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COURT OF APPEALS NO. 304523

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

In re the Marriage of

KENNETH NICHOLS,

Appellant,

and

GLORIA NICHOLS,

Respondent.

Court of Appeals No. 304523

Sup. Ct. No. 10-3-03142-0

RESPONDENT'S BRIEF

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I. INTRODUCTION

After a three day trial and lengthy testimony of the parties and the Guardian Ad Litem, the court found both parties to be in a highly emotionally charged divorce.

The court found both parties needed counseling to deal with their emotions Respondent for allowing the Petitioner “to push her buttons”, the Petitioner for inciting anger and resentment and choosing to call authorities rather than deal productively with his interpersonal relationships. Most troublesome to the court was the Petitioner’s complete and utter lack of insight about his role in conflicts with previous wives girlfriends and even his own mother.

The Guardian Ad Litem appointed in this matter found the Petitioner to have called complaining of Domestic Violence on eleven (11) different occasions with at least three (3) other women. *CP 353-363; CP 436-493*

Petitioner was persistent with his belief that his wife was a Domestic Violence Perpetrator, child abuser and unsuitable parent. The court did not find this to be true. The Petitioner did not produce any credible evidence of domestic violence, child abuse, or impairment which would make the Respondent an unsuitable parent.

Instead, the court found that Ms. Nichols was the primary

care provider to their two year old child. The court found that Mr. Nichols went to work every day for two years prior to this action without a single concern for the safety of their child. Ms. Nichols stayed in the family home and exclusively took care of this child. The Petitioner's testimony was unconvincing in spite of his assertion that his wife was violent.

II. AUTHORITY

The Supreme Court in the *Marriage of Landry at 103, Wn. 2d 807(Wash. 1985)*, clearly states that the Standard of Review for the Court of Appeals to review the decision of a Trial Judge is Abuse of Discretion. The court further opined "Appellant courts should not encourage appeals by tinkering with them".(trial courts decisions) . " The emotionally and financial interests affected by such decisions are best served by finality." (*Supra*).

Nowhere in Appellant's entire Opening Brief does he indicate the trial court abused its discretion. Should the Court of Appeals decide not to dismiss this appeal out of hand for lack of proper basis to appeal, the Respondent responds to the following assignments of error.

III. PETITIONER'S STATEMENT OF THE CASE IS AN ENTIRE MISCHARACTERIZATION AND HENCE IMPROPER

Ms. Nichols did not commit domestic violence by having a door battle resulting in a scrape on the arm to her husband. Ms. Nichols did

not commit domestic violence by mistakenly returning to the family home after the state quickly declined charges after her arrest from the door incident. The Trial court found specifically on Revision “Respondent returned to the family home due to a mistake not impulse”. *CP 132*

It was admitted that Ms. Nichols had a temper but having a temper is much different than having an impairment which would prohibit a parent from continuing to primarily care for her child. Ms. Nichols was attending counseling to address her temper. Mr. Nichols was ordered to attend counseling to address his difficulty in his interpersonal relationships.

It was especially probative for the trial court that Mr. Nichols took absolutely no personal responsibility in his difficulties with virtually every person with whom he has a personal relationship (including his mother) .

He has called law enforcement eleven (11) times involving three (3) women complaining of domestic violence for his perceived slights. Mr. Nichols systematically believes that whatever story he presents at any time is gospel and it is necessary error to interpret the facts he relates as anything but truth. Notice on Appeal he does not ask the court to disturb these specific finding by the trial court that he himself has a problem with anger, power, and relating to others.

It is undisputed that the parties’ two year old child was

primarily attached and principally cared for by her mother the Respondent. It took the trial court, in its unique position to appreciate the evidence and the posture and demeanor of parties, to return this child home to the parent the child was developmentally bonded to.

Discovery

The witness the Petitioner listed in his Joint Trial Management Report five (5) days before trial was intended to ambush the Respondent. Such a tactic is prohibited. To suggest that they should have been allowed in the Petitioner's direct is to condone a practice of "blind man's bluff" contrary to the rules. *McGugart v. Brumback*, 77 Wn 2d 441, 441, 463 P. 2d 140 (1969) *citing Moore v. Kessey*, 26 Wn 2nd 31, 173 P. 2d 130 (1946).

Scheduling orders were designed to eliminate the "hide and seek" trial practices encouraged by earlier procedures. *Id* The rules serve to narrow the issues and provide access by all parties to the facts pertinent to the issues. *Id*

As stated in *Rhinehart v. Seattle Times*, 98 Wn. 2d 226, 232, 654 P. 2nd 673 (1982), the purpose of the rules is to prepare their case for trial. They attempt to remove secrecy and surprise from trial, thus presenting the fact finder with a less dramatic, but more accurate, presentation of information. *Id*

Mark Miller and Barbra Frettich were interviewed in the Guardian ad Litem report. However, the remaining witnesses were not interviewed.

The Petitioner was afforded the opportunity to depose the GAL and did so two weeks before trial. Even after this opportunity he chose to ask the trial court to adopt his version of reality alone. He was afforded further the opportunity to call his witness to rebut the testimony of the GAL satisfying the *Burnet* requirements and declined. *Burnet v. Spokane Ambulance*, 131 Wn. 2d 484, 933 P.2d.

IV. RESPONSES TO THE ASSIGNMENTS OF ERROR / ISSUES

1. The court made no finding of domestic violence as to Ms. Nichols nor did any entity. Nor did the court find that abuse exists with her teen age children Nicholas and Alexandra. No abuse was reported by the Guardian Ad Litem.

RE: Domestic Violence charges of December 23, 2012 those charges were not dismissed but declined – as having not been tenable on a more probably than not basis.

RE: Child Abuse Child Protective Services (CPS)

All Child Protective Service Records show no finding of abuse or neglect. All records discovered were generated by the Respondent's ex- husband his mother or ex- husband's brother in law. All

were investigated and all were determined to be unfounded. *CP 353-363*;
CP 436-493

Now there existed conflict between Respondent and her teenage children and on one occasion she admitted to slapping her teen age son but neither CPS nor the guardian ad litem nor the trial court found this rose to the level of child abuse or neglect. Petitioner's first assignment of error is a total miss statement of facts present at trial. RCW 26.09.191 specifically carves out the mandate that there must be showing of a "history of domestic violence" no such showing was made.

Clearly here the Petitioner wishes he proved his case at trial. He does not seem to understand that repeating these allegations does not make them true. Nothing in the record supports acts or history of domestic violence except Petitioner's self serving statements and witness's who harbor resentment towards the Respondent. This is hardly the proper basis for appeal.

2. The court issued a Scheduling Order in this matter which firmly laid out the discovery cut off dates. Any stay issued in this matter for a GAL investigation pertains only to children under investigation. A stay does not pertain to the parties themselves or any witness they intend to call at trial.

It is asserted here the Petitioner did not know he could

depose Ms. Nichols. This assertion is an improper basis for appeal for he was represented, considerably educated and charged with knowing he could depose his soon to be ex- wife prior to trial.

The trial court did allow the Petitioner to depose the Guardian Ad Litem in this matter before trial because the report was not completed two weeks before trial.

The record supports both the Respondent and Petitioner waived the 60 day requirement for the report to be completed 60 days before trial. Essentially, because the Petitioner was so confident the Guardian ad Litem would support his position he failed to prepare a case.

Contrary to what is argued here, the trial court did not admit documents from the YWCA advocate offered at trial. Ms. Nichols specifically chose not to waive her privilege. The Guardian ad Litem report included the advocate in her report. There was no motion to strike by the Petitioner to strike this inclusion before the court. *CP 353-363; CP 436-493*

3. The scheduling order further carved out a date when a witness list is to be filed. Neither party chose to file a witness list at all. Nevertheless Petitioner chose to list his ex- wife, Ms. Nichols ex- husband Mark Miller, and Mr. Miller's brother-in-law less than a week before trial in his Joint Trial Management Report.

At trial the court ruled that these witnesses could not be

called by the Petitioner on direct but did allow Petitioner the ability to call them in rebuttal. Mr. Nichols chose not to call them in rebuttal.

4. It was not error to find that when parties both have their name on several bank accounts that it is community property unless separate funds can be traced. In fact it is the law as cited in Petitioner's opening brief. The Respondent maintains the very authority Petitioner cites, *Borgi*, is keeping with the trial court's ruling. *In re Estate of Borghi*, 167 Wn. 2d 480, 484, 219 P.3d 932 (2009). Mr. Nichols placed his wife's name on a series of joint accounts at the bank. He deposited his monthly net earnings in this account as he readily admitted. Monthly net earnings during the existence of the marriage are deemed community.

Petitioner failed to trace any clearly separate earnings from these accounts and as a result, they were hopelessly co-mingled and hence community. Further, given the lack of resources for the Respondent to pay the inordinate amount of attorney's fees she generated in bringing this matter to the attention of the trial court, it was hardly an abuse of discretion to award approximately \$20,000 and \$3,500 in attorney's fees to the Respondent. As a matter of equity it is well settled law that all the property is before the court, both separate and community, and is considered in any division. *CP 763-768*

Ms. Nichols produced evidence of this joint bank account

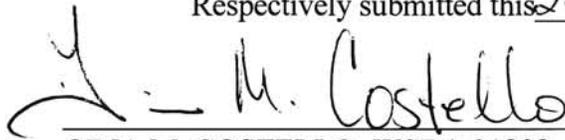
and further showed that Mr. Nichols \$6,000 a month earnings went into those joint bank accounts. Those holdings at one time amounted to over \$70,000. In considering the Petitioner's oral testimony alone the court allowed the Petitioner to supplement the record to show what those holding were at the time of separation in December of 2010. The Respondent was awarded half of the community holding at the time of separation. The same figure the Petitioner disclosed in his financial declaration at the time of separation and filing in December 2010.

V. CONCLUSION

So confident that no one would dare disagree with him, Petitioner asked the court to make a determination in his favor in spite of clear evidence to the contrary. When the trial court did not rule his way he now assigns error.

Such a strong arm display by person found to have such little insight should not be countenanced. Respondent requests the court of Appeals to uphold the ruling of the Trial Court and to award her the costs enumerated in the cost bill submitted herein and further lift the stay so that she may finally collect the judgment issued in this matter.

Respectively submitted this 20th day of November, 2012



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CERTIFICATE OF SERVICE

I, PEGGY FISHER, do hereby certify, swear and affirm that the following is true and correct:

1. On Tuesday, November 20, 2012, I had delivered by hand deliver the original and one copy of the Respondent's Brief to the Court of Appeals, Division III, 500 N. Cedar St., Spokane, WA 99201.
2. Also on Tuesday, November 20, 2012, I served a copy of this Brief by having a copy delivered by hand to Karen Lindholdt, 901 N. Adams, Spokane, WA 99201.
3. I certify that the foregoing is true and correct.

Dated: 11-20-12



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