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No. 64706-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

LORI LIEPPMAN, Appellant,

and

GARY D. FLANZER, Respondent.

APPELLANT'S OPENING BRIEF
and
CROSS-APPELLANT'S OPENING BRIEF

DECISION BY COMMISSIONER MEG SASSAMAN
ISSUED OCTOBER 27, 2009
revision denied by
THE HONORABLE STEVEN GONZALEZ, JUDGE
on December 2, 2009

Marilyn R. Gunther,
WSBA #27797
Attorney for Cross-Appellant

5312 - 9th Ave. N.E.
Seattle, WA 98105

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I. ASSIGNMENTS OF ERROR

A. The trial court erred in assessing monetary sanctions against the father herein instead of against the mother herein.

B. The trial court erred in denying the father's cross-claim for an order that the mother reimburse day-care expense paid without an order therefor.

C. Error is assigned to Finding of Fact 3.22.

D. The trial court erred in denying the father's request for attorney's fees in view of the mother's intransigence. Appellant further requests attorney's fees and costs incurred in this appeal.

E. Appellant asks the appellate court to grant attorney's fees to appellant on appeal.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the trial court abuse its discretion in ordering \$500.00 in sanctions against the father where:

1. the father's counsel was not given notice in advance of the hearing that terms would be requested;

2. father's counsel was not given opportunity to respond and point out the inequity of issuing terms against the father;

3. mother's counsel misrepresented the circumstances to the trial court;

4. it was the mother's counsel who, from the beginning of the modification action, had failed to produce FCLR documentation to support her child support modification and post-secondary support requests;

5. the previous order provided that the parties were to provide a list of

exhibits to the other party and the father's counsel had already provided what the court ordered but the mother's counsel had not previously provided what the court ordered but did so, although inadequately, within the time specified by the trial court;

6. the parties were given specific permission to file a response to any new documents served and filed after entry of the order;

7. mother's counsel untimely served documents that were previously not served and that contained material information that was materially false;

8. father's attorney called that falsity to the attention of mother's counsel with a request for RPC 3.3(d) correction, when no correction was forthcoming, father's attorney pointed it out to the court in pleadings with a request for CR 11 sanctions?¹

B. Did the court abuse its discretion in denying the father's request for reimbursement of overpaid day care where the day care ordered was readily ascertainable, the amount paid was readily ascertainable, and the statute for such reimbursement is mandatory?

C. Was the court's finding of fact 3.22 supported by substantial evidence?

D. Did the court abuse its discretion in denying the father's request for attorney's fees when the mother's counsel failed to provide documents until ordered by the court, provided inadequate documents, misrepresented material facts to the court, sought an unnecessary continuance, and, presented frivolous

¹ It was only after the court deadlines that mother's counsel finally sent a declaration of the mother that acknowledged the information was false.

claims?

E. Should this court award attorney's fees to appellant on appeal?

III. STATEMENT OF FACTS

This matter came on before the court on a mother's petition to modify child support filed on June 18, 2008. CP 82-83. The mother also asked for post-secondary support. *Id.* The father responded and requested judgment for overpayment of day care, attorney's fees, and costs. CP 128-130.

Background:

During the marriage of Lori Lieppman and Gary D. Flanzer, their daughter, J.N.F. was born February 22, 1991. CP 133. Upon separation of the parents, the mother was awarded custody of the child and a child support order was entered on March 26, 1993. CP 133-142. The child support order set out several specific provisos:

1. In paragraph 3.4 the transfer payment was identified as \$450.00 per month "and this payment shall include his apportioned day care obligation." CP 134. (Underline in original).
2. In paragraph 3.5 the standard calculation for child support was \$242.97 per month. *Id.*, CP 139.
3. Paragraph 3.6 specified that the transfer payment in paragraph 3.4 deviated from the standard calculation because, "The transfer payment includes day care expenses for the child which are related to the mother's employment." CP 134-35.
4. The start date was November 1, 1992, the date of separation. *Id.*
5. Post-secondary child support was reserved in paragraph 3.11. CP 136.

6. In paragraph 3.13, the child support order provided for automatic modification by ending the current amount ordered "through April, 1993." Id.

6. The following sentence increased the transfer payment "Effective May 1, 1993, the transfer payment shall increase to \$525.00. . . ." Id.

The child support order was very specific that it included the father's portion of day care, \$207.03 per month that was "related to the mother's employment." CP 134-35.

At a court hearing held on January 10, 1997, eleven years before the modification trial herein, the court suspended the day care part of the child support order. CP 155,130. The mother had testified at that hearing that she was not working, had not worked the previous year, and was unable to work. In that January 10, 1997 order, the court ordered:

". . . the day care portion of the child support obligation is suspended. Furthermore, the father shall receive a credit for day care expenditures for the portion of the child support attributable to day care for the last 12 months, unless the mother shall provide, in camera, copies of day care evidence by January 8, 1997 to this court by 4:00 p.m. . . .".

Id.

No proof of day care, work related or otherwise, was provided then or since then to date.

The child support order of March 19, 1993, and the January 10, 1997 order that suspended day care payments were never modified prior to the order entered herein. In fact, at the trial regarding a parenting plan held in August, 1997 (CP 172), the court specifically refused to address a child support modification. CP 175, 130. However, in the order entered in December, 1997, after that trial, the father was permanently restrained from contacting the

mother or the child until he was cured from a condition that was not curable, effectively severing his contact with his daughter. CP 174.

In spite of the January 10, 1997 court order suspending the day care portion of the child support, the prosecuting attorney and division of child support (DCS) continued to collect from the father the full transfer payment of \$525.00 per month, over the father's ongoing protests². DCS has collected the entire transfer payment of \$525.00, which specifically included "day care expenses for the child which are related to the mother's employment."(CP 135) during the child's entire minority, and the father provided proof of that to the trial court herein. CP 164-167.

The first request for child support modification was filed by the mother to modify the March 19, 1993 order of child support when she filed her summons, petition, and an incomplete financial declaration herein on June 18, 2008 when the child was 17 years of age.³ The mother did not file or serve

² Following issuance of the January 10, 1997 order suspending day care, the father filed multiple requests for reimbursement and cessation of collection of day care with DCS and in the prosecutor's action, and at one time filed for a conference board hearing with DCS. The father was unable to locate the mother to serve her with show cause documents, partially due to the permanent restraining order and partially due to her relocation permitted by the 1997 trial court. The DCS is required to notify the affected party of the convening of a conference board, so the mother presumably had notice that the father contested collection of day care and sought reimbursement of day care already collected.

³ The original trial date on the modification resulted in a default judgment on October 2, 2008. By stipulation, that default order was vacated on February 2, 2009. A new case schedule was issued that set the trial by affidavit for May 15, 2009. That action is only pertinent herein because the default judgment was based on the mother's same documents that contained grossly inaccurate information, showing that the default judgment was not well grounded in fact.

with her modification summons and petition the documents pertaining to her financial circumstances mandated by LFLR 10(b) and LFLR 14(b).

The father served his response and counter-claim to the petition for modification on May 8, 2009, and filed it on May 12, 2009. CP 128-176. He counter-claimed for reimbursement of the over-paid day care in the amount \$207.03 for 156 months, for a total of \$32,296.68, plus interest. Id. He also included that claim in his trial affidavit. CP 130, 190. He proved payment of those amounts by Case Payment History reported by the Department of Social and Health Services (DSHS), Division of Child Support (DCS). CP 164-168.

In addition to his claim for reimbursement of overpaid day care (CP 130, 155, 164-167, 190), the father also asked the court to reduce to judgment, including accrued interest, the previous orders against the mother that remained unpaid. Those judgments included a judgment for \$850.00 entered August 14, 1996 (CP 130, 144); order of August 14, 1996 for the father to pay directly to Dr. Milstein \$100.00 per month on behalf of the mother (CP 130, 145, 148)⁴; order of August 6, 1996 for the \$1,200.00 the father paid of the mother's bill to Dr. Robinson (CP 130, 150); and, order of June 21, 1997 for \$2,595.42, the amount the bank wrongfully transferred from the father's current marital community account to the mother's account, ordered credited to the father's child support obligation. CP 130, 152.

At the trial by affidavit that started on May 15, 2009, the petitioner's documents were insufficient for trial, and Ms. Gunther called that deficiency to the court's attention. RP 5. On May 5, 2009, Ms. Gunther had the petition for

⁴ The mother acknowledged he made those payments for twelve months.

modification, financial declaration of the mother⁵, and had received from Mr. Bobman the Declaration of Lori Lieppman re: Modification of Support, CP 91-125. None of those documents had information about the mother's income, proof of any of her other claims, or documents mandated by LFLR 10(b) and LFLR 14(b). Id. Without such documentation, there was nothing further for the father to respond to. RP 6. The court reviewed the documents provided, ruled that they were deficient, and ordered a new trial date with specific dates for submitting documents. RP 9-11, CP 176-177. The new trial date set was June 26, 2009. Id. Documents were to be exchanged by June 5, and 19, 2009. Id.

Mr. Bobman served one sealed file document to Ms. Gunther and the court on June 5, 2009. CP 178. That document contained "Income Tax records: 2007 Tax Return; Bank statements; Semi Annual Annuity Payments for 2007 and 2008; 1099's from the years 2007 and 2009. Id. The documents were seriously redacted and submitted without an accompanying declaration signed by the mother. Ms. Gunther submitted the father's trial affidavit to Mr. Bobman and to the court on June 24, 2009, detailing the father's position with supporting evidentiary exhibits. CP 182-251. At the trial on June 26, 2009, the trial was continued again for submission of documents, this time to July 24, 2009.⁶ The court entered an order specifying dates and times for documents to

⁵ The mother's financial declaration provided to the Commissioner was not the same as the one Ms. Gunther obtained from the court file. The mother's monthly income at 2.3(a)(2) had been added in the amount \$1,781.42 derived from dividing her annual income set out in 3.4(c) by 12 months. CP 84-85.

⁶ The hearing was not recorded so no transcript is available. CP 181.

be submitted, that "each party shall provide the other with a list of exhibits each intends to rely upon with documents attached. New material may be responded to. All working papers shall be re-submitted by the parties." CP 179-80.

Mr. Bobman finally served to Ms. Gunther for the first time a copy of the original trial Declaration of Lori Lieppman signed by her September 24, 2008. CP 178. These were new documents to Ms. Gunther where the petitioner's specific claims were revealed in detail. The first 4 pages of attached documents related to the father. The next six pages listed the mother's insurance payments and interest with the claim that they were court ordered to be paid by the father.⁷ The next five pages document insurance premiums paid but are unsworn and did not identify the preparer. The next six pages are a claim for child support arrears, not signed or sworn, and did not identify the preparer.⁸ The next six pages purport to list medical and prescription arrearages, unsigned, unsworn, did not identify the preparer, gave no breakdown as to contribution percentages or credit indication for the 5% medical threshold, and the list includes only 1991 through May of 1996. The final page is a list of prescriptions by date, medication name, and charges, unsigned, unsworn, and did not identify the preparer.

⁷ There is no court order for the father to pay the health insurance premiums unless available through his work. CP 137.

⁸ Two items are significant: (1) In June, 1996, the mother claimed a child support obligation of \$2,209.79 per month where the child support order had not been modified and the child support was \$317.97 without the day care portion which had been suspended. (2) The mother acknowledges that the father made payments of \$100.00 per month to Dr. Milstein for 12 months that were to be credited to the child support.

Within those documents submitted by petitioner was egregious false information, i.e., a claim for child support of \$2,209.79 per month from and after June, 1996 showing through August, 1997. Although that is only 15 months, presumably the mother claims that amount for the other 10 years 10 months to the date her modification petition was filed. No such child support order ever existed.

On July 7, 2009, Ms. Gunther sent a letter to Mr. Bobman about the claim for arrears from a child support obligation of \$2,209.79 per month, and asked for verification or retraction. CP 259. Ms. Gunther received no response to that letter.

The father filed a strict reply to this new submission of the mother (CP 252-59). That strict reply was authorized by the court's June 26, 2009 order by the language "New materials may be responded to." CP 180.

In his strict reply, the father pointed out the errors in the mother's September 24, 2008 declaration, including that the false claim for \$2,209.79 per month of child support did not match the Order of Child Support that was being modified. Mr. Bobman did not contact Ms. Gunther. Nor did he respond to that strict reply before or at the hearing held July 24, 2009.

At the hearing on July 24, 2009, Mr. Bobman brought up a preliminary matter, stating that he did not receive court ordered documents from opposing counsel. RP 18. He then asked that the matter be continued. Id. He said

"But you told us what to do. I did it; she did not. I think I'm entitled to have this matter continued and get one of these and then be able to respond to it." RP 19.

His statement that "she did not" was untrue.

He gave no advance notice that he had a problem with documents provided or not provided by Ms. Gunther. He did not respond to Ms. Gunther's July 7, 2009 letter regarding the false information in his documentation. He gave no advance notice that he would seek a continuance. He did not respond to the request for CR 11 sanctions..

The court asked Ms. Gunther for her response, which Mr. Bobman kept interrupting. *Id.* Ms. Gunther essentially responded that she had provided the requested documentation and that the documentation included the "list of exhibits each intends to rely upon with documents attached." RP 19, 21; CP 180.

During the colloquy that then occurred after Mr. Bobman's request for a continuance, the court checked the previous court order (RP 20), spoke of the required "list of exhibits," and both the court and Mr. Bobman acknowledged that they had all of respondent's documents. RP 25-26. Mr. Bobman specifically acknowledged that he received all of Ms. Gunther's documents timely, including the Respondent's Response to Petitioner's Trial Declaration, Supplemental Trial Declaration, and Request for CR 11 Sanctions, which he "received that by fax, your Honor, on July 10th." RP 26. The court order specified that "The responding party's documents shall be delivered to the moving party not later than 12:00 noon on 7/10/09." CP 179 (underline in original.) It was actually Mr. Bobman who did not follow the court's order. Once he received the responding party's documents on July 10, 2009, he was required to follow the sentence of the order that stated: "Reply documents, if

any are provided by the moving party, shall be delivered not later than 12:00 noon on 7/16/09." CP 179 (underline in original.) Mr. Bobman did not reply or respond to the document he received from Ms. Gunther on July 10, 2009 by July 16, 2009 or at all prior to the hearing.⁹ Mr. Bobman's argument to the court and first time request for terms occurred in his reply argument to Ms. Gunther's response argument, just prior to the court's decision:

THE COURT: And there was no reply that you filed on behalf of your client, correct?

MR. BOBMAN: No, your Honor, to be honest, I never got the package. I didn't do anything else because I was very frustrated by that, and Ms. Gunther and I cannot communicate, your Honor, that is quite clear.

THE COURT: Right.

MR. BOBMAN: And so I would like to respond to that. I would like to have had the package properly presented to me, and then I could have prepared for this hearing. But you were very clear what you wanted. I really didn't expect this hearing to go forward, your Honor. I came up here because this is the only way to deal with this. There's no other procedure, but I mean this was -- this was a lot of work, and we did it, and it's the right thing to do, you were right, I didn't know the local rules that well. Ms. Gunther, who practices in King County, presumably knows the local rules and just ignored them and ignored your order. I would like to like \$500 in terms for coming up here, your Honor. I mean this is just -- you were so clear.

RP 26-27.

⁹ Mr. Bobman did not serve and file a response to that document with a declaration from his client signed on August 4, 2009, until August 5, 2009. In that declaration Dr. Lieppman acknowledged that her figures for the father's child support obligation of \$2,209,79 "appears to have been a mistake but those documents was prepared by my trial attorney years ago and I did not catch it."

In fact, the court's ruling was clear. Mr. Bobman's statements to the court were untrue and misleading.

First the court's order stated that: "2. The moving party's documents shall be delivered to (or served on, if required by law or court rules) the other party not later than 5:00 pm on 7/6/09." CP 179. That occurred. Mr. Bobman delivered a packet with his documents to Ms. Gunther on July 2, 2009. Three documents were enclosed:

- Declaration of Lori Lieppman re: Modification of Support signed May 2, 2009 and previously received by respondent's counsel on May 8, 2009. CP 91-125;
- Sealed Financial Source Documents that included 2007 tax return, bank statements, semi-annual annuity payments 2007 and 2008 with 1099's, no declaration and previously received by respondent's counsel on June 5, 2009. CP 178; and,
- Declaration of Lori Lieppman, signed by her on September 24, 2008, never previously received by respondent's counsel. CP 178. The documents attached to this declaration were not numbered or separated by an exhibit cover, nor were they inserted in a "list."

Second Paragraph 2 went on to say: "The responding party's documents shall be delivered to the moving party not later than 12:00 noon on 7/10/09." That also occurred. Respondent's financial declaration and response to petition were delivered to Mr. Bobman May 8, 2009; Respondent's trial affidavit was delivered to Mr. Bobman June 24, 2009; Respondent's response to Petitioner's Trial Declaration, Supplemental Trial Declaration, and Request for CR 11 Sanctions was delivered to Mr. Bobman July 10, 2009.

Third Paragraph 2 went on to say: "Reply documents, if any are provided by the moving party, shall be delivered not later than 12:00 noon on

7/16/09." CP 179. That did not occur. Mr. Bobman did not respond to respondent's letter of July 7, 2009 about false information provided by petitioner to the court; nor did he respond or reply to respondent's July 10, 2009 response document requesting CR 11 sanctions for providing false information to the court "if any are provided by the moving party, shall be delivered not later than 12:00 noon on 7/16/09." as the court had ordered. CP 179.

Without asking for further response from Ms. Gunther, the court awarded the \$500.00 terms to Mr. Bobman. RP 30. Then made the finding that

"It's abundantly clear that it wasn't followed in that there was not a list of exhibits intended to be relied upon with the documents attached, and there was things submitted after the deadlines that I laid out in my order, so on both counts, it was not followed."

RP 32.

The court then still would not permit Ms. Gunther to respond and kept interrupting so that an attempted response was ineffective. RP 32-33. The court did not address the issue raised by Ms. Gunther regarding false information submitted by the mother and her counsel with a request for CR 11 sanctions. RP 30-45.

The trial by affidavit finally started and concluded on September 23, 2009. RP 50, et seq.

The court requested arguments regarding 1) back support, 2) medical and insurance, 3) father's day care credit, 4) whether there should be post-secondary support, 5) support past age 23 based on child's special needs. RP 55-56. Mr. Bobman argued for modification because there had been no

modification for over 10 years. RP 56. He misrepresented to the court that "The -- there was a modification where they dropped the daycare in '97, and since then it was straight child support of 525 per month." Id. Although Mr. Bobman argued the mother's claim that she had significant problems and gets disability, no proof of that was produced other than the mother's statement. RP 56-57, 61. Mr. Bobman then argued the information about the father's possible income from internet information. RP 57. Mr. Bobman stated that "we have no true reflection of [father's] income, but we know it has to be substantial, ..." RP 58. He asked that income be imputed at \$15,000.00 per month. RP 58-59.

Although Mr. Bobman argued for reimbursement of medical and insurance expenses the mother had incurred over the years, no receipts were produced. RP 59. Mr. Bobman acknowledged that "I do not have 11 years worth of invoices and bills." Id. He asked the court to "estimate of what a child would cost growing up when one parent is picking up 100 percent of the cost, because there is what happened." RP 60.

Ms. Gunther's objection concerning argument outside the scope of the modification trial was sustained. Id.

Mr. Bobman misrepresented to the court that there was no daycare overpayment since it was corrected in 1997. Id. It was "suspended" in 1997 with no further modification. CP 155.

Mr. Bobman asked that the father pay seventy-five percent of post-secondary of "whatever is not covered by scholarship or school loans or grants, ..." RP 60. Neither the child nor the mother provided any information as to scholarships, school loans, or grants. The father produced information that the

child did receive a grant. CP 204-205. Mr. Bobman argued extensively that the court should order post-secondary education. RP 60-63. He asked that the issue of support beyond age 23 be reserved. Id.

However, the father had agreed to pay his proportionate share of post-secondary education, in accordance with the statute. CP 187; RP 67.

Mr. Bobman argued for what he and his client calculated as unpaid back child support, \$25,272.00. RP 63-64. Mr. Bobman was unable to explain how the DCS printout provided by the father showed a zero arrears as of July, 2009, and claimed to have another one that showed \$136,149 owing in December, 2008, which he had not served or filed. RP 64.

Ms. Gunther argued for reimbursement of day care that was not owing but collected anyway, as set out in the father's response. RP 66-67; CP 130, 155. Ms. Gunther pointed out that the court had found that the mother was not working and day care was to be work-related, and ordered day care suspended when the mother testified she was not working. RP 66-67; CP 161-62. Ms. Gunther offered to provide the exact amount of an accounting including interest for both sides. RP 70-71 Ms. Gunther argued that income should be imputed to each of the parents, the lowest projected amount that a dentist, as Dr. Lieppman is, would earn, and the imputed amount for the father listed in the child support guidelines. RP 69. Ms. Gunther pointed out the lack of proof as to the mother's disability RP 70. Ms. Gunther pointed out that the claim for "unpaid child support" was frivolous in light of the DCS statement that showed he was paid in full up to the child's 18th birthday. Id. Although the court cut Ms. Gunther's argument time shorter than Mr. Bobman's (RP 71),

Ms. Gunther concluded by pointing out that the father had paid his share of documented medical and dental expense for the child, but had no further receipts or requests for reimbursement. *Id.* Ms. Gunther was also able to point out that there was no proof that the child was disabled. RP 72.

Mr. Bobman thereafter touched briefly on what income to impute. RP 72-73. Thereafter Mr. Bobman again stated his misleading opinion that the day care issue was resolved in 1997, when in fact DCS continued to collect it through the child's eighteenth birthday. RP 73.

The court issued a ruling. RP 74-78. The court denied the mother's request for reimbursement of insurance, medical, and dental expenses due to lack of proof. RP 74. The court denied the father's claim for overpaid day care stating that the previous order that increased the transfer payment to \$525.00 per month did not state whether that included day care. *Id.* Start date of modification was the date the petition was filed, June, 2008, up to the date the child left for college. RP 75. The court imputed income to both parents, from the chart for the mother and \$4,000.00 per month net for the father, the figures to be utilized for the modified child support. RP 76.

The court granted post-secondary support, using the University of Washington budget for an in-state student living in the dormitory, tuition, fees, room, board, and books. The child was to be responsible to apply for and obtain scholarships and grants that might be available to her, to be first applied to the post-secondary figure. RP 77. Whatever was then left unpaid would be divided between the parents, \$500.00 per semester from the mother, and 50 percent of whatever remains to be paid by the father. RP 77-78. Any unpaid

balance would be the obligation of the child. RP 78. The court declined to award attorney's fees. Id.

The father sought reconsideration prior to entry of the orders. CP 272-95. Most of the father's requests were adopted into the court's written order with the exception that the court still denied reimbursement of overpaid day care. CP 297-308.

The mother sought revision of the commissioner's ruling, and the father responded with a request that the denial of reimbursement of overpaid day care be revised. CP 311-13. Both requests were denied by the Honorable Judge Gonzales on December 2, 2009. CP 314.

The mother filed a timely notice of appeal on December 20, 2009. The father filed a timely notice of appeal on December 29, 2009. CP 315-30.

By notice dated January 11, 2009 [sic.], Mr. Bobman withdrew as attorney for the mother, effective immediately. CP 331.

IV. ARGUMENT

Standard of review:

Award of attorney's fees is reviewed for abuse of discretion. A trial court abuses its discretion when it bases its denial on untenable grounds or reasons. *Nakata v. Blue Bird, Inc.*, 146 Wn.App. 267, 276, 191 P.3d 900 (2008)(quoting *Emmerson v. Weilep*, 126 Wn.App. 930, 940, 110 P.3d 214 (2005)). If the meaning of an attorney fee statute is at issue, the appellate court reviews the decision to award or not award attorney fees de novo as a question of law. *Wachovia SBA Lending v. Kraft*, 138 Wn.App. 854, 859, 862, 158

P.3d 1271(2007)(citing *Keystone Masonry, Inc. v. Garco Constr., Inc.*, 135 Wn.App. 927, 936-37, 147 P.3d 610 (2006)).

Constitutional challenges are questions of law and are reviewed de novo. *City of Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004)(citing *Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998)).

The interpretation of a statute is reviewed de novo. *Coalition For The Homeless v. DSHS*, 133 Wn.2d 894, 904, 949 P.2d 1291 (1997); *Dioxin Ctr. v. Boise Cascade Corp.*, 131 Wn.2d 345, 352, 932 P.2d 158 (1997); *Smith v. Continental Casualty Co.*, 128 Wn.2d 73, 78, 904 P.2d 749 (1995).

Evidentiary rulings of the court are reviewed for manifest abuse of discretion. *State v. Smith*, 148 Wn.2d 122 (2002); *State v. Woods*, 154 Wn.2d 613 (2005); *State v. C.J.*, 108 Wn.App. 790 (2001).

A trial by affidavit is review de novo. *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990). In a child support modification trial by affidavit, review is de novo, giving deference to the trial court that has the benefit of oral argument to clarify conflicts in the record. *In re Marriage of Stern*, 68 Wn.App. 922, 928-29, 846 P.2d 1387 (1993).

A. Terms against father to mother's counsel was improper

1. The father's counsel was not given notice in advance of the hearing that terms would be requested:

Terms issued without advance notice, opportunity to prepare, or opportunity to be heard, violate due process.

From the earliest days of jurisprudence, it has been held that the constitutional right to due process is inviolate. *Mullane v. Central Hanover*

Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Due process, reduced to its barest elements, requires notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545-552 (1965).

2. father's counsel was not given opportunity to respond and point out the inequity of issuing terms against the father;

At the trial scheduled for July 24, 2009, for the first time Mr. Bobman interposed comments that he had not received respondent's documents timely per the court's previous order entered June 26, 2009. The court did not permit Ms. Gunther to fully respond to Mr. Bobman's request for a continuance. Petitioner's counsel, Mr. Bobman, had given no previous notice to Respondent's counsel, Ms. Gunther, 1) that he was unable to proceed with the trial due to lack of respondent documents; 2) that he would seek terms. Nor did Mr. Bobman seek to mitigate his claimed disadvantage by any such prior notice. At the hearing, Mr. Bobman did not make the request for terms nor specify the amount requested until after his initial presentation and after Ms. Gunther's abbreviated response, all toward the end of the July 24, 2009, hearing. RP 27, 30. The court then made a ruling without giving Ms. Gunther an opportunity to respond to Mr. Bobman's request for terms of \$500.00.

Respondent's due process rights were violated by lack of notice and opportunity to be heard at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545-552 (1965).

3. mother's counsel misrepresented the circumstances to the trial court;

At the hearing on July 24, 2009, Mr. Bobman claimed that he did not receive respondent's documents specified in the court's order entered June 26, 2009. CP 260-61. That statement was inaccurate and he finally acknowledged that he did receive all the documents, on or prior to the due dates in the court's order, except a he claimed he did not receive a "list" of exhibits. Ms. Gunther explained to the court that the "list" was in the documents themselves with a full explanation of each exhibit.

There was no violation of the court's order.

4. Mr. Bobman was the one who had twice previously failed to provide LFLR 10 and 14 documents.

Trial following vacation of the previous child support modification order was scheduled for May 15, 2009. The parties appeared that date but petitioner had served only the summons, petition for modification, and a financial declaration without any attachments required by LFLR 10 and LFLR 14, although requested to do so. RP 5-8. Petitioner had not served a trial affidavit to respondent by the trial date although requested to do so. Without petitioner's documents, was unable to prepare a trial affidavit, but did prepare, file, and serve his response to the petition for modification on May 13, 2009. That failure of petitioner was called to the attention of the court. Upon respondent's request, the court continued the case to June 26, 2009, with an admonition to petitioner to serve her LFLR 10 and 14 documents. RP 7-8. A schedule was included in the continuance order for submission of documents.

CP 176-77.

Petitioner still did not serve a trial affidavit to respondent's counsel, and failed to do so by the second trial date, June 26, 2009. Even without petitioner's trial affidavit, respondent was hampered in preparation of his trial affidavit, but served and filed it on June 24, 2009, although he did not have documents to respond to. His trial affidavit basically objected to the lack of documentation provided by petitioner and then set out documentation to prove his counter-claim.

At Mr. Bobman's request at the beginning of the trial on June 26, 2009¹⁰, the court one more time continued the trial, this time to July 24, 2009, on the basis of petitioner's failure. The court again admonished petitioner's counsel to provide to respondent's counsel all documents upon which petitioner would rely, and set specific dates by which documents must be produced. Again a specific order was entered.

~~5. the previous order provided that the parties were to provide a list of exhibits to the other party and the father's counsel had already provided what the court ordered but the mother's counsel had not previously provided what the court ordered but did so, although inadequately, within the time specified by the trial court;~~

At the trial hearing on July 24, 2009, Mr. Bobman represented to the court that he had supplied the "list" the court had required in the June 26, 2009 order. However, Mr. Bobman's "list" set forth the title of the documents without any explanation of either the documents or the exhibits. Ms. Gunther

¹⁰ There was no recording made of the June 26, 2009 proceedings and therefore there is no transcript. The court's minute entry is provided. CP 181.

on behalf of the father included a full list, identifying each exhibit and why it was important to the trial issues.

Ms. Gunther's "list" complied with the court's order.

6. the parties were given specific permission to file a response to any new documents served and filed after entry of the order:

The court's order of June 26, 2009, specifically provided that "new materials may be responded to." CP 180. Because Ms. Gunther had for the first time received Mr. Bobman's "trial affidavit" (CP 178), it constituted "new material," she responded thereto, and by July 10, 2009, the date specified by which respondent's pleadings were to be served and filed. CP 252-59.

Ms. Gunther's response to petitioner's trial declaration complied with the court's order.

7. mother's counsel untimely served documents that were previously not served and that contained material information that was materially false;

The petitioner's trial declaration, filed under seal, contained a series of calculations that did not show the basis for the amounts claimed therein. However, one egregious error was where petitioner began listing the child support due, put the amount in as \$525.00 per month, and then for no identifiable reason, began calculating it at \$2,209.79 per month. Because the child support had never been modified from the March 19, 1993, Order of Child Support, that claim was untrue. Ms. Gunther's response on behalf of respondent called that error to the attention of petitioner, her attorney, and the court.

In fact, as a professional courtesy to opposing counsel, Ms. Gunther sent a letter pointing out the error and requested either justification or correction pursuant to RPC 3.3

Filing the response did not violate the authority granted in the court's order.

8. father's attorney called that falsity to the attention of mother's counsel with a request for RPC 3.3(d) correction, when no correction was forthcoming, father's attorney pointed it out to the court in pleadings with a request for CR 11 sanctions:¹¹

As a professional courtesy to opposing counsel, Ms. Gunther sent a letter to Mr. Bobman prior to filing the response. In that letter she pointed out the error and requested either justification or correction pursuant to RPC 3.3(d). CP 259. Mr. Bobman did not respond either to the letter or to the response that requested CR 11 sanctions for frivolous filing.

At the hearing on July 24, 2009, Mr. Bobman did not explain why he permitted his client to misrepresent to the court that the respondent's child support obligation had been increased to \$2,209.07 per month, a blatant misrepresentation.

9. Grant of \$500.00 sanctions against respondent in favor of petitioner was error.

Ms. Gunther interposed comments during Mr. Bobman's argument that

¹¹ It was only after the court deadlines that mother's counsel finally sent a declaration of the mother that acknowledged the information was false. See footnote 9.

she did provide the documents and timely, and Mr. Bobman kept interrupting. The court did not initially request proper verification from Mr. Bobman and when she eventually did, she learned that he did, in fact, timely receive the documents from Ms. Gunther. At first both the court and Mr. Bobman denied getting Ms. Gunther's documents. RP 19-20. Then each went through documents and acknowledged that they did get the documents. RP 23. The court records show that the petitioner's documents were mailed to Ms. Gunther and received by her on July 2, 2009. Ms. Gunther submitted three testimonial documents: Response to Petition for Modification, delivered to Mr. Bobman on May 13, 2009; Trial Affidavit delivered to Mr. Bobman on were delivered to Mr. Bobman on the court denied getting Ms. Gunther's documents stating that "Well, no, because what I have is father's trial brief, respondent's response to petitioner's trial declaration, a financial declaration, and a memo. Oh, and then I have the respondent's affidavit for trial, which was . . . (RP 22). Ms. Gunther interposed that the exhibit list was within that affidavit. Mr. Bobman the claimed it was "not what the court ordered" although he actually acknowledged that he did receive Ms. Gunther's documents. RP reduced his claims to the fact that there was not a "list" of the exhibits. The court made the award without calling for response from respondent's counsel. RP 30, 31. The award of \$500.00 was made without due process and should be reversed.

Furthermore, the court did not permit sufficient time for proper response to the request. Respondent's counsel on the brief time allowed to respond, was unable to point out to the court that the specific points in the court order that were, in fact, properly followed. Nor did the court have

Petitioner's counsel respond to the claim that the documents were false and the request for CR 11 sanctions due to that falsity.

The court has the inherent power to sanction a party by awarding terms where a court rule or court order are violated. See CR 5(d)(2). However, each authorization specifies that the court must award "terms that are just." In awarding attorney's fees, the leading case is *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992). See also *Herring v. DSHS*, 81 Wn.App. 1, 914 P.2d 67.

In the case of *Herring v. DSHS*, 81 Wn.App. at 35, the plaintiff claimed that counsel for DSHS had misrepresented some evidence, and asked that the opening and reply briefs in full or in part be stricken. The court of appeals found that DSHS's counsel had tried to admit the evidence of the letter, but eventually failed to do so. Thereafter, she argued that the evidence was improperly excluded, which was a proper legal argument. The appellate court also found that counsel for DSHS did conduct a reasonable inquiry, but gave a different interpretation to the facts than Herring. Under those circumstances, CR 11 sanctions were not warranted.

In the case of *Biggs v. Vail*, 124 Wn.2d 193, 198-99, 876 P.2d 448 (1994) our Supreme Court has required that sanctions only be imposed in accordance with due process procedures. In *Bryant*, the court held that CR 11 procedures "obviously must comport with" the due process requirements of notice and an opportunity to be heard. *Bryant*, 119 Wn.2d at 224 (quoting FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. at 201).

In the case of *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d at 225, the

Supreme Court stated, "We note that in fashioning an appropriate sanction, "the least severe sanctions adequate to serve the purpose should be imposed." Schwarzer, *Sanctions Under the New Federal Rule 11 - A Closer Look*, 104 F.R.D. 181, 201 (1985)." This court imposed a sanction that amounted to an impermissible fee shifting mechanism as denounced in *Biggs v. Vale*, 124 Wn.2d at 201.

The court must assure that the totality of the circumstances warrants an award of terms. The holding in the case of *MacDonald v. Korum Ford, Inc.*, 80 Wn.App. 877, 892-93, 912 P.2d 1052 (1996) is that the court should impose the least severe sanction adequate to serve the purpose, citing *Miller*, 51 Wn.App. at 304. The *MacDonald* court, at 892, further held that sanctions should be reserved for egregious conduct, citing *Biggs v. Vail*, 124 Wn.2d at 198 n.2. Here, it was petitioner's counsel who failed to serve and file documents at least twice, and then filed and served improper documents that contained false information. Conversely, respondent's counsel did not violate either court rules or the court's order. If Ms. Gunther's filing of a trial brief as supposedly not authorized by the court order, the remedy was to strike it at the time. However, the totality of the circumstances show that it was filed because petitioner's counsel did not file a trial brief. Petitioner's counsel did not articulate prejudice other than that he was unable to prepare for trial. However, it was obvious that he had been unable to respond to the request for CR 11 sanctions due to him filing false documents. The motion for continuance, and the reasons articulated therefor, were a pretext for more time to obtain information from his client who apparently was in Texas, in order to

respond regarding the false claim of \$2,209.79 per month of child support.

If any violation of the court's order of June 26, 2009, occurred at all, it was de minimis, and does not justify the severity of the terms imposed. See CR 1 which states that the court rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." CR 1.

In criminal cases, the usual sanction for violation of the speedy trial rule is dismissal of the case, a very harsh sanction. However, as our Washington State Supreme Court held in the case of *State v. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989), even where an accused's right to a speedy trial is involved, the court rule will not be harshly applied. The court stated therein at 394:

The superior court speedy trial rules were not designed to be a trap for the unwary. Where the rules are unclear, the defendant is not prejudiced by a minor delay, and the defendant has not informed the prosecutor of his or her intent to rely on the rules before the speedy trial period has expired, we will not direct a dismissal of the charges. Cf. *Barker v. Wingo*, *supra* [407 U.S. 514, 522, 33 L.Ed.2d 101, 92 S.Ct. 2182 (1972)]; *State v. Christensen*, *supra* [75 Wn.2d 678, 686, 453 P.2d 644 (1969)].

State v. Fladebo, 113 Wn.2d at 394.

In *Fladebo*, the defendant relied on the court rule, rather than an argument that her constitutional right to a speedy trial had been violated. Defendant did not show that she was prejudiced. The Supreme Court held that without a claim that her constitutional right to a speedy trial was violated, the rule itself was insufficient grounds to apply the harsh sanction of dismissal. The holding in *Fladebo* has been followed since that time. See *State v. Wilton*, 57 Wn.App. 606, 608, 789 P.2d 800 (1990); *State v. Phillips*, 66 Wn.App. 679, 690, 833 P.2d 411, (1992); *State v. Carson*, 128 Wn.2d 805, 818, 912 P.2d

1016 (1996).

The award of terms herein is particularly egregious since it was the petitioner and her counsel who failed to file trial documents requiring two previous continuances, and then served documents that were blatantly false. Rather than respond, petitioner and her counsel attacked respondent and his counsel, and thereby sidetracked the actual issue, i.e., the petitioner's own intransigence and provision of false information to the court.

A respondent is just that. Where a petition is filed, the respondent responds thereto. Where the petitioning documentation is not forthcoming, the respondent is thwarted in his attempts to provide meaningful information for the court to consider at trial. He is to respond, and his obligation is not to supply to the court documentation that is the petitioner's responsibility to supply.

The award of terms against respondent rather than against petitioner was error and should be reversed.

B. The court abused its discretion in denying the father's request for reimbursement of overpaid day care:

and

C. Finding of Fact 3.22 is erroneous:

In this case, the day care ordered was readily ascertainable, the amount paid was readily ascertainable, and the statute for such reimbursement is mandatory.

The original child support order was entered herein on March 19, 1993, The initial child support was set out in paragraph 3.5 as "\$242.97 per

month, without day care, medical or other pro rated items." CP 134

The "transfer payment was set in paragraph 3.4 as "\$450.00 per month for and as the basic transfer payment and this payment shall include his apportioned day care obligation." Id.

In paragraph 3.6, the court granted a deviation stating that "The child support amount ordered in paragraph 3.4 deviates from the standard calculation for the following reasons:

" [x] Other and factual reason therefore:
The transfer payment includes day care expenses for the child which are related to the mother's employment."

CP 134-35.

In paragraph 3.13, that the court ordered periodic adjustment. The first adjustment terminated the paragraph 3.4 *transfer* payment at the end of April, 1993, and "Effective May 1, 1993, the *transfer* payment shall increase to \$525.00. . . ." CP 136.

At no place in that child support order did the court terminate the deviation granted in paragraph 3.7. The \$75.00 per month increase from the transfer payment of \$450.00 to the "transfer payment" of \$525.00, included the deviation for day care because at that time the child was 2 years of age, the mother was working at her business as a dentist, and day care for the child was essential.

On January 10, 1997, nearly four years after the child support order was entered and the child was five years old, Commissioner Prochnau entered an order that "suspended" the father's day care obligation for the past twelve months, to January of 1996, due to the allegations the mother had made that

she had not been working all that time. CP 155. The Commissioner gave the mother the opportunity to produce work related day care receipts, but none were ever produced. Therefore the mother did not incur any "day care expenses for the child which are related to the mother's employment." By making that order, the Commissioner implicitly acknowledged that the transfer payment of \$525.00 per month still included "day care expenses" in the 1994 adjustment.

RCW 26.19.011(9), the statute relating to child support, defines "Support transfer payment." It

. . . means the amount of money the court orders one parent to pay to another parent or custodian for child support after determination of the standard calculation and deviations. If certain expenses or credits are expected to fluctuate and the order states a formula or percentage to determine the additional amount or credit on an ongoing basis, the term "support transfer payment" does not mean the additional amount or credit.

RCW 26.19.011(9).

By the use of the words "transfer payment" in the child support order, when increasing the child support to \$525.00 per month, the deviation regarding day care was included.

The Division of Child Support, continued to collect the full transfer payment of \$525.00 per month that included the deviation portion that added \$207.03 per month as the father's portion of day care expense. The print out from DCS specifically showed the collection of the full \$525.00 per month until all child support transfer payments to the child's 18th birthday were collected.

RP 44.

The father pointed out to the court that the King County Prosecuting Attorney's office in a contempt proceeding, and the contempt court itself, recognized that court order that suspended day care. CP 274. The father also showed that Judge Hubbard in the parenting plan trial refused to address child support, and that the DCS administrative hearing determined lack of jurisdiction to hear his request to stop collection of the day care portion of the child support. Id.

The father specifically counter-claimed in this modification action for reimbursement for the day care portion of child support collected from him that was not spent by the mother for work-related day care. The mother did not answer that claim or deny that she no work-related day care expense. In fact, the mother continued to maintain to this court that she was not working and had not been working. Additionally, at a certain age, the child would no longer require day care.

At one of the first hearings herein, and again at the modification hearing held September 23, 2009, the mother's attorney acknowledged that in 1997 the court modified the child support order to eliminate the day care provision.

RCW 26.19.080(3) provides for the allocation of court-ordered day care. That statute provides that:

(3) Day care and special child rearing expenses, such as tuition and long-distance transportation costs to and from the parents for visitation purposes, are not included in the economic table. These expenses shall be shared by the parents in the same proportion as the basic child support obligation. If an obligor pays court or administratively ordered day care or special child rearing expenses that are not actually incurred, the obligee must

reimburse the obligor for the overpayment if the overpayment amounts to at least twenty percent of the obligor's annual day care or special child rearing expenses. The obligor may institute an action in the superior court or file an application for an adjudicative hearing with the department of social and health services for reimbursement of day care and special child rearing expense overpayments that amount to twenty percent or more of the obligor's annual day care and special child rearing expenses. Any ordered overpayment reimbursement shall be applied first as an offset to child support arrearages of the obligor. If the obligor does not have child support arrearages, the reimbursement may be in the form of a direct reimbursement by the obligee or a credit against the obligor's future support payments. If the reimbursement is in the form of a credit against the obligor's future child support payments, the credit shall be spread equally over a twelve-month period. Absent agreement of the obligee, nothing in this section entitles an obligor to pay more than his or her proportionate share of day care or other special child rearing expenses in advance and then deduct the overpayment from future support transfer payments.

RCW 26.19.080(3)(Emphasis added.)

The statute is clear; where day care is overpaid by at least 20% of the obligor's day care obligation, the obligee **must** reimburse the obligor or apply the overpayment to future child support. The father herein overpaid by 100% of his previous day care obligation because the court suspended his entire day care obligation due to the mother not working and not incurring work-related day care. Under the mandatory language used in the statute, the word "must," the court has no discretion but to order reimbursement or application to future child support.

The child support order, and particularly finding of fact 3.22¹², (CP

¹² Finding of Fact 3.22 states:
"The claim pursued by the Respondent for overpayment of daycare is denied based on the language from the previous child support order, which does not show daycare as an amount. The respondent failed to prove over-payment."

303) are erroneous. The father specifically tracked the previous order's rulings regarding inclusion of day care as part of the "transfer payment." As stated above, the court must order reimbursement of day care that was both suspended and not spent by the mother in relation to work, and by the mandatory language of RCW 26.19.080(3) by use of the word "must." Failure to do so is tantamount to a retroactive modification of child support, awarding to the mother from January, 1996, an increase in child support of \$207.03 per month. Retroactive modification is prohibited by statute. RCW 26.09.170(1) states: "Except as otherwise provided in subsection (7) of RCW 26.09.070, the provisions of any decree respecting maintenance or support may be modified: (a) Only as to installments accruing subsequent to the petition for modification or motion for adjustment" See also *In re Shoemaker*, 128 Wn.2d 106, 904 P.2d 1150 (1995).

The father respectfully requests that the denial of reimbursement of the overpaid day care be reversed.

D. The trial court abused its discretion by failing to award the father attorney's fees due to the mother's intransigence.

Intransigence is an equitable ground for an award of attorney's fees. *Bay v. Jensen*, 147 Wn.App. 641, 196 P.3d 753, (2008).

In *Bay*, Division 2 of the Court of Appeals stated:

We review an award of attorney fees for abuse of discretion, whether the award is under a statute or for intransigence. *In re Marriage of Bobbitt*, 135 Wn.App. 8, 29-30, 144 P.3d 306 (2006). The party challenging the award must show that the court used its discretion in an untenable or manifestly unreasonable manner. *In re*

Marriage of Mattson, 95 Wn.App. 592, 604, 976 P.2d 157 (1999). Where a trial court fails to provide sufficient findings of fact and conclusions of law to develop an adequate record for appellate review of the fee award, we will vacate the judgment and remand for a new hearing to gather adequate information and for entry of findings of fact and conclusions of law regarding the fee award. *Bobbitt*, 135 Wn.App. at 30.

Bay v. Jensen, 147 Wn.App. at .

In the case of *Buchanan v. Buchanan*, 150 Wn.App. 730, 207 P.3d 478 (2009), Division III of the Court of Appeals stated:

Trial courts have authority to award attorney fees and expenses in marriage dissolution proceedings both at trial and on appeal. RCW 26.09.140. "An award of attorney's fees rests with the sound discretion of the trial court, which must balance the needs of the spouse requesting them with the ability of the other spouse to pay." *Kruger v. Kruger*, 37 Wn.App. 329, 333, 679 P.2d 961 (1984). An important consideration, apart from the relative abilities of the two spouses to pay, is the extent to which one spouse's intransigence caused the spouse seeking the award to require legal services. *Burrill v. Burrill*, 113 Wn.App. 863, 873, 56 P.3d 993 (2002). Here, the trial court awarded attorney fees based on intransigence.

Buchanan v. Buchanan, 150 Wn.App. at .

See also *In re Marriage of Wallace*, 111 Wn.App. 697, 710, 45 P.3d 1131 (2002), review denied, 148 Wn.2d 1011 (2003) (citing *Gamache v. Gamache*, 66 Wn.2d 822, 829-30, 409 P.2d 859 (1965) (husband refused to attend trial despite repeated demands that he testify and then filed meritless appeal to cause former wife as much expense and delay as possible); *Eide v. Eide*, 1 Wn.App. 440, 445-46, 462 P.2d 562 (1969) (husband's recalcitrant, foot-dragging, obstructionist attitude increased cost of litigation to former wife)).

In this case it should have been clear to the trial court that the mother

was engaging in intransigence. She filed documents containing false information. She failed and refused to provide those documents to the father's counsel until ordered to do so. She failed and refused to either justify or correct the false information until forced to do so. She failed to produce documentation to support her claims for unpaid but purportedly court ordered insurance, medical, dental expenses for the child as asked the court to "estimate" the amounts. By failing to file her trial documents, she caused at least two continuances of the trial by affidavit. Due to the foot-dragging and failure to provide required documentation, she caused the father to incur more attorney's fees and costs than should have been necessary. The trial court abused its discretion in refusing to award attorney's fees to the father on the basis of the mother's intransigence when considering the totality of the circumstances.

Where an award is sought on the basis of intransigence, the financial position of the parties is irrelevant. As stated in *Bobbitt v. Bobbitt*, 135 Wn.App. 8, 144 P.3d 306 (2006):

It is well settled that '{a} trial court may consider whether additional legal fees were caused by one party's intransigence and award attorney fees on that basis.' In re *Marriage of Greenlee*, 65 Wn.App. 703, 708, 829 P.2d 1120. 'When intransigence is established, the financial resources of the spouse seeking the award are irrelevant.' In re *Marriage of Morrow*, 53 Wn.App. 579, 590, 770 P.2d 197 (1989). Intransigence includes foot dragging and obstruction, filing repeated unnecessary motions, or making the trial unduly difficult and costly by one's actions. *Greenlee*, 65 Wn.App. at 708.

Bobbitt, 135 Wn.App. at .

E. The father is entitled to his attorney's fees on appeal:

Intransigence on the part of the mother is ongoing. Her own appeal is fraught with a variety of procedural errors such as failure to designate proper clerk's papers and failure to provide a verbatim or narrative transcription of proceedings. She has filed motions in the appellate court that have no basis in fact or law. She is advocating for relief that is not supported by any evidence because she provided no evidence to the trial court.

In addition to intransigence, her appeal is frivolous. Because of her frivolous appeal and intransigence, the father has incurred additional and extensive attorney's fees in an amount in excess of \$5,000.00.

RAP 18.9 authorizes the appellate court to award attorney's fees on appeal. The father respectfully requests that this court award him reasonable attorney's fees on appeal.

An appeal is frivolous, allowing an award of attorney's fees to the opposing party, when considering the record in its entirety, no debatable issues are presented upon which reasonable minds might differ, for example, an appellant's claims are so devoid of merit that no reasonable possibility of reversal exists. *Brin v. Stutzman*. 90 Wn.App. 809, 951 P.2d 291 (1998). The mother did not provide proof of her claims to the trial court. She is precluded from doing so here. There is no possibility that the requests she made to the trial court that were denied might be reversed.

V. CONCLUSION

For all the foregoing reasons, appellant respectfully requests that this court reverse the trial court's imposition of terms against him at the July 24, 2009 hearing, the trial court's denial of an order for reimbursement of overpaid

day care, and the trial court's denial of attorney's fees due to the mother's intransigence in the trial court. The father further requests this court to award him attorney's fees on appeal due to the mother's ongoing intransigence, and the frivolous nature of her appeal.

Respectfully submitted this 9th day of July, 2010.


Marilyn R. Gunther, WSBA #27797

5312 - 9th Ave. N.E.
Seattle, WA 98105

253-373-0701

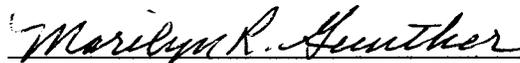
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STATE OF WASHINGTON
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

In re Marriage of:)
LORI L. LIEPPMAN,) No. 64706-7-1
Respondent,) CERTIFICATE OF
and) SERVICE BY MAILING
GARY D. FLANZER,)
Appellant.)
_____)

Marilyn R. Gunther, being aware of the penalties of perjury of the State of Washington, hereby certify that I served a copy of the Appellant's Opening Brief on Dr. Lori Lieppman, opposing party pro se, by mailing a true copy thereof to her in care of 6011 - 37th Ave. S.W., Seattle, WA 98126, first class mail, postage fully prepaid, on July 9, 2010.

DATED: July 9, 2010.


Marilyn R. Gunther WSBA #27797
Attorney for Appellant

5312 - 9th Ave. N.E.
Seattle, WA 98105
253-373-0701

*DECLARATION OF
SERVICE BY MAILING*