In Re The Marriage Of: Jennifer Corinne Anderson, Res. And Loren Heath Anderson, App.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of:

JENNIFER CORINNE ANDERSON,

Respondent,

and

LOREN HEATH ANDERSON,

Appellant. No. 79612-7-I

DIVISION ONE

UNPUBLISHED OPINION

DWYER, J. Loren Heath Anderson appeals a final parenting plan entered after a dissolution trial. He claims that the trial court erred by imposing restrictions on his residential time and a new trial is warranted because the court granted a request to appoint a guardian ad litem (GAL) without sufficient time for a GAL to file a report. Because the trial court acted within its authority to impose restrictions under RCW 26.09.191, substantial evidence findings, and no GAL was ever appointed, we affirm.

I

Jennifer and Loren Heath (Heath) Anderson 1 were married in 2012 in

Issaquah, Washington. They have one child, G.A., who was three years old at

the time of trial. Heath also has a child from a previous marriage, A.A., who was

16 years old at the time of trial.

1 To avoid confusion we refer to the parties by their first names. In 2013, Heath began working for Bank of America as a sales manager

and Jennifer began working at Allyis, where she currently works as a senior

project manager on a marketing contract with Microsoft. In January 2015, Heath

left his job at Bank of America. Jennifer was pregnant with G.A. at the time. In

May 2015, Heath tried to start a business and began selling juices and smoothies

at farmers markets. Heath eventually ran the juice business out of a shop in

Issaquah after G.A. was born.

In February 2017, Jennifer moved out and the parties separated. In

October 2017, Jennifer filed a petition for dissolution. No formal parenting plan

was in place, though the parties agreed to a schedule whereby Heath had G.A.

every other weekend from Friday at 5:30 p.m. until Monday drop off at school,

with additional visits during the week. There were conflicts over exchanges and

pick up times during which Heath sent Jennifer disparaging texts.

In March 2017, G.A. began attending a Montessori preschool across the

street from . She started in the toddler room and was enrolled

five days a week. In May 2018, following a teacher conference in which school

staff commen ve on days Heath picked her up,

Heath stopped taking G.A. to the school during his residential time, claiming the

school was biased against him. Instead, he took her to his workplace on days he

had to work. On one occasion she wandered out of the shop and into the alley.

In June 2018, Jennifer filed a motion for a temporary order to allow her to

move with G.A. to Oregon so she could be closer to her family. employer was willing to allow her to work remotely to accommodate the move. The court denied the motion.

A few months later, after the Labor Day weekend, Jennifer took G.A. on a

two-week trip to Portland. She notified Heath and let him know where she was

going and how long she would be gone. During the trip, Jennifer attempted to

ne calls with Heath but he did not answer her calls on

three of those nights. He also sent texts to Jennifer accusing her of kidnapping

G.A.

On September 7, 2018, Jennifer moved for temporary orders and

requested that the court appoint a guardian ad litem (GAL) concerns for the safety and well-being of [G.A.]. Jennifer raised concerns about

H peaceably co-parent, posed by Hege son A.A., who had a pending At-Risk Youth petition in

juvenile court. She also raised concerns about Heath keeping G.A. home from

preschool and taking her to work with him during his residential time, during

which he was not able to properly supervise her. By this time, G.A. had been

moved to the preschool room because she had turned three years old. Heath

would not acknowledge that she was in preschool, asserting it was just daycare.

He refused to attend preschool ht or tour her new

classroom.

On September 21, 2018, a commissioner ordered that a GAL be

appointed on the condition that the court continued the trial date currently set for

October 29, noting that a GAL is required to file a report 30 days before trial. The including preschool attendance if Petitioner provides [the] contract that identifies

Jennifer moved to continue the trial date. Heath objected. The trial court

denied the motion to continue. No GAL was appointed. The parties proceeded

to trial as scheduled on October 29, 2018.

After a five-day trial, the trial court entered a final parenting plan with a

residential

schedule, Heath had residential time with G.A. every other weekend from Friday

at 5:00 p.m. until Sunday at 5:00 p.m. Heath was restricted from bringing G.A. to

work as follows:

s parenting time, [G.A.] is s shop or at s Market while Father is working at any time until [G.A.] is at least 8 years old, and then only by agreement. The Father shall notify the Mother by Noon the Wednesday before his weekend should he need to work on a day he has [G.A.].

If Father needs to work on his Saturday with [G.A.], then the mother will drop off [G.A.] at the shop on Saturday at 5 pm instead of Friday at 5 pm. Father will forfeit this time and there will be no makeup time allowed.

If Father needs to work on his Sunday with [G.A.], then the mother will pick [G.A.] up at the shop at 9 am Sunday. Father will forfeit this time and there will be no makeup time allowed. Under a section he parenting plan provided that

urt gave Jennifer sole decision-

making on all major decisions, finding:

Major decision-making should be limited because one of the parents does not want to share decision-making and this is reasonable because of the history s participation in decision-making; the ability and desire to cooperate with each other in decision-making; location considerations of the child.

Heath filed a motion for reconsideration, claiming among other things that

the evidence did not support a finding that he emotionally abused G.A. The trial

court denied in part and granted in part the motion to reconsider and amended

the parenting plan to add an abusive use of conflict finding in support of the

limitations imposed under RCW 26.09.191.

Heath appeals.

II

Heath claims that the trial court erred by entering a parenting plan with

GAL. He further contends that cumulative errors deprived him of a fair trial and

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A

Parenting Plan

26.09.191, claiming (1) the court exceeded its jurisdiction because Jennifer did

not request them in her petition, abuse and abusive use of conflict are not supported by substantial evidence and are unrelated to the restrictions imposed. 2

We review parenting plans for an abuse of discretion, which occurs when

or based on untenable grounds

or untenable reasons. In re Marriage of Chandola, 180 Wn.2d 632, 642, 327

P.3d 644 (2014). We accept t ppeal

so long as they are supported by substantial evidence. In re Marriage of Katare,

175 Wn.2d 23, 35, 283 P.3d 546 (2012). Substantial evidence is evidence

sufficient to persuade a fair-minded person of the truth of the matter asserted.

Katare, 175 Wn.2d at 35. We defer to the trial court as the finder of fact to make

credibility determinations and weigh evidence. State v. Merritt, 200 Wn. App.

398, 408, 402 P.3d 862 (2017), , 193 Wn.2d 70, 434 P.3d 1016 (2019).

Superior courts have original jurisdiction of all matters . . . of divorce.

WASH. CONST. art. IV., § 6. The trial court has broad discretion to fashion a

permanent parenting plan but must be guided by provisions in chapter 26.09

RCW. Katare, 175 Wn.2d at 35-36. Among these are statutes requiring the

court to consider limitations Katare,

175 Wn.2d at 35-36; RCW 26.09.187(3) (be consistent with RCW 26.09.191. RCW 26.09.191(3), the court has

authority to limit any interests,

[t]he abusive use of conflict by the parent which creates the danger of

2 shall have sole decision-making on major decisions involving the child. se

factors or conduct as the court expressly finds adverse to the best interests of the

In In re Marriage of Fan & Antos, No. 77490-5-I (Wash. Ct. App. April 1,

2019) (unpublished), http://www.courts.wa.gov/opinions/pdf/774905.pdf, an

unpublished decision cited by Jennifer, we rejected the same argument Heath

advances here:

Antos argues that the trial court did not have jurisdiction to enter parenting plan restrictions under RCW 26.09.191, pleadings did not request those restrictions. . . .

His arguments ignore the mandatory language of RCW 29.09.187(3)(a), requiring the trial court to create a parenting plan consistent with RCW 26.09.191. Because the statutory scheme requires the court to consider parenting plan restrictions, it was not s authority or discretion to consider those restrictions. Instead, fai s mandatory language would have b s discretion.

Fan, No. 77490-5-I, slip op. at 4. We adopt that reasoning here. The court had

jurisdiction over the dissolution proceeding and properly considered restrictions

under RCW 26.09.191.

The cases cited by Heath do not require a different result. As he

acknowledges, In re Marriage of Leslie, 112 Wn.2d 612, 772 P.2d 1013 (1989),

addresses the court s authority to grant relief from a default judgment, which is

not at issue here. Nor is In re Marriage of Watson, 132 Wn. App. 222, 130 P.3d

915 (2006), applicable. As the court acknowledged in Katare, Watson indicate that restrictions cannot be imposed not the case here. 175 Wn.2d at 37. In Watson, following a trial on a petition to modify a parenting plan, the

trial court denied the modification petition but sua sponte entered a temporary

order imposing restrictions under RCW 26.09.191(3) on grounds not raised by

either party. 132 Wn. App. at 233. The mother alleged sexual abuse in her

petition and at trial but the court imposed restrictions based on substantial

impairment of emotional ties with the child. The evidence at trial showed that the

with the child was only a result of severe

restrictions on his residential time based on the unfounded abuse allegations.

Watson, 132 Wn. App. at 235. On appeal, the court reversed, concluding that

modification petition, the court lacked authority to

modify the parenting plan sua sponte on grounds that neither party had

and that substantial evidence did not support the

restrictions. Watson, 132 Wn. App. at 233.

Unlike in Watson, the trial court here did not impose restrictions under

RCW 26.09.191 for unfounded reasons. The trial court did not impose

restrictions sua sponte after denying a petition for modification of a parenting

plan; rather, the trial court was tasked with creating a permanent parenting plan,

requiring it to consider limitations under RCW 26.09.191. Katare, 175 Wn.2d at

35-36; RCW 26.09.187(3). And the record is clear that both parties

contemplated and argued the restrictions imposed. Jennifer raised issues of

emotional abuse and abusive use of conflict well before trial in her motion for

temporary orders and again at trial. Heath responded to those allegations before

and at trial. Indeed, Heath succeeded in preventing a GAL from investigating the trial to allow

appointment of a GAL. Moreover, as discussed below, substantial evidence

Heath next s of emotional abuse and

abuse of conflict are not supported by substantial evidence and do not support

the restrictions imposed. He does not assign error to the but the restrictions.

The trial court made the following unchallenged findings of fact:

46. There was conflict over pickup times for visitation. Petitioner had some flexibility due to her work schedule. When Respondent stopped taking her to school, he felt he could decide what time [G.A.] should go back to her s house. 47. Respondent has kept [G.A.] out of school without telling

Petitioner. On at least one occasion Petitioner went to the school to take snacks and pick [G.A.] t there. 48. On 2/20/18 when Petitioner texted respondent asking whether she was sick since she t in school, his response was Not really your business . . . . 49. There were contentious emails about exchanges by both parties. 50. There were many texts or emails from him comparing Petitioner s mother . . . with whom he also had a contentious relationship, and calling Petitioner a psychopath . . . 2.0. 51. There were also texts accusing Petitioner of kidnapping [G.A.] when she took her to Portland: She was kidnapped, so even though she is young you have caused some lifelong issues . . . like what happened to [A.A.]. 52. Those statements constitute emotional abuse. 53. He took [G.A.] to work, believing it to be safe, even if he was working and unable to give her his full attention. 54. His employees are high school students, and only work after school. 55. He pays for employees to take care of the store sometimes when he takes care of [G.A.], which takes money from the business. 56. He texted her what am I supposed to do with the business, it t support me, you do. 57. Respondent believes [G.A.] s school is unsafe, but has no substantiated reason to believe that. She has appeared to have normal childhood scrapes and scratches. . . . . 62. Petitioner went on a 2 week trip to Oregon with [G.A.] after the Labor Day weekend, and texted Respondent where she was going and how long she would be gone. 63. She called him at the designated nightly phone call time with [G.A.], but he t answer on three of those nights. 64. He repeatedly refers to that trip as kidnapping [G.A.].

We accept these unchallenged findings as verities on appeal. Estate of Nelson

of Labor & Indus., 175 Wn. App. 718, 723, 308 P.3d 686 (2013).

In addition to these unchallenged findings, the evidence at trial supports

conflict. The evidence

showed that Heath conflict with Jennifer had adverse effects on G.A. Heath

stopped taking G.A. to preschool because he felt the school was biased against

him. Instead, he took her to his workplace where he admitted he could not

always keep her within his sight while he was working and that on one occasion

she wandered into the alley on her own. 3 He also testified that after G.A. was

moved to the preschool room, he refused to attend preschool events such as

chool teacher testified that after Heath stopped taking

G.A. to school regularly, she noticed a shi

not that

a

3 Without citation to the record, Heath points to his testimony that the shop contained a was always within sight of G.A. We defer to the trial court to resolve conflicts in testimony and assess credibility. Merritt, 200 Wn. App. at 408. Jennifer also testified that Heath withheld nightly calls with G.A. when he

was angry with Jennifer. In addition to withholding his calls during the Portland

trip, the weekend after Jennifer filed the relocation motion Heath turned his

phone off and would not allow Jennifer to talk to G.A. When G.A. returned to

had not called. Jennifer further testified that after the Portland trip, G.A. spent

the weekend with Heath and when she returned to Jennifer, G.A. was

to leave her. Jennifer also testified to a time when she was a few minutes late

bringing G.A. to Heath for an exchange and he came up to her car screaming at

her that she was late. She asked him to step back so G.A. would not see him but

G.A. had seen him and was in tears. findings of abusive use of conflict and emotional abuse.

findings and the evidence also support the restrictions

imposed. A court may impose restrictions under RCW 26.09.191(3) where

, Chandola, 180 Wn.2d at 648. [T]he trial court need not wait for actual harm to

Katare, 175 Wn.2d at 36.

Rather, the required showing is that a danger of . . . damage exists. Katare,

175 Wn.2d at 36 (quoting In re Marriage of Burrill, 113 Wn. App. 863, 872, 56

P.3d 993 (2002)). The restriction must be reasonably calculated to prevent such

a harm. Chandola, 180 Wn.2d at 648. The trial court

finding that may harm the child[ ] s best interests. As the

findings and the evidence abusive use of conflict

presents a danger of damage to G.A. -being and physical safety.

Withholding his contact with G.A. and preventing her contact with her mother

damages the child-parent relationship. Refusing to take G.A. to preschool where

she was safe and engaged in age-appropriate activities, and taking her instead to

work where he could not realistically supervise a three-year-old adversely affects

social and emotional well-being and poses risks to her physical safety.

articipate in preschool events was further damaging to the

child-parent relationship.

time to every other weekend and preventing him from taking G.A. to his

workplace. By minimizing opportunities for Heath to engage in conflict with

Jennifer and keeping G.A. in a safe environment, such limitations are reasonably

calculated to prevent harm to G.A..

ot

impairments. Heath mischaracterizes this provision as a restriction on his

involvement with the child imposed under RCW 26.09.191. Rather, this condition

relates to a sibling who, Heath acknowledges, does not live with him. Heath fails to show that the trial court abused its discretion by

including this provision in the final parenting plan.

In establishing a permanent parenting plan, the trial court shall consider

[t] [t] involvement with his or her physical surroundings, school, or other significant

activitie (a)(iv),(v). Here, the trial court found:

4. Respondent has a son, [A.A.], about 16 years old, from a prior marriage. 5. Their daughter [G.A.], is 3 years old (DOB 8/16/15). . . . . 42. [A.A.] has pending juvenile court offender matters. 43. Respondent testified that [A.A.] has never been charged with anything. Respondent either knew or should have known that he has, in fact, been charged.

Heath does not challenge these findings.

Heath also testified at trial that A.A. has behavioral issues that warranted

filing an At-Risk Youth petition. Indeed, he agreed that G.A. should not be left

unsupervised with A.A., or anyone for that matter:

Q. Are you happy to agree that [G.A.] will not be left unsupervised with [A.A.]? A. t leave [G.A.] unsupervised with anybody. Q. So the answer is yes? A. Yes.

The trial court did not abuse its discretion by including in the final parenting plan

a provision that prevents G.A. from being left alone with A.A.. B

Appointment of GAL

Heath claims a new trial is warranted because the trial court granted

a GAL to file a report 60 days before trial. has no basis in law or

fact. T GAL was conditioned on the court continuing the trial date, precisely because a

GAL report could not be filed within the required time limits:

This commissioner notes the trial date has been continued to 10/29/2018 and any GAL report would be due 30 days prior to trial. . . . This court hereby makes the following self effecting order the parties shall appoint a GAL for this case within a week on condition that Judge Mack grants a continuance of the current trial date which is 10/29/2018.

no GAL was appointed. Accordingly, RCW 26.12.175(1)(b) does not apply. In any event, Heath cites no authority requiring remand for a new trial where a GAL report is not filed within the time limits of the statute. Where no authority is cited in support of a proposition, the court is not required to search for it and may assume counsel had diligently searched and found none. DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

C

Cumulative Error and Bias

demonstrates no error, much less cumulative error. Moreover, he cites no authority applying the cumulative error doctrine in civil cases. See DeHeer, 60 Wn.2d at 126.

Finally, Heath claims that preserve the appearance of that the trial court demonstrated bias against him. Because we affirm, we need not address the issue. 4

D

Attorney Fees

Jennifer requests an award of reasonable attorney fees on appeal, claiming that Heath filed a frivolous appeal and was intransigent. We exercise our discretion and decline to award appellate fees.

Affirmed.

WE CONCUR:

4 As Jennifer notes, the trial judge has since retired.