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Court of Appeals  
Division III

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

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Appeal from the Superior Court of Spokane  
Honorable Annette Plese

Michelle Demand  
Petitioner/Appellant

And

Sean Minderman  
Respondent

No. **348296**

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Opening Brief of Appellant

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ORIGINAL

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## I. FACTS

The parties were a married couple in Spokane County who have two children, one preteen boy and the other a teenage girl. CP 292-295. Unfortunately, the parties' dissolution case had been going since 2012, so they had to live with temporary orders over a four-year period until this trial. CP 31-154 & 26-30. As happens, many things transpired under the interlocutory orders, including contempt, discovery issues, issues related to their incomes and parenting, payment of medical insurance, and the appointment of a Guardian ad Litem (GAL) for the children. CP 31-154. The ruling on appeal deals primarily with parenting and child support issues since that it was separate from the property. CP 506-549. (The parties had settled the financial issues before this trial and so only these parenting issues remained. See CP 295 line 21).

This was a rather unusual trial, in that it seemed to focus on what happened during the temporary order period, rather than the parties care taking history before separation. Additionally, the husband's counsel spent an inordinate amount of time controlling the testimony of both his client and their expert using highly leading questions. See e.g. RP 139-161,188-264, expert 525-593 & 601-607. At times, it was difficult for this writer to determine who was testifying, the witness or the attorney. To be fair, the judge did correct counsel a couple times, however, after a short while he continued with more leading questions. The wife's counsel objected to this leading, especially with their expert, however,

she eventually it was so obvious and recurring that she had to make a “continuing objection”. RP 134-161; as to expert RP 525-609, as an example<sup>1</sup>. However, interestingly, the court basically ignored the objection, and even told the father’s attorney how to ask the question so it would be allowed. Id.

There was also testimony by the GAL about what happened in the case since 2012. RP 10-124; 162-188; & 709-718. The GAL testified that she felt an equal parenting plan would be best for the children. Id. At one time the concept of “Parental Alienation” was broached by the father’s expert, however, the GAL did not say that she found alienation. Id.

In the end, and despite the GAL’s testimony the court found a limitation basis, referencing the father’s expert’s testimony on parental alienation, basically accepting the leading questions and answers as true. RP 810-837. Even so, the court entered no limitations on the mother but instead ordered an exactly equal parenting plan to maintain the mother’s contact in the lives of the children since it was clear that she had been significantly involved with the children all their lives. Id. Unfortunately, the court’s findings, orders, and parenting plan that was entered were inconsistent with the final orders and inappropriate findings of fact that were very prejudicial and inappropriate. For example, the court made the father the “primary custodial parent with the greatest amount of time”

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<sup>1</sup> The transcript is replete with leading questioning by the Respondent’s counsel. It would almost be fair to cite to the entire record of proceedings. The greatest amount of prejudicial leading by the Respondent’s counsel was with his expert witness Ms. Zorozua as Identified at RP 525-609.

when that was not even close to being true since they had an exactly equal schedule. RP 825-830. In addition, even though the court ordered equal time between the parties, and although the mother's attorney told the court she wanted to argue for a deviation, the child support did not deviate and ordered the mother to pay the father almost \$1,700.00 a month without explanation of why. See CP 285-291. This left the child support orders completely deficient and did not follow the case law or statutes on this issue. Id.

The orders that were eventually entered seemed to emphasize the clear possibility that the judge was highly prejudiced toward the mother since the orders were in no way slanted against the father in any way, and basically seemed to punish the mother because she was found to have inappropriately used conflict to the children's detriment. RP285-291.

All of this was compounded by the fact that the Findings of Fact were replete with innuendo, dicta, and prejudicial opinions and comments about the mother, that are inappropriate as findings of fact. There were nine pages of numbered findings which were more like "comments" from the judge's oral ruling, without appropriate explanations. CP 295-304. At least 50 or more of the 134 "findings" were clearly inappropriate and potentially misleading for future courts with even more focused on negative comments about the mother. Id. In addition to the negative opinions by the judge there were no detailed Conclusions of Law of any legal substance. There was no conclusion of law that the parenting plan

was “in the best interests of the children”, or that explained how the findings fit with the court’s rulings CP 304-305.

Finally, the child support that was ordered was based on the mother’s business income, without any explanation of how her business tax deductions taxes, and other deductions affected her net monthly income she was said to earn. CP 280-284. Nothing was filled out in the deduction column for the mother, however, since the father’s counsel drafted the final orders, his client’s deductions were detailed and showed a lot of deductions, even though he too was a business owner of two businesses. Id.

All in all, there were many seeming errors in the final papers that are part of the basis for this appeal along with violations of the evidence rules. The mother requests this court vacate the parenting plan and child support orders, and remand the matter back to a different judicial officer to retry this case properly.

## **II. DESCRIPTION OF JUDICIAL ERRORS**

The trial judge erred in the following matters in this case:

1. By failing to control the presentation of evidence at trial allowing the father’s attorney to continuously ask prejudicial and leading questions, especially with his expert witness;
2. By providing the father’s attorney with legal advice on how his leading questions could be admissible, in response to the mother’s attorney’s objection to excessively leading questions with his expert.

3. By entering Findings of Fact that included a significant number of prejudicial dicta comments, hearsay statements, and opinions that were not factual in nature;
4. By referencing the parties' temporary parenting orders and how well the parties did under those orders as proof that a final shared parenting plan would be appropriate, in apparent violation of the *Kovacs* case ruling at 121 Wn.2d 795, 854 P.2d 629 (1993).
5. By entering a parenting plan without any substantive conclusions of law and not indicating that it was in the children's "best interests",
6. By prejudicially entering a parenting plan that ordered that the father was the *primary parent with the greatest amount of parenting time in the custodial section of those orders*, even though the plan ordered exactly equal time for both parents;
7. By entering a child support order that failed to recognize that the mother asked for a deviation from the standard calculation because of the 50/50 schedule and failing to enter findings as to why a deviation from the standard calculated support was not granted to the mother reducing her child support, even though a strict 50/50 plan was ordered and both parents had substantial incomes;
8. By approving and entering a child support worksheet that failed to show how the mother's "net income" was determined for the standard calculation of support;

### III. Law & Argument

- A. The use of leading questions in a parenting trial that leads to prejudicial findings and orders, especially with a parenting expert, should be remedied by a remand for a new trial.

Right from the start of this custody case, Mr. Minderman's counsel began directing his client through a series of leading questions that had what appeared to be one answer, either "Okay" or "Yes", and were seemingly intended to paint the mother in a negative light. RP 139-1611,188-264. These were not simple questions like "Are you the children's father", "What sort of holiday schedule do you think would be best?", or "What do think of the Petitioner as a parent?"; these were seemingly scripted questions of substance taken from rather negative declarations filed in the heat of the battle during the interlocutory phase of the case. *Id.* Many, if not most of the questions were reviews of temporary declarations that with a yes answer, simply and conveniently provided alleged competent foundational evidence about the mother's alleged parenting problems. *Id.* An example of this was as follows. In this example, the father's attorney directed his client to look at one of the temporary hearing declarations labeled as an exhibit and instead of asking an open directed his client about the incident that prompted the declaration, he asked –

*"Looking at the declaration, and you can look at P-1, is that what you represented to the court under oath had occurred at the bottom of page 1 under your declaration".* RP 141.

Then his attorney read from the declaration, rather than have his client explain why he wrote the declaration and what he remembered about it. He would then ask whether what he wrote was true or not, as if his client would say under oath, "No I lied". In each case he of course said, "Yes". This occurred over and over, in fact on one occasion the father answered "Yes" 12 times in a row, after his attorney read what was in his or his wife's declaration, until he ran into an "*I don't know*", from his client, which was a form of "Yes" answer to a question about why his wife would do something suggestively bad regarding his visitation. RP 141-147. Then he went on with another dozen more leading questions with "Yes" or "Okay" answers. The only remaining issue was what would be the effect of these leading questions and negative answers on the judge. Since most, if not all these questions were about allegations (only) that the mother was interfering with the father's parenting, the message was clear that the father and his counsel were setting out to paint a picture of a mother who was trying to destroy the father's relationship with his children.

As the trial wore on, the proceedings became replete with these leading questions by the father's counsel about how bad the mother was in how she dealt with the father's parenting plan time and rights. RP 147-161. All of which seemed to be the attorney testifying, not the father, which is obviously one of the reasons why leading questions are

so inappropriate, since parties must provide the evidence, not the attorneys.

The father's leading questions continued but with a potentially more important expert witness. The father called an expert named Ms. Rita Zorozua, a Master's level child and family therapist from Spokane. RP 525-608. As Ms. Zorozua testified it was obvious that she had never met the mother, the father, the children or GAL in this case. Id. Even so, after allowing her a significant amount of time talking about her resume, the attorney began questioning her about the concept of "parental alienation", without laying any foundation as to how it related to this case. RP 565. Thereafter, the questions became more pointed and leading about this topic. A sample of this questioning is set out above, when the attorney started showing this expert the mother's temporary declarations, without any explanation by the mother about why she made this declaration or the reasons for the declaration. For example:

**Attorney Crouse:** "If you look at line 45 through 50, you'll see then the allegation, 'Over the past two years Sean has been removed from the children's life as his optical business [was subjectively] [sic] audited by Premera. This audit has caused an extreme amount of stress on Sean and the family including the children. This audit has caused already high level of anxiety to amp up, as well as cause him to be more withdrawn, depressed, erratic, irrational and angry towards the children, and on the next page, it continues. He has spent several nights out gambling and drinking with his friends in order to help him cope with his overall overly stressful audit situation?"

He has spent several nights out gambling and drinking with his friends in order to help him cope with his overall overly stressful audit situation?” RP 565-567.

The mother’s counsel quickly objected, asking if there was a question in all this discussion. RP 565. The father’s counsel claimed this was all foundational. RP 566. The mother’s attorney objected that this line of questioning was so leading if it was going to be allowed to continue it would likely end up “railroading” her client RP 566-567. The judge did not sustain her objection but instead instructed the father’s counsel on how he could ask the question as a “hypothetical” so she would allow it. RP 566-567. The mother’s counsel then appropriately indicated that she would have to now make a continuing objection to the continued use of leading questions with this expert, and the questioning continued. RP 565-570.

In addition to seeming to ignore the mother’s attorney’s objection, the father’s counsel continued with his leading questions over and over, without even a suggestion that these questions were hypothetical’s, as recommended by the judge. See e.g. RP 567–594. To be fair, the father’s counsel did try and not read all the declarations to this expert; however, instead of reading the declarations he simply looked at them and by apparent memory recited the alleged facts about what the mother had done, all of which were very negative and described the mother as basically a very bad parent to this expert. Id.

An example of the attorney's questions is found on page 569 of the record after the father's attorney told the expert witness that Ms. Minderman wanted to "reduce the father's time" in a temporary order; he then turned to the expert and asked pointedly, "why would you be concerned about the children?" Id. It was as if the attorney was arguing the case while questioning this expert, with the expert there simply to corroborate his argument about the mother and her effect on the children.

After telling the expert more stories about the mother's actions, presumably from a declaration in the file, the mother's attorney then started to talk about what the GAL said about an allegation of a sexual nature against the father by the mother, including an attempt to tell her what the father's counselor said, and the mother's attorney objected again. RP 571-572. The Judge reminded counsel about her suggestion about using a hypothetical, and he simply used the words "In this hypothetical", before his next few leading questions, without changing what was asked. See RP 572 line 13 to 577 line 19. The "hypothetical" precursor lasted for a few questions, however, after about 4 or 5 such questions the attorney continued with his leading questions, with only an occasional mention of it possibly being a "hypothetical". The expert seemed to have no alternative, after being fed this one-sided information about the mother, and offered opinion after opinion that seemed scripted that eventually described Ms. Minderman as a parental alienator

suffering from Parental Alienation Syndrome.<sup>2</sup> RP 577-593. This happened even though virtually all the significant alienation questions were without foundation and were substantially leading. See RP 571-593. This sent the case down a path of guesses by this expert since she had no testimonial knowledge of the parties or children in the case other than what was told to her at trial by the father's counsel. *Id.* Eventually it was a fore gone conclusion that the theme of the expert and father was "parental alienation."

Case law on courtroom control in the presentation of evidence indicates that the judge has a duty to maintain the integrity of the truth-seeking process, especially dealing with important issues. See e.g. *Pierce v. Frace*, 2 Wash. 81, 26 P. 807 (1891)). In the case of *In re Dependency of M.H.P.* at 184 Wn.2d 741, 364 P.3d 94 (2015) the court seemed to indicate that the higher the constitutional interests (such as parental rights) the greater scrutiny the court should use in the allowance of evidence in a case. For example, leading questions would be clearly inappropriate in parenting cases where judges are entrusted with the welfare of children under the *parens patriae* doctrine. However, case law also indicates that the trial court has broad discretion in permitting or excluding leading questions and a case will not generally be overturned simply because of the allowance of leading questions. *Id.* More

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<sup>2</sup> Coined as a diagnostic impression in parental custody cases by Dr. Richard Gardner in the 1980's. See Wikipedia.

specifically, permitting leading questions is usually not a basis for reversible error unless there is substantial prejudice due to these questions. *Stevens v Gordon* 118 Wn.App. 43, 55-56, 74 P.3d 653 (2003). The key then seems to be what prejudice it may have caused. *Id.* However, the rules seem to be different for expert witnesses who may have a greater effect on the trier of fact.

When dealing with experts and leading questions in a trial the rules are a little different than for parties. It is almost axiomatic in criminal cases, for example, that leading questions are inappropriate for experts and that the only appropriate way to ask an expert a question in such cases is using hypothetical's, which ironically the judge in this case seemed to acknowledge in her counsel to the father's attorney on how to question his own expert witness. See *Cornell v. State*, 104 Wis. 527, 80 N.W. 745; *Duthey v. State*, 131 Wis. 178, 188, 111 N.W. 222, 10 L. R. A. (N. S.) 1032; and *State v. McKeown*, 172 Wash. 563, 20 P.2d 1114, (1933). However, what the father's attorney did in this case is simply place the words, for example, "this is a hypothetical" in front of some of his leading question and continue to go down the alienation path. All of which forced the judge to draw an unfavorable opinion of the mother.

Besides criminal cases, it is a long-time rule of civil trial procedure and evidence that a party who calls a witness may not ask leading questions of that witness. See e.g. *Jones on Evidence*, § 903 (5th

ed. 1958) at 1690 and See *Bishop v. Averill*, 17 Wash. 209, 49 P. 237, 50 P. 1024 (1897). As indicated below, depending on the severity of such a violation the matter may be remanded to trial to deal if there is evidence of prejudice caused by leading an expert witness's testimony. See e.g. *Zukowsky v. Brown*, 79 Wn.2d 586, 488 P.2d 269 (1971).<sup>3</sup>

In this case, the mother claims that the father's counsel improperly led his own client and his expert Ms. Zorozua, and the court allowed such to the mother's detriment. For the mother to prevail on this argument she must show that the leading questions and led testimony caused a "resulting prejudice" in the case if she uses criminal and/or civil case scrutiny. See *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) & *Zukowsky*, supra. In this case, it clearly appears from the findings alone, for example, that the net effect of the father's leading presentation seemed to help the judge draw a prejudicial opinion that the mother was an "alienator" of the children.

The findings of fact show that almost 80% of the findings are made up of judicial comments and opinions that are either not factual in nature or in many cases were highly critical of the mother. Some of them recited things that expert Zorozua said after being led down the

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<sup>3</sup> The fact that the father's expert was allowed to talk about how the mother was a parental alienator, was also inconsistent with other types of health care provider experts in such matters as personal injury cases. Health experts generally are said in personal injury cases, to not be able to provide an opinion without some sort of hands on meeting with the party he or she is assessing. See e.g. *Kennedy v. Monroe*, 15 Wn.App. 39, 547 P.2d 899, (1976). And a professional counselor may not, according to statute make a diagnosis without first meeting with the individual, all of which was not done by this expert. See WAC 246-810-0201 for example.

testimonial pathway toward a conclusion that Mom was likely suffering from Parental Alienation Syndrome (hereinafter PAS). This to the mother shows the clear effect of all the leading questions for her ex-husband, along with the father's expert's seeming scripted testimony. By approving the Findings of Fact as they are written, with all their prejudicial comments and opinions against the mother the judge seemed to ratify the notion that she was extremely prejudiced and affected by all this rather artful posturing and leading. Even her oral ruling at times specifically used Ms. Zorozua's testimony indicating, things like her examples about what the mother might do if she was suffering from PAS, without giving even lip service to how the mother's attorney's objections or how the questioning was so leading it was not credible.

The mother offers the following references to prejudicial comments by the court in the findings. In some cases, these "alleged findings" changed the language of parenting statutes to even include the words "parental alienation", as well as not apparently caring about the family law rule that a judge is not to use temporary custody order to determine final orders pursuant to *Kovacs*, supra.

The following is a non-exhaustive list of these findings offered from the mother's perspective, using the Finding of Fact numbers:

- 4. *This "finding" includes the statement that the abusive use of conflict from the statute at RCW 26.09.187 refers to parental "alienation" as a factor;*

- 10. This is a finding that the mother wanted to restrict the father's time "because of these huge issues" (Emphasis added), seems clearly excessive and somewhat of an unreasonable exaggeration of what happened, in almost a sarcastic way;
- 12. This finding refers to setting up a temporary parenting plan and the failure of the commissioners to make any findings of "these issues", apparently referring to finding #10. This was and is a clear violation of the Kovacs case supra, however, of most importance it seems that the father used the actions of the mother during the temporary orders to try and show her bad parenting and support their theory of the case. Instead of reminding the attorneys about the irrelevance of the temporary custody orders the judge continued to allow these type of questions, which at times also focused on an attempt to prove their allegations of parental alienation.
- 13 to 21. These eight "findings" all reference things that were done or not done during again, the interlocutory period, all with an eye toward a prejudicial slant against the mother on how she did not follow the temporary order [which also parenthetically was an apparent attempt to prove PAS].
- 24. This is opinion evidence by the judge and predicts parenting plan noncompliance by the mother because of her failure to answering discovery, showing the clear mindset by the judge that this mother was not a trustworthy or compliant individual and everything she did showed what a bad mother she was.
- 25 & 26. These alleged findings simply refer to alleged parenting "red flags" without identifying what they were and without any factual conclusions, but again add fuel to the fire that the mother had problems, even though they reference that the father had also had some problems.
- 29. This apparent finding is about Ms. Minderman and her alleged failure to "agree to anything" as a general blanket statement. The statement itself is highly inappropriate on its face since it describes a

*mother who is uncooperative, one of the traits of PAS. It must be asked, what would she not agree to? School issues, medical issue, financial issue, without factual findings to explain what this refers to it is prejudicial about the mother and is so general it almost describes a hermit or pariah of society. What description could be more harmful to a person who sees themselves as successful and a good parent than they would not agree to anything? Also, this negative description was not even close to being true, had the court simply considered that the parties actually settled a laundry list of expensive and important personal property and debts from a long term and wealthy couple. See e.g. CP 306-311. This statement should not have been a finding of fact.*

*- 32. This finding includes hearsay along with more prejudicial comments about the mother.*

As for the other findings, the following numbered findings from pages 295 to 304 are also replete with prejudicial opinions, inappropriate and unclear comments, incomplete sentences that were negative about the mother, and references to things referred to in previous alleged findings about the mother that were negative as well. They are: numbers 38-41, 45-48, 50-51, 60, 65-74, 88-91, 97, 101, 119, 129, and 137. All of which show how the leading questions of the father's counsel tainted these proceedings. It is almost as if his questioning was a blue print for the judge's negative findings, which were very prejudicial toward the mother in many respects and can be misinterpreted by future courts against her.

The leading and informational questions which the father's attorney used seemed to affect the judge's final ruling adversely against

the mother, even though his expert had never met her, never tested her, never met the children, and hadn't even talked with the father or GAL. Given the mother's continuing objection about leading questions in this case, what a difference an instruction by the court would have made had she stopped the leading by the father's counsel, and asked him something to this affect, "*Counsel, how can your expert even go down this road if she has no first-hand knowledge of the mother's attitude, or why the children said what they said about their father, and the actual circumstances of each incident?*" At that point, counsel would have had to come up with something to justify his leading questions, and/or his supposed hypothetical's. Again, there was no testimonial knowledge by expert Zorozua about the parent's attitudes, therefore, there could be no psychological hypothetical's; even one little difference in the attitude of the parties would have changed all the hypothetical's. The judge would have had no basis to make such negative findings about the mother without this expert being led down the path she was. As such the judge needed to exercise better control of the testimony lead by the father's counsel in this matter and since she did not it through this case into prejudicial chaos about how bad the mother was. All of which should be remedied by this court by a new trial.

B. The Findings of Fact and Conclusions of Law should be very clear and having disjointed dicta and/or prejudicial opinion comments as part of those findings, along with the leading questions and their affect, was so detrimental to the administration of justice that a new trial should be ordered to make this important parenting matter fair.

There were 50+ findings of the 138 that were either opinions, incomplete sentences, dicta, prejudicial comments, unsupported comments, hearsay, inappropriate references to the temporary orders, or that were not factual findings. RP 295-394. Such an extensive list of inappropriate findings, if incomplete, and prejudicial could follow the targeted party throughout the lifetime of the case, and can be misinterpreted by future courts and may even unjustifiably rob children of a parent's contact. These things should not have been part of the court's findings.

A parenting plan trial would seem to require appropriate findings of fact and conclusions of law given the nature of such cases and the detail needed to decide the case. In such cases an appeals court has the authority to send the case back to the court for appropriate findings and/or even a new trial if the prejudice is impossible to cure. See e.g. *In re the parentage of CMF* at 179 Wn.2d 411 (2013), where there were no statutory findings of adequate cause and the entire case was dismissed. The court in the *Fahey*, a parental relocation case at 164 Wn.App. 42, 262 P.3d 128 (2011), made the following observations regarding the importance of appropriate findings and conclusions in parenting cases:

“We review errors of law to determine the correct legal standard de novo. *In re Marriage of Kinnan*, 131 Wash.App. 738, 751, 129 P.3d 807 (2006). We review challenges to a trial court's factual findings for substantial evidence. *In re Marriage of McDole*, 122 Wash.2d 604, 610, 859 P.2d 1239 (1993). We uphold trial court findings that are supported by substantial evidence. *McDole*, 122 Wash.2d at 610, 859 P.2d 1239.

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 Griswold*, 112 Wash.App. 333, 339, 48 P.3d 1018 (2002), review denied, 148 Wash.2d 1023, 66 P.3d 637 (2003). We review conclusions of law to determine whether factual findings that are supported by substantial evidence in turn support the conclusions. *In re Marriage of Myers*, 123 Wash.App. 889, 893, 99 P.3d 398 (2004). Within the confines of these standards, the trial court has discretion to grant or deny a relocation after considering the RCW 26.09.520 relocation factors and the interests of the children and their parents. *In re Marriage of Horner*, 151 Wash.2d 884, 893-94, 93 P.3d 124 (2004); *Bay v. Jensen*, 147 Wash.App. 641, 651, 196 P.3d 753 (2008). We defer to the trial court's ultimate relocation ruling unless it is manifestly unreasonable or based on untenable grounds or untenable reasons under the abuse of discretion standard. *Horner*, 151 Wash.2d at 893, 93 P.3d 124; *Bay*, 147 Wash.App. at 651, 196 P.3d 753." As quoted from *In re Marriage of Fahey*, 164 Wn.App. 42, 262 P.3d 128 (2011). [See also *In re Marriage of Skarbek*, 100 Wash.App. 444, 447, 997 P.2d 447 (2000).]

In this case, the judge did not change any of the standard form Conclusions of Law in the final orders, and in fact ostensibly failed to enter any substantive legal conclusions. The judge simply signed the legal conclusions, presented by the father's counsel, as they are formed by the State forms committee, without filling in any of the blanks with anything of substance about the case. CP 304. Additionally, although there are some findings that are not dicta that could be said to be conclusions of law, it is also presumed that since the judge signed them they were intended to be entered the way they were. If not, that would be an even greater problem since that would mean they were not read or intended.

Here the court ordered an equal plan for the parties, which was discussed in the findings and seems appropriate given the references to the GAL's testimony and recommendations, but also seemed to be ordered because the parties did well with a shared plan under the temporary orders, given findings number 11-15 for example. CP 295. However, the issues related to the mother's alleged problems with alienation seemed to not be supported since there was no findings of a nexus between the alleged PAS and anything but leading testimony by the father's expert and this diagnostic suggestion. There are a few references to "alienation" by creatively inserting that term into the description of the language of some statutes, and comments about what expert Zorozua said about alienation, by the judge in her oral ruling; However, again, there is no clear discussion about the credibility of such a conclusion or such a finding by an expert who had never met with the children, mother, father or GAL. Unless there is a finding as to how this conclusion can be drawn from this expert, given her lack of experience with this family and case, it is nothing more than a posturing addition by the father's counsel since there was no testimony about why the mother would even try to alienate the father from the children. There was also never any evidence about her motive to be alienating. For all intent and purposes, the mother could simply be a protective mother, or knows the father's propensities better than anyone else; however again, there was no evidence shown about her motive. It would seem that the mother's

motive would be an important nexus that would be needed to make final the leap from this mother who simply was more organized than the father about the children, to one bent on ruining his relationship with his children. Hence the vital importance of testimonial knowledge of the family and children by the expert, before such serious conclusions are drawn. Frankly this expert should have said from the outset, "I do not know these people so I could not say if the mother was suffering from PAS or not and should have given the WAC codes for counselors and making diagnostic opinions. (See for example WAC 246-810-0201 which places restrictions on counselors in making diagnosis'). These hypothetical's as more theoretical than founded; more like educated guesses than evidence.

When discussing a nexus between the alleged problem and the personalities of family members in a custody case this brings in the *Fahey* standard for proper findings facts, which show "substantial evidence" of the things alleged. This case and the findings that the mother was an alienator or a parent who inappropriately litigated this case, cannot meet the *Fahey* standard of "substantial evidence" of sufficient quantity to persuade a fair-minded person of the facts supporting that prejudicial findings in this case. It is understandable that the judge may have been persuaded by the father's attorney's leading the presentation of evidence; However, that is like a musket without any bullets. It looks like alienation, and has some of the features of parental

alienation, except for the fact that the evidence presented was one sided and was the product of skillful leading, rather than credible explanations by a competent witness with his or her own understanding of the case, not what their attorney draws their attention to. Also, with no legal conclusions of any substance, it is virtually impossible to connect the dots in this case as to the notion of PAS and that the mother was so bad she should be punished by having her pay a higher than appropriate child support, or not be named a co-custodial parent in their exact 50/50 plan. What is left is the clear and unmistakable prejudice of the judge against the mother. She simply did not like the mother and expressed that in many ways. There is nothing in the findings or conclusions to explain this arbitrary and strained parental ruling.

C. The court's references to the temporary parenting plan orders, that the parties followed a 50/50 "temporary plan", therefore a 50/50 plan would be a appropriate final plan. was and is prohibited by the Kovacs and other cases.

In the findings of fact, the judge considered and even based much of her ruling for a 50/50 plan on what was temporarily ordered, agreed or followed during the interlocutory period and that it seemed to go well. In the Division III case of *In re Marriage of Combs* case at 19 P.3d 469, 105 Wn.App. 168 (2001) the appeals court clearly indicates that even a slight reference in the court's decision to the temporary orders and how they would influence the final parenting plan is inappropriate, and calls for a new trial on remand pursuant to the *Kovacs* case law.

In this case, it is very clear that the temporary orders and how they were followed by the parties greatly influenced the judge's ruling. Findings or comments number 6 to 18 references how well the parties did with the temporary parenting plan and that it was never changed, implying that a 50/50 plan would be successful and appropriate as a final plan. All of violated the *Kovacs*' rules about the use of temporary plans to decide final plans at trial.

D. Child support worksheets need to include a clear description of how and why the court came up with the net income for all parties in order to properly set the child support.

The final child support decision rested initially on a child support worksheet presented by the father's that did not include how he arrived at the mother's net income, but simply placed a rather large net figure in her column. This was a significant decision since there were issues involving an equal parenting plan and a deviation that were directly affected by this worksheet. The mother suggests that it was error for the judge to fail to show how she got to her rather large \$16,000+ income. See RP 831.

When a court of appeals reviews a final order of child support there must be a manifest abuse of discretion before the child support order will be overturned. *In re Marriage of Griffin*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990); *In re Marriage of Choate*, 143 Wn.App. 235, 240, 177 P.3d 175 (2008). The *Littlefield* case at 133 Wn.2d 39, 46-47, 940

P.2d 1362 (1997) indicates that a “trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.” And “A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” Substantial evidence must support the trial court’s factual findings and final orders. *In re Parentage of Goude*, 152 Wn. App. 784, 790, 219 P.3d 717 (2009). “Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise.” *In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984).

As for child support decisions and the worksheets, the trial court must review the worksheets, complete them, and include them with the order modifying child support. RCW 26.19.035(4); *In re Marriage of Sacco*, 114 Wn.2d 1, 3-4, 784 P.2d 1266 (1990). This rule provides no exceptions. *In re Marriage of Sievers*, 78 Wn. App. 287, 305, 897 P.2d 388 (1995). Additionally, the court has a duty to provide findings that clearly show how they reached their decision. See *Fahey* and *In re Marriage of Skarbek*, *supra*. In a child support matter, the worksheet is the finding of the court therefore, they need to be clear as to how they

arrived at the standard calculated support. See e.g. *In re Marriage of Skarbek*, 100 Wash.App. 444, 997 P.2d 447 (2000).

In this case, even the husband's attorney admitted that the wife had taxes that should would be "taken" out of her income to come to a net income. RP 725-735. And it was argued several times that the mother did not have "discretionary income to use" since she clarified that those funds were to be used for paying "taxes". RP 517, 689 & 682. Instead the court simply entered a net income without showing how she made that determination other than to say she reduced what the father's counsel used in his worksheet by dividing a lower number used for her annual net income. If the child support worksheets are part of the court's findings for determining child support, these worksheets are woefully incomplete and do not meet the *Skarbek* standards for proper findings. This is especially true for a parent who owns their own business, having business and occupational taxes, labor and industry taxes, unemployment taxes, social security taxes, and surplus profit income taxes for a small business. Had the court properly included all the mother's taxes, she would have likely had a much lower income and support. [Note: it might be argued that some of this was the fault of the mother, however, it is this writer's opinion that since RCW 26.19.075 indicates that the Superior Court has a duty to the children of this state to enter a proper support amount and worksheet, there can be no such thing as "invited error" in the determination of support.] The matter

should be returned to court for a proper finding as to the mother's income using exact deductions from a gross figure.

E. It is incumbent on a trial judge to respond to a request for a "deviation" from the standard calculation of support by explaining how and why a deviation was or was not granted; it is inappropriate to just say "does not apply".

The State Supreme Court and its administrator along with the child support statutes require the courts to use the approved forms in child support determinations. Those forms are made to be completed with blank findings and determination explanations within the unfinished forms. See RCW 26.18.220. See e.g. also *In re Parentage of CMF* 179 Wn.2d 411 (2013).

The child support orders are specifically made to deal with requests by parties to deviate from the child support worksheet's standard calculation of support due from each parent or party. For example, see section 9 of family law form FL All Family 130. The Order of Child Support asks first if the deviation was asked for, and goes on to deal with why it was granted or denied by a series of questions that go into detail as to the court's reasoning.

Case law on the issue of a deviation for residential time indicates that the most important factor to consider is whether the proposed deviation would adversely affect the finances in the one of the parent's homes more than the other home. The case of *In re Parentage of A.L.*,

185 Wn.App. 226, 340 P.3d 260 (Div. 3 2014) made the following ruling, which identifies the process of dealing with a deviation request:

After determining the standard calculation and nominating the obligor, the trial court, if requested, considers whether it is appropriate to deviate upward or downward from the standard calculation. RCW 26.19.011(4), (8). The court has discretion to deviate from the standard calculation based on such factors as the parents' income and expenses, obligations to children from other relationships, and the children's residential schedule. RCW 26.19.075(1). If the court considers a deviation based on residential schedule, it must follow a specific statutory analysis:

The court may deviate from the standard calculation if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment. The court may not deviate on that basis if the deviation will result in insufficient funds in the household receiving the support to meet the basic needs of the child or if the child is receiving temporary assistance for needy families. When determining the amount of the deviation, the court shall consider evidence concerning the increased expenses to a parent making support transfer payments resulting from the significant amount of time spent with that parent and shall consider the decreased expenses, if any, to the party receiving the support resulting from the significant amount of time the child spends with the parent making the support transfer payment. RCW 26.19.075(1)(d).

[¶27] The 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. A court's decision to deviate from the standard calculation for child support based on residential time is discretionary, but the court cannot deviate if it will result in insufficient funds in the household receiving the support, or if the child is receiving TANF. RCW 26.19.075(1)(d); *In re Marriage of Rusch*, 124 Wn.App. 226, 236, 98 P.3d 1216 (2004), abrogated on other grounds by *In re Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007). After determining the standard calculation and any deviations, the trial court then orders one parent to pay the other a support transfer payment. RCW 26.19.011(9). *Id.*

As indicated, the Court of Appeals made it clear that residential credit deviations are to only be allowed if the court finds that the deviation would not adversely affect one of the parent's financial circumstances. *Id.* In this case, the court's Order of Child Support simply indicates under "Reasons why Request for Deviation Was Denied" – "Does not apply." See page 3 of Order of Child Support, CP 282.

There is no reason why the failure to grant a deviation was not explained by the judge, as is required by both the form itself and case law. There was also no clear reasoning given in subsequent memorandum rulings on motions for reconsideration of the child support; the orders seem completely devoid of any reasoning on this important issue. There was some discussion in the presentment hearings about the incomes and child support, and why the mother is to pay full support; However, that dicta was simply a discussion about "equalizing incomes in the parent's homes" as you would do in a maintenance case, and said nothing about whether the father's household would be left with insufficient funds to pay their normal everyday expenses if he had to receive a lower support amount. This seems particularly troublesome since both parties make significant monthly incomes approaching or exceeding \$100,000 gross income a year, and there was an exactly equal parenting plan. Making the mother pay full child support considering these facts seems incredibly punishing and prejudicial, and needs an explanation. In fact, the fact that no explanation was given seems to

magnify the prejudicial nature of this ruling since if taken to its technical extreme it could be said that the judge gave no reason for making the mother pay this much money to the father especially when she clearly asked for a deviation, or made it known that she wanted the court to deal with that question. See RP 842.

F. A child support deviation seems proper in this case when looking at the law and the parent's incomes.

The second issue regarding child support is whether a deviation should have been granted. The *A.L.* case indicated that the process of dealing with whether a deviation should be denied in a 50/50 plan is as follows: First there needs to be a comparison of incomes. In this case, the question revolves around whether the father, because he was found to only make \$8,761.00 a month as compared to the mother's \$16,162 a month is that enough to cause hardship in the father's home, so that a reduction in the amount of support he receives due to the mother's superior income would be improper. The only discussion on this issue by the judge seemed to be that it was a discussion between she and the father's counsel wherein he indicated to her that even in a 50/50 plan the higher income party usually pays support to the lower income parent. RP 834-837. The judge dropped the topic and ordered the father's counsel to draft the orders. The father's attorney then completely bypassed the issue causing the orders to read that the mother pay the father the full standard calculation. Regardless of how this happened, the court signed

his orders without deviation. This is not how a deviation is to be dealt with by the court according to the *A.L.* case.

“[T]he court shall consider evidence concerning the increased expenses to a parent making support transfer payments resulting from the significant amount of time spent with that parent and shall consider the decreased expenses, if any, to the party receiving the support resulting from the significant amount of time the child spends with the parent making the support transfer payment.” *Id.*

It would seem that given the very high incomes of the parties that almost \$9,000.00 in income in the father’s home should satisfy the requirement that a “residential” credit reduction in the rather large child support amount ordered would not affect his household. This situation would be different if the father was making minimum wage, but we have a history of the father owning a profitable business, and even enough financial backing to become one of the best pro bass fishing tournament winners and had a history of good employment. See RP 832 generally.

Again, there was no evidence that the father would have suffered with a drop in the transfer payment to around \$900.00, which parenthetically would leave him with over \$9,000.00 a month to live on. This is a far cry from a minimum wage young person’s income, or a home that will do without. Again, at least the deviation denial should have been explained given the high incomes of the parties and lack of evidence about struggling financially.

What we are left with in the end is scratching asking why it happened that the mother was treated so differently and was frankly

seemingly punished when you consider the fact that their combined incomes is off the child support charts. In this case, the child support order should be remanded for a new trial on the deviation.

G. A new judge should be appointed to hear this matter given the amount and extent of prejudice shown by the original trial court.

There is no question that this judge appeared extremely upset with the mother and seemed to barely even discuss the father's shortcomings, except for a couple small findings. She allowed the father's counsel to ask leading questions, did not address the fact that the GAL did not find the mother had as many problems as she did, and punished her in the final parenting plan designation of who the custodian would be even though she was awarded equal time to the father's time, by making her pay a very large child support payment and the father nothing, then compounding this by failing to explain why her deviation request was denied. She also gave the father's counsel legal advise on how to ask his expert a proper question to "get it in", allowing the father to ask leading question after leading question, ignoring the *Kovacs*' rule, equating a failure to answer discovery questions appropriately to a failure to be a good parent, allowing the father's counsel to provide proposed findings that included substantially prejudicial comments about the mother, she followed the opinion of the father's expert, who had never seen the children nor talked to the parents or GAL, and finally allowing many negative and prejudicial dicta comments about the mother in the findings. If this case is remanded, there is absolutely no

way that the trial judge can forget what she felt was appropriate answers to the father's questions and argument. To say that the mother feels that even if the case is remanded, there will be little hope that this judge will change anything about her opinion of the mother and all this will be for naught, is an understatement.

As for the law on a new judge, where it appears from the record that the original judge might have difficulty setting aside their prejudice on remand, the appeals court has authority to assign a new judge for the remand. Litigants are entitled to a judge who is impartial. *Magana v. Hyundai Motor Am.*, 141 Wn.App. 495, 523, 170 P.3d 1165 (2007), rev'd on other grounds, 167 Wn.2d 570 (2009). If a party feels they cannot get a fair trial on remand and they can show proof of actual or perceived prejudice, they can request a new judge for the remand due to a lack of impartiality. *Id.* This is true in family law cases where, in the opinion of the aggrieved party and the appeals court is that the original judge has become so prejudiced against the appealing parent they would find it difficult, if not impossible to change their position in the case. And where the trial judge, shows what appears to be a clear pattern of prejudice in the original case and so it would be virtually impossible to set that prejudice aside. See *In re Custody of R.*, 88 Wn.App. 746, 762, 947 P.2d 745 (1997) See also *In re Marriage of Tostado*, 137 Wn.App. 136, 151 P.3d 1060 (2007). In *Saldivar v. Momah*, 145 Wn.App. 365, 186 P.3d 1117, 165 Wn.2d 1049 (2009); the court remanded the matter to a new

judge because the trial judge's statements questioning a certain important witnesses' credibility, and it clearly appeared that the judge would have a hard time setting aside previously expressed prejudicial opinions about the appellant. Finally, in the case of *McCausland v. McCausland*, 129 Wn.App. 390, 417, 118 P.3d 944 (2005), which was reversed on other grounds at 159 Wn.2d 607 (2007), the appeals court remanded the case to a different judge where the original trial judge would not completely follow the mandate on remand.

In this case, a taxonomy outlining the negative findings of the court about the parties, along with the positive comments, versus neutral comments, can show the court why it would likely be impossible for this judge to remain neutral on a remand, and why a new judge would be appropriate. That taxonomy is as follows:

	<u>Neg./Mom</u>	<u>Neg./Dad</u>	<u>Posit./Mom</u>	<u>Posit./Dad</u>	<u>Neutral</u>
Fdg.	7,9,10,13,	75,76,78	30,103,106	8,12,17,	1,2,3,5,
	16,20,21,	79,80,81,	111,113,132.	18,19,54,	11,14,25
	22,23,24,	87,92,93,		55,56,61,	52,53,72,
	31,32,33,	95,103,106,		82,83,84.	82,85,90,
	34,35,36,	107,112,			96,98,99,
	37,38,39,	132.			100,101,
	40,41,42,				102,104,
	45,44,45,				105,108,
	46,47,48,				109,110,
	49,50,51,				114,115,
	57,58,59,				116,117,
	60,62,63,				120,121,
	64,65,66,				122,123,
	68,67,69,				124,125,
	70,71,72,				136,138.
	73,74,87,				
	88,89,92,				
	94,85,97,				
	118,119,				
	126,127,				
	128,129,				
	131,133,				

	134,135,				
	137.				
<b>Total:</b>	64 – 46.4%	15 – 10.8%	8 – 4.2%	12 – 8.7%	36 – 26%

In our taxonomic analysis of the judge’s findings, over 55% of the findings were negative toward the mother, or positive toward the father, whereas only 15% were negative toward the father or positive for mom, with 26% being neutral. Of those comments that were not neutral Mom had almost 80% of the findings negative toward her without any tempering of those statements, and the father only had 20% negative or in mother’s favor. Clearly there is a drastic imbalance when these comments are looked at in a comparative analysis. Should this matter go back in front of the trial judge she is not going to forget this imbalance of findings and they will more likely than not result in refashioning new pleadings that look less negative toward the mother, but will likely not change the orders in a fairer direction. Thus, it seems both fair and reasonable to order that this matter go back before a new judge.

### **III. Conclusion**

The parents in this custody case presented their cases differently, the mother’s counsel asked open questions and tried to follow the rules of evidence. In contrast, the father’s counsel set about a clear and unmistakable plan to use mostly leading questions taken from temporary declarations by both parents, to read them to or for his client and denigrate the mother, show her as a bad person and try and make her out to be suffering from Parental Alienation Syndrome. The court recognized that the mother was in fact the primary caregiver for their

children and did allow her exactly equal time with the children, but also arbitrarily gave the father the title of “primary custodian” for what appears to be the judge’s opinion that the mother had a problem with attempting to alienate the children from the father. This conclusion seemed to be formed after hearing from the father’s expert, who was lead through her testimony by the father’s attorney, and who had never talked to the children, the parties, or even the GAL about the case but gave a educated guess about whether the mother was likely to have PAS or not.

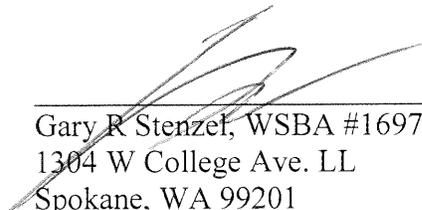
The end result of this seemed to be that the judge found that the mother had interfered with the father’s relationship with the children, however, there was never any evidence to show why the mother would do this, nor anything more than conjecture on the part of their expert about the mother’s actions.

Besides leading the testimony about the mother’s alleged interference issues, much of the father’s presentation was about how successful the 60/40 temporary parenting plan was to apparently show that any other plan like “normal visitation” for the father was not appropriate. The focus on the temporary orders seemed to influence the findings as well, so much so that it violated the Kovacs case that forbids a trial court from being influenced by the temporary orders in forming a final parenting plan.

This case also showed clear signs of prejudice by the court because of the leading questions of the expert and Mr. Minderman. The

judge ruled that even though the parties had a 50/50 exact schedule that the father would be named the primary custodial parent, the one with the greatest amount of parenting time with the children, and the mother would have to pay full non-deviated child support of \$1,732.23 to the father, who averaged almost \$100,000.00 income a year to live on. This prejudice was so pronounced that the judge did not even enter findings why she did not provide a deviation for the mother to at least half the amount of support. The judge sldo failed to include many potential tax deductions in her worksheet, allowing the father to have many different deductions without questioning their basis. Finally, the judge failed to ensure that the father's counsel stop asking his expert leading questions, after the mother's attorney objected over and over about that form of asking questions. All of which led to a highly prejudicial outcome for the mother. As a result, the mother asks that there be a new trial on the parenting plan and a new judge assigned given this judge's clear bias against the mother.

Respectfully submitted this 6<sup>th</sup>, day of February 2018 by,



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Declaration of Service by Mail

I certify that on the 7th day of February 2018, I caused a true and correct copy of this Motion for Extension to be served on the following by mail as indicated below:

Respondent  
Sean Minderman  
2617 S. Steen Lane  
Greenacres, WA 99016

I sign this under penalty of perjury under the laws of the State of Washington.

Dated: 2-7-18

  
\_\_\_\_\_  
Lisa Burns