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STATE OF WASHINGTON

MICHELLE L. SAMODUROV, RESPONDENT

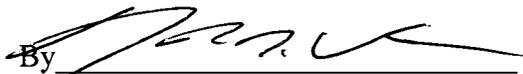
v.

BRENT JAMES SAMODUROV, APPELLANT

Appeal from the Superior Court of Snohomish County
The Honorable Richard J. Thorpe

No. 07-3-02227-1

REPLY BRIEF OF APPELLANT

By 

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I. INTRODUCTION TO REPLY

Ms. Samodurov cites RCW 26.09.002 in support of her position that parental unfitness outweighs the fundamental right to parent. The full text of RCW 26.09.002 provides:

The state recognizes the *fundamental importance of the parent-child relationship* to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. Residential time and financial support are equally important components of parenting arrangements. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental or emotional harm.

Ms. Samodurov further argues that under the best interest of the child standard the trial court must take into consideration the seven factors set forth in RCW 26.09.187(3)(a) for allocating parental responsibilities. Ms. Samodurov cites *In re Marriage of Kovacs*, 121 Wash.2d 795 (1993) as authority to restrict Mr. Samodurov's residential time. The *Kovacs* case did not involve restrictions on either parent under RCW 26.09.191. In *Kovacs* the Court analyzed the seven statutory factors set forth in RCW 26.09.187(3)(a) in designating a primary residential parent. Mr.

Samodurov is not seeking review of the trial court's findings under RCW 26.09.187(3)(a).

RCW 26.09.187(3)(a) specifies that "The child's residential schedule shall be consistent with RCW 26.09.191." Mr. Samodurov appeals the trial court's findings under RCW 26.09.191 and the limitations on his residential time with his children to supervised visitation every other weekend, two days each of those weekends, eight hours a day.

II. ARGUMENT

A. RESPONDENT MISSTATES THE ISSUES BEFORE THE COURT ON APPEAL

Mr. Samodurov appeals the Trial Court's Findings of Fact and Conclusions of Law that his residential time with his children should be restricted under RCW 26.09.191. Mr. Samodurov argues that the evidence does not support the imposed restrictions on his parental rights under RCW 26.09.191(2)(a)(ii) and (3)(c). The trial court's findings are set forth in paragraph 2.19 of the Findings of Fact and Conclusion of Law and in paragraphs 2.1 and 2.2 to the Final Parenting Plan. Mr. Samodurov's appeal is limited to the following assignments of error:

1. May a court place restrictions on a parent's residential time with his children under RCW 26.09.191(2)(a)(ii) based upon allegations of sexual deviancy conduct and an attraction to pornography that are not supported by substantial evidence.
2. May a court place restrictions on a parent's residential time with his children under RCW 26.09.191(2)(a)(ii) based upon an allegation that he sexual exposed himself to one of children that that is not supported by substantial evidence.
3. May a court place restrictions on a parent's residential time with his children under RCW 26.09.191(3)(c) based on an allegation of severe alcohol problems that is not supported by substantial evidence.

Ms. Samodurov cites *Borenback v. Borenback*, 34 Wash.2d 172, 208 P.2d 635 (1949) and *In re the Marriage of Allen*, 28 Wash.App. 637, 626 P.2d 16 (1981). However, both *Borenback* and *Allen* predate the enactment of the Parenting Act of 1987.

Borenback was a termination of visitation case that involved a fundamentally absent parent. In *Borenback*, the court terminated the father's visitation because the father did not have a convenient or satisfactory place for visitation, made no effort to contribute to support of the child, and the visitation at the other parent's home interfered with regular activities of home, created confusion for the child and made her dissatisfied and unhappy. 34 Wash.2d at 177, 208 P.2d at 637. There were no findings by the Trial Court that Mr. Samodurov's home was unsatisfactory or that he failed to pay support.

The issue before the court in *Allen* was nonparental custody based on the best of the interest of a deaf child. In *Allen*, the nonparent did not allege that either parent was an unsuitable custodian. 28 Wash.App. at 642-643, 626 P.2d at 20. The Court held that the “best interests of the child” test of RCW 26.09.190 compares the parents’ competing home environments and awards custody, by a preponderance of the evidence, for the better environment.” But when analyzing a nonparental custody case, “The only alternative currently recognized in Washington by which a parent may lose custody to a nonparent is a finding of unfitness pursuant to the neglect and termination provisions of RCW 13.34.030 and 26.44.030.” *Id.* at 648, 23.

The issue presently before the Court is neither the termination of parental rights nor which parent can provide a better environment for the children. Rather, the issue is the Trial Court’s findings that the father’s residential time with his children shall be limited and restricted to supervised visitation under RCW 26.09.191(2)(a)(ii) and (3)(c).

B. RESPONDENT MISSTATES THE TRIAL COURT’S FINDINGS

The first issue on appeal is whether or not the court may restrict a parent’s residential time with his children under RCW 26.09.191(2)(a)(ii)

based upon findings of sexual deviancy conduct and an attraction to pornography.

Ms. Samodurov states that the trial court may impose restrictions on a parent's actions under RCW 26.09.191(3)(g) if the court finds "*such other factors or conduct as the court expressly finds adverse to the best interest of the child.*"

Ms. Samodurov cites RCW 26.09.191(3)(g) and *In re Marriage of Littlefield*, 133 Wash.2d 39 (1997) as a general authority to impose restrictions on a parent's residential time. Ms. Samodurov implies that the court had sufficient evidence to limit Mr. Samodurov's residential time for sexual deviancy conduct and an attraction to pornography under RCW 26.09.191(3)(g). However, the trial court made no findings under RCW 26.09.191(3)(g) and the numerous other factors cited in Ms. Samodurov's brief were not expressly included in the trial court's findings as conduct that was adverse to the children's best interest.

The majority of Ms. Samodurov's brief is merely an attempt to prejudice Mr. Samodurov by highlighting the various indiscretions made during the course of his adult life. Despite these numerous allegations, the evidence does not support the imposed restrictions on Mr. Samodurov's parental rights under RCW 26.09.191(2)(a)(ii).

C. THE EVIDENCE DOES NOT SUPPORT THE RESTRICTIONS ON THE FATHER'S RESIDENTIAL TIME WITH HIS CHILDREN

The second and third issues on appeal pertain to the Findings and Fact and Conclusion of Law and basis for restrictions in the Final Parenting Plan under RCW 26.09.191(2)(a)(ii) and (3)(c).

Mr. Samodurov appeals the Findings and Fact and Conclusions of Law that support the limitations on his residential time to supervised visitation under RCW 26.09.191(2)(a)(ii) and (3)(c). Parental limitations under RCW 26.09.191(2)(a)(ii) apply when there has been a finding of physical, sexual, or a pattern of emotional abuse of a child. Additional limitations may be imposed under RCW 26.09.191(3)(c) if the court finds that a parent has a long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions. Thus, the final two questions on appeal are (1) does the evidence support the Trial Court's findings that Mr. Samodurov physically, sexually, or emotionally abused his children; and (2) does the evidence support the finding that that Mr. Samodurov suffers from a long term impairment from alcohol use that limits his ability to parent his children.

Again, Ms. Samodurov summarizes each and every allegation raised against Mr. Samodurov at trial and implies that the trial court has a

general authority to restrict or limit parental rights without making specific findings of parental conduct that is adverse to the children's best interest. As stated above, RCW 26.09.191(3)(g) mandates that the court make expressed findings as to any other factor or conduct that may be adverse to the children's best interest prior to precluding or limiting provisions of a parenting plan.

Reply to Indecent Exposure: The 1997 indecent exposure did not involve a child named in the parenting plan and predated the birth of any Mr. Samodurov's four children. The Trial Court made no specific finding that the 1997 indecent exposure incident was a basis for restrictions against Mr. Samodurov under RCW 26.09.191. It should also be noted that the Trial Court made no findings under RCW 26.09.191(2)(a)(iv), which provides in part:

The parent's residential time with the child shall be limited if it is found that...the parent has been convicted as an adult of a sex offense under:

- (A) RCW 9A.44.076...;
- (B) RCW 9A.44.079...;
- (C) RCW 9A.44.086...;
- (D) RCW 9A.44.089;
- (E) RCW 9A.44.093;
- (F) RCW 9A.44.096;
- (G) RCW 9A.64.020...;
- (H) Chapter 9.68A RCW.

Indecent Exposure, as defined in RCW 9A.88.010, is not listed as a sex

offense under RCW 26.09.191(2)(a)(iv).

Reply to the Costco Attempted Rape: The trial court found “that the [Ms. Samodurov] tends to exaggerate and overact” but was persuaded that Mr. Samodurov did tell the Ms. Samodurov that he was going to Costco with immoral intentions. RP Vol. VI 2:19-21. Beyond any *corpus delicti* issues, Mr. Samodurov denied the allegation and passed a polygraph examination when asked of the same. RP Vol. III 16:13-24; Ex 16. The Trial Court made no finding that the Costco story was a basis for restricting the father’s residential time with his children.

Reply to the Kathy Owili Incident: There was no finding by the Trial Court that the Kathy Owili incident was a basis for restricting the father’s residential time with his children.

Reply to the Allstate Incidents and Boundary Issues: There was no finding by the Trial Court that the Allstate incidents and boundary issues were a basis for restricting the father’s residential time with his children. In paragraph 3.10 of the Final Parenting Plan, the trial court ordered the father to continue with his therapist and to focus his treatment on understanding appropriate boundaries with women. CP 70 ¶ 3.10. Mr. Samodurov is not seeking review of the trial court restrictions as set forth in paragraph 3.10 of the Final Parenting Plan, except for the restriction requiring supervised visitation.

Reply to Other Sexual Misconduct: The trial court made no findings that Mr. Samodurov's other sexual misconduct alleged in Ms. Samodurov's brief, beyond the addiction to pornography, was a basis for restricting the father's residential time with his children. Mr. Samodurov completed a sexual deviancy evaluation with Dr. Lennon and Dr. Lennon found no indication of sexual compulsivity, deviancy, violence, or predatory behavior. RP Vol. IV at 99:5-11.

Reply to Anger, Narcissism, and Abuse Use of Conflict: Mr. Samodurov is not seeking review of the Trial Court's findings of abusive use of conflict under RCW 26.091.191(e). Therefore the portions of Ms. Samodurov's brief that address narcissism, My Space postings, a false DUI message, the home equity loan, anger, and the guardianship action are not relevant to the underlying appeal.

Reply to Father's Drinking Problem: For the reasons set forth in Mr. Samodurov's initial brief, there was no evidence presented at trial that Mr. Samodurov's parenting skills were impaired from alcohol use. As such, the Trial Court erred in its findings that Mr. Samodurov had severe alcohol problems in the recent past and placing restrictions on his residential time under RCW 26.09.191(3)(c).

Reply to History of Visitation Problems: There was no finding by the trial court that any alleged visitation problems were a basis for

restricting the father's residential time with his children.

Reply to Lack of Credibility: There was no specific finding by the trial court as to either parent's credibility. As previously mentioned, the trial court found that Ms. Samodurov "tends to exaggerate and overreact." RP Vol. VI 2:19-21. The denial of the My Space posting, the home equity loan and credit cards, the unexplained absences, cancellation of health insurance, and removal of children's effects, are not relevant to the issue before the court on Mr. Samodurov's appeal. Further, there were no findings that Mr. Samodurov lied about a drinking problem or lied about sexual misconduct. In reply to the allegation raised in Ms. Samodurov's brief that that Mr. Samodurov is not credible because he provided no evidence that he completed a sexual deviancy treatment program after his arrest for indecent exposure in 1997, Ms. Samodurov acknowledges that Mr. Samodurov provided a copy of the court docket that showed he completed the treatment. Respondent's Brief at 36. The court docket is evidence that Mr. Samodurov completed the treatment.

Reply to Misconduct with Brynn: When interviewed by the Sacramento Sheriff's Office on October 1, 2008 at 1:05 p.m., Brynn (age 5) stated that during her last visit with her father he showed his penis to her, Caleb, and Madelyn. Ex 54; RP Vol. I 109:3-5, 13-16. Caleb and Madelyn were subsequently interviewed by the Sacramento Sheriff's

Office and both children denied the allegation that Mr. Samodurov exposed his penis to them. *Id.* at 111:24-25; 112:1-14. Madelyn (age 8) stated that her father has never shown his penis to her. Caleb (age 4) stated that he was not present when his father allegedly showed Brynn his penis. *Id.* Both children contradicted Brynn's statement. On November 4, 2008 at 10:10 a.m. Brynn was interviewed a second time by the Sacramento Sheriff's Office Special Assault Forensic Evaluation Center (SAFE) and during that interview she denied ever seeing her father's penis. Ex 54.

Restrictions on a parent's residential time with their children under RCW 26.09.191 must be supported by substantial evidence. *In re Marriage of Watson*, 132 Wn. App. 222, 130 P.3d 915 (Div. II 2006). Thus, the question before the Court is whether or not a statement by a five year-old child, that was later recanted, and uncorroborated by the other children, is substantial evidence to support the restrictions imposed under RCW 26.09.191(2)(a)(ii).

There was no actual evidence presented at trial that Mr. Samodurov engaged in physical, sexual, or a pattern of emotion abuse of a child. In fact, the Guardian Ad Litem (GAL) testified that her recommendation to restrict the father's residential time with his children was based on a "belief" and not evidence. RP Vol. II 64:15-21. Yet, the

GAL also stated that she considered Mr. Samodurov as being a “hands on father and having good relations with his children” and that she “had no problem with parenting skill concepts in either of these parents.” RP Vol. II 69:3-4, 9-11.

III. CONCLUSION

For the foregoing reasons the court should vacate paragraphs 2.19.2, 2.19.3, 2.19.4, 2.19.5, 2.19.6, and 2.19.16 of the Findings of Facts and Conclusion of Law and Sections 2, 3, and 4 of the Final Parenting Plan and remand this matter back to the Trial Court.

Dated this 30th Day of September, 2009



Todd R. DeVallance, WSBA #32286
Attorney for Appellant

IV. CERTIFICATION OF SERVICE

This is to certify that on September 30, 2009, I, Todd R. DeVallance, delivered a copy of this brief via ABC Legal Messenger Service upon Respondent's attorneys, Christine Mayoue and Jerome Scowcroft, at the Law Office of Michael Bugni.



Todd R. DeVallance, WSBA #32286
Attorney for Appellant

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**IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON, DIVISION 1**

11 In re the marriage of:)

13 BRENT JAMES SAMODUROV,)

15 Appellant,)

17 and)

19 MICHELE L. SAMODUROV,)

21 Respondent.)
23

Court of Appeals No. **63063-6**

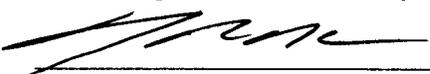
**DECLARATION OF SERVICE
RE REPLY BRIEF**

25 I, Todd R. DeVallance, who represents the Appellant, Brent James Samodurov, in the above
27 matter, residing within King County, Washington declare:

29 That on the 30th day of September, 2009, I personally served a copy of Appellant's Reply Brief, via
31 ABC Legal Messenger Service, upon Respondent's attorneys, Christine Mayoue and Jerome
33 Scowcroft, at the Law Office of Michael Bugni Law Office of Michael Bugni at:

35 11320 Roosevelt Way NE
37 Seattle, WA 98125

39 DATED at Seattle, Washington this the 30th day of September, 2009.

41 
43 _____
Todd R. DeVallance, WSBA #32286

DECLARATION OF SERVICE - 1

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