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Division III
State of Washington
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No. 361390

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

In re:

GINGER GOMEZ,

Petitioner/Appellant,

and

JOSHUA MASTERSON,

Respondent/Appellee.

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

1. The trial court erred by finding that detriment existed in Ms. Gomez's home at the time of trial in 2018 based on only one incident of mental health decompensation in 2016 since the entry of the Final Parenting Plan in 2014.

2. The trial court further erred in using the best interest of the child standard to determine that there was a substantial change in circumstances since 2014 which justified a finding of detriment.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court err in finding that substantial factual evidence supported a finding that detriment existed in Ms. Gomez's home at the time of trial in 2018 which would justify granting Mr. Masterson's petition for modification?

2. Did the trial court assign the correct legal standard in determining if a modification of the Final Parenting Plan was appropriate in this case?

C. STANDARD OF REVIEW

To review a court's determination modifying a final parenting plan, "the proper standard of review is whether the trial court's findings are supported by substantial evidence and whether

the court has made an error of law that may be corrected on appeal.” *In re Welfare of R.S.G.*, 172 Wn.App. 230, 243, 289 P.3d 708, (Div. 2 2012) (citing *In re Marriage of Taddeo-Smith*, 127 Wn.App. 400, 405, 110 P.3d 1192 (Div. 1 2005)).

D. STATEMENT OF THE CASE

The parties here, Mr. Joshua Masterson and Ms. Ginger Gomez-Masterson (now Gomez) married in December 2006. RP. 35, 86. One child was born during the marriage, Emma in August 2007. RP #. The parties separated in June 2010 and began living apart with Mr. Masterson taking care of Emma primarily at that time. RP 12, 92, 98-99. The parties attempted to co-parent from 2010 to 2012 in Washington between Spokane, Orting, and Ford with a few different verbally agreed residential schedules – but this was difficult for both at times. RP 90-92, 99.

In 2012, a no contact order was entered between the parties due to Ms. Gomez’s concerns about abuse against Emma by Mr. Masterson. RP 20, 93-94, 96. The divorce between the parties was finalized in May 2013 and Ms. Gomez was granted primary residential placement of Emma. RP 74, 94, 96, 98, 100. By then Mr. Masterson had not seen Emma in a significant amount of time, almost 2 years. RP 21, 96. The Parenting Plan entered by the

Court on May 6, 2013 was by default because Mr. Masterson voluntarily chose not to appear to for court despite receiving notice. RP 39. This plan included RCW 26.09.191 restrictions against Mr. Masterson. RP 39, 95. Mr. Masterson was granted supervised visitation at the Fulcrum Institute due to concerns with his drug and alcohol abuse. RP 20, 38, 74, 94-95.

Mr. Masterson only exercised two of these visits and then stopped going altogether and failed to reach out to Ms. Gomez's attorney for any sort of contact with Emma. RP 95, 97, 100, 102, 104. Mr. Masterson claims this was because Ms. Gomez never answered Fulcrum's calls to her to set up visits over a period of 2 years (RP 21), but he submits no proof of this and never filed a motion for contempt against Ms. Gomez alleging such. RP 43.

In 2014 CPS became involved and this necessitated that Mr. Masterson complete the court ordered requirements in the Final Parenting Plan from the parties' divorce. RP 22, 38. He eventually worked through his requirements, although he waited 2 years after being ordered in 2012 before completing them in 2014, he eventually had unsupervised visits every other weekend. RP 38.

After Mr. Masterson completed his .191 requirements, the Final Parenting Plan at issue here was entered into in 2014 by

agreement of the parties. RP 29, 103. This Plan included no RCW 26.09.191 restrictions against either parent. RP 29.

Ms. Gomez and her significant other, Mr. David Barnard, began dating in late 2010 and married in November 2014. RP 58, 59. They lived together with Emma, and because of this Mr. Barnard became very close in their relationship. RP 58. Mr. Barnard had helped Ms. Gomez raise Emma since she was 3 years old and has been actively involved in raising her. RP 65, 73, 77.

During the summer of 2016, Ms. Gomez's mental health began to deteriorate due to an imbalance in her medication regimen. RP 60. Due to the unavailability of medical appointments with her doctor, Ms. Gomez continued to spiral downward while waiting for an appointment to become available. RP 106-108. Additionally, there was also a 2-month period of time that Ms. Gomez had to stop taking her medication per doctor's orders because she found out she was pregnant. RP 106. During this same time in the summer of 2016, Ms. Gomez and her significant other Mr. Barnard were faced with the fact that their apartment building was in the process of being sold and they had to find somewhere else to live. RP 61.

September of 2016 Ms. Gomez and Mr. Barnard got into an argument that resulted in Mr. Barnard requesting a police response for Ms. Gomez's mental health. RP 62-64. As Washington is a mandatory arrest state, Ms. Gomez was arrested due to accidentally breaking Mr. Barnard's phone during a struggle between them for the cellphone. RP 63, 108. Subsequently the state put in place a no contact order between Ms. Gomez and Mr. Barnard. RP 64. This caused Ms. Gomez to have to move out of the residence and leave Emma with Mr. Barnard to maintain her normal routine. RP 64.

Ms. Gomez was staying with friends at that time and regularly attending to her mental health through services at Frontier Behavioral Health. RP 65. Unfortunately, it was later discovered by Ms. Gomez's mental health professionals that she was on the incorrect medication for controlling her symptoms associated with bipolar disorder. RP 107-108, 110. In addition to this complication alone, Ms. Gomez was facing many different challenges in 2016 which triggered a break down: a miscarriage, loss of her housing, car accident, work injury, financial stress due to not working, inability to obtain an appointment to see a mental

health professional, and her grandmother's health declining. RP 61-62, 107.

Mr. Barnard had to move out of the apartment prior to the building sale, and both him and Emma stayed with his parents. RP 65. This was something that Ms. Gomez was aware of and trusted Mr. Barnard to care for Emma as he had been helping do for year. RP 124-125. However, the high stress of going to school and working full time as well as taking care of Emma began to wear on Mr. Barnard. RP 65. Mr. Barnard's parents also requested that they move out, and in consideration of the fact that he had no legal rights to Emma and could not contact Ms. Gomez, Mr. Barnard was placed in a very difficult situation. RP 65.

Ultimately, Mr. Barnard got into contact with Mr. Masterson and drove with Emma to Orting, Washington in September 15, 2016 to live with Mr. Masterson for the time being. RP 10, 23, 65-66, 124-125. Mr. Barnard and Ms. Gomez did not believe that another option existed in the short term for Emma's care and stability. RP 65, 124-125. However, Mr. Masterson at this point had not seen Emma for four months. RP 10.

Subsequently the no contact order against Ms. Gomez in regard to Mr. Barnard was dropped and they moved back in

together. RP 64, 66. Both became fully employed and they no longer faced the financial stresses that they had previously. RP 67.

Ms. Gomez filed a motion for contempt on December 19, 2016 against Mr. Masterson for his withholding of Emma and not allowing Ms. Gomez to see her whatsoever. CP 48, 49, 105. Mr. Masterson and Ms. Gomez saw each other at the Spokane County Courthouse and met over dinner to discuss Emma. CP 105. They verbally agreed that Ms. Gomez would be allowed to see Emma for the upcoming holidays. CP 105. Mr. Masterson wanted to work out a new parenting plan between them, but Ms. Gomez did not agree with his proposal. CP 105; RP 32. After this discussion, Mr. Masterson continued to withhold Emma and filed a petition to change a parenting plan alleging detriment in Ms. Gomez's home on December 20, 2016. CP 50, 52, 53, 55, 105; RP 146-147.

Shortly thereafter on December 23, 2016 that Ms. Gomez and Mr. Barnard drove to Orting, Washington to Mr. Masterson's parents' house to deliver Christmas presents to Emma. CP 68. Mr. Masterson's father opened the door and began to scream at them both to leave the property for trespassing. CP 68. Unbeknownst to Ms. Gomez at the time, Mr. Masterson had filed a restraining order against her that she had not yet been served with. CP 56-58. Ms.

Gomez thereafter filed her response to the petition and protection order on January 13, 2017. CP 68.

Throughout trial Mr. Masterson brought up the issue of CPS investigating Ms. Gomez twice by 2015, however, both investigations were closed with a finding of unfounded. RP 11-12, 42-43, 75-76. The longest Emma was in Mr. Masterson's care from 2014 until the petition to modify in 2016 was January to February 2015 when Emma lived with him due to the CPS investigations against Ms. Gomez – which she voluntarily chose to do and was not ordered by the court. RP 104, 130-131. The findings were unfounded and the parties agreed that Emma should go back to Ms. Gomez's care, and she did. RP 104, 126-127.

Despite Ms. Gomez's assertions, adequate cause was granted on January 20, 2017 and her motion for contempt was denied. CP 77, 78. This finding of adequate cause gave Mr. Masterson primary placement of Emma with Ms. Gomez receiving visits every other weekend exchanging her in vantage. CP 77, 78.

By the time of trial, there were no concerns of detriment and there had not been for over a year prior. RP 120, 138-140. Ms. Gomez's issue of improper medication for her problem causing symptoms had been resolved by working with a mental health

provider and doctor. RP 68, 111, 139-140. This was someone that she was seeing approximately every week or every other week dependent on Ms. Gomez's needs. RP 112, 135, 137. These consistent appointments allowed her to gain further insight and focus on her stability as it relates to all parts of her life. RP 80, 108, 111, 122, 127-129. Mr. Barnard also began actively participating in Ms. Gomez's medication and counseling to provide her support that she needed to remain consistently stable. RP 68-69, 129. Ms. Gomez changed counselors and medical doctors after September 2016 and began taking a different medication (Zyprexa) which was more appropriate for her symptoms. RP 110-111, 128-129. Moreover, both had been working a full-time job and were not facing housing or financial issues any more. RP 25-26, 55, 67, 113.

One of the main issues throughout trial was the fact that Ms. Gomez had been diagnosed with bipolar disorder and the effect that this had on Emma throughout her 10 years of life by the time of trial. RP 11-13, 24-26, 107, 128, 138, 161.

Counsel for Ms. Gomez submitted a trial memorandum on May 7, 2018 discussing briefly the factual history and asserting the standard the trial court was required to use here of finding

prospective detriment in returning to the prior parenting plan. RP 148-150, 153-156. Counsel did this in anticipation of the fact that detriment would be the main contention at trial and that the Court could only look to the time since the entry of the final parenting plan. RP 148, 157. The trial court read and took notice of this memorandum of counsel. RP 4, 8. However, despite the statutory requirements for modifying a final parenting plan based on detriment, the trial court did not agree with Ms. Gomez's counsel even prior to giving its ruling in this matter. RP 148, 160.

At trial Mr. Masterson represented himself and argued that there was "good cause has been demonstrated throughout the hearings to modify this plan". RP 4, 6. This was based on testimony by Ms. Masterson about the effect that her mental illness had in his marriage to Ms. Gomez and later with their co-parenting of Emma. RP 12, 25, 36. Mr. Masterson argued that Ms. Gomez typically had mental breakdowns approximately twice a year and they could become violent showing the necessary detriment – however, this testimony only spanned the years 2006 to 2011. RP 12, 25, 36, 109, 157. Mr. Masterson also alleged that Emma was not excelling in school with Ms. Gomez, however, that was refuted. RP 115-116, 144-145.

This modification based on detriment requested by Mr. Masterson was to allow Emma to remain with him primarily, only allowing Ms. Gomez to have every other weekend from Friday to Sunday with Emma. RP 8, 26, 53, 146-147. Counsel for Ms. Gomez argued that if no detriment was found then the parties would revert back to the 2014 parenting plan with some minor changes that would be agreed to. RP 116-119. However, from the entry of the agreed Final Parenting Plan in 2014 until the precipitating events in late 2016 Ms. Gomez had not suffered any episodes which Mr. Barnard had described as harmful. RP 31, 71. In addition, Ms. Gomez had experienced no episodes from that event in 2016. RP 34, 71, 113, 154.

Ms. Gomez makes this appeal from the decision of the Honorable Judge Hazel on May 9, 2018 granting a modification of the Final Parenting Plan entered into in 2014 based on detriment. RP 161-164. The Court found that there was “a periodic and historic pattern of mental health decompensation . . . more than just one incident . . . [which] did create a destabilizing and uncertain environment for the child”. RP 161. In addition, the Court then focused on the best interests of the child standard. RP 162-163.

However, this modification was improper based upon many specific facts showing there was no detriment and that only one incident had occurred since the entry of the Final Parenting Plan in 2014. Moreover, both case law and statute support a finding on the facts of this case for Ms. Gomez that there was no prospective detriment due to 1 serious mental health episode since the entry of the Final Parenting Plan. This one incident does not rise to the level of substantial evidence as required for finding a modification. As such, the trial court's order must be reversed with instructions.

E. ARGUMENT

a. The Trial Court's Legal Standard Used to Find A Modification of the Final Parenting Plan was Incorrect.

When determining whether to grant a moving party's request to modify a final parenting plan, the trial court must look to the narrow provisions under RCW 26.09.260, which states:

the court shall not modify a prior custody decree or a parenting plan unless it finds, **upon the basis of 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**, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.

(emphasis added).

Of the four statutory requirements which justify a modification of a final parenting plan, only one applies here: “The **child’s present environment is detrimental** to the child’s physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child”. RCW 26.09.260(2)(c) (emphasis added).

This language codified under Washington statute places the burden on the moving party to prove that the child’s present environment is detrimental before the Court has the legal authority to modify the residential schedule in the final parenting plan. The meaning of the term “present environment” as used in RCW 26.09.260 is “to be determined presently, at the time the custody decision is being made, and not as of some earlier time.” *Ambrose v. Ambrose*, 67 Wn. App. 103, 107, 834 P.2d101 (1992) (internal citations removed).

When discussing modifications of final parenting plans there are narrow considerations within which trial courts are bound to. “Custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification.” *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993) (internal citations removed). This

presumption looks at the final parenting plan entered, and not necessarily the placement of the child at the time of trial as the temporary plan is not determinative of the final plan.

b. This Court Must Reverse the Trial Court's Decision in Granting the Father's Request to Modify the Final Parenting Plan Based on the Incorrect Standard and a Lack of Substantial Evidence Supporting the Finding.

At the time of trial, Judge Hazel erred by failing to properly consider what substantial evidence within the appropriate time period was in line with the legal standard that would justify a modification of final parenting plan. These errors of both law and fact are so substantial that they must be corrected by this Honorable Court in the appeal from the trial court's decision.

The trial court here used the wrong standard to find that Emma should remain with Mr. Masterson based on detriment in Ms. Gomez's home. RP 44. The trial memorandum that was submitted by counsel for Ms. Gomez properly discussed, as outlined in the facts section above, why no detriment could be found under the law and facts of this case. RP 148-150, 153-156, 157.

In the four years between the entry of the Parenting Plan in 2014 and the trial in 2018, Ms. Gomez only had one serious mental

health incident in 2016 which ultimately lead to this proceeding. RP 31, 34, 71, 113, 154. This certainly does not rise to the level of justifying an argument for present detriment when by the time of trial Ms. Gomez had completely recovered and was excelling.

Any history between the parties prior to 2014 when the controlling Final Parenting Plan was entered has no bearing on the court's consideration of it at the time of trial in determining whether Ms. Gomez's care was detrimental to Emma's health and wellbeing. RP 150, 152, 154, 157.

Mental health and the modification of parenting plans together can create many difficult considerations for a trial court when determining whether detriment exists. Unfortunately, this is the reality of the medical and mental health system in America today, that delays occur and persons with immediate and increasing mental health issues that arise ultimately can decompensate as they wait for treatment. Thus, their mental illness begins to affect more things in their lives to more serious degrees even if they are seeking the treatment that they so desperately need. Due to no fault of Ms. Gomez she began to decompensate based on the life stressors that she had experienced – she sought treatment immediately upon recognizing what was happening but

was let down by the very healthcare system that she has to depend on for stability in her life. RP 60, 106-108.

Any issues of past cycles or problems with her bipolar diagnosis only allowed her to gain knowledge and experience about her condition. RP 108, 111, 122, 127-129. This is evidenced by the discussions in trial that she gradually experienced lessening of her symptoms over the years and by the time of trial had gained complete control of her symptoms for over a year prior at that point. Moreover, many of the stressful life triggers which lead to her decompensation, such as a loss of job and a miscarriage, had been appropriately dealt with or resolved prior to trial. RP 25-26, 55, 67, 113. Thus, this drastic improvement in her mental functioning and life stability shows that no detriment existed.

Mr. Masterson in his explanations and arguments throughout trial makes it seem as if a history of mental issues is condemning someone to a life without mental health stability for the foreseeable future. RP 12, 25, 36, 109, 157. Much of what he asserted in regard to Ms. Gomez's mental health was during their marriage and prior to the entry of the Final Parenting Plan in 2014. RP 12, 25, 36, 109, 157. However, this is incredibly naïve of Mr. Masterson and ignores the focus under statute which requires only

facts unknown to the court or arising since the Final Parenting Plan was entered in 2014 to be considered. It is certainly warranted that Mr. Masterson have concerns about Ms. Gomez's mental health with their history together, however, his concerns do not justify the trial court's determination in this case.

No substantial change in circumstances which justifies a finding of detriment had occurred since this time; in fact the opposite is true. The substantial change in circumstances that had occurred was that Ms. Gomez had been dealing with her bipolar disorder for approximately 15 years and was finally gaining full control of it with medication and mental health treatment. RP 108, 111, 122, 127-129.

The trial court was clear in discussing that the modification was not found to be based on integration, another one of the four statutory requirements to grant a modification under RCW 26.09. RP 163. This was taking into consideration the length of time Emma had been with Mr. Masterson by the time trial actually took place in May 2018; approximately 1.5 years since the filing of the petition in December 2016 and almost 2 years since the situation arose in September 2016. RP 163. However, any assertions of integration would have been inappropriate regardless as this was

based on the court's temporary orders and was not based on voluntarily actions of the parties.

It is not uncommon for persons with mental illnesses to be judged and misunderstood by the same society that encourages them to seek mental health treatment. This case involves a mother who faced some serious obstacles at a certain period in her life and made decisions for the health and wellbeing of her child and herself. These were not easy decisions for her to make, but she took every step available to her to address the signs and symptoms of decompensation, as her history had shown that she had done.

Ms. Gomez asks that this Honorable Court reverse the decision of the trial court and enter a finding that the modification was not appropriate due to Mr. Masterson's failure to meet the statutory burden of proof required and because the trial court used the wrong standard in granting the modification.

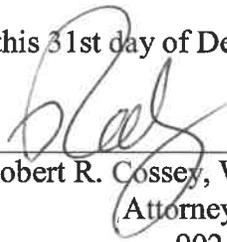
F. CONCLUSION

As the aforementioned discussion shows, the facts of this case presented in the record and at trial do not support the finding of a modification of the 2014 Final Parenting Plan based on detriment under Washington law. The applicable standard in Washington State for a modification of the parties' Final Parenting

Plan is not the best interests of the child standard alone, rather based on the facts here it is whether there is present environmental detriment. RCW 26.09.260(2)(c).

This Honorable Court has the authority to reverse the decision of the trial court in determining that a modification based was appropriate, and this Court must do so. Furthermore, this Court must instruct the trial court to use the appropriate standard upon applying the facts of this case to a modification.

Respectfully submitted this 31st day of December, 2018.



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AFFIDAVIT OF SERVICE

I, BRIANA M. GIERI, upon penalty of perjury under the laws of the State of Washington, declare that on the 31st day of December, 2018, I served by email and USPS mail a copy of the Appellant's Opening Brief to the following persons at the included addresses:

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