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NO. 94077-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ERIC R. SHIBLEY,

Petitioner,

v.

TINA M. SHIBLEY,

Respondent.

ANSWER TO PETITION FOR REVIEW TO THE WASHINGTON
SUPREME COURT

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I. STATEMENT OF FACTS

A. Procedural History

This case comes before the Washington State Supreme Court from a Court of Appeals' decision upholding a final parenting plan entered after a dissolution of marriage trial in Snohomish County Superior Court.

Tina and Eric were married on May 6, 2008, in Nashville, Tennessee. They separated on April 26, 2013, when Tina left with their three-year-old son Ryan and sought safety in a domestic violence shelter. RP 1240-1241, CP 21. Eric filed for dissolution of marriage on June 27, 2013. CP 786.

On April 1, 2014, Eric requested Tina undergo a CR 35 psychiatric exam. CP 797. Dr. Olsen, retained by Eric, completed his interview of Tina on June 14, 2014. Eric's counsel, Eric and Eric's expert, Dr. Natalie Novick-Brown, inserted themselves into Dr. Olsen's evaluation process, delaying the report. RP 100, Ex. 1, 103 and 105. The court found Eric, Eric's counsel, and Dr. Novick-Brown improperly inserted themselves into the evaluation process by suggesting rewrites to the report, causing it to not be independent. OD 7, RP 57-58.

Trial began on March 16, 2015, and ended on March 25, 2015. RP Vols. I-VIII. The court issued its oral ruling on April 1, 2015, and entered the parenting plan and order setting child support at that time. OD 9, 17.

The court entered the Decree of Dissolution and Findings of Fact and Conclusions of Law and an amended Parenting Plan on May 1, 2015. Tr. 5/1/15. Eric appealed the final orders on May 29, 2015. The Court of Appeals issued a decision upholding the final parenting plan on December 27, 2016. Eric filed this Petition for Review to the Supreme Court of the Court of Appeals' decision on January 24, 2017.

B. Parenting

Eric and Tina met through Yahoo!'s dating website. RP 1171. Two years after Tina and Eric married, they relocated to Washington for Eric to pursue employment at hospitals in this area. RP 1198. Not long afterward, Tina gave birth to their only child, Eric "Ryan" Shibley, Jr., on November 28, 2010. RP 120.

Tina has a diagnosis of a traumatic brain injury (TBI) from a serious car accident in 1998. RP 1158. Tina was diagnosed with depression at age 13. RP 1153. Eric, a medical doctor, was aware of Tina's medical and mental health issues prior to the marriage. RP 767, 925-926. Eric claimed he wanted to "rescue" her. RP 926. However, during the marriage, Eric denied Tina financial resources to continue her mental health care. RP 1199. He also refused to let her see a TBI doctor or receive mental health care because he did not feel she needed it. RP 1199.

Eric belittled Tina telling her that she was stupid, lazy, messy, that she was a burden on him, and a liability. RP 1195.

When Ryan was born Eric worked for Snoqualmie Valley Hospital, which is part of King County Hospital District No. 4. RP 1212. In March 2011 Eric's employer terminated him for unprofessional conduct related to falsifying patient records, and his medical license was suspended. RP 1117-1118, Ex. 52.

After leaving Snoqualmie Valley Hospital Eric went to work for Sound Physicians. RP 1227. Sound Physicians provided Eric with a nearby hotel for him to stay when not working. RP 1227. Eric insisted Tina and Ryan stay in the hotel with him instead of staying in their home. RP 1227. Tina spent her days in the hotel, they ordered food in, or Tina cooked on a small hotplate. Ex. 13, pg. 17. Eric's employment with Snoqualmie Valley Hospital ended in the fall of 2011 and he received severance pay until January 2012. RP 1229.

Eric next worked briefly in South Dakota and Wyoming, again insisting Tina and Ryan travel with him and spend long hours in a hotel room. RP 1228, 1231-1232. Tina wanted to stay at home with Ryan but Eric insisted they accompany him. RP 1234-1235, Ex. 13, pg. 2, 17. When Eric was not working he was with Tina at all times and controlled her movements. RP 1230. During this time Eric still would not allow Tina to

see a neurologist for her TBI nor receive any mental health therapy. RP 1199.

When they were not traveling for Eric's work, the family moved to a mobile home in Marysville that they purchased the summer of 2011. RP 1223. While living there, Ryan left the house on several occasions and wandered the neighborhood. Ex. 13, pgs. 10, 18. These elopements happened while Tina was watching him and while Eric was watching him. RP 1277-1278. They put child locks on the door to keep Ryan from wandering however Eric removed the locks. RP 1278. After separation Ryan ran away on two occasions while in Tina's care. RP 1272, 1276. Tina worked with Wendy Beagle on parenting strategies to keep Ryan from eloping. RP 872-873.

Eric and Tina began taking Ryan to Dr. Shushan in 2012 for his well-child checkups. RP 568. After the dissolution was filed, they agreed to continue using Dr. Shushan as Ryan's primary pediatrician. Ex. 122, 122A. They also began to find help for Ryan's sleep issues and had Ryan enrolled in a sleep study at Seattle Children's Hospital, where he was diagnosed with severe behavioral insomnia. Ex. 13, pg. 23. Tina wanted to continue taking Ryan for treatment; however, Eric did not believe it was necessary. RP 1279.

In January 2013 Tina told Eric she was going to leave him. RP 979. By January 2012 Eric's physical assaults on Tina had increased. RP

1236. Tina felt trapped. RP 1236. She was not able to take care of herself given Eric's control and limitations and knew she needed to leave so that she could get help. RP 1236.

Tina planned leaving Eric in advance and discussed her plans with Heidi Roy at the Domestic Violence and Sexual Assault Services (DVSAS) in Mt. Vernon. RP 910. Four months after she first mentioned it to Eric she left with Ryan. RP 1242. She took one of the parties' two cars and a few belongings. RP 1242-1243. Eric initially had daily telephone contact with Tina and Ryan beginning the day she left. RP 980. His contact with Ryan ceased after he tracked her down at the shelter. RP 1248, 1257.

When Tina left, she and Ryan initially moved between three domestic violence shelters. CP 787. Once separated from Eric, Tina promptly sought out mental health treatment. RP 1243. She also started seeing a TBI doctor again, who is currently working with her to treat the migraine headaches she has suffered since the 1998 accident. RP 1159-1160.

In addition to seeking mental health help, Tina actively engaged in parenting skills education. RP 1250. Tina regularly met with an early childhood specialist, Wendy Beagle, to help her with parenting. RP 1250. Additionally, she enrolled Ryan in Head Start and daycare through the

YMCA to help Ryan develop his social and early childhood skills and create more community for the two of them. RP 1151-1152. Ryan regularly attended Head Start and the YMCA during the time he was with Tina. RP 1151-1152.

Shortly after separation and throughout the pending dissolution Tina tried to get Ryan play therapy, parent child interaction therapy (PCIT), and counseling due to concerns raised by the GAL, YMCA, Head Start, and issues she noticed. RP 1279-1280. Ryan's behavioral problems included acting out aggressively towards other children and staff at daycare. RP 1271-1272. When Tina tried to arrange play therapy and PCIT, Eric refused to cooperate. RP 1280-1281. Eric denied Ryan had any behavioral problems. RP 1123. When Head Start and the YMCA recommended that Ryan receive a developmental screening so that they could better attend to Ryan's needs, Eric refused to allow the screening. Ex. 135. He went so far as to ask the court to suspend the temporary order requiring cooperation with regard to Ryan's mental health and medical needs. CP 798.

Ryan's pediatrician, Dr. Denise Shushan, also recommended psychological therapy for Ryan. RP 577. On September 27, 2014, Eric showed up with Ryan unannounced at Dr. Shushan's office. RP 583. Eric made such a scene yelling at Dr. Shushan that security intervened. RP 585.

Eric threatened to get her medical license suspended and said he would declare a “personal jihad” against her, unless she retracted her recommendation regarding psychological counseling. RP 584. Ryan witnessed the entire altercation. RP 583. Shortly thereafter, Eric requested Ryan’s medical records because he claimed to be moving “far away.” RP 1109.

Eric also made threats to Ryan’s daycare workers after learning what they reported to the GAL. Ex. 17, pg. 20-21. Eric maintained that Ryan never exhibited aggressive behaviors during the weeks that Ryan stayed with him. RP 1123. However, testimony from a daycare center in Marysville showed that Ryan was not allowed to return after twelve days because of his continued, aggressive behaviors that the daycare discussed with Eric. RP 784. Ryan acted out at different day care, located in Puyallup. Ex. 17, pgs. 20-21. Eric enrolled Ryan in a day care center in Port Orchard where it took several weeks for Ryan’s behavior to settle down. RP 655. Ryan’s severe behavioral insomnia and elopement problems were not new; Eric was aware of Ryan’s behavior prior the parties’ separation. Ex. 13, pgs. 10, 23, 18.

Since separation Eric repeatedly violated the Temporary Parenting Plan. OD 4, 8. Eric took Ryan to two new primary physicians and a dentist without notifying Tina. RP 1107-1108. He interfered with Ryan’s medical

care by refusing to tell Tina what vaccinations Ryan received. RP 1113-1115. He did not cooperate with obtaining services recommended by health care and educational professionals for Ryan because he did not believe Ryan needed services. RP 1123.

In December 2014 Tina started therapy for Ryan through Catholic Community Services. RP 1284. Eric was ordered to provide medical insurance for Ryan but chose not to provide it because he knew Ryan was covered by the State. Ex. 113. Tina chose Catholic Community Services after informing Eric and receiving no response. RP 1284-85.

Shortly before trial the GAL learned that Eric was taking Ryan to Dr. Herman Gil¹, an unlicensed therapist. RP 419. Eric took Ryan to Dr. Gil for a year without notifying Tina. RP 1109. During trial Tina learned he also took Ryan to two additional counselors, Reid Stahl and Donald Brown. RP 1127-1130, 1294. Since August 2013 Eric used multiple daycare facilities, none of which were used for an extended time period, or were used to drop off Ryan for a day. OD 8, RP 1013. During trial Eric had two babysitters who watched Ryan on a few occasions. RP 1102-

¹ In his original brief the court of appeals, Eric refers to this therapist as Dr. Homs. Brief of Appellant, pg. 23-24. Dr. Homs was the physician from whom Eric purchased a medical practice treating methadone patients. RP 1053.

1103. The court found Eric dropped Ryan “into multiple day cares for a short period of time in a disruptive manner for the child.” CP 26.

The afternoon of May 1, 2014, Eric was criminally cited for leaving Ryan in his car unattended. Ex. 112. The temperature was in the 80s, the car was parked in direct sunlight, the windows were rolled up, and Ryan was left alone in the car. RP 339-340. When Eric returned to the car an officer asked if it was Eric’s car and asked that he unlock it. RP 339-340. When the officer removed Ryan from the car Ryan was sweaty and had been crying. RP 342. Eric threw himself to his knees and pled for mercy. RP 342. Ryan could see him. RP 342. He would not stop his behavior after being asked several times by the officer and would not cooperate with the officers until an officer placed his hand on Eric’s elbow. RP 342. Not once did Eric express concern for the welfare of his son. RP 344. Eric was criminally charged and placed on a deferred disposition in Marysville Municipal Court. Ex. 112. Child Protective Services issued a finding of neglect against Eric. RP 1067.

The GAL provided an initial report with five addendums. Exs. 13, 15, 17, 66, 132, and 152. During her initial home visit with Eric she had to ask him repeatedly to stop talking negatively about Tina in front of the child. Ex. 13, pg. 21. She also noticed his home was messy and there were electrical cords lying on the floor. Ex. 13, pg. 21. The trial court found the

GAL to be thorough and unbiased. CP 26-27. The trial court adopted the recommendations of the GAL, except that it also found there should be limitations under RCW 26.09.191(3) for neglect of parenting functions and abusive use of conflict. CP 27.

The trial court found Tina was best suited to care for Ryan's future needs. OD 3. The court found Tina to be aware of Ryan's emotional and developmental needs and that she was open to continually learning and improving her parenting skills. OD 3. The court found Eric was not best suited to care for Ryan due to his rigid thinking toward Ryan's mental health issues, acts that demonstrated a lack of judgment including leaving Ryan in the car unattended on a hot day, allowing Ryan to be treated by an unlicensed therapist, and refusing to cooperate with Tina about Ryan's medical care. OD 4. In addition, the court found that Eric engages in angry and emotional outbursts in front of Ryan and that they impact Ryan. OD 4.

II. AUTHORITY AND ARGUMENT

A Petition for Discretionary Review to the Supreme Court will be granted only upon one or more the four bases enumerated in RAP 13.4. In this case the Petitioner argues that the decision of the Court of Appeals, Division I, is in conflict with a decision of the Supreme Court. Petitioner, Eric Sibley has not met his burden to show that the decision below in this matter is in conflict with a decision of the Supreme Court. His reliance on

Schultz v. Schultz, 66 Wn.2d 713, 716, 404 P.2d 987, 989 (1965) is inapposite. In its 1965 decision, the court in *Shultz*, held that a mother with a history of mental illness, including several suicide attempts and hospitalizations was unfit. Specifically, the court held that a parent adjudged incompetent was not a fit parent. The court overruled the Court of Appeals finding that the lower court erred when it looked only to moral fitness and not to mental fitness in upholding the custody decision of the trial court. The decision in *Shultz* does not stand for the proposition that all parents who have some sort of mental impairment are by definition, unfit. Rather, the court set forth the rule that a parent's mental fitness is a proper factor for consideration in custody decisions and that a parent who is found to be incompetent is not a fit custodian.

The Washington State Legislature has subsequently addressed the complexities of parenting decisions in this state by the enactment of the Parenting Act in 1987. Specifically, RCW 26.09.191 sets for the standards for a courts imposition of limitations in parenting plans.

- (3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court **may** preclude or limit any provisions of the parenting plan, if any of the following factors exist:
 - (a) A parent's neglect or substantial nonperformance of parenting functions;
 - (b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004; ... (emphasis added)

RCW 26.09.191

In this case, the trial court did not find that the mother had an emotional or physical impairment which interfered with her parenting functions. Specifically, the court found that the mother's disability did not interfere with her parenting functions. CP 4-14. Even if the court had made a finding against the mother, such a finding would not have rendered the court's decision to make her the primary residential parent improper. The imposition of limitations on a parent with respect to findings under RCW 26.09.191(3) are within the discretion of the trial court. Tina has some cognitive limitations due to her traumatic brain injury, but substantial evidence supported the trial court's decision to make her the primary residential parent. The Court of Appeals decision to affirm the trial court's decision is not in conflict with the *Shultz* decision.

Likewise, Eric's reliance on *Shaffer v. Shaffer*, 61 Wn.2d 699, 379 P.2d 995 (1963) does not support his Petition for Review to this court. In *Shaffer*, the court remanded a decision to change custody from the mother to the father because it could not determine whether the trial court improperly changed custody to punish the mother for her failure to comply with the visitation schedule. The court held that parenting decisions cannot be made in order to punish a parent for their bad behavior; rather the

welfare of the child is paramount. *Shaffer* involved a modification action. In this case, the court considered the entry of a parenting plan pursuant to the dissolution of the marriage of the parties. While the court made a finding of intransigence against the father in ordering him to pay attorney's fees, it did not rely on that finding to make its decision with respect to parenting. It relied on the extensive investigation of the GAL and considered the opinions of several experts as well as extensive testimony by the parties. The court made findings against Eric for neglect of their son and abusive use of conflict. CP 4-14. It made a decision, based on all the evidence available to it, to determine that the best interests of the child supported placement with his mother and visitation with his father. Eric has not pointed out any statements or actions by the court that would indicate any motivation for its decision other than the factors set forth in the Parenting Act. The trial court's decision, and the Court of Appeals decision, in this case is not in conflict with *Shaffer*.


III. CONCLUSION

The Court of Appeals decision in this case to affirm the trial court's decision with respect to the entry of a parenting plan is not in conflict with the decisions cited by Eric. All parenting plan decisions in this state are governed by the overarching principle of the "best interests of the child" and the statutory bases for entry of parenting plans as set

forth in RCW 26.09. The decisions that Eric relies upon, from 1963 and 1965 respectively, do not stand in conflict with decisions that a trial court makes today under the statutory framework of the Parenting Act, and the extensive body of case law that has developed over the last fifty-five years, regarding parenting in this state. Eric has failed to meet his burden to show that there is a basis for this court to exercise discretionary review. Tina Shibley asks this court to deny his petition.

DATED this 26th day of February, 2017.


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CERTIFICATE OF SERVICE

I certify that on February 23rd, 2017, I caused to be delivered the Answer to Petition for Discretionary Review to the Supreme Court of the State of Washington by Electronic Filing to Supreme@courts.wa.gov, and a copy to H. Michael Finesilver, Attorney at Law, 207 E. Edgar St., Seattle, WA 98102 by ABC Legal Messenger.

DATED this 23rd day of February, 2017.



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