

FILED

OCT 02 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 33430-9-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

In Re the Marriage of:

Jeffery K. Newgard, Appellee/Petitioner

and

Pennelopy A. Newgard, Appellant/Respondent

APPELLANT'S APPEAL BRIEF

**David Hazel, WSBA #7833
Attorney for Appellant**

**HAZEL & HAZEL
1420 Summitview Avenue
Yakima, WA 98902
(509) 453-9181/Fax: (509) 457-3765
e-mail: daveh@davidhazel.com**

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I. Introduction

A mother enrolled her teenage daughter in psychotherapy and afterward wrote the father asking him to pay his percentage of the bill not covered by insurance, invoking the terms of their divorce decree. When he refused by letter objecting to psychotherapy, she filed a motion to compel payment. The father did not contest the necessity or reasonableness of the bill, only that the mother failed to comply with the parenting plan's directive that non-emergency medical care be jointly decided and that he had not spoken with the treating psychotherapist. The court commissioner required the father only to pay his share up to the date he gave notice of his objection but excused the father from his obligation for psychotherapy expenses after he objected, reasoning that she violated the parenting plan's joint decision making provisions. Her motion for revision was denied (except to correct a plain wording error) and this appeal follows.

II. Assignment of Error

1. The trial court erred in entering the order of April 30, 2015 excusing the father from paying his percentage of psychotherapy bills incurred after February 4, 2014 “because mother violated the parenting plan’s joint decision making provisions”.

Issues Pertaining to Assignment of Error

If a parent violates a provision of the parenting plan, may that properly be a basis to relieve the other parent of a duty under the order of child support?

III. Statement of the Case

The parties child support order of June 2, 2010 required the father to pay 69.3 % of his portion of non-covered medical expenses. (CP1-8). The mother obtained psychotherapy for their teenage daughter and wrote the father on December 13, 2013 asking him to pay his percentage of those and other medial expenses. The father responded with a letter dated February 4, 2014 in which he objected to paying for psychotherapy, citing

the joint decision making provisions of their parenting plan. He wrote “I have at no time ever given consent for psychotherapy.” (CP 63-66). On January 20, 2015, the mother filed a motion to compel payment of his percentage (CP 67) and the father submitted his February 4, 2014 letter in defense of the motion. After a hearing, the court commissioner ordered that because the mother violated the joint decision making provisions of the parenting plan, the father was relieved of his obligation to pay for psychotherapy expenses effective from the date of his notice of his objection to them. (RP 107-114, ,page 5, line 22-24) (CP 66). On April 30, 2015, The Superior Court denied the mother’s motion for revision and entered this order, attached to the appendix: “*Petitioner* (father) is not required to pay his percentage of only psychotherapy bills incurred after February 4, 2014 *because mother violated the parenting plan’s joint decision making provisions.*” (Parenthesis added). (CP 76).

IV. Summary of Argument

A parent’s obligation under a child support order is unaffected by the other

parent's violation of a provision of the parenting plan. The mother is entitled to attorney fees on appeal.

V. Argument

The father never filed a motion for contempt alleging the mother violated the joint decision making provisions of the decree. Instead, he claimed, and the trial court agreed, he needn't pay for medical care for which he did give advance approval. It is not necessary to examine whether that reasoning is a correct interpretation of the meaning of "joint decision making". RCW 26.09.184 (7) states:

PARENTS' OBLIGATION UNAFFECTED. If a parent fails to comply with a provision of a parenting plan or a child support order, the other parent's obligations under the parenting plan or the child support order are not affected. Failure to comply with a provision in a parenting plan or child support order may result in a finding of contempt of court, under RCW 26.09.160.

The language of the statute is clear and unambiguous. This has long been

the law. In *Malfait v. Malfait*, 54 Wn. 2d 413, 354 P.2d 154 (1959), the Supreme Court held that issues of custody and support are not to be used to punish or reward one parent. Other cases hold the same. *Starkey v. Starkey*, 40 Wn.2d 307, 242 P.2d 1048 (1952); *Wheeler v. Wheeler*, 37 Wn. 2d 159, 223 P.2d 400 (1950). See also, Weber, *Washington Practice*, Vol. 20, Section 33.30.

As Weber points out, the violation of a parenting plan does not reduce the need of the children to be supported. Here, the father made no claim that psychotherapy expenses were unnecessary for this child. His letter, which is attached in the appendix, complains only of her violation of the parenting plan. Though he also said he wasn't give the opportunity to speak with the treating psychotherapist, the child is fifteen years-old and lawfully entitled to withhold disclosure of information to either parent. See RCW 71.34.530. Further, that statute allows a child over the age of thirteen to request and obtain treatment even over the objection of both parents, who still have joint and several liability to the provider under RCW 26.16.205, Washington's family expense statute.

A fit parent is always presumed to act in the child's best interest. *In re Custody of B.M.H.*, 179 Wn.2d 224, 315 P.3d 470 (2013). The mother is thus presumed to have acted wisely and appropriately in seeking mental health services for their daughter. No inquiry was ever conducted by the trial court, or a challenge made by the father, of the propriety of the services or the reasonableness of the cost. The trial court's order, plainly contrary to law, threatens the child's well being due to the disparity of her parents' incomes. The father's net monthly pay is \$13,587 while the mother's is \$4,611. (CP 91-98).

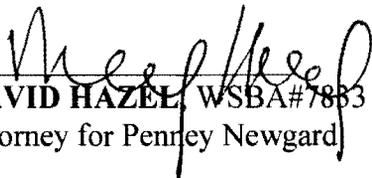
VI. Request for Attorney Fees

RCW 26.09.140 authorizes the court to award attorney fees and costs to a party based on need and ability to pay. Pursuant to RAP 18.1, the mother respectfully asks this court to award her fees and costs. The father nets \$13,587 per month while the mother nets \$4,611 per month (CP 91-98). An affidavit of financial need will be timely filed.

VII. Conclusion

The April 30, 2015 order of the trial court should be reversed and the mother awarded her costs and attorney fees on appeal.

Respectfully submitted this 1st day of October, 2015.



DAVID HAZEL, WSBA#7883
Attorney for Penney Newgard

APPENDIX

1. Order on Revision - April 30, 2015
2. Jeff Newgard's Letter to Penny Newgard - February 4, 2014

APPENDIX 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

Jeffrey Newgard

NO. 10-3-00028-6

^{vs.}
Pennclippy Newgen

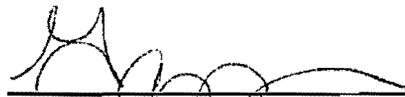
ORDER ON Revision

THIS MATTER HAVING COME ON for hearing before the undersigned judge/commissioner of the above-entitled court, it is hereby ORDERED THAT:

The mother's motion for revision is
granted only to correct the written
order to conform to the court's clear
intention as expressed in the commissioner's
oral ruling, as follows: Positioner is not required
to pay his percentage of ^{only} psychotherapy bills incurred
after February 4, 2014. ~~He must pay~~ because
mother violated the parenting plan's final decision
making provisions.

DONE IN OPEN COURT this 30th day of April, 2015.

In all other respects, the motion for revision is denied. Motion for



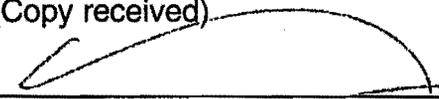
JUDGE/COURT COMMISSIONER

Presented by: Terms is
(Copy received) denied.

Approved as to form:
(Copy received)

Davey / H. 2.0, 7533

Attorney for mother



Attorney for

APPENDIX 2

February 4, 2014

Dear Penny:

I am in receipt of your request for additional funds. I have reviewed your letter of December 17, 2013. I have also reviewed some of the actual statements. As you may recall, the Order of Child Support was entered in this case which set forth certain obligations.

The original Order of Child Support had a principle judgment in the sum of \$5,416.00, which I have paid. I was required to pay the sum of \$1,805.27 per month in child support. The Child Support Worksheet upon which the Order of Child Support is based takes into account all of the issues relating to health insurance. I have fulfilled my obligation in regards to any obligation to pay health insurance premiums as set forth in the Child Support Worksheet dated May of 2010.

Some, if not the majority, of the medical expenses relate to some type of psychotherapy. Pursuant to the Parenting Plan that was entered in our case, Paragraph 4.2 in regards to major decisions states: major decisions regarding each child shall be made as follows: Non-emergency health care: joint. I have at no time ever given consent for psychotherapy. The same would be true for much of the treatments that I believe the girls have incurred.

With that in mind, I am more than willing to pay the actual costs that remain after payment by insurance of any and all expenses that include pharmacy products and doctor visits, that relates to an actual illness of the children based on the percentages set forth in the child support. Paragraph 3.19 states that I am required to pay 69.4% of uninsured medical expenses. Please supply me with that figure and the basis of what work was performed and delete the psychotherapy I will be happy to pay the expenses.

Having been given no opportunity to speak to the counselors it is troubling that no one has advised me what the purpose of the therapy is. For whatever reason you have chosen not to include me in that process.

I have enclosed a check that covers the bills that I believe are appropriate to pay under the terms of the order. If you disagree, please advise me of your position on what debt you think that I have not paid that I should have.

Sincerely,

JEFF NEWGARD

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5
6 **THE COURT OF APPEALS OF THE**
7 **STATE OF WASHINGTON**
8 **DIVISION III**

9 **In re:**

10 **JEFFERY K. NEWARD,**

11 **Appellee/Petitioner,**

12 **and**

13 **PENNELOPY A. NEWGARD,**

14 **Appellant/Respondent.**

NO. 10-3-00028-6

Appeal No. 33430-9 - III

AFFIDAVIT OF MAILING

15 I, **DEBBIE BARTHEL** hereby certifies under penalty of perjury under the laws of the
16 State of Washington that the following statement is true and correct:

17 That I am an employee of the attorney for the Appellant/Respondent in the above-
18 entitled matter; that I am a citizen of the United States, over the age of majority, and not a party
19 to said action. That on the 1st day of October, 2015, I sent through attorney messenger service,
20 a true and correct copy of:

21 **MOTION FOR ORDER ALLOWING ADDITIONAL TIME TO FILE BRIEF**

22 **APPELLANT'S APPEAL BRIEF**

23 addressed to:

24
25 **W. JAMES KENNEDY**
26 **Thorner, Kennedy & Gano**
27 **101 S. 12th Avenue**
Yakima, WA 98902

DATED this 1st day of October, 2015.


DEBBIE BARTHEL