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IN THE COURT OF APPEALS
DIVISION III
THE STATE OF WASHINGTON

CAUSE NO. 36722-3

NICHOLAS DENNIS, [Petitioner or Appellant]

v.

MEGAN YATES, Respondent

OPENING BRIEF

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I. Statement of Facts

The following facts are not in the court pleadings in this matter since these facts are part of the paternity action. And they are just superficial in nature to assist this court with a foundation for this matter.

Ancillary description of the facts in this case: The parties are Nicholas Dennis and Megan Yates. These young people met socially and became friends. During their brief friendship they lived together for a short while since Ms. Yates did not have a permanent place to live. There was some alleged domestic violence by both parties, however, although Ms. Yates filed a Petition for a domestic violence order, it was dismissed after one hearing. The Ms. Yates got pregnant and the father, Mr. Dennis filed a paternity action. The parties' child was born, and the Appellant was found to be the father with the mother named as the primary parent, and the standard orders named the mother the child's custodian, but did not say what the father's parenting time would be, similar to the case facts in *In re Parentage of C.M.F.*, 179 Wn.2d 411, 314 P.3d 1109 (Wash. 2013).

After the parties' paternity decree was enter, the father filed a Petition to modify the paternity decree to have time with their new baby. CP 1-8. The father also filed a proposed parenting plan that requested a somewhat normal visitation schedule with his daughter. CP 8-15. The mother then filed a Response to the father's Petition, but did not file a Proposed Parenting Plan. CP 16-18. A motion for temporary orders was filed, and the commissioner ordered a somewhat slow and supervised visitation schedule, to be overseen by a specialist in bonding and reunification first. CP 20-21. Although the temporary plan was somewhat

cumbersome and unclear, the father felt it was a precursor to a better plan that could possibly be entered at the time of trial. Unfortunately, because of the lack of clarity in the temporary orders, some time passed before the father was able to meet with the specialist due to difficulties with scheduling. Eventually the father was able to start the counseling, but that was also difficult, so he filed a motion for review and the commissioner ordered his visits be supervised at the Fulcrum Center in Spokane in July 2018. CP 22-23.

Before trial the attorneys for both parties agreed to have the parties go to mediation at the same center that the father's supervised visitation was held, that was known for its pro se mediations, called the Fulcrum Center in Spokane. A letter was sent by the Fulcrum Center confirming the mediation, and did in fact say the parties could have their representative at the mediation. CP114-115. After the mediation date was set the mother's attorney, Ms. Schweigert, sent a rather controlling letter to the father's attorney putting him in a difficult place about the mediation. She told him that the mother would not go to the mediation if he was going to be there. See CP 89. Taken in the best light, her letter made it sound as if neither party would have their attorney there since why would she send such a letter since mediation is to be neutral and if the father's counsel was not going to be there, why would the mother's counsel be the only one attending. It clearly appeared that the parties would be attending the mediation without counsel. See CP 89 again. Additionally, this "exclusion" letter did not explain that Ms. Schweigert would be attending the mediation regardless of what the father's counsel decided. The father's attorney, wanting the mediation to go forward, sent

back a letter that he would not be attending the Fulcrum mediation. CP 97-98. Unfortunately, it was absolutely unknown to the father and his counsel, that the mother's counsel would be going to the parties' mediation. CP 103.

The mediation went forward with the mother and her attorney providing the father with her "version" of a settlement parenting plan, again, without the father's attorney present. See CP 25-38 (The handwritten mediation parenting plan was clearly drafted by the mother's counsel at the mediation; her signature and the writing in the parenting plan are clearly the same). After being presented with Ms. Schweigert's proposed plan the Appellant, who is an "easy going" young man thought he could have his attorney go over anything that he signed, and went ahead and signed the proposed parenting plan, and the CR2a statement, not having his counsel there to explain what all the language in the parenting plan meant or what a CR2a was. CP 96-97. However, again he also wanted his attorney to review and approve the plan before it became final. CP 96, & RP 6-7.

After the mediation the father's attorney received a letter from the mother's counsel with the "agreed" parenting plan attached and a threat that if he did not sign the parties final parenting plan orders she would seek the "entire costs of mediation" from the father. CP 24-38 & CP 43, ln 18-19. Since the mother's counsel indicated that she would be asking Mr. Dennis to pay the "costs of mediation" and the father's attorney knew that Fulcrum mediations only charged about \$50 an hour, it was more important to make sure that the parenting plan that was entered was proper instead of worrying about these small costs, so the father's

counsel did not sign the proposed final plan as they were woefully inappropriate the way they were written. See CP 82-87 & CP 24-38.

Upon review of the mediation parenting plan it was clear that the alleged agreed plan reserved all the mother's disputed limitations and yet ordered supervised visits (CP 25-38). This was in spite of the fact that the Parenting Act and case law requires a recitation of the limitations before normal visits can be made supervised, along with findings. The plan should at least put something in the orders to eventually deal with the reasons for the supervision and this plan did not have that. It keep the father hanging over his head forever because it actually ordered that, "If the parent does not follow the evaluation and treatment requirement above, then (what happens): Mr. Dennis shall not be eligible to Petition to remove the supervision requirement" at page 4, 1st para. CP 28. And when you go to the supervision requirements, which call for an evaluation and treatment as well, the only third parties doing the supervision are his brothers, who are not professionals and cannot do "treatment or an evaluation", leaving Mr. Dennis in a dark tunnel of supervision with no way out. CP 27-28.

If this plan was ratified by Mr. Dennis' counsel, there would have been absolutely no way for the father to get anything but supervised visits for the rest of his child's life, and he could never say he had no limitation unless there was such a finding. Also, he would need a change in circumstances and adequate cause found before he challenged any of the limitations, making it extremely hard to do especially with all the limitations reserved in the plan. *Id.* Therefore, the father's counsel, declined to sign this incomplete and egregious parenting plan.

The father's attorney tried to explain why he did not sign the plan in a return letter to the mother's attorney. RP 3-24; CP 82-93. The mother's attorney then set the plan for presentment, and also asked for her fees now instead of the "costs of mediation". RP 3; CP 39-46. Both parties filed their own legal theories and argument. RP3; CP 39-46, 82-93, 100-107. The trial judge held a hearing and it was explained by the father's counsel that he would not sign the plan because of at least three reasons; First, the plan was obviously presented via ex parte contact with the father by the mother's attorney in possible derogation of the RPC's; Second, the plan was too open-ended and the father may never get to see his child unsupervised with this plan; and, Finally, the plan a right to file for a modification without adequate cause. RP 4-24. See RP generally.

At the hearing the mother's counsel indicated that she did not deal with the alleged RPC violations, although the father's counsel briefed that issue. RP 3; CP 84-87. In her argument the mother's counsel asked to enforce the CR2a agreement from the Fulcrum Center, and asked for fees in the amount of \$1,600.00. RP 3-4; CP 45-46. The father's attorney argued that if his concerns could be cured by some language in the plan that did not make it so difficult to modify the plan away from supervision and possibly did not "reserve" limitation issues, then he would likely sign the plan. RP 4-11 & 22-23.

During the hearing the court continued to question the father's attorney about the matter as if the settlement agreement was to simply keep the temporary orders in place. RP 14-23. However, this also was not the net effect of this plan since a look at the proposed final plan showed that it was not the same thing since the

temporary ordered plan also had an invitation for the father to come back, after he finished counseling, which is not possible in this final parenting plan unless there is an order or clause that states that adequate cause is waived. See e.g. *In re Parentage of C.M.F.*, supra.

To make things worse, it was clear that Mr. Dennis had no legal help to deal with this rather complicated and incomplete plan. The should have been a focus of the court since Ms. Schweigert made a significant misrepresentation about this in her argument. Mr. Dennis' counsel had indicated in his argument that Mr. Dennis had no one to turn to to help him with the mother's counsel's proposed plan. RP9-12. Then the mother's counsel chimed in on what the judge asked and said he had an opportunity to receive help with the plan from the mediator who was an attorney. She said at RP 19, line 9-11,

"Thank you, Your Honor. To clarify, our mediator actually was an attorney."

In regard to this allegation and/or testimony by the mother's counsel, the Appellant's attorney contacted the mediator, as the judge suggested, and found out that the mother's counsel misrepresented the facts about the mediator being an "attorney". He sent a letter to the judge, that he called the mediator and found out he in fact was not a Washington attorney, but was a retired California attorney doing mediations, who knew nothing about Washington parenting plan law. See CP 137-139.

Later in the colloquy between the father's counsel and the judge, although it seemed that the judge first understood the plan was basically the Temporary Ordered Plan as final, that was not the case or the issue. The father's attorney

argued that this plan offered no “solution” for the supervised visits in the plan and reminded the court that he had the discretion to add language to the plan to solve these unclear. RP 22-23. The judge said he would take the matter under advisement, and he also welcomed more investigation about the mediator, as well as legal input, hence the post-argument letter from the father’s attorney. RP 23.

The Judge eventually tendered his written ruling, ratifying the alleged agreed parenting plan, but also including language incorporating the suggestions provided by the father’s counsel with a review process, findings, and modification section. CP 132-134. However, in spite of this the judge also ordered that the father pay the mother’s fees in the amount of \$1,600.00, without any explanation of why he ordered those fees other than the father’s action forced the mother to file a motion for presentment, and did not even mention that but for his attorney forcing a presentment the judge would not have known to allow the plan to be reviewed “without adequate cause”. *Id.* and CP 135-136.

This appeal was filed pro bono by the father’s counsel regarding the fees that were ordered, since it made little or no sense to sanction the father for a legitimate concern over the parenting plan drafted by the mother’s attorney, especially when the mother’s attorney orchestrated the mediation so that the father was pro se and her client was represented. Further, the judge must have agreed with the father and his attorney that the “stipulated” parenting plan needed to be clarified to include an order to eventually allow a change to the plan to receive unsupervised visits because he added his own findings in that to allow for what the father and his attorney argued. It makes no sense then to charge the father with the mother’s

fees since he did nothing wrong here. The father requests that the sanctions that were levied be dismissed.

II. Error by the Trial Court

The trial court erred in the following manner:

1. The judge levied sanctions against the Appellant father even though there was clearly a legitimate reason for his attorney not to sign this open ended plan which limited visits without findings of fact of why those limitations were appropriate, and did not allow a change in the plan without adequate cause.
2. If the judge levied the sanctions against the father because his attorney did not attend the mediation, the court should have taken into consideration that it was reasonable that the father's counsel thought that the mother's counsel would not be attending as well because it was not clear in the letter that the mother's counsel would be attending the mediation, and if she did she likely would be doing so in derogation of the RPC's;
3. The court erred by not taking into consideration that the mother's counsel misrepresented the truth about the father having a Washington Attorney Mediator available to explain any problems in the final parenting plan.
4. The court erred by not addressing the intentional act by the mother's counsel to force the father's attorney to not attend the mediation by threatening that the mediation would not go forward if he did not first agree to not attend, making it a forgone conclusion that the mother's counsel would be the only legal expert there for both parties if she attended.

III. Law and Argument

- A. There was no basis to levy monetary sanctions against the father under the circumstances of this case since both the father and his attorney's concerns regarding the "agreed" plan were applied by the judge in his final order on the presentation motion.

There are only a few ways to levy sanctions against a party in a family law paternity case. They can be levied for the following reasons:

1. Intransigence;
2. CR 11 sanctions;
3. By statute; Specifically, RCW 26.26B.060 in the court's discretion weighing the parties finances and comparative financial needs; or
4. By contract or agreement.

The judge disclosed that he ordered that the father pay the fee sanctions because he forced the mother to file a presentment of the CR2a agreement. However, it was obvious that the mother put the father and his counsel in an untenable position, in that the mediation would not have even gone forward unless the father's counsel did not attend. The letter is clear, the mother's counsel said it was written because the mother would not attend mediation unless Mr. Stenzel did not go to the mediation. Under such circumstances with no explanation the only conclusion that was logical was that neither parties would have an attorney there since the RPC's forbid exparte communication with the other party, and nowhere in any letter or agreement does it say from the father that he consented to just deal with the mother and her attorney, without his counsel to help him.

“A trial court abuses its discretion if it bases its order on untenable grounds or makes a manifestly unreasonable or arbitrary decision.” See *Everett Hangar, LLC v. Kilo 6 Owners Association*, 73504-7-I (2016) and the law therein¹. If there is an appeal of an award of fees, the appeals court may review the court’s findings of fact for substantial evidence and conclusions of law *de novo* to see why the court ordered what it did. See *Everett Hangar, supra*. A decision by the judge to grant or deny a request by a party is reviewed to see if the decision was may without basis, or is based on untenable grounds, or lacks sufficient grounds to support the decision. See *Kucera v. State, Dept. of Transp.*, 140 Wn.2d 200, 995 P.2d 63 (Wash. 2000). In particular, when the decision is about attorney’s fees, the court looks at the decision *de novo* to see if the fees were both reasonable and ordered on proper grounds. *Id.*

In order to see if the judge’s order for the fees was arbitrary or not, the *Kucera* case says we have to first look at the findings for why the fees were ordered. In this case, the judge did made findings that the fees were ordered because the father forced the mother’s attorney to set a presentment, however, the father and his attorney were also fooled into believing that the mother and her counsel would treat them fairly and not attend the mediation, otherwise why would the mother’s counsel insist on not having the father’s attorney at the mediation. Any attorney

¹ GR 14.1 (a) states: “(a) Washington Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

with any experience would not presume, after receiving such a letter, that the mother's attorney would be there but demanded that the father's attorney not be there. That is the essence of RPC 4.2, so there is "fairness toward opposing parties". The only conclusion must be that the mother would not be going too, since if she went to the mediation after sending this letter she would automatically know that the father's counsel was not going to be there; and even if the father's attorney attended, if they found that out they would leave and likely ask for fees because he came. The mother's attorney was basically intending to utilize her skills in family law to help her client, and surely she did not intend to use those skills to help the father; therefore, her intentional attempt to preclude the father's counsel was a plan to get this case done by any means possible, especially to do so without interference from the father's attorney. This is not due process, this is why the prohibition against *ex parte* contact with a represented party rule was made. As they said in *Cruz v. Chavez*, 186 Wn.App. 913, 347 P.3d 912 (Div. 1 2015),

"Indeed, the evidence shows that Jacobson's acts may have been contrary to RPC 4.2.[6] RPC 4.2 forbids an attorney from communicating directly with a represented party. The purpose of the rule " is to prevent situations in which a represented party is taken advantage of by adverse counsel." *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 597, 48 P.3d 311 (2002). Comment 4 to RPC 4.2 states, in pertinent part, that "[a] lawyer may not make a communication prohibited by this Rule through the acts of another." The evidence shows that Jacobson may have made prohibited communication by providing Chavez the release paperwork and instructing Chavez to contact Ramirez directly in an effort to obtain a settlement without the involvement of Ramirez's counsel.

Even though the mother's attorney was in a separate room, she drafted the proposed parenting plan and had it delivered to the unrepresented party, and the

mediator talked him into signing it. The father did not know what “Reserved” meant, or what it meant to not have an end point to the supervised visits, nor that the supervised visits had to have findings before they were appropriate. The mother’s counsel was successful in her plan to keep the father at a disadvantage in this mediation, and was even rewarded for having done this in a very inappropriate manner which did not make it clear that she would be attending the mediation even if the father’s counsel would not be attending, which attendance would have stopped the mediation according to the Ms. Schweigert’s letter.

Finally, by an analogy, fees for inappropriate behavior of an opposing litigant in an appeal are only ordered if the actions of that litigant are frivolous, or there is some reasonable basis for the fees. First there must be some basis in law for the fees ordered. *In re Marriage of Konzen*, 103 Wn.2d 470, 693 P.2d 97 (Wash. 1985). Here there was no basis other than the mother had to “file a motion” to enter the plan, which was caused by the father’s counsel. However, what the father did must have a basis such as frivolousness or some other basis within such a description or finding. Here it could be said that the father won the motion to add a clause that allowed him to change the parenting plan over time, and do away with the clause about “never being able to change the supervision” even though the mother prevailed on the fees issue and entry of part of the plan. Generally the “prevailing party” should be awarded his fees, even where both parties may have prevailed in some respects. See e.g. *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (Wash. 2010); and *Cooke v. Chu-Yun Twu*, 448 P.3d 190 (Div. 2 2019).

A judge is also required to make findings that are clearly related to why fees are ordered. Here, the judge ordered fees because the father forced the mother to file a motion for presentment of the CR2a agreement. However, the judge also changed the agreement significantly based on the father's argument that the proposed plan was inappropriate and afforded the father no real way to change the plan. With that the judge added a waiver of adequate cause, and with time a right to change the supervision. As such the mother was not the real prevailing party, the father was. If anything the father should have been awarded his fees because of the mother attorney's actions in the case, her attempt to control the mediation, her misrepresentation about the California attorney being "an attorney" that the father to use in the mediation, and her letter that orchestrated the father's pro se status at the mediation.

But for the father's attorney's intervention in this presentment, the orders would have been entered which were completely inappropriate and would have resulted in substantial court time and legal fees in the future, mostly for the father. Therefore, the fees ordered and the findings are clearly unsupported by the facts of this case. But for the father's attorney's decision not to sign the orders and protect the father, both parents were saved from significantly more litigation that would have surrounded the issue of when the supervision would have ended with a professional therapist to file the required reports in the plan. The father should never have been sanctioned.

B. The father's attorney had a very good reason not to want the parenting plan finalized since it was incomplete and seemed to be without an end to his client's supervision.

As indicated, both during the argument at the presentment hearing and in a supplemental written argument, that such an incomplete parenting plan was not condoned by this State's Court of Appeals, except where there is a return date contemplated. For example, The cases of *In re Marriage of Possinger*, 105 Wn.App. 326, 19 P.3d 1109 (Div. 1 2001) and *In re Marriage of True*, 104 Wn.App. 291, 16 P.3d 646 (Div. 1 2000), both make it clear that it is okay to do what the young people in this case did, but you need a date certain or anniversary of some sort for a review. In fact, the father's counsel gave the judge the *True* case to review before he signed any order in this matter.

In fact, the father's attorney was clear why he did not sign the final settlement plan. He said in his argument:

"MR. STENZEL: Well, okay, okay. Let's put that aside for a second. All I'm suggesting is that you cannot enter a parenting plan with reserved limitations when you have limitations in there. How is a future court, or even the commissioners to decide whether he's gone through the hoops to get over that supervised visitation if the limitations aren't clarified? How are we going to be able to do that? The judge will always ask, well, there's no findings. You get reports from the Court of Appeals that say there's no findings here.

Every case I've researched -- the *Underwood* Case, 181 Washington Appeals 608; the *Maddon* Case, it was an unpublished, but it was 66551-1 Court of Appeals Division-I -- all say that if you enter limited parenting time, you have to put what the limitations are. It is incumbent upon a judge to make sure that happens. So do we come back to you to do that? How do we do that?" RP 9-10.

The parenting plan forms that were initially used by Ms. Schweigert to write down this alleged agreement, have a large number of the open clauses, and findings that have been developed over the last 30 years of the 1987 Parenting Act. Failing to require proper use of the forms can equate to unnecessary and

expensive litigation and parent child misunderstandings, and large court clerk's files over time. See *In re the matter of CMF*, supra, where the father's counsel misused the forms, by actually using the wrong form in that particular case, eventually causing the case to go all the way to the Supreme Court. There are very important reasons why the plan form needs clarity, and why this attorney's fees award was unfair, especially since it was the father's attorney that caught the mistakes in this form which required a presentment hearing to rectify.

Parenthetically, this court may ask if all this was the case, why wasn't the entire plan appealed. That certainly is a good question, but it boils down to whether Mr. Dennis wanted to pay for a very very expensive appeal over all the issues, or just the fees issue. The parenting plan issues would have possibly caused a remand and an entire trial, not to mention the added costs on appeal for the added briefing, and new trial costs, therefore, Mr. Dennis simply decided to deal with the sanctions that he felt were unfair and to allow some *Possinger* type clauses in the parenting plan.

- C. The court has a duty to make sure that the parenting plan that is entered in a RCW 26.09 and a paternity action by reference, be consistent with the law and statutes; and allowing the mother's parenting plan to be entered, even in the face of a CR2a agreement would be inappropriate without adding corrections that would make it consistent with the law on final parenting plans

The father's counsel knew that the Judge had a duty to make sure that the parenting plan that was entered was done so within the law. *Decker v. Decker*, 326 P.2d 332, 52 Wn.2d 456 (Wash. 1958). Here the parenting plan that the mother's counsel was proffering was missing several key parts. See e.g. *In re Marriage of Possinger*, supra. A "parenting plan court" has a duty to insure that

due process is waived properly in some domestic cases in the *Beatson v. Beatson*, 32541-5-III (2015) case, the judge in this case needed to make sure that there was some way for Mr. Dennis to move on to unsupervised visits where the plan offered was a complete dead end for him to get out of these supervised visits. There also needed to be some resolution and/or findings why there were limitations, or a way to resolve those limits if they were simply reserved. See *In re Marriage of Underwood*, 181 Wn.App. 608, 326 P.3d 793 (Div. 2 2014).

It was patently obvious that the mother's counsel simply did not care about resolution of the supervised parenting time because this meant that her client had all the control to keep the father from being in her child's life, and she felt, rightfully or wrongly that he was an abusive person. Therefore, it seems obvious that there were substantial reasons for her to control the mediation and the language of "her parenting plan" that was "agreed to" at the mediation. However, the judge should not have awarded fees for the father reminding him of his duty and asking that he understand that there was a legitimate reason for the father's attorney to force a presentment in good faith.

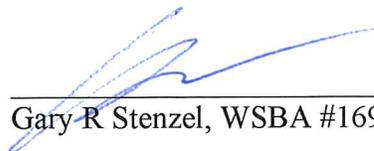
Awarding attorney's fees for the father utilizing his attorney's advise was what he should have done, and ordering him to pay fees for doing what he should have done, and following that advice will have a chilling and adverse effect on a litigants right to use an attorney in the future. He should not have been punished for his attorney helping the court fulfill its duty to the parties child. As they said in *In re Estate of Travis*, 33315-9-III, "Because CR 11 sanctions have a potential chilling effect, the trial court should impose sanctions only when it is patently

clear that a claim has absolutely no chance of success”. Citing *Lee v. Jasman*, 183 Wn.App. 27, 71, 332 P.3d 1106 (2014), *aff’d*, *Grant County Prosecuting Attorney v. Jasmin*, 183 Wn.2d 633, 354 P.3d 846 (Wash. 2015). The court should not have awarded the mother fees for the father and his attorney pointing out deficiencies in the “agreed” parenting plan; that was and is the duty of the father’s attorney.

IV. Conclusion

The father in this parenting plan case was sanctioned fees because his attorney would not sign the “mediated parenting plan” that was ratified by him as if he was pro se, even though he had counsel. He did not have his attorney at the mediation because the mother’s counsel warned that if his attorney attended the mediation her client would not attend, but she also did not make it clear that she would be attending with her client, making it a very unbalanced mediation. Upon the mother’s motion to enforce the signed parenting plan, the court levied the fees against the father for forcing a presentment. This was done even though the father’s attorney’s concerns were utilized by the court in changing the “agreed parenting plan”, and even though there were so many problems with the agreed plan which would have created a future family law mess for probably both parties. There appeared no reason for the father to be sanctioned, therefore, the father requests that the sanction/fees be vacated.

Signed this 4th day of February 2020 by,



Gary R Stenzel, WSBA #16974

STENZEL LAW OFFICE

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