No. 91267-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of

ARADHNA FORREST
Respondent

and

VIKAS LUTHRA
Petitioner

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The respondent is Aradhna Forrest, fka Aradhna Luthra, who was the petitioner in the Superior Court and the respondent in the Court of Appeals.

B. RESTATEMENT OF ISSUES ON WHICH REVIEW IS SOUGHT

1. After continuous conflict over parenting issues, the parties, through counsel, stipulated in 2013 to modify the 2010 parenting plan. The father was not present at the hearing where the stipulation was made, but he produced no evidence that his attorney acted without the authority described in RCW 2.44.010.

2. The court and the opposing party are entitled to rely on the apparent authority of an attorney to bind his or her client by agreement entered on the record, in keeping with RCW 2.44.010(1), especially where all parties and their attorneys participate in the subsequent proceedings by filing pleadings, etc. consistent with the agreement.

3. In modifying the parenting plan, the trial court was not required to work on a "blank slate" in terms of the facts, but, rather, could rely on the extensive findings made by the same judge after trial in 2010 regarding the father's mental health issues, from which the father did not appeal. Moreover, this makes sense given that nothing had improved

since 2010 because the father had not sought the kind of treatment he needs and the court ordered.

4. Did the trial court make clear, and then make clearer by repetition, that the father's midweek visitation depends on his compliance with the specific treatment ordered by the court and did the orders require the father establish his compliance if he seeks to reinstate midweek visitation?

5. Where the court made explicit and repeated orders regarding the only treatment likely to be effective in addressing the father's mental health issues, which is essential to protect the child's best interests, and where the father admittedly obtained different (ineffective) treatment, was the court justified in finding the father intransigent for seeking again to reinstate midweek visitation despite having not complied with the court's treatment orders?

6. Where the issue of what type of treatment the father needs was addressed fully at trial in 2010, and the court's decision rendered on the basis of that evidence was not appealed, can the father now challenge the treatment order?

7. Where the parties have tried various dispute resolution processes, with little effect on the level of conflict, may they stipulate to

arbitration as an alternative, and where the father so stipulates (CP 276, 308, 349-350), may he then challenge the order?

8. When the father has repeatedly evaded the court's orders, by reading them to mean anything not explicitly prohibited is permitted, and where his communications with the child are injurious to the child's best interests, including because they undermine the child's relationship with the mother, does the court have the authority to clarify the modes of communication permitted, and, in any case, were not some of these clarifications already made in previous orders from which the father did not appeal?

9. Should the mother receive her fees for answering the father's petition?

C. RESTATEMENT OF THE CASE

The mother refers this Court to the statement of the case she provided in her brief filed in the Court of Appeals, and to additional facts in that brief. Br. Respondent, at 5-19. The mother also notes the father, in his petition, recites facts related mainly to the issue of midweek visitation, perhaps relevant to his challenge to the finding of intransigence. Petition, at Issue 5 (there are no page numbers). The mother will address additional facts as needed in the argument section, partly because the arguments do not necessarily align with the issues statement.

Finally, the mother notes the father includes as Appendix D, a declaration that is not part of the court record, from which he quotes in his argument section (§ 1) (no page numbers). See Br. Respondent, at 18 n.4. This violates RAP 9.1(a) and (c).

D. ARGUMENT WHY REVIEW SHOULD NOT BE GRANTED.

In all respects, the father fails to establish any basis for review of the Court of Appeals' decision, which affirmed a parenting plan entered pursuant to a stipulated modification proceeding and in other respects merely clarified aspects of the court's prior orders, including the parenting plan and enforcement orders entered in the intervening years, which were not appealed (or, in one case, appealed unsuccessfully by the father).

1. THE STIPULATION TO MODIFY THE PARENTING PLAN WAS BINDING ON THE FATHER.

The father's challenge to the court's reliance on his attorney's stipulation lacks support in the facts or the law. Statute expressly confers upon an attorney the authority "[t]o bind his or her client in any of the proceedings in an action ... by his or her agreement duly made, or entered upon the minutes of the court; ..." RCW 2.44.010(1). The court and the other party to the action "are entitled to rely upon that authority..." *Haller v. Wallis,* 89 Wn.2d 539, 547, 573 P.2d 1302 (1978). Even where a "consent judgment" is entered on the "[e]rroneous advi[c]e of counsel," the party is bound by the judgment. *Id.,* at 544.

Here, there is simply no evidence in the record that Luthra's attorney acted without authority. Essentially, Luthra asks this Court to ignore the statute. He argues that because he was not present, the court had a duty to establish that Luthra's attorney had authority to agree to modify the parenting plan. But the law does not require that a party be present whenever an agreement is made, nor does the law require the court to inquire whether the attorney acts with authority. As a practical matter, such requirements would severely impede the daily operation of the courts. Rather, the burden to show some irregularity falls on Luthra and he made no effort to satisfy that burden. His case bears no resemblance to those cases where the facts show the attorney waived a substantial right without the client's authoriety (e.g., right to a jury trial). The right to a threshold hearing is not a substantial right, but a mechanism to prevent needless trials. See Br. Respondent, at 23-24.

Moreover, had the parties not stipulated to modification, the court would easily have found adequate cause to do so. For over three years and despite the assistance of a neutral professional to facilitate communication, conflict over the parenting plan continued, including in court. Clarification and modification was needed, as Luthra tacitly acknowledges by agreeing to many of the changes. Effectively, the father objects to an agreement that saved both parties time and money. Even if it is error in

general to bypass the threshold, certainly there are circumstances where it is harmless. *See* RCW 4.36.240 ("The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."). Here, the stipulation was better than harmless; it was beneficial.

2. THE TRIAL COURT ORDERED THE FATHER TO RECEIVE SPECIFIC TREATMENT ON THE BASIS OF EVIDENCE AT TRIAL IN 2010, FROM WHICH THE FATHER DID NOT APPEAL.

The father takes issue with the kind of psychotherapeutic treatment the court ordered in 2010. He did not appeal the court's treatment order; he ignored it.

In 2010, the court found the child's best interests "will be served if his father obtains intensive treatment for his OCD so that [the child] can continue to have the regular presence of his father in his life in a way that is healthy for him." CP 772-797. Accordingly, the court ordered the father into a specific treatment regimen, as recommended by the parenting evaluator. CP 399. Specifically, for example, the court ordered the provider have the relevant expertise and that the therapy should be "home-

based," since the father's problematic behavior was worst and most affecting at his home. CP 399 (FOF ¶ 2.19).[1]

The father disregarded the specific requirements and undertook to design his own treatment program, consistent with his earlier refusals to stick with programs that promised to ameliorate the effects of his condition. See, e.g., CP 398 (court finding father left a residential program before completion and had not pursued treatment afterward). The parenting evaluator was very clear about the extremity of the father's condition, considering that it was both longstanding and incurable, and was concerned the father was not actively pursuing recovery. CP 789. She noted "[h]e will need to change this in order to have a healthy relationship with his son." CP 789. This the father has not done.

The issue of noncompliance with the court's treatment order came up repeatedly in litigation subsequent to the parenting plan's entry. See, e.g., 20-21, 23, 432-452, 455-457, 530-538, 600, 602, 616-617. The court reiterated throughout the proceedings that the father must comply with the treatment requirement to gain reinstatement of his midweek visitation.

The father did not comply but did seek to reinstate his midweek visitation, which the mother opposed because of the father's failure to

[1]The court placed these details in the findings to protect the father's privacy, which would be affected by inevitable dissemination of the parenting plan itself (e.g., to schools, doctors, etc.). CP 21; see, also CP 600.

comply with the treatment requirements. CP 24-79, 82-147. In denying the father's motion, the court reminded him, again, that the court's findings included "quite specific language about the kind of treatment that needed to be engaged in...," and referred to ¶ 2.19 of the Findings. RP 14; see, also CP 168 (incorporating oral ruling). Not only was the father's therapy not of a type that has potential to help him (e.g., it is not home-based), the providers of the therapy did not satisfy the court's orders (no relevant expertise). The court noted, too, that the father's purported OCD therapist had failed to produce credentials, despite requests, and that, on its face, the father's treatment with that provider fell short of what the court ordered. Id.

> Since this is an intractable condition that [the father] has experienced since the age of seven and he has severe OCD, to meet for an hour once a week with a licensed mental health counselor, on the face of it, does not comply with my definition of a therapist highly experienced in intensive OCD.

RP 15. The court recalled the testimony at trial of the father's regular therapist and of the parenting evaluator who agreed the father "needed more intense treatment" than the regular therapist could provide. Id.[2] In her report, the evaluator made plain that the father needed a particular kind of therapy (ERP) in a particular location. CP 792. That is, "ERP,

[2] The minutes reveal that both the parenting evaluator and the father's therapist testified extensively at trial. CP 368-378.

especially undertaken in [the father's] environment (outside the office), is the standard treatment for OCD." Id. The purported OCD therapist, Griffin, seemed unacquainted with this standard; rather, the court noted with concern, Griffin's statements about the condition were "completely contrary to the testimony at trial [calling] into question her knowledge of OCD, her knowledge of [the father's] intractable condition." RP 16.

In short, nothing showed the father had made any improvement in the severity of his condition where it matters most to the child – in the home. RP 16; see, also RP 3 (observing the therapist Griffin lacked any basis to opine that the father had visitors in his home); CP 84 (parenting evaluator testifying the father "is not likely to be an accurate reporter of events."). The court simply had no reason to believe the father's severe and longstanding problem had "somehow all of a sudden ... disappeared." RP 17.

In short, the court entered these orders after a long trial, including the extensive testimony of experts and testimony regarding the behavior and its effect on the child. The father did not challenge the original parenting plan's requirements for the specific treatment the evidence established was necessary. He cannot challenge it now.

Nor does the modification proceeding require the court to revisit those underlying facts and findings. There is no authority to support this

argument. Indeed, modifications, in general, particularly major modifications, respond to new facts ("substantial change of circumstances"); they are not designed to "do over" the facts settled at trial. RCW 26.09.260.

3. THE TRIAL COURT ACTED IN 2010 AND SUBSEQUENTLY TO PROTECT THE CHILD FROM THE HARM CAUSED BY THE FATHER'S CONDITION.

In the last of the father's argument sections, he seems to challenge for the first time the restrictions on his residential time, which the court first imposed in 2010 and subsequently restated in a number of orders, as well as in the modified parenting plan of 2013. See, Br. Respondent, at 5-13. Of course, this challenge is not timely. Nevertheless, the mother responds briefly below.

While the father did not appeal the parenting plan, he has contested it in other ways. For example, despite that the parenting plan set forth the residential schedule, the father attempted to evade it by spending time with the child at his school, prompting a motion to enforce by the mother. CP 458-588. The court clarified the parenting plan to mean the father could not have visits with the child other than as stated in the plan and ordered the father to cease his visits to the child's school. CP 556-557.

Subsequently, denying the father's motion for reconsideration, the court explained that because of the need for restrictions, the father's time with the child was limited to that specified in the plan. CP 598-600. The court explained that the father could not "somehow revive[ ]" his midweek visitation "by calling it volunteering at the school." CP 600.

The father appealed this order and the Court of Appeals affirmed, and this Court denied review. *In re Marriage of Luthra*, 165 Wn. App. 1032 (2012), *review denied at* 174 Wn.2d 1008 (2012).

Likewise, the court's communications restrictions were part of the original parenting plan, which provides that the father shall have "phone contact" with the child, and provides very specific procedures for that access. CP 391. Specific reasons for limiting the contact are recited in the court's findings. CP 398 (e.g., disparaging mother in front of child, discussing conflict in front of child, alienating child, etc.). The plan also orders the father to have contact with the mother by email only. CP 388 (¶ 3.13). No appeal was taken from these orders.

Consistent with the father's position that he may do anything not specifically prohibited, he engaged in harassing and harmful communications by other means or at other times than the permitted ones. See, e.g., CP 184-185, 213-224, 260-262, 605-611. Accordingly, the court forbade the father from using text messages and ordered that his telephone

contact be supervised by the mother. CP 23. The father challenged neither restriction.

Problems were ongoing and, in 2013, the parties stipulated the court should determine "[g]uidelines regarding child-father communication through various technologies." CP 169. In the amended parenting plan, the court spells out that the father "shall not communicate with the child through other media, including but not limited to e-mail, Facetime, chat rooms and other web-based communication." CP 305. The court further clarified that when telephone access is ordered, as it was in the original plan, that means it is the exclusive mode of access: "[t]he designated form of contact between father and child when the child is not with the father shall be by telephone with audio only." CP 304-305.

The father now argues these limitations are tantamount to a protection order and violate his constitutional rights. Certainly, they are designed to protect the child, which is the court's duty. *See In re Custody of Skyanne Smith,* 137 Wn.2d 1, 16, 969 P.2d 21 (1998) (state may intrude on family's autonomy to protect against harm or threat of harm).

In particular, it is well settled that where there exists a nexus between parental conduct and the child's needs, the court has the authority to restrict the parent. *In re Marriage of Pennamen,* 135 Wn. App. 790, 806, 146 P.3d 466 (2006) (in relocation context, trial court properly

considered parent's historical drug abuse). Even where the restrictions impinge on fundamental constitutional rights, such as the free exercise of religion, the court may restrict a parent if necessary to prevent harm to the child. *In re Marriage of Jensen-Branch*, 78 Wn. App. 482, 491-92, 899 P.2d 803 (1995). In short, so long as the court complies with the statutes, the constitution is not implicated in disputes between parents. *In re Marriage of Katare,* 175 Wn.2d 23, 42, 283 P.3d 546 (2012).

The father also argues the lack of a nexus between the restrictions and the child's best interests. This argument ignores the court's unchallenged findings of fact and the evidence upon which they are based. See, e.g., CP 385, 398-399, 772-797. The father claims there "is no finding or allegation that the child i[s] unsafe" in his presence, when, in fact, there are multiple findings of the danger the father's behavior poses to the child, as cited above.

Ironically, while the father argues the restrictions exile him from the presence of his son, it is clear the court labored to protect the father-son relationship. The court found the child's best interests "will be served if his father obtains intensive treatment for his OCD so that [the child] can continue to have the regular presence of his father in his life in a way that is healthy for him." CP 772-797 (emphasis added). The court is trying to protect this relationship, but needs the father's cooperation.

Simply, here, the problem is the father refuses to acknowledge and address the harm his behavior causes. Three years after ordering him into the appropriate treatment, the father has yet to comply, prompting the court in the modification hearing, reflecting on the evidence from trial, to reiterate its concern that the child will be harmed by continued contact with the father's behaviors ..." RP 17. The need for remediation extends beyond what the father describes as "cleanliness" issues. The father also endangers the child's relationship with his mother and family members and friends, which justified a finding of abusive of conflict in 2010. The court found the father disparaged the mother and her family and friends to the child, "subtly and directly," and "engaged in behaviors designed to align [the child] emotionally with the father and against the mother," as well as discussing with the child or in his presence "adult financial and dissolution matters, all of which is harmful and detrimental to [the child's] best interests." CP 398.

During the modification proceeding, the court expressed concerns about the evidence of the father's continued manipulation of the child, fulfilling what the parenting evaluator had predicted. RP 17-18. The evaluator had been very concerned about the father "acting in a self-centered manner in getting his emotional needs met through his son by making inappropriate disclosures so that his son will be sympathetic

[which] causes the child significant distress." CP 788. Three years later, the court found evidence of the father's "continuing effort to negatively impact the child's relationship with his mother[, which is] the healthiest relationship this child has." RP 18; see, also, CP 788. The father's conduct, including five months worth of problematic emails from 2012, was "creating serious problems" for the child's growth and development and demonstrated the father's failure to address the abusive use of conflict and other issues, which conduct remains unaffected by his current therapeutic regimen. RP 18. The father does not have the right to harm his child in these ways.

In any case, these issues were mostly settled at trial and then in the stipulated modification. The father is procedurally barred from raising them now. The court imposed restrictions based on demonstrated harm to the child and the father continues to fight those restrictions rather than doing the work he needs to do to have a healthy relationship with his son.

E. MOTION FOR ATTORNEY FEES

The father's abusive use of conflict also manifests in either litigating or prompting litigation by defying court orders. Rather than getting the help he was proven to need, he has fought the court's order at every turn, resulting in many costs to the child and the mother, including litigation costs. In this petition, which in itself is difficult to unscramble,

the father continues this intransigent conduct. In Washington, an award of attorney fees is justified where the conduct of one of the parties causes the other "to incur unnecessary and significant attorney fees." *Burrill v. Burrill,* 113 Wn. App. 863, 873, 56 P.3d 993, 998 (2002). The father should pay for the costs the mother incurs litigating in this matter, including here, where the amended parenting plan was entered pursuant to an agreement of the parties.

F. CONCLUSION

For the foregoing reasons, Aradhna Forrest respectfully asks this Court to deny review of Vikas Luthra's petition and to award her fees.

Dated this 12th day of February 2015.

RESPECTFULLY SUBMITTED,

/s/ Patricia Novotny

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Marriage of: ARADHNA FORREST (fka Luthra) Respondent and VIKAS LUTHRA Appellant	No. 91267-0 DECLARATION OF SERVICE

Jayne Hibbing certifies as follows:

On February 12, 2015, I served upon the following true and correct copies of the Respondent's Answer to Petition for Review and this Declaration, by:

X depositing same with the United States Postal Service, postage paid

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Janet Helson
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I certify under penalty of perjury that the foregoing is true and correct.

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Attached for filing in pdf format are the Respondent's Answer to Petition for Review and Declaration of Service in Marriage of Luthra, No. 91267-0. The person submitting these pleadings is Patricia Novotny, WSBA No. 13604, whose email address is novotnylaw@comcast.net.

Thank you.

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