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COURT OF APPEALS OF  
THE STATE OF WASHINGTON  
DIVISION TWO

THURSTON COUNTY SUPERIOR COURT NO. 12-3-01272-6

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AUTUMN L. CURTIS,  
Respondent on Appeal,

and

MARCUS S. HANSEN,  
Appellant.

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REPLY BRIEF OF APPELLANT

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**ORIGINAL**

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## I. INTRODUCTION

Petitioner Marcus Hansen (“Hansen”) brings the following Reply memorandum to respond to specific points contained in Respondent Autumn Curtis’s (“Curtis”) Brief of Respondent.

## II. ARGUMENT

A. Curtis’s Contention That Hansen’s Brief Does Not Cite To Authority or Contain Citations To the Record Should Be Disregarded.

Curiously, Curtis argues six times over that Hansen failed to cite any authority for a particular argument he makes. Apparently Curtis confuses Hansen’s analysis of the facts of the case as applied to the law with unsupported assertions of binding legal authority. For example, when Hansen argues that his subpoenas to witnesses should not be deemed intransigence, this is simply argument based on the case law previously discussed regarding the legal definition of intransigence. If Hansen knew of a controlling case with identical or analogous facts, he would have provided it (as we can assume Curtis would). In the absence of such, Hansen is permitted to argue whether the trial court’s stated bases for intransigence were adequate. These cases are by their nature fact-specific,

and require case-by-case analysis of the facts.

In another example, Curtis complains that Hansen asserted that his mother's mental health was not a new issue, without "authority."<sup>1</sup> This fact is relevant because the trial court felt that failure to disclose an additional incident (in August 2013, of which Hansen was unaware) increased litigation cost and showed bad faith. Hansen supported the statement with voluminous citations to the record in pages 3-6 of his brief. Hansen has no idea why Curtis believes that asserting a fact in the case must have "authority" or be disregarded, or how she believes that that fact was not adequately supported by citations to the record.

Hansen's argument is just that: analysis and *argument* regarding whether the court abused its discretion in finding intransigence based on the standards set forth in the case law cited by both parties. Curtis's arguments that Hansen failed to cite "authority" should be rejected across the board.

B. Curtis's Objections To Hansen's Statement of Facts Are Entirely Meritless.

Curtis spends over 15 pages of her brief pointing out facts she believes were omitted or mis-characterized by Hansen. Hansen's brief,

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<sup>1</sup>Respondent's Brief ("RB") 16.

however, focused specifically on the trial court's oral ruling, and facts relevant to the issues raised regarding alleged intransigence and bad faith. Curtis's additional facts are either irrelevant or misconstrued. It would be impossible in the narrow confines of this reply to respond to all 15 pages of the irrelevant facts individually, so Hansen will attempt to respond to the most pertinent of them by category.

1. *Value of grandmother-facilitated Skype sessions*

Curtis points out that the language of the court orders requiring visits between Coltin and his mother Jessica (hereinafter, "Jessica") do not specifically discuss the higher quality of those visits from those facilitated by Curtis. This is irrelevant — that exact argument was the basis of Hansen's requests for the visits, which was accepted and adopted by the court multiple times over. It is logical to assume that (in the absence of a contrary basis stated in the court's findings) the reason for the request argued by Hansen was the reason accepted by the court when it granted the same request.

2. *Quantity of pre-trial litigation re: grandmother-facilitated Skype sessions*

Curtis spends the next six pages of her brief pointing out facts she believes undermine Hansen's contention that Skype visits facilitated by

Jessica was heavily litigated by the parties during the case. On this point, the appellate record speaks for itself. Curtis can try to parse language and argue that this issue was not brought up over and over and over, but such acrobatic attempts at reconstruction of this litigation are not credible.

Hansen has documented the voluminous litigation over Jessica's mental health and the Skype visits, culminating in her attorney's accurate admission during argument on pre-trial motions that Jessica's mental health was "the primary issue" in the case ... for "a year and a half."<sup>2</sup>

Curtis also contends that the trial court record makes no reference to "grandmother-facilitated Skype visits."<sup>3</sup> She cites orders from October 2012 and January 2013 that do not describe Jessica's time with Coltin as being for the purpose of facilitating Hansen's Skype visits with his son. The Order on Motion for Revision of October 25, 2012, however, ordered that Hansen have reasonable Skype privileges during the time Coltin spent with Jessica. And after Curtis filed yet another motion to terminate the visits with Jessica, in November 2013,<sup>4</sup> Hansen argued in response that the visits that occurred with his mother were to facilitate his Skype sessions

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<sup>2</sup>RP (Feb. 25, 2014) 21:16-20; 22:2-5, 22-24.

<sup>3</sup>RB 2.

<sup>4</sup>CP 231-34.

and were in Coltin's best interests.<sup>5</sup> What Curtis fails to mention is that the trial court's December 10, 2013 ruling *specifically authorized* "grandmother-facilitated Skype visits" for Hansen, and confirmed that this was the intent of the prior order as well: "The Court ordered the father have Skype visitation *pursuant to the prior order* and have visits on Saturdays for up to 3 hours. *That visit shall be facilitated by the maternal grandmother.*"<sup>6</sup> The language of the December 17, 2013 written order said: "The father shall *continue* to have weekly Skype privileges with the child at the paternal grandmother's home every Saturday for three hours."<sup>7</sup>

Curtis's motion to revise that ruling — permitting grandmother-facilitated Skype sessions with Hansen — was denied: "Court ruled father has visitation rights (via Skype at grandmother's house) every Saturday."<sup>8</sup> Curtis's contention that the trial court did not repeatedly address "grandmother-facilitated Skype visits" prior to trial in this case is without merit.

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<sup>5</sup>CP 236.

<sup>6</sup>CP 289 (emphasis added).

<sup>7</sup>CP 291 (emphasis added).

<sup>8</sup>CP 296.

3. *GAL's position re: Jessica and Skype visits*

Curtis then spends three pages listing out facts showing the GAL had concerns about Jessica all during her investigation, and discussed those concerns in her report. But these facts, rather than support Curtis's case, merely reinforce Hansen's position that: (1) Jessica's mental health was front and center during the entirety of the case, and (2) Jessica as a possible facilitator for Hansen's Skype sessions with Coltin *was* an appropriate issue for trial.

4. *Motion to continue*

Next, Curtis attacks Hansen's fact summary regarding his motion to continue. Curtis meticulously recapitulates each of the trial court's statements about why it felt Hansen's motion was brought in bad faith. But Hansen's argument is not that these statements were not made, but that they were not based on substantial evidence. The reason the case "involved a lot of litigation" is because *Curtis* repeatedly brought motions to end Hansen's Skype visits facilitated by Jessica. There was *no* evidence that Hansen's inability to fund his attorney for trial was a delay tactic — this unsupported conclusion of the trial shows a bias that may help explain the court's later, unwarranted finding of intransigence. More importantly,

the motion caused no prejudice to Curtis because the motion was denied and her attorneys' fees were ordered to be paid by Hansen.

5. *Jessica's mental health and Hansen's disclosure of it*

Next, Curtis recounts numerous scraps of trial testimony<sup>9</sup> establishing Jessica's mental health problems. Hansen concedes that a lot of evidence was presented regarding these problems — indeed, almost the entirety of Curtis's case at trial was about nothing but this issue. But the way that issue relates to this appeal is in the trial court's conclusion that Hansen withheld certain information about Jessica's mental health during the litigation, which constituted intransigence.

But this is a mis-application of the case law surrounding intransigence. Intransigence requires evidence of foot-dragging or obstruction.<sup>10</sup> “The party requesting fees for intransigence must show the other party acted in a way that made trial more difficult and increased legal costs, like repeatedly filing unnecessary motions or forcing court hearings for matters that should have been handled without litigation.”<sup>11</sup>

Unsupported assertions about “intransigence and obstructionist tactics” are

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<sup>9</sup>RB 10-12.

<sup>10</sup>*Marriage of Pennamen*, 135 Wn. App. 790, 807, 146 P.3d 466 (Div. I 2006).

<sup>11</sup>*Id.*; see also, *Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (Div. I 1992).

not a basis for awarding fees.<sup>12</sup> The fact that a family law case involves contested issues does not open a door to an award of fees, absent a showing of specific, inappropriate legal tactics.<sup>13</sup> Moreover, a litigant need not do pre-trial discovery for his opponent. CR 26.

Hansen's litigation of the parameters of his Skype visitations was not a "matter that should have been handled without litigation" — if that were true, Curtis would have been guilty of intransigence several times over, because she repeatedly brought motions to address the Skype visits. All the additional facts cited by Curtis regarding Jessica's mental health are irrelevant in this appeal — Hansen showed that through all the litigation, a mountain of information about Jessica's 911 incidents and hospitalizations was known both to Curtis and the court, as evidenced by Curtis's filings. This information was known to Curtis *from the beginning of the case*, as the appellate record shows. This issue was not "hidden" by Hansen — that notion is absurd, and not based on substantial evidence. Moreover, as previously argued, it is undisputed that Hansen had no knowledge of the August 2013 incident that was discussed to such

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<sup>12</sup>*Marriage of Wright*, 78 Wn. App. 230, 239, 896 P.2d 735 (Div. II 1995).

<sup>13</sup>*Id.*

a great degree at trial and impacted the GAL's opinion.<sup>14</sup>

6. *Settlement discussions*

Finally, Curtis complains that Hansen omitted the fact that Curtis sat down with Hansen's attorney on November 1, 2013 to, according to Curtis, "resolve issues at hand," and that Hansen's attorney said he would speak with his client and respond, and failed to respond to Curtis's November 1 offer until after New Year's.<sup>15</sup>

But there is no evidence in the record about what the alleged November 1 settlement offer on visitation was, or whether it bore any relation to the pre-trial proposed orders filed by Curtis on February 19, 2014 that her counsel contended were substantially similar to the trial court's rulings. The trial court gave no indication of relying on that unspecified November 1 offer. As such, it has no relevance to this appeal.

C. Curtis Fails To Address the Primary Issues in Hansen's Appeal.

The essence of Hansen's argument, which Curtis seems to try to sidestep, is that the court found intransigence by Hansen for his litigation of an issue — the Skype sessions facilitated by his mother — that he had been successful on five times over in the same court prior to trial. Curtis

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<sup>14</sup>RP 432:2-20; RP 277:11 to RP 278:16.

<sup>15</sup>RB 13-14.

fails explain how litigation of a contested issue that a party had prevailed on multiple times over in pre-trial motions could constitute intransigence. This goes to the heart of the trial court's error in this case.

Curtis's brief simply recapitulates the trial court's ruling, which is flawed for all the reasons documented in this appeal.

As argued above, Curtis does not address why litigation of a contested issue would be a basis for intransigence, but simply complains that Hansen failed to cite to authority.<sup>16</sup> But no authority is needed — it is uncontested that the trial court based its intransigence finding in part on that basis.<sup>17</sup> The “authority” for this argument is that cited above regarding the legal standard for intransigence.<sup>18</sup> The trial court's belief that Hansen's litigation regarding Skype equalled intransigence failed to satisfy that standard and Curtis's brief does not explain how it does.

Next, Curtis does not address in any way whatsoever why Hansen should be required to prepare Curtis's case and make affirmative disclosures to her about specific incidents regarding his mother, when she had already filed such a huge volume of evidence of similar incidents in

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<sup>16</sup>RB 17.

<sup>17</sup>RP (Mar. 20, 2014) 33:17-35:10, as cited at AB 11.

<sup>18</sup>See, discussion, *supra*, pp. 5-6, also cited at AB 12-13.

court. Curtis merely complains that Hansen's argument that Jessica's mental health was not a new or unknown issue had no authority cited in support thereof. But Hansen's argument is about the sufficiency of the record for the trial court's conclusion that he concealed the issue of Jessica's mental health. It is not a legal proposition, so Hansen does not understand what "authority," beyond the voluminous citations to the appellate record, would be required.

Likewise, Curtis does not address why an attempt to call a rebuttal witness, when the opposing party's expert (the GAL) produces new evidence just days before trial, would constitute intransigence. Instead, Curtis just recapitulates the trial court's flawed analysis that Hansen's subpoenas were late, and that Hansen has not "cited authority."

Tellingly, in her analysis of the cases regarding attorneys fees and intransigence, Curtis cites to no Washington case that found bad faith or intransigence on facts even remotely close to these. Hansen's appeal should be granted.

D. Hansen's Appeal Is Well-Founded, Brought In Good Faith, and Attorneys Fees May Not Be Awarded.

Curtis argues, without any analysis whatsoever, that she is entitled to attorneys fees on appeal on two possible bases: (1) "intransigence in the

trial court” and (2) RCW 26.26.140. Attorneys fees should not be granted on either of these bases.

Curtis cites two cases supporting her contention that “[a] party’s intransigence in the trial court can also support an award of attorney fees on appeal.” In *Marriage of Mattson*,<sup>19</sup> the appellant had responded to an action for child support modification by repeatedly providing inaccurate representations to the court as to his income.<sup>20</sup> The trial court awarded \$1,000 in attorneys fees to his former spouse based on this intransigence. The appellant then, almost immediately, filed his own child support modification petition, seeking to evade the obligations of the prior order,<sup>21</sup> by claiming that he had lost his job, he had irreconcilable differences with his employer, and that the company had terminated his lease arrangement.<sup>22</sup> In fact, the court learned, the appellant was voluntarily underemployed and had misrepresented his role in the termination of his lease.<sup>23</sup> The trial court denied his petition, awarding \$3,000 of fees to the former spouse, since the appellant’s unjustified misrepresentation to the

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<sup>19</sup>95 Wn. App. 592, 976 P.2d 157 (Div. II 1999).

<sup>20</sup>*Id.* at 595-97.

<sup>21</sup>*Id.* at 604.

<sup>22</sup>*Id.* at 598.

<sup>23</sup>*Id.* at 603-05.

court had increased litigation costs for his spouse.<sup>24</sup>

*Mattson* does say that appeal fees can be based on trial-court intransigence, but *Mattson* has grossly mis-read the two cases it cites as supporting that principle: *Eide v. Eide*<sup>25</sup> (also cited by Curtis) and *Chapman v. Perera*.<sup>26</sup> In *Eide*, there was separate intransigence *in the appeal*, because the appellant tampered with the exhibits.<sup>27</sup> The court is clear that it was this *appellate* intransigence that justified the appellate fee award in *Eide*, not intransigence in the trial court. Similarly, in *Chapman*, the court found “continued” intransigence, through the appellate process, that justified fees.<sup>28</sup> Neither *Eide* nor *Chapman* holds — or even offers any support for the contention — that attorneys fees on *appeal* can be based solely on intransigence in the trial court.

Consequently, an appeal fee award based on trial court intransigence in this case would be wrong for two separate reasons. First, *Mattson*’s statement that such fees would be permissible is based on a mis-reading of Washington case law. Second, in any case, the facts here are

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<sup>24</sup>*Id.* at 598.

<sup>25</sup>1 Wn. App. 440, 462 P.2d 562 (Div. I 1969).

<sup>26</sup>41 Wn. App. 444, 704 P.2d 1224 (Div. I 1985).

<sup>27</sup>1 Wn. App. at 441, 446.

<sup>28</sup>41 Wn. App. at 456.

distinguishable from *Mattson*, *Eide*, or *Chapman*. Hansen contends that the trial court's intransigence finding was an abuse of discretion — if so, fees on appeal would obviously be inappropriate. But even if this court upholds the trial court's fee award, the intransigence on which it was based does not rise to the level demonstrated in *Mattson*. And there is no continuing, appellate intransigence as in *Eide* or *Chapman*. It is significant that Curtis does not provide any specific argument in her brief as to why intransigence should justify appellate fees in this case.

As to RCW 26.26.140, it is true that attorneys fees may be awarded in a parentage case, and need versus ability to pay is not a *mandatory* consideration. But the court needs to have *some* logical basis on which to base such an award, with need versus ability to pay being the most-obvious, and most-utilized, by courts. Here, there is no evidence regarding that justification, or any other, offered by Curtis. She simply "requests" an award of attorneys fees on appeal.<sup>29</sup> The trial court, however, did *not* award any attorneys fees based on RCW 26.26.140. There is no basis for this court to do so either.

As such, Curtis's request for attorneys fees should be denied.

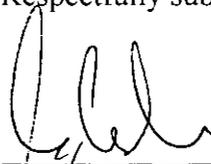
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<sup>29</sup>RB 24-25.

### III. CONCLUSION

For the foregoing reasons, Hansen respectfully requests that this court reverse the award of \$5,000 of attorneys fees for bad faith and intransigence imposed by the trial court in this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'S. Tye Menser', written over a horizontal line.

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I certify that on August 28, 2014, I caused to be mailed, via first class regular mail through the United States Postal Service, a true and correct copy of the **Reply Brief of Appellant** to the following individuals:

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DATED this 28<sup>th</sup> day of October, 2014, at Olympia, Washington.

*Traci Goodin*

Name: Traci Goodin of  
MORGAN HILL, P.C.

SUBSCRIBED AND SWORN to before me this 28<sup>th</sup> day of October, 2014, by Traci Goodin.

*Megan Rue*

Notary Public in and for the State of  
Washington, residing at: Olympia

My commission expires 3/4/18

Print Name: Megan Rue

