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No. 66510-3-I

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

In re the Marriage of:

KENNETH KAPLAN

Respondent

And

SHEILA KOHLS

Appellant

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

KAREN D. MOORE
Brewer Layman, P.S
3525 Colby Avenue
P.O. Box 488
Everett, WA 98206-0488
(425) 252-5167
Attorney for Respondent

ORIGINAL

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I. INTRODUCTION.

When Kenneth Kaplan and Sheila Kohls dissolved their marriage in March 2005, they entered an agreed parenting plan providing for joint decision-making on major decisions regarding their children, I.K. and Z.K.. Major decisions include “non-emergency health care” of any kind. In 2007, Kohls’ unsuccessfully sought to modify the agreed parenting plan to give her sole decision-making authority.

The genesis for Kohls’ 2007 modification action was a dispute over I.K.’s ADHD/medical treatment, and Kohls’ assertion that joint decision-making was impossible. After three years, a four-day trial in 2009, and two separate appeals¹, this Court affirmed the trial court’s (Judge James A. Doerty) decision that Kohls failed to demonstrate adequate cause for a modification. In Kaplan II, this Court either refused to review, or found substantial evidence to support, the trial court’s findings against Kohls, including:

that Kohls ‘lied to the court;’ that Kohls fabricated the claim that Kaplan was out to ruin her financially; that Kohls’ accusation that Kaplan refused to participate in ADR was a ‘histrionic exaggeration;’ and that Kohls’ expectation that Kaplan would refuse to adhere to the parenting plan was in ‘bad faith.’

Id. at *11-*12.

In June 2010, while Kaplan II was pending in this Court, Kaplan sought a finding of contempt against Kohls for failing to follow the joint-

¹ In re Marriage of Kaplan, No. 59612-8-I, 144 Wn. App. 1015, 2008 Wash. App. LEXIS 953 (April 28, 2008) (referred to as “Kaplan I”); In re Marriage of Kaplan, No. 64114-0-I, 158 Wn. App. 1021, 2010 Wash. App. LEXIS 2424 (November 1, 2010), rev. denied, 171 Wn.2d 1004, 249 P.3d 181 (2011) (referred to as “Kaplan II”).

decision making provisions of the parenting plan regarding I.K.'s and Z.K.'s medical treatment. In response, Kohls filed her own motion for enforcement seeking a judgment against Kaplan on behalf of Childrens' University Medical Group (CUMG), for outstanding medical expenses owed to CUMG. These motions resulted in extensive litigation over the next five months. Ultimately, Judge Doerty found Kohls in contempt, denied Kohls' motion for enforcement, and awarded Kaplan \$13,453.33 in attorney fees.

Kohls returns to this Court seeking review of Judge Doerty's fact based discretionary decisions. Because the legal issues here are straightforward, it is tempting to paint them with very broad strokes as Kohls' has done in her opening brief. However, decisions regarding contempt and enforcement are highly fact specific, and a broad brush does not give the trial court the deference it deserves on appeal. After reviewing the detailed record, this Court will conclude, as it did previously, there is substantial to Judge Doerty's discretionary orders.

II. RESTATEMENT OF ISSUES.

1. The agreed parenting plan required joint decision making for all "non-emergency health care." Kohls failed to provide notice to Kaplan for medical appointments for their children and unilaterally changed the date of appointments. Did the trial court properly exercise its discretion when finding Kohls' in contempt of the joint decision-making provisions regarding non-emergency health care and thereafter provide for appropriate sanctions as a result of finding Kohls in contempt?

2. The agreed order of child support required Kohls' to contribute 28% towards the childrens' educational expenses. Kohls' did not pay her share of these expenses. Did the trial court properly exercise its discretion when finding Kohls' in contempt for failing to pay her share?

3. Kohls sought to enforce the parties' child support order on behalf of a third party, CUMG, and requested a judgment against Kaplan in favor of CUMG for a debt for previous medical appointments. CUMG confirmed it had previously written off all debt and no balance was owed. Did the trial court properly exercise its discretion and deny Kohls' motion to enforce on behalf of CUMG?

4. After finding Kohls in contempt for violating the parenting plan in bad faith, and denying Kohls' retaliatory motion for enforcement, did the trial court properly award Kaplan his fees and costs associated with both motions?

5. Should this Court deny Kohls' request for attorney fees on appeal based on the parties' respective need and ability to pay and instead award Kaplan his costs and fees under RAP 18.1, RCW 26.09.160, and RCW 26.18.160?

III. RESTATEMENT OF THE CASE.

A. Kaplan's Motion For Contempt.

On June 2, 2010, while Kaplan II was pending in this court, Kaplan filed his motion for contempt. CP 1-2. Kaplan sought a contempt finding against Kohls as follows.

1. Kohls' Failure To Comply With Joint Decision Making Regarding I.K.'s Medical Treatment.

Kaplan requested Kohls be held in contempt for failing to abide by the joint decision making provisions of the agreed parenting plan regarding non-emergency health care. See CP 19 (joint-decision making required for all non-emergency health care). Continuing disputes over I.K.'s treatment for ADHD, and the extent of Kaplan's involvement in and payment for appointments, were the primary reasons for Kohls' 2007 modification action. See Kaplan I, 2008 Wash. App. LEXIS 953 at *2-*3; Kaplan II, 2010 Wash. App. LEXIS 2424 *2-*3.² In his June 2, 2010 motion, Kaplan specifically cited Kohls' failure to notify him of a medical appointment regarding I.K.'s treatment for ADHD in November 2009 (following the modification trial). CP 3-5.

In her response declaration, Kohls did not dispute that she failed to inform Kaplan of I.K.'s November 2009 appointment. Kohls knew I.K.'s treatment was very important to Kaplan and that he wanted to be involved in all aspects of her treatment. See CP 55 (trial court's findings on dismissal refer to dispute about "the nature of I.K.'s medical diagnosis and the appropriateness of treatment by stimulant medication"); CP 725-726 (2007 letter from Dr. Varley identifying disagreement between Kohls and Kaplan regarding I.K.'s treatment). Kohls argued Kaplan likely received

² Kohls cites extensively to this Court's prior unpublished decisions in her brief. Although RAP 10.4(h) and GR 14.1 generally prohibits citation to unpublished decisions, exceptions exist when the "decision is relevant under the doctrines of law of the case, res judicata or collateral estoppel." State v. Sanchez, 74 Wn. App. 763, 765, fn.1., 875 P.2d 712 (1994), rev. denied, 125 Wn.2d 1022 (1995).

notice directly from Dr. Varley's office because of their office procedures. Kohls also argued it was just a "regular" appointment for which Kaplan had no right to advance notice. CP 122-123³.

In reply to Kohls' argument, Kaplan stated he did not receive notice from Dr. Varley's office, and that "joint-decision making was not an obligation of the doctors' offices." CP 441-442. Kaplan argued the parenting plan required notice of all non-emergency health care, even regular appointments. Notice was important to Kaplan regarding I.K.'s treatment because

[t]he issue of whether [I.K.] should continue on medication for ADHD, and whether she needs to be re-evaluated given the time that has passed since her original diagnosis, has been a source of concern for me for years, and Dr. Varley is well aware of this. Given that we have joint decision making, it is important for me to be able to attend her infrequent appointments to discuss this with him.

CP 441.

2. *Kohls' Failure To Comply With Joint Decision Making For Z.K.'s Medical Treatment.*

Kaplan also sought a contempt finding for Kohls' failure to notify him of medical appointments for Z.K. on three occasions in 2010: January 14, March 12, and April 30. CP 5-6. Z.K.'s January 2010 appointment was to evaluate the headaches he was experiencing. Although Kaplan was scheduled to take Z.K. to this appointment on January 15, 2010, Kohls

³ Kohls further acknowledged her failure to provide Kaplan notice of I.K.'s appointment by stating "even if I did not take action to ensure [Kaplan] is kept informed, he has the affirmative duty to keep himself informed..." CP 123.

changed the appointment date to January 14, 2010, and took Z.K. without telling Kaplan. CP 5, 67, 69. Kaplan did not have the opportunity to participate in the appointment, which resulted in a referral for a CT scan. CP 5, 71-73. Kaplan found out the appointment took place without him when Kohls notified him on January 15 that he did not have to take Z.K. to the appointment as planned. CP 6.

Kaplan found out about the March 12 and April 30, 2010, appointments after receiving an explanation of benefits from his insurance company well after each appointment occurred. Kaplan received no notice from Kohls regarding these appointments. CP 6, 75-76.

Kohls gave inconsistent explanations regarding her failure to notify Kaplan of Z.K.'s appointments. Kohls initially acknowledged Kaplan had a right to advance notice. Kohls used Kaplan's handwritten note dated January 13 wherein he advised her that he would take Z.K. to the appointment as proof she notified Kaplan of the appointment in advance. CP 123; see CP 67 (handwritten note). Kohls states she would have told Kaplan of the time, date, and who the appointment was with "during initial notification." CP 124. Kohls also acknowledged she asked for an earlier appointment if one became available. CP 124. Despite her initial acknowledgement of Kaplan's right to notice, Kohls did not notify Kaplan when the earlier January 14 appointment became available and she took Z.K. to that appointment without Kaplan. Id.

Having admitted to unilaterally changing the appointment time and taking Z.K. to the appointment without Kaplan's knowledge, Kohls then

changed tactics. She claimed she never knew Kaplan wanted to take Z.K. to the appointment and that Kaplan “fabricated” the handwritten note. CP 124. Kohls focused the court’s attention on her behavior on January 15 – the day after the appointment actually occurred. Kohls pointed out she gave Kaplan notice of the outcome of Z.K.’s appointment, the referral for the CT scan, and the date and time of the appointment for the CT scan. CP 124, 715. Kohls gave this information to Kaplan when she called him to tell him he did not have to take Z.K. to the appointment. CP 443.

Kohls gave no explanation about her failure to notify Kaplan regarding Z.K.’s appointment on March 12, 2010, or about the appointment itself despite the fact it was billed as a “consultation” with “diagnostic medical care.” CP 75. Kohls did address Z.K.’s April 30, 2010, appointment with Dr. Dassel. Without denying she failed to notify Kaplan of the appointment, Kohls again justified her behavior by stating the appointment was “routine” and speculating that Kaplan “would have received the appointment reminder phone call” directly from the physician. CP 125. Kaplan stated Dr. Dassel’s office did not provide reminder calls to him, and that Z.K.’s treatment for ADD, like I.K.’s treatment for ADHD was far from “routine.” CP 443.

3. *Kohls’ Failure To Comply With The Order Of Child Support Regarding Payment Of Her Proportional Share Of Educational Expenses.*

Kaplan also requested the court find Kohls in contempt for failing to pay her share of the cost of the children’s text books as required under

the agreed order of child support. CP 6-7; See also CP 28 (child support order requiring contribution for educational expenses from both parents), CP 77-78 (receipts). When Kaplan attempted to address her proportional share of these expenses, Kohls would simply refuse to pay. CP 7.

Kohls did not deny she failed to pay her share of the educational expense for childrens' books. Instead, Kohls simply stated she had no obligation to pay under the order of child support because Kaplan had not proven he had no funds available from his father for educational expenses, and Kaplan had promised, in an arbitration brief, to pay the entire cost of any private school. CP 125⁴. Kohls also stated, even if she did have an obligation to pay, Kaplan failed to prove the books he purchased were actually for the children's education. Kohls speculated that, because Kaplan used a company credit card to pay for the books, the books were a business expense. CP 125-26.

In his reply, Kaplan provided proof that he, not his father, was paying for the childrens' tuition. CP 444, 456. Although he had agreed to pay 100% of the childrens' tuition, Kaplan stated he did not agree to pay for books and other educational expenses and that the order of child support did not require him to pay all educational expenses. CP 444.

⁴ Kohls does not provide the arbitration decision, just an excerpt from Kaplan's arbitration brief. CP 149.

4. *Confirmation and Enforcement Of December 17, 2008 Arbitration Decision Regarding E-mail Communication.*

Finally, Kaplan asked the court to enforce a December 17, 2008, arbitration decision ordering Kohls to use email to communicate with Kaplan. CP 8; CP 45-46. During the earlier modification trial, Judge Doerty made specific findings about Kohls refusal to use email as ordered by the arbitrator, specifically finding “[Kohls] lied to the court about communication methods.” CP 8, 52. Despite this finding, Kohls continued to refuse to use email, telling Kaplan she didn’t have to comply with the arbitrator’s decision because it wasn’t a court order, and daring Kaplan to “sue me” and to “get an order of contempt against me if you don’t like it.” CP 4.

In her response, Kohls acknowledged the arbitration decision in December 2008 ordered her to communicate by email, but argued the decision was not properly before the court for enforcement. CP 126. Kohls did not dispute that she dared Kaplan to “get an order of contempt” for her refusal to honor the arbitrator’s decision even after Judge Doerty’s findings. Instead, Kohls primary argument was that the court had no authority to confirm the arbitration decision in a formal order because the arbitration decision was an impermissible modification of the parenting plan. CP 126-27.

Kaplan pointed out that neither party requested a trial de novo within 20 days of the December 17, 2008 arbitration decision. CP 444-

445. Kohls acknowledged she did not request a trial de novo of the December 2008 arbitration decision. 7/15/10 RP 6-7.

Kaplan's contempt motion was originally set for hearing on June 18, 2010. CP 691. The hearing did not occur as scheduled. On June 18 it was continued to July 15, 2010 to accommodate Kohls. This delay allowed Kohls time to bring her own motion against Kaplan. CP 491.

B. Kohls' Motion To Enforce.

On July 1, 2010, Kohls filed her motion seeking enforcement of the order of child support under RCW 26.18.160. Kohls sought a judgment against Kaplan for unpaid "counseling, daycare and extraordinary health care expenses" and requesting attorney fees. CP 91-92.

1. Payment Of Medical Expenses Owed To CUMG.

In her motion, Kohls claimed Kaplan failed to pay \$1,695.95 for I.K.'s counseling appointments with Dr. Varley at CUMG starting in 2007 and continuing through 2010. CP 94, 694-698. Kohls claimed Kaplan never paid his 72% share of Dr. Varley's bill as required by the order of child support, and requested

...that [Kaplan] immediately be required to pay Dr. Varley or, in the alternative, that a judgment be entered against him which would allow me to collect and pay his pro-rata share and bring [I.K.'s] account current.

CP 94.

In his response, Kaplan stated that he did not know about the balance Kohls claimed he owed CUMG until he received Kohls' motion. CP 383. Kaplan pointed out that the billing statements Kohls filed with her motion were all dated June 30, 2010 – one day prior to filing her motion. CP 383-384, 695-698⁵. Kaplan's discussions with CUMG in March 2009 and the letter he received from CUMG in May 2009 led him to believe the account was paid in full at that time. CP 384, 412. A billing statement Kaplan received dated July 20, 2009, showed a balance owing of \$98.62, after adjustments of \$3,089.51. CP 414. The July 2009 billing statement was "absolutely consistent" with the information Kaplan received from CUMG in May 2009 that his account was current at that time. CP 384.

Kaplan could not explain why the amount Kohls claimed he owed to CUMH was so different from the information he received from CUMG. The reason became clear after Kohls filed her reply declaration. In her reply, Kohls admitted that CUMG had previously written off the balance she was seeking to collect on CUMG's behalf from Kaplan, but the balance was reinstated on June 30, 2010, based on her communication with CUMG. CP 162, 723.

The charges Kohls sought to collect on CUMG's behalf were actually written off several times prior to June 30, 2010. According to the

⁵ One statement was addressed to Kohls at Kaplan's address and one statement was properly addressed to Kaplan. CP 695-698; see also CP 309-310 (CUMG letter supplied by Kohls).

CUMG billing statements dated September 29, 2008 and October 27, 2008, the first write-off occurred on March 13, 2008. This write-off was for appointments occurring between July 12, 2007 and December 12, 2007⁶. CP 719-721. According to billing statements dated September and October 2008, the write-off was reversed and the charges were reinstated on September 29, 2008⁷. CP 718-721. These statements were printed on March 4, 2009, and were submitted as Exhibit 302 during the parties' 2009 modification trial. CP 161, 717-721.

The trial exhibit is consistent with Kaplan's testimony, in the 2009 trial, that he contacted CUMG in March 2009 and was advised adjustments were made to the account and that he owed only \$38.34. CP 384. As of May 2009, Kaplan believed he did not owe anything to CUMG. The reason the account was current in May 2009 was because CUMG wrote-off the 2007 charges a second time on October 31, 2008. CP 695-697⁸. Therefore, by the time of trial in 2009, the account balance would have been current.

Based on the evidence provided by Kohls', CUMG wrote off the costs for subsequent appointments as follows:

⁶ The billing statement shows the 3/13/08 notation "PT BAD DEBT PRE COL W/O." CP 719, 721.

⁷ The billing statements show the 9/29/08 reversal/reinstatement with the notation "PT BAD DEBT PRE COL W/O - RV." CP 719, 721.

⁸ The billing statements show the second write-off with the 10/31/08 notation "TIMELY FILING - PT." CP 696; See also CP 414 (line entries dated 10/31/08 show "PT TIMELY ADJ"). This coding notation was an error and was corrected on March 12, 2010. See CP 723 (letter of Sherry D provided with Kohls' reply materials).

<u>Appointment Date</u>	<u>Write Off Date</u>
September 9, 2008	March 26, 2009
March 25, 2009	August 7, 2009
September 16, 2009	February 22, 2010
November 24, 2009 ⁹	June 15, 2010
April 27, 2010	May 3, 2010

CP 696-698¹⁰.

For reasons not apparent from the record, CUMG reinstated all the previously written off charges on June 30, 2010 – one day before Kohls filed her motion. CP 696-698.¹¹ This is how, as of July 1, 2010, when Kohls’ filed her motion, she was able to claim Kaplan owed CUMG \$1,659.95. CP 694. Prior to that time, there was no balance owed.

2. Payment Of Medical Expenses For Prescriptions and Co-Payments.

Kohls also sought a judgment against Kaplan for \$205.64 for his proportional share of prescription costs incurred in March, April and June 2010 and for a co-payment for an April 30, 2010 medical appointment – the same appointment Kaplan had no notice of and identified in his motion for contempt against Kohls. CP 95-96, 707-709 (Kohl’s Motion); CP 6, 76 (Kaplan’s Motion). In her motion, Kohls acknowledged that Kaplan had paid \$190.04 towards the prescription costs on June 17, 2010 (two

⁹ This is the appointment Kaplan referenced in his June 2, 2010, motion for contempt against Kohls. CP 5, 65.

¹⁰ The billing statements show these write-offs with the notation “PT BAD DEBT PRE CL W/O.” CP 697-698.

¹¹ The billing statements show all previously written off charges were reversed on 6/30/10 with the notation either “BAD DEBT – PT- RVRSL” or “PT BAD DEBT PRE COL W/O RV.” CP 695-697; See also, CP 523-526 (Dunahoo Declaration dated August 31, 2010, with attached billing statements).

weeks before Kohls filed her motion to enforce). Kohls claimed Kaplan's check "bounced," implying she attempted to deposit it, although Kohls' handwritten notation on the check indicates the "check is no good according to bank teller." CP 95, 706.

In his response, Kaplan advised the check would have been honored had Kohls simply deposited it rather than going to the lengths she did to prove there were insufficient funds in the account. CP 386, 421; see CP 197-207 (Kohls' issued subpoenas to Kaplan's bank to prove there were not funds). In her reply, Kohls acknowledged she never attempted to deposit the check prior to filing her July 1, 2010, motion. CP 164. Instead, she waited and deposited the check before the July 15, 2010 hearing. CP 218. However, she persisted that Kaplan owed her an additional \$15.00 for the co-payment for Z.K.'s appointment that Kaplan did not receive notice of. 7/15/10 RP 13.

3. Payment For YMCA Daycare Expenses.

Finally, Kohls sought a judgment against Kaplan for \$172.80 for his proportional share of YMCA daycare expenses incurred two years earlier in October 2008. CP 96, 711-712. In response, Kaplan pointed out this debt had already been ruled upon in Kaplan's favor during the December 2008 arbitration. CP 386-387; see also CP 41-42, 424-425 (2008 arbitration decision that no contribution for daycare required when parenting plan provision regarding right of first refusal is not followed); CP 82 (June 2009 letter from Kaplan to Kohls advising YMCA expenses

have been ruled upon in arbitration); CP 153 (2008 letter from Kohls to arbitrator raising issue regarding YMCA debt).

C. July 15, 2010 – Motion Hearing For Kaplan’s and Kohls’ Motions

On July 15, 2010, both motions came before the court (Commissioner Sassaman) for hearing. 7/15/10 RP 1-26. Following the hearing, the Commissioner entered three orders.

1. Order On Family Law Motion (Kaplan’s Motion To Enforce 2008 Arbitration Decision).

Commissioner Sassaman affirmed the 2008 arbitration decision requiring both parties to communicate by email stating:

[t]his is a decision that was made, well a year and a half ago, almost two years ago now, in 2008. The, if either party felt there was an error in that decision or there was a basis for it to be reviewed, they had the right to request a review and have a de novo determination made. Neither party did that. ... I do not find that the mother has raised arguments sufficient or explained how I have the authority not to confirm that decision at this point in time.

7/15/10 RP 11; CP 220.

2. Order On Motion For Contempt.

Commissioner Sassaman denied Kaplan’s motion for contempt. CP 211-216. Commissioner Sassaman declined to find Kohls in contempt for failing to pay her share of educational expenses. Commissioner Sassaman found Kaplan did not meet “his burden to show that he has no funds for this purpose paid by his father” and that the order of child

support was ambiguous as to what was “included in the term educational expenses.” 7/15/10 RP 12.

Commissioner Sassaman also declined to hold Kohls in contempt for violating the joint decision-making requirements of the parenting plan by failing to notify Kaplan of I.K.’s and J.K.’s medical appointments. Commissioner Sassaman noted “the appointments the father complains of missing were not appointments aimed at making any kind of decision or change to the regular care.” 7/15/10 RP 10. Because no major decisions were being made, Commissioner Sassaman found “routine medical appointments are not a major decision,” CP 212. In doing so, Commissioner Sassaman revised the language in the parties agreed parenting plan defining major decisions as “non-emergency healthcare” to create an exception for “routine” healthcare. See CP 19 (agreed parenting plan). By exempting “routine” healthcare from major decisions, Commissioner Sassaman concluded Kohls did not violate the parenting plan when she failed to give Kaplan notice of these “routine and regularly scheduled” medical appointments. 7/15/10 RP 10.

3. Order Enforcing Support.

Commissioner Sassaman expressed great concern over Kohls’ motivation behind her motion to enforce.

Why is the mother bringing this motion now in regards to receipts for things that occurred in 2007 and 2008? It does not look good. It appears to this Court as if she is engaging in improper use of litigation in furtherance of her conflict and in retaliation for a motion that was filed by the father of the children. If you look at

the total amount she is asking for in terms of relief for things she says were unpaid child support obligations they do not exceed the amount of fees that she paid to come here and bring this motion according to her own statement in request for fees.

7/15/10 RP 20-21. With this in mind, Commissioner Sassaman found Kaplan's check for \$190 "was a good check that [Kohls] could have re-deposited" but failed to do so "in furtherance of the conflict." *Id.* at 21¹²; CP 218. Commissioner Sassaman went on to deny Kohls' request for payment of YMCA daycare expenses stating: "it appears to me as if these are the same receipts and requests that were previously ruled upon in [the 2008] arbitration." 7/15/10 RP 21; CP 218.

Regarding Kohls' request to collect payment from Kaplan on behalf of CUMG, Commissioner Sassaman immediately recognized the irregular nature of Kohls' request, stating:

[i]t is not clear to me why this is relief that the mother felt she needed to file a motion for. In other words, this appears to be a dispute between the father and Children's. Children's having written off some of the outstanding bill as being a bad debt and unable to collect. ... The mother didn't pay this and is now asking to be reimbursed. She is asking this court in essence to enforce a, or to collect a debt owed to a third-party that they have now written off. And it doesn't appear from the record and no one has alleged that this debt that was written off has resulted in the child not receiving care and that there is a need to correct this in order for care to continue or some other, I don't understand where it is the mother's motion to bring and Children's Hospital collecting on their own debt due.

¹² Commissioner Sassaman ordered Kaplan to pay the remaining sum owed, \$15.00, for the co-payment for Z.K.'s appointment based on her earlier contempt ruling. 7/15/10 RP 21; see also 7/15/10 RP 15 (Kaplan's acknowledgment additional sum is owed based on contempt decision).

7/15/10 RP 22 (emphasis added). Commissioner Sassaman asked counsel for both parties “to explain” why this was a motion the court should deal with. Id.

Kohls’ counsel alleged, for the first time, that “providers eventually quit” and that the purpose of the motion is “to ensure that service for [I.K.] isn’t interrupted.” Id. Kaplan’s counsel argued Kohls’ intentionally revived the bill on June 30, 2010, in order to bring her motion against Kaplan. Kaplan’s counsel further pointed out “[t]here is no testimony that [I.K.’s] care has been compromised in any way... .” Id.

Despite the lack of evidence that I.K.’s care was being compromised in any way, Commissioner Sassaman entered an order directing Kaplan to contact Sherry D. at CUMG to determine whether the debt was actually written off or whether it was owed. 7/15/10 RP 24-25; CP 218. Commissioner Sassaman ordered Kaplan to pay his share if the debt was actually owed, but left the amount of Kaplan’s share undetermined¹³. Commissioner Sassaman scheduled a review hearing on August 16, 2010. 7/15/10 RP 24-25; CP 219.

In their motions, both Kaplan and Kohls requested attorney fees from the other under RCW 26.09.160 (contempt) and RCW 26.18.160 (enforcement). CP 2, 91. Commissioner Sassaman denied both requests. 7/15/10 RP 25; CP 214, 218.

¹³ Commissioner Sassaman rejected Kohls’ argument that I.K.’s appointments with Dr. Varley were exempt from the first 5% of monthly medical expenses that Kohls’ was required to pay. 7/15/10 RP 24; CP 219.

D. Kohls' Motion for Reconsideration and Kaplan's Motion for Revision.

On July 26, 2010, Kohls filed a motion for reconsideration of Commissioner Sassaman's order on enforcement. In her motion, Kohls requested the court reconsider its decision not to award her attorney fees based on the mandatory language contained in RCW 26.18.160. CP 463-478. Kohls scheduled her hearing for August 20, 2010. CP 461-462. Kaplan sought revision of Commissioner Sassaman's Order Enforcing Support and the Order On Contempt. CP 479-489¹⁴. Kaplan noted his revision motion for August 27, 2010, before Judge Doerty. CP 460-461. On July 27, 2010, Commissioner Sassaman sent a letter to Kaplan requesting a response to Kohls' motion for reconsideration. CP 490. Kaplan filed his response on August 13, and Kohls filed a reply on August 17, 2010¹⁵. CP 491-501 (response); CP 502-506 (reply).

On the same day, Kohls filed a motion requesting the Court transfer Kaplan's motion for revision to a different Judge under RCW 4.21.040 and 4.21.050. CP 509-511. Kohls noted her motion to transfer for hearing five days later on August 24, 2010. CP 507-508. Kaplan filed a response on August 20, 2010, asserting Kohls' motion to transfer was untimely under King County LCR 7(b)(4), Kohls' could not obtain relief

¹⁴ Neither party sought further review of Commissioner Sassaman's order affirming the 2008 arbitration decision requiring both parties to use email to communicate. CP 220.

¹⁵ The review hearing previously scheduled for August 16, 2010 (to determine what each parent owed for medical expenses) was continued to September 2, 2010 presumably to allow the reconsideration and revision motions to proceed. See CP 527.

under RCW 4.21.040 and 4.21.050, and requesting attorney fees. CP 512-514. Kohls did not pursue her motion.

Instead, Kohls took a different tactic to prevent Kaplan's revision motion from occurring. On August 25, 2010, at 12:00 p.m. (two days before the revision hearing), Kohls' filed an objection and motion requesting the court strike Kaplan's revision motion as untimely because it was filed one day late. Kohls also requested "terms and sanctions" against Kaplan. CP 515-520. Eighteen minutes later, Kaplan filed his response to Kohls' objection and motion to strike. In his response, Kaplan withdrew his motion for revision recognizing that Kohls' timely motion for reconsideration extended the deadline for filing a revision motion under King County LR 7(b)(8)(vi). At the time he withdrew his motion for revision, Commissioner Sassaman had not issued her decision on reconsideration. CP 521-522. Just hours after Kaplan withdrew his motion for revision, Kohls sent a letter to Commissioner Sassaman withdrawing her motion for reconsideration – her third attempt to block Kaplan's motion for revision. CP 542.

Because of Kohls' tactics, Kaplan was forced to seek a decision from Commissioner Sassaman to preserve his right to file his motion for revision of the earlier orders. See CP 540-549 (Kaplan's 9/3/10 memorandum identifying efforts to obtain decision on motion for reconsideration and reasons for re-filing revision motion within ten days of withdrawal of Kohls' reconsideration motion); CP 529-539 (9/3/10 re-

filed motion for revision)¹⁶. On September 9, 2010, Commissioner Sassaman entered an Order On Respondent's Motion for Reconsideration, triggering a new deadline of September 20, 2010, for any revision motions regarding the July 15, 2010 orders. CP 550-552.

E. September 15, 2010 – Review Hearing.

Amidst Kohls' legal maneuvering to prevent Kaplan's revision motion, the parties' respective obligations for I.K.'s and Z.K.'s medical expenses remained unresolved. On August 31, 2010, in preparation for the September 2 review hearing, Kohls' filed a declaration from CUMG employee Stephanie Dunahoo indicating the balance on I.K.'s account was \$1,518.60, and advising that "Sherry D. no longer works at CUMG." CP 523-526. Kaplan did not file anything in advance of the September 2 review hearing because he was responding to Kohls' efforts to prevent his revision motion. See CP 529-539 (9/3/10 re-filed motion for revision); CP 540-549 (9/3/10 memorandum regarding re-filed motion for revision). Ultimately, Commissioner Sassaman continued the review hearing to September 15, but advised that the "Court shall strike the hearing unless the parties file the required calculations under previous order...by [September 13, 2010]." CP 527-528.

On September 13, 2010, Kohls filed a declaration stating Kaplan owed \$1,498.88 to CUMG and \$15.00 to Kohls. CP 221-223, 335-365. To support her declaration, Kohls filed yet another declaration from

¹⁶ This motion for revision is exactly the same as Kaplan's earlier July 27, 2010 revision motion. See CP 479-489.

Stephanie Dunahoo at CUMG. CP 236-240, 335, 366-373. Kohls requested attorney fees against Kaplan based on his failure to “resolve this matter.” CP 223. Kohls also renewed her request for attorney fees as the “prevailing party,” citing RCW 26.18.160. CP 223-24; see also CP 463-466 (earlier withdrawn reconsideration motion).

Kaplan responded on September 13, 2010, and requested to continue the review hearing be continued in order to allow his revision motion to proceed first as the parties originally contemplated. CP 553-561. Commissioner Sassaman declined to continue the hearing finding “it is preferable to have the revising court to have all the orders to consider at the same time.” CP 245. Thus, based on the financial information presented by Kohls, including the financial information from Stephanie Dunahoo, Commissioner Sassaman ordered Kaplan to pay the sum of \$1,429.26 to CUMG “within three days of the entry of order on revision and subject to the ruling on revision.” CP 242. Commissioner Sassaman also granted Kohls’ request for attorney fees finding that Kaplan’s failure to contact CUMG created extra fees for Kohls. CP 243. Kohls’ presented a fee affidavit requesting \$3,176.50 in attorney fees. CP 247-250. Kaplan objected to the reasonableness of the fee request. CP 562-563. On September 20, 2010, Commissioner Sassaman awarded \$2,900.00 in attorney fees to Kohls. CP 281-282.

F. Kaplan's Final Motion For Revision and Motion For Terms And CR 11 Sanctions.

On September 20, 2010, Kaplan timely filed his final motion for revision. In his motion, Kaplan sought to revise Commissioner Sassaman's July 15, 2010, orders, the September 15, 2010 order, and the subsequent September 20, 2010 fee order. CP 260-280. Kaplan noted his revision motion for hearing on October 8, 2010, before Judge Doerty¹⁷. On September 30, 2010, Kaplan (acting pro se) filed his own motion for terms and CR 22 sanctions against Kohls' attorney. CP 572-595. Kaplan noted this hearing for the same date as his revision motion. CP 570-571.

On October 6, 2010, Kohls filed a response to Kaplan's motion for terms/CR 11 sanctions. CP 612-630. She also filed an objection and motion to strike Kaplan's revision motion re-raising the same arguments contained in her earlier objection. CP 596-99 (10/6/10 objection); CP 515-518 (8/25/10 objection). In her renewed motion to strike, Kohls requested "terms and sanctions" for Kaplan's "intransigence in refusing to strike" his motion. CP 599. As a result, Kaplan was forced to reply. In his reply Kaplan requested terms for having to respond Kohls' renewed motion and also for having to respond to the multiple earlier motions Kohls' made and withdrew. CP 634-669. Kaplan also filed a reply regarding his motion for terms/CR11 sanctions. CP 670-675.

¹⁷ Kohls did not re-file her motion to transfer Kaplan's revision motion to another Judge.

G. Revision Hearing – Judge Doerty.

On October 8, 2010, the parties appeared before Judge Doerty for the revision hearing. 10/8/10 RP 1-33. Judge Doerty heard argument from Kaplan and Kohls and took the matter under advisement. *Id.* at 32. On October 15, 2010, after oral argument, Kaplan submitted a supplemental declaration regarding the debt Kohls' claimed was owed to CUMG. In this declaration, Kaplan outlined how Kohls and her attorney caused CUMG to reinstate the bills on June 30, 2010. CP 284-285. Kaplan also presented a new bill from CUMG dated October 12, 2010, showing a zero balance owing. CP 286-288.

On October 19, 2010, Judge Doerty issued his decision. First, Judge Doerty denied Kohls' motion to strike the revision hearing. CP 291. Second, Judge Doerty revised Commissioner Sassaman's contempt order with respect to Kohls' lack of notification of medical appointments, specifically finding her failure to notify Kaplan was in bad faith. CP 291-292. Judge Doerty specifically referenced Z.K.'s January 14, 2010, appointment and found that appointment was not a routine doctor visit. CP 291.

Judge Doerty also found that “[t]he commissioner misapprehended the core significance of this particular problem for these parents and the children.” *Id.* Judge Doerty found Kohls' statement that Kaplan failed to be involved in his childrens' medical care was false and that her false statement was “another manifestation of [Kohls'] determination that [Kaplan] must engage in parenting [Kohls'] way.” *Id.* at 291-292; *see*

CP 130 (Kohls' response declaration). Judge Doerty found that Kohls' failure to abide by the earlier arbitration decision regarding email communication created "this regrettable re-escalation of old conflicts...." CP 291.

Judge Doerty awarded Kaplan attorney fees for his revision motion. CP 292. Judge Doerty denied Kaplan's motion for revision of Commissioner Sassman's September 15, 2010, order requiring him to pay CUMG. Judge Doerty also denied Kaplan's motion for terms/CR 11 sanctions. CP 292.

On October 29, 2010, Kaplan filed a motion for clarification and/or reconsideration of Judge Doerty's revision order. In his motion, Kaplan asked Judge Doerty to clarify the order finding Kohls' in contempt by setting purging conditions. Kaplan also requested Judge Doerty specify what attorney fees Kohls was required to pay in connection with the contempt finding. Finally, in light of the fact no debt to CUMG was actually owed, Kaplan asked Judge Doerty to reconsider his decision affirming Commissioner Sassaman's order requiring Kaplan to pay CUMG and the related order awarding Kohls attorney fees. CP 293-297.

On November 4, 2010, Kohls responded. In her response, Kohls objected to the purging mechanisms Kaplan requested, although she offered no purging mechanisms of her own. Kohls also objected to being held responsible for Kaplan's attorney fees, and, most importantly, Kohls asked Judge Doerty to continue to require Kaplan to pay the debt to CUMG. CP 298-315. In support of this latter request, Kohls provided a

letter from yet another CUMG employee dated October 12, 2010, to explain the zero balance Kaplan referenced in his motion for reconsideration. CP 301-302, 309-315; see also CP 283-290 (Kaplan's supplemental declaration dated 10/15/10); CP 297 (Kaplan's motion for clarification and/or reconsideration). Kaplan filed a reply on November 18, 2010. CP 316-331.

On November 19, 2010, Judge Doerty entered an order on Kaplan's motion for reconsideration. In his order, Judge Doerty adopted Kaplan's proposed purging mechanisms requiring Kohls to consult with Kaplan before or while scheduling any medical appointments; have email access and check her email daily; and to pay all uninsured expenses for any appointments (past or future) if Kaplan did not receive notice¹⁸. CP 333. Judge Doerty also clarified his revision order to include holding Kohls in contempt for failing to pay her share of the childrens' books/educational expenses. CP 333. Regarding the CUMG debt, Judge Doerty reconsidered his earlier decision:

[i]n light of the information presented with the Supplemental Declaration of Mr. Kaplan, the invoice from CUMG showing a zero balance, and the correspondence from CUMG (submitted by Ms. Kohls) verifying that the bill had been written off and not balance was owed, the court reconsiders and vacates its prior order on revision to the extent that it denied Mr. Kaplan's motion for revision of Commissioner Sassaman's orders dated 9/15/10 and 9/17/10. These orders are hereby vacated, and Mr. Kaplan shall

¹⁸ Based on the latter purging mechanism, Judge Doerty vacated Commissioner Sassaman's July 15, 2010, order requiring Kaplan to pay \$15.00 for Z.K.'s medical April 2010 appointment because Kaplan was not given proper notice. CP 333; see also CP 218 (7/15/10 order).

have no obligation to make any payment to (1) CUMG and/or Ms. Kohls, or (2) to Ms. Zaike and/or Ms. Kohls for...attorneys' fees incurred in pursuing those charges... .

CP 334. Finally, Judge Doerty awarded Kaplan a judgment against Kohls in the amount of \$13,453.33 for his attorney fees in connection with his motion for contempt and the subsequent motion – including Kohls' "retaliatory motion to enforce child support." Id.

Kohls timely filed a notice of appeal seeking review of Judge Doerty's orders. CP 374-380.

IV. ARGUMENT.

A. Standard Of Review.

A trial court's decision in a contempt proceeding is reviewed for an abuse of discretion. In re Marriage of James, 79 Wn. App. 436, 439-440, 903 P.2d 470 (1995). A trial court abuses its discretion if its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. Id. at 440. A trial court's findings regarding contempt will be upheld on appeal if they are supported by substantial evidence. In re Marriage of Rideout, 150 Wn.2d 337, 350, 77 P.3d 1174 (2003).

Evidence is substantial if it exists in a sufficient quantum to persuade fair-minded person of the truth of the declared premise. So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it. This is because credibility determinations are left to the trier of fact and are not subject to review.

In re Marriage of Burrill, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), rev. denied, 149 Wn.2d 1007, 67 P.3d 1096 (2003) (citing Holland v.

Boeing Co., 90 Wn.2d 384, 390, 583 P.2d 621 (1978); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1999)).

B. Judge Doerty Properly Exercised His Discretion And Found Kohls In Contempt For Failing To Notify Kaplan Of Medical Appointments For Their Children As Required By The Agreed Parenting Plan.

1. Substantial Evidence Supports Judge Doerty's Finding That Notice Was Required For Non-Emergency Health Care Decisions And That Kohls Acted In Bad Faith When She Failed To Provide Notice.

Judge Doerty found Kohls “in contempt with respect to notification of medical appointments.” CP 291. On appeal, Kohls does not assign error to Judge Doerty’s finding that she did not provide notice to Kaplan regarding I.K.’s and Z.K.’s appointments. Appellant’s brief, p. 1-2. Unchallenged findings are treated as verities on appeal. Young v. Young, 164 Wn.2d 477, 482 n.2, 191 P.3d 1258 (2008); In re Marriage of Brewer, 137 Wn.2d 756, 766, 979 P.2d 102 (1999). Instead, Kohls argues that “the evidence simply cannot support a finding that [she] violated *any* provision of the parenting plan” because “there is no provision in the parenting plan that requires notification of medical appointments.” Appellant’s brief, p. 30-31.

Kohls argues that the agreed parenting plan does not require notice of non-emergency appointments because no major decision is made at the appointment. She recognizes notice might be necessary, and contempt might be appropriate for failing to give notice, if a major decision is made. Id. at 31, fn. 12. Kohls’ argument necessarily focuses on the nature or

outcome of the non-emergency appointment to determine whether a major decision has occurred requiring joint decision-making. The plain language of the agreed parenting plan does not limit the requirement for joint-decision in this manner.

The agreed parenting plan specifically identifies two classes of health care decisions; emergency and non-emergency. The parties did not agree upon any other classes. CP 19, 21. Each class has its own decision making authority. Kaplan and Kohls each have independent authority to make emergency health care decisions without notice to the other. Id. They do not have the same independent authority regarding non-emergency health care. Non-emergency health care is defined, by agreement, as a major decision, and Kohls and Kaplan are required to make all major decisions jointly. CP 19. All non-emergency health care decisions, including scheduling non-emergency medical appointments, necessarily require notice in order for a joint-decision to occur.

Kohls' argument that notice is not required for non-emergency medical appointments invites this Court to modify the agreed parenting plan, create a new class of health care decisions, i.e. "routine" health care, and exempt those decisions from the joint-decision making. This is what Commissioner Sassaman did, and it is improper. In re Custody of Halls, 126 Wn. App. 599, 606, 109 P.3d 15 (2005) (court abuses its discretion by modifying parenting plan during contempt proceeding without following procedural requirements of RCW 26.09.260); see also Graves v. Duerden, 51 Wn App. 642, 647, 754 P.2d 1027 (1988) (order will not be expanded

beyond the plain meaning of its terms when read in light of the issues and purposes surrounding its entry to determine whether party has violated order).

Joint decision making necessarily includes notice. Without notice of non-emergency medical appointments, joint decision-making simply cannot occur. The decision occurs when the appointment is made. The parent who finds out about the appointment “after the fact” is deprived of the ability to attend the appointment and participate in whatever health care discussion occurs, regardless of the outcome of the appointment. Under Kaplan’s and Kohls’ agreed parenting plan, failing to provide notice of medical appointments plainly violates the joint-decision making requirement for non-emergency health care decisions and can lead to a finding of contempt. See In Re Marriage of Eklund, 143 Wn. App. 207, 213, 177 P.3d 189 (2008) (contempt requires a plain violation of parenting plan).

Kohls complains next about the lack of specificity in Judge Doerty’s order finding her in contempt. She pulls apart each individual statement in Judge Doerty’s order to argue it is “unclear” what provision of the parenting plan was violated and whether multiple violations occurred. Appellant’s Brief, p. 29-30. A contempt finding will be upheld on review if it is supported by any proper basis. Trummell v. Mitchell, 156 Wn.2d 653, 672, 131 P.3d 305 (2006); In re Marriage of Davisson, 131 Wn. App. 220, 224, 126 P.3d 76, rev. denied, 158 Wn.2d 1004, 143 P.3d 828 (2006).

In his written order, Judge Doerty was clearly referring to the joint-decision making requirements of the parenting plan as the basis for the contempt finding. Judge Doerty's comments that "it is not a matter of routine medical appointments" and "it is not a matter of...therapy appointments," were not a disclaimer of any finding of contempt for I.K.'s appointments. Instead, when read as a whole, Judge Doerty's comments were designed to address Kohls' argument, and Commissioner Sassaman's ruling, that notice was not required for non-emergency appointments. See 10/8/10 RP 18-19 (Kohls' revision argument); 07/15/10 RP 9-10 (Commissioner's ruling); CP 212 (order denying contempt).

Judge Doerty's specific comment regarding Z.K.'s appointment also goes toward rejecting the distinction Kohls' attempted to draw between "routine" appointments requiring no notice and other non-emergency health care. CP 291. Judge Doerty specifically notes Kohls own acknowledgment that she unilaterally moved Z.K.'s appointment because of the seriousness of the medical issue. Id. Ultimately, Judge Doerty found "these are serious medical concerns, not routine doctor visits." CP 291. In this context, Judge Doerty recognized the serious nature of *all* of the medical issues for both children, not just Z.K.'s appointment¹⁹.

¹⁹ Even if this Court concluded Judge Doerty's opinion was not specific enough regarding I.K.'s appointments, the order is sufficiently clear to uphold the contempt finding for Z.K.'s appointment. See Eklund, 143 Wn. App. At 213 (multiple incidents constitute pattern of conduct and may merge into single finding of contempt).

There is substantial evidence to support Judge Doerty's finding notice was required, and, absent notice, Kohls was in contempt. Kohls went to great lengths to demonstrate Kaplan did have notice of the childrens' medical appointments from either her or from the medical providers themselves and simply was not interested in participating. CP 122-125. Why would Kohls go to such lengths to demonstrate her efforts to provide Kaplan with notice if she did not believe notice was necessary? The only logical conclusion is that Kohls knew notice was required. In fact, Kohls acknowledged that the issue of notice of the childrens' medical appointments was before the trial court during the 2009 modification trial. CP 160 (Kohls' declaration stating issue of notice was before the trial court but issue of payment was not).

Following the 2009 trial, Judge Doerty found Kohls had violated the joint-decision making provisions of the parenting plan regarding I.K.'s and Z.K.'s medical treatment and that the parenting plan required notice for joint decision-making. CP 398-399 (finding that Kohls intentionally violated joint decision making when selecting health care provider for I.K.), CP 401 (finding that "parenting plan anticipated that the parents share decision making about health care and education"). This Court rejected Kohls' arguments that Judge Doerty's findings were not supported by the evidence during Kaplan II. See Kaplan II, 2010 Wash. App. Lexis 2424 at *18-*26 (noting credibility of witnesses and weight given to contradictory evidence is solely for trial judge) The prior appellate proceedings demonstrate Kohls' acute awareness of Kaplan's

particular interest and desire to be involved in all medical decisions regarding his children²⁰.

Based on this evidence, Judge Doerty properly concluded Kohls' acted in bad faith. CP 292. Despite Kohls' alternate explanations for her actions, Judge Doerty alone weighed the credibility of both parties.

A trial court may weigh the credibility of each party based on sources other than oral testimony. These might include the plausibility of a party's position, consistency with information in the court file and testimony at trial, and affidavits of persons other than the parties.

James, 79 Wn. App at 473. Credibility determinations are not reviewable on appeal. Rideout, 150 Wn.2d at 337; In re Marriage of Woffinden, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982), rev. denied, 99 Wn.2d 1001 (1983). Substantial evidence supports Judge Doerty's decision that notice was required under the plain language of the agreed parenting plan, that Kohls' failed to give notice, and that Kohls' acted in bad faith by doing so. Based on these findings, Judge Doerty properly exercised his discretion and found Kohls in contempt of the joint decision-making requirements of the agreed parenting plan.

²⁰ Pursuant to Judge Doerty's 2009 trial decision, Kaplan advised Kohls was not going to pay for the cost of appointments if Kohls failed to provide him with notice so he could participate as required by the joint decision making provisions of the parenting plan. CP 384, 437. In support of her argument that her enforcement motion was appropriate, Kohls argues she could have brought a motion for contempt against Kaplan because of his deliberate refusal to pay. Appellant's brief, p. 40-41. This argument has no bearing on the issues before this Court as Kohls did not bring a motion for contempt.

*2. Judge Doerty Appropriately Imposed Sanctions
Designed To Obtain Kohls' Future Compliance With
The Agreed Parenting Plan.*

A contempt sanction is within the sound discretion of the trial, and will not be disturbed on appeal absent a showing of an abuse of discretion. Schuster v. Schuster, 90 Wn.2d 626, 630, 585 P.2d 130 (1978); In re Marriage of Humphreys, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995). Here, Kohls argues Judge Doerty abused his discretion by requiring her to notify Kaplan of all medical appointments in the future, and requiring her to pay for all uninsured charges (past or future) for which Kaplan did not have notice of as required. Appellant's brief, page 38²¹.

As Kohls' recognizes, as part of a contempt sanction, the trial court has the authority to enter remedial sanctions including an "order designed to ensure compliance with a prior order of the court." RCW 7.21.030(2)(c). In her brief, Kohls argues that her "promise" to comply with the parenting plan should have been sufficient to purge the contempt and that further sanctions were punitive and excessive. Appellant's brief, p. 37-38. However,

where a promise to comply is demonstrably unreliable, the court can insist on more than mere words of promise as a means of purging contempt. To conclude otherwise would render the statutes unenforceable and reduce the court to the level of beggar.

In re Interests of M.B., 101 Wn. App. 425, 448, 3 P.3d 780 (2000), rev. denied, In re Interests of Hansen, 142 Wn.2d 1027, 21 P.3d 1149 (2001).

²¹ Kohls does not challenge the requirement regarding having access to and checking her email daily. CP 333.

Based on the evidence, including the parties' historical litigation over the issue of medical care for their children, Judge Doerty properly determined Kohls' promise to comply with the parenting plan in the future was "demonstrably unreliable." See CP 291-292 (Kohls' false statements are manifestation of her determination to make Kaplan parent her way). Thus Judge Doerty imposed conditions "aimed at reassuring the court that compliance with the original order will indeed be forthcoming." In re M.B., 101 Wn. App. at 450.

Judge Doerty's additional conditions were appropriately remedial, within Kohls' power to comply, and reasonably related to the cause or nature of Kohls' contempt. Id. Requiring Kohls to provide Kaplan with notice for all future appointments, and relieving Kaplan of his obligation to pay for any costs (past or future) associated with any appointment he did not have notice of, is specifically designed to ensure compliance with the language of the parenting plan requiring joint decision-making for non-emergency health care.

To purge the contempt, all Kohls must do is follow the original parenting plan, and provide Kaplan notice as already required²². Judge Doerty's conditions do not amount to a permanent modification of the parenting plan as Kohls already has the obligation to provide notice. As discussed at pages 28-30 herein, non-emergency health care, as defined by

²² Kohls' argues this will "engender massive litigation on Kaplan's part" based on Kohls' claims that Kaplan had notice of the appointments because of her efforts to ensure the physicians sent notice to Kaplan directly. Appellant's brief, p. 39, fn. 13. She claims Judge Doerty did not "resolve this issue." Judge Doerty necessarily rejected Kohls' claim that she ensured Kaplan had notice by finding her in contempt. CP 291-92.

the plain language of the parties agreed parenting plan, necessarily includes any medical appointment. CP 19. As such, all of Kohls' arguments regarding the excessive nature of the sanctions and the lack of an appropriate purging mechanism fail.

C. Judge Doerty Properly Exercised His Discretion And Found Kohls In Contempt For Failing To Pay Her Proportional Share Of Educational Expenses As Required By The Order Of Child Support.

Judge Doerty also found Kohls' in contempt for failing to comply with the order of child support requiring her to pay 28% of the childrens' educational expenses. CP 291 (generally revising 7/15/10 order on contempt); CP 333 (specifically revising 7/15/10 order regarding contempt to address this). This court can uphold a contempt finding upon any proper basis. Trummell, 156 Wn.2d at 672.

Paragraph 3.15 of the parties agreed order of child support provides Kohls shall pay 18% of "educational expenses, to the extent [Kaplan] proves he has no funds for this purpose paid by his father." The same paragraph provides "[f]uture tuition is prospectively to be determined by arbitration with Larry Besk per the Parenting Plan." CP 28. On appeal, Kohls argues the evidence is insufficient to conclude Kaplan did not have funds from his father for this purpose, despite Kaplan's evidence to the contrary. Appellant's brief, p. 26-27; see CP 6, 126, 151, 443-44, 456. Judge Doerty weighed the evidence, and rejected Kohls' argument. An appellate court cannot reweigh the evidence. Burrill, 113 Wn. App. at 868.

Kohls also argues the order is ambiguous regarding the term “educational expenses” because Kaplan promised to pay all costs for the childrens’ education in his earlier “arbitration memorandum.”²³ Appellant’s brief, p. 27-28; CP 125, 149. Kaplan maintained he agreed to pay for all tuition, not for all educational expenses, consistent with the existing order of child support. CP 6-7, 443. Judge Doerty weighed the evidence, and found “Kaplan’s agreement to pay private school tuition does not act as a modification absolving Ms. Kohls of responsibility for all other educational expenses.” CP 333. This Court will not reweigh the evidence on appeal. Burrill, 113 Wn. App. at 868. Judge Doerty’s decision to hold Kohls’ in contempt for failing to pay these expenses is proper²⁴.

D. Judge Doerty Properly Denied Kohls’ Motion To Enforce Kaplan’s Child Support Obligation On Behalf Of A Third Party, CUMG.

A trial court’s decision regarding enforcement, like contempt, is reviewed for an abuse of discretion. Shafer v. Bloomer, 94 Wn. App. 246, 250, 973 P.2d 1062 (1999). Here, Kohls sought to enforce the order of child support on behalf of a third-party, CUMG, citing RCW 26.18.160. CP 91-92. Judge Doerty denied Kohls’ motion, found it to be retaliatory, and awarded Kaplan attorney fees for having to respond. CP 333-334.

²³ The record does not contain an arbitration decision or any related order.

²⁴ Kohls also argues this issue was not properly before Judge Doerty following Kaplan’s motion for reconsideration of his first revision motion. Appellant’s brief, p. 28-29. This issue was properly before Judge Doerty on revision, and both parties addressed it during argument. 10/8/10 RP 11, 13, 20.

On appeal, Kohls' summarily argues "the trial court improperly denied [her] motion for payment of medical expenses." Appellant's brief, p. 39. The only legal analysis Kohls' provides attacks Judge Doerty's decision on procedural grounds. Id., p. 39-44. Kohls argues the decision was "improper" because Judge Doerty considered Kaplan's supplemental declaration filed on October 15, 2010. CP 283-290. This declaration was not part of the record before Commissioner Sassaman on either July 15, 2010, or September 15, 2010. Appellant's brief, p. 41-42. Judge Doerty's decision denying Kohls' motion relied in part on Kaplan's supplemental declaration. CP 379.

It is error for a superior court to consider additional evidence during a revision hearing under RCW 2.24.050. In re Marriage of Moody, 137 Wn.2d 979, 992-993, 976 P.2d 1240 (1999). To the extent Judge Doerty erred by considering Kaplan's supplemental declaration, Kohls invited the error. In her response declaration, Kohls' did not object to Kaplan's new evidence²⁵. Instead, Kohls provided her own new evidence to specifically rebut Kaplan's new evidence. CP 298-315. Judge Doerty considered both Kaplan's new evidence and Kohls' new evidence when denying Kohls' motion. See CP 379 (order on reconsideration referencing both Kaplan's declaration and the "correspondence from CUMG (submitted by Kohls)"). Under the doctrine of invited error, a party cannot complain, on appeal, about an error that he affirmatively participated in

²⁵ This Court does not have to consider an issue that was not raised in the trial court. RAP 2.5(a).

creating. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995).

Kohls provides no other legal analysis to this Court in support of her argument Judge Doerty's decision was "improper." This Court can decline to review errors unsupported by citation to authority or meaningful analysis. State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Notwithstanding, Judge Doerty's decision was a proper exercise of his discretion. This Court cannot overlook Kohls "is not asking to receive money from Kaplan; she merely wants him to pay what he owes" to CUMG. Appellant's brief, p. 44.

First, the evidence before Judge Doerty shows that Kaplan owes nothing to CUMG. CP 286-288; 311-313²⁶. Second, it is questionable whether even Kohls has standing to bring this enforcement action. RCW 26.18.170 provides:

[i]f a parent required to provide medical support fails to pay his or her portion, determined under RCW 26.19.080, of any premium, deductible, copay, or uninsured medical expense incurred on behalf of the child, pursuant to a child support order, the department or the parent seeking reimbursement of medical expenses may enforce collection of the obligated parent's portion of the premium, deductible, copay, or uninsured medical expense incurred on behalf of the child.

²⁶ The billing statement for account ending 2293 shows a balance owing of \$137.20. CP 289-290, 314-315. Based on Judge Doerty's decision regarding contempt, Kaplan is not responsible for these costs unless he had notice. One of the appointments referenced on this billing statement is the November 24, 2009, appointment Kaplan complained of in his motion for contempt. CP 5. The other is for a April 27, 2010, appointment that was part of Kohls' motion for enforcement. CP 94, 694, 698. The issue of notice for the April appointment was not addressed.

RCW 26.18.170(17) (emphasis added). By her own admission, Kohls does not seek reimbursement from Kaplan; she seeks payment for a third party who was not, and is not, interested in obtaining payment. Commissioner Sassaman recognized this problem when she noted Kohls “is asking this court to enforce a or to collect a debt to a 3rd party.” 7/15/10 RP 22.

Kohls justifies her behavior with the same speculative argument she provided to Commissioner Sassaman – that CUMG would stop providing care if the debt was not paid. Appellant’s brief, p. 43-44. She provides no citation to the record for this argument, and she cannot because there is no support in the record. Under these circumstances, Judge Doerty’s discretionary decision to deny Kohls’ motion for enforcement was entirely proper.

E. Judge Doerty Properly Ordered Kohls To Pay Kaplan’s Attorney Fees After Finding Kohls In Contempt And Finding Kohls’ Motion To Enforce Was Retaliatory.

1. After Finding Kohls Violated The Joint Decision Making Provisions Of The Agreed Parenting Plan In Bad Faith, Judge Doerty Was Required To Award Kaplan His Attorney Fees Under RCW 26.09.160.

Upon finding a parent violated a parenting plan in bad faith, a court “shall order the parent to pay, to the moving party, all court costs and reasonable attorneys’ fees incurred as a result of the noncompliance.” RCW 26.09.160(2)(b)(ii). An order of fees under this section is mandatory. Eklund, 143 Wn. App. at 215, 218. The amount of attorney

fees awarded is a matter of the trial court's discretion and must relate to the costs associated with the current contempt proceeding. Id. at 218 (citing In re Parentage of Schroeder, 106 Wn. App. 343, 353-54, 22 P.3d 1280 (2001)).

Kohls argues the fees awarded to Kaplan were unreasonable *solely* because Judge Doerty only found Kohls in contempt for Z.K.'s single appointment. Appellant's brief, p. 45. As discussed at pages 30-32 herein, this interpretation of Judge Doerty's decision is incorrect. Even if Kohls' argument were correct, she cites no authority for this Court to conclude that attorney fees should somehow be limited based on the number of contempt findings in a single motion. Kaplan's motion was granted, and fees must be awarded. See Eklund, 143 Wn. App. at 214 (multiple instances of contempt collapsed into single contempt finding required award of attorney fees).

Kohls does not assign error to Judge Doerty's finding that Kaplan's costs associated with the current contempt proceeding included

filing and arguing his motion for contempt; responding to [Kohls'] motion for reconsideration of the Commissioner's 7/15/10 Order, responding to [Kohls'] motion to change of judge, corresponding to the court to obtain an order re the withdrawn motion for reconsideration...preparing and arguing his motion for revision, and preparing this motion for reconsideration.

CP 380. This unchallenged finding is a verity on appeal. Young, 164 Wn.2d at 482 n.2. This finding amply supports Judge Doerty's

discretionary decision to award Kaplan \$13,435.33 in fees in connection his contempt motion.

2. After Denying Kohls' Motion For Enforcement And Finding It Was Retaliatory, Judge Doerty Was Required To Award Kaplan His Attorney Fees Under RCW 26.18.160.

Judge Doerty's fee award of \$13,435.33 includes fees Kaplan incurred responding to Kohls' motion for enforcement, including fees for responding to appearing at the presentation hearing on September 17, 2010. CP 380. Kohls assigns error to Judge Doerty's finding that Kohls' motion was "retaliatory." Appellant's brief, p. 2. This finding is supported by substantial evidence.

Judge Doerty was not the only jurist who labeled Kohls' motion retaliatory. See 7/15/10 RP 20 (Commissioner Sassaman opines is retaliatory and filed in response to Kaplan's contempt motion), 7/15/10 RP 25 (Commissioner Sassaman notes motion is brought in bad faith). Kohls apparently believed Kaplan's payments to CUMG were an outstanding issue during or shortly following the 2009 modification trial. See CP 160 (Kohls' declaration states payments for medical expenses were not addressed during trial only issue of notice). Yet Kohls took no action until Kaplan filed his motion for contempt on June 2, 2010. CUMG billing records show that, as of June 2, 2010, the charges had been written off a second time. CP 695-697 (showing final write off on March 12, 2010); CP 698 (showing write offs on May 3 and June 15, 2010). However,

CUMG reinstated the balance, at Kohls' request, on June 30, 2010 – one day before Kohls brought her motion for enforcement. Id.

It is undisputed CUMG was not seeking payment from Kohls when she filed her motion to enforce, and was not seeking payment from Kohls at any time during the proceedings. It is undisputed CUMG continued to provide medical care to I.K. and Z.K.. In the new evidence Kohls provided to Judge Doerty, she provides a billing statement showing charges for an appointment for I.K. that occurred on September 22, 2010. CP 314. Despite the lack of disruption to the childrens' treatment or a financial impact to Kohls, she recklessly drug Kaplan into court, and then kept him there, tenaciously obtaining declaration after declaration from CUMG staff without providing them with full disclosure about Kaplan's belief no debt was owed. CP 283-284, 574²⁷. Substantial evidence supports Judge Doerty's finding Kohls' motion was retaliatory²⁸.

Based on this finding, Judge Doerty properly ordered Kohls to pay Kaplan's attorney fees in connection with defending against Kohls' motion for enforcement. Kohls brought her motion under RCW 26.18.160. CP 91. This statute provides:

²⁷ Kaplan did file a lawsuit against CUMG. CP 574, 587-592. On January 28, 2011, CUMG settled that lawsuit in Kaplan's favor (King County Cause No. 10-2-39919-4 SEA).

²⁸ Kohls other original requests were also denied. Commissioner Sassaman found that Kohls' decision not to deposit Kaplan's check was "silly" and "in furtherance of the conflict." 7/15/10 RP 21. Commissioner Sassaman also rejected Kohls' argument that the 2008 arbitration decision could not be enforced finding Kohls did not raise sufficient arguments to avoid the fact she failed to file a request for a trial de novo. 7/15/10 RP 11.

[i]n any action to enforce a support or maintenance order under this chapter, the prevailing party is entitled to a recovery of costs, including an award for reasonable attorney fees. An obligor may not be considered a prevailing party under this section unless the obligee has acted in bad faith in connection with the proceeding in question.

RCW 26.18.160. Kohls acted in bad faith by bringing her retaliatory motion for support. Kaplan prevailed. An award of fees to a prevailing party under this statute is mandatory. In re Marriage of Cummings, 101 Wn. App. 230, 235, 6 P.3d 19, review denied, 141 Wn.2d 1030, 11 P.3d 825 (2000); In re Marriage of Hunter, 52 Wn. App. 265, 273, 758 P.2d 1019 (1988); see also CP 224, 466 (Kohls' declarations noting that attorney fees award is mandatory for prevailing party under this statute). Judge Doerty properly awarded Kaplan his attorney fees.

F. This Court Should Decline To Exercise Its Discretion To Award Kohls Fees On Appeal Under RCW 26.09.140 And Instead Grant Kaplan's Request For Mandatory Fees Under to RCW 26.09.160 and RCW 26.18.160.

Kohls requests attorney fees on appeal under RAP 18.1 and RCW 26.09.140. Appellant's brief, p. 48. RCW 26.09.140 allows an appellate court, in its discretion, to order a party to pay the other party the cost of maintaining an appeal based on the financial circumstances of the parties. Rideout, 150 Wn.2d 357-58. This Court should decline to exercise its discretion in Kohls favor under the facts and circumstances here. Id. (court declines to exercise its discretion and award fees to party who violated parenting plan in bad faith).

Kaplan, however, is entitled costs and fees on appeal regardless of the financial circumstances of the parties. RAP 18.1, RCW 26.09.160(2)(b)(ii), RCW 26.18.160. Because Kohls failed to comply with the joint-decision making provisions in the parenting plan in bad faith, Kaplan is entitled to not only his fees below, but his fees on appeal. Eklund, 143 Wn. App. at 218-19 (citing RCW 26.09.160(2)(b)(ii); Rideout, 150 Wn.2d at 359). RCW 26.18.160 similarly requires this Court award Kaplan, as a prevailing party, his costs and fees on appeal. Hunter, 52 Wn. App. at 274 n.5 (distinguishing RCW 26.18.160 from RCW 26.09.140 on the ground that it does not require a showing of one party's need or the other's ability to pay).

VII. CONCLUSION.

For the foregoing reasons, Respondent, Kenneth Kaplan respectfully requests this Court affirm Judge Doerty's fact-based discretionary decisions holding Kohls in contempt, denying Kohls' retaliatory motion to enforce the order of child, and awarding Kaplan fees. Kaplan also requests this Court award him costs and attorney fees on appeal under RAP 18.1, RCW 26.09.160, and RCW 26.018.160.

Respectfully submitted this 17th day of June, 2011.

BREWE LAYMAN
Attorneys at Law
A Professional Service Corporation

By



Karen D. Moore, WSBA 21328
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 17th day of June, 2011, I caused a true and correct original and one copy of the foregoing document to be delivered to the following:

Richard D. Johnson
Court Administrator
The Court of Appeals of the State of Washington
Division I
One Union Square
600 University Street
Seattle, Washington 98101-4170
BY: US Mail

I also caused a true and correct copy of the foregoing document to be delivered to the following:

David B. Zuckerman
Attorney to Appellant
1300 Hoge Building
705 Second Ave
Seattle, Washington 98104
BY: Email to david@davidzuckermanlaw.com
ABC Messenger

Dated this 17th day of June, 2011 at Everett, Washington.



Karen D. Moore, WSBA 21328