

FILED

AUG 14 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

Arthur H. Laubach,

Appellant

v.

Kimberly L. Laubach

Respondent.

BRIEF OF APPELLANT ARTHUR H. LAUBACH

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INTRODUCTION

Mr. Laubach "Appellant" and Mrs. Laubach "Respondent" married in 1999, and subsequently had two children, Benjamin, born in 2000 and Elizabeth "Grace," born in 2006. The marriage slowly deteriorated during their 10 year wedlock, but the parties consistently co-habited the same household to equally share financial and parental responsibilities up until the time Respondent relocated to Washington in January 2009. In early 2010, Respondent initiated dissolution proceedings and the divorce and a parenting plan became final in June 2010. In 2011, unhappy with the limited residential time with his children and restrictions placed upon him in the parenting plan, Appellant petitioned the court to modify the parenting plan. In April 2011 the parties participated in court ordered mediation and entered into a new agreed parenting plan.

In the summer of 2012, Appellant became concerned with their son's behaviors and contacted the Respondent to request their son receive a psychological evaluation. In response, the Respondent informed the Appellant that their son was already seeing a counselor and had been for some time. The Appellant was already disconcerted over other instances of parenting plan violations, so finding out the Respondent withheld this information from him was the proverbial "straw that broke the camel's back," that compelled the Appellant's first contempt motion initiated in September 2012. A flurry of declarations and exhibits ensued, and new information uncovered in the litigation process prompted a second contempt motion, in November 2012. The outcome of the Motion for Contempt filed in November of 2012 is what is in dispute in this appeal.

ASSIGNMENTS OF ERROR

- I.* Did the trial court abuse its discretion by denying Appellant's motion for contempt?

STATEMENT OF THE CASE

On or around June 2010, Mr. Laubach "Appellant" pro se, and Mrs. Laubach "Respondent" represented by her attorney, dissolved their marriage and entered into a permanent parenting plan. CP 2-3. Appellant later petitioned the court to modify the parenting plan, and in April 2011 both parties participated in mediation with the local Wenatchee Valley Dispute Resolution Center, and entered into a new permanent parenting plan. CP 37. On April 14, 2011 the court signed and entered into court record the agreed permanent parenting plan between Appellant and Respondent that required joint decision making for non-emergency healthcare decisions and education. CP 37.

In September 2012 Appellant filed a contempt motion and a hearing was held in October 2012, to address Appellant's complaints, namely; Appellant complained he was not informed their son was seeing a mental health counselor, Respondent didn't inform Appellant what medications their son was to take while in Appellant's care during summer visitation 2012, and Respondent did not keep Appellant updated regarding son's recent bicycle accident that resulted in dental injuries. CP 22-24. The trial court denied Appellant's motion. CP 16-20.

On November 29, 2012, Mr. Laubach moved the court to find Mrs. Laubach in contempt, for violating section 4.2- Major Decisions, and section 3.13- Affection. CP 1. Specifically, Appellant complained that on or around March 2012, Appellant's son was proscribed Prozac without Appellant's knowledge or consent. CP 2. Appellant also complained that Respondent was very negative and denigrated Appellant, and made disparaging remarks about Appellant to

their son via text messages. CP 3. Documents submitted during the litigation process revealed several pages of text message exchanges between Respondent and their son, with comments like, "I hate you being there," (in reference to their son's residential time with the Appellant), and referring to Appellant as a "butthole." CP 3.

At the combined contempt motion and adequate cause hearing on December 7, 2012, the trial court refused to address or hear any argument regarding the contempt concerning violations of section 4.2 - Major decisions, stating, "the issue of medical care was addressed at a prior hearing." CP 15. The court subsequently modified the existing parenting plan and removed the joint decision making provision, giving Respondent sole decision making with regards to medical care and education. CP 15.

However the court found Respondent in contempt for violating section 3.13 – Affection, for calling Appellant "a butthole" in a text message exchange between Respondent and their son, but reserved imposing the statutorily required attorney fees and costs. CP 16-20.

On January 7, 2013, Appellant filed a motion for reconsideration, requesting the court reconsider its dismissal of the alleged violations of section of 4.2 - Major Decisions – non emergency health care. CP 21. Appellant asserted that the issue raised in his November 29, 2012 motion was not previously addressed at the prior contempt hearing and were new allegations. CP 23. Specifically, Appellant complained that Respondent violated the joint decision making requirement of the parenting plan when on or around March 2012, Respondent took their son to a medical appointment where a major medical decision was made to put their son on the psychiatric medication, Prozac, without Appellant's participation or knowledge. CP 23-24. Appellant also requested the court reconsider its removal of the joint decision making

provision, during the December 7, 2012 hearing, as removing joint decision making only rewarded Respondent for refusing to comply with the parenting plan. CP 23.

On March 1, 2013 a hearing was held on the reconsideration motion and the court denied Appellant's motion for reconsideration in its entirety. CP 30, 32-34. The court found that although Respondent violated the parenting plan, Appellant failed to prove that Respondent acted in bad faith, and Respondent's declaration was persuasive regarding her understanding of what types of information Appellant wished to receive. CP 34. It is from that decision that Appellant now appeals.

PROCEDURAL HISTORY

On November 29, 2012, Appellant filed a Motion/Declaration for an Order to Show Cause re Contempt. CP 1-3. Ms. Laubach filed a Responsive Declaration on December 5, 2012. CP 4-14. On December 7, 2012, the Court found Ms. Laubach in contempt for the use of the word "butthole" as it related to the Affection paragraph in the parenting plan and did not address the medical care issue in the Motion for Contempt. CP 15. On December 28, 2012, the Court signed the Order on Show Cause re Contempt. CP 16-20.

On January 7, 2013, Mr. Laubach filed a Motion for Reconsideration. CP 21. Accompanying his Motion for Reconsideration was a Declaration of Arthur Laubach in Support of Motion for Reconsideration. CP 22-24. Ms. Laubach filed a Responsive Declaration to the Motion for Reconsideration on January 18, 2013. CP 25-27. Mr. Laubach filed a Reply Memorandum re Reconsideration on January 22, 2013. CP 28-29. The Court heard oral argument of counsel on March 1, 2013. CP 30. The Court ordered Mother shall have continued sole decision making for non-emergency health care based on the geographic distances between the parties and the father's past domestic violence incident against mother. CP 30. The Court denied

the required to change the ruling regarding to decision making as it relates to health care and took the issue of contempt under advisement. CP 30.

The Court issued a letter ruling on March 5, 2013. CP 31. In the letter ruling the Court denied the motion for reconsideration by finding Mr. Laubach failed to prove that Ms. Laubach acted in bad faith for failing to notify him of the March 28, 2012 well-child appointment. CP 31. Further, the Court found Ms. Laubach's declaration persuasive as to what she understood were her requirements as it related to informing Mr. Laubach of issues as they related to health care and thus while she did fail to provide Mr. Laubach with information or consult with him in regards to health care decision the actions were not taken in bad faith. CP 31. An order on Respondent's Motion for Reconsideration was entered on May 2, 2013. CP 32-34.

SUMMARY OF ARGUMENT

This Court should review the present case for abuse of discretion, finding that the lower court abused its discretion when it denied Appellant's contempt motion, erroneously finding Appellant failed to prove bad faith or intentional misconduct, and basing those findings on untenable grounds.

ARGUMENT

I. STANDARD OF REVIEW

A trial court's decision in a contempt proceeding is reviewed for an abuse of discretion. *In re Marriage of James*, 79 Wn. App. 436, 440, 903 P.2d 470 (1995). A trial court abuses its discretion by exercising it on untenable grounds or for untenable reasons. *James*, 79 Wn. App. at 440. A trial court's factual findings are reviewed for substantial evidence. *In re Marriage of Myers*, 123 Wn. App. 889, 893, 99 P.3d 398 (2004). A trial court's findings of fact are reviewed

to determine whether they are supported by substantial evidence and, if so, whether they support its conclusions of law. *In re Marriage of Rideout*, 150 Wn.2d 337, 77 P.3d 1174 (2003).

Substantial evidence is that which is sufficient to persuade a fair-minded person of the declared premise. *In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984). A court acts on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *In re Marriage of Horner*, 151 Wn.2d 884, 93 P.3d 124 (2004).

- A. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S CONTEMPT MOTION BECAUSE A PARENT'S REFUSAL TO PERFORM THEIR DUTIES IN A PARENTING PLAN IS PER SE BAD FAITH.

Appellant challenges the trial court's findings with respect to failing to prove Respondent acted in bad faith because a parent who refuses to perform the duties imposed by a parenting plan is per se acting in bad faith. RCW 26.09.160(1). A parent seeking a contempt order must demonstrate the contemnor's bad faith or intentional misconduct by a preponderance of the evidence. *In re Marriage of James*, 79 Wn.App. 436, 439-40, 903 p.2d 470 (1995). A parent who refuses to perform the duties imposed by a parenting plan is per se acting in bad faith. RCW 26.09.160(1). Parents are deemed to have the ability to comply with orders establishing parenting plan provisions and if the moving parent establishes a prima facie case, the burden is on a noncomplying parent to establish by a preponderance of the evidence that he or she lacked the ability to comply with provisions of a court-ordered parenting plan or had a reasonable excuse for noncompliance. RCW 26.09.160(4); *In re Marriage of Rideout*, 150 Wn.2d 337, 352-53, 77 P.3d 1174 (2003).

1. Respondent's actions constitute a plain violation of the parenting plan.

In reviewing contempt findings concerning parenting plans, the Appellate Court strictly construes the parenting plan to see whether the alleged conduct constitutes "a plain violation" of the plan. *In re Marriage of Humphreys*, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995). The parenting plan that was in effect during the months of May 2011 through December 2012 required joint decision making for all major medical decisions, including "non-emergency health care." CP 45, 47. It is undisputed that the Respondent made a medical appointment for their child on or around March 2012. CP 25. And it is undisputed at that appointment Appellant's son was prescribed the psychiatric medication Prozac. CP 23. It is also undisputed, and Respondent admits, that she did not notify Appellant of the appointment in March 2012, thereby excluding Appellant from the decision making process to put their son on Prozac. CP 25.

2. Respondent's excuses prove bad faith per se and intentional misconduct

"A parent who refuses to perform the duties imposed by a parenting plan is per se acting in bad faith. RCW 26.09.160(1).

Respondent proffers two different excuses in two different declarations that fleetingly address the contempt charges, and somewhat contradict each other. First, the Respondent states that she did not inform Appellant of the medical appointment and decisions because she "did not believe she had to," followed with that she believed the Appellant only wanted to know about "elective surgeries," or in other words, inconsequential medical care. CP 25. Ms. Laubach also states that her refusal to inform Appellant and comply with the joint decision making provision was because their son "did not wish for his therapy or use of anti-depressants to be discussed with his father." CP 13. Respondent reiterates in her later declaration that she did not inform

Appellant of their son's Prozac prescription or involve the Appellant in the decision making process because of their son's "real concern about his father knowing about his mental health therapy as well as his father being informed that he had started on antidepressants." CP 26.

Appellant asserts that Respondent's own admissions show a refusal to perform the duties imposed by the parenting plan and Respondent was per se acting in bad faith. RCW 26.09.160(1). *In re Marriage of Rideout*, 150 Wn.2d 337 (a parent who refuses to comply with duties imposed by a parenting plan is considered to have acted in "bad faith").

In *Rideout*, the Washington State Supreme Court held that a parent's failure to deliver a child to the other parent according to the requirements of a court ordered residential schedule on the excuse that the child is resisting the schedule *or in acquiescence to the child's wishes* constitutes bad faith by the parent, within the meaning of RCW 26.09.160, if the parent has either contributed to the child's recalcitrant attitude or has failed to make reasonable efforts to require the child to comply when, considering the child's age and maturity, it is within the parent's power to do so (*emphasis added*). *Id.* at 356-57.

In *Rideout*, the mother refused to comply with the residential provisions of the parenting plan, claiming that the child refused to spend time with the father. However the Court found that where evidence establishes that a parent contributed to the child's attitude such parent may be deemed to have acted in "bad faith" for purposes of RCW 26.09.160(1). *Id.* at 356-57

Rideout is analogous to this case because Ms. Laubach refused to comply with the joint decision making provision of the parenting plan, claiming their son did not wish his father to know about his medical care. In other words, the Respondent claims that her son refused/objected to involving Mr. Laubach in his medical care and the mother *acquiesced to his wishes*. However, *Rideout*, additionally requires that a parent's bad faith be found if the "parent

is the source of the child's attitude or fails to overcome the child's recalcitrance when, considering the child's age and maturity, it is within that parent's power to do so." *Id.* at 356. See also *In re Marriage of Farr*, 87 Wn. App. 177, 940 P.2d 679 (1997) (affirming finding of contempt where child's choices were manipulated by parent openly degrading other parent).

Mr. Laubach maintains that the record shows that Ms. Laubach's negative attitude towards his parental involvement, her secrecy and resistance around disclosing their son's medical issues, needs and records, previous findings of contempt for referring to Appellant as "a butthole," and her comments to their son, such as "I hate you being there," in reference to son's visitation with Appellant, all support a finding of bad faith because Respondent contributed to their son's recalcitrant attitude. Mr. Laubach also believes that if Ms. Laubach is not directly responsible for their son's alleged recalcitrant attitude, the Respondent failed to overcome their son's recalcitrance, when it was in her power to do so since their son was under Respondent's sole and direct care since the age of nine years old.

Moreover, distinguishable to *Rideout*, the Respondent in this case did not have to force compliance with their child, but rather the compliance required here – notification and joint decision making - were solely the Respondent's duty and it was easily within the Respondent's power to comply, regardless of their son's "alleged" concerns.

3. *A specific finding of bad faith does not have to be found if there is a finding of intentional misconduct*

In order for a court to enter a finding of contempt pursuant to RCW 26.09.160, the trial court must first make a specific finding that the parent has acted in bad faith or committed intentional misconduct. *James*, 79 Wn. App. at 436.

If the lower court determined Appellant failed to prove Respondent's bad faith, the lower court should have found that Respondent intentionally failed to comply with the parenting plan,

which would warrant a finding of contempt. *In re Marriage of Davisson*, 131 Wn. App. 220, 126 P.3d 76, (2006); See also *James* at 436.

The Court in *Davisson*, held that where a trial court did not make a specific finding of bad faith, a finding of a parent's "intentional failure to comply with a lawful order of the court" is a finding sufficient for contempt under RCW 26.09.160(2)(b) and *James* at 224.

The Respondent's refusal to involve Appellant in the decision to start their son on Prozac, because of their minor son's alleged concerns, demonstrates an intentional failure to comply with the parenting plan, which therefore supports a finding of contempt. *James* at 440.

4. Respondent not only violated the joint decision making provision when she unilaterally placed their son on Prozac, but Respondent also violated the provision by failing to notify Appellant of the March 2012 medical appointment.

Respondent's actions in March 2012 violated the parenting plan twofold. Firstly, with her refusal to notify and involve Appellant in the decision to put their son on Prozac – a major medical decision as have been previously argued in this brief. Secondly, when Respondent made medical appointments without notifying the Appellant, specifically the March 2012 medical appointment.

Joint decision making includes notice of medical appointments, including "non-emergency health care," because without notice of medical appointments joint decision making simply cannot occur. Decision making occurs when an appointment is made and when treatment is proposed and/or accepted or rejected. The parent who finds out about the appointment "after the fact" is deprived of a voice in the decision making process.

In this case Ms. Laubach failed to notify Mr. Laubach of the medical appointment in March 2012, specifically, and various other medical appointments thus violating the joint decision making provision of the parenting plan. Ms. Laubach also offers unreasonable excuses

in her various declarations such as she “did not believe she had to” inform Appellant of the medical appointment, or that it was her “understanding” that Appellant only wanted notification of inconsequential medical appointments. CP 4-14; 25-27. This Court should also find that Respondent’s actions were a plain violation of the parenting plan and find that her excuse is unreasonable, unpersuasive and contrary to any meaningful definition of joint decision making.

5. ***Respondent failed to meet her burden to establish a reasonable excuse, by a preponderance of the evidence, for failing to comply with the parenting plan as required by RCW 26.09.160(4).***

“If the moving parent establishes a prima facie case in a contempt motion, the burden shifts to the contemnor to establish a reasonable excuse, by a preponderance of the evidence, for failing to comply with the parenting plan.” RCW 26.09.160(4).

The Respondent submitted two declarations in response to Appellant’s contempt complaint that barely address or offer an excuse for violating the parenting plan. The bulk of content within Ms. Laubach’s declarations do not address the violations or establish a reasonable excuse by a preponderance of the evidence for failing to comply with the provisions; but rather, they contain unsupported claims and lengthy character assassinations against the Appellant. CP 4-14; 25-27.

The excuses offered by the Respondent for her failure to comply with the parenting plan, are difficult to root out within her two separate declarations, totaling 14 pages. Respondent’s first declaration in response allotted one sentence to address the complaint, that said “Ben did not wish for his therapy or use of anti-depressants to be discussed with his father.” CP 13. Ms. Laubach’s second declaration allotted four sentences that said, “I did not inform Art [Appellant] of this doctor’s appointment because I honestly did not believe I had to. During mediation Art lead me to believe he wanted notification of elective surgeries and that was why we were

checking the joint decision making box. CP 25. As I have stated before, Ben showed real concern about his father knowing about his mental health therapy as well as his father being informed that he had started on antidepressants.” CP 25-26.

The Respondent’s excuses are unreasonable and are not supported by *any* evidence in the record. Respondent’s excuses in her declaration are exactly that, mere excuses, for what has become a pattern of Respondent’s intentional exclusion of the Appellant in matters concerning their children. i.e., Respondent’s failure to inform Appellant of the counseling their son was undergoing, the medications the child was taking, self-injurious behavior of the child, and other issues not addressed in this appeal. CP 22. The Respondent did not provide the court any evidence (or even a rational explanation) that established how withholding information from the Appellant, and refusing to comply with the joint decision making provision, was reasonable.

To the contrary, the Respondent’s excuses are unreasonable, since it is illogical for a parent to say they only want to participate or receive information on “elective” or inconsequential medical issues, but they do not want to be involved or receive information regarding regular or major medical issues. The Appellant asserts such a claim is nonsensical and unsupported by any evidence in the record. Furthermore, the Respondent has also accused the Appellant of being “a strong critic of mental health counseling and therapy,” suggesting this as a reason for refusing to inform and involve Appellant in decisions regarding their son’s medical issues. CP 13.

However, these claims are unfounded and contradicted by the record, since it was the Appellant that requested their son receive a physiological evaluation after their son’s summer visitation in 2012, and it was the Appellant’s sincere concern of his son that prompted their son receive clinical intervention and undergo therapy with a licensed child psychologist or child

psychiatrist. CP 3. If the trial court had properly considered the evidence in the record, it should have found Respondent's claims and excuses unreasonable – because Appellant was clearly advocating mental health therapy and intervention, and Respondent never provided any evidence into the record to prove anything to the contrary.

Respondent's unsupported oppositional beliefs seem to be the only excuse offered as a cause for failing to comply with the clear and unambiguous provision of parenting plan, and this Court should find that the Respondent did not meet her burden of providing a reasonable excuse by a preponderance of the evidence as required by statute. RCW 26.09.160(4).

CONCLUSION.

The Respondent's actions were a plain violation of the parenting plan. Bad faith and intentional misconduct have been proven, and the lower court abused its discretion by denying Appellant's contempt motion.

The lower court's finding in favor of the Respondent was not supported by any evidence in the record, and therefore made on untenable grounds. Respondent offered *no* evidence, let alone a preponderance of evidence, to establish and support any of her excuses for failing to comply with the joint decision making provision, and therefore Respondent did not meet her burden under RCW 26.09.160(4).

Conversely, the evidence before the trial court supported Appellant's contempt motion and the trial court abused its discretion by exercising its discretion on untenable grounds. The lower court erred when it found in favor of the Respondent without having substantial evidence in the record to support such findings, and its ruling was manifestly unreasonable. Therefore, this Court should find that the lower court abused its discretion by basing its decision on untenable

grounds and reverse the lower court's ruling. *In re Marriage of Katare*, 125 Wn. App. 813, 105 P.3d 44, (2004) (reversing trial court's ruling made on untenable grounds).

Appellant respectfully request costs and attorney fees for this appeal and for the related attorney's fees and costs that were incurred attempting to enforce the trial court's order under RCW 26.09.160(2)(b)(ii).

DATED this 11 day of August, 2013.

COLLIER REDAL, PLLC

By: 

JUSTIN T. COLLIER, WSBA #37849
Attorney for Appellant Arthur Laubach

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5 **IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
6 **DIVISION III**

7 **In re the Marriage of:**

COA No. 316807

8 Kimberly Laubach

DECLARATION OF DELIVERY

9 **Petitioner**

10 **and**

11 Arthur Laubach III

Respondent

12 The undersigned declares that on August 11, 2013, I sent via facsimile to the business of:

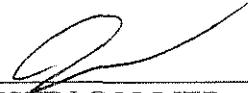
13
14 **Kathleen Schmidt**
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19 true and correct copies of the following documents in the above-entitled matter:

- 20
21
22
23
24
25
1. Brief of Appellant Arthur H. Laubach
 2. Declaration of Delivery

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct.

Signed at Wenatchee, Washington on the 11 day of August, 2013.



JUSTIN COLLIER