

No. 66510-3-I  
King County Superior Court No. 04-3-01252-3SEA

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

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KENNETH KAPLAN,  
Petitioner-Appellee,  
v.

SHEILA KOHLS,  
Respondent-Appellant.

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

The Honorable James Doerty

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APPELLANT'S REPLY BRIEF

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**I.**  
**INTRODUCTION**

Kaplan maintains that Kohls has painted the facts “with very broad strokes.” Brief of Respondent (BOR) at 2. That characterization might better apply to Kaplan. Kohls has focused on the specific rulings below that she has chosen to appeal. Although Kaplan has not filed a cross-appeal, he dwells on many side issues that are irrelevant to Kohls’ claims. For example, he discusses his multiple claims of contempt regarding doctor’s appointments even though the court found only a single instance of contempt. Similarly, he discusses his motion to enforce a particular arbitration decision even though neither side has challenged the commissioner’s ruling on that issue. Kaplan likewise goes into great depth regarding the complex procedural history between the time of Commissioner Sassaman’s initial ruling and Judge Doerty’s ruling on revision, although neither side has appealed any issue regarding that procedure. Kohls is not arguing, for example, that Kaplan’s motion for revision was untimely.<sup>1</sup> Kaplan also dwells on the rulings regarding

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<sup>1</sup> To be sure, this portion of the litigation could have been handled more efficiently. But Kaplan’s numerous pleadings contributed to the confusion.

payments for prescriptions and YMCA expenses, although those are not at issue on appeal. BOR at 13.

## II. STATEMENT OF THE CASE

### A. BACKGROUND

Kaplan quotes some negative comments about Kohls during a previous modification action, citing to *Marriage of Kaplan and Kohls*, No. 64114-0-I, 158 Wn. App. 1021, 2010 WL 4290447 (Nov. 1, 2010) (*Kaplan II*), *review denied*, 171 Wn.2d 1004, 249 P.3d 181 (March 3, 2011). *See* BOR at 1. The portion of the decision he cites, however, is taken a bit out of context. It arises during this Court’s rejection of Kaplan’s argument that Kohls brought the modification action in bad faith. The full context is as follows:

Alternatively, Kaplan argues that the trial court’s findings “[t]aken as a whole” compel a finding of bad faith. [footnote omitted]. We also reject this argument.

It is difficult to accept why findings “taken as a whole” support the very specific finding required by the fee statute – that the motion to modify was made in bad faith. Nevertheless, it appears that Kaplan relies on the following findings in support of his claim for fees under this statute:

*Id.* at Westlaw \*4. The Court then summarized Kaplan’s characterization of the trial court’s findings. It is that sentence which Kaplan quotes. This Court then continued:

We note that none of these findings, other than the last, mention bad faith. . . . Despite these findings, the trial court did not find that Kohls’ motive for filing the petition was improper.

*Id.* at \*5.

Kaplan states that “Kohls acknowledged that the issue of notice of the childrens’ medical appointments was before the trial court during the 2009 modification trial.” BOR at 32, citing CP 160 (Kohls’ reply declaration on her motion for enforcement of child support obligations). He repeats this claim at BOR 42. In fact, Kohls was explaining in her reply declaration that – at the modification trial – she presented numerous exhibits showing that Ken repeatedly received notice *of amounts owing for the children’s medical expenses*, yet refused to pay. CP 160-61. She does not suggest in the declaration that the issue of her giving notice to Kaplan regarding doctor’s appointments was addressed at the modification trial. Kaplan does not cite to any testimony or rulings on this issue from the modification trial, and there is no discussion of that issue in *Kaplan II*.

B. KAPLAN'S MOTION FOR CONTEMPT

1. Z.K.'s Headache

Kaplan discusses at length his numerous claims of contempt against Kohls. The trial court, however, found only a single instance of contempt: Kohls' failure to notify Kaplan that the date for Z.K.'s headache appointment had changed. *See* Appellant's Opening Brief (AOB) at 30-31. *See also* section III(B)(2), below. Kaplan has not cross-appealed the trial court's failure to find other instances of contempt so the matters are not before the Court.

Kaplan mistakenly states that Kohls gave "inconsistent explanations regarding her failure to notify Kaplan of Z.K.'s appointments." BOR at 6. Kohls maintains, and Kaplan concedes, that Kohls gave Kaplan notice of the original appointment date for Z.K.'s headache. Kohls has consistently maintained that she placed Z.K. on the "call list" for any earlier slot that might open up when his headaches increased in severity. Because of that, she was able to get him to his pediatrician a day early. CP 123-24. She admittedly did not give Kaplan notice of that change. Kohls has never conceded that she was required to give Kaplan notice of either appointment date. As she stated in her declaration, she has generally made an effort to ensure that he has notice of

appointments – whether or not she is required to – because she wishes to avoid conflict with Kaplan. CP 122-23.

Kaplan does not dispute that the only action taken at the January 14, 2010 visit with the pediatrician was an appointment for a CT scan, and that Kaplan had full notice regarding the scan and all other follow-up evaluations and treatment, including a referral to an ophthalmologist. He does not claim to have been excluded from any *decision* regarding the headache care, diagnosis or treatment. Nor does he claim that he disagreed with any course of action taken.

Kaplan notes that his insurance records show an appointment for Z.K. on March 12, 2010. BOR at 7, citing CP 75. He maintains that Kohls never disputed his claim that she did not notify him of this appointment. He also maintains that the appointment would fall under the joint decision making provisions because it is billed as a “consultation” with “diagnostic medical care.” In fact, CP 75 reflects the billing for the appointment with the ophthalmologist, Dr. Cadera, which Kohls fully addressed in her declaration.

After the CT scan, Dr. Smith prescribed antibiotics which were picked up and administered by Ken [Kaplan] at his regular Friday visit. At the visitation exchange, I told Ken about the appointment and also that Dr. Smith had recommended that [Z.K.] be seen by Dr. Cadera, an ophthalmologist, for a routine eye exam to rule out eye

problems as a source of [Z.K.'s] headaches. Ken did not express any objections.

CP 124. It is Kaplan who has never disputed Kohls' account of this appointment.

## 2. School Books

Kaplan also maintained in the trial court that Kohls was in violation of the child support order because she refused to pay \$188.63 for her share of the children's books. CP 6-7. Kaplan concedes that the child support order requires Kohls to pay 28% of educational expenses only "to the extent petitioner proves he has no funds for this purpose paid by his father." CP 6. Kaplan states: "In his reply [on his motion for contempt] Kaplan provided proof that he, not his father, was paying for the children's tuition." BOR at 8. Even if that "proof" were convincing (and Commissioner Sassaman found it was not) it could at most support a finding that Kohls would be in contempt if she failed to pay for school books in the future. Kohls could not be in contempt for failing to pay for books prior to Ken's submission of proof.

In any event, Kaplan also concedes that – notwithstanding the language of the child support order – he promised in writing to pay the "entire cost" of private school during an arbitration in which he successfully sought private school education for the children. CP 149.

Kaplan maintains that “entire cost” meant only “tuition.” BOR at 8. But he points to no corroboration of that interpretation.<sup>2</sup>

### C. KOHLS’ MOTION TO ENFORCE CHILD SUPPORT

Kaplan continues to quibble about whether and when he owed various amounts to CUMG for I.K.’s treatment with Dr. Varley. The following facts remain undisputed, however:

- In prior litigation, Kaplan vigorously and unsuccessfully challenged the decision for I.K. to be treated by Dr. Varley.
- Kaplan received all insurance explanations of benefits concerning the treatment, which showed the uninsured amount owing.
- Kaplan was obligated to pay about 72% of the fees not covered by insurance.<sup>3</sup>
- By his own account, Kaplan made only one \$38 payment. (Kohls submitted proof that she actually made that payment.)

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<sup>2</sup> As Kaplan notes, Kohls did not submit all of the pleadings from the arbitration proceeding. But Kaplan never suggests that Kohls took his words out of context or that there was some other document or testimony during the arbitration (or elsewhere) that would confirm his interpretation of “entire cost.”

<sup>3</sup> Commissioner Sassaman found that Kaplan’s obligation was more precisely to pay 72% only to the extent that total uninsured expenses in a given month exceeded \$76.70. As discussed in the AOB at 19, this did not change the calculation very much because that amount was exceeded in almost every month at issue. Kohls chose not to seek further review of the commissioner’s ruling on this issue.

- Regarding many of the appointments, Kaplan admitted that he deliberately withheld payments because, in his view, he was not given sufficient notice of the appointments.
- To the extent CUMG would, at various points in time, show an amount owing less than the amount Kaplan had failed to pay, it was only because it had written off the amount as “bad debt.” Nevertheless, CUMG’s policy was to revive the debt if a party was willing to make a late payment.
- Kohls did pay her share of the uninsured expenses.

Kaplan seems to contend that Kohls perpetrated some sort of fraud on the court by claiming he owed money to CUMG, when in fact CUMG had written off the amounts as bad debt. BOR at 13. In fact, in every submission to the court, Kohls explained CUMG’s write-off/revival policy for the bad debt. The true dispute is over whether Kaplan may evade his child support obligations by failing to make payments until creditors give up on collecting. Nevertheless, Kaplan was so outraged that Kohls would refer to the bad debt as an amount “owing” that he filed a motion for sanctions against her attorney and sued CUMG for preparing a statement at Kohls’ request.

### III. ARGUMENT

#### A. STANDARD OF REVIEW

Kaplan does not seem to have any substantial dispute with Kohls' statement of the legal standards.

#### B. THE TRIAL COURT ERRED IN FINDING KOHLS IN CONTEMPT

##### 1. School Books

A party may be held in contempt only if the requirements of an order are clear and the party intentionally violated them. Further, a parent cannot be held in contempt if her deviation from a court order was done with the agreement of the other parent. *See* AOB at 28. Here, Kohls had two good reasons to believe she did not have to pay for the children's school books: 1) the child support order required her to pay a share only if Kaplan "proves" that he has no funds for that purpose from his father; and 2) Kaplan stipulated in writing during arbitration that he would pay the "entire cost" of the children's private school education.

Kaplan reasons backwards from Judge Doerty's contempt rulings that Kohls must have been wrong to rely on those two points. But he

never explains how Kohls could have intentionally violated any clear provision of the order before the judge made those rulings.

Kaplan maintains that Judge Doerty found Kaplan had no funds from his father to pay for educational expenses. He argues that this Court cannot reweigh the evidence and conclude otherwise. BOR at 36. The first problem with this argument is that Judge Doerty never made such a finding. As Kaplan notes, Judge Doerty's only comment about the school books is at CP 333 in his order on Kaplan's motion for reconsideration of the order on revision. *See* BOR at 36. He states in full:

(B) Ms. Kohls is in contempt of those provisions of the Order of Child Support requiring her to pay 28% of the children's educational expenses. Mr. Kaplan's agreement to pay private school tuition does not act as a modification absolving Ms. Kohls of responsibility for all other educational expenses (textbooks) paid by Mr. Kaplan, and judgement is entered accordingly

CP 333. Judge Doerty completely ignored the provision that Kaplan must prove he had no funds from his father.

The second problem is that, even if Judge Doerty had made such a finding (in the very last ruling in these proceedings), it could not retroactively turn Kohls' prior conduct into contempt. As discussed above in section II(B)(2), Kaplan did not even attempt to prove that he had no funds from his father until he filed his reply brief on his motion for

contempt. An experienced family law commissioner found his proof lacking even then. Thus, it could hardly have been clear to Kohls that Kaplan had proved this point a year earlier, when the school books were bought.

Further, Kaplan had stipulated that—notwithstanding the provisions of the child support ruling—he would pay the “entire cost” of private school. CP 149. Kaplan accepts that this stipulation excuses Kohls from paying her full 28% of the educational expenses under the child support order. Yet, in his own mind, he interprets “entire cost” to mean only tuition. It is true that Judge Doerty refers to “Mr. Kaplan’s agreement to pay private school *tuition*.” CP 333 (emphasis added). But it is not clear why the judge characterizes the stipulation in that way. Kaplan states again that Judge Doerty must have “weighed the evidence” (BOR at 37), but there was no evidence to weigh other than the clear language of the stipulation. Kaplan never presented, for example, any other statements from the arbitration proceeding that would limit the language cited by Kohls. Nevertheless, in his briefing below, Kaplan repeatedly referred to the stipulation as an agreement to pay “tuition” and Judge Doerty apparently accepted this characterization without reviewing the actual language of the arbitration brief. In any event, even if Judge Doerty had

some basis for finding that “entire cost” did not include books, that interpretation could hardly have been clear to Kohls prior to the ruling. In common speech, tuition is only one “cost” of an education.<sup>4</sup>

It is not surprising that Judge Doerty erroneously believed that Kaplan’s stipulation covered only tuition because Kohls had no opportunity to correct Kaplan’s briefing. The initial order on revision did not find Kohls in contempt regarding the school books, nor mention them in any way. CP 291- 92. Likewise, Kaplan’s motion for reconsideration contains no reference to the school books. CP 293-97. Kohls therefore had no reason to address that matter in responding to the motion for reconsideration. Then, in violation of local court rules, Kaplan argued in his *reply* on the motion for reconsideration that Kohls should be found in contempt regarding the books. CP 319-20. In that brief, Kaplan states as fact that he agreed only to pay only tuition, and maintains that Kohls is unreasonably broadening the agreement to include other expenses. *Id.* Kaplan fails to mention in that brief that the actual language of the stipulation referred to “entire cost” rather than “tuition.” *Id.* There was no

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<sup>4</sup> For example, the University of Washington’s web site specifically includes books and other items, along with tuition, in calculating the “total costs” of an academic school year. See <http://www.washington.edu/students/osfa/prospectiveug/costs.html>

hearing on the motion for reconsideration so Kohls had no opportunity to respond to Kaplan's misleading and untimely statements.

2. Z.K.'s Headaches

Kaplan maintains that Judge Doerty found Kohls in contempt for failing to notify Kaplan of numerous (although unspecified) doctor's appointments for I.K. and Z.K. In fact, the ruling clearly covers only one appointment for Z.K.'s headache. The ruling begins by criticizing Commissioner Sassaman and Kohls for focusing solely on the "routine medical appointments" and the "several pages of history about therapy appointments." CP 291. The commissioner noted that these appointments did not involve any new "decision" that would require joint decision making. *See* AOB at 8-9. Judge Doerty, on the other hand, specifically stated that the act of contempt was "not a matter" of those appointments. CP 291. Rather, he focused on what he viewed as "the appointment in question," which Kohls conceded was not routine. CP 291. Rather, she "acknowledges the severity and concern of the medical issue" by stating that she "asked to be placed on the call list in the event an earlier appointment becomes available because his headaches were increasing in severity." *Id.* The court noted that Kohls could have notified Kaplan of the changed appointment date by email or text message. CP 292.

Thus, the Court clearly limited its finding of contempt regarding medical issues to the single headache appointment. Kaplan apparently interprets some of Judge Doerty's general criticisms of Kohls as implying that there must have been additional violations. But Kaplan does not state exactly what those violations might be, and Kohls is at a loss to see how she could appeal findings that were never made.

In arguing that Kohls was in contempt regarding additional doctor's appointments, Kaplan is actually seeking reversal of the superior court's ruling, although he has not filed a cross-appeal. In any event, as Commissioner Sassaman found, there is no evidence to support a finding that any of the other medical appointments involved a major decision.

Kaplan seems to argue that Commissioner Sassaman improperly excluded "routine" health care from the joint decision making provisions. BOR at 29. He states: "Non-emergency health care is defined, by agreement, as a major decision, and Kohls and Kaplan are required to make all major decisions jointly." *Id.* Kaplan has things backwards. The parenting plan states that *only* major decisions concerning non-emergency health care are subject to joint decision making. CP 19. It does not state that non-emergency health care necessarily involves a major decision. As Commissioner Sassaman properly found (without contradiction from

Judge Doerty), routine appointments for established care do not involve a major decision.

It is actually Kaplan who wishes to re-write the parenting plan to require notice of all doctor's appointments. It is not uncommon for parenting plans to contain such a provision, but the plan that Kaplan and Kohls negotiated does not.<sup>5</sup>

C. EVEN IF THE CONTEMPT FINDING WERE APPROPRIATE, THE PURGE CONDITIONS WERE IMPROPER

Kaplan's arguments on this point are based on his erroneous interpretation of the contempt finding, which Kohls has addressed above.

D. THE TRIAL COURT IMPROPERLY DENIED KOHLS' MOTION FOR PAYMENT OF MEDICAL EXPENSES

As discussed above in section II(C), Kaplan does not dispute that he has failed to pay his share of the uninsured expenses for Dr. Varley's services. Nor does he deny that he deliberately withheld many of the payments because he did not wish to pay for any appointments for which, in his view, Kohls failed to provide adequate notice. In fact, Kaplan does

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<sup>5</sup> Kaplan maintains that "substantial evidence supports Judge Doerty's decision that notice was required under the plain language of the agreed parenting plan." BOR at 33. As discussed above, Judge Doerty made no such finding. Even if he had, the interpretation of the language of a parenting plan is not a factual finding reviewed under the "substantial evidence" test, but rather a legal conclusion reviewed de novo. After all, the only "evidence" on this issue is the undisputed language of the parenting plan.

not dispute that it is contempt of court to condition the payment of child support obligations on the other party's compliance with the parenting plan. *See* AOB at 41-42. Kaplan's only response is that "[t]his argument has no bearing on the issues before this Court as Kohls did not bring a motion for contempt." BOR at 33 n.20. In fact, as discussed below in section E, this issue has considerable bearing on the trial court's order awarding fees to Kaplan.

Kaplan's only argument is that Kohls may not have standing to bring an enforcement action when Kaplan's debt is to a third party. He cites RCW 26.18.170(17), which states that either the "department" or the "parent seeking reimbursement of medical expenses" may enforce collection of "uninsured medical expenses." *See* BOR at 39. Another subsection, however, states: "This section shall not be construed to limit the right of the parents or parties to the support order to bring an action in superior court at any time to enforce, modify, or clarify the original support order." RCW 26.18.170(15).

In any event, Kohls has argued in the alternative – in the superior court and in this Court – that if Kaplan need not pay his share to CUMG, then he owes money to Kohls. *See* AOB at 44. As things stand, she has paid 100% of the uninsured expenses when the child support order

requires her to pay only 28%. If she is truly restricted to a claim for reimbursement, as Kaplan maintains, then the trial court erred in denying her that.

This may seem to be a relatively small amount of money to be concerned about on appeal, but there are two reasons why it takes on additional importance. First, the trial court's ruling sets a dangerous precedent for the parties. Kaplan has been told that he is free to ignore his child support obligations as long as the creditors at some point give up on collecting. While CUMG has graciously allowed I.K. to continue treatment under those conditions, it is doubtful that all creditors would be so generous. More likely, they would cut off services and/or demand that Kohls pay the balance owing.

Second, the trial court ordered Kohls to pay Kaplan for his legal fees in responding to this issue. CP 334. Presumably, this accounts for a significant portion of the \$13,000 fee award against Kohls.

This Court should therefore reinstate the commissioner's ruling on this issue, including the award of attorney fees to Kohls.

E. THE TRIAL COURT'S ASSESSMENT OF ATTORNEY FEES AGAINST KOHLS WAS AN ABUSE OF DISCRETION

Kaplan's position on this issue is largely based on his view of the merits of the claims, which Kohls has already addressed.

It was especially unfair to hold Kohls responsible for all the fees involved on the child support issue when Kaplan could have quickly resolved the entire matter by simply paying off his bad debt. That would have cost far, far less than litigating endlessly his position that he no longer owed the money because CUMG had stopped chasing him for it.

Kaplan maintains that the award against Kohls was required because Kohls brought her motion for enforcement in "bad faith." BOR at 44-43, citing RCW 26.18.160. It is hard to see how Kohls could have been acting in bad faith, however, when Kaplan frankly admitted that he deliberately refused to pay his share. As noted above, his actions clearly amounted to contempt of court. Had Kohls sought a contempt finding, she would have prevailed and an award of fees in *her* favor would be mandatory. She should not be punished for showing restraint.<sup>6</sup>

Similarly, Kohls could theoretically have paid 100% of the medical bills and then sought reimbursement from Kaplan. She would clearly have

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<sup>6</sup> Kaplan, on the other hand, showed no such restraint. He fought for a contempt finding over less than \$200 worth of school books.

prevailed on such an enforcement action and once again an award of fees in her favor would be mandatory. Once again, however, it would be unfair to punish Kohls for declining to take that route. On a school nurse's salary, it is not easy to front thousands of dollars, especially when reimbursement will likely require a court fight.

**IV.  
CONCLUSION**

Based on the foregoing, the Court should reject Kaplan's arguments and grant the relief requested by Kohls.

DATED this 20<sup>th</sup> day of July, 2011.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by United States Mail, postage prepaid, and email, one copy of the foregoing brief on the following:

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