

FILED
Court of Appeals
Division III
State of Washington
2/21/2020 10:11 AM

COA No. 35974-3

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

RONALD SIMON and TERESA SIMON, Appellants,

v.

WAYNE JANKE and DORIS STRAND, Respondents.

BRIEF OF GUARDIAN AD LITEM

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I. INTRODUCTION & RELIEF REQUESTED

These consolidated family law proceedings began in 2015. The case began with a "Child in Need of Service" ("CHINS") petition, filed by a minor known as CS. At the time CS was 13 years old – CS is now an adult. CS asked to be removed from his biological parents' custody and placed in the custody of two people who (according to the petition) he had viewed as his true parents since his birth. CS's biological parents – Ron and Teresa Simon – opposed CS' petition.

The other proceeding that is involved in the consolidation was filed on or about March 31, 2015. That proceeding was filed by Wayne Janke and Doris Strand. Mr. Janke and Ms. Strand argued that they were CS's *de facto* parents or, in the alternative, sought custody of CS through a third-party Custody Petition.

The Court appointed Kimberly A. Kamel to serve as CS' guardian ad litem. Ms. Kamel was appointed on or about April 27, 2015. She was not released from service until May 14, 2018. During that time, two trials were held in the consolidated matters, numerous witnesses were interviewed, and countless documentary exhibits were reviewed. During that time, no fewer than 7 attorneys were involved – Mrs. Simon alone was represented at one time or another by 5 different lawyers.

Ultimately, the Spokane County Superior Court held that the Simons were not unfit as parents but that, nonetheless, CS' placement with the Simons would

be to CS' detriment. The Superior Court, however, allowed the Simons the opportunity to have supervised visitation with CS, with an eventual goal of reunification.

There is some disagreement between Mr. Janke and Ms. Strand, on the one hand, and the Simons, on the other¹, with respect to why reunification failed. There is also some dispute between those parties with respect to the Superior Court's underlying determination that CS' placement with the Simons would be to his detriment.

Even if those issues were not mooted by CS reaching the age of majority, the Parties' disagreements and disputes, however, have little and less to do with the issues before the Court *vis a vis*, Ms. Kamel (as the guardian ad litem). The sole issue before the Court with respect to Ms. Kamel is whether the Trial Court abused its discretion in awarding guardian ad litem fees.

The record unambiguously supports the Trial Court's award of fees to the guardian ad litem. As a matter of law, Ms. Kamel (as a guardian ad litem) was serving as an officer of the Court and was entitled to be compensated for her time. As a matter of fact, the record demonstrates (in detail) that during the thirty-six months of her appointment, Ms. Kamel was actively involved in these

¹ Ms. Kamel, as guardian ad litem, was not a party to any of the consolidated matters. In the interest of clarity, therefore, Ms. Kamel will refer to Mr. Simon, Mrs. Simon, Mr. Janke, and Ms. Strand collectively as "the Parties."

consolidated cases – she conducted an investigation; she analyzed the issues; and she reported her findings to the Court. In short, Ms. Kamel did exactly what the Court appointed her to do.

The Trial Court was absolutely correct to award Ms. Kamel her fees as CS' guardian ad litem. The Simons' brief devotes precious little ink to its challenge of the Trial Court's award of fees to Ms. Kamel; instead, it presents an alleged (but unsupported) web of conspiracy and conjecture. And regardless of whether any of that is relevant with respect to Mr. Janke and Ms. Strand, it is undisputed that those arguments have nothing to do with whether the Trial Court correctly awarded Ms. Kamel her guardian ad litem fees.

There is no support, in the law or in the record, for the Simons' to be excused of their obligation to pay the guardian ad litem's fees. Ms. Kamel, therefore, respectfully asks the Court to affirm the Trial Court's fee award.

II. RESTATEMENT OF ISSUE PRESENTED²

With respect to Ms. Kamel, the sole issue before the Court is whether the Trial Court correctly awarded guardian ad litem fees and entered judgment against Mr. and Mrs. Simon (in the amount of \$24,379.21) for their portion of those guardian ad litem fees.

III. STATEMENT OF THE CASE

A. ON APRIL 27, 2015, KIMBERLY A. KAMEL WAS APPOINTED AS GUARDIAN AD LITEM FOR CS.

In or about April 27, 2015, both the Simons, on the one hand, and Mr. Janke and Ms. Strand, on the other hand, brought motions for the appointment of a guardian ad litem to protect CS' interests in the consolidated family law proceedings. CP 1001. On or about April 27, 2015, the Spokane County Superior Court entered an Order granting that motion and appointing Kimberly A. Kamel as CS' guardian ad litem. CP 1001-1006.

² Though it has no bearing upon the Court's review of the Trial Court's award of guardian ad litem fees, brief comment is warranted on the Simons' arguments regarding the declaration of Corrie Amsden. The Simon's Opening Brief, pp. 10-11. Ms. Amsden's "declaration" is rife with multi-layered hearsay, speculation, conjecture, and prejudicial allegations without any factual support. See CP 10-11. The Court should be aware that Ms. Amsden is Ms. Kamel's former legal assistant and that Ms. Amsden appears to have taken (misappropriated) documents from Ms. Kamel's confidential files and disseminated the same in violation of the Trial Court's protective order. The Court should entirely disregard Ms. Amsden's declaration and the Simons' arguments based upon that declaration.

Pursuant to the Court's Order of appointment, Ms. Kamel was tasked with investigating: (i) whether Mr. Janke and Ms. Strand qualified as de facto parents for CS; (ii) whether the case should be regarded as a third party custody case; and (iii) all issues related to the development of a parenting plan for CS. CP 1002. The Order set \$200.00 per hour as Ms. Kamel's fee, and the Order pre-authorized up to \$15,000 in fees – noting that any additional fees would require a further Court Order. CP 1004-1005. Lastly, the Court's appointment Order allocated the guardian ad litem's fees on a 50/50 basis, with Mr. Janke and Ms. Strand paying 50% and the Simons the other 50%. CP 1004. The Order also provide for interest to accrue at 12% on any unpaid fees. CP 1004.

B. FOLLOWING HER APPOINTMENT, MS. KAMEL UNDERTOOK AN INVESTIGATION AND SUBMITTED MULTIPLE REPORTS TO THE COURT.

Between the time of her appointment through August 2015, Ms. Kamel spent over 80 hours investigating the issues and speaking with approximately twenty-four witnesses, reviewing the court file, obtaining medical and mental health information, requesting criminal history information and child protective services information. CP 1068-1121. She further spent numerous hours participating in Court hearings, contacting the minor child's counselor and discussing issues with the parties. CP 1068-1121, 679-681. The disputes between

the parties were far from over. Ms. Kamel was to be deposed at the end of November 2015.

C. THE MATTER BECAME EXTRAORDINARILY CONTENTIOUS, AND MS. KAMEL REQUESTED AUTHORITY FOR PAYMENT OF ADDITIONAL FEES.

Seven months after her appointment, Ms. Kamel moved the Court for an order increasing the guardian ad litem's ability to bill fees from \$15,000 to \$35,000 based on the amount of work that had become necessary. CP 25-27. During the litigation, CS made an allegation of sexual assault against Ms. Simon; that allegation required additional investigation by the guardian ad litem and five hearings prior to November 20, 2015. CP 964, 1499, 2015. On or about November 20, 2015, the Trial Court entered an Order approving guardian ad litem fees of up to \$35,000. CP 25-27. The Trial Court's Order also empowered Ms. Kamel to bring another fee motion at the close of trial for the third-party custody case to cover the additional fees to be incurred in the matter. CP 25-27.

As of June 2017, the Parties collectively had paid \$28,394.74 in guardian ad litem fees. At that time, the Simons owed an additional \$6,605.26, and Mr. Jenke/Ms. Strand owed \$1,386.05. CP 177. As of June 2017, neither Party had paid Ms. Kamel for approximately 10 months; however, she nonetheless continued to comply with her appointment – attending all hearings,

communicating with CS, and working with CS's mental healthcare providers. CP 177-188.

D. MS. KAMEL WAS RELEASED FROM SERVICE AS THE GUARDIAN AD LITEM, BUT THE SIMONS REFUSED TO PAY THEIR SHARE OF THE GUARDIAN'S FEES.

This matter drug on for nearly three years. The Trial Court did not enter a final Non-Parent Custody Order until March 13, 2018. CP 968.

On April 17, 2018, Ms. Kamel filed a final motion for payment of fees and to be discharged as CS' guardian ad litem. CP 1526. That motion requested fees of \$44,925.27, for work performed between April 11, 2016 and March 13, 2017. CP 1526. Ms. Kamel supported that motion with monthly statements of the work performed and itemized billing statements which were previously provided to the parties via Ms. Kamel's prior fee requests to the Court. CP 989-1035, CP 51-75, 176-188, 222-228, 242-256, 1024-1034.

The Simons objected to Ms. Kamel's motion. CP 1532-1533. The Court overruled the Simons' objection and entered an Order approving the guardian ad litem's fees. CP 1532-1533, 1530-1531.

On May 14, 2018, the Trial Court ordered the Parties to pay the outstanding guardian ad litem fees – in full. CP 1532. Specifically, the Trial Court entered two different Orders – one for the Simons and the other for Mr. Janke/Ms. Strand. CP 1532-1533, 1530-1531. The Order that applies to the

Simons required them to pay \$24,379.21 for the guardian ad litem's fees and costs. CP 1532-1533. The Trial Court's Order afforded the Simons 60 days to make full payment. CP 1532-1533. And the Order provided for interest to that interest would accrue on the unpaid costs and fees at a rate of 12% per annum. CP 1532-1533.

Despite the Trial Court's Order, the Simons did not pay their debt to the guardian ad litem. The Trial Court, therefore, entered a judgment against the Simons; that order was entered on August 13, 2018, and like the prior Order, interest was set to accrue at 12%. CP 1791-1792.

Mr. and Mrs. Simons filed a timely notice of appeal on August 22, 2018. This appeal has been delayed repeatedly by the Simons' appeal of issues pertaining to their dispute with Mr. Janke and Ms. Strand.

IV. ARGUMENT

A. REVIEWING THIS MATTER FOR ABUSE OF DISCRETION, THE COURT SHOULD AFFIRM THE TRIAL COURT'S AWARD OF GUARDIAN AD LITEM FEES AND THE TRIAL COURT'S JUDGEMENT.

The decision of whether to appoint a guardian ad litem, as well as all decisions regarding approval of a guardian ad litem's fees, rest in the trial court's sound discretion, and the trial court's decisions will not be overturned on appeal unless they were made in abuse of that discretion. *In re Marriage of Burke*, 96 Wn. App. 474, 476, 980 P.2d 265 (1999). A trial court retains the discretion to

evaluate the fees and costs requested by the guardian ad litem and enter an appropriate order. *In re Marriage of Bobbitt*, 135 Wash. App. 8, 31, 144 P.3d 306, 317 (2006). A party challenging a guardian's appointment or compensation must demonstrate that the trial court exercised its discretion in a manner that was "clearly untenable or manifestly unreasonable." *In re Marriage of Crosetto*, 82 Wn. App. 545, 563 (1996) (quoting *In re Marriage of Knight*, 75 Wn. App. 721, 729 (1994)).

Here, the Order appointing Ms. Kamel specifically noted that Ms. Kamel would not be awarded fees unless and until the Court analyzed Ms. Kamel's time records and cost reimbursement requests. CP 1001-1006. And the Trial Court considered both Ms. Kamel's support for her fee request as well as the Simons' objections to Ms. Kamel's request. CP 1783-1784, 1546-1549, CP 989-1035.

Prior to awarding any guardian fees, the Trial Court reviewed testimonial evidence from the guardian, as well as documentary evidence of the time that Ms. Kamel had spent on the matter and the costs that Ms. Kamel had incurred in the matter. CP 989-1035. That evidence detailed the date, task, and time spent for the work and corresponding charge for each aspect of the guardian's work on this matter. CP 989-1035.

The Simons filed objections and responses to the guardian ad litem's fee request. CP 1546-1549. The Petitioner, Doris Strand, filed a declaration

supporting Ms. Kamel's fee request. CP 1551. Prior to entering its order, the Trial Court reviewed and considered all of the information that had been submitted. CP 1783-1784. The Trial Court granted Ms. Kamel's fee request and, ultimately, entered a judgment in Ms. Kamel's favor for those fees. CP 1791-1792.

There is no basis in the record to even suggest that the Trial Court abused its discretion in evaluating and awarding guardian ad litem fees. The Trial Court carefully and faithfully considered evidence and considered all interested parties' arguments prior to awarding Ms. Kamel's fees. There is no basis for the Simons' assertion that the Trial Court abused its discretion in awarding guardian ad litem fees.

B. THE TRIAL COURT'S JUDGMENT FOR THE GUARDIAN'S COSTS AND FEES WAS A FINAL JUDGMENT.

It is Hornbook law in Washington State that a judgment represents a final judicial action. *See* CR 54. On May 14, 2018, the Trial Court entered an order releasing Ms. Kamel from service as the guardian ad litem and awarding Ms. Kamel \$44,925.27 in fees for her work in the case. CP 1530-1533. The Order also gave the Parties (the Simons, on one hand, and Mr. Janke and Ms. Strand, on the other) 60 days to pay the guardian fees in full. CP 1530-1533. By August 10, 2018, Mr. Janke and Ms. Strand had set up a payment plan with Witherspoon

Kelley for their portion of Ms. Kamel's fees, but the Simons had not – in fact, the Simons had not paid any portion of the fees that they were ordered to pay on May 14, 2018. CP 1532-1533. The Trial Court, therefore, entered a formal judgment against the Simons. CP 1791-1792. That judgment was, and remains, a fully enforceable final judgment.

The Simons' contend that the Trial Court lacked authority to award fees to Ms. Kamel in May 2018, due to an interim award of fees that the Trial Court had made earlier in the case. The Simons argue that the Trial Court's initial order appointing Ms. Kamel as the guardian ad litem constituted a temporary family law order and that, as a result, the order could not be modified at the matter's conclusion. See the Simons' Opening Brief, p. 32 (citing *Furgason v. Furgason*, 1 Wn. App. 859, 860-61 (1970)). The Simons' argument is contrary to law, contrary to the Trial Court's Order, and contrary to reason.

In *Furgason*, the Court considered a dispute regarding unpaid child support (pursuant to a temporary order) in the context of a final divorce decree. 1 Wn. App. at 860. At the temporary orders stage of the case, Mr. Furgason was delinquent in his monthly child support payments. *Id.* at 859. At the conclusion of the litigation, a divorce decree was entered which did not contemplate the delinquent payments to the respondent wife for support of the minor children. *Id.* at 859. Later, Ms. Furgason obtained an order granting judgment for child

support. Mr. Furgason appealed that decision and asserted the debt had been subsumed in the family court's allocation of the parties' property, assets, and debts. *Id.* at 859. The Court of Appeals agreed with Mr. Furgason, holding that Ms. Furgason's failure to affirmatively preserve the issue in the divorce decree caused the child support debt to be subsumed within the parties' global resolution of the marital assets. *Id.* at 861. Thus, *Furgason* holds that accrued delinquent temporary payments are not collectible after entry of a final decree of dissolution. 1 Wn. App. at 861; *see also In Re Marriage of Stout*, 27 Wn. App. 306, 308 (1980).

The *Furgason* decision has no bearing on this case. Firstly, Ms. Kamel's fees were not subject to any temporary family law order. Instead, the Trial Court entered a specific order appointing the guardian ad litem. CP 1001-1006. Moreover, a subsequent order included specific language reserving all decisions with respect to the guardian ad litem's fees and costs for a later date. CP 968-970. Secondly, Ms. Kamel, as the guardian ad litem, is not (and never was) a party to the action; instead, Ms. Kamel served as a neutral advisor to the Court. *Fernando v. Nieswandt*, 87 Wn. App. 103, 107 (1997). No order that resolved the parties' rights and responsibilities vis a vis one another could, therefore, adjudicate Ms. Kamel's right to be paid for her work – work that was done directly at the Trial Court's behest and on the Trial Court's behalf. Finally, the

order that the Simons purport to have resolved all issues in the case did not discharge Ms. Kamel from service to the Trial Court. CP 968-970. Ms. Kamel was not discharged from the Court's service until approximately sixty days after that order was entered. CP 968-982, 1532-1533. Thus, Ms. Kamel continued to serve the Court after the Order that the Simons contend terminated her right to payment.

Firstly, the Simons' argument is contrary to the law. Ferguson does not support the Simons' argument. There is no basis in the law for the Simons' assertion that an order that resolves issues between and among the parties can affect a guardian ad litem's right to be paid for her work.

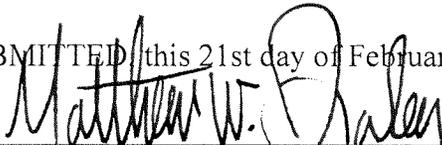
Secondly, the Simons' argument is contrary to the record. The Trial Court's appointment Order specifically reserved the right to consider and award fees. And Ms. Kamel remained in the Court's service after the Order that the Simons rely upon.

Lastly, the Simons argument is contrary to reason. A guardian ad litem, by definition, is an independent, non-partisan, advisor to the Court who can provide a common sense impression about family dynamics *Fernando*, 87 Wn. App. at 107. A guardian ad litem provides a service that the Court determined to be necessary, and a guardian ad litem has a right to be paid for that service.

V. CONCLUSION

The Trial Court duly appointed Ms. Kamel as the guardian ad litem in this matter. The Trial Court properly analyzed and supervised Ms. Kamel's work, her expenses, and her time records. The Trial Court properly authorized compensation for Ms. Kamel's time and reimbursement for her costs. Nothing in the Trial Court's management of the guardian ad litem's work was an abuse of discretion. Ms. Kamel, therefore, respectfully asks the Court to affirm the Trial Court's Orders and judgment.

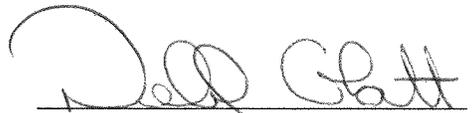
RESPECTFULLY SUBMITTED, this 21st day of February, 2020.


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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 21st day of February 2020, the foregoing was delivered to the following persons in the manner indicated:

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February 21, 2020 - 10:11 AM

Transmittal Information

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Appellate Court Case Title: Wayne Janke, et al v. Ronald Simon, et al
Superior Court Case Number: 15-3-02130-1

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