

FILED

JAN 13 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Appellate Court No. 332756-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

Division III

NANCY PIMENTEL,

Appellant

v.

DAVID MAULEN,

Respondent

BRIEF OF RESPONDENT

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II. TABLE OF AUTHORITIES

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III. SUMMARY OF ARGUMENT

David Maulen and Nancy Pimentel met in high school in the city of Los Angeles, California, in or around the year 2002. RP 58. While dating, the wife became pregnant with their daughter Eveny (age 11 at the time of trial) was born on March 26, 2003. RP 59. The parties' son David (age 10 at the time of trial) was born on February 11, 2005. RP 59.

The parties ended their relationship and separated in April 2006. RP 12. The husband had been on his first tour in Iraq, and when he returned and learned that his wife was pregnant with the child of another man, he returned to Texas where he was stationed, and she returned to Southern California to reside with her family. RP 148. After his first tour, and after they separated, the children resided with the father for approximately one year until he re-deployed to Iraq. RP 148. The children were with their mother for less than a year when the father returned and they resided with him again. RP 150. They continued this rotation until the end of 2013, when a dispute over the child tax credit led the mother to refuse to return them. RP 37. The father filed this petition in response to that action.

The father moved to Tacoma, Washington in 2007, and settled in Othello, Washington in 2012. RP 150. He has been in a relationship with Daisy Perez since 2008, and they have two additional children together: Adam (age 3 at the time of trial) and Dealany (age 2 at the time of trial). RP 27, 28. Daisy has another child from a previous relationship: Adrian (age 13 at the time of trial). RP 27. The father and his fiancé have purchased a home in

Othello, he works as a police officer for the Othello Police Department, and she works part-time as a CNA. RP 19, 38, 55.

Based on the evidence presented at trial, the court awarded primary placement of the children with their father in Othello.

IV. ARGUMENT

A. RESPONSE TO ISSUES #1-3

While the court is required to consider the factors of RCW 26.09.187(3), the court is under no obligation to make specific oral or written findings on each factor. The court wrote in *In re Marriage of Croley*, 91 Wn.2d 288, 588 P.2d 738 (1978):

The trial judge in the instant case heard evidence on each of the factors enumerated in [former] RCW 26.09.190. Most of the testimony at trial centered around the issue of child custody. Testimony regarding the statutory factors was offered by a staff member of the family court and a psychiatrist as authorized by RCW 26.09.220. Both the father and mother testified as did a woman friend of the father and a teacher of one of the children. The wishes of the parents and the children, the children's relationship to their parents, their school and their community, and the mental health of all the individuals involved were discussed thoroughly. In absence of evidence to the contrary, we assume the trial court discharged its duty and considered all evidence before it. Thus, the specific language of [former] RCW 26.09.190 . . . requiring the trial court to consider the

enumerated factors, clearly have been met.

(Citations omitted.) *Croley*, 91 Wn.2d at 291-92.

As in *Crowley*, evidence was specifically provided on all factors of RCW 26.09.187(3)(a). These factors were specifically reviewed by counsel for the petitioner in closing argument shortly before the court's oral decision was made.

The court is granted wide discretion in granting relief.

A trial court has wide discretion to set the terms of a parenting plan, and we will not reverse its decision unless we find that it abused its discretion. *In re Marriage of Littlefield*, 133 Wash.2d 39, 46, 940 P.2d 1362 (1997). An abuse of discretion occurs when a trial court's "decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *Id.* at 46-47, 940 P.2d 1362. "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard." *Id.* at 47, 940 P.2d 1362. A court's decision "is based on untenable grounds if the factual findings are unsupported by the record." *Id.* A court's decision "is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard."

In re Marriage of Chandola, 180 Wn.2d 632, 642, 327 P.3d 644 (2014) (emphasis added).

While the appellant cites in great detail the court's alleged failure to property documents its itemized basis for findings, the

appellant fails to give any sufficient argument why those conclusions are not the correct conclusions.

Had the mother or her attorney been confused about the basis of the decision at the time of trial, they could have requested an itemization of the statutory factors at that time. No request was made. There is no argument now that any of the factors weighed more heavily in favor of the mother; only that the court did not say why it weighed in favor of the father.

B. RESPONSE TO ISSUE #4

The superior court properly exercised its discretion to determine that it was appropriate to have the mother pay transportation costs for the visitation occurring on weekends should she chooses to exercise the visitation. Testimony provided that the mother had not come to Washington to visit the children when they were residing with the father previously, and the visitation under § 3.2 of the parenting plan was presumed to be a rare occurrence. The court stated in its oral ruling:

Now the geography gives me a problem. I can't see making him the primary custodial parent and giving her every other weekend because she's obviously not going to be here every other weekend. She shall have visitation during the last full week, the last full calendar week of every other month starting with the month of April from Sunday at 6:00 PM to Sunday at 6:00 PM. So that's the last full final Sunday to Sunday of every other month starting in April. Sunday at 6:00 PM/Sunday at 6:00 PM. Provided the children cannot be removed from the state during that time. Travel shall be at her expense and

she will notify petitioner in advance in writing at least ten days in advance of her intention to exercise that every other month visitation

There is no indication at all that, even if the costs are shared, the mother will make a weekly-visit to Washington to see the children.

The court wrote in *In re Marriage of Casey*, 88 Wn. App. 662, 667, 967 P.2d 982 (1997):

Although Division One recently held that the requirement to allocate long-distance travel costs proportionately is mandatory, *Murphy v. Miller*, 85 Wash.App. 345, 932 P.2d 722 (1997), *Murphy* was not a case in which the trial court had grounds for deviating from the allocation of the basic support obligation. RCW 26.19.080(4) expressly gives the trial court "discretion to determine the necessity for and the reasonableness of all amounts ordered in excess of the basic child support obligation." We hold that in a proper case, this language permits the court to depart from the usual practice of allocating special child rearing expenses, such as long-distance transportation costs, in the same proportion as the putative basic support. Where, as here, the court finds grounds to deviate from the basic obligation, it follows that the court can also allocate transportation costs differently. We find no abuse of discretion.

Considering the court's oral ruling and the fact that this provision of the parenting plan concerns only a portion that is expected to never be exercised, this issue on appeal should be denied.

C. RESPONSE TO REQUEST FOR FEES

There is no sufficient basis to award fees in this case. This request for fees should be denied.

V. CONCLUSION

The court should deny the mother's appeal for the reasons set forth above. The court considered all the evidence at trial and reached the correct decision. The children should not be moved back and forth between homes, but should maintain the stability that the trial court determined, after considering all the evidence, was abundant in the home of their father.

Respectfully submitted this 11th day of January, 2016.



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Attorney for Respondent

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COURT OF APPEALS, DIVISION THREE
IN AND FOR THE STATE OF WASHINGTON

In re the Marriage of:

NANCY PIMENTEL,
Appellant,
v.
DAVID MAULEN,
Respondent.

Appeal No. 332756-III
Certificate of Service

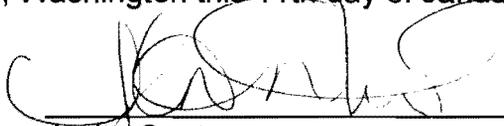
CERTIFICATE OF SERVICE

I, Jovita Cantu, certify that on the 11th day of January, 2016, I caused a true and correct copy of this **Brief of Respondent** to be served on the following via US Mail (First Class) on this date:

Robert Cossey
Attorney for Appellant
902 N. Monroe
Spokane, WA 99201

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

SIGNED at Moses Lake, Washington this 11th day of January, 2016.



Jovita Cantu