

No. 72316-2-1
King County Superior Court No. 13-3-09766-8 KNT

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

In Re Parenting of:

L.L., Child,

GEOFFREY LYLES, Respondent,

and

TRINITY SESAY, Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Suzanne Parisien, Judge

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON
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STATUTES

RCW 26.09.191..... 1, 6, 8, 9, 10
RCW 26.18.220.....8
RCW 26.50.010.....1, 5, 8

ASSIGNMENT OF ERROR

1. The trial court erred in finding that the parties were mutually engaged in an abusive relationship as set forth in the “Note” in section 2.1 of the parenting plan.

2. The trial court erred in ordering joint educational decision-making in section 4.2 of the parenting plan.

ISSUES RELATING TO THE ASSIGNMENT OF ERROR

1. The father admitted to perpetrating behaviors amounting to domestic violence, and additional supporting evidence was presented at trial. Vague allegations were made that the mother was similarly engaged in the parties’ arguments, but no evidence supports a finding of domestic violence under RCW 26.50.010(1). Because the evidence, even if the allegations are taken as true, does not support a restriction against the mother under RCW 26.09.191, should the additional provision citing abusive behavior on her part in section 2.1 be stricken?

2. The trial court properly made a finding that the father had engaged in a history of acts of domestic violence as defined in RCW 26.50.010(1). Accordingly, was it improper under RCW 26.09.191(1) for the court to order joint decision-making in violation of the statutory mandate?

STATEMENT OF THE CASE

Factual history: Appellant Sesay and Respondent Lyles began dating in 2010, and Ms. Sesay soon became pregnant with L.L., the child whose care is at issue in this case.¹ Ms. Sesay described the relationship with Mr. Lyles as “very verbally, physically abusive, and draining.”² Mr. Lyles hit Ms. Sesay in the face the day before her baby shower for L.L.³, slapped her while she was holding L.L.⁴, and bit her face.⁵ The day after the last assault, Ms. Sesay secured a domestic violence protection order,⁶ and the Federal Way Municipal Court issued a 60 month no-contact order against Mr. Lyles.⁷ Mr. Lyles acknowledged the violence he committed against Ms. Sesay and the injuries caused,⁸ but blamed Ms. Sesay for provoking him.⁹

Procedural history: Mr. Lyles filed a petition to establish a residential schedule on July 12, 2013.¹⁰ The trial occurred on June

¹ Verbatim Report of Proceedings (“VRP”) page 99

² VRP at 100

³ Id.

⁴ VRP at 103

⁵ VRP at 102

⁶ VRP at 126

⁷ VRP 47-48, Trial exhibit 102

⁸ VRP at 40-42, 47

⁹ VRP at 46

¹⁰ Clerk’s Papers (“CP”) pages 1-6

11, 2014,¹¹ and the court entered a final parenting plan¹² on June 25, 2014.¹³ Following a motion for reconsideration, the court held an additional hearing on July 7, 2014 to address the conflict between the criminal no-contact order and the court's provision for exchanges,¹⁴ and issued a revised final parenting plan nunc pro tunc on July 9, 2014.¹⁵ Both parenting plans included a finding of domestic violence against Mr. Lyles, and both provided for joint educational decision-making. Ms. Sesay filed a timely notice of appeal of the revised final order on August 5, 2014.¹⁶

ARGUMENT

I. STANDARD OF REVIEW

Parenting plans are reviewed for abuse of discretion.¹⁷ A trial court abuses its discretion when "its decision is based on untenable grounds or reasons, or is manifestly unreasonable."¹⁸ A court's decision is based on untenable grounds or reasons "if its factual

¹¹ VRP Volume 1 of 2

¹² CP 18-24

¹³ VRP Volume 2 of 2, pages 153-168

¹⁴ VRP Volume 2 of 2, pages 169-195

¹⁵ CP 25-31

¹⁶ CP 32-40

¹⁷ In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)

¹⁸ In re Marriage of Wicklund, 84 Wn.App. 763, 770 n. 1, 932 P.2d 652 (1996), citing In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971)

findings are unsupported by the record.”¹⁹ “A trial court’s factual findings are accepted if “supported by substantial evidence in the record,”²⁰ which is evidence that would “persuade a fair-minded, rational person of the truth of that determination.”²¹

A court also “acts unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard.”²² Questions of law, including questions of statutory construction, are reviewed de novo.²³

II. THE TRIAL COURT ERRED IN FINDING THE PARTIES ENGAGED IN A MUTUALLY ABUSIVE RELATIONSHIP

Section 2.1 of the parenting plan regarding Parental Conduct reads:

The father’s residential time with the child shall be limited or restrained completely, and mutual decision-making and designation of a dispute resolution process other than court action shall not be required because this parent has engaged in the conduct which follows: A history of acts of domestic violence as defined in RCW

¹⁹ Wicklund, supra, citing State v. Rundquist, 79 Wn.App. 786, 793, 905 P.2d 922 (1995)

²⁰ In re Marriage of Thomas, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991), citing In re Marriage of Nicholson, 17 Wn.App. 110, 114, 561 P.2d 1116 (1977).

²¹ In re Marriage of Spreen, 107 Wn.App. 341, 346, 28 P.3d 769 (2001), citing Bering v SHARE, 106 Wn.2d 212, 721 P.2d 918 (1986)

²² Wicklund, supra, citing State v. Rundquist, 79 Wn.App. 786, 793, 905 P.2d 922 (1995)

²³ Dioxin/Organochlorine v. Pollution Control Hearings Bd., 131 Wn.2d 345, 352, 932 P.2d 158 (1997), citing Smith v. Continental Casualty Co., 128 Wn.2d 73, 78, 904 P.2d 749 (1995)

26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.²⁴

Domestic violence, for the purposes of restrictions in parenting plans, is defined as:

(a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.²⁵

The finding that Mr. Lyles did commit such acts, including causing physical harm to Ms. Sesay and inflicting ongoing fear, is supported by substantial evidence as described in the oral ruling from the bench:

Viewing all of the police reports and the testimony in this case, as well as the DV, domestic violence assessment that was done lead the court to conclude—and frankly, perhaps most importantly, Mr. Lyles did not deny the instances of domestic violence in this case. I believe that was one of the first things he said in his opening statements was an acknowledgment of what had happened and his regret for that. So the court obviously is making a finding of domestic violence in this case pursuant to the statute.²⁶

However, the court went on to commend Mr. Lyles for his accountability for his prior actions and participation to date in his court-mandated treatment, and expressed its belief that the parties

²⁴ CP at p25

²⁵ RCW 26.50.010(1)

²⁶ VRP at 154

engaged in “mutual aggression.”²⁷ This perspective was added to the Section 2.1 finding of domestic violence as follows:

NOTE: The Court specifically finds that the parties were mutually engaged in an abusive relationship but there is evidence indicating that the father’s level of physicality exceeded that of the mother. The Court also finds that at time of trial, the father had substantially complied with his court ordered domestic violence treatment and was exhibiting signs of accountability and appreciation for the harm caused by his prior conduct.²⁸

This commentary improperly distorts the statutory intent of RCW 26.09.191(1) restrictions and should be stricken.

Whereas Ms. Sesay testified to several specific incidents when Mr. Lyles assaulted her and caused physical injury,²⁹ Mr. Lyles never articulated facts about any incident in which Ms. Sesay’s supposedly caused him physical harm, fear, or any other element of the statutory definition of domestic violence. When asked by the court to be more specific about the number of times the two had been in physical altercations, he testified, “I can’t, I don’t even remember. I mean, we, the type of fights that we had were just stupid fights.”³⁰

²⁷ VRP at p155

²⁸ CP at p26

²⁹ See, e.g., VRP at pp100-102

³⁰ VRP at 35

Throughout his testimony Mr. Lyles blamed the victim and attempted to justify his escalation to violence; for example, “one time I was reading a book and she just threw the book down and got in my face and called me a name and then I reacted off that. I might have hit her off that, you know what I mean?”³¹ He also attempted to minimize his guilt by down-playing the effects of his violence; for example, when reviewing the diagram of the bite mark on Ms. Sesay’s jaw in a police report,³² he stated, “I’m not saying I didn’t cause it, but I didn’t hurt her.”³³

There was no corroborating evidence or testimony to support Mr. Lyles’ contentions that Ms. Sesay was ever violent. Mr. Lyles’ own mother, who lived in the same apartment complex as the parties during L.L.’s infancy, witnessed only yelling³⁴ and acknowledged in court that she had told Ms. Sesay she would go to the police if she were in Ms. Sesay’s position.³⁵ While this court does not make credibility determinations or weigh evidence,³⁶ there

³¹ VRP at p36; see also VRP 33-38

³² Exhibit 101, not admitted into evidence because it was hearsay, used on cross examination

³³ VRP at p42

³⁴ VRP at p61

³⁵ VRP at 67

³⁶ In re Marriage of Meredith, 148 Wn. App. 887, 903, 201 P.3d 1056, review denied, 167 Wn.2d 102, 220 P.3d 207 (2009)

is insufficient evidence to support this particular finding under scrutiny.

III. THE TRIAL COURT ERRED IN ORDERING JOINT DECISION-MAKING AFTER A DOMESTIC VIOLENCE FINDING AGAINST LYLES

As referenced above, Section 2.1 of the parenting plan regarding Parental Conduct reads:

The father's residential time with the child shall be limited or restrained completely, and mutual decision-making and designation of a dispute resolution process other than court action shall not be required because this parent has engaged in the conduct which follows: A history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.³⁷

The terminology used in that clause is found in the court's mandatory forms for parenting plans,³⁸ as quoted from the statute:

The permanent parenting plan *shall not require mutual decision-making* or designation of a dispute resolution process other than court action if it is found that a parent has engaged in any of the following conduct: ... (c) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.³⁹ (emphasis added)

The language of the statute is clear and leaves no room for discretion. This issue has already been decided by the Supreme

³⁷ CP at p25

³⁸ RCW 26.18.220, published by the Administrative Office of the Courts, available at <www.court.wa.gov/forms>

³⁹ RCW 26.09.191(1)

Court of Washington, en banc, in the case of In re Marriage of

Caven:

Petitioner asserts that 'a history of acts of domestic violence' must be 'defined in a way that acknowledges that it is...[a] fear-based dynamic' where the court has discretion to grant mutual decision-making if there is absence of that fear. That is not correct. The clear and unambiguous language of RCW 26.09.191(1)(c) does not lend itself to such an interpretation."⁴⁰

The Caven court found that the Court of Appeals, Division I,

correctly reversed the trial court which incorrectly interpreted RCW 26.09.191(1)(c), resulting in that court erroneously granting the parties mutual decision-making. The trial court usually has broad discretion in determining matters relating to the welfare of children, but in matters of statutory construction this Court exercises de novo review. The words of an unambiguous statute must be given their plain and ordinary meaning unless a contrary intent is evidenced in the statute."⁴¹

The grant of mutual decision-making in this case was equally erroneous and must be reversed.

Even if this court accepts the trial court's finding that the parties' relationship was mutually abusive to some lesser extent, neither that notation by the court nor Mr. Lyles' progress in treatment can nullify the statutory domestic violence finding against the father and circumvent the dictates of the plain language of the law. A similar scenario was presented to the Court of Appeals,

⁴⁰ In re Marriage of Caven, 136 Wn.2d 800, 806, 966 P.2d 1247 (1998)

⁴¹ Id. at 810

Division I, in the case of In re Marriage of Mansour, where the father pointed to remedial steps he had taken and the courts' oral ruling lauding both parents for their good intentions toward the child.⁴² There the court reinforced Caven, stating,

RCW 26.09.191 is unequivocal. Once the court finds that a parent engaged in physical abuse, it must not require mutual decision-making and it must limit the abusive parent's residential time with the child.⁴³

The court went on to say that subsections (2)(m) and (2)(n) can mitigate harshness of the residential limitations, but there is no such compromise for section (1) regarding decision-making. The court also rejected the father's argument that the restrictions should not apply because the mother engaged in alienation, because "that transgression is not mentioned in RCW 26.09.191(1) or (2)."⁴⁴ No legal or factual grounds exist to support a different result here.

CONCLUSION

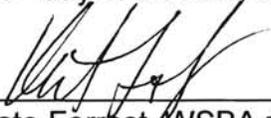
Based on the foregoing argument, this court should strike the erroneous notation in section 2.1 of the parenting plan and award sole decision-making to the mother.

⁴² In re Marriage of Mansour, 126 Wn.App. 1, 10, 106 P.3d 78 (2004)

⁴³ Id. at 11

⁴⁴ Id.

Respectfully submitted this 18th day of December, 2014.

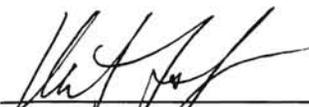


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CERTIFICATE OF FILING AND SERVICE

I certify that on today's date I submitted to the original and one copy of the foregoing brief to the clerk of the Court of Appeals, Division One, and served a copy by first-class postage paid U.S. Mail to:

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