IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of ALEXANDRA VAN ANTWERP (f.k.a. Alexandra Gropper), Respondent, and ROBERT LELAND GROPPER, Appellant.	)	No. 65979-1-I DIVISION ONE UNPUBLISHED OPINION FILED: July 5, 2011

Becker, J. — This is an appeal from an order modifying a parenting plan and adjusting child support. We affirm.

FACTS

Robert Gropper and Alexandra Van Antwerp married in 1998. Alexandra had a son and a daughter from an earlier marriage. Both lived with Alexandra and Robert during their marriage. They are now over the age of 18 and are not the subject of the parenting plan in this appeal. Robert and Alexandra had three children together: AG, LG, and EG.

In 2005, Robert and Alexandra separated and Alexandra filed for dissolution. As of the entry of the modified parenting plan in August 2010, AG

was 11, LG was 10, and EG was 8.

Predissolution Events

In late 2005 and up until the dissolution trial in April 2007, Alexandra accused Robert of domestic violence and sought protection orders against him. Pretrial orders entered in 2006 show domestic violence and parenting plan restrictions were possible issues for trial. A pretrial conference order entered on February 9, 2007, stated that the parenting plan remained a contested issue.

Alexandra and Robert signed a side agreement on February 20, 2007, in which they settled the terms of a parenting plan that they would submit to the court. The remainder of the agreement was to remain private. Robert would attend domestic violence treatment, and Alexandra would seek psychiatric evaluation; they would not use these concessions against one another; and if either party sought modification of the parenting plan, only facts arising after the date of the agreement would be considered.

On March 12, 2007, Alexandra filed her trial brief. The brief asked for a continuing restraining order against Robert in favor of Alexandra and her two older children based on allegations of domestic violence and stalking. The brief did not request a restraining order in favor of the three children of the marriage.

On April 10, 2007, the parties presented their agreed final parenting plan to the court. The court was not made aware of the other terms of the side agreement. Judge Linda Lau entered the parenting plan. The plan did not contain limitations based on domestic violence. It provided that the children

would reside primarily with Alexandra, that the parents would have joint decision-making authority, and that disputes would be resolved by mediation or arbitration.

The parties went to trial before Judge Lau primarily on property issues. The court issued findings and a decree on June 1, 2007. Robert was ordered to pay child support and $5,000 per month in maintenance for one year. The court divided business assets and awarded Alexandra a promissory note for $439,000. Robert was ordered to make payments of $5,740 per month on the note over eight years beginning in May 2008, after maintenance ended. The court denied Alexandra's request for a continuing restraining order: "No restraining orders and all orders are lifted. Parties agreed to attend programs and treatment incident to entry of their Parenting Plan." Neither party appealed.

Postdissolution Events

After the divorce, Robert paid maintenance for one year as required and then began making payments on the note in May 2008. In September 2008, Alexandra accused Robert of physically abusing their son, LG. She got a temporary protection order. Child Protective Services investigated the abuse claim and determined that it was "unfounded."

In November 2008, Alexandra petitioned to modify the parenting plan based on the allegation that Robert had physically abused LG. Alexandra asked that Robert's residential time be reduced and that she be given sole decision-making authority. Robert responded by asking that the plan be modified in his

favor so the children would reside a majority of the time with him and so that he would have sole decision-making authority.

Commissioner Meg Sassaman found there was adequate cause to modify. She appointed a guardian ad litem and specifically ordered investigation

of both mental health and domestic violence issues.

In December 2008, a commissioner terminated the temporary protection order for the children, except LG. The commissioner appointed a therapist to reunify Robert and LG. In May 2009, Robert moved to terminate the protection order with respect to LG. Alexandra opposed the motion. A commissioner granted the motion and orally remarked that Alexandra's counsel should take her to the library to read "The Boy Who Cried Wolf." Alexandra moved to revise. Judge Mariane Spearman, who by this time was presiding over the case, did not revise the order terminating the protection order, but she did strike the commissioner's comments on suggested reading.

The guardian ad litem filed a report in July 2009. The report suggested conditioning Robert's residential time on maintaining enrollment in and completing a domestic violence treatment program. Commissioner Sassaman adopted the recommendations of the guardian ad litem and made them the basis of a temporary plan. Robert moved for revision. Judge Spearman denied revision. Robert took steps to begin a treatment program for domestic violence.

By August 2009, Robert had been making payments on the promissory note for about one year. But he had begun to withhold $1,000 from each monthly payment. According to Robert, this was to recoup funds he earlier advanced to Alexandra. Alexandra moved to find Robert in contempt. The motion was continued to December 2009.

In September 2009, the guardian ad litem moved against both parties to

collect $5,075 in unpaid fees. A commissioner ordered Robert and Alexandra to split the cost evenly. Alexandra moved to revise so that she would pay a lesser proportion. If the fees were reallocated based on the child support work sheets from 2007, Robert would pay 72 percent of the guardian's fees while Alexandra would pay 28 percent. The child support work sheets, however, calculated Alexandra's income as including the maintenance of $5,000 per month. Robert was no longer paying maintenance; instead, his obligation to Alexandra was $5,740 per month on the promissory note. Nevertheless, Robert, who was representing himself, said he understood the payments on the note to be maintenance. Judge Spearman used the 72-28 allocation reflected in the child support work sheets to allocate responsibility for paying the fees of the guardian ad litem.

In December 2009, Commissioner Sassaman heard Alexandra's motion for contempt regarding incomplete payments on the promissory note. The commissioner declined to hold Robert in contempt, but found the payments on the promissory note were intended for the support of Alexandra and the children. Alexandra moved to revise. In January 2010, Judge Spearman granted the motion and held Robert in contempt. She reasoned that the payments were "in the form of a maintenance because this is what she's living on." The order allowed Robert to purge the contempt through payment of amounts past due. Robert has not appealed from the order of contempt.

In August 2010, the parties went to trial before Judge Spearman on

Alexandra's petition to modify. Robert represented himself. The court found that domestic violence occurred during the marriage and Robert had engaged in an "abusive use of conflict." The parenting plan was modified to condition Robert's residential time and decision-making with the children upon completion of a treatment program for domestic violence. The court also increased Robert's child support obligation. The increase rested partially on a determination that the promissory note payments were not maintenance and therefore Alexandra's income was lower than in the first year after the divorce. Robert was ordered to pay $30,000 of Alexandra's attorney fees based on intransigence. This appeal followed.

RES JUDICATA & ACTS OF DOMESTIC VIOLENCE

At the modification trial, Alexandra sought parenting plan restrictions based on domestic violence, including the alleged recent abuse of LG. In her testimony, Alexandra also described some incidents of domestic violence that allegedly occurred during the marriage. While the court was not confident regarding whether Robert ever assaulted his son, LG, the court found Alexandra's testimony regarding acts of domestic violence during the marriage to be credible. These acts included Robert smashing pizza in the face of Alexandra's older son, destroying a remote control by throwing it, and beating the family pet in front of the children. Robert argues res judicata applies and the court erred by basing the modification of the parenting plan on acts of domestic violence that occurred during the marriage. His position is that Alexandra could

have used these incidents to obtain restrictions in the parenting plan when it was originally entered, and because she did not, the court should view the issue of his need for domestic violence treatment as having already been resolved with finality.

The effect of the modification was to award Alexandra sole decision-making authority, to dispense with nonjudicial dispute resolution procedures unless required by court action, and to change the residential plan. The modified plan slightly reduced Robert's residential time, but the primary difference from the first plan is that it conditioned Robert's residential time upon satisfactory completion of domestic violence treatment. The court based its decision to make this change upon acts of domestic violence by Robert during the marriage:

> **2.3 Modification or Adjustment Under RCW 26.09.260(4) or (8)**
>
> The custody decree/parenting plan/residential schedule should be **modified** because the reduction or restriction of the residential time for the person with whom the children do not reside a majority of the time would serve and protect the best interests of the children using the criteria in RCW 26.09.191. The following facts support the request for modification:
>
> The father engaged in acts of domestic violence against the mother and his step-son during the marriage. The parenting plan entered in 2007 does not acknowledge the father's need for DV treatment and does not contain any .191 restrictions. After considerable resistance, the father entered domestic violence batterer's treatment in 2010. It is in the best interests of the children for the father's residential time to be conditioned upon his satisfactory completion of DV batterer's treatment as well as a parenting class with a DV component. The court incorporates its oral findings from today's hearing.

The modification statute generally requires a substantial change in circumstances as a prerequisite for modification of a decree or parenting plan, but there are exceptions to this rule.

> Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.

RCW 26.09.260(1) (emphasis added). One of the exceptions is found in RCW 26.09.260(4), which allows the court to modify a parenting plan by imposing so-called ".191 restrictions" even if the facts presented do not satisfy the definition in RCW 26.09.260(1) for a substantial change of circumstances.

> The court may reduce or restrict contact between the child and the parent with whom the child does not reside a majority of the time if it finds that the reduction or restriction would serve and protect the best interests of the child using the criteria in RCW 26.09.191.

RCW 26.09.260(4).

The legislature added subsection (4) in 1999. Laws of 1999, ch. 174, § 1. We have recognized that it provides the trial court with greater flexibility to modify a parenting plan to include a ".191 restriction." In re Marriage of Watson, 132 Wn. App. 222, 231-32, 130 P.3d 915 (2006). "A court has authority to impose restrictions under RCW 26.09.191 when modifying a parenting plan to the same extent it has such authority at the time of dissolution." Watson, 132

Wn. App. at 232 (emphasis added). The need to protect a child from domestic violence is an appropriate basis for restricting residential time. RCW 26.09.191.

Res judicata, or claim preclusion, bars the relitigation of claims and issues that were litigated or might have been litigated in an earlier action. Pederson v. Potter, 103 Wn. App. 62, 69, 11 P.3d 833 (2000), review denied, 143 Wn.2d 1006 (2001). Application of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made. Pederson, 103 Wn. App. at 69.

In general, res judicata applies to dissolution proceedings. In re Marriage of Timmons, 94 Wn.2d 594, 597, 617 P.2d 1032 (1980). But when dissolution is obtained by the agreement of the parties or by default, the doctrine is not applied to children's residential schedules. Timmons, 94 Wn.2d at 598-600; In re Marriage of Akon, 160 Wn. App. 48, 62-63, 248 P.3d 94 (2011). Even before subsection (4) was added, the statute was understood as manifesting "an intent to moderate the harshness of res judicata, regardless of whether or not the decree was contested, due to the public interest in the welfare of children." Timmons, 94 Wn.2d at 599, discussing former RCW 26.09.260 (1973). When a dissolution was uncontested, on a subsequent petition to modify, predecree facts are "unknown" within the meaning of RCW 26.09.260(1) and can be considered by the trial court. Timmons, 94 Wn.2d at 600. This assures that there will be "true judicial consideration of all relevant facts concerning the welfare of the

children." Timmons, 94 Wn.2d at 599.

Under Timmons, res judicata does not bar the modification court from considering Alexandra's allegations of domestic violence during the marriage. Robert and Alexandra did not contest parenting plan issues at their dissolution trial. Therefore, facts known to the parties before the decree were available for consideration at the modification trial to the extent they were relevant to the welfare of the children. By adding subsection (4) to RCW 26.09.260, the legislature specifically authorized trial courts to impose ".191 restrictions" in a modification as readily as in a dissolution. This is consistent with Timmons and further indicates legislative intent that the doctrine of res judicata not be applied so as to put children beyond the court's protection.

Alexandra mentioned domestic violence as an issue in her trial brief at the dissolution trial in 2007. However, the trial court (Judge Lau) ultimately accepted the agreed parenting plan without imposing restrictions related to domestic violence. Robert contends the allegations of domestic violence must therefore be seen as having been fully adjudicated. We disagree. Judge Lau was not asked to evaluate the domestic violence claim in relation to the parenting plan. The allegations made at the time were related to a request for a restraining order to protect Alexandra and her children from a previous marriage. In any event, the interests of the children are paramount. They cannot be disregarded simply because the court consented to a plan agreed to and presented by the parents.

Robert and Alexandra privately agreed that the parenting plan could never be modified based on predecree facts. Robert argues that the modification was contrary to this agreement. It was; but a court will not enforce a private contract of this type. Children are not property. Adults who are parties to a parenting plan cannot agree to foreclose judicial inquiry into matters involving the best interests of the children. See Timmons, 94 Wn.2d at 598-99. The side agreement does not control.

ABUSIVE USE OF CONFLICT

Robert argues that the court did not make findings sufficient to support its decision to condition his residential time on completion of domestic violence treatment.

A court may preclude or limit any provisions of the parenting plan if there is an "abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development." RCW 26.09.191(3)(e).

The court made oral findings which were incorporated into the written findings. Pertinent to Alexandra's allegation of an abusive use of conflict, the court found that Robert pulled LG out of therapy when LG disclosed an incident of abusive treatment by his father:

> After the dissolution in 2007, all three children began to -- began therapy with Peggy Diggs. Then in July of '08, LG started to see Dr. Benjamin because it was thought that he might feel more comfortable with a male therapist.
>
> In October of 2008 is when LG disclosed to Dr. Benjamin that his father had jerked his arm and hurt his shoulder and had in the past held him by the shoulders and shaken him with such force that his head went back and forth. Upon learning this, Mr. Gropper insisted that LG stop therapy with Dr. Benjamin and return to therapy with Peggy Diggs.
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> There is a letter that was in evidence, Exhibit 1, a January 2009 letter from Ms. Diggs, where she expressed her strong disagreement with the decision to remove LG from treatment with Dr. Benjamin, as it would be interpreted by LG as punishment for opening up with a therapist that he had clearly bonded to.
>
> Despite Ms. Diggs' recommendation that LG return to therapy with Dr. Benjamin without delay, this did not occur, and he is not in therapy to his detriment.

This court will uphold a conclusion of law if the trial court's findings of fact support it. In re Marriage of Burrill, 113 Wn. App. 863, 870, 56 P.3d 993 (2002),

review denied, 149 Wn.2d 1007 (2003). The finding that LG suffered detriment when Robert intervened in his therapy sufficiently supports a conclusion that Robert engaged in an abusive use of conflict that created a danger of serious damage to his son's psychological development.

COMPLIANCE WITH PROCEDURAL RULES & DUE PROCESS

After trial, the court adjusted Robert's child support obligation upward. Robert argues the trial court erred by adjusting child support because Alexandra raised the issue in her trial brief rather than by motion. Contrary to Robert's assertion, RCW 26.09.170(7)(b) does not say a motion is the only way to initiate an adjustment in child support. "Either party may initiate the adjustment by filing a motion and child support worksheets." RCW 26.09.170(7)(b) (emphasis added). Even assuming error, Robert fails to show how he was prejudiced. He had sufficient time to respond.

Robert baldly asserts that because the issue of child support was raised for the first time in Alexandra's trial brief, his due process rights were violated. The argument is unsupported, and we decline to consider it.

CHILD SUPPORT & COLLATERAL ESTOPPEL

When Robert failed to make complete monthly payments on the promissory note, Alexandra moved for contempt. The contempt motion was heard by Commissioner Sassaman in December 2009. Alexandra argued contempt was a proper remedy because she relied on the payments for support

and therefore the payments were "like" maintenance. She pointed out that Robert had previously agreed the payments were maintenance at a hearing where Judge Spearman was deciding how to allocate payments for the fees of the guardian ad litem.

Commissioner Sassaman found that the payments were intended for support, but declined to find contempt. Alexandra moved to revise the ruling. Judge Spearman heard the revision motion in January 2009. She held Robert in contempt for not paying the full amount owed.

At the modification trial in August 2010, in connection with adjusting child support, Judge Spearman determined that the monthly payments Robert owed to Alexandra under the promissory note were a property distribution and not maintenance:

> The $5,740 that the father is paying is part of the property settlement agreement. It is not maintenance. The decree is very clear that maintenance was ordered for 12 months from 2007 to 2008. And the decree also provided that once the maintenance payments stopped, then the father would start paying on the promissory note. The $439,000 promissory note which represented the wife's half of her share -- community share in the business, that is not income to her. That's -- she already owns that, and it is not deductible by the husband.

Based on Commissioner Sassaman's finding that the payments on the promissory note were intended as support, Robert contends Judge Spearman was collaterally estopped from determining that the promissory note was a property distribution. If the payments are maintenance, then the money would be considered income to Alexandra and Robert could deduct the payments from

his own income. Thus, Robert's child support obligation would be reduced.

Robert does not cite authority for the proposition that he may raise collateral estoppel for the first time on appeal. And his argument is unpersuasive in any event because the issues and parties were not identical.

A person may be held in contempt for failing to pay a property distribution under a decree if the payment has a reasonable relationship to the support of the former spouse or children. Decker v. Decker, 52 Wn.2d 456, 465, 326 P.2d 332 (1958). Thus in the contempt proceeding, the issue was not whether the distribution was actually maintenance, it was whether it was intended as support. And in the contempt proceeding, the children were not parties. See McDaniels v. Carlson, 108 Wn.2d 299, 305-08, 738 P.2d 254 (1987). Support payments are for the children, not the parent. Depriving the children of support owed to them because their mother took an inconsistent position in a different proceeding would be unjust. See McDaniels, 108 Wn.2d at 306.

Robert relies on In re Marriage of Trichak, 72 Wn. App. 21, 863 P.2d 585 (1993). Trichak is dissimilar. The former wife in Trichak was attempting to relitigate a legal issue she had previously raised, without contending that the proposed reconsideration was necessitated by the needs of the child. Here, any inconsistency in the court's rulings is overcome by the priority given to the needs of the children.

CONTEMPT

Robert asks that if the collateral estoppel issue is decided against him,

this court should address the issue of whether it was proper to hold him in contempt for failing to make payments on the promissory note.

This issue is not squarely before us. Robert has not assigned error to the contempt order. Robert suggests we should exercise our discretion to address the issue because it is likely to arise again. We decline to do so.

INTRANSIGENCE

The court found Robert intransigent and ordered him to pay Alexandra $30,000 in attorney fees:

> Father has been intransigent in these proceedings which unnecessarily increased the Mother's attorney fees. He was ordered to enter domestic violence treatment in July 2009 and deliberately delayed entry into treatment instead focusing on Mother's mental health issues. He also challenged almost every adverse decision in these proceeding through revision or reconsideration. He did so without following the applicable civil and local rules. He intentionally disobeyed numerous court orders requiring payment to the Mother and the GAL and had to be ordered to pay his proportionate share of the children's treatment provider's fees and the children's extracurricular expenses. His conduct resulted in multiple UFC [United Family Court] Planning Conference hearings. Based on the foregoing, Father should pay Mother's attorney fees in the amount of $30,000.

Finding 2.9. In her oral ruling, Judge Spearman described other events that support the finding of intransigence. She estimated that Robert's intransigence resulted in Alexandra paying at least a third more than she would have had to otherwise.

Robert argues the findings do not support the trial court's conclusion of intransigence. A trial court has discretionary authority to order an award of

attorney fees. In re Marriage of Crosetto, 82 Wn. App. 545, 563, 918 P.2d 954 (1996). A court may award a party legal fees caused by the other party's intransigence. In re Marriage of Greenlee, 65 Wn. App. 703, 708, 829 P.2d 1120, review denied, 120 Wn.2d 1002 (1992). Intransigent conduct includes "foot-dragging" or obstructionist behavior, repeatedly filing unnecessary motions, or simply making a trial unduly difficult with increased legal costs. Greenlee, 65 Wn. App. at 708.

The conduct described by the court in finding 2.9 and in the oral ruling supports the award of fees on the basis of intransigence. Robert's conduct spanned more than one year from when Alexandra filed her petition to modify in November 2008 to the court's ruling in August 2010. The trial court's observations show that Robert was dilatory and obstructive.

ATTORNEY FEES ON APPEAL

Both parties request attorney fees on appeal. Alexandra alleges that Robert continues to be intransigent on appeal and that he has violated CR 11. She also claims that she has need while Robert has the ability to pay. Robert contends that Alexandra is actually the intransigent party.

We deny both requests. We do not find that Robert has been intransigent on appeal or that he has violated CR 11. We do not find that Alexandra was intransigent. As to need, Alexandra filed her affidavit of financial need one week before oral argument, in violation of RAP 18.1(c)'s requirement that the affidavit be filed no later than 10 days before oral argument. Even were we to waive this

rule, we would exercise our discretion to deny Alexandra's request for fees.

Alexandra has filed a motion to supplement the record with additional evidence on review. The standards of RAP 9.11 are not met. We deny the motion.

Affirmed.

Becker, J.

WE CONCUR:

Appelwick, J.

Dwyer, C.J.