No. 102373-1

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

DONNA M. COCHENER

Respondent,

and

CHRISTIAN T. METCALFE,

Petitioner.

RESPONSE TO AMICUS MEMORANDUM OF DISABILITY RIGHTS EDUCATION AND DEFENSE FUND (DREDF) AND CIVIL RIGHTS LAW SECTION OF THE FEDERAL BAR ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

STATUTES

RULES AND REGULATIONS

A. Introduction.

Respondent Donna Cochener submits this answer to the Amici Curiae memorandum filed by Disability Rights Education and Defense Fund and Civil Rights Law Section of the Federal Bar Association, collectively "Amici," in support of review:

B. Response to Amici's Argument.

In its memorandum, Amici hardly addresses Division One's unpublished decision, which it purportedly asks this Court to review. Rather than provide any argument in support of its request that this Court review Division One's decision, Amici merely repeats the same arguments it made in the lower appellate court without addressing Division One's holding that Amici's "argument that the trial court's decision ran afoul of any federal protections for students with disability is meritless." (Op. 20)

For the same reasons that Amici's argument did not merit reversal of the trial court's order granting sole decision-making to the mother in the lower appellate court, this Court should deny review of Division One's decision affirming the trial court's order.

1. The Court of Appeals decision does not conflict with the federal framework "governing the education of students with disabilities" or its policy favoring parental participation and advocacy in their educational needs.

Review of Division One's unpublished decision affirming the trial court's discretionary decision granting the mother sole decision-making on major issues for the parties' two special needs children is not warranted. Division One's decision does not conflict with the "public policy favor[ing] parental participation and advocacy" in the education of disabled children underlying the Individuals with Disabilities Education Act ("IDEA" or "the Act"). (Amici Memo. 7) The mother does not disagree that ordinarily "children with disabilities benefit from parental

participation and advocacy in their educational programs and services" (Amici Memo. 7), which would ideally include both parents when they are divorced. However, sometimes that is not possible, as the trial court found here, and as Division One held, when that happens, "[f]ederal law contemplates, and Washington law directs, that in such circumstances a state court may appoint one parent as sole decision-maker." (Op. 20)

The trial court found "joint decision-making is impossible" (FF 10B(12), CP 1233) because "the intensity of the co-parenting dynamic is so extreme that multiple expert and lay witnesses testified the children are suffering." (FF 10B(11), CP 1233) Division One properly held, "[t]hese findings, together with the finding that [the mother] has less deficit in the area of interpersonal communication, provide a tenable basis for the trial court to conclude it is in the best interests of the children that [the mother] hold sole

decision-making, and that any harm of such an arrangement is outweighed by the benefits." (Op. 15)

Neither the trial's court order granting sole decision-making to the mother nor Division One's decision affirming it conflicts with the IDEA, which was enacted to "strengthen[ ] the role and responsibility of parents and ensur[e] that families of such children have meaningful opportunities to participate in the education of their children at school and at home." 20 U.S.C.A. §1400(c)(5)(B). To the contrary, the IDEA's regulations contemplate that only one parent may be entitled to the Act's rights and protections by providing that if "a judicial decree or order identifies a specific person or persons under paragraphs (a)(1) through (4) of this section to act as the 'parent' of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the 'parent' for purposes of this section." 34 C.F.R. § 300.30(b)(2). (*See* Op. 19)

Any rights a parent may have under the IDEA do not override a state court's authority to determine who may make educational decisions on behalf of a child in a domestic relations matter. *See Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 772 (2nd Cir. 2002) (rejecting mother's claim that the parents' divorce decree, which granted sole decision-making authority over education to the father, could not abrogate her federal rights under the IDEA) (*See* Op. 19-20).

The Second Circuit in *Taylor* held that a "parent's rights under the IDEA must be determined with reference to the rights she retains under the state custody decree." 313 F.3d at 786. Since the mother's "legal authority to make educational decisions on behalf of a child ha[d] been terminated by operation of local domestic law," she was not entitled "to challenge an IEP determination" for her child under the IDEA. 313 F.3d at 782; *see also Navin v. Park Ridge School Dist. 64*, 270 F.3d 1147, 1150 (7th Cir. 2001)

(father who was not granted educational decision-making in divorce decree "cannot use the IDEA to upset choices committed to [the mother] by the state court") (*See* Op. 20); *Schares v. Katy Independent School Dist.*, 252 F. Supp. 2d 364, 366 (S.D. Tex. 2003) (father did not have standing under IDEA because divorce decree placed authority to make educational decisions for child in mother); *Smith v. Meeks*, 225 F. Supp. 3d 696, 705 (N.D. Ill. 2016) (dismissing mother's claim under the IDEA challenging school district's decision not to create an IEP for child because divorce decree granted father the sole right to make decisions for the child).

Because the IDEA contemplates that only one parent may be entitled to make educational decisions for their disabled children, and the trial court's order granting sole decision-making to the mother ensures "parental participation and advocacy" in the children's educational programs and services, the trial court's order granting sole

decision-making to the mother, and Division One's decision affirming it, is consistent with the federal framework "governing the education of students with disabilities." (Amici Memo. 4) (*See* Op. 19-20)

2. The Court of Appeals properly concluded that state law, not federal law, governs a court's authority to decide which parent should be entitled to exercise the right to make educational decisions for their children.

The trial court was not required to consider "relevant federal law" (Amici Memo. 13) before it considered the best interests of the children in deciding which parent should be granted sole decision-making authority. Just as Amici cited no "authority holding that any federal law imposes any substantive requirements on a state court deciding the issue of decision-making in a parenting plan according to state law" in the lower appellate court (Op. 19), it presents no such authority here to warrant review of Division One's decision.

State law, not federal law, governs a court's authority to decide which parent should be entitled to exercise the right to make educational decisions for their children. *Taylor,* 313 F.3d at 779-80; *Fuentes v. Board of Educ. of City of New York*, 540 F.3d 145, 151 (2nd Cir. 2008) ("we look to state law to determine who has such legal authority" to make educational decisions for the child). Under our state law, in "any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities." RCW 26.09.002.

There is no need for remand based on Amici's claim that the trial court "made no attempt to determine whether petitioner's advocacy was protected advocacy before (mis)characterizing that advocacy as a parenting defect." (Amici Memo. 16-17) As Division One recognized, the "trial court did not rely on the content of [the father]'s communications nor criticize at any point his right to seek

appropriate care for his children. Its findings were that his communication style was interfering with the children's ability to receive the support they needed." (Op. 20)

As the trial court found, some of the children's providers had been alienated by the father because his "advocacy efforts" were "overwhelming," "burdensome," "intimidating," "persistent," "tenacious," and "manipulative." (FF 10B(17), CP 1234) While these adjectives may sometimes be used to unfairly describe *some* parents who advocate for their children (Amici Memo. 12), the evidence considered by the trial court shows that it was not an unfair description of the father's conduct here.

As one teacher reported to the parenting evaluator, the father's interactions "fell outside of that range of impassioned advocacy for the child" shown by other parents he has dealt with:

> I have worked with a lot of parents who advocate passionately for their children, especially children with special needs . . . I would describe my experience interacting with Chris as being

> outside of the range of interactions . . . I have interacted with parents who might ruffle feathers, but they are clearly advocating for the best interest of their child . . . there was an aggression about Chris's interactions that fell outside of that range of impassioned advocacy for the child, in my experience . . .

(Ex. 2 at 9 (DMC 00063)) The head of the school similarly testified that her interactions with the father was "the most difficult" she had experienced in dealing with families with children who have different challenges and needs:

> I've worked with a lot of kids who have different challenges and needs and this is, by far, the most extreme, the most difficult. My professional, and you know human nature has been called into question.

(RP 1151) And the CEO of Ryther, the group that formerly provided ABA therapy to the parties' older son testified to the "exceptional . . . amount and volume of contact" with the father:

> I think about the amount of contact I typically have with families, my contact with Mr. Metcalfe was exceptional in terms of amount and volume of contact.

(RP 1630)

Even assuming that the father's actions with the children's providers were "protected activity," the trial court was not barred from relying on its negative impact on the children to deny the father's request for sole decision-making authority.[1] (*See* Op. 20) "We have long recognized a parent's right to raise his or her children may be limited in dissolution proceedings because the competing fundamental rights of both parents and the best interests

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[1] In any event, any "right" the father has to advocate on behalf of the children is not unlimited. Courts have rejected claims of "retaliation" by parents when limits have been imposed on them because the parents' purported "advocacy" was disruptive or burdensome. *See e.g. L. F. v. Lake Washington School District #414,* Cause no. C17-375 TSZ, 2018 WL 3428213, at *3 (W.D. Wash. July 16, 2018), *aff'd,* 947 F.3d 621 (9th Cir. 2020) (upholding communication plan enacted by the school due to the father's "history of burdensome, intimidating, and unproductive communication with District Staff"); *Camfield v. Bd. of Redondo Beach Unified Sch. Dist.,* 800 Fed. Appx. 491, 494 (9th Cir. 2020) (school's requirement that mother obtain permission from the principal twenty-four hours prior to any on-campus visit was not in "retaliation for her advocacy," as it was intended to ensure the "the peaceful conduct of the activities of the campus") (both unpublished, cited per GR 14.1).

of the child must also be considered." *Katare v. Katare*, 175 Wn.2d 23, 42, ¶36, 283 P.3d 546 (2012), *cert. denied*, 568 U.S. 1090 (2013).

Regardless of the father's purported "protected activity" of advocating for the children, the trial court properly considered its impact on the children in deciding to grant the mother sole decision-making authority. As the parenting evaluator testified, even if the father had not intended the effect of his advocacy, if the children's providers experience the father as "aggressive and harassing . . . that is absolutely going to impact the boys' experiences . . . If that is the impact it has on [the children's providers], that will negatively impact the children." (RP 640)

Because the trial court found the father's "communication style was interfering with the children's ability to receive the support they needed," Division One properly affirmed the trial court's order granting sole

decision-making to the mother since "[f]ederal law contemplates, and Washington law directs, that in such circumstances a state court may appoint one parent as sole decision-maker." (Op. 20)

C. Conclusion.

This Court should deny review of the Court of Appeals decision affirming the trial court's decision granting sole decision-making to the mother.

I certify that this brief is in 14-point Georgia font and contains 1,994 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 6th day of December, 2023.

SMITH GOODFRIEND, P.S.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 6, 2023, I arranged for service of the foregoing Response to Amicus Memorandum of Disability Rights Education and Defense Fund (DREDF) and Civil Rights Law Section of the Federal Bar Association, to the court and to the parties to this action as follows:

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/s/ Victoria K. Vigoren
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SMITH GOODFRIEND, PS

December 06, 2023 - 4:25 PM

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