

ORIGINAL

NO. 68052-8-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

MELISSA COOLEY,

Appellant,

v.

ARMANI SADETTANH,

Respondent.

---

BRIEF OF RESPONDENT

---

ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR KING COUNTY

---

Attorneys for Respondent

Andrea L. Schiers WSBA # 38383  
Curran Law Firm P.S.  
555 West Smith Street  
P.O. Box 140  
Kent, Washington 98035  
(253) 852-2345

2012 JUL -6 PM 1:53  
COURT OF APPEALS  
STATE OF WASHINGTON  
JL

## Table of Contents

I.	RESPONDENT’S STATEMENT OF THE CASE.....	1
	A. Introduction.....	1
	B. Issues Presented.....	1
	1. Whether the superior court abused its discretion in not finding Sadettanh in contempt when the evidence did not demonstrate either a plain or an intentional violation of a court order.....	1
	2. Whether Sadettanh is entitled to attorney’s fees.....	1
	C. Facts.....	2
	1. <u>Background</u> .....	2
	2. <u>Collecting the Support Payments</u> .....	2
	3. <u>The 2009 and 2010 Tax Exemptions</u> .....	4
	4. <u>The Contempt Motion</u> .....	5
	5. <u>The Revision Motion</u> .....	7
II.	ARGUMENT.....	9
	A. The Standard of Review.....	10
	1. <u>The superior court’s review on revision</u> .....	10
	2. <u>This Court’s review of the superior court</u> .....	11
	B. The superior court reasonably decided not to find Sadettanh in contempt.....	12
	1. <u>The law requires a plain and intentional violation to find contempt</u> .....	12
	2. <u>The facts do not show a plain violation of the order</u> .....	13

3.	<u>The facts do not show an intentional violation of the order.</u> .....	15
C.	Cooley’s arguments to the contrary fail.....	17
1.	<u>The amount of any alleged arrearage is irrelevant.</u> .....	17
2.	<u>There was no “free pass.”</u> .....	18
3.	<u>The meaning of the word “current” is not at issue.</u> .....	19
D.	Motion to strike portions of the Brief of Appellant regarding the 2009 tax exemption.....	22
E.	Sadettanh is entitled to attorney’s fees.....	24
III.	CONCLUSION.....	26

**TABLE OF AUTHORITIES**

**CASES**

*Andrus v. State Dept. of Transportation*, 128 Wn.App. 895, 117 P.2d 1152 (2005), *review denied* 157 Wn.2d 1005, 136 P.3d 759 (2006).....25

*Burrill v. Burrill*, 113 Wn. App. 863, 56 P.3d 993 (2002), *review denied*, 149 Wn.2d 1007, 67 P.3d 1096 (2003).....12

*Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn. App. 542, 13 P.3d 240 (2000), *review denied*, 143 Wn.2d 1024, 29 P.3d 717 (2001).....18

*Holiday v. City of Moses Lake*, 157 Wn. App. 347, 236 P.3d 981 (2010), *review denied*, 170 Wn.2d 1023, 245P.3d 774 (2011).....13

*In re Dependency of BSS*, 56 Wn. App. 169, 782 P.2d 1100 (1989), *review denied*, 791 Wn.2d 536, 791 P.2d 536 (1990).....10

*In re Estate of Palmer*, 145 Wn. App. 249, 187 P.3d 758 (2008).....11, 16

*In re Estate of Smaldino*, 151 Wn. App. 356, 212 P.3d 579 (2009), *review denied*, 168 Wn.2d 1033, 230 P.3d 1061 (2010).....11

*In re Marriage of Dodd*, 120 Wn. App. 638, 86 P.3d 801 (2004).....10

*In re Marriage of Humphreys*, 79 Wn. App. 596, 903 P.2d 1012 (1995).....13

*In re Marriage of James*, 79 Wn. App. 436, 903 P.2d 470 (1995).....11, 13

*In re Marriage of Littlefield*, 133 Wn.2d 39, 940 P.2d 1362 (1997).....11

*In re Marriage of Moody*, 137 Wn.2d 979, 976 P.2d 1240, *reconsideration denied* (1999).....10

*In re Marriage of Rideout*, 150 Wn.2d 337, 77 P.3d 1174 (2003).....11, 16

*In re Settlement/Guardianship of AGM*, 154 Wn. App. 58, 223 P.3d 1276 (2010).....24, 26

*Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 108 P.3d 1273 (2005).....18

<i>Johnson v. Jones</i> , 91 Wn. App. 127, 955 P.2d 826 (1998).....	26
<i>Kenneth W. Brooks Trust v. Pacific Media LLC</i> , 111 Wn. App. 393, 44 P.3d 938 (2002).....	18
<i>Mahoney v. Shinpoch</i> , 107 Wn.2d 679, 732 P.2d 510 (1987).....	25
<i>Mangan v. Mangan</i> , 227 Ariz. 346, 258 P.3d 164 (2011).....	18
<i>Millers Cas. Ins. Co. of Texas v. Briggs</i> , 100 Wn.2d 9, 665 P.2d 887 (1983) .....	25
<i>Pope v. Larmey</i> , 2010 WL 363833.....	18
<i>Richardson on Behalf of Lanier</i> , 134 Misc.2d 148, 509 N.Y.S.2d 759 (1986).....	20
<i>Rohr v. Williams</i> , 2007 WL 4696807.....	20, 21
<i>Rzemieniewska-Bugnacki v. Bugnacki</i> , 51 A.D.3d 1029, 859 N.Y.S. 2d 467 (2008).....	20
<i>Saviano v. Westport Amusements, Inc.</i> , 144 Wn. App. 72, 180 P.3d 874 (2008).....	24
<i>Sherry v. Financial Indem. Co.</i> , 160 Wn.2d 611, 160 P.3d 31 (2007).....	23
<i>Smith v. Whatcom County Dist. Court</i> , 147 Wn.2d 98, 52 P.3d 485, (2002).....	13
<i>Sorrel v. Eagle Healthcare, Inc.</i> , 110 Wn. App. 290, 38 P.3d 1024, review denied, 147 Wn.2d 1016, 56 P.3d 992 (2002).....	23
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).....	11
<i>Steinbock v. Ferry County Public Utility Dist. No. 1</i> , 165 Wn. App. 479, 269 P.3d 275 (2011).....	19
<i>Young v. Young</i> , 164 Wn.2d 477, 191 P.3d 1258 (2008).....	12, 16
<b>STATUTES</b>	
RCW 2.24.050.....	10
RCW 7.21.....	12
RCW 7.21.010(1).....	12, 13

RCW 7.21.030(3).....	6
RCW 26.09.160(2)(b)(iii).....	6
RCW 26.18.050(1).....	12
RCW 26.18.160.....	6
RCW 26.23.060(2) .....	2
RCW 26.23.060(3) .....	2
RCW 26.23.060(7).....	2, 3

**REGULATIONS**

WAC 388-14A-4030(1).....	2
WAC 388-14A-5001(3).....	3

**COURT RULES**

GR 14.1.....	18
GR 14.1(b).....	18, 20
RAP 2.5(a).....	23
RAP 2.5(a)(3).....	24
RAP 10.3(a)(5).....	23
RAP 10.3(a)(6).....	24
RAP 10.4(h).....	18
RAP 18.9(a).....	25

**OTHER AUTHORITIES**

AZ Rules of Civil Appellate Procedure 28(c).....	18
Ohio Supreme Court Rules for the Reporting of Opinions, Rule 4(B).....	20

**I. RESPONDENT’S STATEMENT OF THE CASE**

**A. Introduction**

This case is about contempt – intentional disobedience of a lawful court order. Armani Sadettanh believed he was complying with the order of child support at issue here; by definition, then, he could not have been intentionally violating it. His former spouse, Melissa Cooley, offered no evidence to the contrary in the superior court proceedings below. After weighing the evidence and applying the relevant legal standard, a commissioner and then a superior court judge found Sadettanh did not intentionally violate the support order and so declined to find him in contempt. That decision enjoys ample support from the record and rests securely in the superior court’s discretion. It should be affirmed and Sadettanh awarded the attorney’s fees he incurred on appeal.

**B. Issues Presented**

1. Whether the superior court abused its discretion in not finding Sadettanh in contempt when the evidence did not demonstrate either a plain or an intentional violation of a court order.
2. Whether Sadettanh is entitled to attorney’s fees.

//

//

## **C. Facts**

### **1. Background**

In 2008, the parties' marriage dissolved and the superior court entered an order of child support as to their son. Clerk's Papers (CP) 1-12. The order directs Sadettanh to pay Cooley \$476.32 per month. CP 3. She requested the state Division of Child Support (DCS) administer and enforce the support payments. CP 4 at ¶3.11; CP 7. The order also governs how the parties claim income tax exemptions regarding their son each year. Specifically, the order provides that Cooley claims the child in odd years, and Sadettanh claims the child in even years "so long as he is current in his child support obligation in that year." CP 5 at ¶3.17.

### **2. Collecting the Support Payments**

Pursuant to the order, and Cooley's request for full support enforcement, DCS collects the support amount from Sadettanh's pay. CP 7; CP 41 at ¶6; WAC 388-14A-4030(1). DCS sends a notice of payroll deduction to his employer and it, in turn, is required to "deduct each pay period the amount stated in the notice divided by the number of pay periods per month." RCW 26.23.060(2), (3). Then, his employer remits "proper amounts to the Washington state support registry within seven working days of the date the earnings are payable to the responsible parent." RCW

26.23.060(7). DCS considers the date it receives the funds from the employer as the date the funds are collected, regardless of when the funds were withheld from Sadettanh's pay. WAC 388-14A-5001(3).

The DCS payment records Cooley submitted to the superior court demonstrate how the agency applies payments it receives from Sadettanh's employer. CP 147-151. For example, the record reflects that DCS received a payment of \$238.16 from Sadettanh's employer on January 3, 2011. CP 147. That amount was withheld from his pay some time before that date, in fact, as many as seven working days before that date. RCW 26.23.060(7). January 3, 2011 was a Monday. The first possible working day immediately prior to that was Friday, December 31, 2010. That is, this \$238.16 payment DCS received in January 2011 was necessarily withheld from Sadettanh's pay in December 2010.

This process leaves the acts of collecting and transmitting the support obligation to DCS and the employer, and largely out of Sadettanh's control. DCS automatically collects portions of the monthly amount Sadettanh owes from each of his paychecks. CP 41 at ¶6; Report of Proceedings (RP) Nov. 18, 2011 at 12-13. The appearance of arrearages on the payment history reflects the difference between the amount owed and the amount DCS has

collected thus far in any given month; it does not necessarily reflect an amount Sadettanh has deliberately failed to pay.

3. The 2009 and 2010 Tax Exemptions

After their divorce in 2008, the parties briefly reconciled and began living together again. CP 40 at ¶2. They lived together throughout 2009. *Id.* During that time, Sadettanh paid the majority of the household expenses; he also provided the majority of the support for their son and for Cooley's two other children who also lived in the household. *Id.* Based on these unique circumstances, Sadettanh assumed he could take the income tax exemption as to the parties' son for 2009, even though he knew the child support order entitles Cooley to the exemption in odd years. *Id.*; CP 5 at ¶3.17. Later, after consulting with counsel, Sadettanh learned Cooley was entitled to the tax exemption for that year, regardless of his belief based on those particular circumstances. CP 40 at ¶3.

For 2010, as an even year, Sadettanh was entitled to claim the parties' child so long as he was "current in his child support obligation in that year." CP 5 at ¶3.17. Because DCS collected portions of the support amount from his employer through each of his paychecks, Sadettanh understood that the agency collected enough funds to maintain his support obligation. CP 41 at ¶6; RP Nov. 18, 2011 at 12, 15. He believed his obligation was met at the end

of 2010, and that he was thus entitled to take the exemption for that tax year. CP 41 at ¶6; CP 108, 110. In contrast to the 2009 exemption, when he knew he was departing from the terms of the support order, Sadettanh believed he was following the order when took the 2010 exemption.

4. The Contempt Motion

In August 2011, Cooley moved for an order to show cause why Sadettanh should not be found in contempt for, according to Cooley, improperly taking the income tax exemption for their son in 2009 and 2010. CP 15-17.<sup>1</sup> In response, Sadettanh explained the circumstances surrounding his taking the 2009 exemption as described above. CP 40-41. As to 2010, he also maintained his understanding that DCS collected sufficient funds from each paycheck to maintain his support obligation and that he believed his obligation was current for that year when he took the exemption. CP 41 at ¶6. He also noted the DCS records Cooley provided to show otherwise appeared to be ambiguous on that point. *Id.*

On September 19, 2011, Commissioner Sassaman heard the motion. As to the 2009 exemption, the court found Sadettanh in contempt for claiming the child in Cooley's year. CP 69-73. It entered a judgment against

---

<sup>1</sup> Initially, Cooley's motion also sought to find Sadettanh in contempt for taking the exemption in 2008, but that claim was waived at the hearing, and so is not before this Court. CP 111, 113.

him for nearly \$3,400.00, which comprised the exemption amount Cooley would have received, plus interest, attorneys' fees, and a civil penalty. CP 69.<sup>2</sup> Sadettanh satisfied that judgment in full. RP Nov. 18, 2011 at 11.

The court did not find Sadettanh in contempt for taking the 2010 exemption. CP 70 at ¶2.1; CP 72 at ¶3.11. In the first place, the court could not find that he had violated the order because it could not conclude whether his payments were behind at the end of 2010. It denied relief for that year because Sadettanh "may or may not have been behind" then. CP 72 at ¶3.11.

In its oral ruling, the court explained:

... there is some question as to whether or not he paid and was timely, or he didn't pay and had an arrearage, because there is a delay from when payments are received to when they show up on the log for the Division of Child Support. So I am going to deny the request for a finding of contempt in regards to 2010. ...

[Sadettanh] is on notice, however, after this hearing. He has the responsibility to assure that he is fully paid as of the end of the year, and the mother's going to be watching this closely. Now, he knows he can't just rely on the records of DCS. He needs to be on top of this or he will not be entitled to the exception [sic] in future years.

CP 115-16.

---

<sup>2</sup> In its oral ruling, the court explained this penalty is "mandatory ... when there's a finding of contempt[.]" CP 114. This is true when the contempt stems from a violation of a parenting plan. RCW 26.09.160(2)(b)(iii). However, the statute governing costs related to enforcement of child support orders contains no such mandatory penalty. RCW 26.18.160. Further, the contempt statute contains no such requirement, and makes the award even of attorneys' fees discretionary. RCW 7.21.030(3). Nonetheless, Sadettanh is not cross-appealing the civil penalty issue.

The court entered a written finding that Sadettanh had not intentionally failed to comply with the child support order for that year. CP 70 at ¶2.1. Cooley assigns no error to that finding. *See* Br. of Appellant at 2-3.

5. The Revision Motion

Cooley moved to revise the commissioner's order, and Superior Court Judge Darvas heard the motion on November 18, 2011. The superior court noted it reviewed *de novo* the materials submitted to the commissioner, as well as the transcript of the original contempt hearing, and considered counsels' arguments. CP 134; RP Nov. 18, 2011 at 3, 21.

The court noted it was required to find a "willful" violation of the support order to find Sadettanh in contempt, and that the DCS payment records Cooley submitted were "really confusing." RP Nov. 18, 2011 at 6, 8. Counsel explained the process DCS used to collect the support payments as follows:

[COUNSEL FOR SADETTANH]: ... So he doesn't send it in; it's actually taken out of his pay as a way of assignment.

THE COURT: They just kind of grab the amount that they think they should be grabbing?

[COUNSEL FOR SADETTANH]: Right.

THE COURT: Okay.

[COUNSEL FOR SADETTANH]: And they determined, based on the schedule that they have, how much they think

they need to get from every paycheck in order to keep the support amount current.

RP Nov. 18, 2011 at 12-13.

Counsel further explained the DCS payment history revealed that Sadettanh had paid more in 2010 than the full support amount due for that year. CP 147-151; RP Nov. 18, 2011 at 12-16. The following table shows what DCS collected throughout the year compared to the monthly obligation:

<b>PAYMENT DATE</b>	<b>AMOUNT PAID</b>	<b>MONTHLY SUPPORT AMOUNT</b>
Jan-10	\$552.50	\$476.32
Feb-10	\$1,511.05	\$476.32
Mar-10	\$439.68	\$476.32
Apr-10	\$439.68	\$476.32
May-10	\$439.68	\$476.32
Jun-10	\$586.24	\$476.32
Jul-10	\$476.32	\$476.32
Aug-10	\$476.32	\$476.32
Sep-10	\$439.68	\$476.32
Oct-10	\$439.68	\$476.32
Nov-10	\$439.68	\$476.32
Dec-10	\$458.00	\$476.32
<b>TOTAL</b>	<b>\$6,698.51</b>	<b>\$ 5,715.84</b>
		(Difference of \$982.67)

CP 147-148, 150-51.

The superior court noted the “varying amounts” of the payments reflected on the payment history, and counsel explained:

[COUNSEL FOR SADETTANH]: And that’s pursuant to whatever the Division of Child Support tells his employer to

withhold from his pay and send to them. So he didn't know that at the end of 2010 it appeared from his case payment history that, in fact, there was a small arrearage. ... [I]t wasn't a knowing and willful violation.

RP Nov. 18, 2011 at 16-17.

The superior court agreed. In its oral ruling, the court explained:

... I don't believe that I can find a knowing and willful violation of the court order in the father ... claiming the tax exemption for the child in 2010. I don't have any reason to believe that he did not have a good faith belief that he could do so[.]

*Id.* at 20.

Accordingly, the court denied the motion to revise. CP 134-35.

Cooley now appeals.

## **II. ARGUMENT**

To prove contempt, the moving party must show a plain and intentional violation of a court order. The evidence presented to the superior court demonstrated neither. It could not find that a violation occurred. Nor could it find that Sadettanh intentionally violated the child support order. To the contrary, he understood he was complying with the order when he claimed the 2010 tax exemption. A fair-minded person could believe his testimony. The record reflects that the superior court weighed the evidence, applied the relevant legal standard, and found in favor of Sadettanh. The court's findings enjoy substantial support from the evidence, and its

conclusion not to find Sadettanh in contempt reasonably followed as well within its discretion. The decision should be affirmed.

**A. The Standard of Review**

1. The superior court's review on revision.

The acts and proceedings of court commissioners are subject to revision by the superior court. RCW 2.24.050. Where, as here, “the evidence before the commissioner did not include live testimony, then the superior court judge’s review of the record is *de novo*.” *In re Marriage of Dodd*, 120 Wn. App. 638, 643, 86 P.3d 801 (2004)(quoting *In re Marriage of Moody*, 137 Wn.2d 979, 993, 976 P.2d 1240, *reconsideration denied* (1999)) (internal quotations omitted). Here, the superior court noted it employed the *de novo* standard and reviewed the entire record before the commissioner. CP 134; RP Nov. 18, 2011 at 3, 21.

When the superior court makes independent findings and conclusions, the revision order supersedes the commissioner’s decision. *Dodd*, 120 Wn. App. at 644. However, when the superior court denies a motion to revise, the commissioner’s decision remains unchanged. *In re Dependency of BSS*, 56 Wn. App. 169, 170-71, 782 P.2d 1100 (1989), *review denied*, 791 Wn.2d 536 (1990). In that situation, the commissioner’s findings, conclusions, and order become those of the superior court. *Id.* That is the case here; the

commissioner's decision remained unchanged on revision and became that of the superior court.

2. This Court's review of the superior court.

An appellate court reviews a trial court's decision in a contempt proceeding for an abuse of discretion. *In re Estates of Smaldino*, 151 Wn. App. 356, 364, 212 P.3d 579 (2009), *review denied*, 168 Wn.2d 1033, 230 P.3d 1061 (2010); *In re Marriage of James*, 79 Wn. App. 436, 439-40, 903 P.2d 470 (1995). A trial court abuses its discretion when its decision is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Brown*, 132 Wn.2d 529, 569, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). A trial court's decision

is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

An appellate court reviews a trial court's challenged factual findings regarding contempt for substantial evidence. *In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003). "Substantial evidence exists if a rational, fair-minded person would be convinced by it." *In re Estate of Palmer*, 145 Wn. App. 249, 265-66, 187 P.3d 758 (2008). If substantial

evidence supports the factual finding, “it does not matter that other evidence may contradict it.” *Burrill v. Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *review denied*, 149 Wn.2d 1007, 67 P.3d 1096 (2003). This is so because appellate courts do not weigh conflicting evidence and credibility determinations “are not subject to review.” *Id.* Finally, unchallenged factual findings are verities on appeal. *See Young v. Young*, 164 Wn.2d 477, 482 n.2, 191 P.3d 1258 (2008).

**B. The superior court reasonably decided not to find Sadettanh in contempt.**

After weighing the evidence before it, the superior court could not find that Sadettanh violated the order of child support, or that any violation was intentional. CP 70 at ¶2.1; CP 72 at ¶3.11; RP Nov. 18, 2011 at 20. Both elements are necessary to find him in contempt. The court’s findings are supported by evidence, and its refusal to find Sadettanh in contempt was well within its discretion.

1. The law requires a plain and intentional violation to find contempt.

If a parent with a child support obligation does not comply with the support order, he may be subject to a contempt action pursuant to chapter 7.21 RCW. RCW 26.18.050(1). Contempt is defined as, among other things, intentional disobedience of any lawful court order. RCW 7.21.010(1); *see*

also *In re Marriage of Humphreys*, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995). A court strictly construes “the order alleged to have been violated, and the facts must constitute a *plain* violation of the order.” *Humphreys*, 79 Wn. App. at 599 (emphasis added). But a violation of the order is not enough; the violation must be intentional to constitute contempt. RCW 7.21.010(1); *Holiday v. City of Moses Lake*, 157 Wn. App. 347, 355, 236 P.3d 981 (2010), *review denied*, 170 Wn.2d 1023, 245P.3d 774 (2011) (“[A] finding that a violation of a previous court order was intentional is required for a finding of contempt.”).

The party moving for contempt must prove the contempt by a preponderance of the evidence, including evidence that the other party engaged in intentional misconduct. *James*, 79 Wn. App. at 442. Then, the trial court must find that the disobedience of the court order, if any, was intentional before the court holds a party in contempt. *See Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 112, 52 P.3d 485, (2002); *Holiday*, 157 Wn. App. at 355; *James*, 79 Wn. App. at 440.

2. The facts do not show a plain violation of the order.

The evidence before the commissioner and the superior court judge did not reveal that Sadettanh plainly violated the order as to 2010. He testified that he understood in good faith that he had met his obligation

throughout the year based on the method that DCS used, at Cooley's request, to collect the support payments from his employer. CP 41 at ¶6. *See also* CP 108, 110; RP Nov. 18, 2011 at 12, 15. He showed that the same records Cooley presented to prove he was behind also reflected that he had paid more than the full obligation amount for that year. RP Nov. 18, 2011 at 12-16. He believed he was complying with the order when he took the 2010 exemption. CP 41 at ¶6; RP Nov. 18, 2011 at 15.

Cooley offered no evidence to the contrary. Instead, she relied exclusively on the DCS payment records to show a "bright line" violation. RP Nov. 18, 2011 at 5. However, both tribunals noted those records were unclear. CP 115; RP Nov. 18, 2011 at 8. Indeed, as shown by the January 3, 2011 payment discussed earlier, according to the DCS records, Sadettanh appeared to have an arrearage of \$128.24 at the end of December 2010. CP 151. But DCS received a payment from his employer of \$238.16 on the first working day of January 2011. CP 147. That amount more than satisfied the alleged arrears of \$128.24, and the payment must have been withdrawn from his pay in December 2010. At best, the records are amenable to more than one interpretation. They reflect an automatic administrative process outside of Sadettanh's control. They do not show, plainly or otherwise, that he failed to pay child support.

Instead, a rational, fair-minded person could believe Sadettanh's testimony that he believed his obligation was current. Indeed, both the commissioner and the superior court judge believed it. Neither tribunal could find that he had violated the support order. CP 72 at ¶3.11; RP Nov. 18, 2011 at 20. Those conclusions enjoy substantial support from the evidence presented.

3. The facts do not show an intentional violation of the order.

As the superior court noted on revision, the key issue for the contempt proceeding was whether Sadettanh intentionally violated the support order. RP Nov. 18, 2011 at 6. On that point, he testified that he understood DCS collected enough funds from each of his paychecks to keep his support obligation satisfied. CP 41 at ¶6. *See also* CP 108, 110; RP Nov. 18, 2011 at 12-13, 15-17. He believed his obligation was satisfied at the end of 2010. *Id.* He believed he was complying with the order when he took the exemption for that tax year. *Id.* That is the opposite of intentionally disobeying it.

Again, Cooley offered no evidence to the contrary. Her bald assertions on appeal that Sadettanh or “[e]veryone knew he was behind[.]” find no support in the record. Br. of Appellant at 4-5. This likely explains why she does not cite to the record for either of these propositions. *Id.* The only evidence Cooley relied on were the DCS payment records. CP 147-151;

RP Nov. 18, 2011 at 5, 7-11. But those records did not demonstrate that Sadettanh deliberately failed to pay. Whatever they show, the records reveal nothing about Sadettanh's intent.

Both the commissioner and the superior court judge found he did not intentionally violate the support order. CP 70 at ¶2.1; RP Nov. 18, 2011 at 20. Cooley is "obligated to demonstrate why specific findings of the trial court are not supported by the evidence and to cite to the record to support of that argument." *Palmer*, 145 Wn. App. at 265. This she fails to do. She assigns no error to that finding; it is a verity. *Young*, 164 Wn.2d at 482 n.2.

This Court may affirm the decision below on any basis supported by the record. *Rideout*, 150 Wn.2d at 358. The evidence revealed neither a plain nor an intentional violation of the child support order. The law requires both to find contempt. The standard is not one of strict liability, as Cooley merely assumes without citing any authority.<sup>3</sup> Rather, the evidence fully supports the finding that Sadettanh did not intentionally fail to comply the order as to 2010. The record shows the commissioner and the superior court judge weighed the evidence, considered the facts, and applied the correct legal standard. The decision not to find Sadettanh in contempt was well within the court's discretion. It should be affirmed.

---

<sup>3</sup> See Br. of Appellant at 16, 19.

**C. Cooley's arguments to the contrary fail.**

1. The amount of any alleged arrearage is irrelevant.

Far from creating a “*de minimus* exception,”<sup>4</sup> the superior court’s decision comports with the law of contempt. The pertinent issue is whether Sadettanh deliberately violated the support order, not the amount by which he was allegedly behind at the end of 2010. Although the commissioner and superior court judge each expressed that the alleged arrearage appeared to be small in proportion to the heavy sanction of contempt,<sup>5</sup> neither tribunal found that Sadettanh was not in contempt because the alleged amount was small.<sup>6</sup>

Instead, the commissioner found he had not intentionally disobeyed the support order; the superior court judge reemphasized and adopted that finding CP 70 at ¶2.1; RP Nov. 18, 2011 at 5-6, 20. The alleged arrearage amount did not bear on the issue of whether he meant to disobey the support order. A party who purposefully does not comply with an order of child support, in any respect, runs the risk of being held in contempt; that the alleged violation is small does not excuse the party seeking contempt from her burden of proving the conduct was intentional. The evidence presented

---

<sup>4</sup> Br. of Appellant at 9, 14, 17, 28, 29-31.

<sup>5</sup> CP 115; RP Nov. 18, 2011 at 20-21.

<sup>6</sup> In fact, the superior court underscored this point in its oral ruling, stating: “... I’m not suggesting that an obligor parent should be able to skate for any amount he or she owes on a child support obligation and it’s not a big deal.” RP Nov. 18, 2011 at 20.

here showed only the contrary. Accordingly, the superior court correctly concluded Sadettanh was not in contempt.<sup>7</sup>

2. There was no “free pass.”<sup>8</sup>

Likewise, the commissioner did not depart from the law of contempt by discussing Sadettanh being “on notice” of the DCS payment records. CP 115-16. When read in context, that discussion relates to the court’s observation that the DCS records were unclear as to whether arrears existed in 2010. *Id.* The commissioner directed him not to rely on those records in determining whether his obligation had been met. *Id.*

This pertains to whether Sadettanh deliberately violated the order, not whether he had notice of it. Sadettanh is not arguing, nor has he argued, that

---

<sup>7</sup> Cooley relies on an unpublished Arizona decision to support her *de minimis* argument, *Pope v. Larmey*, 2010 WL 363833. Br. of Appellant at 29. The rule governing citation to unpublished decisions, RAP 10.4(h), refers to General Rule 14.1. That rule, in turn, allows a party to cite to an unpublished decision from another jurisdiction “only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court.” GR 14.1(b). The Arizona Rules of Civil Appellate Procedure (ARCAP) do not permit citation to unpublished decisions as legal authority “in any court” except under limited circumstances not present here. See Rule 28(c), ARCAP. Thus, Cooley’s citation and discussion of the unpublished Arizona decision is inappropriate and should, at best, be disregarded. See *Mangan v. Mangan*, 227 Ariz. 346, 353, 258 P.3d 164 (2011) (Arizona appellate court expressing “extreme concern” regarding, in part, a party’s reliance on an unpublished decision and finding an award of attorneys’ fees an appropriate sanction for such behavior); *Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn. App. 542, 548-49, 13 P.3d 240 (2000), *review denied*, 143 Wn.2d 1024, 29 P.3d 717 (2001) (Division One imposing \$500 sanction for citing and discussing at length an unpublished opinion); *Kenneth W. Brooks Trust v. Pacific Media LLC*, 111 Wn. App. 393, 401, 44 P.3d 938 (2002) (Division Three imposing \$100 sanction for quoting from an unpublished decision); *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 519, 108 P.3d 1273 (2005) (noting Washington appellate courts’ “longstanding prohibition against citing unpublished opinions[.]”).

<sup>8</sup> Br. of Appellant at 31.

he did not know what the order said. Rather, he believed he was complying with it. He could not have intentionally violated an order he thought he was following. The commissioner's comment illustrates only that Sadettanh ought not base his belief on the ambiguous records of DCS.

3. The meaning of the word "current" is not at issue.

This is an appeal of a contempt proceeding, not of one to clarify or declare the meaning of the child support order. This Court need only decide whether the superior court abused its discretion in not finding Sadettanh in contempt. Cooley's discussion of the proper definition of "current" is beside the point. The evidence presented below demonstrated Sadettanh believed he was entitled to the exemption. The superior court found he did not intentionally violate the order and so did not find him in contempt. No interpretation of the word "current" is necessary to decide whether those conclusions were erroneous. Neither tribunal below made findings or conclusions regarding the wording of the support order when deciding the contempt issue. That is, the definition of "current" was not a basis for the superior court's decision below, and so this Court need not consider it now. *See Steinbock v. Ferry County Public Utility Dist. No. 1*, 165 Wn. App. 479, 489, 269 P.3d 275 (2011).

Moreover, the out-of-state decisions Cooley relies on are inapposite. The New York decisions are irrelevant because they do not address the definition of “current” in this context; they merely decide whether, under the particular facts of the respective cases, support arrearages existed. *See Rzemieniewska-Bugnacki v. Bugnacki*, 51 A.D.3d 1029, 1030, 859 N.Y.S.2d 467 (2008); *Richardson on Behalf of Lanier*, 134 Misc.2d 148, 149-51, 509 N.Y.S.2d 759 (1986).

Similarly, the issue before the Ohio appellate court in *Rohr v. Williams*, 2007 WL 4696807,<sup>9</sup> was not, as Cooley suggests, the definition of the word “current” in relation to the word “arrears.” Rather, the question there was at what point in time an obligated parent must be “current” in his support to claim the child for income tax purposes – “at the end of each month or merely at the end of the year[.]” *Id.* at \*5. The Ohio appellate court concluded the latter time was a reasonable interpretation of the order at issue in that case. *Id.* Its conclusion rested on the court’s interpretation of the order at issue and on the manner in which the support was collected from the

---

<sup>9</sup>This is another unpublished decision. Again, a party may cite an unpublished decision from another jurisdiction “only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court.” GR 14.1(b). Ohio has abolished distinctions between authority based on publication status; all appellate court decisions in that state may be cited “and weighed as deemed appropriate by the courts.” Ohio Supreme Court Rules for the Reporting of Opinions, Rule 4(B).

obligated parent's pay, not on the state's statutory scheme regarding child support. *Id.*

Notably, the court found the obligated parent was current in his support payments, despite the appearance of arrears in the records of that state agency's automatic collection system. *Id.* The court explained:

Since the law provides for payments to be made by employer withholding, as long as a payment is withdrawn from an obligor's paycheck as required, that obligor is current. Delays by the employer in sending or child support in processing are not attributed to the obligor for the purposes of whether or not he is current. Thus, the obligor-appellee would factually be considered current at the end of each tax year.

*Id.*

The same reasoning could apply here.

Finally, even construing the word "current" in the manner Cooley urges would not have answered the pertinent question before the superior court: whether Sadettanh intentionally violated the order. Even assuming "current" means "no arrears," the unclear DCS records Cooley presented did not reflect that arrears actually existed at the end of 2010. Nor did they establish that any violation of the order, if it occurred, was intentional. The same information contained in those records also established that Sadettanh had paid more than the total obligation amount in that year, and bolstered Sadettanh's testimony that he believed he was current in his support

obligation when he took the 2010 tax exemption. Having considered the DCS records, the commissioner could not find that any arrears existed and the superior court judge did not revise that finding. CP 72 at ¶3.11; CP 134-35. Rather, the commissioner found no intentional violation of the order and the superior court judge adopted that finding. CP 70 at ¶2.1; RP Nov. 18, 2011 at 20. Those findings rest not on an interpretation of the word “current”, but instead on substantial evidence reflected in the existing record.

**D. Motion to strike portions of the Brief of Appellant regarding the 2009 tax exemption.**

The issue before this Court whether the superior court properly declined to find Sadettanh in contempt as to the 2010 tax exemption. However, Cooley devotes much of her initial brief to discussing the 2009 exemption, perhaps hoping to paint Sadettanh in a poor light. *See* Br. of Appellant at 10-12, 21-23. Whatever the reason, the discussion is inappropriate on several grounds.

First, the 2009 tax exemption is not at issue here. The commissioner considered and conclusively addressed all the circumstances surrounding that matter; it was not before the superior court on revision. RP Nov. 18, 2011 at 11, 20. The commissioner entered a judgment against Sadettanh for the amount due for the 2009 exemption, interest and attorneys’ fees; he satisfied

it in full. CP 69; RP Nov. 18, 2011 at 11. The issue is resolved and not subject to review.

Second, the 2009 exemption is not relevant to the item on review – the 2010 exemption. Sadettanh fully explained his reasons for taking each exemption. Cooley never argued below, nor could she, that those explanations were not credible. Any attempt now to use the 2009 exemption as an indication of Sadettanh’s “bad faith” regarding the 2010 exemption is itself disingenuous and this Court should disregard it. Br. of Appellant at 10.

Third, the discussions of the 2009 exemption are replete with factual assertions that are either not supported by the record citation Cooley provides,<sup>10</sup> or are devoid of a record citation at all,<sup>11</sup> in contravention of RAP 10.3(a)(5). *See Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 615 n. 1, 160 P.3d 31 (2007) (declining to consider facts recited in brief but not supported by the record).

Finally, Cooley never presented to the superior court her new argument that the amount she lost from the 2009 exemption must be included in the calculation of the alleged arrears for 2010. This Court should disregard it. RAP 2.5(a); *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 299, 38 P.3d 1024, *review denied*, 147 Wn.2d 1016, 56 P.3d 992 (2002). She does

---

<sup>10</sup> Br. of Appellant at 11.

not attempt to show the superior court's decision involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). And she cites no authority for this new position. Consequently, this Court need not address it. RAP 10.3(a)(6); *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 84, 180 P.3d 874 (2008).

For all these reasons, Sadettanh moves this Court to strike those portions of Cooley's initial brief discussing the 2009 tax exemption, namely section 4.6, pages 10-12; and section 5.2, pages 21-23.<sup>12</sup>

**E. Sadettanh is entitled to attorney's fees.**

RAP 18.9(a) authorizes this Court to award Sadettanh the fees he incurred to respond to this appeal. An appeal is frivolous "when there are no debatable issues on which reasonable minds can differ, when the appeal is so devoid of merit that there is no reasonable possibility of reversal, or when the appellant fails to address the basis of the lower court's decision." *In re Settlement/Guardianship of AGM*, 154 Wn. App. 58, 83, 223 P.3d 1276 (2010).

//

---

<sup>11</sup> Br. of Appellant at 21-22.

<sup>12</sup> Although not included in the motion to strike, the remainder of section 5.2 of the Brief of Appellant is also not relevant to this appeal, as Sadettanh is not arguing here that the tax exemptions are unrelated to child support and not enforceable through a contempt motion. Accordingly, this Court need not consider section 5.2 of the Brief of Appellant in its entirety.

This appeal fits that description. Cooley offers no debate that Sadettanh deliberately failed to pay his support obligation. She does not address his intent at all. However, that issue was the basis for the superior court's decision. Instead of addressing that basis, Cooley merely repeats the arguments she lost twice below, relying on evidence the superior court has already weighed and that this Court will not weigh again. She focuses on matters irrelevant to the ultimate issue, while misconstruing the superior court's rulings and citing out-of-state, unpublished decisions in the process.

This conscious disregard of the applicable legal standard and its relation to the evidence presented below qualifies this appeal as frivolous. *See Millers Cas. Ins. Co. of Texas v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983) (awarding fees under RAP 18.9(a) where the law was clear, appellant failed to cite contrary authority and its circuitous arguments ignored the facts in the record); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 692, 732 P.2d 510 (1987) (awarding fees where appellant's arguments were belied by the record and failed to address the basis of the trial court's decision); *Andrus v. State Dept. of Transportation*, 128 Wn. App. 895, 900, 117 P.3d 1152 (2005), *review denied*, 157 Wn.2d 1005, 136 P.3d 759 (2006) (awarding fees where appellant "asserted arguments that lack any support in the record or are precluded by well-established and binding precedent that he does not

distinguish.”); *AGM*, 154 Wn. App. at 83-87 (awarding fees where appellant’s challenge to matter within superior court’s discretion lacked factual and legal support, and failed to address reasons for superior court’s decision).

Nor can Cooley show the superior court abused its discretion. Rather, the record shows both tribunals considered the evidence and applied the correct legal standard. She offers no reasonable basis to conclude otherwise. Therefore, Sadettanh is entitled to recover fees on appeal. *AGM*, 154 Wn. App. at 86-87; *see also Johnson v. Jones*, 91 Wn. App. 127, 138, 955 P.2d 826 (1998) (awarding fees where “there was no reasonable basis to argue that the trial court abused its discretion[.]”)

### **III. CONCLUSION**

Sadettanh believed he was complying with the child support when he took the tax exemption for 2010. He did not intentionally violate it. The evidence presented below amply supports the superior court’s finding to that effect. The court’s conclusion that he was not in contempt reasonably followed from that evidence. The decision rested soundly within its

discretion. The decision should be affirmed and Sadettanh awarded the attorney's fees he incurred to respond to this frivolous appeal.

Dated this 6 day of July, 2012.



Andrea L. Schiers WSBA # 38383  
CURRAN LAW FIRM P.S.  
Attorneys for Respondent  
555 West Smith Street  
Kent, WA 98035  
(253) 852-2345

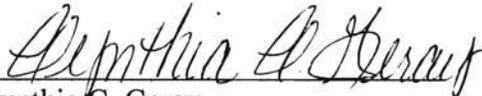
**CERTIFICATE OF SERVICE**

Cynthia C. Geray, being first duly sworn, on oath deposes and says:  
I am over the age of 18 years and am not a party to the within cause. I work at Curran Law Firm P.S. and on this date I caused to be served by messenger a true and correct copy of the above Brief of Respondent on the following persons set forth below:

JEFFREY R. CAFFEE  
Van Siclen Stocks & Firkins  
721 – 45<sup>TH</sup> ST NE  
AUBURN WA 98002

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Kent, Washington, this 16<sup>th</sup> day of July, 2012.

  
Cynthia C. Geray

COURT OF APPEALS DIV. 1  
STATE OF WASHINGTON  
2012 JUL -6 PM 1:54

**APPENDIX**

Rep R 4 Ohio Supreme Court Rules.....30  
Rule 28 Arizona Rules of Civil Appellate Procedure.....31  
*Mangan v. Mangan*, 227 Ariz. 346, 353, 258 P.3d 164 (2011).....33

Baldwin's Ohio Revised Code Annotated

Supreme Court Rules for the Reporting of Opinions (Refs & Annos)

Rules for Reporting Opinions, Rule 4

Rep R 4 "Controlling" and "persuasive" designations based on form of publication abolished; use of opinions

Currentness

(A) Notwithstanding the prior versions of these rules, designations of, and distinctions between, "controlling" and "persuasive" opinions of the courts of appeals based merely upon whether they have been published in the Ohio Official Reports are abolished.

(B) All court of appeals opinions issued after the effective date of these rules may be cited as legal authority and weighted as deemed appropriate by the courts.

(C) Unless otherwise ordered by the Supreme Court, court of appeals opinions may always be cited and relied upon for any of the following purposes:

(1) Seeking certification to the Supreme Court of Ohio of a conflict question within the provisions of sections 2(B)(2)(f) and 3 (B)(4) of Article IV of the Ohio Constitution;

(2) Demonstrating to an appellate court that the decision, or a later decision addressing the same point of law, is of recurring importance or for other reasons warrants further judicial review;

(3) Establishing *res judicata*, estoppel, double jeopardy, the law of the case, notice, or sanctionable conduct;

(4) Any other proper purpose between the parties, or those otherwise directly affected by a decision.

**Credits**

(Adopted eff. 5-1-02)

Rules for Reporting Opinions, Rule 4, OH ST RPT OPINIONS Rule 4

Current with amendments received through January 1, 2012.

End of Document

© 2012 Thomson Reuters. No claim to original U.S. Government Works.

Arizona Revised Statutes Annotated  
Rules of Civil Appellate Procedure (Refs & Annos)

Arizona Rules of Civil Appellate Procedure (ARCAP), Rule 28

Rule 28. Publication of Opinions of the Supreme Court and the Court of Appeals

Currentness

**(a) Opinion; Memorandum Decision; Order; Publication.**

- (1) An opinion is written disposition of a matter which is intended for publication under subdivision (4) below.
- (2) A memorandum decision is a written disposition of a matter not intended for publication.
- (3) An order is any disposition of a matter before the court other than by opinion or memorandum decision.
- (4) Publication is the distribution of opinions for reporting by publishing companies in compliance with the provisions of A.R.S. § 12-107, § 12-108 and § 12-120.07.

**(b) When Disposition to Be by Opinion.** Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:

1. establishes, alters, modifies or clarifies a rule of law, or
2. calls attention to a rule of law which appears to have been generally overlooked, or
3. criticizes existing law, or
4. involves a legal or factual issue of unique interest or substantial public importance, or
5. if the disposition of a matter is accompanied by separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.

**(c) Dispositions as Precedent.** Memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to publish an opinion, grant a motion for reconsideration, or grant a petition for review. Any party citing a memorandum decision pursuant to this rule must attach a copy of it to the motion or petition in which such decision is cited.

**(d) Designation of Written Disposition.** The written disposition of the case shall contain in the caption thereof the designation "Opinion," "Memorandum Decision," or "Order."

**(e) Publication of Dissenting Vote on Denial of Petition for Review.** If a Petition for Review is denied and a justice of the Supreme Court voted to grant review, such justice's dissenting vote shall be reported in the caption of the decision of the Court of Appeals, if such decision is published in accordance with these rules.

**(f) Depublication.** Notwithstanding the provisions of Rule 28(b) above, an opinion which has been certified for publication by the Appeals Court shall not be published, on an order to that effect by the Supreme Court entered in a case which is before the Supreme Court on a petition for review, cross-petition for review, or petition for special action and which is entered before such opinion becomes final.

**(g) Partial Publication of Decisions.** When the court issuing a decision concludes that only a portion of that decision meets the criteria for publication as an opinion, the court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision not intended for publication.

**Credits**

Amended June 29, 1987, effective July 1, 1987; Sept. 13, 1989, effective Sept. 20, 1989. Amended June 10, 1997, effective Jan. 1, 1998.

**Editors' Notes**

**COMMENT**

This rule [Rule 28(a)] is based on former Supreme Court Rule 48(a). (See promulgating order to these rules preceding Rule 1.)

This rule [Rule 28(b)] is based on former Supreme Court Rule 48(b). (See promulgating order to these rules preceding Rule 1.)

This rule [Rule 28(c)] is based on former Supreme Court Rule 48(c). (See promulgating order to these rules preceding Rule 1.)

This rule [Rule 28(d)] is based on former Supreme Court Rule 48(d). (See promulgating order to these rules preceding Rule 1.)

**APPLICATION**

<Applicable to all cases in which the petition, motion, brief, decision, paper, or transcript is filed or required to be filed on or after January 1, 1998.>

Notes of Decisions (14)

17B A. R. S. Civil Appellate Proc. Rules, Rule 28, AZ ST CIV A P Rule 28  
Current with amendments received through 6/1/12

End of Document

© 2012 Thomson Reuters. No claim to original U.S. Government Works.

227 Ariz. 346  
Court of Appeals of Arizona,  
Division 1, Department E.

In re the Marriage of Deborah J. MANGAN, Petitioner/Appellant,  
v.  
John V. MANGAN, Respondent/Appellee.

No. 1 CA-CV 10-0726 A. | May 26, 2011.

### Synopsis

**Background:** Father filed petition to modify custody, parenting time and child support. Following an evidentiary hearing, the Superior Court in Maricopa County, No. FC2006-051713, Mina E. Mendez, Judge Pro Tempore, found that Arizona had home state jurisdiction and issued a preliminary ruling directing that the children be returned to father. Mother filed an accelerated appeal.

**Holdings:** The Court of Appeals, Winthrop, J., held that:

- [1] Arizona had exclusive, continuing jurisdiction over child custody and parenting time dispute under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA);
- [2] trial court did not abuse its discretion by awarding father attorney fees, despite the disparity in the parties' financial resources; and
- [3] award of appellate attorney fees to father was warranted as a sanction.

Affirmed.

### Attorneys and Law Firms

**\*\*165** Ariano & Reppucci, P.L.L.C. By Ryan M. Reppucci, Phoenix, Attorney for Petitioner/Appellant.

Moshier Law Firm, P.C. By Jennifer K. Moshier, Peter J. O'Connor, Phoenix, Attorney for Respondent/Appellee.

### Opinion

#### \*347 OPINION

WINTHROP, Judge.

¶ 1 This is an accelerated appeal pursuant to Rule 29 of the Arizona Rules of Civil Appellate Procedure (“ARCAP”). Petitioner/Appellant, Deborah J. Mangan (“Mother”), appeals the family court's signed minute entry order finding that Arizona has home state jurisdiction to hear and decide the petition of Respondent/Appellee, John V. Mangan (“Father”), to modify custody, parenting time, and child support. Mother argues that the petition should have been dismissed because, under Arizona Revised Statutes (“A.R.S.”) section 25-1032 (2007), the court lost jurisdiction over the matter when she and the parties' children moved to New Mexico. Mother also challenges the court's decision to award attorneys' fees to Father. Concluding that the family court had exclusive, continuing jurisdiction to modify its initial child custody order and did not abuse its discretion in deciding to award attorneys' fees to Father, we affirm.

#### BACKGROUND <sup>1</sup>

<sup>1</sup> We review the record in the light most favorable to upholding the family court's decision. *See Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999).

¶ 2 Mother and Father were married in 2001 and had two children. The parties separated in mid-March 2006, when Mother and the children left Arizona temporarily and moved back East.<sup>2</sup> In May 2006, Mother filed a petition for dissolution of marriage in Arizona, conceding at that time Arizona was the children's "home state." In October 2006, the family court, after determining it had initial jurisdiction pursuant to A.R.S. § 25-1031(A)(1), entered a decree of dissolution of marriage. The court awarded Mother sole custody of the children, designated Mother as the primary residential parent, and ordered that Father have parenting time and periodic telephonic access to the children. Thereafter, each party filed any documents related to child custody, parenting time, or \*348 \*\*166 child support in Maricopa County Superior Court.

<sup>2</sup> In the brief time that Mother and the children lived back East, they lived in New Jersey, Pennsylvania, and New York.

¶ 3 Mother and the children moved back to Arizona, and on February 1, 2008, Father filed a petition for post-decree mediation, alleging that Mother was "blocking [his] visitation and communication" with the children. The family court ordered the parties to meet for mediation in March 2008. Although the parties did not reach a formal agreement in mediation, they did reach an informal agreement, to which Mother unilaterally chose not to adhere. At about that time, Mother purportedly informed Father that she planned to move to New Mexico.<sup>3</sup> After seeing the children in mid-July 2008, Father was unable to contact the children again for approximately 650 days.

<sup>3</sup> In her opening brief, Mother states that she "moved to New Mexico with the children after filing a Notice to Move on May 19, 2008." The portion of the record she cites as support for this statement, however, is a notice filed on May 19, 2008, by the law firm representing her, indicating that the firm had moved to a new address in Phoenix. At trial, Mother testified that she provided Father with sixty days' notice of the move to New Mexico by sending two letters to him beginning in April 2008, and she produced a copy of a letter she purportedly sent dated April 2, 2008. In his testimony at trial, Father acknowledged receiving a certified letter from Mother sometime in July 2008, *after* Mother and the children had moved, but he stated the letter provided no specific contact address in New Mexico. Mother has not directed this court to any documents filed in the record that confirm she complied with A.R.S. § 25-408 (2007) in providing Father with prior notice of the move.

¶ 4 On July 30, 2008, Father filed a petition to enforce parenting time, and the family court ordered the parties to appear at an evidentiary hearing regarding the petition on September 26, 2008. Mother did not appear at the hearing, however, and the court found she was evading service and granted permission for Father to serve her by publication in New Mexico.<sup>4</sup>

<sup>4</sup> The record indicates Mother informed her counsel in September 2008 that she had moved. Mother filed an application for writ of garnishment in Maricopa County Superior Court that same month.

¶ 5 The court scheduled another enforcement hearing for December 12, 2008, and Mother was served by publication but again did not appear. The court found Mother in contempt of court for failure to appear and failure to abide by the terms of the parties' custody agreement.

¶ 6 On December 22, 2008, Father filed a petition to modify custody, parenting time, and child support, in which he claimed that Mother had "unlawfully blocked ALL contact between Father and [the] children." Father, however, again encountered difficulty locating and serving Mother, who relocated at least two more times within New Mexico after arriving there.<sup>5</sup> In January 2009, the family court granted a motion to withdraw filed by Mother's counsel, who cited in part Mother's failure to communicate.

<sup>5</sup> In total, Mother acknowledged having at least nine different addresses from 2006 to August 2, 2010, the date of trial.

¶ 7 On February 18, 2010, Father filed a renewed petition to modify custody, parenting time, and child support, in which he sought sole legal custody of the children and moved for a warrant to take custody of the children using reasonable force. At a return hearing on April 8, 2010, at which Mother appeared telephonically and conceded she had been personally served, the family court issued temporary orders, ordering in part that the parties participate in a parenting conference and Mother provide Father with telephone access to the children and parenting time, with the exchanges of the children to occur in Flagstaff. The

<sup>1</sup> We review the record in the light most favorable to upholding the family court's decision. *See Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999).

¶ 2 Mother and Father were married in 2001 and had two children. The parties separated in mid-March 2006, when Mother and the children left Arizona temporarily and moved back East.<sup>2</sup> In May 2006, Mother filed a petition for dissolution of marriage in Arizona, conceding at that time Arizona was the children's "home state." In October 2006, the family court, after determining it had initial jurisdiction pursuant to A.R.S. § 25–1031(A)(1), entered a decree of dissolution of marriage. The court awarded Mother sole custody of the children, designated Mother as the primary residential parent, and ordered that Father have parenting time and periodic telephonic access to the children. Thereafter, each party filed any documents related to child custody, parenting time, or \*348 \*\*166 child support in Maricopa County Superior Court.

<sup>2</sup> In the brief time that Mother and the children lived back East, they lived in New Jersey, Pennsylvania, and New York.

¶ 3 Mother and the children moved back to Arizona, and on February 1, 2008, Father filed a petition for post-decree mediation, alleging that Mother was "blocking [his] visitation and communication" with the children. The family court ordered the parties to meet for mediation in March 2008. Although the parties did not reach a formal agreement in mediation, they did reach an informal agreement, to which Mother unilaterally chose not to adhere. At about that time, Mother purportedly informed Father that she planned to move to New Mexico.<sup>3</sup> After seeing the children in mid-July 2008, Father was unable to contact the children again for approximately 650 days.

<sup>3</sup> In her opening brief, Mother states that she "moved to New Mexico with the children after filing a Notice to Move on May 19, 2008." The portion of the record she cites as support for this statement, however, is a notice filed on May 19, 2008, by the law firm representing her, indicating that the firm had moved to a new address in Phoenix. At trial, Mother testified that she provided Father with sixty days' notice of the move to New Mexico by sending two letters to him beginning in April 2008, and she produced a copy of a letter she purportedly sent dated April 2, 2008. In his testimony at trial, Father acknowledged receiving a certified letter from Mother sometime in July 2008, *after* Mother and the children had moved, but he stated the letter provided no specific contact address in New Mexico. Mother has not directed this court to any documents filed in the record that confirm she complied with A.R.S. § 25–408 (2007) in providing Father with prior notice of the move.

¶ 4 On July 30, 2008, Father filed a petition to enforce parenting time, and the family court ordered the parties to appear at an evidentiary hearing regarding the petition on September 26, 2008. Mother did not appear at the hearing, however, and the court found she was evading service and granted permission for Father to serve her by publication in New Mexico.<sup>4</sup>

<sup>4</sup> The record indicates Mother informed her counsel in September 2008 that she had moved. Mother filed an application for writ of garnishment in Maricopa County Superior Court that same month.

¶ 5 The court scheduled another enforcement hearing for December 12, 2008, and Mother was served by publication but again did not appear. The court found Mother in contempt of court for failure to appear and failure to abide by the terms of the parties' custody agreement.

¶ 6 On December 22, 2008, Father filed a petition to modify custody, parenting time, and child support, in which he claimed that Mother had "unlawfully blocked ALL contact between Father and [the] children." Father, however, again encountered difficulty locating and serving Mother, who relocated at least two more times within New Mexico after arriving there.<sup>5</sup> In January 2009, the family court granted a motion to withdraw filed by Mother's counsel, who cited in part Mother's failure to communicate.

<sup>5</sup> In total, Mother acknowledged having at least nine different addresses from 2006 to August 2, 2010, the date of trial.

¶ 7 On February 18, 2010, Father filed a renewed petition to modify custody, parenting time, and child support, in which he sought sole legal custody of the children and moved for a warrant to take custody of the children using reasonable force. At a return hearing on April 8, 2010, at which Mother appeared telephonically and conceded she had been personally served, the family court issued temporary orders, ordering in part that the parties participate in a parenting conference and Mother provide Father with telephone access to the children and parenting time, with the exchanges of the children to occur in Flagstaff. The

court also set a temporary orders/status hearing for May 14, 2010, ordered both parties to be present in person, and set a trial date for August 2, 2010.

¶ 8 On April 20, 2010, Mother, through new counsel, filed an accelerated motion to transfer jurisdiction,<sup>6</sup> arguing that the children had lived in New Mexico since April 2008,<sup>7</sup> \*349 \*\*167 and challenging the family court's jurisdiction.<sup>8</sup> In a minute entry filed April 26, 2010, the court (the Honorable Carey Snyder Hyatt, presiding) denied the motion.

<sup>6</sup> Mother's counsel, Dennis Riccio, filed a notice of limited appearance at the same time he filed the motion to transfer jurisdiction. On June 8, 2010, Mr. Riccio filed a notice of appearance, and he continued to represent Mother through the August 2 trial.

<sup>7</sup> Mother had previously represented to the court that she and the children had moved in July 2008.

<sup>8</sup> In the motion, Mother stated that "no visitation has taken place since April of 2008."

¶ 9 At the May 14, 2010 temporary orders/status hearing before Judge Hyatt, Mother again contested jurisdiction. The court ruled that Arizona had not relinquished jurisdiction over the custody issues involving the children, explaining its reasoning in part as follows:

And what happened was that even by mom's own information, she left with [the] children in July of #08. And that's when dad had said, testified earlier, that that was really the last time he's had other than telephonic contact with [the children].

He immediately filed an expedited request to enforce, which unfortunately didn't get resolved until December of #08. But at that point in time, your client was served, she had notice of the hearing, she was found in contempt, and to this day, is still in contempt of the Court's parenting time orders from back in, goodness, 2006, I guess they were.

So the mere fact that the passage of time [has occurred] cannot undermine this Court's home state jurisdiction under the [Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") ], when the whole time she's been in contempt of court for not following through with parenting time orders.

So that's why I indicated that, and will indicate here today, that Arizona has not relinquished its home state jurisdiction over the custody issues involving the child[ren]. She's been [in] contempt for a year and a half.

And if some action was ever started in New Mexico, you know, I could certainly counsel with the New Mexico judge, but I highly doubt that they would take away or undermine or overrule Arizona's home state jurisdiction. We've still got it.

The court also issued various temporary orders to ensure that Father receive parenting time.

¶ 10 In June 2010, Mother obtained an order of protection from the superior court after making allegations of abuse against Father and stating that she had contacted the FBI and the Scottsdale Police Department after allegedly discovering on May 6 that Father's website was linked to illegal pornography sites that appeared to depict violence against underage girls.<sup>9</sup> Mother also informed the family court that Father's counsel had allegedly engaged in improper ex-parte communications with the parties' parenting conference provider, and she filed petitions for contempt against Father, alleging he had failed to pay child support and made misrepresentations to the court. Mother sought sanctions and increased child support.

<sup>9</sup> A detective with the Scottsdale Police Department Computer Crimes Unit investigated Mother's claims before she sought the order of protection and found "no evidence of illegal activity or criminal activity" related to Father's blog. The FBI agent contacted by Mother testified at trial that he conducted no formal investigation based on the information Mother provided because he concluded that "there wasn't any solid evidence" to support such an investigation.

¶ 11 Father's counsel responded by seeking sanctions pursuant to Rule 11, Ariz. R. Civ. P., against Mother and her counsel regarding the notice of purported ex-parte communication. Father also sought a hearing regarding Mother's "false" "allegations of abuse and association with offensive internet materials" and a status conference regarding her allegations with regard to the

parenting conference provider, and he sought to quash the order of protection. After a hearing on June 25, 2010, the superior court quashed the order of protection based on a lack of evidence.

¶ 12 On August 2, 2010, the court (Judge *Pro Tem* Mina E. Mendez, presiding) held an evidentiary hearing on Father's petition to modify custody, parenting time, and child support. At the conclusion of the hearing, the court issued a preliminary ruling directing that the children be returned to Father and otherwise took the matter under advisement.

**\*\*168 \*350** ¶ 13 In a comprehensive and thoughtful signed minute entry filed August 27, 2010, the family court issued its ruling reaffirming that Arizona is the home state of the children and concluding it had not relinquished the jurisdiction it had obtained pursuant to A.R.S. § 25-1031 (A)(1). The court denied Mother's motions and petitions, addressed Father's motions and petitions, and as to the petition to modify custody, ordered that the parties have joint legal custody and Father have primary residential custody, with Mother to receive parenting time as specified.<sup>10</sup> The court also directed Father's counsel to submit a *China Doll* affidavit,<sup>11</sup> AND SUBSEQUENTLY awarded attorneys' fees to father in the amount of \$10,000 pursuant to A.R.S. § 25-324 (Supp.2010).

<sup>10</sup> In evaluating the parties' credibility, the court found that Mother had "made a number of inconsistent statements and misstatements of fact" and had "exaggerated and/or fabricated allegations against [Father]," including claims of domestic violence and abuse, her claims related to pornography and the order of protection, and her claims of apparent neglect or abuse of the parties' daughter. The court further found that Mother had "made false and misleading reports to CPS, law enforcement, and the Courts in an effort to [unreasonably] deny Respondent/Father parenting time with the children" for 650 days. In contrast, the court found "Father's testimony to be credible and consistent with the record" with regard to the full payment of his child support obligation in a timely manner, parenting time missed, and his motives regarding the children's welfare.

<sup>11</sup> See *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 673 P.2d 927 (App.1983).

¶ 14 Mother filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(C) (2003).

## ANALYSIS

### I. Jurisdiction

¶ 15 Mother argues that the family court erred in concluding that Arizona retained exclusive, continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, or UCCJEA, for purposes of modification of the initial child custody order. Finding no error, we affirm.

[1] ¶ 16 We review *de novo* whether a court has subject matter jurisdiction under the UCCJEA. See *In re Marriage of Tonnessen*, 189 Ariz. 225, 226, 941 P.2d 237, 238 (App.1997) (addressing the predecessor statute, the Uniform Child Custody Jurisdiction Act); see also *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, 233, ¶ 8, 119 P.3d 1034, 1036 (App.2005) (stating that this court reviews *de novo* matters of statutory interpretation and mixed questions of fact and law).

¶ 17 In 2001, Arizona adopted the UCCJEA, see A.R.S. §§ 25-1001 to -1067 (2007), a uniform statute adopted by the majority of states in an effort to resolve ambiguity and create consistency in interstate child custody jurisdiction and enforcement proceedings. *Melgar v. Campo*, 215 Ariz. 605, 606-07, ¶¶ 7, 10, 161 P.3d 1269, 1270-71 (App.2007); *Welch-Doden v. Roberts*, 202 Ariz. 201, 208, ¶ 29, 42 P.3d 1166, 1173 (App.2002).

¶ 18 The conditions under which an Arizona court may exercise initial child custody jurisdiction are provided in A.R.S. § 25-1031. Additionally, A.R.S. § 25-1032 provides that an Arizona court has exclusive, continuing jurisdiction unless certain conditions are met:

A. Except as [inapplicable here], a court of this State that has made a child custody determination consistent with § 25-1031 ... has exclusive, continuing jurisdiction over the determination until either of the following is true:

1. A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships.

2. A court of this state or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this state.

B. A court of this state that has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination \*351 \*\*169 only if it has jurisdiction to make an initial determination under § 25–1031.

[2] [3] ¶ 19 As codified in Arizona, A.R.S. § 25–1032 reflects the UCCJEA's goal of allowing the court that makes the original custody determination to retain exclusive, continuing jurisdiction over that order. *Melgar*, 215 Ariz. at 607, ¶¶ 10–11, 161 P.3d at 1271 (recognizing that “[t]he rule of exclusive, continuing jurisdiction remains the jurisdictional lodestar until either the court that originated the order determines that the child's connection with the state is too attenuated or that the child *and* parents no longer reside in the state” (citations omitted)). With limited exceptions, “the decision to discontinue exclusive, continuing jurisdiction belongs to the court exercising it, and no other.” *Id.* at ¶ 11.

[4] ¶ 20 In this case, we find no error in the family court's decision to exercise exclusive, continuing jurisdiction. Mother previously affirmatively invoked the jurisdiction of the Arizona court pursuant to A.R.S. § 25–1031 when she filed for divorce, conceding at that time Arizona was the children's “home state.” She and the children moved back to Arizona, where both parties and the children resided, and she continued to invoke the jurisdiction of the Arizona court system when it was convenient for her.

¶ 21 Although a statutory mechanism existed for Mother to seek to relocate with the children, *see* A.R.S. § 25–408, she has not shown that she followed that mechanism. Instead, she simply took the children to New Mexico, evaded service, and was soon thereafter found in contempt by the Arizona family court for failure to appear and failure to abide by the terms of the parties' custody and parenting time agreement. Mother continued to relocate while in New Mexico and continued to be in contempt of the Arizona court's orders. Thus, both Mother and the children have had and continue to have a significant connection with this state.

¶ 22 In the meantime, Father continues to reside in Arizona, where throughout the proceedings he has paid child support to Mother from his employment in this state, and he has provided health care insurance to the children through his employer in this state. Father testified that the children have friends in the Phoenix area, and he remains in close contact with the parents of his children's friends. Although substantial evidence is available in New Mexico concerning the children's care, protection, training, and personal relationships, it continues to exist in this state as well.

¶ 23 Moreover, Father asserts that no other court has sought jurisdiction over the child custody order, and Mother does not dispute Father's assertion or otherwise indicate that she at any time sought to invoke the jurisdiction of the New Mexico court. Instead, she filed numerous motions and petitions in the Arizona court prior to trial. We agree with the family court that Mother's reliance on the passage of time cannot otherwise undermine Arizona's home state jurisdiction when the entire time Mother has been subject to the Arizona court's orders and been in contempt of those orders. Mother cannot use her unauthorized conduct in removing the children from this state and defying the court's custody and parenting time orders to defeat jurisdiction.<sup>12</sup> *See generally Duwylene v. Moran*, 220 Ariz. 501, 503–04, ¶ 9, 207 P.3d 754, 756–57 (App.2009).

<sup>12</sup> We also disagree with Mother's contention that, in citing A.R.S. § 25–1031(A)(1) rather than A.R.S. § 25–1032, the court used the incorrect statute and standard to determine whether it should retain jurisdiction over the matter. Read in context, it appears that the court simply recognized that initial child custody jurisdiction existed under A.R.S. § 25–1031(A)(1), and “[b]ased upon the May 14, 2010 findings made by Judge Hyatt,” neither subsection (A)(1) nor subsection (A)(2) of A.R.S. § 25–1032 applied to defeat that jurisdiction.

¶ 24 We conclude that the family court did not err in determining that it had exclusive, continuing jurisdiction to modify its initial child custody order.

## *II. The Family Court's Award of Attorneys' Fees*

¶ 25 In awarding attorneys' fees to Father, the family court found that, despite a disparity between the financial resources of Mother and Father, an award of attorneys' fees was warranted because Mother had taken unreasonable \*352 \*\*170 positions during the course of the proceedings:

The Court has considered the financial resources of each of the parties and the reasonableness of the positions taken by each party throughout the proceedings relating to the Petition to Modify Custody, Parenting Time and Child Support filed February 18, 2010.

Based upon the evidence presented at the time of the August 2, 2010 trial, the court finds that Petitioner/Mother has taken positions over the course of the litigation that are unreasonable. Specifically, the Court makes these findings with respect to misrepresentations and false allegations made by Petitioner/Mother in an effort to deny parenting time to Respondent/Father without good cause, as more fully set forth above.

The financial resources of the parties are disparate. Respondent/Father earns significantly more income than Petitioner/Mother. In consideration of the difference in the parties' incomes the Court deviated from the child support guidelines so that Petitioner/Mother would not be required to pay any child support to Respondent/Father.

Under these circumstances, the Court would not ordinarily enter an order awarding attorneys' fees. However, in this case, the Court finds that Petitioner/Mother created obstacles over a period of two years to deny Respondent/Father a relationship with the children. Respondent/Father entered into two agreements with Petitioner/Mother over the course of these two years in an effort to gain back the right to see his children. First he requested mediation shortly after filing his 2008 Petition to Enforce Parenting Time. Respondent/Father made a good faith effort to resolve the parenting time issues. At the mediation, the parties reached an agreement, which was almost immediately breached by Petitioner/Mother before Respondent/Father could have even one visit in 2008. The parties again reached a number of agreements during the Court ordered parenting conference on May 14, 2010, which, as discussed more fully above, were breached by Petitioner/Mother.

Following the conference Petitioner/Mother sought and obtained a baseless order of protection for the purpose of denying Respondent/Father parenting time as ordered by Judge Hyatt on May 14, 2010. Petitioner/Mother's actions were in bad faith and she caused significant expense to Respondent/Father by unnecessarily expanding the litigation.

**The Court finds** that an award of attorneys' fees in favor of Respondent/Father is necessary and appropriate.

[5] [6] ¶ 26 Mother argues that, in ultimately awarding attorneys' fees under A.R.S. § 25–324, the family court erred because the court dismissed the disparity between the parties' financial resources and, instead, based the award solely on the unreasonableness of her actions during the proceedings. We review for an abuse of discretion an award of attorneys' fees made under A.R.S. § 25–324. *See In re Marriage of Berger*, 140 Ariz. 156, 167, 680 P.2d 1217, 1228 (App.1983). We find no abuse of the court's discretion.

[7] ¶ 27 Subsection (A) of A.R.S. § 25–324 provides as follows:

The court from time to time, after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending any proceeding under this chapter or chapter 4, article 1 of this title. On request of a party or another court of competent jurisdiction, the court shall make specific findings concerning the portions of any award of fees and expenses that are based on

consideration of financial resources and that are based on consideration of reasonableness of positions. The court may make these findings before, during or after the issuance of a fee award.

(Footnote omitted.) Thus, contrary to Mother's contention, the plain language of the statute makes clear which factors a court must consider in determining whether an \*353 \*\*171 award of attorneys' fees is appropriate. To award attorneys' fees under § 25–324, a court must consider “the financial positions of the parties,” *Gerow v. Covill*, 192 Ariz. 9, 19, ¶ 46, 960 P.2d 55, 65 (App.1998), and “the reasonableness of the positions each party has taken throughout the proceedings.”<sup>13</sup> A.R.S. § 25–324(A). In this case, the family court expressly considered each.

<sup>13</sup> Nevertheless, “an applicant need not show both a financial disparity and an unreasonable opponent in order to qualify for consideration for an award.” *Magee v. Magee*, 206 Ariz. 589, 591 n. 1, ¶ 8, 81 P.3d 1048, 1050 n. 1 (App.2004) (citing *In re Marriage of Pownall*, 197 Ariz. 577, 583, ¶¶ 27–29, 5 P.3d 911, 917 (App.2000)).

¶ 28 In deciding whether to award attorneys' fees, the family court was presented with and carefully considered evidence related to the financial resources of the parties, including the parties' testimony and affidavits of financial information filed by each party before trial.<sup>14</sup> Because the court balanced that information with its consideration of the unreasonableness of Mother's positions throughout the proceedings, we find no abuse of the court's discretion in awarding attorneys' fees to Father.

<sup>14</sup> In fact, as the court referenced in its award of attorneys' fees, in determining child support the court demonstrated its cognizance of Mother's financial wherewithal when it exercised its discretion and deviated from the child support guidelines by reducing Mother's payment obligation to “\$0.00 (zero),” in an effort to “assist Petitioner/Mother's ability to pay her costs related to travel to exchange the children for parenting time.”

### III. Mother's Counsel's Brief

¶ 29 We also express extreme concern regarding two matters in the appellate briefs filed by Mother's counsel. First, as we have noted, in his opening brief, counsel states that Mother “moved to New Mexico with the children after filing a Notice to Move on May 19, 2008.” The portion of the record relied on as support for this statement, however, is a notice filed on May 19, 2008, by the law firm representing Mother, which advised that the firm had moved to a new address in Phoenix. Further, we have found no document in the record otherwise supporting this statement to which Mother's counsel attaches significance. Whether counsel's misrepresentation of the record is the result of inadvertent sloppiness or is an intentional attempt to mislead the court, we cannot say. Nevertheless, we remind counsel that he has a duty of candor to this court and a duty to certify that representations made to this court are accurate. *See* Ariz. R. Sup.Ct. 42, ER 3.3; Ariz. R. Civ. P. 11(a); *see also In re Ireland*, 146 Ariz. 340, 342, 706 P.2d 352, 354 (1985) (recognizing that an attorney has “an obligation not to mislead the court through an intentional omission” (citations omitted)).

¶ 30 Second, we note that, in making his argument on appeal, counsel for Mother explicitly relies on *In re Marriage of Cruz*, 2 CA–CV 2010–0013, 2010 WL 3365910 (Ariz.App. Aug. 26, 2010). Counsel failed to advise this court and opposing counsel that *Cruz* is an unpublished memorandum decision.<sup>15</sup> Rule 28(c), ARCAP, prohibits the citation of memorandum decisions as legal authority:

<sup>15</sup> When opposing counsel in the answering brief questioned the validity of *Cruz*, Mother's counsel attached a copy of the decision to the reply brief and again affirmatively relied on the decision to advance the merits of Mother's position, once more without advising or apparently even recognizing that *Cruz* was an unpublished decision.

**(c) Dispositions as Precedent.** *Memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to publish an opinion, grant a motion for reconsideration, or grant a petition for review. Any party citing a memorandum decision pursuant to this rule must attach a copy of it to the motion or petition in which such decision is cited.*

(Emphasis added.) “A memorandum decision is a written disposition of a matter not intended for publication.” ARCAP 28(a) (2).

¶ 31 We give no consideration to the memorandum decision relied on by Mother's counsel. See *Walden Books Co. v. Ariz. Dep't of Revenue*, 198 Ariz. 584, 589, ¶¶ 20–23, 12 P.3d 809, 814 (App.2000). Further, we \*354 \*\*172 caution counsel not to cite such decisions in the future except as allowed under the limited exceptions recognized in the rule.

***IV. Costs and Attorneys' Fees on Appeal***

[8] ¶ 32 Father requests attorneys' fees on appeal pursuant to A.R.S. §§ 12–349 (2003) and 25–324. After a thorough review of the record, including the testimony and financial affidavits filed by the parties, and consideration of the reasonableness of the positions taken by the parties throughout the proceedings, we award Father his costs and attorneys' fees on appeal pursuant to A.R.S. § 25–324, contingent on his compliance with Rule 21, ARCAP. We also conclude that the award of attorneys' fees is appropriate as a sanction pursuant to Rule 25, ARCAP, based on Mother's counsel's misrepresentation of the record and reliance on a memorandum decision as legal authority. Accordingly, to discourage like conduct in the future, responsibility for the award of attorneys' fees to Father shall be equal and joint and several between Mother and her appellate counsel.

**CONCLUSION**

¶ 33 The family court's order is affirmed.

CONCURRING: MAURICE PORTLEY, Presiding Judge, and SHELDON H. WEISBERG, Judge.

**Parallel Citations**

258 P.3d 164, 609 Ariz. Adv. Rep. 49

End of Document

© 2012 Thomson Reuters. No claim to original U.S. Government Works.