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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

IN RE THE MARRIAGE OF:

TOBIAS MICHAEL LYNN
Appellant

V.

AMANDA SUSAN LYNN
Respondent

NO. 30866-9

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities.....Page 3

Introduction and Relief Requested.....Page 4

Argument .....Pages 4 - 13

Amanda's cross appeal failed to assign error to any of the trial court's findings or conclusions, and she failed to make any argument justifying her cross-appeal.....Pages 4 - 5

The trial court's legal conclusion on placement is not supported by its factual findings .....Pages 5 - 9

The trial court applied an incorrect legal standard of a presumption in favor of mother's receiving placement.....Pages 9 - 11

The trial court abused its discretion in denying Toby's motion for reconsideration.....Pages 11 - 12

This Court should deny Amanda's request for attorney's fees.....Pages 12 - 13

Conclusion.....Page 13

TABLE OF AUTHORITIES

CASES

Emmerson v. Weilep, 126 Wn. App. 930, 110 P.3d 214, (2005).....Page 4

Harrington v. Pailthorp, 67 Wn. App. 901, 841 P.2d 1258 (1992).....Page 12

In re Marriage of Kovacs, 121 Wn.2d 795, 809, 854 P.2d 629 (1993).....Page 8

Malfait v. Malfait, 54 Wn.2d 413, 341 P.2d 154 (1959).....Page 10

Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611 (2002)..... Page 5

STATUTES

RCW 26.09.002.....Page 9

RCW 26.09.191..... Page 5

RCW 29.09.140.....Page 12

RCW 26.09.187.....Page 7

COURT RULES

RAP 18.1 .....Page 12

CR 60 .....Pages 11, 12

INTRODUCTION AND RELIEF REQUESTED

Tobias (Toby) Lynn respectfully requests that this Court dismiss Amanda Lynn's[1] cross-appeal. Amanda failed to assign error to any of the Court's rulings and she failed to make any substantial argument justifying her cross-appeal. In addition, Toby renews his request that this Court reverse the trial court decision on residential placement and remand for entry of an order consistent with the trial court's factual findings and the applicable law: the order should award Toby primary residential placement of his two children. Finally, Toby requests that this court deny Amanda's request to be awarded attorney's fees.

ARGUMENT

Amanda's cross appeal failed to assign error to any of the trial court's findings or conclusions, and she failed to make any argument justifying the cross-appeal.

"It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error." *Emmerson v. Weilep*, 126 Wn. App. 930, 939-40, 110 P.3d 214, (2005) (quoting *Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2,* 117 Wn App. 183, 190, 69 P.3d 895 (2003)). In the present case, Amanda filed a cross-appeal of the trial court's decision not to limit

[1] This brief will again use the parties' first names for clarity.

Toby's time with the children under RCW 26.09.191. But in her opening brief Amanda did not assign error to any of the findings related to that decision. Therefore, the court's findings as to this issue are verities on appeal. See *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). In addition, Amanda only obliquely addressed the issue in her argument. Accordingly, this court should decline to consider Amanda's cross appeal.

The trial court's legal conclusion on placement is not supported by its factual findings.

As initial matter, in her Amended Brief, Amanda misstates Toby's position on the trial court's Findings of Fact. Amanda asserts that Toby "challenges the trial court's findings of fact." Resp. Amended Br. At 5. But Toby assigned error only to the trial court's Conclusion of Law K. *See* Appellant's Br. at 4. Toby accepts the trial court's Findings of Fact in their entirety. The problem with the trial court's decision was not its factual findings; it is that the court's legal conclusion on placement does not logically follow from its factual findings.

Amanda spends much of her Amended Brief complaining about the Guardian Ad Litem (GAL). But Amanda failed to assign error to the trial court's oral finding regarding the GAL's credibility. Because the trial court specifically incorporated its oral ruling into its Findings of Fact, CP

at 829, this finding is also a verity on appeal. In its oral ruling, the trial court found the GAL report to be a "professional document". RP at 582. The trial court did not disagree with a single factual finding from the report. This court should ignore Amanda's attempts to impugn the reputation of a GAL whose report the trial court found to be "professional."

Contrary to Amanda's suggestion, Toby did not simply rely on the GAL's report in asserting that the trial court erred. In his initial brief, Toby cited the testimony of his friends and family and the children's day care provider. *See* Appellant's Br. at 19. All of this testimony confirmed the factual assertions in the GAL report. In particular, the testimony of the children's daycare provider, a neutral uninterested party, confirms that the children were better bonded with Toby. That daycare provider testified that the children were aggressive with each other and other children when they came from Amanda's home and that they calmed down after a day or two in Toby's care. RP at 310. The daycare provider also reported to the GAL that when the children were distressed they requested Toby and not Amanda. CP at 647. While Amanda makes repeated references to additional testimony that the trial court heard which would support her position on appeal, she fails to cite to any specific examples of this testimony.

Despite the evidence from witnesses, the finding that the GAL report was professional, and the lack of factual disagreement with the GAL report's contents, the trial court rejected the GAL's ultimate recommendation; the children should be placed with Toby. With no explanation tied to the facts of this case, the trial court concluded as a matter of law that the children's best interest would be best served with primary residential placement with Amanda. CP at 881. This was after the trial court had properly concluded that Toby had the better bond with the children. RP at 584.

As the trial court correctly noted, RCW 26.09.187(3)(i) requires the court to give the greatest weight to the relative strength and stability of the children's relationship to each parent when deciding which parent should have primary residential placement. RP at 581. In its oral ruling, the trial court spoke at length about the bond between the children and Toby. It described Toby's bond with the children as "outstanding" and remarked that "I [the court] don't remember a case where I've had a father with level of ability, this excellence in detailing [sic] with his children and that says a great deal." RP at 584. The best that the trial court could come up with when describing Amanda's bond was that Amanda took the children to the doctor regularly and that it could say nothing "negative about the mother's care of these little kids." RP at 581;585. While in its

written findings the court described both Toby and Amanda as having good, loving relationships with their children, CP at 804, the net result of all of the trial court's findings is that Toby demonstrated, and the trial court found, that Toby had a better bond with the children. The trial court acknowledged this by giving the "nod" to Toby on a better bond before backtracking and calling the factor a "draw" because these were "two good parents." The trial court failed to give the required weight to Toby's better bond with the children when it reversed the temporary placement decision and awarded primary placement with Amanda.

In addition to ignoring the overwhelming evidence of Toby's better bond with the children, the trial court inexplicably concluded that "continuity" would be better served with Amanda as primary residential parent. CP at 811. There are no factual findings and no evidence from trial which supports this conclusion. The children, age three and four, had been thriving in Toby's primary care for nearly two years at the time of trial. While it is true that a court cannot presume that the temporary placement should be permanent based on a continuity argument alone, *see In re Marriage of Kovacs*, 121 Wn.2d 795, 809, 854 P.2d 629 (1993), this cannot and does not mean that preserving the continuity of the children's living situation should not be considered when deciding a permanent placement.

Indeed the best interests of the child, which is the governing standard in all residential placement decisions, *requires* taking into consideration the disruption to the child's life. *See* RCW 26.09.002. Here, the children were thriving in Toby's care; the overwhelming evidence suggested he had better bond with the children;, and there was no evidence to support "continuity" being enhanced by primary placement with Amanda. Indeed, the children's lives were disrupted by the change in placement. Liam began biting himself shortly after being removed from Toby's care and being placed with Amanda. The court abused its discretion in awarding placement to Amanda.

<u>The trial court applied an incorrect legal standard of a presumption in favor of mother's receiving placement.</u>

As Toby pointed out is his opening brief, given the court's factual findings, the only logical explanation for the trial court's conclusion that the children's best interest would be served by primary residential placement with Amanda is that the court applied a presumption in favor of placement with the mother unless the father shows the mother is unfit. *See* Appellant's Br. at 28-33.

While Amanda asserts that the trial court must have considered other factors such as the one incident of domestic violence, the unfounded allegations of child abuse, and Toby's limited record of alcohol and anger

problems, the trial court's unchallenged findings of fact and conclusions of law directly contradict Amanda's arguments. While the trial court made a ruling, based upon one incident in 2008, that domestic violence had occurred, the court specifically ruled that the likelihood of recurrence was so remote as to not justify any restriction on Toby's interaction with his children. Conclusion of Law H, CP at 810. In addition, the court ruled that Toby "had not lapsed into alcohol related violence for about four years" and "has not engaged in physical abuse of his children." *Id.* In her brief, Amanda did not assign error to any of these conclusions.

Even if the court had considered Amanda's request to punish Toby for past acts, it would have been improper for the court to use these acts to deny primary residential placement to Toby. This is because the trial court found that Toby is a good parent today. *See* RP at 584 ("the father *at one time or another was struggling with some problems,* and maybe was not at the same level of parenting that he has reached now")(emphasis added). This finding of the Court, again unchallenged by Amanda, indicates that whatever problems Toby may have had in the past, they are resolved now and do not affect his ability to parent in the present or future.

Placement decisions cannot be based upon punishment for past bad acts; they must be based upon prospective parenting ability. See *Malfait v. Malfait*, 54 Wn.2d 413, 417, 341 P.2d 154 (1959). In *Malfait*, the court

reversed visitation restrictions where there was no showing that the welfare and best interests of children required restrictions. In the present case, the trial court found that Toby was an excellent parent, but then removed the children from his primary care where the children had been for nearly half their lives. As in *Malfait*, the trial court appears to have based this decision on a reason unrelated to parenting ability; a presumption in favor of placement with the mother. Because the trial court applied an incorrect legal standard in making its placement decision, this Court should reverse and remand for a decision consistent with the law and facts in this case.

The trial court abused its discretion in denying Toby's motion for reconsideration.

Contrary to Amanda's assertion, in his opening brief, Toby did address the trial court's denial of his motion for reconsideration. *See Appellant's Br.* at 27, 34-35. The evidence of Amanda's actions and children's reaction to the placement change after trial which were provided to court was sufficient to justify reconsideration. Amanda unilaterally moved the children to a daycare which required the three and four year children to ride in a car two hours each day. Liam began biting himself due to stress. These two facts, which were not available at trial, were evidence that the children's best interest were not served by the

court's placement decision. The court abused its discretion in failing to reconsider its placement decision based on these facts. Finally, contrary to Amanda's assertion, the trial court was well within its rights to hear Toby's motion reconsideration. The court had the authority under CR 60(a) to correct the judgment to reflect an entry date which would give the parties the opportunity to pursue reconsideration. In addition, Toby's Motion for Reconsideration itself provided the notice required by CR 60(e).

This Court should deny Amanda's request for attorney's fees.

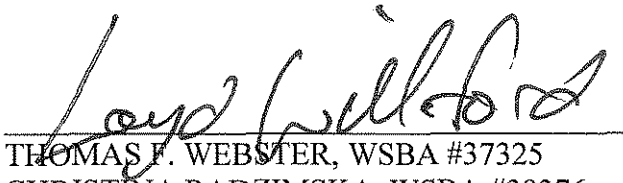
Amanda requests attorney fees under RCW 29.09.140. (Court may award attorney fees on appeal). She gives the Court no citation to any case where the Court has exercised this power. She also request fees under RAP 18.1 (fees may be awarded for defending against a frivolous appeal). Amanda correctly cites the legal standard the court applies in deciding to award fees for frivolous appeals: namely that there are "no debatable issue of fact" and the appeal is so "totally devoid of merit that there is no possibility of reversal." *See Harrington v. Pailthorp*, 67 Wn. App. 901, 913, 841 P.2d 1258 (1992). She then completely misapplies this standard to the facts of this case.

Contrary to Amanda's suggestion, an appeal of a discretionary ruling does not make an appeal frivolous. In addition, Toby has not misstated facts or otherwise misrepresented anything. The record in this case speaks for itself. Amanda's request for attorney's fees is completely devoid of merit. It is also a particularly galling request given that Amanda is well aware that, because they felt so strongly that trial court had committed a gross miscarriage of justice in this case, Toby's attorneys agreed to represent him pro bono on appeal.

CONCLUSION

Toby Lynn respectfully requests that this Court dismiss Amanda Lynn's cross-appeal, reverse the trial court's decision on residential placement and remand for a residential placement order which reflects the fact Toby is the parent with whom the children have their primary attachment, and deny Amanda's request for attorney's fees.

Submitted February 28, 2013 by:



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CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on February 28, 2013 I provided a true and correct copy of Appellant's Brief, served by the method indicated below, and addressed to the following:

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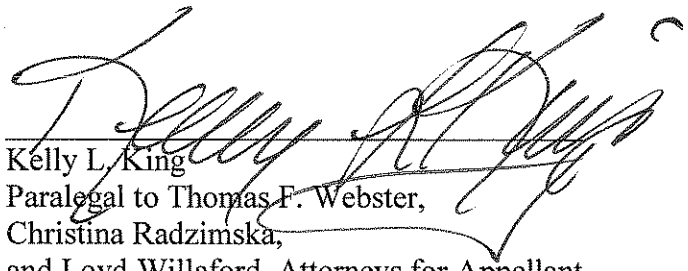
DATED: February 28, 2013.



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