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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 349942

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

IN RE CUSTODY OF DEVER
MARTIN and SANDY DEVER,
Respondents

vs.

REBECCA GORLEY,
Appellant

BRIEF OF RESPONDENT'S

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I. INTRODUCTION

Respondents, Martin and Sandy Dever are the paternal grandparents of 8 year-old Chloe Dever. Rebecca Gorley is Chloe's birth mother. Respondent's essentially raised Chloe for the first five years of her life due to her mother's severe drug addiction. After Chloe's father, Bradford Dever passed away in 2013 this third party custody action was filed.

By agreement appellant and respondent's were eventually able to enter into an agreed residential schedule which ultimately returned the child to her mother's care as the mother was showing strides towards recovery. That residential schedule also provided that mother would put away certain funds each month for the child's post-secondary education. The agreed residential schedule was entered November 19, 2014 resolving all issues in the case. That agreement was signed by appellant and her attorney. After the fact appellant made no effort whatsoever to abide by the financial stipulation contained in the residential agreement necessitating several motions and several findings of contempt against her in superior court. Mother's position repeatedly seems to be that she agreed to and stipulated to an order which cannot be enforced. Respondent's have continued to maintain that appellant should not be able to enter an agreement for her convenience and then only seek to enforce those portions which she finds beneficial to herself.

II. ISSUE ON APPEAL

1. The crux of the issue on appeal is whether the mother, in this third party custody action can enter into an agreed parenting schedule and later claim it is unconstitutional, and non-enforceable, despite the fact that she voluntarily signed the order and was represented by counsel in signing the order.

III. STATEMENT OF THE CASE

Factual Background Supplement.

Eight year-old Chloe Dever was raised the majority of her life by respondent's Martin and Sandy Dever. (CP 11). For the first five years of Chloe's life, her birth mother Rebecca Gorley was absent from her life. (CP 11). This was due to Rebecca's long-term substance abuse issues. (CP 11).

Prior to trial the parties were able to reach an agreement and entered into an agreed residential schedule which was signed by appellant Rebecca Gorley, her attorney Ellen McLaughlin, the GAL Rick Kinney, the respondent's and counsel for respondent's, Howard N. Schwartz. (CP 9). It was approved and signed by court commissioner Kevin Naught of the Yakima County Superior Court on November 19, 2014. (CP 1-9). The agreed residential schedule transitioned the child from the respondent's home where she had primarily resided to residing in mother's home full-time commencing January 3, 2015. (CP 2). It also provided for regular residential time between the child and the grandparents. (CP 2 and 3).

The agreed residential schedule also provided for mother to set aside funds each month in an amount equal to one-half of the social security benefits the child was receiving as a result of her father's death, and paragraph 3.12 of the agreed residential schedule at paragraph 2 provided as follows:

"2. As it currently stands the payee and overseer of Chloe Dever's social security benefit left to her by Bradford Dever is Sandy Dever. Sandy Dever is to remain the payee until such time as social security dictates that Rebecca Gorley becomes the payee by virtue of the guardianship/parentage of Chloe. When the final parenting is signed and is filed with the Yakima County Superior Court the social security office in Yakima will be notified of the time and change of Chloe's guardianship/parental control per their regulations. They are the final arbiters of the assignment of funds, not the Dever's. It is the intent of the parties that an educational fund be created for the child. It is also the intent of the parties that mother provide for the basic needs of the child. It is agreed by both Rebecca Gorley and Martin and Sandy Dever that within three days of social security benefit payout monthly (the third week of each month) Rebecca will place into a custodial account, with Chloe and her names on it, an amount equal to one-half of whatever the social security death benefit payout is. These funds are to be retained for Chloe's future secondary education upon her graduation from high school. Should Chloe not attend a secondary educational facility the fund is still hers upon graduation from high school and achieving adulthood. The amount paid to this educational fund is to be the exact equivalent of one-half of whatever the monthly governmental payment is. The payment from Rebecca to this fund is not to be construed as an attachment of social security death benefits but a dollar amount due regardless of the source of money. It is up to Rebecca Gorley to decide where the funds for this monthly saving come from. In the event the social security administration was not to approve Rebecca Gorley as the

payee of this benefit it is agreed that Sandra Dever (the current payee) will duplicate the described savings for Chloe's education from February 2015 forward with the other half being paid directly to Rebecca Gorley for as long as Chloe is her legal dependent to be used for Chloe's care and upbringing. The assumption is that the parenting change of Chloe Dever to Rebecca Gorley will be January 3, 2015. The social security benefits would start to pay out to Rebecca Gorley in the third week of February, 2015 as they pay after the month due, not during the current month. The assumption of this payment time/date is agreed to and understood. Rebecca is to provide a bi-annual statement to the Devers showing the account has been properly funded and the money retained. If for any reason social security was to deny a transfer of payee status then a reverse situation would be honored with an accounting of funds being provided to Rebecca. This shall be provided in June and January annually. A simple bank statement will suffice.” (CP 5, 6).

On or about July 5, 2015 respondent's filed a motion and declaration for an order to show cause regarding contempt against appellant alleging failure to comply with the parenting plan (agreed residential schedule). (CP 10-14). In that motion it was alleged that mother was failing to provide residential time with the grandparents provided in the agreed residential schedule and further, that mother failed to provide proof of the educational fund agreed to in the agreed residential schedule. (CP 11-12).

On August 13, 2015 after a hearing on the contempt, commissioner Kevin Naught found mother in contempt for willful violation of the agreed residential schedule by denying residential time and also in contempt for failing to follow the educational trust fund provisions of the agreed

residential schedule. (CP 59).

The court set purge conditions whereby appellant could purge the contempt by allowing make-up visitation and putting funds into a trust account per the agreed residential schedule and providing proof of the same as well as paying attorney fees of \$750.00. (CP 59).

Appellant rather than following the contempt order regarding the education funds and attorney fees, attempted to file bankruptcy to avoid these obligations claiming they were an executory contract. (CP 61).

As a result respondent's were forced to hire James Hurley, a bankruptcy attorney in Yakima to object to the plan and get a determination from the bankruptcy court that this was not a dischargeable obligation. (CP 61, 62). (Declaration of James Hurley filed September 14, 2016).

Because appellant thereafter did not designate and preserve the funds as ordered, pay attorney fees, or provide an accounting of the funds the respondent's, again filed a motion for contempt on September 14, 2016. (CP 62, 63). That was heard by commissioner Kevin Naught on November 21, 2016 and an order on contempt was entered. (CP 91-97). In that order the court specifically found:

“Mother made a contractual obligation to fund an educational trust as set forth in the parenting plan and has failed to do so.” (CP 92).

The court entered a money judgment for \$11,110.00 in past due

educational funds with the creditor being listed as Chloe Dever and an additional \$300.00 in attorney fees to be paid to counsel for the respondents. (CP 95). The court further ordered that:

“The mother must account for and replace the educational funds within 30 days and pay attorney fees within 60 days.”
(CP 95).

The indicated contempt could be purged by replacing all educational funds per the parenting plan and paying the attorney fees. (CP 96). None of these purge conditions have been met to date. Appellant never sought or received an order staying these proceedings. Thereafter mother filed her motion for revision pursuant to RCW 2.24.050. (CP 98-107). After hearing the motion for revision on December 12, 2015 the Honorable Judge Douglas Federspiel denied the motion. (CP 149).

At the revision hearing Judge Federspiel specifically indicated that based on the record, the contempt finding was appropriate, (RP 12/12/16, pp 26, 12-27).

Judge Federspiel indicated in his decision that the only issue before him was whether the contempt was appropriate and as there was no motion to vacate the judgment, there was no reason to consider constitutional attacks and the like and in fact the only issue before the court was the appropriateness of the contempt under the circumstances (RP 12/12/16, p 27).

IV. ARGUMENT

A. Standard of Review.

In addition to the authorities referenced in Ms. Gorley's brief, a Division I Court of Appeals, State of Washington, in *Weiss v. Lonquist*, 173 Wn.App. 344, 293 P.3d 1264 (2016) has also stated the standard of review for sanctions for contempt is abuse of discretion.

B. The mother and her attorney should not be able to avoid obligations agreed to under a stipulated residential order by claiming that the order is not enforceable.

Mother and her counsel, Ellen McLaughlin, signed the agreed residential schedule which became a permanent order when it was signed by court commissioner Kevin Naught on November 19, 2014. (CP 1-9). This agreed order transitioned Chloe Dever from the home she had resided in most of her life and was residing in pursuant to temporary court order, to her mother's home. It also provided for the educational trust provision and residential time for the respondent's. (CP 1-9).

At that juncture the only reason the child ended up residing primarily with the mother was pursuant to this agreement. Mother is now attempting the catch twenty-two situation where she claims she is primary custodian pursuant to that agreement and therefore the agreement is not enforceable because she is the primary parent. It is a rather circular argument. Further, mother's argument that she has complete control under the constitution to

raising her child would pretty much void any and all provisions of the agreed residential schedule including those entitling the respondent's to residential time with the child they raised for most of her life while mother was incapacitated by drug use. It has become ludicrous during these proceedings that mother has presented herself as somehow the victim in this situation. She and her attorney knowingly and voluntarily entered into the agreed residential agreement in order for the child to be returned to her care, only to them claim that it was never a valid agreement and in fact is unenforceable. This is a fraud perpetuated against the courts and the respondent's. As stated in *In re Marriage of Wilson*, 117 Wn.App. 40, 68 P.3d 121 (2003) at 46:

“agreed parenting plans further the objectives found in RCW 26.09.184(1).”

RCW 7.21.010 provides at section (1)(b):

“contempt of court means intentional: Disobedience of any lawful judgment, decree, order, or process of the court;”

Throughout these proceedings, the only matter before the court has been allegations of mother's contempt. There have been no motions to vacate the agreed residential schedule or otherwise set it aside. In fact currently it is still in full force and effect. Mother is continuing to not follow the order regarding the education trust provisions. In her defense mother incorrectly and continuously states that she's being required to put aside

half of the social security funds received by the child when in fact the order only provides she has to set aside an amount equal to half of the social security funds. Further, she fails to mention in outlining her financial situation that she is residing with a gentlemen that is the father of her second child. She makes no mention of his resources.

Further, mother fails to mention that even after setting aside an amount equal to half the social security funds, she still has an excess of \$470.00 a month of such funds to spend for Chloe's care. Respondents would submit that this is more than she would've ever received in child support from Chloe's father.

Again, there has never been a motion to set aside the agreed residential schedule but only claims it was not enforceable when mother failed to follow it. It is important to keep in mind that "a contempt judgment will normally stand even if the order violated was erroneous or was later ruled invalid." (Citations omitted). *State v. Coe*, 101 Wn.2d 364, 679 P.2d 353 (1984) at 370.

Further, "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)." *In re Marriage of Meyers*, 123 Wn.App. 889, 99 P.3d 398 (2004) at 893.

Also, "if the court finds that a parent has, in bad faith, failed to comply with the parenting plan, the court shall find the parent in contempt

of court. RCW 26.09.160(2)(b)”. *Rideout v. Rideout*, 110 Wn.App. 370, 40 P.3d 1192 (2002) at 376.

The *Rideout* decision, *supra* stands for the proposition that once contempt is found sanctions are mandatory and not discretionary with the court.

The respondent’s voluntarily raised Chloe for most of her young life while her mother was abusing controlled substances. Eventually, largely due to probation requirements mother entered into recovery. Finally recognizing the strides mother was making, respondent’s entered into an agreement that would allow the mother to parent her child while allowing them to have significant time with the child, and further assuring that there were suitable funds for the child’s support while also providing for the child’s post-secondary needs. The respondent’s had always set aside the child’s social security benefit in full for her future education. It becomes painfully obvious through these proceedings that the only portion of the agreed residential schedule that mother and her attorney took seriously were the provision returning the child to her care. Mother never made any attempt at any point to set any funds aside pursuant to the agreement. She has not accounted for a dime and it is obvious that she never intended to set aside any education funds for the child. If the court grants the relief she seeks, holding her right to parent superior to anything she might have agreed to in

order to get that right, it is obvious that she will then withhold access of the child from respondent grandparents and in essence the agreed order will be null and void.

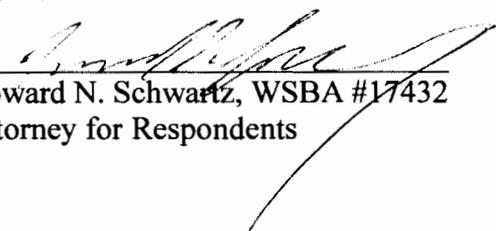
Mother should not be able to enter into an agreement to gain what she wants and then have the agreement declared unenforceable to her benefit. That is abuse of both the respondents and our legal system. It would also have a chilling effect on any agreed orders in any third party custody actions.

Regarding mother's request for attorney fees, she has failed to articulate a basis under rule of Appellate Procedure 18.1. The court should be mindful that she is the one that has been spending the child's education trust funds for her own benefit. The respondents have never had any financial benefit as a result of raising their grandchild and have spent vast sums simply looking out for her best interests, unlike her mother.

V. CONCLUSION

For the reasons set forth above respondents respectfully request this court to affirm the decision of the trial court.

Respectfully submitted this 9th day of June, 2017.


Howard N. Schwartz, WSBA #17432
Attorney for Respondents

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the 9th day of June, 2017, I caused a copy of the attached Brief of Respondent's, to be filed and served upon the following:

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Dated this 9th day of June, 2017.



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