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No. 52385-0-II

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

In re the Parentage of A.W.

MITCHELL WHITE
Appellant

v.

LINSDAY SPUCK
Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 2

III. RESTATEMENT OF THE CASE..... 2

A. WHITE MADE A FAIR STATEMENT OF THE CASE. 2

IV. ARGUMENT 6

A. THE COURT ERRED BY RELYING ON THE FRIENDLY PARENT CONCEPT. 6

1) The court relied on the concept. 6

2) The error was not invited. 10

3) Lawrence is (and should remain) the law in Washington. 11

B. WHITE DID NOT ENGAGE IN ABUSIVE USE OF CONFLICT. 12

1) The Court did not find harm to the child caused by abusive use of conflict (or anything). 13

2) White's conduct was not "abusive," especially not his litigation of this case. 15

3) The court cannot ignore evidence material to the child's best interests. 18

C. THE COURT APPEARS BIASED. 20

D. ATTORNEY FEES. 21

V. CONCLUSION 23

TABLE OF AUTHORITIES

Washington Cases

Burrill v. Burrill, 113 Wn. App. 863, 56 P.3d 993 (2002), *review denied*, 149 Wn.2d 1007 (2003) 13

In re Custody of B.M.H., 179 Wn.2d 224, 315 P.3d 470 (2013) 14

In re Custody of Stell, 56 Wn. App. 356, 783 P.2d 615 (1989) 18

In re Marriage of Black, 188 Wn.2d 114, 392 P.3d 1041 (2017)..... 20

In re Marriage of Chandola, 180 Wn.2d 632, 636, 327 P.3d 644 (2014) 13

In re Marriage of Landauer, 95 Wn. App. 579, 975 P.2d 597, rev. denied, 139 Wn.2d 1002 (1999) 18

In re Marriage of T, 68 Wn. App. 329, 3842 P.2d 1010 (1993)..... 21

*In re Marriage of Wagner***,** 111 Wn. App. 9, 44 P.3d 860 (2002). 22

In re O.E.D., 189 Wn. App. 1007, 2015 WL 4533848 (2015) 8

Lawrence v. Lawrence, 105 Wn. App. 683, 20 P.3d 972 (2001)..... 8

Marriage of Farrell-Milosavljevic & Milosavljevic, 4 Wn. App. 2d 1046, 2018 WL 3434706 (2018)..... 8

Marriage of Rounds, 4 Wn. App. 2d 801, 423 P.3d 895 (2018)..... 20

Matter of A.F.M.B., 1 Wn. App. 2d 882, 407 P.3d 1161 (2017) 16

Matter of Marriage of Greenlee, 65 Wn. App. 703, 829 P.2d 1120, 1123 (1992)..... 21

Shibley v. Shibley, 197 Wn. App. 1020, 2016 WL 7490906 (2016)..... 17

Spreen v. Spreen, 107 Wn. App. 341, 28 P.3d 769 (2001) 21

Statutes

RCW 26.26B.060 21

Other Authorities

Webster's Third New International Dictionary (Unabridged, 2002)..... 8

I. INTRODUCTION

If there is one thing this family does not need, it is inflammatory rhetoric. This young child and her young parents need the help of Washington's law, fairly applied, to chart a healthy, collaborative future. Unhelpfully, Spuck instead misstates the record and the law, and mischaracterizes White's brief as "another opportunity to falsely accuse and demean Spuck," when, actually, White repeatedly acknowledges both parties are capable parents and have successfully co-parented in the past. Spuck acts as if White had attacked her character (e.g., Br. Respondent, at 3), when, in fact, White focuses on the issues relevant to the child's best interests, such as mental health. In doing so, Spuck perpetuates the mistaken approach taken by the trial court. White stands by his statement of facts and their fidelity to the record.

What White takes issue with is the court's reliance on the "friendly parent" concept instead of focusing on the child's best interests and fostering the strong bond the child has with each parent. White's recounting of Spuck's history of mental health issues is not an attempt to relitigate "falsehoods," as Spuck asserts, and he challenges the court's findings to the contrary. As the record shows, the suicide attempts were well documented by third parties and reported to the police. White did not make this up or "manufacture an emergency," as the court found; he

accurately supplied this information to the court seeking temporary orders, Spuck had an opportunity to respond, and two judicial officers determined a temporary parenting plan placing the child primarily in White's care was warranted until further investigation, including psychological evaluations of both parents to which White agreed. None of this amounts to an abusive use of conflict.

Altogether, the problem is the failure to take a neutral view of the evidence, the law, and the parties and to keep the focus on the child's best interests.

II. RESTATEMENT OF THE ISSUES

1. The court erred by relying on the friendly parent concept.
2. White did not engage in abusive use of conflict.
3. The court appears biased against White.
4. The attorney fees were improperly awarded.

III. RESTATEMENT OF THE CASE

A. WHITE MADE A FAIR STATEMENT OF THE CASE.

Spuck attacks White's statement of the case, accusing him of making "false, terrible, demeaning, and cruel allegations to a court," engaging in "cruel, false, and discredited attacks," and attempting "to destroy Spuck in false court filings." Br. Respondent, at 1-2, 4. She argues White cannot offer this Court the full narrative because the trial court

rejected portions of it (e.g., GAL recommendations). Br. Respondent, at 3. But White challenges the court's factual findings and, importantly, the court's overall approach to the evidence, which pertains directly to the legal issues White raises. White never veers from the record in his brief, which cannot be said of Spuck.

For example, the attempted suicide allegations in White's court filings were documented by police reports, based on third party accounts, and accurately described when they occurred. Ex. 225 (motion for restraining order alleges Spuck had at least three suicide attempts in the past 3 years, refers to attached police reports and 911 CAD reports detailing the incidents); see also CP 92-98, 121-123 (declarations listing chronology of events including dates of attempted suicides).

Based on these allegations, the court issued an immediate restraining order pending a show cause hearing, but also permitted Spuck to revisit the order in ex parte before the show cause hearing. CP 377. Spuck did so, filing a response and declaration explaining each of the incidents, CP 89-91; Supp. CP __ (sub 2/9/17 Spuck Declaration), and White submitted additional declarations detailing relevant events with accurate dates, including more recent events involving Spuck's conflict-

driven erratic behavior as they tried to co-parent. CP 92-98, 121-123.[1] After considering both parties' submissions, the court ordered the previous order remain "in full force and effect pending the hearing on February 15, 2017," and ordered that both parties complete psychological evaluations as agreed to by the parties. CP 380.

White did not "succeed[] in separating" the child from her mother by obtaining these orders, as Spuck claims, Br. Respondent, at 22; under both orders, she had supervised residential time on the weekend and during the week and her parents, with whom she was living were the supervisors. CP 377, 379.

Five days later, after a hearing in which Spuck had another opportunity to respond to the allegations, the court (a different commissioner) entered a temporary parenting plan maintaining the child primarily in White's care pending further investigation of parenting issues. CP 126-140, 125. The court did not grant "total custody" to White as Spuck asserts, Br. Respondent, at 7; it gave her residential time every other weekend (including overnights) to be supervised by her parents

[1] This is but one example belying Spuck's claim she had no opportunity until trial to present her side of the story. See, e.g., Br. Respondent, at 1-2 ("finally able to present her evidence and testimony to a court of law"). This case was conducted with all procedural propriety.

(with whom she lived) and allowed her to attend the child's swim lessons twice a week. CP 131.

As the record makes clear, Spuck is the one doing the exaggerating and perpetuating falsehoods. White did not manufacture an emergency or falsify evidence nor did he seek to deprive Spuck of all contact with their child, as Spuck claims. His allegations about Spuck's past suicide attempts were well documented and concerning, particularly in light of her recent erratic behavior as they tried to co-parent, and he simply sought temporary orders until her mental health and parenting issues could be further investigated, even agreeing to undergo a psychological evaluation himself.

Indeed, Spuck acknowledges that White "chronologically list[ed] the allegations upon which his petition was based," and that White's court filings also included more recent events involving disputes over the agreed parenting schedule. Br. Respondent, at 6. Thus, by Spuck's own admission White accurately disclosed the timing of the suicide attempts. Indeed, Spuck acknowledges these events occurred, though discounts them because of when they occurred, Br. Respondent, at 23 ("his allegations were largely based on incidents that occurred more than 18 months prior to filing"). There is nothing false about this history, nor any dispute that it concerned White, Dr. Whitehill, two court commissioners, and the Guardian ad Litem. Even the trial court acknowledged Spuck suffered

from mental health issues in the past and attempted suicide. Supp. CP __ (Sealed Decision at 10).[2] Only the trial court took the view that Spuck had "put those issues behind her." Id. White had every right to disagree, as had all the other neutrals.

White provided this Court with a fair statement of the case, pertinent to the legal challenges he makes.

IV. ARGUMENT

A. THE COURT ERRED BY RELYING ON THE FRIENDLY PARENT CONCEPT.

1) The court relied on the concept.

Spuck wants to obscure what the trial court did here, so she describes the court's reliance on the friendly parent concept as a "reference" to it and further demotes the reference to an "afterthought." Br. Respondent, 12 ("isolated" and "single" reference), 17 (apparent "afterthought"). She goes so far as to declare "nothing in the ruling

[2] The trial court issued two versions of its ruling, a sealed version and a public document version. White cites to the sealed (complete) version by its internal pagination (1-14). See Br. Appellant, at 1 n.1. Attempts to designate the sealed version have been complicated by the lack of sub numbers and confusing titling of the two versions (filed on the same day). White first designated the public version, then attempted to designate the sealed version (as he indicated he would in his opening brief), but the clerk simply again indexed the public version. White has now designated the sealed version and will confirm this effort succeeds. He will continue to refer to the sealed version by its internal pagination. Comments by Spuck in her brief suggest she may not have that document and perhaps did not see the original footnote describing the different documents. See Br. Respondent, at 12 n.3.

indicates it was the basis for the decision." Br. Respondent, at 17. Nothing, that is, but the court's own words:

> The court has no confidence that [White] would ever promote a relationship between [A.W.] and her mother, or her mother's family. Hence, the Court finds that it is in [A.W.]'s best interests to be placed in the primary care of her mother at this time. Ms. Spuck is the parent most likely to foster a relationship between [A.W.] and her father, and her father's family.

Supp. CP __ (Sealed decision at 12.) The court then goes on to say that if White participates in co-parenting counseling he may petition the court for a 50/50 schedule and joint decision-making, indicating an intent to reward White for becoming a "friendly parent." Id. The court repeats this in a specific finding. Id. (Finding 6) ("the Mother shall have sole medical and educational decision-making authority until co-parenting counseling occurs"). The friendly parent concept was the primary basis for the court's decision.

Nor does this reliance need to be the primary or sole basis for the court's decision, as Spuck then argues. Br. Respondent, at 12-17 (variations on the friendly parent concept was not "a basis," not "the basis," not "the primary basis" for the court's decision). She claims any error is harmless, an argument that depends on persuading this Court to

ignore the trial court's actual ruling (e.g., ignore the trial court's use of "Hence," meaning, "because of a preceding fact or premise"[3]).

In any case, reliance on the friendly parent concept need not be the only or primary reason for it to be fatal to the court's decision, as the cases make plain. Spuck tries but cannot successfully distinguish those cases. She claims the court addressed all statutory factors and also relied on an abusive use of conduct finding for its decision, claiming that was not true in the other cases. Br. Respondent, at 15 (citing *Lawrence v. Lawrence,* 105 Wn. App. 683, 20 P.3d 972 (2001); *In re O.E.D.*, 189 Wn. App. 1007, 2015 WL 4533848 (2015) (unpublished), and *Marriage of Farrell-Milosavljevic & Milosavljevic,* 4 Wn. App. 2d 1046, 2018 WL 3434706 (2018) (unpublished)). But she is simply wrong about that. In *Milosavljevic*, the trial court applied the statutory factors under the CRA (though did so prematurely) and also made similar findings of abusive use of conduct, yet reliance on the friendly parent concept was a basis for reversal. 2018 WL 3434706 at ***7-***8. Likewise, in *Lawrence* and *O.E.D.*, the apparent or potential influence of the friendly parent concept was the problem because, as here, there can be no confidence the court would reach the same result otherwise. The court's reversal was not based solely

[3] Webster's Third New International Dictionary (Unabridged, 2002).

on a lack of findings regarding the statutory factors; the court's reliance on the friendly parent concept was itself grounds for reversal. See *Lawrence*, 105 Wn. App. at 684 and *O.E.D.* 2015 WL 4533848 at *10 (remanding for entry of findings based on statutory factors without consideration of the friendly parent concept). Indeed, these cases got sent back to ensure that the court's decision was reached on proper grounds alone. No authority supports Spuck's argument that any kind of reliance on the friendly parent concept can be "harmless" error.

For this reason, it does not help Spuck that the court mentioned abusive use of conflict in its decision to not continue the parties' historical joint custody arrangement as this does not render harmless its reliance on the friendly parent concept. See Br. Respondent, at 16. For starters, the court expressly ruled there would be no parenting limitations based on the abusive use of conflict finding. Supp. CP __ (Sealed Decision at 12: "without parenting limitations."); Br. Appellant, at 22. That leaves the friendly parent concept.

Even were this not obvious, the court could not rely on the abusive use of conflict findings because they are erroneous, just as they were in *Milosavljevic*. See 2018 WL 3434706 at ***7-***8. As discussed in the opening brief and below, the court's finding that White engaged in abusive use of conflict by pursuing legal action is contrary to the record and the

law, especially since the court failed to identify any harm to the child as a result of this alleged abusive use of conflict. Br. Appellant, at 22-26.

2) The error was not invited.

Spuck also contends White invited the court to make the error of relying on the friendly parent doctrine, pointing to comments in closing argument regarding White's ongoing engagement with Spuck's family, which Spuck characterizes as having "explicitly invoked" the friendly parent concept. Br. Respondent, at 14. First of all, the quoted comments do not even "invoke" – explicitly or otherwise - the friendly parent concept; they refer to White fostering the child's relationship with Spuck's family, not fostering her relationship with Spuck (the parent). Br. Respondent, at 14 (quoting RP 883) ("White has fostered the child's relationship with … Ms. Spuck's side of the family"; "he kept an ongoing relationship with Ms. Spuck's mother"; "he is watching out for the child's relationship with this other side of the family").

Moreover, Spuck takes the purportedly objectionable comments completely out of context. White was addressing the statutory factor regarding the child's relationship with siblings and other significant adults; it was not a request to place the child with him as "the friendly parent." RP 882 ("So the next factor, the child's relationship with siblings and other significant adults…"). For some reason, Spuck omits this

preface when she quotes the passage, perhaps because the passage makes clear White was simply and pertinently pointing out that A.W. had a good relationship with the significant adults in her life, relationships that he supported. This is a far cry from inviting the court to rely on the friendly parent doctrine and place the child's primary residence with the parent who was more likely to foster a relationship with the other parent.

3) *Lawrence* is (and should remain) the law in Washington.

Recognizing the controlling law requires reversal, Spuck suggests in a footnote that this Court "revisit" that law, in particular, *Lawrence.* She contends *Lawrence* was wrongly decided and based on nothing (i.e., not based on cases cited in *Lawrence,* or any other case). Br. Respondent, at 13 n. 4. In fact, this Court was doing its job fulfilling the Legislature's intent in purposefully omitting the friendly parent concept from the Parenting Act:

> Under the "friendly parent" concept, primary residential placement is awarded to the parent most likely to foster the child's relationship with the other parent. This is often reflected in statutes that establish that it is a matter of public policy that children have "frequent and continuing contact" with both parents. Bills adopting the friendly parent concept, either as a presumption or a factor to be considered in custody decisions, have been rejected by our Legislature every year since 1982. The Supreme Court recognized this rejection of the friendly parent concept in *Marriage of Littlefield,* where it commented,

> Other state legislatures have expressed that it is a matter of public policy that children have 'frequent and continuing contact' with both parents.
> ....
> Our state Legislature ... year after year has declined to determine that, as a matter of public policy, frequent and continuing contact with both parents is in the best interests of the child.
>
> After *Littlefield* was decided, the Legislature rejected adoption of the friendly parent concept again in 1998 and 1999. The Legislature's rejection of this rule is consistent with our state's policy that "custody and visitation privileges are not to be used to penalize or reward parents for their conduct."

Lawrence, 105 Wn. App at 687-688 (citations omitted). It could not be much plainer. Our state does not like this idea. Spuck complains the concept "existed nowhere in Washington law before *Lawrence*." Br. Respondent, at 13 n. 4. Right. And it "exists" in *Lawrence* only because a trial court abused its discretion by taking it into account when determining a parenting plan. That error was repeated here.

B. WHITE DID NOT ENGAGE IN ABUSIVE USE OF CONFLICT.

Spuck wants to transform White's challenge to the abusive use of conflict holding into a mere dispute about the evidence. See, e.g., Br. Respondent, at 17-21. It is a lot more complicated. White's challenge encompasses the court's factual finding to the extent it attributes the conflict only to him, elevates the conflict to the level of "abusive," and fails to make any connection between the purported conduct and the

child's well-being (i.e., harm). These are legal standards and the errors the court makes are legal errors. In respect of what the evidence shows, White concedes only what cannot be disputed: that these young parents have had a lot of mutual conflict.

1) The Court did not find harm to the child caused by abusive use of conflict (or anything).

As previously noted, to justify limitations, there must be proof of a parent's problematic conduct and "relatively severe physical, mental, or emotional harm to a child" caused by the conduct. *In re Marriage of Chandola*, 180 Wn.2d 632, 636, 327 P.3d 644 (2014); Br. Appellant, at 22-23. Spuck ignores the complete absence of any finding connecting the purported abusive use of conflict and harm to the child.

Obviously, parental conflict is a fact of life for every family. Under our law, even when that conflict qualifies as abusive, it justifies limitations on a parent only where there is also proved to be a nexus between the conduct and specific, identifiable, and "relatively severe" harm to the child. Spuck tries to evade this necessity by claiming the court did not need to find actual harm, just danger of harm, citing *Burrill v. Burrill*, 113 Wn. App. 863, 871, 56 P.3d 993 (2002), *review denied*, 149 Wn.2d 1007 (2003). Br. Respondent, at 22. It is true that "[c]oncern about future action is not necessarily impermissibly speculative for findings of actual detriment." *In re Custody of B.M.H.,* 179 Wn.2d 224, 239, 315 P.3d 470,

477 (2013). It is also true there is a limit on such speculation, as occurred in *B.M.H.,* where evidence of the mother limiting the child's relationship with his de facto father and the concern she might do so in the future did not satisfy even the burden of production for adequate cause. *Id.*

Here, the court did not even speculate about potential harm, the court said nothing, so Spuck has to speculate. She argues White engaged in "the same alienating behavior" found harmful in *Burrill*, where the mother "strenuously opposed any contact by both children with their father, supervised or otherwise, despite the fact that they were well bonded and enjoyed being with him." Br. Respondent, at 22 (citing *Burrill* 113 Wn. App. at 872). This comparison is completely unfair because it is so inaccurate. In *Burrill*, the mother straight-out lied about the father, lies rising to the level of criminal conduct, thus involving the children in criminal investigations and causing a complete separation. Br. Appellant, at 28 (citing *Burrill*, 113 Wn. App. at 868). Nothing like that happened here. Nor did White oppose "any" contact with Spuck; he simply asked to have A.W. temporarily reside primarily with him and for Spuck's time to be supervised (by her parents with whom she lived) while mental health issues were investigated. Indeed, his proposed parenting plan scheduled Spuck to have every other weekend with overnights and attend swim lessons twice during the week. CP 111.

Thus, it is Spuck falsifying when she claims White "succeeded in separating them temporarily by obtaining 'emergency' orders." Br. Respondent, at 22. A.W. was never "separated" from Spuck; the ex parte order gave Spuck supervised residential time, and less than two weeks later, the court entered a temporary parenting plan with White's proposed residential schedule of every other weekend and twice weekly attendance at swim lessons. CP 131.

Spuck fails to show these early court proceedings had an adverse effect on the child because there is no evidence of such harm. See Br. Appellant, at 25-26 (e.g., no noticeable differences in the child's behavior at daycare; she was excited to see both parents at pick up). Certainly, the court made no such finding.

2) White's conduct was not "abusive," especially not his litigation of this case.

Spuck also defends the court's finding that White's "presentation of this case amounts to abusive use of conflict," claiming, again, that White made "false allegations" to a court "in order to alienate a child from a parent." Br. Respondent, at 24. As detailed above, White sought legitimate court intervention based on documented evidence of Spuck's mental health issues and conflict-driven behavior. These are certainly the kinds of legitimate concerns parents bring to court every day. *See, e.g., In re Marriage of Chandola,* 180 Wn.2d at 649, 327 P.3d 644, 653 (parenting

deficits and troubling personality traits supported restrictions). In *Chandola,* the trial court properly imposed restrictions on a parent where his overly protective and chaotic parenting adversely affected the child's growth and development. Here, the mother has long-term depression and a history of suicidal conduct. As a matter of law, it is not an abusive use of conflict to bring such concerns to court. That is where these disputes belong.

Therefore, it is unsurprising two family law commissioners took these concerns seriously, entered temporary orders to ensure the child's welfare (including by maintaining consistent time with both parents), and properly ordered further evaluation and appointment of a GAL, who agreed it was appropriate to temporarily have the child reside primarily with White. And, of course, Dr. Whitehill and the GAL corroborated White's concerns. That the trial court later disagreed with all of this still does not make White abusive in seeking these remedies; it cannot serve as a basis for its abusive use of conflict finding. See Br. Appellant, at 24-25. What the court's decision boils down to is using residential placement to punish White for his legitimate conduct in seeking court intervention, an improper purpose if ever there was one. See Br. Appellant, at 21.

Spuck argues otherwise, citing *Matter of A.F.M.B*., 1 Wn. App. 2d 882, 407 P.3d 1161 (2017) as support for "White's suggestions that his

abusive use of conflict is not immunized because he used the judicial system was recently rejected by this Court." Br. Respondent, at 24. White does not disagree that litigation can be an abusive use of conflict, as this Court well knows. He disagrees this litigation was. In any case, *A.F.M.B*. said nothing pertinent here; the issue there was simply whether a court's previous finding of abusive of conflict was intentionally omitted from a new parenting plan. 1 Wn. App. 2d at 890 (reversing and remanding because the record on appeal does not reveal how or why the trial court decided to delete the restriction).

Nor does *Shibley v. Shibley*, 197 Wn. App. 1020, 2016 WL 7490906 (2016) (unpublished) support the court's finding of abusive use of conflict in this case. See Br. Respondent, at 25. There, the mother had suffered a traumatic brain injury from a car accident and the court upheld a finding of abusive use of conflict based on, among other things, "litigation tactics" that included abusive letters from the father's lawyer "belittling" the mother's mental health and the father's disclosure of the mother's private journals and medical records without her permission. 2016 WL 7490906 at 3-4. Here, there was no such "belittling" of Spuck's mental health or disclosure of private records. Here, again, Spuck conflates concerns about her mental health (which Spuck minimizes) with an attack on her character. White, represented by experienced and

reputable legal counsel, conducted his litigation in full compliance with the rules and statutes. Yet the court punished him for doing so, akin to a CR 11 sanction. White had both a legal and factual basis for litigating. The litigation cannot form the basis for a finding of abusive use of conflict.

3) The court cannot ignore evidence material to the child's best interests.

Spuck also argues White concedes there is conflict ("mutual combat") and says nothing about the plentiful evidence of her contribution. Is the trial court free to disregard this evidence, i.e., the parenting evaluator, the corroborated evidence of long-term depression and multiple suicidal actions? Spuck says yes, that this was nothing more than a credibility contest. Br. Respondent, at 19-20. Our law says no: the court must consider all the evidence bearing on the issues and, in particular, the issues of a child's best interests. *In re Marriage of Landauer,* 95 Wn. App. 579, 975 P.2d 597, rev. denied, 139 Wn.2d 1002 (1999) and *In re Custody of Stell,* 56 Wn. App. 356, 371, 783 P.2d 615, (1989).

Spuck dismisses *Landauer* as being about an undisputed fact about property, Br. Respondent, at 21, but she misses the broader point. The trial court in *Landauer* valued a property without considering constraints on sale of the property. It did not believe one witness's valuation and disbelieve another's. Here, the trial court valued one witness's narrative

without considering all the other evidence undermining that narrative. In other words, this was not merely a credibility contest between White and Spuck. The court could not "believe" Spuck simply by disbelieving White. The court had also to disbelieve almost everyone and everything else – Spuck's mother (long-term depression), her roommate (suicide attempt locked in bathroom with gun), her sister (gun accident in apartment actually suicide attempt, her ex-lover (attempted overdose), the psychologist (conflict-driven personality), and the guardian ad litem.

What the court did here was not assess credibility so much as engage in wishful thinking. The record reveals all this but does not reveal why the court so much wanted to accept Spuck's self-regard as free of mental health problems, lacking a history of suicidal behaviors, etc. *See, e.g., Custody of Stell,* 56 Wn. App. at 371 (the trial court abused discretion by completely disregarding "repeated and unanimous independent expert opinions" relevant to issue of detriment and noting the court remained "fixed in a position virtually unsupported by anything but the most speculative and conclusive testimony"). The fact of the court's selective reading must be faced squarely and suggests, regrettably, the court was biased.

C. THE COURT APPEARS BIASED.

Again, in response to White's bias argument, Spuck contends White is really arguing credibility, i.e., the court must be biased if it found him not credible. Br. Respondent, at 25 (citing *Marriage of Rounds*, 4 Wn. App. 2d 801, 808, 423 P.3d 895 (2018) (a finding that a party lacks credibility does not mean the judge is biased). In fact, bias is claimed precisely because the court cannot reach the same result only by means of its different views of White's and Spuck's credibility. The court must also disregard most of the rest of the evidence. Our case law is pretty clear this scenario indicates bias. See Br. Appellant, at 33 (citing *In re Marriage of Black*, 188 Wn.2d 114, 392 P.3d 1041 (2017) and *Stell*).

Spuck tries to distinguish *Black* and *Stell*, Br. Respondent, at 27, though mistakenly asserts that *Stell* involved the same issue as *Black*, "impermissibly favoring one parent over another because of sexual orientation," Br. Respondent, at 28 (citing 188 Wn.2d at 136, a citation to *Black,* not *Stell*). In fact, this Court remanded in *Stell* for a new trial in front of a different judge when the trial court abused its discretion by completely disregarding unanimous and independent expert opinions. 56 Wn. App. at 371.

Judges are human and family law cases probably hit most humans right where they live. Perhaps no legal subject has a greater need for

policing judicial subjectivity. It is human to error, but when the judge does so, correction is required.

D. ATTORNEY FEES.

Spuck requests her fees on appeal based on RCW 26.26B.060 (parentage act), noting she was awarded $30,000 on this basis below and White has not appealed the order. Br. Respondent, at 28. A decision on that request in this Court turns on compliance with RAP 18.1. Moreover, the trial court's award is reviewed for an abuse of discretion, unlike the other issues in this case, which are either errors of law or mixed errors of law and fact. *In re Marriage of T,* 68 Wn. App. 329, 334, 842 P.2d 1010, 1012 (1993) (paternity statute); *Spreen v. Spreen,* 107 Wn. App. 341, 351, 28 P.3d 769, 774 (2001) (based on financial circumstances for abuse of discretion). White should not be punished for choosing not to pursue conflict for its own sake.

Likewise, with intransigence. Implicit in every page of White's briefing is a refutation of the court's findings about litigiousness (CP 314-318), but the court apparently based the fee award on both grounds. *See* CP 317; *See Matter of Marriage of Greenlee,* 65 Wn. App. 703, 708, 829 P.2d 1120, 1123 (1992) (upholding on one ground though reversing on the other). Again, by picking his battles, White has demonstrated just the opposite of what Spuck alleges.

Nevertheless, Spuck also requests fees based on intransigence and what she deems a "frivolous" appeal. Br. Respondent, at 29, 31. She contends White's arguments on appeal "continue th[e] same intransigence" he engaged in in the trial court and that he invited the "only even colorable legal argument." Br. Respondent, at 32. An appeal is frivolous if there are no debatable issues upon which reasonable minds may differ and it is so devoid of merit that there is no possibility of reversal. *In re Marriage of Wagner***,** 111 Wn. App. 9, 18, 44 P.3d 860 (2002). White has raised meritorious issues requiring reversal and treated the facts in context to demonstrate the fallacy of Spuck's invited error argument. By exercising his right to appeal the court's orders he has not been intransigent, any more than when he litigated in the trial court.

Nor is this appeal lacking a significant purpose, as Spuck contends when she suggests White had the "simpler" option to just attend co-parenting counseling. Br. Respondent, at 30-31. Spuck neglects to mention transition to 50/50 parenting does not operate automatically.[4]

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[4] That controlling provision states:

> If Father agrees to participate in co-parent counseling with Mother, as recommended by Dr. Whitehill, he may petition the Court to re-establish a week-on/week-off co-parenting schedule and joint-decision making, upon recommendation of the co-parenting counselor.

Rather, the parenting plan provides only that White "may petition the Court" for a 50/50 plan, and only "upon recommendation of the co-parenting counselor," if he participates in co-parenting counseling. CP 312. Hypothetically, Spuck could derail this path by refusing to participate, since it is "co-parent" counseling. Indisputably, it is an impediment, and one based upon the improper reasons already described. Moreover, the trial court's findings (e.g., abusive use of conflict) have an afterlife, one that should not unfairly haunt this young parent. Finally, the court limited decision-making based on that finding. This appeal multiple reasons to exist.

For all these reasons, and because White believes Spuck has the ability to pay her own fees, Spuck's request for fees should be denied.

V. CONCLUSION

Again, White respectfully requests reversal and remand for entry of a shared residential schedule and reconsideration of decision-making by a different judge.

Respectfully submitted this 8th day of May 2019.

/s Patricia Novotny, WSBA #13604

/s Nancy Zaragoza, WSBA #23281

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