

NO. 73117-3-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON  
2015 JUL 15 PM 1:11

In re the Marriage of:

FRANCISCO ANTONIO CASTILLOS,

Appellant,

and

ISABELLA CASTILLOS,

Respondent.

BRIEF OF RESPONDENT

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206--463-6711

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## I. INTRODUCTION

Petitioner Francisco Castillos, Appellant here, and Respondent Isabella Castillos, Appellee, were divorced in King County on July 6, 2012 following Trial, after a 31 year marriage. Maintenance of \$2500 monthly was awarded. Her RCW 26.18.160 Contempt Motion Hearing was held on January 16, 2015 before a Commissioner for failure to pay \$7500 past due maintenance. Francisco appeals this Order. His attorney, not Francisco, filed a Response declaration. The Commissioner entered judgment for the delinquent maintenance and gave him 30 days to present a defense to the Contempt motion, and ordered Isabella's attorney to file within 7 days a Declaration regarding the reasonableness of her claimed \$7728.56 attorney fees and costs. The detailed Declaration was filed within 7 days, but no further Response nor objection was filed by Francisco, other than this Notice of Appeal. Francisco could have, but did not, file a Motion for Revision of the Commissioner's Order within 10 days,

per RCW 2.24.050 and KCLR 7(b)(8)(A) or present a defense to the Contempt Motion within the 30 days granted by the Commissioner. The Notice of Appeal filed on February 17, 2015 notwithstanding, Isabella's motion to enforce judgment was granted on March 18, 2015. Because no objection was ever made to the attorney fees, Francisco appears to be making this argument for the first time on appeal. Because the January 16, 2015 Order was not a Final Order, this appeal seems not allowable under RAP 2.2. Francisco's attorney conceded in oral argument a QDRO had not been done, so Francisco probably cannot now appeal an issue conceded in the Trial Court. The attorney for Francisco further attempted to serve Isabella with a Petition to Modify during the Hearing on Contempt, but the Commissioner refused him permission to do so, although acknowledging the Petition had been filed on December 12, 2014. In summary, Francisco did not dispute in the Trial Court the amount or reasonableness of the attorney fees, the allegation the QDRO had not been done, nor the provisional contempt order. Only the service issue.

## II. ASSIGNMENT OF ERROR AND ISSUES.

### A. Assignment of Error - Appellants.

Issue 1. Can an appellant appeal a Court Commissioner's provisional Order that required Attorney for Isabella to file a Declaration regarding the reasonableness of attorney fees without ever contesting the reasonableness of the (attorney fees) subsequent Declaration in the Trial Court? (Assignment of Error 1.)

Issue 2. Can a party appeal an Order to prepare a QDRO that he had previously prepared and filed, after conceding in argument that it had not been filed? (Assignment of Error 2.)

Issue 3. Did the Commissioner commit legal error or abuse her discretion in entering a deferred finding of contempt on January 16, 2015 for failure to pay November, December 2014 and January, 2015 maintenance when an unserved Petition to Modify Maintenance was filed on December 12, 2014? (assignment of Error 3).

Issue 4. Did the Commissioner commit legal error or abuse her discretion by refusing Francisco's

attorney permission to serve Isabella in her courtroom during the Hearing? (Assignment of Error 4).

Issue 5. (Appellee Issue) Whether the Order of January 16, 2015 is appealable as a Final Judgment, pursuant to RAP 2.2(a)(1).

Issue 6. (Appellee Issue) Whether Isabella should be awarded attorney fees and costs pursuant to RCW 26.18.160 and RAP 18.1 for responding to this appeal, in addition to any fees or costs awarded in the Trial Court?

### III. STATEMENT OF THE CASE

Francisco's Statement of the Case contains allegations by Counsel not facts from the Record. Examples include all references to information contained in CP 63-64, and CP 66-71 which contain unsworn allegations by Mr. Young, (CP 63-64)

"Response" and his Declaration (CP 66-67), detailing his conversations with Isabella's attorney, and including unsworn allegations he made in a letter form. Although these were tendered to the Commissioner, she refused to consider them (RP 13) **"Because an attorney cannot testify"**. She found Francisco had submitted no financial information. (RP 13). He had not.

The issue of the QDRO was addressed at RP 11 by Mr. Young, alleging "The QDRO is being done"; "That is in the works" and "it just takes the Federal Government a long time to do that"; "But that is in the works and I don't know that she-- if she's received it or not, but she should receive it". Counsel never told the Commissioner a FAA QDRO had been filed with the Court; instead he implied it had not been done. RP 11. The

Declaration filed by Isabella's attorney actually totaled over \$7728.56 and was quite detailed. CP 103-113. There is no evidence Francisco ever contested the reasonableness of this Declaration of attorney fees or costs to the Commissioner or by a Motion for Revision. There is no evidence Francisco ever contested the entry of the March 18, 2015 Order Authorizing Enforcement of Judgment. Francisco further makes no argument here that the fees or costs are unreasonable; his only complaint is to the mathematics, Brief of Appellant p.5, and an allegation he had no opportunity to object. Both statements are incorrect. In fact, when legally given two opportunities to argue his issues at the January 16, 2015 Hearing, or after the Hearing, specifically by a Motion for Revision filed within 10 days of the Hearing, or a Motion regarding the QDRO error he contributed filable within 30 days, or as a Response to the March 18, 2015 Motion Hearing to Enforce Judgment, he did nothing except file a Notice of Appeal.

IV. ARGUMENT

A. Summary of Argument:

1. The Order of January 16, 2015 is not a "Final Order" and therefore not appealable.
2. Francisco cannot appeal for the first time factual issues not contested in the Trial Court.
3. Francisco cannot appeal factual issues he conceded in the Trial Court.
4. Issues of law on appeal are decided De Novo, but the Commissioner was under no legal obligation to allow Francisco's attorney to serve Isabella during the Hearing, and this does not involve a claim of immunity by Isabella; rather an issue of Courtroom Decorum by the Commissioner; it was not an abuse of discretion, and did not prejudice Francisco.
5. Francisco has recourse to challenge any factual findings of the Trial Court, and was given an opportunity to do so; Isabella's attorney was required to, and did, supply a Declaration regarding the reasonableness and necessity of her

attorney fees and costs, which Francisco never contested, nor did Francisco ever attempt a demonstration to the Court that the FAA QDRO had previously been filed.

B ARGUMENT

Assignment of Error 1.

The Commissioner entered a provisional judgment only that clearly required Emelia R. Castillo, Counsel, to file and serve a Declaration within 7 days regarding "Reasonable/fair fees". Francisco had 10 days from January 16th to file a Motion for Revision of the Commissioner;s Order, pursuant to KLCR 7(b)(8) which would be heard, in this case by the Chief Superior Court Civil Judge. Oral argument would have been allowed at this Hearing, pursuant to KCLR 7(b)(3)(A), which specifically provides for Oral Argument. It thus was not error for the Commissioner to require a Declaration regarding reasonable attorney fees and allowing time for Francisco to file a Motion to contest it. KCLR 7(b)(3)(A) allows 10 days from the date of Order to file a Motion; in this instance until January 26, 2015. Generally an Appellate Court

may decline to consider an issue that was not the subject of an objection at Trial. Pettit v. Dwoskin, 116 Wn.App. 466, 68 P.3d 1088 (2003); State v. McDaniel, 155Wn.App. 829, 856; 230 P.3d 245(2010); Wingert V. Yellow Freight Systems, Inc., 146 Wn. 2d 841,853; 50 P.3d 256(2002).

Attorney for Francisco acknowledged he had not paid for December, 2014 or January, 2015. RP 10. He did argue costs for Isabella's motel and gas money, and the Court declined to award those costs. RP 10; 13; but he never addressed the attorney fee issue. RP 6-11.

Assignment of Error 2.

The Commissioner did not err in requiring Francisco and Counsel to prepare a (FAA) QDRO when Counsel acknowledged to the Commissioner that one had not been finalized. RP 11. Counsel did not argue a QDRO had previously been prepared and filed in the case. Had some proof been offered initially or on Revision, the result may have changed. But this is not error; at best it is invited error, based on an erroneous or misleading statement of Counsel. Ames v. Ames, 184 Wn.App. 826 (2014). Francisco, moreover, was

given 30 days to prepare and complete a (FAA) QDRO, and presumably the same 30 days to demonstrate it had already been prepared and filed in 2012. CP 92. Instead, Francisco did nothing. He should be estopped from objecting to this error he contributed to.

Assignment of Error 3.

The Commissioner did consider the unserved Modification Petition, but said the issues would be for the judge on the TBA (Trial By Affidavit) calendar, and limited her Hearing to the issues presented. She was correct in referring any issues raised in the unserved Petition to Modify to the Trial Judge, since Marriage of Logg, 74 Wn.App. 781; 875 P.2d 647 (1994) held that, without proper service, actual Notice of the pendency of an action is insufficient to obtain personal jurisdiction over the opposing party. Logg, supra, at p. 786 held that attorney fees are mandatory on a Motion to enforce maintenance under RCW 26.18.160, citing Marriage of Nelson, 62 Wn.App. 515, 814 P.2d 1208 (1991) as precedent. Because a Petition to Modify and a Court Order are necessary to change a support

Order, she had no authority to do so on a Motion for enforcement, even had she been so inclined. Marriage of Waters, 115 Wn.App. 211, 219; 3 P.3d 137 (2002). Francisco's attorney, moreover, admitted that two payments had not been made. RP 10. The Washington legislature has found an urgent need for vigorous enforcement of child support and maintenance obligations. RCW 26.18.010. The remedies are to be liberally construed. RCW 26.18.030. RCW 26.18.160 allows costs and reasonable attorney fees to the prevailing party. It is unnecessary to show need or ability to pay. Marriage of Rhinevault, 91 Wn.App. 688, 959 P.2d 687 (1998), a case where even the great Robert E. Prince's brief "teetered on a tightrope of inadequacy", a worrisome finding in my instance. Attorney fees under this Statute are mandatory at both the Trial and Appellate level. Marriage of Dicus, 110 Wn.App. 347, 40 P.3d 1185 (2002). The Commissioner stated any modification could relate back to the date of filing. RP 4-5; 12-13. Again, this was a correct statement of the law. Marriage of Cummings, 101 Wn.App. 230. 6 P.3d 19 (2000), citing RCW 26.09.170(1). She

ruled as she did because "the responding party has put forth no defense, because an attorney cannot testify, and ....(no KCLFLR 10 Financial Documents were submitted)." RP 12-13. Because the January 16, 2015 Order specifically deferred any finding of contempt for 30 days, to allow Francisco opportunity to dispute the Contempt issue, respondent never challenged this ruling in Superior Court, and in fact is not appealing it here. An Order of Contempt was only entered on March 18, 2015.

Assignment of Error 4.

It was not error by the Commissioner to refuse to allow Counsel to serve a litigant in her courtroom, during a hearing. Alternate methods of service were available, including service before court, after court, or service by publication. Cases advanced by Francisco on this topic for the most part concern a claim of immunity by a defendant from service of process; it is clear the Court simply refused Francisco permission to serve Isabella in her courtroom, during a Hearing. No claim of immunity was made

by Isabella or her lawyer. This situation of an attempt by an attorney to physically serve a litigant with process during a Hearing before a Court Commissioner seems to impinge on the Code of Judicial Conduct, Rule 2.8(A) which states "A Judge shall require order and decorum in proceedings before the Court." It seems evident handing a sheaf of paper to a litigant during a court hearing would cause a disruption while the litigant struggles to read the material and is necessarily distracted from the matter at hand. It seems evident that, should a Judge allow such a procedure, it would violate CJC Rule 2.8(A). The Commissioner was well within her authority to countermand this awkward service attempt during a hearing.

Issue 5. Whether the Order is a Final Order. RAP 2,2(a)(1) prohibits an appeal of an order that is not a Final Order. In this instance, the Order was obviously not a Final Judgment, since it postponed any contempt finding for 30 days, an issue not here on appeal, and allowed for "reasonable/fair" attorney fees only upon filing of a

mandatory Declaration within 7 days. Under Local Rules, the opposing party then had 10 days to file a Motion for Revision to contest the reasonableness of the claimed fees. Instead, Francisco filed a Notice of Appeal, without ever contesting the reasonableness of the fees in the underlying court. His sole objection here is that the requested fees do not add up to the amount requested. But, while the Fees Declaration is not a model of clarity, the fees enumerated actually add up to more than the fees requested. In any event, the January 16, 2015 Order was not a final one, and the fees requested only became final due to the inaction of Francisco. Generally an issue cannot be raised for the first time on Appeal, unless it is a "manifest error affecting a constitutional right". RAP 2.5(a)(3), and Marriage of Choate, 143 Wn.App. 235, 177 P.3d 175 (2008). Francisco has identified no manifest error affecting a constitutional right. State v. McFarlane, 127 Wn.2d 322, 333; 99 P.2d 1251 (1995). Issue 6. Whether Isabella gets Attorney Fees. RCW 26.18.160 grants the prevailing party in an

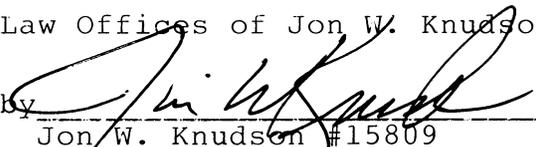
action to enforce a support order costs and attorney fees at both the trial and appellate levels. Marriage of Dicus, 110 Wn. App. 347, 40 P.3d 1185(2002). Marriage of Abercrombie, 105 Wn.App. 239, 244; 19 P.3d 1056 (2001). Attorney fees and costs are mandatory to the prevailing party without a showing of need or ability to pay. Marriage of Rhinevault, supra, p. 696.

V. CONCLUSION

In this instance Isabella has endured months without the \$2500 monthly maintenance she depends on for her support, plus huge legal bills incurred in attempting to enforce her court ordered support. She requests this Appeal be Denied, and requests attorney fees and costs most liberally construed pursuant to RCW 26.18.160 and RPC 18.1 to correct this injustice visited upon this most vulnerable senior citizen.

RESPECTFULLY SUBMITTED this 14th day of  
June, 2015.

Law Offices of Jon W. Knudsen

By 

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Attorney for Isabella Castillos  
Appellee

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COURT OF APPEALS  
STATE OF WASHINGTON

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION I

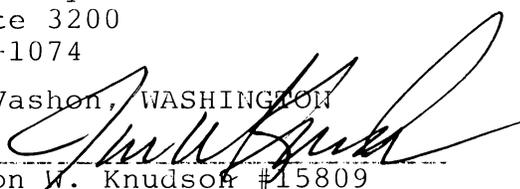
In Re: The Marriage of: )	
FRANCISCO A. CASTILLOS, )	
Appellant, )	No. 73117--3--I
and )	
ISABELLA CASTILLOS, )	DECLARATION OF SERVICE
Respondent. )	

I, Jon W. Knudson Declare under penalty of perjury under the laws of the State of Washington as follows:

1. I am an attorney representing Isabella Castillos Respondent in this Action;
2. On July 15, 2015 I delivered to Counsel for Appellant a copy of the Brief of Respondent by delivery to the following address:

Dan R. Young, Attorney at Law  
1002 2nd Ave. Suite 3200  
Seattle, WA 98104-1074

Dated July 15, 2015 at Vashon, WASHINGTON

  
 \_\_\_\_\_  
 Jon W. Knudson #15809  
 Attorney for Isabella  
 Castillos, Respondent.