

original

No. 35518-3-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

In Re the Marriage of:

CHERI LOUISE EKLUND,

Appellant,

v.

MICHAEL ALLEN EKLUND,

Respondent.

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY
COURT OF APPEALS
DIVISION TWO

APPEAL FROM THE SUPERIOR COURT
FOR COWLITZ COUNTY
HONORABLE STEPHEN WARNING

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal concerns the trial court's interpretation of a parenting plan in deciding a motion for contempt. At issue was a provision in the parenting plan that gives each parent the option of caring for the child when the other parent would otherwise place the child in "daycare" or with a "babysitter"—terms undefined in the parenting plan—for more than four hours. The mother, who at times also placed the child with others, filed this contempt action citing several violations by the father over the course of the previous ten months for (1) time the child spends with the father's fiancé (now wife) in the home they share, (2) time the child spends overnighting at the house of a friend of the child, and (3) time the child, who is adopted, spends with a biological grandparent with whom he has a strong bond. The father did not contest the factual allegations but instead disagreed with the mother's interpretation of "babysitter" as including persons with whom the child has social relationships. The court, interpreting the parenting plan, agreed with the mother in part and the father in part. The court found the father in contempt for several violations but reasonably exercised its discretion not to award sanctions, attorney fees, or make-up residential time.

II. ASSIGNMENT OF ERROR

The trial court erred by interpreting “babysitter” to include not only persons hired or otherwise used to supervise the child for the convenience of the parent during the parent’s absence, but also persons with whom the child has a social relationship.

Related Issue: Whether the trial court interpreted the term “babysitter” too broadly when it included persons with whom the child has social relationships and who are not hired or used primarily for the convenience of the parent.

III. RESTATEMENT OF THE CASE

- A. When the parties divorced in 2002, the trial court granted the father primary residential care and gave each parent an option to have residential time when the other parent would otherwise place the child in “daycare” or with a “babysitter” for four hours or longer.**

Michael Eklund and Cheri Eklund divorced in 2002, when their child, Nathan Eklund, was three. (CP 51) At the time they separated, the parents were the adoptive parent of Nathan and a long-term foster parent to another child, Aaron, who they intended

to adopt. (FF 2.18, CP 52; CP 23) The other child, Aaron, is not part of the present controversy.

The court awarded primary residential placement of Nathan to the father after expressing serious concerns about the mother's parenting. Though Cheri had been the "primary parent" to both children, she cut off all relations with Aaron when DSHS switched Aaron's placement to Michael's home due to a technical licensing issue. (FF 2.18, CP 52-53) The court found she had similarly severed her relationships with other family members and three prior spouses, each time as a response to conflict. (FF 2.18, CP 52-53) The court was concerned about the effects of Cheri's admitted problems if the court placed Nathan with Cheri. (FF 2.18, CP 52-53) Due to what the court described as Cheri's "relationship and instability problems," the court awarded primary residential care of Nathan to Michael subject to liberal visitation with Cheri on the weekends. (FF 2.18, CP 53; CP 2)

In its parenting plan, the court granted each parent the right to independently make decisions "regarding the day-to-day care and control" of the child while the child is living with that parent. (CP 7) But the court made that right subject to an exception when the child would otherwise be placed in "daycare" or with a

“babysitter” for longer than four hours. (CP 5) At those times, the other parent is given an option to care the child until the scheduled parent is available. (CP 5) The court did not define the terms “daycare” or “babysitter” in the 2002 parenting plan.

B. During the following several years, both parents at times entrusted the child’s care to others.

Michael did not interpret the terms “daycare” and “babysitter” to include either family members whose relationship with Nathan he is trying to maintain or develop, or others who supervise Nathan when there is a purpose other than watching the child in his absence. (CP 23-25)

For example, Michael has sought to maintain Nathan’s relationship with his biological grandmother, who is Cheri’s sister. (CP 35) The court found that although Cheri and the grandmother are now estranged, Nathan and has a close relationship with the grandmother. (CP 35) It was alleged and admitted that Michael allowed Nathan to visit with the grandmother for over four hours on four separate occasions between June 2005 and January 2006. (CP 13-15, 24, 33)

Similarly, Michael's current spouse, Elaine, has alone supervised Nathan at times when Michael was unavailable. They began dating in August of 2004, became engaged in October 2005, and married in April 2006. (CP 23) After Michael and Elaine began living together, Elaine at times supervised Nathan. (CP 24) It was alleged and admitted that Michael allowed Elaine to supervise Nathan in his home for over four hours on two occasions, June 28, 2005 and April 17, 2006. (CP 24, 34)

On yet another occasion alleged by Cheri and admitted by Michael, Michael allowed Nathan to be supervised overnight on January 14, 2006 by his wife's cousin, who has two children close in age to Nathan. (CP 14, 24) Cheri did not allege that Michael was out of town or otherwise unavailable. (CP 14) Michael described the event as a sleepover with friends. (CP 24)

Though Michael did not file a cross-motion for contempt, he testified that Cheri has on a few occasions left Nathan with people other than him without asking his permission. (CP 25) In reply, Cheri did not deny these occasions, instead focusing on her affirmative allegations of Michael's contempt. (CP 27-28)

- C. Interpreting “babysitter” very broadly, the trial court found the father in contempt for allowing the child to visit his grandmother and future step-mother for longer than four hours.**

On July 18, 2006, Cheri filed a contempt motion alleging the above acts by Michael. (CP 11) Michael admitted the basic facts but argued the language in the parenting plan was not intended to prevent him from encouraging the child’s relationships with family members and friends. (CP 22-26) Michael asked the court not to interpret “daycare” and “babysitter” to include the child’s relationship with the grandmother and step-mother or the parent of a friend Nathan visits socially. (CP 22-25)

At a hearing on August 11, 2006, the superior court for Cowlitz County, Hon. Stephen Warning, heard the matter on the basis of the parties’ declarations. The court recognized that the language in the parenting plan created some issues. The court orally opined that it would not interpret “daycare” or “babysitter” to include a spouse. (RP 12) Similarly, in its written order, the court ruled that allowing an overnight visit with a friend was not a violation. (CP 33) But “pretty much everybody else” is a babysitter, the judge said. (RP 12) “They’re family, they’re related, but they’re still babysitters.” (CP 12)

The court found Michael in contempt for making “a unilateral decision that here’s how far he was willing to comply and here’s how far he wasn’t.” (RP 12; CP 35) Accordingly, the court found Michael’s noncompliance was in bad faith, though it also acknowledged Michael’s present willingness to comply with the court’s interpretation of the parenting plan. (CP 34)

Cheri filed a timely notice of appeal. (CP 38) Michael has not cross-appealed.

IV. ARGUMENT

A. This court should not interpret “babysitter” to include a live-in fiancé or a biological grandparent with whom the adopted child has a significant relationship.

Michael has not filed a notice of cross appeal. He therefore does not ask for affirmative relief from the trial court’s contempt order. **See *Arbitration of Doyle***, 93 Wn. App. 120, 127, 966 P.2d 1279 (1998) (refusing to grant affirmative relief to respondent in absence of cross appeal).

A respondent, however, may assign error for purposes of affirming the judgment. ***Amalgamated Transit Union Local 587 v. State***, 142 Wn.2d 183, 202 (2000); ***City of Tacoma v. Taxpayers of City of Tacoma***, 108 Wn.2d 679, 685, 743 P.2d 793 (1987). A

respondent who merely seeks to affirm the judgment is not seeking affirmative relief. *Wolstein v. Yorkshire Ins. Co.*, 97 Wn. App. 201, 206-07, 48 P.2d 924 (1935). Accordingly, Michael does not ask the court to reverse the judgment of contempt, but he does ask this court not to compound error by reversing the trial court's denial of further sanctions, attorney fees, and make-up time.

Specifically, the trial court erred in interpreting the term "babysitter" to include persons with whom the child has social relationships. The biological grandmother, for instance, is a person who supervised the child on five overnight visits during the ten-month period. (CP 33-34) The court specifically found that the child has a "close relationship" with his biological grandmother (Cheri's sister) who, because Cheri is estranged from her family, would not be available to the child during the mother's residential time. (FF 2.8, CP 35) Cheri herself testified that the only contact she has with the child's biological grandmother is when she sought to take the child back from the grandmother. (CP 27) Because Cheri is estranged from her family, the responsibility of furthering the child's close relationship with his grandmother falls to the father.

Similarly, the father has an interest in developing and fostering the relationship between the child and the father's intimate

partner, Elaine. On each of the two occasions on which the court found the child spent more than four hours with Elaine, she was in a long-term relationship with Michael and both Michael and the child lived in her home. (CP 24, 33-34) They are now married. (CP 23)

Michael's interest in furthering the child's relationships with the child's peers also involves occasional visits of longer than four hours. In the one incident found by the court, the child was supervised by Michael's wife's cousin while overnight in her house with her two children who are close in age to the parties' child. (CP 24, 33) Though Cheri alleged this visit was a babysitting situation, the trial court correctly concluded otherwise and found no violation.

Similarly, there will surely be other times during the next several years when there are non-babysitting purposes for allowing the child to visit for more than four hours with someone other than the parties. As the child ages, he'll surely spend time at home alone or just in the presence of his step-mother. He may wish to attend camps, extracurricular activities, or other social activities that are longer than four hours. Under the trial court's broad interpretation of the parenting plan, these activities may one day be found to be babysitting occasions which the mother could deny.

The interpretation of “babysitter” as used in the parties’ parenting plan should be limited to persons with whom the child is left for the primary purpose of providing care. The trial court should not have defined it to deny contact with persons with whom the child has social relationships that the father wants to encourage during his scheduled time with the child.

Accordingly, this court should deny Cheri’s requests for relief, all of which depend on the trial court’s broad and faulty interpretation of “babysitter”. This court should affirm the judgment.

B The trial court acted appropriately when it entered only one finding of contempt because (1) Cheri did not request more than one finding of contempt, and (2) multiple contempt findings would have been error.

1. Cheri cannot complain that the trial court erred by entering only one finding of contempt because she requested only one finding of contempt.

Consistent with caselaw holding contempt is a status, Cheri asked the court to find Michael “in contempt for failure to comply with the Parenting Plan.” (CP 11) Neither in her written motion nor in her oral argument did Cheri ask the court to enter multiple findings of contempt.

For the first time on appeal, Cheri now argues the court should have made multiple contempt findings, probably because she would like to be entitled to enhanced sanctions. (The first contempt finding ordinarily carries a civil penalty of not less than \$100, while each subsequent contempt finding carries a penalty of not less than \$250. RCW 26.09.160(2)(b)(iii) and (3)(c).)

The invited error doctrine precludes review of Cheri's claimed error because she asked the trial court to make only a single finding of contempt. (CP 11, ¶ 1.1) Under the invited error doctrine, when the trial court does what a party asks, the party cannot complain on appeal that the court's action was error. **City of Seattle v. Patu**, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002); **Marriage of Blakely**, 111 Wn. App. 351, 360, 44 P.3d 924 (2002).

The doctrine applies here because Cheri referred to a single contempt finding throughout her motion. In her request for relief, Cheri specifically asked that the court "find[] Micheael Allen Eklund in contempt for failure to comply with the Parenting Plan/custody order entered on February 22, 2002." (CP 11) She requested "a forfeiture for each day the contempt of court continues" and an order "establishing conditions by which the contempt may be purged." (CP 11-12)

In her oral argument Cheri did not argue that the court should make multiple findings of contempt. After the judge made his oral ruling, her attorney asked, "Are you making a single finding of contempt?" (RP 13) The court answered affirmatively. (RP 13) Never did Cheri ask the court to make multiple findings of contempt. Review should be denied. *Patu*, 147 Wn.2d at 720-21; *Blakely*, 111 Wn. App. at 360.

2. A single finding of contempt was appropriate under case law.

Even if this court reviews the alleged error, the superior court was not required to enter multiple findings of contempt.

Contempt orders are reviewed for abuse of discretion. *Marriage of Myers*, 123 Wn. App. 8889, 892, 99 P.3d 398 (2004). Cheri argues (for the first time on appeal) that the trial court should have found Michael in contempt eight times. Had the court made such sua sponte findings, then it would have grounds for multiple sanctions, including \$100 for the first violation and \$250 for each subsequent violation – a total of \$1,600 plus whatever attorney fees the court might award. RCW 26.09.160(2)(b)(iii) and (3)(c).

In other cases, depending on the facts and the parenting plan, there might be dozens of similar violations before a party brings a motion for contempt. Indeed, under Cheri's argument, a party would have incentive to accumulate lots of individual violations before going to court to claim contempt and sanctions. Certainly this is not what the Legislature intended.

The Court of Appeals has rejected the argument that contempt findings can be stacked in that manner. *Interest of N.M.*, 102 Wn. App. 537, 543, 7 P.3d 878 (2000). In *N.M.*, a juvenile violated various provisions of an at-risk youth order. The trial court found five separate violations, including a curfew violation, a refusal to attend AA meetings, verbal abuse of the juvenile's mother, and coming home stoned. *N.M.*, 102 Wn. App. at 538-39. The court of appeals distinguished between violations and contempt, holding that multiple violations of the order could not give rise to multiple contempt findings or stacked penalties. *N.M.*, 102 Wn. App. at 544. The court of appeals stressed that being in contempt is a status rather than a discrete violation: "Civil contempt is a status; once the juvenile is in contempt, the status is legally present whether there is one or several violations of the court's order." *N.M.*, 102 Wn. App. at 545.

Extra-jurisdictional case law cited on appeal by Cheri is consistent with the rule of *N.M.* In *United States ex rel. Ushkowitz v. McCloskey*, 359 F.2d 788 (2d Cir. 1966), the court was faced with a reluctant witness who refused to answer a particular question for a grand jury on multiple occasions, even after being granted immunity from prosecution. *Ushkowitz*, 359 F.2d at 788. The witness was found in contempt and punished with 30 days in jail and a \$250 fine. *Ushkowitz*, 359 F.2d at 789. After completing that sentence, he was called as a witness again, refused to testify again, and was given the same punishment again. *Ushkowitz*, 359 F.2d at 789. After repeating this scenario a third time, the witness appealed from the third order and claimed he could not be punished three times for refusing to answer the same question. The Second Circuit disagreed, reasoning that the violations were separated not only by time but by the findings of contempt and the punishment imposed. *Ushkowitz*, 359 F.2d at 789.

Here, in contrast, the present action is the first action in which the trial court has found Michael in contempt. He was not previously found in contempt for his interpretation of the parenting plan and he was not previously sanctioned. When the Legislature

imposed a higher penalty for the contempt findings subsequent to the first, it surely did so because it intended that the subsequent finding came after, not contemporaneous with, an earlier punishment for contempt. **Compare** RCW 26.09.160(2)(b)(iii) (\$100 sanction for first contempt finding) **and** RCW 26.09.160 (3)(c) (\$250 sanction for each subsequent contempt finding). **See also** *Yates v. United States*, 355 U.S. 66, 72, 2 L. Ed. 2d 95, 78 S. Ct. 128 (1957) (holding witness's 11 refusals to answer questions could not be basis for 11 separate terms of punishment where all questions were directed to the same topic and asked on the same occasion).

The trial court here did not abuse its discretion when it reasonably found Michael in contempt only once for multiple violations which arose from a single misinterpretation of the parenting plan and which were alleged together at the same time in single action asking for a single contempt finding.

C. The trial court did not abuse its discretion when it declined to award sanctions, attorney fees, and make-up time.

The trial court had discretion to deny the sanctions and attorney fees under the facts of this case.

First, Cheri did not prove all her allegations of contempt. The court disagreed with her interpretation of the parenting plan to the extent she believed the parenting plan would prohibit Michael from allowing the child to visit overnight at a friend's house. (CP 33) Though she prevailed on most of her allegations, Michael also prevailed on at least one allegation and had made a competing request for attorney fees. (CP 26, 33)

Second, it was uncontested that Cheri had acted in the same manner, at times leaving the child with another person for more than four hours without giving Michael the option to exercise residential time. (CP 25) The fact that Cheri's actions manifested an interpretation of the plan consistent with Michael's interpretation was grounds to decline sanctions.

Third, with regard to the make-up residential time, the superior court has inherent authority to act in the best interest of the child. The child's residential time should be consistent with the

child's best interests. While in most cases the court may find that granting several overnights of make-up time is not inconsistent with the child best interests, the court reason to think otherwise here. The mother's residential time had been limited due to her "relationship and instability problems" and her particular problem in dealing with conflict in relationships. (FF 2.18, CP 53) Under the circumstances, denying make-up time was within the court's discretion.

Finally, a trial court has inherent discretion to refuse to enforce its order. ***Marriage of Olsen***, 24 Wn. App. 292, 300, 600 P.2d 690 (1979). The authority to refuse to enforce an order where appropriate must also include the authority not to sanction a party for violating the order.

V. CONCLUSION

Contempt laws are best used to enforce clear violations of a parenting plan, not to settle disputes over interpretation of ambiguous provisions or add clarity to gray areas. Cheri could have filed a simple motion to clarify the parties' rights and responsibilities, or she could have filed either that motion or a motion for contempt much earlier. Instead, she waited nearly a

year and acted consistently with Michael's interpretation. Though the superior court interpreted and clarified the parenting plan in a way that partially agreed with many (but not all) of Cheri's allegations, the court appropriately declined to stack punishments or award sanctions, attorney fees, and make-up time. The trial court was satisfied that Michael "is presently willing to comply" with the court's clarification of the parenting plan and believed the sanctions were inappropriate under the circumstances. This Court should find that the trial court acted within its discretion.

Respectfully submitted: June 29, 2007.

A handwritten signature in cursive script that reads "Brendan Patrick".

Brendan Patrick, WSNB 25648
Attorney for Respondent

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 29, 2007, I deposited in the mails of the United States of America, postage prepaid, an envelope containing a true and correct copy of the Designation of Clerk's Papers, addressed to:

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07 JUN -2 AM 9:08
STATE OF WASHINGTON
BY _____ DEPUTY
COURT OF APPEALS
DIVISION II

DATED at Seattle, Washington, June 29, 2007:



Brendan Patrick