

No. 42640-4-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II
TACOMA, WASHINGTON
DEPUTY

In Re:

STEPHEN J. BUCHANAN, II,
Appellant,

v.

VARONICA A. BUCHANAN,
Respondent.

BRIEF OF RESPONDENT

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I. Statement of the Case

On May 17, 2007, the Pierce County Superior Court dissolved the marriage of Appellant, Stephen Buchanan, II, and Respondent, Varonica Buchanan.¹ CP 26. Stephen and Varonica have two children, Elizabeth, age 9, and Stephen, age 8. CP 26. Pursuant to the Final Parenting Plan entered when the marriage was dissolved, the children reside primarily with Varonica, while visiting with Stephen every other weekend, as well as various holidays and special occasions. CP 27.

The parties' daughter, Elizabeth, has entered the fourth grade, which is her sixth consecutive year attending Life Christian School (hereinafter referred to as "LCS"). CP 27. The parties' son, Stephen, has entered the third grade, which is his fifth consecutive year attending LCS. CP 27. The parties were still married when they first enrolled the children in LCS. CP 27. Both of the children have excelled at LCS, earning high grades, participating in advanced classes, and engaging in community outreach projects. CP 28-30 & 42-79.

¹ For purposes of clarity, the parties will be referred to by their first names herein. No disrespect is intended.

On October 31, 2008, the parties approved the entry of an Agreed Order Supplementing Final Parenting Plan Pursuant to Mediation Agreement. CP 5-7. The order states, in pertinent part:

1. The parties shall keep their children enrolled at Life Christian School for an additional two (2) years: Fall 2008/Spring 2009, and Fall 2009/Spring 2010. 2. Unless the father agrees, the children shall not continue to attend Life Christian after Spring 2010. Furthermore, unless the mother agrees, the children should not attend public school beginning in Fall 2010.

CP 6-7.

Stephen served in the military and was located outside of the State of Washington, either in training or on deployment, from March 8, 2009 until June 28, 2010. CP 80-81. Stephen kept in contact with Varonica and the children during his training and deployment. CP 32. In late August of 2010, without any objection from Stephen, who had returned from deployment two months earlier, the children began the new school year at LCS. CP 31 & 109. The children attended LCS for the entirety of the 2010/2011 school year, without any objection by Stephen. CP 31.

On August 19, 2011, Stephen filed a Motion/Declaration for Ex Parte Restraining Order and for Order to Show Cause, seeking to restrain Varonica from enrolling the children in LCS for the

upcoming 2011/2012 school year. CP 11. Pierce County Superior Court Commissioner Diana Kiesel denied *ex parte* relief and set the matter for a hearing on August 30, 2011. CP 8-10. The children were scheduled to begin school at LCS on August 31, 2011. CP 30. Stephen's motion to the Court did not seek enrollment of the children at another school in lieu of LCS. CP 11.

In opposition to Stephen's Motion, Varonica offered testimony that the children already had attended LCS beyond the time specified for the change of schools, as set forth in the October 31, 2008 Agreed Order. CP 27. She testified that the children know all the teachers and staff and that they love the school. CP 28. Varonica testified about the advanced classes the children attend and the high academic standards maintained by LCS. CP 28. She also testified regarding the children's excellent performance in school and filed approximately 35 pages worth of the children's school records. CP 28, 44-79. Finally, Varonica testified that the children suffer no harm by attending LCS and that their continued attendance at LCS would be in their best interests. CP 34.

On August 30, 2011, Pierce County Superior Court Commissioner Clint Johnson granted Stephen's request and

restrained Varonica from having the children attend school at LCS, which was scheduled to start the following day. CP 114-119. However, Commissioner Johnson stayed his Order, pending a revision hearing, which was ordered to be heard by Judge Rosanne Buckner on September 2, 2011. CP 119-121. The following day, August 31, 2011, Varonica filed a Motion for Revision of Temporary Order of August 30, 2011. CP 123-132.

On September 2, 2011, Judge Buckner revised the ruling of Commissioner Johnson and ordered that Stephen's Motion was denied and that the children were to continue to attend LCS. CP 125. Judge Buckner's ruling was "based on a consideration of the best interests of the children weighed against the Agreed Order (re 3/14/08) of 10/31/08." CP 125.

In her oral ruling, Judge Buckner clearly indicated that she was weighing the best interests of the children against the provisions of the October 31, 2008 Order. Report of Proceedings, September 2, 2011, (hereinafter, "RP1") 16. She went on to state, "And certainly, I think that because that situation did not work out as anticipated by the parties that I have to consider the totality of the situation for the children. And it's clear to me that their interests in continuing at Life Christian and continuing in a stable educational

situation and not being required to go into a different situation after they have been there four and five years would be in their best interests, as opposed to trying to find a new school at this point in time that's agreeable and acceptable." RP1 16.

Stephen filed a timely Notice of Appeal to Court of Appeals on September 29, 2011. CP 133-135. This appeal follows.

II. Argument and Analysis

THE COURT SHOULD REVIEW THE DECISION OF THE TRIAL COURT FOR ABUSE OF DISCRETION.

A trial court's rulings dealing with the provisions of a Parenting Plan are reviewed under the abuse of discretion standard. In re Marriage of Christel and Blandchard, 101 Wn. App. 13, 21, 1 P.3d 600 (2000), *citing* In re Marriage of Wicklund, 84 Wn. App. 763, 770, 932 P.2d 652 (1996).

In order to determine if a trial court has abused its discretion, the reviewing Court should determine if the trial court's decision is based on untenable grounds or reasons, or is manifestly unreasonable. Wicklund, 84 Wn. App. at 770. Determining whether or not the trial court has abused its discretion is a three-step analysis:

First, the court has acted on untenable grounds if its factual findings are unsupported by the

record; second, the court has acted for untenable reasons if it has used an incorrect standard, or the facts do not meet the requirements of the correct standard; third, the court has acted unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard.

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

The Washington Supreme Court has recognized that “a trial judge generally evaluates fact based domestic relations issues more frequently than an appellate judge and a trial judge's day-to-day experience warrants deference upon review.” In re Parentage of Jannot, 149 Wn. 2d 123, 127, 65 P.3d 664 (2003).

The Court should overturn Judge Buckner's decision only if it finds that Judge Buckner abused her discretion.

THE TRIAL COURT DID NOT ERR IN DENYING STEPHEN'S MOTION BECAUSE THE COURT'S FINDINGS WERE SUPPORTED BY THE FACTS, THE COURT APPLIED THE CORRECT STANDARD, AND THE DECISION WAS WITHIN THE RANGE OF REASONABLE CHOICES.

A. The trial court's findings were properly supported by the facts contained in the record.

The first step in determining whether or not the trial court has abused its discretion is to determine if the trial court's findings are supported by the record. Rundquist, 79 Wn. App. at 793.

In the present case, Judge Buckner made a specific finding that the children continuing to attend LCS was in their best interests. Her decision is fully supported by the facts in the record.

Varonica provided the trial court with ample evidence to support the trial court's conclusion that keeping the children in school at LCS was in their best interests. She provided nearly 35 pages worth of school records, including grade reports, test scores and awards received by the children. Varonica also testified regarding the high academic standards of the school, the children's successful performance and love of the school, and the fact that removing the children from LCS would not be in the children's best interests.

Judge Buckner's decision is clearly supported by the record of the case and therefore her ruling was not based on untenable grounds under the first prong of the Rundquist analysis.

B. The trial court used the correct legal standard by properly considering the children's best interest in ruling on Stephen's motion and the facts before the court conform to the standard.

The second prong of the Rundquist analysis directs the court to determine if the trial court has acted for untenable reasons by using an incorrect standard, or basing the decision on facts which do not meet the requirements of the correct standard. Rundquist 79 Wn. App. at 793.

RCW 26.09.002 governs a trial court's consideration of issues presented to it which involve the welfare of children. The statute provides in pertinent part: "In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities." RCW 26.09.002.

In the present case, Judge Buckner made it abundantly clear, in both her oral ruling and her written order, that in deciding this matter she considered the children's best interests. This is the correct standard.

The facts presented to the court also conform to the best interests standard. Varonica provided evidence regarding the children's schooling, including records from the school and ample testimony regarding the school and the children's high performance and love for the school. The evidence presented by Varonica was the proper evidence to allow the trial court to determine whether or not it was in the children's best interests to continue attending LCS.

Judge Buckner applied the appropriate standard to her analysis of Stephen's motion and the facts before the court were the correct facts to allow Judge Buckner to make such a

determination. Judge Buckner did not act for untenable reasons pursuant to the second prong of the Rundquist analysis.

- C. Judge Buckner's ruling was within the range of possible choices given the legal standard and was a permissible clarification of the October 31, 2008 Order rather than a modification of the Parenting Plan.

The third prong of the Rundquist analysis asks the court to determine if the trial court has acted unreasonably by rendering a decision outside the range of acceptable choices given the facts and the legal standard. Rundquist, 79 Wn. App. at 793.

Stephen argues that Judge Buckner's ruling was outside the range of possible choices because it constituted a modification of the parties' Parenting Plan when no Petition for modification had been filed and the parties had not agreed. To support his position, Stephen relies on Christel, 101 Wn. App. 13. Stephen's reliance is misplaced.

In Christel, the parties' final Parenting Plan contained a provision that required the parties to live within a certain proximity to one another. Id. at 16. In the event either party was to move outside of the designated proximity, the Parenting Plan directed that the issues of transportation and the father's residential schedule would be reviewed. Id. at 17. The father, who was not the primary

residential parent, learned that the mother intended to move outside the designated proximity and filed a motion seeking to restrain her from doing so. Id. at 17. The parties also were in dispute as to where the child should attend school, given the mother's relocation. Id. at 17. The father did not file a Petition for modification. Id. at 17.

The trial court in Christel, in response to the father's motion, completely changed the Parenting Plan by *adding* a provision to the Plan which would change the primary custody of the child in the event the mother moved outside the designated proximity at any point in the future. Id. at 19. The trial court also completely revamped the dispute resolution section of the Parenting Plan, adding provisions with which the parties would need to abide for the years to come. Id. at 19.

The appellate court's analysis began by drawing a distinction between a clarification of a Parenting Plan and a modification. Id. at 22. The court defined a clarification as "merely a definition of the rights which have already been given and those rights may be completely spelled out if necessary." Id. at 22. Via a clarification, the court is allowed to define "the parties' respective rights and obligations, if the parties cannot agree on the meaning of a particular provision." Id. at 22. The court then went on to state, "A modification,

on the other hand, occurs when a party's rights are either extended beyond or reduced from those originally intended in the decree." Id. at 22.

The appellate court in Christel next applied those definitions to the facts before it by determining that the trial court's changes to the dispute resolution provisions of the Parenting Plan, because they were to apply to the parties' future actions rather than simply dealing with the present dispute, constituted a modification of the Parenting Plan. Id. at 23. The appellate court, in addressing the new dispute resolution provisions, found that the "language goes beyond explaining the provisions of the existing Parenting Plan." Id. at 23.

In the present case, the trial court simply was asked to enforce the October 31, 2008 Order, which Stephen argues was clear on its face. However, Stephen fails to acknowledge that the October 31, 2008 Order allowed Stephen only to prevent the children from attending LCS "after Spring 2010," which he did not do. The children did attend LCS after the Spring of 2010. They did so with Stephen's implied consent.

Stephen now argues that the October 31, 2008 Order gave him the authority to stop the children from attending LCS *at any point* beyond the Spring of 2010, but that is not stated in the Order and

Varonica does not agree that this is the meaning of the Order. Rather, the Order is silent as to what will happen in the event the children *do* attend LCS beyond the Spring of 2010, which is what actually occurred. Judge Buckner's Order simply resolved the dispute by clarifying Stephen's right to prohibit the children from attending LCS. Judge Buckner found that Stephen's right terminated when he allowed the children to attend LCS beyond the Spring of 2010.

Stephen had the opportunity, pursuant to the October 31, 2008 Order, to stop the children from attending LCS. He arrived back in the State of Washington months before the beginning of the 2010/2011 school year, yet he chose to take no steps to address the children's continued attendance at LCS at that time; he took no steps even though he was always been in contact with Varonica. Instead, Stephen waited a full 15 months to seek relief under the October 31, 2008 Order. His initial appearance in the *ex parte* department was less than two weeks before the beginning of the children's *next* school year, that of 2011-2012. Stephen failed to properly enforce rights he claims under the October 31, 2008 Order.

It is evident that Judge Buckner considered the ramifications of Stephen's failure to assert his rights when she stated, "And certainly, I

think that because that situation did not work out as anticipated by the parties that I have to consider the totality of the situation for the children.” RP1 16.

The decision of Judge Buckner simply clarified the October 31, 2008 Order by defining what would happen in the event Stephen failed to bring a timely objection and the children continued to attend LCS beyond the timeline contemplated by the order. In doing so Judge Buckner clarified the Order relating to the Parenting Plan, which is allowed pursuant to the Christel case, upon which Stephen relies so heavily. Judge Buckner’s Order was not a modification.

Unlike the trial court in Christel, Judge Buckner did not make changes to the Parenting Plan, which would apply to the future actions of the parents in this case. Judge Buckner’s Order did not say that Stephen could not seek modification of the Parenting Plan based on the children’s attendance at LCS, nor did Judge Buckner’s ruling alter the way in which Stephen may seek dispute resolution with respect to the educational decisions of the children. The only effect of Judge Buckner’s ruling was to determine that, once the children continued to attend LCS beyond the spring of 2010, Stephen lost his ability to unilaterally prohibit the children from attending LCS.

Since the October 31, 2008 Order was unclear as to whether Stephen retained the right to unilaterally prohibit the children from attending LCS in the event the children continued to attend LCS beyond the spring of 2010, Judge Buckner's ruling was a clarification of the Parenting Plan, not a modification.

Judge Buckner had the authority to clarify the Parenting Plan and thus her decision fell within the range of appropriate outcomes given the legal standard and, therefore, her ruling is not unreasonable pursuant to the third prong of the Rundquist analysis.

The Court should find that Judge Bucker did not abuse her discretion by clarifying the October 31, 2008, Order and should dismiss Stephen's appeal.

THE COURT SHOULD ORDER STEPHEN TO PAY VARONICA'S ATTORNEY FEES INCURRED IN DEFENDING AGAINST THIS APPEAL.

- A. The Court should award Varonica her reasonably incurred attorney fees because she has the need and Stephen has the ability to pay.

Pursuant to RCW 26.09.140, the appellate court has the ability to award attorney fees for actions falling within the purview of RCW 26.09. The statute states in pertinent part as follows:

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost

to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

Varonica asks the Court to provide an award of attorney fees to her pursuant to RCW 26.09.140. Pursuant to Washington State Rule on Appeal (RAP) 18.1, Varonica will file an Affidavit of Financial Need, which will show that she does not make a substantial income, and her expenses, including those related to this appeal, exceed her income. She submits that Stephen has the ability to pay her fees.

The Court should find that Varonica has the need for an award of fees and that Stephen has the ability to pay.

B. The Court should order Stephen to pay Varonica's costs incurred herein in the event Varonica is the prevailing party.

RAP 14.2 provides in pertinent part, "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review."

In the event Stephen's appeal is denied, Varonica will be the substantially prevailing party. Varonica requests that the court award her with costs in the event Stephen's appeal is denied.

III. Conclusion

The issue presented to the trial court in this case is a simple one: should the court grant Stephen's request to prohibit the children from continuing to attend their school or should it deny the request. The trial court reviewed the language of the Order upon which Stephen relied, considered the best interests of the children, and denied the request. In doing so, the trial court did not change any prospective rights or obligations of either party. Rather, the trial court simply found that Stephen failed to properly pursue enforcement of his rights under the October 31, 2008 Order and clarified the order by finding that Stephen did not have the right to unilaterally remove the children from LCS at any point after the Spring of 2010.

Nothing prevented Stephen from making a timely objection to the children attending LCS. He had returned from deployment and was back in the State of Washington months before the children began school at LCS in the fall of 2010. This would have been the proper time to object pursuant to the October 31, 2008 Order. Yet Stephen did nothing. He never notified Varonica of any objection to the children continuing to attend LCS. He did not

submit his list of prospective schools in a timely manner and he did not bring the matter to the Court's attention at that time.

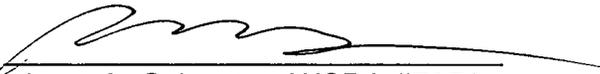
Instead, Stephen waited 15 months and then appeared in the *ex parte* department less than two weeks prior to the start of the *following* school year, voicing his objection. His objection was not in accord with the timeline contemplated by the October 31, 2008 Order and therefore Judge Buckner had every right to deny his request.

The trial court should be paid its due deference in matters concerning the best interests of children. This Court should deny Stephen's appeal because the trial court did not abuse its discretion in this matter.

This Court should also order Stephen to pay Varonica's reasonably incurred attorney fees and costs.

Respectfully submitted this 9th day of April, 2012.

McGAVICK GRAVES, P.S.

By: 

Barbara Jo Sylvester, WSBA #7856
Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 9th day of April, 2012, he hand delivered the original Brief of Respondent plus one true and correct copy thereof for filing with the Court of Appeals, Division II, and a true and correct copy of the same for delivery to the following counsel of record:

Jason P. Benjamin, WSB#25133
Attorney for Appellant Stephen J. Buchanan, II

And placed in the US Mail, postage pre-paid, at Tacoma, Washington, a true and correct copy of Brief of Respondent to Jason P. Benjamin, attorney for Appellant, at the address below:

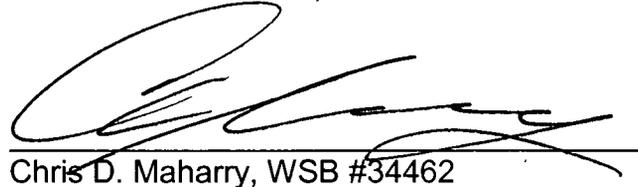
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AND

Via E-mail to j25133@me.com
(Pursuant to an Electronic Service Agreement)

DATED this 9th day of April, 2012, at Tacoma, Washington.

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Chris D. Maharry, WSB #34462

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