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Harrington Law Office, PLLC
1517 W. Broadway Ave.
509-838-8300
www.SpokaneDivorceLaw.com

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JAN 10 2019
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS DIVISION III OF THE STATE OF
WASHINGTON

MICHAEL BRANNING

Respondent,

No. 357350

and

LAURA BRANNING

Appellant..

Appellant's Brief

MATTHEW J. DUDLEY
ATTORNEY FOR PETITIONER
WSBA #24088
104 S. Freya, Ste 120A
White Flag Building
Spokane, WA 99202
509-534-9180

ORIGINAL

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Whether the Court engaged in an abuse of discretion in ordering a shared parenting plan upon the facts of the case

Whether in determining a parenting plan, the Court adequately considered the mother had been the primary care provider for the children throughout their lives.

The issues for this Court to decide are whether the Honorable Judge Tony Hazel of the Spokane County Superior Court erred in his ordering a shared parenting plan for the children of the Branning marriage or whether he engaged in an abuse of discretion.

Statement of Facts

Michael and Laura Branning married on September 9, 2009 and separated in the summer of 2016. (RP 19, 16-19)

At the time of the trial, the parties had three minor children, Hunter, Logan and Clara, then ages 9, 7 and 2.(RP 9-12)

Mr. Branning was employed at Coca Cola and Ms. Branning worked as a real estate agent. Mr. Branning had been with Coca Cola for 20 years. (RP 20, 3-4)

In 2016, Mr. Branning had \$66,540.09 in social security wages (RP 22, 8)

During proceedings Mr. Branning, based on his and his counsel's review of tax returns, offered Ms. Branning's income at \$3,444.00 (RP 87, 1-5.)

For 2017, Mr. Branning was earning \$71,500.00 (RP 23) however he actually had documented earnings of \$76,221. (RP 99, 17-19)

Only at the time of the trial had Mr. Branning voluntarily taken a position paying him less. (RP 100, 7-12)

The parties first child, Hunter, was born October 8, 2007. (RP 119)

Ms. Branning took three months off to stay home with Hunter and Mr. Branning took one week. (RP 120)

Mr. Branning was working and away from Ms. Branning and Hunter from 7:00 am to 5:00-5:30 pm. (RP 4-16)

During this period, Mr. Branning attended between 75 and 85 percent of medical appointments for Hunter while Ms. Branning attended 100%. (RP 15-18)

On December 26, 2007, Ms. Branning resumed employment. (RP 122)

Mr. Branning continued to leave for work at 7:00 am.

The day care for Hunter was near Ms. Branning's employment and she was responsible for delivering Hunter to day care and would check in on Hunter during lunch. (RP 123, 126)

Ms. Branning was the parent primarily responsible for picking up Hunter from day care and taking him home. (RP 126)

Ms. Branning nursed Hunter for the first year of his life. (RP 127)

From December 26, 2007 to October 2008, Mr. Branning was working full time for Coca Cola Monday through Friday, leaving at 7:00 am to 5:00-5:30 pm. (RP 122-123)

Ms. Branning was working four days a week, Monday through Thursday. (RP 124) Ms. Branning had Hunter on Fridays and stayed home with Hunter and Mr. Branning worked on Fridays. (RP 125)

From October 2008 to May, 2010, Mr. Branning continued to work Monday through Friday, leaving the home at 7:00 am and returning 5:00-5:30 pm. (RP 127)

Mr. Branning was unable to recall who the day care provider was during this period (RP 128) and acknowledged when prompted it was Ms. Branning who secured the day care provider. RP 128.

On May 11, 2010, Logan was born (RP 130) and Ms. Branning took three months off again. (RP 130).

Ms. Branning was home with the children from May 11, 2010 to the middle of August, 2010 (RP 13).

Mr. Branning continued to work 7:00 am to 5:00-5:30 pm outside of the home. (RP 131, 9-17).

After three months, Ms. Branning worked four days a week and Mr. Branning continued to work five days a week. (RP 131)

From November 2010 to June, 2011, Mr. Branning was employed full time outside the home, 7:00 am to 5:00-5:30 pm and Ms. Branning was home with the children, no longer employed. (RP 133)

Ms. Branning was the parent providing for the children and no day care was used. RP 133.

From June, 2011 to September 2014, Mr. Branning continued to work outside the home 7:00 am to 5:00-5:30 pm Monday through Friday(RP 136) . and Ms. Branning started a real estate career. RP 134-135

Ms. Branning was working from home. RP 135 (4-13)

From June 2011 to September, 2014, Monday through Friday, the children were home with Ms. Branning and not attending day care. (RP 14-22)

In September, 2011, Hunter started pre-school attending Monday and Tuesday, 10:00 am to noon RP 137, 16-17. Ms. Branning was

responsible for the drop off and pick up. RP 138. If Hunter was sick, Ms. Branning was the parent who cared for him. RP 139

During the summer of 2012, Ms. Branning was home with both children during the day while Mr. Branning was employed and outside the home, Monday through Friday, 7:00 am to 5:00-5:30 pm. RP 138. Ms. Branning was the parent doing the day to day care of the children. RP 138 20-25

In the fall of 2012, Hunter resumed a second year of preschool attending three days a week this time. RP 139.

Mr. Branning continued to work full time Monday through Friday, 7:00 am to 5:00-5:30 pm. RP 139. Pre-school started at 10:00 am and it was Ms. Branning who was taking and picking up Hunter from pre-school and the one caring for Hunter when he was sick and unable to attend pre-school. RP 140.

In the summer of 2013, Ms. Branning is home with the children and Mr. Branning is working full time Monday through Friday, 7:00 am to 5:00 -5:30 pm.

In September 2013, Hunter started kindergarten which started at 9:00 am and Ms. Branning was responsible for getting Hunter to kindergarten. (RP 140, 17-25 and RP 1-9). Ms. Branning was also

responsible for picking up Hunter from kindergarten between 3:00, 3:15.

RP 20-24.

Ms. Branning was home taking care of Logan during the day Monday through Friday while Mr. Branning was at work. (RP 142, 9-16)

During the summer of 2014, Mr. Branning worked full time Monday through Friday, 7:00 am to 5:30 pm and Ms. Branning was home taking care of the children. RP 142, 17-22, RP 143 1-9.

On September 12, 2014, Clara is born. RP 143, 10-14.

From September 12, 2014 to September 2015, Mr. Branning continued to work Monday through Friday, 7:00 am to 5:00-5:30 pm. RP 143, 14-18.

From September 12, 2014 to September 2015, Ms. Branning was home with the children. RP 143, 21-22.

Ms. Branning was responsible for dropping off Hunter at school for 1st grade and Logan to his pre-school on the days he attended. RP 144.

From September 2014 to September 2015, Ms. Branning was home taking care of Clara, RP 145, 16-25.

During the 2015-2016 school year. Ms. Branning was responsible for dropping off Hunter to school for 2nd grade. RP 149, 8-10. Ms. Branning is picking up Hunter from school. RP 150, 5-10.

Ms. Branning would deliver Logan to school (Kindergarten) and picking him up. RP 150.

Mr. Branning continued to leave the home at 7:00 am and not get home until 5:00-5:30 pm.

Clara continued to be home with Ms. Branning and cared for by Ms. Branning. RP 151, 13-24.

During the temporary orders, Ms. Branning would have the children during Mr. Branning's time when he was at work and unavailable to care for the children. RP 154-155.

During the temporary orders, on Tuesdays, Clara, who was supposed to be with her father, was being cared for by her mother. RP 156. The end result was Laura Branning was providing more care for Clara than Mr. Branning during Mr. Branning's scheduled time. RP 156, 7-11.

Under the temporary orders, during the summer of 2017, during Mr. Branning's time, he delivered the children to Laura Branning who cared for the children during the entire day. RP 159 3-15.

There were numerous other times Mr. Branning delivered the children to Ms. Branning during his scheduled time. RP 163-166.

Legal Argument

An appellate Court will review a trial court's final parenting plan for an abuse of discretion. In re Marriage of Cabalquinto, 100 Wn.2d 325, 327, 669 P.2d 886 (1983).

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In re Marriage of Littlefield, 133 Wn.2d 39, 46–47, 940 P.2d 136 (1997).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it 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. State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995) (citing WASHINGTON STATE BAR ASS'N, WASHINGTON APPELLATE PRACTICE DESKBOOK § 18.5 (2d ed. 1993)), review denied, 129 Wn.2d 1003 (1996).

Judge Hazel engaged in an abuse of discretion in applying RCW 26.09.187. The fact of the matter is Judge Hazel failed to even address the statutory factors in his ruling. His ruling was more musings. In fact,

the Court will strain to even locate the word “finding” in the ruling of Judge Hazel other than regarding income. RP 389. Nowhere is there a discussion regarding conclusions of law.

Judge Hazel was required to go through the statutory factors when making his ruling but the record will show a complete absence of such.

The factors he is required to examine are:

(3) RESIDENTIAL PROVISIONS.

(a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors:

(i) The relative strength, nature, and stability of the child's relationship with each parent;

(ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;

(iii) Each parent's past and potential for future performance of parenting functions as defined in *RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;

(iv) The emotional needs and developmental level of the child;

(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Factor (i) shall be given the greatest weight.

(b) Where the limitations of RCW 26.09.191 are not dispositive, the court may order that a child frequently alternate his or her residence

between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child. In determining whether such an arrangement is in the best interests of the child, the court may consider the parties geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions.

Judge Hazel did not even discuss the factor that is to be given the greatest weight, the relative strength, nature and stability of the children's relationship with each parent. The testimony supported the finding that the relative strength, nature and stability of the children's relationship with Ms. Branning was substantially superior to that of Mr. Branning.

Judge Hazel did not apply factor 2, agreement of the parties, despite the agreement that Ms. Branning would reorient her career and stay home and work from home so as to avoid day care for the children.

Judge Hazel failed to apply factor iv and address the emotional needs and development level of the children and just ordered a week on week off schedule.

Judge Hazel did not properly apply the employment schedule factor as Mr. Branning's documented schedule was Monday through Friday, 7:00 am to 5:00-5:30 pm and the Court simply accepted the claim on the day of trial that Mr. Branning could now work from home.

While I have discussed some of the factors Judge Hazel failed to apply his ruling did not address any of the statutory factors.

The failure is an abuse of discretion.

Judge Hazel acknowledged a lack of background in family law and having been a prosecuting attorney before being appointed to the bench. RP 386. He also acknowledged it was his first dissolution of marriage trial. He claimed that he his ruling peer reviewed. Whom that peer was is unknown.

Judge Hazel expressed his opinion that there are two schools of thought regarding parenting plans. RP 390.

Judge Hazel discussed his ruling was in part based on what was happening under the temporary order, but he is barred from considering temporary orders when ordering a final parenting plan. Marriage of Kovacs, 121 Wn. 2d 795, 854 P. 2d, 629, 1993.

Ms. Branning has always been the primary caregiver to the children and there was no history of shared caregiving.

Ms. Branning was the parent who was responsible for investigating and selecting day care providers. Ms. Branning was the parent who was

responsible for dropping off and picking up the children from day care.

Ms. Branning was the responsible for selecting the health care providers for the children. Ms. Branning was the parenting primarily responsible for making and taking the children to their medical appointments.

Ms. Branning was the parent responsible for delivering and picking up the children who attended pre-school, kindergarten and school.

Ms. Branning was the parent who stayed home and provided the care of the children when they were sick.

Ms. Branning was the parent whose employment allowed her to work from home and occasionally have to go show a house. RP 335

Mr. Branning simply announcing on the day of trial that he has changed his work schedule cannot be allowed to somehow create a claim for shared parenting. RP 156

Conclusion

Judge Hazel engaged in manifest abuse of discretion in ordering a shared parenting plan and failing to even apply the statutory factors nor issuing findings of fact-conclusions of law. The Court should reverse the

trial court's ruling.

January 9, 2019

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matthew Dudley", written over a horizontal line.

Matthew Dudley, #24088
104 S. Freya, Ste 120A
White Flag Building
Spokane, WA 99202
509-5349180