74034-2

No. 74034-2-I
Consolidated

FILED
Sep 14, 2016
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Marriage of

ARADHNA FORREST
Respondent

and

VIKAS LUTHRA
Appellant

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case involves the child of the parties' marriage, which ended with final orders entered in July 2010. The child is now age 13. This is the father's third appeal; he has also sought discretionary review. Essentially, the father contests the trial court's ruling in 2010 that he has serious mental health problems that harm his child and ordering him to obtain treatment effective to remedy those problems. Because the only proper subject of the current appeal must be the court's more recent orders, this brief will focus on the arguments that relate to those orders. Though he tries here and in the trial court, the father cannot relitigate the 2010 order.

II. RESTATEMENT OF THE ISSUES

1. Substantial evidence supports the trial court's finding that Luthra intentionally failed to comply with the 2010 child support order and that he had the ability to comply.

2 Substantial evidence supports the trial court's finding that Luthra intentionally failed to comply with the 2010 parenting plan provision and that he had the ability to comply.

3. The court may order sanctions to coerce compliance with its orders. Such an enforcement order neither modifies nor clarifies; it enforces.

4. The constitutional prohibition against double jeopardy does not apply to the coercive sanctions ordered pursuant to the court's civil contempt power.

5. The coercive sanction of work crew assignment is not punishment, let alone "cruel and unusual" punishment.

6. Should Forrest receive her fees and costs on appeal?

III. RESTATEMENT OF THE CASE

1) Parenting Plan

In 2010, after a five-day trial, Judge Deborah Fleck found the father's OCD-related conduct "has an adverse interest" on the child's best interests" (RCW 26.09.191(3)(g)) and "constitutes an emotional impairment that interferes with the father's performance of parenting functions under RCW 26.09.191(3)(b)." CP 61. The court found the child's best interests "will be served if his father obtains intensive treatment for his OCD so that [the child] can continue to have the regular presence of his father in his life in a way that is healthy for him." CP 61; see, also, CP 60-63.

The court also found Luthra engaged in the abusive use of conflict and "engaged in behaviors designed to align [the child] emotionally with the father and against the mother" and otherwise involved the child in the litigation. CP 61.

Accordingly, the court ordered the father into a specific treatment regimen, as recommended by the parenting evaluator. CP 61. For example, the court ordered the treatment provider have the relevant expertise and that the therapy should be "intensive" and "home-based," since the father's problematic behavior was worst and most affecting at his home. CP 62.[1] The court conditioned reinstatement of a mid-week residential visit on compliance with this order, that is: until the therapist "affirmatively reports on the father's commitment to and progress in treatment" and reports "that the father is engaged in and making progress in intensive therapy…." CP 62. Luthra did not appeal these findings or restrictions.

To this day, the father has disregarded Judge Fleck's order, instead insisting upon a prerogative to design his own treatment program, behavior consistent with his earlier refusals to stick with

[1]The court placed these details in the findings to protect the father's privacy, which would be affected by inevitable dissemination of the parenting plan itself (e.g., to schools, doctors, etc.). CP 246-247.

programs that promised to actually help his condition. His noncompliance has arisen repeatedly in litigation subsequent to the parenting plan's entry, including during proceedings to enter an amended parenting plan in 2013. See, e.g., 69 (06/06/11 order that father "shall commence treatment for his Obsessive Compulsive Disorder (OCD), as set forth in the Court's Findings of Fact and Conclusions of Law, dated July 8, 2010, within three months of this Order"); CP 73-78 (06/05/13 hearing where court reprises history, including inadequacy of father's therapy); CP 236 (court acknowledging failure of father to comply and ordering mother to have sole decision-making about child's therapist). Luthra has ignored these repeated admonitions.

In 2015, Forrest sought by motion to gain Luthra's compliance with the court's treatment order. CP 3-79. Again, the father argued that the therapeutic interventions he preferred were sufficient, offering that his providers have previously attested to his "normalcy." 1RP 18 (sees his counselors); CP 100-101. Luthra made this same argument to Judge Fleck in 2013, which she rejected in no uncertain terms, reiterating the reason and evidence for the specific requirements of her 2010 order. CP 73-38; 1RP 14.

Luthra also argued that the treatment Judge Fleck ordered was unavailable through his insurance and that he seemed unable to find a provider meeting the requisites of the order. 1RP 16, 33-36, 38-39, 42-44. Judge Fleck did not invent this treatment regimen; it was recommended with particularity by the psychologist who performed the parenting evaluation. Supp. CP __ (sub 422, at 21). Nor is compliance contingent on insurance-eligibility. CP 75. If Luthra wanted to contest the existence of this form of treatment, or its availability through insurance, he needed to do that at trial in 2010.[2]

As had Judge Fleck, Judge O'Donnell disagreed with Luthra's assertions, finding instead that he "failed to provide evidence showing inability to obtain" the ordered treatment and that he possessed the ability to comply and that he is currently unwilling to comply, which noncompliance is "in bad faith." CP 256-257. The court threatened jail time in an effort to get through to Luthra that he could not go six years defying the court's orders and that those

[2] Forrest was able to identify a potential therapist through a simple Internet search. CP 618, 627. (Can be replicated by going to the website for the International OCD Foundation, where at least fifteen psychologists, accepting private insurance, are listed for area code 98056 – Newcastle, where Luthra resides). Luthra nevertheless maintained finding a therapist required "magic[…]." 1RP 41. The court disagreed: "This is a big county, a big State. You will find someone." 4RP 10.

orders "matter." 1RP 26, 29, 41. The court gave Luthra two weeks to "propose through counsel his plan" to engage in the previously ordered treatment. CP 257. Luthra responded that he was investigating local treatment providers but that he could not afford any who were available. CP 274-285. In response, Forrest noted Luthra had made precisely these same excuses in the past and that he failed to substantiate any of his claimed efforts. See CP 288-289, 307-309 (Forrest's reply); 1RP 20-22.

On October 20, 2015, the court found Luthra made "no substantial progress in commencing OCD treatment." CP 353. The court did acknowledge "some progress," but not adequate given the length of time since the 2010 order. 1RP 40. The court ordered Luthra to serve 30 days on work crew on weekends and that he "shall make substantial progress re: commencing OCD treatment…." CP 353. The court further ordered that failure to comply would result in conversion to jail time. Id. Luthra did not appeal this order (though he attached it to a notice of appeal filed 04/25/16: Supp. CP __ (sub 452)).[3] The court also ordered Luthra to provide financial source information. 1RP 40-41.

[3] Luthra has not designated the notices of appeal. RAP 9.6(b)(1)(A).

On January 28, 2016, the court found Luthra "remains in contempt." Supp. CP ___(sub 431: Order). In light of an injury to Luthra's arm, the court suspended work crew duties for three weeks, substituting a requirement that Luthra perform volunteer work. Id.; 2RP 24-27. The court also noted any lack of "supplemental information" related to the OCD treatment and ordered Luthra to provide documentation of compliance by the next review hearing. Id.; 2RP 28 (Luthra conceding no evidence of his claims of treatment-related efforts); 2RP 29-31.[4]

On March 18, 2016, the court again found Luthra "remains in contempt." CP 765. However, Luthra did not appear at the hearing. The court noted Luthra's failure to document his volunteer activity and his failure to provide supplemental information on treatment as ordered. CP 766. "As a further coercive sanction," the court ordered Luthra "to complete 30 additional work crew days." CP 770. The court ordered $350 in attorney fees for the continuing contempt and his failure to appear. CP 770. See, also,

[4] At this hearing, the court also denied Luthra's motion for reconsideration. 2RP 29. For brevity's sake, omitted from this brief is any discussion of Luthra's effort to have Forrest found in contempt, which the court denied. See, e.g., CP 354-355; Supp. CP _ (sub 420: Response; 433: Order); 2RP 1-24. Luthra did not appeal from this order.

CP 569-571 (ordered fees for Luthra's violation of court rules governing motions for reconsideration).

In advance of the next review hearing, Luthra complained about the hardships he suffered from performing volunteer work and work crew due to his OCD. CP 573. In response, Forrest noted these complaints contradicted Luthra's oft-repeated claim that his OCD was well-controlled by the treatment regimen he preferred (to the one the court ordered). CP 616-617.[5] Luthra also repeated his claim to financial constraints on his ability to afford treatment. CP 573. Forrest pointed out that Luthra failed to document his financial circumstances and that his luxury cars and a recent major remodel to his home suggested his claims of poverty were false. CP 617-618, 620-623. Forrest also rebutted Luthra's claim that there were no treatment providers willing to do home-based therapy. CP 618, 627. Luthra attempted to make an appointment with the therapist Forrest easily found, but complained his insurance might only reimburse him for half the cost. CP 628-629. He asked for a continuance to June 3 for time to make an appointment. CP 630.

[5] Luthra repeats this claim in his brief. Br. Appellant, at 26-27 ("he is highly functional despite his diagnosis and is properly managing his condition with proper medical care").

The court held review hearings on May 17 and June 3, 2016 and entered an order on June 13 finding Luthra "remains in contempt." CP 767. Luthra still had "not obtained an appointment with a qualified provider who will do home based OCD treatment to comply with Judge Fleck's original order […] despite the Court's admonition to do so before the June 3 hearing in order to avoid potential incarceration as a coercive sanction." CP 769.[6] The court gave Luthra until June 17 to provide "written verification from a qualified treatment provider" that he has either commenced treatment or scheduled an appointment, or else face incarceration as a potential "further coercive sanction" at another review hearing to be set by the court. CP 770. The court also ordered 15 additional work crew days and attorney fees. CP 770. Luthra filed another notice of appeal.[7]

2) Child Support

An additional issue raised in these appeals concerns Luthra's financial obligations. In June 2015, Forrest sought an order of contempt for Luthra's failure to comply with the July 8,

[6] The ellipsis represents the court's footnote reciting again the requirements of Judge Fleck's 2010 order. CP 769 n.1.

[7] Luthra has not designated any of these notices. RAP 9.6(b)(1)(A).

2010 child support order and his failure to pay over $7,000 in attorney fees. CP 3-79.[8] (This is the motion that also sought to enforce the 2010 treatment order. CP 4, 6.)

The 2010 child support order obligated Luthra to pay $700 monthly as his transfer payment ("inclusive of partial daycare $166 of his monthly share of child care"). CP 10. The base daycare obligation is calculated in the worksheets, reflecting the parties' proportional shares. CP 21. As clarified in the 2013 amended parenting plan, the court expressly provided for this amount to be paid irrespective of any consulting, negotiating, verifying, reconciling, etc. between the parties. CP 760 (the first of two ¶¶ 6.14). See, also, CP 237-238.[9]

The order also included a provision requiring the parents to split 50/50 "Expenses not Included in the Transfer Payment" (e.g., daycare, activities). CP 13. Luthra was ordered to pay these expenses upon receipt of verification and to submit his own expense claims; the parties were to submit disputes to Jill Salmi or

[8] Luthra also had been ordered by this Court and the Supreme Court to pay $2,225 in attorney fees. Supp. CP __ (sub 442). Judgment for those fees and interest was entered on 03/16/16. Supp. CP ___ (443).

[9] A consistent theme in these long proceedings is the court having over and again to restate its original orders in the face of Luthra's persistent resistance to them. *See Marriage of Luthra,* No. 71018-4-I (11/17/14) (partial history recited therein); GR 14.1(a).

her appointee. CP 13. The order also required the parties to split uninsured medical expenses 50/50. CP 17. The only issue in these proceedings involves the transfer payment; the other expenses provision applies expressly only to "day care in excess of $332/mo." CP 13. As part of his transfer payment, Luthra pays half that base amount, or $166. Luthra did not appeal the child support order.

Since 2010, as he concedes, Luthra has failed to make all his transfer payments, resulting in a balance due of $9,500. CP 25-28, 91. (Of this, $310.59 derived from pretrial. CP 25.) The Division of Child Support, through which the Luthra payments are made, applies payments first to outstanding balances. CP 5. Judge Fleck had not relieved Luthra of his pretrial obligations. CP 17. He failed to provide any support for his claims of financial distress. 1RP 37-38. As the court noted, "there's nothing to back up the numbers" he attested to in his financial declaration. 1RP 39. The court did not find Luthra's assertions "trustworthy." 1RP 40.

Judge O'Donnell found Luthra in contempt for failure to pay $10,900 in child support (reflecting two additional $700 support payments that had accrued) and interest of $1,979.79. CP 254-255. The court also entered judgment for $1,257.34 interest on

unpaid attorney fees and awarded attorney fees of $5,348 to Forrest. CP 254. (The court also sanctioned Luthra's attorney $100 and awarded fees of $408, due from the attorney to Forrest. CP 255.) Luthra appealed.

IV. ARGUMENT

A. THE STANDARD OF REVIEW

This appeal mainly challenges the court's exercise of its contempt power, which this Court reviews for an abuse of discretion. *In re Marriage of Davisson*, 131 Wn. App. 220, 224, 126 P.3d 76, 77 (2006). Likewise, to the extent Luthra's challenge is to enforcement of child support orders, child support orders also are reviewed for an abuse of discretion. *In re Marriage of Booth,* 114 Wn.2d 772, 776, 791 P.2d 519 (1990).

B. THE COURT PROPERLY FOUND LUTHRA IN CONTEMPT FOR FAILING TO PAY CHILD SUPPORT.

Luthra assigns error to the court finding him in contempt for failing to pay child support when Forrest had not first attempted alternative dispute resolution. Br. Appellant, at 4 (Assignment of Error 1). In his statement of issues, he also claims the court modified an agreement purportedly negotiated with the co-parenting therapist. Br. Appellant, at 7 (Statement of Issues 1). He argues the facts supporting these claims at Br. Appellant, at 10-11.

He argues the court modified the child support order retroactively to 2011, then found him in contempt for violating the order. Br. Appellant, at 14-15. All of these assertions are baseless.

The court's order concerns only Luthra's transfer payment, not payment for any other child related expenses. CP 254-255. Luthra conceded he had withheld a portion of his transfer payment: "I have not paid the additional $166.00 monthly as, by agreement, I was not supposed to without pre-approval from me to petitioner." CP 91. There is no such agreement. The 2010 child support order distinguishes between the obligation due as part of the transfer payment, which includes a minimal amount for monthly childcare ($166), and "Expenses not Included in the Transfer Payment." Luthra even cites to this provision verbatim, so he is aware of the distinction. CP 94. Forrest sought only to enforce the transfer payment, not the other expenses she had incurred. CP 214-215 (describing as too burdensome her efforts to obtain reimbursement from Luthra for other expenses); 1RP 15 (motion concerns only monthly transfer payment); 1RP 19-20 (describing how efforts to obtain reimbursement for other expenses merely generated more

controversy).[10] Accordingly, the provisions regarding verification of expenses, reconciliation, and dispute resolution – all aspects unrelated to the transfer payment – do not apply to the order entered here by Judge O'Donnell finding Luthra in contempt for failing to make his transfer payment. Luthra's challenge to the order – an order that is plain on its face and was clarified in 2013 -- merely evidences his ongoing intransigence.

Substantial evidence supports the court's finding Luthra in contempt for failing to fully pay his child support obligation. *See* RCW 26.18.050(4) (placing burden of production on non-paying parent). There is no abuse of discretion in enforcing this obligation.

C. THE TRIAL COURT PROPERLY FOUND LUTHRA IN CONTEMPT FOR HIS FAILURE TO COMPLY WITH THE COURT'S ORDER ENTERED SIX YEARS AGO, WHICH ORDER SOUGHT TO PROTECT THE CHILD FROM LUTHRA'S HARMFUL BEHAVIOR.

The history of Luthra's defiance of Judge Fleck's 2010 order is lengthy. He has proven unresponsive to any and all efforts to gain his compliance. Certainly, the many awards of attorney fees against him for his intransigence have been ineffective; he has

[10] Thus, Luthra's abusive use of conflict seems strategic, an evasion of his obligations accomplished by inflicting costs in time and expense on Forrest. See Pollema, Beyond the Bounds of Zealous Advocacy: The Prevalence of Abusive Litigation in Family Law and the Need for Tort Remedies, UMKC Law Review (Summer 2007).

simply ignored them. (He does seem to respond to threats of incarceration. See, e.g., 1RP 11: withdrawing request for continuance "with jail off the table"). After thorough review and after extending multiple inducements to comply, the court imposed sanctions on Luthra in an attempt to coerce his compliance.

1) Substantial evidence supports the court's finding that Luthra intentionally failed to comply with the 2010 treatment order.

Luthra challenges the court's finding that he intentionally failed to comply with Judge' Fleck's order that he obtain intensive home-based therapy for his OCD. CP 256 (finding Luthra "failed to provide evidence showing inability to obtain intensive home-based therapy for OCD…"). This finding is supported by substantial evidence, including Luthra's continuing assertion that his chosen therapeutic regimen should suffice and the evidence supplied by Forrest. 1RP 16, 18, 20-22, 33-36, 38-39, 42-44; CP 75, 288-289, 307-309. The order places on him the burden of proving compliance. CP 62 (therapist must report on progress). The court's finding that Luthra has intentionally failed to comply with Judge Fleck's six-year-old order is supported by substantial evidence.

In subsequent orders (10/20/15, 1/28/16, 3/18/16, 6/13/16), the court found Luthra made no substantial progress in purging the contempt.[11] For example, in October, the court found Luthra had made no substantial progress in commencing OCD treatment. CP 353. Luthra does not really dispute this finding. As always, he merely challenges the 2010 order's treatment requirement. See, e.g., Br. Appellant, at 19 (asking this Court to weigh the evidence regarding his preferred treatment regimen).[12] This finding, in each of the successive orders, is supported by substantial evidence. As of June 3, 2016, a year after commencement of the contempt proceedings, Luthra had yet to make an appointment with a therapist. 4RP 8-12.

2) The court did not modify the parenting plan by attempting to coerce compliance with it.

In August 2015, having found Luthra in contempt for making "no substantial progress on commencing OCD treatment," the court ordered him to work crew for 30 days. CP 353. Luthra did not appeal this order, yet he now claims the court erred by "unilaterally

[11] Luthra did not timely appeal the ordered entered on October 20, 2015 on review of Luthra's progress in purging the contempt found in the 08/27/15 order. CP 353; see Supp. CP ___ (sub 452: notice of appeal dated 04/25/16).

[12] This Court does not do that. *In re Marriage of Rideout,* 150 Wn.2d 337, 350, 77 P.3d 1174 (2003).

modifying" the parenting plan by "sentencing him to the community work program." Br. Appellant, at 17-18. He also argues the court imposed "cruel and unusual punishment" by this order and violated double jeopardy. The court twice more ordered work crew as a coercive sanction, in orders entered 3/18/16 and 6/13/16. Since Luthra did not appeal the initial order, it is not clear he can appeal these extensions of the 10/20/15 order. In any case, Forrest responds to his arguments.

First, by ordering work crew, the court did not modify the parenting plan; it merely sought to enforce it. *See In re Marriage of Christel and Blanchard,* 101 Wn. App. 13, 22, 1 P.3d 600, 605-606 (2000) (modification extends or reduces rights and responsibilities). Luthra fails to support his claim to the contrary with either argument or record citation. Judge O'Donnell repeatedly referred to the 2010 order in his effort to enforce it. He did not change that order.

Luthra does make a play for *de novo* review, claiming there was a "clarification" of the decree. Br. Appellant, at 18. But the trial court did not clarify the dissolution decree. *See In re Marriage of Christel and Blanchard,* 101 Wn. App. at 22 (clarification merely defines rights and obligations already given). Here, Judge Fleck's

2010 order is clear, and it has been restated over and over again.[13] There is no ambiguity regarding what Luthra is to do. The only problem is his continuing failure to do it.

As to that failure, the court's statutory and inherent authority to enforce its orders is discussed further below.

As for Luthra's constitutional arguments, he fails to cite to where in the proceedings below he raised these arguments. RAP 2.5(a). Nor does he develop these arguments or cite relevant authority. *See* RAP 10.3(a); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by authority); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440, *cert*. *denied*, 498 U.S. 838 (1990) (insufficient argument); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (issues unsupported by adequate argument and authority).

As a general matter, these constitutional challenges fail because of what the court here is trying to do – coerce compliance with its orders, which Luthra has defied for six years! Such "[r]emedial sanctions are civil rather than criminal and do not require criminal due process protections." *In re M.B.,* 101 Wn. App.

[13] The court's 2010 order could not be any clearer, yet the court has had to restate it over and over again. See, e.g., CP 73 (in 2013, Judge Fleck remonstrating that court's findings included "quite specific language about the kind of treatment that needed to be engaged in…").

425, 438, 3 P.3d 780, 787–88 (2000). Luthra is not being punished. As the court noted, and Luthra conceded, the work crew assignment is motivating. 2RP 32 (agreeing with the court that it is "great motivation to do what I ask him to do"); 3RP 9 (court is "running out of alternatives to jail as an incentive"). If anyone is being punished by Luthra's conduct, in court and out of court, it is Forrest and the parties' child. Luthra continues to harm his child rather than take the steps the court ordered to ameliorate his problematic conduct. Sadly, he is fulfilling the grim prediction of the parenting evaluator. Supp. CP __ (sub 422, at 25) (father "at risk for continued, intractable litigation").

3) The trial court properly exercised its contempt authority.

This apparent challenge to the exercise of the court's contempt authority first claims that Luthra has not violated RCW 7.21.010. Br. Appellant, at 22-23. Specifically, he claims "there was no allegation of, nor evidence" of Luthra violating three of the statute's subsections. Br. Appellant, at 23. He agrees the court might find the remaining subsection applicable, defining contempt to include "[d]isobedience of any lawful judgment, decree, order, or process of the court …" RCW 7.21.010(1)(b). Id.

Indeed.

Forrest sought contempt on the authority of Chapter 7.21 RCW, Chapter 26.09 RCW, Chapter 26.10 RCW, Chapter 26.26 RCW, and RCW 26.18.040. Forrest will address these in turn.

First, "[i]t is axiomatic that a court must be able to enforce its orders." *In re M.*B., 101 Wn. App. 425, 431, 3 P.3d 780, 784 (2000). Here, multiple statutes grant the trial court authority for the orders issued here.

First, RCW 26.09.160 authorizes the trial court to "impose remedial sanctions for contempt of court … in addition to any other contempt power the court may possess." Contempt exists if a parent is presently able to comply with the provisions of a court-ordered parenting plan and is presently unwilling to do so. Sanctions the court may impose to coerce compliance include incarceration. Luthra acknowledges RCW 26.09.160 as applying. Br. Appellant, at 23-24.

RCW 26.18.040 authorizes proceedings to enforce a duty of support.

As noted, Chapter 7.21 RCW authorizes civil contempt actions, including an action to enforce the court's orders. According to the statute:

> If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:
>
> (a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.
>
> (b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.
>
> (c) An order designed to ensure compliance with a prior order of the court.

RCW 7.21.030(2). Here the court found Luthra has the ability to comply, was unwilling to comply, and his noncompliance is in bad faith. CP 256-257. The court complied with RCW 7.21.020, .030, .040, and .050, contrary to Luthra's vague claim. Br. Appellant, at 22-25. He does not argue any specific defect, making it hard to respond except in kind, i.e., vaguely.

The court has broad discretion to fashion a coercive sanction. RCW 7.21.030(2)(c) and (d). The court did not impose a punitive sanction, so RCW 7.21.040 does not apply, nor does the provision governing courtroom regulation (RCW 7.21.050). Luthra fails to show an abuse of discretion in the court's exercise of its contempt authority under the statute.

Finally, Luthra claims an infringement of his right to autonomy in child rearing. Br. Appellant, at 24. Here, as he has many times before, Luthra attempts to challenge Judge Fleck's 2010 order, claiming a need for new evidence that the specified treatment "was in the best interest of the Child." Id. The court's findings on this issue were made six years ago, based on a five-day trial and a thorough parenting evaluation. Luthra never even appealed these findings or the order, though he has resisted compliance in every way possible. Yet, he claims there is no "compelling interest" in the court ordering the specific treatment he resists. Br. Appellant, at 25. This really is an outrage. The harm his untreated OCD does to his child and the child's mother was thoroughly proven at trial, as was the need for a specific, intense and intensely-focused kind of treatment. That treatment is available in the Seattle metropolitan area. Luthra has the enviable financial capacity to take advantage of such treatment (and to drive luxury automobiles). Yet, rather than act to protect his child, he spends his energy resisting the treatment. In doing so, he repeatedly thumbs his nose at the court.

4) Forrest's counsel acted properly and the court properly awarded fees.

Luthra also argues, without citation to authority, that the court "in effect allowed" Forrest's counsel "to act as a State Prosecutor" in seeking contempt and coercive sanctions. Br. Appellant, at 25. Plainly, Forrest has the right to seek enforcement of the court's orders; given the interests of the child at stake, one might even say she has a duty to do so. Luthra makes no credible argument to the contrary. Moreover, though he cites to the civil contempt statute, he seems to mistake the court's civil contempt power for the court's criminal contempt power. The court here is using its civil contempt power, imposing a remedial sanction "for the purpose of coercing performance when the contempt consists of failure to perform an act that is yet in the person's power to perform." *M.B.,* 101 Wn. App., at 438.

Luthra also claims the court was unfair when it asked Forrest on January 13, 2016 "is there a fees request." Br. Appellant, at 25; 2RP 32-33. It appears the court was simply checking off the list of items on its agenda (i.e., Luthra's motion for contempt, motion for reconsideration, status of compliance with child support and treatment orders); see, also, 3RP 23 (court indicating it will entertain proposed orders, including regarding fees). These

efficiencies hardly establish prejudice. Nor, especially given this litigation history, does Forrest's counsel need any prompting to request fees. See, e.g., 4RP 11.

Rather, it is clear from the court's extraordinary patience that Luthra cannot make a case for bias, nor has he attempted to do so. See, e.g., 1RP 4-11 (granting continuances), 32-33 (allowing late supplementation of record); 3RP 1, 7-11 (addressing Luthra's absence at hearing and failures to comply with orders); 4RP 1-13 (giving Luthra another two weeks to make an appointment with a treatment provider). *See* RAP 10.3(a); *Cowiche Canyon*, 118 Wn.2d at 809, 828 P.2d 549 (1992) (disregarding arguments not supported by authority).

Finally, Luthra argues the court's fee awards of 8/27/15, 1/28/16, 4/7/16, and 6/13/16 are unsupported by adequate findings and conclusions. Br. Appellant, at 26 (citing a case involving intransigence and arrival at a particular fee award).

An award of attorney fees is within the trial court's discretion. *In re Marriage of Crosetto*, 82 Wn. App. 545, 563, 918 P.2d 954 (1996). An appellate court will uphold an attorney fee award unless it finds the trial court manifestly abused its discretion; discretion is abused when the trial court exercises it on untenable grounds or for

untenable reasons. *Chong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007).

Here, trial counsel submitted fee declarations in support of the fees request. See CP 80-84, 453-456, 636-639. Luthra does not argue the amounts are unreasonable, or otherwise indicate what precise issue he finds problematic. The court even noted at one point the fees were more than reasonable. 4RP 12. Some of the fees were awarded for the contempt motion, as the statute permits. See 1RP 13, 26; RCW 7.21.030(3). There was a sanction for the attorney failing to appear at a hearing. 1RP 28. The court awarded fees as a sanction when Luthra failed to appear at a hearing, requiring it to be set over. 3RP 12. The court awarded fees for the third and fourth contempt review hearings, necessitated, of course, by Luthra's ongoing failure to comply. 4RP 11. The court's fees order is supported by substantial evidence and authority.

Moreover, a party's intransigence can support a trial court's award of attorney fees. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992). In addition to abusive use of discovery, intransigence includes resistance to discovery, such as "incremental disclosure of income." *In re Marriage of Mattson*, 95

Wn. App. 592, 976 P.2d 157 (1999). Intransigence also includes "foot dragging" and "obstruction," *Eide v. Eide*, 1 Wn. App. 440, 445, 462 P.2d. 562 (1969), and willful concealment of property. *Seals v. Seals*, 22 Wn. App. 652, 654, 658, 590 P.2d. 1301 (1979). The court repeatedly noted Luthra's failure to document his claims regarding finances or treatment efforts. Intransigence is Luthra's strategy. "Where a party's bad acts permeate the entire proceedings, the court need not segregate which fees were incurred as a result of intransigence and which were not." *In re Marriage of Burrill*, 113 Wn. App. 863, 873, 56 P.3d 993 (2002), *review denied*, 149 Wn.2d 1007 (2003); *In re Marriage of Sievers,* 78 Wn. App. 287, 312, 897 P.2d 388 (1995).

Luthra fails to show an abuse of discretion in the award of attorney fees.

D. FORREST REQUESTS HER FEES ON APPEAL

This Court should award Forrest her fees. This appeal is frivolous and intransigent. It is brought from orders enforcing Luthra's plainly stated child support obligation and the similarly plainly stated (and often repeated) treatment order. It is part of an ongoing pattern of resistance and abuse of conflict, just as the parenting evaluator predicted. The father either recycles the same

arguments he has made over and over again throughout this litigation or his arguments fail to cohere, demonstrating their real purpose is to annoy and harass. As this Court has held, an award of attorney fees is justified where the conduct of one of the parties causes the other "to incur unnecessary and significant attorney fees." *Burrill,* 113 Wn. App. at 873. The father continues to engage in the abusive use of conflict, including on appeal, consuming resources this family needs to meet the child's needs. This conduct is quintessentially intransigent.

Similarly, attorney fees are justified when an appeal is frivolous. RAP 18.9 permits this Court to sanction a party who files a frivolous appeal, one where there are no debatable issues upon which reasonable minds could differ and which is so totally devoid of merit that there is no possibility of reversal. *Mahoney v. Shinpoch,* 107 Wn.2d 679, 732 P.2d 510 (1987). This appeal meets that definition.

IV. CONCLUSION

For the foregoing reasons, Aradhna Forrest respectfully asks this Court to affirm the trial court's orders and award her fees for having to respond to this baseless appeal.

Respectfully submitted this 14th day of September 2016.

/s Patricia Novotny, WSBA #13604
/s Nancy Zaragoza, WSBA #23281

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