

FILED
Court of Appeals
Division II
State of Washington
4/24/2018 10:20 AM

Case No. 51183-5-II

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

CRYSTAL JEAN FOX,

APPELLANT,

v.

DAVID L. HAYES,

RESPONDENT.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal arises from a mother's challenge to a finding of contempt against her for violating a parenting plan. In 2013 pursuant to a modification trial, the parenting plan was modified to significantly reduce the mother's residential time with the parties two sons. Since that time, the mother engaged in multiple efforts to sabotage the plan. A family court commissioner and trial judge both found her in contempt based on numerous dismissed petitions to modify, numerous unfounded abuse complaints against the father with various law enforcement agencies, and ultimately, her blatant failure to return the two boys to the father's custody when it was within her power to do so. Substantial evidence clearly supports the finding of contempt. The mother's allegation that she was an "innocent bystander" to the boys' recalcitrance was not a reasonable excuse for her failure to return them to the father's custody. Her appeal must be denied and attorneys' fees and costs awarded.

II. STATEMENT OF ISSUES ON APPEAL

1. Whether substantial evidence exists in the record to support the trial court's entering of a Contempt Order imposing sanctions on Crystal Jean Fox ["Crystal"] under RCW 26.09.160(2)(b) for her failure to comply with the residential provisions of the final 2013 Parenting Plan ["2013 Plan"] where:

(1) the trial court found that Crystal intentionally and in bad faith failed to affirmatively encourage and overcome nine year old Anthony's and fourteen year old Nathan's refusals to return to David Hayes' ["David"] primary custody when it was within her power to do so;

(2) the trial court also relied on Crystal's multiple failed petitions to modify the custody arrangements as well as her numerous unfounded complaints to government agencies about David's alleged abuse in an effort to obtain primary custody of Nathan and Anthony; and

(3) Crystal failed to prove by a preponderance of the evidence under RCW 26.09.160(4) that she had a "reasonable excuse" for failing to affirmatively encourage the boys to return to their father. [Assignments of Error Nos. 1 and 2]

2. Whether reasonable attorney fees and costs are appropriately awarded to David Hayes under RCW 26.09.160(2)(b)(ii) for all fees and costs incurred in obtaining and enforcing the contempt order both in the trial court below and in this appeal. [Assignment of Error No. 3]

III. STATEMENT OF THE CASE

Pre-Contempt Order History

At the time of their divorce in September 2011, David and Crystal agreed to a Parenting Plan that provided for equal residential time with the couple's two children, Nathan (then 8) and Anthony (then 3). CP 107. In

2013, Crystal relocated and David moved to modify the Parenting Plan. A 1-1/2 day trial took place in October 2013 to determine what custody arrangements were appropriate going forward. CP 107; CP 20-23 [Memorandum of Journal Entry 10/10/13 and 10/14/13]. David and Crystal testified extensively and numerous exhibits were entered. *Id.* Crystal's husband Wilbur Lynn also testified. CP 22.

On November 1, 2013 based on the evidence presented at trial, the trial court entered the 2013 Plan that substantially changed the custody arrangements, giving David primary residential custody of both sons. CP 24-33. Under the 2013 Plan, the boys reside with Crystal for two days every other weekend and two days during the week. CP 25. This represented a significant reduction in Crystal's residential time with the boys.

The holiday exchange schedule remained the same with each parent entitled to two weeks of uninterrupted vacation time with each child during the summer with the parents exchanging planned dates by May 15th of each year. CP 26. Significantly, the 2013 Plan contains an explicit **WARNING** that

Violation of residential provisions of this order with actual knowledge of its terms is punishable by contempt of court and may be a criminal offense under RCW 9A.040.060(2) or 9A.40.070(2). Violation of this order may subject a violator to arrest. CP 32.

Co-parenting counseling was ordered as well as continued counseling between Nathan and Crystal. CP 31-32. The 2013 Plan also incorporated a provision in the earlier Plan allowing grandparents to assist with the transferring of the children from one parent to the other. CP 31.

Since the 2013 Plan was entered by the trial court, David has resided with his parents Bruce and Maria Hayes in Tacoma, WA. His parents assist David with childcare as he works full time in a car dealership. CP 5, 7. David's mother Maria helps get the two boys off to school every day and his father Bruce helps with transporting them. CP 7. Crystal has resided in Lakewood, WA with her husband Wilbur Lynn, their two children and her husband's male friend. CP 7, 4.

Contempt Order History

From the beginning, Crystal has not been happy with the significantly revised custody arrangements ordered in the 2013 Plan. She has repeatedly engaged in protracted litigation to change them. She filed three separate Petitions for Modification after the 2013 Plan was entered, each one of which involving allegations of a detrimental environment.

Less than one year after the 2013 Plan was entered, she filed her first Petition for Modification. CP 56. That Petition was dismissed on April 6, 2015 and a Motion for Reconsideration was denied on June 8,

2015. *Id.*

Two months later, Crystal filed her second Petition for Modification. CP 56. Adequate cause for the second Petition was denied on September 28, 2015. *Id.*

Four months after that, in February 2016, Crystal filed her third Petition for Modification, once again seeking temporary restraining orders as she had done with her first Petition. CP 56. After four more months of redundant litigation including parenting investigations and appointments of GALs, etc., the third Petition for Modification was dismissed on June 3, 2016. *Id.* The judge in the last Petition found on a motion for revision that there was an abusive use of conflict by the mother. CP 148. He also found that the mother was over involving the children in the litigation and that her declarations were likely to be false. CP 149.

Paralleling her multiple Petitions for Modification were Crystal's numerous unfounded complaints to DSHS Child Protective Services and the police alleging "neglect, physical abuse and domestic violence" against David in his parenting of Nathan and Anthony. CP 3. Crystal made six referrals or complaints to CPS including allegations that (1) David hit Anthony in the face and made his nose bleed; (2) David told Anthony to lie to the CPS caseworker; (3) David choked Nathaniel with a belt; (4) David was opposed to Nathan and Anthony being in counseling.

CP 4, 5, 8. Caseworkers determined these allegations as well as others to be unfounded, finding (1) that Anthony experienced frequent nosebleeds related to dry heat in the home, (2) that Crystal appeared to be directing Anthony's comments about David's alleged coercion, (3) that the alleged choking never took place and (4) that David actively encouraged the boys' counseling. CP 4, 5, 6, 8, 9.

Crystal also filed a complaint against David about the incident with the belt with the police. It was also determined to be unfounded. RP 7-8.

Even with these unfounded allegations and failed attempts at modification, the 2013 Plan worked fairly well until June 2017. Nathan was easily able to ride the school bus to the Hayes' family home after school. CP 126. Crystal had no problem picking the boys up there and taking them back after their stays with her. CP 59, 82. Both boys maintained relaxed interactions with their grandparents and father, with Nathan in particular enjoying helping his dad and grandpa with various home projects such as painting. CP 81-82.

In March 2017, Crystal's husband Wilbur Lynn approached David at Nathan's school to ask if David was willing to change the 2013 Plan. Wilbur wanted to change the schedule to alternating weeks starting that summer. CP 56. Crystal also pressured David to change the Plan. *Id.*

On May 12, 2017, David informed Crystal that his vacation dates

with their sons were July 1st - 7th and August 19th - 25th. CP 61, 120. He had planned to take them on a camping trip in Eastern Washington. *Id.* David also informed Crystal that he would not agree to change the 2013 Plan. CP 120. At that point, she became upset and decided to require that the drop offs and pickups happen at a halfway point between the two houses. CP 66.

On June 29, 2017 at 8:00am, David went to the newly agreed upon halfway point at McDonalds on South Tacoma Way to pick up Nathan and Anthony. CP 58. Nathan got into David's car but Anthony refused and sat in Crystal's car crying. David asked Crystal what was going on but she simply said that he didn't want to go and then said "He's always like this when he gets dropped off and you are never around so how would you know how he is." *Id.* Crystal stated that she wouldn't help. David told her that he would have his father pick Anthony up later in the day. CP 59.

Bruce Hayes went back to the McDonald's at 5:00pm to pick up Anthony. CP 59. Anthony was there "crying and upset" with Crystal. She made no effort to encourage him to go. When Bruce questioned Anthony about why he wouldn't go with him, he would only say that his father was "rude to him and mean." CP 82. When Bruce challenged him about that, Crystal called Bruce a liar. *Id.*; CP 124.

Crystal recorded this interchange illegally on her phone¹ and the transcript of it verifies that Crystal made no effort to encourage Anthony to go with Bruce. To the contrary, she actively encouraged his recalcitrance, saying for example that she had no control over Anthony and that the decision was “up to” him, that his father was in fact mean to him, that he wasn’t making it up and that anyone who challenged Anthony’s version of the alleged abuse was lying. CP 122, 124.

Between June 29th and August 21st, David missed 19 days of visitation with Nathan and 21 days of visitation with Anthony. CP 57. Each attempt to retrieve the boys from their mom became a war of nerves as David and his parents never knew what would happen with the boys and Crystal.

On Saturday July 1, 2017, David and Bruce made another effort to get Anthony. CP 82-83. Anthony still refused to get out of Crystal’s car. When David asked Crystal to help, she would not. After 45 exasperating minutes, David and Bruce left without Anthony.

Crystal apologized for Anthony’s behavior the next day and then David and Bruce were finally able to retrieve Anthony from her house.

¹ Counsel for David Hayes objected to the use of the illegally-obtained transcript at the contempt hearing. He moved to exclude it as a violation of RCW 9.73.030 and for sanctions. CP 129-135, 151-153. However, the Commissioner ruled that it was admissible and relied on it in its ruling on contempt. CP 136, 171. It is therefore included here.

CP 83. The boys returned to Crystal on July 8th.

On July 20th, 2017, David emailed Crystal to express his concern that she had been “talking to the children telling them they don’t have to come home.” CP 114. He pointed out that Nathan was uncharacteristically reluctant to speak to his grandfather on the phone and that in the morning when David tried to pick the boys up, Crystal “didn’t assist or do anything.” *Id.* He also noted that Anthony wouldn’t get on the bus after summer school, asked the school to call his dad and then when David arrived, refused to go with him and made “a big scene.” *Id.*

In response, Crystal commented that David’s conversation with the boys that morning was “less than two minutes” so “what is there to help with”? She also claimed that she did try to calm Anthony down to get him to go with David but that David “said nothing in trying to get him to calm down and go. The only thing you said to us was to take him and go, you would deal with the cops.” *Id.*

On August 7th, Bruce and Maria attempted to retrieve the boys at the McDonald’s, but neither would get out of the car after repeated efforts on their part and none on Crystal’s. CP 84. On August 14th, David and Bruce went to the McDonald’s with the hope that Crystal would show up with the boys but she did not. CP 84.

On August 17th, David and his mother Maria arrived early in the

morning to pick the boys up at the Tacoma McDonald's. CP 60. Crystal finally arrived around 8:00am but Anthony refused to get out of the car, saying again that he did not want to go. He kept looking back and forth between David and Crystal, as if he were confused. Nathan also refused to go. Maria tried to talk more with Anthony but Crystal intervened by saying to her "if you don't like it just walk away." *Id.* David finally realized that without Crystal's cooperation, neither son would get out of the car so after giving the boys hugs, David and Maria left without them.

On August 18, 2017, David and Crystal participated in a mediation initiated by David in an attempt to resolve the residential time dispute. CP 59. The mediation on that issue was unsuccessful because Crystal was adamant that she wanted full custody of their sons. CP 77 ("Mother wants full care of children").

Later that day, Bruce Hayes attempted to pick up the two boys at Crystal's home but they were only willing to give him a hug and were not willing to go home with him. CP 61. Although Nathan called David later that evening to discuss the camping trip, there was no discussion about how that was going to happen. CP 61.

The camping trip did not happen: On August 19th, the day it was to start, Crystal showed up at McDonald's at 8:00am without notifying David that she would be bringing the boys there at that time. She then

emailed him that they waited until 8:30am but he did not show up so they left. CP 79. As with her other efforts to “comply” with the 2013 Plan, this was in reality an effort to sabotage it.

On August 22, 2017, David filed a Motion for Order to Show Cause for Contempt based on Crystal’s efforts to sabotage the 2013 Plan. CP 86-87. The Show Cause hearing was set for September 27, 2017. *Id.* After being served with the Contempt motion, on August 25, 2017, Crystal scheduled a second mediation. CP 92.

On August 28, 2017, David spoke with Nathan and Anthony by phone to wish them a good first day of school the next day. CP 93. It was the first time David had missed the first day of school with the boys since they started school. *Id.*

On the first day of school (August 29th), neither Nathan nor Anthony got off the school bus as usual to go to David’s house. Fourteen year old Nathan walked six miles from the school in unsafe neighborhoods to his mom’s house based on her explicit directions that were texted to him. CP 94, 98. On September 3, 2017, Bruce called Nathan to ask that he no longer walk the six miles to his mom’s house because of the danger and because he was too young to be walking alone. CP 94.

David’s mother Maria waited for then nine year old Anthony at the bus stop as usual but he did not get off the bus. David frantically called

the school and eventually talked with Anthony who said “I’m not going to your house.” CP 93. Numerous phone calls took place after this but the custody situation remained the same with both boys remaining at Crystal’s house rather than with David as required in the 2013 Plan. CP 25 (“Upon enrollment in school, the children shall reside with the father ...”).

On September 7, 2017, David received a call from the Principal at Anthony’s elementary school saying that Anthony was refusing to leave the classroom, was throwing a tantrum and the buses had already left. CP 94-95. On September 8, 2017, Crystal sent David an email in which she disavowed having any responsibility for the decisions being made by the two boys to refuse to go with their father:

I think it is time we listen to what they have to say, and take the abuse allegations seriously, instead of playing it off like they don’t know what they are talking about. They are 9 and 14 years old, they are not little kids that do not know what they are taking about. *The decisions they are making are not done by me* [emphasis supplied]. CP 116.

A meeting with school officials, Crystal, David and Bruce took place on September 11, 2017. Crystal merely shrugged her shoulders when asked what she could do to help with Anthony’s behavior. CP 95. At that point, Crystal was picking both boys up at school and returning them to her house in violation of the 2013 Plan. *Id.*

On September 17th, David emailed Crystal pleading with her to put

both boys on their school buses and then wait for them at David's house. This suggestion was one last desperate effort on his part to impress upon the two boys that Crystal and David were making the decisions, not Nathan and Anthony. CP 127. He received no response.

Crystal has set forth that both Anthony and Nathan need counseling to get to the bottom of why they won't go to their father's. CP 106. Counseling for the boys was ordered in both the original 2011 Parenting Plan and the 2013 Plan. However, Crystal stopped Nathan's counseling and also eventually stopped speech therapy for Anthony. CP 126; 14-19. Counseling for Anthony was discontinued on March 23, 2017, just a few months before he began refusing to be around his father. *Id.* David and Crystal had ten sessions of co-parenting counseling in 2013 and 2014 but Crystal refuses to continue it. *Id.*; CP 12.

By September 25th, 2017, David had missed 43 residential days with Anthony and 40 residential days with Nathan. CP 127.

On September 27th, Pierce County Superior Court Commissioner Mark Gelman held a hearing on David's motion for contempt. CP 144-172 (Transcript). In his ruling, Commissioner Gelman noted that nowhere in Crystal's declaration did she say that she had control over the ten year old child as an adult parent, that the ten year old "is going to listen to me and go visit with the other parent who is the residential parent." CP 160.

He also noted that none of the multiple law enforcement or CPS investigations into Crystal's allegations of abuse and neglect supported her position. On multiple occasions over multiple years by multiple different agencies, the findings were that "there is no credibility to the allegation" and the "outcomes are all unfounded." CP 161-162. With regard to the 6/29/17 transcript, Commissioner Gelman noted that not once did Crystal "get out of the car and say I'm going to escort you over to dad's car and have you get in." CP 164.

Applying the holdings in *In re Marriage of Rideout, infra*, and *In re Marriage of James, infra*, Commissioner Gelman found that Crystal had the ability to comply with the 2013 Plan, that she had been unwilling to do so and that she had failed to comply in bad faith. CP 166; 140 (Contempt Hearing Order). He therefore found that she intentionally violated the 2013 Plan and was in contempt. CP 166-167; 140. He ordered her to give David makeup time over the next six months for the days of residential time (43 days for Anthony and 40 days for Nathan) lost. CP 167; 141. He also ordered counseling for both boys, stating that it was "unacceptable under any characterization" to have a "10-year-old dictating what mom and dad are going to do." CP 168. Counseling was ordered to begin immediately. CP 136; 141.

A Superior Court hearing on Crystal's Motion to Revise the

Commissioner's ruling was held on October 20, 2017 before Judge Michael E. Schwartz. RP 1-26. After hearing arguments and reviewing the record before the Commissioner, Judge Schwartz held:

All of the documents that I reviewed, including the historical context of this case, demonstrate to me that mom is failing to fulfill her parental duty to insure that the court order is complied with. She has taken zero affirmative steps. The fact that she brings them to the visitation is not, to me, an affirmative step if she is undermining dad's role as a parent prior to getting there. RP 23.

He further stated:

There is no evidence, no reliable evidence that dad has abused these children. None. There has never been a finding that he has. And the history of this case demonstrates to me that mom is using CPS, the police and the prosecutors, to undermine that relationship. The record I reviewed is sufficient to find that mom is in contempt for failing to comply with the Parenting Plan. RP 23.

An Order on Revision was subsequently entered denying Crystal's Motion for Revision of Commissioner Gelman's contempt ruling and granting David \$1,500 in attorney's fees and \$126.15 in costs. CP 173-174.

A Notice of Appeal from the Contempt Order was timely filed on November 17, 2017.

IV. ARGUMENT AND AUTHORITY

Standard of Review for Contempt Orders in Family Law Cases

Contempt of court includes any "intentional ... [d]isobedience of any lawful ... order ... of the court." RCW 7.21.010(1)(b). If the superior

court bases its contempt finding on a court order, “the order must be strictly construed in favor of the contemnor ... “ and the “facts found must constitute a plain violation of the order.” *Johnston v. Beneficial Mgmt. Corp. of America*, 96 Wn.2d 708, 713, 638 P.2d 1201 (1982).

Ordinarily, punishment for contempt of court is within the sound discretion of the trial court and an appellate court will not reverse a contempt order absent an abuse of that discretion. *In re Marriage of James*, 79 Wn. App. 436, 439-40, 903 P.2d 470 (1995). Under the abuse of discretion standard of review, a contempt finding will be upheld “even though the trial court did not rely on any particular theory as long as a proper basis can be found.” *State v. Boatman*, 104 Wn.2d 44, 46, 700 P.2d 1152 (1985).

However, a contempt order based on a parent’s bad faith refusal to perform a duty under a parenting plan is reviewed under a “substantial evidence” rather than an abuse of discretion standard. *In re Marriage of Rideout*, 150 Wn.2d 337, 351-352, 77 P.3d 1174 (2003). Unlike other contempt proceedings, deciding whether or not a parent acted in “bad faith” always involves credibility determinations and often a review of the entire dissolution file. *In re Marriage of Rideout*, 110 Wn.App. 370, 376, 40 P.3d 1192 (2002), *aff’d in Rideout, supra*.

Trial judges and court commissioners routinely hear family law

matters and are called upon daily to make credibility determinations and factual findings of bad faith and sometimes do so based solely on the written record.² *Id.* Thus, they stand in a much better position than appellate judges to assess the credibility of witnesses even where such determinations are based on written affidavits rather than live testimony. *Rideout*, 150 Wn.2d at 351.

Thus, “notwithstanding the fact that the submissions at the contempt proceeding were entirely documentary, the superior court’s findings of fact should be given deference and evaluated to determine if there was substantial evidence to support them.” *Rideout*, 150 Wn.2d at 340. Under that standard, an appellate court may not substitute its findings for those of the trial court where there is “sufficient evidence” in the record to support the trial court’s determination. *In re Marriage of Pennamen*, 135 Wn.App. 790, 802-803, 146 P.3d 466 (2006).

Substantial evidence exists if a rational, fair-minded person would be convinced of the truth of the declared premise. *Heqwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007). Even if there are several reasonable interpretations, the evidence is substantial if it

² It should be noted that in this case, the judicial officers who ruled in favor of contempt had twenty years combined family court experience. The commissioner has served exclusively in Pierce County Family Court for 17 years and the judge has served exclusively on the Pierce County Family Court calendar since 2015. www.co.pierce.wa.us/1063/Superior-Court-Department-3; www.co.pierce.wa.us/2992/Superior-Court-Commissioners.

reasonably supports the factual findings and conclusions of law. *Fred Hutchinson Cancer Res.Ctr. v Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987).

Basic Law Regarding Refusal to Perform
Duties Set Forth in a Parenting Plan

RCW 26.09.160 governs what happens when a parent fails or refuses to perform duties set forth in a court-ordered parenting plan establishing residential provisions for a child. It states in pertinent part:

(2)(a) A motion may be filed to initiate a contempt action to coerce a parent to comply with an order establishing residential provisions for a child. If the court finds there is reasonable cause to believe the parent has not complied with the order, the court may issue an order to show cause why the relief requested should not be granted.

(b) *If, based on all the facts and circumstances, the court finds after hearing 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.* [Emphasis supplied].

Once a parent has been found to have violated the parenting plan in bad faith “based on all the facts and circumstances,” a finding of contempt is mandatory. Once such a finding has been entered, the trial court has no discretion but to require the violating parent to provide make-up time, to pay *all* court costs and reasonable attorneys fees as well as a civil penalty.

The statute does permit the trial court in making a finding of contempt for violating the residential provisions of a parenting plan to

consider a “reasonable excuse” brought by the violating parent as follows:

(4) ... [T]he parent shall be deemed to have the present ability to comply with the order establishing residential provisions unless he or she establishes otherwise by a preponderance of the evidence. *The parent shall establish a reasonable excuse for failure to comply with the residential provision of a court-ordered parenting plan by a preponderance of the evidence.* [Emphasis supplied].

RCW 26.09.160(4). If such an excuse has not been proved by a preponderance of the evidence, then the parent may be held in contempt under the statute “for failure to make reasonable efforts to require a child to visit the other parent as required by a parenting plan and a court order establishing residential time.” *Rideout*, 150 Wn.2d at 340.

Crystal Acted in Bad Faith by Her Failure to Return Nathan and Anthony to Their Father’s Custody When She Was Capable of Doing So

Crystal argues that her failure to return Nathan and Anthony to David’s home starting on June 29, 2017 was due to no fault of her own and that she did everything possible to make the children available to David. For example, she states that she “has consistently brought the children to the exchange location pursuant to the court order” and that “she has attempted to work with the father and his family to make multiple attempts to exchange the children.” Appellant’s Opening Brief at p. 11. She also states that she “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." *Id.* at p. 13. She further asserts that not only did she "appear" for every exchange, but "she typically spends a significant time at the exchange *allowing David to speak to the children and urge them to go with him* [emphasis supplied]." *Id.* at p. 16. Nowhere in this parade of nominally "reasonable excuses" is an admission that Crystal herself had a responsibility as the parent to "urge" or "order" the children to go with their father, the primary custodial parent.

Crystal asserts that she did not violate the 2013 Plan because there was nothing else she could do and that she fulfilled her parental duty by simply showing up at the exchanges. Appellant's Brief at 12 (Crystal brought "the children to the exchange location, and she did so on every day she was supposed to in compliance with the court order"). Crystal maintains that the facts and circumstances presented here are crucially distinct from those presented in *Rideout, supra*, the case that the trial judge and commissioner relied on below to find her in contempt. CP 163-164 (Commissioner Gelman); RP 16-17 (Judge Schwartz); Appellant's Brief at p. 11. She claims that because she simply showed up with the children, there is no evidence that she either "contributed to the child's attitude or failed to make reasonable efforts to require the child to comply" as she

claims is required by *Rideout*. *Id.*, citing *Rideout*, 110 Wn.App. at 370.³

To the contrary, a close reading of *Rideout* (as was done at the trial court below) positively requires a finding of contempt where a parent fails to affirmatively order young children to return to their father for court ordered residential time. *Rideout* involved a mother (Sara) who was found in contempt for bad faith failure to comply with the father (Christopher)'s summer residential time with their then 12 year old daughter (Caroline). The permanent parenting plan provided that Sara was the primary custodial parent except for alternating weekends and one month during the summer when their two children would reside with the father. *Rideout*, 150 Wn.2d at 340-341.

In July 14, 2000, after notifying her by phone and letter, Christopher went to Sara's home to pick up the children for his summer residential time. Neither Sara nor the children were home. Sara informed him by phone that Caroline (then one week from turning 13) would be staying with her. When Christopher attempted to retrieve her the next day, Sara's boyfriend would not tell him where Caroline was. *Id.* at 343.

Christopher then obtained a court order establishing specific dates for his summer residential time with Caroline. Sara did not deliver

³ Crystal only cites to the Court of Appeals opinion in *Rideout*. Although that opinion was upheld on appeal, the Washington Supreme Court's final opinion contains the crucial analysis to be applied here and is the one that was applied by the trial court below.

Caroline to Christopher as ordered, claiming that because Caroline “is still a minor, she is at a great disadvantage in this dispute and *I get dragged into the middle of it no matter how hard I try to stay out* [emphasis supplied].” *Rideout*, 150 Wn.2d at 343. *Id.* In the subsequent motion for contempt, Sara maintained that “I have tried every method of persuasion available to me to encourage my daughter to visit with her father, but Caroline adamantly refuses to go visit him” and that because Caroline refused to visit with her father, she had not violated the residential time order. *Rideout*, 150 Wn.2d at 344. Caroline filed her own declaration stating that “I don’t want to spend four weeks with my father this summer.” *Rideout*, 150 Wn.2d at 346.

A commissioner found that Sara denied Christopher access to Caroline for the summer residential time. He also found that Sara:

... is an intelligent, competent, and capable parent with the ability to cause her thirteen year old to comply [with] the court’s orders, yet the mother has failed to do so. *She was charged with a duty to comply with an order, had the ability to comply, and failed to do so* [Emphasis supplied].

Rideout, 150 Wn.2d at 346-347. The commissioner found Sara in contempt for her bad faith failure to comply with the order regarding the summer visitation schedule. A superior court judge denied Sara’s motion for revision. *Id.* at 348. This contempt ruling was upheld by the Court of Appeals which concluded that “when a child resists residential, a parent

may be held in contempt if he or she either contributed to the child's attitude or failed to make reasonable efforts to make the child comply." *Rideout*, 150 Wn.2d at 348, summarizing *Rideout*, 110 Wn.App. at 382.

The Washington Supreme Court upheld this opinion, finding explicitly that a parent who refuses to comply with a parenting plan is considered to have acted in bad faith under RCW 26.09.160(1). Further, parents

are deemed to have the ability to comply with orders establishing residential provisions and the burden is on a non-complying parent to establish by a preponderance of the evidence that he or she lacked the ability to comply with the residential provisions of a court-ordered parenting plan or had a reasonable excuse for noncompliance.

Rideout, 150 Wn.2d at 352-353.

In upholding the lower courts' findings of contempt, *Rideout* addressed Sara's alleged "reasonable excuse" for failing to comply with a parenting plan that she was an "*innocent bystander* without the ability to require Caroline to visit her father in accordance with the parenting plan [emphasis supplied]." *Id.* at 357; RCW 26.09.160(4) (parent deemed able to comply unless able to establish a "reasonable excuse" by a preponderance of the evidence). *Rideout* rejected this excuse and emphatically stated:

Whether they like it or not, parents, like Sara, have an obligation to attempt to overcome the child's resistance to

the residential time in order to ensure that a child's residential time with the other parent takes place. Sara had that responsibility and failed to meet it by not assuring that Caroline visited with her father in accordance with the parenting plan ...

Rideout, 150 Wn.2d at 357.

Finally, *Rideout* held that a finding of bad faith contempt and consequent punishment is “appropriate when the parent fails to overcome the child’s recalcitrance when, *considering the child’s age and maturity*, it is within the parent’s power to do so [emphasis supplied].” *Id.* That is exactly what happened here. The fact that Crystal (unlike Sara) physically delivered the nine and fourteen year old children to the exchanges is a false distinction.

Like Sara in *Rideout*, Crystal took absolutely NO affirmative action (and even admits not doing so) to verbally encourage or if necessary, order her minor children to get into the car with their father. Like Sara, Crystal failed to establish by a preponderance of the evidence that being an allegedly “innocent bystander” was a “reasonable excuse” for her failure to comply. The finding of contempt upheld in *Rideout* should similarly be upheld here.

Substantial Evidence Supports the Trial Court’s
Finding of Contempt Under RCW 26.09.160

At the trial court below, Commissioner Gelman pointed to

evidence of Crystal's failure to take affirmative action as follows:

I didn't see [Crystal] say, yeah, get the child out of the car. If he doesn't want to go, grab him and pull him out of the car. I didn't see her once get out of the car and say I'm going to escort you over to dad's car and have you get in. Not once. I didn't see her once. CP 164.

He held that Crystal failed to meet her burden of proof under RCW

26.09.160(4) that she had a "reasonable excuse" for her failure to comply:

[Crystal] has the ability to comply. In order to find contempt, I have got to find she has the ability to comply with the parenting plan. Even she acknowledges she has the ability to comply. She admits it. I find that she has been unwilling to do so. She has done so in bad faith ... and intentionally violated ... the parenting plan, a lawful order of the court. CP 166-167.

Similarly, Judge Schwartz after quoting from the "innocent bystander"

language in *Rideout* concluded:

I'm seeing [Crystal] go like this, shrugging her shoulders... I see a pattern of conduct here is that [Crystal] has ... consistently attempted to undermine the Parenting Plan that was entered back in 2013... I'm not seeing anything here where [Crystal] has done anything in the affirmative nature in order to carry out the Parenting Plan. RP 16-17.

He also found that Crystal involved the two children in her unrelenting litigation over custody and their string of ultimately unfounded abuse allegations against the father orchestrated by Crystal: "How can they not, under those circumstances, try to please mom by choosing sides?" RP 17.

Judge Schwartz concluded by finding Crystal in contempt based on

the following:

These aren't 17 year old kids. These are young kids. I suspect very strongly that based on the pattern that's been involved in this case is that your client is purposefully undermining the relationship and bond between these children and their father. I think that there are sufficient facts in the record to so find and I'm denying revision. These kids are not old enough to make decisions on their own. Simply put, parents are the ones that make the calls. RP 21.

Judge Schwartz further pointed to the "substantial evidence" that supported his finding Crystal in contempt for failing to comply with the Parenting Plan:

All of the documents that I reviewed, including the historical context of this case, demonstrate to me that mom is failing to fulfill her parental duty to insure that that court order is complied with. She has taken zero affirmative steps. The fact that she brings them to the visitation is not, to me an affirmative step if she is undermining dad's role as a parent prior to getting there ... And the history of this case demonstrates to me that mom is using CPS, the police and the prosecutors, to undermine that relationship. RP 23.

Thus, the evidence relied upon in this case is far more substantial than the evidence relied upon in *Rideout*. Although *Rideout* did similarly include some evidence of the mother's previous withholding of the children for the father's summer residential time, it did not involve the mother's repeated efforts to use CPS and law enforcement agencies to carry out a false narrative that the father was physically abusing the two children. There can be no doubt that here, substantial evidence supports the trial

court's finding that Crystal not only failed to make reasonable efforts to require the children to comply with the 2013 Parenting Plan, but that she also made concerted efforts over a four year period to sabotage the court-ordered residential time in order to retain custody of Nathan and Anthony.

None of the other cases mentioned or other arguments made in the Appellant's Brief undermine a finding of substantial evidence here. For example, Crystal cites an unpublished 2005 Court of Appeals opinion for the proposition that *Rideout* requires this court to not only apply the "substantial evidence" standard of review but to also assess whether the trial court's factual findings support the conclusions of law. Appellant's Brief at p. 10, n. 47, citing *Wallace v. Jennings*, Court of Appeals Case No. 31288-II (9/13/05). Unlike the Court of Appeals opinion in *Rideout* (which did require that analysis), the Washington Supreme Court upheld only the "substantial evidence" standard and did not add the second step of assessing whether the factual findings support the conclusions of law. *Rideout*, 150 Wn.2d at 341 (requiring only that the trial court's factual findings be evaluated to determine if there was substantial evidence to support them). In any event, the citation to a pre-2013 unpublished Court of Appeals opinion should be stricken from the Appellant's Brief since it has no precedential value. GR 14.1.

Other cases cited by Crystal cannot change the reality that there

was more than substantial evidence at the trial court level here to uphold the finding of contempt against her. In one pre-*Rideout* case, an appellate court reversed a finding of contempt of a non-compliant parent where the trial court made NO factual findings to substantiate its ruling. Appellant's Brief at p. 9, n. 42, citing *In re Marriage of James*, 79 Wn.App. 436, 903 P.2d 470 (1995).

In *James*, the court reversed the contempt orders where the trial court not only made no "specific findings of bad faith" or "intentional misconduct" but there was also no "oral order from which we could ascertain whether the trial court made a finding that would support these orders." *James*, 79 Wn.App. at 441 (noting that sometimes "life emergencies and unexpected events" may sometimes prevent a parent from complying with a residential schedule; the contempt remedy "should be reserved for situations in which a parent who has been clearly told that he or she must comply ... violates it in bad faith").

James significantly did not reach the question of whether substantial evidence supported the contempt orders, and in passing noted that the initial parenting plan was deficient because it did not warn the parents that violations of the residential schedule would be punishable by contempt of court. *James*, 79 Wn.App. at n.5. Unlike *James*, substantial evidence supported the contempt findings here and Crystal received a

clear warning about possible contempt in the 2013 Plan. CP 32.

Crystal also cites RCW 7.21.010(1)(b) for the proposition that the trial court failed to enter a required finding under that statute that Crystal “*intentionally* disobeyed” the 2013 Plan. Appellant’s Brief at pp. 19-20. In arguing that she did nothing *intentionally or willfully* to violate the 2013 Plan, she cites a North Carolina case, *Hancock vs. Hancock*, 471 S.E.2d 415 (N.C.App. 1996). The *Hancock* court was not applying RCW 7.21.010(1). Rather, it was applying an entirely different statute from a different state, N.C.Gen.Stat. §5A-21. That statute did not require conduct to be willful or intentionally disobedient but North Carolina cases had interpreted it to do so. *Hancock*, 471 S.E.2d at 418.

Crystal argues based on *Hancock* that she cannot be found to have been *intentionally disobedient* where she took “no action to [physically] force the child to go” with the father. But the facts presented in *Hancock*, unlike those presented here, involve a mother who went out of her way to tell her minor son to go with the father, saying she told him “he had to go I told him to get in the car.” *Hancock*, 471 S.E. 2d at 419. Both the minor child and his older sister testified that the mother always “encouraged” him to go with his father and that she had done nothing to discourage him from visiting. The child also testified that the mother always told him to go in the car with his father and that she even “tried to”

make him do it. *Id.*

No such verbal encouragement took place here. In addition, the *Hancock* court reversed a contempt order that imposed the harshest punishment of jail time, not simply make-up days and fees and costs which is the case here. *Hancock*, 471 S.E.2d at 420 (noting that there were no fact findings to justify that incarceration was “reasonably necessary to promote and protect the best interests of the child”). Unlike the trial court in *Hancock*, the trial court here made explicit factual findings to support its ruling that Crystal intentionally and in bad faith violated the 2013 Plan. RP 23; CP 167.

Attorneys Fees and Costs Are Appropriately Awarded
To David Under RCW 26.09.160(2)(b)(ii)

RCW 26.09.160(2)(b)(ii) requires that the parent found in contempt under the statute pay the moving party “all court costs and reasonable attorneys’ fees incurred as a result of the noncompliance.” Commissioner Gelman awarded David costs of \$84, a penalty of \$100 as well as a yet undetermined amount for attorneys’ fees. CP 139, 152 (counsel’s request for \$4,500 in attorneys fees to be re-noted for hearing). Judge Schwartz reasonably awarded him \$1,500 in attorneys’ fees and the costs of the transcript on the motion to revise. RP 26. Attorneys’ fees are also appropriate under the same statute for the costs of this appeal in the

amount of \$7,500.00.

V. CONCLUSION

David Hayes respectfully requests that the court affirm the trial court's Contempt Hearing Order dated September 27, 2017 and the trial court's October 20, 2017 denial of Crystal's Motion to Revise that Order. The finding of contempt is supported by substantial evidence in the record. Crystal failed to prove by a preponderance of the evidence that being an "innocent bystander" with allegedly no parental power over her sons' recalcitrance "reasonably excused" her from complying with the residential schedule set out in the 2013 Plan.

The award of attorneys' fees below was entirely reasonable under the circumstances presented. David also requests that the court award him reasonable attorneys fees and costs in the amount of \$7,500.00 for the time spent responding to this unnecessary appeal.

DATED this 24th of April, 2018.


RAJ BAINS, WSBA No. 22459
Attorney for Respondent David L. Hayes

BAINS LAW FIRM

April 24, 2018 - 10:20 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51183-5
Appellate Court Case Title: David L. Hayes, Respondent v. Crystal J. Fox (Hayes), Appellant
Superior Court Case Number: 10-3-03692-9

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