

original

COURT OF APPEALS

07/17/03 11:09:52

NO. 35518-3-II

FILED BY *Chm*

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

In Re the Marriage of

CHERI LOUSE EKLUND
Appellant

and

MICHAEL ALLEN EKLUND
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Stephen Warning, Judge

OPENING BRIEF OF APPELLANT

PATRICIA NOVOTNY
Attorney for Appellant
3418 NE 65th Street, Suite A
Seattle, WA 98115
(206) 525-0711

Pm 4/2/07

TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR	1
B.	MOTION FOR ATTORNEY FEES	2
C.	STATEMENT OF THE CASE	2
D.	ARGUMENT	5
	1. THE STANDARD OF REVIEW IS DE NOVO.....	5
	2. THE COURT HAD A NONDISCRETIONARY DUTY TO ORDER "MAKE-UP" TIME, ATTORNEY FEES, AND A CIVIL PENALTY.	6
	3. THE COURT CANNOT DECIDE AN ISSUE NOT PRESENTED (I.E., APPLICATION OF THE PROVISION TO THE NEW SPOUSE) AND, IN ANY CASE, THE COURT DECIDED IT INCORRECTLY.....	8
	4. THE TRIAL COURT ERRONEOUSLY HELD THAT SIX INSTANCES OF NONCOMPLIANCE CONSTITUTED ONE INSTANCE OF CONTEMPT.	10
E.	MOTION FOR ATTORNEY FEES	12
F.	CONCLUSION	13

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Corbray v. Stevenson</i> , 98 Wn.2d 410, 656 P.2d 473 (1982).....	9
<i>In re Marriage of Myers</i> , 123 Wn. App. 889, 99 P.3d 398 (2004)..	6
<i>In re Marriage of Rideout</i> , 150 Wn.2d 337, 77 P.3d 1174 (2003)	12
<i>In re Marriage of Sager</i> , 71 Wn. App. 855, 863 P.2d 106 (1993) ..	9
<i>In re Marriage of Wolk</i> , 65 Wn. App. 356, 828 P.2d 634 (1992)....	7
<i>In re N.M.</i> , 102 Wn. App. 537, 7 P.3d 878 (2000).....	11
<i>Kirshenbaum v. Kirshenbaum</i> , 84 Wn. App. 798, 929 P.2d 1204 (1997)	5
<i>Kruger Clinic Orthopaedics, LLC v. Regence Blue Shield</i> , 157 Wn.2d 290, 138 P.3d 936 (2006).....	5
<i>State v. Maloney</i> , 1 Wn. App. 1007, 465 P.2d 692 (1970).....	8
<i>State v. Roberts</i> , 77 Wn. App. 678, 894 P.2d 1340 (1995).....	8
<i>Stokes v. Pulley</i> , 145 Wn.2d 341, 37 P.3d 1211 (2001).....	9

RULES, STATUTES, & OTHER AUTHORITIES

17 <i>Am. Jur. 2d Contempt</i> § 32.	11
<i>AmJur COURTS</i> § 37.....	8
RAP 18.1.....	12
RCW 26.09.160.....	6, 10, 12

CASES FROM OTHER JURISDICTIONS

U.S. ex rel. Ushkowitz v. McCloskey, 359 F.2d 788 (2d Cir. 1966)
..... 11

A. ASSIGNMENTS OF ERROR

1. The trial court found the father in contempt of the parenting plan, but erroneously declined to order make-up residential time, as required by statute. See CP 35 (§§ 3.3).

2. The trial court found the father in contempt of the parenting plan, but erroneously declined to award attorney fees and declined to impose the civil penalty, both mandatory under the statute. See CP 35-36 (§§ 3.7 and 3.9).

3. The trial court erred when it entered the following “finding and conclusion”:

Petitioner is estranged from her family, and respondent permitted overnight visits with the maternal grandmother to maintain their close relationship. Given that circumstance, it is appropriate that no fees or penalty be imposed.

CP 35 (§§ 2.8).

4. The trial court erred when it opined that the optional residential time provision does not apply when the father leaves the child in the care of his new spouse. RP 12-13.

5. The trial court erred by collapsing six separate violations of the parenting plan into a single contempt finding. See CP 36 (§§ 3.9).

Issues Pertaining to Assignments of Error

1. Under RCW 26.09.160(2), once the court finds a parent in contempt, is the court required to order make-up residential time?
2. Under RCW 26.09.160(2), once the court finds a parent in contempt, is the court required to award attorney fees to the other parent?
3. Under RCW 26.09.160(2), once the court finds a parent in contempt, is the court required to impose a civil penalty of no less than \$100, payable to the other parent?
4. When a parent violates the residential provisions of a parenting plan on six separate occasions, has that parent committed six acts of contempt?

B. MOTION FOR ATTORNEY FEES

Because the mother has a right to attorney fees under the statute, she requests fees on appeal.

C. STATEMENT OF THE CASE

Michael and Cheri Eklund have one child of their former marriage. CP 1-10. Pursuant to a parenting plan entered in 2002, the child resides primarily with Michael and regularly spends eight

days monthly with Cheri; the parents share holiday and vacation time. Id.

The parenting plan makes provision for optional time with either parent when the parent scheduled to have the child will be unable to be with the child for at least four hours, as follows. CP 5.

If a parent scheduled to have the child is unable to do [so] for a period of at least four hours, that parent shall promptly notify the other parent and the other parent shall then have the option to care for the child while the normally-scheduled parent is absent. The child shall not be placed in daycare or with babysitters during the extended period of time that the other parent is available and agrees to provide the care. This does not eliminate the normally-scheduled parent's responsibility to arrange for alternative care when necessary.

CP 5 (¶ 3.13(e)).

In July 2006, Cheri alleged that Michael had violated this provision on numerous occasions, often leaving the child overnight with others. CP 11-18. Michael conceded these facts, but explained that he left the child with relatives or with his domestic partner, to whom he is now married. CP 22-26. The court found that relatives are still babysitters and, accordingly, Michael violated the statute by leaving the child with relatives without first offering

Cheri residential time he could not or chose not to use. RP 12.¹

The court found Michael had the ability to comply and that his noncompliance was in bad faith. CP 34 (¶¶ 2.5 and 2.7).

Michael argued that once his domestic partner became his spouse, the provision at issue here does not apply. CP 25. The trial court appeared to agree. RP 12-13. However, none of the incidents occurred after the marriage, so the question of whether the provision applies to the spouse was not before the court. The trial court seemed to acknowledge that the question was not presented (“So, I don’t have a modification motion in front of me, certainly, but that would be how I would view the – that language.” RP 13) (emphasis added). Michael indicated he would bring a “Petition to Modify” on that basis. CP 25.

The violations, six altogether, ranged from June 25, 2005 to April 17, 2006 and totaled eight overnights. CP 33-34. The court found these separate violations constituted a single contempt. RP 13; CP 36 (¶ 3.9) (“The above findings of contempt shall be

¹ The court did not find a violation when the child had a sleepover with friends. CP 33; see, also, CP 24.

considered as a single instance of contempt for purposes of RCW 26.09.260(2)(d).”²

Cheri requested make-up time, attorney fees, and a civil penalty. CP 12; RP 13. The court declined to grant any of these requests. CP 35-36 (§§ 2.8, 3.3, 3.7 and 3.9).

This appeal timely followed. CP 38-46.

D. ARGUMENT

1. THE STANDARD OF REVIEW IS DE NOVO.

The trial court’s decision not to order make-up residential time, attorney fees, or a civil penalty is a question of what the statute means, as is the question of whether six violations constitutes one or six contempts. Interpretation of a statute is a question of law, which this Court reviews de novo. ***Kruger Clinic Orthopaedics, LLC v. Regence Blue Shield***, 157 Wn.2d 290, 298, 138 P.3d 936 (2006). Likewise, the question of what the parenting plan provision means vis-a-vis the new spouse is reviewed de novo. ***Kirshenbaum v. Kirshenbaum***, 84 Wn. App. 798, 803, 929 P.2d 1204 (1997) (interpretation of parenting plan is question of law).

² The cited statute permits modification of a parenting plan where “[t]he court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan,…” RCW 26.09.260(2)(d) (in pertinent part).

2. THE COURT HAD A NONDISCRETIONARY DUTY TO ORDER “MAKE-UP” TIME, ATTORNEY FEES, AND A CIVIL PENALTY.

Washington has a strong policy encouraging parents to comply with the provisions of their parenting plans. In particular, failure to comply may lead to contempt, which, in turn, leads to specific, mandatory remedies and sanctions. In pertinent part, the statute provides as follows:

(b) If, based on all the facts and circumstances, the court finds after hearing that the parent, in bad faith, has not complied with the order establishing residential provisions for the child, the court shall find the parent in contempt of court. Upon a finding of contempt, the court shall order:

(i) The noncomplying parent to provide the moving party additional time with the child. The additional time shall be equal to the time missed with the child, due to the parent's noncompliance;

(ii) The parent to pay, to the moving party, all court costs and reasonable attorneys' fees incurred as a result of the noncompliance, and any reasonable expenses incurred in locating or returning a child; and

(iii) The parent to pay, to the moving party, a civil penalty, not less than the sum of one hundred dollars.

RCW 26.09.160(2)(b). This Court has made clear that these provisions impose a nondiscretionary duty on the trial court. *In re Marriage of Myers*, 123 Wn. App. 889, 893, 99 P.3d 398 (2004). The trial court's failure to fulfill this duty constitutes obvious error.

In re Marriage of Wolk, 65 Wn. App. 356, 359, 828 P.2d 634 (1992).

In this case, the trial court found that Michael Eklund “intentionally failed to comply” with the parenting plan. CP 32 (¶ 2.1). The trial court found that “[t]he noncompliance with the residential provisions was in bad faith.” CP 34 (¶ 2.7). Accordingly and properly, the court held Michael in contempt. CP 35 (¶ 3.1). However, the court did not order make up residential time, attorney fees, or a civil penalty, as required by statute and as requested expressly by Cheri Eklund. CP 11-12, 34-36 (¶¶ 2.8, 3.3, 3.7, and 3.9); RP 13. The court reasoned that, under the circumstances of the contempt (i.e., the identities of the “babysitters” involved), “it is appropriate” not to award fees or impose the civil penalty. CP 35.

The statute does not provide for any exceptions. The trial court’s order in these respects was erroneous, should be reversed, and this cause should be remanded for compliance with the statute.

3. THE COURT CANNOT DECIDE AN ISSUE NOT PRESENTED (I.E., APPLICATION OF THE PROVISION TO THE NEW SPOUSE) AND, IN ANY CASE, THE COURT DECIDED IT INCORRECTLY.

Though the father argued that the optional time provision does not apply to his new spouse, none of the violations occurred after his marriage. Accordingly, the issue was not actually presented to the court for decision. However, the court did offer an opinion on the question, though the court also acknowledged that it did not have before it a petition to modify the parenting plan. The court did not and could not decide the issue. Absent a modification, the decree must be enforced according to its plain language.

First, the court did not have the power to decide the issue. It simply lacks the power to offer an advisory opinion. **See State v. Roberts**, 77 Wn. App. 678, 683, 894 P.2d 1340 (1995); **State v. Maloney**, 1 Wn. App. 1007, 1009, 465 P.2d 692 (1970) (same). **See, also AmJur COURTS** § 37 (“Absent ... constitutional or statutory authorization, the court has no power to render an advisory opinion.”). Accordingly, the court’s advisory opinion has no effect.

Second, the court is wrong in its opinion. Courts interpret decrees (or other orders) as they do contracts. **Stokes v. Pulley**,

145 Wn.2d 341, 346, 37 P.3d 1211 (2001). Review by this Court is de novo. *Id.*

Words used in the order will be given their ordinary meaning. *Id.*, citing *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982). Unless the order is ambiguous, that is, “susceptible to more than one meaning,” it is not “open to construction.” *In re Marriage of Sager*, 71 Wn. App. 855, 866-867, 863 P.2d 106 (1993).

The parenting plan is not ambiguous. The provision at issue here is plainly triggered whenever a “parent” is unable to spend four hours of residential time with the child. “Parent” has an unambiguous meaning, specifically, here, the parents whose rights and obligations are set forth in the parenting plan. The father’s new spouse is not a parent to this child.

In one respect, the court understood this, since the court recognized that excluding the new spouse from the effect of the provision would require modification of the parenting plan. No modification was before the court. Accordingly, this Court should make clear that the trial court’s opinion on this question has no effect and that the optional time requirement is triggered whenever

the father would leave the child with his new spouse for more than four hours.

4. THE TRIAL COURT ERRONEOUSLY HELD THAT SIX INSTANCES OF NONCOMPLIANCE CONSTITUTED ONE INSTANCE OF CONTEMPT.

It is undisputed that Michael left the child with babysitters on six separate occasions, spanning almost a year, without having first offered Cheri time with the child, as the parenting plan requires.

CP 5. He did so despite Cheri's request, on several occasions, that he leave the child with her. CP 13-15, 22. Cheri suggests his conduct is not only intentional, but that part of the intent is to curtail residential time between her and the child. CP 22-23.

Each of these instances was separate in time and involved a distinct and deliberate violation. However, instead of finding Michael to have violated the parenting plan six times and to have, therefore, committed contempt six times, the court aggregated these separate events into one finding of contempt. This was error. The statute declares that contempt occurs whenever a parent "in bad faith, has not complied with the order establishing residential provisions for the child,..." RCW 26.09.160(2)(b). Giving this language its plain and ordinary meaning, the six separate violations constitute six separate acts of contempt. The conduct, though

similar, occurred on six occasions, each separated from the other by appreciable periods of time. **See U.S. ex rel. Ushkowitz v. McCloskey**, 359 F.2d 788, 789 (2d Cir. 1966) (three separate convictions for contempt for “similar conduct, but it was engaged in on three occasions separated from each other by appreciable periods of time”); **see, also 17 Am. Jur. 2d Contempt** § 32. This was not a continuing course of conduct, but six separate, and separately deliberated, violations of the parenting plan.

Any other interpretation of the statute frustrates its purpose, which is to insure compliance with parenting plans. Indeed, the legislature reinforced this purpose when, in 1991, it made mandatory the sanctions that follow from contemptuous conduct. **Compare In re N.M.**, 102 Wn. App. 537, 7 P.3d 878 (2000) (legislature clearly did not intend to permit disaggregation of sanctions for contempt under BECCA). As applied here, obviously the mandatory make-up time is aggregated (i.e., totals all the residential time missed by the mother because of the father’s violation). Likewise, the civil penalty should be imposed for each occurrence. And, similarly, each occurrence should count as a separate instance of contempt.

Moreover, the importance of parental compliance is further underscored by the role contempt as defined by RCW 26.09.160 plays in establishing a predicate for modification. RCW 26.09.260(2)(d). Giving full effect to every act of noncompliance comports the legislature's emphasis on compliance.

Finally, to interpret the statute as the trial court did here encourages more litigation, at great cost to families and to the family courts. Essentially, the court here gives the father a pass on five acts of contempt because the mother did not hail him into court each and every time. That kind of rule does not make sense.

E. MOTION FOR ATTORNEY FEES

RAP 18.1 allows for the awarding of fees and costs on appeal where applicable law so authorizes. RCW 26.09.160(2)(b)(ii) provides that the parent found in contempt of a parenting plan shall be ordered to pay to the other parent "all court costs and reasonable attorneys' fees incurred as a result of the noncompliance, ..." The Washington Supreme Court has held this statute applies to these proceedings. *In re Marriage of Rideout*, 150 Wn.2d 337, 359, 77 P.3d 1174 (2003) (party is entitled to attorney fees on appeal under RCW 26.09.160 to the extent the appeal concerns contempt). The subject of this appeal entirely

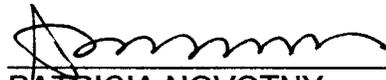
relates to the contempt. Accordingly, Cheri should receive her attorney fees and costs on appeal.

F. CONCLUSION

For the foregoing reasons, Cheri Eklund respectfully asks this Court to reverse the trial court's order declining to award additional time and attorney fees and declining to impose a civil penalty. She asks the cause be remanded with instructions to comply with the statute in these respects. She asks further that this Court reverse the trial court's finding that one contempt occurred, when, in fact, six did. Finally, she asks this Court to award her attorney fees on appeal.

Dated this 31st day of March 2007.

RESPECTFULLY SUBMITTED,



PATRICIA NOVOTNY
WSBA #13604
Attorney for Appellant

COURT OF APPEALS
DIVISION TWO

07 APR -07 AM 9:52

STATE OF WASHINGTON
BY Cmm
DEPUTY

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

In re the Marriage of:)	
)	No. 35518-3-II
CHERI LOUISE EKLUND,)	
Petitioner,)	
and)	DECLARATION
)	OF SERVICE
MICHAEL ALLEN EKLUND,)	
Respondent.)	
_____)	

Jayne Hibbing certifies as follows:

On April 2 , 2007, I served upon the following true and correct copies of the Appellant's Opening Brief and this Declaration, by:

- depositing same with the United States Postal Service, postage paid
- arranging for delivery by legal messenger.

Michael Eklund
225 Quick Road
Castle Rock, WA 98611

I certify under penalty of perjury that the foregoing is true and correct.

Jayne Hibbing
Jayne Hibbing
3418 NE 65th Street, Suite A
Seattle, WA 98115