

Court of Appeals No. 70728-1
Snohomish County Cause No. 12-3-01771-1

**COURT OF APPEALS
DIVISION 1
STATE OF WASHINGTON**

DEE ANN JOHNSTONE,
Appellant-Respondent

vs.

TIMOTHY JOHNSTONE
Respondent-Petitioner

BRIEF OF RESPONDENT

Appeal from the Snohomish County Superior Court, Washington
Honorable Judge Richard Okrent, Superior Court Judge
Superior Court Case No. 12-3-01771-1

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STATE OF WASHINGTON
COURT OF APPEALS
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NATURE OF CASE

Appellant, Dee Ann Johnstone, appeals the trial court's final orders of July 10, 2013 entered after a week-long trial which began on May 5, 2013. In those orders, Judge Richard T. Okrent approved a parenting plan which established shared custody and designated Respondent, Timothy Johnstone, as the custodial parent. (R. C.P. 141, 3-6.) The trial court entered an order for child support that required Appellant to make \$676.15 monthly payments to Respondent. (R. C.P. 142, 3.) Appellant assigns error to both orders supra, and argues that the trial court abused its discretion in so ruling. (Appellate brief 4, 18-19) Appellant also argues that the trial court's unwillingness to order Respondent to pay \$24,000.00 in legal fees constituted a clear error. (Id. at 3.)

STATEMENT OF ISSUES

- I. Appellant designated an incomplete record on appeal.**
- II. The trial court entered an appropriate parenting plan.**
- III. The trial court entered an appropriate order of child support.**
- IV. The trial court's decision not to award attorney's fees to Appellant was proper.**

STATEMENT OF FACTS

Appellant and Respondent were married on August 29, 1998 in Everett, Washington. (R. C.P. 143, 2.) Appellant and Respondent separated on June 2, 2012. *Id.* The parties had two children: Tiffany Johnstone, and Alex Johnstone, ages 15 and 11, respectively, at the time of

the trial. (R. C.P. 55, 2.) The parties went to trial on May 5, 2013. The guardian ad litem assigned to the case completed an initial report and a follow-up report. (R. C.P. 55; 121.)

The guardian ad litem concluded that the children had a stronger relationship with Respondent than Appellant. (R. C.P. 55, 12.) The report included accounts by both children that they had observed Appellant regularly drink around the house, and at the residence of Monica, a friend of the appellant. (R. C.P. 55, 7-8.) The daughter reported feeling abandoned by Appellant, and disapproved of Appellant's use of discretionary time. (R. C.P. 55, 7-8; 121, 7.) The guardian ad litem recommended that the children reside with Respondent, with weekend visitation reserved for appellant. R. C.P. 121, 1.) The trial court granted shared custody to both parties. (R. C.P. 141.)

Both parties completed financial affidavits containing their total earnings that were admitted at trial. (R. C.P. 134, Exhibits 39, 78.) The trial court awarded a downward deviation in favor of Appellant based on the residential schedule contained in the parenting plan. (R. C.P. 142, 3-4.)

Appellant filed this appeal on October 31, 2013. Appellant failed to designate a copy of the transcript of the court proceedings from the May 5, 2013 trial as part of the record. (R. C.P. 1-3.)

ARGUMENTS AND AUTHORITIES

I. Appellant designated an incomplete record on appeal.

The Appellant has the burden to designate a record sufficient to demonstrate the errors it alleges on appeal. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). Here, in order to be successful on appeal, Appellant must demonstrate that the trial judge abused its discretion in entering the final parenting plan and child support order. See In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997).

In order to determine whether a trial court has abused its discretion, it must be determined whether the trial court's determinations are supported by evidence. Appellate courts do not retry factual disputes, but do consider whether the record supports a court's findings. See In re Marriage of Thomas, 63 Wn.App. 658, 660, 821 P.2d 1227 (1991). ("The court's findings of fact will be accepted as verities on appeal as long as they are supported by substantial evidence in the record.") Appellant cannot support her claims that the trial court abused its discretion relying on the incomplete record that has been designated.

A. Appellant's failure to designate a transcript of the trial as part of the record constitutes a basis to affirm the trial court's decision.

Appellant failed to designate a transcript of any of the court proceedings from the five-day trial. (R. 1-3.) Nevertheless, Appellant seeks to attack the validity of several of the trial court's findings of fact based on evidence presented at trial. Specifically, Appellant argues that

the trial court was mistaken regarding its findings of Appellant's own alcohol abuse, parental neglect, and Respondent's capability as a parent. (Appellate brief 30-32.) Any such erroneous findings, argues Appellant, are only possible if one presupposes that the trial court either ignored evidence presented at trial, or made an incorrect witness credibility determination. Id. Due to the incomplete designation of the record currently before this Court, any review to determine whether substantial evidence in the record exists to support appellant's claims is not possible. See Bulzomi v. Dep't of Labor & Indus., 72 Wn.App. 1,6, 790 P.2d 1266 (1990). ("An insufficient record on appeal precludes review of the alleged errors.") Here, the trial court considered the testimony of multiple witnesses at trial. Their testimony is not before this Court due to Appellant's failure to designate a sufficient record.

If an appellant fails to properly designate a sufficient record on appeal meant to establish an abuse of discretion, the Appellate Court has the authority to affirm the challenged decision. Lau v. Nelson, 92 Wn.2d 823, 829, 601 P.2d 527 (1979). A trial court's decision is presumed to be correct and should be affirmed unless there is a clear showing of error. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850, 852 (1999). Here, where Appellant has designated only the conclusions of the trial court and various exhibits and reports admitted at trial, the presumption that the trial court's judgment is correct should serve as a sufficient basis to affirm the decision made below.

II. The trial court entered an appropriate parenting plan.

The manifest abuse of discretion standard applies in the appellate review of a dissolution action. In re Marriage of Landry, 103 Wn.2d 807, 809, 699 P.2d 214, 215 (1985).

(“Trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court.”)

A trial court’s decision will be affirmed on appeal unless no reasonable judge would have reached the same conclusion. Id.

Appellant argues that the evidence presented at trial showed that Respondent was abusing alcohol and drugs, that Respondent engaged in abusive use of conflict, and was not a credible witness. (Appellate brief 20-33). Essentially, Appellant argues that Respondent is not capable of parenting, and that the guardian ad litem assigned to the case, and the trial court judge who oversaw the trial, were both somehow duped by Respondent. Appellant invites this Court to re-weigh evidence and make credibility determinations of witnesses which testified at trial in order to attack the basis for the parenting plan.

The reviewing court’s role is to determine whether findings of fact are supported by substantial evidence. Greene v. Greene, 97 Wn. App. 708, 714, 986 P.2d 144, 147 (1999). (“We will not substitute our judgment for the trial court's, weigh the evidence, or adjudge witness credibility.”)

Appellant argues that the trial court made incorrect findings regarding (1) Appellant's alcohol use, (2) Appellant's neglect of her children, and (3) Respondent's character. Despite being confined to the limited record designated by Appellant, there is substantial evidence in the record available to support the trial court's decisions.

A. Substantial evidence demonstrates that Appellant's use of alcohol negatively affected the children.

“Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise.” In re Marriage of Monaghan, 78 Wn. App. 918, 923, 899 P.2d 841, 844 (1995). Here, the report of the guardian ad litem included accounts by both children that they observed Appellant regularly drink around the house, and at the residence of Monica, a friend of the appellant. (R. C.P. 55, 7-8.) Appellant's use of alcohol was perceived by the children to affect her negatively. (R. C.P. 55, 8.) The guardian ad litem was concerned enough to request that Appellant complete a chemical dependency evaluation. (R. C.P. 55, 11.) The trial court correctly found that Appellant's alcohol use negatively affected the children.

B. Substantial evidence demonstrates that Appellant neglected her children by giving priority to her own social needs.

Appellant admitted to attending “hot yoga” and socializing with friends after work on a weekly basis. (R. C.P. 55, 6.) The children's perception of the use of Appellant's discretionary time was negative. The daughter reported to the guardian ad litem that Appellant was in the habit

of not coming home after work, sometimes two times a week, and would not tell her if she would be coming home or not. (R. C.P. 55, 7.) The daughter did not approve of her mother's decisions. *Id.* The daughter reported that she felt abandoned by her mother when she needed her the most. (R. C.P. 121, 7.)

The children both reported that they felt closer to Respondent than Appellant, and felt that Respondent was the only parent who really listened to them. The son reported feeling more safe with Respondent. (R. C.P. 55, 7-8.) The guardian ad litem's report demonstrates substantial evidence that the children felt negatively affected by Appellant's social habits, and that as a result, they turned to Respondent as the more trusted parent who really listened to their needs.

C. Substantial evidence demonstrates that it was in the children's best interest to award Respondent shared custody.

RCW 26.09.187(3) lists several factors courts are to consider in developing residential schedules. First among the factors, is the children's relationship with their parents. As established above, the children had a stronger bond to Respondent, trusted him, and knew that he listened to them. On the other hand, both children reported that their relationship with Appellant was more strained. (R. C.P. 55, 7-8.) There was substantial evidence to support the trial court's ruling that the parties, on the whole, had equally positive relationships with their children. (R. C.P. 135, 12.)

The next applicable factor in RCW 26.09.187 looks at the performance of parenting functions by the parties. RCW 26.09.187(3)(iii). The trial court found that despite the various issues raised by Appellant, Respondent had a high potential for future performance of parenting functions. (R. C.P. 135, 13.) The guardian ad litem reports indicated that the children were doing well in school, and that Respondent was good about helping them with homework. (R. C.P. 55, 7; C.P. 135, 12.) The children's bond to the Respondent and their trust in him are also strong indicators that Respondent will continue to be a successful parent.

The trial court did not ignore the alcohol abuse allegations against Respondent. Specifically to address the trial court's concerns, an RCW 26.09.191(3) restriction was made part of the parenting plan. Respondent was required to enroll in an alcohol and drug evaluation within two weeks of the oral decision, and complete a polygraph evaluation, and comply with any treatment the evaluations deemed necessary. (C.P. 141, 2-3.) Appellant was given authority to order Respondent to complete a UA any time she suspected alcohol abuse; a single failed UA constituting the basis for a modification of the parenting plan. *Id.* The trial court extended jurisdiction to provide quick access to court so that the parties could enforce the parenting plan. It is clear that the trial court considered all of the evidence and made appropriate findings and orders to create a parenting plan that would be in the best interest of the parties' children.

The oral opinion of the trial court demonstrates that the statutory factors were considered, and that substantial evidence supported the factual findings that served as a basis for shared custody of the children by both parents. The trial court did not abuse its discretion.

III. The trial court entered an appropriate order of child support.

A trial court's award of child support is subject to the abuse of discretion standard. State ex rel. J.V.G. v. Van Guilder, 137 Wn. App. 417, 423, 154 P.3d 243, 246 (2007). "A trial court does not abuse its discretion where the record shows that it considered all the relevant factors and the child support award is not unreasonable under the circumstances." Id.

Appellant argues that the trial court abused its discretion by accepting Respondent's actual earnings in calculating child support instead of imputing a higher income as Appellant requested. (Appellate brief 34-35.) Appellant also assigns error to an alleged failure of the trial court to grant a downward deviation based on the residential schedule as expressed in the parenting plan. (Appellate brief 35.)

The trial court reviewed financial declarations of both parties. (R. C.P. 134, Exhibits 39, 78.) It was not an abuse of discretion on the part of the trial court to calculate child support based on actual earnings instead of imputed ones.

Appellant's contention that the trial court abused his discretion by neglecting to provide a downward deviation has no basis. The order of child support provided for a downward deviation, bringing the total

monthly transfer amount from \$876.15 down to \$676.15 based on the residential schedule. (R. C.P. 142, 3-4.) The child support order was supported by substantial evidence. The trial court did not abuse its discretion.

IV. The trial court's decision not to award attorney's fees to Appellant was proper.

RCW 26.09.140 governs awards of attorney's fees in family law cases. According to RCW 26.09.140, a trial court may award fees after considering the financial resources of both parties, the particular need of one party, and the ability of the other party to pay. Kirshenbaum v. Kirshenbaum, 84 Wn.App. 798, 808, 929 P.2d 1204 (1997). A party must demonstrate that a trial court's decision to award attorney's fees constituted an abuse of discretion in order to prevail on appeal. In re Marriage of Ayyad, 110 Wn. App. 462, 473, 38 P.3d 1033, 1039 (2002).

Here, there is nothing to demonstrate that the trial court abused its discretion in deciding to order that both parties were responsible only for their own legal fees. It is clear that Appellant earns more money than Respondent, and that Appellant has more ability to pay than Respondent. The trial court's decision is directly in line with the analysis directed by the statutory factors in RCW 26.09.140 and should be affirmed.

CONCLUSION

Appellant has failed to demonstrate that the trial court abused its discretion in any way. The parenting plan, order of child support, and

decision not to award attorney's fees were all supported by substantial evidence. The trial court's judgment should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'B. Peterson' with a stylized flourish extending to the right.

BRUCE A. PETERSON WSBA #18688
Attorney for Respondent Timothy
Johnstone

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**COURT OF APPEALS
DIVISION 1
STATE OF WASHINGTON**

DEE ANN JOHNSTONE,
Appellant-Respondent

vs.

TIMOTHY JOHNSTONE
Respondent-Petitioner

RETURN OF SERVICE/DECLARATION OF SERVICE AS TO
APPELLANT DEE ANN JOHNSTONE REGARDING FILING OF
TIMOTHY JOHNSTONE'S BRIEF OF RESPONDENT

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION 1

I DECLARE:

1. I am over the age of 18 years, and I am not a party to this action.

2. I served the following documents to:

Mr. Stuart E. Brown
Attorney at Law WSBA #35928
Attorney for DEE ANN JOHNSTONE
12535 15th Ave NE #201
Seattle, WA 98125

Brief of Respondent

3. The date, time and place of service were:

Date: December 2, 2013

Address: Stuart E. Brown
12535 15th Ave NE #201
Seattle, WA 98125

4. Service was made:

By personal service at office of Stuart E. Brown on 12-2-13 at
1:15 p.m.

5. Service of Notice on Dependent of a Person in Military Service:

N/A

6. Other: N/a

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Seattle, Washington on 12-2-13 by:

David Gorecki David Gorecki

Of Northsound Due Process: 7901 Happy Hollow Rd, Stanwood, WA
(425) 238-1896 phone