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THE SUPREME COURT OF WASHINGTON

Court of Appeals No. 390918

Spokane Superior Court No. 17-3-00265-6

In RE: the Parenting of Elijah Saunders

JENNIFER MICHELLE MCCLUSKEY,

Petitioner/Appellant,

vs.

DAVID ALLEN SAUNDERS,

Respondent/Appellee.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jennifer McCluskey was the Petitioner in an action for Legal Separation against Respondent, David[1] Saunders, which filed in Spokane County Superior Court in February 2017. Both parties are practicing Seventh-day Adventists and raise their child in that tradition. The matter proceeded to a two-day trial on Respondent's Objection to Relocation of the minor child in April 2022. Ms. McClusky was the Appellant in the Court of Appeals in 2022, where she challenged the trial court's findings and order on final residential schedule, contempt, and sanctions. She asks this Court to accept review of the Court of Appeals *Opinion*[2] affirming the superior court's final findings and order.

B. COURT OF APPEALS DECISION

Division Three issued its unpublished *Opinion* on October 5, 2023, affirming the trial court's decision on

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[1] Petitioner and Respondent are referred to by their first names. No disrespect is intended.
[2] Appendix A.

residential schedule, contempt, and sanctions. No motion for reconsideration was filed. A copy of the *Opinion* is in the Appendix at A1-13.

C. ISSUES PRESENTED FOR REVIEW

1. The Lower Court(s) erred in adopting a parenting plan which emphasized the Respondent's freedom of religious expression over the family's agreed and established practice regarding the Sabbath.

2. The Appellate Court misread the holding of *In Re Marriage of Jensen-Branch* which involved decision-making and erred in ignoring the established best interest of the child by agreement of the parents.

3. The Lower Court(s) failed to apply the statutory framework of RCW 26.09 et seq. in adopting a final parenting plan.

4. The Lower court(s) abused their discretion in finding the mother in contempt without analyzing whether her disobedience was in bad faith.

D. STATEMENT OF THE CASE

Petitioner, Jennifer McCluskey, is the 32-year-old mother of one child: Elijah Saunders, age 7. Jennifer was raised in a conservative Christian household belonging to the Seventh-day Adventist denomination. CP 279; I RP[3] 281. Jennifer met and married Respondent, David Saunders, on February 8, 2015, while on mission in Kenya, Africa. CP 1. David also belonged to the Seventh-day Adventist denomination, falling away from the church for a few years as a young adult, to return to the faith in medical school. CP 513; I RP 281.

Jennifer returned to Washington from her African mission in March 2016 in preparation of the birth of the parties' son. I RP 182. 5. David returned to Washington from his Africa mission in April 2016 for his paternity leave. I RP 183. The parties' only son, Elijah, was born May 12, 2016, at Walla Walla General

[3] I RP refers to Verbatim Report of Proceedings – Judge Michelle Szambelan – April 25, 27, 2022, and May 23, 2022 - Trial

Hospital. I RP 62, 184. Elijah was breech; Jennifer required an emergency cesarean section. I RP 117. Jennifer and Elijah were discharged from the hospital on May 14, 2016. I RP 189. The parties separated on May 25, 2016, when Elijah was 2 weeks old. CP 86. That same day, the parties left their rented lodgings. Jennifer moved to her parents' home to aid in her recovery, and David moved to a hotel but did not immediately disclose where he was. I RP 190, 193. David stayed in the hotel until June 15, 2016, when he rented an apartment in Spokane. I RP 192.

During the time David was in the hotel and his apartment, David and Jennifer communicated over the phone and text messaged each other sparsely. I RP 192. David returned to Africa on July 12, 2016. CP 87, I RP 196. David returned to Washington on February 8, 2017, and a Restraining order was put in place protecting Jennifer and Elijah. CP 128. David visited Elijah on February 11, 2017. I RP 198-9. David had visits with Elijah on February 25, March 4, 11, 18, 25, April 1, 8, 15, 2017, returning

again to Malawi. I RP 201. David had visits with Elijah on September 2, 5, 9, 12, 14, 15, 16, 17, 2017, again returning to Malawi. I RP 202, 204. The 2017 visits were scheduled to be two hours in duration; however, due to Elijah's age, David only spent an average of one hour or less per time with Elijah. I RP 244.

On November 30, 2017, a Final Parenting Plan was entered by agreement with a reservation as to each party's right to raise issues of abandonment in the future. CP 174-75. The parties agreed upon joint decision making for school/education, non-emergency health care, daycare, and religion. *Id*. A provision was included in the plan "[t]he residential time will not include overnight visits" and "<u>if any of the scheduled residential times take place on a Saturday the parties agree that the visitation shall be moved to the Sunday after</u>" (to allow the child to observe Sabbath with his mother). CP 176-77. The agreed parenting plan was to be revisited in mediation prior to the child turning three (on May 12, 2019). *Id.*; I RP 251.

On July 23, 2019, in support of his motion for temporary order, David acknowledged he has had limited contact with Elijah because of the limited time David has been in the states. CP 187, 239. In 2017, David had a total of 18 visits with Elijah, lasting an average of 1 hour each. In 2018, David had 22 visits with Elijah, lasting a maximum of 2 hours each. CP 188; I RP 205-07. In 2019, David had 13 visits with Elijah, lasting a maximum of 4 hours each. CP 189, 207, 377; I RP 209. In 2020, David had 9 visits with Elijah lasting 4 hours each, with one visit being 6 hours in duration. CP 323; I RP 211. The parties did agree upon Skype only visits between March and November 15, 2020, due to COVID. CP 246; I RP 211. Between January 10, 2021, and April 18, 2021, David visited Elijah a total of 8 times (every other Sunday). CP 323, 328, 378. Over the duration of five years (July 2016, to June 2021), Elijah spent 70 visits with David, never exceeding 8 hours in duration.

On June 16, 2021, David filed a motion to expand his time. CP 374. David remained confident Elijah was not ready for

overnight visits with him. CP 375. David, instead, proposed 8 hour visits every other Sunday for three months, then revisit expansion of time, and also appointment of a guardian ad litem to assist the Court and parties in reaching an appropriate final parenting plan. CP 375, 383, 387.

On June 22, 2021, Jennifer filed her Notice of Intent to Relocate and Motion for Temporary Order Allowing Move with Child. CP 416-7. David filed his Objection to Relocation on June 25, 2021. CP 420-5. On June 30, 2021, David filed a Petition to Change a Parenting Plan. CP 432. David did not request "other changes" (decision making) to the parenting plan. CP 435. A Temporary Order about Moving with the Child was entered by the Superior Court on August 2, 2021, granting Elijah's relocation with Jennifer to Oklahoma and allotting visits for David in Oklahoma one weekend a month for 8 hours each day on a Friday, Saturday, and Sunday. CP 475-77. In this decision, the lower court made oral findings Elijah's time with David "is as important or more than his religious time one time a month."

II RP[4] 28.

In March of 2022, the parties appeared before Superior Judge Szambelan for a two-day trial. Jennifer testified regarding her belief that breaking the Sabbath or allowing Elijah to break the Sabbath would mean she would not go to heaven. I RP 102, 136. As a parent, Jennifer's religious belief is that Elijah is within her "gate" or imperative instruction as set forth in Deuteronomy chapter 5, which requires:

> Remember the Sabbath day. Keep it holy. Six days thou shalt labor and do all thy work, but the seventh day is the Sabbath of the Lord thy God. In it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy ox, nor thy stranger that is within thy gates.

I RP 101. Jennifer also explained her belief that visits with David on Sabbath would break Sabbath, as the visits at the time up to trial had been stressful on Elijah because the Sabbath is a day of rest, and David incited conflict on the Sabbath. I RP 82, 137. If

[4] II RP is in reference to Verbatim Report of Proceedings – Judge Rachelle Anderson – July 28, 2021 – See Appendix B

Jennifer had to prepare Elijah for a visit with David on Sabbath, Elijah would be at unrest – thereby breaking Sabbath. I RP 137-38. At trial, when confronted about abiding by government law, Jennifer explained God's law is above all other law, and if she did not obey God's law on keeping Sabbath sacred, it would be like breaking other commandments such as not committing adultery, not murdering someone… I RP 141. Again, the parties' prior agreed 2017 parenting plan and subsequent agreements up until Judge Anderson's July 2021 order specifically provided Elijah's visits would not take place on the Sabbath.

STATEMENT OF CASE RE: CONTEMPT

David's first visit to Oklahoma was September 3, 2021. I RP 215. David was scheduled to have Elijah on September 3, 4, and 5, 2021. *Id.* Jennifer exchanged Elijah on September 3 and 5; she did not bring Elijah to the exchange on September 4, as the visit time conflicted with observation of the Sabbath. I RP 215-17. David visited the same church as Jennifer and Elijah spent part of Sabbath. I RP 217. Jennifer did not agree to allow David

to take Elijah from the church. *Id.* David called the police, having police show up at the church during Sabbath. *Id.* On September 5, 2021, David and his mother brought a brand-new bicycle purchased for Elijah's birthday (DOB May 12, 2016) to the visit. I RP 220. David's next visit to see Elijah was scheduled for October 15 – 17, 2021. Jennifer brought Elijah to the exchange on October 17 only. I RP 222. Jennifer did not bring Elijah to the exchange on October 15, as it was a Friday overnight (and also beginning of Sabbath). I RP 225. David's next visit was to occur November 12 – 14, 2021. I RP 223. Jennifer brought Elijah to the exchange on November 12 and 14 but did not meet for the exchange on November 13 in observation of the Sabbath. *Id.* David's next visit was to occur December 24 – 26, 2021. I RP 225. Jennifer brought Elijah to the December 26 visit only. *Id.* David came for a visit in January 2022; Jennifer brought Elijah only to the last day of the visit. *Id.* The February 2022 visit was cancelled as Elijah had COVID. I RP 227.

On April 7, 2022, David filed a Motion for Contempt for

Jennifer's refusal to produce the child for his make-up time visit from March 17 to 21, 2022, continuously. Further, David asked that if Jennifer had not complied with the prior contempt order as to jail time, he wanted her sanctioned with additional jail time to show her the Court decides parenting time and not her and to punish her. CP 478-81. David, again, asked for a guardian ad litem to be appointed so the Court would have the information necessary to make a determination at trial regarding relocation, custodial and parenting issues. CP 480. David sought the guardian ad litem's scope to include "the extent of any psychological abuse of the child while in the Mother's care and her attempts to alienate the child from the Father. Without this information, the Court is left guessing as to exactly what is going on in the Mother's home that is so detrimental to the Father's relationship with the child." CP 481. The missed March 2022 visits are the subject of the contempt before the lower court at trial. CP 489.

The trial court found “overnights are too disruptive to the child without reunification therapy.” I RP 294. Paradoxically, the trial court found Jennifer in contempt of court for not making Elijah available for David’s overnight time with Elijah from “7:00 p.m. on Thursday, March 17th continuously to noon on Monday, March 21st, in other words, overnights.” I RP 292.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The fundamental dispute in this case involves ensuring the best interests of a child, established by years of agreement between parents, are protected. For five years, the child observed the Sabbath according to <u>both</u> parents’ religious beliefs as Seventh-day Adventists. Elijah was raised with an agreed schedule providing for his best interest: father’s visitation with the child would take place on any day <u>*except*</u> the Sabbath. The trial court ignored this fact. The appellate court ignored this fact. The Supreme Court should not ignore this fact, as doing so ignores this family’s constitutional rights and the statutory

framework of RCW 26.09 regarding the child's best interest.

1. **The Lower Court(s) erred in adopting a parenting plan which emphasized the Respondent's freedom of religious expression over the family's agreed and established practice regarding the Sabbath.**

This Court made clear in *Custody of Smith*, 137 Wn.2d 1, 20-21, 969 P.2d 21 (1998), *aff'd sub. nom.*, *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed.2d 49 (2000), that the State can constitutionally interfere with a parent's rights to make decisions for her children <u>only to prevent harm to a child</u>. Where there is a conflict between the parents regarding the religious faith and training of the children, the paramount concern is the welfare of the children. *See Munoz v. Munoz*, 79 Wn.2d 810, 812, 489 P.2d 1133 (1971).

> When it is made to appear that a conflict between divorced parents as to religious instruction is affecting the welfare of their children, a court should always act in accordance with what is best for the happiness and welfare of the child. In legal contemplation the court recognizes no difference in object between religious or other conflicts.

Id. citing Angel v. Angel, 2 Ohio Op. 2d 136, 140 N.E.2d 86 (1956)*; Schreifels v. Schreifels,* 47 Wn.2d 409, 287 P.2d 1001

(1955).

The Munoz Decision noted court intervention in matters of religion is a "perilous adventure upon which the judiciary should be loath to embark." *Munoz* at 812, citing *Donahue v. Donahue*, 142 N. J. Eq. 701 (E. & A. 1948). "Nevertheless, in awarding the custody of an infant the religious training of the child is appropriately an element which may be considered in promoting the general welfare of the infant." *Id., citing Boerger v. Boerger*, 26 N. J. Super. 90 (Ch. Div. 1953). The court in *Munoz* therefore found "religious training cannot in all cases be entirely disregarded." *Id.*

Trial courts must be prohibited from prioritizing one constitutional right over another, <u>especially when those rights are not in conflict</u>. The right to parent a child and right of religious expression are <u>fundamental</u> rights enshrined in the First and Fourteenth Amendment. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 (1972). Washington statutes work in tandem with constitutionally protected rights, not in juxtaposition.

The decisions of the lower courts needlessly disrupted a child's religious observations, devalued a person's right to his/her beliefs within such religious observations, and undermined the parents routine for a child to be raised in the Seventh-day Adventist denomination. When a child is raised by a parent for years ensuring the child observes the Sabbath in a particular schedule, and both parent's visitation can be accomplished without disrupting that shared historical decision, the trial court should consider that fact in crafting a final parenting plan. RCW 26.09.184(3).

A religious claim, to merit protection under the free exercise clause of the First Amendment, must satisfy two basic criteria. First, the claimant's proffered belief must be sincerely held. *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981), internal citations omitted. Second, as the Supreme Court held in *Wisconsin v. Yoder*, "the claim must be rooted in religious belief, not in 'purely secular' philosophical concerns." *Id. citing United States v. Seeger*, 380 U.S. 163, 185, 85 S. Ct. 850, 863, 13 L. Ed.

2d 733 (1965) (test for religious belief within meaning of draft law exemptions is whether beliefs professed are sincerely held and, in claimant's scheme of things, religious).

In the case at bar, "Mom has repeatedly testified her actions are based on her sincerely held religious beliefs. Trial testimony demonstrated her commitment to her faith." I RP 277. "She testified that her [and Elijah's] eternal salvation is at risk if Elijah breaks the Sabbath when he is with Dad." I RP 277-78. Trial testimony established, and the Court of Appeals noted, that both parents are "devout Seventh-day Adventists and that they observe the Sabbath." App. A at 8. The trial court and appellate court *misinterpreted* Jennifer's testimony as a difference of "sincerity" between her and David on how they observe the Sabbath. *Id.* Both courts focused on this 'non-issue' instead of the primary one: the historical and established practice of this family regarding the Sabbath as it pertained to Elijah. The trial court and Division III ignored case law and stripped the child and mother of their established religious practice, instead focusing on

the father's desire to change the tradition and exercise visits on the Sabbath.

The Court of Appeals, and the trial court, ignored RCW 26.09.184(3) by blatantly disregarding Elijah's religious beliefs in fashioning the parenting plan. Instead, the lower court claimed simply because both parents observe Sabbath, "this is not a religious-freedom case." I RP 293, App. A at 7. That decision ignored the historical agreement of the parties in the exercise of religious practice – therefore also stripping Elijah of his constitutional right to free exercise of religious practice established by agreement for years.

2. **The Appellate Court misread the holding of *In Re Marriage of Jensen-Branch* which involved decision-making and erred in ignoring the established best interest of the child by agreement of the parents.**

As the Court outlined in *Marriage of Jensen-Branch,* each case must be decided on its own facts, as every child is different. *In re Marriage of Jensen-Branch*, 78 Wn. App. 482, 491, 899 P.2d 803, 1995. The *Jensen-Branch* ruling involved decision

making in a parenting plan with potential for parental conflict involving religious decision-making. "Decision-making orders must be fashioned so as to protect children from harmful exposure to parental conflict while still protecting the rights to free religious exercise --with the best interests of the children the paramount concern." *Id. citing* RCW 26.09.002; RCW 26.09.184(e); *In re Marriage of Hadeen*, 27 Wn. App. 566, 579, 619 P.2d 374 (1980). The *Jensen-Branch* court held that in order to limit decision-making, findings of actual or potential harm must be made with reference to specific evidence and the specific needs of the children involved. *Id.*

This case does not involve a dispute regarding religious decision-making, as both parents acknowledged a shared faith as Seventh-day Adventists. The fundamental disputed issue has to do with David exercising residential time on the Sabbath, in direct contradiction to the family's established practice.

By way of illustration, the reviewing court can assume *arguendo* that the 'Sabbath' was just another day of the week

(Saturday). For five (5) years of the child's life, both parents remained separated with the mother having primary placement of the child. Both parents established a routine for the child, codified in a final parenting plan, that <u>the child's best interest was served by him spending every 'Saturday' with his mother</u>. The remaining 6 days of the week are 'free reign' for visitation between the child and his father, but the family always maintained Saturdays would be 'reserved' for the mother and son. After 5 years and minimal contact between the child and father, and after the mother's relocation with the minor child, suddenly an order is entered disrupting the 'Saturday' tradition without the father even requesting said disruption.

These are the facts of this case. From a purely secular and non-religious standpoint, the mother's Saturday visit with the child was part of his upbringing <u>by agreement of the parents</u>. For reasons unknown and unexplained, the underlying court(s) gave <u>greater</u> scrutiny to Jennifer's 'Saturday' visit with Elijah because it was **also** part of her sincerely-held religious beliefs. The trial

court's Decision, and affirming Decision of the appellate court, perceived a conflict between religious and secular practices which did not exist. The established routine of the child spending Sabbath with the mother was a joint decision for the child's best interest, which was uncontroverted in the record. The religious beliefs and practices of both parents shaped the child's upbringing and residential time with both parents. The underlying courts focused on the perceived "establishment clause question" in granting the child shared access to both parents on the Sabbath instead of focusing on the child's routine by agreement of both parents. In doing so, the lower court adopted a residential schedule which marginalizes and tramples upon a *child's* religious freedom in favor of residential time from a secular standpoint without questioning the facts of the child's upbringing. This grievous error not only raises issues of constitutional proportions, but it also envelopes substantial public interest for religious families in custody disputes.

3. The Lower Court(s) failed to apply the statutory

framework of RCW 26.09 et seq. in adopting a final parenting plan.

In fashioning a parenting plan and determining a child's residential placement, Wash Rev Code § 26.09.184(1)(f) encourages agreements of the parents over litigation. Further, Washington law promotes, above all, the continuity of bonds between parent and child. RCW 26.09.002. Accordingly, among the factors a trial court *must* consider in determining a child's residential placement is the agreements of the parties, with the most weight should be given to the "relative strength, nature, and stability of the child's relationship with each parent." *See Id.;* RCW 26.09.187(3)(a)(i). Further, Wash Rev Code § 26.09.184(3) authorizes consideration of the child's religious beliefs when establishing a permanent parenting plan.

The trial court and Division III overlooked the parties' joint Decision for the child to be raised in the Seventh-day Adventist denomination with assurances of observance of religious practices falling on the mother. The trial court

overlooked David’s fractured contacts and long absences from the child’s life (before and after Jennifer’s relocation). The record does not support a finding it is in the best interest of a child to significantly increase residential time simply because the other parent relocates. Moreover, the primary parent’s relocation is irrelevant when the noncustodial parent 1) already travels for visits; and 2) has chosen to maintain limited visits with the child for over five years, from just weeks after the child’s birth.

Here, Division III endorsed expanded residential time for the father over the history of the fractured father-son relationship, the best interest of the child, and the child’s historical observance of Sabbath with his mother. The trial court ignored the strength of the child's relationship with his mother, cemented through her long-time role as primary caregiver and religious role model, because the father would like to spend Sabbath with the child.

By affirming the trial court’s Decision, Division III not only approved a blasé fair approach to a constitutionally protected religious exercise, but also undermined the duty of

the court to protect the child's best interests. The trial court's departure from established Washington law harms this family and threatens the security and stability of other families with historic religious observations which do not conflict with establishing a residential schedule. Division III ignored statutory elements despite Jennifer's pervasive focus on David's history of a sporadic visitation with Elijah. The child's historical Sabbath observation was wiped away because "There is no indication that allowing Dr. Saunders parenting time on the Sabbath is not in the best interest of E.S.". App. A at 8. Not only did the trial court fundamentally alter Elijah's constitutionally protected right to be free in his religious beliefs, but the court also signaled to all families similarly situated that their established religious practices will be ignored in a custody dispute.

The trial court needlessly restricted the family's religious freedom in disrupting the child's established best-interest of observing the Sabbath with his mother. These restrictions were affirmed by Division III based on "both parents'" observance

practices related to the Sabbath, App. A at 5. David's residential time and Sabbath observance need not be in conflict to ensure the child's religious freedom and historical relationships remain intact. Both parents proposed residential schedules allowing for day-time visitation only, with the only substantial difference being whether visits would occur on the Sabbath.

David returned to Africa on July 12, 2016 when his child was 2 months old. David next saw Elijah in February 2017. David again departed for Africa in April 2017. David next saw Elijah September 2017. David departed for Africa, returning to see Elijah April 2018. David departed for Africa, returning to see Elijah September 2018. David departed for Africa, returning to see Elijah May 2019, at which time David remained in the states indefinitely. However, even with living miles from Elijah and then living in Auburn while Elijah lived in Spokane County, David only saw Elijah in May, June, August, September, October, November, and December of 2019 for a total of 13 visits. In 2020, due to COVID, David saw Elijah in Janurary and

February, then not again until November. Even in the months David had in-person visits with Elijah, he agreed upon a schedule where he received every other Sunday visits of 4 to 6 hours. In 2021, David continued every other Sunday visits, increasing the time to 8 hours per visit. In July 2021, when Jennifer announced her intent to relocate, David was asking the court for visits every other Sunday only.

The trial court justified its residential time decision by explaining the child would experience no harm whether he observed the Sabbath with his mother or with his father. The court's justifications here were substantiated only by the unsupported assumptions all observance of the Sabbath is the same while ignoring the strength and stability afforded the child by the parties' historical joint decision for the mother the ensure he observed the Sabbath. "The trial court's findings of fact will be accepted as verities by the reviewing court so long as they are supported by substantial evidence." *In re Marriage of Katar*e, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). "Substantial evidence is

that which is sufficient to persuade a fair-minded person of the truth of the matter asserted." *Id.* The lower court and Division III Decisions ignore substantial evidence and depart from the elements of RCW 26.09.184.

4. **The lower court(s) abused their discretion in finding the mother in contempt without analyzing whether her disobedience was in bad faith.**

Wash Rev Code § 26.09.160(2)(a) provides a party the ability to file a motion to coerce compliance with a residential schedule. A contempt of court finding will be made if by a preponderance of the evidence the non-moving party cannot provide a reasonable excuse for his/her noncompliance lacked bad faith. RCW 26.09.160(4). If found in contempt of violating a residential provision, the court may provide the moving party with make-up time. RCW 26.09.160(3)(a).

Here, the Contempt Hearing Order entered March 11, 2022, granted David time from March 17, 2022, at 7:00 p.m. until March 21, 2022, at 12 noon, which was more than his scheduled visit of March 18, 19, and 20, 2022, 9:00 a.m. to 5:00 p.m. This

make-up time exceeded two times the amount of time missed. Moreover, a preponderance of the evidence supports Jennifer's defense of acting out of necessity for the child's best interest and consistent with her sincerely held religious beliefs.

The Court of Appeals upheld the Decision of the lower court regarding a parenting plan and contempt findings that were not just or supported by substantial evidence, ignoring serious flaws in the trial court's analysis. Such findings improperly elevate a finding of contempt over the evidence of the common-held belief of the court, the father, and the mother – the child was not ready for overnights with the father. A contempt finding dismissive of preponderance of evidence the originating order violated the best interest of child policy is a matter of substantial public interest.

The prior reviewing judge did not believe Elijah ready for overnights with David. II RP 29. David did not believe Elijah ready was ready for overnights at temporary orders or at trial. CP 375, I RP 294. The trial court did not believe Elijah prepared for

overnights with David. I RP 294. Even in contempt proceedings involving noncompliance with residential time, the importance of Elijah's best interests must not be lost. Jennifer's parenting decision to withhold Elijah from not just one overnight but 4 consecutive overnights with no break was not a decision made in bad faith – it was a decision made in congruence with the trial court's own findings regarding the child's best interest.

The concurring Division III opinion authored by Judge Fearing correctly pointed out "a party's First Amendment rights may preclude contempt sanctions for violation of a court order under some circumstances." App. A at 14, *citing State v. Everly*, 150 W. Va 423, 146 S.E.2d 705 (1966). It is undisputed Jennifer did not make Elijah available for March 2022 overnight, make-up residential time. The preponderance of evidence, however, supports Jennifer's reasonable excuse of considering Elijah's best interest above all else, in addition to her free exercise of religion. The trial court ignored the years-long history established by the family in how they observed the Sabbath.

Thus, the contempt finding was (and is) an abuse of discretion. Furthermore, the upheld contempt finding violates the substantial public interest of Washington state policy supporting the best interest of a child.

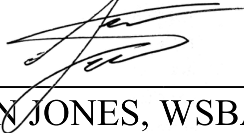
F. CONCLUSION

For the reasons delineated above, Jennifer McCluskey respectfully requests this Court take review and reverse the Decision of the Court of Appeals on these issues.

Certificate of Compliance: This document contains 4945 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 6th day of November, 2023.

THE LAW OFFICE OF AARON L. JONES, PLLC



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AARON JONES, WSBA No. 52250
Attorney for Jennifer McCluskey, as Appellant

APPENDIX

Appendix A: Court of Appeals Decision 1 - 18

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CERTIFICATE OF SERVICE

I, Cherrish H. Fultz, under penalty of perjury under the laws of the State of Washington, declare that on November 6, 2023, I delivered by eService through the Court of Appeals portal, a copy of the Petition for Review to the individual listed in this Affidavit at the below address(es).

Gregory Decker
Attorney for Respondent/Appellee
greg@gregdeckerlaw.com

Dated this 6th day of November, 2023.

____
CHERRISH H. FULTZ,
Paralegal to Aaron L. Jones

THE LAW OFFICE OF AARON L. JONES

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Transmittal Information

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

In the Matter of the Marriage of JENNIFER M. MCCLUSKEY, Appellant, and DAVID A. SAUNDERS, Respondent.	)))))))))))	No. 39091-8-III UNPUBLISHED OPINION

STAAB, J. — Jennifer McCluskey, a Seventh-day Adventist, appeals the trial court's parenting plan that allows her ex-husband, Dr. David Saunders, residential time with their child on the Sabbath. She also contends that the court erred by finding her in contempt for withholding the child from Dr. Saunders on the Sabbath. On appeal, Ms. McCluskey argues that the residential schedule is not in the best interest of their child, and the finding of contempt was an abuse of discretion because she did not act in bad faith. We disagree and affirm, awarding Dr. Saunders his attorney fees on appeal for defending the contempt finding.

FACTS

Ms. McCluskey and Dr. Saunders married in 2015 and have one child together, E.S., born in 2016. The two separated in 2017 and divorced in 2019. Both Ms. McCluskey and Dr. Saunders are devout Seventh-day Adventists and observe the Sabbath, which begins Friday at sundown and concludes Saturday at sundown.

Following the parties' separation, a final parenting plan was entered by agreement identifying Ms. McCluskey as the primary parent. Ms. McCluskey and Dr. Saunders entered an order by agreement for Dr. Saunders's visitation with E.S.

In 2021, Ms. McCluskey received a job offer in Oklahoma and filed a motion for relocation, to which Dr. Saunders objected. The court permitted the move by temporary order and provided Dr. Saunders with parenting time one weekend per month for eight hours each on Friday, Saturday, and Sunday as well as Skype communication.

In March 2022, Ms. McCluskey refused to turn E.S. over to Dr. Saunders for a makeup visit lasting from Thursday until Monday because it fell on the Sabbath. The court found that Ms. McCluskey acted in bad faith when she refused to turn E.S. over, and granted Dr. Saunders's motion for contempt. This was the fifth finding of contempt against Ms. McCluskey for withholding E.S. from Dr. Saunders.

At trial, Ms. McCluskey objected to Dr. Saunders's proposed residential schedule that provided Dr. Saunders with parenting time on the Sabbath. Both parties testified at trial that they observe the Sabbath consistent with the requirements of the Seventh-day

Adventist faith. The parties described the same obligation to abstain from performing any secular activities on the Sabbath. Ms. McCluskey testified that E.S. was prone to outbursts upon being returned to her after Dr. Saunders's parenting time.

Following trial, the court filed its written findings of fact and conclusions of law. The court adopted Dr. Saunders's proposed parenting plan that gives him parenting time with E.S. and that sometimes falls on the Sabbath.

Ms. McCluskey timely appeals.

ANALYSIS

1. RESIDENTIAL SCHEDULE ON THE SABBATH

As a threshold issue, Dr. Saunders argues that Ms. McCluskey failed to assign error to any findings of fact or conclusions of law in violation of RAP 10.3(g). While Dr. Saunders is correct, we nonetheless exercise our discretion as provided in RAP 1.2(a), and address the substantive issues because Ms. McCluskey's arguments are clear from the briefing.

Ms. McCluskey contends that the court abused its discretion when it gave Dr. Saunders parenting time during the Sabbath. Ms. McCluskey argues that Dr. Saunders, though also a Seventh-day Adventist, practices the Sabbath differently than her. She therefore contends that giving Dr. Saunders parenting time on the Sabbath is not in the best interests of E.S. We disagree.

A trial court has broad discretion in crafting a permanent parenting plan. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A trial court's rulings dealing with the provisions of a parenting plan are reviewed for an abuse of discretion. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *Id*. at 46-47.

A court's decision is considered 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." *Id*. at 47.

We review specific findings of fact for substantial evidence, "'defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.'" *DeVogel v. Padilla*, 22 Wn. App. 2d 39, 48, 509 P.3d 832 (2022) (quoting *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)).

"In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities." RCW 26.09.002. "[U]nder the Parenting Act, the best interests of the child continues to be the standard by which the trial court determines and

allocates parenting responsibilities." *In re Marriage of Possinger*, 105 Wn. App. 326, 335, 19 P.3d 1109 (2001).

Ms. McCluskey assigns error to finding of fact 18, which states in relevant part: "The testimony showed that both parties honored and celebrated the Sabbath day consistent with their Seventh[-d]ay Adventist faith. There is no indication of harm to the child dependent upon which parent he is with on the Sabbath." Clerk's Papers (CP) at 515. This finding is supported by substantial evidence.

Ms. McCluskey repeatedly argues in her briefing that Dr. Saunders observes the Sabbath differently than her, but she does not describe this difference. At trial, Dr. Saunders testified that he observes the Sabbath consistent with the requirements of the Seventh-day Adventist faith. Rep. of Proc. (RP) at 176-179. He described the same obligation to abstain from performing any secular activities on the Sabbath as Ms. McCluskey did. RP at 174-78, 253-54; 59-61. Thus, the court's finding that both parties honored the Sabbath consistent with their Seventh-day Adventist faith is supported by substantial evidence.

Similarly, the court's findings that there is no indication of harm to the child dependent on which parent he is with is supported by substantial evidence. Ms. McCluskey points to testimony in the record demonstrating that E.S. would act out after spending time with Dr. Saunders. RP at 43, 68. However, Ms. McCluskey does not explain how E.S.'s behavior relates to visits on the Sabbath. In fact, in her reply, Ms.

McCluskey admits that E.S.'s outbursts did not occur following visits on the Sabbath. Appellant's Reply Br. at 6-7. There is no indication that visits with the father on the Sabbath will harm E.S. Thus, the court's finding of fact is supported by substantial evidence.

Ms. McCluskey also assigns error to finding of fact 19, which states in relevant part: "[Dr. Saunders] recognizes it will take time for the child to rebuild his relationship with [E.S.] due to the damage done by withholding of the child, long distance and concerns about alienation." CP at 516.

Ms. McCluskey argues that this finding is not supported by substantial evidence. Ms. McCluskey states that "[she] does not believe she has alienated Dr. Saunders from having a relationship with [E.S.] in fighting to keep [E.S.'s] sabbath routine consistent." Appellant's Reply Br. at 3. The record reflects that Ms. McCluskey withheld E.S. from Dr. Saunders on multiple occasions. RP at 87, 96, 290, 294. The court stated in its oral ruling that, "Whether intentional or not, Mom is alienating [E.S.] from his father by her conduct." RP at 294. Thus, Ms. McCluskey's contention that the court's finding is not supported by substantial evidence fails.

Throughout her briefing, Ms. McCluskey suggests that Dr. Saunders's beliefs and practices are wrong and her religious beliefs are right. She contends that because her faith is more sincere, her beliefs and practices should be afforded greater weight than Dr. Saunders's beliefs. But this is not the way our laws work. In the absence of substantial

evidence of actual or potential harm to the child from the parent's conflicting religious beliefs, each parent has equal rights to their own religious beliefs and equal rights to raise their child. *See In re Marriage of Jensen-Branch*, 78 Wn. App. 482, 490, 899 P.2d 803 (1995). The law in this area is not concerned with whose beliefs are right or more sincere.

Here, the court's findings of fact are supported by substantial evidence. There is no indication that allowing Dr. Saunders parenting time on the Sabbath is not in the best interests of E.S. The testimony at trial established that both Ms. McCluskey and Dr. Saunders are devout Seventh-day Adventists and that they observe the Sabbath. Thus, it was not an abuse of discretion to allow Dr. Saunders visitation on the Sabbath and we should not disturb the court's decision on appeal.

2. CONTEMPT OF COURT

Ms. McCluskey contends that the court abused its discretion when it held her in contempt of court for refusing to allow Dr. Saunders visitation time on the Sabbath in violation of the court's parenting plan. Again, we disagree.

"Punishment for contempt of court is within the discretion of the trial court." *In re Marriage of Myers*, 123 Wn. App. 889, 892, 99 P.3d 398 (2004). A contempt finding will be upheld on review if this court finds the order is supported by a "proper basis." *In re Marriage of Davisson*, 131 Wn. App. 220, 224, 126 P.3d 76 (2006). We do not review

the trial court's credibility determinations on appeal. *In re Marriage of Rideout,* 150 Wn.2d 337, 352, 77 P.3d 1174 (2003).

RCW 26.09.184(7) states that, "[f]ailure to comply with a provision in a parenting plan or a child support order may result in a finding of contempt of court." A parent "shall be deemed to have the present ability to comply with the order establishing residential provisions" unless, by a preponderance of the evidence, they establish "a reasonable excuse for failure to comply." RCW 26.09.160(4).

A court shall find a parent in contempt if "based on all the facts and circumstances, the court finds after [a] hearing that the parent, in bad faith, has not complied with the order establishing residential provisions for the child." RCW 26.09.160(2)(b). "An attempt by a parent . . . to refuse to perform the duties provided in the parenting plan . . . shall be deemed bad faith." RCW 26.09.160(1).

On reply, Ms. McCluskey assigns error to finding of fact 21, which states: "The Court finds the Mother willfully and in bad faith failed to allow the father's parenting time on March 17 through March 21, 2022, in violation of the Court's Order of March 11, 2022."[1] CP at 516. This finding is supported by substantial evidence.

[1] This finding is located in the court's findings and conclusions. CP at 516. The court's Order finding Ms. McCluskey in contempt was issued the same day and also found that Ms. McCluskey acted in bad faith. CP at 498.

Ms. McCluskey argues that the court's finding that she acted in bad faith was error and not supported by substantial evidence. Ms. McCluskey contends that her failure to comply with the order on visits was due to her sincerely held religious beliefs and that it was not bad faith. Her argument is unpersuasive for several reasons.

First, the court noted that the Sabbath issue appeared to be a pretext for withholding E.S. from Dr. Saunders. CP at 518. Indeed, as Ms. McCluskey's counsel pointed out, the March 2022 visit for which Ms. McCluskey was held in contempt also included three overnights with Dr. Saunders outside of the Sabbath. RP at 263; CP at 479 (Ms. McCluskey refused to turn E.S. over to Dr. Saunders for a makeup visit lasting from Thursday March 17, 2022, until Monday March 21, 2022). Ms. McCluskey testified that she did not make any effort to facilitate E.S.'s visit with Dr. Saunders in March because "it encompassed the Sabbath." RP at 99.

Even if Ms. McCluskey's reason for withholding E.S. from Dr. Saunders was based on her sincerely held religious beliefs, it still demonstrates that she knowingly and willfully defied the court's order. Bad faith does not equate to ill-intent. Ms. McCluskey does not cite any authority to support her position that her sincerely held religious beliefs provide a legal justification for withholding E.S. in violation of a court order.

Ms. McCluskey established no reasonable excuse for failing to comply with the court's order on visits nor did she explain why she withheld E.S. on the days outside of the Sabbath. RP at 99. The court's finding that Ms. McCluskey acted in bad faith when

she withheld E.S. from Dr. Saunders, in violation of the court's order on visits, was supported by substantial evidence. The court did not abuse its discretion when it held Ms. McCluskey in contempt.

3. ATTORNEY FEES ON APPEAL

We grant Dr. Saunders's request for his attorney fees on appeal, but only related to the finding of contempt against Ms. McCluskey.

RCW 26.09.160(2) states in relevant part that:

> (b) If, based on all the facts and circumstances, the court finds after hearing that the parent, in bad faith, has not complied with the order establishing residential provisions for the child, the court shall find the parent in contempt of court. Upon a finding of contempt, the court *shall* order:
>
> . . . .
>
> (ii) The parent to pay, to the moving party, all court costs and reasonable attorneys' fees incurred as a result of the noncompliance.

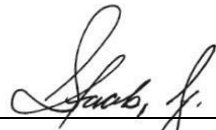
(emphasis added). Under the statute, if the court finds that the noncomplying parent acted in bad faith, an attorney fee award to the moving party is mandatory. *In re Marriage of Eklund*, 143 Wn. App. 207, 214, 177 P.3d 189 (2008).

RAP 18.1 states: "If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule."

Here, Dr. Saunders made a separate request for attorney fees in his brief. RAP 18.1(b). RCW 26.09.160 mandates an attorney fee award to the moving party when a parent acts in bad faith and is found in contempt. RCW 26.09.160 applies to attorney fees incurred on appeal. *In re Marriage of Eklund*, 143 Wn. App. at 218-19. Thus, under RAP 18.1 and RCW 26.09.160(2)(b)(ii), Dr. Saunders is entitled to his attorney fees on appeal connected to the issue of contempt.

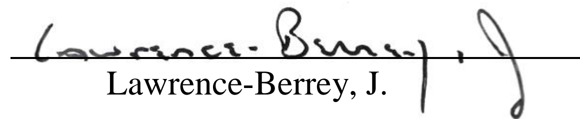
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Staab, J.

I CONCUR:



Lawrence-Berrey, J.

No. 39091-8-III

FEARING, C.J. (concurrence) — I concur with all written in the majority opinion. I write separately to emphasize two points.

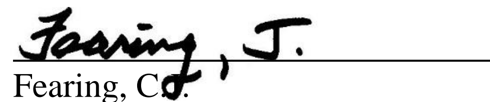
First, Jennifer McCluskey argues that David Saunders' beliefs and practices as to the seventh-day Sabbath, in light of Seventh-day Adventist doctrine, is wrong and her practices and beliefs and practices are right. David Saunders disagrees that his beliefs and practices disregard church doctrine. The United States Constitution's First Amendment precludes a court from resolving underlying controversies over religious doctrine. *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969). After having read the entire record, I agree with the majority that McCluskey did little to detail any difference between her and Saunders in Sabbath observance or in views as to how the Sabbath should be observed. Still, the dissolution court wisely avoided attempting to resolve this controversy.

Second, Jennifer McCluskey asks this court to excuse her violation of the orders for visitation because she violated the orders based on her sincere religious views. The majority correctly notes that McCluskey cites no authority to support a rule that one can avoid a contempt citation based on exercise of one's religious beliefs. I, however, do not

wish to rule out the possibility that a party's First Amendment rights may preclude contempt sanctions for violation of a court order under some circumstances. *State v. Everly*, 150 W. Va. 423, 146 S.E.2d 705 (1966). For example, a member of the press avoided contempt sanctions for violating a court order based on the free speech and press clause of the First Amendment. *State ex rel. Snohomish County Superior Court v. Sperry*, 79 Wn.2d 69, 483 P.2d 608 (1971). After a reading of the entire record, I conclude ample evidence supported the dissolution court's finding that Sabbath observance served as a pretext to deny the father visiting rights.

I commend the trial court judge for her careful handling of the visitation and contempt issues. I commend the father for his patience in insisting on full visitation rights based on his wise recognition that the child needed some time to become acquainted with him.

I CONCUR:



Fearing, C.J.

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October 5, 2023

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CASE # 390918
Jennifer Michelle McCluskey v. David Allen Saunders
SPOKANE COUNTY SUPERIOR COURT No. 173002656

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:ko
Attach.
c: **Email** Hon. Michelle Szambelan