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No. 64284-7-1

COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

DIANA MAE BLOME,

Appellant,

v.

DOUGLAS R. BLOME,

Respondent.

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REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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ORIGINAL

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I.
APPELLANT/CROSS-RESPONDENT'S
RESPONSE TO CROSS-APPEAL

Respondent argues that the Court improperly restored joint decision making in the modified parenting plan. Respondent's assignment of error is addressed below as well as a response to Respondent's Reply.

A. The Trial Court's Findings of Fact Support Joint Decision Making.

In Respondent's Reply Brief, at page 2, Respondent states as follows:

The court determined a reduction or restriction in the contact between Spencer and his mother was appropriate: The court's reasons for this restriction were:

- (1) The mother's neglect or substantial non-performance of parenting functions; (2) the mother's long-term emotional or physical impairment, which interferes with her performance of parenting functions as defined by RCW 26.09.004; and (3) the mother's abusive use of conflict creates the danger of serious damage to the child's psychological development. (CP 39)

The court accordingly entered a revised Parenting Plan, restricting Diana to limited and supervised visitation twice a week. (CP 25-29)

However the trial court made specific findings that each of the three grounds for restrictions is no longer applicable.¹ Findings, paragraph 2.5.1(a)(4), 2.5.1(b)(2), 2.5.1(c) and 2.5.1(d).

In the trial court's Findings and Order Re Modification, the court finds in paragraph 2.5.1(b)(3) "The evidence shows that Diana Blome has a close and loving relationship with her son." The court further found at paragraph 2.8(2), "The court agrees that Diana Blome has demonstrated the ability to perform all appropriate functions..."

It is clear from the record and the court's findings that (a) Diana's joint decision making authority and residential time was originally taken away because of limitations found under RCW 26.09.191 and that (b) the factors that led to the modification of the original parenting plan were no longer applicable in that Diana had regained fully functional parenting capabilities.

Respondent's brief cites the January 30, 2007 Parenting Plan as follows:

Sole decision making shall be ordered to the father for the following reasons:

One parent is opposed to mutual decision making and such opposition is reasonable based on the following criteria:

¹ Findings and Order re Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule (September 11, 2009; Docket/Sub. No. 267)(Designated in Diana Blome's Designation of Clerk's Papers)

- (a) The existence of a limitation under RCW 26.09.191;
- (b) The history of participation of each parent in decision making in each of the areas in RCW 26.09.184(4)(a);
- (c) Whether the parents have demonstrated ability and desire to cooperate with one another in decision making in each of the areas in RCW 26.09.184(4)(a);
- (d) The parents' geographical proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

(CP 31-32)

As set forth above, the trial court found that the “existence of a limitation under RCW 26.09.191” specifically did not apply. Sub-section (b) refers to “the history of participation of each parent in decision making...” which clearly was not a basis for Judge Doyle’s decision in the January 30, 2007 Parenting Plan, as she was modifying a Parenting Plan that had included joint decision making on all issues. Sub-section (c) refers to “whether the parents have demonstrated ability and desire to cooperate with one another...” As set forth in the trial court’s Findings referenced above, Diana Blome was found not to have exhibited any abusive use of conflict and was found to be capable of performing all parenting functions. RCW 26.09.004(2) defines parenting functions as follows:

(2) Parenting functions means those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child.

Parenting functions include:

(a) Maintaining a loving, stable, consistent, and nurturing relationship with the child;

(b) Attending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;

(c) Attending to adequate education for the child, including remedial or other education essential to the best interests of the child;

(d) Assisting the child in developing and maintaining appropriate interpersonal relationships;

(e) Exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances; and

(f) Providing for the financial support of the child.

Thus, in the court's finding that Diana "has demonstrated the ability to perform all appropriate parenting functions," the definition in RCW 26.09.004 applies and the court found that Diana is able to make decisions, exercise appropriate judgment regarding the child's welfare,

attend to “adequate education for the child”, and attend “to the daily needs of the child...appropriate to the development level of the child...” These are all findings in support of the trial court restoring joint decision making.

References to the guardian ad litem’s recommendations are not applicable as the trial court is free to disregard those recommendations and in fact did so as to many issues, including joint decision making.

The court made a finding in its Letter to Counsel Re Parenting Plan as follows:

Were it not for the Court’s conclusion that the prior parenting plan was subject only to minor modifications of the residential schedule, the Court would likely have found that, after a transition period, the residential schedule should be relatively equal between the parents.²

The court’s finding that “the residential schedule should be relatively equal between the parents” is an implied finding that the requirements of RCW 26.09.187(3)(b) are met in which the court is required to determine that such schedule is in the best interest of the child. Sole decision making in a relatively equal residential schedule would be incompatible.

² Letter to Counsel re Parenting Plan, Judge Bruce Heller, Dept. 52 (February 2, 2009; Docket / Sub. No. 277) (Designated in Diana Blome’s Supplemental Designation of Clerk’s papers)

II. REPLY TO RESPONDENT'S REPLY BRIEF
RE: "REVIEW V. MODIFICATION"

A. Respondent's Reliance on the Major Modification Provisions of RCW 26.09.260(5) is Misplaced.

Respondent's brief states at page 7 as follows:

Rather, Diana argues that, instead of proceeding under the minor modification provisions, the court should have instead used its inherent equitable powers as discussed in Marriage of Possinger to conduct a full review of the 2007 parenting plan and, in effect, grant Ms. Blome the major modification she plainly was not entitled to under the statute.

This argument misses the point in that the Appellant was not arguing that a major modification should apply but rather that the court has an inherent equitable power to review a permanent parenting plan when a review provision is contained in that parenting plan.

B. Under *Possinger* the Trial Court has an Inherent Equitable Authority to Include a Review Provision in a Permanent Parenting Plan that is Separate from the Statutory Modification Procedure.

The language of *In Marriage of Possinger*, 105 Wash.App. 326(2001) is set forth at pages 327-328 as follows:

To pose essentially the same question in slightly different terms, we must determine whether the court has the authority under the Parenting Act to adopt a permanent parenting plan that contains a residential schedule that will remain in effect for a specified period of time pending significant changes that are expected to occur in the lives of the parents, and then, at the end of that period of time, revisit the plan in order to make a final disposition of the parenting issues, applying the criteria contained in

RCW 26.09.187 for establishing permanent parenting plans rather than the criteria contained in RCW 26.09.260 governing modification of parenting plans.

To paraphrase Possinger, the Court it is asking whether the trial court has the authority to adopt a permanent parenting plan that contains a review that will later take into account anticipated changes in the lives of the parents. If so, the new parenting plan will be determined based on the criteria of RCW 26.09.187 for establishing a permanent parenting plan rather than the modification provisions of RCW 26.09.260. The Possinger court of course answered this in the affirmative. The Respondent correctly notes in page 10 his Brief that Potter v. Potter, 46 Wn.2d 526, P.2d 1052(1955) “found it was within the court’s power to briefly delay the entry of a permanent plan to evaluate the mother’s fitness.” That is exactly the issue in this case. Judge Doyle’s parenting plan set forth and ordered a process whereby Diana could restore the parenting plan after she dealt with the substance abuse and mental health issues that had caused the modification in the first place.

The cases cited by the Respondent do not limit the court’s equitable review power to exclude its application in the present case. The cases all agree that the applicable standard is the best interests of the child. Both Possinger and Potter involved parental instability which is the same issue in this case. To adopt the Respondent’s position in this case would

mean that a court modifying a permanent parenting plan based on a parent's temporary instability lacks authority to give that parent time to seek rehabilitation and then seek review to see if restoring the original schedule would be in the best interests of the child. Here, in the dissolution action it was determined that the child's best interests were served by an equal residential plan with equal involvement by both parents. Due to the substance and mental health issues of the mother, the best interests of the child were interrupted and a plan was entered in which the mother had restricted visitation. Once the reasons for those restrictions were eliminated, it makes sense that the child's best interests would again be served by the full involvement of both parents. A fair interpretation of the January 30, 2007 parenting plan is that Judge Doyle sought to restore both parents to this child if the mother was able to overcome the issues resulting in the modification.

Respondent argues that the case law requires a specific defined period of time for the review. While that may be appropriate in many cases it does not change the principle that the courts should seek the best interests of the child and that the trial court may include a review provision so that a parenting plan entered based on temporary transitory circumstances need not be permanent. Whether the review was brought within an appropriate period would presumably be decided by the trial

court. And in such case the modification provisions of RCW 26.09.260 do not apply.

C. The Trial Court Found That the Child's Best Interests Would Likely be Served by Restoring a Relatively Equal Parenting Plan.³

The Court found that the case was governed by the modification statute and that it lacked the inherent equitable power of review. Thus in this case the best interests of the child are not served by applying the modification statute.

Respondent misses the point in arguing at page 11 as follows:

Possinger, et al. do not stand for the proposition that every parenting plan decision, whenever made and however phrased, may be subject to what amounts to a major modification despite the specific and strict statutory standards governing such modifications.

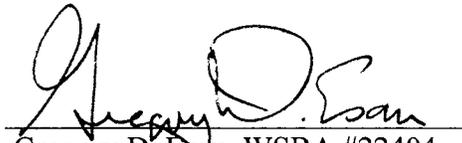
That is not Appellant's argument. The Appellant is not arguing that the modification statutes do not generally apply or that a trial court in a modification case has an inherent power to exceed the provisions of that statute. Rather, the Appellant is arguing that the trial court entering a parenting plan, where there are extenuating circumstances, has an equitable power to include a provision for later review. Thereafter the reviewing court may exercise a review under the provisions of

³ Letter to Counsel re Parenting Plan, Judge Bruce Heller, Dept. 52 (February 2, 2009; Docket / Sub. No. 277) (Designated in Diana Blome's Supplemental Designation of Clerk's papers)

RCW 26.09.187 rather than under the modification statute. This is because the review is taking place pursuant to the terms of the parenting plan and not pursuant to the terms of the modification statute.

RESPECTFULLY SUBMITTED May 7, 2010.

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