

NO. 44037-7-II [ACCELERATED]

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

In re the Marriage of:

BANDANA WAIKHOM,

Appellant.

v.

JOHN WALLACE LUCKWITZ,

Respondent.

REPLY BRIEF

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INTRODUCTION

This is not about Luckwitz. It is about S, and S is in crisis. S markedly declined when Luckwitz's visitation changed to one-week blocks each month. Everyone but Luckwitz, including S's therapist, psychiatrist, and school principal agree that S is suffering tremendously due to this change in the residential schedule. Luckwitz's dismissive handling of this point requires its repetition – multiple professionals, neutral third-parties with no stake in this matter other than their care and concern for S, agree that the current residential schedule is damaging S immensely.

The theme of Luckwitz's response is the accusation that Waikhom is attempting to remove him from S's life. BR 1, 12, 24, 37. But the parenting evaluator and parenting coordinator agree that Waikhom genuinely wants S to have a healthy relationship with Luckwitz. CP 50, 205. This is just one of many instances in which Luckwitz's assertions are supported only by his own conjecture and speculation, and contradict the opinions of the professionals involved in S's care.

Yet Judge Gonzales found adequate cause lacking. And although S and every witness but Luckwitz live in Ohio, Judge Gonzales refused to decline jurisdiction. This Court should reverse.

REPLY STATEMENT OF THE CASE

A. Parenting evaluator Clarke and S's providers all agree that the residential schedule is harming S.

When Luckwitz's visitation changed from every other weekend to one-week blocks each month, S's emotional and behavioral health "markedly" declined. CP 157-169, 203. S's decline and its cause were "clearly documented." CP 157. S "has been suffering tremendously under the strain of the existing [residential] arrangement." CP 159.

Dr. Sarah Knox (S's therapist), Jennifer Aquino (S's principal), Waikhom and others worked extensively to stabilize S's behavior, but he could not sustain any improvement. CP 149, 158-59. S eventually was expelled, a "severe" and reluctant action by his school. *Id.* S's loves his school – his "refuge" – making "his inability to control his behavior during the last few years all the more striking." CP 149, 158.

While the trial court faulted Waikhom for failing to provide information from Knox, Aquino, and others, parenting coordinator Brett Clarke's reports summarize their "unanimous opinion" that the current residential schedule is causing S's decline. CP 159-60,

451-57; 489-500.¹ Clarke explained that “the constant shifting from mother’s world to father’s and back again” is a “repeated loss[]” of his parents S simply cannot tolerate. CP 158-59. This is not about S “gaining his independence as he grows older and . . . questioning authority.” BR 11. S “has suffered internally and been developmentally crippled in recent years.” CP 159.

Luckwitz falsely claims that Knox and Aquino “apparently both stated that it was the conflict between the parents that was causing S.L. distress,” but switched positions, later citing the residential schedule. BR 11. Knox and Aquino never opined that parental conflict is causing S’s turmoil, but have always maintained that the residential schedule is damaging S. *Compare* BR 11 *with* CP 158-60. And Judge Gonzales never accused Knox and Aquino, or anyone else involved in S’s care, of taking a “quantum leap.” *Id.* Rather, Judge Gonzales used this term to describe his own failure to see the connection between the residential schedule and S’s downward spiral, despite the unanimous and uncontroverted opinion of every expert involved in S’s care. *Compare* BR 11 *with* 6/15 RP 10-11.

¹ Clarke plainly had court-ordered authority to provide a report summarizing these opinions and to recommend parenting-plan modifications. *Supra*, Argument § C.

Before the trial court, Luckwitz conceded that S's circumstances have substantially changed, but blamed Waikhom. CP 171-73. Here, Luckwitz agrees that S's "emotional and behavioral health has changed," but argues that Waikhom causes S's distress by refusing to communicate with Luckwitz. BR 11-12.² Every professional involved in S's life disagrees that Waikhom is the cause. CP 158-60, 451-57, 489-500. Waikhom is not perfect, but "[n]o one involved professionally with this family believes that [Waikhom] is the primary problem in [S's] ongoing troubles, or that her contribution is in any way comparable to [Luckwitz's]." CP 493. And while Luckwitz continues to complain that Waikhom wants to "minimize his role on S.L.'s life," he ignores and contradicts neutral third-party evidence that Waikhom wants S to have a healthy relationship with Luckwitz. *Compare* BR 12 with CP 50, 467, 493.³

² Luckwitz ignores that his abusive behavior is the source of Waikhom's need to draw clear boundaries and limit direct communication. BA 11-12.

³ Luckwitz references a contempt motion he filed "expressing concern" that Waikhom was trying to "thwart" his relationship with S, stating that the motion "was apparently never resolved." BR 7-8. That is false. This motion was about Waikhom's inability to give Luckwitz personal contact information for a childcare provider, against the childcare agency's policy. CP 533-37. The court ruled in Waikhom's favor. CP ___ Sub. No. 399. (To avoid delaying this accelerated matter, Waikhom files a Supplemental Designation of Clerk's Papers along with this Reply).

B. S markedly declined after Luckwitz started one-week per-month visitation under the current residential schedule.

Luckwitz claims that S's behavioral and emotional problems are not "new," where S "exhibited some problems at school" in 2009. BR 10. When Waikhom and S relocated to Ohio in August 2008, S naturally went through a period of adjustment to his new home and school, and to his parents' divorce. CP 45, 48. S became very close to Aquino, loved his school, and improved over time. CP 157-58. Although the adjustment was not easy, it was not "out of the range' of that typically observed." CP 48.

The parties have long known that S faces some emotional challenges that most children do not face (CP 15, 29), but it was not until S's visitation with Luckwitz changed to one-week blocks each month that S declined so much that he cannot control himself in a socially appropriate fashion. CP 158-59. This is as "new" as it is "striking." CP 149, 157-58.

Luckwitz's current position that S's behavior has not changed is inconsistent with his own prior descriptions of S. *Compare* BR 10 *with* CP 28-29.⁴ In the 2009 parenting evaluation,

⁴ Luckwitz agrees that S's circumstances have substantially changed, but blames Waikhom. CP 171-73.

Luckwitz (and Waikhom) described S as a shy child who tested boundaries in an age-appropriate manner. CP 28-29. Luckwitz called S “generally . . . positive,” and “easy to deescalate” when upset. *Id.* That is not a child who gets expelled from his beloved school for “disciplinary issues.” CP 153.

C. Clarke had broad court-ordered authority to talk to S’s providers, compile a report, and recommend parenting-plan modifications.

Crucial to this Court’s understanding of this matter is that Clarke was, among other things, specifically authorized: (1) to gather information from Aquino, Knox, and other professionals; (2) to speak with these providers *ex parte* and disclose their communications; (3) to file reports; and (4) to recommend parenting plan modifications. CP 66-67, 111-12; RP 6; BR 7, 10. Luckwitz agrees that “Clarke could make recommendations ‘for new or modified parenting provisions’” BR 7 (quoting CP 66); BR 10. Judge Gonzales “acknowledged [Clarke’s] authority to report information from [S’s] providers.” BR 31 (citing RP 25-26).

ARGUMENT

A. This matter should be resolved in Ohio, where Waikhom and S have resided for the last four years.

As addressed in the opening brief and below, Washington is an inconvenient forum, due in large part to the fact that Waikhom and S have resided in Ohio for four years, a result of which is that all evidence relevant to Waikhom's petition (and Luckwitz's cross-petition), except Luckwitz's testimony, is located in Ohio. BA 26-35. Luckwitz ignores most of Waikhom's arguments. BR 18-23. When he briefly addresses the statutory factors, he primarily recites the trial court's findings as if they were unchallenged. BR 21. The Court should reject this unpersuasive, but telling tactic. BA 25-35.

Luckwitz's principle argument has nothing to do with the controlling statute, RCW 26.27.261. BR 21-22. He argues that a different section of the UCCJEA, RCW 26.27.211, "presumes that a court can and should retain jurisdiction so long as at least one parent continues to reside in Washington, regardless of the absence of the child and the other parent from the state." BR 21-22.⁵ RCW 26.27.211 says no such thing – it sets forth the

⁵ Waikhom moved to transfer jurisdiction twice. BA 20-21. Luckwitz's opening remark that Waikhom has sought a transfer "[e]very year since the parenting plan was entered" is misleading. BR 18.

circumstances in which a Washington court that has made a child custody determination, or that has continuing jurisdiction over a child custody determination, loses its jurisdiction. But Waikhom never argue that Washington lost its jurisdiction, she asked the court to “decline to exercise its jurisdiction” where Washington “is an inconvenient forum under the circumstances and [Ohio] is a more appropriate forum.” RCW 26.27.261(1). Thus, RCW 26.27.261, not RCW 26.27.211 applies.

1. S has resided in Ohio for four years, heavily favoring Ohio Jurisdiction.

The length of time S has resided outside of the State weighs heavily in favor of Ohio jurisdiction.⁶ RCW 26.27.261(2)(b). Nine-year-old S was only five when he moved to Ohio, so had not even begun school in Washington. CP 147-48, 203. He has lived in Ohio for most of his life, and his only contact with Washington is some brief vacation time with Luckwitz. CP 147-48.

2. Luckwitz’s significant contacts with Ohio favor Ohio jurisdiction.

The considerable distance between Ohio and Washington favors Ohio jurisdiction. RCW 26.27.261(2)(c). Waikhom and S

⁶ Factors (a) and (e) are inapplicable here. BA 28.

reside in Hamilton County, Ohio, where this matter would be heard if transferred. CP 204-05. Luckwitz also maintains a Hamilton County residence, residing there one-week-per-month. CP 158, 203, 205. Both parties are from Ohio and have extended family there. CP 203.

3. The parties' financial resources minimally favor Ohio jurisdiction.

The parties' relative financial resources minimally favor Ohio jurisdiction. BA 30-31; RCW 26.27.261(2)(d). Although the parties both have "substantial income," it is far more difficult financially and otherwise for Waikhom to litigate in Washington than it is for Luckwitz to litigate in Ohio. BA 30-31.

Luckwitz asserts that it would be more expensive to litigate in Ohio, where the parties would have to obtain new counsel. BR 23. It would not take much for counsel to "come up to speed," where this is a modification motion, so the issue is changes in S's life occurring over the last 2.5 years. BR 23. And any increased legal fees would quickly be offset, and likely exceeded, by the cost to Waikhom of litigating in Washington, including travel, renting a hotel, procuring Ohio witnesses, and the like. BA 30-31.

4. The nature and location of the evidence required to resolve the modification heavily favors Ohio jurisdiction.

Knox, Aquino, Clarke, and all the other professionals involved in S's life agree that Luckwitz's visitation is causing S's decline. CP 158-61, 451-57, 489-500. Their testimony is plainly crucial to Waikhom's modification petition, as evidenced by the trial court's complaint that he did not hear directly from these witnesses. CP 447; RP 4, 9, 30. These witnesses all live in Ohio, as do S's paternal and maternal grandparents, and other family and friends. CP 203, 204, 205-06.

Even the evidence relevant to Luckwitz's counter-petition is located in Ohio. BA 33. The only evidence located in Washington is Luckwitz's testimony, but he maintains a residence in Ohio and resides there one week each month. CP 157-58, 203.

It is "highly unlikely" that critical witnesses, including S's doctors, therapist, and school personnel, would voluntarily testify in Washington. CP 206. Procuring their testimony would be "extremely difficult and expensive," and may even be impossible. CP 182-83, 205-06.

Largely ignoring Waikhom's argument on this point, Luckwitz

argues that “distance concerns can be alleviated by applying the communication and cooperation provisions of [RCW 26.27.111] and [RCW 26.27.121].” BR 22 (quoting Comments, UCCJEA (1997) § 207, brackets theirs). Again, telephonic and electronic testimony is not nearly as effective as live testimony and Waikhom has no subpoena power over unwilling witnesses in any event. BA 32.

Luckwitz also argues that distance cannot be a factor where Waikhom has “led in part” “continuous litigation” in Washington. BR 22; *see also* BR 23. Waikhom cannot be faulted for litigating in Washington where both parties and the child lived when the dissolution was filed. And the court denied her prior motion to decline jurisdiction, so she had no choice but to proceed here. In any event, the issue is inconvenience, not impossibility. RCW 26.27.261.

In short, nearly all of the evidence is located in Ohio, strongly favoring Ohio jurisdiction. The trial court plainly erred in criticizing Waikhom for failing to provide more direct evidence from Ohio witnesses, yet refusing to consider Clarke’s report.

5. Each State's ability to decide this matter and familiarity with the matter are neutral factors.

Each State's ability to decide the modification petition is a neutral factor. RCW 26.27.261(2)(g). Waikhom provided evidence that proceeding in Ohio is "relatively simple" and that Ohio will expeditiously and capably resolve this matter. BA 33-34; CP 213-14. Luckwitz does not respond.

Again, Washington is not "more familiar" with this matter. BA 33-35; BR 21. A modification is a new proceeding, based on new circumstances that arose since the final dissolution papers were entered. Even though a modification relates to the dissolution, the dissolution case was never actually tried, where the parties resolved everything by agreement before trial. No Washington court has heard live testimony. Judge Gonzales began presiding over this matter after Waikhom filed her modification petition. CP 81, 141, 446-48.

In sum, the statutory factors are either neutral or strongly favor Ohio jurisdiction. This Court should reverse.

B. Waikhom proved adequate cause (and much more).

When S first moved to Ohio in August 2008, his adjustment to his new home and school, and to his parents' divorce, was naturally difficult, but also "typical." CP 48. S improved "over time,"

but markedly declined in fall 2010, after Luckwitz started one-week per month visitation under current residential schedule. CP 48, 148-49, 157, 158-59. Try as he might, Luckwitz cannot overcome the simple fact that Knox, Aquino, Clarke and other professionals involved in S's care agree that S is in crisis and that the current residential schedule is causing his "marked decline." *Id.* This is not a matter of Waikhom's perception versus Luckwitz's perception – everyone but Luckwitz agrees that S is in crisis and that he simply cannot sustain the current residential schedule.

Luckwitz agrees that "there has been [a] substantial change in circumstances affecting [S's] health and welfare," and speculates that it is S's home environment with Waikhom that is detrimental. BR 29; CP 172. Indeed, Luckwitz convinced Judge Gonzales that Luckwitz could not be the cause of S's turmoil because he has less residential time than Waikhom:

[The Court] But I don't see how you can connect behavioral problems for this child, who will be nine this summer who's having all these issues at school while spending the majority of the time with the mother, and how can you blame the father for that?

RP 10. It grossly oversimplifies this matter to say that S's turmoil is simply a matter of where he spends most of his time.

Contrary to Luckwitz's assertions, there are well-documented concerns that his home environment is detrimental to S. *Compare* BR 27 with BA 23, 41; CP 160. Although S enjoys his time with Luckwitz "in some respects," he is also "afraid" of Luckwitz, feels manipulated by him and mistrusts him. CP 160. S feels that Luckwitz needs to be taken care of and that he cannot handle time away from S. *Id.* Luckwitz isolates S, tells S his negative views of others, and encourages S to distrust those are trying help him. *Id.*

But Waikhom's principle argument is that it is the residential schedule that is damaging S, not Luckwitz's home environment in and of itself. BA 37-40. Clarke, Aquino, Knox, and other professionals involved in S's care agree that the residential schedule is causing S's "behavioral difficulties." CP 157-60. Clarke could not have been clearer (CP 159-60, *emphasis in original*):

[The professionals involved in S's life agree that] the existing arrangement has been harmful, and that [S]'s behavioral difficulties at school over the course of the past two years have been evidence of this.

...

[I]t is the unanimous opinion of the professionals involved with [S] that the existing arrangement is emotionally and psychologically unsustainable for this child.

And again, “behavioral difficulties” does not capture the extent to which S “has suffered internally and been developmentally crippled in recent years.” CP 159. All except Luckwitz agree that S “has been suffering tremendously under the strain of the existing [residential] arrangement.” CP 159.

When Luckwitz is not blaming Waikhom, he blames S, stating it is “not the father’s fault” that S is “‘so sensitive’ that he could not handle ‘everyday stresses.’” BR 29-30 (quoting RP 26-27). S is not just “sensitive” – he deals with a number of challenges including Sensory Processing Disorder. BA 12; CP 49. And the current residential schedule is not an “everyday stress[.]” – shifting between his parents homes is a shift between two entirely different worlds. *Compare* BR 30 *with* CP 158-59. This shifting is a “repeated loss[.]” of his parents that S simply cannot tolerate. *Id.*

As if Waikhom does not challenge them, Luckwitz relies on the trial court’s incorrect conclusions that Waikhom “failed to connect [S’s] purported deteriorating behavior at school with the residential schedule.” BR 26. Waikhom’s entire point is that the trial court abused its discretion in finding an inadequate link between the residential schedule and S’s decline, where Clarke’s report documents the unanimous opinion of the experts involved in

S's life that the residential schedule is harming S. BA 35-40. The only way to conclude that "there was no evidence that [S's] behavioral issues were related to the current residential schedule" is to completely ignore Knox, Aquino, Karakostas (S's psychiatrist), Waikhom and Clarke. *Compare* BR 24 (formatting omitted) *with* BA 35-40.

Finally, Luckwitz incorrectly claims that Judge Gonzales "simply did not find the purported opinions of the 'experts' credible." BR 28. This is simply false. The trial court did not make any credibility determinations. (citing CP 447; RP 4, 9-10, 12).

Waikhom established adequate cause, but the trial court set the bar far too high. This Court should reverse.

C. Clarke's reports and recommendations were well within his broad court-appointed authority.

Judge Gonzales read, but erroneously refused to consider Clarke's May report, which was plainly within his court-ordered authority to report information gathered from S's providers and to recommend parenting-plan modifications. BA 40-42; CP 66-67, 443-44; BR 7, 31. Judge Gonzales also erroneously struck Clarke's July 2012 letter on the ground that it contained new evidence that could have previously been submitted, where Judge

Gonzales ordered Clarke to provide the new report, and where it was entirely consistent with his May report. BA 40-42; CP 157-60, 444, 453, 504.

Luckwitz argues that that the trial court had discretion to place little weight on Clarke's May report. BR 31. But this is not about weighing Clarke's report – there was no competing expert testimony. Every expert agreed that S is suffering tremendously because of the current residential schedule. CP 158-60. Luckwitz – the only person who disagrees, offered nothing other than speculation and conjecture.

The Court refused to consider Clarke's May report having found (1) that Clarke exceeded his authority; (2) that Clarke's "duty" was to help the parents, not to "conduct investigations"; and (3) that "recommending modification of the residential schedule was not the type of report that [Clarke] was authorized to provide." BR 15, 31. Each of these rationales is fundamentally incorrect. BA 40-42.

Luckwitz agrees that Clarke has court-ordered authority to recommend parenting-plan modifications. BR 7. Judge Gonzales "acknowledged [Clarke's] authority to report information from [S's] providers." BR 31 (citing RP 25-26). In other words, Clarke can do exactly what he did – talk to S's providers, share their information

with the court, and recommend parting-plan modifications. *Supra*, Statement of the Case § C. Thus, it is unreasonable and untenable to conclude that recommending a residential-schedule modification “was not the type of report” Clarke could make. BR 31. One plus one really does equals two.

Recommending something the Luckwitz does not like does not make Clarke “somewhat . . . non-neutral.” BR 31. Every professional involved in S’s care opined that the residential schedule is causing S’s marked emotional and behavioral decline. *Supra*, Argument § B. Clarke agreed. *Id.* Luckwitz complains that he is being blamed, but this is not about him. BR 10.

Luckwitz’s argument that the trial court correctly rejected Clarke’s July report ignores two obvious points – (1) Clarke provided the same information in his May report; and (2) his second report was exactly what Judge Gonzales ordered “a report” that “[p]rovide[s] information as to why [Clarke] thinks [S] is in turmoil.” *Compare* BR 32-33 *with* CP 444 and BA 41-42. Clarke’s July report could not have “been available to the parties” when Waikhom moved to modify – it was submitted in response to the court’s order. *Compare* BR 32 (quoting CP 522) *with* CP 444, 460. The only thing new about Clarke’s July report was the report itself, not the

information in it. BA 41. It is unreasonable and untenable to direct Clarke to submit a new report with more information about S's decline, and then strike the report because it is "new."

D. Ordering the parties to communicate more would likely harm S.

Everyone involved in S's care, other than Luckwitz, agrees on four crucial points:

- ◆ S's marked decline is primarily caused by the change in the residential schedule. CP 149, 157-60, 452, 491.
- ◆ The parties' lack of communication is not the cause S's decline. CP 453, 495.
- ◆ Trying to facilitate better communication between the parties will not work (and would have already been implemented if it were possible). CP 452.
- ◆ Increased communication could harm S. CP 452.

Waikhom provided uncontested evidence (1) that Luckwitz's emotionally abusive, domineering, and controlling behavior has caused the parties' communication problems; (2) that Luckwitz will use any court-ordered communication with Waikhom to involve her in an abusive cycle; and (3) that Luckwitz is unaware of his abusive behavior and shows no interest in understanding or changing it. CP 453. This alone mandates against increased communication. Waikhom tries to communicate with Luckwitz in a civil, conciliatory, and factual manner. CP 453. She cannot be forced to do more

and S “would be immune to any phoniness, even if [more communication] were possible.” CP 494.

Luckwitz ignores these points. *Compare* BA 42-44 *with* BR 34-35. He blames Waikhom, claiming that S is aware of, and negatively impacted by, her refusal to communicate with Luckwitz. BR 34-35. Waikhom does not disagree that S is attuned to conflict between the parties, but Luckwitz again misses the point. S’s awareness of the parties’ inability to communicate is not the cause of his decline, nor would increased communication help him. BA 43-44 (citing CP 149, 157-60, 452, 491). As unfortunate as it may be, requiring these parties to talk more will likely harm S. CP 452. No one but Luckwitz disagrees. *Id.*⁷ This Court should reverse.

E. The Court should deny Luckwitz’s fee request.

Luckwitz asserts that Waikhom’s appeal is frivolous, and asks this Court to award fees. BR 36-37.⁸ Luckwitz plainly fails to satisfy the very high standard of proving that there are “no

⁷ Luckwitz asserts that his own conclusions are consistent with the parenting evaluator’s report, filed during the dissolution, stating that S believed that Waikhom did not wish to speak to Luckwitz. BR 34. But the parenting evaluating was not addressing S’s emotional and behavioral decline, which was not yet at issue. CP 43. Rather, he was simply documenting S’s awareness of his parents’ conflict, which no one denies.

⁸ Luckwitz argues that Waikhom waived her challenge to the attorney fee award, but apparently missed the argument on this point in the opening brief. *Compare* BA 34 *with* BR 35-36.

debatable issues upon which reasonable minds might differ” and that the matter “is so totally devoid of merit that there was no reasonable possibility of success.” *In re Recall of City of Concrete Mayor Robin Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003).

Discretion can be abused, and it was here. The statutory factors plain favor Ohio jurisdiction. *Supra*, Argument § A. And the primary bases for Judge Gonzales’ adequate cause determination are false: S’s providers agree that the residential schedule is harming S and Clarke had court-ordered authority to recommend parenting-plan modifications, as Luckwitz agrees. *Id.* at §§ B and C; BR 7; CP 66.

CONCLUSION

For the reasons stated above, this Court should reverse.

RESPECTFULLY SUBMITTED this 24th day of January, 2013.

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