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No. 73615-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

NASRI ABUBAKAR
Appellant,

v.

ABDIMALIK HASSAN,
Respondent.

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

The Honorable Suzanne Parisien, Judge

BRIEF OF RESPONDENT

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ARGUMENT

A. Abubakar does not have a statutory right to appointed counsel.

1. The issue is not preserved for appeal.

Abubakar argues that the trial court should have appointed counsel for her under RCW 13.34.090. Brief of Appellant, at 13. But this issue is not preserved for appeal because she did not raise it in the trial court. RAP 2.5(a).

Abubakar did raise the issue of counsel in her motion for a new trial, but even there she asked only for the opportunity to "retain" counsel, not to have counsel appointed. CP 337, 347. Abubakar never asked the trial court to appoint counsel. And although she was *pro se* at trial and this Court might be willing to disregard the caselaw that requires *pro se* litigants to be held to the same standard as attorneys, *see e.g., Carver v. State,* 147 Wn. App. 567, 575, 197 P.3d 678 (2008), even a lay person should be expected to raise this kind of issue in the trial court. They might raise it imperfectly and by using different words than a lawyer might use, but they should still be expected to raise it clearly enough for the trial court to rule on it.

Additionally, no exception applies to this omission. The issue is not jurisdictional, not an issue of failure to establish facts upon which relief may be granted, and not an error affecting a constitutional right.

Therefore, this Court may refuse to consider it on appeal. RAP 2.5(a). Hassan urges this Court to decline to consider whether Abubakar had a statutory right to appointed counsel.

2. **RCW 13.34.090 does not grant Abubakar a right to appointed counsel in family court.**

Even if Abubakar had requested appointed counsel below, the trial court would have been correct to deny it. She bases her argument here on the fact that a dependency case was underway at the same time as this parenting plan modification and that she had a statutory right to appointed counsel in the dependency, under RCW 13.34.090. Brief of Appellant, at 13-14. From this, she argues that her right to counsel in the dependency should have extended to this modification. Brief of Appellant, at 8-9, 13-14.

This argument fails for at least three reasons: the concurrent jurisdiction order is not in the record, the order is not jurisdictional, and dependency cases are significantly different from modification cases.

First, the concurrent jurisdiction order appears nowhere in the record for this case. It is only in the dependency court file (Hassan's appellate counsel has seen it), but it is not in the record here. Therefore its exact wording is unavailable here. Abubakar relies on a declaration by a

social worker to bring its contents before this Court, Brief of Appellant, at 8, but this is not a reliable description of the exact language of the order. Because the declaration would not be admissible for the truth of the matter asserted in the trial court, ER 801, ER 802, RCW 5.44.040, this Court should not consider it either.

Second, even taking an educated guess at the order's contents from the language of the social worker and from similar orders in other cases, Abubakar does not establish that this modification was a proceeding under RCW 13.34.090. The concurrent jurisdiction order she relies on is misnamed, because the dependency court does not have jurisdiction separate from the family court. They are both parts of the same Superior Court:

> The legislature has enacted numerous statutes to "distribute and assign" superior court matters to juvenile courts and family courts. While these statutes often speak of "jurisdiction" they are not jurisdictional because they are not the source of the superior courts' power to hear and determine the issues before them. Article IV, section 6 of the state constitution is the source of that power. What the statutes actually do is distribute certain cases to specific divisions of the superior court. Thus, juvenile courts have "exclusive original jurisdiction" over dependent children. RCW 13.04.030(1)(b). Family courts have "jurisdiction" over any Title 26 RCW proceeding, including proceedings related to parenting plans, child custody, visitation, support, and property distribution. RCW 26.12.010. Importantly, however, juvenile court and family court are not separate courts but, rather, are divisions of the superior court. RCW

> 13.04.021(1); RCW 26.12.010, .020; see also *Werner*, 129 Wn.2d at 496.

In re Dependency of E.H., 158 Wn. App. 757, 765-66, 243 P.3d 160 (2010). The concurrent jurisdiction order was the dependency court's acknowledgement that the family law case was proceeding at the same time, no more. It was not an invitation for the family court to actually decide the dependency itself. If it were, at a minimum the family court records would have been sealed, and they are not. RCW 13.50.100. Because the family court was not actually deciding the dependency, Abubakar has no more right to appointed counsel in this case than does any other private litigant.

Third, finally, and perhaps most importantly, Abubakar's argument fails because dependency cases are significantly different from family law cases. Dependency cases require counsel because they put at risk parental rights, which are a fundamental liberty interest. *In re Welfare of Luscier*, 84 Wn.2d 135, 136-137, 524 P.2d 906 (1974). Family law cases do not. They only allocate parental rights. At no time does a family law case terminate or even limit actual parental rights:

> The rights and responsibilities of the parents are not terminated but rather allocated. Furthermore, the parents retain the right to seek modification of the parenting plan. RCW 26.09.260. They also retain standing in legal proceedings concerning the children. The interest at stake here is not commensurate with the fundamental parental

> liberty interest at stake in a termination or dependency proceeding.

In re Marriage of King, 162 Wn.2d 378, 394-95, 174 P.3d 659 (2007). *See also, Dependency of Grove,* 127 Wn.2d 221, 238, 897 P.2d 1252 (1995). Additionally, in a family law case neither party must face the power and resources of the State. *King,* 162 Wn.2d at 395. For all of these reasons, the right to counsel for a dependency case does not extend to a family law case.

Abubakar relies on *In re Dependency of E.H.*, 158 Wn. App. 757, 243 P.3d 160 (2010), to argue otherwise. But *E.H.* is not on point because it is not factually similar. In *E.H.,* a child had been found dependent as to both parents, and the dependency court was considering the child's permanency plan. The child's half-sister filed a petition for nonparental custody in family court, and the dependency court revised the concurrent-jurisdiction order to specifically ask the family law court to decide the permanency plan:

> The juvenile court judge revised the concurrent jurisdiction order, specifying that the family court would also decide the dependency-related permanency planning issue of whether to return EH to one of the parents' homes.

In re E.H., 158 Wn. App. at 760. The parents argued on appeal that this order gave them the right to appointed counsel in the nonparental custody case, because the dependency court essentially deputized the family court

to decide one of the dependency issues. The Court of Appeals agreed. But here, the concurrent jurisdiction order is not available to the Court, and Abubakar has not established that it was revised so as to cede any of the dependency judge's decision-making authority to the family law judge. Because of this crucial difference, *E.H.* does not control this case.

The issue of a statutory right to counsel was not preserved for appeal. Even if the Court were to consider it, RCW 13.34.090 does not grant a right to appointed counsel in a modification case and the dependency court did not cede its decision-making authority to the family law court. Therefore, Abubakar does not have a statutory right to appointed counsel.

B. Because she has provided no *Gunwall* analysis, this Court should decline to consider whether Abubakar has a right to appointed counsel under the state constitution.

Abubakar also argues for a right to appointed counsel under Article I, §3, of the state constitution. Brief of Appellant, at 14-17. However, the brief does not include any mention of *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). A *Gunwall* analysis is required whenever a party argues for an interpretation of the state constitution that is different from the federal constitution. *State v. Wheeler,* 145 Wn.2d 116, 124, 34 P.3d 799 (2001); *Collier v. City of Tacoma,* 121 Wn.2d 737,

747 n.5, 854 P.2d 1046, 1051 (1993); *State v. Wethered*, 110 Wn.2d 466, 472, 755 P.2d 797 (1988). The analysis has been called "a necessary starting point for a discussion between bench and bar about the meaning of a state constitutional provision." Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience,* 65 Temp. L. Rev. 1153, 1160-63 (1992). In the absence of proper briefing, this Court should decline to consider the argument.

C. The trial court did not abuse its discretion in modifying the parenting plan.

As Abubakar correctly notes, there is a "strong presumption in favor of custodial continuity and against modification." *In re McDole,* 122 Wn.2d 604, 610, 859 P.2d 1239 (1993); Brief of Appellant, at 19. But at the same time, an appellant in this type of case bears a particularly heavy burden in asking an appellate court to overturn a trial court:

> [T]rial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court.

In re Marriage of Landry, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). *Landry* applies to dissolution cases, but its reasoning also applies with

equal—if not greater—force to this case, because what is at stake here is not a property division as in *Landry,* but the welfare of seven children, in the context of allegations of mental illness, domestic violence, and rape. The standard of review here, as in *Landry*, is that "The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion." *Landry*, 103 Wn.2d at 809-10.

The trial court's decision is entirely reasonable. Abubakar argues that the court abused its discretion in finding that the environment in her home was detrimental. Brief of Appellant, at 20. She makes no argument in support, but only baldly asserts that the finding doesn't fit the law. But the court found that Abubakar has "some mental health deficiencies which interfere with her ability to safely parent these children" and that she was "no longer able to ensure the health, safety and welfare of the children." CP 298. This is a finding of detriment, which at least one—and probably many—reasonable judges would make. Therefore it is not an abuse of discretion.

Abubakar argues that the detrimental environment did not exist at the time of trial, relying on *In re Marriage of Ambrose*, 67 Wn. App. 103, 834 P.2d 101 (1992). Brief of Appellant, at 21. But *Ambrose* permits the court to rely on the family's history to help determine its present circumstances:

> We do not mean to suggest by our holding here that the trial court may not consider the children's environment while they were in Robin's custody prior to the entry of the temporary order. We are simply saying that the trial court must consider any and all relevant evidence to determine if Robin is presently a fit parent capable of providing a suitable home for the children.

Ambrose, 67 Wn. App. at 109. Additionally, two witnesses (Walton and Hashemi) testified to events from the five months preceding trial, and the court found the witnesses credible. CP 298; VRP1 19 *et seq.*; VRP1 50 *et seq.* Because the court relied on evidence across a wide time span, including shortly before trial, the court properly ruled on the children's present environment.

Abubakar argues that the change in circumstances was not substantial or detrimental enough to justify modification. Brief of Appellant, at 21, arguing that the witnesses provided conflicting testimony. But the court ruled on the credibility of that testimony, and the testimony was more than sufficient for a reasonable judge to reach the same conclusion. Therefore, the court did not abuse its discretion.

Abubakar argues without citation that evidence of her mental health was insufficient because it did not include expert testimony. Brief of Appellant, at 24. But expert testimony is not necessary if lay testimony is sufficient. A lay witness can testify:

> to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

ER 701. *See also, Pagnotta v. Beall Trailers,* 99 Wn. App. 28, 34, 991 P.2d 728 (2000). Here, the court relied on testimony from three professionals, testifying as lay witnesses, to establish that Abubakar's mental-health needs were endangering the children. The witnesses supplied sufficient evidence that a reasonable judge could find that Abubakar has mental health deficiencies. Therefore, the court did not abuse its discretion.

Finally, Abubakar argues that there was "no evidence that the harm of a change of environment is outweighed by the advantage of the change to the child." Brief of Appellant, at 24. But Walton did supply this evidence, and the court found it credible. VRP1 40-41; CP 298. This finding was not an abuse of discretion.

In sum, Abubakar has not established that no reasonable judge would rule in the same way as the trial court, therefore Hassan asks this Court to find that the trial court did not abuse its discretion.

D. The Court should deny Abubakar's request for attorney fees.

In the last sentence of her opening brief, Abubakar requests attorney fees, based on a court rule and two statutes. Brief of Appellant, at 25. She does not request costs or expenses.

This Court should not award fees under RAP 18.1, because that rule requires the appellant to "request the fees or expenses as provided in this rule" and to "devote a section of its opening brief to the request." RAP 18.1 (in pertinent part). In her opening brief, Abubakar devotes not a section but only a single sentence, at the end of her conclusion, with no authority. This alone is grounds to deny her request. *In re Marriage of Hoseth,* 115 Wn. App. 563, 575, 63 P.3d 164 (2003), *review denied,* 150 Wn.2d 1011, 79 P.3d 445 (2003).

Even if this Court overlooks the lack of briefing, it should deny fees because RAP 18.1 applies only "[i]f applicable law grants to a party the right to recover reasonable attorney fees." RAP 18.1 (in pertinent part). The applicable law in this context are the two statutes that Abubakar cites: RCW 26.09.140 and RCW 26.09.260. But RCW 26.09.260 does not apply because it requires bad faith. Hassan did not bring his motion to modify in bad faith. He brought it on substantial grounds, and he prevailed. Abubakar does not assert bad faith now. Therefore, this Court should deny fees under RCW 26.09.260.

An award under the other statute, RCW 26.09.140, "must balance the needs of the spouse requesting them with the ability of the other spouse to pay." *In re Marriage of Stenshoel,* 72 Wn. App. 800, 813, 866 P.2d 635 (1993). As their financial declarations in the trial court show, the finances of both parties are strained. Hassan is unemployed and struggles to meet his basic needs, plus he has needed to pay his own attorney fees at both the trial and appellate level. Even if Abubakar's need is great, it does not outweigh Hassan's ability to pay, so Hassan asks this Court to deny the request.

CONCLUSION

Abubakar's statutory right to appointed counsel in the dependency does not extend to this modification, and she has not preserved the issue for appeal. Also, this Court should not decide whether she has a right to appointed counsel under the state constitution, because she has provided no *Gunwall* analysis. And finally, the trial court did not abuse its discretion by granting the modification. For all of these reasons, Hassan asks this Court to affirm.

DATED this 3 day of June, 2016

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IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

NASRI ABUBAKAR, Appellant, v. ABDIMALIK HASSAN, Respondent.	**No. 73615-9-I** **CERTIFICATE OF SERVICE**

CERTIFICATE

I certify that on June 3, 2016, I mailed, postage prepaid, a copy of the following documents:

1. Brief of Respondent
2. Certificate of Mailing

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