

DEC 12 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 309371

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

In re the Marriage of

KIRSTEN M. HESS (NACHTMANN)

Respondent

v.

SCOTT D. HESS

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Joseph Schneider, Commissioner

OPENING BRIEF OF APPELLANT

Scott D. Hess, Pro Se
*Address in court file, and
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A. ASSIGNMENTS OF ERROR

In regards to attorney fees:

1. The trial court erred when it awarded costs and attorney's fees to Nachtmann.

In regards to contempt allegations for weekend visitation:

2. The trial court erred in finding Nachtmann not in contempt for violating section 3.2 of the PP, and/or number 16 of the Amended PP, which relates to the father's weekend visitation (3.2) and states that holidays and special occasions do not count as regularly scheduled visitation (No. 16).
3. The trial court erred in finding that the father was confused and that the mother's initial confusion (in regards to November 4th, 2011, visitation) was a reasonable excuse to not abide by the parenting plan.
4. The trial court erred in not ruling on June 3rd, 2011 contempt allegation by Hess.

In regards to contempt allegations for additional Saturday:

5. The trial court erred in finding Nachtmann not in contempt for violating section 3.1 and 3.2 of the PP, and number 13 of the Amended PP, which relates to Hess having additional 8 hours visitation with the child 1 additional Saturday per month.
6. The trial court erred by not ruling on the "November 2011", Saturday visitation contempt allegation made by Hess.
7. The trial court erred in written ruling, finding Hess did not attempt mediation.

In regards to contempt for e-mail requirement in the parenting plan:

8. The trial court erred by ruling that Nachtmann was not in contempt for violating an e-mail requirement in the parenting plan.

In regards to notice of relocation and joint decision making contempt allegation:

9. The trial court erred by not finding the mother in contempt for violating section 3.14 and 4.2 of the Parenting Plan (PP), which relates to joint educational decision-making requirements and notice for relocation.

10. The trial court erred by not ruling on the contempt allegation regarding the joint decision making requirement.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

In regards to attorney fees:

Issue 1-

a. Should the parent found in contempt be required to pay, to the moving party, all court costs and reasonable attorneys' fees incurred in the contempt proceeding, including her own?

b. Should the parent in contempt be required to pay a civil penalty not less than \$100?

c. Should the mother have been required to make a request for attorneys' fee by motion?

d. Because both parties prevailed on the only major issue in question (of which contempt is the only issue), and because US courts follow American law, should both parties be responsible for their own attorney fees?

In regards to contempt allegations for weekend visitation:

Issue 2-

a. Did the trial court abuse its discretion in finding that the mother was not in contempt for refusing to make the child available to the father for his 6pm, court ordered weekend visitation, on Friday, November 4th, 2011?

b. If the mother is found in contempt for violating 3.2 (PP) or No 16 (amended), shall the father be awarded makeup time and a civil penalty of not less than \$100?

Issue 3-

Does the evidence support the trial courts finding that the father was confused and that the mother presented a valid excuse in denying the visitation on 11/4/11?

Issue 4-

Did the trial court abuse its discretion, or err in law in and its duties, by "picking and choosing" which contempt violation it would rule on related to these particular parenting plan provisions (particularly omitting in entirety the father's request for a contempt violation for June 3rd, 2011, and the required make-up time/civil penalty)?

In regards to contempt allegations for additional Saturday:

Issue 5-

a. Did the trial court abuse its discretion in either failing to rule on, or finding that the mother was not in contempt for refusing to make the child available to the father for his additional, monthly 8 hour Saturday visitation for the months of October and/or November, 2011, & not requiring make-up time or the required civil penalty?

b. Does the evidence and record support the trial courts finding that the mother presented a valid excuse in denying or failing to perform the October and/or November, 2011 visitation as required by RCW 26.09.160(4)?

Issue 6-

a. Did the trial court abuse its discretion, or err in law and its duties, in "picking and choosing" which contempt violation it would rule on related to these particular

provisions (particularly omitting in entirety the father's request for a contempt violation for the November, 2011, visitation)?

b. When the mother did not respond to or refute the allegation, should the trial court have entered a default judgment for Hess finding Nachtmann in contempt regarding the November 2011 contempt allegation?

Issue 7-

Is the trial courts finding that Hess did not attempt mediation supported by substantial evidence?

In regards to contempt for e-mail requirement in the parenting plan:

Issue 8-

a. Did the trial court abuse its' discretion when it found the mother was not in contempt for violating the e-mail requirement (#5 of the modified PP) in the PP?

b. Did the trial courts' decision equate to a slight modification of the parenting plan?

In regards to notice of relocation and joint decision-making
contempt allegation:

Issue 9-

a. The mother was ruled by the trial court to not be in contempt for failing to give notice of her move to a new home. Despite the fact that no personal service is required because the move was within the same school district, does that change *what* is required to be communicated to the other parent, regardless of the form of notice that is required?

b. The father is entitled to joint education decision-making requirements as described in the parenting plan (PP). When declarations on both sides clearly show

the awareness by both parties that the child had the option of attending one of 2 schools, and the mother fails to give specific time and dates as to a move, enrollment, and attendance at a new school, did it remove the opportunity for the father to be involved as he could necessarily choose to be, or remove him of the opportunity to be involved in educational joint decision-making as required by the PP?

Issue 10-

Did the trial court abuse its discretion, or err in law and its duties, when it failed to issue a ruling regarding Hess' contempt allegation for the joint decision making requirement in the parenting plan?

B. Statement of the Case

Prior to Scott Hess and Kirsten Nachtmann dissolving their marriage in July 2006, they entered an agreed parenting plan May 1st, 2006, regarding their child born in 2004. CP 71-78. The plan provided for: joint decision-making on major decisions regarding their child, including educational decisions; notice requirements upon relocation; residential schedule including a "regular" weekend residential and visitation schedule, a holiday visitation schedule, as well as an "additional" 8 hours visitation on one Saturday per month; a scheduled visitation start time of 6pm for weekend visitation.

In February 2011, Hess brought Nachtmann to mediation at the Dispute Resolution Center of the Tricities to resolve issues between the parties related to disagreements they were having, including the above-referenced "additional Saturday". CP 82 at 13. The mediation agreement was signed by the parties on February 14, 2011. The amended parenting plan was signed by the court and

filed/entered on April 21, 2011. CP 79-82. The amended plan states that it "shall supersede any other elements of the old Parenting Plan in case of conflict". CP 79.

Among other things, the amended plan provided for: requiring e-mail communication when the parents exchange clothing for visitation; notifying the other parent of the child missing school; clarifying which parent will choose the additional, 8 hour, monthly Saturday visitations. CP 82.

On November 17th, 2011, Hess filed a motion and declarations in which he sought a finding of Contempt against Nachtmann for violating the parenting plan multiple times; sought for the court to compel Nachtmann to adhere to certain actions in the parenting plan; and sought further amendment of the parenting plan. CP 17. Hess moved to strike the motion to compel, and strike the motion to modify the parenting plan, so contempt was the only issue in question. RP 6, at line 6-9. Galioto was the attorney representing Nachtmann at this hearing, and due to receiving over 50 pages of documents from her the day before, Hess moved the court to continue. RP 15, line 2-19. Commissioner Joseph Schneider was the judge presiding over this matter at the trial court. CP 121-123. Nachtmann had a personal friend named Kathleen Galioto represent her, and Galioto is a prosecuting attorney for Benton County. RP 56, line 4-7, and RP 56, line 9-10. Galioto withdrew from the matter and Steve Defoe began representing Nachtmann in her place. CP 120.

In an order to show cause, Hess alleged violations of 6 different provisions of the parenting plan and amended/modified parenting plan, with allegations of multiple violations in certain instances, November 29th, 2011. CP 17. Due to case law, Hess believed that regardless of the number of contempts, they would be

collapsed into a single finding. Hess argued that Nachtmann's lack of adhering to the parenting plan was hindering his rights as a parent, and his desire to be involved with every aspect of the child's life. Hess writes in declaration he "...has made every effort to be in his son's life in the maximum capacity possible", has regularly and annually coached his son's baseball, soccer, and basketball since the child was 4 years old, and that "There has been an ongoing, self-centered spirit of arbitrary and unilateral decision-making by Ms. Nachtmann... for years, oftentimes in violation of... the actual requirements of the PP (parenting plan)". CP 20. Accordingly, he proceeded with contempt allegations in a hearing dated January 3rd, 2012 after many holiday continuances and/or Commissioner Schneider being on vacation. RP 17. Hess requested the trial court award him the required civil penalty, and make-up residential time, and to find the mother in contempt. RP 32 line 21-23, and CP 94.

All contempt allegations were made simultaneously, and the ultimate findings of contempt (or not) were similarly adjudicated simultaneously. As follows:

1st contempt allegation: Hess first alleges contempt for violating section 3.14 and 4.2 of the parenting plan, regarding lack of notice and educational joint decision-making requirements. RP 20-21, and CP 90. Hess did not learn his son had been enrolled at Cottonwood Elementary (from Ridgeview Elementary), until after the child had already been in school for 3 days. CP 91. Hess complains of being deprived of being involved with the child's education as he is entitled to under joint decision-making requirements in the parenting plan. CP 91.

The mother never gave Hess notice as to the specific dates that their child would be enrolled or attend a new school, nor specific date of their relocation, and this is

not disputed by Nachtmann. RP 20-21. Nachtmann does not address joint decision requirements, and her argument centers around her physical move and belief that "It was no secret and (Hess) was made fully aware of the move verbally...". CP 62. Hess' argument for contempt centers around: 1) the legal requirement of notice of relocation and what specifically should have been communicated to him, and 2) the need for joint education decisions requiring specific notice, at the minimum. Hess states, "Nachtmann and I had one conversation where she said she was moving, and 'thinking about' taking him out of Ridgeview and enrolling him at Cottonwood Elementary instead." CP 90. Regarding RCW 26.09.440, Hess states he was harmed by being omitted from education decisions, & not receiving specific information about the child's changes as he is entitled. CP 23.

The trial court agreed that "Hess acknowledges that he was told about the move but he was not provided specific details." CP 121. In his ruling, Commissioner Schneider found the mother not in contempt. The court states that Nachtmann provided "reasonable notice" of her move, so she was not in contempt. The trial court ruled on the relocation allegation by Hess, but failed to address or rule on the joint decision-making requirement. CP 121.

2nd contempt: Hess next alleges contempt for the mother violating provision 3.2 of the parenting plan, and No. 16 of the modification. RP 22-24, CP 23-24, CP 90-92. The parenting plan calls for alternating weekends starting Fridays at 6pm, in provision 3.2 and 3.11. CP 72 and 74. The modified plan also dictates in No. 16 that holiday weekends and special occasion weekends will not count as regularly scheduled visitation, except in the case that it results in one parent having 3

consecutive weekends in a row with the child. CP 82 (No. 16). Both parties either agree with this and do not refute this in declaration. Hess seeks contempt for denial of visitation on November 4th, 2011, and June 3rd, 2011. CP 23-24. Nachtmann argues the father has burden of proof for November 4th. RP 38, line 18-20. Hess cites RCW 26.09.160(4) stating the mother has the burden of proof. CP 91.

Nachtmann states the father confused her and she did not believe it was Hess' weekend, "I was totally confused." CP 62-63. Hess states in declaration and oral argument he was not confused, "No, no, no. She was the one confused." RP, 12, Line 16-17. Hess provides e-mails and phone records showing his attempts to convince the mother, prior to commencement of visitation, that it was in fact his weekend as stated. CP 96-102. Hess describes the relativity of those exhibits in declaration and further describes his extensive efforts to obtain the child for visitation. CP 91 (under "2a"), and CP 23-24. In oral argument Hess states, "Exhibits 1 through 5 give evidence of my e-mailing Ms. Nachtmann at 5:43pm, insisting it was my time with my son, even going so far as to explain how and why." RP 22, line 2-19. Visitation should have commenced at 6pm. CP 74 (3.11). Hess provided phone records showing this to be the 3rd phone conversation between the parties, with calls at 4:23pm, 5:12pm, and 5:14pm. CP 98-99 (Ex. 3).

Hess' contempt allegation for June 3rd was argued orally. RP 23 at line 3, to RP 24 at line 13. He requests contempt for that date in declaration. CP 22, 24, and 91-92. He provides Exhibit 7 to support his argument and declarations. CP 104. Commissioner Schneider ruled that the mother was not in contempt for the November 11th violation, and did not rule on the June 3rd contempt allegation.

Despite the e-mail sent prior to visitation that shows the father clearly understanding it was his weekend (CP 96, 97/Exhibit 1 & 2), Commissioner Schneider ruled, "Later in the evening on November 4, Mr. Hess realized that it was still his weekend" and that the delay in visitation offered by the mother was "instigated by Mr. Hess and his confusion." CP 121, 122. The trial court completely omitted and failed to rule on the June 3rd contempt.

3rd contempt: This is not being addressed on appeal.

4th contempt: The parenting plan demands that the father shall have "One additional Saturday during each month, for a period of 8 hours". CP 72 (3.1-3.2). The modified plan supersedes the original in case of conflict. CP 79. The modified plan states in No. 13, "Scott will choose which Saturday daytime visit he has with (the child) on even months; Kirsten will choose on odd months." CP 82. The parents attempted mediation, and the signed, entered modification was entered April 21st, 2011, and signed by the mediators. . CP 79-82. There are no limitations or notice requirements for the parents decision on Saturday visitation.

Hess had previously "brought this issue up in mediation". CP 25 (No. 4). Hess alleged the mother refused his monthly, "additional Saturday" with the child in February, 2011, October 2011, and November 2011. RP 25-29, CP 22, CP 25 (No. 4), CP 92-93 (No. 4). It is not disputed the mother refused the 3 visitations, but February is not in question on appeal. October 2011 she states she made plans for the child & that Hess did not give proper notice for his requested Saturday of October 22nd. CP 65-66. Hess argued that whenever the last Saturday of the month arrives, it

was assumed by both parties to be the father's Saturday, "...it was the last Saturday of the month, and per the norm, by default it was my Saturday." CP 25.

Hess argues that because it is his month to choose in even months and the modification supersedes the original plan in case of conflict, he can choose without limitation his Saturday visitation on any Saturday he chooses. CP 92, and RP 28 at 5-15. Hess also states that he then told the mother he would compromise and take his Saturday on the following Saturday instead (October 29th), but the mother refused that visitation as well. CP 92 (No. 4). The mother did not refute or respond to Hess' October 29th allegation. Although Hess stated he agrees with notice, he also argues that no specific notice is required (i.e. 1 hour is the same as 24 hours, etc) therefore his notice was sufficient. CP 92 (No. 4).

For the November 2011, Saturday visitation, Hess states the mother denied Hess his visitation for the entire month, and did not choose nor alert Hess as to which Saturday he would be with the child as required by the parenting plan. Nachtmann does not refute this allegation. In fact, Nachtmann completely ignores the November allegation and doesn't even respond to it, and thus, Hess believes he should have prevailed by default. Hess states in declaration, "Nachtmann denied me my November visitation, when it was her month to choose which Saturday I would take my son. She failed to give notice for any day the entirety of the month, as to when she was choosing my Saturday to occur." CP 92-93. Hess also argues this orally. RP 28, line 15-25.

The trial court issued a written ruling on these allegations, along with the others,

as all contempt matters were adjudicated simultaneously. Of the 3 Saturday contempt allegations, the court ruled on February and October 2011, but omitted the November 2011 Saturday, which is the only one that was not refuted, addressed, nor denied by the mother. The court also did not address October 29th, 2011.

Regarding issues on appeal, the trial court ruled October 2011 specifically to the October 22nd allegation, and found the mother not in contempt because mediation was not sought and that notice was late. CP 122. The trial court did not rule on or reference the October 29th Saturday that the father also requested from Nachtmann. The trial court either forgot to rule on, or refused to make a ruling on the November, 2011, allegation, yet, this is the one Saturday issue not refuted by Nachtmann.

5th contempt: The modified parenting plan has a provision (no. 5) stating, "Both parents will email list of contents in (the child's) bag with each visit..." CP 82. This provision was entered and agreed between the parties to diffuse disagreements they were having regarding exchanging clothes. CP 26. Hess argued that he had performed the e-mail requirement "without fail, and every time", and that the mother "blatantly disregarded this as if it doesn't exist". CP 26 (No. 5). Nachtmann admits she stopped e-mailing the required communication with the father because she had worked out a different arrangement with Hess' wife (Kristina Hess). CP 66-67.

Hess provides an e-mail as an example of one of his many instances of trying to get Nachtmann to comply with the requirement. CP 115 (Ex. 15). Hess indicates he did not acquiesce to the arrangement and states, "It is strange that Ms. Nachtmann believes she can decide to make an 'agreement' with my wife, and in turn ignore the modified PP parenting plan. It makes no sense." CP 93 (no. 5). Hess explains how

Nachtmann adhered to the e-mail requirement at the beginning, then simply stopped, and he also asks for contempt. RP 29, line 7-20. Nachtmann agrees with this description. CP 66-67 at issue #28. In his written ruling, the Commissioner found Nachtmann not in contempt because, "Nachtmann... and in Mr. Hess's new wife had worked out other arrangements in regards to this situation." CP 122.

6th contempt: Hess moved to find the mother in contempt for the mother failing to adhere to a requirement in which she must notify the father when the child misses school, when the child goes to the emergency room, falls ill, or similarly. Section 4.1 of the parenting plan covers this. CP 76. As does Number 6 of the modification. CP 82. Nachtmann makes general statements as to why she did not provide Hess notice, typically saying "I texted him", or similarly. CP 68 (No. 32). Hess argues Nachtmann is blatantly lying. RP 29 at line 22 to RP 30 at line 9, and CP 93 (No. 6). He provides proof she is lying. CP 93 (No. 6), CP 107 (Ex. 10), CP 108-110 (Ex. 11), CP 111-112 (Ex. 12). In its ruling, the trial court found Nachtmann in contempt, stating the mother did not provide "timely notice or any notice" for the dates of March 4, March 23, 24, 25, May 6, and September 28, all from year 2011, and that the father did attempt mediation. CP 122-123.

In its written ruling filed February 7th, 2012, the trial court also ruled on attorney fees, stating that Hess prevailed on one allegation of contempt and that Nachtmann prevailed on 5 allegations of contempt. He then awarded Hess "costs and attorney's fees, if appropriate, as to allegation number six", and Nachtmann was "awarded her costs and attorney fees for allegations one through five." CP 123.

Both Hess and Nachtmann noted the calendar to present their order for entry based on the Commissioner's ruling on the same day, May 8th, 2012. Nachtmann submitted two cost bills, one for attorney Galioto and one for Defoe. The Galioto cost bill was \$2,527.45, Defoe cost bill was \$935, totaling \$3,462.45. CP 130. Hess argues that he should not have to pay both of Nachtmann's attorneys' fees because attorney Galioto was a personal friend of Nachtmann who didn't know what she was doing, was generally "a mess" with the whole case, and had excessive fees because her "research of family law" was exorbitant and would not normally be required by a family law attorney. RP 52 at line 23 to RP 53 at line 2. And, RP 55-57. Hess complains that Galioto charged nearly triple what attorney Defoe charged, despite Defoe doing all the arguments and trial work. Hess believed he should not have to pay for both attorney's "review" of the documentation, and felt he was "dinged on both sides" and paying for Galioto's 'family law training'. RP 57.

Hess further argues that because the attorney's fee was not specifically allowed by statute, then attorney fees must be made by motion, and no motion was made by Nachtmann or counsel. RP 58, line 10-13. Hess complains that no request for relief was made by Nachtmann and that the only request for relief was made by the Galioto brief, "...she references two RCW's, 26.09.160 and 26.09.140 both of which cite awards of attorney's fees based on frivolous motion. And this matter wasn't deemed frivolous, and it wasn't filed on an unreasonable basis." RP 57-58 (starting at line 3). He also states that the only relief requested was "based solely on the grounds of this matter being unreasonable...". RP 56, line 11-15.

The trial court responds, and cites the contempt statute, "RCW 7.12¹", stating that there is, "...a provision within that statute that allows for reasonable attorneys fees to be awarded to the prevailing party." RP 58-60, (starting line 22). The trial court further states that Nachtmann is 'entitled' to attorney fees, "...out of the six or seven items that you brought for contempt, you prevailed on one. Mr. Defoe prevailed on the others. So, as a result of that he gets his attorneys fees on each of those items that he prevailed upon and you did not prevail upon. But, that's under the statute dealing with contempt." RP 59 at line 17 to RP 60 at line 23.

The trial court proceeded to enter Defoe's proposed order, but did not enter Hess' proposed order, May 8th, 2012. CP 130-134. Hess timely filed for appeal and paid the required fee stemming from the judgment entered May 8th, 2012, and served copies of same upon Nachtmann via attorney of record, Defoe. CP 135, CP 136.

Hess now turns to this court seeking a more thorough review of the record as it pertains to decisions, findings, and substantial evidence; seeking review of Commissioner Schneider's discretionary decisions; seeking de novo review of matters pertaining to law, or where the trial court did not make a finding or ruling; seeking reversal of the award of attorney's fees to Nachtmann; seeking reversal on four of the contempt issues in which Nachtmann was declared to prevail; seeking reimbursement of costs for this appeal as it relates to contempt; seeking make-up residential time; and seeking the required civil penalty levied upon the mother.

**C. MOTION, OPENING STATEMENT, and STANDARD
OF REVIEW**

¹ It is duly referenced in Arguments that the trial court incorrectly cites RCW 7.12, instead intending to have referenced the contempt statute, RCW 7.21.

Hess requests and moves for costs on appeal, as a party is entitled to an award of costs on appeal to the extent it relates to the issue of contempt. *Rideout*, 150 Wn. 2d 337, 77 P.3d 1174. The entire appeal is related to contempt, or attorney fees associated with the contempt hearing. Further, Hess request his costs on the basis of financial considerations of the parties per RAP 18.1(b) and RAP 18.1(c).

Regarding standard of review, those issues are addressed accordingly in "ARGUMENTS" since there are likely differing standards of review depending on the issue at hand. Any time a matter was not adjudicated or was omitted by the trial court, the requested standard of review is de novo.

Hess frequently references the trial courts written ruling in this matter versus the judgment, as the judgment is very general in nature and enters very little in the way of specific findings of fact or conclusions of law (other than stating how the mother is not in contempt, and references of attorney fees). For reference-sake, the judgment/order is at CP 130-134. Hess' right of superior court review is guaranteed by RAP 2.2. Accordingly, he timely appeals the following matters from the trial court, as follows:

D. ARGUMENT

In regards to attorney fees:

Errors of law are reviewed de novo. *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn.App. 791, 65 P.3d 16 (2003), at 799-800. The determination of whether a statute provides for an award of fees "is a question of law and is reviewed de novo." *Guillen v. Contreras*, 147 Wn. App. 326, 195 p.3d 90 (2008) at ¶7, (citing *Lindsay v. Pac. Topsoils, Inc.*, 129 Wn. App. 672, 684, 120 P.3d 102 (2005), review denied,

157 Wn.2d 1011 (2006)). Where the trial court mislabels a conclusion of law as a finding of fact the conclusion will be reviewed de novo, and questions of law are reviewed de novo.

Hegwine v. Longview Fibre Co, Inc, 132 Wn. App. 546, 132 P.3d 789 (2006), at 556. This was an error of law as it relates to awarding attorney fees and should not be a discretionary decision, so should be reviewed de novo. Even if it is was discretionary, it was still an abuse of discretion and on untenable grounds or for untenable reasons and should be reversed.

In this matter, Nachtmann was ordered to pay Hess' attorney fees, and Hess was ordered to pay Nachtmann's attorney fees. Not only was this an abuse of discretion, but it is an incorrect use of law and incorrect use of applying prevailing party standards. Further, prevailing party statutes do not apply here. There is one major issue here, and that issue is whether the mother is in contempt for violating a parenting plan. The court ruled that the mother was in contempt, and because contempt is a *status*, she can't be in contempt and not in contempt at the same time. The number of violations of the parenting plan/order is irrelevant whether there is one violation or there are twenty. Either a party is in contempt, or they are not. A party either violated the order in the parenting plan, or they did not. Contempt is a status, the allegations were adjudicated upon simultaneously, and the mother was found in the status of contempt for violating the parenting plan.

The trial court commissioner in this case gives the appearance of awarding attorney fees to both parties for punitive purposes, with the punitive purpose being that of punishing the party without an attorney for his "shotgun approach". RP 47 at

line 14 to RP 48 at line 2. And, RP 59 at line 13-16. Despite the "American Rule" dictating that parties do not generally recover attorney fees unless authorized by statute, and despite precedent showing that when both parties prevail on a major issue then neither have prevailed from the perspective of the attorney's fee, the trial court reversed course in this matter and instead made a decision that profoundly impacted the Pro Se party while completely letting the "lawyered" party off the hook. This flies in the face of federal case law that protects the rights of Pro Se litigants. "... the right to file a lawsuit pro se is one of the most important rights under the constitution and laws." Elmore v. McCammon, 640 F. Supp. 905 (1986), at 911. "There can be no sanction or penalty imposed upon one because of his exercise of Constitutional Rights." Sherar v. Cullen, 481 F. 2d 946 (1973), at 947. The trial courts' decision equates to a penalty imposed on Hess in the way of attorneys' fees, as the award by the trial court could not be reciprocal for prevailing party purposes. Further, the mother's attorney's fee award was not allowed by law.

As follows, further case law and arguments regarding the attorneys' fee:
Contempt is a status. If contempt is a status, a party cannot be simultaneously in contempt and not in contempt at the same time. You are either in contempt of violating an order, or you are not in contempt. "Civil contempt is a status... "th[e] status is legally present whether there is one or several violations of the court's order." Interest of N.M., 102 Wn. App. 537, 7 P.3d 878 (2000), at 545. Similarly, in this case the mother was found in contempt of the order in question, so the father is the prevailing party.

Washington state follows the "American Rule" that a prevailing party does not generally recover its attorney fees unless expressly authorized by statute, by agreement of the parties, or upon a recognized equitable ground. Guillen v. Contreras, 147 Wn. App. 326, 195 p.3d 90 (2008), at ¶7 (citing Panorama Vill. Condo. Owners Ass'n Bd. v. Allstate Ins. Co., 144 Wn.2d 130, 143, 26 P.3d 910 (2001)). There is no statute expressly authorizing Nachtmann to obtain attorney fees in this contempt matter as a prevailing party, especially when Hess prevailed on contempt.

"We do not believe that the Legislature intended that the phrase 'substantially prevailing party' would have one meaning for attorney fee awards under the forfeiture statute and a different meaning in other attorney fee awards statutes." *And*: "Substantially prevails" should not have two different meanings in the same context. Guillen, 147 Wn. App. 326 (2008), at ¶1 and ¶10. So, in the trial court ruling that both parties are a prevailing party, the appellate court should look at the trial court's ruling from the perspective of who prevailed. There are only two options here: 1) Contempt is a status and the only issue in question, the mother was found in contempt, so the father is the prevailing party. 2) Both parties prevailed on the issue of contempt, contempt was the only major issue at hand, thus both parties prevailed and in turn neither is the prevailing party. Case law supports that these are the only 2 options that can be considered.

"When the question is one of money damages, the decision about which party prevails or substantially prevails is easy. The party that receives judgment is the prevailing party". Guillen, 147 Wn. App. 326 (2008), at ¶12, citing Blair v. Wash.

State Univ., 108 Wn.2d 558, 571, 740 P.2d 1379 (1987)." As evidenced in this statement, "prevailing party" and "substantially prevailing party" are equated to the same degree. There is one party that prevails, and whether that is the prevailing party or substantially prevailing party, only one party prevails or neither do.

If neither party is "**the**" prevailing party, or neither party prevails substantially, then neither party is said to prevail. In *Guillen*, it reads: "*Id.* at 985-986. Similarly, in *Goedecke v. Viking Investment Corporation*, 70 Wn.2d 504, 513, 424 P.2d 307 (1967), the court concluded its opinion: 'Since neither party has completely prevailed, each will bear his own costs.' Many other cases are similar--if both parties prevail in part, then neither is a 'substantially prevailing party.' *E.g.*, *Ennis v. Ring*, 56 Wn.2d 465, 473, 341 P.2d 885, 353 P.2d 950 (1959)." *Guillen V Contreras*, 147 Wn. App. 326 (2008), at ¶12.

Also in *Guillen*: "The rule is similar under chapter 4.84 RCW. At least a dozen provisions of that chapter award costs or attorney fees under varying circumstances to the "prevailing party." «2» In those cases, also, **when both parties win significant issues, then neither is a prevailing party.** «3» *Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 234-235, 797 P.2d 477 (1990); *McGary v. Westlake Investors*, 99 Wn.2d 280, 288, 661 P.2d 971 (1983); *Puget Sound Serv. Corp. v. Bush*, 45 Wn. App. 312, 320-321, 724 P.2d 1127 (1986); *Tallman v. Durussel*, 44 Wn. App. 181, 189, 721 P.2d 985, *review denied*, 106 Wn.2d 1013 (1986); *Rowe v. Floyd*, 29 Wn. App. 532, 535-536, 629 P.2d 925 (1981). However, **when there is one primary issue**, the party prevailing on that issue is entitled to its costs and fees as the "prevailing party" even though the party lost on another issue.

Osborn v. Grant County, 130 Wn.2d 615, 630, 926 P.2d 911 (1996)." *Guillen V Contreras*, 147 Wn. App. 326 (2008), at ¶12. In this matter, either Hess is a prevailing party, or both prevailed and neither party is a prevailing party.

Note that all laws on this matter reference awards to "***the*** prevailing party", and do not reference awards to "***any*** prevailing party" unless specifically stated by statute. The respondent in this matter will find it impossible to support any notion that "***any*** prevailing party" shall have an award of attorney fees, because those statutes are a rarity. Every statute related to prevailing party refers to "***the*** prevailing party", unless the legislature specifically states otherwise in a written statute. When the Legislature has wanted to do so in other circumstances, it has written statutes to ensure that attorney fees are awarded when a party prevails in any degree. *Guillen v Contreras*, 147 Wn. App. 326, (2008), at ¶14. Either one party prevails or substantially prevails, or neither do.

There are only 2 statutes that can govern this case as it relates to attorney fees, and those are RCW 26.09.160 on violating a parenting plan, and RCW 7.21 on contempt of court. RCW 26.09.160(1) states that a parent who will "refuse to perform the duties provided in the parenting plan, or to hinder the performance by the other parent of duties provided in the parenting plan, shall be deemed bad faith and shall be punished by the court by holding the party in contempt of court and by awarding to the aggrieved party reasonable attorneys' fees and costs incidental in bringing a motion for contempt of court." The reference here is strictly limited to the party found in contempt and the party who violates an order, and not a "prevailing party". Further, the statute specifically references "holding the party in contempt ***and***

by awarding"... this is not an "either/or" matter. Holding the party in contempt "***and***" awarding attorneys' fees makes direct correlation between being found in contempt and awarding attorney fees to the person aggrieved by the contempt. If no one is found in contempt, than no one is aggrieved. Further, the statute references that which is "incidental in bringing a motion for contempt of court", meaning the Pro Se Hess' costs. The entirety of RCW 26.09.160(1) serves the purpose of describing remedies for the person aggrieved by *violation* of a parenting plan, and not merely a prevailing party.

RCW 26.09.160(2)(b)(ii) references "The parent to pay, to the moving party, all court costs and reasonable attorneys' fees incurred as a result of the noncompliance, and any reasonable expenses incurred in locating or returning a child". Again, the statute strictly references the parent to pay ***to the moving party*** reasonable expenses and attorney fees, not the prevailing party. The father in this matter, Hess, was the moving party. Not one time did Nachtmann or counsel move the court for attorney fees, in declaration or oral argument. Further, this statute specifically states that the parent found in contempt shall pay "**all**" court costs and reasonable attorneys' fees". "All" means all attorney fees, including their own. Nachtmann was found in contempt. CP 122-123.

The only basis for the moving party (again, the Pro Se, Hess, in this matter) being required to pay attorney fees in RCW 26.09.160(7), is if "the court finds the motion was brought without reasonable basis". Hess prevailed on contempt in this matter and thus the trial court found there was reasonable basis for this motion and

cause. Further, the other contempt issues where the mother was not found in contempt were not deemed by the trial court as brought without a reasonable basis.

Regarding prevailing party, the trial court opined, "I will take a look at that and determine in how many cases there is contempt and how many cases there is not contempt. But I will tell you, that if the majority of those fall in favor of the mother, you'll pay attorney's fees. Because the statute says the prevailing party will pay attorneys' fees. It doesn't mean you prevail on one basis. If you shotgun it, you better prevail on a majority of those basis where you pay attorney fees." RP 47 line 18, to RP 48 line 1. Then the trial court says, "Okay, and you've read 7.12? RCW 7.12 that says the statute that deals with contempt actions?" RP 58 at line 22-24. The court continues, "And, it distinguishes between remedial contempt and punitive contempt, but there's also a provision within that statute that allows for reasonable attorneys fees to be awarded to the prevailing party. Okay? It also indicates within that statute that if you bring a motion for contempt that it is to be for a specific incident. When you shotgun approach it and you bring numerous allegations in regards to contempt, then I have to go through and segregate each one of those. And that's what I did." RP 59 (beginning at line 7).

The problem in these statements is that the trial court is wrong. First, we can assume that the trial court meant to reference RCW 7.21, which governs contempt and the remedial sanctions he is referring to, rather than "RCW 7.12" as mentioned. An "RCW 7.12" statute simply does not exist. Further, there is nothing, not a single word in the entirety of RCW 7.21 that specifies awards to "prevailing party". The trial court is simply wrong. The *only* reference to payment of attorney fees is found

in RCW 7.21.030(3), where it states the court may "order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees." This court should note that the statute does not reference "prevailing party" in any facet, and instead very limitedly orders *the person found in contempt* to pay attorney fees. Nachtmann was found in contempt. Further, case law shows multiple contempt allegations are typically not segregated as the trial court indicates it is required to do, but in fact collapses multiple allegations into single findings of contempt. Marriage of Rideout, 150 Wn.2d 337, 77 P.3d 1174 (2003).

Even if the judge was right however, in his belief that the statute allows him to award prevailing party, he can't do so mutually. There is one major issue, that issue is contempt, and thus there must be one prevailing party, or there is no prevailing party. There is no law or statute that supports the trial courts' opinion that he should award prevailing party, even as he tried to very specifically cite a statute to support his reasoning. This is not only an error of law to be reviewed de novo, but it is also an abuse of discretion, and on untenable grounds and for untenable reasons. Again, the trial court states that, "...it indicates within that statute that if you bring a motion for contempt that it is to be for a specific incident." Though the record shows Hess was specific, "specificity" is nowhere to be found in RCW 7.21 as indicated by the trial court. Further, nothing prevents Hess from adjudicating multiple contempt allegations in a single hearing, despite the trial courts obvious displeasure in him doing so. It is doubtful it is the legislatures intent or the courts desire for litigants to

drag themselves into court multitudes of times whilst draining the courts resources, versus one time to kill two or ten birds with one stone.

These attorney fees should be reversed in favor of Hess no matter which way it is looked at on the above-referenced basis' alone, but even if they were allowed to stand, Nachtmann is still not entitled to attorney fees. Because these statutes do not specifically allow an award of reasonable attorney fees to the prevailing party, an award of attorney fees must be made by motion. CR 54(d)(2). Nachtmann's counsel in this matter never made a motion for attorney fees, nor is there a fee request in declaration. There is not a single motion or request for attorney fees in the Transcript of Proceedings, and there is no motion for attorney fees in any of the paperwork, excepting Galioto's brief. CP 34. That request for relief however, is strictly related to frivolous motions. The trial court deemed this matter not frivolous, so it is not a proper basis for relief. Further, under RCW 4.84, when both parties win significant issues, then neither is a prevailing party. Guillen, 147 Wn. App. 328 (2008), at ¶13.

Further, Hess argued to the trial court that attorneys' fees must be made by motion. RP 58 at line 11-13. This is supported by statute, "Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses". CR 54(d)(2). No such law provides for the recovery of attorney fees to Nachtmann in this contempt matter, unless the matter was deemed frivolous as described in RCW 26.09.160. The matter was not frivolous, and on top of it there was no motion for attorney fees. There can be no award of attorney fees for any instance whatsoever, no matter which argument Nachtmann will try to make.

In the Marriage of Eklund, the Court of Appeals ruled that contempt proceedings do not require a party to prevail in terms of costs and attorney fees. It simply requires a party to be found in contempt. As described in Eklund, " ¶28 Here, the trial court found that Michael was in contempt of its parenting plan but declined to award Cheri attorney fees and costs necessary to obtain Michael's compliance with the plan. As discussed above, state law requires that the trial court order a party in contempt to pay all court costs and reasonable attorney fees of the moving party in a proceeding to enforce compliance with a court-ordered parenting plan.«11» RCW 26.09.160(2)(b)(ii); see *In re Parentage of Schroeder*, 106 Wn. App. 343, 353-54, 22 P.3d 1280 (2001) «11» Michael mistakenly argues that the trial court should not award Cheri attorney fees at all because she did not prevail on all the issues she raised at the trial court. But the relevant statute does not require Cheri to prevail. Its only requirement is a finding of contempt. The trial court shall order the parent found in contempt to pay all court costs and reasonable attorneys' fees incurred as a result of the noncompliance.' " *Marriage of Eklund*, 143 Wn. App. 207, 177 P.3d 189 (2008). In this matter, Nachtmann was found in contempt, Hess prevailed, so Nachtmann shall pay all attorney fees, including her own.

Also in Eklund, the appellate court rules that "...when an initial petition alleges separate violations of a single court order, the incidents constitute a pattern of conduct that merges into a single finding of contempt when these acts are simultaneously declared to violate the order. See, e.g., *Rideout*, 150 Wn.2d at 348 (a single finding of contempt for multiple violations); Myers, 123 Wn. App. at 892 (a single finding of contempt for multiple violations)." *In Re Marriage of Eklund*,

143 Wn. App. 207, 177 p.3d 189 (2008). Similarly and in the same section of Eklund, the court opined, "Because the trial court simultaneously adjudicated all the instances of Michael's noncompliance, no finding is prior to any other and the trial court did not abuse its discretion by merging them into a single finding of contempt." Whether Hess prevailed on one contempt or fifteen contempt violations is not relevant, as there is reasonable expectation that one contempt violation would be entered against Nachtmann regardless of the number of violations, as previously cited in *Rideout* references. Similar to Eklund, each one of these contempt allegations in *Nachtmann v. Hess* were adjudicated simultaneously. Contempt is a status, there was either contempt or there was not contempt, and Nachtmann was found in contempt so Hess prevailed. Further, if both parties prevail on a major issue, then neither do from the perspective of attorney fees. Because this is a question of law regarding attorney fees, it is a question of law to be reviewed de novo. Regardless, it was still an abuse of discretion.

Finally, statute requires that "Upon a finding of Contempt, the court shall order: The parent to pay, to the moving party, all court costs and reasonable attorneys fees". RCW 26.09.160(2)(b)(ii). This means all attorney fees, including her own. Eklund, 143 Wn. App. 207 (2008), at ¶28. Also the court "shall" order "The parent to pay, to the moving party, a civil penalty, not less than the sum of \$100". RCW 26.09.160(2)(b)(iii). Nachtmann should pay a civil penalty.

In regards to contempt allegation for weekend visitation:

There are two contempt violations in question here alleged by the father. He requested a finding of contempt for denying him his scheduled weekend visitation on

November 4th, 2011, and June 3rd, 2011. The court found the mother not in contempt for November 4th, and failed to address and omitted the June 3rd allegation in its entirety and without explanation. Under section 3.11 of the parenting plan, the fathers weekend residential time with the child is cited as beginning "in Kennewick on Friday, at 6p/m". CP 74.

To refuse to perform the duties provided in the parenting plan, or to hinder the performance by the other parent of duties provided in the parenting plan, shall be deemed bad faith and shall be punished by the court by holding the party in contempt of court. RCW 26.09.160(1). Also: For purposes of subsections (1), (2), and (3) of this section, the parent shall be deemed to have the present ability to comply with the order establishing residential provisions unless he or she establishes otherwise by a preponderance of the evidence. The parent shall establish a reasonable excuse for failure to comply with the residential provision of a court-ordered parenting plan by a preponderance of the evidence. RCW 26.09.160(4). Hess states the same in declaration. CP 91(at 2a). Nachtmann does not refute that it was Hess' weekend with the child on November 4th, 2011, *and* that she denied him the child, so it is Nachtmann's responsibility to establish a reasonable excuse. Nachtmann claims that "there was initial confusion over when the holiday was which was caused by Petitioner". CP 63. However, the record belies that claim.

Nachtmann also states "I had not been keeping track of the number of weekends that I had spent with EJH (the child)" and that she was "operating under the assumption that it was my weekend with EJH" . CP 62. This is important, because she states she was not keeping track of whose weekend it was, and all parties agree

that it was in fact the father's weekend on November 4th, and that weekend should have begun at 6pm that evening. This is not refuted. Nachtmann states in her declaration "I was also planning on going out to dinner to Anthony's with my friends to celebrate my birthday." CP 62. These two declarations made by Nachtmann clearly outline her priorities for this evening. Her only excuse was that the father confused her. CP 63. The trial court ruled that the father was confused. CP 122. There is no substantial evidence supporting a notion that the father was confused about whose weekend it was. "Substantial evidence" is evidence that would persuade a fair-minded, rational person of the truth of the declared premise. In re Welfare of C.B., 134 Wn. App. 942, 953, 143 P.3d 846 (2006). The record in this matter, in fact points to the opposite.

In its ruling, the trial court finds "...delay in the commencement of visitation on November 4 was instigated by Mr. Hess and his confusion with the Veteran's Day weekend". CP 122. Exhibits one and two clearly contradict the trial courts finding. Nothing in the record supports the notion that Hess was confused about visitation for November 4th and the following weekend of Veterans Day. It was Hess' weekend *either way* and the e-mail sent to Nachtmann prior to visitation clearly shows he knew that. CP 96, 97 (Ex. 1, 2). He states same in declaration. CP 91 (at 2a).

A refusal to perform duties in a parenting plan shall be deemed in bad faith. RCW 26.09.160(1). Part of the duty of properly exercising a parenting plan is researching and having awareness of whose weekend it is with the child. The father clearly knew and understood that it was his weekend. See "Exhibit 1" in this matter, which is an e-mail at 5:43pm, 29 minutes after the last phone conversation between

the parties. In this e-mail, Hess writes, "To the right is the other option I was talking about. This is my weekend because he was with you Halloween weekend and the weekend before. I was just thinking the one to the right might be a little better because Kristi (Hess' current wife) will be going into scheduled for labor (birth of the father's baby) any one of those days around the 12th, so might be better to play Veteran's Day as a 'regular' weekend..." CP 96, 97. Note the father wrote, "...I was talking about", as in he had just gotten done verbally explaining to the mother why it was his weekend *now*. Veteran's Day was irrelevant, because the weekend in question was his normally scheduled visitation, and Veteran's Day was his holiday. Hess had the child both weekends, so Veteran's Day was irrelevant. CP 91 (at 2a).

The father sent the 5:43 pm e-mail to the mother 29 minutes after their last phone conversation, and 17 minutes before his scheduled visitation with their son. The mother does not deny or refute that Hess sent and she received that e-mail, nor does she refute that she receives those e-mails by way of her cell phone. She does not dispute or deny having received that e-mail. Hess provides an e-mail that was both sent from the mothers phone and sent from the mother's aforementioned e-mail address. Please note at the bottom of the exhibit/e-mail it says, "Connected by DROID on Verizon Wireless". CP 101 (Ex 4). Hess provides a photo of how the sent e-mail (to Nachtmann) looks on her DROID cell phone. CP 97 (Ex. 2), CP 91 (at 2a). This is not refuted by Nachtmann.

Nachtmann states Hess did not learn about it being his weekend until "later in the evening, after 9pm". CP 63 at line 22-24. The trial court rules that "later in the evening on November 4th, Mr. Hess realized that it was still his weekend based on

their rotational schedule." CP 121. The record does not support this finding and is the basis for the trial court not finding contempt. Hess states in declaration, "At 5:14 pm I spoke with Ms. Nachtmann and she said that what I was saying 'didn't sound right', and even though I was confident and insisted it was my weekend, I assured her that I would e-mail her to better understand and have a visual of what I was saying. I did e-mail her (see exhibit 1 and 2), at 5:43 pm." CP 91 (at 2a), CP 96. Please remember that the father's visitation was to begin at 6 pm. Even entertaining the false notion that the trial court was correct in that the father contributed to the mother's confusion, it was immediately mitigated by the father by his e-mail (Exhibits 1 and 2), which the mother does not deny she received on her cell phone. So, to what extent is she excused from being held in contempt for keeping the child from the father, until finally offering the child at 9:34pm by text message? CP 102 (at 9:34 pm). This was more than 3.5 hours after his scheduled visitation time.

There has been no questioning either parties credibility or the exhibits in this matter. Nachtmann simply and conveniently omits the e-mail in question in its entirety (Ex. 1 & 2, at CP 96, 97), refusing to acknowledge it in oral argument or address it in her declaration. It is clear that the father was not confused, and the mother admits being confused about which weekends she had previously had the child. The father's declaration and e-mail (Exhibit 1, 2) were filed timely, Nachtmann had an opportunity to respond to this e-mail and she chose not to address the e-mail. The father in no way contributed to her admitted confusion as the trial court indicates. CP 122. Nachtmann admits she was confused, but the record shows the father was not and in fact tried to convince the mother to research the issue

further. Nachtmann states in declaration, "I called Petitioner back and told him that Veteran's Day was not until the following Friday and he said, 'Okay.' " The record shows her call back as an "incoming call" to Hess at 5:12pm. CP 98 (Ex. 3, at 402). So Nachtmann references only 2 calls between the parties. The most important call is a 3rd call between the parties at 5:14 pm that she fails to reference. CP 99 (Ex. 3, at 403)².

The 3rd call is shown in Exhibit 3, line #403, and shows a length of a 9 minute phone call.² CP 99. Nachtmann references a very short phone call where she said, "I called Petitioner back and told him that Veteran's Day was not until the following Friday and he said, 'Okay.' " CP 63. That contradicts the 9 minute phone call at 5:14pm. The reason for this is because as Hess' declaration states, "At 5:14 pm I spoke with Ms. Nachtmann and she said that what I was saying 'didn't sound right', and even though I was confident and insisted it was my weekend, I assured her that I would e-mail her to better understand what I was saying. I did e-mail her (see exhibit 1 and 2), at 5:43 pm." CP 91. The mother *has never denied* the father sent or that she received the e-mail, her only complaint was that the initial phone call confused her. Despite her confusion, she failed to prioritize her obligation to research the issue further and abide by the parenting plan.

Further, the record shows Nachtmann's continued confusion, not the father's.

She states "My mother contacted Petitioner and he did not answer his phone." CP 63.

2-For clarity purposes of the referenced exhibits, the court should be aware that Nachtmann's cell phone number is 509-222-9710, and her mother's cell number is 509-308-3472. These numbers apply to both phone calls and text messages referenced in the record.

She also states, "...at around 7:00pm, I started receiving phone calls and text messages from my mother and Petitioner again. I tried to call Petitioner and he would not answer his phone." CP 63. Exhibit 3 shows there were no phone calls from either Nachtmann or her mother, which would have come from 509-222-9710¹ or 509-308-3472¹, and would have been cited in phone records as "INCOMING CL". CP 98-99. In fact, these phone records show that Hess is the one who tried to call Nachtmann at 7:28pm, and that she did not pick up before the call going to voicemail. Contradicting Nachtmann's declaration and further showing her confusion, neither does Nachtmann's mother's declaration state that Nachtmann's mother tried to call Hess. That declaration in fact says she didn't contact Hess and that, "I did not want to be in the middle." CP 86.

Nachtmann states, "It was only later in the evening, after 9:00pm, that he (Hess) realized that this would be my third weekend in a row with EJH (the child)." CP 63. The trial court bought this and ruled accordingly, as follows "...later in the evening on November 4th, Mr. Hess realized that it was still his weekend based on their rotational schedule." CP 121. There is no substantial evidence to support this finding, and the father shows he knew it was his weekend at 5:43pm, *prior* to visitation, and not "later in the evening" as the trial court ruled. Nor "later in the evening, after 9:00pm" as the mother states in declaration. There is no substantial evidence, and in fact, Exhibits 1, 2, 3, 4, and 5 contradict the finding. CP 96-102. The parties spoke on the phone about the matter at 5:14 pm, which is not disputed. CP 91 (at 2a). Exhibit1 specifically shows the fathers clarity of it being his weekend at 5:43pm, and there is no substantial evidence or refuting to the contrary. CP 96.

Without the finding that the father was confused and instigated the mother's confusion, the mother is in contempt.

On top of all this, not a single party in this matter refutes that the father was told the child would be brought to him between 6pm and 7pm. Hess' declaration states, "Her (Nachtmann's) mother said she would bring my son to me between 6p and 7p because they 'wanted to bake some cookies.' " CP 23. Hess sat in wait, expecting his child to be brought to him, and when that didn't happen he began calling and texting both parties repeatedly, with 3 phone calls to Nachtmann's mother from 7:23pm to 7:45pm and a call to Nachtmann at 7:28pm (CP 91 at 2a, and CP 97 at 403-406), a text to Nachtmann's mother at 7:25pm (CP 100 at 107, CP 102), and a text to Nachtmann at 7:38pm (CP 100 at 108, CP 102). As stated in declaration, neither Nachtmann nor her mother would take his calls. CP 91.

Nachtmann simultaneously claims she learned from Hess it was his weekend by text message shortly after 7pm (CP 63 at line 10-15, and CP 102), and yet somehow also claims Hess did not learn it was his weekend until after 9pm. CP 63 at line 22-24. Regardless, Hess was offered the child at 9:34pm, by text message from Nachtmann's mother. CP 102. Even entertaining the notion that the mother learned only at the 7:38pm text message that it was the Hess' weekend with the child, she clearly expressed the ability to instantly communicate with her mother (CP 63 at line 11-14), and failed to immediately deliver or make the child available to the father. Instead, Nachtmann proceeded to keep the child for another 2 hours, before finally offering the child at 9:34pm. This alone is basis for contempt.

The mother has the requirement for preponderance of the evidence, proving that she had a reliable excuse in refusing to execute a residential provision of a court ordered parenting plan. RCW 26.09.160(4). She has severely failed to do that, as the father demonstrated to the trial court extensively via declaration and exhibit that he was not confused as Nachtmann and the trial court opine. Nachtmann on the other hand, admits her confusion. Nachtmann saying the father was confused is simply hearsay. He in fact proved he went above and beyond the call of duty in trying to get the mother to understand that it was his weekend whether it was Veteran's Day weekend or not, and the record supports that. Instead, she made a unilateral decision to keep the child and failed to even inform the father about this, leaving him in limbo wondering why the child was not delivered as promised between 6pm and 7pm that evening. CP 23-24.

Hess did not accept Nachtmann's ultra-late offer of the child, in fear that it would give the appearance he had acquiesced to the arrangement. CP 91 at 2a. The father missed and requests make-up time for his missed 3 overnights of visitation. The father is entitled to make-up time and a civil penalty under RCW 26.09.160(2)(b)(i) and (iii). Eklund, 143 Wn. App. 207 ¶26, (2008). Hess also requests 3 overnight stays of make-up time for the below-referenced second contempt allegation on June 3rd, 2011. This totals 6 overnight stays with the father.

In the second contempt violation alleged for this provision, the father asked the court to find the mother in contempt for refusing his visitation with the child on the weekend of June 3rd, 2011. CP 24 at #2, CP 91-92 at 2b. The trial court only ruled on the weekend of November 4th. In oral arguments Hess asks the trial court to find

Nachtmann in Contempt for June 3rd, 2012, and Hess states, " The next issue of contempt for violation of visitation where she refused me my weekend... it was supposed to be my weekend, she denied it to me and said, 'Nope, you're not having him. It's not gonna happen.' So, that was June 3rd, 2011,when she denied me my visitation." RP 24 at lines 3-6. Hess also makes the June 3rd, 2011, visitation complaint in declaration. CP 24 and CP 91-92.

Every case submitted to a judge of a superior court for his or her decision shall be decided by him or her within 90 days. RCW 2.08.240. The trial court Commissioner only partially decided this contempt allegation. There were 2 allegations, the trial court decided on one. The trial court judge shall have power to rule upon all motions, demurrers, issues of fact, or other matters that may have been submitted to him or her. All such rulings and decisions shall be in writing. RCW 2.08.190.

It is a matter of law that the trial court should have ruled on the June 3rd, 2011 visitation, and because it didn't make a ruling the matter should be decided by the appellate court de novo based on the record. It was also an abuse of discretion and for untenable reasons that the trial court would arbitrarily decide what to make a ruling on, without so much as mentioning the issue. The trial court cannot pick and choose which matters it wants to rule on without providing a reason as to why it is withholding its judgment, especially when a contempt violation is sought in declaration and heard by the court in oral argument. The fact is, the court erred and this matter should be decided upon de novo and a finding entered. The father provides an overview of how the 2 parties typically exchange the child, what is involved, and how the provided exhibits support that description of the father's

visitation, and that description is not disputed by Nachtmann nor did she respond to it in any capacity. CP 92 at 2b. Exhibits 6, 7, and 8 support the fathers declaration of that description as well. CP 103-105. Declaration in support of this was also made at CP 8 (at #2). Oral argument at RP 23 at line 3 to RP 24 at line 13. The declarations were accepted, oral argument was made, a specific request of contempt was requested by the father, and the trial court either mistakenly or purposely failed to make a decision, and that is improper. The trial court judge has an absolute obligation and responsibility to hear and decide all matters presented to the judge as described in the Washington Code of Judicial Conduct. **A judge shall hear and decide matters assigned to the judge.** Canon 2. Rule 2.7 "Responsibility to Decide". This was assigned to Commissioner Schneider, yet he didn't decide.

In regards to contempt allegations for additional Saturday:

The trial court ruled on a February 2011 visitation, and an October 2011 visitation, but ignored the November 2011 visitation allegation. Regarding the October visitation, the trial court rules "there has been no mediation to rectify or clarify this issue". CP 122. In declaration Hess writes he, "brought the issue up in mediation...", and in mediation they decided, "Mr. Hess will choose the weekend he has his son in even months, while Ms. Nachtmann will make that choice in odd months." CP 25 at No. 4. The modified parenting plan arose from that mediation session, and the provision is seen in #13 of the modification. CP 82. Further, the mother does not claim in declaration that the parties did not attempt mediation, so it is a moot point since only arguments made from declaration can be made. RCW 94.07W(2)(A), and RP 7 at line 1-4. So, the record does not support the trial courts

finding. Further, the trial court ruled oppositely that the father had attended mediation for the 6th contempt allegation (where the mother was found in contempt). CP 122-123. The Saturday contempt allegation (mother not in contempt) and notice requirement for illness and missing school (mother found in contempt) stemmed from the *same mediation session*. CP 122-123, and CP 82 at 6 and 13. This is a double standard and abuse of discretion. How could the court apply the mediation provision to one contempt allegation, but not the other? The finding that the father did not attempt mediation is not in declaration, or supported by substantial evidence. Further, nothing requires Hess to attempt mediation more than once. RCW 26.09.184(4).

Nachtmann denied Hess his additional, 8 hour, Saturday visitation on both Saturday, October 22nd, and Saturday, October 29th, yet the judge made a ruling specific only to the October 22nd allegation. Hess writes, "Nachtmann denied me my Saturday for both the last non-holiday weekend of the month, as well as the last holiday weekend of the month (in October)". CP 92 at 4. This was not disputed by Nachtmann. The only dispute by Nachtmann was late notice for October 22nd. The trial court agreed, "Given the fact that notice was not timely provided... the court does not find a willful violation of the parenting plan." CP 122. The problem is that as mentioned previously, Hess states in declaration and oral argument that the mother also denied him Saturday visitation on October 29th. RP 28 at Lines 5-15. This means the *month* of October, not a single day.

This matter is not a specific violation by the mother of refusing Saturday visitation for October 22nd as the trial court rules, it is a matter of refusing the father

his *monthly* October Saturday visitation in its entirety. The father indicated in declaration and oral argument that he also requested Saturday, October 29th visitation. CP 92. The mother refused visitation on the 29th as well, and the mother does not refute this in declaration. Further, the modified parenting plan clearly says in #13, "Scott will choose which Saturday daytime visit he has with EJH (the child) on even months". CP 82. October is an even month.

Further, the parenting plan very specifically states in the modification that, "The newly updated Parenting Plan shall supersede any other elements of the old Parenting Plan in case of conflict." CP 79. If there was conflict, Hess' authority to choose the Saturday superseded anything else. Hess was well within his rights to utilize his authority to choose any Saturday he wanted, without regards to notice and without limitation. He chose October 22nd which was denied by the mother, and when that was denied he tried to work with her and chose October 29th which was also denied by the mother. There is no requirement for the father to give a certain amount of notice, even if he agrees it may have served the parties better to have provided more notice than one hour. The proper basis for Nachtmann to remedy this is modification. Eklund, 143 Wn. App. 207 (2008), at ¶25.

As for November, 2011, the father writes in declaration, "Ms. Nachtmann denied me my November 2011 visitation, when it was her month to choose which Saturday I would take my son. She failed to give notice for any day the entirety of the month, as to when she was choosing my Saturday to occur." CP 92-93. This was not refuted by Nachtmann. Hess also makes that case in oral argument. RP 28 at lines 15-23. So, the trial court rules that the father must provide notice, and then

turns around and does not hold Nachtmann to the same standard for November. Apparently Hess must give notice when it is his month to choose, but Nachtmann must not. Instead, the trial court omits the November 2011 request for contempt in its entirety from its ruling. This is an abuse of discretion, because Nachtmann did not refute that she refused to make the child available to the father for his November, 2011, Saturday visitation. It is an error of law because the trial court is required by rules of judicial conduct and statute to provide a ruling. The trial court should have ruled on this in Hess' favor, but for some reason either forgot to or refused, without basis or rationale. It gives the appearance that the trial court went out of its way to find Nachtmann not in contempt.

In this matter, the burden is on the mother to establish a reasonable excuse for failure to comply with this Parenting Plan's Saturday residential visitation with the father. RCW 26.09.160(4). And: Marriage of Davisson, 131 Wn. App. 220, 126 P.3d 76, rev denied, at 225, ¶12 . And: Marriage of Davisson, 158 Wn.2d 1004, 143 P.3d 828 (2006). She did not establish reasonable excuse for October, the trial court only addressed one of the 2 October weekends in question, and the mother provided *no* excuse for November. In fact, she did not refute that she denied the father both his 2011, October **and** November "additional Saturday". Ironically, she did not respond to the November 2011 allegation, and neither did the trial court. Because she did not comply with the order establishing residential provisions, nor provide reasonable excuse, she "shall" be found in contempt. Rideout, 150 Wn.2d 337 (2003), at 349 (quoting RCW 26.09.160 (2)(b)). And: Rideout, 150 Wn.2d 337, 77 P.3d 1174 (2003), at 352-353.

Further, mediation is only required in "disputes" of the parenting plan. Section V. of the parenting plan, CP 77. There was no dispute here, there was a residential parenting plan violation. There was a simple refusal to offer the child to the father for visitation as is required, it occurred for 2 consecutive months, the second month wasn't addressed nor refuted by the mother, and thus the father was entitled to initiate and pursue a contempt finding for violating a residential provision of the plan. RCW 26.09.160(2).

The trial court commissioner in this matter only partially decided this contempt allegation, but should have ruled on both. A judge shall hear and decide matters assigned to the judge. *Canon 2*. Rule 2.7, "Responsibility to Decide". All such rulings & decisions shall be in writing and within 90 days. RCW 2.08.240, 2.08.190.

In regards to contempt for e-mail requirement in the parenting plan:

This particular violation is bothersome because it is such a clear and plain violation of the parenting plan. This provision of the Modified Parenting Plan clearly states, "Both parents will email list of contents in (the child's) bag with each visit..." CP 82 at 5. Hess writes in declaration and the court made no findings otherwise that, "Mr. Hess has 100%, without fail, and every time sent an e-mail as to items he has sent to Ms. Nachtmann's house." CP 26 at No. 5.

Nachtmann admits she stopped e-mailing lists of clothing exchanged as required by the parenting plan, "Initially I tried to send a clothing list by e-mail but it simply did not work... I hand write out a list and place it in EJH's (the child) backpack." CP 66-67. Her rationale for not following the parenting plan is that she made an agreement with Hess' wife, Kristina, that eliminated the email requirement. CP 67.

Surprisingly, the trial court agreed with this when it ruled, "The response by Ms. Nachtmann was that she and in Mr. Hess new wife had worked out other arrangements in regards to the situation." CP 122. Unfortunately, this is not a "situation". This is a signed order by a judge, and a modified parenting plan signed by a judge, not simply a "situation" that is optional.

The judge here has exceeded his authority in deeming whether a "situation" is necessary or not. The trial courts duty is to enforce the parenting plan, and not determine if "side-agreements" involving outside, 3rd parties constitute a viable rationale for not following a court order. Under what authority can a party to an order or a contract, approach an uninvolved, third party, and make a deal that relinquishes them of a court-ordered responsibility? Kristina Hess is not a party to the parenting plan, and she is not a party to the order. Under what basis can Kristina Hess sit down with Kirsten Nachtmann and make decisions as to what is mandatory or necessary under the parenting plan? Since Nachtmann lives with her mother, can Hess approach Nachtmann's mother and make an agreement to not follow certain aspects of the parenting plan? Certainly not.

It is not the trial courts duty to determine whether the parenting plan inconveniences a party, or whether a 3rd party negotiated an alternative arrangement with one party to the order, its job is to "strictly construe the parenting plan to see whether the alleged conduct constitutes a 'plain violation' of the plan. *In re Marriage of Humphreys*, 79 Wn. App. 596, 903 P.2d 1012 (1995)." *Eklund*, 143 Wn. App. 207 (2008), at ¶14. The trial courts duty was to determine if there was a plain violation of the order *presently* in effect. *Humphreys*, 79 Wn. App. 207 (2008), at

599. This was a clear and plain violation of the plan. The court should have suggested to Nachtmann that the proper remedy was a modification of the parenting plan, as in *Eklund*, "We are not unmindful of the disruption the alternative care provisions of the parenting plan will likely cause in the future, but the proper remedy is for the parties to file a motion to modify the plan." *Eklund*, 143 Wn. App. 207 (2008), at ¶25. The trial court should have opined similarly.

Further, the trial court ruled the violation was not a "willful" violation. CP 122. A "willful" finding or a finding of bad faith is not required. All that is required is a refusal to perform a duty in a parenting plan or an order. *Marriage of Davisson*, 131 Wn. App. 220, 126 P.3d 76, at ¶8.

RCW 26.09.160(1) states, "...to refuse to perform the duties provided in the parenting plan, or to hinder the performance by the other parent of duties provided in the parenting plan, ***shall*** be deemed bad faith and shall be punished by the court by holding the party in contempt of court and by awarding to the aggrieved party reasonable attorneys' fees and costs incidental in bringing a motion for contempt of court." Here, the mother admitted she refused to perform the duty in the parenting plan. Therefore it is bad faith, and she "shall" be held in contempt. "Shall" indicates it is not optional. *Eklund*, 143 Wn. App. 207 (2008), at ¶20 and ¶21. And: *James*, 79 Wn. App. 436, 903 P.2d 470 (1995), at 442. The mother must be found in contempt for this allegation, and the statute requires that the father be awarded attorneys' fees and costs. If this is inconvenient to Nachtmann, the proper method for resolution is not an agreement with an uninvolved 3rd party and ignoring a court order, the proper method is modification.

What the trial court did here is essentially allow itself and Nachtmann to modify the parenting plan, even if only on a slight basis. *In re the Marriage of Coy* covers this extensively, citing: "Modifications are any increases or reductions to the rights originally granted to a party. *Rivard v. Rivard*, 75 Wn.2d 415, 418, 451 P.2d 677 (1969). Any modification, no matter how slight, requires an independent inquiry by the trial court. *Schroeder*, 106 Wn. App. at 352; *In re Parentage of Smith-Bartlett*, 95 Wn. App. 633, 640, 976P.2d 173 (1999). A trial court cannot delegate its authority to modify a parenting plan. See *Kirshenbaum v. Kirshenbaum*, 84 Wn.App. 798, 807, 929 P.2d 1204 (1997). After a trial court enters a final parenting plan, and neither party appeals it, the plan can be modified only under RCW 26.09.260. *Schuster v. Schuster*, 90 Wn.2d 626, 628-29, 585 P.2d 130 (1978); *In re Parentage of Schroeder*, 106 Wn. App. 343, 350, 22 P.3d 1280 (2001)." *In re Marriage of Coy*, 160 Wn. App. 797 (2011), at ¶18.

It is a matter of law as to whether or not the trial court slightly modified the parenting plan, so review should be de novo. This was also an abuse of discretion by the trial court, and on untenable grounds or untenable reasons. Nachtmann should pay Hess' costs and her own attorney fees for this matter. A trial court abuses its discretion if its decision is based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

In regards to notice of relocation/joint decision making contempt allegation:

This is half a matter of law and interpretation of relocation and RCW 26.09.440 and 26.09.450, and should be reviewed de novo. Errors of law are reviewed de novo. *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn.App. 791, 799-800 (2003). The

other half of this matter is related to joint decision-making and was not ruled on by the trial court leaving it to be reviewed de novo.

Hess states that, "All he was aware is that she (Nachtmann) was moving with their son, with no awareness of details or essentials." CP 22-23. The trial court ruled that, "The law requires that Ms. Nachtmann provide reasonable notice to Mr. Hess." and "Mr. Hess acknowledges he was told about the move but he was not provided with specific details." CP 121.

RCW 26.09.440 & 26.09.450 are the two statutes that deal with relocation. Not one time does Nachtmann state that she gave a specific date of the intended relocation. Her only claim was that she mentioned to Hess she was moving. Hess agrees he was never given a specific date of the move or enrollment in school and thus, he was removed from the opportunity to participate in the child's first day at a new school for the first time in the child's educational life. CP 23. Joint decision-making requires specific notice, otherwise a parent can make wide-ranging decisions with only reference to vague details that effectively omit the other parent from the process and an opportunity to be involved.

RCW 26.09.440(2)(b)(v) states, "(b)Except as provided in RCW 26.09.450 and 26.09.460, the following information shall also be included in every notice of intended relocation, if available: (v) The date of the intended relocation of the child" RCW 26.09.450(1) states, "(1) When the intended relocation of the child is within the school district in which the child currently resides the majority of the time, the person intending to relocate the child, in lieu of *notice* prescribed in RCW 26.09.440, may provide actual notice by any reasonable means to every other person

entitled to residential time or visitation with the child under a court order." This statute only changes the *type* of notice, it does not change *what* is required to be communicated in the notice. This statute changes the *form* of notice from "personal service" described in RCW 26.09.440(1), to "actual notice" described in RCW 26.09.450. It does not change what shall be communicated in notice.

Case law states that "[3, 4] The construction of a statute is a question of law and is reviewed de novo.«13» Ambiguities in the statute must be resolved in accordance with the intent of the legislature.«14»" Interest of N.M., 102 Wn. App. 537, 7 P.3d 878 (2000), at 543. Because the statute is not clear as to what should be communicated in the case of an in-school district move by a custodial parent, the appellate court should look to determine the legislatures intent. Did the legislature intend for a parent to be able to say, "Hey, I'm moving and changing school districts", and then move sometime between 1 and 4 months later? No, the legislatures intent was that instead of a strict personal service or certified mail that will document dates for purposes of modification or a parents right to due process, the parent relocating could instead leave the details of the move via e-mail, text message, or verbally when moving within the same school district.

The legislature did not intend for *what* was communicated to the non-moving parent to change, it only intended to change the *manner* of the notice itself. The statute does not contradict this last statement. When interpreting a statute, the appellate courts primary goal is to effectuate legislative intent. *City of Seattle v. St. John*, 166 Wn.2d 941, 945, 215 P.3d 194 (2009) (citing *In re Custody of Shields*, 157 Wn.2d 126, 140, 136 P.3d 117 (2006)). The combination of "Joint Educational

decision-making" requirements in the parenting plan, and "actual notice requirements" as described in RCW 26.09.450, demands specific notice as to a parents exact date of moving, as well as the child's exact day of enrollment in a new school. Not simply a phone call where the mother says, 'Hey, we're going to be moving here at some point.'

The father complains in declaration that, "Ms. Nachtmann's lack of advance notice disallowed me from participation in his transition to a new school, researching his teacher or the school, or being present and holding his hand on his first day of school." CP 91.

Joint decision-making necessarily requires notice. Not only does it require notice, but it requires specific notice. Joint decision-making is not joint when one parent says, "Hey, I'm thinking about switching schools for our boy", and then proceeds to do so without alerting the father first as to dates and times so he can necessarily be involved. Especially when nothing prevents the child from finishing the school year in his existing school (the 2 schools are less than 5 miles apart). Joint decision-making also requires notice of specific time and dates so that the parent has the proper time, method, and means with which to dispute the change of school via the dispute resolution process or similarly. In this matter, Nachtmann never once says she gave Hess time and date of her move nor did she give him the time and date of enrollment of the child in the new school.

In declaration, Hess cites unpublished opinion which is not disallowed in trial court, stating, "In Re: Marriage of Kohl, Court of Appeals, Div. I, State of WA, No. 66510-3-I, Kohls was found in contempt for failing to adhere to 'joint decision'

requirements in the PP (parenting plan), and... (it) states that 'Joint decision making necessarily includes notice'." CP 91. Hess states in oral argument, "joint decision-making necessarily includes notice, and that the parent that finds out about the appointment after the fact is deprived the ability to attend the appointment or participate..." RP 21 at line 16-20. The trial court judge responded, "Okay, that's a health care decision, correct?" RP 21 at line 22-23. Whether a health care decision or educational decision is irrelevant, as whatever type of decision it pertains to is joint, and thus, necessarily requires specific notice.

The child could have finished the school year at Ridgeview Elementary but was transferred to Cottonwood Elementary, and Nachtmann does not deny this. Hess says he "was not sure how I felt about him being yanked out of school in the middle of the year". CP 90-91. One of the purposes of joint decision-making in a parenting plan is so that both parents can necessarily be involved. Nachtmann enrolled the child in a new school after beginning the school year at his previous school, did not share that information with the father, and thus, he was unnecessarily omitted from the child's first day at a new school, meeting his teacher prior to school, & similarly.

Medical decision making in this parenting plan is also joint. Can the mother e-mail the father and say, "I am thinking about taking our son to the doctor", and then not tell him the date of the eventual Doctor's appointment? No, because that doesn't satisfy joint decision-making and the father's right to be necessarily involved, because times and dates are not included. Similarly, educational joint decision-making requires specific notice. The trial court did not address the joint decision-making requirement, and because the notice requirement is two-fold, in that it relates

both to the mother's move as well as the child's enrollment into a new school, he asks this court to review the notice *and* joint decision-making aspects of the contempt allegation de novo. The relocation is interpretation of statute and a matter of law, and the joint decision-making was not ruled upon by the trial court.

Further, the order is not ambiguous and its' intent is clear because it plainly grants both Hess and Nachtmann joint decision-making for educational issues. (*Marriage of Davisson*, below). Despite the trial court ruling, "His (Hess') real complaint was that he was not notified that the child would be changing schools", that is not relevant because Nachtmann did not adhere to the joint decision-making requirement. *Marriage of Davisson*, 131 Wn. App. 220 (2006), at 226, ¶15.

Additionally, the trial court judge was required to rule on both aspects of the move and child's change: the relocation itself (3.14 of the parenting plan, at CP 75) and the joint decision-making requirement (section 4.2 of the parenting plan, CP 76-77). The trial court commissioner in this matter only partially decided this contempt allegation, but should have ruled on both. A judge shall hear and decide matters assigned to the judge. Canon 2. Rule 2.7 "Responsibility to Decide". All such rulings and decisions shall be in writing and within 90 days. RCW 2.08.240 and 2.08.190. The trial court only ruled on notice for relocation, and did not rule on nor address the matter of joint decision-making for the child's education.

E. CONCLUSION

For the foregoing reasons, Appellant Hess respectfully requests this court to:

Reverse the award of attorney fees to Nachtmann, and award Hess costs under RAP 18.1, RCW 26.09.160, RCW 4.84, and/or RCW 7.21, or any other reasons and

case law cited in arguments, above. Also, to remand to the trial court to vacate the judgment against him related to the award of attorney fees, and make entry of any reversal of contempt findings against the mother.

Reverse the findings of Nachtmann not in contempt for allegations related to:

1) Weekend visitation on November 4th, 2011. 2) The October 2011, Saturday visitation. 3) The e-mail requirement. 4) The relocation.

Based on the record, for the appellate court to make findings and issue written ruling on matters previously presented in declaration and argued orally to the trial court, but which were never adjudicated or ruled upon. Including: 1) Weekend visitation on June 3rd, 2011. 2) The non-refuted November 2011, Saturday visitation. 3) The joint decision-making requirement.

Also for this court to award make-up time, extended to the father in the case of prevailing on any residential issues. As well as the required civil penalty levied against the mother for a first time contempt violation for violating an order related to a parenting plan. RCW 26.09.160.

Dated this 11th Day of December, 2012.

Respectfully submitted,



Pro Se, Scott D. Hess

FILED

DEC 12 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE WASHINGTON STATE COURT OF APPEALS Division III	
<u>Kirsten Nachtmann</u>	Respondent,
vs.	
<u>Scott Hess</u>	Appellant

NO. 309371

CERTIFICATE OF SERVICE

I DECLARE that I am not the plaintiff, defendant or a witness, and:

SERVICE

I certify under penalty of perjury under the laws of Washington state that I am 18 years of age or older and I am not the Petitioner or the Respondent, and that on the 23rd day of August, 2012, I served :

-Corrected brief

by delivering in person a true copy to the defendants attorney of record in Benton County, State of Washington, as follows:

Name of Respondent	Address Where Served	Date of Service
<u>Kirsten Nachtmann</u>	<u>Defoe Pickett, 830 N Columbia Cntr Blvd, "A", Kennewick, WA</u>	<u>12-12-12</u>

I, the undersigned, declare under penalty of perjury that the foregoing is true and correct and that I was at the time of service of the above notice(s) a resident of the State of Washington over the age of 18 years and not a party to the above numbered claim.

DATED: 12/12/12

x *Janis N. Hess*
Signature of Server

Server's Phone No: 2533327878

Print name: Janis N. Hess
Address: 19526 108th St E
Banney Lake, WA
98391