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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 35557-8

**COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON**

In re Marriage of:

Jeremy Rene Lott,
Appellant,

Melanie Dee Lott,
Respondent.

RESPONDENT'S BRIEF (2ND AMENDED)

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A. Introduction

This case is about a post-divorce dispute between parents concerning the parenting arrangement for their children. This appeal, however, is about a pro se father's dissatisfaction with two of the Superior Court's decisions in the case thus far: declining to find mother in contempt, and, awarding attorney fees to mother for her counsel's work in defending father's motion to relocate. This Court should affirm the Superior Court's decisions because they were properly within the court's discretion and based on substantial evidence.

Not only were the court's discretionary decisions based on substantial evidence, but many of father's present arguments improperly rely on new evidence admitted on appeal and improperly argue issues he failed to preserve with the lower court. Notwithstanding father's procedural deficiencies, there is substantial evidence supporting the decisions below. Because there is substantial evidence to support the trial court's decisions, the Orders supported thereby should be affirmed on appeal.

B. Assignments of no error¹

Assignment of no error

1. The trial court did not err in entering an order on August 14,

¹ Appellant, Mr. Lott, did not separately state and number each assignment of error. In good faith, Respondent, Ms. Lott, has attempted to delineate the assignments of error in order to confront each issue raised on appeal.

2017, finding that Melanie Lott obeyed the Final Parenting Plan and holding that she was not in contempt.

2. The trial court did not err in entering an order on August 14, 2017, granting Melanie Lott's Motion to Dismiss Jeremy Lott's Notice to Relocate and awarding attorney fees for time spent preparing and defending the action when the court found that Mr. Lott actively attempted to avoid service.

Issues Pertaining to Assignments of No Error

1. Is there substantial evidence to support a court's finding that a Parenting Plan and CR2A agreement were obeyed, when the alleged contemning conduct lacked bad faith and occurred before entry of the CR2A and Final Parenting Plan on January 9, 2017? (Assignment of Error 1.)
2. Is it properly within a court's discretion to award attorney fees for prevailing against a motion when, in addition to lacking a legal basis, the moving party was found to have actively attempted to avoid service? (Assignment of Error 2).

C. Statement of the case

November 2, 2015 Ms. Lott filed a Dissolution action. The parties attended mediation and came to a partial agreement on child support, spousal support, and division of property as set forth in the Final Orders and

attached CR2A Agreement, entered on March 21, 2016. (Clerk's Papers ("CP") at Ex. 1). Final Orders were entered in the Franklin County Superior Court on January 9, 2017. (*Id.* at p. 13). On March 24, 2017 Mr. Lott petitioned for minor modification. He also filed a Notice-for-Relocation motion, and motion for contempt. (*See* CP 124, 142). Ms. Lott opposed the relocation and contempt motions and moved to dismiss the petition. (CP 134).

After repetitive attempts, Mr. Lott was eventually served with the objection and motion on July 24, 2017. The process server attempted service six times on July 20, 2017; attempted service five times on July 23, 2017; and finally effected service the next day, July 24, 2017. (CP 151). The facts surrounding service are important because Commissioner Ekstrom found that Mr. Lott attempted to avoid service – the basis for Ms. Lott's award of attorney fees. (CP 159 at ¶ 3). The night of July 23, 2017, two girls answered the door and stated that Mr. Lott was not home, that they did not know how to get a hold of him, and that they did not know when he would return. (CP 151 at ¶ 6). The process server returned later that same night and observed a van in the driveway with Utah license plates. (*Ibid.*). The next day, July 24, the process server attempted service again at 6:11 a.m. and 7:37 a.m. (*Ibid.*). At 7:37 a.m., Mr. Lott answered through a digital doorbell and expressed that he was not going to get up to answer the door and that the

process server better leave or be escorted off the property by the police. (CP 151 at ¶ 6).

The hearing on the Motion to Dismiss the Petition for Modification and the Notice of Relocation was held on July 31, 2017. Mr. Lott contended that Ms. Lott violated the parenting plan and CR2A agreement. (July 31, 2017 Verbatim R. Proceedings Hr’g 10:15–11:20; CP 142 Exs. A–C). First, Mr. Lott contended that Ms. Lott violated the Parenting Plan’s joint-decision making provision with respect to non-emergency health care for decisions made before entry of final orders. (*Id.* at Ex. A). Second, Mr. Lott contended Ms. Lott violated the CR2A agreement by failing to let Mr. Lott inspect “all items in [Ms. Lott’s] possession” to determine if there is any more of his property in her possession. (*Id.* at Ex. B). Lastly, Mr. Lott contended that Ms. Lott failed to reimburse him for expenses that he allegedly paid but failed to provide receipts for on their family communication software. (*Id.* at Ex. C).

At the hearing, Commissioner Ekstrom held:

As for your motion for relocation, Ms. LaCoste is correct, the Act does not apply [to 50-50 parenting plans]. Your suggestion that the solution to the problem is that the other party just needs to move to a new community is kind of stunning. And reflects, and I don’t use this word often, an arrogance about the degree to which you believe that you get to control the world. It’s dismissed. I’m inclined to believe that you avoided service, and for that reason, with respect to defending the motion for relocation, I will grant attorney

fees. With respect to your motion for show cause, that is denied. I will not grant attorney's fees there.

(July 31, 2017 Verbatim R. Proceedings Hr'g 16:11–18). Orders reflecting that ruling were entered on August 14, 2017. (CP 161 at ¶¶ 3–4, CP 159 at ¶ 3). This appeal follows.

D. Summary of the argument

The scope of this appeal is fairly narrow. Mr. Lott has appealed the lower court's decision to decline holding Ms. Lott in contempt and the decision ordering Mr. Lott to pay attorney fees. Both decisions were discretionary; both decisions rely on findings supported by substantial evidence; and therefore, both should be affirmed.

E. Argument

To begin, the Superior Court properly found that Ms. Lott obeyed the orders that Mr. Lott contended she willfully violated with bad faith. That finding is supported by substantial evidence. The decision not to hold Ms. Lott in contempt was properly within the court's discretion and should be affirmed. Next, the Superior Court properly awarded Ms. Lott attorney fees for the defense of this action, in consideration of the finding that Mr. Lott actively attempted to avoid service. That award was proper, reasonable, and should be affirmed. Lastly, this Court should award fees and costs to Ms. Lott for the preparation and defense of this appeal.

1. It is properly within a court's discretion to decline holding a litigant in contempt when there is substantial evidence showing the litigant's compliant conduct.

Ms. Lott complied with the Final Parenting Plan and the CR2A Agreement Mr. Lott contended she willfully violated in bad faith. Thus, the court properly declined to hold her in contempt. A trial court's decision to grant or deny a motion for contempt is a matter within the trial court's discretion and will not be set aside absent abuse. *In re Marriage of James*, 79 Wn. App. 436, 439–40, 903 P.2d 470 (1995). A trial court does not abuse its discretion unless its decision is based on untenable grounds or reasons. *Id.* Credibility determinations are not reviewed on appeal. *In re Marriage of Rideout*, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003).

Contempt of court is, *inter alia*, an intentional disobedience of any lawful order of the court. RCW 7.21.010(1)(b). In reviewing contempt decisions concerning parenting plans, the plan is strictly construed in favor of the alleged contemnor to determine whether the conduct constitutes a “plain violation” thereof. *In re Marriage of Humphreys*, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995). In addition, a parent moving for contempt for failure to comply with residential provisions of a parenting plan must also establish that the contemnor acted in bad faith. *James*, 79 Wn. App. 436, 440, 903 P.2d 470 (1995) (applying RCW 26.09.160(2)(b)).

Here, the trial court declined to hold Ms. Lott in contempt. (CP 161). At the hearing, Mr. Lott argued that Ms. Lott violated the Final Parenting Plan entered January 9, 2017 and the CR2A agreement entered March 21, 2016. Specifically, Mr. Lott contended that Ms. Lott did not discuss the children's health care with him, did not pay her share of certain child-related expenses, and refused to allow him to inspect her property to determine if she maintained any of his property after he learned that she possessed a broken bowl of his. (CP 142 Exs. A–C).

Several provisions of the parenting plan applied to Mr. Lott's motion, they provide as follows:

- Non-emergency health care of the children is a joint decision that shall be made between parents. (CP 119 at ¶ 4.2).
- “Each party is to notify the other parent as soon as reasonably possible of any illness requiring medical attention or any emergency involving the child. Each party shall have equal authority to provide routine and emergency medical and dental services for the child while the child is/are in his or her care.” (*Id.* at ¶ 6.11).
- “All other health related appointments with a non-licensed medical professional (for example, nutritionist/herbalist) shall be at the sole expense of the parent who wants such care, unless such care was a joint decision, in which case they shall split the expense 50/50.” (*Id.* at ¶ 6.13).

Mr. Lott also relied on a provision in the CR2A agreement for his contempt argument regarding his personal property, which provides that “[Mr. Lott] want[s] today . . . All items from [his] family.” (CP 119, Ex. 1 at p. 5).

At the hearing on the contempt motion, Commissioner Ekstrom indicated that he had read all materials submitted by the parties (July 31, 2017, Verbatim R. Proceedings Hr'g at 3:12–13), and after both parties argued, he found that Ms. Lott had obeyed the Final Parenting Plan. (CP 161). That finding is supported by substantial evidence.

First, regarding the joint decision making for non-emergency medical decisions, Ms. Lott's affidavit states that she took the child to see an herbalist for the child's depression – two months before he turned 18 and two months before the Final Parenting Plan was entered. (CP 147 at 1). She also averred that the child only took the supplements for approximately two months. (*Id.*). Meaning, the alleged conduct occurred, if ever, before entry of the parenting plan. When the parenting plan was entered, Ms. Lott averred that she no longer took the child to the herbalist and the child no longer took the supplements.

Moreover, the separate “other” provision of the plan regarding use of herbalist remedies demonstrates an intent that taking herbal supplements would not qualify as a major medical decision (even though the underlying condition may have been serious) requiring medical attention. But dispositive to this contention is that the alleged conduct did not occur after entry of the order upon which the contempt motion relies. The order did not apply retroactively *nunc pro tunc*, thus, there can be no violation. *See* RCW

7.2.010(1)(b). As a result, declining to find Ms. Lott in contempt is supported by substantial evidence.

Second, regarding the payment of child-related expenses, Ms. Lott averred that she did not intentionally withhold payment, instead, she followed the Final Parenting Plan, which requires that all “expenses . . . be handled through Our Family Wizard.” Indeed, she was waiting for proof of the expenses to be shared and entered into Our Family Wizard before paying. (CP 119 at ¶ 6.1). Thus, unless and until Mr. Lott provided proof of the expense on Our Family Wizard, Ms. Lott could not have intentionally failed to comply with the plan nor could she have acted in bad faith. Undermining Mr. Lott’s argument, however, is the absence of any evidence evincing expenses were shared in Our Family Wizard. Because she could not have intentionally violated the Final Parenting Plan in this fashion, the decision to deny Mr. Lott’s motion for contempt is similarly supported by substantial evidence.

Third, regarding Mr. Lott’s family items, Ms. Lott averred that she had “given [Mr. Lott] all of his possessions that [she knew were] in the house with [her].” (CP 147 at 2). She stated that she did not purposely break or withhold the bowl, but that it was boxed and placed in the garage when they moved into the home, during their marriage, and they only found it when her and her sister were cleaning the garage. Neither Mr. or Ms. Lott

was aware of the bowl until then. She cannot be in contempt for failing to return something she was unaware existed and unaware she possessed. Moreover, she averred that she had not received a list of items of his that he wanted back, but that if and when she did receive a list she would return them. (CP 147 at 2). Consequently, the decision to decline finding Ms. Lott in contempt for intentionally, and in bad faith, failing to return Mr. Lott's personal property was supported by substantial evidence. The court below found Ms. Lott obeyed the orders in all respects and that finding should be affirmed.

2. Granting Ms. Lott's attorney fees was properly within the court's discretion and should be affirmed.

The court was well within its discretion to award \$3,000 to Ms. Lott, the prevailing party, on a motion to dismiss Mr. Lott's petition and motion to relocate with the children because, *inter alia*, it found that Mr. Lott, the non-prevailing party, attempted to avoid service – and that finding is supported by substantial evidence. An award of attorney fees is reviewed for an abuse of discretion, whether the fees are awarded pursuant to statute, contract, or equity. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 29–30, 144 P.3d 306 (2006); *In re Marriage of Crosetto*, 82 Wn. App. 545, 564, 918 P.2d 954 (1996) (holding that intransigence is a basis for attorney fees in dissolution proceedings). The party challenging the award has the burden to

show that the awarding court exercised its discretion in an untenable or manifestly unreasonably manner. *In re Marriage of Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999).

Mr. Lott challenges the award of attorney fees because, according to him, the “ruling was based on the assumption that [he] avoided service which [he] has proven to be a false assumption.” (Appellant’s Br. 11). There are several issues with Mr. Lott’s argument, not least of which is his attempt to introduce new evidence on appeal. *See Wash. Fed’n of State Emps., Council 28 v. State*, 99 Wn.2d 878, ___, 665 P.2d 1337 (1983) (noting that additional evidence on review may be taken by an appellate court if all six conditions of Rule of Appellate Procedure 9.11(a) are met). The brief is overwhelmed with ubiquitous attempts to introduce new evidence on every page of his opening brief and Ms. Lott objects to the same.²

Putting aside the improper evidence, ostensibly, Mr. Lott challenges the court’s finding that he was attempting to avoid service – but that finding,

² Ms. Lott objects to Mr. Lott’s introduction of new evidence in his brief on pages 2–12, and attachments A–D. Specifically, Ms. Lott objects to the following portions of Mr. Lott’s brief:

- Every sentence of paragraph 1 of page 3;
- Sentences 5–12 and 19–23 of paragraph 2 of page 3;
- All information on pages 5–6 regarding Mr. Lott’s interaction with court staff;
- All information on pages 7 regarding Mr. Lott’s intentions with Commissioner Ekstrom and Ms. Lott;
- All information on page 8 regarding Mr. Lott’s communication with Ms. Lott;
- All information on pages 9–10 regarding the finances and spreadsheet; and
- All information on page 10 regarding attorney fees and costs.

too, is supported by substantial evidence. The process server declared that she attempted service at Mr. Lott's address six times on July 20, 2017, but that Mr. Lott was out of town. (CP 151 at 2). As a result, she waited until July 23, 2017 to attempt service again, which she did at 5:30 p.m., 6:30 p.m., 7:15 p.m., 8:30 p.m., and 10:30 p.m. (*Id.*). At 7:15 p.m., two girls opened the door and stated that Mr. Lott was not home, did not know how to get a hold of him, and did not know when he would return. At 8:30 p.m. and 10:30 p.m., Mr. Lott did not answer the door but the server suspected he was home because there was a van was in the driveway with Utah B license plates that was not there during her previous attempts. (*Id.*). She tried again the next day at 6:11 a.m. and 7:37 a.m. (*Id.*). At 7:37 a.m. Mr. Lott answered the process server through a digital doorbell.

The process server avers that Mr. Lott threatened, by voice through the audio of the digital doorbell, to have her escorted off the property by the police, demanded to know why she was there, and that when she stated she needed him to take the papers he said he was not going to. (*Id.*). She then asked, "are you refusing service?" Mr. Lott stated that he was not but that he was just not going to get out of bed and answer the door. (*Id.*). This is substantial evidence.

Mr. Lott may not like the commissioner's decision and he may contend that the process server is lying. But that is a credibility

determination the commissioner made, which is not reviewable on appeal if supported by substantial evidence. *See Rideout*, 150 Wn.2d at 352. Consequently, because there is substantial evidence to support the commissioner's finding that Mr. Lott was attempting to avoid service, which served as a basis on which the commissioner awarded fees, the order awarding of fees should be affirmed.

3. The remainder of Mr. Lott's arguments are without merit and do not warrant the remedy he seeks.

No other argument raised by Mr. Lott justifies disturbing the lower court's decisions. The arguments are either improperly supported with new evidence, are outside the scope of the appeal, are inapposite, or are otherwise unconvincing.

First, Mr. Lott contends that Ms. Lott refused service when he sent her the notice of intent to move with children, and that because she refused service, the lower court's decision declining to find Ms. Lott in contempt should be reversed. (Appellant's Br. 11). The lynchpin of this argument requires that that Ms. Lott was home at the time service was attempted. The sole support for Mr. Lott's argument to that point, is his belief that she was home because she teaches piano lessons at that date and time.

Besides erroneously introducing new evidence on appeal in support of that argument, Mr. Lott's dispositive deficiency is that he did not move

for contempt based on Ms. Lott's avoidance of service. Thus, he is attempting to raise this issue for the first time on appeal, contrary to rule and law. *See* RAP 2.5(a); *In re Marriage of Buecking*, 167 Wn. App. 555, 274 P.3d 390 (2012). But even if that were not the case, Mr. Lott's knowledge of Ms. Lott's schedule before their dissolution and his assumption that it remains the same today, and his assumption it was the same on the day he attempted service, is not the kind of persuasive evidence and argument required to reverse a trial court's finding that a party did not willfully and intentionally violate a parenting plan.

Second, Mr. Lott contends that Commissioner Ekstrom was biased against him based on "false assumptions." (Appellant's Br. 1). Mr. Lott fails to identify any law in support of his position. Here too, Mr. Lott attempts to introduce new evidence on appeal contrary to rule and law. *See* RAP 2.5(a); *Buecking*, 167 Wn. App. at 555, 274 P.3d at 390. He also failed to assert this issue below with a motion that the court recuse itself. Notwithstanding, Mr. Lott's arguments fail on their merits.

Due process, the appearance of fairness, and Canon 2 of the Code of Judicial Conduct require that judges disqualify themselves from hearing a case if that judge is biased against a party or if his or her impartiality may be reasonably questioned. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 840–41, 14 P.3d 877 (2000). Trial courts are presumed,

however, to perform regularly and properly without bias or prejudice. *Id.* The appearance-of-fairness doctrine requires actual or potential bias, in that, judicial proceedings are valid unless a reasonably prudent and disinterested person would not conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674, *review denied*, 127 Wn.2d. 1013 (1995).

There is nothing impartial, unfair, or biased about Commissioner Ekstrom's colloquy, inquiry, and interest in Mr. Lott's use of the ex parte process. In relevant part, the exchange went as follows:

COURT: Do we have the parties on number 29, the Lott matter here? So is Mr. Lott present?

Mr. LOTT: Yes.

COURT: Alright, when we get to your case we're going to talk about the use and the misuse of the ex parte process so have a seat and we'll chat.

....

Mr. LOTT: Thank you Your Honor. Just let me start out by saying I mean no disrespect in any way; I'm not an attorney. I'm trying to do the best I can with what I know and what I have. In regard to filing the ex parte motion on Friday, from what I understand the CR states that if a response [to] an objection is not served and filed within 30 days that they . . . that it will be granted. And so that was just me asking for that to be granted because I felt like that's what the law stated. So, I apologize if there

was some things that were out of order there. Again, I'm just trying to do the best I can.

COURT: Let me ask you a question.

Mr. LOTT: Sure.

COURT: I understand, anecdotally, that on Friday when I declined to sign that for you that, that wasn't that, that wasn't the first time you had come asking for that order to be signed. [sic] Is it correct that earlier in the week that you attempted the same thing?

Mr. LOTT: The day previous?

COURT: Yes.

Mr. LOTT: Yes. So on Thursday, I'm trying to remember exactly what happened, but yes, I was there. Or it was Friday morning that I came in and there was no ex parte judge and so the . . . I came in Friday afternoon.

COURT: So, you hadn't come the day before and been told: "No, the Judge isn't going to sign this."

Mr. LOTT: Uh –

COURT: And you hadn't been told [that] you have a hearing [and that] you need to show up at your hearing with this?

Mr. LOTT: No. I was not told that the judge did not look at it, and I was not told that the judge wouldn't sign it. I did not come in a second time and say, "you, you didn't do it the first time," (inaudible). I would never impose upon a judge like that. I mean no disrespect in any way.

COURT: Alright, please proceed.

(July 31, 2017, Verbatim R. Proceedings Hr’g 2:13–18, 7:11–8:14).

It is not an act of bias to inquire into what a court may perceive as misuse of civil procedure. It is neither unfair or impartial. Mr. Lott contends that “it was obvious from [Commissioner Ekstrom’s] tone of voice and his condescending approach that he was very frustrated with [Mr. Lott].” (Appellant’s Br. 5–6). But frustration with a litigant, in it of itself, is not a manifestation of judicial bias. Even if it were, Mr. Lott failed to raise this issue below, failed to comply with rules and law prohibiting new evidence on appeal, and has failed to tether this ostensible error to a proper appellate remedy. Thus, the lower court’s decision should be affirmed.

Third, Mr. Lott contends that Ms. Lott’s counsel provided false statements to the court. (Appellant’s Br. 2). As to that contention, Mr. Lott has failed to tie that argument to a judicial assignment of error warranting the remedies he now seeks. Moreover, Ms. Lott’s position is that the statements are not false, but argument properly heard during the oral argument portion of the hearing. To the extent this Court is inclined to consider Mr. Lott’s arguments on this issue, each issue is responded to below.

Mr. Lott contends that “there is not a single word in any of the emails between [the Lott’s] that can be understood as a threat in any way,” so Ms.

Lott's counsel's argument that "[Ms. Lott] has received threat up on threat upon threat, stating that [Mr. Lott's] going to move with the children," is false. (Appellant's Br. 8). Mr. Lott also contends that there "is no email communication that supports" Ms. Lott's counsel's argument that Mr. Lot's "issues are being brought . . . in order to force a move[.]" (*Id.*).

This is simply unfounded. Ms. Lott declared that she "found out on Monday July24, 2017 [sic] that [Mr. Lott] was packing and having the kids pack for the move to Utah." (CP 148 at 1). She learned that her oldest son was "anxious on Wednesday and voluntarily stated that their father told them that at the beginning of the week to start packing boxes to move to Utah." (*Id.*). She also averred that Mr. Lott got "the older boys to write statements supporting a move to Utah." (CP 134 at 2-3). Mr. Lott directed the children to write statements indicating that they wanted to move – statements that Mr. Lott had their 18-year-old son personally serve upon Ms. Lott. (*Id.*). In addition, attachment C of Mr. Lott's motion in response to Ms. Lott's objection includes an email from him, that reads:

I've sent you a couple of messages about moving to Utah and you haven't responded to either of them. I am willing to offer concessions with the kids and help pay for your moving expenses if you agree to move to Utah by the end of the summer. If not then you'll get a court summons from me by probably next week. If this goes thru the court system then I won't be offering you anything because I believe I have a strong enough case to get this approved. I have written statements from [two of their sons] with strong

support for moving to Utah as well as a request from my company for moving to Utah. I believe you will be much happier there as well. [sic]

(CP 144, Ex. C at p. 2) (emphasis added).

Because there is evidence in the record that Mr. Lott threatened to leave with his children, it was proper for counsel to argue it. Mr. Lott contends he is not legally allowed to leave with children and Ms. Lott's lawyer knew that, so it was false for her to argue Mr. Lott threatened to leave with him. Mr. Lott's argument that he is not legally allowed to leave with children has no bearing on the veracity of his threats – nor does it control the propriety of arguments that highlight the statements.³⁴

In short, Commissioner Ekstrom properly denied Mr. Lott's contempt motion, properly awarded fees on Mr. Lott's dismissal of his motion to relocate children, and conducted the hearing and entered the Orders without bias.

4. Ms. Lott should be awarded fees and costs for this appeal.

Ms. Lott moves for costs, pursuant to RAP 14.1 and for fees pursuant to RAP 18.9(a).

³ Mr. Lott takes issue with Ms. Lott's counsel's argument regarding the herbalist issue. That issue was discussed *infra*. See § E.1.

⁴ Mr. Lott also takes issue with Ms. Lott's counsel's argument regarding the proof of expenses issue discussed *infra*, in section E.1. Moreover, Mr. Lott is attempting to introduce new evidence on appeal. Yet, even with the new evidence, Mr. Lott has failed to show he complied with the parenting plan by providing Ms. Lott with proof of the expenses on Our Family Wizard.

Ms. Lott should be the substantially prevailing party in this appeal and should therefore be awarded costs. Unless an appellate court determines otherwise, costs are awarded to the party that substantially prevails on review. RAP 14.2; *Family Med. Bldg., Inc. v. State Dep't of Social & Health Servs.*, 38 Wn. App. 738, 739, 689 P.2d 413 (1984). Within 10 days after the filing of an appellate court decisions terminating review, a party seeking costs must file a cost bill with the appellate court and serve a copy on all parties. RAP 14.4(a). To the extent this Court agrees Ms. Lott is the substantially prevailing party, she intends to recoup her permitted costs. *See* RAP 14.3(a).

Because Mr. Lott's appeal is frivolous, Ms. Lott should be awarded attorney's fees. An appellate court may impose attorney fees against frivolous claims. RAP 18.9(a). A claim is frivolous when "it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal." *Streater v. White*, 26 Wn. App. 430, 434–35, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980). In making the determination, the Court should consider whether:

- (1) A civil appellant has a right to appeal under RAP 2.2;
- (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant;
- (3) the record should be considered as a whole;
- (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous;
- (5) 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 reversal.

Id. at 435.

When there has been no reasonable basis to argue that a trial court abused its discretion, an appeal is frivolous. *Johnson v. Mermis*, 91 Wn. App. 127, 130, 955 P.2d 826 (1998) (holding that there was no reasonable basis to argue trial court abused discretion in granting sanctions when opposing party expressly violated court order compelling discovery). Mr. Lott has appealed two decisions reviewed for an abuse of discretion. Mr. Lott's arguments lack a reasonable basis. Consequently, Ms. Lott should be awarded fees.

Mr. Lott appeals to this court to reverse a finding of no contempt. To prevail, the Superior Court must have abused its discretion and there must be prima facie evidence showing Ms. Lott's willful, knowing violation of a contempt order occurring after entry thereof. There is no such evidence. There is no basis for Mr. Lott's appeal. Because there is no reasonable argument supporting his appeal, it is frivolous. Because it is frivolous, this Court should grant Ms. Lott attorney fees on appeal.

F. Conclusion

The trial court properly found that Ms. Lott obeyed the Parenting Plan and properly awarded attorney fees for the preparation and defense of

the July 31, 2017 motions. That finding is supported by substantial evidence because Ms. Lott's actions occurred before the Orders were entered or she did not act willfully and intentionally in violation thereof. But Ms. Lott has spent over a year defending herself against Mr. Lott's frivolous motions and appeal. Indeed, Mr. Lott has a penchant for asserting arguments for which there is no legal remedy. Mr. Lott does not want to accept that the trial court disagreed with him, and did not order his requested relief. Yet, without evidence in the record supporting the argument that she violated the Orders, Mr. Lott cannot show an abuse of discretion. Without an abuse of discretion, Mr. Lott cannot prevail on this appeal. Consequently, the Orders entered below should be affirmed and costs and fees should be awarded to Ms. Lott.

Respectfully submitted,

March 6, 2018
Date


Jennifer LaCoste, WSBA No. 49025
Attorney for Respondent on appeal

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Court of Appeals, Division III, of the State of Washington

In re:

Petitioner/Appellee:

MELANIE DEE LOTT,

And Respondent/Appellant:

JEREMY RENE LOTT

No. 35557-8

Proof of Mailing or Hand Delivery
(for documents after Summons and
Petition)
(AFSR)

**Proof of Mailing or Hand Delivery
(for documents after Summons and Petition)**

I declare:

- 1. I am Alexis Lachhab and am competent to be a witness in this case.
- 2. On 03/07/18, I served copies of the documents listed in 3 below to Jeremy Lott by USPS to the following address:

<u>1297 E 900 S</u>	<u>Pleasant Grove</u>	<u>UT</u>	<u>84062</u>
<i>mailing address</i>	<i>city</i>	<i>state</i>	<i>zip</i>

- 3. **List all documents you served:**

Respondent's Brief (2nd Amended)
Proof of Mailing or Hand Delivery

- 4. **Other:**

Does not apply.

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I declare under penalty of perjury under the laws of the state of Washington that the statements on this form are true.

Signed at: Kennewick, WA Date: 03/07/2018


Signature of server

Alexis Lachhab
Print or type name of server