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THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

MELISSA MONTGOMERY (f/n/a NADIR),
Respondent

v.

WANIS NADIR
Appellant

REPLY BRIEF OF APPELLANT WANIS NADIR

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III. INTRODUCTION

When the trial court entered a modified parenting plan and child support order, it failed to enter the required findings of fact and conclusions of law. Of particular concern is the trial court ordering arbitrary restrictions on the child's father without any findings to support the restrictions, and without even facts in the record to support these restrictions. The trial court also did not have any type of final order presentation hearing where the court could have articulated oral findings of fact. The trial court also excluded some of the father's witnesses and testimony, because the court thought the mother was presenting evidence only regarding alleged domestic violence, and not abusive use of conflict. Yet, the trial court then placed restrictions on the father allegedly based on the mother's claims that the father had engaged in abusive use of conflict. The mother's brief is full of proposed findings that she wanted the trial court to make, but completely devoid of any citation to the record where the trial court actually made the required findings for the restrictions imposed. Under these circumstances and with this record, the trial court arbitrarily and in error entered a parenting plan, child support order, and attorney fee judgment without the required findings, either written or oral.

IV. ARGUMENT

A. The Father's Witnesses and Testimony That The Trial Court Excluded and Limited was Relevant And Prejudiced The Father's Case As It Went Directly To Co-Parenting And Lack Of Abusive Use of Conflict.

1. The trial court made several errors when it excluded Dr. McVittie's testimony, and the court's oral rulings regarding the testimony conflict with the court's parenting plan.

The mother's argument that Dr. McVittie's testimony was not relevant because the trial court thought only evidence regarding domestic violence was at issue, directly contradicts the mother's argument that restrictions should be placed on the father for alleged abusive use of conflict.

The trial court clearly erred when it excluded the father's evidence regarding parenting coaching and his efforts to reduce parental conflict as not relevant, when the trial court entered a parenting plan with provisions that the mother alleges are due to abusive use of conflict. The mother wants the court to affirm restrictions in the parenting plan, such as the requirement to post bond, for alleged abusive use of conflict, while disingenuously arguing that evidence showing that the father was not engaging in abusive use of conflict was not relevant at trial.

Dr. McVittie's testimony went directly to the father's trying to reduce parental conflict and receive parenting coaching from a doctor. RP

(July 3, 3013) 249-258. The mother's argument that Dr. McVittie's testimony was not relevant, is an erroneous argument that is not supported by the record or court rules. To allow parties to present their evidence and case to the trial court ER 401 broadly defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (emphasis added).

Here, Dr. McVittie's testimony is relevant as it went to both the father's parenting skills and his efforts to reduce conflict between the parties. These were two central issues at trial. Even though the trial court thought that the only issue at trial was whether domestic violence had occurred, this finding and limitation is an error of law because the trial court is required to consider the best interests of the child. It was also an error to limit the father's evidence at trial to only alleged domestic violence issues, when the trial court imposed restrictions that were not directly related to any alleged domestic violence. Also, the trial court applied this limitation on evidence and issues regarding domestic violence to the father's case only, and did not apply the same limitations on the mother. Even if the issues at trial had initially been limited to domestic violence, the mother's testimony opened the door to the father's parenting

skills and alleged abusive use of conflict as the trial court allowed her to testify extensively about these issues.

Additionally, the trial court's order directly contradicts its previous reasoning that evidence regarding alleged abusive use of conflict was not relevant, where the trial court imposed restrictions on the father's ability to file pleadings and motions in the case.

The mother now argues on appeal that Dr. McVittie's testimony was somehow prejudicial or cumulative. Neither of these arguments are supported by the record. First, the mother fails to identify how Dr. McVittie's testimony could have been unfairly prejudicial to her. The only unfair prejudice is to the father where the trial court allowed the mother to present testimony about the father's alleged lack of parental skills and alleged abusive use of conflict and excluded the father's evidence that directly contradicted the mother's testimony. The mother's argument that the court's finding of domestic violence shows no prejudice fails to follow well established case law that requires the court to consider the statutory factors, including the parental skills, and requires the court to make findings that support each particular restriction. The court imposed restrictions on the father with absolutely no findings to support them, such as the travel restrictions and the requirement to post a bond. Nor does a general finding of domestic violence support such restrictions. If this

court adopted the mother's argument, than a general finding of domestic violence could support any and all restrictions on a parent, regardless of whether those restrictions are supported by any evidence in the record.

Nor would Dr. McVittie's testimony be cumulative to the father's testimony, particularly where the father was not a doctor and could not testify regarding best techniques to reduce parental conflict and what was recommended for this particular case. Nor is the mother's allegation that Dr. McVittie did not have enough personal knowledge regarding the case any basis for excluding Dr. McVittie's testimony, where Dr. McVittie was qualified to testify as an expert witness and was allowed under ER 703 to testify regarding her expert opinions based on the facts she had knowledge about and her application of these facts to her opinion regarding the father's parenting skills and reduction of parental conflict. If this court adopted the mother's argument, then all expert witnesses would be excluded from testifying because they did not have personal knowledge of all of the facts in the case.

The mother's argument that Dr. McVittie's testimony would have been cumulative is not supported by the record where the testimony from family court services did not provide a parenting evaluation or information regarding the mother's alleged abusive use of conflict. Family court services provided a risk assessment, but did not provide a parenting

evaluation or conduct an investigation into the father's parenting skills. *See* RP at 181-182 (Family court services testifies that she did a risk assessment); *see also* RP at 199-200 (family court services representative testifies that she did not make recommendations in her report about decision making because she was not asked to conduct a parenting evaluation). Thus, Dr. McVittie's testimony was not cumulative and her testimony regarding the father's parenting skills and his efforts to reduce parental conflict were extremely relevant to the parenting plan.

2. The trial court erred when it refused to allow the father to call the mother during his case-in-chief or rebuttal, when counsel had previously reserved questions for the mother on several issues.

The mother's argument that the father should not have been able to call and question her as a witness during his case-in-chief because he only sought to impeach her, does not take into account the facts and record that show the numerous issues that the father's attorney wanted and needed to address through the mother's testimony during the father's case-in-chief.

The attorney's cross-examination of the mother was limited to within the scope of the direct examination when the mother testified on her own behalf. This limitation on cross-examination is one of the reasons why the father's attorney properly sought to call the mother to testify during the father's case-in-chief.

Additionally, witnesses who testified during the mother's case, and after the mother's testimony brought up new issues at trial that the father's attorney sought to address during the father's case-in-chief and by calling the mother as a witness. The father's attorney repeatedly told the court and opposing counsel that the mother would be called during the father's case-in-chief and that there were numerous issues that this testimony would address. *See* RP (July 2, 2013) 152 (father's attorney telling the court that additional questions for the mother would be reserved for when she was called during the father's case); *see also* RP (July 3, 2013) 229 (father's attorney telling the court that she would reserve questions regarding Ms. Montgomery's friend and daycare worker for direct questioning of Ms. Montgomery during the father's case). In addition to these issues, the father's attorney sought to elicit testimony regarding the mother's ever changing story regarding the alleged domestic violence, and the mother's false allegation that the father had thrown a chair during mediation and the mother subsequently recanting these allegations.

Thus, there were numerous issues and additional evidence that the father's attorney wished and needed to address by calling the mother as a witness during the father's case-in-chief. The trial court's refusal to allow the mother to be called during the father's case and the mother's untimely objection to being called during the father's case, substantially prejudiced

the father and his ability to present evidence to the trial court. The father was unable to present evidence and testimony that went to the essential issues of the case such as his parenting skills, his efforts to reduce parental conflict, and the mother's false allegations regarding mediation and domestic violence. Although credibility determinations are left to the trial court, here the trial court made credibility determinations without allowing the father to present his evidence and case. Accordingly, this court should remand for a new trial.

B. The Trial Court Erred When It Imposed Restrictions on Travel and a Bond Requirement And There Were No Findings or Facts To Support Such Restrictions.

The mother speciously attempts to distinguish the present case from *In re Marriage of Katare* based on the trial court's general finding that domestic violence had occurred.¹ The mother completely fails to take into account the case's language and other case law that holds that general findings are not enough to impose limitations or restrictions in a parenting plan without evidence to support such restrictions.

In *Katare*, the court was very clear "that any limitations or restrictions imposed must be **reasonably calculated to address the identified harm.**" *In re Marriage of Katare*, 125 Wn. App. 813, 826, 105

¹ We assume that this finding of domestic violence was based on the mother's testimony at trial that the father had committed domestic violence against her when they were married. The court should note that there were no allegations of domestic violence against the minor child, Nadir, in the trial testimony.

P.3d 44 (2004) (emphasis added). Thus, the trial court's general finding that domestic violence occurred does not support the restrictions in the parenting plan regarding posting bond and travel restrictions.

At trial there was absolutely **no** evidence that the father had tried or even threatened to improperly remove the child from the State. In her appeal brief, the mother now tries to argue that her allegations that the father sometimes did not exercise his visitation rights supports the travel restrictions in the parenting plan. At trial, the father and other witnesses explained that he was sometimes unable to visit with the child because he could not afford the supervised visitation fees or because the mother did not cooperate with setting up the visits. The mother's argument that a missed visit supports travel restrictions on a parent is completely illogical and devoid of any merit.

The mother also alleges for the first time on appeal that she has a good faith fear that the father may take the child in the future should not be considered by the court on appeal as there is absolutely no testimony in the record regarding any such fear or any basis for such a fear regarding the father's travel with the child. *See* Respondent's Appellate Brief at pg. 16 (alleging a new fear on appeal by the mother, with no citation to the record regarding any testimony at trial for this alleged fear).

The mother also alleges that the trial court determined that the travel restrictions and requirement to post bond was due to findings regarding harassment through the court process. See Respondent's Appellate Brief at pg. 15. Yet, the mother fails to make any citation to the record regarding any such finding by the trial court. In fact, there was **no findings** by the trial court regarding why the travel restrictions and bond requirement were included in the parenting plan. We have thoroughly reviewed the record and all of the testimony and have not found a single written or oral finding by the trial court regarding what facts, if any, support travel restrictions or the bond requirement.

If the court adopted the mother's proposal that a general finding of domestic violence in a parenting plan will support any and all restrictions that the trial court arbitrarily decides to impose, then this court would be overturning prior case law that requires "any limitations or restrictions imposed must be reasonably calculated to address the identified harm." *In re Marriage of Katare*, 125 Wn. App. at 826.

The trial court's lack of findings regarding the reasons for the restrictions and the lack of any evidence to support the travel and bond restrictions in the parenting plan are an abuse of discretion and should be reversed by this court.

C. The Trial Court Erred When It Refused To Grant The Requested Deviation In Child Support Based On The Father Supporting Two Children And When It Did Not Calculate The Child Support Based On The Father's Actual Income, Actual Taxes and Retirement Paid, & The Father's Medical Insurance Coverage of the Children.

In her brief, the mother alleges that the child did not receive a benefit from the father's medical insurance coverage because the father allegedly refused to authorize her on the card. However, if the court looks at the actual testimony of the mother at trial, she provided conflicting testimony about the child's medical insurance. At one point she claims that the father never provided medical insurance and she did not have a copy of the medical insurance card. At another point, she admits to receiving a copy of the medical insurance card and that a copy had been filed with the court.

The mother also argues that the trial court's language of "no good reason" is enough of a finding to deny the father's request for a deviation of child support because he was supporting two children. If the father had presented no evidence to the trial court that he was supporting two children, than the "no good reason" finding would have been enough to deny the deviation request.

But, where the father did present evidence of supporting two children, the trial court failed to make any findings regarding such

evidence and the deviation request. The father's financial declaration, paystubs, and bank statements presented to the court were all evidence that he supported two children. This included buying food, clothing, and providing a household with rooms for the children. *See* Trial Exhibits 69-74 (bank statements, paystubs, tax returns, and financial declaration of the father). The mother's argument that the father admitted that he did not have evidence at trial regarding child support payments is taken out of context. The father admitted during his testimony that he did not present the individual checks for child support as evidence. But, he presented his bank statements as evidence at trial which showed that he regularly made child support payments. *See* RP at 759-60 (Father's attorney explaining to judge that his bank statements showed his child support payments for his older son); *see also* Trial Exhibit 69 pg. 14 (showing \$300 check payment toward child support on 2/19/13), pg. 25 (showing \$300 check payment toward child support on 3/15/13), pg. 39 (showing \$260 check payment toward child support on 4/22/14), pg. 50 (showing \$250 check payment toward child support).

Also, the mother's argument that the father failed to disclose his spouse's income as required for the deviation request omits the fact that the father was not married at the time of trial. The father had a long-time girlfriend and they planned on getting married sometime in the future, but

were not married when the father requested the child support deviation. *See* RP at 385-86.

Additionally, the trial court's findings in the child support order conflict with the child support worksheet that it used to calculate the child support amount. For instance, in the child support order section 3.2(B) the trial court found that the father's gross income for child support purposes should be \$10,000. Yet, the trial court used \$10,403 as the father's gross income on line 3 of the child support worksheets; thereby inflating the father's income by \$403 monthly and improperly increasing the standard calculation amount. Nor are the other numbers the trial court used in the child support worksheet supported by the evidence in the record.

Another example of the improper calculations and numbers for child support is evident on line 2.f of the child support worksheet, where the trial court found that the father contributed \$364 monthly to his retirement account. The clear evidence at trial and in Trial Exhibit 70 of the father's paystubs shows that he contributed \$666 monthly to his retirement accounts. This error by the trial court inflated the father's net monthly income by \$302, which resulted in further error and improperly increasing the standard child support calculation.

The trial court erred in denying the deviation request where Mr. The trial court's lack of findings regarding the deviation request, refusal to

grant the deviation, and improper child support calculations should be reversed.

D. The Trial Court Erred When It Awarded Attorney Fees to Ms. Montgomery Without Any Basis or The Required Findings.

Without citation to the record or any such finding by the trial court, the mother argues that the trial court properly considered her attorney fee request and awarded the mother attorney fees. The mother also argues that attorney fees was proper because the trial was unnecessarily lengthy.

The mother's argument fails because there are no such findings by the trial court or facts to support her arguments about attorney fees. The fact that she filed a brief regarding her attorney fees and arguing different grounds for attorney fees, does not satisfy the law requiring the trial court to make findings before awarding attorney fees.

Nor does the award of attorney fees by the trial court provide us any findings or grounds to know what the trial court considered as the basis for awarding attorney fees. In her brief to the court, the mother argued that she should be awarded attorney fees on financial need or in the alternative for alleged intransigence. The trial court failed to make any findings in its award of attorney fees as to whether the mother had a financial need, or the father's ability to pay. Nor did the trial court make

any findings of intransigence. Thus, the trial court erred in awarding attorney fees.

Under RCW 26.09.140 and all known Washington State case law, the trial court must indicate in its written findings or orally on the record the method used to calculate the award of attorney fees and the basis for such fees. *See In re Marriage of Foley*, 84 Wn. App. 839, 930 P.2d 929 (1997); *see also In re Marriage of Van Camp*, 82 Wn. App. 339, 918 P.2d 509 (1996).

Even when there is a basis for fees, the trial court must first determine that counsel expended a reasonable number of hours and exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims. *Roberson v. Perez*, 123 Wn. App. 320, 344-45, 96 P.3d 420 (2004). The trial court must also determine and make findings regarding the reasonableness of counsel's hourly rate. *Id.* "Court's must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought." *Id.*

Here, the trial court's attorney fee award was error where the trial court made no findings regarding the basis of the attorney fee award, and no findings regarding reasonableness of the hours requested or the hourly rate.

E. The Mother's Does Not Have A Financial Need For Attorney Fees On Appeal And The Court Should Deny Her Request.

In her response, the mother claims a financial need for attorney fees on appeal, but does not provide any details about her financial situation. The court should be aware that the mother is voluntarily unemployed, because she has no need to work when her present husband makes more than enough to support her. Where a party has a spouse wealthy enough to pay all living expenses so that the party does not have to work, that party does not have a valid financial need for attorney fees on appeal. A party's choice not to work should not be grounds for financial need on appeal for attorney fees. If this was allowed, than it would encourage parties to not work or quit their jobs to then claim financial need.

V. CONCLUSION

The trial court made multiple errors of law both at trial and in its lack of findings to support the court orders. The mother's brief is full of allegations that she makes for the first time on appeal and findings that the mother wishes the trial court had made, but that were never actually made by the trial court. The trial court's errors resulted in prejudicing the father's ability to present his case at trial. It also resulted in restrictions on him that are not supported by the record. Nor did the trial court properly

calculate the child support. Accordingly this court should reverse and remand for a new trial.

DATED THIS 28TH DAY OF JULY, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Yasmeen Abdullah', written in a cursive style.

Yasmeen Abdullah, WSBA # 38832
Attorney for Appellant, Wanis Nadir

CERTIFICATE OF FILING AND SERVICE

I certify I caused the foregoing and its attachments, if any, to be

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Record

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July 28, 2014 _____;

I certify under penalty of perjury under the laws of the State of Washington the foregoing is true and correct to the best of my knowledge.

Signed at Seattle, Washington, on July 28, 2014 .

ABDULLAH LAW FIRM, PLLC



Yasmeen Abdullah, WSBA 38832
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