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Division III
State of Washington
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IN THE COURT OF APPEALS
DIVISION III
THE STATE OF WASHINGTON

CAUSE NO. 36722-3

NICHOLAS DENNIS, [Petitioner or Appellant]

v.

MEGAN YATES, Respondent

REPLY BRIEF

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I. Reply Response

The intent of this pro bono reply brief is to try and make sure that this matter is focused on the relevant facts, which from the Appellant's position are as follows:

1. The court did not make any findings regarding why Mr. Dennis deserved sanctions, therefore, they appear to be arbitrary and have had a chilling effect on Mr. Dennis in this litigation;

2. The initial CR2a "agreement" was virtually the same as the temporary parenting plan but had no way to remove the "supervision" for the father's parenting, which seemed to leave the father in supervision the rest of his child's life, and was inappropriate as a final agreement since among a number of things there was no basis for the supervision in the plan;

3. Ironically, even though the father and his attorney convinced the judge to change the originally mediated plan, the judge sanctioned the father a large amount of attorney's fees for his attorneys refusal to sign the final orders;

4. Finally, the Respondent has listed a number of alleged "misrepresentations" in the Opening Brief of the Appellant, the items listed by the Respondent do not necessarily go to the heart of this matter, and seem to distract from the main issue of why Mr. Dennis was sanctioned without a finding for such a fine.

The mother's counsel also made these alleged "misrepresentation" arguments, in spite of the fact that she failed to include one of the most significant misrepresentations in this case. The misrepresentation was made by

the her and was so significant that it likely played a part in the court's decision about the sanctions. This misrepresentation came during Ms. Schweigert argument on whether to ratify the CR(2)(a) "agreement" or not, and was clearly an effort to persuade the judge that Mr. Dennis had access to legal advice at the mediation from a Washington attorney. After a lengthy colloquy between the judge and Mr. Dennis' counsel, at the start of her rebuttal, Ms. Schweigert said, *"Thank you, Your Honor. To clarify, our mediator actually was an attorney"*. See RP p. 19 l. 9-11[Emphasis added]. Obviously, Ms. Schweigert clearly had to mean a licensed attorney for the State of Washington, since if the mediator was not a licensed Washington attorney he would not by definition be an "attorney" that could help Mr. Dennis with this mediation. However, significantly, the mediator that she was referring to had never practiced nor passed the bar as a Washington attorney, and was only a retired California attorney who now lives up here now. [See CP 137-139] Therefore, Mr. Dennis did not have a attorney at his disposal as the mother's attorney argued.[1]

For the court to sanction Mr. Dennis for listening to his counsel and rejecting the CR(2)(a) mediation agreement[2], when the mother's counsel's clearly misrepresented the truth about Mr. Dennis having a Washington attorney

[1] Counsel for the mother might say that "yes the mediator was an attorney – a California attorney". However, that is what we say is a "Distinction without a difference". An attorney from any state but Washington, is not an "attorney" to be relied on for a Washington parenting plan mediation, especially a plan that deals with "*Possinger*" type issues. It was plain and simple distraction and misrepresentation of the truth.

[2] It must be remembered that Ms. Schweigert gave Mr. Dennis the option of only doing mediation if his attorney was not present for the mediation, which is clearly a kind of "Catch 22" for he and his attorney. Either go to a mediation to try and resolve it without his attorney or not. That did not mean that a parenting plan that was inappropriate should be ordered under those circumstances. And frankly Mr. Dennis saved the process by suggesting an addition to the plan that would make it palatable. But again, sanction are not in order under those circumstances.

available to him, seems clearly an abuse of discretion. It could not be said that this retired California attorney knew anything about the numerous cases on both temporary orders, modifications, adequate cause and preliminary parenting plans, such as *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993) or In re Marriage of *Possinger, at* 105 Wn. App. 326, 19 P.3d 1109 (2001).

By making such a significant misrepresentation, this could not help but influence the judge and discount Mr. Dennis' argument about no longer wanting to ratify the CR(2)(a) plan, even though it was untrue. The question then is if the judge knew that what Ms. Schweigert said was untrue about Mr. Dennis' access to an attorney at the mediation, why would he then sanction him for refusing to honor the alleged settlement.

Finally, on the issue of the purpose of this appeal, the mother's counsel forgets the law on the enforcement of a CR(2)(a) agreement and it is that she had the burden to prove that the agreement was fair and entered into properly. See i.e. *Cruz v. Chavez*, 186 Wn.App. 913, 347 P.3d 912, (2015). The father had a right to question this agreement given the circumstances under which it was made, and he should not have been sanctioned for doing what he thought was best for him and his child. Sanctioning him in this matter, when he did this with his attorney, not to needlessly "cry foul" but to straighten up the parenting plan that was a mess and was done to seemingly keep him from having a "normal" relationship with his child was totally inappropriate.

II. <u>Reply to Alleged Inconsistencies in Appellant's Opening Brief</u>

With regard to the alleged inconsistencies in the Appellant's brief, here is the Appellant's reply to those allegations, citing each item:

1. Mother was forced to file "for presentment" – Not an inaccuracy, simply a figure of speech. However, if she was not "forced" then why were fees ordered? Otherwise this is irrelevant since it has little or nothing to do with the sanctions;
2. Father was "able to start counseling" – Here again, why is this important to the arguments in this case, it was simply background information, however, this again, seems to be some form of posturing;
3. The mother's attorney did not deal with the "alleged RPC violations" – the mother's attorney did not deal with the allegations about the RPC's. That is born out by the Record of Proceedings; But, it is clearly a violation of the RPC's to misrepresent to the judge that the mediator was a Washington attorney and he was not. However, the RPC referenced in the Appellant's Superior Court papers was to have exparte contact with a represented adverse party;
4. Mother's attorney send a "rather controlling letter" – What is not "controlling about a letter that not only implies that the father's attorney should not go, and if he does not and they agree to a parenting plan and it is rejected by his attorney, there would be fees to pay. It clearly was a "Catch 22" letter. Mr. Dennis was danged if he had his attorney go, and if his attorney did not go. That is controlling.

5. Mother would not go if the father's attorney was there at the mediation – All the more reason to allow the father's attorney to object to a parenting plan that was the same as the Temporary Orders and had no end point for the supervision;
6. Appellant "thought he could have his attorney go over" the papers – That is a true statement and implies nothing wrong;
7. The Appellant's attorney received a letter that said if his attorney objected to the Parenting Plan he would have to pay the costs of mediation – This is important because the actual costs of mediation at Fulcrum in Spokane was approximately $60.00. Then the mother's counsel in her argument in front of the judge says she wanted $1,600 in fees but then wanted double that.
8. Finally, footnote page 13: The footnote to the Respondent's brief indicates that it "merely asked for written confirmation that mediation could occur if Mr. Dennis was unrepresented and queried whether Mr. Stenzel intended to reserve the right to review and approve any agreements." Yes that is in fact the case and that was done and the agreement was rejected as unfinished and inappropriate for the reasons given in the presentment hearing. And to make the record straight Mr. Dennis was "represented" at the time and that also was the basis for the objection at the hearing.

III. Request for Fees for Intransigence

The Respondent's brief asks for fees for this appeal, for intransigence. Intransigence is defined in the case of *In re Marriage of Hemrick*, 78086-7-I (see GR14.1):

> . . . The court may also enter an award of fees when one party's intransigence causes the other party to incur additional legal costs. *In re Marriage of Foley*. 84 Wn.App. 839, 846, 930 P.2d 929 (1997). Intransigence is the quality or state of being uncompromising. *In re Marriage of Schumacher*. 100 Wn.App. 208, 216, 997 P.2d 399 (2000) (citing Webster's Third New International Dictionary 1186 (3d ed. 1993)). "Determining intransigence is necessarily factual, but may involve foot-dragging, obstructing, filing unnecessary or frivolous motions, refusing to cooperate with the opposing party, noncompliance with discovery requests, and any other conduct that makes the proceeding unduly difficult or costly." *In re Marriage of Wixom*, 190 Wn.App. 719, 725, 360 P.3d 960 (2015) (citing *In re Marriage of Greenlee*. 65 Wn.App. 703, 708, 829 P.2d 1120(1992)). (Emphasis added)

The Respondent has not shown anything to prove that Mr. Dennis has been intransigent in this Appeal, and if you are going to ask for fees you must show some basis for that request. RAP 18.1. The father did not foot-drag, obstruct, or become uncompromising in the appeal. He and his counsel did pointed out what was wrong with the stipulated parenting plan, and the judge used his attorney's suggestion to change the CR(2)(a) final orders. That is not intransigence; in fact, the mother's attorney actually complicated this by not agreeing with that change and prolonging the process. She and her client also misrepresented facts about the mediator and Mr. Dennis' access to a Washington attorney, and put Mr. Dennis in an untenable situation by trying to bypass his attorney without cause. The in court misrepresentation is and was arguably a CR11 violation which would have and should have at the least balanced out the rulings in this case. Finally, and this writer believes most importantly, but for Mr. Dennis and his counsel pointing out the flaws in the final plan that was mediated the judge

would not possibly have changed those final papers to bring about a way to solve the problems that this "unfinished 'agreed' plan" would have caused if not corrected. The Appellant asks that the sanctions be dismissed.

Respectfully submitted by,

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Comments:

My brief was done Friday the 24th of July as required. I sent counsel a copy of the brief after 5pm. I scanned it but it was after 5 at 5:02 and so I missed sending it on time.

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