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THE SUPREME COURT OF WASHINGTON

Court of Appeals III No. 390918

Spokane Superior Court No. 17-3-00265-6

In re the Marriage of:

JENNIFER MCCLUSKEY,

Supreme Court No. 102,539-4

Petition/Appellant,

vs.

DAVID SAUNDERS,

Respondent/Appellee

ANSWER TO PETITION FOR REVIEW

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CONTENTS

TABLE OF AUTHORITIES	iv
A. INTRODUCTION	1
B. COURT OF APPEALS DECISION	1
1. THE TRIAL COURT ERRED WHEN IT DID NOT RECOGNIZE THE ACTUAL AND POTENTIAL HARM TO THE CHILD CAUSED BY THE PARENTS CONFLICTING RELIGIOUS PRACTICE	1
1. Standard of Review.....	1
2. Conflicting religious beliefs between the parents	1
3. The denial of observing the Sabbath with the father is not in the child’s best interests	1
2. THE COURT ERRED WHEN IT FOUND APPELLANT ACTED IN BAD FAITH WHEN SHE FOLLOWED HER RELIGIOUS BELIEFS OVER THE COURT ORDER MANDATING VISITS ON THE SABBATH	1
1. Standard of Review	1
2. Ms. McCluskey did not act in bad faith and should not have been held in contempt of court for following her sincerely held religious beliefs	1
C. ISSUES PRESENTED FOR REVIEW.....	2
1. Did the trial court err in adopting a parenting plan which emphasized the Respondent’s freed of religious expression over the family’s agreed and established regarding the Sabbath	2
2. The Court of Appeals misread the holding of In Re Marriage of Jensen-Brach which involved decision-making and erred in ignoring the established best interest of the child by agreement of the parents	2

3.	The Court of Appeals failed to apply the statutory framework of RCW 26.09 et. Seq. in adopting a final parenting plan	2
4.	The Court of Appeals abused its discretion in finding the mother in contempt without analyzing whether disobedience was bad faith	3
D.	STATEMENTS OF THE CASE	3
E.	ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED	6
F.	APPELLEE ENTITLED TO ATTORNEYS FEES – RAP 18.1	15
G.	CONCLUSION	17

TABLE OF AUTHORITIES

Cases

<i>City of University Place v. McGuire</i> , 144 Wn.2d 640, 652, 30 P.3d 453 (2001).....	11
<i>Herring v. Pelayo</i> , 198 Wn. App. 828, 832, 397 P.3d 125 (2017).....	8
<i>In re Marriage of Eklund</i> , 177 P.3d 189, 143 Wn. App. 207 (2008).....	16,17
<i>In re Marriage of Gillespie</i> , 89 Wn. App. 390, 404, 948 P.2d 1338 (1997).....	8
<i>In re Marriage of Jensen-Branch</i> , 78 Wn.App.482, 491, 899 P.2d 803 (1995).....	2
<i>In re Marriage of Katare</i> , 175 Wn.2d 23, 35, 283 P.3d 546 (2012).....	7
<i>In re Marriage of Kim</i> , 179 Wn. App. 232, 240, 317 P.3d 555 (2014).....	7
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).....	7
<i>In re Marriage of Murray</i> , 28 Wn. App. 187, 189, 622 P.2d 1288 (1981).....	7
<i>In re Marriage of Rideout</i> , 150 Wn.2d 337, 352, 77 P.3d 174 (2003).....	9,17
<i>State v. N.B.</i> , 7 Wn.App. 2d 831, 837, 436 P.3d 358 (2019)...	8
<i>Sunnyside Valley Irrig. Dist v. Dickie</i> , 149 Wn.2d 873, 879, 73 P.3d (2003).....	8
<i>The-Anh Nguyen v. City of Seattle</i> , 179 Wn. App. 155, 163, 317 P.3d 518 (2014).....	8

Constitution & Statutes

RCW 26.092,11
RCW 26.09.160(1).....17
RCW 26.09.160(2).....15
RCW 26.09.160(2)(b)(ii)..... 16,17,18
RCW 26.09.160(3)(a).....15
RCW 26.09.160(3)(b).....16
RCW 26.09.184.....12
RCW 26.09.18712
RCW 26.06.2609
RCW 26.06.260(1).....14
RCW 26.06.260(6).....10

Rules & Other Authorities

RAP 18.1.....15,16,17
RAP 18.1(a) & (b).....17

A. INTRODUCTION

Respondent accepts the introduction provided by Appellant.

B. COURT OF APPEALS DECISION

Division III of the Court of Appeals issued its decision addressing the issues presented and briefed by the Appellant in its Notice of Appeal, Opening Brief and Reply to wit:

1. THE TRIAL COURT ERRED WHEN IT DID NOT RECOGNIZE THE ACTUAL AND POTENTIAL HARM TO THE CHILD CAUSED BY THE PARENT'S CONFLICTING RELIGIOUS PRACTICE.

1. Standard for Review
2. Conflicting religious beliefs between the parents
3. The denial of observing the Sabbath is not in the child's best interest.

2. THE COURT ERRED WHEN IT FOUND APPELLANT ACTED IN BAD FAITH WHEN SHE FOLLOWED HER RELIGIOUS BELIEFS OVER THE COURT ORDER MANDATING VISITS ON THE SABBATH.

1. Standard for Review
2. Ms. McCluskey did not act in bad faith and should not have been held in contempt of court for following her sincerely held religious beliefs.” (Appellant's Opening Brief, Pg.i-ii)

The Court of Appeals was not asked to and did not address the issues presented by the Petition for Review except the issue of Appellant's "bad faith" with regard to the contempt.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in adopting a parenting plan which emphasized the Respondent's freedom of religious expression over the family's agreed and established regarding the Sabbath.
2. The Court of Appeals misread the holding of *In Re Marriage of Jensen-Brach* which involved decision-making and erred in ignoring the established best interest of the child by agreement of the parents.
3. The Court of Appeals failed to apply the statutory framework of RCW 26.09 et. Seq. in adopting a final parenting plan.

4. The Court of Appeals abused its discretion in finding the mother in contempt without analyzing whether disobedience was bad faith.

D. STATEMENT OF THE CASE:

Appellee agrees with the Appellant's Statement of The Case except as follows:

All of the visits that occurred during Dr. Saunder's furloughs from his physician missionary service for the Seventh Day Adventist Church during February and early September 2017 took place at the Seventh Day Adventist Church in Spokane Washington. CP 207-209, 1 RP 201-204

At the time the parties entered their Parenting Plan on November 30, 2017, E.S. was only a few months old, and Dr. Saunders was contracted with the Seventh Day Adventist missionary physician program in Malawi, as the parties had both been involved when married. CP at 174-186, CP at 520

Dr. Saunder's visits were during furloughs from the mission field and limited in duration due to the age of the child. CP at 520 The November 30, 2017 Parenting Plan specifically provided that it was effective for only three (3) years as follows:

The father shall have residential time in Spokane, WA when he travels from Malawi. When he is in Spokane, WA he will be entitled to 3 periods of residential time per week that will not exceed 2 hours in length at a time. The residential time shall not include overnight visits.

* * *

If any of the scheduled residential times take place on a Saturday, the parties agree that the visitation shall be moved to the Sunday after.

The above terms for residential time will continue until the child turns 3 years old. The parties by agreement can expand the residential time. CP at 177 (Emphasis added)

The reason for moving the Saturday visit to Sunday is not given. The father's parenting time was expanded as a result of mediation and then by court order, as noted by the Trial Court:

16. The parties engaged in mediation resulting in multiple two (2) hour visits at United Family Services until it was changed to Coeur d Alene Park at the end of June, 2019. Dad consistently exercised the parenting time every other Sunday with increasing length of time to April of 2021. The October 30, 2020 Order specifically expressed a pathway for more parenting time increasing to overnight parenting with the father. (CP 515) (Emphasis added)

As referenced above, the October 30, 2020 Order provided that the father's parenting time would gradually increase to overnights, however, the Order did not specify the dates and times of father's parenting time after April 2021. (CP 275-276) Father filed for additional parenting time and four days later the mother filed her Notice of Intent to relocate. Immediately upon her move, the mother began refusing to turn the child over for the Sabbath and then for other days, being held in contempt five (5) times prior to trial in this matter. CP at 497-55, I RP 87, I RP 294.

E. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

Appellant's first problem in seeking review is that she is presenting three (3) new issues to the Supreme Court that were not presented to the Court of Appeals. (Petition for Review, Issues 1-3, Pg. 2) This Court has repeatedly held that

“ . . .we do not address this issue because it was not raised on appeal. **An issue not briefed in the Court of Appeals will not be considered by this Court.**” *State v. Halstien*, 122 Wn.2d 109,130, 857 P.2d 270 (1993) citing from *State v. Laviolette*, 118 Wash.2d 670, 679, 826 P.2d 684 (1992) (Emphasis added)

Appellant's first two (2) issues presented address freedom of religion versus “family's agreed and established practice regarding the faith.” Petition for Review, Pg 2 The third addresses the trial court's application of “the statutory framework of RCW 26.09 et. seq. in adopting a final parenting plan.” None of these three issues were presented to the Court of Appeals as is obvious by the Notice of Appeal and Opening Brief

as set forth on page 2 of this Answer. This Court should refuse to address any of these issues.

In addressing the other issue or issues, trial courts have broad discretion in adopting a parenting plan, and such plans are reviewed for an abuse of discretion. *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012) Appellate courts “are reluctant to disturb a child custody disposition because of the trial court’s unique opportunity to personally observe the parties.” *In re Marriage of Murray*, 28 Wn. App. 187, 189, 622 P.2d 1288 (1981) The party challenging a trial court’s ruling on such decisions bears the heavy burden of showing a manifest abuse of discretion. *In re Marriage of Kim*, 179 Wn. App. 232, 240, 317 P.3d 555 (2014) A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)

Likewise, this Court reviews the specific findings of fact made by the trial court to determine if they are supported by substantial evidence. *Herring v. Pelayo*, 198 Wn. App. 828, 832, 397 P.3d 125 (2017) Substantial evidence is “a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *Sunnyside Valley Irrig. Dist v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d (2003) Unchallenged conclusions of law become the law of the case. *The-Anh Nguyen v. City of Seattle*, 179 Wn. App. 155, 163, 317 P.3d 518 (2014)

In its determination of whether substantial evidence exists to support a trial court’s finding of fact, the appellate court views the record in the light most favorable to the party in whose favor the findings were entered. *In re Marriage of Gillespie*, 89 Wn. App. 390, 404, 948 P.2d 1338 (1997) “This Court must defer to the finder of fact in resolving conflicting evidence and credibility.” *State v. N.B.*, 7 Wn. App. 2d 831, 837, 436 P.3d 358

(2019); *In re Marriage of Rideout*, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003)

The trial court did not find that the family had “an agreed and establishes practice regarding the Sabbath.” CP 510-519 This was because the issue had not been presented or argued to the Court and therefore the Court does not reference any such agreement between the parents.

The November 3, 2017 Parenting Plan was due to only run three (3) years and it anticipated expansion of the father’s parenting time. As indicated in the October 30, 2020 order by the Commissioner shows that the Court anticipated expansion of the father’s parenting time, which given the father’s work schedule would necessarily include Saturday. CP at 515

Further, RCW 26.09.260 provides for the modification of a parenting plan upon showing a substantial change in circumstances. But modification was not necessary in the present case because the parenting plan entered was already self-

limiting in length to three (3) years. CP at 174-184) Likewise, relocation itself provides a basis for modification of a parenting plan without a finding of adequate cause. RCW 26.09.260(6)

The mother sought relocation in this matter and the relocation statute provides that:

The court may order adjustments to the residential aspects of a parenting plan pursuant to a proceeding to permit or restrain a relocation of the child. RCW 26.09.260(6)

A consequence of the mother's relocation adding significant additional distance and father's available schedule, the trial court's adoption of the father's parenting plan was the only reasonable schedule. CP 509-510

The trial court's ruling after trial on these issues was dependent upon findings regarding credibility when the court entered conclusion of law number 2 and 11:

2, The evidence adduced at trial established there is not a burden on free exercise in this case since each party; honors and celebrates the Sabbath in a similar fashion. *In assessing credibility of witnesses, there is not a conflict between parents regarding free*

exercise but conflict between parents where one does not want the other to exercise increased parenting time despite not requesting §191 limitation.

CP at 516 (Emphasis added)

* * *

11. The Court has significant concern that *the Sabbath issue is a pretext for wanting to alienate the child from his father.* The father has a fundamental right to parent his child and exercise his religion. This is supported by the mother withholding the child on days other than the Sabbath including overnight make-up visits ordered by the Court. The Court also finds the timing of the relocation suspect.
CP 519

The trial court clearly found the testimony of the mother and her witnesses lacked significant credibility. *The appellate court defers to the trial court on issues of conflicting evidence, witness credibility, and persuasiveness of the evidence. City of University Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001) (Emphasis added)* This court should not circumvent the credibility findings by inventing a supposed agreement included in a document entered into when E.S. was just months old. CP

at 174-185 The trial court's decision on all of these issues is supported by substantial evidence.

Appellant argues that the trial court did not apply the statutory framework of RCW 26.09. While it is difficult to determine exactly the content of the framework, the Court clearly made findings and conclusions which reference consideration of the requirements of statute for the best interests of the child. RCW 26.09.184 and RCW 26.09.187 These are set forth on page 7 through 10 of the trial court's findings of fact and conclusions of law. CP at 517-519 The trial courts ruling is, as found by the Court of Appeals, supported by substantial evidence and lack of credibility on the part of the mother.

Finally, the mother asks the Supreme Court to find that she did not exercise bad faith in refusing the father's parenting time. Petition for Review, pg. 2 The Court of Appeals correctly found that the mother did exercise bad faith in her refusal to provide for a make-up visit in March, 2020. Appellant argues that because

she has “sincerely held beliefs” that she had provided an excuse for her actions. The problem with this is that the trial court had previously found, based upon assessment of credibility and weighing of evidence that

2, The evidence adduced at trial established there is not a burden on free exercise in this case since each party; honors and celebrates the Sabbath in a similar fashion. **In assessing credibility of witnesses, there is not a conflict between parents regarding free exercise but conflict between parents where one does not want the other to exercise increased parenting time** despite not requesting §191 limitation.

CP at 516 (Emphasis added)

* * *

11. **The Court has significant concern that the Sabbath issue is a pretext for wanting to alienate the child from his father.** The father has a fundamental right to parent his child and exercise his religion. This is supported by the mother withholding the child on days other than the Sabbath including overnight make-up visits ordered by the Court. The Court also finds the timing of the relocation suspect. CP 519 (Emphasis added)

The court correctly found that these findings and conclusions were supported by substantial evidence.

Appellant attempts to impute to the child a free exercise right which is alleged to weigh in favor of denying the father his parenting time on the Sabbath. Petition for Review, Pg. 26 Again, the trial court weighed the evidence and assessed the credibility of the witnesses and found that

. . .[E.S.] is not mature enough to express an independent reasoned preference. Also given the concern about alienation, the Court is concerned about coaching. CP at 517, ¶6

Whether the mother or father believed the child was ready for overnight parenting time, the Commissioner ordered a makeup visit and the mother failed to comply. Neither the trial court nor the Court of Appeals believed this would justify withholding the child from the father. The judicial officer in five (5) instances held that the mother withheld the child in bad faith. CP at 518 This was just another instance of using her “sincerely held beliefs” as a pretext to withhold parenting time. She has cited no case authorizing withholding the child as the mother here has done. The Appellant argues that the make-up time was

twice the number of days the child was withheld in this instance. This was the fifth (5) finding of contempt for such withholding of the child and RCW 26.09.160 (3)(a) directs the Court on repeat offense to order twice the amount of time missed due to the parents noncompliance. CP at 498

Finally, RCW 26.09.260 (1) provides that if a party fails to comply with a provision of parenting plan, it shall be deemed bad faith. No good faith justification has been offered. A party cannot merely decide they disagree with the judge and then violate the terms of the court's order.

F. APPELLEE ENTITLED TO ATTORNEYS FEES –

RAP 18.1

RCW 26.09.160(2) provides that:

(b) If, based on all the facts and circumstances, the court finds after hearing that the parent, in bad faith, has not complied with the order establishing residential provisions for the child, the court shall find the parent in contempt of court. Upon a finding of contempt, the court shall order:

- (i) The noncomplying parent to provide the moving party additional time with the child. The additional time shall be equal to the time missed with the child, due to the parent's noncompliance;
- (ii) The parent to pay, to the moving party, all court costs and reasonable attorneys' fees incurred as a result of the noncompliance, . . .(Emphasis added)

If this Court upholds the trial court's finding of contempt, the statute provides that the court "shall order" the noncomplying party to pay the other party's attorney's fees. (RCW 26.09.160(3)(b))

In re Marriage of Eklund, the court addressed the issue of attorney's fees on appeal for upholding a contempt order and stated:

Cheri also asks that we award her attorney fees on appeal pursuant to RAP 18.1 and RCW 26.09.160(2)(b)(ii). We agree that such fees are required. Because Michael failed to comply with the alternate care provision of the court-ordered parenting plan in bad faith, he is responsible for paying reasonable attorney fees and costs that Cheri incurred to enforce the court's order. Accordingly, we award her attorney fees and costs in an amount to be determined by the commissioner of this court

upon her compliance with the provisions of RAP 18.1. RCW 26.09.160(1), (2)(b)(ii); *Rideout*, 150 Wn.2d at 359, 77 P.3d 1174. *In re Marriage of Eklund*, 177 P.3d 189, 143 Wn. App. 207 (2008)

Dr. Saunders respectfully requests pursuant to the statute and Rule of Appellate Procedure 18.1(a) and 18.1(b) that he be awarded his attorney's fees incurred for responding to the Petition for Review and defending the finding of contempt Court of trial court's Contempt Order of July 5, 2022. (CP 497-500)

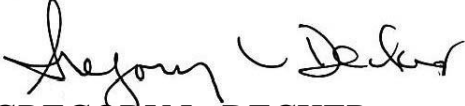
G. CONCLUSION

Substantial evidence supports the findings of fact and conclusions of law entered by the Superior Court. Deference to the trial court on credibility and the weighing of the evidence dictates that the court's decision should be affirmed.

The mother was properly found to have denied the father's residential time intentionally and in bad faith and was adjudged to be in contempt of court. This finding should also be affirmed.

Pursuant to RCW 26.09.160(3)(b)(ii) and RAP 18.1, respondent should be awarded attorney's fees for that portion of his attorney's time for responding to the contempt issue.


Respectfully submitted,


GREGORY L. DECKER
Attorney for Appellee

WORD COUNT CERTIFICATION

I certify that this document consists of 2,867 words exclusive of the cover page, tables, this certification, and the signature blocks contained herein.

Respectfully submitted this 6th day of December, 2023


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