

**FILED**

NOV 04 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 316009

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

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In re the Marriage of:

DARRYL ROBINSON, Appellant

and

SHEA ROBINSON, Respondent

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE MICHAEL PRICE

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BRIEF OF APPELLANT

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I.

**ASSIGNMENTS OF ERROR**

1. The trial court erred by entry of ¶ 15 of the Findings of Fact & Conclusions of Law, *i.e.* “The wife has incurred reasonable attorneys fees and the husband has the ability to assist her in paying those fees. The husband is ordered to pay \$3,500 towards the wife’s fees and costs...” (CP 106).
2. The trial court erred by entry of ¶ 15 of the Findings of Fact & Conclusions of Law, *i.e.* “The husband shall also pay the remainder of the fees owing to the guardian ad litem Mary Ronnestad...” (CP 106).
3. The trial court erred by entry of ¶ 19 of the Findings of Fact & Conclusions of Law, *i.e.* “The parenting plan signed by the court on this date is approved and incorporated as part of these findings.” (CP 106).
4. The trial court erred by entry of ¶ 3.7 of the Findings of Fact & Conclusions of Law, *i.e.* “The husband shall pay \$3,500 towards the wife’s fees and costs...” (CP 108).

5. The trial court erred by entry of ¶ 3.7 of the Findings of Fact & Conclusions of Law, *i.e.* “The husband shall also pay the remainder of the fees owing to the guardian ad litem...” (CP 108).
6. The trial court erred by entry of ¶ 3.11 of the Decree of Dissolution, *i.e.* “ The parties shall comply with the Parenting Plan signed by the court on this date. The Parenting Plan signed by the court is approved and incorporated as part of this decree.” (CP 112).
7. The trial court erred by entry of ¶ 3.13 of the Decree of Dissolution, *i.e.* “The husband shall pay \$3,500 towards the wife’s fees and costs...” (CP 112).
8. The trial court erred by entry of ¶ 3.13 of the Decree of Dissolution, *i.e.* “The husband shall also pay the remainder of the fees owing to the guardian ad litem, Mary Ronnestad...” (CP 112).
9. The trial court erred by entry of ¶ 2.1 of the Final Parenting Plan, *i.e.* “The petitioner’s residential time with the child shall be limited or restrained completely, and mutual decision-making and designation of a dispute resolution process other than court action shall not be required, because this parent has engaged in the conduct which follows: A history of acts of domestic violence

as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.” (CP 76-77).

10. The trial court erred by entry of ¶ 3.1, 3.2, 3.4, and 3.5 of the Final Parenting Plan, *i.e.* All residential provisions under these paragraphs. (CP 77-78).

11. The trial court erred by entry of ¶ 3.10 of the Final Parenting Plan, *i.e.* “The petitioner’s residential time with the child shall be limited because there are limiting factors in paragraphs 2.1 and 2.2. The following restrictions shall apply when the children spend time with this parent: The petitioner shall enroll in and complete a valid Domestic Violence Perpetrator’s Program and provide verification of his enrollment within thirty days of the entry of this plan. Verification of compliance with the terms of the program and completion of the program shall be provided to both parties attorneys and shall be filed with the court.” (CP 80).

12. The trial court erred by entry of ¶ 3.12 of the Final Parenting Plan, *i.e.* “The child named in this parenting plan is scheduled to reside the majority of the time with the respondent.” (CP 81).

13. The trial court erred by entry of ¶ 4.2 of the Final Parenting Plan,  
*i.e.* “Major decisions regarding each child shall be made as follows: Education decisions – respondent; Non-emergency health care – respondent; Religious upbringing – respondent; Daycare – respondent.” (CP 82).
14. The trial court erred by entry of ¶ 4.3 of the Final Parenting Plan,  
*i.e.* “Sole decision making shall be ordered to the respondent for the following reasons: A limitation on the other parent’s decision making authority is mandated by RCW 26.09.191” (CP 82).
15. The trial court erred by entry of ¶ 4.3 of the Final Parenting Plan,  
*i.e.* “One parent is opposed to mutual decision making, and such opposition is reasonably based on the following criteria ...” (CP 82).

#### **ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Whether the trial court erred as a matter of law in imposing RCW 26.50.191 restrictions against Mr. Robinson in the final parenting plan thus limiting his residential time and mutual decision-making ability?

2. Whether the trial court abused its discretion in imposing RW 26.50.191 restrictions against Mr. Robinson in the final parenting plan thus limiting his residential time and mutual decision-making ability?
3. Whether the trial court erred in failing to base its findings on substantial evidence to support denial of Mr. Robinson's request for a shared residential schedule?
4. Whether the trial court erred in requiring Mr. Robinson to be responsible for the remaining Guardian ad Litem fees, which amount was unreasonable and not supported by sufficient findings of fact?
5. Whether the trial court erred in imposing an unreasonable award of attorney fees against Mr. Robinson and without sufficient findings of fact to support that award?

II  
STATEMENT OF THE CASE

This appeal arises from a Petition for Legal Separation that was originally filed on March 20, 2012. (CP 1-11). After a contested hearing on May 22, 2012, temporary orders were entered setting up a shared residential plan between the parties. (CP 33-38). The parties followed this shared residential plan until trial on February 25, 2013. (RP 314). A contested trial was held before the Honorable Judge Michael Price on February 25, 2013 (RP 4) where both parties were represented by counsel. Two days later, on February 27, 2013, Judge Price gave his oral ruling. (RP 292-346).

III  
STANDARD OF REVIEW

Although a trial court has broad discretion when crafting a parenting plan, its decisions may be reviewed for an abuse of discretion. In re Marriage of Caven, 966 P.2d 1247 (1998). A trial court “abuses its discretion when its decision is manifestly unreasonable or made on untenable grounds or for untenable reasons.” In re Marriage of Crump, 175 Wn.App. 1045 (2013)(citing Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 132 P.3d 115 (2006)). In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940

P.2d 1362 (1997), explained “A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” This standard is also violated when a trial court bases its decision on an erroneous view of the law. Id. (citing Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006)).

The trial court’s challenged findings are reviewed for substantial evidence. In re Marriage of Rockwell, 170 P.3d 572 (2007). Substantial evidence is defined as “a sufficient quantity of evidence to persuade a fair-minded, rational person that the finding is true.” Id. at 242.

#### IV ARGUMENT

The issue of restrictions in parenting plans is addressed in RCW 26.09.191 where a list of possible bases for restrictions is listed. In this case, the only basis for restriction raised by the parties and addressed by Judge Price is that under RCW 26.09.191(2)(a)(iii) which states:

The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: ... (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm...

The court did not find that Mr. Robinson had actually committed an assault which caused grievous bodily harm or the fear of such harm or a history of acts of domestic violence *as intended* in RCW 26.09.191(2)(a)(iii). Judge Price began his discussion of RCW 26.09.191 restrictions by referencing “allegations of domestic violence in this relationship.” (RP 322). He went on to state that “those allegations really would act to entirely preclude implementation of a shared parenting plan...” (RP 322-323). However, nowhere did Judge Price actually find that domestic violence as intended by RCW 26.09.191 as a basis for a restriction, or as defined in RCW 26.50.010(1), took place. Instead, he based his finding that a history of domestic violence for purposes of RCW 26.09.191(2)(a)(iii) existed upon the fact that Mr. Robinson plead guilty to a criminal charge which included a DV (domestic violence) tag. (RP 324-325).

For purposes of restrictions to a parent’s residential time under RCW 26.09.191(2)(a)(iii), the restricted parent must have been found to

have “a history of domestic violence as defined in RCW 26.09.191(1).”

Domestic violence is defined, for purposes of parenting issues, as:

(a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member. RCW 26.50.010(1).

Judge Price based his finding that Mr. Robinson should be subject to RCW 26.09.191 restrictions upon an improper basis which does not meet the definition of domestic violence under RCW 26.50.010(1). Although Judge Price states that “Mr. Robinson entered a plea as to the domestic violence, and he agreed it had been pled and proven,” the domestic violence referred to in reference to this plea is not domestic violence as defined in RCW 26.50.010(1).

The evidence clearly showed that Mr. Robinson’s plea of guilty was to a charge of “no contact order violation.” (RP 137). The charge of “assault, domestic violence” was dismissed. (RP 138). When Judge Price indicated in his ruling that Mr. Robinson “agreed it had been pled and proven,” (RP 325) this could only be in reference to the plea of guilty to the No Contact Order Violation since the Assault DV charge had been dismissed. (RP 137-138).

The problem with Judge Price's reasoning is that a stipulation to the police reports for purposes of a No Contact Order Violation does not meet the definition of domestic violence under RCW 26.50.010(1), even if a DV tag is appended to the conviction. Mr. Robinson was convicted in Spokane Municipal Court. (RP 324). The Spokane Municipal Code defining Violation of a No Contact Order states as follows:

Whenever a restraining order is issued under this chapter or chapter 26.09 RCW, and the person to be restrained knows of the order, a violation ... of a provision excluding the person from the residence, workplace, school or day care of another is a misdemeanor. SMC 10.09.020(A).

A DV or domestic violence designation is added to the criminal charge if the circumstances surrounding the charge meet the following definition:

"Domestic violence" includes, but is not limited to, any of the following crimes when committed by one family or household member against another: ... (18) Violation of the provisions of a restraining order restraining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school or day care: SMC 10.09.020, SMC 10.09.030 or SMC 10.09.040. SMC 10.09.010(B).

The definition of Violation of a Restraining Order under SMC 10.09.020(A) does not necessarily include an element that any assault took place. Violation of a Protection Order may occur simply by violation of exclusion requirements from a certain location. SMC 10.09.020(A).

The fact that a DV designation is appended to the charge or conviction refers only to the fact that the crime was committed by one "family or household member against another." SMC 10.09.010(B). A finding that Mr. Robinson's conviction of No Contact Order Violation included a finding of "domestic violence" refers to the nature of the relationship between himself and the other party, i.e. Ms. Robinson. It does not mean that Mr. Robinson committed "domestic violence" as defined in RCW 26.50.010(1) for purposes of allowing restrictions on his parenting time.

The fact is that Mr. Robinson only plead guilty to No Contact Order Violation which was designated a crime of domestic violence solely because of the relationship between himself and Ms. Robinson as defined in SMC 10.09.010(B). Judge Price's reliance on the domestic violence nature of the No Contact Order Violation in placing RCW 26.09.191 in finding that he was "mandated to reference this DV conviction and incorporate the same as to section [RCW 26.09] 191 restrictions in the final parenting plan" (RP 326) was erroneous, unsupported by law, and an abuse of discretion. Judge Price did not find that Mr. Robinson had engaged in domestic violence as defined in RCW 26.50.010(1) for purposes of restrictions under RCW 26.09.191(2)(a)(iii).

Instead, he improperly relied on the DV tag appended to the No Contact Order Violation conviction as sole support for showing a history of acts of domestic violence when that DV tag referred only to the relationship between Mr. and Ms. Robinson. Without a specific finding that Mr. Robinson actually committed domestic violence as defined in RCW 26.50.010(1), there is no basis for restrictions under RCW 26.09.191(2)(a)(iii).

As such, the trial court erred as a matter of law in imposing RCW 26.09.191(2)(a)(iii) restrictions against Mr. Robinson. This situation is comparable to that made by the father in In re Marriage of Crump, 175 Wn.App. 1045 (2013). There the father argued that the trial court erred as a matter of law by imposing mandatory RCW 26.09.191 restrictions against him when no finding of a history of acts of domestic violence had been made. Id. The Court of Appeals agreed that the trial court had not made a proper finding of a history of acts of domestic violence. Id. The Court of Appeals stated that, “[a]lthough that finding may imply that [the father] is at risk of committing acts of domestic violence in the future, that finding does not support a conclusion that [the father] has a *history* of domestic violence.” Id. Similarly, in this case, the evidence may support a finding that Mr. Robinson is at risk of committing acts of

domestic violence in the future but the trial court did not make findings that support a history of acts of domestic violence.

Furthermore, one conviction of No Contact Order Violation does not support a finding of “a history of acts of domestic violence” under RCW 26.09.191(2)(a)(iii). This is especially true when the conviction did not include any elements of assaultive behavior but merely a DV tag based on the relationship between the parties. Even if the conviction was for assault, or this court was justified in determining domestic violence sufficient to meet the definition under RCW 26.50.010(1) existed in the facts surrounding the No Contact Order Violation conviction, one conviction is not sufficient to support a finding of a history of acts of domestic violence.

The Court of Appeals in In re Rodden, 162 Wn.App. 1040 (2011) found that “[a] single misdemeanor assault conviction does not constitute “a history of acts of domestic violence.” Similarly, the court has found that, “[m]ere accusations, without proof, are not sufficient to invoke the restrictions under the statute. “ Marriage of Caven, 136 Wn.2d 800, 809, 966 P.2d 1247 (1998). The fact that there was one misdemeanor conviction for No Contact Order Violation is not sufficient to support restrictions against Mr. Robinson. Ms. Robinson’s allegations

of domestic violence are insufficient to invoke the restrictions as no proof was offered and the trial court made no findings as to the verity of her allegations. Without a finding that the one act of domestic violence relied upon by the trial court (i.e. the conviction for No Contact Order Violation) was "an assault or sexual assault which causes grievous bodily harm or the fear of such harm" under RCW 26.09.191(2)(a)(iii), the trial court abused its discretion in imposing restrictions since that one act was insufficient to show a history of acts.

The legislature wrote RCW 26.09.191(2)(a)(iii) as it did to provide restrictions when there was either one serious incident of domestic violence or a history of acts. The commentary to the original proposed Parenting Act states that the term "history of domestic violence" was intended to exclude "isolated, de minimus incidents which could technically be defined as domestic violence." 1987 PROPOSED PARENTING ACT, REPLACING THE CONCEPT OF CHILD Custody, *Commentary and Text* 29 (1987). See Matter of the Marriage of C.M.C., 87 Wn.App. 84, 88, 940 P.2d 669 (1997).

Although Ms. Robinson may argue that the record contains substantial evidence of a history of acts of domestic violence, the reality is that the trial court did not make findings of such. The one solid basis

upon which Judge Price based his findings was the interpretation that Mr. Robinson's plea of guilty to No Contact Order Violation DV was an admission of domestic violence for purposes of establishing a history of domestic violence as defined by RCW 26.09.191 and RCW 26.50.010(1) which therefore mandated imposition of RCW 26.09.191 restrictions. Since that finding was based upon an error of law and was an abuse of discretion, the imposition of RCW 26.09.191 restrictions should be reversed and the issue of parenting plan provisions remanded.

Similarly, for the same reasons, the imposition of sole decision-making to the mother should also be reversed and remanded as being based upon the same findings and considerations under RCW 26.09.191(1)(c). The same legal analysis set forth above applies to the imposition of mandatory restrictions on mutual decision-making under RCW 26.09.191(1). Judge Price based his restrictions on decision-making on the same determinations. (RP 329-330).

Without the restrictions under RCW 26.09.191, the trial court provided insufficient findings to support a reduction in Mr. Robinson's parenting time. The trial court acknowledged that since the initial temporary order from May [2012] was entered the parties had been operating under a shared residential plan. (RP 314). Judge Price

acknowledged that the allegations of domestic violence were not new and had been raised at the temporary order hearing where a shared parenting plan was implemented despite the allegations. (RP 314). Judge Price found that a shared parenting plan was no longer appropriate because he believed it was “a schedule designed in mind with [the father’s] particular best interests and not necessarily [the child’s].” (RP 317). The schedule had been dynamic and required some changes based on Mr. Robinson’s work schedule. (RP 317). Judge Price then went on to provide dicta about the need for stability in a child’s life. (RP 320-322). However, nowhere within his ruling did Judge Price present any findings which would support that the shared residential schedule that had been followed was actually detrimental to the child or that changes to the schedule based on the work schedule had detrimentally affected the child. Judge Price provided absolutely no findings based on substantial evidence that would do more than conjecture that a shared residential schedule as proposed by Mr. Robinson might be detrimental to the child in the future. Dicta that children generally thrive on stability does not support a finding that this particular child has suffered from the shared residential schedule that was historically in place.

Additionally, since the findings placing RCW 26.09.191 restrictions against Mr. Robinson were an error of law and manifest abuse of discretion by the trial court, the provision that Mr. Robinson should complete a Domestic Violence Perpetrator's Program as a restriction on his residential time (CP 80) was also invalid and should be reversed.

Mr. Robinson also contests the award of attorney fees in the amount of \$3,500 to Ms. Robinson. (CP 106, 108, 112). An award of attorney fees is within the trial court's discretion. In re the Marriage of Mattson, 95 Wn.App. 592, 604, 976 P.2d 157 (1999). The party challenging the award must show that the court used its discretion in an untenable or manifestly unreasonable manner. Id. at 604 (citing In Re Marriage of Knight, 75 Wn. App. 721, 729, 880 P.2d 71 (1994)). Under RCW 26.09.140, the trial court can order a party in domestic relation actions to pay reasonable attorney fees, but generally the court must balance the needs of the party requesting fees against the ability of the opposing party to pay the fees. Id. at 604 (citing In re Marriage of Crosetto, 82 Wn. App. 545, 560, 918 P.2d 954 (1996)).

The trial court in this case did not enter findings of fact supporting what Mr. Robinson claims is an unreasonable award of attorney fees. The Findings of Fact & Conclusions of Law, as well as the Decree of

Dissolution, simply state that Mr. Robinson shall pay \$3,500 for Mr. Robinson's attorney fees. (CP 106, 108, 112). Other than a bare statement that, "[t]he wife has incurred reasonable attorneys fees and the husband has the ability to assist her in paying those fees," (CP 106), there is no support for this statement. Even in the trial court's oral ruling, Judge Price simply states, "I'm going to award \$3,500 in attorney fees to Mr. Nelson paid by Mr. Robinson." (RP 338). There was no explanation as to why Judge Price deemed this amount reasonable, upon what information he based the decision to choose \$3,500 as the amount to be paid, how he came to the finding that Mr. Robinson had the ability to pay or that Ms. Robinson had the need for assistance. In fact, even the determination of the amount Ms. Robinson might owe in attorney fees was speculative at best. Judge Price stated, "I would anticipate that Ms. Robinson's fees following trial, taking an educated guess, would be that her attorney fees and costs are somewhere in the neighborhood of \$7,500 to \$8,000. I could be completely off base, but I think that's a reasonably accurate amount." (RP 336-337). There was no factual support provided for this "educated guess."

A trial court must sufficiently explain the basis for its fee award to permit appellate review. Mahler v. Szucs, 957 P.2d 632, 966 P.2d 305

(1998). In fact, when a party challenges the calculation or amount of a fee award, "the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record." Id. The trial court must enter findings of fact and conclusions of law in support of an award of attorney fees. Id. The purpose of findings is to alert the appellate court to the basis for the amount of fees awarded by the trial court. Id. The trial court did not sufficiently explain the basis for its fee award in this case and the issue should be remanded both to address the reasonableness of the award and to enter sufficient findings of fact.

Similarly, the trial court also ordered that Mr. Robinson pay the remaining Guardian ad Litem fees. (CP 106, 108, 112). Again, the trial court provided no sufficient basis for why Mr. Robinson should be solely responsible for these fees. The trial court did not even state what the remaining Guardian ad Litem fees even amounted to as a figure. Other than a generalized statement that, "having in mind the parties' financial circumstances, reviewing their financial declaration, mindful of the attorneys' comments and the parties' testimony and the percentages that I indicated as to differentiation between the incomes," (RP 338), the trial court made no other specific findings as to why Mr. Robinson should

be required to pay all the remaining Guardian ad Litem fees, what that amount was, or whether Ms. Robinson had any ability to pay a portion. Under the same legal analysis for attorney fee awards, this issue should be remanded to address the reasonableness of having Mr. Robinson be solely responsible for the unspecified amount of the Guardian ad Litem fees and to enter sufficient findings of fact.

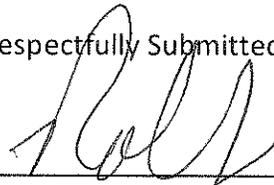
V  
REQUEST FOR ATTORNEY FEES

Mr. Robinson requests that this court award him attorney fees on appeal pursuant to RAP 18.1 and RCW 26.09.140. Under this statute, the Court of Appeals may, in its discretion, award attorney fees and costs incurred on appeal from a dissolution proceeding. In exercising its discretion, the Court of Appeals considers the arguable merit of the issues on appeal and the parties' financial resource. In re Marriage of King, 66 Wn. App. 134, 139, 831 P.2d 1094 (1992). Mr. Robinson has shown that his issues have merit on appeal and his financial resources, while arguably less than Ms. Robinson's, are not extensive. It is therefore respectfully requested that he be granted attorney fees on appeal.

VI  
CONCLUSION

It is therefore respectfully requested that this Court of Appeals reverse and remand this case for the bases set out in this brief.

Respectfully Submitted,



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