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NO. 64114-0-I

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

In Re Marriage of
KENNETH B. KAPLAN,
Appellant/Cross Respondent,

and

SHEILA D. KOHLS,
Respondent/Cross Appellant.

**REPLY BRIEF ON APPEAL AND RESPONSE ON CROSS-
APPEAL**

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INTRODUCTION

Respondent Sheila Kohls' entire defense to Ken Kaplan's appeal from the denial of bad faith attorney fees hinges on her argument that Judge Doerty's findings of fact are erroneous. Sheila serves up a tedious helping of inconsequential challenges to the findings of fact. Every finding is supported by the evidence.

But even if Judge Doerty had omitted the findings challenged by Sheila, the undisputed facts of the case still call out for an award of attorney fees against Sheila. Sheila's accusations were a "fabrication," she mis-characterized documents, and she unreasonably excluded Ken from the joint decision making required under the parenting plan and then blamed Ken, claiming that the court should modify the plan.

This Court should affirm Judge Doerty's refusal to deprive Ken of joint decision making as to medical issues, reverse Judge Doerty's refusal to award fees to Ken at the trial court level, order Sheila to disgorge the attorney fees she obtained in the prior appeal through mis-representations in her pleadings, and award attorney fees to Ken for both appeals.

**RESPONDENT ATTORNEY JAN DYER HAS NOT RESPONDED
TO KEN'S APPEAL.**

Ken Kaplan asked in his Brief of Appellant for attorney fees against respondent Sheila Kohls' trial attorney Jan Dyer. The brief was served on attorney Dyer. Dyer has not filed a brief of respondent. Accordingly, Ms. Dyer may not present oral argument. RAP 11.2(a).

REPLY TO RESPONDENT'S ARGUMENTS ON APPEAL

A. The trial court abused its discretion in refusing to award attorney fees against Sheila under RCW 26.09.260(11) for bringing a modification petition in bad faith.

1. Respondent Sheila Kohls does not dispute many facts that call for an award of attorney fees.

Respondent Sheila Kohls cross-appeals from some, but not all, of the findings of fact and evidence that justify an award of attorney fees. We show later in this brief that all of Judge Doerty's findings are supported by substantial evidence. But even without any of the challenged findings, this Court should order an award of attorney fees based on the uncontested facts.

Sheila does not deny claiming in her declaration that Ken only wants to harass her and cause her unnecessary expense in order to get what he wants, CP 104, quoted at BA 11, but that

Judge Doerty found this accusation “not believable,” CP 877, and a “fabrication.” CP 879, quoted at BA 24.

Sheila does not dispute alleging that she demanded and set a “mediation/arbitration” that Ken cancelled, CP 108-09, quoted at BA 12, contrary to the undisputed fact that Ken first requested arbitration of the Engelberg issue, Ex. 69, Sheila would not agree to arbitration, Ex. 70, 72, 73, and the mediator confirmed mediation and enclosed a mediation agreement for the parties to sign, not an arbitration agreement. Ex. 75. Nor does Sheila dispute Judge Doerty’s finding that, “[b]oth Ken and Sheila have invoked the ADR process,” CP 880, and that a great deal of the delay in proceeding to ADR “was because of the lawyers, not the parties.” CP 881.

Sheila does not deny claiming that Ken withdrew his objection to Dr. Engelberg, CP 610, quoted at BA 12, contrary to the fact that Ken’s letter simply stated that, “Mr. Kaplan will not present for arbitration or discuss in mediation his objections to Dr. Engelberg at this time and he will pay her past fees” CP 633. This Court relied on Sheila’s account in holding that Ken “withdrew his objection to I.K.’s counselor and agreed to pay his portion of treatment costs.” CP 723.

Sheila does not deny claiming that when she scheduled the first appointment with Dr. Engelberg, “Ken knew the situation was urgent, but he did nothing, “ CP 108, quoted at BA 12, despite the undisputed fact that Ken immediately tried to reach Dr. Engelberg, asked for references when he reached her, was unable to reach the references immediately, and asked Sheila to delay the Engelberg appointment until he could evaluate Engelberg. 6 RP 71-72, 76, discussed at BA 4-5. Judge Doerty found that Sheila acted unreasonably when she insisted on proceeding with counseling because Ken did not respond to her in writing as she demanded. CP 884.

These undisputed facts in themselves justify an award of bad faith attorney fees against Sheila. Sheila’s false claims not only caused this Court to award attorney fees against Ken, they also led this Court to reverse and remand for a trial of Sheila’s modification petition.

3. Sheila does not dispute Ken’s discussion of the legal principles governing an award of attorney fees for bad faith in litigating a parenting plan modification.

Ken’s opening brief discussed the case law describing bad faith misconduct that can justify an award of attorney fees. With one exception, Sheila does not dispute any of these principles.

Sheila argues that Judge Doerty's "adverse credibility findings" cannot support a finding of bad faith because in one of the leading cases cited in Ken's brief the Court reversed an award of attorney fees for bad faith, stating, "many if not most trials turn upon which party is the most credible." BR 14, quoting *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 930, 982 P.2d 131 (1999), *rev. denied*, 140 Wn.2d 1010 (2000). Sheila omits that the only ground for bad faith in *Rogerson* was an alleged inconsistency between a corporation's litigation position and a convoluted and lengthy corporate income tax return. 96 Wn. App. at 930. This one inconsistency was insufficient to justify an award of attorney fees.

Here, by contrast, Sheila misquoted an entire series of letters and communications, as well as including in her petition and subsequent pleadings a central allegation found by the trial court to be a "fabrication," CP 879, a much more forceful characterization than a mere credibility determination.

The undisputed evidence as a whole cries out for an award of attorney fees for Sheila's bad faith.

4. Sheila's arguments fall far short of defending Sheila's bad faith misconduct.

Sheila offers three pale arguments against a finding of bad faith. BR 11-15. All of her arguments ignore the undisputed facts discussed above, any one of which justifies an award of attorney fees. In any event, her arguments are all misdirected.

Sheila challenges several of Judge Doerty's findings of fact. BR 12-15. Ken responds to these arguments *infra* as part of his answer to Sheila's cross-appeal, showing that substantial evidence supports Judge Doerty's findings.

Sheila denies violating the joint decision-making in the parenting plan because after the fact Ken agreed reluctantly to allow IK to continue counseling with Dr. Engelberg for a period of four weeks. BR 12-13. Sheila has not assigned error to Judge Doerty's characterization of Sheila's conduct as "Sheila's *intentional violation* of the joint decision making requirement" CP 884 (emphasis supplied). This finding is a verity on appeal. Of course Sheila violated the joint decision making; Ken's decision not to move for contempt does not excuse her violation.

Sheila argues that she did not commit procedural bad faith by demanding mediation/arbitration, arguing that the mediator held that the parenting plan contemplated that arbitration would

immediately follow a failed mediation. BR 13. Sheila is asking the Court to ignore the forest, to ignore the trees, and to focus on the bark instead of the trees. When Ken suggested arbitration, Sheila's attorney responded, "Sheila . . . is willing to go to mediation." Her letter continued, "Larry Besk is available to mediate the issue," listing available dates. Ex. 70. Three subsequent letters between counsel refer to mediation. Ex. 72, 73, 74. On August 15, the mediator's office confirmed "a four hour **mediation** with Lawrence Besk" on August 30, enclosing an agreement for mediation.¹ Ex. 75 (emphasis supplied).

Having insisted on mediation instead of arbitration, Sheila then unexpectedly shifted gears, designated witnesses for an arbitration, and refused to continue the arbitration when Ken was unable to prepare for the arbitration. BA 7-8. The bad faith consists, not in insisting on following the parenting plan, but on erratically responding and then misrepresenting this sequence of events to the trial court and to this Court.

¹ In a previous arbitration, Besk had sent the parties a different agreement specifically for arbitration. 6 RP 256.

B. The Rules of Appellate Procedure are interpreted to promote justice and facilitate decisions on the merits, not to erect hypertechnical hurdles to accomplishing the legislative intent.

Sheila argues that the Rules of Appellate Procedure insulate her from an award of attorney fees for bad faith litigation because RAP 12.2 required the trial court to adhere to this court's prior decision that Sheila was entitled to a hearing on her petition for modification. BR 9-11. This is a singularly ill-conceived and cynical distortion of the appellate rules. Under Sheila's argument, any time a party can fool this Court through lies and fabrication, the offending party is insulated for liability for bad faith attorney fees. Such a rule would be an absurd injustice.

Neither the trial court nor this Court could have known that Sheila's petition was in bad faith, or the extent of Sheila's bad faith, until after the trial. In the prior appeal, this Court accepted Sheila's declarations and arguments at face value. Sheila's argument ultimately undermines the legislative intent to award attorney fees to bringing a bad faith petition for modification of a parenting plan.

Sheila's argument would also lead to the conclusion that a party who filed a false declaration in order to avoid summary judgment and proceed to trial could not be held liable for bad faith

litigation for the false affidavit because the false affidavit resulted in requiring a trial. Sheila's argument would drastically narrow, if not entirely eliminate, liability for bad faith attorney fees.

Title I of the Rules of Appellate Procedure clearly states that the rules "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). Sheila's interpretation of RAP 12.2 would result in exactly the opposite, promotion of injustice and evading a decision on the merits. It would also result in undermining the legislative direction that if a party brings motion to modify in bad faith, "the court shall assess attorney's fees and court costs of the non-moving parent against the moving party." RCW 26.09.260(11) (now subsection (13)). The rules should not be interpreted to undermine or render meaningless a clear legislative command.

Sheila offers another distorted argument when she claims that there is no basis for Ken's request that this Court require Sheila to disgorge the attorney fees previously ordered by this Court in the first appeal. BR 15-17. Sheila relies on the following case quotation:

[Q]uestions determined on appeal, or *which might have been determined had they been presented*, will not again be considered on a subsequent appeal if there is no substantial

change in the evidence at a second determination of the cause.

Adamson v. Traylor, 66 Wn.2d 338, 339, 402 P.2d 499 (1965)

(emphasis supplied by respondent at BR 16).

This case falls squarely within the exception described in the ***Adamson*** quotation because there was a “substantial change in the evidence at [the] second determination of the cause.” *Id.* Having heard testimony, Judge Doerty rejected Sheila’s account and her declaration and entered new findings based upon the evidence presented at the hearing. Sheila’s argument that there was no substantial change in the evidence, BR 16, flies in the face of the procedural history of this case.

C. This Court should award to Ken fees on appeal as well as a refund of the fees he paid to Sheila for the prior appeal.

Ken requested attorney fees on appeal under the legislative direction that a court may award attorney fees against a party who pursues a modification action in bad faith. BA 43-44. Sheila argues that fees should not be awarded against her because she brought this action in good faith. BR 17. That is the issue on appeal. Sheila never argues that fees should not be awarded if she was in fact acting in bad faith.

Sheila argues that the Court should not require her to disgorge the fees paid by Ken because she advocated for “what she believed was in the children’s best interests” BR 16. Sheila did not simply advocate for what she believed to be in her children’s best interests; she fabricated evidence, mischaracterized documents and tried to remove Ken from any meaningful role in decision-making as a parent.

Sheila offers the argument that she should be awarded fees under RAP 18.1 “on the basis of the father’s continued intransigence.” BR 18. Sheila’s argument is frivolous because she has not assigned error to Judge Doerty’s ruling on Ken’s motion for reconsideration, in which Judge Doerty withdrew the previous finding of Ken’s intransigence, holding instead that, “[i]n proceedings before this Court Mr. Kaplan has not been intransigent.” CP 967. There is no finding of intransigence.

Alternatively, Sheila asks for attorney fees under RCW 26.09.140 on the basis of need and ability to pay. BR 18. No one has a “need” to pursue litigation in bad faith, or to premise an action on lies, fabrications or misquotations from documents. The Court should deny attorney fees for this reason alone.

Judge Doerty not only refused to award attorney fees to Sheila, he ruled that he would have awarded attorney fees to Ken but for this Court's opinion requiring a hearing on Sheila's modification petition. CP 882.

The Court should award fees on appeal to Ken and deny fees to Sheila.

RESPONSE TO SHEILA'S CROSS-APPEAL ARGUMENT

A. The trial court's findings against Sheila are amply supported by the evidence.

The trial court's findings of fact are amply supported by the evidence and this Court should reject Sheila's factual challenges to the trial court's factual findings. But as shown *infra*, the Court should affirm the dismissal of modification whether or not each and every finding challenged by Sheila is supported by the evidence. The unchallenged findings amply support dismissal of Sheila's petition.

We now show, assignment by assignment, that each finding is supported by the evidence.

A. E. 1

"Sheila testified that her twelve years of marriage to Ken justifies her anticipating that Ken would refuse to adhere to a court ordered parenting plan. This is bad faith. It also means that one of the parties, did not expect the other to

cooperate. As noted above this has proven self-fulfilling.” (CP 885).

A. E. 15

“Sheila’s testimony did not always address facts; she testified about her feelings of Ken being consistent in co-parenting with the way he was during 12 years of marriage (EX 260) and the stress and frustration of co-parenting.” (CP 876)

As Sheila points out, Ex. 260 is a mediation letter from Ken’s counsel, not Sheila’s testimony. BR 31. Judge Doerty cited Ex. 260 for a very good reason. Sheila testified at trial that although Ex. 260 appeared to have been written by Ken’s lawyer, she believed it was written by Ken. 5 RP 74-75. When asked how she knew that, Sheila replied, “I was married to him for close to 12 years and I know his style. I know his language and it’s been consistent throughout all his attorneys.” 5 RP 75.

Sheila testified at trial that she was emotionally abused during the marriage and that abuse has continued since the dissolution (12 RP 230):

Dyer: You were emotionally abused in this marriage; do you feel like that has continued?

Kohls: It is, that is one of the definitions used by, it’s by no means and I wouldn’t want you to think that this is a legal definition of domestic abuse but what is happening to me is defined as behavioral domestic abuse and because it’s just not physical force, there was never physical or sexual abuse but they do define it as emotional and verbal abuse and

using the legal system on it's (sic) victim, that's how it is defined along with using the children in getting the children in the middle of the conflict. So in that sense it is a continuation. I thought once the marriage would end that that would end, but it hasn't yet, he just found another avenue, another venue to continue the harassment and emotional and now economic coercion. Economic coercion is also another definition of behavioral domestic abuse.

Before the prior appeal, Judge Doerty initially denied Sheila's petition for modification because the parties had engaged in conflict before their dissolution, and the presence of conflict after the dissolution could not be a change of circumstances. CP 580. Accordingly, Sheila argued in the prior appeal that the parenting plan was based on the assumption that Sheila and Ken would be able to cooperate after divorce, and the failure of that presumption was the basis for her petition for modification (Ex 213 at 23-24):

If, as in this case, conflict does not subside after the divorce, and in fact increases, a parent should not have the gate to the courts closed on the family merely because the cooperation that was anticipated after divorce does not come to fruition.

This Court acknowledged in its prior decision that Ken and Sheila had a history of conflict (CP 728):

We agree that the record shows that the parties had a history of conflict. Presumably, that is one of the reasons why the parenting plan includes a provision for ADR with a specific person in the event of post-dissolution disputes.

Sheila's very conduct in proceeding with the Engelberg appointment without Ken's approval demonstrates Sheila's bad faith expectation that Ken would refuse to cooperate. Sheila made the appointment with Dr. Engelberg before consulting with Ken, and only told Ken a week in advance. When Ken was unable to contact Engelberg's references, Sheila refused to postpone the appointment to give Ken a chance to evaluate Engelberg.

Sheila argues that she testified that the parties had "full cooperation" in raising the children prior to the dissolution. BR 20. But the issue is not whether some evidence might support Sheila's version of events but whether some evidence supports Judge Doerty's finding. The evidence clearly supports Judge Doerty.

A. E. 2 & 3.

"In testimony [on] May 4th and earlier declarations in the record Sheila mischaracterizes [Ken's] issue as demanding that the summer Wednesday mid-week visits all be overnights. The issue Ken raised (ECR doc. No. 81) was that the parenting plan reduced Wednesdays to alternate weeks contrary to what the parties' settlement letters had proposed (ECR doc. No. 90), contrary to what Judge Pekelis wrote would be included (Wednesday evenings, EX 1) and contrary to what the children were used to (ECR doc. No. 22)." (CP 877-78)

Judge Doerty correctly noted that the issue about which Ken complained was elimination of weekly Wednesday visits, which created ten day gaps between the times in which he would see his

children: “Ken complained that the parenting plan as drafted injected regular ten day intervals when he would not see his children.” CP 878. This was a change from the temporary parenting plan, which provided for Wednesday overnights every week during the summer, and weekly Wednesday evening visits during the school year. Ex 4 at 1-2. But the parenting plan as approved by the court provided for alternate week Wednesday night visits, eliminating the weekly Wednesday evening visits. *Id.* This resulted in Ken’s loss of continuity and a loss of several of his Wednesday night visits. *Id.* The parenting evaluator, Dr. Wieder, agreed with Ken that during the summer the weekly Wednesday visits should become overnight visits. CP 121.

Ken’s position was clearly stated by his attorney in opposing Sheila’s petition for modification: “There was no intention by either party to eliminate the father’s Wednesday evening (3:00 p.m. – 8:00 p.m.) balance on the Wednesdays during the summer that were not overnights.” CP 122.²

A. E. 3, A. E. 4

“In view of the substantial reduction in Ken’s residential time between Ken’s proposed parenting plan

² Ken follows Sheila’s example in citing to declarations and documents in the clerk’s papers, e.g., BR 24, 25, 27, 29, 33.

(ECR doc. No. 5) and the final parenting plan, a reasonable understanding from Judge Pekelis that Wednesdays were included, Dr. Wieder's recommendations, RCW 26.09.070(3) and that ultimately this issue was settled in negotiation in Ken's favor (EX 56) Ken's pursuit of this relief was not abuse of the court process. It does not support Sheila's case to modify. It does not show he was out to ruin her financially. It does not support Sheila's contention that he frustrates the ADR provisions." (CP 878)

Exhibit 1 calls for a continuation of Ken's weekly Wednesday evening visits with the children. It is one page of a 40 page document labeled "Pekelis, 1/5/05." Ex. 1. Judge Doerty misunderstood the document to be a recommendation by Judge Pekelis, not Sheila's proposed parenting plan. Judge Doerty's attribution of this document to Judge Pekelis is harmless and quite trivial.

Ultimately, both parties compromised. Ken gave up the overnights in return for weekly visitation until 9 p.m. and payment of less than half of Sheila's attorney fees. Ex 51, 56. This was longer than visitation previously offered by Sheila, and half the fees incurred by Sheila. Ex 51.

Sheila quibbles that, "the appeal was not settled in the father's favor." BR 23. This is simply a matter of argument that does not affect any of Judge Doerty's findings or his dismissal of Sheila's action. More to the point, nothing about this initial dispute

bears on whether Sheila's petition for modification was brought in bad faith and whether the petition should have been denied.

A. E. 5:

"There was no emergency justifying Sheila violating the joint decision requirement for health care in unilaterally selecting Engelberg." CP 883.

Sheila argues that there was no emergency because the head of IK's school encouraged Ken and Sheila to arrange for tutoring, an assessment for ADHD, and regular sessions with a therapist, as soon as possible so that [I] will have the greatest opportunity for success as she begins 2nd grade." CP 75. This recommendation does not constitute an opinion that an emergency existed. Moreover, Ken presented the testimony Dr. Nells Muggelson, a practicing psychologist who testified: a psychologist should not move ahead with treatment until both parents are ready for the child's treatment, and the failure to obtain the cooperation of both parents can make it more difficult to work with the child. 6 RP 183-84. Dr. Muggelson also testified that there was no emergency (6 RP 185).

Johnston: And in reviewing the records for [IK] did you see anything that suggested that there was an emergency situation that required Dr. Engelberg to start treatment prior or without giving Mr. Kaplan an extra week to investigate?

Muggelson: No.

Dr. Muggelson's testimony amply supports Judge Doerty's finding that there was no emergency.

A. E. 6

"Sheila testified on cross examination that both she and Ken knew about the school conference about Idalia's behavior three weeks before but that *neither* of them came with counselor names. This is inconsistent with her assertion that there was an 'emergency'". CP 883.

Sheila argues that she acted quickly because there had been a delay in having the meeting – which she blames on Ken – and the school recommended acting "as soon as possible." BR 25. Sheila's argument totally ignores Ken's testimony on this and many other points. Ken testified that he was notified of the prior scheduled meeting one day in advance, at a time when he happened to have a conflicting hearing in superior court. 6 RP 59-60. Ken immediately told the school administrator, "I can do it in the other half of the day I said I will cancel everything on my calendar to meet." 6 RP 60. When Ken and Sheila arrived at the rescheduled meeting, they were advised that IK had trouble and needed a psychologist, which Ken fully supported. *Id.* The very next day Ken went to the school to ask for recommendations for counselors. *Id.* at 65-66. Ken relayed the referrals to Sheila, but

was soon advised by Sheila that she had already scheduled a meeting with Dr. Engelberg. *Id.* at 66.

In short, there was no emergency and Sheila had no justification for proceeding without Ken's cooperation, particularly since Ken was already working to obtain a counselor.

A. E. 7

"Sheila's unwillingness to delay the start of [IK's] counseling a week because Ken didn't ask in writing as she told him to do was unreasonable." (CP 884)

Sheila advised Ken by fax on Friday, June 24 that she had scheduled IK's appointment with Engelberg for Wednesday, June 29, adding, "[i]f there is a disagreement on your part, please respond in writing by Monday 6/28, 5 p.m. as we will need dispute resolution services." Ex 18. Ken called Sheila on the 28th and asked her to delay the appointment but she refused. 6 RP 75. Both Ken and his attorney then sent letters asking Sheila to delay the appointment. Ex 19, 21. Sheila then told Ken that she would not delay the appointment because he had not asked in writing (6 RP 76):

I talked to Sheila that morning again and said put this off a week. And her response was you didn't say in writing on the 28th that you objected to Susan Engelberg, so I don't have to continue it. And she said, as I said in my note to you on June 24th, you had to say it in writing.

Sheila argues that she did not refuse to delay the appointment because Ken's objection was not in writing, citing 4 RP 57-58. BR 25-26. Sheila does not say this on pages 57-58, and Judge Doerty was entitled to believe Ken's testimony on the point.

A. E. 8

"The factual issue for which testimony was sought was the nature of [IK's] medical diagnosis and the appropriateness of treatment by stimulant medication. This is a very contentious and controversial subject in general and especially so in parental disagreements. In this instance Ken's concerns were well taken." (CP 879)

Sheila's brief gives this issue away when she states, "there may be support in the record for this finding" BR 26. She has failed to argue the lack of support and there is no need to prolong this brief with a discussion of this issue.

Sheila points out that two years after IK first saw Engelberg, the parties were still "seeking assistance to reach a decision on how to proceed on this issue." Whatever the significance or insignificance of this fact, it certainly undercuts Sheila's other argument that the Engelberg appointment was urgent and an emergency.

A. E. 9

"Both parties appealed." (CP 875).

Ken appealed and Sheila cross-appealed. The finding of fact is undisputed. There is no support for Sheila's assertion that she would not have appealed if Ken had not appealed.

A. E. 10

"Sheila lied to the court about communication methods. She testified that the first time she heard that sending personal dispute related FAXs to Ken's law office was an issue or caused problems for him at work, was during this trial." (CP 876)

Ken testified (6 RP 67):

Kaplan: I told her from the very first fax and I told her on every single fax not to fax me. It was a big problem, and she knew it was a big problem and when I would tell her that she would just go neh neh neh. That was her verbal response.

Sheila complains that there is no written evidence that Ken told Sheila sending faxes to his office caused problems for him at work. BR 27. Written evidence is not required. Ken's testimony is sufficient and Judge Doerty believed it.

Sheila claims that Ken's reason for asking that she use email was because Ken considered it "unduly burdensome and time consuming" to send a fax to Sheila. BR 28. Sheila omits that it is burdensome because Sheila's fax can only be activated when she is home and is on the same telephone line as her telephone, so Ken must first reach her at home and then prevail on her to turn on

her fax. Ex 254 at 8. In any event, Ken gave other reasons for wanting email, including the fact that he did not want everyone in his law office to know the details of his divorce, and handling these personal faxes required special handling within the firm. 6 RP 67-68.

A. E. 11

“[Sheila] testified that she refuses to use email as ordered by the mediator because she can’t type and is not good with computers. This is contradicted by other evidence such as EXs 228, 254, 257 & 257.” (CP 876)

Sheila’s objection to this finding is simply argument. Judge Doerty relied on Sheila’s testimony that she can only type “slowly” and on her answer to the question, “Ok, you admit you don’t type,” when Sheila responded, “I’m faster at hand writing.” 5 RP 300. The two exhibits on which he relied that were typed by Sheila, 228 and 257, are clearly examples of someone quite capable of typing on a computer.

A. E. 12

“Sheila’s testimony was often histrionic and exaggerated for example when she testified ‘not a single month has gone by without some ADR dispute’ or Ken’s objections to Dr. Dassel was ‘last minute sabotage’. Her assertion that Ken fabricated an issue under the CR 2A is not supported by the facts as discussed above.” (CP 876)

Sheila attempts to back away from her testimony on this point, claiming that she did not testify about legal issues every

month, but only that there was some type of dispute. BR 29. Judge Doerty appropriately considered Sheila's testimony in context (12 RP 228-29) :

[T]his has been on all fronts if there wasn't an over arching appeal, there was a dispute resolution, there was reconsideration, there was Trial De Novo. One time I think I had all 4 things going, and all the dispute resolutions, always reconsideration not to mention the letters, the letters. When I say there has not been 1 month without something legal issue or created by Mr. Kaplan there has not been in 4 years.

Sheila also ignores Judge Doerty's other example of histrionic and exaggerated testimony when Sheila referred to Ken's objections to Dr. Engelberg (Judge Doerty incorrectly referred to Dr. Dassel) as "last minute sabotage." CP 876. Those were the exact words Sheila used. 4 RP 57. The finding is amply supported.

A. E. 13

"Sheila has involved the children in parental disagreements more than Ken (EX 64) . . ." CP 877.

Exhibit 64 is exactly what Judge Doerty called it: involving their son in a parental disagreement. On another occasion, Sheila prompted their son to make requests of Ken while the son was leaving a voicemail for Ken. 6 RP 98.

A. E. 14

"On many occasions Sheila has sought to involve others in her disagreements with Ken: the FAXs to the mail room at his law office and her assertion that 'Ken is not an

involved father' to many individuals (Keyes, Engelberg, Fong, Zipperman, some people involved in school applications), and inflammatory messages to Ken's family and friends (EX 69) are examples." (CP 877)

Sheila does not dispute that she sought to involve others in her disagreements through faxes and inflammatory messages to Ken's family and friends. This evidence alone supports the finding.

Sheila's only objection is that although she did tell Dr. Fong that Ken was "not involved," she claims that she may not have accused Ken of not being an involved father to all of the people listed in the findings. Without plowing through hundreds of exhibits and hundreds of pages of testimony, suffice it to say that the finding is amply supported by the examples that Sheila does not contest.

A. E. 15

See A. E. 1, *supra*.

A. E. 16

"Dr. Wieder observed issues with Sheila letting go of control over the children (EX 167)." (CP 884).

Sheila does not deny that Dr. Wieder, the parenting evaluator from the dissolution action, said that Sheila has difficulty letting go of control. Rather, Sheila simply argues that when an excerpt of Wieder's report was offered in connection with Ex 108, Judge Doerty stated that he would not consider Dr. Wieder's "evaluation" unless the entire report is presented. 4 RP 283-84.

The particular finding challenged here is based on a different document, Ex 167, which is a much more limited excerpt from Dr. Wieder's declaration and as to which neither party objected. The evidence is clearly before the Court and the finding is supported by the evidence.

A. E. 17

"The trial was the first time in the long sad history of this case that Sheila asserts domestic violence. Domestic violence through economic coercion is entirely unsupported by the facts. That it comes up now is evidence in support of Ken's view that Sheila clings to the conflict unable to move on." (CP 878-78).

Sheila objects that she never claimed "domestic violence." BR 32. In fact, however, she did accuse Ken of "behavioral domestic abuse." 12 RP 230. She also testified, "[e]conomic coercion is also another definition of behavioral domestic abuse." *Id.* The finding is amply supported.

A. E. 18

"Sheila's need to cling to the conflict is further evidenced by her response to Ken's CR 68 offer of judgment discussed below." (CP 879).

"EX 266 establishes that on January 14, 2009 Ken made a CR 68 offer of judgment *yielding sole health care decision making to Sheila*. This offer was rejected. Sheila insisted on this trial. But for the Court of Appeals requiring a hearing on Sheila's modification, the absence of any real current issues, and Ken's offer of judgment there would be CR 11 grounds for the court to order Sheila to pay Ken's

attorney fees for this proceeding.” (CP 882) (emphasis in original).

Sheila objects to this finding, arguing that although it gave her sole decision-making on health care issues, it was “unworkable” because it included the following proviso (Ex 266):

For anything non-emergency and non-routine, your client should give Ken four weeks’ notice (proposed treatment, cost, etc.); if Ken opposes the plan action, then he has to file a motion within two weeks of receiving the notice; otherwise she can proceed. We accept your suggestion that there should be no other form of dispute resolution.

Ken was responsible for paying a majority of the childrens’ healthcare costs. It would be unreasonable to expect that he should not have any opportunity to question the necessity for cost of “non-emergency and non-routine medical action.” The finding is amply supported.

B. The trial court’s dismissal for the petition for modification should be affirmed whether or not evidence supports each of the findings challenged by Sheila.

Judge Doerty found that Sheila failed to carry her burden of proving that a modification of the parenting plan to deal with joint decision making on medical issues. Even if some or all of the findings challenged by Sheila are disregarded, Sheila simply failed to carry her burden of proof. There is no justification for reversing the denial of a change in the parenting plan.

C. No objective reasonable person would conclude that Judge Doerty was biased.

Judges should recuse only if “their impartiality might reasonably be questioned” CJC 3(D)(1). That is, a party seeking to disqualify a judge must show “actual or potential bias,” without which “an appearance of fairness claim cannot succeed and is without merit.” **State v. Post**, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). The test is what an objective, reasonable person who knows the facts would conclude. See **Sherman v. State**, 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995), and **Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Wash. State Human Rights Comm’n**, 87 Wn.2d 802, 810, 557 P.2d 307 (1976).

Judge Doerty carefully listened to the evidence, read the exhibits and the pleadings, and reached reasonable conclusions based on well supported findings. It is a judge’s job to decide whether a party is credible. Judge Doerty’s finding that Sheila was not credible does not show bias but the careful weighing of evidence by a seasoned and experienced judge. Judge Doerty had to decide the credibility of each party. The fact that he did not believe Sheila is totally consistent with a fair and unbiased hearing.

CONCLUSION

The Court should reverse the denial of attorney fees to Ken and remand for an award of fees at the trial court, require Sheila to disgorge attorney fees previously ordered by this Court and the trial court, and award attorney fees to Ken for both appeals.

The Court should also remand for a determination of CR 11 sanctions against attorney Jan Dyer.

RESPECTFULLY SUBMITTED this 2nd day of July, 2010.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 2 day of July 2010, to the following counsel of record at the following addresses:

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