No. 98821-8

SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 78512-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

In re the Marriage of

JENNIFER CORINNE ANDERSON,

Respondent,

v.

LOREN HEATH ANDERSON,

Appellant.

LOREN HEATH ANDERSON'S REPLY TO RESPONDENT JENNIFER (ANDERSON) EMERY'S ANSWER TO PETITION FOR REVIEW

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I. ISSUE PRESENTED FOR REVIEW

Whether, contrary to this Court's precedent, the Court of Appeals erred by affirming the trial court when it exceeded its jurisdiction by imposing restrictions in the parenting plan that were not requested in the divorce petition. *See* Wash. R. App. P. 13.4(b)(1); *In re Marriage of Leslie*, 112 Wn.2d 612, 617-18, 772 P.2d 1013, 1016 (1989).

II. RESTATEMENT OF ISSUES BY RESPONDENT

Whether, "Heath Anderson failed to meet the criteria in RAP 13.4(1) and (2) because there is no conflict with a decision of the Supreme Court and no conflict with a published decision of the Court of Appeals?" Respondent's Answer p. 1. And whether "Heath failed to meet the criteria in RAP 13.4(b)(4) because there is no constitutional fundamental liberty interest in a parenting dispute between parents?" *Id*.

III. ARGUMENT

A. Mr. Anderson meets the criteria in RAP 13.4 for a petition for review.

Respondent claims that Mr. Anderson "fails to meet the criteria in RAP 13.4(1) and (2)", Respondent's Answer p. 1, however there is no RAP 13.4(1), nor is there a RAP 13.4(2). Instead, the Washington Rules of Appellate Procedure show a RAP 13.4(a) and a RAP 13.4(b). Wash. R. App. P. 13.4. Appellant assumes that these are the sections to which Respondent is referring.

In addition to being incorrect about the numbering of the appropriate Rule of Appellate Procedure, Respondent is also incorrect about what the Rule says. In its Answer, Respondent argues that Mr. Anderson "failed to meet the criteria… because there is no conflict with a decision of the Supreme Court and no conflict with a published decision of the Court of Appeals." Respondent's Answer p. 5. However, a thorough reading of the Rule would show that a Petition for Review will be accepted by the Supreme Court if (1) the decision is in conflict with a decision of the Supreme Court; *or* (2) the decision is in conflict with a published decision of the Court of Appeals; *or* (3) a significant

question of law under the Constitution of the State of Washington or of the United States is involved; *or* (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Wash. R. App. P. 13.4(b)(1)-(4). Respondent, therefore, deliberately misleads the court by claiming that there are only two ways that a discretionary review can be granted: if there is a conflict with a decision of the Supreme Court, or if there is a conflict with a decision of the Court of Appeals. However, there are two other ways that a discretionary review can be granted: if there is a significant question of law under the Constitution of the State of Washington or the United States, or if the petition involves an issue of substantial public interest.

A parent has a "constitutionally protected" "fundamental 'liberty' interest" in rearing his or her children "without state interference," by virtue of the Fourteenth Amendment and the constitutional right to privacy. *Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21, 28 (1998); *see Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (recognizing that parental rights are a fundamental liberty interest protected by the Constitution). Thus, this matter implicates Mr. Anderson's

due process rights under both the Washington and United States Constitutions and falls squarely within Wash. R. App. P. 13.4(b)(3).

Further, this matter implicates a matter of continuing and substantial public interest. In determining whether a case presents a matter of continuing and substantial public interest, the Court must look at (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur. *Eyman v. Ferguson*, 7 Wn.App. 2d 312, 433 P.3d 863 (2019) (citing *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wash.2d 781, 796, 225 P.3d 213 (2004)). The court may also consider the "level of genuine adverseness and the quality of advocacy of the issues" as well as the "likelihood that the issue will escape review because the facts of the controversy are short-lived". *Id*.

There can be little more that implicates continued and substantial public interest than the best interests of a child. The courts in Washington have regularly found that issues involving the best interests of the child have been found to be of "continuing

and substantial public interest." *See*, *e.g.*, *In re Marriage of Horner*, 151 Wn.2d 884, 93 P.3d 124 (2004) (case related to parental relocation with a child are a continuing and substantial public interest because they are likely to recur "given the frequency of dissolution, joint custody, and relocation in today's society"); s*ee, e.g.*, *In re M.B.*, 101 Wn.App. 425, 3 P.3d 780 (2000) (cases involving a child in need of services, an at-risk youth, or a truant are of a substantial public interest because the nature of the issues and their frequency of recurrence are evident); s*ee also*, *In re Placement of R.J.*, 102 Wn.App. 128, 5 P.3d 1284 (2000) (case involving a placement of a child with the Department of Social and Health Services for foster care was of a substantial public interest); s*ee also*, *In re Dependency of MSR*, 174 Wn.2d 1, 271 P.3d 234 (2012), *as corrected* (May 8, 2012) and *Matter of Dependency of S.K-P.*, 200 Wn.App. 86, 401 P.3d 442 (2017), *aff'd sub nom. Matter of Dependency of E.H.*, 191 Wn.2d 872, 427 P.3d 587 (2018) (question of whether a child has a right to counsel in a dependency matter is of a substantial public interest).

B. Mr. Anderson meets the criteria in RAP 13.4(b)(3) and (4) for a petition for review

Next, Respondent claims that Mr. Anderson "fails to meet the criteria in RAP 13.4(b)(4) because there is no constitutional fundamental liberty interest in a parenting dispute between parents". Respondent's Answer p. 8. Wash. R. App. P. 13.4(b)(4) does not discuss constitutional rights, rather, as discussed above, it discusses whether there is an issue of "substantial public interest". Instead, Wash. R. App. P. 13.4(b)(3) addresses whether there is a question of law under either the Washington or United States Constitution. Appellant assumes that this is the section to which Respondent is referring and refers this Court to the argument made above. Further, Appellant notes that Respondent has made no argument regarding whether this case is of "substantial public interest".

C. Ms. Emery is not entitled to an award of attorneys' fees and costs

Respondent argues that Mr. Anderson should be required to pay attorney fees and costs due to alleged "intransigence" under Wash. R. App. P. 18.1 and Wash. R. App. P. 18.9. In doing

so, Respondent accuses undersigned counsel of intransigence because, Respondent claims undersigned counsel's "argument has twice been rejected by the Court of Appeals". Respondent's Answer p. 10. Respondent's counsel cites to a completely different matter with a completely different appellant and alleges that the two arguments are identical. Yet even a cursory glance at the two briefs show that not to be the case. In that unrelated and irrelevant matter, Appellant alleged 12 assignments of error and 6 statements of issues related to errors. Appellant's Opening Brief, *In re Marriage of Fan v. Antos*, p. 2-3. These assignments of error ranged from issues regarding motions for continuance, trial rulings, calculations regarding the sale of a home and child support, and appointment of a parenting evaluator, as well as issues surrounding a parenting plan. *Id*. In contrast, the instant Petition *only* addresses the final parenting plan. Thus, claiming that the two cases are "reiterat[ing] the unsuccessful arguments" is misleading at best and disingenuous at worst.

Respondent's attorney appears to misapprehend the definition of intransigence, and the purpose behind the award of attorney fees for same. Intransigence is "the quality or state of

being uncompromising". *MacKenzie v. Barthol*, 142 Wn.App. 235, 242, 173 P.3d 980 (2007) (quoting *In re Marriage of Schumacher*, 100 Wn.App. 208, 216, 997 P.2d 399 (2000). It may be found when a party engages in "foot-dragging" and "obstruction", files repeated motions which are unnecessary, or when one party makes the trial unduly difficult and increases legal costs by their actions. *Matter of Marriage of Greenlee*, 65 Wn.App. 703, 708, 829 P.2d 1120 (1992) (citing *Eide v. Eide*, 1 Wn.App. 440, 445, 462 P.2d 562 (1969); *Chapman v. Perera*, 41 Wn.App. 444, 455-56, 704 P.2d 1224, *review denied*, 104 Wn.2d 1020 (1985); and *In re Marriage of Morrow*, 53 Wn.App. 579, 590, 770 P.2d 197 (1989)). Intransigence may also be found by a pattern of obstructionist tactics, such as refusal to cooperate with a guardian ad litem, refusal to allow visitation, interference with court-ordered visits, attempts to avoid service, threatening to take action against third parties if they did not behave in the way they wanted, and violating court orders. *Matter of Marriage of Crosetto*, 82 Wn.App. 545, fn5, 918 P.2d 954 (1996). Or it may be found by one party remaining voluntarily unemployed and/or being less than candid about their financial situation. *Mattson v. Mattson*, 95 Wn.App.

592, 605-06, 976 P.2d 157 (1999). Intransigence may also be found for submitting false documents. *Wixom v. Wixom*, 190 Wn.App. 719, 728, 360 P.3d 960 (2015).

Merely asserting an argument that may be rejected is not intransigence. *In re Marriage of Schnurman*, 178 Wn.App. 634, 643, 316 P.3d 514 (2013). Rather, it is part of the zealous advocacy required by all attorneys called to the bar. As this Court is well aware, an attorney is ethically bound to advocate zealously for his client's interests to the fullest extent permitted by law and the disciplinary rules. *Hawkins v. King Cty., Dep't of Rehab. Servs., Div. of Involuntary Treatment Servs.*, 24 Wn.App. 338, 341-42, 602 P.2d 361 (1979); *Slattery v. City of Seattle*, 169 Wash. 144, 149, 13 P.2d 464 (1932) (quoting Justice Gose: "It is the duty of the trial lawyer to be zealous in the advocacy of his client's cause. The common opinion of all mankind has fixed this as the measure of his professional responsibility. In the discharge of this duty a reasonable latitude must be allowed him.") *See, e.g.*, *Clark Cty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 143-44, 298 P.3d 704 (2013).

Further, Respondent's counsel alleges that this appeal is "frivolous". Similar to above, simply because an appeal is affirmed does not make it frivolous. *Schnurman*, 178 Wn.App. at 643. In order to determine whether an appeal is frivolous and was, therefore, brought for the sole purpose of delay, the court must look at the following: 1) the fact that a civil appellant has a right to appeal under Wash. R. App. P. 2.2; 2) that all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; 3) the record should be considered as a whole; 4) an appeal that is affirmed simply because arguments are rejected is not frivolous; and 5) an appeal is only frivolous if "there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Lee v. Kennard*, 176 Wn.App. 678, 692, 310 P.3d 845 (2013). *See e.g.*, *Matter of Custody of A.T.*, 11 Wn.App. 2d 156, 171, 451 P.3d 1132; *see also, e.g., Advocates for Responsible Dev. v. W. Washington Growth Mgmt. Hearings Bd.*, 170 Wn.2d 577, 245 P.3d 764 (2010); *see also, e.g.*, *Kinney v. Cook*, 150 Wn.App. 187, 195, 208 P.3d 1 (2009).

Finally, Respondent's counsel's assertion that Mr. Anderson's confidence in the meritoriousness of his appeal shows that this Petition is "for the purpose of a delay in the trial court proceedings and to increase legal costs", Respondent's Answer p. 10-11, has no basis in fact and is, at best, an uncharitable interpretation of Mr. Anderson's statement. Interestingly, Respondent cites to no case law supporting the position that this statement has any sort of evidentiary value regarding either intransigence or frivolousness. Simply because Mr. Anderson expressed optimism that he will prevail on appeal should not be interpreted in such a nefarious way.

Mr. Anderson submits that this appeal is not frivolous, nor is it intransigent, rather it is zealous advocacy on behalf of his counsel. As such, Respondent's request for attorney fees should be denied.

IV. CONCLUSION

For the reasons stated herein, Mr. Anderson respectfully asks the Court to grant his Petition for Review and deny Respondent's request for attorney fees.

Respectfully submitted this 25th day of August, 2020.

THE APPELLATE LAW FIRM

Corey Evan Parker

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CERTIFICATE OF SERVICE

I, Dave Evanson, certify under penalty of perjury under the laws of the United States and of the State of Washington that on August 25th, 2020, I caused to be served the document to which this is attached to the parties listed below in the manner shown below:

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APPELLANT﷿S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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