

No. 47789-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BUCK THOMPSON,

Petitioner,

v.

KATIE HOLT (FKA ACKERLUND)

Appellant

ON REVIEW FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR PIERCE COUNTY

RESPONSIVE BRIEF OF PETITIONER

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I. INTRODUCTION

The trial court correctly found that there was admissible evidence sufficient to modify the parties previous parenting plan and therefore the decision of the lower court should not be disturbed.

II. ASSIGNMENTS OF ERROR

Issues Pertaining to Appellant's Assignment of Error

1. Whether there was an evidentiary basis to admit the Declaration of Colleen Hicks?
2. Were the requirements of the Business Records exception to the Hearsay Rule satisfied by testimony of Chaplain Fry?
3. Did the testimony of Buck Thompson and his wife, Brandi Thompson, violate the Hearsay Rule?
4. Was the trial Court bound to follow the recommendations of the Guardian ad Litem?
5. Was there substantial evidence for the trial court to find that there was a detrimental environment in the mothers home?

III. STATEMENT OF THE CASE

A. Procedure

This case was initiated on February 28th, 2014 by Buck Thompson. In his initial Petition, Buck alleged that the children had made disclosures of

physically, emotional, and sexual abuse while they were in their mother's care. Trial took place on May 4th, 5th, and 7th, 2015. Two Guardian ad Litem were appointed. The first, was discharged. The second, Christine Kerns, submitted an initial report and testified at trial. The Court issued an oral ruling on May 7th, 2015.

B. Facts

During trial, Buck testified that he received the children on June 4th, 2013 in Florida at a tractor supply. RP 42. The children were delivered in an unfit condition. According to Buck, Tyson wore shorts that were dirty and falling apart, Korie had a small skirt on with flip flops. RP 42-43. He reported that the children were "quiet and standoffish". RP 43. Brandi Thompson echoed these concerns. RP 76-78. Buck went on to disclose that the children, after they were at his home in Washington State for a period of weeks, started to disclose that they were "beat". *Id.* Buck immediately went to his First Sargent on base and enrolled the children in counseling with Colleen Hicks. RP 46. Buck also enrolled the children in counseling on base under the supervision of Chaplain Fry. *Id.*

Buck also testified that on or about December 27th, 2013, Tyson became very agitated and upset and asked Buck to leave the area in order to tell what he was upset over. RP 50. Brandi Thompson also testified that the children disclosed disturbing events regarding the abuse the children suffered. She

testified that at first, the children were stiff, like they were afraid to say anything. RP 78. Brandi testified that while the children were out at the park, Tyson told both Buck and herself that he had to “break them up” or he would be “beat” when he returned to Florida. RP 79. Brandi also testified that that Korie indicated that her mother hit her in the head with the hair brush if she pulled away from her mother. RP 80. Korie also indicated that her mother hit her in the face with a flat iron, which left a scar. RP 81. Brandi testified that in December of 2013, Tyson began to cry and shut down. RP 81. He would not disclose what was wrong, and finally Korie indicated that while she was in her mother’s care, the children were told to touch people in inappropriate places.

At trial, the Court allowed the testimony of Christine Kerns, the Guardian ad Litem (“GAL”). The GAL initially submitted a preliminary report on April 20th, 2014. RP 7. This report contained no recommendation, no findings, and contained a request for more time. RP 7. This report was admitted as exhibit 55. The GAL had requested additional time because she was unable to make final recommendation because it was so close to trial. RP 7, Exhibit 55. The GAL then indicated, via email, admitted as exhibit 66, that she was going to make final recommendation in the case. This sudden shift came only two days prior to trial. *See* Exhibit 66.

During direct examination, the Guardian ad Litem testified that she did not interview the children's primary counselor, had serious concerns about the children's initial counselor, Colleen Hicks, and based her recommendations primarily on a phone call with an army investigator and her interviews with the parties. The GAL testified that Colleen Hicks had been an investigator for 15 years and have worked with children who had experienced trauma. RP 18. The GAL testified that Colleen Hicks thought the children were telling the truth about the abuse allegations and that they were not coached. *Id.* The GAL believed that Colleen Hicks did not complete a thorough investigation. RP 29. The GAL did not discuss this case with the children's primary counselor, Chaplain Fry. RP 19. She did, however, rely on the representations of Agent Graham, the CID investigator, regarding Chaplain Fry. RP 28. Agent Graham apparently alluded that Chaplain Fry thought the children had been coached but had no evidence of such, other than the statement of Agent Graham. *Id.*

The GAL relied heavily on the report of the CID officer, Agent Graham. RP 27-28. The GAL had only spoken to Agent Graham via phone and had not seen any investigative documents from Agent Graham. RP 33. When asked why she found the CID report more credible than Colleen Hicks or Chaplain Fry, she stated that it had huge amounts of collateral information. RP 33. However, in response to the following question "But you haven't

seen any of that documentation, though, correct”, she stated, “I was taking Agent Graham’s word for it”. She also indicated that she did not have any records from Chaplain Fry and she did not talk to him. *Id.* On redirect, the GAL said that the choice to use collateral information from in a therapeutic setting was a professional decision, when discussing the reports of Colleen Hicks. RP 34.

The trial court, in its oral ruling stated: “Ms. Kerns report is troubling. On the eve of trial, she contradicts her original recommendations without providing any sufficient basis for those recommendation to return the children to the mother and restrict the father’s residential time, except based on coaching, or her conclusion that the children were coached. The Court cannot use the Guardian ad Litem to vouch for whether there was a breach of duty by Colleen Hicks or her evaluation of the documents she reviewed from Chaplain Fry.” RP 230.

The Court admitted exhibit 13, the declaration and statement of Colleen Hicks because counsel for Katie Holt read the document into the record. Buck admitted Exhibit 13, and argument was heard, that counsel for Katie Holt read and used the documents during his case in chief. RP 217. The Court stated, “For the allegation aspect of exhibit 9 and 10, I am going to admit those now. I had reserved on that based upon examination. I am not assuming, just as I indicated with the other documents I have admitted, the

truth of the allegations.” RP 218. Similar logic was applied to Exhibit 13, admitted at the same time as exhibit 9 and 10.

From RP 175 through RP 181, counsel for Katie Holt read, line by line, the sealed confidential reports of Colleen Hicks into the record. Although not specifically identified by exhibit number, counsel indicated that the line of questions between RP 175 and RP 181 was based upon the statement of Colleen Hicks. RP 177. After a motion brought by Buck, the Court reserved the admission of Exhibit 13, “I’ll come back to that. I want to let Mr. Benjamin finish. I understand the genesis of your motion. Also, basically there are allegations that Mr. Benjamin’s client denied and some that have some perhaps legitimate understanding of what this witness testified to.” RP 182.

The children’s primary counselor, Chaplain Fry, testified at the time of trial for the narrow purpose of authenticating medical treatment records for the children. Just weeks prior to trial, Chaplain Fry disclosed a full set of medical records for the children. These records were printed and organized by child, into exhibits 4, 5, 6, 7, 8, 8A, 9, and 10. Exhibits 4-6 were treatment plans for the children. Exhibit 7 was process notes, including counselor notations. Exhibit 8 was a timeline prepared by Chaplain Fry of his counseling with the children. Exhibit 9 was a letter to the Tacoma Police

Department created by Chaplain Fry and Exhibit 10 was a letter to the Garrison Commander created by Chaplain Fry.

Exhibits 4, 5, 6, and 8A were admitted after Chaplain Fry testified to the Court. RP 126. The trial court identified that two issues present with the admission of the proposed treatment exhibits. RP 113. The court stated, "I think there are two things. One, the records custodian can provide the authentication of the records, if they are the person responsible for maintaining and keeping the records. The issue then becomes; the content of the documents is something different." RP 113. The first issue the court indicated was one of foundation. Chaplain Fry testified that he was the records custodian of the proposed exhibits, that he was responsible for maintaining the records, that the exhibits were documents that were kept in the ordinary course of the counseling process, that the documents were made at or near the time of the counseling, the records were made by someone with the knowledge or was present at the counseling, and that the documents submitted were true and correct copies. RP 116-117. Counsel for Buck argued that he had submitted true and correct copies of the counseling records that Chaplain Fry had submitted via email and that had been disclosed as the exhibits. RP 121.

The second issue with the exhibits was one of content. RP 113. Chaplain Fry testified that he supervised the counseling of the three Thompson

Children, that there were three counselors doing the direct counseling with the children, that he directly supervised those counselors during the course of treatment, that he was involved in the treatment plans, he reviewed the files of the children, that he talked with the three counselors and that he talked with them prior to the sessions and afterward. RP 115-116.

After direct examination and cross examination of Chaplain Fry, the Court separated the exhibits at issue into two parts. Part one consisted of exhibits 1, 2, 3, and 7. Part two consisted of exhibits 4, 5, and 6. RP 123. The Court quickly dispatched with the argument that there was an issue with late disclosure of the exhibits. RP 124. The Court stated that both parties had issues with late disclosures and that the Court remedied that issue by giving both attorneys time to review the objectionable materials and prepare. RP 124. The Court then found that there was proper foundation had been laid for the records custodian to authenticate the records. RP 124. Foundation was laid because the records were on U.S. Department of Arney letterhead, Court found they were in fact the records provided by counsel for Buck, and Chaplain Fry testified to their authenticity RP 124.

Having resolved the foundational issue with the proposed exhibits, the Court moved onto issue two. The Court was troubled that exhibits 1, 2, 3, and 7, were created by interns, although they were under the supervision of Chaplain Fry. RP 125. The court did not admit these exhibits. RP 125.

Despite the issues with exhibits 1, 2, 3, and 7, the Court did admit Exhibits 4, 5, and 6. RP 126. During her ruling on the issue, the Judge stated that the Court was concerned with the treatment plans for the children, as these were in the best interests of the children and that the treatment records were going to be admitted for the purpose of defining the where the children are. RP 125. The Court also found that the Guardian ad Litem recommended that the children obtain counseling, had known of the counseling reports and additional foundation for admitting the documents were included in the GAL's testimony and recommendation. RP 125. Regarding the child hearsay issue, the Court specifically stated that the Court would not consider whether the statements were true or not but rather the reports were used to see what was recommended for the children by their primary counselor. RP 126.

The Court admitted exhibits 8A, which was a cover page to a narrative report of Chaplain Fry. The Court also admitted Exhibits 9 and 10. Initially, the admission of Exhibits 9 and 10, was reserved for further testimony. RP 130. Counsel for Katie, read into the record much of Exhibit 9 and 10. RP 170-175. The Court admitted Exhibits 9 and 10, stating "I want to at least have the ability to reference those. I am not assuming, just as I indicated with the other documents I have admitted, the truth of the allegations." RP 218.

IV. LEGAL AUTHORITY AND ARGUMENT

A. Standard of Review

A trial courts determination in a parenting plan modification should not be disturbed absent an abuse of discretion. In re the Marriage of Hansen, 81 Wn.App. 494, 498, 914 P.2d 799 (1996). Trial courts are given broad discretion in matters dealing with the welfare of children. In re McDole, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993.) Thus, a trial courts decision will not be reversed on appeal unless the court exercised its discretion in an untenable or manifestly unreasonable way. Id. The court in Hansen went on; “Moreover, a trial court’s findings will be upheld if they are supported by substantial evidence.” Substantial evidence is that which is sufficient to persuade a fair minded person of the truth of the matter asserted. In re Marriage of Kartare, 175 Wn. 2d 23, 36, 283 P.3d 546 (2012). Id. A courts decision is manifestly unreasonable if it is 1.) outside of the range of acceptable choices, given the facts and the applicable legal standard; 2.) if the factual findings are unsupported by the record; 3.) it is based upon an incorrect standard or the facts do not meet the requirements of the correct standard. In re Marriage of Littlefield, 133 Wn. 2d, 39, 47, 940 P.2d 1362 (1997).

A trial court can modify a parenting plan or custody order only if a substantial change has occurred in the circumstances of the children or the

nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interest of the child. RCW 26.09.260(1). In applying these standard, the court shall retain the residential schedule unless, among others, “the child’s present environment is detrimental to the child’s physical, mental or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.” RCW 26.09.260(2)(c).

If the trial courts finding that the standard set forth in RCW 26.09.260 was supported by substantial evidence, and the decision of the court to modify the parenting plan was not manifestly unreasonable or made on untenable grounds, then the trial court did not abuse its discretion.

B. There is substantial evidence that supports the conclusion of the trial court to modify the Parenting Plan.

The trial courts decision was based upon the testimony of Buck and Brandi Thompson, Exhibit 13, and Exhibits 4, 5, 6, 8A, 9 and 10. The testimony and exhibits were properly authenticated, proper foundation was laid, and they were properly admitted. The findings that the detrimental environment standard, described in RCW 26.09.260, was met and indeed supported by facts on the record sufficient to persuade a fair minded person of the truth of the matter asserted.

i. The testimony of Buck Thompson and Brandi Thompson did not violate Evidence Rule 802.

The issue here is whether the testimony of Buck and Brandi Thompson regarding the facts around the children's disclosure of abuse violated Evidence Rule 802. Generally, "hearsay is not admissible except as provided by these rules, by other courts rules, or by statute". ER 802. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted. ER 801. Buck and Brandi Thompson testified to two incidents when the children disclosed abuse. RP 45, 50, 78-83. Both Buck and Brandi testified to the facts surrounding the disclosure of physical, emotional, and sexual abuse. Both Buck and Brandi were present for components of these disclosures by the children. The court repeatedly overruled hearsay objections, stating that the the Court was trying to get an understanding of what was happening from each witness's perspective. RP 80. The Court also stated that the objections would go to weight. RP 45, 50, 78-80.

The Court was allowing the witnesses to testify about events that unfolded before their eyes. The Court was not in fact taking the statements of the children as evidence of the truth of the matter asserted, rather the Court was allowing into evidence testimony regarding the *circumstances* surrounding the disclosures as witnessed and processed by both Buck and

Brandi Thompson. Thus, these statements did not fall under the hearsay rule. The Court made this very clear after objections were made, giving Counsel for Katie Holt the opportunity to challenge the weight of the witness statements on Cross examination. RP 45, 50, 78-80.

The Court did not allow in inadmissible hearsay, rather it allowed in eye witness testimony about the facts and circumstances surrounding disclosure of abuse.

ii. Exhibit 13 was properly admitted under ER 106 and the admission of Exhibit did not violate Evidence 802.

The issue here is whether Exhibit 13 was properly admitted and whether its admission violated ER 802. ER 802 indicates that hearsay is not admissible unless, among other reasons, it is allowed by other rule. ER 802. ER 106 states that when a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it. ER 106.

Beginning at RP 175 through 181, a large portion of Exhibit 13 was read into the record by the Counsel for Katie Holt in question format. Buck, through counsel, made a motion for the Court to admit and review the entirety of Exhibit 13. RP 182. The Court reserved but did admit the

document under this theory at the close of the trial. RP 218. Counsel for Katie Holt had previously made a ER 106 motion and at the time of trial, it was clear to the Court that ER 106 was applicable to the reading of those allegations. RP 182 and 218.

Since the document was introduced and read into the record by Katie Holt, it was proper for the trial court to admit the entirety of the document because it was fair for the entire document to be considered contemporaneously by the Court when it considered the testimony of Katie Holt. The Court did not err in admitting Exhibit 13 because it was admitted under ER 106 and thus the statements in the exhibit do not violate ER 802. In addition, the Court stated clearly on RP 218, that it was not necessarily assuming the truth of the allegations, rather, the Court wanted to reference those allegations and the treatment recommendations of the counselors. Id.

iii. Proper Foundation was laid for the admission of Exhibits 4, 5, 6, 8A, 9 and 10 under the business records exception to ER 802 and the Court took proper steps to protect against the admission of child hearsay.

The issue here is whether proper foundation was laid for the admission of ER 4, 5, 6, 8A, 9 and 10 under the business records exception to the hearsay rule. RCW 5.45 makes evidence that would otherwise be hearsay competent testimony. RCW 5.45. To be admissible, the following must be true; 1.) the business record must be in record form; 2.) be of an act,

condition, or event; 3.) be made in the regular course of business; 4.) be made at or near the time of the fact, condition, or event; and 5.) the court must be satisfied that the sources of information, method and time of preparation justify admitting the evidence. State v. Fleming, 155 Wn.App. 499, 228 P.3d 804 (2010). The trial courts decision to admit these records should not be disturbed absent a manifest abuse of discretion. Id. Further, under RCW 5.45, business records are presumptively reliable if made in the regular course of business and there was not apparent motive to falsify. Id.

This exception does not require the person who created the document to actually testify, rather it only requires one who has custody of the record as a regular part of his work or who has supervision of its creation. Id. Citing State v. Iverson, 126 Wn.App. 329, 338, 108 P.3d 799 (2005).

The Court in Fleming discussed a particularly relevant point to the case at bar; what happens when there is a question as to the accuracy of the records admitted. The Fleming Court found that there are no Washington cases on the topic specifically, but after a review of out of state cases (State v. Marston, 200090589 (La. 3/16/01); 780 So.2d 1058, 1064; People v. Montroy, 225 A.D. 2d 913, 639 N.Y.S. 2d 522 (1996); and Graham v. State, 547 S.W.2d 531, 538 (Tenn. 1977)) and the dicta of a Division One case (State v. Ben-Neth, 34 Wn.App. 600, 602 n.2, 663 P.2d 156 (1983), stating “where actual error is suspected the challenge should be to the accuracy of

the business record, not to its admissibility”); it found that tge accuracy issues of admitted business records do not go to admissibility, but to weight. Id. At 500-501.

In this case, the Court admitted exhibits 4, 5, 6, 8A, 9 and 10 after Chaplain Fry testified that the documents were made in the ordinary course of business, he was the person in charge of maintaining the records, the documents were made at or near the time of counseling, it was made by those with knowledge of the events, and that they were true copies. RP 116-117. The records were medical reports and treatment plans, clearly business records. Proper foundation was laid and the documents were correctly admitted under the exception.

Katie Holt, through counsel, objected arguing that the records could not properly authenticated because Chaplain Fry could not physically see the documents. RP 118. However, the Court was satisfied that the documents were what they said they were after an explanation of Buck’s counsel of the submission of the exhibits and the testimony of Chaplain Fry. RP 121. The objection from Katie Holt is one of accuracy; are the documents true representations of the documents. In Fleming, Division Two already decided this issue, the accuracy issue pertaining to Exhibits 4, 5, 6, 8A, 9 and 10 *go to weight and credibility, not admissibility*. Katie Holt had time to cross examine the witness and the exhibits. RP 118-119.

The Court did not manifestly abuse its discretion because its ruling was based upon the correct legal standard, based upon facts in the record, and was not outside of the applicable choices, given the legal standard at issue. Therefore, the Court did not err or abuse its discretion when it admitted the exhibits.

C. The Trial Court did not exercise its discretion in a manifestly untenable or manifestly unreasonable way when it found the standard enumerated in RCW 26.09.260 were met and that standard was met with substantial evidence.

The issue here is whether the trial courts finding that the requirements to modify a parenting were met under RCW 26.09.260. A trial courts ruling will only be disturbed is if was manifestly unreasonable or untenable and was not supported by substantial evidence. *Supra* section IV(A).

In the case at bar, the Court properly allowed the testimony of Buck and Brandi Thompson, properly admitted exhibits 4, 5, 6, 8A, 9 and 10 under the business records exception, and properly admitted exhibit 13 under evidence rule 106. *Supra* sections IV(B)(i), (ii), and (iii). This evidence, taken in aggregate or separately are enough to convince a fair minded person that Buck Thompson was telling the truth.

Moreover, the Courts ruling was not manifestly unjust or untenable. A ruling is untenable or manifestly unreasonable when 1.) outside of the range of acceptable choices, given the facts and the applicable legal standard; 2.)

if the factual findings are unsupported by the record; 3.) it is based upon an incorrect standard or the facts do not meet the requirements of the correct standard. Littlefield at 47, 940 P.2d 1362 (1997). In this case, the record is clear and there were facts in the record that support a finding that the children were abused and that the mothers home was a detrimental environment. The findings were made upon the correct legal standard. RP 226-230. The findings were within the acceptable choices, either modify or do not modify, given the standards enumerated under RCW 26.09.260.

The trial courts ruling was not manifestly unreasonable or untenable and it was supported by substantial evidence.

D. The Trial Court did not err when it did not follow the recommendations of the Guardian ad Litem.

The final issue is whether the trial court erred by not following the recommendations of the GAL. Although the GAL in this case was to make recommendations, the Court is not bound by those recommendations. McDaniels v. Carlson, 108 Wn.2d 299, 312, 738 P.2d 254 (1987); see also In re Marriage of Magnuson, 141 Wn.App. 347, 350, 170 P.3d (2007)(stating a trial court is not bound by a GAL's recommendation and the standard of review is abuse discretion). A courts decision to not follow a GAL recommendation is reviewed as an abuse of discretion. Id.

In the case at bar, the Court did not give the recommendations of the GAL significant weight because of the facts disclosed during the GAL's testimony. The GAL did not talk to the children's primary counselor, she talked only to a CID investigator yet did not review any of those records, she changed her recommendations on the eve of trial, she did not account for her interview with Colleen Hicks, and her report was generally questionable. The Court specifically found that it was troubled by the report of the GAL stating "One the eve of trial she (GAL) contradicts her original recommendations without providing any sufficient basis for those recommendations to return the children to the mother and restrict the fathers residential time, except based upon coaching, or her conclusion that the children were coached." RP 230.

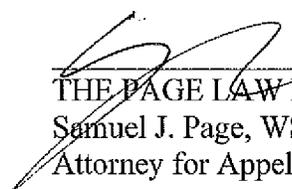
The Courts finding that the GAL was not credible was supported by substantial evidence and the decision to not follow the recommendations of the GAL was not an abuse of discretion, as it was an appropriate choice within the applicable legal framework and the decision was supported by facts on the record.

V. CONCLUSION

The trial court properly concluded that the factors defined in RCW 26.09.260 were met. The facts on the record provided substantial evidence that the children were abused in the mothers care. The testimony of Buck

and Brandi Thompson did not violate the hearsay exclusion rule. Exhibit 13 was properly admitted under Rule 106. Exhibits 4, 5, 6, 8A, 9 and 10 were properly admitted under the business exception rule. The trial courts ruling should not be disturbed.

Dated this 30th day of March, 2016.



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CERTIFICATE OF SERVICE

I certify that on March 30th, 2016, I caused a true and correct copy of this Brief of Petitioner to be served on the following in the manner indicated below.

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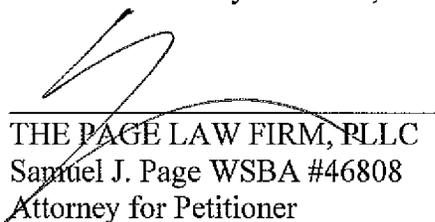
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PETITIONER

Buck Thompson via Email

Dated this 30th day of March, 2016 at Tacoma, Washington 98402.


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