IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of:		**No. 27827-1-III**
	)	**(consolidated with**
KRISTI KARVALHO,	)	**No. 27847-6-III)**
	)	
Appellant,	)	
	)	
and	)	**Division Three**
	)	
JAMES CARVALHO,	)	
	)	
Respondent.	)	**UNPUBLISHED OPINION**
	)	

Sweeney, J. — This appeal follows a dissolution action and an order finding the wife in contempt for disobeying the court's order. The order permitted the wife to purge herself of the contempt by satisfying a number of conditions. The court found that she failed to do so. We conclude that the court's findings of fact are supported by the record and they support the court's conclusion that the wife was in contempt of court. And we conclude that the contempt here was civil, not criminal, and, therefore, the wife was not entitled to the procedures required by a citation for criminal contempt. We then affirm the order of the trial judge.

FACTS

Kristi Karvalho[1] and James Carvalho divorced in 1998. They have two daughters, Sheela (born June 30, 1989) and Aszalee (born March 29, 1993). They agreed to, and the court entered, a parenting plan as part of the dissolution.

The parenting plan provided that the children would reside with Ms. Karvalho, and Mr. Carvalho was entitled to visitation with the children "in a public setting with no over night." Clerk's Papers (CP) at 434. The plan also specified blocks of time for "[u]nlimited phone conversation" between Mr. Carvalho and the children. *Id.* The plan required that Ms. Karvalho bring the children to Mr. Carvalho once per month if Ms. Karvalho moved more than 75 miles from Chewelah, Washington. The plan called for Mr. Carvalho and Ms. Karvalho to share decision-making authority on matters concerning the children's education and religious upbringing.

Ms. Karvalho moved with the children to Costa Rica around the time that the 1998 parenting plan was entered. After returning to the United States, Ms. Karvalho was arrested for custodial interference. Mr. Carvalho then moved to have her found in contempt. Ms. Karvalho responded by moving to modify the parenting plan. The matter proceeded to hearing. The court entered a contempt order and a final parenting plan on

[1] Ms. Karvalho's last name is now Peña. We use Karvalho for consistency throughout the course of the case.

December 19, 2003.

Ms. Karvalho stipulated to the court finding that she had violated several lawful orders of the court, including a restraining order, an order requiring return of the children, and a temporary parenting plan. The order set out conditions for Ms. Karvalho to purge the contempt. They included that she waive her right to relocate with the children for four years, enroll the children in public school, facilitate the children's weekly attendance at therapy, and pay Mr. Carvalho's attorney fees and costs. Mr. Carvalho also agreed to ask that the prosecutor dismiss a count of custodial interference and reduce a penalty for a second charge if Ms. Karvalho complied, in good faith, with the conditions necessary to purge the contempt order.

The four-year restraint on relocation expired in December 2007. Ms. Karvalho filed a notice of intent to relocate in March 2008. Mr. Carvalho objected. Mr. Carvalho moved for an order to show cause on contempt based on Ms. Karvalho's failure to abide by other contempt conditions. Sheela was emancipated between the 2003 final parenting plan and contempt order and the 2008 proceedings. So the 2008 relocation and contempt proceedings focused solely on Aszalee.

The trial court reviewed the numerous declarations from Ms. Karvalho and Mr. Carvalho and heard oral argument from counsel. The court entered findings and

concluded that Ms. Karvalho was in contempt. It entered an appropriate order on January 12, 2009. The court ordered another hearing for January 27, 2009, to determine whether Ms. Karvalho had complied with the conditions necessary to purge the contempt.

Those conditions included immediately inquiring with Dr. Lisa Christian regarding the balance owed for past services, paying Dr. Christian the balance of what Ms. Karvalho owes to her, depositing with Dr. Christian a retainer of $2,500 for future services, and presenting Aszalee and herself to Dr. Christian to complete an assessment and report. CP at 949. The next hearing took place on February 17, 2009, not January 27. At the hearing, the trial court determined that Ms. Karvalho had only partially paid her obligation to Dr. Christian and had not paid any portion of the retainer. The trial court refused to purge the contempt and ordered Ms. Karvalho to jail until a review hearing 30 days later.

Ms. Karvalho appeals.

DISCUSSION

Civil Contempt v. Criminal Contempt

Ms. Karvalho argues that the court imposed criminal sanctions and therefore she was entitled to the full panoply of procedural safeguards that attend criminal sanctions. Specifically, RCW 7.21.040(2)(a) provides that a prosecuting attorney or city attorney

must commence an action to impose a punitive sanction by filing a complaint or information. And "[i]f a contempt order is criminal, due process protections must be afforded, including the right to a trial by jury." *State v. John*, 69 Wn. App. 615, 619, 849 P.2d 1268 (1993).

Mr. Carvalho responds that the court's contempt order, including the conditions to purge, reflects classic contempt proceedings in a dissolution action. And the contempt proceedings leading up to the court's order in January 2009 were conducted pursuant to RCW 26.09.160(1), which provides that "[a]n attempt by a parent . . . to refuse 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 of court."

Whether the trial court imposed a civil or criminal contempt sanction is a question of law that we review de novo. *In re Marriage of Thompson*, 97 Wn. App. 873, 877-78, 988 P.2d 499 (1999).

A court has inherent authority to impose civil contempt sanctions. *In re Pers. Restraint of King*, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988). RCW 26.09.160(1) also authorizes, indeed requires, that the trial court hold a parent in contempt of court where he or she, "in either the negotiation or the performance of a parenting plan [attempts] to refuse to perform the duties provided in the parenting plan." Whether a contempt

sanction is civil or criminal turns on "the substance of the proceeding and the character of the relief that the proceeding will afford." *Id.* at 799. "If the purpose of the contempt sanction is punitive and results in a determinate jail sentence, with no opportunity for the contemnor to purge himself of the contempt, it is criminal. If the purpose of the sanction is to coerce compliance with a lawful court order, and a contemnor is jailed only so long as he fails to comply with such order, then the contempt is civil." *Id.*; *see also In re Marriage of Didier*, 134 Wn. App. 490, 501-02, 140 P.3d 607 (2006).

Here, the court's ruling and contempt order do not use language of punishment or sentencing. *Compare with Didier*, 134 Wn. App. at 503 (where the court determined that the trial judge's use of the word "sentenced" suggested punitive thinking). To the contrary, here the trial judge emphasized that she imposed the sanction to induce Ms. Karvalho's compliance with the court's orders and the parenting plan. The contempt order was entered on January 12, 2009. It provided that if Ms. Karvalho complied with the purge conditions by a status hearing on January 27, 2009, she would not be confined at all. And she would be released immediately if she complied with the conditions set forth in the order. These are the hallmarks of a civil contempt order. *King*, 110 Wn.2d at 799. And *Snook v. Snook*, 110 Wash. 310, 188 P. 502 (1920), is inapposite. Here, the court found that Ms. Karvalho had the ability to pay and, as we will conclude, that

finding is supported by this record.

Findings of Fact Supported by Record

Ms. Karvalho argues that a number of the court's findings are not supported by the record, specifically: that she acted in bad faith when she failed to pay for one-half of the therapist's fees; that she failed to secure therapy for Aszalee; that she relocated before December 19, 2007; that she acted in bad faith by not enrolling Aszalee in public school and by not involving Mr. Carvalho in decisions regarding Aszalee's education; that she poisoned the relationship between Aszalee and Mr. Carvalho; and, finally, that Ms. Karvalho bad-mouthed Mr. Carvalho in Aszalee's presence.

We review findings of fact for substantial evidence, even where other evidence may contradict the finding. *In re Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002); *In re Marriage of Rideout*, 150 Wn.2d 337, 353, 77 P.3d 1174 (2003).

Ms. Karvalho challenges a number of the court's findings. But she argued only two of the assignments of error. We find evidence in this record to support both.

Ms. Karvalho did not facilitate Aszalee's regular attendance with Dr. Christian, as required by the 2003 parenting plan, and it was done in bad faith and not due to her inability to pay. There is evidence that she could secure a well-paying job in Chewelah. CP at 812-13 (Ms. Karvalho began but did not complete the process of becoming

employed by Chewelah Rural Ambulance). And evidence showed that Ms. Karvalho was able to support other activities for Aszalee, including horses and skiing. CP at 12, 28, 80. Her letters to Dr. Christian between 2003 and the 2008 proceedings suggest that her reluctance to facilitate regular sessions was in large part due to her disagreement with Dr. Christian's role under the parenting plan and with Dr. Christian's openness to communication between Aszalee and Mr. Carvalho. CP at 285, 323-24. Ms. Karvalho did not bring Aszalee and Sheela to multiple scheduled appointments, once because she said she could not find the girls after they had "ridden off on their horses." CP at 176-77. Dr. Christian reported that Ms. Karvalho repeatedly mischaracterized Dr. Christian's role and her connection to Mr. Carvalho and his attorney and that Ms. Karvalho declined to cooperate with Dr. Christian's efforts to communicate with other therapists who had seen Aszalee.

Substantial evidence also supports that Ms. Karvalho moved from Chewelah before December 2007. CP at 773-76 (a bill showing Avista utilities account for Chewelah house was closed in October 2007). And evidence supports findings that Ms. Karvalho acted in bad faith with regard to Aszalee's education. *See, e.g.,* CP at 65 (letter from home school program informing Ms. Karvalho that Aszalee was dropped from program for failure to comply with conditions agreed to by Ms. Karvalho); CP at 746-47

(letter from Stevens County truancy officer explaining history of school attendance problems, failure to attend a truancy hearing, and Ms. Karvalho's inappropriate behavior during a meeting with the officer). There is also support for the two findings that Ms. Karvalho spoke ill of Mr. Carvalho in Aszalee's presence. CP at 746-47 (declaration of Stevens County truancy officer reporting that Ms. Karvalho implied to him, in front of Aszalee, that Mr. Carvalho sexually abused their daughters, a statement the officer found strange in the context of the meeting).

Both Ms. Karvalho and Mr. Carvalho submitted lengthy and voluminous documentation, often in the form of declarations, each supporting conflicting accounts of the past several years of their parenting plan. This case turns mainly on credibility. And we will defer to trial courts, even when the findings are based primarily on documentary evidence, in cases that turn on credibility and "where competing documentary evidence ha[s] to be weighed and conflicts resolved." *Rideout*, 150 Wn.2d at 351. Ms. Karvalho asserts that there is some evidence in the record that contradicts the challenged findings. She is correct. But the question before us is whether there is evidence to support the findings the court made. *Id.* at 351-53. There is.

Findings Support the Conclusions

Ms. Karvalho next argues that this conclusion is unsupported by the findings:

Paragraph 2.4, Past Ability to Comply with Order provides:

> (Name) Kristi Peña (fka Karvalho) [X] had [ ] did not have the ability to comply with the order as follows
>
> 1) Failure to Pay Therapist
> From April of 2004 (when Dr. Christian finally began providing therapeutic services and billing Ms. [Karvalho] for her share of those services) to date Ms. [Karvalho] admitted she has only paid $20 to Dr. Christian. However, she had the ability to pay fully for Dr. Christian's services.
>
> 2) Failure to Participate in Therapy with Dr. Christian in Good Faith
> Ms. [Karvalho] always had the ability to participate in good faith in the therapy as directed by Dr. Christian and failed to do so, using lack of funds as one excuse for not participating at all. Ms. [Karvalho] had the ability to encourage the children to rehabilitate their relationship with their father, Mr. Carvalho, but appears to have done the opposite. She had full custody of the children since 2003 and the children's attitudes toward their father were worse in 2008 than they were in 2003, becoming even worse as this litigation has fired up again. For example, Mr. Carvalho saw and heard Ms. [Karvalho] enlisting Aszalee in the task of going through this court file and marking materials in the court file. Other examples are provided by Ms. [Karvalho], including her submission of the diary of one of the children and the CHINS petition filed by the children, which appears to this court to have been conceived and managed by Ms. [Karvalho] as part of her plan to get her daughters to believe that Mr. Carvalho was a fearsome child molester.
>
> 3) Moving Prior to 12/19/07
> Ms. [Karvalho] clearly had the ability not to move prior to the end of the 4 year period included in the court order and settlement agreement.
>
> 4) Failure to Enroll Child in Public School
> Ms. [Karvalho] also clearly had the ability to keep Aszalee in public school but chose to switch her to homeschooling even though Ms. [Karvalho] appears in no way qualified nor compliant with the requirements for home schooling. Ms. [Karvalho] passively allowed, or claimed to allow, Aszalee

> to control the choice of schooling – the "tail wagging the dog", so to speak.
>
> Ms. [Karvalho] also had the ability, as well as the duty under Sec. 4.2 of the parenting plan, to involve Mr. Carvalho in the decision to home school Aszalee. She failed to do so.
>
> 5, 6, 7) Failed to Admit that Mr. Carvalho wasn't a Risk to the Children, Promote Love and Affection toward Mr. Carvalho, and Made Derogatory Remarks in front of the Children
> Ms. [Karvalho] had the ability to tell the children Mr. Carvalho wasn't a risk to them, to encourage them to rehabilitate their relationship with Mr. Carvalho and to refrain from making derogatory remarks about him in front of the children. The voluminous material that she submitted provided ample proof.

CP at 946 (periods added).

Each of these conclusions is supported by a factual finding set out earlier in the trial court's order. CP at 944-46.

We affirm the trial judge's order of contempt.

A majority of the panel has determined that 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.

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Sweeney, J.

WE CONCUR:

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Kulik, C.J.

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Brown, J.