

No. 45921-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

APRIL ADAMS,

Appellant,

and

AUSTIN MCMILLIN,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE ELIZABETH MARTIN

BRIEF OF RESPONDENT

LAW OFFICE OF JEFFREY A. ROBINSON
Amanda J. Cook, WSBA # 35454
Of Attorneys for Respondent

FILED
COURT OF APPEALS
DIVISION II
2014 SEP 26 PM 1:51
STATE OF WASHINGTON
BY DEPUTY

4700 Pt. Fosdick Dr. NW, Ste. 301
Gig Harbor, WA 98335
Phone: (253) 851-5126
Facsimile: (253) 851-2868

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii-iii
I. Introduction.....	1
II. Restatement of Facts.....	2
III. Argument.....	4
A. Standard of Review	4
B. The Trial Court found Appellant Acted in Bad Faith	5
C. Strict Construction of the Court Order Required April Adams to Return the Child.....	7
D. The Father Did Not Cause the Mother’s Intentional Violation of the Residential Provisions of the Court Order.....	8
E. The Father Should be Awarded Attorney Fees on Appeal.....	12
IV. Conclusion.....	23

TABLE OF AUTHORITIES

<u>Washington State Cases</u>	<u>Page</u>
<i>Davis v. Dep't of Labor & Indus.</i> , 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).....	5
<i>Francis v. Washington State Dept. of Corrections</i> , 178 Wn.App. 42, 52, 313 P.3d 457, 462 (Div. 2, 2013).....	5
<i>In re Marriage of Davisson</i> , 131 Wn.App. 220, 126 P.2d.76, <i>rev denied</i> 158 Wn.2d 1004, 143 P.3d 828 (Div. 3, 2006).....	6
<i>In re Marriage of Eklund</i> , 143 Wn.App. 207, 218-219, 177 P.3d 189, 195 (Div. 2, 2008).....	13
<i>In re Marriage of James</i> , 79 Wn.App. 436, 440, 903 P.2d 470, 472 (1995)	4, 5
<i>In re Marriage of Mathews</i> , 70 Wash.App. 116, 126, 853 P.2d 462, review denied, 122 Wn.2d 1021, 863 P.2d 1353(1993).....	4
<i>In re Marriage of Myers</i> , 123 Wn. App. 889, 893, 99 P.3d 398 (Div. 2, 2004).....	6
<i>In re Marriage of Rich</i> , 80 Wn.App. 252, 259, 907 P.2d 1234 (1996).....	4
<i>In re Marriage of Rideout</i> , 150 Wn.2d 337, 350, 77 P.3d 1174 (2003).....	4,13
<i>In re Marriage of Spreen</i> , 107 Wn. App. 341, 346, 28 P.3d 769 (2001)....	5
<i>In re Marriage of Thomas</i> , 63 Wn.App. 658, 660, 821 P.2d 1227, 1228 (1991).....	4
<i>In re Recall of City of Concrete Mayor Robin Feetham</i> , 149 Wn.2d 860, 872, 72 P.3d 741 (2003).....	12
<i>Magnusson v Johannesson</i> , 108 Wn.App. 109, 113, 29 P.3d 1256 (Div. 1, 2009).....	9
<i>Moreman v. Butcher</i> , 126 Wn.2d 36, 40, 891 P.2d 725 (1995).....	4

<u>Washington State Cases (cont.)</u>	<u>Page</u>
<i>State v. Bible</i> , 77 Wn.App. 470, 471, 892 P.2d 116 (1995).....	4
<i>State v. Rundquist</i> , 79 Wn.App. 786, 793, 905 P.2d 922 (1995)	4
<u>Washington State Rules</u>	<u>Page</u>
CR 60(b).....	6
RAP 18.1.....	12
<u>Washington State Statutes</u>	<u>Page</u>
RCW 4.84.185.....	12
RCW 26.09.160.....	6
RCW 26.09.160(1).....	11
RCW 26.09.160(2).....	13
RCW 26.09.160(2)(b).....	5
RCW 26.09.160(2)(b)(ii).	12

I. INTRODUCTION

On January 15, 2014, the Pierce County Superior Court found Appellant, April Adams, in contempt of a valid court order dated December 6, 2013, relevant to residential time for the parties' children. April Adams appeals the court's findings and conclusions that she was in contempt of that order by failing to return the parties' minor child to the father on the date required therein.

II. RESTATEMENT OF FACTS

The parties were engaged in open litigation to modify their parenting plan, when on December 6, 2013, Judge Elizabeth Martin, Pierce County Superior Court, entered an order requiring:

"It is hereby ordered, adjudged and decreed that the current residential schedule shall remain with one modification. Mother shall have residential time with Lia from 10 am-5pm every Saturday. Transportation provided by delivering parent and pickup shall be University Place City Hall." CP 2.

The "current residential schedule" referenced in the December 6, 2013, court order, provided that the parties' child, Ryan, was to be in April Adams' sole care, while the parties' child, Lia, was to be in Austin McMillin's sole care. Thus, the only residential effect of the December 6, 2013 court order was that it

allowed April Adams to begin seeing Lia for daytime visits on Saturdays.

Austin McMillin was not present at the hearing on December 6, 2013, as he was teaching at a conference in Las Vegas. Before he left, he arranged for Lia to stay during his absence with Ms. Beth Barker, his neighbor and the mother of one of Lia's friends. CP 17-18.

After the December 6, 2013 hearing, Austin McMillin received phone communication from his attorney, notifying that April Adams was to have Saturday daytime visits with Lia. There was a miscommunication in that when his attorney informed Austin McMillin of the seven-hour daytime visits, Austin McMillin understood the visits to end at 7:00 p.m. He accordingly told Ms. Barker to provide Lia to April Adams on Saturday at 10:00 a.m. and return to pick her up at 7:00 p.m. CP 18.

Ms. Barker facilitated Lia's transfer to April Adams at 10:00 a.m. on Saturday, December 7, 2013. She went back to the transfer location to pick up Lia that same day at 7:00 p.m. CP 31.

When Lia did not arrive, Ms. Barker contacted April Adams, who indicated to that she had met her own obligation and that there was no court order now. CP 31. She declined to return Lia,

claiming that the child was winding down for the evening. When Ms. Barker requested to pick up Lia the next day, Sunday, April Adams again refused, indicating her intent to keep Lia until Monday morning. CP 31.

When Austin McMillin returned from his conference and attempted to arrange to personally pick up Lia on Sunday afternoon or evening, April Adams continued to refuse. CP 18-19, 28-29. April Adams insisted that she would keep the child in her care until Monday, December 9, 2013 – two days after she was ordered to return the child. CP 19, 31.

April Adams kept the child from Saturday, December 7, 2013 to Monday, December 9, 2013, when she dropped Lia off at school. Austin McMillin picked Lia up from school that afternoon.

Austin McMillin filed a motion to find April Adams in contempt of the December 6, 2014 residential schedule order. CP 10-11. On January 15, 2014, Judge Elizabeth Martin heard the motion and found April Adams in contempt. RP 68-76.

April Adams appeals.

III. ARGUMENT

A. **Standard of Review**

A trial court's decision in a contempt proceeding is reviewed for an abuse of discretion. *In re Marriage of James*, 79 Wn.App. 436, 440, 903 P.2d 470 (1995); *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *In re Marriage of Mathews*, 70 Wash.App. 116, 126, 853 P.2d 462, review denied, 122 Wn.2d 1021, 863 P.2d 1353 (1993); *In re Marriage of James*, 79 Wn.App. 436, 440, 903 P.2d 470, 472 (1995); *State v. Bible*, 77 Wn.App. 470, 471, 892 P.2d 116 (1995); *State v. Rundquist*, 79 Wn.App. 786, 793, 905 P.2d 922 (1995).

The appellate court does not weigh conflicting evidence or substitute judgment for the trial court. *In re Marriage of Rich*, 80 Wn.App. 252, 259, 907 P.2d 1234 (1996). A trial court's challenged factual findings regarding contempt will be upheld on appeal if they are supported by substantial evidence. *In re Marriage of Rideout*, 150 Wn.2d 337, 350, 77 P.3d 1174 (2003); *In re Marriage of Thomas*, 63 Wn.App. 658, 660, 821 P.2d 1227, 1228 (1991). Evidence is substantial if it persuades a fair-minded, rational

person of the truth of the finding. *In re Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001).

Thus, the question before this court is whether Judge Elizabeth Martin's finding of contempt is supported by substantial evidence. The court should find that it is.

B. The Trial Court Found Appellant Acted in Bad Faith.

Issues to which an appellant does not assign error are treated as verities on appeal. *Francis v. Washington State Dept. of Corrections*, 178 Wn.App. 42, 52, 313 P.3d 457, 462 (Div. 2, 2013); *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980). Here, April Adams assigns error only as to whether the trial court found her to have acted in bad faith before finding her in contempt.

Contempt proceedings may be initiated under the domestic relations statute when a parent has, in bad faith, not complied with the order establishing residential provisions for the child. RCW 26.09.160(2)(b); *In re Marriage of James*, 79 Wn.App. 436, 440, 903 P.2d 470 (1995). The party moving for contempt has the burden of proving contempt by a preponderance of the evidence, by providing evidence that the offending party "acted in bad faith or

engaged in intentional misconduct or that prior sanctions have not secured compliance with the plan.” *Id.* at 442.

The mother claims the court did not find she acted in bad faith by failing to provide Lia to the father (via his designated agent) on Saturday night, December 7, 2013, or on Sunday, December 8, 2013. Her claim is not supported by the record.

When making her ruling on January 15, 2014, Judge Martin stated on the record that the mother “refused to cooperate, refused to return the child Saturday night, refused to return the child on Sunday.” (RP 27.)

When a parent refuses to comply with duties imposed by a residential schedule order, that parent is considered to have acted in bad faith, as required by RCW 26.09.160 for a contempt finding. *In re Marriage of Davisson*, 131 Wn.App. 220, 126 P.2d.76, *rev denied* 158 Wn.2d 1004, 143 P.3d 828 (Div. 3, 2006). “A parent who refuses to perform the duties imposed by a parenting plan is per se acting in bad faith” as required for contempt adjudication. *In re Marriage of Myers*, 123 Wn. App. 889, 893, 99 P.3d 398 (Div. 2, 2004). In other words, Judge Martin was not required to state the magic words “bad faith” on the court record; her finding that the

mother refused to cooperate or comply with the court order is per se a finding of bad faith.

Additionally, Judge Martin's written Order on Show Cause re Contempt entered January 15, 2014 clearly provides at paragraph 2.7 as follows:

"April McMillin has not complied with the residential (visitation) provisions of the parenting plan and had the ability to comply with the parenting plan, and is currently unwilling to comply. The noncompliance with the residential provisions was in bad faith." CP 71.

Here, both the court's oral ruling and the written order include findings that April Adams had acted in bad faith by failing to return Lia on the evening of Saturday, December 7, 2013, or during the next day, December 8, 2013.

C. Strict Construction of the Court Order Required April Adams to Return the Child.

April Adams alleges that the language of the December 6, 2014 court order must be strictly construed. However, she misdirects the focus of her argument to the provision in the court order directing how the transfers for residential time were to occur, rather

than the portion of the order that defined the child's residential time with each parent.

Here, the language of the December 6, 2014 court order required that "the current residential schedule shall remain with one modification, mother shall have residential time with Lia from 10 am-5 pm every Saturday." Strictly construed, because the prior court order setting the residential schedule placed Lia entirely in the father's care, the December 6, 2014 order required that April Adams was to have Lia in her care only on Saturdays from 10:00 a.m. to 5:00 p.m. The strict construction of the court order required the Lia reside with the father at all other times.

The court strictly construed the December 6, 2013, court order when it found that April Adams had violated the order in bad faith.

D. The Father Did Not Cause the Mother's Intentional Violation of the Residential Provisions of the Court Order.

April Adams argues that the father made it "impossible" for her to follow the parenting plan in two respects: first, because he delegated an agent to retrieve the child rather than being personally present to receive the child himself; and second, because of his

failure to appear on time for the transfer. Again, the mother's arguments are misplaced.

Austin McMillin's attendance at an out-of-state conference neither invalidated the December 6, 2013 court order nor justified Ms. Adam's resistance to provide the child after Austin McMillin identified his mistake and made effort to come into compliance with the residential schedule.

A parent typically has a right to designate to others the care of a child during his or her residential time. A parent may designate other caretakers even though the parenting plan makes no special finding or conclusion on that topic. *Magnusson v Johannesson*, 108 Wn.App. 109, 113, 29 P.3d 1256 (Div. 1, 2009). Even though a parenting plan or order for residential time designates a child's time only between parents, absent an order to the contrary, each parent has inherent authority to designate his or her residential time and responsibilities to others. There were no court orders in this case which would limit Austin McMillin's right to designate others to care for the child during his brief absence while teaching at the conference. Thus, his action in arranging for Lia's care during his absence, including arranging for someone other than himself to transfer Lia to residential exchanges with

April Adams was appropriate. More importantly, his brief absence in no way affected April Adams' obligations and rights under the existing court orders for residential time.

With respect to the failure of Austin McMillin's agent to meet April Adams to pick up the child at 5:00 p.m., such was due to a miscommunication with his attorney. CP 18, RP 27. After Ms. Barker alerted him to the mistake (because April Adams did not arrive to exchange the child at the later 7:00 p.m. time), Austin McMillin attempted, both directly and through Ms. Barker, to retrieve the child later that evening and all through the next day. CP 18-19, 28-29, 31. April Adams resisted all efforts on the part of Austin McMillin or his agent to retrieve Lia and come into compliance with the residential schedule.

It was not alleged that April Adams was acting in bad faith by keeping Lia beyond 5:00 p.m., when no one immediately arrived to receive the child. However, April Adams actions were in bad faith when she continued to fail to return the child after it became possible for her to do so.

April Adams essentially advances the position that when the father did not meet his obligation under the transportation portion of the order by timely appearing to retrieve Lia (at 5:00 p.m.) on

Saturday, this absolved her of any obligation to comply with the residential schedule portion of the other. Her argument – that compliance with the residential schedule was conditioned upon Austin McMillin’s strict compliance with the transportation provision – is not only logically flawed, but is also in violation of statute.

RCW 26.09.160(1) provides that *“[a]n attempt by one parent, in either the negotiation or the performance of a parenting plan, to condition one aspect of the parenting plan upon another, [...] to refuse to perform the duties provided in the parenting plan, or to hinder the performance by the other parent of duties provided in the parenting plan, shall be deemed bad faith and shall be punished by the court by holding the party in contempt...”*

A parent may not condition one provision of the parenting plan upon another. Here, the mother’s very argument – that the father’s failure to provide timely transportation absolved her of the responsibility to comply with the residential schedule – is in and of itself contempt.

E. The Father Should be Awarded Attorney Fees on Appeal.

Attorney's fees should be awarded on appeal for having to defend a frivolous appeal. RAP 18.1, RCW 4.84.185. An appeal is frivolous if there are no debatable issues on which reasonable minds can differ and is so totally devoid of merit that there was no reasonable possibility of reversal. *In re Recall of City of Concrete Mayor Robin Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003). In this case, there is simply no issue presented on which reasonable minds can differ.

April Adams has assigned error by alleging that the trial court did not find her actions to be in bad faith, yet it is abundantly clear from the record that Judge Martin made exactly that finding. There is no reasonable conclusion otherwise. April Adams has argued that the father's failure to appear on time to exchange the child allowed her to keep the child as long as she wanted, in disregard for the residential schedule. She advances such position not only without any authority, but in direct conflict with statute.

Attorney's fees should also be awarded on appeal for having to defend an appeal of a finding of contempt. RAP 18.1 and RCW 26.09.160(2)(b)(ii). When a party has hired an attorney to bring a

motion for contempt, under RCW 26.09.160(2) attorney's fees an award of attorney's fees are mandatory against the party found in contempt. *In re Marriage of Rideout*, 150 Wn.2d 337, at 359, 77 P.3d 1174 (2003). This includes attorney's fees incurred at the trial level and on appeal. *In re Marriage of Eklund*, 143 Wn.App. 207, 218-219, 177 P.3d 189, 195 (Div. 2, 2008). Here, the trial court did properly award fees to Austin McMillin after finding April Adams in contempt. Austin McMillin should also be awarded his attorney's fees on appeal. The sole issue on appeal is contempt and hence Austin McMillin should be awarded all of his attorney's fees incurred.

CONCLUSION

This court should affirm the Superior Court order finding the appellant in contempt. This court should award attorney fees to the father for having to respond to this appeal.

Dated this 24th day of September, 2014.

LAW OFFICES OF JEFFREY A. ROBINSON

By: Amanda J. Cook
Amanda J. Cook, WSBA No. 35454
Attorneys for Respondent

IV. CERTIFICATE OF SERVICE

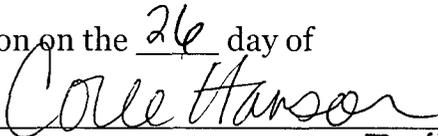
I hereby certify that I am not a party to this action and that I placed for service of the foregoing document on the following parties in the following manner(s):

Barbara Henderson
Smith Alling, P.S.
1102 Broadway, Suite 403
Tacoma, WA 98402
bhenderson@smithalling.com
lisa@smithalling.com

[X] by causing a full, true, and correct copy thereof to be E-MAILED to the party at their last known email address, per prior agreement of the parties, on the date set forth below.

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

Executed at Gig Harbor, Washington on the 26 day of September, 2014.



Corie Hanson, Legal Assistant

BY
DEPUTY
STATE OF WASHINGTON

2014 SEP 26 PM 1:51

FILED
COURT OF APPEALS
DIVISION II