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Court of Appeals
Division I
State of Washington

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| In the Matter of the Marriage of | ) | No. 79559-7-I |
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| JESSICA BODGE, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | DIVISION ONE |
| and | ) | |
| | ) | |
| BRIAN BODGE, | ) | UNPUBLISHED OPINION |
| | ) | |
| Appellant. | ) | |
| | ) | |

MANN, C.J. — This matter arises out of a postdissolution proceeding between Jessica and Brian Bodge.[1] Brian appeals the trial court's decision holding him in contempt of court after he sought removal of what the parties refer to as a "domestic violence restriction" as to Jessica, from their parenting plan. Brian contends that the trial court abused its discretion in: (1) failing to remove the domestic violence restriction, (2) finding him in contempt for failing to comply with the terms of his voluntary treatment agreement, (3) failing to include a purge provision in the contempt order and, (4) retaining control of funds deposited by Brian into the court registry. We reverse the

[1] For clarity, we refer to Jessica Bodge and Brian Bodge by their first names. No disrespect to the parties is intended.

Citations and pin cites are based on the Westlaw online version of the cited material.

finding of contempt and remand to the trial court to release the funds in the court registry to Brian.

I.

Jessica and Brian married in December 1997. They separated in September 2010 after Jessica alleged that Brian perpetrated domestic violence against her. After a brief reconciliation, Jessica again filed for legal separation in October 2012. Brian and Jessica had three children together.

On July 9, 2015, Jessica and Brian's marriage was dissolved. The trial court entered an agreed final parenting plan. The 2015 parenting plan made Jessica the parent with whom the children primarily resided, imposed a domestic violence limiting factor on Brian, set forth the process by which Jessica could relocate the children, and granted Jessica sole decision-making authority. The 2015 parenting plan required that Brian's relationship with the children be repaired prior to Jessica being allowed to relocate with the children.

In June 2016, Jessica filed a notice of intended relocation with the children to Alabama. Brian objected to the relocation and petitioned to modify the 2015 parenting plan. After a lengthy relocation trial and several posttrial proceedings, the trial court entered a new final parenting plan in September 2017. The new parenting plan granted Brian sole decision-making authority over major decisions in light of Jessica's abusive use of conflict and the parties' inability to cooperate with each other in decision-making.

We previously considered and affirmed the 2017 parenting plan in an unpublished decision.[2]

Paragraph 3 of the 2017 parenting plan is labelled "reasons for putting limitations on a parent (under RCW 26.09.191)."[3] It first identifies an "abusive use of conflict" for Jessica. It stated that Jessica "uses conflict in a way that endangers or damages the psychological development of a child."

Paragraph 3 also identifies "domestic violence" for Brian. It provides that "Brian Bodge has a history of domestic violence as defined in RCW 26.50.010(1). This limiting factor is only as to the mother, not the children." It then references a previous order to enforce changes to custody entered July 14, 2017. The July 14, 2017, order provides that Brian was to follow the recommendations of the June 19, 2017 domestic violence evaluation, and "upon completion of the abbreviated treatment program, [Brian] may motion the court for removal of the .191 restriction as to the mother. That motion shall be granted upon proof of completion."

Separate from the final parenting plan, on September 25, 2017, the trial court entered findings about child support. The court found that because Brian was now the parent that the children would primarily reside with, Brian's child support obligation should be stayed:

> The father's child support obligation of $1,500.00 per month to the mother is hereby stayed, effective September 1, 2017 and thereafter. The monies shall be paid into the Court registry. The issue of child support from mother to the father is hereby reserved for either party to make further motion to the court.

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[2] See In re Marriage of Bodge, No. 76954-5-I (unpublished) (Wash. Ct. App. Nov. 26, 2018), http://www.courts.wa.gov/opinions/pdf/769545.pdf, review dismissed, 193 Wn.2d 1003, 438 P.3d 127 (2019).

[3] RCW 26.09.191 addresses restrictions in temporary or permanent parenting plans including limitations on residential time with children.

On March 12, 2018, Brian filed a certificate of completion of treatment for domestic violence with the trial court. Based on the certificate, on April 27, 2018, Brian moved for removal of the domestic violence limiting factor from the parenting plan. Dr. Tim Tackels testified in support of the condition removal. Dr. Tackels supervised Brian's domestic violence perpetrator program with Evergreen Recovery Centers. Tackels testified that he saw Brian for an hour and half a week for six months, and he said that Brian successfully changed his behaviors from treatment.

During cross-examination, Dr. Tackels was asked about two police reports from October 2017. On October 7, 2017, Jessica requested a welfare check on her children because she was concerned that their father left them alone. Brian was not home with the children and the officer allowed Jessica to take the children. When Brian went to pick up the children, officers expressed concern that Brian had been drinking. Brian submitted to a voluntary breath test, and when he tested over the legal limit, officers drove him home. Dr. Tackels testified that he was unaware of the incidents in the police reports and that it was outside of the domestic violence treatment.

On June 12, 2018, the trial court issued an oral ruling denying Brian's motion. The court based this decision from Dr. Tackels' testimony at the hearing. The court stated that Brian

> had a couple of major episodes that should have been disclosed to your treatment provider, and when [Dr. Tackels] saw the police reports, he was completely surprised. Completely surprised. That shows me that you did not abide by your contract. You did not follow the spirit of it.

The court found that to remove the restriction, Brian would need to be reevaluated because he did not comply with the prior treatment contract, and he would need to show an actual change in behavior.

During a subsequent August 27, 2018, review hearing, the trial court, sua sponte, issued an oral ruling finding Brian in contempt: "I am going to find -- make a contempt finding with regard to father for his failure to disclose the fact that he was in violation of his treatment contract and failure to disclose that at the time that he made his motion."

On September 21, 2018, Brian moved for reconsideration of the trial court's oral finding of contempt with a new request for the court to remove the .191 domestic violence restriction. Brian submitted the declaration of Joey Johnson and the declaration of Dr. Tackels. Johnson was the group facilitator who worked closely with Brian, and testified that Brian was successful in the domestic violence experience. Johnson asserted that Jessica reported the drinking incident and police reports to him and that he discussed the incidents with Brian. Johnson further stated that "since drinking alcohol was not a legal issue for Brian, he was compliant with the policies of Evergreen Recovery Centers and the Domestic Violence Program. Therefore, no issues of Brian being non-compliant with his DV treatment arose in that respect."

The court found that Brian had violated treatment by not disclosing the police report until six months later. The court provided that:

> The whole analysis there was my analysis based on my in-court perception of Mr. Tackels' reaction to the disclosure of the information about the police reports, which he was not aware of.
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> . . . .
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> The problem with the 191 restriction and the problem with the police reports was not whether it was ever disclosed. It's whether it was timely disclosed. And it was not timely disclosed when he was arrested and the police report was generated.
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> . . . .
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> That was not revealed to treatment. It was not revealed to treatment. And according to the declarations you gave me, it was still not revealed for about six months. That, in my view, is a violation of the contract.

The court further stated:

> It was pretty clear that [Dr. Tackels] was not aware of everything that was going on with Mr. Bodge. And I am – you know, I'm kind of one of the experts in this state on domestic violence. You know, maybe that's unfortunate in this case. But I know how it's supposed to work. And I know how a person who is in treatment, what they're supposed to do in terms of obligation of their contract. They have an obligation for full disclosure, and [Brian] did not give Mr. Tackels full disclosure.
>
> Now, that does not mean Mr. Tackels can't graduate him. He can. But if I'm making the decision with regard to whether the DV restriction is going to be lifted, then the issue is did his treatment provider get full disclosure. And the answer to that question is no.

On January 16, 2019, the trial court entered its written order on contempt. The court's order found Brian "in contempt of court for [his] failure to disclose to his private treatment provider that he was the subject of a police report in October 2018 during his time in treatment." The court reserved sanctions and the purge mechanism on contempt. The court further found that Brian was no longer required to pay $1500.00 per month into the Court Registry for child support, but the court denied Brian's request to release the funds held in the court registry. "Instead the Court will retain control and make decisions on how to use Respondent's funds being held in the Court Registry." Additionally, the court signed an order denying Brian's request for reconsideration of the court's preliminary oral ruling on contempt. Brian appeals.

II.

We first address Brian's argument that the court erred by denying his request to lift the domestic violence limitation as to Jessica.

The parties and trial court appear to be confused about the .191 domestic violence restriction. Under RCW 26.09.191, a court's finding that a parent has a history of domestic violence can be used to restrict that parent's time or decision-making with

respect to the children. See RCW 26.09.191(1) (limiting mutual decision-making based on acts of domestic violence); RCW 26.09.191(2) (limiting residential time with the children based on acts of domestic violence). Here, the court made a finding of domestic violence by the father against the mother, but the court concluded that it didn't affect the children, therefore, the court did not impose a .191 limiting factor on Brian with respect to the children.

What the trial court and parties are referring to as a .191 domestic violence restriction is not .191 limitation, but instead appears to be a finding of fact of domestic violence. A domestic violence restriction as against the mother is not a valid limiting factor under RCW 26.09.191 and does not affect the parenting plan.[4] If a valid .191 limiting factor had been imposed limiting either Brian's time with the children or mutual decision-making, then it could have been lifted by his completion of the domestic violence treatment. Completion of a domestic violence treatment program, however, does not eliminate the factual finding of historic domestic violence.

Because there was no .191 limitation in the parenting plan against Brian, there is nothing to remove.

III.

Brian next contends that the trial court erred by finding him in contempt. We agree.

"A court's authority to impose sanctions for contempt is a question of law, which we review de novo." In re Interest of Silva, 166 Wn.2d 133, 140, 206 P.3d 1240 (2009).

[4] During oral argument, neither party could articulate the effect of the domestic violence finding, nor the effect of removing it from the parenting plan. There does not appear to be a domestic violence protective order in place.

"Punishment for contempt of court lies within the sound discretion of the trial court." State v. Dugan, 96 Wn. App. 346, 351, 979 P.2d 885 (1999); see also Templeton v. Hurtado, 92 Wn. App. 847, 852, 965 P.2d 1131 (1998). Thus, when "reviewing a trial court's finding of contempt, an appellate court reviews the record for a clear showing of abuse of discretion." Templeton, 92 Wn. App. at 852. An abuse of discretion occurs when a trial court exercises its discretion in an unreasonable manner or bases it on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

"The authority to impose sanctions for contempt may be statutory, or under the inherent power of constitutional courts."[5] State v. Hobble, 126 Wn.2d 283, 292, 892 P.2d 85 (1995). To be valid, contempt orders must comply with constitutional procedural due process requirements, specifically by providing contemnors with notice and an opportunity to be heard. Burlingame v. Consol. Mines & Smelting Co., 106 Wn.2d 328, 332, 722 P.2d 67 (1986).

Here, the trial court's finding of contempt was an abuse of discretion for two reasons. First, the trial court made its finding of contempt sua sponte. There was no pending contempt motion, no order to show cause, or other pleading specifying allegations of contempt of otherwise providing notice of a potential finding of contempt. Under RCW 7.21.050, a trial court may only summarily impose a contempt sanction "upon a person who commits a contempt of court within the courtroom if the judge

[5] However, "courts may not exercise their inherent contempt power '[u]nless the legislatively prescribed procedures and remedies are found inadequate.'" In re Dependency of A.K., 162 Wn.2d 632, 647, 174 P.3d 11 (2007) (quoting Mead Sch. Dist. No. 354 v. Mead Ed. Ass'n, 85 Wn.2d 278, 288, 534 P.2d 561 (1975)). Here, the trial court did not find the statutory procedures or remedies inadequate. Therefore, we need not address the court's inherent contempt authority.

certified that he or she saw or heard the contempt." Dimmick v. Hume, 62 Wn.2d 407, 409, 382 P.2d 642 (1963). There is no dispute here that the trial court based its finding of contempt on its belief that Brian had not disclosed the October 2018 police reports to his treatment provider. This act did not take place in the courtroom and thus the summary imposition of contempt was inappropriate.

Second, it does not appear that the act of failing to disclose the police report to the treatment provider meets the statutory definition of contempt. Contempt of court is defined as 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;
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> (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.

RCW 7.21.010(1). While the trial court's order does not identify the legal basis for the contempt finding, the only possible basis would be RCW 7.21.010(1)(b): disobedience of a lawful judgment, decree, order, or process of the court.

Here, the only court order or decree at issue was the statement in the parenting plan that in order to lift the "domestic violence restriction" as to Jessica, Brian was required to complete domestic violence treatment. As discussed above, however, the finding of domestic violence against Jessica was not a valid .191 limitation in a parenting plan. Moreover, Brian's participation in the treatment program was voluntary, and only necessary if he wanted to have the "restriction" lifted. And finally, as the

treatment provider testified, Brian's alcohol abuse was not the subject of his domestic violence treatment and thus, disclosure of the police report was not deemed a requirement of treatment.

The trial court abused its discretion in imposing the finding of contempt.

IV.

Brian argues that the court erred when it declined to release the funds in the court registry. We agree.

We review the court's distribution of funds for abuse of discretion. Pac. Nw. Life Ins. Co. v. Turnbull, 51 Wn. App. 692, 699, 754 P.2d 1262 (1988). The court abuses its discretion when its exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. Turnbull, 51 Wn. App. at 699. Generally, the court which has custody of funds has the authority and the duty to distribute the funds to the party or parties who have demonstrated that they are entitled to the funds. Turnbull, 51 Wn. App. at 699.

The funds held in the registry are Brian's child support payment that were stayed when Brian became the parent that the children would primarily reside with and therefore no longer owed child support to Jessica. Since Brian is the parent that the children primarily reside with, there is no basis for the court to keep the funds. The court held the money in the registry pending further motion, which Brian made. The court confirmed that Jessica was not owed child support, which is why the fees were originally contested and held in the court registry. The court provided no legal or factual basis to retain the funds, and was uncertain as to the amount of money retained in the court registry. Although the court has broad discretion to distribute court held funds,

there is no authority of law to support the court's retention of the funds in this unrestrained manner.

Because Brian does not owe child support, the court should release the funds in the registry to Brian.

We reverse the finding of contempt and remand to the trial court to release the funds in the court registry to Brian.

WE CONCUR: