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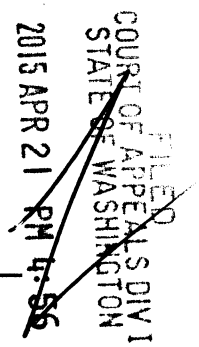
COURT OF APPEALS, DIVISION ONE OF THE STATE OF WASHINGTON



NO: 72562-9-I

SOLOMON MEKURIA

Appellant

V.

ASTER MENFESU

Respondent

MEKURIAS' AMENDED OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

A. The trial court erred in awarding private school costs in violation of public policy, in light of relevant contextual evidence and case law of which there was more than one reasonable inference and in violation of Merkuria's due process rights.

B. The trial court erred in granting "*sole decision making*" in the Final Parenting Plan to the Mother when there was no finding against the Father pursuant to RCW 26.09.191, no narrowly-drawn, compelling, State interest to interfere with Merkuria's liberty interests and Constitutionally-protected parental rights; disenfranchising him as an equal decision-maker and equal parent with the Mother.

C. The trial court erred by ordering the Father to do 100% of transportation for visitation purposes, meeting the Mother near her home instead of a mid-point.

D. The trial court erred in making *no finding* under Section 2.2 of the final parenting plan that the Mother has a disability of any kind that may hinder her regarding transportation nor lack of ability to perform daily needs for the child pursuant to RCW 26.09.004(2)(b).

E. The trial court erred in failing to find that Menfesu failed to attend to her child's medical needs pursuant to RCW 26.09.004(2)(b) and

(2)(e) and created parental conflict in failing to consult with Merkuria regarding medical decisions in violation of existing orders.

F. The trial court erred in abusing its discretion regarding the above-referenced rulings, A-E.

II. INTRODUCTION AND ISSUES RELATED TO ASSIGNMENT OF ERROR

The underlying case was initiated with a major modification [CP 21, per previous Appeal by Mekuria, the Father] for a change of custody for the Final Parenting Plan. [*CP 11, per previous Appeal by Mekuria*] was brought by Mekuria emanating from his continued concern regarding Menfesu's inability to help the child with her school and to properly care for her medically. Also, Menfesu failed to consult with Mekuria regarding medical issues in violation of the trial courts parenting order. Further, Menfesu filed for a minor modification that ended up, in actuality, making *major* changes in the orders in violation of Mekuria's parental rights.

Mekuria argued that the child was suffering educationally and that she suffered emotionally and physically as a result of Menfesu's inability to perform basic parenting functions pursuant to RCW

26.09.004(2)(b), RCW 26.09.004(2)(c) and RCW 26.09.004(2)(b) and (2)(e) *inter alia.*

Merkuria argued further that there has been substantial contextual evidence, at Menfesu's own admission, *inter alia,* that she has not performed her parental duties, that she has neglected same to the child's detriment, needed outside help to care for basic needs. Menfesu even had a witness testify that she is not able to do many of her parental duties; all the while, the Father was ready, willing, able and available to help the child in areas the mother could not.

Merkuria was denied relief in every respect; with his petition for modification CP 21, pursuant to previous Appeal No. 72562-9-1 filed by Merkuria and two reconsiderations being denied. CP 408 and CP 525. *Inter alia.*

Merkuria filed a major modification based upon Menfesu's representations of physical disability and inability to parent. Said action was dismissed upon revision; however, this ruling was appealed to the Court of Appeals; with a ruling in favor of Menfesu. This resulted in an awarded of over $31,000.00 in costs and fees against Merkuria. CP 440. Merkuria has always acted in good faith with all of his court actions.

Menfesu, then filed petition for minor modification regarding Dispute Resolution, Decision Making, Transportation Arrangements, elimination of Mid Winter Break Provision from the Parenting Plan, and Telephone Contact Between Parents.

Without Merkuria's knowledge permission, nor consent, Menfesu placed the child in a private school even though she has choices of good public schools in her neighborhood. Subsequently, Menfesu asked the court for Merkuria to share in private school tuition, which the court granted.

Other irregularities that have occurred are that the court didn't make a finding that Menfesu abused the legal process, nor did it place any restrictions upon Menfesu. Also, the court allowed a witness, Mr. Michael Kantu, which wasn't even on the witness list, CP 21, at the last minute on the first day of trial. RP 8. Based on the testimony of this new witness the trial court ordered Mekuria to volunteer a minimum of 20 hours to the school, CP 376 line 21. In fact, the court accepted the Guardian Ad Litem's report and the Guardian Ad Litem being called as a witness even though there is no court order appointing the Guardian for this trial. [*The Guardian Ad Litem was appointed for the first segment of Merkuria's major modification*] In

fact, Menfesu was given sole decision making capability even though the record shows that she has credibility issues and an inability to perform basic parental functions without outside help.

The "minor" modification was thinly *cloaked* and resulted in *major changes* such as the Mother being given sole-decision making capability. This is "not" a minor change! Subsequent reconsiderations were filed; all dismissed against Merkuria and in favor of Menfesu. Hence, the necessity of this appeal.

III. STATEMENT OF CASE

A. trial was heard on Menfesu's Petition for a minor Modification of the Parenting Plan. The Honorable Judge Suzanne Parisien presided and entered final orders on July 11, 2014, a Final Parenting Plan CP 369, an Order on Modification CP 379, an Order of Child Support CP 383 and a Legal Memorandum of Findings. CP 404.

Merkuria now asks this court to correct the trial courts errors and remand for further consideration by the trial court.

IV. ARGUMENT

A. Regarding private school tuition, Merkuria's position is

that private school tuition cannot be ordered by a court without certain *requisite factors,* including a pattern of private school being used for a substantial period of time and that a change from that pattern would be detrimental to the child. In fact, at the time of this trial the child was attending only kindergarten.

Income and ability to pay are "*not*" factors for a court to render such orders; however, Judge Parisien ordered Merkuria to pay a portion of private school tuition if Menfesu could no longer obtain an adequate discount. "*Based on the expressed desire of both parties*" CP 523 line 21 was "stated" as the reason by the court yet, no findings were made regarding the above-referenced *requisite factors.* Minimal testimony was given regarding the necessity of same and no pleadings were filed in the record for private school yet, the court insinuated that Menfesu has a physical disability that interferes with her performance of parenting functions CP 524 and RCW 26.09.004. This is reversible error! The court *must* make a finding! Public policy factors regarding an order for private school expenses were not followed, not testified to nor were they even considered. The court, *sua sponte*, simply ordered it!

"*Where acceptable public schools are available, and there is*

no showing of special circumstances justifying the need for private school education, the noncustodial parent should not be obligated to pay for the private education of his or her minor children." Re Marriage of Stern, 57 Wn. App. 707, 720, 789 P.2d 807 (1990).

In the instant case, there was no evidence presented to the court for the court to even consider.

Menfesu's counsel attempted to convince Merkuria that he had previous knowledge of the child's school by asking him different types of questions about this school CP 156, 157, 158, 159; however, Merkuria testified that his involvement with the school is controlled by Menfesu and the school did not do any type of communication with him. RP 94 line 15, RP 95 line 6, RP 96 line 7.

At trial, Merkuria testified about sending the child to another private school. One of the reasons for this testimony was that he had a lower discount than what the mother pays, RP 226 line 22 , which was based upon his income at the time of the trial CP 546, CP 630. However, now Merkuria cannot afford to send the child to *any* private school because of his changed circumstance and inability to pay. The increased child support up from $300.00 to $786.83, CP 388 line 4 and

the judgment by the Court Of Appeal to pay attorney fees to the NW Justice Project to the amount of $31,165.06, CP 440. All have impoverished Merkuria.

In considering whether to order payment of private school tuition, the trial court should consider all relevant factors, including "family tradition, religion, and past attendance at a private school." In Re Marriage of Vander Veen, 62 Wn. App. 861, 866, 815 P.2d 843 (1991). In Vander Veen, there was no attempt to make statements or provide one single *shred* of proof on the record as to what factors applied to warrant a request for private school tuition and there was no award of private school tuition. Two (2) of the three (3) factors do not exist at all. Neither parent had a tradition of going to private school. The child has no siblings that went to private school and there was "no" tradition.

Further, Rule CR 52 Findings and Conclusions state that findings and conclusions *in an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court.*

Judgment must be entered under Rule 58.

In the matter at hand, no substantial evidence appears in the record to justify a request for private school fees, no argument regarding an acceptable public school alternative, no argument regarding exceptional educational needs and no evidence regarding Merkuria's ability to pay for same other than the amount of his salary. The trial court never explained its decision orally and entered no findings on the matter; thus, the evidence in the record is inadequate to persuade an *ordinary, reasonable person,* of the need for private schooling. Thus, an adequate basis for a finding of special circumstances justifying an obligation to pay such expenses has not been presented.

As the parent requesting assistance with private tuition costs, the burden plainly lays upon Menfesu to make a showing justifying the imposition of such an obligation on Merkuria but Menfesu did not do. See Marriage of Vander Veen. Thus, the trial court's ruling regarding private school must be reversed.

B. Regarding sole decision-making, Merkuria was deprived of his Constitutionally protected fundamental parenting rights without just cause; especially since Merkuria had said rights prior to them

being changed. Merkuria has a Constitutional right to the care and custody of his child just as Menfesu does. The court presumes that a fit parent acts in a child's best interests. Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Merkuria has legal right, barring a finding of being unfit, to participate in decision-making for his child. This is Merkuria's *right* not a *privilege* granted or taken away by a court!

Also, the rights of parents to the care, custody and nurture of their children is of such character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and such right is a fundamental right protected by the 1st, 5th, 9th, and 14th Amendments. Doe v. Irwin, 441 F Supp 1247; U.S. D.C. of Michigan, (1985).

Further, in the 1920's [*and nothing has changed in this regard*] the Court asserted that the right of parents to raise and educate their children was a "fundamental" type of "liberty" protected by the Due Process Clause. Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

In fact, in Griswold v. Connecticut, 381 U.S. 479, 502 (1965), Justice White in his concurring opinion offered "this Court has had

occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right "to marry, establish a home and bring up children," and "the liberty . . . to *direct the upbringing and education of children*," and that these are among "the basic civil rights of man." Justice White then added; These decisions affirm that there is a "realm of family life *which the state cannot enter*" without substantial justification. Prince v. Massachusetts, 321 U.S. 158, 166. There has been "no" substantial justification and no *unfitness* in the matter at hand to order sole decision-making to Menfesu and to deny Merkuria such right!

Any preliminary determination of unfitness of a parent must be based upon a well-founded allegation and any interference with a parent's fundamental right must be based upon a compelling State interest that must be narrowly drawn. A court *may* place restrictions upon a party's decision-making *if it is found* that the parent engaged in conduct that is outlined in section RCW 26.09.191. In the Custody of Nunn, 103 Wn. App., 883, 14 P.3d 175. The court made no such findings in the matter at hand and, thus, cannot deprive Merkuria of his parental decision-making rights. Family court is not different than a criminal court in that a court cannot find a defendant *not guilty* of

assault, yet throw the defendant in jail anyway and deprive defendant of his liberty interests *without* proper findings. This is reversible error.

Also, In Meyer v. Nebraska, 262 U. S. 390, 399, 401 (1923) it was determined that the rights of parents to "*bring up children*" and "*to control the education of their own*" is protected by the Constitution. See also Washington v. Glucksberg, 521 U. S. 702, 720 (1997) at 761.

As United States case law has developed, it became more and more clear that *parents have a Constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate their child*. This parental right stems from liberties protected by the Due Process Clause of the Fourteenth Amendment. Pierce v. Society of Sisters, 268 U. S. 510, 534-535 (1925); Prince v. Massachusetts, 321 U. S. 158, 166 (1944); Stanley v. Illinois, 405 U. S. 645, 651-652 (1972); Wisconsin v. Yoder, 406 U. S. 205, 232-233 (1972) and Santosky v. Kramer, 455 U. S. 745, 753-754 (1982).

Merkuria has the *right* to participate in parenting decisions. As otherwise outlined herein, this is not some *privilege* that the trial court can grant or deny without just cause; thus, the trial courts error in this regard must be reversed!

C. Regarding transportation, Menfesu is capable of providing transportation; however, the court ordered Merkuria to do *all* transportation and/or meet Menfesu close to her residence. Transporting a child is a basic parenting function and there was no RCW 26.09.191 finding that Menfesu has any parenting inabilities or disabilities that hinder her performance of parenting functions. This responsibility should be shared or allocated more equally. The trial court made no finding,

If the court empathizes with Menfesu's *alleged blindness excuse* and yet makes "no" finding in this regard, nonetheless, the court is not left at large to decide cases in light of its personal and private notions. It cannot be said that a Judge's responsibility to determine whether a right is basic and fundamental in this sense vests him with unrestricted personal discretion. Griswold v. Connecticut, 381 U.S. 479, 502 (1965) at 493 w/FN7. The trial court exhibited prejudice [*preconceived idea*] regarding transportation and, therefore, its decision must be reversed.

D. In the 2010 trial there was never a finding about Menfesu's sight impairment RP 426 lines 10-16, RP 427 line 23, RP 453 line 22, and RP 452 line 17; yet Menfesu testified under oath, on

numerous occasions, that she has sight impairment and needs relief. The Mother's Counsel also testified in this regard, RP 428 line 16-17.

In her affidavit to request Accommodations Under the American With Disabilities Act, Menfesu states "*I am legally blind I currently receive SSDI due to my blindness. I have Multi Focus Coloritis of Retina. This is a degenerative disease which has resulted in no sight in one eye and only limited sight in the other eye. I can see some light and shadows, but I can not read ordinary printed documents, even with a magnifying glass or enlarged print*" CP 19.

Declaration of Menfesu's Counsel states "*This is a degenerative disease which are resulted in no sight in one eye, and only limited sight in the other. She can see some light and shadows, but she can not read ordinary printed documents, even with magnifying glass or enlarged print.*" CP 15 line 20.

Menfesu also testified she had no problem watching the child while the child is playing with other kids in the park RP 391 lines 14-22 and RP 392 line 2-4 and her Counsel knew her client was able to read RP 410 line 2-5, as well as, Menfesu stated that she is blind in one eye and sees light and shadow through the other eye; but, when the court asked her about sorting colors during laundry Menfesu

testified she had no problems distinguishing colors RP 642 line 9-20.

According to Menfesu, she was blind for about 8 years and yet she doesn't know how to read brail RP 474 line 24. She also stated "*...Because we don't have such things as checkups back home, I always thought I had vision*." RP 420 line 4. But it is a requirement by the U.S. Embassy to take a complete physical examination before one is granted visa to immigrate to the United States; thus, Menfesu would likely been told if she had vision issue.

Further, when asked by the court if she had any assistance from a group who assist blind people in parenting, RP 439 line 1-15 Menfesu's response was "not any" and conflicting RP 439, 440, 441, 442. Menfesu never attended parenting training prepared for visually impaired people. Instead, she took parenting class like other sighted people did from a training center for sighted people RP 439 line 6 and CP 340 line 7 and 8. Menfesu's attorney testified that her client is completely blind in one eye, RP 428 line 16-17; but, when asked by the court in trial Menfesu testified both eyes are blurry
RP 434 line 14, RP 435 line 3.

RCW 9A.76.175, which provides, in its appropriate sections that it is a misdemeanor to knowingly make a false or misleading

material statements to a public servant. The court should have ordered some remedial actions to the best interest of the child.

Regarding RCW 26.09.004(2)(c) findings, the court should have found, given the evidence presented by Merkuria, that Menfesu failed and/or neglected necessary parenting functions. It is an uncontested fact that Menfesu has someone else helping the child with her homework and, in fact, Menfesu refuses to help with her homework, transportation and neglected proper medical necessities pursuant to RCW 26.09.004(2)(c). Because of Menfesu's inability to perform *basic* parenting functions the child must be cared by different people to support her basic needs which should be provided by her own parents.

The court should have been compelled to document in Section 2.1 of the Final Parenting Plan that Menfesu either refused or substantially neglected to perform basic parenting functions" RCW 26.09.191(2)(a)(i). This includes parenting functions such as help with education, help with transportation and medical issues. The court should be aware that Menfesu unilaterally obtained an immunization at a doctor that was not the child's regular, primary doctor, CP 554. She also did so at the wrong time.

The Parenting plan should have been set up dependent upon Menfesu's abilities and/or inabilities to meet the child's needs; particularly in areas in which the Mother cannot help the child. Menfesu testified that parenting of the child has been done by other people, RP 385 line 12-15, and the child's educational assistance is done by other people while the father is fit and around to help. [See testimony of Menfesu RP 344 line 15-17, Menfesu 's wittiness Ms. chin RP 184 line 23-25 and RP 185 line 1-15. RP 192 line 25, RP 193 line 1-5. Merkuria is available to help the child in these crucial areas where Menfesu cannot.

Merkuria testified that Menfesu's inability to *fully* parent the child on her own and the potential consequences of involving many people in the child's parenting RP 498 line 15-25.

In deposition, Menfesu could not spell "Cry House" CP 289 line 18-19 and "Alexis" CP 300 line 22; but, when asked how she helps the child with her reading, CP 288 line 23, Menfesu replied "the child would spell the word for her and she would read it, CP 289 line 4. Not only is Menfesu's inability to help the child hurting the child, Merkuria is being barred from involvement in his child's life against his Constitutional right to raise and get involved in his child's life. U.S.

Supreme Court Quillon v. Walcott, 434 U.S. 246 (1978) 434 U.S. 246.

It *should stand to reason* that the court should have been more concerned about Menfesu's negligence or willful refusal to help the child with homework, transportation and rendering proper medical care. The court abused its discretion in this regard.

The court must not treat parties disparately under the law. Merkuria requests that this court *instruct* the trial court to make a proper finding in the best interests of the child.

E. The trial court erred in failing to find that Menfesu failed to attend to the child's medical needs pursuant to RCW 26.09.004(2)(b) and (2)(e) and created parental conflict in failing to consult with the Father regarding medical decisions in violation of existing orders. The previous orders prior to the trial courts decision required Menfesu to include Merkuria in decision-making for the parties' daughter; Menfesu did not do! This fact was well proven to the court, yet the court failed to make findings in this regard,

The child had invalid vaccinations while under Menfesu's care, CP 554. The child's primary medical provider changed from her historical medical provider, CP 406, to another. This also showed poor decision-making authority by Menfesu regarding medical

decision-making because the child was taken to different medical providers in Renton such as Renton Community Center RP 375 line 14, Valley Medical Center RP 376 line 2-4 and also as far North as Bellingham where the child had been administered invalid vaccinations.

F. The court further abused its discretion in violation of RCW 26.09.191(3)(g) which permits, in part, parenting plan restrictions only when they are reasonably calculated to prevent relatively severe physical, mental, or emotional harm to the child. The trial court excluded the father for no good reason.

Discretion is the power or right to make official decisions using *reason* and judgment to choose from among acceptable alternatives. An abuse of discretion occurs when a decision is not an acceptable alternative. The decision may be unacceptable because it is logically unsound, because it is arbitrary and clearly not supported by the facts at hand, or because it is explicitly prohibited by statute. In the matter at hand, the courts decisions were purely arbitrary and not based upon the evidence presented by Merkuria. Merkuria asks this court to reverse the trial courts decisions pursuant to *abuse of discretion* on all of the above-referenced issues.

V. CONCLUSION

For the reasons set forth above, this court should reverse the trial court's orders and remand for further consideration by the trial court in an effort to effectuate a fair and equitable decision in the best interests of the parties' minor daughter. In this regard, Appellate courts may review, disturb, reverse and/or remand a trial courts findings if there is ***no substantial evidence*** in the record to support the trial court findings. In re Marriage of Lutz, 74 Wn. Wpp. 356, 370, 873 P.2d 566 (1994).

Dated April 21, 2015

Solomon M. Mekuria, *Appellant, Pro Se*