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No. 71018-4

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

VIKAS LUTHRA,

Appellant,

vs.

ARADHNA FORREST (fka ARADHNA LUTHRA),

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE DEBORAH D. FLECK (Retired)

REPLY BRIEF OF APPELLANT

PRO SE

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I. INTRODUCTION

The trial court erred in assuming that the father was agreeable to its suggestion that the parties allow it to modify the Parenting Plan without adhering to the provisions of WA RCW 26.09.260. The Court failed to afford Luthra his due process rights, by not giving his Counsel an opportunity to confer and confirm with her client his express agreement to such a stipulation (which impacted his Substantial Right to a Parenting Plan Modification Hearing and its related safeguards – such as a new, impartial Judicial Decision maker who would de novo review the facts of the case).

In fact, the very idea of modification of the Parenting Plan to address disagreements between Luthra and Forrest was brought up by the Trial Court Judge herself during the hearing on June 5th, 2013 (where Luthra was not present), and there was no indication in the record prior to the hearing that a potential modification of the parenting plan may be needed by the parties to help adjudicate disputes before the court in that hearing. The written and verbatim

record of the hearing fails to demonstrate that Luthra legal counsel got an opportunity to consult with her client telephonically or otherwise, or that the court in colloquy with Seymoure even confirmed Luthra's concurrence with the its proposed Stipulation, before proceeding with the assumption that Luthra was in fact agreeing to the Stipulation for Modification of the Parenting Plan.

Even in the event that the Trial Court correctly assumed it had Luthra's agreement to enter Stipulation between the Parties to modify the Parenting Plan, it still failed to use the proper standard of review when entering the Modified "**Parenting Plan Final Order (PP) <u>Amended</u> on 9/9/2013"**.

In addition, by disregarding & discounting the unchallenged medical opinions of qualified Licensed Mental Health Practitioners who submitted sworn current assessments of Luthra's diagnosis before the Court, the Court abused its discretion by substituting its own misinformed/outdated understanding of Luthra's Mental health diagnosis when entering its interlocutory orders denying Luthra's MOTION TO REINSTATE MIDWEEK VISITATION.

Finally, the trial court also erred in awarding attorney fees of $5,985 to Petitioner in response to Petitioners Motion for Fees and Costs. (CP 294-295)

II. REPLY TO RESTATEMENT OF ISSUES

1. The Trial Court order's entered on June 5th, 2013, on Luthra's MOTION TO REINSTATE MID-WEEK VISITATION AND FOR ORDER ALLOWING VACATION were interlocutory and contained numerous notations clearly indicating that multiple issues were still be adjudicated upon. Per RAP 2.2(a) Luthra timely appealed the "final" ruling in these intertwined matters entered on October 21st, 2013 by Honorable Judge Deborah Fleck (Retired), by filing an Amended Notice of Appeal to Court of Appeals on November 20th, 2013.

2. Luthra was not given an opportunity to affirmatively agree to the Stipulation (per CR2(a)) allowing Modification of the parties Parenting Plan.

"CR RULE 2A - STIPULATIONS

No agreement or consent between parties or attorneys in respect to the proceedings in a

cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same."

3, 4, 5, 6: (Cumulative Response)

To the extent that Luthra's attorney agreed to a Stipulation on Luthra's behalf, given his physical absence at the hearing, she clearly did so without his authority and without getting an opportunity to obtain his express approval to waive his Substantial Rights to a proper modification hearing per RCW 26.09.260.

7. While a Trial Court has full authority to clarify its own orders, Modifying a Parenting Plan, as was done here, without proper authority & without a proper motion before the Court for the same, and without affording Luthra his due process rights to agree to a Stipulation to waive his right a threshold hearing is a reversible error.

8. No requirement for seeking court approval to begin mid-week visitation was included in the Original Parenting Plan Final Order from 7/8/2010 (CP 35). On 9/9/2013, the Trial Court

modified Section 3.2 (School Schedule) of the **Parenting Plan Final Order (PP) Amended on 9/9/13** (CP 297) by introducing a requirement that the father must seek approval from the trial court ("**and the court approves midweek visits**") to begin mid-week visitation after his therapist for OCD treatment reports to counsel and the court that affirmatively reports on the father's commitment to and progress in treatment. (CP 35, 297) Neither party had designated this portion of the Parenting Plan for clarification during the hearing on June 5th, 2013, nor was there an agreement via stipulation between the parties to have this portion of the Parenting Plan be modified.

In addition, the modified language pertaining to reinstatement of mid-week visitation was entered by the Trial Court in an Order it clearly designated as "**Parenting Plan Final Order (Amended) on 9/9/2013"** which was a Modified Parenting Plan in this case. To argue that that entire revised document with numerous changes was simply a clarification lacks merit.

9. Without a valid stipulation between the parties to vest authority in the Trial Court to Modify the Parenting Plan, even with "191" restrictions in the Original Parenting Plan, the Trial Court

erred by modifying the Parenting Plan limiting fathers contact with the Child's therapist. The Court lacked jurisdiction per the requirements of RCW 26.09.260 which govern modifications of a Parenting Plan. Without affording Luthra due process, by entering a de facto restraining order between the Father and the child's therapist the Court exceeded its remand.

10. The Court abused its discretion when it took upon itself the task of defining phone contact as "AUDIO ONLY" communication between the father and the Child when the Child was not residing with the father. Even with "191" restrictions previously found against the father, without "due-process" being afforded to the Child, and or consulting a qualified guardian ad-litem for the child at the hearing, the court lacked authority to arrest the Minor Child's Constitutionally guaranteed reasonable right to communicate freely with his father.

11. The Court improperly modified the Parenting Plan on 9/9/2013 when it narrowed the scope of father's right to seek routine medical care for the Child – since no such restrictions existed in the Original Parenting Plan.

12. Awarding attorney fees of $5,985 to Forrest for Luthra bringing a trial court motion to assert his Parenting Rights per the Original Parenting Plan from 7/82010 was an abuse of discretion by the Court. Luthra relied on Sworn Medical Opinion (submitted via affidavit) of 3 qualified Medical Professionals in bringing his Motion.

13. Per RAP 2.2(a) and 2.3(b) The father was well within his rights to File a Notice of Appeal on 10/8/2013 and his Amended Notice of Appeal to the Court of Appeals filed on 11/20/2013.

14. As a Pro Se Appellant, Luthra has worked hard to formulate arguments and cite relevant case law throughout this appeal. Without identifying specific, quantifiable procedural defects in Luthra's brief, Ms. Novotny is attempting to simply confuse the decision makers by throwing a "shot in the dark" allegation that Luthra's brief had procedural defects amounting to intransigence.

15. The request for award for Attorney's Fees on Appeal by Novotny lacks merit.

III. REPLY ARGUMENT

1. The written record of the interlocutory orders from June 5th, 2013 (CP 167-169) and Oral orders detailed in VRP

included numerous references to unresolved issues the Court asked both Parents to submit preferences for. In addition as evidence of ongoing actions from the orders on June 5th, 2013, the Court did not enter its related order on Motion for Fees submitted by Forrest till 9/9/2013, all of which Luthra timely appealed on per WA RAP 5.2 on 10/8/2013 to WA COA, Division 1.

Further, per

> ***WA RAP 5.1(c) (c) Incorrectly Designated Notice. A notice for discretionary review of a decision which is appealable will be given the same effect as a notice of appeal. A notice of appeal of a decision which is not appealable will be given the same effect as a notice for discretionary review.***

Per the provisions above, given the ongoing nature of the hearings in this matter, and numerous interlocutory orders entered during the course of the action below, Luthra is well within his rights to challenge the findings of fact from those initial orders.

2. While in the interest of Judicial Economy a Court may modify the Parenting Plan when the parties enter into a Stipulation giving authority to the Court to do so, the facts of this case offer no

verifiable evidence that Luthra did indeed agree to such a Stipulation.

On the contrary, Luthra was unaware of the Court's suggestion to agree to Stipulation to Modify the Parenting Plan till after the hearing on June 5, 2013. The court's written record nor the Verbatim Report from the hearing, show any evidence whatsoever that Luthra, (**who was not present at the hearing**), in open court per CR 2 (a) got an opportunity to willingly enter into such a Stipulation by giving his attorney authority for doing so on his behalf.

As further evidence that Luthra never agreed nor intended to agree to the Stipulation allowing Modification of the Parenting Plan, in his subsequent declaration to the Trial Court regarding Preferences filed by his counsel Andrea Seymoure (CP 276-277) Luthra clearly stated that **"I believe that the imposition of an entirely new form of dispute resolution is outside the scope of such a clarification and respectfully request that it be resolved via the filing of a Motion for Modification and it's associated due process"**

3. In Graves v. PJ Taggares Co., 616 P.2d 1223, 94 Wash. 2d 298 (1980)::

> "The general rule regarding an attorney's authority to bind his client to stipulations or compromises in the conduct of litigation is tersely stated in 30 A.L.R.2d 944, 947, § 3 (1953): "an attorney is without authority to surrender a substantial right of a client unless special authority from his client has been granted him to do so." This rule is supported by the many cases listed in the A.L.R. annotation as well as many cases from this jurisdiction. E.g., Barton v. Tombari, 120 Wash. 331, 207 P. 239 (1922); Morgan v. Burks, 17 Wn. App. 193, 563 P.2d 1260 (1977); In re Coggins, 13 Wn. App. 736, 537 P.2d 287 (1975); Grossman v. Will, 10 Wn. App. 141, 516 P.2d 1063 (1973); In re Houts, 7 Wn. App. 476, 499 P.2d 1276 (1972)."

Here, in the physical absence of Luthra from the hearing, and without prior knowledge that a Modification via Stipulation might be brought up, Luthra's Counsel – Andrea Seymoure expressively lacked authority and permission from her client to bind him into such a Stipulation. The record here offers no written or other proof of Luthra getting an opportunity to agree to the stipulation, and the Verbatim Report lacks any evidence showing that the Trial Court indulged in even basic colloquy with Seymoure to confirm Luthra's agreement to its proposed stipulation. This makes the supposed stipulation unenforceable.

In State v. Stegall, 881 P.2d 979, 124 Wash. 2d 719 (1994)::

> "The burden of proving the waiver of a constitutional right rests with the State, not the defendant. *In re James*, 96 Wn.2d 847, 851, 640 P.2d 18 (1982); *Seattle v. Crumrine*, 98 Wn.2d 62, 65, 653 P.2d 605 (1982). As this court stated in *Wicke*, "every reasonable presumption should be indulged against the waiver ... absent an adequate record to the contrary". *Wicke*, at 645. Silent acquiescence does not by itself give the court any basis for concluding that the defendant's election met constitutional standards. *Wicke*, at 645.

4. Modification of a Parenting Plan, without adhering to the strict provisions of RCW 26.09.260 is a reversible error. When no reasonable agreement existed between the parties allowing the trial court authority to modify the Parenting Plan, the Court clearly exceeded its remand by entering a Modified Parenting Plan on 9/9/2013. This Order (Parenting Plan Final Order (PP) Amended on 9/9/2013) was clearly titled as an "Amended" Parenting Plan – and arguing now that portions of it were simply "clarifications" – is an obvious end-run attempt to discount the safeguards of Judicial due diligence and established Constitutional Protections.

5. The Court abused its discretion in determining that Mr. Luthra's MOTION TO REINSTATE MIDWEEK VISITATION

AND ORDER ALLOWING VACATION was intransigent, when in contrast it was reliant on medical opinions of qualified, (Washington State Department of Health Licensed) Medical Professionals each of whom specialized in providing Mental Health Care. (CP 331, 332) The Court could have easily asked for details pertaining to the qualifications of the Medical Professionals working with Luthra, instead of simply discounting their abilities and discarding their m edical opinions based on its own ex-parte misunderstanding of their licensing requirements with the State of Washington Department of Health.

Forrest's argument that Father's Motion for reinstatement of Mid-Week visits after undergoing 2 long years of court ordered therapy and care by qualified, Washington State Department of Health licensed medical professionals (each of whom submitted sworn affidavits detailing father's measurable progress in OCD treatment) was insufficient lacks logic and merit. It is clearly not Luthra who is attempting here to circumvent court orders, but Forrest blatantly continuing her agenda to push away the goal post allowing Luthra reinstatement of mid-week visits with his son. Aradhna Forrest is doing so despite all reasonable, verifiable

evidence from qualified Medical Professionals confirming that father's behavior will not have any ongoing negative effect on the minor child! The Court assessing fees of $5,895 to Luthra serves no other purpose but to attempt to financially oppress him, and diminish his right for due process and for bringing up a motion well supported by merit.

6. In her brief, Ms. Novotny goes on in length rehashing old issues and disputes between the parties to date. However, while doing so, she clearly misleads this bench to think that it was Luthra who was intransigent and litigious throughout this long running dispute. Further, she repeatedly, incorrectly defines Luthra's OCD affliction as a "Personality Disorder" without recognizing the simple difference between "**Obsessive Compulsive Disorder**" which Luthra has been diagnosed with versus "**Obsessive Compulsive Personality Disorder**" which Luthra has ***never*** been diagnosed as suffering from, The record shows no verifiable Medical Proof submitted by Ms Novotny or Ms. Forrest supporting her claim Luthra suffers from such a Personality Disorder.

The American Psychiatric Association's DSM-5 Manual clearly delineates between these 2 different types of mental health diagnosis. Ms. Novotny, just like the Trial Court in this matter has gone on to make presumptions in this matter acting as quasi unqualified, pseudo arm-chair mental health practitioner, even when she as a fine Attorney lacks medical qualification and education to make such claims. I respectfully request this court to disregard Ms. Novotny's false assertions inaccurately terming Luthra's OCD as a Personality Disorder!

7. The trial court lacked authority to modify the party's Parenting Plan limiting the father from having contact with the Child's therapist. No such restriction existed in the original Parenting Plan, and Court had no new evidence before it at the Clarification hearing indicating such a limitation was reasonable and necessary.

IV. CONCLUSION

This court should reverse the trial court's order as it improperly modifies the Parenting Plan without proper authority.

Dated this 22nd day of August, 2014 in NewCastle, WA.

Respectfully Submitted by:

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on ___August 22nd_____, 2014, I arranged for service of the foregoing Appellants Reply Brief to the court and to the parties to this action as follows:

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DATED at NewCastle, Washington this 22nd day of August, 2014

Vikas Luthra (Pro Se)