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NOVEMBER 25, 2015
Court of Appeals
Division III
State of Washington

No. 334309-III

WASHINGTON STATE COURT OF APPEALS – DIVISION III

In re the Marriage of:

JEFFREY K. NEWGARD,

Respondent,

v.

PENNELOPY ANN NEWGARD,

Appellant.

ON APPEAL FROM YAKIMA COUNTY SUPERIOR COURT
Hon. Gayle M. Harthcock

BRIEF OF RESPONDENT

Amended

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is an appeal from the Mother's effort to enforce a support order's shared payment requirement for non-emergent medical care, psychological counseling. The support order is subject to the parenting plan's joint decision-making requirement for such care. Mother obtained the care unilaterally; Father was never asked to participate, nor given information on the need for or course of treatment. The commissioner, and the superior court on revision, denied Mother's effort to enforce the support order after Father objected to payment and to Mother's continued unilateral decision-making in his February 4, 2014, letter. The appeal should be denied.

The trial court did not abuse its discretion in revising the commissioner's written ruling to conform to his oral decision. That decision clarified the support order and confirmed that unilateral decisions for non-emergent health care, where joint decision-making is called for in the parenting plan, are the financial responsibility of the parent making the unilateral decision. Because Mother's effort to get relief under the support order failed, Father should be awarded fees for this appeal per RCW 26.18.160 or for intransigence.

II. RESTATEMENT OF ISSUES ON APPEAL

1. Should the trial court be affirmed because it did not abuse its discretion by revising the Commissioner's decision to clarify that, under the Support Order and Parenting Plan, a parent who makes a unilateral decision as to non-emergent health care subject to joint decision-making bears the cost of her unilateral decision if the other parent objects?

2. Should Father be awarded attorney fees if he prevails under RCW 26.18.160 or for intransigence?

III. RESTATEMENT OF THE CASE

The parties divorced in 2007. A parenting plan and child support order were entered as to the two daughters who resided primarily with Penny Newgard (“Mother”) in Yakima. CP 213-223 (“Parenting Plan”). The applicable support order was entered in 2010. CP 1-8 (“Support Order”). Respondent Jeff Newgard (“Father”) now lives and works in Idaho Falls. The older daughter graduated from high school in 2014 (CP 19), is 20 years old, attends Central Washington University (CP 27), and lives independently. The younger daughter, age 16, lives with Mother.¹

The Parenting Plan requires joint decision-making for non-emergent medical care. CP 220. The Support Order was entered in conformance with the Parenting Plan. The Support Order’s provisions presume, as a predicate, the good faith adherence by each parent to the terms of the Parenting Plan, including joint decision-making. The Support Order is silent on the financial obligations of a parent where the first parent makes a unilateral decision as to a joint decision-making matter with a fiscal impact, here health care.

¹ A new support order was entered 2/18/15 following the older daughter’s graduation from high school, turning 18, and beginning college, to address post-secondary support and the changed circumstance of only one of the daughters at home. CP 91-98. The new support order, which necessarily covers all support payments between the parties up to its entry, states that the unpaid medical support is “resolved.” CP 98. That order was not appealed and is final.

Mother unilaterally obtained counseling for the daughters without contacting or informing Father, then sent him the bills expecting payment of the 69% share specified in the Support Order for non-emergent medical care obtained via joint decision-making. *See* CP 65 (Father's letter).² The date of the counseling sessions range from January 2013 through August, 2014. *See* CP 38-45 (bills). Father was not given any information at any time on the counseling provided, its need, or its expected duration or course of treatment. CP 65. Nor was he invited to participate in any discussion over the counseling for their daughters or its necessity. *Id.* Father sent Mother his letter of February 4, 2014, stating his objections. He objected to payment and to the continuing pattern of incurring costs for a joint-decision matter as to which he was never asked for input nor given any information. *Id.*

Mother sought to enforce the Support Order's provision for shared expenses for uninsured, non-emergent medical care. She filed a declaration (CP 48-50), noted a "motion for past due medical bills" on January 9, 2015 (CP 61-62), then filed a "Motion for Judgement For Back Medical Bills" on January 20, 2015. CP 67. Father filed his letter as part of his declaration. CP 63-65. He objected to Mother's pattern of ignoring joint decision-making

² The counseling was obtained for both girls and for Mother. *See* CP 49, Mother's Declaration. Though the bills are cryptic and have double entries for many dates, the bills do not state that Mother's counseling was included in the costs she seeks to recover from Father. *See* CP 38-45.

provisions in the Parenting Plan while seeking to have Father pay for decisions he had no voice in, and to pay for counseling without giving him any information as to the need for, or scope of, the counseling services, contrary to the structure and intent of the Parenting Plan. *See* CP 63-65 (letter); CP 112 (Commissioner’s oral ruling). Mother noted in later briefing that she “did not specifically rebut” Father’s assertions that she made unilateral decisions rather than engage in joint decision-making as required by the Parenting Plan, thus admitting her actions were outside the Plan. *See* CP 105:15. Father did not submit briefing, to minimize costs.

Commissioner Naught ruled at the February 18, 2015, hearing that no payment by Father was required for counseling after February 4, 2014, *i.e.*, once Mother was on notice of Father’s objection, “because he has joint decision making” under the Plan. CP 112 (transcript). However, Father would be responsible for his share of counseling costs incurred up until his February 4 objection (CP 112), which is about half of the bills.³ The March 11 written order went farther, stating that Father would not be required to pay “for any medical bills incurred subsequent to February 4, 2014” (CP 100), necessarily including medical bills beyond the counseling bills to which Father objected.

³ Father has since paid his share of those medical bills per the court’s order.

Mother moved to revise. CP 104-06. Father again did not file a brief, but had counsel appear at the April 30 hearing. CP 122:19-23 (transcript). Judge Harthcock heard the same arguments Mother now also presents in her Opening Brief as to RCW 26.09.184(7),⁴ that she could not be “punished” for violating the Plan by not engaging in joint decision making, so that Father had to pay his proportionate share of those expenses. *See* CP 121-22. The trial court determined the argument sought an “absurd result”

. . . because what that means is someone can go out and get services, medical services for their child and rack up thousands and thousands of dollars without notification to the other side and then expect that those bills be paid, and I don’t think that was the intent of the legislature.

CP 125:9-12. The trial court recognized the statutes cited by Mother focus on maintaining visitation despite violations of the Parenting Plan, and that Mother’s proposed application “would be absurd.”

Judge Harthcock then granted revision, but “only to correct the written order to conform to the [commissioner’s] clear intention as expressed in the commissioner’s oral ruling” to limit the relief to not require payment of Father’s percentage for counseling incurred after February 4, 2015. CP 119. The revision order concludes:

⁴ That statutory argument, however, was not presented to the Commissioner and, thus, arguably is not properly considered on revision or this appeal since it goes beyond the records and files presented to the commissioner in the first instance. *See In re Marriage of Williams*, 156 Wn. App. 22, 27, 232 P.3d 573 (Div. III 2010) (superior court reviews “the evidence **and issues presented to the commissioner.**”) (emphasis added).

“In all other respects the motion for revision is denied.” CP 119. The denial of revision of the Commissioner’s ruling “in all other respects” means the superior court adopted all unrevised rulings.⁵

Mother appealed. Father no longer has the option to just have counsel appear at a hearing. Her appeal shows her intent to continue this course. Father thus is required to submit this brief to respond. He also needs to have this continuing problem of unilateral decision-making by Mother resolved because there are many years left of support and post-secondary support.

IV. RESPONSE ARGUMENT

A. Standard of Review.

The appellate court reviews the trial court’s order on revision of the superior court commissioner for an abuse of discretion. *In re Marriage of Williams*, 156 Wn. App. 22, 27, 232 P.3d 573 (Div. III 2010), citing *In re Marriage of Moody*, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999); *In re Marriage of Dodd*, 120 Wn. App. 638, 644, 86 P.3d 801 (Div. III 2004) (“our focus is whether the superior court abused its discretionary authority under RCW 2.24.050 when it revised the commissioner’s support modification ruling.”). Thus, appellate review is of “the superior court’s decision, not the commissioner’s.” *State v. Romer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004). In turn, on

⁵ RCW 2.24.050 states that where a commissioner’s rulings are not revised, “the orders and judgments shall be and become the orders and judgment of the superior court,” *i.e.*, they are incorporated in the ultimate superior court ruling.

revision the superior court reviews “the evidence and issues presented to the commissioner.” *Williams, supra*, 156 Wn. App. at 27.

The appellate court will affirm on a basis other than that stated by the trial court, if supported by the record. *In re Marriage of Raskob*, 183 Wn. App. 503, 514-15, 334 P.3d 30 (2014).

B. The Trial Court Should Be Affirmed Because It Acted Within Its Authority, Within Its Discretion, And Made The Correct Decision.

1. Mother is not being “punished.” She simply does not have a proper basis to enforce the Parenting Plan here where she acted outside the Plan.

Mother argues that under RCW 26.09.184(7) and associated cases that she cannot be “punished” for violating the Parenting Plan’s joint decision requirement and, therefore, she is entitled to enforce the proportionate payment provision against Father. Mother is wrong on the facts, the law, and the equities.

First, no one is seeking to “punish” Mother or hold her in contempt. Father filed no motions. He did not even file a brief in superior court, only a declaration. It is Mother who was seeking relief from the trial court for her extra-Plan actions. The trial court ruled that Mother’s position was “absurd” and denied her requested relief by refusing to revise the denial of required payment by Father.

Second, the cases and the WASHINGTON PRACTICE section cited by Mother as to violations of parenting plans and the application of RCW 26.09.184(7) all involve a very different

question than that presented here. They focus on whether a parent's *visitation* rights with his or her child could be diminished for his or her failure to comply with one provision or another of the given parenting plan. None of the cases involved a non-residential-related, subsidiary financial issue for non-necessary items, as here.

Moreover, the support issue here is an adjunct and necessary consequence of the joint decision-making provision of the Parenting Plan. Those decisions are designed to be under the control of *both* parents and not subject to the unilateral decision of either. The provision in the Support Order thus necessarily *assumes* that joint decision-making occurs. It is Mother's position, not Father's, that results in unilateral decision-making authority. That position is either outside the bounds of, or in conflict with, the Parenting Plan. Either way, the trial court correctly restored the proper balance required by these orders and should be affirmed.

Third, Mother's interpretation of RCW 26.09.184(7)'s application in these circumstances is overly literal and disregards the specifics of this case, the overall structure of parenting plans and support orders, and common sense. It was aptly characterized as "absurd" by Judge Harthcock.

As noted, the cases and the WASHINGTON PRACTICE provision Mother cites all involved changes to or reductions in a parent's *residential* time with his or her child for the failure to comply with provisions of the given plan. That is not the situation

here, as the trial court recognized. The issue here is not one of a parent's right to time with their child, nor of a child's basic support for necessary sustenance. It is whether Father must make un-agreed-to, un-ordered contributions to non-emergent health care the requesting spouse arranged for unilaterally, outside the Parenting Plan. It would be no different than if Mother had unilaterally decided to obtain non-emergent orthodonture and teeth whitening, or cosmetic plastic surgery such as nasal diminution or breast augmentation. Mother's position in fact is that the joint decision-making provision for non-emergent medical care does not really exist or apply if she does not want it to, but nevertheless, the payment provision is inviolate. That is nonsense.

Under Mother's interpretation, there can be no clarifications of a parenting plan or support order to account for a parent's failure to follow an important non-residential-related provision of the parenting plan or otherwise act outside the plan. She asks the Court to reward her misbehavior by holding that a common sense ruling cannot be made by the trial court sitting in equity, which the family law court is, or that a trial court cannot clarify the rights of the parties when one parent follows a course not contemplated by either the parenting plan or the support order. Rather, she argues the only "remedy" for Father is to bring contempt proceedings. That too is absurd here. As noted above, Father is not seeking relief, but Mother is, claiming Father did not follow the Plan. The

Commissioner and trial court both said no – he did not need to follow the Plan. Mother cannot “enforce” the Plan in these circumstances where she acted outside the Plan. She is not being “punished” for “violating” the Plan. Her extra-Plan actions simply are outside the proportionate payment provisions, so her enforcement effort based on those provisions fails.

In sum, denying Mother’s requested relief is simpler and more appropriate under these circumstances than engaging in the “rigmarole” of contempt proceedings in Judge Harthcock’s terms, which would only add needless attorney time, cost, and hearing time and is not necessary here.

2. The trial court should be affirmed because it ruled within its authority and discretion.

Mother tries to argue error in the written revision order crafted by her attorney to say the reason her enforcement is denied is because she “violated” the Parenting Plan—a rationale that neither the Commissioner nor the trial court used. Nevertheless, even assuming that construction is applicable and insufficient to support the ruling, which it is not, the trial court still can and should be affirmed under different theories than the one written in by Mother’s attorney. *Marriage of Raskob, supra*.

One proper legal basis to support the ruling is that the trial court’s adoption and correction of the Commissioner’s written order was made under the court’s inherent powers as a proper and more

expeditious resolution than holding contempt proceedings for Mother's "violation" of the joint decision-making provision. It is more appropriate than formally branding Mother as being in contempt, which can carry serious consequences in future proceedings. *See* CP 125: 17-18 (no need to "go through the rigmarole of contempt" under these circumstances).

The ruling fits comfortably within the family law court's province as it sits in equity and exercises its inherent powers. In the post-dissolution setting, the trial court:

has the authority to use "any suitable process or mode of proceeding" to settle disputes over which it has jurisdiction, provided no specific procedure is set forth by statute and the chosen procedure best conforms to the spirit of the law. RCW 2.28.150. Indeed, "**[w]hen the equitable jurisdiction of the court is invoked . . . whatever relief the facts warrant will be granted..'**"

In re Marriage of Langham, 153 Wn.2d 553, 560, 106 P.3d 212 (2005) (emphasis added) (internal citations omitted). *Accord In re Marriage of Farmer*, 172 Wn.2d 616, 625, 259 P.3d 256 (2011).

Any arguable defect in the procedure the trial court used is cured by reference to the trial court's inherent powers and RCW 2.28.150. The statute affirms that trial courts may use "any suitable process or manner of proceeding" in exercise of their jurisdiction if no specific procedure is set out in statute, and also allows for supplementing those procedures which may be specified if they are lacking. *Langham, supra*. *See Rogoski v. Hammond*, 9 Wn. App.

500, 502-05, 513 P.2d 285 (1973) (affirming trial court's show cause procedure when determining whether to permit pre-judgment attachment because it met basic due process requirements).

Clarification is another proper basis for the ruling since the trial court's revision order clarifies the rights of the parties under the Plan and Support Order in these unique circumstances.⁶ The Support Order is read in conjunction with the Plan. Under the Plan, the normal obligation of the parties is to engage in joint decision making for non-emergent medical care and then to pay their proportionate share of such jointly-agreed non-emergent care. Neither the Support Order nor the Parenting Plan specify what occurs in the circumstances here where Mother acted outside the Parenting Plan by failing to include Father in the normally joint decision to obtain non-emergent medical care. But common sense does. The Plan's proportionate payment provision does not apply to unilateral actions because they are outside the Plan.

3. The trial court also should be affirmed because it reached the correct result.

Since the decision to obtain a continuing course of non-emergent medical treatment was not a shared decision, and Mother

⁶ *In re Marriage of Jarvis*, 58 Wn. App. 342, 345, 792 P.2d 1259 (Div III 1990) (“[a] clarification is merely a definition of the rights which have already been given and those rights may be completely spelled out if necessary,” quoting *Rivard v. Rivard*, 75 Wn.2d 415, 418, 480 P.2d 219 (1971); *In re Marriage of Monaghan*, 78 Wn. App. 918, 924, 899 P.2d 841 (Div. II 1995) (clarification of decree defines the rights and obligations previously granted).

has not provided any information to tell Father of its necessity or otherwise help him understand the genuine importance of it, the only equitable approach is for the parent who acts outside the Plan and makes such a unilateral decision to pay for all of the costs. That parent should not get the benefit of the Plan's cost-sharing provision when the parent chose to act outside the Plan. Otherwise, as Judge Harthcock noted, the parent acting unilaterally gets a blank check for his or her actions, no matter what is done, be it counseling or cosmetic dental work or plastic surgery. There is no proper reason why a parent excluded from decision-making over a continuing course of treatment should have to pay for the other parent's decision as to which there is both lack of any meaningful disclosure and consequent disagreement over its need or efficacy when the parenting plan requires joint decision-making *before* any such treatment is obtained.

Here it is admitted that Mother took no steps to have joint decision-making for the care in question. The record also reflects that Father was denied any information about the care and its necessity. And it is Mother who seeks relief, to enforce the Plan against Father. In these circumstances, as both the commissioner and trial court recognized, it is inequitable for Father to be required to pay for an un-defined stream of a type of care for which he was entitled to have joint decision-making, and for which he was not, and still has not been given, any information to confirm its genuine need.

Nor is Mother in a position to ask the court in equity to give her relief when she claims she violated the Plan and thus comes with unclean hands; or acted outside the Plan and, thus, cannot seek relief under it.

C. Father Should Be Granted Appeal Fees If He Prevails.

The prevailing party in an action brought to enforce a support obligation is entitled to an award of fees. RCW 26.18.160.⁷ If he prevails in the appeal, Father does not need to show financial need, but does need to show that “the obligee has acted in bad faith.” *Id.* Father suggests that test is met here by Mother’s continued appeal.

First, Mother contends she is in violation of the parenting plan’s requirement for joint decision-making. Assuming that is true, she cannot properly seek relief under the Plan in what is at heart an equitable proceeding with such unclean hands. Nor can she seek relief under the Plan for her actions which were *outside* the Plan.

Second, she continued in the course of conduct of ignoring the Plan’s requirements, despite being put on notice of it. Moreover, by this appeal Mother continues to seek payment to which she is not entitled. Absent a favorable ruling for Father, there is no reason to believe Mother will not continue this course. That is why Father is

⁷ “In any action to enforce a support or maintenance order under this chapter, the prevailing party is entitled to a recovery of costs, including an award for reasonable attorney fees. An obligor may not be considered a prevailing party under this section unless the obligee has acted in bad faith in connection with the proceeding in question.”

compelled to incur the cost of filing this brief and to seek fees for the appeal. Otherwise, this problem will recur in the many remaining years of support.

Third, Mother is seeking to pursue this matter further despite two adverse rulings, first by Commissioner Naught, then by Judge Harthcock. Mother seeks to pursue it despite her unclean hands and Judge Harthcock's clear statement of the "absurdity" of Mother's position: that Mother may ignore the joint decision-making provisions of the Parenting Plan with impunity and make Father pay for her unilateral decisions. Her position negates the joint decision-making requirement for non-emergent medical care and reads that provision out of the Plan rendering it, at most, mere surplusage. An interpretation that deletes a part of the Plan's terms is untenable since, like contracts and statutes, every provision of a parenting plan must be given meaning. To pursue such an interpretation on this now-second level of appeal is untenable.

Whatever may be the arguable positions taken by counsel to try to avoid the strictures of a frivolous appeal, under all these circumstances, the further pursuit of this matter by appeal should be deemed bad faith under the statute because the untenable position asserted cannot be sustained, logically or legally. Alternatively, it should be deemed frivolous because, under these circumstances, "no reasonable possibility of reversal exists," *Chapman v. Perera*, 41

Wn. App. 444, 455-56, 704 P.2d 1224 (1985), permitting fees under RAP 18.9.

Finally, pursuing this appeal under all these circumstances also constitutes intransigence, which permits an award of fees regardless of the parties' need or ability to pay. "Intransigence is a basis for awarding fees on appeal, separate from RCW 26.09.140 (financial need) or RAP 18.9 (frivolous appeals)." *In re Marriage of Mattson*, 95 Wn. App. 592, 605, 976 P.2d 157 (1999). The financial resources of the parties are irrelevant when fees are awarded for intransigence. *Id.* at 606. The question is whether the intransigent party's actions imposed the fees. *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989), cited in *In re Marriage of Burrill*, 113 Wn. App. 863, 873, 56 P.3d 993 (2002). *Accord*, *In re Marriage of Farmer*, *supra*, 172 Wn.2d at 633-34. They did here since Mother's appeal required Father to file this brief.

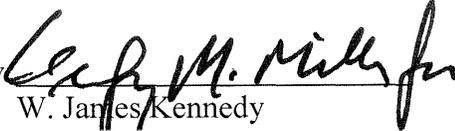
Respondent Father suggests that the Court's award be limited to terms of \$2,500 if based on Mother's bad faith under RCW 26.18.160 or Mother's intransigence, which is substantially less than Father has spent on the appeal. Alternatively, Father suggests that the Court award all his fees incurred on this appeal if it is found to be frivolous and chargeable to Mother's counsel.

V. CONCLUSION

Respondent Father Jeff Newgard respectfully asks the Court to affirm the trial court. Affirming the trial court will help assure future compliance with the joint-decision-making provisions. It will minimize, if not eliminate, future disputes because Mother will know that if she takes unilateral action in areas subject to joint decision-making, she will be responsible for any such actions. If Father prevails in this appeal of a support enforcement action, he should be awarded his fees on appeal as provided *supra* because Mother's pursuit of this further appeal under all the circumstances constitutes bad faith and/or intransigence, or is frivolous.

Respectfully submitted this 24th day of November, 2015.

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PENNELOPY ANN NEWGARD,
Appellant.

NO. 334309

CERTIFICATE OF
SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of:

1. Brief (Amended) of Respondent Jeffrey K. Newgard;
2. Transmittal letter to COA III; and
3. This Certificate of Service.

on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 24th day of November, 2015.



Catherine A. Norgaard, Legal Assistant