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NO. 318044

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CHRISTOPHER RENO, Appellant,

v.

HEIDI RENO (NKA) BANIK, Respondent.

BRIEF OF RESPONDENT

Benjamin D. Platt, WSBA #37616
Attorney for Respondent
1020 N. Washington St.
Spokane, WA 99201
(509) 326-6593

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I. COUNTER-STATEMENT OF ASSIGNMENTS OF ERROR

1. The trial court did not err when the court referred Mrs. Banik to a domestic violence program at the YWCA.

2. The trial court did not err in regards to the residential schedule as it appropriately limited and in some respects restrained Mrs. Banik's residential time pursuant to RCW 26.09.191.

II. COUNTER-STATEMENT OF THE CASE

This matter came before the trial court's attention based on petition to modify the parenting plan filed by Christopher Reno on March 21, 2012. To give a brief procedural history of the case, Mr. Reno filed a petition for dissolution of marriage on January 15, 2008. The parties' daughter, Karli, was born May 22, 2007 and has been in Mr. Reno's care since she was 7 months old. She was officially placed in his care after he obtained an ex parte restraining order on January 15, 2008. During most of the pendency of this matter there have been substantial concerns about Mrs. Banik's drug use and domestic violence. (CP 2). A Decree of Dissolution and Final Parenting were entered on June 2, 2009. Restrictions were imposed in the parenting plan on Mrs. Banik's residential time based upon: 1) neglect or substantial nonperformance of parenting functions; 2) long-term emotional or physical impairment which

interferes with the performance of parenting functions; and 3) a long term impairment resulting from drugs, alcohol, or other substance abuse. Pursuant to the plan, Mrs. Banik was to have Karli while she was in treatment for (2), 2 hour supervised visits each week at the treatment facility. After completion of inpatient treatment, she then would have Karli for (2), 2 hour supervised visits each week at the Fulcrum Institute. After 90 days of supervised visitation at the Fulcrum Institute then either party could seek review of the visitation schedule. (CP 2). The parties mediated requested changes to the residential schedule on (3) separate occasions between May, 2010 and September 23, 2011. (CP 2, 3). In 2010, Mrs. Banik's residential time was unsupervised and included overnight visitations.

In his declaration of in support of the modification Mr. Reno stated that Mrs. Banik tested positive for opiates and hydrocodone and that she possibly altered her test results for the hair follicle test. There was also an allegation that she had been soliciting herself sexually on a local internet site. (CP 3). Domestic violence in which Mrs. Banik was both the victim and the perpetrator was also a major concern. On April 9, 2013, Commissioner Rachelle Anderson entered an Order re: Treatment Evaluation Review. (CP 18) This

Order required Herb Robinson to be the DV/Anger Management evaluator. Mr. Reno was allowed to provide secondary information to the evaluator prior to the completion of Mr. Robinson's evaluation. Mrs. Banik was required to follow the recommendation of the counselor and be responsible for the costs. (CP 19). Mr. Robinson was recommended as one of (4) state certified DV perpetrator programs in Spokane. This recommendation came directly from the Guardian Ad Litem, Stanley Kempner via letter to both counsel on April 2, 2013. (CP 17). Mr. Kempner recommended a domestic violence evaluation instead of arbitrarily involving her in a year-long program. (CP 17). It should be noted that the domestic evaluation done by Herb Robinson was not provided to this court for review through the designation of clerks papers but was considered by the trial court.

A trial was held in regards to this matter on May 6, 2013, before the Honorable Salvatore F. Cozza. Mrs. Banik was represented at trial by Gordon Stoa. Mr. Reno was represented by Robert Cossey. (5/16/13 RP 4). Both parties presented exhibits in support of their respective cases. (CP 24, 25) The following witnesses testified: GAL Stanley Kempner, Christopher Reno, Heidi Banik, and Jody Banik. (5/16/2013 RP 3).

One of the listed exhibits was the GAL report articulating Mr. Kempner's recommendations. Specifically, in regard to domestic violence, he recommended Mrs. Banik simply partake in a domestic violence class. (CP at 14).

The GAL testified that Mrs. Banik had an extensive history of domestic violence stretching back to 2003 where she had been either the victim or the perpetrator. (5/16/13 RP 12-13). Mr. Kempner further testified that he was "disappointed" with the domestic violence evaluation done by Herb Robinson. (*Id* at 22). This was based primarily on Mr. Robinson allegedly not having a complete history of Mrs. Banik's criminal history at the time of the evaluation. (*Id* at 30).

Despite the evaluation, the GAL testified that Mrs. Banik was honest with him. (*Id* at 34). He further recommended that a one year domestic violence program was inappropriate. (*Id* at 43). He testified that a domestic violence evaluation may recommend a month of classes or none at all. (*Id* at 43). He testified he was reluctant to limit her parental time if she was simply accused of domestic violence in the future. (*Id* at 45). At the conclusion of his direct testimony, the Court specifically asked Mr. Kempner if he had a specific recommendation as to what domestic violence class was

appropriate in conjunction with his written GAL report. Mr. Kempner was not able to formulate a direct answer as Mrs. Banik fit into a unique category as both a victim and perpetrator of domestic violence. (*Id* at 46-47). The court was the first to recommend the YWCA as a provider for the domestic violence class. (*Id* at 47).

During cross examination, the concern of the cost of another domestic violence evaluation and follow-up treatment was addressed. (*Id* at 61). The GAL also echoed that he couldn't make a determination as to what course of domestic violence treatment Mrs. Banik should undergo. (*Id* at 61). Further, the GAL testified that Mrs. Banik's problems with the law stemmed from drug use. (*Id* at 62). Further testimony by the GAL brought up the fact that Mrs. Banik was attending faith-based counseling on a weekly basis. This gave the GAL a further sense of surety that things were going well for her. (*Id* at 79).

At the time of his direct testimony, Mr. Reno did not request the court to order a specific provider in regards to Mrs. Banik's domestic violence evaluation or potential follow up treatment. (*Id* at 84-112). However, Mr. Reno asked the court to disregard the recommendation of Herb Robinson. During cross examination, Mr. Reno testified that he did disclose to the domestic violence

evaluator Mrs. Banik's criminal history and other collateral information. (*Id* at 127.) Mr. Reno had no evidence that Mrs. Banik had been using any sort of drugs or been charged with any criminal activity in the preceeding (15) months prior to trial. (*Id* at 129).

Mrs. Banik did not deny her criminal past but testified she was a changed person. (*Id* at 135-136). She also testified that she attends weekly self-help groups. (*Id* at 139). She went on to elaborate that every single domestic violence incident stemmed from drug use. (*Id* at 153). Mrs. Banik asked the court to accept the recommendation of Herb Robinson. Specifically, that she did not need any follow up domestic violence treatment. (*Id* at 154) According to Mrs. Banik, it took her three days to fill out Mr. Robinson's questionnaire and she was candid regarding her criminal history. (*Id* at 156).

The Court ruled that Mrs. Banik was to undergo domestic a domestic violence evaluation with the YWCA. If the YWCA recommended follow-up treatment, then Mrs. Banik was required to undergo said treatment. (CP 30). "The reason is that we have a history, especially in juvenile family law cases, of dealing with them for a long time. It is a known product. They have professional people that the court has some degree of trust in." (CP 30, 31). The

Court further ordered RCW 26.09.191 restrictions based on domestic violence. (CP 72, 73). At the presentment on June 13, 2013 it was argued by Mr. Cossey that a different DV treatment provider should be ordered based on the fact that the YWCA did not do perpetrator treatment. (6/13/2013 RP 199-200). In response, Mr. Stoa argued that Mrs. Banik had already started domestic violence counseling services with the YWCA on May 8, 2013. Two days after trial concluded. She had also attended May 17 and June 12 domestic violence sessions with the sessions with the YWCA. After hearing exhaustive argument by both counsel on the issue of domestic violence treatment, the court maintained its ruling it had made at the conclusion of trial on May 6, 2013. The court opined, "I am reasonably satisfied that if she has done a program at the "Y", I think she has done enough to at least at this point to satisfy me that is enough to cover that issue." (*Id* at 206).

The court entered a final parenting plan on June 13, 2013. Pursuant to the final plan, the mother's residential time was restricted/limited based on RCW 26.09.191. (CP 56-57). Her residential time would increase to a relatively standard plan after she completed domestic violence treatment. This plan would include unsupervised overnight contacts. A provision of the final

parenting plan states, "If the mother violates any provisions of this parenting plan, (including but not limited to DV classes, violations of drug laws, criminal charges) the father shall have the right to file for a modification on the normal family law docket with ten (10) days' notice to the mother without the need for adequate cause." (CP 61). The mother's decision making was also limited and the father given sole decision making based on RCW 26.09.191. (CP 63)

Mr. Reno appeals the Trial Court's ruling. Specifically alleging the court erred in not "limiting" Mrs. Banik's residential time based on RCW 26.09.191 and that the court erred in requiring Mrs. Banik to undergo her domestic violence evaluation and treatment at the YWCA. This response follows.

III. ARGUMENT

A. The court did not err when it ordered Mrs. Banik to the YWCA for domestic violence treatment.

RCW 26.09.260 governs modifications of parenting plans or custody decrees. The basis for the modification in this case was Mr. Reno's concern over Mrs. Banik's historical use of drugs and involvement with domestic both as a victim and a perpetrator. Statute provides a parent's residential time with the child shall be limited if it is found that the parent has engaged in a history of acts

of domestic violence as defined in RCW 26.50.010(1). RCW 26.09.191(2)(a)(iii). RCW 26.09.191 also applies to the modification of a final parenting plan. *In re the Marriage of Watson*, 132 Wn. App. 222, 232, 130 P.3d 915 (2006). When the court finds a history of domestic violence, regardless of severity the restrictions are mandatory. *In re the Marriage of Caven*, 136 Wn. 2d 800, 966 P.2d 1247 (1998). However, the court may not impose limitations or restrictions in a parenting plan in the absence of express findings under RCW 26.09.191. In addition, any limitation or restriction imposed must be reasonable calculated to address the identified harm. *In re Marriage of Katare*, 125 Wn. App. 813, 826, 105 P.3d 44 (2004). More importantly, if the court is concerned about the harshness of the limitations required by RCW 26.09.191(2)(a) and their effect on the best interests of the child, in an appropriate case it may apply subsections 2(m) and 2(n) to temper the limitations. *In re the Marriage of Mansour*, 126 Wn. App. 1,10, 106 P.3d 768 (2004). RCW 26.09.191(2)(m) and 2(n) allow for relevant counseling or treatment.

The requirement for Mrs. Banik to partake in a domestic violence evaluation and follow up treatment with the YWCA was a limitation pursuant to RCW 26.09.191. This limitation came after

the trial court made express findings of domestic violence as required by *Katare*. The court considered argument by Mr. Cossey that the YWCA was not a provider appropriate to counsel perpetrators of domestic violence. The court also considered evidence provided by Mr. Cossey that the YMCA was not an accredited treatment provider for perpetrators of domestic violence. (CP 39-52). Despite this argument, the court precisely reasoned that, "It is not as if issues of domestic violence are always nice and neat and you can put them in a box labeled, "perpetrator" and "victim." It really is kind of a situation in which the issues can be on one side of the equation one day and the other side the other day." (6/13/13 RP 206). Ultimately, the court maintained its decision. This court's decision also seems appropriate when enabled with the decision in *Mansour*. As the court was pressed with the fact that the GAL had not made a recommendation for a year-long treatment program, Mrs. Banik had not had domestic violence issue in the (15) months preceding trial and Mrs. Banik at the time of the presentment hearing had already begun treatment at the YWCA.

B. The Court did not err when it allegedly failed to limit Mrs. Banik's residential time.

Mr. Reno's argument is quite perplexing. He argues correctly that a finding of domestic violence under RCW 26.09.191 requires a limitation or restraints on a parent's residential time. Then incorrectly concludes that Mrs. Banik's residential time was has not been limited by the trial court. In truth, Mrs. Banik's residential time was limited and in some respects restrained completely. A review of the final parenting plan seems most appropriate to address this issue.

The court ordered RCW 26.09.191 restrictions against Mrs. Banik. (CP 72-73). For the three months after trial Mrs. Banik only had (1) 4.5 hour visit per week with her child. (CP 73). She was required to complete a domestic violence evaluation and follow up treatment with the YWCA, and until such time she was restrained from overnight visitation. (CP 76). Conditions were placed on Mrs. Banik that she remain drug-free and that she not commit any criminal law violations. (CP 76). The trial court also ordered that "If the mother violates any provisions of this parenting plan including but not limited to DV classes, violations of drug laws, criminal charges, the father shall the right to file for a modification of the normal family law docket with ten (10) days' notice to the mother without the need for adequate cause." (CP 77). This in of itself is a

major restriction. It has been held that, "It is an abuse of discretion to order of modification without first finding adequate cause followed by a separate evidentiary hearing, as required under RCW 26.09.270. In re the *Marriage of Kinnan*, 131 Wn App. 738, 749-50, 129 P.3d 807 (2006). Lastly, Mrs. Banik's decision making was restrained and sole decision making was given to Mr. Reno based on the RCW 26.09.191 findings.

C. Mrs. Banik should be awarded reasonable attorney fees in having to respond to this appeal.

Pursuant to Rule RAP 18.1 and RCW 26.260.13 Mrs. Banik respectfully requests attorney fees for having to respond to this appeal.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mrs. Banik respectfully urges this court to deny Mr. Reno's request for appeal and affirm the trial court's ruling. In addition, Mrs. Banik requests reasonable attorney fees based on RAP 18.1 and RCW 26.09.260(13).

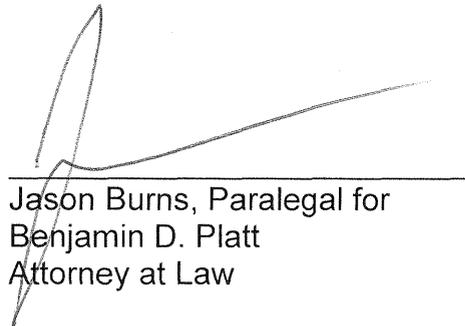
DATED this 3rd day of February, 2014.



Benjamin Platt, WSBA # 37616
Attorney for Respondent
1020 N. Washington St.
Spokane, WA 99201
(509) 326-6593

CERTIFICATE OF SERVICE

I certify that on February 3rd, 2014, I served a copy of the brief of respondent and verbatim report of proceedings by personal service on Christopher Reno, at 1020 N. Washington Spokane, Washington 99201 and by email, on Christopher Reno at Chrisreno@outlook.com.



Jason Burns, Paralegal for
Benjamin D. Platt
Attorney at Law