

ORIGINAL

No. 65515-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN RE: THE MARRIAGE OF

TAMARA RODDEN,

Respondent,

and

JAMES RODDEN,

Appellant.

REPLY OF APPELLANT

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¹ The Brief of Respondent stated that the original Designation of Clerk’s Papers omitted the Notice of Appeal, but the respondent did not include the notice in her supplemental designation. Accordingly, the Notice of Appeal is attached as an appendix to this brief.

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I. INTRODUCTION

Respondent Tamara Rodden seeks to blame the appellant for the trial court's errors, arguing that he "waived" objections to inadmissible evidence and effectively admitted everything he now disputes. This is factually and legally wrong. Appellant James Rodden consistently denied the allegations at issue, and objected to the trial court's reliance on hearsay from the outset.

Ms. Rodden fails to rebut that the trial court improperly relied on inadmissible evidence and false assumptions in depriving Mr. Rodden of parental decision-making. She concedes that the trial court improperly applied the parenting statute. Accordingly, the trial court decision must be reversed.

II. ARGUMENT IN REPLY

A. Ms. Rodden's Response is Based on Misapprehension of the Relevant Facts.

The Brief of Respondent reflects a fundamental misunderstanding of what happened in the trial court. It is therefore necessary to set straight the fallacies in Ms. Rodden's thinking, lest this Court be misled.

1. The judicial information report does *not* prove that charges were deferred. It says they were *dismissed*.

A glaring error permeating Ms. Rodden's brief concerns the Judicial Information System (JIS) printout which the trial court generated on August 13, 2009, and eventually cited as a basis for finding that Mr. Rodden committed domestic violence. Inexplicably, Ms. Rodden argues repeatedly that the JIS printout proves that Mr. Rodden entered into deferred prosecutions on two domestic violence charges, and that deferred prosecutions are tantamount to admitting guilt. Amended Brief of Resp., p. 21 ("the JIS record alone is sufficient to establish the deferred prosecutions"); p. 22 ("the JIS record was sufficient proof of the deferred prosecutions"); p. 23 ("the deferred prosecution was proved by the JIS report"). These assertions are baffling because, as Mr. Rodden carefully explained in his opening brief, ***the JIS report says nothing about deferred prosecutions.*** Brief of App., pp. 12-14, 31-34, Attachment 2. Ms. Rodden is simply repeating the trial court's mischaracterization of the report, as if saying it over and over makes it true.

The JIS report speaks for itself. CP 83-84. The two charges in question – "protection order violation" on July 21, 2008, and "assault 4th degree" on March 30, 2008 – are listed on the JIS printout next to the code "D" in the "Jg" (judgment status) column.

Id. A “D” in that column means the case was ***dismissed***. Brief of App., Attachment 2. It does *not* mean deferred. Id. Therefore, the JIS report does *not* prove that Mr. Rodden entered deferred prosecutions nor does it even remotely suggest that he admitted guilt. On the contrary, it shows only that he was charged with an assault and a protection order violation, and that both of those charges were dismissed.

Ms. Rodden’s mischaracterization of the report shows, at best, a sloppy approach to the facts. Her error is especially significant because she concedes that the trial court’s finding of domestic violence was based on the JIS report and one other document allegedly establishing that deferred prosecutions occurred – an October 2008 report of a guardian ad litem (GAL). Amended Brief of Resp., pp. 19-26. But, as discussed below, the GAL report was not admissible evidence of deferred prosecutions either. In sum, the JIS report does not prove that Mr. Rodden agreed to deferred prosecutions on domestic violence charges, and instead illustrates that the trial court decision was based on false assumptions and should be reversed.

2. Domestic violence was not an issue at trial.

Ms. Rodden makes numerous assertions based on the mistaken notion that domestic violence was an issue at the trial. For example, she asserts that Mr. Rodden “waived” objections to the trial court’s reliance on the JIS and GAL reports because Mr. Rodden did not move in limine to exclude them from admission at trial, and because he did not call the GAL as a witness at trial. Amended Brief of Resp., pp. 19-20, 24. Actually a party cannot waive the right to cross-examine a GAL. RCW 26.09.220(3). Ms. Rodden also argues that the record on appeal is incomplete because it does not include the entire trial transcript and relevant testimony may be missing. *Id.*, pp. 17, 26. She is wrong.

There was no trial on the issue of domestic violence. Indeed, a theme of this appeal is that it was unfair, and contrary to rules of proof and evidence, to make a finding of domestic violence *without* a trial. The trial court relied on hearsay allegations that were not brought up until *after* the trial ended. Ms. Rodden is aware of this, as her brief shows. Amended Brief of Resp., pp. 4, 6.

a. The parenting plan was not contested.

Prior to trial, the parties agreed to a parenting plan which included joint decision-making, as Ms. Rodden concedes. Amended Brief of Resp., p. 4. The trial court did not hear testimony

about parental decision-making – or whether it should be limited by domestic violence - because it was not a contested issue. RP (Sept. 22, 2009) at 4 (“I didn’t take any testimony about the parenting plan”). Ms. Rodden acknowledges this. Amended Brief of Resp., p. 6.

Furthermore, the record clearly shows that the trial was limited to financial issues unrelated to this appeal. CP 272 (the parenting plan was agreed and “all other issues are reserved for trial”); CP 265 (trial exhibits consisted only of money-related documents). Mr. Rodden provided a complete transcript of the oral decision at the trial, showing it was limited to property distribution, child support, maintenance and attorney fees. RP (July 15, 2009) at 3-16. In sum, this Court does not need a complete trial transcript because the trial did not deal with the issues raised on appeal.

Rather, the trial court brought up its concern about domestic violence *after* the trial ended, and after the court made oral rulings on the contested issues. *Id.*; Brief of App., p. 11. At the conclusion of its oral decision on the day of trial, the court said:

You know, I note...an issue that I think is problematic, counsel, with regards to your agreement and parenting plan. However, I'm going to not make a particular decision on that, because I think you may all be entitled to an opportunity to at least address the

Court on this if you wish. However, I do note that one of the provisions in the parenting plan in the agreement says it will be joint decision making, and when I read RCW 26.09.191, and when there is a history of domestic violence, I think the Court is constrained not to allow for joint decision-making on major issues. It appears there has been a finding by a court to that effect with regards to Mr. Rodden. So I'm going to indicate to you that the Court has concerns about that, and when it comes time to sign the final parenting plan, I'm going to want to hear from counsel about that issue....

RP (July 15, 2009) at 16-17 (italics added). Thus, contrary to Ms. Rodden's assertions, the domestic violence issue was not part of the trial and was brought up by the trial court after the trial ended.¹

b. A motion in limine would have made no difference.

Ms. Rodden makes the illogical assertion that Mr. Rodden should have filed a motion in limine to exclude the GAL and JIS reports from evidence if he was concerned about their accuracy. She argues that he "waived" objections to the reports by not moving to exclude them as evidence. Amended Brief of Resp., p. 20. This again reflects a misunderstanding of the facts.

¹ In arguing that a complete trial transcript is needed, Ms. Rodden uses a statement by Mr. Rodden's trial attorney to create a false impression that the trial included testimony about deferred prosecutions of domestic violence charges. Amended Brief of Resp., pp. 17-18. She quotes the attorney saying that "we had testimony regarding" deferred prosecutions, as if he was referring to testimony at trial. *Id.* But he was referring to the declaration filed by Mr. Rodden months after trial explaining that the domestic violence charges were dismissed without conditions, and were not deferred. CP 25.

A motion in limine is a tool for preventing admission of evidence at trial. ER 103, 104 and 105. As previously explained, ***the JIS report was not even created until after the trial ended.*** Brief of App., p. 12. The trial took place on July 15, 2009. The court made the JIS printout a month later - on August 13, 2009. Obviously, Mr. Rodden could not have moved to exclude a report that did not exist. Moreover, there was no reason to challenge the JIS report. The problem is the trial court's mischaracterization of the report, not the report itself. A motion in limine cannot stop a court from misreading a JIS code.

As for the October 2009 GAL report, it was not offered for admission at trial because it related to parenting issues that had been settled, and the trial court did *not* admit the GAL report as evidence. CP 265. So moving to exclude the report would not have changed anything. The trial court insisted upon using the report as evidence *despite* the fact that it was never formally admitted nor subjected to any sort of adversarial process.

Mr. Rodden could not have anticipated that the trial court would violate RCW 26.09.220(2), which prohibits receiving a GAL report in evidence without providing an opportunity for cross-examination of the GAL and persons consulted by the GAL.

Moreover, Mr. Rodden could not have anticipated that the trial court would use the GAL report as a basis to award sole decision-making to Ms. Rodden, when the GAL actually recommended joint decision-making by both parents. CP 313. In sum, contrary to Ms. Rodden's assertions, there was no reason to move in limine to exclude the GAL and JIS reports because the JIS report did not exist before trial and the GAL report did not come up.

c. There was no waiver.

By no stretch of the imagination did Mr. Rodden waive objections to admissibility of the GAL or JIS reports or to the sufficiency of evidence of domestic violence. Rather, he made timely objections at the September 22, 2009 hearing on adopting the agreed parenting plan, which is when the trial court first divulged its belief that the reports were evidence of domestic violence. RP (September 22, 2009) at 5. The first clue was when the court said: "My recollection from the guardian ad litem's report and the file is that there's an indication that he was charged and had a deferred prosecution or disposition of some sort on an assault charge." *Id.* Mr. Rodden's trial attorney, David Hunter, *immediately* said he was "troubled" by the court's assertion. *Id.* The trial court then said that both the GAL report and the sealed

JIS report stated that charges against Mr. Rodden resulted in deferred prosecutions, and that “for a deferred, you must admit something.” Id. at 6-8.

In response, Mr. Hunter repeatedly argued that the reports were not sufficient evidence of domestic violence. Id. at 6-8, 16-17. He said that the GAL report could be used only for the limited purpose of showing what the GAL recommended, because the parties had agreed to carry out the GAL recommendations. Id. at 16. He argued that the GAL report was “not substantive evidence of things which occurred” because the GAL “didn’t testify, he wasn’t available for cross-examination, and so there was no evidence admissible in court as to the issue of domestic violence.” Id. at 16-17. Thus, from the very first instant when the trial court said the JIS and GAL reports were evidence of domestic violence, Mr. Rodden objected.

Notwithstanding his objections, the trial court made its ruling that same day – finding that the JIS and GAL reports were sufficient evidence of domestic violence and that Mr. Rodden was excluded from joint decision-making as a result. RP (Sept. 22, 2009) at 9. Thus, Mr. Rodden had no advance notice that alleged deferred

prosecutions would be an issue, or that the GAL and JIS reports would be used as evidence of domestic violence.²

He filed a motion for reconsideration reiterating that “there was no admissible evidence of any form of domestic violence,” that the GAL report was not evidence because the GAL was not examined at trial, and that the only relevance of the GAL report was to explain the parenting plan settlement. CP 7. The motion also said the JIS report did not show convictions, and that the charges were in fact dismissed. CP 8. The motion included a *sworn declaration by Mr. Rodden that the charges were dismissed* without any conditions of probation, classes or treatment. CP 25. Finally, the motion included Ms. Rodden’s April 2008 petition for a protection order based on the alleged March 30, 2008 assault, and the court’s decision dismissing that petition because she failed to prove domestic violence. *Id.*; CP 23. Based on that earlier decision, Mr. Rodden argued that collateral estoppel prevented a conflicting finding that the March 30, 2008 incident constituted domestic violence. *Id.*

² Ms. Rodden misleadingly contends that the “father framed the issue as” whether a deferred prosecution constitutes evidence of domestic violence precluding joint decision-making. Amended Brief of Resp., p. 6. Actually the father did not frame the issue at all. His attorney merely disagreed with the court’s unexpected assertion that if a charge is resolved by deferred prosecution, the defendant must have admitted guilt.

In sum, Mr. Rodden made the necessary objections as soon as he could do so. The record shows that, contrary to Ms. Rodden's assertions, he did not waive any arguments about the admissibility or sufficiency of the hearsay evidence which the trial court relied upon.

B. Ms. Rodden Does Not Rebut Key Arguments, Effectively Conceding That Her Sole Decision-Making Authority Was Granted Erroneously.

The Amended Brief of Respondent does not contest several of Mr. Rodden's key arguments regarding statutory interpretation, due process and collateral estoppel. By declining to offer any substantive rebuttal to these arguments, Ms. Rodden effectively concedes that the trial court erred as alleged.

1. Ms. Rodden does not dispute that proper application of RCW 26.09.191(1)(c) required a finding of multiple "acts" of domestic violence, not a single act.

The opening brief explained at length that it was error to award sole decision-making authority to Ms. Rodden based on RCW 26.09.191(1)(c), when the elements of that statute were not met. Brief of App., pp. 21-25. Ms. Rodden does not even attempt to rebut these arguments.

RCW 26.09.191(1)(c) says in relevant part:

The permanent parenting plan shall not require mutual decision-making...if it is found that a parent has engaged in...**a history of acts of domestic violence** as defined in RCW 26.50.010(1)...

(emphasis added). Here, the trial court applied the statute as if the words “acts of” and “as defined in RCW 26.50.010(1)” were omitted. If the trial court had correctly applied the statute to give meaning to all of its words, it could not have deprived Mr. Rodden of parental decision-making authority. Thus, this error of law – impliedly conceded by Ms. Rodden – is dispositive.

a. “Acts” means more than one act.

Ms. Rodden does not dispute that, in order to deprive Mr. Rodden of decision-making authority pursuant to RCW 26.09.191(1)(c), the trial court needed to find that he committed multiple “acts” of domestic violence.³ Thus, the question is whether both of the acts which the trial court relied upon, when finding that a history of domestic violence precluded joint decision-making, constituted domestic violence as defined by the parenting statute. They did not.

b. Each of the acts must involve actual or threatened *physical* harm.

³ As explained in the opening brief, the prohibition on joint decision-making also applies if a single act causing “grievous bodily injury” is found. RCW 26.09.191(1)(c). The trial court made no finding of a “grievous” injury, and in her response, Ms. Rodden does not allege that any such finding was warranted.

The opening brief explained at length that, of the two acts which the trial court relied upon in invoking RCW 26.09.191(1)(c), one was clearly outside the statutory definition of domestic violence. Brief of App., pp. 23-24. The parenting statute, RCW 26.09.191(1)(c), uses the definition of “domestic violence” contained in RCW 26.50.010(1)(a), which is:

physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members.

Based on that definition, Mr. Rodden argued that the trial court needed to find two or more incidents of actual or threatened *physical harm* in order to prohibit joint decision-making pursuant to RCW 26.09.191(1)(c). In her response, Ms. Rodden did not disagree. Brief of Resp., p. 16 (quoting the applicable definition).

This is significant because, of the two incidents which the trial court determined were domestic violence, one was an alleged protection-order violation which did not involve any threat of physical harm. Rather, it merely involved a friend of Mr. Rodden’s checking on the condition of the house where the couple previously lived, when Ms. Rodden was not there. Ms. Rodden silently concedes that the alleged violation does not fit the statutory

definition of domestic violence. In fact, it was not possible for her to be physically injured by the alleged protection-order violation because she was not physically present when the friend, Eric Yurk, visited the couple's unoccupied former home. CP 27. Moreover, the charge against Mr. Rodden, based on the friend's visit, was dismissed. CP 25; CP 83.

In sum, the trial court needed to find two or more acts of actual or threatened physical harm in order to deprive Mr. Rodden of decision-making authority, but according to the undisputed evidence, there was no physical threat associated with one of the two acts which the trial court relied upon. Accordingly, the trial court's granting of sole decision-making to Ms. Rodden was an abuse of discretion and must be reversed.

2. Ms. Rodden gives short shrift to compelling due-process arguments.

The Brief of Appellant discussed at length the reasons why the trial court's process was unconstitutional. Brief of App., pp. 35-41. In response, Ms. Rodden makes only a bare assertion that the due-process claims are "not well-founded" without addressing any of the particular points raised. Brief of Resp., p. 29. She does not deny that Mr. Rodden has a constitutionally protected liberty

interest in making decisions for his daughter, that his interest vastly outweighs any state interest in depriving him of parental rights because he is deemed to be a fit parent, and that strong procedural protections were required for those reasons.

And while it is true that this Court need not reach constitutional issues if the case can be decided on other grounds, here the procedural defects were overarching. Indeed, the trial court's refusal to apply any standard of proof to the question of whether domestic violence occurred, and its insistence that a mere subjective belief was adequate to deprive Mr. Rodden of parenting rights, were at the very heart of the decision at issue. The trial court essentially substituted the required statutory analysis with a wholly subjective test. Under these unusual circumstances, where the trial court expressly stated that no quantum of evidence was required and that it must "assume" guilt simply because charges were filed, the lack of due process merits attention. RP (September 22, 2009) at 11.

3. Ms. Rodden does not deny that she was collaterally estopped from alleging that the March 30, 2008 incident constituted domestic violence.

Mr. Rodden argued that the doctrine of collateral estoppel barred Ms. Rodden from asserting in the dissolution proceeding

that her March 30, 2008 confrontation with him constituted an assault. Brief of App., pp. 41-42. The trial court had made a final decision in a prior proceeding that Ms. Rodden had not met her burden of proving that domestic violence occurred on March 30, 2008. Ms. Rodden makes no attempt to dispute the collateral estoppel argument and, therefore, concedes its validity.

It bears mentioning again that the prior proceeding was the *only* one in which the parties testified about the incident, and in which the court had an opportunity to assess the relative credibility of Ms. Rodden and Mr. Rodden as witnesses. Ms. Rodden offers no reason why the court's original determination of insufficient evidence – based on live, sworn testimony - should be substituted for a conflicting determination based entirely upon hearsay. Accordingly, and because the trial court abused its discretion by failing to apply the doctrine of collateral estoppel where the same parties dealt with an identical issue a second time, the finding of domestic violence should be reversed.

C. Mr. Rodden Did Not Stipulate to the Facts Alleged in the GAL Report, But Even If He Had Done So, It Would Not Establish that He Committed Domestic Violence.

Ms. Rodden asserts that the appellant “never explains why the court should not have viewed the parties’ agreement (to carry

out GAL recommendations) as a stipulation to the facts contained in the guardian's reports." Amended Brief of Resp., p. 19. The explanation is simple. In the settlement agreement, Mr. Rodden agreed only to follow the GAL recommendations, not to accept as true everything the GAL was told.⁴ Therefore, it would be error to view the GAL reports as stipulations. They are merely hearsay, as explained in the opening brief.

But even if Mr. Rodden had stipulated to every word of the two GAL reports, it would not prove he committed domestic violence. It would only prove that Ms. Rodden accused him of domestic violence, which is vastly different.

1. The first GAL report is not evidence of domestic violence.

The October 2008 GAL report refers to "conflicting statements" and says the "father denies" the mother's allegations of domestic violence. CP 303, 305. In describing the March 30, 2008 incident which was the subject of the assault charge, the GAL wrote: "Father allegedly grabbed mother's arms." Thus, the GAL was simply describing what was *alleged*. This proves only that Mr. Rodden was accused, not that he was guilty.

⁴ The agreement said a "parenting plan shall be entered consistent with the recommendations of the GAL contained in his 10/24/08 report and his revised recommendations dated 6/17/09." CP 272. It did *not* include a stipulation of facts.

Similarly, the report said that the mother alleged that Mr. Rodden spansks his daughter and that he once “left bruises” on her arms. CP 306.⁵ But the report also said that Child Protective Services investigated the bruising allegation “and determined the injury was not intentional and resulted from the father using too much force while restraining [the daughter] during a tantrum. No case was opened.” CP 306. Under RCW 9A.16.100, “the physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child.” Here, the GAL report indicated the restraint was reasonable. If the GAL believed otherwise, presumably he would not have recommended awarding “equally shared” residential time to Mr. Rodden. CP 313.

And although the GAL report did say the father “was granted a Deferred Prosecution on the assault charge” involving the mother, there is no indication where that information came from. CP 305.

⁵ Ms. Rodden attacks Mr. Rodden’s credibility, but her own credibility in alleging domestic violence is questionable. She admitted problems with alcohol abuse, including a reckless driving conviction. CP 304, 306. The GAL described police reports “in which the investigating officers either note that mother was acting irrational, or they note the smell of intoxicants,” and the daughter stated that she is afraid of her mother when she drinks. CP 304, 308. Also, Mr. Rodden and his mother both accused Ms. Rodden of domestic violence. CP 304. Against this backdrop, and in light of Ms. Rodden’s statement in her dissolution petition that there was no domestic violence warranting parenting restrictions, the credibility of her allegations must be questioned. CP 181,185.

Similarly, in discussing the alleged protection order violation, the GAL wrote that he “understands that this case has also been resolved with a Deferred Prosecution.” CP 306. Neither statement proves anything except what the GAL subjectively understood. Because Mr. Rodden had no chance to cross-examine him, this Court can only speculate as to the basis for the GAL’s statements. Perhaps the GAL, like the court, simply misread JIS codes.

Regardless of the GAL’s source of information, the GAL’s unsworn statements about deferred prosecutions are negated by Mr. Rodden’s sworn statement that the cases were “dismissed.” CP 25. In fact, Mr. Rodden’s declaration about the dismissals, filed with the motion for reconsideration, was the *only* testimony ever presented on the matter. The trial court abused its discretion by relying on hearsay in an unsworn report when it contradicted sworn testimony that the cases were dismissed.

2. The second GAL report similarly was not proof of domestic violence.

The GAL changed his recommendations in June 2009 based on Ms. Rodden’s drinking. CP 96. She had been charged with drunken driving in an episode involving the daughter. *Id.* The GAL recommended reducing her parenting time.

And while the second GAL report discussed the mother's new allegation that Mr. Rodden had spanked the daughter to the point of bruising, it also noted that Mr. Rodden denied causing a bruise and said "it will never be known for certain" whether his spanking caused a bruise. CP 96, 98. In fact, there was never a criminal charge and Child Protective Services did not find abuse. Also, the GAL did not characterize the spanking as domestic violence but saw it as "corporal punishment." CP 96, 98.

Corporal punishment of children is not unlawful when such physical discipline is objectively reasonable. State v. Singleton, 41 Wash.App. 721, 723-24, 705 P.2d 825 (1985); RCW 9A.16.100. A parent has a right to use reasonable and timely punishment to discipline a minor child within the bounds of moderation and for the best interest of the child. Singleton at 723. According to the GAL report, Mr. Rodden denied bruising his daughter, and the GAL recommended increasing the daughter's time with Mr. Rodden, indicating the spanking was within reasonable disciplinary bounds. Thus, even if the GAL report is viewed as a stipulation instead of hearsay, it is not proof of domestic violence.

D. Ms. Rodden Did Not Establish An Exception to Hearsay Rules.

The Brief of Appellant explained that the GAL and JIS reports are inadmissible hearsay. Brief of App., pp. 31-32. Ms. Rodden does not deny that the reports constitute hearsay under ER 801(c). She also concedes that the trial court relied on the reports – in particular the GAL’s references to deferred prosecutions - in finding that Mr. Rodden committed domestic violence. Amended Brief of Resp., p. 17 (“the trial court found domestic violence expressly based on a charge of simple assault and a violation of a protection order, both resulting in deferred prosecutions, and on events described in the guardian ad litem reports”). Thus, in order to uphold a decision admittedly based on hearsay, Ms. Rodden must establish that an exception to the hearsay rule applies. She fails to do so.

Ms. Rodden cites ER 902(d) for the proposition that the JIS report “is an official government record comparable to a certified judgment” and therefore proves that Mr. Rodden entered deferred prosecutions. Amended Brief of Resp., p. 21. But ER 902(d) is not a hearsay exception – it has only to do with authenticating records for purposes of admission at trial. More to the point, even if the JIS report was self-authenticated, it does not prove deferred

prosecutions – it says the cases were dismissed. Thus, ER 902(d) and the related cases she cites are of no help to Ms. Rodden.

In reality, the only “evidence” of deferred prosecutions was the October 2008 GAL report. Ms. Rodden fails to even argue, let alone establish, that the GAL report falls under an exception to the hearsay rule. Because it was inadmissible under ER 802 as well as RCW 26.09.220(2), and because RCW 26.09.191(6) requires the court to apply civil rules of evidence in determining if domestic violence occurred, the trial court abused its discretion in finding domestic violence based on the GAL report.

E. Parental Discord Cannot Be an Alternative Basis for Denying Joint Decision-Making In This Case.

Ms. Rodden argues that “the trial court offered an alternative basis for ordering sole decision-making, which the father does not challenge.” Amended Brief of Resp., p. 12. This is not true.

Ms. Rodden agreed to share decision-making with Mr. Rodden. She forgets that under RCW 26.09.187(2)(a), the court **must** approve such a voluntary agreement *unless* limitations are “mandated by RCW 26.09.191.”⁶ Thus, in this case, the trial court

⁶ Limitations on decision-making are mandated if the court finds a parent has engaged in “a history of acts of domestic violence,” as the court incorrectly found here. RCW 26.09.191(c).

could reject the parents' agreement to share decision-making *only* if a limitation was mandated by **RCW 26.09.191**.

Ms. Rodden nevertheless argues that this Court should affirm the trial court based on **RCW 26.09.187(2)(c)(iii)**, which permits but does not require a court to exclude one parent from decision-making if the parents cannot cooperate in making education, religion and medical decisions. This is legally wrong. Only RCW 26.09.191, and not RCW 26.09.187(2)(c)(iii), can be the basis for rejecting a voluntary agreement to share decision-making. RCW 26.09.187(2)(a).

Even if the court was permitted to award sole decision-making based on RCW 26.09.187(2)(c)(iii), it would not apply here because the trial court never inquired about the parents' ability to cooperate regarding education, health care and religion. By its express terms, RCW 26.09.187(2)(c)(iii) only allows consideration of ability to cooperate regarding those three issues specifically. RCW 26.09.187(2)(c)(iii) (referring to "a demonstrated ability and desire to cooperate with one another in decision-making in each of the areas in RCW 26.09.184(5)(a)"). Here, nothing in the record indicates the trial court had evidence of conflicts over school, church or medical treatment.

On the contrary, the parents showed a “desire to cooperate” on these issues by agreeing to shared decision-making. RCW 26.09.187(2)(c)(iii). They also persuaded the GAL that they could handle joint decision-making in these areas. His report recommended joint decision-making regarding “medical care, schooling and other significant issues” and said: “The parties have a past history of making decisions between them on behalf of their daughter, and they need to continue to do so.” CP 313.

RCW 26.09.187(2)(c)(iii) does not allow the court to allocate decision-making authority to only one parent based on general discord “about everything,” as Ms. Rodden incorrectly suggests. Amended Brief of Resp., p. 13. If that were the case, divorced parents would never share decision-making because they would not be divorced unless there was some discord about something. In sum, RCW 26.09.187(2)(c)(iii) cannot be an alternative basis for sole decision-making because it is not a permissible reason to reject a voluntary agreement for joint decision-making, and because the record shows the parents could cooperate on the specific issues that RCW 26.09.187(2)(c)(iii) addresses.

F. Ms. Rodden Is Not Entitled to Attorney Fees.

Ms. Rodden requests a discretionary award of attorney fees pursuant to RCW 26.09.140 based on an alleged disparity in financial resources. Such an award would be unfair and inappropriate. First, the statute contemplates that such fee awards should be made periodically by a trial court, based on reviewing financial resources "from time to time" as part of ongoing proceedings. RCW 26.09.140. It is not this Court's job to evaluate financial resources of the parties on an ongoing basis.

Second, Ms. Rodden has not submitted affidavits establishing the parties' current financial status. Rather, she relies on trial court findings made in July 2009. Amended Brief of Resp., p. 5. She cannot seek fees based on periodic review of financial resources without a new review taking place. RCW 26.09.140. Finally, in fairness, Mr. Rodden should receive attorney fees from Ms. Rodden as a prevailing party.

III. CONCLUSION

For the foregoing reasons, the decision should be reversed.

RESPECTFULLY SUBMITTED this 16th day of March, 2011.

HARRISON, BENIS & SPENCE LLP

By: 
Katherine George, WSBA No. 36288
Attorney for Appellant

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**SUPERIOR COURT OF WASHINGTON
COUNTY OF WHATCOM**

Clerk's File Stamp

In re the Marriage of:
TAMARA RODDEN,

and
JAMES F. RODDEN,

Respondent.)

NO. 08-3-00254-3

**NOTICE OF APPEAL TO
THE APPELLATE COURT
DIVISION ONE**

JAMES F. RODDEN, Appellant, seeks review by the appellate court designated above of the Findings of Fact and Conclusions of Law, Parenting Plan, Order of Child Support, and Decree of Dissolution entered on September 22, 2009, and Order on Motion for Reconsideration entered on May 17, 2010. which are attached to this notice.

Respectfully submitted this 7th day of June, 2010.


DAVID B. HUNTER, WSBA #20404
Attorney for Respondent

DAVID B. HUNTER
Attorney at Law
103 E. Holly St., #519
Bellingham, WA 98225
Phone: (360) 671-5366

No. 65515-9-I

COURT OF APPEALS, DIVISION ONE OF THE STATE
OF WASHINGTON

IN RE: THE MARRIAGE OF

TAMARA RODDEN,

Respondent,

and

JAMES RODDEN,

Appellant.

MOTION TO
SUPPLEMENT THE
RECORD

RAP 9.10

I. IDENTITY OF MOVING PARTY AND STATEMENT OF
RELIEF SOUGHT

James Rodden, appellant, moves for permission to supplement the record pursuant to RAP 9.10.

II. FACTS RELEVANT TO MOTION

Mr. Rodden's trial attorney, David Hunter, who has handled all trial-level proceedings in this case and is familiar with the entire record, initiated this appeal including arranging for three transcripts to be filed in this Court. Because the trial in this case did not deal with the limited issue raised on appeal – whether the trial court erred by

finding that a history of domestic violence precludes Mr. Rodden from sharing parental decision-making – the trial attorney did not arrange for a full transcript of the trial. Rather, the Statement of Arrangements identifies only those portions of the record in which the parties and Court discussed the domestic violence issue. (For a complete explanation of when the issue arose, please see the Reply of Appellant filed contemporaneously with this motion.)

The respondent, Tamara Rodden, did not object to the Statement of Arrangements, nor did she object to the Verbatim Report of Proceedings transcripts after receiving them along with the Brief of Appellant. However, in her response brief filed last month, Ms. Rodden claimed that the Verbatim Report of Proceedings should include the entire trial. She asserted that, without a full trial transcript, this Court may be missing relevant testimony and is unable to independently evaluate the credibility of the witnesses. At the same time, she designated as supplemental clerk's papers dozens of trial court records going well beyond the limited issue raised on appeal.

After receiving the response brief, Mr. Rodden's appellate counsel wrote a letter to Patricia Novotny, Ms.

Rodden's appellate counsel (who did not handle the trial), asking if she would join a stipulated motion to supplement the record with a full trial transcript. The letter also asked that Ms. Rodden share the cost of supplementing the record. Ms. Rodden declined both requests.

III. GROUNDS FOR RELIEF

Mr. Rodden does not believe the record is incomplete, as the Reply of Appellant explains. His Statement of Arrangements was consistent with RAP 9.2(b), which says:

A party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review.

This Court already has all of the relevant transcripts reflecting a complete record of the trial court's handling of the parental decision-making issue. As explained in the Reply, the trial dealt with unrelated issues of child support, property distribution and maintenance.

Nevertheless, Mr. Rodden recognizes that this Court might disagree with him, and might agree with Ms. Rodden that in order to resolve the issues on appeal it must review all testimony at the trial. He brings this motion simply to demonstrate that he is willing to

supplement the record at his own expense if the Court wishes to see a complete trial transcript. The Court's direction on this issue will be appreciated.

Dated this 16th day of March, 2011.

Respectfully submitted,

By: 

Katherine George, WSBA No. 36288

Attorney for Appellant

Harrison Benis & Spence LLP

2101 Fourth Avenue, Suite 1900

Seattle, Washington 98101

425 802-1052

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of Washington that on the date below, I arranged for service of the Motion to Supplement the Record and the Reply of Appellant as follows:

By U.S. mail:
Patricia Novotny
3418 NE 65th St., Suite A
Seattle, WA 98115
Attorney for respondent Tamara Rodden

Dated this 16th day of March 2011, at Seattle, Washington.

A handwritten signature in cursive script, appearing to read "Katherine George", written over a horizontal line.

KATHERINE GEORGE