

NO. 73897-6-I

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

PARENTING OF A.C.
MISTY RAE CURRY

Respondent,

v.

CHANDLER HAAKON CLOUGH

Appellant.

FILED
Jun 22, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Susan Amini, Judge

REPLY BRIEF OF APPELLANT

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I. ARGUMENT IN REPLY

A. ADDING FACTS NOT SUPPORTED BY THE RECORD IS IMPROPER AND MUST BE DISREGARDED

Respondent does not include a statement of facts in her responsive brief, nor does she have to under RAP 10.3(b). Respondent instead includes new alleged facts throughout her argument which are unsupported by the record and appear to be new, recent alleged facts since the trial. Respondent may not allege new facts without preparing her own statement of the case. RAP 10.3(b)(“A statement of the issues and a statement of the case need not be made if respondent is satisfied with the statement in the brief of appellant or petitioner.”) Reference to the record must be included for each factual statement. RAP 10.3(a)(5). Here, respondent fails to refer to the record for many factual statements and they must be disregarded.

B. IT IS IN THE CHILD’S BEST INTEREST TO BE PARENTED BY BOTH PARENTS PURSUANT TO THE AGREED PARENTING PLAN WHICH GAVE BOTH PARENTS JOINT CUSTODY

Every child deserves to have both parents in her life. The “best interests of the child” standard controls when determining a parenting plan. In re Parentage of Schroeder, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001). “The relationship between the child and each parent should be fostered unless inconsistent with the child's best interests.” RCW 26.09.002. It is

clear that the best interests of the child are met by joint parenting. The record is clear that Chandler Clough was a great father to A.C. and only had some minor conflicts with the mother, Misty Curry. In parenting decisions, the parents' interests are subsidiary to the children's interests. In re Marriage of Jacobson, 90 Wn. App. 738, 954 P.2d 297, review denied, 136 Wn.2d 1023 (1998); Rickard v. Rickard, 7 Wn. App. 907, 503 P.2d 763 (1972), review denied, 81 Wn.2d 1012 (1973). While Ms. Curry had made it clear that her life may be easier with sole custody of A.C. because she does not have to coordinate visitation drop offs with Mr. Clough anymore, it is the best interest of the child that controls. The record is clear that A.C.'s interests in having her father present in her life trump the mother's interests.

Restricting Mr. Clough's contact with his daughter impinges on his fundamental right to parent and is not reasonably necessary to meet the state's legitimate objectives. *See* State v. Ancira, 107 Wn. App. 650, 654-56, 27 P.3d 1246 (2001). In determining permanent parenting plans (as opposed to temporary ones) "the Legislature not only did not intend to create any presumption in favor of the primary caregiver but, to the contrary, intended to reject any such presumption." In re Marriage of Kovacs, 121 Wn.2d 795, 809, 854 P.2d 629 (1993). The focus is on prospective (not historical) parenting capabilities as determined by the

seven factors of RCW 20.09.187(3)(a). In re Marriage of Combs, 105 Wn. App. 168, 19 P.3d 469, review denied, 144 Wn.2d 1013 (2001).

“[T]he trial court's exercise of discretion to essentially eliminate a parent's residential time must be exercised in the context of other important considerations. First, the legislature has expressed a policy favoring maintaining relationships between parents and children when setting a residential schedule in a dissolution action. RCW 26.09.002 provides that “[t]he 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.” In re Dependency of J.H., 117 Wn.2d 460, 473, 815 P.2d 1380 (1991). Further, RCW 26.09.187(3)(a) provides that the trial court should make residential provisions for children that “encourage each parent to maintain a loving, stable, and nurturing relationship with the child.” The trial court must consider these policy directives before effectively eliminating residential time based solely on RCW 26.09.191(3) factors. Second, parents have a fundamental liberty interest in the “care, custody and management of their children. Id. A trial court also must consider this liberty interest before effectively eliminating a parent's residential time with his or her children based solely on the RCW 26.09.191(3) factors.” In re Marriage of Underwood, 181 Wn. App. 608, 612, 326 P.3d 793 (2014).

The Court abused its discretion in imposing the current permanent parenting plan when it eliminated Mr. Clough’s residential time in this case. RCW 26.09.191(3)(g) allows the trial court to limit the terms of the parenting plan if it finds a parent’s conduct is “**adverse to the best interests of the child.**” Imposing such restrictions “require[s] more than the normal ... hardships which predictably result from a dissolution of marriage.” In re Marriage of Katare III, 175 Wn.2d 23, 36, 283 P.3d 546 (2012) (emphasis added). The type of conflict happening between Mr. Clough and Ms. Curry was the type that is normal in a heated dissolution of relationship and terminating his right to parent by eliminating his residential time with A.C. is not justified.

C. THERE WAS NOT SUBSTANTIAL EVIDENCE OF DOMESTIC VIOLENCE AND THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALTERED THE PARENTING PLAN BASED ON A FINDING OF DOMESTIC VIOLENCE

The Court details its findings of fact and conclusions of law in a nine-page document. *See*, Brief of Respondent (BOR) at 7. CP 94-105. The Court references conflict and “aggressiveness” by the father but does not make any findings that would substantiate a domestic violence finding. There are no facts in this nine-page document that describe an act of domestic violence. Yet, in the parenting plan final order, the bases for restriction states:

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 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.

CP 94-105.

Because the trial Court could not articulate substantial evidence for a domestic violence finding, the parenting plan must be reversed and remanded.

The record shows that the only allegation of a domestic violence incident was when Mr. Clough allegedly threw a pizza at Ms. Curry. RP 21-22. Mr. Clough denies that this occurred. However, even if true, throwing a pizza is not substantial evidence of domestic violence. Domestic violence is defined as physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault. RCW 26.50.010(3). There was no physical harm, no bodily injury, no assault, and no reasonable basis for any fear of physical harm, bodily injury or assault here. Throwing a pizza at someone could be offensive, but it does not rise to the definition of assault or of domestic violence. Therefore, there was

not substantial evidence to make a finding of domestic violence to justify eliminating Mr. Clough's residential time with his child.

D. A FINDING OF DOMESTIC VIOLENCE THAT OCCURRED PRIOR TO THE CHILD'S BIRTH CANNOT BE GROUNDS FOR ELIMINATING MR. CLOUGH'S PARENTAL RIGHTS

Allegations of domestic violence prior to A.C.'s birth are not relevant to whether Mr. Clough is a capable parent. Past environment, if unrelated to present environment, may not constitute the basis for determining choice of primary parent. In re Marriage of Ambrose, 67 Wn. App. 103, 834 P.2d 101 (1992). Here, the only allegation and finding of domestic violence occurred when both parents were in California prior to A.C.'s birth. A.C. could not have witnessed such act and it has nothing to do with Mr. Clough's ability to parent A.C. Since current parenting abilities are what must be considered when determining current ability to parent, any reliance on a past allegation of domestic violence before the child is born is improper and must be disregarded.

II. CONCLUSION

Appellant respectfully submits that the parenting plan order be reversed and remanded for insufficient evidence of domestic violence or that Mr. Clough's contact with his daughter would have an adverse effect on the child's best interests.

DATED this 22nd day of June, 2016.

Respectfully submitted,



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