

No. 30203-2-III
In re Marriage of van Heemstede Obelt

Heemstede Obelt was on active duty with the United States Air Force. Ms. van Heemstede Obelt had three children prior to the marriage and the couple later had two daughters together. The family later relocated to Fairchild Air Force Base in Airway Heights, Washington.

Mr. and Ms. van Heemstede Obelt separated in 2009. He filed for divorce. Ms. van Heemstede Obelt claimed that Mr. van Heemstede Obelt had a history of domestic violence and child abuse. The pretrial proceedings were contentious. The court appointed a guardian ad litem to make recommendations. The trial was continued numerous times for various reasons. The court entered temporary orders regarding child support, maintenance, and guardian ad litem (GAL) fees. The orders required that the parties file a joint tax return for 2009.

In June 2010, Ms. van Heemstede Obelt moved the court to compel discovery from Mr. van Heemstede Obelt because he had refused to produce numerous requested documents. The court found good cause to compel discovery and ordered Mr. van Heemstede Obelt to provide all requested discovery by July 8, 2010. The court awarded Ms. van Heemstede Obelt \$500 in attorney fees for his “inexcusable delay.” Clerk’s Papers (CP) at 218. Mr. van Heemstede Obelt failed to timely provide all of the requested materials.

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In October 2010, Ms. van Heemstede Obelt moved for an order to show cause why Mr. van Heemstede Obelt should not be held in contempt for failing to comply with the court's prior finance order, support order, and discovery order. She claimed that Mr. van Heemstede Obelt had failed to pay maintenance, child support, and the guardian ad litem fees. She further alleged that Mr. van Heemstede Obelt had continued to delay production of requested discovery, including: the 2009 tax return, certain AIG statements, and his retirement contribution statements. The court ordered him to show cause and ultimately found Mr. van Heemstede Obelt in contempt for: "Non-payment of court ordered support on multiple months; Non-payment of GAL fees for excessive period; and Non-compliance with Discovery despite numerous requests." CP at 313. The court awarded Ms. van Heemstede Obelt \$500 in attorney fees.

In December 2010, Ms. Van Heemstede Obelt again moved for an order to show cause why Mr. van Heemstede Obelt should not be held in contempt for failing to comply with the court's temporary order of child support, order compelling discovery, and order regarding the 2009 income tax return. The court again entered an order to show cause and ultimately found Mr. van Heemstede Obelt in contempt for failing to file the 2009 joint tax return. The court awarded Ms. van Heemstede Obelt \$500 in attorney fees.

In February 2011, Mr. van Heemstede Obelt agreed to an order to put the family

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house up for sale. A buyer offered \$160,000, which was an amount in excess of three market analyses but \$10,000 under the list price. Ms. van Heemstede Obelt brought a motion to shorten time and asked the court to allow her to accept the offer. She presented evidence that the realtor recommended accepting the offer. Mr. van Heemstede Obelt apparently refused to communicate with the realtor or negotiate. He argued that the court had no legal authority to allow the sale and, if it did allow the sale, it must force Ms. van Heemstede Obelt to pay the difference between the asking price and the sale price. The court found Mr. van Heemstede Obelt's position unreasonable and reserved the question of fees for trial.

In June 2011, the court held a pretrial hearing to resolve more discovery issues. Counsel for Ms. van Heemstede Obelt showed that Mr. van Heemstede Obelt had failed to provide a mandatory domestic trial management report, 2010 tax information, AIG statements, GI Bill statements, Visa Gold account information, and Global credit check information. The court recognized the continuous delays by Mr. van Heemstede Obelt:

Part of [Ms. van Heemstede Obelt's] frustration [is] because there was in June an order compelling [Mr. van Heemstede Obelt] to provide discovery. In October, there was an order for contempt for non-compliance with the discovery, and then you came in in November, and you said there was not. There was an order of contempt December 16th signed by the Court finding your client [Mr. van Heemstede Obelt] in contempt for discovery issues and penalizing him \$500.

So what I'm saying here is she's frustrated with the pattern of non-compliance by your client, and I know you came on in November, but at

this point, if there's new stuff coming out at trial, that's going to be an issue for the Court because today is the date and time for trial.

1 Report of Proceedings (RP) at 42. Counsel for Ms. van Heemstede Obelt then detailed Mr. van Heemstede Obelt's vague interrogatory response regarding the AIG statements and her overarching concern that he was hiding something:

The [response to the] interrogatory indicates, "Do not have any AIG. Have nothing to give."

I asked for please provide all AIG statements. I didn't -- so I guess, I mean, I want Mr. van Heemstede Obelt to say we never had an AIG account, didn't exist, never was because that's essentially what I'm looking for.

What I'm hearing instead is we don't currently have an AIG account, which means where did those funds go? You can presume that it went to community benefit, but I'd like to know where. So that's my position.

1 RP at 55-56. The court then gave Mr. van Heemstede Obelt a final opportunity to provide the AIG statements in lieu of proceeding to trial without testimony or evidence:

He 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.

....
... [Y]ou're going to provide ... the AIG, either declaration or statement[s] prior to the next court date.

....
... You can do a declaration that he hasn't had it or there was an account and it's gone as of the date, whatever, but I currently don't have statements is vague.

If he's going to make a statement he doesn't have it because we closed it in 2006 and all the money that was in there went to the community fund, that's fine, but he's got to answer the question.

1 RP at 56, 59-60, 61-62. The court

continued the trial and ordered Mr. van Heemstede Obelt to “provide AIG statements,” among other things. CP at 414.

The case proceeded to trial in July 2011. Mr. van Heemstede Obelt had provided neither the AIG statements nor a sworn declaration. The judge asked counsel for the declaration. Mr. van Heemstede Obelt’s attorney could not provide one. Ms. van Heemstede Obelt requested that the court award attorney fees for Mr. van Heemstede Obelt’s intransigence. She testified at trial that her fees from the delays were \$14,000 prior to trial. The court eventually concluded that Mr. van Heemstede Obelt had not been candid with the court and had used the system for conflict and awarded Ms. van Heemstede Obelt \$5,000 in fees:

As far as the attorney’s fees, the Court spent a lot of time going back through the court file.

In October of 2010, there was an order of contempt by the Judge for child support, maintenance and awarded attorney fees, and that was document 138. The Court said you knew you had to pay child support. You knew [it] got upped. You didn’t pay it, so you’re in violation.

Then you go to document number 145, which was in December of 2010, which basically says contempt number 2. You didn’t give the tax returns. There was a contempt, and they order attorney’s fees.

Then we jump through quite a few other issues, and that’s I think what counsel was trying to show to the Court is during the interrogatories, it says you didn’t report your unemployment. You stated your income was actually what it is, but not in doing the unemployment.

Then you go through and there’s motions to compel, a motion to sell the house. Knowing the time and the issues and the money issues, then you come back to court, and the Court says in June we have an issue about this AIG, and if you’ll note in that order, it says Mr. van Heemstede Obelt will

provide these things to the Court, and we should have wrote it in the order, but I specifically remember, and you can pull the transcript, said what if he doesn't have it? They're out of business. Just do a declaration under penalty of perjury and tell me that you don't have it.

Because of the issues and the Court going back and not being candor to the Court and at that time the Court reserved fees to see. [If] you had done a declaration under penalty of perjury saying there is no AIG or there was, but I don't see this as a big issue if that were true, and part of intransigence is do you think that this is coming back to court continuously just for conflict.

You would have saved yourself a ton of money if you had just said I'm not going to fight about this. I don't have it or I do have to, but you go through and you add up we're into three volumes, which should have been a simple divorce.

So the Court is going to find that there is some intransigence. I don't think it's \$14,000 worth of intransigence, and you did get some attorney's fees along the way. I don't think it covers the amount of time that this Court has spent on what I would consider an abusive use of the court system.

So I am going to award them \$5,000 in attorney fees. I think that this was dragged out. There was some dishonesty where you could have said I don't have it or I did have it, but at this point based on the court file and the review of the court file, that's exactly why the Supreme Court says intransigence -- the Court can award attorney's fees based on that. The Court is going to award that.

2 RP at 212-14. The court entered a final decree of dissolution and findings of fact and conclusions of law in August 2011.

In November 2011, the court found Mr. van Heemstede Obelt in contempt for failure to provide the children with health insurance cards, failure to provide the children with military dependent identification cards, and failure to comply with restrictions in the

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parenting plan. The superior court commissioner awarded Ms. van Heemstede Obelt \$1,500 in attorney fees and summarized Mr. van Heemstede Obelt's behavior as follows:

If ever there was a place, a case of a client dragging their feet this is that case. You're sort of passive aggressive on almost all these issues and it's costing everybody a lot more time.

CP at 521-22.

DISCUSSION

A court may award attorney fees on the basis that one party's intransigence caused the other to incur additional legal fees. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). Attorney fees based on intransigence have been awarded where a party engaged in obstruction and foot dragging or made the proceeding unduly difficult and costly. *Id.*

Mr. van Heemstede Obelt's argument focuses solely on whether his failure to provide a sworn declaration regarding the AIG account is sufficient to support a finding of intransigence where the trial court's order did not expressly require it. Even if we were to indulge Mr. van Heemstede Obelt's view of things and disregard all of his other acts of intransigence throughout these proceedings and limit our review to the single instance of discovery abuse, the court's finding of intransigence would still be amply

supported by this record.

Ms. van Heemstede Obelt first requested that Mr. van Heemstede Obelt produce all AIG statements in 2009. He failed to comply and the court awarded fees for his unexcused delays. Some four months later, he still had not complied and the court found him in contempt and again awarded fees. His answer to the request for production stated, “Do not have any AIG. Have nothing to give.” 1 RP at 55. Ms. van Heemstede Obelt maintained that the response was vague and implied that AIG accounts may have existed at one time. The court agreed and explicitly explained at the pretrial hearing that Mr. van Heemstede Obelt had to either provide a declaration explaining the absence of the AIG statements or provide the actual AIG statements:

You can do a declaration that he hasn't had it or there was an account and it's gone as of the date, whatever, but I currently don't have statements is vague.

If he's going to make a statement he doesn't have it because we closed it in 2006 and all the money that was in there went to the community fund, that's fine, but he's got to answer the question.

1 RP at 61-62. Mr. van Heemstede Obelt was at that hearing and there is no showing that he did not understand the court's order. In fact, the court repeated the instructions on three separate occasions. The court's written order simply required that Mr. van Heemstede Obelt “provide AIG statements,” among other things that he had failed to produce. CP at 414. Mr. van Heemstede Obelt contends that he did not have any such statements and, therefore, was not obligated

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to provide anything pursuant to the language in the order. That understanding ignores the court's oral instructions.

The court then did not abuse its discretion in finding Mr. van Heemstede Obelt intransigent and awarding \$5,000 in attorney fees. Mr. van Heemstede Obelt behaved erratically and caused multiple unnecessary hearings, pleadings, and motions. The court also properly segregated the \$5,000 intransigence fee award from the \$14,000 in total litigation expenses, even though it probably was not required to here. *See In re Marriage of Burrill*, 113 Wn. App. 863, 873, 56 P.3d 993 (2002) (“Where a party’s bad acts permeate the entire proceedings, the court need not segregate which fees were incurred as a result of intransigence and which were not.”).

Ms. van Heemstede Obelt also requests attorney fees on appeal pursuant to RAP 18.9 (fees for frivolous appeal), RCW 26.09.140 (fees based on financial need), and *In re Marriage of Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157 (1999) (fee for intransigence in the trial court).

Intransigence is a basis for awarding fees on appeal, separate from RAP 18.9 and RCW 26.09.140. *Mattson*, 95 Wn. App. at 605. The financial resources of the parties need not be considered when intransigence by one party is established. *Id.* at 606. “Moreover, a party’s intransigence in the trial court can also support an award of attorney

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fees on appeal.” *Id.*

The record here supports the court’s finding of intransigence. Accordingly, we award Ms. van Heemstede Obelt her attorney fees and costs here on appeal based on Mr. van Heemstede Obelt’s continued intransigence.

We affirm the judgment of the trial court and we award fees on appeal.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Sweeney, J.

I CONCUR:

Brown, J.