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NO. 70995-0-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

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WILLARD GIBSON

APPELLANT

v.

MARIE-CLAIRE PAGH

RESPONDENT

APPELLANT'S REPLY BRIEF ON APPEAL

Laura Christensen Colberg, WSBA #26434
Attorney for Appellant

MICHAEL W. BUGNI & ASSOCIATES, PLLC
11300 Roosevelt Way NE, Suite 300
Seattle, WA 98125
Telephone: (206) 365-5500

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APPELLANT'S REBUTTAL

Introduction

The Mother's Response Brief is full of repetition, but little substance. The court is asked to "see through" the multiple times an assertion is made as if quantity makes up for quality of the statements therein. There is no more substance for the trial court's second judgment and findings of intransigence to rest upon than there was the first time the court considered this trial record and vacated that fee award. The Mother's Response brief does not rebut to any significant degree the arguments and facts outlined in the Father's opening brief. The temptation to repeat that content is great. Rather than doing so, those portions will be simply referenced herein.

1. Record distorted by Mother.

In the Mother's Response brief, the following assertions are distorted to the point of misleading the court on the actual facts:

1.1 One trial continuance, not several. When asserting that the Father requested "several trial continuances," the Mother includes a 27-day *hearing* continuance from June 1 to June 28, 2010 (6/1/2010 RP 7) which had nothing to do with changing the trial date set in the original Case Schedule, which was December 27, 2010. CP 1515. There was one trial

continuance—unopposed—in November 2010, while the Mother was not represented and thus incurred no attorney fees. A second trial continuance *request* was made verbally on the day of trial and was denied—again, no fees incurred. This is not “several” trial continuance requests.

1.2 Mother refuses to distinguish between two Case Schedules.

When asserting that the Father missed Case Schedule deadlines, the Mother refers only to the *original* Case Schedule (CP 1515) and not the Order Amending Case Schedule (CP 193) issued when the first, unopposed trial continuance request was granted. The Mother does not acknowledge the amended Case Schedule nor tie the dates of compliance to it. Thus these arguments fail.

1.3 This is not the third appeal. This is just the second appeal on the trial court’s decision, the first (and only) appropriately filed following the ruling on remand. A separate appeal (68731-0-I) was made pertaining to garnishment actions taken by the Mother to enforce the judgment that was vacated on the first appeal. The issues in that appeal addressed how Judge Inveen handled the controversion on garnishment. That case was dismissed on 3/17/2014 because the underlying judgment was vacated in the first appeal (66833-1) of the trial decision. On remand, Judge Doerty’s second set

of findings, to support that same judgment (which this court vacated), is appealed now, for the first time. The Mother also misstates at page 7 of her Response brief that the appellate court decision *upheld* the trial court’s decision relating to the DVPO. It did not. It ruled that the DVPO expired one year after entry, vacating the 100-year duration ordered by Judge Doerty, contrary to statute. (A36 to Mother’s Response Brief.)

1.4 Number of hearings misreported. The Mother argues the Father failed to appear at “six” hearings—she must be counting the agreed reissuance hearings on the DVPO. The UCCJEA determination prevented a decision on the merits prior to April 2010. One substantive hearing was set in June 2010—continued from June 1 to June 28, 2010. The Mother’s count includes two pretrial hearings, typically conducted with counsel, not parties, to arrive at her misleading total. *See* Table on page 10 of Appellant’s opening brief. It is consistent for a party contesting the court’s jurisdiction not to appear and thus allow for the argument that he is consenting to same.¹

2. The Mother cites no evidence for facts to support findings.

Following a bench trial, this court reviews findings of fact to

¹ The opening brief referred to a minute entry noting the Father’s presence on 2/12/2010—this was incorrect. The Father did not appear.

determine if substantial evidence supports them. *City of Puyallup v. Hogan*.² The court’s Findings in regard to intransigence as the basis for an award of fees are not supported by substantial evidence. The Mother, under the heading “Facts” does not cite evidence (testimony or exhibits), but rather the court’s oral statements—the court’s “findings.” Response Brief, pg 12 (¶ 2.2). Those “findings” are the subject of this appeal and so the record—the evidence—is what must be shown to support the “findings.” Citing findings to support findings misses the point. The other citations in this section refer to colloquy between the court and counsel on 6/1/2010, not evidence; or hearsay reports (1/18/2011). There are no citations to any evidence presented to Judge Doerty at trial in support of the findings of intransigence the court made, nor were these arguments or citations made to Judge Doerty in support of the Motion for Attorney Fees. “The decision of a cause must depend upon the evidence introduced. If a court should take judicial notice of facts adjudicated in a different case, even between the same parties, it would make those facts, unsupported by the evidence in the case at hand, conclusive against the opposing party; while, if they had been properly introduced, they might have been controverted and

² 168 Wn. App. 406 (2012)

overcome.” *Swak v. Dept. Labor & Ind.*³

Ordinarily, arguments not raised in the trial court will not be considered on appeal. RAP 2.5(a). *MHM&F, LLC v. Pryor*, 168 Wn. App. 451 (2012). At trial and in the Motion for Fees, neither party testified to nor provided evidence to address the following:

2.1 No evidence of parenting seminar status. The Response Brief does not address the omissions in the record identified in Appellant’s opening brief at pgs 17-18. No testimony or evidence at trial addressed whether the Father attended the seminar. It wasn’t asked. It wasn’t argued. The Motion for Fees failed to show how this failure caused any additional fees for the Mother. The documents identified as CP 176, CP 182, and CP 184 were not submitted to Judge Doerty as exhibits at trial, nor was he asked to take judicial notice of them (and he didn’t). They were not submitted in the Motion for Fees. If they had been, the court would have seen that the Mother *also was noncompliant* with the FCS evaluation process, and the Father could have reminded the court that he resided in Nevada. Then and only then could the court have determined whether or not the Father was intransigent and quantify the resulting expense to the Mother. No such

³ 40 Wn. 2d 51 (1952)

expense appears in the fee declaration.

2.2 No evidence to verify criminal case status. Father’s attorney told the court, “I’m not sure what went on there” (referring to a criminal proceeding). 2/1/2011 RP 5. No one with firsthand knowledge testified about this. Mother’s counsel offered hearsay about what the Municipal Court docket said and other “understanding.” She was not made a witness, sworn, nor was a foundation laid for any information she provided. RP⁴ 5. In her opening statement (not evidence, not testimony), she referred to a guilty verdict for a Protection Order violation—not mentioning that this occurred when the Father and Mother were living together in 2006 and the DVPO came up on the search when they were hit by a drunk driver. RP 24-25. The Mother was “not aware” of the status of a Snohomish County case. RP 27. The trial in Seattle Municipal court, the Mother testified, “had nothing to do with” charges she had recounted. RP 27. The court had nothing but word-of-mouth assertions regarding outstanding warrants—no court orders were introduced, offered or admitted.

Unless introduced as a piece of relevant, admissible evidence, the records in a separate case are not a part of the record before this case. This

⁴ Unless otherwise dated “RP” refers to the trial transcript of 2/1/2011.

court cannot, “while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties.” *Adoption of B.T.*, 150 Wn.2d 409, 78 P.3d 634 (2003). The record, though public, must be proved. *Swak v. Dept. Labor & Ind.*, *supra*. Nowhere in the trial record is there any admissible evidence regarding the status of the Father’s criminal proceedings. The court did not take judicial notice of other proceedings.

2.3 No evidence regarding Financial Declaration status. The Mother points to nothing in the trial record that addressed any financial issues that would require a Financial Declaration, nor does she show where this was the basis for the Mother’s Motion for Fees. CP 549. *See* other argument at pages 18-19 of Appellant’s opening brief. The court was not asked to take judicial notice that the Father failed to file a Financial Declaration. The Mother refers to the joint letter dated July 30, 2012, in which the parties *agreed* about the status of their respective financial resources—meaning there was nothing for the court to adjudicate that would require separate Financial Declarations (CP 584). No trial testimony was given on any financial dispute. The Mother recounted some employment history as background information, but did not disclose her earnings. She

gave the court no information regarding her income because the trial was about the parenting plan and the DVPO, not child support—see Mother’s Trial Brief, CP 268, 274. The Petition notwithstanding, the Mother did not pursue child support at trial or any other financial relief for which a Financial Declaration was required. Attorney fees based on intransigence were raised in opening statements (and Father’s counsel promptly objected). RP 11. The Mother argues, on the one hand, that ability to pay does not factor in to her request for fees based on intransigence. And then she argues that because the Father did not submit a Financial Declaration—this is the intransigence for which she should be awarded fees! This is not only circular but illogical. The court’s remedy *if there had been any financial issues at trial*, was to grant relief if the Father failed to rebut an alleged ability to pay. But there were no financial requests until the court allowed the post-trial Motion for Fees. The Father’s submission of a Financial Declaration in response to that Motion would have been irrelevant because it was not a request based on need and ability to pay⁵ (the purpose for the court reviewing Financial Declarations). The Mother chose to have support issues

⁵ The Mother’s Response brief argues this point in support of the Mother’s fee award being based on intransigence only. See *Response Brief*, paragraph 3.9. So a Financial Declaration would not have been considered in relation to this fee request.

addressed administratively—the Findings of Fact affirms: “Does not apply, as child support is being pursued administratively through the Department of Social and Health Services.” *Findings*, ¶2.5. CP 1361.⁶ Asserting intransigence on this item is wholly without merit.

2.4 No evidence of discovery status or flaws. *See* pgs 20-21 of the Father’s opening brief, unrebutted. The Mother cites no authority for imposing discovery sanctions without showing compliance with CR 26—and she does not deny that there was no court order compelling discovery. There are no citations to the record to show that evidence or exhibits were offered or admitted to establish intransigence at trial in this regard. The Mother did not request a deposition, so she cannot argue she was prevented from obtaining information that way. The Mother sent the Father’s attorney Interrogatories and Requests for Production in the final 30 days before the amended discovery cut-off, and the Father answered 35 days later. The court cannot retroactively impose discovery sanctions without strict compliance with the requirements in CR 26. “Sanctions are appropriate only when a party fails ‘to obey an order to provide or permit discovery.’” CR 37(b)(2). In other words, obtaining an order to compel is mandatory

⁶ Unchanged from original Findings, CP 657.

before expecting any sanctions to be applied for failure to cooperate in discovery.” *Chen v. State Farm Ins.*⁷ To the extent any portion of the judgment on fees relates to “discovery” sanctions, it is improper on these grounds. Furthermore, the Mother was not charged for any of this discovery. CP 606-607. Thus there was no increase in legal costs.

2.4.1 Father did participate in discovery. The court’s new findings are that the Father “failed to participate in discovery,” as falsely alleged in the Motion for Fees, CP 549. This is not supported by the record. The Father conducted a deposition when trial was continued for 30 days.⁸ That deposition transcript was published in the course of trial. RP 48. He answered Interrogatories—requests sent on 12/1/2010 (CP 606), after the 11/22/2010 discovery cut-off in the first Case Schedule⁹ (CP 1517), and after the trial continuance that extended the discovery cut-off to 1/1/2011 (CP 302). Because that cut-off date was a Saturday, a non-court day, the deadline extended to the next court day, Monday, 1/3/2011. CR 6(a).¹⁰ The

⁷ 123 Wn. App. 150, 94 P.3d 326 (2004).

⁸ Yet the Mother’s Motion for Fees asserts: “refused to take even the simplest steps to participate in discovery.” CP 549.

⁹ The Mother’s duplicity should be noted here—she’s asking that the Father be punished for not complying with the first Case Schedule when she herself did not conduct discovery on that timeline, either.

¹⁰ CR6 (a) “The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the

Father's Answers were received on Tuesday, 1/4/2011 (CP 610), one day past the effective cut-off.

2.4.2 One-day delay did not increase Mother's costs. Nothing in the trial record shows any increase in attorney fees to the Mother by virtue of the Father submitting his answers just one court day late. The closeness in timing to trial has more to do with the Mother's delay in sending requests (waiting until after the 11/30/2010 trial continuance) than the Father's delay in answering them. Still, the Mother had four weeks to interview the Father's witnesses. She acknowledged receipt of his witness list "two days before the discovery cut-off" in her Motion in Limine, CP 218—yet, inexplicably, in the Motion for Fees, says he "failed to comply with a single case scheduling deadline" and argues that he failed to "timely disclose witnesses." (CP 549) The record defies this conclusion.

2.4.3 No additional costs to contact witnesses. See opening brief, pg 26. The Mother chose not to attempt to contact witnesses until 1/25/2011, less than a week before trial. CP 614. CP 231-233. She did not explain the 27-day delay in calling witnesses from the time they were disclosed (or 21 days from receipt of Answers). The Mother had notice of

next day which is neither a Saturday, Sunday nor a legal holiday.. . ."

potential witnesses from Declarations filed in June 2010 (Pam Gibson, CP 97-107; Alisha Locke, CP 108-110). The Mother’s argument rests on the technicality of missing a local rule deadline by one day¹¹—blatantly elevating form over substance. There is no substance. There is no last-minute, late or undisclosed fact that caught the Mother unawares. The Motion in Limine alleging harm was like taking a sledgehammer to a gnat—overkill.

2.5 No evidence of effect of Father’s absence on proceedings or cost to Mother.

See Appellant’s Brief, pg 22. The Mother does not identify a single hearing that did not go forward due to the Father appearing through counsel instead of in person (other than the continued hearing in June 2010—where fees were reserved, but then never requested at the return hearing). She has failed to show how this had any negative or cost-producing effect on her. The hearings went forward without the Father’s presence—if it had been required, this would not have been the case. It was the court’s own preference to “see this guy” (RP 100) at trial, but this did not “cost” the

¹¹ She says his answers were four days late, but 1/4/2011 is just three days after the cut-off of 1/1/2011. Both are *de minimis* time periods.

Mother due to a delay in proceedings—No, she got all the relief she asked for at trial as a result and the Father’s legal position was weakened.

2.6 **Case schedule deadlines.** See Brief, pg 21-22. The Mother points to no trial testimony or other evidence presented to the trial court in this regard. The Mother points to the *old* Case Schedule deadlines to argue that the Father was noncompliant. *Response Brief*, pg 13. This has no merit. The Amended Case Schedule allowed for exchange of witness and exhibit lists up to 1/10/2011. CP 193.

2.7 **Repetition does not create facts.** The Response brief contains six pages with conclusory statements about what the Father did or did not do. The actual Statement of Facts is just two and a half pages long, with citations to the record on just three points—the Father’s criminal warrants (statements by the court and counsel, not evidence), the Father’s failure to attend the parenting seminar (documents in the record of which the court was never asked to take judicial notice) and his failure to follow the (first) Case Schedule (disregarding the second). All of the other claims (such as flaws in discovery) are not supported by any citation to the record and thus should be disregarded in their entirety.

3. **Method of calculating fee award is required (and is missing).**

See Appellant’s Brief, pgs 29-31. The Mother says *Marriage of Foley*¹² stands for the fact that the method of calculating attorney fees is not required. Response Brief, at pg 15. But *Foley* cites to *Marriage of Knight* to affirm the opposite—“A trial court must indicate on the record the method it used to calculate the award.”¹³ Emphasis added. The Mother cites the factors in *Knight* but does not show how they were met in this case. Under its own facts, the *Foley* court was found to have applied the *Knight* factors. The Mother does not show how the *Foley* case is anything like the present case in order to reach a similar result. The present Findings nowhere identify or address the *Knight* factors in determining the fee award. In *Foley*, the court found the Husband to have “claimed he was unable to work due to a back injury [yet] was helping a friend repair her home and build another.” Mr. Foley filed “numerous frivolous motions, refused to show up for his own deposition and refused to read correspondence from Mrs. Foley’s attorney.” In that case, the Wife incurred \$7,000 fees before trial and the trial court ordered Mr. Foley to pay less than half--\$3,250. None of Mr. Foley’s intransigent behaviors are present here. (If anything, the Mother’s

¹²84 Wn.App. 839, 930 P.2d 929 (1997).

¹³ *Foley*, 84 Wn.App. 839, at 846, citing *Knight*, 75 Wn.App. 721, 729, 880 P.2d 71 (1994) review denied, 126 Wn.2d 1011 (1995).

request for a *permanent* DVPO protecting the child—RP 9—was frivolous—entirely contrary to the statutory one-year limitation in RCW 26.50.060(2), an action that increased the Father’s costs because he had to file an appeal to get that overturned, as it was in this court’s 12/3/2012 decision.) Nothing in *Foley* stands for the conclusion that the court does not need to indicate the method used to calculate the fee award.

4. **On remand, this court did not authorize a re-opening or expansion of the trial record.**

The court’s 12/3/2012 opinion amended on 1/29/2014 in #66833-1 remanded this matter for appropriate findings consistent with its opinion that the attorney fee award on the basis of intransigence was vacated. This was not a “second bite” opportunity for the Mother to create a new record or add to the old one. The Court of Appeals had the entire trial record available when it found insufficient findings on the part of the trial judge. If there had been any substantial evidence to support his finding of intransigence, it could have affirmed/upheld the judgment. The Court of Appeals found once that there was an insufficient record to support an award of fees on the basis of intransigence. It should so find a second time, because the trial record remains devoid of evidentiary support for such an award.

5. **Mother wants remand to correct acknowledged flaws in trial**

court process.

The Mother does not deny the prejudice to the Father in having no opportunity to review and respond to the Mother's fee declaration. She cites no authority that allowed the court to consider this information over the Father's objection. She points to no authority allowing the court to consider new information for the first time on remand or correct a procedural flaw. Nevertheless, the Mother finds it convenient to argue that the remand process somehow "corrected" the reply-only error—see *Response Brief*, pg 32: "The Father was allowed an additional three weeks ... to respond to all previous submissions of the Mother on attorney fees." Thus the Mother recognizes the prejudice to the Father of the Reply-only submission in her Motion for Fees. On the record, Judge Doerty directed Mother's counsel to "submit the fee declaration and that motion to Counsel . . . and then he can reply to it." RP 107. He recognized the importance of due process—the opportunity to reply to the Mother's request for fees and supporting records. The Mother's failure to submit the fee Declaration with her motion defied the court's own directive and deprived the Father of the opportunity to reply. Yet the court ignored his objection when this did not occur. The appropriate remedy was to strike the reply-only submissions.

There is nothing in the findings on remand to indicate that Judge Doerty reviewed or considered any information beyond the initial trial record—nor was it authorized by the Court of Appeals to expand the record. The Father’s analysis on remand identified some flaws in the court’s earlier decision. The Father was not given “extraordinary opportunity to address the reasonableness of the Mother’s attorney fee submissions at trial.” (*Response Brief*, pg 33.) There were no attorney fee submissions at trial. There was zero opportunity in the post-trial Motion for Fees because those were submitted in reply only. And the Court of Appeals did not authorize a reopening of the trial court record on remand.

6. **Reply-only Affidavit of Fees remains improperly considered.**

See Appellant’s Brief, 44-46. It was prejudicial error for the court to rely on the fee declaration produced for the first time in reply. If Judge Doerty relied upon this evidence, he did so in violation of his own directive that the Father was to have notice and opportunity to be heard. This “sandbagging” tactic on the part of the Mother cannot stand—the amount requested in her Motion was not supported by any evidence, leaving the Father to argue against a figure “pulled out of thin air.” Without remedying this breach in process, there is no proper basis for the amount of fees—if the

court relied only on the materials properly submitted with the motion.

7. Court did not actively assess reasonableness of fees.

“Courts should not simply accept unquestioningly fee affidavits from counsel but must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as an afterthought of litigation.”

Berryman v. Metcalf.¹⁴ In ***Berryman***, as here, the court signed proposed findings of fact without making any changes except to fill in the blank with a multiplier. It simply found the hourly rate and hours billed to be reasonable.

In ***Mahler v Szucs***,¹⁵ the fee award was rejected when it was not possible to discern from the record whether the trial court thought services of multiple attorneys were reasonable, or considered if there were duplicative or unnecessary services. Rather than being conclusory, findings must show how the court resolved disputed issues of fact and the conclusions must explain the court’s analysis. ***Berryman***. Nothing of the sort appears in the court’s findings on remand. In ***Mayer v City of Seattle***,¹⁶ for example, claims of double-charging, wasted efforts, duplicative efforts and fees for work unrelated to the claim before the court were not addressed. That case

¹⁴ 312 P.3d 745 (2013)

¹⁵ 135 Wash.2d 398, 957 P.2d 632 (1998)

¹⁶ 102 Wash. App. 66, 10 P.3d 408 (2000), *review denied*, 142 Wash.2d 1029, 21 P.3d

was remanded for more thorough findings regarding challenged entries. The same complaints exist here.

In *Berryman*, the court affirmed that determining reasonable attorney fees begins with a calculation of the lodestar—the number of hours reasonably expended multiplied by a reasonable hourly rate. That’s the starting point. Then the court considers the size of the amount in dispute in relation to the fees requested. The court in *Scott Fetzer Co. v. Weeks*¹⁷ reduced a fee award of 481.49 hours to 70 hours where attorneys failed to exercise “billing judgment.” Similarly, fashioning a claim for over \$45,000 in fees for this less-than-a-day paternity and DVPO trial should fail just as it did in *Fetzer* (a three-and-a-half day trial) and *Berryman*.

The amount of time an attorney actually spends is relevant, but not dispositive. *Nordstrom, Inc. v. Tampourlos*.¹⁸ The hours spent on a case are to be discounted for time spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. *Bowers v. Transamerica Title Ins. Co.*¹⁹ Duplicated efforts include overstaffing. In *Berryman*, as here, multiple

1150 (2001).

¹⁷ 122 Wash.2d 141, 859 P.2d 1210 (1993).

¹⁸ 107 Wash.2d 735, 733 P.2d 208 (1987)

¹⁹ 100 Wash.2d 581, 675 P.2d 193 (1983)

attorneys billed for reviewing the same documents and engaging in the same preparation. The court abused its discretion by failing to address this overbilling. The trial court must make an *independent* judgment about how much time is spent for a particular task, keeping in mind that the attorney's reasonable hourly rate encompasses the attorney's efficiency or "ability to produce results in the minimum time." *Berryman*. In *Berryman* the court suggested using a table that lists for each attorney the hours reasonably performed for particular tasks and the rate charged, which may vary with the type of work—to cut through confusion created by block billing.

Where, as here, billing appears grossly inflated, and it does not appear the trial court gave any meaningful review to the concerns raised, the trial court's decision to include all hours claimed does not rest on tenable ground.

8. Fees for other proceedings should not have been included.

Various billing anomalies are identified in Appellant's brief, pg 45. One, in particular, is acknowledged for the first time in the Response Brief (pg 25)—that the Mother included fees billed for attorney work done related to separate criminal cases and the Mother's litigation in Nevada (where that court had the authority to award attorney's fees if and when appropriate).

The Mother said nothing about this supplemental representation in her Motion for Fees, nor did she explain those charges to Judge Doerty on remand. There is no justification or explanation about how and why representing the Mother in different cases should have been billed to the Father in this case! To allow her to have her attorney bill the Father in the *paternity* case for fees incurred in a criminal case where she is a witness, not a party, is unwarranted. Whether segregation is appropriate or not, it doesn't follow that the Mother's attorney can simply bill for "anything and everything" and not have those billing records scrutinized to make sure all charges pertain to the case at hand. *See* analysis above.

9. **No evidence to support finding that "entire file" was reviewed**

There is no evidence that Judge Doerty had access to or reviewed the "entire file" in this matter—he is retired and served as a *pro tem*. If he did, he expanded the trial record (including records that he was not asked to take judicial notice of at trial). The Mother did not provide a copy of the "entire file" to Father's counsel nor assert that it was submitted in working copies.

10. **"Entire file" does not support finding of intransigence.**

At each juncture prior to trial, the court could have awarded attorney fees on the basis of intransigence. It did not. It is not credible that the court

would retroactively re-write that history and consider the Father intransigent on issues as complicated as UCCJEA matters when both states agreed with the Father that Nevada was the child's home state. Washington did not assert proper jurisdiction until Nevada decided to *relinquish* its home state jurisdiction. All litigation to the point of relinquishment was *not* intransigent—but was required to comply with the UCCJEA as to the transfer of jurisdiction from the child's home state. That occurred in April 2010. Lumping “all” litigation expenses together, finding intransigence that “permeated the entire proceedings” is not justified. The court may believe the Father somehow acted badly toward the Mother, but it does not follow that his efforts to have a fair legal proceeding in a proper jurisdiction are intransigent. *If* the court finds that any fee award is justified, it should segregate.

11. **Changes in counsel did not create delays.**

See Brief, pgs 25-26. Nothing in the Mother's Response Brief rebuts this information by citation to evidence to support her claim.

12. **Intimidation/harassment findings not supported by the record.**

Alleged violations of a DVPO are criminal matters that were not before this court. (See above analysis re separate matters.) Nor was any

admissible evidence introduced in this proceeding to support a finding of “intimidation”—the Mother never said she was intimidated; or “harassment”—the Mother never said she felt harassed. There was no testimony that the Mother—or the court—felt “manipulated” by the father in any way. She alleged she printed and compiled various messages (no evidence produced to show date, source or content) she alleged were from the Father. RP 26. She testified she “assumed” a Facebook message was from the Father, rather than knowing for sure. RP 45. The Mother testified that she felt “safe” from the Father’s “violence and anger.” RP 36. When asked by the court, she said: “it’s been over a year and I haven’t had any contact with him or his family.” RP 41²⁰ Elsewhere she testified to having police patrol regularly—but she never testified to seeing the Father in the vicinity or receiving any communication from him during the course of this case. How could he “intimidate, harass or manipulate” her? Defending himself against unsupported allegations is his legal right, but there is no abuse of litigation on this record—“refusal to litigate” is what she complains of. It can’t be both. These conclusory, accusatory terms drafted by Mother’s

²⁰ The transcript provided erroneously identifies the speaker at lines 7 to 13 as “Mr. Hawkins.” It is clear from context and content that it is the Mother speaking, not the Father’s attorney.

counsel in her proposed Findings were simply signed off by the court, but have no factual basis in the record.

13. **Father maintains he never consented to jurisdiction.**

While of minimal import to the issues in this appeal, the Father, for consistency, identified *all* errors in the second set of Findings, including that he consented to jurisdiction. The court previously found that jurisdiction was appropriate because Nevada relinquished jurisdiction. The Father has at all times, however, opposed personal jurisdiction over himself in this matter and continues to do so. The Mother concedes that he never “appeared” in proceedings—and argues that as intransigence against him. She cannot at the same time gain from arguing that he did in fact “appear.” His only appearances were through counsel. The Mother’s arguments contradict: He appeared. He didn’t appear. He litigated. He refused to litigate. She does not explain her assertion that the Father failed to litigate. He filed a timely Response to the Mother’s Petition. CP 31-33. He filed Declarations in response to the Mother’s DVPO Petition. Judge Doerty said: “Whether he’s acting in good faith to oppose the motion I can’t say.” RP 103. He participated in the UCCJEA proceedings in both WA and NV. He conducted a deposition (she did not). He answered Interrogatories. There is

no “refusal to litigate” nor excessive litigation.

14. **Father objected to Judge Doerty as *pro tem*.**

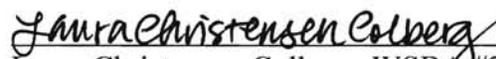
Mother’s authority (criminal cases involving retrials or mistrials) does not help this court define what a “pending case” is for purposes of dispensing with the required consent of parties for a judge *pro tem* to decide their case. The Father was given no opportunity to object before Judge Fleck’s Order assigning the case to him. A procedural inquiry (timing of submissions) is not asking for a decision that involves a discretionary ruling on the merits. He did object.

IV. CONCLUSION

There is no factual, evidentiary basis for a finding of intransigence against the Father in this case and no justification for the amount of fees awarded. His litigation was in all respects reasonable. The fee judgment should be vacated again, and the Father awarded fees on appeal for all the reasons set for in his opening brief, whether repeated herein or not.

RESPECTFULLY SUBMITTED this 09 day of April, 2014.

MICHAEL W. BUGNI & ASSOCIATES



Laura Christensen Colberg, WSBA #26434
Attorney for Appellant/Gibson

CERTIFICATE OF SERVICE

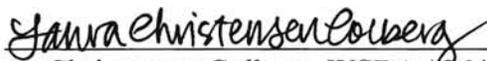
I hereby certify that on the 09 day of April, 2014, the original of the foregoing document was transmitted for filing to the Court of Appeals, Division I, by US Mail:

Via US Mail:

Clerk of Court
Court of Appeals, Division I
600 University Street
Seattle, WA 98101

Attorneys for Petitioner via US Mail:

Mark Rising
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154



Laura Christensen Colberg, WSBA #26434