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No. 72228-0-1

WASHINGTON STATE COURT OF APPEALS, DIVISION ONE

In Re the Marriage of:

JONATHAN PHILPOTT,
Respondent,

and

LINDSEY WRIGHT, fka PHILPOTT,
Respondent.

RHEA ROLFE,
Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE RONALD KESSLER

REPLY BRIEF OF APPELLANT

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I. REPLY ARGUMENT

A. Respondent's lone example of Ms. Rolfe "consistently making arguments not supported by law" is not supported by the record. (Reply to Brief of Respondent § IV.b, pp. 16-17)

Without citation to the record, Philpott says Wright argued below that his violation of the Florida relocation rules is, by itself, grounds for an automatic change of custody. (Brief of Resp. at 16-17) Undersigned counsel has reviewed the record and found no instance of Wright making this argument. See, e.g., CP 6 (original petition), 206 (response to adequate cause motion), 413 (amended petition), 928 (brief re choice of law), 1007 (trial brief).

Philpott's failure to follow the decree's requirements for notice of intended relocation (CP 84) was just one instance of a pattern of disregard for the parenting plan and other orders that included taking away the children's phone (III RP 103; V RP 110), requiring Wright to call him to reach the children (III RP 103; V RP 110), and making unilateral decisions about child care providers and schools (CP 13; VRP 153-54). This pattern of behavior was not in the children's best interest and was a factor for the court to consider together with other factors. Nowhere did Wright or her attorney argue the unauthorized relocation was grounds for an automatic change of custody.

B. Wright's pursuit of a modification of the primary residential parent is not the same as relitigating the Florida decree. (Reply to Brief of Resp. § IV.c, pp. 17-18)

Philpott argues Rolfe tried to "relitigate the Florida divorce". (Brief of Resp. at 17) If by "relitigate the Florida divorce" he means "modify the parenting plan," then, yes, she did. Philpott argues Wright wanted to relitigate the Florida action and faults her for seeking to re-open the Florida decree through a rule 60 motion. But let's be clear about the facts. Philpott denied criminal wrongdoing to get his result in Florida. (CP 21) Then, when the divorce is final, he admits the criminal actions under oath in Washington. (Exs. 4, 129; II RP 65-69) Now he blames Wright for seeking to hold him accountable for his misrepresentations to the Florida court. This classic method of blaming the victim is not only irrelevant to the trial court's sanctions on the amended petition, it is shameful.

By the time Wright moved to modify the parenting plan, Philpott had moved the children out of the environment that supported the Florida court's original decision and into an environment the Florida court had not considered. The Florida court's findings that Philpott had a steady job (CP 17) and intended to remain in Florida (CP 37) were no longer true. The court's finding that the children would attend an "A-rated" school in Florida

(CP 17) was no longer true. The Florida court of course did not consider post-decree conduct that was detrimental to the children. And of course the Florida court did not know that Philpott would plead guilty to the criminal charges which the Florida court, when it awarded Philpott primary custody, believed to be “unjustified.” (CP 32)

The admission of guilt was particularly important. The court’s award of sanctions in this case was not based on Wright’s Florida motion to vacate under rule 60(b). Moreover, the mid-trial petition for modification about which Philpott complains was suggested by the trial court as a way of bringing before the court the evidence of the recent criminal conviction and admission of domestic violence the court refused to consider on the amended petition before it. (II RP 39, 51) The amended petition sought to raise these issues which were much more than a mere “relitigating” of the Florida divorce trial.

C. Wright properly filed in Washington State, not Florida, and sought to amend her petition only because opposing counsel demanded—and the court required—that she do so. (Reply to Brief of Resp. § IV.d, pp. 18-20)

Philpott makes several independent points in section IV.d of his brief. Each is without merit.

First, he contends Wright should have filed in Florida, not Washington. However he admitted Washington's in rem jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). (CP 89-90 (original petition), 127 (answer; "admit Washington has jurisdiction over the children"), 414-15 (amended petition), CP 427 (answer)) Moreover, when he left Florida with no intent to return, Florida lost jurisdiction as the children's "home state" for purposes of jurisdiction became the last state in which the children resided longer than six months, *i.e.*, Washington. Florida Statutes § 61.515(1) (Florida loses exclusive, continuing jurisdiction when neither a parent nor the child resides in Florida); Florida Statutes § 61.515(2) (in absence of exclusive, continuing jurisdiction, Florida has no jurisdiction to modify a custody determination); see also RCW 26.27, 201, 211(1)(b) (Uniform Child Custody Jurisdiction and Enforcement Act). Had Philpott given advance notice of his intended relocation, then Wright could have filed an objection in Florida. Indeed, she would have been required to.

As a choice-of-law matter, Wright would have been happy to have Washington apply Florida law, particularly given Florida's statutory presumption that a parent convicted of a domestic violence misdemeanor of the first degree or higher is a detriment to

the child. Florida Statutes 61.13(2)(c)(2). Philpott evaded application of that Florida statute by moving without giving advance notice as required by Florida law and the decree. Whether Florida or Washington was a better venue for litigating the modification is a debatable question. What is certain is that Florida lost jurisdiction, and Washington gained jurisdiction, when Philpott moved himself and the children out of Florida.

Second, Philpott argues it is “impossible” to believe that Judge Robinson, in denying adequate cause, intended Wright to pursue the modification under a different name. (Brief of Resp. at 20) But context is everything. Philpott had argued Wright could not proceed under the Child Relocation Act given the form she used. (CP 134) He argued that “Before Ms. Wright can ask the court to modify the parenting plan, she has to comply with the rest of the section: file an objection; bring a motion asking the court to restrain the relocation of the children....” (CP 134) The commissioner, too, had said Wright must object to the relocation in order to pursue modification under the Child Relocation Act. (CP 353-54) And most importantly, Judge Robinson specifically permitted the amended petition under the Child Relocation Act—a fact Judge Kessler was unaware of when he announced his decision to sanction Rolfe. (CP 424; VI RP 143)

Philpott's present argument that Judge Robinson did not intend for Wright to seek modification under the Child Relocation Act and the appropriate form is contrary to his own argument to Judge Robinson. Philpott should be judicially estopped from making that argument on appeal. Bartley-Willaims v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)

D. The Child Relocation Act and case law supported Wright's theory that the trial court may change primary residential placement in a relocation case regardless of whether Wright objected to the relocation. (Reply to Brief of Resp. § IV.e, pp. 20-22)

Philpott appears to argue the Child Relocation Act should not apply because "the relocation was no longer being sought; it was over." (Brief of Resp. at 21) This is a rehashing of his argument to the trial court that the Child Relocation Act was inapplicable because the move was no longer being "pursued", rather it was over. (CP 134)

If Philpott's position were true, any parent could circumvent the Child Relocation Act by failing to give the advance notice required by the Act. Certainly the Legislature did not intend to create such a giant loophole when it wrote that the adequate cause hearing is not required "so long as the request for relocation of the child is being pursued." RCW 26.09.260(6).

A more sensible interpretation was adopted by this court in Marriage of Raskob, 183, Wn. App. 503, 334 P.3d 30 (2014). There the mother made a unilateral decision to move—and did move—without adhering to the Relocation Act’s notice requirements. This court held the move is still “being pursued” for purposes of RCW 26.09.260(6) where the mother “never abandoned her relocation and did, in fact, relocate in violation of the parenting plan.” Raskob, 183 Wn. App. at 513. Philpott, like the mother in Raskob, never abandoned his relocation. Therefore RCW 26.09.260(6) applies. Raskob, 183 Wn. App. at 513-14.

Philpott ineffectively tries to distinguish McDevitt v. Davis, 181 Wn. App. 765, 326 P.3d 30 (2014). He emphasizes that the mother in McDevitt relocated to Hawaii without any objection. (Brief of Resp. at 22) But that move happened before the court entered the original parenting plan; the relocation at issue in McDevitt was the mother’s later relocation *from* Hawaii to Colorado. McDevitt, 181 Wn. App. at 767.

Philpott says the McDevitt case is “quite different” than this case because “The wife moved closer to the husband; she was not trying to change custody.” (Brief of Resp. at 22) The relocating parent in each case moved closer to the non-residential parent who lived/lives in Washington – in McDevitt, from Hawaii to Colorado, in

our case from Florida to Colorado. In McDevitt the father sought modification in response to the relocation and the court granted him additional time. McDevitt, 181 Wn. App. at 767-68. On appeal the mother complained the extra time constituted a “major modification”. McDevitt, 181 Wn. App. at 768. The trial court affirmed the major modification, reasoning that the petition for modification heard by the court was under the Child Relocation Act, subsection (6) of RCW 26.09.260, and not under other subsections. McDevitt, 181 Wn. App. at 770. Thus the guiding standard is the “current best interests of the children.” McDevitt, 181 Wn. App. at 773.

Philpott’s main point is that “there is no case law that supports the argument that an Objection to Relocation, in and of itself, allows the court to change primary custody without an adequate cause finding.” (Brief of Resp. at 21) The key qualifier in that sentence is “case law”. While no such case law exists, the Relocation Act itself plainly envisions such changes of custody:

The person objecting to the relocation of the child or the relocating parent’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.

RCW 26.09.260(6) (emphasis added). Thus the Legislature envisioned a change of primary residence as within the scope of relief available under the Act.

Even if an argument can be made that the statute should not be construed to permit modification in this case, this court need not reach that issue. The issue here, of course, is whether Rolfe could make in good faith the argument that the statute does allow the change in primary residence. Raskob and McDevitt, briefed at length in the appellant's opening brief at pages 38 to 43, provide ample support for Rolfe's legal theory.

E. Wright's amended petition was not barred by res judicata or the law of the case doctrine. (Reply to Brief of Resp. at 22-24)

Res judicata is not grounds for affirming the sanctions. First, Philpott's reliance on res judicata conveniently ignores the fact that the predecessor judge specifically granted permission to file the amended petition. Second, this court should judicially estop Philpott's argument because he argued below that the amended petition was necessary in order to request modification pursuant to relocation. Third, the doctrine of the law of the case applies to prior appellate decisions or jury instructions, not an order dismissing some but not all claims. Finally, even assuming res judicata

applies, this court should not affirm the trial court's discretionary award of sanctions on the basis of reasoning not adopted by the trial court.

Philpott's res judicata argument fails on its merits because Wright's claim for modification pursuant to relocation under RCW 26.09.260(6) was reserved by the trial court when it granted Wright's motion to amend her petition. The order dismissing the original petition dismissed claims pleaded under RCW 26.09.260(1), (2). (CP 91 ¶ 2.8, CP 424) Res judicata "does not bar litigation of claims which were not in fact adjudicated." Estate of Black, 153 Wn. 2d 152, 170, 102 P.3d 796 (2004). Washington courts have recognized it does not apply to judicially reserved claims. Case v. Knight, 129 Wash. 570, 573-74, 225 P. 645 (1924); Cummings v. Guardianship Services of Seattle, 128 Wn. App. 742, 754, 110 P.3d 796 (2005), rev. denied, 157 Wn.2d 1006 (2006).

Collateral estoppel does not bar the claim because the issue raised by the amended petition (modification pursuant to relocation under RCW 26.09.260(6)) is not the same as the issue raised by the original petition (modification under RCW 26.09.260(1), (2). (CP 91, 420) Collateral estoppel requires, at a minimum, that the identical issue was decided in the prior action." Dolan v. King County, 172 Wn.2d 299, 321, 258 P.3d 20 (2011).

The standard for modification was much higher under the legal theory Wright originally claimed in the original petition. As Philpott explains in his response brief, RCW 26.09.260(2) would require retaining the residential schedule unless the court finds Wright has met a heightened burden of proving detriment and harm:

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

...

(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.

RCW 26.09.260(2); see Brief of Resp. at 25. When the court considered the adequate cause motion on the original petition, this is the standard the court was applying.

In contrast, Wright's claim for modification raised in the amended petition was a claim for modification pursuant to relocation under subsection (6). RCW 26.09.260(6). (CP 420) In these actions the heightened standard of subsection (2) does not apply. Marriage of Raskob, 183 Wn. App. 503, 513-14, 334 P.3d 30 (2014). The court applies a best interests standard. McDevitt v. Davis, 181 Wn. App. 765, 773, 326 P.3d 865 (2014). Denying adequate cause for modification under subsections (1) and (2) does

not lead to the conclusion that modification is not possible under the lower standard of subsection (6).

Even if res judicata principles would normally apply, this court should judicially estop Philpott's reliance on that argument here because Philpott argued a contrary position in the trial court. Philpott specifically argued "Before Ms. Wright can ask the court to modify the parenting plan, she has to comply with the rest of the section: file an objection; bring a motion asking the court to restrain the relocation of the children" (CP 134) The court and Wright relied on that position and Wright consequently filed her motion to amend the petition, which the court granted. (CP 353-54, 424) This court should judicially estop Philpott's inconsistent claim on appeal that Wright was improperly seeking "another bite of the apple". Bartley-Willaims v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006); see also Anfinson v. FedEx Ground Package System, Inc., 174 Wn.2d 851, 865-66, 281 P.3d 289 (2012) (holding judicial estoppel applies to questions of law as well as assertions of fact).

Philpott's reliance on the law of the case doctrine is misplaced. The law of the case doctrine refers to the binding effect of a prior appellate decision or, in other cases, the rules that jury instructions not objected to shall be treated as the properly applicable law. Lutheran Day Care, Inc. v. Snohomish County, 119

Wn. 2d 91, 113, 829 P.2d 746 (1992). Neither of these uses of the term is applicable here.

To the extent Philpott relies on the fact that Wright did not appeal the claims raised in the original petition or assign error to the order denying adequate cause, he is mistaken. The order dismissing the original claims was not an appealable order because the court allowed the amended petition which relates back to the time of filing the original petition. CR 15(c). An order dismissing fewer than all claims is not appealable as a matter of right, RAP 2.2, and Wright's appeal from the court's final order brings up for review the earlier orders. RAP2.4(b). Wright assigned error to the denial of adequate cause and argued the point in her opening brief. (Brief of App. at 4, 42-43)

Even if principles of res judicata precluded Wright's request for modification of the primary residency, that conclusion is not so clear on this record that Wright should have been sanctioned for making the request in the petition that the predecessor judge granted her permission to file. If Philpott had thought the request was precluded by res judicata, he could have filed a motion for summary judgment. But he did not and the petition proceeded to trial where the trial judge rejected the claim not because of principles of res judicata, but because the judge believed the Child

Relocation Act, not the dismissal of the original petition, limited the scope of the available modification. (CP 1204) It is purely speculative to believe the trial court would have awarded sanctions if it correctly understood the law but believed the claim was nevertheless precluded by res judicata. This court should not affirm the trial court's discretionary award of sanctions on the basis of reasoning not adopted by the trial court.

F. RCW 26.09.260(2) would not have barred modification under the Relocation Act. (Reply to Brief of Resp. § IV.g, pp. 24-27)

When the Legislature adopted the Child Relocation Act, it amended RCW 26.09.260 by adding subsection (6) and rewriting subsection (1) to include new subsection (6) among the enumerated exceptions to the standards set forth in subsection (1). Laws of 2000, ch. 21, § 19. Under the standards of subsection (1), a court may not modify a parenting plan unless it finds, on the basis of facts that have arisen since the prior plan or were unknown to the court at the time of the prior plan, that a substantial change of circumstances 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 interest of the child. RCW 26.09.260.

The following subsection, subsection (2), opens with a reference to those standards, and then enumerates situations where the court may modify the residential schedule:

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

RCW 26.09.260(2) (emphasis added).

Philpott, in arguing that subsection (2) applies in a relocation case, ignores the introductory phrase “in applying these standards”. The antecedent standards are the standards laid out in subsection (1), which expressly exempts relocation cases. RCW 26.09.260(1). Since the court in a relocation case is not applying the standards of subsection (1), the first phrase of subsection (2) further exempts relocation cases. Philpott’s effort to read the subsection without the first phrase is a strained interpretation at best.

Philpott’s interpretation is not just strained, it is contrary to adverse legal authority he fails to cite. In Marriage of Raskob, this court considered this very question and ruled that the factors contained in subsection (2) do not apply in a relocation case:

In a relocation case, it is not necessary for the court to consider whether there is a substantial change of circumstances other than the relocation itself, or to consider the factors contained in RCW 26.09.260(2).

...

The trial court was not required to find some other substantial change in circumstances or consider the factors of RCW 26.09.260(2).

...

We conclude that RCW 26.09.260(2) and (5) do not apply because, as explained above, modification was proper under RCW 26.09.260(6).

Raskob, 183 Wn. App. at 513-14.

G. The trial court erred when it sanctioned Rolfe without giving her notice or an opportunity to respond. (Reply to Brief of Resp. § IV.i, pp. 29-30)

Philpott points to three instances where he requested attorney fees. But none cited Civil Rule 11 or raised any other ground for a judgment against Rolfe. On May 28 Philpott requested an award of fees, but raised intransigence as the only ground and made no mention of liability for Rolfe. (II RP 34) In his trial brief Philpott made the same request, again relying only on intransigence and making no mention of an award against Rolfe. (CP 927) Finally, he relies on the testimony from May 30 (actually May 28), page 40, where Rolfe acknowledges intransigence is an issue at trial. (II RP 40) But again there is no mention of Civil Rule 11 and no mention of liability for Rolfe.

In fact, there was no mention of such sanctions for the amended petition until the court announced its decision from the bench. (VI RP 144) The court did not issue an order directing Rolfe to show cause why she has not violated Civil Rule 11, see 3A Washington Rules Practice, 6th ed., p. 251, or otherwise give her “a

reasonable opportunity to contest and explain.” Watson v. Maier, 64 Wn. App. 889, 900 n.3, 827 P.2d 311 (1992).

Instead of providing a reasonable opportunity to respond, the court affirmatively chilled Rolfe’s opportunity to respond when it further ruled that presentation of final orders “is not a time for re-argument of what the Court decided.” (VI RP 145) Given that she was already being sanctioned, Rolfe toed the court’s line and kept her attorney fee declaration limited to the amount and reasonableness of opposing counsel’s fee declaration. (CP 1181)

H. The award of attorney fees cannot be justified under either CR 11 or intransigence. (Reply to Brief of Resp. § I.V, pp. 27-29)

Philpott argues two bases on which to affirm the sanctions against Rolfe – Civil Rule 11 and intransigence. The trial court relied exclusively on Civil Rule 11. (CP 1198, 1204)

Our courts have frequently cited one spouse’s intransigence in litigation as grounds for awarding attorney fees to the other spouse. But our courts have never cited intransigence as a basis for sanctioning an attorney, and Philpott has not cited any such case. This court should not affirm the sanctions on the basis of a novel theory not elaborated by the respondent.

With regard to Civil Rule 11, the trial court erred in several respects.

First, the trial court relied on an untenable factual ground: its belief that the predecessor judge had not granted Wright permission to amend her petition. (See Brief of App. at 43-44) Philpott has not responded to this argument.

Second, the trial court relied on untenable legal reasons: its erroneous interpretation of RCW 26.09.260(6) contrary to Marriage of Raskob and Marriage of McDevitt. (Brief of App. at 38-43) Philpott's attempt to distinguish these cases is lacking, (see § I.D, supra), and his alternative grounds for affirming—the factors set forth in RCW 26.09.260(2)—was rejected by this court in Marriage of Raskob. (See § I.F, supra)

Third, the sanction was outside the range of acceptable choices because Rolfe was not given a reasonable opportunity to respond to the court's own motion to sanction her. (See § I.G, supra)

Any one of these three errors is grounds for reversal.

Fundamentally, Wright's theory of the case was well grounded in both law and fact. The text of the Child Relocation Act, now bolstered by the decisions in Marriage of Raskob and Marriage of McDevitt, plainly provides that a parent in Wright's situation may

petition the court to modify the parenting plan, including a change of primary residential parent, without first having an adequate cause hearing to establish the substantialness of the changed circumstances. And although the trial court denied much of the evidence relating to a primary residence in Washington with Wright and her husband (see Brief of App. at 28-30) the record contains more than sufficient evidence to support her petition.

The move itself necessarily changed the environment the Florida court had anticipated. The children went from an “A-rated” school to a school where their academic progress suffered. (CP 17, V RP 141-42) The children went into a crowded house with family they hardly knew and where they did not feel safe. (Brief of App. at 19, 26-27) And their father, who told the Florida court he would remain in Pensacola, quit his steady job, was fired from another, and moved suddenly to Colorado. (CP 17, 37; II RP 76, 104; III RP 150-51))

It is changes like these that could lead the Legislature to reasonably deem a relocation a sufficient basis for a modification hearing with a best interests standard. See Marriage of McDevitt, 181 Wn. App. at 773 (stating the test as the current best interests of the children).

Evidence showed that the parenting plan was not working in the children's best interests. The extended family's religious views were limiting the children's reading and subjecting them to anti-feminist views and rigid views on gay rights and gender roles. (Brief of App. at 20) Philpott and his family made telephone access difficult, forcing the children to keep the phone on speaker phone and at times taking the phone away entirely and forcing Wright to call Philpott contrary to the domestic violence protection order. (Brief of App. at 20-21) Philpott was acting recklessly when driving, including evidence of an accident while talking on his cell phone and videotaping the children in the back seat while driving the car at 75 miles per hour on the freeway. (Brief of App. at 22) Philpott was neglecting Michaela's health needs and downplaying symptoms with real, physical manifestations. (Brief of App. at 22) Philpott defied the parenting plan when he made decisions about schooling without consulting Wright. (Brief of App. at 23) Philpott disrupted the children's therapeutic counseling with their Washington therapist and refused counseling recommended by Colorado Child Protective Services. (Brief of App. at 23)

Not surprisingly, the children have suffered as a result. Since returning to Colorado at the end of 2013, their academics have worsened. (Brief of App. at 24) The children expressed a

strong distaste for Colorado and Michaela, in particular, felt she had to be a different person, dress differently, and not be herself. (Brief of App. at 26) And most troubling, Michael and Nathan each expressed very real fears for their safety. (Brief of App. at 26-27)

On top of all this was new evidence of Philpott finally admitting under oath the domestic violence he denied—successfully—to the Florida court. (Brief of App. at 27-28)

On appeal Philpott ignores all this evidence when he argues the amended petition was not well grounded in fact. Was there evidence that favored Philpott and Colorado? Certainly. If the trial court had applied the correct legal standard and heard all the evidence, including the evidence about Washington that it denied, could it have denied the petition? That probably would have been within the court's discretion. But the issue in reviewing these sanctions is not which party should have prevailed below, it's about whether Wright's amended petition was well grounded in fact and warranted by existing law.

I. This court should deny Philpott's request for attorney fees on appeal. (Reply to Brief of Resp. at 30-32)

Philpott raises several theories for an award of attorney fees on appeal, citing RAP 18.1(d), RAP 14.2, CR 11, intransigence, and RCW 26.09.140.

RCW 26.09.140 permits an award of attorney fees after considering the resources of the parties and the merits of a case, and intransigence may be used regardless of the parties' relative need and ability to pay. But neither theory has been used to shift fees to a party's attorney. Philpott cites no cases holding otherwise and his request should be denied.

RAP 14.2 relates to costs and is not a basis for shifting attorney fees.

RAP 18.1(d), cited but not argued by Philpott, describes the procedure for determining the amount of an attorney fee award in this court after the court determines to award fees. RAP 18.1(d) is not itself a basis for awarding attorney fees.

Finally, CR 11 is not a basis for awarding fees on appeal because this appeal is warranted.

Philpott may not have the resources to respond to the appeal, but he is complicit in the trial court's erroneous ruling. It was Philpott who insisted on form over substance and demanded an adequate cause hearing on the original petition. It was Philpott who demanded that any modification had to proceed under an amended petition, and then immediately filed an answer to the original petition so Wright would have to seek permission for the amendment. (CP 353-54) It was Philpott who encouraged the trial

court to rule that a change of primary residential parent is not possible in a relocation case. And finally when the court announced its finding that the predecessor judge had not granted the motion to amend the petition, Philpott remained silent. (VI RP 143-44) At each step, Philpott actively encouraged the errors in this case. Though Philpott did not affirmatively request the CR 11 sanctions in this case, his actions in the court below led to the error as surely as if he did. He should bear the attorney fees he incurs defending the trial court's decision.

II. CONCLUSION

The arguments raised by Philpott in response to this appeal do not undermine any of the three grounds for holding that trial court abused its discretion in sanctioning Rolfe. The trial court decision is based on untenable legal reasons because the court relied on the improper conclusion that Wright could not seek modification under the Child Relocation Act except to "accommodate the relocation". The decision is based on untenable factual grounds because the court relied on a mistaken finding that the predecessor judge had not granted Rolfe leave to amend the petition. And finally the decision is outside the range of acceptable choices given that the court gave Rolfe no reasonable opportunity to respond to the court's *sua sponte* motion to impose sanctions.

The trial court thus abused its discretion in any of these three ways.
This court should reverse the judgment against Rolfe and deny
Philpott's request for attorney fees on appeal.

Respectfully submitted: March 6, 2015.

A handwritten signature in black ink that reads "Brendan Patrick". The signature is written in a cursive style with a horizontal line underneath it.

Brendan Patrick, WSN 25648
Attorney for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 6, 2015, I deposited in the mails of the United States of America, postage prepaid, an envelope containing a true and correct copy of the Reply Brief of Appellant to:

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DATED at Seattle, Washington, March 6, 2015,



Brendan Patrick