

FILED

AUG 01 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 337642

SPOKANE COUNTY CAUSE NO. 06-3-01264-8

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

JENNIFER ROETCISOENDER,
Appellant

v.

JASON GRAY,
Respondent

APPELLANT'S REBUTTAL BRIEF

Will Ferguson, WSBA 40978
Of Attorneys for Appellant
LIBEY & ENSLEY, PLLC

I. ARGUMENT

1. **Reunification was left to the sole discretion of a counselor and such a delegation is improper.**

The Superior Court failed to provide a residential schedule and should be reversed. “The plan **shall** include a residential schedule....” RCW 26.09.184(6) (emphasis added). Superior courts “...**shall** make residential provisions for each child....” RCW 26.09.187(3) (emphasis added). The Superior Court made **no** residential schedule provisions. The Superior Court made **no** reference to any judicial oversight.

Respondent cites Kirshenbaum v. Kirshenbaum, 84 Wn.App 798 (Div. I, 1997), claiming that Kirshenbaum was a case where the Court of Appeals upheld a wholesale delegation of authority, such that a third party may create a parenting plan post-trial. Respondent’s reading is in error. Kirshenbaum permits a court to delegate authority to an arbitrator to make “additions or alterations”, including temporary suspension of residential time, so long as there is some right to have the arbitrator’s decisions reviewed by the superior court. Id. at 800. Kirshenbaum involved the temporary suspensions of a parenting plan with a set “parental visitation schedule for each day of the year.” Id. at 801. The Kirshenbaum court found that temporary suspension of the mother’s residential time by the arbitrator fit within the meaning of “alterations.” Id. at 803.

The Parenting Plan Final Order in this case is silent on court supervision and the procedures to have the counselor's decisions reviewed. The dispute resolution provision of the Parenting Plan Final Order contains the wording "No dispute resolution has been ordered". CP 99. The remainder of the Parenting Plan Final Order is entirely silent as to whether there is any oversight, or how that oversight is to be exercised, by the Superior Court.

More importantly, there is a very clear and distinct difference between delegating authority to suspend an established parental visitation schedule and delegating the authority to create an entire residential schedule out of whole cloth and completely at the whim of a counselor.

What the Superior Court did in this case was the latter. The Superior Court abdicated entirely, leaving the counselor to craft whatever residential schedule she saw fit. The counselor, not the Superior Court, in this case can dictate who has holidays, where the child will reside during the school year, where the child will reside during the summer, even whether Mrs. Roetcisoender will get to see her daughter ever again.

2. The facts at trial do not support 191 factors.

The Superior Court imposed 191 factors on two grounds. First, the Superior Court found that Mrs. Roetcisoender had exposed the minor child

to relationships with a “domestic violence component”. CP 91, Paragraph 2.3. Second, the Superior Court found that Mrs. Roetcisoender or someone in her household had emotionally abused the minor child. CP 91, Paragraph 2.3.

In order to affirm the Superior Court’s imposition of 191 factors, this Court must be able to find substantial evidence presented at trial. In re Marriage of Watson, 132 Wash. App. 222, 233, 130 P.3d 915, 920 (2006). “Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” In re Marriage of Fahey, 164 Wash. App. 42, 55, 262 P.3d 128, 134-35 (2011).

The Superior Court found that “[the mother] had a series of relationships with a domestic violence component to them.” May 7, 2015--RP 627:16-18. Respondent argues that the domestic violence component was met. But there is no evidence the child was **exposed** to any relationships involving domestic violence. Respondent pointed to zero evidence of exposure and the Superior Court could articulate no facts supporting the conclusion of exposure.

Next, Respondent argues that the Superior Court had sufficient evidence to find that Mrs. Roetcisoender had emotionally abused the minor child. The evidence Respondent claims in support of the finding of

emotional abuse is thus:

1. The minor child suffered from anxiety relating to separation from her father and his girlfriend. Respondent's Brief at 13;
2. The minor child was engaging in unusual behavior and was exhibiting signs of severe anxiety. Respondent's Brief at 13;
3. The minor child made drawings of her fears. Respondent's Brief at 14;
4. The minor child continued to have fears about her mother and her mother's husband. Respondent's Brief at 14.

Nothing in the above-listed set of facts, either individually or in the aggregate, proves that the minor child suffered emotional abuse at the hands of Mrs. Roetcisoender. The two sources for the above-listed facts were Dr. Barry Bacon and Dr. Kimberly Chupurdia, neither of whom could offer testimony that Mrs. Roetcisoender, or anyone in her household, was emotionally abusive.¹

Respondent seeks to now tack on additional facts that the Superior Court did not consider. On May 3, 2016, Counsel for Respondent designated several Clerk's Papers that were either not exhibits at trial or

¹ Respondent continues to maintain that Dr. Chupurdia was appointed by the Superior Court. She was not appointed. At trial, the Parties argued this point at length and the Superior Court did not conclude that Dr. Chupurdia was a court-appointed expert. See RP page 33: lines 7-22; pgs. 26-39.

were exhibits but were never admitted. Respondent has used these improperly-designated Clerk's Papers in his brief. See Brief of Respondent at pgs. 11-14. Petitioner has filed a separate Motion to Strike. Respondent designated the following Clerk's Papers that were not considered by the Superior Court:

1. CP 103: February 18, 2014 letter from Donnett Neu, DCFS. CP 103 was filed by Respondent as a Sealed Healthcare Record. CP 103 was marked as Respondent's Exhibit No. 105. R-105 was neither offered nor admitted.
2. CP 104: February 14, 2014 letter from Chewelah Community Health Center re drawings of child. CP 104 was filed by Respondent as a Sealed Healthcare Record. CP 104 was neither offered nor admitted.
3. CP 182: August 11, 2014 Report of Dr. Chupurdia. CP 182 was filed by Respondent as a Sealed Healthcare Record. CP 189 was offered as Respondent's Exhibit No. 114. R-114 was offered but not admitted.
4. CP 209: January 15, 2015 report of Dr. Chupurdia. CP 209 was filed by Respondent as a Sealed Healthcare Record. CP 209 was offered as Respondent's Exhibit No. 115. RP at page 5. R-115 was offered but not admitted.

5. CP 224: January 22, 2015 medical record of Hailey Gray from Dr. Bacon. CP 224 was filed by Respondent as a Sealed Healthcare Record. CP 224 was neither offered nor admitted.
6. CP 227: February 9, 2015 medical record of Hailey Gray by Dr. Bacon. CP 227 was filed by Respondent as a Sealed Healthcare Record. CP 227 was neither offered nor admitted.

This Court should strike the above-listed Clerk's Papers as they did not provide the basis for the Superior Court's decision and thus cannot provide the basis for affirming or reversing the Superior Court. This Court should also not consider those portions of Respondent's Brief which relate to the above-listed Clerk's Papers.

The most important thing to keep in mind, however, is that the Superior Court did not find Mrs. Roetcisoender emotionally abused the minor child. Instead, the Superior Court's finding was that there was "something going on there." "Something going on there" is not substantial evidence and therefore cannot support imposition of 191 factors. Dr. Jameson C. Lontz, Ph.D., who testified at trial, found "no indication of any abuse and there was certainly no indication of any traumatic experience as defined by the DSM." April 21, 2015--RP 484:22-24. Even an investigation by Washington CPS concluded that there had not been physical abuse in Mrs. Roetcisoender's home. Exhibit P-1.

3. The facts and circumstances prior to the 2009 Final Parenting Plan should have been excluded.

RCW 26.09.260 “allows for a modification only if, based on **facts that have arisen since the prior decree or plan** or that were unknown to the court at the time of the prior decree or plan, a substantial change has occurred in the circumstances of the child or the nonmoving party **and** ... the modification is in the best interest of the child and is necessary to serve the best interests of the child.” In re Parentage of Schroeder, 106 Wash. App. 343, 350, 22 P.3d 1280, 1284 (2001) (citing RCW 26.09.260(1)) (internal citations omitted) (emphasis added).

Respondent fronts two arguments as to why the Superior Court could hear and consider facts predating the 2009 Final Parenting Plan. First, Respondent argues that the facts surrounding Mrs. Roetcisoender’s pre-2009 Final Parenting Plan were unknown to the court. Respondent’s Brief at 18. Second, Respondent argues that Timmons v. Timmons, 94 Wn.2d 594 (1980) permits the Superior Court to consider facts predating the 2009 Final Parenting Plan.

The facts and circumstances surrounding Mrs. Roetcisoender’s pre-2009 relationships, particularly with Mr. Combs, would have been within the knowledge of the court. Mr. Combs was referenced by name in the 2009 Final Parenting Plan. An argument that the court would not have known

about a person named in a parenting plan is clearly contrary to basic logic.

Timmons v. Timmons does not give a court unfettered discretion to accept and consider pre-parenting plan facts in a case where a court approved the restriction of contact between the minor child and a named individual. In Timmons, the Washington Supreme Court was asked to determine whether a trial court could review pre-decree facts in an uncontested dissolution. Timmons, 94 Wn.2d at 595. The Timmons court revealed two rationales for allowing the pre-decree evidence. One of the rationales for the rule in Timmons was that in an uncontested dissolution, all the superior court had before it was the agreement of the parties. Id. at 600. But in this case, the Superior Court had more than just the agreement of the Parties; it had a reference to a specific individual. Clearly, the court in 2009 had more facts than the court had in Timmons.

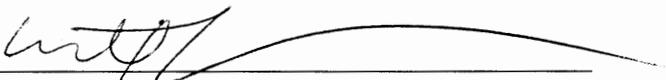
The second rationale revealed by the Timmons court was the best interests of the child. Id. at 599 (“We find an intent to moderate the harshness of res judicata, regardless of whether or not the decree was contested, due to the public interest in the welfare of the children.”). In other words, if the evidence offered related to the child’s best interests, whatever concerns courts have on limiting the scope of evidence is superseded by the larger goal of safeguarding children. But here, Respondent’s introduction of pre-2009 Final Parenting Plan facts was not

to aid the Superior Court in determining the best interests of the child. To the contrary, Respondent's sole intent was an attempt to discredit the testimony of Dr. Jameson Lontz. RP at 460-462. We know the facts were used solely for this purpose because there was no evidence that the minor child was the victim of domestic violence perpetrated by Ms. Roetcisoender's prior partners. The evidence could not rationally have been used for the purpose of meeting the burden of proving any 191 factors. Even if this Court applies Timmons to affirm the Superior Court's acceptance of pre-2009 Final Parenting Plan facts, the Superior Court should have limited the facts for the sole purpose for which they were offered: an attempt at discrediting an expert witness.

II. CONCLUSION

For the reasons stated herein, the Superior Court's 2015 Parenting Plan and Order re Modification of Parenting Plan should be reversed.

DATED this 24th day of July, 2016.



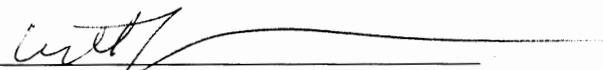
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CERTIFICATE OF SERVICE

I, WILL FERGUSON, do declare that I caused to be served a copy of the foregoing Appellant's Rebuttal Brief to the following party via U.S. Mail (in duplicate), to:

Matthew Dudley
Attorney for Respondent
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Spokane, WA 99201

Dated this 29th day of July, 2016.



WILL FERGUSON