

No. 71053-2-I

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

BRITTANY L. FROMBACH, APPELLANT

v.

DYLAN FROMBACH, RESPONDENT

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COURT OF APPEALS
STATE OF WASHINGTON
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BRIEF OF APPELLANT

Brittany L. Frombach
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INTRODUCTION

Unfortunately, this family law/custody case revolves around the pre-meditated and Machiavellian maneuvers put forth by the Respondent (Mr. Frombach) in order to secure primary custody of the children and punish the Appellant (Ms. Frombach).

This case began when Mr. Frombach provoked a physical response from Ms. Frombach during an argument in their home. He then called the police and she was ultimately arrested and taken to jail. He demonstrated that his thought process was pre-meditated by what he did while Ms. Frombach was in jail. Mr. Frombach proceeded to take and hide their tax records, her medical records, and any other marital or personal files. He emptied their joint bank accounts and even took the money out of Ms. Frombach's wallet, including the coins, credit cards, debit cards, everything. He even took the \$50 that was in an Easter card she had received from her dad the previous day. Mr. Frombach then hid her car and didn't divulge the location and return it until we proposed to report it stolen (a Federal Way police officer informed him that if it was reported stolen and someone was driving it, that would be a felony stop).

After Ms. Frombach was released from jail, there was a no contact order between her and Mr. Frombach and the two children for three weeks. During this time and future times, unbeknownst to her, he took the girls to counseling to intimidate them into proclaiming that they wanted to live with him and not her (which he was found in contempt of court for doing). He was present in the room for these sessions and what child is not going to agree with the parent in the room? Ms. Frombach did not know about these secret counseling sessions until 8 months later when the witness list was produced.

This is one crux of the issue. Can the court rely on biased testimony from a counselor when she has never even met the mother? The social worker even based her recommendations for custody on that same testimony. She had met with Mr. Frombach months before meeting with Ms. Frombach and had been poisoned by both the counselor and him. Her mind had already been made up before even meeting with Ms. Frombach. The court then partly based its decision on that testimony and used the social worker's recommendation for its template and findings.

The other issue at hand is the courts declaration that there is substantial evidence to support that Mr. Frombach was the primary

caregiver to the children. Did he not work for the last two years of the marriage? He did not, but that did not mean he provided the main support and care of the kids. Ms. Frombach still got the kids up and ready for school, made their lunches, dinners, and put them to bed. The kids' grandparents picked them up for school regularly and when Mr. Frombach did, he took them to the grandparent's house so the grandmother could make dinner if Ms. Frombach was working late. She still provided most of the care and support of the children.

Lastly, in the Parenting Plan Final Order, the major educational, medical, and non-emergency health care decisions are solely given to the father (4.2). How can the court deny the mother a voice in what could possibly be life changing decisions? It's not like Ms. Frombach has issues that would interfere with her voicing her opinion and helping to make sound decisions (i.e. drug addict, mental and physical abuse –things like that). To deny her one of the basic acts as a mother is wrong.

There is no reason that 50/50 custody and joint decision making should not have been awarded in this case.

A. ASSIGNMENTS OF ERROR

- 1. The court erred, admitting biased unfair testimony.**

Issue Pertaining to Assignment of Error

The counselor was biased/acted without knowledge of mother.

- 2. The court erred by accepting allegations, recommendations, and testimony from one side of the case without the consent or knowledge of the other.**

Issue Pertaining to Assignment of Error

If the court reviewed this batch of information it would prove unfair to the mother.

- 3. The court erred by ruling there was sufficient evidence the father was the primary care giver.**

Issue Pertaining to Assignment of Error

With much testimony to the contrary, the court erred by placing too much weight to the father's testimony and did not hold the children's best interests paramount.

- 4. The court erred in the Parenting Plan Final Order by giving the father sole discretion in educational, medical, and non-emergency health care decisions.**

Issue Pertaining to Assignment of Error

The court erred by not allowing the mother to have joint decision making regarding, educational, medical, and non-emergency health care decisions.

B. STATEMENT OF THE CASE

The allowance of the testimony of the counselor (Nancy Paul) poisoned both the court and the social worker (Emily Brewer). The counseling sessions that took place between the children and Ms. Paul in the presence of the father without the knowledge of the mother completely prejudiced the court and Ms. Brewer against the Ms. Frombach. What child is not going to agree and say she wants to reside with the father in a counseling session with him present? The admissibility of this testimony (**RP Vol. 2 p.282-323**) is unfair to Ms. Frombach.

That testimony and a previous meeting ultimately led Ms. Brewer to make her recommendation (**RP Vol. 3 p.372-417**) to the court that the father should obtain custody of the children. It's clear that Ms. Brewer had already made up her mind in this case before she had even interviewed Ms. Frombach as she had only heard one side of the story for months.

The unfairness the court showed to Ms. Frombach by allowing the testimony of Ms. Paul is paramount. That testimony (**RP Vol. 2p.282-323**) was developed through a series of counseling sessions Ms. Paul had with the two children with the father present in the

room (**RP Vol. 1 p.5-58**). The mother was unaware these sessions were even taking place. She didn't even get the opportunity to consent or not. Mr. Frombach was also found in contempt of court for putting the girls in these sessions (**CP #89**). How can the court allow this damning testimony that occurred without the knowledge of Ms. Frombach? This testimony in turn prejudiced not only the social worker assigned to the case but the trial court, as well.

The father did not work roughly the last two years of the marriage and was supposed to provide the primary child care duties while Ms. Frombach worked full time. He essentially passed these duties on to his mother and treated his time as a vacation (**CP #10 p.5-6**). The grandparents oftentimes picked up the kids from school and fed them dinner. During this period of years, Ms. Frombach was not only the money maker for the family she was also the primary care giver to the children (**CP #41 p.1, 2, 4**). She woke them up for school, helped them get dressed and ready, cooked breakfast, and made their lunches. Ms. Frombach also took the children to after school activities and play dates with other children, the father did not (**RP Vol. 1 p.160-179**). Every meaningful thing the children did involved the mother. Mr. Frombach kept to himself and washed his hands of any responsibility for the kids.

He also intimated numerous times in his testimony that the stability he provided as well as the close relationship between the girls and his mother and step-father was most important for the children's betterment (**RP Vol. 3 p.429-447**). If Patty Roten was so close to the grandchildren, why did she not even testify? If their relationship was so important to the stability and development of the kids, Ms. Roten's testimony should have been vital to their case. Instead, Mr. Frombach had the grandfather, James Roten, testify to that relationship (**RP Vol.2 p.347-354**) which is essentially second hand information and should be discounted. As of today, the children rarely see these grandparents that supposedly provide this stability.

The court taking away joint decision making from the mother for all long-term decisions regarding the children is not only unfair but cruel. The ability for young children, teen children and even grown children to have both parents debate and discuss major decisions is paramount to their growth as human beings. Giving that responsibility to only one parent is robbing the children of an important person to care for them, the mother. There are no issues prevalent with the mother that should deny her this right as a caring, loving parent.

C. ARGUMENT

There are two cases relevant to the first argument. In common sense terms they may not seem to validate the argument as each case allowed the testimony/affidavit with only one parent's consent. Here are excerpts from the two cases:

In re Marriage of DeFelice 118 Wash.App. 1080, Not Reported in P.3d, 2003 WL 22413699, 5 -7 (Wash.App. Div. 3,2003)

Did the trial court err by considering Ken Cole's affidavit?

Mr. DeFelice contends that the trial court erred by considering the affidavit of Ken Cole. Mr. DeFelice contends that the affidavit should not have been considered because it violated RCW 26.09.220(2), and it does not contain any facts to support his recommendation.

Under RCW 26.09.270, a party seeking a modification of a custody decree must submit an affidavit setting forth facts supporting the requested order or modification, and the other parties may file opposing affidavits. 'The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits....' RCW 26.09.270.

Mr. Cole's affidavit states that he has been the mental health counselor for Anthony DeFelice since early 1999. He asserts that

many of the references made to his opinions in Mr. DeFelice's petition were only partial statements that needed further elaboration. He also states that he recommends that the conflict between the parents be minimized or ended. Mr. Cole's affidavit concludes:

I absolutely do not recommend a change in the guardianship status of Anthony except to suggest the current parenting agreement be simplified so that every need of the child does not require Dennis to 'sign off on'. This situation, usually related to minor dental and medical care but other mundane issues as well, has been the breeding ground for many of the power struggles and control issues in the relationship between Dennis and Joyce as co-parents.

*6 Again, I do not recommend that Anthony's custody be changed and do not believe that this should even be considered. Clerk's Papers (CP) at 120.

First, Mr. DeFelice contends that Mr. Cole's affidavit should not be considered because he violated RCW 26.09.220(2) by failing to obtain Anthony's consent. RCW 26.09.220 addresses dissolution actions and provides that the court may order an investigation and

report concerning parenting arrangements and may appoint a guardian ad litem. RCW 26.09.220(1).

The statute further provides:

Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if the child has reached the age of twelve, unless the court finds that the child lacks mental capacity to consent. If the requirements of subsection (3) of this section are fulfilled, the investigator's report may be received in evidence at the hearing. RCW 26.09.220(2).

Here, the statute is not directly applicable. The court did not order an investigation into parenting arrangements, nor did the court appoint an investigator. Rather, Mr. Cole was Anthony's mental health counselor. As a result, RCW 26.09.220 is not applicable to Mr. Cole, his affidavit, or this proceeding.

Next, Mr. DeFelice contends that the court erred by considering the affidavit because it does not contain adequate foundation or facts, but only contains conclusions. The trial court is vested with

discretion to determine whether a witness is competent to testify as an expert on a particular subject and its ruling will not be disturbed except for a manifest abuse of discretion. *Orion Corp. v. State*, 103 Wash.2d 441, 462, 693 P.2d 1369 (1985).

Mr. Cole's affidavit is admittedly brief. However, he establishes that he has been the mental health counselor for Anthony DeFelice since February 1999. This information is sufficient to provide the court with a minimal foundation for Mr. Cole's recommendations relating to Anthony's residential placement. Certainly, as Anthony's counselor for several years, Mr. Cole was in a position to be familiar with the issues surrounding Anthony's relationship with his parents. Also, by virtue of his role in Anthony's life, Mr. Cole would be in a position to offer an opinion as to Anthony's best interests related to his residential placement. While Mr. Cole does not provide the factual reasoning supporting his recommendation, this failure goes to the weight the court should accord the affidavit, not its admissibility. Moreover, courts indulge in some leniency with respect to affidavits presented by nonmoving parties. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wash.2d 874, 879, 431 P.2d 216 (1967). The court did not abuse its discretion by considering the affidavit of Mr. Cole.

The previous case also involved a long standing relationship and not a fly by night counseling relationship just to get the testimony you need. The second case:

In re Marriage of Kerman (1993, 2d Dist) 253 Ill App 3d 492, 191 Ill Dec 682, 624 NE2d 870.

In dissolution of marriage action, trial court abused discretion by not allowing children's therapist to testify, when therapist had consent of husband, but not of wife, to testify. Mental Health and Developmental Disabilities Confidentiality Act requires consent of only one parent to disclose communications and records concerning children. Further, trial court's insistence that both parents must have consented appeared to have had unduly restrictive effect on therapist's testimony and upon husband's ability to make effective offers of proof. Court's order awarding custody to wife would be reversed, and action remanded for reconsideration of therapist's testimony.

These cases demonstrate that only one parent's consent was needed but in both of these cases the other parent at least knew about the counseling as it was a long term thing, in Ms. Frombach's case she wasn't even given the ability to consent or not as she

didn't know the counseling sessions were even going on. How can one consent or not if you are unaware of it happening?

The court also erred in overemphasizing that one aspect of the case: The testimony of the counselor. As this excerpt states, the court cannot do that if the best interests of the child are at stake.

It is an abuse of discretion for the trial court to overemphasize any one factor when considering the best interests of a child in a custody proceeding; all of the relevant factors impacting the custody decision should be considered and reflected in the record. Markwood v. Markwood, 152 Idaho 756, 274 P.3d 1271 (Ct. App. 2012).

The court showed it gave this testimony too much weight as the recommendations from the social worker were based on this testimony which the court in turn made its findings on. The court did not take everything into account when rendering its decision.

The courts declaration in the Findings of Fact that the father was the primary caregiver and should be given primary custody of the children cannot be reconciled.

The primary consideration in child-custody cases is the welfare and best interests of the child involved; all other considerations are secondary. Marchand v. Marchand, 2011 Ark. App. 210, 382 S.W.3d 775 (2011)

The primary consideration in child custody cases is the welfare and best interests of the children involved; all other considerations are secondary. Coleman v. Arkansas Dept. of Human Services, 2010 Ark. App. 851, 379 S.W.3d 778 (2010).

As those two cases emphasize, the most important considerations in a child custody case are the best interests of the child. Everything else is secondary. The court did not consider this as the facts of the case point to Ms. Frombach as the primary caregiver even when she was working full time (CP #10, 41, 76 RP Vol. 1 p5-58, p160-179, Vol. 2 p.205-305, Vol. 3 p, 429-455). She has always put the best interest of the children first.

Other important factors include:

To determine where the child's best interest lies in custody dispute, chancellors must consider the following factors when evaluating the fitness of each parent: (1) age, health, and sex of the children; (2) continuity of care; (3) parenting skills and willingness and capacity to provide primary child care; (4) employment responsibilities of parents; (5) physical and mental health and age of parents; (6) moral fitness of parents; (7) emotional ties of parents and children; (8) home, school, and community records of

children; (9) preference of children twelve years of age or older; (10) stability of home environment and employment of each parent; and (11) other relevant factors in parent-child relationship. West's A.M.C. § 93–5–24. Solangi v. Croney, 118 So. 3d 173 (Miss. Ct. App. 2013).

The evidence and facts of the case clearly support that Ms. Frombach provides far many of those factors that the father, Mr. Frombach. Furthermore, the father has never encouraged the girls to have a close relationship with their mother since the separation and to build upon their relationship which is in stark contrast to what the court should look for:

Sound and substantial basis in the record supported family court's finding that permanent residential custody of child with mother and visitation to father was in best interests of the child, where court found both parents exhibited shortcomings as parents and that child loved both parents, court found that father refused to encourage and foster contact between child and mother while child was in father's custody, and court found mother was more likely to assure meaningful contact between child and father. Lawlor v. Eder, 106 A.D.3d 739, 966 N.Y.S.2d 92 (2d Dep't 2013).

The pre-meditation the father exhibited with the provoking of Ms. Frombach and the subsequent arrest of her and the spiraling of events that followed should have been recognized by the court and ruled upon as this case clearly shows:

Sufficient evidence supported trial court's finding in proceedings to determine primary residential responsibility of children, that willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child favored awarding residential responsibility to mother; father had told children that he did not like mother, had called police seeking mother's arrest in the presence of children, and made inappropriate comments to the children about the parental rights and responsibilities proceedings. NDCC 14-09-06.2(1)(e). Morris v. Moller, 2012 ND 74, 815 N.W.2d 266 (N.D. 2012).

The overemphasis on the testimony of the counselor and the clear facts that Mr. Frombach was never the primary caregiver of the children even when he did not work should provide this appeals court with enough evidence to at a minimum open this case again and/or modify the current custody order. The modification can take place as circumstances merit:

Modification of an existing custody arrangement is permissible

only upon a showing that there has been a change in circumstances such that a modification is necessary to ensure the continued best interests and welfare of the child. *Tori v. Tori*, 958 N.Y.S.2d 510 (App. Div. 2d Dep't 2013).

Modification of existing custody arrangement is permissible only upon showing that there has been change in circumstances such that modification is necessary to ensure child's best interests. *Bennett v. Schultz*, 110 A.D.3d 792, 973 N.Y.S.2d 244 (2d Dep't 2013).

The circumstances certainly merit in this case. With the current living situation of the children, explained in the conclusion, and the instability provided currently by Mr. Frombach the court should put the best interests of the children first and award minimum 50/50 custody to Ms. Frombach and primary residence with her.

Lastly, the court erred in giving all long term, major decisions to the father. In the best interests of the children, shouldn't both parents together make those decisions?

CONCLUSION

Mr. Frombach set out to portray himself and his living situation as a stable and caring environment for the children when in fact, it is not. The children rarely see their grandparents anymore and have had two different people living in their home in the past year. A four month stint of an aunt they did not know who was thrust into care giving duty and now the 23 year old girlfriend of Mr.Frombach is living with them and trying and failing to provide the girls with care. The house is in disarray, there is no garbage pickup (cat feces is stacked on the front porch), there is no first aid kit or band-aids for the girls, and there is noticeable black mold in all the bathrooms. Mr. Frombach has also moved his music studio into the entire living room from an upstairs room. He is providing a house made for adults, not children. The stability depicted by Mr. Frombach during the trial is simply not there and the girls are suffering for it.

Given that Mr. Frombach set out with a pre-meditated plan to shut Ms. Frombach out of the girls' lives and to gain custody of the kids, falsely portrayed himself and the home as a stable environment for the kids, and that the recommendations for child custody that was

approved by the court was largely based on testimony of counseling sessions without the knowledge of the mother, we respectfully ask the court to amend the Parenting Plan Final Orders to read at minimum a 50/50 joint custody, joint decision making in all matters and primary residence with the mother. There is no reason the mother should not have at least 50/50 joint custody.

RECEIVED
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DIVISION ONE
MAY 1 2014

Respectfully submitted,

A handwritten signature in cursive script that reads "Brittany L. Frombach". The signature is written in black ink and is positioned above the printed name and address.

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Appellant