

NO. 65555-8-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In Re the Parentage of A.M.

THERESA A. MCDONALD,
Appellant,

and

JOHN KARL FISCHER,
Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE DEAN LUM

BRIEF OF APPELLANT

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<u>In re Marriage of Scanlon</u> , 109 Wn. App. 167, 34 P.3d 877 (2001), <i>review denied</i> , 147 Wash.2d 1026, 62 P.3d 889 (2002)	15
<u>In re Marriage of Schumacher</u> , 100 Wn. App. 208, 997 P.2d 399 (2000)	28
<u>In re Marriage of Stern</u> , 68 Wn.App. 922, 846 P.2d 1387 (1993).....	14
<u>In re Marriage of T.</u> , 68 Wn. App. 329, 842 P.2d 1010 (1993)	29
<u>In re Martin</u> , 3 Wn. App. 405, 476 P.2d 134 (1970)	22, 24
<u>In re Petrie</u> , 40 Wn.2d 809, 246 P.2d 465 (1952)	19, 20
<u>In re Riley's Estate</u> , 78 Wn.2d 623, 479 P.2d 1, 48 A.L.R.3d 902 (1970)	14
<u>In re Ross</u> , 45 Wn.2d 654, 277 P.2d 335 (1954).....	22, 24
<u>Marriage of Ebbighausen</u> , 42 Wn.App. 99, 102 (1985)	20
<u>Mullane v. Central Hanover Bank & Tr. Co.</u> , 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L. Ed. 865 (1950).	19, 20, 22
<u>Olympic Forest Products, Inc. v. Chaussee Corp.</u> , 82 Wash.2d 418 (1973);.....	19, 20
<u>R.R. Gable, Inc. v. Burrows</u> , 32 Wn. App 749 (1982), <i>review denied</i> , 98 Wn.2d 1008 (1982), <i>cert. denied</i> 461 U.S. 957, 103 S.Ct. 2429, 77 L.Ed.2d 1316 (1983)	24
<u>State ex rel. J.V.G. v. Van Guilder</u> , 137 Wn. App. 417, 154 P.3d 243 (2007)	15
<u>State ex rel. M.M.G. v. Graham</u> , 159 Wn.2d 623, 152 P.3d 1005 (2007).....	26
<u>Weden v. San Juan County</u> , 135 Wn.2d 678 (1998).....	14

Statutes

RCW 26.09.010 (1)..... 15

RCW 26.19.075 26

Treatises

20 Wash. Prac., Fam. And Community Prop. L. § 37.6. 26

Constitutional Provisions

Wash. Const. Art I, sec. 3..... 25

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered final orders inconsistent with the agreement of the parties and against the Appellant's interests without notice to the Appellant. CP 564, 572, 582, et seq.
2. The trial court erred when it failed to impute income to the father for the purpose of calculating child support. CP 564, 582, et seq.
3. The trial court erred in establishing that the Father's gross monthly income was \$7,371 for the purpose of determining the child support obligation. CP 564, 582, et seq.
4. The trial court erred when it that the mother shall not receive the income tax exemption for the child every year CP 564, 582, et seq.
5. The trial court erred in requiring mother to be assessed by Dr. Bruce Olson. CP 564, 572, et seq.
6. The trial court erred in ordering the mother to pay child support. CP 564, 582, et seq.
7. The trial court erred in entering the findings of fact and conclusions of law. CP 564, et seq.
8. The trial court erred in entering the parenting plan. CP 572, et seq.
9. The trial court erred in entering the order of child support. CP

582, et seq.

10. The trial court erred in entering the order denying reconsideration. CP 789.

11. The trial court erred in entering the “Judgment and Order on Respondent’s Motion to for (sic) Reconsideration?” CP 790.

II. STATEMENT OF ISSUES

1. Did the trial court err when it failed to provide the mother notice and a meaningful opportunity to be heard when it entered orders inconsistent with the parties’ agreement and with its own oral ruling made at the conclusion of the February 3, 2010 hearing that the father should be designated custodial parent for the purposes of medical decisions only?

2. Did the trial court err when it failed to provide the mother notice and a meaningful opportunity to be heard when it entered orders inconsistent with the parties’ agreement and with its own oral ruling made at the conclusion of the February 3, 2010 hearing that the parenting plan should reflect an equal (50/50) parenting arrangement?

3. Did the trial court err when it failed to provide the mother notice and a meaningful opportunity to be heard when it entered orders inconsistent with the parties’ agreement and with its own oral ruling

made at the conclusion of the February 3, 2010 hearing that the agreed upon 50/50 parenting arrangement would not require the mother to pay the father child support?

4. Did the trial court err when it failed to provide the mother notice and a meaningful opportunity to be heard when it entered orders inconsistent with the parties' agreement and with its own oral ruling made at the conclusion of the February 3, 2010 hearing that the residential schedule be such that the child and the mother's other child (the child's half-sister) be with the mother during the same weekends and holidays?

5. Did the trial court err when it failed to impute income to the father for the purpose of setting the child support obligation?

6. Did the trial court err when it established that the Father's gross monthly income was \$7,371 for the purpose of determining the child support obligation?

7. Did the trial court err when it entered orders requiring the mother to pay child support to the father?

8. Did the trial court err when it failed to allow the Mother to be evaluated and treated by Zanny Milo rather than Bruce Olson?

9. Did the trial court err when it failed to allow the mother to receive

the child as an income tax exemption every year?

10. Did the trial court err when it failed to correct inconsistencies in the Order of Support and the Judgment on Parenting in response to mother's motion for reconsideration?

III. STATEMENT OF THE CASE

A. Factual and Procedural History

This case involves Theresa McDonald, the appellant herein and Respondent below, John Fischer, Respondent herein and Petitioner below, and their young child Andy, born February 13, 2008. Ms. McDonald is one of four children born into a lower middle-class Irish Catholic family in upstate New York. CP 76. She has a finance degree with a minor in computer science. CP 76. Ms. McDonald presently works for Nintendo of America as Manager of Financial Systems. CP 76-77. Her hours are approximately 9:00 a.m. to 5:00 p.m., Monday through Friday. Her net monthly income according to the Order of Child Support is \$7,371. CP 583. Ms. McDonald is 42 years old and lives in the Seattle area. CP 583.

Ms. McDonald has three children, Jennifer, Abby and Andy, the subject of this dispute. CP 77. At the time of trial¹ Jennifer was about 22 years old and a sophomore at the University of Hawaii. CP 77. Jennifer was born after a college relationship between Ms. McDonald and Jennifer's father, who decided not to participate in raising Jennifer. CP 77. Ms. McDonald did not seek support from the father, and has had no contact with him. CP 77.

Abby is now about 13 years old, and shares roughly equal residential time with both parents. CP 77. In her trial brief Ms. McDonald describes Abby as an "outgoing, active, well-adjusted girl who enjoys drawing, writing stories and socializing with her friends and family time/game night." CP 77. "Abby loves her little brother, is well-bonded with him and he with her." CP 77. Ms. McDonald and Abby's father, Scott, have different parenting views, but they are cooperative with respect to the residential schedule and flexible when changes to the schedule must be made. CP 77.

¹ "Trial" occurred on February 3, 2010, in the King County Superior Court, Judge Dean Lum presiding. Judge Lum commented at oral argument "I know you're arguing it's not a trial, but essentially it is. This is the final resolution, and whether you call it a hearing or a -- something else, a motion or whatever else, essentially it is a -- you know, this is the trial. This is all the trial that you're going to have, simply because you agreed not to have a full-blown evidentiary trial." VRP "page 3" line 22. Whatever label may ultimately best apply to their day in court, for simplicity sake Appellant refers to the February 3, 2010, proceeding as "trial."

Mr. Fischer is 55 years old, a dentist residing in Anacortes with a successful practice in La Connor. CP 584; 78. In addition to Andy, Mr. Fischer also has two children of other relationships. CP 78. Mr. Fischer's daughter, Lauren, grew up in California and then Hawaii, and at the time of trial was attending college. CP 78. Mr. Fischer's oldest son, Johnny, is about 13 years old, and resides primarily with his mother near Mr. Fischer in Anacortes. Apparently Johnny resides primarily with his mother, and spends time with his father on Thursdays and Fridays, along with nonscheduled residential time on other occasions for school, sporting events, and the like. CP 78.

Mr. Fischer maintains a dental practice in La Connor, where he reportedly works four days each week – seven hours on Monday, Tuesday and Thursday, and seven or less hours on Wednesday, when he drives to Seattle to pick Andy up. Fridays Mr. Fischer takes off. CP 78. According to the Child Support Order Mr. Fischer's income is \$7,371. CP 584.

The parties met online in about March, 2007, and began dating in earnest shortly thereafter. CP 79. In about April 2008, the parties traveled to Hawaii together. CP 79. There was talk of marriage, in June, 2008, Mr. Fischer took Ms. McDonald to a jewelry store to look at engagement rings. CP 79. According to

Ms. McDonald, when Mr. Fischer learned she was pregnant with Andy, the marriage plans, and their romantic relationship, ended rather abruptly. CP 79.

Ms. McDonald's pregnancy was difficult, inasmuch as she suffered excessive amniotic fluid, and the parties maintained some contact with each other during this period. CP 79-80. Andy was born premature at approximately 36 weeks gestational age. CP 340.

After Andy's birth medical complications (relating to Andy) arose, and he was treated for jaundice, gastro esophageal reflux disease (GERD), and Torticollis. CP 80; 332. Two or three months after birth, Andy was discovered to have an intolerance for dairy products, which compounded his reflux issues. CP 80; 332. At about age 4-5 months, Andy began manifesting eczema, hives, and was "overly fussy." CP 81. The results of subsequent allergy tests revealed Andy was strongly allergic to eggs with a moderate allergy to wheat and other food items. CP 82; 332; 329.

Because of the medical complications, extended breastfeeding due to allergies, GERD and other issues, Ms. McDonald was reluctant to allow Andy to spend overnights with Mr. Fischer. This led Mr. Fischer, on or about December 5, 2008, to file a petition to establish a parenting plan. At trial, Mr.

Fischer's attorney described the reasons leading to the filing of the petition:

This case started out when John was not able to have contact with his child outside the mother's home, that is, he would come every weekend for roughly the first year of Andy's life, and the mother really was reluctant to let him leave the home with the child, and only on a couple of occasions was John allowed to even take the child for walks around the block, and sometimes he wasn't allowed to do that. He at that point wanted to have some visitation outside the home for holidays, taking the child to a family member's house nearby, and the mother would refuse, and at about the year mark was thinking I would like to have overnight time with the child soon, and the mother would refuse that as well.

VRP, page 14, line 20, et seq.

January 16, 2009, court appointed a parenting evaluator,² and entered temporary orders. CP 161; CP 193; CP 185. The Temporary Orders provided for the child to continue to reside with the mother and reside with the father from 12:00 p.m. to 7:30 p.m. Sundays for the next 3 weeks in the mothers' home there after 12:00 p.m. to 6 p.m. every Sunday (not in the mother's home) and every Wednesday from 6:00 p.m. to 7:30 p.m. CP 186.

In about April or May, 2009, the parties mediated unsuccessfully with Cheryl Russell (CP 82; CP 108), and on February 3, 2010, after much litigation, and eventually agreement

² Jude McNeil ultimately became the parenting evaluator in the case.

on many of the issues, the matter went to a final hearing before Judge Lum. The primary purpose of the hearing was to enter final orders reflecting the parties' points of agreement, and to resolve the few remaining issues the parties had not resolved between themselves. VRP "page 2" line 19.

The agreement was captured in a string of emails (CP 249-259), wherein the parties resolved their primary issues as follows:

1. The parties agreed to a 50/50 residential schedule. CP 160, line 13; CP 75, line 17; CP 84, line 20; CP 86, line 4; VRP "page 23" line 7; VRP "page 31" line 16.

2. The parties agreed that decision making shall be joint, except that the father shall have sole medical decision making with certain restrictions. CP 160; VRP "page 8" line 17; VRP "page 31" line 24, et seq.

The parties' also agreed that certain issues would be resolved by motion, chief among these included (1) designation of the primary parent (if anyone), and (2) certain financial issues, including whether the Court should impute income to the father as requested by the mother.

As to designation of the primary parent, Ms. McDonald argued that the 50/50 residential schedule eliminated the requirement that the Court designate a primary parent. CP 85;

VRP “page 31” line 17. The RCW’s, she argued in her trial brief (at CP 85) do not require the Court to designate the “primary” parent:

RCW 26.09.184(6) requires the Court to “include a residential schedule which designates in which parent’s home each minor child shall reside on given days of the year, including provision for holidays, birthdays of family members, vacations, and other special occasions, consistent with the criteria in RCW 26.09.187 and 26.09.191.” The State Form parenting plan contains a provision at paragraph 3.12 regarding the “custodian” of the child. This designation is not required to be related to the residential schedule (though most often it is) and the State Form plan specifically states the purpose is solely for “all other state and federal statutes which require a designation or determination of custody. This designation shall not affect either parent’s rights and responsibilities under this parenting plan.”

The parties reached a settlement in which the residential schedule is 50/50 with each parent having two weekends per month. Accordingly, both parents qualify as custodian. Terri’s proposal is that both parents are designated custodian, or in the alternative, they alternate this designation on an annual basis.

CP 85-86.

Mr. Fischer argued in return that he should be designated the primary residential parent because:

A, that’s what the parenting evaluator recommended, and, B, because of the psychological evaluation’s identification of some very serious personality issues and psychological disorders, this is what’s going to be best for Andy. And, C, as John points out in his declaration, it appears that he will

have the majority of the time, although the overnights will remain on a four-week cycle, overnights per parent.

VRP “page 13” line 6 through “page 14” line 14.

Regarding the financial issues, Mr. Fischer argued that “Because the schedule provides for 50% of the overnights with each parent, there should be a residential overnight credit and no transfer payment.” CP 161, line 6.

Ms. McDonald, on the other hand, argued that the Court should impute income to Mr. Fischer, because he worked only four-seven hour days, had additional income from the building he owns in which his dental practice is located and his practice pays rent to him, because he has significant depreciations which reduce his taxable income, and because he pays “maintenance” to the mother of his 10-year old but no child support. CP 87-88. Ms. McDonald therefore proposed that Mr. Fischer pay her \$314 per month with a 60/40 pro rata split and that she receive the child every year as an income tax exemption. CP 87. See also VRP “page 32” et seq.

The parties were also at odds about implementation of a case management order including the requirement of a follow up psychological evaluation for the mother. VRP “page 8” line 4. Ms. McDonald objected to the appointment of a case manager (CP

285; CP 288) and asserted that if the Court were to implement Mr. Fischer's recommendations, Ms. McDonald ought to be permitted to continue treatment with Dr. Zanny Milo, a therapist recommended by the parenting evaluator and with whom Ms. McDonald already had a working relationship, and not to require Bruce Olson to fill the role. CP 285; CP 288.

Finally, Mr. Fischer also sought payment for outstanding judgments against the mother. On April 4, 2011, however, Ms. McDonald filed bankruptcy. On May 13, 2011, Commissioner Mary Neel of this Court ruled "To the extent appellant seeks review of a monetary judgment for \$4,720.00, the appeal is automatically stayed by the bankruptcy petition. Any procedural problems that may arise as a result of the partial stay need not be addressed at this time." Thus facts and issues relating to sanctions and outstanding judgments are not addressed in this brief.

At the conclusion of the hearing, the Court voiced its opinion as to several of the issues before it:

THE COURT: All right. Okay, here's -- I'm ready to make a decision on some of these things, I want to think about some others. One, I'm only going to designate him the primary residential parent for the purposes of medical decisions, which he has sole decision-making authority. I'm going to -- I'm going to separate that discussion or decision from --

because I don't think that I'm required under the law to designate a primary residential parent, period. It really doesn't have any meaning, because the parenting plan divides residential time as it does. The grant of the deduction is separate, and I'll grant the deduction to the mother in this particular case because she's a W-2 wage earner, and the father has ample places to seek business deductions should he so wish. He can certainly talk to a CPA, and there are other -- there are things that he can do which the mother can't as a W-2 wage earner. So she'll be granted the deduction. He'll be designated the primary residential parent for the purposes of medical decisions only, but otherwise there will be no primary residential parent.

VRP "page 53" et seq.

The Court also commented that it would "think a little bit further" about the evaluator issue (VRP "page 54" lines 2 and 6), whether to impute income to Mr. Fischer (VRP "page 55" line 15), and to "think about some other matters." VRP "page 57" line 10. On or about March 18, 2010, Judge Lum signed and filed final orders in the case which were at odds with the parties' stipulations and with the Judge's oral decision. On April 18, 2010, Ms. McDonald filed a motion for reconsideration which was denied. This appeal was then timely filed.

IV. ARGUMENT

A. *Standard of Review: This Court Reviews the Issues Presented Herein De Novo*

Because of the odd procedural posture and the expectations of

the parties at the final hearing in the case, Ms. McDonald was not permitted to present and cross-examine witnesses and fully test the merits of Mr. Fischer's evidence. In a word, the parties went into the final hearing expecting ratification of the points on which they agreed, and the judge gave all indications of intending to do just that. However the judge later apparently changed his thinking about the issues and in essence denied Ms. McDonald her constitutional right to notice that the merits of the case would be resolved on the documentary evidence before the court, and consequently she was denied a meaningful opportunity to be heard. Questions of constitutional magnitude are subject to de novo review. Weden v. San Juan County, 135 Wn.2d 678, 693, (1998). Issues in equity are tried de novo on appeal, and while findings of fact are entitled to great weight and consideration, they are not binding on the reviewing court. Columbia Lumber Co. v. Bush, 13 Wn.2d 657, 664 (1942).

While generally, findings of fact that are supported by substantial evidence will not be disturbed on appeal (Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)), exceptions to this rule have been made in cases where the court's findings are not based on oral testimony. In re Riley's Estate, 78 Wn.2d 623, 479 P.2d 1, 48 A.L.R.3d 902 (1970); *but see* In re Marriage of Stern, 68 Wn.App. 922, 928, 846 P.2d 1387 (1993) (proper standard of findings based on trial by affidavit

is whether the findings are supported by substantial evidence and whether the court has made an error of law). Here there are no findings in support of the final orders which deviated markedly from that which the parties agreed to, thus review of these issues is also de novo.

Finally, while parenting plans and child support orders generally are reviewed for an abuse of discretion (State ex rel. J.V.G. v. Van Guilder, 137 Wn. App. 417, 423, 154 P.3d 243 (2007)), “[a] court necessarily abuses its discretion if its decision is based on an erroneous view of the law.” In re Marriage of Scanlon, 109 Wn. App. 167, 174-75, 34 P.3d 877 (2001), *review denied*, 147 Wash.2d 1026, 62 P.3d 889 (2002). Here, the trial court did not comply with RCW 26.09.010 (1) which would permit Ms. McDonald the succor of the civil rules including the right to present witnesses and test the testimony of her adversary's.

B. Ms. McDonald was Denied Due Process

At the outset of the proceedings Judge Lum commented that the parties were there:

on kind of an unusual procedural posture. My understanding is the parties have agreed on a substantial number of issues, but there are some outstanding issues, and my understanding is we were here to resolve them today and present final orders

VRP at “page 2.” Both parties agreed that the major issues had been stipulated away, and they had every reason to expect that the Court would largely ratify their agreements, and if not, to permit the parties to adjudicate the issues in open court with live testimony. Judge Lum was conscious of the fact that the law in Washington permitted him to refuse to “rubber stamp” the parties stipulations where the best interests of a child is at stake, however Ms.

McDonald’s counsel noted that the Court “could not do that” on a documentary record:

MS. PERRY: . . . The whole point of my bringing this up is there is a point and there’s a counterpoint to it, and that is what the court would have had before it with live testimony had there been a trial, but the parties decided to settle, so what we’re asking you to do is not base your decision on what’s in the record as though this is a summary judgment. What we’re asking you to do is base your decisions on what the parties have agreed to, and with that --

THE COURT: So I -- so I should just rubber stamp what they say?

MS. PERRY: No, no, your Honor, and I understand -- I understand your concern, because we’re dealing with a child.

THE COURT: Well, my concern is that Washington law is different than that. I don’t have to rubber stamp what you guys say, right?

MS. PERRY: There’s two --

THE COURT: Don’t I have an independent obligation to do what’s in the best interests of the child, regardless of what you guys --

MS. PERRY: You absolutely do, but you can’t -- and I think you would agree with me, you can’t do that on a documentary record.

You could do that if it was a motion, but you can't in a permanent plan as though this is a summary judgment, and that's what you would be doing.

THE COURT: Unless you guys have agreed to have me resolve it on paper, which you guys apparently have, haven't you?

MS. PERRY: We've -- yes, we have, we've had -- we've agreed to have you resolve certain issues on paper.

THE COURT: Right.

MS. PERRY: So -- and what my point is then, if you look at these documents, then you will see that for each point -- and the most important one I believe, the very most important one is that the father admitted later that he had been giving the child food that the child wasn't tolerant of, and he never told the mother, and he didn't tell the pediatrician, and he didn't tell the nutritionist. So he created a situation where he could then say, well, look what she's doing, and based on that in itself, if Dr. Friedman knew that, wouldn't it undermine the father's credibility about his whole statements that he's made to him about the mother?

And if you look at Dr. Friedman's report, his report, he didn't review any documents when he did this independent assessment of John, and he meets with John and then months later he reviews pages and pages and pages of documents provided, including a pleading that counsel agreed would not be provided to him, and then he assesses Terri. So how can that be an unbiased, independent assessment?

VRP pages 28-30.

As noted repeatedly above, the parties here intended that some issues be submitted to the Court on the pleadings and argument of counsel, and that other issues -- the issues upon which the parties agreed -- be ratified by the Court. Because the Court failed to give any indication that it would resolve the agreed upon issues differently than proposed by the parties, and in fact would resolve all of the issues on

the basis of documentary materials presented, the mother was robbed of her constitutional right to a meaningful opportunity to be heard on these issues.

As can be seen by her trial brief (CP 75, et seq.) Ms. McDonald went into trial anticipating only a very few issues would be contested, and those the parties agreed could be resolved on the basis of written submission and oral argument. In response to what she perceived as an unnecessarily hostile and overreaching (given the parties' agreements) trial brief filed by the father, (see e.g. CP 284), the mother wrote in her response:

In closing, we ask the Court to simply enforce the parties' agreement and not to hold a trial on the merits on a mere review of the documents. As this Court knows, the documents play only a small role in a trial. It is the testimony and cross examination that completes the picture. This is particularly true here when the parenting evaluation and the psychological assessments were released after the close of discovery so there was no opportunity to challenge or rebut. It is only through the entire process that facts are determined by the Court.

CP 288.

C. *Entry of Final Orders Inconsistent with the Parties' Agreements and Without Permitting Countervailing Testimony on Disputed Issues Robbed Ms. McDonald of her Constitutional Right to a Meaningful Opportunity to be Heard*

The orders as entered deprive Ms. McDonald of fundamental interests in her parental relationship with her child, in

her liberty, and in her wages.³ At minimum, the due process clause of the Fourteenth Amendment demands that any deprivation of a fundamental right by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. In re Petrie, 40 Wn.2d 809, 246 P.2d 465 (1952); Olympic Forest Products, Inc. v. Chaussee Corp., 82 Wn.2d 418 (1973); Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L. Ed. 865 (1950). Here Ms. McDonald received no notice that the Court would treat all matters – even agreed matters – as contested, and she received no opportunity to test the veracity of Mr. Fischer’s evidence by cross-examination before judgment was rendered against him. The Court resolved fundamental issues on the basis of arguably inadequate documentary material, without giving the litigants any indication that it would do so and without giving the litigants the opportunity to test the merit of each-other’s evidence.

³ Cases holding these rights fundamental are legion. For cases establishing a parental constitutional right to the care, custody and companionship of a child see e.g. In re Sumei, 94 Wn.2d 757, 762, 621 P.2d 108 (1980); In re Myricks, 85 Wn.2d 252, 253-54, 533 P.2d 841 (1975); In re Hudson, 13 Wn.2d 673, 678, 685, 126 P.2d 765 (1942); In re Luscier, 84 Wn.2d 135, 524 P.2d 906 (1974); In re Ross, 45 Wn.2d 654, 277 P.2d 335 (1954); In re Akers, 22 Wn.App. 749, 754, 592 P.2d 647 (1979); Marriage of Ebbighausen, 42 Wn.App. 99, 102 (1985); Lehr v. Robertson, 463 U.S. 248, 77 L.Ed.2d 614, 103 S.Ct. 2985, 2991 (1983); Caban v. Mohammed, 441 U.S. 380, 397, 60 L.Ed.2d 297, 99 S.Ct. 1760, 1770 (1979). For cases classifying parental rights as a “liberty” interest protected by the due process clause of the Fourteenth Amendment, see e.g. Meyer v. Nebraska, 262 U.S. 390, 399, 67 L.Ed. 1042, 43 S.Ct. 625, 29 A.L.R. 1446 (1923); In re Akers, 22 Wn.App. 749, 753, 592 P.2d 647 (1979); In re Luscier, 84 Wn.2d 135, 524 P.2d 906 (1974)). See also Stanley v. Illinois, 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972), (fundamental right of a parent to custody of his children).

In Washington, “judgments entered in a proceeding failing to comply with the procedural due process requirements are void.” Marriage of Ebbighausen, 42 Wn.App. 99, 102 (1985) (citing cases). At minimum, the due process clause of the Fourteenth Amendment demands that any deprivation of a fundamental right by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. In re Petrie, 40 Wn.2d 809, 246 P.2d 465 (1952); Olympic Forest Products, Inc. v. Chaussee Corp., 82 Wash.2d 418 (1973); Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L. Ed. 865 (1950). Entry and enforcement of the judgments therefore, at minimum violate the Due Process clause of the State and Federal Constitutions, and violate Ms. McDonald’s constitutional guarantees of due process.

The United States Supreme Court, in Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965), considered a due process problem not unlike to the problem presented here. In Manzo, a mother petitioned a juvenile court judge for an adoption decree, naming her second husband, the child’s step-father, as the prospective adoptive father. Manzo, 380 U.S. at 546. The natural father (petitioner) was not given notice or an opportunity to be

heard. *Id.*, at 548. Based solely upon the mother's submissions, the court entered its decree. *Id.*

Upon learning of the adoption, the petitioner approached the district court seeking to set the decree aside. *Id.* The court granted the petitioner a hearing. *Id.* at 549. The burden was placed upon the petitioner to refute the enforceability of the decree. *Id.* The court denied petitioner's motion to set the adoption aside. *Id.* The court of appeals affirmed the judgment, and the state supreme court denied certiorari. *Id.* The United States Supreme Court heard the appeal. 379 U.S. 816, 85 S.Ct. 46, 13 L.Ed.2d 26.

The Supreme Court boiled the case down to its fundamentals: first, whether failure to notify the petitioner of the pending proceedings had deprived him of due process so as to render the decree constitutionally invalid, and second, whether the subsequent hearing on the motion to set the decree aside served to cure the constitutional invalidity. "In disposing of the first issue," the court wrote, "there is no need to linger long." Manzo, 380 U.S. at 550.

[T]here can be no doubt that at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Id., quoting Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L. Ed. 865 (1950). The court determined that if the petitioner had been given notice and an opportunity to be heard, “which the Constitution requires, [the respondents] would have had the burden of proving their case as against whatever defenses the petitioner might have interposed.” Manzo, 380 U.S. at 551, citations omitted. See also In re Ross, 45 Wn.2d 654, 655, 277 P.2d 335 (1954); In re Martin, 3 Wn. App. 405, 411, 476 P.2d 134 (1970). “Had neither side offered any evidence” at such a hearing, “those who initiated the adoption proceedings could not have prevailed.” *Id.*

Next, the court ruled that the constitutional infirmity in the adoption decree was not cured merely by providing the petitioner with an opportunity to argue that the decree should be set aside. Manzo, 380 U.S. at 551. Thus in addressing the second issue, the court articulated the significant legal disadvantage to which the petitioner had been put:

[T]he petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon [findings] made by another judge. . . . The burdens thus placed upon the petitioner were real, not purely theoretical. For ‘it is plain that where the burden of proof lies may be decisive of the outcome.’ Speiser v. Randall, 357 U.S. 513, 525, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Yet these burdens would not have been imposed

upon him had he been given timely notice in accord with the Constitution.

Manzo, 380 U.S. at 551.

While distinguishable in certain respects, Manzo is analogous to the instant case. Here, Ms. McDonald, after extensive litigation culminating in an agreement on major issues, went into a final hearing anticipating that only a few minor issues would be tried on documentary materials. During the hearing the Court appeared to acquiesce in the parties' stipulations, and even indicated it would resolve the primary issues of residential time and the tax credit in a manner consistent with the agreement of the parties. See e.g. VRP "page 53" et seq.

When the Orders were produced, however, Ms. McDonald discovered that the Court did not resolve the matters as agreed or as it had indicated, and in fact had resolved those issues against her on the mere basis of documentary evidence. While Ms. McDonald timely filed a motion to reconsider, she was then in the unenviable position of having to overcome an adverse judgment already entered against her, absent the right to examine and cross-examine witnesses and thereby test the credibility and authenticity of the submitted evidence. The burdens thus placed upon Ms.

McDonald in attempting to usurp the orders entered were not theoretical, they were real. Manzo, 380 U.S. at 551.

If Ms. McDonald had been given notice and an opportunity to be heard commensurate with the issues at stake, “which the Constitution requires, [Mr. Fischer] would have had the burden of proving [his] case as against whatever defenses [Ms. McDonald] might have interposed.” Manzo, 380 U.S. at 551. See also In re Ross, 45 Wn.2d 654, 655, 277 P.2d 335 (1954); In re Martin, 3 Wn. App. 405, 411, 476 P.2d 134 (1970). The constitutional infirmity in the orders was not cured merely by providing Ms. McDonald with an opportunity to present documentary evidence or to argue on a motion for reconsideration that the orders should be set aside. *Id.* Pursuant to Manzo, “these burdens would not have been imposed upon [her] had [s]he been given [an opportunity to be heard] in accord with the Constitution.” *Id.* Such an opportunity would include the right to present live testimony, cross-examine witnesses, and present rebuttal evidence. “[A]n order is void as violative of due process where based on a hearing for which there was not adequate notice or an opportunity for a party to be heard.” R.R. Gable, Inc. v. Burrows, 32 Wn. App 749, 753 (1982), *review denied*, 98 Wn.2d 1008 (1982), *cert. denied* 461 U.S. 957, 103 S.Ct. 2429, 77 L.Ed.2d 1316 (1983); see also Wash. Const. Art I,

sec. 3. It would now be proper for this court to hold as a matter of law that the orders of the trial court are void for want of due process, and to remand the matter to trial.

D. The Court Erred When It Failed to Impute Income to Mr. Fischer and Award Ms. McDonald the Tax Exemption

Washington child support policy has two goals: to insure support adequate to meet the needs of children commensurate with the parents' income, resources, and standard of living and to equitably apportion that support obligation between the parents. RCW 26.19.001.⁴ In other words, the law aims to provide for the child and to do so fairly. To those ends, the Legislature devised a child support statutory scheme, which operates almost mechanically to allocate the child support obligation between parents. RCW 26.19. See especially RCW 26.19.011 (defining basic child support).

The statutes do not specifically provide for a situation when there is shared residential time with the same child and the *Arvey* formula is not applicable. State ex rel. M.M.G. v. Graham, 159

⁴ The statute provides: "The legislature intends, in establishing a child support schedule, to insure that child support orders are adequate to meet a child's basic needs and to provide additional child support commensurate with the parents' income, resources, and standard of living. The legislature also intends that the child support obligation should be equitably apportioned between the parents."

Wn.2d 623, 636, 152 P.3d 1005 (2007). RCW 26.19.075 allows the Court to vary each parent's obligation based upon residential time provided this does not result in insufficient household income to the other parent. Washington Practice suggests the use of a net support order until the legislature addresses the issue. 20 *Wash. Prac., Fam. And Community Prop. L. § 37.6.*

Here, Ms. McDonald proposed a net support order which resulted in Mr. Fischer paying \$314 per month to her with a 60/40 pro rata split. In this instance Washington Practice suggests that Mr. Fischer would be referred to as the "payor" rather than "obligor." Ms. McDonald does not own a home; Mr. Fischer does. Ms. McDonald does not own a business; Mr. Fischer does. In order for Ms. McDonald to minimize her taxes, she proposed – and at VRP 53 the Court agreed – that she receive the child every year as the income tax exemption which will enable her to file as head of household and deduct daycare costs. As she argued in her trial brief at CP 87, in 2009 the difference was about a \$6,000 swing in taxes owed. The trial court erred in not allowing Ms. McDonald the tax exemption.

In calculating child support, the trial court failed to impute income to Mr. Fischer, who works only four, seven hour days each

week. Under RCW 26.19.071 (6), the court must impute income to a voluntarily underemployed parent:

The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors.

Employment status is a relevant factor that must be considered by the court when making a child support calculation. *In re Marriage of Brockopp*, 78 Wn. App. 441, 446, 898 P.2d 849 (1995). A parent cannot avoid obligations to his or her children by voluntarily remaining in a low paying job or by refusing to work at all. *Id.*, at 445. Here, Mr. Fischer is in good health, has professional training and experience as a dentist, owns his business, and could presently work a 40-hour work week. Instead of working five days per week, Mr. Fischer chooses to work four. This choice should not bear adversely on Ms. McDonald by causing her to lose the tax credit or take a lesser amount of child support. This issue arose in *Dewberry v. George*, 115 Wn. App. 351, 62 P.3d 525 (2003). In that case, this court upheld imputation of income to the father because he was working part-time in order to have a "flexible schedule" while pursuing a new career; he was a healthy, 47-yearold college graduate with a

history of executive-type jobs; and “all of the evidence indicates that his underemployment has been brought about by his own free choice.” Id. at 367. The court also said:

While there was no suggestion that George is trying to lower his income to avoid child support, the trial court’s determinations that George is not employed full-time and is voluntarily underemployed are supported by the record.

Id. (emphasis added).

Typically, in determining whether a parent is voluntarily underemployed, a court should look at the level of employment “at which the parent is capable and qualified.” In re Marriage of Schumacher, 100 Wn. App. 208, 215,997 P.2d 399 (2000). Accordingly, income should have been imputed to Mr. Fischer for the one work-day each week he takes off.

Certainly, the trial court here erred when it failed to consider or enter findings and conclusions on this fact. In a similar case, the court found that the mother was voluntarily unemployed but did not impute income to her. In re Marriage of Brockopp, 78 Wn. App. 441, 445-46,898 P.2d 849 (1995). In that case, this court held that it was error not to make findings and conclusions regarding the employment status of the mother, because voluntary unemployment or underemployment must be considered whenever a court calculates child support. Id., at 446

The Court here should come to the same conclusion. Mr. Fischer was and apparently is voluntarily underemployed. The statute requires the court to impute income to him for the purpose of determining his appropriate child support obligation. The court's failure to do so was error.

E. Ms. McDonald is Entitled to Costs and Attorney Fees on Appeal

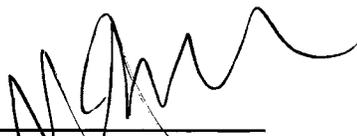
The Uniform Parentage Act, RCW 26.26.140, permits this Court to award attorney fees to Ms. McDonald. In re Marriage of T., 68 Wn. App. 329, 842 P.2d 1010 (1993). Ms. McDonald is struggling financially, and in fact recently filed bankruptcy to discharge overpowering personal debt. Because the Court below erred compelling Ms. McDonald to file this appeal, she should be allowed reasonable attorney fees and costs.

V. CONCLUSION

All Ms. McDonald asks is that she not be penalized by her efforts at attempting to be economical and prudent instead of employing a "scorch the earth" litigation style, and trying every last element of the case. In her prudence she has unwittingly and without knowledge beforehand, lost the opportunity to meaningfully litigate her case. This court should remand the

matter for trial on the contested issues, and award Ms. McDonald her attorney fees and costs incurred in this appeal.

DATED this 3rd day of June, 2011.


/s/ Michael Brannan

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

In re the Parentage of:
ANDREW MCDONALD,
Child,
THERESA A. MCDONALD,
Appellant,
and
JOHN KARL FISCHER,
Respondent.

No. 65555-8-I

DECLARATION OF SERVICE

I, MICHAEL G. BRANNAN, declare as follows:

1) I am over 18 years of age and a U.S. citizen. I am not a party to this case.

2) On June 3, 2011, I caused to be delivered the Appellants' Opening Brief and this Declaration of Service, to the following attorneys:

Service List

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I HEREBY DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

DATED this 3rd day of June, 2011 at Seattle Washington.

/s/ Michael Brannan

MICHAEL G. BRANNAN