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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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BRIEF OF RESPONDENT

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## I. STATEMENT OF THE CASE

Ryan Keane and Nicole Keane married in August of 2006. RP 60. Nicole was already pregnant with their child, Callianara (“Calli”), who was born January 20, 2007. RP 62. During Nicole’s pregnancy, at least two incidents of domestic violence occurred. RP 191. In the first incident, during an argument between Ryan and Nicole, he attempted to punch her, but instead he “punched the wall” right next to her. *Id.* In the second incident, another argument developed when Nicole wanted to leave the house to go for a walk and Ryan would not let her. RP 191-192. He tackled Nicole to the floor and their dog was even trying to attack Ryan to get him away from her. *Id.*

Throughout the marriage, Ryan restricted Nicole’s ability to check the mail, to make phone calls to friends, and to have anyone in the house while he was not there. RP 192-193. He physically “blocked” Nicole from leaving the house “many times.” RP 193. He would not allow

Nicole to obtain her driver's license because he did not want her "leaving the house." RP 193-194.

Another argument developed between Ryan and Nicole when she told him during a mutual visit to Chicago, Illinois, that she wanted to "leave him." RP 195. During this argument, Ryan tackled Nicole to the floor and pinned her down:

"He rested his whole entire weight on top of me while holding my wrists and I screamed at him and yelled at him and told him to get off. I was kicking and yelling and I bit him and tried to scratch at him but it wasn't working . . . I was yelling him to call the cops and I don't want to be here with him. I don't want to be near him. I would feel safer with the cops around."

RP 200. Later, from the time when Ryan and Nicole moved from Chicago, Illinois to Oak Harbor, Washington, Ryan has thrown Nicole against the wall, pressed her down to the floor, tackled her and held her down by her wrists, put all his body weight on her so she could not move, and chased her to the bathroom when she "locked herself" there to escape from him during other arguments. RP 203. Ryan has also pushed Nicole in the closet and refused to let her out. RP 204. Nicole is "currently afraid" of Ryan. RP 209.

Ryan testified during trial that Nicole previously broke furniture or threw various items at her husband, but she denied it. RP 208. There was

another incident in 2007 when the parties lived in Florida where Nicole was arrested, where she did not tell the police her side of the story because she did not want her husband arrested. RP 584. In Florida, Ryan and Nicole had “no family” and “no funds” and Nicole knew that she would have no way to provide for their daughter if her husband was arrested. *Id.*

Based on other founded incidents of domestic violence against Nicole by Ryan during the parties’ marriage, the Island County Superior Court in a separate proceeding entered a domestic violence protection order against Ryan, in favor of Nicole, and a certified copy of such order was admitted into evidence before the trial court. RP 119, 188. Ryan later attempted to obtain his own domestic violence protection order against some of Nicole’s friends, but the Island County Superior Court entered a “denial order” because Ryan’s allegations were not credible and he failed to meet his burden of proof. RP 188.

Based on this evidence of past domestic violence against Nicole, after a five day trial on the merits in front of Island County Superior Court Judge Hancock, although he found Nicole’s testimony about Ryan’s “controlling behavior” overblown, the court found that “she did suffer from domestic violence at the hands of Mr. Keane. Domestic violence is never acceptable in our society, so all of this causes great concern for the court.”

Verbatim Report of Court's Oral Ruling, p. 4. In addition, although the court did not find sufficient evidence based on this past history of domestic violence against Nicole to order a current "continuing" restraining order against Ryan, the court cautioned Ryan as follows:

[THE COURT]: "Mr. Keane would be well advised to stay away from [Nicole] and communicate with her only as necessary with regard to the child."

*Id.* at p. 18.

In addition to Ryan's domestic violence issues, with regard to his mental health and previous suicide attempts, he has admitted to cutting himself on his forearm; that he has been a "cutter"; that he has previously drawn "blood"; and that his cutting marks have left "scars." RP 129. Ryan has recently been prescribed and taken "anti-depressant medication." RP 131. He has admitted to Nicole that he had been seeing a therapist. RP 207.

Ryan admitted to Nicole in 2008 that he had cut himself and then used a lighter to burn his arm while he was begging her to "make the marriage work":

"We were already separated and he was supposed to be leaving to go stay at his friend's father's house, but he was begging me to stay to make the marriage work and he told me 'I want to be completely honest with you' and I said 'why, what happened? He was, like, well I did something and you are going to be mad about it. I was, like, why, what did you do? He said I cut myself. I said where.

Show me. He pulled up his sleeve and showed me his forearm where he had multiple cuts and a few pretty deep and his sleeves were covered in dry blood and he even had burn marks on his wrists, and I said, what happened here? And he told me he used a lighter.”

RP 206. Prior to trial, Nicole also told the court-appointed guardian ad litem that Ryan was cutting himself again after their separation and that she had seen “bleeding.” RP 675.

Prior to trial, Ryan never told the court-appointed guardian ad litem that he was prescribed medication for depression. RP 712. Although the court-appointed guardian ad litem had specifically requested Ryan’s mental health record—including a request that he sign a release of information for his mental health counselor at NAS Whidbey—Ryan never provided the requested records. RP 716-717.

With regard to Ryan’s “cutting,” prior to trial he specifically told the court-appointed guardian ad litem that he had “never engaged in cutting.” RP 129. In commenting on that denial statement during trial, Ryan said the statement was “probably more of a misunderstanding or miscommunication between Ms. McDougall [the court-appointed guardian ad litem] and myself.” *Id.*

Later during trial, the court-appointed guardian ad litem addressed this alleged “misunderstanding” as follows:

“[QUESTION]: Mr. Keane testified that this was a, quote, misunderstanding between the two of you. You heard him say that?”

[ANSWER]: Yes, I did.

[QUESTION]: Is that true, was that a misunderstanding?

[ANSWER]: I asked a question and he answered no.

[QUESTION]: Did his comment in trial surprise you when he said that in trial that he had cut himself?

[ANSWER]: It was news to me.”

RP 709 (emphasis added). During the guardian ad litem’s prior interview with Ryan, she had purposely asked him specific questions about whether he had ever cut himself, and he denied it:

“[QUESTION]: Did you at any point ask him a specific question about whether he had ever cut himself?”

[ANSWER]: Yes. I said, have you ever cut yourself?

[QUESTION]: And what did he say?

[ANSWER]: He said, no, I haven’t.”

RP 710-711 (emphasis added).

With regard to the court-ordered Parenting Plan, based on Ryan’s domestic violence and mental health issues, the trial court’s temporary orders initially allowed only “supervised visitation” for Ryan. RP 726. Later, after the trial court eventually lifted the supervised visitation requirement, the court-appointed guardian ad litem wrote an initial report to the court recommending decreased visitation for the father with the

minor child, based on the child's age, bonding and attachment to Nicole. RP 729.

Nicole has been the primary caretaker for her daughter since she was born, with minimal involvement from the father. RP 190. The guardian ad litem specifically acknowledged during trial that Nicole has been her daughter's primary residential parent since the child was born. RP 728. Up to the day of trial, the minor child had never spent three consecutive unsupervised overnights with the father. RP 731-732.

During trial, one of Nicole's witnesses, Ms. Alexa Morely, testified that she lives next door to Nicole. RP 174. She testified about her personal observations of Nicole playing with her daughter, going on walks, cooking for her, reading her bedtime stories, and so on. *Id.* In contrast, during Ms. Morley's personal observations of the minor child when Ryan would return her to Nicole after one of his visitations, Ms. Morley observed the minor child with "stuff on her face," her hair was "not brushed," she wore "dirty clothes," and sometimes she was returned to Nicole with diapers that were "still dirty." RP 177. In addition to these personal observations of the minor child's physical appearance, as to her emotional state when she was returned to the mother after visitations with the father, Ms. Morley personally observed the minor child "clinging" to Nicole:

“[QUESTION]: So what have you personally observed when the child comes back home?

[ANSWER]: When she comes back to her mother she likes – she holds Nikki. Like she clings to her. She is emotional. Pretty much like she is sad.

[QUESTION]: How would you describe her mood, the child’s mood?

[ANSWER]: She pretty much is off in her own little world for like half an hour or so. She wants to be held by her mother where she is safe.”

RP 176. Nicole also testified about her daughter’s difficulty with transitions when Ryan returns her from a visitation indicating that the child is:

“sad . . . and she is extremely clingy to me and she holds onto me. She is withdrawn. She doesn’t want – she is not her normal self.”

RP 247. Ms. Morley’s father, Mr. Michael Morley, has also personally observed Nicole interact with her daughter “every weekend,” observing similar behavior. RP 171.

With regard to the trial testimony of the court-appointed guardian ad litem, she admitted that both Ryan and Nicole had been involved in an “immature and certainly hostile” conflict for years. RP 730. For the guardian ad litem, this case involved a lot of “he said/she said.” RP 662. The guardian ad litem was aware that Nicole had previously worked in the adult entertainment industry, but also that she had quit that business in

March of 2009. RP 241. In this regard, the guardian ad litem admitted that, based on her investigation, there was no basis to Ryan's claim that she was still in this business after she quit. RP 722. In addition, the guardian ad litem testified that regardless of the "sum total of all the allegations against Mrs. Keane" by her husband, the guardian ad litem's "ultimate finding on this issue and all issues" was that her observations with the child with the parents have "not led to concern"; and, moreover, that there was "no evidence" that the child had been abused, neglected, or harmed in any way:

"[QUESTION]: Regardless of the sum total of all the allegations against Mrs. Keane regarding internet activity business, your ultimate finding on this issue and all issues is that your observations with the child with the parents have not led to concern, correct?"

[ANSWER]: That is correct.

[QUESTION]: You have no evidence that the child has been abused, neglected, or harmed in any way?"

[ANSWER]: No, I do not."

RP 723. Finally, with regard to the parenting plan that is in the minor child's "best interests," the court-appointed guardian ad litem testified that, if the court did not approve a joint custody schedule as proposed by Ryan, the mother should be the minor child's primary residential parent based on the child's best interests:

“[QUESTION]: If the court does not approve a joint custody schedule . . . which parent should be the primary residential parent based on the child’s best interests?”

[ANSWER]: The mother with increased visitation for the father.”

RP at 731 (emphasis added). At the time of trial, Ryan admitted that he had not even taken the mandatory “parenting seminar” as required by the Island County Superior Court Local Rules:

“[QUESTION]: Have you taken a parenting seminar?”

[ANSWER]: No, I have not.”

RP 619. As a result, among other orders issued by the court at the end of trial, Mr. Keane was specifically ordered to take this mandatory parenting seminar “as soon as possible”:

“[THE COURT]: If I recall correctly, Ms. Keane has taken the mandatory parenting seminar. There was some indication during the course of the trial that Mr. Keane had not done so, so he is therefore ordered to take the mandatory parenting seminar as soon as possible.”

Verbatim Report of Court’s Oral Ruling, p. 19.

Finally, with regard to Nicole’s financial circumstances, at the time of trial she was enrolled in school and in the LPN program at Skagit Valley College in Oak Harbor, Washington. RP 257. Since her separation from Ryan, she was able to obtain her driver’s license. RP 256. She has been looking for work “all over Oak Harbor and in Anacortes and in

Coupeville,” including nursing homes, hotels, labor work, jobs at the naval base, secretarial work, dispatching, cleaning positions, Wal-Mart, K-Mart, Home Depot, Island Pet Center, the cinema, McDonald’s, Burger King, Wendy’s, Office Support Services, janitorial services, veterinary clinics, medical file clerk, home care attendant—“many, many places.” RP 253-254. She was unable to obtain employment—despite between “eight and 15” call backs and subsequent interviews—because she did not “have a vehicle with car insurance,” she did not have the “proper education,” and she did not have “enough experience.” RP 255-256.

Finally, with respect to the trial court’s final orders, at the conclusion of trial, the court found that Mr. Keane had a history of acts of domestic violence as defined in RCW 26.50.010(1), based “primarily” on the issuance of the domestic violence protection order entered against him, in favor of Mrs. Keane, in April of 2008. *See* Verbatim Report of Court’s Oral Ruling, pp. 9-10. The court specifically indicated that the issuance of a domestic violence protection order against Mr. Keane in April 2008 was not the only evidence that he had engaged in a history of acts of domestic violence as defined in RCW 26.50.010(1). Specifically, the Court indicated that there was also “other evidence” of Mr. Keane’s committing “acts of domestic violence against Mrs. Keane.” *Id.* at 22. The Court also commented that although both parties had engaged in domestic violence

against the other, Mr. Keane had engaged in such violence “more so” than Mrs. Keane. *Id.* at 4. The Court also specifically commented that Mrs. Keane “did suffer from domestic violence at the hands of Mr. Keane.” *Id.* The Court also noted that the parties had a “stormy marriage” characterized by quarreling and domestic violence. *Id.* at 3. As part of this stormy background, a “military protection order” was also issued against Mr. Keane, in addition to the Island County Superior Court’s domestic violence protection order. *Id.*

After addressing these domestic violence issues, although the trial court ultimately declined to enter a continuing restraining order against Mr. Keane at the conclusion of trial, the Court commented that Mr. Keane would be “well advised” to “stay away” from Mrs. Keane. Verbatim Report of Court’s Oral Ruling, p. 18. Further, the court advised Mr. Keane to communicate with Mrs. Keane “only if necessary” with regard to the child. *Id.* 18.

The Court then went on to address the permanent parenting plan. The Court specifically cited the relevant statutes—RCW 26.09.184 and 26.09.187—and then independently addressed and commented on each of the statutory factors outlined in 26.09.187(3). *Id.* at 10-13. As part of this analysis—and in ultimately finding that Mrs. Keane should be the minor

child's primary residential parent—the Court noted that Mrs. Keane had done a “good job of parenting” the minor child for all of the child's life. *Id.* at 11. In contrast, the Court found that Mr. Keane had only “developed” his relationship with the minor child in “recent months” and had “never” had three consecutive overnights with the child. *Id.* The Court also noted that, although both parents have good potential for future performance with parenting functions, Mrs. Keane had taken the “greater responsibility” for performing parenting functions relating to the minor child's daily needs.

Overall, based on a consideration of each of the relevant statutory factors, and giving specific consideration to the statutory mandate that the first factor—the relative strength, nature, and stability of the child's relationship with each parent—must be given the “greatest weight,” the Court ultimately found that it was in the child's best interest to reside primarily with Mrs. Keane. *Id.* at 15.

The trial court next specifically addressed the issue of whether a “joint custody” parenting arrangement would be in the child's best interest. The Court specifically commented that it was “mindful” of the guardian ad litem's recommendations in this regard, but the Court specifically found that such an arrangement would not be in the best interests of the child in

this case. *Id.* at 14. Among other issues, regarding the statutory factor of the parties' "geographic proximity," the Court commented that the parties were "young people" who have not settled down and have both indicated they intend to move out of state. The Court also noted that the parties do not have a satisfactory history of cooperation and shared performance of parenting functions. In this regard, the Court specifically commented that it was aware that the relevant statute no longer specifically cites considerations of the parties' history of cooperation and shared performance with parenting functions. Thus, the Court commented that these considerations were not "determinative," but nevertheless they were appropriate factors for "consideration." *Id.* Moreover, the Court also noted that "even if these factors could not be taken into account by the Court, the Court's decision would still be the same." *Id.* at 14-15.

As a final parenting plan issue, the Court noted that Mr. Keane had failed to enroll in the "mandatory parenting seminar" required by the Island County Local Court Rules and had not, therefore, completed the mandatory seminar. Verbatim Report of Court's Oral Ruling at 19. Mr. Keane should have completed this seminar prior to trial. *Id.* The Court therefore "ordered" Mr. Keane to take this mandatory parenting seminar "as soon as possible." *Id.*

On the issue of spousal maintenance, the Court found that Mrs. Keane had little or no property or financial resources, and that she needed time to get her education to become a nurse and obtain employment. *Id.* at 17. Although Mr. Keane’s monthly expenses exceeded his income as listed in his financial documentation, the Court found that he did have the ability to pay maintenance for a “limited period of time” to provide some “minimal stability” for Mrs. Keane. *Id.*

## II. ARGUMENT

### 1. THE TRIAL COURT CORRECTLY AWARDED SOLE DECISION MAKING TO THE MOTHER BASED ON THE HISTORY OF ACTS OF DOMESTIC VIOLENCE BY THE FATHER.

RCW 26.09.191(1)(c) specifically restricts mutual decision making in a parenting plan “if it is found that a parent has engaged in any of the following conduct:… (c) a history of acts of domestic violence as defined in RCW26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.”

In the present matter, the trial court specifically found a history of acts of domestic violence by the father against the mother and, therefore, correctly awarded sole decision making to the mother.

Appellant argues that the trial court awarded sole decision making to the mother based on only one incident of domestic violence, as opposed to a history of acts of domestic violence. But the court in its oral ruling specifically indicated that there was “other evidence” of Mr. Keane committing acts of domestic violence against Mrs. Keane—in addition to the domestic violence protection order entered against Mr. Keane in April 2008. Specifically, although the Court said that the domestic violence protection order against Mr. Keane was the “primary basis” upon which the Court found a history of acts of domestic violence, the Court went on to say that there was “other evidence of Mr. Keane committing acts of domestic violence against Mrs. Keane.” Verbatim Report of Court’s Oral Ruling, p. 22. Contrary to appellant’s assertion, this is not a mere “accusation” of domestic violence against the father. This is a specific finding of the trial court that there was “other evidence” of Mr. Keane committing acts of domestic violence against his wife. Nothing in the statute requires the Court to make written findings specifying the particular acts the Court relied on when finding there is a history of acts of domestic violence.

In the present matter, the record contains evidence of multiple incidents that the Court could have used to find that Mr. Keane had committed multiple acts of domestic violence against his wife, including Mr. Keane pushing her,

shoving her, holding her down, attempting to punch her, punching a hole in a wall near her, and so forth. RP 191-195, 197, 200, 203-204, 206-209.

Appellant cites *Caven v. Caven*, 136 Wn.2d 800, 966 P.2d 1247 (1998) (reconsideration denied) for the proposition that the trial court cannot find a history of acts or domestic violence based on “mere accusations” of domestic violence. The issue in *Caven* was a narrow statutory construction issue: whether a court can find a history of acts of domestic violence *only if* such history included “an assault or sexual assault which causes grievous bodily harm or the fear of such harm.” *Id.* at 810. The court specifically found that a “history of acts of domestic violence” alone—even if such history did not contain an assault which causes grievous bodily harm or the fear of such harm—is statutorily sufficient to restrict decision making in a parenting plan to only one parent. As the court explained on page 810:

*The words of an unambiguous statute must be given their plain and ordinary meaning unless a contrary intent is evidenced in the statute. In RCW 26.09.191(1)(c), the phrase “an assault or sexual assault which causes grievous bodily harm or the fear of such harm” does not modify the preceding phrase “a history of acts of domestic violence.” The sentence containing the two phrases separates them with the disjunctive “or” which grammatically indicates that the phrases are alternatives. A review of prior amendments to RCW 26.09.191(1)(c) also supports the conclusion*

*that the phrases were meant to be interpreted as alternatives, and not as modifiers of each other.*

Because a trial court can find a history of acts of domestic violence even when such history *does not* contain an assault which causes grievous bodily harm or the fear of such harm, the *Caven* court ultimately reversed a trial court's ruling granting mutual decision making in a final parenting plan:

*We affirm the decision of the Court of Appeals, Division One, which reversed and remanded to the King County Superior Court its ruling that under RCW 26.09.191(1)(c) the phrase "a history of acts of domestic violence" is modified by the phrase "an assault or sexual assault which causes grievous bodily harm or fear of such harm" and its ruling granting the parties mutual decision making based upon the trial court's erroneous interpretation of RCW26.09.191(1)(c).*

*Id.* at 811 (emphasis added).

In the present matter, the issue of whether Mr. Keane's history of acts of domestic violence against his wife *also caused* grievous bodily harm or the fear of such harm was not before the court. Thus, *Caven* is distinguishable.

In addition, as to the statement in *Caven* cited by appellant that "mere accusations" of domestic violence are insufficient to constitute a "history of acts of domestic violence," that statement is dicta and therefore not

controlling. Even if it were controlling, in the present matter, the court specifically found that Mr. Keane had committed a history of acts of domestic violence including, among other acts, the proof that the Island County Superior Court had issued a domestic violence protection order against Mr. Keane in April of 2008. The court also specifically found that there was additional “evidence” that Mr. Keane had committed acts of domestic violence against Mrs. Keane. Verbatim Report of the Court’s Oral Ruling, p.22. Thus, the trial court’s decision to award sole decision making to the mother should be affirmed.

**2. THE TRIAL COURT CORRECTLY IDENTIFIED AND ADDRESSED EACH OF THE RELEVANT STATUTORY CRITERIA IN DETERMINING THAT IT WAS IN THE MINOR CHILD’S BEST INTEREST TO RESIDE IN MRS. KEANE’S PRIMARY RESIDENTIAL CARE.**

In matters affecting the welfare of children, such as parenting plans, the trial court has broad discretion, and its decisions are reviewed only for an abuse of discretion. *Marriage of Cabalquinto*, 100 Wn.2d 325, 669 P.2d 886 (1983).

RCW 26.09.187(3)(a) outlines seven statutory factors that the court shall consider when ordering a parenting plan. In the present matter, the trial court specifically considered each of the seven factors required by statute in determining the residential schedule for the minor child. Verbatim

Report of the Court's Oral Ruling, pp.10-13. The court specifically noted that Mrs. Keane had done a good job of parenting the minor child for all of the child's life and, further, that Mrs. Keane had taken a "greater responsibility" for performing parenting functions relating to the daily needs of the child. *Id.*

As for Mr. Keane, the court specifically found that although he appeared to have a relationship with the minor child, this relationship had "only developed" in recent months and, in addition, Mr. Keane had never cared for the child for three consecutive overnights in the child's life. *Id.* at 11.

Appellant cites *Marriage of Combs*, 105 Wn. App. 168, 19 P.3d 469 (2001) and *Marriage of Kovaks*, 121 Wn.2d 795, 854 P. 2d 629 (1993) for the proposition that Washington's Parenting Act of 1987 does not create a legal presumption that placement of a child with the parent who has been the primary caregiver is *always* in the child's best interests absent proof that the primary caregiver's personality, conduct or parenting style has harmed the child's physical, mental or emotional well being. The issue of an actual *legal presumption* was the specific and only issue addressed in *Marriage of Kovaks*. *Id.* at 800. The *Kovaks* court concluded as follows:

*The Parenting Act of 1987 does not create a presumption in favor of placement with the primary caregiver. Instead, the Act requires consideration of seven factors and provides that the child's relationship with each parent be the factor given the greatest weight in determining the permanent residential placement.*

*Id.* (Emphasis added.)

Likewise, in *Marriage of Combs, supra*, the court found an abuse of discretion on the part of the trial court because the trial court completely failed to examine any of the seven statutory factors outlined in RCW 26.09.187. The court in *Marriage of Combs* reasoned as follows:

*Mrs. Combs argues, however, that the finding was not an application of a presumption in her favor, but merely a determination that she was capable of being a good parent. The difficulty with this argument, however, is that a court's findings do not relate specifically to any of the factors identified by the legislature as relevant to the determination. Without an examination of those statutory factors, it is impossible to determine on what basis the court ultimately concluded Mrs. Combs should be the primary residential parent. ....Arguably, the court improperly applied a presumption in favor of the status quo in violation of *Kovacks*. Even if it did not, however its failure to examine the statutory factors relevant to its determination was an abuse of discretion.*

*Id.* (emphasis added).

In the present matter, contrary to the trial court's complete failure in *Marriage of Combs* to examine any of the statutory factors, here the trial court specifically identified, examined, and considered each of the seven statutory factors in making its determination that Mrs. Keane should be the minor child's primary residential parent. Nowhere in the court's analysis is any citation or reliance on a legal "presumption" in favor of the status quo. Instead, the court specifically found based on the evidence that Mrs. Keane had done a good job of parenting. Verbatim Report of the Court's Oral Ruling at p. 11. In addition, the Court specifically found that Mrs. Keane had taken greater responsibility for performing parenting functions relating to the daily needs of the child. *Id.* In addition, the Court also noted that Mr. Keane had developed his relationship with the minor child only recently, and that he never in the history of the child's life had cared for the child for three consecutive overnights.

Overall, after addressing each of the seven statutory factors, the trial court ultimately concluded that it would be in the child's best interest to reside primarily with Mrs. Keane. Because the trial court did not apply any legal "presumption" that "required" placement with Mrs. Keane unless it found that her personality or parenting style resulted in harm to the child, both *Marriage of Kovacks* and *Marriage of Combs* are inapplicable.

Finally, appellant argues that the trial court failed to address the mother's past involvement in the adult entertainment industry as such involvement affected her parenting ability. However, the court specifically addressed this issue in its oral ruling and found that there is no evidence in the record that the child had been harmed in any way by either of the parties or anyone else. Specifically, after noting that "both parties" have suffered in the past from depression and other mental health issues, that both have had "stormy pasts," and that Mrs. Keane had previously been involved in the adult entertainment industry to "make money," the court found as follows:

*The record is virtually devoid of any evidence that the child has been harmed in any way by either of the parties or anything else. [The minor child] appears to be a normal, relatively healthy child....*

Verbatim Report of the Court's Oral Ruling, pp. 8-9.

Thus, there is no evidence that Mrs. Keane's past involvement in the adult entertainment industry has had any negative effect on the minor child or her parenting ability. Instead, the Court specifically found that Mrs. Keane has done a "good job of parenting" for "all of the child's life"—in sharp contrast to Mr.

Keane, who decided to develop his relationship with the child only in “recent months.” *Id.* at 11.

In conclusion, appellant’s argument that the trial court failed to consider all the relevant statutory factors and erroneously applied a legal “presumption” in Mrs. Keane’s favor is without merit. The trial court’s ruling should be affirmed.

**3. THE TRIAL COURT ACTED WITHIN ITS “BROAD DISCRETION” IN DECLINING TO ORDER EQUAL RESIDENTIAL TIME TO EACH PARENT.**

As noted above, trial courts have broad discretion in matters affecting the welfare of children, such as parenting plans. *Marriage of Cabalquinto*, 100 Wn.2d 325, 669 P.2d 886 (1983). RCW 26.09.187(3)(b) highlights this discretion, indicating that a trial court “may” order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time “if such provision is in the best interests of the child.” This statute also gives discretion to the trial court to consider the parties’ geographic proximity, as follows: “In determining whether such an arrangement is in the best interests of the child, the court *may* consider the parties

geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions.” *Id.* (emphasis added).

In the case at bar, the trial court specifically addressed the issue of the child frequently alternating between the parents’ households at the father’s request and also as recommended by the Guardian ad Litem. After due consideration, the Court found that such a provision would not be in the best interests of the child in this case:

*The Court does not find such a provision to be in the best interests of the child in this case.*

Verbatim Report of the Court’s Oral Ruling, p. 14.

Regarding the issue of the parties’ “geographic proximity,” the court specifically noted that both parties were “young people” who have not settled down, and who have both specifically indicated that they intend to move out of state. The Court also specifically addressed the issue of the parties’ lack of cooperation and shared performance of parenting functions in the past. Verbatim Report of the Court’s Oral Ruling, p. 14.

Appellant argues that the trial court abused its discretion in denying joint custody for the father based upon the absence of agreement between the parties and the lack of a history of cooperation in the shared performance of parenting functions, because such specific factors no longer exist in the statutory language. However, the trial court specifically noted that, although these specific considerations were no longer part of the statutory framework and were thus “no longer determinative,” they were nevertheless “appropriate factors for consideration.” *Id.* at pp. 14-15. In addition, the trial court specifically ruled that “even if these factors could not be taken into account by the court, the court’s decision would still be the same.” *Id.* at pp. 15.

In addition, the court-appointed Guardian ad Litem in the case specifically testified about the conflict between the parents, which she herself described as “immature and certainly hostile.” RP at 730. The Guardian ad Litem was also asked a specific question about which parent should be the child’s primary residential parent based on the child’s best interest, assuming the court did not approve a joint custody parenting plan. In response, the Guardian ad Litem testified that the mother—Mrs. Keane—should be the child’s primary residential parent based on the child’s best interests:

*“[Question]: If the court does not approve a joint custody schedule[,]which parent should be the primary residential parent based on the child’s best interest?”*

*[Answer]: The mother with increased visitation for the father.”*

RP at 731 (emphasis added).

In sum, the trial court had broad discretion to find that a shared parenting plan arrangement was not in the minor child’s best interest, and the trial court’s ruling should be affirmed.

**4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING MINIMAL AND TEMPORARY SPOUSAL MAINTENANCE TO MRS. KEANE FOR A PERIOD OF ONLY THREE MONTHS.**

Appellant has correctly identified the statutory criteria for an award of spousal maintenance under RCW 26.09.090. This statute identifies a list of six non-exhaustive “relevant factors.” The “relevant” factors include but are “not limited to” the six identified in the statute. In addition to one spouse’s ability to pay spousal maintenance, such relevant factors include the financial resources of the party seeking maintenance, the time necessary for such party to acquire sufficient education or training, and other attendant circumstances.

In the present case, the court ordered a temporary spousal maintenance obligation for a total of only three months—August through October of 2009. Although the court did find that Mr. Keane’s monthly expenses exceeded his income, this is only *one* of the six *non-exhaustive* statutory factors that the court is required to consider. As to Mr. Keane’s ability to pay, the court specifically found that Mr. Keane did not have the ability to pay spousal maintenance “except for a limited period of time to provide some minimal stability until Mrs. Keane can get her affairs in order.” Verbatim Report of the Court’s Oral Ruling at pp. 17 (emphasis added).

As to the other factors, the trial court specifically found that Mrs. Keane has “little or no property or financial resources.” *Id.* at 17. In addition, the court found that Mrs. Keane “needs time to get her education to become a nurse and to obtain employment. She clearly needs maintenance.” *Id.*

As to the length of the marriage, the court specifically noted that this was a “short-term marriage,” and therefore, it was “not appropriate to award maintenance except for a short time in a case like this.” *Id.*

In sum, on balance, it cannot be said that the trial court abused its discretion in ordering minimal spousal maintenance for a period of only three months.

**III. CONCLUSION.**

Mrs. Keane respectfully requests that this court affirm the trial court's rulings in all respects.

Respectfully submitted this 21 day of June, 2010.



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