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SUPREME COURT
STATE OF WASHINGTON
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No. 90072-8

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Custody of:
MASON WADDLE,

GREG MINIUM and
LINDA MINIUM,

Petitioners,

and

PATTI SHMILENKO,

Respondent.

JOHN SHMILENKO,

Respondent,

PATTI SHMILENKO,

Respondent,

and

GREG and LINDA MINIUM,

Petitioners.

JOHN SHMILENKO'S
MOTION TO ENLARGE
TIME FOR RESPONSE
TO THE MINIUMS'
FINANCIAL
DECLARATION AND
RESPONSE TO THE
MINIUMS' MOTION TO
STRIKE



ORIGINAL

A. Motion to Enlarge Time for Response

Counsel for John Shmilenko filed his *Response to Financial Declaration of Petitioners* on June 24, 2015. This was two days late under RAP 18.1(c). Counsel for John Shmilenko mistakenly believed that he had ten days to file John Shmilenko's response under RAP 18.1(d). Counsel makes no excuse for this mistake, as RAP 18.1(c) very clearly applies. However, to the knowledge of counsel for John Shmilenko, this two-day error has caused no prejudice to the Miniums.

RAP 18.8(a) states:

The appellate court may, on its own initiative or on motion of a party, waive or alter the provisions of these rules and enlarge or shorten the time within which an act must be done in a particular case to serve the ends of justice[.]

In the case at bar, no one has been prejudiced by John Shmilenko's inadvertent late filing. The Miniums are requesting thousands of dollars in relief to which they are not entitled. Striking John Shmilenko's response would be unjust in light of the lack of prejudice. This is particularly true given the availability of

sanctions against counsel for John Shmilenko should any prejudice be actually shown.

The Court should enlarge by two days John Shmilenko's time to respond to the Miniums' financial declaration. Any prejudice caused by this mistake should be remedied at the expense of John Shmilenko's counsel.

B. Reply to the Miniums' Motion to Strike

The Miniums' motion to strike has two parts. The first asks the Court to strike John Shmilenko's Response as untimely under RAP 18.1(c). The Court should grant John Shmilenko's motion to enlarge his response time by two days and deny this part of the Miniums' motion.

The Miniums also attack the substance of John Shmilenko's response, claiming that it provides information that is not relevant to the determination of fees under the need based approach of RCW 26.10.080.

As a preliminary matter, RCW 26.10.080 does not even apply to this appeal. Counsel for the Miniums requested fees

under this statute in their opening brief. Counsel for John Shmilenko pointed out that the issue before the Court was equitable in nature, that it had nothing to do with RCW 26.10.080, and that the Miniums had already been denied fees under that statute by the trial court and failed to appeal that ruling. Having argued that John Shmilenko's statutory claim was based on a statute that had been thrown out as unconstitutional, the Miniums cannot come back and claim fees under that same statute, particularly with regard to the adjudication of a purely equitable claim.

Counsel for the Miniums, in her reply brief, seems to have conceded this point by making, for the first time, a generalized plea for attorney fees. Although counsel made reference to equity, she failed to cite the Court to any legal authority for the equitable grounds for attorney fees, nor did she make any serious argument for the same. With the Miniums' having apparently given up on their statutory claim for fees, their financial need declaration came as a surprise.

If the Court is going to reach the issue of statutory attorney fees under RCW 26.10.080, the Court needs to consider the issue of litigation intransigence. While this question has not been addressed under RCW 26.10.080, it has been the topic of many reported cases under RCW 26.09.0140, which is the dissolution of marriage equivalent of RCW 26.10.080 and mirrors the language of RCW 26.10.080.

Intransigence includes making trial unduly difficult and unnecessarily increasing legal costs. *In re Marriage of Morrow*, 53 Wn. App. 579 (1989). “Intransigence is the quality or state of being uncompromising.” *In re Marriage of Raskob*, 183 Wash. App. 503, 517, 334 P.3d 30, 37 (2014), citing *Schumacher v. Watson*, 100 Wash. App. 208, 216, 997 P.2d 399 (2000) (citing Webster’s Third New International Dictionary 1186 (1993)).

A trial court may consider whether additional legal fees were caused by one party’s intransigence and award attorney fees on that basis. *In re Marriage of Raskob*, 183 Wash. App. 503, 517, 334 P.3d 30, 37 (2014) citing, *In re Marriage of Greenlee*, 65

Wash. App. 703, 708, 829 P.2d 1120 (1992). “Awards of attorney fees based upon the intransigence of one party have been granted when the party engaged in ‘foot-dragging’ and ‘obstruction’ . . . or simply when one party made the trial unduly difficult and increased legal costs by his or her actions.” *In re Marriage of Raskob*, 183 Wash. App. 503, 517-18, 334 P.3d 30, 37-38 (2014).

“When intransigence is established, the financial resources of the spouse seeking the award are irrelevant.” *In re Marriage of Morrow*, 53 Wash. App. 579, 590, 770 P.2d 197 (1989). Awards of attorney fees based upon the intransigence of one party have been granted when the party engaged in “foot-dragging” and “obstruction”, as in *Eide v. Eide*, 1 Wash. App. 440, 445, 462 P.2d 562 (1969); when a party filed repeated motions which were unnecessary, as in *Chapman v. Perera*, 41 Wash. App. 444, 455-56, 704 P.2d 1224, *review denied*, 104 Wash.2d 1020 (1985); or simply when one party made the trial unduly difficult and increased legal costs by his or her actions, as in *In re Marriage of Morrow*, *supra* at 591, 770 P.2d 197. *Matter of Marriage of*

Greenlee, 65 Wash. App. 703, 708, 829 P.2d 1120, 1123 (1992).

John Shmilenko's response establishes the Miniums' intransigence at the trial court level. The biggest monthly expense listed in the Miniums' financial need declaration is the cost of repaying their attorney for defending against Patti Shmilenko's modification petition. John Shmilenko's response directly addresses the ways in which the Miniums have inflicted needless attorney fees on themselves and the Shmilenkos. The portion of John Shmilenko's response that discusses the Miniums' end-run adoption petition shows that the Miniums still have plenty of money to fight needless court battles regardless of what their declaration may say.

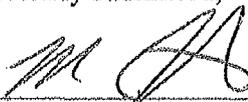
John Shmilenko has never wanted more than exactly what all of the experts, from before this multi-phase litigation started through the date of this appeal, have recommended. The Miniums' aggressive conduct, both in court and out of court, made it necessary for him to assert his own claim given the certainty that should Patti Shmilenko's health fail, Mason would have no access

to his father's side of his heritage.

In short, the Court should deny the Miniums' request for attorney fees under RCW 26.10.080 because that statute does not apply to the sole issue that is before this Court. In the event the Court considers the Miniums' claim of need, the Court should consider their intransigent conduct in this litigation and award them nothing.

DATED this 6 day of July 2015.

Respectfully submitted,



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CERTIFICATE OF MAILING

The undersigned states: On this day, I caused a true and correct copy of JOHN SHMILENKO'S MOTION TO ENLARGE TIME FOR RESPONSE TO THE MINIUMS' FINANCIAL DECLARATION AND RESPONSE TO THE MINIUMS' MOTION TO STRIKE to be served upon the persons listed below at their address, fax number and/or email address as follows:

[x] by mail by depositing same, in a properly addressed and postage paid envelope, with the United States Postal Service

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I hereby certify under penalty of perjury under the laws of
the state of Washington that the foregoing is true and correct.

DATED this 6 day of July 2015, at Longview,
Washington.


KARA L. COPE

OFFICE RECEPTIONIST, CLERK

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Matthew J. Andersen; Heidi M Thomas; Karen Murphy
Subject: RE: In re the Custody of Waddle, Cause No. 90072-8

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Subject: In re the Custody of Waddle, Cause No. 90072-8

Attached for filing in pdf format is John Shmilenko's Motion to Enlarge Time for Response to the Miniums' Financial Declaration and Response to the Miniums' Motion to Strike, in the *Custody of Waddle*, Cause No. 90072-8. The attorney filing this document is Matthew J. Andersen, WSBA No. 30052, email address: mjandersen@walstead.com.

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