

**FILED**

SEP 30 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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

<b>In re the Marriage of:</b>  Kimberly Laubach  <b>Respondent/Petitioner,</b> <b>and</b>  Arthur H. Laubach  <b>Appellant/Respondent.</b>	<b>No. 316807 III</b>  <b>Brief Of Respondent</b> <b>Kimberly Laubach</b>
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### **APPELLANT'S ASSIGNMENT OF ERROR**

The respondent Kimberly Laubach disputes appellant's assignment of error that the trial court abused its discretion by finding Ms. Laubach was not in contempt regarding the major decision making provisions of the amended final parenting plan relating to a medical visit that occurred on March 28, 2012. The decision of the trial court should be affirmed.

### **STATEMENT OF THE CASE**

On November 29, 2012, Arthur Laubach III filed a motion/declaration for an order to show cause re contempt alleging Kimberly Laubach had violated Section 4.2 Major Decisions-Non-emergency health care of the April 11, 2011 final amended parenting plan relating to medical appointments in April/May 2012 and the resulting treatment by prescription medication. CP 1-2 Mr. Laubach asserts that the trial court abused its discretion when Judge Lesley A Allan did not find Ms. Laubach in contempt after a hearing on declarations held December 7, 2012 (CP 15) which was affirmed by Judge Allan after Mr. Laubach filed a motion for reconsideration on January

7, 2013 (CP 21) which was argued on March 1, 2013 (CP 30) and decided by letter opinion filed on March 4, 2013. CP 31. In the motion for reconsideration the date of medical care was noted as an appointment on March 28, 2012. CP 21, lines 16-19. An Order on Respondent's Motion for Reconsideration was filed on May 2, 2013 which is the order from which this appeal is taken. CP 32-34. Judge Allan noted that she was not going to review the allegations as to non-emergency health care matters as they had been addressed in October 2012. CP 15. After the motion for reconsideration was filed Judge Allan reviewed the materials filed in September 2012 and the decision made in October 2012. CP 32 lines 16-18. The trial court found that Mr. Laubach had failed to prove that Ms. Laubach acted in bad faith by failing to notify him of the March 28, 2013 well child check. CP 34-letter decision. The trial court further made findings that Ms. Laubach's declaration as to what type of information Mr. Laubach sought regarding major medical decisions was persuasive. CP 34-letter decision.

The marriage of the parties was dissolved June 23, 2010

after a brief trial before Judge Lesley A. Allan. CP 11 lines 19-20. The wife and children left Colorado and moved to Washington due to the erratic behavior of Arthur Laubach including threats to kill himself. CP 11 lines 9-15. When Ms. Laubach returned to Colorado to pick up personal possessions Mr. Laubach was arrested and convicted for pulling a knife on Ms. Laubach. CP 11 lines 2-3. The June 2010 parenting plan granted the mother sole decision making based on the existence of a no contact order as the result of the domestic violence. CP 6 lines 22-23. The father was granted limited contact with the children.

In April 2011 an amended parenting plan that had been negotiated through the Wenatchee Valley Dispute Resolution Center was filed with the court. CP 37-48. Neither parent was represented by counsel. During the mediation process the mother reports that father said he wanted to be notified of elective procedures and that is why the joint-decision making box was checked. CP 25 line 24-CP 26 line 1. The mother's responsive declaration filed on January 18, 2013 with regard to the March 28, 2012 appointment with Dr. Baumeister, the child's

primary physician, stated that the appointment was for a well-child check. CP 25 lines 17-19. The child was screened for depression and medication was prescribed. CP 25, lines 18-21. 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. CP 25, lines 21-22.

It is clear that the parties are unable to communicate effectively and they are not able to make joint decisions. CP 26 lines 3-8. At the December 7, 2012 hearing Judge Allan granted the mother sole-decision making in the temporary parenting plan. CP 15. The father sought reconsideration of the sole-decision making grant to the mother (CP 21 line 20) which was denied. CP 30.

### **ARGUMENT**

#### **I. Standard of Review.**

Ms. Laubach agrees with the stated standard of review- abuse of discretion- and asserts that the trial court did not abuse its discretion when it failed to find Ms. Laubach had acted in bad

faith or that she had intentionally refused to comply with the parenting plan. *In re Marriage of James*, 79 Wash. App. 436, 440, 908 P.2d 470 (1995).

**II. Per Se Bad Faith to Refuse to Perform-Mother Disagrees**

Mr. Laubach asserts that if Ms. Laubach acknowledges that she did not tell him about the March 28, 2012 well child visit and the subsequent recommendation for treatment that the trial court should have found that she acted in bad faith per se when she “refused” to perform the duties imposed by a parenting plan. Ms. Laubach does not agree that the statute or case law cited by the father supports his assertion. She did not “refuse.”

“RCW 26.09.160 requires the court to first make a specific finding that the parent has acted in bad faith or that prior imposition of a lesser sanction did not compel the parent to comply.” *In re Marriage of James*, 79 Wash. App. 436, 908 P.2d 470,471 (1995). RCW 26.09.160(2) requires a specific finding of bad faith or intentional misconduct. *James* at 473.

Several appellate decisions have reviewed lower court

rulings that were related to one parent's assertion that they should not be found in contempt for their failure to make a child available for residential time with the other parent because the child did not want to spend time with the other parent. In the 1995 case of *In re Marriage of James* cross motions for contempt were filed by mother and father. Mr. James claimed that the mother failed to comply with the residential provisions of the parenting plan and Ms. Barger cross-claimed that the father had failed to exercise his residential time per the terms of the parenting plan. The trial court's contempt ruling against both parents was reversed on appeal based on the failure of the trial court to make a specific finding of bad faith, intentional misconduct or prior unavailing lesser sanctions. *James at 473.*

In 1997 *In re Marriage of Farr*, 87 Wash. App. 177, 940 P.2d 679 (1997) Mr. Farr claimed that the parties' son had made up his own mind to not spend time with his mother per the terms of the residential schedule. The trial court found that the father "deliberately derailed the parenting plan by exposing the children to parental conflict" and the appellate court upheld the lower

court contempt finding. *Farr* at 682. *Farr* is not a “per se” violation but rather requires the court to find that the parent did not comply with the residential schedule without an acceptable excuse—the child’s refusal alone was not an acceptable excuse.

*In re Marriage of Rideout*, 150 Wn.2d 337, 77 P.3d 1174 (2003) the Supreme Court held that the mother as primary residential parent could be found in contempt for her failure to deliver the child to the father as she had not made reasonable efforts to make the child available for residential time with the father when the mother claimed the child refused to go.

Parents are deemed to have the ability to comply with orders establishing residential provisions and the burden is on the noncomplying 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. See RCW 26.09.160(4). *Rideout* at 1181.

The *Rideout* holding includes the following:

In sum, we hold that where a child resists court-ordered residential time and where the evidence establishes that a parent either contributes to the child’s attitude or fails to make reasonable efforts to require the child to comply with the parenting and a court-ordered residential time, such parent may be deemed to have acted in “bad faith” for purposes of RCW 26.09.160(1). *Rideout* at 1183.

Mr. Laubach incorrectly asserts that the trial court was required to make a finding of “bad faith” if the trial court determined that the mother did not notify the father of the well child check on March 28, 2012. 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 from which he did not seek appellate review. The father’s motion and declaration asserts that in April/May 2012 the mother sought medical care for the child in violation of the major decision making provision of the amended parenting plan and in his subsequent motion for reconsideration he identifies the actual date of service for which he sought a contempt finding to be the well child check on March 28, 2012.

The trial court did not find that the mother acted in bad faith. The trial court did not find that the mother had “intentionally” refused to follow a provision of the non-residential aspects of the parenting plan-joint decision making about major health care. The trial court did find that the mother’s statements regarding the type of health care that father wanted to receive

notice of such as elective surgeries etc. was persuasive and therefore did not find she had acted in “bad faith.” The court did not abuse its discretion with regard to any of the stated findings.

### **III. Plain Violation of Parenting Plan-Mother Disagrees**

Mr. Laubach incorrectly relies on the holding in *In re Marriage of Humphreys*, 79 Wash. App. 596, 903 P.2d 1011 (1995) to support his claim that the trial court should have determined the mother was in contempt for a “plain violation” of the parenting plan. The *Humphreys*’ case also makes it clear that “there must be evidence the parent’s failure to comply with an order was in bad faith. RCW 26.09.160(2)” *Id.* at 1013. The *Humphreys* religious beliefs were at odds and the mother had sought an order that prevented the father from taking the parties’ child to church. Such a provision was added to the parties’ parenting plan but was then removed before the complained of act of the father. The context in which the appellate court “strictly construed” the non-residential provision of the parenting plan was in support of the trial court’s decision to not make a finding

of contempt when the father took the child to church.

Major decision making with regard to non-emergency health care does not require the mother to inform the father of well child checks. As noted by the mother in her responsive declarations she had been granted sole decision-making about all aspects of non-emergency health care and agreed to joint decision-making based on the representation of the father that he wanted to know about elective surgeries.

#### **IV. Mother's Excuses Per se Bad Faith or Intentional Misconduct-Mother Disagrees**

The mother's explanation for her conduct starts from the position that she made an appointment for a well-child check which is not a major decision but falls in to the category of day to day decisions she is authorized to make for the children. She also states that she understood that Mr. Laubach wanted to be notified of "major" matters which he stated would be elective surgeries. The mother did not "refuse" to perform as she had a good faith belief that she was acting within the bounds of what Mr. Laubach agreed to during the mediation of the amended

parenting plan.

RCW 26.09.160(1) is misquoted by the appellant. The statute is clear that if a party “refuses” to perform duties imposed by the parenting plan they are deemed to be acting in bad faith. The statute and case law makes it clear that the court will be required to examine a “refusal” to determine if there is an acceptable excuse. Many cases that reach the appellate level are focused on one parent’s refusal to make the child available to the other parent, e.g. *James, Farr and Rideout*.

The trial court exercised its discretion and did not abuse its discretion when it made the findings in this case. The court did not address the mother’s explanation that she did not want the father to know about the child’s on going mental health issues or make any findings related to that assertion. The ongoing therapy with Ms. Van Lith was not the issue before the court.

**V. Bad faith finding not necessary if intentional misconduct has occurred-Mother Disagrees.**

Mr. Laubach asserts that the court erred when it did not

characterize the mother's actions as "intentional" misconduct. The trial court reviewed the record from the October 2012 contempt hearing and the contempt motion at issue in this appeal and after consideration of all the information before the court did not find that the mother had engaged in "intentional misconduct."

**VI. Failure to notify of well child check and commencement of treatment recommended at said appointment violates joint decision-making-Mother disagrees.**

Mr. Laubach continues to repeat the same arguments in this section of his brief as set forth in earlier sections. The court did not agree with Mr. Laubach's assertions and did not abuse the trial court's discretion.

**VII. Failure to meet her burden to establish a reasonable excuse-Mother disagrees.**

The trial court did not abuse its discretion when it determined that the mother had not violated the provisions of the amended final parenting plan. The trial court at the same hearing

when dealing with the mother's petition for modification of the amended parenting plan including joint decision-making changed the provision to eliminate the requirement. CP 15.

**VIII. Attorney Fees per RCW 26.09.160(2)(b)(ii)-  
Mother Disagrees**

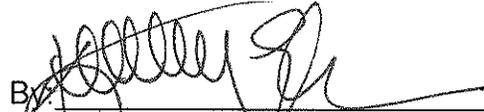
The court's decision to not find the mother in contempt of court related to major decision making non-emergency health care did not require the court to impose sanctions including attorney fees. The trial court's decision should be affirmed and the father's request for attorney fees should be denied.

**CONCLUSION**

The trial court did not abuse its discretion when it did not find that the mother was in contempt for failing to notify the father of a well-child check on March 28, 2012 and subsequent treatment which was not identified by the father until the filing of his motion for reconsideration. The lower court's decision should be affirmed.

Dated: September 27, 2013.

LAW OFFICE OF KATHLEEN E SCHMIDT

A handwritten signature in black ink, appearing to read 'Kathleen E. Schmidt', is written over a horizontal line.

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