

NO. 73117-3-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

COURT OF APPEALS  
STATE OF WASHINGTON  
2015 AUG 17 PM 1:33

In re the Marriage of:

FRANCISCO ANTONIO CASTILLOS,

Appellant,

and

ISABELLA CASTILLOS,

Respondent.

REPLY BRIEF OF APPELLANT

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## I. REPLY TO RESPONDENT'S ARGUMENTS

### A. Isabella Essentially Concedes the Applicability of the Law Relating to Attorney's Fees.

Isabella does not contest Antonio's assertion that "[A] reasonable attorney fee award is calculated by applying the lodestar method. *Mayer v. City of Seattle*, 102 Wn. App. 66, 81, 10 P.3d 408 (2000), *review denied*, 142 Wn.2d 1029, 21 P.3d 1150 (2001). App. Br. at 7. She further does not dispute that "a fee award must be accompanied by findings of fact and conclusions of law to establish a record adequate for review. *Mahler v. Szucs*, 135 Wn.2d 398, 433-35, 957 P.2d 632 (1998)." App. Br. at 7. Nor does Isabella dispute that "[f]ailure to create an adequate record will result in a remand of the award to the trial court to develop such a record. *Mayer*, 102 Wn. App. 66, 79." App. Br. at 7.

Isabella further does not contest that under the standard of *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, "Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel." *Id.* at 434-35. Moreover, Isabella does not dispute that "[t]rial courts must independently decide what represents a reasonable amount of

attorney fees; they may not merely rely on the billing records of the prevailing party's attorney." *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). Isabella does not controvert recent statements of this Court that the trial court "must do more than give lip service to the word 'reasonable.' The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis." *Berryman v. Metcalf*, 177 Wn. App. 644, 658, 312 P.3d 745 (2013), *review denied sub nom., Berryman v. Farmers Ins. Co.*, 179 Wn.2d 1026, 320 P.3d 718 (2014).

Isabella does not contest any of this clear law, which was not followed in this case. The commissioner entered a judgment for attorney's fees in the amount of \$7,728.56 (CP 89), "pending filing of counsel's declaration re fees, which shall be provided to counsel & court. Seven day[s] to file declaration" (CP 92). Isabella's counsel filed such a declaration on January 23, 2015 (CP 103-113), within seven days of January 16, 2015. There is no evidence that the commissioner looked in the court file or reviewed the declaration after it was filed. Certainly no findings of fact or conclusions of law were entered regarding the reasonableness of the fees requested. Isabella does not even contest this manifest error.

Rather than even attempt to refute any of this clear law on

point, Isabella raises several objections which may be easily disposed of.

**B. The Judgment for Attorney's Fees Was an Appealable Order.**

First, Isabella argues that the Commissioner entered a "provisional judgment." RB at 8. Isabella argues that the order in question is not a final order under RAP 2.2(a)(1), since it postponed any contempt finding for 30 days, and allowed for "reasonable/fair" attorney's fees only upon filing of a mandatory declaration within 7 days. RB at 13-14. This argument is without merit. Even if a contempt finding was postponed for thirty days, and even if the judgment was "provisional" until the attorney fee declaration was filed, once that declaration was filed on January 23, 2015, and the thirty days passed, the judgment, by its own wording, certainly became final at that point.

In the present case, the order of January 16, 2015, was entitled "Order on Show Cause re Contempt/Judgment" (CP 89). It contained a judgment summary (CP 89). It contained findings and conclusions (CP 90). Paragraph 3.9 provided that Isabella "shall have judgment" against Antonio "for reasonable/fair fees in the amount of \$7,728.56 for attorney fees and costs . . . which shall be paid directly to

[Isabella's] counsel, within thirty (30) days of the date of this order, pending filing of counsel's declaration re fees, which shall be provided to counsel & court. Seven day[s] to file[ ] declaration" (CP 92). The allowance of a seven-day period to file an attorney fee declaration does not make this order any less final, once the seven-day period has passed, which it did on January 23, 2015.<sup>1</sup>

Similarly, paragraph 3.1 of the order found Antonio in contempt (CP 91). The court then added a provision that the "court defers this finding for 30 days." Even if such a 30-day deferral preventing the January 16<sup>th</sup> order from becoming final, the order certainly became final on the thirtieth day following January 16<sup>th</sup>, assuming there was no intervening action or order. And there was no such action or order.<sup>2</sup>

Second, the order was appealable. A party may appeal from "[t]he final judgment entered in any action or proceeding." RAP 2.2(a)(1). A final judgment is "a judgment that ends the litigation,

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<sup>1</sup>The order provided no court scrutiny of the attorney-fee declaration, but merely the filing of such a declaration within seven days.

<sup>2</sup>Antonio's notice of appeal was filed on February 17, 2015, more than thirty days after entry of the January 16<sup>th</sup> order, so the January 16<sup>th</sup> order was in all respects final when the notice of appeal was filed. (The filing of the notice of appeal was timely because the thirtieth day following January 16<sup>th</sup> fell on a weekend, and the first business day following the thirtieth day was Monday, February 17<sup>th</sup>. RAP 5.2(a); RAP 18.6(a)).

leaving nothing for the court to do but execute the judgment." *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 79 Wn.App. 221, 225, 901 P.2d 1060 (1995) (citing *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945)), *aff'd*, 130 Wn.2d 862, 929 P.2d 379 (1996). Even an unresolved issue of attorney's fees for the litigation in question does not prevent a judgment on the merits from being final. *Budinich v. Dickinson*, 486 U.S. 196, 202, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988).

Isabella offers no date as to when she contends the January 16<sup>th</sup> order became final. The order was final with respect to attorney's fees on January 23, 2015, when Isabella's attorney's fee declaration was filed. The order became final with respect to the contempt finding on February 15<sup>th</sup>, thirty days after the January 16<sup>th</sup> order was entered, and before the notice of appeal was filed.

Even if the order entered on January 16, 2015 was somehow not final by February 15<sup>th</sup>, it certainly became final by March 18, 2015, when the trial court entered an order enforcing the judgment entered on January 16, 2015 (CP 101-02).

Thus the January 16<sup>th</sup> order was final and appealable.

**C. Antonio Was Not Required to File a Motion for Revision.**

Isabella argues that Antonio's remedy in this case was not to file a notice of appeal of the Commissioner's order, but to file a motion for revision. This argument fails. Antonio had the option to file either a motion for revision or a notice of appeal. He chose the latter.

RCW 2.24.050 allows either party to request revision by filing a motion for revision within ten days of entry of the commissioner's order:

**All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge.**

RCW 2.24.050.

This language clearly and unambiguously gives the party requesting superior court review of a commissioner's order ten days from the date of the commissioner's order to move for revision. The statute also clearly and unambiguously provides that a party who does

not act within the ten days may seek relief from the appellate court. *Robertson v. Robertson*, 113 Wn. App. 711, 714, 54 P.3d 708, (2002); see *State v. Mollichi*, 132 Wn.2d 80, 93, 936 P.2d 408 (1997).

Thus, under RCW 2.24.050, a party may *either* file a motion for revision of a Commissioner's order within ten days, *or* file a notice of appeal within thirty days. There is simply no requirement that a motion for revision be filed before a matter may be appealed. Isabella cites no authority for such an argument, and it should be rejected.

**D. Antonio Did Object to the Attorney's Fees Requested by Isabella.**

Isabella argues that the appellate court may decline to consider an issue that was not the subject to an objection at trial, citing *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002). RB at 9. While that is a correct statement of the law, the argument is based on a faulty premise.

Antonio did object in the lower court to the amount of the fees in his response to Isabella's motion (CP 65). He objected to both the necessity for, and the amount of, the fees requested. *Id.* At first glance, charging \$7,728.56 in fees for filing one motion for contempt for non-payment of maintenance would, on its face, appear unreasonable, and the declaration submitted in support of the fees

does not justify the fees sought.<sup>3</sup> But the Commissioner did not review the declaration before the judgment for the fees was entered, so Antonio had no way to have the amount of fees reviewed, except by (a) filing the present appeal, (b) filing a motion for reconsideration within ten days, or (c) filing a motion for revision within ten days. Antonio chose option (a).

The commissioner gave no scrutiny to the fee request—indeed did not have a fee declaration when the judgment was entered—and awarded the full amount requested, subject only to the *filing* of the declaration—not even the *filing and review* of the declaration. There is no evidence that the Commissioner reviewed the declaration after it was filed. Once the declaration was filed on Friday, January 23, 2015, Antonio had only one business day to file a motion for revision or reconsideration (within the ten-day period, expiring on Monday, January 26, 2015), or obtain review by appeal. One business day is an unreasonable period of time for Antonio’s counsel to be able to review the declaration and file a motion for revision.

So the husband chose to appeal. Isabella cannot complain that

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<sup>3</sup>Antonio could not make any more detailed objection to the requested fees at the hearing, because no declaration in support of the fees had been filed. It was impossible to know how the fees were calculated until the fee declaration was filed seven days after the hearing and seven days after the Commissioner had already determined the amount of the fees.

such a choice was made, given Antonio's lack of any meaningful opportunity to challenge the amount of the fees incurred in one contempt hearing.

Isabella further argues that there is "no evidence Francisco [Antonio] ever contested the reasonableness of [the declaration] of attorney's fees or costs to the Commissioner or by a Motion for Revision." RB at 6. As noted earlier, Antonio objected to the necessity for and amount of attorney's fees in his response to Isabella's motion (CP 65). Antonio's counsel did not have to repeat that argument at the hearing before the Commissioner, especially when counsel had no attorney fee declaration from Isabella's attorney setting forth the time spent and the matter worked on.

Moreover, when awarding attorney's fees, the court is required to enter findings and conclusions as to how the fees were determined. *Mayer v. City of Seattle*, 102 Wn. App. 66, 79, 10 P.3d 408 (2000), review denied, 142 Wn.2d 1029, 21 P.3d 1150 (2001). No such findings and conclusions were entered here.

Furthermore, Isabella cites no authority for the proposition that Antonio was required to file a motion for revision. RCW 2.24.050 permits either a motion for revision or an appeal. As noted earlier, statute and case law supports that conclusion. *Robertson v.*

*Robertson*, 113 Wn. App. 711, 714, 54 P.3d 708, (2002); *State v. Mollichi*, 132 Wn.2d 80, 93, 936 P.2d 408 (1997).

**E. The Declaration of Antonio’s Attorney Should Have Been Considered by the Commissioner.**

Finding No. 2.5 provided in handwriting that “Petitioner’s atty [attorney] cannot testify & presented no LR 10 documents for court’s review” (CP 90). Isabella argues that “an attorney cannot testify.” RB at 5. This is incorrect.

“An attorney’s affidavit is entitled to the same consideration as any other affidavit based on testimonial knowledge.” *Glesener v. Balholm*, 50 Wn. App. 1, 4, 747 P.2d 475 (1987); *Meadows v. Grant’s Auto Brokers*, 71 Wn.2d 874, 880, 431 P.2d 216 (1967) (same). It was therefore error for the Commissioner to completely disregard Antonio’s attorney’s declaration.

**F. There Was No Evidence that There Was a Lack of Order and Decorum in the Proceedings Before the Commissioner.**

In responding to Antonio’s argument that the Commissioner erred in enforcing immunity from service of process in the courtroom, Isabella argues only that service in the courtroom “seems to impinge on the Code of Judicial Conduct, Rule 2.8(A) which states ‘A Judge

shall require order and decorum in proceedings before the Court.”

This argument fails.

Of course a commissioner or judge has the inherent authority to maintain order in the courtroom. The problem with Isabella’s argument is that there no evidence whatsoever here that appropriate order or decorum was threatened. Handing papers to someone standing next to the person does not necessarily involve lack of order or decorum. Moreover, here the papers had already been served on Isabella, as the Commissioner told Antonio’s attorney to take the papers back (RP 9). If serving the papers caused any lack of order or undue decorum, then taking the papers back would involve as much or more lack of order or decorum.

Rather than being concerned with order and decorum, the Commissioner was applying an unalterable and invariable rule of law that “[w]hen a judicial officer sits on the bench, you may serve nobody without asking the person sitting on the bench” (RP 9). The problem is that there is no such rule of law—certainly none cited to this Court-- unless it comes within the scope of immunity from service of process, as described in Antonio’s opening brief (App. Br. 12-19).

Currently, attorneys do not have to ask permission from the court before they hand papers to another person in the courtroom.

From a practical standpoint, handing a copy of a summons and petition should be no different. The difference is, of course, the legal effect of handing the different kinds of documents to the recipient. In either case there is no necessary interference with decorum in the courtroom, and if there is, the court is certainly in a position to deal with it.

Here, the Commissioner's application of an imagined hoary rule of law assisted Isabella—who claimed to live out of state with no fixed address and whose counsel refused to accept service on her behalf—in delaying any modification of maintenance which Antonio could no longer afford due to loss of his \$126,00 per year job at the FAA (CP 70). At the time of the hearing, Antonio was living only on his share of his Boeing pension, social security and the relatively small amount of pension from the FAA (CP 7, 63). Clearly Isabella wanted to delay as long as possible any modification of the \$2,500 per month maintenance she was receiving from him directly.

Thus the Commissioner erred in refusing to let Antonio's attorney serve Isabella at the January 16<sup>th</sup> hearing and requiring him to take back the papers he had just served upon her.

**G. Antonio's Counsel Did not Cause the Error Regarding Preparing a QDRO.**

The Commissioner ordered Antonio and his counsel to "prepare the Qualified Domestic Relations Order (QDRO) re his Federal Aviation Administration (FAA) retirement as of the date of his retirement of February, 2014" (CP 92, ¶3.8). This language was in the proposed order submitted by the wife's attorney (CP 89-93), which language was unquestionably accepted by the commissioner.

However, the FAA QDRO had already been prepared by the Antonio's counsel, signed by the trial court and filed with the court on November 13, 2012 (CP 19-22), over a year earlier. It was signed by the wife herself (CP 22). The husband's counsel even sent the wife's counsel a copy of the FAA QDRO in November, 2014 (CP 68, 70), two and one half months before the January 16<sup>th</sup> hearing. Isabella's attorney thus erred in seeking an order that an already-filed QDRO be prepared and filed anew, and the Commissioner erred in requiring Antonio to perform an act he had already done. Rather than address these established facts, Isabella tries to shift the blame on Antonio's counsel for allegedly misleading the court about the preparation of the QDRO (RB at 9-10).

The Commissioner stated that she had read everything that was

submitted at the hearing (RP 8). The fact that a copy of the QDRO had been signed by Judge Yu in the divorce proceedings and provided to Isabella's counsel was part of the submission to the Commissioner at the hearing (CP 68, 70). Therefore, Antonio's counsel could rely on the fact that the Commissioner had read that the QDRO had been signed. In responding to the Commissioner at the hearing, Antonio's counsel was assuming that Isabella wanted some document other than what had already been filed in the case, e.g., some document from the FAA or the federal government. Antonio, of course, had no control over that. The FAA QDRO had been filed with the court, and that is all he could do.

As an officer of the court, Isabella's attorney had an obligation to advise the court that the QDRO in question, a copy of which she had received, had been filed, and there was no need for any other QDRO. If she had any doubt about the filing of the QDRO, she could have checked the court file to see that it had been filed (CP 19-22). Antonio's attorney assumed that Isabella's attorney would realize that the QDRO had been filed and would drop that request.

In any event, it was clearly error for the Commissioner to order a QDRO to be prepared and filed, when the QDRO in question had already been prepared and filed, and the matter was of record. That

part of the order should be reversed.

**H. Isabella Is Not Entitled to Attorney's Fees on Appeal.**

Isabella argues that she is entitled to attorney's fees under RCW 26.18.160, which she asserts are mandatory at both the trial and appellate level, citing *Marriage of Dicus*, 110 Wn. App. 347, 40 P.3d 1185 (2002) (RB at 11, 15); *Marriage of Abercrombie*, 105 Wn. App. 239, 244, 19 P.3d 1056 (2001). She argues that there need be no showing of need or ability to pay. *Marriage of Rhinevault*, 91 Wn. App. 688, 696, 959 P.2d 687 (1998). This argument is without merit.

Dicus holds that the "*prevailing* obligee in an action to enforce a support order is entitled to an award of costs and attorney fees at both the trial and appellate level [*italics added*]." 110 Wn. App. at 359. RCW 26.18.160 provides for attorney's fees to the *prevailing party* in an action to support a maintenance order. Isabella should not be considered the prevailing party in this appeal.

**I. Appellant Antonio Is Entitled to Attorney's Fees on Appeal.**

The court has discretion to award attorney fees based on a balancing of the needs of the spouse seeking fees against the ability of the other spouse to pay. RCW 26.09.140; *In re Marriage of Moody*,

137 Wn.2d 979, 994, 976 P.2d 1240 (1999). Fees should be awarded to Antonio based on his need and Isabella's ability to pay. See, *Marriage of Choate*, 143 Wn. App. 235, 246, 177 P.3d 175 (2008).

This court should therefore order that Appellant is entitled to attorney's fees on appeal.

## II. CONCLUSION

For the reasons set forth above, this Court should reverse the judgment for attorney's fees in favor of Isabella, vacate the requirement that appellant draft a QDRO that has already been filed, rule that the commissioner may consider a motion to modify when considering whether a party is in contempt, and award attorney's fees and costs to appellant on appeal.

RESPECTFULLY SUBMITTED this 14th day of August, 2015.

**Law Offices of Dan R. Young**

By Dan R. Young  
Dan R. Young, WSBA # 12020  
Attorney for Appellant Antonio  
Castillos

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

_____	)	
In re the Marriage of:	)	
	)	
FRANCISCO A. CASTILLOS,	)	
	)	NO. 73117-3-I
Appellant,	)	
	)	DECLARATION
and	)	OF SERVICE
	)	
ISABELLA CASTILLOS,	)	
	)	
Respondent.	)	
_____	)	

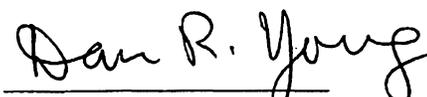
I, Dan R. Young, declare to be true under penalty of perjury under the laws of the State of Washington as follows:

1. I am an attorney representing the appellant Francisco Castillos in this action.

2. On August 14, 2015, I sent by the USPS, first class mail with pre-paid postage affixed, a copy of Reply Brief of Appellant in this case to the following:

Law Offices of Jon W. Knudson  
P. O. Box 229  
(17232 Vashon Hwy. SW)  
Vashon, WA 98070

Dated: August 14, 2015, at Seattle, Washington.

  
\_\_\_\_\_  
Dan R. Young