

**FILED**

JUN 27 2016

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS DIVISION III OF THE STATE OF  
WASHINGTON

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In re

JENNIFER ROETICISOENDER	)	
(AKA WHALEY)	)	
Appellant	)	
	)	No. 337642
v.	)	
	)	
JASON GRAY	)	
	)	
Respondent	)	

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Respondent's Brief

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## Statement of Facts

A final parenting plan was entered on June 2, 2008. (R 101, RP 75-76). The parenting plan placed the minor child, Hailey Gray, in the primary care of Jennifer Whaley. Jason Gray was afforded residential time. (R 101, RP 76, 6-7)

At the time of the entry of the final parenting plan Jason Gray was in a relationship with Thelma “Jaymi” Davis. (RP 77, 7-15)

The parenting plan was followed from June 2, 2008 until February 2009. (RP 89)

On March 6, 2009, a final parenting plan was entered as part of an agreed modification of parenting plan. (CP 1-11) The parenting plan placed Hailey Gray in the primary care of Jason Gray. (CP 1-11) Ms. Whaley was afforded every other weekend during the pre-school, school, winter vacation, spring and summer schedule. Ms. Whaley was afforded a “floater day” from 9:00 am to 4:00 pm the following day. (CP 1-11)

The parenting plan contains a provision that restrained Ms. Whaley from allowing Jason Combs (or any of his family) any contact with Hailey. (CP 1-11, RP 93, 1-6)

In May 2012, Ms. Whaley signed a relinquishment and consent to the termination of her parental rights to Hailey Gray. (R 103, RP 345-346)

Ms. Whaley met Ted Roetcisoender on line in October, 2012. (RP 145) After a brief on line courtship, Ms. Whaley relocated to Juliette, Idaho to move in with Mr. Roetcisoender. (RP 137, 143, 145)

Ms. Whaley resided in Juliette, Idaho until December, 2013.

In December, 2013, Ms. Whaley and her husband relocated from Juliette, Idaho to Thornton, Washington, where they resided at the time of trial.

In January 2014, Hailey Gray returned from visiting her mother and disclosed she had been placed in cold shower, fully clothed ,by Ted Roetcisoender.

On February 4, 2014, Ms. Whaley filed a petition for modification of parenting plan seeking an increase in her residential time with Hailey. (CP 12-21)

On February 18, 2014, Mr. Gray filed a response to the petition. (CP 22-24). Mr. Gray requested the Court deny adequate cause for an increase in time and grant adequate cause for a decrease in residential time. Id

On March 4, 2014, a contested hearing on cross motions for adequate cause was conducted by Commissioner Tami Chavez. An order re adequate cause was entered. (CP 39-42).

Ms. Whaley has had no residential time with Hailey since that time.

On March 20, 2014, a letter from Lindsay Hatch was issued (P 5).

This letter provides “Client appears to experience significant anxiety and avoidance behaviors. Per Client report, she has been engaging in self-harm (skin picking) in attempt to avoid her visitations with Mr. and Mrs. Roetcisoender.” (P5)

Within the recommendation section, Ms. Hatch recommended that contacts continue to be suspended until a psychological evaluation could be completed. (P5)

On September 15, 2014, a hearing occurred before Commissioner Tony Rugel on Ms. Whaley’s motion for supervised residential time. The Court issued an order denying the request for supervised residential time and adopted the recommendation of Dr. Chupurdia as contained within her August 11, 2014 report. (R 106).

Trial occurred before Judge Maryann Moreno in Spokane County Superior Court and a ruling was made.

The order re modification contains findings. (CP 90-93). Within the findings is “Hailey appears to have been emotionally abused by Ms. Roetcisoender or some one in her household. Id. There is another finding that “Since the final parenting plan was entered, Ms. Roetcisoender has

exposed Hailey to several relationships that had a domestic violence component.”

#### Legal Argument

Appellant has three assignments of error, but focuses primarily on the claim that “The Superior Court erred by delegating the residential schedule to the sole discretion of a 3<sup>rd</sup> party counselor.” (Appellant’s opening brief, iii)

The Appellant cites to Parentage of Schroeder, 106 Wn. App, 343, 22 P. 3<sup>rd</sup> 1280, 2001 as support for the claim that the provisions in the parenting plan as ordered by Judge Moreno are impermissible.

In Schroder, the non-custodial parent appealed the denial of his request for change in primary placement. *Id.*

The judicial officer in Schroeder endowed the guardian ad litem, without any opportunity for judicial review, to make modifications to the parenting plan. The trial court ruled [the GAL's] calendar [for visitation] supersedes the parenting plan." It did not provide that it would review the GAL's actions. This 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.* at 353.

In the Whaley-Gray case, a counselor was selected to provide recommendations. There is nothing in the parenting plan that the recommendations of the counselor trump a parenting plan.

The trial court gave the counselor a road map of what the Court was expecting and the court sought “recommendations.” (94-100), Appellant’s brief, page 5).

There was nothing in the ruling of Judge Moreno or the final parenting plan that gave the counselor the final say.

The Appellant cites to *In re Smith-Bartlett*, 95 Wn. App, 633, 979 P. 2d, 173 (1999).

In that case, the parents had gone to mandatory binding arbitration over their parenting plan issues. The document expressly provided for de novo review by the trial court. *Id.* at 638, citing to RCW 26.09.184(3) (e). Despite the clear and unambiguous language providing for judicial review, the trial Court struck the request for trial de novo and confirmed the arbitration decision without a hearing. *Id.* at 636.

In the Whaley-Gray case, there is no bar to judicial review and no Court has said either parent is precluded from coming to Court to address the recommendations of the counselor.

The most relevant case to this analysis is not cited by Appellant and the case is Kirshenbaum v. Kirshenbaum, 84 Wn. App. 768, 929 P. 2d 1204 (1997).

Kirshenbaum was a case of first impression regarding the court's power to delegate visitation suspension authority to an expert. Id.

The Court in Kirshenbaum imposed 26.09.191 restrictions against the mother and awarded the mother specific contacts.

In Kirshenbaum, the parenting plan vested an arbitrator with authority to make "additions or alterations" to the parenting plan. Id at 800, quotes in original.

The parenting plan specifically stated there would be no restrictions on the mother's contacts because the 3<sup>rd</sup> party could make additions or alterations to the parenting plan. Id.

The Kirshenbaum Court upheld the authority of the arbitrator to suspend a parent's contacts as the decision to suspend was subject to immediate court review. The Kirshenbaum Court went on to hold that the delegation of this authority (to suspend the parenting contact such to court review) was valid under the marriage dissolution action. Id at 801.

In Kirshenbaum, the trial court relied on RCW 26.09.191 (3) for appointing an arbitrator with the authority to alter the parenting plan.

In the instant case, there is a 26.09.191 finding against Ms. Whaley regarding a pattern of emotional abuse of a child.

The counselor in the Whaley-Gray case is charged with providing recommendations for reintegrating Ms. Whaley back into the child's life. The counselor does not have unchecked or sole authority to do anything, but to recommend.

The Appellant contends that "The 3<sup>rd</sup> party counselor's authority in the case at bar is unchecked and unrestrained and the Superior Court erred when it abdicated its authority." (Appellant's brief, page 7.) This is simply untrue.

Judge Moreno set out details of her expectations regarding the services of the counselor and goal of trying to reintegrate Ms. Whaley back into the child's life.

The parenting plan itself states "the Court requests Ms. Hatch provide some recommendations as to progressing to one on one visitation with Mom and Hailey." (CP 94-100). This clearly contemplates a judicial review of the recommendations. It does not say the parties shall follow the recommendations and they are barred from seeking judicial review.

The Kirshenbaum Court discussed that:

Courts frequently rely on the recommendations of mental health professionals in fashioning and making alterations to visitation schedules. See, e.g., *Helliar*, 62 Wash. App. at 385, 814 P.2d 238. Allowing an appointed counselor's chosen course of action to be effective immediately, rather than awaiting a decision by the court, provides an efficient and flexible solution to disputes and threats to the children's welfare as they arise. Because the court retained the ultimate authority to review Reiter's decisions, it did not abuse its discretion by giving Reiter authority to suspend visitation. While we agree that the court may not delegate the final and binding authority to terminate a parent's visitation rights, we find no improper delegation here. We hold that the court may vest an arbitrator with authority to suspend visitation as long as the parties have the right of court review. Because Reiter was not given the final and binding authority to terminate visitation, we affirm the judgment below. *Id*

What Judge Moreno did in the Gray-Whaley case is give less authority to the counselor than that which was endowed to the 3<sup>rd</sup> party in Kirshbaum.

The Appellant would have the Court arbitrarily state that a schedule would be A for this period of time, then B for this period of time and then C for this period of time. That is a mechanical approach to a complex relationship between Hailey and Ms. Whaley.

If a child had been the victim of domestic violence from a parent and at the time of the trial was still suffering the effects of that abuse, a trial Court would be required, under the theory proffered by Appellant, to order a specific schedule of contacts without any regard to how the child was progressing in the relationship with the parent who had abused them.

Imposition of Limiting Factors under 26.09.191

The appellant contends the trial court erred in imposing limiting factors against Ms. Whaley under 26.09.191.

The trial court imposed two findings. The first was a finding that Ms. Whaley had engaged in a pattern of emotional abuse of a child. The second is that Hailey has been exposed to several relationships with domestic violence components in the mother's household.(CP 91, 94-100).

The facts and testimony amply support the Court's findings.

In February 2009, Ms. Whaley disclosed to Jaymi Davis that her boyfriend, Alvin Hudson, had sexually molested Hailey Gray. (RP 89-91, RP 92, 5-7) Ms. Whaley had heard Hailey screaming from the home of Mr. Hudson's mother and she entered the home and found Mr. Hudson standing over Hailey. There was diaper with pink. (RP 128-129).

Ms. Whaley had gone and filed a petition for order for protection on December 29, 2008 under Spokane County Cause Number 08-2-05671-1 alleging the same. (RP 92, 1-5) On March 9, 2009, an order denying the petition was entered due to non-appearance. (RP 92-93)

On April 1, 2009, or less than a month after the entry of the final parenting plan that contained a restriction on Mr. Combs being around Hailey, Ms. Whaley married Jason Combs. (RP 98, 12-15) Ms. Whaley

contended that despite being married to Mr. Combs, she really did not live with him. (RP 99, 10-12)

Ms. Whaley acknowledged Mr. Combs had been domestically violent towards her and she married him despite his being domestically violent towards her. (RP 98, 16-25)

On June 4, 2010, Ms. Whaley filed for dissolution of marriage against Jason Combs. This was filed in Spokane County Superior Court on June 4, 2010 under Spokane County Cause number 10-3-01430-4. (RP 104, 5-12)

Ms. Whaley testified that Mr. Combs was both physically and verbally abusive to her. (RP 104, 5-25, RP 105-106) She contended that none of this abuse occurred in the presence of any of the children, namely Hailey Gray and the children Ms. Whaley had with Mr. Combs, however she eventually acknowledged Hailey was there. (RP 106, 17-25)

Ms. Whaley then commenced a relationship with William Charles Soelter, also known as Willie Charles Soelter in 2010. (RP 107-108)

During this relationship, Stephanie Combs, the daughter of Ms. Whaley, broke her femur while in the care of Mr. Soelter. (RP 114, 131-132) Ms. Whaley contended that Stephanie simply fell out of her bunk bed and broke her femur. (RP 114, 3) Ms. Whaley testified at trial that she believed this to be the case based on what Mr. Soelter told her occurred.

Jaymi Davis testified that Ms. Whaley disclosed her belief Mr. Soelter caused the broken femur. (RP 344, 7-22, 345,1-3.)

Subsequently, Mr. Soelter was choking Ms. Whaley. (RP 112, 6-25) During this assault, Ms. Whaley inadvertently dialed Ms. Davis. Ms. Davis, who could hear the assault occurring, commenced driving to the residence and called 911. (RP 111)

When Ms. Davis arrived she saw Stephanie and Sebastian Combs at the home and the home in complete disarray. (RP 343-344) During trial Ms. Whaley testified she could not even recall whether her children were present during the assault. (RP 111, 23-24). She maintained this position even after Ms. Davis testified that the children were present when she arrived that the home. (RP 343)

Ms. Whaley's current household with her current spouse exposed Hailey to abuse.

Records from Dr. Barry Bacon were submitted. (R 107) Dr. Bacon had been a care provider for Hailey Gray since 2012. (RP 271, 10-13)

Dr. Bacon testified that based on his office visit with Hailey per the February 24, 2014 record, "Hailey was exhibiting some anxiety symptoms, including skin picking, some sores that were showing up, new behaviors, including reporting feeling scared and anxious about her—her

situation, her relationship.” ( RP 276, 4-12). The relationship was with Jennifer Whaley, Id

On March 31, 2014, Dr. Bacon met with Hailey. (R 110). These records discuss Hailey has anxiety and depression (she says at her mom’s she feels really scared they are all really mean.”) Within the report, Hailey did not want Jaymi Davis to leave the room. (R110)

On April 23, 2014, Dr. Bacon met with Hailey. (R 111). Hailey continued to have symptoms of anxiety, excessive worry, nervousness, panic attacks, shaky hands, and sweaty palms. Dr. Bacon noted Hailey’s face and arms were better from her not picking at them. During the session, Hailey discussed she had negative reactions to the name of Ted.

Under today’s impression, “it is my opinion that Hailey’s relationship with her mother is the source of much of her anxiety and her relationship with her stepdad, Ted. “ He goes on to discuss that “counseling is very important for this child’s development and behavior issues.” Id

On July 31, 2014, Haley met with Dr. Bacon. (R 113). The records discuss Hailey disclosing Ms. Roetcisoender calling her and proposing to go to splashdown, but that Hailey did not want to speak with her. The records disclose Hailey picking at her legs and feet when she becomes anxious over the phone calls. The picking was in direct reaction to the prospect of having to call Ms. Whaley. Hailey went on to disclose she felt

like she was going to throw up when she was expected to speak with Ms. Whaley. Id

Dr. Bacon testified that Hailey disclosed to him that as a form of discipline that she was placed in a shower and that Ms. Whaley's husband forced her to stay in the shower and turned the shower on and closed the door and caused her to stay inside the shower. Ms. Whaley watched the event. (RP 279, 14-19)

These records of Dr. Bacon discuss that Hailey "suffers greatly from anxiety" and that "much of her anxiety is related to the separation from her father and Jaymi Davis. The records go on to discuss that "it is clear from drawings, from personal interviews and from body language..... Hailey feels frightened, anxious, restless, sad and at times terrified about going to her biological mother's home." The recommendations were made by Dr. Bacon that visits between Hailey and Ms. Whaley and her household be limited and supervised. Dr. Bacon went on to express that "I am convinced that it is not in Hailey's interest to continue unsupervised contact with her biological mother's household and that her health will suffer by such contact." (RP 285)

Dr. Bacon concluded that Hailey was engaging in unusual behavior and was exhibiting signs of severe anxiety. (RP 283, 24-25, RP 284, 12-15)

Dr. Bacon testified that after contacts between Hailey and Ms. Whaley were suspended, Hailey's face and arms were better, from not being picked at. (RP 288-289).

Dr. Bacon testified to drawings the child made exhibiting her fears and anxieties regarding Ms. Whaley and Ms. Whaley's husband. (R 112, RP 296-297).

Dr. Bacon testified that Hailey continued to have fears of Ms. Whaley and Ms. Whaley's husband. (RP 301, 8-12).

Dr. Bacon, while the case was pending, recommended the child have a psychological evaluation.

Dr. Kim Chupurdia, Phd was appointed for said purpose.

On August 11, 2014, Dr. Kim Chupurdia issued a report. (R114. CP 124-131) The evaluation occurred over a two month period. The diagnosis of Post Traumatic Stress Disorder, which is an anxiety disorder, was made. Hailey's PTSD is secondary to the excessive discipline Hailey received while in Ms. Whaley's care. (RP 25, CP 124-131) Hailey was having intrusive distressing memories of abuse, nightmares and both physiological and psychological reactions to external cues that remind her of abuse. Id

The report discusses that Hailey's anxiety is much more intense and engages in a great deal of skin picking when she has to call Ms. Whaley.

Id. The report goes on to discuss that Hailey talking with her mother about these subjects serves as a trigger, which prompts an onslaught of distressing memories following the phone call. Id.

As part of the recommendations, Hailey was to have the option of ending the phone call when she feels her anxiety is too high. Id

On January 15, 2015, Dr. Chupurdia issued a second report. (CP 142-145). The report discusses that Hailey is more assertive and able to speak more freely about the abuse she experienced. The report discussed Hailey recommenced her skin picking caused by the thought of having to see Ms. Whaley. The report goes on to discuss that in Hailey's viewpoint, she has suffered emotional and physical abuse. Id

Hailey shared that she did not feel safe with Ms. Whaley (RP 39-40) nor with Ms. Whaley's husband. Id

Dr. Chupurdia testified that Hailey showed signs of anxiety when speaking about Ms. Whaley. (RP 40). These signs, observed by Dr. Chupurdia, included tears, shortness of breath, gasping and physical agitation.(RP 40, 12)

Dr. Chupurdia testified to Hailey's feelings that she was in danger with Ms. Whaley and Ms. Whaley did not protect her. (RP 47).

Dr. Chupurdia recommended that in treating Hailey's anxiety related to contacts with Ms. Whaley, that the contacts be in a manner that

Hailey feels comfortable. (RP 47, 12-15).

It is further evident that Ms. Whaley has provided homes where domestic violence took place.

It was contended by Ms. Whaley that none of the domestic violence ever occurred in the presence of the children and as a result, the children have not been harmed by such. There is evidence that this position is not credible.

In *Marriage of Zigler and Sidwell*, 154 Wn. App. 803, 2010, review denied 169 Wn. 2d, 1015 (2010), the Sidwell, the Court changed primary placement because of the history of domestic violence Ms. Zigler's home. *Id.* The Court went on to discuss that 2006 episode of domestic violence in Ms. Zigler's home alone supported a finding of detriment. The Court went on to cite that children who live in violent homes are traumatized by the violence and more likely to commit crimes as adults. *Id.* at 814, citing Andrew King-Ries, *Crawford v. Washington: The End of Victimless Prosecution?*, 28 SEATTLE U.L.REV. 301, 307 n. 31 (2005)

In the instant case, not only has the child been exposed to domestic violence in the care of Ms. Whaley, but the child was a victim as well.

The child has suffered and continues to suffer from the effects of that abuse. This was testified to by Doctors Bacon and Chupurdia.

#### Prior Relationship Consideration

The final assignment of error relates to the trial court allowing testimony regarding the history of relationships prior to the entry of the 2009 parenting plan.

This position must be rejected.

The final parenting plan in 2009 had been entered by agreement.

RCW 26.09.260(1) allows the court to consider " facts that have arisen since *the prior [parenting] plan* " and " that were unknown to the court at the time of *the prior [parenting] plan.* "

Moreover, the facts underlying the parties' agreed parenting plans appear to be unknown to the trial judge. " Unknown" facts *include* those facts that existed before an agreed parenting plan was entered. In re Marriage of Timmons v. Timmons, 94 Wash.2d 594, 598-99, 617 P.2d 1032 (1980).

The " prior plan" for RCW 26.09.260(1) purposes, then, was the parties' parenting plan.in 2009. That means the trial court here had to base its decision to modify the existing parenting plan on facts that were not

before the court at the final parenting plan or unknown to the court. And it did.

The court in 2009 was not made aware of the Alvin Hudson event.

There was a direct provision regarding Jason Combs so the trial court would have to make inquiry as to what the basis for that restriction was as the parenting plan did not reflect.

The domestic violence with Mr. Soelter occurred after the entry of the final plan.

The Court did evaluate the credibility of Ms. Whaley including her failure to disclose domestically violent relationships to Dr. Jameson Lontz.

The report of Mr. Lontz (P14) is illuminating to show the inconsistencies in what Ms. Roetcisoender shared with him as compared to what she has testified elsewhere. For example, she disclosed to Dr. Lontz she was married from 2004 to 2005 (married but not together). She then went on to contend she was married from 2009 to 2011, together 2007 to 2010. This time period means it would have to be Jason Combs. Ms. Roetcisoender claimed she and Mr. Combs never really lived together despite being married, but told Dr. Lontz she was with Mr. Combs from

2007 to 2010 (or before the entry of the original final plan and after the modified plan).

The report (page 4 of 8), discusses that “Ms. Roetcisoender has conceded that she has had difficulties being fully available for Hailey at times.” This conflicts with Ms. Roetcisoender’s testimony that any interruptions in time were due to interference by Jaymi Davis.

Other credibility issues with the report are seen from intellectual-academic performance. While Ms. Roetcisoender extolled her academic abilities, her testing results showed the contrary

The report also comments on the validity of the MMPI –II. The report concludes that the test results for Ms. Roetcisoender show one who has a tendency to make self conscious attempts at appearing overly virtuous. This type of person has “low insight and rigid role orientation.” The clinical scales supported those conclusions. The report also discusses that Ms. Roetcisoender “has rather strong symptoms of paranoia.”

The report also contained no disclosures by Ms. Whaley regarding her history of choices she made with men and domestic violence and that this would have made a difference to the report. (RP 621).

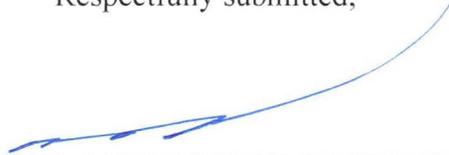
In the end, the Court did nothing improper .

Conclusion

Judge Maryann Moreno issued an appropriate and legally sound parenting plan with appropriate restrictions and the decision of the Court should be affirmed.

June 25, 2016

Respectfully submitted,



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	)	
JASON GRAY	)	
	)	Certificate of Service
Respondent	)	

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I, Matthew J. Dudley, certify that on the 27th of June 2016, I served a copy of the Respondent's Brief by depositing a copy of such in the United States Mail, proper postage affixed, addressed to :

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June 27, 2016

  
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