

FILED
COURT OF APPEALS
DIVISION II

2019 JUN 27 PM 2:46

STATE OF WASHINGTON

BY
DEPUTY

No. 52742-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

AUTUMN MOZER

Appellant,

v.

CHRISTOPHER BROWN,

Respondent.

APPELLANT'S OPENING BRIEF

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COMES NOW the Appellant, Autumn Mozer, and hereby submits Appellant's Opening Brief.

I. INTRODUCTION

This case is about a mother who was punished by the trial court for attempting to protect her daughter in the only way she knew how. The court restricted her decision-making and visitation time based on findings that she engaged in abusive use of conflict and withheld her child. However, upon further review, Mozer did not act in bad faith in using the legal system, made no decisions unilaterally, and acted upon credible fears and concerns. Additionally, the trial court prevented Mozer from presenting all her witnesses in violation of her constitutional rights. To allow Mozer's parental rights to be infringed upon in such a way is not only unfair, but also flies in the face of settled law.

II. ASSIGNMENT OF ERROR AND ISSUES RELATING TO ASSIGNMENT OF ERROR

A. Mozer makes the following assignment of error:

1. That the trial court erred when it prohibited Mozer from presenting identified witnesses with information relevant to the case.

2. That the trial court erroneously permitted Brown to amend his proposed parenting plan in closing arguments in violation of CR 15 and RCW 26.09.181.

3. That the trial court erred when it found abusive use of conflict and withholding of a child without sufficient evidence.

4. The trial court erred when it issued a ruling with insufficient findings to support its conclusion that Mozer engaged in abusive use of conflict and withheld a child.

B. Issues relating to the assignment of error:

1. Did the trial court err when it prohibited Mozer from presenting identified witnesses with information relevant to the case?

2. Did the trial court err by permitting Brown to amend his proposed parenting plan in closing arguments in violation of CR 15 and RCW 26.09.181?

3. Did the trial court err when it found abusive use of conflict and withholding of a child without sufficient evidence?

4. Did trial court err when it issued a ruling with insufficient factual findings to support its conclusion that Mozer engaged in abusive use of conflict and withheld a child?

III. STATEMENT OF THE CASE

A. Factual Background

The Appellant, Autumn Mozer (“Mozer”) and Respondent, Christopher Brown (“Brown”), have a single child in common: G.N.M.-B. (CP 385). The parties hardly knew each other when G.N.M.-B. was conceived and had only been in a relationship for a few weeks. (RP 86; RP 151). Brown was not excited about G.N.M.-B. during Mozer’s pregnancy. (RP 154-155). Brown did not attend any medical appointments with Mozer, nor did he ask to be included. (RP 155-156). G.N.M.-B. was born on May 21, 2015. (RP 89). Brown declined to visit G.N.M.-B. in the hospital when she was born and did not contact Mozer during this time. (RP 156-157). For the first few months of G.N.M.-B.’s life, Brown did not seek a relationship with his daughter. (RP 89). In fact, Brown did not meet G.N.M.-B. until she was about four or five months old. (RP 89). Despite Brown’s initial rejection of G.N.M.-B., Mozer voluntarily allowed Brown informal visitation with G.N.M.-B. at church. (RP 90). Starting in December 2015, Mozer and Brown reached an informal agreement that allowed Brown residential time with G.N.M.-B. (RP 90).

However, G.N.M.-B. developed a food intolerance that

presented as adverse reactions hours later. (RP 15-16, 32). The reactions included irritability, abdominal pain, loose stools, and hematochezia without vomiting. (RP 15-16, 32). G.N.M.-B. visited the Emergency Room in November 2015 after eating rice cereal. (RP 15-16). She was lethargic, gray, and not eating. (RP 15-16). Mozer arranged an occupational therapist and a gastrointestinal specialist to evaluate G.N.M.-B. (RP 15-16). Brown accompanied Mozer and G.N.M.-B. to some of these appointments and was well aware of G.N.M.-B.'s health condition. (RP 15-16).

In June 2016, G.N.M.-B. became seriously ill after staying with Brown. She was laying on the ground, crying; she didn't want to eat. (RP 15-16). When Mozer asked Brown what he had fed her, Brown laughed at Mozer and told her summarily, "all the same stuff." (RP 15-16). Mozer felt Brown was hostile and aggressive when confronted about these issues. (RP 15-16). In an effort to protect G.N.M.-B., Mozer paused visits with Brown. (RP 15-16). Brown did not contest this and allowed it to happen. (RP 89; CP 165).

On June 6, 2016, when G.N.M.-B. was just over a year old, Brown called 911 after he saw Mozer at the store alone; alleging to be worried about G.N.M.-B.'s wellbeing because he believed it odd for a mother of a one year old child to be at a store without the child.

(RP 93-94). G.N.M.-B. was at daycare. (RP 26).

Mozer then filed a petition for a protection order in June 2016, which was denied. (Ex 5, 6). Still feeling threatened and scared, Mozer filed a petition seeking a protection order from harassment and stalking on July 7, 2016. (Ex 7). This was also summarily denied. (Ex 8). There was no custody order or parenting plan in place at this time. (CP 164). Brown did not receive notice of the two protection order efforts. (RP 113).

Brown filed the underlying action in August 2017, requesting a parenting plan. (CP 385-390). Brown proposed a temporary parenting plan with G.N.M.-B. residing with each party on a weekly rotating basis. (CP 391-401). Brown also sought an immediate order for G.N.M.-B. to live with Brown for the remainder of the summer of 2017. (CP 39-43). In ruling on the motion, the Court ordered Brown to have visitation with G.N.M.-B. every Saturday from 10:00 a.m. – 2:00 p.m. and every Sunday from 4:00 p.m.-8:00 p.m. (CP 45-48). The Court further ordered that Brown follow all doctor recommended food tolerance plans. (CP 45-48).

On September 5, 2017, the Court adopted Mozer's proposed temporary parenting plan¹; Brown had residential time for three weekends per month. (CP 434-436). Additionally, the Court ordered that Brown follow G.N.M.-B.'s dietary restrictions. (CP 434-436).

At first, the visits went well. (CP 457). However, G.N.M.-B. became increasingly distressed when she was transferred into Brown's care. (CP 458). On February 21, 2018, when Mozer and G.N.M.-B. FaceTimed with Brown, G.N.M.-B. screamed, cried, and covered her face during the entire call. (CP 73-74, 458). On February 23, 2018, Mozer drove to Taco Time to transfer G.N.M.-B. to Brown's care. (CP 71). Before they reached Taco Time, G.N.M.-B. was happy and playing with her stuffed monkey. (CP 71). When they reached Taco Time, G.N.M.-B.'s mood immediately soured and she began crying screaming. (CP 71). G.N.M.-B. fought to stay in her carseat as Mozer attempted to get her out of the car. (CP 71). G.N.M.-B. continued to scream and fight as Mozer handed her to Brown. (CP 71). Brown simply put G.N.M.-B. in his car and made no attempt to comfort her. (CP 71).

¹ Mozer requested that Brown have visitation in this proposed temporary parenting plan. (CP 57-58).

Following these episodes, on March 7, 2018, Mozer filed a motion to amend Brown's visits to supervised visitation once per week while the parties figured out what was going on with G.N.M.-B. and her behavior towards Brown. (CP 469-473). In this motion, Mozer requested that the parties continue therapy with GN.M.-B. (CP 471). The court granted Mozer's motion and ordered that Brown's visits be supervised moving forward. (CP 474).

On March 15, 2018, the court entered an order setting a show cause hearing for April 5, 2018, and maintaining father's supervised visits until then. (CP 474). On April 5, 2018, the court ordered in part that Brown's subsequent two visits with G.N.M.-B. should be professionally supervised and that Brown's grandmother will serve as the supervisor through the end of April. (Ex 20). Additionally, the Court ordered the parties to enroll in co-parenting/family therapy by the end of April. (Ex 20). Then Brown's visitation was to revert back to the visitation schedule from the order of September 2017. (Ex 20). Mozer filed a motion on May 4, 2018, requesting that the Court clarify the order of April 5, 2018. (CP 159-161). The court never ruled on this motion. This matter came to trial on June 26, 2018.

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B. Trial

On the day of trial, the parties were present before the trial court and discussion was had regarding preliminary issues. (RP 4-11). During this preliminary discussion, Mozer informed the trial court regarding the availability of certain witnesses she intended to call to testify, including Jennifer Cortez, Lora Butterfield, Sarah Crump, and Kimberly Pettie. (RP 8-9). Responding to a request from the trial court for an offer of proof, Mozer explained to the trial court that each witness had knowledge of facts relevant to the case, including the behavior of the child throughout the litigation and the relationship between the parties. (RP 10). Despite hearing no objection to the proposed witnesses, and offering no explanation, the trial court informed Mozer, "you can call one of these individuals. Your choice." (RP 11).

Once trial began, Mozer testified as to why she was reluctant to allow Brown visitation in 2015, before he filed the underlying action. (RP 14-15). G.N.M.-B. was laying on the ground not wanting to eat. (RP 14-15). When Mozer reached out to Brown, he laughed at her and told her she was crazy. (RP 14-15). Mozer testified that she "went and took care of my child who was sick from, again, I don't

even know.” (RP 14-15). At this point, Brown let Mozer dictate the terms of his contact with G.N.M.-B. (CP 164).

Mozer also addressed the petitions for protective orders that she had filed prior to the underlying suit: “I don’t want to feel like I’m being belittled or threatened every time something doesn’t go the way he wants it to. In some of the Talking Parents, you’ll see me bring up issues and then him belittling me like ten different times. (RP 198).” “To me, that’s harassment.” (RP 198). Mozer indicated that she filed the protection orders for the, “safety of [herself] and [G.N.M.-B.]” and had stopped visitation until the situation could be resolved.” (RP 17-18). In her closing arguments, Mozer indicated that she believed that Brown belittling her was harassment. (RP 198). Mozer testified that when Brown called the police to do a wellness check because he saw her at Fred Meyer without G.N.M.-B., that Mozer felt stalked and “watched.” (RP 26).

Mozer further testified that she filed the motion for a protective order on March 7, 2018, because she “didn’t know what else to do to make sure that G.N.M.-B. got the security and safety that she needed at that time...” (RP 45-46).

In responding to questions from opposing counsel as to why Mozer did not revert back to the temporary plan at the end of April

2018, Mozer testified that she had interpreted the April 5, 2018 temporary order to require the parties to engage in co-parenting counseling first. (RP 51). Mozer further testified that she had tried to work with Brown to come to a compromise so that he could get some visitation despite him not satisfying the requirements of the order of April 5, 2018. (RP 52). Brown also testified that Mozer had attempted to cooperate with him despite Mozer believing that Brown was not entitled to visitation at that time. (RP 137).

At trial, Mozer explained that she had not provided her address to Brown or the court because of, ““past stalking, watching, things being said against me.” (RP 12-13). “Just feeling afraid and not feeling I could take care of my children without feeling I’m being watched.” (RP 12-13).

At the end of the trial, the trial court stated:

I’m going to take this opportunity while you are paying attention to me and listening, hopefully, to address a couple of things that I think are important in this case...The two of you don’t really know each other...You haven’t been able to parent with each other. That’s clear. Sitting here and watching the two of you in court, that’s clear. You can’t really communicate with each other, okay. That being said, you are going to have to do that because you have this child in common that is going to be under this parenting plan for at least the next 15 years...The ability of the two of you to communicate and be flexible and appreciate each other for the role that you played in

bringing this child, who is innocent, into this world, to deal with this situation is important. If you can't talk civilly to each other, if you can't respect each other, then you are not going to be able to accomplish anything in parenting this child. One thing she will know and will understand very well as she grows up is whether her parents can act like adults when they are together, because there are going to be times when you are going to want to be together for things that happen in her life. There are a lot of great things to look forward to as she grows up, and she is going to want to have both of her parents there to share in those experiences and be there, but she is not going to want to have that happen if the two of you cannot act as adults when you do that...If you cannot act civilly with each other, and if you cannot communicate with each other, you're going to lose. You're going to lose this child, okay.

(RP 206-208).

C. Written Ruling

The Court issued its written ruling and, in relevant part, found that Mozer engaged in abusive use of conflict and withheld G.N.M.-B. from Brown. (CP 164-165). The order identifies the following facts as evidence of abusive use of conflict: (1) prior to the parentage action, Brown only saw G.N.M.-B. when Mozer let him; (2) Mozer only let Brown see G.N.M.-B. after she was 4-5 months old; (3) Brown began to have residential time with G.N.M.-B. following December 2015, and there was no set schedule; (4) The visitation ended in June, 2016, when Mozer filed an order for protection order

and that petition was denied because harassment had not been established by a preponderance of the evidence; (5) Mozer filed for a protection order from unlawful harassment and stalking on July 6, 2016, and the petition was denied the same day; (6) on March 7, 2018, Mozer filed a motion for an immediate restraining order, requesting that Brown's visits were suspended once a week for four hours based upon behaviors that she described G.N.M.-B. was exhibiting, namely a reluctance to spend time with her father. Brown's visits were suspended until supervised visits could be approved by the Court, and the parties were ordered to participate in therapy focusing on co-parenting and the behaviors allegedly being exhibited by G.N.M.-B. concerning visits with Brown. On April 5, 2018, the commissioner ordered that Mr. Brown's next two visits were to be professionally supervised and after that Brown's grandmother would serve as a visitation supervisor until the end of April. She also ordered that by the end of April, the parties were to be enrolled in co-parenting/family therapy and at that time Brown's visitation would revert back to the temporary parenting plan entered in September 2017. Also, the costs of therapy was to be shared equally and the costs of the visitation supervisor would be paid equally. It took some time for Brown to set up supervised visitation.

Brown and Mozer had a disagreement about the April 5, 2018, order² and the conditions that needed to be met before the visitation reverted back to the temporary parenting plan from September 2017. The parties did become involved in counseling in early May, and visitation reverted back to the temporary order; and (7) Mozer's refusal to give her address in court, or to provide it to Brown. (CP 164-165).

In finding that Mozer withheld G.N.M.-B. from Brown, the court identifies the fact that she kept G.N.M.-B. away from Brown for a long time, without good reason. (CP 165).

The court imposed RCW 26.09.191 restrictions upon Mozer based on these findings. The Court awarded Brown authority to make educational and non-emergent health care decisions and made Brown the primary custodian of G.N.M.-B. (CP 165). Additionally, the Court ordered that G.N.M.-B. will alternate weeks with the parties until she starts kindergarten. (CP 165). Once G.N.M.-B. starts kindergarten she will live with Brown. (CP 165). Mozer will have residential time every other weekend from 7:00 p.m.

² Tellingly, the trial court commented that the April 5, 2018, order, "could have been written more clearly." (CP 164).

Friday – 7:00 p.m. Sunday. (CP 165). Final orders were entered on September 7, 2018. (CP 188-203; 209-28).

Mozer filed a motion for reconsideration on September 17, 2018, arguing that (1) Brown improperly amended his proposed parenting plan, (2) that the RCW 26.09.191 limitations imposed by the court were improper, (3) the courts' finding of abusive use of conflict was unsupported by the record; and (4) the court improperly failed to consider the RCW 26.09.187 parenting plan factors. (CP 229-244). The trial court denied that motion. (CP 289). Mozer timely filed her notice of appeal and this appeal follows. (CP 290, CP 334-335).

IV. ARGUMENT

A. Standard of Review

With respect to questions of law, the decisions of the trial court are reviewed *de novo*. In re Smith-Bartlett, 95 Wash. App. 633, 636, 976 P.2d 173, 176 (1999).

Parental rights constitute a protected, fundamental liberty interest under the Fourteenth Amendment to the United States Constitution. In re Marriage of McNaught, 189 Wn.App. 545, 552, 359 P.3d 811 (2015) *citing* In re Marriage of Chandola, 180 Wn.2d 632, 646, 327 P.3d 644 (2014). The appellate court reviews a trial

court's parenting plan for abuse of discretion. Underwood v. Underwood, 181 Wn.App. 608, 326 P.3d 793 (2014) *citing* In re Marriage of Katare, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). A trial court abuses its discretion when it makes a decision that is manifestly unreasonable or based on untenable grounds or untenable reasons. Id. While trial courts have broad discretion in the context of a parenting plan, that discretion must be exercised within the bounds of the applicable statutes. Chandola, 180 Wn.2d at 658.

B. The Trial Court Erred by Refusing Mozer the Opportunity to Call Available Witnesses with Relevant Knowledge.

During a discussion regarding "preliminary issues," the trial court inquired of Mozer as to witnesses she intended to call to testify during the trial. (RP 4-11). Mozer named four witnesses and described in general detail their knowledge of the facts surrounding the child and the relationship of the parties. (RP 10). While she did not go into great detail, Mozer certainly described knowledge possessed by the witnesses relevant to the question before the trial court. (RP 10).

Nevertheless, without objection or an explanation given, the trial court simply told Mozer that she would only be allowed to present one of her four identified potential witnesses. (RP 11). This violated

Mozer's procedural due process rights. See Smith v. Fourre, 71 Wn.App. 304, 858 P.2d 276 (1993).

The essential elements of procedural due process are notice and opportunity to be heard. In re Hendrickson, 12 Wn.2d 600, 606, 123 P.2d 322 (1942). A litigant who is denied notice and opportunity to be heard is denied procedural due process in violation of article I, section 3 of the Washington Constitution. Ware v. Phillips, 77 Wn.2d 879, 884 468 P.2d 444 (1970) *quoting* State ex rel. Adams v. Superior Court, 36 Wn.2d 868, 872 220 P.2d 1081 (1950). Every litigant is entitled to be heard before her or his case is dismissed. Esmieu v. Schrag, 88 Wn.2d 490, 497, 563 P.2d 203 (1977); Olympic Forest Products, Inc. v. Chaussee Corporation, 82 Wn.2d 418, 422, 511 P.2d 1002 (1973); Hendrickson, 12 Wn.2d at 606. An application of this rule is that a plaintiff must be given the opportunity to present not just part, but all, of his or her evidence before the trial court rules on the sufficiency of the evidence. Fourre, 71 Wn.App. at 307; Hill v. Parker, 12 Wn.2d 507, 524, 122 P.2d 476 (1942).

Here, the trial court erred by abrogating Mozer's right to call her witnesses and present her evidence. Mozer had identified these four witnesses as having relevant evidence prior, opposing counsel had no objections, and the trial court did not offer an explanation for

its actions. (RP 11). Irrefutably, Mozer's right to present her witnesses and evidence as afforded to her by the due process clause was denied.

Additionally, the trial court's violation of Mozer's rights here also interfered with it applying the best interests of the child standard. In a child custody case, the court is tasked with deciding the best interests of a child. In re Parentage of Schroeder, 106 Wash.App. 343, 349, 22 P.3d 1280 (2001). By prohibiting Mozer from presenting her witnesses, the trial court deprived itself of evidence necessary to adjudicate what parenting plan was in G.N.M.-B.'s best interest.

C. The Trial Court Erred by Allowing Brown to Amend his Proposed Parenting Plan in Closing Arguments in Violation of CR 15 and RCW 26.09.181.

The trial court erred by permitting Brown to amend his proposed parenting plan during closing arguments. Mozer was denied the opportunity to fully respond and tailor her trial strategy accordingly. Additionally, Mozer's right to parent is implicated in this case, rendering the trial court's error grave.

Submission of proposed parenting plans is governed by RCW 26.09.181. RCW 26.09.181(2) provides that either party may file and serve an amended proposed parenting plan according to the rules

for amended pleadings. The rules for amending pleadings are laid out in CR 15(a), which reads:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by a leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated "proposed" and unsigned, shall be attached to the motion. If a motion to amend is granted, the moving party shall thereafter file the amended pleading and, pursuant to rule 5, serve a copy thereof on all other parties. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

Brown filed his proposed parenting plan on August 2, 2017. (CP 391-401). Brown never filed an amended proposed parenting plan before trial, nor did he file a motion to amend his proposed parenting plan. However, Brown discussed a proposed parenting plan with different terms during his trial testimony. (RP 117-119). Brown's counsel submitted an amended proposed parenting plan during closing arguments. (RP 194). Simply put, Mozer was denied

the time and opportunity to respond to Brown's parenting plan as anticipated by CR 15(a). The trial court erred when it allowed Brown to amend his parenting plan in this manner.

Further, Brown's amended proposed parenting plan submitted during closing arguments differs significantly from his original proposed parenting plan. The original proposed parenting plan did not seek limitations, proposed joint decision making across the board, and proposed dividing residential time equally between Brown and Mozer. (CP 391-401). The amended proposed parenting plan submitted at trial requests limited decision making, in part due to 26.09.191 limitations; almost exclusive residential time for Brown once G.N.M.-B. starts kindergarten; and 16 new provisions under section 14. (RP 193, 194, 196). Contrastingly, Brown's declaration in support of his original proposed parenting plan said, "I am asking the court to approve my parenting plan in which Ms. Mozer and I would share custody on a 50/50 time schedule...this will allow both parents to have a loving and nurturing relationship with her." (CP 22).

Brown's amended proposed parenting plan differed drastically from his original proposed parenting plan. This disadvantaged Mozer at trial because she was not on notice for what Brown was

actually seeking and therefore could not adjust her trial strategy accordingly. Additionally, the stakes of the trial changed significantly with Brown's amended parenting plan. Brown not only was seeking to have primary residential time with G.N.M.-B., but Brown sought to limit Mozer's decision making via RCW 26.09.191 factors. Mozer was entitled to know of this change this prior to trial. It may have prompted her to obtain counsel or approach trial differently.

While Brown's original proposed parenting plan addressed RCW 26.09.191 factors (abusive use of conflict and withholding), it did not request any limitations based on these factors. In fact, the original parenting plan requested no limitations because "Ms. Mozer has provided for our daughter to the best of her ability and restrictions are not necessary." (CP 392). Mozer was not on notice that these factors would, or even could, significantly limit her residential time or decision making authority for G.N.M.-B. The drastic effect Brown's RCW 26.09.191 factors had on Mozer's residential time with G.N.M.-B. illustrate why Mozer needed the notice entitled to her per CR 15(a).

Mozer's decision making authority as a parent, a constitutionally protected right³, was curtailed by Brown's proposed

³ Troxel v. Granville, 530 U.S. 57, 72-73, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000).

parenting plan the court adopted. A proposed parenting plan Mozer did not even have the opportunity to see prior to trial. Brown's proposed parenting plan implicated new RCW 26.09.191 factors that affected Mozer's decision making authority over her daughter and stripped her of significant residential time with her daughter. Because this amended proposed parenting plan was presented to the court in violation of CR 15 and RCW 26.09.181 it was improper and should not have been considered. The trial court erred in doing so.

D. The Trial Court Erred by Finding Abusive Use of Conflict and Withholding of a Child Without Sufficient Evidence.

A court's reasoning is manifestly unreasonable if it outside the range of acceptable choices given the facts; it is based on untenable grounds if the factual findings are unsupported by the record. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) *citing* State v. Rundquist 79 Wn.App. 786, 793, 905 P.2d 922 (1995). A finding under RCW 26.09.191(3) requires "more than the normal distress suffered by a child because of travel, infrequent contact of a parent, or other hardships which predictably result from a dissolution of marriage." In re Marriage of Watson, 132 Wn.App. 222, 233, 130 P.3d 915 (2006) *quoting* Littlefield, 133 Wn.2d at 55. Further, a

finding under RCW 26.09.191(3) must be supported by substantial evidence that the parent's involvement or conduct caused the restricting factor. Watson, 132 Wn.App. at 223. *citing In re the Marriage of Wicklund*, 84 Wn.App. 763, 770-71, 932 P.2d 652 (1996).

RCW 26.09.191(3) provides statutory authority to the trial court to impose limitations on parenting plans in the presence of certain factors.

(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:...

(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

In relevant part, subsection (3)(e) allows restrictions on the basis of a parent's abusive use of conflict which creates the danger of serious damage to the child's psychological development. Chandola, 180 Wn.2d 647. Subsection (3)(f) allows restrictions when a parent has withheld a child from the other parent for a protracted period without good cause. RCW 26.09.191(3)(f). To apply these the trial court must support the application with factual

findings based on substantial evidence. Wicklund, 84 Wn.App. at 770-71.

RCW 26.09.191(3) bars the trial court from precluding or limiting any provisions of the parenting plan (i.e. restricting parental conduct) unless the evidence shows that a parent's conduct may have an adverse effect on the child's best interests. Chandola, 180 Wn.2d at 642. The legislature intended RCW 26.09.191(3) restrictions to protect the child from physical, mental, or emotional harm. Id. A trial court abuses its discretion if it imposes a restriction that is not reasonably calculated to prevent such harm. Id. By requiring the trial court to identify specific harms to the child before ordering restrictions, RCW 26.09.191(3) prevents arbitrary imposition of the court's preferences. Id. at 655 *citing* Wicklund, 84 Wn.App. at 770-71. This is particularly important in the family law context, where the trial court is empowered to regulate intimate aspects of the parties' lives. Id. *citing* Santosky v. Kramer, 455 U.S. 745, 762-763, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

In order to restrict a parent's role under a parenting plan, the trial court must find, inter alia, that the abusive use of conflict by the restricted parent creates a danger of serious damage to the

children's psychological development. Burrill v. Burrill, 113 Wn.App. 863, 871, 56 P.3d 993 (2002) *citing* RCW 26.09.191(3)(e).

Here, the record does not support the findings that Mozer withheld the child nor utilized abusive use of conflict. The facts the court relies upon in making these conclusions do not hold up upon closer inspection.

Initially, the court identifies the fact that Brown only saw G.N.M.-B. when Mozer let him and not at all until she was 4-5 months old. This is not abusive use of conflict. Brown testified that he did not want an initial relationship with G.N.M.-B. and also Mozer was the primary parent. (RP 89). The trial court, in its ruling, acknowledges that Brown allowed this happen. (CP 165). How can this be considered "conflict" if the other party allowed it to happen? There is nothing in the record that supports the idea that Mozer was hiding G.N.M.-B. away from Brown. In fact, Brown testified that at the outset, he was not interested in a relationship with G.N.M.-B. The court then faults Mozer for not creating a set schedule for Brown's visitations following December 2015. It is not Mozer's job, nor responsibility, to require Brown to be involved with G.N.M.-B. Additionally, Brown had rights, and could have implemented or suggested a schedule himself. Instead, he simply allowed this to

happen until August 1, 2017, when he filed the underlying action. (CP 385-390). Yet, Mozer was punished for this. (CP 164-65).

The court notes that Mozer ended visitation in June 2016. However, Mozer decided to not let Brown have residential time with G.N.M.-B. because she was protecting her child. (RP 14-15). Mozer testified that she was acting to protect G.N.M.-B. from the adverse reactions to not being kept on her diet. (RP 14-15). Further, the record shows that Mozer tried to communicate with Brown about what he had fed G.N.M.-B. (RP 14-15). Mozer's attempts to cooperate with Brown in this scenario do not support the court's finding that this episode constitutes an abusive use of conflict.

The court then points to a series of petitions for protection orders in June and July of 2016, as further evidence of abusive use of conflict. This is inappropriate because these petitions resulted from a misunderstanding of harassment, not an abusive use of conflict. (RP 198). The application for the protection order describes how Mozer is scared that Brown is continuing to hurt G.N.M.-B. by not feeding her properly. (Ex 5). Further, Mozer testified that she believed the belittlement from Brown constituted as harassment and Brown calling the police to do the wellness check on G.N.M.-B. was considered stalking. (RP 198; 26). Mozer was not abusing the legal

process to prevent Brown from seeing his child, she was trying to use legal avenues to keep herself and G.N.M.-B. safe from what she perceived as unlawful acts by Brown. The fact that Mozer was mistaken as to what legally constitutes harassment and stalking is not probative of whether she abused conflict.

Further, even though the petitions for protective orders were denied, there was no finding that the denials were based on bad faith on the part of Mozer. (Ex 6, 8).

Most importantly, filing the petitions for protective orders did not create harm, nor a danger of harm, to G.N.M.-B. There is no evidence, or any likelihood, that G.N.M.-B., as a one year old child, would have been aware of these petitions. Brown even testified that he was not aware of the petitions either, which makes it unlikely it would have had a direct effect upon his relationship with G.N.M.-B. (RP 113). Simply put, there was no conflict created by the petitions because Brown never knew of them until after they were dismissed and thus they never impacted him.

The court also punishes Mozer for filing a motion for an immediate restraining order on March 7, 2018. (CP 164). However, this motion was based on the concern for G.N.M.-B.'s wellbeing, not creating conflict with Brown. (CP 458). G.N.M.-B. had been

displaying troubling behaviors when exposed to Brown. (CP 458). Not only did Mozer request that the court modify the visitation while the parties investigate what was going on with G.N.M.-B, but also requested that they work with a counselor to do so. (CP 472). Asking the court to investigate a child's well-being as well as engage in therapy to work together is not creating conflict, rather it is an attempt to avoid future and continuing conflict.

The court's reliance on the disagreement over the April 5, 2018, order is problematic. The court admitted that the order was not clearly written, but yet still lays blame at Mozer's feet for carrying out the court order in the way she interpreted it. (RP 164-65). If anything, this is the opposite of abusive use of conflict because Mozer was doing her best to care for G.N.M.-B. and also follow the commissioner's orders. Further, in the initial motion for the restraining order, Mozer requested that the parties remain in therapy together. (CP 471). Mozer not only filed a motion for clarification, but she also attempted to cooperate with Brown to reach a compromise in the interim. (CP 159-161; RP 52, 137).

The record does not support the trial court's finding that Mozer withholding her address is an abusive use of conflict. Mozer testified that she would not provide her address because she was scared and

perceived herself to be the victim of stalking. (RP 12-13). There was no evidence that the address was requested in discovery and Mozer refused to disclose it. Even the trial court during testimony allowed Mozer keep her address undisclosed. (RP 12-13). Yet, Mozer was punished for this. (CP 165).

The record does not support the finding that Mozer withheld G.N.M.-B. First, prior to the underlying action, Mozer did not withhold the child as there (1) was no custody agreement and (2) Brown did not want a relationship with G.N.M.-B. initially and then later acquiesced to no visitation. (RP 89, 111). In fact, the trial judge agrees that Brown “let this happen.” (CP 165).

Any withholding that occurred after the filing of the underlying action was pursuant to court order. Mozer filed a motion for a temporary restraining order on March 7, 2018, asking that Brown’s visitations be supervised because she was concerned about G.N.M.-B.’s safety as discussed *supra*. (CP 469-472). The commissioner, on May 15, 2018, ordered that Brown’s visits would be supervised until the show cause hearing on April 5, 2018. (CP 474). Then, on April 5, 2018, the commissioner ordered that Brown’s visits would remain supervised until the end of the April when the parties entered into co-parenting counseling. (Ex 20). Mozer interpreted the April 5,

2018, order to mean that Brown's visitations would resume under the September 2017, temporary orders when the parties entered co-parenting counseling. (RP 51). Because Mozer was acting pursuant to a court order, this is not withholding. She may have incorrectly interpreted the order, but she was acting in good faith by following a court order. The court cannot blame Mozer for withholding when the withholding was at the court's bequest.

In short, the facts that the court identified as instances of abusive use of conflict and withholding do not survive a close inspection. The record does not support the findings that Mozer abusively used conflict or withheld G.N.M.-B.

E. The Trial Court Erred by Issuing Insufficient Findings to Support its Conclusion that Mozer Engaged in Abusive Use of Conflict and Withholding a Child.

A court's reason is manifestly unreasonable if it outside the range of acceptable choices given the applicable legal standard; it is based on untenable reasons if it based on an incorrect standard or the facts do not meet the requirements of the correct standard. Littlefield, 133 Wn.2d at 47. Failure by the trial court to make findings that reflect application of each relevant fact is error. Kinnan v. Jordan, 131 Wn.App. 738, 752, 129 P.3d 807 (2006) *citing* In re Marriage of Stern, 57 Wn.App. 707, 711, 789 P.2d 807 (1990).

RCW 26.09.191(3) provides that 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... the abusive use of conflict by the parent that creates the **danger of serious damage to the child's psychological development.** (emphasis added).

At issue in Underwood was the trial court's order entering a final parenting plan that allowed the children to decide whether the father would have residential time with them. See Underwood, 181 Wn.App. 608. The appellate court found that the trial court's findings that the children were mature and intelligent, but without explanation as to why the children's maturity, intelligent, and ages supported its decision, was insufficient to support its decision to allow the children to decide whether to have residential time with father. Underwood, 181 Wn.App. at 613. Further, the appellate court took issue with the trial court not making individual findings for each child. Id. Additionally, the court found that the trial court erred when it did not explain why the RCW 26.09.191(3) factors supported effectively eliminating father's residential time. Id.

Here, the trial court's written ruling changed G.N.M.-B.'s primary custodial parent and significantly curtailed Mozer's parenting

rights. However, the written ruling does not undergo the necessary analysis to explain how the findings support the ruling. At the outset, the court identifies many facts that it summarily concludes are evidence of abusive use of conflict (*see supra*). Not only are those facts not actually abusive use of conflict (*see supra*), but the written ruling does not even attempt to explain how these findings are an abusive use of conflict. “This is evidence, in the Court’s mind, of abusive use of conflict on the part of Ms. Mozer,” is not an analysis. (CP 164-65).

Further, the ruling is silent as to what type of serious damage Mozer’s abusive use of conflict could or did have on G.N.M.-B or how the abusive use of conflict could seriously damage G.N.M.-B.’s psychological development. There was no testimony regarding this question. The court merely states that Mozer uses conflict in a way that endangers or damages the psychological development of G.N.M.-B. (CP 165). No evidence nor any explanation was given. The court not only applies the wrong standard (damages versus seriously damages), but the court also does not provide any explanation or insight into how it came to that conclusion.

Similar to Underwood, the Court here uses the RCW 26.09.191(3) factors to justify limiting Mozer’s decision making, but

without any discussion of why: “From [finding of abusive use of conflict and withholding] flows a limitation on decision-making.” RCW 26.09.191(3) factors allow the court to limit decision making, it is not a mandatory requirement. (CP 165). Because the court is using its immense discretion to significantly impact a constitutional right, the court must justify its reasoning. There is no discussion of why or how Mozer’s limitations “flow from” the findings. (CP 165).

In fact, the only explanation of how the court gets from its findings to the limits on decision making rests on the friendly parent doctrine. The “friendly parent” concept has been specifically rejected in Washington. Underwood 181 Wn.App. at 163 *citing* In re Marriage of Lawrence, 105 Wn.App. 683, 688, 20 P.3d 972 (2001). The trial court’s lecture at the end of trial indicates that the trial court placed a great deal of weight upon parents working together. (RP 206-08). However, the written ruling does not address, nor explain, a need to co-parent and/or any identification of any harm to G.N.M.-B. from Mozer’s “abusive use of conflict.” (CP 165).

In short, this written ruling is insufficient. It is unclear how the trial court connects the dots between the facts identified and the findings issued. The only logical explanation is that the trial court utilized the friendly parent doctrine, which is expressly rejected in

Washington. To curtail a parent's fundamental right to parent, there must be more than unexplained conclusions and rejected legal doctrines.

V. CONCLUSION

For the reasons set herein, Mozer requests that the trial court's decision be reversed and this case be remanded for a new trial. Mozer requests that she be allowed to present her witnesses at trial, Brown's proposed parenting plan be provided at least 14 days in advance of trial, and that the trial court be ordered to refrain from utilizing the friendly parent doctrine in reaching its decision.

DATED this 27th day of June, 2019.

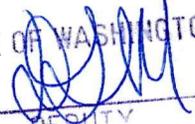
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STATE OF WASHINGTON

BY 
DEPUTY

DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served via E-mail and by U.S. Mail, postage pre-paid, a copy of the foregoing Appellant's Opening Brief to:

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Signed at Tacoma, Washington this 27th day of June, 2019.

McGAVICK GRAVES, P.S.

By: 

Erin M. Hahn