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

No. 51067-7-II

In re the Marriage of:

Renae A. Grady, fka Cooper,

Appellant,

v.

Andrew Cooper,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

REPLY BRIEF OF APPELLANT RENAE A. GRADY

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Argument

1. On Mr. Cooper's motion for revision, the trial court erred by not considering, or even reading, the entire record before the commissioner below.

Although a trial court has discretion to determine the relevance and admissibility of the evidence before it, the trial court in this instance simply chose not to review certain pleadings at all, stating that he reviewed "much of the material" submitted. RP 3. The use of the word "much" is particularly concerning as it does not even indicate that the trial court reviewed the majority of the material submitted, nor did the court specify what materials it chose not to review. Failure to review pleadings goes beyond determining relevance and admissibility of evidence.

Father correctly states that the trial court has authority on a motion for revision to perform "an independent review of the record, [and] redetermine both the facts and legal conclusions drawn from the facts. *In re Marriage of Dodd*, 120 Wn. App. 638, 645, 86 P.3d 801 (2004). However, in this case, the court redetermined the facts and legal conclusions without conducting an independent review "of the record." The court conducted an independent review of only a portion of the record, and dismissed a case in its entirety.

It was error for the trial court not to consider the entire record presented to the commissioner pursuant to RCW 2.24.050 and Pierce County Local Rule 7(a)(12), particularly where the hearing was based entirely upon written declarations and resulted in dismissal of the entire

case. For these reasons, if the trial court's decision dismissing the petition for lack of adequate cause is not reversed on appeal, the matter should be remanded for a determination of the father's motion for revision based upon a review of the entire record before the court commissioner.

2. Ms. Grady presented factual allegations sufficient to support a finding on each fact she was required to establish to modify the parenting plan based on integration.

Ms. Grady was not required to prove each element required for modification at the adequate cause hearing, but was instead required to "set forth specific factual allegations, which if proven would permit a court to modify the plan under RCW 26.09.260." *Bower v. Reich*, 89 Wn. App. 9, 14, 964 P.2d 359, 362 (1997), as amended on denial of reconsideration (Jan. 29, 1998).

RCW 26.09.260(2)(b)- Integration With Consent

First, with regard to the integration requirement, the Ms. Grady presented evidence that the Mr. Cooper voluntarily relinquished 24% of his overnights over the preceding 12 months (44 out of 182 overnights). CP 178-179. She further submitted evidence that her travel with the children interfered with only one of Mr. Cooper's overnights, and that the parties had arranged makeup visitation for the Portugal trip but Mr. Cooper failed to follow through for no reason. CP 121, 167. Therefore, the evidence was that Mr. Cooper missed only one overnight as a result of Ms. Grady's travels, and the remaining overnights were Mr. Cooper's

own voluntary relinquishment. *Id*. Mr. Cooper argues that he only allowed Ms. Grady to care for the children under the right of first refusal, yet presented no evidence as to his "unavailability" during the times in question. The evidence presented by Ms. Grady was sufficient to support a finding, if proven true at trial, that the children had been integrated into her household throughout the prior 12 months.

Next, with regard to consent, Mr. Cooper submitted no evidence to establish that the change in residential schedule was intended to be temporary. In each of the cases cited by Mr. Cooper where the court refused to find integration with consent, the parties had an agreement that they would deviate from the parenting plan for a specific period of time or during a specific life event. *In re Marriage of Taddeo-Smith*, 127 Wn. App. 400, 402, 110 P.3d 1192 (2005) (children resided with father after mother hospitalized for accident rendering her quadriplegic); *In re Marriage of Thompson*, 32 Wn. App. 418, 421, 647 P.2d 1049 (1982) (mother asked father to care for children for five months due to financial difficulty); *In re Marriage of Shyrock*, 76 Wn. App. 848, 850-51, 888 P.2d 750 (1995)(mother consented to changes in schedule while she relocated to a new residence). Furthermore, in each one of those cases the evidence of integration was sufficient to make it past the adequate cause threshold and the matters ultimately went to trial. *Id*.

Here, there was no such agreement to deviate from the plan for a specific period of time or life event. In fact, this is evidenced by Ms. Grady's email to Mr. Cooper on March 25, 2017, asking him if a 30/70

schedule works well for him and if it looks realistic for him to continue with such a schedule. CP 130-131. Clearly she had no indication that the 30/70 schedule was going to change any time soon, and was seeking Mr. Cooper's confirmation that this was the case. Mr. Cooper then continued to allow the children to be integrated into Ms. Grady's home until the filing of the petition in May 2017. CP 178-179.

Although Mr. Cooper did, as he alleges, assert his status as a 50/50 parent when he demanded to follow the parenting plan in mid-2016, he did not in fact follow through with that designation for the following year and through the filing of the petition for modification. CP 65; CP 178-179. Furthermore, his assertion as a 50/50 parent was prior to the time that Ms. Grady alleges the integration began. CP 65; CP 178-179. Allowing the children to reside with Ms. Grady was Mr. Cooper's own choice to relinquish his time, with the exception of one overnight to accommodate Ms. Grady's trip with the children to Japan. CP 121.

In addition, Ms. Grady's allegations that the parties "deviated from the parenting plan by simply arranging visitation as it suited [their] schedules" and that the parties "were able to work together to accommodate both of [their] schedules" related to the time period prior to mid-2016, and it was June 2016 when Ms. Grady alleged the integration began (after Mr. Cooper demanded to follow the plan yet never did). CP 64-65. Where one parent chooses not to exercise 24% of his time over a 12 month period, with no agreement or expectation in

place to return to the parenting plan, Ms. Grady has met her threshold burden of establish facts sufficient to show Mr. Cooper's consent to integration. RCW 26.09.260(2)(b); *Bower v. Reich*, 89 Wn. App. at 14.

RCW 26.09.260(1)- Best Interest of the Children

Ms. Grady set forth sufficient facts that, if proven true at trial, would establish that modification of the parenting plan is in the best interest of the children. *Bower v. Reich*, 89 Wn. App. at 14. First, even setting aside a potential move to Australia, modifying the parenting plan to establish Ms. Grady as the primary caregiver is consistent with the actual practice throughout the children's lives. CP 165-166. Ms. Grady also has an extremely flexible work schedule and is able to care for the children at all times necessary. *Id*. It would also allow the children to continue their extremely close relationship with their half-sister, by allowing them to continue to spend the majority of their time with her (as had been the case her entire life until December 2016). CP 65. The trial court failed to consider whether modification of the parenting plan naming Ms. Grady as the primary caregiver, absent a move to Australia, was in the best interest of the children. Instead, the trial court erroneously based its adequate cause decision solely on the issue of residing in Australia, rather than considering integration. RP 46.

In looking at the potential move to Australia, Ms. Grady also set forth specific facts as to why that move was in their best interest, including the fact that Australia was already a second home to the

children, and they would have access to far superior schools, and more consistent schools, than they would attend in Tacoma. CP 65-67, 75-76, 81-81, 138, 181. The children would enjoy all of those benefits while still spending substantial, quality time with Mr. Cooper during their intermittent school breaks, consistent with the amount of time they have spent with him historically. CP 96-101. Ms. Grady also proposed that Mr. Cooper could visit the children in Australia essentially on demand and as frequently as desired, and presented evidence that he had a flexible work schedule, was able to work remotely, and had worked remotely for an entire summer during their relationship. CP 69. As a result, the trial court erred in finding that Ms. Grady did not meet her threshold burden of establishing that modification of the parenting plan, naming her as primary residential parent, is in the best interest of the children.

3. The parties' 50/50 parenting plan does not contemplate changes to the schedule such that the children would reside primarily with one parent, and integration itself is sufficient to establish a substantial change in circumstances.

Mr. Cooper argues that Ms. Grady must prove a substantial change in the circumstances of the children or of the father in addition to integration. RCW 26.09.260(1). In support of this, Mr. Cooper argues that *Clark v. Gunter* does not stand for the proposition that integration with consent is of itself a substantial change, and that the court did not reach that issue because integration with consent was unchallenged by the father in that case. *See* Response Brief, p. 18; *Clark*

v. Gunter, 112 Wn. App. 805, 809, 51 P.3d 135 (2002). However, that is not the case. The father in *Gunter* did challenge integration, but "[b]ased on the evidence presented, the trial court determined that with Clark's consent, Richie had integrated into Gunter's home." *Id.* at 807. The court noted that "[a] plain reading of RCW 26.09.260 demonstrates that different thresholds form the basis for modification because of a substantial change of circumstances; *e.g.* agreement, integration with consent, and present environment being detrimental." *Id.* at 809. Therefore, a substantial change can be demonstrated by showing agreement of the parties, integration with consent, or detrimental environment. The court specifically noted that "[i]n essence, 'substantial change' was established by the 'integration with consent.'" *Id.* Because the evidence was sufficient to support a finding that the children had been integrated into Ms. Grady's home with Mr. Cooper's consent, Ms. Grady satisfied her burden to establish a substantial change in circumstances.

Mr. Cooper additionally argues that changes to the residential schedule were anticipated, as evidenced by the provisions allowing for international travel and providing for a right of first refusal. *See* Response Brief, p. 18. In fact, the parties' 50/50 parenting plan does not allow for any deviation in the regular schedule for international travel or otherwise. CP 18-28. It would have to be during the residential parent's time, or with the other parent's consent. *Id.* Integration into the other party's household is simply not contemplated by the 50/50 plan. Ms.

Grady also set forth several other substantial changes that have occurred for the children since entry of the 50/50 parenting plan, but in light of integration, the court need not find any other substantial change. CP 64-66, 164; *Clark v. Gunter*, 112 Wn. App. at 809.

4. In looking at the totality of the comments made by the trial court during argument, bias is clearly established against Ms. Grady such that she would not have a fair and impartial trial.

The trial court made repeated comments about Ms. Grady throughout oral argument, the totality of which show the court's sole concern was Ms. Grady's desire to move to Australia. This is particularly true when looking at the context in which many of the comments were made, including where the trial court took the opportunity to interrupt Ms. Grady's counsel's argument to make comments about Ms. Grady that were not relevant to the issue at hand:

- On its own initiative, the trial court stated "[b]ut it's also not, from a legal point of view, appropriate to decide you're going to move out of the jurisdiction and then use that to springboard yourself to adequate cause for a major modification. That seems to me to be gaming the program." RP 5.
- In response to Ms. Grady's objection to argument regarding mediation discussions, the trial court did not rule on the objection but instead took the opportunity to point out that the "law is pretty clear that the practice, in fact, is not the critical point when determining whether there was a joint parenting

plan. It's what the actual document says." RP 12. This was not even an issue and certainly did not address the objection before the court.

- In the middle of Ms. Grady's argument that it is practical and feasible for Mr. Cooper to spend some time with the children in Australia, the court interjected "[w]ell, who is the one who changed the game here? Isn't that Ms. Grady? She decides she is going to relocate to Australia. She gets pregnant, which is fine, with her now husband's child during the period of this marriage. This evolution of circumstances is not driven by what the children need. It is driven by what Ms. Grady wants." RP 27-28.
- The court further noted this "is still something that is being driven by Mrs. Grady's choices." RP 46.

The trial court simply could not look past Ms. Grady's desire to move to Australia and that the matter was being "driven by what Ms. Grady wants" to even consider the integration argument, and the entire ruling was based on Ms. Grady's proposed temporary parenting plan allowing her to reside with the children in Australia. RP 28, 46. The only consideration the court gave to the integration argument was to accept outright Mr. Cooper's argument that all extra time spent with Ms. Grady was as an accommodation to her so she would travel with the children (stating "[w]asn't part of that Mr. Cooper's willingness to follow Ms. Grady's requests to take the children to Japan or wherever else she wanted to take them?" and "[w]ell, the point is he gave that time

up at her request.") In response to Ms. Grady's argument that Mr. Cooper voluntarily gave up his makeup time after the Portugal trip, the trial court stated:

> Whether or not he was able to accommodate, you know, the full-time shift on the other end to pick up the days he lost - - I mean that's different than giving up your time with your children because you want them to be with the other parent because you think it's a positive thing to do. And I think that's what happened here.

RP 33-34. Even if the trial court is correct in saying Mr. Cooper's failure to exercise his pre-arranged makeup time, or allowing Ms. Grady to travel with the children, cannot be considered integration, the trial court still completely failed to consider Mr. Cooper's unexplained voluntary relinquishment of the remainder of the days he forfeited over the prior 12 months (which would be 29 out of 152 days if the Portugal trip is completely removed from the equation). CP 178-179.

The trial court's repeated comments about Ms. Grady's desires, its failure to consider the time relinquished by father unrelated to mother's travel, combined with the trial court's statement that it was "not here to find facts at this point in time" when Ms. Grady asked the court to consider the credibility of the parties' respective evidence of integration, shows the trial court was biased against Ms. Grady such that he was not able to fairly and impartially rule in this case. RP 37; RCW 4.12.040(1). The trial court had a "preconceived adverse opinion, without sufficient grounds or cause," with regard to Ms. Grady and her request for modification based on integration. *Application of Borchert*,

57 Wn.2d 719, 359 P.2d 789 (1961). If the case is remanded, Ms. Grady requests that it be remanded to a different judge so that she may have the benefit of fair and impartial proceedings.

5. Mr. Cooper is not entitled to fees on appeal as there is insufficient evidence in the record regarding the financial positions of the respective households and the appeal is not meritless.

To be awarded attorney's fees on appeal, Mr. Cooper must establish both that he has the need and Ms. Grady has the ability to pay, and that the issues on appeal lacked arguable merit. *State ex rel Stout v. Stout*, 89 Wn. App. 118, 127, 948 P.2d 851, 855 (2014). First, Mr. Cooper cites to nothing in the record to establish that he has a need for attorney's fees or that Ms. Grady has the ability to pay. No financial issues were litigated, so no pay stubs, financial declarations, bank statements, asset or debt statements, or tax returns were ever submitted to the court. Even if he could establish financial need and ability to pay, the issues on appeal have, at the very least, arguable merit. The trial court simply did not separate Ms. Grady's proposed parenting plan from the issue of adequate cause in making its decision, and failed to properly consider the substantial evidence presented regarding integration into her household. An award of attorney's fees should therefore be denied.

V. Conclusion

The trial court exercised its discretion in an untenable or manifestly unreasonable way in dismissing the petition for lack of

adequate cause. *In re Marriage of McDole,* 122 Wn.2d 604, 610, 859 P.2d 1239, 1242 (1993). Ms. Grady respectfully requests that the order dismissing her petition for modification of the parenting plan be reversed, her petition be reinstated, and the case be remanded to a different trial court judge for further proceedings. She further asks that Mr. Cooper's request for attorney's fees be denied.

Respectfully submitted this 12th day of February, 2018.

BLADO KIGER BOLAN, P.S.

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Certificate of Service

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 1st day of December, 2017, she electronically filed the attached Brief of Appellant and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same were electronically delivered to each of the following parties and their counsel of record:

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_/s/_____
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