the one she is required to give by statute. The appellate court must review the trial court's factual findings for substantial evidence. *In re Marriage of Myers*, 123 Wn. App. 889, 893, 99 P.3d 398 (2004). There is no substantial evidence to support the trial courts notion that the father was confused, nor does the mother cite anything in the record to support that thought. Further, even upon the mother's claimed realization that it was in fact the father's weekend, she still proceeded to keep the child from the father for an additional 2+ hours, which in itself is contempt. CP 63. Further, not a single party refutes that Hess was told the child was being brought to him between 6pm and 7pm that evening, at which time the child was arbitrarily withheld from the father. CP 23.

7. Nachtmann's argument on Commissioner Schneider's failure to rule on all allegations of contempt completely misses the point. She cites only one item, with that reference to case law being: *In re Marriage of Eklund* 143 Wash.App207, 177 P.3d 189 (2008). Br. Respondent, at 7. Nachtmann's entire argument is a huge

failure, because the Eklund case actually ruled on each and every separate contempt allegation, and then collapsed them into a single finding. The trial court actually found the father in contempt 6 times in Eklund. The mother in Eklund sought 9 findings of contempt, but 3 were ruled as not in contempt because the child's overnight visits with friends were not a violation of the provision in the parenting plan. *In re Marriage of Eklund* 143 Wash.App207, at ¶12 (2008). Here and in this matter, the Commissioner simply did not rule on multiple allegations made by Hess, and instead ignored them entirely as if they were never argued. This is a huge difference, as each and every allegation in Eklund was addressed and ruled upon. Nachtmann cannot and does not provide any case law, statute, or legal authority in which it is appropriate for a judge to arbitrarily decide what matters of alleged contempt that he or she will rule on, and which ones he or she will not. The mother's argument on this point makes absolutely no sense. In Eklund, there were multiple allegations of contempt for one provision of the parenting plan, and each allegation was addressed and decided upon, and the trial court had the discretion to collapse them into a single finding. In this matter, Hess similarly alleged 2 contempt violations for the one provision of his weekend visitation, and the court similarly had the authority to collapse any findings into a single finding. The problem is that only one of the two contempt allegations were adjudicated upon in Nachtmann/Hess for this provision of the parenting plan, unlike Eklund which adjudicated every allegation brought before the trial court. Commissioner Schneider ruled on the November 4th, 2011, allegation, but ignored the June 3rd, 2011, allegation by Hess. CP 121-122.

8. Respondent is misleading the court regarding October, 2011 visitation. The father clearly cites the record and explains he was willing to take his Saturday with the child either on Saturday, October 22nd, or Saturday, October 29th. Br. Appellant, at 38. The father argues to the trial court that he was denied Saturday visitation for the entire month of October 2011, because the mother refused his visitation on both October 22nd and October 29th. Transcript, Pg. 28/Lines 5-11. Nachtmann argues that the trial court ruled the parenting plan did not address when notification was to be given. Br. Respondent, at 8. However, Nachtmann fails herself to cite the record where she argued or made any sort of request for the trial court to come to that decision, so it is improper for the court to jump to that conclusion. Further, this is problematic and lazy, because Nachtmann simply points to the trial court's decision in every "issue" and basically argues that because the decision was made that way, it must be correct. How can the Appellate court come to a reasonable conclusion to uphold a non-contempt violation, when it has no idea as to how the trial court arrived to that point, and no citation to requests or declarations from the mother, and no citation showing that the mother (not the trial court) actually orally argued or made statements via declaration that Hess' notification was problematic?

The fact is, the parenting plan states that the amended parenting plan supersedes the original parenting plan in case of conflict. CP 79. This was filed 4/21/11, and was signed by a judge, by Nachtmann, and by Hess. CP 79-82. Number 13 of the modification states Hess will choose which Saturday visit he has with Nachtmann without limitation in even months, and he was within his right to call the mother on a Saturday morning and state he wanted his Saturday with the child either

of the last 2 Saturdays of October 2011. CP 82. Nachtmann denied him both Saturdays, and this is not refuted by Nachtmann, and thus, the father was denied his "additional Saturday" visitation with the child for the entire month of October 2011 and not simply the October 22nd, 2011, date that the trial court specifically references. CP 92. This is especially true in light of the fact that the father also was willing to take the child on October 29th, 2011, which the mother also refused.

9. The trial court did error because it absolutely did not rule on the November 2011 visitation as stated by Respondent, nor does the record support their argument or that notion. It is impossible to discern what Nachtmann is referring to in this issue, because there is no relevant reference to the record. Nachtmann states that the trial court ruled on the November 2011 missed 8 hour Saturday visitation, but perplexingly fails to cite where the trial court made a ruling. She simply states, "This is not true." Br. Respondent, at 8.

For the sake of avoiding redundancy, please review #7 of this reply brief for arguments as to why Nachtmann dramatically fails to reach her point regarding these non-addressed issues somehow having been ruled upon, despite no evidence in the record to support that thought. Br. Reply of Appellant, at 11-12 of this document.

Hess states that Nachtmann denied him his November visitation for the entire month of November, and it is factual that this is not refuted by Nachtmann in her brief, in her trial court declarations, trial court arguments, or anywhere else in the record. Hess argues orally that Nachtmann denied him his entire month of Saturday visitation for November 2011. Transcript page 28, Lines 15-23. Yet the trial court did not rule on November 2011, and omitted it from his ruling. He ruled with

specificity on February 18th, 2011, and October 22nd, 2011, but omits any sort of ruling whatsoever from the November 2011 allegations. CP 122. Even if multiple instances of contempt are alleged and the trial court intends to collapse them, they still must be ruled upon. If they are arbitrarily omitted from consideration or ruling, it prevents the father from holding the mother accountable to second remedial contempt enforcements as described in RCW 26.09.160(3), and thus aggrieves the father.

10. Nachtmann is wrong, as Saturday visitation was addressed in mediation. Nachtman references CP 79 to cite her claim that the parenting plan requires dispute resolution for this Saturday visitation, yet CP 79 in no way references a dispute resolution requirement and is misstated by Nachtmann. CP 79 is in fact completely irrelevant to Saturday visitation and any dispute resolution requirements.

The parties had problems related to this issue due to the mother arbitrarily denying the father his Saturday visitation at times and the father having no recourse because it was based on "mutual agreement" of when the additional Saturday monthly visitation would occur. CP 72 (Provision 3.1 and 3.2). The father took the mother to mediation and specifically broached the issue of Saturday visitation to rectify the issue, and the resulting agreement was that the mother chose additional Saturdays between the child and the father in odd months and the father would do the same for even months. Hess states in declaration that he "brought the issue up in mediation because there was rarely 'mutual agreement' ". CP 25. The result of that mediation was #13 of the modified parenting plan that deemed the father choosing which Saturday he will have the child in all even numbered months, and the mother

doing the same in all odd numbered months. CP 82. There is no statute that demands the father go to mediation over the same issue of Saturday visitation repeatedly. He went once, and after that Hess was within his rights to request and enforce contempt for violation and denial of his Saturday visitation.

Further, Nachtmann makes no reference to the record as to any sort of complaints that justify the trial court making a ruling on dispute resolution, as Nachtmann never even argued that dispute resolution was an issue. Not once in declaration or in oral argument did Nachtmann request that the trial court find Saturday visitation unenforceable because Hess didn't request mediation. This was a simple mistake by the trial court who imposed a verdict that wasn't even argued for or asked by Nachtmann, and shouldn't have been a topic to be ruled on. Again, Nachtmann's argument is essentially that because the trial court ruled that way, it must be rest in its place. Hess provides citation and reference to the opposite in his Appellant Brief, pointing to the record to show he did attempt mediation regarding this issue. The mother however, does not claim in declaration that the parties did not attempt mediation, so it is a moot point since only arguments made from declaration can be made. RCW 94.07W(2)(A), and Transcript 7 line 1-4. So, the record does not support the trial courts finding. The appellate court must review the trial court's factual findings for substantial evidence. *In re Marriage of Myers*, 123 Wn. App. 889, 893, 99 P.3d 398 (2004). There is no substantial evidence to support the trial court's ruling that mediation was not utilized for the issue of Saturday visitation, and in fact Hess proves the opposite. Br. Appellant, at 37-38.

11. The trial court erred on the e-mail requirement ruling. Again, Nachtmann's argument is lazy and provides no useful citation to the record. She simply cites the trial court's ruling as her argument for the ruling to remain unchanged, which truthfully, isn't even an argument. Br. Respondent, at 9. Nachtmann states in her Reply Brief, "e-mails had been exchanged with Hess' wife (CP 122)". This is simply untrue and unfounded. Nowhere is that stated in CP 122, as Nachtmann and Kristina Hess have *never* e-mailed each other once in their lives. Nachtmann openly states in declaration she unilaterally modified the parenting plan without Hess' permission. CP 66 (last 2 sentences). Further, Nachtmann specifically states she dismissed the court-ordered parenting plan in favor of her own personal arrangements with Hess' wife, Kristina, by *hand-writing* a list and putting it in the child's backpack (not e-mailing, as Nachtmann incorrectly states). CP 67.

The court severely erred in its discretion, because it's decision to not find the mother in contempt equated to a slight modification of the parenting plan. The trial courts duty was to determine if there was a plain violation of the order *presently* in effect. Humphreys, 79 Wn. App. 207 (2008), at 599. Further, the trial court ruled the violation was not a "willful" violation. CP 122. A "willful" finding or a finding of bad faith is not required. All that is required is a refusal to perform a duty in a parenting plan or an order. Marriage of Davisson, 131 Wn. App. 220, 126 P.3d 76, at ¶8. The mother here clearly made a unilateral decision that the provision in the parenting plan was unnecessary, and that is a violation of the parenting plan. "Modifications are any increases or reductions to the rights originally granted to a party. *Rivard v. Rivard, 75 Wn.2d 415, 418, 451 P.2d 677 (1969).* Any modification,

no matter how slight, requires an independent inquiry by the trial court. *Schroeder*, 106 Wn. App. at 352; *In re Parentage of Smith-Bartlett*, 95 Wn. App. 633, 640, 976P.2d 173 (1999). A trial court cannot delegate its authority to modify a parenting plan. *See Kirshenbaum v. Kirshenbaum*, 84 Wn.App. 798, 807, 929 P.2d 1204 (1997). The trial court here overstepped its bounds.

12. Again, Nachtmann simply references the trial court's ruling with absolutely no reference to the record. Br. Respondent, at 10. Further, she is again completely missing the point. She does not refute that as described, cited and referenced in Hess' brief, her "reasonable notice" entailed effectively telling Hess, "Hey, we're going to be moving one of these days and I'm thinking about changing schools for our son." CP 22-23. The trial court agrees with this assessment, stating, "he was told about the move but he was not provided with specific details." CP 121. What the trial court and Nachtmann are missing, is that the father was unnecessarily deprived of important changes and developments in his son's life, and his opportunity to be a father to his son at an unnerving time in a child's life. Is it fair the father was deprived of being at his son's first day of school, and comforting him in a scary, new environment? Why was the father deprived? Because the mother gave him very vague details as to the date and time of the move into a new home, and this is recognized by the trial court (as referenced above) and is neither refuted by the mother. That is why this is a question of law to be reviewed de novo. Case law states that "[3, 4] The construction of a statute is a question of law and is reviewed de novo.«13» Ambiguities in the statute must be resolved in accordance with the intent

of the legislature.«14»" Interest of N.M., 102 Wn. App. 537, 7 P.3d 878 (2000), at 543.

RCW 26.09.440(2)(b)(v) states, "(b)Except as provided in RCW 26.09.450 and 26.09.460, the following information shall also be included in every notice of intended relocation, if available: (v) The date of the intended relocation of the child" RCW 26.09.450(1) states, "(1) When the intended relocation of the child is within the school district in which the child currently resides the majority of the time, the person intending to relocate the child, in lieu of notice prescribed in RCW 26.09.440, may provide actual notice by any reasonable means to every other person entitled to residential time or visitation with the child under a court order." This statute only changes the *type* of notice, it does not change *what* is required to be communicated in the notice. The mother failed to provide the time and date and details of the intended relocation, and this harms the father and his right to be necessarily involved with the changes in his son's life.

Further, I do not understand Nachtmann's continual arguments that have no relevance. She cites RCW 26.09.480 stating, "Hess had other remedies he did not pursue, including filing an objection to relocation." Br. Respondent, at 10. Yet per statute this is completely false, as Hess cannot object to the intended relocation of the child within the school district. RCW 26.09.450. Thus, Hess' only form of remedy was to receive specific notice of his son's move, and filing of contempt if that is not adhered to, which it was not.

13. The trial court did not rule on the joint decision making requirement. Again, Nachtmann cites the trial court ruling as her sole basis and argument for the

trial court's decision remaining unchanged, and does not bother to cite the record. Br. Respondent, at 10-11. At no point in Commissioner Schneider's ruling does he once state or reference joint decision-making requirements, he strictly references the notice requirements which are related to relocation. CP 121. Nachtmann cannot point to anywhere in the record where she told Hess that the child was changing schools, because it never happened, is not in the record, and that is not refuted by Nachtmann. All parties agree and it is not refuted that there was a very general discussion between Hess and Nachtmann about the child changing schools. Hess argues in both declaration and orally that joint decision-making necessarily includes specific notice. CP 91, and Transcript 21, at line 16-20.

A parent cannot unilaterally place their child in a school when there are joint-decision making provisions in a parenting plan. In re Marriage of Davisson 131 Wn. App. 220, at ¶11, (2006). In Davisson, the mother next contends she did not willfully fail to comply with the parenting plan because she had her attorney notify Mr. Davisson's attorney before she enrolled their son at a new school, and she believed her choice did not require joint approval. "Parents are deemed to have the ability to comply with orders establishing residential provisions and the burden is on a noncomplying parent to establish by a preponderance of the evidence that he or she lacked the ability to comply with the residential provisions of a court-ordered parenting plan or had a reasonable excuse for noncompliance. *In re Marriage of Rideout* , 150 Wn.2d 337 , 352-53, 77 P.3d 1174 (2003)". *In re Marriage of Davisson* 131 Wn. App. 220, at ¶12, (2006). So, "notification" is irrelevant, as the non-complying parent has the burden of proof to show why she could not comply

with the parenting plan joint-decision making requirement. Joint-decisions are just that, "joint-decisions", and not simple, widely general notice. The child had the opportunity to remain at his old school through the end of the current school year. CP 90-91, and CP 22-23. Hess did not learn his son was in a new school until after his third day at the new school. CP 91, and Transcript Pg 21 at Lines 1-2.

Further, nowhere does Nachtmann cite or reference the record showing that the trial court's decision was supported by substantial evidence. Nachtmann correctly states, "Hess is seeking two findings of contempt on one issue." Br. Respondent, at 11. Yet, as it consistently did throughout this contempt matter, the trial court clearly ruled on only one issue rather than ruling on all issues and then collapsing them into a single finding if it so chooses, and as referenced earlier in this document (in relation to Eklund). Br. Reply of Appellant, at 11-12.

**14.** The mother should not be awarded attorney fees in this matter, as she should not have been awarded attorney fees in the first place. Nachtmann cites *Marriage of Terry*, 79 Wn. App. 79 (1995), stating that considerations must be based upon "a consideration that balances the needs of the spouse seeking fees against the ability of the other spouse to pay." Note Nachtmann's citation specifically states "the needs of the spouse". This is another irrelevant case law citation, as *Terry* involves a couple married for over 24 years where the court rules that the wife is entitled to attorney fees as a party to dissolution after a long marriage. Hess has a wife he has been married to for 5 years as of December 2012, and Nachtmann and Hess were first separated over 9 years ago after a 10 month marriage. This is not a dissolution as in *Terry*, this is a contempt matter on appeal.

Further, Nachtmann cites *Marriage of Foley*, 84 Wn. App. 839 (1997), and that her attorney fees are "incurred are a direct result of Hess's intransigence." Br. Respondent, at 12. However, in *Foley*, "Mr. Foley filed numerous frivolous motions, refused to show up for his own deposition, and refused to read correspondence from Mrs. Foley's attorney. His actions caused numerous delays in the trial and required Mrs. Foley to incur additional attorney fees. *Marriage of Foley*, 84 Wn. App. 839, at ¶11 (1997). Hess had no such involvement in trivial matters like those seen in *Foley*, and further, Nachtmann cites nothing in the record to support her claim in Hess' intransigence. In fact, it is an abuse of discretion for a court to award attorney fees to a party who has the ability to pay. *Marriage of Foley*, 84 Wn. App. 839, at ¶10 (1997). Nor does Nachtmann cite case law justifying her an award of attorney fees on appeal. Nachtmann has greater household income and individual income than Hess does, and Hess will also timely file the Affidavit of Financial need prior to the deadline.

### **C. MOTION FOR ATTORNEY FEES**

Like the mandatory consequences, the imposition of attorney fees is mandatory under the statute: the parent held in contempt "shall" pay to the other parent "all court costs and reasonable attorneys' fees incurred as a result of the noncompliance, . . ." RCW 26.09.160(2)(b)(ii). Accordingly, Hess should receive his attorney fees (if applicable) and costs on appeal for both the original contempt motion in the trial court, as well as his costs and fees related to this appeal. Nachtmann was already found in contempt once and should have either been responsible for her own costs and fees or for both parties costs and fees in the first place. RAP 18.1.

#### **D. CONCLUSION**

Nachtmann seemingly made little to no effort to cite case law that actually supports her arguments or has relevance to contempt proceedings, and the only arguments in place are citations to the trial court's ruling essentially arguing, "The Commissioner ruled it so it must be true". There are few to no references to the transcript, no references to Nachtmann's declarations, arguments, and similarly, and they basically come in having rested on their laurels.

Case law and statute binds the court to hear/rule on many of these matters de novo, and for the foregoing reasons described in the Appellant Brief as well as this Reply Brief, Hess respectfully asks this court to review and reverse the trial courts order and allegations related to:

1) Weekend visitation on November 4th, 2011. 2) The October 2011, Saturday visitation. 3) The e-mail requirement. 4) The relocation.

Based on the record, for the appellate court to make findings and issue written ruling on matters previously presented in declaration and argued orally to the trial court, but which were never adjudicated or ruled upon. Including: 1) Weekend visitation on June 3rd, 2011. 2) The non-refuted November 2011, Saturday visitation. 3) The joint decision-making requirement.

Also for this court to award make-up time, extended to the father in the case of prevailing on any residential issues. As well as the required civil penalty levied against the mother for a first time contempt violation for violating an order related to a parenting plan. RCW 26.09.160.

Dated this 12th Day of November, 2012.

Respectfully submitted,

Scott Hess

Pro Se, Scott D. Hess

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIV III

|                      |   |                         |
|----------------------|---|-------------------------|
| Kirsten Nachtmann    | ) | Appeal cause No. 309371 |
|                      | ) |                         |
| Petitioner,          | ) |                         |
|                      | ) | CERTIFICATE OF SERVICE  |
|                      | ) |                         |
| v.                   | ) |                         |
|                      | ) |                         |
| Scott Hess           | ) |                         |
|                      | ) |                         |
| Appellant/Respondent | ) |                         |

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I DECLARE that I am not the plaintiff, defendant or a witness, and:

SERVICE

I served the following documents:

**REPLY BRIEF OF RESPONDENT**

by delivering by US Mail a true copy to the defendants attorney of record in Benton County, State of Washington, as follows:

| <b>Name of Respondent Service</b> | <b>Address Where Served</b>                                        | <b>Date of</b>  |
|-----------------------------------|--------------------------------------------------------------------|-----------------|
| <u>Kirsten Nachtmann</u>          | <u>Defoe Pickett, 830 N Columbia Cntr Blvd. "A", Kennewick, WA</u> | <u>11-12-12</u> |

I, the undersigned, declare under penalty of perjury that the foregoing is true and correct and that I was at the time of service of the above notice(s) a resident of the State of Washington over the age of 18 years and not a party to the above numbered claim.

DATED: 11/13/2012

x James M. Hess  
Signature of Server

Server's Phone No. 253 332 7878

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Bonney Lake  
WA 98391