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No 66855-2-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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DIVISION I

JOEL COHN, Respondent

v.

PAULA COHN, Appellant

BRIEF OF APPELLANT

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I. INTRODUCTION

This is a case that arises out of disputes about the welfare of the now 12 year old daughter of the parties. The father's time with the child was restricted in the original court ordered parenting plan. It took longer than the father had contemplated or wished to achieve a transition to a normal parenting plan. The father believes that is only because the mother sabotaged his relationship with their daughter.

After the agreed amended parenting plan giving the parents equal time with their daughter was entered, the mother was ordered to pay all of the father's post dissolution attorney fees and all of the GAL's fees.

II ASSIGNMENTS OF ERROR

1. The court erred in entering its order of March 4, 2011, finding (a) that the appellant "engaged in destructive, sabotaging, intransigent behavior," which (b) required the respondent "to needlessly spend thousands of dollars of attorney fees and GAL fees" caused by (c) "the mother's

direct behavior, and (d) sustained serious damage to his relationship with his daughter.”

2. The court erred in awarding \$9,461 in attorney fees to the respondent.
3. The court erred in awarding \$4,926 in GAL fees to the respondent.

III STATEMENT OF CASE

Joel and Paula Cohn have a daughter, Sarah, now 12 years old. The parents were divorced, after a trial before Judge Michael J. Trickey. A parenting plan, CP 23 – 33, entered on February 11, 2009. It contained the following provisions:

The petitioner’s [father’s] involvement or conduct may have an adverse effect on the child’s best interest because of the factors which follow:

Other (RCW 26.09.191(3)(g): The father has issues with sexual compulsivity and lack of boundaries. There was some use of child pornography in the past years. There were two sexualized incidents involving the child, one when she was three and another when she was seven, as described in the father’s trial testimony, the trial testimony of the CASA volunteer, and the August 27, 2007 CASA report. (Trial Exhibit 1)

Father’s disclosure of the second incident in 2006 with the child eventually led to the filing of a dependency action, King County Cause Number 06-7-02587-1SEA.

Father underwent a sexual deviancy evaluation. He entered into and completed outpatient treatment for sexual deviancy

His treatment providers concluded he was not a pedophile.

No adjudication of dependency occurred. The dependency was dismissed upon condition mother pursue legal separation, which has now been converted into a dissolution. Both parties agree that their marriage should be dissolved.

Father has been having unsupervised visitation under a temporary parenting plan during the daytime but no overnight visitation has occurred. There was an incident in the fall of 2008 with the child where she was seen rubbing her father's stomach which both were sitting on a couch. This most recent behavior, while not necessarily sexual, reveals a continuing concern with lack of boundaries between father and child.

Section 2.2 Parenting Plan, CP 24

On the basis of the RCW 26.09.191 findings, the court placed restrictions on the father's time with the child.

The petitioner's residential time with the children shall be limited because there are limiting factors in paragraphs 2.1 and 2.2. The following restrictions shall apply when the children spend time with this parent.

There shall be no overnight visitation with father until the following procedure is successfully implemented.

The petitioner's residential time with the children shall be limited because there are limited factors in paragraphs 2.1 and 2.2. The following The parties have 30 days from the date of entry of this Parenting Plan to agree to a supervisor for "partially supervised" overnight visitation. The supervisor shall have completed the mandatory supervisor training. If the parties cannot agree on a supervisor, a motion shall be set on the family law motion calendar to resolve the issue of the supervisor. The supervisor

must be an adult familiar with the facts of the case, and not the mother of the child.

Step 1: The “partially supervised” overnight shall take place on a weekend of the father’s regularly scheduled Saturday and Sunday visits. The “partially supervised overnight” shall be from Saturday at 6 p.m. until Sunday at 7:30 pm. The supervisor must remain at the father’s home until the child is asleep. The child must sleep in her own room at the father’s home. The father shall not sleep with the child. There shall be four of these “partially supervised” visits. The child shall see her therapist after the second and fourth of these visits to determine her level of comfort with them. If the child is not comfortable, the overnights shall cease. Neither party shall attempt to influence the child’s feeling concerning the level of comfort or discomfort.

Step 2: After four successful visits (as determined by the child’s therapist) of these “partially supervised” overnight visits, the child will spend every other Saturday from 6 pm until Sunday at 7:30 pm with the father outside the mother’s home with no supervision. The child shall see the therapist after the fourth of these Step 2 visits to determine her comfort level in order to continue with the unsupervised overnight visits.

Step 3. If the child is comfortable with the unsupervised overnights in Step 2, the child shall visit her father every Saturday from 6 pm until Sunday at 7:0 pm. After four such visits, the child shall be seen by her therapist to determine if she remains comfortable with the unsupervised visits.

Step 4: After four weeks of successful overnights in Step 3 (as determined by the therapist), the child shall visit her father from Saturday at 6: pm until Monday mornings at 9 am (father will take her to school). After four of these visits, the child shall see her therapist to determine if she remains comfortable with the visits. The Father’s Tuesday night visit should be night visit should then be discontinued.

Step 5: After four weeks of successful overnights in Step 4 (as determined by her therapist), the child shall visit her father from Saturday at 6 pm until Tuesday at 9am. Her therapist should see the child again after the fourth week (minimum) to determine her comfort level. If successful, both the father's Tuesday and Thursday visits should be discontinued..

The result of this process would be a 3 / 4 day split of each week, where the mother gets four overnights each week and the father gets three overnights each week. The 4/3 pattern shall alternate so that each parent get an alternating weekend.

Once the 3 / 4 day visitation schedule is implemented, the parties should attempt to agree on two week each of vacation in the summer and a schedule for holiday visitation. If they are unable to reach agreement, the parties should first attempt counseling on the vacation and holiday schedules and if counseling is unsuccessful, they should take the issue to the family law motion calendar.

Parenting Plan Sec 3.10, CP 27, 28

The Parenting Plan. Section 3.10, CP 27, 28, contemplated removal of the restriction with a transition to unrestricted overnight visitation between father and daughter through a five step process. CP 27, 28. At each step, in order for the process to continue, the child must be comfortable with each step for the process to continue.

In order to achieve "comfort" the father and child were in family counseling, with Dr. Milo. CP 110. The mother cooperated with Dr. Milo and supervised visits until the child

refused to see Dr. Milo any more. CP 111. The Parenting Plan does not say what will happen if the child is **not** comfortable. That was important, since the child was not comfortable. The child emphatically was not comfortable. In November 2009 that was obvious. The father came to get the child and a neighbor called the police because “the child was screaming and didn’t want to go.” The father had to be told that the police would not aid him in taking a child who so clearly did not wish to go with him. The police report, attached to father’s motion for contempt, is CP 55 – 57. A month later, on December 8, 2009, Court Commissioner Lori K. Smith removed the requirement that the child be comfortable: “The court orders change/removal of clause in PP stating child must be comfortable with overnights or can end visits on her own.” CP 69

Even without requiring the child’s acquiescence “re-unification” did not proceed smoothly. Nonetheless the schedule that the parenting plan initially contemplated occurring was implemented by an agreed order entered December 8, 2010. CP 82 - 92.

The father believes that the mother has intentionally sabotaged what would but for her actions would be a normal relationship between him and Sarah. e.g. (CP 14). Having achieved an order requiring the transition to have been accomplished, he moved to ask the court to award him all of his attorney fees and all of the GAL's fees on the grounds that the mother had been recalcitrant. CP 13 – 21.

Judge Doerty granted that request. (CP 160, 1) The entry of that order was appealed.

IV ARGUMENT

Judge Doerty conducted no hearing and decided no substantive motions in this case prior to entry of the order finding recalcitrance. (CP 1 – 12) (He signed one agreed order.) He had no personal knowledge of the case. Consequently the judge's order can only be based on pleadings presented to him, and not out of his general familiarity with the case as in *Matter of the Marriage of Greenlee* 65 Wn.App. 703, 710, P.2d 1120 (1992)

Therefore, the order, were it justified, would have to be justified by the material submitted to the judge in support of the motion.

Since there was no testimony and no oral argument, the motion judge had nothing to guide him that this court does not have. Review should be de novo

Logically, recalcitrance is not a fact, observable to the senses; a finding of recalcitrance is a conclusion of law either implicitly or explicitly based on facts. A judge cannot find as a fact the recalcitrance has occurred. Rather he must find that certain facts obtain and on the basis of those facts he can conclude, as a conclusion of law, that recalcitrance has occurred. “Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record.” *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998) Cited with approval in *Marriage of Chua* 149 Wn.App. 149, para 49, 202 P.3d 367 (2009)

Consequently, Judge Doerty’s order is prima facie defective since it leaps immediately, with no foundation and no

expressed basis, to what logically must be a conclusion of law that Paula was guilty of recalcitrance. What is supposed to take the form of a legal argument, with findings of fact leading to a conclusion of law, cannot consist only of a conclusion of law. An appellate court cannot review reasoning when there is no reasoning.

In addition there were not sufficient facts before the court to reach the legal conclusion of recalcitrance. “The equitable grounds upon which an award of fees may be made are cataloged in the opinion of this court in *Public Util. Dist. 1 v. Kottsick*, 86 Wash. 2d 388, 545 P.2d 1 (1976). There are four such grounds: bad faith . . . ‘A court may grant attorney fees to the prevailing party if the losing party’s conduct constitutes bad faith or wantonness.’ 86 Wash.2d at 390, 545 P.2d 1” *Moitke v. City of Spokane*, 101 Wn.2d 307, 338, 678 P.2d 803 (1984)

“The party requesting fees for intransigence must show the other party acted in away that made trial more difficult and increased legal costs, like repeatedly filing unnecessary motions or forcing court hearings for matters that should have been

handled without litigation.” *In re Marriage of Pennamen*,
135.Wn.App. 790, 807, 146 P.3d 466 (2006)

The requirements of *Pennamen* have not been met. The father’s motion for a finding of recalcitrance and requests for all of the father’s attorney fees and all of the GAL’s fees is nine pages long. CP 13 – 21 It is long on accusation and short on specific facts. “The father points the court to his declaration of 11/12/09, which provides a relatively succinct summary of the many concerns he had at that time.” CP 14. It is submitted that both motion and supporting declaration are consist of minimally justified accusations. They are hyperbolic and emotional and short on actual facts, supplying the judge with no facts on which he **could** have stated an adequate record.. .

The declaration, CP 43 -48, supported his motion for contempt, which was denied. CP 68 -9. Having failed a motion for contempt he advanced the same facts in a motion to find recalcitrance. Judge Doerty erred in granting the re-newed motion.

The best evidence provide from the GAL that the mother is entirely responsible for his bad relationship with his daughter is

from the GAL “Her (the mother) denial of having influenced Sarah against overnights is weak.” CP 17,18. The GAL is then quoted as finding it “more likely” Paula is “knowingly and directly sharing her feelings” about Joel with her daughter, and that Paula has “fostered a highly judgmental and critical view of Joel’s parenting. . . which could easily be viewed as manipulation subject to the “good faith” clause in the relocation statute.” CP 18

The mother does not deny that she has an unfavorable opinion of her former husband. That is common in divorces and means nothing. Has she allowed their daughter to know about that opinion? As the GAL says, a credible denial of that would be “weak.”

The relevance of “good faith in the relocation statute,” to which the GAL refers, is unclear. The GAL also states that “At very least, Paula harbors a great deal of anger/distrust/ disrespect for Joel and has unwittingly (the father believes this is not done “unwittingly) communicated this to Sarah, making it untenable for Sarah to fully embrace a relationship with her father.” The GAL further opines that it is “more likely, given the level of professional input Paula has received over time in this case, Paula

has these feelings about Joel and is knowingly and directly sharing them with Sarah.” This case arises out of a divorce. People get divorced **because** they have feelings of “anger/distrust/disrespect” towards each other.

Feelings so common are pretty weak to base an award of all of the father’s attorney fees and all of the GAL’s fees \$14,287 (CP 161) against the mother. “Defendant, by his recalcitrant, foot-dragging, obstructionist attitude, increased the cost of this litigation to plaintiff. . . .” *Eide v. Eide*, 1 Wn.App.440, 445, 462 P.2d 562 (1969) “[A]ttorney’s fees may be awarded if the trial court determines ‘that additional legal services were required because of the intransigence of the appellant.’ *Eide v. Eide* 1 Wash.App. 440, 445, 467 P.2d 562, 566 (1969) See *Fleckenstein v. Fleckenstein*, 59 Wash 2d 131, 366 P.2d 688 (1961)” *In re marriage of Harshman* , 18 Wn.App. 116, 128, 567 P.2d 667 (1977). In order to find “that additional legal services were required because of the intransigence” other a court have to (1) determine what the intransigence consisted of and (2) determine which additional legal services were required as a result. Without specifying what the intransigence was Judge

Doerty apparently decided that all services were additional services necessitated by the unspecified recalcitrance.

The mother has no ability to pay any of the father's fees.
CP 217 – 221.

V CONCLUSION

Paula has done nothing that appellate courts in the past have found to be recalcitrance. *In re Marriage of Foley*, 84 Wn.App. 839, 930 P.2d 929 (1997) *Demelash v. Ross Stores, Inc.*, 105 Wn.App. 508, 20 P.3d 447 (2001)

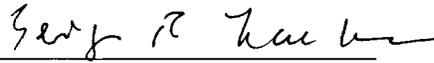
She can be faulted at most for allowing her daughter to know what she thinks of her former husband. Even if, arguendo, that is recalcitrance, it does not justify the punitive award that was made against her.

An intransigence award is compensation for the other party's intransigent behavior, cause and cost are necessary considerations. In order for the court to rationally order an award on the basis of intransigence it would (i) need to identify specific intransigent acts and (ii) rationally determine the cost to the other party of the intransigence. Obviously the court did not do that. It could not have done so on the

material it had before it. The finding of intransigence and the award of fees should be vacated.

Dated: June 3, 2011

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "George R. Landrum".

George R. Landrum/WSBA 7373
Attorney for Appellant

TABLE OF AUTHORITIES

Cases

<i>Marriage of Chua</i> 149 Wn.App 149, 202 P.3d 367 (2009)	page 8
<i>Demelash v. Ross Stores</i> , 105 Wn.App. 508, 20 P.3d 447	page 12
<i>Eide v. Eide</i> , 1 Wn.App. 440, 462 P.2d 562 (1960)	page 12
<i>In re Marriage of Foley</i> , 84 Wn.App. 839, 930 P.2d 929 (1997)	page 13
<i>Fleckenstein v. Fleckenstein</i> , 59 Wash 2d 131, 366 P.2d 688 (1961)	page 12
<i>Demelash v. Ross Stores, Inc.</i> 105 Wn.App. 508 20 P.3d 447 (2001)	page 13
<i>Matter of the Marriage of Greenlee</i> 65 Wn.App. 703, 710, P.2d 1120 (1992)	page 7
<i>In re Marriage of Harshman</i> , 18 Wn.App. 116, 567 P.2d 667 (1977)	page 12
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998)	page 8
<i>Moitke v. City of Spokane</i> 101 Wn.2d 307, 678 P.2d 803	page 9
<i>In re marriage of Pennanmen</i> , 135 Wn.App. 790, 146 P.3d 226 (2006)	page 10
<i>Public Utility District 1 v. Kottsick</i> , 86 Wash 2d 388, 545 P.2d 1 (1976)	page 9

