IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Matter of CAROLYN K. PLOTKE, YVONNE POLKOW, Guardian, Respondent, v. LEO K. PLOTKE, Appellant	No. 41537-2-II Consolidated with
In re the Guardianship of CAROLYN K. PLOTKE, YVONNE POLKOW, Guardian, Respondent, v. LEO K. PLOTKE, Appellant.	No. 41547-0-II UNPUBLISHED OPINION

Johanson, J. — Leo K. Plotke appeals the trial court's orders from two consolidated cases: a vulnerable adult protection action and a guardianship action. Regarding the vulnerable adult protection action, Plotke appeals the trial court's denial of his motion to terminate the vulnerable adult protection order (VAPO) and his request for an evidentiary hearing. Regarding the guardianship action, Plotke appeals the trial court's contempt finding and also the trial court's denial of his motion to modify the guardianship. We reverse the VAPO because the trial court violated Plotke's due process rights and we affirm the trial court's contempt order and judgment

in the guardianship action.

FACTS

I. Vulnerable Adult Protection Order

On August 6, 2008, Clark County Sheriff's Detective Kevin Harper petitioned the trial court for a VAPO and to establish guardianship of the person and the estate of Carolyn Plotke.[1] The trial court entered a temporary protection order, declaring Carolyn to be a vulnerable adult and restraining Plotke (Carolyn's husband) and Kathleen Vanderpool (Carolyn's daughter) from contact with Carolyn.

On August 15, 2008, the trial court considered whether to grant a permanent VAPO. Plotke and Vanderpool proceeded pro se. The trial court informed Plotke that counsel for the petitioner, Detective Harper, would present his case and then it would be Plotke's turn. Detective Harper testified. After Detective Harper's testimony, the trial court told Plotke that he had the right to question Detective Harper and that if he wished, later he could state his case. Samantha Petshow, a supervisor with Adult Protection Services, also testified in support of the protection order. Then the trial court asked Plotke if he would like to testify and he affirmed that he did.

The trial court administered the oath and then sua sponte warned Plotke that because Detective Harper believed there was probable cause for criminal charges, Plotke needed to be aware of his rights. The trial court read Plotke his *Miranda*[2] rights from Detective Harper's card

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[1] In the remainder of this opinion, we refer to Carolyn Plotke by her first name to avoid confusion with the appellant.

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

and asked Plotke if he understood. Plotke responded, "Yes[,] I would request a lawyer as I do not have that type of money." 1 Report of Proceedings (RP) at 35. The trial court appointed a lawyer for Plotke. Speaking to Plotke and Vanderpool, the trial court stated:

> I read you your rights. Do you wish to exercise those rights to consult with an attorney and you're—I'll find that you're both indigent and have the opportunity to consult and we need to set this over.

1 Report of Proceedings (RP) at 38. Plotke and Vanderpool made no response; instead, Detective Harper's counsel responded.

Detective Harper's counsel told the trial court that although Plotke and Vanderpool were choosing for reasons outside the record to remain silent, under chapter 74.34 RCW, the trial court could take the record as presented, enter a permanent order under the preponderance of evidence standard, and "they can always come back and review it at any date." 1 RP at 38. The trial court did not return to its inquiry of Plotke and Vanderpool; nor did the trial court receive a response from them.

The trial court then said:

> [T]here is a valid question—grounds for me to file a Permanent Order of Protection *subject to any review at a later time.* I would suspect that both of the attorneys will advise their clients to remain silent.

1 RP at 39 (emphasis added). The trial court reviewed the evidence presented and found that based on the preponderance of the evidence, it had adequate grounds to sign the permanent protection order. The trial court also stated that if Plotke or Vanderpool wanted to be heard on this later, "we can reopen the hearing." 1 RP at 40.

Plotke's appointed attorney, Mr. Anderson, then arrived in the courtroom. The trial court told Anderson, "If there's a need for further hearing, then you can advise your client how to get in touch with me." 1 RP at 42. Anderson informed the trial court that he was unsure how to proceed when the State had not yet filed criminal charges. The trial court repeated that any party could "cite this back to review and just to provide more testimony." 1 RP at 43.

On June 19, 2009, Plotke moved the trial court to terminate the permanent VAPO or alternatively to schedule an evidentiary hearing. Plotke reminded the trial court that it had told him, at the permanent VAPO hearing, that he could reopen the hearing. Plotke told the trial court that he would waive his right to silence, as connected to possible criminal charges, so that he could present "the whole picture" to the court. 2 RP at 209. Plotke told the trial court that the VAPO made him appear to be a villain.

Carolyn's appointed guardian, Yvonne Polkow, responded that she did not object to reopening the hearing because the trial court had told Plotke that if he wanted to come back, he could do so. At Polkow's request, the trial court granted Plotke's motion for an evidentiary hearing, on the condition that Plotke deposit $20,000 in trust to cover attorney fees should Polkow prevail. Plotke did not deposit the money. Nor did he appeal the order.

On October 29, 2010, Plotke again moved to terminate the VAPO or in the alternative to hold an evidentiary hearing. He also moved to vacate the previous order from the June 19 hearing[3] because that order violated his due process rights. On November 17, 2010, the trial

[3] This order granted Plotke's motion for evidentiary hearing but required him to deposit $20,000 in trust to cover attorney fees should Polkow prevail. This order was filed on July 1, 2010.

court again denied Plotke's motion to terminate the VAPO and his alternative motion to hold an evidentiary hearing.

II. Guardianship

The trial court appointed Yvonne Polkow as personal guardian over Carolyn; Plotke initially retained power of attorney for financial matters. Based on concerns that Plotke managed the finances inappropriately, the trial court ultimately appointed Polkow as guardian over Carolyn's estate as well.

The parties eventually entered into a memorandum agreement, under which Carolyn transferred all of her assets into Plotke's name, thus qualifying her for Medicaid. In return, the agreement required Plotke to deposit funds for Carolyn into a trust account on a monthly basis. The agreement provided that should Plotke be unable to pay for Carolyn's special needs, he would obtain funds by applying for a reverse mortgage on Plotke's and Carolyn's home (now in his name only). Based on the agreement, on January 29, 2010, the trial court ordered Plotke to remit funds for Carolyn's care.

In September 2010, Polkow moved for an order requiring Plotke to appear and to show cause why he had not deposited the funds as provided in the memorandum agreement and as ordered by the trial court. At the October 6, 2010 show cause hearing, Polkow presented evidence showing Plotke's failure to pay a total of $60,000 over the last year, leaving Carolyn "pretty much out of funds." 2 RP at 262. Plotke's counsel asked the trial court for a continuance so that she could meet with her client, who was not present at the hearing. 2 RP at 266. Concerned that a delay could cause "critical problems" and wanting to "keep moving ahead," the trial court gave Plotke "the courtesy of a little extra time."[4] 2 RP at 266, 267-68. The trial court

[4] Plotke characterizes this as the trial court denying his continuance motion. In contrast, Polkow

ordered Plotke to appear "October 15, 2010 to show cause why he has failed to comply" with the memorandum agreement and the associated order. CP at 997. The show cause order included, "[f]ailure to comply may result in incarceration for contempt of court." CP at 997.

Plotke submitted a written declaration responding to the trial court's order that he appear and show cause why he failed to comply with the memorandum agreement. Plotke argued that the trial court had denied his continuance motion, that the trial court's order to "show cause" was a "finding" without a hearing, and that he recalled paying an initial deposit when he signed the agreement. CP at 1006-07.

On October 15, 2010, Polkow presented evidence from the guardian's checking account that contradicted Plotke's claims of making an initial deposit. Plotke then asserted that he had not paid because he did not have the financial capacity and that he took a reverse mortgage to pay his attorney fees and the guardian fees. Polkow responded that the purpose of the reverse mortgage was to pay for Carolyn's care not to pay attorney fees. Plotke disagreed with Polkow's portrayal of the purpose of the reverse mortgage and told the trial court, "[t]here is no money." 2 RP at 272.

The trial court responded that it wanted proof of Plotke's claims. The trial court ordered Plotke to appear on November 5, 2010, to produce complete bank records from July 2009 forward, and to pay all monies owed based on the memorandum agreement. The trial court

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characterizes this as the trial court granting his continuance motion. The summary of proceedings and decisions from October 6, characterize this as the trial court granting Plotke's continuance motion.

warned Plotke[5] that he was "that close to going to jail." 2 RP at 273.

The parties appeared on November 5, to show cause why Plotke was not in contempt for failing to pay money owed based on the memorandum agreement. Polkow presented a summary of the memorandum agreement's monthly budget and Plotke's delinquency. Polkow argued that Plotke's financial documents show that Plotke had money. Using Plotke's financial documents, Polkow pointed out Plotke's receipt of reverse mortgage distributions and his various personal purchases. Polkow argued that Plotke paid his attorney $73,000, rather than paying for Carolyn's care.

Plotke told the trial court that he had not adequately reviewed Polkow's summary and needed more time. Plotke argued that the reverse mortgage distributions were debt, not income and that "[t]o the best of my recollection" counsel used funds Plotke paid to his attorney to write "at least one check" to the guardian. 2 RP at 288. Plotke argued for a forensic accounting, which the trial court permitted, provided Carolyn did not pay the expense. Plotke personally testified that he did not believe the memorandum agreement required him to fund Carolyn's care. Rather, he believed the agreement put his wife on "Medicare." 2 RP at 289.

The trial court found Plotke in "coercive contempt" of court and incarcerated him. 2 RP at 291. The contempt order provided that Plotke could purge by paying $50,000 to the guardian's account.[6] CP at 1137. The trial court entered a judgment against Plotke for

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[5] Polkow states that Plotke failed to attend the October 15, 2010 hearing. But the record shows that the trial court addressed Plotke personally.

[6] Plotke had access to this amount of money through the reverse mortgage. He used the reverse mortgage to pay his judgment in December 2010 and the trial court released him from jail.

$63,009.58 plus attorney fees, for a total of $67,702.08.

While the contempt proceedings were pending, Plotke moved the trial court for an order to show cause why Carolyn's guardianship should not be modified to replace Polkow as the appointed guardian. The trial court considered Plotke's motion to replace Polkow as Carolyn's appointed guardian on November 17. Plotke argued that Polkow had breached her duty to restrict Carolyn as minimally as possible and asked the trial court to appoint an attorney guardian ad litem (GAL) to investigate. Polkow argued that she offered Plotke supervised visitation with Carolyn, yet he never pursued that option. Polkow also asserted that Plotke offered no basis for appointing an independent GAL because she (Polkow) filed and presented regular reports to the trial court, with notice to Plotke, and Plotke neither objected to her reports nor appeared at the presentment hearings. The trial court denied Plotke's motion to replace Polkow and to appoint a GAL, noting that it believed Plotke's motion was retaliatory and not in good faith. Plotke appeals.

ANALYSIS

I. Permanent Vulnerable Adult Protection Order

Plotke first argues that because he did not receive a sufficient hearing at the time the VAPO became permanent, the trial court violated statutory provisions and his due process rights by denying his motion to terminate the VAPO or, in the alternative, to hold an evidentiary hearing. We agree with Plotke that the trial court violated his due process rights when it denied him an evidentiary hearing and therefore we reverse the vulnerable adult protection order.

Due process, at a minimum, requires notice and an opportunity to be heard. *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 761, 871 P.2d 1050, *cert. denied*, 513 U.S. 1056 (1994). Additionally, RCW 74.34.135(3) provides:

> At the hearing scheduled by the court, the court shall give the vulnerable adult, the respondent, the petitioner, and in the court's discretion other interested persons, the opportunity to testify and submit relevant evidence.

Regarding the permanent VAPO, Polkow's only argument is that Plotke had an opportunity to testify and that he waived that opportunity. But the record shows that Plotke did not waive his right to testify. Instead, after the trial court read Plotke his *Miranda* rights and asked if he understood, Plotke responded, "Yes[,] I would request a lawyer as I do not have that type of money." 1 RP at 35. The trial court immediately entered the permanent VAPO order without confirming that he chose to remain silent. Further, Plotke twice requested an evidentiary hearing after the trial court repeatedly promised that he could have such a hearing upon request.

We hold that Plotke did not waive his right to testify. Because Plotke did not waive his right to testify, he was entitled to an evidentiary hearing before the trial court entered a permanent VAPO, prohibiting or restricting Plotke's contact with his wife. Accordingly, we reverse the permanent VAPO and remand for an evidentiary hearing.

Plotke further argues that due process requires that we reassign his permanent VAPO hearing to a new judge because the trial judge displayed bias. Although we hold that the trial court did not afford Plotke an opportunity to be heard, we do not agree that the trial judge displayed bias against him. Thus, we deny his request to assign a new trial judge.

II. Guardianship

Plotke argues that the trial court violated statutory requirements (1) by failing to hold a hearing before entering the order of contempt; and (2) by denying his motion to modify the guardianship, without first making a written finding of a frivolous motion. We disagree because the trial court held three hearings before finding Plotke in contempt, and there is no requirement that the trial court make written findings when counsel represents the applicant.

A. Sufficient Contempt Hearing

A finding of contempt and punishment, including sanctions, lies within trial court's sound discretion and the reviewing court will not disturb a trial court's contempt ruling absent an abuse of that discretion. *State v. Jordan*, 146 Wn. App. 395, 401, 190 P.3d 516 (2008). A trial court abuses its discretion when it exercises its discretion in a manifestly unreasonable manner or bases its decision on untenable grounds or reasons. *Jordan*, 146 Wn. App. at 401.

A trial court may impose a contempt sanction using its inherent constitutional authority or under statutory provisions found in Title 7 RCW. *Jordan*, 146 Wn. App. at 401. Washington's contempt statutes distinguish between punitive and remedial sanctions for contempt. RCW 7.21.010, .030, .040. A "remedial sanction" is "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." RCW 7.21.010(3).

RCW 7.21.030(1) provides:

> The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW

> 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

Plotke argues that the trial court violated the statute by imposing sanctions without a hearing. But the trial court gave Plotke three opportunities at three show cause hearings to present evidence of either his compliance, his good faith efforts of compliance, or a reason why he cannot comply. Additionally, the trial court gave Plotke "the courtesy of a little extra time" to prepare, even when delay could cause "critical problems" for Carolyn. 2 RP at 266, 267-68.

Plotke argues that the trial court denied his continuance motion, found that he failed to comply, and gave him "until October 15, 2010 to purge the contempt." Reply Br. of Appellant at 12. Plotke further argues that he never had a hearing where he could contest the allegations. But Plotke's argument overlooks that the trial court did not enter an order of contempt until November 5, 2010, and that at each hearing, after the trial court listened to Polkow's evidence, it asked for a response from Plotke. The record does not support Plotke's arguments that the trial court would not allow him to present evidence.

Here, Polkow presented evidence that Plotke had not complied with the January 29, 2010 court order and the memorandum agreement. Plotke presented no evidence of compliance. Then the trial court ordered Plotke to appear "October 15, 2010 to show cause why he has failed to comply" with the memorandum agreement. CP at 997. At the October 15 hearing, Plotke claimed, "[t]here is no money" to pay for Carolyn's care. 2 RP at 272. The trial court ordered another hearing where Plotke could demonstrate the truth of this statement by producing his bank records.

At the subsequent hearing on November 5, the trial court did not deny proffered evidence. Polkow used Plotke's bank records to show that Plotke had not complied. In contrast, Plotke's counsel did not use bank records but merely told the trial court that "to the best of my recollection," checks may have been written to Carolyn's care center. 2 RP at 288. Plotke did not use the bank records or present any other evidence. Next, Plotke personally testified that he did not believe that the memorandum agreement required him to fund care for Carolyn. Based on Plotke's own testimony, the trial court had no reason to think that Plotke did comply or would comply with the memorandum agreement.

The trial court found Plotke in contempt after three hearings where Plotke had the opportunity to present evidence. Additionally, the trial court informed Plotke early in the process that failure to comply with the memorandum agreement "may result in incarceration for contempt of court." CP at 997. The reviewing court will not disturb a trial court's contempt ruling absent an abuse of discretion. *Jordan*, 146 Wn. App. at 401. Nothing in the record shows that the trial court acted in a manifestly unreasonable manner or based its decision on untenable grounds or reasons. We affirm the trial court's contempt order and accompanying judgment against Plotke.

B. Motion to Modify Guardianship

Plotke argues that RCW 11.88.120 required the trial court to provide written findings that his motion is frivolous before it could deny his motion to modify the guardianship without a hearing. Polkow responds that RCW 11.88.120 requires the trial court to provide a written explanation of its denial of a guardianship modification motion, only to pro se litigants. Polkow is

correct.

RCW 11.88.120(3) provides:

> By the next judicial day after receipt of an *unrepresented* person's request to modify or terminate a guardianship order, or to replace a guardian or limited guardian, the clerk shall deliver the request to the court. . . . Any denial of an application without a hearing shall be in writing with the reasons for the denial explained.

(Emphasis added.)

Here, Plotke's counsel moved the trial court to modify the guardianship. The trial court considered the motion, on the record, with both parties represented by counsel. RCW 11.88.120(3) applies specifically to "an unrepresented person." No provision requires the trial court to explain its denial of a guardianship modification motion to a represented person. We reject Plotke's argument that the trial court violated RCW 11.88.120.

ATTORNEY FEES

Polkow requests attorney fees under RAP 18.1, which permits attorney fees on appeal if applicable law grants the party the right to recover reasonable attorney fees. RCW 7.21.030(3) permits the award of attorney fees incurred by a party defending an appeal of a contempt order. *Johnston v. Beneficial Mgmt. Corp. of Am.*, 26 Wn. App. 671, 677, 614 P.2d 661 (1980), *reversed on other grounds*, 96 Wn.2d 708, 715, 638 P.2d 1201 (1982). Therefore, Polkow is entitled to reasonable attorney fees on the guardianship issue. But because Polkow does not prevail on the VAPO action, she is not entitled to attorney fees on the VAPO issue.

We affirm in part and reverse in part.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, A.C.J.

We concur:

Armstrong, J.

Penoyar, J.