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**A. ASSIGNMENTS OF ERROR**

***Assignments of Error***

No. 1. The Court erred in finding Ms. Marshall in contempt for failure to send the child for visitation pursuant to RCW 26.09.160(4) because she was justified in relying upon the GAL/Parenting Investigator's report.

No. 2. The Court erred in finding that Ms. Marshall's refusal to send the child for visitation was not justified pursuant to RCW 26.09.160(4).

No. 3. The Court erred in ordering Ms. Marshall to pay attorney's fees and costs to Mr. Rash because she was justified in relying on the report of the GAL/Parenting Investigator and not sending the child for visitation.

No. 4. When Commissioner Johnson denied Mr. Rash's Motion for Contempt on the same exact fact pattern, it became the Law of the Case, Res Judicata and Collateral Estoppel and Mr. Rash was then required to bring a Motion for Supervised visitation or other relief.

No. 5. The Court erred in denying the Motion for Revision of Ms. Marshall for the same reasons stated in Assignment of Error 1 and 2 above.

***Issues Pertaining to Assignments of Error***

No. 1. Is the Court's decision to find Ms. Marshall in contempt for failure to send the child on visitation pursuant to the recommendations contained in the report of the GAL/Parenting Investigator, particularly when the Court itself finds, "***Maybe it was justifiable, but it still was contempt in this Court's opinion***", a manifest abuse of discretion and based upon untenable grounds?

No. 2. Does it not become the Law of the Case or Res Judicata/Collateral Estoppel, when Commissioner Johnson finds Ms. Marshall justified in not sending the child for visitation in December 2006 based upon the same exact fact pattern and Commissioner Johnson refuses to find her in contempt?

**B. STATEMENT OF THE CASE**

A detailed background of the case and the parties' relationship is set forth in the Parenting Investigator's Report. CP 2-11. Kenneth Rash has a very long history of severe domestic violence and mental health issues. CP 2-11. Mr. Rash beat Ms.

Marshall unconscious in the presence of their children. CP 6. Mr. Rash assaulted their children as well. CP 6. While in jail, Kenneth attempted to commit suicide by hanging himself with a bed sheet. CP 6. Mr. Rash threatened the child with murder suicide. CP 14.

Ms. Rash and the children suffered for years at the hands of a violent and abusive tyrant. CP 6-14.

Mr. Rash has been a party to at least 7 domestic violence protection orders involving 3 different women. CP 7.

The parties were divorced in 2004, after approximately 17 years of marriage. CP 2. Mr. Marshall fled to Illinois with the parties two dependent children in 2003. CP 6. Sarah Rash, the parties last remaining dependent child (who is the subject of this appeal) turned 18 on December 3, 2007. CP 6.

Mr. Rash has not have any visitation with Sarah Rash from August 2005 to the present. In October 2006, more than 13 months since his last visitation with Sarah, he filed a Motion for Contempt because Mrs. Marshall stated she was refusing to send the child for visitation for Winter Break 2006. CP 19-21. Ms. Marshall indicated she was relying upon the recommendations set forth in the GAL report to not send the child. CP 22. The GAL/PI

recommended in her report that any visitation between Mr. Rash and the child be professionally supervised. CP 17. At no time did Mr. Rash make arrangements for professional supervision of his visitation, should Ms. Marshall send the child.

On December 6, 2006, Commissioner Johnson entered an Order on Show Cause RE: Contempt, which declined to find Ms. Marshall in contempt for failure to send the child and which inherently (but not specifically) found she was justified pursuant to RCW 26.09.160(4). CP 49-53. This order was never appealed and became a final order.

On June 4, 2007, Commissioner Marshall entered the following order pursuant to Mr. Rash's Motion for Clarification RE: the Parenting Plan:

The father shall have summer visitation as follows:  
Pursuant to the Parenting Plan on June 23, 2004, which remains unmodified. Based upon the Parenting Plan, the father is legally justified to plan for exercising visitation from July 1 to August 15 and make travel arrangements including purchase of plan tickets.

Absent a court order to the contrary, the visitation per the Parenting Plan shall occur.

RP 55.

On June 28, 2007, Ms. Marshall filed a Motion/Declaration for Ex Parte Restraining Order and for Order to Show Cause requesting that the Court enter an order which would suspend Mr. Rash's visitation. RP 57. Counsel for Mr. Rash was going to be on vacation in Eastern Washington and was not able to be present for a hearing. RP 101. Accordingly, counsel for Ms. Marshall sent a letter to counsel for Mr. Rash informing him that Ms. Marshall would not be sending the child for the visitation and requesting a convenient date and time to hold the hearing on the Ex Parte Motion. RP 101.

On July 1, 2007, counsel for Ms. Marshall sent a letter enclosing a check for \$115 for the cost of Mr. Rash moving the airline ticket from December 2006 to July 2007 and again asking if there would be a "mutually agreeable date" to have the hearing to suspend Mr. Rash's visitation prior to the September 11, 2007, trial date that was set on Mr. Rash's Petition to Modify the Parenting Plan. RP 103. No response was received to these letters.

On July 5, 2007, Mr. Rash's counsel returned from his vacation, went to the courthouse and filed a Motion for Order to Show Cause RE: Contempt and obtained ex parte an Order to

Show Cause RE: Contempt which set a hearing date of July 19, 2007. CP 106-107. It was truly unfortunate that no notice was given to counsel for Ms. Marshall that the Motion for Order to Show Cause RE: Contempt was going to be presented, because Ms. Marshall would have presented her Motion to Suspend Mr. Rash's visitation at the same time.

To be on the safe side, Ms. Marshall filed her own petition to modify the parenting plan (even though there was already one pending by Mr. Rash) on July 19, 2007. CP 108-114.

On July 19, 2007, without requiring Mr. Rash to have given the GAL/Parenting Investigator notice and without the GAL/Parenting Investigator being present, Commissioner Marshall found Ms. Rash in contempt for failure to send the child on July 1, 2007, to Mr. Rash and ordered her to pay \$2,840.39 in fees and costs to Mr. Rash. CP 125. Commissioner Marshall made no provision for Ms. Marshall to purge the contempt. CP 128. Commissioner Marshall then immediately thereafter in the same hearing, heard Ms. Marshall's Motion and Declaration for Ex Parte Relief and suspended Mr. Rash's visitation pending a hearing on August 8, 2007. CP 137-141. *At the same hearing*, Commissioner

Marshall entered an order which suspended Mr. Rash's visitation and which stated that the child was to remain with the wife pending the hearing on August 8, 2007, because of the GAL report.

On July 25, 2007, Ms. Marshall filed her Motion for Revision on Commissioner Marshall's order finding her in contempt and by agreement of counsel set it for September 11, 2007—the trial date for Mr. Rash's Petition to Modify the Parenting Plan. CP 123.

Because there was a trial date set for September 11, 2007, counsel agreed to continue Mr. Rash's visitation being suspended as well as the hearing of August 8, 2007 (the return date on the Order to Show Cause issued by Commissioner Marshall suspending Mr. Rash's visitation with the child) to the trial date of September 11, 2007, and on September 13, 2007 the parties entered into an agreed order indicating that Mr. Rash was not going to seek any visitation with the child during the rest of her minority and that all petitions for modification of the parenting plan could be dismissed. CP 143.

On September 11, 2007, the trial date on Mr. Rash's Petition to Modify the Parenting Plan (which he abandoned) Judge Serko heard Ms. Rash's Motion for Revision. Judge Serko was not

interested in hearing from the GAL/Parenting Investigator who was subpoenaed to be present by Ms. Marshall. RP 12, lines 9-10. Judge Serko, during her ruling denying Ms. Marshall's Motion for Revision stated, "**Maybe it was justifiable, but it was still contempt in this Court's opinion.**" CP 23. (Emphasis added).

**C. SUMMARY OF ARGUMENT**

The court manifestly abused its discretion and based its decision on untenable grounds when it found Ms. Marshall in contempt for failure to send the child on visitation when Ms. Marshall reasonable and justifiably relied upon the recommendations set forth in the GAL/Parenting Investigator's report. In fact, the court itself stated during its ruling at the hearing on revision, "**Maybe it was justifiable, but it was still contempt in this court's opinion.**" RP 23, lines 7-8. (Emphasis added).

Further, Commissioner Johnson refused to find Ms. Marshall in contempt in December 2006 on the same exact fact pattern. As such, this becomes the Law of the Case and bars Mr. Rash through Res Judicata or Collateral Estoppel from arguing this same issue once again before a different Commissioner.

**D. ARGUMENT**

**1. Standard of Review.**

A trial court's decision on contempt will not be disturbed absent abuse of discretion. In re Marriage of James, 79 Wn. App. 436, 439-40, 903 P.2d 470 (1995). When the trial court weighs competing documentary evidence to make credibility determinations and a finding of bad faith or willful conduct demonstrating contempt, the Court of Appeals reviews the findings for substantial evidence to determine whether the findings support the conclusions of law. In re Marriage of Rideout, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003). A parent seeking a contempt order must demonstrate the contemnor's bad faith or intentional misconduct by a preponderance of the evidence. James, 79 Wn.App. at 442. If the moving parent establishes a prima facie case, the burden shifts to the contemnor to establish a reasonable excuse, by a preponderance of the evidence, for failing to comply with the parenting plan. RCW 26.09.160(4).

**2. Ms. Marshall Established a Reasonable Excuse by a Preponderance of the Evidence (Relying Upon the Recommendations of the GAL/PI Report), for her Failure to Comply with the Parenting Plan.**

Commissioner Johnson agreed with Ms. Marshall on December 6, 2006, when he failed to find her in contempt for failure to send the child on visitation. At no time did Mr. Rash make provision for supervised visitation between himself and the child should Ms. Marshall have sent the child.

Mr. Rash is a very violent and unpredictable man. He admitted beating Ms. Marshall unconscious in the presence of the children. He admitted attempting to hang himself in jail. He admitted to being a party to 7 different domestic violence protection orders involving 3 different women. The child alleged that he threatened a murder-suicide; that is to kill the child and then himself. Under these circumstances, it was reasonable for Ms. Marshall to not send the child in violation of the parenting plan.

RCW 26.09.160(4) precludes a finding of contempt if the parent had a reasonable excuse for noncompliance. It is respectfully argued that Ms. Marshall had a reasonable excuse for

not sending the child and therefore, it is a manifest abuse of discretion for the court to find her in contempt.

In fact, Judge Serko herself stated during her ruling denying Ms. Marshall's Motion for Revision, "***Maybe it was justifiable, but it still was contempt in this Court's opinion.***" RP 23, at lines 7-8. (Emphasis added).

3. **Pursuant to the Law of the Case Doctrine and Res Judicata and Collateral Estoppel, Mr. Rash is Precluded, Pending Trial, to Argument Contempt on the Same Exact Facts as Before the Court Earlier.**

Under the law of the case doctrine, determination of the applicable law in a prior appeal generally precludes retrial of the same issue in a subsequent appeal. State v. Mannhalt, 68 Wn.App. 757, 762, 845 P.2d 1023, 1026 (1992). Questions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause. Folsom v. County of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196, 1200 (1988).

Even though Commissioner Johnson's denial of contempt against Ms. Marshall on December 6, 2006, was not appealed, the

“Law of the Case Doctrine” should be followed by analogy and by extension of the doctrine. Further the similar doctrines of Res Judicata and Collateral Estoppel should also preclude Mr. Rash from relitigating these same issues.

These doctrines were argued before Judge Serko at page 11 of the Report of Proceedings, lines 10-16. Res Judicata and Collateral Estoppel were not specifically named, but the elements of the doctrines were. That is, “Commissioner Johnson heard the same exact fact pattern and did not find her in contempt. And that’s what – I’m thinking that that then becomes the law of the case. “ RP 11, lines 10-16.

**4. Ms. Marshall Requests Attorney Fees on Appeal.**

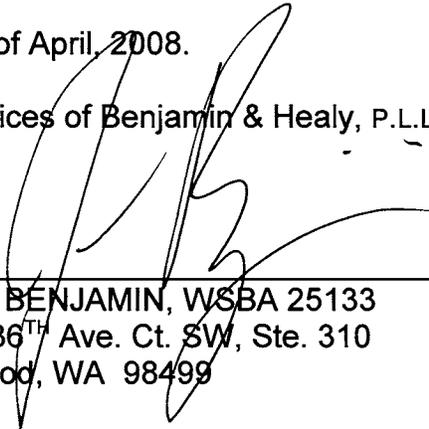
Pursuant to RCW 26.09.140 and other applicable authority, Ms. Marshall requests attorney fees on appeal.

**E. CONCLUSION**

For the reasons stated above, this Court should reverse the finding of contempt and the resulting sanctions and fees and award Ms. Marshall her fees and costs.

DATED this 14<sup>th</sup> day of April, 2008.

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DIVISION II

08 APR 14 PM 2:42

STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

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

SHARON RASH (MARSHALL),	)	
	)	
Appellant,	)	No. 36888-9-II
	)	
and	)	CERTIFICATE OF
KENNETH RASH,	)	SERVICE
	)	
Respondent.	)	
_____	)	

CERTIFICATE OF SERVICE

I certify that on the 14<sup>th</sup> day of April, 2008, I caused a true and correct copy of this Brief of Appellant to be served on the following persons in the manner indicated below:

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