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JIM FERNANDO, *Respondent,* v. BERNHILD M. NIESWANDT, *Appellant.*

No. 37960-7-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

87 Wn. App. 103*; *940 P.2d 1380*; *1997 Wash. App. LEXIS 630

April 28, 1997, Filed

SUBSEQUENT HISTORY: [***1] Motion to Supplement Petition for Review Granted and Petition for Review Denied October 7, 1997, Reported at: *133 Wn.2d 1014, 946 P.2d 402, 1997 Wash. LEXIS 704*. Reported in Table Case Format at: *85 Wn. App. 1087*.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant mother sought review of an order of the Superior Court of Skagit County (Washington), which entered a permanent parenting plan giving respondent father visitation privileges. The father filed a motion for attorney fees alleging the mother's appeal as frivolous.

OVERVIEW: The father initiated an action to establish visitation rights. The trial court granted the father's petition. The mother asserted that the trial court erred by: (1) relying on evidence outside the record; (2) awarding the father attorney fees; and (3) reducing his child support payments. On appeal, the court affirmed. The court held: (1) properly appointed the guardian at litem under *Wash. Rev. Code §§ 26.09.220* and *26.12.175* and her testimony was expressly admissible under *Wash. Rev. Code § 26.12.175(b)*; (2) the visitation plan was supported by ample evidence; (3) the trial judge's illustrative comments were not improper because he was not comparing the case to his own life in rendering a decision; (4) it was not error to consider the statutory guidelines of *Wash. Rev. Code § 26.09.002*; (5) attorney fees were properly awarded to the father under the Uniform Parentage Act, 26.26.140, because the father incurred significant fees in responding to the mother's defense to the visitation request; and (6) the downward deviation from the support award was proper under *Wash. Rev. Code § 26.19.075(1)(e)* because the father had an additional support obligation to his other children.

OUTCOME: The court affirmed the order granting the father visitation rights.

LexisNexis(R) Headnotes

Family Law > Guardians > General Overview

[HN1] A trial court may appoint a guardian ad litem to make recommendations to the court about appropriate parenting arrangements. *Wash. Rev. Code §§ 26.09.220* and *26.12.175*. The guardian is expressly permitted to interview doctors or experts who have seen the child in the past and report those impressions to the court. The guardian need not have any specific training. Rather, the statute requires that each guardian ad litem provide information about their background to the family court program. *Wash. Rev. Code § 26.12.175(3)*. If a party believes that the guardian is not qualified to render opinions in the matter, that party may move to substitute the guardian within three days of the appointment. *Wash. Rev. Code § 26.12.177(2)(c)*.

Evidence > Testimony > Experts > Court-Appointed Experts > Appointments
Family Law > Guardians > Appointment
[HN2] The statutes which authorize the appointment of the guardian ad litem authorize the family courts to hear the opinions of a witness who would not be a traditional expert under *Wash. R. Evid. 702*.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
Civil Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview
[HN3] This court reviews a trial court's findings for a parenting plan for abuse of discretion. The trial court's findings are given great weight on review because it is in a unique position to observe the parties and their demeanor. Therefore, we will not disturb the trial court's findings so long as they are supported by "ample evidence."

Civil Procedure > Trials > Bench Trials
[HN4] When the judge is a trier of fact, illustrative comments phrased in the first person are not improper unless they evidence bias, prejudice, or other impropriety.

Family Law > Child Custody > Procedures
[HN5] The trial court must consider the governing law when fashioning a parenting plan, even if the parties do not present it to the court.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Statutory Awards
Family Law > Paternity & Surrogacy > Establishing Paternity > Uniform Parentage Act
[HN6] An award of attorney fees under the Uniform Parentage Act, *Wash. Rev. Code § 26.26.140*, is within the trial court's discretion. The court will not disturb the trial court's award unless it was manifestly unreasonable or based on untenable reasons.

Family Law > Child Support > Obligations > General Overview
[HN7] Support payments are the child's funds held in trust by the receiving parent Therefore, a party may not offset the payments to cover his personal attorney fees debt.

Family Law > Child Support > Obligations > Computation > General Overview
Family Law > Child Support > Obligations > Modification > General Overview
Family Law > Parental Duties & Rights > Duties > General Overview
[HN8] Under *Wash. Rev. Code § 26.19.075(1)(e)*, the trial court is permitted to grant a downward deviation from the support schedule if the parent has "a duty of support" to children from other relationships. The statute does not define "duty of support." However, *Wash. Rev. Code § 26.19.075(1)(e)(iii)* states that when considering a deviation from the standard calculation for children from other relationships, the court may consider only other children to whom the parent owes a duty of support. The court may consider court-ordered payments of child support for children from other relationships only to the extent that the support is actually paid. The statute distinguishes between "duty of support" and payments of "child support." Therefore, the logical interpretation of "duty of support" is that it means all support obligations, not merely payments of court-ordered child support. Under this interpretation, a trial court may deviate from the standard child support schedule based upon one parent's obligations to children from other relationships who live with them, so long as the parent fulfills the obligation. After the trial court determines that there are grounds for a deviation from the presumptive schedule, its deviation is reviewed for abuse of discretion.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview
Civil Procedure > Appeals > Frivolous Appeals
[HN9] *Wash. Rev. Code §§ 26.26.140* and *4.84.185* allow a court to award attorney fees incurred in responding to a frivolous appeal. An appeal is frivolous when there are no debatable issues upon which reasonable minds could differ and when the appeal is so totally devoid of any merit that there was no reasonable possibility of reversal.

SUMMARY:

Nature of Action: Action to establish the paternity of a child and to secure custody rights.

Superior Court: The Superior Court for Skagit County, No. 92-5-00109-1, George E. McIntosh, J., on December 18, 1995, entered a decree of paternity and a parenting plan granting the father visitation rights to the child.

Court of Appeals: Holding that the trial court properly allowed the child's guardian ad litem to testify to her recommendations regarding visitation, that the trial court's findings of fact were supported by substantial

evidence in the record, that statements made by the trial judge regarding his own commonsense understanding of the evidence were not improper, and that the trial court's deviation from the standard child support schedule on the basis of the father's support obligation to a child from another relationship did not constitute an abuse of discretion, the court *affirms* the decree and parenting plan.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] Juveniles -- Custody -- Guardianship -- Guardian ad Litem -- Testimony -- Qualifications A guardian ad litem appointed on behalf of a child to make recommendations to the court about appropriate parenting arrangements need not have any specific training and, under *RCW 26.12.175(1)(b)*, may present recommendations to the court without being qualified as an expert under *ER 702*.

[2] Juveniles -- Custody -- Guardianship -- Guardian ad Litem -- Testimony -- Review -- Standard of Review Appellate courts review a trial court's decision to admit a guardian ad litem's recommendations for abuse of discretion.

[3] Juveniles -- Custody -- Parenting Plan -- Review -- Standard of Review Appellate courts review parenting plans crafted by trial courts for abuse of discretion.

[4] Juveniles -- Custody -- Parenting Plan -- Findings of Fact -- Review -- Standard of Review A trial court's findings of fact entered in support of a parenting plan are entitled to great weight and will be upheld on review if they are supported by ample evidence.

[5] Trial -- By Court -- Findings of Fact -- First-Person Illustrative Comments -- Validity -- Test When sitting as a trier of fact, a trial judge's commonsense comments and first-person illustrative statements about the facts are not error if they do not indicate bias, prejudice, or other impropriety by the court.

[6] Juveniles -- Custody -- Parenting Plan -- Statutory Guidelines -- Consideration -- Necessity When fashioning a parenting plan, a court must consider the guidelines of *RCW 26.09.002* whether or not the parties brief the court on them.

[7] Juveniles -- Paternity -- Attorney Fees -- Statute Applicable *RCW 26.26.140* governs requests for attorney fees when a claim is initiated as a paternity dispute.

[8] Juveniles -- Paternity -- Attorney Fees -- Review -- Standard of Review A trial court's award of attorney fees under *RCW 26.26.140* is reviewed for an abuse of discretion. A trial court does not abuse its discretion unless the decision to award attorney fees is manifestly unreasonable or based on untenable reasons.

[9] Divorce -- Child Support -- Child Support Schedule -- Deviation -- Parent's Prior Support Obligation to Another Child Under *RCW 26.19.075(1)(e)*, a parent's child support obligation may deviate from the standard child support schedule based on the parent's obligation to support children from another relationship, but only if the parent in fact fulfills the support obligation to them. The obligation may be fulfilled if the child lives with the parent.

[10] Divorce -- Child Support -- Child Support Schedule -- Deviation -- Review -- Standard of Review A trial court's deviation from the standard child support schedule is reviewed for an abuse of discretion.

[11] Appeal -- Frivolous Appeal -- What Constitutes -- In General An appeal is not frivolous unless there are no debatable issues upon which reasonable minds could differ and it is so totally devoid of any merit that there is no reasonable possibility of reversal.

COUNSEL: *Morgan M. Witt (Christopher P. Curran,* of counsel), for appellant.

G. Brian Paxton, for respondent.

JUDGES: Authored by Susan R. Agid. Concurring: H. Joseph Coleman, William W. Baker.

OPINION BY: Susan R. Agid

OPINION

[*105] [**1382] Agid, J. -- Bernhild Nieswandt and Jim Fernando separated about eight months after their child, A., was born. Nieswandt moved from their LaConner home to her parents' home in Portland. Fernando brought a paternity and custody suit to secure his visitation rights. The trial court entered a permanent parenting plan giving him one five-day visit each month plus additional time at holidays. Nieswandt appeals, arguing that the plan was not supported by substantial evidence and that the trial court erred by: (1) relying on evidence outside the record; (2) awarding Fernando attorney fees; and [***2] (3) reducing his child support payments based on his obligations to other children. We disagree and affirm.

FACTS

Nieswandt and Fernando lived together in LaConner, Washington, for over two years and had one child, A. In February 1992, Nieswandt decided to leave LaConner and return to Portland, Oregon, to live with her parents and attend the Western Culinary Institute. She brought A. to Portland with her. In June, Fernando filed a petition for determination of paternity and establishment of a parenting plan.

In preparation for trial, Fernando petitioned the court to appoint a guardian ad litem. The court appointed Eileen Butler, a member of the Washington State Bar who has limited her practice to guardian ad litem work. Butler met with A. at Fernando's house, and also observed her with Nieswandt. In addition, she consulted Nieswandt's expert, Dr. Friesen, and reviewed reports written by Dr. Young, a counselor who saw all parties. She interviewed Nieswandt about her reports that A. behaved differently after she visited with her father and spent some time with them immediately after a visit. She testified that she did not observe any difference in A.'s behavior after the visits. [***3] In her report, Butler recommended that Nieswandt be the primary residential parent. But she also recommended that Fernando have visitation because A. had a strong [*106] bond with her father and his other children and, as a mixed-race child, she needed to learn about her father's culture as well as her mother's. Butler recommended that A. visit with her father in LaConner four to five days per month and that Fernando have liberal and frequent visitation with her in Portland.

In response to Butler's recommendations, Nieswandt presented three experts. Dr. Bohlin, a family therapist, recommended against visitation as too traumatic for A. He also testified that guardians ad litem are generally not qualified to make recommendations for the care of a child because they have no scientific training. Walt Friesen, a marriage and family counselor, testified that his observations of A. after visits with her father lead him to believe that she was not emotionally bonded to Fernando and that she acted out upon her return from these visits because they were disturbing to her. Dr. Reilly, a psychologist, testified that A. suffered from depression after her visits with Fernando, resulting from post-traumatic [***4] stress disorder. He opined that the visitation would damage A.'s relationship with both parents.

The trial court rejected the experts' testimony and adopted Butler's recommendations. It found that both parents were competent and that nothing in the record, including videotapes of A. becoming upset at being put in the car to go to Fernando's house, convinced him that A. was traumatized. It also found that much of the testimony [**1383] of Nieswandt's experts was contrary to the standards underlying Washington's Domestic Relations Act, RCW 26.09. The parenting plan ordered five-day visitations in LaConner each month until A. began school, as well as two two-week visits in the summer and half of Christmas break. The court also granted Fernando's request for attorney fees and reduced his child support payments because he supported a child from his last marriage.

DISCUSSION

[1] [2] Nieswandt first argues that the trial court abused [*107] its discretion by allowing the guardian ad litem to testify to her recommendations. She argues that the testimony was an inadmissible opinion under *ER 702* because Butler is not an expert. [HN1] A trial court may appoint a guardian ad litem to make recommendations to the court about [***5] appropriate parenting arrangements. *RCW 26.09.220, 26.12.175*. The guardian is expressly permitted to interview doctors or experts who have seen the child in the past and report those impressions to the court. The guardian need not have any specific training. Rather, the statute requires that each guardian ad litem provide information about their background to the family court program. *RCW 26.12.175(3)*. If a party believes that the guardian is not qualified to render opinions in the matter, that party may move to substitute the guardian within three days of the appointment. *RCW 26.12.177(2)(c)*.

[HN2] The statutes which authorize the appointment of the guardian ad litem authorize the family courts to hear the opinions of a witness who would not be a traditional expert under *ER 702*. A guardian ad litem is not appointed as an "expert." Rather, she is appointed to investigate the child and family situation for the court and make recommendations. In effect, she acts as a neutral advisor to the court and, in this sense, is an expert in the status and dynamics of that family who can offer a commonsense impression to the court. But the court is also free to ignore the guardian ad litem's recommendations [***6] if they are not supported by other evidence or it finds other testimony more convincing.

Butler has no special training in child parenting matters except that she has several small children and took legal education courses on guardian ad litem work. However, her recommendations are expressly admissible under *RCW 26.12.175(1)(b)*. She developed her opinion about the appropriate visitation after observing A. with each of her parents and conducting interviews with her treating therapists and Nieswandt's experts, as the statute permits. The statute clearly anticipates that the guardian [*108] will testify about her recommendations. Therefore, the court did not abuse its discretion when it considered Butler's testimony.

Nieswandt also argues that the parenting plan was not supported by sufficient evidence because the trial court relied more heavily on Butler's recommendations than those of her experts. She admits that the trial court

considered the testimony of the experts and commented on it during its oral ruling, but argues that the court could not have found the testimony of the untrained guardian ad litem was more convincing than that of the three expert witnesses.

[3] [4] [HN3] This court reviews a trial [***7] court's findings for a parenting plan for abuse of discretion. *In re Marriage of Schneider, 82 Wn. App. 471, 476, 918 P.2d 543, review granted, 130 Wn.2d 1001 (1996)*. The trial court's findings are given great weight on review because it is in a unique position to observe the parties and their demeanor. *Schneider, 82 Wn. App. at 476*. Therefore, we will not disturb the trial court's findings so long as they are supported by "ample evidence." *Schneider, 82 Wn. App. at 476* (citing *In re Marriage of Kovacs, 121 Wn.2d 795, 810, 854 P.2d 629 (1993))*.

In addition to the testimony from the experts, the trial court heard two days of testimony from A.'s parents and the guardian ad litem. Its oral findings and conclusions demonstrated attention to the details of the testimony from both sides. It clearly rejected the recommendations of the experts as not supported by the other testimony, the standards for parenting plans under *RCW* [**1384] *26.09.002*, and the court's observations of A. The testimony supports the court's finding that A. was not traumatized by visiting her father and that she was bonded to him. The parenting plan is supported by ample evidence.

[5] Nieswandt next contends that the [***8] trial court improperly considered evidence outside the record in fashioning the parenting plan. She argues that the trial judge imposed his personal experience and views into his [*109] findings. [1] The judge did make several illustrative comments about his own experience on the bench and as a parent to explain his decision. However, the transcript does not reveal that he was in any way comparing this case to his own life to make a decision. Rather, he was acting as a trier of fact and applying common sense to the facts of this dispute to make a decision. [HN4] When the judge is a trier of fact, illustrative comments phrased in the first person are not improper unless they evidence bias, prejudice, or other impropriety.

1 Her argument stems from three comments. First, the court refused to find that a videotape of A. stiffening as she was put in a car seat was evidence that she suffered trauma as a result of visiting with Fernando. The judge stated "For heaven's sake, I had three children and ten grandchildren and a couple of great-grandchildren, and I'm telling you, I've seen that happen so many times. Just to deprive the child of some trivial little thing, and they'll stiffen their back or they'll swing or they'll throw something." Second, the court rejected the testimony of the experts, finding that, in his experience, an expert can be found to support any position. Third, the court stated that, in his experience, most children emerged from divorce "without any perceptible damage."

[***9] **[6]** Nieswandt also argues that the trial court erred when it considered statutory guidelines even though the parties did not brief the court on the law and when it allowed the guardian ad litem to testify without hearing her qualifications. First, [HN5] the trial court must consider the governing law when fashioning a parenting plan, even if the parties do not present it to the court. *RCW 26.09.002* states a policy of developing a relationship between the child and each of the parents. It also states that the plan should reflect the best interests of the child. The court did not err when it considered the governing statute in making its decision; it would have been error not to. Nor did the trial court err when it took notice of Butler's qualifications without considering them on the record. The statute which permits the court to appoint a guardian ad litem establishes the qualifications as well. In addition, Butler's qualifications were in the court record, and the trial court had considered them prior to appointing her. The trial court did not improperly rely on evidence outside the record to reach its decision.

[*110] Nieswandt next contends that the trial court erred when it ordered her to pay [***10] $ 7,500 of Fernando's attorney fees. The court found that she spent a great deal of time and money arguing about settled law and thereby substantially increased Fernando's costs. In ordering the attorney fees, the court stated, "But I don't feel it was fair for Mr. Fernando, who is a very average middle-class citizen, to have to be somewhat impoverished because the respondent wants to go pioneering in the law." Nieswandt argues that the court erred because it found that Fernando was impoverished without hearing any testimony to support that finding.

[7] [8] RCW 26.26, the Uniform Parentage Act (UPA), governs Fernando's attorney fees request because he began this action to establish paternity and secure visitation rights. *See In re Marriage of T., 68 Wn. App. 329, 334, 842 P.2d 1010 (1993)* (the UPA attorney fees provisions govern in cases arising under that act). [HN6] An award of attorney fees under *RCW 26.26.140*, the costs provision of the UPA, is within the trial court's discretion. *Marriage of T., 68 Wn. App. at 335*. We will not disturb the trial court's award unless it was manifestly unreasonable or based on untenable reasons. Looking at this record as a whole, we cannot say that the trial [***11] court abused its discretion. Nieswandt presented an extensive defense to Fernando's visitation request, and Fernando incurred significant [**1385] addi-

tional fees responding to her defense. In addition, the amount of the award is not unreasonable. [2] We therefore affirm it.

> 2 At the end of oral argument, Fernando's counsel suggested that the attorney fees be offset by his child support payments. [HN7] Support payments are the child's funds held in trust by the receiving parent. *Ditmar v. Ditmar, 48 Wn.2d 373, 293 P.2d 759 (1956)*. Therefore, Fernando may not offset the payments to cover his personal attorney fees debt.

[9] Nieswandt's final contention is that the court erred when it granted Fernando a downward deviation in support based on his obligations to his child from a previous marriage, an obligation which he discharges by having [*111] the child live with him. She argues that the costs of having a child live with you may not be considered in granting a downward departure from the presumptive support schedule. [HN8] Under *RCW 26.19.075(1)(e)*, [***12] the trial court is permitted to grant a downward deviation from the support schedule if the parent has "a duty of support" to children from other relationships. The statute does not define "duty of support." However, *RCW 26.19.075(1)(e)(iii)* states:

> When considering a deviation from the standard calculation for children from other relationships, the court may consider only other children to whom the parent owes a duty of support. The court may consider court-ordered payments of child support for children from other relationships only to the extent that the support is actually paid.

The statute distinguishes between "duty of support" and payments of "child support." Therefore, the logical interpretation of "duty of support" is that it means all support obligations, not merely payments of court-ordered child support. Under this interpretation, a trial court may deviate from the standard child support schedule based upon one parent's obligations to children from other relationships who live with them, so long as the parent fulfills the obligation.

[10] After the trial court determines that there are grounds for a deviation from the presumptive schedule, its deviation is reviewed for abuse [***13] of discretion. *In re Marriage of Trichak, 72 Wn. App. 21, 23, 863 P.2d 585 (1993)*. The trial court did hear testimony about Fernando's and Nieswandt's incomes. He found that Fernando has a monthly income of $ 1,794 and that Nieswandt could have an income of $ 1,238, but was voluntarily underemployed. He also found that Fernando had a support obligation to his two minor children from his previous marriage which was satisfied by having one child live with him. Therefore, the court slightly reduced Fernando's obligation to A. This reduction was not an abuse of discretion.

[11] Finally, Fernando asks for attorney fees under [HN9] [*112] *RCW 26.26.140* or *RCW 4.84.185*, which allow a court to award attorney fees incurred in responding to a frivolous appeal. An appeal is frivolous when "there are no debatable issues upon which reasonable minds could differ and when the appeal is so totally devoid of any merit that there was no reasonable possibility of reversal." *Mahoney v. Shinpoch, 107 Wn.2d 679, 691, 732 P.2d 510 (1987)* (citing *Boyles v. Department of Retirement Sys., 105 Wn.2d 499, 509, 716 P.2d 869 (1986)*). While we affirm the trial court, we do not believe that the appeal was frivolous and deny [***14] Fernando's request.

Affirmed.

Baker, C.J., and Coleman, J., concur.

Review denied at *133 Wn.2d 1014 (1997)*.

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