

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

IN RE PARENTING AND SUPPORT OF:

BAINYA SHAY, Child,
THOMAS O. BAICY,
Appellant,

and

DANELLE M SHAY,
Respondent.

RESPONDENT'S BRIEF

Danelle Shay
25614 NE 47th Place
Redmond, Washington 98053

2016 OCT -4 AM 10:48
COURT OF APPEALS DIV I
STATE OF WASHINGTON

ORIGINAL

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INTRODUCTION

This is a responsive brief to the appeal made by Thomas O. Baicy, Appellant, of the court's July 29, 2015 Order on Show Cause re: Contempt finding the appellant:

had not made any effort to purge the \$4500.00 in sanctions ordered February 23, 2012;

had not been paying monthly child support as ordered, \$402.93 per month; made very few payments overall for the period of 2013 – 105, and this non-compliance was in bad faith; and

took the child when it was the Respondent's residential weekend, November, 14 – 17, 2014. The Court finds the practice of the parties has been to count the number of Fridays in the month as to how many weekends of the month there are, for example, October 2, 2015 is the first weekend of the month, and October 30, 2015 is the fifth weekend of the month. This non-compliance was in bad faith.

As a result of these findings, the Appellant was found in contempt. CP 137-143.

The Appellant is, also, appealing the October 21, 2015 Order Confirming Commissioner's Ruling (titled "Order Denying Petitioner's Motion for Revision and Granting Respondent's Motion for Revision" and dated October 12, 2015), which amongst things found:

the Appellant took the child for his residential the weekends of November 7-9, 2014 and November 14-17, 2014, so regardless how the weekends are determined, the Appellant took Respondent's weekend. Appellant had the burden to prove by a preponderance of evidence he lacked the ability to comply with the parenting plan, or had a reasonable excuse for noncompliance, and Appellant failed to meet his burden;

Appellant failed to provide evidence of due diligence in seeking employment or provide evidence of inability to comply the order of child support;

the hourly billing rate of Respondent's attorney, and total of numbers of hours expended and costs incurred to be reasonable in light of the pleadings, and hearings in this matter;

the conditions for purging the contempt in the July 29, 2014 were too lenient in light of the past history of Appellant's noncompliance;

the review hearing scheduled in the July 29, 2014 order not soon enough.

As a result of these, and other findings, the Court denied the Appellant's motion for revision, and granted Respondent's motion for revision. CP 159-167.

There is significant evidence support the findings and orders of both courts. In addition, much of Appellant's brief is neither supported by the record, or Washington law. It is respectfully requested the Court deny the appeal, and award additional fees and costs.

A. RESTATEMENTS OF ERROR

1. The Court did not err when it found the Appellant took the child on Respondent's weekend, November 14-16, 2014, especially in light of the fact the Appellant, also, took the child for the prior weekend, November 7-9, 2014.

2. The Court certainly did not err holding the contempt hearing on July 29, 2015, since the warrant for Appellant's arrest, due to his

failure to appear for January 29, 2015 contempt hearing, was quashed as a condition of his agreeing to appear for, and have the hearing on the Respondent's contempt motions on July 29, 2015.

3. The Appellant's statement of error is nonsense, and not supported by the facts or law.

4. The Court did not err finding the Appellant had not met his burden that he could not pay child support as ordered.

5. The Court did not err by not ruling on Appellant's counter-claims which were not properly before it.

6. Appellant's appeal is frivolous.

B. RESTATEMENT OF THE CASE

Facts/Procedure: May 25 2011 a trial court entered an Order of Child Support requiring the Appellant to pay monthly child support to the Respondent in the amount of \$402.93 by the 5th of every month. CP 235-247. February 23, 2012, the Appellant was found in contempt of court for failure to follow the residential provisions of the parties' May 25, 2011 parenting plan, and as a requirement of purging contempt, the Appellant was required to pay the Respondent \$4500.00 within 30 days of the order. CP 248-252. The Appellant failed to pay the \$4500.00 or monthly child support as ordered. CP 253, 254, 257-258, 137-143, 159-167. A motion for contempt and supporting pleadings were filed November 14 and 17, 2014, and the court entered an order requiring the Appellant to appear and

show cause on December 2, 2014 why he should not be held in contempt. CP 232, 233-256, 257-258. Appellant was timely and personally served all the contempt pleadings. CP 287-288.

September 6, 2012 the Court entered a new parenting plan, but it did not change either the Appellant's weekends from the May 25, 2011 parenting plan – the 1st, 3rd, and 4th weekends, or the Respondent's weekends, 2nd and 5th. CP 261-269. Neither parenting plan specifically stated how the weekends were counted, however, since the first final parenting plan was entered May 25, 2011, the parties have been determining which weekend of the month it is by counting the number of Fridays in a month, and this is undisputed. CP 259. October 31, 2014, was a Friday, and the 5th weekend of the month, therefore, the Appellant did not pick up the child from school, and the child was with the Respondent that weekend. CP 101. The next weekend was the first weekend of November, 7-9, 2014, and Appellant picked up the child directly from school as required by the September 6, 2012 parenting plan for his weekend. CP 261-269, 101. The following weekend the Appellant, again, picked up their child directly from school for his weekend, November 14-16, 2014. CP 259-260, 101. At no time did the Appellant ask, or did the Respondent give permission for the Appellant to take the child for the weekend of November 14-16. A motion for contempt and supporting pleadings were filed November 17, 2014, and the

court entered an order requiring the Appellant to appear and show cause on December 2, 2014 why he should not be held in contempt. CP 270-271, 259-269, 276.

December 2, 2014, the Appellant requested a continuance in order to obtain an attorney to represent him for Respondent's contempt motions. The parties agreed to a continuance of that hearing to January 27, 2015. The form order also contained the following: failure to appear may result in the issuance of a warrant for arrest. CP 307.

No attorney subsequently filed a notice of appearance for the Appellant.

The Appellant failed to appear for the January 27, 2015 hearing, therefore, the Court entered an order directing the clerk of the court to issue a bench warrant for the Appellant's arrest due to his failure to appear. CP 308-309.

The Appellant was never arrested, but did appear in court on July 15, 2015, and promised to appear in Court to respond to Respondent's motions for contempt filed November 17, 2014, so the Court quashed the bench warrant, and scheduled the contempt hearing for July 27, 2015, and ordered the Respondent to be screened for financial eligibility regarding being assigned an attorney at public expense due to the contempt motions. CP 31-33, 34, 37.

An updated Division of Child Support child support payment

history was filed July 21, 2015. CP 78-80. This showed after Appellant's July 2013 monthly child support payment, he paid no more child support that year. For 2014, he made only three payments that year, \$100.00 July 22nd, \$150 September 9th, and \$113.70 September 29th. For 2015, as of July 21, 2015, the Appellant made no payments¹. For August 2013 through July 2015, the Appellant paid the Respondent a sum total of less than one month's child support.

Appellant responded July 23, 2015. CP 81-86, 87-91, 93-100, 195-231. The following are his relevant arguments.

Re: Parenting Plan. Appellant essentially argued to determine the weekend requires using which Saturday or Sunday of the month it is. He does not explain if the 1st of the month is on a Sunday if that is then the first weekend, or isn't because the day before, Saturday is part of the previous month. Appellant does not explain why he didn't pick up his daughter October 31, 2014, since the next day, November 1st was a Saturday, so per his own reasoning, that would be the first weekend of the month. Appellant does not explain why he picked up his daughter for his weekend November 7th, which would have been the 2nd weekend of the month per his reasoning. CP 88. Appellant's reasoning is illogical given his failure to pick up his daughter October 31st, and then taking his

¹ For unclear reasons, a child support payment of \$420.41 was recorded by DCS, but on the same day, credit for that payment was deducted by DCS.

daughter for his weekend November 7th, since by his reasoning, that was the 2nd weekend of the month, which is the Respondent's, and has been since their parenting plan was initially ordered May 25, 2011.

Re: Failure to Purge 2/23/12 Contempt. Appellant responds only with the February 23, 2012 order is void for lack of jurisdiction and due process violations. CP 94-95. This argument is frivolous, and not supported by anything. Respondent replied with Appellant's argument was false, and that order he complains of in his response had been previously appealed by the Appellant, and that appeal was denied. CP 105-116.

Re: Failure to Pay \$402.93/Month Child Support. The Appellant does not really explain why he paid so little child support from August 2014 to July 21, 2015, \$363.70 over that 24 month period, instead of the ordered amount, \$9670.32. Appellant simply references his the limited financial information he provided. CP 93-100. Respondent questioned the legitimacy of his financials, and his alleged lack of ability to pay child support. Appellant owns free and clear multiple properties in King County worth \$833,700.00, including the 4-plex he lives in, and rents out. His math on his financial declaration made no sense. He claimed to be paying taxes and insurance monthly, but the total listed was total property taxes owed on all three properties, and he wasn't paying them. His business deductions were questioned. He lives at his 4-plex,

and his two other properties are bare land just block or two from his 4-plex, so his car and truck expenses are not legitimate. His claim of transportation expenses in his financial declaration were, also, questioned. The math in his financial declaration is simply wrong; he claimed \$4505.84 in monthly expenses, yet the figures he provides add up to only \$2117.34. Also, questioned if he had any other monies on deposit elsewhere like Bank of Singapore. His parents own a very well off international business, Bay-Sea Cable System Inc. based in Singapore, and they have financially helped him in the past, and he did have a bank account at Bank of Singapore. CP 103, 117-122.

Hearing on Respondent's two contempt motions was held on July 29, 2015. CP 137-143, VRP 7-29-15 at 1-24. Amongst the findings the Court made were the following:

the Appellant had not made any effort to purge the \$4500.00 in sanctions ordered February 23, 2012;

the Appellant had not been paying monthly child support as ordered, \$402.93 per month; made very few payments overall for the period of 2013 – 105, and this non-compliance was in bad faith; and

the Appellant took the child when it was the Respondent's residential weekend, November, 14 – 17, 2014. The Court finds the practice of the parties has been to count the number of Fridays in the month as to how many weekends of the month there are, for example, October 2, 2015 is the first weekend of the month, and October 30, 2015 is the fifth weekend of the month. This non-compliance was in bad faith.

The Appellant was found in contempt, and ordered to:

strictly follow the September 6, 2012 parenting plan, and May 25, 2011 order of child support to the letter for the next 12 months without fail. Pay an additional \$100.00 per month (on top of the regular monthly basic support payment) each month for back child support owed until he is current (DCS shall collect). Pay \$50.00 per month directly to the Law Office of Cassady • Filer, L.L.P. towards the February 23, 2012 attorney fees and costs judgment including interest.

The Respondent was given a judgment of \$2839.09 for attorney fees and costs. The matter was set for review on January 17, 2016 for compliance.

The Appellant timely filed for revision. CP 310-311.

Hearing on the motion for revision was October 12, 2015. CP 159-167, and VRP 10-12-15 at 1-56. The Court found, amongst thing:

the Appellant's argument there might be confusion as to which weekends in November were his may have credibility but for the, fact he took the 1st and 2nd weekends using both his suggested method of counting, as well as Respondent's method of counting, so either way, he took the child for the second weekend of November, and that was done in bad faith, hence the finding of contempt stands. Appellant had the burden to prove by a preponderance of evidence he lacked the ability to comply with the parenting plan, or had a reasonable excuse for noncompliance, and Appellant failed to meet his burden;

referring to RCW 28.18.050(4), the Appellant failed to provide evidence of due diligence in seeking employment or provide evidence of inability to comply the order of child support;

the hourly billing rate of Respondent's attorney, and total of numbers of hours expended and costs incurred to be reasonable in light of the pleadings, and hearings in this matter;

the conditions for purging the contempt in the July 29, 2014 were too lenient in light of the past history of Appellant's noncompliance;

the review hearing scheduled in the July 29, 2014 order not soon

enough.

As a result of these, and other findings, denied the Appellant's motion for revision, and granted Respondent's motion for revision. CP 159-167. The revision increased the monthly amount the Appellant was to pay towards the \$4500.00 sanctions, \$200.00 per month, increased the attorney fees and costs², and scheduled an earlier review hearing, December 2, 2015. This appeal followed.

C. SUMMARY OF ARGUMENT

Appellant's appeal is without merit. The court orders of July 29, 2015 and October 23, 2015 are well supported by the facts, and the law. The Appellant took the child when he knew it was Respondent's weekend to have the child. The Appellant failed to make any effort to purge the portion of the contempt order from February 23, 2012 that required him to pay \$4500.00 within 30 days. The Appellant made no effort to pay child support as ordered. From August 2013 through July 2015, he paid a total of \$363.70 in child support, instead of the \$402.93/month he was ordered to pay, which would have been a total of \$9670.32 for that time period. The attorney fees and costs ordered are reasonable in light of the multiple hearings, and pleadings.

D. ARGUMENT

² The fees and costs were based upon CP 302-303, 123-124, and VRP 10-12-16 at 35-37.

1. IS APPELLANT'S ARGUMENT THAT THE WEEKEND OF NOVEMBER 14-16, 2016 WAS HIS SUPPORTED BY THIS OWN ACTIONS?

No, because if the weekend of November 14-16, 2014 was actually the 3rd weekend of the month, his weekend, then he should not have taken the child the weekend prior, which would have been the Respondent's 2nd weekend, and he should have taken the child October 31-November 2, 2014.

Appellant's argument did not make sense at the court hearings July 29, 2015, and October 12, 2015; and still does not make sense today. There was no actual ambiguity in the parenting plan, and practice of the parties. For the prior 3-1/2 years, the parties counted the Fridays to determine the weekends. CP 259. That practiced continued right up to the weekend the Appellant wrongfully took his child for the weekend. October 31, 2014, was a Friday, and the 5th weekend of the month, therefore, the Appellant did not pick up the child from school, so the child was with the Respondent that weekend. CP 101. The next weekend was the first weekend of November, 7-9, 2014, and Appellant picked up the child directly from school for his weekend. CP 261-269, 101. The following weekend the Appellant, again, picked up their child directly from school for his weekend, November 14-16, 2014. CP 259-260, 101. At no time did the Appellant ask, or did the Respondent give permission for the Appellant to take the child for the weekend of November 14-16. It is impossible for the Appellant to have those two weekends in a row

regardless of how the weekends are determined³.

The initial July 29, 2014 contempt order did find that not giving the Respondent a make-up weekend was equitable, given the lack of a clear definition of how a weekend is defined. CP 139. However, that contradicts the same court's finding that the practice of the parties had been to count the number of Fridays in the month, for example October 2, 2014 was the first Friday, therefore, the first weekend of the month, and October 31, 2014 was a Friday, therefore, the 5th weekend of the month. CP 138. Appellant's professed confusion is negated by him taking the child the weekend of November 14-16, which he claimed was the third weekend of the month, *and* the weekend prior November 7-9, which would then be the second weekend. CP 88. As clearly found on revision, Appellant's argument failed to convince the Court because he took both his claimed 2nd and 3rd weekends. CP 160. Appellant's arguments are not logical, and frivolous!

2. THE APPELLANT OFFERS NO LEGAL SUPPORT FOR HIS CLAIM THE ORDER TO SHOW CAUSE LAPSED, AND MAKES NO SENSE GIVEN THE FACT BECAUSE HE FAILED TO APPEAR FOR THE JANUARY 29, 2015 CONTEMPT HEARING, A WARRANT FOR HIS ARREST WAS ISSUED.

None of the claims or law cited in Appellant's Assignment of Error No. 2

³ Using Appellant's argument, he should have picked up the child October 31, 2014 for his 1st weekend of the month residential time. He did not. Still using Appellant's argument, he then should not have picked up the child the next weekend, November 7-9, because that would have been the 2nd weekend of the month, which is the Respondent's.

makes any sense.

The November 17, 2014 orders to show cause set the return date as December 2, 2014. CP 357A, 364. That hearing was continued to January 27, 2015 by agreement of the parties in part because the Appellant wanted to obtain an attorney to represent him. CP 307. When the Appellant failed to appear at the January 27th hearing, the Court issued the order for the clerk of the court to issue the bench warrant for Appellant's arrest. CP 374. But for the fact the Appellant agreed in court on July 15, 2015 to appear for holding the contempt hearing on July 29, 2015, the Court would not have quashed the bench warrant, and not scheduled the hearing, or directed him to the Office of Public Defense for screening. CP 31-33, 34, and 37. Appellant's Assignment is frivolous!

3. DID THE COURTS PROPERLY AWARD ATTORNEY FEES AND COSTS?

Yes, the Court awarded reasonable attorney fees and costs.

Appellant's arguments are supported by neither the law, nor facts. The attorneys fees and costs were awarded pursuant to RCW 26.09.160(2). CP 162-163. Upon a finding of contempt, the court shall order: (i) The noncomplying parent to provide the moving party additional time with the child. The additional time shall be equal to the time missed with the child, due to the parent's noncompliance; (ii) The parent to pay, to the moving party, all court costs and reasonable attorneys'

fees incurred as a result of the noncompliance. See RCW 26.09.160(2). Appellant's then attorney, Richard B. Cassady, Jr., is not a party to this litigation, therefore, Mr. Cassady is not appearing pro se. The Respondent is not Mr. Cassady's child. Mr. Cassady has appeared as Appellant's attorney. The contempt motions are well supported by the law, and facts. To resolve the Respondent's contempt motions took multiple hearings – November 17, 2014 (CP 232, 276), December 2, 2014 (CP 307), January 27, 2015 (CP 308-309), July 15, 2015 (CP 34), July 29, 2015 (137-143), and October 12, 2015 (CP 159-167). The remainder of Appellant's argument is not relevant to assignment of error, or the contempt orders of July 29, 2015, and October 21, 2015. Again, Appellant's arguments are frivolous!

4. WAS THE APPELLANT IN CONTEMPT FOR FAILURE TO PAY CHILD SUPPORT AS ORDERED?

Yes, over a 24 month period, the Appellant failed to pay even a total of one month's child support, let alone pay 24 months of support, and failed to provide any evidence he exercised due diligence in seeking employment, or otherwise rendering himself able to comply with the order of child support.

The Appellant provided no narrative as to why he paid only \$363.70 from August 2013 through July 2015, instead of the court ordered amount, \$9670.32 (\$402.93/month). Appellant relied upon his financial declaration, and financial documentation, but that documentation was inaccurate, incomplete, and not credible. CP 161- 163, 103. Even the July

29, 2015 court determined Appellant's 4-plex was bringing in \$3200/month for him. VRP 7-29-15 at 9-12. Appellant's claims lack credibility, as well as merit.

5. APPELLANT'S COUNTER CLAIMS NOT PROPERLY BEFORE THE COURT.

Due to the Appellant filing many frivolous motion and petitions, he was not allowed to bring any motion or petition without advance judicial authorization, which he had not obtained. Furthermore, none of Appellant's counter-claims were the same as the issues before the Court, therefore, they were properly ignored, as well as being frivolous. CP 102.

Order on Reconsideration entered in this matter on May 16, 2012:

[Findings.] 5. On the basis of credibility determinations and findings made as a result of the trial, the statements made in the father's pleadings filed since entry of the orders following trial, the revision hearing, my familiarity with these parties, and the extent of litigation initiated by the father since the entry of the orders following trial, I find that the father continues to be angry and defiant, necessitating an order limiting his ability to file additional motions or petitions unless he obtains advance authorization from this court or a subsequent Chief Unified Family Court Judge, or if this court is unavailable, then from another Chief Judge or a UFC Judge. [Page 3]

[Order] The father shall not file additional pleadings, including petition or motions following those filed for the purpose of this motion for reconsideration, unless he obtains advance authorization as described in Finding 5.

6. IS THE APPELLANT'S APPEAL FRIVOLOUS?

Yes. Appellant's appeal is not supported by the facts, or the law, therefore, should be deemed frivolous. Clearly he took the child in November of 2014 when he should not have, even using his counting method. He didn't pay child support for two years, while providing financial information that is clearly false on its face, and incomplete, and does not provide any actual explanation as to why didn't pay child support. His appeal is frivolous.

(a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party... who... files a frivolous appeal... to pay terms or compensatory damages to any other party who has been harmed by the delay... See RAP 18.9(a).

In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) 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. SEE Jordan, IMPOSITION OF TERMS AND COMPENSATORY DAMAGES IN FRIVOLOUS APPEALS, Wash. St. B. News, May 1980, at 46. *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980).

//

E. CONCLUSION

This appeal should be denied, and terms assessed against the Appellant for this frivolous appeal. The Appellant made no effort to purge the February 23, 2012 contempt of court finding against him requiring him to pay \$4500.00 within 30 days. No effort.

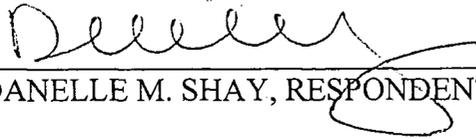
The Appellant took their child for a weekend that was not his weekend, November 14-16, 2014, per the parties' parenting plan. Per their history, the parties counted the weekends by counting Fridays. However, even if Appellant's purported method of counting weekends was accepted, then he wrongfully took the child for the weekend prior, November 7-9, 2014. Under either theory of counting weekends, the Appellant wrongfully took the child.

The Appellant did not pay child support as ordered for two years. He made essentially no effort to pay, and has no credible excuse as to why he did not.

The attorney fees and costs awarded are reasonable given the amount of litigation it took to resolve the contempt motions, and supported by Washington law.

The Appellant's appeal is frivolous, and not supported by the facts, or the law. It is for these reasons it is request the Appellant's appeal be denied, and terms assessed against the Appellant, and in favor of the Respondent. Thank you!

Respectfully submitted this 30 day of September, 2016.



DANELLE M. SHAY, RESPONDENT PRO SE

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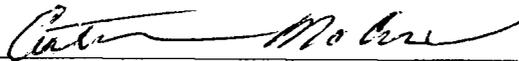
DECLARATION OF SERVICE

I, Autumn McCune, AM OVER THE AGE OF 18 NOT A PARTY TO THE PROCEEDINGS, AND DECLARE:

I sent, via ABC Legal Messengers, the original of this RESPONDENT'S BRIEF to be personally delivered no later than October 4, 2016 to the Court of Appeals, Division I. Furthermore, a copy has been sent to the Appellant via first class mail postage prepaid at 1231 W. James St., #4, Kent, WA 98032.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Seattle, Washington, on October 3, 2016.



Autumn McCune