

70617-9

70617-9

COURT OF APPEALS
DIVISION ONE

MAR 31 2014

**Court of Appeals No. 70617-9-1
King County Cause No. 02-3-03386-9 SEA**

**COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON**

MARK CAVENER,

Appellant
(Respondent Below)

v.

ANDREA JOLLES,

Respondent
(Petitioner Below)

APPEAL REPLY BRIEF OF APPELLANT MARK CAVENER

Decisions to be Reviewed:

Orders of King County Superior
Court Judge Deborah Fleck of 06/27/13
Denying Appellant's Motion to Vacate the
Final Orders of 06/14/12

Stuart E. Brown
WSBA #35928
Attorney for Mark Cavener
2535 15th Ave. NE, #201
Seattle, WA 98125
206-407-9183

Andrea Jolles, Pro Se
4115 Evanston Ave. North
Seattle, WA 98103

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR 31 AM 11:27

I. INTRODUCTION

COMES NOW, the Appellant (Respondent Below), MARK CAVENER, by and through his attorney of record, Stuart E. Brown (WSBA #35928), and provides this reply to Respondent, ANDREA JOLLES' Brief on appeal, provided by and through her attorneys, Karma Zaike (WSBA #31037) and Erika Reichley (WSBA #46811), who appeared on a limited basis for the sole purpose of preparing Ms. Jolles' Appeal response and withdrew on 02/28/14.

As the court is aware, the Appellant is appealing the final court orders of King County Superior Court Judge Deborah Fleck of 06/25/13 (CP 304) denying the Appellant's Motion to vacate the final orders of 06/14/12k, pursuant to CR60(b), including the final parenting plan (PP), and the order and judgment of default of that same day (06/14/12) (CP 294).

II. REPLY ARGUMENT AS TO RESPONDENT'S BRIEF

First, while not necessarily relevant to the legal argument before this court, it appears necessary for the record to correct a number of untrue claims alleged by Ms. Jolles' temporary counsel that appear to be offered solely to distract this court and interject faux 'facts' that aim to falsely demean the Appellant and characterize him as resistant, uncooperative and

hostile (in part to justify their request for attorney's fees as discussed below). For example, on page 1 of Respondent's Appeal brief, opposing counsel (OC) indicates, "[T]he Father refused to cooperate, choosing instead to create conflicts and diversions. The Father repeatedly abused the legal process, manipulated evidence, and fabricated complicated and unnecessary court actions. Despite all of these transgressions and instances of intransigence the trial court gave the Father ample opportunities to be heard, to respond, and to exercise his legal rights." While OC would like dearly like this court to view the Appellant in a negative light by using such disparaging alleged (but untrue) attributes and negative characteristics (i.e. manipulated evidence, transgressions, fabricated, intransigent), the ironic truth is that if anything, the history of this case details a clear history of continual 'end-runs' on court procedure, manufacturing and re-manufacturing of historical facts, and a campaign of false allegations against the Father (Appellant) by the Respondent to destroy his relationship with his daughter. That history on the part of the Respondent has been amply outlined in detail in the Appellant's initial brief and little or no further time of effort will be wasted to defend against OC's campaign of character assassination aimed again at distraction and misdirection, other than to note that OC's comments on page 1 that "[T]he trial court entered an order of default against the Father due to his

intentional failure (italicized for emphasis here and below) to respond to the Mother's petition and his *unwillingness to cooperate* in allowing the case to procedurally move forward," are equally without merit and serve less than credible purposes and motives on the part of OC.

On page 2, under 'Issues Pertaining to Appellant's Assignment of Errors,' OC states that, "The only assignment of error identified by the Father on appeal is a faulty analysis of the *Gutz* factors." While this statement is technically correct, as this court is aware from the 39 page motion to vacate which has been provided to this court, as well as from the 47 page initial Appellant's Brief, the Father through his counsel argued to King County Superior Court Judge Deborah Fleck that the Father's due process rights had been continually violated by the courts leading to the ultimate Default Order and final orders, that the courts had engaged in on-going procedural errors that damaged the father and led to the ultimate Default Order and final orders, that there had been a pattern of on-going bias against the Father in terms of court decisions leading to the ultimate Default Order and final orders, that he was denied his due process and constitutional rights to a trial, etc. In reality, the decision of Judge Fleck addressed such claims (inaccurately in our view) in her oral opinion and ruling, but subsumed all of these rulings (for example by ruling that there were no due process violations, that there were no procedural violations,

that there was no evidence of statutory or legal errors of violations in for example the finding of Domestic Violence (DV) against the Father by Commissioner Sassaman despite the facts before her not legally meeting statutory guidelines for such a finding, etc.) under her analysis of the *Gutz* factors.

On page 2 of the Respondent's Appeal Brief, OC notes, "Due to the Father's history of DV, particularly his abusive use of conflict directed at the parties' daughter, this case has continued to be plagued by litigation for many years." This claim in addition to being factually incorrect and without any merit, is a particularly egregious example of the tendency of OC and the Respondent to present false information to this court as well as the courts below to advance their campaign against the Father. In fact, prior to the Respondent's falsely maintaining that she somehow was a victim of DV after the incident involving her own father running after the Appellant at the very public King County Courthouse and into the bathroom at the King County Court house, there had *never been any* DV finding against the Appellant with only two court actions which were in fact relatively minor and dealt with where the child should attend school and a request by the mother for clarification of several sections of the Parenting Plan (PP). This entire history has been amply outlined in the Appellant's initial trial brief.

On page 4, OC maintain that as to the Mother's 01/13/12 initial Petition to Modify the PP and Order of Child Support (OCS), "The Father was served on 01/17/12." This as well in inaccurate as the Father maintains (see initial brief) that in fact he was never served with such documents which appears understood by the Respondent who then later re-served her Petition to modify the PP and OCS (see below) to the Father. OC in fact then notes this reality by stating on page 4, "On 02/09/12, the Father appeared at the hearing but denied service of process."

On page 5, OC notes, "On 05/11/12, the Mother scheduled a hearing for adequate cause to occur 05/31/12." At that same time she scheduled a hearing as to adequate cause as to her Petition to Modify the PP and OCS (05/11/12), she also filed a second Motion/Declaration for an Order of Default." Thus, even before any adequate cause had been found by the court or had even heard argument as to adequate cause, the Mother attempted to find the Father in Default with the first such action for Default having been eventually rejected by court (see Appellant's initial brief). Her relentless effort to use the courts to find for an order of default has again been fully detailed in the Father's initial Appellate brief.

OC then notes on page 6, "The court continued the Adequate Cause/Temporary Orders hearing to June 14, 2012 to give the Father one last opportunity (actually the court *never* used the words 'one last

opportunity,' as suggested by OC in once again misleading this court to create the misimpression that the court itself gave *one last chance*) to file a response to the petition.” In fact, OC then provides the correct and actual wording used by the Court in stating, “The minute entry for the hearing specifically states, “Court continues the hearing to allow Resp. to respond.” There are of course numerous reasons why a court would continue a hearing to allow a party to respond including concern as to proper service as noted by OC’s own statement on page 6 that “At the hearing, the court spent substantial time in determining whether the Father was contesting service of process of the underlying motion.”

On page 7, OC notes, “On June 1, 2012, the Mother appeared at the status conference hearing. Judge Doerty *extended the adequate cause deadline* to August 13, 2012, but noted that the Respondent (below) has not answered or appeared at this hearing.” Thus, and we believe of great import in significance in this case and testifying to the procedural confusion that marked this case as noted in the Appellant’s initial brief, Judge Doerty *extended* the adequate cause deadline to 08/13/12. Thus, a finding of adequate, a *precursor* to being able to rule on any Petition to Modify a PP, was extended to 08/13/12, and yet the court below ruled on a motion for an order of Default and entered final orders a full two months prior to 08/13/12 deadline for the father to contest adequate cause. We

believe this alone makes it clear that the court below erred which again was clearly pointed out to Judge Fleck in the request to vacate the order of default and final orders.

On page 8, OC notes, “At no time during his argument (for the Motion to Vacate) did the Father’s attorney address the *Gutz* factors nor did he present evidence to the Court that the Father was entitled to relief based on these considerations.” As this court has before it evidence of what was and was not argued before the Court below, and clear evidence as to what Judge Fleck based her decision on, no effort will be wasted to address this inaccurate claim by OC other than to state that of course Appellant’s attorney argued before Judge Fleck as to issues of the father’s allegedly waiting almost a year before filing his motion to vacate (no funding to retain an attorney); his belief that had he had an opportunity to argue his case at trial he would have been able to present a strong prima facie case/defense rejecting any basis for modification of the existing PP (a primary if not *the* primary *Gutz* factor); the reasons for the father’s (claimed) failure to appear (arguing that he did in fact appear); and as to effect of vacating the judgment on the opposing party (there would be none as the parties had had a long term essentially shared custodial arrangement with joint decision making that was in the best interests of the child and which had worked well since 2003 with only a few

disagreements). In effect, all of the so called *Gutz* factors were subsumed under argument before Judge Fleck.

That said, OC's arguments and claims here aside, the legal reality is that Judge Fleck made and based her decision to deny the motion to vacate on her analysis of the *Gutz* factors which the Appellant challenges as inaccurate on both a factual and legal basis.

On page 15, OC argues that, "The trial court did not abuse its discretion in determining that (as to the reason for Father's alleged failure to appear) there was no mistake, inadvertence, surprise or excusable neglect on the Father's part and *none was asserted*." It is not clear as to whether OC has not actually read the initial Motion to Vacate in its entirety or listened carefully to the actual lengthy argument made in behalf of the Father before Judge Fleck, but there certainly *was* significant argument asserted by the Father as to mistake, inadvertence, surprise, or excusable neglect, for alleged failure to appear as well as argument stating that the Father had in fact appeared. There simply is no merit at any level to this claim by OC.

On page 19, OC states further that "The trial court did not abuse its discretion in addressing the fourth *Gutz* factor by simply asserting, "It is difficult for the party who has obtained the order of default and default judgment including parenting plans to oppose vacation of such orders on

this basis.” In reality, Judge Fleck herself offered this statement as her sole analysis of this 4th *Gutz* factor apparently relegating this secondary *Gutz* factor to a relatively unimportant level by suggesting that this factor is difficult to analyze. We believe it is not difficult to analyze as noted above and maintain that the Mother would have not been effected in any significant manner by vacating the orders at issue as this would have simply returned the parents to the very PP that had worked fairly and effectively for eight full years and which allowed for the child’s healthy relationship to both parents. The impact on the Mother would have been in fact that she was not able to misuse the courts and commit a fraud on the courts in all of the ways outlined in the Appellant’s initial brief, during the run up to the court’s inappropriately signing an order and judgment of default and final orders on the same day.

Finally, as to the issue of the Respondent’s request for attorney’s fees, the Appellant asks the court to deny this unsupportable and frivolous request. First, OC correctly notes that under RAP 18.1, RCW 26.09.140 and RCW 26.50.060(g), courts may award attorney fees on appeal on the basis of need versus ability. In fact, the Father remains in a dire financial state, unable to pay his legal fees to this attorney, unable to pay for professionally supervised visits with his child, and barely able to support himself. He has no ability to pay. Other than the Respondent hiring OC on

a limited appearance basis to complete the relatively brief and largely narrative response with limited case law review, she has likely had to pay little in terms of these legal services. Thus, any claim for legal fees should fail on the basis of need and ability to pay.

OC then attempts to make a case that this court should order legal fees to the Respondent based on the bogus request and claim that this “Court should find that intransigence has permeated the case and as a result reward the Mother is not required to segregate attorney’s fees.” There of course has been no prior finding of intransigence on the Father’s part and as outlined clearly in the Appellant’s Motion to vacate and initial Appellate Brief as well as in hundreds of pages of exhibits provided to this court, it *has been the mother* that without question has continually pushed costly and time consuming litigation again and again to modify the PP while recreating history to include an unfounded claim that not only was she at current risk of DV (when the parties had spent no time together for eight years) from the Father, but that the child was now at such risk when *never* having made any such claim prior to her own father chasing the Appellant down a public King County Courthouse into a bathroom at said courthouse *at her request* to serve legal documents, and prior to the FCS (Debra Hunter) evaluator raising an unsubstantiated, unfounded, and professionally unsupportable concern as to *possible future* abuse risk of

the child by the Father. The net result of this campaign by the Mother has been the utter destruction of the Father's relationship with his daughter permanently. The cost to the Father in terms of funds, energy, emotional and psychological pain in terms of the loss of his daughter cannot be underestimated or even calculated. Indeed, the request for legal fees under the circumstances would almost be comical if the damage inflicted on the Father was not so tragic. We ask that the court reject any request for legal fees from the Appellant who brings this action in a last hope and prayer that his loving relationship with his daughter can somehow be salvaged at this late date.

II. CONCLUSION

Based on all of the above, we again respectfully request that the Court of Appeals find that Judge Fleck abused her discretion and misapplied and misunderstood the four factor *Gutz* analysis and came to an incorrect and legally indefensible ruling (based on case law) in denying the father's motion to vacate the final orders of 06/14/13. Based on the above, we ask that this court reverse Judge Fleck's decision and order a new trial on mother's motion to modify the PP.

Respectfully submitted this 29th day of March, 2014 by:

A handwritten signature in cursive script, appearing to read "Stuart E. Brown".

Stuart E. Brown, WSBA #35928
Attorney for Appellant Mark
Cavener

MAR 31 2014

**The Court of Appeals of the State of Washington
Division I**

MARK CAVENER,

Appellant (Respondent Below),

v.

ANDREA JOLLES,

Respondent/Appellee (Petitioner Below).

**Court of Appeals Case
No. 70617-9-1**

**King County Superior Court Case
No. 02-3-03386-9 SEA**

**Return of Service/Declaration of
Service as to Pro Se Petitioner
Below (Appellee) Andrea Jollies**

I Declare:

1. I am over the age of 18 years, and I am not a party to this action.
2. I served the following documents to:

ANDREA JOLLES
4115 Evanston Ave. North
Seattle, WA 98103

APPELLANT, MARK CAVENER'S APPEAL REPLY BRIEF OF 03/29/14

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR 31 AM 11:27

3. The date, time and place of service were (if by mail refer to Paragraph 4 below):

Date: 03/29/14 Time: Approximate Time: 2:00 pm via US Mail and 5:30 pm via
E-mail

Address: Andrea Jolles
4115 Evanston Ave. North
Seattle, WA 98103
Telephone Number: Unknown

4. Service was made:

By e-mail and US Mail to the person named in paragraph 2 above

5. Service of Notice on Dependent of a Person in Military Service: **NA**

The Notice to Dependent of Person in Military Service was served on mailed by first class mail on (date) _____.

Other:

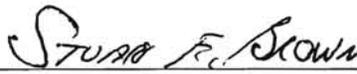
6. Other: **NA**

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Seattle, WA on 03/29/14 by:



Stuart E. Brown, WSBA #35928
Attorney for Mark Cavener, Respondent
Below


Printed Name