

FILED

Court of Appeal No. 363759

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IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

DIVISION THREE

In re:

DAVID LEESON,

Appellant,

v.

NATALIE MOORE

Respondent.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT

Cause No. 16-3-00857-5

The Honorable Ellen K. Clark, Retired

BRIEF OF RESPONDENT

SARAH L. BRANDON, WSBA
#46791
Attorney for Respondent
Burke Law Group. PLLC
221 N. Wall Street, Suite 624

Spokane, WA 99201
(509)466-7770
sarah@burkelg.com

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I. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR AND APPLICABLE STANDARD OF REVIEW

A. The standard of review for adequate cause decisions is abuse of discretion. *In re: Parentage of Jannot*, 149 Wn.2d 123, 65 P.3d 664 (2003).

B. The judge appropriately exercised discretion in weighing conflicting evidence and her determination is not reviewable by this court. *In re: Marriage of Rostrum*, 184 Wn.App.744, 339 P.3d 185 (2014).

II. STATEMENT OF THE CASE

The parties in this case agreed to a shared parenting plan with joint decision making in all respects and no restrictions against either parent regarding their child, Sylvia, on February 13, 2017. On March 21, 2017, Ms. Moore filed a motion to address a conflict regarding the parties' use of daycare for Sylvia the following month. On March 31, 2017 Mr. Leeson, sought and obtained an order that Ms. Moore show cause regarding her alleged failure to seek mediation on the issue. The parties attempted to mediate their disputes on May 3, 2017 and May 27, 2017. Mr. Leeson then sought an order of contempt regarding Ms. Moore's alleged failure to jointly resolve the daycare dispute. Ms. Moore was found in contempt of the parenting plan on June 14, 2017. CP 188-194.

Mediation was scheduled for June 24, 2017, which Ms. Moore was unable to attend while tending to her other child's illness. On August 10, 2017, Ms. Moore filed a motion seeking an order to purge the finding of

contempt against her. Mediation was rescheduled for August 19, 2017, and was cancelled by Mr. Leeson's attorney. Another call to CPS was made against Ms. Moore on August 28, 2017. Mr. Leeson withheld the child from her scheduled time with Ms. Moore beginning August 31, 2017.

On September 5, 2017, seven months after agreeing to a shared schedule with no restrictions, Mr. Leeson made allegations that Ms. Moore physically abused and neglected Sylvia, was an alcoholic, a prostitute, unemployed, and was living in unsanitary conditions. CP 213-221. He was granted placement of the child and restraints against Ms. Moore on September 12, 2017. CP 357-358. Mr. Leeson had been making such allegations to CPS since as early as March 2017. CP 947. Mr. Leeson stated that he had had these concerns since November 2016, four months prior to his agreement to the shared parenting plan. CP 948. Part of Mr. Leeson's support was a declaration from Kristen Riley, the mother of his first child. CP 352-354. That declaration claimed that Ms. Riley believed Ms. Moore was abusive toward Ms. Riley's child in 2016 and prior. This claim was in stark contrast to the first declaration Ms. Riley filed in this matter on May 6, 2016 stating that she had no concerns about her son's care when he was with Mr. Leeson and Ms. Moore while they lived together and generally praised Mr. Leeson for his ability to co-parent and

manage a blended family. At that time, she cited no concern whatsoever about Ms. Moore or her parenting. CP 74-76. Ms. Moore denied the allegations made by Mr. Leeson and his supporters.

Ms. Moore subsequently provided a series of random drug tests, none of which were positive for alcohol or any illicit substance, including marijuana. She was evicted from the “unsanitary” home before Mr. Leeson’s motion for adequate cause had been heard. Mr. Leeson did not request and the court did not appoint a guardian ad litem to conduct an investigation into Mr. Leeson’s voluminous allegations. CP 213-221.

Ms. Moore’s attorney withdrew from representation. CP 371-372. On January 11, 2018 Ms. Moore filed a motion to end the restraints against her pointing out that it was nearly impossible for her to comply with the requirements of the restraints because she was restrained from having the child anywhere where Ms. Moore was living. CP 404-411. Five days later, Ms. Moore was met with another contempt action. CP 427-454. Ms. Moore was understandably overwhelmed by the prospect of facing trial without counsel and Mr. Leeson’s aggressive litigation and request to end Ms. Moore’s time with their child. CP 947-1080. Ms. Moore agreed to a parenting plan that allowed Mr. Leeson to inspect her home and make subjective determinations of its suitability for her limited time with their child (two overnights nights every other week), sole decision making in all

respects for Mr. Leeson, and unspecified RCW 26.09.191 restrictions against Ms. Moore on March 5, 2018. CP 693-702.

Three months later, on June 5, 2018, Mr. Leeson filed another petition for a major modification of the parenting plan to further limit Ms. Moore's time with Sylvia based on his renewed allegations that Ms. Moore physically abused Sylvia. CP 715-725. Mr. Leeson claimed such physical abuse occurred between May 25 and May 27, 2018 and caused facial bruising on Sylvia which he noticed immediately upon her return to his home on May 27, 2018 and that he immediately took Sylvia to the ER to evaluate the bruising. CP 715-725.

Mr. Leeson provided his declaration referring to the serious nature of the facial bruising, saying there were "multiple quarter-sized bruises" on Sylvia's forehead, cheek, temple, and chin and that she had a "black eye." CP 720. In support of his claim, Mr. Leeson provided unauthenticated photographs of a child's face on which small, light blue marks appear. He provided an unauthenticated emergency room report dated May 28, 2018 to support his claim. CP 733-772. The hospital report says "MINIMAL TO NO BRUISING NOTED AT THIS TIME" and "[Case management] looked at [Sylvia's] face and noted minimal bruising and some of the bruises were very difficult to see."

Without providing any authenticated foundation, Mr. Leeson also renewed his allegation that Ms. Moore was or is a prostitute. Mr. Leeson made no allegation whatsoever that such behavior had any effect or detriment on Sylvia. CP 715-725. Mr. Leeson claimed that Ms. Moore would soon be charged with child abuse by the state. CP 715-725. Ms. Moore denied that she is a prostitute and denied any knowledge of any criminal investigation.

Despite his repeated and seriously alarming allegations, Mr. Leeson *did not* request the Court appoint an independent Guardian Ad Litem to investigate his claims in his petition to modify the parenting plan. CP 715-725. It was undenied that CPS conducted an investigation of the allegations, including interviews with the child and her sister and home visits of both parties.

Commissioner Chavez found adequate cause and granted restraints against Ms. Moore. CP 1108-1110, 1111-1116. Ms. Moore moved for revision under RCW 2.24.050.

Mr. Leeson's assertions have been investigated by independent third parties trained in identifying abuse and neglect and no such findings against Ms. Moore have been made. To the contrary, social workers investigating Ms. Moore determined that Mr. Leeson's allegations were "unfounded." CP 1085-1088. Mr. Leeson asserted in his petition to modify

the parenting plan that Ms. Moore's arrest for child abuse was imminent. CP 715-725. Mr. Leeson maintained that assertion until his attorney retracted the claim at the revision hearing, admitting that investigating law enforcement did not, in fact, find probable cause to arrest Ms. Moore. CP 1162-1189.

Judge Ellen Clark (ret.) reviewed the entire file, per the uncontested request made by Mr. Leeson. CP 1127-1129. She was persuaded by the CPS investigation into the allegation and their determination that it was unfounded and denied adequate cause on the petition. CP 1162-1189.

On May 28, 2019, Mr. Leeson filed his third petition to modify the parenting plan in this matter. He alleged that on April 10, 2019, Ms. Moore strangled Sylvia by the throat in a public place. He made a police report and Ms. Moore was willingly interviewed that same night. Again, Ms. Moore has denied the allegations. No probable cause exists to arrest or pursue charges against Ms. Moore. However, Ms. Moore agreed to adequate cause in exchange for Mr. Leeson's agreement to appoint a guardian ad litem to conduct a thorough investigation of the seemingly endless allegations against her. She also agreed to entry of restraints and supervised visitation while the investigation is underway.

III. ARGUMENT

A. Whether the trial court erred in determining that the evidence before it did not support a finding of adequate cause to modify the parenting plan.

On revision, a trial court makes a de novo decision and determines its own facts based on the record before the commissioner. *In re: Marriage of Dodd*, 120 Wn. App. 638, 86 P.3d 801 (2004). There are exceptions, such as when the commissioner took live testimony, but that exception does not apply here. *In re: Marriage of R.E.*, 144 Wn. App 393, 405-406, 183 P.3d 339 (2008). Thereafter, the standard of review by the appellate court on orders regarding adequate cause for a modification of a parenting plan is abuse of discretion. *In re: Parentage of Jannot*, 149 Wn.2d 123, 65 P.3d 664 (2003). Abuse of discretion occurs when a decision is “manifestly unreasonable.” *In re Marriage of Thomas*, 63 Wn.App. 658, 660, 821 P.2d 1227 (1991). An appellate court “does not review the trial court’s credibility determinations or weigh conflicting evidence.” *In re Marriage of Rostrum*, 184 Wn.App. 744, 750, 339 P.3d 185 (2014). Appellate courts can sustain a trial court judgment on “any theory established by the pleadings and proof.” *Weiss v. Glemp*, 127 Wn.2d 726, 730, 903 P.2d 455 (1995).

The appellant asks this Court to re-weigh the evidence that was before Judge Ellen Clark and come to the conclusion that the self-serving affidavits provided by Mr. Leeson and supported by hearsay medical records that contradict those affidavits are more persuasive than the affidavits provided by Ms. Moore and supported by the findings of an independent investigation by CPS.

Appellant relies on *Grieco v. Wilson* for the proposition that mere allegations that would support “inferences that would establish grounds to modify the parenting plan” adequate cause should be found. *Grieco v. Wilson*, 144 Wn.App. 865, 875, 184 P.3d 668 (2008). *Grieco* was a third-party custody case in which a finding of adequate cause was overturned because the petitioners failed to allege both prongs required by the applicable statute and it has little applicability in this case. *Id.* 144 at 673-74 (2008). In fact, “adequate cause requires *more* than prima facie allegations that could support inferences that would establish grounds to modify the parenting plan.” *In re Marriage of Swaka*, 179 Wash.App 549, 319 P.3d 69 (2014).

RCW 26.09.270 requires that “a party seeking... modification of a... parenting plan shall submit together with his or her motion, an affidavit setting forth facts supporting the requested... modification...

[and the other party] may file opposing affidavits.” If mere “allegations that support inferences” are sufficient on their own to establish adequate cause, RCW 26.09.270 becomes meaningless as the opposing affidavits authorized by the statute would not be given equal weight at the outset of the action. Such an interpretation would encourage parties to make outrageous but concerning allegations severe enough establish adequate cause to modify a parenting plan without regard to the statements and evidence offered in response from parties opposed to the modification.

The Court in this case did not find that the Appellant’s affidavits met his burden of proof to establish adequate cause in light of Ms. Moore’s responses, including the findings of the CPS investigation and the admitted lack of probable cause for Ms. Moore’s arrest and that no charges were forthcoming. The trial court weighed the evidence presented and did not find Mr. Leeson’s claims to be persuasive. The appellate court is not in a position to re-weigh the affidavits and presentations of the parties and make new findings.

B. The motion to strike was not before the Court and did not address the “Unfounded” letter summarizing the CPS investigation and the letter was properly relied upon by the Court.

Local rules in Spokane Superior Court require family law motions to be noted for hearing and filed and served 12 days in advance of the chosen hearing date in order to be considered. LSPR 94.04(7)(e)(i).

On the same day as the initial hearing on adequate cause, Appellant filed a motion to strike the underlying CPS records submitted by Ms. Moore in support of her argument. CP 1089-1090. No note for hearing was filed and no such hearing was held. Regardless, the motion to strike clearly references the CPS “records” obtained by Ms. Moore regarding the allegations made against her in 2017. No such objection was made with regard to the separately filed letter summarizing the investigation and conclusion of CPS made in its July 10, 2018 letter. This document was properly before Commissioner Chavez and Judge Clark on revision. This was the evidence that Judge Clark relied upon in determining that adequate cause did not exist, not the CPS records provided in support of Ms. Moore’s argument. CP 1162-1189.

C. The court properly considered the evidence before it.

The standard of review of evidentiary rulings is abuse of discretion. *Hoglund v. Meeks*, 139 Wash.App. 854, 875, 170 P.3d 37 (2007). Evidentiary error does not justify reversal of a ruling unless that error is determined to have been prejudicial. *Brown v. Spokane Co. Fire*

Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Generally, erroneous admission of hearsay is not considered prejudicial “where it is merely cumulative” of other evidence. *Id.*, 100 Wn.2d at 196. Business records may be properly introduced as competent evidence under RCW 5.45.020.

The doctrine of "opening the door" allows one party to introduce otherwise inadmissible evidence on the same issue to rebut any false impression created by another party through the presentation of inadmissible evidence. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). Washington courts have confirmed that when hearsay medical records are introduced as evidence without objection or over objection, the door is opened to rebuttal evidence that would otherwise be likewise inadmissible. *Magana v. Hyundai Motor America*, 123 Wn.App. 306, 320, 94 P.3d 987 (Div. II 2004).

In this case, the Appellant supported his allegations that Ms. Moore had physically abused their child with hearsay medical records containing child hearsay. CP 733-772. Ms. Moore provided rebuttal evidence in the form of the CPS letter summarizing the investigation and “unfounded” finding. If the court considered the hearsay provided in support of the Appellant’s argument, it was proper to also consider the

hearsay provided in support of Ms. Moore's response. *Magana v. Hyundai Motor America*, 123 Wn.App. 306, 320, 94 P.3d 987 (Div. II 2004).

Further, the "unfounded" letter is a regularly kept business record. The letter itself states "the information from this investigation can be used in... legal actions related to child protection or child custody." CP 1088. It was properly admitted under the business record exception to hearsay. RCW 5.45.020.

D. The issue is moot as the parties have agreed to adequate cause on the appellant's third petition to modify the parenting plan and for a guardian ad litem to conduct an investigation

An order is moot if a court can no longer provide effective relief. *In re Marriage of Laidlaw*, 2 Wn.App. 381, 393, 409 P.3d 1184 (Div. I 2018).

The parties returned to the March 5, 2018 parenting plan per Judge Clark's order denying adequate cause and dismissing the Appellant's petition. Ms. Moore maintained her regular residential schedule with Sylvia for the following 8 months, including several overnight visits after the allegation that she strangled Sylvia on April 10, 2019. The parties have agreed to adequate cause and for the appointment of a guardian ad litem to investigate Mr. Leeson's allegations. Though she again denies the

allegations, Ms. Moore agreed to supervised visitation with Sylvia while the investigation proceeds.

The relief sought (adequate cause and supervised visitation) has been agreed upon by the parties and an investigation into Mr. Leeson's claims is underway. This matter is moot and should be dismissed.

IV. CONCLUSION

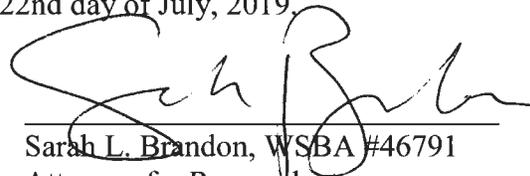
Judge Ellen Clark appropriately reviewed the entire case file at Mr. Leeson's request. She weighed the affidavits and supporting evidence proffered by both parties and made a reasonable and appropriate determination that adequate cause was not supported by the record. Mr. Leeson's appeal requests that this Court determine that the "unfounded" finding by CPS should not be granted the weight that the Court gave to it. This is not an appropriate role for the appellate court and Judge Clark's determination was not an abuse of discretion.

Judge Clark appropriately considered all information before her. The "motion to strike" was not properly before the court and therefore was not ruled upon. Regardless, appellant opened the door for hearsay by providing hearsay evidence in support of his own allegations. Even had he not done so, the "CPS records" referred to in his motion to strike were not the "unfounded" letter relied upon by Judge Clark in her ruling. The

“unfounded” letter was not objected to and there was no request to strike it. In any case, the “unfounded” letter is a business record and admissible as an exception to hearsay.

The Respondent, Natalie Moore, respectfully requests this Court deny this appeal.

Respectfully submitted this 22nd day of July, 2019.

A handwritten signature in black ink, appearing to read "Sarah L. Brandon", written over a horizontal line.

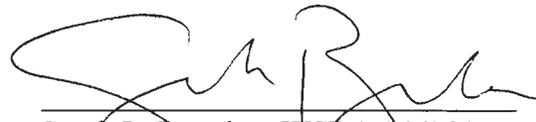
Sarah L. Brandon, WSBA #46791
Attorney for Respondent
Burke Law Group, PLLC
221 N. Wall St. Ste. 624
Spokane, WA 99201
Telephone: (509) 466-7770
Fax: (509) 464-0463
Email: Sarah@BurkeLG.com

CERTIFICATE OF SERVICE

The undersigned states the following under penalty of perjury under the laws of the State of Washington. On the date below, I personally filed, emailed, and personally delivered the foregoing Respondent's Brief to:

1. Gary R. Stenzel, WSBA #16974
Attorney for Appellant
1304 W College Ave. LL
Spokane, WA 99201
Stenz219@comcast.net

Signed at Spokane WA, Washington on Monday July 22, 2019



Sarah L. Brandon, WSBA #46791
Attorney for Respondent
Burke Law Group, PLLC
221 N. Wall St. Ste. 624
Spokane, WA 99201
Telephone: (509) 466-7770
Fax: (509) 464-0463
Email: Sarah@BurkeLG.com