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Supreme Court No.

Case #: 1029438

In the Supreme Court of the State of Washington

In re the Marriage of

KATHRYN ELIZABETH COX,

Petitioner-Appellant,

v.

CHARLES A. FULMER,

Respondent-Respondent.

PETITION FOR REVIEW

Court of Appeals No. 84786-4-I

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I. IDENTITY OF PETITIONER

Kathryn E. Cox is the Petitioner here and the Appellant below. She seeks review of the decision referenced in part II below.

II. CITATION TO APPELLATE DECISION

The Court of Appeals, Division I, issued an unpublished decision in case 84786-4-I on March 11, 2024 attached hereto.

III. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals err in upholding the trial court's limiting of Ms. Cox's parenting time under RCW 26.09.191 when the evidence the restriction was based on was outdated?

Did the Court of Appeals err in upholding the trial court's requirement that Ms. Cox undergo a specific period of a specific type of therapy before she can move through the phases of the parenting plan and lift the imposed restrictions?

IV. STATEMENT OF THE CASE

Kathryn Cox and Charles Fulmer were not married but were involved in a committed intimate relationship. They had a child M.A.F on September 19, 2017. The parties' relationship deteriorated, and they separated shortly after M.A.F.'s first birthday.

Ms. Cox was arrested on an allegation of domestic violence on September 27, 2018. (3CP 1004.) Ms. Cox was not charged. Mr. Fulmer sought a restraining order based on the arrest, but it was not granted. (2CP 514.)

Ms. Cox filed a Petition for a Parenting Plan, Residential Schedule and/or Child Support on October 12, 2018. (2CP 992.) As of December 2019, Ms. Cox was listed as the custodial parent and the parties shared equal residential time. (Marshman VRP 57-58.)¹

¹ There are 4 volumes of Verbatim Report of Proceedings created by 3 different court reporters/transcriptionists. The VRP's will be identified by the name of the court reporter/transcriptionist. (ie: Marshman VRP 20.)

The court ordered a parenting evaluation. (3CP 1163.) Dr. Lynn Fainsilber Katz was the parenting evaluator. She conducted 17.59 hours of interviews and observations with Ms. Cox in 2019 and 2021. (3CP 1066.) The last interview was on July 16, 2021. (*Id.*) The parenting evaluation was submitted to the court on December 8, 2021.

A trial was held on October 26 and 27, 2022. Ms. Cox, Mr. Fulmer, Dr. Katz and Dr. Lisa Adriance all testified.

Ms. Cox's Testimony

Ms. Cox testified that she found it difficult to communicate with Mr. Fulmer. (Faubion 1 VRP 19.) She believes that Mr. Fulmer is not a responsive co-parent and does not share information on how and what M.A.F. is doing during his time with Respondent. (Faubion 1CP 36.)

She made several referrals to Child Protective Services (CPS) based on statements that M.A.F. made. (Faubion 1 VRP 49-50.) The last referrals to CPS were in May and June of 2021. (Faubion 1 VRP 51.)

After the parenting evaluation recommended dialectical behavioral therapy (DBT), Ms. Cox sought out DBT services. (Faubion 1 VRP 55.) However, she had difficulty finding a program. She found an online class and was scheduled to complete it two weeks from the date of her testimony. (Faubion 1 VRP 55-58.) She also had participated in separate therapy with her own psychologist. (Faubion 1 VRP 50, 58.) She felt that the DBT was repetitive of that prior therapy. (Faubion 1 VRP 59, 198-99.)

Mr. Fulmer's Testimony

Mr. Fulmer testified that being with Ms. Cox was like “walking on eggshells. It was very easy to get - - to say something wrong or do something a little bit wrong”, she would become very angry and agitated. It was difficult for her to calm down. (Faubion 1 VRP 116.)

He testified that Ms. Cox called CPS on him several times. He said she made a report last after the parenting evaluation. (Faubion 1 VRP 129.) Mr. Fulmer believed that the

CPS calls would continue if Ms. Cox did not receive the DBT therapy. However, he did acknowledge that no reports had been made for a year. (Faubion 1 VRP 143-44.)

Dr. Katz's Testimony

Dr. Katz, the parenting coordinator, is a clinical psychologist. (Faubion 1 VRP 93.) Her parenting evaluation was admitted as Trial Exhibit 101. (3CP 1165-1216).

Dr. Katz testified that Ms. Cox expressed “suspicious thinking” to M.A.F.. She felt that Ms. Cox had a “style of kind of valuing her intuition and saying that out loud to M.A.F. . . . I haven't seen parents do that in my experience.” (Faubion 1 VRP 99.) Dr. Katz stated that Ms. Cox was reactive and had a lot of strong and deep feelings but was not good at regulating those emotions. This led the emotions to spill over to M.A.F. and impact on her relationship with Mr. Fulmer and her son. (Faubion 1 VRP 100-101.)

Based on these observations, Dr. Katz believed DBT would help with Ms. Cox's emotional dysregulation. (Faubion

1VRP 100, 103, 106.) The focus of DBT was on emotional regulation and distress tolerance. DBT would teach her how to be most effective in difficult or interpersonal situations.

(Faubion 1VRP 101.)

Dr. Katz admitted that she last observed the parties for evaluation purposes about a year prior to her testimony.

(Faubion 1VRP 105.) She did not know if Ms. Cox was engaging in the same behaviors or if her emotional regulation had improved. (*Id.*) She admitted that change was possible, but she could only assume that the behavior had continued.

(*Id.*)

Dr. Adriance's Testimony

Dr. Adriance was Ms. Cox's therapist. She had treated Ms. Cox over several years. (Faubion 2VRP 160, 164-65.) Based on information provided by Ms. Cox, Dr. Adriance made several reports to CPS on behalf of M.A.F.. (Faubion 2VRP 164.)

Dr. Adriance had diagnosed Ms. Cox with anxiety.

(Faubion 2VRP 166.) She stated that Ms. Cox had experienced some symptoms of emotional dysregulation. (Faubion 2VRP 168.) However, she had seen substantial improvement in Ms. Cox in the year before the trial.

I think when you [sic] I saw her last and really over the last several months, as I saw her on and off, I felt as though Kathryn had really learned very effective skills to manage stress and anxiety; that she was using a lot of the tools and strategies we had worked on; she had done a lot of work on her own; that **she was much more able to tolerate distress and to regulate intense emotion and really function quite well despite some significant ongoing stressors in her life.** (Faubion 2VRP 167-168, emphasis added.)

Dr. Adriance also testified that she had used DBT modalities in her treatment of Ms. Cox. (Faubion 2 VRP 171-172.)

Trial Court's Ruling

The trial court issued its ruling on November 22, 2022. It found that both parents had a loving relationship with M.A.F.. However, the trial court had concerns about the stability of the

relationship between Ms. Cox and the child. “Given the mother’s behavioral health concerns, without further services, there could be a negative impact on [M.A.F.]’s emotional wellbeing.” Once Ms. Cox addressed those concerns, a shared parenting plan would be in the child’s best interest. (1CP 6.)

In the parenting plan, the court found, pursuant to RCW 26.09.191(3)(b), that Ms. Cox had a “long-term emotional or physical problem that gets in the way of her ability to parent.” (1CP 24, 92.) She was required under the plan to begin and comply with treatment by Dr. Katz. The plan otherwise would remain in Phase I. (1CP 25.)

Beginning in 2023, under Phase I, Ms. Cox’s time with M.A.F. would be “initially reduced” pending therapeutic intervention. She would have parenting time on alternating Saturday-Mondays, and two mid-week overnights every other week. (1CP 27.)

Once Ms. Cox completed four months of DBT, the parenting plan would move into Phase II and her residential

time would increase to full (Friday-Monday) alternating weekends. (1CP 28.)

Once she completed 12 months of DBT, and “there is no evidence that her mental health issues are impacting parenting,” the plan would move into Phase III. Under this phase, there would be fully shared time on a 5-5-2-2 schedule. (1CP 29.)

If Ms. Cox had not made sufficient progress in DBT after 12 months, the plan would remain in Phase II and her progress would be reevaluated every six months. If there was no progress in DBT after two years, the plan would remain in Phase II. (1CP 29.)

Court of Appeals Ruling

The Court of Appeals upheld the trial court’s ruling. (Court of Appeals Opinion in 84786-4-I dated March 11, 2024 (“Opinion”).) The Court of Appeals did not address the outdated nature of the parenting plan. It found that there was sufficient evidence to support the trial court’s adoption of the parenting plan. (Opinion at 7.)

Similarly, the Court of Appeals upheld the trial court's decision that DBT was the only therapy that would benefit Ms. Cox. (Opinion at 9.)

V. ARGUMENT

A. This Court Should Grant Review under RAP 13.4(b)(4) Because It Involves a Substantial Public Interest, Whether Restrictions on Parenting under RCW 26.09.191 Can be Determined by an Outdated Parenting Evaluation.

Under the Parenting Act of 1987, the child's best interest is primary in the development of a parenting plan. The trial court is authorized to restrict a parent's time in the residential schedule if there is "[a] long-term emotional or physical impairment which interferes with the parent's performance of parenting functions". RCW 26.09.191. These restrictions can be based on evidence such as parenting evaluations or a therapist or doctor's testimony.

However, when the evidence relied upon is out of date, its strength must be called into question. Relying on evaluations and observations that took place more than a year

prior to the hearing cannot be the basis for a trial court's finding that a parent suffers from a long-term emotional or physical impairment. It does not allow for any growth or change in condition that a parent may have achieved through treatment.

To date, no precedent has been set in Washington State to determine when a parenting evaluation becomes stale. For example, the military requires annual mental health evaluations because they recognize humans' mental health status often changes year after year.

To deem that a parent in a family law proceeding is the same person when the child was eighteen months old versus 6 years old is unreasonable. If mental health professionals conclude that a party does not require further treatment, a Court's opinion should not substitute for that of a medical professional's.

There is a substantial public interest in the imposition of fair parenting plans and that restrictions on a parent's relationship with their children are not determined by outdated evidence.

B. The Court of Appeals Erred When It Upheld the Trial Court's Decision to Grant Parenting Restrictions Against Ms. Cox under RCW 26.09.191(3)(b) Because the Evidence "Showing" a Long-Term Emotional Impairment Was Based on Outdated Information and all Evidence of Recent Behavior Showed Improvement and No Impact on Parenting Functions.

Under RCW 26.09.191(3)(b) a trial court may limit a parent's residential time with his or her child in the parenting plan if there is a "long-term emotional or physical impairment which interferes with the parent's performance of parenting functions". Restrictions imposed under this section are discretionary. The court is not required to impose them. (*Katara v. Katara*, 125 Wn. App. 813, 825 (2005).) Any "restrictions imposed must be reasonably calculated to address the identified harm." (*Id.* at 826.)

In this case, the restrictions were based on Dr. Katz's parenting evaluation and testimony. Dr. Katz claimed that Ms. Cox suffered from emotional regulation issues which impacted her relationship with M.A.F.. (Faubion 1 VRP 100-101.) However, there was no showing that this was a long-term

emotional issue, nor that this had continued to affect Ms. Cox's relationship with M.A.F..

The parenting evaluation was filed with the court on December 21, 2021, ten months before the trial. (3CP 1063.) Dr. Katz's last meeting with Ms. Cox was on July 16, 2021, fifteen months prior to the trial. (3CP 1066.) Her last observation of Ms. Cox and M.A.F. took place on February 19, 2021, approximately twenty-one months prior to the trial. (*Id.*) Dr. Katz admitted that her observations were out of date.

Q. It's been about a year since you've met with the parties or seen them parenting. Does that affect or change any of your recommendations?

A. **That's a hard question to answer, because I haven't seen them more recently. I mean, I don't know what they are like.** All I can assume is what I saw has continued. People tend -- you know, the -- the very famous adage in psychology is past behavior predicts future behavior. So change certainly is possible, and typically it's within a range. (Faubion 1 VRP 105, emphasis added.)

The limitations Dr. Katz suggested may have been appropriate when the parenting plan was submitted. However,

neither Dr. Katz nor the trial court knew if they were still appropriate at the time of trial. From the time the evaluation was submitted to the trial, Ms. Cox had undergone therapy with a provider who had used elements of DBT in their therapy sessions. (Faubion 2VRP 172.)

Dr. Adriance testified that Ms. Cox was diagnosed with anxiety and that in 2020 and 2021 “she was in a pretty constant state of really severe stress, worrying about the health and well-being of her child and the impact of this ongoing custody matter on him.” (Faubion 2VRP 165.) However, Dr. Adriance was the only professional who had seen and treated Ms. Cox since 2021. She was the only one who could testify to Ms. Cox’s emotional state at the time of trial and how it may or may not impact her relationship with M.A.F..

Dr. Adriance treated Ms. Cox consistently from January 2022 to March 2022 and occasionally during the summer of 2022. (Faubion 2VRP 166-168.) She clearly stated that Ms. Cox had improved in all aspects of her emotional regulation.

Q. What is your professional opinion as to whether she's -- how she's been doing with her anxiety issues that she saw you for?

A. How has she been doing with her anxiety, is that what you asked me?

Q. Right. Is it still an issue, do you believe, when you last saw her in September of 2022?

A. No. I think when you I saw her last and really over the last several months, as I saw her on and off, I felt as though Kathryn had really learned very effective skills to manage stress and anxiety; that she was using a lot of the tools and strategies we had worked on; she had done a lot of work on her own; that she was much more able to tolerate distress and to regulate intense emotion and really function quite well despite some significant ongoing stressors in her life. (Faubion 2VRP 167-168.)

Dr. Adriance treated Ms. Cox for her emotional regulation issues and again saw substantial improvement.

Q. And how do you feel -- at least based upon your last time you -- you met with her, how do you feel she's dealing with that type of an issue?

A. Significantly better. Really quite well. (Faubion 2VRP 169.)

Furthermore, there was substantial evidence that the behaviors Dr. Katz felt would continue without restrictions and

intervention, such as CPS reports, had not continued. Both Ms. Cox and Mr. Fulmer testified that there had been no CPS reports filed by Ms. Cox against Mr. Fulmer since 2021, approximately one year prior to the trial. (Faubion 1VRP 51, 129.)

The evidence relied on by the trial court was outdated and could not show conclusively that at the time of the trial Ms. Cox had a long-term emotional issue that interfered with her performance of parenting functions. Because of this, any restrictions imposed by the trial court could not be shown as “reasonably calculated to address identified harm.” (*Katara*, 125 Wn. App. at 825.)

The Court of Appeals erred in upholding the parenting restrictions against Ms. Cox.

C. The Court of Appeals Erred when It Upheld the Trial Court’s Order of DBT as a Requirement to Move through the Phases of the Parenting Plan because It Was Arbitrary and there Was No Evidence that DBT Was the Only Therapy that Would Benefit Ms. Cox.

The parenting evaluation was outdated. Dr. Adriance's testimony stated that Ms. Cox's emotional regulation had substantially improved. However, the trial court gave no room to allow for growth and improvement of Ms. Cox's emotional situation. The trial court ignored evidence of a changed situation and decided if Ms. Cox had an emotional impairment in 2021, that impairment must still exist and therefore is long-term.

This Court has held that "any limitations or restrictions imposed must be reasonably calculated to address the identified harm." (*Katane*, 125 Wn. App. at 825.) As stated above, there was no evidence to show that Ms. Cox still suffered from an emotional impairment that limited her ability to parent M.A.F.. As such, the parenting plan as imposed cannot show that the restrictions were calculated to address the identified harm

Under phase 1 of the parenting plan, Ms. Cox's residential time was reduced from 50/50 to every other weekend and two overnights during the week. (ICP 27.) She

can only move to phase 2 (which increases her custody time by 1 day every other week) if she completes 4 months of DBT. (1CP 28.) Finally, she can only move to 50/50 custody under phase 3 if she has completed 12 months of DBT and “there is no evidence² that her mental health issues are impacting parenting.” (1CP 29.)

If there has not been sufficient therapeutic progress after one year of DBT, the residential schedule will remain as is (i.e., at Phase 2) with re-evaluation of therapeutic progress every six months. If after two years of DBT the Mother has not exhibited sufficient improvement to warrant a 50/50 residential plan, then the residential schedule will remain at Phase 2 as outlined above. (*Id.*)

There was evidence at trial that Ms. Cox had undergone therapy and was no longer engaging in the behaviors noted in the parenting plan. (Faubion 2VRP 166-169, Faubion 1VRP 51, 129.) In fact, if the evidential criteria were examined at that time, Ms. Cox may have met all the criteria to move to phase 3.

² The requirements to show her mental health issues are not impacting her parenting were laid out in the parenting evaluation. (3CP 1212.)

(3CP 1212.) The only criterion she could not meet was 12 months of DBT. That is an arbitrary restriction and is not designed to “address the identified harm.” (*Katara*, 125 Wn. App. at 825.) Similarly, restrictions that can be lifted only on completion of an arbitrary number of months of a specific type of therapy are not “necessary to ‘protect the child from physical, mental, or emotional harm.’” (*Chandola v. Chandola*, 180 Wash.2d 632, 652 (2014).)

The Court of Appeals erred when it upheld the trial court’s order of DBT as a necessary part of the ability for Ms. Cox to move through the parenting plan’s phases and achieve unrestricted residential time.

V. CONCLUSION

For the reasons stated above, this case involves substantial public interest as it involves limitations on parental rights based on outdated evidence. The timeframe before an evaluation becomes stale has yet to be settled by this Court and it is high time this Court set a standard for future family law

courts to rely upon. Ms. Cox respectfully requests this Court accept review under RAP 13.4.

This document contains 3,201 words, excluding the parts of the document exempted by RAP 18.17.

Respectfully submitted this 8th day of April 2024,

THE APPELLATE LAW FIRM

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CERTIFICATE OF SERVICE

I, the undersigned declare: I am over the age of eighteen years and not a party to the cause; I certify under penalty of perjury under the laws of the United States and of the State of Washington that on April 8, 2024, I caused the following document(s):

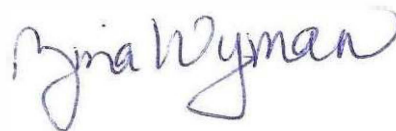
PETITION FOR REVIEW

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on April 8, 2024.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Parenting and
Support of M.A.F.,

KATHRYN COX,

Appellant,

and

CHARLES A. FULMER,

Respondent.

No. 84786-4-I

DIVISION ONE

UNPUBLISHED OPINION

SMITH, C.J. — Kathryn Cox and Charles Fulmer were in a committed intimate relationship for approximately three years and separated in September 2018. They are parents to six-year-old M.A.F. Following their separation, Cox petitioned for a parenting plan and initiated a complaint to distribute assets and debts under the committed intimate relationship. In October 2018, the court entered a temporary parenting plan with the parties sharing residential placement equally.

In the court's final order on the parenting plan, the court found that Cox had a long-term emotional or physical problem that interfered with her ability to parent. The court then implemented a three-phase plan in which Fulmer would be the parent with whom M.A.F. resided for the majority of the time until Cox underwent 12 months of dialectal behavior therapy. Cox has not submitted any proof of complying with the ordered therapy.

On appeal, Cox contends that the court's findings about her emotional instability and her need for therapy are unsupported by substantial evidence. We disagree and affirm.

FACTS

Kathryn Cox and Edward Fulmer began a committed intimate relationship in mid-2015 and separated in late 2018. Their child, M.A.F. was born in September 2017.

The parties had a tumultuous relationship with both parties alleging intimate partner violence. In September 2018, Cox was arrested for domestic violence assault against Fulmer. Fulmer then sought a protection order which was dismissed for lack of evidence.

In October 2018, Cox petitioned for a parenting plan, child support, and to distribute assets and debts under a committed intimate relationship. The court appointed a guardian ad litem (GAL) and entered a temporary parenting plan. The temporary parenting plan provided that the parties would have joint decision-making over M.A.F.'s education and healthcare. The residential schedule provided that the parents would share residential time with M.A.F. equally. The court also appointed a parenting coordinator to address issues with the placement schedule and conflicts over decision-making authority. At the GAL's recommendation, the parenting coordinator, Dr. Lynn Katz, performed a parenting evaluation, which included a forensic mental health evaluation.

In the months following the imposition of the temporary parenting plan, Cox was involved in at least 10 child protective services (CPS) reports. Cox

contacted CPS directly for some of the reports, while others were the result of mandatory reporters like M.A.F.'s physicians and Cox's regular psychologist. Each report alleged that either Fulmer or his mother posed a serious risk to M.A.F. or Cox. None of the allegations were substantiated or deemed founded by CPS.

During this time, Dr. Katz conducted her parenting evaluation and noted that while Cox was an engaged and enthusiastic parent, she also displayed emotional dysregulation that affected M.A.F. Dr. Katz described Cox's extreme reactions to relatively normal behavior, resulting in the many unfounded CPS reports, and expressed her own concern about Cox influencing those disclosures of abuse. Dr. Katz recommended that reducing Cox's residential time until she had undergone certain therapeutic intervention was in M.A.F.'s best interest.

In November 2019, Cox filed a notice of intent to relocate with M.A.F. Fulmer objected. The court granted Fulmer's motion to temporarily prevent Cox from moving with M.A.F., determining that the court needed to make a final decision about the parenting plan before Cox could petition to relocate. Neither party addressed the relocation issue at trial.

The case proceeded to trial in October 2022. The court heard testimony from both parents, the parenting coordinator, Cox's psychologist, and Cox's current husband. Both Cox and Fulmer testified as to the difficulties in their relationship and their focus on supporting M.A.F. Dr. Katz testified about the parenting evaluation and discussed her recommended therapy in greater detail. She testified that dialectical behavioral therapy (DBT) is a form of therapy that

focuses on emotional regulation and distress tolerance. She described the skill-building process of DBT and explained its relevance to her concerns about Cox's emotional dysregulation. She testified that she was not aware of any requirements necessary for beginning the therapy. Dr. Lisa Adriance, Cox's regular psychologist, also testified about DBT. She noted that while she did not engage in a full DBT program, she had worked on building DBT skills with Cox in her regular practice. She also testified about the difficulty finding an available DBT provider during the Covid-19¹ pandemic.

In the final order on the parenting plan, the court found that both parents were primary caregivers and were focused on the best interests of the child. The court also found that Cox had a long-term emotional or physical problem that interfered with her ability to parent. The court then adopted Dr. Katz's three-phase parenting plan, placing M.A.F. with Fulmer until Cox had undergone four months of DBT. Once Cox finished her first therapy requirement, the court would extend her time with M.A.F. If Cox completed 12 months of DBT and could demonstrate that her emotional instability would not affect her parenting, the parents would share equal residential time. Cox appeals.

ANALYSIS

Adoption of Parenting Plan

Cox contends that the court erred in adopting the parenting plan because there was insufficient evidence to establish that Cox's emotional instability

¹ COVID-19 is the World Health Organization's official name for "coronavirus disease 2019," a severe, highly contagious respiratory illness that quickly spread throughout the world after being discovered in December 2019.

interfered with her ability to parent. She also challenges the DBT requirement, asserting that there is insufficient evidence to establish that DBT was the only therapy that would provide the required benefit. We disagree. There is sufficient evidence to support the court's finding regarding the effect of Cox's emotional state on her ability to parent and to support the requirement that she attend DBT therapy.

We review a trial court's ruling on provisions of a parenting plan for manifest abuse of discretion. In re Marriage of Black, 188 Wn.2d 114, 127, 392 P.3d 1041 (2017). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." Littlefield, 133 Wn.2d at 47.

We review a trial court's findings of fact for substantial evidence, which is evidence sufficient to persuade a fair-minded person of the truth of the matter asserted. In re Marriage of Katare, 175 Wn. 2d 23, 35, 283 P.3d 546 (2012). We do not reweigh evidence or judge witness credibility. In re Marriage of McNaught, 189 Wn. App. 545, 561, 359 P.3d 811 (2015). "Under a manifest abuse of discretion standard, '[t]he trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.'" The Parental

Rights to E.D., 195 Wn. App. 673, 685, 381 P.3d 1230 (2016) (alteration in original) (quoting In re Marriage of Landry, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985)).

1. Ability to Parent

Cox asserts that the trial court erred in adopting the parenting plan because there was insufficient evidence to establish that Cox's emotional instability interfered with her parenting ability. This argument is unpersuasive.

The evidence provided by Dr. Katz and the GAL is sufficient to establish that Cox's emotional dysregulation interfered with her ability to parent and directly impacted M.A.F.

In her parenting evaluation, Dr. Katz stated that Cox seemed unable to control her emotions around M.A.F. and that Cox's emotional reactivity was obvious to any observer, including her six-year-old son. Dr. Katz noted that M.A.F. was well aware of his mother's fear of his father. Dr. Katz stated that this awareness resulted in two main areas of concern: first, that Cox's behavior was influencing M.A.F.'s development by making him fearful of his father, and second, that M.A.F. had become "vigilant" about his mother's emotional distress and worried about her safety.

The GAL's report similarly supports the determination that Cox's emotional instability affects her parenting. The GAL listed four primary concerns for M.A.F., each centering on his relationship with Cox:

- a. Becoming emotionally distressed and worried about his mother[.]

- b. Becoming fearful of his father due to negative remarks, suspicious thinking, etc., articulated by his mother in [his] presence[.]
- c. [Being] rewarded with attention and affection from his mother when he says something negative about his father, reinforcing disclosure and increasing potential future disclosures of abuse[, and]
- d. Being an extension of his mother will impact his ability to learn how to manage his reactions to stress.

Each concern displays how Cox's emotional dysregulation directly impacts M.A.F.

Dr. Katz's and the GAL's reports establish that Cox struggles with emotional dysregulation and that it directly impacts her ability to parent M.A.F. The reports also constitute substantial evidence supporting the court's finding of fact. The court did not abuse its discretion in adopting the parenting plan.

2. Therapy Requirement

Cox also contends that there was insufficient evidence to establish that DBT was the appropriate therapy. We are unpersuaded.

Testimony from both Dr. Katz and Dr. Adriance supports the court's finding that DBT therapy is necessary for Cox. Together, the two professionals provide sufficient evidence for a fair-minded person to believe that DBT is the appropriate therapy for Cox.

Dr. Katz specifically recommends that Cox participate in DBT to increase her emotional regulation and distress tolerance skills. She notes that Cox's emotional dysregulation, and the resulting harm to M.A.F., tends to stem from her inability to mitigate her reactions to relatively normal behavior. Dr. Katz also articulated that DBT will help Cox identify when she feels threatened or

overwhelmed and provide coping skills to improve how she handles those feelings. Dr. Katz notes that DBT also serves to develop skills for maintaining interpersonal relationships, such as decreasing blame and the frequency of disparaging statements about Fulmer. And finally, Dr. Katz testified that the therapy would build Cox's skill for more balanced, flexible thinking, increasing her ability to see things from Fulmer's perspective, identify her own role in problematic interactions, and determine when imminent harm is actually present. Decreasing blame and fewer disparaging comments about Fulmer will reduce the risk of M.A.F. being afraid of his father, which will in turn, provide both M.A.F. and Cox with a better idea of when harm is actually present. With less concern about potential harm, Cox will be less likely to put M.A.F. through CPS investigations and M.A.F. will not feel the need to step into a parental role to protect his mother. Dr. Katz's testimony clearly establishes how DBT skill-building will positively impact Cox's relationship with M.A.F.

Dr. Adriance similarly testified that DBT would be an appropriate therapeutic approach for Cox. Dr. Adriance also testified that she and Cox had worked on building some DBT skills in their regular sessions. She also acknowledged that she had encouraged Cox to find a DBT provider.

Given both the parenting evaluation and testimony, there is sufficient evidence in the record to support the court's finding that DBT would be an effective therapy to combat Cox's specific dysregulation.

Dr. Adriance also testified about the differences between DBT and regular psychotherapy. Adriance stated, "[DBT and normal psychotherapy are] two very

different things. DBT is a very manualized, skill based program . . . it teaches skills. . . . So there's a psychoeducational portion to it, and then there are exercises to learn skills to regulate intense emotion. That's a very different thing than psychotherapy." Because DBT is a very different process than traditional psychotherapy, one cannot be traded for the other to achieve the same results. And both Dr. Katz and Dr. Adriance were clear about why DBT would specifically combat Cox's dysregulation. The court had sufficient evidence to determine that DBT was the appropriate therapy to help Cox regulate her behavior and that substituting another form of therapy would fail to achieve the same goal.

Cox points to the struggle of finding a DBT provider during the pandemic as reasoning that the court erred in requiring the therapy. Referencing a letter from Harborview Medical Center, she argues that DBT cannot be compelled by court order and that it was an abuse of discretion to condition her time with her child on her completion of the therapy. But the question at issue is not the accessibility of the program. Rather, the question is whether the court had sufficient evidence to find that DBT was the only therapy that would provide the required benefits. Given the differentiation between DBT and traditional therapy, and the significant testimony as to the benefits that DBT would provide, the court did not err in determining that DBT was the appropriate therapy for Cox.

The court did not abuse its discretion in adopting the parenting plan with the DBT requirement.

Attorney Fees

Fulmer requests attorney fees under RCW 26.09.140 and RAP 18.9. We decline to award fees.

1. RCW 26.09.140

RAP 18.1 provides that applicable law may grant a party the right to recover reasonable attorney fees or expenses on review. RCW 26.09.140 provides that after considering the financial resources of both parties, “upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys’ fees in addition to statutory costs.” But if a party fails to file an affidavit of financial resources, we do not consider their request. Matter of Marriage of Crosetto, 82 Wn. App. 545, 565-66, 918 P.2d 954 (1996); In re Marriage of Gillespie, 77 Wn. App. 342, 350, 890 P.2d 1083 (1995).

Fulmer asserts that he is struggling financially and that the extensive litigation is harming his ability to support his child. He has not, however, filed an affidavit of financial need. Accordingly, we do not consider his request and decline to award fees.

2. Frivolous Appeal

RAP 18.9(a) allows a court to order a party or counsel who files a frivolous appeal to pay compensatory damages or sanctions. Appropriate sanctions include an award of attorney fees and costs. Kinney v. Cook, 150 Wn. App. 187, 195, 208 P.3d 1 (2009). “ ‘An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which

reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal.’ ” Kinney, 150 Wn. App. at 195 (quoting Lutz Tile, Inc. v. Krech, 136 Wn. App. 899, 906, 151 P.3d 219 (2007)). However, “ [a]n appeal that is affirmed merely because the arguments are rejected is not frivolous.’ ” Kinney, 150 Wn. App. at 195 (quoting Halvorsen v. Ferguson, 46 Wn. App. 708, 723, 735 P.2d 675 (1986)).

Fulmer contends that the facts in this matter support finding this appeal frivolous. He provides no further argument. We are unpersuaded. Simply stating that the record suggests the appeal was frivolous is not enough to establish that there were no debatable issues or that the claim was so devoid of merit that there is no possibility of reversal. The fact that we reject Cox’s arguments is not enough to consider the appeal frivolous.

We affirm.

WE CONCUR:

Birk, J.

Smith, C.J.

Mann, J.

THE APPELLATE LAW FIRM

April 08, 2024 - 10:21 PM

Filing Petition for Review

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: Case Initiation
Appellate Court Case Title: Kathryn C. Cox, Appellant. v. Charles A. Fulmer, Respondent (847864)

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