

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

|                                  |   |                          |
|----------------------------------|---|--------------------------|
| In the Matter of the Marriage of | ) |                          |
|                                  | ) | No. 63834-3-1            |
| SOMDET WEBSTER,                  | ) |                          |
|                                  | ) | DIVISION ONE             |
| Appellant,                       | ) |                          |
|                                  | ) | UNPUBLISHED OPINION      |
| and                              | ) |                          |
|                                  | ) |                          |
| WILLIAM D. WEBSTER,              | ) |                          |
|                                  | ) | FILED: December 14, 2009 |
| Respondent.                      | ) |                          |

Grosse, J. — It is well established that once a marriage is proven, it is presumed to be valid. Here, there was a valid marriage certificate and the parties had lived together as husband and wife. A mere allegation of invalidity due to a prior marriage not dissolved by death or divorce is insufficient to overcome that presumption.

William Webster’s allegations that the trial judge was biased and should have recused are without merit. Accordingly, we affirm the trial court’s division of property, parenting plan and decree of dissolution.

**FACTS**

William Webster and Somdet Webster met and married in Thailand in December 1994. William and Somdet remarried in Ketchikan, Alaska on August 30, 1995. Their son, William Scott Webster (Will), was nine years old at the time of the trial. Somdet also has two adult children who reside in Thailand.

William and Somdet separated on January 29, 2007. On February 8,

2007, Somdet was granted a one-year order of protection in Kitsap County Superior Court.<sup>1</sup> On February 27, 2007, Somdet filed a petition for dissolution seeking a parenting plan, child support, spousal maintenance, and a restraining order, as well as distribution of the marital community's property and debts.

William responded through counsel and requested that he be given the tax exemption. His response also sought to reserve the right to petition for a declaration regarding the validity of the marriage. His counsel subsequently withdrew and thereafter William represented himself. He appeals raising a plethora of issues including bias on the part of the trial judge.

## ANALYSIS

### Validity of the Marriage

William contends his marriage to Somdet in Alaska is invalid because Somdet was previously married and not divorced. In Donofrio v. Donofrio,<sup>2</sup> the court held that the burden of establishing a marriage to be invalid rests squarely on the person alleging the invalidity:

Thus if it is claimed that at the time of the marriage, one of the parties had a living spouse, it is incumbent upon him who attacks the marriage upon this ground to overcome the presumption of its validity, by establishing the former marriage, in all respects in conformity to law, and that the former spouse was living at the time that the second marriage was entered into, and undivorced.

William has failed to overcome this presumption of validity. William presented the 1983 Thai birth certificate of Somdet's son which shows that her

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<sup>1</sup> The order found that William had "committed domestic violence as defined in RCW 26.50.010."

<sup>2</sup> 167 Wash. 80, 84, 8 P.2d 966 (1932) (quoting 18 R. C. L. 427).

“maiden name” is Rahothan. This is also the father’s family name. But Somdet testified that she and the father, Somjai Rahothan, were never married and, further, that she had no role in the creation of her son’s birth certificate. Somdet also testified that Somjai Rahothan died before she married William.

William demanded that Somdet prove that she is not married to Somjai and requested that she supply documentation to support her assertion that he is dead. But this was not Somdet’s burden, as the presumption is in favor of a valid marriage. The trial court found William’s evidence insufficient to prove a prior marriage or to rebut Somdet’s testimony that Rahothan had died before she met William. The credibility of witnesses is within the purview of the trial court and will not be overturned on appeal.<sup>3</sup> The trial court’s conclusion is supported by substantial evidence.

### Recusal

William next contends the trial court erred by failing to recuse itself. He cites a litany of federal cases and Canons 1, 2, 3, 4 and 7 of the Code of Judicial Conduct (CJC). William’s arguments are devoid of any merit.

We review a trial court’s denial of a motion for recusal for an abuse of discretion.<sup>4</sup> A court abuses its discretion only when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons.<sup>5</sup> While Canon 3(D)(1) of the CJC, due process, and the appearance of fairness doctrine require recusal of a judge who is biased against a party or whose

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<sup>3</sup> Davis v. Dep’t of Labor & Indus., 94 Wn.2d 119, 124, 615 P.2d 1279 (1980).

<sup>4</sup> In re Marriage of Meredith, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009).

<sup>5</sup> State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

impartiality is reasonably questioned, such is not the case here.<sup>6</sup> Moreover, a trial court is presumed to perform its functions properly without bias or prejudice.<sup>7</sup>

After Judge Leonard Costello made an oral ruling in the dissolution, William moved for the judge's recusal. He argued that the judge engaged in ex parte contact with Somdet's lawyers because he attended a "Justice for All" event in support of legal services that Somdet's attorney, Jennifer Brugger, also attended. But William fails to show how the judge's attendance at this event could have influenced his rulings or decision in this case. Moreover, Canon 4 of the CJC recognizes that judges may participate in activities that improve the legal system.<sup>8</sup>

William's claims that Judge Costello had a close relationship with Brugger because she was a former Kitsap County prosecutor are likewise unsubstantiated and without merit. The judge's prior contact with Brugger in her role as a prosecutor alone does not violate the appearance of fairness doctrine. "The appearance of fairness doctrine seeks to insure public confidence by preventing a biased or potentially interested judge from ruling on a case."<sup>9</sup> To show a violation, William needed to present evidence of the judge's actual or potential bias. This he has not done. William has not rebutted the presumption

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<sup>6</sup> State v. Dominguez, 81 Wn. App. 325, 328, 914 P.2d 141 (1996).

<sup>7</sup> Wolfkill Feed and Fertilizer Corp. v. Martin, 103 Wn. App. 836, 841, 14 P.3d 877 (2000).

<sup>8</sup> Canon 4 Judges May Engage in Activities to Improve the Law, the Legal System and the Administration of Justice.

<sup>9</sup> Meredith, 148 Wn. App. at 903.

that the trial court performs its functions regularly and properly without bias or prejudice. We find no abuse of discretion.

Investigator Stacy Bronson

William also contends the trial court erred by not granting his motion to dismiss the court appointed investigator, Stacy Bronson. RCW 26.09.220 authorizes the court to order an investigation and a report concerning parenting arrangements. The investigator may be called as a witness and is subject to cross-examination.

William contends that Bronson exhibited gender bias, had no time for the case, and was shouting at him during a phone call about the repossession of a truck that Somdet had been using. That phone call was overheard by William's brother, Kip, who submitted an affidavit in support of William's motion. Kip's affidavit alleged that Bronson was so loud that Kip could hear her shouting and verbally abusing his brother while he was sitting next to him.

Bronson's parenting report also mentioned the phone call. Bronson stated she called William to reschedule a home visit and to obtain the name of the tow truck company that towed the truck away, as well as the name and phone number of the lender that had the truck repossessed. William refused to give any information because this had nothing to do with his son. Her report characterized Webster's response to her inquiry as initially defensive and then volatile and argumentative. After her third attempt to elicit the information, Bronson told William the reason she needed the information was none of his

business, but that it just needed to be provided to her. William told her to get the information from his attorney and hung up on her. Based on this conversation, Bronson concluded that it would be unsafe to conduct a home visit with William.

Bronson testified at trial and was cross-examined at length by William. Her testimony indicated that she did not tell William that she was too busy to take the case. The thrust of William's cross-examination was that there was no "physical" evidence he abused Somdet. On redirect, Somdet introduced e-mails William had sent her that were "derogatory, accusatory, demanding, [and] threatening." Bronson testified that her belief that abuse existed in this relationship was based on police reports, medical records, and Somdet's own story.

The record does not contain any evidence of gender bias. Although the investigator did not visit William, he was not prejudiced because he had adequate opportunity to cross-examine Bronson. The record does not support his argument and he fails to show that the trial court erred by denying his motion to dismiss the investigator.

### Parenting Plan

William contends the parenting plan is not supported by substantial evidence. Courts have traditionally deferred to the trial court in the area of family law.<sup>10</sup> The trial court has broad discretion to fashion the provisions of a parenting plan, considering the statutory factors and the child's best interests.<sup>11</sup>

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<sup>10</sup> In re Marriage of Maughan, 113 Wn. App. 301, 305, 53 P.3d 535 (2002).

<sup>11</sup> RCW 26.09.187; In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993).

A court abuses its discretion only when a decision is manifestly unreasonable or based on untenable grounds or for untenable reasons.<sup>12</sup> A 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.”<sup>13</sup>

RCW 26.09.187 sets forth the criteria for establishing a permanent parenting plan. The court must consider seven factors:

(i) The relative strength, nature, and stability of the child’s relationship with each parent;

(ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;

(iii) Each parent’s past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;

(iv) The emotional needs and developmental level of the child;

(v) The child’s relationship with siblings and with other significant adults, as well as the child’s involvement with his or her physical surroundings, school, or other significant activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and

(vii) Each parent’s employment schedule, and shall make accommodations consistent with those schedules.<sup>[14]</sup>

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<sup>12</sup> Kovacs, 121 Wn.2d at 801.

<sup>13</sup> In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

<sup>14</sup> RCW 26.09.187(3)(a).

Although the statute does not set forth how a court should weigh these factors, it does state that the greatest weight must be given to the first factor.<sup>15</sup>

William sought to be designated the parent with whom Will would spend the most time, arguing that Somdet is unfit because of her prior marriage, her abandonment of two children in Thailand, her previous attempts at suicide, her failure to administer medicine to the child for his Attention Deficit Hyperactivity Disorder (ADHD), her relationship with another man, her gambling habit, and perjury. But William's testimony before the trial court presented little affirmative evidence as to why he should be the parent with whom Will should reside the majority of time. Rather, he essentially argued that he is the better parent because he did not do all of the things he accused Somdet of doing. The only evidence he presented was that he and his son could live with his brother and family in a compound, that his son would be big and could play on the football team, and that he loved his son.

Somdet testified through a Thai interpreter that she was a stay-at-home parent when Will was first born. She later worked part time and did all the housework and cooking while providing the majority of care for Will. She said she and Will played, cooked, and read together. Somdet also thought it was important that Will participate in activities outside of school and testified that he had been involved in swimming, karate, and the study of the Thai language. She also testified that Will was involved with the Thai culture and that she and Will went to the Thai temple every week.

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<sup>15</sup> RCW 26.09.187(3)(a)(i).



She further testified that when the parties first separated, she kept Will at Manchester School even though this was further away than her neighborhood school because she felt it would be less disruptive to him. Somdet also testified that she helped Will with his schoolwork, which he had difficulty turning in. She was aware that Will had not been honest about completing his homework and that he had other minor behavioral problems at school. She testified that she was working with Will's teacher and others at the school on these issues and Will was improving.

She also testified that at times William would not permit Will to eat unless his homework was finished, and would also send Will to his room without eating when he was angry with Will. Somdet testified that she would sometimes feed Will when William was not looking. Somdet also reported that William spent a great deal of time in the computer room behind closed doors. When Will needed him for something, he would knock on the door and wait for a long time for his father to come out. She also testified that William mostly yelled at Will to discipline him.

Somdet further testified that she had not consistently given Will his ADHD medicine, particularly on weekends. She expressed concerns regarding the medicine's side effects, including lethargy, a rash, and decreased appetite. But she testified that she would comply with the doctor's recommendations in the future.

Somdet also testified that William had thrown boiling water on her leg and

averred that William had forced her to have sexual relations with him when she did not want to. In one instance, the police were called after William had removed all of her clothing from the house. Somdet testified that William made threats about her immigration status, called her stupid, and told her to go back to Thailand. Somdet further testified that she and William never had a joint bank account and that William monitored Somdet's spending by writing checks from her account and directing her to sign. On cross-examination, she asserted that William controlled her by not letting her go out with friends, outside or even to school.

Somdet further testified that she made two attempts to injure herself. The first was in 1997 when she cut her arm with a knife. She testified that she was fighting with William and he threatened to send her back to Thailand that day. She denied attempting to threaten William with a knife. (William testified that Somdet came after him with a knife, but that he did not report it to the police at the time.) The second incident occurred in 2007 when Somdet was under a lot of stress and William had disconnected the television and the telephone, and discontinued garbage service. She testified that she had little or no money and that everything seemed to "be coming down on her," so she took some pills. Will was not in the room when she took them. Somdet testified that she was in counseling now and had her life in order.

Bronson, the custody investigatory, testified that she had reviewed the police and hospital reports from the two incidents in which Somdet hurt herself.

The medical reports indicated that Somdet said she took the pills due to the separation from her husband, his abusive and controlling behavior, and an upcoming surgery. Additionally, Bronson spoke with Somdet's counselor who reported that Somdet did not need any medication and the depression was caused by William's abuse. Bronson also testified that she had no concerns about Somdet's mental state. Bronson also interviewed Will's school counselor and teacher at the Manchester School, which he was attending when the parties initially separated. They told her that they worked with Somdet on Will's homework and behavior issues and that Will was showing progress. The school staff also reported that previously when they had met with both William and Somdet, William made fun of Somdet's language difficulties and it was obvious to them that William was controlling.

Bronson also testified that she had listened to a phone message left for William by someone from the Thai embassy informing him that that his concerns about Somdet's status in the United States were unfounded. This message, together with letters that William had sent to the Internal Revenue Service and the Washington State Department of Industry, left Bronson with the clear impression that he was trying to undermine Somdet's status in the United States.

Additionally, Bronson recounted her conversation with Will, who told her that before the separation his dad had often yelled at him and would not let him eat until he had finished his homework. But he also said that when he visited his dad at his uncle's house, his dad was nice to him and his uncle would not let his

dad yell at him. Will also told Bronson that he had never seen his mother and her boyfriend, Samuel Flower, kissing, holding hands or hugging. He knew Flower as his mom's friend who sometimes ate over and played Monopoly.

Bronson also visited the Thai restaurant where Somdet worked and Will stayed. She found it to be a suitable environment and had no concerns. Will also expressed his desire to live with his mother.

Based on this evidence, the trial court found that William engaged in an "abusive use of conflict," and found that Somdet was the parent with whom Will should spent the majority of time. There was substantial evidence to support the trial court's findings of fact.

### Contempt

William also challenges the trial court's denial of his motion to hold Somdet in contempt, but he fails to identify the specific order he is appealing.<sup>16</sup>

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<sup>16</sup> RCW 7.21.010 defines contempt of court:

The definitions in this section apply throughout this chapter:

(1) "Contempt of court" means intentional:

(a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

(b) Disobedience of any lawful judgment, decree, order, or process of the court;

(c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or

(d) Refusal, without lawful authority, to produce a record, document, or other object.

(2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.

(3) "Remedial sanction" means a sanction imposed for the purpose of coercing performance when the contempt consists of

According to the briefing, between May 25, 2007 and December 4, 2007, William filed at least 17 motions. Only two of those contempt motions refer to Somdet with any specificity—the motions filed on November 16, 2007 and July 23, 2008.

RAP 5.3(a), which governs the content of a notice of appeal, requires that the appellant “designate the decision or part of decision which the party wants reviewed.”<sup>17</sup> But for an order or ruling not designated in a notice of appeal, RAP 2.4(b) provides:

**Order or Ruling Not Designated in Notice.** The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

Neither condition was met here. In any event, William’s contentions are without merit because they require us to ignore the trial court’s credibility determinations.

William’s November 16, 2007 motion requested an order of contempt for Somdet’s failure to give Will his ADHD medicine and for committing perjury by claiming that she did not speak English. But the November 16 order did in fact hold Somdet in contempt of court for failing to give Will his ADHD medicine and William effectively prevailed on that motion. As the prevailing party William is not “aggrieved” and thus has no standing to seek review.<sup>18</sup> He nonetheless

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the omission or refusal to perform an act that is yet in the person's power to perform.

<sup>17</sup> RAP 5.3(a)(3). Additionally, “[t]he party filing the notice of appeal should attach to the notice of appeal a copy of the signed order or judgment from which the appeal is made.” RAP 5.3(a).

challenges the basis of the ruling and seeks a finding that Somdet perjured herself in declarations and other documents regarding her age, her relationship with Flower, her ability to speak English, and domestic violence incidents. But a party who objects to the reasoning behind an order is not an “aggrieved party.”<sup>19</sup> Moreover, the record contains no evidence to support William’s allegations.

William’s other contempt motion was filed on July 23, 2008, which was after the filing of this appeal on July 7, 2008. It is therefore not properly before this court.

Northwest Justice Project (NJP)

William filed multiple motions for contempt, sanctions, and damages against the lawyers and their employer (NJP) who represented Somdet against him in the dissolution action. NJP was not a party to the dissolution proceedings, but was a target of several motions for sanctions, damages and contempt by William. The trial found all such motions to be baseless. William brought these same allegations against Judge Costello, NJP and its attorneys in federal court where they were dismissed under Rule 12(b)(6). Because NJP is not a party to this dissolution, we will not entertain the arguments against them.<sup>20</sup> Nor we will grant NJP’s motion for attorney fees.

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<sup>18</sup> RAP 3.1 states that “[o]nly an aggrieved party may seek review by the appellate court.”

<sup>19</sup> City of Tacoma v. Taxpayers of City of Tacoma, 108 Wn.2d 679, 685, 743 P.2d 793 (1987) (citing In re Estate of Lyman, 7 Wn. App. 945, 953-54, 503 P.2d 1127 (1972)).

<sup>20</sup> Subsequent to filing this appeal, William submitted multiple motions including one alleging improper conduct on the part of Division Two’s Clerk and Commissioner. These are not matters pertaining to the present appeal and as such will not be considered by this court.

We affirm the trial court.

Grosse, J

WE CONCUR:

Leach, J.

Appelwick, J