

FILED

JAN 21 2020

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 36766-5-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

In re the Matter of:

TIFFANY CARPENTER,

Appellant,

and

CHRISTIAN CORREA,

Respondent.

APPELLANT'S REPLY BRIEF

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A. ASSIGNMENT OF ERROR

The trial court erred and abused its discretion by failing to grant the mother, Ms. Carpenter's request for sole decision making for school, healthcare, and extracurricular activities in a petition to modify a final parenting plan. This request was based on the evidence of continual conflict between the parties and Mr. Correa's inability to communicate appropriately and effectively regarding the parties' child.

Lastly, the only findings in the court's oral ruling dealt with the Judge's personal beliefs regarding sole decision making as it related to his life growing up and that it would not reduce conflict in this case. There were no further findings directly related.

B. OPPOSITIONAL STATEMENT OF THE CASE

EDUCATIONAL DECISIONS: Mr. Correa claims that "Ms. Carpenter provided no evidence of conflict surrounding educational decisions." (Brief of Respondent, at 3). Mr. Correa overlooks the evidence in this case that supports a conclusion that he is unable to civilly communicate and will often resort to profanities or attempt to belittle Ms. Carpenter to get his way. (CP 121, 702). Furthermore, Mr. Correa admitted to not working with

Ms. Carpenter on other issues pertaining to the children such as extra-curricular activities. (CP 6-8, 39, 89, 94, 123). This behavior affects their educational situation in that the children display hostile, defiant, and aggressive behavior to the point of their teachers and school administrators noticing. (CP 124-25, 539, 702). Additionally, Mr. Correa has involved the children in decision making to the point of causing detriment to the children that is also visible to their teachers and school administrators. (CP 124-25, 539, 702). This is the basis for Ms. Carpenter's request of sole-decision making regarding educational matters. (CP 40).

Therefore, the trial court abused its discretion because substantial evidence exists to show that joint decision making between the parties regarding educational matters is ineffective and causes detriment to the parties' children.

HEALTH CARE DECISIONS: Mr. Correa claims that there are no conflicts surrounding health care decisions for the children because “[Ms. Carpenter] has historically notified Mr. Correa of the children’s doctor appointments and confirmed that ‘he’s been in attendance even when he lived in Kent.’” (Brief of Respondent, at 4).

Mr. Correa claims his attendance at these appointments obviates the conflict he has caused in decision making despite evidence supporting the fact that he has engaged in profanities when discussing decision with Ms. Carpenter, misused the Family Wizard app, involved the children in issues between the parties, belittled Ms. Carpenter, and refused to honor other decisions involving the children (CP 89, 94, 121, 124-125, 539, 702, 703).

Substantial evidence exists showing that Mr. Correa has hindered the mutual decision making process and, therefore, the court abused in discretion in not awarding sole decision making to Ms. Carpenter.

EXTRA-CURRICULAR ACTIVITIES: Mr. Correa acknowledges that there is evidence to support conflict in the area of extra-curricular decision making. (Brief of Respondent, at 5). Mr. Correa admits that there was no conflict regarding the children's gymnastic enrollment because he was not aware of it. (Brief of Respondent, at 5). Mr. Correa claims that there is no conflict in extra-curricular decision making, despite absences from the children's choir events, because there is a possibility that Mr. Correa was unaware of information regarding these events. (Brief of Respondent, at 5). The basis for this claim is that Ms. Carpenter

testified that she “had to repeatedly ask the director to receive information about [the children’s] performances.” (Brief of Respondent, at 5, RP 24-25). Furthermore, Mr. Correa relies on the fact that he has been to some of the children’s plays to show no conflict in extra-curricular decision making. (Brief of Respondent, at 5, RP 21-26).

Despite Mr. Correa’s argument to the contrary, there is substantial evidence that exists to show that Mr. Correa was obstinate in the area of extra-curricular activities. Mr. Correa has admitted to not taking the children to some of these events because it was during his time and he did not believe he should have to. (CP 89, 94, 123).

Problems with joint decision making as a whole are also shown through evidence that Mr. Correa engaged in profanities when talking with Ms. Carpenter, belittled her, misused the Family Wizard app, and involved the children in the matter to the point that they have become hostile and defiant to their mother and around their school teachers and administrators. (CP 89, 94, 121, 123, 124-25, 702, 703).

Therefore, the evidence shows that the trial court abused its discretion in not awarding sole decision making to Ms. Carpenter.

C. ARGUMENT

a. The court Should Consider Ms. Carpenter’s Argument Based on RCW 26.09.187(2)(b)(ii), (iii) as Ms. Carpenter Presented Substantial Evidence at Trial Regarding the Parties’ Problems with Joint Decision-Making.

Mr. Correa asks this court to ignore Ms. Carpenter’s argument, based on RCW 26.09.187(2)(b)(ii),(iii), because it is raised for the first time on appeal. (Brief of Respondent, at 6). Mr. Correa cites RAP 2.5(a) as a basis for this request. (Brief of Respondent, at 6). RAP 2.5(a) provides that “the appellate court *may* refuse to review any claim of error which was not raised in the trial court.” (emphasis added). Stated in a different way, “[the appellate court has] authority under the rules to accept review of an issue being raised for the first time on appeal.” *State v. Malone*, 193 Wash.App. 762, 766, 376 P.3d 443, 446 (Wash. App. 2016), (citing RAP 2.5(a)). This authority exists outside of the statutorily enumerated exceptions set out in RAP 2.5(a)(1), (2), and (3). *Id.*

The court should consider Ms. Carpenter’s argument, under RCW 26.09.187(2)(b)(ii), (iii), because it has the discretion to do so. RAP 2.5(a). Ms. Carpenter presented extensive evidence at trial to warrant consideration of this issue. Ms. Carpenter proposed sole decision-making at trial, Mr. Correa has used profanities when

speaking to her about decisions regarding the children, Mr. Correa has admitted to intentionally foregoing the children's extra-curricular activities during his residential time, Mr. Correa has engaged in belittling language towards Ms. Carpenter, and the children have suffered detriment due to Mr. Correa involving them in the litigation process. (CP 89, 94, 121, 123, 124-25, 702).

It is clear that Ms. Carpenter intended to argue for sole decision making based on the factors set out in RCW 26.09.187(2)(b)(ii), (iii). (CP 38). On November 9, 2017, she requested a modification of the parties previous parenting plan that limited decision making of Mr. Correa, and had RCW 26.09.191 restrictions against Mr. Correa including (1) an emotional or physical problem that interfered with his ability to parent, (2) the abusive use of conflict, and (3) withholding the child for a long period of time. (CP 38, *see generally* CP at 37-54).

Therefore, the court should consider Ms. Carpenter's argument under RCW 26.09.187(b)(2)(ii) and (iii) because Ms. Carpenter presented substantial evidence at trial regarding Mr. Correa's behavior and its interference with joint decision making as well as the detriment it has caused the children.

b. **This court should award Ms. Carpenter sole decision-making under RCW 26.09.187(2)(b)(ii) and (iii) and *In re Johnson*.**

As set out in Appellant's Opening Brief, the relevant provision of RCW 26.09.187 is as follows: "the court *shall* order sole decision-making to one parent when it finds that: (ii) both parents are opposed to mutual decision making; (iii) one parent is opposed to mutual decision making, and such opposition is reasonable based on the criteria in (c) of of this subsection." RCW 26.09.187(2)(b)(ii), (iii). Subsection (c) states, in relevant part, that the court is to consider "whether the parents have demonstrated ability and desire to cooperate with one another in decision making in each of the areas. . ." RCW 26.09.187(2)(c)(iii).

While *In re Johnson* does deal with two parties each requesting sole decision-making, the court's conclusion is helpful in this matter. *In re Parentage and Support of Johnson*, 48414-5-II (Div. II, July 25, 2017) (persuasive authority cited in accordance with GR 14.1) (unpublished). In *Johnson*, the parties did both request sole decision making and the parties entered evidence at trial to support both of their contentions and the court found that decision making should be limited, *See generally In re Parentage*

and Support of Johnson, 48414-5-II (Div. II, July 25, 2017) (persuasive authority cited in accordance with GR 14.1) (unpublished).

Mr. Correa claims that, because he was not at trial and did not request sole decision-making, that the court cannot award sole decision making to Ms. Carpenter. (Brief of Respondent, at 7-9). Mr. Correa claims that, because he did not testify at trial or offer any evidence, that there is no evidence to suggest that the parties could not engage in mutual decision-making. (Brief of Respondent, at 8). Ms. Carpenter's testimony and Mr. Correa's behavior in the past form a basis for the court awarding Ms. Carpenter sole decision-making authority.

Mr. Correa is attempting to benefit from not being present at trial and not getting the opportunity, through his own actions, to testify or offer evidence to support his contention. Ms. Carpenter was present at trial and offered substantial evidence that mutual decision-making would not be appropriate and in the best interests of the children. (RP 13-15).

It is clear that Mr. Correa has not demonstrated an ability to and desire to cooperate with Ms. Carpenter regarding decision making. Ms. Carpenter entered evidence at trial indicating that

Mr. Correa use profanities when dealing with her, Mr. Correa has belittled Ms. Carpenter in their dealings involving the children, Mr. Correa has intentionally ignored the children's extra-curricular activities in the past, and Mr. Correa has inappropriately involved the children in litigation. (RP 13-15, CP 89, 94, 121, 123, 124-25, 539, 702). Mr. Correa's involvement of the children in this process has been so detrimental to them that they behave defiantly and aggressive in front of their mother as well as school officials. (CP 124-25, 539, 702).

These facts demonstrate an inability of Mr. Correa to engage in mutual decision-making. Therefore, the court abused its discretion in not award Ms. Carpenter sole decision-making.

c. This Court Should Deny Mr. Correa's Request for Attorney's Fees as Ms. Carpenter's Appeal Is Not Frivolous.

Mr. Correa claims that Ms. Carpenter's appeal is frivolous and that he is entitled to attorney's fees based on the bases set out in *Matheson v. Gregoire*, 139 Wn.App. 624, 639, 161 P.3d 486 (2007). These bases are 1) no debatable issues on which reasonable minds can differ, 2) the appeal is so devoid of merit that

there is no reasonable possibility of reversal, or 3) the appellant fails to address the basis of the lower court's decision. *Id.*

There are debatable issues on which reasonable minds can differ in this matter. Again, Mr. Correa demonstrated a past proclivity to refuse to engage in mutual decision-making by refusing to take the children to extra-curricular activities. (CP 89, 94, 123). Mr. Correa regularly berated Ms. Carpenter and involved the children in the parties' litigation to their detriment. (CP 121, 124-25, 702, 539). These issues could lead a reasonable person to differ from Judge Fennessy's conclusion to award mutual decision-making.

Ms. Carpenter's appeal is not without merit. RCW 26.09.187(2)(c)(iii) directs the court to look to evidence of the parties' respective ability or desire to engage in mutual decision-making. Mr. Correa's actions in the past have shown a lack of ability and desire to engage in mutual decision-making. Mr. Correa has foregone extra-curricular activities that have interfered with his time. (CP 89, 94, 123). Mr. Correa has engaged in belittling behavior towards Ms. Carpenter and caused detriment to the children by involving them in this process. (CP 121, 124-25,

702, 539). These facts show that Ms. Carpenter's contentions have merit and, therefore, her appeal is not frivolous.

Ms. Carpenter's appeal addresses the basis of the lower court's decision. The lower court focused on how sole decision-making was intended to reduce conflict between parties and found that it would not. (RP 28-29, CP 726-36). Ms. Carpenter testified to the detriment mutual decision-making would cause during trial due to Mr. Correa improperly involving the children in these matters. (RP 15, 19). Ms. Carpenter's contentions directly address this finding and, therefore, Ms. Carpenter's appeal is not frivolous.

Ms. Carpenter's appeal is not frivolous under any of the factors set out by *Matheson v. Gregoire* and, therefore, Mr. Correa should not be awarded attorney's fees.

D. CONCLUSION

Based on the above discussed facts and law, the trial court abused its discretion by not entering findings related to the parties' conflict and past decision making, without consideration of the fact that both parties have indicated that they did not want shared decision making, and the record supports the request.

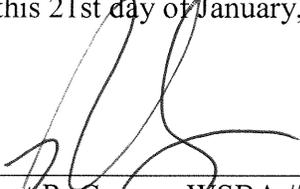
Furthermore, substantial evidence exists in the court file and was argued in the pro forma trial showing that sole decision-

making was appropriate given Mr. Correa's past behavior regarding mutual decision-making, involving the children in the litigation process, and using profanity and belittling language towards Ms. Carpenter.

Lastly, Ms. Carpenter's appeal is not frivolous as she presented debatable topics that on which reasonable minds could differ, her appeal has merit giving Mr. Correa's past behavior towards mutual decision-making, and Ms. Carpenter addressed the basis for the lower court's ruling.

Therefore, this court should reverse the lower court's ruling and award Ms. Carpenter sole decision-making authority and deny Mr. Correa's request for attorney's fees.

Respectfully submitted this 21st day of January, 2020.



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AFFIDAVIT OF SERVICE

I, RYAN D. McINTYRE, upon penalty of perjury under the laws of the State of Washington, declare that on the 21st day of January, 2020, I served by Personal Delivery and by email a copy of the Appellant's Reply Brief to the following persons at the address below:

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