

Washington State
Court of Appeals
Division III

FILED

OCT 24 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Appeal from the Superior Court of Spokane
Honorable Annette Plese

Michelle Demand
Petitioner/Appellant

And

Sean Minderman
Respondent

No. **348296**

Reply Brief of Appellant

Gary R Stenzel
Attorney at Law
WSBA #16974
1304 W College Ave LL
Spokane, WA 99201

(509) 327-2000
(509) 327-5151 Fax
Stenz2193@comcast.net

Table of Contents

	Page
I. RELEVANT FACTS FOR REPLY.....	1
II. REPLY ARGUMENT.....	4
A. <u>There was clear evidence that the court used what happened in the implementation of the temporary orders in fashioning a final parenting plan in violation of the <i>Kovac's</i> rule.</u>	5
B. <u>There were no findings of fact to justify not giving the mother a child support deviation for her 50/50 custody, therefore, this court should either remand this case to resolve that issue equitably or overturn the entire child support order retroactively for a new order.</u>	5
C. <u>There must be substantial evidence to support a finding of fact and they must be relevant to the conclusion of law and decision, and it is an abuse of discretion for a judge to use an expert's opinion that is not well founded on the facts of the case and for the judge to basically diagnose one of the parties without an expert opinion.</u>	5
D. <u>The father has asked for the mother to pay his attorneys fees for this appeal but has not followed the RCW 26.09.140 in this request</u>	8

TABLE OF AUTHORITIES

Cases

Table of Cases	Page
Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 191 P.3d 879 (2008)	6
In re Jacobson, 120 Wn.App. 770, 86 P.3d 1202, (Div. 1, 2004)	7
In re Marriage of Combs, 105 Wn.App. 168, 19 P.3d 469 (Div. 3, 2001)	4
In re Marriage of Kovacs, 121 Wn.2d 795, 854 P.2d 629 (1993)	4
In re Parentage of A.L., 185 Wn.App. 226, 340 P.3d 260 (Div. 3, 2014)	5
Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 230 P.3d 583 (2010)	6
Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 935 P.2d 555 (1997)	6
State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993)	6
State Ex Rel. M.M.G v. Graham, 159 Wn.2d 623, 152 P.3d 1005 (2007)	5

Statutes

Table of Statutes	Page
RCW 26.09.140	8
RCW 26.09.191	3
RCW 26.19.075	5

I. Relevant Facts for Reply

The parties have two children, an older daughter and a younger boy. Kailey, the girl, had quite a difficult time with the divorce and saw counselors. The Appellant was the primary care taker before the divorce even though she is a career woman with a small investment firm of her own. The mother alleged that the father was somewhat abusive during the temporary order period, and so a GAL was appointed for the children. The GAL did not confirm the abuse allegations, however, the Commissioner in the case ordered an 8/6 day and 50% summer Temporary Parenting Plan which was followed for 3 years. (See Findings of Fact 11-19).

Eventually at trial, the GAL testified, along with the parties. Ancillary witnesses testified and in particular the father had a social worker named Rita Zorrozua MSW testify didactically about “parental alienation syndrome” factors, but she made it clear she knew nothing about the case or the parties. Her testimony was objected to by the mother’s attorney given her lack of foundation for applying any psychological theories to the parties or children. Even so the Trial Judge used Ms. Zorrozua’s testimony extensively, which completely lacked foundation for this case, to castigate the Appellant mother and give primary care of the children to the father even though they had a 50/50 parenting plan. See Findings of Fact.

At the time of her oral ruling the Judge also went through the temporary parenting orders and indicated that the parties successfully followed those orders, so a 50/50 plan could work. It seemed clear from the written findings of fact that the judge utilized and referenced the temporary Parenting Plan as a precursor for

the final plan. As she said in part at finding #11, “In October 2012, the Court set up the current parenting plan where the mother had 8 overnights and the father had 6 overnights in a two-week period. . . .” Then at #14 she stated again, referencing the temporary period, “During the three years that this case has churned through the court system and the various judicial officers, the parties continued their 8/6 plan with a 50/50 plan during the summer.” This all seemed to clearly lay a foundation for the final 50/50 Parenting Plan, which the mother objected to.

With the 50/50 plan came a request by the mother for a child support deviation, however, one was not granted, and no findings were entered as to why it was not granted.

Finally, the court entered a very large number of findings of fact, 138 to be exact; which contain significantly negative personal opinions and speculation laced in the judge’s comments, along with hearsay which in the end seemed clearly prejudicial to the mother as well as inappropriate. Those findings of fact are classified in the following taxonomy with a description of what they contained that are examples of objectionable findings of fact (not all findings were analyzed here):

<u>Finding of Fact No.</u>	<u>Concerns</u>
11, 12, 13, 14, 15, 18, & 19;	References to the 8/6 day & 50% summer Temp Parenting Plan and how it worked as a basis to justify her Final Parenting Plan ruling instead of a more restrictive parenting plan.
21, 22, 26, 27, 28, 30, 34, 35, 37, 41, 43, 45, 46, 50, 65, 75, 88, 94,	

101, 104, 110, 117, &
119;

Incomplete sentences without context.

25, 35, 36, 42, 46, 47,
48, 60, 71, 72, 90, 91,
95, 96, 100, 101, &
129;

Personal opinions of the Judge.

3, 4, 5, 40, 43, 68, &
69

These Findings of Fact are not findings of fact, some are hearsay, or are incomplete sentences.

There were other findings that were simply comments and not findings as well. These were too numerous to post to keep this Reply Brief within its page limit. There were few, if any actual findings of fact that seemed to support the court's rulings that were not cluttered with innuendo, opinion, and partial comments. It was as if the Respondent's counsel handed the transcript of the judge's oral ruling to a paralegal, who "summarized" the Judge's oral ruling numerically, without editing. For example, there was a RCW 26.09.191 factor found by the court, which should have been a conclusion of law, which incorporated Ms. Zorrozua's testimony, even though the same findings at #84 partially states as follows: "Ms. Zorrozua admitted she doesn't know anything about the facts in this case. . . ." And, in another finding the court referenced Ms. Zorrozua's testimony to support the court's personal opinions about how the Appellant actions fit her clinical descriptions, again, even though Ms. Zorrozua never said anything about how the mother fit these diagnostic concerns. See findings 83 – 101. In summary, there was no actual testimony by any professional creating a nexus between observation by Ms. Zorrozua and her explanation of this serious clinical problem of parental alienation. Yet, the Respondent's Responsive brief indicates that there was a myriad of "facts

supporting” the court’s parenting plan orders, however, most of these facts were either during the temporary order period or lacked professional corroboration.

II. Reply Argument

A. There was clear evidence that the court used what happened in the implementation of the temporary orders in fashioning a final parenting plan in violation of the Kovac’s rule.

In the case of *In re Combs*, 105 Wn.App. 168, 19 P.3d 469, (Div. 3 2001) (partially overturned for other reasons), the court made it clear that a reliance on the things that occurred during the Temporary Order stage are highly irrelevant pursuant to statute and the case of *In re Marriage of Kovacs*, 121 Wash.2d 795, 809, 854 P.2d 629 (1993) and should not be referenced as in anyway influencing the final parenting plan. In this case, the findings of fact clearly focused on what the parties did regarding parenting during the temporary period and how well it went, to justify the final 50/50 schedule. Two of those finding state,

“11. In October of 2012, the court set up the current parenting plan where the mother had 8 overnights and the father had 6 overnights in a two week [sic] period, and the Court also appointed a Guardian ad Litem.

12. In setting up this 8/6 plan, the Court didn’t make any findings that Mr. Minderman had any of the issues that would concern the Court or limit his time with the children.”

This was not just a recitation of the facets, it was referenced to justify a shared parenting plan as a plan that could work in the future. With this and other comments about how successful Mr. Minderman did during the interlocutory period, it then gave him a clean bill of health for a final equal parenting plan. This is similar if not the same as in the *Combs* case where this court found that the mother’s successes in how well she implemented the temporary parenting plan should have no bearing

on the final plan. The *Kovac*'s rule was breached by the *Combs* judge by focusing on the interlocutory parenting plan facts as a justification for its final parenting plan decision.

- B. There were no findings of fact to justify not giving the mother a child support deviation for her 50/50 custody, therefore, this court should either remand this case to resolve that issue equitably or overturn the entire child support order retroactively for a new order.

As has been decided by this case recently, when a court must consider whether a parent receives a child support deviation or not, it must provide clear findings of facts why it either gave a deviation or denied the deviation request. See *In re Parentage of A.L.*, 185 Wn.App. 226, 340 P.3d 260, (Div. 3, 2014). The court in *A.L.* stated clearly, “[t]he trial court must enter written findings of fact supporting the reasons for any deviation or denial of a party's request for deviation. RCW 26.19.075(3); *Graham*, 159 Wn.2d at 627-28.” (Emphasis added). In this case the court did not make findings of facts why it did not deviate in the child support; this left the mother, who had been the primary parent before and during the filing of the case with a significant support payment and 50% of the parenting time. This was error according to *A.L.*.

- C. There must be substantial evidence to support a finding of fact and they must be relevant to the conclusion of law and decision, and it is an abuse of discretion for a judge to use an expert's opinion that is not well founded on the facts of the case and for the judge to basically diagnose one of the parties without an expert opinion.

In this case, there are 138 findings of fact and very few conclusions of law. The findings of fact in this case are all over the board, some are personal opinions of the judge herself, some are incomplete sentences, some are actual findings, and

others are based on the opinion of an expert without any knowledge of the case.

Trial courts have broad discretion regarding “evidentiary matters and will not be overturned absent manifest abuse of discretion.” *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997). Washington’s Supreme Court has set the standard of review as follows: “A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. A trial court’s decision is manifestly unreasonable if it adopts a view that no reasonable person would take. A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts. See *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010) (internal quotation marks and citations omitted). This rule applies with regard to the use of an expert’s opinion. However, a trial court’s ruling will not be overturned unless the wrongful use of the expert’s opinion “materially affected the outcome of the trial.” *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 446, 191 P.3d 879 (2008) (quoting *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993)).

In this case Ms. Zorrozua testimony seemed to materially affect the outcome of the case in the form of the shared parenting plan and naming Mr. Minderman as the primary custodial parent. This occurred despite the fact that she testified that she did not know the parties, did not know the children, and was unfamiliar with the case. For example, the judge used Ms. Zorrozua’s descriptions of the elements of the diagnosis of parental alienation syndrome to justify its finding that the Appellant had section 191 problems, even stating in her findings of fact that the

mother suffered from parental alienation syndrome. If one was to stop a “person on the street” and ask him or her if it is appropriate to conclude that a parent suffers from parental alienation syndrome if you told them that the expert providing the diagnostic description and elements did not know anything about the case or the parties; most, if not all of them would say No. It is absolutely inappropriate for a judge to make a difficult psychological diagnosis of a person when there has been no analysis by an expert to state “more probably than not” that that person suffers from that diagnosis. See e.g. *In re Jacobson*, 120 Wn.App. 770, 86 P.3d 1202, (Div. 1 2004).

Put another way, there was not substantial evidence about the mother from a clinical expert that labelled her with parental alienation syndrome. Yet the judge took the comments of Ms. Zorrozua, even diagnosing the mother without an expert’s opinion. It is not enough to simply refer to an expert’s oral discussion of the features of parental alienation syndrome to simply plug the activities of a parent into those labels and conclude that she has that psychological problem. *Id.* This was significant because the finding of a 191 issue also included a finding of parental alienation, although no expert ever found the mother to have that syndrome.

The father’s counsel continued on and on about how all the facts support the Judge’s findings. The findings say she had secret phone codes with the daughter, she claimed the father had a sexual object where his teenage daughter could see it, she accused him of reckless driving, she was said to not let the father have phone contact with the children, and in comparison the father was a better or more friendly parent because he would not retaliate against her; all of which was during the

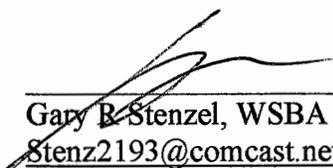
temporary period and was used by the judge to again, diagnose the mother with alienation syndrome and label her with a 191 factor. Any or all of these alleged issues could have been true, there were few findings that they were all false or made up. There was also a lot of speculation about these problems, as well as innuendo, but no finding that they were all made up or false.

D. The father has asked for the mother to pay his attorneys fees for this appeal but has not followed the RCW 26.09.140 in this request

Mr. Minderman, through his counsel has asked for Ms. Minderman to pay for his fees in this appeal. He relies on RCW 26.09.140 and the parties' "child support worksheet" to show that she has the "ability to pay" those fees. That statute requires the party seeking for fees to file a financial declaration in support of their request and show there is a need. No financial declaration was filed with their request. RCW 26.09.140 states: "The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment. Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs. The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name." This statute requires more information than simply the parties' incomes, primarily

because they could own their home, substantial personal property, or even win the lottery from which to pay their own fees. The failure to provide a financial declaration outlining the requesting party's "financial resources" is fatal to the request for fees under this statute. This request should be denied.

Respectfully submitted this 23rd day of October 2018.



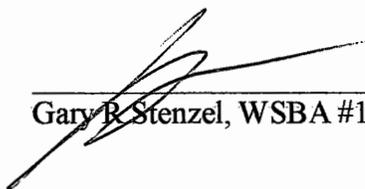
Gary R. Stenzel, WSBA #16974
Stenz2193@comcast.net

Declaration of Mailing

I Gary R Stenzel on this 24th day of October 2018 deposited a true and accurate copy of this Reply Brief of Appellant in the US mail addressed to:

*David Crouse
Attorney at Law
422 W Riverside Ave #920
Spokane, WA 99201*

I sign this under penalty of perjury this 24th day of October 2018.



Gary R. Stenzel, WSBA #16974