

No. 49220-2 II

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

SHILO STRICKLAND, f/k/a LEYERZAPF,

Appellant,

v.

BJORN LEYERZAPF,

Respondent

BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
No. 00-3-04114-3
The Honorable Michael Schwartz, Presiding

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES	3
ASSIGNMENTS OF ERROR	3
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	3
STATEMENT OF FACTS	5
LAW AND ARGUMENT	7
1. WHETHER CONTEMPT CAN BE FOUND WHEN THERE WAS NO PERSONAL SERVICE OF PROCESS?	7
2. WHETHER THE COURT HAS AUTHORITY TO ALLOCATE A TAX EXEMPTION FOR A CHILD WHO HAS REACHED THE AGE OF MAJORITY?	8
3. WHETHER THE ATTORNEY’S FEES AWARDED IN THE CONTEMPT CITATION WERE EXCESSIVE?	9
4. WHETHER APPELLANT MET HER BURDEN OF EXERCISING DUE DILIGENCE IN COMPLYING WITH THE COURT ORDER?	16
ATTORNEY’S FEES REQUEST	17
CONCLUSION	17

TABLE OF AUTHORITIES

Cases

<u>Bauers v. Transamerica Title Insurance Co. Ins.</u> , 100 Wn. 2d 581, 675 P.2d 193 (1983)	15
<u>Burlingame et al v. Consolidated Mines and Smelting Co.</u> , 106 Wn.2d 328, 333, 722 P.2d 67 (1986)	7
<u>Marriage of Logg</u> , 74 Wn.App. 781, 875 P.2d 647, 649 (Div. III 1984),	7, 8
<u>State v. Stump</u> , 185 Wn.2d 454, 456, 374 P.3d 89 (2016)	17

Statutes

RCW 26.18.050	16
RCW 26.18.050(2)	7
RCW 26.28.010	8

ASSIGNMENTS OF ERROR

1. THE CONTEMPT ORDER CANNOT STAND GIVEN THAT THERE WAS NO PERSONAL SERVICE ACCOMPLISHED AS TO APPELLANT.
2. THE CONTEMPT ORDER MUST BE VACATED SINCE APPELLANT WAS FOUND IN CONTEMPT, INCLUDING FOR A TAX EXEMPTION SHE USED WHEN THE COURT DID NOT HAVE JURISDICTION OVER THAT.
3. THE CONTEMPT ORDER MUST BE VACATED AS TO THE ATTORNEY’S FEES AWARDED SINCE THEY WERE EXCESSIVE.
4. CONTEMPT DETERMINATION MUST BE VACATED GIVEN THAT THE APPELLANT MET HER BURDEN OF EXERCISING DUE DILIGENCE IN COMPLYING WITH THE COURT’S ORDER.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. WHETHER CONTEMPT CAN BE FOUND WHEN THERE WAS NO PERSONAL SERVICE OF PROCESS?
2. WHETHER THE COURT HAS AUTHORITY TO ALLOCATE A TAX EXEMPTION FOR A CHILD WHO HAS REACHED THE AGE OF MAJORITY?
3. WHETHER THE ATTORNEY’S FEES AWARDED IN THE CONTEMPT CITATION WERE EXCESSIVE?

4. WHETHER APPELLANT MET HER BURDEN OF EXERCISING DUE DILIGENCE IN COMPLYING WITH THE COURT ORDER?

STATEMENT OF FACTS

A final Child Support Order was entered November 18, 2009, which granted father even years for claiming the remaining minor child's tax exemption, when the older child became an adult. RP 479.

On January 12, 2015, the Court addressed the father's tax exemption on Lines 8 to 10 as follows:

“And now your son turned eighteen in 2014, I don't have authority to award him as an exemption for that year. CP 120.

There were hearings and even a mediation that had been Court ordered in regards to these issues, and ultimately on February 5, 2016, the Court ordered a motion for review and enforcement therein and included a show cause for contempt. CP 238-240. Appellant was not in Court for that hearing and was never served with that show cause order for contempt. CP 240.

Subsequent to that, on March 4, 2016, Appellant was found in contempt pursuant to the February 5, 2016, show cause order for her failure to amend 2012 and 2014 tax returns. CP 291-295. Subsequent to that, a further hearing was held to determine additional sanctions on June 24, 2016, which included damages for both of 2012 and 2014 tax returns, as well as \$17,501.02 in attorney's fees “in light of the number of times respondent's lawyers had to come to Court for relief”. The Court did not intend to include attorney's fees and costs for the Court ordered mediation. CP 398-400.

Once the Court ordered Appellant to amend her tax returns for 2012 and 2014, she attempted to do so, but was unable to financially afford to do so. CP 230. In addition, unfortunately her husband, Bradley Strickland and she were going through a divorce at the time, and he refused to grant consent to amend the 2014 taxes. CP 235.

As to the attorney's fees awarded from the contempt hearing, the Fees Certification of Counsel was filed May 26, 2016. CP. 313-374. The fee declaration does not appear to be reasonable in that, for example, included was the 1.2 hours (\$390) for counsel to put together her fee declaration. CP 12. Clerical work was repeatedly charged. For example, on February 4, 2016, \$121 was charged in order to scan documents, save them in an electronic file, create tabs and dividers and update the internal document index. CP 328. Respondent also charged for preparing a hearing notebook for 2/5/16 hearing for \$143 on February 4, 2016. CP 328.

Appellant, although being held in contempt for not re-filing her 2012 and 2014 tax returns, was charged for all of respondent's attorney's fees and costs that had anything to do with the 2012 and 2014 taxes back dating from the original show cause order on February 5, 2016 to approximately a year previous to that. CP 336-74.

Despite the order to the contrary, it appears that \$90 was charged for mediation in 2015. CP 360

From July 25, 2016, this timely appeal follows. CP 401-409.

LAW AND ARGUMENT

1. WHETHER CONTEMPT CAN BE FOUND WHEN THERE WAS NO PERSONAL SERVICE OF PROCESS?

RCW 26.18.050(2) sets forth:

Service of the order to show cause shall be by personal service, or in the manner provided in the civil rules of superior court or applicable statute.

The language from the contempt statute dealing with child support clearly makes it mandatory that personal service be obtained.

The relevant contempt show cause order was the Order Re: Motion for Review and Enforcement (CP 238-240).

There is nothing in the Court docket indicating that Appellant was ever served with this Order as required by the statute.

Burlingame et al v. Consolidated Mines and Smelting Co., 106 Wn.2d 328, 333, 722 P.2d 67 (1986), additionally made it clear that there must be personal service in order for a court to have jurisdiction over contempt.

In this case, Appellant was never personally served with the order to show cause for contempt (although in this case it was not called an order to show cause re: contempt, but that was what it was and had all the language for an order to show cause re: contempt). CP 238-240.

Given no jurisdiction because of a lack of personal service, the contempt citation must be vacated.

Marriage of Logg, 74 Wn.App. 781, 875 P.2d 647, 649 (Div. III 1984), sets forth in relevant part as follows:

She urges, however, that the essence of due process was served because Mr. Logg had actual notice of the pendency of the action and the issues involved. Notice without proper service is not enough to confer jurisdiction. (citations omitted).

Logg, further sets forth in reversing as follows:

First and basic to any litigation is jurisdiction. First and basic to jurisdiction is service of process. (citations omitted).

The Logg case was a contempt case involving failure to pay child support, just like our case. Since no personal service was effectuated, the contempt was dismissed.

Likewise, the contempt determination in our case must be dismissed.

2. WHETHER THE COURT HAS AUTHORITY TO ALLOCATE A TAX EXEMPTION FOR A CHILD WHO HAS REACHED THE AGE OF MAJORITY?

RCW 26.28.010, the relevant statute sets forth regarding the age of majority as follows:

Except as otherwise specifically provided by law, all persons shall be deemed and taken to be of full age for all purposes at the age of eighteen years.

Commissioner Robyn Lindsay addressed the 2014 tax exemption back on January 12, 2015 (in following RCW 26.28.101), when she stated from lines 8 to 10:

“And now your son turned eighteen in 2014, I don’t have authority to award him as an exemption for that year. CP 120.

It is clear that the Court cannot require a parent to grant a tax exemption for a year when the child is over the age of eighteen. Even the original child support order recognized that by ordering that the younger child's exemption (the child relevant in this appeal) was just granted to the parents on alternating years upon the older child obtaining the age of eighteen. Once the either child turned eighteen, that ability to award an exemption expired. See CP 475-488.

Despite the fact that this child was over the age of eighteen, the Court still found the Appellant in contempt, including for refusal to amend her tax return to include the 2014 tax return. CP 291-295.

3. WHETHER THE ATTORNEY'S FEES AWARDED IN THE CONTEMPT CITATION WERE EXCESSIVE?

The most blatant problem with the \$17,501.02 in attorney's fees that were awarded in the contempt (CP 398-400) was that a very significant amount of these fees awarded predated by approximately a year the order to show cause re contempt (Judge Schwartz' own motion) signed the first part of 2016. CP 238-40 dated February 5, 2016.

This can be seen by reviewing the certificate of respondent's counsel that was the basis for the award of fees. CP. 313-374. Also included were routine working copy charges and secretarial work. (CP 320 - 04/25/2016 Create hearing notebook; 4/26/2016 Docket hearing dates for judgment hearing; 04/30/2016 Confirm hearing. 03/02/2016 Serve same on opposing counsel; File working copies; Review and update hearing binding - -pull copies of current orders in effect, pull case docket,

pull proof of confirmation/service/working copies, insert Declaration of LAC, update pleading index; ... Interoffice meeting with KL & JC re: financial declaration; ... Interoffice meeting with JW re: objection to documents; Meeting with LAC re: attorney fee declaration; ... 03/03/2016 Index pleadings and update pleading index; 03/04/2016 Interoffice meeting with LAC re: hearing. 03/04/2016 Interoffice meeting with LAC re: results of hearing;... Scan and save same to client file; (twice in the same bill as to different documents) ... meeting with LAC re: overpaid child support. 03/08/2016 Process, scan and save LAC notes from hearing on 03.04.16; Process, scan and save LAC notes from Court's oral ruling at hearing on 03.04.16. 03/09/16 print documents, categorized, created tabs and dividers and updated Document Index) (CP 322 – 03/31/2016 ... Interoffice meeting with LAC re: same; (this among many other of the entries in the attorney fee declaration were compounded involving different tasks down without separating out the costs for each task; for example, this 3/31/2016 notation involved five different actions done that were not broken up into 0.70 hours and that is a typical aspect of this attorney's fee declaration)). (CP 324 - 02/01/2016 Confirm 02.05.16 hearing; 02/02/2016 includes an undifferentiated from relevant charges indication of update case status report; 02/03/2016 included a charge to review Attorney Carlsen's response that was undifferentiated; separate 02/03/2016 charge Interoffice meeting with LAC re: no response from Opposing Counsel, instructions to prepare Strict Reply) (CP 326 includes

a 02/04/2016 charge of 3 hours which also included among other actual relevant charges, File with Court, Serve on Opposing Counsel and serve Working copies on Court; an Interoffice meeting with TE re: preparing hearing notebook; Review and finalize hearing notebook. 02/04/2016 an additional charge of 1.10 hours involved scanning documents; saved in electronic file, created tabs and dividers, and updated Document Index. 02/05/2016 prepared hearing notebook for 2-5-16 hearing. 02/05/2016 Prepare hearing material for court; Docket Court's contempt hearing is also included in that 0.90 billing section. 02/09/2016 included with the billing was compiling and process LAC notes from hearing preparation and 02/05/2016 hearing. 02/10/2016 Index pleading and update pleading index.) (CP 328 - 02/26/2016 includes interoffice meeting LJM re: review client declaration. This is undifferentiated from other relevant charges totaling 2.70 hours. 02/29/2016 includes some irrelevant charges, scan, save and file all documents with court; filing working copies; email to opposing counsel re: same; prepare LAC copies for notebook; prepare office copies for file; ... Interoffice meeting with TE re: same. 02/29/2016 Update hearing binder for 3-4-16 Sua Sponte Hearing.) (CP 330 on 01/15/2016 includes the charge to confer with LAC re: filing motion.) (CP 33201/19/2016 includes among other charges in the same 0.60 invoice number, scan and e-file motion, note for Judge's motion docket, serve opposing counsel, calendar hearing...; 01/20/2016 calendar 02.05.16 hearing and deadlines; on same date, different invoice number.

prepare working copies for paralegal; same day, separate charge for status email to LAC re: working copies; 01/21/2016 Review of LINX docket and LAC notes, submit working copies; 01/24/2016 Scan and process Attorney Carlsen 01.13.16 notes, Re: TC with client; 01/25/2016 Index pleadings and update pleading index) (CP 334 – 12/01/2015 charged to scan and save the revision order to client file and 12/03/2015 scanned Attorney Carlsen’s notes and saved in electronic file.) (CP 336 – includes 11/13/2015 scanned document and saved in electronic file, updated document index and created tabs and dividers; 11/23/2015 prepared list of working copies for hearing; 11/23/2015 submit working copies for revision hearing.) (CP 340 includes a undifferentiated charge that included file reply declaration and submit working copies... update hearing notebook.) (CP 342 – 10/09/2015 scanned attorney’s notes from 10-8-15 hearing and saved in electronic file and an undifferentiated charge on 10/16/2015 that included download and save motion for revision to client file; 10/19/2015 Index pleadings received from opposing counsel and updated pleading index; 10/26/2015 includes scan and save note for motion docket to client file... calendar new hearing date and related deadlines, email agreed order; 10/26/2015 scanned and saved to client file 1 set of attorney notes.) (CP 344 on 10/28/2015 there is included scan and save agreed order of continuance to client file.) (CP 346 on 09/01/2015 there are charges included with other more legitimate charges, download order from court website, save to client file.... 09/04/2015 with

undifferentiated charges included re-note hearing; calendar new hearing date and related deadlines....) (CP 348 includes charges from 09/29/2015 is a note to file that is undifferentiated as to this charge.) (CP 350 on 08/05/2015 there is an undifferentiated charge from other charges as to file motion documents with court...coordinate service on opposing party; calendar hearing date and related deadlines, again among other charges with a total of 1.10 hours.) (CP 352 on 08/11/2015 includes charges involving forward process service invoice to accounting for payment; prepare cover sheet for filing declaration of service; file declaration of service; 08/12/2015 submit working copies to the court; 08/24/2015 includes a charge for a conference regarding continuance; 08/24/2015 a separate charge for prepare hearing notebook included among other undifferentiated charges and also a note to file) (CP 358 on 05/21/2015 includes an undifferentiated charge from other charges for review attorney notes and a case status conference with Attorney Carlsen.) (CP 364 on 02/02/2015 there is a charge to strike a hearing and also on 02/02/2015 a charge to plan deadlines for hearing date; 02/03/2015 a charge to prepare and transmit check request for transcript of January 12, 2015, hearing.... E-file, e-serve and submit working copies.... Include copy in hearing notebook; 02/09/2015 there is a charge for confirm the February 13, 2015, hearing via LINX.) (CP 368 on 01/01/2015 there is a charge to transmute a conformed copy of the stipulated order and note for motion docket to opposing counsel and client electronically. This undifferentiated with

1.90 hours from other charges, including calendar the hearing and associated deadlines into outlook and day planner. Continue compiling and preparing hearing notebook. Receive and process the electronic version of the transcript from January 12, 2015.) (CPS 370 on 01/22/2015 undifferentiated 2.40 time is charged to open client electronic file. Create a client case cover and case status report....Prepare check request for CD. Prepare legal messenger slip and transmit CD request and payment to court clerk....Scan, e-file, e-serve and e-deliver working copies of the motion for revision....calendar hearing and associated deadlines, two charges to prepare an notice of absence and unavailability as well a draft notice of appearance that was previously also charged, charges to e-file and e-serve.... 01/22/2015 has undifferentiated charge of 1.50 hours to include conference regarding case strategy; 01/27/2015 with 1.10 with undifferentiated charges for copy and prepare for entry with the court. Scan and process the January 22, 2015 notes regarding revision. Scan and process the 1-22-15 attorney notes regarding telephone call with Sarah L.; 01/28/2015 Document index medical invoices for Cody and check to Shilo Smith for reimbursement...prepare hearing notebook. 01/30/2015 charge to prepare tab, tab with divider – 1 medical record. File into client's file. Set up binder and do SMEAD label.) The worst of it was including approximately one year's work of legal services prior to the (in affect) order to show cause by Judge Schwartz from February 2016.

In addition to that, it is a mischaracterization to claim that the fees were reasonable that were awarded. The fees requested appear to be a poster child example of the “how to” run up a bill. CP 313-374. Charges vastly exceeded the reasonable time to prepare what was charged for such as 3.10 hours to prepare motion for Judgment and Request to Modify; draft email to client (\$961.00) (7/16/15). CP 354.

As this Court is obviously aware, attorney’s fees must be reasonable. See Bauers v. Transamerica Title Insurance Co. Ins., 100 Wn. 2d 581, 675 P.2d 193 (1983). It was not reasonable to award clerical costs, working fees, and attorney fees that predated the order to show cause re: contempt by one year, given that the Appellant was found in contempt for failing to refile the 2012 and 2014 taxes as ordered in February of 2016.

The attorney’s fees award should be vacated and the matter should be remanded for an award of reasonable attorney’s fees, which incidentally should not include work that involved claims with the 2014 tax return, given that the child was over the age of eighteen at all relevant times for that particular part of this as explained hereinabove.

Additionally, on November 25, 2015, Judge Schwartz explicitly ordered that as to the issue with the 2012 and 2014 tax returns that “both parties request for attorney’s fees are denied.” CP 207-09 How is it that when those attorney’s fees have been denied in the order predating the

order to show cause, that they get resurrected in a contempt order for alleged subsequent conduct?

4. **WHETHER APPELLANT MET HER BURDEN OF EXERCISING DUE DILIGENCE IN COMPLYING WITH THE COURT ORDER?**

In her Declaration, Appellant explained that she couldn't afford the expense to (in the short time granted) amend her 2012 taxes, given that she was going through a divorce. CP 230-234.

In addition, as to the 2014 taxes also, Appellant filed jointly with her then husband, Bradley Strickland, who refused to cooperate and consent to her amending their 2014 taxes. CP 235.

RCW 26.18.050 governs contempt involving child support orders.

In relevant part, it sets forth subsection 4:

If the obligor contends at the hearing that he or she lacked the means to comply with the support or maintenance order, the obligor shall establish that he or she exercised due diligence in seeking employment, in conserving assets, or otherwise rendered himself or herself able to comply with the court's order.

In this case, although the Appellant was not the "obligor", the contempt action involved the 2012 and 2014 tax exemptions that respondent was granted to be able to have even years when only the youngest child was a minor. Aside from the fact that he was not a minor for the 2014 year, Appellant has given affirmative evidence that she couldn't afford this cost during the time of going through a divorce to amend her 2012 and 2014 taxes and that as to the 2014 taxes, her husband,

whom she was divorcing at that time, was refusing to cooperate and consent so she could comply with the Court's order.

The evidence does not support that Appellant had the means to comply with the order that required her to amend the tax returns CP 238-40. It does show, however, that she made efforts to amend the returns, but was unable to do so due to financial reasons, and particularly as to the 2014 return, due to her then husband's refusal to consent to the amended return. Thus, at least as far as 2014 was concerned, it was impossible for her to amend that tax return.

ATTORNEY'S FEES REQUEST

Pursuant to RAP 14.2, in the event that Appellant is the substantially prevailing party on review, Appellant requests her attorney's fees and costs. See State v. Stump, 185 Wn.2d 454, 456, 374 P.3d 89 (2016).

CONCLUSION

For the reasons set forth, the lower court should be reversed and the contempt order vacated.

Attorney's fees and costs should further be awarded to the Appellant.

Respectfully submitted this 14 February, 2017.



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February 14, 2017 - 11:44 AM

Transmittal Letter

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