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COURT OF APPEALS  
DIVISION ONE  
72147-0

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No. 721470

Snohomish County Superior Court No. 12-3-02040-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
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CHRISTOPER BURROWS,  
Plaintiff-Appellee,  
v.

ALICIA DEGON,  
Defendant-Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Millie Judge, Judge

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APPELLANT'S BRIEF IN REPLY

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**Erin C. Sperger**

Attorney for Appellant  
1617 Boylston Avenue  
Seattle, WA 98122  
(206) 504-2655

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**I. ARGUMENTS IN REPLY**

**A. DeGon's residential time was restricted and she did assign error to the trial court's decision to grant sole decision making authority to Burrows.**

The Parenting plan says the mother's time is restricted in 2.19. CP 50.

DeGon assigned error to the trial court's decision to grant sole decision making authority to Burrows. See Opening brief I.1(b). This does violate DeGon's constitutional rights under *Katara v. Katara*, 125 Wn. App. 813, 823, 105 P.3d 44 (2004), rev. denied, 155 Wn.2d 1005 (2005) because the trial court's decision to restrict DeGon's residential time and decision-making authority was not based solely on the best interest of the children. Notably, the court found that both parents' conduct may have an adverse effect on the children's best interest. But, the court based its denial of joint decision-making on the same facts used to grant the restraining order. Namely, conflict between the parents. See FF 2.19 (1), CP 50-54. This is constitutionally impermissible because there was a less restrictive alternative. Allowing joint decision making through a case manager would have alleviated the conflict without restricting DeGon's right to the management of her children.

The trial court's imposition of .191 restriction against DeGon were mostly based on its finding that she abused Dr. Burrows. See Final Parenting Plan 4.3, CP 28; FF 2.19, CP 49-50. Although the court was free

not to follow the advice of the GAL and of Mr. Maiuro,<sup>1</sup> their testimony is evidence that directly contradicts the Court's findings. DeGon does not ask this court to substitute its opinion for that of the trial court. Instead, she argues that because the two court appointed experts thoroughly refute the trial court's findings, those findings were based on untenable grounds. See *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (a trial court's decision is based on untenable grounds if the factual findings are unsupported by the record).

It is true that this court does not make credibility determinations. *Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002). But, because the court heavily relied on testimony from Dr. Burrows who, as part of his mental illness, experiences "errors in perception" and attributes "malevolent motives" to other and blames others for his depression and mental state, it shows that these findings were based on untenable grounds. CP 170. For example, the trial court found that Dr. Burrows was traumatized by sexual encounters with DeGon and that "he believes he suffered from PTSD as a result of it." FF 2.19 (h), CP 52-53. But, Dr. Burrows has a tendency to blame others for his mental state. And, in any event, he testified that the sexual encounter with DeGon at Baker

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<sup>1</sup> See *Fernando v. Nieswandt*, 87 Wn. App. 103, 107-08, 940 P.2d 1380, rev. denied, 133 Wn.2d 1014 (1997).

Anderson's house was not the cause of his PTSD and that the symptoms he attributes to PTSD did not start until he left the family home. RP 648-49.

The trial court found DeGon to be the abuser even after clear evidence that he was acting under an apparent delusion. One glaring example of this was the FBI letter he filed to have DeGon arrested and alleged that the appointed experts were in on a conspiracy with the court to keep his children from him. See CP 819-20.

Considering the evidence as a whole, Dr. Burrows has been diagnosed with bipolar disorder by two doctors. RP 567, 840. Some of his symptoms include engaging in adventurous sex acts and then later regretting it. RP 845-46. Despite his well-documented history of mental illness and symptoms, and his denial that he is bipolar, the trial court based its findings of abuse and neglect on Dr. Burrows' testimony. Then it awarded sole decision making authority to Dr. Burrows in order to limit DeGon's contact with him. See Resp. Br. at 34-35; FF 2.19 (1), CP 50-54. The trial court essentially found that DeGon caused his mental state despite the vast amount of evidence that Dr. Burrows suffered from mental illness long before the parties met.

Dr. Burrows' argument that the requirement that DeGon undergo a mental health evaluation with a sexual addiction specialist was not a

precondition to her exercising residential time with the children is wrong because she could be held in contempt of the parenting plan for noncompliance. RCW 7.21.010(1)(b); See Respondent's Br. at 33 n. 4; CP 25. In addition, the parenting plan incorrectly states that the therapy is to address her "diagnosed personality disorder." CP 25. DeGon was not diagnosed with a personality disorder. Although Dr. Burrows was careful not to use this language on appeal, the trial court and Dr. Burrows' trial counsel repeated this misstatement several times. RP 171, 1020. This is another example of how the trial court made findings contrary to the evidence presented.

DeGon showed several other examples in her opening brief, including the "broken leg" incident. Dr. Burrows states on appeal that DeGon disputes the severity of the injury, but that an understatement. See Resp. Br. at 17. The trial court found it was determined that the leg was fractured, but no such testimony was elicited. Dr. Burrows testified that the results were inconclusive, so the doctor decided to treat it like a fracture. Compare FF 2.19 (k), CP 54 with RP 452.

Therefore, the denial of joint decision-making was not warranted because the substantial evidence does not support it.

**B. The court's finding that the restraining order was necessary was based on a misinterpretation of Dr. Maiuro's report**

DeGon's motion for reconsideration was also based on the fact that substantial justice was not done. Dr. Burrows argues that there was more than an adequate basis to grant him a restraining order because DeGon intentionally traumatized him emotionally and physically. Resp. Br. at 36; FF 2.19(i), CP 53. But, that finding heavily relied on Dr. Maiuro's report, which the court misinterpreted. Compare FF 2.19 (f)-(i) citing Exh. 36 at 20-21 with CP 219-20 para. 5-6.

This is different than when the court chooses not to follow the expert testimony as in *Fernando*, 87 Wn. App. at 107-08. Here, the court purported to follow the expert's advice, but misinterpreted his report and testimony. Dr. Maiuro's supplemental declaration points to several areas where the Court misunderstood his testimony. Therefore, the findings based on that misunderstanding were not actually supported by the evidence presented. This was evidence the trial court should have considered on reconsideration in order to prevent a substantial injustice. Given the court's misunderstanding of Dr. Maiuro's testimony it should have re-opened the case to take additional testimony. DeGon's evidence presented on reconsideration corroborated Dr. Maiuro's findings that Dr. Burrows engages in sexual experimentation and that Dr. Burrows

experiences “errors in perception.” See CP 104, 114, 117, 153-54, 170. Therefore, the trial could should have taken additional evidence from those witnesses as well.

**C. Refusal to consider the restraining order would not have been reversible error**

Dr. Burrows argues that it could have been reversible error to refuse to consider the restraining order at issue and cites to *Marriage of Neumiller*, 183 Wn. App. 914, 335 P.3d 1019 (2014). See Resp. Br. at 38. But, *Neumiller* dealt with whether a party must plead an evidentiary fact in a dissolution proceeding. The court found that evidence does not need to be pleaded to be considered at trial. *Id.* at 922. In contrast, requesting a restraining order is not evidence.

DeGon did not impliedly consent to having this issue tried. Instead, she sought to limit the testimony because Dr. Burrows’ petition for a protection order was previously denied, Dr. Maiuro’s report ruled out domestic violence and abuse, multiple reports made to CPS by Dr. Burrows were found to be unfounded, and violence and abuse was not adequately pled. See RP 634, Exh.14; RP 174-75, 828, 953, Under these circumstances, DeGon rightfully believed that residential limitations could not be imposed, nor could a restraining order be granted based on allegations of abuse. She also rightfully believed that the court would

accurately interpret Dr. Maiuro's report that she did not engage in acts of domestic violence or neglect. See CP 182.

**D. The Court's valuation of Agile Recruiter was not within the scope of evidence**

Dr. Burrows argues that the court did not abuse its discretion in valuing Agile Recruiter at \$80,000 because it was within the scope of the evidence. But, this ignores the entire scope of the evidence. Dr. Burrows testified that Agile Recruiter "is a relatively poor implementation and it's hard to maintain and has no customers." RP 543. Both parties testified that the other one should have it because it was essentially worthless in its current state and neither party could afford to invest the time and risk it would take to re-commercialize it. RP 621, 700, 737.

The testimony also revealed that the value was not in the raw data, such as names and addresses, but in the utilization of that data. The real value was in the source code, which both parties testified was old technology and an outdated idea. RP 543. The only testimony about the value of the database itself was from DeGon who testified that without Agile Recruiter the actual data was worth a "small fraction" of the value it has when it is in Agile Recruiter. RP 908-09. In light of the whole record, the trial court's finding that at least 50% of the value was in the database was untenable. (*See* FF 2.8(b), (CP 43-45).

**E. The property division was significantly influenced by the characterization of the Scenic Drive home and resulted in an unjust distribution**

Dr. Burrows argues that there was evidence both parties contributed to the acquisition of the home with the intent to make it community property. Resp. Br. at 44. But, the only evidence was Dr. Burrows' testimony. He produced no documents showing he actually contributed anything other than a \$5,000 gift. RP 625 Exh. 134.

The property division was significantly influenced by the characterization of the home because, including Dr. Burrows' equalizing payment, it awarded half of the community property to each party. See *Marriage of Griswold*, 112 Wn. App. 333, 346, 48 P.3d 1018 (2002). If it had been properly characterized as separate property then DeGon arguably would have received all of the equity in the house on the date of the quitclaim deed, which was roughly \$350,000. This amount represents the value of the home, less mortgages owed in 2011. Evidence that the community paid the mortgage payments does not change the character of the property and, therefore, does not prove by clear and cogent evidence that the parties intended to create community property at the time of acquisition. See *In re Estate of Borghi*, 167 Wn.2d 480, 219 P.3d 932 (2009). It was not fair and equitable to award the home to Dr. Burrows

without a significant equalizing payment when DeGon had roughly \$350,000 worth of equity in the home.

**F. Dr. Burrows does not dispute that the trial court erred in awarding DeGon the \$50,000 line of credit as a separate debt.**

DeGon was awarded \$50,000 as a separate debt. Revised Decree 3.6, CP 34. She was also ordered to pay the expert fees out of that \$50,000. Dr. Burrows does not dispute that this was in error. Dr. Burrows argues that the trial court did not abuse its discretion because it found that DeGon used community assets during the parties' separation to a greater degree than Dr. Burrows and his \$75,000 equalizing payment would offset this. See Resp. Br. at 46-47. But, originally the \$50,000 line of credit was characterized as a community asset. On reconsideration, that line of credit was awarded to her as a separate debt to pay her separate liability of living expenses and attorney fees. CP 33-34, 2059. However, the court also found that she should pay the full amount of the expert fees, which were a community debt, with that same money. This was not a just distribution.

**G. The trial court made no findings that DeGon was voluntarily underemployed to avoid child support**

Dr. Burrows argues that the trial court essentially did find that DeGon was voluntarily underemployed to avoid child support when it found that she did not report income from stocks and other contact jobs. Resp. Br. at

41. But, the trial court made so such finding. See FF 2.20, CP 55. DeGon testified that her exact income was hard to calculate because it fluctuates, but she made a good faith effort to report all of her income. RP 813-14.

And, in any event, DeGon was working in her customary occupation. Therefore the court should not have looked solely to the amount of hours worked. *Schumacher v. Watson*, 100 Wn. App. 208, 215, 997 P.2d 399 (Ct. App. Div. 1 2000).

## II. CONCLUSION

When the record is viewed as a whole, it does not support the trial court's findings of abuse by DeGon or a pattern of negligence sufficient to uphold the restraining order or to deny DeGon's right to decision-making. Therefore, this court should remand the case to the trial court and re-instate the pre-trial orders regarding residential time.

Respectfully submitted this 5<sup>th</sup> day of November, 2015.



Erin C. Sperger, WSBA #45931  
Attorney for Alicia DeGon

I, Erin C. Sperger declare under penalty of perjury that I delivered a copy of Appellant's Brief in Reply to:

**Catherine Wright Smith and Valerie A. Villacin**

Smith Goodfriend, PS  
1619 8<sup>th</sup> Avenue N  
Seattle, WA 98109  
(206) 624-0974  
cate@washingtonappeals.com  
valerie@washingtonappeals.com

**AND**

**Veronica Freitas**

V. Frietas Law, PLLC  
210 Summit Avenue E  
Seattle, WA 98101  
v@vfreitaslaw.com

via email on November 5, 2015

**Clerk of the Court for Court of Appeals Division I**

One Union Square  
600 University Street  
Seattle, WA 98101  
Ph: 206.464.7750

In person on November 5, 2015.

DATED November 5, 2015



Erin C. Sperger, WSBA No. 45931  
Attorney for Alecia DeGon

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