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No. 70420-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

THERESA IBRAHIM GOHAR,

Appellant,

v.

SAMIR GOHAR,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY
THE HONORABLE JOSEPH P. WILSON

BRIEF OF RESPONDENT

SMITH GOODFRIEND, P.S.

By: Valerie A. Villacin
WSBA No. 34515

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

SHIPMAN UBERTI, P.S.

By: Katherine E. Peterson
WSBA No. 44851

3631 Colby Avenue
Everett, WA 98201
(425) 258-6846

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATUTES

RULES AND REGULATIONS

I. INTRODUCTION

In this appeal, the mother challenges the trial court's decision holding her in contempt of the parties' parenting plan that provided the mother with only supervised visitation with the children and prohibited her from discussing the court case with them. Substantial evidence supports the trial court's finding that the mother "went to the children's bus stops on more than one occasion and spoke with them about the litigation" after "unreasonably refus[ing] arrangements for supervised visits." (CP 8) Clearly, the trial court found the mother's denials not credible, particularly in light of her former counsel's concession that the mother did in fact visit the children at their bus stop.

The trial court properly found that the mother was served with the motion for contempt, because her former trial counsel signed an acceptance of service in exchange for a continuance of the hearing and the mother had actual knowledge of the motion. The trial court also properly awarded the father attorney fees for having to bring the motion for contempt, as warranted under RCW 26.09.160(1) and RCW 7.21.030(3). This court should affirm the trial court's decision and award attorney fees to the father on appeal.

II. RESTATEMENT OF FACTS

A. The parenting plan designated the father as primary residential parent of the parties' two children, ordered supervised visitation for the mother, and restrained her from discussing the court case with the children.

Samir Gohar and Theresa Gohar were married on January 10, 1999 and separated on September 20, 2011. (CP 569) On February 20, 2012, Samir filed a Petition for Legal Separation that was later converted to a Petition for Dissolution. (CP 581) The parties have two children: a daughter, CG, and a son, MG, who were ages 11 and 7 at the time of the dissolution trial in November 2012. (CP 581)

While the petition for dissolution was pending, the children resided primarily with the mother. (CP 569) The children resided with the father for two mid-week visits each week and alternating weekends. (CP 569)

1. The GAL in the dissolution case reported that the mother engaged in the abusive use of conflict by involving the children in the court proceeding, which the GAL found unconscionable.

The court appointed Martha Wakenshaw as Guardian Ad Litem (GAL) to investigate parenting issues, represent the children's best interests, and make recommendations based on her

investigation. (CP 568) On October 1, 2012, the GAL issued her report recommending that the children reside primarily with the father. The GAL expressed concern that the mother had been involving the children in the court proceedings. The daughter reported: "my mom tells me most of everything about court – she doesn't want me clueless." (CP 576) The daughter also stated: "I saw the court papers – mom let me. Dad said my mom is crazy and paranoid. I was mad at dad. Mom's not crazy. She sometimes has a sad depression from being in the court thing." (CP 577) The daughter, whom the GAL described as "depressed and anxious" and "obviously distressed by the court case," expressed concern that she and her brother would end up in foster care if the GAL thought both parents were "crazy." (CP 576-77) The son, who also admitted that the mother discussed the court case with him, stated: "my mom's judge is really mean." (CP 576) The GAL believed that the mother's decision to involve the children was "unconscionable," and that the children were "victims of an extreme abusive use of conflict on the part of the mother." (CP 577-78)

The GAL reported that the mother "presents as extremely suspicious, guarded, and depressed." (CP 578) This was consistent with the father's assertion that the mother is "paranoid, anxious,

depressed, and delusional." (CP 570) The father reported that the mother is "mistrustful and paranoid and changes medical professionals and attorneys frequently because she is suspicious of them." (CP 570) In fact, by the time of the dissolution trial, the mother was on her fourth attorney. (*See* CP 217, 584)

2. A superior court commissioner dismissed the mother's request for a protection order when the mother made false abuse allegations against the father shortly after the GAL recommended the father as primary residential parent.

Shortly after the GAL issued her report recommending that the children reside primarily with the father, the mother alleged for the first time that the father sexually abused their daughter, and filed a petition for a protection order. (CP 933-55) The mother filed this petition, despite the fact that the daughter had already denied "any abuse of any kind from her father or mother" when interviewed by the GAL. (CP 572) Further, the mother had never previously reported any physical or sexual abuse by the father. In fact, her only concern with regard to the father's parenting was her claim that he "neglects [the children's] feelings and doesn't understand them." (CP 571, 573)

The parties appeared before Snohomish County Commissioner Susan C. Gaer on October 30, 2012, who expressed concern about the timing of the allegation, as it came immediately after the mother learned she was at risk of losing primary care of the children. (CP 949) The commissioner found that there was not "sufficient evidence of the domestic violence by a preponderance of the evidence," and dismissed the petition for protection order "without prejudice if more clear-cut information were to arise." (CP 950)

3. After a 3-day trial, the trial court found the mother not credible, affirmed the dismissal of the protection order, designated the father as primary residential parent, and ordered supervised visitation for the mother.

The parties appeared before Snohomish County Superior Court Judge Richard Okrent for a 3-day dissolution trial, commencing on November 5, 2012. The trial court also rejected the mother's last-minute allegations that the father sexually abused the parties' daughter. (*See* CP 593-97) The trial court found the mother "falsely accuse[d] the father of sexual abuse" and was "not credible." (CP 596-97) The trial court found that the mother "fak[ed]" her testimony and used "language of deception." (CP 593)

The trial court found the GAL credible and adopted her recommendation that the father be designated the primary residential parent. (CP 590, 597) The trial court expressed concern about the mother's over-involvement of the children in the dissolution proceeding, finding that the children "demonstrate too much knowledge about the case," and the mother was using the children as "pawns" to "gain advantage:"

> You don't talk to your children about the case. You don't let your family talk to the children about the case. You don't make the children your confidants because you're trying to use your children as pawns. You're trying to gain advantage. That's not how we do things if we care about our children. Both children have talked to the guardian ad litem about the court case. They demonstrate too much knowledge about the case. They demonstrate that since placed alone in their mother's home.

(CP 590) The trial court agreed with the guardian ad litem that the mother's involvement of the children in the court proceedings was "unconscionable," and found it was "classic abusive use of conflict." (CP 591)

The trial court entered its parenting plan on December 3, 2012. (CP 596) The trial court limited the mother's residential time with the children after finding that the mother's "involvement or

conduct may have an adverse effect on the children's best interests" based on the following RCW 26.09.191 factors:

> Neglect or substantial non-performance of parenting functions
>
> A long-term emotional or physical impairment, which interferes with the performance of parenting functions
>
> The abusive use of conflict by the parent, which creates the danger of serious damage to the children's psychological development.

(CP 957)

The trial court ordered the mother to undergo a psychiatric evaluation within 30 days of November 8, 2012. (CP 957) The trial court ordered that until the mother completes any treatment recommendations arising from the evaluation, and pending further order of the court, the mother shall have supervised visitation with the children twice a week for four hours each visit. (CP 957) The trial court ruled that the father would choose the supervisor. (CP 958) The trial court restrained the mother from discussing the court case or the father with the children during her visitation with the children. (CP 959) The trial court ordered that if it appears that the mother is attempting to manipulate the children during her

visitation, "the visitations will be suspended and they cannot be renewed except on the family law motions calendar." (CP 959)

B. The mother violated the parenting plan by surreptitiously visiting the children unsupervised at their school bus stops and discussing the court case with them.

1. The mother refused to reach any agreements to commence her supervised visitation. Instead, she visited the children at their school bus stops.

Under the parenting plan, the mother was ordered to undergo a psychiatric evaluation by December 8, 2012 as a first step before she could pursue unsupervised visitation. (CP 957) Even though he was not required to do so, the father offered, and in fact paid, $2,500 to start the evaluation. (CP 296) Nevertheless, the mother dragged her feet and did not meet with the evaluator until February 2013. (CP 296)

Meanwhile, the mother had the ability to pursue supervised visitation with the children, but made no effort to do so until nearly two months after the children were transferred to the father's primary care on November 8, 2012. (*See* CP 561) The father offered the name of three proposed supervisors, who were friends that offered to supervise for free. (CP 221, 296, 561) But the mother, through her counsel (her fifth attorney), refused, stating

the mother preferred professional supervisors. (CP 561; *see also* CP 565)

Nearly another month passed before the mother did anything more to resume contact with the children. (*See* CP 562, 565) By then, the three supervisors that the father had previously offered no longer wanted to supervise the visitation. (CP 562) The father suggested using a professional supervisor and offered to "split[ ] the cost." (CP 562) The mother did not accept the father's offer. (CP 562) Instead, the father discovered that the mother had been surreptitiously visiting the children unsupervised at their school bus stops and telling them that she was "fighting" for them. (CP 562, 566)

On February 27, 2013, the father's counsel warned the mother's counsel that the father would file for contempt for this violation of the parenting plan and asked that he advise the mother of the "appropriate steps for her to see the children." (CP 566) In response, the mother's counsel apparently acknowledged that the mother had visited the children at their bus stop, but blamed the father for not allowing the mother visitation:

> I've spoken to Theresa and the largest issue is that Samir isn't allowing her to see the children – at all.

(CP 565)

Despite the father's warning (as well as his attempts to have the mother obtain supervised visitation), both children reported that the mother had again visited them at their bus stops on March 18 and 19. (CP 562) The mother had apparently completed her psychiatric evaluation and told the son that "the [doctor] said she is not sick anymore and that she will be able to see him again but her lawyers says she has to wait two weeks." (CP 562) The daughter also reported that the mother told her she was no longer "sick," and the daughter angrily demanded that the father give her the "details regarding 'court.'" (CP 562)

2. The father asked for an order finding the mother in contempt of the parenting plan.

On March 20, 2013, the father filed a motion for contempt of the parenting plan and obtained an order to show cause requiring the mother to appear at court on April 10, 2013. (CP 603, 605, 612) Counsel for the parents agreed to continue the hearing to April 25, 2013 in exchange for the mother's counsel accepting service of the motion on her behalf. (CP 98) The mother's counsel accepted service on April 8, 2013, and filed his Acceptance of Service on April

10, 2013. (CP 558) The next day, he withdrew as mother's counsel of record.[1] (CP 555-56)

The mother appeared at the contempt hearing on April 25, 2013 before Snohomish County Superior Court Commissioner Arden J. Bedle. (4/25 RP 3) The commissioner suggested that the mother seek court-appointed counsel in light of the contempt charge against her, but she refused. (4/25 RP 3-4) Despite the mother's expressed desire to represent herself, the commissioner repeated his concern that the mother was not competent to represent herself. (4/25 RP 4, 8) The commissioner continued the hearing to May 7, 2013, in part so that the mother could consult with the public defender's office to determine whether she qualified for court-appointed counsel and because the mother failed to timely file her response to the motion for contempt. (4/25 RP 7-9)

In its order continuing the hearing, the commissioner directed the mother to appear at the Office of Public Defense to be considered for court-appointed counsel. (CP 4) At the mother's request, this order was revised because she "so adamant that she did not want an attorney," even after the court advised "her several

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[1] Apparently, the mother was "not happy" that her counsel agreed to accept service of the contempt motion on her behalf. (*See* CP 378)

times and several ways that she was entitled to and needed an attorney." (CP 5) Accordingly, the court ruled that the mother waived her right to court-appointed counsel and she could represent herself. (CP 5-6)

3. The trial court found the mother in contempt.

At the continued contempt hearing on May 7, 2013, the commissioner rejected the mother's claim that she was not personally served, finding that she was "properly served" as her "attorney who was serving in your behalf at that time accepted service." (5/7 RP 7-8, 17) The commissioner held the mother in contempt after finding that the "evidence supports the fact that she went to the children's bus stop, had unauthorized contact with them there, it was not supervised as was [ ] required." (5/7 RP 17) The commissioner found the mother "went to the children's bus stops on more than one occasion and spoke with them about the litigation." (CP 8) The commissioner also found that the mother had been "unreasonably refusing" the arrangements for supervised visitation that the father attempted to make. (5/7 RP 17; CP 8) The commissioner found that the mother had "not complied with the residential (visitation) provisions of the parenting plan and had the ability to comply with the parenting plan, and is currently unwilling

to comply. The noncompliance with the residential provisions is bad faith." (CP 8-9)

The commissioner ordered that the mother could purge the contempt by remaining no closer than 100 yards of the children's schools, bus stops, and home, and that the mother's visits will be professionally supervised at the mother's expense. (CP 9) Finally, the commissioner awarded the father attorney fees of $1,500. (CP 10)

On May 23, 2013, Snohomish County Superior Court Judge Joseph Wilson denied the mother's motion for revision. (CP 14) The trial court rejected additional materials that the mother sought to put before the court that had not been before the commissioner. (CP 16) The trial court found that the "service issues were waived by [the mother]'s attorney at the time" and that "personal service was not necessary." (CP 16) The trial court agreed with the commissioner that "there are sufficient facts to support the finding that the respondent had unsupervised contact with children at bus stop in violation of the parenting plan." (CP 16) The trial court also found that there are "sufficient facts to support the conclusion that the respondent wrongfully and intentionally thwarted her ability ot get a visit supervisor for her and her children." (CP 16) The trial

court declined to award any additional attorney fees to the father for the revision hearing. (CP 16)

The mother appeals. (CP 1)

III. ARGUMENT

A. Summary of argument.

The mother's challenge is premised on three misguided and baseless claims: 1) that the trial court was required to believe her denial that she did not contact the children at their bus stops despite other evidence showing otherwise, including acknowledgement of her former counsel that she had in fact contacted the children without authorization; 2) that personal service of the order to show cause for contempt was required even though her counsel at the time accepted service on her behalf, and there is no dispute that she had actual notice of the contempt hearing; and 3) that attorney fees awarded under RCW 26.09.160 and RCW 7.21.030 for violating the parenting plan is the equivalent of a "fine" under RCW 44.16.150, which governs contempt in State government proceedings. (*See* App. Br. 1-2, Assignments of Errors) The trial court's decision was well within its broad discretion, and as set forth below is supported by both the facts and law. This court should affirm.

B. The trial court properly found the mother in contempt because she had unauthorized contact with the children and discussed the court case with them, both of which are prohibited under the parenting plan.

"An attempt by a parent [ ] to refuse to perform the 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. RCW 26.09.160(1); *Marriage of Rideout*, 150 Wn. 2d 337, 355, 77 P.3d 1174 (2003). "Whether contempt is warranted in a particular case is a matter within the sound discretion of the trial court; unless that discretion is abused, it should not be disturbed on appeal." *King v. DSHS*, 110 Wn.2d 793, 798, 756 P.2d 1303 (1988). This court reviews a trial court's factual findings for substantial evidence, and will not review credibility determinations on appeal. *Rideout,* 150 Wn.2d at 352; *see also Marriage of Davisson*, 131 Wn. App. 220, 226, ¶ 13, 126 P.3d 76, *rev. denied*, 158 Wn.2d 1004 (2006).

The mother complains that there was "no evidence" that she contacted the children at their school bus stops and refused to cooperate with arranging supervised visitation. (App. Br. 1) But the

father presented evidence of her contempt, including his declaration stating that both children reported being contacted at their bus stops by their mother, who told them that she was "fighting" for them, was no longer "sick," and would resume visitation with them in "two weeks." (CP 562) This evidence along with the acknowledgment by the mother's counsel that she had contacted the children, but did so only because she believed that the father was interfering with her ability to resume contact with the children, (CP 565-66) was the "substantial evidence" on which the trial court relied to support its finding of contempt.

Likewise, there is substantial evidence to support that the mother failed to reasonably cooperate to arrange supervised visitation. The mother refused to use the supervisors proposed by the father, resisted the location of the supervised visitation, and then refused to share in the cost of professional supervision. (*See* CP 221, 308, 311, 609)

It does not matter that the mother denied the allegations against her. "Evidence is substantial if it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise. So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it.

This is because credibility determinations are left to the trier of fact and are not subject to review." *Burrill v. Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993, 996 (2002), *rev. denied*, 149 Wn.2d 1007 (2003).

The trial court was entitled to rely on the evidence presented by the father to reach its decision in finding the mother in contempt, because the mother did not ask the court to strike any of the father's evidence in support of his motion. *See Westberg v. All-Purpose Structures Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175, 1178 (1997) ("pro se litigants are bound by the same rules of procedure and substantive law as attorneys"). Therefore, absent any indication in the record that appellant advanced a particular claim in any substantive fashion at trial, it cannot be considered on appeal. *Marriage of Studebaker*, 36 Wn. App. 815, 818, 677 P.2d 789 (1984); *see also* RAP 2.5(a); *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (declining to review issue, theory, argument, or claim of error not presented at the trial court level).

Finally, the trial court did not abuse its discretion by requiring the mother to stay away from the children's school, bus stop, and home, and require the mother to pay for professional supervision as a means to purge the contempt. (CP 9) RCW 7.21.030 provides that once the court finds a party in contempt, it

may enter an order "designed to ensure compliance with a prior order of the court." RCW 7.21.030(2)(c). In this case, the conditions to purge the contempt would ensure that the mother complied with the parenting plan that provided for only authorized supervised visitation with her and the children.

C. The father was not required to personally serve the mother with the order to show cause. Her counsel of record accepted service on her behalf and there is no dispute that she had actual notice of the contempt motion.

The trial court properly found that personal service on the mother of the order on show cause for contempt was not necessary. (CP 16) Although mother cites to "federal rule 466 and 467" to claim that a person accused of contempt "needs to be served personally," (App. Br. 1), there is nothing in Washington law that requires the same.[2] Instead, as our Supreme Court has stated, "in the context of contempt proceedings relating to alleged disobedience or defiance of a lawful judgment, decree, order, [ ] it is unnecessary that the one charged be personally served with a copy of the order. It is sufficient if the alleged contemnor has knowledge of the order and its legal effect." *State v. Ralph Williams' N.W.*

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[2] In any event, counsel for respondent could not find any "federal rule 466 or 467."

Chrysler Plymouth, Inc., 87 Wn.2d 327, 332, 553 P.2d 442 (1976) (*citing In re Koome,* 82 Wn.2d 816, 821, 514 P.2d 520 (1973)).

The trial court also properly found that any inadequacy of service was "waived by the [mother]'s attorney" at the time he accepted service in exchange for a continuance of the hearing. (CP 16) An attorney is "impliedly authorized to stipulate to and to waive procedural matters" *State v. Varnell*, 137 Wn. App. 925, 932, 155 P.3d 971 (2007), including in this case, service of an order to show cause. The mother does not, and cannot, claim that she was in any way prejudiced by her attorney accepting service, when she had actual knowledge of the motion, and appeared at the hearing and responded to the motion.

D. The trial court properly awarded attorney fees to the father for having to file the motion for contempt.

The trial court properly awarded attorney fees of $1,500 to the father after finding the mother in contempt of the parenting plan. (CP 10) The mother cites to RCW 44.16.150 for her claim that any "fine" for her contempt cannot exceed $1,000. (App. Br. 2) But RCW ch. 44.16 deals with State Government proceedings, the relevant statute here is RCW 26.09.160. RCW 26.09.160 provides that once the trial court determines that a parent is in contempt of

the parenting plan, it "shall order the parent to pay, to the moving party, all court costs and reasonable attorneys' fees incurred as a result of the noncompliance." RCW 26.09.160(2)(b)(ii); *see also* RCW 7.21.030 (3) (allowing for an award of attorney fees under the general contempt statute). There is no limit on the amount that can be awarded, except that it must be "reasonable."

While the mother complains that she does not have the funds to pay attorney fees, the statute gives no discretion to the trial court to deny attorney fees once it finds a parent in contempt. An award of attorney fees under RCW 26.09.160 is mandatory; after finding a party in contempt, the trial court must order that party to pay reasonable attorney fees and all court costs. *Marriage of Wolk,* 65 Wn. App. 356, 359, 828 P.2d 634 (1992).

E. This court should award attorney fees to the father for having to respond to this appeal.

Respondent asks this court to award attorney fees to him under RCW 26.09.160(1), RCW 7.21.030(3), and RAP 18.1, for having to respond to this appeal and defend the trial court's finding of contempt. A party successfully defending an appeal of a contempt order is entitled to attorney fees on appeal. *Marriage of Rideout*, 150 Wn.2d at 359; *R.A. Hanson Co., Inc. v. Magnuson*, 79

Wn. App. 497, 503, 903 P.2d 496 (1995), *rev. denied*, 129 Wn.2d 1010 (1996).

IV. CONCLUSION

The trial court did not abuse its discretion in finding the mother in contempt of the parenting plan. This court should affirm, and award the father his attorney fees in responding to this appeal.

Dated this 21st day of January, 2014.

SMITH GOODFRIEND, P.S.

By: _____
Valerie A. Villacin
WSBA No. 34515

SHIPMAN UBERTI, P.S.

By: _____
Katherine E. Peterson
WSBA No. 44851

Attorneys for Respondent

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 21, 2014, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile _X_ Messenger ___ U.S. Mail ___ E-Mail
Katherine E. Peterson Shipman Uberti, P.S. 3631 Colby Avenue Everett, WA 98201	___ Facsimile ___ Messenger ___ U.S. Mail _X_ E-Mail
Theresa Ibrahim Gohar 2515 Colby Avenue, Apt. #503 Everett, WA 98201	___ Facsimile ___ Messenger _X_ U.S. Mail _X_ E-Mail

DATED at Seattle, Washington this 21st day of January, 2014.

V. Vigoren

Victoria K. Vigoren