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Nos. 353311 and 354032

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

Robert W. Parrish, Jr, Respondent,

v.

Alaxandria M. Von Hell , Appellant.

REPLY BRIEF

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I. REPLY TO COUNTER-STATEMENT OF THE CASE

Mr. Parrish implies that the Superior Court, in including the condition about the psychological evaluation in the parenting plan, merely “followed Ms. Von Hell’s suggestion” of including that language in the plan. Brief of Respondent, p. 4.

The record indicates that the Court in its oral ruling imposed that condition, the comments by Ms. Von Hell’s counsel related to how to handle that ruling in terms of where in the documents it belonged.

In a “Memorandum of Law Regarding Proposed Finals,” counsel for Ms. Hell clearly was arguing against entry of any new parenting plan: “The court is required, by statute to keep the existing parenting plan in place.” CP 34, lines 17-18. Yet this is the same document by which Respondent claims Appellant suggested the psychological exam be imposed upon herself.

Respondent improperly states that counsel for Ms. Von Hell was referring to the “contingent nature of the parenting plan,” Brief of Respondent p. 4, in said discussion when clearly the writing opposed entry of a new parenting plan at all. It refers to the court’s “initial ruling wherein it declined to change the parenting plan.” CP 35, lines 5-6. The argument was that there should be no new parenting plan, only

findings of fact and conclusions of law and an Order on Modification. CP 35, lines 9-10.

There is no showing that Ms. Von Hell's counsel did anything other than reference the Judge's oral ruling made August 4th, 2016, in which he ruled that Ms. Von Hell undergo a "psychological evaluation" and that "[t]he maintenance of the existing plan is contingent upon this." CP 493, lines 3-10. Arguing about in what final document such a ruling belongs is hardly a suggestion by Ms. Von Hell's counsel to impose the condition, let alone a suggestion that it be put in the parenting plan when she vehemently argued against entry of any new plan.

Respondent next states that Appellant conceded the Mabee evaluation was merely a "psychological evaluation" as opposed to a "forensic evaluation." Brief of Respondent, p. 5. This implies that Ms. Von Hell conceded a failure to comply.

In fact, her counsel maintained the condition was met. She pointed out that it was Mr. Parrish and his counsel who made the selection of Dr. Mabee as the evaluator, and made first contact with Dr. Mabee and asked if he could do the type of evaluation needed. The GAL joined in wanting Dr. Mabee to be the evaluator. RP

4/11/17, p. 11, lines 6-21. Any failure of Ms. Ellerd, trial counsel for Mr. Parrish, to understand the difference in explaining to Dr. Mabee why he was being retained should not be imposed upon Ms. Von Hell.

Ms. Von Hell's counsel at no time said it was merely a psychological evaluation as opposed to a "forensic evaluation" but rather stated: "Dr. Mabee was aware of what type of evaluation he was supposed to be doing. He conducted an evaluation." RP 4/11/17, p. 11, lines 15-21.

Mr. Parrish informs this Court that on May 19th, 2017, he filed an Amended Petition for Modification. Brief of Respondent, p. 7, citing CP 215. Respondent forgets to mention that said Amended Petition was stricken by the Superior Court. CP 376.

II. REPLY TO RESPONDENT'S ARGUMENT (Nos. 353311 and 354032)

Appellant, in cases No. 353311 and 354032, raised seven assignments of error and seven corresponding issues. Respondent has lumped his argument on the first six issues into a single argument in part A of his brief, entitled "The trial court had authority to modify the parenting plan."

Mr. Parrish begins with the proposition that Ms. Von Hell has not assigned error to findings of fact and therefore said findings are verities. He does not identify which findings of fact or “verities” would assist him.

Ms. Von Hell has not assigned error to findings of fact as a parenting plan entered in December of 2016 was vacated as a final order by the Superior Court, CP 375, making it a temporary plan, and a non-existent petition for modification was then set for trial to begin in September of 2017. *Id.* Thus the procedure at the time of the filings of the appeals herein did not include any final findings of fact to which to assign error.

To the extent the findings leading to the December of 2016 parenting plan are material, Appellant does not challenge the findings indicating she had no problems that would constitute findings required by RCW 26.09.191 to support limitations. CP 62.

As to the validity of the requirement of a psychological evaluation, Respondent first argues that “[t]here was no such RCW 26.09.191 limitation, but rather a condition” Brief of Respondent, p. 15.

Respondent does not provide any authority for imposition of a “condition” in a parenting plan as a result of a petition for modification

proceeding in which it was found that there were no grounds for modification. Which may only prove Appellant's point. If the requirement is not provided for by RCW 26.09.191 then there is no basis to use it as grounds for adequate cause for non-compliance.

Respondent does cite *In re Marriage of Chandola*, 180 Wn.2d 632, 327 P.3d 644 (2014), but language from that case supports that a "condition" that does not actually limit residential time, but puts a condition on it must survive the same test as an actual "limitation." "A restriction imposed under RCW 26.09.191(3) might be relatively minor--for instance, as here, a parent might be required to attend parenting classes" *Chandola*, 180 Wn.2d at 646. Such a condition could certainly exist without a present limitation on a parent's residential time, so that language supports that there is no meaningful distinction between a "limitation" and a "condition."

The condition is arguably a "preclusion" from further exercise of time if violated.

RCW 26.09.191(3) bars the trial court from "preclud[ing] or limit[ing] 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

Respondent, at p. 15 of his brief, states “the court fashioned a condition under RCW 26.09.191(3)(g)” which allows it to preclude or limit any provisions of the parenting plan in light of “[s]uch other factors or conduct as the court expressly finds adverse to the best interests of the child.”

RCW 26.09.191(3)(g) a “catchall” provision. *Chandola*, 180 Wn.2d at 646. “But RCW 26.09.191(3)(g) does require a particularized finding of a specific level of harm before restrictions may be imposed.” *Id.*

When a statute employs such a general catchall term in conjunction with specific terms, the general term is "deemed only to incorporate those things similar in nature or 'comparable to' the specific terms." *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 151, 3 P.3d 741 (2000) (quoting *John H. Sellen Constr. Co. v. Dep't of Revenue*, 87 Wn.2d 878, 883-84, 558 P.2d 1342 (1976)). In RCW 26.09.191(3), all of the factors specifically listed concern either the lack of any meaningful parent-child relationship whatsoever or conduct by the parent that seriously endangers the child's physical or emotional well-being:

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:

(a) A parent's neglect or substantial nonperformance of parenting functions;

- (b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;
- (c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;
- (d) The absence or substantial impairment of emotional ties between the parent and the child;
- (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.

Consistent with the nature of these specific terms, trial courts typically invoke the catchall provision in RCW 26.09.191(3)(g) only after identifying a specific, and fairly severe, harm to the child.

Chandola, 180 Wn.2d at 646-48.

...RCW 26.09.191(3)(g) must be read in light of chapter 26.09 RCW's statement of policy, codified at RCW 26.09.002. It provides that " the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm." RCW 26.09.002 (emphasis added).

Chandola, 180 Wn.2d at 648.

we conclude that the legislature intended RCW 26.09.191(3) restrictions to apply only where necessary to "protect the child from physical, mental, or emotional harm," RCW 26.09.002, similar in severity to the harms posed by the "factors" specifically listed in RCW 26.09.191(3)(a)-(f). A trial court abuses its discretion if it imposes a restriction that is not reasonably calculated to prevent such a harm.

Chandola, 180 Wn.2d at 648

Whether a "limitation" or a "condition," the real issue is whether such a provision, imposed following findings of no parenting problems supporting modification, can later support automatic adequate cause for modification upon its supposed violation. Here the Court found adequate cause for a second or continued proceeding when there is no showing of how a supposed failure to comply with the evaluation meets any of the criteria in parts (a)-(g) of RCW 26.09.191(3).

If a condition is imposed without identifying a "fairly severe" harm to the child it is designed to prevent, then it follows that using a failure to comply with such a condition as "adequate" cause to modify a parenting plan is an abuse of discretion.

There was no severe risk of harm identified and Respondent's feeble argument in this regard actually concedes the point as a

practical matter when they cite to the language from the Superior Court describing the requirement of the evaluation as “affirmative conduct by the Respondent to address concerns how Respondent’s [potential] mental health issues affect the best interests of the child for whom she has primary custody.” Brief of Respondent, p. 15, citing to CP 41, which is the Order on Final Documents entered October 17th, 2106. (Respondent left the word “potential” out as quoted in his brief, it is inserted here in brackets, as in the original of the order.)

Inquiring into “potential” mental health issues is not the same as a finding of “fairly severe” harm to the child. Call it bootstrapping or what have you, it does not fall into a recognized factor contained in RCW 26.09.191(3).

Respondent is highly inaccurate in then arguing that Ms. Von Hell “did not object to the condition.” Brief of Respondent, p. 27. This is absurd. The trial judge ordered it following trial, there was no chance to “object” to it. As pointed out in the reply on the facts, Ms. Von Hell’s counsel with crystal clarity took the position as to presentation of final documents that there should be no new parenting plan, and the evaluation ordered by the judge should be addressed in an order, not a parenting plan. That is in no way, shape or form an agreement by

Ms. Von Hell that she should be subjected to an evaluation. All attorneys face rulings that do not favor their client, that does not mean that when they point out where in the documents such adverse rulings belong, they have agreed to an erroneous condition or that it can be a basis for adequate cause in the future; that was the judge's idea. Any time there is a presentment, counsel "losing" on an issue is not free to ignore the Court's ruling and surely would take part in drafting of final documents or objecting thereto. To suggest that acknowledging the court's ruling in discussing entry of final documents is tantamount to those orders being at the "suggestion" of the party who was on the losing end of the ruling finds no support in the law.

What Ms. Von Hell's counsel stated orally about her understanding at a hearing before entry of final documents, but after the judge oral rulings following trial was:

So we have the existing parenting plan from Alaska that remains intact. The Court put the caveat that the Court can readdress it, and there is adequate cause if Miss Von Hell doesn't follow through with the services in the order and we're working on to address this issue (sic).

Transcript of 9/29/16 hearing, CP 284.

Clearly Ms. Von Hell's counsel was discussing how the trial judge's ruling for the condition would work, not inviting it. The dilemma was created by the trial judge imposing a condition, with no grounds to do so, that had to be met and reviewed at a point in the future.

The "invited error" doctrine therefore has no place here.

Respondent next claims that since Ms. Von Hell did not appeal the December 13, 2016 parenting plan she "cannot seek review of it now." Respondent again fails to discuss that on June 9th, 2017, the trial court, following a motion by Mr. Parrish to vacate the parenting plan, CP 303-05, ordered that the parenting plan was "temporary," which vacated it as a final plan. CP 375. Respondent advances no argument as to what authority the trial court had to make the final parenting plan entered six months prior "temporary" instead of vacating it. The trial court acted in response to a motion to vacate.

Pursuant to RAP 2.2 (a) (10), vacation of a judgment is an appealable decision. To the extent the trial court effectively ordered a new trial, upon the same petition for modification, that is appealable under RAP 2.2 (a) (9).

Clearly Respondent argues that the December 13th, 2016 parenting plan was temporary in nature. Therefore Ms. Von Hell did not fail to appeal it and all issues were preserved for Ms. Von Hell's appeal in No. 35590.

But the temporary nature of the December 13th, 2016 parenting plan still leave a very real problem for Mr. Parrish. "Watson further argues that the court had no authority to modify the parenting plan through temporary orders after it determined that Boling's petition should be denied for failure of proof. We agree." *In re Marriage of Watson*, 132 Wn. App. 222, 235, 130 P.3d 915 (2006). How can violation of a temporary order that is part of a modification proceeding be substituted for grounds for the petition?

Respondent next contends that because Mr. Parrish filed an amended petition for modification "[e]rror, if any, was thus cured." Brief of Respondent, p. 19. Said amended petition was stricken. CP 376.

The Respondent contends there was no violation of RAP 7.2 (e) by the entry of the June 9th, 2017 order. Ms. Von Hell had filed a Notice of Appeal on June 1st, 2017. CP 246-301. The June 9th, 2017 order did change what was under review, because instead of merely

preceding with a new modification, the trial court, in an attempt to thwart the merits of that review, changed the nature of the proceeding by making the December 13, 2016 parenting plan temporary, effectively ordering a new trial. To the extent it is unclear just what the trial court was doing, in response to a motion to vacate, in making the parenting plan temporary, striking an amended petition to modify and setting a new trial date, that is not Ms. Von Hell's fault.

III. CONCLUSION

The Court should reverse the trial court's orders below and reinstate the original parenting plan from the State of Alaska.

Respectfully submitted,

Dated August 27th, 2018

s/William Edelblute

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