

FILED

NOV 18 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 316807 III

COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON

Kimberly L. Laubach

Respondent,

v.

Arthur H. Laubach,

Appellant.

REPLY BRIEF OF APPELLANT ARTHUR H. LAUBACH

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STATEMENT OF THE CASE

On August, 2013, the appellant, Arthur Laubach (“Appellant”), filed his Brief of Appellant. The Respondent, Kimberly Laubach (“Respondent”) responded on September 27, 2013. On November 12, 2013 Respondent filed an “Amended Brief of Respondent, to correct a material false statement in the “statement of the case” in the Respondent’s original Brief of Respondent. Appellant now replies.

INTRODUCTION

The Respondent’s brief does not contain any legal argument or cite case law that diminishes the Appellant’s argument but rather the Respondent gives a synopsis of a few cases cited in the Appellants brief without distinguishing them or elaborating how said case law is inapplicable to the facts of the present case. For the most part, the Respondent simply restates her unsupported position that she did not “refuse” to comply with the provisions of the parenting plan and she did not act bad faith.

Additionally, the Respondent made a material false statement in the “statement of the case” in the Brief of Respondent, accusing the Appellant of having a criminal conviction involving a serious crime, which was untrue. Subsequently, the Respondent amended her brief on November 12, 2013, to correct the false statement. This type of exaggeration or fabrication of facts has been the typical conduct of the Respondent of which the Appellant has had to combat throughout this entire case.

FACTUAL CLARIFICATIONS

The Respondent's account of events grows into more elaborate and serious versions with every turn. First, Respondent states she left Colorado because of the erratic behavior and Appellant's threats to kill himself. CP 27. However, the Appellant asserts that the Respondent left Colorado to vacation with her family in Washington, as she did routinely every year, and decided to terminate their relationship/arrangement and remain in Washington for financial reasons. CP 22. The Respondent even admits in her declaration dated December 5, 2012, that she decided not to return to Colorado because Appellant "had no job, no prospects and no means to support us, therefore it was 'mutually' decided that the children and I would remain in Washington where we could be supported." CP 11.

The Respondent's unilateral decision to move the children to Washington was against the Appellant's wishes, and when the Respondent returned to Colorado to pack up the children's belongings an argument ensued. CP 22. The Appellant was ultimately arrested for unlawfully touching the Respondent when he "pushed" the Respondent out of his way as she clawed at him when he tried to leave the house with their vehicle keys. CP. 22. The Respondent was not physically harmed in the incident, the Appellant did not strike or injure the Respondent in any way, and there were no threats to harm the Respondent with a knife or any other type of weapon. CP 22-23. Due to the fact that the Appellant did not have any criminal background and no prior criminal history, the Appellant was offered and accepted a plea deal (deferred judgment) to satisfactorily complete the probationary period and have the misdemeanor charges dismissed. CP 23.

ARGUMENT

If we set aside the fact that Respondent has repeatedly stated in her declarations that she did not involve Appellant in joint medical decisions because their pre-adolescent son did not want Appellant involved (which was addressed in Appellant's opening brief), and if we only focus on the Respondent's answer in her Brief, the Respondent still cannot escape the fact that she intentionally failed to follow the parenting plan simply because she believed she didn't have to.

The Respondent's main and only argument is that she did not "refuse" to follow the provisions of the parenting plan because, 1) she believed the Appellant only wanted notice of "elective surgeries," therefore she did not violate the parenting plan in bad faith, and 2) notice of medical appointments are not required under joint decision making. Yet, the Respondent has not produced any evidence to add plausibility or support her position.

1) When addressing the Respondent's first argument, it should be noted that the Respondent's account of the facts have once again morphed into a different version that is more compelling for her cause. In the Brief of Respondent, the Respondent supports her argument that she didn't participate in joint decision making because "the father *said* he wanted to be notified of elective procedures and that is why the joint decision making box was checked" (emphasis added). Brief of Respondent, Page 3. However, in prior declarations that were before the trial court, the Respondent never claimed the Appellant said such a thing, but rather the Respondent states that the Appellant "*lead me to believe* that he wanted notification of elective surgeries..." (emphasis added). CP 25. The leap from an incorrect understanding of what the Appellant wanted, to alleging there was an actual statement made by the Appellant expressing he only

wanted notice of elective surgeries, demonstrates how the Respondent's claims get more fabricated with every submission to the court. Furthermore, as already argued in the Appellant Brief, Appellant has never expressed to the Respondent that he did not want to participate in joint decision making, or he did not want to have notice of any medical concerns/issues or decisions - with the only exception being elective surgeries. And the Appellant has not provided the court with any evidence to support her excuse. Once again, this excuse proffered by the Responded is illogical and unreasonable, and an implausible excuse for refusing, or at the very least, intentionally failing to comply with the parenting plan.

2) When addressing the Respondent's second argument, the Respondent makes much of the title "well child check," instead of calling it what is - a medical appointment, and Respondent insists that "major decision making with regard to non-emergency health care does not require the mother to inform the father of well child checks." Brief of Respondent, Page 3. However, Respondent has failed to provide any legal authority to support her assertion that notice of medical appointments are not required under joint decision making. To the contrary, reviewing courts, such as Division 1 of the Washington Court of Appeals have specifically ruled that notice of medical appointments is required under any meaningful definition of joint decision making and advance notice to all participants must be required. Furthermore, Respondent fails to mention that the "well child check" (aka medical appointment) on March 28, 2012 was not routine, it was scheduled because the parties' son was demonstrating behavioral issues with signs of depression. CP 23. Moreover, the Respondent hardly mentions a major issue - the fact that their son was placed on Prozac, a psychotropic medication, as a result of said appointment, and the Appellant had no notice or opportunity to participate in that decision. Notwithstanding the aforementioned, and even if we ignore the issue of whether or not Respondent was required to

give Appellant notice of the medical appointment, a major decision was made as a result of that medical appointment when the Respondent decided to medicate their son with a psychotropic medication, Prozac. In response, the only argument Respondent has put forward for intentionally failing to involve Appellant in that decision, is that it was her understanding that the Appellant only wanted notice of elective surgeries.

A case that looks at a parent's intentional failure to follow the provisions of a parenting plan is *In re Marriage of Eklund*, 143 Wash.App. 207 (2008). In *Eklund*, the parties' parenting plan stipulated that if a parent needed to leave the child for more than 4 hours, the other parent shall have first option to care for the child and the child shall not be placed in daycare or with babysitters during the extended period if the other parent is available and agrees to provide the care. *Eklund* at 210. The mother filed for contempt because she claimed the father left their child with his mother (the grandmother) and wife (then girlfriend), on multiple occasions. *Id.* at 210. The father did not deny the allegations and admitted to leaving the child for more than 4 hours with his girlfriend – now wife, and his mother, however, the father claimed that there was no bad faith because he didn't believe or consider them to be "babysitters or day care providers." *Id.* at 210. The lower court found the father in contempt for intentionally violating the parenting plan and the reviewing court affirmed. *Id.* at 214. The reviewing court's careful analysis states:

In reviewing contempt violations concerning parenting plans, we strictly construe the parenting plan to see whether the alleged conduct constitutes "a plain violation" of the plan. *In re Marriage of Humphreys*, 79 Wash.App. 596, 599, 903 P.2d 1012 (1995). Michael admitted that he intentionally allowed the biological grandmother and his then girlfriend to care for N.E. on several occasions without giving Cheri the first option to care for him. Michael's actions clearly violated the parenting plan. *Humphreys*, 79 Wash.App. at 599, 903 P.2d 1012. And substantial evidence supports the trial court's finding that Michael intentionally violated the parenting plan. *Rideout*, 150 Wash.2d at 352, 77 P.3d 1174. *Eklund* at 213.

The reviewing court affirmed the lower court's contempt finding but remanded for entry and order awarding the mother fees and costs in accordance with RCW 26.09.160(1), 2(b)(i),(ii) and (iii). *Eklund* at 218.

This case is analogous to *Eklund* because the Respondent here has openly admitted to intentionally violating the parenting plan when she made a medical appointment and unilaterally placed their son on the psychotropic medication, Prozac. Similar to the unpersuasive excuses in *Eklund*, the Respondent here offers unreasonable excuses claiming it was not in bad faith or intentional misconduct because Respondent did not "believe" the father wanted to know about the medical appointments and treatment (just like the father in *Eklund* did not believe his girlfriend and mother were babysitters). The court here should follow the premise behind *Eklund* and enforce that simply stating "I did not think," or "I did not believe" without any reasonable supporting evidence, or even logic, is not absolutory when accused of violating a lawful order of the court.

Lastly, the Respondent attempts to obfuscate the legitimacy and facts of the contempt motion under review, by trying to merge two separate contempt motions into one contempt motion, and strains to justify this by stating, "the father had sought a contempt finding in proceedings in October 2012, which included the period covered by the March 28, 2012 visit, and his request was denied by the court." Brief of Respondent, Page 8. Then Respondent further states, "The trial court first noted that the father had brought the same issues to the court in October 2012 and the court had denied the father's request per an order which he did not seek appellate review." Brief of Respondent, Page 8. And lastly, Respondent makes much of the fact that the Appellant identified an actual date of treatment in his reconsideration versus a rough time frame in his contempt motion. Brief of Respondent, Page 8.

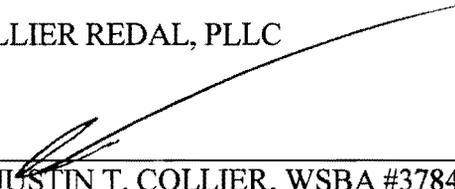
First, simply because Appellant sought a contempt finding in proceedings in October 2012 does not mean that any contemptuous act unknown to the Appellant before October 2012 was forfeited because the act was not known, and therefore the allegation not raised, in the October proceedings. Secondly, Appellant did not raise the same issues in his November 2012 motion for contempt as in the October 2012 proceedings, because in October the Appellant was not aware that his son was taking the medication Prozac, and therefore could not, and did not; raise the issue during the October 2012 proceedings. Lastly, the Appellant was able to clearly identify exact dates in his motion for reconsideration because as the litigation advanced, more documentation was produced into the record by the Respondent and medical providers and new information was revealed to the Appellant.

CONCLUSION

For all of the reasons stated herein and in the Appellants' Opening Brief, it is respectfully requested that this Court reverse the decision of the lower court and find that the trial court abused its discretion by failing to find the mother in contempt. The simple matter remains that the mother agreed to a parenting plan that required joint decision making and simply did not follow the terms of that parenting plan. She's given her reasoning behind her failure to follow the parenting plan is that she didn't think she had to inform father and that she didn't understand the terms of the parenting plan. Those are mere excuses now given to attempt to justify the undisputed fact that the Parenting Plan ordered that she engage in joint decision making and she failed to do so. The lower court's decision should be reversed.

DATED this 14th day of November, 2013.

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By: 

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