

No. 75294-4-1

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

In re the Marriage of

GINGER GALANDO
Respondent

and

MATTHEW GALANDO
Appellant

FILED
Nov. 10, 2016
Court of Appeals
Division I
State of Washington

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

BRIEF OF RESPONDENT

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I. RESTATEMENT OF ISSUE

1. Did the trial court properly exercise its contempt authority, as conferred on it by three statutes?
2. Did trial court properly find the father in contempt of the parenting plan when the father's deliberate violation of the parenting plan's treatment and monitoring conditions prevented him from time with his children?
3. Did the trial court properly find the father in contempt when he had violated numerous court orders, even though he remedied some of these violations before the hearing?
4. Did the trial court properly find the father in contempt for his ongoing violations of numerous parenting plan provisions?
5. Did the trial court properly find that the father willfully inflicted emotional harm to the children by refusing all contact with them?
6. Did the court's purging conditions properly aim to coerce compliance with the court's orders?
7. Should Ginger Galando receive her fees and costs for responding to this appeal?

II. STATEMENT OF THE CASE

A. THE COURT'S ORDERS UPON DISSOLUTION

The marriage of Ginger and Matthew Galando was dissolved by final orders entered in November 2015. CP 1810-1817. The court also issued a parenting plan for their two children that restricted Matthew's residential time under RCW 26.09.191 based on findings of emotional abuse of a child, domestic violence, abusive use of conflict, and long-term impairment from substance abuse. CP 1843-47, 1851-53. Most of the marriage, and the entirety of the children's lives, were troubled by Matthew's addiction to painkillers and his alcohol abuse,¹ ultimately leading to the demise of the marriage. To protect the children, the court imposed on Matthew a variety of treatment and monitoring conditions, with which he needed to comply before the children could spend residential time with him. CP 1845-47.

The child support order required him to pay private school tuition and other expenses not included in the transfer payment.

¹ In his brief, Matthew claims there is no evidence or finding that he is addicted to or dependent on alcohol (though his record citations do not seem to fit). Br. Appellant, at 1. This issue is not properly raised in this appeal, but Matthew raises it in his appeal from the final orders, No. 74427-5-I. The record in that appeal includes evidence of Matthew's history of alcohol abuse. See, also, Supp. CP __ (sub. 409) (most recent alcohol assessment).

CP 1829,1833. Additionally the dissolution decree required that he list the family home for sale by January 18, 2016. CP 1800.

Matthew appealed the court's orders; his appeal was consolidated with an appeal by a Trustee who intervened in the dissolution. (Matthew is the beneficiary of the trust.) These appeals (No. 74427-5-I) are currently pending before this Court and have been linked by ruling of the clerk (11/08/16). Accordingly, Ginger will not unnecessarily repeat here the facts reprised in her brief in the other appeal.

B. MOTION FOR CONTEMPT

By January 20, 2016, two months after the court entered final orders, Matthew had not complied with various aspects of the parenting plan, child support order and decree of dissolution; Ginger filed a motion for contempt specifying the following violations. CP 1792-1934.

Parenting Plan Violations

First, Matthew had failed to comply with the residential provisions of the parenting plan that imposed treatment and monitoring requirements as a condition of his residential time (¶ 3.2(1), CP 1845). He did not comply with any of these conditions: he failed to provide copies of UA test results, copies of signed

attendance slips for AA/NA sponsored meetings, and proof of enrollment and participation in a 12 month drug/alcohol addiction program. CP 1794, 1936.

Matthew had also violated other provisions of the parenting plan by failing to set up, much less complete, a psychological evaluation, CP 1794, 1937, and the Our Family Wizard account, CP 1794-95, 1938. Additionally, he had discussed with the children issues relating to the litigation and residential schedule, and made derogatory remarks about the mother to them. CP 1795, 1939. He had also refused to contact the children since November 20, 2015, causing the children “extreme confusion, upset and great sadness.”² CP 1937. His failure to exercise his residential time resulted in Ginger having to take time off work during Winter break because she could not afford to advance funds for childcare for the time the children were supposed to be with Matthew. CP 1937.

Child Support Violations

Matthew had also failed to pay for uninsured medical expenses as required by the child support order. CP 1795 (total of \$777.20 as of January).

² On December 3, 2015, his attorney sent Ginger an email stating he “would be unable to exercise his visitation.” CP 1937. He did not communicate her with during this time, but it was her belief that this was because he was in violation of the treatment and monitoring conditions in the parenting plan. CP 1937.

Violations of the Dissolution Decree

Finally, Matthew had not listed the house for sale by January 18, 2016, as required by the Dissolution Decree. CP 1795, 1939. Ginger's marital lien was to be paid from the proceeds of the sale, until which time she was hard-pressed for financial needs.

C. CONTEMPT HEARING AND ORDER

The trial court set a show cause hearing on January 29, 2016, but Matthew requested a continuance to February 5, 2016. CP 369. On February 5, 2016, Matthew failed to appear at the hearing and a bench warrant was issued. CP 369. On March 9, 2016, the court quashed the warrant but found that Matthew had "evaded service of the contempt motion." CP 366, 369. As of that date, Matthew had still not complied with the court's orders, with a balance now owing of \$2075 in unpaid medical bills, and an additional \$600 for unpaid private school tuition fees. CP 343.

The court set another hearing date on April 5, 2016. CP 366, 372. Matthew appeared at the hearing with new counsel, asserting that he was "on the cusp of being" in compliance with the orders. RP 16. At the time of the hearing, he had finally paid the child support obligations (on March 9), CP 399; listed the house for sale (on March 31), CP 398; had made an appointment for the

psychological evaluation (just before the hearing), RP 19; enrolled in the Family Wizard program (on March 23), CP 398; and submitted proof of an alcohol assessment from ABH and enrollment in an outpatient treatment program with ABH (the day of the hearing), CP 374, 457, 1787-90, 1791. But he had still not complied with the UA, AA/NA requirements, had not begun a 12 month addiction treatment program, and had not had the psychological evaluation completed or confirmed payment for it. RP 22,10-12,13, 28. Nor had he had any contact with his children. CP 375.

On April 21, 2016, the court entered an order finding Matthew in contempt of court. CP 479-482. The court found that he violated the residential “(visitation)” provisions of the parenting plan, CP 483; the treatment and monitoring requirements of the parenting plan, CP 483; communication and other provisions of the parenting plan (e.g., psychological evaluation, timely activation of Our Family Wizard, derogatory remarks to children about mother), CP 480-81, 483; the child support order (timely payment of uninsured medical expenses and private school tuition) CP 481-83; and the dissolution decree’s order that he list the house for sale by January 18, 2016, CP 481. The court also found that Matthew’s

willful refusal to comply with the parenting plan's treatment and monitoring requirements, thereby intentionally removing himself from any contact with the children, "has caused significant harm to the children." CP 480.

The court found he had the past and present ability to comply with the order, based on his financial ability and belated compliance with a number of the provisions. CP 482. (As noted above, just before the April hearing, Matthew remedied some of his violations, such as paying the uninsured medical expenses and the activation fee for OurFamilyWizard.) With respect to ongoing violations, including failure to submit UAs and proof of attendance at AA/NA meetings, the Court reserved the issue of coercive imprisonment pending a review hearing on July 20, 2016, finding that it has the authority to order imprisonment under RCW 7.21.010 and .030 to enforce performance of court orders. CP 484. The court further ordered that he may purge the contempt by full compliance with all provisions of the court orders. CP 484-486. The court awarded Ginger attorney fees in the amount of \$13,297.50 and \$829.75 in costs. CP 486.

Matthew timely appealed. Subsequently, Ginger filed another motion for contempt based on his failure to purge the April

21, 2016 contempt order and for new violations of the final orders. Supp. CP ____ (sub 325A, 332). After several delays, Matthew appeared at the show cause hearing on July 20, 2016, with new counsel. By that point, his financial support obligations (including tuition) exceeded \$13,000 and his compliance with monthly payments was late (late, plus checks bounced). The court found him in contempt and ordered him incarcerated to coerce compliance with financial provisions. Supp CP ____ (sub. 365A, 367). Matthew quickly purged those aspects of the contempt and was released. He did not appeal from the July contempt order.

III. ARGUMENT IN RESPONSE TO APPEAL.

A. INTRODUCTION

Matthew appeals from an order of contempt entered in April, five months after the court entered final orders in the dissolution of his marriage to Ginger. In this appeal, Matthew fails to make clear what relief he seeks or how this Court can or should change anything about the trial court's contempt order. See Br. Appellant, at 21-22 (Conclusion). Simply put, what is the point of this appeal? Matthew concedes numerous of the violations and observes that he remedied some of them. Subsequently, he was incarcerated to coerce further compliance, and did not appeal the orders related to

that. He remains in contempt for ongoing violations. He has made clear his unwillingness to comply with the court's orders short of being pushed, prodded, and closely monitored. It is hard not to see this appeal as more than an additional form of resistance to simply doing what the court ordered him to do last November.

B. THE STANDARD OF REVIEW.

This Court reviews a challenge to the trial court's exercise of its contempt power for an abuse of discretion. *In re Marriage of Davisson*, 131 Wn. App. 220, 224, 126 P.3d 76, 77 (2006). The trial court's findings are reviewed for substantial evidence. *In re Marriage of Rideout*, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003).

"It is axiomatic that a court must be able to enforce its orders." *In re M.B.*, 101 Wn. App. 425, 431, 3 P.3d 780, 784 (2000). The authority for the court's contempt order resides in several statutes, depending on the reasons for the contempt. (The court also has general contempt authority, available where statutory contempt powers are inadequate. *M.B.*, 101 Wn. App. at 452.) The court has contempt authority under the Parenting Act for violations of a parenting plan. RCW 26.09.160; *In re Marriage of James*, 79 Wn. App. 436, 903 P.2d 470 (1995); *In re Marriage of Humphreys*, 79 Wn. App. 596, 599, 903 P.2d 1012 (1995). The

child support statute, RCW 26.18.050, also authorizes proceedings to enforce a duty of support. Finally, Chapter 7.21 RCW authorizes civil contempt actions, including an action to enforce the court's orders. Each of these statutes provides enforcement mechanisms, including sanctions, fees, and coercive powers, as discussed further below. Here, generally, Ginger will address Matthew's challenge to the court's contempt order according to what kind of order Matthew violated, with the exception of addressing first his claim that no contempt can be found where the contemnor remedies the violation in advance of the court hearing.³

C. THE COURT CAN FIND A PARTY IN CONTEMPT FOR HAVING VIOLATED AN ORDER, EVEN WHERE THE PARTY LATER COMPLIES WITH THE ORDER.

Matthew contends that he should not have been held in contempt for violations he remedied before the hearing. Br. Appellant, at 6-10. He admits that he was violation at the time Ginger filed the contempt motion and before the hearing, but contends that by the time of the hearing he had paid all outstanding

³ As a preliminary matter, undersigned counsel notes that several of the arguments in Appellant's opening brief do not line up with the argument headings, making it confusing and difficult to ascertain the arguments Matt is raising. See e.g., Br. Appellant at 10-11 (Arguments relating to "Purging Conditions," and "Violating a Finding of Fact"). Respondent's brief attempts to sort out those arguments with citations to the relevant sections of the Appellant's brief notwithstanding the brief's erroneous identification of them.

child support bills, though some were late, and was in compliance with the following conditions in the parenting plan: pay and activate Our Family Wizard communication program, obtain alcohol assessment and enroll and participate in 12 month state certified treatment program, and contact Dr. Hutchins-Cook for a psychological evaluation. Br. Appellant at 8-9.

Before addressing Matthew's legal argument, it helps to view the larger picture, which concerns providing financial support for the children and addressing Matthew's serious behavioral problems in order for him to be a healthy parent to the children. The financial obligations continue, so remedying past due obligations does not eliminate the court's ongoing concern for whether Matthew will timely meet those obligations in the future. *See In re Marriage of Watkins*, 42 Wn. App. 371, 374, 710 P.2d 819, 821 (1985) (support payments become vested judgments as the installments come due).

Likewise, Matthew's selective or partial compliance with some of the residential time conditions does not achieve the goal of reunifying him with the children. These conditions should be viewed as a whole, since they must all be satisfied to ensure the children may safely spend time with their father.

Specifically, Matthew ignores his failure to obtain UAs or attend NA/AA meetings, which had not been done by the contempt hearing. RP 22 (no UAs); RP 10-12 (admits he has not done AA/NA even though there are non religious options); RP 13 (“Smart Recovery” program does not satisfy the court’s order for AA/NA); RP 28 (no UAs, no weekly attendance slips, “nothing for this court to make a finding of even moderate compliance”). The court found this failure to comply was alone sufficient basis for a contempt finding, which makes sense given the effect: no residential time with children. RP 28, 33. In fact, Matthew appears to concede this aspect of the contempt order. Br. Appellant, at 22 (“He was found in contempt. There is no challenge as to those findings.”).

As to the alcohol assessment and treatment follow up, Matthew finally obtained the alcohol evaluation, but he had not yet participated in a treatment program as ordered. See CP 1845 (requiring participation in state certified addiction treatment program for minimum of 12 months). Instead he said was going to follow up with ABH aftercare, which was not an inpatient program. RP 15, 26; see CP 1846 (ordering that upon violation of any of the treatment / monitoring conditions, he immediately enter into inpatient treatment program for minimum of 30 days). Indeed

counsel acknowledged that Matthew had yet to participate in the program, RP 16 (“he will start to do aftercare... he didn’t comply up until this point”), but promised that he is “going to start tomorrow, and that’s his plan.” RP 17.

Matthew’s half-measures approach to the court’s orders is further evident with respect to the psychological evaluation, required by the parenting plan. CP 1856 (“both parties shall participate in a full psychological evaluation with Dr. Wendy Hutchins-Cook, which shall include psychological testing and releases for collateral information to be provided by both parties and their treatment providers”). At the contempt hearing, Matthew revealed he finally made an appointment with Dr. Hutchins-Cook, but he had not gone yet. RP 19.

In short, Matthew had remedied some violations but many others remained, with the result being that he had thwarted implementation of the residential time schedule. Indeed, he has not seen his children since November of last year – a full year - a frustration for the court even if not for Matthew. See, also, Supp. CP __ (sub. 403) (recent communication with children’s therapist reveals Matthew has made no efforts toward reunification). Viewed against this backdrop, Matthew’s arguments about his partial

compliance ring hollow, a focus on a few trees as distraction from the state of the forest.

In any case, Matthew's argument that the court cannot find him in contempt for the violations he had remedied relies on a strained reading of the contempt statutes. For example, RCW 7.21.010 defines contempt to include "[d]isobedience of any lawful judgment, decree, order, or process of the court;..." RCW 7.21.010. Matthew concedes he disobeyed many of the court's orders. Though he claims the court cannot find him in contempt for those violations he remedied, his argument more accurately addresses what sanctions are available to the court. For ongoing disobedience to the court's orders, the court may impose a "remedial sanction," such as incarceration, fine, or any order "designed to ensure compliance." RCW 7.21.030(2)(c) and (d). If the compliance has been achieved, no coercive sanction is necessary. The court may still take other actions, such as ordering the contemnor "to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees." RCW 7.21.030(3). The choice of an appropriate remedy

does not alter the historical fact that Matthew disobeyed the court's orders.

By Matthew's reading, a party could indefinitely dodge any consequences for contempt by remedying the violation in advance of a hearing, forcing the other party to enforcement action after enforcement action. Fortunately, that is not how it works.

Moreover, the authority for the court's contempt order related to parenting plan provisions can rest comfortably on RCW 26.09.160. For example, the statute permits an order of contempt where the court finds a parent "has not complied" with the residential provisions. RCW 26.09.160(2)(b). The reference here is to a completed act, such as failing to comply with the residential schedule. *In re Marriage of Eklund*, 143 Wn. App. 207, 211, 177 P.3d 189, 191 (2008). The disobedience occurred and whatever remedy the court orders does not alter that historical fact.

Similarly, any remedies available to the court under the child support provisions of RCW 26.18.040 are in addition to any remedies provided by other law. RCW 26.18.030; *see Marriage of Watkins*, 42 Wn. App. at 373 (civil contempt appropriate method to seek enforcement of past due child support obligations). Thus, RCW 7.21.030(3) applies as well, as discussed above, with the

same sensible result: Matthew cannot persistently ignore his support obligations until Ginger is forced to pursue enforcement, then escape all consequences by paying up at the last minute.

The trial court properly found Matthew violated the court's orders, even where he partially remedied some of those violations. Matthew fails to show how the court imposed any erroneous remedial sanctions for violations Matthew had already remedied.

D. PARENTING PLAN VIOLATIONS

The trial court found four factors under RCW 26.09.191 applied to Matthew requiring limitations and restrictions necessary to protect the children's best interests. CP 1843 (§§ 2.1 & 2.2). The court ordered a gradually increasing residential schedule contingent on Matthew's verified compliance with requirements related to the limiting factors. CP 1844-46 (§ 3.2); see, also, CP 1851-53 (§ 3.10), CP 1855-56 (§ 3.13). Matthew concedes he has not complied with all requirements. Consequently, lacking these safeguards, he may not have residential time with his children. Even assuming Matthew could show the court's contempt order defective in some respect, it would not change this bottom line. He remains in violation of the parenting plan overall. In any case, his arguments will be addressed below.

In structuring the parenting plan so as to protect the children and put Matthew on the path to rehabilitation, the court reinforced how important it is for the children that both parents be involved in their lives. CP 1861 (#2). The court specifically found “[a]bsence, inconsistency and conflict are opposed to the best interests of the children.” CP 1861 (#2). In the wake of the parenting plan’s entry a year ago, Matthew has evaded, stalled, and defied the solution ordered by the court. At the contempt hearing, the court found by his failures Matthew was “deliberately abdicating his residential time,” contrary to the children’s best interests, and his intentional absence from their lives “has resulted in significant harm to the children.” CP 480 (¶ 2.3(f) of contempt order).

Matthew quarrels with these findings. He argues the court cannot find him in contempt for being absent from his children’s lives. Br. Appellant, at 10-11, citing CP 480 (“absence, inconsistency and conflict are opposed to the best interests of the children”) and characterizing this as “merely a finding.” Id. He disputes that disobeying the conditions designed to protect his children was a purposeful abdication of his residential time. Id. And he blames the parenting plan for causing him to “sever

contact” with the children, to avoid further violations. Br. Appellant, at 12-13. At best, these are unappealing arguments.

First, it is verity that Matthew’s absence from his children’s lives is contrary to their best interests. (Matthew has not challenged this finding in his appeal of the parenting plan. See Br. Appellant in No. 74427-5-I. Moreover, “the law presumes that one is capable of performing those actions required by the court.” *King v. Dep’t of Soc. & Health Servs.*, 110 Wn.2d 793, 804, 756 P.2d 1303, 1310 (1988). Inability to comply is an affirmative defense for which Matthew has both the burden of production and persuasion. *Id.* He has failed to meet this burden (and has not really even tried).

Probably Matthew does not want to argue his children are better off without him. Nor does he probably want to argue that he has no control over his actions, i.e., that he cannot meet the court’s conditions because of some incompetency. Nor would it seem helpful to him to argue that he lacks the capacity to understand that failing to comply with the conditions would result in no residential time. These simple propositions of volition and causation form the basis for the court’s findings and Matthew does nothing to alter the equation, i.e., that he has acted deliberately to defy the court’s

orders with the result that he has time with his children. See RCW 26.09.160(4) (parent deemed able to comply with parenting plan unless proves otherwise).

Most tellingly, Matthew ignores that even without having complied with the residential time conditions, he still could have had some contact with this children, through telephone or Skype. Instead, as discussed below, Matthew blamed on Ginger his failure to even talk to his children by phone. Matthew's attempts to absolve himself of all responsibility for reaching out to his children pushed the court to the very limits of its patience.

I mean, these are kids who need their father. And, you know, you just going AWOL on them for five months and then claiming through counsel, Well, you know, she's going to use it against me. She's going to drag me in here for another contempt. These are your children for God's sake. . . .you can't even bother to send a birthday card?

RP 29-30.

A parent can be found in contempt for failing to exercise his residential time. *Marriage of James*, 79 Wn. App. at 443-445, citing RCW 26.09.160 and RCW 26.09.184. The first of these statutes expressly provides that a parent who refuses “to perform the duties provided in the parenting plan ... shall be deemed bad faith and shall be punished by the court by holding the party in contempt ...”

RCW 26.09.160(1). Once the court finds that spending time with a parent serves the children's best interests, "that parent is expected to care for the child during" his or her residential time. *James*, 79 Wn. App. at 445. "To rule otherwise would be to ignore the important role that both parents play in caring for the child as well as both parents' right to rely on the provisions of the parenting plan." *Id.*

Matthew complains the court did not make a bad faith finding. Br. Appellant, at 13. In fact, the court made three findings of bad faith, related to all the parenting plan issues. CP 483. His other arguments seem recycled complaints that he has no control over whether his conduct harms the children. See, e.g., Br. Appellant, at 14 (finding of harm "involves proof that the conduct was within the party's ability to control"). As previously noted, unless Matthew can prove he is incompetent to control his own behavior, the court was fully within its rights to find his conduct willful. Indeed, Matthew's attempt to exculpate himself goes to extraordinary lengths, including arguing the treatment conditions forced him not to have contact with the children, which somehow "belies the conclusion that he deliberately inflicted emotional harm to them by not having contact." Br. Appellant, at 14. The court was

not buying this, noting that nothing prevented Matthew from sending the children a card. RP 29-30. (Let alone, of course, nothing is preventing Matthew from complying with the parenting plan.) Nor did the court buy Matthew's claim that he was afraid Ginger would use against him any effort to contact the children. RP 29-30. There is just no evidence that Ginger is an impediment to Matthew's parenting. In fact, because of Matthew's abdication of his responsibilities, Ginger is parenting two young children solo. *James*, 79 Wn. App. at 444 (noting how a parent's abdication of responsibilities has a detrimental effect on other parent).

A parent can also be found in contempt for deliberately "derailing" a parenting plan by, for example, failing to cooperate with professionals, expressing hostility toward the other parent, exposing the children to harmful parental conflict, etc. *In re Marriage of Farr*, 87 Wn. App. 177, 182, 940 P.2d 679 (1997). Here, when the court found Matthew to be in contempt for his absence, it struck right at the heart of what the parenting plan seeks to accomplish – nurturing a relationship with both parents. So, yes, Matthew is in contempt for causing, through his absence, harm to his children. See. Br. Appellant, at 13 (appears to concede his refusal to contact the children has caused them to be extremely

upset). His failure to meet the parenting plan rehabilitation-oriented safeguards cannot be justified or excused.

An aspect of Matthew's absence concerns his lack of phone contact. He complains the trial court could not find him in contempt of the telephone contact provisions because they were permissive, not mandatory. Br. Appellant, at 6, citing CP 481. Here, again, the big picture relates back to the harm Matthew's behavior – what he does and what he fails to do – causes the children.

Pursuant to the recommendation of the guardian ad litem, the parenting plan permits frequent contact with the non-residential parent to be initiated by the residential parent four times per week. CP 1862. The children have yet to spend any time with Matthew. (In fact, recent communications with the children's therapist reveals Matthew has made no efforts toward reunification. Supp. CP __ (sub. 403)). In her motion for contempt, Ginger alleged that he refused to return the children's calls; he initiated one call to each, and there was one call initiated by his girlfriend, but he refused to get on the phone, so the girlfriend hung up. CP 1938-1939. Matthew claimed that Ginger yelled at his girlfriend on the phone and interfered with the children's attempts to call him, also alleging that he received several hang up calls from Ginger. CP 1910. The

court found these to be “false claims” and that Matthew had “deliberately inflicted emotional harm and distress upon the parties’ children.” CP 481. The court properly found contemptuous Matthew’s disregard for the effect on his children of failing even to speak with them by telephone.

Noncompliance with nonresidential provisions may support a contempt finding. *Davisson*, 131 Wn. App. at 226 (violating of decision-making provision). Nevertheless, Matthew seems to argue he cannot be held in contempt for lying about avoiding telephone contact with his children because the court did not make such contact mandatory. If he is correct and the court erred by finding him in contempt for this behavior, the error is harmless, even if Matthew’s conduct is not. See RCW 4.36.240 (“The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.”). Matthew has suffered no consequence as a result of this finding by the court, except having been found to have harmed his children, a finding that stands regardless of whether telephone contact was mandatory or permissive.

The court also found Matthew had made derogatory remarks to the children about Ginger and involved the children in discussions about the litigation and residential schedule. CP 481. Matthew denied these allegations. CP 375. On appeal, Matthew contends there was no evidence that the remarks he allegedly made caused significant harm. Br. Appellant, at 11-12. In her declaration, Ginger stated that “[o]n December 26 Matthew called and told [M.G.] that I was the person keeping them from seeing him, which upset her greatly.” CP 1939. As noted above, the court found conflict to be contrary to the children’s best interests. Matthew fails to show how impugning the mother and blaming her for his absence from the children’s lives does not contribute to that harm.

Altogether, Matthew’s complaints about the court’s contempt orders do not alter anything about what matters most: that Matthew has failed to comply with the conditions that will allow him to be the parent his children need. The court’s conclusion read in context makes that plain:

Respondent’s failure to comply with the above treatment and monitoring requirements, thus deliberately abdicating his residential time, is a violation of section VI(2) of the Parenting Plan which states, “absence, inconsistency, and conflict are

opposed to the best interests of the children.” Respondent’s willful refusal to comply with the Parenting Plan and intentionally remove himself from any contact with the children has resulted in significant harm to the children.

CP 480 (2.3(f) of contempt order). The court acted well within its authority to protect the best interests of these children.

E. THE COURT IMPOSED REMEDIES WITHIN ITS AUTHORITY.

Matthew contends that the court ordered purging conditions that are punitive because they do not coerce compliance. Br. Appellant at 16. He first asserts that none of the sanctions under the court’s order coerce telephone contact or residential time with the children because they only “encourage” him to resume contact and do not direct him to do anything. Br. Appellant, at 16. As noted above, the parenting plan makes clear the court’s goals, which align completely with Washington law.

He next contends that since he became compliant with some of the court’s orders at the time of the hearing, the purging conditions are punitive because they do not coerce compliance. As noted above, he was only partially and selectively compliant with the effect of not changing one bit the fact that he cannot have residential time with the children. The court was correct to coerce compliance with the remaining and ongoing requirements.

Finally, Matthew contends that the court's order that he be in compliance "with unrelated orders not violated" amounts to punishment and no coercion of compliance. Br. Appellant at 19. It is unclear to which "unrelated orders" he refers; he simply cites to CP 485-486, which are the purging provisions, all of which relate to the current parenting plan, child support order, and dissolution decree. The court made plain its coercive purpose: "really, what are we trying to do here? We're trying to get you to comply with my orders." RP 30-31. The judge declared she wants Matthew to follow through with ABH, sign the release (to provide related information to Ginger), RP 33; the court also wants proof of compliance with ABH treatment, proof of completing the psychological evaluation, RP 36, and proof of AA/NA and UAs, RP 39-40. These are all things Matthew has not yet done, so the court's efforts to coerce his compliance is not punitive.⁴ Rather, the

⁴ Matt also asserts in his Statement of the Case that there was no order requiring him to list the house for sale, Br. Appellant at 3, but does not assign this as error or provide any argument challenging this aspect of the court's contempt order. In any event, this is a misstatement of fact: This directive was contained in the court's findings and conclusions in support of the decree and was certainly an order incorporated into the decree of dissolution:

Said decree is incorporated by reference in to these Findings of Fact as if set forth fully herein.

The Court has authority to order the prompt sale of the "Trust Residence," which testimony by the Independent Trustee and Husband

court's purpose is to serve the children's best interests by coercing Matthew's compliance, exactly the circumstances civil contempt sanctions address: "A civil contempt sanction is coercive and remedial, and is typically for the benefit of another party; a criminal sanction is punitive and is imposed for the purpose of vindicating the authority of the court." *King v. Dep't of Soc. & Health Servs.*, 110 Wn.2d at 800. His complaint that the court cannot order him to comply with existing orders (see Br. Appellant at 19) does not make sense. The statute expressly authorizes the court to impose as a remedial sanction for contempt "an order designed to ensure compliance with a prior order of the court." RCW 7.21.030(2)(c). The court properly exercised its authority.⁵

F. GINGER REQUESTS HER FEES ON APPEAL

This Court should award Ginger her fees for a number of reasons. First, the parenting plan provides for attorney fees for

indicate was underway. With no evidence of substantial progress being made on that transaction/listing, and the Court having the authority to protect the interests of the beneficiary children of this marriage, the house shall be listed for sale within 60 days, no later than 1/18/2016 and all the details and documents required for the sale supervised by the appointment of a Special Master, James McGuire.

CP 1800.

⁵ As part of this argument, Matthew also asserts that "A person cannot be held in contempt for failing to pay a final award of attorney fees," but the case cited appears inapposite. See Br. Appellant at 19 (citing *Smith v. Smith*, 56 Wn.2d 1, 351 P.2d 412 (1960)).

enforcement, recognizing the heavy financial burden on her so far and recognizing Matthew's history of defying court orders. CP 1853, which provides:

If the parties are required to return to court because father has relapsed, violated any requirements in section 3.2 or 3.10, had any triggering events set forth herein, or otherwise failed to comply with this Parenting Plan, then mother may request that the father shall be responsible for all reasonable attorney fees and costs incurred by either party. This provision is explicitly included because father's actions and failure to comply with prior court orders has resulted in significant financial distress and burden to the mother, who is the primary parent.

In this provision, the court proved prescient!

Also, the contempt statutes provide for attorney fees. RCW 26.09.160(1) (awarding fees for parenting plan enforcement); RCW 26.18.160 (awarding costs for support enforcement); and RCW 7.21.030(3) (awarding fees for civil contempt action). Even RCW 26.09.140 supports an award of fees here, as it did at trial, given the relative resources of the parties. RAP 18.1. The statute provides that:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection there with, including sums for legal services rendered and costs incurred prior to the commencement of the

proceeding or enforcement or modification
proceedings after entry of judgment.

This statute has as its purpose “to make certain that a person is not deprived of his or her day in court by reason of financial disadvantage.” 20 Kenneth W. Weber, Wash. Prac., *Family and Community Property Law* § 40.2, at 510 (1997). It is hard to dispute that a parent with vastly inferior resources “is at a distinct and unfair disadvantage in proceedings” pertaining to a child. *King v. King*, 162 Wn.2d 378, 417, 174 P.3d 659 (2007) (Madsen, J., dissenting). Ginger has minimal income and full responsibility for two children. Not only has she been through an extended trial, where fees were awarded for Matthew’s intransigence and relative financial circumstances. CP 1815. She has had to respond to appeals by Matt and the Intervenor (representing the power and wealth of the Galando family). She has had to return to court repeatedly to enforce child support, maintenance, parenting plan, and other provisions. And now she is responding to another appeal. She has been and remains financially disadvantaged in this litigation, shouldering a burden the trial court recognized in its final orders. For these reasons, she should receive her fees on appeal, particularly as the appellate costs have exceeded the

amount anticipated in Ginger's request for interim fees (as discussed in her brief in No. 74427-5-I).

Finally, it remains unclear what purpose this appeal serves, apart from continued intransigence, which can support an award of attorney fees. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992). Intransigence also includes "foot dragging" and "obstruction," *Eide v. Eide*, 1 Wn. App. 440, 445, 462 P.2d. 562 (1969), which are fully evident here, just as they were at trial where the court found Matthew "displayed a pattern of intransigence, violation of court orders, and dissipation of assets." CP 1815.

IV. CONCLUSION

For the reasons above, Ginger respectfully asks this Court to affirm the trial court's contempt order in all respects and to award her fees and costs on appeal.

Dated this 10th day of November 2016.

RESPECTFULLY SUBMITTED,

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Galando Appendix: Statutes

RCW 26.09.160

Failure to comply with decree or temporary injunction—Obligation to make support or maintenance payments or permit contact with children not suspended—Penalties.

(1) The performance of parental functions and the duty to provide child support are distinct responsibilities in the care of a child. If a party fails to comply with a provision of a decree or temporary order of injunction, the obligation of the other party to make payments for support or maintenance or to permit contact with children is not suspended. An attempt by a parent, in either the negotiation or the performance of a parenting plan, to condition one aspect of the parenting plan upon another, to condition payment of child support upon an aspect of the parenting plan, to refuse to pay ordered child support, to refuse to perform the duties provided in the parenting plan, or to hinder the performance by the other parent of duties provided in the parenting plan, shall be deemed bad faith and shall be punished by the court by holding the party in contempt of court and by awarding to the aggrieved party reasonable attorneys' fees and costs incidental in bringing a motion for contempt of court.

(2)(a) A motion may be filed to initiate a contempt action to coerce a parent to comply with an order establishing residential provisions for a child. If the court finds there is reasonable cause to believe the parent has not complied with the order, the court may issue an order to show cause why the relief requested should not be granted.

(b) If, based on all the facts and circumstances, the court finds after hearing that the parent, in bad faith, has not complied with the order establishing residential provisions for the child, the court shall find the parent in contempt of court. Upon a finding of contempt, the court shall order:

(i) The noncomplying parent to provide the moving party additional time with the child. The additional time shall be equal to the time missed with the child, due to the parent's noncompliance;

(ii) The parent to pay, to the moving party, all court costs and reasonable attorneys' fees incurred as a result of the noncompliance, and any reasonable expenses incurred in locating or returning a child; and

(iii) The parent to pay, to the moving party, a civil penalty, not less than the sum of one hundred dollars.

The court may also order the parent to be imprisoned in the county jail, if the parent is presently able to comply with the provisions of the court-ordered parenting plan and is presently unwilling to comply. The parent may be imprisoned until he or she agrees to comply with the order, but in no event for more than one hundred eighty days.

(3) On a second failure within three years to comply with a residential provision of a court-ordered parenting plan, a motion may be filed to initiate contempt of court proceedings according to the procedure set forth in subsection (2)(a) and (b) of this section. On a finding of contempt under this subsection, the court shall order:

(a) The noncomplying parent to provide the other parent or party additional time

with the child. The additional time shall be twice the amount of the time missed with the child, due to the parent's noncompliance;

(b) The noncomplying parent to pay, to the other parent or party, all court costs and reasonable attorneys' fees incurred as a result of the noncompliance, and any reasonable expenses incurred in locating or returning a child; and

(c) The noncomplying parent to pay, to the moving party, a civil penalty of not less than two hundred fifty dollars.

The court may also order the parent to be imprisoned in the county jail, if the parent is presently able to comply with the provisions of the court-ordered parenting plan and is presently unwilling to comply. The parent may be imprisoned until he or she agrees to comply with the order but in no event for more than one hundred eighty days.

(4) For purposes of subsections (1), (2), and (3) of this section, the parent shall be deemed to have the present ability to comply with the order establishing residential provisions unless he or she establishes otherwise by a preponderance of the evidence. The parent shall establish a reasonable excuse for failure to comply with the residential provision of a court-ordered parenting plan by a preponderance of the evidence.

(5) Any monetary award ordered under subsections (1), (2), and (3) of this section may be enforced, by the party to whom it is awarded, in the same manner as a civil judgment.

(6) Subsections (1), (2), and (3) of this section authorize the exercise of the court's power to impose remedial sanctions for contempt of court and is in addition to any other contempt power the court may possess.

(7) Upon motion for contempt of court under subsections (1) through (3) of this section, if the court finds the motion was brought without reasonable basis, the court shall order the moving party to pay to the nonmoving party, all costs, reasonable attorneys' fees, and a civil penalty of not less than one hundred dollars.

RCW 26.18.050

Failure to comply with support or maintenance order—Contempt action—Order to show cause—Bench warrant—Continuing jurisdiction.

(1) If an obligor fails to comply with a support or maintenance order, a petition or motion may be filed without notice under RCW **26.18.040** to initiate a contempt action as provided in chapter **7.21** RCW. If the court finds there is reasonable cause to believe the obligor has failed to comply with a support or maintenance order, the court may issue an order to show cause requiring the obligor to appear at a certain time and place for a hearing, at which time the obligor may appear to show cause why the relief requested should not be granted. A copy of the petition or motion shall be served on the obligor along with the order to show cause.

(2) Service of the order to show cause shall be by personal service, or in the

manner provided in the civil rules of superior court or applicable statute.

(3) If the order to show cause served upon the obligor included a warning that an arrest warrant could be issued for failure to appear, the court may issue a bench warrant for the arrest of the obligor if the obligor fails to appear on the return date provided in the order.

(4) If the obligor contends at the hearing that he or she lacked the means to comply with the support or maintenance order, the obligor shall establish that he or she exercised due diligence in seeking employment, in conserving assets, or otherwise in rendering himself or herself able to comply with the court's order.

(5) As provided in RCW **26.18.040**, the court retains continuing jurisdiction under this chapter and may use a contempt action to enforce a support or maintenance order until the obligor satisfies all duties of support, including arrearages, that accrued pursuant to the support or maintenance order.

RCW 7.21.010

Definitions.

The definitions in this section apply throughout this chapter:

(1) "Contempt of court" means intentional:

(a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

(b) Disobedience of any lawful judgment, decree, order, or process of the court;

(c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or

(d) Refusal, without lawful authority, to produce a record, document, or other object.

(2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.

(3) "Remedial sanction" means a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.