

JAN 19 2012

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION III

VAN HEEMSTED OBELT, WALTER

Appellant,

vs.

VAN HEEMSTED OBELT, SUSAN

Respondent.

COA NO. 30203-2-III

SUPERIOR COURT
NO. 09-3-02687-2

BRIEF OF APPELLANT

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Assignment of Error

The Trial Court erred in making a finding of intransigence based on the facts and evidence of the case.

Statement of the Case

Walter and Susan Van Heemstead Obelt were married in 1994 The Netherlands while he was on active duty in the United States Air Force. (CP 41) The couple arrived at Fairchild AFB, in Airway Heights, WA in 1999. (RP Vol. 2, pg. 26) On July 31, 2009, after serving 20 years on active duty, Mr. Van Heemsted Obelt retired from the Air Force rather than accept a pending assignment to the Pentagon. (RP Vol. 2, pp. 25, 32) At the time of his retirement a portion of Mr. Van Heemsted Obelt's pay was apportioned as disability pay, based on a disability determination made by the Veteran's Administration. (RP Vol. 2, pp. 29-30) The economic impact of Mr. Van Heemsted Obelt's retirement on the family's income was negligible. (RP Vol. 2, pg. 33)

Mr. Van Heemsted Obelt filed a divorce petition in 2009. The matter was scheduled for trial on June 20, 2011. (RP Vol. 1, pg. 25) At that time the parties indicated that all issues but one had been settled. (RP Vol. 1, pg. 25) This was related to the distribution of any Cost Of Living Allowance associated with Mr. Van Heemsted Obelt's retirement pay. (RP Vol. 1, pp. 25-31) The Court made a ruling on that issue and the parties departed to complete their final paperwork. (RP Vol. 1, pp. 31-32)

On June 21, 2011 the parties returned to the Court after failing to agree on child support and final property issues. (RP Vol. 1, pg. 33). Sub-

issues were identified as establishing the date of the marriage, tax exemptions, and income for purposes of determining child support. (RP Vol. 1, pg. 64) At hearings prior to the trial both attorneys had asked the Court for fees. (RP Vol. 1, pp. 33, 59, 63) That issue was also reserved for the trial. (RP Vol. 1, pg. 64)

At trial the Court resolved the remaining issues associated with the dissolution proper. During the trial, the Court found that a document presented during the trial related to an account with AIG had not been signed under penalty of perjury, as the Court mistakenly believed had been ordered. (RP Vol. 2, pg. 18, 212-213) The Court ruled that failing to sign under penalty of perjury as previously instructed by the Court could be a matter of contempt or intransigence. (RP Vol. 2, pg. 184) It the oral ruling the Court relied on this and the size of the file to make a finding that there was “some intransigence,” and that Mr. Van Heemsted Obelt would have saved “a ton of money if you had just said I’m not going to fight about this.” (RP Vol. 2, pg. 213) The Court then awarded Mrs. Van Heemsted Obelt \$5000 in attorney’s fees. (RP Vol. 2, pg. 213) This appeal follows.

Argument

Award of Attorney's Fees for Intransigence

During the course of the dissolution, Mr. Van Heemsted Obelt had been found in contempt for failing to pay child support in full and for failures to comply with court ordered discovery. (RP Vol. 2, pg. 212) In each of those cases attorney's fees were awarded to Mrs. Van Heemsted Obelt's attorney. (RP Vol. 2, pg. 212) On June 20, 2011, the original date set for trial, the parties appeared before the Court and indicated that the case had been settled and only the final details remained to be worked out. (RP Vol. 1, pg. 25) Unfortunately, this was not the case and the parties reported so to the Court.

The parties appeared before the Court again on June 21, 2011 at which time the Court asked the attorneys to outline the specific matters left for determination. After some discussion the general matters for determination by the Court were outlined. Included in this discussion was a request by Mrs. Van Heemsted Obelt's attorney for information regarding an account with the now-defunct corporation AIG. Mr. Van Heemsted Obelt's attorney indicated to the Court that no such information existed and that this had been conveyed to Mrs. Van Heemsted Obelt's attorney on numerous occasions. Mrs. Van Heemsted Obelt's attorney indicated that she would subpoena the desired information. (RP Vol. 1, pg.

60) Mr. Van Heemsted Obelt's attorney then asked the Court what manner of proof would be required if no documents existed regarding this account, to which the Court responded, "[h]e can do a declaration that says we haven't had it from 2006. It was cashed out. We don't have any, but that's what he needs to do in a declaration, which is part of the interrogatories." (RP Vol. 1, pg. 56)

During the trial Mrs. Van Heemsted Obelt testified that information about the AIG account was not provided as ordered by the Court on June 21, 2011. (RP Vol. 2, pg. 180) The document presented was characterized as "just a letter." (RP Vol. 2, pg. 180) On cross-examination, Mrs. Van Heemsted Obelt was asked how many times Mr. Van Heemsted Obelt had responded that he did not have any AIG statements. (RP Vol. 2, pg. 181) An objection was made by Mrs. Van Heemsted Obelt's attorney, at which time the Court took over the argument, indicating that "this Court actually did that hearing, so I have a recollection of what was ordered at the hearing." (RP Vol. 2, pg. 182) When cross-examination resumed Mrs. Van Heemsted Obelt was asked to review the order, then asked if the order reflected that Mr. Van Heemsted Obelt was required to provide a written statement. (RP Vol. 2, pg. 183-84) At this point the Court stopped the questioning and again stated:

“I did the hearing. He said he will provide the AIG statements, period. He has not provided them, so that could be a contempt issue or it could be one of the intransigence issues.

“You asked me after we wrote the order, and I’ve signed it and on the record what if he doesn’t have them and they’re out of business, what do I do? I said then provide a declaration under penalty of perjury that he doesn’t have those in lieu of providing them, but the order specifically says he’s to provide them. Period.”
(RP Vol. 2, pg. 184)

A trial court has discretionary authority to order an award of attorney fees. *In re Marriage of Crosetto*, 82 Wn.App. 545, 563 (1996). A trial court may award a party legal fees caused by the other party's intransigence. *In re Marriage of Greenlee*, 65 Wn.App. 703, 708, *review denied*, 120 Wn.2d 1002 (1992).

Intransigence is the quality or state of being uncompromising. *Schumacher v. Watson*, 100 Wn.App. 208, 216 (2000). Intransigent conduct includes "foot-dragging" or obstructionist behavior, repeatedly filing unnecessary motions, or making a trial unduly difficult with increased legal costs. *Greenlee*, 65 Wn.App. at 708. The party's ability to pay the fee is irrelevant. *In re Marriage of Foley*, 84 Wn.App. 839, 846 (1997).

It is clear that the Court did not make any statement to the effect that a declaration by Mr. Van Heemsted Obelt on the AIG account was required to be provided under penalty of perjury. The testimony also indicates that the court order did not reflect this language either. The Court even indicates, “and we should have wrote it in the order.” (RP Vol. 2, pg. 212) The Court is incorrect when recalling the imposition of such a requirement. (RP Vol. 1, pg. 56 and Vol. 2, pg. 212). The characterization of his response as “a letter,” thereby a failure to comply with the Court’s order is incorrect.

The other issues before the Court at the time of trial were the result of an inability of the parties to reach a settlement, except for the award of attorney’s fees. The issue of intransigence for the purposes of obtaining attorney’s fees was the issue that dominated the proceedings. In the Court’s oral ruling the contempt findings of October and December 2010 were addressed, as was the motion related to the sale of the house. (RP Vol. 2, pg. 212) The Court characterized these actions as an abusive of the court system: “part of intransigence is . . . coming back to court continuously just for conflict . . . you go through and you add up and we’re into three volumes, which should have been a simple divorce.” (RP Vol. 2, pg. 213)

The challenge here is that none of the behavior cited by the court had any bearing on the outcome of the trial. Testimony regarding the AIG account was presented solely for the purpose of alleging that Mr. Van Heemsted Obelt had not presented his document “under penalty of perjury.” Mrs. Van Heemsted Obelt’s attorney did not ask about this account on cross-examination, nor did the court put Mr. Van Heemsted Obelt under oath and ask him questions about AIG. Bank statements were not presented, but testimony on the issue was available. The course of the Court’s reaction indicates that information regarding the AIG account was of no actual consequence to the trial issues.

The Court also attributes the size of the file as a sign of an abuse of the court system. As far as evidence of such, there was no testimony of any issue beyond the two contempt hearings and the hearing to allow Mrs. Van Heemsted Obelt to sign off on behalf of the community for the sale of the house. Attorney’s fees were imposed on the first two and the issue of fees was reserved on the third. All of these hearings took place between October 2010 and March 2011. There is no evidentiary correlation between these hearings and the size of the file. Again, relying on the AIG account, the Court stated, “[t]here was some dishonesty where you could have said I don’t have it or I did have it. . . .” (RP Vol. 2, pg. 212) In other words, the representation of counsel, the past interrogatory responses, and

the document stating the AIG account did not exist were still insufficient to convince the Court that no information was available. Yet, as previously indicated, Mr. Van Heemsted Obelt was not asked to testimony on the subject.

Conclusion

The Court's finding of intransigence is not based on fact, rather on the mistaken belief that the Court had ordered Mr. Van Heemsted Obelt to comply with a discovery demand in a specific manner. The trial itself was protracted by the issue of intransigence itself. The Court summarizes the award of fees under this finding as a sanction for taking this case to trial. The Court clearly states that this sanction was imposed because Mr. Van Heemsted Obelt chose to challenge the issues brought up at trial. Not agreeing to the settlement position of an opposing party and relying on the trial court to resolve issues is not intransigence, it is the reason the trial court exists. This ruling is in error and should be reversed.

RESPECTFULLY SUBMITTED

A handwritten signature in black ink, appearing to read 'Bryan P. Whitaker', written over a horizontal line.

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Attorney for Appellant