

45921-3-II

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

APRIL ADAMS,

Appellant

v.

AUSTIN McMILLIN,

Respondent

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TACOMA, WASHINGTON

BRIEF OF APPELLANT APRIL ADAMS

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I. INTRODUCTION

April Adams (f/k/a McMillin) appeals the finding and order of contempt entered by the Pierce County Superior Court on January 15, 2014. This Order of Contempt relates to the transfer of one of the parties' children to the father at the conclusion of her residential time. In October 2013, both parties petitioned the Superior Court for a modification of the parenting plan entered in September 2012. All proceedings between the parties have been highly contentious and residential exchanges have been particularly difficult. The only ruling on appeal is the January 15, 2014 finding and order of contempt.

II. ASSIGNMENT OF ERROR

- A. Ms. Adams assigns error to the finding 2.3 that "This order was violated in the following manner (include dates and times, and amounts if any: Order of December 6, 2014 by not returning Lia Sunday to Father (December 8, 2014)."
- B. Ms. Adams assigns error to the finding that: "April Adams had the ability to comply with the order as follows: She was aware Beth Barker was available to transfer Lia on Sunday, December 8, 2013."
- C. Ms. Adams assigns error to the conclusion that she was in contempt of the December 6, 2013 Order.

III. ISSUES ON APPEAL

1. Whether the trial court errs when it finds a party in contempt without finding bad faith on the part of the contemnor?
2. Whether the trial court errs when it finds a party in contempt when compliance with the particular court order is impossible due to the conduct of the non-contemnor party?

IV. STATEMENT OF THE CASE

The parties to this action are the parents to two children: Ryan and Lia. The order of contempt entered on January 15, 2014 relates to the transfer of Lia following her residential time with Ms. Adams.¹ CP 68-76. Mr. McMillin, by his own account, has continuously alleged Ms. Adams to be in regular violation of court orders, and the court had not previously so found. CP 17.

During modification proceedings to modify the parties' parenting plan, the trial court entered a temporary order on December 6, 2013 to establish a temporary residential schedule. CP 1-3. That December 6th Order required in part: "the current residential schedule shall remain with

¹ At the time the Order of Contempt was entered, the parties' son, Ryan was not spending residential time with Mr. McMillin, and Mr. McMillin was ordered to have joint counseling sessions with Ryan and Ryan's counselor, Dr. Ruddell. CP 1-3.

one modification. Mother shall have residential time with Lia from 10am – 5 pm every Saturday. Transportation to be provided by delivery parent and pickup shall be University Place City Hall.” *Id.* This order was entered at a hearing before the Court on Friday, December 6, 2013.

The next day, pursuant to the trial court’s order, Ms. Adams was at the University Place City Hall to pick up Lia at 10:00 a.m. on Saturday, December 7, 2013. CP 6. Lia ran up to the car within 10-20 minutes, but Mr. McMillin was not at that location. *Id.* Ms. Adams learned from Lia that Mr. McMillin had gone to Las Vegas with his girlfriend on Thursday, December 5, 2013. *Id.* That trip had not been disclosed to the Court at the December 6, 2013 hearing, despite being planned for months in advance. RP 4-5, 14, 43, 53; CP 17. Mr. McMillin did not disclose to Ms. Adams at any time, when he would be back in Washington. CP 8. Ms. Adams did not know of this trip until Lia said she had been staying with a neighbor when she was dropped off for her residential time with mother. CP 6.

Again, pursuant to the December 6, 2013 Order, Ms. Adams arrived at the University Place City Hall at 5:00 p.m. on Saturday, December 7, 2013. CP 6. Mr. McMillin was not there. *Id.* No other person was there and no one arrived or contacted Ms. Adams. *Id.* At 7:27 p.m., Ms. Adams received a text message from Mr. McMillin stating

“Where is Lia.” *Id.* A second text message came from Mr. McMillin shortly thereafter, “Lia is to have been dropped off at 7:00 p.m. It’s now 30 minutes late. Please explain what is going on.” *Id.*

At 8:05 p.m. and 8:07 p.m., Ms. Adams missed two calls from a woman she would later learn to be Beth Barker. CP 6. Ms. Adams was not certain she had ever met Ms. Barker, did not know her last name (Barker), did not know where Ms. Barker lived, and had not seen her when Lia was transferred on Saturday morning. CP 7. Ms. Adams only knew Ms. Barker’s telephone number. *Id.* Ms. Adams was never involved in the discussions between Ms. Barker and Mr. McMillin regarding Lia’s stay with Ms. Barker, nor her role in transferring Lia. *Id.*

At 8:29 p.m. on Saturday, Mr. McMillin called Ms. Adams from Las Vegas, but she missed the call. CP 6. He left a voicemail that was alarming because he sounded drunk and/or otherwise “out of it.” *Id.* At that point, Ms. Adams heard the earlier voicemail from Ms. Barker, in which she stated who she was and provided her telephone number. *Id.* Ms. Adams returned a call at 8:53 p.m., but Ms. Barker did not pick up. *Id.* Ms. Adams again missed a call from Ms. Barker at 9:27 .p.m. and finally reached Ms. Barker by returning her call at 9:34 p.m. on Saturday. CP 7. Both children were in bed, and given the freezing temperatures, Ms. Adams felt it was unsafe to take the children back out. *Id.* Ms. Barker

alleges that she offered to pick up Lia on Sunday. CP31. Ms. Adams then informed Mr. McMillin of the situation by telephone. *Id.*

Ms. Barker never attempted to reach Ms. Adams on Sunday, December 8, 2014. CP 7. There was no contact from anyone on Mr. McMillin's behalf who could pick up Lia. *Id.* Mr. McMillin texted Ms. Adams repeatedly on Sunday morning, telling Ms. Adams to "coordinate a time with Beth for an exchange now." *Id.*, CP 26-27. Despite Ms. Adams repeated requests, Mr. McMillin would not answer whether or not he was in Washington or in Las Vegas. CP 27. Mr. McMillin never confirmed that he was in Washington when he was demanding the transfer take place. Regardless, Ms. Adams had both children with her on Sunday and had been prepared to meet Ms. Barker, but she was never contacted by Ms. Barker. CP 7. The next day, on Monday, December 9, 2013 Ms. Adams took Lia to school, from there she returned to her Father's residence. That same day, Mr. McMillin filed his motion for contempt. CP 4, 16-29, 33-37.

Ms. Adams never intended to violate the court order. CP 8. She was at the exchange location at the time ordered by the court: 5:00 pm on Saturday, December 7th. *Id.* Mr. McMillin never informed Ms. Adams that he was in Las Vegas, or that he had arranged for someone else to pick up Lia. *Id.*

V. ARGUMENT

A. The Contempt Order Is Appealable.

Final judgments entered in any action or proceeding may be appealed from the superior court. RAP 2.2(a)(1). A civil order of contempt is appealable as a final judgment, if it is a decision affecting a substantial right which determines an action, or a final order made after judgment which affects a substantial right. *Arnold v. Nat'l Union of Marine Cooks & Stewards Ass'n.*, 41 Wn. 2d 22, 246 P.2d 1107 (1952) (At issue in *Arnold* was one party's refusal to produce certain bonds). If the court establishes both willful resistance to a contempt order and a coercive sanction designed to compel compliance with the court's order, the contempt order is final. *Id.* at 26.

Contumacy and a coercive remedy indicate the finality of the contempt order. *Seattle NW. Sec. Corp. v. SDG Holding Co., Inc.*, 61 Wn. App. 725, 732-33, 812 P.2d 488 (1991). *See also Boudwin v. Boudwin*, 162 Wash. 142, 298 p. 337 (1930) (The order of contempt imposed no punishment or coercive penalty, but prescribed a manner in which the party could purge himself of contempt, and was therefore impliedly an appealable order). "An adjudication of contempt is appealable if it is final order or judgment, i.e., the contumacy—the party's willful resistance to the contempt order—is established and the sanction is a coercive one

designed to compel compliance with the court's order.” *Wagner v. Wheatley*, 111 Wn. Wpp. 9, 15-16, 44 P.3d 860 (2002). While the question of whether contempt sanctions are warranted is a matter of discretion, *In re Marriage of Eklund*, 143 Wn. App. 207, 212, 177 P.2d 189 (2008), “[a] ruling based on an erroneous view of the law or an incorrect legal analysis is necessarily an abuse of discretion.” *In re Estate of Smaldino*, 151 Wn. App. 356, 212 P.3d 579 (2009) (citing *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007)).

This order of contempt is properly appealed because it is a final order. The contempt order not only imposes a judgment for attorney's fees and a civil fine of \$100.00 as a coercive sanction, but establishes conditions for purging the contempt: “The contemnor may purge contempt as follows: residential time for Lia with April Adams shall be every other Sat. beginning Feb. 1, 2014 from 10 am – 5 pm.” CP 72. The trial court erred by entering the order of contempt because (1) Ms. Adams did not act with bad faith; (2) Ms. Adams attempted to comply with the order and; (3) Mr. McMillin made it impossible to comply.

B. The Trial Court Did Not Make a Finding of Bad Faith

Civil contempt is “intended to ‘coerce compliance with a lawful court order...’” *In re King*, 110 Wn.2d 793, 797, 756 P.2d 1303 (1988)). Civil contempt may be found under the general contempt statute, RCW

7.21.010 *et seq.*, or if a party fails to comply with the provisions of a decree or a parenting plan under RCW 26.09.160. The general contempt statute defines contempt of court as “intentional ...[d]isobedience of any lawful judgment, decree, order or process of the court.” The language of the intentionality requirements of the statute is imperative to determining whether a party is in contempt. “Implicit in this definition is the requirement that the contemnor have knowledge of the existence and substantive effect of the court’s order or judgment.” *Smaldino*, 151 Wn. App. at 365 (citing RCW 7.21.010).

Under RCW 26.09.160, if based on all the facts and circumstances, the court finds 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.” RCW 26.09.160(b). The trial court must specifically find bad faith or intentional misconduct as a predicate for its contempt judgment. *In re James*, 79 Wn. App. 436, 440, 903 P.2d 470 (1995); *In re Humphreys*, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995). “[B]oth the judicial concern for the rights of contemnors and RCW 26.09.160(2)(b) support a requirement that the trial court make a specific finding of bad faith or intentional misconduct as a predicate for its contempt judgment.” *In re Marriage of Davisson*, 131 Wn. App. 220, 224, 126 P.3d 76 (2006).

The trial court did not make a finding that Ms. Adams had acted in bad faith or engaged in any misconduct. Not only did Ms. Adams lack bad faith, she intended to comply and in fact *attempted* to comply by appearing at the University Place City Hall at 5:00 p.m. on Saturday as ordered. Ms. Adams believed that the December 6, 2014 order required the parents to personally make the transfer. Even after learning that Mr. McMillin was in Las Vegas and could not physically make the transfer, Ms. Adams still arrived at the designated location at the designated time pursuant to the Court's order. Ms. Adams' never engaged in any conduct in bad faith or any misconduct in violation of a court order sufficient to order contempt.¹ While the trial court found that Ms. Adams refused to cooperate on Sunday, the specific order of the Trial Court was for the parents to make the residential exchanges on Saturday: an order that Ms. Adams fully complied with, and with which she fully intended to comply. Notably, the January 15, 2014 order of contempt does not identify *any* absence of willingness to comply with the order. CP 70. Finding 2.5 states: "April Adams has does have [sic] the present ability to comply with

¹ The trial court found, "Given the late hour on Saturday, I don't know that it's entirely unreasonable to keep her overnight, but to not return her on Sunday was a contempt. I do make a finding of contempt for that reason." RP 57. The written order is the binding expression of its findings. *State v. Hescok*, 98 Wn.App. 600, 305-66, 989 P.2d 1251 (1999). The oral ruling is only used to interpret ambiguous written orders. *Id.* The written order is unambiguous and therefor the oral ruling cannot be considered.

the court order as follows: N/A. April McMillin [sic] has does not have [sic] the present willingness to comply with the court order as follows: N/A.” The trial court never made any specific findings of bad faith or intentional misconduct sufficient for the predicate of ordering contempt. Absent this predicate finding, the trial court could not order Ms. Adams in contempt.

C. The Language of the December 6, 2013 Order Must Be Strictly Construed.

When examining the language of the December 6, 2013 order, the Court must strictly construe the language of the trial court. *In re Marriage of Humphreys*, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995). “[T]he facts must construe a plain violation of the order. *Id.* (citing *Johnston v. Beneficial Management Corp. of Am.*, 96 Wn.2d 708, 713-14, 638 P.2d 1201 (1982)). In contempt proceedings, an order will not be expanded by implication beyond the meaning of its terms when read in light of the issues and purposes for which the suit was brought. *Johnston v. Beneficial Management Corp. of America*, 96 Wn.2d 708, 713, 638 P.2d 1201 (1982).

In this case, the plain language of the December 6, 2014 order required the parents to personally make the transfer of the children with the provision: “transportation provided by delivery parent.” CP 2. The

order also states, “the parties shall not have contact with one another at these residential exchanges.” CP 2. Ms. Adams expectation was that Lia was to be transferred to her Father, not an unknown (to her) third-party. Construing the language of the trial court strictly, the parents (parties) were to facilitate the exchange of Lia at 5:00 pm on Saturday. Ms. Adams complied with the order of the court, by having Lia at the exchange location at 5:00 p.m. on Saturday. Mr. McMillin failed to notify the court, and in fact omitted from disclosing to the court or to Ms. Adams, that he would not be the party providing transportation at 10:00 am on Saturday. Because neither Mr. McMillin nor any one he designated arrived to pick up Lia at 5:00 pm on Saturday, Ms. Adams had no choice but to keep Lia. On Sunday, Mr. McMillin would never confirm whether he was present in the state and able to pick up the child, but instructed her to make accommodations with an unknown third party. Strictly construing the language of the December 6, 2014 order, Mr. McMillin was not in a position to designate pick-up or drop-off times at his pleasing, and could not create the very circumstance under which he moved for Ms. Adams’ to be held in contempt. Ms. Adams did not know Ms. Barker, aside from speaking to her briefly on the telephone, and maybe meeting her once at a parade. Ms. Adams was not ordered to transfer Lia unconditionally with anyone designated by Mr. McMillin at a time and place he unilaterally

imposed, but to transfer Lia to Mr. McMillin. Strictly construed, Ms. Adams complied with the Court's order by taking Lia to the University Place City Hall at 5:00 pm. Mr. McMillin's instructions and desires cannot be used to expand the order of the Court and to impose contempt sanctions because Ms. Adams did not comply with Mr. McMillin's wishes.

The specific finding of the trial court was that Ms. Adams failed to comply with the December 6, 2013 order because she "was aware Beth Barker was available to transfer Lia on Sunday, December 8, 2013." CP 69. Ms. Adams had no specific knowledge that Beth Barker was available. The December 6, 2013 Order of the trial court was not to arrange for transfer of Lia through the parties "or a third person." Instead, the specific order was to transfer Lia to Mr. McMillin. Ms. Adams was not in contempt.

D. The Conduct of Mr. McMillin Made it Impossible for Ms. Adams to Comply with The Court Order.

The conduct of Mr. McMillin made it impossible for Ms. Adams to comply with the trial court's order. "It is well settled law that 'the law presumes that one is capable of performing those actions required by the court...[and the] inability to comply is an affirmative defense.'" *Britannia Holdings Ltd. V. Greer*, 127 Wn. App. 926, 933-34, 113 P.3d 1041

(2005)(quoting *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995) .

It is undisputed that Ms. Adams arrived at the University Place City Hall at 5:00 pm on December 7, 2013 as required by the Court's order. No party disputes that Ms. Barker did not arrive at 5:00 pm for the residential exchange. It is further undisputed that Mr. McMillin was out of state during the entire weekend and did not notify Ms. Adams or the court in advance that he would not be available for the residential exchange. His inability to be present and failure to adequately inform Ms. Adams as to alternate arrangements for transportation made it impossible for Ms. Adams to fully comply with the trial court's order. Even on Sunday, Ms. Adams was prepared to take Lia to Mr. McMillin or Ms. Barker. However, Ms. Adams never heard from Ms. Barker, and Mr. McMillin never would confirm whether or not he was present in Washington. Mr. McMillin never made the easy response of confirming or denying his presence in the state, instead insisting on seeking a contempt order. He moved immediately (the next day) to have Ms. Adams held in contempt.

Because of the conduct of Mr. McMillin, Ms. Adams could not have complied with the court order regarding the transfer on Saturday at 5:00 p.m. Ms. Adams should not have been found in contempt because the impossibility to comply with the court order was a complete defense.

VI. CONCLUSION

For the reasons set forth herein, the trial court erred when it found that Ms. Adams had violated the Court's December 6, 2013 order, when it found that Ms. Adams was aware Beth Barker was available to transfer Lia the next day, and ordered Ms. Adams in contempt of court. For these reasons, Ms. Adams respectfully requests this Court to reverse the trial court's findings and order of contempt.

RESPECTFULLY SUBMITTED this 26 day of June, 2014.

SMITH ALLING, P.S.


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CERTIFICATE OF SERVICE

I hereby certify that I have this 20 day of June, 2014, served a true and correct copy of the foregoing document, via the methods noted below, properly addressed as follows:

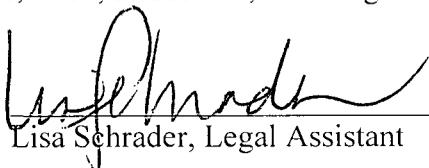
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I declare under penalty of perjury under the laws of the State of Washington that the I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20 day of June, 2014, at Tacoma, Washington.



Lisa Schrader, Legal Assistant

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