

No. 71398-1-I

COURT OF APPEALS,  
DIVISION ONE  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

Nathan Brown, *Appellant*

*and*

Mi Brown, *Respondent*.

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**BRIEF OF RESPONDENT**

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A. STATEMENT OF THE CASE

On April 26, 2012, Appellant filed his Petition for Modification of Parenting Plan discussed in this appeal. CP at 1. An Order Setting Domestic Case Schedule (hereinafter “case schedule order”) was entered on the same date; the case schedule order established a trial date of April 1, 2013. CP at 23.

On May 31, 2012, both an Order on Adequate Cause and Order Appointing Guardian ad Litem (“GAL”) were entered by the court. CP at 81, 97.

On September 24, 2012, Commissioner Bonnie Canada-Thurston entered on Order on Family Law Motion adopting most of the recommendations of the GAL on an interim basis. CP at 143-145. No additional reports from the Gal were required unless updates were needed for the trial court. *See id.*

On January 17, 2013, Respondent filed and served her Disclosure of Primary Witnesses in accordance with the case schedule order; no such document was filed by Appellant. CP at 150-152; CP at 284-289.

On March 28, 2013, an Agreed Order Continuing Trial Date and Order Amending Case Schedule (hereinafter “amended case schedule order”) were entered; the amended case schedule order established a trial date of June 24, 2013. CP at 160-164. The amended case schedule order

also established deadlines for, *inter alia*, the disclosure of possible additional witnesses and the exchange of witness and exhibits lists. *See id.* Appellant failed to provide either document. CP at 286. Indeed, throughout the course of the case and despite the existence of two separate case schedule orders, Appellant never provided any proposed exhibits for trial, documents or intended witnesses. *See id.*

On May 29, 2013, the trial court conducted a telephonic pretrial conference in the case the result of which was an Order on Pre-Trial Conference (hereinafter “pretrial order.”). CP at 169-174. The pretrial order established deadlines for the preparation and delivery of the parties’ financial declarations, witness lists, exhibit lists, copies of exhibits and excerpts of depositions and interrogatories intended to be used at trial. *See id.*

On June 17, 2013—one week before trial—Appellant’s Trial Brief, Joint Statement of Evidence and Documentary Exhibit and Exhibit List were due to the court and counsel for Respondent. *See id.*; CP at 286-287. Appellant failed to meet this deadline, providing none of these documents. CP at 286-287.

On June 20, 2013, Respondent’s trial counsel filed and served Respondent’s Motion to Dismiss [Appellant’s] Modification Petition, citing the many violations of the case schedule order, amended case schedule order

and pretrial order. CP at 284-289. Respondent requested dismissal of the modification action with prejudice, citing King County Local Family Law Rule (LFLR) 4(a). *See id.* Respondent also requested sanctions in the form of attorney's fees and costs "for payment of extensive attorney's fees [Appellant] has forced upon the Respondent as she was acting as good faith, competent Respondent attending hearing after hearing." *See id.* Respondent also requested reimbursement for her portion of the GAL fees she was required to pay. *See id.*

On June 25, 2013, *e.g.*, the date set for trial, the court heard Respondent's motion to dismiss after Appellant's counsel agreed that the motion could be heard on less than six days' notice. RP at 9, 10-28. After hearing the argument of counsel, including Appellant's counsel's concession that he "put [Respondent's counsel] in a position to where she [felt] that she was unable to prepare for trial today[,]," the trial court dismissed the modification action *without* prejudice. RP at 22, 29. Specifically, the court made the following oral ruling:

The court's going to make the decision to grant the motion to dismiss the petition, but it is without prejudice. And the issues that were raised in the petition may in fact be raised again. I think that the court, when the matter comes back to trial, will have the opportunity to sit and parents participate for the children's best benefit, and I am not in any way interested in foreclosing the opportunity to take a full look at the total picture.

So the motion to dismiss would be granted but without prejudice.

Now, here's – here's one reason why, [Appellant's counsel] and [Appellant], the – the rules are set out because they mean something. And the idea is that when the parties come to trial, they should know what to expect from the other side and they should not have to prepare on the fly, so to speak.

It is true that [Respondent's counsel] knew, I think, that [Appellant] was going to be called as a witness. I think it's true that [Respondent's counsel] had a pretty good sense of what [Appellant] was going to say about his concern with the children. And I think [Respondent's counsel] probably knew – had a pretty good sense of what the guardian ad litem was going to say.

That doesn't make it right, however, because she, as the person who's having to – is behind and having the responsibility of representing her client, may find that she needs to bring in an expert witness or nonexpert witness to counter the educational deficiency allegations that were made by the dad. And it is entirely possible that she can't do that with one-day's notice.

We know what the issues are. They're dealing with concerns about the kids' behavior and education. I know that much. And so I also know that there is a certain level of expertise that goes with that, having been trained as an educator, so it's not enough to just kind of generally know that these people are going to be testifying, but the parties need an opportunity to prepare and then to call the witnesses, to depose individuals and so forth.

So I am – I'm not going to give in to the idea that – in this circumstance where there is absolute noncompliance, where Judge Gain, as recently as May, told both sides to comply, there is – there's nothing before the court which would suggest any mitigation, mitigating circumstances, so I'm going to grant the motion to dismiss and – and award terms.

The amount of attorney's fees ... I'm not going to order that today. ... But I'm going to give you ... an opportunity to go through and see if you have an issue with any of that. If the parties can reach an agreement, I'm fine with that. If not, then you can bring it back before the court and we will determine what the amount will be. But there will be some materials for having failed to comply with the court's schedule.

See RP at 29-31.

In announcing its ruling above, the trial court was keenly aware that it had a range of options available to it for Appellant's violations of the court's orders:

I have a choice here ... to either dismiss the case without prejudice, dismiss it with prejudice, grant a continuance, order sanctions against [Appellant's counsel] for noncompliance. I've got a range of things that I – that I could do.

See RP at 18.

The trial court's oral ruling was reduced to a written order (Order on Dismissal of Respondent's Motion to Dismiss [Appellant's] Modification Petition) on June 25, 2013. CP at 200-201. The trial court further entered an Order on Civil Motion (denying Appellant's motion for reconsideration), a Judgment on Respondent's Motion for Attorney's Fees Following Trial Dismissal and Order Re: GAL Fees on December 2, 2013. CP at 327-331. Appellant filed this appeal on January 2, 2014. CP at 332-337.

B. ARGUMENT

1. THE TEMPORARY ORDER IS NOT APPEALABLE AS A MATTER OF RIGHT

a. *The September 24, 2012 Order on Family Motion Was a Temporary Order*

Appellant first assigns error to the September 24, 2012 Order on Family Law Motion, entered by Commissioner Bonnie Canada-Thurston. This order adopted, on a temporary basis, most of the recommendations of the GAL in her report dated August 13, 2012. CP at 143-145. No additional reports from the Gal were required unless updates were needed for the trial court. *See id.* Appellant asks this Court, “*If the purpose of the modification action was to change which parent was to be the majority time parent, what was the purpose of adopting the GAL report before trial and before opportunity to cross-examine?*” *See Br.* at 6. He then argues, without authority, that “there is no other way to view the 9/24 order than as having determined the ultimate issue before the court.” *See Br.* at 9. Appellant misstates or misunderstands the importance and purpose of the September 24, 2012 order.

RCW 26.09.260-.270 and the King County Local Family Law Rules are very explicit with respect the procedure to be followed when a petition for modification of a final parenting plan is brought. For example, LFLR 13(d) provides as follows:

- (1) **Starting an Action to Modify a Permanent Parenting Plan.**
  - (A) This rule applies to actions to modify final parenting plans, and final custody or visitation orders, except for adjustments related to the relocation of a child. See LFLR 15 for proceedings involving relocation of a child.
  - (B) The moving party shall attach to the petition a copy of the current parenting plan and all other effective orders affecting parenting, custody, and visitation. Copies of any orders which were entered outside King County shall be certified.
- (2) **Adequate Cause Hearing.**
  - (A) **Adequate Cause Requirement.** A threshold determination of adequate cause is required for any modification or adjustment of a final parenting plan, whether major, minor, residential or non-residential in nature. An order of adequate cause may be entered by agreement of the parties, by default, or after an adequate cause hearing. This rule does not limit the Court's authority under Chapter 26.50 RCW.
  - (B) **Timing of Adequate Cause Hearing:** The adequate cause hearing may not be heard before the deadline for filing the response to the petition has passed. All requirements of LFLR 6 shall apply to the adequate cause hearing.
  - (C) **Finding of Adequate Cause:** If adequate cause is found, the matter shall remain scheduled for trial. A copy of the Adequate Cause Order shall be attached to the Confirmation of Issues.
- (3) **Entry of Temporary Orders.**
  - (A) **Types of Temporary Orders.** Once a finding of adequate cause has been found, the court may enter temporary orders, including but not limited to: a temporary parenting plan, a referral for mediation, investigation, or evaluation; appointment of an evaluator, attorney for the child or Guardian ad Litem; or a referral to Unified Family Court.
  - (B) **Combined with Adequate Cause Hearing.** A party may, but is not required to, schedule motions for temporary orders for the same time as the adequate cause hearing. Any party seeking the entry of temporary orders at the adequate cause hearing must make that request by motion pursuant to the format and notice requirements of LFLR 6.
  - (C) **Emergency Temporary Orders.** For good cause shown, any party may move for emergency temporary orders at any time, including prior to the finding of adequate cause.

Here, the September 24, 2012 order was clearly an order entered under LFLR 13(d)(3)(A), *e.g.*, a temporary order. *See also* RCW

26.09.060(10)(d). To be sure, the Order Re Adequate Cause was entered on May 31, 2012. In conjunction with the order finding adequate cause, the court also entered an order appointing a GAL, who filed her report on or about August 13, 2012. CP at 84-86. Appellant concedes that it was then his own attorney who brought a motion to adopt “several provisions” of the GAL report. *See* Br. at 8. The terms of the September 24, 2012 order clearly contemplate that there will be a final determination made by the trial court. *See, e.g.*, CP at 85 (“No interim GAL report is required unless updates are needed for the trial court.”); *see also* CP at 86 (“Any update should be provided to the court by February 1, 2013 for trial.”).

As such, Appellant’s contention that the September 24, 2012 order somehow ultimately decided the action is wholly without merit.

*b. All Temporary Orders in the Case Where Terminated  
When the Petition for Modification of Parenting Plan  
Was Dismissed*

An order of temporary custody does not resolve the issue of permanent legal custody, nor does it end the litigation; and thus is it not appealable under RAP 2.2. *See In re Marriage of Greenlaw*, 67 Wn. App. 755, 759 (1992), *rev'd on other grounds*, 123 Wn.2d 593, *cert. denied*, 513 U.S. 935 (1994).

In those rare instances in which the appellate courts have reviewed temporary orders, they have done so prior to entry of a final order and

consistent with RAP 2.3, pertaining to the rules for discretionary review upon a finding the temporary orders altered the status quo. *See Greenlaw*, 67 Wn. App. at 759-60. Here, Appellant never sought discretionary review of the September 24, 2012 order which, in any event, was terminated when the Petition for Modification was dismissed. *See* RCW 26.09.060(10)(c).

2. THE TRIAL COURT'S ORDER OF DISMISSAL WITHOUT PREJUDICE IS NOT APPEALABLE AS A MATTER OF RIGHT

a. *The Trial Court Dismissed Appellant's Petition for Modification of Parenting Plan Without Prejudice*

Although somewhat unclear from his brief, Appellant apparently next assigns error to the dismissal of the petition for modification without prejudice. To the extent Appellant assigns error to the dismissal without prejudice, he must also first satisfy the criteria set forth in RAP 2.2(a)(3) establishing that the order was a decision which in substance determined the action and prevented a final judgment. *See, e.g., In re Marriage of Molvik*, 31 Wn.App. 133, 135 (1982).

In *Molvik*, the appellant filed a petition for distribution of undisclosed assets alleging that her former husband failed to disclose certain community property assets. The husband moved to dismiss the petition on the ground that the court lacked jurisdiction because the action should have been commenced as an independent action and not as part of the previous

dissolution case. The trial court granted the husband's motion to dismiss, but dismissed the petition without prejudice. The wife appealed and the court of appeals held that the order dismissing the petition without prejudice was not appealable as a matter of right under RAP 2.2 because "it is not a decision which determine[d] the action, prevent[ed] a final judgment or discontinue[d] the action. The former wife was free to commence an action in accordance with the civil rules seeking the same relief." See *In re Marriage of Molvik*, 31 Wn. App. at 135. As such, the court continued, the order of dismissal was only subject to discretionary review under RAP 2.3.

*b. The Appellant May Re-File His Petition for Modification of Parenting Plan At Any Time*

Here, as in the *Molvik* case above, there is nothing preventing the appellant from re-filing his modification petition. Indeed, the trial court anticipated that such would be the case at the outset of its oral ruling:

The court's going to make the decision to grant the motion to dismiss the petition, but it is without prejudice. And the issues that were raised in the petition may in fact be raised again. I think that the court, when the matter comes back to trial, will have the opportunity to sit and parents participate for the children's best benefit, and I am not in any way interested in foreclosing the opportunity to take a full look at the total picture.

*See* RP at 29.

Because Appellant's petition was not dismissed with prejudice and because there is no statute of limitations on filing a petition for modification

of a final parenting plan, the rule announced in *Munden v. Hazelriqq*, 105 Wn.2d 39, 44 (1985), *e.g.*, where a dismissal without prejudice has the effect of determining the action and preventing a final judgment or discontinuing the action, the dismissal is appealable, is inapplicable.

Here, Appellant has made no attempt to satisfy the elements of RAP 2.3 for discretionary review of the trial court's order. This court should decline to review the trial court's order dismissing the petition without prejudice under RAP 2.2.

### 3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN SANCTIONING APPELLANT

Appellant concedes in his brief that "the standard of review for sanctions is abuse of discretion." *See Br.* at 10. Nonetheless, Appellant contends that "the trial court abused its discretion when it both dismissed the action and also imposed sanctions." *See id.*

In support of this argument, Appellant points out that only LFLR 4(a) was cited by Respondent as authority for her motion to dismiss and that the last clause of this rule states "failure to comply with the case schedule may result in sanctions or dismissal." Appellant argues that the trial court was limited to either dismissing the case or imposing sanctions, but that it could not do both. Thus, he reasons, the trial court committed an error of law which is a *per se* abuse of discretion. *See Br.* at 12.

Appellant also contends that it was error to personally sanction him and not his attorney, who admitted responsibility for his many failures to comply with the case schedule orders and pretrial order. *See Br.* at 10-11, 13-14.

Finally, Appellant contends that the award of fees—even at a discounted rate of 75%—was prohibited fee shifting and otherwise improper due to lack of segregation of fees incurred as a result of the sanctionable conduct. *See Br.* 12-13.

*a. The Trial Court Properly Considered All Options in Sanctioning Appellant for Violating Its Orders*

The law with respect to sanctions for failure to follow court orders, including scheduling orders, is well settled. For example, in *Apostolis v. City of Seattle*, 101 Wn. App. 300 (2000), this court stated:

A trial court's order dismissing a case for noncompliance with court orders or rules is reviewed for abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.

...

CR 41(b) authorizes a trial court to dismiss an action for noncompliance with court orders. The court may impose such sanctions as it deems appropriate for unexcused violations of its scheduling orders. Dismissal is justified when a party acts in willful and deliberate disregard of reasonable and necessary court orders, the other party is prejudiced as a result, and the efficient administration of justice is impaired. Disregard of a court order without reasonable excuse or justification is deemed willful.

*See Apostolis*, 101 Wn. App. at 303-304 (footnotes).

“[A]s a general principle, a trial court must consider on the record whether a lesser sanction would suffice, in addition to making clear on the record whether the factors of willfulness and prejudice are present.” *See Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 132 (1995).

Additionally, a party who is represented by counsel at trial, such as Appellant, may not avoid imposition of terms on the ground that he is not responsible for his attorney’s actions. *See Woodhead*, 78 Wn. App. at 133 (“[A]bsent fraud, the actions of an attorney authorized to appear on behalf of a client are binding on the client.”) (citations omitted).

Finally, a trial court has the inherent authority to impose terms, which may include the aggrieved party’s attorney fees. For example, in *Graves v. Duerden*, 51 Wn. App. 642 (1988), the court observed as follows:

RCW 7.20.100 permits attorney fees to aggrieved parties in contempt cases. ... While we recognize this statute may not apply directly in cases in which the court exercises its inherent powers, we note that a court’s inherent powers are "at least equal" to its statutory contempt powers.

*See Graves*, 51 Wn. App. at 651 (citations and footnotes omitted); *see also Graves*, 51 Wn. App. at 647 (trial court may use inherent contempt power “to punish violations of orders or judgments.”).

Here, the trial court’s oral ruling reflects that it properly considered other alternatives before dismissing the case without prejudice:

I have a choice here ... to either dismiss the case without prejudice, dismiss it with prejudice, grant a continuance,

order sanctions against [Appellant's counsel] for noncompliance. I've got a range of things that I – that I could do. (*See* RP at 18.)

At the end of the day, however, the trial court properly exercised its discretion to dismiss the matter without prejudice:

Now, here's – here's one reason why ... the rules are set out because they mean something. And the idea is that when the parties come to trial, they should know what to expect from the other side and they should not have to prepare on the fly, so to speak.

It is true that [Respondent's counsel] knew, I think, that [Appellant] was going to be called as a witness. I think it's true that [Respondent's counsel] had a pretty good sense of what [Appellant] was going to say about his concern with the children. And I think [Respondent's counsel] probably knew – had a pretty good sense of what the guardian ad litem was going to say.

That doesn't make it right, however, because she, as the person who's having to – is behind and having the responsibility of representing her client, may find that she needs to bring in an expert witness or nonexpert witness to counter the educational deficiency allegations that were made by the dad. And it is entirely possible that she can't do that with one-day's notice.

We know what the issues are. They're dealing with concerns about the kids' behavior and education. I know that much. And so I also know that there is a certain level of expertise that goes with that, having been trained as an educator, so it's not enough to just kind of generally know that these people are going to be testifying, but the parties need an opportunity to prepare and then to call the witnesses, to depose individuals and so forth.

So I am – I'm not going to give in to the idea that – in this circumstance where there is absolute noncompliance, where

Judge Gain, as recently as May, told both sides to comply, there is – there’s nothing before the court which would suggest any mitigation, mitigating circumstances, so I’m going to grant the motion to dismiss and – and award terms.

See RP at 29-30.

On this record, Appellant simply cannot show that the trial court’s dismissal of the modification action was anything other than a proper exercise of judicial discretion.

*b. The Trial Court Did Not Abuse Its Discretion in Awarding Terms in the Form of Attorney’s Fees*

Respondent’s counsel also requested sanctions in the form of attorney’s fees and costs “for payment of extensive attorney’s fees [Appellant] has forced upon the Respondent as she was acting as good faith, competent Respondent attending hearing after hearing.” CP at 289. Respondent’s counsel further requested reimbursement for her portion of the GAL fees she was required to pay. *See id.* The trial court agreed, awarding terms in the form of judgment for 75% of Respondent’s fees and the GAL fees advanced on December 2, 2013. CP at 327-329.

Under *Woodhead* and *Graves, supra*, the award of fees against Appellant, personally, for his trial counsel’s inexcusable violations of the court’s orders was appropriate as Appellant—the petitioning party bearing the burden of proof at trial—essentially forced a useless and pointless court proceeding upon Respondent. This proceeding lasted over a year in the trial

court, continues to breathe life on appeal and has caused her to employ both trial and appellate counsel.

Appellant's rationale for reversal of this sanction is rather stunning. He asserts in one section of his brief that "[i]t seems like the only offense in the trial court was to fail to follow the rules, with Respondent assuming that that automatically grants her a right to have her fees paid by someone else. It does not." See Br. 14. He then asserts on the next page that "[h]ad this case been ended 9/24/12, there would have been no opportunity to miss deadlines that are the justification used for the award of fees." See Br. 15.

As such, Appellant apparently blames Respondent for being a named as a responding party in a petition for modification that he himself filed. Appellant's frustration with the outcome of this case is understandable, but it is misplaced. The proper forum and responding party for his complaints regarding his former counsel's failings is not the court of appeals and Respondent, but rather superior court and his former counsel in a malpractice action.

Appellant's own citation to the *Fisons* case in his brief supports the court's award of attorney's fees in this case, to wit: "The purposes of sanctions orders are to deter, to punish, to compensate and to educate." See Br. at 12 (citing *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 355-56 (1993)). Appellant contends that he is

“unlikely to be in a similar predicament again so the purposes of education and deterrence are unnecessary.” *See* Br. at 13. Assuming *arguendo* that the sanctions order did not educate and deter (it did), Appellant cannot dispute that the sanctions order fulfilled the purpose of compensating Respondent for the fees she incurred while defending what amounted to a frivolous action.

In sum, the trial court clearly acted within its broad discretion when it dismissed the modification action without prejudice and imposed sanctions, personally, upon Appellant in the form of her 75% of her attorney’s fees and GAL fees advanced. *See generally, Woodhead vs. Discount Waterbeds, Inc.*, 78 Wn. App. 125 (1995) (affirming trial court’s dismissal with prejudice of appellant’s breach of lease action for counsel’s willful, prejudicial failure to comply with court rules and orders regarding service of process and deliberate attempts to mislead court, and imposition of terms against appellant personally).

4. THIS COURT SHOULD AWARD RESPONDENT HER ATTORNEY’S FEES ON APPEAL

Respondent hereby requests attorney’s fees on appeal under RAP 18.9(a), which allows the appellate court to order a party who files a frivolous appeal to pay terms to another party. An appeal is frivolous if, considering the entire record, and resolving all doubts in favor of the

appellant, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. *See Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225 (2005).

Here, all the issues raised by Appellant are either clearly controlled by settled law or matters entrusted to the broad discretion of the trial court in which the court clearly acted within that discretion. In sum, there was no reasonable possibility of reversal of this matter. As such, this court should award Respondent her attorney fees as a sanction against Appellant.

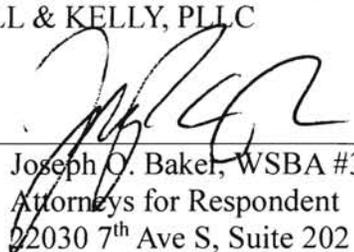
C. CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Court affirm the trial court and award her attorney's fees on appeal subject to RAP 18.1.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of October, 2014.

LAW OFFICES OF GEHRKE, BAKER,  
DOULL & KELLY, PLLC

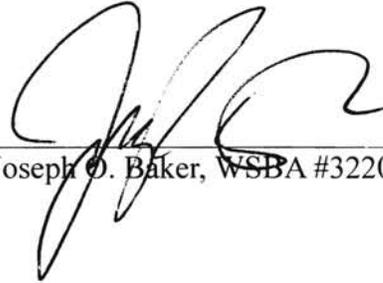
By \_\_\_\_\_

  
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**CERTIFICATE OF SERVICE**

I certify that on October 9, 2014, I caused a copy of the foregoing **BRIEF OF RESPONDENT** to be served on Appellant, Nathan Brown, via first class mail, postage prepaid. The address of the appellant is:

Nathan Brown  
14720 114<sup>th</sup> Ave NE  
Kirkland, WA 98034

A handwritten signature in black ink, appearing to read 'J. Baker', is written over a horizontal line.

Joseph O. Baker, WSBA #32203