

No. 66463-8

In re. the Marriage of:

MICHAEL A. TIPPIE
Appellant

v.

MARY V. WILSON
Respondent

APPEAL FROM THE SUPERIOR COURT OF
WASHINGTON

SNOHOMISH COUNTY
No. 08-3-00943-4

FILED
COURT OF APPEALS DIVISION
STATE OF WASHINGTON
2011 JUN 16 AM 10:32

APPELLANT'S BRIEF

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CR 70

I. INTRODUCTION

Petitioner and Respondent were divorced by Decree of Dissolution on December 18, 2008. Petitioner was awarded the family residence in Edmonds then valued at approximately \$560,000 by appraisal. The Edmonds residence was encumbered by two mortgages, one to Chase and one to Flagstar. Petitioner was ordered in the Decree to withdraw in cash all of the remaining home equity line of credit, and transfer funds exceeding \$87,000 to Respondent.

Subsequently, the Edmonds property declined in value and is now the subject of a short sale offer of \$320,000. The Decree contained a clause at Section 3.10 stating "Petitioner shall make a good faith effort to obtain release of the Respondent from the foregoing obligations and pending release shall make all payments thereon" as well as a hold harmless clause at 3.12

(Dec 18, 2008 Decree of Dissolution, Snohomish County Superior Court, Michael A. Tipple v. Mary V. Wilson).

Respondent filed a Motion on September 9, 2010 to enforce the hold harmless clause of the Decree of Dissolution asking for authority to seize Respondent's property under CR-70, CP p30-37. A hearing was held on September 23, 2010 (CP p30-39) in which it was ordered that Petitioner was to be restrained from a) selling or encumbering property, b) transfer of real estate listing agent and c) ordered to provide verification of assets. A review hearing was set for October 7, 2010. On October 7, 2010 the matter was reviewed (CP p22-24) and the court found that the previous restrainers should be continued and granted Respondent's motion for attorney's fees, the award to be decided in a future hearing. A further review hearing was set for October 28, 2010. On October 28, 2010, Commissioner Tracy Waggoner issued an order enforcing the Decree and on Restrainers, Contempt and other Relief, CP p15-21. In this

order the Court found the Petitioner in Contempt for failing to obey Section 3.10 and 3.12 of the Decree. The order further found that the Petitioner willfully failed to take all reasonable steps to comply with the stated sections of the Decree. It only allowed the Petitioner to purge contempt by bringing Chase and Flagstar obligations current and obtaining the release of the Respondent from said obligations within two weeks of the date of the Order. A judgment for attorney fees was entered for \$7,095 as well as a civil penalty of \$100. Authority was granted under CR70 for the Respondent to execute documents pertaining to the sale of and to sell the Edmonds property, to sell Petitioner's cabin in Chelan County, and to sell as well any remaining stock and exercise such options that Petitioner controls. Additionally, Petitioner and his family were ordered to vacate the Edmonds property by November 11, 2010.

Petitioner filed a Motion for Revision on November 5, 2010, which was heard by the Hon. Ronald Castleberry, CP

p10-14. The matter was heard on November 19, 2010, and the motion for revision was denied and no additional attorney's fees were awarded to either party and Hon. Castleberry declined to rule on the issue of Contempt, CP p7-9. Petitioner filed for review by Division I Appellate Court on December 20, 2010, CP p1.

II. ASSIGNMENT OF ERROR

1. The court erred in finding Petitioner in Contempt of Court in the October 28, 2010 ruling.
2. The court erred in failing to establish bad faith.
3. The court erred in finding willful failure to take all reasonable steps necessary to comply with the Decree.

4. The court erred in not considering the affirmative defenses of inability to pay and impossibility of performance.
5. The court erred in failure to specifying what findings of fact support the judgment, and failure to enter those findings into the court record as required.
6. The Order contained no purge clause in violation of procedural requirements.
7. An abuse of discretion was present in this case.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does an inability to comply with an order an affirmative defense against contempt (Assignment of Error 1)? Must it not be that the alleged contemnor's current ability to

perform an act be considered in such an order of contempt in Accordance with RCW 7.21.030 and *Britannia Holdings*? Does not such inability to pay constitute impossibility of performance? (Assignment of error 4).

2. Does an inability to comply with a divorce decree condition to refinance a mortgage constitute bad faith? (Assignment of error 2)
3. Can a Petitioner be found in willful failure to take all steps necessary to comply with an Order when his inability to comply arose months before the order was entered ala *State v. Phipps*. (Assignment of error 3).
4. Can a judgment be valid when the court fails to specify what findings of fact support that judgment and subsequently does not enter those findings into the court record as is stipulated in *Templeton v. Hurtado* (Assignment of error 5).

5. Can a judgment be valid when there is no purge clause as stipulated in RCW 7.21.010(2) and clarified in *In re: Rebecca K?* (Assignment of error 6).
6. Is abuse of discretion evident in this case by manifestly unreasonable grounds or based on untenable reasons as is outlined in *Moreman v. Butcher and Marriage of Littlefield?* (Assignment of error 7)

IV. STATEMENT OF THE CASE

On September 7, 2010, Mary V. Wilson and her attorney Ann M. Johnson filed motions in Snohomish County for enforcement of decree, restrainers, order to show cause re. Contempt and other relief, CP p30-37. Hon. Commissioner Tracy Waggoner presided. On September 23, 2010, an Order was signed reserving a finding of contempt for a future hearing, not granting a motion to enforce decree under CR-70 and

restraining Petitioner from selling or encumbering property, and listing the Edmonds property with a real estate agent for short sale as well as requiring him to produce verification within 14 days of the status of various assets, CP p30-39. A review hearing was held on Oct. 7, 2010 in which it was ordered that all previous restraining orders remain in effect, that Respondent have free access to information with respect to sale of the house and assets relevant to the CR-70 matter, and the motion for attorney's fees granted, such award to be decided at later date. CP p22-25. The matter was set to be further reviewed on Oct. 28, 2010. On Oct. 28, 2010 a review hearing was held and an order was issued with the following provisions, CP p15-21:

- 1) Establishing a judgment for attorney fees to Respondent in the amount of \$7,095 as well as a civil penalty of \$100.
- 2) Holding Petitioner in Contempt.
- 3) Sanctioning Petitioner under Chapter 7.21 RCW, Chapter 26.09 RCW, Chapter 26.10 RCW, and/or RCW 26.18.040.

- 4) Authorizing Respondent, pursuant to CR-70 to execute documents relevant to the sale of the Edmonds home and sell securities in Petitioner's name.
- 5) Obtain information on Petitioner's children's GET accounts.
- 6) Execute all documents for the sale of Petitioner's cabin in Chelan County.
- 7) Disclose all assets available to Petitioner within 10 days.
- 8) Restrain Petitioner from selling or transferring assets.
- 9) Ordering Petitioner and his family to vacate the Edmonds residence by Nov 11, 2010.
- 10) Maintaining payment to Flagstar Bank.
- 11) Making interest payments on debt on the cabin to Vera Boals and making a good faith effort to delay foreclosure on that property.
- 12) Take no further advances on the loan from Vera Boals.
- 13) Complete the financial package for short sale of the Edmonds property within 7 days.

Petitioner moved for reconsideration of the Oct 28, 2010 hearing in a timely manner, CP p10-14. Hon. Ronald Castleberry heard the reconsideration on November 19, 2010 and the motion for revision was denied and additional attorney's fees were not granted to Respondent, CP p2-9. Petitioner filed Notice of Appeal to Division I in a timely manner on Dec 18, 2010, CP p1.

V. ARGUMENT

A. **The court erred in finding Petitioner in Contempt of Court in the 10/28/10 ruling.**

Contempt of court is defined, in part, as intentional disobedience of a lawful court order. RCW 7.21.010(1).5 RCW 7.21.030(2) states, in relevant part:

If a trial court correctly determines that a party has *intentionally disobeyed* its lawful order and *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: (Emphasis added)

- (a) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.
- (b) An order designed to ensure compliance with a prior order of the court.
- (c) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

The contempt statute creates an improper legal presumption that an obligor who is in arrears is automatically in contempt and the final burden of proof to avoid such a finding is improperly placed on the debtor. An indebted obligor can avoid a finding and order of contempt only if he or she can "establish he or she exercised *due diligence* in seeking employment, in conserving assets, or otherwise rendering himself or herself able to comply with the court's order," RCW 26.18.050(4). However, nowhere does the law state, specifically or generally, how much "diligence" is "due."

RCW 26.18.050(4) fails completely to acknowledge that

an obligor may suffer a physical injury or otherwise become unable "to comply with the court's order." The common law provides that inability to comply is an absolute defense to charges of contempt, Snook v. Snook, 110 Wn. 310, 314, 188 P. 502 (1920), and the court must therefore waive the statutory "due diligence" requirement in cases where a wholesale inability to comply is shown.

Petitioner contends he made every reasonable attempt to refinance the mortgages after the December 2008 divorce with Respondent. *See* RP (Sept. 23, 2010) at 16: 2-25, p 17: 1-25, p18: 1-25, p.19: 1-15, p.28: 18-25, p.29: 1-7, p.37: 2-7. RP (Oct. 28 2010) at 12: 21-25, p.13: at 1-5, p.14 at 3-25, p. 15 at 1-8. The Court ruled otherwise. RP (Oct. 28, 2010) at 14: 3-15.

Within two months of the entry of the Decree of Dissolution, Petitioner began working on a refinance with Mr. Norm Harshaw of GFG Mortgage, with whom Petitioner had worked on prior mortgage transactions. RP (Sept. 23, 2010) at

16: 2-9, 22-25, p. 17: 1). Mr. Harshaw's professional opinion was that with the large debt structure Petitioner carried resulting from the 2008 Dissolution Decree, it was not possible to refinance under present employment situation. RP (Sept. 23, 2010) at 16: 22-25, p. 17: 1; p. 19: 24-25, p. 20: 1-9). Petitioner's salary and all Management's salaries of Eureka Genomics in Hercules, CA, had been cut in half in January 2009, with the deferred pay promised to be paid later. RP (October 23, 2010) at 16: 12-21, p. 17: 10-13, p. 19: 24-25, p. 20: 1-9).

Mr. Harshaw and Petitioner periodically reviewed the situation, concluding it was still not possible to refinance, especially given the increasingly tight credit conditions prevailing in the economy. The salary deferment continued until September 2009 and the company terminated Petitioner in October 2009 without payment of deferred compensation. RP (Oct. 23, 2010) at 17: 10-13, p. 20: 2-6). The back pay has still not been paid despite willful withholding action by the

Department of Industrial Relations in California against Eureka Genomics. RP (Sept. 23. 2010) at 16: 15-21)

It became abundantly clear that after the Eureka Genomics termination, Petitioner was in a worse situation to be able to refinance the mortgages. Petitioner was unemployed from September 2009 until October 2010 despite rigorous and diligent search for employment. RP (Oct. 7. 2010) at 12: 6-18; RP (Oct. 28, 2010), at 6: 13-15). Stable employment with sufficient wage base to establish a qualifying debt to income ratio is mandatory for establishing credit worthiness with regard to mortgage refinance. With the general economic conditions as developed with the current housing and mortgage crisis, lenders are increasingly discriminant about establishing credit worthiness, especially with regard to jumbo mortgages such as would result from refinancing both the Chase and Flagstar loans. It was impossible then and remains impossible now for Petitioner to have established credit worthiness.

A court may find a person who has failed or refused to perform an act within the person's power in contempt. RCW 7.21.030. A threshold requirement to imposing remedial sanctions is a finding of current ability to perform an act previously ordered. Britannia Holdings Ltd. v. Greer, 127, Wn. App. 934 (2005); Id. at 934. In Britannia, as part of a judgment collection, in 2004 the debtors were ordered to pay \$635,000 within four months or be incarcerated. Id. at 928. Although the trial court found in 2002 the debtors had possessed \$635,000, the trial court made no finding about the debtors' present ability to pay in 2004. Id. at 934. Therefore, the 2004 contempt order was not coercive, but impermissibly penal. Id. Inability to comply with the order is an affirmative defense against contempt. As a matter of law, the contempt orders are facially unenforceable.

In similar manner, Petitioner's economic condition at the time of the hearings, as well as presently, renders refinance of

jumbo mortgage on the Edmonds property impossible.

B. The court erred in failing to establish bad faith.

In order to find remedial contempt of court, the trial court must find that substantial evidence exists that favors Respondent and also that the Petitioner's failure to refinance the mortgages were in bad faith.

The contempt orders are fundamentally flawed for three reasons: (1) the orders of contempt failed to make necessary findings that Petitioner failed or refused to perform an act that was still within his power to perform; (2) Petitioner did not actually have the power or ability to comply with the order; and (3) the Court failed to provide an adequate purge clause allowing Petitioner the opportunity to somehow comply with the order to pay all delinquent mortgage payments within the two weeks allowed before sanctions were imposed.

Here, Respondent obtained a judgment of Contempt despite the fact that Petitioner had always complied with the

orders of the trial court. Petitioner asserts that bona fide attempts were made to refinance the mortgages. RP (Sept. 23, 2010) at 16: 2-25, p. 17: 1-25, p.18:1-25, p.19:1-15, p.28: 18-25, p.29: 1-7, p.37: 2-7; RP (Oct. 28, 2010) at12: 21-25, p.13 at 1-5, p.14: 3-25, p.15: 1-8. Respondent disputes this. RP (Sept. 23, 2010) at 28: 20-25, p. 29: 1-7. The Court ruled otherwise. RP (Oct. 28, 2010) at14: 3-15. Additionally, Petitioner was ordered to move his family out of the house by November 11, 2010 (Court's Order, Oct. 7, 2010). In spite of the short time frame he was allowed and the fact that he was living in California, RP (Oct. 28, 2010) at12: 9-12, Petitioner accomplished this. He has cooperated with the real estate agent of Respondent's choice. RP (Oct. 28, 2010) at7:24-25, p.8: 1-17, p.10: 19-25, p.11: 1-4, p.12: 21-23). In general, he contends he has done everything asked of him within the short time frames, and in spite of geographical distances.

On October 28, 2010, when Petitioner was ordered to

make all back payments he had only been working for less than a month after being unemployed for 11 months. RP (Oct. 7, 2010) at 12: 6-15. It was impossible for Petitioner to obtain the necessary funds to comply with this order within two weeks. Therefore the Order itself was impossible to comply with under the circumstances.

C. The court erred in finding willful failure to take all reasonable steps to comply with the Decree.

State v. Phipps, 174 Wash. 443, 24 P.2d 1073 (1933), cited by ELM (Resp. Sr. 24), supports Petitioner's position that he could not be found in contempt when his inability to comply arose before the order was entered. In Phipps, the court held that the Defendant was not in contempt of an order requiring him to return money when the money was acquired one year before the contempt action was brought and there was no evidence that defendant did anything to "disable himself from paying the

money subsequent to the initiation of the original proceeding."

Id. at 446.

The economic facts leading up to Petitioner falling behind on the mortgage payments resulting in Respondent's CR 70 action were the results of unfortunate employment and economic realities that were in existence months before this action. Consistent with State v Phipps, Petitioner cannot be held in contempt for events that transpired months before the first action by Respondent in court.

D. The court erred in not considering the affirmative defenses of inability to pay and impossibility of performance.

Petitioner indeed did take all reasonable steps to comply with the Divorce Decree as well as the Oct 2010 Order. Unemployment, refusal of a former employer to pay wages due, and income limited to unemployment compensation prove positively the inability to finance a jumbo mortgage in the worst Recession since the Great Depression.

E. The court erred in not specifying what findings of fact support the judgment, and then not to enter those findings into the court record, as required in Templeton v. Hurtado 92 Wn. App. 847, 852 (1998): "It has long been the rule that a trial court must make findings of fact setting forth the basis for its judgment of contempt in order to facilitate appellate review"

The Court erred in not specifying what findings of fact support its judgment and not entering those findings into the Court's Record as required. The court's orders must have expressly found that Petitioner failed or refused to perform an act that was still within his power to perform. RCW 7.21.030(b). No such finding was ever made or entered into the Court Record.

F. The Order contained no purge clause in violation of procedural requirements.

The imposition of remedial and punitive sanctions carries certain procedural requirements. RCW 7.21.010(2). "An order of remedial civil contempt must contain a purge clause under which a contemnor has the ability to avoid a finding of

contempt and/or incarceration for noncompliance." In re: Rebecca K., 101 Wn.App. 309, 314, 317 P.3rd 501 (2000) (citing State ex rei. Schafer v. Bloomer, 94 Wn.App. 246, 253, 973 P.2d 1062 (1999)).

The imposition of contempt or sanctions to effectuate that Order must: (1) contain a purge clause sufficient to allow Petitioner the opportunity to clear the Contempt, and (2) must be sensitive to Petitioner's financial capability or incapability. The purge conditions order of Petitioner to repay the past due mortgage debt within two weeks of the Order did not allow Petitioner the opportunity to clear the Contempt and were not sensitive to Petitioner's financial capability or incapability. One month's employment after an 11 month period of unemployment does not constitute reasonable opportunity to clear such past due debt.

The Commissioner specifically stated that Petitioner had been purged of Contempt with respect to the transfer of funds

from Elliott Tippie's GET account to Natacha Butler-Gauthier's (stepdaughter) GET account, by repatriating those funds to Elliot's account. A decision was never made on Petitioner's offer to repay Respondent the \$4,000 that would be owed under the provisions for withdrawal of GET monies in the divorce decree.

G. The trial court abused its discretion.

An abuse of discretion is present if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Moreman, 126 Wn.2d at 40. *See also*; In re Marriage of Littlefield, 133 Wn.2d 39. 46-47.940 P.2d 136 (1997).

It is manifestly unreasonable for the Court to find Petitioner in Contempt when he is required in two weeks to clear a past due mortgage amount that had been accumulating for months. Additionally, in determining whether the trial court abused its discretion, our courts have held "**exercise of the**

contempt power is appropriate only when the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform." Britannia Holdings Ltd. v Greer, 127 Wn.App 926, 113 P 3d 1041 (2005). (Emphasis added)

The contempt finding that allowed Respondent to take control of and sell Petitioner's remaining property under CR 70 is improper because it relies upon the errant assumption that the trial court properly imposed sanctions against Petitioner, namely Contempt.

Based on the foregoing, the application of RAP 2.4 (b) and the cases cited in herein, the October 28, 2010 order should be vacated.

In further support of this it must be noted that no actual harm has been done to Respondent to date. The Commissioner's orders were premature. The Contempt finding is not supported by the evidence as is contained in the record of

the CR-70 hearing.

Respondent filed her CR-70 action in September 2010, at a point at which the Edmonds property had been for sale since March 2010. RP (Sept. 23, 2010) at 17: 14-25; p.18L 1-25; p.19: 1-5. During this time Petitioner reduced the price three times in an attempt to attract a buyer and then discussed a decision to move to short sale with his Realtor. Respondent's CR-70 action forced Petitioner to choose another real estate agent. He did so and retained an agent that focuses on short sales. RP (Oct. 7, 2010) at 9: 20-25. An offer was subsequently obtained for a short sale on the Edmonds property, in advance of the foreclosure date and the foreclosure was delayed.

In December 2010, Petitioner filed for Chapter 13 bankruptcy (United States Bankruptcy Court for the Eastern District of California, Case No. 10-51817) in order to further delay the foreclosure on the Edmonds property and mitigate any potential damage to Respondent. This delay was beneficial in

allowing the short sale then in process to go forward. Such short sale may eliminate any liability to Respondent from the Edmonds property. This bankruptcy proceeding in the United States Bankruptcy Court for the Eastern District of California has been vacated and refiled (*See* Case No. 11-27075). The Meeting of the Creditors occurred on April 28, 2011, at which time it was ordered that the bankruptcy case be continued until July 2011. The bankruptcy court found it essential to allow for finalization of negotiations with the mortgage holders that should moot any potential harm to Respondent before proceeding.

The Bankruptcy Court clearly recognizes it was impossible to ascertain what harm, could accrue to Respondent from the unanswered and unknowable issues on the Edmonds property until the negotiations with the mortgage holders are final. In light of bankruptcy law, the contentions that Respondent has brought before the Washington state courts

under the CR 70 action should be deferred to the Federal Court and should be vacated at this time in WA State Court.

VI. CONCLUSION

Based on the facts of this case and the applicable law the trial court erred in finding Petitioner in Contempt of Court in its October 28, 2010 ruling. The court failed to establish that Petitioner ever acted in bad faith either with respect to the Dissolution Decree or the subsequent Orders. The trial court has not established willful failure to take all reasonable steps necessary to comply with the Decree. The trial court did not consider the affirmative defenses of inability to pay and impossibility of performance in finding Petitioner in Contempt. Finally, the trial court failed to specify what findings of fact support the judgment of Contempt, and then did not to enter those findings into the court record as required. The Order contained a purge clause that was impossible to achieve.

Based on the foregoing, an abuse of discretion was present in this case. Therefore the Court should overturn the Contempt charge and the CR-70 order should be vacated.

RESPECTFULLY RESUBMITTED THIS 16th DAY OF JUNE, 2011


MICHAEL A. TIPPIE
Appellant, *Pro se*