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CASE No. 63967-6-1

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

RYAN KEANE,

APPELLANT,

v.

NICOLE KEANE,

RESPONDENT.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR ISLAND COUNTY

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APPELLANT'S REPLY BRIEF

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**ORIGINAL**

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## **I. INTRODUCTION AND SUMMARY OF THE ARGUMENT**

The Respondent is not persuasive in her attempt to distinguish analogous and authoritative caselaw from the facts of the present case. The Appellant's request for reversal of trial court findings with regard to an allocation of decision-making authority and the residential provisions in the parenting plan, as well as the award for spousal maintenance, are well-grounded in both statutory authority and caselaw. As a result, the Appellant's request for relief should be granted on all counts.

## **II. ARGUMENT**

### **1. THERE WAS NO SUBSTANTIAL EVIDENCE PRESENTED AT TRIAL, OTHER THAN MERE ACCUSATIONS, THAT WOULD SUPPORT A FINDING OF A HISTORY OF ACTS OF DOMESTIC VIOLENCE**

Findings of fact are reviewed under the substantial evidence standard. *Pope v. University of Washington*, 121 Wn.2d 479, 490, 852 P.2d 1055 (1993). Evidence is substantial if it persuades a fair-minded, rational person of the truth of the finding. *In re Marriage of*

*Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001); *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991).

The trial court incorrectly awarded sole decision-making to the mother based on a history of acts of domestic violence because there was no substantial evidence to support that history presented at trial. What the Respondent inaccurately states as fact in her responsive brief, is actually a summary of her one-sided testimony at trial with regard to domestic violence incidents allegedly committed by the Appellant. However, the record shows that Respondent never reported any violence by the Appellant to law enforcement, who had been called to their home on numerous occasions. RP 77. No arrests of the Appellant were ever made and no allegation of domestic violence was ever made against the Appellant within the context of police investigations. RP 94-95.

The Appellant also gave testimony at trial, denying that he had ever been physically violent with the Respondent, and maintained that Respondent was untruthful in her allegations. RP 92-93, 120.

While the court stated that a “military protection order” was entered against the Appellant at one time, that finding was also not based on substantial evidence of domestic violence. The Appellant testified that the Respondent made no allegations of violence that precipitated his removal from the marital residence, and that his removal was nothing more than standard procedure:

A: Nikki had called somewhere in my command and said she wasn't comfortable with me living there anymore. So they took me out....

Q: What, if anything, was she alleging against you?

A: At that point she alleged –she didn't actually allege anything at that point....

Q: So were the military police called to your home at this time?

A: No.

Q: Never?

A: No.

Q: So what was the basis – or did anybody tell you the basis for telling you not to go home?

A: It's standard procedure for military. Once – if there's anything that could potentially become a problem, they just want to separate the two so that –to avoid anything happening.

*RP 91-92.* The simple truth of the matter is, the 2008 Protection Order constitutes the only record of any act of domestic violence committed by the Appellant. There is no history of acts of domestic violence reflected in any other police document or court order, and any “other evidence” found by the trial court is based upon nothing more than Respondent’s “mere accusations”. There was no third-party witness testimony to corroborate the Respondent’s allegations, and Judge Hancock himself questioned the credibility of the Respondent in stating that Ms. Keane’s testimony about Mr. Keane’s allegedly enraged and controlling behavior was substantially overblown.

Under *Caven v. Caven*, 136 Wn.2d 800, 966 P.2d 1247 (1998), mere accusations of domestic violence, without proof, are

not sufficient to constitute statutory basis for denying mutual decision-making in a permanent parenting plan in connection with marriage dissolution.” Though Respondent attempts to distinguish *Caven* from the present case, both cases present circumstances with regard to numerous allegations of domestic violence and the affect those allegations have on the allocation of decision-making within a parenting plan. Respondent correctly asserts that the principal issue in *Caven* deals with statutory construction, but also omits the fact that “a related issue is whether the trial court had discretion to determine mutual decision-making rights under a parenting plan if any of the circumstances recited in RCW 26.09.191(1)(c) were present in the case.” *Caven*, 136 Wn.2d. 800. The present case is directly on point with this “related issue”.

The Respondent also asserts incorrectly that the statement regarding the insufficiency of “mere accusations” of domestic violence is dicta, and therefore not controlling. Dicta are judicial opinions expressed by judicial officers on points that do not necessarily arise in the case. However, the issue as to allegations of domestic violence

without substantial evidence to support them most certainly arose in *Caven*, and the Court correctly addressed the Petitioner's concern:

Petitioner voices concerns that if the Court of Appeals' interpretation of the statute is adopted then "a parent wishing to restrict the other parent's relationship with their child would be given an incentive to levy false accusations of domestic violence." Actually, RCW 26.09.191(1)(c) requires a finding by the court that there is "a history of acts of domestic violence." Mere accusations, without proof, are not sufficient to invoke the restrictions under the statute.

*Id.* The court there ruled specifically that mere accusations of domestic violence was not enough to invoke restrictions in a parenting plan, in direct response to an issue raised by the Petitioner. This was a "related issue" presented to the court in addition to that of statutory construction, and the court's ruling is thereby controlling here.

In making a determination of whether the trial court's finding of a history of domestic violence is reversible error, the Court need only look to the substantial evidence standard. Findings of fact must be supported by substantial evidence. *Pope v. University of Washington*, 121 Wn.2d 479. While Judge Hancock did find there was "other evidence" of domestic violence, he specifically declined to cite to

specific incidents that made up a history. Given that the only possible evidence of further acts of domestic violence could come from the Respondent's own testimony, and given that Judge Hancock also questioned the Respondent's veracity and knack for over exaggeration, specific findings are necessary here. Because the trial court could not make specific findings of past acts of domestic violence, the finding with regard to mutual decision making should be reversed.

**2. THE TRIAL COURT EXPRESSLY STATED ITS INTENT TO AWARD PRIMARY RESIDENTIAL CARE TO THE MOTHER BASED UPON HER HISTORIC STATUS AS THE PRIMARY CAREGIVER**

Trial court parenting plans that do not constitute an abuse of discretion will be upheld. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997); *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991).

In making an initial determination of a permanent parenting plan, it is impermissible for the court to consider a presumption in favor of the parent who provided the majority of residential time under the temporary parenting plan. *In re Marriage of Combs*, 105 Wn. App. 168, 19 P.3d 469, *review denied*, 144 Wn.2d 1013 (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.” *In re Marriage of Kovaks*, 121 Wn.2d 795, 809, 854 P.2d 629 (1993). The focus is on prospective (not historical) parenting capabilities as determined by the seven factors of RCW 26.09.187(3)(a). *In re Marriage of Combs*, 105 Wn. App. 168, 19 P.3d 469, *review denied*, 144 Wn.2d 1013 (2001); *In re Marriage of Kovaks*, 121 Wn.2d 795, 809, 854 P.2d 629 (1993).

While it is true that the trial court did consider each of the seven (7) factors required by RCW 26.09.187, Judge Hancock expressly stated that factor (i) relating to the relative strength, nature and stability of the child’s relationship with each parent, weighs in

favor of the Respondent because "Ms. Keane has been the primary parent for all of the child's life". The court noted this was "a key factor" *Verbatim Report of Court's Oral Ruling pp. 10-11*. Judge Hancock also stated that while both parents have a strong and healthy relationship with the child, and while both parties can provide for her emotional needs, the factors weigh more heavily in favor of the mother because she has "a longer track record" *Verbatim Report of Court's Oral Ruling, p. 10-12*. Except for the consideration as to past performance of parenting functions under RCW 26,09.187(3)(a)(iii), the statute is silent pertaining to the court's consideration of who has been the primary caretaker. The trial court abused its discretion when it awarded the mother more residential time with the child based upon her status as the historical primary caretaker. Although the father had never had more than three overnights with the child, the caselaw is clear under *In re Marriage of Combs*, 105 Wn. App. 168, that the court cannot consider a presumption in favor of the parent who provided the majority of residential time under the temporary parenting plan. *In re Marriage of Kovaks*, 121 Wn.2d 795 makes it clear that a parent's historical role as the primary caretaker is not

determinative. The trial court found that both parents “both have a good potential for future performance of parenting functions”. Verbatim Report of Court’s Oral Ruling, p. 11. Furthermore, based upon the relative strength, nature and stability of the child’s relationship with each parent--the factor that should be given the most weight--the Court and the Guardian ad Litem found that both parents have an equally strong relationship with the child. There is no reasonable basis for the court to have concluded, upon proper consideration of the factors, that the mother should be awarded primary residential care of the child.

Factor (i) should have weighed equally in favor of both parties. The court correctly found there was no agreement between the parties that would give weight to factor (ii). Factor (iii) allows the court to consider both past and future potential for performance of parenting functions. The court found that both parties have future potential, but that the Respondent has taken greater responsibility for past performance of parenting functions. That favor weighs in favor of the Respondent. Factor (iv) relates to the emotional needs and

developmental level of the child. The court found that “both parents can provide that” *Id.*, p. 12, so factor (iv) should have been weighed equally in favor of both parties. The court correctly found that factor (v) weighed heavily in the Appellant’s favor with regard to the support of family members. Factor (vi) does not apply because the child is not old enough to express a preference for residential time. Finally, factor (vii) relates to each party’s employment schedule. The court found correctly that factor (vii) would be given equal weight to both parties because although the Respondent was not presently employed, she would soon be attending school and working full time. *Id.*, p. 13.

Upon proper consideration of the factors, the court should have found the parties to be on equal footing. Given the equal weight that should have been given to both parties, it was an abuse of discretion to award residential placement to the mother based upon her historic role as the primary caretaker.

The Respondent incorrectly asserts that the trial court did not base its decision on the legal presumption cited in *Marriage of Kovaks*. Although the trial court here did not use the term “legal

presumption”, Judge Hancock stated specifically that “a key factor is that Ms. Keane has been the primary parent for all of the child’s life”. *Marriage of Kovacs* is directly on point here, and the trial court’s abuse of discretion in relying on the primary caretaker presumption is clear.

The Respondent additionally states that *Marriage of Combs* should not apply because the trial court there failed to address the seven statutory factors altogether. While the trial court did consider all seven factors in the present case, it is clear that Judge Hancock expressly relied on the fact that Respondent had been the primary caretaker, looking back on historical parenting capabilities in direct opposition *Combs*. Given that proper consideration of the factors would have placed the parties on equal ground, it is clear that the trial court abused its discretion, and the court’s ruling awarding the primary residential care of the child to Respondent should be reversed.

**3. THE TRIAL COURT ABUSED ITS DISCRETION  
WHEN IT DECLINED TO ORDER EQUAL  
RESIDENTIAL TIME TO EACH PARENT BASED  
UPON STANDARDS NOT STATUTORILY  
PRESCRIBED**

In this case, the Appellant argued it was in the child's best interest to reside primarily with him because of the mother's questionable conduct in the adult entertainment industry and psychosocial damage that could be done to the child as a result of the mother's decisions. In the event the child wasn't placed primarily with the father, he requested a parenting plan that designated equal residential time to each parent. Based upon the GAL recommendations and the court's finding that both parties have a strong and stable relationship with the child, the court had the authority to find that it was in the child's best interests to share her time equally with both parents. The only factor contained in the statutory language, outside of the best interest standard, is that of geographic proximity. In this case, the parties reside in relatively close proximity to each other. The court abused its consideration of geographic proximity, however, by stating that "these are young people who have not settled down... it will be difficult to predict where

they will be living in the future, though they indicate in might be Illinois". *Verbatim Report of Oral Ruling, p. 14*. The statute does not give the Court any authority to consider the possible or future geographic proximity between the parties. Certainly the Legislature could not have intended for the Court to consider future geographic proximity between the parties in making a determination of whether equal residential time is appropriate. The uncertainty surrounding where any given party may choose to reside in the future would serve to render the statutory consideration moot. It is far more likely that the legislature intended for the court to consider the current geographic proximity, and the parties here reside within a reasonable distance of one another.

In denying the father's request for equal residential time based upon the absence of agreement between the parties and the lack of a history of cooperation and shared performance of parenting functions the Court abused it's discretion because factors that no longer exist in the statutory language. While the court noted these considerations have been removed from the statute, it continued to state, without citing to any authority, that they were nevertheless "appropriate

factors for consideration". *Id.*, pp. 14-15.

In any event, while there was no agreement of the parties, the Guardian ad Litem, after thorough investigation, determined that this situation was one in which the parties could work together and share their parental responsibilities moving forward. The GAL further testified that the parenting styles of the parties essentially mirror each other, based in part by the fact that the father has followed the recommendations of the mother as to the child's routine and schedule. Therefore, not only did the trial court abuse its discretion in considering factors outside of the statutory framework, but it erred in finding that the parties did not have the potential to successfully enter into a shared parenting arrangement moving forward.

**4. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING SPOUSAL MAINTENANCE AFTER FINDING THAT THE FATHER DID NOT HAVE THE ABILITY TO PAY, THAT THE PARTIES HAD A SHORT TERM MARRIAGE, AND THAT THE PARTIES DID NOT HAVE A HIGH STANDARD OF LIVING DURING THE MARRIAGE**

RCW 26.09.090 sets forth the legal standard for awarding maintenance in a dissolution proceeding, including six (6) factors a trial court must consider when determining whether maintenance

should be awarded. The statute provides:

(1) In a proceeding for dissolution of marriage domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

- a. The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
- b. The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
- c. The standard of living established during the marriage or domestic partnership;
- d. The duration of the marriage or domestic partnership;
- e. The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

- f. The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

*RCW 26.09.090.* The Court found specifically that the Appellant's income was insufficient to meet his monthly expenses, and that he did not have the ability to pay maintenance under *RCW 26.09.090(f)*. The Respondent suggests that because consideration of the Appellant's ability to pay is only one of six relevant factors, it should not be determinative. However, the statute is clear that the court must consider "all relevant factors" in making a determination, to include the obligor spouse's ability to pay. While the list is not exhaustive, neither party is asserting that some other factor absent from the list should or should not have been considered, so the language "including, but not limited to" is irrelevant here. The fact remains that Appellant does not have the ability to pay maintenance for any period of time, however brief. In addition, the court found with regard to subsection (c), that "the parties did not have a high standard of living during the marriage", and that "this is a short term marriage" with regard to subsection (d). *Verbatim Report of Oral Ruling, p. 17.*

The court also considered the time necessary to acquire sufficient education and training under subsection (b), but the award for maintenance for only three months does not resonate with the time Respondent needed to complete her two-year program for nursing school. It simply made no logical sense for the Court to find that the Appellant lacked the ability to pay after consideration of his monthly income and expenses, but also find that he would somehow have the funds available for the next three months. The court properly considered that three of the six factors present in this case did not give rise to an award of spousal maintenance, and therefore abused its discretion by ordering maintenance, however short in duration it may have been. The award of maintenance, even if temporary, was based on untenable reasons and therefore constitutes an abuse of discretion under *Marriage of Wright* and *Marriage of Littlefield*.

### **III. CONCLUSION**

The Appellant father respectfully requests that this Court reverse the trial court's award of maintenance, and remand back to the trial court for a modification of the parenting plan with regard to

the provisions for residential time and decision-making authority.

Respectfully submitted this 22nd day of July, 2010.



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