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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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JOEL COHN, Respondent

v.

PAULA COHN, Appellant

REPLY BRIEF OF APPELLANT
(Corrected)

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INTRODUCTION

In her opening brief the mother objected that she had been assessed **all** of the father's attorney fees and **all** of the GAL's fees for intransigence without either (a) any specific factual findings which would support a conclusion that she had indulged in intransigent behavior or (b) any finding that her behavior, even if intransigent, caused all of the father's fees and all of the GAL's fees.

The father's response does not point out the necessary specific facts on which findings could be based. Instead he says that the mother is so awful that specific findings of actual facts were not necessary. E.g. "In fact, as noted above, the court below had an extensive and detailed billing for the father's time since the start of the mother's intransigent and obstructionist behavior and had a specific billing from the GAL for the time since his appointment. The court also had the benefit of hundreds of pages of materials that clearly addressed the multitude of egregious and intransigent behavior (sic) on the mother's part in making its decision and simply determined that the father's specific and documented allegations (in his motion) was not required." Brief page 18, 19.

ARGUMENT: RESPONSE TO FATHER

The specifics of the Parenting Plan. The father complains that the mother's opening brief contains extensive quotations from the parenting plan and states that the specifics of the parenting plan are "irrelevant." Brief Page 4.

On the contrary, this case is about enforcing the parenting plan. The father's sole ground for claiming the mother was intransigent is that the parenting plan's transition from supervised visitation to half time custody was not accomplished smoothly and quickly. What the parenting plan required the mother to do is not merely relevant. It is crucial. Therefore, the provisions of the parenting plan are not merely relevant but crucial.

The parenting plan contemplated a smooth transition in five distinct stages. At each stage the parenting plan states that if the child is not comfortable with the next stage, the next stage will not occur. CP 27, 28 The parenting plan contemplates and assumes—despite the caveat-- that Sarah will be comfortable. The record does not tell us why that was assumed or what was supposed to happen when Sarah was not comfortable. Those gaps are important since Sarah was not comfortable with overnights. E.g. CP 55 - 57, and CP 111: "When another overnight

was scheduled, Sarah refused to go with Joel when he came to the house to pick her up. Sarah's rage was so extreme that she tried to kick Joel when he attempted to take her physically. My downstairs roommate . . . called the police." CP 111.

When the police came Joel wanted the police to force Sarah to come with him. One of the police officers told him, "We don't force children to go and especially when they are as upset as V/Sarah. [Joel] was upset by this and said there is a court order and it is not fair." CP 56:

The court appointed psychologist could not discover why Sarah was not comfortable with overnights with her father: "I have seen Sarah and her family in therapy for nearly two years. I have worked with Sarah sometimes individually, sometimes with one parent or with the other and I have seen the two parents without Sarah. . . . I presently see my role as helping to support Sarah and her family and to facilitate the Final Parenting Plan. . . ." CP 163

Facilitating the parenting plan requires obeying the parenting plan, not changing it. The parenting plan required Sarah to be comfortable with each step. Consequently it would appear that making Sarah comfortable would be the best way to facilitate the parenting plan. But Dr. Milo could not discover why Sarah was not comfortable. "Sarah expresses hesitation

at staying overnight with her father, but cannot verbalize any reason.” CP 163. The GAL quotes Sarah as saying “I do not know why I am afraid to sleep at my dad’s. . . . It’s not like I like not knowing why; I want to know just as much or more than anyone else. I can’t imagine spending half my life with my dad; it makes me want to go to sleep and not wake up. . .” CP 206, 7.

Sarah’s therapist, Dr. Milo, instead of persisting and helping Sarah find and verbalize a reason so she could address it, decided it didn’t matter. “As Sarah’s therapist I see no reason why Sarah should resist overnights besides the obvious fear and repulsion expressed by Ms Cohn which is either overtly or non-verbally conveyed to Sarah.” CP 165

The GAL, while he agrees with Dr. Milo that the mother’s feeling have influenced Sarah’s feelings, does not conclude that Paula has done anything consciously to influence Sarah: “She may personally believe that she has tried to avoid influencing Sarah, but there are several indications that she has influenced her...” CP 208 “She has an honest reason for doing this—she does not trust Joel’s progress towards addressing his sexual addiction and her daughter is clearly balking at spending overnights.” CP 208 “I do not fault Paula for her feelings—I know how a ‘momma bear’ can respond to perceived risks to her cub.” CP 209

If Paula were consciously giving Sarah reasons to resist overnights by her behavior which was either “overt or non-verbal,” one would suppose that in two years a therapist would have developed enough insight, trust, and rapport to have discovered it. Dr. Milo apparently did not and was forced to conjecture.

Even if Dr. Milo’s conjecture that Paula must be a cause of some of Sarah’s discomfort—since she could discover no other cause— she should have also conjectured that the father had also contributed. After all it was the father’s behavior which initially restricted him to supervised visitation. A coherent order finding recalcitrance could have addressed the role of each parent, assessed the contribution of each, and balanced fees and cost pro rata.

In any event Dr. Milo did not untangle Sarah’s feelings enough to determine why Sarah was uncomfortable with overnights with her father and why she resisted overnights. Commissioner Smith cut the Gordian knot by amending the parenting plan to remove the requirement that the child be comfortable. CP 69. That was a substantial modification. Prior to the modification, Sarah’s comfort was paramount. After the modification, it didn’t matter anymore. So the court disposed of the

question Dr. Milo could not answer, why Sarah did not wish to spend overnights with her father, by ruling the answer to be irrelevant.

2. Financial need. Contrary to what the father says, the mother does not have the funds to pay the punitive award against her of all of her former husband's attorney fees and all of the GALs fees. Financial Declaration CP 121 - 126 The highest salary she has ever earned was \$18,884 in 1993. CP 220.

3. Facts before the court. The court presumably based its decision on the facts presented to it, which are all in the clerk's papers. The father still has not pointed out to the court specific facts supporting a conclusion of intransigence. The father still has not pointed out how or how much his fees were increased by Paula's alleged intransigence. Not having any such facts pointed out to it, the court made no findings of fact, either establishing a basis for a finding of intransigence or any consequent costs and fees.

CONCLUSION

The father has not pointed to any specific facts that allow a conclusion of intransigence. The court order finding intransigence is not based on any specific facts. CP 160, 1 The order gives no hint of (1) what

acts of the mother's constituted intransigence, (2) how much those acts increased the father's attorney fees or, (3) why the GAL's fees were all the mother's responsibility. The father is mistaken that hundreds of pages of court record show intransigence.

On the contrary, what those pages show is that the mother distrusts and dislikes the father with considerable justification. They show that she believes he is not good for their daughter. She may have unconsciously conveyed her feelings to their daughter. A justified finding of intransigence would require more than that. The order finding intransigence should be vacated.

Dated: August 15, 2011



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