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Division II
State of Washington
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50889-3-II

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

YONATHAN HUTAGALUNG,
Respondent,

v.

JENNIFER BARNETT,
Appellant.

BRIEF OF RESPONDENT

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II. INTRODUCTION

The appellant's request for review of court orders entered several months before the appeal is untimely and without merit.

There was no request to exclude the Guardian ad Litem (GAL) report, which was admitted without objection.

The father, Yonathan Hutagalung, met his burden of proof that the prior parenting plan resulted in a detrimental environment for the children (in mother's home). The Court did not err in granting his petition to modify the parenting plan.

III. STATEMENT OF THE CASE

When the parties divorced in Washington County, Oregon, in May 2008, that Court entered an order providing that their children should reside primarily with the mother, Jennifer Barnett. **Ex 2.**

Thereafter the State of Oregon opened dependency actions to protect the children upon substantial evidence of mother's substance abuse and domestic violence. **Ex 3.** These actions were subsequently dismissed. The mother and children later relocated to Washington State.

In Summer 2016, Barnett began to conceal the children from the father. She notified him by text message “you will never see my children again” **Ex 4**.

On September 20, 2016, Hutagalung filed in Pierce County Superior Court a petition for modification of the Oregon parenting plan, alleging that the children’s current living situation was detrimental to their physical, mental or emotional health and that Barnett was not following the prior order. The Court entered an ex parte order requiring the parties to follow the provisions of the Oregon parenting plan pending a hearing, noting that the mother participated in the hearing by telephone and refused to provide her address. **CP 64-67**.

On October 11, 2016, Barnett petitioned in New Mexico for a domestic violence protection order against Hutagalung. **Ex 5**. The New Mexico Court scheduled a hearing for November 7, 2016, and issued an ex parte temporary protection order in effect until the hearing. The hearing scheduled for November 7, 2016, was continued and the court issued a temporary protection order until the new hearing date, December 1, 2016. At that time, the New Mexico Court found and included in its temporary order that *“it appears that Washington State is the children’s home state”* and

ordering that the *"parties shall follow orders of Washington State regarding the children."* **CP 299.**

On November 29, 2016, the parties appeared in Pierce County Superior Court for a hearing to determine whether Barnett was in contempt of the existing parenting plan and whether there was adequate cause to proceed with Hutagalung's petition to modify the parenting plan and issue temporary orders. Barnett appeared at that hearing and supplied an untimely written response. The Court granted a three-day continuance of the hearing, to December 2, 2016, to allow Hutagalung opportunity to review and reply to Barnett's written materials. Hutagalung was authorized to immediately visit with the children, whom Barnett had brought to court with her. **CP 439-440.**

Barnett's New Mexico petition for domestic violence protection order was dismissed and the temporary protection order terminated on December 1, 2016.

When the parties re-appeared in Pierce County Superior Court for the hearing on December 2, 2016, the Court found Barnett in contempt of both the 2008 parenting plan issued in the State of Oregon as well as the ex parte order issued by Pierce County Superior Court on September 20, 2016. **CP 179-184.** The Court

further found adequate cause to proceed with Hutagalung's petition for modification of the parenting plan (**CP 176-178**), issued a temporary parenting plan placing the children in Hutagalung's primary care (**CP 185-192**), and authorized the appointment of a Guardian ad Litem (GAL) (**CP 196**).

The GAL conducted an investigation and issued a report on May 17, 2017. **Ex 1, CP 1-35**. Barnett filed a motion to continue the May 30, 2017, trial date, alleging the GAL's report was untimely and she needed additional time to prepare. **CP 244-250**. During oral argument on the morning of trial, Barnett requested a two-month continuance. **CP 305, 311**. The Court granted her motion and continued the trial date to August 3, 2017. **CP 310-312**.

The next day, May 31, 2017, Barnett filed another petition for domestic violence protection order, under Pierce County Superior Court cause no. 17-2-01591-7. **Ex 8**.

Then, on June 1, 2017, Barnett filed a motion seeking to have Hutagalung held in contempt of the temporary orders. **CP 270-274**.

Then, on June 5, 2017, Barnett filed a motion for a temporary parenting plan, transferring children back to her primary care. **CP 275-285**. Her petition for domestic violence protection order and motions were each denied.

After a two-day trial August 3 and 7, 2017, Pierce County Superior Court Judge Kitty-Ann van Doorninck found that there had been a substantial change in circumstances following entry of the 2008 Oregon parenting plan and that the children's environment under that parenting plan is detrimental to their physical, mental or emotional health. **CP 376, 494.** The trial court further found that Barnett lacked credibility, that she engaged in abusive use of conflict and that she has a long-term emotional or physical problem that interferes with her ability to parent. **CP 377-378, 487,490, 492.**

Based upon these findings, the Court issued orders modifying the final parenting plan and placing the children in Hutagalung's primary care. **CP 375-379, 382-394.**

IV. SUMMARY OF ARGUMENT

Appellant provided no authority or argument in support of her assignments of error 2, 4, 5 and 9.

As to assignments of error 1 and 7, the trial had authority and did not violate the Full Faith and Credit Clause by entering orders regarding the children's residential schedule/parenting plan in November and December 2016.

As to assignment of error 3, Barnett never requested the GAL report by excluded from evidence. Further, she was not prejudiced, as the trial court entered an order continuing the trial date to allow her additional time to prepare for trial after the report was issued.

As to assignment of error 6, Barnett has not described how the trial court allowed pleadings to be proof at the time of trial.

Finally, as to assignments of error 8, 10 and 11, it was not an abuse of discretion for the trial court to find that the children's environment under the Oregon parenting plan was detrimental to their physical, mental or emotional health and enter an order modifying the parenting plan.

V. ARGUMENT

A. Foreign Protection Order.

Barnett alleges that the Court should apply a *de novo* standard of review because this case involves a question of law. However, Barnett asserts no question of law.

The Court did not violate the Full Faith and Credit Clause when allowing Hutagalung residential time with the children prior to dismissal of the New Mexico temporary protection order. First, the Pierce County Superior Court orders entered on November 29 and

December 2, 2016, did not conflict with the New Mexico Court order, which properly ceded subject matter jurisdiction regarding the children to Washington State:

Parties shall follow orders of Washington State regarding the children. [...]

Parties shall follow all orders from Washington State Court regarding long-term custody issues. [...] It appears that Washington State is the children's home state.

Temporary Order of Protection, State of New Mexico, Bernalillo County. CP 298-300.

The New Mexico Court properly recognized that, pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), it would be improper for New Mexico to assert jurisdiction regarding the children's custody other than temporary emergency jurisdiction. RCW 26.27.231 (codified in New Mexico at N.M. Stat. Ann. § 40-10A-204).

Pursuant to the UCCJEA, Washington held jurisdiction to modify the 2008 Oregon parenting plan because it had jurisdiction to make an initial child custody determination because neither of the parents continued to reside in Oregon and the children had resided in Washington for greater than six months. RCW 26.27.221. RCW 26.27.201(1)(a).

Washington had authority to enter the November 29, 2016, court order allowing for a residential contact between Hutagalung and the children, even prior to dismissal of Barnett's New Mexico petition for domestic violence protection order on December 1, 2016.

Furthermore, the Washington Court did nothing to infringe upon the provisions of New Mexico temporary order protecting Barnett. The foreign temporary protection order was properly granted Full Faith and Credit.

B. GAL Report.

Barnett did not motion to exclude the GAL report nor object to its admission at the time of trial. **RP 7.** The appellate court may refuse to review any claim of error which was not raised in the trial court. Because Barnett's assignment of error does not involve (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right, it should not be considered for the first time on appeal. **RAP 2.5(a).**

Furthermore, because the GAL report was issued to the parties at least ten days prior to the trial, it would be properly received into evidence even over Barnett's objection. RCW 26.09.220.

C. Pleadings as Proof.

Barnett assigns error to the trial court allowing pleadings to be used as proof, citing RCW 5.40.010. Issues presented for review must include argument, including citations to legal authority and references to relevant parts of the record. RAP 10.3.a. Barnett has provided no argument from which to determine what pleadings she believes were improperly used as proof.

Barnett offered no objection to any of the exhibits Hutagalung offered into evidence at trial. **CP 373-374**. Because this issue is raised for the first time on appeal (RAP 2.5(a)) and there is no argument from which an error can be identified, the court should decline to consider this issue.

D. Substantial Evidence Supporting Findings and Ruling.

A trial court's decision to modify a parenting plan is reviewed for an *abuse of discretion*. *In re Marriage of Hansen*, 81 Wn.App. 494, 498, 914 P.2d 799 (1996). If a trial court parenting plan does not

constitute an abuse of discretion, it will be upheld. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997)

A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991)

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; and it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *In re Marriage of Fiorito*, 112 Wn.App. 657, 664, 50 P.3d 298 (2002)

A trial court's factual findings are accepted if supported by substantial evidence. *In re Marriage of Wright*, 179 Wn. App. 257, 261-62, 319 P.3d 45 (2013).

Evidence is substantial if it persuades a fair-minded, rational person of the truth of the finding. *In re Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001)

Barnett seems to argue that the court abused its discretion when it rejected her claims that Hutagalung is abusive to her.

However, this claim was based solely on her own testimony and the trial court did not find her to be credible. **CP 377, 487.**

A trial court's findings regarding credibility of witnesses will not be disturbed on appeal. *In re Marriage of Fiorito*, 112 Wn. App. 657, 667, 50 P.3d 298 (2002); *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996).

Moreover, the Court's findings that Barnett engaged in abusive use of conflict and has a long-term emotional or physical problem are based upon substantial evidence. Barnett left Washington and concealed the children from the father. **RP 118-122; Ex 4; CP 377.**

Barnett filed multiple petitions for domestic violence protection order, requesting to suspend the children's contact with their father. **Ex 5, 8; RP 60-62; 90-92.** Barnett engaged the minor children in preparing sworn declarations regarding residential time with their father. **Ex 6.** In addition to illogical parenting decisions made prior to trial, Barnett's demeanor and manner in court caused the court to find her mental health has negatively affected her parenting. **CP 377-378, 493.**

The court may order a major modification to a parenting plan upon finding that there has been a substantial change in circumstances and that the children's environment (under the prior

parenting plan) is detrimental to their physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child. RCW 26.09.260(1),(2)(c).

“An effort by one parent to terminate the other parent’s relationship with a child can be considered detrimental to the child, and modification based on such behavior is appropriate.” In re Marriage of Velickoff, 95 Wn. App. 346, 355, 968 P.2d 20 (1998). In the case of such abusive use of conflict, evidence of actual damage to the children is not required. Rather, the required showing is that a danger of psychological damage exists. Burrill v. Burrill, 113 Wn. App. 863, 56 P.3d 993, 997 (2002).

Based upon substantial evidence, the trial court appropriately found that the children’s environment (under the 2008 Oregon parenting plan) is detrimental to their physical, mental, or emotional health. It was not an abuse of discretion to modify the parenting plan and place the children primarily with the father.

E. Respondent should be awarded attorney fees on appeal.

The trial court ordered Appellant to pay a portion of Respondent’s attorney’s fees on the basis intransigence, finding

“Ms. Barnett has demonstrated intransigent conduct in this matter and it is appropriate to award Mr. Hutagalung his attorney fees incurred as a result.” **CP 378**. Barnett has not assigned error to this finding, nor to the judgment for attorney fees. **CP 380-381**.

On appeal, Barnett is similarly intransigent. She assigns error to admission of evidence that she did not object to at trial. She assigns error in several instances without any authority or argument. Barnett has made numerous allegations with little or no meaningful analysis or argument, but which Hutagalung must still address nonetheless.

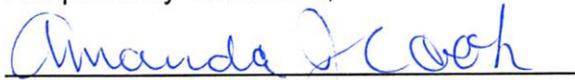
Attorney’s fees should be awarded on appeal for having to defend a frivolous appeal. RAP 18.1, RCW 4.84.185. An appeal is frivolous if there are no debatable issues on which reasonable minds can differ and is so totally devoid of merit that there was no reasonable possibility of reversal. *In re Recall of City of Concrete Mayor Robin Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003). Here there are no issues on which reasonable minds can differ. Barnett should pay Hutagalung’s attorney fees incurred on appeal.

VI. CONCLUSION

For all the reasons set forth above, Hutagalung requests the trial court's rulings be affirmed and that he be awarded his fees and costs incurred as a result of this appeal.

Dated this 4th day of May, 2018.

Respectfully submitted,



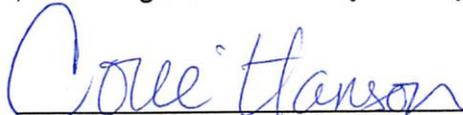
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Declaration of Transmittal

I certify under penalty of perjury that on the 4th day of May 2018, I transmitted a copy of this BRIEF OF RESPONDENT to the individuals and via the method(s) designated below:

Jennifer Barnett 15127 Main St. E. Ste. 104 PMB 407 Sumner, WA 98390	Transmitted via: <input checked="" type="checkbox"/> First-Class US Mail <input type="checkbox"/> Facsimile to _____ <input checked="" type="checkbox"/> Email to jenniferbarnett7788@yahoo.com <input type="checkbox"/> Legal Messenger for Hand Delivery
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Dated at Gig Harbor, Washington this 4th day of May 2018.



Corie Hanson, Paralegal

LAW OFFICE OF AMANDA J. COOK, PLLC

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