

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CASE NUMBER: 42885-7-II

JOSIAH CHRISTENSEN

Appellant,

v.

SARAH MCDONOUGH

Respondent.

BY  DEPUTY
STATE OF WASHINGTON

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FILED
COURT OF APPEALS
DIVISION II

BRIEF OF RESPONDENT

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A. STATEMENT OF THE CASE

During their short marriage, Sarah McDonough (FKA Christensen) and Josiah Christensen lived in Guam. During the marriage, Josiah Christensen was a member of the U.S. Navy, while Sarah McDonough was a stay at home mom, caring for the couple's young son, Noah. CP 152 line 16.

Throughout the marriage there were a number of serious domestic violence events where Josiah Christensen verbally attacked and physically assaulted Sarah McDonough, leaving bruises and doing more extensive damage. In fact, during their marriage, Sarah McDonough made multiple visits to the emergency room to address injuries inflicted upon her by Josiah Christensen. CP 61 to 120.

Some of the most violent attacks that occurred included the time Josiah Christensen slammed Sarah McDonough into a wall in their home; slamming her so hard that a huge hole was made in the wall. CP 72 to 74. During another particularly violent attack, Josiah Christensen hit Sarah McDonough in the head so hard that he ruptured her eardrum. CP 107.

After years of on-going domestic violence Josiah Christensen agreed to divorce, however in exchange for agreeing to the divorce he required that Sarah McDonough agree to "disciplining" which meant she

had to be spanked with various items, leaving marks on her buttocks and upper thighs. CP 107. A divorce was granted in Guam on September 15, 2010. CP 15 to 16. After the divorce was finalized, both parties moved back to Washington State.

On December 16, 2010 Sarah McDonough filed a Petition for Modification of Custody. The basis for her petition was her concern that Josiah Christensen was physically abusing their son Noah. Noah was frequently returning from his visits with his father covered with bruises. CP 1 to 13. And, in addition, Noah's daycare had reported Josiah Christensen to Child Protective Services because the daycare also suspected abuse by the father. On December 9, 2010 Child Protective Services issued a letter stating that "it was likely Noah was physically abused while in the care of Mr. Christensen." CP 118.

The Petition for Modification of Custody was heard at trial before Honorable Judge Kathryn Nelson who issued a written decision on October 20, 2011. CP 178 to 181. In that decision, Judge Nelson found that the Sarah McDonough should be the primary parent with whom Noah resides and that Josiah Christensen's residential time with the child should be limited due to .191 factors which included a history of acts of domestic violence. CP 178 to 179.

Additionally, the court found, based on the report of Steve

Pepping M.A. that Josiah Christensen suffers from “Axis I – Diagnosis Deferred, Axis II Narcissistic Personality Disorder with Histrionic Personality Traits, Obsessive Compulsive Personality Traits, and Paranoid Personality Feature”. CP 178. Josiah Christensen offered no expert during trial to rebut the findings of Steve Pepping M.A.B.

B. ARGUMENT

1. The post trial evaluation provided by Josiah Christensen was not part of the record at trial and thus should not be considered by this court.

During the trial on modification, Steve Pepping testified regarding Josiah Christensen’s mental state. Steve Pepping found that Josiah Christensen suffers from “Axis I – Diagnosis Deferred, Axis II Narcissistic Personality Disorder with Histrionic Personality Traits, Obsessive Compulsive Personality Traits, and Paranoid Personality Feature”. CP 178.

Josiah Christensen offered no expert testimony during trial to rebut the findings of Steve Pepping M.A. Josiah Christensen was represented at the time of trial and had the benefit of counsel in constructing his case. CP 182 lines 13 to 15. If he wished to rebut the statements of Steve Pepping M.A., the proper time for such evidence was

during the trial. By failing to rebut the proffered expert testimony at trial, he has failed to preserve the issue for appeal.

In fact, Josiah Christensen filed a Motion for Reconsideration on November 18, 2011 on this issue. CP 182 to 185. In that motion he argued that under CR 59(a)(4) his motion should be granted because he did not hire an expert to provide a second opinion. CP 183 lines 4 to 15. Judge Nelson denied his motion.

Subsequent to trial, Josiah Christensen hired and obtained an evaluation from Sierra Swing Psy.D. CP 196 to 226. By failing to hire an expert prior to trial and to preserve this issue for appeal at trial, Josiah Christensen has in effect waived his right to present such evidence on appeal. In addition, because Sierra Swing did not testify at trial, Sarah McDonough has had no ability to interview and will have no ability to cross-examine the expert.

Therefore, because Josiah Christensen has failed to properly preserve this matter for appeal and because to allow such evidence would be grossly inequitable to Sarah McDonough, the expert report offered by Josiah Christensen should not be considered as evidence properly before the court on appeal.

2. The Appellant has failed to provide all

Evidence in the Record which is Relevant to
Issues on Appeal.

In Washington, at least since the 19th century, it has been the rule that Appellants have the duty to provide a record which is adequate for review. Roberts v. Tucker, 1 Wash. T. 179 (1862). More recently, it has been held that a party seeking appellate review has the burden of providing the court with all evidence in the record relevant to the issue before the court. Starczewski v. Uniguard Insurance Group, 61 Wn. App. 267, 810 P. 2d 58 (1991). In this opinion, the court first held that the party seeking relief in the appellate court must provide the court with all evidence in the record which is relevant to the issue that party wishes to have discussed. The court then again pointed out that in the absence of a record, the appellate court will consider the trial court's findings to be verities.

Carrying this argument further, it has also been the law, at least since the 19th century, that a judgment will be affirmed where the Appellant does not provide a record adequate to determine the challenges that Appellant is making to the decision. Brown v. Pepin, 1 Wash. T. 205 (1867). Again, a more recent case has also upheld the rule that where there is a factual dispute, the trial court will automatically be affirmed if there is no complete record from which the appellate court

can review the question. Hyatt v. Sellen Construction Co., 40 Wn. App. 893, 700 P.2d 1164 (1985).

Josiah Christensen has failed to provide all evidence in the record relevant to this appeal. Specifically, he has failed to provide the report of the Guardian Ad Litem, testimony of the Guardian Ad Litem, report of Steve Pepping M.A. and testimony of Steve Pepping M.A. These items are essential parts of the record necessary for the court to properly review the findings of the trial court.

3. The trial court did not abuse its discretion when granted the modification of the parenting plan per RCW 26.09.260.

Noah was in Sarah McDonough's primary care from his birth. Sarah McDonough was a stay at home mother while Josiah Christensen worked full time. Initially after divorce, residential time was split between the parents. CP 19.

A substantial change in circumstances arose after the initial parenting plan was entered because abuse of the child by Josiah Christensen quickly became apparent from Sarah McDonough's own observations and from the report made by the daycare to Child Protective Services. CP 6 and 118.

At trial, the court heard testimony from Sarah McDonough,

testimony from Josiah Christensen, testimony from the Guardian Ad Litum and testimony of Steve Pepping M.A. Based on that testimony and the exhibits before it, the court found adequate cause for a major modification of the parenting plan. CP 178. The court modified the plan to restrict Josiah Christensen's time with the child and invoke .191 factors, thereby creating a plan that is in the best interest of the child; a plan which protects the child from domestic violence. CP 179.

4. The trial court did not abuse its discretion when it chose to impose .191 restrictions under RCW 26.09.191.

Substantial evidence was before the trial court regarding domestic violence inflicted by Josiah Christensen on Sarah McDonough and the child, Noah. CP 61 to 120.

First, the child's daycare, made a report to Child Protective Services of suspected child abuse by Josiah Christensen. On December 9, 2010 Child Protective Services issued a letter stating that "it was likely Noah was physically abused while in the care of Mr. Christensen." CP 118.

Second, Steve Pepping M.A. testified at trial that Josiah Christensen suffers from "Axis I – Diagnosis Deferred, Axis II Narcissistic Personality Disorder with Histrionic Personality Traits, Obsessive

Compulsive Personality Traits, and Paranoid Personality Feature”. CP 178.

Third, Sarah McDonough testified at trial about the domestic violence that occurred in her relationship with Josiah Christensen and about her suspicions that he physically harmed Noah.

Josiah Christensen was represented by counsel and had the opportunity and ability to attempt to rebut each piece of evidence and to tell his side of the story to the court. Despite evidence and testimony submitted by Josiah Christensen, the court believed the testimony of the Mother, Sarah McDonough. CP 178 to 179.

Based on its belief of the testimony of the mother, and the totality of the information before it, the court found a history of acts of domestic violence by Josiah Christensen, which caused grievous bodily harm or fear of such harm. CP 179.

Per the statute, when such a finding is made, the court shall place .191 restrictions in the parenting plan. Upon finding that Josiah Christensen had a history of acts of domestic violence, the trial court was obligated to order .191 factors. Therefore the trial court did not abuse its discretion in ordering such factors in the parenting plan.

5. Fees on Appeal.

Pursuant to RCW 26.09.140 the Appellant Court may, in it's

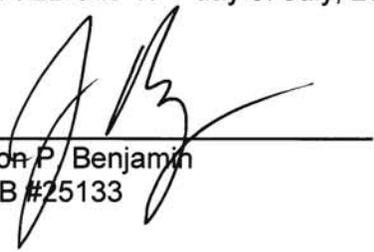
discretion award the costs to the other party of maintaining the appeal. Here, Josiah Christensen has based his appeal on the submission of evidence that was not before the trial court, which is therefore not properly before this court on appeal. Additionally, he has failed to provide a sufficient record to the court.

Although pro se, Josiah Christensen is held to the same standards as an attorney and must adhere to the procedural rules of the court. Sarah McDonough therefore requests attorney's fees in the amount of \$3500 to be paid directly to Attorney Jason P. Benjamin.

C. CONCLUSION

For the reasons stated above, the decision of the trial court should be upheld and Sarah should be awarded her reasonable fees and costs for defending this appeal.

RESPECTFULLY SUBMITTED this 17th day of July, 2012.



Jason P. Benjamin
WSB #25133

