45722-9-II

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

DANIEL KULMAN,

Respondent,

v.

ANNE GIROUX,

Appellant.

BRIEF OF RESPONDENT

DANIEL N. COOK
Attorney for Respondents
Faubion Reeder Fraley & Cook PS
5920 100th St SW Ste 25
Lakewood, WA, 98499-2751

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. INTRODUCTION

The trial court found that ANNE GIROUX ("ANNE") willfully and intentionally violated multiple court orders regarding parenting and visitation of her children with DANIEL KULMAN ("DANIEL"). Anne was found in contempt and incarceration was ordered but immediately suspended so that Anne was not immediately confined in jail. The court order finding contempt contained a purge condition whereby Anne could avoid actually being confined in jail. About two weeks after the finding of contempt and after two review hearings, the court incarcerated Anne for one day because she had not utilized the purge condition and her willful and intentional violation of the court orders continued.

Anne Giroux appeals arguing her incarceration was punitive, rather than coercive, because she could not comply with the purge condition of the contempt order in jail. Her position is frivolous. The order of incarceration was absolutely coercive in all respects and was well within the court's discretion.

Daniel should be awarded his attorney's fees on appeal because there are no legal questions upon which reasonable minds could possibly differ. Even if the court finds Anne presented debatable issues, the trial court awarded attorney's fees to Daniel as authorized by statute in cases of contempt. Daniel's attorney fees incurred on appeal of the contempt order should also be awarded.

II. STATEMENT OF THE CASE

1. Daniel Kulman and Anne Giroux entered an agreed parenting plan in Pierce County on January 6, 2009. The parenting plan provided for Anne Giroux to have primary placement of their children. Daniel Kulman had supervised visitation until he completed a DV evaluation and was gradually re-introduced to the children in a supervised visitation setting. CP 3-7.
2. The State of Washington notified Daniel Kulman of intent to file a dependency if the children continued to reside with Anne Giroux. Daniel Kulman filed a Petition for Modification of the Parenting Plan because he had completed a DV evaluation and alleging supervised visitation was no longer necessary and to avoid dependency. CP 3-7, 135.
3. The court in this action did not immediately place the children with Daniel Kulman because of the supervised visitation requirement. After Daniel Kulman's request for emergency custody was denied the State filed a Petition for Dependency. CP 3-7, 135.
4. The Petition for Dependency included reports by objective and professional third parties, including medical doctors and hospital social workers, about possible concerns Anne Giroux suffered

from "Pediatric Falsification" a/k/a Munchausen by Proxy Syndrome. CP 3-7, 135.

5. This action was suspended pending resolution of the Dependency actions involving the same parties and children. Eventually the child (now almost 17 years old) was placed in control of his own medication without interference by the mother and the Dependency action was dismissed. This action was re-activated upon dismissal of the Dependency. CP 135.
6. At a hearing on February 25, 2013, Annie Giroux and Daniel Kulman were both represented by counsel. On February 25, 2013, a Superior Court Commissioner Diana Kiesel found there was adequate cause to proceed with the modification of the parenting plan and appointed a Guardian Ad Litem. Anne Giroux did not seek revision of the Commissioner's finding of adequate cause or appointment of a Guardian Ad Litem. Trial was set for July 30, 2013. CP 111
7. After investigation by the Guardian Ad Litem a hearing was held on March 27, 2013. At the March 27, 2013, hearing both Anne Giroux and Daniel Kulman were represented by counsel. The Guardian Ad Litem appeared and testified at the hearing on March 27, 2013. At the March 27, 2013, hearing the Court

(Commissioner Diana Kiesel) entered an order which required as follows:

a. Children to be enrolled in counseling with a specific counselor.

b. Visitation with Daniel and the older child as recommended by the GAL.

c. Daniel to obtain an updated DV assessment.

d. Anne to obtain a mental health assessment which was available free or, if not available, Anne was authorized to bring a motion for instructions.

CP 10 – 11.

8. Anne Giroux timely moved to revise the Commissioner's March 27, 2013, order. CP 12 -14. Anne Giroux's first attorney withdrew after filing the motion for revision. Anne appeared Pro Se at the hearing on her motion for revision. The trial court, Judge Elizabeth Martin at the time, declined to revise the commissioner's ruling, except to provide that the children's counselor would be chosen by the Guardian Ad Litem based upon availability and insurance considerations. CP 15.

9. Anne Giroux did not comply with any aspect of the Court's orders. CP 135 – 136, CP 265 – 271.

10. On May 9, 2013, Anne Giroux filed a motion to continue the trial date. CP 106 – 112. A hearing was held on May 31, 2013, where Judge Elizabeth Martin declined to rule on Anne Giroux's motion to continue trial but affirmed the requirement for the mother to obtain a mental health assessment and engage the children in counseling. The May 31, 2013, order specifically provided the name and addresses of three acceptable counselors with whom Anne Giroux could enroll the children. Judge Martin required the mother to make a report[1] regarding progress in getting the children counseling and getting her own mental health assessment by June 12, 2013. Judge Martin scheduled a hearing for June 14, 2013, where Anne Giroux was to appear to make a decision regarding the motion to continue trial based upon Anne Giroux's progress in obtaining a mental health assessment and starting the children in counseling. CP 295 – 301. No hearing was conducted on June 14 2013, because Anne Giroux appeared and requested a continuance. CP 136.

11. Judge Martin recused herself on June 19, 2013. CP 136.

[1] Daniel Kulman was also ordered to report on his progress obtaining an updated DV assessment with collateral contact with the GAL and he did. The updated DV assessment was with the court on July 15, 2013. No further treatment was recommended.

12. The case was re-assigned several weeks after Judge Martin's recusal to Judge Brian Tollefson. The hearing to review mother's progress and compliance with the order for counseling and mental health assessment and mother's motion to continue trial date was rescheduled to July 1, 2013. On June 28, 2013, (the last business day before the hearing on motion to continue trial) Anne Giroux filed an affidavit of prejudice against Judge Tollefson. CP 135-136, 302 – 304.
13. Based upon the affidavit of prejudice filed by Anne Giroux the case was reassigned again this time to Judge James Orlando. Several weeks passed before a hearing could be set. The new trial department was on criminal panel and cannot schedule any civil trial in the year 2013. The trial had to be rescheduled based upon the new trial judge's unavailability until January 2014. CP 135-136, 305 - 307. The trial was continued based upon Anne Giroux's affidavit of prejudice; however, the hearing Judge Martin had ordered to review Anne Giroux's compliance with the court-ordered mental health assessment and counseling for the children prior to continuing the trial did not occur. CP 135-136.
14. After the July 2013 trial date was rescheduled to January 2014 the father filed a motion for contempt/judgment based upon the

mother's failure to obtain the mental health assessment or to enroll the children in the court ordered counseling. A hearing was scheduled for August 15, 2014. CP 133 – 140.

15. On August 15, 2014, Anne Giroux appeared and requested a continuance to obtain counsel. The court (Commissioner Diana Kiesel) granted a continuance to August 22, 2014. Anne Giroux retained private counsel at her own expense. The August 22, 2014, hearing was rescheduled to accommodate Anne Giroux's attorney's schedule. The new hearing date was September 4, 2014. CP 319.
16. Anne Giroux filed a declaration prepared with assistance of her attorney on August 28, 2014. Her attorney advised her to enroll the children in counseling. Anne Giroux stated in her declaration she would not enroll the children with a separate counselor for purposes of working toward reunification with father even though that is what the court ordered. CP 308 - 319
17. The hearing September 4, 2013, hearing was continued by agreement because Anne Giroux's attorney signed an order, presumable with mother's approval, providing the mother would, in-fact, take the children to one of two counselors within 7 days. Daniel Kulman's motion for contempt was reserved pending

review on September 18, 2013, to see if the mother would in fact take the children to one of two counselors as indicated in the agreed order of September 4, 2013. CP 319.

18. On September 16, 2013, Anne Giroux's privately retained attorney withdrew.

19. On September 19, 2013, a review hearing was held. Daniel Kulman asked the court to find Anne Giroux had waived her right to counsel at the contempt hearing by her actions. The court (Commissioner Diana Kiesel) denied that request. On September 19, 2013, the court (Commissioner Diana Kiesel) continued the contempt hearing to October 9, 2013, and ordered Anne Giroux to apply for court-appointed counsel. CP 320 - 322.

20. On September 28, 2013, Kathryn Price, with the Department of Assigned Counsel, appeared on behalf of Anne Giroux to represent her in the contempt proceedings. The October 9, 2013, hearing was continued to November 12, 2013.

21. On November 8, 2013, Anne Giroux filed a declaration responding to the allegation of contempt prepared with assistance of her new attorney Kathryn Price. CP 253 – 261. On November 12, 2013, the contempt hearing was continued to November 21, 2013.

22. On November 21, 2013, the court (Commissioner Diana Kiesel) found Anne Giroux in contempt. The court found that she willfully and intentionally violated the court order to obtain a mental health assessment for herself and enroll the children in counseling. The court ordered that Anne Giroux would be incarcerated for an indeterminate jail sentence, but simultaneously suspended that incarceration specifically to allow Anne Giroux until December 4, 2013, to purge her contempt. The November 21, 2013, contempt order provided Anne Giroux could purge contempt by scheduling her mental health assessment and enrolling the children in counseling by December 4, 2013. A review hearing was set for December 5, 2013. CP 265 - 271.

23. On December 5, 2013, the court (Commissioner Diana Kiesel) entered an order finding that contempt had not been purged and Anne Giroux was still unwilling enroll the children in counseling. The December 5, 2013, set a second review hearing for December 10, 2013, and specifically stated the mother would be incarcerated if she did not enroll the children in counseling with one of five counselors specifically enumerated in the order. CP 272 - 274. RP for December 5, 2013, at page 5-6.

24. On December 10, 2013, a review hearing was held. The court (Commissioner Diana Kiesel) ordered that Anne Giroux actually be incarcerated for one day. The court set a review hearing for December 11, 2013. CP 265 - 271. RP for December 10, 2013, at page 13-14.

25. On December 11, 2013, a review hearing was held. At the hearing the children's Guardian Ad Litem appeared by telephone and a visit for the Guardian Ad Litem to interview the children was scheduled with Anne Giroux present in court for the scheduling. Anne Giroux was released from incarceration on condition that she comply with the court's order to allow the children's Guardian Ad Litem to visit with the children on December 16, 2013, at 1:00 p.m. RP for December 11, 2013, at page 9.

26. Anne Giroux appealed the finding of contempt on December 19, 2013. CP 275 – 282.

III. SUMMARY OF ARGUMENT

The imposition of an indeterminate jail sentence was coercive and within the court's discretion because Anne Giroux always had the opportunity to purge her contempt. The Court found Anne Giroux in contempt and found that incarceration was an appropriate sanction, but did not immediately confine her. The Court suspended the incarceration in the

original order of contempt and provided Anne Giroux an opportunity, free from actual confinement, to purge the contempt over the course of two weeks and two review hearings. Anne Giroux voluntarily choose to continue willfully and intentionally violating the court order after the finding of contempt and eventually was confined for one night in jail after the second review hearing. But the incarceration was absolutely coercive because it was an attempt by the Court to compel compliance with the court order Anne Giroux was continuing to intentionally violate.

The incarceration was only ordered after many opportunities for compliance had been provided. The incarceration was only ordered after Anne Giroux had delayed and manipulated the judicial process to avoid compliance with the order for months. The confinement was reviewed the very next day after Contemnor was confined in jail and the Court released Contemnor giving her another opportunity to purge the contempt.

Under these circumstances the incarceration was absolutely coercive in nature and was an appropriate exercise of the court's discretion.

IV. ARGUMENT

A. Anne Giroux Did Not Assign Error to the Underlying Facts Supporting The Court's Finding of Contempt

Issues to which an appellant does not assign error are treated as verities on appeal. *Francis v. Washington State Dept. of Corrections* 178 Wash.App. 42, 52, 313 P.3d 457, 462 (Div. 2, 2013); *Davis v. Dep't of*

Labor & Indus., 94 Wash.2d 119, 123, 615 P.2d 1279 (1980). Here, Anne Giroux assigns error only to the trial court's order of incarceration. Anne Giroux argues that while she was incarcerated she could not comply with the court's order and this "transformed the imposition of jail time into a punitive, rather than coercive, sanction." See, *Appellant's Opening Brief*, page 1-2. Anne Giroux did not assign error to the underlying findings. Specifically, Anne Giroux did not assign error to the following:

> The finding that Anne Giroux intentionally failed to comply with lawful orders of the court. CP 266 (Par. 2.1).
>
> The finding that the order(s) Anne Giroux violated related to parenting plans, i.e., custody and visitation. CP 266 (Par. 2.2).
>
> The finding that the violation of the order(s) consisted of Anne Giroux's failure to obtain a mental health assessment of herself and her failure to engage the children in counseling with specifically designated providers. CP 266-267 (Par. 2.3).
>
> The finding that Anne Giroux **had the past ability** to comply with the order by obtaining a mental health assessment of herself and by engaging the children in counseling with specifically designated providers. CP 267 (Par. 2.4).

> The finding that Anne Giroux **had the present** ability to comply with the order by obtaining a mental health assessment of herself and by engaging the children in counseling with specifically designated providers. CP 267 (Par. 2.5).
>
> The finding that Anne Giroux **did not have the present willingness** to comply with the order. CP 267 (Par. 2.5).
>
> The Order that Anne Giroux was in contempt of court. CP 268 (Par. 3.1).

Anne Giroux did not assign error to any of findings or the order that she was in contempt. Anne Giroux's first, and primary, Assignment of Error is to the "purge" condition set by the court. See, *Appellant's Opening Brief*, page 1. The issue Anne Giroux presents on appeal is whether "the trial court's failure to construct a feasible purge condition require reversal of the contempt order". *Id* at page 2. Anne Giroux argues: "the contempt sanction was criminal in nature as it punished her for past failure" and "[b]ecause Ms. Giroux did not have the ability to comply with the purge condition, the sanction was punitive in nature, requiring compliance with due process protections as set forth below." *Id* at page 9 and 15. There is no argument or citation to the record that Anne Giroux could not comply with the order,[2] other than her argument

[2] In fact, Anne Giroux acknowledges and cites the court's finding that she had the prior ability to comply with the order. *Opening Brief of Appellant* at page 9.

incarceration created a condition making compliance impossible; therefore appellate review is limited to that issue. *Matter of Estate of Lint* 135 Wash.2d 518, 532, 957 P.2d 755, 762 (1998) ("If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.").

Hence, for purposes of this appeal it is accepted as true that Anne Giroux had the past and present ability to comply with the court's orders regarding parenting plan. It is accepted as true that Anne Giroux was in contempt for willful and intentional violation of the lawful court orders. The only issue[3] before the court is whether the purge condition ordered by the court transformed the contempt from "civil" to "punitive" contempt.

B. Standard of Review

A trial court's decision in a contempt proceeding is reviewed for an abuse of discretion. *In re Marriage of James,* 79 Wn.App. 436, 440, 903 P.2d 470 (1995); *Moreman v. Butcher,* 126 Wn.2d 36, 40, 891 P.2d 725

---

[3] Anne Giroux also assigns error to the trial court's "failure to provide Ms. Giroux with the panopaly of due process protections required in a criminal proceeding". *Opening Brief of Appellant* at pages 1-2. Daniel Kulman acknowledges at least one of the protections required in **criminal** contempt proceedings (i.e., a jury trial) were not afforded; however, this protection was not necessary because the contempt was coercive, or civil, in nature. Anne Giroux does not argue she was not provided the due process protections required in a **civil** contempt proceeding.

(1995). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *In re Marriage of Mathews,* 70 Wash.App. 116, 126, 853 P.2d 462, *review denied,* 122 Wash.2d 1021, 863 P.2d 1353 (1993); *In re Marriage of James*, 79 Wash.App. 436, 440, 903 P.2d 470, 472 (1995); *State v. Bible,* 77 Wn.App. 470, 471, 892 P.2d 116 (1995); *State v. Rundquist,* 79 Wn.App. 786, 793, 905 P.2d 922 (1995).

The appellate court does not weigh conflicting evidence or substitute judgment for the trial court. *In re Marriage of Rich,* 80 Wn.App. 252, 259, 907 P.2d 1234 (1996). A trial court's challenged factual findings regarding contempt will be upheld on appeal if they are supported by substantial evidence. *In re Marriage of Rideout,* 150 Wn.2d 337, 350, 77 P.3d 1174 (2003); *In re Marriage of Thomas*, 63 Wn.App. 658, 660, 821 P.2d 1227, 1228 (1991). Evidence is substantial if it persuades a fair-minded, rational person of the truth of the finding. *In re Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001).

C. Statutory Authority of Contempt and Incarceration as a Sanction

Contempt proceedings may be initiated under the domestic relations statute when a parent has, in bad faith, not complied with the order establishing residential provisions for the child. RCW 26.09.160(2)(b); *In re Marriage of James,* 79 Wn.App. 436, 440, 903 P.2d 470 (1995). The party moving for contempt has the burden of proving contempt by a preponderance of the evidence, by providing evidence that the offending party "acted in bad faith or

engaged in intentional misconduct or that prior sanctions have not secured compliance with the plan." *Id.* at 442. Here, Daniel Kulman did invoke RCW 26.09.160 as one basis of his request for a finding of contempt. CP at 134.

Statutory contempt can also be found under RCW 7.21. Daniel Kulman also invoked RCW 7.21 as a basis of his request for a finding of contempt. CP at 134.

Contempt of court under RCW 7.21 occurs when, among other things, a litigant intentionally disobeys "any lawful judgment, decree, order, or process of the court." RCW 7.21.010. Contempt under RCW 7.21 is characterized as either remedial or punitive.[4] The court imposes a remedial or civil sanction for "the purpose of coercing performance." RCW 7.21.010(3). The court imposes a punitive, or criminal, sanction "to punish a past contempt of court for the purpose of upholding the authority of the court." RCW 7.21.010(2).

Contempt is also characterized as direct and indirect. A direct contempt is an act observed or heard by the judge in the courtroom. Direct contempt is subject to summary punitive sanctions without the criminal due process protections. RCW 7.21.050. The contempt in this case was indirect and not punishable summarily.

An action to impose a punitive sanction for contempt may be initiated only by the filing of a complaint or information. RCW 7.21 .040(2)(a). As

---

[4] Formerly statutory contempt in Washington was characterized as civil or criminal. See *State v. Boatman,* 104 Wn.2d 44, 700 P .2d 1152 (1985). The contempt statutes were rewritten in 1989 to focus on the sanction imposed and the words 'remedial' and 'punitive' replaced 'civil' and 'criminal.' Chapter 7.21 RCW; Laws of 1989, ch. 373, sec.1.

argued extensively by Appellant Anne Giroux in her opening brief, a defendant in a punitive contempt action is entitled to heightened due process protections, including a trial by jury. *State v. John,* 69 Wn.App. 615, 849 P.2d 1268 (1993).

Both contempt statutes authorize incarceration as a sanction. RCW 26.09.160(2)(iii) authorizes imprisonment up to 180 days for contempt related to violating a parenting plan/custody order. RCW 7.21.030(2)(a) authorizes imprisonment for "so long as it serves a coercive purpose" without a specific limitation on the number of days which may be served for general civil contempt.

D. The Trial Court's Action Was Not An Abuse of Discretion Because the Incarceration Was Coercive

The sanctions for civil contempt are intended to be remedial. The purpose of the contempt statute is to coerce, not to punish. *State v. Horton,* 54 Wn.App. 837, 840, 776 P.2d 703, 704 (1989). The distinction between remedial and punitive purposes is essential and it is possible for an unsuccessful remedial sanction to eventually lose its remedial purpose:

> A coercive sanction is justified only on the theory that it will induce a specific act that the court has the right to coerce. Therefore, should it become clear that the civil sanction will not produce the desired result, the justification for the civil sanction disappears. Further incarceration can be justified as a punishment for disobeying the court's orders, but only after a criminal proceeding.
>
> *Interest of M.B.,* 101 Wn.App. 425, 440, 3 P.3d 780 (2000).

1. Anne Giroux's conduct in the entire proceeding was manipulative and obstructionist

To determine whether a contempt sanction is coercive or punitive the court must examine the substance of the proceeding and the character of the relief that the proceeding afforded. *King v. Department of Social and Health Services* 110 Wash.2d 793, 799, 756 P.2d 1303, 1307 (1988).

In this case, Anne Giroux's delay tactics and abuse of the court system was manifest. Anne Giroux filed a motion to recuse and remand to jurisdiction of US District Court. CP 210-230. Anne Giroux filed a motion to strike, vacate and sanctions pursuant to the Washington anti-SLAP statute. CP 45-92. Anne Giroux filed a motion to dismiss after adequate cause had already been established in this case. CP 113 – 128. Anne Giroux filed a motion to vacate the order requiring her to obtain a mental health assessment and counseling for the children after adequate cause had been established and after that order had already been upheld by the trial court on her motion for revision. CP 142 – 201. Anne Giroux filed a motion to dismiss Daniel Kulman's primary witnesses. CP 16-44. Anne Giroux filed a motion for Judge Orland to recuse himself after already executing an affidavit of prejudice against a prior judge. CP 231 - 240. These were frivolous motions without any legal basis and were for the purpose of delay and obstruction. Finally the court issued a

moratorium on Anne Giroux filing non-emergency motions. CP 262-264.

Anne Giroux filed a motion to continue trial date but the court would not consider the motion to continue trial without a status report from Anne Giroux on getting the court ordered mental health assessment and beginning reunification counseling for the children and father. CP 295-301. A hearing was set to review Anne Giroux's progress in complying with the court order but Anne Giroux exercised an affidavit of prejudice on the last business day prior to the hearing on her progress. CP 130-132. In this manner Anne Giroux was able to obtain her requested continuance of trial date without the review hearing on her progress and compliance with the court ordered mental health assessment and re-unification counseling. CP 267-269.

2. The incarceration as a contempt sanction was coercive because it was imposed to benefit the opposing party and children in this case and not to vindicate the authority of the court.

After Anne Giroux filed multiple baseless motions and used an affidavit of prejudice to avoid a hearing on her progress and obtain a continuance of trial, Daniel Kulman moved for contempt under both RCW 26.09.160(2) and RCW 7.21. The court found Anne Giroux in contempt and that Anne Giroux has not assigned error to that finding. Anne Giroux argues the sanction of incarceration should be reversed because the incarceration was punitive, not coercive, and she did not receive the benefit of the heightened due

process protections required for punitive contempt. **Anne Giroux's appeal fails because the incarceration ordered in this case was coercive.** It was not a punitive sanction for direct or criminal contempt and the trial court should be affirmed.

A remedial or coercive contempt sanction is typically imposed for the benefit of another party. *King* at 800. In this case the sanction of incarceration was coercive because the sanction was imposed to benefit Daniel Kulman and the children at issue. The children's with Daniel Kulman was extremely strained and the strain was caused by Anne Giroux's abusive use of conflict. CP at 134. The children's counseling, with a new counselor untainted by the mother, was to benefit the children's relationship with Daniel Kulman and reduce the harmful impact of the mother's abusive use of conflict. CP 136-137. The mental health assessment of Anne Giroux could identify whether Anne's abuse use of conflict originated from a mental health disorder and whether any treatment could be ordered to minimize Anne's abusive use of conflict in parenting the children. The mental health assessment would identify potential personality disorders which led to Anne falsely identifying herself as a victim and falsely accusing Daniel of being an abuser. The court's order to incarcerate Anne to compel compliance with the order for counseling and a mental health assessment was coercive because it was for the benefit of Daniel Kulman and

the children and not for the purpose of vindicating the authority of the court. *King,* at 800.

3. The incarceration as a contempt sanction was coercive because Anne Giroux always had the opportunity to avoid jail by complying with the order.

A remedial or coercive contempt sanction must provide regular opportunities for the contemnor to purge contempt and obtain release from incarceration. This element is best summarized as follows:

> [A] contempt sanction is criminal if it is determinate and unconditional; the sanction is civil if it is conditional and indeterminate, *i.e.,* where the contemnor carries the keys of the prison door in his own pocket and can let himself out by simply obeying the court order.
>
> *King v. Department of Social and Health Services* 110 Wash.2d 793, 800, 756 P.2d 1303, 1308 (1988), citing, *In re Nevitt,* 117 F. 448, 461 (8th Cir.1902); *Shillitani v. United States,* 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966).

Here the incarceration was coercive, or civil, because it was for an indeterminate term. CP at 268. In her brief Anne Giroux argues the sanction was punitive because the court order used the word "sentence." See, *Opening Brief of Appellant* page 13 and 14. But even the case Anne Giroux relies upon states that use of the word "sentenced" does not automatically transform a coercive sanction into a punitive sanction:

> The use of the term "sentenced" **suggests** the court's punitive thinking here. Nevertheless, we look to the specific provisions of the order to determine whether the order is punitive or coercive.

> *In re Marriage of Didier* 134 Wash.App. 490, 503-504, 140 P.3d 607, 613 (2006)
> (Emphasis added.)

It is the specific provisions of the entire order, not just the use of the word "sentenced", which distinguishes a punitive and coercive sanction. As noted above, it is the substance of the entire proceeding and character of relief afforded which determines whether the sanction in coercive or punitive. *King v. Department of Social and Health Services* 110 Wash.2d 793, 799, 756 P.2d 1303, 1307 (1988).

The substance of the entire proceeding shows this case is absolutely distinguishable from *Didier.* **Here when the court first ordered incarceration the court simultaneously provided a specific purge condition and suspended actual confinement for two weeks to allow Anne to avail herself of the purge condition.** The court found contempt on November 21, 2013, and ordered an indeterminate jail sentence at that time but suspended the sentence and did not actually order confinement for two weeks until December 5, 2013. CP 268. Hence, the court allowed another opportunity to avoid jail time by complying with the order even after making the finding of contempt. No such opportunity to purge contempt prior to actual imposition of the jail time occurred in *Didier.*

Then, at the review hearing on December 5, 2013, the court allowed Anne an additional five (5) days to purge the contempt and avoid actual

confinement for the incarceration that was ordered. On December 5, 2013, the court ordered:

> This court FINDS
> Contempt has not been purged. Anne Giroux is still unwilling to comply with the court's order regarding re-unification counseling.
>
> It is ORDERED
> A review hearing is set for 12/10/2013 at 3:30 p.m. Anne Giroux shall appear at the hearing or a warrant shall issue. The court orders that if proof of an appointment for re-unification counseling for Daniel Kulman and the children .... Is not provided the father will have custody of the children and the mother will be incarcerated on 12/10/2013.
>
> *Judgment and Order on Contempt Review Hearing* dated December 5, 2013. CP at 273 – 274.

This case is further distinguishable from *Didier* because there the jail sentence was for a determinate period of 30 days. *Didier* at 495. Here, in contrast, the sentence was for an "indeterminate period." A fixed or determinate sentence without regard for the actions by or on behalf of the Contemnor while incarcerated is a hallmark of a punitive sentence. Here the court did not set a fixed period of time Anne Giroux had to spend in jail as a punishment. The court ordered indeterminate jail time. CP at 269.

Finally, this case is distinguishable from *Didier* because the court itself scheduled a review to determine whether the incarceration was still imposing a coercive effect. In *Didier* the only opportunity to shorten the determinate, 30-day sentence, was for the Contemnor himself to schedule a hearing where the

court "may" consider allowing the Contemnor to spend less than 30 days in jail. In this case, after allowing more than two weeks for Contemnor to voluntarily purge herself of the contempt, **the court itself scheduled an immediate review hearing, one day after actually requiring Anne to be confined to jail.** The court order stated:

> It is hereby ORDERED
> Based upon a finding of civil contempt Anne Giroux shall be incarcerated in the Pierce County Jail on 12/10/2013 for one day. There shall be a review hearing on 12/11/2013 at 2:30 p.m. The Pierce County Jail shall transport Anne Giroux to Courtroom 105 at 2:30 if bail has not been paid. Bail shall be set at $1,000.00 cash only.
>
> *Judgment and Order on Contempt Review Hearing* dated December 10, 2013.

On December 11, 2013, Anne Giroux was released and not required to serve any further incarceration. Clearly this case is distinguishable from *Didier* because the sentence was suspended for two weeks to allow compliance, because it was for an indeterminate period which only required Anne Giroux to actually be confined for such periods the court found to be serving a coercive effect and because the court scheduled its own, immediate, review hearings to assess the continued coercive effect of the incarceration.

4. The incarceration as a contempt sanction was coercive because the court may confine a party even if incarceration makes performance of the act difficult or impossible.

Anne Giroux also argues that once she was actually required to serve the confinement ordered by the court she no longer possessed the ability to comply

with the order. But this is circular logic and would negate the entire purpose of the statutes allowing incarceration as a sanction for contempt. The statutes allow incarceration as a sanction to compel compliance with an act even though that act may only be possible after release from the incarceration imposed to coerce the compliance.

In the context of juvenile court proceedings, *In re M.B.* 101 Wash.App. 425, 449, 3 P.3d 780, 793 (2000) addresses the question squarely as follows:

> Does the child contemnor's inability to comply with the court's original order while in detention render a detention sanction punitive? The appellants contend that it does, and assert that the court's efforts to fashion remedies—such as writing papers—and call them "purging conditions" only mask their punitive qualities. Appellants take the position that the most a court can require is that the child promise to comply in the future.
>
> We believe the court's powers are not as limited as appellants suppose. A contemnor's promise of compliance is the first step. But where that promise is demonstrably unreliable, the court can insist on more than mere words of promise as a means of purging contempt. To conclude otherwise would render the statutes unenforceable and reduce the court to the level of beggar.
>
> The challenge lies in determining how courts can exercise their discretion to fashion an appropriate purge condition such that the court is assured of the contemnor's future compliance while also ensuring that the sanction is remedial.
>
> *In re M.B.* 101 Wash.App. 425, 448-449, 3 P.3d 780, 793 (2000)

The argument that inability to comply with the purge condition while incarcerated has also been rejected when parents have challenged incarceration resulting from failure to pay child support. Parents have argued they cannot earn income, and hence cannot pay child support, from jail. But that does not render a purge condition requiring payment of child support to be punitive. Even though the act (payment of child support) would seem impossible from the jail cell, spending time in jail may be the only way to compel compliance upon release: "Washington courts have repeatedly approved the use of jail time as a remedy to obtain a parent's good faith compliance with child support obligations. Jail can be a particularly useful coercive tool when the contemnor has repeatedly demonstrated his unwillingness to comply after having been given the benefit of the doubt in the past." *In re Marriage of Didier* 134 Wash.App. 490, 502-503, 140 P.3d 607, 613 (2006) (Footnote omitted.).

Review of a court's attempt to coerce a recalcitrant party to comply with a court order must examine the substance of the entire proceeding and the character of the relief that the proceeding afforded. *King v. Department of Social and Health Services* 110 Wash.2d 793, 799, 756 P.2d 1303, 1307 (1988). It is a difficult balancing act and the court is entitled to use incarceration as a means to coerce an intractable party to comply even when they state that such incarceration will not cause them to change their actions:

> Although the contemnor's words and conduct may provide important clues regarding the coercive effect of indeterminate jailing, the trial judge is not bound by the contemnor's avowed intention never to

> comply with the court order. **Even if the court found that the contemnor's present intent is never to comply, the judge may still find that incarceration might cause him to change his mind. Incarceration may continue until the trial judge finds, after a conscientious consideration of the circumstances pertinent to the individual contemnor, that the contempt power has ceased to have a coercive effect.**
>
> Incarceration for civil contempt obviously loses its coercive effect if the contemnor no longer has the ability to comply with the particular court order he is charged with violating. To continue one's incarceration for contempt for omitting an act he is powerless to perform would make the sanctions purely punitive. As soon as it becomes clear to the court that the contemnor cannot obey its original order, the court must release him.
>
> *King v. Department of Social and Health Services* 110 Wash.2d 793, 804, 756 P.2d 1303, 1309 - 1310 (1988) (Emphasis added. Internal citations and quotation marks omitted.)

In this case, Anne stated that she would not take the children to counseling or get the required mental health assessment for herself. CP 267, November 21, 2013, *Order on Show Cause re Contempt/Judgment,* paragraph 2.5 ("Anne Giroux does not have the present willingness to comply with the order as follows: Respondent repeatedly states the Court system is not protecting her children or acknowledging her children's wishes."); CP ___, December 5, 2013, *Judgment and Order on Contempt Review Hearing,* ("Anne Giroux is still unwilling to comply with the court's order regarding re-unification counseling.") After actually ordering confinement, the court

immediately, the very next day, reviewed the matter to determine if the incarceration was still having coercive effect and the court released Anne Giroux at that review hearing the next day. The court was entitled to impose incarceration as a coercive sanction to determine if spending time in jail would cause the contemnor to change her mind. *King* at 804. It was only **after** Anne had been incarcerated for a day that her attorney argued incarceration would not serve a coercive effect. *RP for December 11, 2013, at page 2, line 12-13.* The attorney for Daniel did not take a position on incarceration after Anne had been incarcerated for a day. *RP for December 11, 2013, at page 3, line 11-12.* After the court actually confined Anne for a day and it did not change her resolve, and after her attorney argued that incarceration would not have a coercive effect, the court released Anne from confinement on condition that she allow the children to be interviewed by the Guardian Ad Litem (GAL). *RP for December 11, 2013, at page 9, line 20-23.*

In summary, the incarceration was coercive and within the trial court's discretion. The finding of contempt and imposition of incarceration came only after delay tactics by Anne had resulted in a continuance of the trial date and non-compliance with the order from March 2013 through July 2013. Anne's non-compliance with the order was a continuation of her abusive use of conflict and was preventing the children and father from restoring their relationship; hence, the nature of the relief was for the purpose of benefiting the children and opposing party in the action and not vindicating the power of the court. The jail time was initially ordered but simultaneously suspended for more than two

weeks to provide additional time for the Contemnor to purge contempt short of actual confinement. Then, even after actually requiring Anne to be confined for a single night in jail the court set an immediate review hearing the next day, and released Anne the next day. At every turn Anne Giroux had the opportunity to comply with the court order, or after the finding of contempt, to purge her contempt and avoid incarceration. This renders the sanction coercive, and not criminal, and hence the heightened due process protections Anne Giroux argues should have been provided do not apply.

E. Respondent should be awarded attorney fees on appeal.

Attorney's fees should be awarded on appeal for having to defend a frivolous appeal. RAP 18.1, RCW 4.84.185. An appeal is frivolous if there are no debatable issues on which reasonable minds can differ and is so totally devoid of merit that there was no reasonable possibility of reversal. *In re Recall of City of Concrete Mayor Robin Feetham*, 149 Wash.2d 860, 872, 72 P.3d 741 (2003). In this case, there is simply no issue presented on which reasonable minds can differ. Anne has not assigned error to the fact she was found in contempt, she only assigns error to the incarceration as punitive rather than coercive, and it is abundantly clear from the record that the actual confinement imposed by the court was coercive. There is reasonable conclusion otherwise.

Attorney's fees should also be awarded on appeal for having to defend an appeal of a finding of contempt. RAP 18.1 and RCW 26.09.160(2)(b)(ii). When a party has hired an attorney to bring a motion for contempt, under RCW

26.09.160(2) attorney's fees an award of attorney's fees are mandatory against the party found in contempt. *In re Marriage of Rideout,* 150 Wn.2d 337, at 359, 77 P.3d 1174 (2003). This includes attorney's fees incurred at the trial level and on appeal. *In re Marriage of Eklund,* 143 Wash.App. 207, 218-219, 177 P.3d 189, 195 (Wash.App. Div. 2, 2008). Here, the trial court did properly award fees to Daniel after finding Anne in contempt. Daniel should also be awarded his attorney's fees on appeal. The sole issue on appeal is contempt and hence Daniel should be awarded all of his attorney's fees incurred.

V. CONCLUSION

For all of the reasons set forth above, Daniel requests that the trial court be affirmed and that he be awarded his fees and costs on this appeal.

DATED this 8th day of September 2014.

RESPECTFULLY SUBMITTED,

Daniel N. Cook, WSBA #34866
Attorney for Respondent Daniel Kulman

DECLARATION OF TRANSMITTAL

I certify under penalty of perjury that on the 8th day of September 2014, I transmitted a copy of this RESPONDENT'S RESPONSE BRIEF to the individuals and via the method(s) designated below:

Jan Trasen Washington Appellate Project 1511 Third Ave., Suite 701 Seattle, WA 98101	Transmitted via: ☐ First-Class US Mail ☐ Facsimile to (253) 756-0355 ☒ Email to jan@washapp.org ☐ Legal Messenger for Hand Delivery

Dated at Lakewood, Washington this 8th day of September 2014.

Sally DuCharme, Legal Assistant

I certify under penalty of perjury that on the 9th day of September 2014, I transmitted a copy of this RESPONDENT'S RESPONSE BRIEF to the individuals and via the method(s) designated below:

Original hand delivered to: Court of Appeals, Division II Clerk's Office 950 Broadway, Suite 300 Tacoma, WA 98402-4427	

Dated at Lakewood, Washington this 8th day of September 2014.

Sally DuCharme, Legal Assistant