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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 345891

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Melissa Jade Peterson, Appellant
v.
Sheila Kay Peterson, Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR WALLA WALL COUNTY

REPLY BRIEF OF APPELLANT

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I. Introduction

Respondent's Response Brief ("Response") advanced no legal theory as to why Washington might be able to have jurisdiction to modify an out-of-state parenting plan despite the plain language of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). The Response brief provided no legal theory as to why this court should not honor the Oregon order asserting continuing exclusive jurisdiction and issue an opinion consistent with the Oregon order that vacates all orders issued by the trial court and dismisses the case.

Instead the Response advocated dismissing the appeal based on justiciability or mootness. The mere fact that dismissing this appeal would require affirming the trial court's orders, including its order asserting jurisdiction, makes the frivolity of the justiciability and mootness arguments self-evident.

The Response also failed to argue that there was any factual or legal basis for any of the orders entered by Judge Wolfram. The Response did not provide any legal reason why this court should do anything other than order Judge Wolfram to permanently recuse himself from any matter involving the Peterson family.

The law is clear, Washington Court's lacked jurisdiction to modify the Oregon parenting plan. Oregon issued an order asserting its jurisdiction and declaring all Washington Orders void. This Court should grant the appeal, vacate all orders in the Washington case for lack of subject matter jurisdiction and award Melissa attorney's fees, costs, and expenses.

II. A Justiciable Controversy Exists Because there is a Washington Court Order that Asserts Jurisdiction, Refusing to Vacate the Washington Orders

The Response stated, "[t]his would be a justiciable controversy if, in fact, Sheila Peterson¹ continued to argue that Washington has proper subject matter jurisdiction under the Uniform Child Custody and (sic) Jurisdiction and Enforcement Act." This statement does not express an agreement that Washington never had subject matter jurisdiction. Instead, the Response argued that the Court of Appeals should simply dismiss the appeal because, outside of the facts before this court, Sheila has agreed to a modification in Oregon.²

The singular case the Response cited regarding the issue of a justiciable controversy has no relevance to this case because it held that justiciability was linked to the failure to join an indispensable party and

¹ For clarity, the parties will be referred to by their first names.

² The only facts properly before this court show that Sheila objected to Oregon jurisdiction, even arguing in Oregon during the modification that jurisdiction should be returned to Washington. (See Opening Brief Appendix)

because the case involved a political question not appropriate for the judiciary to resolve. *Nw. Animal Rights Network v. State*, 158 Wn. App. 237, 239, 242 P.3d 891, 892, 894 (2010)

Here, there is no other indispensable party. The only possible parties to this case are the parents, Sheila and Melissa. The question before the court is not a political question, but a question that is as close to black letter law as family law ever reaches. The nonpolitical question is whether Washington had jurisdiction to issue any order, other than an order of dismissal, in a case related to the modification of an out-of-state a parenting plan. The UCCJEA, is clear the answer is no, requiring all orders issued in this case to be vacated because they are void.

Specifically, the justiciable issue is Judge Wolfram's June 22, 2016 Order (CP 1256-1258), which stated that "Washington State superior courts have general jurisdiction and lack subject matter jurisdiction only when expressly denied." The order goes on to state, "Good cause does not exist for dismissal of this action or to vacate the underlying orders[.]" The court then indicated it would hold a UCCJEA conference, which is not applicable for a modification case. Approximately three months later, the Washington and Oregon court's conferred. Oregon asserted jurisdiction and held that the Washington court orders were void.

Sheila's position has been that the Oregon Orders should not be honored in Washington (CP 1351, Letter from Carmon Law Offices stating: "We believe it would be incorrect to dismiss the Walla Walla case and vacate all orders, but rather the most appropriate and accurate order after the UCCJEA conference would be an order transferring jurisdiction.") In addition, Judge Wolfram issued his final order November 10, 2016 (CP 1374), insisting on transferring the case (although walking back from his initial order for Respondent to pay for the transfer of files). Judge Wolfram entered his November 2016 order, *after* Melissa provided a copy of the Oregon Order stating all Washington Orders were void and after Melissa provide a proposed order that would incorporate Oregon's order to vacate Washington's orders. (CP 1365-1373). Judge Wolfram defied Oregon's assertion of jurisdiction, reaffirming his prior order that Washington had jurisdiction and all the Washington orders were valid and the case would be transferred, Washington orders intact.

The Response reveals Sheila's position remains that Washington had jurisdiction to enter orders³ and could have jurisdiction to modify the parenting plan. Instead the Response attempts to shift the focus to say that Oregon has jurisdiction. At page six of the response Sheila "concedes that

³ The Response does not dispute that Sheila argued at the trial level, during discretionary review, and before the Oregon Court that Washington had jurisdiction and should exercise jurisdiction instead of Oregon.

Oregon has continuing jurisdiction under the UCCJEA." Distinctly missing from Response in the discussion of jurisdiction is the crucial word and concept: "exclusive."

The issue has never been about whether Oregon has jurisdiction, it has been whether Oregon's unrelinquished jurisdiction precluded Washington from exercising jurisdiction. The dispute is that Judge Wolfram erred when he allowed this case to move forward towards modification when the Petition identified the underlying order as an out-of-state order. Judge Wolfram compounded this error when he refused to dismiss the case in June 2016 when it was brought to the court's attention that the UCCJEA precluded Washington from exercising jurisdiction, and then again in November 2016 when he insisted that Washington orders were valid and the file was simply "transferred" to Oregon.

The refusal to dismiss, particularly the timing of the last order occurring after Oregon held that Washington Orders are void, is important. There is a November 7, 2014 Temporary Order (CP 0109-10) requiring Melissa surrender her gun collection. There is also a Temporary Parenting Plan. As it stands in the Washington court record, the Washington court has affirmed the validity of these orders. The fact that the court refused to honor the Oregon order declaring all the Washington orders void means that any person in Washington attempting to follow these orders would justifiably

believe that they had to follow the Washington orders, especially because Washington affirmed its jurisdiction after Oregon declared the Washington Orders void.

The Response also takes the position that Oregon should handle the issues. Oregon has already declared the Washington orders void, there is no further action the Oregon courts can take to remedy the Washington orders. A Washington trial court refused to honor the plain language of the UCCJEA and the subsequent Oregon order that the Washington orders were void. The only remedy for the trial court entering is for the Court of Appeals to vacate the Washington Orders. The remedy for Sheila's forum shopping and insistence that Washington has jurisdiction is a monetary award.

III. The Issue of Judicial Error Remains a Ripe Argument in the Alternative to the UCCJEA Argument

It is important to note that Sheila does not dispute the legal argument that the UCCJEA and associated case law demand a dismissal of all the orders entered in Washington in this case. In addition the UCCJEA, the opening brief cited *In Re Custody of A.C.*, 165 Wn. 568, 200 P.3d 869 (2009), *In re Marriage of Greenlaw*, 123 Wn.2d 593, 689 P.2d 1024 (Wash. 1994), and *In re Parentage of Ruff*, 168 Wn. App. 109, 275 P.3d 1175 (Wash. App. 2012) as requiring a court dismiss any case where the state

lacked jurisdiction due to the existence of an out-of-state parenting plan or custody order.

Arguably, this court should not need to reach the argument in the alternative that all of Judge Wolfram's orders should be vacated because he consistently failed to follow the law. In fact, the Response made no effort to dispute that Judge Wolfram failed to law with regard to every order he entered.

Instead, in Response to the argument that all the orders that Judge Wolfram ordered should be vacated because they were not based in fact or law, the Response simply claimed the Washington Orders have been voided, citing the Oregon Order as evidence of this. Response page 7. As discussed in the section regarding the justiciability argument, Sheila consistently and affirmatively argued the Oregon orders did not have the effect of voiding the Washington Orders.

Specifically, in response to the conference call between Oregon and Washington, Melissa proposed an order incorporating Oregon's order and vacating the Washington Order.⁴ Melissa reiterated the request to vacate the Washington Orders in response to Sheila's informal motion to require

⁴ Much of the discussion was done via letters and emails as the Walla Walla County Superior Court Rules provide that proposed findings and orders be submitted to the court. WWCSR 52. There was a pending order and a pending hearing before Court of Appeals for Discretionary review when the Washington courts communicated and when Oregon issued its written decision.

Melissa to pay for the fees of transferring the case at CP 1365-1373. Sheila maintained her position that the Washington orders should remain in effect and the case be transferred to Oregon. CP 1364.

The Washington court granted Sheila's request to reject the Oregon order voiding the Washington Orders. CP 1336-CP 1346 (email from Judge Wolfram's bailiff Tina Driver stating, "Based on the history of the file, Judge Wolfram is not vacating all prior orders and dismissing the case. The case has been transferred to Oregon[.]") CP 1351, CP 1365-1373.

Thus, it is factually incorrect, and perhaps intentionally misleading, to argue the Washington Orders have been voided. Oregon can issue an order asserting that they are void, but until Washington enters an order agreeing with Oregon's ruling, the Washington orders remain in effect in Washington.

Sheila's effort to dismiss the appeal instead of arguing for an order that voids all Washington orders demonstrates Sheila still believes that Washington had jurisdiction to enter the orders. Her own argument demonstrates that the issue is not moot, nor is merely academic.

Even if Sheila had taken a position on appeal that the Court of Appeals should honor the Oregon order and vacate the Washington Orders, the issues in this appeal would not be moot as Melissa is seeking an award of fees, costs, and expenses under the UCCJEA. As the court noted in *In re*

Cross, some appeals can be saved from mootness due to the significant and adverse collateral consequences. *In re Cross*, 99 Wn.2d 373, 377, 662 P.2d 828, 831 (1983) (civil commitment appeals); *See also In re Custody of A.C.*, 165 Wn.2d 586, 582, 200 P.2d 689 (2009) (*Johnson J.J., concurring*). (“[T]ime lost with your child is something you can never get back.”) Having the fundamental right to parent your child infringed upon because of forum shopping is one of those issues.

As *In re Marriage of Irwin* noted:

the term "moot" has variously been applied to include cases concerning an abstract question not resting on existing facts, cases in which the rights have expired due to lapse of time, cases in which no judgment rendered could be put into effect, and cases seeking an advisory decision.

In re Marriage of Irwin, 64 Wn. App. 38, 59, 822 P.2d 797, 808 (1992). (Citing 5 Am. Jur. 2d Appeal and Error § 762 (1962).)

The instant case is based on specific facts, no rights have expired, a judgment could be put in affect, and a specific remedy is available, i.e., it is not a request for an advisory decision. It is not a merely academic inquiry.

Tangible remedies exist. First and foremost, this court can vacate all prior Washington court orders, either pursuant to the UCCJEA or pursuant to the unchallenged position asserted in Appellant’s Opening Brief, that Judge Wolfram failed to follow the law in each order he issued.

The second clear remedy is reimbursement under the UCCJEA for all the expenses related to defending against Sheila's improper efforts to avail herself of Washington courts (see below for more discussion of the UCCJEA fees provision). This court could also issue sanctions for filing a frivolous case. But for Sheila's dogged insistence that Washington has jurisdiction to modify an out-of-state custody order, this whole case would have been resolved, at least more than a year ago on May 5, 2016, when Respondent filed the Motion to Dismiss for lack of subject matter jurisdiction. (CP 1051-1069).

It is also not moot because the Response was clear, Sheila does not believe Oregon's jurisdiction is exclusive. She does not agree with the Oregon order declaring the Washington orders void. Without an order affirming Oregon's continuing exclusive jurisdiction, Sheila may do exactly what she did after the last time she consented to Oregon's jurisdiction, wait six months (or some other amount of time) and pursue a case in Washington under the same theory that Washington courts are courts of general jurisdiction and allowed to modify an out-of-state parenting plan, regardless of the UCCJEA. The likelihood that this could reoccur means that the parties would benefit from an authoritative determination for future guidance, another factor against mootness. Klickitat Cty. Citizens Against

Imported Waste v. Klickitat County, 122 Wash. 2d 619, 632, 860 P.2d 390, 398 (1993).

IV. The Facts in this Case Require Attorney's Fees Under the UCCJEA

The Response argues, without providing support, that fees should not be provided under the UCCJEA. The UCCJEA is clear:

(I) The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorneys' fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

Wash. Rev. Code § 26.27.511(1).

The Response failed to argue that any fees or expense sought would be clearly inappropriate. It is clear Sheila engaged in forum shopping by pursuing a modification in Washington. She waited six months after the finalization of the Oregon order and immediately pursued modification in Washington. There was no allegation in the pleading of emergency jurisdiction. The Oregon court was nearby. Sheila never alleged that there was any kind of barrier that prevented her from accessing the nearby Oregon court. She was simply forum shopping.

Even after Melissa filed for dismissal of the Washington case, Sheila delayed in turning to the Oregon court to ask it to relinquish jurisdiction.

When Oregon refused to relinquish jurisdiction, Sheila fought to have Washington maintain its orders instead of dismissing the case. She fought against dismissing the case during the discretionary review, vigorously arguing that Washington had jurisdiction. Even in the Response, Sheila has maintained her position that the Washington had jurisdiction. She made no claim that she would not seek to pursue another modification case in Washington.

Sheila pursued jurisdiction in Washington even knowing that Oregon had and continues to have continuing exclusive jurisdiction. Even after Oregon asserted its jurisdiction, she fought to keep the Washington orders in effect. She has violated the UCCJEA. She has done so with the clear intent to usurp Oregon's jurisdiction.

Sheila used Judge Wolfram's willingness to enter excessive and unjustifiable restrictions against Melissa to have a de facto parenting plan from October 2014 to approximately November 2016. Judge Wolfram eliminated over 100 overnights per year that Melissa was supposed to have with her daughter and required visitation to occur with a supervisor for limited amounts of time per week. Judge Wolfram placed the entire burden of the supervised visitation on Melissa. Judge Wolfram never held a hearing on the merits of the restraints.

There was no reason for Sheila to diligently pursue modification, she had a de facto plan that radically restricted her other parent's involvement with the child to a greater extent than what she'd proposed in her temporary parenting plan. (CP 095-96 – Melissa was never allowed to call the child daily as proposed and the restraints prohibited Melissa from initiating any contact.)

This is unjustifiable conduct and Sheila made no effort to try to justify it.

As the Response noted, Melissa fought Sheila's Motion to modify and the trial court's rulings. Melissa's efforts to fight the unjust medication and maintain a relationship with her daughter came at great financial expense. Melissa engaged counsel. She obtained the CR 35 examination that Sheila requested. Melissa paid for an invasion into her privacy and the unfounded invasion into her mental health. The CR 35 examination was glowing. Still Sheila requested and the court insisted on maintaining excessive restraints, requiring Melissa to pay for supervised visitation. Melissa fought against the modification and the restraints issued by Judge Wolfram. In the meantime, Melissa paid to have her visitation supervised, never missing visits with her daughter. She exercised as much visitation as she was allowed and could afford. For approximately two years, Melissa

paid \$35/hour to see her daughter. An expense that Sheila did not dispute would be covered under the UCCJEA childcare expenses.

After Sheila finally located a second expert, Melissa bore the burden of expense of gas and a hotel stay, because the court ordered her to travel all the way to Spokane without requiring Sheila to cover the travel expenses. CP 239-492. When the CR 35 examination of Sheila's expert came back, clearly violating the Court Rules in the process of the examination, Sheila incurred the expense of filing a motion to exclude the expert and expert report. Then she incurred the expense of an expert to evaluate both experts and provide a report. All the CR 35 examination expenses should be reimbursed pursuant to the UCCJEA.

Judge Wolfram allowed the appointment of a GAL, conditioned on Melissa bearing the full cost. RP 101-103. The cost for the GAL investigation and report that concluded that modification should not proceed and the parties should follow the Oregon plan, should be reimbursed under the UCCJEA.

Unfortunately, Oregon asserting jurisdiction and declaring Washington Orders void did not put an end to Sheila's insistence of Washington's jurisdiction. Melissa has had to incur all the expenses related to the motion for discretionary review, all the expenses related to the appeal, including clerk's papers and the expense to transcribe the hearings. All of

these costs and expenses are reimbursable under the UCCJEA. Sheila made no attempt to argue they should not be covered.

The court has other sources to turn to require fees, costs, and expenses. The Court of Appeals should use every source and resource available in this case because the abuse of the court system and the forum shopping and the resulting interference on the parent-child relationship was so egregious. RAP 18.1 provides for attorney's fees and expenses for the prevailing party. Another source is Wash. Rev. Code § 26.09.260(13), which provides for attorney's fees and court costs of the nonmoving parent against the moving party if it was brought in bad faith. Sheila's unwavering insistence that Washington has jurisdiction was done in bad faith - forum shopping and having the case before Judge Wolfram resulted in the de facto parenting plan that was later incorporated into a Temporary Parenting Plan that gave Sheila more than she originally requesting in terms of excluding Melissa from the life of their daughter.

The other source for attorney's fees is financial need. Melissa will submit the required Affidavit of Financial Need affidavit no later than 10 days prior to the date the case gets set for oral argument or consideration on the merits.

V. Conclusion

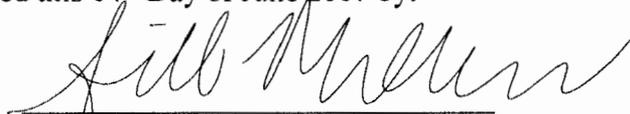
The Response failed to argue the merits of the appeal and the issue of subject matter jurisdiction pursuant to the UCCJEA. The Response provided no alternative argument to the bright line rule that the UCCJEA precludes a state from modifying the order of another state that has not relinquished jurisdiction. This is likely because the UCCJEA and associated case law are unequivocal, the Washington court lacked jurisdiction and the Washington orders must be vacated.

The arguments of justiciability and mootness are defeated by the simple fact that dismissing this case would leave in effect the very orders Washington courts had no authority to enter would remain in effect if this court dismisses the appeal.

Fees, costs, and expenses pursuant to the UCCJEA or several other theories are appropriate. Sheila engaged in intentional forum shopping and delayed the Washington Court from proceeding while Judge Wolfram continued and continued the restraints on Melissa's parenting. Justice requires more than an order vacating the Washington Orders, it demands some kind of compensation for the time that Melissa and her daughter lost together and the expenses Melissa incurred responding to the improperly filed modification of the parenting plan and complying with orders that lacked subject matter jurisdiction. Money will not make up for the lost time

between Melissa and her daughter, but it can help make her financially whole and it can ensure that Sheila will not abuse the courts with a modification of an out-of-state order again.

Respectfully submitted this 14th Day of June 2017 by:



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Declaration of Service

Jill Mullins-Cannon certifies as follows:

On Wednesday, June 14, 2017, I served upon the following true and correct copies of the Appellant's Reply Brief via email and first-class mail to:

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I certify under penalty of perjury that the foregoing is true and correct.

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