

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

No. 43812-7-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of
MCKAYLA SMITH,
Appellant,
and
MATTHEW SMITH,
Respondent.

RESPONDENT'S BRIEF

STEWART & STEWART
LAW OFFICE, INC., P.S.

FILED
COURT OF APPEALS
MONTESANO, WA
2013 OCT 22 PM 12:00
STATE OF WASHINGTON
CLERK

William J. Stewart
Attorney for Respondent
WSBA# 12843

101 First Street South
Montesano, WA 98563

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

360/249-4342

TABLE OF CONTENTS

	Page
A. Table of Authorities.	3
B. Introduction.	4-6
C. Statement of the Case	6-9
D. Argument.	9-16
E. Conclusion.	16-18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF AUTHORITIES

<u>Cases:</u>	Page
<u>Phillips v. Phillips</u> , 52 Wn.2d 879, 329 P.2d 833 (1958)	10
<u>Potter v. Potter</u> , 46 Wn.2d 526, 282, P.2d 1052 (1958)	10
<u>State v. Walton</u> , 64 Wn.App. 410, 415-1 6, 824 P.2d 533 (1992)	10
<u>State v. Cord</u> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985)	11
<u>State v. Armenta</u> , 134 Wn.2d. 1. 948. P.2d 128 (1997)	11
 <u>Statutes:</u>	
RCW 26.09.260	6
RCW 4.12.040	16
RCW 4.12.050	16
 <u>Exhibit "A"</u>	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

INTRODUCTION

Matthew Smith and McKayla Smith were formerly married and have two sons, Rhyllie age 6 and Colin age 10. They were divorced in Grays Harbor County Superior Court by a decree of dissolution dated August 15, 2008. This is Ms. Smith's fourth appeal. We address the matters on this appeal only.

The Mandate on Ms. Smith's previous appeal was issued on August 1, 2011. This Court vacated the August 7, 2009 Parenting Plan, the April 30, 2010 Parenting Plan, and the June 1, 2010 Order for Attorney Fees and Costs and ordered this matter be heard by a different Judge (this Court ruled that Judge David Edwards was divested of his authority to hear matters due to a timely affidavit of prejudice). This Court did NOT order a change of physical custody of the children from Mr. Smith to Ms. Smith in its Mandate. After entry of Division II's mandate, this matter came back to the trial court for a full testimonial proceeding.

1 After extensive testimony, review of the record, and
2 based on the best interest of the children, the Trial
3 Court (Judge Gordon Godfrey) issued a Parenting Plan
4 dated June 25, 2012.

5 In her pleadings to this Court, Ms. Smith appeals
6 the following:

7 1. July 11, 2011 Temporary Order;

8 2. August 1, 2011 Mandate;

9 3. August 1, 2011 Order Finding Adequate Cause;

10 4. June 25, 2012 Parenting Plan;

11 5. July 2, 2012 Denial of her Motion/Affidavit of
12 Prejudice against all three Superior Court Judges and
13 to Remove the Guardian ad Litem; and
14

15 6. July 9, 2012 Order Denying her Motion.

16 Preliminary Matter

17 Ms. Smith has not properly served her Brief upon
18 counsel, nor did Counsel ever receive the original
19 transcripts of the proceedings she is seeking to have
20 reviewed, despite being ordered by this Court's
21 Commissioner to deliver the same to Counsel for Mr.
22 Smith. Counsel received a document which appeared to
23
24

1 be a photocopy of a dog-eared transcript with corners
2 folded over and other issues making it impossible to
3 read the entire transcript. (Attached hereto as Exhibit
4 A is page 147 of copy of "transcript" supplied to
5 counsel for Mr. Smith, showing the dog-eared page
6 copied) It is this document and service to which we
7 objected. This Court's Commissioner ordered Ms. Smith
8 to properly serve her brief and transcript on us or
9 have her appeal dismissed. She still has failed to
10 serve an original transcript. Our motion on the merits
11 has been denied, so we are responding without ever
12 receiving a proper transcript. Our motion for striking
13 of her pleadings and/or dismissal is renewed.
14

15
16 STATEMENT OF THE CASE

17 The Trial Court may review the entire file and the
18 record in making its decisions.

19 A Temporary Order was entered on July 11, 2011,
20 prior to the issuance of this Court's August 1, 2011
21 Mandate. However, the Temporary Order was entered as
22 clarification until the Mandate did issue and an
23

1 evidentiary hearing could be held. The reason for Mr.
2 Smith's motion and the Court's July 11, 2011 entry of
3 the temporary order is as follows: After this Court
4 issued its ruling on Ms. Smith's appeal, but prior to
5 issuance of the Mandate, Ms. Smith had attempted to
6 change the doctors and health providers for the
7 children and had applied for State benefits claiming to
8 be custodial parent of the children. She was even able
9 to stop the DSHS Division of Child Support from its
10 collection efforts against her based on her flawed
11 understanding of this Court's ruling. The July 11,
12 2011 order confirmed the children's placement with
13 their father and also allowed visitations with Ms.
14 Smith pending further proceedings.
15

16
17 On August 1, 2011 the Mandate was issued by this
18 Court. The trial court held a testimonial hearing as
19 ordered in that mandate with a different judge. Judge
20 Godfrey heard extensive testimony before making his
21 decision. This issue is moot, the Court of Appeals
22 Mandate was issued and fully complied with by the Trial
23
24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Court.

The August 1, 2011 Order Finding Adequate Cause. This order was entered after years of investigations, testimony of previous hearings, the record and various appeals. Judge Godfrey specifically stated that he found adequate cause on August 1, 2011 (RP at pg. 18)

The June 25, 2012 Parenting Plan is the current parenting plan in effect and is a direct result of the trial and extensive testimony heard in this matter and should remain in place. The Court found changes in circumstances since the prior parenting plan and the existence of facts not known to the parties at that time. The psychological evaluation previously recommended by the Guardian ad litem and ordered by the Court, that Ms. Smith had failed to obtain, finally was obtained. Psychologist, Dr. Mark Whitehill did the evaluation and prepared a written report and testified at the hearing, all of which is part of the record herein. Dr. Whitehill disclosed psychological conditions needing long term therapy in order to allow Ms. Smith to co-parent the children.

1 (RP March 16, 2012 at pg. 35 line 19 through pg. 36.
2 and written report of Dr. Whitehill).

3 The July 2, 2012 Motion and Affidavit for and
4 Order to Remove the Guardian ad Litem is without basis.
5 Judge Mark F. McCauley specifically waived a written
6 report by the GAL. (November 3, 2008, RP pg 7 at line
7 24.) This issue was addressed in a previous appeal by
8 Ms. Smith. Judge Gordon Godfrey properly denied this
9 Motion on July 9, 2012.
10

11
12 ARGUMENT

13 The Trial Court does not and did not act in a
14 vacuum in its decision when drafting and entering the
15 June 25, 2012 Parenting Plan. This dissolution action
16 and follow up proceedings had been in the trial court
17 for several years. The Court reviewed the record
18 before it, heard extensive testimony and made its
19 decision appropriately.
20

21 If the Court of Appeals finds that the Trial Court
22 acted prematurely in entering the July 11, 2011
23 Temporary Order, any error was corrected or resolved by
24

1 the testimonial hearing (trial) and the entry of the
2 June 25, 2012 Parenting Plan. Both of the parties were
3 present, represented by competent counsel and testimony
4 was taken.

5 The trial court must be given great deference in
6 its decisions regarding credibility and quantum of
7 evidence. Appellate courts should defer to the trial
8 court, without a showing of abuse of discretion.
9

10 Both, *Phillips v. Phillips* 52 Wn. 879 329 P2nd.
11 853 (1958) and *Potter v. Potter* 42 Wn. 2d 52 282 P2d.
12 1052 (1958), cited by Appellant give support to the
13 trial Judge's ability to postpone or defer final entry
14 of a parenting plan. The trial court here did exactly
15 that by entering the final parenting plan dated June
16 25, 2012 after extensive testimony.

17 The court must give deference to the trier of
18 fact, who resolves conflicting testimony, evaluates the
19 credibility of witnesses, and generally weighs the
20 persuasiveness of the evidence. *State v. Walton*, 64
21 Wn.App. 410, 415-1 6, 824 P.2d 533 (1992). In
22 considering this evidence, "credibility determinations
23
24
25
26

1 are for the trier of fact and cannot be reviewed upon
2 appeal." Because the written record of a proceeding is
3 an inadequate basis on which to decide issues based on
4 witness credibility, "great deference. . . is to be
5 given the trial court's factual findings. It, alone,
6 has had the opportunity to view the witness' demeanor
7 and to judge his veracity." *State v. Cord*, 103 Wn.2d
8 361, 367, 693 P.2d 81 (1985).
9

10 The view of the Supreme Court is similar: "The
11 resolution by a trial court of differing accounts of
12 the circumstances surrounding the encounter are factual
13 findings entitled to great deference. *State v. Armenta*
14 134 Wn.2d 1. 948 P.2d 128 (1997).
15

16 RCW 26.09.260 gives the Court authority to modify
17 parenting plans if there has been a substantial change.
18 An Adequate Cause hearing was held and after some time
19 (mainly for the Guardian ad Litem to investigate and
20 report back to the Court) adequate cause was found on
21 August 1, 2011.

22 At trial on March 16, 2012, the Court heard from
23 the GAL of significant problems with Ms. Smith's
24

1 behavior, parenting and cooperation with Mr. Smith in
2 parenting. Her actions included violation of the Court
3 Order's restricting her decision making, throwing rocks
4 at Mr. Smith's vehicle during a visit transfer with the
5 children, posting naked pictures of the children on a
6 Facebook page she created in order to raise funds for
7 her legal costs, giving her middle finger at people in
8 the court, cursing at persons in the courtroom,
9 interfering with the children's medical and dental care
10 without good cause, refusing to follow medical advice
11 regarding vaccinations of the children (March 16, 2012
12 RP pg 121 at 19) and intentionally interfering with the
13 Father's phone contact and visits with the children.
14 (June 25, 2012 RP pg 6 at 19 through pg 4) Ms. Smith
15 was verbally abusive to the GAL, her staff and the
16 children's doctor's staff. (March 16, 2012 RP pg. 135
17 line 11). She further testified that Ms. Smith needs
18 therapy as outlined in the psychological report she had
19 continued to recommend and was finally obtained by Ms
20 Smith just before trial. (March 16, 2012 RP at 138 &
21 139) The GAL testified that she had no recurring
22
23
24
25
26

1 problems with Mr. Smith who had provided a loving
2 supportive home for the children the previous two years
3 and was capable of continuing to do so. (March 16,
4 2012 RP pg 140 at 15 through pg. 141). Most
5 importantly, the Guardian ad litem, Jean Cotton,
6 testified that Ms. Smith posed potential harm to the
7 children and had already caused harm and damage to the
8 children (March 16, 2012 RP at 146 at 13 through 147)
9 and that her continuing recommendation for residential
10 placement was for the two boys to reside with their
11 father with sole decision making by the father. (March
12 16, 2012 RP pg 146 at 6)

14 Ms. Smith's own stepfather, with whom she was
15 "very close" (March 16, 2012 RP at 178 at 19),
16 testified that she "did the best she could" as a mother
17 (testimony of Jim Clinton, March 16, 2012 RP at 188 at
18 19). He testified that he was not allowed to read the
19 psychological report on Ms. Smith, but thought his wife
20 had. (March 16, 2012 RP at 188 at 19). In light of the
21 psychologist's reports on her inability to see her own
22 shortcomings as a parent, accept direction, belief that
23

1 rules do no apply to her, etc., the "best she can"
2 comment is very telling. In fact, the Judge's oral
3 ruling commends her on obtaining the psychologist
4 report and her decision to do so was a good first step
5 at getting the help to become an able parent. (March
6 16, 2012 RP pg 320 at 4 through pg 321 at 15) (March
7 16, 2012 RP pg 329 at 16)
8

9 Ms. Smith's mother testified that she had not been
10 provided a copy of Ms. Smith's psychological report,
11 nor had she read it, nor had anyone told her of any
12 concerns voiced in that report (March 16, 2012 RP at
13 218 at 16. She further testified that issues raised
14 about Ms. Smith in the psychologist's report would be
15 concerning to her. (March 16, 2012 RP at 225 at 8
16 through 23). She also testified that Ms. Smith
17 believed it was normal to strip the boys to examine
18 them after visits with their father. (March 16, 2012 RP
19 at 225 at 24 through 226 at 8)
20

21 The Court took extensive testimony. The
22 testimonial hearing and findings of fact and
23 conclusions of law and parenting plan detail a history
24

1 of non-compliance, inappropriate behavior and active
2 sabotage of co-parenting by Ms. Smith. The Judge found
3 she had engaged in "extremely detrimental behavior"
4 (March 16, 2012 RP pg 319 at 1) and a "litany of
5 behavior of substantial change of circumstance"
6 (March 16, 2012 RP pg 319 at 1).

7
8 The trial court did exactly as allowed and
9 prescribed in cases and statutes cited by Appellant and
10 directed by the Court of Appeal's Mandate. Ms. Smith,
11 represented by able counsel, got an unbiased hearing of
12 the pertinent facts with testimony given, evidence
13 presented and a proper decision reached. The court
14 specifically set out those steps (June 25, 2012 RP pg 8
15 at 14).

16 Disqualification of all three Superior Court
17 Judges. The affidavits of prejudice were denied
18 properly on July 9, 2012 by Judge Gordon Godfrey as to
19 himself and Judge F. Mark McCauley. It is moot to
20 address the affidavit of prejudice with respect to
21 Judge David Edwards. In the previous appeal the
22 affidavit of prejudice against Judge Edwards was
23

1 upheld. He has heard no further matters in this case.
2 Ms. Smith was entitled to one affidavit of prejudice,
3 (RCW 4.12.040, 4.12.050) she used it, removing Judge
4 Edwards from the case.

5 Attorney's Fees. The court found on July 2, 2012,
6 that Ms. Smith's motion was frivolous and that Mr.
7 Smith was entitled to Attorney's fees and costs and
8 Guardian ad litem fees, but refrained from ordering
9 them. With there being no merit to her appeal,
10 Attorneys fees, costs and the Guardian ad litem's fees
11 should be assessed against McKayla Smith.
12

13
14 CONCLUSION

15
16 The Appellant's Brief was not properly served upon
17 counsel, nor were proper official transcripts provided
18 for the issues that are on review. This matter went to
19 trial on remand, with testimony being taken, and
20 evidence entered. Based on a significant change of
21 circumstance and discovery of additional facts that
22 were unknown to the parties and to the Court at the
23

1 time of entry of the previous Parenting Plan the Court
2 determined that the children should be in the
3 residential with their father, Matthew Smith. Testimony
4 clearly showed detriment to the children living with
5 their mother. Findings of Fact, Conclusions of Law were
6 entered and a parenting plan was drafted by the Court
7 and entered. Ms. Smith is now trying to hear all
8 three previous appeals, this new one, and beyond.

9
10 A close review of Dr. Whitehill's report and
11 testimony by telephone at the testimonial hearing
12 (Trial) is very enlightening. Ms. Smith has serious
13 psychological issues that will make it difficult or
14 impossible for her to accept any Court's decision.
15 Without long term and extensive psychological therapy,
16 she can't accept her own short comings. She won't
17 listen to advice, and does not believe rules apply to
18 her. In the meantime two children have suffered due to
19 their mother's actions, see testimony of Guardian ad
20 Litem Jean Cotton (March 16, 2012 RP pg 146 at 17
21 through pg 147 at 14).

22
23 The Court conducted a full evidentiary hearing and
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

made findings of facts, reached conclusions of law and established a new parenting plan. Sending this matter back for a hearing that has already occurred is not an effective or efficient use of either Court's time, nor is there any legal support for doing so. This appeal should be dismissed.

Respectfully submitted,



WILLIAM J. STEWART/WSBA 12843

Attorney for Matthew Smith

EXHIBIT

"A"

1 much money, they are like a lot of folks
2 hard by this economy. So the resources t
3 available to get these kids, help are li
4 until these two bury the hatchet, these boys are re
5 at risk. The constant CPS referrals, they have been
6 through the examinations by doctors and law enforcement
7 and social workers, the tugging and pulling can't be
8 healthy, and we see the damage in court, in juvenile
9 court every week, I don't want to see that for these
10 two little boys, and i think the more stable home right
11 how is Mr. Smith's. I am not saying that Miss Smith's
12 home couldn't be the most stable home in the future,
13 but for right now, and for the last two years, it's
14 been Mr. Smith.

15 MR. STEWART: Thank you. That's all I have.

16 MS. GLORIAN: Yes, Your Honor.

17

18

19

20

21

22

23

24

///

25

CROSS EXAMINATION

JEAN Cotton/Cross by Ms. Glorian

STEWART & STEWART LAW OFFICE, INC., P.S.

101 FIRST STREET SOUTH
MONTESANO, WASHINGTON 98563

WILLIAM J. STEWART

JAMES M. STEWART (Retired)

TELEPHONE NO. (360) 249-4342

FAX NO. (360) 249-6068

RECEIVED
OCT 22 2013

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

October 21, 2013

Washington State Court of Appeals
Division Two
Attn: David C. Ponzoha
950 Broadway, Suite 300
Tacoma, WA 98402-4454

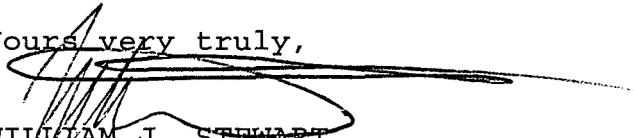
RE: #43812-7-II - Smith

Dear Mr. Ponzoha:

Enclosed for filing with the Court of Appeals in the above referenced matter please find the Respondent's Responsive Brief.

If you have any questions regarding this do not hesitate to contact me.

Yours very truly,


WILLIAM J. STEWART
STEWART & STEWART LAW OFFICE

WJS/cas

Enclosure:

cc: McKayla Smith, Appellant
Jean Cotton, Guardian ad Litem
Matthew Smith, Respondent