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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 337642

SPOKANE COUNTY CAUSE NO. 06-3-01264-8

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

JENNIFER ROETCISOENDER,
Appellant

v.

JASON GRAY,
Respondent

APPELLANT'S BRIEF

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III. ASSIGNMENTS OF ERROR

- I. The Superior Court erred by delegating the residential schedule to the sole discretion of a 3rd party counselor.
- II. The Superior Court erred by imposing limiting factors under RCW 26.09.191 when the Superior Court did not find that the minor child suffered from PTSD and the record does not contain substantial evidence supporting the imposition of limiting factors against the mother.
- III. The Superior Court abused its discretion by permitting testimony regarding mother's prior relationships when the basis of the adequate cause determination was father's allegation that the mother caused the minor child to suffer from PTSD.

IV. STATEMENT OF THE CASE

Appellant Jennifer Roetcisoender is the mother and Respondent Jason Gray is the father of a minor child, H.G. A final parenting plan was entered on behalf of the minor child in 2009 (hereinafter "2009 Final Parenting Plan"). CP 1-11. The 2009 Final Parenting Plan awarded primary custody of the minor child to the father. *Id.* However, the minor child was in the custody of father's girlfriend, Thelma "Jaymi" Davis, a majority of the time because the father worked out of town. April 20, 2015--RP 208-210.

The minor child attended counseling sessions with a Lindsay Hatch M.A., NCC, MHCA. These visits lasted between May of 2013 through

August of 2013, when the father's girlfriend stopped bringing the minor child to the sessions. Exhibit P10.

On February 4, 2014, the Mother moved for modification of the Final Parenting Plan. CP 12-21. Respondent filed his Response to Petition on February 18, 2014. CP 22-24. The father alleged in his Response that the Final Parenting Plan should be modified because of physical, sexual or a pattern of emotional abuse of a child, a history of domestic violence, and abusive use of conflict. CP 23. Both Parties sought adequate cause and filed declarations. CP 25-38.

On March 4, 2014, the Spokane Superior Court through Commissioner Tami Chavez found adequate cause on the father's Response to Petition but not Mother's Petition for Modification. CP 39-42.

The net result of the adequate cause finding was that Mother's residential time was eliminated from April of 2014 through time of trial in May of 2015. May 7, 2015--RP 614: 9-14.

Trial was held before the Spokane County Superior Court through Judge Moreno on April 20-21, April 29, and May 1, 2015. Notice of Filing Verbatim Report of Proceedings. At trial, the Superior Court heard from two of the father's expert witnesses and the mother's expert witness. The father presented Dr. Barry Bacon, MD. April 21, 2015—RP 269-328: 1-5. The father also presented Dr. Kimberly Chupurdia, Ph.D. April 20, 2015—

RP 19-67:1-20. The mother's expert witness, Dr. Jameson C. Lontz, Ph.D. testified that the mother was a competent parent and that he had seen no evidence of abuse by the mother. April 21, 2015—RP 484-487:1-17; P-13, P-14.

The Superior Court gave its oral ruling on May 7, 2015, prohibiting the mother from any in-person visitation, except visitation approved by a 3rd party counselor. May 7, 2015--RP 624-25. The Superior Court entered a final parenting plan (hereinafter "2015 Final Parenting Plan") on August 13, 2015. CP 94-100. The Superior Court found that the mother had been deprived of personal contact with the minor child for approximately a year. May 7, 2015--RP 614: 9-14. However, instead of setting forth times and dates when the minor child would have personal contact with the mother, the Superior Court provided in the 2015 Final Parenting Plan:

1. The services of Lindsay Hatch to be enlisted to develop a plan and to work with [H.G.] to therapeutically reintegrate the mother into [the minor child's] life.
2. The Court contemplates this would start with [H.G.] having contact with Ms. Hatch. Ms. Hatch would detail and schedule some therapeutic visits between Mother and [H.G.] and work toward a somewhat normalized visitation schedule.
3. The Court anticipates that the first couple of visits would be, if Ms. Hatch is agreeable, between Ms. Hatch and [H.G.].
4. The Court contemplates at some point the mother would come up and engage in that process in any manner that Ms. Hatch believes is appropriate.
5. The Court requests Ms. Hatch provide some recommendations as to progressing to one-on-one visitation with Mom and [H.G.].

6. The Court contemplates that in time, there may be a couple-hour visits down at Mom's house in Rosalia.
7. The Court contemplates a very slow integration to a normalized schedule of residential time under the prior parenting.
8. If Ms. Hatch is unavailable to participate in this process, another provider shall be selected. The other provider to be Rachel Marazzo.

CP 95. The duration of residential time and *whether* any residential time would take place was left to the discretion of the 3rd party counselor. Id. The 3rd party counselor was eventually determined to be Rachel Marazzo, due to Lindsay Hatch's unavailability. Id.; CP 77-83.

V. STANDARD OF REVIEW

This Court reviews a trial court's parenting plan or decision to modify a parenting plan for abuse of discretion. Underwood v. Underwood, 181 Wash.App. 608, 610, 326 P.3d 793 (2014); In re Marriage of Zigler and Sidwell, 154 Wash.App. 803, 808, 226 P.3d 202 (2010). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Underwood, 181 Wash.App. at 610. A court's decision is based on untenable grounds or reasons if its factual findings are unsupported by the record or if it has used an incorrect standard, or the facts do not meet the requirements of the correct standard. Mansour v. Mansour, 126 Wash.App. 1, 8, 106 P.3d 768 (2004). A court acts unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard. Id.

The Superior Court's interpretations of RCW 26.09.184 and RCW 26.09.187, like other statutes, are reviewed de novo. In re Dependency of R.V., 113 Wash. App. 716, 720, 54 P.3d 716, 718 (2002). The court's paramount duty in construing a statute is to ascertain and give meaning to the intent of the Legislature. Id. Reviewing courts interpret a statute according to the plain and ordinary meaning of its language. Id. If a statute is unambiguous, reviewing courts will determine the Legislature's intent from the language of the statute alone. Id.

VI. ARGUMENT

1. **The Superior Court erred when it delegated reunification to the sole discretion of the counselor.**

The Superior Court left residential time entirely to the whim of a 3rd party counselor. Instead of a residential schedule, the Superior Court ordered:

1. The services of Lindsay Hatch to be enlisted to develop a plan and to work with [H.G.] to therapeutically reintegrate the mother into [H.G.'s] life.
2. The Court contemplates this would start with Hailey having contact with Ms. Hatch. Ms. Hatch would detail and schedule some therapeutic visits between Mother and [H.G.] and work toward a somewhat normalized visitation schedule.
3. The Court anticipates that the first couple of visits would be, if Ms. Hatch is agreeable, between Ms. Hatch and [H.G.].
4. The Court contemplates at some point the mother would come up and engage in that process in any manner that Ms. Hatch believes is appropriate.
5. The Court requests Ms. Hatch provide some recommendations as to progressing to one-on-one visitation with Mom and [H.G.].

6. The Court contemplates that in time, there may be a couple-hour visits down at Mom's house in Rosalia.
7. The Court contemplates a very slow integration to a normalized schedule of residential time under the prior parenting.
8. If Ms. Hatch is unavailable to participate in this process, another provider shall be selected. The other provider to be Rachel Marazzo.

CP 95.

RCW 26.09.184 commands a superior court to include in a final parenting plan, residential provisions for the child. “The plan **shall** include a residential schedule which designates in which parent’s home each minor child shall reside on given days of the year, including provision for holidays, birthdays of family members, vacations, and other special occasions, [consistent with Sections 187 and 191].” RCW 26.09.184(6) (emphasis added). RCW 26.09.187(3) states that superior courts “...**shall** make residential provisions for each child....” (emphasis added).

The Superior Court’s delegation of determination of any and all residential time to a 3rd party counselor violates RCW 26.09.184 and 187. In an analogous case, the Court of Appeals found that a superior court erred when it failed to specify an appropriate frequency of visitation between a child and parent under RCW 13.34.232. In re Dependency of R.V., 113 Wash. App. 716, 54 P.3d 716 (2002). RCW 13.34.232 required that an order “specify an appropriate frequency of visitation between the parent and child.” Id. at 720. The State argued that under RCW 13.34.232(1)(d), a trial

court has the authority to decline to order visitation because an “appropriate frequency” of visitation may be no visitation. Id. at 721. The State also argued that the trial court did not delegate its authority, but rather entered a “non-specific provision.” The Court of Appeals responded that “[w]hile we agree that ‘appropriate frequency’ of visitation may include no visitation at all, the order here does not do that. Rather, it gives the guardians control over the mother's ability to visit the child.” Id.

Here, the Superior Court ordered that the mother’s residential time resume, but like the State in R.V., provided no guidance, benchmarks, or even a review process. The Superior Court completely abdicated by delegating its authority to a 3rd party counselor. Literally nothing in the 2015 Parenting Plan provided for a residential schedule, let alone any personal contact between the mother and the minor child.

A case not as closely resembling the one at bar, but still providing guidance, is In re Parentage of Schroeder, 106 Wash. App. 343, 352-53, 22 P.3d 1280, 1285-86 (2001). In Schroeder, the Court of Appeals held that “[a]ny modification of a parenting plan, no matter how slight, requires the court to conduct an independent inquiry.” Id. (quoting In re Parentage of Smith-Bartlett, 95 Wash.App. 633, 640, 976 P.2d 173 (1999) (holding the trial court erred by granting an arbitrator authority to revise the parenting plan without allowing de novo review). In Schroeder, the trial court ruled

“the GAL’s calendar for visitation supersedes the parenting plan.” Id. at 353. The trial court did not provide that it would review the GAL’s decisions. Id. The Court of Appeals found error, holding “[t]his was a modification of the plan, and it was error for the court to give this authority to the GAL without providing for court review.” Id.

The 3rd party counselor’s authority in the case at bar is unchecked and unrestrained and the Superior Court erred when it abdicated its authority.

2. The Superior Court erred when it imposed limiting factors on the mother’s residential time because substantial evidence does not support the finding of 191 factors.

The Superior Court imposed 191 factors for two reasons. First, the Superior Court found that the mother had exposed the minor child to relationships with a domestic violence component. CP 91, Paragraph 2.3. Second, the Superior Court found that the mother or someone in her household had emotionally abused the minor child. CP 91, Paragraph 2.3.

A court must limit a parent’s residential time if it finds any of the following conduct:

1. Willful abandonment that continues for an extended period of time;
2. Physical, sexual or a pattern of emotional abuse of a child;
3. A history of acts of domestic violence; or
4. The parent has been convicted, as an adult, of a sex offense.

RCW 26.09.191(2)(a). A court must limit a parent’s residential time if it

finds that the parent resides with a person who has engaged in any of the following conduct:

1. Physical, sexual, or a pattern of emotional abuse of the child;
2. A history of acts of domestic violence; or
3. The person has been convicted as an adult, or has been adjudicated of a sex offense.

RCW 26.09.191(2)(b). The court may also preclude or limit any provisions of the parting plan if any of the following factors exist:

1. A parent's neglect or substantial nonperformance of parenting functions;
2. A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions;
3. A long-term impairment from drug, alcohol, or other substance abuse that interferes with performance of parenting functions;
4. The absence or substantial impairment of emotional ties between the parent and the child;
5. The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;
6. A parent has withheld from the other parent access to the child for a protracted period without good cause; or
7. Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

RCW 26.09.191(3).

The Superior Court's finding that the mother exposed the child to relationships with a domestic violence component is not supported by substantial evidence. "We will uphold the trial court's findings of fact if substantial evidence supports them." In re Marriage of Watson, 132 Wash. App. 222, 233, 130 P.3d 915, 920 (2006). "Substantial evidence exists if the

record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” In re Marriage of Fahey, 164 Wash. App. 42, 55, 262 P.3d 128, 134-35 (2011).

“...[A] finding under RCW 26.09.191(3) requires more than the normal distress suffered by a child because of travel, infrequent contact of a parent, or other hardships which predictably result from a dissolution of marriage.” Id.

The Superior Court found that “[the mother] had a series of relationships with a domestic violence component to them.” May 7, 2015--RP 627:16-18. The Superior Court stated “[s]o my conclusion is that, [mother] you’ve exposed [the minor child] to several relationships that had a domestic violence component. There’s no way to sugar-coat that. It is what it is. It’s past behavior, it was bad behavior, and it’s done.” May 7, 2015--RP 622: 13-17.

There is no credible evidence in the record that the minor child witnessed, knew about, heard about, or in any way perceived any of the abuse that the mother experienced in her prior relationships. The Superior Court’s conclusion that the minor child was exposed to these relationships is not supported by any credible evidence in the record. In fact, the mother testified that she did not allow the minor child to be around these relationships and that the mother protected the minor child from the

relationships. For example, the mother testified “[n]o, I never lived with Mr. Combs (an ex-husband of the mother, who had been abusive to the mother).” April 20, 2015--RP 86: 2-3.

The father presented the testimony of his girlfriend, who claimed that the mother had told her that mother’s ex-husband had been mean and abusive toward the minor child. April 21, 2015—RP 351: 10-15. Even if the testimony were credible from the father’s girlfriend, it was uncorroborated by any evidence and, even if it did occur, occurred before 2009 when the Final Parenting Plan was entered. CP 1-11.

Father’s counsel cited In re Marriage of Zigler and Sidwell, 154 Wash.App. 803, 226 P.3d 202 (2010), claiming that this Court held that “...domestic violence didn’t even have to happen in the presence of the child. The fact domestic violence happened in the home and was going on was sufficient enough for the court.” April 20, 2015--RP 87: 20-25. However, Zigler and Sidwell says nothing of the sort.

In Zigler and Sidwell, the domestic violence occurred in front of the children and in some instances the children were either participants or victims in the violence. Id. at 206. The argument in Zigler and Sidwell by Ms. Zigler was that there had been no showing that the violence in her household had any *effect* on the emotional health of her children. Id. at 206-07. Quite rightly, this Court concluded that there was an effect because the

child at issue in Zigler and Sidwell had actually been assaulted by Ms. Zigler, not just witnessed assaultive behavior. Id. at 206.

Zigler and Sidwell does not apply here. The father was unable, throughout his entire case in chief, to show that the minor child either knew about, heard about, or in any way perceived any abuse visited upon the mother in any relationship. The Superior Court even went so far as to confirm and rightly construe at least one fact established by the evidence: that the mother was not the perpetrator of any domestic violence. May 7, 2015--RP 622: 18-19.

The Superior Court's finding that the mother emotionally abused the minor child is also not supported by substantial evidence. The Superior Court's conclusion was "[a]nd so I am going to find that there has been emotional abuse by Ms. Roetcisoender." May 7, 2015--RP 623: 6-8. The Superior Court stated that "[the mother] is not the perpetrator of any domestic violence here. I'm not finding DV as a limiting factor, but I can't get around the fact that [the minor child] does appear to me to have been emotionally abused by [the mother] or someone in her household that—I don't know who it is. It's either [the mother or her husband]." May 7, 2015--RP 622: 18-23. The Superior Court could not articulate and the record does not sustain a finding of what the mother may or may not have done to emotionally abuse the minor child.

The court's finding that *someone* abused the minor child is not sufficient to impose 191 factors. When pressed for details, the Superior Court stated simply:

MR. FERGUSON: One final question, your Honor, which --can you give us a brief idea of the facts you relied on in coming to the conclusion that there was emotional abuse by [the mother] or someone in her household?

THE COURT: The emotional abuse stems from the documented findings -- I said "findings" -- the conclusions, the facts gathered by experts Chupurdia, Bacon, and Hatch. The biggest thing that jumped out at me was Mom -- her fear that "Mom won't protect me." It leads me to believe that emotional abuse occurred in Mom's home and that **there's something going on there** and Mom -- "Mom doesn't protect me from that." Okay? Does that help?

MR. FERGUSON: Sure, thank you.

May 7, 2015--RP 628: 1-9 (emphasis added). "Something going on there" is not substantial evidence. The mother's expert witness, Dr. Jameson C. Lontz, Ph.D. testified that the mother was a competent parent and that he had seen no evidence of abuse by the mother. April 21, 2015—RP 484-487:1-17; Exhibits P-13, P-14. Dr. Lontz reviewed a Washington Child Protective Services (hereinafter "CPS") report and medical records from Drs. Chupurdia and Bacon. April 21, 2015—RP 484:19-24. Dr. Lontz found "no indication of any abuse and there was certainly no indication of any traumatic experience as defined by the DSM." April 21, 2015--RP 484:22-24. Even an investigation by Washington CPS concluded that there

had not been physical abuse in the mother's home. Exhibit P-1.

A similar case is In re Marriage of Watson, 132 Wash. App. 222, 234-35, 130 P.3d 915, 920 (2006). In Watson, the mother alleged that the father sexually abused the parties' son. The trial court found the sexual allegations unproven, but ordered an amended temporary parenting plan, restricting the father's visitation, based on an impairment of the emotional ties between the father and the child. The father appealed.

The trial court found that M.R. had a subjective perception of sexual abuse and visitation anxiety but not that the father caused it. Id. at 234. On the contrary, the evidence showed only that the father did the "most parenting he could" under the restrictive conditions available to him. Id.

"In the absence of substantial evidence establishing a nexus between the father's 'involvement or conduct' and the impairment of his emotional ties with M.R., the trial court erred in imposing visitation restrictions under RCW 26.09.191(3)(d). Id. "The most reasonable inference from the record is that M.R.'s visitation anxiety is at least perpetuated by the court-imposed visitation restrictions, if not actually originating from them." Id. But any impairment to the parent-child relationship resulting from the visitation restrictions imposed pending resolution of the mother's modification petition cannot supply substantial evidence in favor of the RCW 26.09.191(3)(d) restriction. "To hold otherwise would be to permit the

effects of the lawsuit itself to constitute grounds for modifying a parenting plan, inviting potential abusive use of conflict.” Id. Moreover, “the provisions of a temporary parenting plan or other temporary order should not adversely affect the final determination of a parent's rights.” Id. at 234-35.

Much like the child in Watson, the minor child in this case may have had a subjective fear of visitation with the mother, but there seemed to be no factual basis for those fears.

The father’s witnesses testified about the minor child’s anxiety that she expressed about talking to the mother over the telephone. April 20, 2015--RP 45: 5-6. Dr. Chupurdia testified that the minor child exhibited fear and anxiety over a phone call and that such fear and anxiety were irrational. April 20, 2015--RP 45: 1-6. It was Dr. Chupurdia’s opinion that whether the reasons underlying the minor child’s fears were real or imagined is irrelevant. April 20, 2015--RP 65, 67: 10-13, 13-15. This was in spite of the fact that Dr. Chupurdia relied heavily on what she called “flashbacks” or memories reported to her by the minor child. April 20, 2015--RP 52-53: 8-25, 1-10. Even the Superior Court was puzzled by Dr. Chupurdia’s testimony but the Superior Court nevertheless adopted the same position. May 7, 2015--RP 620: 10-20. The Superior Court adopted the opinion of Dr. Chupurdia, despite the fact that Dr. Chupurdia had

previously been sued for implanting false memories and misdiagnosis of sexual abuse of a child. April 20, 2015--RP 50-51: 21-25, 1-21. Father's witness, a Dr. Kimberly Chupurdia, Ph.D seemed entirely unburdened by facts.

The Superior Court in this case did not find evidence of physical abuse by the mother and did not find any physical abuse perpetrated by the mother's husband, in spite of the father's allegations. Just like in Watson, the court couldn't find evidence of physical abuse, but imposed restrictions based solely on the minor child's subjective fears.

Much like the father in Watson, the minor child's visitation anxiety in this case was at least perpetuated by the court-imposed visitation restrictions, if not originally originating from them. Dr. Chupurdia testified that her examination of the minor child began in the spring of 2014, the same time that mother's residential time was eliminated and replaced by only phone calls. April 20, 2015--RP 59-60: 6-25, 1-15. Dr. Barry Bacon, another of the father's witnesses, testified that he had discussed the pending court case with the minor child. April 21, 2015--RP 317-323. Even Dr. Bacon agreed that much of the minor child's anxiety seemed to stem from the difficulty transitioning between homes and that the minor child seemed to be progressing in overcoming her anxiety before the mother's residential time was eliminated in the spring of 2014. April 21, 2015--RP 327: 10-25.

Additionally, there was credible and substantial evidence that the father's girlfriend had subjected the minor child to sexual abuse. The Superior Court chose to ignore that evidence, even with an admission by the father's girlfriend that she both knew about the sexual abuse and that the sexual abuse occurred while the minor child was in in her custody, not the mother's custody. Exhibit P10. Even the father admitted he knew about the sexual abuse of the minor child while the minor child was in his custody. April 21, 2015--RP 331: 13-18.

The Superior Court's imposition of 191 factors is not supported by substantial evidence. The Superior Court therefore erred.

3. The Superior Court erred when it permitted testimony regarding the mother's prior relationships because the basis for the finding of adequate cause was the father's allegation that the mother physically abused the minor child.

The sole allegation supporting a finding of adequate cause and subsequent modification of the Final Parenting Plan was the father's allegation that the mother had improperly disciplined the minor child and that, as a result of the discipline, the child developed Post-Traumatic Stress Disorder (PTSD). CP 35-36.

Counsel for the mother objected to the admission of testimony regarding mother's prior relationships. April 20, 2015--RP 86: 11. Over counsel's objection, the Superior Court permitted the father to delve into

both evidence unrelated to basis for the adequate cause and events that occurred before the Final Parenting Plan in 2009. April 20, 2015--RP 86-87. Not even the father contends that the potentially abusive relationships endured by the mother occurred after the 2009 Final Parenting Plan was entered. CP 58-60.

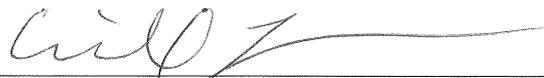
RCW 26.09.260 “allows for a modification only if, based on **facts that have arisen since the prior decree or plan** or that were unknown to the court at the time of the prior decree or plan, a substantial change has occurred in the circumstances of the child or the nonmoving party and ... the modification is in the best interest of the child and is necessary to serve the best interests of the child.” In re Parentage of Schroeder, 106 Wash. App. 343, 350, 22 P.3d 1280, 1284 (2001) (citing RCW 26.09.260(1)) (internal citations omitted) (emphasis added). “There is a strong presumption against modification because changes in residences are highly disruptive to children. Thus, it is the moving party's burden to prove a modification is appropriate.” Id.

The Superior Court erred when it permitted and considered testimony on events before the entry of the Final Parenting Plan in 2009 and erred by permitting and considering testimony unrelated to the basis for adequate cause.

VII. CONCLUSION

For the reasons stated herein, the Superior Court's 2015 Parenting Plan and Order re Modification of Parenting Plan should be reversed.

DATED this 16th day of February, 2016.



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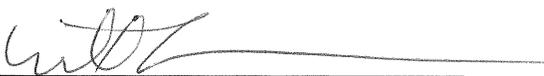
CERTIFICATE OF SERVICE

I, WILL FERGUSON, do declare that on February, 2016, I caused to be served a copy of the foregoing Brief on the Merits to the following party via U.S. Mail (in duplicate) and e-mail, to:

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Dated this 17th day of February, 2016.



WILL FERGUSON