

Pierce County Cause No. 12-3-00600-7
Court of appeals Cause No. 44762-2-II

COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

Jamell Collins,
Petitioner/Appellant

v.

Arlene Collins
Respondent/Appellee

RESPONSE TO PETITIONER'S BRIEF

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I. ISSUES.

- (1) DID THE COURT ABUSE ITS DISCRETION BY PLACING THE CHILD WITH THE RESPONDENT, MS. COLLINS WHEN
 - a. THE COURT WEIGHED EACH OF THE FACTORS UNDER RCW 26.09.187(3) AND
 - b. THE PETITIONER INTENTIONALLY MADE NUMEROUS MISPREPRESENTATIONS AND FALSE ALLEGATIONS TO THE TRIAL COURT, MALICIOUSLY AND INTENTIONALLY ATTEMPTED TO MISLEAD THE TRIAL COURT AND THE PETITIONER PREVENTED THE MOTHER FROM HAVING THE CHILD?

II. STATEMENT OF THE CASE.

The parties were married on August 15, 2008. (Verbatim Report of Proceedings, 93). After two years of marriage the parties separated on September 29, 2010. *Id.* at 96. During the marriage Mr. Collins was stationed in Iraq, at that time, Ms. Collins was the primary parent for their young child, Illiana. After the separation, Illiana went back and forth between Mr. Collins and Ms. Collins over a short period of time. (Verbatim Transcript of Proceedings, Judge's Oral Decision page 4, lines 15 to 17). In February 2012, after the parties had entered into an agreement to have Illiana be placed with each parent for a six months at a time, Mr. Collins deliberately withheld Illiana from her mother, Ms. Collins. (Verbatim Transcript of Proceedings, Judge's Oral Decision page 9, lines 17 to 20). He ignored the order of the trial court in New Jersey to share custody of Illiana and went to great lengths to keep the child away from her mother. *Id.* Mr. Collins filed for divorce in Washington February of 2012. In his declaration to the trial court he made a serious of statements in order to

mislead the court. *Id.* The trial court was presented with all of the evidence and all the testimony in March of 2013. After hearing all of the evidence and testimony the trial court systematically applied the facts to the law under RCW 26.09.87(3); it then made a series of findings of facts and conclusions of law and held that Ms. Collins should be awarded primary custody of Illiana.

III. STATUTES.

Under RCW 26.09.187(3)(a), the Legislature carefully crafted the factors that the court should consider in determining a child's residential schedule with their parents. RCW 26.09.187(3)(a) reads in relevant part:

- (1) The relative strength, nature and stability of the child's relationship with each parent;
- (2) The agreements of the parties, provided they were entered into knowingly and voluntarily;
- (3) Each Parent's past and potential for future performance of parenting functions as defined...including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
- (4) The emotional and developmental level of the child;
- (5) The child's relationship with siblings and with other significant adults;
- (6) The wishes of the parents and wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
- (7) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Under RCW 26.09.191(3) the Legislature set forth the reasons why a parent's time may be restricted with their child.

This statute reads in relevant part:

- (3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors

exist:

- (a) A parent's neglect or substantial nonperformance of parenting functions;
- (b) A long-term emotional or physical impairment, which interferes with, the parent's performance of parenting functions as defined in RCW 26.09.004
- (c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;
- (d) The absence or substantial impairment of emotional ties between the parent and the child;
- (e) The abusive use of conflict by the parent, which creates the danger of serious damage to the child's psychological development;**
- (f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or□□
- (g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

RCW 26.09.191(3) (*emphasis added*)

IV. CASE LAW.

The Washington Supreme Court stated "a court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds". *Kovacs*, 121 Wn.2d at 801. The Court further stated, "[i]n 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 809. The Washington State Supreme Court has recognized that the flexibility given to the trial court in tough residential schedule cases is necessary, and in so doing the Court recognized that great deference should be given to the trial court unless, its decisions is manifestly unreasonable or based on untenable grounds.

V. ANALYSIS.

THE COURT DID NOT ABUSE ITS DISCRETION BY PLACING THE CHILD WITH THE RESPONDENT, MS. COLLINS.

Under RCW 26.09.187(3), the trial court is given the discretion it needs to make difficult decisions in family law, especially in determining the residential schedule. In, *Kovacs*, the Supreme Court of Washington recognized the need for this flexibility in the trial court particularly in residential schedule cases and stated that an abusive use of discretion will only be found if the court's decision is "manifestly unreasonable or based on untenable grounds". Here the trial court took great consideration in the determination of the residential schedule it systematically weighed each of the factors under RCW 26.09.187(3). The court's decision is not manifestly unreasonable, nor is it based on untenable grounds; the court was presented with all of the facts and evidence and made a reasonable and tenable decision based on all the factors set out in RCW 26.09.187(3).

(a) THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT WEIGHED EACH OF THE FACTORS UNDER RCW 26.09.187(3).

In the decision, the Court evaluated each of the factors under RCW 26.09.187(3)(a). The court carefully went through each of the seven factors one by one stating the facts and conclusions that it came to under each factor. The court noted in its decision, "[i]n making the residential placement decision and in developing a parenting plan, I'm guided by statute. I'm guided by RCW 26.09.184 and .187... I have taken all of

those factors into account". (Verbatim Transcript of Proceedings, Judge's Oral Decision pages 4 to 5, lines 22 to 10).

Under the first factor, the relative strength, nature and stability of the child's relationship with the parent, the Court acknowledged that Ms. Collins had less stability in 2011, then in 2013 during the current trial. The Court recognized that prior to 2011, Ms. Collins had moved and had changed her plans to join the military which gave her a less stable life than she had at the time of trial. (Verbatim Transcript of Proceedings, Judge's Oral Decision page 6, lines 9 to 13). However, the Court more importantly recognized that although in 2011 when the original plan was entered into Ms. Collins was less than stable, since 2011 Ms. Collins has a new plan and "is showing maturity and stability that was not there in 2011". (Verbatim Transcript of Proceedings, Judge's Oral Decision page 6, lines 17 to 18). Because the mother and father are both stable, the court correctly found that this factor was neutral among the parties.

Under the second factor, whether there was an agreement between both the parties entered into knowingly and voluntarily, the Court stated it believed that an agreement to allow each parent to have six months was entered into by the parties. However, that agreement was not honored by the father. In particular the Court found that the father's failure to give the child to the mother in February of 2012 was in "bad faith and was essentially a violation of the agreement". The Court further stated that the "the only purpose I can conclude in his refusing to give the child was basically an intent to interfere in the mother-child relationship". (Verbatim Transcript of Proceedings, Judge's Oral Decision page 7 Lines

17 to 19). Further, the Court went on to state that the reason the mother was unable to exercise visitation with the child after 2012 was because the father refused to give Ms. Collins visitation with the child. Mr. Collins continually failed to recognize the agreement between the two parties and he willfully and purposefully withheld the child from Ms. Collins in order to interfere with his child's relationship with his mother, Ms. Collins. At the end of its analysis on this factor, the court stated that it took all of the above findings in to consideration when it made its decision to place the child primarily with Ms. Collins. Because Mr. Collins purposefully failed to abide by the parenting agreement that the parties reached, he withheld the child in February of 2012 in order to interfere with the mother and child's relationship, the factor should have and did weigh in the favor of the mother, Ms. Collins. The Court did not err by taking all of the above facts into consideration under this factor.

Under the third factor, the past and potential ability of each parent to fulfill parenting functions, the Court did not find any deficiencies with either parent. Although the court again recognized that the mother had made a few flawed decisions early on, the Court also noted that mother no longer has stability issues, and the mother is continuing to work on her financial stability to provide for the child. Further the Court noted that the father's allegation that the mother was using drugs, was unfounded, it stated "I found absolutely no evidence of drug use or anything that would interfere with mother's ability to parent." (Verbatim Transcript of Proceedings, Judge's Oral Decision page 8, lines 1 to 3). The Court found that this factor was neutral, not finding any deficiencies on the part of

either parent.

Under the fourth factor, the emotional and development needs of the child, the Court rightfully stated that the child's needs were going to be met by having a relationship with both parents. In coming to this conclusion, the Court found that there were no special needs of the child and that both parents are capable and able parents. The recognized that a child of three and half years old needs a relationship with both parents in order to develop the best. This factor, as the trial court stated, is a neutral factor that did not weight in either of the parent's favors.

Under the fifth factor the Court noted that the Child has noted that the child has no biological siblings, but does have family on both the mother and father's side that she has become bonded to. That each of the relationships is significant in the child's life. Lastly, the Court looked at the sixth, and seventh factors noting that each parent wants to be the primary parent and the employment schedules were not a major factor in the decision.

The Court did not err in its examination of the factors under RCW 26.09.187(3). The record reflects that the Court carefully and slowly went through each factor under the statute in making its decision to place the child primarily with Ms. Collins. It clearly did not abuse its discretion.

(B) THE COURT DID NOT ABUSE ITS DESCRETION WHEN IT FOUND THAT THE PETITIONER HAD ENGAGED IN ABUSIVE USE OF CONFLICT UNDER RCW 26.09.191(3)(e).

The Court examined whether the petitioner engaged in abusive use of conflict. In doing so it noted "abusive use of conflict

requires only the danger of serious damage to a child's psychological development and not a showing of actual damage. (Verbatim Transcript of Proceedings, Judge's Oral Decision page 11, lines 16 to 18). In finding that Mr. Collins did engage in abusive use of conflict the Court cited to a series of disturbing behaviors by Mr. Collins.

First in February 2012, Mr. Collins sent Ms. Collins a series of communication that made it very clear that Mr. Collins did not intend to honor his commitment to provide Ms. Collins with the time she was entitled to with her child; he intended to withhold the child from her. The Honorable Judge Martin explained, "I was very disturbed by what happened in February of 2012". (Verbatim Transcript of Proceedings, Judge's Oral Decision page 9, lines 15 to 16). Mr. Collins willfully and purposefully withheld their child in order to inhibit the mother's ability to see the child. Not only was he harming Ms. Collins, but this type of behavior is highly detrimental to a child, especially a child of three and half years old. The court recognized this detrimental activity when it stated that it was "very disturbed " by the action of the father in February 2012.

Second, the court stated that it was again disturbed by the degree to which the father was willing to go to prevent the mother from having that visitation. Not only did the father prevent the mother from having visitation, but also he went to great lengths in order to make sure that the mother was unable to see her young, child. The Court states in its opinion that "I think that the

declaration that he filed with the court in connection to the action filed in February was designed to mislead the court, mislead the court as to what happened in New Jersey, mislead the court as to the risk that the mother posed for the child.” (Verbatim Transcript of Proceedings, Judge’s Oral Decision page 10, lines 8 to 13). Mr. Collins falsely stated that Ms. Collins posed a risk of danger to her child, and he did so with the intent to mislead the Court.

Third, the court made a series of findings of facts and conclusions of law that stand unopposed by the petitioner in this case. Particularly the Court found the following:

- (a) Mr. Collins made intentional material representations about child’s residence over the past five years
- (b) Mr. Collins falsely stated under oath that Arlene Collins did not appear in court in New Jersey and that Mr. Collins was awarded sole custody of the child.
- (c) Mr. Collins falsely stated that Ms. Collins had a history of drug abuse and was “strung out” on drugs putting the child at risk.
- (d) Mr. Collins testified in his declaration that Ms. Collins is a flight risk and was unable to present any credible testimony or evidence of any kind that would show that Ms. Collins was in fact a flight risk.

- (e) Mr. Collins intentionally and with malice falsely misconstrued the New Jersey Court's ruling to attempt to mislead the Court so as to interfere with the Child's relationship with her mother, Ms. Collins.
- (f) Mr. Collins testified falsely that Ms. Collins arrived at his home in February 2012 unannounced to retrieve the child
- (g) Mr. Collins falsely led his own lawyer to believe that the child's life was in danger if visitation as allowed with Ms. Collins.

Lastly, it should be noted that the Court did take into account the guardian ad litem report; the report stated that neither parent engaged in abusive use of conflict. The Court is not bound by the decision of the guardian ad litem, and it has the discretion to find against what the guardian ad litem has recommended. *Fernando v. Neisewand*, 87 Wn.App 103, 107. The Court noted that it respected Mr. Cathcart and his report, but that it finds that "interfering intentionally and deliberately with mother's ability to have contact with this child has potential to cause serious psychological damage to the child particularly at that age." (Verbatim Transcript of Proceedings, Judge's Oral Decision page 11, lines 18 to 22). In making its decision, the Court cited the events of February 2012 and the length that Mr. Collins went to in order to prevent Ms. Collins from seeing her daughter. Further,

the Guardian ad litem also stated that he believed that Mr. Collins was "being unreasonable and arrangement were made for Arlene to have unsupervised residential time with Illiana". (Guardian ad Litem report, Page 14, lines 9 to 11). He also stated in his report that "Mr. Collins seems to have arrogated himself the right to decide what the conditions of visitations should be on more that on occasion... Mr. Collins needs to allow the court to decide what conditions are and if he sees a problem affecting Illiana then he needs to deal with them through dispute resolution or the court, not by issuing fiats himself". (Guardian ad Litem report, Page. 15, lines 21 to 26). Although the GAL did not find an abusive use of conflict, it is clear from his report that he had concerns about Mr. Collins refusing to allow Ms. Collins to have the ability to see her child and he had concerns about Mr. Collins recognition of the court's order.

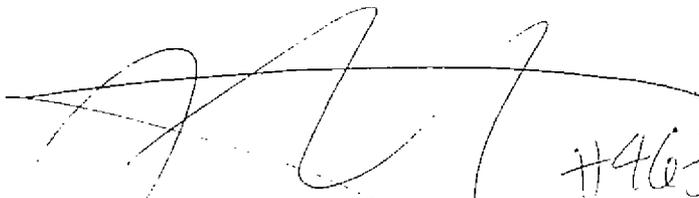
Based on the above facts that stand unopposed by the petitioner, the Court clearly did abuse its discretion when it found that the father had engaged in behavior that posed a serious risk to his child; it had both tenable and reasonable grounds to find that Mr. Collins acted such a manner.

VI. CONCLUSION.

In conclusion, the Court clearly did not abuse its discretion in deciding that the child shall be primarily placed with Ms. Collins. The court engaged in a careful analysis of all of the statutory factors, and after it weighed all of the evidence and testimony it decided that the child should reside primarily with Ms. Collins.

Further the Court did not abuse its discretion in determining that Mr. Collins engaged in abusive use of conflict. Mr. Collins made a large number of false allegations regarding Ms. Collins and made a series of false statements under oath with the purpose of misleading the trial court. Mr. Collins also refused to allow Ms. Collins to have her scheduled visits with their child, and he went to great lengths in order to make sure that she would not be able to see her child. The court found that there was more than enough evidence to find that Mr. Collins behavior could potentially cause serious harm to their child, Illiana.

We respectfully request that this court find that the trial court did not abuse its discretion in placing the child with Ms. Collins and nor did it abuse its discretion by holding that Mr. Collins engaged in abusive use of conflict.


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