

FILED

OCT 15 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 30937-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

In re the Marriage of

KRISTEN M. HESS (NACHTMANN)

Respondent

v.

SCOTT D. HESS

Appellant

APPEAL FROM THE SUPERIOR COURT OF BENTON COUNTY
CAUSE NUMBER 04-3-00435-8

BRIEF OF RESPONDENT

Steve Defoe, W.S.B.A#25837
Attorney for Respondent, Kirsten Nachtmann
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I. INTRODUCTION

The Respondent requests that the court affirm the trial court's rulings regarding contempt and attorney's fees.

II. STATEMENT OF CASE

The parties were married on August 10, 2002. (CP 55). They have a son, born on February 11, 2004. (CP 55). The parties' marriage was dissolved on May 1, 2006. A final parenting plan was entered. (CP 71-78).

On April 14, 2011, an Amended Parenting Plan was entered following mediation. (CP 79-82). Both parenting plans are attached as exhibits to the December 9, 2011 Declaration. (CP 71-84).

On November 17, 2011, Hess filed a motion and declaration for an order to show cause re: contempt of the final parenting plan. (CP 1-13). The respondent alleged several incidents of contempt, and requested a civil judgment in the amount of \$300.00, punitive damages and sanctions, including attorney's fees and costs. (CP 1-13).

November 29, 2011 was the initial contempt hearing. Hess struck his motion to allow for proper service. (Report of Proceedings, Page 5, line 16).

By and through her counsel, Kathleen B. Galioto, Nachtmann responded to this on December 9, 2011 wherein she addressed and denied each allegation (CP 55-84).

The contempt motion was continued once more to allow Hess adequate time to respond to Nachtmann's declaration. (RP 15).

On December 21, 2011, Steve Defoe substituted as counsel with Galioto, and appeared on behalf of the petitioner, Kirsten Nachtmann. (CP 120).

On January 3, 2012, the contempt hearing was held at Benton County Superior Court. (RP 17-50). Due to the volume of declarations and exhibits, Commissioner Schneider decided to take the matter under advisement. (RP 46 lines 17-20). Commissioner Schneider informed the parties he would issue a written decision. (RP 48 lines 3-4).

Commissioner Schneider issued a written ruling on February 7, 2012. (CP 121-123). Hess had made six allegations of contempt, but only prevailed on one. (CP 123). Therefore, Commissioner Schneider found that Nachtmann prevailed on five allegations and awarded her attorney's fees accordingly. (CP 123). Commissioner Schneider awarded Hess costs and attorney's fees 'if appropriate,' to allegation number six. (CP 123).

On May 8, 2012, both parties met again before Commissioner Schneider to enter an Order On Show Cause. (RP 51-64). Nachtmann was

awarded \$3,462.45 in attorney's fees incurred from both attorneys she used to represent her in responding to the motion for contempt. (CP 130-134).

Hess then filed this notice of appeal with Benton County Superior Court on June 6, 2012. (CP 135-141).

123 Wash.2d 641, 644-45, 870 P.2d 313 (1994)

III. ARGUMENT

All of the issues in this case are subject to the abuse of discretion standard. The decision is reviewed "for substantial supporting evidence and for legal error." *Spreen v. Spreen*, 107 Wn. App. 341, 346 (2001).

"Substantial evidence supports a factual determination if the record contains *sufficient evidence* to persuade a fair-minded, rational person of the truth of that determination." (*Italics added*) *Spreen*, at 346.

Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wash.2d 641, 870 P.2d 313 (1994).

A trial court abuses its discretion when its decision is contrary to applicable law. *See Marriage of Littlefield*, 133 Wn. 2d. 39 (1997). The trial court abuses its discretion by exercising its contempt power on untenable grounds or for untenable reasons. RCW 26.09.160 (2)(b). *In re Marriage of James*, 79 Wash.App. 436, 903 P.2d 470 (1995).

A court in a dissolution proceeding has the authority to enforce its decree in a contempt proceeding. RCW 26.09.160. Punishment for contempt of court is within the sound discretion of the trial court, and [the appellate] court will not reverse a contempt order absent an abuse of that discretion. *In re Marriage of Mathews*, 70 Wash.App. 116, 126, 853 P.2d 462, review denied, 122 Wash.2d 1021, 863 P.2d 1353 (1993). The trial court did not abuse its discretion in any way, and its ruling should be affirmed.

Issue 1: The trial court did not err when it awarded costs and attorney's fees to Nachtmann for the contempt allegations she prevailed on.

A defendant who successfully defends is a prevailing party. *Marine Enters., Inc. v. Security Pac. Trading Corp.*, 50 Wn.App. 768 774, 750 P.2d 1290, review denied, 111 Wn.2d 1013 (1988). The trial court's only discretion is to determine who the prevailing party was and what amount is reasonable. *Marassi v. Lau*, 71 Wn.App. 912, 915, 859 P.2d 605 (1993). The statute defines a prevailing party as one "in whose favor final judgment is rendered." RCW 4.84.330; *Kysar v. Lambert*, 76 Wn.App. 470, 493, 887 P.2d 431, review denied, 126 Wn.2d 1019 (1995).

To be considered a prevailing party, a party need not prevail on all issues. *Kysar*, 76 Wn.App. at 493. Where neither party wholly prevails, then the party who substantially prevails is the prevailing party. *Riss v. Angel*, 80 Wn.App. 553, 564, 912 P.2d 1028, review granted, 129 Wn.2d 1019 (1996). Hess prevailed on one issue, while Nachtmann prevailed on 5, making her the substantially prevailing party and entitling her to reasonable attorney's fees.

Issue 2: The trial court did not err in finding Nachtmann not in contempt for violating section 3.2 of the parenting plan, and/or number 16 of the amended parenting plan.

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. RCW 26.09.160(2)(a) (2011). If, based on all the facts and circumstances, the court finds after hearing that the parent, *in bad faith*, has not complied ... the court shall find the parent in contempt of court. RCW 26.09.160(2)(b) (2011) (*Italics added*).

The parent shall be deemed to have the present ability to comply ...unless he or she establishes otherwise by a preponderance of the evidence. RCW 26.09.160. (4). The parent shall establish a reasonable excuse for failure to comply... by a preponderance of the evidence. Id. In

determining whether facts support a finding of contempt, court must strictly construe order alleged to have been violated, and facts must constitute a plain violation of the order. See *Marriage of Humphreys* 79.Wash.App.596, 903 P.2d 1012 (1995).

In contempt proceedings for violation of parenting plan, the moving party has burden of proving contempt by preponderance of evidence; this showing must include evidence from which the trial court can find that the offending party has acted in bad faith or engaged in intentional misconduct, or that prior sanctions have not secured compliance with parenting plan; once the moving party has established prima facie case, the responding parent must rebut that showing with evidence of legitimate reasons for failing to comply with parenting plan. RCW 26.09.160(4).

Hess did not meet his burden of proof to illustrate that Nachtmann acted in bad faith; therefore the trial court could not find her in contempt. There was no error, and this decision should be affirmed.

Issue 3: The trial court did not err in its finding regarding the November 4, 2011 visitation.

In his brief, Hess focuses on the court's finding that both parties were confused with regard to this visitation and whether or not that is a valid excuse. (Appellant's brief, pages 3, 29-335). This is irrelevant. Again, Hess had the burden of proof to provide evidence of a willful

violation and was unable to do so. Nachtmann was not in contempt for the November 4, 2011 visitation as she did not willfully violate the parenting plan.

Issue 4: The appellant claims that the trial court did not rule on the June 3, 2011 contempt allegation. (Appellant's brief, pages 3, 36-37). This is incorrect.

The Appellate court should review. *In re Marriage of Eklund* 143 Wash.App.207, 177 P.3d 189 (2008). In that case, it was not an abuse of discretion when the trial court found the father committed one act of contempt when he violated the parties' parenting plan, rather than multiple acts of contempt as argued by mother.

In this case, the trial court adjudicated all the instances of father's noncompliance, and merging them into a single finding of contempt was not an abuse of discretion. *Id.* That being said, merging Hess's multiple instances of alleged contempt under one finding, is not an abuse of discretion.

In his own motion for contempt, Hess includes this incident under his second contempt allegation for violation of section 3.2 of the parenting plan, and the Amendment/Modification of the Parenting Plan Attachment A, number 16. (CP 7-8).

Hess's motion for contempt isolated six incidents of alleged contempt of the parenting plan. (CP 6). Had he wanted each date to be viewed and ruled on as a separate incident of contempt, he should have formatted his motion as such to reflect that. He did not, and the trial court ruled on his number 2 contempt allegation. (CP 121-122).

Issue 5: The trial court did not err in finding Nachtmann not in contempt with sections 3.1 and 3.2 of the parenting plan, and #13 of the amended parenting plan relating to the additional 8 hour Saturday visitation per month. (CP 122).

In his written decision, Commissioner Schneider ruled the amended parenting plan did not address when notification was to be given. (CP 122). Hess gave notification that same day, when alternate arrangements for the child had already been made. (CP 122). There was no willful violation of the parenting plan or its subsequent amendments.

Issue 6: Hess claims that the trial court did not rule on his allegation of contempt for the missed 8 hour Saturday visit in 2011. (Appellant's brief, pages 3-4). This is not true.

Again, Hess lumped multiple incidents under one contempt allegation. Nachtmann was not found in contempt for violating the Saturday provision of the parenting plan as described above.

Issue 7: The trial court did not err in its written finding when it stated Hess did not attempt mediation. (CP 122).

Hess takes this out of context. In the court's written ruling, Commissioner Schneider states that there was "no mediation to rectify or clarify this [Saturday] issue, the court does not find a willful violation the parenting plan." (CP 122). The trial court did not assert that Hess did not attempt mediation, but rather that no mediation had occurred to address or clarify this ambiguity.

The parenting plan requires mediation through the dispute resolution center if disputes arise between the parties to clarify the terms of the Parenting Plan. (CP 79). There was no error.

Issue 8: The trial court did not err by finding Nachtmann not in contempt for violating an e-mail requirement of the parenting plan. (CP 122).

The court found there was no willful violation of the parenting plan, as e-mails had been exchanged with Hess's wife (CP 122). For the reasons detailed above, Nachtmann cannot be found in contempt without a

showing of willful violation. Hess had the burden to prove this, and he did not.

Issue 9: The trial court did not err by not finding Nachtmann in contempt for violating section 3.14 and 4.2 of the parenting plan, regarding joint educational decision-making and notice for relocation. (CP 121).

The trial court found that Nachtmann provided reasonable notice to Hess and that she met her obligation; she enrolled the child with Hess' consent. (CP 122). Again, finding her in contempt would require finding that Nachtmann had willfully violated the parenting plan, and the burden of proof would be on Hess to provide evidence supporting that.

Hess had other remedies he did not pursue, including filing an Objection to Relocation. See RCW 26.09.480. Hess provided no evidence that he informed Nachtmann he disagreed with her enrolling the child in the new school, and without this he cannot make a showing that Nachtmann acted in bad faith. Therefore, not finding Nachtmann in contempt was the correct decision.

Issue 10: The trial court did rule on the contempt allegation regarding the joint decision making requirement. (CP 121).

The trial court found Nachtmann was not in contempt as outlined above. This was included in his first contempt allegation, which he lumped together in his own motion (CP 6). Hess is seeking two findings of contempt on one issue. The Commissioner ruled on this issue and found Nachtmann was not in contempt as outlined above under Issue 9. (CP 121).

Issue 11: Attorney's Fees and Costs: Nachtmann should be awarded reasonable attorney's fees and costs on appeal.

“If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party must request the fees or costs.” RAP 18.1(a). The party must devote a section of the brief to the request for fees or expenses. *Id.* (b).

The decision to award fees under RCW 26.09.140 is discretionary and must be based upon a consideration that balances the needs of the spouse seeking fees against the ability of the other spouse to pay. *In re Marriage of Terry*, 79 Wn. App. 79 (1995).

This court should review *Marriage of Rideout*, the former wife was required to pay husband's attorney fees and costs associated with Supreme Court appeal of order finding the former wife to be in contempt of court; the former wife was found to have acted in bad faith due to her failure to

use reasonable efforts to assure that daughter visited husband. *In re Marriage of Rideout* (2003) 150 Wash.2d 337, 77 P.3d 1174, corrected.

When one spouse's intransigence causes the spouse seeking attorney fees relating to marital dissolution to require additional legal services, financial resources of spouse seeking fees are irrelevant *In re Marriage of Foley*, 84 Wn. App. 839 (1997).

Here, Nachtmann was not found in contempt, and the attorneys fees she has incurred are a direct result of Hess's intransigence. Hess should be required to pay her attorney's fees associated with the appeal. Mother will send Affidavit of Financial need prior to the deadline.

IV. CONCLUSION

The Appellant failed to meet his burden of proof in finding Nachtmann in contempt and for awarding Nachtmann attorneys fees and costs. The trial judge did not abuse his discretion in his findings of fact or conclusions of law. The trial court's ruling should be affirmed. Nachtmann should awarded attorney's fees for the necessity of responding to this appeal pursuant to RAP 18.1.

Dated this 12th day of October, 2012.

Defoe Pickett Law Office

By:

A handwritten signature in black ink, appearing to be "Steve Defoe", written over a horizontal line.

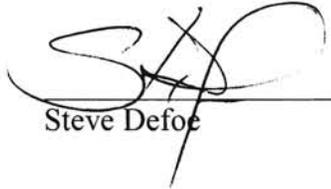
Steve Defoe, W.S.B.A#25837
Attorney for Kirsten Nachtmann, Respondent.

CERTIFICATE OF SERVICE

I do hereby certify that on the 12th day of October, 2012, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to the following:

Scott Hess
810 S. Hartford Street
Kennewick, WA 99336

Delivery Service
 U.S. Mail
 Fax



Steve Defoe