

Appellate Case No. 357350

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

In re:

Laura Branning, Appellant,

v.

Michael Branning, Respondent.

FILED

JAN 25 2019

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

BRIEF OF RESPONDENT

Spencer W. Harrington, WSBA # 35907
Attorney for Respondent

Harrington Law Office, PLLC
1517 W. Broadway Avenue
Spokane, WA 99201
(509) 838-8300

Table of Authorities

Cases

Bering v. Share, 106 Wash.2d 212, 220, 721 P.2d 918 (1986) 6

In re Interest of JF., 109 Wn. App. 718, 722, 37 P.3d 1227 (2001) 7

In re Marriage of Combs, 105 Wn. App. 168, 19 P.3d 469, 10

In re Marriage of Greene, 97 Wash. App. 708, 714, 986 P.2d 144 (1999). 7

In re Marriage of Griffin, 114 Wash.2d 772, 776, 791 P.2d 519 (1990).... 6

In re Marriage of Kovacs, 121 Wn.2d 795, 809, 854 P.2d 629 (1993) 10

In re Marriage of Littlefield, 133 Wash.2d 39, 46-47, 940 P.2d 1362
(1997)..... 6

In re Marriage of Skarbek, 100 Wash.App. 444, 447, 997 P.2d 447 (2000)
..... 6

In re Parentage of J.H., 112 Wn. App. 486, 49 P.3d 154 (2002) 9

In re Parentage of Schroeder, 106 Wn. App. 343, 349, 22 P.3d 1280
(2001)..... 9

Statutes

26.09.187..... 12

RCW 26.09.002, 9

RCW 26.09.187 10, 12

I. Introduction

The sole issue on appeal is whether or not the trial court erred, and abused its discretion, when it ordered a substantially shared parenting plan between Mr. Branning and Ms. Branning for their three children.

The trial court found that both parents were involved, loving, healthy parents to their children. RP at 387: 6-8. The trial court found that both parents engaged in unusual employment situations that allowed them both flexible job schedules that permitted more time to be spent with the children throughout the workweek. RP 390: 22-25. The court also found that it would serve the children's best interest to implement a substantially shared parenting plan. RP at 391: 3-6. Since the entry of the final parenting plan, in October 2017, no issues have arisen that have caused the parties to return to court.

The final parenting plan has served the best interests of the children and was based on substantial evidence before the trial court. Furthermore, the parenting plan ordered by the court was well within the reasonable options available to the court. Accordingly, there is no basis to find any abuse of discretion. The court, having no basis upon which to find any abuse of discretion, must deny the appeal.

II. Statement of the Case

The court commissioner ruled as to the parenting plan for the parties on August 5, 2016. The parties began following the schedule dictated by the court at that time. This schedule placed the children with the mother for 8 of each 14 days and with their father for 6 of every 14 days.

For reasons unexplained in the record, the court did not enter an actual temporary parenting plan for the parties' three children until April 14, 2017. CP 19-24. The parenting plan ordered by the court caused the children to be exchanged multiples times per week. CP 21.

Neither party made any attempt to appeal or revise the decision of the court commissioner between August 2016 and trial in October 2017. The parties followed the parenting plan between August 2016 and trial in October 2017. No motions to change the temporary parenting plan were filed by either party during this period (15 months).

The Final Parenting Plan ordered by Judge Hazel is substantially similar to the historical parenting time of each parent and the temporary parenting plan. CP 19-24, 32-37. The primary difference between the temporary and final parenting plan is that each party has larger blocks of time and there are fewer exchanges of the children under the Final

Parenting Plan ordered by the court. Id. The Final Parenting Plan places the children with the father approximately 6.7 of 14 days and with the mother 7.3 of 14 days. CP 33-34. This is substantially similar to the temporary parenting plan wherein the father exercised residential time 6 of 14 days and the mother 8 of 14 days.

The final parenting plan is also consistent with the prior parenting history of the parties and takes into account all pertinent statutory factors and is in the best interest of the children.

In essence the only claim made by Ms. Branning is that the court abused its discretion. Appellant's Brief, page 8. The sole claim is that the trial Judge was "...required to go through the statutory factors when making his ruling..." Appellant's Brief, page 9.

The court's oral ruling evidences thoughtful deliberation on every factor. The court did consider each parent's relationship with the children and found that both parents were good parents. CP 387, lines 6-8, and CP 393, line 21-24. The agreement of the parties was that they would both parent their children together as they did during the marriage and pursuant to the temporary orders. CP 392, lines 4-8.

The court considered past parenting and future parenting potential. CP 390, lines 21-25. CP 392, lines 4-8. The court considered the emotional needs of the child and even included an evening visit with Ms.

Branning due to Clair's young age. CP 391, lines 12-15. The court even kept the children together on the weekday visit for the youngest child. CP 391, lines 20-21.

The court also considered testimony regarding the important relationship the children have with their paternal grandmother. CP 47, lines 21-24. CP 48, lines 14-15. The court considered the wishes of both parents, but found Mr. Branning's proposal consistent with the best interest of the children. CP 391, lines 1-4. CP 393-394, lines 25-4. The court specifically considered the extensive testimony on employment schedules. CP 390, lines 21-25. CP 392, lines 8-12.

III. Argument

The party challenging a trial court's decision, [here Ms. Branning], has the burden of demonstrating that the trial court manifestly abused its discretion. In re Marriage of Griffin, 114 Wash.2d 772, 776, 791 P.2d 519 (1990). "Here, there is no evidence the court abused its discretion. 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 Wash.2d 39, 46-47, 940 P.2d 1362 (1997). The court in this case applied the statute and case law to the facts before it and arrived at a reasonable decision.

The appellate court is charged with the duty to review the trial court's findings of fact for substantial evidence. In re Marriage of Skarbek, 100 Wash.App. 444, 447, 997 P.2d 447 (2000). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." Bering v. Share, 106 Wash.2d 212, 220, 721 P.2d 918 (1986). Where the trial court has weighed the evidence, the reviewing court's role is simply to determine whether substantial evidence supports the findings of fact and, if so, whether the findings in turn support the trial court's conclusions of law. In re Marriage of Greene, 97 Wash. App. 708, 714,

986 P.2d 144 (1999). An appellate court should “not substitute [its] judgment for the trial court’s, weigh the evidence, or adjudge witness credibility.” Here, the trial court decision is based on the substantial evidence before it and the court did not abuse its discretion. This court should deny the appeal in its entirety.

On review, unchallenged findings of fact are considered verities. In re Interest of JF., 109 Wn. App. 718, 722, 37 P.3d 1227 (2001). Here, the trial court made the following unchallenged findings as found in the courts Oral Ruling:

- i. *I don't doubt that you both are involved, loving, healthy parents for these kids. CP 387, lines 6-8.*
- ii. *...in this particular case I had to look at it on the specific facts before the Court. And the facts before the Court were that both of you are in unusual employment situations where you both have flexible jobs and more time can be spent with children throughout the workweek. CP 390, lines 21-25.*
- iii. *I do think that it's in the best of interest of your children to adopt the proposed parenting plan by Mr. Branning. I think you can do a half-time split and have your children's best interests served. CP 391, lines 1-4.*

- iv. *I think you are both in a unique position to make that work.*
CP 391, lines 5-6.
- v. *...this is similar to what has been happening under the temporary order but there has been confusion with that order and both parties indicated it was workable and it was causing confusion with the kids.* CP 392, lines 4-8.
- vi. *I think this does simplify things [for the children] ...* CP 392, line 8.
- vii. *...is unique to your cases, both of your cases, is that during your workweek you have the flexibility to be with your children more than the typical parent because of the evidence regarding your employment presented to the Court.* CP 392, lines 8-12.
- viii. *And, sir [Mr. Branning], the other reason why I came to this decision again, I believe your testimony...* CP 392, line 22-23.
- ix. *...I want to stress that I think both of you are excellent parents.*
CP 393, line 21-22.
- x. *I think you both love your kids and your love of them was pretty apparent...* CP 393, line 22-23.
- xi. *...this is not a situation where I believe one parent is better than the other.* CP 393, line 23-24.

xii. *I just think in the best interest of your kids, given the employment that you have, given the circumstances that you've been in, I think this plan will provide sufficient stability for your children and give them the ability to have great relationships with both of their parents.* CP 393-394, lines 25-4.

It is clear from the trial transcript and the findings of the court that there was ample evidence to support the trial court's ruling. Similarly, the court is required to make the determination as to what is best interest of the parties' children.

“In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. RCW 26.09.002, In re Parentage of J.H., 112 Wn. App. 486, 49 P.3d 154 (2002), *review denied*, 148 Wn.2d 1024 (2003); In re Parentage of Schroeder, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001).

In determining permanent parenting plans “the Legislature not only did not intend to create any presumption in favor of the primary caregiver but, to the contrary, intended to reject any such presumption.” The focus is

on prospective parenting capabilities. In re Marriage of Combs, 105 Wn. App. 168, 19 P.3d 469, *review denied*, 144 Wn.2d 1013 (2001); In re Marriage of Kovacs, 121 Wn.2d 795, 809, 854 P.2d 629 (1993).

The trial record in this case and the findings of the trial Judge provide significant evidence upon which the trial court based its ruling. Ms. Branning simply laments the court's exercise of its discretion, without actually identifying any error. No specific finding of fact is identified, and no error of law is explicated. Ms. Branning simply asserts that the court abused its discretion with no factual or legal basis for the claim.

In essence the only claim made by Ms. Branning is that the court abused its discretion. Appellant's Brief, page 8. The sole claim is that the trial Judge was "...required to go through the statutory factors when making his ruling..." Appellant's Brief, page 9. However, an exhaustive search of the statute and case law produced no support for this claim that a trial judge is required to enumerate every factor on the record. It is sufficient for the court to *consider* the factors when making a parenting plan determination.

The statute on its face states, in part, "...the court shall **consider** the following factors..." (emphasis added) RCW 26.09.187. It is clear from the trial court's oral ruling that the factors were considered. This is abundantly clear from the oral ruling by the court as highlighted above.

Additionally, the court's oral ruling evidences thoughtful deliberation on every statutory factor.

- i. The court considered each parent's relationship with the children and found that both parents were good parents. CP 387, lines 6-8, and CP 393, line 21-24. Both parents historically provided substantially equal parenting.
- ii. The agreement of the parties was that they would both parent their children together as they did during the marriage and pursuant to the temporary orders. CP 392, lines 4-8.
- iii. The court considered past parenting and future parenting potential. CP 390, lines 21-25. CP 392, lines 4-8.
- iv. The court considered the emotional needs of the child and even included an evening visit with Ms. Branning due to Clair's young age. CP 391, lines 12-15.
- v. The court even kept the children together on the weekday visit for the youngest child. CP 391, lines 20-21. The court also considered testimony regarding the important relationship the children have with their paternal grandmother. CP 47, lines 21-24. CP 48, lines 14-15.

- vi. The court considered the wishes of both parents, but found Mr. Branning's proposal consistent with the best interest of the children. CP 391, lines 1-4. CP 393-394, lines 25-4.
- vii. The court specifically considered the extensive testimony on employment schedules. CP 390, lines 21-25. CP 392, lines 8-12.

The court is not required to enumerate/detail each factor. The court must simply consider each factor while deliberating their decision. Nonetheless, here the trial court's ruling encompasses, and reflects, consideration of the factors pursuant to the statute. It is clear from the trial record and the courts ruling, that the court considered every factor pursuant to RCW 26.09.187 and the best interest of the children.

It may also be pertinent that at trial it was discovered that Ms. Branning viewed herself as having superior rights to Mr. Branning. It was also discovered during trial that Ms. Branning was unwilling to co-parent with Mr. Branning. Mr. Branning harbored no such deficiencies. Ms. Branning admitted the following:

Harrington: When Mr. Branning was not working, like when you were not working, were you sharing the parenting duties?

Ms. Branning: We were sharing them, yes.

CP 333, lines 12-15.

Harrington: ...have there been times when Mr. Branning is doing the bulk of parenting when you're engaged in other things?

Ms. Branning: ...yes.

CP 334, lines 15-17.

Harrington: So potentially you're working seven days a week, right?

Ms. Branning Absolutely.

CP 334, lines 23-24.

Harrington: Has he been a participating parent in the kids' lives for all their lives?

Ms. Branning: Yes, he participates.

CP 335, lines 16-18.

Mr. Branning testified that he was a very good, active and participating parent. There are over 100 pages of testimony from Mr. Branning detailing his parental involvement over the course of his children's lives. CP 18-187. It is beyond doubt that Mr. Branning was an equal participant in raising his children.

During cross-examination Ms. Branning disclosed that she was unwilling to co-parent and unwilling to allow time to Mr. Branning if she

could avoid it. Ms. Branning's testimony during Cross-Examination included the following insights into Ms. Branning's refusal to co-parent:

Harrington: ...you would rather take your daughter to work and show a home than to let Mr. Branning exercise time with his daughter?

Ms. Branning: Yes.

CP 315, lines 13-15.

Harrington: So if Mr. Branning was able to enjoy the same kind of freedom of being able to work at home, set his own schedule where he's going to be there parenting with the kids, just like you are, should he be permitted an equal amount of time?

Ms. Branning No.

CP 335, lines 11-15.

Harrington: Shouldn't the Court be trying to... maximize and encourage the maximum amount of time to spend with their dad when he's available?

Ms. Branning: No.

CP 338, lines 20-23.

Harrington: But if you're available and you have the time to spend with your kids, you should be allocated that time?

Ms. Branning: Yes.

CP 339, lines 7-9.

It is clear from Ms. Branning's testimony that she was unwilling to co-parent with Mr. Branning. Ms. Branning's testimony also highlighted her (false) belief that she had a superior right to parent her children than Mr. Branning.

The court, having all of the facts, evidence and testimony before it, determined that pursuant to the statutory factors that the parenting plan ordered by the court was in the best interest of the parties' children. Ms. Branning is simply unhappy with the decision. There is no judicial error.

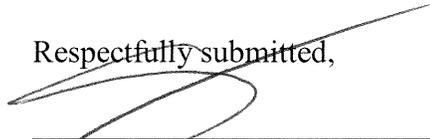
This appeal is a frivolous expression of Ms. Branning's anger about not getting her preferred result after trial. Ms. Branning presents no serious argument that the trial court committed a manifest abuse of discretion. The appeal must be denied and fees awarded to Mr. Branning pursuant to RAP 14.1.

IV. Conclusion

The respondent respectfully requests this court to deny the appeal and uphold the decision of the trial court.

Dated: 1/25/19

Respectfully submitted,



Spencer W. Harrington, WSBA # 35907
Attorney for Respondent

Harrington Law Office, PLLC
1517 W. Broadway Avenue
Spokane, WA 99201
(509) 838-8300

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the 25th day of January, 2019 I delivered a copy of the attached *Brief of Respondent* to:

Matthew J. Dudley
104 S. Freya #120A
Spokane, WA 99202

I then instructed Eastern Washington Attorney Services, Inc. to file said document with the Division III Court of Appeals for the State of Washington.

Dated: 1/25/19


Joanne M. McAtee,
Harrington Law Office, PLLC