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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 303527

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RICHARD T. WIXOM,
Petitioner-Father-Appellant,

v.

LINDA B. WIXOM,
Respondent-Mother.

BRIEF OF APPELLANT

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I. Assignments of Error and Their Issues

A. Assignments of Error

1. The court commissioner entered a finding that Mr. Wixom's behavior on July 29, 2011 was unreasonable. CP 53. The evidence does not support this finding. The entry of this finding by the court commissioner was error.

2. The court commissioner modified the residential schedule for summer of 2011 by giving residential time to the mother's parents. CP 54. This action violated the father's constitutional rights to parent his child. This action by the court commissioner was error.

3. The court commissioner awarded residential time to the mother to make up for time that the mother had lost due to her choice to arrive well past when she was due without proper notice and without accounting for the father's plans for that evening. CP 54. The evidence does not support this action by the court commissioner. This action by the court commissioner was error.

4. The court commissioner awarded fees to the mother's attorney when the mother chose to arrive well past when she was due without proper notice and without accounting for the father's plans for that evening. CP 54. The evidence does not support this action by the court commissioner. This action by the court commissioner was error.

5. Although the order dictated unambiguously that the child “shall” go to the grandparents, the trial judge denied the motion for declaratory relief (CP 145) on the basis that the trial judge felt that the grandparents had not improperly received residential time in violation of the father’s constitutional rights because the trial judge felt the intent was somehow for the grandparents to exercise the mother’s residential time on her behalf. The trial judge’s decision perpetuated the court commissioner’s violation of the father’s constitutional rights to parent his child. The trial judge’s denial of the motion for declaratory relief was error.

6. Without any proper basis, the trial judge awarded fees to the mother’s attorney. CP 145. The statute on which this award was based does not permit such an award. Id. The trial judge’s award of fees to the mother’s attorney was also error.

B. Issues Related to Assignments of Error

1. The doctrine of equitable estoppel contradicts a finding that the father’s conduct was unreasonable, contradicts the court commissioner’s changing the residential schedule for the summer of 2011, and contradicts an award of fees to the mother’s attorney. (Assignments of Error 1, 2, and 4.)

2. The father’s constitutional rights to parent his child contradict the court commissioner’s giving residential time to the mother’s

parents, contradict the court commissioner's award of so-called makeup time to the mother, contradict the trial judge's denial of the father's motion for declaratory relief, and contradict an award of fees to the mother's attorney by the court commissioner and the trial judge. (Assignments of Error 2, 3, 4, 5, and 6.)

3. The father has met the procedural requirements for the trial judge to consider his motion for declaratory relief. (Assignment of Error 5.)

4. The mother is not entitled to any attorney fees. (Assignments of Error 4 and 6.)

II. Statement of the Case

This appeal arises from a surprise suspension of an existing parenting plan and request for temporary modification by a Superior Court Commissioner awarding temporary custody and mandatory visitation to out of state grand parents that prejudiced the father's ability and rights to bond with and parent his child. CP 129, 53-54. The mother petitioned the Spokane County Superior Court for a modification of child support on February 8, 2011. On March 23, 2011, the father petitioned for a change of custody with the two younger, minor children T.W., & J.W., from a parenting plan (PP) that was final on March 3, 2009. CP 1-8. In an August 5th 2011 hearing before a court commissioner, the court modified and

eliminated the balance of the father's summer and Labor Day visitation with his 11 year old child and awarded mandatory visitation to the maternal grand parents in Portland. CP 54.

THE MOTHER WIXOM:

The mother is a 45 year old Confessed Federal Felon (CP 210-225) that earned a Bachelor's degree from the University of Washington in Pharmacy in 1989. CP 279:22-25; 280:1-3. The mother works as a pharmacist for Walgreens Infusion services in Spokane at 1328 N. Ash. 1328 N. Ash Street is on the Maple Ash traffic corridor two and one half to three blocks north of the Maple Street Bridge approach. CP 281:8-11. The mother's job at Walgreens pays her \$50.00 per hour or \$100,000 per year on a fifty forty hour week basis plus benefits. CP 376:3-25; 377:1-13.

Prior to the father's divorce from the mother, the mother was terminated from her position as a supervising pharmacist at Rite Aid for Theft, Forgery, Fraud and Diversion of drugs. The mother was investigated and charged with forging prescriptions and orders, diverting controlled substances for her own use and the use of others, overfilling prescriptions for hydrocodone and consuming some of the drugs herself; Unprofessional conduct; dishonesty; corruption; (CP 229) and misconduct by the Washington State Department of Health, Board of Pharmacy on

April 27, 2007. CP 228-231. The mother was investigated by the United States Drug Enforcement agency, U.S. DEA. CP 296:19-22.

The investigation by the Washington State Department of Health, Board of Pharmacy (WSDH, BOP) resulted in charges being brought against her for unprofessional conduct. The U.S. DEA investigation resulted in three federal felony charges being brought against her. See generally CP 216-225.

Rite Aid's pharmacy data base, which identifies prescriptions filled for Rite Aid customer THE FATHER revealed that the mother had forged by writing or filling at least 56 separate prescriptions 17 of which were for controlled substances which did not include the theft, overfilling of the 400 estimated hydrocodone pills. See generally CP 216-225. The Washington State Department of Health Board of Pharmacy Investigation made many of the same accusations and charges. CP 228-249.

The mother's sworn deposition was taken on September 1, 2011, CP 274:1-25, generally. The mother was clear on the instructions given to her that if she answered any question it would be assumed that she understood the questions. CP 277:1-7. The mother's sworn testimony indicated that the prescriptions she wrote for drugs had the father's name on them and that she did not have his permission to use his name. CP 314:9-16. The mother testified that she would fill the prescriptions, not

collect any money for them and take them home for herself. CP 9:2-22. When the mother was asked in her sworn deposition if she had ever been arrested? The mother answered "no." CP 9:25-25. When asked in the next question have you ever been charged with anything? The mother again answered "no." CP 283:1-2. Later in the deposition (over her attorneys objection she again stated that she was not charged with anything CP 319:26-23. Further on in the Deposition after confrontation, the mother admitted that she had been charged by Rite Aid and the WSDH, BOP with theft (over filling prescriptions without payment), forgery (signing the name of her brother, a doctor in Portland without his permission), (filling and refilling those prescriptions) and (fraud by using and making fraudulent documents by forgery of her brothers name on prescriptions), jeopardizing his medical license with total disregard for those consequences. CP228-241 generally and CP 314-320 generally. The mother finally admitted over her attorney's objections and contrary to her former sworn statements that she was charged with misconduct by the Department of Health. CP 321:19-24. Her current job at Walgreens requires her to handle morphine and other controlled substances. CP 379:19-25; 380:1-16.

The father and the mother have three biological children. At the time of the petitions for modification their son A.W., was 18 years of age;

their daughter T.W, was 16 years old and their son J.W. was 11. The mother Wixom and her domestic partner and man she lives with, Bob McGuinness have a biological son A.M., born in April of 2008 CP 327:14-17. The father Wixom filed for divorce on September 24, 2007. The final Parenting Plan was signed by the father on February 24, the court signed on March 3, 2009, it was filed. CP 1-8.

During the pendency of the parenting plan filed on March 3, 2009, the parents attempted to work out their differences through agreements with each other and after the 2011 modifications were initiated they used their attorneys. The parenting plan allowed the father up to five weeks visitation with 11 year old J.W. The father's desire for up to five weeks summer visitation with 11 year old J.W. became an item of contention in June 2011.

Things started to change in the modification process when the father was refused five weeks of summer vacation with J.W. as per the PP. CP 2:18-22. The father decided to hire his present attorney in the middle of July 2011. The father wanted three weeks but the mother only gave him one week. The mother did not want the father to have their 11 year old son J.W. for five straight weeks or even three straight weeks. CP 26-36 generally and CP 72:22-26.

The decision by the father to engage a new attorney in the middle of July 2011 is indicative of the beginning of the dirty hands the mother used to gain equity. The 11 year old child J.W. was at Camp Reed. CP 38. The father's Attorney served a courtesy letter on the mother's attorneys requesting additional time with the child. CP 40-41. The letter outlined the father's position that paralleled the terms of the parenting plan in effect. Id.

The father had asked for additional time with the child and had given the other party the two weeks required written notice. CP 40-41. The Attorney for the mother assigned to the case was not available; however, her supervising attorney responded to the written notice and agreed in writing to grant a temporary additional week's time to the father. CP 43. That time was to be during the period July 23-29, 2011. CP 43. The agreement was as follows:

July 22, 2011. I am authorized to offer visitation beginning this Saturday after [J.W.'s] camp until the following Friday at the regular pickup time at which time Ms. Wixom would pick [J.W.] up. There is a guardian ad litem home visit scheduled on the 30th and he needs to be there for that visit. Let me know if this is acceptable until you and Ms Swennumson can speak. Sincerely yours, Paul B. Mack.

CP 43. The regular pick up time was verified by the father as 5:00 P.M. and by the mother's attorney in her testimony to the court. "They agreed, No problem, 23 to the 29th; with pickup at 5:00." CP 72; 22-26. The father

accepted their offer by sending an immediate Email the same day accepting the mother's terms on July 22, 2011. The Email stated in pertinent part:

[To the mother], I received the attached letter from your atty's office. I have been unavailable today so I have just reviewed the agreement to have [J.W.] spend this week with me through Friday at 5:00 P.M. I accept and will have him ready for your pickup on Friday the 29th. [The father.]

CP 44, Email from [the father] to lbwixom@comcast.net. This agreement between the parties and their Attorneys setting out the times for visitation and for the mother to pick up the child were reasonable and very clearly set out as to the days and time agreed to for the mother to pick up her and the father's 11 year old son on July 29th at 5:00P.M.

The parenting Plan at Section VI. Other Provisions, Paragraph 8 states as follows: **"Excepting for emergencies, the parents shall notify the other at least two days prior to a scheduled visit if problems are anticipated."** CP 7:7-8. Contrary to the mother's statement in her sworn deposition and the terms of the parenting plan, the mother did not give the father the two days notice required from section VI, paragraph eight that there were any problems anticipated. The mother in her sworn deposition failed to tell the whole truth to cover her violation of the Parenting plan by stating that,

I told him – I sent him an E-mail, and said I got off work at 5, they were doing construction on I 90, and I sent this three days before I was to pick up[J.W.].

CP 301:10-25 and 302:1-3. The E-mail she sent was dated July 28, one day before the agreed upon pick up time of 5:00 P.M. (CP 44); not the three days sworn to in the deposition by the mother. The mother indicated in her sworn deposition that the father was not supposed to put his life on hold for her (CP 329:10-13) or the mother's father, Les Buchholz, J.W.'s Portland grandfather. CP 85-86 generally.

The mother failed to show and did not keep her prior 5:00 P.M. commitment. She intentionally and knowingly put the father and their 11 year old child J.W. on hold while she picked up her and another man's three year old child A.M. at the day care. Her pickup of another man's child took 20 minutes. CP 327-329 generally and CP 301:10-25 and 302:1-3.

For what ever reason, the mother did not indicate that the meaning of "etc" in her Email meant her preference to pick up another man's three year old child prior to keeping her commitment pick up her and the father's 11 year old child was or would make her later than the committed time of 5:00 P.M. She indicated in her Email that, "due to freeway traffic and not being able to get off work until 5:00 etc" she would be late. Although the mother stated under oath that the father does not need to put

his life on hold for her (CP 329:6-13) or for her father Les Buchholz (CP 358:5-25 & 359:1-4), the mother did not make any arrangements for any specific times for when any reasonable contact by phone between the mother and the children while at the father's would take place. CP 395:3-19; & CP 123-125, generally. The mother also stated and agreed that the father does not have any obligation to return her phone calls. CP 400:12-17.

The father lived in the Bella Vista subdivision in Veradale at 5412 Bella Vista Drive. The mother worked at 1328 N. Ash on the Maple bridge corridor. The mother had committed to pick up her and the father's 11 year old son at the fathers home at 5:00 P.M. on the 29th of July 2011. She testified in her deposition that on a good day with no traffic she could drive from her work to the fathers home in 30 minutes. The mother also testified that there was construction traffic on the freeway which would make her late. The mother testified under oath on four separate occasions in deposition that she arrived at the father's home at 5:40 P.M. CP 305:1-2; 324:18-22; 56:14-16; 92:14-19; 128:1-7; 401:12-13; 419:6-7.

The mother also testified in her deposition that, on July 29, 2011, she had stopped at the day care down town at Sprague and Howard Street's to pick up her and her significant other's three year old child A.M. which took between 15-20 minutes. The mother indicated in her

deposition that she called the father at 5:20 P.M., when she had A.M. in the car ready to get J.W., to let the father know that she was on her way to pick up her and the father's son J.W. CP 328: 18-21. The mother agreed and indicated that that the 20 minutes used to pick up A.M., her child with the other man (CP 328:22-24), could have been used to pick up J.W., her and the appellant father's child. CP 329:1-3. The mother stated on four separate occasions under oath that she was at the father's home at 5:40. CP 305:1-2; 324:18-22; 56:14-16; 92:14-19; 128:1-7; 401:12-13; 419:6-7; 329:14-16. When confronted with the subtraction of the 20 minutes used to pick up another mans child with the four sworn arrival times of 5:40 at the fathers home (CP 329:17-19), she indicated that she doubted she could have been there at 5:20 (CP 329:24) and stated that it is a 30-35 minute drive even in no traffic from her work. CP 330:1-5 & 11-14.

The evidence from the mother in her sworn deposition indicates that the mother could not have been at the Bella Vista home at 5:00 P.M. as stated to the court by her attorney. Even under the 5:40 time line that the mother swore to four times in her deposition and E-mail indicates lack of truth. The evidence is clear that 1.) It was 5:20 P.M. at the time the mother left the day care with another man's child; 2.) That on a good day with no traffic it takes 30-35 minutes from her work on the Maple Ash approach; and 3.) The mother did not expect to arrive at the fathers until

5:45 due to the construction on I-90. Under the mother's approach she could not have arrived at the Bella Vista Home until 5:55 at the earliest. Her earlier indication with no traffic she could drive there in 30 minutes means that she expected a 15 minute delay due to the construction on I-90; adding the 30 minutes with no traffic to the 20 minutes it took her to pick up another mans child it would be at about 6:05 P.M. and not 5:40 when she arrived, if she arrived at all. $15 + 20 + 30 = 65$ minutes or 6:05 P.M.

After synthesizing the undisputed evidence as stated by the mother in her deposition and arguments at court, only one conclusion can be reached: Because it takes between 30 and 45 minutes to drive from the down town area to the Bella Vista home and 20 minutes for the mother to pick up another man's child, she could not possibly have arrived at the home until some time between 5:50 and 6:05 P.M. The father testified that he did not leave the home until approximately 5:55 P.M. CP 28:10-16; 29:11-20; 30:1-5; 35:1-3. The mother testified four times under oath in deposition that she arrived at the home at 5:40. Her attorney testified and represented to the court in the August 1, 2011 hearing before the commissioner that the mother arrived at the home at 5:00 P.M. CP 105: 6-8. Any way you look at it, the mother breached the agreement to be there at 5:00 P.M.

THE PARENTING PLAN:

The parenting plan incorporated language that either parent may make emergency decisions regarding health or safety of the children CP 5:17-21. The plan called out that for purposes of visitation the receiving parent will pick up. CP 4:3-7.

The PP (CP 1-8) at 3.2 indicates during the School Schedule the 11 year old J. W. . . . shall reside with the mother, except for every other weekend (Thursday night through Sunday night) and one mid-week contact every week with the father. The PP at 3.5 Summer Schedule indicates: the same as school schedule, except that the father may have residential time with the children up to five weeks in the summer upon giving two weeks notice to the mother. CP 2: 18-22. Construed under 3.2 the school schedule; paragraph 3.5 of the plan would mean that the father would have visitation with J.W. “every other weekend (Thursday night through Sunday night).” The priorities under the residential schedule at 3.9 indicated that where there is conflict, the conflict shall be resolved by reverting to the school schedule.

The father only had visitation with his 11 year old son for the first three days in August and did not have visitation with him until after Labor Day contrary to 3.7 of the original plan which awarded every Labor Day to the father. CP 2:25-27

III. Argument

A. The father has met the procedural requirements for the trial judge to consider his motion for declaratory relief.

Under the Uniform Declaratory Judgments Act, RCW 7.24, courts of record are authorized to "declare rights, status and other legal relations". RCW 7.24.010; Williams v. Poulsbo Rural Tel. Ass'n, 87 Wash. 2d 636, 643, 555 P.2d 1173 (1976). The Superior Courts of Washington are courts of record.

As enacted by the State of Washington, the Uniform Declaratory Judgment Act says absolutely nothing about whether one must request declaratory relief in a separate action or whether one may request declaratory relief in a pending action.

The Mother may cite a case that refers to a party filing an action or complaint for declaratory judgment. See, e.g., City of Federal Way v. King County, 62 Wn.App. 530, 533, 815 P.2d 790 (1991). One's ability to seek declaratory relief in a complaint under CR 8(a) does not deny the ability to seek declaratory relief in a motion in a pending case. If the Mother cites such a case, that citation would prove precisely nothing.

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1. The violation of the father's constitutional rights is a justiciable controversy.

The following are the four elements of a justiciable controversy which will be considered below in reverse order:

- (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Ronken v. County Commissioners, 89 Wn.2d 304, 310, 572 P.2d 1 (1977).

This is clearly a justiciable controversy. The trial court has violated the father's liberty interests to parent his child who has many years of his minority remaining. This is obviously an issue capable of repetition and is, therefore, not moot. The child's schedule and the grandparents' claim to the child through the mother is a continuing and opposing issue. A judicial determination that the grandparents have no rights to the child's schedule when the father has visitation or custody will be **final, conclusive**, and binding on all parties.

Such a judicial determination will prevent the mother from carrying her parents' banner into the courtroom during future disputes regarding the parent's visitation schedule. The father meets the fourth and final element of a justiciable controversy.

The father's rights to parent his child were directly violated on August 5, 2011. For this reason, his interests in those rights are "direct and substantial." The father's interests are not theoretical, abstract, academic, or merely potential. Indeed, one doubts that the mother will argue that this (third) element of a justiciable controversy is not met.

The father wishes to exercise and defend his liberty interest and constitutional rights to parent his child during periods of custody or visitation. The mother wishes to take the father's rights to parent his child from him and give them to the mother's parents through court action whenever she feels like doing so. These parties have "genuine and opposing interests." The father also meets the second element of a justiciable controversy.

With respect to the first element, the mother may argue that the grandparents do not have any visitation rights to the children in the parenting plan. This fact is an immaterial distraction and is completely irrelevant. Neither party argues that the parenting plan creates any visitation rights to the children by the grandparents.

The court's written and unambiguous Order from August 5, 2011 is that document which confers visitation rights on the grandparents in violation of the father's constitutional rights. J.W. "shall go to the Portland visit with his grandparents" is a blatant violation of the father's

constitutional liberty interest and due process rights. The court's order took the father's assigned visitation (through the parenting plan) time with his son and clearly transferred it to the grandparents, an absolute violation of the father's constitutional rights to have visitation with and parent his child. This visitation-with-the-grandparents language is not in the "parenting plan."

By the time of a hearing on September 2, 2011, some four weeks after her August 5, 2011 Order violating Mr. Wixom's rights to visit and parent his child, the court commissioner had an opportunity to review the filings and re-frame the issue. The court commissioner's August 5, 2011 order is clear and unambiguous on its face. This Court should ignore the court commissioner's so-called contradictory after-the-fact spin on the clear unambiguous language of its written August 5, 2011 order.

The mother continues to feel that she can take the father's visitation and parenting time from him and with the court's blessing and direct or give that visitation and parenting time to her parents. For these reasons, there is an "actual, present and existing dispute" between the parties. The father also meets the first element of a justiciable controversy.

Consequently, the father meets all of the elements of a justiciable controversy.

2. Declaratory relief is available in a domestic relations case.

Of course, declaratory relief is available in a domestic relations case. Declaratory relief is provided for in over two dozen places in Chapter 26.09 RCW. One of the forms of relief one can seek under this chapter is a declaration concerning the validity of a marriage or domestic partnership. Such relief would be declaratory relief.

If the mother complains that declaratory relief is inappropriate based on the father's supposedly having an alternative remedy, her complaint is clearly inapplicable here because Chapter 26.09 RCW provides for declaratory relief.

3. The motion for declaratory relief was filed well within a reasonable time.

The mother may complain that the father did not appeal the August 5, 2011 Order. If the mother raises this illusory issue, this Court should find that this complaint is not well taken for these four reasons:

First, the August 5, 2011 order is not an appealable order. RAP 2.2(a) (omitting an order on a return of a TRO in front of a commissioner from appealable orders).

Second, a final judgment includes all interlocutory rulings in the case. Hiner v. Bridgestone/Firestone, Inc., 91 Wn. App. 722, 728 (1998).

Third, the order of August 5, 2011 "is subject to revision at any time before the entry of a judgment adjudicating all the claims and the rights and liabilities of all the parties." CR 54(b).

Fourth, an appellant, for instance, may bring up and argue before the court of appeals a "manifest error affecting a constitutional right" even if the appellant failed to raise the issue before the trial court. RAP 2.5(a)(3).

Thus, the father could bring up this same issue in an appeal of this Court's determination of the custody modification and may certainly litigate this matter in this appeal. Additionally, because the father can bring up the violation of his constitutional right at any time, this motion was timely.

B. The doctrine of Equitable Estoppel contradicts a finding that the father's conduct was unreasonable, contradicts the court commissioner's changing the residential schedule for the summer of 2011, and contradicts an award of fees to the mother's attorney.

The doctrine of equitable estoppel is grounded in the principle "that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon." Wilson v. Westinghouse Elec. Corp., 85 Wn.2d 78, 81, 530 P.2d 298 (1975). A party seeking the protection of the doctrine must establish three elements: "(1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act; (3)

injury to such other party resulting from permitting the first party to contradict or repudiate such admission,

State v. Yates, 161 Wn.2d 714, ¶ 16 (2007).

Here, the father and the mother entered into a CR 2A agreement ascribed in writing by the parties and their attorneys wherein they established a process for modifying the parenting plan. They and their attorneys made this agreement to avoid the need for them to continue to go back to Court every time a dispute arose and to lessen time consuming and costly court litigation.

The father had justifiably and in good faith relied upon the mother and her attorney's representations and the positions they assumed. The positions of the mother and her attorneys were accepted by the father on July 22, 2011. The father took action to prepare for himself and his new wife's time after 5:00 P.M. on July 29 on the faith of the mother and her attorneys admissions, statements, and acceptance of the offer by his performance. The father relied upon the mother and her attorney's admissions and acts. The father had a right to rely on those admissions and acts. The father did rely on those admissions and acts. The father relied upon those admissions and acts to his detriment and lost the rest of his summer and Labor Day visitation with his son.

The regular pick up time was to be at 5:00 P.M. The five o'clock pick up time on July 29, 2011 was the only understanding and agreement of the parties. The five o'clock pick up was also affirmed, argued, and represented to the court by the mother and her attorney when they made statements at the August 1, 2011 hearing for an order to show cause and emergency ex-parte restraining order, without any ambiguity and much to the father's prejudice. The mother's attorney made material statements that were knowingly false and that were designed to influence and inflame the court as to the father's actions as follows:

[The mother Wixom] "[S]he showed up per the email from Mr. Wixom saying I'll have him ready for pickup at 5:00 p.m. He's not there, nobody's there" CP 105:6-8.

This statement was part of the mother's argument made and used to persuade to court to obtain an emergency order of show cause to obtain "return of the child." Later in discovery through the deposition of the mother, it came to light that the "etc" that would make her late as referred to in her Email to the father was the fact that she preferred and intended to take twenty minutes of the time she believed she had committed for the pick up of J.W. to use to pickup an other man's child, three year old A.M. at daycare before even starting out for the father's home. A.M. is the mother's and her domestic partner Bob McGuiness's child that was conceived and born prior to the father and the mother's divorce became final.

The father expected the mother to keep her agreed 5:00 commitment; had a right to rely on it; did rely upon the 5:00 commitment; and made arrangements for his time after the agreed 5:00 P.M. pick up on the 29th of July 2011. The father and his new wife had made arrangements to participate in a church group sodality dinner and social gathering that was to take place at one of the members' homes beginning at 6:00 P.M. on the 29th of July 2011. CP 30: 1-6.

However, some six days later on the July 28, 2011, just one day before the scheduled and committed 5:00 P.M. pick up the mother sent the father an Email that stated in pertinent part:

[To the father], I get off work on FRI(7/29) and due to the construction, etc on I -90 I might not get to your house until 545 or so to pick up [J.W.] I will text you if it looks like it will be much later than that.

CP 44 at top of page.

The court commissioner made the following findings of fact which were incorporated into the order by reference:

The attorney's fees issue to have to get the child back comes from the request that there was an agreement to have the child returned on the 29th [of July 2011], that agreement didn't happen. Mr. Wixom says it's because the mother wasn't present at her pick up time of 5:00 way before that Ms. Wixom does say with road construction I might not get there until I think she said 5:40 or 5:45, but Mr. Wixom was required to leave by 6:00 to go to his prior commitment.

CP 129: 18-23. The "way before that" referred to by the court (CP 129:20-22) was the day before the scheduled pick up and in violation of the parenting plans rules under that require two days notice.

The Parenting Plan and court's order of March 3, 2009 remained in effect until it was modified by an order of a court commissioner on August 5, 2011. That court commissioner's order took away the remainder of the father's summer and Labor day visitation and ordered the child to visit the maternal grand parents in Oregon. The court made findings as follows:

Good cause exists to enter this order. Mr. Wixom's behavior on July 29 2011 was unreasonable. [J. W's] summer schedule shall look like his previous summer schedules prior to litigation where Mr. Wixom did not exercise any extra summer time under section 3.5.

CP 53. The court's written order stated as follows:

Summer 2011 is modified as follows and the summer schedule in the final parenting plan from 2009 is suspended. Summer 2011- [J.W.] shall go to the Portland visit with his grand parents, go to Silverwood w/ mom for his birthday, exercise last weekend in August w/mom for camping trip and shall remain w/mom this weekend (Aug 5-7) as a make up for last weekend. Mr Wixom shall pay Ms. Wixom attorney fees in the amount of \$750.00 for the necessity of the ex parte hearing on 8/1. Phone contact at 6 P.M. (as ordered on 8/1/11) remains in effect.

CP 54. Emphasis supplied. The court's oral rulings are incorporated into this order by reference.

The court here rewarded the mother for breaching her commitment to be there to pick the child up at 5:00 P.M. by granting her extra time with the child; **“shall remain w/mom this weekend (Aug 5-7) as a make up for last weekend.”** CP 54 The court also rewarded the mother’s parents for her breach and intransigence. **“Summer 2011- [J.W.] shall go to the Portland visit with his grand parents.”** Id.

When the hearing on August 5, 2011 opened, the court commissioner opined that either the father and the father’s wife lied to the court or the child is lying. CP 125:6-7. The commissioner asked if the father wanted to withdraw some of his statements or argue that the child lied to the GAL. CP 125:8-11.

The trial judge described what the commissioner was doing as being transparent with the parties and counsel. RP 44. According to the trial judge, judicial officers do this by “letting people know what we’re thinking instead of making you guess.” Id. The trial judge noted that the fact “that the stories were mutually incompatible” (RP 42:18-19) could be based on “their interpretation of what happened, their recollection, [and] their perception of events.” RP 42:24-25.

The court commissioner deliberately raised the above questions without mentioning any other explanations. The possible suggestion that the court commissioner did not even think of the other explanations is

doubtful. (If this possible suggestion is true, that says something about the court commissioner, and what it says is not good.) If the court commissioner did think of the other explanations, the court commissioner appears to have omitted them in order to provoke some sort of response.

The court commissioner could have been seeking a response from the father that he had misspoken somewhere, that the mother had improperly coached the child on what to tell the guardian ad litem (which the GAL apparently did not know how to detect), or so on. By shifting the burden onto the father, instead of keeping it on the mother who properly had the burden of proof because she was the moving party and because she breached the parties' agreement, the effect of the court commissioner's inquiries was to denigrate the father. One expects that a person intends the effects of the person's actions.

The commissioner highlights or otherwise exploits the incomplete and false testimony and testimonial arguments of counsel, such as incorporating it in its decision to punish the plaintiff, "to make up for withholding." The courts questions were put forth in a purposeful way in the sense it was intended to denigrate the father and his "sneaky ways" and undermine his defense that the mother failed to follow her commitments and the parenting plan that the father relied on. The court then shifted the burden to the father to prove that the mother was not there

at 5:40. The court commissioner also implied that the father had some sort of duty to accommodate the mother's breaches of their agreement. The court added the gratuitous comment that the father's actions in taking the 11 year old with him and not notifying the mother was a "secretive sneaky" way to punish the mother. CP 85: 9-10.

The mother's indications in her deposition that she did not go back to the home to attempt to pickup the child later that night, or any time Saturday or Sunday or Monday as an offer of futility of attempting to pick up the child she was so worried about under the tainted circumstances of her failure to show up is nothing more than an excuse for noncompliance. The mother failed to provide the full faith and disclosure required to give the court all of the facts on which a proper decision could be made. The mother's facts given and argued in the hearing under which the father's rights to parent his child fail to meet the minimum threshold of persuasiveness and smell of the taint of rotting principles used to prejudice the father from being with his child. Although the mother made no other attempt to pickup the child that weekend, she ran down to her attorney on Monday to prepare for an emergency hearing. And she accuses the father of intransigence!

There is substantial evidence on which this finding of an agreement of the parties to return the child was made. There was an

agreement between the parties that the mother would pickup the child at 5:00 P.M. on July 29th 2011 at the Bella Vista Home where the father lived. The only agreement between the parties came from the offer and acceptance of the parties for the father to keep the child until the mother picked him up at 5:00 P.M. on the 29th of July. This offer was memorialized in writing and accepted by the father. CP 16, Letter from the mother's Attorney to the father's attorney, and CP 18, acceptance of her offer by the father on July 22. Some six days later, after part performance and acceptance by the father, the mother changes her mind and indicates that due to her not being able to get off work until 5:00 and the construction on I 90, etc she may not get to the house until 5:45 or so to pick up the child.

Substantial evidence exists that the mother's actions were used to taunt the father by not keeping her commitment and using the lie about the time line and excuse of her picking up her child with another man prior to keeping her agreed commitment to picking up her 11 year old child as agreed at 5:00.

C. The father's constitutional rights to parent his child contradict the court commissioner's giving residential time to the mother's parents, contradict the court commissioner's award of so-called makeup time to the mother, contradict the trial judge's denial of the father's motion for declaratory relief, and contradict an award of

fees to the mother's attorney by the court commissioner and the trial judge.

Where a written judicial determination is ambiguous, “a reviewing court seeks to ascertain the intention of the court” “by using general rules of construction applicable to statutes, contracts, and other writings.” Marriage of Gimlett, 95 Wn.2d 699, 704-05, 629 P.2d 450 (1981) (discussing the interpretation of “a judgment” or an “original decree”) (citing Callan v. Callan, 2 Wn. App. 446, 468 P.2d 456 (1970)).

The construction of a written judicial determination is a question of law. Byrne v. Ackerlund, 108 Wn.2d 445, 455, 739 P.2d 1138 (1987) (discussing the construction of a decree and any incorporated contract) (citing Gimlett, at 704-05). The Order of August 5, 2011 was a written judicial determination. CP 53-54. The reviewing court must base its interpretation of a document on the language of the document. Byrne, at 455 (describing the language of the document as reflecting the intent of the parties) (citing Kinne v. Kinne, 82 Wn.2d 360, 362, 510 P.2d 814 (1973)). Where the language of a document “is unambiguous on its face,” the meaning of the document “is interpreted from its language and not from parol evidence.” Kinne, at 362 (citing Messersmith v. Messersmith, 68 Wn.2d 735, 415 P.2d 82 (1966)).

“To resolve issues concerning the intended effect” of a written judicial determination, “we are ordinarily limited to examining the provisions of that” document. Kirk v. Continental Life, 85 Wn.2d 85, 88, 530 P.2d 643 (1975) (discussing the interpretation of a divorce decree). “Where there is ambiguity in the language, however, we will consider other documents for the purpose of ascertaining the trial court’s intent.” Id. (citing Callan, at 2 Wn. App. 446).

Moreover, as the mother’s counsel drafted the order, this Court must interpret ambiguous terms in it against the mother. Compare Forbes v. Am. Bldg. Maint. Co. West, 148 Wn. App. 273, ¶28 (2009) (citing Felton v. Menan Starch Co., 66 Wn.2d 792, 797, 405 P.2d 585 (1965)). Additionally, the order that the mother’s counsel drafted could have provided that no ambiguity therein would be construed against the drafter. Compare City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, ¶29 (2009).

If the mother had intended for the court to allow the child’s grandparents (the mother’s parents) to visit with the child during the mother’s time, the order which was drafted by her attorneys should have specifically provided that the grandparents were visiting with the child on the mother’s time. In Byrne, the wife’s attorneys did the same thing. “If Byrne had intended to have the power to force a sale of the property, the

agreement, which was drafted by her attorneys, should have specifically provided for such.” Byrne, at 454. In Byrne, the court refused to re-write the agreement to match what the wife wished it said. Id. In this case, this Court should also refuse to re-write the order to match what the wife wishes it said.

The Father and biological parent of J.W. asserts that the Court’s recognition and order issued on August 5, 2011 of mandatory (shall) have visitation with the grand parents in Oregon, and granting them mandatory visitation rights after taking away the father’s remaining weeks of court ordered summer visitation is akin to granting the maternal grand parents the status of de facto parents which violated the father’s constitutionality protected liberty interest to care for and control his child without unwarranted state intervention. The biological father believes that the court’s interference is in contravention of United States Supreme Court precedent. See Prince v. Massachusetts, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944). In addition the biological father asserts the violation of his First Amendment right to associate with his child.

It should be noted that the grand parents are not intervenors nor did they file a petition for visitation with the child in Spokane County and were not properly before the court. Under the Washington State Constitution as articulated in In re Custody of Smith, 137 Wn.2d. 1 (1998)

and In re Parentage of C.A.M.A., 154 Wn.2d 52, 57-58, 109 P.3d 405 (2005) (reaffirming Smith's strict scrutiny analysis), the father asserts that the court also violated the petitioners Washington State Constitutional Rights under Smith and C.A.M.A. Supra.

Freedom from arbitrary government restraint is at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. The Substantive and Procedural Due Process Clause of the United States Constitution protects persons from deprivation of life, liberty, or property without due process of law. See U.S. Const. Amend. 5, U.S. Const. Amend. 14. The father also has liberty interest rights of association under the First Amendment. U.S. Const. Amend. 1.

“It is well recognized that ‘{t}he liberty interest . . . of parents in the care, custody, and control of their children { } is perhaps the oldest of the fundamental liberty interests recognized by {the United States Supreme} Court.’ Troxel v Granville, 530 U.S. at 57, 120 S. Ct. 2054 (plurality opinion by Sandra Day O’Connor) (citing Prince, 321 U.S. at 166; Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 399, 401, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); accord In re Welfare of Sumey, 94 Wn.2d at 762.

Additionally, the case In re Custody of Smith, 137 Wn.2d 1 (1998), affirmed on narrower grounds, the Supreme Court of Washington applied a strict scrutiny analysis in discerning whether a grandparent's invocation of the visitation statute infringed on the biological parent's 'fundamental 'liberty' interest.' 137 Wn.2d at 15. In doing so, the Washington Supreme Court stated "state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved".' Id.; see also In re Parentage of C.A.M.A., 154 Wn.2d 52, 57-58, 109 P.3d 405 (2005) (reaffirming Smith's strict scrutiny analysis).

The Supreme Court in Smith Supra stated that the best interest of the child is insufficient to serve as a compelling state interest overruling parent's fundamental rights. And required that a grandparent or other third party seeking visitation must show that denial of visitation would result in harm to the child before a court could order visitation over the objections of a fit parent. Smith 137 Wn.2d, 61.¹

There was no finding by the court that the father was an unfit parent. There have been no findings of fact or conclusions of law that Mr. Wixom is an unfit parent. There are no petitions filed for visitation in this

¹ Where there are prior state court decisions that will guide this court in its decision, no analysis is required under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

matter by the grand parents. The court suspended the petitioners remaining weeks of summer vacation and actually ordered that, “the child shall go to the Portland visit with his grand parents.” Emphasis supplied. By rescinding the balance of the Father’s summer visitation with his son and ordering the child to Portland with the grandparents the court through State action under color of law violated both the father’s State as well as Federal Constitutional rights to parent his children. The impacts and prejudice are that the father has been grievously prejudiced and damaged by the loss of his remaining summer and Labor Day visitation with his 11 year old son who will never be 11 year old again. He has suffered the loss of that period of parental bonding with his 11 year old. The father’s loss and prejudice is irreparable. He can never go back and regain those precious times worth remembering that did not happen.

D. The mother is not entitled to any attorney fees.

“In any proceeding under this chapter, the court may make such award of costs as may seem equitable and just.” RCW 7.24.100.

The courts have uniformly interpreted this statute as allowing for the imposition of statutory costs, including a statutory attorney’s fee, without allowing for “attorney fees.” See Wagers v. Goodwin, 92 Wn. App. 876, 884, 964 P.2d 1214 (1998) (“Goodwin is correct that the term ‘costs’ in RCW 7.24.100 does not include attorney fees, Soundgarden v.

Eikenberry, 123 Wn.2d 750, 777, 871 P.2d 1050 (1994), except statutory attorney fees. Seattle Sch. Dist. No. 1 v. State, 90 Wn.2d 476, 541, 585 P.2d 71 (1978).”).

The mother may seek an award of attorney fees on the basis of CR 11. CR 11 applies to pleadings, motions, and legal memoranda. CR 11(a). To determine whether a document is frivolous, the Court must consider the factors of whether the pleading, motion, or legal memorandum is baseless and whether the signer conducted a reasonable inquiry. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). A pleading, motion, or legal memorandum is baseless if it is not well grounded in fact or not warranted either by existing law or by a good faith argument for changing the law. Id. To evaluate whether the signer of a pleading, motion, or legal memorandum conducted a reasonable inquiry, the Court should consider the time available to the signer, the extent the attorney relied on the client for factual support, whether the attorney received the case from another attorney, the complexity of the legal and factual issues, and the need for discovery to develop the case. Id.

As the detailed arguments for declaratory relief in this brief show, the father has not violated CR 11. For this reasons, CR 11 sanctions against the father are not appropriate.

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E. The father is entitled to attorney fees.

“Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.” RCW 26.09.140. The father asks for attorney fees on this basis.

The father denies that attorney fees are allowed under RCW 7.24.100 (except the statutory attorney's fee as a cost). Under argument not conceded, if this Court finds that RCW 7.24.100 permits the award of a reasonable attorney's fee, the father asks for attorney fees on this basis as well.

A party is intransigent when that party engages in litigious behavior, excessive motions, or discovery abuses. Marriage of Wallace, 111 Wn. App. 697, 710 (2002) (citations omitted). “Intransigence includes foot-dragging and obstruction, filing repeated unnecessary motions, or making trial unduly difficult and costly by one's actions.” Marriage of Bobbitt, 135 Wn. App. 8, 30 (2006), where the appeals court remanded for consideration of a party's claim for its attorney fees at the trial level because the record was inadequate (citation omitted). Intransigence includes making trial more difficult and increased legal costs, like repeatedly filing unnecessary motions or forcing court hearings for matters that should have been settled without litigation. Marriage of Pennamen,

135 Wn. App. 790, 807 (2006), where the appeals court rejected a finding of intransigence (citation omitted).

The mother's conduct in this case has been intransigent. For this reason, the father also asks for attorney fees on this basis.

IV. Conclusion

There have been no findings of fact or conclusions of law that Mr. Wixom is an unfit parent. There are no petitions filed for visitation in this matter by the grand parents. The court suspended the father's remaining weeks of summer vacation and actually ordered that, "the child shall go to the Portland visit with his grand parents." Emphasis supplied. By rescinding the balance of the father's summer and Labor Day visitation with his son and ordering the child to Portland with the grandparents the court violated both the father's State as well as Federal Constitutional rights to parent his children. And Mr. Wixom has been grievously prejudiced and damaged by the loss of his remaining summer visitation with his son.

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This Court should reverse the trial judge's denial of the father's motion for declaratory relief and remand for the trial court to enter the declaratory relief to which the father is entitled.

Respectfully submitted this 8th day of May 2012.

A handwritten signature in cursive script, appearing to read "R. Caruso".

Robert E. Caruso, WSBA #29338

CARUSO LAW OFFICES

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