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Division II
State of Washington
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No. 51183-5-II

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II

CRYSTAL JEAN FOX
Appellant,

v.

DAVID LEE HAYES
Respondent.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

I. ASSIGNMENTS OF ERROR..... 1

II. STATEMENT OF THE CASE – FACTS.....1

III. LEGAL ARGUMENT.....8

 A. STANDARD OF REVIEW.....8

 B. FINDINGS NOT SUPPORTED BY
 SUBSTANTIAL EVIDENCE.....10

 C. FINDINGS DO NOT SUPPORT
 CONCLUSIONS OF LAW.....18

 D. ATTORNEY’S FEES.....24

IV. CONCLUSION.....25

TABLE OF AUTHORITIES

Cases

Corrigeux v. Corrigeux, 37 Wn.2d 403, 224 P.2d 343 (1950)..... 19

Decker v. Decker, 52 Wn.2d 456, 326 P.2d 332 (1958). 19

Hancock v. Hancock, 122 N.C. App. 518, 471 S.E.2d 415, 419-20 (1996)
..... 20

Hancock, 471 S.E.2d at 419-20. 21

In re Estate of Wright, 147 Wn. App. 674, 680, 196 P.3d 1075 (2008) 9

In re Marriage of James, 79 Wn. App. 436, 440, 903 P.2d 470 (1995)... 10

In re Marriage of Moody, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999)9

In re Marriage of Rideout, 110 Wn. App. 370, 377, 40 P.3d 1192, 1195,
1196 (2002).....9,10,11,21

In re Marriage of Williams, 156 Wn. App. 22, 27, 232 P.3d 573, 575
(2010) 10

Johnston v. Beneficial Management Corp., 96 Wn.2d 708, 713-14, 638
P.2d 1201 (1982)..... 20

<i>In re Marriage of Eklund</i> , 143 Wn. App. 207, 213, 177 P.3d 189 (2008) (citing <i>In re Marriage of Humphreys</i> , 79 Wn. App. 596, 599, 903 P.2d 1012 (1995)).	20
<i>State v. Breazeale</i> , 144 Wn.2d 829, 842, 31 P.3d 1155 (2001).	20
<i>Wallace v. Jennings (In re S.J.)</i> , No. 31288-3-II, 2005 Wash. App. LEXIS 2381, at *12-13 (Ct. App. Sep. 13, 2005) citing <i>In re Marriage of Rideout</i> , 110 Wn. App. 370, 377, 40 P.3d 1192 (2002)).	10

Statutes

RCW 2.24.050	9
RCW 26.09.140	25
RCW 26.09.160(4)	10
RCW 26.12.215	9
RCW 7.21.010(1)(b)	20

I. ASSIGNMENTS OF ERRORS

1. The trial court's findings were not supported by substantial evidence.
2. The findings do not support the conclusions of law.
3. Attorney's fees are appropriate for prevailing party.

II. STATEMENT OF THE CASE

A shared custody parenting plan was established on November 1, 2013 for the custody of David Hayes' and Crystal Fox's (f/k/a Hayes) two children, Anthony (9) and Nathan (14). Following the entry of the parenting plan, Crystal became aware of some concerning behavior of David. She learned of domestic violence and child abuse allegations in the home of the father, and filed three (3) petitions to modify the parenting plan over the course of approximately two (2) years because she wanted to ensure the safety of the children.

Crystal's first petition to modify the parenting plan was filed October 1, 2014, but was dismissed due to the failure of Crystal's former counsel to properly follow the court's direction to mediate and subsequently bring a motion for adequate cause.¹ After retaining new counsel, Crystal

¹ CP at 36.

filed another petition to modify such that her concerns could be brought to light, and her petition could be heard on the merits. Adequate cause was denied. Crystal's third petition stemmed from her son's disclosure to her that he had been physically abused by David. The child disclosed the abuse to police and provided a written statement. Adequate cause was found by a Commissioner, but ultimately overturned and dismissed by Judge Johnson on June 3, 2016.

On August 22, 2017, over one (1) year later, David filed a motion for contempt alleging Crystal violated the parenting plan signed by the court on November 1, 2013.² The motion fails to identify the specific violations of Crystal, only referring to "the Declaration of David Hayes and related pleadings submitted herewith and incorporated by reference as if fully set forth herein".³

David's initial declaration filed on August 22, 2017 alleges he missed 19 days of visitation with Nathan, and 21 days of visitation with Anthony.⁴ David's declaration only provides his version of what occurred during the exchanges on three (3) dates, June 29, August 17, and August 18, 2017. Regarding the remainder of the dates David claims he did not have

² Motion.

³ CP at 41.

⁴ CP at 57.

visitation with the children, he fails to provide any information or circumstances as to why. In March of 2017, and prior to the dates David does describe in detail, David states he was approached by Crystal's husband, Wilbert.⁵ David states Wilbert requested a change in the parenting plan. Crystal continued to follow up regarding the same for the next several months.⁶

On May 12, 2017 the parties exchanged text messages where David informed Crystal he wanted to follow the parenting plan.⁷ On May 17, 2017, Crystal requested the parties exchange the child pursuant to the transportation clause (Section 3.11) of the parenting plan, suggesting they meet half way.⁸ David states he believes Crystal's continued request to make changes to the existing parenting plan, and his disagreement with her requested changes, coupled with the dismissal of her petitions to modify the parenting plan prompted her to deny him visitation.⁹

David explains that five (5) weeks later, on June 29, 2017, the parties met at the agreed upon exchange location, McDonalds on South Tacoma Way, and he waited for the kids to get out of the vehicle as they had always

⁵ CP at 56.

⁶ *Id.*

⁷ CP at 56.

⁸ *Id.*

⁹ CP 57.

done in the past. However, only Nathan got out of the car. Anthony did not. David states he got out of his car and opened the door of Crystal's car to talk to Anthony. David describes how he tried for some time, but realized Anthony was not going to get out of the car, so he arranged for his father, Bruce, to pick up Anthony later, to which Crystal agreed.¹⁰

David's father, Bruce Hayes, provided a declaration on August 22, 2017, explaining his version of the June 29th exchange.¹¹ This June 29th exchange was audio recorded.¹² Bruce asserts "things went downhill," when David communicated he wanted to stick to the parenting plan.¹³ According to Bruce, Crystal and Bruce agreed to meet at McDonald's in an attempt to exchange Anthony in the evening of June 29, following the failed attempt by David.¹⁴ Anthony would not go with Bruce either, so Bruce went home. On the following Saturday, Crystal met David and Bruce to attempt to exchange Anthony again. According to Bruce, Anthony would not get out of the car even though they attempted to get him to go with them for a period of forty-five (45) minutes.¹⁵ After forty-five (45) minutes of trying to get Anthony out of the vehicle, the parties proposed contacting

¹⁰ CP at 59.

¹¹ CP at 81-85.

¹² CP at 121-124.

¹³ CP at 82.

¹⁴ *Id.*

¹⁵ CP at 83.

Crystal's husband, Wilbert, on the phone to help. Crystal agreed, but Wilbert was unable to get Anthony to go with David and Bruce.¹⁶

The following morning, Sunday, Crystal sent David an email apologizing for Anthony not coming with them on the day before.¹⁷ Crystal and David agreed for David to come to Crystal's house to get Anthony that day. Upon arriving at Crystal's home, it took David and Bruce approximately fifteen (15) minutes to get Anthony to go with them on July 2, 2017.¹⁸ Both kids spent time with their father for the remainder of his vacation, scheduled for July 1 through July 8, 2017.

Bruce had telephonic contact with Nathan on July 19th, 27th, and 30th. Crystal initiated a discussion with David about the children's refusal to visit their father on July 20, 2017, via email.¹⁹ On August 7, 2017, Bruce was unable to get the boys to come with him at the exchange.²⁰ David claims he did not have visitation with the boys from August 10-14th, but does not provide any details of the circumstances around the exchanges on those dates.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ CP at 114.

²⁰ CP at 84.

On August 17, 2017, David and his mother were present at McDonalds. Crystal arrived five (5) minutes early, but David could not get Anthony out of the car.²¹ Even after opening the back door to access Anthony, David and his mother were unable to get him to go with them.

David also asserts he was denied visitation on August 18, 2017.²² Bruce and Wilbert attempted to exchange the children when Crystal and David were engaged in mediation on the 18th.²³ After getting the children out of the car, Bruce and Wilbert could not get the children to go with Bruce for David's visitation.²⁴

David filed his motion on August 22, 2017 making a claim for missed time, including his vacation dates of August 19th through August 25th. David contacted Crystal on August 28th asking for her to have the boys call him. Crystal initiated a phone call with the children ten (10) minutes later.²⁵

The following day, August 29th, was the first day of school. David claims Crystal's actions prevented his opportunity to see the kids at school, but he fails to elaborate how her actions prevented him from seeing the

²¹ CP at 60.

²² CP at 61.

²³ CP at 77.

²⁴ CP at 61.

²⁵ CP at 93.

children.²⁶ After school, the children were supposed to get on the bus to David's house. However, Nathan did not get off his bus at his father's home, and Anthony did not get on the bus to David's house at school. Instead, Anthony went to the school office and when he spoke with his father, he told him he was not going to his house.²⁷ This behavior continued to the point where Anthony started walking after school the six (6) miles to his mother's house.²⁸ On at least one occasion, David would contact Crystal to have her pick up the children.²⁹

Crystal notified David of her intent to seek a referral for counseling on September 8, 2017, but David never responded to her request to pursue counseling.³⁰ Further, Crystal informed David as to what she proposes if he continues to have her get the children when they will not go to his house after school. Crystal proposed that David contact her when he gets off work, and she will meet him at a midpoint to exchange the children.³¹

The parties had a meeting with school staff on September 11, 2017, based upon the fact that the children would not return to their father's house, and on more than a few occasions had created a scene at school. The intent

²⁶ CP at 93.

²⁷ CP at 93.

²⁸ CP at 94.

²⁹ CP at 118.

³⁰ CP at 103, 116.

³¹ CP at 116.

of the meeting was to establish a plan to deal with the current behavior.³² On September 17, 2017, following the meeting with the school, David sent an email to Crystal requesting she go to the school and put the kids on the bus and then go to his house to wait for the kids to get off the bus.³³ In that email, David acknowledges Anthony will not listen to him, his mother, his teacher, his counselor, or even the principal of the school.³⁴

David's motion was heard by Commissioner Gelman on September 27, 2017. Commissioner Gelman found Crystal in contempt.³⁵ Crystal filed a motion to revise the contempt order issued by Commissioner Gelman. Judge Schwartz affirmed Commissioner Gelman's order on October 20, 2017.³⁶

Crystal requests this court overturn Judge Schwartz finding of contempt, the award of attorney's fees, and award her attorney's fees.

III. LEGAL ARGUMENT

A. STANDARD OF REVIEW

In *In re Marriage of Rideout*, 110 Wn. App. 370, 40 P.3d 1192 (2002), the court debated the appropriate standard of review for a contempt

³² CP at 95.

³³ CP at 127.

³⁴ *Id.*

³⁵ CP at 136.

³⁶ CP at 173-175

action. With one party arguing the standard of review should be an abuse of discretion and the other arguing it should be de novo, the court concluded that the standard of review for a contempt action is to review the trial court's factual findings for substantial evidence and then determine whether the findings support the conclusions of law.³⁷

On a revision motion, a trial court reviews a commissioner's ruling de novo based on the evidence and issues presented to the commissioner.³⁸
³⁹ ⁴⁰ When an appeal is taken from an order denying revision of a court commissioner's decision, we review the superior court's decision, not the commissioner's.⁴¹ We review a trial court's decision in a contempt proceeding for an abuse of discretion.⁴² A court abuses its discretion by exercising it on untenable grounds or for untenable reasons.⁴³ ⁴⁴

B. FINDINGS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A parent who refuses to perform the duties imposed by a parenting plan is per se acting in bad faith.⁴⁵ If bad faith per se is shown, the contemnor parent must, to avoid a contempt order, establish an excuse by a

³⁷ *In re Marriage of Rideout*, 110 Wn. App. 370, 377, 40 P.3d 1192, 1195 (2002).

³⁸ RCW 26.12.215.

³⁹ RCW 2.24.050.

⁴⁰ *In re Marriage of Moody*, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999).

⁴¹ *In re Estate of Wright*, 147 Wn. App. 674, 680, 196 P.3d 1075 (2008).

⁴² *In re Marriage of James*, 79 Wn. App. 436, 440, 903 P.2d 470 (1995).

⁴³ *Id.*

⁴⁴ *In re Marriage of Williams*, 156 Wn. App. 22, 27, 232 P.3d 573, 575 (2010).

⁴⁵ RCW 26.09.160(1).

preponderance of the evidence.⁴⁶ In order to find contempt, the court must find there is substantial evidence that Crystal refused to perform her duties imposed by the parenting plan. The court shall review the trial court's findings of fact to determine whether they were supported by "substantial evidence" and then determine "whether the findings support the conclusions of law."⁴⁷

The findings of the court order of contempt only reflects the residential time had not been followed per the Parenting Plan since June 29, 2017, Crystal was able to follow the parenting order, her failure was intentional, she acted in bad faith, and she is able, but not willing to follow the parenting/custody order.⁴⁸ The court fails to make specific findings as to what behavior was deemed to be in bad faith. The court states they suspect very strongly that Crystal is undermining the relationship with the father, but fails to refer to any evidence provided to support such a statement.⁴⁹

⁴⁶ RCW 26.09.160(4).

⁴⁷ *Wallace v. Jennings (In re S.J.)*, No. 31288-3-II, 2005 Wash. App. LEXIS 2381, at *12-13 (Ct. App. Sep. 13, 2005) citing *In re Marriage of Rideout*, 110 Wn. App. 370, 377, 40 P.3d 1192 (2002)).

⁴⁸ CP at 140.

⁴⁹ RP at 24 .

The court compared the facts to those of *In re Marriage of Rideout*.⁵⁰ In *Rideout*, the court held that to find that a parent has acted in bad faith where the child resists court-ordered visitation, the evidence must show that the parent has either contributed to the child's attitude or failed to make reasonable efforts to require the child to comply.⁵¹

The case at hand can be distinguished from *Rideout*. In *Rideout*, the mother never made the child available to the father. The father was to have four (4) weeks of summer visitation with his children, but after trying to communicate with the mother, she did not respond. The father went to the mother's house at the start of his designated visitation time, but the children were not home. The father then sought a court order for his visitation, and his request was granted. Specifically the mother was ordered to take the parties daughter over to the father's residence at 4:00 pm on the 27th of July. The mother did not do so, claiming the daughter refused to cooperate.

In this case, Crystal has consistently brought the children to the exchange location pursuant to the court order. Additionally, she has attempted to work with the father and his family to make multiple attempts to exchange the children. Unlike *Rideout*, Crystal made reasonable, if not

⁵⁰ RP at 16.

⁵¹ *In re Marriage of Rideout*, 110 Wn. App. 370, 379, 40 P.3d 1192, 1196, 2002 Wash. App. LEXIS 324, *14.

significant, efforts to comply with the provisions of the court order. The children refuse and the father, his parents, and school staff, have observed the children refuse. The relevant portion of the November 1, 2013 parenting plan is section 3.11 regarding Transportation Arrangements stating, “Transportation arrangements for the children, between the parents shall be as follows: ... At the end of the mother’s residential time, she may drop off the children at school (if feasible) or the parties shall meet at an agreed upon location approximately half way between the parties’ homes.”⁵²

The record is clear that the parties were meeting at the agreed location approximately half way between the parties’ homes at the McDonald’s at the I5/512 interchange.⁵³ Pursuant to the court order, Crystal was to bring the children to the exchange location, and she did so on every day she was supposed to in compliance with the court order. David does not allege Crystal failed to comply with this provision of the parenting plan, nor does he claim the mother is withholding them from school. Yet the court states Crystal has taken zero affirmative steps.⁵⁴ Interestingly, the court does not comment on David’s efforts though he is at most every

⁵² CP at 28.

⁵³ CP at 58.

⁵⁴ RP at 23.

exchange, as well. Additionally, instead of taking on his parental responsibilities, he relies completely on Crystal.

David alleges the fact the children will not see him is somehow caused by the actions of Crystal. Most notably, David states there has never been a problem with the exchanges until June 29, 2017.⁵⁵ The parties have shared custody of the boys since they divorced in 2011. David has not identified any specific actions on the part of Crystal that may have caused his children not to wish to spend time with him. David only claims that because she brought her concerns of his alleged domestic violence and alleged abuse of the children to the court's attention, she was somehow undermining the children's relationship with him. David further claims Crystal set up the boys to refuse to get out of the car and come to him at visitation exchanges, through her alleged alienation and brainwashing.⁵⁶

There is no evidence the children have been brainwashed or alienated. Crystal has made the children available at every scheduled exchange, and cooperated for additional exchanges when the children would not go to their father's on the ordered exchange.

⁵⁵ CP at 58.

⁵⁶ CP at 55.

On June 29, 2017, Crystal brought the children for the scheduled exchange. Even after Anthony would not go with his father, and Nathan did, Crystal agreed to try again with David's father, Bruce, the same day.⁵⁷ The transcript of the exchange reflects David telling his father to "just grab him and see what happens," when Bruce was unable to get Anthony out of the car as well.⁵⁸ Bruce was still unable to get Anthony to go with him.

On Saturday, Crystal met Bruce and David in effort to exchange their son again. Bruce states both he and David tried to encourage Anthony to come home, but Anthony refused to go with them. Crystal was there, in her car in the parking lot, with David and Bruce for over forty-five (45) minutes.⁵⁹ The parties even agreed to call Crystal's husband to see if he could help.⁶⁰ That didn't work. Bruce and David gave Anthony a hug and went home. The following day Crystal initiated communication with David regarding the difficulty at the exchanges. She sent him an email apologizing that Anthony would not get out of the car, and the two agreed and setup a time for David to come to her house to try and get Anthony.⁶¹ David

⁵⁷ CP at 82.

⁵⁸ CP at 123.

⁵⁹ CP at 83.

⁶⁰ *Id.*

⁶¹ *Id.*

arrived, and after fifteen (15) minutes, the parties were finally able to get him to go with David for his vacation time.

David alleges that on August 17, 2017 he did not get visitation. However, Crystal arrived at the parking lot of the exchange location five (5) minutes early.⁶² Both David and his mother attempted to get Anthony and Nathan to come with them, but both refused to get out of the car.⁶³ David did not try to physically remove the children from the vehicle, but he was able to hug Nathan.⁶⁴

The following day, August 18, 2017, Crystal and David were engaged in mediation. During mediation Bruce met Wilbert to try and exchange the children.⁶⁵ While Wilbert and Bruce were able to get the boys out of the vehicle, they would not get into the vehicle to go to their father's house. The boys did hug Bruce.⁶⁶

David's vacation was supposed to start the following day, August 19, 2017.⁶⁷ Crystal went to the exchange location to meet David, but he was not there. Crystal waited at the exchange point for thirty (30) minutes

⁶² CP at 60.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ CP at 61.

⁶⁶ *Id.*

⁶⁷ CP at 61.

after which she emailed him at 8:30 am.⁶⁸ David did not make any further attempts to execute an exchange that day.

The record does not reflect or reveal any evidence Crystal has violated any provision of any court order. No such evidence was ever presented by David. David only claims that Crystal, despite being timely present, with the children, at every exchange has brainwashed the children to refuse to go with their father. Crystal has not only appeared for every exchange, the record reflects she typically spends a significant time at the exchange allowing David to speak to the children and urge them to go with him. The record does not reflect Crystal ever coaxed the children not to go with their father. To date, it has not been determined why the children refuse.

The record reflects the children refuse to go to David's house at times when they are not in Crystal's care but are, rather, at school when Crystal is not present. While David claims Crystal gave Nathan directions to walk home, he is mistaken. The message sent by Crystal to David was clearly directions sent to David via MapQuest such that David could know the likely path home Nathan would take.⁶⁹ David did not go and get

⁶⁸ CP at 79.

⁶⁹ CP at 98.

Nathan, but asked Crystal to do so. Crystal has, on multiple occasions, picked the children up from school at David's request when they refuse to go to David's house.^{70 71 72}

On September 17, 2017 David reached out to Crystal proposing she go to the boys' schools, get them on the bus and then drive to his house to meet them at the bus stop. David states "I think this may show Anthony and Nathan how serious this is and they are not the ones to make the decisions we are".⁷³ David acknowledges the boys are ones deciding not to visit him despite Crystal, not because of her.

There is no evidence to show Crystal has violated any provisions of the parenting plan. While the courts findings did not reflect the specific provision allegedly violated, one can only presume the alleged bad faith has to do with the exchanges themselves and the father's visitation time. The evidence shows Crystal has arrived on time and with the children for all scheduled visitation. The evidence shows Crystal has agreed to try and execute additional exchanges to get the boys to go to their father's house. The evidence shows Crystal engaged in a meeting at the school about how to address their son refusing to get on the school bus to David's house, and

⁷⁰ CP at 114.

⁷¹ CP at 118.

⁷² CP at 127.

⁷³ *Id.*

that she acknowledges it is an issue. The children refuse to visit their father even when Crystal is not present at David could not get the children to go to his house, even when Crystal is not present.

C. FINDINGS DO NOT SUPPORT CONCLUSIONS OF LAW

The findings do not support the conclusions of law. Judge Schwartz states, “And not actively and affirmatively encouraging them that dad has a valued role as a parent, just like mom does, this is what happens. This is exactly what happens.”⁷⁴ Judge Schwartz goes further and finds that the contempt is because, “the problem is that she doesn’t take the kids to counseling, because there is, obviously, some issue going on. We wait weeks, almost months, before a commissioner has to say, look, there is something bad going on with these kids.”⁷⁵

The evidence reflects that on July 20th, Crystal had sent an email to David to try and address the visitation issue.⁷⁶ Crystal follows up with an attempts to schedule mediation to address counseling as the parenting plan requires joint decision making.⁷⁷ The two dates provided by Pierce County Center for Dispute Resolution were October 5 and 12.⁷⁸ However,

⁷⁴ RP at 15.

⁷⁵ RP at 16.

⁷⁶ CP at 114.

⁷⁷ CP at 159.

⁷⁸ CP at 159.

the court finds the bad faith is that Crystal tried to follow the parenting plan, instead of unilaterally enrolling the children in counseling. There is nothing in the parenting plan to support the judge's findings.

Commissioner Gelman finds Crystal intentionally violated the court order consistent with "*Marriage of Corrigeux*".⁷⁹ That case has nothing to do with a parenting plan, it is based on contempt for alimony or support.⁸⁰ This case has nothing to do with either. Commissioner Gelman also mentions "*Marriage of Decker*".⁸¹ This case again has nothing to do with a parenting plan and only applies to contempt in the manner of property settlements and support.⁸² Further Commissioner Gelman relies on the case history because Crystal has filed three modification petitions.⁸³ Pierce County Superior Court will not entertain any motions unless a petition is filed in a matter. Therefore, in order to get a temporary restraint so an investigation can be completed, Crystal had to file the modifications to protect her children.

RCW 7.21.010(1)(b) defines "contempt" as "intentional ... [d]isobedience of any lawful judgment, decree, order, or process of the

⁷⁹ CP at 167.

⁸⁰ *Corrigeux v. Corrigeux*, 37 Wn.2d 403, 224 P.2d 343 (1950).

⁸¹ CP at 167.

⁸² *Decker v. Decker*, 52 Wn.2d 456, 326 P.2d 332 (1958).

⁸³ CP at 167.

court.”⁸⁴ The primary purpose of civil contempt power is to coerce a party to comply with an order or judgment.⁸⁵ In determining whether the facts support a finding of contempt, we strictly construe the order to see whether the alleged conduct constitutes a plain violation of that order.⁸⁶ In determining whether the facts support a finding of contempt, the court must strictly construe the order alleged to have been violated, and the facts must constitute a plain violation of the order.⁸⁷

A North Carolina court held that, where the custodial parent "does not prevent visitation but takes no action to force visitation when the child refuses to go," a contempt order is inappropriate because the parent's action is not willful.⁸⁸ The court decided that, absent evidence that the mother refused to allow her son to visit his father or encouraged the child's refusal to visit, the contempt order was improper.^{89 90}

In order to find contempt there must be an intentional act. Further, the record does not reflect a specific finding of what portion of the parenting

⁸⁴ RCW 7.21.010(1)(b)

⁸⁵ *State v. Breazeale*, 144 Wn.2d 829, 842, 31 P.3d 1155 (2001).

⁸⁶ *In re Marriage of Eklund*, 143 Wn. App. 207, 213, 177 P.3d 189 (2008) (citing *In re Marriage of Humphreys*, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995)).

⁸⁷ *Johnston v. Beneficial Management Corp.*, 96 Wn.2d 708, 713-14, 638 P.2d 1201 (1982).

⁸⁸ *Hancock v. Hancock*, 122 N.C. App. 518, 471 S.E.2d 415, 419-20 (1996).

⁸⁹ *Hancock*, 471 S.E.2d at 419-20.

⁹⁰ *In re Marriage of Rideout*, 110 Wn. App. 370, 379, 40 P.3d 1192, 1196 (2002)

plan that was not followed by Crystal, nor is there anything to reflect she has encouraged the children's refusal. David's email reflects he understands this is an issue with the children, not Crystal.⁹¹

In fact, Crystal gets chastised by Judge Schwartz for attempting to follow the parenting plan regarding non-emergency medical decision. On September 8, Crystal requests that the children go to counseling.⁹² Due to David not responding to the request, she is left with submitting the dispute to mediation pursuant to Section 4.2 of the parenting plan.⁹³ Ironically, David claims that Crystal failed to enroll the children in counseling, though they were ordered to do so years ago, but then goes on to say Anthony was in counseling until he was discharged in March of 2017.⁹⁴

The court appears to find that Crystal is using CPS, Police and the prosecutors to undermine the father's relationship.⁹⁵ The problem with this finding is there is no evidence this has occurred, in fact the last allegation made was November 16, 2015 when Anthony disclosed an incident of abuse from his father.⁹⁶ Nothing has happened for over a year, with the last court

⁹¹ CP at 127.

⁹² CP at 116.

⁹³ CP at 30.

⁹⁴ CP at 126

⁹⁵ RP at 23

⁹⁶ CP at 3.

hearing being June 3, 2016. The father's admission that the exchanges were occurring as they were supposed to until June 29, 2017.

The court further bases its finding of contempt on a suspicion that "based on the pattern that's been involved in this case [Crystal] is purposely undermining the relationship and bond between these children and their father."⁹⁷ The court relies on *Rideout* to support its findings. The issue here is the facts in this matter don't show Crystal violating any portion of the parenting plan. She appears for visitation exchanges pursuant to the parenting plan. Quite frankly, the father appears and he cannot get the child out of the car. These are not small children and it is inequitable to hold Crystal in contempt when the father is not able to get the children out of the car either.

More concerning is the court's finding that the father shall have 43 days of makeup time. Those days include the time the children, on the father's days, go to school but fail to go home to him. At one point he called Crystal and she was at the hospital with a family member. Yet the court's finding is that even on days that are not Crystal's, she is in contempt. There is zero evidence to support these findings.

⁹⁷ RP at 21

In order to affirm the trial court's findings this court would have to make a finding that a parent shall not report the concerns of their children to CPS or the court. This ruling would chill parent's reporting of suspected abuse for failure it would be used against them and cause them to be found in contempt. That is exactly what has occurred here. Crystal reported that the father recently had allegations of domestic violence against him from his former girlfriend. Crystal filed two petitions to modify the parenting plan in order to have the matter heard. The first petition was never heard because her attorney failed to act, and has subsequently been disbarred. The second petition was based on the same allegations as the court never heard the merits of the case. The last petition was based on an allegation that the father had abused the children. Based on the ruling of the trial court, it appears Judge Schwartz believes a parent should wait to see what happens prior to attempting to protect their children first.

Even more concerning is Judge Schwartz finds that Crystal's inaction was based on her attempt to follow the parenting plan in regards to joint decision making. "The problem is that she doesn't take the kids to counseling."⁹⁸ The problem is the kids were not in counseling at that time, and in order to enroll the children in counseling she needs to have the

⁹⁸ RP at 16.

permission of David.⁹⁹ Crystal reaches out to David on July 20th via email and informs him she is encouraging the children to see their father, also giving an example of the failure of the father to get the children to his house.¹⁰⁰ David in turn, calls Crystal and requests she picks up the children, even though she is at the hospital with her ailing grandmother. As David failed to respond to Crystal's request for counseling, Crystal setup mediation through the Center for Dialog & Resolution to address the counseling issue.¹⁰¹ This action was required pursuant to the Dispute Resolution clause of the parenting plan.¹⁰²

D. ATTORNEY'S FEES

Pursuant to RAP 801 and RCW 26.09.140 Crystal requests attorney's fees. "The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith...Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other

⁹⁹ CP at 30

¹⁰⁰ CP at 114.

¹⁰¹ CP at 92.

¹⁰² CP at 31.

party of maintaining the appeal and attorney's fees in addition to statutory costs.”¹⁰³

Attorney’s fees are appropriate in this matter as there is no basis for a finding of contempt and Crystal should be awarded fees and cost for being the prevailing party.

IV. CONCLUSION

Crystal has made reasonable efforts to assist in the visitation of the children with David. She has been timely to all scheduled visitation, picked up the children when requested by David, and arranged for alternative attempts to exchange the children. Further the children would not go to their father’s house when they were supposed to ride the bus home from school, or when Crystal’s husband and Bruce attempted to assist with the visitation.

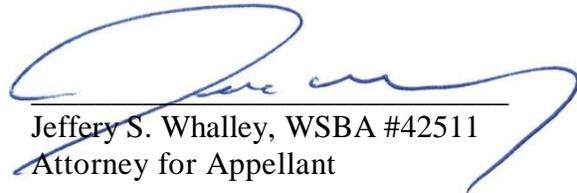
The evidence reflects the children are being defiant, and Crystal has followed the provisions of the parenting plan. Crystal setup mediation to address counseling when David would not respond to her request, which is required by the parenting plan. Most notably, David’s September 17, 2017 email to Crystal reflects that it is not Crystal who is doing these things to make the children act like this and to refuse to see their father.

¹⁰³ RCW 26.09.140

The court failed to make a specific finding as to what provision Crystal violated, and the evidence does not support she violated any provisions. In fact, there have been approximately six (6) people who have attempted to assist in getting the children to David's house, and all have been unsuccessful. The record clearly reflects Crystal maintained communication with David and his family, allowing the children to speak on the phone when requested. Additionally, Crystal made every attempt to allow the exchange to occur, spending up to forty-five (45) minutes trying to coerce the children to go to their fathers.

Crystal respectfully requests the court overturn the finding of contempt and award her reasonable attorney fees on appeal.

RESPECTFULLY SUBMITTED this 30th day of March, 2018.



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