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Court of Appeals
Division III
State of Washington
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NO. 37116-2-III

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

JANINE C. PRITT

Appellant

v.

MICHAEL KOONTZ, J.R.,

And

KYLA KOONTZ

Respondents

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant Janine Pritt, (hereinafter “Ms. Pritt”) appeals a Contempt Hearing Order dated September 27, 2019 wherein the court found Ms. Pritt acted in bad faith by failing to make the minor child (hereinafter “G.K.”) available for supervised visits with her biological parents, the Respondents, Michael Koontz, Jr. and Ms. Kyla Koontz.

II. ISSUES

A. Did the trial court abuse its discretion in finding Ms. Pritt violated the Residential Schedule in bad faith by failing to make G.K. available for supervised visits on April 4, 2019 and April 20, 2019? (Petitioner’s Assignment of Error Nos. 1- 8)

B. Did Ms. Pritt waive assignment of error no. 9, challenging the trial court’s decision denying Ms. Pritt’s motion for a continuance, by failing to address the issue in her opening brief? (Petitioner’s Assignment of Error No. 9)

C. Should Mr. and Mrs. Koontz be awarded costs and attorney fees on appeal Under RCW 26.09.160(1), RCW 7.21.030(3), RAP 18.1, and RAP 18.9 for filing a frivolous appeal?

III. STATEMENT OF CASE

In this nonparental custody case, Judge Burrowes entered a residential schedule on July 18, 2018. (CP 38-51) The pertinent provisions are as follows: (1) Respondents shall have 2 4-hour visits with G.K. on the 1st and 3rd Saturday of every month; (2) visits shall occur in Seattle/King County as a supervised facility; and (3) Respondents are responsible for making the arrangements. (CP 40).

On March 15, 2019, on the parties 10th day of trial, the court heard Ms. Koontz' motion for an order to (a) expand and/or clarify the residential order and (b) to allow the court-appointed GAL to supervise a visit in preparation of her testimony at trial. (VP 3-30)

Judge Burrowes' denied both motions. (CP Notably, after the court heard from both parties, the court made it clear that the current residential order dated July 23, 2018 was clearly written, was not ambiguous, and would enforce it through its contempt powers. (VP 27). The court stated he was reserving the issue whether to amend the current order to identify supervisors' names, times, and locations. Judge Burrowes left completely up to Ms. Koontz to bring the matter "up again" if necessary. (VP27).

With that having been stated on the record by Judge Burrowes', Ms. Koontz accepted the July 23, 2018, and elected not to pursue the matter further.

Respondents selected and arranged for Brandon King, d/b/a Sno-King Visitation to supervise visits on the 1st and 3rd Saturday of April 2019. (CP 9) Numerous attempts were made to confirm the April 6, and April 20, 2020 visit with Ms. Pritt. Ms. Koontz filed a Declaration from Brandon Moore wherein, he testified he attempted numerous times to confirm the visits with Ms. Pritt and her attorney. He also testified that Ms. Pritt did not appear at the designated time and location for either the April 6, or April 20, 2019 visit. (CP 9-10).

A hearing was held on July 23, 2019 on the Koontz' Amended Order to Show Cause re Contempt. (VP 31-59). After hearing oral arguments from both parties, the court found Ms. Pritt in contempt for violating the residential provisions of the July 18, 2018 order. (CP 292-295); (VP 58-59)

IV. LEGAL ARGUMENT

A. Standard of Review

Under RCW 26.09.160, trial courts have the discretion to punish parties for contempt. A trial court's decision on contempt is

within the sound discretion of the court and will not be overruled on appeal absent an abuse of discretion. *In re Marriage of James*, 79 Wn. App. 436, 439-40, 903 P.2d 470 (1995). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d644 (2014).

A trial court must make findings of fact that set forth the basis for the finding of contempt. Findings of fact must be supported by substantial evidence. *In re Marriage of Rideout*, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person that the fact found is true. *In re Marriage of Chandola*, 180 Wn.2d 632, 642 (2014).

Credibility determinations are not reviewed on appeal. *In re Marriage of Rideout*, 150 Wn.2d 337, 352 (2003).

B. The Trial Court Did Not Abuse its Discretion in Finding That Ms. Pritt, in Bad Faith, Had Not Complied With The Order Establishing Residential Provisions.

1. Ms. Pritt did not satisfy her burden of proof by submitting evidence she lacked the ability to comply with the order or that she had a reasonable excuse for not complying. RCW 26.09.160(2)(b)

A motion may be filed to initiate a contempt action to coerce a parent to comply with an order establishing residential provisions. RCW 26.09.160(2)(a). If, based on all the facts and circumstances, the court finds after hearing that the parent, in bad faith, has not complied...the court shall find the parent in contempt of court. RCW 26.09.160(2)(b). The parent shall be deemed to have the present ability to comply...unless he or she establishes otherwise by a preponderance of the evidence. RCW 26.09.160(4).

Here, the trial court's decision hinged upon the credibility of Brandon Moore and the legal authority of the Washington State

Supreme Court decision in *In re the Personal Restraint of King*, 110 Wn.2d 794, 804, 756 P.2d 1303 (1988).¹ (VP 55).

The court unequivocally found Mr. Moore's testimony credible. Judge Burrowes stated: "...I believe Mr. Moore gave the specific information to your office or Ms. Pritt on these particular days and particular times and location. That's really about credibility." (VP 53, lines 10-14). Emphatically, the court stated that it "read Brandon Moore's Declaration "a couple of times" and concluded: "He clearly indicates that he provided notice of the visitation, and there has been no response". (VP 57-58). It was within the sound discretion for the court to do so.

The court rejected Ms. Pritt's assertion that she had no obligation to bring the child to either the April 6, or April 20, 2019 visit because neither Mr. Koontz nor Ms. Koontz' counsel directly communicated the times and locations of each visit to Ms. Pritt's attorney. The court did not consider this a reasonable excuse either.

¹ In *King*, the Supreme Court of Washington, ruled that a trial court is well within its authority to continue a contemnor's incarceration until the contemnor offers evidence that the trial court finds credible that he/she is unable to comply. *King*, at 804.

The court ruled: “There is no responsibility that the – in this order that the parties deal with the attorneys. (VP 58, lines 11-12). In doing so, the trial court determined that Ms. Pritt did not satisfy the burden of proof under the RCW 26.09.160(2)(b), as Ms. Pritt did not provide a reasonable excuse for noncompliance. (VP 58, lines 18-21.)

The court also rejected Ms. Pritt’s reasoning that she had no obligation to comply with the order because the Koontz’ did not show up for the visits. (VP 53, Lines 5-6). The court did not think it was reasonable, for the Koontz’ to “drive all the way to Seattle at a location when they knew the children wouldn’t be there” if Ms. Pritt did not confirm the visit. (VP 53, lines 5-8).

Not finding a reasonable excuse for Ms. Pritt’s noncompliance, the court reached its conclusion: “Therefore, considering all the information that’s set forth in the declarations that have been filed by Ms. Pritt and the Koontzes in this matter, and Mr. Moore, the Court will find that the petitioner in this matter has been found in contempt for failing to file – follow the order.” (VP 58-59). The court did not abuse its discretion. There was no error, and this decision should be affirmed.

2. Ms. Pritt's maintains the court erred in finding her in contempt because, "No new or additional orders with respect to temporary residential visitation between the Respondents and G.K. were issued by the Court." (App. Brief, p. 6).

Ms. Pritt was under no obligation to submit a proposed new residential order after the March 15, 2019 hearing. (VP 27) The court made clear that (1) the current order was sufficient by its terms and (2) the Koontz were to choose the supervisor (not Ms. Pritt), and arrange the times and location of the visit, and (3) that Ms. Pritt could be held in contempt for not complying with the order. (VP 23, 27). At the closing of the March 15, 2019 hearing, Ms. Koontz' informed the court (and alerted Ms. Pritt and her counsel who were present at the hearing) that she (Ms. Koontz) would abide by the current order and file a contempt motion if there were further problems scheduling visitation. (VP 25).

For these reasons, Ms. Pritt's legal contention lacks any legal merit. The court's decision should be affirmed.

C. Assignment of Error No. 9 is Waived as Ms. Pritt Has Not Complied with RAP 10.3.

Ms. Pritt does not present any argument or citation to authority in support of assignment of error no. 9 in her opening brief, and therefore the assignment is waived. (App. Brief. p 7-10) *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (refusing to consider issues on appeal unsupported by references to the record or citations to authority).

D. This Court Should Award Attorney Fees to Mr. and Ms. Koontz For Having to Respond To this Appeal.

1. Prevailing party.

Respondents ask this court to award them attorney fees under RCW 26.09.160 (1), RCW 7.21.030(3), and RAP 18.1 for having to respond to this appeal and defend the trial court's finding of contempt. A party successfully defending an appeal of a contempt order is entitled to attorney fees on appeal. *In re Marriage of Rideout*, 150 Wn.2d 337, 359 (2003).

2. Frivolous appeal.

This court should also award fees under RAP 18.9 because Ms. Pritt's appeal is frivolous. RAP 18.9; *In re Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114, *rev. denied*, 100 Wn.2d 1023 (1983).

An appeal is frivolous, if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. (*Id.*)

The appellate court's function is not to retry the case. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Credibility determinations are not reviewed on appeal. *In re Marriage of Rideout*, 150 Wn.2d 337, 352 (2003). The trial court made it clear at the July 23, 2019 that its ruling was based on the credibility of Mr. Moore – that it did believe Mr. Moore and did not believe Ms. Pritt. (VP 53).

In this case, Ms. Pritt appealed because she did not like being found in contempt. The gravamen of her appeal is twofold. First, she claims the order July 23, 2018 was not legally enforceable because Ms. Koontz did not amend it. (App. Brief p. 6).

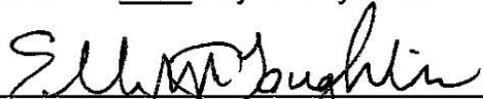
This does not make sense. The July 23, 2018 Residential Schedule was an enforceable court order. (CP 38-51). Judge Burrowes' signed it and it remained fully enforceable. (VP 56). Ms. Pritt presented no legal authority to the contrary. Second, she argues the court was wrong to believe Brandon Moore. This is the trial court's job! Both are frivolous as they are both void of any legal merit.

The Court should impose attorney fees as a sanction for filing a frivolous appeal. RAP 18.9.

V. CONCLUSION

This is an appeal challenging Judge Burrowes' role, as the trier of fact, to judge the credibility of witnesses. Judge Burrowes' exercised sound discretion when he determined Ms. Pritt violated the residential order. This appeal should be denied and the Koontz should be awarded their fees and costs.

Dated this 20th day of July 2020.


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