

66573-1

66573-1

NO. 66573-1

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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MONIQUE U. LE

Appellant,

vs.

TONY MAI

Respondent.

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BRIEF OF APPELLANT

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COURT OF APPEALS  
STATE OF WASHINGTON  
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## I. INTRODUCTION

In April 2010, the father, Tony Mai, filed a petition to modify the final Child Support Order, entered upon the dissolution of the parties' marriage just 10 months prior. (CP 149) The father claimed substantial change in circumstances and worked a severe economic hardship as reasons in his Petition. (CP 28-31) The petition was filed exactly six months after the father was found in willful contempt of the final divorce decree provisions.<sup>1</sup> (CP 467) Using financial information orchestrated over the six months after the contempt findings, he staged a picture of indigence to support his claims with the trial court in the underlying modification petition.

The father had also participated in at least three other home "flips" without disclosing them to the mother and the court. (CP 588-610, CP 419-30)

At the temporary modification of child support hearing, the court initially reduced his child support by \$200 pending father's proof of income. The court found "moving party has the burden to demonstrate severe economic hardship and has not met that burden" and "reserved to the trial court to address possible error by this court and to re-impose the \$200 per month reduction and

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<sup>1</sup>This contempt finding was the result of a Contempt Motion for failure to pay child support and violation of the Parenting Plan. (CP 494) The father brought himself current on the eve of the contempt hearing and the mother agreed to drop the Child Support Order contempt charge at the hearing, thus, the father was only found in contempt of the Parenting Plan. (CP 465)

obligee could get that back” . Issues of the father’s contempt of court and attorney fees sanction were reserved for the trial court. (CP 202-03)

It was discovered that, in January 2010, three months before he petitioned for child support modification, the father purchased a house, in cash, for \$308,500. (CP 575) That house was sold in July 2010 for \$475,500. (CP 584) The father fraudulently conveyed this house to others within the month of purchase, underneath an LLC to hinder and delay child support enforcement. (CP 578)

The father also omitted income from a furniture business he owned from the Petition and Declaration. (CP 28, 545) The father denied ownership of such business at deposition on 10/14/2010 (CP 437) The mother subpoenaed furniture invoices from one of father’s wholesalers, which showed the father’s signatures on approximately 60 orders in the twelve months preceding the deposition, a Reseller Permit and Resale Certificate with his signature on file. (CP 508-32)

During discovery, it was learned that mother’s former counsel from her first marriage<sup>2</sup> at the firm of Anderson Fields, had been advising the father underneath his *pro se* guise. (CP 80)

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<sup>2</sup> Mother was married once before.

Attorney Carena McIlwain and Wolfgang Anderson of the firm Anderson Fields represented the mother in that divorce from April 2004 to May 2005 and collected at least \$25,000 in attorney fees from the mother. (CP 66-78) Evidence confirmed an improper and conflicted attorney-client relationship existed at least between attorney McIlwain and the father during the course of this proceeding. The WSBA is investigating. (CP 324). After the relationship was discovered, no official word came from Anderson Fields to defend this improper relationship until the mother demand the father's attendance at the first deposition set in August 2010.

The father and his business partners failed to attend Depositions set up by the mother and failed to acquiesce to the Subpoenas Duces Tecum's demand of documents. The mother was forced to file a Compel Motion. (CP 38) That motion was granted. (CP 337)

A new Anderson Fields' associate attorney, Jillian Pressnal, was assigned to appear on record for the father for the first time, to object to the mother's Motion to Compel records. (CP 487) Attorney McIlwain was said to have moved to another state in June, after her communication with the father was discovered. The granted motion compelled the father and business associates to attend depositions and produce records requested by the mother.

(CP 336-37) The mother motioned for Anderson Fields to be excluded from representing the father due to Confidentiality, Attorney-Client privilege and Conflict of Interests. Commissioner Lori Smith ruled that mother's former counsels were allowed to continue representation. The issue of attorney fees of \$1,500 for failing to comply with discovery request was also reserved for trial, added to the aforementioned reserved Temporary Order to Modify Child Support attorney's fees. (CP 336-37)

The mother filed to revise this adverse ruling allowing conflicted representation. Judge Mariane Spearman struck the motion on technical/procedural ground on 10/15/2010 (CP 152, Docket No. 110B). *Infra*. The mother pleaded on an independent motion to disqualify counsels on issue merit with King County Superior Court's Chief IC Judge Doerty (CP 152, No. 112), who then passed it again to Judge Spearman, who then struck it, referred back to the first revision order procedural ground again. (CP 829-831, No. 128A)

Meanwhile, father attended the second scheduled Deposition with his attorney on 10/14/2010 and evaded questions of his income with over 100 "I don't knows", "I can't recalls", and "I don't remembers" in a short span of one and a half hours. (CP 377-457) He tampered with witnesses, his business partners, to

dodge their scheduled depositions despite confirmed attendance the night before. They did not show. (CP 297-300)

The father supplied the mother and the court with an array of unauthenticated and invalid financial documents (CP 243-76), financial statements he had cooked up, Promissory Notes where he was the sole signer using the same copy-and-paste signature (CP 640-43, 645-48), LLC Operating Agreements bore only this copy-and-paste signature and no one else's (CP 656-68, 670-82), and some documents without anyone's signature (CP 650-54), Profit and Loss statement not bearing anyone's authentication (RP 1:2, CP 130)<sup>3</sup>

At the modification hearing, the court, after having "spent some time poring through" the parties' voluminous record, (CP 129, In 3) found the father "has not met his burden of proof" (CP 130, In 12). The court did not have full disclosure from the father (CP 130, In 14), and refused to reduce the father's monthly child support from \$1,500 to \$50 as he had requested (CP 130, In 18).

The court found:

**"It appears to me he is not being truthful about his income."** (CP 130) (emphasis added)

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<sup>3</sup> The Report of Proceedings on 11/12/2010 is designated RP 1, and 11/22/2010 is designated RP 2 in Appellate Brief.

The father's petition to modify was denied and attorney fees sanction of \$1,000 were awarded to the mother out of the \$18,888 incurred. (CP 125) Issues of contempt as well as previously reserved attorney fees in the temporary and compel motion were not addressed. (CP 125, 202, 337)

The mother moved for revision asking the court to articulate a finding of bad faith, frivolous filing and intransigence against the father and revise the \$1,000 fees award to reflect the actual expense incurred of \$18,888. (CP 109-23) The revision court refused to award additional attorney fees. (CP 181, 202, 337) Neither the commissioner nor the revision court articulated their legal basis for awarding attorney's fees of \$1,000. Both acknowledged the issue of the father's bad faith and intransigence, frivolous lawsuit in general terms in oral rulings. (RP 1, RP 2) Both written orders failed to reflect these findings. (CP 107, 181)

Judge Spearman stated orally, in two sentences, that she denied the mother's revision motion for reasonable fees due to the mother's filing of motions to remove her former counsel from representing her second husband, even after Judge Spearman had ruled to allow for such representation. Her very brief written order did not provide a legal basis for such findings. (CP 181)

The father also moved to revise the court's rejection of his petition to modify child support and was denied. (CP 181)

The mother timely appeals.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in failing to address the father's bad faith, frivolous filing, and intransigence in proceeding of the petition to modify child support when substantial evidence to support such findings exists. (CP 125, 181)

2. The trial court erred when it failed to adequately award the mother reasonable attorney fees under RCW 26.09.140 and 26.18.160, and failed to sanction appropriately the father's bad faith conduct. (CP 125, 181)

3. The trial court erred when it allowed mother's former divorce attorney to represent the father in a substantially related divorce action in violation of RPC 1.9. (CP 337)

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court abuse its discretion by inadequately sanctioned reasonable attorney fees against the father under RCW 26.09.260 (13) for bringing a modification petition frivolously and in bad faith where he filed false declarations, was found by the trial court to have been untruthful, provided invalid and comingled

financial records; and failed to meet his burden of proof?  
(Assignment of Error 1 and 2)

2. Did the trial court abuse its discretion in failure to assess attorney fees against the father under CR 11 for making false claims in his declarations and attempted to mislead the court, and filed a modification petition not well-grounded in facts?  
(Assignment of Error 2)

3. Did the trial court abuse its discretion in failing to award reasonable attorney fees to the mother as the prevailing party for purposes of RCW 26.18.160? (Assignment of Error 2)

4. Is the mother entitled to an award of attorney fees on appeal when the trial court failed to provide sufficient findings of fact and conclusions of law to develop an adequate record for appellate review of a fee award? (Assignment of Error 1)

5. Did the court violate: (a) the mother's rights to Confidentiality and Attorney-Client Privilege, and (b) the Appearance of Fairness doctrine, in allowing Anderson Fields to represent the father against the mother, their former client?  
(Assignment of Error 3)

#### **IV. STATEMENT OF THE CASE**

**A. The Father Repeatedly Resisted The Child Support Order Before And During Suit, Filed Frivolous Petition In Bad Faith With Unclean Hands; Plotted Petition Right After He Was Found In Contempt.**

The parties' marriage was dissolved in June 2009. They have one child, then age 1 in 2009 (DOB 4/17/2008). (CP 8) Tony Mai, the father/respondent, is a self-employed businessman owning multiple businesses: a real estate development corporation, an insurance corporation, a furniture sale business. (CP 461) The father is an Ivy League graduate from the University of Pennsylvania. *Id.* He became a member of the exclusive Columbia Tower Club shortly after the divorce. (CP 449) Monique Le, the mother/appellant was a financial advisor, is a University of Washington graduate. At the time of the Modification in 2010, she was unemployed and home caring for the parties' infant child. (CP 726-27)

During separation in April 2008, the father pledged in writing to provide for mother and child \$3,000 per month to persuade the mother to stay home with their infant child. (CP 632) After the mother spent months to search for a suitable replacement and arrange the necessary legal steps to transfer her book of investment clients to another financial advisor to stay home with the child, the father reneged on his written pledge in January 2009. (CP 634) He claimed to be unemployed and had no income. *Id.* Yet, King County records showed that the father was selling eight condo units totaling \$2,389,300 in revenue (CP 702-10) and a

house in Seattle for \$648,500 (CP 712-13) between 2008 and 2009, at the time of separation and divorce.

By the time the father backed out of his pledge in early January 2009, the wheels had been set in motion. By mid-January, 2009, the mother's clients were moved to another advisor's management and the mother gradually exited the business per agreement with the replacement advisor. (CP 283-287)

To avoid an all-consuming and costly litigation with the father, and mindful of the time commitment a one-year-old child would require, the mother agreed to the final Child Support Order in June 2009 that lowered the father's support to \$1,500 monthly without the benefits of a trial. (CP 9) This amount is a deviation from the standard Washington State Child Support schedule, per parties' agreement in consideration of the property distribution and childcare expense. (CP 10)

A few months after the final divorce decree was entered, the father stopped paying Child Support and stopped visiting the child. The mother motioned the court for Contempt of Child Support Order and Parenting Plan. According to the father's under oath declaration, he was not making enough money. (CP 495-97) Just before the hearing, he brought himself current. The mother

dropped the Child Support contempt charge, and he was found in Contempt of the Parenting Plan.

Six months after the Contempt order, after having sufficient time to stage the necessary financial statements and self-employed tax returns required by LFLR 10 to look suitably poor, the father filed a petition to modify child support claiming substantial change in circumstances and severe economic hardship. (CP 28-31)

**B. The Father Frivolously Petitioned To Modify The Child Support Order In Bad Faith To Avoid Support And To Abuse Mother; Court Found No Change In Circumstances And No Severe Economic Hardship; The Father Had Not Met His Burden Of Proof, Was Not Credible, Awarded \$1,000 In Attorney Fees To Mother Without Articulating Basis When Actual Fees Incurred Was \$18,888.** (CP 167-72, 487, 575-622)

In April 2010, the father petitioned for modification of the Child Support Order, (CP 28), asking the court to reduce his child support from \$1,500 to \$50. (CP 29 and CP 130/RP 1:2 In 18) The father verified the petition under penalty of perjury, including the claimed substantial change of circumstances. (CP 29) The father provided the court initially with formulated documents that he had staged in the six months prior to filing, disclosing only his insurance income, some real estate involvement without clarification and no furniture income. (CP 244-76)

Interrogatories and Requests for Production Propounded to Respondent went unanswered. (CP 103) Notice of Deposition and

Subpoenas Duces Tecum were sent to the father and his business associates. They failed to attend Depositions and produce records. A Motion to Compel was filed, and granted. (CP 336) The father showed up, but did not bring the relevant information, and evaded questions of his business arrangement, income and expenses, and lied about other facts. (CP 105-06, 377-457) *Infra*.

At the support modification hearing, the court found that the father “is not being truthful about his income” while comingling business and personal income\$ and expenses. (CP 129-30) His motion was denied.

**1. The Father Lied Under Oath About His Criminal Past.** (CP 491, 653, 29-31, 575-610)

The mother disclosed to the trial court the father’s long-standing patterns of criminal behavior to put into context the latest abusive filing from the father. The charges included: car theft, running a “chop shop”, assault with a deadly weapon, illegal possession of firearm, money laundering and counterfeiting. (CP 2) The father denied them all under oath: “I have not been charged or convicted of any of the crimes she alleges in her Declaration” (CP 491) and “Petitioner’s affidavit regarding the Respondent is malicious slander, hearsay, and completely unsubstantiated.” (CP 488)

The mother, having no need previously to obtain his criminal records, then had to prove her credibility. She pulled one of his criminal convictions from California to disprove categorically his innocent claim. (CP 563) The Consolidated Arrest Report showed that the father had “2 Priors” but no other records were requested by the expense-prudent mother. (CP 563) The record showed father’s impaired judgment, disrespect for the law and reckless disregard of another human life (CP 572):

Mai had his left hand on the bed and was holding a gun in his right hand. Mai was pointing the gun at KO’s head and said he would shoot him if he moved. Mai ... give him three days to apologize and would return to kill him if he did not.

**2. The Father Failed To Provide Full Income And Expense Disclosure According To LFLR 10**

The father omitted his income from real estate and furniture sales, and only reported his insurance sales income to the court, despite swearing under penalty of perjury. (CP 29-31) He failed to disclose his ownership in these other unregistered businesses, and only listed “Insurance Agent” as his occupation on his Petition. (CP 545)

Records and evidence of his furniture business were subpoenaed, printed, and provided to the court. (CP 507-32, 534-43)

The father held himself out to the court as impoverished in his Financial Declaration and Petition filed in April 2010, and only listed his insurance corporation as the only income he received. (CP 29, 545) However, King County records showed he purchased in cash a house for \$308,500 on January 8, 2010. (CP 575) He quickly transferred ownership into an LLC by the name "30<sup>th</sup> Ave. Ballard LLC" (CP 577), set up by his long-term real estate legal team at Gordon, Thomas, Honeywell and registered with the State. (CP 392) Despite having set up six other Limited entities in the five years prior, he sheltered this property under Gordon, Thomas, Honeywell Corporate Services to hide true ownership identity. (CP 362, 393)

When it was clear that the mother had become aware of his short-term "flip" homes and the father would have to disclose income from the sale of "30<sup>th</sup> Ave. Ballard" in July 2010, he took his name out of the LLC so on record of the sale seven months later; his name was no longer attached to this property. He had fraudulently conveyed asset to hinder and delay Division of Child Support and the mother by putting such property beyond their reach. (CP 584-85)

Records of the title transfer of this house, along with records of the father's involvement with three other properties were

demanded, in the first set of subpoenas and depositions, served August 26, 2010 to all parties involved in this transaction (Tony Mai and Jacqueline Nguyen of “Cobalt Builds LLC”<sup>4</sup>; David/Ingrid Hyde of “Hyde Homes LLC”) went unanswered and unattended. (CP 370) A Motion to Compel Discovery was filed, and an Order for Tony Mai and his associates to attend depositions and produce records was entered on October 24, 2010 with attorney fees and costs award for failure to comply with discovery request reserved for trial. (CP 336)

A second round of subpoenas and depositions was set up and Tony evaded questions of his income split with these associates with over 100 “I don’t knows”, “I don’t recalls” and “I can’t remembers” in less than 2 hours span. (CP 377-456) He did not bring critical demanded records to provide the mother at the deposition but provided the mother with a 1-page spreadsheet of expenses called “Vendor List” which he himself manually entered to claim as legitimate expenses. (CP 586) When asked about the specifics, he replied that he “not the best at record-keeping” (CP 447).

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<sup>4</sup> Cobalt Builds LLC was disclosed to have been owned and operated by the father and his girlfriend by another Operating Agreement signed again only by the father with the same cut-and-paste electronic signature (CP 657-68)

**3. In Addition To Having Funds To Purchase Real Estate, He Also Hired Several First-Rate Law Firms To Represent Him Before and During The Time Of The Petition, While Refused To Pay Child Support.**

While refusing to pay child support, father hired a top family law firm Anderson Fields to represent his interest in the modification petition. (CP 487) Putting aside the prohibited representation of Anderson Fields against their former client, the father acknowledged contacting them in March 2010.

In addition to *Anderson Fields*, in March 2010, just a month before filing the petition to modify, the father also had funds to hire *Lasher, Holzapfel, Sperry & Ebberson, PLLC*, another legal powerhouse in downtown Seattle to represent him in another civil law suit against a former business partner Todd Vu, alleging father had loaned Vu \$75,000 in 2009. (CP 472) Father also had funds to hire attorney Jemima McCullum of *Gordon, Thomas, Honeywell* to represent him in another lawsuit, which decision filed in March 2010 against yet another business partner. (CP 394-95, 474-76). All of these happened within months before he filed modification petition. (CP 28)

**4. Issues Of Credibility And Other Undisclosed Sources Of Income**

Father had money to throw Todd Vu, his former business partner who he sued a few months later, a birthday party at the

exclusive Columbia Tower Club in September 2009. (CP 449, 619)

At the same time, the father wrote in his Declaration filed October 7, 2009 in support of his withholding child support (CP 495):

After paying necessary monthly expenses I am often short funds for additional needs and have to take small loans from family members (see **Exhibit 1**)

and

I am willing to pay but don't have the ability or immediate funds to comply

**Exhibit 1**, was his sister's under oath Declaration testified loaning him money to pay living expenses (CP 502):

***\$1,000 in June, \$1,000 in July, \$750 in August, and \$1,700 in September***

Yet, Division of Child Support contradicted father's claim of low income in the same period the sister loaned money, reporting he earned just from Insurance Sale alone in 2010: (CP 506)

***7/09 \$9,131; 8/09 \$8192; 9/09 \$19,484***

While claiming having no other way to support his child in the Petition to Modify, he father testified in his deposition taken 10/14/2010, that his mother, sister and brother were "willing to pay" and testified they in fact did pay to litigate against the mother, against having to pay support obligations! (CP 443)

**5. The Father Filed Frivolous Petition, In Bad Faith, Abused Discovery, Acted Intransigently, Came To**

### **Court With Unclean Hands And Substantially Increased Litigation Cost For The Mother**

Attorney Huber represented the mother in the early stage of litigation. After looking at the father's taxing and duplicitous position over the course of two months, he advised the mother that it could cost \$30,000 to investigate and conduct discovery on the father's various businesses because of the father's intransigent and obstructionist conducts, and not \$5,000 he initially estimated. (CP 139) Attorney Huber looked at email print-out evident of father to business associate asking them to fabricate fake invoices to artificially inflate the father's business expenses (CP 636) to reduce net income and realized the kind of complication such a case represented. Balancing cost versus possible end results, the mother proceeded *pro se* with limited counsel. Total cost was at \$10,356 with attorney Huber by June 15, 2010. (CP 756)

The mother sent out Subpoenas Duces Tecum and Deposition Notices to the father and his business associates in August 2010. He claimed he cannot recall most of the expenses paid within the last year because some were paid by the Hydes or Nguyen, his corporate conspirators, which neither he nor they provided records. At the deposition, he did not bring demanded documents per the Subpoenas Duces Tecum instructions, then evaded questions of his arrangements, payments, and agreements

with the associates, contractors and sub-contractors throughout the deposition 10/14/2010. He claimed to pay everyone in cash, thus unable to provide documents and claiming absolutely no traceable records to provide the courts are illustrated here, regarding the plumbing contractor (CP 67):

Q. *You don't check registration and license when you hire these guys?*

A. *No*

Q. *Would you say that is a normal practice –*

A. *Yes.*

Q. *-- for you? To not check license and registration?*

A. *Yes.*

Q. *So how would you obtain recourse if the work is faulty?*

A. *Contact them and ask them to do a call back.*

Q. *A call back?*

A. *That's when they come back and repair or finish the work that you're not satisfied with.*

Q. *Do you have any contractual agreements with them?*

A. *No.*

Q. *So all of this recourse is just verbal?*

A. *Yes.*

*MS. PRESSNAL: Object.*

Q. *Sorry?*

*MS. PRESSNAL: Just wondering the relevance.*

Q. *Records again.*

Father claimed he paid vendors in cash, thus unable to provide receipts or documentation for purpose of calculating his income. He was unable to provide a straight answer for a simple question whether he would be able to provide receipts to his accountant for tax deduction purposes (CP 411):

Q. *How did you pay Jose?*

A. *Cash.*

Q. *Did you obtain receipts?*

A. *No.*

Q. *Why not?*

A. *You don't usually ask cash laborers for receipts.*

Q. *How would you obtain deduction if you don't obtain receipt from people?*

A. *You don't. It's part of the business.*

Q. *Do you submit all your receipts to your tax preparer or do you only provide them with an estimate and they work out of that?*

A. *I provided receipts.*

Q. *Okay. All of them?*

A. *The ones I have, yes.*

Q. *Did you provide Robert Block all your receipts in 2008 for Newbury Truskin (sic)?*

A. *In 2008, I should have.*

Q. *Please be sure.*

A. *I don't recall. I should have. I said I should have. That's my normal practice.*

Q. *You provided him all of the receipts for 2008 and 2007?*

A. *I should have.*

Q. *Okay. I'm not asking if you should or should not. I'm asking, did you provide all of your receipts to Robert Block, CPA?*

A. *I believe I would have.*

Q. *Again, I'm not asking should or would.*

*MS. PRESSNAL: Asked and answered.*

Q. *It's in the details, would ---*

*MS. PRESSNAL: We've gone through this.*

*Objection, asked and answered.*

The father took chances on making undocumented deductions, gambling that the IRS would not audit him. Unfortunately, during the course of discovery, the mother learned he was indeed being audited and fined for year 2007. (CP 448)

The father and his attorney avoided giving answers of any kind to legitimate questions of his income and expenses by repeating deliberately vague answers throughout the deposition (CP 416-17):

Q. *All right. So I'm going to quickly go down the list of all this stuff, what remaining questions I have. What does the word Active on the left column mean, of the "Vendor List"?*

A. *I don't know.*

Q. *And is Dunn Lumber paid for?*

A. *Yes.*

Q. *And Carlos/Roof?*

A. *Yes.*

Q. *By you?*

A. *No.*

Q. *Who paid Carlos?*

A. *I don't know.*

Q. *Okay. And can you recall how much partial payment you paid to Dunn Lumber?*

A. *No.*

Q. *Can you recall how much you paid partial payment to Seattle Dump?*

A. *No.*

Q. *Seattle City Light?*

A. *No.*

Q. *Puget Sound Energy?*

A. *No.*

Q. *Can you recall what you paid - your part in the laborers, right above it?*

A. *No. Exact amount, no.*

Q. *So all of these, none of the partial payments that you made that you indicated on this page you can recall what you have paid them?*

A. *Not the exact dollar amount.*

Q. *None of them?*

A. *Not the exact dollar amount.*

Q. *Or approximate down to like the second digit, you don't recall that either?*

A. *Not the exact dollar amount.*

Q. *Okay. Like I said, I'm not asking for exact, but I'm asking for approximate.*

A. *That's guessing. I wouldn't want to give you an incorrect answer.*

Q. Okay. Well, because the way it is, I don't have anything. Basically you either want to provide me with –

MS. PRESSNAL: Objection. Is there a question?

MS. LE: Clarifying.

MS. PRESSNAL: Are you asking a question?

MS. LE: No. I'm clarifying what he's able to provide. Basically, you said that you can't recall the exact dollars amount, but can you recall approximate amount? That's my question.

A. No.

The father then asked for two breaks in the span of two hour to go outside for 10-15 minutes each. (CP 403, 415) The mother believed he stepped outside to instruct the other witnesses, his associates who were scheduled right after him that day to dodge their depositions. They never showed up despite confirming attendance the night before. (CP 298)

**Father abused court process, came to court with unclean hands, obstructed discovery by withholding critical documents, provided invalid documents that bore no signature, or his signature alone and no one else can authenticate, to muddle the truth about his income**

In investigating the father's real estate corporation arrangement, the mother encounter numerous obstacles set out by the father. He withheld documents despite her three demand

letters: October 16 (CP 741), October 21 and November 1<sup>st</sup>, (CP 294-96)

In January 2010, just three months before he filed his petition to modify child support claiming severe economic hardship and stopped paying, the father purchased a house called “30<sup>th</sup> Ave. Ballard” in cash for \$308,500. (CP 575-77) He did not disclose this cash purchase at the time of filing of his petition. (CP 28-31) Once it was discovered and he was forced to identify the source of the money, he claimed it was borrowed. (CP 383)

Father claimed \$125,000 was borrowed from one investor (CP 40) and provided two dubious Promissory Notes electronically signed only by him, with the same copy- and-paste signature throughout, identical in all of his other questionable corporate and operating agreements. (CP 640-48) Other funds he claimed were borrowed from another investor, David Hyde, of Hyde Homes LLC. (CP 383-84)

For proof, he supplied the court and the mother an invalid, unsigned Agreement, supposedly between himself and David Hyde, stating that Hyde Homes contributed \$260,000. (CP 650-653). This document stated that the father’s company, Cobalt Builds LLC, would be contributing \$100,000 into the deal. (CP 653) This house was purchased just January 2010, right before the

father filed his modification petition claiming severe economic hardship. (CP 575) Even if everything the father said regarding the two investors is to be believed, his failure to pay child support shortly after the purchase, while pledging \$100,000 total in the footnote of the unsigned Agreement just did not add up to a picture of "severe economic hardship". (CP 653)

**6. The Father Had Three Chances Over The Course Of Six Months To Prove A Change Of Income And Circumstances To Three Different Courts And Failed. He Can't Prove It, Because It Isn't True, Can Never Be Proven, Because His Petition Was Frivolously Brought In Bad Faith, With Unclean Hands.**

The father's lack of forthrightness was established three times by three different courts. In the Temporary Order on Support Modification Motion brought by the father, the court found in May 2010 (CP 202):

Moving party has the burden to demonstrate severe economic hardship and has not met that burden. His income information is not complete."

In November 2010, at the final hearing on Petition for Modification of Child Support, the court ruled:

That the motion for modification is denied because the moving party failed to meet his burden of demonstrating a substantial change of circumstances (CP 125)

He has not met his burden of proof for me to reduce his child support. I have concerns because he is self-employed, because I don't think I have full disclosure,

because it's quite clear that his income is certainly more than \$1,017 a month." (CP 130, RP 1:2)<sup>3</sup>

And finally:

It appears to me he is not being truthful about his income (CP 130, RP 1:2)

In December 2010, at the revision hearing on Petition to modify child support, the court again found (RP 2:18):

...he is running all sorts of expenses through his business account, and a lot of the items --- withdrawals from both his business and his personal account are to cash, so no one knows what they were spent on... it's unclear what exactly is going on with his income. Every single month, however, that we look at, there's at least two, three, four, \$6,000 coming in and going out. To where, unknown.

**C. Proceeding Was Further Complicated By Conflict Of Interest And Breach Of Duties To A Former Client In Violation Of RPC 1.9 By Mother's Former Divorce Attorneys At Anderson Fields, Now Representing The Father In Her Second Family Law Proceeding.**

Wolfgang Anderson and Carena McIlwain were mother's former counsel in her first divorce in 2004/2005 and collected over \$25,000 in legal fees, both undisputed. (CP 66-73) Anderson Fields acknowledged representation after being detected and filed their Notice of Appearance six months after first advising father stealthily under the father's *pro se* guise. (CP 441, 487) The mother sent them a request in March 2010 prior to father's petition for them to update their Conflict of Interest. (CP 74-78) No

response came back from Anderson Fields. In May 2010, the father inadvertently admitted into evidence an exhibit that proved an Attorney-Client relationship indeed existed at least between father and attorney Carena McIlwain. (CP 80)

In August, the mother sent the father, still appearing *pro se*, a Notice of Deposition demanding his appearance to answer questions about his income and the nature of his relationship with Anderson Fields. He did not show. Anderson Fields immediately filed their Notice of Appearance to object to the scheduling of the Deposition and Subpoenas Duces Tecum. (CP 150) A Motion to Compel Discovery, Continue Trial, Disqualify Counsel were filed (CP 38) Commissioner Lori Smith ruled that the mother is authorized to conduct deposition and to issue subpoenas, trial to be continued 34 days out to allow discovery, but that Anderson Fields were allowed to represent the father. (CP 336)

The mother has/had great concerns that private and sensitive information she disclosed to Anderson Fields had been used against her. In fact, it had.<sup>5</sup>

The mother filed a complaint with the Bar, and matter is pending investigation. (CP 324)

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<sup>5</sup> Pursuant to RPC 1.9, discussion of Anderson Fields' violation of the mother confidential information will not be a part of this Appeal. RPC 1.9(a) "actual proof of disclosure of confidential information is not necessary"

## V. ARGUMENT

### A. The Trial Court Erred When It Did Not Indicate On Record Specific Findings In Awarding Fees.

Trial court must indicate on record method it used to calculate attorney's fees award. **Marriage of Knight**, 75 Wash.App. 721, 880 P.2d 71 (1994), *rev. denied*, 126 Wn.2d 1011, 892 P.2d 1089. (1994)

Trial court's failure to explain attorney fees award required remand, in proceeding to recover past due maintenance. **Marriage of Sanborn**, 55 Wn.App. 124, 777 P.2d 4 (1989).

The court did not indicate on record method it used to calculate fees award when it awarded the mother \$1,000 out of \$18,888 actually fees incurred, evidenced by attorneys' declarations and billing statements. (CP 148, 181, 754-75)

### B. The Trial Court Abused Discretion In Refusing To Award Adequate Attorneys' Fees Against The Father Under CR 11 For Making False Claims In His Declarations, Intransigent Conducts, And Frivolous Filing, Are Sufficient Grounds To An Award Of Fees

This court reviews the trial court's refusal to impose sanctions to both the father under CR 11 for abuse of discretion. **Bigg v. Vail**, 124 Wn.2d 193, 197, 876 P.2d 448 (1994)

CR 11 provides that a party or attorney's signature certifies that a pleading is well grounded in fact, warranted by existing law, and not interposed for an improper purpose:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Our Supreme Court has explained the purpose of CR 11:

The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. See ***Business Guides, Inc. v. Chromatic Communications Enters., Inc.***, \_\_\_ U.S. \_\_\_, 112 L. Ed. 2d 1140, 1160, 111 S. Ct. 922 (1991). Both the federal rule and CR 11 were designed to reduce "delaying tactics, procedural harassment, and mounting legal costs." 3A L. Orland, Wash. Prac., Rules Practice 5141 (3d ed. Supp. 1991). CR 11 requires attorneys to "stop, think and investigate more carefully before serving and filing papers." See Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. 165, 192 (1983). "[R]ule 11 has raised the consciousness of lawyers to the need for a careful pre-filing investigation of the facts and inquiry into the law." Commentary, Rule 11 Revisited, 101 Harv. L. Rev. 1013, 1014 (1988).

***Bryant v. Joseph Tree, Inc.***, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992).

This Court has noted that, "[t]he revised rule now imposes an objective, rather than a subjective, standard of reasonableness; an attorney's good faith no longer provides a shield against CR 11 sanctions." ***Miller v. Badgley***, 51 Wn. App. 285, 299-300, 753 P.2d 530 (1988), *rev. denied* 111 Wn.2d 1007 (1988).

This court may look to the trial court's oral findings to determine whether a finding of bad faith or contempt is properly supported. See **Marriage of James**, 79 Wn.App. 436, 441, 903 P.2d 470 (1995) (reversing contempt orders where written orders did not contain specific findings of bad faith or intentional misconduct and there was no oral order from which appellate court could ascertain whether trial court made such a finding, because trial court must make specific finding that parent acted in bad faith or committed intentional misconduct to enter contempt order pursuant to RCW 26.09.160(13))

A trial court's oral decision may be used to interpret and explain its written order when not inconsistent with the written order. **Wallace Real Estate Inv. Inc., v. Groves**, 72 Wn. App. 759, 770, 868 P.2d 149, *aff'd.*, 124 Wn.2d 881, 881 P.2d 1011 (1994).

In this case, the court's oral and written ruling implicitly stated father violated CR 11 by being "untruthful" and failure to provide full disclosure, violated RCW 26.09.260(13) by filing a frivolous lawsuit: (CP 130)

He has not met his burden of proof for me to reduce his child support. I have concerns because he is self-employed, because I don't think I have full disclosure, because it's quite clear that his income is certainly more than \$1,017 a month." (CP 130, RP 1:2)

It appears to me he is not being truthful about his income (CP 130, RP 1:2)

Evidence of father's violations of CR 11, to wit:

(1) perjury made by the father about his criminal past in sworn declarations (CP 491, 653, 29-31, 575-610),

(2) the father lied in his Declaration in September 2009, that he didn't have money to live on (CP 494-47), filed sister's false declaration under oath about loaning him "*\$1,000 in June, \$1,000 in July, \$750 in August, and \$1,700 in September*" (CP 502) while Division of Child Support reported in those months, just from insurance sale alone: "*7/09 \$9,131; 8/09 \$8192; 9/09 \$19,484*" (CP 506) in the Contempt action.

(3) At the Contempt hearing, October 2009, he asked to spread payment of the contempt sanction of \$2,000, and \$455 award to the mother for back childcare over six months (CP 465-70) then flew to Hawaii for a seven-day five-star vacation and spent \$7,000 while there. (CP 167-72)

(4) He later embellished again, under oath at the deposition 10/14/2010, "I paid for my Hawaii trip before the October hearing and I didn't say I could not afford child support at that time" (CP 483) This contradicts vividly his

testimony in October 2009, also under oath, that he has very limited funds, has to borrow money from his sister for living expense. (CP 494-506)

(5) commission of perjury in sworn deposition about no ownership of the furniture business (CP 444) against the weight of 60 pages of up-to-date subpoenaed invoices of ordered furniture, online advertisement and photos of displace showroom. (CP 508-543)

(6) fraudulently conveyance of asset to others to obstruct, delay and hinder child support enforcement in sworn under oath Real Estate Excise Tax Affidavit (CP 578)

(6) omitted business ownership of furniture and real estate businesses in the sworn Petition and Financial Declaration to purport a false picture of severe economic hardship. (CP 28, 545)

On January 8, 2010, the father bought a house in cash (CP 575). He claimed at the deposition that \$100,000 came from investor Khoa Ton, and \$25,000 came from "another investor". (CP 383) Yet, his Promissory Notes filed with the court accompanying the petition showed \$120,000 from Khoa Ton (CP 640), and another \$27,500 also from Khoa Ton (CP 645). The father consistently lied that he can't keep his facts straight. The

Promissory Notes were drafted and signed by him. So were his sworn Financial Declarations.

At deposition, the father claimed the remaining money for the \$308,500 cash came from David Hyde: \$260,000 wire in on Janurary 25, 2010 presented in an unauthenticated email printed out by the father. (CP 696)

The problem with this story, is that the house was already purchased in cash for \$308,500 and registered with the county on January 8, a fact went undisputed by the father, three weeks before David Hyde supposedly wired in \$260,000!

Having noted the father's untruthfulness in his sworn testimonies and declarations, the court abused its discretion in failing to award appropriate sanction to the mother.

These findings and substantial evidence of sworn false statements and exhibits are sufficient to prove a finding of bad faith, unclean hands and intransigence. Requiring the matter be sent back to trial court for the purpose of embodying these findings in a written order, in addition to being unnecessary, would be a waste of time and judicial resources. ***Marriage of Davison***, 131 Wn.App. 220, 223, 225, 126 P.3d 76 (2006).

This court could also remand for an adequate award of fees with appropriate findings of fact should it be unable to make a determination hereby.

This Court reviews the trial court's refusal to award attorney fees for abuse of discretion. **Recall of Pearsall-Stipek**, 136 Wn.2d 255, 265, 961 P.2d 343 (1998)

**C. The Trial Court Abused Its Discretion In Awarding Insufficient Attorney Fees Against The Father Under RCW 26.09.260(13)**

A trial court abuses its discretion if its decision is manifestly unreasonable (i.e. outside the range of acceptable choices, given the facts and applicable legal standard), if it is based on untenable grounds (i.e. factual findings are unsupported by record), or if it is based on untenable reasons (i.e. based on incorrect standard). **Marriage of Littlefield**, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). Question of statutory construction are reviewed *de novo* under the error of law standard. **Brin v. Stutzman**, 89 Wn.App. 809, 831, 951 P.2d 291 (1998)

**1. A Party Is Liable For Attorney Fees Or For Bad Faith For: Pre-litigation Misconduct; Procedural Bad Faith; And Substantive Bad Faith**

To ensure modification petitions are not used as weapons in post dissolution battles, attorney's fees are assessed against any party who files a petition in bad faith:

If the court finds that a motion to modify a prior decree or parenting plan has been brought in bad faith, the court shall assess the attorney's fees and court costs of the nonmoving parent against the moving party." RCW 26.09.260(13)

Commissioner Bianca found that the father "was not being truthful about his income. It appears to me he is continuing to pay expenses through his business, personal expenses, and he's not accounting for that", and that "he has not met his burden of proof" and that he was "being untruthful about his income" (CP 130).

Judge Spearman observed that the father claim of a change in circumstances is untrue. "The Court cannot find a substantial change in circumstance if this circumstance already existed at the time the order was entered." (RP 2:18)

Bad faith is defined as "[d]ishonesty of belief or purpose <the lawyer filed the pleading in bad faith>." *Black's Law Dictionary* 159 (9<sup>th</sup> Ed., Garner Ed., 2009).

Our Court of Appeals has fleshed out three different types of bad faith in a case discussing the inherent power of the court to impose attorney fees as a sanction for bad faith litigation:

In the federal courts, three types of bad faith conduct have warranted attorney's fees: (1) pre-litigation misconduct; (2) procedural bad faith; and (3) substantive bad faith. Jane E Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613, 632-46 (1983); Note, *Attorneys' Fees- Nemeroff v. Albesson and the Bad Faith Exception to the American Rule*, 59 TUL. L. REV. 1519, 1524 (1984).

***Rogerson Hiller Corp. v. Port of Port Angeles***, 96 Wn. App. 918, 927, 982 P.2d 131 (1999), *rev. denied*, 140 Wn.2d 1010 (2000).

The father committed all three types of bad faith conduct in these proceedings.

**2. Father is guilty of pre-litigation bad faith misconduct.**

Father committed pre-litigation bad faith misconduct, which "refers to 'obdurate or obstinate conduct that necessitates legal action' to enforce a clearly valid claim or right." ***Rogerson Hiller Corp.***, 96 Wn. App. at 927 (quoting Mallor, *supra* at 632.) Mallor explains that courts "have a strong interest in promoting the efficient use of their resources by punishing and deterring unwarranted use of the courts." Mallor, *supra* at 637.

Father was guilty of pre-litigation bad faith by refusing to pay child support long before filing, when the evidence clearly showed he had a good income, own multiple businesses. Father had funds to purchase house in cash for \$308,500 with \$125,000 loan from investor on Jan. 8, 2010, three months before filing to reduce child support. He fraudulently conveyed interest in the house to an LLC he set up with his attorneys at Gordon Thomas Honeywell to obscure and obstruct the true identity of title owner: himself. (CP 392) Even after conveyance to "30<sup>th</sup> Ave. Ballard LLC" in Jan. 26,

2010 (CP 578), he inadvertently revealed his true ownership of this property on March 2010 on application with City of Seattle Department of Planning & Development. (CP 579-80) This was one month before he filed for modification of support.

**3. Father committed procedural bad faith.**

Father also committed procedural bad faith, which refers to “vexatious conduct during the course of litigation.” *Rogerson Hiller Corp.*, 96 Wn. App. at 928 (quoting Mallor, *supra* at 644.) The *Rogerson Hiller* court listed the following types of procedural bad faith conduct: “dilatory tactics during discovery, failure to meet filing deadlines, misuse of the discovery process, and misquoting or omitting material portions of documentary evidence.” 96 Wn. App. at 928.

Father failed to show up at the first deposition. He also instructed his business associates to dodge depositions and withhold documents requested. It wasn’t until a Motion to Compel was filed and granted that he would attend deposition. (CP38, 336) Once there, he continued his charade of memory failure (CP 388), “not the best at recordkeeping” (CP 447), dilatory tactics, misquoting and omitting material information.

Another example of a different procedural bad faith using dilatory tactics during discovery, is his involvement in another

property 5619 S. Avon St., Seattle, whose ownership title changed five times in the course of six months in 2009 and 2010, also right before his modification petition. (CP 605) In deposition, at first he said that he only visited this house one time (CP 419, In 21), then changed the story to 2 times (CP 420, In 6-7), then he said he had done some minimal work without pay there (CP 420, In 16). When confronted about his hand-writing on the application for Construction, Electrical and Plumbing permits (CP 607-10), he then acknowledged filling out these applications but said "I don't know why they asked me to help them apply" (CP 430, In 7) That still did not explain why he put down his address of four years which he and the mother used to share on the application "300 Queen Anne Ave. N. #408 Seattle" for the City of Seattle to mail those permits to. (CP 607-610) This is the same address he also listed with this Court at the beginning of this Appeal.

The father procedural bad faith continued when he petitioned for modification, "misquoting or omitting material portions of documentary evidence." ***Rogerson Hiller Corp.***, 96 Wn. App. at 928. Judge Spearman found that in father's Petition filed in April 2010, he had acknowledged that the circumstances of real estate market changing climate already existed at the time the parties finalized their divorce. (RP 2:18-19) Not much had changed over

the course of ten months preceeding his Petition. Yet, he insisted on litigating the matter through the months and cost the mother time, money, and stress.

**4. Father committed substantive bad faith.**

The Court of Appeals has described the third form of bad faith misconduct: "Substantive bad faith ... occurs when a party intentionally brings a frivolous claim, counterclaim, or defense with improper motive." *Rogerson Hiller Corp.*, 96 Wn. App. at 929.

The court found that father had acted in bad faith in filing this petition when he deliberately lied to hide his income. (CP 130, RP 1:2):

*It appears to me he is not being truthful about his income*

The father had funds to hire three high-priced firms to represent him in non-criminal litigation in 2010, at the time of petition to modify support's filing: *Lasher, Holzapfel, Sperry & Ebberson, PLLC* in March 2010 (CP 472), *Anderson Fields* in March 2010 (CP 487) and *Gordon Thomas Honeywell* from 2006-2010, time of the Deposition (CP 392, 476)

**5. Father's Intransigence Is An Independent Ground For Attorney's Fees Pursuant To CR 11.**

Independent of his bad faith in filing a petition for modification, father's behavior during this litigation demonstrates

intransigence and thus independently supports an award of fees. Where an independent grounds for upholding a trial court's decision is apparent from the evidence, this court may utilize it, even if not pleaded to the trial court below. RAP 2.5.

Intransigence is a basis for an award of attorney's fees apart from either RCW 26.09.260(13) or the question of financial need.

***Mattson v. Mattson*** (1999) 95 Wn. App. 592, 976 P.2d 157

Evidence supported finding of husband's intransigence in post-dissolution child support modification proceeding, as basis for attorney fee award to wife; husband produced conflicting information about his income, thus forcing wife to conduct intense discovery, and husband's reported income increased with each round of investigation by wife's counsel.

Intransigence is the quality or state of being uncompromising. ***Marriage of Schumacher***, 100 Wn. App. 208, 216, 997 P.2d 399 (2000).

***Eide v. Eide***, 1 Wn. App. 440.

Even though a wife has sufficient assets to pay her own attorney, the court may award her attorneys' fees for the additional legal services required because of the husband's intransigence and obstructionist tactics.

The father dodged the first deposition, led to a Motion to Compel being filed and incurred attorney fees to the mother. (CP 81-90, 336-38)

At the re-noted deposition, father did not bring the requested documents (CP 384, 294-96, 741), yet when asked about his business arrangement with the Hydes and Nguyen, his business partners, he stated he is “not the best at recordkeeping” and continue to state “I don’t recalls” throughout deposition (CP 447). He also stated that his “memory is very bad” (CP 388).

See ***Marriage of Morrow***, 53 Wn. App. 579, 770 P.2d 197

In determining under RCW 26.09.14, whether to award attorney fees to a divorcing spouse and the amount of an award, a court should consider the relative abilities of the two spouses to pay and whether one of the spouse's fees and expenses were necessitated by the other spouse's intransigence.

A factor to be considered is the father's dispersion and conveyance of asset before and during proceeding. Prior to filing the modification, statements showed he had \$84,000 in one account early 2008 (CP 693), \$2,389,300 in revenue in condo sale early 2009 (CP 702-10) and a house in Seattle for \$648,500 in 2008 (CP 712-13), a cash purchase of a house in Jan. 2010 three months before the herein action (CP 575), \$50,000 down payment to set up Allstate insurance office June 2009 (CP 619), \$75,000 he allegedly loaned a friend in his own Declaration in March 2010 (CP 472).

Then there is the matter of the conveyance of title within weeks of purchase from the father into “30<sup>th</sup> Ave. Ballard LLC” (CP 578), with David Hyde’s signed as the grantee. By the time that same house was sold in July 2010, Tony Mai’s signature is no longer on record. Father had successfully avoided a child support lien against this property by withdrawing his name from under “30<sup>th</sup> Ave. Ballard LLC” by the time of sale.

A court does not need to use the term “intransigence” if it is clear a fees award is based on a party’s unjustified actions in litigation. ***Matter of Greenlee***, 65 Wn. App. 703, 829 P.2d 1120 (1992) (court noted that though trial court did not use the term “intransigence” in its findings, it did state basis for attorney’s fees to be the husband’s unjustified actions in refusing to sign certain financial documents, requiring the wife to resort to court).

**6. The Court erred in awarding *inadequate* fees of \$1,000 for prevailing party.**

Considering the substance of this case, with the number of businesses the father operated, the deceptive and intransigent conducts, \$18,888, not counting over 80 hours of the mother’s personal time, is more than *reasonable*, in light of the mother’s attorney’s early estimate of \$30,000 to pursue the father deceptive income reports. Her decision to use limited attorney time has been prudent. She is not asking for compensation of her time. She

asked for reasonable reimbursement of fees and costs she actually incurred in defending her legal position from an abusive and frivolous motion.

In ***Marriage of Nelson***, 62 Wn.App. 515, 520, 814 P.2d 1208 (1991) Accordingly, an award of attorney fees under RCW 26.18.160 (the prevailing party is entitled to a recovery) was “required”, and not discretionary. The appellate court reversed, holding that the mother, the obligee parent, was the prevailing party because she sought enforcement of the child support and obtained a money judgment. See also ***Marriage of Hunter***, 52 Wn. App., 274, 758 P.2d 1019 (1988) Courts find that [appellant] is entitled to an award of attorney fees, *rev. denied*, 112 Wn.2d 1006 (1989)

**7. Conflict Of Interests And Breach Of Duties To A Former Client By Mother’s Former Divorce Attorneys Anderson Fields, Now Representing The Father In Her Second Divorce Should Be Reviewed De Novo For Error Of Law By This Court And Sanctioned Appropriately.**

“Attorney-client privilege is protected by statute in the State of WA. See RCW 5.6.060(2). The purpose of the privilege “is to encourage clients to make full disclosure so the attorney is able to render effective legal assistance.” ***R.A. Hanson Company v. Magnuson***, 79 Wn. App. 497, 499, 903 P.2d 496 (1995) Per the provisions of RAP 2.4(b), this issue is include in the scope of this

review.

Wolfgang Anderson and Carena McIlwain, two out of four attorneys at Anderson Fields represented the mother in her first divorce. They encouraged full disclosure from the mother, as they should. The mother disclosed personal, material, protected, confidential information in her case to them, as she should.

The mother terminated Anderson Fields for breach of duties, failure to provide zealous representation, and other misconducts in May 2005, three weeks before trial.

In representing the father against their former client, Anderson Fields had committed legal malpractice, breach of fiduciary duty, negligent misrepresentation, and violations of the Consumer Protection Act. They have also violated RPC 1.9. They have duties to protect the mother's right to confidentiality. Attorney-Client Privilege and Confidentiality are the cornerstones in the practice of law. That privilege belongs to the client.

***Burns v. Norwesco Marine, Inc.***, 13 Wn. App. 535 P.2d 860. (1975) An attorney who represented a party in a former matter should be disqualified from representing opposing party when the present suit is substantially related to former matter, or attorney had access to confidential information material to the present suit.

In ***Teja v. Saran***, 68 Wn. App. 793, 801, 846 P.2d 1375 (1993), Teja consulted with and retained attorney Satwant S. P Pandher on a domestic violence action unrelated to Saran. Attorney Pandher later represented Saran in an action on a debt against Teja. Similar to the instant case, Teja's motion to disqualify Pandher in Superior Court was denied, but Court of Appeals held that an attorney-client relationship had been established, and the attorney had a conflict of interest, even if no prejudice had resulted.

"[3] The plain language of RPC 1.9 indicates actual proof of disclosure of confidential information is not necessary if the matters are substantially related. The weight of authority from other jurisdictions similarly interprets the rule as not requiring proof of disclosure of confidential information."

We agree and hold that under RPC 1.9(a), former clients need not prove that actual confidences were divulged. Because Teja consulted Pandher about the underlying circumstances of the current suit between Teja and Saran and the matter is substantially related, Pandher was precluded from continuing his representation of Saran absent consent from Teja. At that point, Pandher should have withdrawn.<sup>[8]</sup>

The trial court erred by not granting the motion to disqualify."

-***Teja v. Saran***, 1993, emphasis added -

Each partner at Anderson Fields had their own paralegal. (CP 64) Anthony Miliken, Mr. Anderson's paralegal worked with the mother in the first divorce. Mr. Anderson instructed all emails from clients to be sent to Anthony because he did not use email. (CP

75) In September 2010, Anthony Milikan's name appeared on King County e-filing for Jillian Pressnal, the father's counsel of record for this proceeding. (CP 88) That was an indication that Mr. Anderson, the mother's former counsel may be directing behind the scene his young associate, Ms. Pressnal, age 30, admitted to the WSBA in Nov. 2008. The other former counsel for the mother, Ms. McIlwain's relationship with the father was well-established. (CP 80)

The father contacted Anderson Fields in March 2010, according to his deposition. (CP 487) They advised him underneath his *pro se* guise without obtaining informed consent from the mother pursuant to RPC 1.9(a). Also in March 2010, the mother sent them a notice to update their Conflict of Interests data base. (CP 75) No word came back from Anderson Fields.

Commissioner Lori Smith erred in granting Anderson Fields' representation against their former client. (CP 336) LFLR 6 required the father (or his counsel) to respond "not later than noon (4) court days prior to the hearing time" to allow for a strict reply to be filed. The father filed and served his response on September 22, 2010, two court days before the hearing at noon barring the mother's Strict Reply from consideration and prejudiced her. (CP 81-5) The mother believed Anderson Fields used their

knowledge of Family Court calendaring system to unfairly and dishonestly advance their cause.

This dishonest tactic is a violation of CR 11.

The mother's reply was filed the same day 9/22/2010 but the commissioner had already picked up all of her pleadings to read for the next two days by noon that day. The mother's motion to remove Anderson Fields was unjustly ruled. At the end of the support modification trial, 11/22/2010, Commissioner Bianca returned her pleadings back to the mother. Affixed to the mother's Strict Reply was a "Post-It" note with the following words: "Comm did not have this when she made her ruling w/o oral on 9/24/10." (CP 141)

The mother's revision motion to remove Anderson Fields was stricken by Judge Mariane Spearman on 10/15/2010 because it was served opposing counsel one day late. (CP 151 – Docket No. 110B) While Judge Spearman's ruling may be technically correct, it was unjust. A fair minded person would view the mother's subsequent Disqualification Motion on merit, filed 10/20/2010, as a reasonable recourse. Judge Spearman, once again, struck the motion on ground that it had been decided previously on 10/15/2010, also by her.

After Commissioner Bianca denied the father's petition and award \$1,000 to the mother for attorneys' fees, that Revision Motion was reviewed by Judge Spearman.

Judge Spearman denied additional attorneys' fees award, faulting the mother for filing motions to remove her former counsels from harming her, that this "increased the husband's attorney's fees". This is the crux of this appeal and is an abuse of discretion.

Anderson Fields and its attorneys should have been sanctioned under CR 11 and prohibited from representing against their former client, pursuant to RPC 1.9.

Even if there were no statute or court rule that would authorize this Court to sanction father and his attorneys for their falsehoods, the Court has "inherent equitable powers authorize the award of attorney fees in cases of bad faith." ***Pearsall-Stipek***, *supra*, 136 Wn.2d at 266-67; ***State v. S.H.***, 102 Wn. App. 468, 473, 8 P.3d 1058 (2000). The Court should award attorney fees for this reason alone.

Aside the violation of RPC 1.9, even a cursory review of the evidence would have revealed that the father's testimonies were false. Anderson Fields pressed on with evidence of bad faith and misconducts.

If this Court finds that the mother was entitled to attorney fees in the trial court, the Court should also award attorney fees on appeal. Cf. ***Mahler v. Szucs***, 135 Wn.2d 398, 432, 957 P.2d 632 (1998). If the Court remands to Judge Spearman to determine reasonable attorney fees, the Court should similarly award fees to the mother, or else provide guidelines for a determination of fees.

Per RAP 18.1, a party may be awarded fees and expenses on appeal, if applicable law allows. Per RCW 26.09.260(13) and equity, Respondent Tony Mai owes fees if his underlying petition was filed in bad faith and constitutes intransigence. In preparing this Appellate Brief, the mother had limited assistance from counsel. Fees Declaration shall be submitted pursuant to RAP 1.8.

## **VI. CONCLUSION**

Reasonable attorney's fees and costs should be ordered because this proceeding was brought in bad faith, Mr. Mai's "unclean hands." The original Child Support order contemplated Mr. Mai's change in circumstances and Mr. Mai's did not suffer severe economic hardship. This was a frivolous lawsuit. The last support order was entered only ten months prior to his filing. Mr. Mai's conduct constituted bad faith, "unclean hands", intransigent conduct and are basis for attorney's fees. Unclean hands included

Mr. Mai's fraudulently conveyed asset, his dispersion of assets to hinder and delay child support enforcement, his failure to pay his support obligation, underhandedly hired the mother's former divorce attorneys to jointly abuse her, are among the factors that Mr. Mai should be held accountable for. Bad faith is supported by substantial evidence. This court should sanction Mr. Mai and his attorneys.

Dated this 15<sup>th</sup> day of August, 2011.

By: \_\_\_\_\_  
Monique U. Le  
Appellant



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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

UYEN/MONIQUE LE

Plaintiff/Petitioner,

vs.,

TONY MAI

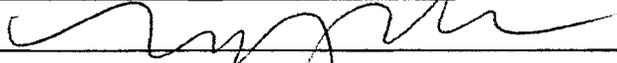
Defendant/Respondent.

KING COUNTY NO.: 08-306004-1SEA  
COURT OF APPEALS NO.: 66573-1-I  
SUPREME COURT NO.: X  
THIS IS SUPPLEMENTAL  YES  NO

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