

No. 34976-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE MARRIAGE OF:

RICHARD GUERRERO
Appellant.

and

DANA GUERRERO
Respondent.

BY: [Signature]
DATE: 07/11/97
COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II
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AMENDED BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

The appellant, Richard Guerrero made the following general assignments of error:

- 1) Re: Residential Placement:
 - a. That the trial court failed to consider the factors outlined in RCW 26.09.187 prior to establishing a residential schedule.
 - b. That the trial court erred by drawing a presumption regarding residential placement based upon the temporary parenting plan in violation of RCW 26.09.191; and
 - c. The trial court abused its discretion by designating Dana Guerrero as the Primary Residential Parent.
- 2) Re: Spousal Maintenance: The trial court abused its discretion in awarding spousal maintenance.
- 3) Re: Monetary Judgment: Richard Guerrero asserts there was insufficient evidence to support a monetary judgment in favor of Dana Guerrero and therefore the trial court abused its discretion in awarding Dana Guerrero a monetary judgment.

The Respondent, Dana Guerrero, has not made any additional assignments of error.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I. IS THERE AMPLE EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURTS PARENTING PLAN DETERMINATION?

II. DID THE COURT ABUSE ITS DISCRETION IN AWARDING SPOUSAL MAINTENANCE TO DANA GUERRERO?

III. DID THE COURT ABUSE ITS DISCRETION IN AWARDING A MONETARY JUDGMENT IN FAVOR OF DANA GUERRERO?

B. STATEMENT OF THE CASE

STATEMENT OF PROCEDURE

Dana Guerrero and Richard Guerrero were married on August 19, 1995 and separated on May 7, 2003. CP 11, Findings of Fact and Conclusions of Law, paragraphs 2.4 and 2.5. There was one child born of the marriage, Noah Guerrero who was four at the time the parties separated and six years old at the time of trial. RP 50, 58. Prior to the trial a temporary order was entered which named Dana Guerrero as the primary residential parent and provided Richard Guerrero with unsupervised residential time, summer visitation, and input in decision making. RP 61-64. The matter proceeded to trial on November 9, 10, and 21, 2005. RP i-ii, 1-408. The court heard final arguments by trial counsel on December 15, 2005, RP iii, 417-444. The trial

court issued an oral ruling on December 20, 2005, RP iii, 445-488, and conducted a hearing on the findings on February 16, 2006, RP iii, 489-581. The trial court entered its Findings of Fact and Conclusions of Law, CP 11; Decree of Dissolution, CP 9; Parenting Plan, CP 19; and Child Support Order, CP17, on February 24, 2005. Richard Guerrero filed motions for a new trial or reconsideration, CP 12, and for relief from judgment, CP 13. The trial court considered, and denied, these motions on February 24 and March 31, 2006. RP iii, 582-614. Thereafter Richard Guerrero timely appealed the decision of the trial court.

STATEMENT OF FACTS

The trial testimony in this matter took place over three days and included testimony by the parties, RP 50-195, 250-400, and expert testimony by Dr. Kirk Johnson on the parenting abilities of both parents, RP 196-249.

Richard Guerrero has summarized the content and context of his testimony in the brief of appellant. The following statement of facts summarizes the relevant testimony made by Dana Guerrero.

Dana Guerrero is currently a substitute teacher attempting to secure a license in order to teach full time. RP 51-54. She has a BS in community health education from California State University of Long Beach; a multiple

teaching credential from the State of California; and an expired teaching license from the State of Oregon. RP 96. It is this educational background that led Dr. Johnson to testify that her background was an important factor in concluding that “Dana is, however, probably altogether more sophisticated vis-à-vis the emotional and developmental needs of Noah.” RP 202-03, 212, 221.

For a period of time Dana Guerrero worked with Richard Guerrero in Odin Technologies. RP 56-57. However, when their son Noah was born Dana considered raising him as her primary job. RP 57. It was Dana’s role to take care of Noah so Richard could be rested and alert in order to work in their home office or when Richard traveled on business. RP 57-58. As Noah became older Dana Guerrero was responsible for Noah’s involvement in a number of activities including play groups, church activities, pre-school, music activities, and Cub Scouts, RP 64. Lay witnesses who participated with the Guerreros in toddler classes testified that Ms. Guerrero is bonded to Noah and that she uses age appropriate discipline such as time outs and logically explaining the consequences of his actions. RP 22, 29. More recently Dana Guerrero is involved in field trips and volunteering at Noah’s school. RP 390.

Dana Guerrero's ability to care for Noah was hampered for a limited period of time by injuries she suffered in two automobile accidents. RP 110, 112. After the first serious accident Ms. Guerrero had her physical activities limited for a period of six weeks to two months in January and February of 2002. RP 110-11, 386. After the six to eight weeks of limited activity she resumed the primary care of Noah because Richard Guerrero felt that his additional parenting responsibilities were burdensome and interfered with his own activities. RP 387.

Dana Guerrero was seeing a counselor for anxiety about driving for six months when she had her second accident in August of 2002. RP 113. She also was seeing a Christian counselor after her separation from Richard Guerrero. RP 232-33. She sought counseling because the event that led to the break up of their family was Dana Guerrero discovering sexually explicit material that Richard Guerrero maintained on a computer hard drive. RP 59-61, 233. This affected Dana Guerrero to the point she did not know who her husband was and led her to be cautious about Noah seeing his father. RP 62-63, 233. It did not help that Mr. Guerreros refused to financially support Dana and Noah Guerrero during this time and which aggravated her negative feelings towards Mr. Guerrero. RP 81-89, 233-234. The failure of Mr.

Guerrero to support Dana Guerrero included refusal to pay for day care costs and the cancellation of health insurance benefits. RP 81-89. While much was made about Dana Guerrero's anger towards Richard Guerrero, Dr. Johnson testified that in his opinion the animosity between Noah's parents is shared. RP 232. And that between the two parents Dana Guerrero is altogether more sophisticated with regard to her general emotional sensitivity. RP 220.

Much was said about Dana Guerrero's health but Dr. Johnson also testified to Dana Guerrero's physical health as well. He testified that although he would be concerned about her weight, "Relative to the parenting function, it is not at this time of serious concern, but I think something that just would need to be considered or hopefully dealt with by her in terms of managing her health so it does not impact over the longer term her capacity to act in a parenting role." RP 235-36. Dr. Johnson goes on to state that he does not have any reason to believe that Dana Guerrero ignores her health to her detriment. RP 236.

Perhaps most importantly Dr. Johnson testified with regard to Noah's observations of his parents. Dr. Johnson testified that: Noah did not recall either parent discuss the other parent negatively; he feels that each parent

enjoys him spending time with the other parent; he did not recall either parent making negative statements about the other parent; and that Noah appeared to identify his mother as the parent who he felt emotionally closest to. RP 238.

C. ARGUMENT

I. THERE IS AMPLE EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURTS PARENTING PLAN DETERMINATION.

A. The court properly considered the RCW 26.09.187 factors and is not required to file specific findings under RCW 26.09.002 and the trial court did not abuse its discretion by designating the respondent as the Primary Residential Parent.

The appellate court reviews a trial courts decision on the provisions of a parenting plan for abuse of discretion. In re the Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Littlefield, at 46-47. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Id.* at 47. An appellate court may not substitute its findings for those of the trial court

where there is ample evidence in the record to support the trial court's determination. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

The legal standard a trial court must consider in adopting a parenting plan was enacted by the legislature under the Washington Parenting Act statutes. These include the guidelines set forth in RCW 26.09.002 (stating the policy of the Parenting Act); RCW 26.09.187(3), which must be read in conjunction with RCW 26.09.184 (setting forth the objectives and required contents of a permanent parenting plan), and RCW 26.09.191 (setting forth limiting factors which require or permit restrictions upon a parent's actions or involvement with a child). Katara v. Katara, 125 Wn. App. 813, 823-24, 105 P.3d 44 (2004).

RCW 26.09.002 provides, in part:

[T]he best interests 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.

While setting a residential schedule under RCW 26.09, the best interests of the child is to be determined with reference to the seven factors in RCW 26.09.187(3)(a) there is no requirement in RCW 26.09.002 for

specific findings. Katare at 824. Richard Guerrero does not provide any authority for his position that a trial court must provide specific findings as to the seven factors listed in RCW 26.09.187(3)(a).

The Supreme Court in In re the Marriage of Kovacs, 121 Wn.2d 795, 854 P.2d 629 reviewed the statutory history of the Washington Parenting Act and comes to the following conclusion:

In establishing the seven statutory factors set forth in RCW 26.09.187(3)(a), the Legislature has provided the trial court guidance, along with the flexibility it needs, to make these difficult decisions.

Kovacs at 804-09.

In fashioning a parenting plan, the trial court determines the residential arrangement that will serve the best interests of the child. Acting with broad discretion, the trial court considers several factors, including: the strength of the relationship between the parent and the child; the parent's performance of parenting functions; the emotional needs of the child; the child's relationship with siblings; the child's involvement in school or other significant activities; the wishes of the parent and of a sufficiently mature child; and the parents' employment schedules.

Marriage of Wicklund 84 Wn. App. 763, 770, 932 P.2d 652 (1996).

It is clear from this trial record that both parties advocated for being named the primary residential parent for Noah. Each parent recites his or her own strengths, and the weakness of the opposing party in terms of the statutory criteria. Each parent in their statement of facts presents the record support their performance of parenting functions, involvement in additional activities, and the parents' employment schedules. The trial court was in the best position to gauge the credibility and demeanor of the parents. Once the trial testimony was completed the trial judge spoke to these issues and the best interest of Noah

Both parties in the Court's mind, have been playing games. Not one but both. And maybe some - - or maybe one a little more than the other. But nevertheless, my concern is, is that for the last two years plus, there has been chaos in the mind and the concern of the small boy, Noah, much to do to your credit. . . .

Now both of you can each point the finger at the other one, 'cause that's what you've done on the stand. And I submit to you that you're both responsible. In your minds, I'm certain think the other one is. But I will tell you, that isn't the way I see it. That isn't the way I see the facts, the evidence. It appears to me that you're both equally responsible for what has gone on.

RP 445-46.

The trial court goes on to point out Dana Guerrero's anger and health problems as interfering with her parenting duties. RP 446. The trial court states that Richard Guerrero has physical health issues and that

according to Dr. Johnson has unaddressed emotional issues that impact Noah's life. RP 448-49.

The written findings of fact reflect these oral findings by stating:

Both parties are fit parents. Both parties have misbehaved to the child's detriment during the pendency of this matter. The credibility of both parents is suspect. Both parties have the capability to earn more than they are presently. The Court has insufficient information to assess incomes of the parties and therefore it must impute incomes as best the Court can given the evidence. Mother has been diagnosed as having residual anger issues related to father which, if untreated may adversely affect the development of the child. Mother should obtain treatment. Both parents are fit parents and should be in the life of their son.

CP 11, page 1-2.

While the findings are not particularly articulate in stating the specific seven factors listed in RCW 26.09.187(3)(a), the court's findings do comport with the principles of those factors and they do not fall below the standard where the court has made a decision outside the range of acceptable choices, given the facts and the applicable legal standard. This parenting plan is based on factual findings that are unsupported by the record. While the evidence in this case may be contradictory, there is ample evidence to support the trial judge's findings of fact. Therefore, the trial court did not abuse its discretion in naming Dana Guerrero as the primary residential parent of Noah and by granting Richard Guerrero

residential time with Noah above what is recommended by the local court rule.

B. The trial court did not draw a presumption as to residential placement in violation of RCW 26.09.191

Richard Guerrero is correct when he stated that there is nothing expressly stated in the court record that the court presumed that because Noah was placed primarily with Dana Guerrero that Mr. Guerrero was unduly prejudiced. The trial court goes out of its way to indicate that both parents are complicit in the conflict that arose from their divorce. See RP 448-49 above. Mr. Guerrero does not express a standard by which this improper presumption can be measured. Mr. Guerrero does not provide any case law which identifies when a trial court has crossed the line of drawing an improper presumption from a temporary parenting plan. While the trial court cannot draw a presumption from a temporary order, it would be remiss not to identify the temporary order. Indeed it would be impossible for the court to evaluate the factors necessary for adopting a permanent parenting plan without considering where the child is living and what his relationship is with his parents.

II. THE COURT DID NOT ABUSE ITS DISCRETION IN AWARDING SPOUSAL MAINTENANCE TO DANA

GUERRERO

RCW 26.09.090(1) provides the court may grant a maintenance order for either spouse, in an amount and for a period of time the court deems just, after considering all relevant factors, including:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance.

An award of maintenance is within the trial court's discretion. In re

Marriage of Vander Veen, 62 Wn. App. 861, 867, 815 P.2d 843 (1991).

The trial court abuses its discretion when its decision is based upon "untenable grounds or for untenable reasons, considering the purposes of the

trial court's discretion." Coggle v. Snow, 56 Wn. App. 499, 507, 784 P.2d 554 (1990). "The only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of the relevant factors, the award must be just." In re Marriage of Bulicek, 59 Wn. App. 630, 633, 800 P.2d 394 (1990).

The court heard the testimony regarding the parties incomes and abilities to earn as outlined in Richard Guerrero's brief. At the time considered its decision with regard to spousal maintenance it had just concluded determining the party's incomes and responsibilities for child support. RP 459-65. During that calculation the court considered Dana Guerrero's income as a substitute teacher, her need for further education and what her day care requirements are going to be. RP 460. The court found it difficult to identify the parties incomes as no tax returns had been prepared for the previous three years. RP 460. Therefore the court imputed a net income to the father of \$2,619.00. That figure has not been challenged on appeal. Once child support was determined the court addressed the issue of maintenance and took into consideration that the parties had been married for a little less than eight years. RP 467. The court granted Dana Guerrero maintenance in the amount of \$400.00 per month for a period of 12 months.

RP 467. Immediately after making the maintenance award the court went on to divide the community assets and liabilities of the parties by stating "Now let me tell you where – how I offset some of this stuff." RP 467-80. This statement reflects the courts consideration of the division of the marital assets and liabilities in making its decision with regard to maintenance. In light of these facts it cannot be said that the court made an unjust maintenance award based upon untenable grounds or for untenable reasons.

**III. THE COURT DID NOT ABUSE ITS DISCRETION
IN AWARDING A MONETARY JUDGMENT IN
FAVOR OF DANA GUERRERO.**

Again, the trial court abuses its discretion when its decision is based upon "untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion." Coggle v. Snow, 56 Wn. App. 499 (1990). Dana Guerrero requested that the court award her judgments for unpaid child support, day care, and medical insurance as required by temporary orders entered on January 14, 2004 and March 12, 2004. RP 81. Dana Guerrero testified that she is working with the State of Washington to help her collect her child support and day care expenses. The court entered the judgment in the Child Support Order against Richard Guerrero as follows:

Well, I submit to you this Court will say this on the record -- that I didn't grab these figures and make them up. I couldn't

have made them up. Well, I could, I guess, but I try not to. I will say that my memory serves me that Petitioner testified, I simply took what was testified, and yes, verified by a demonstrative exhibit.

I will further go on to cover all bases and, for Mr. Guerrero, that if these amounts are not accurate, then it is my intent that the only amounts that he is responsible for are the accurate amounts. All right? That doesn't hurt anybody.

Mr. Guerrero does not deny he had an affirmative obligation to provide the medical, daycare and child support contained in the judgment. He did not testify that he had paid larger sums. He did not provide any proof of payment other than that submitted by Dana Guerrero. The court based its decision upon the information provided to it through Dana Guerrero and the Division of Child Support. The court was not given any reason not to believe that the figures testified to by Dana Guerrero were not correct. The court even gave Mr. Guerrero the opportunity to prove that the figures were incorrect and he failed to do so. The trial court weighed the evidence it had before it and made a decision that cannot be called untenable.

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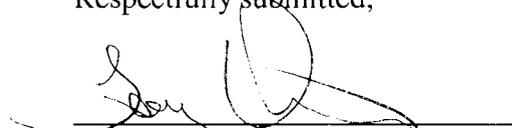
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D. CONCLUSION

For the reasons set forth above, Dana Guerrero respectfully requests this court affirm the Findings of Fact and Conclusions of Law, Parenting Plan, Decree of Dissolution and Judgments entered in the trial court on February 24, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terry Vetter", is written over a horizontal line.

TERRY VETTER, WSBA #17756
Attorney for Dana Guerrero, Respondent

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY gn
DEPUTY

**COURT OF APPEAL, DIVISION II
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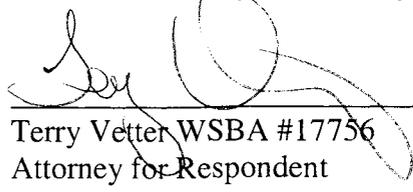
CERTIFICATE OF SERVICE

NO. 34976-1-II

TO: The Clerk of the Court of Appeals and to Appellant, Richard Guerrero, by through his attorney, Clayton L. Spencer:

I certify that on February 2, 2007 that I delivered a copy of this Certificate of Service and Amended Brief of Respondent in the above captioned cause addressed to Clayton Spencer, Attorney for Appellant, at 1216 Columbia Street, Vancouver, WA 98660. I declare under penalty of perjury of the State of Washington the foregoing is true and correct.

Dated this 2nd day of February, 2007, at Vancouver, Washington.



Terry Vetter WSBA #17756
Attorney for Respondent