

COURT OF APPEALS DIVISION II OF THE
STATE OF WASHINGTON

Pierce County Cause No. 12-3-00600-7

Court Of Appeals No. 4762-2-II

In re the Marriage of:

JAMELL COLLINS
Appellant/petitioner

and

ARLENE MELINDA COLLINS
Respondent

FILED
COURT OF APPEALS
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STATE OF WASHINGTON
BY 

APPELLANTS CORRECTED OPENING BRIEF

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ASSIGNMENTS OF ERROR:

1. The court erred in placing the child with the respondent as the residential custodial parent.
2. The court erred in finding an abusive use of conflict against the petitioner.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

It was an abuse of discretion to place the child with the respondent; as there was no stronger evidence presented by the respondent that disputed the investigation of the Guardian Ad Litem, James Cathart. No bias was represented, nor was there any evidence of abuse or neglect by the petitioner proven (Assignment of Error 1)

It was an abuse of discretion to find that there was an abusive use of conflict by the petitioner when there was no reliable evidence to prove abusive use of conflict presented by the respondent. (Assignment of Error 2).

STATEMENT OF THE CASE AND FACTS

This appeal arises out of a ruling by the Honorable Elizabeth P. Martin after a non-jury Trial on whether there was an abusive of discretion in finding that there was an abusive use of conflict by the Petitioner and subsequently placing the minor child with the Respondent and Custodial Parent.

The parties were married on August 15, 2008 (Verbatim Report of Proceedings at 93) and separated on September 29, 2010. Mr. Collins was stationed in Iraq for a part of the marriage, during which time, the Respondent was custodial parent of Illiana (*Id.* at 96). While married, the Respondent failed to remain in one place, moving from Washington to New Jersey to North Carolina (*Id.* at 100) and then back to New Jersey (*Id.* at 103 – 104). She also failed to hold a steady job, Mr. Collins paid all the expenses (*Id.* at 94-95). When Mr. Collins returned to Iraq, he became the primary parent for Illiana, after he had to travel across country to Florida to pick up Illiana from a stranger. (*Id.* at 117-120, 126). During a visitation that Mr. Collins allowed, the Respondent refused to return the child, which resulted in a New Jersey court order of custody (*Id.* at 136). Mr. Collins left the state of New Jersey and returned to Washington, where he was stationed. A bi-coastal parenting situation arose (*Id.* at 203). The Petitioner filed for divorce in February 2012, and the subsequent trial for that petition ensued, resulting in a ruling placing the minor child in the care of the Respondent as primary custodian.

A timely appeal was filed.

STANDARD OF REVIEW

We review a trial court's ruling addressing the placement of a child for abuse of discretion. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Kovacs*, 121 Wn.2d at 801. A 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 therecord; 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." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

ARGUMENT

I. *The Recommendation of the Guardian Ad Litem, James A. Cathcart*

“[I]t was in the best interest of Illiana to stay in the home which she has been living for the past couple of years most of the time, but that her mother should be given the opportunity to maintain a close, loving, and supportive relationship with her, which requires time, not just quality time, but quantity time.” (Verbatim Report of Proceedings, page 43, lines 8-13). This was the GAL’s express recommendation testified to at trial - that Mr. Collins be the designated residential parent of Illiana Collins and that the Respondent should have visitations during what would be the winter break, spring break, and summer break from school.

The GAL was requested to specifically examine the issue of abandonment by the Respondent and by the abusive use of conflict by Mr. Collins, but found neither.

The GAL specifically stated, “Arlene was placing her own priorities above Illiana’s” (Confidential GAL report, 15). While the GAL found no neglect, he stated that the pattern of the Respondent moving repeatedly and bouncing around idea’s of enlisting “shows a lack of maturity and a lack of understanding the necessity for stability in a small child’s life.” *Id.*

The GAL also specifically mentioned the stability and pattern that Mr. Collins and his fiancé, Michelle Herd, have provided, stating, “Jamell is still the more stable parent.” *Id.*

While the court clearly has the authority to go against the opinion of the GAL if the recommendations are not supported by further evidence or the court finds other testimony more convincing *Fernando v. Nieswandt* 87 Wash.App. 103,107. However, it is unclear exactly what evidence could be more convincing.

II. *Instability of the Respondent.*

A. Financial Stability

Arlene Collins has no stability. Not only does she not have a home of her own to provide to Illiana, but she has no source of income. She testifies at trial that she lives with her parents. (Verbatim report of proceedings, page 299). She has no way to provide the necessities of taking care of a small child, such as food, clothing, health care, or any other basic necessity. She will rely upon her parents for help.

She has provided no actual evidence of how she will provide for Illiana. During trial she testified that she did not have a job, (Verbatim Report of Proceedings, page 319, line 24-25), but rather she was going through licensing school with New York Life. She testified to her potential future income, would be \$30,000 a year. (*Id* at page 320, line 2). The court took this into consideration as a way for her to provide for Illiana; however, there is no real evidence that the Respondent will even find a job. To state that just because you are licensed means you will have a job is absurd – every lawyer in the state would be excited to just pass the bar. It takes time to find gainful employment, even if a person is licensed and educated. Even if she is licensed and certified, there is no guarantee that she could even find a job in the field.

She has never provided Mr. Collins with any type of support in the time that he has had Illiana. She never provided money for the care of Illiana, or even supplies such as diapers, food, or clothing. She provided no proof at trial that she provided anything other than gifts for Illiana.

There has been no child support ordered until August. The Respondent has no way to provide for Illiana until then – no way to provide health care. The Respondent is already requesting that Mr. Collins provide Illiana's military ID card, presumably for health care. Mr. Collins has no problem with providing for Illiana, even absent a court order. The fact that the Respondent is already demanding the ID card demonstrates her inability to care for Illiana properly.

Further, the Respondent did not disagree that she did not hold a steady job. There has been much testimony about the possibility of her entering the military (page 379, line

17-21); about her wishes to go to interior design school (page 374, line 22); and then about attending school to be licensed for New York Life. The Respondent does not stick with any one thing, and continually bounces around – both with potential jobs and where she lives.

B. *Emotional Instability*

Trial testimony established that the Respondent has shuffled Illiana around every time she has had Illiana. She moved from New Jersey, where she had the support and care of her parents, to North Carolina, on a whim. When she got tired of that she moved back to New Jersey. She then landed in Florida, with her boyfriend at the time, where Mr. Collins was contacted by the mother of the Respondent's boyfriend, and requested that he come get his child. He received Illiana from a complete stranger with the Respondent nowhere to be found. Testimony at trial showed two different stories; however, one fact not disputed was that she was not part of the exchange.

C. *Reliability*

The Respondent has no reliability. A court order establishing Skype visitation two days a week for the Respondent was entered on April 11, 2012. The Respondent chose to have Skype visits on Sunday and Thursday. Since the March 15, 2012 order, the Respondent has failed to answer any Skype call or have any Skype visitation. The Respondent missed her Skype visitation on Sunday, March 17, Thursday, March 21, or Sunday, March 24. She provided no proof that she attempted to make these Skype visitations. She has no desire to interact with her daughter. She has taken no advantage of her visitation right, just as she has in the past. With the exception of coming to Washington for court appearance, the Settlement Conference, and in February when she was informed by New Jersey that Mr. Collins would not be in contempt unless she physically came to Washington, the Respondent has never exercised visitation or attempted to exercise visitation at any time, holidays included. During that trip for the Settlement Conference, the Respondent provided the GAL, Mr. Cathart, an itinerary. He

specifically asked the Respondent if she had made plans for visitation. Mr. Cathart testified that she had not made plans in advance (Verbatim report of Proceedings, page 24, lines 5-9). Mr. Cathart went on to testify that it would have been a perfectly normal time for the Respondent to exercise visitation; however, she hadn't even tried to make arrangements.

Pierce County requires the completion of a parenting class. On April 11, 2012, Mr. Collins provided his certificate of completion for his parenting class to the court. The Respondent failed to complete the required parenting class prior to trial. In fact, to date, the Respondent has failed to complete the required parenting class. The Respondent testified at trial that she did in fact complete a parenting class (page 335, lines 10-17); however, she never filed completion of this class, nor did she request relief from the court to accept these parenting classes. Pierce County has a list of acceptable classes, and the Respondent never asked to have her classes be allowed as exceptions.

There was a New Jersey Custody Order prior to the entry of the Order that we are requesting be reconsidered. It stated that the Respondent was to have custody of Illiana starting on or about the 3rd week of February. The order also states that "any travel arrangements for the child that includes flying shall be made in good faith at least thirty (30) days prior to the transfer of the child. This shall include which airlines and flight numbers." At trial, testimony stated that the Respondent notified Mr. Collins on February 17, 2012 that she would arrive at his house on February 23, 2012 at 7 pm. She provided no itinerary or flight information. She arrived at Mr. Collins' house at 11 pm on the February 23rd 2012. Illiana was already in bed, and that is why Mr. Collins refused the visitation. The Respondent did not follow the proper notice requirements, she failed to provide any real information regarding the flight schedule, and she showed up 4 hours after she stated she would, during a time in which Illiana was already in bed and had been sleeping for hours. The respondent did provide some communication that she would be

coming, and did interact with Mr. Collins, but again, she never provided a date or time to be expected. She just showed up at night after Illiana was asleep.

Further, the Respondent was arrested in March 2012. If Mr. Collins had allowed the Respondent to take Illiana, she would have had Illiana at the time of her arrest. What would have happened to Illiana while her mother was being arrested and processed? Who would have been caring for Illiana?

The only other time that Mr. Collins has had concern regarding the visitation was in November 2011, when the Respondent requested visitation, as well as a note from Mr. Collins stating that she had permission to take Illiana to Canada. Mr. Collins was not comfortable with this, and feared she would flee. The Respondent said she had family in Canada, but Mr. Collins had never met or spoken with said family. On November 16th, 2012, there was a settlement conference. During that settlement conference, the issue of travel to Canada was again raised, and the commissioner prohibited travel to Canada. Mr. Collins was not withholding visitation.

The Respondent has repeatedly failed to exercise her visitation rights and follow court orders. She failed to see Illiana in November 2011 for Thanksgiving. She failed to see Illiana in December 2011 for Christmas. Other than the attempt in February, the Respondent has failed to maintain steady contact or visitation. Even now, when she has gotten what she wanted, she fails to exercise her Skype visitation. The Respondent has also failed to comply with the March 15th order. She was ordered to pay for a round trip ticket for Mr. Collins, as well as a one way ticket for Illiana; however, she failed to comply by only buying Mr. Collins a one way ticket. She stated that since Mr. Collins was supposed to reimburse her for half of the ticket, it would just be easier for her to pay for a one-way ticket and Mr. Collins get his own ticket back. However, that was not what she was ordered to do. The Respondent continues to have no responsibility, even when ordered by the court she fails to comply.

The respondent also has failed to provide Mr. Collins' with her contact number. She only provides her parents' number. The Respondent testified that she uses a fake number app to prevent Mr. Collins' from harassing her, and giving out her number (page 335, line 18-25). There is no proof of any harassment. This is simply just another way that the Respondent can keep Mr. Collins' from having direct contact with his child.

III. *Prior Court Rulings on Residential Schedule*

On August 15, 2011, Ocean County, New Jersey, entered an order which established Mr. Collins as the Primary Residential Custodian. The Court went through a significant list of factors, including the fitness of both parents, and decided that Mr. Collins was the more stable parent. Again, this court is under no obligation to follow or accept the New Jersey's court ruling; however, it is in line with the GAL's recommendation.

IV. *RCW 26.09.187(3): Criteria for establishing residential provisions in a parenting plan.*

RCW 26.09.187(3) lays out factors, which should be used in determining the residential provisions of a parenting plan:

- (i) *The relative strength, nature, and stability of the child's relationship with each parent.*

This factor should be given the most weight, per the language of the RCW.

Illiana has established a routine in Washington with Mr. Collins. She is attached to Mr. Collins' fiancé, Michelle Herd and her children, Dominique (19) and Kalaya (12). This is the world that Illiana knows. She is in a stable environment, and has established a pattern in which she has two full time providers who both have stable jobs. Mr. Collins and Ms. Herd have created an integrated family that is comfortable and supportive.

The Respondent has been in and out of Illiana's life, rarely choosing to exercise the visitation that she is allowed. She hasn't provided a stable life for Illiana, rather she has moved numerous times in the few times that the Respondent did have Illiana (which was really only when Mr. Collin's was deployed overseas).

- (ii) *The agreements of the parties, provided they were entered into knowingly and voluntarily*

Although the New Jersey order had aspects of agreement and mediation, Mr. Collins testified at trial that he did not feel like it was a mediation, but rather an order by the court in order for him to get his daughter back. He had given the Respondent the child out of good faith, and she kept the child from him for over 5 days at the time this order was entered.

- (iii) *Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child*

Mr. Collins has been the primary, and usually only, provider for Illiana for the duration of her young life. During the times that the Respondent has had Illiana, she has moved repeatedly. The Respondent has never had a steady job, and has never provided any sense of normal routine for Illiana. At trial, the Respondent failed to provide any real evidence that this would change. She still lives with her parents, and still has no steady employment – she is banking on getting a job once she is certified; however, in the current economy there is no guarantee on employment simply because of education. One of the key elements of parenting functions is “maintaining a loving, stable, consistent, and nurturing relationship with the child.” The Respondent has provided none of that, while Mr. Collins has dedicated himself for providing exactly those things to Illiana. Another key element is “attending to the daily needs of the child.” Again, the Respondent has never provided for the daily needs in any way – even if it was simply sending money or items. Even when she has Illiana it is unclear how she can provide for the daily needs when she has no job.

- (iv) *The emotional needs and developmental status of the child*

Mr. Collins has had Illiana basically her entire childhood. This is the life that Illiana knows. She is not only attached to Mr. Collins, but to Ms. Herd and her children. They have a life they live as a family. Taking Illiana away from the family she knows would be detrimental to the emotional needs and development of Illiana.

- (v) *The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities.*

Illiana has bonded with Mr. Collins' fiancé and her children. Their life together as become the only thing she knows. She has established a routine with Mr. Collins.

- (vi) *The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule.*
- (vii) *Each parent's employment schedule, and shall make accommodations consistent with those schedules.*

Mr. Collins' has been the only one to provide a consistent schedule and a stable environment. His environment and routine with Illiana will remain the same; whereas, if Illiana is with the Respondent, Illiana's life will have a low likeliness of stability. The Respondent has provided no actual proof of her ability to provide, rather, just the hope of future earnings if she got the job she desired.

V. *The finding of Abusive Use of Conflict*

James Cathart, the GAL was ordered directly to explore this issue. Mr. Cathart came to the conclusion that there was no abusive use of conflict. At trial, in an explanation of this conclusion, he testified that that a finding of abusive use of conflict needs to rise to a severe level; and while he did have some concerns about some of Mr. Collins' behavior, it was not at the severe level (Verbatim Report of Proceedings, page 18, lines 9-20).

Speaking directly on the incident when Mr. Collins' would not let the Respondent have the child when she flew in from New York, at trial Mr. Cathart comments that there was no actual agreed time or place of exchange. He concluded that because there was no set time, because she showed up late in the evening, that it was NOT and abusive use of conflict, even though it could be argued that Mr. Collins was interfering with the mother-child relationship. (*Id* at page 22, lines 17-25). Mr. Cathart

states that had the Respondent provided a time and date, as the New Jersey order required, that Mr. Collins would have complied, maybe reluctantly, but he would have complied (*Id* at page 23, lines 11-13.)

Again, when the Respondent flew down for the settlement conference, she made no arrangements to see Illiana; nonetheless, even with no prior arrangements, Mr. Collins' allowed a visitation. The Respondent will argue that Mr. Collins' interfered with her mother-child relationship by not allowing her to leave the country and visit Canada, but restrictions against leaving the country during a custody dispute are perfectly normal.

The Respondent cites many examples of why abusive use of conflict should be found; however, wants the court to overlook her actions. Mr. Collins' testified that while he was deployed in Iraq he had little contact with his child. The respondent would not put Illiana on the phone – always had an excuse, that he felt his relationship with his daughter was being interfered with. (*Id.* at page 111, 6-9). Further, it was the Respondent who kept the child from Mr. Collins, telling him that before she would return the child he had to sign a piece of paper. She did this twice, once at the exchange in Florida via her boyfriends mother, and again prior to the New Jersey Order (*Id.* at page 137, lines 2-9). Mr. Collins allowed the visitation over Illiana's birthday, as to foster a mother-child relationship, and in return, the respondent refused to return Illiana to Mr. Collins – forcing court action in New Jersey.

Even after the incident where he had to travel to Florida, he still looked at the best interests for Illiana. When the respondent called, as he was almost home from Florida, saying she had no where to go and asking if she could come to Washington and be with him, he told her “Our daughter needs both of us.” (*Id.* at page 122, line 4). Even after having to fly across the country and pick up his child from a stranger, he still allowed the Respondent to come live with him.

CONCLUSION

There is no dispute that the Court has the final decision, and can take into consideration and give weight to evidence as the Court deems proper; however, looking at the GAL recommendation and the factors established in RCW 26.09.187(3), it should be determined that the court abused its discretion in finding that the Respondent should be the Residential parent; and in finding that there was an abusive use of conflict by Mr. Collins.

In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Kovacs*, 121 Wn.2d at 801. Mr. Collins has shown at trial, and the GAL agrees, that he is the more stable parent. He is the parent that can provide for Illiana. He has been the steady hand in Illiana's life – not the Respondent. The Respondent has presented no evidence that shows she can provide better for Illiana. It is simply in the best interest of Illiana to live with Mr. Collins; in fact, it would be detrimental to Illiana if she was removed from Mr. Collins' care. The court bases findings that the Respondent would be able to provide for the child on future potential incomes at a job that the Respondent has not even received. A 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." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

It is our argument that there was no solid evidence to go against Mr. Cathart. He was court appointed, neutral party. He found no abuse of discretion. The argument is not that the Respondent is an unfit mother; rather, that the best interest of the child is not to uproot her from the home she knows, from the parent who has been the primary caregiver and sole supporter. This was the recommendation of the GAL and there was no better

evidence. It was an abuse of discretion to award custody to the mother; as there was no evidence that showed that Mr. Collins would not foster a mother-child relationship; and he is clearly the better and more stable provider.

DATED this 6th day of September, 2013

Respectfully submitted,

TAMBLYN LAW GROUP



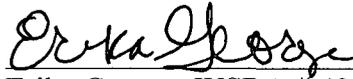
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington on the 15th day of August, I served Jason Benjamin electronically with a true copy of Petitioner's Corrected Opening Brief. Mr. Benjamin and I have an agreed reciprocal service via electronic mail.

DATED this 6th day of September, 2013

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