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ORIGINAL

No. 65663-5-I
Superior Court No. 09-3-07981-5 SEA

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

DHEERAJ KONERU,
Petitioner/Appellee,
v.

ALEKHYA YALAMANCHILI,
Respondent/Appellant.

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

The Honorable Michael J. Fox, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

- 1) The trial court improperly enforced a purportedly agreed final parenting plan without a trial when Yalamanchili raised genuine, material disputes regarding:
 - a) what terms the parties had agreed to; and
 - b) whether her agreement to any terms was the result of duress and undue influence.
- 2) The trial court improperly enforced the parenting plan without consideration of, or findings relating to, the best interests of the child.

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1) Did Yalamanchili raise genuine disputes regarding the terms of the parenting plan when three different versions were before the court, and Yalamanchili maintained, with corroborating evidence, that the one Koneru sought to enforce was not the one she signed?
- 2) Did Yalamanchili raise genuine disputes regarding the validity of any “agreement” she may have made where she presented evidence that Koneru controlled and demeaned her throughout that marriage, and that he threatened to keep the child in India and forever away from Yalamanchili unless she signed his papers.

- 3) May a trial court enforce a parenting plan based solely on a finding that it is “agreed”, without consideration of, or findings relating to, the best interests of the child?

III. STATEMENT OF THE CASE

Alekhya Yalamachili and Dheeraj Koneru were both born in India but are now U.S. citizens. They were married in 2002 and have one child, Sruthi Koneru, who is now four years old. As Yalamanchili explained in the Second Declaration of Respondent (CP 61-72), Koneru dominated and demeaned her during the marriage. CP 62-63. “I have always given in to everything he asked of me. He has always put me down and made me feel like I am nothing. He has blackmailed and emotionally abused me.” CP 67. Among other things, Koneru told Yalamanchili that she was an “incapable mother” and that Sruthi was better off with him. “He also told me that I never succeeded as much in life as I could have and that Sruthi needed to do better in her education than I did. I actually believed a lot of what he was telling me.” CP 62-63¹. In April, 2009, when Yalamanchili said she was interested in a separation, Koneru became angry and would not let Yalamanchili go anywhere alone with Sruthi. CP 63-64. He then

¹ In fact, Yalamanchili is a competent and gainfully employed Physician’s Assistant.

left for India, taking Sruthi with him over Yalamanchili's objection. This was the first time Yalamanchili and her daughter were ever separated. *Id.* Koneru told Yalamanchili that she would never see her daughter again unless she signed the divorce papers his lawyer had prepared. He said he would "find evidence" that would ensure a judge gave him custody. CP 238.

In November 2009, Yalamanchili flew to India for Sruthi's birthday and reluctantly signed Koneru's documents there. CP 64. As discussed below, the "agreed" parenting plan that Koneru ultimately submitted to the court is not the same one that Yalamanchili signed. Both versions provided that Sruthi would reside with Koneru except for specified vacations and short visits with Yalamanchili.

In December, Koneru said he would attend law school in the United States. He dropped Sruthi off with Yalamanchili in Houston and then moved to Snoqualmie, Washington. CP 64.

On December 3, 2009, Koneru filed a Petition for Dissolution in King County Superior Court. CP 1-5. Yalamanchili then hired a Washington lawyer and filed a "Revocation and Rescission of Joinder and Agreements Between Parties." CP 29-32.

On March 4, 2010, the parties appeared before Commissioner Meg Sassaman on Yalamanchili's motion for a temporary parenting plan, and Koneru's motion for permission to return to India with Sruthi. RP 1. By this time, Koneru had produced a *second* "agreed" parenting plan, providing Yalamanchili with even more restrictive access to Sruthi than either version of the first one. CP 190-97.² At the hearing, however, he suggested that the parties should follow the first one. The Commissioner found this suspicious.

The father . . . wanted to go back to an agreement that is now in dispute, not even the most recent one, but the one before the most recent one, which is confusing at best, and . . . [i]t brings his credibility into question. If he really thinks that these agreements were fairly and . . . with full capability entered into, why would we then be ignoring the most recent one and going back to the one before that one? It doesn't make sense.

RP 24-25.

After reviewing voluminous pleadings regarding the relative parenting abilities of the parties, and hearing oral argument, Commissioner Sassaman issued a temporary order placing Sruthi primarily with Yalamanchili. She also prohibited either party from removing Sruthi from

² In this brief, Yalamanchili will refer to both versions of the parenting plan signed in November, 2009 as the "first" parenting plan, and to the parenting plan purportedly signed in January, 2010, as the "second" parenting plan.

the country. However, Koneru could have the child for one week out of each month as long as he resided in the United States. CP 256-58. The commissioner appointed a guardian ad litem and ordered an interim report due May 4, 2010. *Id.* As discussed below, the court never received a report from the guardian ad litem because it summarily issued final rulings prior to May 4.

Following the Commissioner's ruling, Koneru filed a motion for revision, CP 259-69, and a motion to enforce the parties' "CR 2A Agreement." Supp. CP ____; Dkt. 36.³ He maintained that the settlement agreement "should be summarily enforced without trial." *Id.* at 15. In his view CR 2A required the court to enforce a written agreement "regardless of whether there are genuine disputes about its existence or terms." *Id.* at 16. Koneru still maintained that the parties had signed and agreed to two radically different parenting plans, (*id.* at 7-8) but stated that he would be "satisfied with enforcement of either signed parenting plan." *Id.* at 17. Incredibly, he maintained that he had prepared the more

³ "Supp. CP ____" refers to documents inadvertently omitted from Respondent-Appellant's initial Designation, but included in the attached First Supplemental Designation of Clerk's Papers. Also attached is the receipt showing it was filed with the King County Superior Court on September 13, 2010.

restrictive one – which accused Yalamanchili of significant misconduct – at Yalamanchili’s request. *Id.*

In her response brief, Yalamanchili argued that no version of the parenting plan was enforceable because she signed out of a well-justified fear that Koneru would otherwise keep Sruthi in India and prevent Yalamanchili from seeing her. CP 311. She also noted that the version of the first parenting plan submitted by Koneru was not the same one she had signed. CP 302. Koneru’s version gave Yalamanchili one-half of the summer if Koneru resides in the United States, while the one Yalamanchili signed gave her two-thirds of the summer under those circumstances. Further, Koneru’s version gave him the entire winter break if he resides in India, while the one signed by Yalamanchili gives her the entire winter break under those circumstances. *Compare* CP 318-26 with CP 350-58. *See also*, CP 390. In an e-mail dated November 6, 2009, (shortly before Yalamanchili signed) Koneru acknowledged that the parenting plan would contain the more favorable terms. CP 184.

On April 21, 2010, the parties appeared before Judge Michael Fox. RP 32. Yalamanchili, through counsel, pointed out that there were a total of three parenting plans before the court: the two versions of the first (November) parenting plan as well as the second (January) parenting plan.

RP 49-50. Yalamanchili understood that the version of the first plan she had signed was the one with the more favorable vacation terms. RP 52-53. In any event, she disputed that any version could be enforced. RP 50. Yalamanchili maintained that the terms of any final parenting plan should be decided at a trial, and after the guardian ad litem prepared her final report. RP 59-60. Although the guardian ad litem was present in court at the April 23 hearing, Judge Fox declined to hear from her because “we should confine ourselves to the record below.” RP 32.

After hearing argument, the court issued its ruling in a single sentence: “I find that the agreement that they entered into is a valid CR 2A agreement, and I think that ends all issues, and I’ll sign an order to that effect.” RP 65. The court then signed all the final orders proffered by Koneru, including his preferred version of the parenting plan. There are no findings, written or oral, that this plan is in the best interest of the child. The court found only that the plan was “the result of an agreement of the parties.” *See* CP 347-48.

In her motion for reconsideration, Yalamanchili reiterated that there were factual disputes relating to the content of the parenting plan as well as to whether Yalamanchili was coerced into signing it. CP 389-90. For that reason, the Court improperly granted a summary judgment in

favor of Koneru in violation of CR 56. CP 394-95. Judge Fox summarily denied the motion for reconsideration. CP 400-01. This appeal was timely filed. Supp. CP ____, Dkt. 62.

On September 7, Court of Appeals Commissioner Nell denied Yalamanchili's motion for a stay pending appeal. She agreed that Yalamanchili had raised debatable issues, but reasoned that the Court could decide this appeal quickly so there would be little harm in denying a stay.

IV. ARGUMENT

A. THE COURT IMPROPERLY RENDERED FINAL JUDGMENT WITHOUT A TRIAL WHEN THERE WERE MATERIAL DISPUTES OF FACT

Disputes regarding the validity of a settlement agreement are decided in the same manner as summary judgment motions under CR 56. *Marriage of Ferree*, 71 Wn. App. 35, 43, 856 P.2d 706 (1993). *See also*, *Lavigne v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001); *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696-97, 994 P.2d 911 (2000); *In re Patterson*, 93 Wn. App. 579, 583-84, 969 P.2d 1106 (1999). "The burden is on the moving party to prove there is no genuine dispute regarding the

existence and material terms of a settlement agreement.” *Ferree*, 71 Wn. App. at 41 (citations omitted).

The moving party must initially produce affidavits, declarations or other cognizable materials that show the *absence* of a genuine dispute of fact. If and only if the moving party does this, the nonmoving party must produce affidavits, declarations or other cognizable materials that show, internally or by comparison, the *presence* of a genuine dispute of fact. . . . The court must read the parties’ submissions in the light most favorable to the nonmoving party, and determine whether reasonable minds could reach but one conclusion. If so, summary judgment is appropriate. Otherwise, it is not.

Id. at 43-44 (citations omitted, emphasis in original).

The same standard applies when there is a material dispute regarding a *defense* to a settlement agreement, even when the agreement’s existence and material terms are undisputed. *Brinkerhoff*, 99 Wn. App. at 697. As with all issues reviewed under a summary judgment standard, appellate review of the trial court’s decision is *de novo*. *Id.* at 696.

Here, even assuming that Koneru met his initial burden, Yalamanchili amply rebutted it by raising genuine disputes through her own declarations. First, she declared under oath that the parenting plan submitted to the court by Koneru was not the same one she had signed. Yalamanchili did not dispute that Koneru produced a *signature page* containing her signature, but maintained that he had switched internal

pages concerning Sruthi's time with Yalamanchili during winter and summer breaks. *See* section III, above. She supported her declaration, in part, by producing an unsigned copy of the agreement containing the terms more favorable to her.⁴ The record also contains an e-mail from Koneru acknowledging that the plan would contain those terms. Because these vacations comprise almost all of the visitation provided to Yalamanchili under the parenting plan there can be no question that the dispute is material. Further, Koneru maintained that the parties had also agreed to a second, radically different, parenting plan although he did not seek to enforce it. As the superior court commissioner noted, the existence of multiple "agreed" plans called into question the validity of any of them. Thus, when the evidence is viewed in the light most favorable to Yalamanchili (the nonmoving party) there is clearly a genuine dispute regarding the terms of the settlement agreement which should not have been decided summarily.

Second, as discussed in section III, above, Yalamanchili maintained in her sworn declarations that she did not sign *any* parenting plan voluntarily, but rather was coerced into signing by Koneru. She

⁴ When Yalamanchili signed a parenting plan in India, Koneru did not give her a copy with the parties' signatures on them.

explained that Koneru controlled and demeaned her throughout the marriage; that he took Sruthi away to India when she requested a separation; and that he threatened to keep Sruthi from her forever if she did not sign his settlement papers. She maintained that her signature was induced by his threats and his domination over her.

“Duress” is one defense to a contract. *Pleuss v. Seattle*, 8 Wn. App. 133, 137, 504 P.2d 1191 (1972). It includes “any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.” *Id.*, quoting *Restatement of Contracts § 492* (1932).

“Undue influence” provides an additional basis for voiding a contract. “The law of undue influence therefore affords protection in situations where the rules on duress and misrepresentation give no relief.” *Gerimonte v. Case*, 42 Wn. App. 611, 614, 712 P.2d 876 (1986), quoting *Comment to Restatement (Second) of Contracts § 177* (1981). “Where one party is under the domination of another . . . a transaction induced by unfair persuasion of the latter, is induced by undue influence and is voidable.” *Id.* at 613, quoting *Restatement of Contracts § 497* (1932).

“Relations that often fall within the rule include those of . . . husband and wife.” *Id.* at 614, quoting *Comment to Restatement (Second) of Contracts* § 177 (1981). “The ultimate question is whether the result was produced by means that seriously impaired the free and competent exercise of judgment. Such factors as the unfairness of the resulting bargain, the unavailability of independent advice, and the susceptibility of the person persuaded are circumstances to be taken into account.” *Id.*

When all inferences from the evidence are taken in favor of Yalamanchili, a reasonable mind could conclude that she established both duress and undue influence. Koneru’s wrongful threats to keep Sruthi from Yalamanchili forever unless she signed his papers amounted to duress. Further, Koneru’s control and domination of Yalamanchili throughout the marriage amounted to undue influence. She had become susceptible to his demands through years of psychological abuse. The “unfairness of the resulting bargain” also tends to prove undue influence. Prior to the parties’ separation in April 2009, Yalamanchili had never been apart from her daughter, yet Koneru’s plan gave Yalamanchili at best a couple of months a year with Sruthi.

When Yalamanchili signed the separation papers, Koneru was essentially holding Sruthi hostage in India at the time, and the U.S. courts

could not compel him to release Sruthi since India has not signed the Hague Convention. CP 93. Further, Yalamanchili feared that she could not fight Koneru through the Indian court system, which she believed to be corrupt and easily influenced by Koneru's family. CP 64.

Thus, Yalamanchili amply raised genuine disputes of material fact regarding the terms and validity of the parenting plan and the matter should have proceeded to trial. *Cf. Brinkerhoff*, 99 Wn. App. at 699 (uncorroborated declaration of a single witness regarding purported oral statements of opposing party was sufficient to overcome summary judgment).

B. THE COURT ENTERED A FINAL PARENTING PLAN WITHOUT ADDRESSING THE REQUIRED FACTORS SET OUT IN RCW 26.09.187(3)(A)

Even if the trial court could properly have found that the parenting plan was part of a valid settlement agreement, that would be only *one* factor in favor of approving it. The trial court failed to make any inquiry or findings regarding the many other factors that it was statutorily required to consider. Its only finding in support of the parenting plan was that it was "agreed."

Washington has a long history of placing the best interests of a child before any agreements between the parents. "[W]e are more

concerned with the best interests and welfare of a minor child than we are with any alleged contractual rights or obligations, assumed by parents under a settlement agreement.” *Clarke v. Clarke*, 49 Wn.2d 509, 511, 304 P.2d 673 (1956).

The Parenting Act of 1987 expressly embraces this policy. “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 (“Policy”). More specifically:

The Parenting Act anticipates that the court will determine the child’s residential schedule based on the best interests of the child, as they can be determined at the time of trial, after considering the factors set forth in RCW 26.09.187(3)(a). Those factors include the following:

- “(i) The relative strength, nature, and stability of the child’s relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
- (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
- (iii) Each parent’s past and potential for future performance of parenting functions;
- (iv) The emotional needs and developmental level of the child;
- (v) The child’s relationship with siblings and with other significant adults, as well as the child’s involvement with

his or her physical surroundings, school, or other significant activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.”

Marriage of Littlefield, 133 Wn.2d 39, 52, 940 P.2d 1362 (1997). In *Littlefield*, the parties had entered into a prenuptial agreement providing that any child would spend equal residential time with both parents. The Supreme Court held that the trial court could consider this agreement as *one* factor under RCW 26.09.187(3)(a)(ii), but the agreement was not binding on the court. *Id.* at 58.

Of particular relevance to this case is the *Littlefield* Court's discussion of separation agreements. It noted that RCW 26.09.070⁵ expressly excludes parenting plans from those separation agreements that are binding on the trial court. *Id.* at 58. *See also, Marriage of Thier*, 67 Wn. App. 940, 944, 841 P.2d 794 (1992), *review denied*, 121 Wn.2d 1021, 854 P.2d 41 (1993).

⁵ The statute states in relevant part: “If either or both of the parties to a separation contract shall . . . petition the court for dissolution of their marriage . . . the contract, *except for those terms providing for a parenting plan for their children*, shall be binding on the court . . .” RCW 26.09.070(3) (emphasis added).

In *Marriage of Burke*, 96 Wn. App. 474, 980 P.2d 265 (1999), the Court of Appeals addressed a prenuptial agreement that prohibited either party from requesting attorney fees relating to any dissolution proceeding. The Court found that such a provision, when applied to parenting proceedings, violated public policy as expressed in RCW 26.09.002 and RCW 26.09.070(3). *Id.* at 478-80. “The state’s interest in the welfare of children requires that the court have the discretion to make an award of attorney fees and costs so that a parent is not deprived of his or her day in court by reason of financial disadvantage.” *Id.* at 480.

Thus, even if the trial court believes that the parties have executed a valid agreement regarding parenting, it still has a duty to ensure that the plan is in the best interests of the child.

Even if the divorcing parents agree as to every aspect of their dissolution, their stipulations must be approved and entered by a court to have effect, and a court must agree that a parenting plan jointly agreed to by the parents is in the best interests of the child. RCW 26.09.002, .181, .184, .187.

King v. King, 162 Wn.2d 378, 416, 174 P.3d 659 (2007) (Madsen, J., dissenting). Although this statement is contained in a dissent, it does not appear to be controversial. Certainly the majority in *King* did not disagree with this point. *See King*, 162 Wn.2d at 381-98 (holding that there is no

constitutional right to representation at public expense in a dissolution proceeding).

The trial court in this case, however, relied solely on its finding that the parenting plan was “agreed” without considering any of the other six factors required by statute. Yalamanchili presented substantial evidence and argument that the “agreed” parenting plan was *not* in the best interest of Sruthi. *See, e.g.*, Declaration of Respondent, CP 67-70. For example, she explained why she had the stronger and more stable relationship with Sruthi, and how she had taken greater responsibility for Sruthi’s daily needs, including her emotional needs. *See* RCW 26.09.187(3)(a)(i) and (iv). She was the “stay at home mother” from the time Sruthi was born until April, 2009, when Koneru took her back to India. CP 68. Yalamanchili also fostered Sruthi’s relationship with many loving relatives in the Houston area, including her grandparents. *See* RCW 26.09.187(3)(a)(v). She also maintained that Sruthi – a precocious girl by all accounts – expressed a clear preference for living with her. *See* RCW 26.09.187(3)(a)(vi). The Commissioner, who fully considered all parenting information provided by the parties, issued a temporary order placing Sruthi primarily with Yalamanchili.

In any event, this Court need not speculate as to what findings might have been made on this issue by the trial court. The appropriate remedy for inadequate or missing findings is a remand. *See, e.g., McCausland v. McCausland*, 159 Wn.2d 607, 620, 152 P.3d 1013 (2007) (cursory findings of fact, even when supported by the record, are insufficient); *Marriage of Horner*, 151 Wn.2d 884, 896-897, 93 P.3d 124 (2004) (conclusory findings are insufficient because their basis is unclear and appellate courts cannot review the trial court's decision); *Daves v. Nastos*, 105 Wn.2d 24, 711 P.2d 314 (1985) (reversing order changing child's name to that of biological father because court made no findings that the change was in the best interests of the child); *Kinnan v. Jordan*, 131 Wn. App. 738, 129 P.3d 807 (2006) (trial court's failure to make findings with respect to best interest of child on modification of parenting plan is error). Here, the trial court's complete failure to address the RCW 26.09.187(3)(a) factors is reversible error.

In addition, the trial court had a duty to hear from the guardian ad litem concerning Sruthi's best interests. *Daves v. Nastos, supra.*, is instructive on that point. In that paternity action, the trial court found that Nastos was the child's father. The court then granted Nastos's request to change the child's last name to his. The Supreme Court reversed because

the trial court failed to expressly consider whether the name change was in the best interests of the child.

[A] change in the child's surname should be granted only when the change promotes the child's best interests. Since the child's best interests are the ultimate fact on this material issue, the trial court is required to enter a finding on this issue.

Id., 105 Wn.2d at 30. Further, the trial court may not assume that the parties are acting in the child's best interest in such a matter. Therefore, "the child's guardian or guardian ad litem should take a more active role." *Id.* at 32. "The child's guardian cannot passively stand by, but must become an active participant and, under appropriate circumstances, obtain independent legal counsel to represent the child." *Id.*

In this case, however, the trial court never heard from the guardian ad litem even though she had been working on her report for almost two months. Although the guardian ad litem was present at the April 23, 2010, hearing, the court believed it improper to consider input from her because "we should confine ourselves to the record that we've got below." RP 32. While that statement may have been correct regarding Koneru's motion to revise the commissioner's temporary parenting plan, it was not correct regarding Koneru's motion to enforce the first "agreed" plan as a

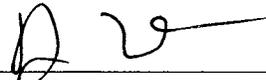
permanent order. The Court was in fact *required* to hear from the guardian ad litem so as to protect Sruthi's interests.

**V.
CONCLUSION**

For the reasons stated above, this Court should reverse the superior court, vacate the final parenting plan, and remand for a trial regarding an appropriate plan. One issue at trial will be whether the parties validly agreed to particular terms at some point in time, but any ruling on that issue should not control the crafting of an appropriate plan.

DATED this 13th day of September, 2010.

Respectfully submitted,



David B. Zuckerman, WSBA #18221
Attorney for Alekhya Yalamanchili

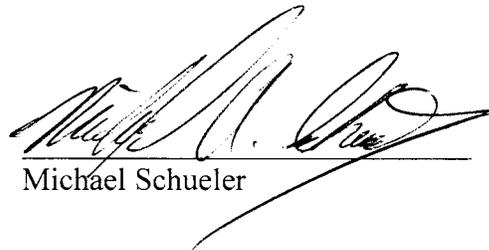
CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail, and e-mail, one copy of this brief on the following:

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9-3-2010
Date


Michael Schueler

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5 IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
6 COUNTY OF KING

7 DHEERAJ KONERU,

8 Petitioner-Appellee,

9 vs.

10 ALEKHYA YALAMANCHILI,

11 Respondent-Appellant.

KING COUNTY NO.: 09-3-07981-5 SEA

COURT OF APPEALS NO.: 65663-5-I

SUPREME COURT NO.:

THIS IS SUPPLEMENTAL YES NO

EXHIBITS ARE REQUESTED YES

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12 **RESPONDENT-APPELLANT'S FIRST**
13 **SUPPLEMENTAL DESIGNATION OF**
14 **CLERK'S PAPERS (Clerk's Action**
15 **Required)**

16

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CONFIRMATION RECEIPT

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