73615-9

73615-9

NO. 73615-9-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NASRI ABUBAKAR,

Petitioner-Appellant,

v.

ABDIMALIK HASSAN,

Petitioner-Appellee,

APPELLANT'S BRIEF

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INTRODUCTION

Nasro Abubakar (Petitioner-Appellant) has been the primary parent of her minor children (Mariam Hassan; Morris Hassan; Leila Hassan; Ikra Hassan; Westin Hassan and Yassin Hassan), since her divorce from Abdimalik Hassan (Petitioner-Appellee) in 2012. The court below erred in failing to assign counsel to Appellant during trial, and in granting Petitioner's request for modification (thus granting him primary custody of the children) without any evidence that a substantial change of circumstances had occurred, without a finding that the children had suffered harm and without finding that Appellant's present environment was detrimental to them. The Order, which was prepared and submitted by Mr. Hassan's attorney, disregards the particular evidence required for a major modification of a parenting plan under RCW 26.09.260.

ASSIGNMENT OF ERROR

1. The trial court erred in failing to appoint counsel for Appellant, particularly after being notified of the "parallel dependency proceeding".

2. The trial court erred as a matter of law when it disrupted the original parenting plan that designated the Appellant as the primary custodian of the children and instead named the Petitioner.

3. Relying on its modification of the residential schedule, the trial court erred in ordering the adjustment of child support.

ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. Did Appellant have a right to appointed counsel under RCW 13.34.090.

2. Was the State obligated to provide Appellant with counsel under Article I §3 of the Washington Constitution.

3. Did the trial court have authority to appoint counsel for Appellant at public expense.

4. Did the facts of this case support a finding of a "substantial change of circumstances" within the meaning of RCW 26.09.260(1) when the primary issues were resolved by the time of trial and there was no demonstrable detriment to the children.

5. May a court modify a parenting plant based on detriment when the mother had been primary caretaker for the children's entire lives including since the parents' divorce, where there is no evidence that the Appellant's present environment was not detrimental to the children, and there was no

evidence or finding that the harm of removing the children from the Appellant's home was outweighed by the benefit to them.

STATEMENT OF THE CASE

Appellant and Appellee are Somali Refugees who immigrated to the United States together in or about 2004. They were divorced on January 17, 2012. A parenting plan entered that day provided that their eight (8) children would reside primarily with Appellant while Petitioner-Appellee would have restricted visitation. This arrangement was triggered by allegations of domestic violence against Petitioner-Appellee.

On September 17, 2013, Petitioner-Appellee filed a Petition for Modification of the said Parenting Plan. The basis for modification was an allegation by one of the children that she was raped by Appellant's oldest son from a previous relationship. Petitioner-Appellee amended his petition on April 25, 2014 to add allegations of neglect stemming from an ongoing investigation by Child Protective Services (CPS). CPS subsequently removed the children from Appellant's household and temporarily placed them with Petitioner.

Dependency petitions were filed with regard to each minor child under King County Cause Numbers 14-7-01099-9 SEA, 14-7-01095-6 SEA,

14-7-01096-4 SEA, 14-7-01097-2 SEA, 14-7-01100-6 SEA and 14-7-01101-4 SEA. Appellant requested appointment of counsel, which was granted by the dependency court. Appellant was assisted by counsel throughout the dependency proceedings.

The dependency and modification proceedings continued simultaneously and parallel with each other. Although she had assigned counsel in the dependency matters, she was unrepresented in the modification. The modification proceeding was scheduled to go to trial on February 23, 2015.

Upon information and belief, the Juvenile Court was aware of the trial date. The Juvenile Court "granted concurrent jurisdiction authorizing the family law custody matter to proceed, and ... continued the dependency fact finding until after resolution of the custody modification" (Declaration of DSHS Social Worker – Trial Exhibit 4). Because the date was approaching, the court elected to wait for the modification proceeding to reach a decision before proceeding further.

On or about January 5, 2015, Petitioner-Appellee retained counsel to represent him in the modification proceeding. (Clerk's Papers, pg. 271). On January 6, 2016, counsel appeared at a pre-trial conference before the trial

court and related that there was a "parallel dependency" in the Juvenile Court, and that the Juvenile Court was "simply waiting on the resolution of this matter in order for them to make a decision about what to do with the dependency". (RP - Vol. IV -Page 9:4 to 9:8).

Appellant also appeared at the said conference, and indicated that she was not represented by counsel. The court acknowledged that she was unrepresented and advised her that she was required to present evidence at trial. (RP - Vol. IV - Pages 7:20 to 8:1).

At trial, Petitioner-Appellee's counsel again represented that there was a "parallel dependency", and indicated that "(t)he Dependency court, for better or for worse, has kicked the can to us to see if we can adjudicate and figure it out." (RP- Vol. I – Trial - Page 12:22 to 12:24). The trial proceeded. Appellant was not appointed counsel despite concurrent jurisdiction, the fact that she had assigned counsel in the dependency matters and the obvious link between the modification and dependency.

During trial, counsel for Petitioner-Appellee called three witnesses: Brian Walton, a social worker with the Department of Social and Health Services, who was assigned to Appellant's/Petitioner's two older children; Saeed Hashemi, a social worker with the Department of Social and Health Services, who was assigned to Appellant's/ Petitioner's five younger

children; and Joan Freeman, the Guardian ad Litem in the dependency proceeding.

Mr. Walton testified that he had been involved with the matter since September 2014, approximately five months after the children were removed from Appellant's home. (RP - Vol. I - Trial, Page 18:3 to 18:3). He also related that since his involvement, both of the older children had been placed in Appellant's home for periods of time. (RP - Vol. I – Trial -Page 23:12 to 23:14)(RP - Vol. I – Trial - Page 21:3 to 21:5).

Mr. Hashemi testified that he had also been involved with the matter since September 2014. (RP - Vol. I – Trial - Page 50:20 to 50:22). He also related that he had only met with Appellant and her children on two occasions. (RP - Vol. I – Trial - Page 53:24 to 53:25). Finally, he related that he did not have any first-hand knowledge about any abuse or neglect allegations. (RP - Vol. I – Trial - Page 53:8 to 53:10).

Ms. Freeman testified that she holds a JD and a Master's Degree in French. (RP - Vol. I – Trial -Page 104:9 to 104:10). She related that she met with Appellant on two occasions. (RP - Vol. I – Trial - Page 107:19 to 107:21). Based on her experiences with Appellant and review of her file she gave her opinion with regard to Appellant's psychological state and

recommended a neuropsychological evaluation and some sort of therapy. (RP - Vol. I – Trial - Pages 120:14 to 121:20).

Appellant attempted to cross examine each, with very little effect. She also attempted to present her own witnesses, who she hoped would testify telephonically. Petitioner-Appellee's counsel objected to such an arrangement. (RP - Vol. I - Trial, Pages 156:6 to 157:12). Appellant's witnesses were therefore not able to testify. (RP - Vol. II - Trial, Pages 4:19 to 5:6).

The trial court subsequently entered an Order modifying the Parenting Plan to the effect that the five younger children were to reside primarily with the Petitioner, while the two older children could reside with Appellant if they chose to. (Clerk's Papers, pgs. 297-301). The Court also entered an Order of Child support directing Appellant to pay $188.00 for each of the five younger children, and $100 for each of the two older children (in spite of the fact that they were likely to reside with her primarily). (Clerk's Papers, pgs. 308-320).

Appellant filed a timely motion for a new trial (CP, pgs. 347-348). It was denied by Order, dated May 29, 2015. (CP, pg. 349.).

Appellant subsequently filed a Notice of Appeal. (CP, pgs. 352-378).

STANDARD OF REVIEW

The standard of review is whether the trial court's decision is supported by substantial evidence and whether the trial court made an error of law. Substantial evidence supports a factual determination of the record contains sufficient evidence to persuade a fair minded, rational of the truth of that determination. *In re Marriage of Stern*, 68 Wn. App. 922, 928-29, 846 P.2d 1387 (1993); *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

ARGUMENT

The trial court erred by failing to assign counsel for Appellant during the modification proceeding/trial and by granting Petitioner's motion to modify the 2012 parenting plan. In doing so, the court failed to recognize the requirement for counsel with regard to matters inextricably linked to dependency matters, and disregarded the strong presumption in favor of Appellant's continued custody. More important, the court failed to apply or even articulate whether there was a change in circumstances and/or how the "change" was substantial, or how the children were being harmed by Appellant's conduct.

A. APPELLANT HAD A RIGHT TO APPOINTED COUNSEL DURING THE MODIFICATION PROCEEDING

RCW 13.34.090 provides for the right to appointment of counsel for parties to a dependency proceeding. It states, in part that:

> (1) Any party has a right to be represented by an attorney in all proceedings under this chapter, to introduce evidence, to be heard in his or her own behalf, to examine witnesses, to receive a decision based solely on the evidence adduced at the hearing, and to an unbiased fact finder.
>
> (2) At all stages of a proceeding in which a child is alleged to be dependent, the child's parent, guardian, or legal custodian has the right to be represented by counsel, and if indigent, to have counsel appointed for him or her by the court...

Although the underlying modification was not a dependency proceeding, it was inextricably linked to the "parallel dependency proceedings". As related by Petitioner's counsel and the testimony of witnesses, the matter before the trial court essentially dictated how the Juvenile Court was going to rule with respect to the dependency proceeding. (RP- Vol. I – Trial - Page 12:22 to 12:24). The modification proceeding served as the fact finding portion of the dependency proceeding.

Therefore, inasmuch as such a link exists, Appellant respectfully submits that the modification was a proceeding under RCW Chapter 13.34,

and that she had a right to appointed counsel. Such a result would be consistent with the holding in *In re Dependency of E.H,* 158 Wn. App 757, 243 P.3d 160 (2010).

In that case, Division Two determined that parents, as parties to a non-parental custody proceeding, were entitled to appointed counsel when the proceeding served as a "stage of a proceeding in which a child is alleged to be dependent". *Id* at 768.

Similarly, and as related by Petitioner's counsel and witnesses, the modification served as a stage of the "parallel dependency" proceeding, inasmuch as the trial court's decision dictated how the Juvenile court would rule in the dependency matter. The Juvenile Court, moreover, granted concurrent jurisdiction. (Declaration of DSHS Social Worker – Trial Exhibit 4)

B. ARTICLE I, §3 OF THE WASHINGTON CONSTITUTION DICTATES THAT COUNSEL SHOULD HAVE BEEN APPOINTED.

Article I, §3 of the Washington Constitution provides that "(n)o person shall be deprived of life, liberty, or property, without due process of law." Insofar as appointment of counsel, it has been interpreted to mean that it is a constitutionally required right "when procedural fairness demands it," *Tetri v, Tetri*, 86 Wn.2d 252, 253, 544 P.2d 17 (1975) (holding that indigent

litigants charged with contempt are entitled to appointed counsel when facing incarceration). The right exists in all termination of parental rights proceedings (*In re Welfare of Luscier,* 84 Wn.2d 135, 138, 524 P.2d 906(1974)), and extends categorically to parents involved in dependency and child neglect proceedings (*In re Myrick's Welfare*, 85 Wn.2d 252 at 254) (1975). Citing to *Luscier* and *Myricks,* the Washington Supreme Court has stated broadly that the right to counsel extends to cases in which "a fundamental liberty interest, similar to the parent-child relationship, is at risk," thus rejecting the case by case, balancing approach established in *Lassiter v. Department of Social Servs,* 452 U.S. 18, 25, 101 S.Ct. 2153, 2158–59, 68 L.Ed.2d 640 [1981]). *In re Dependency of Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995). Applying such a test here demonstrates that fundamental fairness required the appointment of counsel for Appellant. She faced an adversarial trial proceeding; she faced a significant curtailment of her fundamental parenting rights; she was unable to find counsel who would represent her free of charge; the proceedings and issues were emotional and complex, and (as evidenced in the Report of Proceedings) she was unable to effectively navigate the proceedings on her own.

The fact that Petitioner-Appellee was represented by counsel and Appellant was not is significant, as Appellant was particularly unable to

effectively navigate the proceeding in light of the imbalance in the courtroom. In *Luscier,* the court considered the inequity of one party proceeding pro se while the other party is represented by counsel. 84 Wn.2d at 137. Particularly compelling to the court was a law review note that concluded:

> [A] significant number of cases against unrepresented parents result in findings of neglect solely because of the absence of counsel. In other words, assuming a basic faith in the adversary system as a method of bringing the truth to light, a significant number of neglect findings (followed in many cases by a taking of the child from his parents) against unrepresented indigents are probably erroneous. It would be hard to think of a system of way which works more to the oppression of the poor than the denial of appointed counsel to indigents in neglect proceedings.

Id. At 138 (quoting Note, Child Neglect: Due process for the Parent, 70 Colum. L. Rev. 465, 476 (1970).

Thus, the court considered it "readily apparent that the lack of counsel, in itself, may lead improperly and unnecessarily to deprivation of one's children." *Id.*

C. COURTS HAVE AUTHORITY TO APPOINT COUNSEL AT PUBLIC EXPENSE

It is the duty of the courts to interpret the Washington Constitution. "[I]t is emphatically the province and duty of the judicial department to say what the law is ... even when the interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taking by another branch." *Seattle Sch. Dist. No 1 v. State*, 90 Wn.2d 476, 496, 585 P.2d 71 (1978).

When an individual constitutional right is at stake, courts must interpret and apply the constitution, notwithstanding the possibility of an impact – even a significant one – on public fiscal. 90 Wn.2d at 503 n.7 ("The power of the judiciary to enforce rights recognized by the constitution, even in the absence of implementing legislation, is clear."); see also Washington Constitution at. I, §29 (the provisions of the Washington Constitution are "mandatory" unless expressly not made so). Most if not all constitutional rulings will have some fiscal impact on the State, but that cannot determine the courts' underlying constitutional analysis.

D. THE COURT ERRED IN AWARDING PRIMARY CUSTODY OF THE CHILDREN TO PETITIONER-APPELLEE

I. There is a Strong Presumption in Favor of the Original Parenting Plan

In Washington, the court may only modify a parenting plan under RCW 26.09.260 if (1) there has been a substantial change in the circumstances of the child or the nonmoving party and (2) the modification is necessary to serve the child's best interests. The discretion of the court is narrowly tailored and the statute is written in mandatory terms. The court must retain the custodian established by the prior decree unless:

> (a) The parents agree to the modification;
>
> (b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;
>
> (c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change in the environment is outweighed by the advantages of a change to the child; or
>
> (d) The court has found the nonmoving parent in contempt of court at least twice within three years...
>
> RCW 26.09.260(2).

Absent a finding of one of the above four circumstance, a court has no discretion to modify a parenting plan. Moreover, a petitioner for modification

bears a heavy burden: to prevail, petitioner must prove one of these four factors with substantial evidence. *In re Marriage of Stern*, 68 Wn.App, at 928-29 (1993). As our courts have explained, there is a "strong presumption in favor of custodial continuity and against modification". See, *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). The trial court's discretion is limited and must be exercised with caution and within the bounds of legal principles. *Id.* See, *George v. Heller*, 62 Wn. App. 378, 382-83, 814 P.2d 238 (1991); *In re Stern*, 57 Wn. App. 707, 712, 789 P.2d 807, review denied, 115 Wn.2d 1013 (1990*); In re Marriage of Roorda*, 25 Wn. App, 849, 851, 611 P.2d 794 (1980); See also, RCW 26.09.002 (defining "best interests of the child"); RCW 26.09.260 (establishing the standard for modification); RCW 26.09.270 (providing that a modification action may not even pursued unless the trial court initially finds "adequate cause" to proceed).

The presumption in favor of the parent granted custody in the original parenting plan exists because "children and their parents should not be subjected to repeated re-litigation of the custody issues determined in the original action. Stability of the child's environment is of utmost concern." *Schuster v. Schuster*, 90 Wn.2d 626, 628, 585 P.2d 130 (1978). "A court's

preference for one parent over the other is not a basis for ordering modification". *George* v. Heller, 62 Wn. App, at 382-83.

II. The Trial Court's Finding that the Environment at Appellant's Home is Detrimental is an Abuse of Discretion.

The trial court erred in finding detriment. As a matter of law, the facts presented at trial do not support a major modification based on detriments under RCW 26.09.260(c). The court held:

> The following facts supporting the requested modification have arisen since the decree or plan/schedule or were unknown to the court at the time of the decree or plan/schedule:
>
> There is a parallel dependency proceeding that is ongoing with this family. The Department of Social and Health Services (DSHS), along with the assigned CASA for the children, support the father as a replacement for these children as the mother is no longer able to ensure the health, safety and welfare of the children.
>
> It appears as though the mother may have some mental health deficiencies which interfere with her ability to safely parent these children. There are five "founded" finding made by DSHS as to the mother: 2 for physical abuse of the children and 3 for neglect...

III. The Detrimental Environment Related in the Modification No Longer Existed at the Time of Trial

The "child's present environment" within the meaning of RCW 26.090260(2)(c) means "the environment that the residential parent or custodian is currently providing or is capable of providing for the child..." *George v. Heller*, 62 Wn. App. 378, 386, 814 P.2d 238 (1991) *Ambrose v. Ambrose*, 67 Wn. App. 103, 108.

In *Ambrose,* at 108-109 the court noted that in those cases where there is a lengthy time involved the need to look at the "current circumstances of both parents is compelling". Here the modification was filed in September 2013, and the trial not held until February 2015. The last alleged finding of abuse/neglect was in April 2014, nearly a year prior to the trial date.

IV. The Change of Circumstances was not Sufficiently Detrimental or Substantial to Support a Major Modification.

In *Ambrose* (67 Wn. App, at 104), the court discusses the purpose of the modification statute as being "...to promote stability for children and ensure that 'existing patters of interaction between parent and child" are changed only to the extent necessary 'to protect the child from physical, mental or emotional harm'. RCW 26.09.002.

In *In re Marriage of Roorda*, 25 Wn. App. 849, at 851-852 the court discussed the high standard applicable in a modification proceeding pursuant to RCW 26.09.260 as follows:

> There is a strong presumption in the statutes and the case law in favor of custodial continuity and against modification. RCW 26.09.260 and 270; Anderson v. Anderson, 14 Wn. App. 366, 541 P.2d 996 (1975); 9A U.L.A., Uniform Marriage and Divorce Act, § 409, Comm'rs Note at 212 (Master ed. 1979). We observe a related policy expressed in the statute of preventing harassment of the custodial parent and providing stability for the child by imposing a heavy burden on a petition which must be satisfied before a hearing in convened. Another purpose of the statue is to discourage a noncustodial parent from filing a petition to modify custody. The oft-repeated touchstone of any custody decision is "the best interests of the child." Schuster v. Schuster, 90 Wn.2d 626, 585 P.2d 130 (1978). Litigation over custody is inconsistent with the child's welfare.

The presumptions and policies of this State are designed to promote consistency and recognize the high value of stability and continuity for a child, and therefore set a high bar to the modification of a parenting plan.

The facts in this case do not support a finding of either substantial change or detriment.

In *In re Marriage of Mangiola*, 46 Wn. App. 574, 578 (1987) the Court of Appeals reversed a trial court finding of adequate cause and

remanded to the trial court with direction to enter an order dismissing the petition for modification where the "problems" were not specifically caused by the environment in the custodial parent's home and the petitioner had not alleged facts tending to show that the advantages of a change in custody outweigh the harmful effects of a change in custody..."

While *Mangiola* was an adequate cause case, the principle is the same: the facts were insufficient to show the requisite substantial change and detriment for modification.

In examining detriment, the Court reviews "the fitness of the child's total environment" with the custodial parent. The inquiry extends far beyond the physical attributes of a structure to whether placement will be detrimental to the child's physical, mental, and emotional well-being. RCW 26.09.260(2)(c).

In this matter, the witnesses provided conflicting testimony as to the environment at Appellant's home. Such conflict related specifically to her children Mariam and Mohamed, who were permitted to reside with Appellant, in spite of the fact that one of the "founded" findings relating to physical abuse related to Mariam.

V. There was no proof, other than lay opinion, as to Appellant's psychological condition.

As in *Mangiola*, in this case the record likewise does not include a report of a psychologist upon whom the trial court apparently relied on heavily. The troubling psychological profile is simply an opinion of the witnesses, who do not claim to have any expertise to render psychological opinions.

VI. The Trial Court Modified the Parenting Plan without hearing any Evidence that the Harm of a Change of Environment is Outweighed by the Advantage of the Change to the Child.

In *Mangiola* the Court of Appeals reversed a trial court finding of adequate cause and remanded to the trial court with directions to enter an order dismissing the petition for modification, holding in part that the petitioner alleged no facts "tending to show that the advantages of a change in custody outweigh the harmful effects of a change in custody..." That is the case here.

No evidence was presented that the mother's home was not appropriate of that the children are not well taken care of by her. No evidence was presented as to why the schedule imposed by the court was to the advantage of the children. As set forth above the change in schedule does not

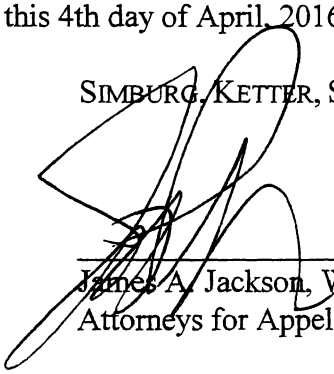
appear to be logically related to the supposed change in circumstances. No evidence was presented or findings made that the children were more attached to their father or that they were more likely to thrive in his home. No findings were made or evidence presented as to the emotional harm that might befall the children in being taken from their mother's home.

CONCLUSION

Because the trial court did not appoint counsel for Appellant it erred as a matter of law and there was no substantial evidence to support the court's factual findings, Appellant respectfully requests that this court reverse the trial court's decision without remand, and reinstate the original parenting plan. She also asks that the court award her attorney fees under RCW 26.09.140, RCW 26.09.260 and RAP 18.1.

DATED this 4th day of April, 2016.

SIMBURG, KETTER, SHEPPARD & PURDY, LLP



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CERTIFICATE OF SERVICE

I hereby certify that on the date below I caused the attached and/or foregoing APPELLANT'S BRIEF to be served on all parties of record via e-mail and first class United States mail, addressed as follows:

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Dated: April 4, 2016

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