

**FILED
Court of Appeals
Division II
State of Washington
1/26/2018 1:24 PM**

No. 50141-4-II

**The COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

**DONILO C. BURKE,
RESPONDENT
AND
KRYSSONDRA R. BURKE
APPELLANT**

RESPONDENTS APPELLATE COURT BRIEF

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INTRODUCTION.

In October of 2016, the Superior Court of Clark County determined that the primary residential parent would be the Respondent, Donilo C. Burke. The reason for the children to be placed with the Respondent was due to the, “stability of the children and their best interest is the continuity” as stated by the Trial Court Judge, (RP page 456) and the satisfaction of the 7 factors of RCW 26.09.187(3) (i-vii), (CP 144). The GAL also states during her conclusions in her report that, “up-rooting and relocating the children would not serve the best interests of Donilo and Zander, (the children)”. (CP 71 page 21). As the length of time that the children have been in the primary home of the Respondent had been over three years at the time of the original trial and over 4 years at the time of this appeal. This falls in line with the “continuity” statement, (RP page 456), of the Superior Court Judge during final orders as well her discretion in being able to determine this ruling.

With regards to Ms. Burkes’ assignment of error in the court not finding Mr. Burke had engaged in abusive use of conflict and withholding as it applies to RCW 26.09.191(3)(e)/(f), it must be pointed out that throughout this case evidence was provided as well as testimony that both parents engaged in this form of behavior. Therefore, if findings are to be made that one parent engaged

in this behavior, then based off the evidence provided it must also be determined that the other parent also engaged in this type of behavior.

The Trial Court did acknowledge some concerns with “abuse” during the marriage however, the emphasis was clearly on a verbal aspect not one of a physical nature. This is evident from the Judges’ own words in her final ruling statement, (RP 451-463), limitations such as joint decision making as well as ordering an evaluation for Mr. Burke were put in place as a means of reprimanding Mr. Burke for what the Judge referred to as behavior. Only at the request of opposing counsel during final rulings was there any mention of actually imposing these limitations based off of RCW 26.09.191. Given that the definition of a “history of acts of domestic violence” as defined in RCW 26.09.191, does not fit the evidence presented at the time of trial nor does any testimony provided by witnesses at the time of the trial support any basis to find that there were multiple incidents of domestic violence on the part of Mr. Burke throughout the marriage. As this evidence and the witness testimony provided does not show just cause for the placement of parental time limitations on Mr. Burke.

Therefore, Mr. Burke asks the Court to reverse the Trial Court Judges’ findings that Mr. Burke had engaged in “a history of acts of Domestic Violence”, based on RCW 26.09.191(2)(a) and to also uphold the ruling that the children should be placed with Mr. Burke as the primary parent and maintain the current parenting

plan as no factors concerning abusive use of conflict and withholding of children were found by the Trial Court as it relates to RCW 26.09.191 (3)(e)/(f).

ASSIGNMENTS OF ERROR

1. The Superior Court erred in finding Mr. Burke had committed a “History of acts of Domestic Violence”, as it relates to RCW 26.09.191(1)(c).
2. The Superior Court did not error in not making a finding that Mr. Burke had committed acts of withholding or abusive use of conflict as it relates to RCW 26.09.191(3)(e)/(f).
3. The Superior Court did not error in placing the children with Mr. Burke.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

Did the Superior Court abuse its discretion in finding that Mr. Burke had committed a “history of acts of domestic violence”, as it relates to RCW 26.09.191(1)(c)? As there was a lack of evidence and credible testimony to support the claim that there was a true “history of acts of domestic violence” and nothing more than a singular incident.

Did the Superior Court error by not making a finding of Abusive use of conflict/ withholding of Children under RCW 26.09.191(3)(e)/(f)? The evidence and testimony that was provided to the Superior Court as part of this case clearly showed that both Mr. and Ms. Burke had engaged in these acts. This was cited by the GAL both in her report, (CP 71), and Her testimony at the time of trial. The GAL even recommended that both parents attend a parenting class in Her conclusion, (CP 71 pages 17-23). Since both parents were likely responsible for abusive use of conflict pursuant to RCW 26.09.191(3)(e)/(f), the only error then is that if Mr. Burke is guilty of this, then so is Ms. Burke.

Did the court consider the contributing factors for RCW 26.09.187 (3)(a) (i-vii) and were the factors correctly applied based on the residential schedule of the children at the time of the final ruling? The Superior Court ultimately decided that it was in the best interest of the children that they remain with Mr. Burke. The "Findings and Conclusion about a Marriage", (CP Sub 144 page 4-5), state that both parents met the factors of RCW 26.09.187(3)(a)(i-vii). Therefore, due to length of time that Mr. Burke had solely cared for his children during Ms. Burke's absence, the children's continuity was the most important factor.

STATEMENTS OF THE CASE

This case is about whether or not the trial court erred in naming Mr. Burke as the primary parent in the final parenting plan. This case focuses on the limitations of RCW 26.09.191. The limitations of RCW 26.09.191 are up to the discretion of the trial court judge. The trial court judge in this case, determined that there was cause to impose limitations based on RCW 26.09.191 in the form of ordering an evaluation for Mr. Burke. Yet the basis for the limitations focused solely on Mr. Burkes conduct and inappropriate communications in the form of text messages and phone messages, (RP page 454). While the definition of “Domestic Violence” has a clear definition in the form of RCW 26.50.010, this definition that is used for the determination of limitations under RCW 26.09.191 does not state that verbal misconduct is a form of domestic violence. Also, the wording of RCW 26.09.191(1)(c) clearly states a “history of acts of domestic violence” which is plural and is not the singular incident admitted to by Mr. Burke in his statement to the GAL, (CP 71 page 5 4th paragraph), and the GAL’s testimony at trial, (RP page 51).

Furthermore, evidence and sworn testimony that both parents engaged in abusive use of conflict as it relates to RCW 26.09.191(3)(e)/(f) has been found, it is within the trial courts discretion to determine what, if any, limitations should be applied. In this case the Superior Court found that there was no finding of abusive use of conflict and withholding by Mr. Burke.

This case also brings into account the significance of RCW 26.09.187 which deals directly with the residential placement of a child and whether the importance of the 7 contributing factors for placement have the strongest bearing in a custody case where continuity in the child(s) lives is the main reason for placement.

This case began on December 21st 2013 when Mr. Burke filed for divorce originally and Ms. Burke subsequently left the home and moved to California leaving the children with the Mr. Burke. A pattern of repeated returns and leaving would continue until February of 2014. At which time Ms. Burke left the home for California never to return. Mr. Burke would later move to California in an attempt to reconcile with Ms. Burke. Upon Mr. Burke's move to California there were many episodes of Ms. Burke not showing up for visits with the children. Evidence of this behavior can be found in the Conclusion of the GAL report, (CP 71 page 17), it states, "Mother did not always follow through with her promise to visit". The parties had entered into an agreement that would have named Ms. Burke the primary parent, (CP Exhibit 50 Notarized Agreement between parties), provided that Ms. Burke meet the criteria listed in the agreement. Ms. Burke did not meet the mutually agreed upon stipulations.

The case ultimately progressed to trial, where several witnesses testified that they had not seen any type of physical incident between the parties including Ms. Burkes' own cousin, Tony Bancel, (RP pages 87-102). Although the Superior court judge did find that, "Ms. Burke certainly suffered from some abuse

during the marriage”, She never specifically stated any one incident that would satisfy the criteria to impose residential placement restrictions on Mr. Burke pursuant to RCW 26.09.191. The Superior Court did feel that some degree of limitation was necessary and that was in the form of a domestic violence evaluation.

The final parenting plan was agreed upon by the parties and the final orders were signed. Ms. Burke filed a “motion to re-consider”, (CP sub 148), that was ultimately denied, (CP sub 150).

Argument

The first argument that must be brought to the courts’ attention is whether or not the Superior Court abused its discretion in finding that Mr. Burke had committed a “history of acts of domestic violence”, pursuant to RCW 26.09.191.

RCW 26.09.191 states;

(1) 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: (a) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (b) physical, sexual, or a pattern of emotional abuse of a child; or (c) a history of acts of domestic violence as defined in RCW

26.50.010(3) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm or that results in a pregnancy.

(2)(a) The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence as defined in RCW 26.50.010(3) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm or that results in a pregnancy; or (iv) the parent has been convicted as an adult of a sex offense under.

The Supreme Court of Washington State stated during the review of *Caven* 136 Wn. 2d 800, 806, 966 p.2d 1247 (1998), that “the language of RCW 26.09.191(1)(c) is clear and unambiguous” *Id.* At 807-808 and that the, “words of an unambiguous statute must be given their plain and ordinary meaning”, *id.* At 810. If the language of a statute is considered “unambiguous” and it must be given its “plain and ordinary meaning”, then it is required by the court to take the wording as verbatim. The RCW clearly states, “a history of acts of domestic violence”, which is plural, is cause for limiting the residential time of a parent not a singular act. The only incident of any physical harm that occurred during the marriage was one where Ms. Burke had received a mark across her chest that stemmed from an argument that had escalated between Mr. Burke and Ms. Burke. Witness testimony provided by Robert Burke, (RP page 112-113), at the

time of trial lends support to the fact that an argument between Mr. and Ms. Burke had escalated. This was also stated by Mr. Burke to the GAL during the initial investigation and the GAL makes reference to this incident in her testimony at the time of trial, (RP page 51-52). The ultimate conclusion by the GAL was that this was not an ongoing concern giving cause to the fact that this was an isolated incident. Since this incident was considered isolated it cannot be deemed to be the definition of a "history of acts" of domestic violence throughout the marriage. "the language of RCW 26.09.191(1)(c) is clear and unambiguous", Therefore it must be concluded that the Superior Court abused its discretion in finding Mr. Burke had committed a, "history of acts of domestic violence" pursuant to RCW 26.09.191(1)/(2)(a) and thus no limitations should have been imposed on Mr. Burke.

The second argument that must be brought up is whether or not the court abused its discretion in not finding that Mr. Burke had engaged in abusive use of conflict/withholding of Children under RCW 26.09.191(3)(e)/(f).

Ms. Burke makes the claim that, "The trial court heard significant evidence from both the GAL and testimony of Abusive use of Conflict and withholding of children under RCW 26.09.191(3)(e)(f)", However, it should be pointed out this statement by Ms. Burke is subjective and misleading. The GAL, during her report noted that the father, "withheld the children on several occasions", (CP 71 page 18), however, it should also be noted in the same report on page 17 the GAL also stated, "Mother did not always follow through with her

promises to visit...”, (CP 71 page 17). The GAL also added in her report, (CP 71 pages 18-21), text messages that show that both Mr. and Ms. Burke were at fault when it came to abusive use of conflict as it relates to RCW 26.09.191(3)(e)/(f). Since the GAL noted faults by both the parties, and as this sentence by Ms. Burke infers fault on behalf of Mr. Burke solely. It can only be considered as subjective and misleading, as clearly there is evidence that both parents were at fault. Had the Trial Court Judge agreed with Ms. Burke or felt that Mr. Burke had solely committed these acts the likely scenario is that it would have not been dismissed by the Trial Court Judge at the time of her final ruling on October 7th 2016. The Judge only warned Mr. Burke at the time of the final ruling that this type of behavior would have consequences, (RP page 455 line 14-17).

Furthermore, in Ms. Burkes brief the case of, In re Marriage of Mansour, 126 Wn.App 1, 10, 106 P.3d 768 (2004) was cited as having a significant bearing on the restrictions that must be imposed as a result of “physical abuse”. However, the Marriage of Mansour deals more directly with the physical abuse of the child by the father which holds no relevance to this case.

The final argument that must be addressed centers around the placement of the children and whether or not the Superior Court Judge erred in naming Mr. Burke the primary parent. The RCW that is used to determine the placement of the children is RCW 26.09.187(3)(a).

RCW 26.09.187(3)(a) sets forth the following factors to be determined by the trial court in making placement decisions:

(3) RESIDENTIAL PROVISIONS.

(a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors:

(i) The relative strength, nature, and stability of the child's relationship with each parent;

(ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;

(iii) Each parent's past and potential for future performance of parenting functions as defined in *RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;

(iv) The emotional needs and developmental level of the child;

(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Factor (i) shall be given the greatest weight.

The residential schedule is based on the criteria set forth in RCW 26.09.187 the most important factor being the relative strength, nature and the stability of the child's relationship with each parent. In matters dealing with the welfare of children, trial courts are given broad discretion. In re Marriage of Cabalquinto, 100 Wn.2d 325, 327, 669 P.2d 886 (1983). This broad discretion is due to the trials courts unique ability to observe the parties, determine credibility, and sort out the conflicting evidence. When making the decisions regarding the residential placement, the Trial Court must analyze the statutory factors in RCW 26.09.187 (3). In re Marriage of Murray 28 Wn.App. 187, 189-190, 622 P.2d 1288 (1981). The decision must be made with the best interest of the children in mind, only after considering the factors found in RCW 26.09.187 (3). In re Parentage of J.H., 112 Wn.App. 486, 493, 49 P.3d 154 (2002). The objectives of permanent parenting plans are to provide for the child's physical care, maintain the child's emotional stability, provide for the child's changing needs as the child grows and matures, in a way that minimizes the child's exposure to harmful parental conflict;

and encourage agreements instead of intervention. RCW 26.09.184, RCW 26.09.022.

With RCW 26.09.187(3)(a) having such a significant bearing it must be determined if either parent meets the criteria set forth in this statute. In the Findings and conclusion about a marriage, (CP sub 144 page 5), it was determined that both parents met the criteria of RCW 26.09.187(3)(a). This also was mentioned by the Superior Court Judge during her final ruling statement, (RP pages 451-463). With both parents adequately meeting the criteria this RCW sets forth the Trial Court judge must then weight "The relative strength, nature, and stability of the child's relationship with each parent". As the children had spent such a lengthy amount of time with Mr. Burke and as no findings that suggested that the bond between Mr. Burke and the children was not one that could not be considered anything but strong, the decision to place the children with Mr. Burke based on maintaining their continuity was made by the Superior Court Judge as her discretion allows. Since no factors of RCW 26.09.191 should have been applied, there was no reason remove the residential placement of the children from the care of Mr. Burke. Therefore, the Superior Court did not error in its decision to place the children with Mr. Burke and name him the primary parent.

Conclusion

This case is a very complex case for any court to decipher. There are extenuating circumstances on both sides of the arguments. The appellant claims that the Trial Court Judge unequivocally found that the Respondent had committed clear and defined forms of a “history of acts domestic violence”, pursuant to RCW 26.09.191. However, the Trial court judge heard significant evidence and testimony that there was only one singular incident of a physical altercation by Mr. Burke towards Ms. Burke. Since the “words of an unambiguous statute must be given their plain and ordinary meaning”, In re Marriage of Caven 136 Wn. 2d 800, 806, 966 p.2d 1247 (1998), the evidence provided as well as the testimony given to the court by witnesses in this case give significant support to the fact this one incident was nothing more than a singular event and it can only be determined that this does not fit the “ordinary meaning” of a “history of acts of domestic violence”. Combine this fact with the GAL report, that made it clear throughout it, that both parties engaged in some form or another of abusive use of conflict and due to the fact that the Superior Court Judge did not find that this was a factor that required limitations being placed on Mr. Burke, it should be determined that no findings with regards to RCW 26.09.191 should have been made by the Superior Court and thus the Appellate court has to, at the very least uphold the currently parenting plan that is in place.

With regards to the placement of the children, RCW 26.09.187(3)(a), clearly states the desired factors for placing children in a custody case. These factors have been met and the fact that at the time of the final ruling by the Superior Court this decision weighed heavily on the continuity in regards to the children's lives, which at this time, the children in this matter have been in the primary care of Mr. Burke for over 4 years, the court of Appeals must rule that RCW 26.09.187 must be given the importance that these seven factors carry. With the GAL in this case making the determination that leaving the children with Mr. Burke was in the best interest of the children further supporting these factors, it must be determined that removing the children from the primary care of Mr. Burke at this point in their lives would create a negative impact on their social, emotional, and mental well-being.

One further point that should be brought to the courts attention is the fact the Ms. Burkes' entire brief is almost verbatim to the Motion for Reconsideration, (CP sub 144), that was denied by the Superior Court initially. This is significant for the simple fact that it shows an overall lack of effort on the part of Ms. Burke when it comes to what is in the best interest of the children.

For all of the factors listed in this brief, the Court must find that reversing the findings pursuant to RCW 26.09.191 and the limitations subsequently imposed are without cause due to a lack of supporting evidence and the interests

of the children in this case are best served by upholding the Superior Court's decision to leave them in the custody of Mr. Burke.

Dated on this 25thth day of January, 2018

A handwritten signature in black ink, appearing to read "Donilo C. Burke", is written over a solid horizontal line. The signature is fluid and cursive.

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January 26, 2018 - 1:24 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50141-4
Appellate Court Case Title: Donilo Burke, Respondent v Kryssondra R. Burke, Appellant
Superior Court Case Number: 13-3-02618-7

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