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96682-6

SUPREME COURT OF
THE STATE OF WASHINGTON

Jessica Bodge,

Appellant,

v.

Brian Bodge,

Respondent

ON APPEAL FROM
COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE
(No. 76954-I (consolidated with Nos. 77155-8-I and 77494-8-I)

RESPONDENT'S ANSWER TO APPELLANT'S FIRST AMENDED PETITION FOR REVIEW

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TABLE OF CONTENTS

I. IDENTITY OF THE MOVING PARTY 1

II. STATEMENT OF THE ISSUE 1

III. AUTHORITY AND ARGUMENT 1

A. Appellant Mother's petition for discretionary review does not meet a single requirement for consideration governing acceptance for discretionary review by the Washington Supreme Court.

B. Appellant Mother's Petition is loaded with misrepresentations of the facts of this case.

C. Attorney's Fees.

IV. CONCLUSION 11

TABLE OF AUTHORITIES

Washington

Caven v. Caven, 136 Wn.2d 800, 966 P.2d 1247 (1998) **1**

Chapman v. Perera, 41 Wn. App. 444, 445-56, 704 P.2d 1224, review denied 104 Wn.2d 1020 (1985) **11**

In re Marriage of Homer, 151 Wn.2d 884, 891, 93 P.3d 124 (2004) **3**

In re Marriage of Schnurman, 178 Wn. App. 634, 645, 316 P.3d 514, 520 (2013) **4**

Marriage of Bodge, 76954-5-I, 2018 WL 4215618, (Wash. Ct. App. Sept. 4, 2018), opinion withdrawn and superseded on reh'g in part sub nom. Bodge & Bodge, 76954-1, 2018 WL 6181740 (Wash. Ct. App. Nov. 26, 2018) **3, 10**

Orwick v. City of Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). . . **3**

Statutes

RCW 26.09.140 . . . . **10**

RCW 26.09.191(2)(n) **7**

Rules

GR 14.1(a) **1, 11**

RAP 13.4(b)(1)(2)(3)(4). **1, 11**

RAP 18.1 . . . . **1, 11**

RAP 18.1(j) **11**

RAP 18.9(a)(c) **5**

I. **Identity of the Moving Party**

Brian Bodge, Respondent, (Father) by and through his attorney of record, Mary Joyce ("MJ") McCallum, submits this answer to Mother's First Amended Petition for Discretionary Review.

II. **Statement of the Issue**

1. Should the Court accept a petition for discretionary review that does not meet the requirements of RAP 13.4(b)(1)(2)(3)(4)?

2. Should the Court sanction Mother's counsel for violating GR 14.1(a) by citing an unpublished opinion from 2008 as an authority?

III. **Authority and Argument**

Appellant Mother's petition for discretionary review should be denied.

A. Appellant Mother's petition for discretionary review does not meet a single requirement for consideration governing acceptance for discretionary review by the Washington Supreme Court. RAP 13.4(b)(1)(2)(3)(4) requires that "A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the

Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

First, the decision of the Division I Court of Appeals does not conflict with any decision of the Supreme Court. Mother's reliance on *Caven v. Caven*, 136 Wn.2d 800, 966 P.2d 1247 (1998) as a conflicting decision of the Washington State Supreme Court is misplaced. The *Caven* case is distinguishable in that: Only one parent was subject to a parental conduct factor; there was no case manager appointed to mitigate the possible ramification of shared decision-making; and in *Caven* the court on appeal engaged in de novo review to resolve a question of statutory construction. In the Bodge case we have: two parents who are subject to parental conduct factors in the appealed parenting plan; a parenting plan monitor who facilitates communication, decision making , and conflict resolution between the parties; the standard of review on appeal was abuse of discretion, as the statutory issue was moot when the decision was rendered; an abusive use of conflict limiting factor as to the Mother; and a .191 limited restriction for the Father as to the Mother only. Moreover, the Father's .191 restriction was lifted as to the children by the trial court

and this decision was correctly upheld on appeal. The trial court properly exercised its wide discretion to fashion a parenting plan that served the best interests of the Bodge children. Additionally, the trial court's decision to maintain the domestic violence limiting factor as to the Mother only (with the restriction lifted as to the children) constitutes a qualified finding on domestic violence.

Second, Mother cites cases as conflicting decisions of the Washington State Court of Appeal for the issue of:

1. When a parent has engaged in a history of acts of domestic violence, the restrictions prohibiting joint decision making and alternative dispute resolution are absolute and the restrictions on residential time can only be waived upon express findings not made in this case.

The Washington State Division One Court of Appeals found this issue to be moot. In their unpublished decision *Marriage of Bodge*, 76954-5-I, 2018 WL 4215618, (Wash. Ct. App. Sept. 4, 2018), opinion withdrawn and superseded on reh'g in part sub nom. Bodge & Bodge, 76954-1, 2018 WL 6181740 (Wash. Ct. App. Nov. 26, 2018) states that "Joint Decision-Making- Jessica argues that the trial court erred when it ordered joint decision-making between the parties in the June 2017 parenting plan because of Brian's history of domestic violence. Because the September 2017 parenting plan granted sole decision-making authority to Brian, with

disputes resolved by the parenting plan monitor or the trial court, **we conclude that this issue is moot**. "A case is moot if a court can no longer provide effective relief." *In re Marriage of Homer*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004) (quoting *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984)). Here, the September 2017 parenting plan, which granted sole decision-making authority to Brian, superseded the June 2017 parenting plan. Jessica acknowledges that joint decision-making ended when the September 2017 parenting plan was filed. Therefore, this court cannot provide Jessica with effective relief for any error in the decision-making section of the June 2017 parenting plan, **and we reject her argument as moot.**" All of the Mother's cited case law for conflictions with Washington State Court of Appeals cases are irrelevant ,as the this issue is moot. Moreover, Mother cites unpublished opinion *In re Marriage of Moody*, 143 Wn. App. 1025 (2008) as an authority. Such citation violates GR 14.1(a) which prohibits citing unpublished Washington Court of Appeals opinions as authority. *In re Marriage of Schnurman*, 178 Wn. App. 634, 645, 316 P.3d 514, 520 (2013) the Court of Appeals found that "28 RAP 10.3(a)(6) requires the argument portion of an appellate brief to include citations to legal authority. RAP 10.7 and 18.9(a) authorizes us to sanction, sua sponte, a party or counsel for failing to comply with rules of appellate procedure. In Lalida's response brief, her

counsel cited and relied on an unpublished appellate decision from this court. This violates GR 14.1(a), which prohibits citing unpublished Washington court of appeals opinions as authority. For this violation, we impose a $100 sanction against Lalida's counsel, payable to the registry of this court." *Id.* This Court should sanction Mother's counsel for citing an unpublished Washington court of appeals opinion as authority.

Third, Mother's Petition fails to address any significant question of law under the Constitution of the State of Washington or of the United States simply because none exist.

Finally, the Court of Appeals decision does not involve a substantial public interest. Contrary to Mother's assertion, the decision on appeal does not repudiate public policy against domestic violence, nor does it create a conflict with current jurisprudence regarding domestic violence. The Court's findings were clear that the Father did not pose a threat to the children, thus the Court lifted the .191 restriction as to the children. Moreover, the facts of this case are unique and are unlikely to be replicated. The case facts are only important to the parties and involve a parenting plan between two individuals that does not constitute an issue of significant public policy. This is evidenced by the Division One Court of Appeals issuing an unpublished opinion. Had this case significantly impacted any public policy then surely the Court of Appeals would have

issued a published opinion that could have been binding on the lower courts. Further, the Mother is using the .191 restriction as a sword rather than a shield. Domestic violence parental conduct factors are intended to afford protection to victims of domestic violence and their children-- not to harass the parent with the restriction or interfere with their relationship with minor children. Here, the trial court found that the .191 restriction should be lifted as to the children because he did not pose a threat to the children. This finding was correctly upheld on appeal.

THIS APPEAL IS FRIVILOUS AS DEFINED BY RAP 18.1 AND 18.9(a)(c)

The Mother's petition is baseless, without merit, and is evidence of her continued abusive use of conflict.

B. Appellant Mother's Petition is loaded with misrepresentations of the facts of this case.

First, Father was **NEVER** required under the criminal case nor in the final parenting plan to complete domestic violence treatment. It was optional, and Father optionally decided to complete Domestic Violence Treatment through Evergreen Recovery Centers. He successfully completed this treatment on March 12, 2018.

Second, the Court lifted a domestic violence finding or restriction toward the **CHILDREN** not the Mother.

Third, the GAL was appointed 4 years before the parties' trial. Moreover, her recommendations were fully incorporated into the 2015 Agreed Final Parenting Plan. Notably, her recommendations did not include domestic violence treatment. Furthermore, the mother never contested that the father was in compliance with the parenting plan and had moved to Phase III of the residential schedule at trial. It was only after the trial court's decision that she found unfavorable to her that she began attaching significance to the fact that the father had not completed domestic violence treatment. Now, she continues her attempt at revisionist history in this latest Petition by misrepresenting the facts and the issues that were before the court during trial. No domestic violence treatment was ever ordered, for the father, and her assertions that he "failed "to complete treatment are red herrings that serve only to distract from the actual facts of this case.

Fourth, Mother only provides the findings from the April 14, 2017 Memorandum Decision Findings of Fact and Conclusions of Law that appear favorable to her. CP 485-500. Moreover, she fails to include the following significant findings regarding herself or the father:

1. By contrast Mother asserts eight separate instances of domestic violence/and/or emotional abuse of Mother (See Jessica Bodge Brief at 17-18):

-Withholding emergency dental treatment: **Rejected**, because mom has sole decision- making authority and scheduled a dental appointment during Father's visitation time. The letter from the doctor suggests that this could have been arranged at another time.
-Public humiliation of mother: **Rejected**. It was mother who made the situation worse.
-Medical Insurance lapsed: **Rejected**. There is no proof that this was intentional. In fact, the court views this as just Dad's normal sloppy response.
-Uninvited Holiday: **Rejected**. This is the dental incident again and this was completely under mom's control.
-Hotel pickup texts: **Rejected**. First, there is no audience so mom could not be cast in a bad light. In addition, their text time cannot be relied on as a real time indication of when the text was sent because texts are often delayed. And this is also de minimis.
-Children left alone: **Rejected**. In Mother's Exhibit 137(G}, ("Washington State Law on Leaving Kids Alone,"} indicates that there is no law in Washington and the guideline age is 10 years. In addition, Mom turned dad into CPS and CPS concluded the allegation was unfounded.
-The black tooth brush incident: **Rejected**. Credibility. The court just does not believe this without more proof.
-Father manipulates children numerous times: **Rejected**. The court views Exhibit 193, as a treatment analysis and not for the truth of the matters asserted. Therapists are not required to determine whether their client's complaints are real or imagined. They are only required to treat the person as they present. In other words to accept this exhibit as true you have to believe Mother and this court has made its credibility determination above. Mother lacks credibility. Memorandum, Pg. 4-5.

2. The objective evidence is that the children are doing well and mother is suffering, at least by her own report. She contradicts herself repeatedly: she says she is a domestic violence victim living in fear and then accepts an invitation to spend the holiday with the perpetrator (and then gets upset when he cancels it}.

   ALL WHILE OPERATING UNDER A PARENTING PLAN THAT PUTS HER IN COMPLETE CONTROL. SHE CONTINUALLY CHOOSES TO ENGAGE WHEN SHE SIMPLY COULD CHOOSE TO DISENGAGE.

As such, the court finds, in the best interest of the children, that Father is no longer a threat to the children in compliance with and as required by RCW 26.09.191(2)(n) The testimony of Ms. Martinelli supports this, the children's performance supports this, and the general circumstances support this finding. Memorandum, Pg. 5.

3. Father petitions the court for a major or minor modification of the parenting plan based on mother's abusive use of conflict. And the court does find that Mother has engaged in abusive use of conflict. As such this limitation shall be imposed on the Mother. Memorandum, Pg. 8.

4. The evidence at trial shows that Mother has relentlessly interfered with Father's relationship with their three children. The court uses the term "relentless" descriptively not pejoratively. The evidence supports that Mother is relentlessly engaged in trying to mold reality to fit her own point of view.

   With regard to the children, much of the effect is positive when we view their academic and extracurricular performance. However, when applied to Father it becomes a battle of wills: a battle where she punishes the opponent if they do not bend to her will.

   Examples include:

   -Evidence that Mother acted in bad faith by refusing to cooperate with arbitration to determine the process by which Father could move to Phase 111--overnight visitation;
   -Evidence that, even after the parties went to arbitration in September, 2016, Mother continued to interfere in the process via unsolicited contact with Pat Martinelli, the counselor appointed to evaluate Father's relationship with the children and make recommendations regarding overnight visits;
   -Evidence that Mother has and continues to portray Father in a negative light and that this negative portrayal has impacted the children's view of their father and in formation of those relationships;
   -Testimony from Mother outlining a laundry list of complaints about Father, including perceived deficiencies in his parenting.
   -Testimony from Pat Martinelli that Mother inundated her with unsolicited information regarding Father and the case history, attempting to cast Father in a negative light. In addition, Martinelli testified that the children's statements-that they were afraid of their father and that they

were not ready to have overnights with him-were not consistent with their demeanor and actions when they were with their father. Their comments, however, did appear to mimic the concerns raised by Mother-namely that Dad didn't have the necessary medical knowledge to properly care for them.
-Evidence that Mother called CPS and insisted that Martinelli make a call to report that the boys, ages 11 and 8, had been left home without adult supervision-allegations that CPS ultimately deemed unfounded.
-Evidence of Mother's inability to accept orders of the court that are adverse to her- including findings of bad faith and intransigence.
-Evidence presented of other attempts to engage in communication with decision makers in this case (email to Ret. Commissioner Bedle) in an attempt to influence the reviewer's decisions and impressions of the parties.
-Evidence of retribution and intimidation of witnesses if their actions and testimony did not conform to her desires (Martinelli) to the point of filing formal complaints to professional regulatory agencies;
-Evidence of text communications from Mother which in volume alone can only be characterized as "oppressive" and in terms of content reflect a constant effort to micromanage not only the lives of her children but Father's life through his interaction with them.
Mother seeks to excuse her behavior as the response of a domestic violence victim. And in some sense this may be the case. Nevertheless, it is clear that if such "relentlessness" proceeds unchecked the danger to the children is real. Memorandum, Pg. 9-10.

5. In addition, as a condition of custody, Mother will be required to undergo a psychological evaluation and follow the recommendations for treatment. In the course of this evaluation all collaterals who participated at trial shall be reviewed. Mother shall comply within a discrete time frame set by the court .9 And if there is failure to comply, custody will change to the Father. Memorandum, Pg. 10.

6. As such, the .191 limiting factor for domestic violence, although lifted for the children, will remain in place as it applies to the mother. And if Father desires to have this limitation excised from the parenting plan, then he must submit to reevaluation for domestic violence and follow any new recommendations for further treatment. Memorandum, Pg. 11-12.

7. As to the alleged parenting plan violations for which Mother seeks a finding of contempt, these similarly fail or have been dealt with in other

ways above. And this motion, filed one day after Commissioner Tinney's finding that Mother had violated the parenting plan and had acted with intransigence, is arguably retaliatory and further evidences Mother's propensity to engage in the abusive use of conflict. Memorandum, Pg. 12.

Fifth, The Court found that the Mother did not comply with the trial court's relocation order. In fact, she ignored the Court order even when she had the advice of counsel. Both during and in subsequent post trial hearings, the Mother continued to ignore the trial court's orders and to follow her own self-serving and inaccurate interpretation of rulings from the bench.

C. Attorney's Fees

Mother's request for attorney's fees should be denied. The Court of Appeals ruled correctly when they denied her request for fees on appeal. **Mother has not accounted for significant funds of $600,000.00 received during litigation!** *Marriage of Bodge*, 76954-5-I, 2018 WL 4215618, (Wash. Ct. App. Sept. 4, 2018), opinion withdrawn and superseded on reh'g in part sub nom. Bodge & Bodge, 76954-1, 2018 WL 6181740 (Wash. Ct. App. Nov. 26, 2018) states that "In its order denying in part and granting in part Jessica's motion for reconsideration regarding attorney fees, the trial court noted below that Jessica received $500,000.00 net after the sale of the family home, and received an additional $100,000.00 in cash from her parents as a loan. Jessica claimed that these

funds were completely dissipated, but did not provide documentation of how these funds were distributed. The trial court concluded that there was insufficient proof in the record of Jessica's need and that there was an inference of financial waste by Jessica. The parties' financial declarations demonstrate a disparity between Jessica's and Brian's monthly incomes. But on appeal Jessica has still not accounted for the funds that she received during litigation. Thus, we decline to award Jessica her attorney fees on appeal under RCW 26.09.140 Further, the Father was the prevailing party on appeal. He was not awarded attorney fees, despite RAP 18.1 which provides attorney's fees for the prevailing party.

IV. **Conclusion**

Appellant has failed to raise any arguments that warrant acceptance of a petition for discretionary review. Respondent respectfully requests that this Court deny Petitioner's first amended petition for review. and request for attorney's fees. Respondent also requests that this Court sanction Mother's counsel for violating GR 14.1 by citing an unpublished opinion from 2008 as an authority. Finally, Respondent requests reasonable attorney's fees for having to respond to this baseless petition. Intransigence is a basis for awarding attorney's fees on appeal. *Chapman v. Perera*, 41 Wn. App. 444, 445-56, 704 P.2d 1224, review denied 104 Wn.2d 1020 (1985). The court may consider the extent to which one

spouse's intransigence caused the spouse seeking a fee award to require additional services. Here, Mr. Bodge incurred additional attorney's fees for having to respond to this baseless and insufficient petition that does not meet a single requirement per RAP 13.4(b)(1)(2)(3)(4) for discretionary review.

Moreover, as the prevailing party, Respondent is entitled to attorney's fees on appeal pursuant to RAP 18.1. Respondent having to respond to a baseless petition is sufficient to allow this Court to award fees to him as the prevailing party. RAP 18.1(j) states "if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review." Respondent's request for attorney's fees from Appellant in the amount of $3,000.00 is reasonable.

DATED this 7th day of February 2019.

JAY CAREY LAW OFFICES

/s/ Mary Joyce McCallum

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.
On the below written date, I caused delivery of a true copy of this Answer of Respondent to the following:

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DATED this 8th day of February 2019, at Arlington, Washington.

/s/ Derek Ralph
Derek Ralph, CRP®
Paralegal

JAY CAREY LAW OFFICES

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