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No. 332756

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COURT OF APPEALS, DIVISION III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

STATE OF WASHINGTON

In re:

DAVID MAULEN, Respondent

and

NANCY PIMENTEL, Appellant

APPEAL FROM THE SUPERIOR COURT

OF ADAMS COUNTY

HONORABLE STEVEN B. DIXON

APPELLANT'S BRIEF IN REPLY

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I. ARGUMENT IN REPLY

a. The trial court erred when it failed to enter findings sufficient to facilitate appellate review.

Mr. Maulen makes no specific response to Ms. Pimentel's argument that the trial court erred when it entered findings that were insufficient to facilitate appellate review. Presumably, this is because he had none.

This Court need not address an argument that is not discussed with meaningful citation to authority. Saviano v. Westport Amusements, Inc., 144 Wn.App. 72, 84, 180 P.3d 874 (2008); citing RAP 10.3(a)(6).

The requirement of findings sufficient to conduct appellate review is based on the relevant standard of review, the requirements of CR 52(a)(2)(B), RCW 26.09.187(3)(a), and Washington case law.

STANDARD OF REVIEW: A trial court's decision with respect to the entry of a parenting plan is reviewed for abuse of discretion. In re Marriage of Caven, 136 Wn.2d 800, 806, 966 P.2d 1247 (1998). In order for this Court to determine whether the trial court abused its discretion, it must consider whether the decision was manifestly unreasonable or made on untenable grounds for untenable reasons. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). Such an analysis can include the consideration that (1) a trial court's decision is manifestly

unreasonable if it is outside the range of acceptable choices given the facts and applicable legal standard, (2) a trial court's decision is based on untenable grounds if the factual findings are unsupported by the record, and (3) a trial court's decision is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirement of the correct standard. In re Marriage of Littlefield, 133 Wn.3d 39, 47, 940 P.2d 1362 (1997), citing State v. Rundquist, 79 Wn.App. 786, 793, 905 P.2d 922 (1995)(citing WASHINGTON STATE BAR ASS'N, WASHINGTON APPELLATE PRACTICE DESKBOOK § 18.5 (2d ed. 1993).

Currently, this Court is not in a position to determine whether the trial court abused its discretion because there is insufficient information in the record to conduct this analysis.

In this case, the trial court made insufficient findings that do not indicate what standard it applied nor whether the facts as found met the requirements of that standard.

CR 52(a): The authority presented by Ms. Pimentel in her opening brief demonstrates that Washington appellate courts have repeatedly confirmed that CR 52 specifically requires findings and conclusions to be entered in connection with all final decisions in divorce proceedings, and that while a trial court is not required to make a finding in regard to every

item of evidence introduced, it *is* required to make findings of fact concerning all of the ultimate facts and material issues. In re the Marriage of Wold, 7 Wn.App. 872, 875, 503 P.2d 118 (1972). Ultimate facts are “the essential and determining facts upon which the conclusions rests and without which the judgment would lack support in an essential particular” and “[t]hey are the necessary and controlling facts which must be found in order for the court to apply the law to reach a decision.” Id.

This is important, because it is ***“improper for an appellate court to ferret out a material or ultimate finding of fact from the evidence presented.”*** Id. at 876, emphasis added.

It is undisputed that, in this case, neither the written *Findings of Fact and Conclusions of Law* nor the oral ruling addresses any of the statutory factors.

RCW 26.09.187(3)(a): State statute lays out the factors for consideration in the determination of the parenting plan, but the factors are not all considered equally. RCW 26.09.187(3)(a) clearly states that “[f]actor (i) shall be given the greatest weight.” Factor (i) is “[t]he relative strength, nature, and stability of the child’s relationship with each parent.” RCW 26.09.187(3)(a). There is no indication that the trial court specifically considered this factor *at all*, much less that it was guided by

this statute and weighed that factor most heavily. Instead, the trial court appears to have made its decision based on its conclusion that “the evidence shows that they’re both very good parents,” (RP 176), that “the children are probably equally integrated into both homes,” (RP 177), and the trial court’s belief that “some of the things that you make your decision on are just small things that tell you a lot about somebody” (which, in this instance, was the fact that Ms. Pimentel (who is an immigrant who does not speak English as her first language) could not remember if one of her children had gotten an F in reading or in math)(RP 177-78).

One could not even hazard a guess at which factor(s) these comments are intended to address, and making any attempt “would place the appellate court in the initial decision making process instead of keeping it to the function of review.” Wold at 876.

Without sufficient findings of fact, the purpose of making those findings – to enable an appellate court to determine the basis on which the case was decided and to review the questions raised on appeal - is entirely undermined. In re Welfare of Woods, 20 Wn.App. 515, 516, 581 P.2d 587 (1978).

b. The trial court erred when it failed to apply the statutory factors of RCW 26.09.187(3) in its decision concerning the residential schedule and parenting plan.

In his brief, Mr. Maulen asserts that the trial court “is under no obligation to make specific oral or written findings on each factor.” (*Respondent’s Brief*, pg. 2.) In doing so, Mr. Maulen relies on the decision of the Washington Supreme Court in In re the Marriage of Croley, 91 Wn.2d 288, 588 P.2d 738 (1978) for his position that the trial court “is under no obligation to make specific oral or written findings on each factor.”

This is not entirely correct:

When written findings of fact do not clearly reflect a consideration of the statutory factors, resort can be made to the court’s oral opinion. See In re Marriage of Dalthorp, 23 Wn.App. 904, 598 P.2d 788 (1979). ***When evidence of those factors is before the court and its oral opinion and written findings reflect consideration of the statutory elements, specific findings are not required on each factor.*** In re Marriage of Croley, 91 Wn.2d 288, 588 P.2d 738 (1978).

In re the Marriage of Murray, 28 Wn.App. 187, 189, 622 P.2d 1288 (1981).

In fact, the Murray court goes on to say that, in that case, the trial record *did* contain “substantial evidence to provide a basis for analysis of the statutory factors,” but it concluded that “we cannot find the court

made its determination by applying those statutory factors.” Murray at 189. The Murray court further concluded that: ***“Any presumption that the trial court considered the statutory factors is rebutted by the failure of the written findings or oral opinion to reflect any application of the statutory elements or to even mention the best interests of the child.”*** Murray at 189-90, emphasis added. Similarly here, the trial court makes no reference to the statutory elements or the best interests of the child in the written findings or its oral ruling.

c. The trial court erred when it failed to base its findings on substantial evidence.

Mr. Maulen makes no specific response to Ms. Pimentel’s argument that the trial court erred when it failed to base its findings on substantial evidence. Presumably, this is because he had none.

In this case, it is nearly impossible for the appellate court or the parties to meaningfully discuss whether the findings are based on substantial evidence because there are insufficient findings to support any kind of review.

d. The trial court erred when it failed to order that transportation costs be shared proportionally pursuant to RCW 26.19.080(3).

Mr. Maulen argues that the trial court did not abuse its discretion when it allocated transportation expenses differently than required by

RCW 26.19.080(3), and he bases his argument on the authority found in In re Marriage of Casey, 88 Wn.App. 662, 667, 967 P.2d 982 (1997). In that case, the appellate court ruled that a trial court may deviate from the allocation of transportation expenses when it finds ground to deviate from the basic obligation. Casey at 667.

This authority actually requires a conclusion that is entirely opposite to that drawn by Mr. Maulen - which is evidenced by his total failure to argue it; rather, he quotes the holding in Casey and quickly concludes: "Considering the court's oral ruling and the fact that this provision of the parenting plan concerns only a portion that is expected to never be exercised, this issue on appeal should be denied." (*Respondent's Brief*, at 5-6.) As before, this Court need not address an argument that is not discussed with meaningful citation to authority. Saviano at 84.

In the Casey case, the father's gross income was approximately \$5,848/month and the mother's was approximately \$500/month. Casey at 665. The trial court relieved the mother of any obligation to pay any child support and ordered the father to pay the children's entire transportation costs. Casey at 667. On review, the court of appeals held that the trial court did not abuse its discretion in ordering the father to pay the entirety of transportation costs because, while RCW 26.19.080(3)

states that transportation costs shall be shared in the same proportion as the basic child support obligation, the trial court had entered a deviation that relieved the mother from paying *any* of her basic child support obligation and concluded the same reasoning permitted the trial court to relieve her of her obligation to pay transportation costs. The appellate court concluded that because RCW 26.19.080(4) expressly gives the trial court discretion to determine the necessity for and the reasonableness of all amounts ordered in excess of the basic child support obligation, “this language permits the court to depart from the usual practice of allocating special child rearing expenses, such as long-distance transportation costs, in the same proportion as the putative basic support.” Casey at 667-68.

In this case, Ms. Pimentel was given a deviation based on the fact that she had five other children from other relationships. If anything, the award of a deviation to Ms. Pimentel should *decrease* her obligation to pay for long-distance transportation costs. The reasoning in Casey emphasizes the injustice of the trial court’s order regarding long-distance transportation in this case, because Ms. Pimentel should be entitled to pay *less* what is required by RCW 26.19.080(3) – not required to pay *more*.

II. REQUEST FOR ATTORNEY FEES

Mr. Maulen provides no argument beyond his statement that “[t]here is no sufficient basis to award fees in this case,” and he cites to no authority. See, State v. Logan, 102 Wn.App. 907, 911, n.1, 10 P.3d 504, (“Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.”)(quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

Ms. Pimentel again requests that this court award her attorney fees on appeal pursuant to RAP 18.1 and RCW 26.09.140. Ms. Pimentel has shown that her issues have merit on appeal and her financial resources are much less than Mr. Maulen’s as was made clear in the evidence before the trial court.

III. 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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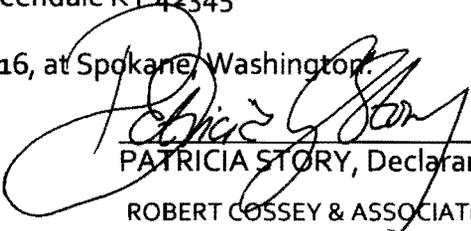
**CERTIFICATE OF SERVICE &
AFFIDAVIT OF MAILING**

I, Patricia Story, under penalty of perjury under the laws of the State of Washington, declare that on February 16, 2016, I mailed a copy of the Appellant's Reply Brief to the individuals listed in this Affidavit at the below last known addresses:

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