68925-8

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No. 68925-8-I

COURT OF APPEALS

DIVISION I

OF THE STATE OF WASHINGTON

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IN RE PARENTAGE AND SUPPORT OF:

BAINYA SHAY,
THOMAS O. BAICY,
Appellant,

and

DANELLE SHAY,
Respondent.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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# RESPONDENT'S BRIEF

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ORIGINAL

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## INTRODUCTION

This is a responsive brief to the appeal made by Thomas O. Baicy, Appellant, of multiple decisions made by several different superior courts. In summary, mere months had passed since the parties had their trial, and multiple courts found there had been no substantial change in circumstances since those final orders were entered May 25, 2011 (CP 103-111, 112-119, 120-132); therefore, they dismissed Thomas' petition for parenting plan, and found the petition was filed in bad faith. Furthermore, the courts found Thomas had willfully, and in bad faith violated the parties' parenting plan, thus finding him in contempt of court in response to Danelle Shay, Respondent's, motion for contempt. CP 15-19. Attorney fees and costs were ordered in the amount of $4500.00 against Thomas for both his modification petition, and Danelle's contempt of court motion. CP 15-19, 20-23. Thomas appeals this.

Thomas, also, filed three petitions requesting modification of child support. CP 133-140, 219-222, 286-288. The first action was requested within his petition for parenting plan modification (CP 135-140), therefore, it was dismissed with that modification. CP 20-23. The second action was filed within days of the court vacating the final orders he obtained by default on the parenting plan modification case. CP 219-222. This second action was dismissed at the same time the parenting plan modification was dismissed because there had been no substantial change

in circumstances, and none of the statutory exceptions applied. CP 20-23. The third action was filed prior to the trial court issuing its ruling on his motion for reconsideration of its revision ruling. CP 286-288. The third action was voluntarily stricken by Thomas upon receiving the trial court's reconsideration ruling. CP 99-102.

Thomas filed several subsequent motions (as well as the afore-mentioned petitions), but those were denied as well. SUB 162, CP 24-42, 47-75. In fact, because of the familiarity the trial court had with the parties as a result of their trial, and the subsequent litigation, the trial court limited Thomas' ability to file additional motions or petitions unless he obtain advance authorization to do so from a judge. CP 101. Despite this specific court order, several months later Thomas defied it, and filed another motion and obtained an order to show cause without advance authorization. CP319-323. Once the trial court was informed of Thomas' actions, it vacated Thomas' order to show cause, and sanctioned him $1500.00. CP 324-325. Thomas appeals this.

Danelle, in the intervening months filed her notice of intent to relocate Bainya, the parties' child, with a new proposed parenting plan. CP 326-328, 304-312. Thomas did not file an objection to the notice, so after the 30 day waiting period lapsed, Danelle obtained Court authorization to relocate Bainya. CP 313-314. Thomas appeals this as well.

Danelle views these multiple appeals as without basis, frivolous, and further evidence in support of the trial court's decision to limit Thomas' ability to file future motions and petitions. It is requested the appeals be denied, and sanctions imposed.

## A. RESTATEMENTS OF ERROR

1. May one appeal a decision of the superior court without the requisite notice of appeal?

2 - 4. If there is an overwhelming amount of evidence supporting the courts' decisions, should they stand?

5. If the Appellant refuses to attend a hearing he was given notice of, was Appellant given an opportunity to be heard?

6. If the Appellant refuses to obtain advance judicial authorization prior to filing a motion and obtaining an order to show cause was it proper to vacate said order to show cause?

## B. RESTATEMENT OF THE CASE

Facts/Procedure: May 25, 2011 the Honorable Deborah Fleck, Judge of the Superior Court, entered initial final orders after a contested trial May 25, 2011. The parties had represented themselves pro se. The final orders included extensive findings of facts, an order of child support with support worksheets, and a parenting plan. CP 103-111, 112-119, 120-132.

The parenting plan entered by Judge Fleck has Bainya primarily

living with Danelle, and Thomas having her on the first, third, and fourth weekends, and after school on Wednesdays. CP 104. Judge Fleck ordered "receiving parent shall be responsible for transporting the child." CP 106.

The trial court imputed income to both parties, and ordered Thomas to pay monthly child support of $402.93, and his percentage of work-related day care. CP 122. Judge Fleck imputed income to father because...

> At the time of trial, the father asserted he was not working, except for maintenance on his fourplex. However, credible evidence was provided that the father was in a joint construction venture with another person, building a house in the Newcastle area. The father has an earning capacity based upon his education and his prior work history. He reports having a college degree in telecommunications. He worked overseas for about 10 years as a technician in the oil and gas industry, and he report earning about $19/hour. With the last two years, he worked at a job for three days earning a similar amount, and he has no apparent concerns about his ability to obtain employment. He came back to the United States with substantial savings which he reports is now gone. The father has the ability to work in the construction industry, with heavy machinery, hydraulic machinery and in telecommunications and is also a member of the pile drivers' union. He expects to find work this summer. If the father is not working, he is voluntarily unemployed and income should be imputed at $19/hour. CP 113.

In addition, Judge Fleck made additional findings of facts concerning Thomas' credibility, and his attitude towards Danelle and her family:

> The father also testified in a way that was quite concerning, repeatedly referring to the mother as a liar and manipulator and an unfit mother, which was inconsistent with the evidence and the creditability of each party, and making other completely negative statements about the mother, as well as about her family. His testimony was largely a very negative attack on the mother, as a person and as a parent as well as on her family. Contrary to the credible presentation by members of the mother's family, the father describes them as "the most selfish, ungrateful people on this planet." The mother provided credible, balanced testimony; the father's testimony was at times not credible or accurate and it was not balanced. CP 116.

Problems with transporting Bainya to Thomas developed almost immediately after the final orders were entered. It was evident to Danelle that Thomas was angry about what Judge Fleck ordered. Despite what Judge Fleck ordered about the receiving parent providing transportation, Thomas insisted Danelle provide transportation at the beginning of his visit. He refused to pick-up Bainya at her house, or other locations Danelle offered to meet Thomas at, insisting she drive Bainya to his home telling her "we do it my way, or I no longer want to see Bainya." CP 170.

Even though Thomas was to have his daughter for the Fourth of July, he had Danelle pick her up from his home July 3rd, and refused to return her call until July 6th when he called her insisting she drive Bainya to him for his weekday visit. Danelle refused to do that, and Thomas refused to meet her at any of her suggestions (her home, a nearby bakery,

or local city hall), so Thomas screamed at Danelle extremely offensive names, threatening to make her life as miserable as possible and keep her in court as much as possible until Bainya turned 18, he was appealing Judge Fleck's orders, and to "never call or bring Bainya around [him]" and to "watch my back". CP 170-171. None of these facts were ever disputed by Thomas.

Danelle knew Thomas meant what he said. He had already filed suit against Danelle in Renton Small Claims Court, and appellate paperwork started arriving in August. Several times Danelle spoke with the Appellate Court Clerk. She was told of the many procedural problems there were with Thomas' appeal case. While the appeal was pending, Danelle received Thomas' parenting plan/child support modification pleadings with a child support Case Schedule stating trial was on January 26, 2012. Not realizing the pleadings were not related to the appeal but to a new lawsuit in Superior Court, Danelle spoke with the Appellate Clerk, and was told there was nothing to respond to, so she didn't. Also, Thomas had a history of incorrectly serving Danelle. CP 171.

October 10, 2011 Thomas filed his petition for modification requesting a new child support order with worksheets, and adjusting the transportation arrangements of the parenting plan. No change in circumstances at all were alleged for the child support modification portion of the petition. The only change in circumstances alleged was

against the maternal grandfather, who Danelle lived with at the time. Thomas alleged the grandfather has an anger management issue, and confronted and threatened Thomas. He wanted the court to modify the parenting plan so he does not have go to Danelle's home to pick Bainya up to avoid alleged hostility and abuse of conflict. He claims that would be in Bainya's best interests. CP 135-139. However, what Thomas failed to disclose in his petition is he has had no contact with the maternal grandfather since they saw each other inside the courtroom at the just-completed spring trial. CP 135-140, 206-207, VRP for 2/23/12 and 3/30/12 hearings. He did not deny this fact in any of his subsequent pleadings filed with the Court, nor in any of his oral presentations at the subsequent hearings, and, in fact, admitted it at the hearings. And please note, Thomas' appeal of the final orders entered May 25, 2011 were still pending as he was seeking modification of the orders he was appealing.

Thomas wanted major changes to child support, and a minor adjustment to the parenting plan. CP 3-5, 6-12. Except for child support worksheets, no financial information was ever served upon Danelle. He was requesting his monthly child support be reduced from $403 to $69 and the parenting plan transportation provision change from "receiving parent pick up" to both parties meet at a McDonalds in Covington. CP 148-160.

November 22, 2011, Thomas defaulted Danelle on his parenting plan/child support modification case, and entered all final orders, except

for a child support order. CP 1-2, 3-5. He supplied Danelle with an unsigned parenting plan in November. CP 172. Danelle did not know about the default entry of final orders, or that the four month Case Schedule she was served with (for child support only modification) was a mistake. Further, Danelle was not served with the new eleven month schedule (for a parenting plan modification) that was issued. CP 171-172.

A support order was not entered by the Court because Thomas had failed to comply with local rules by supplying a financial declaration, last six months of pay stubs and bank statements, and last two years of tax returns. Evidently Thomas did file some financial documents December 22, 2011 with the Court, but he never served them upon Danelle. This was not discovered until February 2012.

The next month, on December 2nd Danelle received a letter from the Appellate Court holding the appeal was withdrawn, and case dismissed. Shortly thereafter, she was served with Thomas' December 12, 2011 motion for contempt, order to show cause (CP 289-303), and the newly signed parenting plan. CP 141-147.

Thomas alleged Danelle was willfully and in bad faith violating the parenting plan by not meeting him at the Covington McDonalds at the beginning of his residential time. When Danelle was served the contempt pleadings, it was the first time she had seen the signed final parenting plan Thomas obtained by default. Danelle consulted with an attorney, and then

appeared pro se at the original show cause date for Thomas' contempt motion, December 29, 2011. The court continued the motion at the request of Danelle so she could obtain an attorney to assist her filing to vacate those default orders, and respond to Thomas' contempt motion. CP 161-162. The Court told the parties they had to follow the new parenting plan in the mean time. CP 141-147.

January 9, 2012, Danelle filed motions for both contempt, and to vacate the default and final orders Thomas obtained in November. CP 163-168, 169-175, 181-182, 183, 184-201. Her hearing was scheduled for the same date as Thomas' contempt motion. The bases for Danelle's contempt were Thomas willfully and in bad faith violated both the parenting plan he had just obtained by default, and the one entered by Judge Fleck from their trial. After the December 29th continuance hearing, Thomas refused to go to McDonalds for all of his Wednesday visits (a fact not denied by Thomas), and went to Covington only one of three weekend visits he was supposed to have; missing the other weekends. And under the old parenting plan Thomas refused all visits after July 3, 2011. CP 141-147.

Interesting facts were deduced regarding the exchanging at McDonalds. The receipts Thomas provided the Court to prove he was at McDonalds December 2nd and January 6th were obtained by him going through the drive-thru, not actually going into the restaurant, like Danelle

did. Thomas does not deny the receipts were from him "waiting" for Danelle and Bainya while going the drive-thru, but he did *not* admit that until faced with evidence that is what he did. CP 176. In fact, prior to that admission, Thomas claimed to Danelle's former attorney he was waiting for them in the dining area, and accused Danelle of using the drive-thru, and that doing so would be trying to exchange Bainya in bad faith violating the parenting plan. CP 211-214, 303, SUB 147, CP 208-210, 202-203.

Thomas never denied there had been no change in circumstances since their spring 2011 trial, where final orders were entered May 25, 2011. Thomas never denied he had not seen the maternal grandfather since the trial, or had any contact with him since prior to trial. Thomas never denied the allegations he made in his modification petition were before the trial court. The maternal grandfather specifically denied Thomas' allegations. CP 177-178.

Danelle filed her motion to vacate the order of default and entry of final orders claiming mistake, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment and order, and any other reason justifying relief from the operation of the judgment. Not only did Danelle move the court to vacate the final orders, but also find there was no basis for Thomas' petition in the first place since there had been absolutely no change in circumstances, let alone substantial change in circumstances

since their trial, just five months prior to Thomas' filing his modification petition. Danelle also moved the court for dismissal, as well as sanctions since the petition had been filed in bad faith to harass her. CP 163-168, 179-180.

The hearing was held January 30, 2012 concerning both parties motions. Only Danelle's motion to vacate the default and final orders was addressed by the court, and it was granted. CP 13-14. Regarding the other relief, contempt and adequate cause, the court ordered as follows:

> Court has informed Father that in order for his petition to modify is granted to modify Judge Fleck's orders, RCW 26.09.260 requires a substantial change of circumstance [to] occur since the parties had trial before Judge Fleck and the substantial change cannot be any issue that was, could have, or should have been raised at trial with Judge Fleck, and if Father proceeds with his petition to modify and a court does not find there is adequate cause, Father could be sanctioned. This Court strongly encourages Father to consult a family law attorney before proceeding further. The Court is not addressing either party's motions for contempt or Mother's request for attorney's fees/sanctions today as those issues will have to be addressed another day, and renoted accordingly. It is suggested the renoting not occur until father has been afford [sic] adequate time to seek legal assistance. The court does remind the Father of his ability to file for reconsideration if this Court's understanding of the time line re: his appeal, the date his modification was filed, and the default and final orders were entered, however, there still remains the other problems re: entering final orders without finding of adequate cause on Ex Parte Calendar still remains. Bottom

line: The order for vacating default is granted. CP 14.

This order was never appealed by Thomas.

Instead of heading the Court's strongly worded advice, and obtaining legal assistance before moving forward with his modification petition, and contempt, *just three days later*, February 2, 2012, Thomas re-noted his contempt motion, filed a new motion for adequate cause on his parenting plan modification petition, filed another modification petition (this one limited to just child support), and a new motion for temporary child support. In response, Danelle re-noted her contempt motion, and motion for denial of adequate cause and dismissal, and filed her motion to dismiss the newly filed child support modification petition.

Thomas alleged the change in circumstances for this second petition for child support modification was he had not been able to find employment despite Judge Fleck expecting him to find stable, full-time work. Thomas did not offer any evidence he had actually been looking for work. Thomas' statement as to what Judge Fleck found in her findings regarding his employment situation was inaccurate. CP240-248. Danelle alleged Thomas' latest filing were more evidence of his intent to harass her, and asked not only for sanctions (CP 227), but also an order limiting his ability to keep filing motions and petitions. CP 223-224.

Furthermore, even though Thomas' November 22, 2011

parenting plan was vacated, thereby reinstating the May 25, 2011 parenting plan, and Danelle's motion for contempt had not been decided by the court, Thomas continued refusing to follow the parenting plan. He refused to see Bainya on his Wednesdays; refused to pick her up on one Friday (instead on Saturday); and continued insisting on meeting Danelle at the Covington McDonalds. CP 238-239, 240-248. Further, he continued to disregard court rules by following proper court procedures. CP 229-237, 205.

Danelle, by February 21, 2012, had incurred $5983.60 in legal fees and costs, of which she had paid only $1000.00. CP 249-253.

A hearing was held on February 23, 2012 on all parties' motions. No testimony was taken. Danelle did not ask for imprisonment on her contempt motion, and Thomas neither asked for an attorney nor a continuance to seek an attorney. Thomas agreed with Danelle's argument there had been no change in circumstances. Thomas agreed he had not been following the parenting plan. The Court found Danelle had been served an incorrect Case Schedule with the summons and petition in November 2011. CP 15-19. Furthermore, the Court found the following:

> Adequate cause for hearing the petition has clearly not been established. Furthermore, this Court finds the Petition to Modify/Adjust the Parenting Plan was brought in bad faith by the Petitioner. The parties just had a contested trial on parenting plan and child support issues before the Honorable Deborah Fleck, who entered

> final orders May 25, 2011. […] Petitioner specifically told the court there was no substantial change in circumstances. Court found that father's allegations of hostile environment due to mother living with maternal grandfather was insufficient to rise to the level of substantial change in circumstances because (1) it was all before Judge Fleck, and (2) there has been no contact between petitioner and maternal grandfather. CP 21.

Attorney fees and costs in the amount of $4500.00 were ordered "based upon [Thomas'] failure to follow the court order and bad faith filing of the petition for modification of parenting and child support." CP 21. The December 22, 2011 final order of child support was vacated, since it could not exist in light of the January 30, 2012 order that vacated the order of default and the other final orders. CP 13-14. And both of Thomas' modification petitions were dismissed. Thomas was ordered to pay the $4500.00 within 30 days. An order of dismissal was filed by the court on March 5, 2012. CP 43-44. He has not complied with the court order.

Thomas filed his motion for revision of commissioner's ruling March 3, 2012. CP 24-42. Nowhere in his motion does he allege there had a been change in circumstances; he just wanted one thing changed. He then attempted to add new allegations of facts, which were not before the Commissioner on February 23rd, claiming it would be easier for Danelle, better for Bainya, and Danelle had acquiesced to using McDonalds. Also, despite the January 30th order warning Thomas of

sanctions, Thomas newly claimed he had not been warned he could be sanctioned by the court for his parenting plan modification petition lacking a substantial change in circumstances. Throughout the proceedings, Danelle denied she ever agreed to using McDonalds except one time, and consistently argued McDonalds would make things more difficult, especially since Thomas more times than not refused to utilize his residential time provided for in either parenting plan.

Per local rules, when a motion for revision is filed and there is an open case pending before the Court, the assigned judge hears the motion. Therefore, Judge Fleck, who heard the parties' trial just months earlier was assigned the case; therefore, the revision motion was before Her Honor. After hearing argument from both parties, the Court denied the revision motion. The Court did not increase the sanctions, but did allow for Danelle to re-raise the issue if Thomas continued litigating. CP 45-46.

Danelle had incurred $7909.05 in legal fees by March 31, 2012.

On April 9, 2012 Thomas filed a motion for reconsideration primarily alleging Danelle was not incurring attorney fees because she was in a relationship with her former attorney. CP 47. Further, he claimed there actually was a change in circumstances warranting a parenting plan modification because Danelle took Bainya to him on March 19, 2012 (which Danelle did because Thomas refused, again, to pick up Bainya from Danelle's home, and Danelle thought it still better Bainya see her

father than not at all). None of the allegations were made in any prior pleadings. The allegations regarding the relationship were made based upon an unsigned declaration from an investigation of following Danelle. CP 76-98, 273-277.

Danelle filed a notice of objection (CP 254-255) objecting to:

Objection #1 no new evidence is supposed to be submitted in a reconsideration;

Objection #2 the new evidence was not relevant to:
(1) Thomas' parenting plan modification petition where his sole allegation had to do with maternal grandparent, who he had had no contact with since trial;
(2) whether his remaining unemployment since trial was a substantial change in circumstances;
(3) whether there was any substantial change in circumstances to support his multiple petitions;
(4) whether or not Thomas willfully and bad in faith repeatedly failed to exercise his residential time with Bainya, and repeatedly refused to meet at McDonalds; and
(5) what sanctions should be imposed for contempt, and bad faith filing of multiple petitions;

Objection #3 No declaration was submitted in support of motion despite the fact such a declaration was referred to in the motion;

Objection #4 Multiple declarations were submitted by officers of the court regarding all the attorney fees and costs Danelle has incurred, which are 100% attributable to Thomas' actions; and

Objection #5 Thomas wildly mischaracterizes Danelle's attorney's letter regarding the one time Danelle brought Bainya to her father so he would utilize his residential time with his daughter he would otherwise not do, because he continued refusing to follow the court orders regarding his obligation to pick up Bainya.

Upon the Court's request, Danelle filed a responsive declaration. CP 263-272. Danelle initially paid her law firm $1000.00 to represent her

per the terms of her fee agreement, and is responsible for all legal fees and costs. CP 262. Because of the obvious frivolousness of Thomas' case and him being in contempt of court, she was told she would not have to make additional payments until it was determined how much the Court would sanction Thomas for his, bad faith litigation. Danelle is ultimately responsible for remaining legal fees not paid by Thomas. Danelle, also, pointed out Thomas continues and repeatedly lies to the Court about the exchanging of Bainya, and violating the parenting plan. She stressed how she simply wants Thomas to follow the court orders, and she had not relocated from her home in Black Diamond at that point.

Danelle continued incurring legal fees and costs due to more of Thomas' frivolous filings. For the reconsideration, she incurred an additional $1228.50. By April 16, 2012, the total amount of attorney fees and costs increased to $9135.55. CP 278-285.

Two and a half weeks prior to the one year anniversary of the parties' final orders from their trial, May 8, 2012, Thomas filed his **third** petition for modification of child support. CP 286-288. This time he alleged "whether or not there is a substantial change in circumstances, the previous order was entered more than a year ago, and the order works a severe economic hardship." CP 286. Further, Thomas wanted to consider deviating from the standard calculation due to income of other adults in the household, gifts, and disparity in livings costs of the parents. CP 287.

Also, Thomas filed a motion for a temporary order of child support.

May 16, 2012 Judge Fleck issued her order on reconsideration. CP 99-102. Her Honor denied Thomas' reconsideration motion. Amongst other findings, the following are summaries:

(1) Thomas acted in bad faith by refusing to see Bainya for several months when Danelle did not agree to deviate from the parenting plan. CP 100.

(2) Thomas' petition to modify the parties' parenting plan was made in bad faith, and CR 11 sanctions were appropriate. CP 100-101.

(3) Even if she were to consider Thomas' new evidence, it was not relevant for his bad faith filing, and contempt of court for failure to follow the parenting plan;. CP 101.

(4) There are no lesser sanctions than monetary sanctions, pursuant to CR 11 and RCW 7.21.030(3). CP 101.

(5) "On the basis of credibility determinations and findings made as a result of the trial, the statements made in the father's pleadings filed since entry of the orders following trial, the revision hearing, my familiarity with these parties, and the extent of litigation initiated by the father since the entry of the orders following trial, I find that the father continues to be angry and defiant, necessitating an order limiting his ability to file additional motions or petitions unless he obtains advance authorization from this court or a subsequent Chief Unified Family Court Judge, or if this court is unavailable, then from another Chief Judge or a UFC Judge." CP 101.

Her Honor then ordered the motion for reconsideration was denied, the $4500.00 in sanctions previously ordered remained the sanction; and Thomas "shall not file additional pleadings, including petition or motions following those filed for the purpose of this motion for reconsideration, unless he obtains advance authorization as described in Finding 5." CP

102.

May 23, 2012, Danelle filed her objection to Thomas' third child support modification petition, and motion for temporary order of child support.

May 30, 2012, Thomas filed his voluntary dismissal of his third child support modification petition.

June 12, 2012, Thomas filed his first notice of appeal regarding the following orders:

August 1, 2012, Danelle filed her notice of intent to relocate Bainya with a proposed parenting plan.

September 6, 2012, Thomas did not object to the relocation. Danelle obtained court permission to relocate Bainya, and the new parenting plan was signed by the court. CP 315-318.

September 24, 2012 Thomas filed his first supplemental notice of appeal regarding the relocation.

October 26, 2012, without first obtaining the advance authorization required by Judge Fleck's May 16, 2012 order, Thomas filed a motion to vacate the recently entered parenting plan, and an order to show cause. CP 319-323. The basis for the motion is Danelle did not seek appellate court permission before obtaining the superior court's signature on the orders granting the relocation, and parenting plan. Thomas alleged the relocation would effect his appeal of the orders

finding his multiple modification petitions were not based on a substantial change in circumstances and filed in bad faith, and the finding of contempt for his willful and bad faith failure to follow the parenting plans entered May 25, 2011, and November 22, 2011.

November 6, 2012, Danelle's attorney spoke with Thomas on the phone giving him notice of her intentions of going to the Ex Parte Department, where Thomas had his order to show cause signed, at 9:30 a.m., moving the Court to quash his order to show cause. Furthermore, after the conversation, Danelle's attorney confirmed their conversation by email, along with attaching her motion and proposed order.

November 7, 2012, Danelle's attorney waited in the Ex Parte Department for Thomas to appear from 9:30 a.m. to 10:30 a.m.. Thomas never appeared, then the Department directed the attorney to Judge Fleck's court to present her motion. At 11:45 a.m. the order on the motion to quash was entered. CP 324-325. The Court granted Danelle's motion because it did not appear Thomas obtained the required advance authorization before filing his motion, therefore, the Ex Parte Department was without authority to issue Thomas' order to show cause. Further, because it appeared Thomas purposely failed to disclose this requirement to the Ex Parte Department, sanctions against Thomas were appropriate. Based on the fact that Thomas had failed to pay the $4500.00 in prior sanctions, the court found and ordered Thomas could not even seek the

advance authorization required of the May 16, 2012 order until the $1500.00 in sanctions awarded that day were paid. CP 325, VRP 11/7/12 hearing.

November 9, 2012, Thomas filed his second supplemental notice of appeal.

## C. SUMMARY OF ARGUMENT

Thomas' appeal is without merit, and filed in bad faith. No appeal was filed for the January 30, 2012 decision (CP 13-14), therefore, that order is not properly before this Court. Even if it was, the facts and Washington law support the vacating of the default and final orders, as pointed out in Danelle's motion and related pleadings before the Superior Court.

The February 23, 2012 Commissioner hearing was conducted fairly, no testimony was given, no request for an attorney made, and the arguments made by both parties during the hearing were all supported by the written record before the Court. Thomas was correctly found in contempt pursuant to RCW 7.21 and RCW 26.09.160, and his multiple modification requests were denied pursuant to RCW 26.09.170 and RCW 26.09.260. Thomas at no time ever claimed he was indigent, or requested an attorney be appointed. More importantly, at no time was incarceration ever an issue regarding the contempt against Thomas, so his argument that an attorney should have been appointed is without merit. In fact, at the

January 30, 2012 hearing, the Court strongly advised him to obtain legal advice, or be subject to sanctions if he proceeded with his litigation. CP 14. Furthermore, the decisions on February 23rd's were affirmed by the subsequent hearings before a Judge.

Thomas' reconsideration motion was largely based upon new, but irrelevant evidence to the issues at hand: Thomas' actions, repeated frivolous filings, and his refusal to follow the parenting plans. The record is crystal clear that Thomas did not plead there had been any change in circumstances since the parties' 2011 trial, and orders cannot be changed just because one party wants a "small" modification. Danelle repeatedly requested in her pleadings for sanctions against Thomas for his frivolous filings and contemptuous conduct.

Danelle's relocation, which Thomas did not object to, has nothing to do with the subject of this appeal – Thomas frivolous filings, and contemptuous conduct. Thomas was provided more than adequate notice and opportunity to respond to the motion to quash his inappropriately obtained ex parte order, yet he chose not to appear, and the order was appropriately quashed, and Thomas sanctioned.

## D. ARGUMENT

The following arguments are made in direct response to those listed in the Appellant's Brief.

## 1. WHEN MUST AN APPEAL BE FILED?

1. Notice of an appeal of a superior court order must be filed within 30 days of the filing of the order.

Revision by Court

All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge. RCW 2.24.050.

Decisions Of The Superior Court That May Be Appealed

(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

(10) Order on Motion for Vacation of Judgment. An order granting or denying a motion to vacate a judgment. RAP 2.2(a)(10).

Time Allowed To File Notice

(a) Notice of Appeal. Except as provided in

rules 3.2(e) and 5.2(d) and (f), a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e). RAP 5.2(a)

The order vacating the default, and final orders was entered January 30, 2012. Thomas failed to file either a motion for revision, or a notice of appeal, therefore, Thomas is not allowed to argue that decision in his appeal. Besides, as shown in Danelle's motion to vacate the default, final orders, and other relief, and supporting pleadings, there is more than enough support in the facts and law to support the underlying decision to vacate order of default and resulting final was appropriate. Thomas' attempts to appeal a decision not under appeal is frivolous.

**2. WAS THOMAS ENTITLED TO APPOINTMENT OF A PUBLIC DEFENDER?**

No, Thomas was not entitled to an appointment of a public defender, as his liberty was not at stake, and Danelle's contempt was neither the only issue before the court, nor the only issue he was sanctioned for

Thomas correctly points out, the right of counsel does not necessarily turn on the title of the proceedings, but the particular nature of the proceedings, and the issues involved.

Insofar as the right to counsel is concerned, the label put on the proceedings is less important than the threat of imprisonment the matter entails. *Tetro v. Tetro*, 86 Wn.2d 252, 254, 544 P.2d 17 (1975).

The threat of imprisonment upon which the right

to counsel turns must be immediate. The mere possibility that an order in a hearing may later serve as the predicate for a contempt adjudication is not enough to entitle an indigent party therein to free legal assistance. *State v. Walker*, 87 Wn.2d 443 (1976) [citing and clarifying the holding in Tetro].

•The right to appointment of counsel in a civil matter limited to the stage of proceeding where incarceration is imminent as a result of contempt proceedings. *Bellevue School District v. E.S.*, 171 Wn. 2d 695 (2011) (citing with approval *Tetro v. Tetro*, 86 Wn. 2d 252 (1975) and *In re Truancy of Perkins,* 93 Wn App 590, review denied 138 Wn 2d 1003 (1999).

The due process clause of the Fourteenth Amendment does not automatically require provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year). *Turner v. Rogers*, 131 S. Ct. 2507 (2011). (Note: the Supreme Court reserved ruling on a situation in which the State is proceeding against an indigent individual for collection of child support payments. The holding in Turner appears limited to private party civil actions for contempt).

Nowhere in the record is Thomas threatened with imprisonment. Danelle did not move for such sanctions, and no Court threatened Thomas with it. Thomas never claimed to be indigent and in need of an appointment of an attorney. In fact, on January 30, 2012 the Court took great pains explaining how Thomas' modification petition could be frivolous and "strongly encouraged" him to obtain legal assistance. CP 14. The Court warned him if he proceeded he was subject to sanctions if the next court did indeed find his petition frivolous. Furthermore, that

same Court refused to hear the two contempt motions, and suggested Danelle not re-note her hearing until Thomas had adequate time to seek legal assistance. CP 14. Apparently, Thomas needed only three days to obtain legal assistance, and not only re-noted his hearings, filed another modification petition.

Thomas was sanctioned not only due to the contempt of court findings against him, but also due to the court finding his two modification petitions were frivolous, and filed in bad faith. Nowhere does Thomas claim he was entitled to appointment of an attorney for those matters.

**3. WAS THOMAS UNFAIRLY TREATED?**

No, Thomas was treated fairly.

Thomas' argument does not refer to anything specific as to how he was supposedly treated unfairly at the February 23, 2012 hearing. Furthermore, Danelle does not understand Thomas' claimed that they were not subjected to the same process at that hearing. No testimony was taken at the hearing. No request to take testimony was asked by either party. The questions raised by the Court during Thomas' argument were directly taken from the facts alleged by Danelle in her pleadings, and not disputed by Thomas' in his pleadings. No new facts were deduced by the answers. Thomas was not always listening to the Court, was argumentative with the Court, and evasive with his argument and answers. What Thomas leaves out of his argument was the February 23, 2012 hearing was subject to his

motion for revision, which was denied.

The February 23, 2012 hearing had three different sets of questions – minor modification of the parenting plan, modification of the child support order (2 petitions), and contempt (filed by each party against the other). CP 15-19, 20-23. As pointed out by Thomas, *Rideout*, holds the appellate standard review of the contempt order is:

> The procedural safeguards of our court system strongly support the application of the substantial evidence standard of review. As noted, trial courts are better equipped than multijudge appellate courts to resolve conflicts and draw inferences from the evidence. In sum, we affirm the decision of the Court of Appeals, holding that the appropriate standard of review here is not de novo, but rather is whether the trial court's findings of fact are supported by substantial evidence. *Marriage of Rideout*, 150 Wn.2d 337, 352 (2003).

The appellate review standard of the adequate cause determination is:

> A trial court's adequate cause determination under RCW 26.09.270 will be overturned only for abuse of discretion. *In re Marriage of Tomsovic*, 118 Wn. App. 96, 104, 74 P. 3d 692 (2003). *In re Marriage of Parker*, 135 Wn. App. 465, 471 (2006).

And the appellate review standard of the child support modification petitions is:

> In a modification proceeding, a trial court is required to set forth written findings of fact, which must be supported by substantial evidence and justify the court's conclusion. Substantial evidence is that which would persuade a fair-minded and rational person of the truth of a

stated premise. *State ex rel. Stout v. Stout*, 89 Wn. App. 118, 124, 048 P.2d 851 (1997).

Thomas' misapplies *Woodruff v. Spence*, 76 Wn. App. 207, 883 P.2d 936 (1994). In *Woodruff* the issue was whether or not there was proper service of a summons and complaint. The court held:

> When a motion to set aside a default judgment is supported by affidavits asserting lack of personal service, and the plaintiff files controverting affidavits, a triable issue of fact is presented. [Citations omitted.] The court, in its discretion, ***may*** direct that an issue raised by motion be heard on oral testimony if that is necessary for a just determination. [Citations omitted, emphasis added.] A court ***may*** abuse its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact whose resolution requires a determination of witness credibility. [Citations omitted, emphasis added.] *Woodruff*, supra at 211.

The *Woodruff* court then found in that particular case before it the issue needing resolution, proper service, could only be resolved with an evidentiary hearing. It did not hold in every case depending upon credibility of witnesses an evidentiary hearing is required. If that were indeed the law, practically every family law motion would require an evidentiary hearing. Arguably, family law motion hearings, and any resulting revisions are evidentiary hearings where the commissioners and judges almost always have to make decisions based upon the declarations submitted before it.

Oral testimony was not required, and only argument was made at

the two oral hearings. Thomas neither requested oral testimony, nor objected to the hearing being argued on the pleadings. Thomas does not point to any new facts that were elicited from his argument. Whether or not there was a "substantial change in circumstances" since the parties 2011 trial is a conclusion of law, not a fact. Thomas never disputed he had not seen the maternal grandfather since trial, (CP 21) and the only basis for his first modification petition was alleged conduct of the maternal grandfather. CP 138. Based upon the undisputed facts, there is no other conclusion the court, or Thomas could reasonably make other than there had been no substantial change in circumstances. Nothing Thomas ever submitted changes those facts.

Whether or not the court believed Thomas' claim that he was "confused" is a finding of fact. Thomas never disputed he refused to see Bainya after July 3, 2011 until at least until he modified the parenting plan by default November 22, 2011. Thomas never denied he used the McDonald's drive-thru when he was supposed to meet Danelle and Bainya at McDonalds. Thomas never denied refusing to utilize his Wednesday visits in January, and February of 2012.

Thomas has been found by the 2011 trial court as lacking credibility, and showing much negativity towards Danelle and her family:

> The father also testified in a way that was quite concerning, repeatedly referring to the mother as a liar and manipulator and an unfit mother, which

> was inconsistent with the evidence and the creditability of each party, and making other completely negative statements about the mother, as well as about her family. His testimony was largely a very negative attack on the mother, as a person and as a parent as well as on her family. Contrary to the credible presentation by members of the mother's family, the father describes them as "the most selfish, ungrateful people on this planet." The mother provided credible, balanced testimony; the father's testimony was at times not credible or accurate and it was not balanced. CP 116.

Thomas, throughout the pleadings he filed, and arguments made since that trial, clearly shows he is angry with Danelle. The February 23, 2012 court found him "not confused, he was defiant." CP 16. The judge for Thomas' revision and reconsideration motions was the same judge, Judge Fleck, the parties had for the 2011 trial, as such, she was very familiar with both parties, their history, and issues. In light of Thomas' unabating anger, and repeated filings of petitions despite no legal basis for doing so, it is not surprising Judge Fleck made the following findings and order on May 16, 2012:

> [Findings.] 5. On the basis of credibility determinations and findings made as a result of the trial, the statements made in the father's pleadings filed since entry of the orders following trial, the revision hearing, my familiarity with these parties, and the extent of litigation initiated by the father since the entry of the orders following trial, I find that the father continues to be angry and defiant, necessitating an order limiting his ability to file additional motions or petitions unless he

obtains advance authorization from this court or a subsequent Chief Unified Family Court Judge, or if this court is unavailable, then from another Chief Judge or a UFC Judge. CP 101.

[Order] The father shall not file additional pleadings, including petition or motions following those filed for the purpose of this motion for reconsideration, unless he obtains advance authorization as described in Finding 5. CP 102.

**4. SHOULD THE REVISON HAVE BEEN GRANTED?**

No, the revision motion was properly denied, as the record is very clear on this.

**5. SHOULD THERE HAVE BEEN REMAND ON THE RECONSIDERATION MOTION?**

No, the reconsideration motion was irrelevant to the issues of (a) whether or not Thomas willfully violated the parenting plan, and (b) if there were any legal bases to repeatedly file modification petitions, as pointed out in Danelle's responsive pleadings to the motion, and supported by the resulting Superior Court order.

Thomas' argument is still reflective of his anger over the decisions made by Judge Fleck in 2011, and towards Danelle, as well as irrelevant to the undisputed facts – there had been no substantial change in circumstances since the trial warranting a modification of either the parenting plan, or order of child support as required by RCW 26.09.170 and RCW 26.09.260, and Thomas refused to pick up Bainya in 2011 and 2012, as repeatedly found by two different courts in three different proceedings, therefore, the contempt finding pursuant to RCW 26.09.160 and RCW 7.21 were proper.

**RCW 26.09.170**
Modification of decree for maintenance or support, property disposition — Termination of maintenance obligation and child

(1) Except as otherwise provided in RCW 26.09.070(7), the provisions of any decree respecting maintenance or support may be modified: (a) Only as to installments accruing subsequent to the petition for modification or

motion for adjustment except motions to compel court-ordered adjustments, which shall be effective as of the first date specified in the decree for implementing the adjustment; and, (b) except as otherwise provided in this section, only upon a showing of a substantial change of circumstances. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

(2) Unless otherwise agreed in writing or expressly provided in the decree the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance or registration of a new domestic partnership of the party receiving maintenance.

(3) Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child or by the death of the parent obligated to support the child.

(4) Unless expressly provided by an order of the superior court or a court of comparable jurisdiction, provisions for the support of a child are terminated upon the marriage or registration of a domestic partnership to each other of parties to a paternity order, or upon the remarriage or registration of a domestic partnership to each other of parties to a decree of dissolution. The remaining provisions of the order, including provisions establishing paternity, remain in effect.

(5) (a) A party to an order of child support may petition for a modification based upon a showing of substantially changed circumstances at any time.

(b) An obligor's voluntary unemployment or voluntary underemployment, by itself, is not a substantial change of circumstances.□

(6) An order of child support may be modified one year or more after it has been entered without a showing of substantially changed circumstances:

(a) If the order in practice works a severe economic hardship on either party or the child;

(b) If a party requests an adjustment in an order for child support which was based on guidelines which determined the amount of support according to the child's age, and the child is no longer in the age category on which the current support amount was based;

(c) If a child is still in high school, upon a finding that there is a need to extend support beyond the eighteenth birthday to complete high school; or

(d) To add an automatic adjustment of support provision consistent with RCW 26.09.100.

(7) (a) If twenty-four months have passed from the date of the entry of the order or the last adjustment or modification, whichever is later, the order may be adjusted without a showing of substantially changed circumstances based upon:

(i) Changes in the income of the parents; or

(ii)Changes in the economic table or standards in chapter 26.19 RCW.□

(b) Either party may initiate the adjustment by filing a motion and child support worksheets.

(c) If the court adjusts or modifies a child support obligation pursuant to this subsection by more than thirty percent and the change would cause significant hardship, the court may implement the change in two equal increments, one at the time of the entry of the order and the second six months from the entry of the order. Twenty-four months must pass following the second change before a motion for another adjustment under this subsection may be filed.

(8) (a) The department of social and health services may file an action to modify or adjust an order of child support if public assistance money is being paid to or for the benefit of the child and the child support order is at least twenty-five percent above or below the appropriate child support amount set forth in the standard calculation as defined in RCW 26.19.011 and reasons for the deviation are not set forth in the findings of fact or order.

(b) The department of social and health services may file an action to modify or adjust an order of child support in a nonassistance case if:

(i) The child support order is at least twenty-five percent above or below the appropriate child support amount set forth in the standard calculation as defined in RCW 26.19.011:

(ii) The department has determined the case meets the department's review criteria; and

(iii) A party to the order or another state or jurisdiction has requested a review.

(c) The determination of twenty-five percent or more shall be based on the current income of the parties and the department shall not be required to show a substantial change of circumstances if the reasons for the deviations were not set forth in the findings of fact or order.

(9) The department of social and health services may file an action to modify or adjust an order of child support under subsections (5) through (7) of this section if:

(a) Public assistance money is being paid to or for the benefit of the child;

(b) A party to the order in a nonassistance case has requested a review; or

(c) Another state or jurisdiction has requested a modification of the order.

(10) If testimony other than affidavit is required in any proceeding under this section, a court of this state shall permit a party or witness to be deposed or to testify under penalty of perjury by telephone, audiovisual means, or other electronic means, unless good cause is shown.

**RCW 26.09.260**

Modification of parenting plan or custody decree.

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. The effect of a parent's military duties potentially impacting parenting functions shall not, by itself, be a substantial change of circumstances justifying a permanent modification of a prior decree or plan.

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

(a) The parents agree to the modification;

(b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;

(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; or

(d) The court has found the nonmoving parent in contempt of court

at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.

(3) A conviction of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070 shall constitute a substantial change of circumstances for the purposes of this section.

(4) The court may reduce or restrict contact between the child and the parent with whom the child does not reside a majority of the time if it finds that the reduction or restriction would serve and protect the best interests of the child using the criteria in RCW 26.09.191.

(5) The court may order adjustments to the residential aspects of a parenting plan upon a showing of a substantial change in circumstances of either parent or of the child, and without consideration of the factors set forth in subsection (2) of this section, if the proposed modification is only a minor modification in the residential schedule that does not change the residence the child is scheduled to reside in the majority of the time and:

(a) Does not exceed twenty-four full days in a calendar year; or

(b) Is based on a change of residence of the parent with whom the child does not reside the majority of the time or an involuntary change in work schedule by a parent which makes the residential schedule in the parenting plan impractical to follow; or

(c) Does not result in a schedule that exceeds ninety overnights per year in total, if the court finds that, at the time the petition for modification is filed, the decree of dissolution or parenting plan does not provide reasonable time with the parent with whom the child does not reside a majority of the time, and further, the court finds that it is in the best interests of the child to increase residential time with the parent in excess of the residential time period in (a) of this subsection. However, any motion under this subsection (5)(c) is subject to the factors established in subsection (2) of this section if the party bringing the petition has previously been granted a modification under this same subsection within twenty-four months of the current motion. Relief granted under this section shall not be the sole basis for adjusting or modifying child support.

(6) The court may order adjustments to the residential aspects of a parenting plan pursuant to a proceeding to permit or restrain a relocation of the child. The person objecting to the relocation of the child or the relocating person's proposed revised residential schedule may file a petition to modify the parenting plan, including a change of the residence

in which the child resides the majority of the time, without a showing of adequate cause other than the proposed relocation itself. A hearing to determine adequate cause for modification shall not be required so long as the request for relocation of the child is being pursued. In making a determination of a modification pursuant to relocation of the child, the court shall first determine whether to permit or restrain the relocation of the child using the procedures and standards provided in RCW 26.09.405 through 26.09.560. Following that determination, the court shall determine what modification pursuant to relocation should be made, if any, to the parenting plan or custody order or visitation order.

(7) A parent with whom the child does not reside a majority of the time and whose residential time with the child is subject to limitations pursuant to RCW 26.09.191 (2) or (3) may not seek expansion of residential time under subsection (5)(c) of this section unless that parent demonstrates a substantial change in circumstances specifically related to the basis for the limitation.

(8) (a) If a parent with whom the child does not reside a majority of the time voluntarily fails to exercise residential time for an extended period, that is, one year or longer, the court upon proper motion may make adjustments to the parenting plan in keeping with the best interests of the minor child.

(b) For the purposes of determining whether the parent has failed to exercise residential time for one year or longer, the court may not count any time periods during which the parent did not exercise residential time due to the effect of the parent's military duties potentially impacting parenting functions.

(9) A parent with whom the child does not reside a majority of the time who is required by the existing parenting plan to complete evaluations, treatment, parenting, or other classes may not seek expansion of residential time under subsection (5)(c) of this section unless that parent has fully complied with such requirements.

(10) The court may order adjustments to any of the nonresidential aspects of a parenting plan upon a showing of a substantial change of circumstances of either parent or of a child, and the adjustment is in the best interest of the child. Adjustments ordered under this section may be made without consideration of the factors set forth in subsection (2) of this section.

(11) If the parent with whom the child resides a majority of the time receives temporary duty, deployment, activation, or mobilization orders from the military that involve moving a substantial distance away from the parent's residence or otherwise would have a material effect on the parent's ability to exercise parenting functions and primary placement responsibilities, then:

(a) Any temporary custody order for the child during the parent's absence shall end no later than ten days after the returning parent provides notice to the temporary custodian, but shall not impair the discretion of the court to conduct an expedited or emergency hearing for resolution of the child's residential placement upon return of the parent and within ten days of the filing of a motion alleging an immediate danger of irreparable harm to the child. If a motion alleging immediate danger has not been filed, the motion for an order restoring the previous residential schedule shall be granted; and

(b) The temporary duty, activation, mobilization, or deployment and the temporary disruption to the child's schedule shall not be a factor in a determination of change of circumstances if a motion is filed to transfer residential placement from the parent who is a military service member.

(12) If a parent receives military temporary duty, deployment, activation, or mobilization orders that involve moving a substantial distance away from the military parent's residence or otherwise have a material effect on the military parent's ability to exercise residential time or visitation rights, at the request of the military parent, the court may delegate the military parent's residential time or visitation rights, or a portion thereof, to a child's family member, including a stepparent, or another person other than a parent, with a close and substantial relationship to the minor child for the duration of the military parent's absence, if delegating residential time or visitation rights is in the child's best interest. The court may not permit the delegation of residential time or visitation rights to a person who would be subject to limitations on residential time under RCW 26.09.191. The parties shall attempt to resolve disputes regarding delegation of residential time or visitation rights through the dispute resolution process specified in their parenting plan, unless excused by the court for good cause shown. Such a court-ordered temporary delegation of a military parent's residential time or visitation rights does not create separate rights to residential time or visitation for a person other than a parent.

(13) If the court finds that a motion to modify a prior decree or parenting

plan has been brought in bad faith, the court shall assess the attorney's fees and court costs of the nonmoving parent against the moving party.

**RCW 26.09.160**

Failure to comply with decree or temporary injunction — Obligation to make support or maintenance payments or permit contact with children not suspended — Penalties.

(1) The performance of parental functions and the duty to provide child support are distinct responsibilities in the care of a child. If a party fails to comply with a provision of a decree or temporary order of injunction, the obligation of the other party to make payments for support or maintenance or to permit contact with children is not suspended. An attempt by a parent, in either the negotiation or the performance of a parenting plan, to condition one aspect of the parenting plan upon another, to condition payment of child support upon an aspect of the parenting plan, to refuse to pay ordered child support, to refuse to perform the duties provided in the parenting plan, or to hinder the performance by the other parent of duties provided in the parenting plan, shall be deemed bad faith and shall be punished by the court by holding the party in contempt of court and by awarding to the aggrieved party reasonable attorneys' fees and costs incidental in bringing a motion for contempt of court.

(2) (a) A motion may be filed to initiate a contempt action to coerce a parent to comply with an order establishing residential provisions for a child. If the court finds there is reasonable cause to believe the parent has not complied with the order, the court may issue an order to show cause why the relief requested should not be granted.

(b) If, based on all the facts and circumstances, the court finds after hearing that the parent, in bad faith, has not complied with the order establishing residential provisions for the child, the court shall find the parent in contempt of court. Upon a finding of contempt, the court shall order:

(i) The noncomplying parent to provide the moving party additional time with the child. The additional time shall be equal to the time missed with the child, due to the parent's noncompliance;

(ii) The parent to pay, to the moving party, all court costs and reasonable attorneys' fees incurred as a result of the noncompliance, and any reasonable expenses incurred in locating or returning a child; and

(iii) The parent to pay, to the moving party, a civil penalty, not less than the sum of one hundred dollars.

The court may also order the parent to be imprisoned in the county jail, if

the parent is presently able to comply with the provisions of the court-ordered parenting plan and is presently unwilling to comply. The parent may be imprisoned until he or she agrees to comply with the order, but in no event for more than one hundred eighty days.

(3) On a second failure within three years to comply with a residential provision of a court-ordered parenting plan, a motion may be filed to initiate contempt of court proceedings according to the procedure set forth in subsection (2)(a) and (b) of this section. On a finding of contempt under this subsection, the court shall order:

(a) The noncomplying parent to provide the other parent or party additional time with the child. The additional time shall be twice the amount of the time missed with the child, due to the parent's noncompliance;

(b) The noncomplying parent to pay, to the other parent or party, all court costs and reasonable attorneys' fees incurred as a result of the noncompliance, and any reasonable expenses incurred in locating or returning a child; and

(c) The noncomplying parent to pay, to the moving party, a civil penalty of not less than two hundred fifty dollars.

The court may also order the parent to be imprisoned in the county jail, if the parent is presently able to comply with the provisions of the court-ordered parenting plan and is presently unwilling to comply. The parent may be imprisoned until he or she agrees to comply with the order but in no event for more than one hundred eighty days.

(4) For purposes of subsections (1), (2), and (3) of this section, the parent shall be deemed to have the present ability to comply with the order establishing residential provisions unless he or she establishes otherwise by a preponderance of the evidence. The parent shall establish a reasonable excuse for failure to comply with the residential provision of a court-ordered parenting plan by a preponderance of the evidence.

(5) Any monetary award ordered under subsections (1), (2), and (3) of this section may be enforced, by the party to whom it is awarded, in the same manner as a civil judgment.

(6) Subsections (1), (2), and (3) of this section authorize the exercise of the court's power to impose remedial sanctions for contempt of court and is in addition to any other contempt power the court may possess.

(7) Upon motion for contempt of court under subsections (1) through (3) of this section, if the court finds the motion was brought without

reasonable basis, the court shall order the moving party to pay to the nonmoving party, all costs, reasonable attorneys' fees, and a civil penalty of not less than one hundred dollars.

**RCW 7.21.10**
Definitions.

The definitions in this section apply throughout this chapter:

(1) "Contempt of court" means intentional:

(a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

(b) Disobedience of any lawful judgment, decree, order, or process of the court;

(c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or

(d) Refusal, without lawful authority, to produce a record, document, or other object.

(2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.

(3) "Remedial sanction" means a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.

**RCW 7.21.030**
Remedial sanctions — Payment for losses.

(1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

(2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

(a) Imprisonment if the contempt of court is of a type defined in

RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.

(b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.

(c) An order designed to ensure compliance with a prior order of the court.

(d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

(e) In cases under chapters 13.32A, 13.34, and 28A.225 RCW, commitment to juvenile detention for a period of time not to exceed seven days. This sanction may be imposed in addition to, or as an alternative to, any other remedial sanction authorized by this chapter. This remedy is specifically determined to be a remedial sanction.

(3) The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees.

(4) If the court finds that a person under the age of eighteen years has willfully disobeyed the terms of an order issued under chapter 10.14 RCW, the court may find the person in contempt of court and may, as a sole sanction for such contempt, commit the person to juvenile detention for a period of time not to exceed seven days.

## 6. WAS THE LIMITATION ON THOMAS'ABILITY TO FILE FUTURE MOTIONS OR PETITIONS PROPER?

Yes. In less than one year's time since the parties' 2011 trial, Thomas requested four modification petitions, one parenting plan, and three child support modifications. Not one of the requests was based on any substantial change in circumstances, or was otherwise legally supported.

A court may restrict further court action of a party contingent upon payment of attorney fees, but the remedy should only be applied in extraordinary circumstances. See *Bay v. Jensen*, 147 Wn. App. 641, 656-59, __ P.3d__ (2008).

Clearly Thomas was angry and frustrated with both the court and Danelle. He was expressing this by refusing to follow the parenting plan, and harassing Danelle with frivolous lawsuits. CP 240-248. First, he filed his appeal of the trial court decisions regarding the parenting plan and order of child support, then before he dismissed that appeal, and just six months after the trial, he filed his first modification petition for both the parenting plan, and support order. Then after the court vacated his default orders January 30, 2012, but left his modification petition still pending, he filed another child support petition on top of his already pending support modification. And then, before the Court had ruled on his reconsideration of the dismissal of all those modifications and the contempt, Thomas filed his third request for child support modification. All this within a year of the final orders from their trial, and none of the modifications were supported by Washington law. Furthermore, multiple courts found Thomas was willfully and in bad faith refusing to follow court orders, as well as angry an defiant. Thomas is a bitter litigant making good on his post-trial threat to keep Danelle in court. This is harassment, and the Court was well within its authority to restrict Thomas' ability to file motions and petitions without first seeking judicial authorization.

## 7. WERE THE ATTORNEY FEES AWARDS REASONABLE AND AUTHORIZED?

Yes, the attorney fee awards/sanctions are not only authorized, but more than reasonable; arguably less than they should have been.

(3) Motions for Temporary Orders. Motions for Temporary Support Orders will not ordinarily be considered in support-only modification proceedings. Exceptions may apply in exigent circumstances, such as when there has been a change in residential care, a party has requested a continuance of the trial date, or when the lack of a temporary order would substantially prejudice a party. KCLFLR 13(c)(3)

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

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

person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee. CR 11.

Except for the non-contested relocation that took place over the summer of 2012, all of the post-trial litigation was a result of Thomas. He either filed frivolous actions (including lawsuits on top of lawsuits, and a child support motion not allowed by local rules), or refused to follow court orders. From December 10, 2011 through April 16, 2012, Danelle incurred $9135.55 in attorney fees and costs. Thomas was repeatedly warned by multiple courts if he continued with his behavior, he would be subjecting himself to sanctions.

If Father proceeds with his petition to modify, and a court does not find there is adequate cause, Father could be sanctioned. This Court strongly encourages Father to consult a family law attorney before proceeding further. CP 14.

The court will not impose additional attorney fees on the father at this time, <u>but if litigation is continued</u> then the mother is permitted to re-raise the request for attorney fees for this motion and hearing, and father may be subject to pay said fees, in addition to any new ones. The court also informed father that continuing litigation/conflict is, by definition, damaging to the child. CP 14.

They did not thwart him from pressing on, harassing Danelle with his frivolous litigation.

## 8. WAS THE RELOCATION PROPERLY GRANTED?

Yes. Thomas did not file an objection within the 30 day window Washington law grants for the non-relocating parent to object; therefore, the relocation was properly granted.

Thomas' argument is nonsensical, including his estoppel theory. When Thomas filed his reconsideration motion March 3, 2012, Danelle had not relocated. She did not seek to relocate until months later. Collateral estoppel does not apply. Thomas does not deny he failed to object to the relocation notice and proposed parenting plan within the 30 day window Washington's Relocation Act RCW 26.09.405 – 26.09.560 provides. In fact, Thomas agrees Danelle properly followed RCW 26.09.500 obtained her ex parte order granting the relocation and parenting plan pursuant to RCW 26.09.500(5)[1]. The relocation does not change the issues before the Appellate Court – whether or not Thomas repeatedly filed frivolous modification petitions, and willfully violated the parenting plans.

## 9. DID THE COURT PROPERLY SANCTION THOMAS A SECOND TIME, AND HAD THOMAS NOTICE AND OPPORTUNITY TO RESPOND?

Yes, in light of Thomas' refusal to follow prior court orders regarding obtaining advance judicial authorization prior to filing any future motions

[1] Thomas complained in his appellate brief that Danelle's attorney signing on her behalf the declaration in support of the ex parte motion granting the relocation is improper, but it is allowed per CR 11, and was not alleged by Thomas as improper in his October 25, 2012 motion. In same motion, he actually states proper relocation procedures were followed, and does not deny the facts alleged in Danelle's ex parte motion is inaccurate.

or petition, being sanctioned was proper and appropriate, and Thomas was given appropriate notice and opportunity to respond.

Thomas was not allowed to file his October 26, 2012 motion in the Ex Parte Department without first obtaining advance judicial authorization from either Judge Fleck, or subsequent Chief Unified Family Court Judge, or if unavailable, another Chief Judge or UFC Judge, per the May 16, 2012 court order, therefore, Ex Parte was without authority to sign its Order to Show Cause. Danelle should not have to respond to an order to show cause obtained without proper legal authority. There are no direct court rules on modifying/quashing an ex parte order to show cause, but the morning of November 6, 2012, Thomas was provided actual notice of Danelle's intentions of going to the ex parte department at 9:30 a.m. November 7, 2012 to quash his order in ex parte, as well asking for the sanctions she was requesting - $1500.00, and an order requiring them to be paid before seeking court advance authorization in order to file a motion or petition. This notice was provided by telephone, and in writing.[2] CP 324 and see attached Appendix 1.

Notice of the sanctions requested are not even required when a litigant brings a frivolous motion. Court can impose CR 11 sanctions sua sponté for the bringing of a frivolous CR 11 motion. *Biggs v. Vail*, 124

[2] Thomas argues email was not proper legal notice without any legal authority, but he ignores the fact Thomas and Danelle's attorneys agreed to accept service by email, which is allowed per CR 5(b)(7). CP ?

Wn.2d 193, 198, 876 P.2d 448 (1994). Nonetheless, Thomas was provided notice, Danelle's attorney waited for Thomas to appear in court, and Thomas chose not to appear in court to defend his show cause order. CP 324.

November 7, 2012 Danelle's attorney waited in ex parte for Thomas from 9:30 a.m. to 10:30 a.m. before being directed by ex parte to go to Judge Fleck, who did not sign the order until later that morning. At no time did Thomas appear in court, tell Danelle's attorney he objected to the November 7th hearing, he needed more time, or otherwise was unavailable to attend the hearing. Clearly, he chose not to go the hearing. CP 324-325.

The November 7, 2012 order was proper. The proposed order provided to Thomas the day before was essentially what the court signed with none of its substance changed. Judge Fleck did make it more clear in the order the notice Thomas was provided about that hearing; what the ex parte commissioner apparently was or was not informed about; and how the order was consistent with, and enforces the May 16, 2012 order, not changing it. CP 324-325. At some point, it is hoped the sanctions do deter Thomas' harassing litigation strategy as CR 11 sanctions are meant to do. See *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994).

## E. CONCLUSION

Multiple issues Mr. Baicy has brought to this Court's attention are not properly before the Court, as Mr. Baicy did not follow proper court procedure by filing a timely Notice of Appeal within 30 days.

The court has not treated Mr. Baicy improperly; both parties were treated equally and given the same opportunities and limitations. Nor was Mr. Baicy entitled to a public defender when ordered to show cause regarding contempt because imprisonment sanctions were not requested.

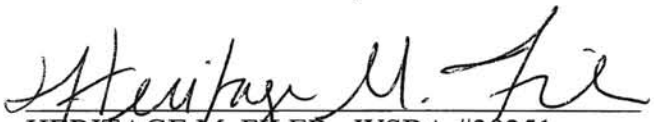
Point blank: the litigation over the parenting plan is solely based on Mr. Baicy wanting to change the place of exchanging the child to McDonalds for no good reason. This does not constitute a substantial change in circumstances, and when asked by the Court, Mr. Baicy agreed there had been no change in circumstances. Mr. Baicy's multiple attempts to change the child support order all disregarded the recent Findings put forth by Judge Fleck that determined what would occur if the father remained unemployed.

In conclusion, this appeal has been brought by the Appellant in bad faith and is merely another attempt to harass and bully Danelle Shay. It is more evidence that Mr. Baicy will not stop abusing the court system until he is sufficiently deterred. Mr. Baicy was properly sanctioned by the Superior Court for this bad faith litigation, and I ask that this Court

consider ordering an additional sanction for Mr. Baicy's relentless, bad-faith litigation, and to deter him from continuing to do so.

Respectfully submitted this 27th day of February, 2013.

DANCEY & CASSADY, L.L.P.



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No. 68925-8-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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| In re:<br>THOMAS O. BAICY<br>Appellant,<br>and<br>DANELLE M. SHAY,<br>Respondent. | ) | DECLARATION OF SERVICE |

DECLARATION OF SERVICE

I, Myra Guideng, am over the age of 18, not a party to the proceedings, and declare:

I sent, via messenger, a copy of this RESPONDENT'S BRIEF to be personally delivered no later than February 28, 2012, to: Court of Appeals for Division 1, and via U.S. Postal Service, to the Appellant's address of record at 1231 West James St., Apt. #4, Kent, WA 98032

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

Signed at Seattle, Washington, on February 27, 2013

Myra Guideng

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