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DIVISION ONE

JAN -2 2014

Court of Appeals No. 70728-1-1  
Snohomish County Cause No. 12-3-01771-1

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COURT OF APPEALS  
DIVISION I  
STATE OF WASHINGTON

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DEE ANN JOHNSTONE,

Appellant  
(Respondent Below)

v.

TIMOTHY JOHNSTONE

Respondent  
(Petitioner Below)

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REPLY APPEAL BRIEF OF APPELLANT DEE ANN JOHNSTONE

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Decisions to be Reviewed:

Final Orders of Snohomish County Superior  
Court Judge Richard Okrent of 07/10/13 as  
Final PP, OCS, and denial of Mother's  
Legal Fees

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## I. INTRODUCTION

COMES NOW, the Appellant (Respondent Below), **DEE ANN JOHNSTONE**, by and through his attorney of record, Stuart E. Brown (WSBA #35928), and provides her Reply to the Responsive Brief of The Respondent on appeal, **TIMOTHY JOHNSTONE**, filed with the court on or about 12/02/13 by and through his attorney of record, Bruce A. Peterson.

As this court is well aware, the Appellant (hereafter referred to as ‘the mother’), appealed the final court orders of 07/10/13 (CP 141, Final PP; CP 142, Final OCS; CP 143, FNFCL; CP 144, DOD, CP 135, Transcript of Judge’s Oral Ruling) of the Honorable Snohomish County Superior Court Judge, Richard Okrent, and specifically as to the Final Parenting Plan (PP) and Final Order to Child Support (OCS) signed by the court, and Judge Okrent’s denial of Dee Ann Johnstone’s request for legal fees. The Appellant is not appealing the court’s final decisions as to final division of assets and liabilities.

The mother has outlined in detail with supporting evidence and case law, her argument for asking for relief from this court and thus will not waste this court’s valuable time by restating or re-summarizing the underlying case and basis for appeal other than to respectfully remind the

court that the mother argued that Snohomish County Superior Court Judge Richard Okrent, abused its discretion by ordering shared custody (50/50) after a week-long trial and after *his own* (italicized here and below for emphasis) oral ruling made it 100% clear that the court found RCW 26.09.191 restrictions against the father (also included in the final PP), found the father to be an untreated long term alcoholic, found him to lack credibility at almost every level, found him to have been deceitful to the court and to the GAL, found him to have serious anger problems, found him to have engaged in abusive use of conflict (AUOC), and ordered him to complete an A&D evaluation and treatment as an untreated alcoholic (CP 135, Oral Ruling of Judge Okrent). In essence, the mother argued that the final Parenting Plan (PP) ordered by the court and providing for joint custody and shared decision making, and the final Order of Child Support (OCS) ordered by the court and granting a monthly child support (CS) transfer payment to the Respondent from the mother of \$676.15 (the court below denied a request from the mother for a deviation downward based on its own order granting shared or 50/50 custody time between the parties), was and is simply an abuse of discretion by the court below which was completely at odds with Judge Okrent's *own* factual decisions as to the father's serious deceptive practices, pathology and parenting issues. The mother argued to this court in her initial brief that these

decisions by the court below should thus be reversed and asked this court to order that she be given primary custody and sole decision making with CS recalculated based on the change of custody she seeks from this court. Finally, the mother argued in her initial brief that the court erred and abused its discretion in denying her request for \$24,000 in actual legal fees that she accrued during the pendency of the case, that she maintained were unquestionably only necessitated as a direct result of the father's fraud and deception on the court over the year prior to the trial and at the trial itself. The court clearly erred in refusing to order the father to pay for such costs despite clear, cogent and on point case law allowing the granting of such legal fees apart from the 'need and ability to pay' standard under RCW 26.09.140 on the basis of intransigence or fraud committed on the court which resulted in increased and unnecessary legal costs for a party as clearly occurred in this case.

To respectfully remind this court, Judge Okrent in his *own* oral ruling and this in his *own* findings of fact, determined based on the trial record and all of the evidence before him from trial, that *he found* the Respondent to be a narcissist, to have been deceptive to the court, to be an *untreated* alcoholic and ordered completion of an A&D evaluation and treatment as an untreated alcoholic, to have engaged in abusive use of conflict (AUOC) , to warrant .191 restrictions which were then ordered, to

have serious anger problems, to have stalked the mother, to likely have not been truthful with the court as to his claims that he had not consumed any alcohol since 2009-10, etc. The mother maintained that for the court below to have then ordered joint custody with the father being paid \$676.15 in monthly child support and denying the mother's request for legal fees necessitated solely by the father's fraudulent and intransigent behavior, was not only an abuse of discretion but suggested with little question that the court below had made its decisions on the basis of mistake and/or irregularity in the proceeding; was based on fraud, misrepresentation or misconduct of the Respondent; was not based on the actual evidence before the court; represented a decision based on passion or bias; and certainly did serve or represent substantial justice being done in the case.

#### **REPLY ARGUMENT AS TO RESPONDENT'S BRIEF**

The Respondent through his attorney of record makes several arguments in response to the mother's Appeal and brief, all of which have no merit and should be rejected based on argument and authorities cited below:

First, the Respondent argues correctly that "the Appellant has the burden to designate a record sufficient to demonstrate the errors it alleges on appeal," (*State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999)), but then argues incorrectly that the mother has failed to meet this burden

by failing to provide the entire trial transcript or significant portions of the trial transcript. For the record, *State v. Wade* dealt with a case where the State Supreme Court held that the Court of Appeals (COA) erred by reversing the trial court's decision admission of prior bad acts evidence without having before it a report of the proceedings from the evidentiary hearing. The *State v. Wade* court noted at 464, "The appellate rules provide that a party should arrange for the transcription of all of those portions of the verbatim reports of the proceedings *necessary to present the issues raised on review,*" citing RAP 9.2(b). The Respondent misstates and/or misunderstands the basis of the mother's appeal which clearly has to do with the court's *own* statement of the facts as it saw them in the case and as detailed at great length and with clarity in his *own* oral ruling. The mother maintains that based even on the Judge's findings of fact alone in his own oral ruling, his ultimate determination of a PP (shared custody with joint decision making) and OCS (granting the father \$676.15 per month) and denial of legal fees (\$24,000) to the mother, so far departed from his *own* findings of fact and determination of the trial evidence; that no reasonable judge would have produced the final orders of the court below, that the court below clearly abused its discretion, and that the final orders so far deviated from the court's *own* findings of fact so as to clearly suggest evidence of a decision based on passion or bias, etc. There is no

need for any trial transcripts in the face of the Judge's own oral ruling where he himself has determined findings of fact on which he then (erroneously) generates final orders that in fact have no basis or merit or justification based on said findings of fact by the court. The Respondent maintains that "in order to be successful on appeal. Appellant must demonstrate that the trial Judge abused its discretion in entering the final PP and OCS," and cites *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997) in support. Based on all of the argument in the mother's initial brief and herewith, the mother believes without question that she has demonstrated that the trial court did abuse its discretion in entering the final PP and OCS consistent with the requirements of *Littlefield*. For the record, *Littlefield* involved a relocation case where the State Supreme Court held that the trial court did not have the authority under the Parenting Act to order the wife as primary residential parent to live in a particular geographic area. The *Littlefield* Court noted at 46, "Generally, a trial court's rulings dealing with the provisions of a PP are reviewed for abuse of discretion. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices given the facts and the applicable standard ...." The mother maintains again that the trial Judge's decisions

as to the PP and OCS were clearly unreasonable and unjustified based on *his own* findings of fact and clearly did represent an abuse of discretion in that the final orders so far diverged from the court's own findings of fact as to indicate bias, passion, irregularity, etc., and clearly did not serve significant justice. We again have the very odd situation where the court clearly ignored its own findings of fact in reaching orders as to the PP and OCS that have no relationship to the court's own findings as to the evidence.

The father cites *In re Marriage of Thomas*, 63 Wn.App. 658,660, 821 P.2d 1227 (1991) to again incorrectly claim that the mother's appeal based on abuse of discretion by the trial court fails on the basis of her allegedly providing an incomplete record on appeal (already addressed above). For the record, the *Thomas* case dealt solely with distribution of property issues and not a PP but ironically in terms of the mother's argument as to legal fees, did deal with Mrs. Thomas contending that "the trial court should have awarded her attorney fees because she was forced on numerous occasions to institute contempt proceedings to enforce the parties' agreements and court orders." *Thomas* at 660. The COA denied the request for legal fees but only based on its findings that "both parties have been less than faithful in following the orders of the court resulting in their frequent show cause hearings." *Thomas* at 671. In our case, the trial

court noted in its own oral ruling the many lies, deceptions, AUOC behaviors, failure to follow orders, etc., perpetrated by the Respondent/father alone and thus this court (COA) clearly has a basis for ordering legal fees of \$24,000 which clearly never should have been necessary for the mother but for the above behaviors of the Respondent found *by the trial court itself*. I

The Respondent then cites *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn.App. 522, 525, 864 P.2d 996 (1994) (incorrectly cited as *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn.App.1, 6, 790 P.2d 1226 (1990)), as support for his inaccurate contention that the mother's appeal fails on the basis of her providing an insufficient record on appeal (already addressed above). For the record, *Bulzomi* dealt with a suit against the Department of L&I and an appeal of the trial court's denial of Mr. Bulzomi's motion for a new trial on the grounds that the trial court failed to give his proposed jury instructions which he argued in turn deprived him of an opportunity to present his theory of the case. The *Bulzomi* Court noted at 525, "As a preliminary matter we address the issue of whether Bulzomi's case is properly presented on appeal. RAP 9.6(b)(1)(F) requires that the clerk's papers at a minimum, shall include "any jury instructions given or refused which presents an issue on appeal." "The party seeking review has the burden of perfecting the record so that the reviewing court has before it all

of the relevant evidence.” Thus, the case while not on point in terms of the facts related to our case, does point out what in the record at a minimum should be presented to the COA for review which as now noted a number of times, clearly was a burden met by the mother given that the appeal rests on the trial court’s own oral ruling which detailed findings of fact that were then in direct contrast to and did not support in any manner the ultimate final PP and OCS of the court and did not support the rejection of mother’s request for legal fees.

The father further cites *Lau v. Nelson*, 92 Wn.2d 823, 829, 601 P.2d 527 (1979) in claiming that “a trial court’s decision is presumed to be correct and should be affirmed unless there is a clear showing of error.” The mother believes without question that she has demonstrated a clear showing of error by the trial court. For the record, the *Lau* Court had to do with a wrongful death suit brought against the driver of a truck in which the deceased was a passenger and the question on appeal was “whether the change in common law should apply to this case in which event a new trial would be required,” (*Lau* at 826) and whether the court erred in refusing an investigating officer to give his opinion as to the cause of the accident (*Lau* at 829). Again, while the case clearly is not on point as to the facts of our case as it relates to a trial court’s discretion in allowing a witness to testify or not, the mother argues that the record on appeal is sufficient for

all of the reasons noted above. The father also then cites *In re Marriage of Landry*, 103 Wn.2d 807, 809, P.2d 214, 215 (1985) in claiming incorrectly that the mother has not met the “manifest abuse of discretion standard’ in her appeal. For the record, the *Landry* case dealt with property division issues and husband’s military pension and thus again in not on point in terms of the facts of our case and specifically dealt with the issue as to whether the trial court abused in discretion in dividing the husband’s pension. That said, the *Landry* Court did note at 809-810, “The trial Court’s decision will be affirmed unless no reasonable judge would have reached the same conclusion.” The mother again maintains that the trial court in our case clearly and without question ordered a final PP and OCS and refused legal fees to the mother in direct contradiction and opposition to his *own* findings of facts. Judge Okrent’s conclusions as to the law, while never clearly enunciated in his ruling and thus making his final rulings further suspect and unsupportable, clearly are not supported by his own factual findings in his oral ruling.

The father then cites *Greene v. Greene*, 97 Wn.App. 708, 714, 986 P.2d 144, 147 (1999), in noting (full quote provided here), “And where the trial court has weighed the evidence, the reviewing court’s role is simply to determine whether substantial evidence supports the findings of fact and if so whether the findings in turn support the trial court’s conclusions of

law.” This case as well dealt solely with property division issues. As noted continuously in the mother’s reply herewith and in her initial appellate brief, the oddity in this case is that the trial court issued its findings of fact in its oral ruling on the trial evidence but then produced final orders as to the PP and OCS and refusal to order legal fees to the mother that were in direct contradiction to its own findings of fact and thus clearly engaged in abuse of discretion in ignoring its own findings.

The father then cites *In re Marriage of Monaghan*, 78 Wn. App. 918, 923, 899 P.2d 841, 844 (1995), in following up on the above *Green* court findings, and noting that “Substantial evidence is evidence sufficient to persuade a fair minded person of the truth of the declared premise.” We agree with this proposition and maintain that the trial court itself produced its findings of fact in its own oral ruling based on very substantial trial evidence sufficient to persuade *any* fair minded person that the mother should have been made primary custodian with sole decision making and granted CS from the father consistent with such full time custody and should have granted legal fees; but then deviated without cause, justification or merit in terms of his final orders (PP and OCS) which again are in direct contradiction to the court’s own findings as to the frankly devious, manipulative, AUOC, alcoholic, anger oriented, narcissistic, etc., behavior of the father.

As to the related issues as to whether the trial court or COA can and should impose restrictions or limitations on a parent's time where the court has found .191 restrictions as here with the Respondent/father, in *In re Marriage of Katare v. Katare*, 125 Wash. App. 813, 825, 105 P.3d 44 (2004), the court stated, "Whether RCW 26.09.191 factors must be resent before limitations may be imposed on residential provisions of a PP is a question of statutory interpretation." The *Katare* Court the outlined the mandatory restrictions on decision making and residential time that follow a finding under RCW 26.09.191(1) and (2) and outlined the discretionary provision that allows a court to limit a parent's residential time with a child if any of the factors listed under RCW 26.09.191(3) are found and if "the court finds that a parent's involvement or conduct *may have* an adverse effect on the child's best interests and any of the factors in RCW 26.09.191(3) are present." (*Katare* at 825-826). Those factors were then noted to include: (a) A long term emotional or physical impairment which interferes with the parent's performance of parenting functions; (c) a long term impairment resulting from drug, alcohol or other substance abuse that interferes with the performance of parenting functions; (e) the abusive use of conflict by the parent which creates the danger of serious damages to the child's psychological development; (g) such other factors or conduct

as the court expressly finds adverse to the best interests of the child.

*Katara* at 826-827.

The trial court's oral ruling and findings of fact that the Respondent/father was narcissistic, was an untreated alcoholic, had lied to the court, had engaged in stalking of the mother, had engaged in AUOC with in terms of stating negative and false reports as to the mother and the maternal grandmother, was likely continuing to drink, etc., could not be any more telling and conclusive in terms of adequate reasons to restrict the Respondent/father's residential time and decision making. It simply is unfathomable that a court could pass (accurate) judgment as it did on the father's frankly horrendous behavior in terms of character and modeling of dynamics for his children, and not impose restrictions on his time and decision making as to the children.

We ask this COA to reverse the trial court's decision as to the PP, OCS and denial of legal fees to the mother.

Next, in terms of specific reply and argument as to the final OCS, the father correctly notes that a trial court's award of CS is subject as well to the abuse of discretion standard. *State ex rel. J.V.G. v Van Guilder*, 137 Wn. App. 417, 423, 154 P.3d 243, 246 (2007). This case did in fact deal directly with a request as to a CS reduction and opposition to a request for a downward deviation. The COA held that "the trial court abused its

discretion by failing to consider the total financial circumstances of both households in denying the downward deviation and requiring the father to pay for private school without making a finding that he could afford to do so. We reverse and remand.” *Van Guilder* at 420. We agree with the *Guilder* court and point out that this case is on point with our own in that the mother argued below at trial and in her motion for reconsideration (CP 136, Mother’s Motion for Reconsideration) that she was facing a dire and impossible financial situation by having to pay such significant CS as ordered by the trial court; was already in arrears of nearly \$30,000 and mounting in legal fees that she could not afford to pay; that a deviation downward was clearly warranted given her own significant costs for the children in terms of having half time custody; and that the evidence was clear that the Respondent/father was voluntarily underemployed and as such should have his income levels imputed by the court at higher levels than his part time employment produced. We maintain thus that the trial court did in fact abuse its discretion where the record showed that the court did not consider all of the relevant factors and thus the CS award is unreasonable under the circumstances. *Van Guilder* at 423. There simply is no basis for the court to have awarded the Respondent \$676.15 in CS and denying the mother’s request for a significant downward deviation.

Finally as to the issue of mother's request for legal fees of \$24,000, the father cites *Kirshenbaum v. Kirshenbaum*, 84 Wn.App. 798, 808, 929 P.2d 1204 (1997) for the proposition that "A party must demonstrate that a trial court's decision to award (or not to award) attorney's fees constituted an abuse of discretion in order to prevail." The father's attorney argues that "there is nothing to demonstrate the trial court abused its discretion in deciding that both parties were responsible for their own legal fees. It is clear that the Appellant earns more money than the Respondent and that the Appellant has more ability to pay than the Respondent." The father again confuses, and/or misunderstands, and/or misstates the basis for the mother's appeal as to the denial of legal fees. While the father certainly has the ability to pay mother's legal fees based on the trial court's distribution of assets including the family home and retirement funds, the request for legal fees is based on the fraudulent, deceptive, intransigent behavior the father evidenced and which but for, no trial would likely have been required as outlined at length in the mother's initial appeal brief. It is again noted that the trial court's own oral ruling included extensive findings of fact on the court's part as to these very fraudulent, deceptive, intransigent, misleading duplicitous behaviors on the father's part that are the basis of the request for legal fees to the mother. In this COA's (Division I) own decision in *Burnard v. Burnard*, 2013 WL 223061

(Wash.App. Div. 1), the court noted at 2, “A court may award attorney fees for intransigence if one party’s intransigent conduct caused the other party to incur additional legal fees. Intransigence includes obstruction and foot dragging, filing repeated unnecessary motions, or *making a proceeding unduly difficult and costly.*” We believe that the evidence even from the trial Judge’s findings himself, that this is exactly what occurred (by the Respondent) in this case and that no trial would ever likely have occurred if the Respondent had been honest and did not perpetrate a fraud on the courts as occurred here. The mother’s request for legal fees should be granted.

We thank the court for its time and consideration of this reply brief.

Respectfully submitted this 1<sup>st</sup> day of January of 2014 by:



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