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Court of Appeals
Division III
State of Washington
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No. 361519

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

In re:

SEAN PARKER,

Appellant,

and

MEGAN DOMPIER,

Respondent.

APPELLANT'S REPLY BRIEF

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A. ASSIGNMENT OF ERROR

The trial court erred by finding that Mr. Parker voluntarily consented to the integration of the children into Ms. Dompier's care. The trial court further erred in finding that granting Ms. Dompier's modification was in the best interests of the children.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court err in finding that there was a substantial change in circumstances that justified a modification of the prior 50-50 custody decree between the parties based on integration?

Did the trial court err in granting the modification by finding that it was in the best interests of the children and necessary?

C. ARGUMENT

- a. **The Court Must Find that Voluntary Integration Never Occurred Given that Mr. Parker Consistently Fought to Return to the 50-50 Residential Schedule, Despite Circumstances out of his Control.**

Ms. Dompier and Mr. Parker agreed that the best interests of the children were served by placing them in his primary care. Ms. Dompier chose to move out of state after the divorce, and Mr. Parker time and time again, chose the interests of his children over his own interests. He took demotions, moved more than once, and

eventually set up residence in the same city as Ms. Dompier so that he could continue to work toward more residential time with the children.

After he established a stable home in the city where Ms. Dompier lived, he sought to increase his parenting time and to be more assertive in requesting time with the children. Mr. Parker would have returned back to the residential schedule, had Ms. Dompier not filed an emergency parenting plan to halt his attempts.

Moreover, Ms. Dompier never even filed a proposed parenting plan for trial and yet Judge Clark determined that she should still grant Ms. Dompier's modification.

b. The Court Must Reverse the Decision Finding that Modification is in the Best Interests of the Children.

Not only did Mr. Parker continually do everything in his power to maintain and grow his parenting time, including taking demotions and moving hundreds of miles from his home to where Ms. Dompier had relocated and moved the children, he has consistently shown that he is a loving and involved father. The trial court stated that “[t]he father wishes to be involved, and should be able to do so in the future.” (CP 32 at 3).

Yet, based on testimony by Ms. Dompier (RP 140, 145-6, 178, 219-21) and Mr. Parker (RP at 204-08), it is clear that she favors following the court order over allowing extra parenting opportunities and chances for Mr. Parker to become more involved in the lives of his children.

This is evident based on the fact that once he sought to increase his parenting time, she purposely filed for a plan that gave him less time than he had been seeing the children previously, including the Wednesday nights he had spent taking the children to youth group as an ongoing activity. Further, Mr. Parker and Ms. Dompier had previously agreed that he could take one of his daughters on weekly walks, and he came by and took those as often as possible, until Ms. Dompier chose to deny him that time as well, stating that it was not Mr. Parker's time with the kids (RP at 205-06).

The existing parenting plan only allows Mr. Parker 8 overnights per month, (CP 32 at 4), a highly restricted schedule for someone who is so involved in the lives of his children. This goes against the best interest standards that are established in the state of Washington.

The parenting plan granted at trial does not help to maintain the relationship that Mr. Parker has cultivated with his children. It is a plan that more closely resembles one of two parents living a significant geographic distance from one another, instead of one where both parents live within 15 minutes of each other. Mr. Parker has worked as hard as possible to develop a stable, loving and nurturing relationship with his children, and this is being limited without any legal reason for doing so.

RCW 26.09.002 states explicitly that the relationship between parents and their children is vital to the well-being of children:

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.

Mr. Parker receiving ample parenting time is in the best interest of the children. He is a loving and involved father, and there is no reason that his relationship with his children should not be fostered. As it stands, the parenting plan adopted at trial does not foster his relationship with the children, given that the court is aware that Ms. Dompier has no interest in expanding his visitation beyond the 8 nights per month he was assigned.

c. This Court Must Deny Ms. Dompier's Request for Fees & Costs Because This Appeal Is Not Frivolous and Was Not Brought in Bad Faith by Mr. Parker

Counsel for Ms. Dompier is incorrect that fees and costs she has incurred stemming from this appeal are necessary under the authority cited. The Court here certainly has the discretion to order fees and costs, but must find that the appeal is frivolous in line with RAP 18.9 and *In re Marriage of Tomsovic*, 118 Wn. App. 96, 109-10, 74 P.3d 692 (Div. III 2003), as has been argued.

However, this case seeking reversal now is not frivolous and has been brought in good faith by the Appellant in what he believes to be the best interests of his children, which is to reverse the modification granted which substantially limits his time with the children. It is clear based on the record at trial that reasonable minds differ here on whether the modification by integration was consented to by Mr. Parker, the amount of time Mr. Parker was spending with the children in the timeline at issue, and whether granting the modification was in fact in the best interests of the children. Considering the extensive testimony regarding Mr. Parker's relationship with each of his children, this alone is enough to support a differing of reasonable minds to deny Ms. Dompier's request that this Court find Mr. Parker's appeal to be frivolous.

It is important to reiterate “[t]he fact that an appeal is unsuccessful is not dispositive [and the Court] consider[s] the record as a whole and resolve all doubts in favor of the appellant.” *Tomsovic*, 118 Wn. App. at 110. Even if Mr. Parker is ultimately unsuccessful in this appeal, he certainly did not have bad faith intentions in doing everything he could to reverse the modification order and be able to maximize his residential time with the children he loves so dearly in order to maintain their relationship.

There is limited case law regarding appeals of parenting plan modifications and award of fees/costs for appellate litigation, as the focus appears to be on review of awards at the trial court level (including awards involving bad faith, financial need, and intransigence). In an unpublished opinion by the Court of Appeals for Division I, there are 5 considerations at issue in deciding what is considered to be a frivolous appeal:

- (1) a civil appellant has a right to appeal under RAP 2.2;
- (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant;
- (3) the record should be considered as a whole;
- (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous;
- (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

In re the Marriage of Conklin, No. 73933-6-I (Div. 1, Nov. 9, 2015) (unpublished case cited in accordance with RAP 10.4 and GR 14.1) (citing *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980)). In consideration of the above persuasive, although not binding, case law requirements – it is clear that the appeal here is not frivolous and is brought in the best interests of the children.

Based on the evidence Mr. Parker should have been able to return to the 50-50 parenting plan, and at a minimum, should have been allotted more time with his children based on all of the testimony regarding the strong bond he maintained with all of them. There is nothing frivolous about Mr. Parker asserting his rights to appeal despite Ms. Dompier believing that she is correct.

While RCW 26.09.140 authorizes the appellate court to award fees in its discretion, the prevailing party on appeal must make a showing of need and of the other's ability to pay fees in order to prevail. *Konzen v. Konzen*, 103 Wash.2d 470, 693 P.2d 97, *cert. denied*, 473 U.S. 906, 105 S. Ct. 3530, 87 L. Ed. 2d 654 (1985).

Kirshenbaum v. Kirshenbaum, 929 P. 2d 1204, 1208 (Div. I 1997).

The issues here are without a doubt debatable. It is the actions of the appellee after the marriage of Mr. Parker and Ms. Eckenberg that caused the parties to attend trial in the first place.

Ms. Dompier filed an order to reduce Mr. Parker's existing visitation and prevent him from increasing it, despite the parties having a long history of agreeing, and Mr. Parker having a history of acquiescing to the schedule requests of Ms. Dompier. This order stayed in effect for over a year, during which Ms. Dompier made every effort to deny Mr. Parker any extra parenting time, clearly not attempting to foster his relationships with the children to the full extent possible.

Despite Ms. Dompier's citation to authority that allows this Court to order fees in certain cases, the Court here must deny her request for fees believing that the appeal brought is frivolous and under the prevailing party theory that she believes will uphold the lower court's ruling, and under the authority cited: RAP 14.2, 18.1, 18.9; RCW 26.09.140; and RCW 26.09.260(13). Moreover, Ms. Dompier has not argued that she has a financial need for fees, thus this cannot be later asserted as a basis for her request.

D. CONCLUSION

This Honorable Court should reverse the decision of the trial court in determining that a modification of the Utah custody decree was appropriate based on an integration without consent of the father, Mr. Parker despite the time that had passed since the

entry of the final custody decree because that modification was not in the best interests of the children when reviewing the record. Additionally, the Court must deny Ms. Dompier's request for fees.

Respectfully submitted this 14th day of June, 2019.

A handwritten signature in cursive script, appearing to read "Briana M. Gieri".

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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 14th day of June, 2019, I served by email a copy of the Appellant's Reply Brief to the following persons at the included addresses below:

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DATED this 14th day of June, 2019.


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