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No. 75294-4-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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IN RE THE MARRIAGE OF

GINGER PAUL GALANDO, Respondent

v.

MATTHEW PAUL GALANDO, Appellant

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BRIEF OF APPELLANT

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STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION ONE  
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### **I. Statement of the Case:**

This is an appeal of a post marital dissolution contempt order signed by King County Superior Court Judge Julie Spector on April 21, 2016 involving certain provisions of the Final Parenting Plan Order, Findings of Fact, and Child Support Order entered in November 2015. (CP 479). The findings indicated that Mr. Galando had been addicted to prescribed pain killing medications for which he was treated in an inpatient facility in Malibu California in 2014 after which he was involved in an aftercare program that was not NA or AA. There was no evidence and no finding that he has an addiction to or a dependence upon alcohol. (RP 24 and 39).

The issues raised on contempt related to a variety of protocols contained in the parenting plan order involving alcohol consumption and possession, UA/Etg test monitoring and treatment, telephone and residential contact with the children, a psychological evaluation, uninsured health care bills, payment of a private school registration fee, and family wizard. (CP 478 - 488).

The parties have two children. The final parenting plan order provides Mr. Galando residential time in three phases. The contempt proceeding occurred during Phase I in which his residential time is

alternating Fridays after school return to mother Sundays at 6pm for the initial 12 months. The parenting plan order prohibits both parents from discussing the residential arrangements directly with the children. It requires Mr. Galando to abstain from use or even possession of alcohol, to submit to Urinalysis and Ethyl Glucuronide testing every 80 hours and at his own expense for the first six months. He must enroll and comply with an NA/AA sponsorship program. He must enroll in a state certified treatment program for alcohol addiction for a minimum of 30 days. If any of the UA/EtGs have positive results, (diluted results and failure to take a UA for any reason count as positive) he is to enroll in an inpatient treatment program for a minimum of thirty days (RP 33). Both parties were ordered to hire Dr. Wendy Hutchins-Cook for psychological evaluations (RP 41).

If Mr. Galando should fail to meet any one of those requirements, his contact with the children is completely eliminated pending further court order. When he failed to obtain all drug tests ordered, he stopped his contact with the children as ordered. (CP 376)

As to the payment of private school tuition registration fee, payment of family wizard for communications about the children, and number of uninsured health care bills for the children, he was found in

contempt, even though he paid them all in full by the time of the contempt hearing, as acknowledged in the contempt order itself. (CP 481).

The court found him in contempt for failing to hire Dr. Wendy Hutchins-Cook for psychological evaluations, even though he had done so before the contempt hearing occurred. (CP 480).

The findings of fact entered in November 2015, required entry of an order appointing a special master to control the listing and sale of a residential home owned by an irrevocable trust with Mr. Galando as co-trustee and sole primary beneficiary. The court found him in contempt for violating the Findings of Fact, by listing the home for sale in February 2016 instead of by January 2016 (CP 481). There was no order requiring him to do so. The Court did not find that he violated the order appointing the special master who controls the marketing and sale of the home that was entered in February 2016.

## **II. Assignments of Error**

The Trial Court committed the following Errors:

- 1. Finding Mr. Galando In Contempt For Failing To Engage In Acts Not Required By The Parenting Plan Order.**
- 2. Finding Mr. Galando In Contempt As To Orders With Which He Was In Compliance Before The Hearing Occurred.**

- 3. Ordering Purging Conditions In Sub-Sections 3.6 a through g That Are Not Limited To Acts Of Immediate Performance Within His Control To Avoid Incarceration.**
- 4. Finding Mr. Galando In Contempt For Violating a Finding of Fact.**
- 5. Finding Mr. Galando Willfully Inflicted Significant Emotion Harm To The Children By Refusing Contact With Them Even Though He Had To Do So To Avoid Violating Another Provision Of The Parenting Plan Order.**
- 6. Ordering Purging Conditions That Are Punitive Because They Do Not Coerce Compliance With The Orders Violated.**

### **III. Argument:**

The following principles circumscribe a trial court's civil contempt authority: Each of the assignments of error involves abrogations by the trial court of one or all of those principles. They are summarized here so as not to be repeated in full where applicable under each assignment of error.

A civil contempt sanction will not stand if it is punitive in purpose. *See United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826–27, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994); *King v. Department of Social and Health Services*, 110 Wash.2d 793 at 799–800, 756 P.2d 1303 (1988). A

punitive purging provision is one whose purpose is not to coerce compliance but rather “...for the purpose of upholding the authority of the court.” RCW 7.21.010 (2); *In re Silva*, 166 Wa.2d 133 at 141, 206 P.3d 1240 (2009).

A court has civil contempt power in order to coerce a party to comply with its lawful order or judgment. *See* RCW 7.21.020; *In re M.B.*, 101 Wash.App. 425 at 437–38, 3 P.3d 780 (2000). It must be remedial in purpose and effect as to the order violated: “A '[r]emedial sanction' is one 'imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.' RCW 7.21.010(2)(b). The court's authority to impose a jail sentence is only allowed if there is a purging mechanism through which the contemnor can immediately act in compliance with the order violated and is within his control, to avoid incarceration.” (*State v. John*, 69 Wash.App 615 at 619, 849 P.2d 1268 (1993).

**1. Finding Mr. Galando In Contempt For Failing To Engage In Acts Not Required By The Parenting Plan Order.**

The source of authority for imposing contempt findings and sanctions at issue here are RCW 26.09.160(2) as to the failure to exercise

contact with the children and RCW 7.21.010 (3) as to child support and the non-residential provisions of a parenting plan order. To find that contempt has occurred, the violation must be based upon clear language requiring or prohibiting certain conduct. (*In re of Rapid Settlements, Ltd's*, 189 Wash.App 584 at 601-602, 359 P.3d 823 (2015).

The court found that Mr. Galando willfully violated provisions of the parenting plan order by failing to have telephone contact with the children (See section 2.3 (j) of the contempt order. (CP 481). The court cited section VI (4) of the parenting plan order. (CP 481) However, Section VI (4) does not require that he phone the children. It merely allows him the opportunity should he choose to do so. Therefore, finding him in contempt for failing to have phone contact with them must be reversed and eliminated.

**2. Finding Mr. Galando In Contempt As To Orders With Which He Was In Compliance Before The Hearing Occurred.**

RCW 7.21.030 provides contempt authority of an order or process of which a party is in violation and has the ability to perform at the time the contempt hearing occurs. The language of the statute that lends of this interpretation is the phrase “failed or refused to perform an act that is yet within the person’s power to perform.” Thus, only if at the time of the

contempt hearing, the party has failed to perform an act within his power to perform, does contempt lie.

Webster's International Dictionary defines the word "yet" as follows: "1. Up to now...2. at the present time; now." (See Third College Edition, p. 1549 (1988). The legislature is presumed to intend the dictionary definition of the words used in a statute unless it indicates otherwise. (*State v. Rhodes*, 58 Wash.App 913, 795 P.2d 724 (1990). The time reference which is the subject of inquiry is whether, at the time of the hearing, the party is in violation of an order or judgment that he or she has the ability to perform.

That the party must be in violation at the time of the hearing is also discerned from what RCW 7.21.030 requires, read para materia, with how a remedial sanction is defined. A "remedial sanction" is "a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform." RCW 7.21.010(3). (*State v. Hobble*, 126 Wash.2d 283 at 292, 892 P.2d 85 (1995). Thus a party cannot be found in contempt of an order, of which he is not in violation at the time of the hearing, because there is no violation to remediate.

In every reported decision in which a civil contempt citation has been upheld, without exception, the contemnor was in violation of the order in question at the time the contempt hearing occurred.<sup>1</sup>

Here, the court should not have found him in contempt of the following previous violations which he cured in advance of the hearing. Section references mean the order on contempt entered on April 21, 2016.

**As To The Parenting Plan Order:**

Section (i): Failure to pay and activate Our Family Wizard: compliance was acknowledged to have occurred by March 25, 2016. (CP 480). The required act was completed. There is no compliance to coerce.

Section 2.3 (d) and (e): failure to enroll and active participation in a 12 month state-certified alcohol/drug treatment program. Compliance occurred by the terms of the order with the ABH assessment of March 16, 2016. Outpatient treatment began on April 6, 2016. (CP 480).

He had obtained an alcohol assessment from ABH. (CP 480).

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<sup>1</sup> EG: *In re MB*, 101 Wash.App 425, 3 P.3d 780 (2000); *State ex. rel. Shafer v. Bloomer*, 94 Wash.App 246 , 973 P.2d 1062 (1999); *In re of Rapid Settlements, Ltd's*, 189 Wash.App 854, 359 P.3d 823 (2015); *In re Dependency of AK*, 162 wash.2d 632, 174 P.3d 11 (2007); *In re JL*, 140 Wash.App 438, 166 P.3d 776 (2007). *In re Silva*, 166 Wash.2d 133, 206 P.3d 1240 (2009)

Section 2.3 (g): Failing to contact Dr. Wendy Hutchins Cook for psychological evaluation. The order confirms that he did so on April 5, 2106 and was scheduled for an interview on April 27, 2016. (CP 480).

**As To The Child Support Order:**

Section (m): Of ten separate bills for medical treatment, December 2015 through March 2016, the order acknowledges the first two in March as timely paid, that the bills for December through February were paid late, but they were paid, and that the two issued that last two days in March totaling \$562 “are not yet due”. (CP 481-482). The order of contempt even identified all child support payments as to uninsured medical bills and the dates on which they were paid. (CP 481). The order indicated that the various bills were paid on January 13, February 4, March 7, March 9, March 15 and March 23, 2016. The private school registration fee was paid in full on March 9, 2016. (CP 482).

Section (n): school registration fees of \$600 were due on February 5, 2016. Mr. Galando reimbursed Ms. Galando less than a month after she paid, on March 9, 2016 (CP 482).

The contempt order also observes that another \$1,475 due on March 4, 2016 was paid in full by him by March 9, 2016. ( CP 483), a month and a half before the contempt hearing. (CP 488).

As to all of those orders, there was no compliance to coerce. Therefore he should not have been held in contempt. This does not mean Ms. Galando was without a remedy for his past violations. The appropriate remedy as to the past violations of a child support order is an award of attorney fees under RCW 26.18.160. The statute does not require a finding of contempt. It merely requires proof of a violation when payments were due.

Mr. Galando's failure to comply with the parenting plan order with which he had the ability to perform and which he cured before the hearing justifies an award of attorney fees against him based upon intransigence. Intransigence has been defined in a variety of ways. One example is behavior that causes the other attorney to engage in otherwise needless activity. *State ex rel. Stout v. Stout*, 89 Wn. App. 118 at 127, 948 P.2d 851 (1997).

**3. Ordering Purging Conditions In Sub-Sections 3.6 a through g That Are Not Limited To Acts Of Immediate Performance Within His Control To Avoid Incarceration.**

RCW 7.21.010 defines contempt of court as "Disobedience of any lawful judgment, decree, order, or process of the court." The court found: "Respondent's failure to comply with the above treatment and monitoring

requirements, thus deliberately abdicating his residential time, is a violation of section VI(2) of the Parenting Plan which states ‘absence, inconsistency, and conflict are opposed to the best interests of the children.’ (CP 480). That absence and inconsistency and conflict are opposed to the children’s best interests is merely a finding. It also suggests that his failure to obtain some random UAs or alcohol treatment was for the purpose of abdicating his residential time with the children. There is no evidence to support that finding. Therefore contempt cannot lie and the finding should be reversed and eliminated.

**4. Finding Mr. Galando In Contempt For Violating a Finding of Fact.**

At the contempt hearing the court found: “Failure to comply with section VI (8), (13) and (15) of Parenting Plan when he discussed issues related to litigation, residential schedule, and made derogatory remarks about mother to the children. The court found that Mr. Galando “...deliberately inflicted emotional harm and distress upon the parties’ children.” (CP 481).

The only evidence of an alleged one time conversation was contained in the declaration of Ms. Galando, who was not present when

the conversation occurred. (Page 5 of sub number 234, to be designated).

The allegation was denied by Mr. Galando. (CP 375).

Findings must be supported by substantial evidence. *Smith v. Yamashita*, 12 Wash.2d 580 at 582, 123 P.2d 340 (1942). Substantial evidence is that quantum of evidence sufficient to convince the trier of fact of the truth of the stated premise. *Helman v. Sacred Heart Hospital*, 62 Wash.2d 136 at 147, 381 P.2d 605 (1963).

Here, nothing in the record indicates what these remarks were. It merely shows that they were made once. There is no evidence that if made they caused significant emotional harm. Thus the finding must be reversed as it relates to statements made to the children.

**5. Finding Mr. Galando Willfully Inflicted Significant Emotion Harm To The Children By Refusing Contact With Them Even Though He Had To Do So To Avoid Violating Another Provision Of The Parenting Plan Order.**

**a. He Had To Sever Contact To Avoid Violating Another Provision Of The Parenting Plan Order.**

The court also found that he violated section VI (2) of the parenting plan order: Respondent's willful refusal to comply with the Parenting

Plan and intentionally remove himself from any contact with the children has resulted in significant harm to the children.” (CP 480).

The evidence, instead, was that his refusal to be in contact with the children even when they tried to contact him caused them to be extremely upset. (RP 16 ). Even if that refusal caused harm, section 3.2 3 of the final parenting plan order provides that if Mr. Galando relapses or violates the requirements of any provision under 3.2, 3.10 or 3.13, all his visitation with both children is severed pending further court order.

**b. No Finding That Mr. Galando’s Compliance With Refusal To Have Contact Was In Bad Faith.**

RCW 26.09.160 (3) and *In re Marriage of James*, 79 Wa.App 436, 903 P.2d 470 (1995) provide that to be held in contempt for violating a parenting plan order the violation must be found to be in bad faith. No finding of bad faith was made here; nor could there be. For to have contact of any kind with the children after he had failed to obtain a random UA/Etg, would have constituted a violation of the visitation suspension provision of the parenting plan, under section 3.2.3.

*In re Marriage of Watson*, 132 Wash.App 222 at 234, 130 P.3d 915 (2006) is instructive here, even though it was not a contempt issue. It

involved a reversal of a limitation under RCW 26.09.191 (3) as to a lack of emotional ties to the children found by the trial court which the court of appeals reversed. The Court held: “Here, the record lacks substantial evidence that the emotional impairment in M.R.'s relationship with Watson arose from anything other than four years of severely restrictive visitation conditions resulting from Boling's unproven allegations of sexual abuse. The trial court abused its discretion when it imposed continued visitation restrictions after concluding that the sexual abuse allegations were unproven.” *In re Watson, supra*, stands for the broad principle that harm involves proof that the conduct was within the party’s ability to control.

Since Mr. Galando was under an order not to have any contact with his children whatsoever if he was out of compliance with any orders the requisite finding of bad faith could not be made. To be in compliance with that provision he had to refuse contact with the children, even where, at the behest of their mother, she prompted them to try and contact him. His compliance with the order prohibiting contact belies the conclusion that he deliberately inflicted emotional harm to them by not having contact. (CP 480). The finding of contempt should be reversed and eliminated.

**6. Ordering Purging Conditions That Are Punitive Because They Do Not Coerce Compliance With The Orders Violated.**

**a. The Orders Violated.**

Section 3.6 of the order is the section entitled “Conditions For Purging The Contempt” (CP 484). It pertains to all violations, including those cured prior to the hearing, discussed ante at pages 10 through 14 under section 2.

Section 3.9 of the order entitled “Other” provides: “The findings of contempt will be purged only upon Matthew Galando successfully complying with the provisions set forth in the parties’ Final Parenting Plan, Final Order of Child Support, Decree of Dissolution, and Findings of Fact and Conclusions of Law entered...on November 8, 2015 and with order Appointing Special Master entered on ...February 5, 2016, for a period of six months. (CP 486).

The only violations with which compliance did not occur by the time of the hearing were the following:

Section 2.3 (j): failing to have telephone contact or see the children. (CP 481).

Section 2.3 (a): failure to provide copies of the 42 UA/Etg test results required by section 3.2 1 (a) of the final parenting plan order. (CP 479).

Section 2.3 (b): failure to provide signed attendance slips as to weekly attendance at NA/AA meetings pursuant to section 3.2 1 (b) of the final parenting plan order. (CP 479)

Section 2.3 (c): failing to abstain from use of alcohol and marijuana. (CP 479).

**b. None Of The Purging Conditions Coerce Telephone Contact Or Residential Time With The Children.**

None of the sanctions under §3.6 coerce compliance with the lack of telephone contact or residential time with the children. The only condition related to those alleged violations merely “encourages him to resume .... contact... as is appropriate through recommendations from the children’s therapist... The parties may discuss monitored or safe visitation proposals per therapist recommendations.” (CP 486.). Viewed for what the order states that it is, (to wit:) a purging mechanism to avoid imprisonment, it fails because it does not direct Mr. Galando to do anything. It merely “encourages” him to do so. It is not an appropriate

exercise of discretion. It must be reversed and eliminated in so far as it is a purging condition to avoid incarceration.

Alternative reasons why this contempt finding must be reversed is contained under Section 3 page 17.

**c. Full Compliance With All Orders Previously Entered Is An Invalid Condition To Purge Any Of The Violations Found.**

Mr. Galando is ordered to purge the failure to provide drug testing results or, proof of attendance at NA/AA meetings, or participation in out-patient treatment or failure to timely pay uninsured health care bills to avoid incarceration by: “Full compliance with all provisions of the court orders”. (CP 484). In addition to section 3.9, Section 3.2 of the contempt order is entitled “Imprisonment” (CP 484). It states: “Should Respondent fail for any reason whatsoever to comply with all aspects of the court orders and the purge conditions ordered herein, after court hearing Matthew Galando **is to be** (emphasis supplied) confined in the King County jail.” (CP 484).

While RCW 7.21.030(2)(c) provides the court with authority to impose as a contempt sanction by ordering “compliance with a prior order or ... process” unless the purging condition is directly related to the order

violated it is therefore deemed punitive. (*In re M.B supra*. See also: *State v. Buckley*, 83 Wash.App 707, at 711, 924 P.2d 40 (1996).

Here, compliance with all aspects of numerous orders that he did not violate is required to avoid imprisonment. As such, it is punitive. Mr. Galando was not accused and not found to have violated the provision that he pay \$1,800 per month, nor of his obligations to pay for the costs of extra-curricular activities and work related day care expenses under section under sections 3.5 and 3.15 of the child support order.

Nor was he accused and not found to have violated the order appointing special master to oversee the sale of the home. The language of the purging clause even indicates that Mr. Galando has been complying with that order (CP 486); nor of his \$4,000 per month spousal maintenance obligation contained in the decree of dissolution.

Section 3.10 of the parenting plan, prohibits the father from having any contact with the police. He was not accused and was not found to have violated that provision. If he were to be a witness to a car accident, rear ended by a car, or were his home to be burglarized, under the purging clause, any contact with the police, even if they were to initiate it, as for example to obtain a witness statement from him, would be violation of the order resulting in incarceration.

Another previous order in the decree of dissolution was the final attorney fee award of \$99,000 contained as an order in the decree of dissolution. A person cannot be held in contempt for failing to pay a final award of attorney fees. *Smith v. Smith*, 56 Wa.2d 1, 351 P.2d 412 (1960). And yet, he is ordered to be in full ongoing compliance with all of those orders as a purging mechanism to avoid incarceration for failing to provide all required drug tests, weekly AA attendance slips, etc. (CP 485-486). This provision of the purging provision of the contempt order must be reversed and eliminated. Ordering compliance with unrelated orders not violated constitutes punishment and not coercion of compliance. The blanket purging clauses in section 3.6 and the blanket violations of all unrelated orders resulting in incarceration under section 3.2 must be reversed and eliminated.

Those clauses under Sections 3.6 and 3.9 must be reversed and eliminated.

**d. The Purging Conditions Outlined In Sub-Sections 3.6 (a) through (g) Are Not Limited To Immediate Acts Within Mr. Galando's Power To Control.**

*In re Silva, supra* at 138 (2009), involved an order of contempt for violation of a prior order compelling drug treatment for which detention

could only be avoided by enrollment and participation in the 28 day drug treatment previously ordered. The State Supreme court reversed. “Purge conditions are valid only if they are in the contemnor's capacity to **immediately** (emphasis supplied) purge. Here, it was not in Estevan's capacity to immediately purge his contempt. His admission into a treatment facility is outside of his control: his parents must arrange the treatment, a treatment facility must have availability, and that facility must accept Estevan as a patient.” (*In re Silva*, supra at 148 (footnote 5), (2009).

The failure to have telephone or residential contact with the children is to be purged by working with Ms. Galando and their children’s therapist. This fails because it leaves his ability to have contact with the children dependent upon the acts of Ms. Galando and the children’s therapist that neither of them will necessarily perform.

Since there is no clear directive that Mr. Galando do anything and the purging clause leaves Mr. Galando dependent on the behavior of others in order to comply. The clause is therefore not within his ability to control. It is therefore punitive since it fails to put into his hands the keys to his own release from incarceration. It must be reversed and eliminated from section 3.6 of the contempt order. (CP 485-486).

#### **IV. Conclusion:**

The trial court retained jurisdiction of this case post-divorce (RP 3). She had concerns about both Ms. Galando and Mr. Galando and so ordered both to undergo psychological examinations (CP485). It had concerns about Mr. Galando's addiction to opiates and alcohol. Thus the court ordered that he abstain from alcohol as well as drugs, do outpatient treatment, get tested on a random basis prove regular attendance at AA meetings and should he fail in any regard, ordered his contact with the children be severed pending further court order and inpatient treatment.

To enter an order recommending he work with the children's therapist and Ms. Galando to resume contact with the children is a "further order of the court" within its discretion, as a vehicle to reunify him with the children, but not as a contempt sanction to avoid incarceration.

As of the time of the contempt hearing Mr. Galando had fully complied with the requirements to pay his share of uninsured health care bills and reimbursed Ms. Galando her advance of school registration fees. (CP 481). The order finding in contempt for those past violations should be reversed.

As of the time of the contempt hearing, he had not obtained all the required random UAs or entered into inpatient treatment or provide proof

of regular AA attendance. He provided no evidence of why he had not, nor why he could not. He was found in contempt. There is no challenge as to those findings.

To order compliance with all prior orders, which include orders unrelated to those he violated, including the final judgment for attorney fees contained in the decree of dissolution, and those not only unrelated, but never violated, such as spousal maintenance contained in the decree of dissolution, the order appointing the special master, the parenting plan provision that he have no contact with the police, is punitive because it does not coerce compliance with the obtaining random UAs or drug and alcohol treatment. The court therefore erred in finding him in contempt of those orders.

DATED this 7 day of October, 2016.

Respectfully submitted,



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