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**SUPREME COURT
OF THE STATE OF WASHINGTON**

IN RE THE MATTER OF THE MARRIAGE OF

**MICHELLE MINDERMAN
Petitioner/Appellant**

V.

**SEAN MINDERMAN
Respondent**

Court of Appeals No. 34829-6-III

SEAN MINDERMAN'S MEMORANDUM IN OPPOSITION TO PETITION FOR REVIEW

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II. ARGUMENT

1. Lack of Basis For Review

There are four factors under RAP 13.4(b) that the Washington Supreme Court should consider when determining whether a Petition for Review of the Supreme Court should be accepted or denied. These factors are: "1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or 2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or 3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or 4) If the petition involves an issue of substantial interest that should be determined by the Supreme Court. RAP 13.4(b). As there is no substantial constitutional argument present here nor any conflict between the Courts, Ms. Minderman has the burden of establishing that a review of Division III's unpublished opinion would be of significant interest. *See* In re Coats, 173 Wn.2d 123, 132 (2011).

While Ms. Minderman uses her Petition for Review to reiterate the arguments she made on appeal, she fails to address why this matter is proper for this Court's review under RAP 13.4(b). Although Ms. Minderman lists a set of 5 bullet points on pages 1 and 2 which outline her issues, she does not reference RAP 13.4 in her Petition for Review. There is no discussion or application of RAP 13.4 which is not surprising given the guidance provided by the statutes and numerous published cases setting forth the criteria for child custody and parenting plan determinations.

2. Claimed Errors as to Findings

Instead, Ms. Minderman uses her Petition to reiterate her disagreement with the findings made by the trial court and accepted by the Court of Appeals in their review. As with her initial appeal, Ms. Minderman faults numerous findings made by the trial court and sprinkles in allegations of leading questions proffered to an expert witness, Ms. Rita Zorrozua. However, Ms. Minderman's Petition for Review should be denied for exactly the same reasons as her original appeal. She entirely failed to comply with RAP 10.3 which requires a "separate assignment of error for each finding of fact a party contends was improperly made. . ." RAP 10.3(g)

At page 10 of the Court of Appeals' opinion, the Court states: "We decline to address this assignment of error because Michelle Minderman fails to assign error to discrete findings." Although Ms. Minderman spends a significant time in her Petition for Review discussing what the Court of Appeals could mean by "discrete findings," it is clear that the Court of Appeals meant that Ms. Minderman failed to state, with any specificity, exactly which findings she was attempting to appeal or why said findings were made in error.

The flaw in Ms. Minderman's current presentation is that an appellate court reviews a trial court's findings of fact to determine whether they are supported by substantial evidence. In re Marriage of McDole, 122 Wn.2d 604, 610 (1993). A trial court's custody disposition will not be disturbed on appeal absent a manifest abuse of discretion. Schuster v. Schuster, 90 Wn.2d 626, 632 (1978). A trial court only abuses its discretion when its decision is manifestly

unreasonable or based on untenable grounds. In re Marriage of Kovacs, 121 Wn.2d 795, 801 (1993).

As with the appeal, Ms. Minderman fails to address in her Petition the fact that the trial court had very substantial information on which to base its determination. The children's guardian ad litem, Mary Ronnestad, was called as a witness by appellant's trial attorney Jane Brown on direct examination. RP 10. Ms. Ronnestad performed a complete investigation. RP 13, line 6. She testified that the parties' daughter initially wanted more time with the father beyond the 8/6 shared schedule. RP 29, line 24. Kailey expressed concerns about the lack of attention from her mother. RP 30, line 2. See also RP 30 lines 22-25.

However, the child's behavior changed after the guardian ad litem released her first report to both parties. See testimony beginning at RP 31, line 7. A pattern of allegations then began by the mother to include allegations that the father exposed the child to a dildo, that the child was suicidal, that the child's counselor Dr. Christian was suddenly no longer fit, that the child needed a neuroeducation study, and finally that the mother then began making reports to CPS about the father alleging abuse. See RP 31 line 20 through RP 33, line 7. Each of these issues was explored in substantially more detail from RP 36 through RP 63. See also RP 120, line 8-25. The trial court was entitled to consider and rely on this testimony.

Furthermore, the guardian ad litem testified that the child's psychologist Dr. Christian did not see any of the behaviors reported by the mother. RP 79, line 4. See also RP 117 lines 9-21 where the GAL testified that neither of the child's

counselors raised any of the complaints being raised by the mother.

The GAL further testified that the parenting proposal made by the mother was inconsistent with her recommendations. See RP 118 through 122. The guardian ad litem's testimony spans from RP 10 to RP 124. No objections were raised by Ms. Minderman. The trial court was entitled to consider and rely on this information presented. It could be very fairly said that the testimony of the guardian ad litem, alone, would support all of the findings of the trial court.

In addition, Sean Minderman provided testimony as to his involvement with the children, which included the calls made by Ms. Minderman to CPS, calls made by her to the sheriff and other false allegations raised by Ms. Minderman to include those of suicidal ideation by the daughter and that the children did not want to visit with him. See RP 134 through RP161 and RP 188 through RP 247 line 11. No objections were raised until RP 225 where a single hearsay objection was sustained by the Court. This was very extensive testimony that the trial was entitled to consider. Again, this testimony in and of itself would support all of the trial court's findings and conclusions.

Ms. Minderman was then called as a witness by Mr. Minderman. See testimony beginning at RP 365. Literally every issue raised in this case was discussed with Ms. Minderman. Ms. Minderman's testimony proceeded to RP 459 line 17. Every single finding and conclusion made by the trial court finds support in the testimony of Ms. Minderman, to include all of the findings about alienating conduct and other inappropriate parental conduct by Ms. Minderman. Importantly, not a single objection was raised by Ms. Minderman during this

testimony. The trial court was entitled to consider and rely upon this testimony.

In addition to these three witnesses, there was substantial other lay testimony provided by witnesses called by both parties to include neighbors, friends and family. See the testimony of the parties' neighbor Robert Sola beginning at RP 610 through RP 630. The paternal grandmother Donna Jean Minderman provided lay testimony from RP 637 through RP 663. There were other witnesses as well. Again, no objections were raised.

Ms. Minderman claims at page four of her Petition for Review that the trial court erred by entering findings that included a significant number of prejudicial dicta comments, hearsay statements, and opinions that were not factual in nature. The issue is identical to that faced by the Court of Appeals. Ms. Minderman does not describe with required specificity which findings she finds inappropriate or provide an appropriate citation to the record supporting such claimed errors. Instead, she now simply assigns error to over two-thirds of the first 30 Findings of Fact in this case.

Again, there was more than ample evidence to support the trial court's findings. "The question is whether the findings which were made are supported by evidence and support the conclusion of law and order of the court." Daubert v. Johnson, 124 Wn.App. 483, 491 (2004). Accordingly, there was no abuse of discretion.

3. Claims of Leading Questions

Ms. Minderman argued on appeal, and now in her Petition, that there were some leading questions that occurred during trial. She provides few citations to

alleged leading questions. Even if a few leading questions occurred *arguendo*, given the number of witnesses called and the substantial evidence available to the trial court, a few leading questions would be meaningless to the Court's determination. Even if the alleged leading questions were removed from consideration, there is an overwhelming amount of evidence available to the trial court that would substantially support her findings and determinations.

In State v Swanson, 73 Wn.2d 698, 699 (1968), the prosecutor asked an "obviously" leading question that resulted in the identification of the defendant. Despite the high burdens involved in criminal prosecution, the court ruled that this leading question did not justify a mistrial because other witnesses appropriately identified the defendant. Id. at 699. "In consequence of those unshaken and undenied identifications, defendant is unable to effectively assert that the prosecutor's leading question prejudicially affected the result of the trial." Id. Here, the Appellant completely fails to provide a link or nexus between any particular alleged leading question and the court's ultimate determinations.

Only in the most extreme cases does the existence of a leading question warrant a new trial or reversal. In State v. Torres, 16 Wn.App. 254, 258 (1976), the prosecutor intentionally and consistently continued to ask leading question to the point that the court was required to find the prosecutor contemptuous. The defendants were referred to by racial references. The prosecutor also repeatedly raised the issue during trial and in closing that the defendants refused to testify. The court held that "while the asking of leading questions is not prejudicial error in most instances, the persistent pursuit of such a course of action is a factor to be

added in the balance." Id. at 258. Only when combined with the error of violating the privilege against self-incrimination and the racial references did the court grant a new trial. Id. at 258-265.

A fair reading of this case indicates that even given the prosecutor's gross violation of leading questions leading to a finding of contempt, even this conduct was not enough to warrant a new trial without the other cumulative misconduct. Certainly, nothing even close to the facts of Torres have occurred here. Many days worth of testimony had no issues of leading questions raised whatsoever.

Appellant's implication is that, but for the cited leading questions, the trial court could not have made its findings as to the mother's alienating conduct. This argument ignores overwhelmingly substantial information from other witnesses where no claim of a leading question is even being raised by the Appellant. Ms. Minderman has focused on an expert, Ms. Rita Zorrozua, who was called by Mr. Minderman at RP 525. No objection was raised by Ms. Minderman until RP 549, line 5 and that was over the issue of whether pornography was discussed, not on the issue of inappropriate questioning.

The next objection by Ms. Minderman's counsel does not occur until RP 561, line 25 and it was sustained by the trial court. However, even if certain portions of the testimony were excised, the vast majority was not objected to. Importantly, even if all of Rita Zorrozua's testimony was disregarded, the trial court had ample evidence from other witnesses and admitted evidence on which to base its findings and conclusions as cited above. The vast majority of all the testimony presented at trial was not objected to. The portions that were objected

to are minuscule compared to the other evidence.

The requirement to show a material effect in the overall outcome is a consistent theme in the case law. "An erroneous evidentiary decision is reversible error only if it is reasonable to conclude that the trial outcome would have been materially affected had the error not occurred." Miller v. Kenny, 180 Wn.App. 772, 794 (2014). Lutz Tile, Inc. v. Krech, 136 Wn.App. 899, 905 (2007), review denied 162 Wn.2d 1009 (2008). Here, there was very substantial testimony available to the trial court beyond the very small portion of Rita Zorrozua's testimony that was objected to.

4. Claim that this is a "Parental Alienation Syndrome" Issue

While Ms. Minderman argues that this case is ripe for Supreme Court review, there is no clearly articulated basis under RAP 13.4(b). At best, Ms. Minderman argues that there is a loose connection with public policy. She argues that this is a case involving Parental Alienation Syndrome and argues that the finding of Parental Alienation Syndrome is controversial in other states. The problem is that the trial court certainly made no finding of any "Syndrome". Further, while the trial court made findings of alienating conduct by Ms. Minderman, the court still entered a joint custody parenting plan. The trial court literally changed the temporary parenting plan (an 8/6 overnight split between the parents in a 14 day period) by two days in an entire month. This is hardly an issue of public policy worthy of Supreme Court review.

While Ms. Minderman attempts to characterize the issue at hand as a "Syndrome" as she seeks to articulate some basis for review, the trial court merely

applied the requisite statute and case law. RCW 26.09.191(3) proves that:

"A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

...

(e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;"

During trial, Ms. Minderman repeatedly asserted that the children did not want to visit their father or that visits with the father would trigger harm. See the facts cited above from the record which include calls by the mother to CPS (ruled unfounded), calls to law enforcement (ruled unfounded), her reports to the school, her claims of suicidal ideation by the daughter, her false claims of a dildo being left out by the father, and her claims that the children did not want to talk to the father or see him (for which she was found in contempt). All of these are recited in the GAL Marry Ronnestad's testimony on the record as cited above.

These types of "conflict" claims may change from case to case, but they are hardly novel much less present a substantial issue for this Court's review. For as long as there have been parenting plans, there have been claims that the child does not want to visit the other parent or that they would suffer some harm from doing so, or that there is ongoing conflict. While in a different context, the issue of parental conflict was discussed at length in the seminal case of Marriage of Rideout, 150 Wn.2d 337 (2003).

In Rideout, a father initiated a contempt proceeding alleging that his former wife demonstrated a pattern of interference within his residential time. Id.

The mother defended on the contempt action by claiming that their 13 year old daughter did not want to spend time with her father indicating that "I have tried every method of persuasion available to me to encourage my daughter to visit with her father but Caroline adamantly refuses to go visit him." The mother even filed a declaration purportedly written by Caroline expressing her views as to residential arrangements with her father. Id. at 346. The father filed a declaration stating that Caroline's declaration was not her free expression. Id.

The Rideout court found that "Parents are deemed to have the ability to comply with orders establishing residential time and the burden is on a non-complying parent to establish by a preponderance of the evidence that he or she lacked the ability to comply with the residential provisions of a court ordered parenting plan, and that they have a reasonable excuse for noncompliance. Id. at 352-353. The trial court found that the mother was a "competent and capable parent with the ability to require her 13 year old daughter to comply with the court's orders yet failed to do so." Id. This finding was affirmed. Id. The Rideout court held that a parent must make reasonable efforts to comply with the parenting plan, rejecting the notion that the child "does not want to go". Id. at 355-357. See also Marriage of Farr, 87 Wn.App. 177 (1997), where a father was found in contempt for deliberately manipulating his son's decision to not spend residential time with his mother.

While these two contempt cases discuss conflict at exchanges, they also address the duty of a trial court to make findings and determinations of such conflicts and then to fashion an appropriate remedy. Thus, the trial court is charged under RCW 26.09.191(3) to determine if a parent's involvement or conduct may have an adverse effect on the child's best interests and whether the

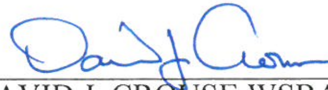
abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development. This type of inquiry by the court happens in many forms and functions, whether it be a contempt action to enforce an exchange of visitation, or as here, where a trial court must determine a final parenting plan that is in the best interests of the children.

The trial court appropriately made a RCW 26.09.191(3) inquiry. The trial court made findings of numerous instances of alienating conduct and conflict that the mother engaged in. Contrary to Ms. Minderman's current claims, these findings were not based solely on the testimony of the expert Rita Zorrozua. These findings were amply supported by the guardian ad litem, the parties, and other lay witnesses. These findings were amply supported by the exhibits which included medical records, school records, phone records, and much more. These are findings and determinations that a trial court must make in any case where substantial conflict exists. This is certainly not the case of the trial court making a new "Sydrome" diagnosis and basing its decision on such.

5. Conclusion

There is no basis for review under RAP 13.4(b). Instead, the trial court applied the statute as required and made a RCW 26.09.191(3) inquiry and findings given the high conflict that existed. Rather than any "Syndrome" being at issue, the trial court's findings of alienating conduct by the mother was supported by very substantial evidence from multiple witnesses and exhibits. Even then, despite these findings of the trial court, the mother was afforded a true joint custody parenting plan where the parties alternate weeks of residential time. The trial court simply took the necessary steps to assess the facts of the case and then protect the children from conflict and guard their best interests.

RESPECTFULLY SUBMITTED this 12th day of July 2019.



DAVID J. CROUSE WSBA #22978
Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion to be competent to serve papers. That on the 12th day of July, 2019, he personally served a copy of the Response to Petition for Review to the persons hereinafter named at the places of address stated below which is the last known address.

ATTORNEY FOR PETITIONER/APPELLANT

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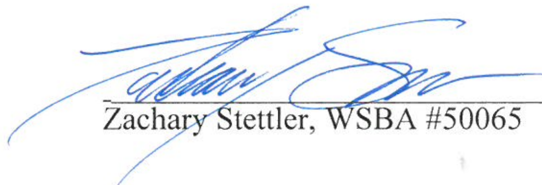

Zachary Stettler, WSBA #50065

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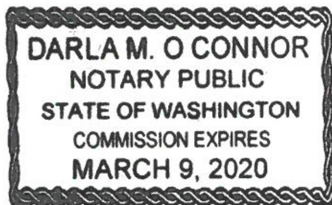

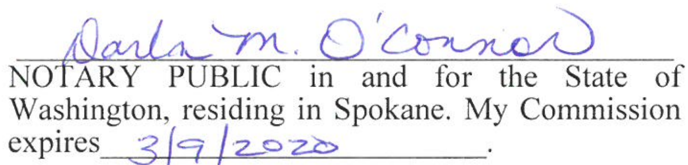

NOTARY PUBLIC in and for the State of Washington, residing in Spokane. My Commission expires 3/9/2020.

DAVID J. CROUSE & ASSOCIATES

July 12, 2019 - 1:14 PM

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Memorandum in Opposition to Petition for Review

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